

**KEYNOTE ADDRESS:
THE FEC AND FEDERAL CAMPAIGN
FINANCE LAW**

Commissioner Shana Broussard

The following is a transcript of the keynote address given by Commissioner Shana Broussard at First Amendment Law Review's 2022 Symposium on Election Speech and the First Amendment.¹ The virtual event also featured three panels on (1) Regulation of the Content of Election-Related Speech, (2) Regulation of Money and Transparency in Election-Related Speech, and (3) The Role of Online Platforms in Reducing Election Misinformation.²

First, I want to say good morning to everyone, and I want to thank the *First Amendment Law Review* for inviting me to be your keynote speaker at your symposium this year.

It is an honor to participate in your symposium. As the Dean mentioned, I'm very disappointed that I could not be there in person with you. I have never had a chance to visit your campus, so I was looking forward to visiting Chapel Hill, taking a stroll down Franklin Street, and touring the Dean Dome. One of the attorneys who works for me, Jonathan Peterson, went to school at Carolina and he definitely bleeds Carolina blue, much to our annoyance at times.

So, what exactly is the Federal Election Commission (FEC), which I might refer to at times as the Commission, and what role does it play in regulating money in politics? The Commission was created through amendments to the Federal Election Campaign Act in 1974³ in the aftermath of the Watergate political scandal, which involved secret illegal donations to the Nixon campaign. Congress recognized that a properly functioning democracy requires a well-informed public, and that citizens should know how money is used to influence elections and be armed with that knowledge when they cast a vote in federal elections. I am one of six commissioners, all of

¹ This transcript has been lightly edited for clarity. The editors have also inserted footnotes throughout the transcript where there are references to specific cases, statutes, works of scholarship, or other sources.

² First Amendment Law Review, *Symposium: Election Speech and the First Amendment*, YOUTUBE (June 24, 2022), <https://www.youtube.com/watch?v=TaIRCyckvtM&t=26s>.

³ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 310-312, 88 Stat. 1263, 1280-83 (1974).

whom are appointed by the President and confirmed by the Senate.

The Commission has exclusive jurisdiction over the civil enforcement of federal campaign finance laws. As such, the FEC's responsibilities include disclosing campaign finance information, enforcing provisions of the Federal Election Campaign Act (FECA),⁴ and overseeing the public funding of presidential elections. The commission may issue regulations, advisory opinions, policies, and procedures, all for the guidance of compliance with the law, and we may fine persons or entities for violations of the law.

I view the mission of the FEC as strengthening our democracy and protecting the integrity of the federal campaign finance process, (1) by providing transparency to the public about money use in federal elections, and (2) by fairly enforcing and administering our federal campaign finance laws. Indeed, transparency is perhaps the most important function of this agency.

This year's symposium, Election Speech and the First Amendment, is taking place at an important moment in the nation's history. Campaign spending in the 2020 election cycle totaled nearly 14.4 billion, more than double the 6.5 billion spent in the 2016 cycle, making it by far the most expensive election ever.⁵ Nine of the ten most expensive senate races in history occurred in the 2020 cycle, as well as five of the ten most expensive house races.⁶ The other, for history's sake, occurred in 2018.⁷ Looking ahead at the midterm elections, I've seen projections of 9 billion on political spending alone, which is more than the total spending in the 2018 midterms.

⁴ Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146.

⁵ Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion*, OPEN SECRETS (February 11, 2020), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16>; Press Release, Federal Election Commission, Statistical Summary of 24-Month Campaign Activity of the 2019-2020 Election Cycle, <https://www.fec.gov/updates/statistical-summary-24-month-campaign-activity-2019-2020-election-cycle/#:~:text=Presidential%20candidates%20raised%20and%20spent,2019%20through%20December%2031%2C%202020>.

⁶ Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion*, OPEN SECRETS (February 11, 2020), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16>.

