



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**STATEMENT OF COMMISSIONER LEE E. GOODMAN ON
LRA 980 REQUEST FOR CONSIDERATION OF A LEGAL QUESTION
SUBMITTED BY CANTOR FOR CONGRESS**

In this matter, a campaign committee exercised its legal right to raise and spend general election contributions on general election expenses incurred prior to the date of the primary election. The campaign lost the primary election. Having spent a small percentage of its general election funds, the committee was unable to refund 100 percent of its general election funds to its general election contributors. Therefore, the committee asked the Commission to determine whether a campaign committee that spends general election funds on general election expenses as permitted by law nevertheless breaks the law as a result of its inability to refund 100 percent of general election contributions after losing a primary. Because I do not believe the law should place a campaign committee in an impossible catch-22, I voted to read two regulations *in pari materia* to provide for refunds of general election funds on hand *less* general election funds spent on general election expenses.

I. Factual Background

Cantor for Congress (“the Committee”), the primary campaign committee for former House Majority Leader Eric Cantor, raised nearly \$2 million in contributions designated for the 2014 General Election.¹ Prior to the 2014 primary election, Cantor for Congress spent almost \$230,000 on disbursements for “indisputably general election expenses,”² as it was legally permitted to do.³ On June 10, 2014, Representative Cantor unexpectedly lost his primary election. Following that defeat, his committee redesignated, reattributed, or refunded all but roughly \$230,000 in contributions received for the general election – *i.e.*, the money already spent prior to the primary.⁴ The Commission’s Reports Analysis Division (“RAD”) advised the Committee that this was not enough – that the Committee needed to redesignate, reattribute, or refund *all* of the contributions received for the general election.⁵

¹ LRA 980 (Cantor for Congress), Request for Consideration of a Legal Question by the Commission at 2 (Dec. 23, 2014).

² *Id.* at 2-3.

³ *See* 11 C.F.R. § 102.9(e)(2); Advisory Opinion 1986-17 (Green).

⁴ LRA 980 (Cantor for Congress), Request for Consideration of a Legal Question by the Commission at 2-3 (Dec. 23, 2014).

⁵ LRA 980 (Cantor for Congress), Request for Consideration of a Legal Question by the Commission at 3-4 (Dec. 23, 2014) (describing a series of communications between RAD and the Committee).

Using a procedure first adopted 2011 and updated in 2013 providing an avenue for Committees to request Commission input on important legal questions when corrective action is requested by RAD, the Committee brought this matter to the attention of the Commission.⁶ In response to this request, the Commission determined (by a vote of five to one) that the Committee was required to refund all general election contributions it accepted before the primary election, including general election contributions it expended on advance expenditures relating to the anticipated general election.⁷ I disagree with this outcome and the Commission's logic in reaching it, and write separately to note how this result places committees in an impossible catch-22.

II. Legal Background

Under the Federal Election Campaign Act of 1971, as amended (“the Act”), the term “contribution” means “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”⁸ No person may make contributions to a candidate or his/her authorized committee that in aggregate exceed certain limits.⁹ A “candidate” is any “individual who seeks nomination for election . . . to federal office” and makes or receives contributions or expenditures of \$5,000 or more.¹⁰ The term “election” means “a general, special, primary, or runoff election.”¹¹ For the purposes of the Act's contribution limits, a primary election and a general election are considered separate “elections,” each with a separate limit.¹²

Commission regulations recognize that candidates may receive contributions designated for a general election prior to the date of the primary election, provided that they “use an acceptable accounting method to distinguish between contributions received for the primary

⁶ *Id.*; see generally Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 78 Fed. Reg. 63203 (Oct. 23, 2013) *superseding* Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45798 (Aug. 1, 2011).

⁷ See LRA 980 (Cantor for Congress), Certification (March 17, 2015); see also LRA 980 (Cantor for Congress), Memorandum Regarding Request for Consideration of a Legal Question Submitted by Cantor for Congress (Jan. 27, 2015) (recommending that the Commission require a refund of 100 percent of general election funds).

52 U.S.C. § 30101(8)(A)(i) (formerly 2 U.S.C. § 431(8)(A)(i)); see also 11 C.F.R. § 100.52.

⁹ 52 U.S.C. § 30116(a)(1)(A) (formerly 2 U.S.C. § 441a(a)(1)(A)); see also 11 C.F.R. § 110.1(b)(1). Further, under Commission regulations committee treasurers are responsible for examining all contributions for evidence of illegality and to ascertain whether, when aggregated with other contributions from the same contributor, they exceed the contribution limits. 11 C.F.R. § 103.3(b). As part of this duty, treasurers must return any excessive contribution that cannot be redesignated or reattributed within sixty days. 11 C.F.R. § 103.3(b)(3).

