



FEDERAL ELECTION COMMISSION  
 1050 FIRST STREET, N.E.  
 WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 ) MUR 7527  
 News for Democracy, *et al.* )  
 )

**STATEMENT OF REASONS OF COMMISSIONER ALLEN J. DICKERSON**

On October 18, 2022, the Commission voted 5-1 to find reason to believe (“RTB”) that News for Democracy, a § 501(c)(4) nonprofit corporation,<sup>1</sup> violated the Federal Election Campaign Act (“FECA” or “Act”) “by failing to report independent expenditures” and “by failing to include [the] required disclaimer on ads containing express advocacy.”<sup>2</sup> The Commission also approved a factual and legal analysis setting forth the basis for that decision.<sup>3</sup>

I was the lone dissenter. To be clear, I agree with the Commission’s determination concerning an ad opposing the reelection of Senator Rick Scott<sup>4</sup> and its decision not to find RTB that News for Democracy was a political committee — questions that were properly before us.<sup>5</sup> But the decision to include an ad opposing Senator Marsha Blackburn’s reelection in our conciliation efforts is a different matter.<sup>6</sup>

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<sup>1</sup> A § 501(c)(4) organization is a tax-exempt organization that is permitted to spend some, but not a majority, of its funds on electoral activity. 26 U.S.C. § 501(c)(4); *see Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (finding § 501(c)(4) organization had First Amendment right to make electioneering communications).

<sup>2</sup> Certification (“Cert.”) at 2, MUR 7527 (News for Democracy), Oct. 18, 2022 (citing 52 U.S.C. §§ 30104(c)(1); 30120(a)).

<sup>3</sup> *Id.*

<sup>4</sup> Factual and Legal Analysis at 8.

<sup>5</sup> Cert. at 1.

<sup>6</sup> Factual and Legal Analysis at 6-7.

By pursuing that additional communication, the Commission ratified what was, in my view, the Office of General Counsel’s (“OGC”) mishandling of its pre-RTB review. Because that investigation exceeded our statutory authority and cherry-picked from the available information, I could not join my colleagues in acting upon its fruits.

**I. THE COMMISSION HAS SHARPLY LIMITED AUTHORITY TO INVESTIGATE ALLEGATIONS BEFORE FINDING REASON-TO-BELIEVE.**

In establishing the Commission, Congress created an unusually rigorous and respondent-friendly enforcement process. The most fundamental, and most often overlooked, check on our authority is the Commission’s lack of plenary enforcement power.<sup>7</sup> Even where we are convinced a violation has occurred, we are required by law to seek voluntary conciliation with the offender. Failing that, our only recourse is to the courts.<sup>8</sup>

This Matter, however, implicates two checks on our discretion that are more familiar: the statutory rules governing the initiation of enforcement matters, and the requirement that we find “reason to believe” a violation has occurred before we may initiate any investigation.

Congress provided only two avenues for the Commission to commence its civil enforcement process: either (1) we must receive a notarized complaint filed under penalty of perjury,<sup>9</sup> or (2) we may act upon “the basis of information ascertained in the normal course of carrying out [our] supervisory responsibilities.”<sup>10</sup> This Matter involved the former course, as we received a complaint alleging that News for Democracy was operating as an unregistered political committee.<sup>11</sup> The complaint

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<sup>7</sup> 52 U.S.C. § 30109.

<sup>8</sup> 52 U.S.C. § 30109(a)(6)(A) (“If the Commission is unable to correct or prevent any violation of this Act...by the methods specified” in FECA’s conciliation requirement, “the Commission may, upon the affirmative vote of 4 of its members, institute a civil action for relief...”).

<sup>9</sup> 52 U.S.C. § 30109(a)(1). Notably, the Commission is barred from “conduct[ing] *any* investigation or tak[ing] *any* other action...solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.” *Id.* (emphasis supplied).

<sup>10</sup> 52 U.S.C. § 30109(a)(2). While the outer limits of this authority are unclear, examples include an audit or other standardized review of reports filed with the Commission. 52 U.S.C. § 30111(b) (authorizing the FEC to conduct such audits).

