Testimony of Bradley A. Smith before the

Committee on Oversight & Government Reform

Politicizing Procurement:

Will President Obama's Proposal

Curb Free Speech & Hurt Small Business?

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Center for Competitive Politics

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Introduction

Mr. Chairman, Ranking Member, and members of the committee.

My name is Bradley Smith. I am the Josiah H. Blackmore II/Shirley M. Nault Professor of Law at Capital University in Columbus, Ohio, founder and Chairman of the Center for Competitive Politics, a non-profit education organization based in Alexandria, and a former Commissioner and Chairman at the Federal Election Commission.

Thank you for inviting me here today to address a proposed executive order requiring bidders on government contracts to disclose their political spending, and that of certain employees, to the government prior to bidding on contracts. Such an order is, in my mind, ill-advised and represents an attempted power grab by the Obama administration on campaign finance issues. In short, it has three major flaws:

- It imposes junk disclosure requirements that serve no good purpose
- It chills protected political activity
- It seems motivated by simple partisan politics

The main purpose of the order is to force disclosure of donations made to independent groups that engage in any electioneering communications—ads mentioning candidates that air near elections—or independent expenditures—ads advocating for the election or defeat of candidates but made independently of candidates. Historically, this information has not been subject to disclosure under federal campaign finance laws, and in the last congress an effort to require disclosure of this information was defeated. This proposed Executive Order will interject into the contracting process political information that is illegitimate to the award of government contracts. Today, we enjoy an acquisition system that is, with rare exception, free of political pressure. Should the draft Executive Order be implemented, those days will be gone. This type of disclosure will dramatically reduce the transaction costs for those few procurement officials who may find it attractive to engage in pay-to-play activity. The Order will create one-stop shopping for everything the rare dishonest federal acquisition official might want to know.

The draft order would also duplicate existing disclosure laws by requiring contractors to submit records of the political donations made by the company, top employees, subsidiaries and affiliates. Recall

that existing law already requires that all contributions to candidates, party committees and other political committees be reported. Once any donor contributes $200 to such an effort, that person's name, address, occupation and employer become part of the public record. The spending of all these entities is also itemized at the $200 level. Contributions to so-called "527" groups are disclosed in similar reports filed with the IRS. Moreover, direct contributions by federal contractors, both incorporated and unincorporated, are flatly prohibited. These contractors, like businesses generally, may establish political action committees, but all contributions and expenditures in excess of $200 by political action committees are publicly disclosed under the Federal Election Campaign Act. Similarly, all independent expenditures and electioneering communications, by any group, are already disclosed under the Federal Election Campaign Act and the Bipartisan Campaign Reform Act of 2002, as are all donations to any group that is specifically for the purpose of airing such ads. Thus, what we are talking about here, really, is requiring the disclosure of spending by individuals and businesses that goes to groups that then spend the money, often without the knowledge and almost always without the specific approval of the donors, to further their agenda.

Limits to Disclosure

We hear in some quarters that such disclosure requirements are benign. "It's just disclosure – what do you have to hide?" is a theme repeated when more intrusive disclosure requirements are being advocated. Make no mistake, there are limits to the government's power to mandate disclosure. The government cannot require individuals to divulge information without good reason. In the political law arena, disclosure requirements must be justified by some government interest in fighting corruption, and calibrated to reveal activity germane to that interest.

There is good reason for this. Over the years, the Supreme Court has struck down as unconstitutional laws requiring civil rights organizations to disclose their membership lists to the government; laws requiring socialist groups to disclose their donors, and laws requiring union organizers, organizers of boycotts and picketing, leafletters and pamphleteers, and citizens passing door to door, to disclose their identities where no anti-corruption or other compelling government interest was served. Moreover, the Supreme Court has required that even campaign finance disclosure requirements must not be vague, so that speakers may know what they may say without having the government infringe on their privacy.

What does the Executive Order require that has not already been covered by existing law? It take a bold step away from this vision of tailored and calibrated disclosure, by demanding disclosure of fees, contributions, donations or other transfers to independent non-profit entities that, among other activities, make electioneering communications or independent expenditures. It requires such information looking back two years before the entity submits a contracting offer.

Not to put too fine a point on it, but this is junk disclosure. It captures all payments, not just those ultimately used for political speech. No connection need be shown between the payment and the use of the funds. The two-year look back period will capture transactions that lack any connection to political activity, and are far removed from any subsequent use of the money. As a result, individuals and entities will be associated with issues and political speech they do not share. This will give the public (and contracting officials) inaccurate and confusing information. A rule ostensibly designed to inform will create disinformation. Only in an Orwellian vision of participatory democracy could this result be tolerated.

Vague Requirements Lead to Chilled Speech

The Executive Order furthermore imposes its dictates using vague and amorphous terms. It is not evident what donors might be included in the group of "affiliates or subsidiaries" whose activity is brought into this disclosure regime. What constitutes a "reasonable expectation" that money will be "used" for "independent expenditures or electioneering communications?" Vague requirement chill protected speech, by causing individuals and groups to steer wide of the mark so as not to trigger a violation. Vague rules also present a trap for the unwary, which in this case might not know they will be considered an "affiliate" or "subsidiary."

Another Example of "Reform's" Dark Side

Considering the timing of this executive order, as President Obama prepares for re-election, the motive seems to be about politics, rather than good government or rooting out corruption. White House-allied organizations that support the executive order openly admit that the intent of the order is to target business groups, singling out the U.S. Chamber of Commerce. As *The Hill* newspaper reported,

> Fred Wertheimer, president of Democracy 21, said that if the order had been in place during the last election, government contractors who contributed to the $33 million that the Chamber spent on

electioneering communications would have been disclosed. "That, in a nutshell, is the reason," Wertheimer said.[1]

There is no present justification for this Order. Since late 2007, companies have been able to spend money on electioneering communications. That year, the Supreme Court ruled in *Federal Election Commission v. Wisconsin Right to Life* that the government, via McCain-Feingold, could not prohibit a nonprofit group from airing an ad that happened to mention a candidate in a window before Election Day. *Citizens United v. FEC*, in early 2010, expanded on that decision and held that the government could not prohibit companies, unions and advocacy groups from airing independent expenditures.

Yet, the Obama administration waited until April 2011 to draft this executive order. If a grave problem of corruption within the federal contracting process and political donations exists, why hasn't President Obama addressed this problem since he took office? Indeed, this action comes only after the administration and its allies have failed in Congress and at the FEC, and now must try to impose this provision by fiat.

First, the Obama administration urged congressional action. Democrats proposed the DISCLOSE Act, which would have banned the political speech of many government contractors. The bill also contained myriad new disclosure and disclaimer regulations. It failed to pass Congress.

Next, the administration turned to the FEC. Rather than allowing the agency to simply remove the unconstitutional regulations invalidated by *Citizens United*, three commissioners allied with the president's party refused, insisting on including broad new disclosure regulations not authorized by Congress. That process has stalled as the otherthree commissioners objected.

In closing skepticism is called for when government begins to regulate political speech. This is because of how incumbent governments, politics, and the enforcement process work. The history of "reform" is in part a history of efforts to silence or cripple political opponents. This current initiative seems no different.

[1] *The Hill*, "Watchdogs urge action on White House's contractor donation disclosure order," May 4, 2011 http://thehill.com/business-a-lobbying/159353-watchdogs-urge-action-on-donation-disclosure-order