IN THE
UNIVERSITY ELECTIONS COMMISSION

No. UEC-2016-W-002

AN OPINION CONCERNING SECTION D(2) OF THE ELECTION CODE

[Cite as: Third Party Spending Opinion]

Advisory Opinion

[March 7, 2016]

Heard Before: REESE, Election Director, PODRYGULA, Backup Election Director, ANDREWS, BENNETT, BROWN, CELENTINO, COLELLA, REAVES, and ROSENTHAL, Commissioners

Opinion of the Commission

COMMISSIONERS ANDREWS and BROWN deliver the opinion of the Commission with respect to the meaning of the Election Code, which ELECTION DIRECTOR REESE and COMMISSIONER BENNETT join in full, BACKUP ELECTION DIRECTOR PODRYGULA joins except as to part III, and COMMISSIONERS CELENTINO, COLELLA, REAVES, and ROSENTHAL join except as to part IV.¹

¹ Election Director REESE sits ex officio in this matter except as to part IV of the majority opinion where he sits as a voting member, because the Commission would otherwise be tied as to the disposition
In November of last year, John Lin—a student at the University of Michigan Law School—filed a petition for an advisory opinion on behalf of himself and his organization (LINPAC) with this Commission pursuant to Rule 6.03 of the UEC Rules of Practice and Procedure. The petition asked the Commission to clarify the extent to which the Election Code governed the spending or contributions of students and organizations that are not affiliated with any campaign during an election cycle. We declined to answer this petition for prudential reasons. In Re Petition of John Lin, UEC-2015-F-002 (November 5, 2015). We now exercise our authority under Rule 6.02(a)(2) and issue an advisory opinion sua sponte to respond to the issues raised by Mr. Lin’s petition.

I.

As a preliminary matter, this Commission lacks jurisdiction over “any actors other than parties or candidates.” Make Michigan v. The Team et al. III, UEC-2015-W-006; CSG Comp. Code Art. VI § D(8)(a). The Commission does have the power to assess demerits against candidates and parties in violation of the Election Code. But this power simply does not extend to third parties, who are not bound by the Commission’s judgments. Id.

of this case. CSG Comp. Code Art. VI § (F)(1)(D)(xi). That section of the opinion thus should be considered to have the support of a majority of the Commission. For clarity then, the voting members of the Commission are unanimous as to parts I and II, part III is supported by seven of eight voting members, and part IV is supported by five of nine voting members.
But while the Commission cannot penalize independent actors such as LINPAC directly, a party or candidate may sometimes still be liable for that actor’s conduct on behalf of the campaign. This Advisory Opinion addresses whether a party or candidate may be penalized for non-candidate’s conduct in three separate scenarios: first, when a prohibited non-candidate makes direct donations to a campaign; second, when a non-candidate coordinates prohibited expenditures with a campaign; and finally, when a non-candidate’s expenditures are wholly independent from any candidate or party.

II.

The Election Code sets clear, specific limits on campaign donations. CSG Comp. Code Art. VI § D. Campaign finance violations are a major infraction and are defined as a failure “to adhere to the Campaign Finance Regulations set forth in Article VI § D.” CSG Comp. Code Art. VI § B(7)(f)(ii). The Code provides that parties, candidates, and individual students are eligible to donate to election campaigns, but “[a]ll individuals and organizations not covered by [this] section are forbidden from donating to campaigns.” CSG Comp. Code Art. VI § D. Therefore, an independent organization such as LINPAC—which is not a party, candidate, or individual student—is a “prohibited donor” under this section.

Parties or candidates who accept direct donations in violation of the Election Code—either because they exceed the imposed limits or because they are made by a
prohibited donor—are liable for the violation. This can be likened to an “aiding and abetting” or “fault” theory of liability. See Black’s Law Dictionary (“[L]iability imposed on one who assists in or facilitates the commission of an act that results in harm or loss, or who otherwise promotes the act’s accomplishment.”). A party or candidate who accepts donations from a prohibited donor has participated in and facilitated a violation of the campaign finance regulations outlined in § D.

The Commission will thus assess demerits against a party or candidate who accepts direct donations that are prohibited by the Election Code, including donations from prohibited donors like LINPAC.

III.

The Commission also considers whether candidates and parties are liable for the “coordinated expenditures” of a non-candidate. Coordinated expenditures are not donated directly to a campaign, but are made on behalf of the campaign. Such expenditures could include, for instance, when a non-candidate purchases flyers for use by a particular party or candidate. The Election Code regulates the activities of non-candidates that are coordinated with a particular campaign. A candidate or party is liable for the actions of a non-candidate when three elements are met. CSG Comp. Code Art. VI § B(8)(e).

First, the non-candidate must violate the Election Code. Expenditures that exceed the campaign finance
limits as well as expenditures made by prohibited donors violate the campaign finance regulations outlined in § D.

Second, the non-candidate must work with or at the request of a candidate or party. Whether a non-candidate worked with a party or candidate is a fact-specific inquiry to be determined under the totality of circumstances. *Make Michigan v. The Team et al. III.* It does not require a specific request by the party or candidate, but simply “implies some degree of coordination or mutual understanding between actors or at least the knowing acquiescence of one actor in the actions of another.” *Id.* Where a non-candidate coordinates with a campaign and makes expenditures on behalf of that campaign, this element will have been met.

Finally, the violation must occur within the scope of the coordination. The Election Code defines “scope of coordination” as “what the candidate or party requested the non-candidate to contribute to the campaign.” CSG Comp. Code Art. VI § B(8)(e)(iii). Candidates and parties are thus not liable for wholly independent expenditures that fall outside the scope of any coordination. *See Part IV, infra.*

When these three elements are met, the Commission “must assess demerits against the candidate or party that coordinated with the non-candidate.” *Id.* Thus, under the theory of *respondeat superior* established by § (B)(8)(e), candidates are responsible for coordinated expenditures that violate the rules. In appropriate circumstances, the
Commission will assess demerits against a party or candidate who coordinates with donors acting in violation of the Election Code.

