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Campaign Finance: Key Policy and Constitutional Issues

Campaign Finance Policy: The Basics

For more than a century, Congress has attempted to limit potential corruption and ensure transparency in campaigns through two major approaches: (1) limiting sources and amounts of financial contributions and (2) requiring disclosure about contributions and expenditures. Two major federal statutes, enacted a generation apart, establish most of modern campaign finance policy. The Federal Election Campaign Act (FECA), first enacted in 1971 and substantially amended in 1974, 1976, and 1979, is the nation's primary campaign finance statute. FECA and its 1970s amendments established or updated longstanding provisions about which entities and practices campaign finance law regulates. In 2002, Congress amended FECA by enacting the Bipartisan Campaign Reform Act (BCRA) to address money and activities that were widely perceived to affect elections, but were not then regulated by campaign finance law.

FECA limits the amount of money that individuals, parties, and political action committees (PACs) can contribute to campaigns, parties, or PACs. In 2018, individuals could contribute up to $2,700 per candidate, per election (for a total of $5,400 for the primary and general elections). PACs can contribute up to $5,000 per candidate, per election. Except for super PACs, political committees may not accept contributions above the limits set in FECA. FECA also requires disclosure about certain campaign fundraising and spending, and it established the Federal Election Commission (FEC) to administer the act. BCRA banned previously unregulated or *soft money* in federal elections and established a new political advertising concept known as *electioneering communications* to regulate money spent on certain communications that refer to clearly identified federal candidates during pre-election periods.

FECA prohibits corporations and unions from using their treasury funds to make contributions. The act also bars contributions from national banks, government contractors, and foreign nationals. Despite the prohibition on treasury-fund contributions, corporations and unions may form affiliated, but legally, distinct PACs to make contributions. Those contributions must come from voluntary donations; the corporation cannot simply route its treasury funds through a PAC.

Constitutional Considerations for Legislation

Several federal court rulings have had a significant impact on the regulatory scope of FECA and inform the constitutional bounds of campaign finance regulation. Such pivotal rulings may be instructive should Congress consider policy options to amend FECA.

Limits on Contributions and Expenditures

In its landmark 1976 ruling, *Buckley v. Valeo*, the Supreme Court established the framework for evaluating the constitutionality of campaign finance regulation. According to the Court, limits on campaign contributions, which involve giving money to an entity, and expenditures, which involve spending money directly for electoral advocacy, implicate rights of political expression and association under the First Amendment. The Court, however, held that contribution limits are subject to a more lenient standard of review than expenditures because they impose only a marginal restriction on speech, and they will be upheld if the government can demonstrate that they are a "closely drawn" means of achieving a "sufficiently important" governmental interest. In contrast, the Court held that because they impose a substantial restraint on speech and association, expenditure limits are subject to strict scrutiny, requiring that they be narrowly tailored to serve a compelling governmental interest.

Significantly for Congress if it considers legislation, the Court's recent case law has announced that only *quid pro quo* candidate corruption or its appearance constitute a sufficiently important governmental interest to justify limits on contributions and expenditures. (*Quid pro quo* corruption involves an exchange of money or something of value for an official act.) In addition, the Court has rejected government interests in lessening influence over or access to elected officials, decreasing the costs of campaigns, and equalizing financial resources among candidates. Therefore, with some exceptions, courts have generally upheld limits on contributions, concluding that they serve the governmental interest of protecting elections from corruption, and invalidated limits on independent expenditures, concluding that they do not pose a risk of corruption.

Limits on Corporate and Labor Union Spending

In a 2010 ruling, *Citizens United v. FEC*, the Supreme Court invalidated two prohibitions on corporations and unions using their treasury funds for independent electoral spending: the longstanding ban on independent expenditures and the 2002 ban on electioneering communications. As a result, corporations and labor unions are not required to establish a PAC for such spending. According to the Court, independent electoral spending is protected speech—regardless of whether the speaker is a corporation—and merely permitting a corporation to engage in such speech through a PAC does not allow the corporation to speak directly nor does it alleviate the First Amendment burden created by such limits.

Prohibition on Foreign Nationals

In 2012, the Supreme Court summarily affirmed a three-judge federal district court panel ruling that upheld the constitutionality of the FECA prohibition on foreign nationals making contributions and independent expenditures. In *Bluman v. FEC*, the three-judge court held that under the First Amendment, the United States has a compelling interest in limiting foreign citizen participation in American democratic self-government, thereby preventing foreign influence in the political process. However, the court interpreted the ban on independent expenditures to apply only to foreign nationals engaging in express advocacy or its functional equivalent, and not issue advocacy. This case seems to suggest that legislation to enhance the current ban on foreign nationals donating or spending money, so long as its scope is limited to the regulation of express advocacy or its functional equivalent, might withstand a First Amendment challenge if Congress could demonstrate that the restriction furthered the governmental interest in preventing foreign influence over U.S. elections.

