

Testimony of

The Honorable Russ Feingold

May 23, 2002

Full Statement on D. Brooks Smith

Mr. Chairman, I will vote NO on the nomination of D. Brooks Smith. Let me take a few minutes to explain my decision.

First, I want to say to the Committee, and particularly to the Senator from Pennsylvania, who I know cares deeply about this nomination, that I did not reach this decision lightly. After this vote, we will have considered 64 judicial nominations in this Committee and I will have voted against only three. This will be only the second Court of Appeals nominee I have voted against in Committee, while I have voted in favor of 11 circuit court nominations.

I also want to again commend the Chairman for the way that he has handled this nomination. Once again, the pressure has been intense, and the criticism quite harsh. It is my view that a process that gives a nominee a hearing, and then a vote in this Committee is not an unfair process, it is the way this Committee is supposed to work.

During the previous six years, the Committee did not work this way. Literally dozens of nominees never got a hearing, as Judge Smith did, and never got a vote, as Judge Smith is about to. Those nominees were mistreated by the Committee. Regardless of the outcome here today, Judge Smith has not been mistreated. I commend Chairman Leahy for doing what he can to set a new course on this committee, even though most supporters of the Presidents' nominees do not give him credit for that.

Mr. Chairman, I chaired the hearing that we held on Judge Smith. He is obviously a very intelligent man, and a talented lawyer. He is personable and respectful. My opposition to his nomination is not personal.

I oppose this nomination because I believe that Judge Smith has not demonstrated good judgment on certain ethical issues. Beyond that, I believe he has misled this committee when his conduct was fairly questioned. These are serious issues, not trifles, not excuses. I cannot in good conscience support his elevation to the Court of Appeals.

People who come to our courts don't get to pick their judges. And, at least at the federal level, they don't get to elect judges. If our system is to work, if the people are to respect the decisions that judges make, they have to have confidence that judges are fair and impartial. Judges, more than any other public figures, have to be beyond reproach. The success of the rule of law as an organizing principle of our society is based on the respect that the public has for judges. A legal system simply cannot function if the public does not believe its judges will be fair and impartial.

That is why I have focused on ethical issues on a number of nominations we have faced so far. I can't as a Senator assure my constituents that every decision made by a judge will be one they will agree with, or even the correct one legally. But I should be able to assure them, indeed, I must be able to assure them, that those decisions will be reached fairly and impartially, that the judges I approve for the federal bench are ethical, and beyond that, that they understand the importance of ethical behavior to the job that they have been selected to do.

In 1988, Judge Smith was nominated to the federal district court in Pennsylvania. He had a distinguished legal and academic record, and his nomination faced no serious opposition. The one issue that aroused controversy was his membership in a hunting and fishing club called the Spruce Creek Rod and Gun Club that did not then, and does not today, permit women to be members. Judge Smith told Chairman Biden in a letter that he would try to convince the club to change its policy and if he was unsuccessful he would resign from the club.

In answers to questions posed by Sen. Schumer, Judge Smith states: "In my 1988 letter to the Judiciary Committee, I stated that I would resign from the Spruce Creek Rod & Gun Club if it did not amend its by-laws to admit women as members. I did not specify in my letter when I would resign."

But Judge Smith also testified before this committee, under oath, in 1988. Senator Howell Heflin asked what steps he would take to change the restriction and how long he would wait. Judge Smith testified as follows:

Well, first of all, Senator, I think the most important step would be to attempt an amendment to the bylaws. Failing that, I believe an additional step would and could be - and I would support, and have indicated to at least one members of the club that I would support and attempt - an application for membership from a woman. Failing that, I believe that I would be required to resign.

I think it would be necessary for me to await an annual meeting which is, as I understand it - and I preface it with "as I understand it" because I have not been an active member in any real sense of the word, but I believe there to be an annual meeting every April - and I believe I would have to await that point in time to at least attempt a bylaws amendment.

Now I suppose that our former colleague Senator Heflin, who was a state Supreme Court judge earlier in his career, could have nailed him down even tighter than we did. But we don't have to do that in this Committee Mr. Chairman. This is not a court of law. We have a right to rely on the clear implications of sworn testimony of nominees who come before us. I believe everyone at that hearing, and everyone reading it fairly today would conclude that Judge Smith promised that he would resign in 1989, if he was unsuccessful in getting the club to change its policies at the next annual meeting.

Judge Smith made that promise in October 1988. He was then confirmed by this Committee and by the full Senate. We learned after Judge Smith was nominated to the Third Circuit last year that he didn't resign from the club until 1999, eleven years later. Indeed, he didn't resign until after a vacancy arose on the Third Circuit Court of Appeals in which he was interested. This is what he wrote to the club when he resigned on December 15, 1999:

After considerable thought, and not without a measure of regret, I hereby submit my resignation from membership in the Spruce Creek Rod and Gun Club, effective immediately. Certain of the Club's exclusive membership provisions, which I do not expect will change, continue to be at odds with certain expectations of federal judicial conduct.

At this point, it certainly appears that Judge Smith recognized that his continued membership in the club was not consistent with the Canons of Judicial Conduct.

After he was nominated to the Third Circuit vacancy last year, Judge Smith filled out our committee's questionnaire. This is how he responded to a question about membership in organizations that discriminate:

I previously belonged to the Spruce Creek Rod and Gun Club, a rustic hunting and fishing club which admits only men to membership. I joined the club in 1982 for largely for sentimental reasons: it is where my grandfather taught me to fish when I was seven or eight years old. I urged the club, through letters to club officers and personal contacts with members, to consider changing its exclusive membership provision. These efforts were unsuccessful. Eventually, in late 1999, I voluntarily resigned my membership.