<sup>11</sup> Compl. at 2 (“News for Democracy is a political committee according to 11 CFR § 100.5(a) and has failed to register as a committee pursuant to 11 CFR § 101.2(d”).

included news stories about News for Democracy and a sample of Facebook ads the group had allegedly run.

The mere receipt of a complaint, however, does not permit the Commission to investigate the underlying allegations. The Act also requires the Commission to afford respondents the opportunity to respond before it may vote on whether there is “reason to believe that a person has committed, or is about to commit, a violation” of FECA.<sup>12</sup> Crucially, the Act permits the Commission to “make an investigation of [an] alleged violation” only *after* it has affirmatively found that RTB exists.<sup>13</sup> Before that determination is made, the Commission may not engage in “speculative outside research” to bolster the record before it.<sup>14</sup> In practice, then, the reason-to-believe determination is best thought of as a reason-to-open-an-investigation vote.<sup>15</sup> This procedural step is not a judgment of wrongdoing, but, at most, a finding of sufficient legal justification to open an investigation to determine whether such wrongdoing may have occurred.<sup>16</sup>

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<sup>12</sup> 52 U.S.C. § 30109(a)(2).

<sup>13</sup> *Id.*

<sup>14</sup> See Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 4, MUR 7754 (Pacific Atlantic Action Coal.), Dec. 1, 2021; see also Statement of Reasons of Vice Chairman McGahn and Comm’r Hunter at 5, MUR 6540 (Rick Santorum for President, *et al.*), July 25, 2013 (noting that such pre-RTB investigation is “extra-statutory”), *id.* at 6 (“[I]mportantly, OGC has been unable to identify a Commission vote empowering it to conduct what are, by any definition, pre-RTB investigations”); Statement of Reasons of Chairman Dickerson and Comm’r Trainor at 3, MUR 7320 (Libertarian Party of Miami-Dade, *et al.*), Aug. 30, 2022 (“[W]hether the offense to jurisdiction is great or petty, we cannot condone the claim that this agency has any more authority than what Congress, in its judgment, specifically granted. ‘Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided’”) (quoting *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. \_\_; 142 S. Ct. 661, 665 (2022)).

<sup>15</sup> Fed. Election Comm’n, “Statement of Policy Regarding Commission Action in Matters at the Initial Stage of the Enforcement Process,” 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007) (“Commission ‘reason to believe’ findings have caused confusion in the past because they have been viewed as definitive determinations that a respondent violated the Act. In fact, ‘reason to believe’ findings *indicate only that the Commission found sufficient legal justification to open an investigation* to determine whether a violation of the Act has occurred”) (emphasis supplied).

<sup>16</sup> Only after such an investigation is conducted does the Commission next move to deciding whether there is “probable cause to believe” the respondent violated the Act. 52 U.S.C. § 30109(a)(4)(A)(i). (Inevitably, probable-cause-to-believe has been shortened in agency parlance to “PC.”) “The evidence required to move from an RTB finding to a PC finding...may be analogized to the difference between the evidence a peace officer needs to stop a vehicle versus what she needs to arrest to someone.” Statement of Reasons of Vice Chair Dickerson at 4, MURs 7165/7196 (Jesse Benton), Oct. 13, 2021.

But under current practice, and in some tension with the Act,<sup>17</sup> the Commission does not confine its initial, pre-RTB review to the complaint and response. Rather, OGC typically considers the complaint, response, information in the Commission's files, and any publicly available information cited in the complaint or response before making a recommendation to the Commission concerning further action.<sup>18</sup>

In short, while the Commission has muddled the outlines of its discretion over the years, OGC is statutorily prohibited from “conduct[ing] their own ad hoc review and supplement[ing] the complaint.”<sup>19</sup> Unfortunately, while doubtless operating with good intentions, OGC's pre-RTB actions here constituted the sort of “standardless” and “ad hoc review” denied to us by Congress.<sup>20</sup>

