CAMPAIGN FINANCE REFORM

Senator Russell Feingold (D-WI)

Russell Feingold, 51, has represented Wisconsin citizens in the United States Senate since 1992 and is well known for his work with Senator John McCain (R-AZ) to enact the most sweeping changes to American campaign finance law in a generation.

A Rhodes Scholar, honors graduate of the Harvard Law School, and a graduate of the University of Wisconsin-Madison, Senator Feingold began his political career at the age of 29, defeating a longtime incumbent to win a seat in the Wisconsin State Senate. Feingold ran for U.S. Senate in 1992, defeating a two-term incumbent to earn his seat. He was re-elected in 1998, while keeping a pledge to limit his own campaign spending and directing the Democratic party to spend no soft money on his behalf.

In 2002, Senator Feingold and his allies secured passage of the Bipartisan Campaign Reform Act (BCRA), ending a nearly decade-long struggle. BCRA placed significant restrictions on the use of “soft money,” unlimited contributions from corporations, unions, and wealthy individuals raised and spent outside the scope of federal campaign finance law. The Act also doubled the amount of limited, regulated “hard money” that individuals are permitted to contribute to candidate campaigns. Opponents of the legislation immediately filed lawsuits attacking the law from nearly every angle. The suits were consolidated into McConnell v. FEC; on December 10, 2003, the United States Supreme Court upheld every major provision of the Act.

On March 10, 2004, Uzo Asonye and Adam Lioz of the Yale Law & Policy Review staff spoke with Senator Feingold by phone. The conversation focused on the effort to pass BCRA and to defend the law in the courts.

INTRODUCTION

YLPR: Senator, you clearly bring a whole lot of passion to the issue of campaign finance reform. You have devoted a large part of your career to it. How did you originally discover that campaign finance was something you wanted to work on? What do you trace your interest back to?

SENATOR FEINGOLD: Well, I’ll tell you what I trace it back to: A good thing and a bad thing. The good thing was that when I came out of law school
and had been practicing law for a couple of years, I had no money, and I
decided that I wanted to run for the state senate. Because my state had the
wisdom to have a public financing system at that time, I was able, with no
money at all, to raise about $17,000 in small checks—$10 checks, $100
checks—because there was a voluntary spending limitation rule there. By
agreeing to the limit, I’d get that amount in a check from the state. So I got
roughly $35,000 total. And I was able to eke out a thirty-one vote victory out of
47,000 votes. That’s how I got into politics. It’s because there was public
financing that worked.

The bad thing was that after doing fairly well as a Wisconsin state senator,
getting good marks as being competent and able, I found when I started to run
for the United States Senate that people didn’t take me seriously. I kept
hearing: “Where are you going to get the money, Russ?” That was the question.
And I decided to prove that you could still win even though you didn’t have the
money. Through a series of 100 miracles, far more than anyone deserves in
their lifetime, I won. But, I knew that that wasn’t the way the system was set up
to work.

So by the time I came to Washington, I was interested in the issue, but it
was an issue where I did not expect to be a leader. Because there were so many
strong leaders here already—people like John Kerry, and Joe Biden, and Dale
Bumpers. I remember once being just thrilled to be one of ten senators in a
room, tenth man on a totem pole, tenth man in the whole discussion. I was
thrilled to be in the room just talking about it in 1993. I never dreamed that
within a few years I would start a journey where my name would be forever
stamped on the issue along with John McCain.

Well that’s how I got to that point, and then John McCain called me about
working together on reform issues in general. We didn’t talk in ’94 about
campaign finance reform. We actually worked on few other items, and we
started talking about campaign finance reform, and we looked at each other and
said, “Do you really think we can come together on this?” And we surprised
each other and did come together, and the whole journey began in May of
1995.

McConnell v. FEC

YLPR: Senator, now that the Court has vindicated BCRA\(^2\) in *McConnell v.*

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2 U.S.C. § 431 et seq.). The Act is often referred to by its acronym, BCRA, or as McCain-Feingold after
its sponsors in the Senate.
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FEC, how do you feel about the entire struggle to pass and defend the law and would you have done anything differently?

SENATOR FEINGOLD: I couldn't be happier than to have this major battle lead not just to a victory but to a landmark decision on campaign finance reform and the First Amendment. The decision, as somebody said to me, goes well beyond our bill. It's a great statement about democracy. So, to actually accomplish the elimination of what I consider to be one of the most corrupting things I've ever seen in American politics, and to also have it clarified that we're in good standing on the law not only for this law but for the future, was a huge victory. Now, of course, my preference all along was to have even more accomplished. I wanted voluntary incentives for candidates to be able to limit their spending in return for free television time. I personally prefer public financing. But in terms of accomplishing something that makes a difference, it'd be hard to ask for a better outcome given the task that we had set for ourselves in the last few years.

