FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Democratic Congressional Campaign	)	MUR 5835
Committee and Brian L. Wolff, in his	)	
official capacity as treasurer	)	

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STATEMENT OF REASONS
Vice Chairman MATTHEW S. PETERSEN and
Commissioners CAROLINE C. HUNTER and DONALD F. McGAHN

The issue in this matter is whether survey research (colloquially referred to as "polls" or "polling") conducted over the telephone on behalf of a political committee must contain certain disclaimers. The Office of General Counsel ("OGC"), in its recommendation to find probable cause to believe a violation occurred in this matter, and more than six years after the Bipartisan Campaign Reform Act ("BCRA") became effective, suggests that BCRA does impose such an obligation. We disagree, and voted against finding probable cause. Here, telephone polls do not require disclaimers, and to say otherwise goes beyond the scope of 2 U.S.C. § 441d.

I. INTRODUCTION

Prior to our joining the Commission and in its normal course of carrying out its supervisory responsibilities, OGC became aware of information which, it believed, suggested that an individual or entity may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by failing to include disclaimers on two sets of telephone polls in support of Congressman Leonard Boswell during the 2004 election cycle. On October 5, 2006, the Commission voted to find reason to believe ("RTB") that an unknown respondent, possibly a political committee, violated 2 U.S.C. § 441d, and authorized an investigation to determine the identity of the entity responsible for telephone polls which OGC asserted required a disclaimer.[1] Over a year later, on December 17, 2007, the Commission voted to substitute the names of Boswell for Congress and Carl McGuire, in his official capacity as treasurer ("the Boswell Committee"), and the Democratic Congressional Campaign Committee and Brian L. Wolff, in

[1] MUR 5835, Certification dated Oct. 5, 2006; MUR 5835, Factual and Legal Analysis at 3 ("The available information does not establish who paid for the telephone calls. However, we do know that the individual or entity is a client of Quest and that there is a possibility that this client is a political committee....").

his official capacity as treasurer (the "Committee," "DCCC" or "Respondent"), in place of the unknown respondent in the Commission's previous RTB finding.[2]

On February 13, 2008, the DCCC (through counsel) submitted a memorandum in response to the Commission's December 17, 2007 vote, asking that the Commission reconsider its RTB finding against the DCCC on the grounds that the Commission's application of section 441d to what the Committee described as "legitimate public opinion polls" is an impermissible construction of section 441d. The DCCC had not had an opportunity to present this, or any other argument prior to the Commission's vote on OGC's recommendation to find RTB against the person or entity responsible for the telephone polls—a recommendation based on a theory that presupposed that the polls required disclaimers. This motion to reconsider was never presented to the Commission for a vote,[3] although OGC eventually notified the Commission that it had been made.[4] Despite this motion, on July 1, 2008, OGC served on Respondent a brief stating its intent to recommend that the Commission find probable cause to believe a violation of the Act occurred. The DCCC responded in opposition, relying on the substance of their previous unconsidered motion, and requested a probable cause hearing. A hearing was held on October 28, 2008. On December 22, 2008, OGC submitted an additional brief to the Commission, once again recommending probable cause.[5] On February 10, 2009, we voted to reject OGC's recommendation.[6]

II. STATEMENT OF FACTS

The Committee hired a polling and voter identification company, Anzalone Liszt Research, Inc. ("Anzalone"), to conduct two telephone polls in October 2004. The Committee paid a total of $20,000 for the polls, and reported the disbursements as coordinated party

[2] MUR 5835, Certification dated Dec. 17, 2007.

[3] As we discuss below, we are concerned that the DCCC, like other similarly-situated parties in non-complaint generated matters, did not have the ability to respond to the reason to believe recommendation before the Commission votes on that recommendation.

[4] On March 17, 2008, OGC notified the Commission (which, at that time, lacked a quorum) of its intent to proceed on a procedural issue unrelated to the Committee's motion to reconsider. Memorandum from Thomasenia P. Duncan to The Commission (Mar. 17, 2008) at 2. However, in that same memorandum, OGC informed the Commission that:

> On February 12, 2008, counsel for the Committee submitted a memorandum in response to the Commission's reason to believe finding. The memorandum requests that the Commission "reconsider" its reason to believe finding based on a variety of policy arguments. Specifically, the Committee argues, *inter alia*, that the application of section 441d to what it describes as "legitimate public opinion polls" is an impermissible construction of section 441d and Commission rules that would "change campaigning in ways that Congress never imagined," and infringes the First Amendment rights of the Committee and all candidates and political committees that conduct polling.

Id. In conclusion, the Commission was also told that OGC had already "informed counsel that we were prepared to move on to the next stage in the enforcement process." *Id.*

[5] As discussed below, we question whether current Commission practice at the probable cause briefing stage comports with the Act.

[6] MUR 5835, Certification dated February 10, 2009.

expenditures for Leonard Boswell, the incumbent candidate in Iowa's 3rd Congressional District in the 2004 general election.

