Rules Committee Mark-up on Federal Elections Commission (FEC) Nominations
Opening Statement of Sen. Bob Bennett, Ranking Republican Member
September 26, 2007

One of the things I have learned since coming to the Senate is that we have rules and we have precedents and the precedents seem to trump the rules. For example, the rule does not say that the majority leader is recognized first, the rule on the floor says that whoever addresses the chair is recognized first, but the precedent has been so firmly established that the majority leader is always recognized and whoever else is absent for recognition has the force of rule. You have stated the rule correctly, and you will be within your rights if you insist on that rule. The precedent in this committee is very clear that nominations to the FEC have always been reported en bloc and in pairs, that is a Republican is paired with a Democrat.

Let me run down that list for the record:

Michael Toner and Ellen Weintraub in 2003. The committee was discharged from further consideration, and nominees were confirmed en bloc on the floor.

Bradley Smith and Danny Lee McDonald in 2000. As you just indicated they were considered en bloc and reported out in that fashion from the committee.

Scott Thomas and Darryl Wold, David Mason and Karl Sandstrom in 1998. The nominees were considered en bloc and reported out by voice vote.

Lee Ann Elliott and Danny Lee McDonald in 1994. The nominees were considered en bloc and reported out by unanimous vote.

Trevor Potter and Scott Thomas in 1991. The committee was discharged from further consideration, and the nominees were confirmed by the Senate en bloc.

Joan Aikens and John McGarry in 1989. The nominees were considered en bloc and reported out by unanimous roll call vote.

Lee Ann Elliott and Danny Lee McDonald in 1987. The nominees considered en bloc and reported out by voice vote.

Thomas Josefiak and Scott Thomas in 1986. The nominees were considered en bloc and recorded by voice vote.

You have to go back 28 years to find an instance of someone being considered individually. The precedent is that they are considered en bloc. You are very much within your rights to insist that they not be considered en bloc, as you have cited quoting Senator Byrd. I will make a motion to have them considered en bloc and we will see what happens from there. I assure you our friendship will not be defected by whatever happens here. That has been the precedent and history of this committee which I would hope to uphold.

Comments Made Regarding Hans von Spakovsky

Let me begin with a comment made by John Fund in the Wall Street Journal. I realize he is a journalist rather than a lawyer, but it leads to what I think is the definitive statement about some of the groups that have written to us.

Mr. Fund says, Everyone has reason to be concerned about a politicized Justice Department. But to set up a cartoon version of reality in which principled career lawyers at Justice were battling Bush political appointees bent on voter suppression is absurd. The Civil Rights shop at Justice has been stuffed with liberal activists for decades. Many of the former career Justice lawyers complaining about Mr. von Spakovsky today now work at liberal groups such as People for the American Way. And their imaginative, hyperaggressive enforcement of the Voting Rights Act hasn't fared well in court. During the Clinton years, when their theories were allowed to be put to a legal test, courts assessed Justice over $4.1 million in penalties in a dozen cases where it was found to have engaged in sloppy, over-reaching legal arguments. In one case, the Supreme Court noted "the considerable influence of ACLU advocacy on the voting rights decisions of the Attorney General is an embarrassment."

These are people who have been trying to get their version of the law forward in the courts and have been struck down as, in the words of the Supreme Court, "an embarrassment". Obviously they would have objection to Mr. von Spakovsky trying to rein them in a little bit. But those are battling opinions, back and forth, between those who have one partisan view and those who have another.

Let me go directly to the letter that the chairman quoted. I got a copy of exactly the same letter. I am interested in the sentence, which is in the second paragraph, quoted by the chairman that says, “By all accounts von Spakovsky drove the department’s decision to approve the Georgia law, later struck down by a federal judge as akin to a Jim Crowe era poll tax.”

Let’s get the facts on what happened to the Georgia law. The federal judge did not strike down the Georgia law. The federal judge granted an injunction that said the Georgia law could not go into effect until after the full trial had taken place. The full trial has now taken place and the same federal judge has ruled that the Georgia law is proper law. The federal judge who issued the

injunction against the law, immediately has now, at the end of the case, ruled that it can go into effect, and by doing so has endorsed the position that Mr. von Spakovsky took. The decision in the federal court upholding the Georgia law came down two weeks before this letter to the chairman and I was written. Either the scholarship on the part of the Leadership Conference on Civil Rights is bad or they deliberately withheld information from this committee. I will be charitable and say that their scholarship is bad, but we should not depend on this kind of letter that omits facts of this importance to be making our decisions.

To go now to the fundamental question with respect to the FEC as raised by Sen. McConnell, I would like to quote at some length, but with some editing, the statement made by the ranking member of this committee [Congressional Record, May 23, 2007.] At the time, the ranking member of this committee was Sen. Dodd. The nominee before the Senate, to which he had strong objection, was Bradley Smith. There is probably not anyone in the area of FEC regulations who is more of a firebrand for the Republican or right wing position than Bradley Smith. Sen. Dodd made the speech on the floor which I will now quote, moving from sentence to sentence, not quoting the whole thing because it was fairly long.

> Sen. Dodd said, "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.
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> "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.
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> "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 matter and confirmed by unanimous consent, again en bloc.
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> "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 that the answer lies in the very statute that created this commission.

“What is obvious, however, is that 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 had similarly paired their considerations so that no hearings are held, nor 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.

“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 has developed that the leadership of Congress, both Republican and Democratic leadership, communicate to the president their preferences for the nominees.”

He goes on to discuss Bradley Smith and says, “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.

“I could not disagree more with Mr. Smith’s conclusion that Congress needs to reverse course and loosen campaign finance regulations.

“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.

“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 view they do. And nobody holds them more strongly than my friend and colleague from Kentucky, Sen. McConnell. 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 the 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."

That is the case for the procedure we followed. Madam Chairman, I am grateful for the deft way in which you handled the difficulty we had within the committee. That is the case I will be making on the floor. I could not say it any better than Sen. Dodd has said, and therefore I have confined my comments to simply quoting him on this matter.