YLPR: You have mentioned that McConnell v. FEC really moved the ball forward from a legal angle. The Supreme Court does continue to base its rulings on the government's interest in fighting corruption or its appearance. And some legal commentators have maintained that this standard is inadequate and that we should push the Court to accept regulation of contributions based upon the concept of maintaining political equality in a country where vast inequalities in wealth have translated into corresponding inequalities in political power. Do you think the corruption rationale is adequate and would you embrace the political equality rationale?

SENATOR FEINGOLD: I think the corruption rationale has worked well. I think it does a good job. I am intrigued by this other approach, but my job as a legislator is not to create new rationales. The Supreme Court has given us a rationale that I, along with Senator McCain, worked closely to follow, which has been reflected all the way back to Buckley v. Valeo, reflected again in

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Shrink Missouri,9 Colorado II,10 and now in McConnell. That is an important line of decisions, and to me, my job is to work within the confines of what the Court has said. But, as a person who is interested in the broader subject, I am very interested in the equality issue, and I think it is an interesting analysis, but it is not of a lot of practical value to me as I try to create legislation that the Supreme Court would look favorably upon.

HARD MONEY LIMITS AND PUBLIC FINANCING

YLPR: Some have raised concerns about the hard money increases in BCRA.11 Evidence shows it has had a significant impact. For example, your colleagues in the Senate have increased their fundraising 72% over the first half of the last election cycle,12 more than a quarter of the funds raised by current presidential candidates would have been illegal before BCRA,13 and the political parties raised more hard money in 2003 than hard and soft money combined in 1999.14 Much of this money comes in high dollar contributions that average Americans can’t afford to make. Are you concerned about this development?

SENATOR FEINGOLD: It does concern me. I am the reason that the limits were not tripled. It was my personal effort to make sure that the necessary compromise did not get carried away. In order to get rid of unlimited soft money contributions, this compromise had to be made. We had to work with Senator Dianne Feinstein and Senator Fred Thompson in order to achieve it. I would have preferred to not go in that direction. But, I don’t think we were ever able to adequately respond to the argument that the other side had, which is that twenty-five years of inflation certainly changes the value of the thousand dollar limit.

Part of me would prefer a hundred dollar limit on contributions. That’s something that I would be interested in, in the context of public financing. But I completely reject the absurd notion that this reform means there is going to be more money in politics. Frankly, it is the silliest argument I have ever heard. Obviously, unlimited contributions mean that that over time there is going to be far more money in politics with soft money. Hard money limits have limited

14. Id.
how much has been involved. When people talk about how much President George Bush has right now, he’d have a billion in the bank right now if he still had soft money. So this has made a difference.

YLPR: In the wake of the higher hard money limits, what can Congress do to rehabilitate the role of small donors in our political system?

SENATOR FEINGOLD: Well, my preference is a voluntary public financing system, like they have in Arizona and Maine. We should apply that to our federal congressional elections, as has never been done, and we should fix the presidential system so that public financing is attractive again. I am also open to other ways to encourage people to be able to give small contributions, perhaps through a tax benefit that used to exist when I first came out of law school. You could contribute, I think, a hundred dollars a person—it was a credit, I think—and you got a credit off your taxes. These are the things I would be open to. But I also think that just the reality of the Internet and direct mail means that a candidate that has appeal is able, without using the hard sell of dialing for dollars, to raise funds in an impressive way. Howard Dean certainly showed that. Frankly, my own campaign has been very successful, although it’s costly. In other words, you have to spend a fair amount to get back a reasonable amount. But it’s real grassroots politics. I mean people give five dollars, ten dollars, and they seem excited, not about the fact that they’ve given money but that they’re participating at a grassroots level. So to me, that’s the only good part about fundraising: When you get people to give small dollars and then they get motivated to get out there and work on campaigns and be politically involved.

YLPR: Along the lines of the tax credit that you mentioned, Senator, our own Yale Law School Professor Bruce Ackerman has suggested a system whereby citizens would receive small dollar vouchers that they could then contribute to candidates, parties, or political groups. Would you support that?

SENATOR FEINGOLD: Well, I think that would be something you’d want to
do perhaps *in addition* to voluntary public financing. It’s not a good replacement for it, in my view. But I would be open to it. The fact is that I was elected to the Wisconsin State Senate only because there was a good public financing system in place in Wisconsin at the time. There is always the question of how you finance this sort of thing. If you had such a system nationally and also especially in Wisconsin, the voluntary tax check-off sometimes doesn’t keep up with the need. However, I am open to this proposal and I think that the Professor has an interesting idea.

**YLPR:** If we were to combine that system with low contribution limits, wouldn’t that effectively be very similar to public financing?