Anzalone subcontracted the first poll to a vendor, Communications Center, Inc. ("CCI"). CCI asked questions regarding demographics, the likelihood a voter would vote for a Democratic or Republican party candidate, the voter's impression of the Presidential and Congressional candidates, and the voter's likelihood to vote for Boswell's opponent, Stan Thompson, after hearing several negative statements about Thompson.[7] As is typical with polls, the poll did not contain a disclaimer disclosing who paid for the call, and did not state whether it was authorized by a candidate. Information obtained during the Commission's investigation indicates that CCI completed 550 calls between October 12 and 14, 2004, for which it billed Anzalone, and Anzalone in turn billed the Committee $10,000 for the calls.

The second poll was subcontracted to another vendor, Quest Global Research, Inc. ("Quest"). Like the preceding poll, this poll sought general demographic information, the likelihood the voter would choose a major party candidate, and impressions of the Presidential and Congressional candidates. This time, the poll inquired about the voter's likelihood to vote for Stan Thompson after hearing the following statement:

> Stan Thompson opposes additional spending in Afganistan [*sic*] that will help in the hunt and capture of Osama Bin Laden and the fight against terrorism.

The poll comprised at least 600 telephone calls and took place between October 21 and 25, 2004. Quest billed Anzalone for 600 calls, but information obtained during the Commission's investigation indicates that Quest completed 800 calls in connection with the poll. Anzalone billed the Committee $10,000 for the second poll. The poll did not contain a disclaimer disclosing who paid for the call, and did not state whether it was authorized by a candidate.

The Committee's response to the RTB finding confirms that more than 500 calls were made within a thirty day period, and that the DCCC spent approximately $10,000 on the first set of calls and approximately $10,000 on the second set of calls. Therefore, it appears that the Committee spent a total of $20,000 on both sets of calls.

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[7] For example, statements tested in the first poll included:

- "Stan Thompson supported the Republican Prescription Drug Program that was called a 'big win' for the drug industry by the Wall Street Journal. The new program is too confusing, doesn't guarantee lower drug prices and blocked access to safe and affordable drugs from Canada."
- "Stan Thompson supports free trade agreements that allow the use of child labor by third world countries, undercutting American jobs. Thompson was quoted saying that 'child labor is no reason for impeding [sic] trade promotion."
- "Stan Thompson supports George Bush's economic policies that create tax incentives for American companies to ship their jobs overseas."

MUR 5835, Factual and Legal Analysis at 3.

III. ANALYSIS

A. Polls Do Not Require Disclaimers

OGC, in recommending that the Commission find probable cause to believe a violation occurred, asserted that the DCCC violated 2 U.S.C. § 441d because it made disbursements for telephone polls that did not include a disclaimer. Respondent countered that section 441d does not impose a disclaimer requirement upon telephone polls, and that any construction of the statute (including *via* regulation) that purports to impose such a requirement: (i) would be counter to the unambiguously expressed intent of Congress; (ii) would not be the result of reasoned decision making; and (iii) would raise significant First Amendment issues.

We agree with Respondent (although we need not reach several of the issues it raises), and begin our analysis with the statute itself. Under the Act, as amended by BCRA, disclaimers are required:

- "Whenever 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*,"

- "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

- "Whenever any person makes a disbursement for an electioneering communication [as defined in 2 U.S.C. § 434(f)(3)]."[8]

The plain language of this section does not impose disclaimer requirements upon polls, survey research, or anything of the sort. Instead, the reach of this section applies to "general public political advertising." OGC's argument, however, leapfrogs the statute, and instead is based on a self-fulfilling, mechanical application of the Commission's regulations. Notwithstanding the limits of the statutory language, OGC suggests that section 110.11(a)(1) of the Commission's regulations applies disclaimer mandates not only on "general public political advertising," but also on the more general concept of "public communications," as defined by 2 U.S.C. § 431(22), which is relevant only for the purposes of certain funding restrictions under the Act.[9] That section includes "telephone bank" in its definition, which in turn is defined to mean "more than 500 calls of an identical or substantially similar nature within a 30-day

[8] 2 U.S.C. § 441d(a) (emphasis added).

[9] *See, e.g.*, 2 U.S.C. § 431(20) (including certain "public communications" under the definition of "federal election activity," which are subject to funding restrictions if conducted by state and local party committees).

period."[10] According to OGC, because the DCCC's polls utilized 500 or more phone calls, they each constituted a "telephone bank," which, as a form of "public communication," must contain disclaimers under Commission regulations.

This line of reasoning contains a number of flaws. First, this argument ignores the statute itself, particularly section 441d, which deals with disclaimers directly. That section does not include any reference to "telephone bank," let alone the separate concept of polls. When compared with other similar language found elsewhere in the Act, this omission is significant. As stated above, the definition of "public communication" in section 431(22) includes "telephone bank." In contrast, section 441d speaks simply in terms of "communications," "general public political advertising," and "electioneering communications."

