



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 ) MUR 6908  
National Republican Congressional Committee )  
and Keith Davis, as treasurer )  
American Action Network )  
American Crossroads and )  
Caleb Crosby, as treasurer )

**STATEMENT OF REASONS OF  
VICE CHAIRMAN MATTHEW S. PETERSEN  
AND COMMISSIONER CAROLINE C. HUNTER**

Relying primarily on a single press report and its own conjecture, the Complaint in this matter alleged that the National Republican Congressional Committee (“NRCC”), American Crossroads, and the American Action Network (“AAN”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by secretly exchanging poll results via Twitter. Specifically, the Complaint alleged that NRCC made in-kind contributions to American Crossroads and AAN by posting “encrypted internal political polling information” on two “hidden” Twitter accounts,<sup>1</sup> and that American Crossroads and AAN, in turn, used the “strategically material information” in these Twitter posts to make “excessive” and “illegal” in-kind contributions to NRCC in the form of coordinated communications.<sup>2</sup> The Complaint further alleged that the three groups failed to report these purported in-kind contributions as required by the Act.

At first blush, allegations of supposedly encrypted information transmitted via Twitter pursuant to a covert arrangement between three politically aligned groups seem particularly noteworthy and potentially alarming. Upon closer examination, however, it is not clear that the allegations in the Complaint, even if true, would have stated a violation of the Act. Moreover, the Respondents all provided specific and persuasive denials of the allegations. But even if the allegations in the Complaint had stated a violation of the Act, and even if Respondents had not effectively rebutted them, prudential and due process considerations would nonetheless have warranted the Commission’s exercise of prosecutorial discretion to dismiss the Complaint.

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<sup>1</sup> Compl. at 1.

<sup>2</sup> *Id.* at 2.

Accordingly, we did not vote in favor of the recommendations of the Commission's Office of General Counsel ("OGC") to find reason to believe that the Respondents violated the Act and, instead, voted to close the file. This statement explains the reasons for our vote.

## I. BACKGROUND

The allegations in the Complaint were based almost entirely on a single media report.<sup>3</sup> The report cited an anonymous source "with knowledge of the activities" to claim that NRCC used Twitter to provide American Crossroads and AAN with "coded" polling results for key congressional races.<sup>4</sup> The anonymous source allegedly directed the reporter to two Twitter accounts, @BrunoGianelli44 and @TruthTrain14, and contended that postings on the accounts conveyed polling results for various congressional races.

The Complaint speculated that "it appears that the NRCC posted polling information . . . as coded requests or suggestions for outside groups to get involved," and that the NRCC posted information only about "races of interest," thereby "convey[ing] information about the NRCC's plans, projects, activities, and needs."<sup>5</sup> These postings, the Complaint alleged, "apparently prompted advertising buys and other spending by the outside groups in the specific races for which the NRCC posted data."<sup>6</sup> Without the poll results, the Complaint suggested, "the outside groups may not have sponsored communications supporting or opposing certain candidates."<sup>7</sup>

But the Complaint did not provide any evidence that this actually occurred. Instead, the Complaint contemplated the potential benefits that the groups might have derived from such activity. For example, the Complaint contended that when the NRCC posted a message showing that a particular race was close, AAN and American Crossroads "would then know to devote more spending, resources, and time on that race."<sup>8</sup> At the same time, "if the NRCC posted a Twitter message showing a particular congressional candidate polling significantly ahead of his

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<sup>3</sup> See Compl. at 1-3, n.1-n.3, n.5-6 (citing Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN (Nov. 17, 2014) ("Moody, November 17"), <http://www.cnn.com/2014/11/17/politics/Twitter-republicans-outside-groups/>).

<sup>4</sup> Moody, November 17; see also Compl. at n.3 (citing Chris Moody, *See the GOP's Coded Tweets*, CNN (Nov. 18, 2014), <http://www.cnn.com/2014/11/18/politics/gop-tweets-screenshots/> (relying on anonymous source "with knowledge of the activities" and publishing 84 of @BrunoGianelli44's 98 messages and 75 of @TruthTrain14's 87 messages)).

