

the National Review—and advocacy groups, and target all of them. With those combined lists, campaigns decide which potential voters to target for which mailings. The campaigns will also often share lists with each other and with party committees. All of this goes on offline.

On the other hand, when I go to the shopping mall and I walk into a store and look at five different items, five sweaters, or five pairs of pants, whatever it may be, and I don't buy any of them, there is no record of them at all. But there is a record of that kind of traveling or perusal, if you will, with respect to the web.

There are clearly questions that we have to resolve with respect to what kind of anonymity can be protected with respect to the online transaction.

I just do not think this is the moment for us to legislate. I think we need to study the issue of access very significantly.

There is a general agreement that consumers should have access to information that they provided to a web site. We still don't know whether it is necessary or proper to have consumers have access to all of the information that is gathered about an individual.

Should consumers have access to click-stream data or so-called derived data by which a company uses compiled information to make a marketing decision about the consumer? And if we decide that consumers need some access for this type of information, is it technologically feasible? Will there be unforeseen or unintended consequences such as an increased risk of security breaches? Will there be less rather than more privacy due to the necessary coupling of names and data?

Again, I don't believe we have the answers, and I don't believe we are in a position to regulate until we have thoroughly examined and experienced the work on those issues.

I disagree with those who think that this is the time for heavy-handed legislation from the Congress. Nevertheless, I believe we can legislate the outlines of a structure in which we provide some consumer protections and in which we set certain goals with which we encourage the consumer to familiarize themselves while we encourage the companies to develop the technology and the capacity to do it.

Clearly, opting in is a principle that most people believe ought to be maximized. Anonymity is a principle that most people believe can help cure most of the ills of targeted sales. For instance, you don't need to know if it is John Smith living on Myrtle Street. You simply need to know how many times a particular kind of purchase may have been made in a particular demographic. And it may be possible to maintain the anonymity and provide the kind of protection without major legislation. It seems to me that most companies will opt for that.

In addition to that, we need to resolve the question of how much access

an individual will have to their own information, and what rights they will have with respect to that.

Finally, we need to deal with the question of enforcement, which will be particularly important. It is one that we need to examine further. I believe that there is much for us to examine. We should not, in a sense, intervene in a way that will have a negative impact on the extraordinary growth of the Internet, even as we protect privacy and establish some principles by which we should guide ourselves. I believe that the FTC proposal reaches too far in that regard.

I hope my colleagues in the Senate will join me in an effort to embrace goals without the kind of detailed intrusion that has been suggested.

I thank the Chair.

#### CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

#### EXECUTIVE SESSION

#### NOMINATION OF BRADLEY A. SMITH, OF OHIO, TO BE A MEMBER OF THE FEDERAL ELECTION COMMISSION

The PRESIDING OFFICER. Under the previous order, the hour of 11:30 a.m. having arrived, the Senate will proceed to executive session.

The legislative clerk read the nomination of Bradley A. Smith, of Ohio, to be a member of the Federal Election Commission.

Mr. MCCONNELL. Mr. President, based on the caricatures of Professor Bradley Smith, one would think he must have horns and a tail. I unveil a picture of Brad Smith and his family in the hopes of putting to rest some of these rumors.

Let me quote Professor Smith himself on this point, talking about the experience he has had over the last 10 months. He said: In the last 10 months since my name first surfaced as a candidate, certain 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, one-time leader in the Ku Klux Klan, to high office. Nominating me has been likened to nominating Theodore Kaczynski, the Unabomber, a murderer, to high office.

Professor Smith went on and said: Just this week I saw a new one. I was compared to nominating Jerry Springer, which is probably not a good comparison since Springer is a Democrat. Other critics have attempted ridicule, labeling me a "flat Earth Society poobah," and more.

He says: I say all this not by way of complaint because I'm sure that Mem-

bers—he is referring to Members of the Senate—have probably been called similar or worse things in the course of their public lives.

I thought it might be appropriate to begin with a photograph of Professor Smith and his family, which bears little resemblance to Larry Flynt, David Duke, or Theodore Kaczynski.

