



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

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**DISSENTING OPINION OF
VICE CHAIRMAN TREVOR POTTER AND
COMMISSIONER JOAN D. AIKENS
TO ADVISORY OPINION 1993-17**

In this matter we agree with the Office of the General Counsel's ("OGC") revised draft opinion, rather than the opinion adopted by our colleagues. In response to the Massachusetts Democratic Party ("the Party") request, the OGC draft opined that Commission regulations do not constrain the Commonwealth of Massachusetts from requiring the Party to comply with Massachusetts fundraising allocation requirements for party expenditures related to non-Federal activities, assuming those regulations allow for the minimum federal percentages required by the regulatory allocation scheme outlined at 11 CFR 106.5.

The Party committee here seeks to have the Federal Election Commission preempt state laws and allow the party to allocate a higher portion of expenditures to Federal activity than the percentage allowed under the Massachusetts Office of Campaign & Political Finance ("OCPF") interpretation of Massachusetts campaign finance law, M.G.L. c.55.¹ The OCPF acknowledges that Federal law and regulation regarding federal payment and reporting in connection with a federal account preempts state law. It nonetheless maintains that federal law does not preempt state law in instances where the federal law merely permits

1. For the 1993-94 election cycle, the ballot composition ratio calculated on Federal Form H1 mandated a 75/25 percent state/federal allocation. The Party in this case wished to allocate at a state/federal ratio of 67/33 percent. The differing allocation percentages revolved around the Party's discretionary assignment of zero points to the category for local candidates. The OCPF disagrees with this assignment of zero points to the local candidate category and maintains that while the Party may not directly participate in local elections, other state party committees might, and the Party here might even do so in the future. OCPF also notes that there were 25 communities in Massachusetts with "partisan preliminaries or caucuses."

payment of a state's share of a joint state/federal expense while state law mandates otherwise.²

We agree with the OCPF position. The Commission's allocation regulations establish a system designed to ensure that Federal elections are conducted only with funds permitted by federal law. The obvious corollary is that States may require state elections be conducted with funds only permissible under state law. It is a travesty to hold that Commission regulations allow a state committee to utilize federal funds in payment of up to 100% of its get-out-the-vote activities, in elections which may include few or no federal candidates, when state law prohibits the expenditure of such funds. The potentially destructive precedent established by the majority opinion is self evident. The majority in effect allows state party committees to assume the powers of the federal government at will, by giving parties the discretion to invoke our regulations and preempt any state control which is stricter than federal law.

Under the majority interpretation, the regulations potentially federalize all state party expenditures, even when they are made for only state election purposes. In contrast to our colleagues position, it is our belief that existing Commission regulations have not previously been interpreted as completely occupying this field. Instead, we believe the regulations merely established a minimum floor for allocation of expenditures to Federal activity. In an attempt to allow flexibility to state parties in the payment of allocable expenses, the regulations merely permit parties to take a higher Federal percentage when warranted and when otherwise allowed by state law.

In Common Cause v. F.E.C., 692 F.Supp. 1391 (D.D.C. 1987), the court specifically rejected the position taken by Common Cause that no allocation method was permissible under that Act, and that even solely state party election expenditures must come from funds not prohibited by the Federal Election Campaign Act

2. The state of Massachusetts does not permit a state committee to pay for the state share of joint expenses from federal funds since those funds may not be subject to Massachusetts prohibitions and limitations. Thus using the Federal ballot composition formula, OCPF asserts that allocating greater than 25% of state party expenditures to Federal activity in the case at hand would violate Massachusetts law requiring solely state election activity to be paid entirely from the state party depository account. In its request the Party even suggested that it might pay for all of its administrative costs out of its Federal account.

of 1971, as amended ("FECA"). The court stated "[i]t is clear from the statute as a whole that the FECA regulates federal elections only. This limit on the FECA's reach underlies the entire act." *Id.* at 1395. The court was correct: the FECA and basic principles of federalism require the Commission to defer to state regulation of purely state elections. We believe our allocation regulations fairly balanced this fundamental fact with the Commission's interest in federal election financing by establishing certain minimums for federal funding of general state party activity in elections with both federal and non-federal candidates. The majority opinion here undoes that balance by allowing state parties to seek refuge in our allocation regulations from state laws when (and only when) it is in the interests of state parties to do so. This approach is vulnerable to both statutory and policy challenge. We predict the Commission will rue this Advisory Opinion, and sooner rather than later.

For the reasons stated above we could not agree with the majority opinion issued in Advisory Opinion 1993-17.


Joan D. Aikens
Commissioner


Trevor Potter
Vice Chairman

October 28, 1993