## II. OGC'S SAMPLING OF THE FACEBOOK AD LIBRARY WAS AN IMPROPER PRE-RTB INVESTIGATION.

The Complaint in this Matter alleged that “News for Democracy [was] a secretive organization that has spent millions of dollars on political advertising,” and therefore should have registered and reported as a political committee.<sup>21</sup> The complainant provided five examples of Facebook ads that News for Democracy allegedly ran, including an ad expressly advocating against the re-election of Senator Rick Scott of Florida.<sup>22</sup> In response, News for Democracy denied that its major purpose was electoral activity, and argued that the complaint did not “identi[fy] a federal independent expenditure made by News for Democracy.”<sup>23</sup>

In preparing its recommendation to the Commission, OGC could have taken one of three paths. It could have conducted no outside research and based its

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<sup>17</sup> Notably, the statute does not direct OGC to conduct any pre-RTB analysis whatsoever.

<sup>18</sup> See Fed. Election Comm'n, “Guidebook for Complainants and Respondents on the FEC Enforcement Process” at 12, May 2012 (“With regard to each matter assigned to an attorney in the Enforcement Division, the General Counsel recommends to the Commission whether or not there is ‘reason to believe’ the respondent has committed or is about to commit a violation of the law”).

<sup>19</sup> Statement of Reasons of Vice Chairman McGahn and Comm'r Hunter at 10, MUR 6540 (Rick Santorum for President, *et al.*), July 25, 2013.

<sup>20</sup> *Id.* at 10-14.

<sup>21</sup> Complaint at 1-4.

<sup>22</sup> *Id.* at Ex. A.

<sup>23</sup> Resp. at 2-5.

recommendations solely on the complaint and any response. It could have limited its search to publicly available information, including the Facebook Ad Library,<sup>24</sup> verifying the specific factual assertions in the complaint and response. Or it could have conducted a full review of publicly available information potentially relevant to the violations alleged in the complaint, with an eye toward uncovering additional, unalleged facts to support any reason-to-believe recommendation.

The first two options would have been unremarkable choices given past Commission practice. But the last course would have been challenging. To constitute a political committee, an organization must both (1) receive or spend \$1,000 in FECA-regulated contributions or electoral expenditures *and* (2) have as its major purpose the election or defeat of a candidate for federal office.<sup>25</sup> Because “the surest guide to a group’s major purpose” are its “revealed preferences, as exposed by the inescapable mathematical facts of its actual spending,”<sup>26</sup> OGC’s outside research would have had to address the funds spent on qualifying advertisements — necessitating a review of News for Democracy’s communications<sup>27</sup> — in the context of its overall spending.

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<sup>24</sup> By visiting Facebook’s publicly available “Ad Library,” anyone may review political advertisements made on Facebook by organizations such as News for Democracy. Facebook, Ad Library, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=political\\_and\\_issue\\_ads&country=US&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&media_type=all).

<sup>25</sup> *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (*per curiam*) (holding that political committees are those “organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate”).

<sup>26</sup> Statement of Reasons of Vice Chair Dickerson and Comm’r Trainor at 5, MUR 7181 (Independent Women’s Voice), May 10, 2021.

<sup>27</sup> In fact, many of the Facebook ads attached to the complaint were not FECA-regulated communications. Ex. A. An ad does not fall within our regulatory ambit merely because it concerns a politician or a political issue. U.S. CONST., amend. I; *see also United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972) (“We dispose more readily of the Government’s suggestion that the Act applies to the National Committee because—quoting from the affidavit supporting its motion for a preliminary injunction—‘with respect to the upcoming election for President and Vice-President of the United States, the National Committee derogates President Nixon’s stand on a principal campaign issue—the Vietnam war.’...On the Government’s thesis every little Audubon Society chapter would be a ‘political committee,’ for ‘environment’ is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat ‘juvenile delinquency’ or a Golden Age Club promoting ‘senior citizens’ rights’ would fall under the Act. The dampening effect on [F]irst [A]mendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable... [we] reject the suggestion for we believe Congress had no intention of regulating the expression of opinion on fundamental issues of the day”).

