

# Paying for America's Elections

## The Bipartisan Campaign Reform Act of 2002 and Information Access

Rachel Condon

*This paper provides an overview of the legislative history of the Bipartisan Campaign Reform Act of 2002 (BCRA), known popularly as McCain-Feingold. It will also explore the challenges to the act in the courts. The paper will conclude with a review of access to campaign finance reports resulting from the Bipartisan Campaign Reform Act of 2002. With a rich legislative history that spans several Congresses as well as a history of judicial interventions which have shaped the law as it stands today, it is pertinent that the American people have access to information associated with the law so as to better understand the federal election process and assess its strengths and weaknesses in advance of the 2020 elections.*

Senators John McCain and Russell Feingold began championing campaign finance reform in the mid-1990s as a reaction to what was seen as a toxic political landscape in which large donations tipped the scales for certain candidates and parties. Of grave concern to reformers was the influence of what they termed “soft money” on American politics.<sup>1</sup> This money, given by donors to political parties, was being used to finance or at least assist federal election campaigns.

Also of concern was the influence of broadcasting on the electorate, more specifically how broadcast media amplified the voices of candidates with access to more money. Regulation of such advertising would prevent a particularly wealthy or well-funded federal election candidate from dominating the airwaves immediately preceding the elections. These goals are evident in all iterations of the legislation proposed by McCain and Feingold between 1998 and 2002. The bills would draw varying levels of ire from critical colleagues who equated money to speech and viewed regulation of campaign finance as an infringement on the First Amendment.<sup>2</sup>

The proposed bills of the mid-1990s and early millennium would amend the 1971 Federal Election Campaign Act (FECA), which itself was a response to growing anxieties caused by the Watergate scandal. FECA called for a body to regulate federal

elections, thus creating the Federal Election Commission (FEC).<sup>3</sup> This is the agency tasked with ensuring fair and legal federal elections, but its powers to enforce campaign finance reporting were limited, which was a key weakness of FECA. BCRA aimed to strengthen the FEC by requiring detailed and accurate reporting by campaigns, which would theoretically hold these campaigns accountable to the American people. By forcing campaigns to report their data to an agency, which would then make it available for public consumption, BCRA would have significant implications for information access.

### Background

Before the 107th Congress passed the bill that would become the Bipartisan Campaign Reform Act of 2002, a similar bill, also co-sponsored by Senators John McCain and Russ Feingold, died in the Senate of the 105th Congress. The Bipartisan Campaign Reform Act of 1997 was introduced in January of 1997 and outlined Senate election spending limits, a ban on political action committee contributions to federal elections, regulations concerning broadcasting, and reporting requirements.<sup>4</sup> The bill was criticized as overly political and unconstitutional by some lawmakers. In October 1997, bill co-sponsor Senator Bob Smith, while speaking in opposition to cloture on the bill, cited political motivations concerning soft money as his main concern with moving forward with the bill as it stood. Smith said, “Full disclosure, not limitations on free speech, is the right kind of campaign finance reform,” highlighting the importance of information access to the champions of campaign finance reform.<sup>5</sup>

Others criticized the bill's unwillingness to take on wealthy, self-financed candidates. Though the bill would regulate so-called soft money, this would advantage candidates who were able to finance their own campaigns.<sup>6</sup> If a candidate is able to donate funds to their own campaign that any other donor would be required to disclose and limit, this would

unfairly allow the unregulated money of the super-wealthy to cast a shadow on federal elections.

Campaign reform fared no better in the House of the 105th Congress. While addressing the House, California Republican John Doolittle suggested the bill was rushed and that it was “a bill that everybody is afraid not to support.”<sup>7</sup> Doolittle argued that the bill was premature and more research was still needed, saying that the problems in United States federal elections had not yet been “diagnosed.”<sup>8</sup>

Ultimately in the Senate the bill failed to get the sixty votes necessary to end the filibuster and invoke cloture. A version of the same campaign finance reform bill was introduced in the House of the 106th Congress where it was passed; this bill, however, was never brought to the Senate.<sup>9</sup>

