



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

David Vitter for U.S. Senate and)

William Vanderbrook in his official capacity)
as treasurer)

MUR 5587R

STATEMENT OF REASONS OF COMMISSIONER HANS A. von SPAKOVSKY

This matter arises from a complaint alleging that the David Vitter for U.S. Senate campaign commissioned telephone calls that lacked proper disclaimers. I dissented from the Commission's vote to find probable cause to believe that the respondent violated 2 U.S.C. § 441d, and write separately to explain that dissent.¹ (Subsequently, I dissented from the Commission's determination to authorize the Office of General Counsel to file a civil suit against David Vitter for U.S. Senate and William Vanderbrook, in his official capacity as treasurer.²)

I. Background

A. The First Set of Telephone Calls

Prior to the 2004 election for U.S. Senate in Louisiana, the respondents hired a commercial polling company to conduct two sets of telephone polling calls. The first set of calls

consisted of advocacy and voter identification calls. At the beginning of each call, the callers informed the recipient that s/he was "working with the David Vitter for U.S. Senate Campaign." The caller then explained, "I have decided to work to elect David Vitter because he has worked hard to being good jobs to Louisiana[,] . . . has a concrete record of fighting political corruption [a]nd fully

¹ I objected to the recommendations made in the *First General Counsel's Report* for the same substantive reasons as set forth herein. I approved the recommendation made in *General Counsel's Report #2* to authorize compulsory process to permit the Office of General Counsel to conduct a limited investigation in this matter. That investigation was necessary to resolve certain issues pertaining to the first set of telephone calls.

² This objection was made in response to the recommendations made in *General Counsel's Report #4*.

27044174766

supports the Bush tax cuts;" asked the recipient of the call if "David Vitter [can] count on your vote on election day;" and asked what issue the recipient considered to be the most important issue facing our nation today. The caller ended by stating, "Thank you for your time and we really do hope you will consider David Vitter for U.S. Senate when you go to vote."

First General Counsel's Report at 2-3 (citations omitted); see also General Counsel's Report #3 at 2-3.

I agree fully with the Commission's actions in this matter with respect to this first set of telephone calls. These calls were clearly advocacy messages in support of David Vitter, and having been made in sufficient quantity, constituted a telephone bank to the general public, and thus, a public communication that lacked an adequate disclaimer as required under 2 U.S.C. § 441d. See 2 U.S.C. §§ 431(22) and (24); 11 CFR 100.26 and 100.28. The Commission properly determined that the caller's introductory statement that he was "working with the David Vitter for U.S. Senate Campaign" constituted a partial disclaimer under these facts.

B. The Second Set of Telephone Calls

Following the first set of calls, a second set of telephone calls was made to individuals classified as "undecided" based on the results of the first set of calls.

In the "Undecided" poll calls, the caller stated that s/he was from "PJB Media Research," simply asked the recipient, "In the U.S. Senate Race (sic) in November are you more likely to vote for," and then listed the names of the candidates, including David Vitter. The caller was instructed to rotate the order of reading the candidates' names when making the calls. It is alleged that the callers were instructed to use a fake name to identify themselves personally, in addition to using the name PJB Media Research.

First General Counsel's Report at 3; see also General Counsel's Report #3 at 3.

These calls contained no indication that they were paid for by respondent. My colleagues concluded that these calls required a disclaimer pursuant to 2 U.S.C. § 441d on the grounds that "disclaimers are required on any telephone bank communications, without regard to their content, for which a political committee makes a disbursement." *General Counsel's Report #3 at 4; see also First General Counsel's Report at 5* ("disclaimers are required on any phone bank communications for which a political committee makes a disbursement"). I disagree with this conclusion.

II. Analysis

Under the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002,

27044174767

[w]henever a political committee makes a disbursement for the purpose of financing any communication through *any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising*, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through *any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising* or makes a disbursement for an electioneering communication (as defined in [2 U.S.C. § 434(f)(3)]),

that communication must include the prescribed disclaimer. 2 U.S.C. § 441d(a) (emphasis added). Notably, this provision does not mention telephone banks, meaning that if telephone banks are to be subjected to the disclaimer requirements, it must be because they are “any other type of general public political advertising.”

The Act incorporates the term “telephone bank to the general public” into its definition of “public communication,” which the Commission determined should be used in place of the term “communication” at 2 U.S.C. § 441d(a).³ See 2 U.S.C. § 431(22); *Final Rules on Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds*, 67 Fed. Reg. 76,962, 76,964 (Dec. 13, 2002) (“the term ‘public communication’ serves generally to describe the proper reach of the disclaimer rules”). The Commission also determined that “telephone banks to the general public” are subject to the disclaimer requirements. See *id.* at 76,963 (“[r]equiring a caller to identify himself or herself serves important disclosure functions consistent with Congressional intent to broaden the reach of the previous laws regarding disclaimers”).

