STATEMENT OF REASONS OF CHAIR ELLEN L. WEINTRAUB

For our campaign finance system to work, the Federal Election Commission must regulate coordinated activity between political party committees and outside spenders. If we do not, then coordinated third-party expenditures could render contribution limits meaningless. Outside groups that are not subject to contribution limits, but are privy to the strategies and objectives of national party organizations could spend limitless amounts of money on independent expenditures that further partisan goals. Each dollar would then have the same effect as if contributed to the party.\(^1\) Sadly, this situation has become more common now that parties and outside groups are coordinating over the Internet. But unlike situations where a political campaign posts B-roll on YouTube for all to see and use,\(^2\) the Respondents in this case hid their coordination in not-so-plain sight, sharing virtually indecipherable information over social media.

In the months leading up to the 2014 midterm elections, employees of the National Republican Congressional Committee (“NRCC”) took to Twitter to publish polling data via anonymous accounts.\(^3\) These tweets contained polling results for over fifty congressional races, but the information was not immediately recognizable as polling data. Read the following tweet, which is representative of over 150 messages published on Twitter:\(^4\)

IL-39/37-36/28/10-36/19-44/51-7/21/14-12

---

4. NRCC Resp. at 3, MUR 6908 (Jan. 28, 2015) (describing this tweet as “typical” of all the other Twitter posts); Chris Moody, See the GOP’s Coded Tweets, CNN (Nov. 18, 2014), https://www.cnn.com/2014/11/18/politics/gop-tweets-screenshots (providing screenshots of all the known tweets).
To most readers, it looks like gibberish. The tweet is devoid of context or narrative and the information does not make any sense at a glance. Pollsters may recognize it as “topline” political polling data, but even sophisticated readers may not fully understand the message. And barring inside knowledge, no one who read these tweets could attribute the information to the NRCC. Without that attribution, the American public had no idea that a national party organization was publishing polling results for several congressional races or that the information in the tweets came from an authoritative source.

Despite the obscurity of these Twitter accounts, two outside groups appear to have reviewed the polling data. American Action Network (“AAN”), a conservative social welfare organization, admits that it “periodically reviewed[] the poll results that NRCC posted on Twitter.” American Crossroads, a pro-Republican Super PAC, denies that its CEO and Political Director read these tweets, but that does not eliminate the possibility that American Crossroads’s staff or consultants reviewed the tweets. And for thirteen of these congressional races, either AAN or American Crossroads made independent expenditures totaling roughly $11.5 million after the NRCC tweeted polling data, as summarized in the following chart:

<table>
<thead>
<tr>
<th></th>
<th>August 2014</th>
<th>September 2014</th>
<th>October 2014</th>
<th>IEs Made After Tweets</th>
</tr>
</thead>
<tbody>
<tr>
<td>AR 2</td>
<td></td>
<td></td>
<td></td>
<td>$1.4 million</td>
</tr>
<tr>
<td>AZ 1</td>
<td></td>
<td></td>
<td></td>
<td>$893,893</td>
</tr>
<tr>
<td>AZ 2</td>
<td></td>
<td></td>
<td></td>
<td>$503,742</td>
</tr>
<tr>
<td>CA 7</td>
<td></td>
<td></td>
<td></td>
<td>$1.1 million</td>
</tr>
<tr>
<td>FL 26</td>
<td></td>
<td></td>
<td></td>
<td>$1.2 million</td>
</tr>
<tr>
<td>IA 1</td>
<td></td>
<td></td>
<td></td>
<td>$469,715</td>
</tr>
<tr>
<td>IL 13</td>
<td></td>
<td></td>
<td></td>
<td>$100,438</td>
</tr>
<tr>
<td>MN 8</td>
<td></td>
<td></td>
<td></td>
<td>$737,269</td>
</tr>
<tr>
<td>NJ 3</td>
<td></td>
<td></td>
<td></td>
<td>$596,854</td>
</tr>
<tr>
<td>NY 1</td>
<td></td>
<td></td>
<td></td>
<td>$1.4 million</td>
</tr>
<tr>
<td>NY 18</td>
<td></td>
<td></td>
<td></td>
<td>$593,465</td>
</tr>
<tr>
<td>TX 23</td>
<td></td>
<td></td>
<td></td>
<td>$497,320</td>
</tr>
<tr>
<td>VA 10</td>
<td></td>
<td></td>
<td></td>
<td>$9,613</td>
</tr>
</tbody>
</table>

---

5 First GCR at 11-12, MUR 6908 (noting that the CNN reporter who broke this story could not correctly interpret the polling data).

6 Nate Cohn, Sharing Polling Numbers on Twitter: Decoding a Mystery, N.Y. TIMES (Nov. 26, 2014), https://nyti.ms/1FrNICx (noting that the accounts did not have followers).

