

## THE FEDERAL ELECTION COMMISSION'S INTERPRETIVE ROLE AFTER *LOPER BRIGHT*

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Criticisms of campaign finance regulation usually take one of two forms. Libertarian-leaning commentators see an assault on free speech and association, a clear violation of the First Amendment's broad protection of political activity. Their opponents see a hopelessly dysfunctional system that fails to accomplish the lofty promises of the post-Watergate reforms and instead permits torrents of unlawful funds to enter the political process.

But, for practitioners and those directly engaged in politics, the original sin of campaign finance law is more modest. As the Supreme Court recognized almost a half century ago, "in its effort to be all inclusive" the campaign finance laws "raise[] serious problems of vagueness."<sup>1</sup> It is the lack of legal clarity that most often threatens to "deter those who seek to exercise protected First Amendment rights."<sup>2</sup> Unclear laws force "speaker[s] to hedge and trim,"<sup>3</sup> a tax on free expression that is especially insidious because it is hidden.

Against this backdrop, the Federal Election Commission ("FEC" or "Commission") has been tasked with clarifying Congress's vague and unclear dictates. This article discusses two of those

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1. *Buckley v. Valeo*, 424 U.S. 1, 76 (1976) (per curiam).

2. *Id.* at 77.

3. *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

means, regulations and advisory opinions, in the context of the Supreme Court's recent decisions in *Loper Bright Enterprises v. Raimondo*<sup>4</sup> and, to a lesser extent, *Corner Post v. Board of Governors of the Federal Reserve System*.<sup>5</sup> Taken together, those decisions subject regulatory efforts by independent administrative agencies, including the Commission, to newly robust judicial scrutiny. As a result, they may also endanger the FEC's ability to provide much-needed guidance to the public, increasing the risk that federal laws will chill the exercise of protected rights.

### I. THE INTERPRETIVE ROLE OF THE FEC

In the aftermath of Watergate, Congress undertook a comprehensive revision of the laws governing the financing of federal campaigns. The resulting amendments to the Federal Election Campaign Act ("FECA")<sup>6</sup> were designed to funnel all discussion of campaigns into narrow channels. The amounts campaigns could expend were capped at low levels: \$70,000 for the House of Representatives, and \$20,000,000 for the Presidency.<sup>7</sup> Contributions to

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4. 144 S. Ct. 2244 (2024).

5. 144 S. Ct. 2440 (2024).

6. Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (1972) (codified at 52 U.S.C. § 30101 *et seq.*). FECA was first enacted in 1972, but that iteration of the law mostly provided for a disclosure regime. Richard Nixon, Statement on Signing the Federal Election Campaign Act of 1971 (Feb. 7, 1972), <https://www.presidency.ucsb.edu/documents/statement-signing-the-federal-election-campaign-act-1971> [https://perma.cc/72GS-7NM9]. Even so, it incurred early judicial scrutiny when the Nixon administration sought to use FECA to go after a group which had opposed the Vietnam War and sought Nixon's impeachment for expanding that conflict into Cambodia. *See, e.g., United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972). Ironically, it was efforts by the Nixon re-election campaign to evade those 1972 rules which sparked the post-Watergate effort to convert FECA into a comprehensive statute. *Buckley v. Valeo*, 519 F.2d 821, 838 (D.C. Cir. 1975) (highlighting illegal contributions made to the Nixon and Humphrey campaigns in 1972); GARRETT M. GRAFF, WATERGATE: A NEW HISTORY 145 (2022) ("Signing the bill . . . Nixon touted its new transparency . . . Behind the scenes, though, during the eleven weeks before the law took effect, his campaign raced to hide as much money as it could").

7. Federal Election Campaign Act Amendments of 1974, S. 304, 93d Cong. § 101(c) (1974).

those campaigns were limited to \$1,000 per election. Strict limits were placed on self-funded campaigns and expenditures by non-candidate individuals and organized committees. The effort was comprehensive.

The Federal Election Commission was established to administer this ambitious statute. While the FEC is vested with enforcement powers, commentators often overlook the agency's statutory interpretative function.<sup>8</sup> It was given authority to "prescribe rules, regulations, and forms,"<sup>9</sup> subject to Congressional oversight, and expressly instructed "to encourage voluntary compliance" with the Act.<sup>10</sup> To that end, anyone "who relies upon any rule or regulation prescribed by the Commission" and acts thereon "in good faith" cannot be subject to any legal sanction under the Act.<sup>11</sup>

Most importantly, the Commission was given the authority to issue advisory opinions. The advisory opinion ("AO") process is one of the most consequential tools provided by Congress. Anyone may submit a "written request concerning the application of" FECA "with respect to a specific transaction or activity by the person."<sup>12</sup> The Commission is required to provide an answer within 60 days.<sup>13</sup> And, if four commissioners agree on the answer, the requester is immunized from liability for good faith reliance on that opinion—as is anyone else engaged in materially-indistinguishable activity.<sup>14</sup>

While a powerful tool, advisory opinions are not license. They, as mentioned, require a bipartisan vote to pass, and they are limited

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8. *But see* Allen Dickerson & Zac Morgan, *Campaign Finance Advisory Opinions at the State Level*, 40 *FORDHAM URB. L.J.* 773 (2012) (discussing the Commission's advisory opinion process and comparing it to campaign finance systems in the fifty states).

9. 52 U.S.C. § 30111(a)(8).

10. 52 U.S.C. § 30107(a)(9).

11. 52 U.S.C. § 30111(e).

12. 52 U.S.C. § 30108(a)(1).

13. This deadline is shortened to twenty days if the request is made within 60 days of an election "involving the requesting party." 52 U.S.C. § 30108(a)(2).

