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Cruz Case Aside, Opportunity Remains for Expanded Campaign Finance Disclosure Laws in New Jersey

JEFF BRINDLE | May 23, 2022, 1-:32 am | in [Edward Edwards](#)

A federal campaign finance law preventing federal candidates from repaying personal loans of more than \$250,000 with money raised after the election was ruled unconstitutional by the U.S. Supreme Court on May 16, 2022.

The law was challenged by Senator Ted Cruz of Texas. Cruz objected to a provision in federal campaign finance law that blocked federal candidates from loaning themselves more than \$250,000.

Section 304 of the Bipartisan Campaign Reform Act (BCRA), 2002, limits a candidate who makes a personal loan to his or her campaign from raising money post-election to reimburse more than \$250,000.

Senator Cruz believed the provision infringed upon First Amendment rights. The case, *Federal Election Commission (FEC) v. Ted Cruz for Senate*, constituted another in a line of legal challenges to BCRA, otherwise known as *McCain/Feingold*.

Admittedly, there was a bit of gamesmanship on the part of the Senator. On the eve of the 2018 Election Day, he loaned his campaign \$260,000; \$5,000 from his personal bank account and \$255,000 from a loan backed by his personal assets.

Nevertheless, the objective exposed a legitimate grievance by testing the law against First Amendment constitutional standards. This included Federal Election Commission (FEC) regulations that had established a 20-day window post-election during which personal loans up to \$250,000 could be reimbursed using donations received prior to, on, or after Election Day.

In other words, once the 20-day period ends, candidates can no longer use their campaign accounts to pay-off loans of more than \$250,000, though loans less than that amount may be repaid.

Federal Election Commission Rules for Repayment of Federal Candidate Loans

Candidate Loan Amount	Within 20 Days After Election	More than 20 days After Election
Repayment Options		
\$250,000 or Less	Can Use Contributions Raised Before, On, or After Election	
More than \$250,000	Can Use Contributions Raised Before the Election	Repayment No Longer Allowed

In its ruling, the Supreme Court decided 6-3 that the law, by imposing major restrictions on reimbursement over the \$250,000 threshold, discouraged candidates from taking out personal loans in furtherance of their candidacies, thereby violating their First Amendment Free Speech rights.

In Senator Cruz's case, the 20-day window prevented him from recouping \$10,000 of his personal money.

The Supreme Court's ruling was the fifth since John Roberts was confirmed as Chief Justice in 2005 to strike down sections of BCRA.

The case stoked fears among individuals and organizations who favor strict regulation of campaign finances that the Supreme Court might overturn what remains of the law.

These concerns were understandable given that U.S. Senate Minority Leader Mitch McConnell, no friend of campaign finance regulation, had submitted an amicus brief seeking to scrap what remained of BCRA.

A lawsuit filed in McConnell's name shortly after enactment of the law resulted in a December 10, 2003 ruling that narrowly upheld its main provisions. But it also included the first two declarations that parts of the BCRA were unconstitutional- one provision banning contributions by minors and another that restricted the ability of parties to make independent expenditures on behalf of candidates.

Several pro-regulation groups were so concerned with what the Supreme Court might do in the Cruz case that they intervened on behalf of the FEC. They defended the constitutionality of Section 304, contending that allowing unlimited reimbursement for candidate loans could be corrupting.

The Cruz case confronted the Supreme Court with two main issues: whether Senator Cruz had standing to challenge the law and whether the limit violates the free speech clause of the First Amendment.

A previous column of mine authored about the case published on January 24, 2022 maintained that both the pro-regulation groups and Senator McConnell would be “disappointed.”

It accurately predicted that the Court would rule that the Senator has standing, that Section 304 of BCRA would be ruled unconstitutional, and that the Court would not invalidate what remains of BCRA.

“The Court is likely to accept Senator Cruz’s argument that the \$250,000 cap places a burden on a candidate to not loan more than \$250,000, thus infringing on the candidate’s First Amendment rights,” said the earlier column.

One takeaway from this case is that the New Jersey Legislature displayed considerable wisdom in its approach toward regulating a similar question under this state’s campaign finance laws.

The Legislature permitted non-gubernatorial candidates for office to personally loan their campaigns unlimited amounts and to have the loans paid back after the election with post-election contributions.

Under New Jersey law, contributors are prevented from exerting undue influence on candidates because contributions before or after the election are subject to contribution limits and reimbursement can be made only up to the amount of the loan.

Whether this provision influenced the Supreme Court, who knows. But the Cruz ruling seems to reflect New Jersey’s common-sense approach.

No doubt many learned individuals whose focus is campaign finance law breathed a sigh of relief that the Supreme Court did not fully undo BCRA or target other campaign finance laws.

With respect to those sentiments, this columnist has consistently argued that the Supreme Court, despite its free speech concerns and relying both on precedent and good political sense, would continue to uphold cornerstone campaign finance laws such as contribution limits and disclosure.

So far, that has been the case, as indicated by an April 22, 2022 Supreme Court decision to let stand a Rhode Island independent expenditure disclosure law.

The court's long-time support for disclosure signals an opening for the state Legislature to undertake once again to pass legislation that would, like Rhode Island's law, require disclosure by independent groups engaged in electioneering in New Jersey.

Recently, independent groups have spent tens of millions attempting, with considerable success, to influence election outcomes in New Jersey. It is time that these groups be lawfully placed on a par with candidates and political parties, which are required to fully disclose their financial activity, to return balance to the state's electoral system.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission.

The opinions presented here are his own and not necessarily those of the Commission.