IV.

The Election Code speaks in terms of “donations” to and “spending” by candidates and parties. CSG Comp. Code Art. VI §§ (D)(1) and (2). But the text of the Code does not make clear precisely where “independent expenditures” fall within the scheme it creates.

Before deciding whether or where such spending falls within the Code’s campaign finance scheme, we must define the term “independent expenditures.” This Commission has often looked to state and federal law in interpreting the Compiled Code; after all, those legal systems undoubtedly influenced the Assembly’s efforts to draft its own legislation. See, e.g., Make Michigan v. The Team II, UEC-2015-W-005, *3 (March 29, 2015) (incorporating the common law “rule of lenity” as a rule of construction applicable to interpreting the Election Code); Keeney v. Garthus, UEC-2014-W-009, *1–2 (March 13, 2014) (looking to federal law to interpret the Code’s “beyond a reasonable doubt” burden of proof). We do so again today.

For federal purposes, an independent expenditure is:

An expenditure by a person expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or
cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

52 U.S.C.A. § 30101 (West). Under Michigan law, an “independent expenditure” is “an expenditure by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee.” MCL Ann. § 169.209. We therefore adopt this common meaning and, for the purposes of the Code as it is currently written, define “independent expenditure” to mean an expenditure by a person or student organization that is made independent of coordination with, control by, or direction by a candidate or party.

The central question of LINPAC’s request for an advisory opinion could not be clearer: can a student organization or student unconnected to any political party or candidate “advocate for issues and candidates in Central Student Government elections” through independent expenditures? Advisory Opinion Request ¶ 1. Indeed, in the wake of Citizens United v. FEC this is the question to which LINPAC seeks an answer. While some members of this Commission would prefer to leave this question unanswered, to issue an advisory opinion that fails to address this matter misses the point entirely. The purpose of the Commission’s advisory opinion power is clear: “These Rules are intended to promote the fair, orderly, and efficient resolution of claims before the
Commission.” Rule 1.02, University Elections Commission Rules of Practice & Procedures, Winter 2016. If this Commission does not address the issue at hand, we fail to promote any resolution of claims before us.

With regard to independent expenditures on issues and on candidate campaigns, this Commission repeats its conclusion that it has no jurisdiction and thus cannot condone or punish students or organizations engaging in such activities. It is the opinion of this Commission that the democratically elected Central Student Government must address this issue as this body cannot.

We also conclude that we cannot hold candidates or parties responsible for the independent expenditures of third parties. We agree with LINPAC that spending limits apply to individual candidates, presidential tickets, and parties, CSG Comp. Code Art. VI § D(1), and donation limits apply to donations made to legislative campaigns, presidential tickets, and parties, CSG Comp. Code Art. VI § D(2). Even the respondeat superior provisions of the Code—which allow candidates to be held responsible for “violations by a non-candidate”—do not reach independent student activities: the text indicates that parties and candidates must have some sort of direct control over or coordinate in some way with “volunteers” or other non-candidates that violate the Code. CSG Comp. Code Art. VI § B(8)(e). Furthermore, neither the Fault/Aiding and Abetting theory under CSG Comp. Code Art. VI § D(2) nor the case-by-case approach under CSG Comp. Code Art. VI § B(8)(e)(i)-(iii) (see supra). Section
D(2) simply does not speak to independent expenditures and the *respondeat superior* provisions of the Code require some sort of relationship between Code offenders and parties, tickets, or candidates.

*Citizens United* paved the way for a bevvy of necessary and complicated rules at the state and federal level to ensure that elections continue to be conducted as fairly and transparently as possible while simultaneously maintaining deferential respect for freedom of speech. But this Commission can only determine what the Code, as it is currently written, has to say on the matter. It cannot insert new provisions into the Code to govern independent expenditures—only the Assembly can do that.
Concurring Opinion

ELECTION DIRECTOR REESE (ex officio), delivers the opinion of the Commission with respect to part I.A and a concurring opinion with respect to parts I.B and II, which COMMISSIONERS ANDREWS and BROWN join in full, and COMMISSIONERS CELENTINO, COLELLA, REAVES, and ROSENTHAL join as to part I.A.

I join the majority opinion in full. I write separately only to articulate a further reason why the majority’s reading of the Election Code with regard to independent expenditures is correct and to respond to the objections raised by the dissenting opinions in this case.

I.

The majority’s textual analysis of the campaign finance provisions is unimpeachable: the Code clearly does not speak to independent expenditures, and candidates and parties cannot be punished for them. But I would include an additional reason why this conclusion is correct: the canon of constitutional avoidance.

A.

Among the federal courts, it is a common rule of construction that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court’s] duty is to adopt the latter.” United States ex rel Attorney Gen. v. Del. &
Hudson Co., 213 U.S. 366, 407–08 (1909). This rule of “constitutional avoidance” represents “[a] judgment [by the courts] that statutes ought not to tread on questionable constitutional grounds unless they do so clearly, or perhaps a judgment that courts should minimize the occasions on which they confront and perhaps contradict the legislative branch.” Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 249 (2012).

As the majority correctly points out, “[t]his Commission has often looked to state and federal law in interpreting the Compiled Code; after all, those legal systems undoubtedly influenced the Assembly’s efforts to draft its own legislation.” Ante at 6. The canon of constitutional avoidance is well suited to incorporation into the Commission’s interpretative repertoire. The Commission, like the federal courts, is not a democratic body. And, like the federal courts, it is charged with interpreting statutes passed by a body that is democratically elected: the CSG Assembly. We should not lightly conclude that the acts of the Assembly are unconstitutional, and we should not willingly force constitutional questions—and the attendant risk of conflict with the Assembly—where a reasonable construction of a statute allows us to avoid them.

