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- Paying for America’s Elections: The Bipartisan Campaign Reform Act of 2002 and Information Access

# DttP

## Documents to the People

Winter 2019 | Volume 47, No. 4 | ISSN 2688-125X





*DttP: Documents to the People* (ISSN: 2688-125X) is published quarterly in spring, summer, fall, and winter by the American Library Association (ALA), 50 East Huron Street, Chicago, IL 60611. It is the official publication of ALA's Government Documents Round Table (GODORT).

*DttP* features articles on local, state, national, and international government information and government activities of GODORT. The opinions expressed by its contributors are their own and do not necessarily represent those of GODORT.

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**Distribution Manager:** ALA Subscription Department, 50 E. Huron St., Chicago, IL 60611; 1-800-545-2433, press 5; fax: (312) 280-1538; [subscriptions@ala.org](mailto:subscriptions@ala.org)

**Subscriptions:** *DttP* is accessible to ALA/GODORT members on a per volume (annual) basis. For subscriptions, prepayment is required in the amount of \$35 in North America, \$45 elsewhere. Checks or money orders should be made payable to "ALA/GODORT" and sent to the Distribution Manager.

**Contributions:** Articles, news items, letters, and other information intended for publication in *DttP* should be submitted to the Lead Editor. All submitted material is subject to editorial review. Please see the website for additional information: <https://journals.ala.org/index.php/dttp/about/editorialPolicies#focusAndScope>.

**Indexing:** Indexed in Library Literature 19, no. 1 (1991) and selectively in PAIS 33, no 1 (2005). Full text also available in HeinOnline 1, no.1 (1972).

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# DttP

Documents to the People

Winter 2019 | Volume 47, No. 4 | ISSN 2688-125X

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**About the Cover:** Congratulations to Gwen Sinclair from the University of Hawai'i at Mānoa Library for winning the Courthouse Photo Contest! Ali'iolani Hale in Honolulu, completed in 1874, houses the Supreme Court of the State of Hawai'i, the Intermediate Court of Appeals, the Judiciary History Center, and the Supreme Court Law Library. Fronting the building is a statue of King Kamehameha I. Each Kamehameha Day (June 11), the statue is draped with hundreds of flower lei in his honor.

Thank you to everyone who participated, it was fun to see all the different types of courthouses.

To continue the legal theme set by the cover photo contest, I am often called on by colleagues to teach strategies for finding legal resources in library instruction sessions. Legal databases and legal materials are often perceived as foreign and overwhelming to undergraduate students as compared to other scholarly resources. Teaching legal materials also often includes having to give a brief overview of the legal system so students understand what types of materials are available to them. When demonstrating how to find legal materials I demonstrate case law relevant to the curriculum in the class, but I find that an active learning session helps reengage the students who are needing a break. I have a collection of “fun laws” for students to find and briefly read so that I know they have learned basic searching techniques. I break down these session to search for case law by citation and by case names.

For case searches, trademark cases often have wonderful names. My favorite is *Juicy Whip v. Orange Bang* (185 F.3d 1364) because it sounds slightly kinky, and you can see students perk up and eagerly search to read the case. Another attention grabbing case is *Mayo vs. Satan* (54 F.R.D. 282). Look for the 1971 case which grabs student interest as they learn Satan could not be sued because the court did not have jurisdiction. I end case name searching with *Brake v. Speed* (605 So.2d 28). The defendant's name was Sally Speed who was ironically involved in an auto-accident case. Speed rear-ended a car driven by Brake.

For citation searching, I use laws that take too long to type in during the class period. A good one to start with is 241

U.S. 265 (*U.S. v. Forty Barrels and Twenty Kegs of Coca-Cola*). This case from 1916 shows the government trying to make the Coca-Cola Company remove caffeine from its product. This is also a good way to have them search for the lower court case 191 F. 431 and show how reversals are marked in the database. Another unique case is 386 F.3d 1169 (*The Cetacean Community v. George W. Bush, Donald H. Rumsfeld*). Here the court concluded that whales, dolphins, and porpoises do not have standing to sue. The old debate on if the tomato is a fruit or a vegetable made it to the Supreme Court in 1893 in 149 U.S. 304 (*Nix v. Hedden*). Here the tomato was classified as a vegetable for custom regulation purposes. To show state level court cases I like to use 784 S.W. 2d 480 (*Lynd v. State*) where the defendant was convicted of theft because he put weights in his fish so he could win a fishing contest that had a monetary prize.

Law reviews are also important resources, and I have a couple of fun reviews to look for as well. A search for “Star Wars” narrowed down to law reviews from Texas turns up Browning's exploration of case law where judges and attorneys refer to various Star Wars quotes and characters. A search for “Star Trek” turns up Browning again, showing Mr. Spock is a favorite reference.

I hope you enjoyed this lighter side of the law and that it can be useful for instruction. For more cases I recommend <http://loweringthebar.net/comical-case-names>.

## GODORT's Notable Document Panel

GODORT's Notable Documents Panel was established with the goals of promoting the value of government documents in our communities and of recognizing the individuals and agencies involved in their creation.

The panel requests your nominations for noteworthy government publications produced in 2018 or 2019 by any Federal, state, local, foreign or international agency. Selected nominations will be featured in the May 2020 issue of the *Library Journal*.

Please submit your recommendations through the form at this link: <http://www.library.unt.edu/forms/godort-notable-document-nomination-form>.

By nominating a government publication you can help the panel raise awareness about the immense value of government information, promote utilization of government documents collections and support the wider mission of GODORT.

Please submit your nomination by January 10, 2020.





**I**t is an honor to serve as the chair of GODORT. For those of you who do not know me, I first worked with state and federal information while at the New Mexico State Library. I left the Land of Enchantment for Big Sky Country in 2011. At the University of

Montana I took on the role of regional for the first time, and fell in love with that fabulous collection. I eventually learned that the state nickname did not apply to Missoula with an inversion layer during a nasty fire season. I moved to Fargo in the middle of winter to start at North Dakota State University in 2018, just a few months before our Past Chair started.

During my time working with government information I have fallen in love with the strange and fascinating histories that are bound in some of the most benign covers. Personal favorites include the 1980 “Operation Animal Mutilation” by the New Mexico Attorney General, the Roswell Report, the Congressional hearings on the Brownville Affray, and the massive amount of material from Civil Defense and the Atomic Energy Commission. I am a government information geek, and it is one of my great joys in life to be a member of a community that also appreciates these wonderful resources. I look forward to this year and the opportunity to work with our talented volunteers to grow our organization.

There is a great deal currently happening in GODORT, ALA, and the country. We hear that our skills are needed now more than ever, but what action can we take? We can be active in GODORT. The Education Committee is working with the State Database Project volunteers on Librarians’ Elections and Voting Toolkits for each state. This project was developed by our very talented emerging leaders: Azalea Ebbay, Shelly Guerrero, Megan Hamlin-Black, and Leslie Purdie.

Government Information Online (<https://godort.libguides.com/GIO>) has volunteers answering questions from around the country and the world. We are developing programs for ALA’s Annual Conference. The new editions of *DTTP* are now immediately available online for all to read, and the editors are looking at providing a peer-review option for authors. Peer reviewers will be needed. We have a new technology committee to maintain our website and social media accounts.

We need to decide our path forward as ALA looks to adjust and modernize its structure. The Midwinter Meeting will be changing, with ALA promoting virtual options for meetings. This year GODORT is taking advantage of technology by having the meetings, which are traditionally held at Midwinter, online. Now, those who previously were unable to fully participate at Midwinter due to scheduling or limited budgets will be able to take part in all of the meetings.

ALA is also exploring structural changes. The Steering Committee on Organizational Effectiveness (SCOE) has been investigating significant alterations to the structure of the whole organization, including Round Tables. There have been very few details released, but we know change is coming and a more comprehensive plan should be released at Midwinter.

Nationally the information climate has been . . . heated. Misinformation has always been with us, from pseudoscientific treatments to income tax protesters. Over the last few years there has been an obvious shift, and the presence of misinformation has become ubiquitous. We must continue to hone our skepticism, check our sources, and help our patrons tune their critical-thinking skills. We work with agencies in constant states of flux as heads of departments depart, missions shift, regulations are struck, and there is a sense of uncertainty. Our membership is rising to the occasion; every eye that spots questionable content and every reference interaction is part of our fight to provide the public with good information. Now is the time to show what we can and are doing for our libraries and our communities.

My invitation to you all is to continue to engage. Find a GODORT project to participate in, join the conversation on restructuring, and share the projects you are working on in your own institution. Are you teaching users how to evaluate sources? Are you presenting at your state library conference? Are you creating exhibits or involved with helping voters? Let us know so we can share and celebrate your work.

**Susanne Caro** ([susanne.caro@ndsu.edu](mailto:susanne.caro@ndsu.edu)), Government Information Librarian

# In Larger Freedom

## Access to Information and International Government Organization Archives

Jim Church

In April 2019 at the International Studies Association (ISA) annual conference, I participated in a panel about International Organization Archives and the UN Depository system.<sup>1</sup> There we learned of a report by the Joint Inspection Unit (JIU) of the United Nations titled “Strengthening Policy Research Uptake in the Context of the 2030 Agenda for Sustainable Development.” The report notes that “the research value and visibility of United Nations digital outputs, which are currently residing, unconnected, on numerous United Nations websites and in a plethora of diverse, online databases” presents challenges to researchers. They also recommend that “a principle of open access should operate by default for research products and data published or commissioned by the United Nations. This includes publications, authorship and co-authorship in open access journals or collections.”<sup>2</sup> Per their mission statement, the JIU is the “only independent external oversight body of the United Nations system mandated to conduct evaluations, inspections and investigations system-wide.”<sup>3</sup>

That is welcome news if the United Nations Department of Public Information agrees; to date, their practice of pay-walling UN Sales Publications does not indicate as much. But charging for publications is not the full extent of the UN Access to Information (AI) problem: researchers also complain about IGO archives. The way some international organizations handle requests for information, as well as a tendency to broadly classify internal communications as “confidential,” can present impediments to researchers interested in the history and practices of these organizations, not to mention citizens affected by the work of UN Operations. This column offers a selective review of IGO archives and AI policies and makes tentative suggestions for reform.

### Research Guides to International Government Archives

Online guides to IGO archives are not common. An informative, if dated, one can be found at the Woodrow Wilson International Center for Scholars (Wilson Center). In 2004 the author completed a survey of IGO Archives and reached out to “each of the UN specialized agencies, two UN programs (UNHCR and WFP), and two UN-related organizations (WTO and IAEA)

to summarize its access policy” as well as “NATO, OECD, and the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.”<sup>4</sup> Fifteen years later the guide is still valuable for its contact information and descriptions of these policies. A current guide created by the UN Archives in New York provides listings of international government and nongovernmental organization archives and specialists,<sup>5</sup> including the International Council on Archives (ICA) (“dedicated to the effective management of records and the preservation, care and use of the world’s archival heritage”) and the International Management Records Trust.<sup>6</sup> UNESCO has published three versions of a *Guide to the Archives of Intergovernmental Organizations*, providing detailed information about the mission and policies of thirty-nine IGO archives.<sup>7</sup> Each entry includes contact information, hours, languages, organizational history, collection descriptions, finding aids, and AI policies. The drawback is the latest volume was written in 1999, which predates the era of massive digitization and many changes to IGO information policies. For example, in 1999 the World Bank Archives AI policy stipulated “the World Bank Group Archives are currently classified as ‘Official Use Only’ and thus are normally available only to staff within the World Bank Group.”<sup>8</sup> This contrasts strikingly with the current World Bank Group’s AI policy, which states that the World Bank Group “will disclose any information in its possession that is not on its list of exceptions.”<sup>9</sup>

### United Nations Archives in Geneva

I visited the United Nations Office in Geneva (UNOG) Archives when researching League of Nations Depositories. These magnificent archives contain six linear kilometers of material, including the League of Nations Archives, archives of international peace movements, the Archives of the United Nations Office at Geneva, and a collection of related private archives. A good way to get acquainted is to browse the organizational hierarchy of the UNOG Registry, Record and Archives Unit at <https://biblio-archive.unog.ch/archivplansuche.aspx>. Opening the high-level fonds of the League of Nations Secretariat and drilling down is staggering. The “Economic Relations Section” from 1933–1946, for example, displays more than 175 sub-series with titles that are disquietingly familiar: “Demographic and Migration Problems,” “Protection of Consumers Against Worthless Goods,” “Customs Tariffs,” “Import and Export Restrictions,” and my favorite, “Artificial Manure.” The series “Health and Social Questions” is similar, with sub-series

on opium, vaccines, and trafficking in women and children. The archive has a catalog (<https://biblio-archive.unog.ch/suchinfo.aspx>) with advanced search options.