14. 52 U.S.C. § 30108(c).

to the facts set before the Commission.<sup>15</sup> Moreover, FECA commands that AOs must be based on the Act or a “rule or regulation” of the Commission; they cannot themselves announce “any rule of law.”<sup>16</sup> For this reason, advisory opinions are a one-way ratchet protecting requestors; they are “shields, not swords.”<sup>17</sup> They can only create immunity for a class of activity, not announce a rule creating future enforcement authority.<sup>18</sup>

Of course, this process is subject to error. Because the Commission binds itself to a view of the Act, and immunizes future violations, these errors tend to persist.<sup>19</sup> To take one example, FECA bans the “sale or use” of FEC reports “for the purpose of soliciting contributions or for commercial purposes.”<sup>20</sup> Yet the Commission, in a series of ill-considered advisory opinions, has blessed the “commercial use” of its reports, with the exception of fundraising activity.<sup>21</sup> This is badly inconsistent with the statute (it makes the “commercial purposes” language redundant) and a blow to the privacy

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15. See Statement of Comm’r Dickerson Regarding Advisory Opinion 2025-06 (Campaign Legal Center) at 1–2, Apr. 18, 2025 (“An executive order is not the Act, and so the FEC may not lawfully opine upon its application.”).

16. 52 U.S.C. § 30108(b).

17. Statement of Comm’rs Dickerson & Trainor Regarding Advisory Opinion 2024-08, at 1, July 25, 2024 (quoting Statement of Reasons of Chairman Dickerson & Comm’rs Cooksey & Trainor at 4, MUR 7491 (Am. Ethane Co., LLC), Oct. 27, 2022).

18. Statement of Reasons of Chairman Petersen & Comm’rs Hunter & McGahn, MUR 5625 (Aristotle Int’l, Inc.) at 2 n.3, May 10, 2010 (“Of course, it is well-established that advisory opinions cannot be used as a sword, but instead merely a shield from burdensome Commission enforcement action”).

19. See Statement of Commissioners Regarding Advisory Opinion 2024-08, *supra* note 17, at 1 (“But where, as here, an imperfect advisory opinion supports a request, we prefer to rely upon it rather than cast unnecessary doubt on the Commission’s prior decisions and put the requestor’s rights at risk over an ancillary dispute”).

20. 52 U.S.C. § 30111(a)(4); 11 C.F.R. § 104.15 (“[I]nformation . . . filed under the Act, shall not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose . . .”).

21. See Advisory Opinion 2017-08 (Point Bridge Capital LLC), Aug. 17, 2017; Advisory Opinion 2015-12 (Ethiq), Nov. 13, 2015; Advisory Opinion 2014-07 (Crowdpac), Aug. 12, 2014; *but see* Advisory Opinion 2009-19 (Club for Growth), Aug. 13, 2009; Advisory Opinion 1995-05 (14th District TRIM Comm.), Feb. 23, 1995; Advisory Opinion 1983-44 (Cass Commc’ns), Jan. 6, 1984.

rights of those listed on FEC reports. But the Commission has been unable to unring the bell.<sup>22</sup>

This permanence, however, is what makes an AO such a valuable tool for both “encouraging voluntary compliance” with the law and establishing legal clarity. Advisory opinion requests can be filed cheaply—many are filed directly, without hiring a lawyer, and FEC staff assist requesters in developing their requests. Because they are limited to specific transactions, and because the Commission has long held that speculative or abstract questions are not appropriate for the AO process, they tend to raise the cutting-edge, concrete questions that are most likely to raise vagueness concerns precisely because they are novel.<sup>23</sup> And the statute’s mandatory language—the Commission “shall render a written advisory opinion”<sup>24</sup> within 60 days of a request—allows these question to cut to the front of the FEC’s interpretive queue.

## II. VAGUENESS

As already discussed, the Federal Election Campaign Act of 1974 worked a sea-change in the law, but its most dramatic provision, arguably, was a ban on individuals “spending more than \$1,000 a year ‘relative to a clearly identified candidate.’”<sup>25</sup> That phrase immediately became the subject of litigation, and the Supreme Court was asked to consider its constitutionality two years later in *Buckley v. Valeo*.

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22. In 2021, the Commission faced another such request from an organization called Aluminate, Inc. Advisory Opinion 2021-01 (Aluminate), Mar. 10, 2021. I abstained on the question, noting that while the advisory opinions which served as the foundation for Aluminate’s request were wrongly decided, those erroneous opinions immunized “materially similar fact patterns” creating “serious” “reliance interests . . . and [the Commission] would err if [it] did not recognize the immunities [it] ha[d] already granted.” Statement of Vice Chair Dickerson Regarding Advisory Opinion 2021-01 at 3–4, June 14, 2021.

23. To take a recent example, in January 2024, the Commission clarified that a federal officeholder could establish a State political committee to advocate in State ballot measure campaigns without triggering a shared contribution limit with that officeholder’s leadership PAC. Advisory Opinion 2023-09 (Cortez Masto), Jan. 11, 2024.

24. 52 U.S.C. § 30108(a)(8)

25. *Buckley v. Valeo*, 424 U.S. 1, 13 (1976).