<sup>5</sup> Compl. at 5-6 (emphases omitted).

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 4.

opponent, the groups would know that the party viewed the candidate as ‘safe,’ and that they should not target spending on that race.”<sup>9</sup>

The Respondents each denied the allegations. They noted that information in a public Twitter posting is publicly available information and, thus, is excluded from the scope of the Commission’s coordinated communication regulation.<sup>10</sup> They also contended that the posts were not “coded,” but were generally recognizable as “top-line” poll results. Indeed, AAN cited a *New York Times* article in which the reporter deciphered the substance of these Twitter posts,<sup>11</sup> and NRCC cited a *Washington Post* article in which another reporter did likewise.<sup>12</sup>

Moreover, in their responses and sworn affidavits, both AAN and American Crossroads confirmed that the Twitter posts had no material effect on their political advertising decisions, and they explained why. American Crossroads affirmed that the individuals responsible for decisions regarding its independent expenditures never saw the Twitter posts. Further, American Crossroads affirmed that it made independent expenditures in connection with only one election implicated in the Twitter data, and that its decision to advertise in that election was based not on any Twitter data but on its own privately commissioned polling data.<sup>13</sup>

AAN described the four criteria that it uses to decide whether to spend money on advertising in support of a candidate. They are (1) the candidate’s position on issues; (2) the closeness of the election; (3) the help independent expenditures could provide; and (4) the candidate’s resources or need of help. To determine whether a race is competitive, AAN stated that it commissions private polls. According to AAN, the most important information from these polls derives from analyzing hundreds of pages of so called “cross-tabs” to collate and evaluate demographic variables that show how close a race is regardless of the summary “top-line” results.<sup>14</sup>

AAN also noted the widespread view that “top line” polling data — like that contained in the Twitter posts — “is generally ignored.”<sup>15</sup> Although AAN acknowledged that its personnel periodically review publicly available polling data, including the data in the Twitter messages at issue, it indicated that such publicly available information provides little value because of

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<sup>9</sup> *Id.* at 3-4.

<sup>10</sup> American Crossroads Resp. at 4; NRCC Resp. at 6-8; AAN Resp. at 11-12.

<sup>11</sup> AAN Resp. at 5, 11-12 (citing Nate Cohn, *Sharing Polling Numbers on Twitter: Decoding a Mystery*, THE NEW YORK TIMES (Nov. 26, 2014) (“Cohn Article”).

<sup>12</sup> NRCC Resp. at 3 (citing Philip Bump, *Republicans, Twitter and the Brave New World of Campaigning/Outside Group Coordination*, WASHINGTON POST (Nov. 17, 2014)).

<sup>13</sup> American Crossroads Resp. at 3.

<sup>14</sup> AAN Resp. at 3-4.

<sup>15</sup> *Id.* at 5.

questions about the data's source, methodology, and reliability, and lack of cross-tab information. Further, AAN had a greater degree of overlap in the elections in which it spent money in 2014 and the districts identified in the Twitter posts, but the overlap was only in elections that the RNC had previously, publicly, and frequently identified as "Targeted Districts" and "Top Targets." The Twitter posts, AAN stated, "were not the basis for this knowledge."<sup>16</sup> In addition, AAN categorically denied having any relevant communications with NRCC, and indicated that AAN had already made many of its spending decisions before the Twitter posts were published.<sup>17</sup>

## II. ANALYSIS

This matter turns on whether AAN or American Crossroads made electioneering communications or expenditures for public communications at the "request or suggestion" of, or after "substantial discussion" with, NRCC.<sup>18</sup> If so, these communications would be "coordinated" under Commission regulations and would, therefore, constitute in-kind contributions to the NRCC.<sup>19</sup>