¹⁰ 52 U.S.C. § 30101(2) (formerly 2 U.S.C. § 431(2)); see also 11 C.F.R. §§ 100.3, 100.72, 100.131, 101.3.

¹¹ 52 U.S.C. § 30101(1)(A) (formerly 2 U.S.C. § 431(1)(A)); see also 11 C.F.R. §§ 100.2, 110.1(j).

¹² 52 U.S.C. § 30116(a)(6) (formerly 2 U.S.C. § 441a(a)(6)); see also 11 C.F.R. § 110.1(j)(1).

election and contributions received for the general election.”¹³ Candidates may spend money prior to the primary election on “general election disbursements,” provided that their records “demonstrate that, prior to the primary election, recorded cash on hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made.”¹⁴ Finally, “[i]f a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated . . . or reattributed” as appropriate.¹⁵

Within these regulatory provisions lurks a potential conflict. On the one hand, the regulation expressly permits a candidate committee to spend general election contributions to pay *bona fide* general election expenses (e.g., fundraising and accounting expenses) before the date of the primary election. On the other hand, the regulation requires the committee to refund all general election contributions if the candidate loses the primary election. How can a campaign committee spend and refund the same dollar? In the past, the Commission has attempted to reconcile these two provisions of the same regulation in the most ponderous manner: permit the campaign committee to spend general election contributions before the primary date at the risk of violating the law if the candidate loses the primary election.¹⁶ But there is a reasonable alternative way to harmonize the two regulatory provisions: read them in *para materia* to require refunds of general election funds on hand *net* of the general election funds already spent.¹⁷

III. The Commission’s Approach Is Illogical, Unfair, And Impractical

Here, the Commission determined that the Committee must refund 100 percent of its general election contributions, including those it spent on expenses necessary to prepare for the anticipated general election. In so concluding, the Commission reasoned that a “general election contribution limit does not exist for a candidate who does not participate in the general election, and a committee’s spending cannot create a legal contribution limit where one would otherwise not exist.”¹⁸

This reasoning is illogical on its face. The Commission reasons that because there is no general election candidacy, there is no contribution limit. Because there is no contribution limit,

¹³ 11 C.F.R. § 102.9(e)(1).

¹⁴ 11 C.F.R. § 102.9(e)(2).

¹⁵ 11 C.F.R. § 102.9(e)(3).

¹⁶ *See, e.g.*, Advisory Opinion 1986-17 (Green).

¹⁷ There may be other regulatory approaches affecting the expenditure side of this regulatory scheme that might assist in accomplishing a rational approach, but this is a subject beyond the scope of the present critique of the flaws in the Commission’s current approach.

¹⁸ LRA 980 (Cantor for Congress), Memorandum Regarding Request for Consideration of a Legal Question Submitted by Cantor for Congress at 3 (Jan. 27, 2015); *see also* LRA 980 (Cantor for Congress), Certification (March 17, 2015).

a former candidate – retroactively – was prohibited from accepting contributions. This syllogism treats the contribution limit as government permission to raise money for a potential candidacy – permission that can be revoked when the candidacy does not materialize. It is the First Amendment that affords that right, not the contribution limit. The contribution limit is a narrowly drawn restriction on the First Amendment right that applies only when a candidacy materializes in a federal election.

Additionally, there is no basis in the Act for the Commission’s conclusion. The Commission can only “administer, seek to obtain compliance with, and formulate policy with respect to” the Act.¹⁹ The Act prescribes specific limitations applicable to specific circumstances – when a person is spending money to influence a federal election. When money is given outside of these circumstances, the Commission has no authority to impose new limits or prohibitions. If anything, after a candidate ceases to be a candidate, the government’s interest in imposing any contribution limit at all that dissipates because there is no longer any potential to corrupt a federal candidate or officeholder.

Even accepting the Commission’s once and continuing jurisdiction over a non-candidate who lost his primary election, however, the Commission’s interpretation of its regulations places candidate committees in an impossible catch-22. Commission regulations, prior advisory opinions, and even OGC’s memorandum in this matter all acknowledge candidates may legally raise and spend general election funds prior to the date of the primary election.²⁰ If a candidate wins, there is no problem – any contributions received prior to the primary date count against the general election contribution limit and may be spent just like any other funds raised for the general election. However, if the candidate, despite all efforts to win, loses the primary election the exercise of this legal right becomes illegal. If a candidate loses the primary the campaign committee is trapped by the Commission’s interpretation requiring the committee to refund all of the funds raised for the general election within sixty days, regardless of whether or not it spent funds on *bona fide* general election expenses.²¹ When it fails to refund 100 percent of its general election contributions – *i.e.*, funds already spent on necessary general election expenses – it has broken the law.

