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Mr. Smith, Welcome to Washington

by Roger Pilon

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In the often heated debate over campaign finance reform, few events have generated more heat than Senate Majority Leader Trent Lott's selection of Professor Bradley A. Smith for a GOP seat on the Federal Election Commission. Critics called Smith, a noted expert on campaign finance, "unfit" to serve, his selection "an insult." Someone on the FEC with his views, said one critic, is "unthinkable." Given that opposition, President Clinton has thus far refused to nominate Smith. In response, the GOP has put a hold on Clinton's nominee for ambassador to the United Nations.

What is Smith's "crime"? In his scholarly writings, he has challenged the conventional wisdom by arguing that past campaign finance reforms have made the system worse and that most proposed reforms would do the same—and, more important, would violate the First Amendment. He urges an end to limits on both contributions and spending—but with full disclosure. Although Smith's critics call him "radical," their attack has raised a question: Just who is the radical? For in case after case, the courts have been on Smith's side, not on the side of his critics. Indeed, what his critics plainly fear is that Smith, on the FEC, will not be "radical" enough, will not press the "robust enforcement" the courts have repeatedly struck down. For his part, Smith has said he will enforce the law, but he will not waste the taxpayers' money pursuing unconstitutional enforcement theories. His selection is a breath of fresh air that should bring needed balance to the campaign finance debate.

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Introduction

The debate in recent years over campaign finance reform has often been heated. Just as often it has left the impression that there are only two camps—those who want to reform the "corrupt" system now in place and those who want to leave it as it is. Reformers, who want more regulation, stand for "good government," of course; they wear white hats, whereas those who oppose further regulation—to say nothing of those who call for less regulation—are often branded as benighted, corrupt, or worse.

At no time, perhaps, has that Manichean divide come more to the surface than when Senate Majority Leader Trent Lott, earlier this year, selected 41-year-old Bradley A. Smith, a law professor at Capital University in Columbus, Ohio, and an adjunct scholar at the Cato Institute, to fill a Republican vacancy on the Federal Election Commission. Out came the long knives, aimed at pressuring President Clinton not to nominate Smith for the GOP spot. Editorially, the *New York Times* called Smith's selection "an insult." The *Washington Post* labeled him a "radical," as did *Wall Street Journal* columnist Al Hunt, who added that Smith was "unfit" to serve. The *Atlanta Constitution* described him as the equivalent of a "flat earth society poobah." And the *Syracuse Post-Standard*, throwing all caution to the wind, likened Smith to David Duke, the Unabomber, and Slobodan Milosevic.[1]

Given that opposition, President Clinton has thus far refused to nominate Smith to the GOP seat. That means, of course, that he is trying to control a seat that, under the Federal Election Campaign Act, is the GOP's to fill. Responding to Clinton's intransigence, Senate Majority Leader Trent Lott has put a hold on the president's nomination of Richard Holbrooke as ambassador to the United Nations, prompting the *Washington Post* to cry foul.[2] Thus, the politics of the matter at this writing.

Efforts to vilify prospective appointees are not uncommon in Washington, of course, but they are especially absurd in this case. Smith has established himself, since graduating from the Harvard Law School, as one of the nation's foremost experts on campaign finance. His voluminous writings in the *Yale Law Journal*, the *Georgetown Law Journal*, and elsewhere have been cited approvingly in federal court opinions and have made him, in the words of even his most vocal critics, "the most sought after witness" in Congress whenever the topic is campaign finance reform.[3] Even the *Washington Post*, in opposition to Smith's nomination, conceded that he is "clearly qualified." Why, then, the near hysteria over this appointment?

Challenging Conventional Wisdom

Smith's "crime," it seems, is to have challenged the conventional wisdom that drives today's campaign finance debate. The thrust of his writing is that much of what has passed for "reform" has in fact made the system worse. He has shown that limits on contributions have forced candidates to spend more time fundraising than ever before. He has demonstrated how contribution and spending limits help entrench incumbents, make campaigns longer and more negative, and reduce political accountability. He has argued convincingly that the burden of regulation has fallen most sharply on political amateurs and grassroots activists who lack the time, technical know-how, and resources to comply with heavy regulation. But above all, his writings have demonstrated time and again how efforts to ratchet up regulation by closing "loopholes" have eroded First Amendment liberties.[4]

Rather than call for more regulation, Smith has urged deregulation. He would do away not only with spending limits but also with the contribution limits the Supreme Court upheld in its landmark 1976 decision in *Buckley v. Valeo*.[5] In their place he would require full disclosure. Sunshine, in short, is the best disinfectant.

