

Cato Institute Book Forum

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“Unfree Speech: The Folly of Campaign Finance Reform” (Princeton University Press, 2001)

Comments by Bradley A. Smith
Commissioner, Federal Election Commission

Thank you for that kind introduction. It's always a pleasure for me to be back at Cato. As John mentioned, I did some of my earlier writing on the subject for Cato and so it's a real joy to be back here today. It's kind of interesting that I blundered in really to the issue of campaign finance reform. Some years ago when I began teaching law at Capitol University in Columbus, Ohio, they asked me to teach a seminar in addition to other things I'd been teaching and they said, "Well, you can pretty much teach the seminar whenever you'd like." I had written, at that time, a couple of pieces on the rights of political parties, the rights of third parties, and independent candidates and so on, and so I said, "Well, why don't I teach election law?" because that seemed like a good seminar course. When you teach election law you start thinking about the topics that are covered there and seeing what's going on and, of course, campaign finance is a big part of that.

About the same time there was a case that was winding its way up through the Ohio courts and eventually got to the United States Supreme Court involving a woman named Margaret McIntyre, who lived in the Columbus, Ohio, suburb of Westerville, and she had gone about distributing some flyers in the parking lot of a public school in Westerville opposing a mileage increase. She did this at the same time there was a meeting going on being held by the school officials to rally voter support for this tax increase. And they knew, of course, full well who had distributed the flyers. They knew it was Margaret McIntyre. They saw her in the parking lot, the assistant superintendent walked up to her, talked to her, yelled at her a little bit about what a rotten person she was for opposing this tax increase and so on. And then they filed a complaint with the Ohio election commission against her because she had not put her name on these leaflets she was distributing. She had just signed them "Concerned Taxpayers" or something like that, rather than putting her name on them. And this violated the Ohio election code that required her name to go on them. At that point one of the arguments that the State of Ohio made, as this case went up to the Supreme Court, was that it was necessary to have this disclaimer on everything as part of the general scheme of regulating campaign finance. That you had to know who was spending what and who was doing what.

This got me thinking more and more about campaign finance. Here's a woman who is engaging in classic grassroots American political activity, and is doing so in a position where she is certainly subject to retaliation from the public officials involved because she has kids in the school district who get grades from the teachers who are all behind this, who want to try out for bands or the athletic teams or things like that. So there would be some advantage to her in seeking to speak anonymously, as the signers of the Federalist Papers, for example, did. And we're saying, "No, we can't have that," in this scenario. And I began to look at this case and look generally at what was going on in the area of campaign finance and as I looked I began to

feel more and more that virtually everything that I was seeing -- particularly in the popular press, but even in much of the legal scholarship -- was simply wrong. It didn't jive with my own experience, this notion that all of these folks over on Capitol Hill are corrupt. Most of the ones that I have known over the years are not corrupt. There are some who are corrupt and it's important to figure out who those are and to separate the wheat from the chaff, but to say they're all corrupt is just so obviously untrue. You'd hear comments, just to take a current example, and people would say, "Well, you know the Republicans repealed the ergonomics rules and that must show that they were doing the bidding of their corporate sponsors and that's the only reason they did this." And I thought, now Senator Don Nickles led the charge on that and Senator Nickles is a very conservative Senator from a conservative state and a man, I think, of tremendous integrity. Anybody who knows Don Nickles, he campaigns as a conservative, anybody who knows most of the Republican senators can't sit there and say they did this because they got some campaign contributions. This is what Republicans do, at least in theory. They try to deregulate things, they try to cut things back.

In many other ways, I saw this. For example, we kept hearing how the campaign finance system was making it so unfair to challengers only incumbents could win, look at what a huge fundraising advantage they had, but when you begin to look you discover that that fundraising advantage had increased since we began regulating campaign finance heavily in the 1970s. So there was this sort of disjoint and then I began looking more at the political science literature and you discover in the political science literature that there are a lot of things that are very different. There's a much less alarm and more just factual analysis and you begin to find that although there's not unanimity on many of these points, on many of them I think there's at least a strong perception that who spends the most is not so important as making sure that everybody can spend some. In particular, that challengers need to spend a lot. Efforts consistently show in this literature very little cause and effect relationship between donors and legislative activity rather, it's the other way around -- what legislators do, believe, and say is what attracts donations from different types of groups. So this is really what the book was about.