## Bipartisan Campaign Reform Act of 2002

### Life as a Bill

The bill that would eventually become law was introduced in the House of the 107th Congress as House of Representatives Bill 2356—To amend the Federal Election Campaign Act of 1971.<sup>10</sup> This bill called for a reduction of special interest money, including the soft money held by political parties, and outlined legislation for greater regulation of federal campaign contributions. It did not go as far as to call for a ban on political action committees nor did it outline regulations for broadcasting of political messages. This eliminated two of the aspects of the previous campaign finance reforms of the late 1990s that critics condemned as unconstitutional.<sup>11</sup>

In the Senate, McCain and Feingold introduced Senate Bill 27—To amend the Federal Election Campaign Act of 1971. This proposed bill called for tighter regulations on what the bill called “electioneering communications.”<sup>12</sup> This term replaced the more narrow term “broadcasting” of past iterations of McCain-Feingold, and though it is the House bill that would become law, it is this language from the Senate bill that would be integrated into the House bill and shaped the language of the eventual law.

### Key Points of BCRA

The most prominent feature of the law is its attempted reduction of special interest influence through soft money donations. These donations made not for a specific candidate but to a political party, were not to be used by political parties on behalf of a federal election candidate.<sup>13</sup> The prohibition represents the consistent goal of McCain-Feingold through three Congresses to lessen the influence of political parties in federal elections. This same concept was what in 1997 critics in the Senate called an unconstitutional attack on freedom of speech.

The other most important part of the law is its regulation of electioneering communications on behalf of federal election candidates. Any media communications (excluding news sources) produced on behalf of a candidate would have to be reported to the FEC. Labor unions and corporations were also banned from funding electioneering communications.

These provisions are both attempts to prevent undue influence of money on the electorate’s decision-making. In another attempt to mitigate undue influence, limits were placed on individual contributions to candidates or expenditures made in coordination with the candidate or their campaign. It is these provisions that would be challenged in court; those challenges would then shape the law into the weakened Bipartisan Campaign Reform Act of 2002 that governs campaign finance today.

### Codification of Regulations

Signed by President George W. Bush into law, The Bipartisan Campaign Reform Act of 2002 was codified in the *Code of Federal Regulations*, Title 11, Chapter I, Subchapter C.<sup>14</sup> The regulations are divided into five subparts according to the parties they represent: national political parties, state and local political parties, tax-exempt organizations, federal candidates and officeholders, and state and local candidates.

All donations to national political parties are subject to reporting to the Federal Election Commission. They cannot give or receive Levin funds, which are funds that adhere to state law but are in violation of BCRA.<sup>15</sup> Another notable restriction is the prohibition of donation to certain tax-exempt organizations. These regulations are intended to curb the influence of political parties in federal elections. State and local parties can use Levin funds in support of federal elections. All other funds are subject to regulation under BCRA. In accordance with the restrictions on national political parties and local parties, organizations qualifying as tax-exempt under 6 U.S.C. 501(a) and who participate in federal election activities are prohibited from receiving funds from political parties.

Federal candidates and officeholders are prohibited from soliciting funds in excess of \$20,000 from an individual in one calendar year. Additionally the acceptance of soft money is subject to regulations under BCRA, which again serves to limit the influence of soft money in federal elections. State and local candidates and office holders cannot use funds donated to their campaigns to fund media advertisements, the so-called electioneering communications, in support or opposition to a federal election candidate unless those funds are subject to the prohibitions and limitations of the Bipartisan Campaign

