FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

INTERPRETIVE STATEMENT OF CHAIRMAN SEAN J. COOKSEY

The Federal Election Commission's authority over ballot initiatives is misunderstood. Because ballot initiatives affect only matters of state and local law—there are no questions of federal law subject to popular vote under the Constitution—the Commission generally lacks the authority to regulate those measures. Instead, Commission rules affect ballot initiatives only incidentally, if at all. Yet when it comes to federal soft-money regulations, the Commission has failed to give coherent guidance on whether or how those rules apply to federal candidates' involvement with state and local ballot initiatives.[1]

The Commission should straighten out its understanding of the law. State and local ballot initiatives are not "elections" under the Federal Election Campaign Act of 1971, as amended (the "Act"). Therefore, when federal candidates raise and spend money in connection with ballot initiatives, the Act's soft-money restrictions do not apply. And while past advisory opinions suggesting the opposite have been functionally superseded, the Commission should make that fact explicit. This statement summarizes why.

* * *

The Act's definition is clear: an "election" is "a general, special, primary, or runoff election," or "a convention or caucus of a political party which has authority to nominate a candidate."[2] Commission regulations reiterate the point: "*Election* means the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office."[3] As the agency tasked with administering and enforcing the Act, we are bound by the law Congress has enacted, including the statutory definitions: "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."[4]

Consequently, notwithstanding what an ordinary speaker might think the term means, as used throughout the Act, "election" is limited to candidate elections for public office. This limiting

---

[1] I use "ballot initiatives" as a catch-all term for all non-candidate elections, that is, elections other than those to select an individual for nomination or election to public office. These non-candidate elections take many names and forms, including ballot initiatives, ballot measures, ballot questions, propositions, referenda, and recall elections.

[2] 52 U.S.C. § 30101(1)(A)–(B). The definition further includes "a primary election held for the selection of delegates to a national nominating convention of a political party" and "a primary election held for the expression of a preference for the nomination of individuals for election to the office of President." 52 U.S.C. § 30101(1)(C)–(D).

[3] 11 C.F.R. § 100.2(a).

[4] *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *Meese v. Keene*, 481 U.S. 465, 484–85 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.").

construction is important as a matter of constitutional law because the only permissible ground for restricting political speech is the prevention of *quid pro quo* corruption or its appearance.[5] And as the Supreme Court has observed, "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."[6]

Despite this, the Commission's precedents have inconsistently interpreted the meaning of "election," especially with respect to the Act's soft-money restrictions. The principal source of confusion is Advisory Opinion 2003-12 (Flake) ("Flake AO"). There, the Commission considered whether a federal officeholder and candidate could, consistent with the Act's soft-money restrictions, lead a state-level ballot committee in trying to qualify a ballot initiative for an upcoming election and campaign for its passage. The Commission concluded he could not because "all activities of a ballot measure committee 'established, financed, maintained or controlled' by a Federal candidate … are 'in connection with any election other than an election for Federal office.'"[7] It reached that conclusion based on a misguided textual analysis that ignored the general statutory definition of "election" in favor of a false comparison to the prohibition against corporate and bank contributions.[8] The advisory opinion went on to conclude that even without a federal candidate or officeholder at the helm, a ballot-initiative committee's activities after it qualifies for the ballot were "in connection with" a non-federal election, and the Act's soft-money restrictions applied to any federal candidate who sought to solicit or raise funds on behalf of such a committee.[9]

The Flake AO was wrong then, has been significantly undermined since, and should be formally overruled now. Just two years after issuing the Flake AO, the Commission reached a contradictory decision in Advisory Opinion 2005-10 (Berman-Doolittle). There, it permitted federal candidates and officeholders to raise funds for a ballot-initiative committee even though the initiative had already qualified for the upcoming election.[10] That conclusion is plainly irreconcilable with the Flake AO's reasoning, and it effectively overruled its core conclusion that a ballot initiative is a non-federal election.