I would hold that the canon of constitutional avoidance is applicable when the Commission interprets the Election Code.
B.

The canon would undoubtedly apply here. The campaign finance provisions of the Election Code raise major constitutional concerns. In particular, the First Amendment of the United States Constitution and Article VIII, Section 1 of the All Campus Constitution might render certain provisions in § D of the Election Code void.

The Supreme Court of the United States has long held that caps on independent expenditures made without coordinating with candidates or parties—and indeed even caps on expenditures made by candidates and political parties themselves—violate the First Amendment. *Buckley v. Valeo*, 424 U.S. 1 (1976). In recent years, it has carried this principle further by, for instance, striking down a law banning corporations from using general treasury funds for independent expenditures. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

A broad reading of § D of the Election Code to include independent expenditures—such as one that considered independent expenditures to be “in kind” contributions to campaigns—would transform it into just such a limit. It would limit the amount independent groups could spend, by punishing their chosen candidate if they spent above the specified donation limits. Indeed, in the case of organizations (even student organizations) or non-students, it would punish their chosen candidate if they
spent anything at all. **CSG Compiled Code, Art. VI, § D(2)(b).**

This raises a host of Constitutional questions:

- Is the CSG Assembly or the Commission a state actor, such that the Federal Constitution binds us? It is at least arguable that they are not. *See, e.g.*, *Husain v. Springer*, 494 F.3d 108, 133–34 (2d Cir. 2007) (concluding that the plaintiffs had not demonstrated that members of the College of Staten Island’s student senate were state actors).

- If so, do the principles applied in *Buckley* and *Citizens United* apply in the student government context? After all, the First Amendment applies differently to educational environments, at least at the elementary and secondary levels. *See, e.g.*, *Tinker v. Des Moines Independent Sch. Dist.*, 393 U.S. 503 (1969). And not even the federal courts can agree whether *Tinker*’s curtailment of student speech rights is applicable to the university context. *Compare McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 242–47 (3d Cir. 2010) (concluding that “the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities”) *with Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (applying the *Tinker* framework to the university setting without alteration).
- Even if the First Amendment applies with full force to the university setting, is there a compelling interest in that context that would justify restrictions that would not be permissible in elections to local, state or federal government? After all, there are interests that are unique to the university environment. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (recognizing that an interest in diversity can justify affirmative action in the university context).

- Does the fact that the university election setting is arguably a “limited public forum” rather than a “traditional public forum,” see *Christian Legal Society v. Hastings College of the Law*, 561 U.S. 661 (2010), alter this analysis?

- Is Article VIII, Section 1 of the All Campus Constitution coextensive with the U.S. Constitution’s First Amendment, such that none of the preceding questions matter? And, if it means something different, does it at least incorporate the teachings of *Buckley* and *Citizens United*?

I do not pretend to have answers to any of these questions, nor is anything in this opinion meant to suggest what my answer to them might be if I were forced to choose sides today. But the point is that—by adopting a narrow interpretation of the Election Code on this matter—all of these deeply controversial and complex
questions are avoided.¹ We should not venture into these waters unless the Assembly forces us there. Thankfully, as far as the issues raised in this Advisory Opinion are concerned, the Assembly has not done so here.

II.

I also write separately to respond directly to today’s dissents.

A.

Characterizing the Code’s failure to speak to independent expenditures as a “loophole,” Commissioner REAVES worries that the majority “has effectively pointed a flashing, neon arrow at this Commission’s inability to punish candidates or parties responsible for the independent expenditures of third parties.” Post, at 29. Commissioner COLELLA voices similar concerns in his own dissent. Post, at 40–43. In other words, the dissenting members of the Commission fear that today’s opinion will

¹ The issues considered by the Commission in Parts I, II, and III do not implicate this canon, because Part I deals purely with statutory jurisdiction, and Parts II and III deal with direct contribution limits and the equivalent of direct contribution limits (coordinated expenditures), which have been upheld against First Amendment challenges. See, e.g., Buckley, 424 U.S. 1 (1976) (upholding direct contribution limits); Federal Election Commission v. Beaumont, 539 U.S. 146 (2003) (upholding extension federal ban on direct contributions by unions or corporations to nonprofit advocacy organizations); Federal Election Commission v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001) (upholding limits on coordinated expenditures by political parties on behalf of candidates).
lead to a sudden influx of independent expenditures into CSG Elections.

Even assuming that to be empirically true, it is a strange thing to be worried about. After all, the dissent is essentially concerned that the majority opinion will encourage more legal behavior. This is akin to worrying that setting the speed limit on a highway to 70 miles per hour will encourage people to drive 70 miles per hour. It is true, but irrelevant. I can think of no other context where we worry about the law making it too clear what is prohibited and what isn’t. Indeed, we are usually concerned about the fact that vague laws discourage legal behavior. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). And this is especially true in the context of the First Amendment, where the chilling of legal speech—and especially political speech—is of grave concern. See e.g. Citizens United, 558 U.S. at 324 (“Prolix laws chill speech for the same reason that vague laws chills speech: People ‘of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.’ ” (quoting Connally, 269 U.S. at 391)); Cf. Reno v. American Civil Liberties Union, 521 U.S. 844, 871–72 (1997) (“The vagueness of [content-based] regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.”).

B.