I began to sense that we had these political scientists and economists who are coming up with a sort of a body of literature about the actual effects of money and politics and then we had legal scholars who were writing and coming up with these convoluted constitutional theories at times about how we had to regulate things or how the Constitution actually required that we ban all private contributions or required that the government fund all campaigns and a variety of other theories. Some of them suggested that we needed to regulate the press and so on in order to assure equality and even saying that the Constitution mandates these principles. I found myself just saying that this just doesn't seem right. Let's see if we can't start to put the two together -- put some legal theory together with the kind of empirical research that the political scientists and economists are doing. If I've accomplished anything in my contribution to the literature, I think would be to bring some of that work together where it's operated more or less separately in the past. There's not, I will admit, a lot of original research in this book but I hope that it brings things together and puts new light on them; puts some new meaning to them. So that's what the book is basically about.

Now, there's two main issues that pound through any discussion of campaign finance reform and that go through this discussion of campaign finance reform: Equality and corruption.

You'll see on an issue like equality, for example, my friend Jamin Raskin and I have very, very serious theoretical differences about what it means to be political equals. My basic belief is the sort of traditional classical liberal notion of equality before the law, we're all even [equal] before the law, we're all equal when we walk into the voting booth and we vote once and it's counted once. But otherwise, naturally, we're different. We have different abilities, we have different types of things we can do and this not only goes to monetary differences, it goes to differences in talents and abilities. For example, all of us up here on the panel have the types of careers and the types of talents that give us more political influence than most Americans have. We can, we write and we speak reasonably well although you may be questioning that at this point but I do write well if you read the book. And we have jobs that give us the chance to participate in public life to follow amicus briefs and so on, in the case of Jamie and I and the other lawyer professors and so on. Journalists have influence that other people do not have because of the types of talents that they have. So the idea that we can be equal is just not there, but there are also in addition to these theoretical differences, there are empirical differences that we have about what is the effects of money -- what are the effects of money in politics?

It is generally my belief which I outline in the book. That money is something that actually equalizes, that breaks up the political monopolies and the systems. Otherwise you've got this sort of political barter system in which you have the people like those of us up here on the panel, you've got the consultants and the lawyers, and you've got the lobbyist. And of course big business in America spends ten times as much money lobbying as it does on campaign contributions; its real influence comes from lobbying. And for the average American out there, often it's money, big money, the money of Ross Perot or Steve Forbes or someone that comes in and can shake up the system and puts new issues on the agenda. And it's also money which is the only way by which most people can participate in most political activity.

If you're living in Alabama and your concerned about last fall's New York senate race, there is pretty much one thing the average American can do and that is write a check to somebody. And in fact, short of the actual act of voting for candidates the single most common act that most Americans do that puts them in some kind of contact, official sort of connection to a candidate is sending the people money -- is sending money along. And we have different views in how money reacts in other respects. As I've said I think it both helps the average person participate and I think big money often represents the average person. Ross Perot spoke for millions when he talked about the national debt, and he put that on the map and it's largely due to campaigns of Ross Perot I think that we got serious about balancing the budget. But there are also things I think that that all of the regulation doesn't create equality because it benefits again the lawyers, and the consultants, and the people who can work the rules, but the little guy gets squashed by all of this regulation, he can't compete.

If you want to go run for Congress now and you're an upstanding citizen with some name recognition, people know you a bit. The first thing you have to do is go hire a lawyer -- it's the very first thing you have to do. The regulation has decimated third party political activity. Now third parties continue to be active and continue to struggle but except for a case where you have a self-financed candidate like Ross Perot, it is extremely hard for third parties now to compete in the political realm.

The other aspect, the other thing that runs through the book is the whole question of corruption. As I have mentioned empirically, most of the studies that are done, I think an overwhelming majority don't find that campaign contributions affect the way that individuals act, that legislators vote and act. Now the response to this is always, common sense tells us, of course, that money influences people and therefore money must be dominating the process over on the capital. Obviously, if you get money from somebody you must be heavily influenced by that, but in the light of the fact that there is no empirical evidence for that, or at least very little, that the evidence goes the other way. We probably need to think more closely about that. Is it really common sense? I can think of all kinds of common sense reasons to think that's clearly not going to be the case.

Most people I know that go into political life have strong views on political issues; that's why they go over to the Hill. Most Americans who would choose to serve as Congressional staffers, often at pretty low pay, have very strong views on issues and that's why they go into those types of jobs. So that you've got people who have strong views who are surrounded by and getting advice from all day long from people with strong views on issues, but they also hear from their family and friend and they care about those opinions and they care about what newspaper editorials are going to say and they care about how newspaper reporters are going to report things and they care about what's going to make a good thirty second ad for their opponent and they have all kinds of competing pressures that come in. And the fact is that legislators meet all the time with people who never make contributions to their campaigns and most donors never seek meetings with legislators. And we know that they have to be worried of course about what their constituents think, why would you betray your own principles and do something that is against the interest of your constituents solely to get a campaign contribution. The idea I don't think makes a whole lot of sense, I don't think it's common sense, I think it's almost nonsense to think that campaign contributions would be particularly important in a regime like that.