It is noteworthy that in this answer, Judge Smith makes no mention of the argument that he and his supporters now advance, that he had no obligation to resign from the club because it is a purely social club. Only when questions began to be raised about his continued membership did this argument arise.

Now I know that there is a dispute about whether business is conducted at this club. To be honest, I tend to credit the email and statements of Dr. Silverman, a supporter of Judge Smith, who said that a medical PAC held meetings there, rather than his letter to the committee saying that the events were just picnics, which was written after he learned that what he had said might be damaging to Judge Smith's confirmation. In my mind, if the club permits its members to invite business associates to the club and hold business meetings there, that is a club that should not discriminate against minorities or women. And the President of the Club has confirmed that members can hold any meetings they want at the club.

But for me, that's not the crucial point here. The crucial point is that this nominee made a commitment to the Committee under oath. He broke that commitment. And then he compounded his problem by coming up with an after the fact rationalization for why he broke his commitment. Even if he were obviously correct that he need not have resigned his membership, I still believe he was untruthful when he suggested to the committee that the changes to the Code of Conduct in 1992 "afforded me the opportunity to reexamine the entire Code and consider it's application to my membership in [Spruce Creek]." I don't believe that Judge believed between 1992 and 1999 that his obligation had changed after 1992. If he did, I don't think he would have had, and I'm quoting here from his written answers to Sen. Schumer's questions:

"numerous conversations with Club officers about changing the by-laws. In fact, in practically every conversation I had with members of the Club in which we talked of the Club, I recall discussing the by-law issue and advocating change."

Why would he do that if he thought the club was not engaging in invidious discrimination? And why would he say in his resignation letter that the club's membership policies: "continue to be at odds with certain expectations of federal judicial conduct"?

I have concluded that Judge Smith came up with his argument after questions were raised about his failure to resign. Some on this committee may be convinced by this argument that they should ignore Judge Smith's failure to follow through on his commitment to the Committee in 1988. I cannot ignore that failure.

I am afraid that this is not the only instance where Judge Smith has come up with after the fact rationalizations of his behavior that don't hold up under scrutiny. At his hearing, I asked Judge Smith about numerous trips he had taken to judicial education seminars paid for by corporate interests. Judge Smith indicated that had studied and been guided by Advisory Opinion No. 67, which instructs judges to inquire into the sources of funding of such seminars before attending them in order to be sure that there was no conflict of interest. I asked him if before he went on the trips he had inquired about the source of funding sponsored by The Foundation for Research on Economics and the Environment, known as FREE, and the Law and Economics Center of George Mason University, known as LEC. Judge Smith answered the question with respect to FREE, saying that he remembered inquiring more than once about FREE's funding by telephone.

So I asked him a followup question in writing about whether he made a similar inquiry about the funding for seminars put on by the Law and Economics Center at George Mason University. Judge Smith gave an amazing answer. He said that because the trips were sponsored by a university, he had no obligation to inquire about the source of funding, and he claimed that he reached that conclusion in 1992 and 1993 when he was taking these trips.

Both ethics professors with whom I consulted state in no uncertain terms that Judge Smith is wrong in his interpretation of the ethical obligations of a judge who wishes to go on one of these trips. As Prof. Gillers states: "Obviously, there would be room for much mischief if a judge invited to an expense-paid judicial seminar could rely on the non-profit nature of an apparently neutral sponsor to immunize the judge's attendance. Judge Smith is therefore wrong in his assumption."

Mr. Chairman, I believe if Judge Smith really reached this conclusion with respect to LEC at the time of the hearing, he would have told us when he answered my question at the hearing. His written response to the followup question indicates that he in fact did not understand the import of Advisory Opinion No. 67, then, or now. I find that very troubling. It undercuts his assurances to me at the hearing that he would refrain from taking additional trips until he was "satisfied that funding does not come from a source that is somehow implicated in a case before him." I don't know how I can rely on that assurance.

In addition, Mr. Chairman, there is the question of Judge Smith's failure to recuse himself in two cases in 1997 - SEC v. Black and United States v. Black. These are very complicated cases, which is why I sought the advice of two legal ethics experts. After reviewing Judge Smith's testimony and written answers to questions and all of the other materials submitted to the Committee on this issue from both supporters and opponents of Judge Smith, both Prof. Gillers and Prof. Freedman conclude that Judge Smith violated the judicial disqualification statute, 28

U.S.C. § 455, by not recusing himself earlier in SEC v. Black, and by not recusing himself immediately upon being assigned the criminal matter in United States v. Black. Professor Freedman called his violations "among the most serious I have seen."

I was particularly disturbed by Judge Smith's failure to disclose his financial interest in the bank involved in the case to the parties in the criminal case. He told them about his wife's employment and about the fact that he had recused himself in the civil case. But he didn't give the parties full and complete information upon which they could base a decision whether to ask him to recuse himself. This was Judge Smith's obligation in my view.

In my opinion, Mr. Chairman, these ethical questions individually raise serious concerns about Judge Smith's fitness to serve as a Circuit Court judge. Together, they are very significant. I cannot support a nomination plagued by such an ethical cloud, despite all of the heartfelt support he has received. I will therefore, reluctantly, vote No.