S. HRG. 106–391

NOMINATIONS TO THE FEDERAL ELECTION COMMISSION

HEARINGS

BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

THE NOMINATIONS DANNY LEE McDONALD, OF OKLAHOMA, AND BRADLEY A. SMITH, OF OHIO, TO BE MEMBERS OF THE FEDERAL ELECTION COMMISSION

MARCH 8, 2000

Printed for the use of the Committee on Rules and Administration

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NOMINATIONS TO THE FEDERAL ELECTION COMMISSION

WEDNESDAY, MARCH 8, 2000

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The committee met, pursuant to notice, at 9:33 a.m., in Room SR–301, Russell Senate Office Building, Hon. Mitch McConnell, chairman of the committee, presiding.

Present: Senators McConnell, Warner, Nickles, Dodd, and Schumer.

The CHAIRMAN. Good morning. I want to thank the nominees, Commissioner McDonald and Professor Smith, for adjusting their schedules to be with us this morning. As the nominees are aware, we had originally tried to schedule this hearing for Wednesday, February 23rd, but ultimately postponed the hearing at the request of my distinguished colleagues on the other side of the aisle and at the request of some outside groups like Common Cause and the Brennan Center.

I might add that we also had requests from other groups to testify in opposition to each of the nominees: the National Right to Life Committee, the National Legal Policy Center, as well as Common Cause and the Brennan Center.

The committee, however, decided to stick with our tradition and allow only the nominees to testify. I would encourage any outside groups who have written comments to submit that testimony for the record today.

It is my understanding that Senator Nickles and Senator Voinovich are on the way, and we need one more Senator to swear you fellows in, and we hope that they will be here momentarily. In the meantime, the senior Senator from Virginia will tell jokes.

[Laughter.]

Senator DODD. Give an analysis of last night. What happened there, John?

Senator WARNER. I am not sure that when I was privileged to be chairman of this committee we indulged in that great a degree of humor. But, anyway, this is a very important occasion, Mr. Chairman, as you well know.

The CHAIRMAN. Yes.

Senator WARNER. We have waited a very long time for the opportunity to re-establish the membership of this Commission so that t can carry out its statutory responsibility. And I wish to commend the chairman and the ranking member for facilitating this hearing and getting it underway.

I see the presence of our distinguished leader here, so I will refrain from further comment and yield back.

The CHAIRMAN. All right. Senator Nickles has joined us, and now that we have four, we will swear the witnesses in. If you fellows would stand and raise your right hand and repeat after me? Actually, you don't need to repeat after me. You can just say, "I do."

We are not going to swear you in, Senator Voinovich. You can sit down.

This is for Commissioner McDonald and Professor Smith. Do you swear or affirm that the testimony that you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MCDONALD. I do.

Mr. SMITH. I do.

The CHAIRMAN. Senator Voinovich and Senator Nickles are here to introduce the nominees from their States. I will call first, in order of seniority, on our colleague, Senator Nickles.

STATEMENT OF HON. DON NICKLES, A UNITED STATES SENATOR FROM THE STATE OF OKLAHOMA

Senator NICKLES. Mr. Chairman, thank you very much, and I appreciate your having this hearing, as well as Senator Dodd and Senator Warner, and I am pleased today to introduce a friend of mine, a nominee to the Federal Election Commission and also a fellow Oklahoman, Danny McDonald.

Danny is a native of Oklahoma. He was born in Tulsa, and he has had an extensive career in public service, including election policy and administration, prior to coming to Washington, D.C. He is married to Gail McDonald, who also has a distinguished career in public service, served on the ICC, and they also have a daughter, Jill.

Is Jill here, by any chance? She is not here.

Personally, I think that Gail should be appointed to this position instead of Danny, but the President didn't call me and ask me that.

Originally, Danny McDonald was nominated by President Reagan. He has served on the Federal Elecion Commission since 1982. He served as Chairman in 1983 and 1989 and 1995.

Prior to his position at FEC, Danny McDonald served as the general administrator for the Oklahoma Corporation Commission, the secretary of the Tulsa Election Board, and as chief clerk in the Tulsa County Clerk's Office. Prior to his professional career, he attended my alma mater, Oklahoma State University, before receiving his master's from Harvard and his law degree from Columbia.

[Laughter.]

Senator NICKLES. You thought that was funny?

[Laughter.]

Senator NICKLES. I don't know what was funny about that, law degree from Columbia. I think that is impressive.

I have known Danny for many years. Many times we differed on ideas on campaign election policy, but I consider him a good friend, and I would hope that the Senate would move forward both with his nomination and the nomination of Mr. Smith as expediently as possible and move forward positively on both nominations.

So, Mr. Chairman, thank you very much for having this hearing, and I welcome both of our nominees to the Rules Committee.

The CHAIRMAN. Thank you, Senator Nickles.

Now I would like to call on Senator Voinovich for his comments about his constituent.

STATEMENT OF HON. GEORGE V. VOINOVICH, A UNITED STATES SENATOR FROM THE STATE OF OHIO

Senator VOINOVICH. Chairman, it is good to be with you this morning. I am here this morning to present Professor Bradley A. Smith, who has been nominated to serve as a Commissioner of the Federal Election Commission. As the chairman is aware, Senator De Wine is unable to be here with me this morning in order to present Professor Smith; however, I understand, Mr. Chairman, that you have a copy of Senator DeWine's statement.

The CHAIRMAN. I do have his statement in support of Professor Smith.

Senator VOINOVICH. He is back in Ohio, coming back today. He had a primary yesterday.

I would like to take a moment and recognize Professor Smith's family who has joined us today: his wife, Julie, who is ehind me, and their two daughters, Eleanor and Emma. And I would also like to recognize his brother, Dana Smith, who is also here with us today. It is nice to have members of the family here with you.

There is an old saying that goes, Mr. Chairman, you can't choose where you were born, but you can choose where you live. That phrase is certainly applicable to Brad Smith. Professor Smith is a native Michigander, born in Wyandotte, Michigan, and having grown up in suburban Detroit, the town of Trenton, Michigan. I am pleased to report, however, that he is of good Ohio stock. Both of his parents were born in Columbus where they are now retired. Columbus is also where Professor Smith now lives.

Brad attended the public school system in his home town and entered Kalamazoo College in 1976. At Kalamazoo, he earned a bachelor's degree and graduated cum laude in 1980, and after graduation entered the Foreign Service, spending 2 years as vice counsel of the U.S. Embassy in Ecuador.

In 1983, he left the Foreign Service and, after a short stint in the private sector selling insurance, pursued a law degree at Harvard University. It was at Harvard where he first became interested in campaign law. After he graduated cum laude from Harvard Law School in 1990, Dr. Smith joined the law firm of Vorys, Sater, Seymour & Pease in Columbus, and in 1993 was offered a teaching position at Capital University Law School in Columbus, Ohio, where he is currently a full professor of law.

Professor Smith has quite an impressive list of accomplishments covering a wide variety of media, with the majority of his work focused on election and campaign finance law. In all, he was written one book, which is due out this year, penned nine Law Review publications, contributed three chapters to other books, compiled 14 studies and reports, and made seven journal and periodical contributions. He has had over 20 newspaper columns published in such papers as the Wall Street Journal, USAToday, the Columbus Dispatch, Washington Times Detroit News, Chicago Tribune, and dozens of other columns published in smaller daily and weekly papers.

He has written two amicus briefs and participated in numerous speaking engagements, presentations, radio and television news interviews.

Professor Smith is regarded as a leading scholar on the issue of campaign finance. In fact, in the most recent Supreme Court ruling on campaign finance, Nixon v. Missouri Government, Professor Smith's work was cited in both the majority and in the dissenting opinions. There is no question that he knows the issues that he would face as an FEC Commissioner. That is really important. He knows the subject. His knowledge has generated respect from his peers as well as professional and editorial support for his nomination.

Indeed, the Columbus Dispatch has given its unequivocal support to Professor Smith, saying in a February 13th editorial, "The Senate should move quickly to confirm Smith, who is one of this Nation's foremost constitutional scholars and an expert on election law and free speech."

In addition, Professor Smith has received letters of support from a number of law professors, most notably, Professor Daniel T. Coble. Professor KobilCoble is a colleague of Professor Smith's at Capital University as well as a former governing board member of Ohio Common Cause.

In a letter to you, Mr. Chairman, Professor Kobil states that although he does not share all of Professor Smith's view on campaign finance reform, "he is, in my view, an outstanding candidate for the position and certainly should be confirmed."

In the same letter, in apparent response to charges that Professor Smith has a disregard for the rule of law and the continued function of the FEC, Professor Kobil wrote—and I think this is important for the committee to listen to these words: "Having come to know Brad personally, I have no doubt that his critics are wrong in suggesting that as an FEC Commissioner Brad would refuse to enforce Federal campaign regulations because he disagrees with te laws. I have observed Brad's election law class on several occasions, and he has always took the task of educating his students about the meaning and scope of election laws very seriously. I have never observed him denigrating or advocating skirting State or Federal election laws, even though he may have personally disagreed with some of those laws. Indeed, several times in class he admonished students who seemed to be suggesting ignoring what they considered overly harsh election laws. Brad is an ethical attorney who cares deeply about the rule of law, and I am confident that he will fairly administer the laws he is charge with enforcing as Commissioner."

I would also like to insert the Columbus editorial with your permission, Mr. Chairman. [*See Appendix 1.*]

Mr. Chairman, several of our Senate colleagues have already expressed their disapproval of Professor Smith as the next FEC Commissioner based on opinions he holds regarding campaign finance law. In their view, his statements and writings are enough to disqualify him from consideration, even before the benefit of this hearing. I know the Senate better than that. However, I don't believe that our colleagues have received all the facts regarding Professor Smith to make such a judgment.

I have every confidence that today's hearing will give Senators an ample opportunity to question Professor Smith on his views on election law. I also believe it was provide Professor Smith a chance to clarify his views and dispel any possible misconceptions regarding his service as an FEC Commissioner.

It is my hope that today's hearing will produce a lively and thought-provoking exchange of views that will be of benefit to both the nominee and my colleagues. And I want to underscore again: I have been in this business a long time, over 34 years. I have taken an oath of office to uphold the Constitution and to apply the laws of my State and of this country. And there are many of these that I don't agree with. But the fact of the matter is I have upheld them conscientiouly. And I think that because someone may disagree with the law, that doesn't mean that they can't honorably discharge that law. As a matter of fact, I have observed on many occasions where people think that maybe they have a difference with it, they even are more scrupulous in terms of fulfilling what the law—not only the letter but also the spirit of the law. And I would hope that the Senate gives this man an opportunity to have his case heard and that they will, after giving consideration to that, find him qualified to be—

The CHAIRMAN. Senator Voinovich, on that point, it is interesting to note that we are all here in Congress frequently lectured by Federal judges about the laws that we pass with regard to sentencing, this suggestion that we are loading up the jails with people and taking away the discretion of judges. So your point is well made. We are frequently lectured by people who disagree with things we do here, who nevertheless uphold the law.

Senator VOINOVICH. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Voinovich. As you indicated in your introduction, the senior Senator from Ohio, Senator DeWine, also supports the nominee, and I would ask unanimous consent that his statement appear in the record after Senator Voinovich's.

[The prepared statement of Senator DeWine follows:]

INTRODUCTION OF PROFESSOR BRAD SMITH BY SENATOR MIKE DEWINE

Mr. Chairman, Senator Dodd, thank you for giving me the opportunity to say a few words today on behalf of Mr. Bradley Smith, who has been nominated to be a member of the Federal Elections Commission (FEC).

As a former practicing attorney, Professor Smith has gained first–hand knowledge of our election laws. Since 1994, Mr. Smith has been a member of the faculty of Capital Law School in Columbus, Ohio, and is a nationally recognized scholar in the field of election law, with an emphasis on campaign finance issues. He has written extensively on the subject and has been cited in legal briefs to and opinions of the Supreme Court.

I have received a number of letters supporting Professor Smith, particularly from his colleagues—the people who know him well on a personal and professional level. Those who know Professor Smith cite his commitment and dedication to the rule of law. One colleague wrote that " the first and most important attribute to appre-

ciate in Professor Smith is his integrity. He has a real sense of the moral obligations of whatever office he holds." I have even received letters of support from colleagues who disagree with Professor Smith's views on election law. One wrote that Professor Smith's "critics are wrong in suggesting that as a FEC Commissioner, Brad would refuse to enforce federal campaign regulations because he disagrees with the laws."

Professor Smith also has demonstrated a strong sensitivity to the role of Congress as the principle architect of election policy, and has stated repeatedly that election laws should be enforced by the Commission, even if the Commissioners personally do not agree with them. After his experience in teaching and practicing law, Professor Smith understands and respects our system of government.

Again, I thank the Chairman and Ranking Member for holding today's hearing.

The CHAIRMAN. All right. Well, thank you, Senator Voinovich. We appreciate very much your being here.

Senator WARNER. Before the Senator leaves, Senator Voinovich—he is gone. He gave a very good statement on behalf of Mr. Smith. We have heard a lot of statements in this room and in other hearing rooms, but he expressed that in a heartfelt way.

The CHAIRMAN. Thank you, Senator Warner.

It is my distinct honor to preside over this hearing today, and let me say at the outset that I believe Congress has given the Federal Election Commission one of the toughest Federal mandates in all of America—that is, to regulate the political speech of individuals, groups, and parties without iolating the First Amendment guarantee of freedom of speech and association.

Over the past quarter century, the FEC has had difficulty maintaining this all-important balance and has been chastised, even sanctioned, by the Federal courts for overzealous prosecution and enforcement—overzealous prosecution and enforcement that treated the Constitution with contempt and trampled the rights of ordinary citizens.

In light of the FEC's congressionally mandated balancing act and the fundamental constitutional freedoms at stake, Congress established the balanced, bipartisan, six-member Federal Election Commission. The law and practice behind the FEC nominations process has been to allow each party to select its FEC nominees. Republicans pick Republicans and Democrats pick Democrats.

As President Clinton said a few weeks ago, this is "the plain intent of the law" which requires that it be bipartisan and by all tradition that the majority—referring to the majority here in the Senate—make the nomination.

Typically, Republicans complain that the Democratic nominees prefer too much regulation and too little freedom, while Democrats complain that the Republican nominees prefer too little regulation and too much freedom. Ultimately, both sides bluster and delay a bit, create a little free media attention, and then move the nominees forward. In fact, the Senate has never voted down another party's FEC nomination in a floor vote or even a staged filibuster on the Senate floor.

At the end of the day, the process serves the country well. The FEC gets a few Commissioners that naturally lean toward regulation and a few Commissioners that naturally lean toward constitutionally protected freedoms. And the country gets a six-member, bipartisan Federal Election Commission to walk the critical fine line between regulation and freedom.

Let me say that I sincerely hope that we can uphold the law and tradition that President Clinton invoked when he sent these two nominees to the Senate. After all, Professor Smiths views are similar to the Republicans who have gone before him, and Commissioner McDonald's views are similar to those he himself has held for the past 18 years as one of the Democrats' Commissioners at the FEC.

In fact, Commissioner McDonald's views are so consistent with and helpful to the Democratic Party that former Congressman and currently top adviser to Gore campaign chairman Tony Coelho has hailed Commissioner McDonald as "the best strategic appointment" the Democrats have ever made.

So notwithstanding the bluster and delay, these two nominees largely represent their party's long line of past FEC Commissioners.

The questions before the committee this morning should be: Is each nominee experienced, principled, and ethical? And will the FEC continue to be a balanced, bipartisan Commission?

I would like to dedicate the remainder of my opening comments this morning to reading a few excerpts from the flood of letters I have received in support of Professor Smith since he was nominated. And I want to say to you directly, Professor Smith, that the professional and personal esteem in which you are held by constitutional law scholars and election law experts is evidenced by the dozens of letters I have received urging the Senate to confirm you.

I would like to ask unanimous consent that these letters of support that I have here this morning be entered into the record, and I ask my staff to make copies available for all members of the committee and the press. [*See Appendix 2.*]

Even staunch advocates of reform, including two past board members of Common Cause, have written in support of your nomination. These many letters attest to the central role your scholarship has played in mainstream thought about campaign finance regulation and make clear that no one who knows you personally or professionally, including self-avowed reformers, believes that you will fail to enforce the election laws as enacted by Congress or to fulfill your duties in a fair and even-handed manner.

All of the scholars that have written urging the confirmation of Professor Smith believe that his scholarly work is not radical but rather well grounded in mainstream First Amendment doctrines and case law. Let me share with you a few examples, and Senator Voinovich actually has referred to some of these already.

Professor Daniel Kobil, at the Capital Law School, a reform advocate and past director of Common Cause, Ohio. This is a quote from his letter. "Groups seeking to expand campaign regulations dramatically might have misgivings about Brad's nomination. However, I believe that much of that opposition is based not on what

Brad has said or written about campaign finance regulations, but on crude caricatures of his ideas that have been circulated."

"I think that the FEC and the country, in general, will benefit from Brad's diligence, expertise and solid principles if he is confirmed to serve on the Commission."

Professor Larry Sabato, Director of the University of Virginia Center for Governmental Studies, who served on the Bipartisan Campaign Finance Reform Group, appointed by Senator Dole and Senator Mitchell in 1990, had this to say: "Contrary to some of the misinformed commentary about Professor Smith's work and views, his research and opinions in the field of campaign finance are mainstream and completely acceptable. For example, Professor Smith has argued in several of his academic papers for a kind of deregulation of the election laws in exchange for stronger disclosure of political giving and spending."

"This is precisely what I have written about and supported in a number of publications as well. Bradley, certainly supports much of the work of the Federal Election Commission and understands its importance to public confidence in our system of elections. I have been greatly disturbed to see that some are not satisfied to disagree with Professor Smith and make those objections known but believe it is necessary to vilify the Professor in almost a McCarthyite way. I do not use that historically hyper-charged wordlightly but it applies in this case. Any academic with a wide-ranging portfolio of views on a controversial subject could be similarly tarred by groups on the right or the left."

Professor John Copeland Nagle, of the Notre Dame Law School. "Professor Smith's view is shared by numerous leading academics from across the political and ideological spectrum, including Dean Kathleen Sullivan of the Stanford Law School, and Professor Lillian Bevier of the University of Virginia Law School. His understanding of the First Amendment has been adopted by the courts in sustaining State campaign finance laws."

It also speaks well of Professor Smith that constitutional scholars and election law experts that know him personally and are familiar with his work, including some who have served on the board of Common Cause, are confident that he will faithfully enforce the law as enacted by Congress and upheld by the courts.

Professor Smith, let me read to you just a few examples of the confidence these experts have in your integrity, and commitment to the rule of law.

Professor Daniel Lowenstein of the UCLA Law School served six years on Common Cause's National Governing Board. This is what he had to say: "Anyone who compares his writings on campaign finance regulation with mine will find that our views diverge sharply. Despite these differences, I believe Smith is highly qualified to serve on the FEC. Smith possesses integrity and vigorous intelligence that should make him an excellent commissioner. He will understand that his job is to enforce the law even when he does not agree with it. In my opinion, although my views on the subject are not the same as theirs, the Senate leadership deserves considerable credit for having picked a distinguished individual rather than a hack. Although many people, including myself, can find much to disagree with in Bradley Smith's views, I doubt if anyone

can credibly deny that he is an individual of high intelligence and energy and unquestioned integrity. When such an indvidual is nominated for the FEC, he or she should be enthusiastically and quickly confirmed by the Senate."

Professor Daniel Kobil of the Capital Law School, as I mentioned earlier, a former governing board member of Common Cause, Ohio, said, "Knowing Brad personally, I have no doubt that his critics are wrong in suggesting that as an FEC Commissioner Brad would refuse to enforce Federal campaign regulations simply because he disagrees with them. I have observed Brad's election law class on several occasions and he always took the task of educating his students about the meaning and scope of election laws very seriously. I have never heard him denigrating or advocating skirting State or Federal laws, even though he may have personally disagreed with some of those laws. Indeed, several times in class he admonished students who seemed to be suggesting ignoring what they considered overly harsh election laws. Brad is an ethical attorney who cares deeply about the rule of law. I am confident that he will fairly administer the laws he is charged with enforcing as commissioner."

Professor Randy Barnett, of the Boston University Law School, "I can tell you and your colleagues that Professor Smith is a person of the highest character and integrity. If confirmed, Brad will faithfully execute the election laws which the Commission is charged to enforce, including those with which he disagrees. Brad's critics need not fear that he will ignore current law but those who violate it may have reason to be apprehensive."

I think I will stop there and turn it over to my friend and colleague from Connecticut, the ranking member, Senator Dodd.

Senator DODD. Well, thank you very much, Mr. Chairman, and let me begin by welcoming both of our nominees and their families who are here as well. It is a great distinction to be nominated to serve in any capacity, but particularly one which is so important to the proper management of our Federal elections.

So, I thank you, Mr. Chairman, for holdng this hearing this morning. I appreciate your willingness to cooperate in terms of the timing of all of this so that it would allow for a proper consideration of these two nominees, as well as, I hope, the printing in the record of those who have different views on these nominations so that our colleagues, prior to a final vote by the Senate, will have an opportunity to review the materials. I know there were those who wanted to testify here this morning, but as you have accurately pointed out it has been the longstanding tradition of this Committee to hear from nominees, rather than have public witnesses despite their desire to appear. But certainly their comments, I think, should be included in the record. I know you agree with that and, so, I appreciate your willingness to allow them to be a part of the record.

At any rate, the terms these two nominees before us have been waiting to be filled for a year, and I feel very strongly that the FEC needs to be a functioning organization and body and to delay it any further is to do a great disservice to the country. It is important to the efficient and effective working of the Commission that we

move these nominations to the floor, in my view, in an expeditious manner.

But let me be very, very clear at the outset of these brief comments. Mr. Smith, I have some very serious reservations about your nomination and as an ardent supporter of campaign finance reform I have consistently stated my belief that there is too much emphasis on money in campaigns today. I believe that very deeply and very strongly. I have stated that for many, many years, going back to my elections in the House of Representatives.

I have supported the elimination of soft money contributions and I firmly believe that large political contributions at the very least appear to corrupt the American political process and to erode confidence in our form of democracy and, so, can be justifiably limited in my view

My personal views on the need for a strong enforcement body at the FEC, I think, are very different from yours. But the question today is not just what I or Mr. Smith or the Chairman or anyone else on this Committee believes is wrong with political campaigns—we have debated that, we will continue to do so—the important question before us today is whether we will allow the process of choosing the political parties' representatives on the Federal Election Commission to go forward. That is the issue.

And by way of background, let me remind my colleagues that in keeping with the intent of the Act it has been the practice of the Committee to move nominations, as I said a moment ago, for the Federal Election Commission in strict pairs: A Democratic nominee paired with a Republican nominee. Great deference has traditionally been given by the President to the preferences of the Republican and Democratic leadership in the selection of such nominees. Not surprisingly such nominees usually, usually reflect the relative positions of the parties on such issues as the constitutionality of spending limits and the need for reform. And nowhere is the distinction between the parties in my view more evident than on the issue of campaign finance reform.

Having said that, barring any unforeseen revelations in this morning's testimony, it would be my intent to follow the usual process and support the Chairman's action in moving this pair of nominees to the Senate floor. However, I will reserve my rights to review the full hearing record and the floor debate before casting a final vote to confirm either of these two nominees.

Again, I commend the Chairman for ensuring a complete hearing record by allowing interested parties, many of whom are gathered in this room today, and including some of our colleagues, the opportunity to augment the hearing record with written testimony. To ensure the full Senate has the benefit of today's testimony, I would encourage the Committee staff to have the hearing record printed prir to the Senate's deliberation on these nominations.

I welcome Mr. McDonald and Mr. Smith here, this morning, and I look forward to hearing your testimony. I am sure it comes, it shouldn't anyway, as no surprise to you, Mr. Smith, that your nomination is viewed with skepticism, to put it mildly, by some members of this Committee and some members of the United States Senate and many people who are not a part of the political body of the Senate. Personally, I do not share your views nor your con-

cerns that campaign finance reform will lead to undemocratic consequences. Regardless of that, I can assure you that I intend to see that you and Mr. McDonald receive a complete and fair hearing.

The purpose of the hearing today is to examine the nominees and to determine their fitness for office, as a member of the regulatory body which oversees compliance with the Federal election laws. It is our ultimate responsibility to make a recommendation to the Senate as to whether or not these nominees should be confirmed to the positions to which they have been nominated.

Let me be very clear, Mr. Chairman, that I have no preconceived litmus test for making that determination. A nominee's views on the constitutionality of the Federal Election Campaign Act are less a reflection of his or her fitness for office than in many ways they are a reflection of the values held by the party that chooses such a nominee.

Regardless of a nominee's personal views, our responsibility is to determine whether or not such an individual can, nonetheless, fulfill his or her constitutional responsibility to enforce our election laws, not as the nominee would have wished that these laws be written but as the laws have been enacted by the Congress of the United States. The nominees before us today are both clearly qualified experts on election law. Commissioner McDonald is currently the Vice Chairman of the Federal Elections Commission. He has served on the FEC for nearly 18 years, three times in the position of Chairman and tree times as Vice Chairman. Prior to joining the Commission he served in the election trenches, as Secretary of the Tulsa County Election Board in Tulsa, Oklahoma.

Mr. Smith's expertise is similarly undisputed. He is a recognized academician on the subject of campaign finance and election law. For the past seven years, he has taught election law courses at Capital University, Law School in Columbus, Ohio. And has written and testified extensively on campaign finance reform, including an article in the University of Connecticut Law Journal, I might point out.

That is a good recommendation.

[Laughter.]

Senator DODD. And one at Yale Law Review, as well, less of a recommendation than Connecticut, I might add, but certainly an important one, as well.

[Laughter.]

Senator DODD. And certainly you are no stranger to this Committee having testified before us in 1997 on the topic of soft money and in 1996 in the McCain–Feingold reform legislation. And while I do not share your views, Mr. Smith, as to the wisdom of our current election laws or the need for campaign finance reform, I respect the Republican majority's prerogative to choose a nominee who reflects their beliefs. My criteria for reviewing your qualifications this morning are to determine whether, regardless of your views as to the wisdom or constitutionality of those laws, you can and will uphold and enforce, enforce the election laws of this land.

Consequently, Mr. Smith, I will be listening very closely to your statement, your answers to the questions this morning. I look forward to hearing the testimony from both of our witnesses.

And I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Dodd.

We will proceed.

Commissioner McDonald, you make your opening statement, followed by Professor Smith.

TESTIMONY OF DANNY LEE McDONALD, OF SAD SPRINGS, OKLAHOMA

Mr. MCDONALD. Mr. Chairman, thank you, and Senator Dodd, as well.

First of all, let me say that I want to thank the staff of the Rules Committee. They have been very gracious in dealing with me and have kept me informed of what was going on and what might change and what might not. So, I appreciate that very much.

I want to thank Senator Nickles. I am sorry Don had to leave. We both suffered a real blow this last week as I conveyed to the Chairman moments before the meeting that Oklahoma State Cowboys came up a little short for the conference title but there is always the next round; we are hopeful.

Now, I want to recognize my wife, Gail, the first lady of our house. She is here for the fourth time. I want to recognize my staff, as well, that is here and they have been very good to prepare me for today's session, as well as the past some 18 years.

I want to also, Mr. Chairman, express my appreciation for the Committee moving quickly on this nomination. As you have indicated, it is time to move along. We would like to have a settled Commission and we appreciate that very much. I want to thank the President for the confidence in placing my name in nomination again and if I am confirmed I look forward to continuing my service at the Federal Election Commission.

I want to say, Mr. Chairman, Senator Dodd, that in the years that I have been at the Federal Election Commission maybe one of the things that I appreciate about it the most is the staff. We have had good luck because we have had people that are dedicated to the process. And as the Chairman alluded to in his opening remarks, things get a little tense, might be the most appropriate way to put it, in relationship to the Federal Election Campaign Act. I think that is just part of the process. But throughout one of the things that has remained constant is the staff and the service to the public.

PricewaterhouseCoopers–Lybrand conducted an audit of our agency a couple of years ago at the direction of this Congressand said among all else that the staff was fair, it was unbiased and it was committed to an outstanding job performance. So, I think it is really important to recognize the staff because I think without that kind of dedication to this process it would make it much more difficult.

Mr. Chairman, I know that you and members of this Committee have a number of other things on your agenda and I just want to say to you that I will be happy to answer any questions you have and, once again, I appreciate you scheduling this meeting expeditiously.

Thank you.

[The prepared statement of Mr. McDonald follows:]

PREPARED STATEMENT OF DANNY LEE McDONALD

Mr. Chairman, Senator Dodd and members of the Committee. I express my gratitude to you and all the members of the Committee for the prompt scheduling of this nomination hearing. It is indeed an honor and a privilege to appear before you today as a nominee to the Federal Election Commission.

May I also, Mr. Chairman, take this opportunity to thank the President for the great confidence that this nomination reflects. Service on the Commission is a source of immense pride to me personally.

If confirmed by the Senate, I look forward to continuing my public service at the Federal Election Commission.

Mr. Chairman, over the years I have had the good fortune of working with a number of dedicated and hard working people, and most of all fair individuals at the FEC. This was further bolstered by an FEC Technology and Performance Audit, mandated by Congress and conducted by PriceWaterhouseCoopers (PwC). That report found the FEC's disclosure and compliance activities are executed without partisan bias, which is vital.

I acknowledge, Mr. Chairman, that you and the members of this Committee are heavily burdened with an overload of critically important issues currently before the Senate, so out of deference to your very busy schedules, I will close and will be happy to answer any and all questions you or any member of this Committee may have.

Thank you for the opportunity to appear before you today and for all your consideration.

The CHAIRMAN. Thank you, Commissioner.

Professor Smith?

TESTIMONY OF BRADLEY A. SMITH, OF COLUMBUS, OHIO

Mr. SMITH. Thank you, Mr. Chairman.

I would like to begin by thanking Senators Voinovich and DeWine for their support and for their introductions and to say it is a pleasure to be back before this Committee, albeit in a different capacity than in the past.

If I may indulge for a minute, in addition to my family, I was pleased to see this morning, both some of my former students and current students in the audience today and it is a great pleasure for me to see that. Ken Nahigian, who is clerking Federal court here, and who has a brother who has played a major role in the campaign of Senator McCain; and our president of the student bar association at Capital University, Dave Thomas; and one of my former election law students, Corey Columbo, are here.

Generally speaking, well, let me say this, I am deeply honored to be here and to be nominated for the seat on the Federal Election Commission and I am honored to get a chance to explain my beliefs. And, Senator Dodd, I appreciate the fairness with which you have approached this hearing, as opposed to those who have made prejudgments based on press releases written by interest groups which are opposed to this nomination.

It is, quite frankly, hard for me, as the son of a Midwestern public school teacher with no prior political conections, to imagine hav-

ing been called on to fill a position of public trust such as this. And I take the responsibility for which I am being considered most seriously.

One of the founding principles of our nation was a commitment to the rule of law and that commitment requires that public servants faithfully carry out their assigned duties under the laws passed by Congress with due regards to the rights guaranteed to Americans through the Constitution. It also requires humility on the part of those who serve in Government.

This humility requires public servants to recognize both the limits of government as a cure for every flaw, whether actual or apparent, in our society and demands that public servants recognize and respect the limits placed on their authority and power within the framework of our Government.

This humility is especially important when we consider the role of the Federal Election Commission and those who would serve on it, for the FEC's role in monitoring and enforcing election laws goes to the core of our democratic institutions.

Equally important, the FEC, necessarily deals with First Amendment issues of the most sensitive nature, as the United States Supreme Court recognized in Buckley v. Valeo and has consistently recognized in later cases brought under the Federal Election Campaign Act.