Now the book goes further, I argue further that our efforts at reform have actually been folly-ous. The subtitle of the book suggests is that many of the problems we now complain about can be directly traced to efforts to regulate campaigns. And I am not saying that if we deregulate, which is basically the solution I propose, that campaigns would be nice and pretty and beautiful and we'd all be happy all the time and there'd never be corruption and everybody, everything would be great. I am suggesting that the cost of regulating campaigns has been extremely high. That it has harmed challengers, entrenched an elite, it has walled ordinary citizens off from political participation, campaigns actually discourage volunteers from showing initiative now because they might start to violate campaign laws. No longer can you just start a candidate's campaign by having, going around having some coffees with some people and passing the hat, no longer can people just begin acting spontaneously -- it's an example I often point out a colleague of mine at my old law school called me this fall and said, "Hey, some of the law students here have started a group law students for Bush/Cheney and I am going to be their advisor." I said that's great don't spend more than \$250 because if you do you will have to register as a political committee with the Federal Election Commission and you will have to start filing reports and so on, and needless to say they didn't really do much after that because you can spend \$250 pretty quick. I mean that's your pizza for your organizational meeting, you know, a small ad in the school paper and maybe if you buy a banner to hang behind you at your

organizational meeting and whoops you've spent your \$250 so if you don't want to suddenly have to register with the FEC, you're pretty much done, you're out of business at that point.

It's also a folly because we have to think about where it is that we're going and this ties in a little bit to the debate on the Hill, today. As we think about this debate we've got issues coming up, they're almost bizarre: Not only do we want to ban soft money to parties, but we also recognize that if we ban soft money to parties that would just increase the power of non-party groups like the Christian Coalition and the National Abortion Rights Action League, so we've got to limit these issue ads that these groups want to run, we've got to quit, we've got to stop them from talking about political issues. And then they set up this bizarre system where the government is going to determine what's a sham issue ad and what's a legitimate issue ad, and I would've always thought that the entire purpose of the First Amendment was that the government doesn't make those kind of decisions. We don't go in and say your speech is a sham and yours is not, and I wonder if we let this kind of concept go through when we're going to get around to deciding who is engaging in sham reporting and whose engaging in real reporting.

You know we might sit down and start thinking you know that Rush Limbaugh guy that's not real reporting he's just doing sham discussion of issues, really he's promoting Republicans, so he's got to be silenced. And you know that O'Reilly guy too and who knows who else we might want to get at once we accept the principle that the government can determine whose speech is legitimate on issues and whose speech is not.

But the thing is, even this won't really cut it off; they've got this idea in this bill that if you limit speech 60 days before an election because that is OK because that is a bright line people will know if they can speak or not and that does away with questions of vagueness and people not knowing if their speech is allowed. We'll just limit your speech 60 days before an election. What kind of idea is this, that voters have less right to talk about political issues in the 60 days immediately before an election than they do further from an election? When are your First Amendment rights most valuable to you? It's in the 60 days before an election; that is when you want to talk about things, that's when you want to engage in speech. And of course, if we use that 60 day limit, these groups would step back and start running ads on the 61st day and campaigns would become longer and more expensive because the further you are from an election you probably got to spend more money to stick the message in a person's head, in a voter's head.

And so again we start to see where just exactly are we planning to go with all of this and in fact in the legal journals today in prestige's law journals like the *Texas Law Review* and the *Columbia Law Review* and the *California Law Review*, which is California Berkley's law review, we have some of our leading academics arguing that in fact that we do need to censor the press; it's just not fair otherwise and this just needs to be done. This should be cause for tremendous alarm and these ideas are not those by people who are viewed as sort of you know, kind of crackpots or wackos in the academic community.

One such author of one such piece is a man named Ed Foley. I know Ed Foley, I like Ed, he's a very nice guy and he's a very, very bright guy. Ed Foley was appointed by a Republican Attorney General to be Solicitor General for the State of Ohio, the top litigating position in the

state of Ohio. These are not considered to be loopy theories to go off and say we should limit the ability of newspapers to write articles and editorials about political candidates because it is not fair. And this is where we're going as we look over here at the Hill this week and this debate on the McCain-Feingold bill.