It is my distinct honor today to rise in support of the nomination of Professor Bradley A. Smith to fill the open Republican seat on the bipartisan Federal Election Commission.

In considering the two FEC nominees, Professor Brad Smith and Commissioner Danny McDonald, the Senate must answer two fundamental questions: Is each nominee experienced, principled, and ethical? And: Will the FEC continue to be a balanced, bipartisan commission?

I might state this is a different kind of commission. It is a commission set up on purpose to have three members of one party and three members of another party so that neither party can take advantage of the other in these electoral matters that come before the Commission. The Federal Election Commission is charged with regulating the political speech of individuals, groups, and parties without violating the first amendment guarantee of freedom of speech and association—obviously, a delicate task.

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 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. The Republicans pick the Republicans; the Democrats pick the Democrats. As President Clinton said recently, this is, "the plain intent of the law, which requires that it be bipartisan and by all tradition, that the majority make the nomination" to fill the Republican seat on the Commission.

Professor Bradley Smith was a Republican choice agreed to by the Republicans in the House and the Republicans in the Senate and put forward by the Republicans to the President of the United States, who has nominated him.

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 nominee in a floor vote or even staged a filibuster on the Senate floor.

At the end of the day, however, the bipartisan nature of the FEC 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.

The Dean of Stanford Law School, Kathleen Sullivan, has summed up the balance as well as anyone. Specifically, she praised Professor Smith for the instrumental role he would play in upholding constitutional values and establishing a bipartisan equilibrium:

I do think Mr. Smith's views are in the mainstream of constitutional opinion. . . . I think it is a good thing, not a bad thing, to have people who are very attuned to constitutional values in Government positions, just as we would think it is a good thing to have a prosecutor who thinks very highly of the Fourth Amendment and wants to make sure searches are always reasonable, maybe more so than some of his colleagues. It is certainly good to have one of those prosecutors in the shop, and it certainly would be a good thing to have one Commissioner at least who has those views.

Let me say that I sincerely hope that we can uphold this bipartisan law and tradition that President Clinton invoked when he sent these two nominees to the Senate.

After all, Professor Smith's 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 current Gore campaign chairman Tony Coelho has hailed Commissioner McDonald as "the best strategic appointment" the Democrats ever made. So, notwithstanding the bluster and delay, these two nominees largely represent their parties' long line of past FEC Commissioners. One could argue that the only thing new in this debate is the opportunity for new headlines.

Again, let me restate the questions before the Senate on these two FEC nominees?

Is each nominee experienced, principled and ethical?

Will the FEC continue to be a balanced, bipartisan commission?

I 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. These letters from those who agree and those who disagree with Professor Smith clearly establish that: (1) Professor Smith is experienced, principled and ethical, and (2) his service would help the FEC to be balanced and bipartisan.

Even staunch advocates of reform, including two past board members of

Common Cause, have written in support of Professor Smith's nomination. These many letters attest to the central role that Professor Smith's scholarship has played in mainstream thought about campaign finance regulation. Equally important, these letters make clear that no one who knows Brad Smith personally or professionally, including self-avowed reformers, believes that he will fail to enforce the election laws as enacted by Congress or to fulfill his 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 of what these experts say.

I ask unanimous consent the full text of these letters that I am going to be reading be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. McCONNELL. First, 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.

Second, Professor 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.

Third, Professor John Copeland Nagle of 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.

Fourth, Professor Burt Neuborne of the Brennan Center at New York University. There is no group in America that disagrees more passionately with Professor Smith on campaign finance than the Brennan Center. Yet, listen to what Burt Neuborne, the Legal Director of the Brennan Center had to say about Smith's scholarship.

Neuborne considers Professor Smith's writings to be "thoughtful discussions of topics of extreme importance" and concludes that Smith has done "excellent work in debunking the status quo." He goes on to say of Professor Smith's scholarship:

I learned from it and altered aspects of my own approach as a result of his argument. It is, in my opinion, thoughtful scholarship that helps us move toward a better understanding of an immensely important national issue. Higher praise than that I cannot give.

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. Here are just a few examples of the confidence these experts have in Brad Smith's integrity and commitment to the rule of law.