While I cannot hope to replace the experience and wisdom that Commissioner Lee Ann Elliott has given the Commission, I believe that my academic and generally nonpartisan background, my studies of constitutional issues surrounding campaign finance regulation, and my knowledge of the empirical effects of past regulatory efforts will make me an effective addition to the Commission.

Unlike Mr. McDonald, I am a professor, so it is virtually impossible for me to keep my remarks extremely brief. And given the controversy that has surrounded this nomination, it is perhaps appropriate for me to say a few words on that controversy.

In the 10 months since my name first surfaced as a candidate, ertain outside groups and editorial writers opposed to this nomination have relied on invective and ridicule to try to discredit me. Among other things, some have likened nominating me to nominating Larry Flynt, a pornographer, to high office. Nominating me has been likened to nominating David Duke, a one-time leader in the Ku Klux Klan, to high office. Nominating me has been likened to nominating Slobodan Milosevic. Nominating me has been likened to Theodore Kaczynski, the Unabomber, a murderer, to high office.

Just this week I saw a new one. I was compared to nominating Jerry Springer, which is probably not a good comparison since Mr. Springer is a Democrat.

Other critics have attempted ridicule, labeling me a "flat earth society poohbah," and more, and I say all this not by way of complaint, because I am sure that the members of this committee have probably been called similar or worse things in the course of your public lives.

The CHAIRMAN. I have definitely been called worse.

[Laughter.]

Mr. SMITH. Such over-the-top name calling I think we recognize, while it is not usually what we would think of as good government, it is an unfortunate reality of politics in America today.

I mention this only to point out the extent to which some people are willing to go to try to defeat this nomination. In my case, this has also included an effort to twist and distort my views through the intentional misrepresentation of my positions and through selective, out-of-context quotation from the thousands of pages of written work that I have produced over the past 5-plus years. But, again—you can correct me if I'm wrong—I suspect that those of you on the committee are not strangers to having your views misrepresented and oversimplified.

It has now been a quarter of a century, nearly a quarter of a century since the Supreme Court decided the seminal case on campaign finance regulation, Buckley v. Valeo. The issues in Buckley divided observers, to a substantial extent, into two camps. The first amp insisted that the Constitution allowed Congress and the States expansive leeway to regulate all aspects of campaign funding, both expenditures—including what we now call "issues ads"—and contributions. And into this camp fell a broad spectrum of persons, scholars, activists, politicians, ranging from then Republican Senate leader Hugh Scott, to Common Cause and the Center for Public Financing of Elections.

The second camp, in turn, insisted that the First Amendment constituted a high barrier to the regulation of both expenditures and contributions. And this camp, too, was broad, including then Republican Senator and now U.S. Court of Appeals Judge James Buckley, the American Civil Liberties Union, and, once again, a variety of scholars, activists, and politicians.

In the end, neither camp gained a complete victory in Buckley. The Court recognized that limits on campaign contributions and expenditures do infringe on First Amendment rights but, nevertheless, held that the Government interest in preventing the corruption or appearance of corruption noted by Senator Dodd was sufficient to justify some limitation of contributions, so long as the limits on contributions were not so low as to prevent "candidates and political committees from amassing the resources necessary for effective advocacy."

At the same time, the Court rejected efforts to limit a candidate's contributions to his or her own campaign, and also rejected as unconstitutional under the First Amendment all mandatory efforts to regulate spending, whether those efforts consisted of direct candidate spending, independent expenditures, or what we now refer to as "issue advocacy."

Over the years, the Court's distinction between contribution limits and spending limits has been a source of great controversy. Indeed, Chief Justice Burger rejected the distinction in Buckley itself, writing that "contributions and expenditures are two sides of the same First Amendment coin," and going on to argue that contribution limits are, in fact unconstitutional.

Justice Blackmun agreed, arguing that the Court was not able to make "a principled constitutional distinction between contribution limits, on the one hand, and expenditure limits, on the other." And

Justice Blackmun also felt that it was unconstitutional to regulate contributions.

In later years, other Supreme Court Justices have also questioned the distinction between contributions and expenditures, including Justice Marshall, who, though part of the original Buckley majority, came to believe that expenditures, like contributions, could be regulated, consistent with the Constitution; and more recently, Justices Scalia and Thomas and Kennedy, who seem to have concluded that a proper understanding of the First Amendment precludes regulation of either contributions or expenditures.

Not surprisingly, commentators have also reached different conclusions on what should be the state of the law. But, nevertheless, Buckley's distinction has stood, and that is what the law is. And, throughout, a majority of the Supreme Court and lower courts have held that issue advocacy in particular remains constitutionally protected speech.

I believe that it is safe to say that few observers are completely satisfied with the distinction that Buckley makes between contributions and expenditures. Although I believe that there are some logical arguments for the distinction and that contribution limits are better justified than expenditure limits, in the end I find myself in the company of Judge Buckley, Chief Justice Burger, Justices Kennedy, Scalia, Thomas, and Blackmun, and the numerous other commentators who believe that the First Amendment should have been interpreted to prohibit limits on contributions. That my view on this part of the Buckley decision is not, in fact, the law is well known and easily understood. What seems not to be so easily understood by some outside observers is that their vision of what Buckley should have said as to expenditure limits and issue advocacy is not the law, eiter.

Nor is it apparent why those of us who agree with Buckley's holding on expenditure limits, but disagree with it on contribution limits, should be branded as "extremists" who are "unfit" for office, while those who agree with Buckley's holdings on contribution limits, but disagree with its holdings on expenditure limits and issue advocacy, and who specifically and loudly call for Buckley to be overruled, should be deemed "mainstream reformers."

But regardless of whether any one Commissioner would fall into one camp or the other, it is not the Federal Election Commission, let alone any one Commissioner, which will make the law in that area. These issues are decided by you, the Members of the Senate, along with the House of Representatives, and with the signature of the President on legislation, which is then interpreted by the courts. And the job of the Commission and of the Commissioners is to enforce the laws of Congress as interpreted by the courts.

Earlier I mentioned some of the extreme analogies that have been made about my nomination, and the truth is that for the most part I find such analogies really silly and more amusing than a particularly troubling source of abuse. But there is one charge that I do take as a personal insult to my integrity and to my devotion to the rule of law, and that is the charge that as a Commissioner I would not uphold the law, I would not enforce the law, where I might disagree with it.

The irony, of course, is that those who most vehemently make this charge also disagree with substantial portions of the law as interpreted by the Supreme Court and lower Federal courts. But, in any case, these critics have no basis—I assure you, none whatsoever—for making this allegation about me, for every day in our country thousands of public servants—from the President on down, Cabinet officials, prosecutors, police officers, clerical staff—are asked to and do enforce laws with which they disagree. And I claim no particular heroism in making clear that I have noproblem in enforcing the law as it has been written by Congress and interpreted by the courts.

Finally, should you confirm my nomination to the seat—I guess today I just hope you'll send it forward for that confirmation—I would like to make a quick pledge to you.

First, I will defer to Congress to make law and not seek to usurp that function to an unelected bureaucracy.

Second, when the Commission must choose under the law whether to act or not to act, or how to shape the rules necessary for the law's enforcement, faithfulness to congressional intent and to the Constitution, as interpreted by the courts, will always be central to my decisionmaking.

Third, I will act to enforce the law as it is, even when I disagree with the law. But, further, noting once again the manner in which the Buckley decision has largely divided commentators into two camps, I will also act to enforce the law as it is, even when self-styled reform groups or other special interests would urge the Commission to enforce the law as they would like it to be, but as it is not.

Finally, I pledge that I will strive at all times to maintain the humility that I believe is necessary for any person entrusted with the public welfare to successfully carry out his or her duties.

Thank you, and I am open for questions.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF BRADLEY A. SMITH

Mr. Chairman, and members of the Committee, it is a pleasure to be back before this committee, albeit in a much different capacity than in the past. I am deeply honored to have been nominated to a seat on the Federal Election Commission, and honored to appear before you today in connection with that nomination.

It is, quite frankly, hard for me, the son of a mid-western public school teacher, with no prior political connections, to imagine be called on to fill such a position of public trust. I take the responsibility for which I am being considered most seriously. One of the founding principles of our nation was a commitment to the Rule of Law, and that commitment requires public servants to faithfully carry out their assigned duties under the laws passed by Congress, with due regard for the rights guaranteed to Americans through the Constitution. It also requires humility on the part of those who serve in government. This humility requires public servants to recognize both the limits of government as a cure for every flaw, whether actual or apparent, in our society, and demands that public servants recognize and respect the limits placed on their authority and power within the framework of our government. This hu-

mility is especially important when we consider the role of the Federal Election Commission and those who would serve on it. For the FEC's role in monitoring and enforcing election laws goes to the core of our democratic institutions. Equally important, the FEC necessarily deals with First Amendment issues of the most sensitive nature, as the United States Supreme Court has consistently recognized since the first cases brought under the Federal Election Campaign Act.

This is both an exciting and a challenging time to contemplate an appointment to the Commission. I have met only a handful of people on the Commission staff, but these people have uniformly impressed me with their talent, knowledge, and dedication. I note that a recent management review of the Commission, conducted by Price–Waterhouse–Coopers, went out of its way to praise the Commission's staff for its impartial, ethical, and independent conduct, and for maintaining a high level of confidentiality in enforcement investigations. Although I lack the detailed knowledge that would come from serving on the Commission, in recent years even the casual observer must note the improvements being made in the Commission s operations. Anybody with even a passing familiarity with the Commission cannot help but be impressed by the improvements made by the Commission in carrying out its disclosure function. I am pleased to see little changes at the Commission, such as adding Spanish to the FEC website. As a former resident in Latin America, and the first ever Honorary Member of the Hispanic Republican Coalition of Central Ohio, the low voter turnout in most of our nation s many Hispanic communities is a source of concern to me, and I think it important that these fast growing communities become fully integrated into the functioning of American democracy. Such small steps that move us in that direction are to be applauded. And I am pleased to see big steps at the FEC, such as the Commission moving, with what appears to me to be a appropriate mix of speed and caution, to consider what, if any, rules it should adopt with regard to the internet. I am pleased to see the Commission reducing the number of non-substantive dismissals. Mine is just an outsider's view, but there seems to be a new, positive direction at the FEC, and I congratulate the Commission and staff for it. And though I cannot hope to replace the experience and wisdom that Commissioner Elliott has given the Commission, I believe that my academic and non-partisan background; my studies of Constitutional issues surrounding campaign finance regulation; my experience in running a very small state PAC, of the type on which the burden of regulation weighs heaviest; and my knowledge of the empirical effects of past regulatory efforts, will make me an effective addition to the Commission.

Given the controversy that has surrounded this nomination since my name first surfaced publicly as a candidate for this position nearly ten months ago, it is perhaps appropriate for me to say, now, a few words on that controversy. In those ten months, certain outside groups and editorial writers opposed to this nomination have relied on invective and ridicule to try and discredit me. Among other things, some have likened nominating me to nominating Larry Flynt, a pornographer, to high office. Nominating me has been likened to nominating David Duke, a onetime leader in

the Klu Klux Klan, to high office. Nominating me has been likened to nominating Slobodan Milosovic to high office. Indeed, nominating me has been likened to nominating Theodore Kacynski, aka the Unibomber, a murderer, to high office. Other critics have attempted ridicule, labeling me a "flat earth society poohbah", a "toady", and more. I say this not by way of complaint, for I am sure that many, if not all, of you have been called similar or worse things in the course of your public lives. And although such over-the-top name-calling is not generally what we would associate with the cause of "good government", we recognize that in political life, this is sometimes the unfortunate reality. Rather, I mention this only to point out the extent to which some persons are willing to go to try and defeat this nomination. In my case, this has also included an effort to twist and distort my views, through intentional misrepresentation of my positions, and through selective, out-of-context quotation from the thousands of pages of written work I have produced over the past five plus years. But again, I suspect that some of you are no strangers to such misrepresentation and oversimplification of your views.

It has now been nearly a quarter of a century since the Supreme Court decided the seminal case on campaign finance regulation, Buckley v. Valeo. The issues in Buckley divided observers, to a substantial extent, into two camps. The first camp insisted that the Constitution allowed Congress and the states expansive leeway to regulate all aspects of campaign funding, both expenditures—including what we now call "issue ads"—and contributions. Into this camp fell a broad spectrum of persons, ranging from then Republican Senate leader Hugh Scott, to prominent Democrats such as Archibald Cox, to Common Cause, to the Center for Public Financing of Elections, and finally to numerous scholars, activists, and politicians. The second camp, in turn, insisted that the First Amendment constituted a high barrier to the regulation of both expenditures and contributions. This camp, too, was broad, including then Republican Senator and now U.S. Court of Appeals Judge James Buckley, the American Civil Liberties Union, the Conservative Party, and, once again, numerous scholars, activists, and politicians.

In the end, neither of these two camps gained a complete victory in Buckley. In that decision, the Court recognized that limits on campaign contributions and expenditures infringe upon First Amendment rights, and therefore can only be justified by compelling government interests. Despite the infringement of First Amendment rights, the Court ultimately held that the government interest in preventing "corruption" or the "appearance of corruption" was sufficient to justify some limitation of contributions, so long as the limits on contributions were not set so low as to "[prevent] candidates and political committees from amassing the resources necessary for effective advocacy". At the same time, the court rejected efforts to limit a candidate's contributions to his or her own campaign, and also rejected, as unconstitutional under the First Amendment, all mandatory efforts to regulate spending, whether those efforts consisted of direct candidate spending, "independent expenditures," or what we now refer to as "issue advocacy".

Over the years, the Court's distinction between contribution limits and spending limits has been a source of great controversy. Indeed, Chief Justice Burger rejected the distinction in Buckley itself, writing that "contributions and expenditures are two sides of the same First Amendment coin," and arguing that contribution limits are unconstitutional. So did Justice Blackmun, writing, "I am not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between contribution limitations, on the one hand, and expenditure limitations, on the other..." In later years, other Supreme Court Justices have also questioned the distinction between contributions and expenditures. Justice Marshall, for example, though part of the original Buckley majority, came to see the distinction as untenable, and came to believe that expenditures, like contributions, could be regulated consistent with the Constitution. Justices Scalia and Thomas, on the other hand, concluded that a proper understanding of the First Amendment precluded regulation of either contributions or expenditures. Not surprisingly, commentators have also reached differing conclusions on what should be the state of the law. Nevertheless, Buckley's distinction has stood. And, throughout, a majority of the Supreme Court, and lower courts, have held that "issue advocacy" remains constitutionally protected speech.

I believe that it is safe to say that few observers are completely satisfied with the distinction that Buckley makes between contributions and expenditures. Although I believe that there are some logical arguments for the distinction, and that contribution limits are better justified than expenditure limits, in the end I find myself in the company of Judge Buckley, Chief Justice Burger, Justices Blackmun, Scalia, and Thomas, and the numerous commentators who believe that the First Amendment should have been, and should be, interpreted to prohibit limits on contributions. That my view on this part of the Buckley decision is not the law is well known and easily understood. What seems not to be so easily understood, at least by some, is that their vision of what Buckley should have said, as to expenditure limits and "issue advocacy", is not the law, either.

Nor is it apparent why those of us who agree with Buckley s holding on expenditure limits, but disagree with it on contribution limits, should be branded as "extremists" who are "unfit" for office; while those who agree with Buckley's holdings on contribution limits, but disagree with it s holdings on expenditure limits and "issue advocacy", and who specifically and loudly call for Buckley to be overruled, should be deemed "mainstream reformers". And I believe that it lowers the quality of debate, lessens our understanding of the serious issues involved, and increases the cynicism of the public, when special interests seek to brand all those with whom they disagree as "extremists".

Regardless of whether any particular Commissioner falls into one camp or the other, it is not the Federal Election Commission, let alone any one Commissioner, which makes the law. These issues are decided by you, the members of the Senate, along with the House of Representatives, and with the signature of the President on legislation, which is interpreted by courts. The job of the Com-

mission, and of the Commissioners, is to enforce the laws of Congress.

This points up an important difference between me and many of the outside groups that have opposed this nomination, and this difference is our respective views of the proper role of the FEC. In the past, the FEC has been criticized for pursuing enforcement actions that push the limits of the law and, indeed, infringe upon the First Amendment rights of Americans. These efforts by the FEC to expand the scope of the law resulted in a number of defeats for the Commission in the courts of the United States, culminating three years ago with the decision of the Fourth Circuit Court of Appeals in FEC v. Christian Action Network. In Christian Action Network, the Court admonished the Commission for arguing for an expansive interpretation of the law that, said the Court, "simply cannot be advanced in good faith..., much less with 'substantial justification.'" Finding the Commission's legal position "disingenuous," the Court then took the extraordinary step of ordering the Commission to pay the opposing party's attorneys' fees. Not knowing the inside history of this or the various other enforcement actions which have caused the Commission such embarrassment, I do not intend for my comments to be construed as criticism of past or present Commissioners or staff. But it was clear at the time of Christian Action Network that at some point the Commission has made serious errors in its enforcement approach.

There are those, however, who applaud such enforcement actions, and urge the appointment of a commissioner who will continue to vote for such "robust" enforcement. But what they call "robust", the courts have all too often called "unconstitutional." A true commitment to enforcing the law, as it now stands, does not mean pushing the envelope on the Constitutional limits of enforcement every time one thinks one might get away with it. Rather, it must include showing restraint where the courts have indicated that such restraint is required. Moreover, I believe that if we are to continue the strides made by the FEC in recent years, the Commission must continue to respect the statutory and constitutional limits on its power and focus its resources accordingly. Truly effective enforcement requires a careful allocation of its resources. The cost of appellate litigation is substantial, and undoubtedly resources devoted to such adventuresome litigation as Christian Action Network might otherwise be devoted to resolving a much greater number of cases where the law is clear. So what some of my critics have cheered as "robust" enforcement not only has infringed on the Constitutional liberties of our citizens, but it has probably damaged the Commission's overall enforcement efforts. The FEC ought to focus on that vast majority of cases where the law is clear and enforcement can be made swift and sure. Devoting resources to these "meat and potatoes" cases, removing the backlog of cases, and improving response time strikes me as a more appropriate use of enforcement resources, and one more likely to restore and build confidence in the integrity of government, than is pursuing actions that infringe on the constitutional rights of the people and which are likely, eventually, to lose in the courts. Such losses come at great cost to the Commission, to the taxpayers, and to the private

defendants attempting to exercise their rights of free speech and political participation.

At the time such decisions were made, members of the Commission may have had justifiable reasons for pursuing cases such as Christian Action Network. I am quite sure that had I been on the Commission I would have voted against that enforcement action, since I viewed the Commission's position as unconstitutional, as the Court of Appeals ultimately did. In any case, after Christian Action Network, future efforts at such "robust" enforcement by the Commission would be nothing less than irresponsible.

The difference between my view of the proper role of the FEC, and that held by many of my critics, is also apparent when considering the Commission s rule making function. For example, in each of the last several sessions of Congress, bills have been introduced and voted on in both the House and Senate to ban "soft" money. Such legislation, however, has not passed, as you well know. In response, some have sought to have the Federal Election Commission ban soft money through the rule-making process.

It strikes me, however, that a proper respect for the Rules of Law requires the Commission to respect the role of Congress first. It is, of course, necessary at times for federal agencies, through the rule-making process, to fill in gaps or to provide guidelines to assure compliance with the law. But when Congress has specifically considered, and failed to pass legislation, it is not appropriate for unelected federal bureaucrats to legislate in Congress s place. Proper respect for this body, for the House of Representatives, and for the Constitution, requires Commissioners of the FEC to be more humble. Where Congress has specifically defeated legislation, I will not legislate in your place, any more than you would expect me, or any other Commissioner, to ignore legislation which Congress has actually passed.

Let me add that I share many of the concerns of my critics about a growing cynicism, as opposed to healthy skepticism, of government. But I do not believe that this cynicism is best combated by broadly painting all members of this Chamber, and the House of Representatives, as "corrupt", when such charges are demonstrably untrue, nor by hurling over-the-top invective at those with whom we have disagreements on issues. Earlier I mentioned some of the extreme analogies that have been made about my nomination, and the truth is that, for the most part, I find such analogies silly, and more amusing than abusing. However, there is one charge that I take as a personal insult to my integrity and to my devotion to the Rules of Law, and that is the charge that as a Commissioner, I would not enforce the law. These critics have no basis - none whatsoever - for making this allegation. And while the Rule of Law is a value I hold deeply, I pretend no particular heroism in this task. For every day in our country, thousands of public servants are called upon to, and do, enforce laws with which they disagree, from the President on down through cabinet officials, lower level officials, civil servants, prosecutors, law enforcement officers, and even clerical staff.

Finally, should you confirm my nomination to this seat, which I hope that you will, here is my pledge to you. First, I will defer to Congress to make law, and not seek to usurp that function to the

unelected bureaucracy. Second, when the Commission must choose, under the law, whether to act or not to act, or how to shape rules necessary for the law's enforcement, faithfulness to congressional intent and the Constitution, as interpreted by the courts, will always be central to my decision making. Third, I will act to enforce the law as it is, even when I disagree with the law. Further, noting once again the manner in which the Buckley decision has largely divided commentators into two camps, I will act to enforce the law as it is, even when self-styled "reform" groups or other special interests would urge the Commission to enforce the law as they would like it to be, but not as it is. Finally, I pledge that I will strive at all times to maintain the humility that I believe is necessary for any person entrusted with the public welfare to successfully carry out his or her duties.

Thank you.

The CHAIRMAN. Thank you, Professor Smith.

Commissioner McDonald, I have a letter, the entire text of which I am going to put in the record, [*See Appendix 3.*] but parts of which I am going to read to you and in a moment ask for your reaction. This letter makes some very serious allegations regarding your fitness to serve as Commissioner. I cannot help but take the letter seriously, and I am quite sure my colleagues will as well, especially my colleague from California, the senior Senator from California, because it was written by a constitutional law expert who has been honored as Lawyer of the Year by both the 20,000-member Los Angeles County Bar Association and the Constitutionl Rights Foundation. The author is a former member of the faculty of the University of Chicago Law School and is regularly asked to speak on election law and the First Amendment throughout the United States and in Europe. So let me just read some parts of the letter.

This is from Emmanuel S. Klausner, whose background I already described, and he says, "I am a lawyer in Los Angeles and my practice emphasizes First Amendment election law and civil rights litigation. I serve as general counsel for the Individual Rights Foundation. I was a former member of the faculty of the University of Chicago Law School and am a past recipient of the Lawyer of the Year Award from the Constitutional Rights Foundation and the Los Angeles Bar Association. I have written and spoken on First Amendment election law issues at law schools and conferences in both the U.S. and Europe."

"As you well know, for many years"—this is a letter to me. "As you well know, for many years the FEC has sought to expand the scope of its jurisdiction beyond the limitations the First Amendment places on the agency's authority to regulate political speech. Some have blamed an overzealous general counsel for the FEC's long history of contempt for the First Amendment. But it must be remembered that under the FECA the general counsel cannot pursue litigation that impermissibly chills free speech, unless Commissioners, such as Danny Lee McDonald, vote to adopt and enforce unconstitutional regulations. Commissioner McDonald's disregard for the rule of law and our constitutional system of government is illustrated by his role in the FEC's ongoing efforts to expand the definition of express advocacy."

Further, Mr. Klausner says, "After the 1992 Presidential election, Commissioner McDonald voted to pursue an enforcement action against the Christian Action Network for issue ads it ran concerning Governor Bill Clinton's views on family values. McDonald supported the suit against CAN despite the fact that the general counsel conceded that Chistian Action Network's advertisement did not employ explicit words, express words, or language advocating the election or defeat of a particular candidate for Federal office."

"McDonald voted for the case to proceed on the theory that the ad constituted express advocacy, not because of any express calls to action used in it but, rather, because of the superimposition of selected imagery, film footage, and music over the non-prescriptive background language. This was basically an effort to blur the objective standard for express advocacy into a vague, subjective, totality of circumstances test."

"The United States District Court for the Western District of Virginia dismissed the FEC's complaint on the grounds that it did not state a well-founded claim. The Christian Action Network subsequently asked the court to order the FEC to pay the expenses it had incurred in defending the FEC's baseless lawsuit. The Fourth Circuit ruled in favor of the Christian Action Network, explaining that'in the face of an unequivocal Supreme Court and other authority discussed and arguments such as that made by the FEC in this case that no words of advocacy are necessary to expressly advocate the election of a candidate simply cannot be advanced in good faith as disingenuousness in the FEC's submissions test, much less with substantial justification'."

"By rejecting the nomination of Danny Lee McDonald," Mr. Klausner says, "Congress can signal that it will not tolerate FEC Commissioners who arrogantly refuse to honor their oath to uphold and defend the Constitution."

Pretty strong language, Commissioner McDonald. I think this letter raises serious issues this committee cannot ignore concerning your own fitness to serve on the Federal Election Commission.

Specifically, I think this letter calls into question your commitment to the rule of law as enacted by Congress and upheld by the courts, your willingness to abide by the constitutional limits the First Amendment places on the FEC, and whether you are substiuting your view of the law for that of Congress and the courts.

Moreover, this esteemed and honored member of the California Bar is not the only one questioning your ability to faithfully enforce the laws as passed by Congress and upheld by the courts. According to the nonpartisan government watchdog group, the Fair Government Foundation, you have steadfastly refused to accept the clear meaning of the Supreme Court precedent because, in the words of the Fair Government Foundation, "it so conflicts with your fervently held regulatory beliefs—beliefs that are less a product of the FECA or court cases than a personal philosophical disposition."

You yourself have made this clear in open meetings of the FEC when the agency was considering the express advocacy regulation discussed in Mr. Klausner's letter. During those deliberations, you

responded to a discussion of the Supreme Court's precedents on express advocacy by declaring, "The Court just didn't get it."

Can you tell the committee why you believe, as you have stated on the record in open session of the Commission, "The Supreme Court just didn't get it" on express advocacy, and, more importantly, how your disagreement with this Supreme Court decision might affect your duties as Commissioner?

Mr. MCDONALD. Mr. Chairman, thank you. I will be happy to. I am not sure I can go back to the direct quote since I don't recall that direct quote, but there's a number of things that I would like to address since you brought them up.

Let's start with the Christian Action Network, if we might, or any case that we have proceeded on in a court of law. Let's remember that it takes four votes to proceed on any matter, so if the suggestion is that my votes on any particular case are either partisan or not fair, the only thing I could remind the Chair is you do have to have a bipartisan vote to proceed in any court proceeding.

On the Fair Government Foundation, I'm a little surprised because, as you know, they had a very substantial audit of our ommission for—that they did over a 3-year period analyzing our cases, and, in fact, they came to the conclusion that the Commission was not partisan in nature.

Now, very specifically to the point about Buckley, if I might for just a minute, I'm not sure what, to be honest with you, without looking at a transcript, what they "just didn't get it" meant. If the discussion is whether or not there are words that are outside of the purview of Buckley that other courts have, in fact, alluded to that would encompass the possibility that it had something to do with the campaign over and above issue advocacy, then the answer is yes, I would take that position, and I have consistently taken the position that I agree with Buckley, I agree with the Furgatch court.

We looked again the other day, when the Court in Shrink PAC v. Missouri, the Court again addressed some of these issues and indicated in a concurring opinion, actually, by one of the Justices that they may look into other aspects of the law that they feel the Congress may or may not want to pursue.

The CHAIRMAN. But, Commissioner, that was a case about hard money contributions, was it not?

Mr. MCDONALD. That was. And in relationship to—

The CHAIRMAN. And my question to you is about your views with regard to the express advocacy/issue advocacy dichotomy and your observation that the Supreme Court didn't get it.

Mr. MCDONALD. Yeah, I—I must tell you, Mr. Chairman, that I just don't know without looking at the full context of that statement. I'd have to go back and think or at least analyze it, but I'd be more than happy to submit it for the record.

The CHAIRMAN. Senator Schumer has joined us. I had another question, but—

Senator SCHUMER. No, I'll wait.

The CHAIRMAN. Okay. Commissioner McDonald, I also want to talk about the best efforts regulation that was invalidated in 1996. The Federal Election Campaign Act requires the treasurer of a political committee to make "best efforts" to gather and report to the

FEC the name, ddress, occupation, and employer of donors giving more than $200 a year.

Mr. MCDONALD. That's correct.

The CHAIRMAN. In 1979, the FEC issued regulations stating that the best efforts standard was satisfied if the committee's solicitation included a clear request for the information.

In 1992, you advocated an amendment of the best efforts regulation to require that committees make a follow-up request for required information after the initial solicitation. This regulation, which you supported, required the follow-up request to contain the following statement: "Federal law requires political committees to report the name, mailing address, occupation, and name of employer for each individual whose contributions aggregate in excess of $200 in a calendar year."

In RNC v. FEC, decided in 1996, the D.C. Circuit invalidated this mandatory statement in the best efforts regulation that you championed because it was "unreasonable and contrary to the statute, inaccurate and misleading." This is because, as the court explained, "the Federal Election Campaign Act, as enacted by Congress, does not require political committees to report the information for each donor. It only requires committees to use their best efforts to gather the information."

The mandatory statement that you championed was simply a misstatement of the law as enacted by Congress, that is clear to anyone reading the statute. Fortunately, the court rejected your apparent view that "Congress authorized the Commission to forbid political committees from accurately stating the law." So, my question is, if you could tell us why you supported a regulation that required political committees to make a statement about the law that was, as the court said, "Contrary to the statute, inaccurate and misleading"?

Mr. MCDONALD. Mr. Chairman, I will be happy to. I must go back for just one second. I am sounding more powerful than even Brad is here today. I can't champion anything, as you know. I don't remember whether that was passed unanimouly or not by the Commission. You may well have that vote. You can't proceed at the request of a commissioner. I certainly was for that by the way. And it couldn't be a more timely question.

It was before this very Committee that a chairman said to me or actually said to our Commission to be more specific, that what is the problem with all of these other candidates filing with the Federal Election Commission? I turn in all of my records, I adhere 100 percent to the rule of law and I look at my opponents who have 50, 60 and 70 percent of noncompliance. We all discussed that after we left the Rules hearing because we felt like that it was a valid point, and I think any time that candidates who comply with the statute look across at their opponents and find out that they do not, they seem to be somewhat disappointed and they start with the Federal Election Commission.

And we did take a good look at it because I think your point is a very good one. The law is about compliance and disclosure. If, in fact, you don't have compliance and disclosure of the very fundamental aspects of the law that you outlined, then I think it is a problem. The Commission went back and looked at it. If you want

to say I championed it, that's is all right, I will be willing—I think I would be willing to accept that. I am not sure I championed it, but I certainly would be for it without any question, as a practical matter, as were a number of my colleagues, the court decided that that was not correct. Unlike Brad Smith, I agree, the court spoke. We, as you well know, went back and reconstituted it again.

But I do think that the effort to try to get the information on the public record was a very important matter. I must say to you that I don't know of anyone at the Commission that thought it was deliberately misleading the public. That was certainly not the intention. And as I think you will see if you look at the record, I think but I'm not sure, that that was probably passed—well, I shouldn't say that. I don't know i. It may have been unanimously but I don't really know.

The CHAIRMAN. Commissioner, the FECA prohibits people from using donor data for political or commercial solicitations and other commercial purposes so that the disclosure necessary to bring transparency to the system is not going to result in harassment of donors.

In FEC v. Political Contributions Data, Inc., you voted for the FEC to bring an enforcement action against a private company that was selling reports, analyzing donations to Federal candidates. The lists the company sold did not include the donors' addresses or telephone numbers and contained a disclaimer warning against using the list to get donations or advance commercial purposes.