But that goes against the regulatory gospel of campaign finance "reform" as pronounced by a troika of "good government" groups—Common Cause, Democracy 21, and the Brennan Center for Justice. The three groups launched a series of attacks on Smith with a June 3 press release and an open letter to President Clinton that denounced Smith as "not fit to serve" because of his "radical" views.

In thus attacking Smith, however, the three "reform" groups may have launched, inadvertently, a national debate that will come back to haunt them. For the question their attack has brought to the fore is, Just what does it mean to be a "radical" on campaign finance reform?

Just Who Is the "Radical"?

Common Cause and its allies have dominated that debate for years. By dictating the terms for "reform," the Common Cause crowd has induced an all but unquestioned belief that reform requires an ever-increasing regulatory web around political contributions and expenditures—and hence, if the Supreme Court is right, around political speech. Among other things, the reform lobby has pushed bills to regulate speech mentioning a candidate for federal office within 60 days of an election, to prohibit citizens from organizing committees to support or oppose candidates, to prohibit citizens from contributing to candidates running outside their home districts (even friends and relatives), and to prevent groups from publishing the voting records of candidates if those records include any words of praise for or condemnation of the votes there noted.

But the reformers have been conspicuous thus far in their lack of success in getting Congress to enact their proposals. Thus, they have turned increasingly to the FEC—an agency they have largely "captured"—pressing it to make rules and bring enforcement actions—what the *Washington Post* calls "robust enforcement"—to "reform" the system along their favored lines. Yet there too the reformers have been notably unsuccessful, for the courts have repeatedly struck down such rules and enforcement actions as unconstitutional violations of the First Amendment.

Given that record of failure in both Congress and the courts, it is not a little ironic for the reformers to be calling Smith "radical." For both branches have been with Smith far more often than with the reformers. Indeed, the Brennan Center—the reform lobby's prime litigation arm since 1995—has been on the losing side in every reported campaign finance case it has participated in that has reached final judgment.

Losing Case after Case

Thus, in *Colorado Republican Federal Campaign Committee v. FEC*,[6] the Supreme Court held that political parties, like other groups, have a right to campaign for their candidates. More precisely, the Court upheld the right of parties to make unlimited independent expenditures in support of their candidates—a position urged by Smith in his writings but opposed by the Brennan Center, Common Cause, and the FEC.

Again, in *North Carolina Right to Life v. Bartlett*,[7] the Brennan Center argued that a North Carolina statute limiting the rights of nonprofit organizations to engage in issue advocacy was constitutional. The federal appeals court disagreed. It struck down a law remarkably similar to proposals at the federal level. Here again, Smith argued in his writings that such restrictions on issue advocacy are unconstitutional violations of First Amendment rights.

Similarly, in *Elections Board v. Wisconsin Manufacturers & Commerce*,[8] a Wisconsin state court declared a state statute regulating political discussion unconstitutional—against the intervention of the Brennan Center supporting the law. Just four months earlier, on September 18, 1997, the executive

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director of the Brennan Center testified before the House Judiciary Committee's Subcommittee on the Constitution that, in his opinion, the Wisconsin statute was constitutional. At the same hearing, Professor Smith averred that it was not.[9] Once again, it was the position of the Brennan Center, not Smith, that turned out to be "radical."

The Brennan Center also found itself on the losing side in *Kruse v. Cincinnati,*[10] where the court, on First Amendment grounds, struck down limits on spending in city council races. Here too Smith's published writings put him, not the Brennan Center, in the mainstream of judicial thought.

Although Smith has generally agreed with the positions taken by the courts in scrutinizing campaign finance regulation under the First Amendment, he has criticized the Supreme Court's rationale in upholding limits on the size of political contributions. It is that position, doubtless, that has lent whatever credibility there might be to the charge that he would "sabotage" the work of the FEC. But that is one area of the law that calls for little interpretation by FEC commissioners. As Smith noted in an interview with the *Columbus Dispatch*, "I'm not going to be out there saying we won't enforce [contribution] limits. They are in the law, they've been upheld by the Court. This isn't all that hard."[11]

Yet on that issue, too, it turns out that Smith's "radical" view is close to the mainstream of judicial thought. For his skepticism regarding the constitutionality of contribution limits was shared by Chief Justice Warren Burger, in dissent, in *Buckley*. And more recently, in a concurring opinion in *Colorado Republican Federal Campaign Committee*, three members of the high court expressed similar views.