Fifth, Professor Daniel Lowenstein of 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.

Sixth, Professor Daniel Kobil of 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 confident that he will fairly administer the laws he is charged with enforcing as a Commissioner.

Seventh, Professor Randy Barnett of 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.

Let me close my opening comments by sharing with you Brad Smith's own closing remarks in his statement before the Senate Rules Committee:

[S]hould 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. . . . 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.

I think, with all due respect to current and past members of the FEC, this is clearly the most outstanding individual ever nominated for that commission. We all regret that this nomination has taken on some level of controversy because of Professor Smith's views, which are similar to those of 95 percent of the Republicans in the Senate. But that happens occasionally.

I am confident that well-meaning Senators on both sides of the aisle will remember that this is a bipartisan agency. It is supposed to have three Democrats, picked by the Democrats, and three Republicans, picked by the Republicans. It is important for us to honor each others' choices if the FEC is to work. So I am hopeful and confident that Professor Smith's nomination will be confirmed tomorrow when the roll is called.

With that, I yield the floor.

EXHIBIT 1

UNIVERSITY OF CALIFORNIA  
SCHOOL OF LAW,  
Los Angeles, CA, February 17, 2000.

Re Bradley Smith nomination.

(Attn: Andrew Siff)

Senator MITCH MCCONNELL,  
Senate Rules Committee, Senate Office Building,  
U.S. Senate, Washington, DC

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 regulations 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.

CAPITAL UNIVERSITY  
LAW SCHOOL, COLUMBUS OH,  
February 15, 2000.

Re nomination of Professor Bradley A. Smith for Commissioner on Federal Election Commission.

Hon. MITCH MCCONNELL,  
Chair, Senate Committee on Rules and Administration, Russell Senate Office Building, U.S. Senate, Washington, DC.

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, *Pesttrak v. Ohio Elections Commission*, 926 F2d 573 (6th Cir. 1991).

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 know 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,  
Professor of Law.

UNIVERSITY OF VIRGINIA,  
WOODROW WILSON DEPARTMENT,  
Charlottesville, VA, March 1, 2000.

Senator MITCH MCCONNELL,  
Chairman, Senate Rules Committee, Russell  
Building, U.S. Senate, Washington, DC.

(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 been 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 vilify 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,  
ROBERT KENT GOOCH,  
Professor Of Govern-  
ment and Foreign  
Affairs, and Director  
of the University of  
Virginia Center for

*Governmental Stud-  
ies.*

NOTRE DAME LAW SCHOOL,  
Notre Dame, IN, February 18, 2000.

Hon. MITCH MCCONNELL,  
U.S. Senate, Russell Senate Office Building,  
Washington, DC.

(Att'n: Andrew Siff)

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 of communicate their message 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 evidence 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 to 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 had 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.* 170, 200 (1998). In sort, 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,

JOHN COPELAND NAGLE,  
*Associate Professor.*

BOSTON UNIVERSITY,  
SCHOOL OF LAW,  
*Boston, MA, February 13, 2000.*

Senator MITCH MCCONNELL,  
*Chair, Senate Committee on Rules and Administration, Russell Senate Office Building, U.S. Senate, Washington, DC.*

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 E. BARNETT,  
*Austin B. Fletcher Professor.*

The PRESIDING OFFICER. The Chair recognizes the Senator from Connecticut.

Mr. DODD. Mr. President, I begin by thanking the distinguished chairman of the Rules Committee for his leadership and for bringing these matters to the floor. We will have roughly 6 hours of debate on this matter. A number of my colleagues have some very strong views about this nomination and will take the time to express them at the appropriate time.

I begin by apologizing to Danny Lee McDonald, the Democratic nominee for the Federal Election Commission, and his family. I do not have a picture of Danny Lee McDonald. I do not know if he has a dog or not, or two dogs. I will try to correct that before the next 6 hours and see if I can come up with a nice picture of Mr. McDonald to show to our colleagues and the public.

Mr. MCCONNELL. Will my friend yield?

Mr. DODD. I will be happy to yield.