The use of publicly available information generally defeats a coordinated communication claim. Communications "offered to the public generally" do not constitute a "request or suggestion."<sup>20</sup> Further, to be a "substantial discussion," the discussion must convey information that is "material to the creation, production, or distribution of the communication" and that is not "obtained from a publicly available source."<sup>21</sup>

The Twitter posts at issue likely were exempt from the coordinated communication regulation because they were publicly available or offered to the public generally. To meet these standards, the Commission requires only that information be accessible to the public. There is no dispute that Twitter is a publicly available source and, in general, Twitter posts on open accounts are available to the public.

The complaint, however, argued that the Twitter posts at issue were not publicly available for two reasons.

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<sup>16</sup> *Id.*, Attach. 1, ¶¶ 19-21 (Affidavit of Brian O. Walsh, President) ("Walsh Aff.").

<sup>17</sup> *Id.* at ¶¶ 23-28.

<sup>18</sup> *See* 11 C.F.R. § 109.21(d)(1), (3).

<sup>19</sup> *See* 52 U.S.C. § 30116(a)(7)(B)(i).

<sup>20</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003). In its Explanation and Justification of the new coordinated communication rules, the Commission clarified that "a request that is posted on a web page that is available to the general public" is not a basis for coordination. *Id.*

<sup>21</sup> 11 C.F.R. § 109.21(d)(3).

- First, the Complaint asserted that the posts were “hidden” on accounts that “only certain groups knew existed.” But the Complaint does not provide any information to support its claim. While it is possible for Twitter users to protect their accounts so that their posts are not publicly accessible, the accounts at issue here were both publicly accessible and searchable. Thus, nothing in the record supports the inference that these accounts were any more “hidden” than any other unprotected Twitter account.
- Second, the Complaint asserted that the postings were “encoded” so that members of the public could not understand them.<sup>22</sup> This claim is similarly unavailing. At least one independent third party familiar with polling data recognized the Twitter posts as containing “top-line poll results.”<sup>23</sup>

The Complaint did not provide any evidence to show that the Respondents communicated with each other about these Twitter posts or about any messages that the posts might have been intended to send; indeed, the Respondents affirmed that there were no such communications. Thus, the record does not provide any information to support the assertion that the Twitter posts constituted NRCC’s non-public requests or suggestions to, or were the result of NRCC’s substantial discussions with, AAN or American Crossroads.<sup>24</sup>

But even if the Twitter posts were “hidden” or “encoded,” and thus not publicly available, the record still would not have supported a conclusion that the Respondents unlawfully coordinated with each other because there was no evidence indicating that the Twitter posts provided information that was material to American Crossroads’s or AAN’s public communications. To the contrary, AAN explained that its public communication spending decisions are based on its own privately commissioned polls, conducted by carefully vetted pollsters, and containing questions customized to address AAN’s particular issues of interest.<sup>25</sup> These poll results include “cross-tabs” — hundreds of pages of “granular” data — and are subjected to regression analyses and evaluated in light of voter turnout models and other

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<sup>22</sup> Compl. at 7.

<sup>23</sup> *See also* Cohn Article (interpreting Twitter polling data and explaining that anyone considering whether to use it “wouldn’t have done so without more information”).

<sup>24</sup> *See* Walsh Aff. ¶¶ 22-23 (“[T]he Twitter polls did not suggest to me that the NRCC thought those races were any more or less important, either over time or in relation to each other. . . . AAN avoided obtaining information about the NRCC’s non-public campaign plans, projects, activities, or needs and obtained no such information from the NRCC on how AAN should react to the Twitter polls. In any event, the Twitter polls were not material to AAN’s independent expenditure decision-making. AAN’s planning for its independent expenditures was well advanced prior to when the twitter polling information was released.”). Even if, as the Complaint speculates, there were non-public discussions between AAN, American Crossroads, and NRCC, in which NRCC explained how to find and decipher the polls, these discussions would not support a coordinated communication claim absent evidence that the polling data were, in fact, material to AAN’s or American Crossroads’s subsequent public communications.

