Testimony of

The Honorable Orrin Hatch

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Mr. Chairman, I understand that there may be some opposition today to Judge Smith's nomination. I read about it yesterday in an editorial in The New York Times and as the extreme left-wing special interests groups launched their last-minute press releases this week. I learned of the extent of the opposition when ethical pronouncements by liberal professors were copied to me just yesterday, at the eleventh hour - 254 days after Judge Smith's nomination, and over 3 months after his Committee hearing.

Of course, it is not surprising that Judge Smith's opposition has relied on untruths to assail his nomination when we consider that one of the professors assailing Judge Smith has advocated perjury, and was almost disbarred for it. To be precise, he advocated putting a "perjured witness on the stand without explicit or implicit disclosure" of the truth and then arguing the perjured testimony to the jury. I can provide the law review citation if anyone wants it.

Knowing a little about Judge Smith's enemies helps us better to consider his friends. I think that an editorial in the liberal Pittsburgh Post-Gazette put Judge Smith's nomination best when they wrote that "outside Washington's world of partisan politics, Smith seems to have no enemies, only admirers. Those who have watched him work say an exemplary 14-year record on the federal bench in Western Pennsylvania is being twisted by political opportunists. His popularity outside the capital extends even to members of the opposing political party, who describe him as fair, hard-working and respectful to all."

I hope I am not alone in finding this home-town report much more reliable and convincing than the hit pieces circulated by the Washington left-wing special interest groups, or for that matter The New York Times.

Given the bi-partisan support Judge Smith enjoys from the people who know him best, and his stellar record, I find it most difficult to accept that the opposition to him has centered on his belonging to an all-male, family oriented fishing club where his father first taught him to fly fish - the same rustic club that Jimmy and Roslyn Carter have visited frequently to escape, relax, and fish.

Last week, I warned that if this is the kind of thing that this Committee uses as an excuse for thwarting the President's judicial nominations, then the American people will have a big laugh at our expense. And rightly so.

I also noted that there are hundreds of small, family-oriented fishing clubs like the one Judge Smith belonged to all across this country from Washington to North Carolina. I even pointed out the website called www.womens fly fishing.net, which lists the 60 or so women-only fishing clubs across the country. There is a rich mosaic of single gender social clubs. Is this Committee

really prepared to say that the members of the Francesca Club in San Francisco or the Raleigh Women's Club, or the Junior Leagues, or the Masons, or the Knights of Columbus cannot serve as judges?

Perhaps the reason for this misguided line of attack on Judge Smith lies in the fact that, in his 1988 confirmation hearing, he stated that he believed the Judicial Code would require him to try to open the club to women, and to resign if he failed. But the fact is that he was wrong in that belief. The Judicial Code DOES NOT require resignation from clubs whose principal purpose is social, that do not function as public accommodations serving food to the public, or whose principal purpose is other than business. No legalistic parsing of words can change this fact - even though any motivated lawyer can certainly confuse the issue, as we have seen.

It is not surprising, of course, that the liberal legal ethicists chose to disregard the clear constitutional standards articulated by the Supreme Court as well as the letter of the public accommodations law of Pennsylvania. After 1988, when the issue of single gender clubs was at its most heated peak, this Committee and the Judicial Conference adopted standards pursuant to Supreme Court's decisions. Each made clear that there was nothing improper about a Judge or nominee belonging to single-gender clubs, which exist in great numbers for both women and men in this country, so long as the association or club exhibits certain attributes of privacy first articulated by the Supreme Court in the 1984 case of Roberts v. Jaycees.

Judge Smith was under no obligation to make efforts to open the club to women - as he promised this Committee - or to resign from the club. But he did both - even though he had no obligation to do so.

Opposing Judge Smith because he used to belong to a fisher-men's club is most absurd when contrasted with Judge Smith's record. Judge Smith has earned a reputation for competence, fairness, and judicial temperament during 14 years as a federal judge. His nomination is supported by lawyers, judges, and public figures from across the political spectrum. The Pittsburgh Post-Gazette, a respected newspaper with a liberal editorial viewpoint, has endorsed his nomination twice.
The accounts of the people who know Brooks Smith became real to me a few weeks ago when I listened to tremendously moving stories of women lawyers from Pennsylvania who recounted emotionally powerful events where Judge Smith bent over backwards to help them succeed as pregnant women and mothers in the practice of law.