These determinations are entirely correct – provided we acknowledge the context in which they were made. In explaining why it considered the term “communication” (as used in 2 U.S.C. § 441d) to be coterminous with the statutory term “public communication,” the Commission observed that it “interprets each term listed in the definition of ‘public communication’ or in 2 U.S.C. 441d(a) as a specific example of one form of ‘general public political advertising.’” *Id.*; see also *id.* (“each form of communication specifically listed in the definition of ‘public communication,’ as well as each form of communication listed with reference to a ‘communication’ in 2 U.S.C. 441d(a), must be a form of ‘general public political advertising.’”). Since both 2 U.S.C. § 441d(a) and the definition of “public communication” at 2 U.S.C. § 431(22) utilize the phrase “general public political advertising,” they can reasonably be read to cover the same territory even if “public communication” includes additional specific terms not found in 2 U.S.C. § 441d, because those additional terms are captured by “general public political advertising” in 2 U.S.C. § 441d.

³ The Commission’s disclaimer regulations specifically replace the term “communication” with the statutory term of art “public communication.” See 11 CFR 110.11 (“this section applies only to public communications” plus certain email communications, political committee websites, and electioneering communications)

These considerations, however, do not necessarily lead to the conclusion that a political committee's "telephone bank to the general public" is subject to the disclaimer requirements, regardless of content.⁴ The more logical (and common sense)⁵ conclusion is that the disclaimer requirements apply *only* to "telephone banks to the general public" that have the character of, and can reasonably be considered to be, "general public political advertising."⁶

The second set of telephone calls were not "political advertising." They contained no advocacy message or exhortation to take any sort of political action and they did not promote, attack, support or oppose any candidate or party. Rather, they were politically-neutral polling calls asking potential voters which candidate they preferred. The candidates' names were even rotated from one call to another so that the well-recognized bias caused by name order would not affect the results. No one receiving this call would be any more or less inclined to support David Vitter, or take any action that might impact David Vitter's election, after hanging up the phone.

Understanding "telephone banks" with the gloss of "political advertising" applied also has the virtue of producing consistency with the common understanding of "telephone banks" in the political arena. Candidate and political party "telephone banks" ask people to vote, contribute money, promote a candidate or party, or explain why an opposing candidate or party should not be supported. A research or polling call that contains no advocacy of any sort is simply not what is meant by the term "telephone bank to the general public."

Thus, I conclude that the second set of telephone calls was neither a "telephone bank to the general public," nor "general public political advertising," and thus not a "public communication" that required a disclaimer.

⁴ This is the conclusion my colleagues reached. See *General Counsel's Report #3* at 7 ("the only requirements for the calls to be considered a phone bank are those set forth by Congress in the Act, specifically that the calls were substantially similar in nature and totaled more than 500 over the course of 30 days").

⁵ Unfortunately, common sense is occasionally overwhelmed by the Byzantine and often confusing maze of campaign finance statutes and regulations

⁶ This conclusion applies to every specific term listed in the definition of "public communication," and to the term "public communication" itself. "Public communication" is defined as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising" 2 U.S.C. § 431(22) (emphasis added), see also 11 CFR 100.26. The most natural reading of this language indicates that Congress views each of the specifically-listed means of communication to be forms of "general public political advertising." Thus the phrase "general public political advertising" is a descriptive term that modifies and informs the meaning of the specific terms preceding it. In other words, "public communication" has a built-in content standard; to conclude otherwise ignores the language of the statute and elevates ease of administrative implementation over plain meaning. I hope that in the future the Commission will recognize that Congress intended only to require disclaimers on those "public communications" (or "communications") that have the character of "general public political advertising."

27044174769

From a public policy standpoint, the majority's view that research and polling calls require disclaimers is something that will make social scientists and pollsters shudder with dismay. Legitimate political survey research *never* identifies the campaign paying for the survey, because doing so undermines the validity of the results. Many survey respondents, especially those who are less well-informed, look for cues to the "correct" answer to a question. When respondents know that candidate A paid for the survey, then they have all the cues they need to lean towards choosing candidate A on a preference question, and the survey will give that candidate an inflated estimate of his standing. Many polling firms do not even tell their interviewers who is paying for the survey, so the interviewers cannot hint or suggest answers to the members of the public they contact. Telling someone who is responding to a political survey the name of the sponsor of that survey undermines the fundamental tenets of political survey research. The Commission's conclusions in this matter fail to take into account these legitimate concerns, and create a troublesome precedent, and one that I am sure Congress did not intend when it passed BCRA.

III. Conclusion

For the foregoing reasons, I voted against proceeding to the probable cause stage (and then to the civil suit stage) in this matter with respect to the second set of telephone calls commissioned by the respondent. Those particular calls did not violate the disclaimer requirements of 2 U.S.C. § 441d. The Commission should make clear to the regulated community that legitimate survey research and polling calls (as opposed to "push polls") are not "telephone banks to the general public" that require a disclaimer.

One or more of my colleagues indicated that these were not *bona fide* research and polling calls, but rather, were part of David Vitter's get-out-the-vote effort. I disagree that this – assuming it were true – would necessarily subject those calls to the Act's disclaimer requirements, and prefer an approach that examines only the text of a phone call to determine whether it has a "political advertising" character. However, this distinction at least offers some hope that a research or polling call *could* be found exempt from the disclaimer requirements by my colleagues in the future, and that this MUR is not a broadly definitive statement on any and all research and polling calls.

September 4, 2007


Hans A. von Spakovsky, Commissioner

27044174770