7 First GCR at 14, MUR 6908.

8 Am. Crossroads Resp. at 2-3, MUR 6908 (Jan. 28, 2015); First GCR at 6 (“The Response acknowledges that ‘[the CEO and Political Director] solicit input and recommendations from staff and consultants . . . .’”).

How did AAN and American Crossroads find these tweets? How did they know what the
tweets meant? Did AAN and American Crossroads use the polling data to make their independent
expenditures? We can reasonably infer that the NRCC somehow made AAN and American
Crossroads aware of the tweets and explained to them how to decipher the polling data—an
inference that Respondents do not squarely address.10 My Republican colleagues have nevertheless
decided against pursuing an enforcement action despite this troubling pattern of activity and
evidence sufficient to warrant conducting an investigation.

We have plenty of facts to consider, but more questions that require investigation. The
Federal Election Campaign Act (the “Act”) requires that the Commission find “reason to believe
that a person has committed, or is about to commit, a violation” of the Act as a predicate for
investigating an alleged violation.11 A reason-to-believe finding does not mean that the Commission
has found a violation of the law, it merely indicates that the Commission found sufficient legal
justification to open an investigation.12 If a complaint credibly alleges that a violation may have
occurred, then it is appropriate to investigate the matter to determine the actuality and scope of the
violation.13

Here, the Complainant provided enough evidence to warrant an investigation. Per agency
guidance, the Complaint linked to the news article that uncovered the NRCC’s potential
coordination with AAN and American Crossroads.14 CNN published screenshots of the tweets—
hard evidence of the content of the communications and circumstances surrounding the alleged
coordination. Moreover, the NRCC conceded in its response that:

The Twitter accounts identified in CNN’s report (@BrunoGianelli44
and @TruthTrain14) were created and used by two NRCC employees.15

The American public may freely cite in their complaints to evidence uncovered by the press; it then
becomes the Commission’s responsibility to consider that information in light of the facts presented
by the parties and any other information that may be taken into account.16 In this matter, the
screenshots of the tweets and the outside groups’ independent expenditure reports establish the
factual predicate for a reason-to-believe finding. That is enough to investigate whether a violation
occurred. The Republican commissioners’ refusal to authorize an investigation because the

10  First GCR at 23, 23 n.88, MUR 6908.
12  Statement of Policy Regarding Comm’n Action in Matters at the Initial Stage in the Enforcement Process, 72
13  Id. Before the Commission votes to find reason to believe, the Commission weighs any written arguments
presented by respondents explaining why no action should be taken against them. 52 U.S.C. § 30109(a)(3).
14  Guidebook for Complainants and Respondents on the FEC Enforcement Process at 6, FED. ELECTION COMM’N
(May 2012) [hereinafter “FEC Enforcement Guidebook”] (instructing complainants to provide links to the news articles
or websites upon which the complaints are based); Compl. at 3 n.3, MUR 6908 (NRCC, et al.) (linking to Chris
Moody’s CNN article); Moody, supra note 4.
15  NRCC Resp. at 3, MUR 6908 (NRCC, et al.).
16  FEC Enforcement Guidebook at 6.
complainant did not already compile all the evidence unfairly places the onus on the complainant to do the work of the investigatory body.

Furthermore, part of my Republican colleagues’ rationale for not pursuing an investigation turns on whether the tweets were “publicly available information.”17 Under Commission regulations, a communication is coordinated with a political committee when the facts satisfy a three-pronged test, one of which—the conduct prong—provides safe harbors for information obtained from publicly available sources.18 If the NRCC’s tweets were publicly available information, the conduct prong would not be satisfied.19

There’s no way these cryptic tweets were publicly available information. The tweets were not in any way designed for public consumption despite the public nature of Twitter’s platform. To read tweets, a Twitter user would generally have to follow another user or find the tweet with a search.20 Members of the general public would therefore have to know the usernames of the NRCC employees who sent these tweets or enter a search that matches some part of “IL-39/37-37/36-28/10-36/19-44/51-7/21/14-12,” for example.21 These accounts had no followers.22

The content of the tweets were facially meaningless strings of text and numbers that were not attributable to the NRCC. The average Twitter user probably would not know what the tweets represented even if they somehow stumbled upon them.23 If the NRCC sought to make this polling data available to the public generally, it should have sent the information from its verified Twitter account and preserved the information for the public to review.24 Instead, the tweets and the Twitter accounts were quickly deleted shortly after the press questioned the NRCC about them.25 Moreover, the Commission did not have these kinds of Internet communications in mind when it created these

