



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Senator Claire McCaskill, *et al.*) MUR 6958
)

**STATEMENT OF REASONS OF
VICE CHAIR CAROLINE C. HUNTER AND
COMMISSIONERS LEE E. GOODMAN AND MATTHEW S. PETERSEN**

The Complaint and Supplemental Complaint in this matter allege that respondents violated the Federal Election Campaign Act of 1971, as amended (“the Act”), based upon information published by U.S. Senator Claire McCaskill in a memoir recounting her 2012 reelection campaign, including her campaign’s efforts to run against then-U.S. Representative W. Todd Akin as her general election opponent.¹ According to the memoir, McCaskill’s campaign committee paid \$40,000 for polling to analyze the 2012 Missouri Republican Senate primary. McCaskill subsequently authorized her pollster to speak with Akin’s campaign to offer advice, in “broad generalities,” about the effectiveness of a particular television ad. The Complaint alleges that the conversation constituted an excessive in-kind contribution of “opinion poll results” by McCaskill and her principal campaign committee, McCaskill for Missouri (“McCaskill Committee”), to Akin and his principal campaign committee, Akin for Senate (“Akin Committee”), and that the Akin Committee formally accepted the in-kind contribution. The Complaint further alleges that the two committees failed to report the transaction.

We were not persuaded that the alleged conversation, even if it occurred, constituted a contribution or, even if it were a contribution, that an investigation would be a prudent use of Commission resources. Therefore, we voted against finding reason to believe and to dismiss the matter.²

¹ Complaint (Aug. 19, 2015); Supplemental Complaint (Aug. 27, 2015).

² Vote Cert. (Sept. 16, 2016), MUR 6958 (McCaskill); *see also* First Gen. Counsel’s Rpt. at 13-14 (Apr. 4, 2016), MUR 6958 (McCaskill).

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I. BACKGROUND

In August 2015, *Politico Magazine* published an article by McCaskill entitled “How I Helped Todd Akin Win – So I Could Beat Him Later.”³ The article, excerpted from McCaskill’s 2015 memoir, describes the 2012 Missouri Republican primary for U.S. Senate, in which Akin competed with two other candidates for the opportunity to challenge McCaskill in the general election.⁴ This article was the basis of the complaint here.

McCaskill commissioned a poll to be conducted during the first week of July 2012, approximately one month before the August 7, 2012 primary election.⁵ McCaskill writes that she paid a pollster \$40,000 to survey Missouri Republicans on the three candidates running in the Republican primary.⁶ The poll appears to have sought the status of the race, the effect of candidates’ messaging on the race, and voters’ positions on various issues.⁷ Upon reviewing the poll’s findings, McCaskill came to believe that Akin would be her “ideal opponent” and then took steps to promote Akin’s nomination.⁸ The McCaskill Committee ran television advertisements that, she writes, sought to promote indirectly Akin’s nomination within the Republican field.⁹

During the weeks before the primary, the Akin Committee was also running its own ads. McCaskill believed that one of these ads, which featured Mike Huckabee, was particularly effective.¹⁰ But, McCaskill writes, when the Akin Committee stopped airing the Huckabee ad shortly before the election in lieu of a new ad (which McCaskill describes as “flames of freedom”), McCaskill concluded that Akin would “be in trouble if he didn’t get the Huckabee ad back up.”¹¹ Consequently, five days before the election, McCaskill asked two individuals with

³ Compl. Ex. A (Claire McCaskill, *How I Helped Todd Akin Win – So I Could Beat Him Later*, POLITICO MAGAZINE (Aug. 11, 2015), <http://www.politico.com/magazine/story/2015/08/todd-akin-missouri-claire-mccaskill-2012-121262> (“McCaskill, *How I Helped Todd Akin Win*”)).

⁴ McCaskill, *How I Helped Todd Akin Win* at 2-3.

⁵ *Id.* at 1-2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 1, 3.

