



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CONCURRING OPINION IN ADVISORY OPINION 2010-07 (YES ON FAIR)
of
Chairman MATTHEW S. PETERSEN and
Commissioners CAROLINE C. HUNTER and DONALD F. McGAHN

On May 27, 2010, the Commission was unable to agree on a single rationale in response to the Advisory Opinion Request of Yes on FAIR (“Requestor”), an organization advocating for the qualification and passage of a ballot initiative for California’s statewide November 2, 2010 election. The fundamental question in this request is whether the vote by California citizens on the ballot initiative being championed by Yes on FAIR would be an “election” under the Act, thereby subjecting any solicitations made by Federal candidates on behalf of Yes on FAIR to the amount limitations and source restrictions set forth in the Federal Election Campaign Act of 1971, as amended (“the Act”). On the basis of the Act, the legislative history of the Act, Commission regulations, and prior Commission consideration of this issue, we concluded that the vote on the ballot initiative (should it qualify for the ballot) would not be an “election” as defined by the Act, and thus, Members of Congress and other Federal candidates may raise funds outside of the Act’s limits and restrictions to support Yes on FAIR’s activities.

With respect to solicitations made before the initiative qualifies for the ballot, our colleagues agreed with the same general outcome (albeit not necessarily for the same reason), but concluded that solicitations made after ballot qualification could only be made to individuals and for amounts not exceeding \$20,000. This distinction between Yes on FAIR’s pre- and post-ballot qualification activities, however, is arbitrary and seemingly without a firm basis in the law. If Requestor’s pre-qualification activities are not *in connection* with an election, then neither are their post-qualification activities. Thus, we cannot support the application of section 441i(e)(4)(B)’s \$20,000 individual amount/source restriction to Federal candidates’ solicitations made in the latter period.

We discuss the reasoning in support of our conclusions in more detail below.

I. ANALYSIS

A) The Act and Prior Advisory Opinions

Under the Act, Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained or controlled by them or acting on their behalf (collectively, “covered persons”) are limited in how much and from whom they may solicit funds in connection with an election. Specifically, covered persons may

not solicit, receive, direct, transfer, or spend any “funds in connection with any election for Federal office” unless the funds are “subject to the limitations, prohibitions, and reporting requirements of this Act.”¹ Similarly, covered persons may not solicit, receive, direct, transfer, or spend any “funds in connection with any election other than an election for Federal office” unless the funds are consistent with the Act’s amount limitations and source prohibitions.²

Thus, in analyzing the application of 2 U.S.C. § 441i(e), the threshold question is whether the funds involved are in connection with a Federal or non-Federal election under subsection (e)(1). If such funds are not in connection with an election, then the inquiry ends—the Act does not apply, and the \$20,000 limit set forth in subsection (e)(4) has no relevance.

In Advisory Opinion 2003-12 (Flake), the Commission stated in dicta³ that, under section 441i(e)(1)(B), the activities of a ballot measure committee that is not directly or indirectly established, financed, maintained or controlled by a Federal candidate or officeholder, or an agent thereof, are not in connection with an election before the committee has qualified an initiative or ballot measure for the ballot, but are in connection with an election after the committee has qualified an initiative or ballot measure for the ballot. The rationale for this determination was that pre-qualification activities, such as petition and signature gathering, do not occur within close proximity to an election, while post-qualification activities in support of or in opposition to an initiative occur closer to the election.⁴

However, in Advisory Opinion 2005-10 (Berman-Doolittle), the Commission concluded that section 441i(e) does not prohibit Federal candidates and officeholders from raising funds for committees that have been formed solely to support or oppose ballot measures, notwithstanding that the measures in question had already qualified for the ballot.⁵ Moreover, neither of the concurring opinions of the commissioners who voted for the result in AO 2005-10 drew any distinction between the pre- and post-ballot qualification periods. In fact, the concurrence by Commissioners Weintraub and McDonald stated the “reasoning was faulty” in AO 2003-12 regarding the “in connection with” analysis, and that the distinction between pre- and post-ballot qualification was

¹ 2 U.S.C. § 441i(e)(1)(A); *see also* 11 C.F.R. § 300.61.