17 See Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 2, 5, MUR 6908 (NRCC, et al.) [hereinafter “Statement of the Republican Commissioners”]; see also NRCC Resp. at 6 (arguing that the messages posted on Twitter were publicly available).
18 First GCR at 16-24, MUR 6908; 11 C.F.R. § 109.21(d)(2) (safe harbor for the “material involvement” conduct standard); § 109.21(d)(3) (safe harbor for the “substantial discussion” conduct standard).
19 See 52 U.S.C § 30104(b) (reporting requirements); 11 C.F.R. § 100.52(d)(1) (in-kind contributions).
20 About Your Twitter Timeline, TWITTER.COM, https://help.twitter.com/en/using-twitter/twitter-timeline (last visited Apr. 29, 2019). Twitter will sometimes display Tweets from accounts that a user does not follow, but only when that content is popular, relevant, or promoted. Id. Nothing in the record shows that the tweets were popular, relevant to any user, or promoted.
22 Cohn, supra note 6.
23 Philip Bump, Republicans, Twitter and the Brave New World of Campaigning/Outside Group Coordination, WASH. POST (Nov. 17, 2014), http://wapo.st/1sYzgyT (“If it’s impossible to translate the poll numbers without some special knowledge, that implies a level of coordination between campaigns and outside groups that moves this beyond a legal gray area and into a black one.”); Cohn, supra note 6 (“[I]t’s hard to be certain about the data or its assumptions. Without additional information, it’s a stretch to imagine that the tweets were useful to anyone.”).
24 First GCR at 10, 10 n.38, MUR 6908 (noting that “NRCC has operated a ‘verified’ Twitter account in its own name since April 2007”).
25 Id. at 3.
safe harbors—it instead envisioned information openly disseminated to the public, like a speech at a campaign rally.26

Even if the tweets were publicly available information, the safe harbor does not apply to the “request or suggestion” conduct standard in 11 C.F.R. § 109.21(d)(1).27 As the Office of the General Counsel put it: “given the many millions of Tweets posted every day and the anonymity of the two accounts the NRCC used for the purpose, there must have been some communication between the Respondents for AAN and American Crossroads to find the postings.”28 It is also reasonable to infer that the NRCC explained to AAN and American Crossroads how to correctly interpret the polling data.29 There is no safe harbor for an insider tip about obscured polling data anonymously conveyed online.

The Republican commissioners argue that topline polling data has little value and would not be material in deciding where to spend money on political ads. Please. If a major national party organization broadcasts polling results, outside groups will pay attention. And if the polling data had no value, why post it at all? By posting polling results for only certain races, the NRCC may have prompted AAN or American Crossroads to intervene in (or avoid) certain congressional races.30 That aside, my colleagues cite only to themselves when they compare this to MUR 6958 (McCaskill, et al.), which Republican commissioners blocked after the Office of the General Counsel recommended investigating allegations similar to what we have here.31 Their sophistry is no more persuasive the second time around.

Finally, my Republican colleagues cover up their flawed rationale by invoking prosecutorial discretion.32 As I have repeatedly warned, a minority of commissioners now routinely paper over flimsy legal rationales with inauthentic concern over the conservation of Commission resources.33 They speculate that this case would have been a “drain” on Commission resources, when in fact the Office of the General Counsel proposed a limited, narrowly tailored investigation.34 And their pretense that refusing to investigate here will preserve the Commission’s ability to enforce the Act and its regulations in other cases is particularly brazen.35 The Commission has not once entered into

26 Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006) (explanation and justification).
28 First GCR at 23, MUR 6908.
29 Id.
30 First GCR at 13, MUR 6908.
31 Statement of the Republican Commissioners at 6; First GCR at 11, MUR 6958 (McCaskill, et al.)
34 See First GCR at 28, MUR 6908.
35 Statement of the Republican Commissioners at 7.
pre-probable cause conciliation or found probable cause to believe that a respondent violated the coordination regulations since the 2010 decision in Citizens United.

I voted to launch an investigation in November 2015, the same month we received the recommendations from the Office of the General Counsel. Yet my Republican colleagues have dragged their feet in this matter time and time again, agreeing to close the matter only as we approach the expiration of the five-year statute of limitations. Whatever the outcome, it should not take four years for commissioners to make up their minds.

Party committees and outside groups may not coordinate their communications by conveying information with a digital needle in a virtual haystack—that is not the purpose of the safe harbors. If this were permissible, then anybody could coordinate communications by burying their material on the Internet, disguising it or placing it beyond the reach of the general public. The Federal Election Commission should have taken this opportunity to clarify the application of the safe harbors for publicly available information and pursued an investigation against the Respondents. Instead we are left with more confusion while the Internet continues to evolve and outpace our regulatory framework.

May 6, 2019
Date

Ellen L. Weintraub
Chair