federal register

TUESDAY, JANUARY 27, 1976

PART III:

FEDERAL ELECTION COMMISSION

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FEDERAL ELECTION CAMPAIGN ACT OF 1971

Opinion of Counsel

FEDERAL ELECTION COMMISSION

[Notice 1976–12]

OPINION OF COUNSEL

The Federal Election Commission announces the publication today of Opinion of Counsel 1975–14. This is in response to inquiries by a party who does not have standing under the Federal Election Campaign Act of 1971, as amended ("the Act"), to request an Advisory Opinion, but whose inquiries are so significant as to warrant the issuance of an Opinion of Counsel. It should be emphasized that this opinion reflects only the current view of the Office of the General Counsel with respect to the issues in question and that there is no presumption of compliance (see 2 U.S.C. 437f(b)) in connection with this opinion. The Commission has noted this opinion without objection.

This opinion is published in order to assure the widest publication and dissemination of the views of the Commission's Office of the General Counsel. It is the view of the Commission that any person who has a further question as to whether a particular state election statute has been preempted by the Act, should directly request guidance from the Secretary of State or other appropriate election official of that state. Each Secretary of State or other appropriate election official is requested to consider all preemption inquiries in light of the legislative history, rules, holdings, and statutory appendix which appear in OC 1975–14. If a Secretary of State, other appropriate election official, or any other person desires additional assistance on a matter concerning the preemption of State election law, he or she may write the Office of the General Counsel, Federal Election Commission, 1325 K Street, NW., Washington, D.C. 20463; or telephone (202) 382–3153.

Mr. W. NORMAN GLEASON,
Director, Massachusetts Office of Campaign and Political Finance,
Eight Beacon Street
Boston, Massachusetts 02108.

DEAR MR. GLEASON: This is in response to your request for an advisory opinion as to whether the provisions of Chapter 55 of the Massachusetts General Laws (hereinafter "Chapter 55") were preempted by he Federal Election Campaign Act of 1971, as amended, and the applicable parts of Title 18 of the United States Code (hereinafter "the Act"); and whether the Federal requirement that a duplicate of the Federal reports be filed with the Secretary of the Commonwealth, fully discharges the reporting requirements for Federal candidates and their committees. I apologize for the delay in supplying these answers, which has resulted in part from the significance and sensitivity of the issues mentioned in your correspondence. The Commission continues to labor under a serious backlog of similarly important inquiries, but we are making every effort to meet the public's need for information as expeditiously as possible.

This response to your request is in the form of an opinion of counsel since the Massachusetts Office of Campaign and Political Finance does not have standing to receive an advisory opinion under 2 U.S.C. 437f.

A. *General Federal Authority to preempt State Law.* You first ask whether provisions of Chapter 55, under which candidates for Federal office and committees organized in their behalf are regulated as to their reporting requirements, committee organizational requirements, and contribution and expenditure limits, have been preempted by the Act. It is provided in the Constitution of the United States in Article VI, clause 2, 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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This clause requires that where there is a clear collision between State and Federal law, or a conflict between Federal law and the application of an otherwise valid State enactment, Federal law will prevail. "Hamm v. City of Rock Hill," 379 U.S. 306, 311–312 (1964). However, it is the established policy of both State and Federal governments to treat possible conflicts between their powers in such a manner as to produce as little conflict and friction as possible. "Bute v. People of State of Illinois," 333 U.S.C. 640, 658–569 (1948). Thus, it will not be presumed that a Federal statute was intended to supersede the exercise of a given power by a State unless there is a clear manifestation of intention to do so, since the exercise of Federal supremacy will not lightly be presumed. "Schwartz v. State of Texas", 344 U.S.C. 199, 202–203 (1952). To determine whether a State law violates the supremacy clause of the Constitution because of the existence of a Federal law in the same field involves a determination of the purpose of the respective laws, whether such purposes are in conflict, and whether the Federal authority intended to preempt the field. "Associated Gen. Contractors of Mass., Inc. v. Altshuler," 361 F. Supp. 1293, 1300 (Mass., 1973).[1]