**SENATOR FEINGOLD:** I think it has a lot of the same merits. The thing I like about public financing is that everybody can just agree to limit their spending, and then they can get the public help, and it creates sort of a level playing field that I think is—not that it should be mandatory—but it’s very attractive when it works.

**YLPR:** Senator, some of the law’s opponents are concerned that restricting the use of soft money by political groups and other corporations gives media corporations—who are exempted in their editorial content¹⁹—a tremendous amount of power. Given the recent trend in media consolidation,²⁰ does this concern you?

**SENATOR FEINGOLD:** Well media consolidation concerns me a great deal. But I’ll tell you, the one area where I don’t think media consolidation is a threat in wiping out the other voices is in politics. There’s obviously a whole lot of money still in politics, a whole lot of messages going out both in terms of paid and free media of all kinds, and I do not at this point see any need at all to start talking about rearranging the First Amendment vis-à-vis the media.

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YLPR: We would like to get a sense of how far you think campaign regulation should go. As you know, the FEC has proposed a number of possible regulations regarding 527 groups, which will likely be finalized by the time that we publish. Do you think that 527s should be brought within the scope of federal campaign finance law? What about 501(c) organizations? And given that people will tend to find ways to influence elections, is there a logical point at which we should stop regulating?

SENATOR FEINGOLD: There definitely is a point at which you stop regulating. My view is you have to make a very compelling case for any regulation at all because the presumption should be in favor of the First Amendment. That's how I approached McCain-Feingold. That's how we approached it and the United States Supreme Court agreed with us. We were meticulous about that. The 527 issue is a tricky issue because it actually is not derived from McCain-Feingold. The 527 issue really has to be analyzed under the 1974 law that was ruled upon in Buckley v. Valeo. And the question there is: Is an organization involved in political activity but also principally involved in other activities? I think you have to be careful. I think there are First Amendment questions about going after their ability to do what they want to do outside of that 60 or 30 day period. On the other hand, when an organization is obviously set up solely for political purposes, there are questions there. The first question is: Is there in fact coordination, which would be illegal already, and is this just a way to circumvent the law that has been established for twenty-five years. And if that is the case, I think that kind of 527 should be properly regulated. So it's not a yes or no answer. It depends on the kind of 527 and whether it's a sort of a scam or an attempt to evade the law, or whether it’s a legitimate 501(c) organization.

YLPR: What about 501(c) organizations that do advocacy work on issues, but that also do criticize political candidates in a way that might affect an election?

SENATOR FEINGOLD: Well that's, in effect, what I just said. For example, the Sierra Club and the NRA are organizations that are not principally created for political activity. Outside of that sixty or thirty day period where we did restrict them in terms of unlimited contributions to pay for certain kinds of ads, I think you have there a problem—serious problems, First Amendment

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problems—to try to restrict what they can say or how they can pay for their activities.

**YLPR:** Interestingly enough BCRA seems to have placed the Democratic Party in a difficult situation this presidential cycle. President Bush will likely break all fundraising records thanks largely to the doubled hard money limits, and Democrats have been forced to resort to circumventing the law through 527 organizations in order to keep pace. Has BCRA put the Democrats in an untenable position? What are your thoughts about your own party undermining the spirit of the law you worked so hard pass?

**SENATOR FEINGOLD:** Everything you just said is absolutely wrong. The Democratic Party is not disadvantaged by McCain-Feingold. If you had to pick a party, which I doubt you have to, that benefits more in the presidential election, it is the Democratic Party. And the reason is not because some people are trying to create 527s. It’s because it has forced the Democratic Party to return to its roots. And when you return to your roots, you return to the voters. In the end, no amount of money wins an election. The person who gets the most votes wins the election. The Democratic Party was decaying in the rot of soft money. We were calling a few people and asking them for a million dollars or two million dollars, and we lost our base. We lost our enthusiasm. We lost the kind of people—that I know in Wisconsin—who used to be excited to be part of the Democratic Party and felt that they didn’t matter anymore because they couldn’t give twenty thousand, one hundred thousand, or a quarter million

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26. See, e.g., Alexander Bolton, RNC Seeks Court Order to End Liberal 527s' Activities, THE HILL, Apr. 1, 2004, at A3 ("[The Republican National Committee] charged that the liberal groups are illegally coordinating their activities with the Kerry campaign, noting that one group, the Media Fund, aired ads defending Kerry's economic plan before the plan was made public.").

27. See, e.g., Jim VandeHei, Kerry Funds Signal Hope For Party: Donations Set Record, But GOP Is Still Ahead, WASH. POST, April. 2, 2004, at A1 ("The Kerry fundraising totals cast doubts on doomsday projections that the new campaign finance law—which cracked down on large unlimited ‘soft money’ checks from wealthy individuals, labor unions and businesses—would inevitably hurt the Democratic nominee most. In past elections, Democrats were more dependent on soft money than Republicans.").
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dollars. The Party has returned to its roots. It is excited. It is unified. It is raising money from many small contributors and we are in the best shape we’ve been in in a long, long time, and I think I’m going to take some credit for that.