Even more interesting is the Total Digital Access to the League of Nations Archives (LONTAD) Project (<https://lontad-project.unog.ch/>) launched by the UNOG Library Institutional Memory Section. This stupendous undertaking aims to preserve and provide online access to the more than 15 million pages of archival documents, requiring more than 250 TB of data. Some material is already available: if a user goes to the UN Enterprise Search Engine (<https://search.un.org>) there is a pull-down menu limiting the search to League of Nations content. I also like the simplicity of their AI policy: “The Archives of the League of Nations are entirely accessible” and “United Nations records over 20 years old are generally open for public research, unless the classification level ‘Strictly Confidential’ (or related) applies.”<sup>10</sup> This is important because the archives also contain records of the UN offices currently operating in Geneva: notably the UN Economic and Social Council and the Economic Commission for Europe.

## United Nations Archives in New York

The United Nations Archives in New York (a.k.a. Archives and Records Management Section, or ARMS) has an ambitious mission: in addition to organizing, digitizing, and providing access to UN historic content, they receive material from the offices at the UN Headquarters in New York on an ongoing basis. Even so, the archives are not as comprehensive as one might think. They do not, for example, include materials from the UN Specialized Agencies, such as UNESCO, nor from UN Funds and Programs like the United Nations Development Programme.<sup>11</sup> That said, ARMS is an ideal place to research the UN’s political and administrative history, UN Peacekeeping Operations and Field Missions, or the UN’s origins. A good way to get oriented is to browse the Finding Aids at <https://archives.un.org/content/finding-aids-0>, which groups the archives into four broad categories: Archives of the Secretaries General, Archives of Secretariat Departments (e.g., Departments of Economic and Social Affairs), UN Field Missions (including observer, relief, and peacekeeping missions), and selected predecessor organizations, such as the United Nations Conference on International Organization.

The archives are organized using the hierarchical “tree structure” used by most IGO archives: fonds, sub-fonds, series, sub-series, folders, and files. The search engine <https://search.archives.un.org/> retrieves metadata from the finding aids and an impressive array of digital objects (at the time of this writing more than 215,000). The search page also provides an inspiring

list of archives for UN missions. Browsing through these is a fantastic way to get acquainted with the arc of UN history. What was the purpose of the first UN Peacekeeping force, the United Nations Emergency Force? Look at the finding aid to find out. An active digitization program has also recently completed two vast digitization projects for the complete archives of Ban Ki Moon and Kofi Annan. Clearly much is to be commended here.

Yet navigating an archive of this size is a challenge, even for the most dedicated and knowledgeable researcher, so it’s advisable to consult with a UN archivist before making a trip. But one may encounter other obstacles. ARMS asks users to book a visit well in advance (the recommended time is four to six weeks) and to come prepared with a list of documents and a work schedule. But the most serious issue of is the extraordinary emphasis placed on “information sensitivity” and the absence of a UN AI policy. A significant amount of material seems unnecessarily classified as “confidential.” The current procedures for “information sensitivity, classification and handling” are spelled out on the Secretary General’s Bulletin ST/SGB/2007/6 (SG bulletins represent the highest level of Secretariat policy) and state that

a) Records that are classified as “strictly confidential” shall be reviewed on an item-by-item basis by the Secretary-General, or by such officials as the Secretary-General so authorizes, for possible declassification when 20 years old. Those not declassified at that time shall be further reviewed, every 5 years thereafter, by the Secretary-General or by such officials as the Secretary-General so authorizes, for possible declassification.

(b) Records that are classified as “confidential” shall be declassified automatically by the Archives and Records Management Section when 20 years old.<sup>12</sup>

There are clearly situations where unauthorized disclosure of sensitive information could seriously jeopardize the work of the UN or compromise the safety and security of individuals. But the rationale seems to be anything even *potentially* sensitive should be restricted, and the decision to declassify has to go all the way up the chain of command to officials who seem to have wide discretion about what to release, to whom, and when. The UN Archives Management Guidance Document titled “How Do I Protect Sensitive Information?” states that “as a safeguard, you should consider all documents to be STRICTLY CONFIDENTIAL or CONFIDENTIAL until their classification is confirmed.”<sup>13</sup> There is also a seventy-seven-page “Information

Sensitivity Toolkit” that goes into exhaustive detail about reasons to classify documents (one is “strained relations between the United Nations and a non-governmental organization”).<sup>14</sup>

Another confusing issue is the process and timelines for declassification: in theory this is automatic and all documents classed as “confidential” get declassified after twenty years. But the ARMS metadata typically indicates the *original* classification status, not the current one. Thus the fond Criticisms of United Nations Operations, dating from 1961 to 1970, still says “confidential” (after almost fifty years) even though it was technically declassified twenty-nine years ago.<sup>15</sup> Numerous other fonds, for example, the International Conference on the Former Yugoslavia (ICFY) (1992–1993), which include negotiations and ceasefire agreements, likewise indicate a confidential status.<sup>16</sup>

An excellent (and highly critical) review of UN information practices was written by the UN Special Rapporteur of the Human Rights Council on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, director of the International Justice Clinic and Clinical Professor of Law at UC Irvine. His report at <https://undocs.org/A/72/350> is worth a read. Here Kaye states,

The United Nations does not have an access-to-information policy that applies to every department and specialized agency; it does not even have ad hoc standards to provide a response to access-to-information requests. For the central global political institution, one that serves the public interest across a range of subject matters, this is intolerable.<sup>17</sup>

It is intolerable. What is more, the UN expects governments of nation states to “enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation” when the UN itself has no such measures.<sup>18</sup> There is no UN Freedom of Information Act. There is no clear procedure whereby the public can request information about allegations of whistle-blowing, fraud, or potential UN conflicts of interest. The Department of Public Information does have a web form via which the public may address inquiries, and on the UN Archives FAQ the answer to access to confidential documents is “please email us a list of the files you’d like access to, and our reference staff will initiate the declassification review process.” But providing an email address is not the same thing as having an AI policy. And what is ironic is that international financial institutions like the World Bank and IMF (the traditional bogeys of international civil society)

now have the most open AI policies. One of these is examined next.

### World Bank Archives

The World Bank has made great strides in its AI policy, going from one of the most restrictive in the 1980s to the most open today. First of all, they *have* a policy: it is available at <https://www.worldbank.org/en/access-to-information> and a brochure about it is aptly titled “Open Archives.”<sup>19</sup> There is a clear pathway to make an AI request at <https://www.worldbank.org/en/access-to-information/requests>, and there is even an AI annual report. For researchers needing information there is a straightforward process. Requests for information may be submitted via an AI request form. Inquiries are acknowledged within twenty-four hours with a more comprehensive response sent within twenty business days. The system is so transparent the Bank records all requests made monthly, with case numbers. If requests are denied, there is an appeal process conducted by the Access to Information Committee and the Access to Information Appeals Board.

The features on the World Bank Archives website <https://archivesholdings.worldbank.org/> are similar to the UN Archives in New York, if a bit easier to navigate. One can browse the hierarchical list of fonds by going to <https://archivesholdings.worldbank.org/list-of-fonds>, some of which have exhaustive metadata. Upon discovery of a series, one can often find an inventory listing of documents with their disclosure status. Sometimes the availability is obvious (press releases are public); and most are “eligible for disclosure” (a better term than “unclassified.”) Per the World Bank Classification and Control Policy materials not available for disclosure include items that are “Strictly Confidential,” “Confidential,” or “Official Use Only.”<sup>20</sup> I spent a considerable amount of time searching the site, and found that the amount of information classified as “confidential” or “partial disclosure” was rare compared to the UN Archives.<sup>21</sup> This is an extraordinary step forward from the policies of previous World Bank regimes (Official Use Only!) representing a great transformation towards transparency and open government.

### European Union (EU)

The EU archives can be confusing for a different reason: there are a lot of them, but they are being consolidated. A list of appears on the EU page devoted to libraries and archives, but this not extraordinarily helpful as some of the links are broken and others provide minimal information.<sup>22</sup> The major EU institutions such as the European Parliament, the European Commission, and the European Council historically had their own



archives, some with search engines and finding aids. Access to archival content is generally governed by what is known in Europe as the “30-year rule,” elaborated in EU Council Resolution No 354/83,<sup>23</sup> which calls for automatic declassification of archival content after thirty years. EC Regulation (EC) No 1049/2001 also specifies rights of access for EU citizens (note the limitation) to European Parliament, Council, and Commission documents.<sup>24</sup> The EU also has a useful “Freedom of Information” website that specifies rights and exceptions for access to information.<sup>25</sup>

The good news is many of these collections have been (or are in the process of being) transferred to the Historical Archives of the European Union (HAEU) at the European University Institute in Florence.<sup>26</sup> They are housed in the Villa Salviati, a beautiful building with a colorful history. Many EU archives thus exist at more than one institution: originals may be kept at the contributing organization and copies sent to the HAEU; or microforms or digital copies may be kept at the contributing institution with originals sent to HAEU. Consolidation and redundancy represent the best of both worlds: researchers wishing to examine the archives of different EU institutions do not have to travel to multiple locations, and preservation is enhanced through redundancy. HAEU also serves as an archive for the “private papers of key European politicians, high-ranking EU officials, and individuals involved in the process of European integration as well as the archives of pro-European movements and other organizations with a European scope” resulting in a one-stop archive for the history of European integration.<sup>27</sup>

The HAEU has a helpful online research guide, organized by topic. The search engine has a much-needed language limit (there is even a category for “American English”). Since many collections were originally housed in French archives, most are described using French metadata regardless of the original language(s). For this reason, searching (not browsing) is the optimal strategy since documents created in English, Dutch, Italian, German, etc., may have an abstract in the original language, while the fonds and series will have French titles (additional language metadata would be helpful and hopefully there are plans for this). The archives also contain impressive collections of oral histories, audiovisual collections, digital files, and a reference library. HAEU even conducts educational and outreach programs. There is much to admire about this institution, which clearly has the support of the EU and seems both well-funded and celebrated.