The *Buckley* plaintiffs argued that the phrase “relative to a clearly identified candidate” was hopelessly vague, and the Court agreed. It explained that “so indefinite a phrase as ‘relative to’ a candidate fails to clearly mark the boundary between permissible and impermissible speech.”<sup>26</sup> Nor could the Court separate “discussion of issues and candidates” from “advocacy of election or defeat of candidates,” because such a fine line “may often dissolve in practical application.”<sup>27</sup> To “avoid the shoals of vagueness” regarding this and other keystone provisions of the Act, the Court imposed a series of narrowing constructions to reduce the Act’s scope.<sup>28</sup>

*Buckley*’s concerns serve as the touchstone for later analysis. In case after case, the Supreme Court has insisted that the First Amendment requires “precision of regulation”<sup>29</sup> in the area of campaign finance.<sup>30</sup> It has insisted upon “brightline requirements,” free of “intent-and-effect test[s].”<sup>31</sup> It has in required that any “tie [be] resolved in favor of protecting speech.”<sup>32</sup> Even where the Court has upheld a restriction, as in *McConnell v. FEC*, it has “emphasize[d]” the vagueness concerns “that drove [its] analysis in *Buckley*” and insisted that the statute be “both easily understood and objectively

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26. *Id.* at 41.

27. *Id.* at 42; *cf.* *United States v. Williams*, 553 U.S. 285, 306 (2008) (“What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is”); *Grayned v. City of Rockville*, 408 U.S. 104, 108 (1972) (“[B]ecause we assume that man is free to steer to between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly”).

28. *See United States v. Raines*, 362 U.S. 17, 22 (1960) (a “limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented”).

29. *NAACP v. Button*, 371 U.S. 415, 438 (1963).

30. *E.g.*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (extending *Buckley*’s “express advocacy” limitation to the statutory term “expenditure”). The campaign finance cases have not always been entirely clear, ironically, on the interaction between the vagueness and overbreadth doctrines. The theory may perhaps be best understood as requiring sufficient precision to *know* whether a law is overbroad. *Cf. Buckley*, 424 U.S. at 79–81.

31. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476 n. 7 (2007).

32. *Id.*

determinable.”<sup>33</sup> In the classic formulation: “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney... or seek declaratory rulings before discussing the most salient political issues of our day.”<sup>34</sup>

These narrowing constructions are liberty-maximizing in two ways, providing clarity to the law while limiting its reach.<sup>35</sup> But, as a result, the most central terms in FECA—“contribution,” “expenditure,” and “political committee”—are still, to this day, misleadingly defined in the Act. The true, *Buckley*-limited construction, applied by the Commission (and the bar) on a day-to-day basis, is not reflected in the statute.

This legal backdrop creates a challenge for the FEC. On one hand, the Commission can play a useful role through regulatory and advisory-opinion efforts in clarifying unclear rules and protecting bright-line interpretations. But, conversely, the accumulation of interpretive guidance poses its own risk. After all, “[p]roliferous laws chill speech for the same reason that vague laws chill speech.”<sup>36</sup> They create such an overwhelming quantity of “law” that no one, besides a specialist, can possibly navigate it. For this reason, the Court has also been careful to warn against “amorphous regulatory interpretation,” and directly criticized the Commission’s “unique and complex rules” spanning hundreds of pages of regulations and nearly 2,000 advisory opinions.<sup>37</sup>

Ultimately, this tension has been resolved by Congress. While the FEC retains discretion in its rulemaking, advisory opinions are mandatory. Guidance from the Commission will continue to accrete. The question is whether that guidance will be useful, and

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33. *McConnell v. FEC*, 540 U.S. 93, 194 (2003).

34. *Citizens United v. FEC*, 558 U.S. 310, 413 (2010).

35. As the *en banc* D.C. Circuit noted in its review of FECA in 1975, “in the First Amendment area . . . statutory vagueness and statutory overbreadth are constitutional vices often related and sometimes functionally inseparable.” *Buckley v. Valeo*, 519 F.2d 821, 874 (D.C. Cir. 1975).

36. *Citizens United*, 558 U.S. at 324.

37. *Id.* at 334 (quoting Brief for Seven Former Chairmen of FEC, et al. as Amici Curiae Supporting Appellant, at 11–12, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2349018).

whether the agency will be able to consistently issue it. It has not always proven equal to the task.

### III. DYSFUNCTION AND REDEMPTION

The FEC is a unique agency in that its “sole purpose is the regulation of core constitutionally protected activity, ‘the behavior of individuals and groups only insofar as they act, speak[,] and associate for political purposes.’”<sup>38</sup> Congress recognized the danger that such an agency could be coopted for partisan purposes and ensured that it could not be captured by either major party. No more than three of its six members may be members of the same party.<sup>39</sup> And all substantive decisions must be made by the affirmative vote of four commissioners—even when there are vacancies.<sup>40</sup> It is designed to be mathematically impossible to interfere with Americans’ protected liberties without the concurrence of a bipartisan majority.

These protections have sometimes frustrated people with a strong view of how campaign finance laws should be enforced. A number of proposals have been raised over the past thirty years with an eye to upsetting this equilibrium: eliminating the Commission itself and establishing a single campaign finance commissioner,<sup>41</sup> undoing the even bipartisan division on the Commission,<sup>42</sup>

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38. *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Pol. League*, 655 F.2d 380, 388 (D.C. Cir. 1981)).

39. 52 U.S.C. § 30106(a)(1).

40. 52 U.S.C. §§ 30107, 30109.

41. Editorial, *Rethinking the FEC*, WASH. POST, Mar. 5, 1999, <https://www.washingtonpost.com/archive/opinions/1999/03/05/rethinking-the-fec/94b722eb-0589-4ba4-99f3-381b5c8cda60/> (“A far better model would put civil enforcement under the direction of one person, who—like the FBI director—would serve a term of years not corresponding to the president who appointed him or the senators who confirm him”).

42. Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, BRENNAN CTR. FOR JUST. (Apr. 30, 2019), <https://www.brennancenter.org/our-work/policy-solutions/fixing-fec-agenda-reform> [<https://perma.cc/AC3Y-5U89>] (“To reduce gridlock and allow for decisive policymaking, Congress should change the Commission’s structure to give it

or simply devolving enforcement decisions to the Commission's general counsel.<sup>43</sup>

Much of this perceived dysfunction, however, flowed in the other direction. Rather than underenforcement, the true scandal was the Commission's inability to accept binding judicial limits on its authority.<sup>44</sup> The crisis accelerated after the Supreme Court's decision in *Citizens United v. FEC*,<sup>45</sup> which had the effect of eliminating the Act's ban on independent spending by for-profit corporations and unions, and ultimately led to the rise of so-called "Super PACs."<sup>46</sup> Even after that decision expressly invalidated certain regulations, three members of the Commission simply refused to repeal them or even amend the Commission's registration documents to allow groups to easily register as a Super PAC.<sup>47</sup> As a predictable result, the Commission was unable to engage in substantive rulemaking for more than a decade as distrust and recrimination consumed the agency.<sup>48</sup>

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an odd number of five commissioners, with no more than two from each of the major political parties").

43. Bradley A. Smith, *Democrats Propose a Free Speech Czar*, NAT'L REV., Oct. 20, 2021, <https://www.nationalreview.com/2021/10/democrats-propose-a-federal-speech-czar/> [https://perma.cc/AEJ4-754P] ("Under the Democrats' proposal, the FEC would keep the same structure, but scrap the bipartisan requirement for enforcement action. Instead, the Commission's general counsel would take control of actions such as starting an investigation and declaring a violation. The counsel's decision would prevail unless, within 30 days, four commissioners voted to overrule it"); cf. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) (holding that a similar structure was unconstitutional).

44. See Statement of Chair Trainor on the Dangers of Procedural Disfunction, Aug. 28, 2020.

45. 558 U.S. 310 (2010).

46. See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*). Technically, such groups are called independent expenditure only committees, as Super PACs are allowed to raise unlimited money only by virtue of their inability to make coordinated expenditures. But the colloquial has outrun the technical, and the term "Super PAC," while arguably misleading, is now broadly recognized by the public. See STATEMENT OF ORGANIZATION (FEC FORM 1), FEC, <https://www.fec.gov/documents/116/fecfrm1sf.pdf> [https://perma.cc/9NVT-KCUK].

47. This change was finally accomplished in 2021, ten years after the *SpeechNow.org* and *Citizens United* decisions.

48. In 2011, the Commission began the process of conducting a rulemaking to clarify how FECA's disclaimer requirements would apply to internet communications.

This was worse than mere dysfunction; the Commission's regulations remained affirmatively misleading. They stated that corporations could not make independent expenditures supporting candidates, even though such expenditures were blessed by the Supreme Court in the *Citizens United* decision. In another case, a federal district court issued a nationwide injunction against an FEC regulation and "ordered [that it be] stricken from the Code of Federal Regulations."<sup>49</sup> While the Commission complied with the injunction, the regulation remained on the books for five years before being formally repealed. And when another federal court vacated a third regulation,<sup>50</sup> the Commission responded to the decision with "guidance" in the form of a press release.<sup>51</sup>

At the same time, the Commission was increasingly incapable of issuing advisory opinions by the required four votes, instead "conclude[ing] its consideration of [the] advisory opinion request without issuing an advisory opinion."<sup>52</sup> The agency divided on questions of coordination,<sup>53</sup> whether separate segregated funds could receive unlimited funds for independent expenditures,<sup>54</sup> whether a web platform could collect pledges and make political contributions,<sup>55</sup> reporting rules for electioneering communications,<sup>56</sup>

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Internet Communication Disclaimers, 76 Fed. Reg. 63567 (proposed Oct. 13, 2011) (to be codified at 11 C.F.R. pt. 110). That process was not completed until 2022, taking effect on March 1, 2023. *Commission Adopts Final Rule on Internet Communications Disclaimers and the Definition of Public Communication*, FEC (Dec. 19, 2022), <https://www.fec.gov/updates/commission-adopts-final-rule-internet-communications-disclaimers-and-definition-public-communication/> [<https://perma.cc/MUC3-NWP2>].

49. *FEC v. Swallow*, 304 F. Supp. 3d 1113, 1119 (D. Utah 2018).

50. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018).

51. *FEC Provides Guidance Following U.S. District Court Decision in CREW v. FEC*, FEC (Oct. 4, 2018), <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>.

52. Close Out Letter, Advisory Op. 2011-23 (Am. Crossroads), Dec. 1, 2011.

53. *Id.*

54. Advisory Op. 2012-01 (Stop This Insanity, Inc. Emp. L'ship Fund), Mar. 2, 2012.

55. Advisory Op. 2012-08 (Repledge), May 10, 2012.

56. Advisory Op. 2012-20 (Mullin), June 1, 2012.

whether an LLC could produce and market a candidate's autobiography,<sup>57</sup> joint fundraising rules,<sup>58</sup> candidate appearances at corporate events,<sup>59</sup> solicitation rules,<sup>60</sup> cryptocurrency usage,<sup>61</sup> disclosure exemptions,<sup>62</sup> disclaimers on character-limited text advertisements,<sup>63</sup> bundling,<sup>64</sup> committee abbreviations,<sup>65</sup> contribution limits,<sup>66</sup> federal contractor contributions,<sup>67</sup> straw poll results being advertised online,<sup>68</sup> and candidate loans—to provide a non-exhaustive list.<sup>69</sup> While this practice peaked in 2012, the number of advisory opinions dramatically reduced over the years.<sup>70</sup> And when the Commission lost its quorum on September 1, 2019, people stopped asking altogether.