The Commission cannot simply ignore such differences in language passed by Congress, because when an ambiguity in a regulation exists, the prudent action on the part of the Commission is to interpret the regulation in such a manner as to avoid the conflict with the statute, and we do so here.[11] After all, the Supreme Court has found such differences in statutory language to be significant.[12] Applying such teachings, if Congress had intended the disclaimer requirement to apply to polls, it would have included at least one of the relevant terms (*e.g.*, "*public* communications" or, more specifically, "telephone bank") in section 441d. It did not, and instead limited the reach of section 441d only to certain "communications," "general public political advertising," and "electioneering communications." Thus, Congress has directly spoken to the issue and there is no need to second guess that decision.[13]

OGC's reading is also inconsistent with legislative intent as expressed by one of BCRA's primary sponsors, Senator Russell Feingold. According to his section-by-section analysis of BCRA, the section amending the disclaimer provision "applies the requirement to any disbursement for public political advertising."[14] The heading for the section is significant, as it

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[10] 2 U.S.C. § 431(24); 11 C.F.R. § 100.28.

[11] We have, in other matters, refused the invitation to read Commission regulations in ways that run counter to the plain language of the statute. *See* Determination of Ineligibility and Letter of Candidate and Committee Certification and Agreement, Mike Gravel for President 2008 (LRA #748), *Agenda Document 08-44* (Dec. 4, 2008) (By a vote of 4-2, the Commission voted not to accept a staff recommendation to deny matching funds eligibility to Presidential candidate Mike Gravel, where, *inter alia*, the recommendation was based on a reading of the Commission's regulations regarding the personal expenditure limitation of the presidential matching funds program that was at odds with the Act's plain language).

[12] *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally or purposely in the disparate inclusion or exclusion.'" (*quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). *See also Cottage Savings Ass'n v. Commission*, 499 U.S. 554, 562 (1991) (when Congress revises a statute, its decision to leave certain sections unchanged indicates acceptance of the preexisting construction and application of the unchanged terms).

[13] *See FDA v. Williamson Tobacco Corp., et al.*, 529 U.S. 120, 132 (2000) (In holding that Congress had directly spoken to the issue and therefore precluded FDA's jurisdiction to regulate tobacco products, the Court stated that a court need not "confine itself to examining a particular provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.").

[14] 148 Cong. Rec. S1994 (Mar. 18, 2002).

describes the amendments to the disclaimer provision as "Standards for Identification of Sponsors of Election-Related Advertising."[15] This suggests that section 441d means what it says: that disclaimers are required only on "general public political advertising." Nothing in this analysis suggests that BCRA was intended to apply the disclaimer provisions beyond various forms of political advertising to activities such as polls.

Even if we assume *arguendo* that Congress did not speak directly to the issue at hand, there is no indication whatsoever that disclaimer requirements are to be imposed upon polls, or that the statute can be reasonably construed in such a manner.[16] This conclusion is further supported by an analysis of the state of the law prior to the enactment of BCRA. In 1995, the Commission considered the option of including phone banks in a "listing of types of activities that constitute general public political advertising."[17] The proposed regulations would have required disclaimers:

> Whenever any person makes an expenditure for the purpose of financing a communication that expressly advocates the election or defeat of a clearly identified candidate or that solicits any contribution, through any broadcast station, phone bank, newspaper, magazine, outdoor advertising facility, poster, yard sign, direct mailing or other form of general public political advertising.[18]

The proposed regulations were adopted – but the reference to phone banks was omitted, because the Commission lacked four affirmative votes supporting its inclusion.[19] As Respondent noted in oral argument, the so-called regulated community perceived this lack of four affirmative votes as meaning that disclaimers were not required on political phone calls. It is against this backdrop that BCRA was passed, and we must presume that Congress was aware of this background when it enacted BCRA.[20]

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[15] *Id.*

[16] *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (setting forth two step analysis when judging agency action: (1) Congress must not have spoken directly to the precise question at issue; (2) if Congress has not directly spoken, the agency's interpretation must be reasonable, and must be based upon a permissible construction of the statute); *see also Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005).

[17] Express Advocacy; Independent Expenditures; Corporation and Labor Organization Expenditures, Explanation and Justification, 60 Fed. Reg. 52,069, 52,070 (Oct. 5, 1995).

[18] Communications Disclaimer Requirements, Notice of Proposed Rulemaking, 59 Fed. Reg. 50,708, 50,710 (Oct. 5, 1994).

[19] 60 Fed. Reg. at 52,070.

[20] Further support for Congress' understanding of the law regarding the application of disclaimer requirements to telephone polls (as opposed to a phone bank, or as discussed in detail below, a "push poll") can be gleaned from the introduction of legislation in the past several Congresses to increase disclosure requirements for phone calls, thus indicating that current law does not reach all phone calls. For example, the Push Poll Disclosure Act of 2007 would have required federal election polls that survey more than 1,200 households to disclose the identity of the survey's sponsor. *See* H.R. 1298, 110th Cong. § 2 (2007).

