

Testimony of Senator Russ Feingold

Hearing on Oversight of the Federal Election Commission Senate Committee on Rules and Administration July 14, 2004

Good morning Mr. Chairman, members of the Committee. I realize that it is unusual for Senators to testify at an oversight hearing, so I want to thank you for this opportunity. Oversight of the executive branch and the independent agencies is one of Congress's most important roles, and it is my view that we do far too little of it in general. But the FEC, in particular, is an agency very much in need of oversight. So I am pleased that this Committee under your leadership, Mr. Chairman, is taking a more active role in examining the work of the agency.

My testimony this morning is going to be quite critical of the FEC, but I do want to mention at the outset that I think the agency does very well at fulfilling its public information duties. The main problem I see with disclosure at this point is not the FEC's fault, it is ours. More specifically, it is the Senate's fault that the law does not require Senate campaigns to file their periodic reports directly with the FEC. I know you agree with me on this Mr. Chairman, and I hope we can together figure out some way to fix that anomaly in the law either by Senate rule or by legislation such as S. 1874, which I have introduced with Senator McCain, and which is currently pending before this Committee.

Having given the FEC that one bit of sincere praise, I must now state my view that the agency has repeatedly failed to properly fulfill its other major duty – interpreting and enforcing the laws that Congress has enacted. While it is tempting to focus on the issue of the day – the FEC's inaction on 527s – I think it is important to provide some historical context so the Committee understands that the current problem is part of a pattern, a very long and frustrating pattern for those of us who care about the proper functioning of the election laws.

The Federal Election Campaign Act was enacted in 1974 and amended in 1976 after the Supreme Court's decision in *Buckley v. Valeo*. Only a few years later, the FEC opened the soft money loophole with two advisory opinions that allowed state and national parties to spend non-federal funds on activities that would affect federal elections. The FEC ignored repeated calls to close the loophole in the 1980s.

Then in the 1990s, when the parties moved to exploit the loophole by raising hundreds of millions of dollars of corporate and labor union money for use in federal elections, particularly on phony issue ads, the FEC sat on its hands. The FEC also failed to address the issue ad loophole and the airwaves were filled with

election ads masquerading as issue ads paid for with money that could not be legally used in federal elections. The political parties were complicit in this because they wanted to spend money from their overflowing soft money coffers on political advertising.

In the late 1990s, the FEC's professional staff recommended a regulation to ban soft money but the FEC failed to act. It also rejected a number of staff recommendations to pursue enforcement actions for the improper use of soft money in federal campaigns in 1996 and 2000.

As you know, the loopholes opened by the FEC sparked a seven-year campaign finance reform effort, which ultimately produced the Bipartisan Campaign Reform Act, signed by the President in March 2003. The Supreme Court upheld the new law in the *McConnell v. FEC* decision in December 2003. The Court had some very pointed, and not positive, things to say about the FEC's performance. It said that the FEC "subverted" and "invited widespread circumvention" of the law through allocation rules that allowed soft money to be used to aid federal campaigns.

Unfortunately, there have been similar shortcomings in the FEC's performance after BCRA was passed. The new law required the FEC to quickly issue implementing regulations. To its credit, the FEC met the tough deadlines in the statute. But in the substance of the regulations, the Commission repeatedly engaged in a breathtaking redrafting of the statute Congress enacted. Mr. Chairman, I want to submit for the record a summary of the shortcomings of just the regulations implementing McCain-Feingold's ban on soft money.

The FEC's most recent failure to act on 527s is but the latest in a long list of failures dating back a quarter of a century. The result, as the Supreme Court noted, has been the subversion and circumvention of the laws that Congress has passed. That leads to public cynicism, a view among our citizens that no matter what laws are passed not only will politicians and lawyers find ways around them, but the body charged with enforcing them will look the other way. That is not good for our democracy, or for the rule of law.

I hope the Rules Committee will help get this agency back on the right track, but Mr. Chairman, as you are aware, it is my view and that of the senior Senator from Arizona that a new agency should be created to undertake this important responsibility. I hope that proposal will be the focus of a future hearing in this Committee.

Thank you again for the opportunity to testify.