I am well aware that it is primarily the responsibility of the judiciary to determine whether a sufficient conflict exists between a State and Federal statute as to necessitate the exercise of Federal preemption. However, as Chapter 55 provides for its own preemption in certain cases[2] and as you[3] and the Massachusetts Attorney General[4] agree that both the Act and Chapter 55 are intended to provide for disclosure and limitations upon contributions and expenditures in connection with elections, that the Act and Chapter 55 conflict with regard to Federal elections, and that the Federal authority is intended to preempt the field; I believe that it is appropriate for me to render an opinion in this case as your inquiry is in fact solely concerned with which provisions of Chapter 55 are preempted by the Act.

B. *Provisions of Chapter 55 which are preempted by the Act.* In general, reference should be made to 2 U.S.C. 453 which states that:

"[t]he provisions of this Act, and rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office."

The scope of congressional intent with regard to this section is stated in the House Report of the Committee on Conference on the Federal Election Campaign Act Amendments of 1974 (Report No. 93–1438, 93d Cong., 2d Sess., 100–101, 1974), where the Committee states that:

"[i]t is clear that the 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."

Similarly, it is provided in the note to 18 U.S.C. 591 (which is derived from section 104 (a) of the Federal Election Campaign Act Amendments of 1974, Pub. L. 93–443, 93d Cong., 2d Sess.) that:

"[t]he provisions of chapter 29 of title 18, United States Code, relating to elections and political activities, supersede and preempt any provision of State law with respect to election to Federal office."

The intent of this provision, as stated in the House Report, *supra.*, at 69, is that:

"[t]he provisions of the conference substitute make it clear that the Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds 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."[5]

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[1] It may be argued that there is a "pervasive national interest in the selection of candidates for national office * * * [which] is greater than any interest of an individual State," Cousins v. Wigoda, —— U.S. ——, 95 S. Ct. 541, 549 (1975), and thus the summary preemption of any State statute which impinges on Federal elections is authorized in order to prevent the placing of an inordinate burden on the political process. Such a view may have been applied in Katzenbach v. Morgan, 384 U.S. 641, 647 (1966). But see 53 Texas L. Rev. 934, 944 (1975) in which this proposition is declared to be merely overboard dicta.

[2] It is provided in section 4 of Chapter 55 that "[c]andidates for nomination or election to the senate or house of representatives of the United States shall not be subject to the provisions of this chapter insofar as they may conflict with federal law." I note that this section does not provide for Federal preemption of state statutes for candidates for President, Vice President, and delegates to national political party conventions.

[3] Letters from W. Norman Gleason, Director of the Massachusetts Office of Campaign and Political Finance, to Federal Election Commission, May 7, 1975 and August 12, 1975.

[4] Letter from Francis X. Bellotti, Massachusetts Attorney General to W. Norman Gleason, Director of the Massachusetts Office of Campaign and Political Finance, June 23, 1975, on file at the Federal Election Commission.

The Attorney General states on page 2 of his letter, in pertinent part:

"* * * I conclude, therefore, that except for those matters referred to in the Conference Report, e.g. voting fraud, the State has no authority to regulate the conduct of Federal campaigns and elections.

"With respect to your second question, I conclude that Federal candidates satisfy the provision of the Federal Election Campaign Act if they file duplicate forms with the Secretary of State, as required by 2 U.S.C. § 439. * * *

[5] The intent of these provisions was further elaborated in the Report of the Committee on House Administration on H.R. 16090 (House Report No. 93–1239, 93d Congress, 2d Sess., 10, 1974) where the Committee states:

"* * * It is the intent of the committee to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated. Under the 1971 Act, provision was made for filing Federal reports with State officials and the supervisory officers were required to cooperate with, and to encourage, State officials to accept Federal reports in satisfaction of State reporting requirements. The provision requiring filing of Federal reports with State officials is retained, but the provision relating to encouraging State officials to accept Federal reports to satisfy State reporting require-

The Conference substitute, which became the enacted version of 2 U.S.C. 453 and section 104(a) of Pub. L. 93-443, is identical to the coverage of the original House amendment. House Report of the Committee on Conference on the Federal Election Campaign Act Amendments of 1974, Report No. 93-1438, 93d Cong., 2d Sess., 69, 100 (1974).