Mr. MCCONNELL. Had Commissioner McDonald been subjected to the same things to which the Republican nominee has been subjected, my colleague might have needed a picture with children and dogs. In any event, we are going to be voting on him as well after we vote on Professor Smith.

Mr. DODD. If he does not have a dog, maybe he can rent one. This is a fine looking dog here. Maybe we can borrow that fine looking red dog for our picture. I apologize to Mr. McDonald, we do not have a similar photograph of him and his family and dog before us.

I want to take our colleagues who are monitoring this back in time for a historical framework before I get to the issue of the nominees before us because it might be helpful for people to understand the legislative background as well as the historical background of these nominees and how the process has proceeded over this past quarter of a century. It has been 25 years since we created these positions. It might be worthwhile to understand how this process has worked and how nominees have historically been handled.

My colleague from Kentucky has already alluded to that in his opening comments. I thought it might be helpful to take a few minutes and give a history lesson about the Federal Election Commission and about the people who have been nominated to fill these positions.

We are here to consider two Presidential nominations. That is the first lesson. We are considering Presidential nominations. The Republican Party may have promoted Brad Smith and the Democrats may have promoted Danny McDonald, but, in fact, these are two nominations that have been sent to us by President Clinton, as every other President has done during the consideration of nominees for the Federal Election Commission.

The two nominees are Danny McDonald of Oklahoma to fill the Democratic seat and Brad Smith of Ohio to fill the Republican seat on the Commission. Rollcall votes, as we know, will be conducted later this week.

It is somewhat unusual, although not unprecedented, for the Senate to take a significant amount of time to debate Presidential nominees to the Federal Election Commission. I know some of my colleagues have planned extensive remarks, and they are not out of order at all in doing that. It has been done on other occasions.

It is even more unusual for the Senate to conduct a rollcall vote, however, on such nominees. It might be instructive to briefly review Senate action of FEC nominees over the past 25 years since the creation of the Commission.

Approximately 43 nominees, including reappointments, have been submitted to the Senate for consideration to this Commission. Of that total, only three nominations have required a roll-

call vote by this body in the past quarter of a century. In each of those three instances, the nominees were confirmed by the Senate. The Senate has never voted to reject a nominee to the Federal Election Commission submitted by respective Presidents.

Of the remaining 40 or so nominees, 3 were withdrawn by Presidents for various reasons, 1 was returned to the President without action under rule XXXI of the Senate, 3 were recess appointments, 2 of which were confirmed by the Senate by unanimous consent; and the remainder, some 33 nominees, were all confirmed by unanimous consent without recorded votes in the Senate.

In the last 10 years, pairs of nominees, one Democrat paired with one Republican, have been considered by the Senate Rules Committee, reported to the Senate, and confirmed en bloc by unanimous consent. In the most recent action by the Senate in 1997, four nominees, or two pairs, were considered and confirmed in this manner and confirmed by unanimous consent, again en bloc.

How is it possible so many nominees, to what is considered by some to be a controversial agency, have received the nearly unanimous support of this body throughout the past 25 years? I suggest the answer lies in the very statute that created this Commission.

Chapter 14 of title 2 of the United States Code governs Federal campaigns. Section 437c establishes the Federal Election Commission and provides for the appointment of Commissioners. The statute provides for—and I apologize for going through this laboriously, but it may help to understand the background of all of this—the statute provides for the appointment by the President, with the advice and consent of the Senate, of six members to the Commission. Further, the statute provides that no more than three members of the Commission be affiliated with the same political party; and that members shall serve for 6 years, with the requirement that the initial six members serve staggered terms, with two members not affiliated with the same political party being paired for each of the staggered terms. These requirements were adopted by the Congress in the 1976 amendments to the Federal Election Campaign Act.

The Supreme Court struck down the original membership provision of this act in the landmark case of Buckley v. Valeo. The original provisions of the 1971 act provided that the six members of the Commission be appointed by the President, the President pro tempore of the Senate, and the Speaker of the House, with confirmation by a majority of both Houses of Congress. The Buckley Court struck that process down.

What is obvious, however, is it has always been the intent of Congress that these nominees be appointed with regard to their party affiliation. That part has been quite clear.