## Conclusion

This column has only touched on the scope and AI policies of a limited number of IGO archives—to do this justice, a book

could be written. But one can’t help but question the contradictions: UNESCO just celebrated “International Day for Universal Access to Information,” and their archival website is clear and comprehensive. But many IGOs, particularly in the UN, have policies both mysterious and antiquated. As late as 2015 the UN Food and Agriculture Organization required researchers to make appointments to use the archives via their FAO Ambassadors, which was nowhere explained on the website.<sup>28</sup> The ILO archives website has contact information and a brief description of its contents, but the link to “Rules for Access to the ILO Historical Archives” is broken. The UNCEF archives are closed. The GATT/WTO archives only provides a brief description of its content with a cryptic note that “access limited to authorized users.”<sup>29</sup> And some IGOs mention virtually nothing about their archives. The 1999 UNESCO publication cited earlier notes that the archives of the International Fund for Agricultural Development (a UN Specialized agency dedicated to helping the rural poor) “are open only to internal staff and the staff of other international organizations.”<sup>30</sup> I can now find no other trace of its existence.

It can be difficult for even the most dedicated and credentialed IGO researcher to determine what information they are entitled to and how to access it (just think of the challenges a member of the public faces). Some of this may be due to financial constraints and staff limitations, but judging from the report by the Special Rapporteur it also sounds like institutional culture and lack of transparency. Kaye notes with dismay that “despite extensive outreach, dozens of intergovernmental organizations and agencies within the United Nations system did not respond to the mandate’s call for submission. I was particularly disappointed not to receive a submission from the Secretariat of the United Nations Headquarters in New York.”<sup>31</sup> Despite a climate of open government policies now being embraced around the world, many IGOs seem resistant to change.

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# TRAIL Spotlight

## Fires in Abandoned Coal Mines and Waste Banks

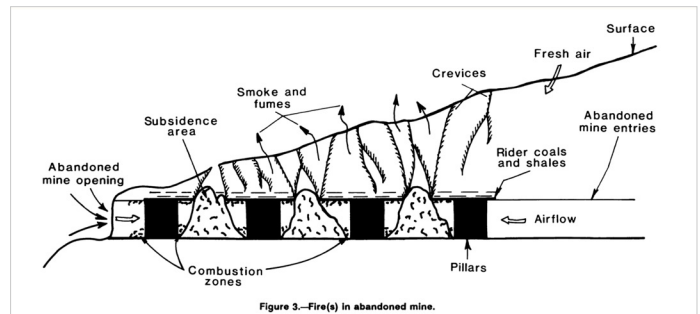
Mark Chalmers

Coal is a readily combustible rock of carbon and hydrocarbons that is found all across the United States. Due to its combustible properties and relative abundance, burning coal has been and still is a substantial fraction of the US energy market. However, also due its combustible properties, coal veins and mines tend to, well, catch fire. Lewis and Clark reported seeing burning veins of coal in 1805 when they were exploring the Missouri River in what is now central North Dakota.<sup>1</sup> Maybe you have heard of the still burning mine fire in Centralia, Pennsylvania where a strip mine has been burning since 1962 and could continue to burn for over 250 years.<sup>2</sup> Abandoned coal mines that catch fire are serious health, safety, and environmental hazards that the US government has been trying to address for decades.

The report, *Fires in Abandoned Coal Mines and Waste Banks*, from the U.S. Bureau of Mines addresses the problems specific to fires in coal mines that have been abandoned. It covers possible sources of ignition, the current technology of the time to help control the fires, what kind of factors influence the propagation of the fires, and what research is being done in the field.

Find more technical reports at [www.technicalreports.org](http://www.technicalreports.org).

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Fires in an abandoned mine.

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# Tuskegee Syphilis Study of 1932–1973 and the Rise of Bioethics as Shown Through Government Documents and Actions

Laura A. Barrett

One government source regarding clinical trials is Clinicaltrials.gov (<https://clinicaltrials.gov>), which is available to health information seekers as a resource to find information about past, current, and recruiting clinical trials. Currently, if you participate in a clinical trial you are required to provide your “informed consent.” This means you have been informed of the risks, benefits, purpose of the study, and your rights. This information is provided to you so that you, as the potential participant, can make an informed decision before deciding whether or not to participate. If you work with or in research, you will become very familiar with the term IRB, which stands for “Institutional Review Board.” An IRB is a panel intended to oversee the entire scope of one or more medical research studies including protecting the rights and welfare of human research subjects. Although it may seem like common sense that these two things are necessary, there was a time when they did not exist. A new approach to bioethics and the regulation of clinical trials and medical studies using living human subjects came about from public and governmental outrage over one study, known as the Tuskegee Syphilis Study. By looking specifically at this case, which led to the rise of bioethics at the federal-government level in the 1970s, the origin of IRBs and informed consent as they relate to medical studies and human subjects will be illuminated. The issues of IRBs, informed consent, and bioethics are important in the library and information science community because we often interact with a public that is impacted by the policies and regulations related to these issues. In addition, we are the very researchers, or hold relationships with researchers, that are held to the strict standards set in place by IRBs and bioethics in general.

## Syphilis

Let’s go back to the 1920s. Syphilis had an incidence rate higher than that of gonorrhea, typhoid, diphtheria, or pertussis.<sup>1</sup> It was not as deadly as some other diseases but did cause damage—some permanent—or death.<sup>2</sup> Syphilis is a sexually transmitted disease (STD) caused by a bacterium but can also be transmitted from a pregnant woman to her unborn child.

Symptoms of syphilis are not always apparent even now, and they were less so in the 1920s, when it was often referred to as “bad blood,” especially in the African American community. Symptoms can look like other illnesses, but syphilis usually follows stages that can last for weeks, months, or years. Syphilis can be transmitted during stage one, stage two, or the early latent stage of the disease. In addition, even if you receive treatment once, you are still at risk of being reinfected if you come into contact with the bacterium that causes syphilis again. “Syphilis is a disease with an acute span of about 2 years and with chronicity which may persist throughout the life span. Most of its lethal and crippling manifestations occur during the first 15 to 20 years of the chronic period.”<sup>3</sup>

## Choosing Macon County and the Start of the Tuskegee Study

Syphilis in Macon County, Alabama, was chosen as a study topic for the following reason,

In the late 20’s various of the foundations began their studies of health conditions in the south which were to eventuate in the development of local health units. One of the most striking findings in the early surveys

of disease prevalence was the high rate of syphilis among the majority of the Negro groups studied. In one of the study areas (Macon County, Ala., home of Tuskegee Institute) initial efforts at control of syphilis were followed by further moves on the part of the United States Public Health Service to bring diagnosis and treatment to the population. With the finding of high prevalence of syphilis in the survey and with certain other factors apparent in the community it became evident that it might be possible to institute in this region a prospective—in contrast to a retrospective—study of the results of untreated syphilis in the Negro male. Such a study was needed to assist in the planning and execution of the national venereal disease control program which was then being planned for a later time.<sup>4</sup>

In addition, that area had the highest syphilis rate in the United States at the time. It was thought that syphilis in African Americans had different manifestations than in whites. Initially, the U.S. Public Health Service and Tuskegee Institute created this study to monitor syphilis for six to eight months. The Tuskegee Institute and the African American professionals from there, were involved to help build relationships with the study population. The U.S. Public Health Service and Tuskegee Institute planned on having a syphilitic group and a control group and wanted to monitor health differences between the two groups. To get as much information as possible about the study participants, autopsies were also intended to be performed on all study participants. To recruit appropriate participants, they used fliers beginning in the fall of 1932. The fliers advertised a new health program and promised free blood tests and free treatments for “bad blood” in addition to free meals, free physicals, and free burial insurance. Approximately 600 black men initially signed up, 399 with syphilis and 201 without. Recruitment was not active after 1933, but participants were added when other participants moved away or were lost. Participants that were enrolled in the control group at the beginning of the study also contracted the disease during the study. There are not exact numbers regarding the total number of participants because records were not exact.<sup>5</sup>

The men tended to be sharecroppers who were poor and illiterate and had never had any proper medical care. The men were never told what the study involved, were never told that they would not receive adequate treatment for syphilis, and were not given the option of leaving the study. In addition, positive participants were not specifically told that they had syphilis or that that was the specific disease being studied. In 1936,

the decision was made to follow the study participants until their death. They also continued the decision to not provide any treatment for syphilis. This practice continued even when it was discovered in the 1940s that penicillin was a safe and effective treatment for the disease. The U.S. Public Health Service established treatment centers for syphilis but made sure that study participants were not treated. Study doctors went as far as to prevent participants from receiving this treatment from other doctors. In the case of George Key, even when he moved to California and Massachusetts, he was still tracked as a study participant and not given the appropriate treatment. Similarly, Ernest Hendon was tracked by study doctors when he relocated to Ohio.<sup>6</sup> One other issue with this type of study was that the study did not consider the effects of the disease and lack of treatment on wives, partners, children, unborn children, families, and local communities of the study participants.

When ongoing continuation of the study was evaluated under multiple supervisors, it was deemed that the benefits of continuation outweighed the benefits of ending the study. Patient welfare was not taken into consideration. Even as late as 1969, a committee with the Center for Disease Control decided to continue the study until all study participants had died and been autopsied.<sup>7</sup>

## End of the Study, Advisory Panel, and Civil Case

The study continued until 1972 and ended for several reasons. The most prominent and the first chronologically was when one of the investigators associated with the study, Peter Buxtun, leaked information to an Associated Press reporter. This is after he had voiced his concern to the director of the U.S. Division of Venereal Disease, which was a branch of the U.S. Public Health Service, and was ignored. A news article was published on the front page of the *New York Times* on July 26, 1972, under the headline “Syphilis Victims in U.S. Study Went Untreated for 40 Years.” “Officials of the health service who initiated the experiment have long since retired. Current officials, who say they have serious doubts about the morality of the study, also say that it is too late to treat the syphilis in any surviving participants.”<sup>8</sup> This publication immediately raised concerns both internally in the Department of Health, Education, and Welfare, which now oversaw the study, as well as in Congress. Merlin K. DuVal, the Assistant Secretary of Health, created the Tuskegee Syphilis Study Ad Hoc Advisory Panel. DuVal tasked the panel with three tasks:

- Determine whether the study was justified in 1932 and whether it should have been continued when penicillin became generally available.
- Recommend whether the study should be continued at this point in time, and if not, how it should be terminated in a way consistent with the rights and health needs of its remaining participants.
- Determine whether existing policies to protect the rights of patients participating in health research conducted or supported by the Department of Health, Education, and Welfare are adequate and effective and to recommend improvements in these policies, if needed.<sup>9</sup>

On November 16, 1972, a memo from DuVal, was sent to the Director of the Center for Disease Control. This memo called for the termination of the “Tuskegee Study.”<sup>10</sup> The decision was based on information from the Ad Hoc Advisory Panel and noted that additional information would be forthcoming regarding next steps. Besides in-depth answers to the three specific tasks they were assigned, a few summary conclusions were also raised:

1. There was no evidence of informed consent.
2. There was known risks to human life and transmission of the disease during the time of the study.
3. There was evidence that those from the control group that developed syphilis were moved to the syphilitic group and it is not clear if those participants received treatment.
4. The study was deemed ethically unjustified in 1932 (Based on hindsight from 1973).
5. This type of study would never be repeated.
6. The scientific pluses of the Tuskegee study were hugely overshadowed by the violation of basic ethical principles.
7. Congress should establish a permanent body to regulate, at a minimum, all federally funded research involving human subjects.<sup>11</sup>

On July 24, 1973, an individual civil case was filed on behalf of study participant Charlie Pollard by lawyer Fred D. Gray. Gray was known for his civil rights work with Martin Luther King Jr., Claudette Colvin, and Rosa Parks. *Pollard v. United States* alleged violations of both federal and state law.<sup>12</sup> The case was based on violations of wrongful death statutes, deprivation of life and liberty, and involuntary servitude. The case was expanded to a class-action lawsuit and broadened to include both remaining study participants as well as family members of deceased participants. The case was settled for \$10

million dollars, which is equal to about \$60 million in 2019. As part of the settlement, the Tuskegee Health Benefit Program was also created.