⁷ *Id.*

Now while the numbers are large, I don't think these extraordinary amounts should come as a surprise to anyone. The amount of money spent on federal elections has exploded over the last decade. At the same time, the spending has created enormous challenges in the regulation of campaign finance, particularly due to outdated laws and recent court cases.

Beginning with *Buckley v. Valeo*,⁸ the Supreme Court has emphasized that federal campaign finance laws implicate core speech protected by the First Amendment. I'm always mindful of the unique relationship between the federal campaign finance laws and the First Amendment and the careful balancing act that must occur in matters that come before me, as a commissioner. Since *Buckley* was decided 45 years ago, advances in technology have changed the way in which modern campaigns and other political actors engage in election related activity. For instance, political advertising continues to shift from traditional sources, such as television and radio, to texting and online, including through social media platforms and streaming services.

As the symposium will explore, political spending on social media platforms raises important First Amendment and federal campaign finance questions. Many of these questions appear campaign finance related on their face, but even ostensibly campaign finance questions may not necessarily fall within the jurisdiction of the FEC. The FEC's jurisdiction over campaign finance is sharply limited by our statutory authority, and there's an obvious disagreement at times over the FEC's statutory authority, and whether the First Amendment protects certain activity from regulation.

Then there are those times, which we all agree that the agency lacks statutory authority to regulate certain activities. For instance, does the FEC have a role in regulating the practices of online social media platforms and, if so, what is it?

Several matters that the Commission recently closed originated with complaints against some of the largest social media companies, including Twitter and Facebook. The pervasive use and influence of these platforms, particularly as it involves politics and campaigns, is one of today's hot button issues. These companies' content moderation policies are a

⁸ 424 U.S. 1 (1976).

source of impassioned debates that often involve questions of whether they are too powerful and whether government intervention, including stricter laws, is appropriate.

Some of the complaints that we considered allege that Twitter made prohibited corporate contributions to Joe Biden and his committee during the 2020 election cycle, by suppressing negative information, for example, blocking users from tweeting links to certain news articles that Twitter determined contained false information. Some of the complaints were made by federal candidates whose own accounts were suspended or restricted, based on what the platform may have viewed as inflammatory content. Other complaints still, allege that Facebook violated the act by fact checking and limiting the distribution of post by users linked to articles critical of Biden and Harris, including labeling some of those as false information.

The Commission though, unanimously concluded that there was no reason to believe that any campaign finance violations occurred. In disposing of the complaints in these matters, the Commission concluded that the alleged actions did not result in contributions or expenditures under the act. In other words, the Commission found that the actions of the social media companies were based on permissible business considerations and were not done for the purposes of influencing any federal election. And without any evidence of coordination or an electoral purpose, there was very little debate among the Commissioners regarding how to handle these matters. FECA does not generally permit the Agency to regulate an entity's business practices, even if they have the potential for election consequences.

As I mentioned earlier, campaign finance laws often tread in very sensitive areas involving the regulation of political speech, and the First Amendment is generally the touchstone that determines whether laws that we apply cross the line and infringe on constitutional rights. However, Facebook and Twitter are not government entities that make or enforce such laws, they are for-profit corporations. But there seems to be some temptation to recast social media companies, particularly when they limit user access in response to the posting of controversial content, as quasi-government creatures trampling on the speech rights of the little guy.

Now, no one would dispute that they are among our largest and most influential entities, but wearing my commissioner hat, I look to the area of law or which our agency has jurisdiction, and our laws do not regulate their content moderation choices.

Now there's one final point that I'd like to make here given the topic of the symposium. Social media platforms' content choices could be viewed as analogous to newspapers exercising editorial control over the content they publish, which has long been recognized as a First Amendment protected right.

Does Twitter enjoy such a right? In declining to pursue enforcement in these social media matters, my republican colleagues wrote that Twitter and Facebook were acting as press entities and thus not subject to regulation under FECA. FECA exempts any news story, commentary, or editorial distributed by a broadcasting station, newspaper, magazine, or periodical publication from the definition of an expenditure, so long as they are acting in their legitimate press function, their materials are available to the general public, and the subject activity is comparable in form to those ordinarily issued by the entity.