To construe the regulations in the manner OGC suggests not only goes beyond the statute, it ignores the very real distinctions between polls and telephone banks. "Telephone banks" have been defined as:

> [T]he organized telephoning of large numbers of people to inform them of a policy or action. This is often done by volunteers who come into a work hall and telephone others during a certain time period. Phone banks are used by organizations such as unions, political committees, and others. It is a way for callers to make direct contact with others whose support is sought for a particular cause.[21]

A "poll," on the other hand, has been defined to mean:

> [A] method of collecting information from people by asking them questions. Most polls involve a standardized questionnaire, and they usually collect the information from a sample of people rather than the entire population. Candidates use polls as an essential part of the intelligence-gathering operation of their campaign. Polls provide a candidate with information about what the voters are thinking and how they are inclined to vote.[22]

Therefore, there is a clear distinction between telephone banks, which tend to convey information and thus can arguably be viewed as a form of general public political advertising (notwithstanding the already highlighted distinctions found in the statute), and polls, which by their very nature do not, and thus cannot be viewed as "general public political advertising." After all, polls involve unique dialogues with selected voters, and are designed to extract legitimate information, not to disseminate it. This point is made quite clearly and persuasively by noted pollster Alan Quinlan, who submitted a signed declaration in support of the DCCC's arguments.[23] Mr. Quinlan makes clear that "polls are not designed to persuade voters to influence or to influence the outcome of an election."[24] Rather, "their purpose is to capture information without introducing bias, so that the results can be analyzed and used to inform later strategic decision-making."[25] Mr. Quinlan also directly addresses the central issue: "Public opinion polls are not intended in any way to function as public advertising."[26]

In light of these expert representations, it is clear that, at least with respect to those familiar with campaign and elections, telephone banks and polls are not the same thing. Thus, given the very practical differences between telephone banks and polls, we can only presume that Congress was well aware of the differences between the two. As the Supreme Court recognized in *McConnell v. FEC*,[27] decisions made by Congress with respect to campaigns and

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[21] Legal Definition of Phone Bank, http://definitions.uslegal.com/p/phone-bank/.

[22] MICHAEL W. TRAUGOTT & PAUL LAVRAKAS, THE VOTER'S GUIDE TO ELECTION POLLS 1 (2d ed. 1999).

[23] Mr. Quinlan serves as President of Greenberg Quinlan Rosner, one of a handful of elite polling firms. Quinlan Decl. at para. 1.

[24] *Id.* at para. 5.

[25] *Id.*

[26] *Id.*

[27] 540 U.S. 93 (2003).

elections – activities with which Members of Congress are quite familiar – are to be given deference. Certainly, Congress was keenly aware that campaigns conduct opinion polls *via* telephone, and certainly could have included them in section 441d, but chose not to. To read Section 441d as OGC recommends would require us to consider factors which Congress did not intend for us to consider.[28] We decline that invitation.

This is not to say that the regulation itself is unenforceable in other contexts (a result suggested by Respondents, but an issue we need not reach in this matter).[29] It was not intended to apply to polling, and, certainly, it cannot be read to reach polling and remain faithful to the statute.[30] After all, during the course of the relevant rulemaking, there was no indication that the Commission's disclaimer regulations would apply to public opinion telephone polls and survey research.[31] As Respondent points out, given that public opinion polls are a constant presence in federal campaigns, one would assume that there would have been widespread interest among those potentially subject to the reach of BCRA in any proposed restrictions. In fact, it appears only one commenter proactively raised the issue (and even then, without detailed analysis) and

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[28] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider"); *see also Nat'l Cable & Telecommunications Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (an agency's interpretation and implementation of a statute will be sustained only if the agency provides adequate reasons to support its interpretation); *Holland v. Nat'l Mining Ass'n.*, 309 F.3d 808, 818 (D.C. Cir. 2002) (courts will not defer to an agency's interpretation if it has not exercised "reasoned judgment about the meaning of the statute").

[29] We are mindful of the constitutional considerations raised by the DCCC, particularly with respect to the constitutional protections already afforded by *McIntyre v.* Ohio, 514 U.S. 334 (1995) (striking down statutory prohibition against distribution of anonymous literature on the grounds that that anonymous political speech is protected under the First Amendment). After all, as Mr. Quinlan notes, "[l]egitimate public opinion polls must be conducted as anonymously as possible to avoid biasing the result." Quinlan Decl. at para. 8. However, we need not reach such issues in this matter, and when possible, will avoid such issues. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (*citing NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."))); *see also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt").

[30] *See supra* note 8.