Indeed, what motivates at least some of the dissenters’ objection today is not so much the consequences of today’s
decision regarding independent expenditures—which, by the way, it admits to be correctly decided—but rather the means by which it came before the Commission. Commissioner CELENTINO explicitly argues that the Commission should limit its activities to resolving actual cases and controversies. *Post*, at 31–39. And Commissioner REAVES devotes fully half the paragraphs in his dissent to emphasizing that the original petition that was the impetus for this opinion was submitted by a now-graduated student and that many students on campus will not be interested in this question. Reading between the lines, Commissioner REAVES, it appears, would also like to limit the Commission’s activities (so far as it is possible) to actual cases and controversies. This view is mistaken.

This Commission is not a court. Though it has the power to adjudicate disputes between candidates, parties, and other individuals or organization with standing, the Commission is a component of the executive branch. And it is this fact that makes Commissioner CELENTINO’s reference to the refusal of federal courts to issue advisory opinions, *post*, at 32–33, so misplaced. That doctrine is rooted in the separation of powers. It is intended to keep the judiciary independent from the other branches, and particularly the executive. But the Commission is part of the executive. Its independence comes not from being a distinct branch of government, but from a non-partisan means of appointment and removal.
C.

This Commission’s primary charge is to administer and enforce the Election Code. The Commission is impartial in the sense that it is designed to be free from political control and not to advocate for any particular candidate or party, but it is not impartial in terms of purpose. Its overriding purpose is to promote free, orderly, and fair elections and ensure that the Code is properly interpreted and implemented. Indeed, past Election Directors have frequently mediated disputes to prevent them from resulting in litigation, and the Election Director does not have a vote precisely so that he can give some guidance to candidates about what they may and may not do under the Code.

The Commission’s Advisory-Opinion power was conveyed to further this goal. Over the past few years, CSG election results have been held up by litigation between parties and candidates. In at least one presidential election, the result of the democratic process was overturned by this Commission when it disqualified and Presidential and Vice Presidential ticket. Even though the Commission’s decision in that case was correct, it shook the confidence of the electorate. The contentious litigation that has developed in subsequent elections has had a similar effect.

The Advisory Opinion power was meant as a corrective for this. It allows candidates and parties to determine whether the actions they plan to take are permissible
before they take those actions. It also allows the Commission to clarify vague portions of the Code so as to prevent confusion about what is or is not permitted. Both of these uses forestall litigation later in the election cycle, and thus prevent voters from coming to the conclusion—rightly or wrongly—that their vote only matters if a majority of this Commission agrees with them.

Both Commissioner C E L E N T I N O and Commissioner R E A V E S worry that this encourages litigants to invent fanciful scenarios and bring pointless cases before the Commission. In light of the fact that we have previously compared at least two complaints filed with this commission to “the charge of the light brigade,” Email Harvesting Opinion, UEC-2015-W-007 & 009, *4 (April 1, 2015), I fail to see how a “cases and controversies” requirement would remedy the matter. At least where an Advisory Opinion is requested, we do not risk unseating a democratically elected member of the Assembly or the executive branch.

Moreover, the Commission’s power to issue an Advisory Opinion is discretionary, and we have denied petitions for prudential reasons before—indeed, we did so in this very case. In Re Petition of John Lin, UEC-2015-F-002 (November 7, 2015). If Commissioners C E L E N T I N O and R E A V E S thought that addressing the role of PACs in CSG elections was fanciful, they could have advocated doing so again. But once we have agreed that we should answer a question, I fail to see why failing to answer the whole question is principled judicial restraint. If the
Commission is going to set out to clarify the Code’s application to something, one would at least think basic considerations of fair play and due process would require that we provide readers with more than half an answer.²

D.

Moreover, the dissenters’ perspective on this front is out of step even with the way the Central Student Judiciary—which is a court—has interpreted its own powers. CSJ has determined that it need not await a case or controversy and may issue Advisory Opinions in response to petitions. *In Re Petition of Alterman*, F-13-001 (October 7, 2013). While it is arguably true that CSJ has since expressed a preference for resolving cases and controversies rather than issuing advisory opinions, see, e.g., *In Re Petition of Reese*, W-16-001 (February 29, 2016), I emphasize again that this Commission is not a court. As an administrative agency, its powers are broader than CSJ’s, even if its jurisdiction is narrower. It

² Commissioner CELENTINO’s attempts to distinguish the issues presented in Parts I, II, and III of the majority opinion from the independent expenditures issue are unconvincing. The answer to the independent expenditures question is also a “common sense application[] of the text of the Election Code.” Post, at 39. And while it may be true that every reader of the Code would not wonder about independent expenditures, surely most would after reading Part III of the majority which deals with coordinated expenditures. Isn’t the natural question after reading that section, “what about uncoordinated (independent) expenditures?” Commissioner CELENTINO has no issue with that section of the opinion.
should be willing to use its Advisory-Opinion power more broadly to meet its responsibilities under the Code.

E.

But the biggest problem with the dissenters’ view of the Advisory-Opinion power is that it reads a restriction into the Code that is simply not there. Indeed, it reads a restriction into the Code that contradicts what is there. The Commission is expressly empowered to “hear and decide upon all election complaints.” *CSG Compiled Code*, Art. VI, § F(2)(e)(ii). But it is also empowered to “assist the Election Director in fulfilling her obligations and executing the election,” *id.* § (F)(2)(e)(i), and—most importantly—to “issue advisory opinions to pertaining (clarifying) to election or campaigning activities and rules,” *id.* §(F)(2)(e)(iii). Clearly, then, the Advisor-Opinion power is meant to extend to more than simply cases and controversies—since the power to decide cases and controversies is expressly granted to the Commission by a different clause. Generally, “[b]ecause legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant.” Scalia & Garner, *supra*, at 176 (citing *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); and *Burdon Cent. Sugar Ref. Co. v. Payne*, 167 U.S. 127, 142 (1897)). Commissioner CELENTINO provides no justification for his attempt to read the Advisory-Opinion power out of the text.
The Advisory-Opinion power is most analogous to the rulemaking powers of administrative agencies in the state and federal government. What differentiates it from the power to decide election complaints (or “cases and controversies” to use Commissioner CELENTINO’s preferred phrase) is that it is meant to be used prospectively to head off potential problems before they become actual problems. Of course, this means the Commission will have to consider hypothetical scenarios that may never come to pass. Indeed, the point of the power is to prevent them from coming to pass. But that is the nature of policymaking. And the Assembly clearly intended the Commission to be a policymaker in this way.