² 2 U.S.C. § 441i(e)(1)(B); *see also* 11 C.F.R. § 300.62.

³ The Commission did not decide AO 2003-12 on the basis of whether the ballot measure committee’s activities occurred pre- or post-qualification. Rather, as the Commission stated, “The Commission finds that all activities of a ballot measure committee ‘established, financed, maintained or controlled’ by a Federal candidate, as is the case here . . . , are ‘in connection with any election other than an election for Federal office.’”

⁴ In our view, AO 2003-12 (Flake) was wrongly decided and, as explained below, was effectively superseded by a subsequent advisory opinion.

⁵ The ballot qualification deadline for the ballot measures at issue in AO 2005-10 was June 30, 2005. The AO request raising the question of whether the ballot measures at issue was “in connection with” an election was submitted on July 15, 2005, and the advisory opinion was issued on August 22, 2005. Had the ballot measures not qualified, the advisory opinion would have been moot.

drawn “[f]or the sake of compromise.”⁶ Thus, AO 2005-10 effectively superseded AO 2003-12 and its distinction between the pre- and post-ballot qualification periods.⁷

B) Whether Ballot Measures are “In Connection With” an Election

Because the distinction between pre- and post-ballot qualification activities drawn in AO 2003-12 has been superseded, we turn to whether activities related to ballot measures generally are “in connection with” an “election” as contemplated by the Act. As shown above, the specific sections of 441i(e) at issue relate to either “an election for Federal office” or “any election other than an election for Federal office.” The Act defines an “election” as follows:

- (A) A general, special, primary, or runoff election;
- (B) A convention or caucus of a political party which has authority to nominate a candidate;
- (C) A primary election held for the selection of delegates to a national nominating convention of a political party; and
- (D) A primary election held for the expression of a preference for the nomination of individuals for election to the office of President.⁸

Moreover, under Commission regulations, an “election” is defined as “the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office.”⁹ Thus, both the statutory and the regulatory definitions of “election” discuss the term in the context of voting for candidates, rather than ballot measures.

Furthermore, the Act’s legislative history (and the views of the Members of Congress who voted for the Act) confirms the understanding that ballot measures are not “elections.” As Vice Chairman Toner and Commissioner Mason explained in AO 2005-10:

⁶ AO 2005-10, Concurring Statement of Commissioners Ellen L. Weintraub and Danny Lee McDonald at 2. Although Commissioners Weintraub and McDonald also stated that they “would have preferred to have regulated the pre-qualification activities as well” in AO 2003-12, we read that statement as suggesting that they believed the ballot measure committee at issue in AO 2003-12 was established, financed, maintained, or controlled by a Federal candidate.

⁷ This request involves a ballot measure that will appear on the same ballot as Federal candidates, which was not the case in AO 2005-10. This is a distinction without a difference, however, since section 441i(e)’s prohibition on Federal candidates soliciting “soft-money” applies equally to funds that are “in connection with an election for Federal office” as well as “funds in connection with any election other than an election for Federal office.” Compare 2 U.S.C. § 441i(e)(1)(A) and 2 U.S.C. § 441i(e)(1)(B). Thus, the operative question in AO 2005-10 was whether the ballot measures were in connection with *any* election, whether Federal or non-Federal. The Commission could not have concluded that 441i(e)(1) did not apply to the fundraising activities in that AO if a vote on a ballot measure were an *election*. Thus, the fact that, in this instance, Federal candidates would appear on the same ballot as the Yes on FAIR ballot initiative does not make the vote measure at issue any more “an election” than the vote on the ballot measure at issue in AO 2005-10.

⁸ 2 U.S.C. § 431(1).

⁹ 11 C.F.R. § 100.2(a).