[31] *See* Notice of Proposed Rulemaking on Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 55,348, 55,349 (Aug. 29, 2002). In its Third General Counsel Report, OGC argues that, because the Notice sought comments on the scope of the term "communication" and specifically noted that the statutory definition of "public communication" includes the term "telephone bank," Respondents were on notice that the regulations would be applied to public opinion telephone polls. MUR 5835, General Counsel Report #3 at 9. That assumes, however, precisely what we are being asked to determine – whether a public opinion telephone poll constitutes a telephone bank such that the disclaimer regulations apply. That the term "telephone bank" was highlighted in the Notice (and, importantly, that public opinion telephone polls were not) cannot be sufficient to provide notice. Since reasonable people consider telephone banks and telephone polls to be different, mentioning one does not telegraph that the other is being discussed.

made clear its belief that polls were beyond the reach of the statute and thus the rulemaking.[32] To impose a disclaimer requirement now, more than six years after BCRA took effect, denies Respondent precisely the sort of advance notice and opportunity to be heard mandated by both the Administrative Procedures Act ("APA")[33] and fundamental notions of due process.[34]

Moreover, as also noted by Respondent, to effectively change the law now would completely change how campaigns are conducted, requiring them to either cut the sample sizes of their polls (to fall under the 500-call "public communication" threshold, and thus fatally compromising a poll's method), or include extraneous information that would skew the results. As we have done in other matters, we decline the invitation to use the enforcement process to make new law, and we will not engage in so-called regulation *via* MUR.[35]

B. So-Called "Push Polls"

The DCCC's telephone polls were alleged to be "push polls." The term "push poll" is not defined in the Act. Therefore, usage of the term is of no legal significance here. Moreover, we take exception with any intent to cast a negative light on the telephone polls at issue by associating them with the pejorative term "push polls." As we explain below, we believe that the DCCC was conducting legitimate public opinion telephone polling that does not constitute political advertising requiring any disclaimers.

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[32] *See* 67 Fed. Reg. 55,348, Comments of the National Republican Congressional Committee at 3.

[33] 5 U.S.C. §§ 1001–1011.

[34] *See Republican Nat'l Committee v. FEC*, 76 F.3d 400, 407-08 (D.C. Cir. 1996) (courts will look to whether an agency's interpretation of a statute is the product of sound rulemaking procedures where there is ample opportunity for notice and comment); *Shays v. FEC*, 424 F. Supp. 2d 100, 114 (D.D.C. 2006) (an agency's adoption of a standard rulemaking procedure is crucial in that it gives those parties affected by the rules "advance notice of the standards to which they will be expected to conform in the future, and uniformity of result is achieved"). *See* MUR 4250 (Republican National Committee), Statement of Reasons of Chairman Darryl R. Wold and Commissioners Lee Ann Elliot and David Mason at 10 (expressing "reservations" about adopting a doctrine that "has not been relied on before by the Commission or the courts in applying the provisions of the FECA for the first time in an enforcement action," because doing so "raises significant questions about fair notice to the regulated community, and hence, questions of due process"); MUR 5369 (Rhode Island Republican Party) (by a vote of 4-2, the Commission rejected OGC's recommendation to find reason to believe, on the grounds that the respondents had inadequate notice that their activity constituted a violation of the Act), Statement of Reasons of Chair Ellen Weintraub at 1 ("Penalizing this party and committee would be unfair, and would open the Commission to charges of arbitrary and capricious decision-making."). Commissioner Scott Thomas, even when agreeing with the legal reasoning of OGC's RTB recommendation in that matter, conceded that he "could not support the recommendation to conduct an investigation and possibly pursue civil penalties;" because, "[i]n view of the Commission's inconsistent history (or, more accurately, not enforcing) [the provisions of the Act at issue]... it would be inappropriate to single out these particular respondents in an enforcement action." *Id.*, Statement of Reasons of Scott Thomas at 1-2.

[35] *See* MUR 5541 (The November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn; *see also* MURs 5878 (Pederson 2006), 5642 (George Soros), 5572 (Special Operations Fund), 5937 (Romney for President, Inc.), Report of the Audit Division of Missouri Democratic State Committee, *Agenda Document 08-36* (Dec. 4, 2008), and Report of the Audit Division of Friends of Weiner, *Agenda Document 09-26* (May 14, 2009).

Respondent persuasively distinguishes between their polling calls, which are one of several legitimate forms of survey research, and the so-called "push poll," which operates "under the guise of legitimate survey research to spread lies, rumors, and innuendo about candidates."[36] Moreover, "a push-poll is a survey instrument containing questions which attempt to change the opinion of contacted voters, generally by divulging negative information about the candidate which is designed to push the voter away from him or her and pull the voter toward the candidate paying for the polling."[37] The public opinion polling community has condemned the practice of push polling; the National Council on Public Polls ("NCPP") does not recognize push polls as legitimate research. NCPP goes so far as to liken push polls to political telemarketing: "[T]he intent is to push the voters away from one candidate and toward the opposing candidate. This is clearly political telemarketing, using innuendo and, in many cases, clearly false information to influence voters; there is no intent to conduct research."[38]

Many in the polling industry liken push polls to candidate advocacy. The DCCC cites to Stuart Rothenberg, a leading political analyst and commentator who states that push polls should be more accurately referred to as "advocacy telephone calls."[39] Numerous other articles make the same point. Mark Blumenthal of Pollster.com has authored several informative pieces chronicling what is and is not a push poll, and lays to rest many of the common misconceptions regarding polling.[40] Blumenthal succinctly and correctly states that "[a] true push poll is not a poll at all. It is a telemarketing smear masquerading as a poll."[41] He notes that a push poll "has no 'sample' (in any statistical sense), no data collected, no analysis."[42] He goes on to analyze specific polls, labeled by various media sources as "push polls," and demonstrates that they are, in fact, not "push polls." He found that push polls:

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[36] LARRY SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS 245 (1996).