Moreover, these nominees are appointed and considered in pairs—one Democratic nominee paired with a Republican nominee—and that is how the Committee on Rules and Administration has also traditionally considered FEC nominees. The committee has similarly paired their consideration so that no hearings are held, nor are the nominees reported, except in strict pairs.

In recent history, the Rules Committee has reported pairs of nominees, voting to report the pair en bloc to the Senate as a full body. That is the case with the two nominees before the Senate today. The Rules Committee held a confirmation hearing in which both nominees appeared, presented testimony, and answered questions of members of the committee. On March 8, the committee, by a voice vote, reported these nominations en bloc to the full body. That is also why the overwhelming majority of these FEC nominees have moved through the Senate over the past 25 years by unanimous consent, often, again, confirmed en bloc.

The statute creates a presumption that the views of each of the two major political parties will be represented by the three members of the Commission. And the practice that has developed that the leadership of the Congress, both Republican and Democratic leadership, communicate to the President their preferences for the nominees.

Presidents have rejected these preferences in the past. I noted that earlier. This practice may be a holdover from the original provisions in which the President of the Senate and the Speaker of the House actually chose the nominees under the 1971 statute. Now the recommendations are made to the President, and the President makes the nomination. He can reject the recommendations, which Presidents have. Ronald Reagan rejected a nominee, and I recall Jimmy Carter also. Others may have a better recollection historically of that.

This practice may be a holdover from the original provisions in which the President pro tempore of the Senate and the Speaker of the House actually chose the nominees. Or it may reflect the reality that such nominees, because they are intended to reflect the relative views of the political parties, must be confirmed by members of those parties in the Senate. In either event, these nominees are accepted as somewhat partisan in their views and consequently are paired in their consideration.

So why does the Senate find itself in the somewhat unusual position of taking the time of the body to fully debate and conduct rollcall votes on these nominees? Not surprisingly, each of these nominees is very closely associated with the majority views of their party on issues of campaign finance reform. Commissioner McDonald has been a member of the FEC since 1982. He is currently Vice Chairman of the

Commission. He has been reaffirmed to a seat on the Commission twice since his original appointment. During his tenure, he served as Chairman of the Commission three times, and as Vice Chairman four times.

Professor Bradley Smith is a distinguished professor of law at Capital University Law School in Columbus, OH. He is the author of numerous scholarly articles on campaign finance and his views are well-published and widely known on this subject matter.

In testimony before the Rules Committee, Mr. Smith acknowledged that, notwithstanding the decision of the Supreme Court in Buckley and the long line of cases that follow, he happens to believe the first amendment should be read to prohibit restrictions on campaign contributions.

Mr. Smith has similarly argued that Congress needs to reverse course and loosen campaign finance regulations. He has argued that contrary to the belief of a majority in Congress, and a majority of the American people, that there is too much money in politics today, Mr. Smith argues that money increases speech and therefore we need more speech—and more money, I argue, from his point of view—in our campaigns. He also argues that campaigns funded by small donors are not more democratic and that, in fact, large donors are healthier for the system. Mr. Smith has also argued that the perception that money buys elections is incorrect and that rather than corrupting the system, limiting money corrupts the system by entrenching the status quo, favoring wealthy individuals, and making the electoral process less responsive to public opinion.

Let me categorically state for the record that I could not disagree more with Mr. Smith's positions and his writings when it comes to campaign finance. It is clear to me that money plays far too great a role in campaigns today. I could not disagree more that limits on contributions are not only constitutional but necessary for our form of democracy to survive.

There is no doubt in my mind that money corrupts, or has the appearance of corrupting our system, and this perception threatens to undermine our electoral system and jeopardize the confidence in our form of democracy.

I could not disagree more with Mr. Smith's conclusion that Congress needs to reverse course and loosen campaign finance regulations. It is past time for this Congress to pass comprehensive campaign finance reform, which I have consistently supported and will continue to support.

That is what the debate in the Senate is about today—whether or not this Congress will act on the will of the people and bring this system of campaign finance loopholes and the money chase to a close. My support for such action could not be more clear.