Thankfully the story doesn't end there. On December 9, 2020, three commissioners (including the author) were confirmed by the Senate, restoring the Commission's quorum and, with it, the ability to issue advisory opinions and pass regulations. An enormous backlog of enforcement matters, many endangered by the statute of limitations, consumed much of the Commission's energy.<sup>71</sup> But progress on regulatory matters was made, at first haltingly and then with significant speed.

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57. Advisory Op. 2012-24 (Peterson), Aug. 10, 2012.

58. Advisory Op. 2012-25 (Am. Future Fund), Jan. 22, 2013.

59. Advisory Op. 2012-29 (Hawaiian Airlines, Inc.), Aug. 23, 2012.

60. Advisory Op. 2012-37 (Yamaha), Dec. 20, 2012; Advisory Op. 2013-19 (Yamaha), Dec. 5, 2013.

61. Advisory Op. 2013-15 (Conservative Action Fund), Nov. 21, 2013.

62. Advisory Op. 2013-17 (Tea Party L'ship Fund), Nov. 21, 2013; Advisory Op. 2016-23 (Socialist Workers Party), Apr. 21, 2017.

63. Advisory Op. 2013-18 (Revolution Messaging, LLC), Mar. 11, 2014.

64. Advisory Op. 2015-03 (Democracy Rules, Inc.), Sept. 21, 2015.

65. Advisory Op. 2016-04 (Grand Trunk W. R.R.—Ill. Cent. R.R. PAC), May 9, 2016.

66. Advisory Op. 2016-13 (Martins for Congress), Oct. 3, 2016.

67. Advisory Op. 2016-20 (Mlinarchik), Dec. 1, 2016.

68. Advisory Op. 2018-04 (Conservative Primary, LLC), May 21, 2018.

69. Advisory Op. 2018-08 (Issa), Aug. 2, 2018.

70. In 2012, the Commission received 39 advisory opinion requests. In 2015, the Commission received just 16.

71. As of December 9, 2020, there were "446 matters before the agency, counting everything in the hands of the Office of General Counsel," including 275 staff recommendations prepared for a Commission decision on enforcement. Statement of

The first breakthrough was the adoption, after more than a decade, of an updated regulation addressing online disclaimers—the “paid for by” messages that accompany most political ads.<sup>72</sup> The topic had been broached in the time of dial-up internet and flip-phones, and the can continually kicked down the road as the commissioners struggled to find common ground. Finally, in 2022, a draft was agreed to that defined an internet public communication, clarified the rules for such communications, and provided an adapted disclaimer rule for circumstances where an online ad could “not be provided or would occupy more than 25 percent of the communication due to character or space constraints intrinsic to the advertising product or medium.”<sup>73</sup>

Sensing the shift, the rate of advisory opinions requested—and granted—has expanded markedly. The Commission has reached bipartisan agreement, sometimes by lopsided votes, on a range of controversial topics: candidate salaries,<sup>74</sup> the use of campaign funds to pay for candidate security,<sup>75</sup> the interplay between the federal

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Comm’r Weintraub on the Senate’s Votes to Restore the Federal Election Commission to Full Strength, Dec. 9, 2020.

72. 11 C.F.R. §§ 110.11(c)(5), (g).

73. 11 C.F.R. § 110.11(g)(2).

74. Advisory Op. 2021-03 (Hoh), Apr. 6, 2021. The Commission later clarified the candidate salary regime through a formal rulemaking. 11 C.F.R. § 113.1(g)(6).

75. Advisory Ops. 2021-03 (NRSC & NRCC), Apr. 6, 2021; 2022-02 (Steube), May 4, 2022; 2022-25 (Crapo), Jan. 13, 2023. This bipartisan process ultimately led the Commission to codify its prior AOs. 11 C.F.R. § 113.1(g)(10).

and State campaign finance systems,<sup>76</sup> and coordinated communications.<sup>77</sup> These decisions did not go without criticism, from institutional actors on both the left<sup>78</sup> and the right.<sup>79</sup> This is unsurprising. The advisory opinion process, by design, ought to involve thorny, difficult, and fact-specific questions of law—which is why getting to concrete answers is welcome progress.

Each time the Commission is able to agree on what the law is, and provide a safe harbor for political speakers, the vagueness concerns long articulated by the courts are incrementally addressed. But each decision is merely an exercise of discretion; the Commission's view of the law is seldom unanimous, let alone universal.<sup>80</sup> And there remains the possibility that a reviewing court will disagree, potentially creating new ambiguity.

#### IV. *LOPER BRIGHT* AND *CORNER POST*

Much has been and will be written about two of the most significant cases to emerge from the Supreme Court's recent terms: *Loper*

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76. Advisory Ops. 2021-06 (Robin Kelly), July 16, 2021; 2023-09 (Cortez Masto), Jan. 31, 2024; 2024-05 (Nevadans for Reprod. Freedom), May 9, 2024.

77. Advisory Op. 2022-20 (Maggie for N.H.), Oct. 14, 2022; Advisory Op. 2024-01 (Tx. Majority PAC), Apr. 4, 2024.

78. Saurav Ghosh, *Watch Out: The FEC Just Invited More Special Interest Influence on Elections*, THE HILL, May 8, 2024, <https://thehill.com/opinion/campaign/4649925-fec-special-interest-influence-on-elections-dark-money-super-pacs/> (arguing that the Commission's 2024 advisory opinion on coordinated spending "is foolhardy and myopic" and "runs counter to federal law").