Meanwhile, lower federal courts have been striking down contribution limits that are below the $1,000 limit approved in *Buckley*. In *Shrink Missouri Government PAC v. Adams,*[12] *Russell v. Burris,*[13] *Arkansas Right to Life v. Butler,*[14] and *California ProLife Council PAC v. Scully*[15] federal courts struck down contribution limits ranging from $100 to $500. In each case, the Brennan Center litigated on the losing side. Indeed, the Supreme Court recently agreed to hear the *Shrink Missouri* case, suggesting that it may think it time at last to review the *Buckley* holding on contribution limits.

The FEC's litigation record is little better than the Brennan Center's. In fact, the FEC has tried so often to expand its authority under FECA that in *Federal Election Commission v. Christian Action Network*, the appeals court took the extraordinary step of ordering the FEC to pay the opposing party's legal fees. The FEC's argument was so thoroughly contrary to "unequivocal Supreme Court and other authority," the court said, that it "simply cannot be advanced in good faith."[16] If nominated and confirmed, Smith would be an important voice on the FEC in pulling its aggressive litigation theories back into the mainstream.

Toward a More Balanced Debate

More important, however, Smith's nomination may help balance the national debate about how to structure our campaign finance laws. From its inception, that debate has been dominated by the Common Cause "good government" crowd, demanding ever more regulation and enforcement. Indeed, *Wall Street Journal* columnist Al Hunt suggested recently that violators should "go to jail" if that would help change the system.[17] By contrast, Professor Smith, as noted earlier, calls for deregulating the system and focusing the FEC's resources on promoting full disclosure of the sources and amounts of contributions. He reminds us that the Founding Fathers pledged their "lives, fortunes, and sacred honor"—not their fortunes "up to $1,000 per year." In a 1996 article in the *Yale Law Journal*, Smith summed up his position this way: "The problems of self-government in the twenty-first century are unlikely to be resolved by piling more regu-

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lations on top of a failed system of campaign finance regulation. Instead, we should . . . take more seriously the benefits of the system of campaign finance regulation that the Founders wrote into the Bill of Rights. . . . It begins: 'Congress shall make no law. . . .'"[18] A more balanced debate over the proper role of federal regulation would be a refreshing change from the one-sided morality play we have today. Indeed, as we will see shortly, such a debate may already have begun—thanks to the reformers' overreaching.

It is abundantly clear that Common Cause and its allies do not want such a debate, which helps explain the heated rhetoric they have directed at the GOP's selection of Smith. Their efforts have been complicated, however, by the more thoughtful among them. Thus, the Brennan Center's legal director, New York University law professor Burt Neuborne, wrote to an academic colleague in 1996 praising "Smith's excellent work in debunking the status quo." He went on to say: "I find Professor Smith's piece among the best skeptical critiques of the campaign reform movement. I learned from it, and altered aspects of my own approach as a result of his argument. It is, in my opinion, thoughtful scholarship that helps to move us toward a better understanding of an immensely important national issue."[19]

Clearly, Neuborne's assessment hardly squares with the reformers' heated June 3 press release. Drawing selectively from Smith's voluminous writings and numerous public appearances, Common Cause, Democracy 21, and the Brennan Center claimed there that he is "unfit" to serve on the FEC because he believes that "the entire body of the nation's campaign finance law is fundamentally flawed and unworkable—indeed, unconstitutional," and because "he has called . . . for the abolition of the agency he aspires to head."[20] The reformers support their contention by citing a 1997 *Wall Street Journal* op-ed, which Smith finished with a rhetorical flourish: "The most sensible reform is a simple one: repeal of the FECA."[21]

Here, reformers wrench a single line out of context: just as the reformers, when they call for overruling *Buckley*, do not mean to refer to that portion of the opinion that upheld contribution limits, so too Smith, in an article urging an end to contribution limits, did not mean to end current disclosure requirements. Indeed, reformers are well aware of Smith's work supporting disclosure laws and a role for the FEC in enforcing those laws: their release quotes from a 1997 article Smith published in the *Georgetown Law Journal* in which he stated, "[D]isclosure provides the necessary information to the citizenry to manage the problem [of corruption]."[22] In another 1997 article, in a symposium in the *Journal of Law & Policy* in which Professor Neuborne also participated, Smith wrote of the campaign finance scandals in the Nixon administration: "[I]f these revelations proved anything, it was . . . that good, enforceable disclosure laws, such as those passed in 1971, would work."[23] Again, in a 1996 article in the *Cornell Journal of Law & Public Policy*, Smith devoted several pages to discussing the benefits of disclosure as a remedy for corruption.[24]

