Brad Smith Departs to Cheers and Jeers

Free Speech

By K. Daniel Glover

In a January 2004 speech before the American Conference Institute, then-Federal Election Commission Chairman Bradley A. Smith delivered a scathing critique of *McConnell v. FEC*, a Supreme Court ruling from the previous month that had upheld campaign finance reforms as constitutional. "Now and then," he said, "the Supreme Court issues a decision that cries out to the public, 'We don't know what we're doing!' *McConnell* is such a decision."

That was just a warm-up jab. A passionate defender of unfettered political speech, Smith then used what has since become a favorite comparison of his: "If it was unclear before, it is now a fact that our Court gives less constitutional protection to the right to criticize the voting record of an incumbent congressman close to an election than it does to virtual child pornography, cross-burning, sexually explicit cable television programming, topless dancing, tobacco advertising, flag-burning, defamation, and the dissemination of illegally acquired information."

Such pointed rhetoric, a hallmark of Smith's five-plus years at the FEC, explains why self-styled campaign reformers are celebrating Smith's departure from the commission last month. But it just as clearly reveals why free-speech advocates are lamenting the loss of a man they see as a principled, fearless, and eloquent champion of the First Amendment.

"It seems that what the 'reform industry' wants is a puppet, and if [a commissioner] isn't their puppet, then they run to the media and whine about how awful that person is," said Cleta Mitchell, a lawyer at Foley & Lardner who practices before the FEC. "So, Brad Smith isn't and wasn't their puppet. Good for him."

Then-Senate Majority Leader Trent Lott, R-Miss., and Kentucky Republican Mitch McConnell, the senator whose challenge of the McCain-Feingold campaign finance law eventually went to the Supreme Court, suggested Smith for the slot on the FEC back in February 2000. Smith's nomination quickly became controversial because of his criticisms of campaign finance law during his time as a law professor at Capital University in Columbus, Ohio, a post that he now has resumed.

Sen. John McCain, R-Ariz., compared putting Smith on the FEC with "confirming a conscientious objector to be secretary of Defense." McCain's allies in the advocacy community agreed. "The full Senate should reject Bradley Smith to serve on the FEC because of his fundamental disagreement with the law he would be sworn to enforce," said then-Common Cause President Scott Harshbarger in a March 2000 statement.

Smith won confirmation as part of an agreement under which the Senate also confirmed 16 of President Clinton's judicial nominees. But Smith's tenure at the election agency was marked by repeated clashes with reform-oriented lawmakers and advocates.

Two noteworthy episodes showcased that tension. First, in April 2002, McCain and three other lawmakers most associated with the Bipartisan Campaign Finance Reform Act urged Smith to recuse himself from rule-makings required by the law, which had been enacted weeks earlier. They accused him of "inappropriate and ill-advised intervention into the congressional debate" and of other "public attacks" on the measure.

In a detailed letter back to the lawmakers, Smith dismissed their concerns. "Our disagreements over tactics and the effects of regulation ought not to blind you to the fact that our goals and purposes are the same," he concluded. "We can all wear white hats. We are all 'reformers.' "

The second episode came during last year's presidential campaign, when the



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Campaign Legal Center, Democracy 21, and the Center for Responsive Politics jointly asked the FEC to disqualify Smith from "any participation" in their complaint against Swift Boat Veterans for Truth. The veterans' group had questioned the military service record of Democratic presidential nominee John Kerry, and campaign reformers said that the group's actions violated election law. The three reform organizations accused Smith of making public comments that prejudged the outcome of the complaint. Smith did not recuse himself, and the case is still pending before the FEC.

The underlying current of both complaints embodies the predominant criticism of Smith: that, for an FEC commissioner, he spoke a bit too freely about free speech and thus let his personal views influence his work. "Brad is a very bright, able person, which makes his term at the FEC all the more disappointing," said Trevor Potter, president and general counsel of the Campaign Legal Center and also a former FEC commissioner. "I don't think he was able to differentiate between the anti-regulation ideology ... [and] the responsibilities of enforcing the law."

