FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Bordonaro for Congress and	)	
Betty Presley, as Treasurer	)	MUR 4735
Tom Bordonaro, Jr.	)	
	)	
	)	
	)	

STATEMENT OF REASONS OF COMMISSIONER MICHAEL E. TONER

On January 14, 2003, by a vote of 6-0, the Commission accepted the Office of General Counsel's ("OGC") recommendation to reject the counteroffer submitted on behalf of Bordonaro for Congress and Betty Presley, as treasurer and take no further action against Bordonaro for Congress and Betty Presley as treasurer and Tom J. Bordonaro, Jr. and close the file.

I voted in favor of the General Counsel's recommendation to reject the counteroffer and close the file in this matter but I write to express my strong support for the Commission to aggressively pursue allegations of fraudulent misrepresentation under U.S.C. § 441h.

Analysis and Conclusions

This matter arose out of a complaint filed by Catherine Duvall ("Complainant"), Campaign Manager of the Lois Capps for Congress Committee, alleging that the Tom Bordonaro for Congress Committee ("Bordonaro Committee") violated 2 U.S.C. § 441h by allegedly using phone banks to make telephone calls to voters in California's 22nd Congressional District that conveyed negative and false information about Bordonaro's opponent, Lois Capps, in connection with a March 10, 1998 special congressional election. Phone bank callers allegedly represented themselves as calling on behalf of the

Central Coast Democrats for Honest Representation ("Central Coast Democrats") in an apparent effort to persuade voters to support Bordonaro.

FECA prohibits an individual who is a candidate for Federal office, or his employee or agent, from fraudulently misrepresenting himself or any committee or organization under his control, as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to the other candidate or political party. 2 U.S.C. § 441h(1).

In the days leading up to the special election runoff in California's 22nd Congressional district, voters allegedly received phone calls, purportedly from a Democratic organization that conveyed negative information about Democratic candidate Lois Capps and urged support for Capps' opponent, Tom Bordonaro. The Bordonaro Committee acknowledged that the phone bank was commissioned by the Bordonaro Committee, and phone bank callers identified themselves as the Central Coast Democrats for Honest Representation. Response to Complaint at 1. Furthermore, the Bordonaro Committee's campaign consultant designed the phone bank, including writing the script, selecting the criteria for the target audience and recommending the program to the candidate; the campaign manager reviewed and edited the script; and the candidate approved the script and phone bank program. General Counsel's Report #2 at 5.

The General Counsel recommended that the Commission reject the counteroffer submitted on behalf of the Bordonaro Committee and Betty Presley because it was difficult to determine if the Respondents' actions fell within the scope of § 441h's prohibition. Although I voted to accept the General Counsel's recommendation to dismiss this matter, I strongly support vigorously pursuing alleged violations of § 441h.

The Supreme Court has ruled that the First Amendment does not shield fraud. *See, e.g., Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (holding that where advertisements for a contest were artfully contrived to mislead and confuse readers, the government may take action to protect the public against fraud without violating the First Amendment); *See also Illinois ex re. Madigan v. Telemarketing Associates, Inc.*, 123 S. Ct. 1829, 1843 (2003) (holding that the First Amendment does not bar fraud claims against fundraisers where the fundraisers made false or misleading representations designed to deceive donors about how their donations would be used). The Court has made clear that the "intentional lie is no essential part of any exposition of ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

Additionally, Congress has considered the effects of fraudulent misrepresentations in the campaign context and acted to strengthen penalties against those violating § 441h. The U.S. Sentencing Commission was required, by Section 314 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), to promulgate penalty guidelines for FECA violations. Those guidelines were promulgated and became effective November 1, 2003. As part of the Sentencing Commission's report to Congress, the Sentencing Commission proposed legislative recommendations concerning areas where the available statutory maximum punishment constrains the imposition of

appropriate sentences for violations. One of these areas was violations of § 441h. Specifically, the Sentencing Commission stated that violations of § 441h are "especially malicious in that they are designed to confuse the electorate to the opponent's detriment." United States Sentencing Commission, *Report to the Congress: Increased Penalties for Campaign Finance Offenses and Legislative Recommendations*, May 2003. The Sentencing Commission recommended that Congress increase the statutory maximum sentence applicable to 441h offenses to five years' imprisonment, regardless of the amount of money involved.

Many aspects of the nation's campaign finance laws raise serious constitutional concerns, and I believe the Commission has the responsibility and duty to be sensitive to these concerns when it interprets and enforces the law. However, political actors do not have a constitutional right to misrepresent themselves or otherwise engage in fraudulent conduct.

I supported the Commission's decision to dismiss MUR 4735 under the particular circumstances of this matter. However, in light of the Supreme Court's rulings and the recent actions by Congress in this area, I believe that alleged violations of § 441h should be a top Commission enforcement priority.

December 1, 2003

Michael E. Toner, Commissioner