3 Commissioner CELENTINO claims that this analogy is lacking, because the “expertise” rationale that so often justifies delegation to administrative agencies does not justify delegation here. Post, at 33. There are two responses to that assertion. First, it is based on a false assumption. Commissioner CELENTINO assumes that expertise requires past experience on the Commission, when in reality all of the present Commissioners were selected for their expertise. Fully six members of the Commission were selected because they are law students and because they have substantial writing experience. The three undergraduate members were selected because they have substantial experience in student government. Surely when the EPA was founded there was no argument to be made that the delegation was improper merely because the scientists that were hired hadn’t worked for the EPA before. They were experts because they had experience in relevant fields. The same is true here.

Second, even if Commissioner CELENTINO was correct, it makes little difference. That the Assembly’s delegation may have been unwise does not empower this Commission to ignore its directives. Since the dissenters make no argument that the Advisory-Opinion power is unconstitutional, their preference for a different Code than we currently have is irrelevant.
There is no other reason to place it in the executive branch. There is also no other reason for the Code to expressly leave certain policy choices to the Commission’s discretion, including the Advisory-Opinion power itself and the decision to grant a warning rather than demerits. *CSG Compiled Code, Art. VI, §§ (F)(2)(e)(iii), B(8)(c)(iii).*

If they had wanted the Commission to function solely as a court, they would have made it a court. They didn’t.

The dissenters’ views on this question are of a piece with the majority decision in *In Re Petition of Joseph Ambrose*, UEC-2016-W-001 (February 11, 2016). That opinion, too, read restrictions on the Commission’s discretion into the Code based on some Commissioners’

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4 Commissioner CELENTINO takes issue with these examples. He argues that courts have long exercised discretion as to the penalty assessed against violators of the law. *Post*, at 37–38. Fair enough, but the Commission isn’t a court and delegation of sentencing discretion to independent agencies is of a much more recent vintage. Thus, the delegation cannot be dismissed quite so easily as something entirely ordinary.

Commissioner CELENTINO also contends that I err in using the Advisory-Opinion power itself as evidence of the Assembly’s desire to grant broad policymaking authority to the Commission. Indeed, he accuses me of “begging the question,” stressing that: “The advisory opinion power is not a long-enshrined duty of this Commission and so should not inform our understanding of what role CSG views the Commission to have; it was added to the CSG Compiled Code only this year.” *Post*, at 38. One wonders why this matters. If the Assembly decided “this year” to confer broad policymaking authority on the Commission, it shouldn’t matter whether it had historically done so. This Assembly, no less than the very first Assembly, has the power to delegate authority to an administrative agency. The validity of that delegation in no way turns on when they chose to do so.
view of what the proper role of the Commission should be: namely, that it should be less an agency and more a court. I maintain, as I did in that case, that this is profoundly misguided. Whether or not we agree with the Assembly’s choice to construct the Commission as an agency and confer on it broad rulemaking discretion or not, we are not empowered to undo that choice by artificially narrowing the Code’s provisions. And while *stare decisis* may compel me to accept the decision of the majority in *Ambrose*, I would not extend the philosophy motivating that decision further. I applaud the majority’s refusal to do so here.
Concurring Opinion

BACKUP ELECTION DIRECTOR PODRYGULA, with whom COMMISSIONER BENNETT joins, concurring.

I write separately to briefly suggest a more expansive conception of liability for when candidates and parties coordinate expenditures with a prohibited donor. The majority is certainly correct in stating that Article VI § B(8)(e) permits this body to assess demerits against a candidate or party that coordinates with a prohibited donor (i.e., the penalty is levied as a result of the prohibited donor’s malfeasance). See Majority Opinion Part III, ante, at 4–6. However, federal election law suggests that an electioneering communication funded by an individual acting in concert with a candidate or party is a contribution to and expenditure by said candidate or party. 52 U.S.C.A. § 30116(a)(7)(C) (West). That is, the candidate or party may be directly liable when a benevolent prohibited donor, in coordination with the candidate or party, purchases flyers for use by said candidate or party because that candidate or party is commanding ill-gotten funds. This theory imposes a blanket ban on such coordinated expenditures, which may provide greater certainty to candidates and parties and

1 While federal statute further defines an electioneering communication as a “broadcast, cable, or satellite communication,” 52 U.S.C.A. § 30104 (West), I see no reason to limit the concept in the more limited arena of university elections, which, to my knowledge, solely involve the production of hand-bills and posters (and, perhaps, Facebook posts, YouTube videos, and other forms of contemporary communication).
facilitate quicker disposition of allegations of campaign finance violations. I would apply this theory of liability—in addition to the theory of liability suggested by the majority—to Section (D) of the Election Code.
Dissenting Opinion

COMMISSIONER REAVES, with whom COMMISSIONERS CELENTINO and ROSENTHAL join, dissenting in part.

I join parts I, II, and III of the majority opinion in full. I write separately with the hope that I do not bring further attention to an issue about which I fear this Commission has already said too much. See Part IV, ante, at 6–9. The majority is perhaps correct in its analysis and conclusion on the issue of independent expenditures. But to answer such a question in the absence of an actual case or controversy—and call such attention to an issue without the slightest trepidation or forethought of what may come of it—is, I fear, a grave misstep.