The Commission has long recognized that an entity otherwise eligible for the press exemption does not lose its eligibility, even if the activity in question lacks objectivity, or it advocates the election or defeat of a clearly identified candidate or is tailored to its users based on their preferences. The press exemption also applies equally to Internet communications.

The press exemption is grounded in the First Amendment. In enacting FECA, the legislative history indicates that Congress did not intend to limit or burden in any way the First Amendment freedom of press and of association, providing them the unfettered right to cover and comment on political campaigns.

Now my three colleagues explained that the press exemption applies to Twitter and similar social media companies, because a sizable share, if not most, of Americans consume their news via Twitter and other social media platforms. These platforms allow the publishing and sharing of original content, they sell advertising and curate and summarize news stories, and they're available to the general public. They

also explained that, even if the press exemption did not apply to twitter's content moderation policies, those policies were protected under the First Amendment.

Three Commissioners, including myself, concluded that determining whether the press exemption applies, or whether Twitter and other social media companies enjoy the protections of the First Amendment, is unnecessary given the Commission's precedent on similar matters where we concluded that the respondents' actions were motivated by business considerations rather than efforts to influence the election.

Now, there's a lot of information, so I invite anyone who is interested in looking into this or wants to know about it to feel free to reach out to me. You can also locate this on our website under legal resources under the enforcement tab and search by keyword under MURs.⁹

I want to say that, despite our conclusion in these matters, social media company practices raise a number of other questions regarding their roles in our elections, and democracy more generally, given the pervasiveness of online campaign activities. These questions include not only their content moderation policies, but also extend to the use of their platforms for micro-targeting of political ads, the spread of misinformation through their platforms, and whether they should receive immunity under 47 U.S.C. § 230.

Whether these companies should continue to enjoy Section 230 is a question for Congress, but I will comment on the use of micro targeting and the spread of false information and political ads. During the 2016 election cycle, the Russian Federation engaged in an extensive social media campaign that included the micro-targeting of political advertising as a means of spreading disinformation to large U.S. audiences. These tactics were designed to sow discord in the U.S. political system, undermine the 2016 election, and help Donald Trump win the presidency. None of this is in dispute. Social media campaigns have been examined at length in official reports by the U.S. intelligence community, Congressional committees, and the special counsel at DOJ.

⁹ *Enforcing Federal Campaign Finance Law*, FEC.GOV, <https://fec.gov/legal-resources/enforcement>.

Following the 2016 election, the Commission has received a number of complaints alleging that the use of these and similar online tactics violate federal campaign finance laws. These tactics raise novel and complicated questions. Ordinarily, whether ads are issue ads or contain express advocacy generally determines whether they must be disclosed by non-political committees. In some cases it's clear, others not so much. This issue has been a source of wide disagreement among the Commissioners and there will certainly be a robust debate on whether, and to what extent, misinformation and micro-targeting factor into this analysis.

Does it matter whether these tactics are used by domestic or foreign actors? The Supreme Court recently issued a decision explaining that foreign individuals outside of the United States do not possess First Amendment rights.¹⁰

Regardless of how the Commission addresses these issues going forward, the use of these online tactics poses real challenges to election spending transparency.

With respect to transparency, I firmly believe that the laws that promote transparency in election spending are all the more important, given the Supreme Court's 2010 decision in *Citizens United*¹¹ and the shift to online advertising, and I think there's something profound about the fact that you're having your event today, which is the 12th anniversary of that decision.

It's hard to believe that this decision is 12 years old, but its effects cannot be overstated. *Citizens United* caused a fundamental shift in campaign finance law, ushering in a new era of explosive campaign spending. As we all know, in *Citizens United* the Court invalidated the FEC's ban on corporate and union spending by independent expenditures and overturned decades of court precedent. The Court explained that the prohibition acted as a ban on free speech in violation of the First Amendment, but at the same time, the Court linked this holding to another holding in which eight justices reaffirmed the constitutionality of disclosure obligations.