Thus, in light of the scope of Chapter 55 as revised by the 1975 session of the Massachusetts General Court, and the effect of 2 U.S.C. 453 and the note to 18 U.S.C. 591, it is my opinion that 1-10, 18-25, 28-31, 32 in part[6] and 34-42 of Chapter 55[7] conflict with the provisions of the Act and I suggest that you treat these sections as preempted and unenforceable with respect to all candidates for Federal office, or political committees to the extent that such committees' activities relate to Federal candidates and a Federal election. Of course, there are a number of other provisions in Chapter 55 which do not generally relate to elections for Federal office.

C. *Statements filed with State Officials.* You further ask in your letter whether the Federal requirement that a duplicate of the Federal reports be filed with the Secretary of the Commonwealth of Massachusetts, fully discharges the reporting requirements of Federal candidates and committees. Since the Act clearly supersedes and preempts any State reporting requirements (see House Conference Report, supra, at 100-101), Federal candidates and political committees are governed solely by the Act. Thus, the filing of a duplicate report with the Secretary of the Commonwealth does fully discharge the reporting obligations of Federal candidates and committees, regardless of any conflicting or different State statutory provisions. The Act does provide that "[a] copy of each statement required to be filed with the Commission * * * shall be filed with the Secretary of State (or, if there is no office of Secretary of State, the equivalent State officer) of the appropriate State." 2 U.S.C. 439(a). These statements shall be preserved by the Secretary of State and be available for public inspection, and copying. 2 U.S.C. 439 (b). Thus any State agency with a need to examine these reports would have ready access to them.

I hope that my views will be of assistance in your administration of Chapter 55.

This letter is to be regarded as an opinion of counsel which the Commission has noted without objection.

JOHN G. MURPHY, Jr.,
General Counsel.

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ments is deleted. Under this legislation, Federal reporting requirements will be the only reporting requirements and copies of the Federal reports must be filed with appropriate State officials. The Committee also feels that there can be no question with respect to preemption of local laws. Since the committee has provided that the Federal law supersede and preempt any law enacted by a State, the Federal law will also supersede and preempt any law enacted by a political subdivision of a State.

"The other preemption provision was added to title I of the bill, relating to amendments to the criminal code. This was done to make it clear that the Federal law is intended to be the sole source of criminal sanctions for offenses involving political activities in connection with Federal elections."

[6] One part of Chapter 55 which I believe has not been preempted by the Act and is specifically applicable to the actions of a candidate for Federal office, is the part of section 32 which reads:

"A candidate shall be deemed to have committed a corrupt practice who commits any of the following offenses: * * *

Any candidate fraudulent and willfully obstructing and delaying a voter, interfering with, hindering or preventing an election officer from performing his duties, forging an endorsement upon, altering, destroying or defacing a ballot tampering with or injurying or attempting to injure any voting machine or ballot box to be used or being used in a primary or election, or preventing or attempting to injure any voting machine or ballot box to be used or being used in a primary or election, or preventing or attempting to prevent the correct operation of such machine or box."

[7] I have not set out the substance of these sections in this letter because you obviously are conversant with them. However, because this letter is available to the public and may be used for guidance in other jurisdictions, I have taken the liberty of attaching an appendix which briefly summarizes all of the provisions of Chapter 55. This attachment also will be available to the public.