I.

The majority is correct that “[t]he central question of LINPAC’s request for an advisory opinion could not be clearer.” Ante, at 7. But the majority should have taken heed of what it noted at the outset of its advisory opinion: this clearly framed question was presented by a University of Michigan Law School student—a third year law student at that (now graduated). See ante, at 2. To assume that others, even a minority of others, share the same depth of understanding of campaign election law is simply injudicious.

Even more, to quote common coaches’ speak, “There is no ‘I’ in team.” Here, there is an “I”—and as far as this Commission knows, only an “I”—in LINPAC. See
Advisory Opinion Request ¶¶ 1–3. Based on the Advisory Opinion request, LINPAC is made up of only one person, John Lin, a recent graduate of the University of Michigan Law School. See Advisory Opinion Request ¶ 2.

Therefore, while it is admirable that the Commission has used its advisory opinion power *sua sponte*, it is important to realize that it did so to address a question presented by a one-man political action committee founded by a now graduated law student. The concurrence takes this revelation to mean that this dissent’s position is that “many students on campus will not be interested in this question.” *Concurring Opinion B.R., ante*, at 17. However, nothing could be further from the truth. Indeed, the importance of this question cannot be understated. But to posit that the even a minority of students (at least before this Commission’s decision today), had even the slightest clue that such a loophole existed is exceedingly fanciful.

II.

Further, the concurrence states that it “can think of no other context where we worry about the law making it too clear what is prohibited and what isn’t.” *Concurring Opinion of B.R., ante*, at 16. While quite nice in theory, this statement (and Election Director REESE’s hypothetical 70 miles per hour speed limit in his concurrence) goes to the heart of this dissent’s concern in this case. *Concurring Opinion of B.R., ante*, at 16. Today’s majority is not just “raising the speed limit.” It is instead
supplying the “vehicle,” before unbeknownst to many, through which students can blaze past the Election Code while flipping it the proverbial “bird.”

As Commissioner CELENTINO aptly pointed out, this law school graduate “no doubt finds this Commission’s six-opinion split and the 43 pages of ink we have spilled to be quite amusing.” Celentino Dissent, post, at 35. Essentially, we have been called upon to decide the issue of political action committees (PAC) in CSG elections even though John Lin had no any intention of actually creating an active PAC. This Commission should not decide questions of such great importance based on the thought exercise of a now-graduated law student. It should wait for an actual case or controversy to arise.

III.

The majority is correct that the advisory opinion power of this Commission is to “promote the fair, orderly, and efficient resolution of claims before the Commission.” Ante, at 6–9; Rule 1.02, University Elections Commission Rules of Practice & Procedures, Winter 2016. Yet what the majority has done today will likely produce the opposite result, as it has effectively pointed a flashing, neon arrow at this Commission’s inability to punish candidates or parties responsible for the independent expenditures of third parties.
IV.

Today, this Commission has given parties the roadmap to sidestepping the Election Code. While this loophole existed before the majority’s advisory opinion, it has now been highlighted for all to see.

I respectfully dissent.
Dissenting Opinion

COMMISSIONER CELENTINO, with whom COMMISSIONER REAVES joins, dissenting in part.

I join parts I, II, and III of the majority opinion in full. But while I was among the Commissioners who originally recommended that the Assembly grant this Commission the power to issue advisory opinions, I have now come to believe that this power was ill-conceived and should be used sparingly or eliminated entirely. I therefore dissent from the majority’s decision to use its advisory opinion power to address independent expenditures, contained in Part IV of its opinion.

I.

The Election Code provides that the University Elections Commission “may issue advisory opinions pertaining (clarifying) to election or campaigning activities and rules.” CSG Compiled Code, Art. VI, §

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1 I also join Part I.A of Election Director REESE’s concurrence, and would hold that the canon of constitutional avoidance is applicable when the Commission interprets the Election Code. I do not join Part I.B, however, because I would not reach the issue of independent expenditures here.

2 I applaud the Central Student Judiciary’s decision to use its own advisory opinion power sparingly. See, e.g., In Re Petition of Reese, W-16-001 (February 29, 2016).

3 Obviously, the Assembly alone has the power to eliminate the advisory opinion power.
F(2)(e)(iii). Critically, the Code provides that “the nature and scope of these opinions shall let to the discretion of the UEC.” Id. I acknowledge that circumstances may arise when the use of the advisory opinion power is appropriate—hence my willingness to join Parts I, II, and III of the majority’s opinion—but I would utilize that power sparingly, as the Code gives this Commission discretion to do, and adopt a strong preference for actual cases and controversies.

The Supreme Court has long interpreted Article III of the United States Constitution to prohibit federal courts from issuing advisory opinions. Muskrat v. United States, 219 U.S. 346 (1911). While this Commission is not an

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4 Election Director REESE accuses me of “read[ing] the advisory opinion power out of the text.” Ante at 21. But his invocation of the Rule Against Surplusage is inapt when the Election Code also explicitly vests discretion over the “nature and scope” of advisory opinions in the UEC. CSG Compiled Code, Art. VI, § F(2)(e)(iii). By exercising the discretion that the text of the Code provides, we do not render the advisory opinion power surplusage. To the contrary: we give effect to the entirety of § F(2)(e)(iii), not just the sentence that Election Director REESE prefers.