Despite the fact that these lists were devoid of the contact information that could make them viable tools for commercial and political solicitations, you took the position that the company was violating the commercial use prohibition. Apparently you deemed it enough that the company was charging people for compiling analysis of donations to campaigns.

You advocated an enforcement action that resulted in a Second Circuit Court of Appeals ruling that your interpretation of the commercial use prohibition, under which the company was prosecuted, was "an unreasonable restrictive interpretation of the provision in question." The court emphasized that the lists could not be used for commercial or political purposes because they were devoid of addresses and phone numbers. The court also made clear that by seeking to prohibit "the distribution of Appellant's contributor list," you "defied the Congressional intent behind the FECA, namely to require disclosure of campaign contributions and contributors in order to inform the electorate where campaign money comes from, to deter corruption and to enforce the Act's contribution requirements."

Your interpretation of the commercial use rule was so contrary to the clear Congressional intent of the FECA that the Second Circuit ruled that it was not substantially jstified in law or fact, and ordered the FEC to use taxpayer funds as it did in the Christian Action Network litigation case, to pay the fees the company incurred defending the enforcement action that you had voted to pursue. According to the court, the interpretation that you championed was "unreasonable in that it frustrated the intent of Congress and might jeopardize First Amendment rights."

I think the Second Circuit was correct in observing that in bringing a case on a theory such as this which you, Commissioner McDonald, endorsed, you clearly defied, if you will, the will of Congress. So, the question is, why did you vote to pursue an enforcement action that was predicated on an interpretation of the law that as the court said, "frustrated the intent of Congress and might jeopardize First Amendment rights"?

Mr. MCDONALD. Thank you, Mr. Chairman. I wasn't sure you were finished. I apologize.

Well, again, I can only tell you what—there are two very important matters to keep in mind, I am developing more strength all the time as I hear it referred to me, again, you have to have a four votes of the Commission. I don't know what the vote on that was. We know we at least had a four-vote majority to proceed in that case. It is interesting that that would be a criticism. Normally what we have found from this body, and rightfully so, is the concern the other way.

As we well know in this day and time, with lists, any kind of list, it's very easy if you have a partial part of the list, that is to say the name, in particular, it is not difficult, of course, to be able to get other information in accordance with that. I think you can go to your computer at any point and pull up virtually anything like that you want to know.

Now, if the position of the Chairman is that we went too far, I think that is certainly an arguable point. Certainly four of us or more felt like that it was something that should be preserved for the candidates and for their contributors. Because I think the first partof that statement that you indicated was that kind of concern and I believe that is a serious concern.

I think the concern in relationship to contributors and their privacy and the candidates as well should be maintained. And I think your assessment of what the court did was right, but I felt, as did a majority of my colleagues, that it was something we should pursue.

The CHAIRMAN. Senator Dodd.

Senator DODD. Well, thank you.

Mr. Chairman, why don't I turn to the Senator from New York, if he would like to make an opening statement and then reclaim some time for some questions.

Senator SCHUMER. Well, thank you.

I thank both my friend, the Senator from Connecticut, and our Chairman, the Senator from Kentucky, for the opportunity to say a few words. I guess there are three points that I would like to make here.

The first is, obviously, as is well known, I am a strong advocate of campaign finance reform. I believe that there has just got to be a lot of change in the system. I believe that it is corrosive in many ways to people's trust and I also believe—and this is where I fundamentally disagree with the Senator from Kentucky, although I have to respect him because he is consistent on a lot of issues like flag burning and others, but I don't believe that the First Amendment is absolute in any way. It is, I believe, a vital amendment but just as Justice Holmes said, you can't scream fire in a crowded theater, which is, in fact, an impingement on First Amendment rights.

I believe, for instance, talking about Buckley v. Valeo, your ability to put the same ad on television for the 437th time is not as strong as your ability to put it on the first time.

And, so, I think if we want to find a proper balance between good representative government and First Amendment rights, we would move the pendulum on campaign finance reform further over rather than move it back.

Having said that, I have not put a hold on this nomination despite my strong views. I believe that we should go forward, hav a full debate on this issue and then let people vote the way they choose. That is what we should be doing with many judges, who are lined up waiting to be heard. Judge Piaz, for instance, waited four-and-a-half years and now at least he will get his fair hearing on the floor of the Senate. And, particularly, you know, the FEC is a place that calls for some Democrats, some Republicans. That doesn't mean necessarily that every view is going to be represented but certainly in the legislation it calls for diversity of viewpoints. So, there is a point there.

But I must tell you that I believe that Mr. Smith, despite his erudition and despite taking on good faith your comments that you will uphold the law, I don't think you should be on that board and I think we should fight it out on the floor and here is the reason why.

Assuming, which I do—I have no reason to dispute—that you will make decisions in accord with the law not in accord with your personal views and Senator McConnell has done his usual mastery of work trying to point out that everybody has that problem, I just think nothing could send a worse signal to everyone who has to obey the campaign finance laws and people who support the campaign finance laws, than nominating somebody whose views are as absolute as yours are.

I agree with you that the kinds of analogies that have been made to people like Flynt or David Duke of Milosevic are uncalled for. I think it is a pretty fair analogy to say that I would not want to nominate an Attorney General who did not believe in incarcerating people, even if that person said they would uphold the laws. I would say I would not want a police chief who did not believe—I would not want to nominate a police chief who believed that prison was absolutely uncalled for in serious crimes.

I think even if I believed that that police chief or that Attorney General would uphold the law, I think it would send a terribly wrong signal to criminals in the country to have an Attorney General or criminals in that loclity to have a police chief who believed the other way.

So, I don't—and by the way, on a recent vote one judge that we rejected on the floor of the Senate was Judge Ronnie White, some of my colleagues got up and said that they did not want to nominate him because of his views on capital punishment. Now, Judge White had already held, upheld several capital punishment cases in the Missouri court. But they said they just didn't want to see somebody on the bench, even though he had already proven to uphold the law, be there.

I think, you know, I didn't agree with their view. I agree with their view on capital punishment, I didn't agree with their view on

Judge White. I voted for him. I thought he was a fine jurist. But the same standard could be used here as well.

We have a serious problem in this country, which is that to most observers there is too much either appearance or relationship between raising money and policy. I don't say, I don't pick any specific instance. I think that is wrong and unfair. I think there is a general cloud out there. And I think John McCain's campaign, ill-fated though it was, proved that there is far more popular belief that that occurs than we would like to admit here, many of us would like to admit here. I think it is corrosive. Not corrosive on individual's ethics, but corrosive on the body politic—the relationship, the trust, the bond, that people have with their government.

I think nominating someone such as yourself, Mr. Smith, who has strong views, who is not a politician, who is an academic person, who I respect, is exactly the wrong thing to do at this time. So, I will respectfully oppose your nomination. I will argue forcefully here and on the floor of the Senate that it shouldn't be.

But I don't believe that we should prevent that debate. I hope you are defeated fair and square on the floor, not defeated for lack of a vote or a debate.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Schumer.

Senator DODD.

Senator DODD. Ys. Thank you, Mr. Chairman.

Let me again state, Mr. Smith, I appreciate your statement and your opening comments that you will leave the legislating to Congress and constitutional interpretation to the courts. The focus of my inquiry has to do with the issue you addressed in your opening comments and that is your willingness to enforce the laws, whether you agree with them or not. That is a critical question for those of us who care deeply about the role of the Federal Election Commission. And you have been, as you pointed out, both an academician, a professor and, so, your role is now going to change: a substantial difference here between commenting on the actions of a commission to which you may become a member, very shortly.

So, I would like to address those questions dealing with enforcement based on your writings, where you have spoken extensively on the constitutionality of some of these provisions. While I generally do not agree with your positions, my questions are not intended to argue with your interpretations as much, although I certainly would, but to utilize this forum here to elicit some comfort level that regardless of your views that you so fervently hold, that you can, nonetheless, exercise your constitutional obligations to uphold the law.

In your written testimony you state that although you do not know the "inside history" of enforcement actions—and I am quoting you there—had you been a member of the Commission at the time you would have voted against taking enforcement action in the case of the FEC v. The Christian Action Network, a case that has already been discussed at some length here with the Chairman's questions.

Your reasoning, as I understand it, is that you view the position of the Commission as unconstitutional. Your apparent prejudgment of the necessity for an enforcement action concerns me in this case.

If what you are saying is regardless of the arguments to the contrary, you would not support enforcement actions if, in your opinion, you believe them to be nconstitutional, then I might suggest here this morning that you are going to marginalize your tenure on the Commission before you even are confirmed.

Certainly the fact is that numerous votes of the Commission were required in this case, seven I believe, and every one of those seven votes required a majority of four Commissioners to proceed, including at least one member of the Republican Party that was part of that Commission. That isn't inside history, in a sense, that is by operation of statute, that is the only way you can proceed.

I have two questions. Are you suggesting that by supporting this action, those Commissioners—and I would stress that there were at least four—who voted to proceed with this action are somehow acting in an unconstitutional manner in violation of their oath?

Mr. SMITH. I believe, first, of course, when I say I would have voted against it, that's presuming that nothing would have come up on those inside deliberations that would have called for another conclusion. But I don't think it would have, and the reason I say that is that by the time of Christian Action Network, there was already some fairly good precedent going forward, and certainly by the time that decisions were made on appeals there was good precedent going forward that the Commission's position would be struck down by the courts.

So this was not a judgment based on my independent reading of the Constitution; rather, it was a judgment based on a number of court decisions, including Faucher v. FEC, and FEC v. Central Long Island Tax Reform immediately out of the Second Circuit. You had multiple circuits already giving strong indications, I think, that the FEC was going to lose in Christian Action Network and lose badly.

And I think that what you've done—as you know, four Commissioners voted for it—and I'm not saying those Commissioners were unreasonable, but I think what you've pointed out is that this is where the Commission has had difficulties in the past.

The areas where I tend to be in disagreemet with what the state of the law is are relatively easy areas to deal with, where contributions exceed limits and so on. Had I been on the Commission and the case had come forward under Federal law rather than State law—I'm thinking of the Shrink PAC v. Missouri case recently decided by the Supreme Court, which was a State case—had that been a Federal case, a group clearly spending more than the statutory limit allowed or contributing more than the statutory limit allowed, I would have had no problem voting for enforcement action in that kind of case.

But in a case like Christian Action Network, I think I would have looked and said I don't think we can go in this direction. I don't believe that the rule of law is enhanced by sort of trying to stretch everything to the limits of enforcement whenever you can. I think, rather, you have to show restraint where the courts indicate that restraint is required. And it has been my view that the Commission's resources would be better used to attack the more routine cases, to cut down the backlog, to cut down the number of

dismissals for staleness, basically, and to engage in a reallocation of resources.

I agree, for example, with much of what the Senator from New York stated, at least when he began by saying that he was a strong advocate for reform. I think I'm a strong advocate for reform. My reforms are somewhat different. He gets to vote on them.

He believes that change is necessary. I believe that change is necessary. He believes that there is a corrosive effect. I believe that there is a corrosive effect. But I believe, given the current state of the law, we only add to that corrosive effect when the Commission goes off on this sort of adventuresome litigation, spending the resources of taxpayers. You know, it's often been said that this is a Commission—and there may be some solid grounds for it—that is underfunded to begin with, and then it spends its money on this type of litigation. I think that is an error.

And I think one role that I would play—I don't think you'd want a Commission with six academics on it, or even five, but maybe one or two might be good at playing a little role in looking at the law in a somewhat different way and pulling the Commission back toward the center on questions such as issue advocacy.

Senator DODD. Well, the reason I raise the question of whether or not the other Commissioners had acted unconstitutionally, in violation of their oath, is that it seems to me that aside—in addition to looking at the constitutionality of the issue, you would want to consider the facts beyond just reacting in an academic fashion. I appreciate your desire to have an academician on the Commission, somewhat self-serving but, nonetheless, I appreciate your desire to have one.

[Laughter.]

Senator DODD. But also we have to obviously deal in real cases and certainly not unmindful of constitutional interpretation, although, as you point out in your opening comments, your job is not to interpret the Constitution. You leave that to the courts.

What concerns me, as I look at your writings—now, again, you're going to be fulfilling a different role here is whether or not you are going to disregard specific facts, and disregard the views of other Commissioners that are examining this, and also disregard the fact that you can't write a regulation without there being reams of attorneys someplace who are trying to find some way to get around it.

As we all know here the day that Bill Clinton was sworn into office, there were 45 pages on the World Wide Web—45 pages worldwide. Eight years later, there are 45,000 pages added to the World Wide Web every minute. We could not have imagined--we can't even sit here and imagine--the technological advances, the cute and sophisticated ways to game the system in a way that the courts could not have imagined a year ago, let alone 25 years ago.

So it requires, it seems to me, a Commission not to be so restricted as to be unmindful of the kind of innovations and efforts that exist every day by people all across the political spectrum to find some way to get around the provisions included in the law. It seems to me incumbent, then, on the Commissioners not to allow for regulations to be adopted that are clearly violative of what the law intended, but also not to be unmindful of the fact that there

are people out there every day trying to find out some way to avoid the application of a regulation.

And so I come back to the question again and give you a chance to respond to it. Given the role now that you may assume, how do you feel about looking at facts? You said in your own words that you are "quite sure" that you would have voted against the action. What I want to know, I guess, is are you suggesting that in the future you will similarly feel compelled to determine the need for enforcement actions without the benefit of specifics of a case and the input of other Commissioners?

Mr. SMITH. I think, Senator, I think it's a good point that you raise, and I see what you're trying to get at. I think it's an important point.

I know the facts of Christian Action Network from the extensive judicial opinions that have followed. So it's not like I'm speaking about a case where I don't feel I have any knowledge of the facts of the case. And when I say I'm quite sure, what I mean by that is I don't suspect that there were any other facts that came up in the Commission hearings. And, again, as I noted in the testimony, I don't know that for a fact. But I don't suspect that there was anything that would have made me analyze the case differently from a legal point of view.

Had there been, of course, we would have looked at it differently. The point that I'm trying to make there is that I do believe that the Commission has often stretched its authority too far. I think that's obvious when you lose a case and a court actually sanctions you. I'm not saying the Commission has acted—th Commissioners acted unconstitutionally. Commissioners have tough decisions to make. But it strikes me as being clear by this point that maybe a somewhat different perspective is needed on the Commission.

And I would suggest to you, I do think that, for example, you'll make mistakes. You have to enforce—you have to draft regs, and sometimes those regs will be struck down. I mean, I don't expect any agency to have a perfect record in enforcement actions or in challenges to regulations.

Recently there was a case, FEC v. Christian Coalition, decided here in the district of the District of Columbia, and I had read news reports on the case when the opinion first came out, noting that the judge had found one incident of express advocacy. And so I got the opinion, and I began to read the opinion. As I'm reading the opinion, I ran across it in the facts of the case, which begins with—it talks about Ralph Reed, then the director of the Christian Coalition, going out and making a speech in Montana. And I don't remember the exact things that he said in that speech, but, oddly enough, as I was reading that, I thought to myself, "Ah, well, there's the express advocacy." Right?

Well, no, it turned out that wasn't the express advocacy. If anything, I was far more liberal in my construction of express advocacy than, in fact, the court was. The court held that Reed's speech had been issue advocacy and could not be regulated.

So I would expect that I, too, would make mistakes. But I think in the way in which the Commission has had problems, again, that it needs somebody who perhaps leans a little bit toward the other

side, again, to pull it back to the center. I think the Commission has gone off constitutional center on the question of issue advocacy.

Senator DODD. Well, as I said at the outset here, by longstanding tradition we have generally accepted the notion that political parties in this case have a right to put people forward who share their views. And, clearly, in your case, I think you do comevery close to sharing the views of a majority of the Republican Party in Congress when it comes to campaign finance reform. So I respect that. But also I know that it is going to be necessary to really enforce the law and, again, relying on your skills as a lawyer and someone who understands this law, to be very, very mindful of what the facts are.

Let me cite another example, if I can, and this is what concerns me, because even though you are writing articles, it is not the same as taking a vote on a commission. We rely on legal, scholarly works and major journals to form some of our opinions. Again, I made reference earlier to the fact that you wrote an article in 1998 for the Connecticut Law Review.

You argued in that article that campaign finance reform efforts are misplaced and have distracted attention from addressing other concerns such as the resurgence of what some call true corruption, vote buying and voter fraud. In support of your contention in that article, which I have read, you cited a June 1997 article as showing, and I quote from your statement, "very credible evidence of fraud also surround the 1996 U.S. Senate election in Louisiana."

As this committee well knows—the chairman and I were a part of this—we determined in October of 1997 that the so-called evidence of fraud in the contest was anything but credible, and we voted unanimously on this committee to abandon the preliminary investigation and allegations of fraud and other irregularities.

Even recognizing your role as an academic observer at the time, in light of the outcome of the election position, your uncritical reliance, in my view, on the Louisiana example as anecdotal evidence to support your assertion troubles me because, again, this is a very scholarly work.

My question is this: If confirmed, are you willing to thoroughly review the facts of pending cases before making similarly conclusive statements about the quality of evidence in enforcement cases?

Mr. SMITH. I assume, Senator, that this Committee would not have investigated that race had it not felt there was some kind of credible evidence of fraud. And I'm very gratified that, in fact, it turned out on closer investigation that it was not there. But certainly writing in the spring of 1997 my conclusion was no different than that of the U.S. Senate which decided this race was worth investigating, and all I write in that article is that there are allegations of fraud and there's enough credibility to them that they're being investigated.

I almost find myself wondering how can a person think that that was a radical statement given that the Senate did an investigation into that matter.

Senator DODD. Why didn't you find some other example to use, maybe, where that decision had already been rendered rather than jumping ahead of a decision by this committee? We hadn't rendered one by then, and a good academician might have decided to hold

off on deciding that case, wait a couple of years, and see how the committee voted before you determined in an article which will be around for a long time. There is no footnote in that case to refer to later to see how the committee voted.

Mr. SMITH. No, there is not. One of the things that you have to decide as an academician is how much you want your work to be current, how much you want it to be precise. You know, one thing one gets credit—or criticized for sometimes is, "Ah, well, you know, that's in the past, you're not current enough, you're not up on current events and current literature."

Again, I would stand by that footnote now. I think it was accurate. I think what the Senate did reflects that it was accurate, though I would not at this point write, or write again, that there was evidence of a problem there.

The Commission itself, the Election Commission, is often called upon to respond to allegations and determine whether they are credible. And I think this is exactly what we're called upon to do, and I don't see in that statement any prejudgment of facts.

The CHAIRMAN. If I could just interject on the Louisiana case, to say to my friend from Connecticut, we didn't all conclude there was no fraud in the election. Some of us thought that there was some. The issue was whether it was substantial enough to change the outcome of the election, and clearly the Rules Committee did not think that there was such fraud of a substantial nature as to change the outcome of the election.

Senator DODD. No, I appreciate that.

The CHAIRMAN. Yes.

Senator DODD. My point is, you are writing for a scholarly journal. There are examples where there have been allegations of fraud that have been categorically proven to be such. I don't think it's an illegitimate argument to say that resources ought to be allocated to going after clear cases of corruption in the political process. But my view is here, instead of citing one that was still pending in terms of a final determination, just the judgment factor in using that case rather than others that were somewhat contemporaneous to the time the article was being written would have demonstrated better judgment.

We are sitting here making—I am not going to argue with you about whether or not you think there are too much resources being spent on questionable issues or whether or not on clear cases. At the time we have debated that. We will discuss it again and again and again, I presume. The question we have to make here is the suitability of someone to serve on a Commission. Their prior record and how they arrive at decisions—you made a decision in writing that article to cite that case--is relevant.

Mr. SMITH. Yes, I did.

Senator DODD. And I think it is a legitimate issue for me to raise why you cited that case which was pending rather than cite some other cases where clearly you would have been on much more solid footing in arriving at that conclusion as evidence of where the Commission ought to spend its resources.

Mr. SMITH. I cited that case because it was current, it was in the news as I was writing, and I cited it for largely the same reasons that you chose to investigate it.

Senator DODD. Now, much of your writing, of course, predates the Supreme Court decision in the Shrink v. Missouri PAC case and consistently argues that money is not a corrupting influence in elections and, consequently, is an invalid rationale for reform. And, obviously, I don't share your position on that, nor does my colleague from New York, but I appreciate your perspective. And certainly an academician is an academician, and you are a First Amendment scholar, and I think your articles are fascinating and well written.

The current Supreme Court, however, doesn't appear to agree with you. You cited the Justices that disagreed with Buckley v. Valeo, but, of course, it is important to point out that a majority of the Court reached a different conclusion, and certainly they did in the most recent decision by the Court on campaign matters.

So, if confirmed, I want you to tell me whether or not you will take an oath to uphold the Constitution not as you interpret it but as the courts have interpreted it? In light of a ruling in the case of Shrink v. Missouri PAC, are you prepared to enforce the laws which are founded on the congressional belief that political contributions can corrupt elections and need to be limited, as the Court concluded in that case?

Mr. SMITH. I would proudly and without reservation take that oath.

Senator DODD. I thank you.

Lastly, Mr. Chairman, for Mr. McDonald. I made reference to some of the new technologies that are emerging in the area of campaigning, the Internet being the one that has most recently come on line. There are wonderful advantages to that, obviously, the contemporaneous reporting of campaign contributions, something I think, in fact, the Bush campaign did, which I commend them for. I think that is a wonderful use of that technology to allow people to have a contemporaneous window on whois supporting them as they seek election.

But I wonder if you might just share with us quickly what in your opinion the FEC should be doing to stay abreast of these latest developments, what is being done, and how can and must it change its own operations in order to ensure that it is not constantly fighting the last war in the enforcement. And, lastly, based on your experience both as an administrator and long-time Commissioner, are you satisfied that the FEC is doing enough to assist State and local election officials with their duties where so much of these activities are concentrated?

Mr. MCDONALD. Senator, thank you. First of all, let me take the last issue first, because being a local election administrator for years, the way I first became acquainted with the Federal Election Commission was when I was put on the advisory panel of the Federal Election Commission when I was secretary of the Election Board in Tulsa. And I must say that I have a particular fondness for election officials because I think at the end of the day they do an awfully good job. They find themselves, as you point out, particularly in terms of technology, it's always tough at the local level to get money for new technology until something goes wrong. Then after it goes wrong, you get it, but people never forget what went wrong before.

So we have on our election administration network, which used to be called a clearinghouse, we have a relationship with all 50 States. We have an ongoing panel that works with State and local election officials to try to stay abreast of the kind of voter equipment that they use, changes in technology, and, in fact, we are proceeding again to update that very sort of thing based on the kind of comments you've made.

Also, in the rules and regulations projects that we have ongoing, we have asked the public to come in and testify, and we have had just an unbelievable response, I think some 1,200 inquiries wanting to comment on the changng technology that you alluded to. Not only is it true in the information that Governor Bush has put forward, probably one of the most creative and fastest turn-arounds we've seen in relationship to making those contributions known to the general public, but we're also doing it in relationship to how you may accept money. And we started that in the Presidential election and we started with Senator Bradley.

It is an unbelievable area, and I think it has wonderful opportunities for us. But I must tell you that we are also concerned about it because it's changing very dramatically how we're to do business. And I think it's important that we follow up on that in every aspect possible.

Senator DODD. Well, I thank you for that. It has been very distressing to me over the years that in terms of resource allocation, the Commission should be at least capable of trying to stay abreast of some of these changes that go on so dramatically and so rapidly. It is hard for you to do it if we don't provide adequate resources for you to accomplish your desired results. And, obviously, by depriving the Commission of the necessary resources, it creates a self-fulfilling prophecy in terms of the Commission's role. And so my hope would be that we will—despite whatever differences we have about how the Commission interprets Buckley v. Valeo or the latest case in applying or crafting regulations--that we would give the Commission the adequate resources to do the job. Certainly the Commission should do what Mr. Smith is advocating—and I don't disagree with him—that is, going after the clear-cut cases of corruption and fraud, but also trying to stay abreast of what campaigns are trying all the time. There are people out there every day trying to figure out how to get around this law. And if we don't have a Commission that is vigilant in that regard, if it views candidates as if they of have an unfettered right to figure out how to sport and game the system, then we are going to be way behind the curve.

So my hope s, Mr. Smith, if you are confirmed here, you will surprise your critics and you will prove, as has happened in many cases where people have an assumption of what a person is going to be like, to be quite different. You are tremendously bright. You are a tremendously talented individual. And you have got a good understanding of what First Amendment rights are. If you are confirmed to this Commission, you could do a lot of good. And so if you are confirmed by the Senate, I hope you will accept the criticism in the spirit in which it is offered by people who fundamentally disagree with at least your writings as they have been presented up to now, but understand as well that our expressions here are not

the expressions of a political party. There is bipartisan support for trying to really change these laws, and the public overwhelmingly cares about it, deeply cares about it.

I know it doesn't show up as a great issue when surveys are done and education and health care and prescription drugs are on the agenda. But I think that is a misinterpretation of how the public feels about this, that they are deeply worried about the political process that is escaping them and out of touch with them. Too often I think it is because we are so consumed with raising the money necessary to be heard, that we don't listen to the other voices out there that can't afford to participate in this process at the level that many others do. That worries me, deeply, that we are disengaging. I like the fact that people make contributions. I think it's important. But if we don't want to bother with a $5 and $10 and $100 contributor because we can't waste the time, as we seek the $1,000, $2,000, $5,000, $10,000, $100,000 contributors, we cut off a substantial part of the American public from participating in something as fundamental as choosing the people who represent them.

So I would hope as we go forward here, you'd keep that in mind.

The CHAIRMAN. Thank you, Senator Dodd.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman, and, again, I thank you, Mr. Smith, for your—and Mr. McDonald, although I won't be asking you any questions—for your answers on this. I do want to say I see in the front row, daughters. I'm the father of daughters the same age, and I just want to tell you girls that some of us disagree with your dad on the issues, but we think he's a fine man who's doing the best he can, and who just disagrees with us.

Senator DODD. They don't buy that for a second, Chuck.

[Laughter.]

Mr. SMITH. I do, actually, and I thank you for that, Senator.

Senator SCHUMER. Okay. I just went through a campaign where my great worry was with all the attack ads, what my daughters might start thinking, and so I appreciate that. They are 15 and 10, probably similar to your ages.

I have two questions for you, Mr. Smith. You did an analysis for the Cato Institute, it was dated September 13th, 1995, and there you stated that the FECA and its various State counterparts are—and these are your words—"profoundly undemocratic and profoundly at odds with the First Amendment."

So even though we've talked about this, I would just like you to—I mean, that's a pretty strong statement. That is not just saying I disagree, policy-wise, but saying the whole darn thing is unconstitutional.

Do you have qualms—just address that a little more for us, other than just saying you'll enforce the law.

Do you have personal qualms about enforcing a law which you believe to be unconstitutional? Why would you want to enforce laws in which you are in such profound disagreement? I mean, as we've all talked here, and even the questions that have been asked, that's the main job of this Commission. It's not to make policy. It's, rather, to enforce laws that exist.

Mr. SMITH. Thank you, Senator.

When I graduated from law school, I did not have a lot of money and I needed a new car, or another car, and so i bought a used Ford Escort. It was four years old. I owned that car or six years, and with all due respect to the Ford Motor Company, in one of whose plants I worked for a summer as a young man, I never liked that car.

But I kept it clean. I changed the oil and I did repairs on it when it needed repairs, and nobody ever said to me, "Brad, you don't like that car. Why do you keep it in such good shape?"

I think to be called on to fill a position of public service is a great honor, and I think it is because I share many of the concerns, in fact, that Senator Dodd just listed, even though we may disagree, to some extent, on the solutions, that I am interested in filling this position.

Again, when we talk about complying with the law, or following the rule of law, we have to recognize, once again, that proper deference to the rule of law does not only mean going after and getting penalties against those who have violated the law, but it means not going after those who haven't. I say that last, recognizing that sometimes commissioners, in good faith, will err on the side of excess enforcement, and as I pointed out in at least one case, even I, you know, the"radical extremist," would have erred on the side of excess enforcement versus what the Court ultimately allowed the FEC to do.

I would like to see the FEC work better, and I think to a point you raised earlier, that I sort of tried to address, but I think I lost my train of thought. You know, I do think that some of the cynicism of the public comes when they see what are obviously violations of the law not being enforced, or when they see penalties being levied, three or four or six years after a campaign.

So, again, you know, one of my top priorities on the Commission would be to try to improve enforcement in those areas, going after these "meat and potatoes" cases, going after them quickly, getting them done.

Maybe when that's all done, and all that's left is to go further, I'll say I've had enough. I don't know. But it's not my intention to say that at this point. I don't know that wecan get there even in the five years that would be left on this term.

Senator SCHUMER. It's not too late to do it now.

Mr. SMITH. Because it is important to me, and because I do think what the FEC does is important, that I'm interested in the position. I should address the comments you began with, the quotes from the Cato study. I wrote that campaign finance reform efforts are basically profoundly at odds with the First Amendment.

In Buckley v. Valeo, at 424 U.S. 1, page 50, the Supreme Court says that restrictions on issue advocacy are, and I quote, "wholly at odds with the First Amendment."

So perhaps like Senator Dodd, you should go after me not just for writing law review articles but for writing bad law review articles. Maybe I was inadvertently plagiarizing in this particular case.

For me to say something that the Supreme Court has said doesn't strike me as radical, and in fact the Supreme Court in Buckley struck down substantial portions of the law on constitutional grounds.

In National Conservative Political Action Committee, it struck down portions of the law. In Massachusetts Citizens For Life, it struck down portions of the law. In Colorado Federal Republican Campaign Committee, it struck down an interpretation of the law. All of these cases were decided on First Amendment grounds.

So, obviously, there are serious First Amendment problems, and I think all of us will agree with that, just as I agree that there are serious problems about corruption, and the perception of corruption, and just as I have argued that I think those problems of corruption are there but overstated, others have argued that the First Amendment problems are there but not so great. But I think to suggest that this is unreasonable is simply not fair.

Senator SCHUMER. Except you didn't qualify. You said the FECA, not certain portions of the FECA. Obviously, there are differences in the whole law. There's advocacy, and then there are limits on political contributions. I mean, I have not read the aticle but the excerpt I have in front of me seems to indicate you feel the whole darn thing is unconstitutional, including limits on individual contributions.

Aren't I correct in that assumption?

Mr. SMITH. Yes, I do think that about contributions, but, again, as I've pointed out, that is not an area where the Commission has had difficulty enforcing the law, and it's not an area where I would see it being difficult to enforce the law, and I'm comfortable that the Supreme Court has decided that decision. SHRNK PAC did not change anything in the law, but it certainly reaffirmed that the Supreme Court is comfortable with that distinction.

We just couldn't get Kennedy and Scalia, and Thomas and Blackmun and Burger on the Court at the same time, or maybe we wouldn't have that distinction.

You also mentioned—you know, if you read that article in its entirety, in that same article I praised disclosure. So, obviously, one who's reading the whole article understands that when I say the FECA is at odds, they understand that I'm not necessarily referring to every single provision of the law, because I wouldn't be sitting there writing an article in which I'm also arguing for disclosure, and more disclosure, which is part of the FECA.

As to the other part of that comment, that the laws are undemocratic, what I've done there—the term I use, and it's explained, in some detail, when I use it again in my Yale Law Review article—what I mean to say by that is that campaign finance reform has tended to support incumbents against challengers in ways that go beyond what I think is justified, truly insulating many incumbents from challenges, and I think that's well-supported by the political science data.

I don't know that that's something that's intentional, but I think it has been an inadvertent consequence of the system. I have noted that given the current constitutional law which allows a candidate to spend whatever they want, putting limits on contributions has then tended to favor wealthy candidates, and promote more and more ultimillionaires running for office, because those are the people who have a fund-raising advantage.

