



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

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

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

¹ See *Buckley v. Valeo*, 424 U.S. 1, 36-37 (1976).

² See Statement of Reasons of Vice Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther (Feb. 27, 2012), <https://eqs.fec.gov/eqsdocsMUR/12044312290.pdf>.

³ First Gen. Counsel’s Rpt. at 2-4, MUR 6908 (NRCC, *et al.*) [hereinafter “First GCR”].

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.⁵ 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.⁶ American Action Network (“AAN”), a conservative social welfare organization, admits that it “periodically reviewed[] the poll results that NRCC posted on Twitter.”⁷ 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.⁸ 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:⁹

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

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’”).

⁹ See First GCR at 7-8, MUR 6908; Compl. at 3, 3 n.7; 24- and 48-hour Reports of Am. Crossroads, FEC.GOV, <https://www.fec.gov/data/committee/C00487363/?tab=filings&cycle=2014#notices>; 24- and 48-hour Reports of Am. Action Network, FEC.GOV, <https://www.fec.gov/data/committee/C90011230/?cycle=2014&tab=filings#notices>.

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.

¹¹ 52 U.S.C. § 30109(a)(2).

¹² Statement of Policy Regarding Comm’n Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007).

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.

²¹ *How to Follow People on Twitter*, TWITTER.COM, <https://help.twitter.com/en/using-twitter/how-to-follow-someone-on-twitter> (last visited Apr. 29, 2019).

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/1sYzgvT> ("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).

²⁷ 71 Fed. Reg. at 33,205.

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.*)

³² *Statement of the Republican Commissioners* at 6-7 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)); *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018).

³³ Statement of Chair Ellen L. Weintraub Re: D.C. District Court Decision in *CREW v. FEC (New Models)* (Apr. 5, 2019), https://www.fec.gov/resources/cms-content/documents/2019-04-05_ELW_Statement_-_DDC_decision_in_New_Models.pdf; Statement of Vice Chair Ellen L. Weintraub On the D.C. Circuit’s Decision in *CREW v. FEC* (June 22, 2018), https://www.fec.gov/resources/cms-content/documents/2018-06-22_ELW_statement_re_CREWvFEC-CHGO.pdf.

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
Ellen L. Weintraub
Chair