Moreover, it is strange to suggest that I am eliminating the advisory opinion power when I support the majority’s use of it with regard to prohibited direct donations and coordinated expenditures. My opinion suggests that this Commission should utilize the advisory opinion power “sparingly . . . and adopt a strong preference for actual cases and controversies,” ante at 32, not that we should decline to issue advisory opinions in all circumstances. See also ante at 31 n.3 (“Obviously, the Assembly alone has the power to eliminate the advisory opinion power.”). Regarding this Commission’s jurisprudence, my opinion advocates only restrained use of the power. It is hyperbolic to suggest that such restraint will render the power a nullity.
Article III court, and therefore is not bound by the constitution’s strictures in this area, the reasons for limiting this Commission to deciding actual cases or controversies are legion.

II.

As Election Director REESE notes, “The advisory opinion power is most analogous to the rulemaking powers of administrative agencies in the state and federal government.” Ante, at 22. True. But a central justification for consolidation of adjudicatory and policymaking power in federal administrative agencies is those agencies’ expertise on issues within their jurisdiction. This Commission, with the exception of Election Director REESE,\(^5\) completely lacks that expertise. Indeed, Commissioners are appointed each semester and are not required to have familiarity with CSG, election law, or even student government at the University of Michigan in general. While policymaking authority may be convenient, it is not a power that a Commission made up of unelected individuals with no expertise in CSG elections should possess.

And convenience alone is what convinced at least two Commissioners—myself included—to support granting the advisory opinion power to this Commission. I was

\(^5\) Election Director REESE has served on the Commission for six semesters. His concordant knowledge of the university elections process has been of great assistance to the Commission.
convinced by the onerously short windows within which this Commission is required to resolve cases and controversies that actually do arise: once a complaint is filed, the Commission must schedule a hearing within 48 hours and must render its decision within 36 hours after the hearing. Because of the quick turnaround time within which the Commission must resolve cases, further complicated by the logistical difficulty of coordinating the schedules of nine full-time students, there will be instances when a difficult question is imminent, but the Commission will lack the time to research and draft a thorough opinion. Allowing this Commission to decide such cases before the election season makes Commissioners’ lives easier, and may improve the quality of this Commission’s opinions on the margins.

III.

But this justification for the advisory opinion power is, in my mind, outweighed entirely by its greatest vice:

6 Indeed, the better course, in my opinion, would be for the Assembly to untether this Commission from these time constraints and thereby eliminate a major reason why the Commission would feel the need to issue advisory opinions at all. But that is, of course, a matter for the Assembly—not this Commission—to decide.

7 This proposition is dubious, however, since the advisory opinion power itself imposes onerous time limits within which this Commission must issue a response. Rule 6.03(b), UEC Rules of Practice and Procedure (“The Commission shall respond—either with an Advisory Opinion or a Denial—to any Petition under subdivision (a) of this Rule within 36 hours of its filing.”).
prompting questions on hypothetical issues that would never arise in the absence of the power.

LINPAC’s petition is one such example. As Commissioner REAVES’ opinion suggests, LINPAC and the issue of PACs in CSG elections generally is the brainchild of a single Michigan Law student. Until LINPAC’s petition was filed there was no line of PACs itching to donate money to CSG candidates, though I suspect that will change this election cycle as a direct result of this opinion. In short, John Lin thought it would be entertaining to make this Commission consider the issue, and so invoked the advisory opinion power to accomplish that goal. He no doubt finds this Commission’s six-opinion split and the 43 pages of ink we have spilled to be quite amusing.

The advisory opinion power is, as this petition demonstrates, ripe for abuse. I, for one, can’t wait to see what Election Code “issues” the students of the University of Michigan will, in their infinite creativity, dream up next.

The fact that the majority must invent and then consider three hypothetical scenarios in order to create a reasoned response to LINPAC’s petition8 demonstrates

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8 I recognize that we are not formally responding to LINPAC’s petition, but issuing an opinion sua sponte that decides the same issues is effectively the same thing. And who are we kidding; this morass of opinions is precisely the result John Lin wanted.
one of the problems of addressing hypothetical questions: we don’t know what the actual case or controversy would look like. It seems possible—if not likely—that expenditures by a PAC in the university context will not fit into one of the three nice, neat categories that the majority has cobbled together. And then, what does the hours of labor that this Commission spent come to? I, for one, think that Commissioners’ time is better spent on addressing questions when they arise.

A third, related objection should be mentioned. When we issue an advisory opinion, we deny interested parties the opportunity to weigh in on the merits. It seems safe to assume that representatives of major parties on campus have opinions as to how this Commission should treat PAC activities. But we will never hear those opinions, since this Commission’s advisory opinion is binding precedent for the rest of our term. Rule 6.02(b), UEC Rules of Practice and Procedure (“Within an election cycle, an Advisory Opinion issued by the Commission shall be binding in all cases before the Commission filed after the date of issuance . . . .”)9 Those voices could have drawn this Commission’s attention to issues that we may have missed or changed the minds of some

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9 I take little comfort in the fact that future Commissions will not be so bound, Rule 6.02(b), UEC Rules of Practice and Procedure (“Advisory Opinions issued in a preceding election cycle shall be persuasive precedent in cases before the Commission . . . .” (emphasis added)), since it is much easier to drop a citation to this opinion than engage meaningfully with the issues a second time. Again, Commissioners are non-expert volunteers.
Commissioners. That type of adversarial discourse is essential to thoughtful and complete consideration of this question.

IV.

Finally, I feel the need to respond to one portion of Election Director REESE’s opinion directly because, although I do not doubt his sincerity, I believe his reasoning to be gravely mistaken. Election Director REESE argues:

[T]he assembly clearly intended the Commission to be a policymaker . . . . There is no other reason to place it in the executive branch. There is also no other reason for the Code to expressly leave certain policy choices to the Commission’s discretion, including the Advisory-Opinion power itself and the decision to grant a warning rather than demerits.

_Ante_, at 22–23.