One does not need to pore over Professor Smith's academic writings to fairly read the selected line. Appearing on national television in the fall of 1996 he said: "[W]hat we really need to do is dump some of these laws, deregulate the system, require full disclosure. Now people are trying to hide their contributions. If we open up and let people contribute, those contributions come into the open, and then if the voters think it's important, the voters can decide."[25] Since those comments were made in a debate with former Common Cause president Ann McBride, it is all but impossible that Common Cause is unaware of Smith's views on the matter. Smith has supported disclosure in such public forums as the editorial pages of *USA Today*[26] and congressional hearings, including a hearing on February 1, 1996, when he shared the witness table with Ms. McBride. Given that long public record, the reformers' claim that Smith opposes

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"the entire body" of campaign finance law is simply not credible.

In Defense of the First Amendment

With the reformers' overreaching, a number of prominent legal experts have sprung to Smith's defense. Thus, Brooklyn Law School professor Joel Gora, who is also general counsel of the New York Civil Liberties Union and was one of the original *Buckley* attorneys, calls Smith's writings "models of academic analysis and intellectual integrity"—adding that "far from being 'radical,' Smith's views have prevailed in the courts far more often than the truly anti–free speech positions of many of his . . . 'reform' opponents."[27] Again, constitutional history professor David Mayer notes that "Professor Smith is an uncompromising champion of the First Amendment. . . . Ironically, the *Times* is in the odd position of opposing someone because he believes too strongly in the First Amendment."[28] And James Bopp Jr., director of the James Madison Center for Free Speech and one of the nation's leading attorneys in the field of election law, adds that "the criticism by Common Cause arguing that Bradley Smith is out of the mainstream simply reflects the fact that Common Cause and their allies have such an extreme position on the ability of the government to regulate speech that they don't know the mainstream when they see it."[29] Indeed, as Mr. Bopp observes, the reformers' effort to tar Smith as a wild-eyed radical actually shows just how far from the mainstream the "reform" groups are.

As an example of Smith's "radical" views, reformers are left to quote from a 1995 Cato Institute Policy Analysis in which he wrote, "FECA and its various state counterparts are profoundly undemocratic and profoundly at odds with the First Amendment."[30] That view may seem "radical" to reformers. It is not to the Supreme Court. In *Buckley*, the Court struck down, on First Amendment grounds, numerous provisions of FECA, including limits on candidate spending, limits on independent expenditures made on behalf of a candidate, limits on what is today known as issue advocacy, and limits on candidates' contributions to their own campaigns. As Professor Gora notes, "On at least five occasions since . . . *Buckley v. Valeo*, the Supreme Court has struck down campaign finance controls." And as the Brennan Center and Common Cause have learned in litigation, lower federal courts have also repeatedly stepped in to strike down state and local campaign finance regulation on constitutional grounds.

It is plain, therefore, that the real complaint reformers have is not that Professor Smith will be too radical but that he will not be radical enough. Their concern is that, if seated on the FEC, he would not pursue the radical theories and "robust enforcement" the courts have repeatedly rejected as violating the First Amendment. As Smith stated in one recent interview, "[If confirmed on the FEC], I will enforce existing laws, but I will not go along with wasting taxpayers' dollars to pursue legal theories that have been rejected [as unconstitutional] by federal courts."[31]

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Since its creation nearly a quarter of a century ago, the FEC has been the captive of groups such as Common Cause and the Brennan Center, from which they have made war on the First Amendment rights of American citizens, restrained only by the determination of federal judges to uphold the Constitution. Professor Smith's nomination threatens that dominance—and threatens also to expose the true radicalism of those "good government" groups.

But it also threatens the very purpose and, thus, the power of groups like Common Cause, Democracy 21, and the Brennan Center. Until now, the Common Cause crowd has dictated the meaning of campaign finance "reform." Bradley Smith's potential nomination to the FEC threatens that dominance. For, as Professor Mayer writes, "Smith . . . favors real reform,

in the direction of deregulation." That is a debate the "reform" lobby wants desperately to avoid. As one Smith foe put it, "[T]he Professor is entitled to his views, . . . [b]ut there is no reason to give him a platform like this"[32]—to which the Brennan Center added, "Mr. Smith . . . is entitled to sit in the ivory tower and advocate," but to have such views represented on the FEC is "unthinkable."[33] Unthinkable? Better to denounce him as "radical" and link him to the Unabomber and Slobodan Milosevic, one supposes, than to engage in a serious debate about campaign finance reform. Such a debate is long overdue. If this nomination should trigger one, it will have served a valuable purpose.

