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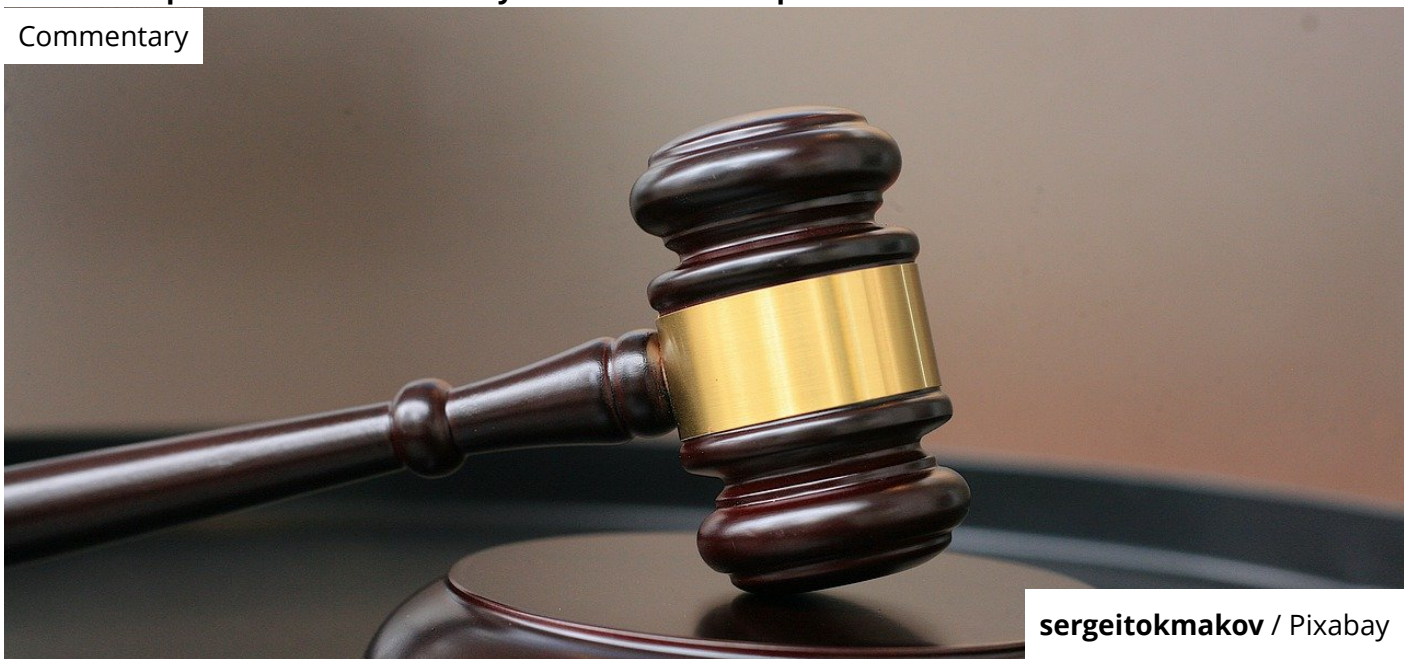

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When Federal and State Laws Collide: The FECA Preemption Question in Trump's Trial

Professor Mark Brown | Capital University Law School

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Edited by: **Ingrid Burke Friedman | JURIST Editorial Director**

The author, a professor at Capital University Law School in Ohio, argues that despite claims to the contrary, the Federal Election Campaign Act does not preempt New York's prosecution of Donald Trump for falsifying business records...

Does the Federal Election Campaign Act (FECA) preempt New York's use of federal campaign

finance violations to enhance Donald Trump's criminal penalties for falsifying his New York business records? **Professor Elizabeth Price Foley** (Florida International University) and conservative media commentator David Rivkin argued in the Wall Street Journal last week that it does, since FECA includes an "express" preemption provision (now codified at 52 U.S.C. § 30143(a)) stating that FECA "supersede[s] and preempt[s] any provision of State law with respect to election to Federal office." Foley and Rivkin thus argue that the Supremacy Clause in Article VI of the federal Constitution – which says that the laws of the United States take precedence over State laws — means that Trump's conviction cannot stand.

