The 1972 Watergate burglary that led to the resignation of President Nixon was, among other things, a campaign finance scandal involving the use of undisclosed political donors’ funds for illegal purposes. The Federal Election Commission (FEC) was created by Congress in response to that scandal. Born out of a crisis in public confidence in government, the central purpose of the FEC has been, and continues to be, ensuring that the public is well informed about the sources of political spending. As the Supreme Court has repeatedly recognized, disclosure of campaign spending by the FEC helps prevent corruption in the political process. Disclosure of election-related spending also fosters the accountability of elected officials to their constituents and helps voters make informed decisions at the ballot box.

Despite the significant changes in campaign finance jurisprudence in the last decade, the Supreme Court has continued to resoundingly reaffirm the disclosure mission of the FEC. Unfortunately, the FEC has not adequately fulfilled its obligations to the public or abided by the direction of Congress and the Court. The FEC must do more to promote disclosure and provide the public with necessary campaign finance information.

I. Disclosure of Political Spending: Central to the FEC’s Mission

The 1974 amendments to the Federal Election Campaign Act of 1971 (FECA or “the Act”) created the FEC.¹ In the wake of Watergate, the American public was losing confidence in the integrity of government and the political process. At that time, Americans’ trust in government was at a then historic low of 29 percent.² Congress envisioned the FEC as a regulatory force that would help prevent another Watergate. Supporting the bill on the Senate floor, Senator Claiborne Pell stated: “We may not eradicate all future Watergates, but certainly we will discourage the perpetuation of a climate in which power is abused by the clever at the expense of the unwary, where
power is perverted by a calculated deception.” Part of the agency’s mandate was to ensure that the public was provided with information about spending to influence elections. According to the legislative history, Congress created the FEC “to enforce . . . reporting and disclosure requirements,” and intended to accord the FEC “broad powers of enforcement.”

The original 1971 Federal Election Campaign Act and the 1974 amendments established a scheme of reporting and publication that was intended to increase transparency in campaign spending, to be enforced by the FEC. As first enacted, that statute required disclosure of all political contributions exceeding $100 and of expenditures by candidates and political committees that spent more than $1,000 per year.

II. The Supreme Court Affirms the Constitutionality of the FECA’s Disclosure Requirements

In Buckley v. Valeo, the first Supreme Court case addressing the constitutionality of modern campaign finance laws, the Court struck down certain provisions of the FECA, but held that the Act’s disclosure requirements were constitutional. The Court’s central holdings invalidated expenditure limits on First Amendment grounds, but sustained contribution limits on the basis that they did not impermissibly impinge on freedom of speech or association. Further, the Court sustained the FECA’s disclosure requirements and offered a ringing endorsement of disclosure laws, making clear that such laws are constitutional.

The Buckley Court reasoned that disclosure requirements are subject to the less rigorous “exacting scrutiny” standard for purposes of constitutional review. The Court determined that the Act’s disclosure rules met exacting scrutiny and were warranted, for three key reasons.

First, disclosure rules permit voters to make informed decisions about how to cast their vote. The Court noted that disclosure provides voters with more information about a candidate’s views than a campaign speech or a party label might and helps voters locate candidates on the ideological spectrum. Moreover, the Court noted that disclosure offers voters insight into which interests a candidate will support and therefore tells voters which groups a candidate will respond to once in office.

Second, disclosure rules help deter corruption and the appearance of corruption. The Court wrote that disclosure permits the public to track large donations and therefore determine if bribery or untoward behavior occurs, adding heft to ordinary anti-bribery laws. As a result, the public can discover corruption and suspect behavior not prevented by anti-bribery law and, in so doing, also deter candidates’ future misbehavior. The Court concluded that “exposing large contributions and expenditures to the light of publicity” was likely to “discourage those who would use money for improper purposes either before or after the election.”
Finally, the Court reasoned that disclosure rules are an “essential means” of gathering data necessary for law enforcement agencies, like the FEC and the Department of Justice, to detect violations of the law.\textsuperscript{17}

The Court acknowledged that disclosure would burden some individual rights, such as that of association, through potential retaliation on the basis of contributions. But the Court held that the “substantial” government interest in disclosure outweighed the burdens on individual rights, particularly in the case of campaign finance, where the “free functioning of our national institutions is involved.”\textsuperscript{18}
Moreover, the Court wrote that “disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist,” thereby giving disclosure a primary place in campaign finance regulation.\textsuperscript{19}

\section*{III. The Bipartisan Campaign Reform Act Expands Disclosure}

Since Buckley, Congress has expanded campaign finance disclosure requirements to prevent circumvention of the FECA campaign finance regime. The Bipartisan Campaign Reform Act of 2002 (BCRA), popularly known as the McCain-Feingold Act, was enacted in response to the proliferation of “soft money”—contributions to the political parties that were not subject to the Act’s contribution limits because the funds were purportedly intended to influence state and local elections. Before Congress took action, the Senate Committee on Governmental Affairs prepared a 9,500-page report describing how the parties’ ability to use soft money had effectively circumvented the Act’s contribution limits.\textsuperscript{20}

Besides addressing soft money, BCRA also reinforced and expanded the FEC’s disclosure mission.\textsuperscript{21} To begin, BCRA mandated that the FEC place all campaign finance information it collects online, so that the public, the press and other groups could access the data instantly.\textsuperscript{22} To further foster public accountability, BCRA required disclosure of soft money that, prior to BCRA, went undisclosed.\textsuperscript{23}

To expand disclosure of political spending, BCRA also created the category of “electioneering communications,” which are defined as broadcast, cable, or satellite communications made in a short window before an election, which clearly mention a candidate and are targeted at the relevant electorate.\textsuperscript{24} BCRA significantly expanded the disclosure of campaign spending by requiring that entities that paid for electioneering communications disclose their donors.\textsuperscript{25} BCRA gave entities making electioneering communications two options for reporting their donors. They could either create a segregated bank account for spending on these communications and report donors who gave $1,000 or more to that account, or they could report all of their donors who gave $1,000 or more for the calendar year.\textsuperscript{26} BCRA also required that any electioneering communication identify who authorized it, so that candidates and outside groups would “stand by their ads” instead of hiding in the shadows.\textsuperscript{27} While BCRA, for constitutional reasons, exempted some groups (like