In debating the Bipartisan Campaign Reform Act of 2002 ('BCRA') [which introduced section 441i(e)'s so-called 'soft-money' ban], not a single Member of Congress, including the legislation's sponsors, indicated that the soft money ban would apply to initiatives and referenda. Moreover, Members of Congress who voted for BCRA, including House Minority Leader Nancy Pelosi (D-CA), filed comments in this proceeding indicating that it was not their understanding that 441i(e)'s soft money restrictions would apply beyond candidate elections to ballot measures.¹⁰

We agree with these statements. The Act and Commission regulations define an "election" in terms of individual candidates seeking representative office. The ballot initiative process, on the other hand, allows voters to directly enact a proposed statute, constitutional amendment, or ordinance.¹¹ This is a straightforward distinction: a candidate is elected into representative office – not passed into law – by voters, whereas the opposite is true for ballot initiatives; they are passed into law – not elected – by voters. Under the Act, the Commission's jurisdiction is circumscribed accordingly; it reaches the process by which voters select their representatives, but not how those representatives, or the people themselves, enact legislation.

This does not reflect merely our view or the views of Members of Congress or former commissioners; it is also the view of the Supreme Court. As the Court recognized in *McIntyre v. Ohio Elections Commission*, "The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures...."¹² The Court further noted that "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."¹³

Accordingly, because the Act does not regulate State ballot measures and referenda, ballot measures and referenda are not "elections" within the meaning of the Act. Thus, activities supporting or opposing ballot measures and referenda are not "in

¹⁰ AO 2005-10, Concurring Statement of Vice Chairman Michael E. Toner and Commissioner David M. Mason at 1; see also Memorandum from Commissioner Ellen L. Weintraub to Commission Secretary, August 17, 2005, available at <http://saos.nictusa.com/aodocs/413239.pdf> (disclosing *ex parte* communication from Representatives Howard Berman, Nancy Pelosi, and Zoe Lofgren).

¹¹ See, e.g., Cal. Election Law Code, Div. 9, Art. 1 §9000 *et seq.*

¹² 514 U.S. 334, 356 (1995). See also *Citizens United v. FEC*, No. 08-205, 558 U.S. ___, slip op. at 9 (2010) (recognizing the *Bellotti* distinction between a candidate election and a referendum) (opinion of Roberts, C.J., concurring); slip op. of Stevens, J., dissenting at 52-53 (reasoning that the anti-corruption interests advanced for limiting corporate advocacy of candidates do not apply to corporate advocacy of referenda because "[a] referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation."). See also note 17, *infra* (explaining that the Commission has taken the position that communications that address only state ballot initiatives would not constitute federal election activity). Moreover, the prospect of the federal government exercising jurisdiction over the process by which a state's voters change the constitution of that state raises constitutional doubt. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

¹³ *McIntyre*, 514 U.S. at 352 n.15 (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978)).

connection with” an election. Federal candidates, therefore, may solicit funds for ballot measure committees without restriction.

C) The Untenable Distinction Between Pre- and Post-Ballot Qualification

Neither the Act nor the facts of the request support the proposition in Draft B that, post-ballot qualification, general campaigning in support of a ballot measure becomes activity that is “in connection with an election for Federal office.” According to Draft B, ballot measure committees such as Yes on FAIR:

engage in generalized campaigning with the goal of persuading voters to support the measure and encouraging supporters to vote. Indeed, this generalized campaigning often takes the form of federal election activity (‘FEA’), as defined by BCRA, such as voter registration, voter identification and get-out-the-vote programs. Because FEA affects federal elections, even where federal candidates are not explicitly referenced, Congress has determined that such activities are “in connection with an election for Federal office” and subject to the solicitation restrictions at issue here.¹⁴

In other words, Draft B suggests that Yes on FAIR’s activities are “in connection with an election for Federal office” because those activities are FEA, and those activities are FEA because they are “in connection with an election for federal office.” This is circular, and therefore never proves the underlying requirement that activities must be in connection with “an election” to be subject to the Act.