79. As just one example, Republican commissioners voted together to approve Advisory Opinion 2024-05 (Nevadans for Reprod. Freedom), May 9, 2024, notwithstanding comments from the NRSC claiming that the decision would "alter the scope of . . . longstanding regulations and incentivize a flood of foreign contributions into the American political system." NRSC Comment at 11, Advisory Op. 2024-05.

80. *E.g.*, Statement of Comm'rs Dickerson and Trainor Regarding Advisory Opinion 2024-08 (Good for Congress) at 1, Fed. Election Comm'n, July 25, 2024 (noting that the commissioners "are not convinced that AO 2006-24 was correctly decided"); Statement of Comm'rs Dickerson and Trainor Regarding Advisory Opinion 2023-09 (Cortez Masto), Jan. 11, 2024 (disagreeing with the Commission's determination that Senator Cortez Masto's Nevada "committee for political action" should be considered "affiliated with her federal leadership PAC").

*Bright Enterprises v. Raimondo*<sup>81</sup> and *Corner Post v. Board of Governors of the Federal Reserve System*.<sup>82</sup> For present purposes, a brief sketch is sufficient.

*Loper Bright* concerned the continued viability of so-called “*Chevron* deference.” Pursuant to a line of cases stretching back to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>83</sup> courts had been required to defer to administrative agencies’ statutory interpretation, at least in certain circumstances. Specifically, courts were required to engage in a two-step analysis. First, they determined whether a given statutory provision was “‘silent or ambiguous with respect to [a] specific issue’ at hand”<sup>84</sup> If it was not and “the intent of Congress [was] clear, that [was] the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>85</sup> But where a statute *was* silent or ambiguous, then the court would “set aside the traditional interpretive tools and defer to the agency if it had offered ‘a permissible construction of the statute.’”<sup>86</sup>

As the *Loper Bright* majority explained at length, the rule was never especially clear or consistently applied.<sup>87</sup> But the general theory was “‘that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.’”<sup>88</sup> This was, in the telling, “the almost obvious choice” because by giving agencies “the authority to administer” a statute, Congress also made an “implicit . . . delegation of interpretive authority.”<sup>89</sup>

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81. 144 S. Ct. 2244 (2024).

82. 144 S. Ct. 2440 (2024).

83. 467 U. S. 837 (1984)

84. *Loper Bright*, 144 S. Ct. at 2254 (quoting *Chevron*, 467 U.S. at 843).

85. *Chevron*, 467 U.S. at 843.

86. *Loper Bright*, 144 S. Ct. at 2254 (quoting *Chevron*, 467 U.S. at 843).

87. *Id.* at 2270–72 (collecting cases); *id.* at 2270 (“One judge might see ambiguity everywhere; another might never encounter it”).

88. *Id.* at 2265 (quoting *Smiley v. Citibank (S.D.), N. A.*, 517 U. S. 735, 740–741 (1996)).

89. *Id.* at 2294 (Kagan, J., dissenting)

The Court disagreed, “plac[ing] a tombstone on *Chevron* no one can miss.”<sup>90</sup> Numerous reasons were given for that decision—*stare decisis* is no small thing—but two predominate.

First, the Court noted that the Administrative Procedure Act (“APA”) expressly “command[s]... that ‘the reviewing court’—not the agency whose action it reviews—is to ‘decide all relevant questions of law’ and ‘interpret . . . statutory provisions.’”<sup>91</sup> *Chevron* never “grappled with the APA,” and so it improperly delegated the judiciary’s interpretive responsibility to any “Executive Branch agency [that] views a statute differently.”<sup>92</sup> Compared with the APA’s explicit instructions to the judiciary, mere ambiguity “is not a reliable indicator of actual delegation of discretionary authority to agencies.”<sup>93</sup>

Second, *Chevron* was inconsistent with the judiciary’s role and the separation of powers. Ambiguity is to be expected; “[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation,’ would be ‘more or less obscure and equivocal, until their meaning’ was settled ‘by a series of particular discussions and adjudications.’”<sup>94</sup> And it is courts, not agencies, that have “special competence in resolving statutory ambiguities.”<sup>95</sup> After all, “The Framers appreciated that the laws judges would necessarily apply in resolving . . . disputes would not always be clear.”<sup>96</sup> And in such cases, Chief Justice Marshall’s famous dictum applies: “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>97</sup>

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90. *Id.* at 2275 (Gorsuch, J., concurring).

91. *Id.* at 2265 (majority op.) (quoting 5 U.S.C. § 706).

92. *Id.* at 2273.

93. *Id.* at 2272.

94. *Id.* at 2257 (quoting THE FEDERALIST NO. 37, at 236 (James Madison) (J. Cooke ed. 1961)).

95. *Id.*

96. *Id.*

97. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Justice Thomas was particularly emphatic as regards this second point,<sup>98</sup> although it was shared by the full majority. But the APA statutory argument was sufficient to carry the day. After *Loper Bright*, the courts will apply their independent judgment, recognizing that “statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning.”<sup>99</sup> Administrative agencies retain technical expertise, and have the “power to persuade” while “lacking power to control.”<sup>100</sup>

*Chevron* itself was limited to situations where Congress gave an agency authority “to make rules carrying the force of law,” and it is these “fruits of notice-and-comment rulemaking or formal adjudication” that are most vulnerable.<sup>101</sup> But, in that sense, *Loper Bright* may take some time to take effect at the level of any particular regulation because, as a general matter, it can be difficult to challenge agency regulations. After all, once a regulation is promulgated it is generally open to judicial challenge for only a brief window, after which it may lie dormant unless used in an enforcement proceeding—an unchallengeable sword of Damocles dangling over the public.<sup>102</sup>

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98. *Id.* at 2274 (Thomas, J., concurring) (“*Chevron* compels judges to abdicate their Article III ‘judicial Power’ because ‘under *Chevron*, a judge must accept an agency’s interpretation of an ambiguous law, even if he thinks another is correct”).