<sup>25</sup> AAN Resp. at 3-5.

materials.<sup>26</sup> The record indicates that none of this information was available for the “top-line” summaries posted on Twitter. Further, American Crossroads confirmed that the individuals responsible for making its public communication decisions did not even see the Twitter posts at issue;<sup>27</sup> in any event, American Crossroads stated that it spent money on public communications in only one election covered by the polling data in the Twitter posts. For the same reasons that the Twitter posts did not constitute coordination, they also would not have constituted an in-kind contribution.

Finally, due process and prudential considerations warranted dismissing this matter. The allegations here were similar to the allegations in MUR 6958 (McCaskill), which the Commission dismissed. In that matter, Senator McCaskill authorized her pollster to speak with another campaign committee in “broad generalities” about McCaskill’s internal polling results and analyses of political advertisements. We concluded that the information communicated by McCaskill’s pollster was too general to have value:

[W]hat makes the provision of poll results to a committee something “of value” — and thus a “contribution” under the Act — is in the recipient’s access to the detailed raw data generated from the poll. In contrast, discussing poll results “in general” does not provide a recipient the kind of access to data, cross-tabulations, questions asked, and methodology sufficient to make independent use of the poll or its results. . . . To have real value, the campaign must have access to underlying data sufficient to critically analyze the data, understand the public’s positions on issues or candidates, opponents, vulnerabilities, which messages are effective, compare demographic groups and alternatives, and otherwise develop an effective political strategy.<sup>28</sup>

Here, the value of any polling data provided in the Twitter posts may have been even more speculative than the value of the information provided by McCaskill’s pollster in MUR 6958. Unlike in that MUR, the Twitter posts at issue here did not include any analyses, advice, conclusions, or other guidance regarding the data or its use.

Moreover, even if the Respondents had technically violated the Act, further pursuit of this matter would have been an unwise use of Commission resources. Any investigation and analysis of the Respondents’ actions under the conduct prong of the Commission’s coordinated communication regulation and precedents likely would have been difficult and resource- and fact-intensive, particularly given the paucity of information in the Complaint. Further, this drain on Commission resources likely would have significantly overshadowed any benefit to be derived from pursuing the matter, given the questionable value of the information in the Twitter

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<sup>26</sup> *Id.* at 4-5.

<sup>27</sup> American Crossroads Resp. at 3.

<sup>28</sup> MUR 6958, Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen. Despite the similar facts, neither OGC nor our colleagues on the Commission suggested in that matter that political advertisements run by the campaign committee with which Senator McCaskill’s pollster discussed “poll results” would have been coordinated communications.

posts. Finally, the Commission's ability to enforce the Act and regulations was not impaired as a result of this dismissal. The volume of complaints before the Commission is at or near record levels; thus, the Commission should have an opportunity to address the legal issues raised here in another matter with a stronger record. Under these circumstances, dismissing this matter as an exercise in ordering Commission enforcement priorities was not only reasonable, but proper.<sup>29</sup>

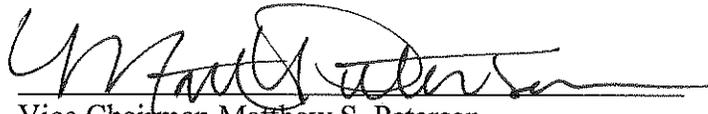
### **III. CONCLUSION**

For these reasons, we did not vote in favor of OGC's recommendations to find reason to believe that the Respondents violated the Act and voted, instead, to close the file.

May 2, 2019

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<sup>29</sup> *Heckler v. Chaney*, 470 U.S. 821 (1985); *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018).



Vice Chairman Matthew S. Petersen



Commissioner Caroline C. Hunter