Notwithstanding my strong disagreement with his views, I am not going to oppose this nomination of Mr. Smith

for the following reasons: Traditionally, there is a heightened level of deference given to the President's nominees, particularly when the position is designated to be filled by one party. That is particularly the case with nominees to the FEC, who by statute are to be the representatives of their political parties on that commission. Moreover, in performing our constitutional responsibility to provide advice and consent to the President's nominations, the Senate should determine whether a nominee is qualified to hold the office to which he or she has been nominated.

Mr. President, it is clear to me that Mr. Smith is qualified to hold this office. He is clearly intellectually qualified for the position. He is a recognized, although controversial, scholar on election law and the Constitution. He is bright, articulate, and anxious to serve. Again, I could not disagree with him more, but to say he is not qualified to serve is not to have spent time reading his writings or listening to him. You can disagree with him—and I do vehemently—but he is certainly qualified to sit on the FEC. Most importantly, he has appeared before the Senate Rules Committee and testified under oath that if confirmed, he will uphold the Constitution of the United States and the election laws of the land.

During Rules Committee consideration of this nominee, I asked Mr. Smith if, notwithstanding his personal views, was he prepared to enforce the election laws founded on the congressional belief that political contributions can corrupt elections and need to be limited, as allowed by law and the Constitution. Mr. Smith responded that he would "proudly and without reservations" take that oath of office.

Finally, this Senate, and the Rules Committee in particular, have an obligation, in my view, to fill vacancies on the Federal Election Commission. Otherwise, we face gridlock and inaction by our agencies. The FEC is simply far too important, in my view, to be hamstrung by refusing to confirm a controversial but otherwise well-qualified nominee.

My vote in favor of this nomination should not be read as an endorsement of his views. Nothing could be further from the truth. It is an endorsement of the process that allows our political parties to choose nominees who hold views consistent with their own. I regret that the majority party here—at least a majority of the majority party—embraces the views they do, and nobody holds them more strongly than my friend and colleague from Kentucky. I think he is dead wrong in his views on these issues, but he represents the views of the majority party on this issue. They have made a choice that Bradley Smith reflects their views well on this issue. Therefore, they have the right, in my view, to have him confirmed to the seat, assuming that he is otherwise qualified to sit on the Commission. I would not vote for him if it

were strictly a case of endorsing his views as opposed to mine. But the FEC has never been a body where that has been a litmus test applied to Presidential nominees.

Whether or not this nominee is confirmed will not determine the real issue for Congress—and that is whether we will pass meaningful campaign finance reform laws to restore the public's faith in our elected system of Government.

The fundamental problem we face is not whether Bradley Smith is on the FEC, but whether or not this body, before we adjourn this Congress, is ever going to address the fundamental campaign laws that some of us would like to see modified, including the McCain-Feingold legislation, which has been before this body in the past.

It is time, in my view, to confirm these nominees to ensure that this agency has a full complement of dedicated, talented Commissioners sworn to uphold the laws on the books.

It is time to get on with the work of the Senate to reform our campaign finance laws and give the FEC the resources it needs—both financially and statutorily—to restore the public's confidence in our electoral system.

I yield the floor at this time.

The PRESIDING OFFICER. The Chair recognizes the Senator from Kentucky.

Mr. MCCONNELL. Mr. President, let me say briefly to the ranking member of the Rules Committee, I listened carefully to his statement. I thank him very much for respecting the process by which we have selected our nominees for the Federal Election Commission. He made it clear that, had the choice been his, he would not have picked Professor Smith. I will make it clear a little later that had the choice been mine, I would not have picked Commissioner McDonald. This is the way the FEC is supposed to work. I thank my colleague for honoring that tradition.

The PRESIDING OFFICER. Under the previous order, the Senate is to recess at 12:30.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that I be recognized at that point to use such time as I am allotted.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### RECESS

The PRESIDING OFFICER. Under the previous order, the Senate will now stand in recess until the hour of 2:15 p.m.

Thereupon, at 12:49 p.m., the Senate recessed until 2:15 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. INHOFE).