I noted that regulation, as it does in most areas, falls most heavily on small entities. Smaller businesses suffer from regulation

more than big businesses. Grassroots, true grassroots political organizations feel regulation more than big lobbies like the NRA, or the Sierra Club, or things like that.

So, again, I think the statement that I used there, when one reads the entire article, and sees my qualification, I wanted a term to describe all these various effects—and I say, very clearly, I've chosen the term "undemocratic."

Senator SCHUMER. Profoundly undemocratic.

Mr. SMITH. Profoundly undemocratic.

The CHAIRMAN. If I could interject. I don't want to keep Professor Smith from finishing his—

Mr. SMITH. I think I was finished.

The CHAIRMAN. If I could just interject. If Kathleen Sullivan, the dean of Stanford Law School, were sitting where Professor Smith is, I have a feeling she'd be sailing through to an uncontroversial confirmation, and she has a piece in today's New York Times, your home town newspaper, on this very issue of contribution limits, which, as Professor Smith's views have been described, is some sort—nutty views. Dean Sullivan, in today's New York Times, has an article saying she agrees, totally, with Professor Smith on this. Let me just read a couple of pertinent parts.

"Such calls for greater regulation of campaign donations, however, ignore the real culprit in the story—the campaign finance laws we already have. Why, after all, would any—this is talking about the Sam Wiley ads in your state, earlier."

"Why, after all, would any Bush supporter go to the trouble of running independent ads rather than donating the money directly to the Bush campaign? And why label the ads as paid for by Republicans For Clean Air rather than Friends of George W. Bush? The answer is the contribution limits that Congress imposed in the wake of Watergate, and that th Supreme Court has upheld ever since."

Her conclusion: "The result is not only unintended but undemocratic." The very adjective you are saying that Professor Smith had in his Cato piece. Dean Sullivan's suggestion: "The solution is simple. Removal of contribution limits, full disclosure, and more speech."

This is, as astonishing as it may be to my friend from New York, and a number of people on his side of the aisle, this is mainstream Republican conservative thinking on this issue, also shared by the American Civil Liberties Union. Also shared by the American Civil Liberties Union.

This is not some sort of goofy, off-the-wall notion here. So the professor's views are not ones held by him alone. There are other very credible people who also share those views.

Senator SCHUMER. My riposte to the, my friend from Kentucky, is twofold. If Dean Sullivan's views were that she thought that contribution limits were profoundly undemocratic and profoundly at odds with the First Amendment, I would not support her.

The CHAIRMAN. You would be consistent.

Senator SCHUMER. Okay. And second, just because the Civil Liberties Union is for it doesn't mean that I'm for it. I disagree with them on an issue that we disagree on, greatly, on gun control, and other things as well. My general view on all of these amendments

is they're sacred, they're vital, but they're not absolute, and if somebody tries to interpret them absolutely, I think they miss a whole lot about the flexibility of the Constitution, how it is a living, breathing, and practical document.

I didn't like Hugo Black, some of Hugo Black's decisions, for that reason, even though he was from my party and way over on one side.

I'd be happy to yield to my friend from Connecticut.

Senator DODD. Just one question to you, Mr. Smith. We've been kind of dancing around it a bit here, but I get a clear sense of where you think the Commission ought to spend its time, and I think I've got a pretty good idea as to where you think they ough not to spend their time. I'm wondering if you would tell us where you would think the actions of the Commission would be unconstitutional.

Mr. SMITH. Well, a short time ago, you were criticizing me for making judgments on published judicial decisions without having been involved in Commission decisions in the past, and I think for much those same reasons at this point, it's not proper for me to sit and say exactly what the FEC ought to be doing in particular areas now.

I think the FEC has made great strides, as I mentioned in my prepared testimony in recent years. The disclosure function has obviously improved. They seem to be hacking away at the backlog of cases. They're trying to get the regulatory rulemaking function I think back on track in issues of coordinated expenditures and the Internet.

I think they're moving with appropriate caution on the Internet. I do not know what the answer is to the Internet in politics. I am very concerned that if we try to leap in and take pre–Internet regulation and apply it to the Internet, what we may end up doing is smothering the little guy, the one person who finally, now, has the ability to put up a Web page and reach thousands of people in a short period of time.

Yet I recognize that if we decide that the press exception applies totally to the Internet, that would undercut virtually the entire Federal regulatory system which does, as we've gone over and over again, in fact exists, regardless of what I think about it.

So that's a very difficult issue. It's an issue I think the Commission needs to pay a lot of attention to. I don't know what my feelings are on it. That's one of the things I would really want to talk to commissioners who have done a lot of work on it—David Mason, who I noticed behind me, I know has been particularly involved in that.

So these are the types of issues facing the Commission. Again, I think what I add to the Commission is a little different perspective than it has ever had. There has never been an academic on the Commission, and, again, I do think that in certain areas, with Christian Action Networks being the coup de grace, the Commission, for whatever reason, has gone a bit offtrack, and that someone like myself can help to pull it back to the center where it belongs.

Senator DODD. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Dodd.

I'm going to include a closing statement in the record. I believe we've completed the hearing. It's my plan to have a meeting off the floor of the Senate after the first vote for the purpose of reporting out the nominations. We are going to complete the record as rapidly as we can, as Senator Dodd has requested.

CLOSING STATEMENT OF CHAIRMAN MCCONNELL

In closing this morning, let me sum up my thoughts on these two nominees.

Professor Smith, I believe that your sin in the eyes of the reform industry is twofold: (1) you understand the constitutional limitations on the government's ability to regulate political speech, and (2) you have personally advocated reform that is different from the approach favored by *The New York Times.* I believe that neither your appreciation for the First Amendment nor your disagreement with *The New York Times* and Common Cause should disqualify you for service on the Federal Election Commission.

As the numerous letters that have been flooding in to me at the Committee establish: Your personally–held views are well within the mainstream of constitutional jurisprudence and should not bar you from government service at the FEC. Personally, I think your views would be a breath of fresh air at a Commission whose actions have all too frequently been struck down as unconstitutional by the courts.

TWO CAMPS—NEITHER OF WHICH IS OUT OF BOUNDS

As Professor Smith has also noted, the world of campaign finance is generally divided into two camps of reasonable people who disagree with the Supreme Court's interpretation of the First Amendment in *Buckley.* One camp prefers more regulation. Another camp prefers less regulation. Neither camp is perfectly happy with the current state of the law.

One camp is made up of *The New York Times,* Common Cause and the Brennan Center, and scholars such as professors Ronald Dworkin, Daniel Lowenstein, and Burt Neuborne.

The other camp is occupied by citizen groups ranging from the ACLU to the National Right to Life, and scholars such as Dean Kathleen Sullivan, professors Joel Gora, Lillian Bevier and Larry Sabato.

It's probably fair to say that Danny McDonald is in one camp and Brad Smith is in the other. And, I definitely agree more with one camp than I do the other. But, I do not think agreement with either camp makes a person into a lawless radical or a wild-eyed fanatic. And, I certainly do not think that membership in either camp should disqualify a bright, intelligent, ethical election law expert from a six–year term of service on the bipartisan Federal Election Commission.

ENFORCING THE LAW

Finally, and most importantly, the overwhelming letters of support for you, Brad, and your testimony here today convince me without a doubt that you understand that the role of a FEC Com-

missioner is to enforce the law as written, and not make the law in your own image.

Critics who have philosophical differences with you should heed the words of Professor Daniel T. Kobil, a former board member of Common Cause:

"I believe that much of the opposition is based not on what Brad has written or said about campaign finance regulations, but on crude caricatures of his ideas . . . . Although I do not agree with all of Brad's views on campaign finance regulations, I believe that his scholarly critique of these laws is cogent and largely within the mainstream of current constitutional thought. . . .

I am confident that he will fairly administer the laws he is charged with enforcing . . . ."

And, let me add the sentiments of Professor Daniel Lowenstein of the UCLA Law School and also a former board member of Common Cause:

"Smith possesses integrity and vigorous intelligence that should make him an excellent commissioner. He will understand that his job is to enforce the law, even when he does not agree with it."

So I say to my colleagues here this morning that I personally believe that Professor Smith's intelligence, his work ethic, his fairness, and his detailed knowledge and understanding of election law will be a tremendous asset to the FEC and to the American taxpayers who have been forced to pay for numerous FEC enforcement actions that have been struck down in the courts as unconstitutional.

Professor Smith is a widely-respected and prolific author on federal election law, and, in my opinion, the most qualified nominee in the twenty-five year history of the Federal Election Commission. I am firmly convinced that he would faithfully and impartially uphold the law and the Constitution as a Commissioner at the FEC and I wholeheartedly support his nomination.

COMMENTS FOR COMMISSIONER MCDONALD

Now, Commissioner McDonald, I have a few specific thoughts on your nomination. First, let me state the obvious: you and I are in different campaign reform camps. If I follow the new litmus test that is being put forth by some in this confirmation debate, then I have no choice but to vigorously oppose your nomination.

Also, I have serious questions about your 18-year track record at the FEC. I think that your votes have displayed a disregard for the law, the courts and the Constitution. And, it has hurt the reputation of the Commission, chilled constitutionally protected political speech, and cost the taxpayers money.

All of that being said, Commissioner McDonald, I am still prepared to reject this new litmus test whereby we "Bork" nominations to a bipartisan panel based on their membership in a particular campaign finance camp. I am prepared to follow the tradition of respecting the other party s choice and to report your nomination out of the Committee assuming that your party grants similar latitude to the Republicans' choice.

Thank you both for being here today. I hope that we can move this process forward and report your nominations en bloc very shortly.

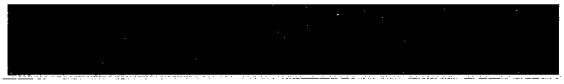
I thank both of you gentlemen for being here, and my intention—I'm not going to apply the standard that Senator Schumer's applying to Professor Smith. Otherwise I'd have to oppose you, Commissioner McDonald, and assuming Professor Smith is confirmed, obviously I will not oppose you. If Professor Smith is not confirmed, then that'll be a signal that we're going to operate in a new way around here in terms of the deference that is given to each party in naming their own members of the Commission, which might cause me to reverse my position on you, Commissioner McDonald.

Mr. MCDONALD. I won't take it personally, Mr. Chairman.

The CHAIRMAN. Good. All right. Well, thank you very much. The hearing is concluded. Let me announce that the Committee will recess subject to the call of the Chair to vote on these nominations. This vote will occur following the first Senate floor vote later today.

[Whereupon, at 11:27 a.m., the committee was adjourned, subject to the call of the chair.]

APPENDIX 1.



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Confirm Bradley Smith

Capital U. law prof belongs on election panel

Sunday, February 13, 2000

After waiting for more than a year for President Clinton to act, Capital University law professor Bradley A. Smith finally has been nominated by the White House for one of the three Republican seats on the six- member Federal Election Commission.

The Senate now should move quickly to confirm Smith, who is one of the nation's foremost constitutional scholars and an expert on election law and free speech.

The commission comprises three Democratic nominees and three Republicans. Presidents routinely nominate the candidates offered by the Senate leadership of the two parties.

But when Senate Majority leader Trent Lott, of Mississippi, submitted Smith's name to the administration last year, Smith immediately was tarred falsely as an "extremist" by several groups who themselves favor radical infringement on political speech.

Smith's sin, in the view of Common Cause, Democracy 21 and the Brennan Center for Justice at the New York University School of Law, is that he thinks that any attempt to limit campaign contributions or spending infringes upon the First Amendment guarantee of free speech.

But if this view is radical, then so is the last quarter-century of U.S. Supreme Court opinion. The high court stated clearly in Buckley vs. Valeo that campaign giving and spending are protected political speech. In that 1976 ruling, the court struck down all limits on campaign spending. While acknowledging that campaign giving also enjoys free-speech protection, the court allowed some donation limits on the grounds that they are intended to minimize corruption and the appearance of corruption.

Smith fully endorses the court's view that campaign giving and spending are protected speech. His only departure from the justices is on contribution limits. He believes a better approach is to do away with contribution limits and simply require that all giving be fully disclosed. Voters then could decide for

themselves if a candidate is being "bought" by contributors.

This "radical" view is shared by The Dispatch.

Besides his philosophical objection to infringements of free speech, Smith has argued in legal journals, newspapers and magazines that, in practice, contribution limits harm political challengers and voters.

These limits "favor incumbents, stifle grass-roots activity, distort and constrict political debate," he has written.

He is right. U.S. Rep. John R. Kasich, R- Westerville, was forced to drop out of the presidential race a few months ago because he simply could not raise the money needed to make his name, face and views familiar to a national audience.

On March 7, voters will find no "John Kasich" choice on the GOP primary ballot for president. This is how contribution limits stifle political diversity, constrict debate and reduce voters' choices.

Smith is not the one who is extreme; it is those who most stridently attack him. They want more restrictions on the raising and spending of campaign cash, which means, in effect, letting the government decide who may speak and how much they may speak. Unable to persuade Congress to enact such a sweeping revision of the Constitution, Smith's critics would like to see the Election Commission do it.

They also charge that Smith cannot be trusted to enforce the election laws already on the books. Smith rejects the charge.

"All kinds of people hold federal office and enforce laws that they don't agree with," he said last week. "The president is charged with enforcing laws he doesn't agree with. My position is not that the law should be ignored, it's that the law should be changed."

He also has pointed out that the commission frequently overreaches in its enforcement actions, only to be slapped down in court. His constitutional expertise could help his colleagues avoid wasteful and expensive court action that is doomed before it begins.

Finally, remember that his vote is just one of six. Anything he attempts to do as a member of the commission will be successful only with the support of at least three other members.

In the upcoming confirmation hearings for Smith, his critics will attempt to create a role reversal in which his mainstream view of constitutional law will be painted as radical, while their truly opposite view will be presented as conventional.

Smith's opponents hope to make support of radical campaign-finance reform a litmus test for election commissioners.

The Senate should give these critics a polite hearing and then confirm Smith.

APPENDIX 2.

LETTERS IN SUPPORT OF PROFESSOR BRADLEY A. SMITH

Mainstream Views

All of the scholars that have written urging the confirmation of Professor Smith believe that his scholarly work is not radical but rather well-grounded in mainstream First Amendment doctrines and case law. Let me share with you a few examples of what these experts say:

1. **Professor Daniel Kobil - Capital Law School, Reform Advocate and Past Director of Common Cause, Ohio**

   "Groups seeking to expand campaign regulations dramatically might have misgivings about Brad's nomination. However, I believe that much of that opposition is based not on what Brad has said or written about campaign finance regulations, but on crude caricatures of his ideas that have been circulated. . . . I think that the FEC and the country in general will benefit from Brad's diligence, expertise, and solid principles if he is confirmed to serve on the Commission."

2. **Profesor Larry Sabato - Director of the University of Virginia Center for Governmental Studies, appointed by Senator George Mitchell to the Senate's 1990 Campaign Finance Reform Panel**

   "Contrary to some of the misinformed commentary about professor Smith's work and views, his research and opinions in the field of campaign finance are mainstream and completely acceptable. For example, Professor Smith has argued in several of his academic papers for a kind of deregulation of the election rules in exchange for stronger disclosure of political giving and spending. This is precisely what I have written about and supported in a number of publications as well. Bradley certainly supports much of the work of the Federal Election Commission and understands its importance to public confidence in our system of elections. I have been greatly disturbed to see that some are not satisfied to disagree with Professor Smith and make those objections known, but believe it necessary to vilify the professor in an almost McCarthyite way. I do not use that historically hyper-charged word lightly, but it applies in this case. Any academic with a wide ranging portfolio of views on a controversial

subject could be similarly tarred by groups on the right or left."

3. **Professor John Copeland Nagle - Notre Dame Law School**

"Professor Smith's view is shared by numerous leading academics from across the political and ideological spectrum, including Dean Kathleen Sullivan of the Stanford Law School and Professor Lillian BeVier of the University of Virginia School of Law. His understanding of the First Amendment has been adopted by the courts in sustaining state campaign finance laws. See Toledo Area AFL-CIO v. Pizza, 154 F.3d 307, 319 (6th Cir. 1998)."

Enforcing the Law as Written by Congress and Interpreted by the Courts

It also speaks well of Professor Smith that constitutional scholars and election law experts that know him personally and are familiar with his work, including some who have served on the board of Common Cause, are confident that he will faithfully enforce the law as enacted by Congress and upheld by the courts. Professor Smith, let me read to you just a few examples of the confidence these experts have in your integrity and commitment to the rule of law:

4. **Professor Daniel Lowenstein - UCLA Law School, Served Six Years on Common Cause National Governing Board.**

"Anyone who compares his writings on campaign finance regulation with mine will find that our views diverge sharply. Despite these differences, I believe Smith is highly qualified to serve on the FEC. . . . Smith possesses integrity and vigorous intelligence that should make him an excellent commissioner. He will understand that his job is to enforce the law, even when he does not agree with it. . . . In my opinion, although my views on the subject are not the same as theirs, [the Senate Republican Leadership] deserves considerable credit for having picked a distinguished individual rather than a hack. . . . Although many people, including myself, can find much to disagree with in Bradley Smith's views, I doubt if anyone can credibly deny that he is an individual of high intelligence and energy and unquestioned integrity. When such an individual is nominated for the FEC, he or she should be enthusiastically and

quickly confirmed by the Senate."

5. **Professor Daniel Kobil - Capital Law School, former Governing Board Member of Common Cause, Ohio.**
"*Knowing Brad personally, I have no doubt that his critics are wrong in suggesting that as a FEC Commissioner, Brad would refuse to enforce federal campaign regulations because he disagrees with them. I have observed Brad's election law class on several occasions and he always took the task of educating his students about the meaning and scope of election laws very seriously. I have never heard him denigrating or advocating skirting state and federal laws, even though he may have personally disagreed with some of those laws. Indeed, several times in class he admonished students who seemed to be suggesting ignoring what they considered overly harsh election laws. Brad is an ethical attorney who cares deeply about the rule of law. I am confidant that he will fairly administer the laws he is charged with enforcing as a Commissioner.*"

6. **Professor Randy Barnett - Boston University Law School.**
"I . . . can tell you and your colleagues that [Professor Smith] is a person of the highest character and integrity. If confirmed, Brad will faithfully execute the election laws which the Commission is charged to enforce—including those with which he disagrees . . . . Brad's critics need not fear that he will ignore current law, but those who violate it may have reason to be apprehensive."

Letters From Constitutional Scholars and Election Law Experts Concerning Brad Smith's Nomination

1. Prof. Daniel Lowenstein - UCLA Law School, Former Member National Governing Board of Common Cause
2. Prof. Daniel Kobil - Capital Law School, Former Member Governing Board Common Cause, Ohio
3. Dr. Larry Sabato - University of Virginia Dept. of Government, Member of the Senate's 1990 Campaign Finance Reform Panel
4. Prof. Lillian BeVier - University of Virginia Law School
5. Hon. Charles Fried - Harvard Law School, Former Solicitor General of the United States
6. Prof. John Yoo - Boalt Hall Law School, Berkeley
7. Prof. John R. Lott - Yale Law School
8. Prof. Ronald Cass - Boston University Law School, Former Member of the Massachusetts Office of Campaign Finance
9. Prof. Randy Barnett - Boston University Law School
10. Prof. Eugene Volokh - UCLA Law School
11. Prof. Michael McConnell- University of Utah School Law
12. Prof. L.A. Scot Powe, Jr. - University of Texas at Austin School of Law
13. Prof. Michael Solimine - University of Cincinnati School of Law
14. Prof. Joel M. Gora - Brooklyn Law School
15. Prof. John Nagle - Notre Dame Law School
16. Prof. Todd Zywicki - George Mason Law School
17. Prof. Stephen Gottlieb - Albany Law School
18. Bob Dahl - President of the Fair Government Foundation

19.	Prof. John O. McGinnis	- Benjamin Cardozo School of Law
20.	James Bopp	- Bopp, Coleson & Bostrom
21.	Rep. Charles Canady	- Chairman of the Constitution Subcommittee of the House Judiciary Committee
22.	Prof. David Forte	- Cleveland-Marshall College of Law
23.	Roger Pilon	- CATO Institute, Director for the Center for Constitutional Studies
24.	Theodore Cooperstein	- Constitutional Litigator, Former Associate General Counsel to the FBI
25.	Ken Boehm	- Chairman, National Legal Policy Center
26.	Cleta Mitchell	- Counsel to the First Amendment Project of the Americans Back in Charge Foundation
27.	Prof. John Hasnas	- George Mason Law School
28.	Professor Stephen Ware	- Cumberland School of Law
29.	Professor David Mayer	- Capital Law School
30.	Dr. John Eastman	- Chapman Law School
31.	Prof. Tom Bell	- Chapman Law School
32.	Prof. Daniel Klein	- Santa Clara University

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

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SCHOOL OF LAW
BOX 951476
LOS ANGELES CALIFORNIA 90095-1476

February 17, 2000

Senator Mitch McConnell
Senate Rules Committee
Attn: Andrew Siff
SR-305 Senate Office Building
United States Senate
Washington, D.C. 20510

Re Bradley Smith nomination

Dear Senator McConnell,

I write in support of the nomination of Bradley Smith to serve on the Federal Election Commission. My support is not based on either partisan or ideological grounds. To the contrary, I have been an active Democrat since 1970, whereas, as is well known, Smith's appointment to the FEC was proposed by Republicans. Anyone who compares Smith's writings on campaign finance regulation with mine will find that our views diverge sharply. Despite these differences, I believe Smith is highly qualified to serve on the FEC.

The difficulties that have affected the performance of the FEC since its creation have not been caused by the ideological views of its members, but by excessive partisanship and, sometimes, by mediocrity. Smith possesses integrity and vigorous intelligence that should make him an excellent commissioner. He will understand that his job is to enforce the law, even when he does not agree with it.

That the Senate Republican leaders should have proposed an individual who matches their ideological views on campaign finance regulation should not have surprised anyone. Law and custom assume that the members of the FEC will have different partisan and ideological backgrounds. In my opinion, though my views on the subject are not the same as theirs, these leaders deserve considerable credit for having picked a distinguished individual rather than a hack.

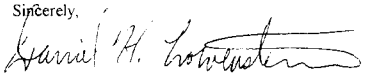
That Smith is indeed distinguished can hardly be doubted. He has published numerous articles on campaign finance regulation in distinguished law journals. These articles are widely recognized as leading statements of one of the major positions in the campaign finance debate. In 1995 I published the first American textbook of the twentieth century on election law (*Election Law*, Carolina Academic Press). Not long after the book was published, Smith published his first major article on campaign finance in the *Yale Law Journal*. With his permission, I included

extended excerpts from that article in the supplements that have been published for my textbook. I certainly would not have done so unless I regarded his article as intellectually distinguished.

It is understandable that in an area such as campaign finance regulation, whose effects are so far-reaching for all competitors in American politics, appointments should be highly contested. However, as I mentioned above, the system contemplates that individuals with different backgrounds and beliefs will serve on the FEC. Although many people, including myself, can find much to disagree with in Bradley Smith's views, I doubt if anyone can credibly deny that he is an individual of high intelligence and energy and unquestioned integrity. When such an individual is nominated for the FEC, he or she should be enthusiastically and quickly confirmed by the Senate. If such an individual is denied confirmation, the result inevitably will be to compound the already prevalent gridlock in this difficult area of public policy.

If I can provide any additional information I should be happy to do so. I can be reached at 310-825-5148, and at <lowenste@mail.law.ucla.edu>.

Sincerely,



Daniel H. Lowenstein
Professor of Law

January 4, 2000

NAME: Daniel H. Lowenstein

ADDRESS: 14038 Hamlin Street, Van Nuys, CA 91401

BIRTH DATE: May 10, 1943

SOCIAL SECURITY #:

EDUCATION:

A.B., Yale University, 1964
LL.B., Harvard Law School, 1967

PREVIOUS EMPLOYMENT:

Sheldon Travelling Fellowship, 1967-68
Attorney, California Rural Legal Assistance, 1968-71
Special Counsel and Deputy Secretary of the State of California, 1971-75
Chair, California Fair Political Practices Commission, 1975-79

UCLA SERVICE:

ACADEMIC AND ADMINISTRATIVE TITLES: (§7)

Acting Professor of Law, 1979-84
Professor of Law, 1984-

LAW SCHOOL COURSES TAUGHT: (§8)

Date	No.	Title	Units	Enrollment
Yr. 1979-80	130.	PROPERTY	6	§ 3 - 89
S 1980	321.	LEGISLATION	2	53
Yr. 1980-81	130.	PROPERTY	6	§ 4 - 101
F 1980	319.	POLITICAL PROCESS	2	23
S 1981	568.	SEM-POLITICAL THEORY	2	6
Yr. 1981-82	130.	PROPERTY	6	83
F 1981	319.	POLITICAL PROCESS	2	9
S 1982	130.	PROPERTY	3	78
S 1982	568.	SEM-POLITICAL THEORY	2	18
F 1982	130.	PROPERTY	3	§ 1 - 84
F 1982	319.	LAW & THE POLITICAL PROCESS	3	22
S 1983	130.	PROPERTY	3	§ 1 - 75
F 1983	130.	PROPERTY	3	§ 2 - 71
F 1983	500.	SEM-CONSTITUTIONAL LAW	3	9
F 1983	130.	PROPERTY	3	§ 2 - 65
S 1984	577.	SEM-LAW & THE POL. PROCESS	4	11
S 1984	130.	PROPERTY	3	78

Date	No.	Title	Units	Enrollment
F 1984	319.	LAW & THE POLITICAL PROCESS	3	32
S 1985	130.	PROPERTY	3	77
Yr. 1985-86		Sabbatical Leave		
F 1986	130.	PROPERTY	6	71
S 1987	201.	CONSTITUTIONAL LAW	4	63
F 1987	319.	LAW & THE POLITICAL PROCESS	3	16
S 1988	500.	CONSTITUTIONAL LAW II	3	36
F 1988	201.	CONSTITUTIONAL LAW II	3	60
F 1988	500.	SEM-CAMPAIGN FINANCE	3	16
S 1989		Leave of Absence (Taught at Cal Tech)		
F 1989	130.	PROPERTY	5	32
S 1990	201.	CONSTITUTIONAL LAW II	3	52
F 1990	130.	PROPERTY	5	29
S 1991	148.	CONSTITUTIONAL LAW I	4	87
S 1991	319.	LAW & THE POLITICAL PROCESS	3	20
F 1991	319.	LAW & THE POLITICAL PROCESS	3	14
S 1992	148.	CONSTITUTIONAL LAW I	4	81
S 1992	540.	SEM-LEGISLATIVE ADVOCACY (W/LIEBMAN)	3	13
F 1992	319.	LAW & THE POLITICAL PROCESS	3	18
F 1992	540.	SEM-LEGISLATIVE ADVOCACY (W/LIEBMAN)	3	12
S 1993		Leave of Absence		
F 1993		Leave of Absence		
S 1994	319.	ELECTION LAW	3	9
S 1994	321.	LEGISLATION	3	17
F 1994	319.	ELECTION LAW	3	7
F 1994	321.	LEGISLATION	3	16
S 1995	540.	SEM-LEGISLATIVE ADVOCACY (W/LIEBMAN)	3	9
W 1995	98C.	PROF. SCHOOLS SEMINAR PROGRAM	3	9
F 1995	319.	ELECTION LAW	3	17
F 1995	592.	SEM-SCANDAL & CORRUPTION	3	15
S 1996	321.	LEGISLATION	3	17
W 1996	98C.	PROF. SCHOOLS SEMINAR PROGRAM	3	7
F 1996	319.	ELECTION LAW	3	3
F 1996	321.	LEGISLATION	3	6
S 1997	540.	SEM-LEGISLATIVE ADVOCACY (W/SINCLAIR)	3	7
S 1997	585.	SEM-LAW AND LITERATURE	3	13
F 1997	319.	ELECTION LAW	3	7
F 1997	321.	LEGISLATION	3	11
S 1998	540.	SEM-LEGISLATIVE ADVOCACY (W/LIEBMAN)	3/2	14
S 1998	585.	SEM-LAW & LITERATURE	3/2	16
S 1998	585A.	SEM-AV LAW & LITERATURE	3/2	6
F 1998	321.	LEGISLATION	3	12
F 1998	540.	SEM-LEGISLATIVE ADVOCACY (W/ MARGOLIN)	3/2	12
S 1999	319.	ELECTION LAW	3	11

Date	No.	Title	Units	Enrollment
S 1999	585.	SEM-LAW & LITERATURE	3/2	12
F 1999	319.	ELECTION LAW	3	25
F 1999	585.	SEM-LAW & LITERATURE	3/2	12
S 2000		Sabbatical Leave		

LAW SCHOOL COMMITTEE MEMBERSHIP: (§9)

Standards Committee, 1979-80
Externship Committee, 1980-81; Chair, 1989-90
Placement Committee, Chair, 1981-82
Curriculum Committee, 1982-83
Library Committee, 1983-84; Chair, 1984-85
Computer Advisory Group, 1984-85
Appointments Committee, 1986-87; 1987-88; 1988-89 (F); 1990-91, 1995-96; Internal Appointments, 1998-99 (F), 1999-00 (F)
Search Committee for Head Law Librarian, 1987
Externship Committee, Chair, 1989-90; Chair, 1991-92; 1992-93 (F)
Public Interest, 1993-94 (S)
Public Interest and Loan Forgiveness, Chair, 1994-95
Faculty Colloquia, Co-Chair, 1996-98

LAW SCHOOL--OTHER SERVICE: (§10)

Member of Ad Hoc Committee on Olin Program, Summer 1984
Search Committee for Asian American Studies Center Appointment, 1989-90
Faculty Advisor, Pro Bono Society, 1994-95
Ad Hoc Committee for Tenure, 1998-99 (Chair); 1999-00

OTHER UNIVERSITY TEACHING: (§11)

Supervised law students' independent study courses, ongoing
Ph.D. Committees:
Priscilla Slocum, Political Science Department, 1983-85
Neal Glen Jesse, Political Science Department, 1993
Toshio Nagahisa, Political Science Department, 1993-94
David Jones, Political Science Department, 1996-1998
Robyn Wornall, Political Science Department, 1996-
Brian Lawson, Political Science Department, 1996-
Lucy Lee, Graduate School of Education, 1998-99 (Degree Awarded, Spring 1999)
Joe Doherty, Political Science Department, 1998-99
Taught undergraduate course in Communication Studies on Theory of Freedom of Speech, Winter 1988, Winter 1990

ACADEMIC SENATE COMMITTEE MEMBERSHIP: (§12)

Affirmative Action-Equal Opportunity Committee, 1981-84
Independent Substantive Review Committee, 1984-85
Academic Freedom Committee, 1984-85; 1998-99
Law School Representative to Senate Legislative Assembly, 1987-88
Member, Communications Studies Governing Committee, 1987-88

Charges Committee, 1994-95
Member, ad hoc panel of Charges Committee, 1998

OTHER UNIVERSITY SERVICE & ACTIVITIES: (§14)

Member, ad hoc committee regarding campus and university policy on patents, 1991-92
Member, Committee on the Master's Degree in Public Policy of the new School of Public Policy, 1994-95

ADDITIONAL ACADEMIC AND OTHER APPOINTMENTS: (§15)

Visiting Professor at Cal Tech, Spring 1989

SERVICE TO PROFESSIONAL SOCIETIES AND ORGANIZATIONS: (§17)