## The National Research Act of 1974

As a result of becoming aware, Congress held hearings regarding the Tuskegee Study and bioethics in general. Testimony was heard from Peter Buxtun; Fred D. Gray; multiple Department of Health, Education, and Welfare officials; members of the Tuskegee Syphilis Study Ad Hoc Advisory Panel; study participants; as well as others. It is clear from the testimony of the study participants that they thought that they were receiving appropriate medical treatment as participants of the study.<sup>13</sup> The result of these hearings was The National Research Act of 1974 that created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. This Commission produced multiple reports, of which two were highly influential. The first of these is “Report and Recommendations: Institutional Review Boards.”<sup>14</sup> IRBs were initially created by The National Research Act of 1974 and certain specifics about IRBs are listed in the Title 45 *Code of Federal Regulations* Part 46. “Report and Recommendations: Institutional Review Boards” helped to further define how IRBs should work, how to evaluate if they are working, and how to improve the review process. IRBs are in place to oversee research from an ethical perspective as well as to monitor research to ensure that steps are taken to protect the rights and welfare of human participants. IRBs exist at academic and nonacademic organizations. They review protocols and methods as well as study materials. Most IRBs require documentation in specific formats. They may approve, disapprove, or require modifications to research before it can begin. In addition, they require continuous monitoring during the course of a study. If aspects of a study or the study environment change, an IRB does have the ability to revoke approval of the study. If IRBs had been required during the time of the Tuskegee Study, both the Tuskegee Institute and the U.S. Public Health Service would have had IRBs that would have reviewed the study. Based on given facts and current IRB standards, it is doubtful that the Tuskegee Study would, at any point, have been given approval by an IRB. Even if the study had met all of the requirements of both the Tuskegee Institute and federal IRBs and approval had initially been granted for the study to start, there is no guarantee that there would have been continued approval given the extension of the timeframe and the discovery of a safe and effective treatment for syphilis.

The second influential document created by the Commission is “The Belmont Report: Ethical Principles and Guidelines

for the Protection of Human Subjects of Research.”<sup>15</sup> This document defined three basic ethical principles of respect for person, beneficence, and justice. Respect for persons is the idea that all people deserve the right to autonomy (i.e., the right to make their own choices based on their values, preferences, and beliefs) and included additional protections for those who cannot practice this right because they are “disadvantaged.” As part of respect for persons, researchers should be truthful and without deception. Beneficence is the idea that researchers must “do no harm” and maximize benefits and minimize risks for study participants. Justice is the idea that the benefits and burden of the study must be equally distributed.

“The Belmont Report” also discussed the application of informed consent, risk/benefit assessment, and the selection of subjects of research that somewhat match to respect for persons, beneficence, and justice. Informed consent is based on three main principles: information, comprehension, and voluntariness. Information typically includes items such as the purpose of the study, risks, benefits, procedures, and ability to withdraw. Comprehension has to do with both the manner in which the information is presented and the ability of the subject to understand the information. The researcher has a responsibility to make sure that participants understand their informed consent, especially if they are considered disadvantaged. Lastly, informed consent is only valid if it is given voluntarily. There can be no coercion or undue influence. Risk/benefit assessment requires the researcher to look at data and consider alternative ways to obtain the benefits of a study under consideration. It requires that a researcher consider all options and carefully plan proposed research. It is designed to make sure that research is appropriately designed to maximize benefits and minimize risks. The selection of subjects of research requires that there be fair procedures in the selection of participants for research. This maximizes the application of justice.

If these concepts had been in place in 1932, the Tuskegee Study would not have taken place as it did. The participants in the Tuskegee Study would have been considered disadvantaged because they were poor, had limited access to health services, limited education, and limited literacy. Because of these factors, they would have needed special protections to make sure that they understood their choices and their ability to make their own decisions. In addition, researchers would have needed to make sure there was no deception and be truthful about the study. After knowing the full facts of the study, participants would have needed to voluntarily join the study and stay in the study. In addition, there would have had to be some form of informed consent, which never occurred. In terms of

beneficence and risk/benefit balance, the Tuskegee Study did not meet the qualifications for beneficence as they did harm and did not seek to benefit the study participant or limit risk for the participants, the families, or the community. It is not clear that the researchers sought out other ways to obtain the benefits that they did through the Tuskegee Study. In the case of justice, the burden was not equal as the burden was strictly on the participants and they did not see any of the benefits. It was also clear that these subjects were chosen for specific reasons that placed a bigger burden on them than was appropriate.

## Later Bioethics Commissions

In 1978, Congress created the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research.<sup>16</sup> This Commission was different from the previous one in that it was operated through the President instead of through the Department of Health, Education, and Welfare. It also broadened the scope to allow for consideration of more emerging issues, or issues raised at the request of the President. Presidents Clinton, Bush (I), and Obama created bioethics bodies via executive order. It does not appear, at the time of writing, that President Trump has created a commission or council on bioethics.

## Official Apology

On May 16, 1997, President Clinton made official remarks in apology to African Americans on the Tuskegee Experiment.

So today America does remember the hundreds of men used in research without their knowledge and consent. We remember them and their family members. Men who were poor and African-American, without resources and with few alternatives, they believed they had found hope when they were offered free medical care by the United States Public Health Service. They were betrayed.

Medical people are supposed to help when we need care, but even once a cure was discovered, they were denied help, and they were lied to by their Government. Our Government is supposed to protect the rights of its citizens; their rights were trampled upon—40 years, hundreds of men betrayed, along with their wives and children, along with the community in Macon County, Alabama, the City of Tuskegee, the fine university there, and the larger African-American community. The United States



Government did something that was wrong, deeply, profoundly, morally wrong.<sup>17</sup>

## Application for National Register of Historic Places

The National Register of Historic Places recognizes the country's historic buildings, sites, and structures worthy of preservation. Being added to this list marks these buildings, sites, or structures, as important examples of the country's heritage, both positive and negative. "The Tuskegee syphilis study, has come to symbolize the most egregious abuse of authority on the part of medical researchers."<sup>18</sup> In addition, the application also highlights some of the more deplorable acts such as painful and dangerous spinal taps performed without informed permission of the participants and taking blood samples and giving medication at local roadway intersections or in other non-sterile environments. This application called for different types of properties to be added to the National Register of Historic Places. These include cemeteries, medical facilities, residences associated with prominent persons, and "roundup" centers, which include churches and schools. The goal with this application was not just to recognize the negatives of the study but to remember the rural, African American Alabama families that were forever changed by the Tuskegee Study. Though the study is over, generations of Macon County families will be able to show the impact that the study had on changing the face of bioethics in the United States.

## Conclusion

The United States has come a long way from the 1920s in Macon County, Alabama. There are now in place protections intended to help protect the welfare of human participants in research. Unfortunately, without up-to-date guidelines about the ever-changing bioethics environment, we may be in a situation in which we are bound to repeat history. Staying current with this environment, not forgetting the past mistakes and transgressions that have occurred, and changing policy as necessary are key to making sure that we do not repeat the past. We will have to pay close attention to new advances in subjects like human genetics, stem cell use, precision medicine, and the use of AI in medicine. Along with advancements in medicine and clinical care comes the need for reciprocal and forward-thinking advancements in bioethics. In looking at the intersection of health information and government documents, there are important areas of legislative history that can teach us as librarians and our library users much about the growth of health research in the United States from both a professional perspective and one that can impact us on a more personal level as well.

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# The Radioactive Dirt

## An Analysis of the Role Information has Played Throughout Hanford's History

Spencer Bowman

*This paper will explore how information played an important role in the history of the Hanford site. Looking closely at Environmental Protection Agency (EPA), Department of Energy (DOE), and other government agency publications and documents will bring more insight into the effects on the environment and how the government has handled the situation throughout its operations. This paper will also add non-governmental perspectives on the issues presenting news reports and evidence that call attention to the problems.*

East of Mount Rainier National park, past the dry but green vineyards of Yakama, over the low slung sandy beige hills in a flat stretch of land near a bend in the Columbia River lies the Hanford site. At this moment, buried beneath its arid, dusty earth is over 750,000 cubic meters of stored toxic waste.<sup>1</sup> Since 1944 the Hanford site has pumped 75,000 gallons of water a minute from the Columbia River to cool its 200 tons of uranium in its three reactors.<sup>2</sup> The groundwater eighty square miles around the site is contaminated with radioactive or chemical substances above the drinking water standards.<sup>3</sup> Since operation, the site has caused major environmental hazards affecting both the natural environment and individuals surrounding the site.<sup>4</sup>

### History and Background

The genesis of the Hanford site starts with the Manhattan Project. After the Japanese attack on Pearl Harbor in 1941 the U.S. government decided to carry out a full-scale program to build an atomic bomb. The Army Corps of Engineers set up the Manhattan Engineer District as described in a U.S. Department of Energy document as operating like a “large construction company on a massive scale.”<sup>5</sup> With the investment of hundreds of millions of dollars, the project rapidly expanded, scattering research laboratories and facilities across the nation.

In 1943 the War Department decided to use portions of land near the towns of White Bluffs and Hanford in eastern

Washington. These small towns sprang up in the 1850s to support the farms and ranchers in the area. The War Department informed the residents of these towns to evacuate their homes and abandon their farms and gave the residents just thirty days and a small amount of money in aid.<sup>6</sup>

Once the residents were pushed out of the area the War Department recruited workers for the construction of reactors and laboratories for the processing of plutonium. The work at the site was compartmentalized, meaning very few workers knew exactly what the laboratories and facilities were producing at the time they were working.

This compartmentalization of the departments inside Hanford was a calculated way by the government to limit information. The reasons are twofold. The first reason was to restrict military secrets from getting out. Even if the worker shared information with spies, that worker only knows a small part of the complex project. The second reason this limiting of information worked in the government's favor was that it masked the intent of the project at Hanford to its workers.

The construction crews built a total of three reactors and “two massive processing facilities called ‘canyons,’ where plutonium would be extracted from uranium fuel rods after removal from the reactors.”<sup>7</sup> All the scientific, technical, and labor behind the Manhattan Project came to a head with the detonation of a nuclear bomb dubbed “Fat Man” which was dropped on Nagasaki, and partly assisted in ending the Second World War in 1945.

The end of the Second World War did not however bring an end to operations at the Hanford site. With atomic weaponry and energy came both the Cold War and the idea of America's Atomic Age in late 1940's. President Harry S. Truman addressed Congress on October 3, 1945 touting the limitless possibilities of atomic energy when he said, “The discovery of the means of releasing atomic energy began a new era in the history of civilization.”<sup>8</sup> In this same address, President Truman highlighted the utopian vision that the utilization of

atomic power meant to America at the time by remarking, “it may someday prove to be more revolutionary in the development to human society than the invention of the wheel, the use of metals, or the steam or internal combustion engine.”<sup>9</sup> However, with the promise of this new, powerful energy came the quick move by the U.S. government to control every part of it.