This approach is unfair because candidates have no way of knowing whether or not it will be legal to dip into their general election funds for general election expenses *ex ante*. Thus, a candidate’s campaign committee must either forgo exercising its right to spend general election funds on general election expenses and devote primary election contributions to pay for such expenses, or run the risk of breaking the law if its candidate unexpectedly loses the primary

¹⁹ 52 U.S.C. § 30106(b)(1) (formerly 2 U.S.C. § 437c(b)(1)).

²⁰ See generally 11 C.F.R. § 102.9(e)(2); Advisory Opinion 1986-17 (Green); LRA 980 (Cantor for Congress), Memorandum Regarding Request for Consideration of a Legal Question Submitted by Cantor for Congress (Jan. 27, 2015).

²¹ See 11 C.F.R. § 103.3(b)(3); see generally Advisory Opinion 1986-17 (Green) (describing the types of expenses that may be paid with general election funds prior to the date of the primary election).

election. In the realm of political speech, “[t]his ‘heads I win, tails you lose’ approach cannot be correct.”²²

The unfairness of this regulatory approach is compounded because the same law prohibits campaign committees from remedying the situation. The premise of the Commission’s interpretation stipulates that because the candidate is not running in the general election, the candidate’s campaign committee may not raise new general election contributions to cover any shortfalls, such as that experienced by the Committee. As noted above, a candidate’s campaign committee may only accept a contribution designated for a prior election after the date of that election “to the extent that the contribution does not exceed net debts outstanding *from such election*.”²³ Any outstanding general election expenditures or refund obligations are by definition general election debts that are not outstanding from the primary election. Moreover, even were a losing committee permitted to raise contributions to pay its general election refund debt, the Commission’s rule would require the committee to refund those contributions too.²⁴ In sum, unless committees have sufficient primary election funds remaining to provide refunds to all general election contributors, they have a legal obligation to refund money that they have already spent and no way to raise additional funds.

Recognizing its own regulatory conundrum, the Commission engaged in legal gymnastics to afford the Committee an escape route. The Commission invented from whole cloth a legal fiction: that the Committee can, if it so chooses, treat its unrefunded general election contributions as excessive *primary* election contributions.²⁵ In theory, this legal fiction provides the Committee an avenue to raise additional funds: convince new contributor Jones to make a contribution in order to pay a refund to old contributor Smith a year after the Committee ceased political activity. In practice, this is highly impractical. Committees have only sixty days to refund excessive contributions. Thus, losing primary candidates have sixty days to raise money that people were not willing to provide during a heated primary campaign for the sole purpose of transferring that money to other contributors as a refund. If a losing campaign committee is unable to find a sufficient number of new contributors willing to pay refunds to old contributors, then the campaign committee is right back where it started: breaking the law by doing something that was perfectly legal at inception. Here, the Cantor Committee is long past its sixty day refund window, so choosing to assume a fictitious primary debt still places the Committee into a precarious legal position.

Furthermore, committees with significant outstanding debts are not permitted to terminate.²⁶ Thus, committees are trapped in a perpetual limbo – they have no money to pay

²² *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 471 (2007).

²³ 11 C.F.R. § 110.1(b)(3)(i) (emphasis added).

²⁴ While payments or loans from candidates to their campaign committees are unlimited, they are considered contributions under the Act, and thus would likewise be prohibited under these circumstances.

²⁵ LRA 980 (Cantor for Congress), Certification (Mar. 17, 2015).

²⁶ See 11 C.F.R. §§ 102.3, 116.7.

their debts and no plausible way to raise additional funds, yet they have no way to terminate and are obligated to continuously file reports with the Commission. When they fail to do so, they face additional fines and incur more debts that they have no way of repaying. All the while they incur additional administrative expenses to address their ongoing existence for hollow regulatory purposes.

At first blush the Commission's effort to provide committees an escape remedy may have seemed fair, but the legal contortions actually reflect the Commission's effort to absolve itself of its own irrational quagmire. At some point, the Commission should simply admit its error in logic and afford campaign committees a rational regulatory interpretation.

IV. The Commission's Refund Requirement Is Not Necessary

A defunct committee's solicitation of a contribution from a new contributor to pay a refund to an old contributor seems like a pointless exercise, so it begs the question: What public policy objective does that kind of post-campaign fundraising exercise achieve? Because the Commission's dogmatic refund requirement drives the regulatory result, it is illuminating to take a step back and consider what is so necessary about a refund requirement for losing primary campaigns in the first instance. Does the refund requirement serve a compelling policy purpose that justifies the regulatory contortions we see here? The answer is no. One can scarcely be conjured, and certainly no anti-corruption purpose is advanced.

