



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

POLICY STATEMENT OF COMMISSIONER LEE E. GOODMAN

Section 30125(e)(1)(B) of the Federal Election Campaign Act of 1971, as amended (the “Act”), prohibits “an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of [a] candidate[] or individual[] holding Federal office” from spending funds raised outside the federal contribution limits and prohibitions in connection with a federal, state or local election. This speech prohibition has received scant legal analysis by the Commission or federal courts. I have my own ideas for a disciplined legal approach to this statutory prohibition.

The “Established, Financed, Maintained or Controlled” Doctrine

First, the plain language of the statute makes clear that the candidate or officeholder must either “establish,” “finance,” “maintain,” or “control” the entity. The law does not require that all four factors be present in order to support a finding of reason to believe that a violation occurred. Any one of the four factors will suffice if it provides the basis for four or more Commissioners to find reason to believe as to that factor.

Second, the plain language of the statute also provides that a candidate or officeholder must establish, finance, maintain, or control the entity *while the person is a federal candidate or federal officeholder*. The statute does not purport to prohibit organizations from speaking because they historically were established, financed, maintained or controlled by a person who was not a federal candidate or officeholder at the time, but who later in time became a federal candidate or federal officeholder.¹

Third, following from the previous point, an individual can separate herself from an organization, become a federal candidate, and the organization retains its First Amendment right to speak about elections, including that candidate’s election. The federal candidate’s historical involvement with the organization should not strip the organization of its First Amendment right to speak about federal elections going forward. Indeed, the speech of that organization, given its prior relationship with the candidate, may provide highly salient information to voters, who have as much a right to hear the speech as the organization has to speak it.²

¹ MUR 7114 (Casperson for Congress, *et al.*), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen at 3-4, n.19.

² See *Pac. Gas and Elec. Co. v. Pub. Utilities Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (“[T]he First Amendment protects the public’s interest in receiving information”).

Fourth, as the Commission has routinely found, candidates' authorized committees and leadership PACs may make unlimited contributions to independent expenditure committees and other political organizations without implicating the contributions violating the "finance" prong of the statute. The statute should be interpreted to reach only those organizations over which the federal candidate or officeholder exercises *significant financial or operational control*. An arms-length contribution—even a large contribution—from a candidate's campaign committee or leadership PAC to an independent expenditure committee may be a form of financial support, but it does not constitute the kind of financial control over non-federal funds which is the focus of the statute. The candidate or officeholder must exercise a significant degree of control over the recipient organization beyond the mere provision of financial support in order for an organization to be "financed" by the candidate as contemplated by the statute.³

Finally, I offer the observation that the speech prohibition in section 30125(e) is not a substitute for the restriction against coordinated expenditures by third-party organizations where the alleged coordinating conduct occurred before an individual became a federal candidate. There is no pre-candidacy coordination prohibition in the Act, and section 30125(e) cannot be misused to effect such a rule.

Conclusion

My view is that the contours of this speech prohibition need clarification. I believe this policy statement accurately synthesizes prior cases and sets forth a workable and Constitutional framework for approaching this important speech prohibition in the Act. In the absence of a clear Commission policy, I have committed my view to paper for reference by the Commission and the public.

February 16, 2018

³ MUR 6753 (People for Pearce, *et al.*), Concurring Statement of Reasons of Commissioner Lee E. Goodman at 1-2.