Truman’s address plays with information in an interesting way. By presenting to the public an image of atomic energy as an invention as safe as the wheel, metal, or steam, he downplays the intent and extreme dangers associated with harnessing the new energy. During the same day that President Truman was addressing Congress, a bill, H.R. 4280, was making its way through the House. This bill sought to create a policy that would allow “control of all sources of this energy be vested in the commission established by this Act and that all activities connected with research on the transmutation of atomic species, the production of nuclear fission, and the release of atomic energy shall be conducted in the interest of the Nation and world peace, under the supervision and direction of the commission.”<sup>10</sup> This commission would eventually be called the Atomic Energy Commission when the Atomic Energy Act was signed into law the next year in 1946.

On August 1, 1946, President Truman signed into law the Atomic Energy Act (AEC). This solidified how atomic energy was to be regulated in the United States. Looking closely at the act, one can see the intent was to restrict any public or commercial use of atomic power and keep all production and ownership by the U.S. government. Evidence of this can be seen in section 4 of the Declaration of Policy that reads, “A program for Government control of the production, ownership, and use of fissionable material to assure the common defense and security and to insure the broadest possible exploitation of the fields,” along with “the United States shall be the exclusive owner of all facilities for the production of fissionable material.”<sup>11</sup>

The reason to keep the processes and facilities in control of the government was to keep them secret. During the Cold War Hanford increased its production of plutonium and in 1959 construction began on the “N” reactor which was to be Hanford’s last reactor.<sup>12</sup>

It was behind this cloak of government control and restriction of information, put in place by the Atomic Energy Act that allowed for many of the problems to arise at the Hanford site. This secrecy was not to last much longer. In 1986 managers at Hanford released declassified documents that revealed for first time the extent of Hanford’s radioactive contamination of eastern Washington in the 1940s and 1950s.<sup>13</sup> In 1994, 270,000 additional pages of declassified documents originating from the Richland Operations Office became available.<sup>14</sup> Included

in this release were reports such as, HW-72819 from February 26, 1962, which was a cost versus benefit analysis of developing an artificial lake to hold contaminated wastewater.<sup>15</sup> Its conclusion was that creating a holding lake was a more costly option than directly releasing the contaminated wastewater into the Columbia River.<sup>16</sup>

From the site’s inception two million curies of radioactivity and between 90,000 and 270,000 metric tons of chemicals have been deposited in the soil and groundwater beneath Hanford.<sup>17</sup> The information further illustrates how these problems compounded, it reads, “Some liquids evaporated, leaving surface residues for plant and animal uptake as well as being dispersed by the wind.”<sup>18</sup>

## Impact on Surrounding Communities

These previously classified reports corroborated what Hanford workers had long suspected. Throughout Hanford’s operation and weapons development radioactive materials were released in the air. Workers at the site believe they were exposed to toxic materials and lied to about the safety on site. The release of this information confirmed that radioactive releases were not just confined to the workers on site but extended to the surrounding communities.

The people that lived in the areas downwind from Hanford or who used the Columbia River south of Hanford were exposed to radiation.<sup>19</sup> With increasing public pressure to know more about radioactive exposure in the area, the Hanford Environmental Dose Reconstruction Project (HEDR) was conducted. The objective, to quote the report directly, was to “estimate the radioactive doses that individuals and populations could have received from nuclear operations at Hanford since 1944.”<sup>20</sup> The finding of this report concluded that the largest part of their total dose came from drinking milk and eating food that was contaminated with radioactive materials in the immediate area and downwind from Hanford. For Native Americans in the area, they most likely came in contact with radiation through eating contaminated fish. Between 1944 and 1972, according to HEDR’s estimates, about 2 million people were exposed either through the air or the Columbia River.

It may seem hard to give the government the benefit of the doubt in regard to keeping secret information on the release of radiation into the land and communities. It seems that the government’s focus at the time was to keep the brisk pace to successfully harness atomic energy for a weapon to end the largest war in history, not to take the sufficient time to understand the precautions that were needed to be put in place to protect people and the planet.

## Clean up

By the mid 1960s through the early 1970s reactors began to be shut down. In 1988, the last operating reactor, N, ceased operation. Once Hanford's reactors were shut down, the main task at the site became its clean up. This clean up began with the signing of the Hanford Federal Facility Agreement and Consent Order, also called the Tri-Party Agreement. The purpose of the agreement as defined in Article II is to "ensure that the environmental impacts associated with past and present activities at the Hanford Site are thoroughly investigated and appropriate response action taken as necessary to protect the public health, welfare and the environment."<sup>21</sup> The agreement goes on to lay out both a Legal Agreement and an Action Plan.<sup>22</sup> The Legal Agreement lays out the terms, obligations, and authority of the three parties. The Action Plan outlines the cleanup duties, timelines, and procedures the agencies will follow.

Much of the Tri-Party Agreement also had to conform to two other related acts and policies noted in its introduction. The first of these two acts was the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Enacted in 1980, this law aimed to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."<sup>23</sup> CERCLA also sets up, in section 221, the "Hazardous Response Trust Fund" more popularly known as the Superfund.<sup>24</sup> These federal funds were available for response to threats or "releases of hazardous substances into the environment only for purposes of . . . claims for injury to, or destruction or loss of, natural resources, and response costs."<sup>25</sup> The second of these laws that the Tri-Party Agreement had to follow was the Resource Conservation and Recovery Act (RCRA). This act sets up financial and technical assistance for the management for the safe disposal of discarded hazardous waste materials.<sup>26</sup>

The Hanford site includes four separate superfund sites which include the 100, 200, 300, and 1100 Areas (see figure 1).<sup>27</sup> An official five-year report on the progress of the DOE's performance and actions on the site illustrate the different area's contaminations. Area 100's ground water is contaminated with strontium-90, Area 200 needs contaminated soil removed, the "remedial action objectives" to treat the uranium plume in Area 300 was not achieved, however the dichlorodiphenyl trichloroethane (DDT) contamination in Area 1100 has been removed and remains secure.<sup>28</sup>

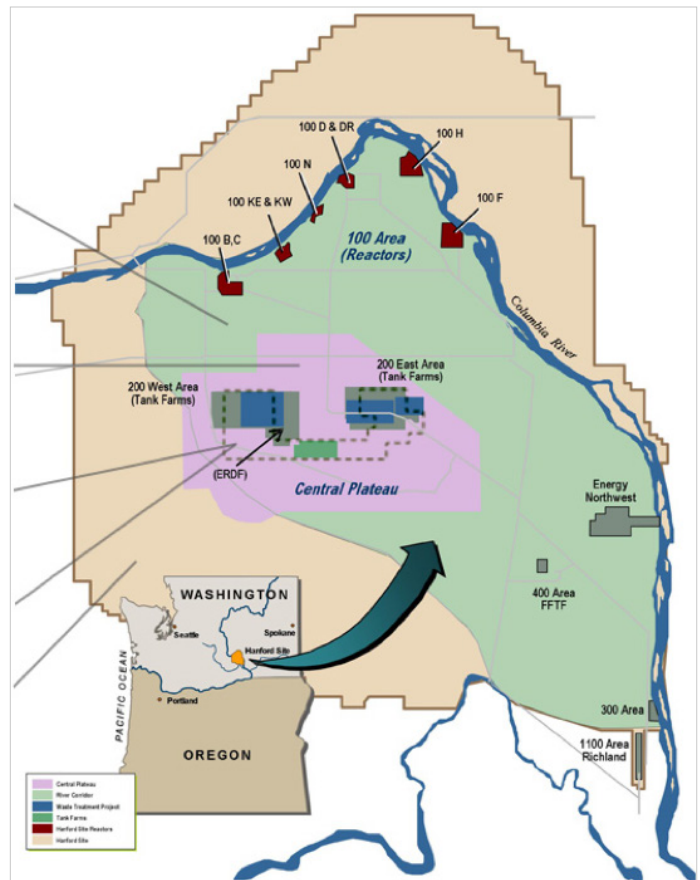


Figure 1. Map of Hanford site. U.S. Department of Energy, Hanford Information Related to the American Recovery and Reinvestment Act of 2009, <https://www.hanford.gov/page.cfm/Recovery>.

## Public Involvement and Mounting Problems

The Tri-Party Agreement's article XLII contains the details for the implementation of a "Community Relations Plan, now known as the Public Involvement Plan (PIP) which responds to the need for an interactive relationship with all interested community elements, both on and off Hanford, regarding activities and elements of work undertaken by DOE under this Agreement."<sup>29</sup> Out of this public relations plan grew the Hanford Future Site Uses Working Group.

This Group was made up of individuals from The Confederated Tribes of the Umatilla Indian Reservation, The Yakima Indian Nation, the Nez Perce Tribe, farmers of the region, local city officials, environmental groups, labor councils, and others. The driving force behind this group was to include the public in discussion together about the future of the site and to shape how clean up will proceed over the decades to ensure that "beneficial future uses of the site will indeed become a reality."<sup>30</sup>

The Working Group met nine times through 1992 and came up with future use options for the site and to determine appropriate clean up scenarios to make their decisions possible.<sup>31</sup> The Working Group ended and released their final report

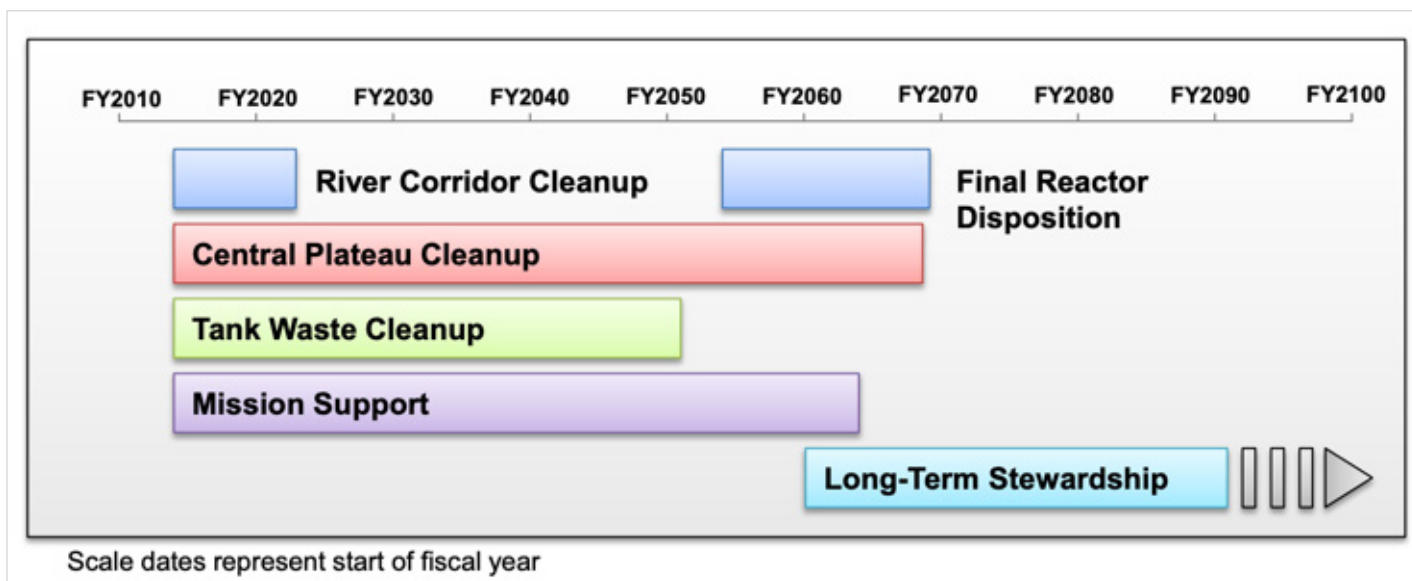


Figure 2. Hanford clean-up timeline. U.S. Department of Energy, "2014 Hanford Lifecycle Scope, Schedule and Cost Report," [https://www.hanford.gov/files.cfm/2014\\_Fact\\_Sheet\\_final\\_021814.pdf](https://www.hanford.gov/files.cfm/2014_Fact_Sheet_final_021814.pdf).

in 1992. This report highlighted four major recommended options and the appropriate environmental improvement plans for each of the future use options. These included an arid land ecology reserve, Native American use, wildlife and recreation use, and a museum and visitor center.