THE FUTURE OF CAMPAIGN FINANCE REFORM

YLPR: You mentioned earlier today that you teamed up with your BCRA co-sponsors to amend the current presidential public financing system. Can you talk a little bit about why that is necessary?

SENATOR FEINGOLD: Well, it is sort of obvious that we had a couple of problems in this cycle, on the Democratic side, where the contested primary was. One was that two of our leading candidates opted out of the system, which has never happened before. That obviously makes the system not work very well and it destroys the whole idea of having fair competition in the primaries. Secondly, the whole Dean phenomenon, which ended up not being successful, but the phenomenon was that we really had a whole lot of the election happening the year before. And we’ve got to adjust the timing of when people can get their public financing so that people can fairly play in the process. Finally, the amount of money needs to be adjusted upward from forty-five million to seventy-five million in order to have it keep pace with the expensive reality of presidential campaigns. So those are the basic components of our bill to change the primary system to make it more workable today.

YLPR: Senator, it took you and your colleagues the better part of a decade to pass what many concede is an incremental measure to plug some gaps in the current campaign finance system. How does one effectively reform a system from within? How can we expect legislators to vote against their own short-term financial interest?

SENATOR FEINGOLD: Well, clearly it took us a long time, but we actually either caused members of Congress to reassess their interest or forced them to vote against their interest. We took away the ability of members of Congress to get unlimited contributions. Just think about that. In any walk of life, if

somebody has the power to get unlimited amounts of money, just think what it takes to take that away from them. We did it. And as we did it, we did it in a way that made sure a law was established in the future that welcomes new reform. The McConnell decision completely wipes out so many of the phony constitutional arguments that some people started to believe in because it had been so long since there was a major decision on campaign finance reform. So it not only was a victory and significant proof that you can somehow force people to go against their financial interests, but it also created a legal path and political momentum for much more reform. So I would argue that the other reforms are going to be easier, such as public financing, because we paved the way with this very difficult but incremental first step. I agree that it is incremental.

YLPR: Senator, where do you see yourself going from here? What is the agenda for campaign finance reform in the next five years? And do you think that, ultimately, Buckley v. Valeo\(^3\) must be overruled in order for you to win these comprehensive reforms?

SENATOR FEINGOLD: Not only before the Supreme Court decision were we doing some of this stuff, but after it. We've got a whole very broad agenda of items. One is to simply get rid of the Federal Election Commission and replace it with an agency that actually has enforcement power. Two is the item we just talked about—fixing the presidential primary and public financing system. Three is to, in my view, try to move in the direction of public financing—voluntary public financing for all campaigns. We also have a bill that will not be easy to pass, but McCain and I and Sen. Dick Durbin have renewed the idea of free television or reduced costs for television time to benefit qualified candidates.\(^2\) Those are some of the areas of campaign finance reform that we're already active in. We didn’t miss a second on this. The wind is at our back. We have a full agenda. But my preference would be that this whole system be based on voluntary public financing. And, no, I do not think that Buckley has to be overruled in order for these reforms to be accomplished.

YLPR: What would your advice be to citizens or average readers who share your concerns? What could people on the ground do to help make that a reality given the fact that it seems so difficult to get politicians to change the systems like public financing?

\(^3\)424 U.S. 1 (1976).
SENATOR FEINGOLD: My rule is that when you’re ahead, you’ve got to work even harder. We’re ahead right now. This is the time to really have a national strategy. Just point to places like Maine and Arizona and say “Look, public financing is working great in these states. Let’s do this for the whole country.” So I think people should have campaign finance advocacy organizations in the states. They should try to come together on a couple of main agenda items, as they did so well back in McCain-Feingold. That was an incremental step, and it took some work to get a lot of the really strong groups to join in, but everybody—ultimately, just about everybody—came to the conclusion that we had to do this. We need to figure out the one or two things that we have to do next, and all work together. And I know this works. I gave a speech down at the University of North Carolina, and I was talking about McCain-Feingold, but all these young kids were there, excited to meet me, because they were working on something more dramatic. They saw what I was doing as a bridge to what they wanted to do. That’s how it works. In my own state of Wisconsin, we’re desperately in need of a new campaign finance law. The law is in shambles, even though our state was once one of the models of campaign finance reform. Energy that we generated on this thing needs to be capitalized on and needs to be capitalized on now. So I’m hoping these citizens groups will work with state legislators, work with us here in Washington, and we will continue this really historic coalition that got this bill through.