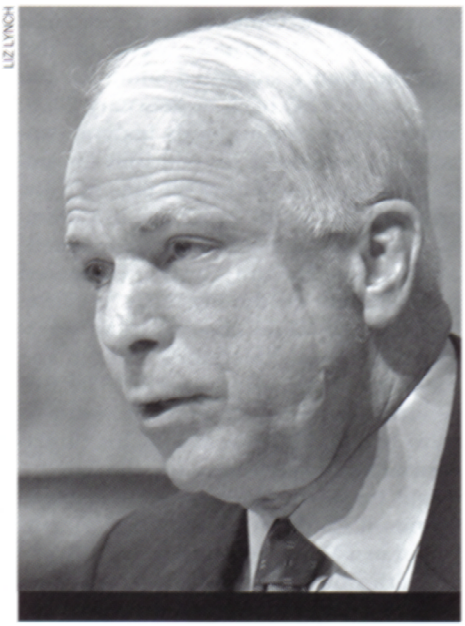
Don Simon, the counsel to Democracy 21, echoed that view. He said that Smith "has worked for the last six years, often with great success, to ensure that the FEC did not uphold the law." And Larry Noble of the Center for Responsive Politics, who once served as a general counsel to the FEC, contended that Smith "helped steer the agency to the position where it's a lot less aggressive than it used to be."

Simon cited the FEC's decision last year not to regulate so-called "527" organizations such as the Democratic-allied America Coming Together and the Republican-allied Swift Boat Veterans for Truth. The FEC saw that such groups were illegally raising and spending hundreds of millions of dollars to influence the 2004 election, he said, but "at the urging of Brad Smith, it ended up doing nothing at all" to stop it.

In an interview during his last week on the job, Smith challenged the accusation that he worked to undermine the law; he said he had tried diligently to see that the agency adhered strictly to the statute and to the Constitution. But he agreed with his critics' contention that he had tried "to pull the agency back a bit," because for years, it "had been pursuing an aggressive mode of enforcement, which frankly was trampling on people's rights."

Smith put the blame squarely on Potter, Noble, and others who had served on or worked at the FEC during the time that Smith said it became a "rogue agency," regularly losing court cases because it had exceeded its authority. He also insisted that the FEC made the right call on 527s. " 'Reform' does not necessarily mean what Fred Wertheimer and a handful of other reformers say it means," he said in a reference to the president and CEO of Democracy 21.

Indeed, the criticism that Smith could not be trusted to enforce the law looks suspect when compared with the commission's record in 2004, the year he served as chairman. For the second consecutive year, the FEC imposed civil penalties of more than $2 million, which Smith's annual report called a first, and the median penalty jumped 45 percent, to $45,000.



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Smith has plenty of fans eager to defend his tenure at the FEC. After the June announcement of his departure, *The New York Sun* lauded Smith for being "a man of principle who openly questioned the wisdom of the very regulations he was charged with enforcing." Rep. Deborah Pryce, R-Ohio, said that Smith was "an independent freethinker and will be remembered for ferociously protecting" political speech. And Ohio State University's law school editorialized in its election-law newsletter: "There likely will be no speeches in Washington thanking him for his contribution to the democratic system we hold so dear. But he deserves those thanks nonetheless."

Former Smith aide Allison Hayward said that one of Smith's greatest contributions was in helping average Americans who unwittingly got ensnared in the campaign finance morass—by not including disclaimers on homemade signs in support of candidates, for instance. Smith always tried to remember that the agency can "really scare people," she said. "Ordinary people think it's a big deal when you get a letter from the government saying you did something wrong."

FEC Commissioner Michael Toner, who was appointed by President Bush, added that Smith pushed successfully for "safe harbors" to protect certain conduct and for "clear rules, bright-line standards" aimed at benefiting "people who aren't in Washington, D.C., who do not have access to K Street lawyers." Toner noted the uproar that Smith helped to set off earlier this year by hinting that the FEC might apply campaign finance law to "bloggers," the authors of online journals, who became a political phenomenon in 2004. "Brad put that issue front and center" by criticizing the idea of regulating blogs before it was ever officially proposed, Toner said, "and it was a very important thing to do."

Both Smith's champions and his detractors are now focused on the process for replacing him and, potentially, three other commissioners whose terms have expired: Republican David Mason and Democrats Danny McDonald and Scott Thomas, the current chairman.

Noble, of the Center for Responsive Politics, said that the bellwether will be what happens with Thomas. "There are those who are trying to get him off the commission," Noble said, and if they succeed, that will indicate the future direction of the FEC. In a July 20 letter, leading campaign finance reformers in Congress urged President Bush to reappoint Thomas.

In filling Smith's seat, Hayward suspects that the Bush White House will seek a commissioner who is less independent and more "predictable, because it values loyalty above all else." She added that Smith's successor is sure to be "a little less colorful, a lot less quotable." Asked if there will ever be another commissioner like Smith, she said with a laugh: "Oh, no. No, they broke the mold." ■

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