⁹ *Id.* at 3-4. McCaskill writes: “I told my team we needed to put Akin’s uber-conservative bona fides in an ad – and then, using reverse psychology, tell voters *not* to vote for him” and that “[t]his presentation made it look as though I was trying to disqualify him, though, as we know, when you call someone ‘too conservative’ in a Republican primary, that’s giving him or her a badge of honor.” *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.*

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connections to the Akin campaign to relay the message that “[i]f he gets the Huckabee ad back up by Friday, he’s going to win.”¹²

Shortly thereafter, McCaskill says, her campaign manager received a call from an unidentified individual with the Akin Committee, wanting to talk to McCaskill’s pollster.¹³ McCaskill writes that she “gave clearance” for the pollster “to speak in broad generalities” with the Akin Committee.¹⁴ Three hours later, she says, the Huckabee ad was back on television.¹⁵ Akin went on to win the Republican primary but was defeated by McCaskill in the general election.¹⁶

Akin and his committee challenge the accuracy of McCaskill’s description of the events immediately before the primary. They assert that the Akin Committee never aired the “flames of freedom” ad on television, and that it was disseminated solely online on the Akin Committee’s website.¹⁷ Furthermore, respondents assert “it is not plausible that the Akin Committee could have changed the ad traffic within three hours of speaking with a pollster.”¹⁸ They maintain that the Akin Committee made its advertising decisions independently of any advice allegedly received from their general election opponent’s pollster, and decided to air the Huckabee ad because they already had made a decision to close the primary campaign on a positive message.¹⁹ And they assert that “[a]t no time was Akin aware that anyone connected with the McCaskill campaign was in contact with his Committee.”²⁰ Finally, Akin and his committee point out that there is no information to suggest that the Akin Committee “actually received polling data from Senator McCaskill.”²¹

II. LEGAL ANALYSIS

The Complaint alleges that the conversation authorized by McCaskill took place and, through that conversation, McCaskill and the McCaskill Committee made an excessive in-kind contribution of “opinion poll results” to the Akin Committee, which it accepted.²²

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Akin Comm. Resp. at 2 (Nov. 12, 2015), MUR 6958 (McCaskill).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *See* Compl. at 1; Supp. Compl. at 1.

NONDISPENSABLE

In MUR 2133 (George Bush for President), for instance, the Commission found that a prospective candidate accepted opinion poll results from a national party committee, where: representatives of the prospective candidate had discussed particular questions before the poll had been conducted; a written analysis of the results was presented to the prospective candidate; and a meeting was held between the prospective candidate and his immediate advisors to review the data.³¹ The "poll results" in that matter comprised a voluminous document: (1) an eight-page summary of the poll's methodology and sample size; (2) seventeen pages of polling questions and results; (3) six "chapters" of analysis that spanned 109 pages; and (4) three pages of tables further breaking-down the results.³² The poll results apparently informed the prospective candidate's decision-making and scheduled events over several months.³³ The Commission ultimately concluded that, of the poll's \$70,000 cost, only \$17,610 was allocable to the candidate.³⁴

MUR 2212 (Snelling '86 Committee) similarly addressed a prospective candidate's acceptance of poll results from a national party committee.³⁵ There, the record included materials pertaining to several polls,³⁶ one of which "was composed of 10 statistical questions

U.S.C. § 30108(c). The Strub advisory opinion contained language indicating that the requestor, a former candidate who desired to volunteer for another candidate, should not provide advice or analysis informed by polling results his prior campaign had purchased. Quantifying the value of such summary advice, and differentiating between such advice at a high level of generality versus the cost of the poll or one data point of the poll is not possible in an enforcement context. Were the Commission to attempt to pursue enforcement here, the Commission would bear the burden to prove that the advice was based upon polling data and place a monetary value on nebulous advice. Moreover, we disagree that general advice informed by knowledge of a poll or other research necessarily constitutes an in-kind contribution in all facts and circumstances. This case is a good example of a conversation at a high level of generality that does not rise to the level of an in-kind contribution, much less a quantifiable one.

³¹ Gen. Counsel's Brief at 15-28 (Nov. 6, 1987), MUR 2133 (George Bush for President); *see also* Conciliation Agreement ¶ IV.5 (July 20, 1988), MUR 2133 (George Bush for President) (finding that prospective candidate "accepted" the results).

³² *See generally* U.S. National Study Analysis Report Prepared for the Republican National Committee (Dec. 1985) (available in file of MUR 2133 (George Bush for President)).

³³ Gen. Counsel's Brief at 25, MUR 2133.

³⁴ Conciliation Agreement ¶ IV.6, MUR 2133.