Requirements for Disclosure

In *Buckley* and more recently, the Supreme Court has generally upheld the constitutionality of campaign finance disclosure requirements. According to the Court, disclosure provides the electorate with information; serves to deter corruption or its appearance; and is an essential method of detecting violations for the purposes of law enforcement.

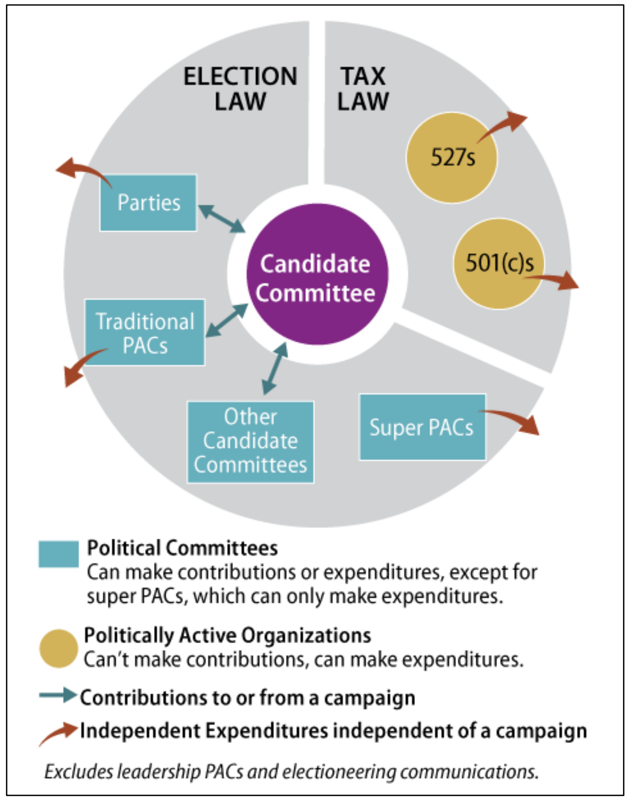
Policy Issues

The constitutional framework described above has shaped longstanding and recent policy debates facing Congress. Most issues concern which entities are receiving or spending money, and how or whether they are regulated by campaign finance law. Different groups face different regulation, particularly concerning contributions and disclosure requirements.

FECA primarily regulates *political committees*, which are candidate campaign committees, party committees, and PACs, that receive contributions or make expenditures aggregating in excess of $1,000 during a calendar year, and whose major purpose is to elect federal candidates to office. All political committees regularly must file disclosure reports with the FEC. These reports summarize total receipts and expenditures. Donors who give more than $200 are also identified, as is the purpose of disbursements of more than $200. In some cases, corporations, unions, or other groups that are not political committees, but which engage in certain political advertising, must also file disclosure reports. The FEC is responsible for providing public access to campaign finance reports.

In some cases, *non-political committees* may also attempt to influence campaigns, even though they are not primarily regulated by FECA. Recent attention has focused on groups organized under §501(c)(4) of the Internal Revenue Code as social welfare groups. Similar provisions apply to §501(c)(5) unions and §501(c)(6) trade associations. To maintain their tax-exempt status, these groups may not primarily engage in electioneering. As non-political committees, 501(c)s generally do not report to the FEC, but are required to do so if they make electioneering communications or independent expenditures. These groups may not contribute to campaigns or parties, as shown in **Figure 1**. Particularly since *Citizens United*, much of the policy debate in Congress has focused on whether or how to regulate activities or organizations, like 501(c)s, that can affect the campaign environment, but are not regulated under campaign finance law.

Figure 1. Major Entities in the Campaign Environment



Source: CRS figure.

Note: Political committees are regulated by IRC §527 for tax purposes.

Recent Policy Debate

Recent Congresses have generally been divided about how or whether to amend campaign finance law in response to emerging policy challenges; developments in campaign practice; and amid judicial and agency decisions. Major topics of debate include, for example,

- donor disclosure, particular for 501(c)s and super PACs;
- regulation of foreign money in U.S. elections;
- regulation of online political advertising;
- public financing of congressional campaigns or updating the presidential public financing program;
- personal use of campaign funds;
- contribution limit and disclosure threshold increases; and
- oversight of the Federal Election Commission.

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