To begin, the refund requirement is not necessary to maintain per election contribution limits. Commission regulations already provide that general election funds may only be spent on *bona fide* general election purposes.²⁷ This restriction is sufficient to maintain the per election contribution limit under other circumstances, including when a candidate wins their primary race, and is sufficient to do so in cases such as this, when a candidate loses.

Money given to a primary candidate designated for the general election is like money given to a candidate who is testing the waters. In both cases, a donor gives money with the hope that the recipient will become a candidate, and that the funds given will be used to help influence a federal election. However, with testing the waters the Commission has no jurisdiction until a person becomes a candidate. It is only at that point that donations are considered contributions, and subjected to the Act's reporting requirements. If a person never becomes a candidate, there is no obligation to report donations, let alone refund supporters.²⁸ That is simply a risk contributors readily understand and choose to take in supporting a potential candidacy that may never materialize for any number of reasons or circumstances.

Likewise, losing campaigns often close with surplus funds, yet the Commission does not require them to refund contributors. The law provides that campaign committees may dispose of surplus funds by donating to charity, political parties, other campaigns, or "any other lawful

²⁷ See 11 C.F.R. § 102.9(e)(2); Advisory Opinion 1986-17 (Green).

²⁸ See generally 11 C.F.R. §§100.72; 100.131; 101.3.

purpose.”²⁹ The only absolute prohibition is converting surplus funds to the personal use of the candidate to prevent corruption.³⁰

As both testing the waters and losing candidates illustrate, refunds are often not required under similar circumstances. Simply put, there is nothing sacrosanct about the Commission’s refund requirement.

V. The Commission Should Read Its Regulations *In Pari Materia*

Having extended its jurisdiction over these funds, the Commission could have decided that candidates may not raise and spend general election money before the date of the primary election. It wisely did not.³¹ Instead, having decided to require refunds, the Commission compounded its error by adopting an interpretation that runs counter to basic statutory interpretation. Statutory interpretation counsels *verba cum effectu sunt accipienda* – where possible, every word and provision is to be given effect.³² The Commission’s interpretation effectively nullifies section 102.9(e)(2)’s recognition that candidates can spend general election funds prior to the primary date. In doing so, the Commission reduces section 102.9(e)(2) to a redundancy – mere belt and suspenders supporting the accounting methods at section 102.9(e)(1). As the Court has made clear, this type of reading is disfavored.³³

The Commission must at minimum interpret its regulations “as a symmetrical and coherent regulatory scheme”³⁴ that fits “all parts into an harmonious whole.”³⁵ One reasonable way to do so is to read subsections 102.9(e)(2) and (e)(3) *in pari materia* by requiring committees to refund, redesignate, or reattribute the *net* amount of all general election contributions minus general election disbursements. This approach satisfies the purpose of the regulations by providing the same safeguards against subsidizing a primary election with general election funds, gives effect to all of the words in the Commission’s regulations, and avoids placing committees in a lose-lose situation or putting them through purposeless post-election fundraising exercises to pay off fictitious primary election debts.

²⁹ 11 C.F.R. § 113.2.

³⁰ 11 C.F.R. § 113.1(g).

³¹ We need not decide here whether a broad temporal prohibition on general election expenditures – *i.e.* speech – would be constitutional. If it were unconstitutional, then punishing a campaign for doing it under a catch-22 regulatory scheme, as here, would be equally unconstitutional.

³² *See generally* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012 Thomson/West).

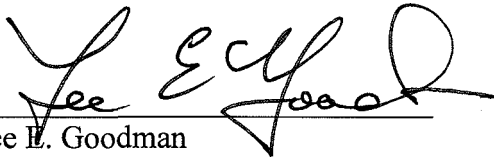
³³ *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (It is a “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.”).

³⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

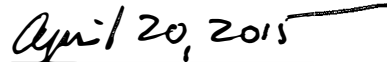
³⁵ *Id.* (quoting *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)).

VI. Conclusion

The Commission's approach fails to give full effect to all of the words of the Commission's regulations, is unfair, and creates serious practical problems for Committees seeking to comply with the law. Because there is a better way to interpret the law to avoid these difficulties – requiring *pro rata* refunds of net general election contributions on hand – I cannot join my colleagues' interpretation of our regulations in this matter.³⁶



Lee L. Goodman
Commissioner



Date

³⁶ Emerson visited Thoreau in jail and asked, “Henry, what are you doing in there?” Thoreau replied, “Waldo, the question is what are you doing out there?” W. McElroy, “Henry Thoreau and ‘Civil Disobedience,’” (The Thoreau Reader, University of Iowa, 2009), available at www.thoreau.eserver.org/wendy.