Common Cause National Governing Board, 1979-85
Co-director, Law and Political Process Study Group, 1983-
Board Member, Shakespeare Society of America, 1981-1990
Board Member, Americans for Nonsmokers Rights, 1980-1992
Co-founder and Management Committee Member, Law & Political Process Study Group, an affiliate of the American Political Science Association, 1984-
Executive Committee Member, National Lawyers Council of the Democratic National Committee, 1988-91
Advisory Board Member, Interact Theater Company, 1998-

SERVICE ON EDITORIAL BOARDS: (§18)

Reviewer: University of N. Carolina Press, 1987-88; Princeton University Press, 1991; University of Michigan Press, 1996-97
Reviewer for Manuscript, Social Science History, 1996

SERVICE TO EDUCATIONAL AND GOVERNMENTAL AGENCIES/CONSULTING SERVICES: (§19)

Spokesperson, "Yes on Proposition 10" Committee, California General Election, 1980
Served as public spokesperson for the "No on Proposition 39" campaign in the 1984 California general election
Provided legal consulting services to clients and others regarding election law, 1981-
Member of Steering Committee of National Redistricting project, 1988-91
Consultant to Calif. Atty. Gen. regarding Eu v. San Francisco Democratic Central Committee, 1988-89
Consultant to Commission on Ethics in L.A. City Government, 1988-89
Spokesperson, "No on 118 and 119" Committee, California Primary Election, 1990
Co-Chair, "No on 140" Committee, California General Election, 1990
Main author of amicus curiae brief filed in the United States Supreme Court on behalf of the California Democratic Party et al in the case of U.S. Term Limits v. Thornton, 1994
Sent by U.S. Information Service to Minsk, Belarus, to lecture on U.S. elections and electoral process, November 1-10, 1996
Co-counsel to two slate mail publishers, who challenged certain provisions of Proposition 208, the campaign finance initiative passed in 1996-

INVITED LECTURES, PAPERS AT MEETINGS AND SIMILAR ACTIVITIES: (§20)

"Campaign Spending and Ballot Propositions," paper delivered to Direct Democracy Panel at annual meetings of American Political Science Association, New York City, September 5, 1981

"California Initiatives and the Single Subject Rule," paper delivered to the Direct Democracy Panel at annual meetings of Political Science Association, Denver, Colorado, September 1982

Presented papers on bribery law to the International Political Science Association (1982) and the American Political Science Association (1983)

"The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?" (co-authored with Jonathan Steinberg), a paper presented to Law and Political Process Study Group at annual meetings of American Political Science Association, Washington, D.C., September 1, 1984

Testified as an invited expert before joint committee of the California legislature regarding the Gann legislative "reform" initiative (1984) and before the California Fair Political Practices Commission regarding regulation of campaign consultants (1985)

"The Ecology of the Japanese Electoral System," paper delivered to the Law and Political Process Study Group at the annual meetings of the American Political Science Association, Washington, D.C., August 28-31, 1986

"Bandemer's Gap: Gerrymandering and Equal Protection," paper delivered at the annual meeting of the American Political Science Association, Chicago, September 4, 1987

"Constitutional Rights of Major Political Parties: A Skeptical Inquiry," paper presented to American Political Science Association, September, 1988

"The First Amendment and Paid Initiative Petition Circulators," paper presented at conference entitled "From Gold Chips to Silicon Chips: The California Constitution in Transition," Hastings Law School (co-authored with Robert M. Stern), March 2-3, 1989

"Campaign Finance, Corruption, and Responsible Party Government, The Case of Inter-Candidate Transfers," paper presented at Annual Meeting, Mid-western Political Science Association, Chicago, Illinois, April 18-20, 1991

"A Patternless Mosaic: Campaign Finance and the First Amendment after Austin," paper delivered at the Symposium on Comparative Political Expression and the First Amendment, at Capital University Law and Graduate Center, Columbus, Ohio, November 7, 1991

"Incumbency and Electoral Competition," presented at the annual meeting of the American Political Science Association, Chicago, Illinois, September 1992

"Are Congressional Term Limits Constitutional?" presented at the annual meeting of the American Political Science Association, Washington, D.C., September 1993

Radio Broadcast, NPR Morning Edition, November 28, 1994. Re: Constitutionality of term limits to be argued before the U.S. Supreme Court

Television Appearance, KCET McNeil-Lehrer Newshour, November 28, 1994. Re: Constitutionality of term limits

"The Constitutionality of Congressional Term Limits: An Overview," presented at Cato Institute conference on term limits, Washington, D.C., December 1993

"Associational Rights of Major Political Parties -- A Political and Jurisprudential Dead End," paper presented to the short course on "Political Parties and the Law," held in conjunction with the annual meetings of the American Political Science Association, Chicago, Illinois, August 30-September 3, 1995

"When Is a Campaign Contribution a Bribe?" paper presented at annual meetings of Midwest Political Science Association, Chicago, Illinois, April 1996

"You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases," paper presented at annual meetings of American Political Science Association, San Francisco, California, August 29-September 1, 1996

Television Appearance, Channel 9 News, April 28, 1998. Re: Sheriff's election

"The Stealth Campaign: Experimental Studies of Slate Mail in California" (co-authored with Shanto Iyengar and Seth Masket), presented to the annual meetings of the American Political Science Association, Atlanta, Georgia, September 2-5, 1999

I wrote a short play that was read at the Play Development Lab of Interact Theater Co., May 1999

Pre-performance lectures at the California Shakespeare Festival, Orinda, California, 1997, 1999

BIBLIOGRAPHY

Books:

Election Law: Cases and Materials. Durham, NC: Carolina Academic Press (1995)

Articles and Reviews:

"A Role for Parties," in Money and Politics: Financing Our Elections Democratically 78-83 (Joshua Cohen & Joel Rogers, Eds., 1999)

"Election Law as a Subject--A Subjective Account," 32 Loyola (L.A.) Law Review 1199-1215 (1999)

"Election Law Miscellany: Enforcement, Access to Debates, Qualification of Initiatives," 77 Texas Law Review 2001-2021 (1999)

"Conflict and Corruption: Appearances and Reality," Western City (May 1999), at 10-12

"Election Law and Rules for Using Initiatives," (with Caroline J. Tolbert and Todd Donovan) in Citizens as Legislators: Direct Democracy in the United States 27-54 (Shaun Bowler et al., eds., 1998)

"Political Parties and the Constitution," in Voting Rights and Redistribution in the United States 83-117 (Mark E. Rush, ed., 1998)

"Race and Representation in the Supreme Court," in Voting Rights and Redistribution in the United States 49-81 (Mark E. Rush, ed., 1998)

"You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases," 50 Stanford Law Review 779-835 (1998)

"A Role for Parties," 22 Boston Review 15-16 (April/May 1997)

"Associational Rights of the Major Political Parties: A Political and Jurisprudential Dead End," 16 American Review of Politics 351-370 (1995)

"Campaign Contributions and Corruption: Comments on Strauss and Cain," 1995 University of Chicago Legal Forum 163-192 (1995)

"Are Congressional Term Limits Constitutional?" 18 Harvard Journal of Law & Public Policy 1-72 (1994)

Book Chapter, "Congressional Term Limits and the Constitution," in The Politics and Law of Term Limits 125-140 (Edward H. Crane & Roger Pilon, eds., 1994)

"The Failure of the Act: Conceptions of Law in The Merchant of Venice, Bleak House, Les Misérables, and Richard Weisberg's Poethics," 15 Cardozo Law Review 1139-243 (1994)

"Associational Rights of Major Political Parties: A Skeptical Inquiry," 71 Texas Law Review 1741-92 (1993)

Book Chapter, "American Political Parties," in Developments in American Politics, at pp. 63-85 (G. Peele, C. Bailey, B. Cain, eds., New York: St. Martin's, 1992)

"A Patternless Mosaic: Campaign Finance and the First Amendment after Austin," 21 Capital University Law Review 381-427 (1992)

Book Review of Hadley Arkes, Beyond the Constitution, 518 Annals of the American Academy of Political & Social Science 202-3 (1991)

"A Democratic Perspective on Legislative Districting," (with Ronald H. Brown), 6 J. of Law and Politics 673-81 (1990)

"Bandemer's Gap: Gerrymandering and Equal Protection," at pp. 64-116 in Political Gerrymandering and the Courts (B. Grofman, ed.), New York: Agathon Press, 1990

"On Campaign Finance Reform: The Root of All Evil is Deeply Rooted," 18 Hofstra Law Review 301-367 (1989)

"The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal," 17 Hastings Constitutional Law Quarterly 175-224 (co-authored with Robert M. Stern), 1989

"'Too Much Puff': Persuasion, Paternalism, and Commercial Speech," 56 University of Cincinnati Law Review 1205-1249 (1988)

Contributor, Encyclopedia of the American Constitution (edited by Kenneth L. Karst, Leonard W. Levy, et al., New York: MacMillan, 1986)

"For God, For Country, or For Me?" 74 California Law Review 1479-1512 (1986) (book review of John T. Noonan, Jr., Bribes [1984])

"The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?" 33 UCLA Law Review 1-75 (1985) (co-authored with Jonathan Steinberg)

"Political Bribery and the Intermediate Theory of Politics," 32 UCLA Law Review 784-851 (1985)

Comments on Magleby, "Researching California's Direct Democracy," in Institute of Governmental Studies, Conference Report: Conference on Research Needs in California Government and Politics, May 11-12, 1984, pp. 196-204 (University of California, Berkeley)

"California Initiatives and the Single-Subject Rule," 30 UCLA Law Review 936-975 (1983)

"Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment," 29 UCLA Law Review 505-641 (1982)

"Need for Reform as Great as Ever," 10 California Journal 103-05 (1979)

"Neighborhood Law Offices: The New Wave in Legal Services for the Poor," 80 Harvard Law Review 805-50 (1967) (Co-author)

"Disqualification of Judges for Bias and Prejudice in the Federal Courts," 79 Harvard Law Review 1435-52 (1966)

Other:

"Can States Prevent Candidates from Appearing on the Ballot under More than One Party Label?" West's Legal News, 12-6-96 WLN 13038, 1996 WL 694945 (1996) (on-line publication)

"Campaign Finance and the Constitution," and "Legislative Districting," Social Science Working Papers, Division of the Humanities and Social Sciences of the California Institute of Technology (1989); also published in Political Parties and Elections in the United States: An Encyclopedia, L. Sandy Maisel, ed., (Garland, 1991)

"Oral History Interview with Daniel H. Lowenstein." Los Angeles: UCLA Oral History Program, for the State Government Oral History Program, California State Archives (1989). Interviewed by Carlos Vasquez.

Excerpts of "Political Bribery and the Intermediate Theory of Politics," (32 UCLA Law Review 784-851 1985) published in "Political Corruption," (2d ed.), edited by A. Heidenheimer, M. Johnston, & V. Levine (1988)

Principal Draftsman, Political Reform Act of 1974 (Prop. 9) (on-line publication)

February 15, 2000

Hon. Mitch McConnell
Chair, Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Re: ***Nomination of Professor Bradley A. Smith for Commissioner on Federal Election Commission***

Dear Senator McConnell:

I am writing in support of Professor Bradley A. Smith's nomination for a position as a Commissioner on the Federal Election Commission. I have known Brad since he joined the faculty of Capital Law School in the Fall of 1993 as a visiting professor, and have served as the chair of his committee for purposes of considering his tenure and promotion, most recently to Full Professor. He is, in my view, an outstanding candidate for the position and should certainly be confirmed.

As a friend and colleague of Brad's, I am of course aware of the controversy surrounding his nomination to a position on the FEC. Indeed, as a former governing board member for Common Cause, Ohio, I can understand why groups seeking to expand campaign regulations dramatically might have misgivings about Brad's nomination. However, I believe that much of that opposition is based not on what Brad has written or said about campaign finance regulations, but on crude caricatures of his ideas that have been circulated.

Although I do not agree with all of Brad's views on campaign finance regulations, I believe that his scholarly critique of these laws is cogent and largely within the mainstream of current constitutional thought. I have taught Constitutional Law at Capital Law School for nearly thirteen years. I was also counsel for *amicus curiae*, the ACLU of Ohio, in a significant case dealing with the intersection of the First Amendment and election law, *Pestrak v. Ohio Elections Commission*, 926 F2d 573 (6th Cir. 1991).

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Brad's central premise, that limits on political contributions burden expression and should only be upheld for the most compelling reasons, is hardly radical. It has long been a basic tenet of the Supreme Court's First Amendment jurisprudence that the amount and content of speech cannot be limited except for the most important reasons. Brad's writings do question the Supreme Court's conclusion in *Buckley v. Valeo* that the government's interest in preventing the appearance of corruption is sufficient to outweigh the burden campaign finance regulations place on speech. However, this critique is not outlandish, but calls attention to the one of the obvious tensions in *Buckley* that in my view ought to be continuously reexamined by courts and scholars if the basic values underlying the First Amendment are to be adequately protected.

Moreover, having come to knowing Brad personally, I have no doubt that his critics are wrong in suggesting that as a FEC Commissioner, Brad would refuse to enforce federal campaign regulations because he disagrees with the laws. I have observed Brad's Election Law class on several occasions and he always took the task of educating his students about the meaning and scope of election laws very seriously. I have never observed him denigrating or advocating skirting state and federal election laws, even though he may have personally disagreed with some of those laws. Indeed, several times in class he admonished students who seemed to be suggesting ignoring what they considered overly harsh election laws. Brad is an ethical attorney who cares deeply about the rule of law. I am confident that he will fairly administer the laws he is charged with enforcing as a Commissioner.

In conclusion, I think that the FEC and the country in general will benefit from Brad's diligence, expertise, and solid principles if he is confirmed to serve on the Commission. Please contact me if I can provide additional information or assist the Committee in any way regarding Brad's nomination.

Very Truly Yours,

Daniel T. Kobil

Daniel T. Kobil
Professor of Law

UNIVERSITY OF VIRGINIA
CHARLOTTESVILLE, VIRGINIA 22903
TELEPHONE 804-924-5192

WOODROW WILSON DEPARTMENT
OF GOVERNMENT AND FOREIGN AFFAIRS
232 CABELL HALL

WRITER'S DIRECT LINE

March 1, 2000

U.S. Senator Mitch McConnell
Chairman,
Senate Rules Committee
SR 305 Russell Building
United States Senate
Washington, D.C 20510

Attention Andrew Siff

Dear Senator McConnell:

I am pleased to write this letter in support of Professor Bradley Smith's nomination to the Federal Election Commission. I believe Professor Smith is a solid and informed choice for the vital federal agency at a critical moment in its history. I am pleased to be able to add my voice to many who support Professor Smith.

My own credentials in this field are outlined in the attached vita. I have published several books and many articles in the field, including *Pac Power: Inside the World of Political Action Committees*, *Paying for Elections*, and *Dirty Little Secrets*. In addition, I was honored and privileged to serve on the U.S. Senate's campaign finance reform panel back in 1990, having being jointly appointed by then-majority leader George Mitchell and minority leader Robert J. Dole.

Contrary to some of the misinformed commentary about Professor Smith's work and views, his research and opinions in the field of campaign finance are mainstream and completely acceptable. For example, Professor Smith has argued in several of his academic papers for a kind of deregulation of the election rules in exchange for stronger disclosure of political giving and spending. This is precisely what I have written about and supported in a number of publications as well. Bradley certainly supports much of the work of the Federal Election Commission and understands its importance to public confidence in our system of elections. I have been greatly disturbed to see that some are not satisfied to disagree with Professor Smith and make those objections known, but believe it is necessary to villify the professor in almost a McCarthyite way. I do not use that historically hyper-charged word lightly, but it applies in this case. Any academic with a wide-ranging portfolio of views on a controversial subject could be similarly tarred by groups on the right or left. I hope and trust that under your able leadership, the Senate Rules Committee will not give in to this kind of vicious sloganeering and character assassination.

I should note that I don't completely agree with Professor Smith's views and opinions in all respects. Even though we have our differences, I fully respect his scholarship and the clear argumentation and documentation that undergirds it. I have not been a long acquaintance of Professor Smith so I cannot be accused of simply backing an old chum! Instead, I am supporting Bradley Smith because he is fully qualified for the Federal Election Commission and I believe that he will do an outstanding job, putting in long hours and thoroughly analyzing the complicated subjects that come before the Commission. I trust him to fulfill his public responsibilities with great care and a determination to be fair and honest. That is all one can reasonably ask from a nominee.

Thank you for permitting me the opportunity to offer these observations. Please let me know if I can be of any additional help as Professor Smith's nomination moves forward, as it should.

With every good wish.

Yours respectfully,
Dr. Larry J. Sabato

Dr. Larry J. Sabato

Robert Kent Gooch Professor
Of Government and Foreign Affairs;
and Director of the University of
Virginia Center for Governmental
Studies

UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Lillian R. BeVier
Doherty Charitable Foundation Professor of Law and
Class of 1948 Professor of Scholarly Research

February 18, 2000

Honorable Mitch McConnell
Committee on Rules & Administration
Senate Russell 305
Washington, D.C. 20510

Dear Chairman McConnell:

It is a great pleasure for me to write to you about Professor Bradley A. Smith, who has been nominated by President Clinton to become a member of the Federal Election Commission

I write because I believe I have some standing to offer a judgment about the merits of Professor Smith's appointment. In hopes of persuading you to agree with me on this point, I have listed in a footnote the titles of several law review articles and other works that I have written on the subject of campaign finance regulation and the First Amendment.[1] In preparing these articles, I have become familiar with both the scholarly literature and the terms of the political debate about the topic.

Professor Smith has made major contributions to the scholarly literature and to the more general debate (I will not list his many articles, since I am sure you and the other members of the Committee are familiar with them.) His work, carefully argued and supported by rigorous research, has enriched and enlivened the discussion. He has staked out a position that takes resolute account of First Amendment principles in both analyzing proposals for new regulations and describing the effects that extant regulatory regimes have actually had on election campaigns and candidates.

Professor Smith's concern to protect First Amendment freedoms has been a constant theme of his work. It is my understanding that there are those who are inclined to characterize this concern as somehow "out of the mainstream" of views about campaign finance regulation. I assure you that, quite to the contrary, Professor Smith's work is very much in the mainstream. This is not to say, of course, that everyone agrees with Professor Smith's analysis: the reason that this is a "debate" is that scholars and political actors have not yet managed to achieve consensus on some of the important issues. But to say that Professor Smith has written academic articles with which not everyone agrees is a very far cry from offering support to the proposition that his views are not in the "mainstream." Indeed, the very idea that defending the First Amendment puts one beyond the pale is frankly absurd on its face: the *Buckley* case itself was of course decided almost entirely on First Amendment grounds, and serious participants in post-*Buckley* campaign finance regulation discussions have always understood that new regulatory proposals would face serious First Amendment scrutiny. Indeed, recently two highly-regarded legal academics whose work on voting rights generally falls to the left-of-center noted that "[p]olitical expression in the electoral arena is...*at the very heart of expression on matters of self-governance.* Nowhere else should the

[1] *The Issue of Issue Advocacy: An Economic, Political and Constitutional Analysis*, 85 VA. L. REV. 1761 (1999); IS FREE TV FOR FEDERAL CANDIDATES CONSTITUTIONAL (AEI Press 1998); *Campaign Finance "Reform" Proposals: A First Amendment Analysis* (CATO Institute 1997); *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 501 (1994); *Money and Politics: The First Amendment and Campaign Finance Reform*, CALIF. L. REV. 1045 (1985).

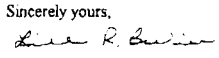
580 Massie Road • Charlottesville, Virginia 22903-1789 • 804.924.3132 • FAX 804.924.7536 • e-mail: irb5s@virginia.edu.

hand of government be viewed with such distrust."[2] Thus to cast aspersions on one who has argued that strict First Amendment scrutiny of such regulations is appropriate, and who has offered reasons and evidence to support his arguments, is unfairly to obscure the issue of his qualifications rather than to shed light on them.

In my view, Professor Smith is eminently qualified for the position to which he has been nominated. He has built an impressive scholarly record for himself in the course of his relatively brief career, and has earned a reputation for integrity, dedication, and competence. I believe that Professor Smith will serve the Federal Election Commission with diligence and great distinction. He certainly deserves to be confirmed.

Thank you for giving me the opportunity to present these views to you. I hope you will feel free to share them with the Committee.

Sincerely yours,



Lillian R. BeVier

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[2] Samuel Issacharoff and Pamela S. Karlan, *The Hydralics of Campaign Finance Reform*, 77 TEXAS L. REV. 1705, 1712 (1999)(emphasis supplied).

CHARLES FRIED
1525 Massachusetts Avenue
Cambridge, MA 02138

February 29, 2000

Chairman Mitch McConnell
Senate Rules and Administration Committee
Russell Building #305
Washington, DC 20510

Dear Chairman McConnell:

I do not know Professor Smith nor his work. I address only the proposition that because he has been critical of the Commission to which he has been nominated and some of the laws which it administers he is somehow disqualified for confirmation to the post of Commissioner. This argument is not only dangerous, but so far-fetched, so out of line with historic practice, that it is hard to believe it is not being deployed strategically only, and that those who urge it in this case would not repeat it were they more in sympathy with the nominee or his philosophical orientation.

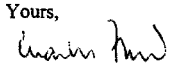
First let me state an obvious point. Anyone appointed as an officer of the United States takes an oath to administer the law fairly and in all good faith. If there is some reason to believe that a candidate is not an honorable person, not a person of good character, then he should certainly be denied confirmation for that reason. But only a person of bad character would take on such a position with the intention of sabotaging the law he is bound to administer. I could cite dozens of examples of persons—judges, prosecutors, military officers—nominated to administer laws they have felt no enthusiasm for as a matter of policy. It happens every time there is a change of administration and laws enacted by previous administrations are left to be administered by a new one. I can think of no more dramatic example than Kenneth Starr, who I believe thought the independent Counsel statute to be unconstitutional, as did most of us in the Reagan and Bush administrations. Yet no one would say that Judge Starr showed insufficient zeal in administering that law.

As I say, this much is obvious. What is left is that every law, and particularly every law which is turned over to an administrative agency for its implementation, leaves open a large field for interpretation and judgment. Within that field reasonable men and women of good faith will and should be expected to differ. That is why they are chosen in an overtly political process, with a balance of Republicans and Democrats, so that diverse perspectives will be represented and enter into the process which leads to their ultimate accommodation. The arguments deployed against Mr. Smith seem to me a barely disguised attempt to stack the deck by denying representation to those who are

more skeptical about the way in which the law has been administered or whether it represents sound public policy. If they are persons of honor and competence, we want some persons like that in administrative posts.

Finally, if these arguments against Mr. Smith should prevail it would have two dangerous consequences. It would limit more and more the administration of laws to zealots. And it would inhibit robust debate about the wisdom of laws, by using views expressed in such debates as weapons used deny the opportunity for public service on the basis of those views. The first danger would give us an administration of zealots; the second an administration of malleable non-entities.

Yours,



Charles Fried
Beneficial Professor of Law
Harvard Law School

UNIVERSITY OF CALIFORNIA

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

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SCHOOL OF LAW (BOALT HALL)
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March 2, 2000

Chairman Mitch McConnell
Senate Rules and Administration Committee
305 Russell Senate Building
United States Senate
Washington, D.C. 20510

Re: Nomination of Professor Bradley A. Smith to the Federal Election Commission

Dear Chairman McConnell:

I am writing to comment on the nomination of law professor Bradley A. Smith to the Federal Election Commission. I am a professor of law at the University of California at Berkeley School of Law (Boalt Hall), where I teach constitutional law, separation of powers law, legislative and administrative process, and foreign affairs law. I have also served as General Counsel to the Senate Judiciary Committee, where I worked on the nominations of federal judges and of appointees to the Justice Department. I have written extensively on the nominations process that applies to federal judges.[1] Over the years, I have had the honor and pleasure of advising several different congressional committees and members of Congress on different constitutional issues.

I do not know Professor Smith nor am I an expert on election law, but I am familiar with the general contours of his work and with the First Amendment issues involved with campaign finance. More importantly, I have studied the nominations process and have thought in great detail about the standards that should guide the appointment of judges and officers to federal office. I understand that Professor Smith has been criticized as an unsuitable nominee because of his criticism that certain federal regulations on campaign finance violate the First Amendment. I also understand that his nomination has been criticized because he holds a restrained approach toward the FEC's enforcement of the federal elections laws.

I believe that the concern that Professor Smith would be an unsuitable commissioner

[1] See John C. Yoo, *Criticizing Judges*, 1 Greenbag 2d 277 (1998); John C. Yoo, *Picking Justices*, 98 Mich. L. Rev. (forthcoming 2000).

Senator McConnell
March 1, 2000

because of his academic views is unfounded. Professor Smith's views are not outside of the scholarly mainstream; in fact, his writings appear to me to be very much within the traditional approach that legal scholars bring to constitutional problems. His publication record in such fine journals as the *Yale Law Journal* speaks to the quality of his work.

It is perhaps true that Professor Smith does not agree with all of the FEC's interpretations of the federal election laws or with all of the FEC's enforcement decisions. I would be surprised if Professor Smith or any other nominee to the FEC did. It would be extremely troubling if Senators considered nominees to be qualified for their position only if they agreed with an agency's every interpretation and every decision. If the Senate wants individuals with the best minds and character to serve in the federal government, it must confirm those who have thought critically and carefully about the mandate and activities of the agencies. Otherwise, the Senate will turn the administration of the laws over to individuals whose only goal is to expand the power of their agencies. Rather than something to be held against him, the fact that Professor Smith has expressed doubts about the FEC's activities is the welcome sign of a critical, independent mind.

Imagine the unfortunate policy implications that would arise were the Senate to adopt the notion that it could only confirm individuals who did not disagree with their agency. Should the Senate refuse to confirm any judge who does not agree, on the merits, with every decision of the Supreme Court? Should the Senate refuse to confirm any judicial nominee who believed in judicial restraint, or whose instincts rested on the idea that the judiciary ought to exercise its powers of judicial review only sparingly? There can be little doubt that the Senate should not refuse to confirm such nominees simply because they believe that their agency or institution should exercise its powers in a restrained manner. Such views, in fact, are more respectful of the policymaking authority of Congress and of the democratic process. It seems to me that Professor Smith's views give more respect to Congress, to the democratic process, and to the Constitution, than to the policy agenda of the FEC or its commissioners. This is an entirely desirable thing.

There is even more reason for the Senate to confirm individuals with views of restraint to positions in an independent agency such as the FEC. As you know, agencies such as the FEC are substantially independent of presidential direction, due to the conditioned removal provisions for commissioners, in a way that true executive agencies are not. Yet, at the same time, these independent agencies perform certain core executive functions, such as bringing enforcement actions under federal law. Generally, we want prosecutorial discretion -- the freedom to choose which suits to bring and not bring -- to lie in the executive branch because the President is electorally accountable for his or her decisions. Prosecutorial discretion also provides a checkon the unjust enforcement of unconstitutional laws. As Thomas Jefferson said of the Alien and Sedition laws: "the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution," even if the courts believed the law to be constitutional. Due to its independence, however, the FEC does not take its direction from the Chief Executive. Therefore the diversity of policy views held by the commission's members becomes even more important in playing a restraining role on agency action. Otherwise, as many academic studies have concluded, the natural tendency of agencies

Senator McConnell
March 1, 2000

to constantly seek to expand their powers will predominate. In order for an independent agency to perform its function in a balanced, fair manner, it must have members like Professor Smith who have thought critically about the nature and functions of the agency.

I hope that these views help to address any concerns that might exist concerning the relationship between Professor Smith's views and his suitability as a nominee to the FEC. Again, it seems to me that Professor Smith would make a fine nominee to the Commission and I urge the Committee and the Senate to approve his nomination. Please do not hesitate to contact me if I can provide further assistance.

Best wishes,

John Yoo

John Yoo
Professor of Law

Yale Law School

February 18, 2000

Senator Mitch McConnell, Chair
Committee on Rules and Administration
SR 305 Russell Building
United States Senate
Washington, D.C. 20510
202-224-3036 Fax

Dear Senator McConnell:

I am writing to you in strong support of Professor Brad Smith's nomination to the Federal Election Commission. Professor Smith's research is widely respected among academics both here at the Yale Law School and the University of Chicago, where I was at until last summer. His papers in the 1996 Yale Law Journal on the impact of campaign finance reform and the 1996 Cornell Journal of Law and Public Policy on "corruption" that arises from campaign donations are required reading. He has written eight major academic articles on campaign finance rules and he is currently in the process of writing a widely anticipated book from the Princeton University Press.

Professor Smith is not an economist, but he has done an excellent job of applying public choice arguments to campaign finance issues and I am sure that the vast majority of economists and political scientists who work in the area would agree with what he has written. In fact an open letter that was signed last summer by 46 economists and political scientists raised the exact same concerns about campaign finance reform that Professor Smith has raised in the past. Many of these signers were past presidents of the Public Choice Society. If Professor Smith can be faulted for anything, he has been more cautious in his conclusion in this area than I think is warranted.

What is generally regarded as Professor Smith's most controversial statement, that fears about the corrupting effects of contributions on the legislature have been substantially overstated, is in fact supported by my own empirical research. Indeed, Professor Smith has simply been reporting what the research in this area has been showing.

Sincerely,

John R. Lott, Jr.
Senior Research Scholar

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617/353-3112
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Ronald A. Cass
Dean and Melville Madison Bigelow
Professor of Law

February 15, 2000

Honorable Mitch McConnell
Chairman, Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Chairman McConnell:

I am writing to urge the Senate to confirm Bradley Smith as a member of the Federal Election Commission. I have met Mr. Smith only once and do not have any real personal knowledge of him. I do, however, know his work. Although I am not an expert on campaign finance regulation, I believe I understand the basic issues confronting the FEC and the qualifications necessary for members of the FEC. I have been a member of the commission overseeing the Massachusetts Office of Campaign and Political Finance and have written about campaign finance from the perspective of one generally familiar with Constitutional Law and with the theoretical underpinnings for campaign finance regulation. I have served as a member of a federal agency (the United States International Trade Commission) and as Chair of the American Bar Association's Administrative Law Section (which has a prominent and active election law committee). And I have taught and written about Administrative Law, Constitutional Law and First Amendment topics.

I strongly believe that Bradley Smith will bring substantial scholarly credentials and a valuable perspective to the work of the FEC. Mr. Smith is a serious scholar who has contributed significantly to the debate over campaign finance. Mr. Smith certainly is not one who has added a "me too" voice to the dominant line of writing about campaign finance regulation. Indeed, he is out of step with many of the writers who have contributed to this debate. As a matter of policy, he does not favor most of the controls over campaign finance that have been tried over the past two decades or that are being advocated as additional strictures. Mr. Smith's belief that many components of current law are not the best policy, of course, does *not* mean that he would fail to enforce the law as written. Nothing in his background or his writing would suggest that. Mr. Smith's disagreement with some facets of campaign finance regulation is not a reflexive one. It is based on critical examination of the effects of campaign finance regulation and on careful analysis of the arguments advanced in support of campaign finance regulation. Even those who disagree with him should find that Mr. Smith's positions are well-reasoned. Including a scholar of his stature on the FEC should make a significant contribution to fulfillment of the Commission's mission. That he approaches that mission with some skepticism, rather than zealotry, should be salutary—democratic interests seldom are harmed by the judicious application of public power.

I hope that Mr. Smith will be confirmed promptly. Please let me know if further information would be helpful.

Sincerely,

Ronald A. Cass

Boston University

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Fax: 617/353-3077
Internet: rbarnett@bu.edu

Randy E. Barnett
Austin B. Fletcher Professor

February 13, 2000

Senator Mitch McConnell
Chair, Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator McConnell:

I am writing to strongly urge the Senate to confirm the nomination of Brad Smith as a commissioner on the Federal Communications Commission. I have known Brad well since he was a student at Harvard Law School, and have followed his academic career closely, and can tell you and your colleagues that he is a person of the highest character and integrity. If confirmed, Brad will faithfully execute the election laws which the Commission is charged to enforce—including those with which he disagrees—and he will also take seriously the rights guaranteed by the Constitution.