³⁵ *See generally* Conciliation Agreement (Aug. 9, 1989), MUR 2212 (Snelling '86 Committee). Also at issue in the Snelling matter was whether the prospective candidate accepted the results from two polls (some of the topics and questions he had specifically suggested) even though he was not given hard copies of the results, if at all, until well after an initial detailed briefing. *See* Gen. Counsel's Rpt. at 12-21 (June 7, 1988), MUR 2212 (Snelling '86 Committee). Ultimately, the Commission found that the candidate received the results because, upon a comparison of the candidate's briefing notes and the polling data, the candidate's notes reflected "figures which were, with few exceptions, identical to or within one or two percentage points of, the actual totals." *Id.* at 20; *see also* Conciliation Agreement ¶ IV.N, MUR 2212. Thus, "[w]hile he apparently was not given the actual data nor copies of the actual results, he was given percentages which in many cases matched or came within one percentage point of the true figures." Gen. Counsel's Rpt. at 27, MUR 2212. No information in the record suggests that McCaskill's pollster provided data verbally to the Akin Committee.

³⁶ *See generally* Gen. Counsel's Rpt., MUR 2212.

and of 86 substantive questions, 70 of which dealt with prospective candidates and issues related to the 1986 election . . . and almost 40 of which asked specifically about reactions to [the prospective candidate].”³⁷ The prospective candidate was briefed on “every aspect of the poll including the actual percentages of persons who responded in certain ways to the survey questions”³⁸ and received a “draft campaign plan” that incorporated the poll results.³⁹ The prospective candidate used that information, in part, “in deciding to become a candidate and in formulating his campaign strategy.”⁴⁰

Looking to these matters, as well as the features of opinion poll results described in Commission regulations, we are not persuaded that there was reason to believe that the McCaskill Committee provided opinion poll results to the Akin Committee. McCaskill writes that she authorized her pollster only “to speak in broad generalities.” Even assuming the pollster had such a conversation with a representative of the Akin Committee, the facts do not suggest that the pollster shared any information as detailed as the opinion poll results at issue in prior MURs. In those matters, the prospective candidates received access to polling reports complete with specific figures generated in response to specific questions, along with extensive written analysis and detailed verbal consultation. Nothing like that is alleged to have been provided here. The complaint alleges one conversation advising the Akins Committee to air a particular ad. Such a conversation — even if informed by polling data or even if one data point was shared — did not transmit an actual polling report or detailed data for independent use by the Akin Committee.

Indeed, that which makes the provision of poll results to a committee something “of value” — and thus a “contribution” under the Act — is in the recipient’s access to the detailed, raw data generated from the poll. In contrast, discussing poll results “in general” does not provide a recipient the kind of access to data, cross-tabulations, questions asked, and methodology sufficient to make independent use of the poll or its results. In order for a campaign to make use of a poll it must have access to more than summary advice or one data point. To have real value, the campaign must have access to underlying data sufficient to critically analyze the data, understand the public’s positions on issues or candidates, opponents’ vulnerabilities, which messages are effective, compare demographic groups and alternatives, and otherwise develop an effective political strategy⁴¹ — a point all the more salient here given that

³⁷ *Id.* at 2-3.

³⁸ *Id.* at 3.

³⁹ *Id.* at 11.

⁴⁰ Conciliation Agreement ¶ IV.L, MUR 2212.

⁴¹ *See, e.g.*, Advisory Opinion 2006-04 (Tancredo) at 6 (concluding that authorized committee would accept contribution of polling results where authorized committee would “have access to . . . polling data” and use it to create ads); Gen. Counsel’s Brief at 15-28, MUR 2133 (concluding that poll results informed prospective candidate’s scheduling decisions over several months); Conciliation Agreement ¶ IV.L, MUR 2212 (finding that polling results informed individual’s decision to enter race and initial campaign strategy); *see also* Gen. Counsel’s Rpt. at 28 n.4, MUR 2212 (distinguishing between “descriptive statements” and “mathematical results” and deferring “whether the statements . . . constituted ‘results’ of a poll”).

McCaskill herself was using the poll results to *defeat* the Republican nominee for Senate. In other words, in the context of polling, “broad generalities” discussed in one telephone conversation aren’t something of value.

In sum, even if the McCaskill Committee’s pollster, in the course of advising the Akin Committee representative to air the Huckabee ad, explained a data point on the effectiveness of the ad, we cannot conclude that the conversation amounted to the provision of opinion poll results.

B. Even if the McCaskill Committee Provided Opinion Poll Results to the Akin Committee, the Amount in Violation Fails to Justify Further Commission Resources.