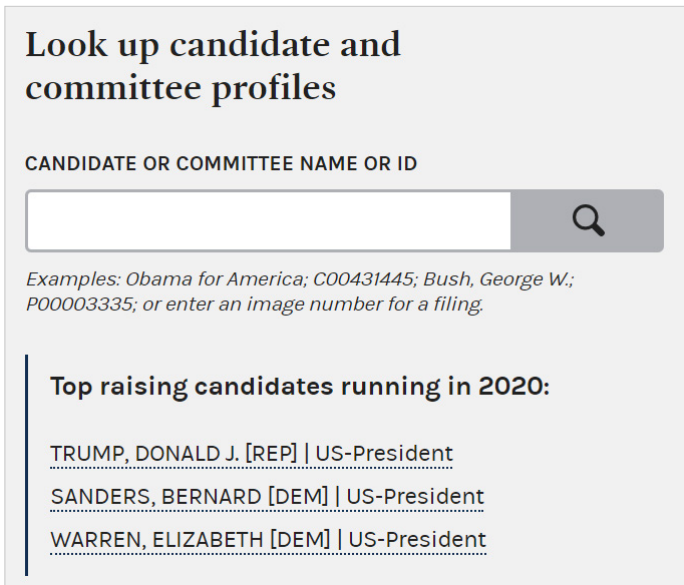


Figure 1. Look Up Candidate  
<https://www.fec.gov/data/>

Reform Act of 2002 and are reported in accordance with the act.

### BCRA in The Courts

The legislation was first brought before the Supreme Court in the 2003 case of *McConnell v. Federal Election Commission*. Senate Majority Whip Mitch McConnell, a long time opponent of BCRA, challenged the act on grounds of infringed freedom of speech. The Court sided with the FEC in the technically complicated case, but in the following years three high-profile cases served to strike down and weaken core tenants of the Bipartisan Campaign Reform Act of 2002.

### *FEC v. Wisconsin Right to Life*

With the case of *Federal Election Commission v. Wisconsin Right to Life, Inc.* the Supreme Court began the pattern of striking down key provisions of BCRA. The case saw the group Wisconsin Right to Life filing a lawsuit against the Federal Election Commission on the grounds of infringement of their First Amendment right. The US District Court of the District of Columbia ruled that BCRA's ban on corporations' use of funds to finance electioneering communications was unconstitutional, so the FEC appealed to the Supreme Court questioning the decision of the three-judge district court.

The advertisements in question criticized a filibuster to block voting on judicial nominees and called viewers to reach out to specific Congresspeople, identified by name.<sup>16</sup> Wisconsin Right to Life took issue with the language of the law, which limited "issue advocacy," which is the advocacy not on behalf of a candidate, but instead on behalf of a political idea.

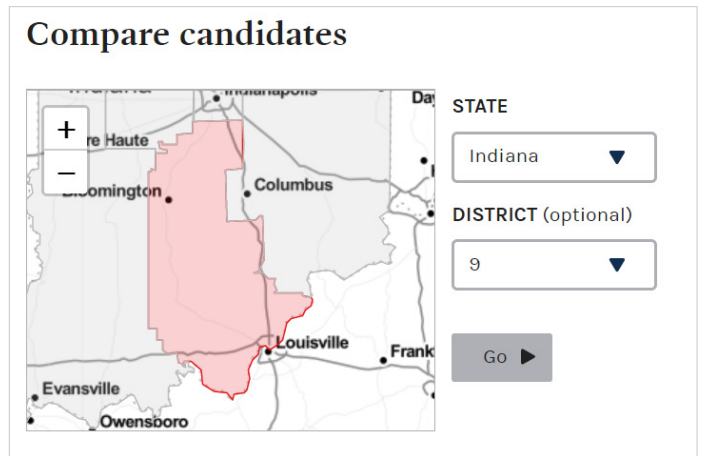


Figure 2. Compare Candidates  
<https://www.fec.gov/data/>

The Court upheld the D.C. District Court decision that Section 203 BCRA prohibiting the advertisements by Wisconsin Right to Life was unconstitutional, deciding against the Federal Election Commission. Chief Justice John Roberts gave the majority opinion focusing on the distinction between express and issue advocacy. He said only issue advocacy that was the functional equivalent of express advocacy (explicit support of a candidate) was what the spirit of the law was aimed toward. He qualified, however, that the Supreme Court must "err on the side of protecting political speech rather than repressing it."<sup>17</sup> He concluded that the Federal Election Commission had significantly curtailed the ability of Wisconsin Right to Life to express the corporation's freedom of speech. Dissenters, led by Justice David Souter, focused on the public, saying large contributions have fostered a cynical electorate and democratic integrity hinges on the regulation of political speech by corporations and other entities.<sup>18</sup>

The decision effectively weakened the electioneering communications provision of the law. Corporations and labor unions could now legally air advertisements on communication media promoting general political ideas as long as the spirit of the message was not express advocacy or its "functional equivalent."