99. *Id.* at 2266 (majority op.).

100. *Id.* at 2267 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

101. *Id.* at 2268 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)).

102. 28 U.S.C. § 2401(a) (“[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues”); compare 15 U.S.C. § 80b-13 (“Any person or party aggrieved by an order issued by the [Securities and Exchange] Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal office or place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part”); see *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1128 (D.C. Cir. 2015) (“We . . . hold that such challenges must be brought in this court within sixty days of promulgation of the rule, and there are no grounds for an exception in this case”).

Enter *Corner Post*.<sup>103</sup> In that case, an entity sued the Federal Reserve Board of Governors on the theory that the Board promulgated a regulation (“Regulation II”) which was inconsistent with a statutory cap on the rate of so-called interchange fees.<sup>104</sup> “*Corner Post*, of course, did not exist when the Board adopted Regulation II or even during the D.C. Circuit litigation,” and joined a subsequent lawsuit.<sup>105</sup> The Eighth Circuit, applying a majority rule, held that the action was time-barred because the Regulation was more than six years old.<sup>106</sup> In other words, *Corner Post* could perhaps bring an as-applied challenge to the rule’s application to it, which it had not—but it could not challenge the regulation itself.

*Corner Post* held that the APA’s statute of limitations for facial challenges to administrative rules runs from the date a party is injured, even if it is many years after the agency’s decision itself.<sup>107</sup> In other words, agencies cannot insulate their regulations by carefully selecting enforcement cases that will not place the underlying rule in jeopardy.

This holding is especially relevant to the FEC. Because most regulated entities—political committees, candidate committees, and the like—are created for specific elections, there is an ever-rotating cast of potential plaintiffs available to challenge any given FEC regulation. And after *Loper Bright*, those challenges will be reviewed by courts unable to defer to the Commission’s carefully crafted interpretations. Here, at least, the bipartisan nature of the Commission’s decision making will count for little.

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103. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440 (2024).

104. As the Court explained, “[w]hile convenient for customers, debit cards are costly for merchants: Every transaction requires them to pay an ‘interchange fee’ to the bank that issued the card.” *Id.* at 2448. A lower fee, then, would save merchants money—and a higher fee could eat away a profit margin. *Id.* (“Since it opened, *Corner Post* has paid hundreds of thousands of dollars in interchange fees—which has meant higher prices for its customers”).

105. *Id.*

106. *N.D. Retail Ass’n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634 (8th Cir. 2022).

107. *Id.* at 2460.

Of course, with the Commission's regulations ripe for challenge, their predictive force is somewhat diminished. But political actors may take some comfort in the Act's provision blessing good-faith reliance on those provisions so long as they remain in force. Yet regulations, like statutes, can also be ambiguous. And *Loper Bright* raises significant issues for the Commission's most powerful ability to fill those gaps: advisory opinions.

## V. FEC GUIDANCE UNDER THE NEW REGIME

*Loper Bright*, like most administrative law precedents, is geared toward the usual administrative agency: a regulatory body, often with independent enforcement authority,<sup>108</sup> responsible to leadership appointed by (if not solely accountable to) the President.<sup>109</sup> The FEC differs from that model in a number of important ways.

First, it is structurally *unaccountable* to the President. The evenly-divided nature of the body, with staggered terms and a rotating (and exceedingly weak) chair, makes it immune to the democratic

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108. Indeed, not only is the FEC precluded from issuing fines by itself, 52 U.S.C. § 30109, its investigatory authority is much more sharply limited than that of its sister administrative agencies. *FEC v. Machinists Non-Partisan Pol. League*, 655 F.2d 380, 387 (D.C. Cir. 1981) (noting “the obvious difference between the scope of investigatory authority vested in agencies such as the FTC, SEC, or the Administrator of the Department of Labor’s Wage and Hour Division on the one hand, and the FEC on the other”).

109. For example, the Federal Trade Commission and the Securities and Exchange Commission have an odd number of commissioners, which in practice gives the President the ability to tilt the partisan balance of the agency through his appointment of a chairman. *See also* *CFPB v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 144 S. Ct. 1474, 1479 (2024) (“Congress shielded the Bureau from the influence of the political branches. To insulate the Bureau from the President’s control, Congress put a single Director with a 5-year term at the Bureau’s helm and made the Director removable only for inefficiency, neglect, or malfeasance. This Court held in *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), that this combination of single-Director leadership and for-cause removal unconstitutionally circumscribed the President’s ability to oversee the Executive Branch”) (internal citations omitted).

responsiveness arguments sometimes advanced for other agencies.<sup>110</sup> The Act also requires that commissioner “be chosen on the basis of their experience, integrity, impartiality, and good judgment.”<sup>111</sup> And because four affirmative votes are required for nearly every important decision, a president may be able to deprive the Commission of a quorum or otherwise hobble its enforcement priorities, but the Commission itself cannot be captured by any given party.

The Commission, in other words, is intended to “fail safe” regardless of the White House’s occupant.<sup>112</sup> This has sometimes rankled those with strong views of the Commission’s course. In past years, some have suggested that Democratic presidents “pack” the FEC “with liberal commissioners” who, while nominally independent, could be expected to vote with Democratic commissioners.<sup>113</sup> More recently, in early 2025 President Trump removed Ellen L. Weintraub, a Democratic commissioner whose six-year term had morphed into a 23-year tenure.<sup>114</sup> But the point remains: the Commission is designed to be structurally resistant to partisan capture. As a result, the FEC’s decision-making, like that of the judiciary, is insulated to an unusual degree.