Though election law is not my specialty, I am generally familiar with Brad's writings in the field and I have written extensively on the Constitution and, in particular, the constitutional protection of liberty. I believe that Brad's positions on federal election laws in general, and campaign finance laws in particular, are far more consonant with the requirements of both the First Amendment and the Supreme Court's first amendment jurisprudence than are the views of his critics. These critics would deny public office to anyone who disagrees with their views of good policy, or to anyone who believes in reforming existing law in a manner with which they disagree.

I share Brad's policy view that the goal of free, fair, and competitive elections would be better served with less rather than more regulation of elections. But I have no doubt whatsoever that he will vigorously enforce current law. Indeed, in recent years, we have seen wholesale and flagrant violations of current election laws which have gone largely unenforced by the FEC and the Justice Department. Brad's critics need not fear that he will ignore current law, but those who violate it may have reason to be apprehensive.

Sincerely,

Randy Barnett

Randy E. Barnett
Austin B. Fletcher Professor

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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405 HILGARD AVENUE
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Senator Mitch McConnell, Chair
Committee on Rules and Administration
SR 305 Russell Building
United States Senate
Washington, D.C. 20510

February 16, 2000

Dear Members of the Committee:

I am a professor of law at UCLA School of Law, and I teach and write about free speech law. I write this letter to express my delight that President Clinton has nominated Professor Brad Smith to the FEC, and to urge you to promptly confirm him.

I do not know Professor Smith well personally, but I know his work, and I think it is extremely thoughtful, important, and respected; he is truly a leading voice in election law scholarship. Even people who disagree with him—as I do in some measure—have to acknowledge the strength of his arguments, and the value of the contributions he has made to the field. His work is both well within the mainstream of American legal thinking (an important thing in a profession that too often values the shocking and the novel simply for the sake of shock and novelty) and at the same time always creative and original.

My professional interactions with Professor Smith, and what I know of his reputation, also convince me that he will serve with the highest integrity and respect for the law. He knows that an FEC commissioner's duty is to enforce the law, not to implement his own preferences; and I am certain that he will do his duty splendidly.

It is genuinely heartening to see a thinker of Professor Smith's caliber being proposed for this post. Our government needs more people like him.

Please let me know how I can be of any further help on this matter.

Sincerely Yours,

Eugene Volokh

Michael W. McConnell
Presidential Professor
College of Law

(801) 581-6342
Fax: (801) 585-5288
mcconnellm@law.utah.edu

February 15, 2000

Senator Mitch McConnell, Chair
Committee on Rules and Administration
SR-305 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator McConnell:

I understand that some opponents of the nomination of Bradley A. Smith to the Federal Elections Commission are claiming that his scholarly writings regarding the First Amendment and campaign finance laws are irresponsible or otherwise beyond the pale. This is simply partisan nonsense. As a professor of constitutional law and scholar in the field of the First Amendment, I can assure you that Professor Smith's writings are entirely within the range of responsible commentary. Indeed, his writings are often cited by opponents and proponents alike, and are the center of this very important debate over the meaning of freedom of speech in the context of election campaigns. These are difficult and important issues, and Smith's writings have contributed significantly to our understanding of them. The merits of his nomination should not be clouded by charges of this sort, which have no scholarly validity.

Very truly yours,

Michael W. McConnell
Presidential Professor

College of Law
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L.A. Scot Powe, Jr.
Anne Green Regents Chair
Professor of Law Professor of Government

February 14, 2000

Dear Chairman McConnell:

I am writing concerning the First Amendment view of Professor Bradley Smith on campaign finance. I feel qualified to do so because I have specialized in First Amendment law at The University of Texas ever since I completed a clerkship with Justice William O. Douglas of the United States Supreme Court twenty-nine years ago. I have written three books and numerous articles on the First Amendment. One of the articles, published in the Supreme Court Review, was one of the first by a law professor on campaign finance issues.

As you undoubtedly know, a majority of constitutional law scholars believe that one facet of Buckley v. Valeo is wrong and another facet is correct. Professor Smith also agrees on facet is wrong and another correct, but he differs from the concensus on both issues. My writings reflect the view that Buckley was correct on all issues. Whichever of these views is accepted, the contrary position cannot be deemed beyond the constitutional pale. Every possible position on the issues in Buckley has had serious champions. Indeed, had Justice Douglas not retired two months before Buckley came down, he would have voted exactly as Professor Smith holds the First Amendment to require - and Douglas remains the greatest civil libertarian to grace the Court.

I know there is serious opposition to Professor Smith's appointment to the Federal Election Commission. In our great country people have the constitutional right to oppose people for believing too much in the Constitution. But it will be a sad day indeed when the grounds for rejecting someone for a governmental position are that he believes too strongly in the First Amendment.

Thank you for your consideration.

Sincerely yours,

Senator Mitch McConnell
Committee on Rules and Administration
SR 305
United States Senate
Washington, DC 20510

Attn: Andrew Siff, Counsel

UNIVERSITY OF CINCINNATI
COLLEGE OF LAW

Michael E. Solimine
Donald P. Klekamp Professor of Law

Cincinnati, Ohio 45221-0040
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fax: (513) 556-1236
e-mail: Michael.Solimine@law.uc.edu

February 15, 2000

Honorable Mitch McConnell
United States Senate
Chairman, Committee on Rules & Administration
Attention: Andrew Siff
SR-305, Russell Building
Washington, DC 20510

Re: Nomination of Bradley Smith to the Federal Election Commission

Dear Senator McConnell:

President Clinton has nominated Professor Bradley Smith for a position on the Federal Election Commission (FEC), and I am writing in support of his conformation.

I am a law professor at the University of Cincinnati and have written about a variety of election law issues, and have followed legal and policy developments in that field, including but not limited to the issue of campaign finance reform. I have met and conversed with Brad Smith on these issues, and read his scholarly writings on these topics. His writings show him to be extraordinarily well-qualified for this position, given his expertise on the often complicated but important issues of election law.

Some of the apparent opponents for this position have argued that Prof. Smith's positions are somehow "extreme." This charge is flatly wrong. Of course it is no secret that in his writings Prof. Smith has taken the position that both sound policy and the rights of freedom of expression guaranteed by the First Amendment argue that there should be only minimal regulation on campaign fund raising, coupled with open disclosure of contributions. In his writings, he has made these arguments in careful, fair, and scholarly ways, acknowledging and discussing the arguments against his position. The depth and excellence of his scholarly writings on this subject is reflected in the fact that these articles have been selected for publication in extremely prestigious law reviews, including the Yale Law Journal and the Georgetown Law Journal.

Indeed, Prof. Smith's articles were cited in the U.S. Supreme Court's decision last month on campaign finance reform, in both the majority opinion by Justice Souter and the dissenting opinion by Justice Thomas. Nixon v. Shrink Missouri Government PAC, 68 U.S.L.W. 4102, 4106, 4116 (U.S. Jan.24, 2000). This is still more proof, if proof is necessary, that Prof. Smith's positions are taken seriously by all careful discussants in the field, and has contributed to and advanced public discourse on

these issues. I certainly believe this, even though I don't necessarily agree with all of his views, though I have sympathy with many of them.

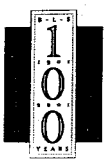
Prof. Smith has told me, and has stated publicly, that he believes in the rule of law, and would of course apply and follow the mandates of federal election as it now stands, even where it departs from the views he has expressed in his articles. I have no reason to disbelieve him, and of course his actions as an FEC commissioner will speak for themselves. It is certainly odd and disturbing that some organizations, that profess to be supporting freedom of expression, are now, by their opposition to his nomination due to his views, seeking to suppress a diversity of viewpoints.

Prof. Smith will make an excellent FEC commissioner. I strongly support his nomination and I hope he is confirmed.

Regards,

Michael Solimine

Michael E. Solimine
Donald P. Klekamp Professor of Law



BROOKLYN LAW SCHOOL

JOEL M. GORA
Professor of Law

February 15, 2000

Honorable Mitch McConnell
Committee on Rules and Administration
United States Senate
305 Senate Russell Office Building
Washington, D.C. 20510

Dear Senator McConnell:

I am writing in strong support of the appointment of Professor Bradley A. Smith to the Federal Election Commission. Professor Smith is one of the nation's leading experts on campaign finance law and particularly on the critical relationship between campaign finance restrictions and First Amendment rights. It is hard to imagine finding a more knowledgeable person to serve on that Commission.

I would particularly like to take the opportunity to respond to some of the assertions by so-called campaign finance reform groups that Professor Smith's views on the First Amendment problems posed by campaign finance controls render him some kind of an ideological "extremist" hopelessly beyond the mainstream of responsible academic commentary on campaign finance laws. Nothing could be further from the truth.

Professor Smith is widely regarded as one of the most thoughtful, knowledgeable and intellectually honest academic commentators in the field, even by scholars who challenge his views. In less than a decade, he has become one of the most prominent, prolific and respected campaign finance scholars in the country. His extensive writings are models of academic analysis and intellectual integrity which deal openly and honestly with the complex constitutional, political and public policy questions that make the campaign finance dilemma so intractable. His thoughtful and widely-cited articles have appeared in the pages of such prestigious scholarly journals as the Georgetown Law Journal, the Yale Law Journal and, just recently, the University of Pennsylvania Law Review - hardly hotbeds of right-wing radicalism.

Indeed, far from being "radical" or "extreme," Professor Smith's views on the severe First Amendment problems posed by overly broad campaign finance controls have prevailed in the courts far more often than the truly extreme anti-free speech positions of many of his academic and "reform" opponents. On at least six occasions since the Supreme Court's

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landmark decision in Buckley v. Valeo, 424 U.S. 1 (1976), the Court has struck down campaign finance controls as violating the First Amendment. Many lower court rulings have followed suit.

In recent years, this trend has included a 1996 Supreme Court ruling that limitations on expenditures by political parties are unconstitutional, see Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) and a 1999 ruling that certain financial disclosure requirements for petition circulators violate the First Amendment, see Buckley v. American Constitutional Law Foundation, 119 S.Ct. 636 (1999). Even in its most recent campaign finance ruling reaffirming Buckley v Valeo's holding that legislative limitations on contributions are permissible because of concerns with corruption, both the majority opinion and the dissenters cited Professor Smith's scholarship, the former finding it not dispositive and the latter finding it highly persuasive. See Nixon v. Shrink Missouri Government PAC, --- U.S. --- (2000). Far from showing that his views are extreme, the opinions indicated that Professor Smith's scholarship was deemed worthy of regard by both sides of the judicial aisle.

Professor Smith's view that campaign finance limitations are unconstitutional and unwise is shared by numerous constitutional scholars, such as Dean Kathleen Sullivan of Stanford Law School, Professor Lillian BeVier of the University of Virginia, Professor Sam Issacharoff of Columbia Law School and Professor Pamela S. Karlan of Stanford Law School. Professor Smith's view is also shared by one of the nation's leading First Amendment advocates, Floyd Abrams, and its leading First Amendment advocacy organization, the American Civil Liberties Union.

I have been involved in the debate over the First Amendment implications of campaign finance laws for almost 30 years, since even before Buckey v. Valeo, in which I served as counsel. I have also been involved in litigation with the Federal Election Commission about the proper boundaries of campaign finance regulation. Based on my experience, I can think of no better or more important credential to serve on the Federal Election Commission than a healthy respect for the First Amendment. Professor Smith has that and then some. His appointment should be confirmed.

Sincerely,

Joel M. Gora

NOTRE DAME LAW SCHOOL
NOTRE DAME, INDIANA 46556

February 18, 2000

The Honorable Mitch McConnell
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

Att'n: Andrew Siff
FAX (202) 224-3036

Dear Senator McConnell:

It is my privilege to recommend Bradley A. Smith for appointment to the Federal Election Commission (FEC).

Professor Smith is a leading scholar in election law. His work – which has appeared in such prestigious publications as the Yale Law Journal and the Georgetown Law Journal – is innovative, academically rigorous, and an exciting contribution to the existing literature in the field of campaign finance legislation. He is one of the few scholars who has investigated how campaigns were financed before the second half of the twentieth century, *see* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1053-56 (1996), and his scholarship builds upon the lessons that history teaches. For example, he dispels a common perception by observing that "the role of the small contributor in financing campaigns . . . has increased, rather than declined, over the years." *Id.* at 1056. He has closely examined the way in which money affects both political campaigns and the legislative process, concluding that the precise relationship between campaign spending and corruption is far more complicated than many commonly assume. *See id.* at 1057-71; Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO.L.J. 45, 58-60 (1997). Yet that is exactly the kind of analysis that should be performed when considering what legal regulation is merited, especially in light of the frequent laments that the federal campaign finance laws enacted in the 1970's have not performed as Congress hoped or expected.

Professor Smith questions the compatibility of campaign restrictions with the first amendment. In doing so, he gives voice to the many organizations across the political and ideological spectrum who fear the impact of some of the proposed legal regulation on the ability

of citizens and groups to communicate their messages to the public. Professor Smith's view is shared by numerous leading academics, again from across the political and ideological spectrum, including Dean Kathleen Sullivan of the Stanford Law School and Professor Lillian BeVier of the University of Virginia School of Law. His understanding of the first amendment has been adopted by the courts in sustaining state campaign finance regulations. *See* Toledo Area AFL-CIO v. Pizza, 154 F.3d 307, 319 (6th Cir. 1998) (quoting Professor Smith's description of the first amendment). But Professor Smith sees the first amendment in an affirmative light rather than a negative one. As he has so eloquently explained:

> By assuring freedom of speech and of the press, the First Amendment allows for exposure of government corruption and improper favors and provides voters with information on sources of financial support. There is no shortage of newspaper articles reporting on candidate spending and campaign contributions, and candidates frequently make such information an issue in campaigns. By keeping the government out of the electoral arena, the First Amendment allows for a full interplay of political ideas and prohibits the type of incumbent self-dealing that has so vexed the reform movement. It allows challengers to raise the funds necessary for a successful campaign and keeps channels of political change open. By prohibiting excessive regulation of political speech and the political process, the First Amendment, properly interpreted, frees individuals wishing to engage in political discourse from the regulation that now restrains grassroots political activity. And because the First Amendment, properly applied to protect contributions and spending, makes no distinctions between the power bases of different political actors, it helps to keep any particular faction or interest from permanently gaining the upper hand. In each respect, it promotes true political equality.

Smith, 105 YALE L.J. at 1090. This positive explanation far better serves the first amendment than the frightening prospect that the meaning of the Constitution's protections might soon depend upon the perceived majority desire for the stringent regulation of political campaigns. *See* Nixon v. Shrink Missouri Government PAC, 120 S. Ct. 897 (2000) (Breyer, J., concurring) (suggesting that the Supreme Court's interpretation of the first amendment should change if it "denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance").

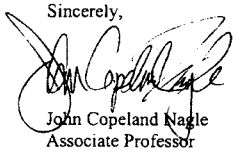
Yet Professor Smith understands the problems evidenced in our current system. He recognizes the need for "radical" reform, *see* Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 CONN. L. REV. 831, 837 n.37 (1998), a sympathy that I share. *See* John Copeland Nagle, *The Recusal Alternative to Campaign Finance Reform*, 37 HARV. J. LEGIS. (forthcoming February 2000). What impresses me most about Professor Smith is his insistence that the problems evident in our existing system be addressed in a manner that protects constitutional rights. It is far too easy assume that the first amendment must be discarded when it is inconvenient to adhere to its teachings. Moreover, apart from the commands of the Constitution, Professor Smith has questioned whether the same kinds of proposed solutions that have been tried and failed for nearly thirty years are best suited

for the kinds of problems that we face today. Indeed, he has identified a number of unintended effects of the standard restrictions on campaign contributions and expenditures, including the entrenchment of the status quo, the promotion of influence peddling, the favoritism of select elites and special interests, and perhaps most obviously, the encouragement of wealthy candidates. *See* Smith, 105 YALE L.J. at 1072-84. Instead, Professor Smith has advocated other actions that could be taken to solve the problem, including increased disclosure requirements. *See* Smith, 45 GEO. L.J. at 62-62. But Professor Smith has clearly stated his preferred remedy: "I believe strongly that the best solution to any ills in our political system lies in the American voter." Smith, 30 CONN. L. REV. at 862. I cannot imagine a more attractive view to be possessed by a member of the Federal Election Commission.

Perhaps most importantly, Professor Smith has displayed a fidelity to the law. His writing about the first amendment shows that he abides by the Constitution regardless of the consequences. Professor Smith is also faithful to the laws enacted by Congress. He has counseled that both the statutes enacted by Congress and the constitutional decisions of the courts are entitled to respect, whether or not one agrees or disagrees with them. *See* Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 200 (1998). In short, he possesses the "experience, integrity, impartiality, and good judgment," 2 U.S.C. § 437c(a)(3), necessary to serve on the FEC.

Please contact me at (219) 631-9407 or at *john.c.nagle.8@nd.edu* if you have any further questions about Professor Smith's nomination to the FEC. He will be an excellent commissioner.

Sincerely,



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February 22, 2000

The Honorable Senator Mitch McConnell
Chair
Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
United States Senate
Washington, D.C. 20510
ATTN: Andrew Siff, Counsel

Re: Nomination of Bradley A. Smith for Federal Election Commission

Dear Chairman McConnell:

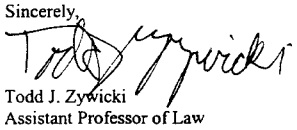
I am writing to you to urge the Senate to confirm the Nomination of Professor Bradley A. Smith to the Federal Election Commission. I have been acquainted Professor Smith and with his scholarship for quite some time. He is regarded as a leading academic in his field and is regularly consulted as an expert on issues of electoral and campaign law. I have read Professor Smith's scholarship and am familiar with the views of the leading commentators in the field. It is my opinion that Professor Smith is one of the most influential, sensible, and well-respected scholars currently working in the field. Indeed, his scholarship is a model of careful research and considered judgment. Professor Smith's views on campaign finance reform place him well within the long American tradition of free and robust political expression. The rigor and respect that his scholarship has commanded is evidenced in the fact that he is regularly cited in Supreme Court opinions as an expert on campaign finance and electoral law.

Based on my personal knowledge of Professor Smith's character and experience, it is my strong opinion that he would faithfully execute the obligations of serving as a Federal Election Commissioner. While he may criticize some elements of the current campaign finance regime – a regime, it should be noted, that is widely criticized by commentators across the political spectrum – it is evident that Professor Smith recognizes that being a Federal Election Commissioner imposes upon him obligations to carry out the duties of the office to faithfully enforce the law. It is no more plausible that his pointed criticisms would lead him to refuse to enforce existing law than it would be for an advocate of greater regulation to make-up and enforce nonexistent regulations. Both situations would amount to a derelict of duty and abandonment of the rule of law. There is absolutely no

evidence nor reason to believe that Professor Smith would refuse to enforce the current regulatory regime if he is confirmed.

Bradley Smith is a leading expert in the field of election law and his career and scholarship has evidenced a deep commitment to the rule of law. I hope that the Senate will confirm his nomination to the Federal Election Commission.

Sincerely,



Todd J. Zywicki
Assistant Professor of Law

Albany Law School UNION UNIVERSITY

Stephen E. Gottlieb
Professor of Law

February 14, 2000

Senator Mitch McConnell
Chairman, Committee on Rules and Administration
Russell Senate Office Building – Room 305
U.S. Senate
Washington, D.C. 20510

Re: Bradley A. Smith, Nominee for the Federal Election Commission

Dear Senator McConnell:

I write as one who has written extensively in the area of election campaign law. I have been invited to participate in many forums on election campaign law and I believe that it is fair to say that I am well known in the area. Certainly I am familiar with many of the people who write in on election campaign law.

Brad Smith has done a great deal of very fine work the subject of campaign finance. It certainly has been very much in the mainstream of work in this very contentious area.

Interestingly, legal scholars have been somewhat divided among themselves about how to handle the problems of campaign finance law, and there has also been a bit of a split between the views of political scientists and many legal scholars. Brad's work, to his credit, is closely aligned with the work of political scientists. I say to his credit because this is an area where we are all predicting consequences and it is therefore essential for those of us in the legal world to take full account of the empirical studies of our brethren in political science. In effect, Brad has been doing excellent, very sophisticated, multi-disciplinary work for many years. Brad's work, therefore, is not only in the mainstream, it is among the best to be found.

I would be delighted to have the benefits of Brad's insight and integrity on the Federal Election Commission.

Sincerely,

Stephen E. Gottlieb
Professor of Law

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*Admitted in California only

February 18, 2000

Senator Mitch McConnell, Chairman
Committee on Rules and Administration
SR-305 Russell Senate Office Building
Washington, D.C. 20510-6325

Dear Mr. Chairman:

I served as Executive Assistant to a member of the Federal Election Commission from 1985 to 1991. I have maintained a strong interest in the operations of the FEC, and practice law in the area of elections and campaign finance regulation. I am also President of the Fair Government Foundation, an IRC §501(c)(3) organization engaged in research and public education regarding First Amendment rights of political speech and action.

My purpose in writing to you today is to express my support for the nomination of Professor Bradley Smith for appointment to the FEC. His intellectual and professional credentials for the job are outstanding, as I am sure many others have expressed to you.

Nevertheless, Smith's nomination has recently been subject to extraordinary criticism from high-profile politicians and major newspaper editorials. I would like to specifically address the standards for assessing qualifications of FEC commissioners that have emerged in these criticisms of Professor Smith.

The premise from which these critics begin is that the FEC should advance an agenda of campaign finance "reform" and that candidates for FEC appointment are unsuitable if they are not dedicated to a reformist agenda. That is a clear distortion of the statutory mission of the FEC and the job of an FEC commissioner. FEC appointments are not a vehicle for reforming campaign finance laws. "Reform" necessarily implies a change (and usually expansion) of existing law. The forum for any debate over whether or how political finance regulation should be changed or expanded should not be the federal agency charged with enforcing the law as written, but rather Congress and the political arena.

Contrary to general impressions, the FEC's record includes constant efforts to broadly interpret its statute and to fairly aggressively restrict and regulate political speech and action.

And the FEC has repeatedly been knocked down by courts for exceeding its jurisdiction in those instances. This is strikingly true in the area of identifying independent political speech that is subject to regulation under the FECA -- the issue of the "express advocacy" standard. The FEC is simply not permitted to regulate independent political speech that does not contain express or explicit words of advocacy for particular candidates. *See, e.g.*: FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986); Maine Right to Life Committee v. FEC, 914 F.Supp. 8 (D.Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct 52 (1997); FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997); Right to Life of Dutchess County, Inc. v FEC, 6 F.Supp.2d 248 (S.D.N.Y. 1998); and Virginia Society for Human Life v. FEC, 2000 WL 136144 (E.D.Va. 2000).

Many campaign finance reform advocates ignore the unmistakable direction of court precedent upholding First Amendment limitation in this fundamental area, and fail to recognize the impact of these decisions on prospects for expanding regulation into areas such as "issue advocacy" and "soft money." Reform supporters who do acknowledge judicial reasoning in this area simply hope for a dramatic reversal of fortune if new laws contrary to these decisions are passed anyway. The most disingenuous argument is that "the circuits are split," based upon a 1987 decision -- FEC v. Furgatch -- that is the most over-cited and misinterpreted case in all of campaign finance jurisprudence. 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987). The court in Christian Action Network (cited above) ably distinguishes Furgatch and dispenses with its future relevance.

What is most remarkable is that the critics of Brad Smith's nomination for the FEC claim his conservative views are subversive and radical for accepting consistent court opinion about the scope of restrictions upon political speech and activity under the First Amendment. It is an indication of arrogance on these issues that opinions of FEC nominees are labeled disqualifying only if they oppose broader regulation of political expression.

Brad Smith has declared his intention to fully enforce the law as it is written and as interpreted by the courts, and would take an oath to faithfully uphold the law if confirmed. Not only should that be enough, not only is that position reasonable, it should be the standard by which all FEC nominees are judged. It is those who want the FEC to keep challenging judicial precedent and contesting the primacy of the First Amendment that are subversive to the law. It is those who want to push government regulation too far who bear the burden of defending a radical position.

Opponents of Smith's nomination nostalgically yearn for an expansive view of the law and for an activist FEC that are neither constitutionally sound nor desirable in practice. They have miscast the FEC nomination process as demanding vindication of their point of view. That is wrong, and I strongly encourage your committee to ignore the background noise they have created.

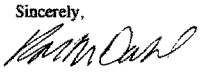
Finally, I note that another area of my professional activity is serving as election law consultant to American foundations engaged in democratization programs overseas. In that

work, I am constantly reminded of the merits of vigorous political discourse and competition, for which the United States is widely admired, and also the dangers of unrestrained election authorities. Nowhere is the rule of law more important than in legal or administrative restraints upon political rights. In a democracy, any government "watchdog" of political activity -- even one supposedly motivated by "reform" -- must be on a very short leash.

Throughout its twenty-five year history, the FEC has generally sought the power to subjectively determine -- on a case by case basis, depending on numerous factors and relying on the Commission's divining of motive and intent -- which political speech and activity, and which political actors, come within its regulatory jurisdiction. Even the most sympathetic reading of case law, however, yields no room for doubting that the door to that power has been shut by judicial precedent, often in cases brought by the FEC itself (outside the "express advocacy" area, *see, e.g.*, FEC v. GOPAC, 917 F.Supp. 851 (D.D.C. 1996)). Yet the enforcement and litigation strategies of the FEC's General Counsel still deny the constraints of the First Amendment. They continue to dispute the constitutional requirement that only narrowly defined and objectively discernable standards, inherently less encompassing, are suitable for regulation of political speech. The FEC could benefit from a fresh perspective.

Brad Smith's point of view on campaign finance regulation is entirely legitimate and completely justified by a consistent line of judicial precedent. If his views are somehow not seen as "mainstream," that is only because of bias in the media and among political elites that have shielded conventional thinking on campaign finance reform from reality. I hope your committee will recommend Brad Smith for confirmation by the U.S. Senate as a member of the Federal Election Commission.

Sincerely,



Bob Dahl

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

John O. McGinnis

Senator Mitch McConnell
Chairman of the Senate Rules and Administration Committee
Senate Russell Office Building Room 305
Washington D.C. 20510-1767

Dear Chairman McConnell: Feb. 15, 2000

This letter is written in strong support of the nomination of Bradley Smith to the Federal Election Commission. Professor Smith is one of the truly fine young legal academics in the country. I would be proud to have him on my faculty.

He is a leading expert in his chosen field of election and campaign finance law. His importance in this area is clear from objective criteria. He has written on this subject in some of our most distinguished law reviews, such as the *Yale Law Journal* and the *Pennsylvania Law Review*. In particular, his article, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996), is already a classic in the field– noted and debated by almost who write about the subject. His work in general has been cited over 180 times by other scholars. This is a high citation count and very high for such a young scholar. I would venture to say that puts him in the top 10 percent of all law professors in the United States, including many who have been in academics far longer than Professor Smith.

The substance of the writings is superb. He defends the classical ideal of liberty – in this case freedom of speech against those who would weaken it. His arguments are direct and powerful. For instance, he notes that restrictions on contributions to election campaigns would result in less discussion of essential political issues. He also observes that such restrictions would not promote equality but would entrench the power of those who already have huge influence on the political process– the press and pundits of all kinds. Even if one does not agree with these claims, any serious proponent of further campaign finance restrictions must address his careful data and analysis.

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His eminence and analytic abilities would clearly improve both the stature and the decisionmaking of the Federal Election Commission. A multimember commission is designed to accommodate commissioners of various views. Indeed, the entire theory of such bodies is that the public good emerges from the deliberations of individuals of differing and independent judgment. Thus, even those who do not agree with Professor Smith should welcome the appointment of a man of his ability for the good of the institution.

Let me close by making a few observations on Professor Smith's public character and his fidelity to the rule of law. In the academic world as it is today there are few rewards for defending the ideas of liberty that inspired our Constitution. Law professors, particularly those in public law, are (as measured by objective surveys) overwhelmingly on the left. Academic appointments and honors are very much influenced by this monochromatic political orientation. Professor Smith has never for a moment tempered his ideas or diluted his arguments for the sake of advancement. In my view, that shows he will fearlessly and without fear or favor carry out the law according to his oath of office. There is no higher recommendation than I can give for a prospective officer of the United States.

Sincerely yours,

John O. McGinnis

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February 18, 2000

United States Senate
Committee on Rules and Administration
Russell Senate Office Building
Room 305
Washington, D.C. 20510

Re: Confirmation Hearing for Professor Bradley A. Smith

Dear Chairman McConnell:

It is with great pleasure that I write the Committee and offer my support for the confirmation of Professor Bradley A. Smith as a Commissioner of the Federal Election Commission.[1]

I offer this support for Professor Smith based upon my knowledge of his extensive writings regarding federal election laws which reflect both his comprehensive knowledge of the complex legal and constitutional issues involved in federal election law and his sensitivity to the First Amendment values which permeate this area.

It is important to the future of our democracy that those who are appointed to the Federal Election Commission are sensitive to and respectful of the First Amendment rights of free speech and association that are subject to limited regulation by the Federal Election Campaign Act which the Federal Election Commission administers. Unfortunately, until recently, the FEC has showed insufficient respect for these First Amendment values in its efforts to regulate and prohibit speech that might have any influence on federal elections. The result has been numerous defeats in federal courts as the FEC's regulations and enforcement actions have been overturned on First Amendment grounds. *See* THE FEC'S EXPRESS WAR ON FREE SPEECH (1996): Bopp &

[1]I write these comments based upon my extensive experience as a practitioner, commentator, and litigator on First Amendment and election law issues. A summary of my resume is attached.

Coleson, *The First Amendment Is Not A Loophole: Protecting Free Expression In The Election Campaign Context*, 28 U.W.L.A. LAW REV. 1 (1997). While the FEC's efforts to expand its power to regulate cherished First Amendment freedoms have suffered uniform defeat in the federal courts, the cost of such efforts on First Amendment values has been great. Since the opinions of Professor Smith fit squarely within the overwhelming body of federal court decisions in this area, he would be a welcome and worthy addition to the Commission.

The critics of Professor Smith, *i.e.*, Common Cause, Democracy 21, and the Brennan Center for Justice, have claimed that his appointment would be "at odds with any notion of fair and effective enforcement of the federal campaign finance laws." Letter from Donald Simon, Acting President Common Cause, Fred Wertheimer, President Democracy 21, and E. Joshua Rosenkranz, Executive Director Brennan Center for Justice, to President William Clinton (June 3, 1999). However, the criticism of these groups needs to be understood in the context of what *they* mean by "fair" and "effective" enforcement of federal campaign finance laws. For over 25 years, Common Cause, and more recently Democracy 21 and the Brennan Center, have been the principal cheerleaders for the FEC's failed effort to regulate free speech and association rights protected by the First Amendment. Thus, what they view as "fair" and "effective" the federal courts' have viewed as unconstitutional intrusions on the First Amendment that threaten our democracy. These groups want to impose a litmus test on appointees to the Federal Election Commission – the appointees must share their disdain for the limits imposed by the First Amendment on the FEC and must pledge to continue the FEC's failed 20 year war on the First Amendment. The Senate should reject this proffered litmus test and confirm Professor Smith.

In their zeal to oppose Professor Smith, these critics have distorted his record and claimed that his positions are outside the mainstream. To the contrary, any comparison of Professor Smith's academic writings and public statements with the federal court decisions in this area demonstrate that Professor Smith's statements and positions have been endorsed by the overwhelming weight of federal court opinion. This comparison is provided below.