### *Davis v. FEC*

Another major case, *Davis v. FEC*, ended in the striking of another piece of the law. A candidate for New York's 26th seat in the House of Representatives, Jack Davis, filed suit against the Federal Election Commission. Under 319(b) of BCRA, wealthy candidates who wished to give to their own fund in their federal election campaigns were required to report all financing to the FEC and obey all limitations set forth if their opposition personal funds account (OPFA) exceeded \$350,000.

Davis's suit claimed this required disclosure and adherence to limitations infringed on his First Amendment right to freedom of speech.

Chief Justice Roberts's Court sided with Davis in a 5–4 decision with Justice Alito giving the majority opinion. He noted, “The OPFA, in simple terms, is a statistic that compares the expenditure of personal funds by competing candidates and also takes into account to some degree certain other fundraising.”<sup>19</sup> This OPFA calculation required extensive reporting and disclosure on the part of the self-financing candidate. Alito argued that such a burden unfairly exceeds the notification burdens placed on the non-self-financing candidate, and is thus unconstitutional as a suppression of Davis's political speech. The decision gutted the provision intended to regulate super-wealthy candidates and their money's influence on elections.

### *Citizens United v. FEC*

The most significant blow to the Bipartisan Campaign Reform Act was the 2010 case *Citizens United v. FEC*. A politically conservative nonprofit corporation, Citizens United, wished to distribute a movie disparaging of Hillary Clinton in advance of the 2008 Democratic primary elections but were not legally permitted to do so under the electioneering communications provision of the law. The corporation appealed to the Supreme Court, which ruled it did in fact qualify as electioneering communications. However, the Court also ruled that the provision 441(b), under which corporations expenditures were regulated, was unconstitutional. The grounds for this ruling were the infringements on freedom of speech, which discriminated, the court ruled, on corporations based on their identity.

The language of the film fell undeniably in the realm of express advocacy against Hillary Clinton, so this ruling went further than *FEC v. Wisconsin Right to Life*. Whereas the 2007 decision made issue advocacy electioneering communications legal on the part of corporations, this decision on *Citizens United v. FEC* effectively ruled that the distinction between express and issue advocacy is not relevant to the issue of constitutionality. It ruled that both forms of electioneering communications would be protected under the First Amendment right to free political speech.

Justice Anthony Kennedy authored the majority opinion. In it he argues that regulation of these soft money contributions to an election penalizes corporations for their identity by preventing their freedom to express political opinion, but maintains that the disclosure requirements are valid. He argues this is not part of the infringement on freedom of speech because it allows the people to come to proper conclusions about a corporation's interests, and such disclosures allow for

equal weighing of all public messaging. Dissenting Justice John Stevens said Citizens United's freedom of speech was never infringed upon because the wealthy corporation had its own political action committee that could have undertaken distribution and advertising of the film. The failure to consider this and the subsequent striking of the provision, the dissent argues, opens dangerous holes in BCRA.<sup>20</sup>

Though this decision invalidated some regulations on electioneering by corporations and organizations, it did uphold the right of the FEC to require financial reporting on behalf of the organizations. Though much of the intended reform of BCRA was scaled back in its first decade as a law, the provisions that have the deepest consequences for public access to information are still largely in place.

### Legacy and Proposed Legislation

With its fraught history in the courts and as a bill before that, the Bipartisan Campaign Reform Act of 2002 is prone to criticism of being ineffective and filled with glaring loopholes. For these reasons, the issue of campaign finance reform has been floating around Congress since 2002. In 2010 Democracy Is Strengthened by Casting Light On Spending in Elections Act was first introduced in the House of Representatives.<sup>21</sup> As its abbreviation, DISCLOSE, suggests, the act would have increased disclosure requirements around federal election expenditures by expanding the definitions of “independent expenditure” and “electioneering communications.”<sup>22</sup> The bill died without reaching cloture, with criticism from some Republicans who cited it as “a smokescreen to adopt still more restrictions on political speech . . . and stifle criticism of Democrats.”<sup>23</sup> Several iterations of the DISCLOSE Act have been introduced in Congress but none have been successful.