Section 441i(e)(1)(A) applies to funds raised or spent “in connection with an election for Federal office, including funds for any Federal election activity,” and section 441i(e)(1)(B) applies to funds raised or spent “in connection with any election other than an election for federal office.”¹⁵ However, Yes on FAIR’s activities in fact do not fall into any of these categories. Instead, Yes on Fair’s proposed activities are in connection with a ballot initiative, which, as discussed above in more detail, are not “elections” under the Act. Similarly, the get-out-the-vote and generic campaign activities that Yes on FAIR intends to carry out would meet the definition of FEA only if “conducted in connection with an *election* in which a candidate for Federal office appears on the ballot.”¹⁶ Therefore, the proposed activities are not in connection with any “election” and cannot be subject to 441i(e)) or the relevant definition of FEA.¹⁷

¹⁴ AO 2010-07, Draft B at 5-6, *available at* <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3052&START=1138798.pdf>.

¹⁵ Section 441i(e)(1)(B), which restricts solicitations for funds “in connection with any election other than an election for Federal office,” does not discuss FEA. *Cf.* 2 U.S.C. § 441i(e)(1)(A).

¹⁶ 2 U.S.C. § 431(20)(A)(ii) (emphasis added). We note that the respondent has not asserted it will conduct voter registration pursuant to 2 U.S.C. § 431(20)(A)(i).

¹⁷ As the Commission itself stated in a brief filed with the United States District Court for the District of Columbia, “*Communications that address only state ballot initiatives would not constitute federal election activity, and state and local parties can finance them with nonfederal dollars.*” Brief of Defendant Federal

Moreover, assuming *arguendo* that FEA, taken by itself and without reference to whether it is “in connection with an election for Federal office,” is enough to draw the line for when the Act’s limitations and prohibitions apply at the date of ballot qualification, this line is still incorrect. It would permit Federal candidates and officeholders to make certain unrestricted solicitations for Yes on FAIR for activities that nonetheless could constitute FEA, while prohibiting unrestricted solicitations for other activities that would not constitute FEA.

For example, the Act treats voter ID and GOTV activity as FEA when it is “conducted in connection with an election in which a candidate for Federal office appears on the ballot.”¹⁸ The Commission’s regulations define “in connection with an election in which a candidate for Federal office appears on the ballot,” in relevant part, as “[t]he period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law . . . and ending on the date of the general election”¹⁹ The FEA period for voter ID and GOTV in California for 2010 is March 12, 2010 through November 2, 2010.²⁰ Thus, Draft B would permit Federal candidates and officeholders to make unrestricted solicitations for Yes on FAIR during the pre-ballot qualification period, notwithstanding that those funds may be used for some voter ID and GOTV activities that could constitute FEA.

Because we conclude that section 441i(e)(1) does not subject Federal candidates’ and officeholders’ solicitations for Yes on FAIR to the Act’s limits and prohibitions, the \$20,000 limit set forth in section 441i(e)(4) (for solicitations of funds for 501(c) organizations conducting federal election activities) also does not apply.

II. CONCLUSION

As explained above, ballot measures and initiatives are not “elections” under the Act. Consequently, activities supporting or opposing ballot measures and initiatives are not “in connection with an election for *Federal* office” for the purposes of the Act. Therefore, the Act’s amount limitations and source prohibitions do not apply to solicitations of funds on behalf of ballot initiative committees such as Yes on FAIR, even if such solicitations are made by Federal candidates and officeholders.

Election Commission Opposing Plaintiff’s Motion for Summary Judgment at 47, *RNC v. FEC*, No. 08-1953 (D.D.C. Mar. 26, 2010) (emphasis added).

¹⁸ 2 U.S.C. § 431(20)(A)(ii).

¹⁹ 11 C.F.R. § 100.24(a)(1)(i).

²⁰ “Federal Election Activity Dates (2010),” *at*:

http://www.fec.gov/pages/bcra/rulemakings/charts_fea_dates_2010.shtml.


MATTHEW S. PETERSEN
Chairman

6/30/2010
Date


CAROLINE C. HUNTER
Commissioner

6/24/10
Date


DONALD F. MCGAHN II
Commissioner

6/30/2010
Date