[37] *Id.*

[38] "A Press WARNING from the National Council on Public Polls," Press Release (May 22, 1995), *available at*: http://www.ncpp.org/?q=node/41; *see also* American Association of Public Opinion Research Statement (explaining that "a so-called 'push poll' is an insidious form of negative campaigning disguised as a political poll. 'Push polls' are not surveys at all, but rather unethical political telemarketing – telephone calls disguised as research that aim to persuade large numbers of voters and affect election outcomes, rather than measure opinions.").

[39] Stuart Rothenberg, *For the Thousandth Time: Don't Call Them Push Polls*, ROLL CALL, Mar. 8, 2007 ("[R]eferring to advocacy calls as push polls adds to public cynicism and, more importantly, discredits a legitimate survey research approach.").

[40] *See, e.g.*, Mark Blumenthal, *More on Message Testing and 'Push Polls'* (Sept. 16, 2008), *at* http://www.pollster.com/blogs/more_on_message_testing_and_pu.php; Mark Blumenthal, *Pro-Clinton Push Poll?* (Feb. 3, 2008), *at* http://www.pollster.com/blogs/proclinton_push_poll.php; Mark Blumenthal, *The Anti-Romney Poll: Who Did It* (Nov. 17, 2007), *at* http://www.pollster.com/blogs/antiromney_poll_so_who_did_it.php; Mark Blumenthal, *'Pushing' The Ethics of Message Testing* (Nov. 16, 2007), *at* http://www.pollster.com/blogs/pushing_the_ethics_of_message.php; Mark Blumenthal, *About Those Ugly Iowa Calls* (Nov. 14, 2007), *at* http://www.pollster.com/blogs/about_those_ugly_iowa_calls.php; Mark Blumenthal, *A Real Push Poll?* (Sept. 8, 2006), *at* http:// www.pollster.com/blogs/a_real_push_poll.php; Mark Blumenthal, *So What Is a Push Poll?* (Aug, 22, 2006), *at* http://www/pollster.com/blogs/so_what_is_a_push_poll.php.

[41] Blumenthal, *So What Is a Push Poll?*, *supra* note 40.

[42] Blumenthal, *'Pushing' The Ethics of Message Testing*, *supra* note 40.

- Typically ask just a question or two, whereas real surveys are almost always much longer and typically include demographic questions about the respondent (such as age, race, education, and income); and

- Do not include a series of innocuous questions usually included in polls, such as "whether the country is headed in the right direction," Presidential job rating, and initial voting preference.

Perhaps the most informative article on the subject was authored by Neil Newhouse, who, like Mr. Quinlan, is one of a handful of elite polling professionals. Mr. Newhouse characterizes his article as "a brief pollster's guide to what constitutes a push poll and what doesn't."[43] Mr. Newhouse explains that "[p]ush polls are not polls, in that they don't really seek people's opinions." Further:

- Push pollers usually don't record the respondents' answers to the questions asked.

- Push polls are generally very short – no longer than three or four questions.

- Push polls don't "sample" public opinion; they try and change it.

- Push polls generally occur very close to Election Day, to make it more difficult to track down the initiator of push polls.

Mr. Newhouse contrasted this with public opinion polls:

- Public opinion polls can last as long as twenty or twenty-five minutes, or as short as five or six minutes. During such polls, voters are asked demographic information, such as their age, education, or partisan affiliation.

- Public opinion polls scientifically sample voters in a specific constituency, such as a state, county, or congressional district.

- Public opinion polls that test campaign messages are usually fielded days or weeks prior to the main media crush in a campaign (meaning, prior to when candidates are going back and forth with TV ads and mailings).

In fact, Mr. Newhouse distills the essence of the distinction between push polls and public opinion surveys to three simple questions, which provide a useful test for distinguishing between a legitimate poll (which is not subject to the disclaimer requirements) and advocacy telephone communications:

- Was the respondent on the phone for more than three or four minutes?

[43] Neil Newhouse, *Think You've Been 'Push Polled? Maybe Not*, POLITICO, Nov. 19, 2007, *available at* http://www.politico.com/news/stories/1107/6977.html (accessed Apr. 7, 2009).

- Did the caller ask the respondent about his or her age or party affiliation?

- Did the caller ask more than five or six questions?