OGC, however, took none of these roads. It did not limit itself to the complaint and the response, nor did it confine its efforts to verifying the concrete factual assertions therein. But neither did it conduct a holistic review of the Ad Library in order to build an overall record of publicly available information concerning News for Democracy's activities, so that the Commission might endeavor to assess the group's major purpose. Instead, at random, it "spot-checked" the Facebook Ad Library for ads run by News for Democracy and folded whatever express advocacy communications it happened to find into its RTB recommendation.

As a threshold matter, such an approach is plainly unhelpful where, as here, an alleged political committee is involved.<sup>28</sup> Again, the legal question is whether a majority of News for Democracy's spending was for qualifying political ads. To determine whether there is reason to believe that is true, we would need to have an indication of how many of News for Democracy's ads qualify, how much was spent on them, and how much was spent on other activities that would not count toward a major purpose determination.

A haphazard sampling of ads might tell us that an organization made independent expenditures which it must report. But it does not tell us the *proportion* of a group's spending those ads represent, which is the relevant question for political committee status. Knowing a numerator, especially a partial one, is useless information for the major purpose analysis unless one also knows the denominator.<sup>29</sup>

In my view, a decision to systematically review the Facebook Ad Library for all information concerning News for Democracy would have stretched the statute and may have created litigation risk. But it would have been understandable given the Commission's drift and the complaint's reliance upon the Library. I could not, however, find RTB that News for Democracy was a political committee based on a partial and unscientific survey of its advertisements. "It is precisely this sort of standardless sweep that courts have time and time again chastised."<sup>30</sup>

Two of my colleagues agreed that insufficient information was before us to find RTB that News for Democracy was a political committee. But five commissioners did agree to move forward with independent expenditure reporting and disclaimer

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<sup>28</sup> Notably, the Commission did not find RTB concerning that allegation.

<sup>29</sup> See, e.g., *McReynolds v. Sodexo Marriott Servs., Inc.*, 349 F. Supp. 2d 1, 22 (D.D.C. 2004) ("[A]nalysis that exclude major factors may be 'so incomplete as to be inadmissible as irrelevant'" (quoting *Coward v. ADT Sec'y Sys.*, 140 F.3d 271, 274 (D.C. Cir. 1998)).

<sup>30</sup> Statement of Reasons of Vice Chairman McGahn and Comm'r Hunter at 13, MUR 6540 (Rick Santorum for President, *et al.*), July 25, 2013.

violations concerning two advertisements, including one “which was not referenced in the Complaint.”<sup>31</sup>

I could not support the inclusion of that advertisement, which concerned the re-election of Senator Blackburn of Tennessee.<sup>32</sup> It came to our attention, not through the complaint nor through our supervisory duties, but solely as a result of OGC’s pre-RTB investigation of the Facebook Ad Library which, as I have explained, was arbitrarily conducted. Such “arbitrar[y] supplementing [of] the factual record transforms OGC from an umpire seeking to call balls and strikes into an active participant, in effect functioning as counsel to the complainant, or as a complainant in [its] own right.”<sup>33</sup> Including that communication upset the careful constraints placed upon our enforcement process by Congress. And it creates troubling precedent encouraging OGC to expand the scope of future matters by treating complaints as license to conduct roving investigations of unalleged potential FECA violations without Commission supervision or approval.

### CONCLUSION

For the foregoing reasons, I dissented from the Commission’s RTB determination in this Matter.




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Allen J. Dickerson  
Commissioner

January 13, 2023

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Date

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<sup>31</sup> Factual and Legal Analysis at 6.

<sup>32</sup> *Id.*

<sup>33</sup> Statement of Reasons of Vice Chairman McGahn and Comm’r Hunter at 5, MUR 6462 (Donald J. Trump, *et al.*), Sept. 18, 2013.