As time pressed on, clean up goals were missed; the work group renegotiated hundreds of individual changes since its original adoption.<sup>32</sup> The plan to immobilize the tank wastes by pressurizing it into vitrified (glass) form was expected to begin by 1999 and all the tanks to be emptied and closed by 2018.<sup>33</sup> Only one area, the 1100 area, has been deemed clean enough to be removed from the 1989 Superfund clean-up list.<sup>34</sup>

## Progress since 2000

Hanford has been called "the most toxic place in America" and cleanup is expected to go on for decades to come.<sup>35</sup> As of 2018, delays and problems still plague the site. In 2017 the DOE had to activate emergency operations when a twenty-foot-long tunnel that was used to store ageing contaminated radioactive materials collapsed.<sup>36</sup> The timeline for a recent clean-up schedule, seen in figure 2, reveals clean up stretching to 2070.

As cleanup continues so does the battle for official information concerning the site. On May 14, 2018, the DOE released a highly criticized order altering the way it interacts with the Defense Nuclear Facilities Safety Board.<sup>37</sup> The board was created by Congress to make recommendations to the energy secretary on safety issues at Hanford and elsewhere. The *Tri-County Herald* reported that "the board, along with nuclear facility watchdog groups across the nation and the Energy Communities Alliance, have raised concerns that the order appears

to reduce the board's access to nuclear facilities and information."<sup>38</sup> The struggle to keep important information accessible to those who need it and can benefit from it persists. The U.S. government has and will continue to restrict and regulate information. However, the more individuals know about methods and techniques for requesting and connecting to relevant information, the better off we are at holding the government.

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

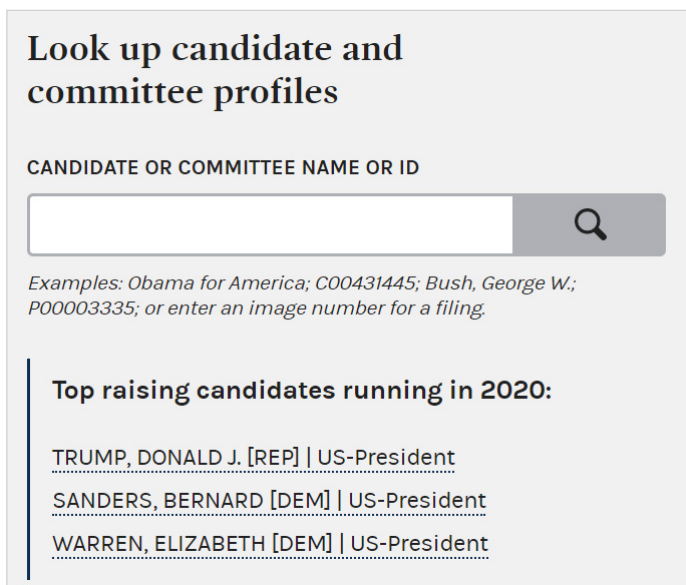


Figure 1. Look Up Candidate  
<https://www.fec.gov/data/>

### 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.

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

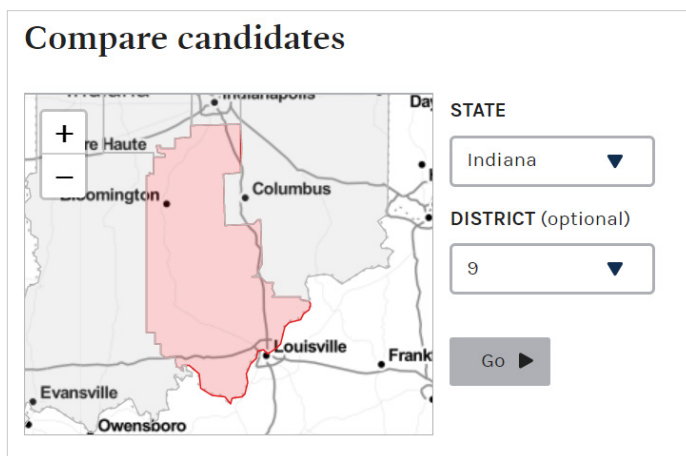


Figure 2. Compare Candidates  
<https://www.fec.gov/data/>

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.

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Z525 Government Information Spring 2019

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# Privately-Held Companies

## Legislation, Regulation, and Limited Dissemination of Financial Information

Zoanna Mayhook

*Publicly-traded companies have reporting and disclosure requirements set by the U.S. Securities and Exchange Commission (SEC), which includes the public disclosure of financial statements and an annual 10-K report. In contrast, privately-held companies most often do not meet the SEC filing requirements, and therefore, are not required to disclose financial information. For investors and business researchers, this can provide clear challenges for researching privately-held companies. This paper first highlights a sample of the significant legislation and rules affecting disclosure requirements of public and private companies. Then, it offers other government sources for company and industry financial information. Finally, it suggests further resources to educate business owners, investors, and business researchers.*

Company research can be an arduous task for business researchers and investors alike. The elusiveness of financial information from privately-held firms can make company research even more challenging, especially when compared to their publicly-traded counterparts. Privately-held firms do not trade company securities on the public market, and are generally exempt from the public reporting obligations, which are set by the Securities and Exchange Commission (SEC).<sup>1</sup> In contrast, publicly-traded companies are required to disclose comprehensive statements through the SEC, which include, but are not limited to, audited financial information within an annual 10-K report, executive compensation summary, and annual statement of beneficial ownership of securities.<sup>2</sup>

In 2015, there were over 6,000,000 companies in the United States, and only 4,381 companies were publicly-traded.<sup>3</sup> The number of publicly-traded companies has also dramatically decreased in the last two decades. At its peak in 1996, there were 8,090 publicly-traded companies, which by 2017 fell to 4,336.<sup>4</sup> There is speculation that regulatory pressures, such as reporting standards required by the Sarbanes Oxley Act, create an incentive for companies to remain privately-held or to go from a public to private status.<sup>5</sup>

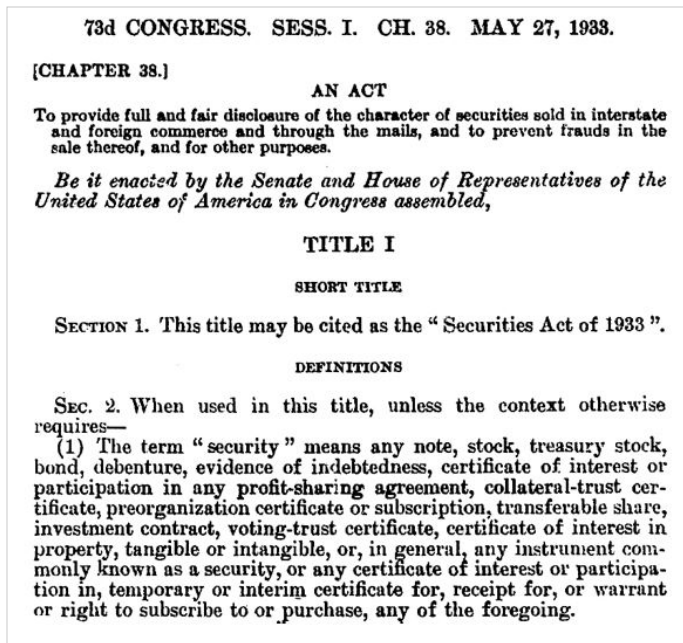
Because the vast majority of U.S. companies are private, it is often challenging to find financial information about these businesses. Under most conditions, private companies are exempt from registration requirements put forth by the SEC and are instead regulated by the Secretary of State.<sup>6</sup> Registration and disclosure requirements through the Secretary of State vary by state, but the company information made available to the public is often minimal and may include articles of incorporation and general company information.<sup>7</sup> In order to supplement this limited information, business researchers should also consider whether a particular private company belongs to “an industry subject to special regulations and reporting.”<sup>8</sup> Regulated industries, such as utilities, health, and transportation, can be required to disclose company data, which are sometimes published on federal and state agency websites. Private companies might also share confidential financial information with the United States Census Bureau (Census) and the Bureau of Economic Analysis (BEA) for aggregated industry and economic statistics.

### Background

Privately-held companies vary in size and structure and can be wholly owned by a corporation and its members, or its shares can be privately sold to a limited number of investors. While private companies do not trade securities to the general public, there are options under the SEC regulations to sell unregistered offerings, which are also commonly referred to as private placements.<sup>9</sup> Private placements are security offerings that are sold to private investors, and thus are exempt from registration requirements through the SEC. However, private placements are not exempt from “antifraud, civil liability, and other provisions of federal securities law,” which have accumulated over decades of legislative action.<sup>10</sup>

### Legislation Highlights, 1933–2002

The laws that govern the securities industry are grounded in the notion that companies and individuals that sell or trade

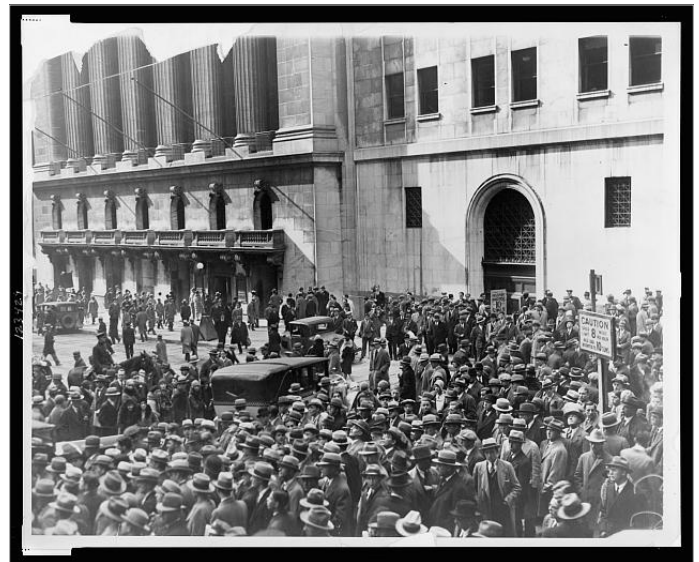


**Figure 1.** Securities Act of 1933, P.L. No. 73-22, § 48 Stat. 74 (1933). <https://www.loc.gov/law/help/statutes-at-large/73rd-congress/session-1/c73s1ch38.pdf>.

securities on the public market should be honest and fair to promote consumer confidence and market stability.<sup>11</sup> Between 1933 and 2002, many securities laws were passed to support these goals. This includes the Securities Act of 1933 (figure 1), the Securities Exchange Act of 1934, Investment Company Act of 1940, Investment Advisers Act of 1940, and the Sarbanes-Oxley Act of 2002.<sup>12</sup> What follows are brief summaries of these essential laws.