We've had one amendment proposed already and its attempts to get at the problem that the Supreme Court has held that rich people can spend all they want of their own money, and so the idea is "well this is not fair so now we're going to set a bunch of different triggers in." If a person spends their own money to run, well then set up this various triggers at which other people can get more money from contributors, because the rich person can spend a million of his own money and you can't, as the other candidate, go combat it by asking somebody to give you a million dollars, which you would have done in 1968, say, or 1970. So, you know, what can you do? Well at least we'll raise the contribution limit from \$1,000 to \$3,000 or something. But then you got all of these triggers. You know Wyoming is a very different state from New Jersey or New York – you've got to spend a lot more money in New York to make a difference. So they're going to set the triggers based on what state you're in, and then I think they have 3 different triggering clauses. You know, if the candidate spends this amount then the opponent gets this benefit, and then if the self-funded candidate spends a little more his opponent gets another little benefit, and it keeps going on like that. And I just find myself asking: what are we thinking? Where are we going? And where in the Constitution? And how congruent with the First Amendment do we give this kind of authority to our elected officials?

And there seem to be very few people who recognize this problem. One person who has, who has stood forward a long time for it, is Senator Mitch McConnell. He stands up there he takes the shots from the press, from the *New York Times* and the *Washington Post* and many other people in the press, the "Darth Vader" of reform and so on. For years he has stood up there and argued on principle, we cannot do this and where is it leading. And now, a lot of people can no longer hide behind Senator McConnell; there's a chance this bill could actually pass and we're suddenly seeing a new debate. But we're seeing some of the odd questions, some of these odd issues brought up to the floor. This idea of triggers for rich people, and then were going to have who knows what other kinds of amendments, the whole system is getting bizarre.

I want to close by talking just a touch more about one theme in the book. In the book I have a passage where I say that we are talking about the most serious threat to free speech since the Alien and Sedition Acts. In fact, this is a more serious threat because the Alien and Sedition Acts had an automatic expiration date and none of this has an automatic expiration date. And the rational is the same while people will lose confidence in their government if we let people continue to do these sorts of things. If we pass the McCain-Feingold bill or almost any of the versions being talked about, political speech will be more heavily regulated than Internet pornography, than beer commercials, than most other kinds of speech that most of us would view as being not quite so central to the First Amendment.

Now, Larry Eichel is a very perceptive and balanced columnist in one of the Philadelphia papers, and he wrote earlier this week that ... he said he couldn't really agree with me on that, although he found much to like in the book, he said, "Fifteen years ago, we didn't know what soft money was so it's hard to see how getting rid of it threatens the Republic." But this is

exactly the point. I mean he's right: I don't think just getting rid of soft money threatened our republic, we won't lose our democracy if that's it, at least not today, although we will have to move onto closing the next set of loopholes. But that's the point. We're going to have to keep closing loophole after loophole after loophole, and think about what Larry Eichel says, 15 years ago we didn't know what soft money was. He is already a very balanced, fair person, who is very skeptical of much of this regulation. He has already in his mind made the shift from thinking about the norm -- being that you can spend whatever you want like the founders did during the revolution and so on. The norm is no longer "you can spend whatever you want," the norm is "it's limited and soft money is some kind of new invention that's an exception to the norm." In fact, the norm in this country's history has been anybody could spend, whatever they want. That's the norm. The idea that anybody would restrict soft money is what's odd.

The very fact that we've now come up with a term soft money for what we used to just call money -- political participation -- for the kinds of contributions that Gene McCarthy used to fund his late opposition to Lyndon Johnson in 1968 that knocked Johnson out of the race, for the kind of participation for the kind of money that was used to fund the campaigns of Abraham Lincoln and Teddy Roosevelt and many of our greatest Presidents is now seen even by this perceptive critic as sort of being some bizarre aberration from the norm. You see already, the liberties are slipping away and we are getting used to that idea, and pretty soon we will get used to the idea that you shouldn't criticize your Congressman in the 60 days before an election, that that's just not very fair. And we will wonder why it is that Congressmen never lose races and why all the controversial bills are taken up in the last 60 days of the session, you know.

And then pretty soon we will have to start limiting people's ability to speak in other ways, we will start limiting the abilities of newspapers to run editorials, 'cause that's just commentary, that's not the news. And one day some perceptive otherwise critic will have the next move and he'll say, "Well I can't think that the republic is really threatened if we just tell the *New York Times* they can run only one editorial a day instead of three, or we say, 'Well George Will only gets one column a month, he can't write more than that because it's not fair and gives him too much influence.'" I do think that this is a very important issue and I think that we are in a very dangerous situation here because right now what is going on in Congress is being done with very little public discussion, or very little recognition of what is at stake.

So I hope that you will pick up this book. I hope that you will read the arguments therein. If I haven't convinced you today, I hope that reading them in 200 pages will convince you that much of what I say, if not all of what I say, rings true, and I thank you for your time. And it will be my pleasure to turn things over to Jamin now.