We agree with Mr. Newhouse that if the answer to any of these questions is "yes," then the communication did not constitute a push poll, but instead is legitimate survey research.[44]

This is not to say that bona fide public opinion polls, such as the DCCC's calls in this matter, cannot contain negative information about a candidate. For example, Mr. Rothenberg correctly observes that "[s]erious polls can include push questions that contain some explosive or even incorrect information, but that doesn't make them advocacy calls. . . . [I]t really doesn't matter how negative the message is."[45] Mr. Newhouse makes the same point: "Public opinion polls sometimes ask questions that convey positive or negative information about candidates, even about their own candidate. . . . Testing negatives about candidates on a public opinion poll doesn't make the instrument a push poll."[46] Mr. Blumenthal echoes the same sentiment: "What confuses everyone is that campaign pollsters routinely conduct surveys that test campaign messages and try to simulate the dialogue of a real campaign. That message testing can involve negative information."[47]

Accordingly, the fact that the interviewer in the DCCC telephone polls provided voters with seemingly negative information about Congressman Boswell's opponent Stan Anderson did not transform the calls into "push polls" or "advocacy calls." There is no reason to think that the DCCC's polls were anything other than a fundamental data collection tool to inform legitimate campaign strategies in Iowa's 3rd Congressional District. Contrast this with the anonymous push polling that took place during the 2000 presidential primary race in South Carolina against John McCain. There, anonymous opponents used "push polling" to suggest that McCain's Bangladeshi-born daughter was his own, illegitimate child. Voters in South Carolina received a call, ostensibly from a polling company, asking which candidate the voter supported. In this

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[44] We also note that polls ultimately ask questions, and thus no matter how negative or suggestive, do not as a matter of law expressly advocate election or defeat. This is true even if a poll contains so-called "magic words" of express advocacy, as evidenced by the typical testing of whether or not certain information makes a respondent more or less likely to vote for a candidate. Use of such a method does not convert a poll into express advocacy because "magic words" in the context of a poll are susceptible of a reasonable interpretation other than as an appeal to vote for or against a specific candidate. *See FEC v. Wisconsin Right to Life, Inc.* (*"WRTL"*), 127 S. Ct. 2652, 2667 (2007). Although the Supreme Court applied this standard in the context of ascertaining the functional equivalent of express advocacy that was immediately at issue in *WRTL*, the same constitutional principles that limit the reach of the functional equivalent of express advocacy similarly limit the reach of the express advocacy test. *See* MUR 5974 (New Summit Republicans); *see also* MUR 5991 (U.S. Term Limits). This is true particularly with respect to groups that may ultimately only produce issue ads, but nonetheless test messages against the likelihood of voting (as opposed to asking more amorphous questions about whether certain information makes one feel more or less favorable toward an individual or entity). It is well-established that testing against the "more or less likely to vote for or against" question represents the most accurate methodology when gauging people's true reaction to messages, regardless of whether one intends to use the results to engage in subsequent issue discussion or express advocacy.

[45] Rothenberg, *supra* note 39.

[46] Newhouse, *supra* note 43.

[47] Blumenthal, *'Pushing' The Ethics of Message Testing*, *supra* note 40.

case, if the "pollster" determined that the person was a McCain supporter, he or she made statements designed to create doubt about the Senator. Thus, the "pollsters" asked McCain supporters if they would be more or less likely to vote for McCain if they knew he had fathered an illegitimate child, and then promptly terminated the call.[48]

Finally, as a policy matter, legitimate political survey research does not identify the campaign, committee, entity, group, or individual paying for the survey or telephone poll because doing so undermines the validity of the results. Many survey respondents, especially those who are less well-informed, look for clues to give the "correct" answer to a question. As Mr. Quinlan observed:

> If an interviewer reveals who is paying for the poll, that knowledge can influence the response to the interviewer's questions. . . . If the responder knows who is sponsoring the poll, he or she is more or likely to think there is a "right" answer and may adjust his or her response accordingly. Introducing such bias degrades the value of the data obtained.[49]

Thus, we can assume that Congress, the Members of which routinely use polls in their own elections, understood this background when it amended section 441d. When responders know the source of a poll, particularly if the source is a candidate or party committee, then such responders may try to anticipate what the sponsor of the poll wants to hear and either parrot or oppose such views, rather than answer truthfully. The results of the poll are then compromised, and the survey will give that candidate or party an inflated (or deflated) 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. To now insist upon the inclusion of disclaimers in connection with polls fails to take into account these legitimate concerns, and creates a troublesome precedent – one that Congress did not intend.[50]

C. Procedural Concerns

This matter commenced and concluded in procedural postures that seem at odds with the Act's emphasis on transparency and due process. At the outset, the DCCC had no opportunity to address the Commission about alleged violations before the Commission found RTB that the DCCC violated the Act and Commission regulations. After receiving notice of the RTB finding, the DCCC responded to the factual and legal allegations in a motion to reconsider. Unfortunately, as discussed above, that motion was not presented to the Commission for a vote, nor was it presented to us when we joined the Commission. If it had, both DCCC and Commission resources might have been saved, for we would have supported the DCCC's motion to end the matter. Currently, however, the Commission has no formal procedures in place that

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[48] *See* Richard H. Davis, *The Anatomy of a Smear Campaign*, BOSTON GLOBE, Mar. 24, 2004, at C12.