*Securities Act of 1933.* In a response to risky investments that contributed to the stock market crash of 1929 (figure 2), the Securities Act of 1933 was enacted on May 27, 1933, with the purpose of regulating sales of securities and providing fair and full disclosure of financial information to protect the public and investors from reckless and fraudulent sellers of securities.<sup>13</sup> Securities and transactions that are exempt include securities that are "not necessary in the public interest" because of the "small amount involved or limited character of the public offering."<sup>14</sup> However, if the aggregated amount offered to the public exceeded \$100,000 in 1933, then a public disclosure was required.<sup>15</sup> In 2016, this value was increased to \$5,000,000 in the amended Securities Act.<sup>16</sup>

*Securities Exchange Act of 1934.* Next, the Securities Exchange Act of 1934 was enacted on June 6, 1934. Section 4(a) established and authorized the Securities and Exchange Commission to promulgate securities law and regulations.<sup>17</sup> Registration requirements for publicly-traded securities were originally outlined in Section 12. The registration application



**Figure 2.** Crowd of people gather outside the New York Stock Exchange following the Crash of 1929. New York, 1929. Photograph. <https://www.loc.gov/item/99471695/>.

required information about the financial structure of the business, balance sheets of three preceding fiscal years (certified by independent public accountants), profit and loss statements, and further required financial statements for the protection of investors.<sup>18</sup>

*Investment Acts of 1940.* Another primary activity for the SEC is the regulation of investment companies and advisers, which was authorized under the Investment Company Act of 1940 and Investment Advisers Act of 1940.<sup>19</sup> Investment advisers are defined as persons who advise on the value of securities, and the advisability of investing, purchasing, and selling securities.<sup>20</sup> Similar to public companies, investment advisers must register with the SEC and comply with registration requirements. However, there are exemptions for certain private fund advisers, including those that act solely as an advisor to private funds, where assets under management are less than \$150,000,000.<sup>21</sup>

*Sarbanes-Oxley Act.* As a result of the Enron scandal, the Sarbanes-Oxley Act was signed into law by President Bush on July 30, 2002, to improve the accuracy and reliability of corporate disclosures.<sup>22</sup> In an investigation by the 107th Senate on the role of the board of directors in Enron's collapse, the subcommittee found that Enron's board of directors failed to safeguard their shareholders, knowingly allowed high-risk accounting practices, engaged in extensive undisclosed off-the-books activities, approved excessive compensation for company executives, and failed to ensure the independence of the company's auditor.<sup>23</sup> The Sarbanes-Oxley Act reformed business practices to promote corporate responsibility and enhance financial

disclosures. The Sarbanes-Oxley Act also established the Public Company Accounting Oversight Board (PCAOB), a third-party non-profit entity that would oversee company audits.<sup>24</sup>

The increase in insurance, legal, and compliance costs associated with the Sarbanes-Oxley Act have resulted in some public companies deciding to go private, which can be accomplished by having the company or investor group acquire all publicly-held shares.<sup>25</sup> Going private can be appealing because private companies are not required to comply with the mandated business practices promulgated by the Sarbanes-Oxley Act. However, there are provisions of the Sarbanes-Oxley Act that apply to both private and public companies, especially as it relates to corporate and criminal fraud accountability.<sup>26</sup> For example, violations of federal and state securities law with private securities are nondischargeable in a bankruptcy, and fabricating or destroying evidence during a federal agency investigation is a crime under the Sarbanes-Oxley Act.<sup>27</sup>

The Securities Act of 1933, the Securities Exchange Act of 1934, Investment Company Act of 1940, Investment Advisers Act of 1940, and the Sarbanes-Oxley Act have thus been foundational in defining and enforcing registered and unregistered requirements for financial information disclosures. I now turn to the provisions of these acts that govern private companies, many of which are currently exempted from the reporting requirements detailed above.

## Laws and Regulations Affecting Private Company Financial Information

Under the Securities Act of 1933, the general rules and regulations of the SEC were codified under Title 17, Part 230 of the *Code of Federal Regulations* (CFR). In 1982, Regulation D was added to Title 17 (§§ 230.500–230.508), addressing rules governing the limited offerings and sales of securities without registration.<sup>28</sup> Rules 504 and 506 specifically reference private securities. Rule 504 states that issuers may offer and sell up to \$1,000,000 of securities within twelve months without being subject to disclosure requirements.<sup>29</sup> Rule 506 stipulates that private companies can have an unlimited number of accredited investors, and can decide what information to give to an investor, so long as it does not “violate antifraud prohibitions of the federal securities laws.”<sup>30</sup>

On December 12, 2011, an issued report was submitted through the House of Representatives on the suggested Private Company Flexibility and Growth Act.<sup>31</sup> If enacted, the law would raise the “threshold for mandatory registration under the SEC from 500 shareholders to 1000 shareholders,”<sup>32</sup> which would amend section 12(g) of the Exchange Act that had not been updated since 1964. By increasing the threshold, the

report argued that small companies would have the opportunity to grow capital and create jobs, but the bill was rejected.<sup>33</sup> However, the Jumpstart Our Business Startups (JOBS) Act of 2012 included Title 5, which addressed private company flexibility and growth, and through section 501 officially amended the Securities Exchange Act of 1934 to increase the statutory threshold from 500 to 2000 shareholders.<sup>34</sup> With new laws and rules amending the shareholder threshold, private companies are more likely to be exempt from registration requirements and financial disclosures.

## Regulations through the Secretary of State

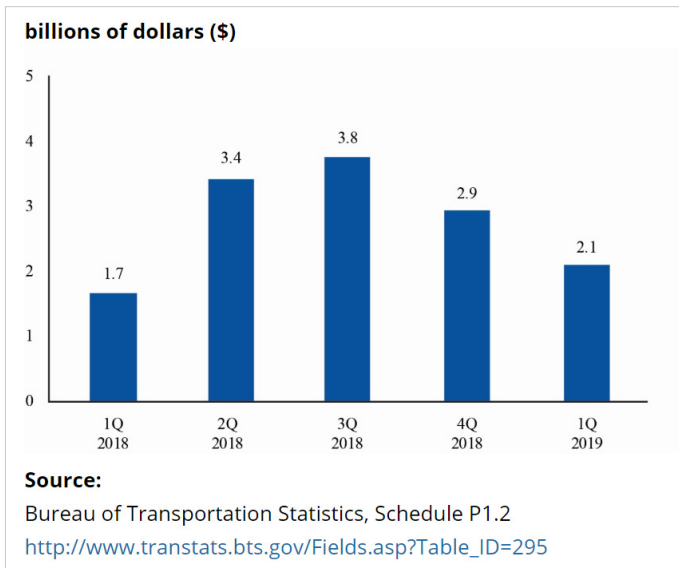
In addition to federal requirements for financial reporting, public and private companies are required to file general business disclosures with the Secretary of State in the state where it was incorporated. Depending on the business structure, companies may need to submit an article of incorporation, certificate of formation, or a certificate of limited partnership.<sup>35</sup> In Washington State, the filing requirements are outlined through the Revised Code of Washington (RCW) 23B.01 under the Washington Business Corporation Act.<sup>36</sup> RCW 23.95.255 details the initial and annual reports, which include entity name and jurisdiction, address, a brief description of the nature of the business, and other necessary information. The annual report does not include financial information for its disclosure. However, through RCW 23B.16.200, financial statements are required for shareholders that show a reasonably detailed look at the financial condition of the corporation and include recent balance sheets and income statements prepared using generally accepted accounting principles. Financial statements are only required for shareholders, and not available to the general public through the Secretary of State Business search.

## Private Companies in Regulated Industries

Regulated industries, such as utilities, health, and transportation, may provide additional financial reports by company or by industry. The Bureau of Transportation Statistics, for example, offers quarterly data for the airline industry that includes net income (figure 3), operating revenue, and operating expenses.<sup>37</sup>

Another example is the Washington Utilities and Transportation Commission (WUTC), which provides financial data by company for specific industries. For the electric industry, annual statistics of the three major electric utility companies from 1978 to 2017 are publicly available through the WUTC website. The financial information included are balance sheets, net income statements, unappropriated retained earnings, unappropriated undistributed subsidiary earnings





**Figure 3. Systemwide U.S. Scheduled Service Passenger Airlines Quarterly After Tax Net Profit, 1Q 2019.** Bureau of Transportation Statistics, Schedule P1.2. <https://www.bts.gov/newsroom/first-quarter-2019-us-airline-financial-data>

statement, and more.<sup>38</sup> Disclosure of financial records and reporting rules is promulgated by the Washington Administrative Code (WAC) chapter 480-100, sections 203-248.<sup>39</sup>

## Economic Statistics through Government Resources

*Economic Census.* The Economic Census collects aggregated data and reports from both private and public companies by industry or geographic area.<sup>40</sup> The Economic Census tries to avoid possible disclosure issues where users may infer that data values are connected to an individual business. Two methods are used to prevent disclosure and protect participant confidentiality: cell suppression and noise infusion.<sup>41</sup> Cell suppression involves withholding data and replacing the value with a “D.” Noise infusion camouflages data by marginally adjusting each respondent’s data to lightly distort the total amount. Disclosure limitations are bound by Title 13 and Title 26 of the *United States Code*, which protects information collected by individuals and businesses. While the Economic Census provides aggregated data by industry, opposed to company-specific data, it offers useful insights on estimated sales and annual payroll expenses.

*Statistics of U.S. Businesses (SUSB).* The SUSB is a data series that concentrates on small business statistics.<sup>42</sup> The data is extracted from the Business Register (BR), which the census considers to be “the most complete, current, and consistent data for U.S. business establishments.”<sup>43</sup> The BR compiles information from the Economic Census, current business surveys, federal tax records, and other federal statistics. Though

not as focused on financial data, the SUSB provides an alternative source for small business statistics.

*U.S. Bureau of Economic Statistics (BEA).* The BEA (bea.gov) provides economic statistics and analysis to enhance public understanding of the U.S. economy. Notable data collections from the BEA include the corporate profits by industry estimates and private fixed investments. Corporate profits are income before income tax deductions and are an important U.S. economic indicator that measures corporate financial health and economic performance, as well as measure the relationship between earning and equity valuation.<sup>44</sup> Corporate profits data are collected from federal, state, and local taxes and are received on a tax-accounting basis when available to ensure consistent accounting definitions.<sup>45</sup> Private fixed investments (PFI) measures spending by private businesses, which serves as an indicator to whether private companies are willing to expand their production capacity.<sup>46</sup> Similar to corporate profits, data is collected using business-tax-accounting practices. The BEA industry financial statistics and ratios provide rich data from private companies, as well as critical economic indicators when evaluating business industries.

## Information Dissemination

*Private Company Financial Information.* Lenient regulations have allowed exemptions and increased shareholder thresholds of privately-held companies that as a result limit the dissemination of private company financial information. Private companies that exceed a shareholder threshold of 2000 persons and have more than \$10,000,000 in total assets must register with the SEC, and would, therefore, be searchable in the EDGAR Company Filing Database. Some private company information may be available through the Secretary of State Business database, such as an article of incorporation or annual reports. Financial information may also be available for companies within regulated industries depending on the state legal codes and regulations. Users can also supplement financial information with industry statistics and reports through the economic census and the BEA. Non-government subscription databases, such as PrivCo, estimate financial data for private companies, and thus could fill in information gaps for users who have database access.

*Business, and Investor Resources.* Through the SEC Office of Investor Education and Advocacy, Investor.gov is a resource that can help users make informed investment decisions and avoid fraud. The site provides instructional materials on investment research and assessing risk tolerance, as well as strategies to protect investments. Another useful resource is the U.S. Small Business Administration (sba.gov), which assists small business

owners with launching and managing their businesses. SBA offers online courses and helps connect business owners with funders from the Small Business Investment Company (SBIC).