#### NOMINATION OF BRADLEY A. SMITH, OF OHIO, TO BE A MEMBER OF THE FEDERAL ELECTION COMMISSION—Continued

The PRESIDING OFFICER. Under the previous order, the distinguished Senator from Wisconsin is recognized.

Mr. FEINGOLD. Thank you, Mr. President.

Today we are debating a nomination that may be just as important to the cause of campaign finance reform as any bill that has been considered by the Senate in recent years. Tomorrow's vote on the nomination of Brad Smith may be just as significant for campaign finance reform as any of the votes we had on those bills.

The issue here is the nomination of Brad Smith to a 6-year term on the Federal Election Commission, and I oppose that nomination.

Like other speakers, I take note of the photograph of Brad Smith's family shown today on the floor only to make a point that this nomination is certainly not analogous to treatment that has been given to judicial appointments, where we have had to wait for years and years for a confirmation vote. Mr. Smith was just nominated a couple of months ago. So this has not been a long drawn out delay of his nomination that would do harm to him, his family, or anybody else. In fact, I rejected that kind of approach to his nomination because, as far as I know, Professor Smith is a perfectly reasonable man in terms of his integrity and his academic ability and the like. He deserved a vote on the floor and he is going to get it, a lot faster than many judicial nominees that President has sent to us.

The problem is that Professor Smith's views on Federal election laws as expressed in Law Review articles, interviews, op-eds, and speeches over the past half decade are startling. He should not be on the regulatory body charged with enforcing and interpreting those laws.

So when words are used on the floor such as "vilification," or questioning his integrity, or any other excuse not to get to the real issue, I have to strongly object. This debate is simply on the merits of what Professor Smith's views are of what the election laws are or should be.

Over the course of the debate—and I note that a number of my colleagues will be joining me on the floor to set out the case against Professor Smith—we will explain, and I hope convince, our colleagues and the public that this nomination has to be defeated.

Let me again make it clear, because I think there was some attempt to suggest the opposite, that I hold no personal animus towards Professor Smith. It is not a matter of personality. I am sure he is a good person. I do not question his right to criticize the laws from his outside perch as a law professor and commentator. But his views on the very laws he will be called upon to enforce give rise to grave doubt as to

whether he can carry out the responsibilities of a Commissioner on the FEC. It just isn't possible for us to ignore the views he has repeatedly and stridently expressed simply because he now says he will faithfully execute the laws if he is confirmed.

We would not accept, nor should we accept, such disclaimers from individuals nominated to head other agencies of government. Sometimes a cliché is the best way to express an idea. Professor Smith on the FEC would really be the classic case of the fox guarding the hen house.

Let me illustrate this by pointing out the views of Bradley Smith that caused me and many others who care about campaign finance reform to have a lot of concern about his being on the FEC.

Professor Smith has been a prolific scholar on the first amendment and the Federal election laws, so there is a rich written record to review. Let's start with one of his most bold statements. In a 1997 opinion in the Wall Street Journal, Professor Smith wrote the following:

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 Elections Campaign Act.

That is right. The man who we may be about to confirm for a seat on the Federal Election Commission believes the very laws he is supposed to enforce should be repealed. Thomas Jefferson said we should have a revolution in this country every 20 years. He believed laws should constantly be revised and revisited to make sure they are responsive to the needs of citizens at any given time. Yet Professor Smith sees the need for closing a loophole in the Federal elections laws as evidence that the whole system, the whole idea of campaign finance reform laws, should be completely scrapped. In other words, what would be the purpose of the Federal Elections Commission under his view of the world?

A majority of both the House and the Senate have voted to close the loophole in the law known as soft money. We know that loophole is undermining public confidence in our elections and our legislative process. We have seen that loophole grow until it threatens to swallow the entire system. Many Members think it already has. A majority of the Congress wants to fix that problem. We are willing to legislate to improve an imperfect system. But Brad Smith wants to junk the system entirely and let the big money flow, without limit.

So what are we doing? We are about to put somebody with that view on the body charged with enforcing laws we pass. I don't think this makes any sense.

Another statement by Professor Smith that I think should give us pause, in a policy paper published by the Cato Institute, for whom Professor