[49] Quinlan Decl. at para. 8.

[50] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (if an agency "entirely failed to consider an important aspect of the problem," the decision or regulation is generally considered to be arbitrary and capricious). *See also Cottage Savings Ass'n*, 499 U.S. at 554.

provide respondents: (1) an opportunity in non-complaint generated matters to address RTB recommendations before they are voted on by the Commission, and (2) the ability to make motions (such as a motion to reconsider) after the Commission has found RTB. We believe this problem must be solved. While one approach is to allow motions to reconsider (like the one filed by the DCCC), a more effective approach would be to require that any recommendation to find RTB (including the recommended Factual & Legal Analysis) be served on the respondent. The respondent would then be afforded an opportunity to respond to the proposed recommendation prior to a Commission vote. Such a procedure would, in our view, speed up the enforcement process by allowing the Commission to narrow the issues at the outset, thus providing for Commission resources to be used in a more focused manner in any ensuing investigation.

Other procedural concerns arose in the final stage of this matter as well. Under current Commission practice, the DCCC was not provided with the Third General Counsel's Report, which contained the recommendation that the Commission find probable cause. This Report and recommendation included factual and legal analysis based in part on (1) the DCCC's earlier brief, which responded to OGC's notice that it was "prepared to recommend ... probable cause to believe a violation occurred,"[51] and (2) the probable cause hearing.

We question whether this current practice for considering probable cause fully comports with the statute and Commission regulations. Under the Act, a probable cause recommendation must proceed in the following order:

(1) OGC's probable cause recommendation;

(2) OGC's notification to respondent of the recommendation;

(3) OGC's brief to respondent in support of its recommendation; and

(4) Respondent's brief, to be filed with the Commission *via* the Commission's Secretary.

The language of 2 U.S.C. § 437g(a)(3) clearly states:

> The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause .... With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission

[51] MUR 5835, Notification Letter (July 1, 2008).

> and shall be considered by the Commission before [voting on the probable cause recommendation].[52]

Commission regulations contemplate the same process, and further provide that "[a]fter reviewing the respondent's brief, the General Counsel shall advise the Commission in writing whether he or she intends to proceed with the recommendation or to withdraw the recommendation ...."[53]

Current practice, however, follows a different order:

(1) OGC's notice to respondent of an "intent to recommend";

(2) OGC's brief to respondent in support;

(3) Respondent's brief; and

(4) OGC's recommendation (based on the respective briefs and, sometimes, a probable cause hearing).

At the January 14-15 2009, public hearing on the Commission's practices and procedures, the General Counsel summarized this practice as follows:

> [T]he general counsel's office provides respondent a brief indicating that ... we are prepared to recommend to the Commission a finding of probable cause to believe. After that respondents have an opportunity to submit a brief. ... The Office of General Counsel considers the brief, and then it writes a recommendation to the Commission as to whether it recommends probable cause to believe. That recommendation takes into account respondent's brief and relies heavily on our initial brief.[54]

The recommendation to the Commission after receipt of the respondent's brief is not provided to the respondent until after the matter is closed.[55]

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[52] 2 U.S.C. § 437g(a)(3) (emphasis added).

[53] 11 C.F.R. § 111.16(d). This regulation supports our view that the actual recommendation is made by OGC prior to sending its brief to respondent, and the statute provides that the respondent can address OGC's actual recommendation. In other words, advising the Commission as to whether OGC "intends to proceed with the recommendation" presupposes that a recommendation has already been made. Likewise, how could OGC "withdraw the recommendation" that has not yet been made?

[54] Transcript of Public Hearing on Agency Practices and Procedures ("Agency Procedures Hearing Transcript") at 59 (Testimony of Thomasenia P. Duncan, General Counsel, Federal Election Commission), *available at* http://www.fec.gov/law/policy/enforcement/2009/01141509hearingtranscript.pdf.

[55] *Id.* The issue arose after a commenter raised questions about a "secret" submission to the Commission at the probable cause stage of the enforcement process. *See id.* at 56 (Testimony of Cleta Mitchell, Foley and Lardner, LLP).

Under the Act and Commission regulations, the probable cause stage is designed to give respondents a rare opportunity of unfiltered access to the Commission and provide them the proverbial last word on the factual and legal issues in the matter. But currently, OGC makes its recommendation after the briefing process. Thus, under current practice, the Commission could make probable cause determinations based on information or arguments that respondents never had an opportunity to address.

These are but two of many procedural issues we believe the Commission needs to address generally to ensure that parties have the ability to respond to the allegations made against them in a manner that both complies with the Act and comports with notions of due process and fundamental fairness.

IV. CONCLUSION

For the foregoing reasons, we rejected OGC's recommendation to find probable cause to believe the DCCC violated section 441d, and supported dismissing this matter.

MATTHEW S. PETERSEN
Vice Chairman

7/1/09
Date

CAROLINE C. HUNTER
Commissioner

7/1/09
Date

DONALD F. McGAHN II
Commissioner

7/1/09
Date