Contrary to Foley's and Rivkin's claim, express preemption under the Supremacy Clause is not much simpler than its implicit cousin. Congress may, of course, preempt State regulations and State enforcement proceedings, but nothing in the Constitution requires that it do so. Nor does the Constitution itself prohibit New York from regulating matters that have been addressed by Congress. States retain powers notwithstanding the Supremacy Clause, and these powers are generally only lost when Congress either expressly or implicitly says so. The question in Trump's case is whether Congress's 1974 addition of an express preemption provision to the FECA immunizes federal candidates from anything beyond the contribution and expenditure restrictions spelled out in federal law when they conduct their campaigns.

Lower courts have struggled with this problem under the FECA for fifty years. Notwithstanding that they have uniformly recognized that FECA's express preemption provision was meant to "**make certain** that [FECA] 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," these same courts have usually backed away from using FECA's preemption provision to override state laws of general applicability. The always-conservative United States Court of Appeals for the **Fifth Circuit**, for instance, noted ten years ago that a "'strong presumption' exists against preemption, and 'courts have given [FECA] a narrow preemptive effect in light of its legislative history.'"

In that case, the Fifth Circuit rejected the claim that FECA preempted application of Texas's fraudulent transfer law to contributions made to federal candidates. Even though the contributions satisfied FECA, the Fifth Circuit ruled, Texas's law could still render them illegal. The Fifth Circuit explained that Texas's restriction "is a general state law that happens to apply to federal political committees," and "nowhere in the text of FECA or accompanying regulations is the personal liability of a candidate addressed." Consequently, Texas law could be used to hold a federal candidate personally liable for fraudulent campaign contributions notwithstanding their being made in compliance with FECA.

Lower courts have similarly refused to use FECA to preempt state-law **contract actions** against federal candidates and their campaigns, state-law **fiduciary actions** against corporate directors for wasting company assets on congressional candidates, and **deceptive practice**

actions against federal candidates under state consumer protection laws.

In contrast, lower courts have ruled that specific state laws that duplicate or interfere with FECA's limits on contributions, expenditure restrictions and reporting provisions are preempted. The United States Court of Appeals for the **Sixth Circuit** thus invalidated Kentucky's attempt in 1994 to investigate a congressional campaign committee's polling expenditures, monies that were otherwise properly used under the FECA, explaining that it was "at a loss to identify a legitimate state interest in this expenditure." State laws restricting or conditioning **contributions** to federal candidates have also been ruled invalid under FECA, as have been **disclosure requirements** beyond those spelled out in the FECA.

This distinction between general laws that adversely impact federal campaign practices and those that directly address them is admittedly not always easy to parse or apply. Still, federal **Judge Alvin Hellerstein** did a thorough and convincing job of it when he rejected Trump's attempt to remove his New York prosecution to federal court. Judge Hellerstein explained that the "FECA does not preempt the application of a general state law to conduct related to a federal election except if the law, or its application, constitutes a specific regulation of conduct covered by FECA. The mere fact that Trump is alleged to have engaged in fraudulent conduct with respect to a federal election is not a basis for preemption."

In the end, whether Trump's wrongdoing is sheltered by either FECA preemption or the Supreme Court's stunning **presidential immunity decision** will likely be decided by appellate courts (maybe the U.S. Supreme Court) following the November presidential election. Suffice it to say that New York's successful prosecution of Donald Trump, contrary to Foley's and Rivkin's claim, appears to stand on solid ground.

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THIS DAY @ LAW

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On February 6, 1900, the Permanent Court of Arbitration (PCA) was founded with the ratification of the 1899 Convention for the Pacific Settlement of International Disputes. Set at The Hague in the Netherlands, the PCA was the first international tribunal established to settle disputes between nations. The PCA was later revised by the subsequent 1907 Convention for the Pacific Settlement of International Disputes. Today, the PCA is housed at the Peace Palace in The Hague and is comprised of 109 member countries.

20th Amendment to the US Constitution ratified

On February 6, 1933, the 20th Amendment to the US Constitution was ratified by the requisite majority of states, moving the start of presidential, vice-presidential and congressional terms from March to January in an effort to shorten the problematic "lame duck" period.

Learn more about the 20th Amendment.