However, even if (1) the alleged telephone conversation took place, (2) the pollster explained a data point, and (3) the verbal discussion of that data point constituted the provision of opinion poll results under Commission regulations, the resulting amount in violation was likely so minimal — indeed too nebulous to quantify — that it does not warrant further use of Commission resources under an excessive contribution theory.

As an initial point, we are skeptical that the Commission could satisfactorily place a monetary value on poll results discussed verbally at a general level. As a first step, the initial cost of the McCaskill poll (\$40,000) would need to be halved (\$20,000), because any opinion poll results were shared here between 16 and 60 days after the poll results were first received by the McCaskill Committee, and the value of polling results depreciate rapidly.⁴²

Here, any monetary value would be reduced further to reflect the proportionate value of one question or data point (effectiveness of the Huckabee ad) of the much broader set of poll questions.⁴³ Under this methodology, we doubt the pollster’s sharing of one data point would amount to an excessive contribution. The value calculation would look something like this:

- $\$40,000 / 2 = \$20,000$ (depreciated value from initial cost of poll); and
- $\$20,000 / 10 = \$2,000$ (value of one question assuming poll covered 10 questions).

Alternatively, Commission regulations provide that the value of opinion poll results may be established “by any . . . method which reasonably reflects the benefit derived.”⁴⁴ The record before the Commission indicates that the advice the Akin Committee allegedly received, informed by opinion poll results or not, provided very little benefit to the Akin Committee. Its statement that it decided to air the Huckabee ad independently of any conversation with the McCaskill pollster is wholly plausible and deserves to be credited. Moreover, we find the

⁴² 11 C.F.R. § 106.4(g)(1).

⁴³ 11 C.F.R. § 106.4(e)(3) (allocating costs of individual poll questions as a percentage of overall poll cost).

⁴⁴ 11 C.F.R. § 106.4(e)(4).

suggestion that the Akin Committee so valued one telephone conversation with the pollster for McCaskill, Akin's general election opponent, that it altered its entire advertising strategy within three hours to be implausible.⁴⁵

Or we could look to "the extent of . . . verbal consultation" provided by the McCaskill Committee pollster to determine monetary value.⁴⁶ The verbal consultation alleged to have occurred between the pollster and a representative of the Akin Committee by all accounts was brief and limited to one piece of advice — to air the Huckabee ad. No elaborate briefing regarding the results of a comprehensive poll complete with cross-tabulations and analysis is alleged, or plausibly inferred, to have occurred here.

Under all three of these methodologies, we would be unable to determine or prove the value of the telephone conversation or that it exceeded a \$2,000 contribution limit.

Finally, any additional Commission action would require an investigation to produce a specific recounting of the alleged telephone conversation between McCaskill's pollster and the Akin Committee. Even if the pollster could identify the individual with whom he spoke, the two individuals would be required to recount the details of their conversation, including any specific polling data discussed during the conversation, and the reliability of the years-old recollections would be questionable.

Therefore, when balancing the difficulties of undertaking an investigation here against the small amount in violation (which again, would be difficult to quantify), we conclude that further action would not be a prudent use of Commission resources.⁴⁷

III. CONCLUSION

The kind of conversation suggested in McCaskill's memoir — in which one political consultant provides helpful advice to a staffer from another campaign, or discusses generally the results of a poll — is commonplace in American politics. Regulating these conversations as in-kind contributions under the Act would be a striking precedent. The Commission cannot realistically treat all such conversations as in-kind contributions.⁴⁸


Accordingly, for the foregoing reasons, we voted against finding reason to believe and instead to close the file.

⁴⁵ See *supra* note 41 and accompanying text.

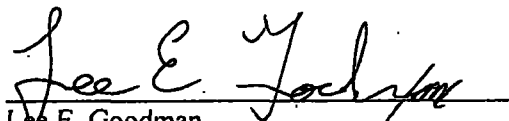
⁴⁶ 11 C.F.R. § 106.4(c)(1); see also 11 C.F.R. § 106.4(e)(4).

⁴⁷ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

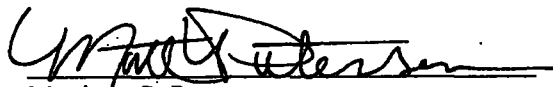
⁴⁸ This matter does not raise a violation of the coordination rules, which can implicate conversations.


Caroline C. Hunter
Vice Chair

2/28/17
Date


Lee E. Goodman
Commissioner

2/28/17
Date


Matthew S. Petersen
Commissioner

FEB. 28, 2017
Date

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