The truth is that Judge Smith is supported in the strongest possible terms by the women leaders and members of the Women's Bar Association of Western Pennsylvania, the Allegheny County Bar Association, and the Blair Bedford Domestic Abuse Advisory Board, to name a few. The Women's Bar Association gave Judge Smith their Susan B. Anthony Award "because of his commitment to eradicating gender bias in the court system." That is a remarkable laud. The officers of the Women's Bar have also stated that they "did not receive a single complaint concerning Judge Smith."

To attempt now to taint Judge Smith as being insensitive to women's rights or interests is really beyond the pale of fair-mindedness, if not decency.

Mr. Chairman, I briefly recount Judge Smith's record again because it highlights the nature of the prejudice that occurs when a nominee - or any person is judged on a single, private and lawful lifestyle choice. It seems to me that the root of all intolerance begins with just that act - to judge a person's entire worth based on a single characteristic - whether it be how a person exercises his or her freedom of religion or his or her freedom of association, which - like religion - has contributed so much to this nation's unmatched vitality.

I believe the Senate suffered a great shame when it ruined whole careers in the 1950's by asking a single infamous question intruding into the freedom of association. I was ashamed when this Committee echoed this question last year by questioning nominees about the Federalist Society. Now the special interest groups are asking the Senate Judiciary Committee to deny the President's nominee a floor vote on the basis of a fly fishing club.

Mr. Chairman, last week I warned the Committee that the American people will roll their eyes at us. But the truth of it is that if this Committee today disregards the right of lawful association, it will be no laughing matter.

The Supreme Court first recognized the Freedom of Association in 1958 as an extension of First Amendment free speech in NAACP v Alabama, and most recently it reaffirmed the right in Boy Scouts of America v Dale.

It is a right, as Justice Thurgood Marshall wrote, "which our system honors" and that encourages "all-white, all-black, all-brown, all-yellow clubs, as well as all-Catholic, all-Jewish as well as all-agnostic clubs to be established." And, it is a right that applies, Mr. Chairman, as Justice Sandra Day O'Connor noted, to clubs whose purposes would be "undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background."

Mr. Chairman, we should be glad that our personal politics are trumped by this American freedom because it has protected groups as diverse as the Communist Party and the Moose Lodge, and from the NAACP to the Boy Scouts of America. The Freedom of Association has protected the thousand points of light that have made this country's public life so vibrant. And it helps to distinguish us from those foreign places where people are shunned or even imprisoned for mere memberships in unpopular associations.

While the constitutional right of association at first related to expressive association and protected unpopular groups, like the NAACP, in 1984, the Supreme Court articulated the right of intimate association concerning clubs such as Judge Smith's small fishing club. It did so while enforcing Minnesota's public accommodations law against a large single gender organization organized principally for business purposes. That is not the case here. The Court described the attributes of such intimate associations that the Constitution honors, including "relative smallness." That is the case here.

An intimate association, said Justice Brennan, writing for the Court, must be protected "as a fundamental element of personal liberty," and "must be secured against undue intrusion ... because of the role of such relationships in safeguarding the individual freedom central to our constitutional scheme." As Justice Brennan explained, such small clubs transmit our culture and foster diversity.

Mr. Chairman, I for one stand by our Freedom of Association. As Justice Thurgood Marshall pointed out, it is a freedom that has helped make this country great, and a freedom we honor. I hope that all on this Committee do also, and that Judges, or people who might want to be Judges someday, are just as free as anyone else to exercise that right lawfully.

Now, members of the Committee who do not share my reverence for this First Amendment right will be interested to know that the State of Pennsylvania has a law against clubs that discriminate on the basis of gender. Pennsylvania has not sought to regulate the club Judge Smith resigned from -- and for a good reason: that club does not violate the law against discrimination. In fact, Pennsylvania courts have found single-gender clubs to be permissible not on the basis of First Amendment rights, but as a privacy right, citing Griswold v. Connecticut. It would certainly be an entertaining footnote to Griswold jurisprudence if this Committee, which has seen fit to probe Judge Smith's views on Griswold, voted against him for exercising privacy rights emanating from that very case.

Mr. Chairman, today we have the opportunity to show that this Committee is focused on the merits of President Bush's nominees, and is not out to obstruct them in the name of sensibilities far from the mainstream of the American people. I hope we take it. I hope we vote favorably on a fine judge.

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