I will treat the second policymaking power that the concurrence mentions—“the decision to grant a warning rather than demerits”—first. It has long been the province of _courts_ to apply the punishments allowable within the statutory options provided by the _legislature_. The choice to include a warning as a possible sanction _is_ the policy decision. While the Commission arguably makes some policy every time it adjudicates a case, including in its decisions to sanction with a warning rather than with a
demerit, this is a fundamental component of common law judicial decisionmaking. The relevant policymaking decision was choosing to include warnings as a potential sanction, not choosing how to apply the sanctioning options in any given case. We cannot infer that CSG intended to grant this Commission broad policymaking power from its decision to authorize multiples possible sanctions.

Second, Election Director REESE appears to take the existence of the advisory opinion power itself to be evidence of the Commission’s policymaking authority. In addition to its question-begging nature, this reasoning flies in the face of history. The advisory opinion power is not a long-enshrined duty of this Commission and so should not inform our understanding of what role CSG views the Commission to have; it was added to the CSG Compiled Code only this year. And, as mentioned above, several Commissioners were only willing to recommend the change to the Assembly because of its perceived convenience, not because of their broader understanding of this Commission’s power.

V.

I firmly believe that the proper policymaking body for all matters related to university elections is the Assembly, not this Commission. That policymaking prerogative admittedly includes the ability to allow this Commission to issue advisory opinions, and for that reason I am willing to join the majority’s analysis with regard to
prohibited direct donations and coordinated expenditures, contained in Parts II and III of its opinion. See ante at 3–6. But this is because I see those questions as clear, common sense applications of the text of the Election Code, such that any reader—even one without legal training—would have no problem discerning them. Moreover, these applications of the Code track cases and controversies previously before this Commission and so should be self-evident from this Commission’s precedents. See, e.g., Make Michigan v. The Team III, UEC-2015-W-005 (March 29, 2015). I am uncomfortable, for the reasons described above, with using the advisory opinion power to create from whole cloth definitions not included in the Election Code or to pass judgment on questions that, in the absence of one student’s misguided attempts at levity, would never arise.

I respectfully dissent.
Dissenting Opinion

COMMISSIONER COLELLA, with whom COMMISSIONERS REAVES and ROSENTHAL join, dissenting in part.

I join parts I, II, and III of the majority opinion in full. I write to clarify why I am, in the words of the Majority Opinion, one of the “members of this Commission [who] would prefer to leave this question [independent expenditures] unanswered . . . .” Ante, at 7.

I.

I have two primary objections to Part IV of the majority opinion. First is the assertion that the University Election Commission must address all the points brought up in Mr. Lin’s petition to this body. Second, I believe the issuing of this opinion is a poor policy choice and will overall be detrimental to the efforts of running a fair election this semester.

The UEC denied the petition of Mr. Lin and LINPAC rather than issue an advisory opinion to him (No. UEC-2015-F-002) as the UEC wished to address the issues brought up by his petition via our powers of sua sponte advisory opinions (Rule 6.01 §A2). This means that UEC believes “issuance of an Advisory Opinion would provide useful guidance to Candidates or Parties in an ongoing or future Election” (Rule 6.01 §A2). This brought the ball fully into the court of UEC allowing us to address the issues however we see fit. While I do believe the issue of independent expenditures is a worthy of clarification for
future elections, it is far from necessary that we address it at this time via this manner as we are not responding to Mr. Lin’s petition; rather, we are seeking to provide guidance sua sponte.

I do, however, agree with majority’s assessment that the CSG Assembly must review its Election Code and address the issues of independent expenditures as soon as the election season has ended. But I am afraid that addressing this loophole this semester may open a flood door in which these expenditures become a central campaign tactic this semester.

This second concern is born out of many years of contentious CSG election filled with what most students, myself included, feel is an undue level of polarizing and politicking. As the Commissioner with the most experience in the trenches of CSG and general student government politics on this campus,¹ I feel like the majority of this Commission underestimates the effects that independent expenditures could have on the upcoming election.

The UEC’s function is to promote and ensure a fair election for CSG and to adjudicate all complaints originating from that election. It is not designed, nor should we, become a body dedicated to finding holes in the

¹ I currently serve as the President of the second largest student government on campus, LSA Student Government, and I worked on the CSG presidential campaign of youMICH and Michael Proppe as a college freshman.
Election Code and then using our powers of *sua sponte* advisory opinions to shout from the mountaintop ways to get around the meaning and intent of the Election Code. The issuing of this opinion on independent expenditures makes this election less fair and less democratic. It advantages parties and candidates who take the time to read thoroughly our opinions, have highest levels of student legal counsel, and the resources and connections necessary to encourage independent expenditures. Others may argue that independent expenditures promote democracy as it allows more people to get involved and voice their opinions in the elections. To those, I ask where have the independent expenditures been for the last few years or why this never was an issue until it was made as a legal thought exercise for this body to address.

II.

Next I write to address the Election Director REESE’s assertion that encouraging more independent expenditures is to encourage more people to act legally and subsequent illustration of comparing it to getting more people to drive on the highway at seventy miles an hour. That is a ludicrous assertion that bears next to no relevance in the case. Just because something is technically legal it does not make it right, ethical, or a good idea. Secondly, I strongly believe that independent expenditures goes against the very intent and purpose of Election Code, and the UEC Rules of Practice and Procedure, which is to ensure a fair and democratic election for all students just not the privileged few with a
multitude of connection for whom the independent expenditures would help.

Lastly, I wish to echo the sentiments laid out in the dissent by Commissioner REAVES who writes “I write separately with the hope that I do not bring further attention to an issue about which I fear this Commission has already said too much.” Ante, at 27. I too wish I did not need write to bring even further light to this issue, but I feel as if I must.

I respectfully dissent.