One example of Professor Smith's writings, which reveal his proper understanding of the First Amendment, is his rejection of the "level the playing field" justification for government regulation of speech. In conformity with the unanimous opinion of the federal courts, Professor Smith has explained that "[t]he plain purpose of the First Amendment was to limit the authority of government to regulate speech," and therefore, efforts to enhance the voice of others is "'wholly foreign to the First Amendment.'" Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo. L.J. 45, 76 (1997) (*quoting Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

Contrary to this understanding, however, the critics of Professor Smith have consistently sought to seize the power of government to suppress speech to "level the playing field." The federal courts, however, have not hesitated in rejecting this effort. In *Georgia State Conference*

of NAACP Branches v. Cox, for instance, in a lawsuit filed by a "campaign reform" group opposing Professor Smith, the Eleventh Circuit Court of Appeals refused to "recognize the right to equal influence in the overall electoral process." 1999 WL 603925, at *4 (11th Cir. 1999) (*citing Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 257 (1986) ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.")(citations omitted)); *Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.")(citations omitted)).

The "reformers'" real agenda behind opposing Professor Smith's nomination is not because his positions are unconstitutional or unsupportable; indeed, the opposite is true. Rather, Professor Smith's views regarding the importance of First Amendment values are inconsistent with the "reformers'" unconstitutional efforts to regulate free speech. In their quest to "level the playing field" by imposing restrictions on our cherished right to political speech, the "reformers" have tried to distract this Committee and the public from the real issue – whether Professor Smith possesses the requisite qualifications. These he possesses in spades.

(1) Issue Advocacy and Express Advocacy

Professor Smith has written that "[i]ssue advocacy is firmly protected by the First Amendment." Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. Legis. 179, 196 (1998). Furthermore, he has opined that vague definitions of issue advocacy are unconstitutional. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & Pol'y 1, 33 (1997) ("The vague definition of issue advocacy speech to be regulated," not using "phrases as 'elect,' 'defeat' and 'support,'" "fails to draw the Buckley bright line and instead, opens up virtually all political speech mentioning a candidate to government regulation."). Professor Smith is concerned that vague definitions of issue advocacy require regulators "to probe past actions and comments by the speaker in an effort to determine the speaker's true motivation. This will have a chilling effect on speech and will further take political debates out of the electoral arena and into the courts." *Id.* As a result, Professor Smith has written that express words of advocacy, rather than an intent or purpose of influencing, are required before any regulation of a communication is constitutionally permissible. Smith, *Soft Money, Hard Realities*, 24 J. Legis. at 187-194.

Not only is federal case law entirely consistent with these positions, it is overwhelmingly so. *See Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976); *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-970 (8th Cir. 1999);; *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-713 (4th Cir. 1999); *Virginia Society for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 274 (4th Cir. 1998); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d

503, 506 (7th Cir. 1998); *Virginia Society for Human Life v. Federal Election Commission*, No. CIV.A. 3:99CV559, 2000 WL 136144 (E.D.Va. January 4, 2000); *Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997); *Maine Right to Life Comm., Inc. v. Federal Election Commission*, 914 F. Supp. 8, 12 (D. Me.), *aff'd*, 98 F.3d 1 (1st Cir. 1996); *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996); *Faucher v. Federal Election Commission*, 928 F.2d 468, 472 (1st Cir. 1991); *Federal Election Commission v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980)(*en banc*); *Federal Election Commission v. Freedom's Heritage Forum*, Civil Action No. 3:98CV-549-S (W.D. Ky. 1999); *Federal Election Commission v. The Christian Coalition*, 52 F. Supp.2d 45, 61 (D.D.C. 1999); *Kansans for Life, Inc. v. Gaede*, 38 F. Supp.2d 928, 935-37 (D. Kan. 1999); *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp.2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates v. Miller*, 21 F. Supp.2d 740, 743 (E.D. Mich. 1998); *Right to Life of Dutchess County, Inc. v. Federal Election Commission*, 6 F. Supp.2d 248 (S.D.N.Y. 1998); *Clifton v. Federal Election Commission*, 927 F. Supp. 493, 496 (D. Maine 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *West Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954, 959 (S.D.W.Va. 1996); *Federal Election Commission v. Survival Educ. Fund, Inc.*, 1994 WL 9658, at *3 (S.D.N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); *Federal Election Commission v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1456 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 116 S. Ct. 2309 (1996); *Federal Election Commission v. NOW*, 713 F. Supp. 428 (D.D.C. 1989); *Federal Election Commission v. AFSCME*, 471 F. Supp. 315, 317 (D.D.C. 1979). Most recently, Justice Kennedy, in his dissent, stated that "[i]ssue advocacy, like soft money, is unrestricted." *Nixon v. Shrink Missouri Government State PAC*, 2000 WL 48424 (Jan. 24, 2000) (*citing Colorado Republican Fed. Camp. Comm. v. Federal Election Commission*, 518 U.S. 604, 616 (1996)).

(2) Soft Money

Professor Smith has also opined that a ban on soft money contributions to political parties would be, under clear, well established First Amendment doctrine, constitutionally infirm. *See* Smith, *Soft Money, Hard Realities*, 24 J. Legis. at 180. This is also a widely held view that is supported by recent United States Supreme Court precedent. *See Nixon v. Shrink Missouri Government State PAC*, 2000 WL 48424, at * (January 24, 2000)(Kennedy, J., dissenting)("Soft money may be contributed to political parties in unlimited amounts."); *Colorado Republican Fed. Campaign Comm. v. Federal Election Commission*, 518 U.S. 604, 616 (1996); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981); *First National Bank v. Bellotti*, 435 U.S. 765, 777, 790 (1978); *Buckley v. Valeo*, 424 U.S. 1, 55-59 (1976). However, Professor Smith has not argued that no ban on soft money would be permissible. Consistent with cases permitting regulation of communications containing express advocacy, Professor Smith has stated that it may be possible to prohibit soft money expenditures by political parties for express advocacy communications. *Soft Money, Hard Realities*, 24 J. Legis. at 199. However, he has

also stated that all political party advocacy cannot be deemed express advocacy, and therefore contributions to political parties may not be banned. *Id.* at 195-96. This assertion is also well-grounded in the Supreme Court's decision in *Colorado Republican.* 116 S. Ct. at 2316.

(3) Contribution Limits

Professor Smith has also argued that "arcane restrictions on contributions" should be lifted because they have "decreased the influence of regular people," increased fundraising by candidates, made candidates more dependent on special interests who can provide this cash, and increased evasion of contribution limits. Smith, *Campaign Finance Laws Backfire on Public*, Cato Institute, January 17, 1997. More generally, Professor Smith has argued that "efforts to regulate campaign finance have, for the most part, had deleterious effect for our democracy." *The Siren's Song*, 6 J.L. Policy at 42.

The view that contribution limits should at least be raised, if not lifted completely, is also widely held, both among legislators and by the courts. Many Congressman, including Senator McConnell, have expressed support for raising the contribution limit for federal races on grounds similar to those express by Professor Smith. In addition, while contributions limits are not per se unconstitutional, as the Court ruled in *Buckley* and recently reaffirmed in *ShrinkPAC*, numerous state contribution limits have recently been struck down as too low, once again echoing Professor Smith's concerns. *See Day v. Holahan*, 34 F.3d 1356 (8th Cir 1994); *Carver v. Nixon*, 72 F.3d 633 (8th Cir 1995); *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998); *Wilkinson v. Jones*; 876 F. Supp. 916 (W.D.Ky. 1995); *Shrink Missouri Gov't PAC v. Maupin*, 892 F. Supp. 1246 (E.D.Mo. 1995), *aff'd*, 71 F.3d 1422 (8th Cir. 1995); *National Black Police Ass'n v. District of Columbia Bd. of Elections and Ethics*, 924 F. Supp. 270 (D.D.C. 1996); *Arkansas Right to Life v. Butler*, 983 F. Supp. 1209 (E.D. Ark. 1997), *aff'd*, 146 F. 3d 558 (8th Cir. 1998); *California ProLife Council Political Action Committee v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998), *aff'd* 164 F.3d 1189 (9th Cir 1999); *Citizens for Responsible Government State Political Action Committee v. Buckley*, 60 F. Supp.2d 1066 (D.Colo. 1999).[2]

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[2]In addition, some members of the Court have even endorsed the view that all contribution limits are unconstitutional. *See Colorado Rep. Fed. Campaign Comm. v. Federal Election Commission*, 518 U.S. 604, 642 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (Justice Thomas observed that simply because a few individuals might corrupt the political process by making large contributions, this does not warrant preventing many more individuals from making contributions that will not.); *ShrinkPAC*, 2000 WL 48424 (Kennedy, J., dissenting) ("The melancholy history of campaign finance in Buckley's wake shows what can happen when we intervene in the dynamics of speech and expression by inventing an artificial scheme of our own.").

(4) Disclosure Requirements

Also in agreement with *Buckley* are Professor Smith's views concerning the importance of disclosure laws. Professor Smith has stated that "[d]isclosure allows both individuals and groups to fulfill their desire to participate freely in the system," *Siren's Song* at 18, and that "[d]isclosure, in turn, provides voters with information that should deter improper legislative behavior." *Id.* The *Buckley* Court found that "disclosure provides the electorate with information . . . in order to aid the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67, and that disclosure also "deter[s] actual corruption" by "exposing large contributions and expenditures to the light of publicity." *Id.* at 67.

Professor Smith's Qualifications

In addition to the fact that Professor Smith's views are well within the mainstream of opinion on federal election law issues,[3] he is also eminently qualified and suited for the post of Commissioner. Not only is he well qualified by experience and training, he offers a fresh approach to how this agency should operate.

In particular, he has already given thoughtful consideration to how the Federal Election Campaign Act could be more effectively enforced. In so doing, he has proposed five criteria by which any campaign finance system ought to be measured. *See* Smith, *Some Problems With Taxpayer-Funded Political Campaigns*, 148 U.Pa.L.Rev. 591, 593 (1999). An examination of this proposal demonstrates that, not only can he administer and enforce the law, he will be an asset, rather than a hindrance, to the Commission in adopting new *constitutional* rules to enforce the FECA.

Administrability: First, a system of campaign finance should be easy to administer.

---

[3] As one indication of the acceptance of his views, courts have relied upon and cited his works. *See Nixon v. Shrink Missouri Government State PAC*, 120 S. Ct. 897, 925 (2000)(Thomas, J., dissenting) (*citing* Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 Yale L.J. 1049, 1061 (1996)); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 319 (6th Cir. 1998) (*quoting* Smith, Money Talks: Speech, Corruption, Equality, and Campaign Finance, 86 Geo. L.J. 45, 67 (1997)); *McLaughlin v. North Carolina Board of Elections*, 850 F. Supp. 373, 388 (M.D. N.C. 1994) (*citing* Smith, Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply, 28 Harv. J. on Legis. 167, 215 n. 252 (1991)).

> Flexibility: Second, it should be flexible – able to adapt quickly to changing political environments, new technologies, and evolving campaign techniques.
>
> Opportunity: Third, it should, if not necessarily foster more candidacies and entries into politics by political newcomers, at least not overly discourage such challenges.
>
> Competitiveness: Fourth, it should, if not necessarily promote more competitive races, at least not overly insulate incumbents from challenge.
>
> Communication: Finally, it should provide candidates with adequate funds to communicate with and educate voters.

Id. at 593. These criteria are hardly controversial, yet Professor Smith has stated that these are goals that "any campaign finance system" ought to strive to meet. *Id.*

In discussing the criterion of "administrability," Professor Smith indeed states that "[w]hen it comes to ease of administration, no system can beat that of a private, unregulated system of funding." *Id.* at 594. However, Professor Smith also goes on to acknowledge that the United States does not have such "an unregulated system of private finance, but rather one that, at the federal level, is quite heavily regulated." *Id.* And he continues, not by calling for an end of this regulation, but by analyzing how government financing of campaigns could actually reduce administrative costs. *Id.* at 595. Professor Smith not only does not "criticiz[e] government financing," *id.* at 593, but he suggests ways that the current presidential financing law could be better administered. It is, therefore, quite inaccurate, and grossly misleading, to say that Professor Smith "is on record for the position that the federal campaign laws are, in their entirety, unconstitutional." Letter from Donald Simon, Acting President Common Cause, Fred Wertheimer, President Democracy 21, and E. Joshua Rosenkranz, Executive Director Brennan Center for Justice, to President William Clinton (June 3, 1999). In fact, the Supreme Court's decision in *Nixon v. Shrink Missouri Government State PAC*, 120 S. Ct. 897 (2000), confirms the correctness of Professor Smith's fifth criterion. In *ShrinkPAC*, the court held that contribution limits may not be so low as to impede the ability of candidates to amass the resources necessary for effective advocacy.

In addition, Professor Smith's approach would seem to avoid embroiling the Commission in years of administrative investigations, only to have the federal courts reject these expensive and wasteful enforcement actions. *See* Benjamin Weiser and Bill McAllister, *The Little Agency That Can't*, Washington Post, February 12, 1997, at A01 ("Federal courts have repeatedly gutted the agency's enforcement efforts."). Professor Smith's nomination and confirmation would be another step towards a reversal of the Commission's string of court defeats.

The Senate has previously nominated and confirmed three Commissioners who have brought much-needed new blood to the Commission. New blood is desperately needed as "a succession of presidents have appointed pliant commissioners who rarely displayed get-tough independence." *See* Benjamin Weiser and Bill McAllister, *The Little Agency That Can't*, Washington Post, February 12, 1997, at A01. What once was a passive Commission, that was "both a symbol of a dysfunctional electoral system and a lightning rod for criticism," *id.*, has now become a more proactive Commission, beginning to address problems that have plagued the Commission, and its administration and enforcement of the FECA, since its inception. The confirmation of Professor Smith would continue this trend that is beginning to restore public confidence in the ability of the Commission to fairly and effectively enforce federal election laws.

Finally, as many have experienced firsthand, it is not always what your friends say about you that is most revealing, but what your opponents say. Even individuals in academic disagreement with Professor Smith have acknowledged the substantive contribution his writings have made to the study of election law. In responding to some of Professor Smith's views, Jeremy Paul called Professor Smith a "distinguished campaign finance expert[]," and stated, "[d]espite our disagreements, however, Professor Smith's comments are characterized by professional courtesy and a refreshing generosity of spirit." Paul, *Structuring Campaigns: A Reply To Professors Foley and Smith*, 30 Conn. L. Rev. 897, 904 (1998).

The Senate should confirm Professor Smith without any unnecessary delay.

Sincerely,

BOPP, COLESON & BOSTROM

James Bopp, Jr.
Heidi K. Meyer

SUMMARY OF RESUME OF
JAMES BOPP, JR.

James Bopp, Jr. is an attorney with the law firm of Bopp, Coleson & Bostrom in Terre Haute, In. and with the law firm of Webster, Chamberlain & Bean in Washington, D.C. His law practice concentrates on first amendment cases regarding political free speech and free exercise of religion and constitutional law cases regarding pro-life issues. He represents numerous not-for-profit organizations, political action committees, and political party committees, including the National Right to Life Committee, Inc.,the Christian Coalition, and the Republican National Committee.

Mr. Bopp's extensive federal and state election law practice includes successful federal litigation striking five sets of Federal Election Commission regulations in cases including *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991), *Maine Right to Life Committee v. FEC*, 98 F.3d 1 (1st Cir. 1996) and *Minnesota Citizens Concerned for Life v. Federal Election Commission*, 113 F.3d 129 (8th Cir. 1997). In addition, Bopp has successfully challenged state election laws in over two dozen states on free speech grounds, including winning the seminal cases of *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), and *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996). Finally, Bopp has successfully litigated several redistricting cases, including *La Porte County Republican Central Committee v. Board of Commissioners*, 43 F.3d 1126 (7th Cir. 1994).

Because of Bopp's expertise in election law, he has testified on campaign finance reform before the United States Senate Committee on Rules and Administration and before the United States House Committee on House Administration and the Subcommittee on the Constitution of the United States House Judiciary Committee. Bopp has published three leading law review articles on election law entitled *The First Amendment Is Not A Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA LAW REV. 1 (1997), *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. LAW REV. 235 (1998-99) and *All Contribution Limits Are Not Created Equal: New Hope in the Political Speech Wars*, 49 CATHOLIC U. LAW REV.11 (1999). He has also published opinion pieces in The Washington Post and The Washington Times.

Mr. Bopp currently serves as General Counsel for the James Madison Center for Free Speech and as Chairman of the Election Law Subcommittee of the Free Speech and Election Law Practice Group of the Federalist Society.

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ONE HUNDRED SIXTH CONGRESS

Congress of the United States
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March 3, 2000

The Honorable Mitch McConnell, Jr., Chairman
Senate Rules Committee
United States Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator McConnell:

I am writing to express my support for the President's nomination of Professor Bradley A. Smith to serve on the Federal Election Commission. Professor Smith is well qualified for this position. His confirmation will strengthen the FEC and help ensure that it acts within the constraints imposed by the First Amendment.

Professor Smith is one of the leading election law scholars in this country. He has published numerous articles in scholarly journals, including the law journals of Yale, Georgetown, Cornell, Connecticut, and Pennsylvania. His writings demonstrate a keen intellect, intellectual integrity, and knowledge of and commitment to the rule of law. Traits such as these will serve him well as an FEC Commissioner. As Chairman of the Subcommittee on the Constitution in the House, I invited Professor Smith to testify before the Subcommittee at a hearing on free speech and campaign finance reform in February of 1997. His testimony was insightful and helpful to the Subcommittee.

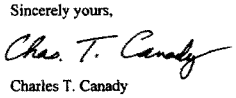
Professor Smith has been criticized by some for his views on the constitutionality of certain regulations of political campaign speech. These views, it is said, suggest that he would be unwilling to "apply the law" as a Commissioner. But this criticism ignores the fact that Professor Smith has clearly stated that as an FEC commissioner he will apply the law as it has been written by Congress and interpreted by the Supreme Court, regardless of what his private views on the matter may be.

Moreover, Professor Smith's respect for First Amendment freedoms will clearly serve to strengthen the FEC, an agency that has a disturbing history of disregarding the First Amendment rights of those engaging in political campaign activity. For example, one recent study indicates that since the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the FEC has lost

eight major cases in which it has attempted to extend its regulatory authority to political speech that is clearly protected by the First Amendment, as interpreted by the Court in *Buckley*. In one of those cases, two judges on the United States Court of Appeals filed a separate concurring opinion criticizing the FEC for its "insensitivity to First Amendment values," and "abuse of power." *FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 54-55 (2d Cir. 1980) (en banc) (Kaufman, C.J., joined by Oakes, J., concurring).*

For these reasons, I hope that you will move to confirm Professor Smith to this important post as soon as possible.

Sincerely yours,



Charles T. Canady
Chairman, Subcommittee on the Constitution

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February 15, 2000

Senator Mitch McConnell
Chairman, Committee on Rules and Administration
SR 305
Russell Building
United States Senate
Washington, D.C. 20510

Attention: Andrew Siff, Counsel

Dear Senator McConnell:

I am very pleased to support the appointment of Professor Bradley Smith to the Federal Elections Commission. I have known Professor Smith for many years. I have worked with him in the Buckeye Institute, a public policy organization in Ohio. And I am familiar with and admire his writings immensely.

The first and most important attribute to appreciate in Professor Smith is his integrity. He has a real sense of the moral obligations of whatever office he holds. As an academic, he is committed to objective, well-researched writings. As a teacher, he focuses on the development of each of his students. As a public office holder, he would fulfill the duties of the office with consistency and integrity.

In all of these activities, Professor Smith is first and foremost dedicated to the rule of law. He does not believe that laws are an excuse to enforce personal agendas, or a cover by which one undermines the elective branches with one's own ideology. Whatever his views of the laws governing elections, you will be able to count on his full and complete dedication to enforcing them as Congress intended. Those who oppose him because of his well-argued views on campaign finance merely project what they themselves would do if they were in an office of responsibility. Not so for Professor Smith. He is a conservative in all the best senses of the word. He is self-restrained, respectful of democratic accountability, and forthright. He is the kind of office holder this country very much needs.

I very much regret that in this country, we are now witnessing a drive for ideological uniformity. It may simply be a reflection of executive leadership we have seen for the last eight years, but there is, frankly, much too much manipulation of political power for personal and ideological ends. In contrast to this unfortunate practice, a man like Bradley Smith is all the more admirable. I most strongly urge you to approve this most honorable, intelligent, and worthy man

Sincerely yours,

David F. Forte
Professor of Law

February 15, 2000

ROGER PILON
Vice President for Legal Affairs
B. Kenneth Simon Chair in Constitutional Studies
Director, Center for Constitutional Studies

Hon. Mitch McConnell
Chairman, Rules and Administration Committee
United States Senate
Washington, DC 20510

Dear Chairman McConnell:

I am writing in support of the nomination of Prof. Bradley A. Smith for a seat on the Federal Election Commission. As you know, I have written, spoken, and testified often on the constitutional, legal, and policy aspects of campaign finance. In the course of doing so, I have become quite familiar with the scholarly work of Prof. Smith. I can assure you that his scholarship is first-rate, he has an excellent mind, and, of particular importance, he is intellectually honest.

Given those qualities, I must confess that I am appalled, but not surprised, at some of the interest group and editorial reaction the nomination has prompted. Groups like Common Cause have long called for radical restrictions on campaign contributions and expenditures. Prof. Smith has argued that such restrictions would be unconstitutional—and the courts, when faced with FEC efforts to impose them, have repeatedly agreed with him. Thus, to call him "radical," as those groups do, is to turn matters on their head. One imagines that the great fear of such groups is that Prof. Smith will not be, in their sense, radical enough—that on the commission, as a February 11 *Washington Post* editorial put it, he would oppose "robust enforcement of campaign enforcement laws."

To the contrary, my acquaintance with Prof. Smith, who is an adjunct scholar of the Cato Institute, convinces me that he will draw careful distinctions between what the law does and does not require by way of enforcement. Whatever his views on particular aspects of the law, he will not ignore violations, as too often happens today. But neither will he pursue the kind of "robust enforcement" that led the U.S. Court of Appeals for the Fourth Circuit recently to take the extraordinary step of ordering the FEC to pay the opposing parties legal fees. In that case (*FEC v. Christian Action Network*, 110 F.3d 1049, 1064 (1997)), the court said that the FEC's argument was so thoroughly contrary to "unequivocal Supreme Court and other authority" that it "simply cannot be advanced in good faith." Some may call such enforcement "robust." In truth, it is an abuse of the law, the public trust, and the taxpayers' money. And, more important still, it burdens and chills the rights of every American, which the First Amendment was written to protect.

For those reasons, I recommend Prof. Smith without reservation.

Yours truly,

Roger Pilon

Roger Pilon

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March 2, 2000

Chairman Mitch McConnell
Senate Rules Committee
Russell 305
United States Senate
Washington, D.C. 20510

Re: *Appointment of Bradley A. Smith to the Federal Election Commission*

Dear Senator McConnell:

I write to express my strong support for the nomination of Professor Brad Smith to the Federal Election Commission ("FEC"), and I urge you to confirm him to the post. Brad Smith can and will make a positive contribution to the workings and effectiveness of the FEC, and his confirmation can only have a salutary effect upon the practice and preservation of our constitutional freedoms under the First Amendment.

I come to my assessment of Professor Smith and his potential on the FEC from my experience as a practitioner and litigator who focuses on federal constitutional rights, including the First Amendment.[1] In the course of my career in private practice, I have successfully litigated claims, at both the trial and appellate levels, against the federal government and its individual officers for the violation of First Amendment rights of free speech, assembly, and the right to petition the government for redress of grievances. Previously, I served for three years as Assistant General Counsel of the Federal Bureau of Investigation, where my duties included the defense of civil litigation against the Bureau and its Agents for the alleged violation of constitutional rights, often to include First Amendment rights. I have also participated continuously in academic and professional organizations, fora, and continuing legal education events, to maintain currency in the state of constitutional and First Amendment law.

It is against this professional background that I can confidently assert to you and your committee that Professor Smith's views regarding campaign finance, election law, and the Constitution in general are well within the established mainstream of prevailing legal thought. Professor Smith's approach to constitutional issues reflects the famous statement of Chief Justice John Marshall, that we should never forget that "it is a

[1] A summary of my resume is attached.

THEODORE M. COOPERSTEIN, P.C.
ATTORNEY AT LAW

constitution that we are expounding" – that is, the governing document that *constitutes* the federal government by delineating what it can and cannot do. Professor Smith accordingly starts from the first principle that the Constitution, and in particular the First Amendment, operates to place limits on the federal government, while maximizing the liberty of every individual and group in our country to take part in political speech, and thereby to contribute to the nation's self-government. As an FEC member, he would take care to assure that any enforcement action by the Commission would have a sound basis in the authority of the Constitution, the laws passed by Congress, and those reasonable regulations the FEC may properly administer in conformity with the expressed intent of the Congress. This view is solidly within the mainstream; indeed, it remarkably parallels the renowned and widely accepted view of one of my earlier mentors, then-Dean of Stanford Law School John Hart Ely, who wrote in his acclaimed work Democracy and Distrust that the underlying principle of the Constitution is to assure the "unblocking of the channels of political change."

It is therefore ironic to contrast these views with the positions asserted by Professor Smith's detractors that his interpretations are "radical" and "outside the mainstream." I personally have had recent occasion to litigate against the principal detractor of Professor Smith, the Brennan Center for Justice at New York University School of Law, on a case that amply demonstrates the extreme positions they espouse. In the appeal now pending before the United States Court of Appeals for the Fifth Circuit, styled *Southern Christian Leadership Conference, et al. v. Supreme Court of Louisiana*, No. 99-30895, the Brennan Center is leading a full blown challenge to the rules of attorney practice adopted by that State's Supreme Court, which restrict the privilege formerly accorded to certain law students to appear in Louisiana state courts under academic supervision in the context of their law studies. The new Louisiana rules left untouched the freedom of law school graduates to apply for and gain admission to the bar; the freedom of admitted attorneys to represent any public interest group or other indigent client; and the freedom of every individual and group in Louisiana to seek out and obtain counsel willing to represent them. It is well established under federal and state law that there is no per se right for nonlawyers to represent others in court. Nonetheless, the Brennan Center vehemently contends that the new rules are an unconstitutional burden upon the First Amendment rights of the law clinic students and the neighborhood groups whom they have in the past solicited for litigation against certain unpopular industries in Louisiana.

The Brennan Center, as I pointed out in my brief to the Fifth Circuit, is engaged in an attempt to invoke the power of the federal government to interfere and overrule the internal processes of a state court, in the name of parties who are unharmed, to create and

THEODORE M. COOPERSTEIN, P.C.
ATTORNEY AT LAW

preserve rights that do not exist, all in furtherance of a grossly distorted view of the First Amendment and a deliberate ignorance of the federal structure of our nation's government. This is quite the antithesis of Professor Smith's known values, in that he views the First Amendment as a bulwark and a shield to protect from federal interference all citizens' rights to speech and assembly, rather than as a sword wielded to advance a narrow political agenda.

For all of these reasons, I am happy to recommend you confirm the appointment of Professor Brad Smith to the FEC. If I can be of any further assistance to you and your committee in the future, please do not hesitate to call upon me.

Respectfully submitted,

Theodore M. Cooperstein

National Legal and Policy Center

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1309 Vincent Place • Suite 1000 • McLean, VA 22101

March 1, 2000

Senator Mitchell McConnell
Chairman
U.S. Senate Committee on Rules & Administration
SR-305
Washington, DC 20510

Dear Chairman McConnell:

I am writing to endorse the nomination of Professor Bradley A. Smith as commissioner of the Federal Election Commission.

Over the last two decades, I have seen the consequences that flow from a Federal Election Commission pursuing an agenda bent on restricting the political speech rights that are essential to our democratic system. As treasurer of a major political committee in the early 1980's, I participated in two lengthy legal battles before the Supreme Court of the United States when the FEC sought to deny the rights of citizens to participate in independent expenditure campaigns. (Federal Election Commission v. National Conservative Political Action Committee, et. al., 470 U.S. 480; 105 S. Ct. 1459)

More recently, the FEC has used litigation to attempt to expand its authority at the expense of essential First Amendment rights to free speech. For the most part, courts have rejected the FEC's attacks on political speech.

Professor Smith has shown that he is sensitive to the First Amendment concerns in any undertaking to restrict political speech. In a 1997 article in *The Journal of Law and Policy*, he addressed this point directly when he wrote:

> **Historically, fights over the First Amendment have focused on the extent to which this language protects commercial speech, pornography, hate speech, or fighting words. Few have suggested that it does not or should not cover political speech. Yet, political speech is precisely what campaign finance reforms seek to regulate, with ever increasing scope and vigor.**

As Chairman of the National Legal and Policy Center (NLPC), a government ethics watchdog group, I am especially concerned about the potential for abuses inherent in any government agency. NLPC was one of three groups which went to federal court to successfully challenge the illegal secrecy of the Health Care Task Force when it violated the Federal Advisory Committee Act by denying public access to its meetings, documents and even its membership list in 1993. But the harm that comes from denying the public access to information pales next to the potential harm intrinsic to limiting the public's right to engage in free and open speech on political issues.

Professor Smith's academic and professional qualifications for the position of FEC commissioner are beyond reproach. His stalwart defense of political liberties will make him a valuable addition to a government body that all too often has been found insensitive to the basic rights that make a free society possible.

Sincerely,

Kenneth F. Boehm
Chairman

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*Admitted in California only.

February 18, 2000

The Honorable Mitch McConnell
Chairman, Senate Committee on Rules and Administration
SR-305 Russell Senate Office Bldg.
Washington, D.C. 20510-6325

RE: Nomination of Bradley Smith to
Federal Election Commission

Dear Senator McConnell:

Our law firm serves as Counsel to the First Amendment Project of Americans Back in Charge Foundation, a 501(c)(3) non-profit foundation. The First Amendment Project is dedicated to protecting the First Amendment speech and association rights of every American with respect to campaign finance 'reform'. Our law firm also specializes in the practice of campaign finance and election law at the federal, state and local levels, so we are well schooled in the impact of government regulation on political speech and expression.

We write to you today to enthusiastically support the nomination of Bradley Smith to the vacancy on the Federal Election Commission ("Commission"). These comments are offered to the Senate in that regard as you consider his nomination.

There is absolutely no doubt that Mr. Smith is highly qualified for the position of Commissioner, perhaps one of the best qualified nominees in the history of the Commission. As a law professor and legal scholar, Mr. Smith has written and taught extensively on the subject of the First Amendment and regulation by the government of political speech. Mr. Smith will bring an important and valuable perspective on these subjects to the actions and undertakings of the Commission.

Those who advocate increased government regulation of political speech are now speaking loudly against Mr. Smith's nomination. This is characteristic of campaign finance regulation proponents who would, if they could, stifle the views of all who disagree with them.

Such attitudes and behavior are representative of their utter disregard of the guarantees of the First Amendment to protect speech of *every* type - even that which may be disagreeable to leading editorial writers in Washington and New York.

The pro-regulation forces seek to silence Mr. Smith's voice in this arena no doubt because he has articulated important views that First Amendment principles may well preclude the type of campaign finance 'reform' the pro-regulation forces advocate.

Yet, Mr. Smith's views have been advanced not only by him, but by the United States Supreme Court and dozens of lower courts across the nation. Is Mr. Smith's nomination to the Commission to be blocked because he has written from a perspective shared by federal judges nationwide? Surely not.