¹⁰ Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082 (2020).

¹¹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

In the majority opinion, Justice Kennedy noted that the Court's ruling would lead to a new campaign finance system that pairs corporate independent expenditures with the effect of disclosure. Transparency, the Court explained, enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Now, perhaps this is the case in theory. The more information that you as a voter know about who's contributing to candidates on the ballot and in what amounts, and what super PACs are running ads for or against those candidates, the more democracy is enhanced. That's how it should be. But in the aftermath of *Citizens United*, Justice Kennedy's prediction regarding effective disclosure has not come to fruition. A significant amount of the election related spending is taking place in secret, especially on the Internet. Massive amounts of monies are flowing from wealthy donors and corporations to super PACs and other corporate entities which are masquerading as nonprofit social welfare groups but are really political committees.

The Commission is frequently confronted with issues involving whether and to what extent corporate and union spending to influence elections should be disclosed, including whether a 501(c)(4) group's political spending rises to such a level that they should be deemed a political committee under FECA. Commissioners have very different views about what the FEC can and should do on these issues.

With the decisive shift to online political advertising post *Citizens United* and the use of micro-targeting and misinformation tactics, effective disclosure is more important now than ever. Not only does micro-targeting make it easier for this information to spread and for political spenders to sow further division in our country, but political spenders can do so by concealing who they really are and who funded their ad spending. By carrying out their social media campaigns in this manner, voters are deprived of valuable information on who is seeking to influence them and why, and this prevents effective counter speech.

Now this is not to say that there's no value to online political advertising, indeed, the more speech, in my view, the better, as it contributes to a robust marketplace of ideas.

While there are a number of ways to combat microtargeting and misinformation online, effective transparency is one of the many tools that are available that could address the problems associated with misinformation and micro-targeting of political ads. This is why I believe the Commission has to do more about enforcing the existing disclosure laws. At the same time, these laws must be strengthened to respond to online political advertising in a world of rapid technological change.

For instance, public communications that expressly advocate the election or defeat of a federal candidate are subject to disclosure and disclaimer requirements, but the Commission has been unable to agree on a rationale with respect to disclaimers for ads placed on social media platforms.

Further, the commission's definition of public communications is outdated. It also doesn't explicitly capture political spending on social media and media sharing networks such as YouTube, Instagram and LinkedIn, streaming applications such as Netflix and Hulu, and other devices or applications. The Commission has been considering rulemaking on internet communication disclaimers and revising the definition of public communications since 2011. The need for having these rules in place increases in tandem with the growing use of social media as a campaign tool. These rules would ensure that the millions of Americans who view campaign ads through their computers and personal devices have the necessary information to ascertain the source of these ads.

Also, Congress should close the existing loopholes that allow political actors to run their ads online without having to disclose them to the Commission, which is effectively concealing the source of the ads and the amount spent on them. FECA requires disclosure of a certain category of communications called electioneering communications. An electioneering communication is a broadcast on cable or satellite communication that clearly refers to a clearly identified federal candidate, is publicly distributed within 30 days of a primary or 60 days of general election, and is targeted to the relevant electorate.

Entities that run such communications must disclose them in filings with the FEC, but these requirements do not apply

to online political ads. In other words, a group can spend millions of dollars funding political ads that feature federal candidates online without having to disclose them, even though they would have to do so if they ran the same ads on television. Proposed legislation such as the Honest Ads Act in HR1 would extend these reporting requirements to online ads.¹² This legislation is necessary to ensure proper disclosure of political spending in our current political environment.

To conclude, today's symposium will continue the important discourse concerning campaign finance, election spending online and through social media, and the First Amendment. These topics are not only timely, but they also involve some of the most pressing legal issues facing American democracy. Thank you very much, it's been a pleasure speaking with you today about the work of the FEC and the challenges that we face in transparency in the context of election spending.

¹² H.R. 1 Subtitle C (117th Congress)