The point was reinforced in two separate concurring statements that said, unequivocally, that the Flake AO's analysis was "faulty."[11] As Vice Chairman Michael Toner and Commissioner David Mason explained—and as comments filed by Members of Congress reiterated—"not a single Member of Congress, including the legislation's sponsors, indicated that the soft-money

---

5 *See McCutcheon v. FEC*, 572 U.S. 185, 207 (2014).

6 *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 352 n.15 (1995) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978)).

7 Advisory Op. 2003-12 (Flake) at 6.

8 *Id*. at 5 (citing the statute currently designated as 52 U.S.C. § 30118(a)).

9 *Id*. at 6.

10 Advisory Op. 2005-10 (Berman-Doolittle) at 2.

11 Concurring Statement of Commissioners Ellen L. Weintraub and Danny Lee McDonald at 2 (Sept. 2, 2005), Advisory Op. 2005-10 (Berman-Doolittle); *see also* Concurring Statement of Vice Chairman Michael E. Toner and Commissioner David M. Mason at 2 (Aug. 29, 2005), Advisory Op. 2005-10 (Berman-Doolittle).

ban would apply to initiatives and referenda."[12] Arguments against the Flake AO were further refined five years later in a concurring statement by the Republican Commissioners to Advisory Opinion 2010-07 (Yes on FAIR). That statement set out, chapter and verse, the constitutional, statutory, and logical problems with the Flake AO's reasoning.[13] The force of those arguments persists today.

Finally, were all that not enough, the Flake AO cannot be squared with more recent Commission decisions interpreting the term "election" in other provisions of the Act. The Act's foreign-national prohibition provides that it is unlawful for a foreign national to make "a contribution or donation … in connection with a Federal, State, or local election."[14] In two enforcement matters—MUR 7512 (Pembina Pipeline) and MUR 7523 (Stop I-186 to Protect Mining and Jobs)—the Commission considered whether two foreign corporations that had donated funds to state-level ballot committees had made prohibited foreign-national contributions. Relying on the same statutory and regulatory definitions of "election," as well as Supreme Court and Commission precedents, the Commission concluded that ballot initiatives and referenda were *not* "Federal, State, or local election[s]" within the meaning of the Act, and that the foreign-national prohibition therefore did not apply.[15] Importantly, the Commission reached that decision notwithstanding that the initiatives at issue were on the same ballot as candidates for federal and state office, or that state-level candidates had appeared in ballot-committee advertisements.[16] Yet those circumstances did not render the initiatives federal or state "elections" under the Act. In the same way, a federal candidate's involvement with or proximity to a ballot initiative does not render it a federal "election."

The Flake AO has not withstood the test of time. Its erroneous reasoning has been undermined by subsequent Commission decisions, and its holding has created incoherence in the larger body of Commission and judicial precedent interpreting the Act.[17] The Commission should take affirmative steps to clarify the law on this issue—that federal candidates may solicit, receive, direct, transfer, or spend funds in connection with state and local ballot initiatives free from the Act's soft-money regulations. Short of self-initiated guidance, I am hopeful that future advisory-opinion requests or enforcement matters will squarely present the Commission with the opportunity to revisit this question.

February 14, 2024

---

[12] Concurring Statement of Vice Chairman Michael E. Toner and Commissioner David M. Mason at 1 (Aug. 29, 2005), Advisory Op. 2005-10 (Berman-Doolittle).

[13] *See* Concurring Statement of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn (June 30, 2010), Advisory Op. 2010-07 (Yes on FAIR).

[14] 52 U.S.C. § 30121(a)(1)(A).

[15] *See* Factual & Legal Analysis at 5–6 (Oct. 4, 2021), MUR 7523 (Stop I-186 to Protect Mining and Jobs, *et al.*); Factual & Legal Analysis at 6–8 (Oct. 5, 2021), MUR 7512 (Pembina Pipeline Corporation, *et al.*).

[16] *See* Factual & Legal Analysis at 2, 6 (Oct. 4, 2021), MUR 7523 (Stop I-186 to Protect Mining and Jobs, *et al.*).

[17] *McIntyre*, 514 U.S. at 356 ("The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures….").