Second, Congress created a mechanism whereby private parties may obtain judicial review of Commission decisions, at least in the enforcement context. Under FECA, “[a]ny party aggrieved by an

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110. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2299 (Kagan, J., dissenting) (“Agencies are ‘subject to the supervision of the President, who in turn answers to the public’”) (quoting *Kisor v. Wilkie*, 588 U.S. 558, 571–72 (2019)).

111. 52 U.S.C. § 30106(a)(3).

112. Statement of Comm’r Allen J. Dickerson upon the Conclusion of his Term, Apr. 30, 2025, at 2, <https://www.fec.gov/resources/cms-content/documents/Statement-Commissioner-Allen-J-Dickerson-Upon-Conclusion-of-Term.pdf>.

113. Dave Levinthal, *Joe Biden could “pack” the Federal Election Commission with liberals and transform the agency. But he’s resisting.*, BUSINESS INSIDER, Sept. 15, 2021, <https://www.businessinsider.com/federal-election-commission-fec-joe-biden-white-house-2021-9> [<https://perma.cc/TK6Y-RC43>].

114. Ashleigh Fields, *Trump removes Democratic FEC commissioner “effective immediately,”* THE HILL, Feb. 6, 2025, <https://thehill.com/homenews/administration/5132004-trump-removes-democratic-fec-commissioner-effective-immediately>.

order of the Commission dismissing a complaint filed by such party...or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed" is permitted to file in the U.S. District Court for the District of Columbia to seek a declaratory judgment "that the dismissal of the complaint or the failure to act is contrary to law."<sup>115</sup> Such a judgment "may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring" in its own name "a civil action" *against the respondent* "to remedy the violation involved in the original complaint."<sup>116</sup> So while four Commissioners must vote to move forward with enforcement, there is a mechanism for reviewing the Commission's decision making.<sup>117</sup>

Third, recall that FEC advisory opinion are unusual in that they bind all parties—including the courts. By immunizing requesters, and those like them, from any enforcement under the Act, the Commission can provide functionally decisive interpretations of the Act.

For these reasons, the FEC may well prove a testbed for *Loper Bright*. Because Congress has provided an extraordinarily clear grant of interpretive authority in the form of its advisory opinion power, the scope of the Court's rule is necessarily presented. If *Loper Bright* merely interprets the APA to require clear delegation from Congress, the FEC appears to pass the test. But if the case instead relies upon separation of powers concerns, as the majority hints and two Justices state, can the Commission's interpretive role remain intact?

The answer is uncertain. But there is reason to think that it might.

First, it is not clear that advisory opinions are truly interpretive—they do not "have the force of law" in *Loper Bright's* formulation. Because they are limited to specific courses of conduct, and because

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115. 52 U.S.C. § 30109(a)(8).

116. *Id.*

117. As is sometimes overlooked, this procedure has nothing to do with whether the Commission has deadlocked or the partisan breakdown of a deadlocked vote. Section 30109(a)(8) applies with precisely the same force to a *unanimous* Commission dismissal.

an advisory opinion merely stands in the way of any “sanction” for “good faith” reliance, an AO may be better thought of as a non-prosecution agreement or similar, forward-looking enforcement decision. In this way, the continued viability of AOs tracks the recent—and strongly-fought—dispute over the Commission’s ability to invoke prosecutorial discretion in enforcement cases.<sup>118</sup>

Second, as discussed, an AO must be based upon the Act or a Commission regulation. Of course, those regulations have faced regular challenge, both for being too strict<sup>119</sup> and too lenient,<sup>120</sup> a trend that is likely to accelerate thanks to *Corner Post*. AOs will need to operate against the background principles established by the resulting caselaw. But the opinions themselves are rooted in the statute, and the Commission remains entitled by law to directly interpret the Act through the advisory opinion process.

In the end, the scope of the FEC’s regulatory and advisory opinion authority will need to be determined in the courts. Whether through direct challenges under *Corner Post* or collateral attacks on the defensive nature of advisory opinions,<sup>121</sup> parties driven by partisan preferences and ideological commitments will use *Loper Bright* in an attempt to bypass the Commission’s bipartisan decision-making structure.

Courts should pause before taking the invitation. The special First Amendment equities surrounding the Commission’s work deserve careful consideration. What at first glance appears to be a blow for liberty may instead auger greater confusion and opportunities for

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118. See, e.g., *Citizens for Responsibility & Ethics in Wash. v. FEC*, 993 F.3d 880 (D.C. Cir. 2021), *en banc reh’g denied*, 55 F.4th 918 (D.C. Cir. 2022). The en banc D.C. Circuit is currently considering whether and how the FEC may rely upon principles of prosecutorial discretion in declining to move forward in enforcement cases.

119. E.g., *FEC v. Swallow*, 304 F. Supp. 3d 1113, 1119 (D. Utah 2018) (applying *Chevron*’s first step in enforcement action and invalidating FEC regulation barring any person from helping or assisting another to make a contribution in the name of another individual).

120. E.g., *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005).

121. See Statement Regarding Advisory Opinion 2025-06, *supra* note 15; Complaint, *Dem. Cong. Campaign Comm. v. FEC*, No. 24-2935, 2024 WL 4650907 (D.D.C. Oct. 17, 2024).

gamesmanship. Congress wisely acknowledged the Commission's unique role, both in its bipartisan structure and in giving it special interpretive authority. Operating at the heart of the public's faith in our democratic institutions, in the midst of the rough and tumble of real-time electoral politics, the FEC's ability to provide clarity and predictability has particular value.