APPENDIX TO OC 1975-14

As revised by the 1975 session of the Massachusetts General Court (the Massachusetts legislature), Chapter 55 of the Massachusetts General Laws generally provides in:

§ 1 For various definitions of "contribution," "election," "expenditure," "political committee," and that "candidate" be defined to mean any individual who seeks nomination or election to public office;

§ 2 For requirements for the contents of the reports to be kept by a candidate;

§ 3 That a Massachusetts campaign and political finance commission shall administer the provisions of Chapter 55, and establishes its powers and duties;

§ 4 That political committees principally organized and operated in Massachusetts in behalf of candidates for president and vice president, are subject to the provisions of Chapter 55, and allows the director of the Commission to dissolve a political committee organized or operating principally in Massachusetts on behalf of a candidate for president and vice president of the United States, if the candidate does not consent to the formation of such a committee;

§ 5 For the requirements of a statement of organization which is to be filed by a political committee;

§ 6 For restricting the purposes for which political committees may expend campaign money;

§ 7 That no person shall make any expenditures except as provided in Chapter 55, limits the amounts that may be contributed by an individual to a candidate or political committee, and provides a procedure for the payment of services rendered and goods sold;

§ 8 For a prohibition on contributions or expenditures by certain types of corporations for the purposes of influencing the election of any person, the interests of any political party, or the vote on any question submitted to the voters, except when the question materially affects the corporation;

§ 9 That contributions in excess of a certain amount must be made by check;

§ 10 That the origins of contributions may not be distinguished;

§ 11 That the solicitation of money from a candidate for advertising gratuities, donations, tickets, programs and the like, are prohibited;

§ 12 That political committees are prohibited from demanding or soliciting money for nomination papers;

§ 13 That a State or local employee, who is other than an elected officer, is prohibited from soliciting or receiving money for political campaign purposes;

§ 14 That solicitation by appointed officers or employees of contributions in a State or local public building is prohibited;

§ 15 That the giving of money by a State or local official for the promotion of a political object is prohibited;

§ 16 That persons in public service are under no obligation to contribute to a political fundraiser or provide any political service;

§ 17 That the taking of favorable or hostile job action by a State or local officer or employee against a State or local employee because of his making or failing to make a contribution, is prohibited;

§ 18 For the filing of reports of contributions received and expenditures made, and specifies the contents of these reports;

§ 19 That a campaign depository must be designated and appropriately reported by candidates, including candidates for Federal office, and also regulates deposits to and expenditures from the depository;

§ 20 For limits on the amounts that may be expended by a candidate for campaign media expenses, but excludes candidates for U.S. Senate and Congress;

§ 21 For reporting by media agencies as to accounts;

§ 22 For reporting by a corporation which has made a contribution or expended money to influence a voter or question which materially affects the business of the corporation;

§ 23 That agents of a political committee are required to give a detailed accounting to the treasurer of the committee;

§ 24 For the filing location of statements;

§ 25 That the director of the Massachusetts campaign and political financing commission is to retain for a certain time, reports filed in his office;

§ 26 That a city or town clerk is to retain for a certain time, reports filed with them;

§ 27 That the direction of the Massachusetts campaign and political finance commission shall make available appropriate forms to city and town clerks, and the director also shall make available to candidates, political committees, and appropriate clerks a summary of Chapter 55;

§ 28 For inspection by an appropriate public official of the reports filed with the Massachusetts campaign and political financing commission, and notice to delinquent filers;

§ 29 For notification of the Massachusetts attorney general in the case of a failure to file, and also provides for appropriate civil proceedings;

§ 30—That the courts may compel a person to file a report;

§ 31 For immunity of witnesses in cases involving an alleged violation of Chapter 55;

§ 32 For a general description of what constitutes a corrupt practice by a candidate;

§ 33 For a procedure for bringing an election petition if a corrupt practice is believed to have occurred, but excluding candidates for Congress;

§ 34 That Chapter 55 generally applies to all public elections; and

§ 35-42 For inquests in the case of violations of Chapter 55, and for the conduct of the inquests.

Dated: January 21, 1976.

NEIL STAEBLER,
Vice Chairman for the Federal Election Commission.

[FR Doc.76-2332 Filed 1-26-76;8:45 am]