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FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 28, 1993

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1992-43

Senator Tim Erwin
Washington State Senate
109-A Institutions Building
P.O. Box 40444
Olympia, WA 98504-0444

Dear Senator Erwin:

This responds to your letter dated December 16, 1992, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a Washington statute placing fundraising restrictions on state legislators.

In November 1992, a campaign contribution limitation initiative known as Initiative 134 received a favorable vote from the people of the State of Washington. Section 11 of the initiative places restrictions on public officials seeking to retire their Federal election campaign debts.

Section 11 states as follows:

> SEC. 11. TIME LIMIT FOR STATE OFFICIAL TO SOLICIT OR ACCEPT CONTRIBUTIONS.
>
> During the period beginning on the thirtieth day before the date a regular legislative session convenes and continuing thirty days past the date of final adjournment, and during the period beginning on the date a special legislative session convenes and continuing through the date that session adjourns, no state official or a person employed by or acting on behalf of a state official or state legislator may solicit or accept contributions to a public office fund, to a candidate or authorized committee, or to retire a campaign debt.

You are a state senator who ran for Congress in the 1992 primary election and, as of its last report filed with the Clerk of the House, your principal campaign committee owes debts totaling over $22,500. You wish to know whether section 11 is preempted by Federal law so that state officials retiring Federal campaign debts may solicit or accept contributions "before, while, or after the Washington State Legislature is in session."[1/]

Your request does not identify any other requester but yourself, although you also refer to the fact that other members of the Washington State Legislature sought Federal office last year. The Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. 437f(a). The request must concern a specific transaction or activity that "the requesting person plans to undertake or is presently undertaking and intends to undertake in the future." 11 CFR 112.1(b). Inquiries presenting only a general question of interpretation or the activities of third parties do not qualify as advisory opinion requests.

In view of these requirements, your inquiry qualifies as an advisory opinion with respect to your activity and the activity of your authorized campaign committees. Your inquiry does not, however, qualify as an advisory opinion request with respect to other State officials or employees because they have not joined in the submission of your request, and you have not set forth a specific factual situation as to the activity of such other personnel. 11 CFR 112.1(b).

The 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. 453. The House committee that drafted this provision intended "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." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference report also states that 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. Id. at 100-101.

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on state law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes state law with respect 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. Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 51. 11 CFR 108.7(b). The regulations provide that the Act does not supersede state laws concerning the manner of qualification as a candidate or political party organization, dates and places of elections, voter registration, voting fraud and

similar offenses, or candidates' personal financial disclosure. 11 CFR 108.7(c). The Commission explained that "[t]hese types of electoral matters are interests of the states and are not covered in the act." House Document 95-44, at 51.

Section 11 appears to be addressed to the regulation of the behavior of State officials. Nevertheless, even when part of a state statute may appear, upon its surface, to be aimed at regulating the behavior of a state official or employee outside the area of campaign financing, the Commission has interpreted the broad preemptive powers to be applicable because of the statute's effect on campaign financing. See Advisory Opinions 1989-27 and 1989-12. Regulation of finance issues such as the receipt of contributions for the payment of Federal campaign debts is at the heart of the sweeping preemptive power granted by Congress. Consistent with this broad power, the Act provides for the continuance of a political committee until it has no outstanding debts or obligations and the authority of the Commission to regulate the disposition of debts. See 2 U.S.C. 433(d)(1) and (2), and 434(b)(8). The power to regulate the timing of the retirement of campaign debts is inherent in the ability to regulate the sources of campaign funds and campaign expenditures. Such power is evident in the Commission's regulations relating to 2 U.S.C. 441a(a)(1) and (2) when the Commission addresses contributions for debt retirement. 11 CFR 110.1(b)(3)-(5) and 110.2(b)(3)-(5). It is also evident in regulations relating to those two statutory sections, as well as to 2 U.S.C. 433(d) and 434(b)(8), when the Commission regulates conduct as to a political committee's repayment of debts. 11 CFR Part 116.

The Commission acknowledges that Congress may have intended that the regulatory scheme should not extend into the area of state laws regulating the political activities of state and local employees, known as the "little Hatch Acts." The House Committee Report, in discussing amendments to Title 5, which were part of the 1974 amendments to the Act, stated that the regulation of political activities of State and local employees "would be left largely to the States." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 11 (1974); see also H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 102 (1974). During the Senate debate on the 1974 amendments, subsequent to the issuance of the Conference Report, Senator Stevens and Senator Cannon clarified that point. Senator Stevens stated:

> It is my understanding, and I should like to ask the manager of the bill, my friend from Nevada (Mr. Cannon), if he agrees that this means that State laws which prohibit a State employee, or local laws which prohibit a local employee, from engaging in Federal campaign activities and Federal campaigns are still valid?

120 Cong. Rec. S18538 (daily ed. October 8, 1974).

Senator Cannon replied that Senator Stevens' understanding was "absolutely correct." Id.

Insofar as section 11 refers to the conduct of a state legislator and his authorized Federal campaign committees, the Commission concludes that the Act preempts the State's application of section 11. The Hatch Act is aimed at ensuring that employees of the Executive Branch of government, or its agencies, administer the law in accordance with the will of Congress, rather than in accordance with their own will or that of a political party. See United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548, at 564-565

(1973). Such statutes are not aimed at elected legislators whose jobs, of necessity, contain a political element. See, for example, the exception for elected officers in the Massachusetts statute referred to in Advisory Opinion 1989-27. The Commission concludes, therefore, that section 11, as it relates to state legislators and their authorized Federal committees, is preempted under 2 U.S.C. 453 and 11 CFR 108.7, and is not a "little Hatch Act," subject to special treatment under the preemption provisions of the Act and Commission regulations.

The Commission does not express any views as to whether section 11 would be preempted by the Act or Commission regulations in the case of other types of state officials or employees.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Scott E. Thomas
Chairman for the Federal Election Commission

Enclosure (AOs 1989-27 and 1989-12)

ENDNOTES

1/According to section 33 of the initiative, section 11 is to be codified as part of a new subchapter of Chapter 42.17, Revised Code of Washington. RCW 42.17.030(2) states that Chapter 42.17 RCW does not apply to Federal elections. An assistant attorney general of the State, however, wrote a memorandum approved by the Executive Director of the State's Public Disclosure Commission which stated that section 11 applied to the retirement of Federal campaign debts. The author of the memorandum reasoned, in part, that section 11 applies "after a campaign is complete" and that "it regulates the conduct of state officials, rather than the financing of a campaign." For the purposes of this opinion, the Commission assumes that section 11, with respect to campaign debts, applies to Federal candidates.