Notes

1. "An Insult to Campaign Reform," editorial, New York Times, June 4, 1999, p. A28; Al Hunt, "The Lesson of the 1996 Scandals: Do It Again, and More," Wall Street Journal, June 3, 1998, p. A27 (but see Roger Pilon, "Absurd Campaign Finance Limits," Letters, Wall Street Journal, June 15, 1999, p. A19); "Mr. Smith and the FEC," editorial, Washington Post, June 6, 1999, p. B6; "Critic Doesn't Belong on FEC," editorial, Atlanta Constitution, June 9, 1999, p. 16A; "Bad Choice for FEC: A Foe of Rules and Reform Would Make a Poor Watchdog," editorial, Syracuse Post-Standard, June 18, 1999, p. A12.

2. "Bad Hold in the Senate," editorial, *Washington Post*, July 8, 1999, p. A24.

3. "Bradley A. Smith: A Potential FEC Nominee Who Would Repeal All Election Laws and Abolish the Agency He Aspires to Head," Brennan Center, New York, June 3, 1999.

4. This paper focuses more on the politics of the Smith candidacy than on the substance of the campaign finance debate. For the latter, see other studies noted here and Lillian R. BeVier, "Campaign Finance 'Reform' Proposals: A First Amendment Analysis," Cato Policy Analysis no. 282, September 4, 1997.

5. 424 U.S. 1 (1976).

6. 518 U.S. 604 (1996).

7. 168 F.3d 705 (4th Cir. 1999).

8. No. 97-CV-1729 (Wis. Cir. Ct., Jan. 16, 1998; aff'd, Wis. Sup. Ct., No. 98-0596, 1999 Wisc. LEXIS 103, (Wisc. July 7, 1999)).

9. Bradley A. Smith, Testimony before the Subcommittee on the Constitution of the House Committee on the Judiciary, Hearings on the First Amendment and Restrictions on Issue Advocacy, 105th Cong., 1st sess., September 18, 1997.

10. 142 F.3d 907 (6th Cir. 1998).

11. Quoted in Joe Hallett, "Foes Scorn Nomination of Capital Law Professor," *Columbus Dispatch*, June 9, 1999, p. A3.

12. 151 F.3d 763 (8th Cir. 1998).

13. 146 F.3d 563 (8th Cir. 1998).

14. 29 F. Supp. 2d 540 (E.D. Ark. 1998).

15. 164 F.3d 1189 (9th Cir. 1999).

16. 110 F.3d 1049 (4th Cir. 1997), at 1064.

17. Hunt.

18. Bradley A. Smith, "Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform," *Yale Law Journal* 105, no. 4 (1996): 1049.

19. Burt Neuborne, Letter to Professor Daniel T. Kobil, Capital University Law School, October 16, 1996. Copy in author's files.

20. "Bradley A. Smith."

21. Bradley A. Smith, "Why Campaign Finance Reform Never Works," *Wall Street Journal*, March 19, 1997, p. A15.

22. Bradley A. Smith, "Money Talks: Speech, Corruption, Equality, and Campaign Finance," *Georgetown Law Journal* 86, no. 1 (1997): 61.

23. Bradley A. Smith, "The Sirens' Song: Campaign Finance Regulation and the First Amendment," *Journal of Law & Policy* 6, no. 1 (1997): 24.

24. Bradley A. Smith, "Real and Imagined Reform of Campaign Corruption," *Cornell Journal of Law & Public Policy* 6, no. 1 (1996): 151–54.

25. *Newshour with Jim Lehrer*, October 18, 1996, transcript no. 5680.

26. Bradley A. Smith, "Laws Backfire on Public," *USA Today*, October 10, 1996, p. 14A.

27. Joel Gora, "Absurd Campaign Finance Limits," Letters, *Wall Street Journal*, June 15, 1999, p. A19.

28. David Mayer, Unpublished letter to the *New York Times*, June 4, 1999. Copy in author's files.

29. Quoted in Amy Keller, "Candidate for FEC Defends Record," *Roll Call*, June 8, 1999, p. 1.

30. Bradley A. Smith, "Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences," Cato Institute Policy Analysis no. 238, September 13, 1995, p. 23.

31. Quoted in Hallett, p. A3.

32. "FEC Foe Is a Bad Choice," editorial, *Syracuse Herald Journal*, June 16, 1999, p. A16.

33. "Bradley A. Smith." The idea that an appointee cannot enforce the law if he does not agree with it in its entirety is particularly absurd. Were that idea to be taken seriously, no one would be fit to be president.

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