Testimony of

The Honorable Patrick Leahy

May 23, 2002

Today's vote on Judge D. Brooks Smith, who is nominated to the United States Court of Appeals for the Third Circuit, is taking place in broad daylight. Each member of this Committee, Democrat and Republican, will vote his or her conscience about the merits of this suggested promotion to the appellate bench. Under the Democratic majority, Judge Smith received a hearing less than four months after the receipt of his ABA peer review. In contrast, Robert J. Cindrich was nominated for this vacancy on the Third Circuit in February 2000 and, although pending for more than 10 months, never received a hearing or a vote. Judge Smith is receiving a vote today, less than three months after his hearing and shortly after he answered the Committee's follow up questions.

This is in marked contrast to several of President Clinton's judicial nominees who were allowed a Committee hearing but were never permitted a Committee vote. They include Allen Snyder, who clerked for Chief Justice Rehnquist and who was nominated to the D.C. Circuit, and Bonnie Campbell, the former Attorney General of Iowa who was nominated to the 8th Circuit, among others. These were nominees with bipartisan and home-state support in the Senate who had uncontroversial hearings. Unlike the manner in which they were treated, Judge Smith's nomination is getting a vote today.

While the course charted by the Democratic-led Senate -- to improve the process, to hold hearings and votes on judicial nominees -- is an honorable course, it is also a difficult and time-consuming one. It was the road not taken in many instances in the recent past.

It is difficult because the record of a judicial nominee is often not black and white. As one might expect, the examination of a lifetime of work can reveal shades of many colors and nominees can have many facets. Some nominees, like Judge Smith, are portraits of contradiction. Those on the other side of the aisle may extol his accomplishments and popularity while omitting his failings. They may minimize his troubling record on ethical issues and in his decisions as a judicial officer. They may belittle the genuine concerns raised by many and shared by some members of the Committee. They may try to castigate and caricature those who express opinions about the nomination and other issues of concern to Americans. They may even choose to vilify those who would dare to vote against a nominee, who may be popular in some quarters but who may be flawed in other respects.

The fundamental question is whether this particular nominee should be confirmed. Should he be promoted to a higher court? Does his record of conduct as a District Court Judge warrant it? A lifetime appointment to review the decisions of other judges and shape the development of the law is not a right. It must be earned by conduct that provides a sound basis for confidence and trust that the awesome authority of a federal appellate judge will not be misused.

The Constitution establishes the Senate's responsibilities as "advice and consent." The Senate is not a rubber stamp for any President to remake the federal judiciary along narrow ideological lines. It is each Senator's responsibility to do his or her best to make sure judges will be fair and impartial.

I believe that the record before us does not demonstrate that Judge D. Brooks Smith merits this promotion. In saying this, I mean no disrespect to Senator Specter, who has strongly supported the confirmation of this nominee, nor to the nominee, who is well-liked by many. I genuinely mean no harm to Judge Smith who, no matter the outcome of today's vote, will be a federal judge with a lifetime appointment, having been confirmed in 1988.

It is fair to say, however, that this nominee's record is problematic in a number of ways. Among my many concerns is that fact that Judge Smith's actions create the appearance that, as a judge, he has too often been beholden to right-wing political groups and their causes. An independent judiciary is the people's bulwark against a loss of their freedoms and rights.

We have heard from many Americans who are concerned about Judge Smith's record as a judge, and I would like to put those in the record today.

Judge Smith's record is a mixed one. While a number of judges and lawyers in Pennsylvania have written to the Committee to support Judge Smith's confirmation, a number of individuals and groups from Pennsylvania and elsewhere in the Third Circuit and throughout the country have written to the Committee and called and e-mailed our offices to express their deep concerns about this nomination. A summary of those concerns is contained in an editorial this week in The New York Times and in others in The Washington Post and The Los Angeles Times this morning. Judge Smith's record on the bench has resulted in significant controversy and misgivings.

As I have reviewed his record as a judge, that record raised significant doubts. The issue for me is whether Judge Smith's record justifies this promotion to a court that is one step below the Supreme Court. Appellate judges in the federal circuit courts write opinions that can become law affecting all of us, no matter where we live. I have concluded that Judge Smith's record does not justify this promotion.

My first area of concern is that Judge Smith belonged to a discriminatory club more than a decade after he assured the Senate he would quit if the rules were not changed to allow women to become members in 1989. He did not resign from the Spruce Creek Rod and Gun Club until 1999, after the vacancy on the Third Circuit to which he is nominated arose. I find that extremely troubling.

Some have asserted that Spruce Creek is just a little fishing club, of no consequence, a shack in the woods where a group of male friends store their gear. That is not an accurate portrait of the club at issue, as anyone can see just by looking at a photograph of the stately clubhouse, which is listed on the National Registry of Historic Places.

For nearly a century, Spruce Creek has been an exclusive recreational and sportsmen's club that hosts its members and their guests at its beautiful clubhouse. It has dining facilities, fireplaces,

and bedrooms for overnight guests. It sits on hundreds of acres of prime real estate. It makes no difference that the sport pursued is fishing rather than golf.

There are a number of "women's fly fishing clubs," attesting to the interest of women in that sport, but those "clubs" do not have facilities to conduct business. In fact, those women anglers could not walk into the Spruce Creek clubhouse or fish on the stream called "Spruce Creek" that runs through the land owned by the Club, unless a man who was a member invited them. It should make no difference that it is women who are excluded and not African Americans or those of minority faiths - membership in such a club with these exclusions is unacceptable for a federal judge.