## Conclusion

Legislative and regulatory exclusions to private companies limit public access to financial information. Public access to audited financial information can protect investors from risky unregistered offerings and provide data for company research and valuation. However, registration requirements can be costly, and expose unwanted details to competitors. For business researchers, libraries can fill the information gap by subscribing to databases like PrivCo and Dun & Bradstreet to provide estimated financial data for available private companies. Though the future of publicly-traded companies is unclear, increased shareholder thresholds through the JOBS Act and enhanced disclosures through the Sarbanes-Oxley Act have made the privately-held status attractive to moderate and large-sized firms. Thus, more companies may remain unregistered and keep their information private.

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# The Equal Rights Amendment in the Twenty-First Century

## Ratification Issues and Intersectional Effects

Hanna H. White

*The Equal Rights Amendment (ERA), originally introduced only three years after women gained the right to vote, has seen a resurgence in interest in the twenty-first century with recent ratifications in Nevada and Illinois. This is in spite of the fact that the version of the ERA these ratifications pertain to, which passed in Congress in 1972, appeared to expire in 1982. This paper seeks to summarize the history and present of the ERA, with particular attention paid to how ratification might affect current hot-button issues such as restrictions on abortion access and transgender rights.*

In March of 2017, the state of Nevada became the 36th state to ratify the Equal Rights Amendment (ERA), 35 years after the Congressional ratification deadline had passed. In its joint resolution, the Nevada legislature stated that “The Legislature of the State of Nevada finds that the proposed amendment is meaningful and needed as part of the Constitution of the United States . . . political, social and economic conditions demonstrate that constitutional equality for women and men continues to be a timely issue.”<sup>1</sup> Indeed, the well-publicized backlash against current threats to *Roe v. Wade* and to the legal status of transgender individuals indicates a strong public interest in the topic of gender equality. Yet this interest does not apparently indicate an informed understanding of the current law; according to statistics from the National Organization for Women, more than 70 percent of people believe that the constitution already grants equal treatment under the law regardless of sex.<sup>2</sup> With recent actions in Nevada and Illinois and upcoming action in Virginia, now is an appropriate time to take stock of the ERA’s complex past and nebulous future.<sup>3</sup>

### Background

The ERA was originally introduced to Congress in December 1923, only three years after the 19th amendment was ratified.

This original version of the ERA read as follows: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation.”<sup>4</sup> Little progress was made on this ERA for the following two decades, principally due to objections from organized labor and some women’s groups regarding the potential effect of the ERA on protective legislation around women and labor.<sup>5</sup> The so-called Hayden rider was developed in the 1950s to address these concerns: “The provisions of this article shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex.”<sup>6</sup> This rider was removed in 1964 by the Senate Committee on the Judiciary.<sup>7</sup>

In 1969, the version of the ERA that would ultimately be sent to the states for ratification was introduced to the House by Representative Martha Griffiths.<sup>8</sup> It passed in the House in October of 1971, and passed in the Senate six months later.<sup>9</sup> While concerns about the proposed amendment’s effect on protective legislation remained, the ERA at this time had broad support in Congress, passing both chambers with more than 90 percent of representatives in favor. By the time of its passage, the text of the ERA had been updated; Section 1 of the 1972 ERA reads, simply, “Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.”<sup>10</sup> At the time of passage, Congress set a seven-year ratification limit for the amendment, as had been done for each amendment since the 20th. However, this time limit was included not in the text of the amendment itself, but in the preamble, a distinction that would prove key in the decades following.<sup>11</sup>

The ERA was ratified by 22 states in 1972, but ratification slowed between 1973 and 1977.<sup>12</sup> Anti-ERA groups coalesced around concerns similar to those once addressed by the Hayden



Figure 1. Martha Griffiths at ERA rally in Houston, Texas, 1977. From U.S. National Archives, <https://catalog.archives.gov/id/7452294>.

rider, as well as additional concerns such as the possibility that the ERA could allow same-sex marriage.<sup>13</sup> In 1978, finding themselves three states short of the thirty-eight necessary for ratification, ERA advocates convinced Congress to extend the ratification deadline to 1982.<sup>14</sup> No additional states ratified, and the amendment seemingly died in 1982. Conversation around the amendment was revived in 1997 by the publication of an article in the *William & Mary Journal of Women and the Law* suggesting that because the ERA deadline was in the preamble rather than the amendment itself, it might still be ratified.<sup>15</sup> What became known as the “three-state strategy” has become a “one-state-strategy” two decades later. Following the aforementioned ratification by Nevada and a 2018 ratification in Illinois, the feasibility of the three-state strategy may soon be put to the test.<sup>16</sup>

## Alternatives to the ERA

One objection to revivification of the ERA that has been voiced by some is that there are already a set of laws which, taken together, ensure gender equality nationally. These include Title VII of the 1964 Civil Rights Act, Title IX of the 1972 Education Amendments Act, the equal protection clause of the 14th amendment, and the existing patchwork of state and local laws which guarantee gender equality. While these objections are too many and varied to address fully here, it is worth noting that these existing rules are not equivalent to an ERA. Title VII, as amended by the Lilly Ledbetter Fair Pay Act of 2009, prohibits employment discrimination based on sex as well as differences in pay that occur because of sex, leaving women and minority genders vulnerable to discrimination in other areas.<sup>17</sup> Title IX pertains only to federally-funded education programs.<sup>18</sup> The Equal Protection Clause was not found to apply

to gender-based discrimination until 1971, and its guarantees apply only to state actors.<sup>19</sup>

Even state-level ERAs do not consistently guarantee equal treatment regardless of sex. Though state constitution ERAs have often been a useful tool in advancing gender equality, in some cases they have been interpreted to go no further than the 14th amendment in guaranteeing against discrimination.<sup>20</sup> In addition, less than half of U.S. states even include an ERA in their constitutions.<sup>21</sup> Many advocates hope that a federal ERA, if ratified, would cover these gaps and provide a more comprehensive guarantee of equal treatment.

## The ERA Today

Currently (as-of this writing), joint resolutions to officially remove the 1972 ERA’s ratification deadline are in committee in both the House and Senate.<sup>22</sup> Article V of the Constitution does grant Congress extremely broad authority over the amendment process, as demonstrated by the case of the 27th Amendment, ratified over a century after it was passed by Congress.<sup>23</sup> The question of what effect the 1972 ERA would have if ratified today is thus relevant. As the possible ramifications of a full constitutional guarantee of equality between sexes are numerous, this paper will focus on two particular areas of concern: abortion rights, and rights of transgender people.

Regarding abortion access, the possibility that the ERA could require government-funded abortion is one of the reasons often brought up by ERA opponents to justify their cause, as demonstrated by the ongoing debate over ratification in Virginia.<sup>24</sup> There are significant reasons to believe that the ERA would not affect reproductive justice issues. *Roe v. Wade* was decided based on a right to privacy and due process, rather than an equality-based interpretation.<sup>25</sup> In addition, the inclusion of an ERA in state-level constitutions has generally not impacted state courts’ decisions on reproductive rights issues.<sup>26</sup> However, there is some precedent for rights-based arguments on abortion, as seen in Justice Ginsberg’s dissenting opinion in *Gonzales v. Carhart*: “[Women’s] ability to realize their full potential . . . is innately connected to ‘their ability to control their reproductive lives.’ Thus, legal challenges to undue restrictions on abortion procedures . . . center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”<sup>27</sup> Considering the current political climate, the abortion issue is almost certain to come up in any new federal proceedings around the ERA.

Shockingly little attention has been paid by legal scholars to the question of how a ratified ERA could affect the rights of transgender Americans. Historically, dialogue about the ERA’s possible effects on the LGBT community have been dominated

by fears that its passage would legalize same-sex marriage, a point rendered moot by the Supreme Court's 2015 decision in favor of same-sex marriage in *Obergefell v. Hodges*.<sup>28</sup> Though transgender issues seem more related to the ERA than those surrounding sexuality, this researcher could find few explicit mentions of transgender people in connection with the ERA on either side of the argument. What follows is therefore conjecture.

The wording of the 1972 ERA does not explicitly mention either men or women, sticking instead to the somewhat vague "sex." Historically, federal courts have upheld, in a number of instances, that Title VII protections against sex-based discrimination apply to transgender individuals.<sup>29</sup> For example, in *Glenn v. Brumby*, the 11th Circuit Court ruled that "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."<sup>30</sup> Given this and other precedents, it seems entirely possible that the 1972 ERA would be upheld by the courts to cover discrimination against transgender individuals if ratified. Pro-ERA organizations including the National Organization for Women have also suggested that the ERA's non-specific language lends itself to an inclusive interpretation.<sup>31</sup> Recent controversies over transgender rights, including the Trump administration's plans to define gender as permanent male or female sex assigned at birth, make this a deeply pertinent question which deserves further inquiry.<sup>32</sup>

## Threats to Ratification

Revivification of the 1972 ERA is not without its potential issues, the most obvious of which exist around the expired ratification deadline. Many pro-ratification arguments list the 27th Amendment as an example when discussing the continued viability of the ERA. Unlike the ERA, however, when the 27th Amendment was passed in 1789, Congress neglected to set a time limit at all.<sup>33</sup> The precedent established by the Supreme Court in *Coleman v. Miller* determined that "it is only when there is deemed to be a necessity . . . that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently" and that "there is a fair implication that [ratification] must be sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."<sup>34</sup> This contemporaneity requirement will probably be brought to the



Figure 2. Photograph of Jimmy Carter Signing Extension of Equal Rights Amendment (ERA) Ratification, 10/20/1978. From U.S. National Archives, <https://catalog.archives.gov/id/181981>

courts and/or the legislature if a thirty-eighth state ratifies the ERA.

Another significant issue affecting the viability of the ERA is that of state rescissions of previous ratifications. Between 1973 and 1979, five states (Nebraska, Tennessee, Idaho, Kentucky, and South Dakota) passed resolutions rescinding their previous ERA ratifications. In 1979, Idaho brought legal action to the U.S. District Court asserting its right to rescission. The case went to the Supreme Court, who agreed to hear it in January 1982. When the ERA ratification deadline expired later that year, the court dismissed the case, leaving the question of states' right to rescission undecided.<sup>35</sup> ERA advocates maintain that states' right to rescission has not previously been recognized as valid as both the 14th and 15th Amendments were confirmed by Congress to have been ratified after one or more states rescinded.<sup>36</sup> However, the Supreme Court's willingness to hear Idaho's case suggests this precedent may be challenged should a thirty-eighth state ratify the ERA.

## Conclusion

The "one-state" strategy is not the only possibility for the ERA going forward. "Fresh start" versions of the ERA were proposed in each Congress from the 97th (when the ratification deadline expired) to the 115th. Interestingly, section 1 of the 2017 house resolution used different language than 1972 amendment, harkening back instead to the 1923 ERA: "Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."<sup>37</sup> It is unclear whether or not this change in language would lend itself less to an intersectional interpretation which would include the transgender population in addition

to cisgender women under the ERA umbrella. As of this writing, members of the 116th Congress have proposed no similar measures, sticking instead to resolutions intended to remove the ratification deadline. This, along with recent popular media coverage related to the ERA and discussions of it during presidential primary debates, suggest strongly that the ERA ratification is far from dead as it was once perceived to be.<sup>38</sup> Only time will tell how, and if, it might come to pass.

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