More recently the House of Representatives of the 116th Congress has passed a bill known as the For the People Act of 2019 (H.R. 1). This proposed legislation has many goals, one of which is campaign finance reform. The statement in this first bill of the 116th Congress seeks to reduce the influence of big money in federal elections.<sup>24</sup> It outlines a ban on foreign contributions to domestic corporations on behalf of federal elections, as well as saying the *Citizens United* decision, and related decisions, had invalidated legislation fairly regulating the interests of big money. The bill states that “these flawed decisions have empowered large corporations, extremely wealthy individuals, and special interests to dominate election spending, corrupt our politics, and degrade our democracy through tidal waves of unlimited and anonymous spending.”<sup>25</sup> This highlights transparency as an information access issue that is imperative to the fostering of an informed public, and thus a healthy democracy.

The future of this legislation remains to be seen. It is an ambitious bill with many goals, and it positions campaign finance as a single topic under the greater umbrella of election reform. Relevantly to issues of information access, the bill would strengthen the FEC's ability to disburse information to the American people concerning their federal elections.

## Dissemination of Information and Access

Information disclosed in accordance with Title 11 of the *Code of Federal Regulations* and BCRA is made available through the Federal Election Commission for public access on the Campaign Finance Data website. Extensive archives of statistics are available for download via PDF or Excel spreadsheet.<sup>26</sup> Additionally, the site provides tools for helping users search based on their information needs.

The site also arranges its data in statistical displays for immediate readability. One such example is displayed on the front page (figure 1). The graphic charts money raised or spent by candidates in various federal elections.

This tool is flexible. It can represent House, Senate, or Presidential elections; money raised or money spent; and dates back to the 1980 election year. Users can also look more deeply at a custom generated chart by browsing the top raising or spending candidates in that cycle. One challenge of such a display is that it does trace data across legislative contexts. Users must be careful to distinguish differences between pre-BCRA numbers and post-BCRA numbers and not to draw inaccurate inferences about the history of campaign financing. The tool does not offer a way to contextualize this information accordingly, which may be a disservice to users not versed in the nuances of the topic.

Another tool by which the FEC website promotes user access to information is the Compare Candidates in an Election tool (figure 2). The map graphic allows users to click on the relevant district and find disclosure materials related to historical, current, and future elections in that district's race.

Performing this search brings users to summaries of all financial disclosures associated with the district and the race including total receipts, total disbursements, and cash on hand. This tool is directly in service to the electorate; it allows voters, and all citizens, the ability to find financial information concerning elections most relevant to them. Access to information, simplified as it is here, helps build a better-informed democracy. Importantly, information is submitted to the FEC depending on the filers' schedules, not on an FEC mandated deadline. This too could harm the electorate's ability to properly understand and contextualize the data despite the usefulness of the FEC's digital tools.

## Conclusion

Post-Watergate legislation to regulate campaign finance was in sore need of reform by the late 1990s. After several unsuccessful attempts, finally in 2001 a bill was introduced in Congress that might make the imagined reforms a reality. Despite drawing the familiar criticism of unconstitutionality that its predecessor bills had, the Bipartisan Campaign Reform Act of 2002 was able to squeak through the Senate of the 107th Congress with the exact minimum number of votes required for its passage. The act's life after Congress would be just as fraught.

The topic brings up many important issues: soft money, electioneering communications, issue advocacy and express advocacy; but an oft-overlooked consequence of the bill is the increased information dissemination by the Federal Election Commission. Tighter regulations and more authority to enforce disclosures allowed the FEC to make available to the American public information that candidates and parties might have been inclined to slip under the rug before.

But merely making the information available does not ensure the public will access it. The data collected and distributed by the FEC is difficult for inexperienced users to distill. By nature the data represents large quantities of money and money for expenditures the typical American citizen may not fully understand. The use of tools and statistical graphics can help bridge the divide between users and this information, but further efforts to encourage literacy on the topic of campaign finance could produce a better-informed electorate. Efforts to inform the electorate are particularly critical in the current political moment as our country approaches the 2020 election cycle.

**Rachel Condon** (rmcondon@iu.edu), Indiana University,  
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