More than two decades ago we settled the questions whether federal judges should belong to exclusionary clubs, and the answer to that question is no. In order to be a beacon of fairness and for all Americans to have confidence that our federal judges will be fair and impartial, codes that govern the conduct of federal judges have long provided that guidance.

The Spruce Creek club may at times welcome the families of the exclusively male membership or their guests when accompanied by those men. But the fundamental fact is that women cannot belong. They do not have equal status as members. Judge Smith knew that when he first applied for a job as a federal judge in 1988. And he knew it was wrong for a federal judge to remain a member of such an exclusionary organization.

In order to be given a lifetime appointment to the federal courts, Judge Smith promised this Committee and the Senate of the United States that he would resign unless the club acted promptly to change its exclusionary rules. In his 1988 letter to the Chairman of the Committee, Judge Smith acknowledged that, if he were confirmed, his continued membership in the Club would be "inconsistent" with ethical rules against belonging to clubs that engage in invidious discrimination. He assured the Committee that, if he could not get the by-laws changed, "adherence to the Code would require [his] resignation from the Club."

In his testimony under oath in 1988, he assured Senator Heflin that if he could not amend the by-laws he "would be required to resign." When the Senator pressed him for a time-frame, Smith responded that he would try to get the by-laws amended in April of 1989.

Judge Smith did not resign within one year or even two of his commitment to do so and as was required by the ethical rules he swore he would follow.

There is no reasonable, logical explanation for why he waited more than 10 years to follow through -- except, perhaps, that the vacancy to which he is now nominated and to which he aspired did not arise until 1999.

When a nominee comes before this Committee and makes a commitment, we must rely on his or her word to honor that the promise will be kept. With federal judges that is especially true. They have lifetime appointments. Impeachment is not a realistic way to enforce such commitments and, unlike Republicans in the House and Senate a few years ago, I have never suggested impeachment of federal judges.

If we allow such a promise, whether it is about club membership or some other issue, to be so flagrantly broken with no consequence, then promises and assurances to this Committee will mean very little. That is a bad precedent.

That is a bad message to send to future nominees to the courts and to the executive branch: Just tell us what we want to hear and then ignore those commitments without consequence. Just tell us you will follow precedent and apply the law, then once confirmed do whatever you choose with impunity. That would not be right and Judge Smith's breach should not be condoned.

I cannot think of another occasion in which a judicial nominee has promised to take specific actions and then been confirmed, after failing to keep his word. It is true that some judicial nominees have been confirmed after resigning from a discriminatory club, but none have ever been confirmed after telling the Senate that they would resign and then failing for years to do so.

The closest analogy I recall is the failed nomination of Judge Kenneth Ryskamp to the 11th Circuit. As a district court nominee, Judge Ryskamp was on notice that membership in discriminatory clubs was impermissible, but he continued his membership in a discriminatory club anyway. Judge Ryskamp's nomination to be promoted to a circuit court was rejected. Judge Smith's nomination should be as well.

I do not think Judge Smith should be given a promotion after failing to keep his word to the Committee. On this basis alone, I feel I must vote against Judge Smith's confirmation to the Third Circuit. Accountability is the issue here, and this Committee can enforce accountability to its own principles and to those of the code of ethical conduct that apply to all federal judges. Public officials should not have to be told, repeatedly, not to belong to clubs that discriminate. We have received two ethical opinions stating that, under the ethical rules, if club members sponsor events or meetings at the club that are business or professionally related then the club cannot be called purely private and the Club's discrimination against membership for women is "invidious." This is true even if women are allowed to attend some events when hosted by the club's members.

The Committee is informed that, in fact, the Spruce Creek club has always allowed the men who are members to host business and professional meetings at its facilities. The President of the Club, who has been a member for decades, has told the Committee staff that members can use Club facilities for any meetings or occasions they want, without any oversight, but he would not discuss any specific ways the club is used by members.

We also know that the Club's constitution and by-laws do not discourage the members from hosting business, professional or political meetings at the Club. Women, regardless of their standing in the community, cannot invite their colleagues to Spruce Creek for business meetings because they are explicitly and intentionally excluded from membership.

All judges, no matter how popular, have a solemn obligation to "avoid the appearance of impropriety in all activities." That is because "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must

therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

When Judge Smith finally resigned from the Club in December of 1999, he acknowledged that the Club's men-only membership rules "continue to be at odds with current expectations of federal judicial conduct." It is only now after questions have been raised about his belated resignation that he contends for the first time that the Club is "purely social" and so the rules against discriminatory club membership should not apply.

His recent statements on this point really give me pause with respect to how Judge Smith would follow the law as an appellate judge or whether he would seek to bend it, reinterpret it and construe it to suit his personal purposes. I think it only reasonable that Judge Smith's conduct regarding his previous commitment to the Committee would lead a reasonable person to doubt the sincerity of his other assurances to the Committee this year. Breaking a promise to the Committee, or misleading the Committee into believing that certain action would be taken, is an unusually strong reason for the rejection of a nomination.

I have a number of other concerns that are detailed in my full written statement. Briefly, the unsettling anti-plaintiff pattern of his judicial decisions, his high level of participation in right wing, special interest-funded junkets, his activist and insensitive speeches, his late recusal in two cases involving his substantial financial interests, along with his very belated resignation from a discriminatory club, all create a very unfavorable impression. His cramped and self-serving approach to ethical rules is particularly troubling.

What an objective review of his record as a whole calls into question is his sensitivity, his fairness, his impartiality and his judgment. Based on that record, I will vote against his confirmation.

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