It is ironic indeed that editorial writers and journalists, who continually claim the protections of the First Amendment for themselves, oppose Mr. Smith as a member of the Commission. Is it because he has advanced a notion that the First Amendment also protects speech by persons other than journalists?

Where in this discussion is the notion that while one may disagree with another's philosophy one would nevertheless defend to the death the other's right to advance it? That principle seems to have been lost on the pro-regulation forces, which is precisely why they not only oppose Mr. Smith's nomination but seem so comfortable with restricting the free speech rights of others.

We would submit that the Commission has a constitutional obligation to insure that government regulation of political speech is limited to that narrowly permitted by the Supreme Court in *Buckley v. Valeo* nearly a quarter century ago. That responsibility is one from which the Commission unfortunately departed long since and to which it has only recently started to repair.

We believe Mr. Smith would exercise a crucial role in encouraging the constitutional duty of the Commission to exercise its authority in a fashion more limited in scope than its historic pattern.

No doubt that is what the pro-regulation forces fear. They have long sought to expand the Commission's regulatory role beyond that authorized by the First Amendment and its application in *Buckley* and subsequent decisions. Those forces are determined to keep those of us who are adherents to *Buckley* from being represented with an equal voice at the Commission.

We urge the Senate's prompt and favorable action on Mr. Smith's nomination. Should the Committee invite testimony on this nomination, we would be more than happy to appear before the Committee in support of this distinguished and honorable gentleman, Professor Bradley Smith.

Thank you for your consideration and for allowing us this opportunity to speak on behalf of this fine nominee.

Sincerely,
SULLIVAN & MITCHELL, P.L.L.C.

Cleta Mitchell, Esq.
For the Firm

George Mason University

School of Law
3401 North Fairfax Drive
Arlington, Virginia 22201-4498
Office: (703) 993-8000
Fax: (703) 993-8088

February 14, 2000

Dear Members of the Committee

I am an associate professor of law at George Mason University School of law. I am writing to the committee because I read that President Clinton has nominated Bradley Smith to the Federal Election Commission. I understand that Professor Smith's nomination is a controversial one. However, I believe he is a very good choice and I advice the committee to support him.

Prior to joining the faculty at George Mason, I served as assistant general counsel to Koch Industries, Inc. One of my responsibilities in that position was to prepare a white paper on campaign finance law to ensure that the corporation was always in compliance. In doing so, I read almost all the literature on election and campaign finance law and reform. This included all of Professor Smith's work on the subject. I am aware that Professor Smith is depicted as extremely radical by the popular press and many proponents of a regulatory approach to campaign finance reform, but I do not believe this characterization is borne out by his scholarship.

Professor's Smith constitutional analysis can only be characterized as mainstream since it precisely tracks the consistent line of decisions of the federal courts. On my reading of his work, his position on the constitutionality of various campaign finance reform proposals is not only not radical, it adheres so closely to the federal judiciary's long and uncontroverted line of precedent as to be almost boringly conventional. Furthermore, his work on the potential effectiveness of various reform proposals in achieving their author's stated goals is based on a comprehensive and non-ideological consideration of the best social science data available. His work is significantly more rigorous and better-grounded than almost all other work on the subject.

I was actually quite surprised to find him being represented as a radical since his work suggests he is seeking the most effective way to ensure the integrity of the federal electoral process *consistently with the federal judiciary's interpretation of the First Amendment.* My understanding of this nation's commitment to the rule of law suggests that this is precisely the attitude that is required of one working in the executive branch. I would be alarmed if President Clinton had nominated someone who intended to place his personal understanding of what the law should be ahead of the courts' interpretation of what it actually is. Professor Smith's scholarship clearly demonstrates that he would do nothing of the kind.

I can offer no opinion on the political suitability of Professor Smith to serve on the FEC.

However, from a purely legal standpoint, I believe he the most qualified person in the nation to hold such a position. I strongly recommend his confirmation.

Yours truly,

John Hasnas

John Hasnas

CUMBERLAND SCHOOL OF LAW

Stephen J. Ware
Professor of Law

February 15, 2000

Senator Mitch McConnell,
Chair, Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
United States Senate
Washington, D.C. 20510
ATTN: Andrew Siff, Counsel

Dear Senator McConnell:

President Clinton has nominated Professor Bradley A. Smith for a seat on the Federal Elections Commission. I am pleased to offer my strong recommendation.

I have known Brad Smith for many years. Our interaction is both professional and personal. On a professional level, I know him to be an outstanding scholar. I also know him to be committed to the rule of law and conscientious in the performance of his duties. On a personal level, I know him to be a fine, decent, upstanding person. I am confident that Americans will be proud to have him serve in Government.

I hope you will give Professor Smith's nomination every consideration. If you or your staff would like to discuss it in greater detail, please do not hesitate to call me at (205) 726-2413.

Very truly yours,

Stephen J. Ware

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February 14, 2000

Senator Mitch McConnell
Chair,
Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
United States Senate
Washington, D.C. 20510
ATTN: Andrew Siff, Counsel

Dear Senator McConnell:

I am writing in support of the confirmation of my colleague Bradley A. Smith as a member of the Federal Election Commission. I'm writing both as someone extensively familiar with Professor Smith's views and as someone who has written about and taught constitutional history for virtually my entire professional career.

Opponents of Professor Smith's nomination to the FEC have characterized him as somone "not fit to serve" on the Commission because of his "radical" views unsympathetic with the "mission" of the FEC. For example, Common Cause president Scott Harshbarger in a recent press release charged that Smith has "complete and utter hostility to the laws he would be charged with enforcing." These criticisms are patently unfair.

Professor Smith is one of the nation's leading experts on elections law and particularly on campaign finance laws. No objective person could deny his qualification to serve on the FEC in light of his extensive knowledge about the law in this area -- an expertise documented in his various scholarly writings in such prestigious legal periodicals as *Yale Law Journal*, *Georgetown Law Journal*, and *The University of Pennsylvania Law Review* -- which have been frequently cited by courts and commentators and which have reshaped the way experts think about campaign finance reform.

The "radical" views which his opponents ascribe to Professor Smith stem from the fundamental point demonstrated in his writings: that much of what has passed for "reform" in our campaign finance laws has, in fact, made the system worse. He has shown, among other things, how campaign spending and contributions limits help to entrench incumbents in office, to silence grassroots activists and political amateurs, and to expand non-monetary influences, such as that of the news media, on campaigns. Most importantly, Smith has demonstrated how efforts to expand regulation by closing so-called "loopholes" have eroded and threatened First Amendment rights to freedom of speech.

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It is true that Professor Smith is a critic of the existing regulatory regime and has written in a *Wall Street Journal* opinion piece that the "most sensible reform" would be repeal of the Federal Election Campaign Act and its limits on campaign contributions and spending that have been in place since 1974. To my knowledge, however, Professor Smith has never called for abolition of the FEC; in fact, he has suggested that ideally its most important function would be enforcing full and instant disclosure of contributions, a reform he favors. Moreover, the fact that he advocates changing the law does not mean that he would be unwilling to enforce the laws as currently written.

Professor Smith understands the importance of the principle of the rule of law and the obligations that principle imposes on government officials: an obligation to enforce the law even when one personally opposes it. At the same time, Professor Smith understands that the rule of law limits the discretionary power of administrative agencies in two important ways: the limits imposed by acts of Congress (which create the body of law a given agency is charged with enforcing), and the limits imposed by the higher law of the Constitution, which binds all government officials.

Ironically, it is because of Professor Smith's adherence to the rule of law that advocacy groups like Common Cause and the Brennan Center oppose his presence on the Commission. Having failed to influence Congress to pass more draconian campaign-finance laws, these groups increasingly have sought to use the FEC's rule-making and enforcement powers to "reform" the system along their favored lines. Yet the courts have repeatedly struck down such rules and enforcement actions as unconstitutional violations of the First Amendment. As Roger Pilon, vice president for legal affairs at the Cato Institute, has noted, "[g]iven that record of failure in both Congress and the courts, it is a little ironic for the reformers to be calling Smith 'radical'," noting that the courts have agreed far more with views expressed in Professor Smith's writings than they have with those expressed in the legal briefs of groups like the Brennan Center. "If nominated and confirmed," Pilon notes, "Smith would be an important voice on the FEC in pulling its aggressive litigation theories back into the mainstream."

Bradley Smith's presence on the FEC would help assure that the Commission keeps within the bounds of the law and the Constitution. I can think of no better qualification for a commissioner.

Sincerely yours,

David N. Mayer

David N. Mayer
Professor of Law and History
Capital University,
Columbus, Ohio

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February 18, 2000

The Honorable Mitch McConnell
United States Senate
Committee on Rules and Administration
Russell Senate Office Building, Room 305
Washington, D.C. 20510

Re: Nomination of Bradley Smith to the Federal Election Commission

Dear Senator McConnell:

I write in support of President Clinton's nomination of Bradley Smith to the Federal Election Commission. I am a professor of constitutional law at the Chapman University School of Law and Director of The Claremont Institute Center for Constitutional Jurisprudence, a public interest law firm that, among other things, is currently engaged in litigation addressing the constitutionality of local campaign finance ordinances.

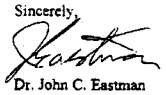
I have been dismayed – though I must admit not surprised – at the attacks on Mr. Smith. Those attacks are not only unwarranted but do a disservice to our Constitution.

Lest we forget, the debate over campaign finance reform must be guided first and foremost by the prohibitions of the First Amendment. As with the other provisions of the Bill of Rights, the First Amendment serves as a check on the powers of government, and it does so even when – perhaps especially when -- the proposed actions by government are popular. Our founders made the deliberate judgment that the protections of speech contained in the amendment were so important to the perpetuation of our republican form of government that those protections needed to be beyond the reach of transitory majorities of elected officials. This is especially true in the case of political speech, which lies at the core of the First Amendment. And it is especially critical that we subject limitations on election speech – limitations that always seem to benefit incumbents – to the most exacting scrutiny.

Brad Smith's scholarly work has repeatedly reminded us of that constitutional obligation. His published positions have frequently been cited by courts that have been called upon to review the constitutionality of various campaign finance restrictions on our precious First Amendment freedoms. Even when he has suggested that the courts have been too deferential to legislative incursions on the First Amendment, his positions have been well grounded in both constitutional text and history, and continue to find support among members of the Supreme Court of the United States as well as legal scholars.

Civil libertarians should therefore applaud, and support, this nomination, but in their devotion to the campaign finance reform agenda of the day, many have been blinded to the requirements of the First Amendment. Brad Smith has not succumbed to that blind spot, but that is precisely why he should be confirmed. Insistence on conformity to the Constitution should be the most important qualification for an appointment to the Federal Election Commission, which regulates activity so central to the First Amendment. Brad Smith has demonstrated just such a commitment in his scholarly work; his service on that body will therefore be a tremendous asset to the country and to our liberty in the months and years ahead.

Sincerely,



Dr. John C. Eastman
Associate Professor of Law

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February 15, 2000

Senator Mitch McConnell
Chair
Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator McConnell,

I am writing in support of Prof. Bradley A. Smith's nomination to the Federal Election Commission. Prof. Smith offers the FEC a point of view firmly based in First Amendment jurisprudence and demonstrates a profound respect for the rule of law. The current debate over campaign finance reform makes his well-researched and carefully reasoned arguments all the more important to the FEC's work.

Sincerely,

Tom W. Bell
Assistant Professor
Chapman University School of law

The Chapman University School of Law is provisionally approved by the American Bar Association: 550 West North Street, Indianapolis, Indiana 46202 (317) 264-8140

SANTA CLARA UNIVERSITY

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DEPARTMENT OF ECONOMICS

Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
United States Senate
Washington, D.C. 20510
ATTN: Andrew Siff, Counsel

14 February 2000

Dear Senator Mitch McConnell, Chair, Senate
Committee on Rules and Administration.

I write in support of Bradley Smith's nomination to the Federal Election Commission. I know of Professor Smith's work on campaign finance reform and believe that his views are well reasoned and ought to take a central place in discourse on the matter. The dictum that "money corrupts politics" is too simplistic. Speech and expression cannot be separated from "money", they cannot not occur without resources. I think Smith's work intelligently addresses these issues. He is a firm supporter of the rule of law and integrates the appropriate sanctity of law into his analysis of policy.

Sincerely yours,

Daniel Klein
Associate Professor of Economics

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APPENDIX 3.

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February 29, 2000

BY FEDERAL EXPRESS

Senator Mitch McConnell
Chairman, United States Senate Committee on Rules and Administration
Senate Russell Bldg. Room 305
Washington, D.C. 20510

Dear Senator McConnell:

I am an attorney in Los Angeles, and my practice emphasizes First Amendment, election law and civil rights litigation. By way of background, I am a founding editor of REASON Magazine and a trustee of the Reason Foundation. I serve as general counsel to the Individual Rights Foundation. This letter is written on my own behalf, and is not intended to reflect the views of Reason Foundation or the Individual Rights Foundation.

I was formerly a member of the faculty of the University of Chicago Law School and am a past recipient of the Lawyer-of-the-Year Award from the Constitutional Rights Foundation and the Los Angeles Bar Association. I have written and spoken on First Amendment and election law issues at law schools and conferences in the United States and Europe.

As an attorney well versed in the First Amendment, I am writing to urge you to reject the nomination of Danny Lee McDonald to the Federal Election Commission

As you well know, for many years the FEC has sought to expand the scope of its jurisdiction beyond the limitations the First Amendment places on the agency's authority to regulate political speech. This has resulted in the FEC having the worst litigation record of any major government agency. It has also resulted in many citizens and citizen groups being needlessly persecuted for exercising their First Amendment rights. Some have blamed an overzealous general counsel for the FEC's long history of contempt for the First Amendment.

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But it must be remembered that, under the FECA, the general counsel cannot pursue litigation that impermissibly chills free speech – unless commissioners such as Danny Lee McDonald vote to adopt and enforce unconstitutional regulations.

Commissioner McDonald's disregard for the rule of law in our constitutional system of government is illustrated by his role in the FEC's ongoing efforts to expand the definition of express advocacy. In Buckley v. Valeo, 424 U.S. 1, 44 (1976), the Supreme Court ruled that the FECA could be applied consistent with the First Amendment only if it were limited to expenditures for communications that include words which, in and of themselves, advocate the election or defeat of a candidate. This clear categorical limit served a fundamental purpose: It provided a way for people wishing to engage in open and robust discussion of public issues to know ex ante whether their speech was of a nature such that it had to comply with the regulatory regime established by the FECA. The Court did not want people to have their core First Amendment right to engage in discussion of public issues (even those intimately tied to public officials) burdened by the apprehension that, at some time in the future, their speech might be interpreted by the government as advocating the election of a particular candidate. Ten years after Buckley, in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), the Court reaffirmed the objective, bright-line express advocacy standard.

Despite these clear, unequivocal precedents from the Supreme Court regarding the bright-line, prophylactic standard for express advocacy, it is my view that Commissioner McDonald has flouted the rule of law. He has consistently supported FEC enforcement actions and regulations that seek to establish a broad, vague and subjective standard for express advocacy. In doing so, Commissioner McDonald seeks to create exactly the type of apprehension among speakers that the First Amendment (as interpreted by the Supreme Court) prohibits.

After the 1992 presidential election, Commissioner McDonald voted to pursue an enforcement action against the Christian Action Network (CAN) for issue ads it ran concerning Governor Bill Clinton's views on family values. McDonald supported the suit against CAN despite the fact that the General Counsel conceded that CAN's advertisement "did not employ 'explicit words,' 'express words' or 'language' advocating the election or defeat of a particular candidate for public office." FEC v. Christian Action Network, 110 F.3d 1049, 1050 (4th Cir. 1997). McDonald voted for the case to proceed on the theory that the ad constituted express advocacy – not because of any express calls to action used in it, but rather because of "the superimposition of selected imagery, film

footage, and music, over the non-prescriptive background language." Id. This was basically an effort to blur the objective standard for express advocacy into a vague, subjective "totality of the circumstances" test.

The United States District Court for the Western District of Virginia dismissed the FEC's complaint against CAN on the grounds that it did not state a well-founded legal claim. FEC v. Christian Action Network, 894 F. Supp. 946, 948 (1995). This was because the agency's subjective theory of express advocacy was completely contrary to the bright-line standard articulated in Buckley and MCFL. Id. After this stern rebuff by the district court, Commissioner McDonald voted to appeal the case to the United States Fourth Circuit Court of Appeals. The Circuit Court summarily affirmed in a per curiam opinion. FEC v. Christian Action Network, 92 F.3d 1178 (4th Cir. 1996).

The Christian Action Network subsequently asked the court to order the FEC to pay the expenses it had incurred in defending against the FEC's baseless lawsuit. The Fourth Circuit ruled in CAN's favor, explaining that:

> In the face of unequivocal Supreme Court and other authority discussed, an argument such as that made by the FEC in this case, that 'no words of advocacy are necessary to expressly advocate the election of a candidate,'simply cannot be advanced in good faith (as disingenuousness in the FEC's submissions attests), much less with "substantial justification."

Commissioner McDonald's vote to authorize the CAN litigation was unfortunate, because taxpayers ended up footing the bill for CAN's defense of meritless litigation. His vote was particularly disturbing, because the CAN case was not the last time Commissioner McDonald voted to pursue litigation based on an impermissibly broad and subjective definition of express advocacy. See, e.g., FEC v. Freedom's Heritage Forum, No. 3:98CV-549-S (W.D. Ky September 29, 1999). Sadly the CAN litigation did not cause Commissioner McDonald to question his broad and subjective theory of express advocacy. While the CAN case was being litigated, Commissioner McDonald voted to enact a regulation that defines express advocacy in exactly the same broad and subjective terms that the courts have rejected. And despite this regulation being declared unconstitutional on several occasions, see, e.g., Maine Right to Life Committee v. FEC, 98 F.3d 1 (1st Cir. 1996), Commissioner McDonald has repeatedly voted against amending the agency's definition of express advocacy to comply with the law as declared by the courts of the United States. Earlier this year, the United States District Court for the Eastern District of Virginia issued a nationwide injunction against the FEC's enforcement of the broad and subjective definition

of express advocacy that Commissioner McDonald has consistently supported. Virginia Society for Human Life, Inc. v. FEC, No. 3:99CV559 (E.D. Va. Jan. 4, 2000). Nevertheless, just a few weeks ago, Commissioner McDonald voted against reconsidering the agency's definition of express advocacy.

It must be noted that Commissioner McDonald cannot reasonably assert that his support for a broad and subjective definition of express advocacy is grounded in the Ninth Circuit's decision in FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987). As more than one court has made clear, Furgatch is an inherently suspect decision because it does not discuss or even mention the Supreme Court's ruling in MCFL, which was decided a month before Furgatch. But, even to the extent Furgatch is good law, the broad definition of express advocacy that Commissioner McDonald consistently supports goes beyond what even the Furgatch court permitted. The Fourth Circuit has aptly summarized the discrepancy between the broad FEC regulation defining express advocacy (which Commissioner McDonald voted to approve) and the loose definition used in Furgatch:

> It is plain that the FEC has simply selected certain words or phrases from Furgatch that give the FEC the broadest possible authority to regulate political speech . . . and ignored those portions of Furgatch . . . which focus on the words and text of the message.

Moreover, the FEC itself has acknowledged that its broad definition of express advocacy is not fully supported by Furgatch. In its brief in opposition to Supreme Court review of Furgatch the FEC described as dicta the portions from Furgatch that made their way into the agency's express advocacy regulation. See FEC Brief in Opposition to Certiorari in Furgatch at 7. And just last year in FEC Agenda Document No. 99-40 at 2, the FEC's General Counsel conceded that the broad view of express advocacy Commissioner McDonald endorses is not completely supported by Furgatch, but only "largely based" on Furgatch. In short, neither the courts nor the FEC view Furgatch as fully justifying the definition of express advocacy that Commissioner McDonald endorses.

Unfortunately, the history of the FEC's express advocacy rulemaking is just one of many examples I could proffer of Commissioner McDonald's disregard for the Constitution and the rule of law. By supporting the agency's willful efforts to disregard the law as pronounced by the courts of the United States, Commissioner McDonald has helped to create a situation in which an individual's First Amendment rights vary – depending upon where they happen to live in the United States. Of course, even people who reside in regions of the

Law Offices of
MANUEL S. KLAUSNER, P.C.

country where the controlling court of appeals has rejected the FEC's efforts to expand its jurisdiction over political speech, are still chilled from conveying their views on issues. After all, if they fund a public communication that is broadcast into a neighboring state that is in a federal circuit which has not ruled on the FEC's novel theories, they may find themselves the test case for that Circuit and be exposed to lengthy and costly litigation.

When federal agencies are allowed to create such a patchwork system of speech regulation, public confidence in the competence and integrity of the administrative state declines. People come to feel that their rights extend no further that the capricious whims of government bureaucrats.

It is for Congress in its capacity as the body charged with overseeing independent agencies to take the lead in remedying such problems and reining in agencies that are out of control. You can start reining in the FEC by making public officials such as Commissioner McDonald accountable for disregarding the rule of law and the constitutional rights of citizens. By rejecting the nomination of Danny Lee McDonald, Congress can signal that it will not tolerate FEC Commissioners who arrogantly refuse to honor their oath to uphold and defend the Constitution. By rejecting Danny Lee McDonald – a man who has for almost twenty years demonstrated contempt for the rights of ordinary Americans and the rulings of federal courts – Congress can begin to restore confidence that the Federal Election Commission will not continue to trample on core First Amendment rights.

Very truly yours,

Manuel S. Klausner

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APPENDIX 4.

Common Cause

DEREK BOK, *Chairman*
SCOTT HARSHBARGER, *President and CEO*
ARCHIBALD COX, *Chairman Emeritus*
JOHN GARDNER, *Founding Chairman*

March 8, 2000

The Honorable Mitch McConnell
The Honorable Christopher Dodd
Senate Committee on Rules
U.S. Senate
Washington, DC 20510

Dear Chairman McConnell and Senator Dodd:

While Common Cause believes the Committee and the Senate would have been better served with full and open hearings regarding the nomination of Bradley A. Smith to be commissioner to the Federal Election Committee (FEC), I request that this letter be made part of the record.

Common Cause strongly urges the Committee to reject the nomination of Bradley A. Smith, Professor of Law at Capital University in Ohio, to serve on the Federal Election Commission. Mr. Smith has written extensively about the need to deregulate the campaign finance system, has stated that the FEC should be abolished, and has written that the Federal Election Campaign Act (FECA) is unconstitutional. Clearly, as someone who strongly opposes the law he would be duty-bound to uphold and administer impartially, Mr. Smith should not be confirmed.

The FEC was created for the sole purpose of upholding and enforcing the FECA. Mr. Smith, however, strongly believes that the Act should be repealed. In a 1997 op-ed published in *The Wall Street Journal*, Smith stated: *"When a law is in need of continual revision to close a series of ever-changing 'loopholes,' it is probably the law, and not the people, that is in error. The most sensible reform is a simple one: repeal of the Federal Election Campaign Act."*

Elimination of FECA would repeal, among other provisions, the ban on corporate and labor union contributions to federal candidates, the limits on individual and PAC contributions to federal candidates, the ban on foreign contributions to federal candidates, the ban on cash contributions of more than $100 to federal candidates, and the prohibition on federal officeholders converting campaign contributions to personal use.

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recycled paper

In short, repeal of the Federal Election Campaign Act would return this country to the days before Watergate when hundreds of thousands of dollars in cash were being given directly to candidates from undisclosed wealthy contributors.

Any member of a federal regulatory agency should, at a minimum, believe in the mission of that agency, and the constitutionality of those laws. Not only does Mr. Smith demonstrate utter contempt for the agency, he also demonstrates his comprehensive hostility to the federal campaign finance laws – laws which he believes are wrong, burdensome, and unconstitutional.

Mr. Smith is on record stating that federal campaign finance laws are, in their entirety, unconstitutional. He has written that *"FECA and its various state counterparts are profoundly undemocratic and profoundly at odds with the First Amendment."*

Smith also wrote: *"The solution is to recognize the flawed assumptions of the campaign finance reformers, dismantle FECA and the FEC bureaucracy, and take seriously the system of campaign finance regulation that the Founders wrote into the Bill of Rights: 'Congress shall make no law...abridging the freedom of speech.'"*

Any individual who believes that an agency's organic statute is unconstitutional and should be repealed *in toto*, is not fit to serve as a Commissioner of the agency charged with administering and enforcing that statute.

No one, for example, would conceive of appointing to head the Drug Enforcement Agency an individual who believes all federal anti-drug laws are unconstitutional and should be repealed. Such an appointment would be viewed as an act of utter disdain and disrespect for the laws to be administered by the agency involved.

Mr. Smith believes the federal campaign finance laws are not only unconstitutional, but misguided in their very purpose. In supporting repeal of the campaign finance laws, he has written that the country "would best be served by deregulating the electoral process."

Mr. Smith's ideas are not simply a matter of whether one takes a liberal or conservative view of the existing campaign finance laws. What is at stake here is whether the law will be administered and enforced to its full extent. While Mr. Smith's ideas may be appropriate for an academic participating in public debate, they are wholly unacceptable for a Commissioner charged with administering and enforcing the nation's anti-corruption laws enacted by Congress and upheld by the Supreme Court. The purpose of the FEC is not to be a debating society. The role of a FEC Commissioner is not to be an advocate.

Indeed, Mr. Smith fails even to accept the fundamental anti-corruption rationale for the campaign finance laws – the rationale that was at the very heart of the Supreme Court's decision in *Buckley v. Valeo,* upholding the constitutionality of the existing campaign finance laws, and which was reaffirmed this year by the Supreme Court in *Nixon v. Shrink Missouri Government PAC.* In that case, Justice David Souter, writing for the majority, stated "There is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters."

Mr. Smith dismisses the rationale by writing that *"money's alleged corrupting effects are far from proven ... That portion of Buckley that relies on the anti-corruption rationale is itself the weakest portion of the Buckley opinion – both in its doctrinal foundations and in its empirical ramifications."*

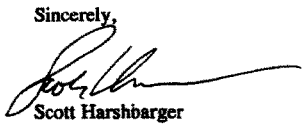
The FECA requires the members of the Federal Election Commission shall be chosen "on the basis of their experience, integrity, impartiality, and good judgment." 2 U.S.C. 437c(a)(3). While we believe President Clinton would have been within precedent to reject the recommendation from Senate Majority Leader Trent Lott (R-MS) of Mr. Smith's nomination (President Reagan rejected a proposed FEC nominee in 1985), the Committee now has the responsibility to judge whether Mr. Smith meets these criteria.

Mr. Smith is in no way "impartial" about the campaign finance laws. He simply does not believe in them.

Mr. Smith's extreme opposition to the existence of the federal campaign finance laws, and his clearly stated views that they are unconstitutional, make him unfit to serve as a Commissioner of the FEC.

Common Cause strongly urges the Committee to vote against Mr. Smith's nomination. A vote to confirm Mr. Smith is a vote against campaign finance reform.

Sincerely,



Scott Harshbarger
President

APPENDIX 5.

Democracy 21

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For Immediate Release:
Wednesday, February 23, 2000

Contact: Jennifer Fuson

Note To The Press

Attached is an op-ed by Democracy 21 President Fred Wertheimer entitled "The Wrong Man for the Job, " which explains why Bradley Smith, who President Clinton nominated earlier this month to the Federal Election Commission (FEC), should not be confirmed by the Senate.

The FEC is responsible for enforcing the federal campaign finance laws.

Smith, a strong opponent of the nation's campaign finance laws, has stated "the most sensible reform is a simple one: repeal of the Federal Election Campaign Act [FECA]," Wertheimer writes.

Mr. Smith also believes that the FECA is unconstitutional, a position directly contradicted by numerous Supreme Court decisions, Wertheimer writes.

"Mr. Smith's nomination is a classic symbol of the breakdown in law enforcement that has occurred when it comes to the nation's campaign finance laws," Wertheimer writes.

"[T]he American people are entitled to law enforcement officials who believe in the validity and constitutionality of the laws they are statutorily responsible for enforcing, and who do not view these laws with total disdain and hostility."

Feel free to use this op-ed as you wish.

The Wrong Man for the Job

By Fred Wertheimer
President, Democracy 21

Would an individual who believes the nation's drug laws should be repealed and are unconstitutional be appointed to head the Drug Enforcement Agency?

No way.

Would the United States Senate confirm an individual with these views to be the nation's chief drug law enforcement official?

Absolutely not.

Then, what in the world is Bradley Smith's name doing pending before the Senate for confirmation to serve as a Commissioner on the Federal Election Commission (FEC)?

Mr. Smith -- who has stated that the nation's campaign finance laws should be repealed and are unconstitutional — was nominated by President Clinton earlier this month to serve on the FEC, the agency responsible for enforcing the nation's campaign finance laws.

That's the same President Clinton who is a self-proclaimed supporter of campaign finance laws and campaign finance reform.

The Smith nomination was dictated by Senate Republican Majority Leader Trent Lott and Senator Mitch McConnell, the leading Senate defenders of the corrupt campaign finance status quo in Washington, and Smith's two leading advocates for the Commission job.

President Clinton lamely explained his nomination of Smith, a strong opponent of federal campaign finance laws, on the grounds that he was just following custom in ceding to

the other major party the ability to name three of the six FEC Commissioners. In fact, however, when the Republicans held the White House, President Reagan had no problem rejecting the appointment of an FEC nominee of the Democrats that he found to be objectionable.

So what are the potential consequences of Clinton's campaign finance betrayal if the Senate confirms Smith to serve on the Commission?

Here is what Bradley Smith has said about the nation's campaign finance laws: "[T]he most sensible reform is a simple one: repeal of the Federal Election Campaign Act [FECA]."

And, here is what Mr. Smith's "reform" would accomplish: repeal of the ban on corporate contributions to federal candidates, repeal of the ban on labor union contributions to federal candidates, and repeal of the limits on contributions from individuals and PACs to federal candidates.

Mr. Smith's "reform" also would repeal the system for financing our presidential elections, the ban on officeholders and candidates pocketing campaign contributions for their personal use, the ban on cash contributions of more than $100, and various other provisions enacted to protect the integrity of our democracy.

Mr. Smith also has stated that the federal campaign finance law, known as the FECA, is "profoundly undemocratic and profoundly at odds with the First Amendment."

Mr. Smith's position that the FECA, and its contribution limits, are unconstitutional, however, is directly contradicted by numerous Supreme Court decisions.

Just last month, for example, the Supreme Court reaffirmed in *Nixon v. Shrink Missouri Government PAC* that contribution limits are constitutional.

The Court cited "the prevention of corruption and the appearance of corruption" as the rationale for upholding contribution limits, a rationale that Smith firmly rejects.

Justice Souter, writing for six of the nine Justices including Chief Justice Rehnquist, stated, "Leave the perception of impropriety unanswered and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."

Mr. Smith, it goes without saying, is entitled to hold and express whatever views and philosophy he may have about campaign finance laws.

It should also go without saying, however, that the American people are entitled to have law enforcement officials who believe in the validity and constitutionality of the laws they are charged to enforce, and who do not view these laws with total disdain and hostility.

As *The Washington Post* noted in an editorial, Smith's premises "are contrary to the founding premises of the commission on which he would serve. He simply does not believe in the federal election law."

And, *The New York Times* wrote in an editorial that Smith's stated positions "make plain that his agenda as a commission member would be a further dismantling of reasonable campaign limits intended to curb the corrupting influence of big money rather than serious enforcement of current campaign finance laws."

Mr. Smith's nomination is a classic symbol of the breakdown in law enforcement that has occurred when it comes to the nation's campaign finance laws. Mr. Smith's confirmation to be an FEC Commissioner would be an insult to the American people.

United States Senators should not allow this to happen.

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