

country what the Members of the Senate have already done for themselves? I say vote for the Graham proposal. We will make the commitment that this will be a downpayment and we will see the day when our senior citizens will be able to raise their heads high and know they will not have to fear when they hear from their doctors that they need prescription drugs in order to live a healthy and happy life.

I think the time has expired.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. KENNEDY. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Madam President, I ask unanimous consent the order for the quorum call be rescinded.

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

TRADE ACT OF 2002—CONFERENCE REPORT—MOTION TO PROCEED

Mr. REID. Madam President, I move to proceed to the conference report to accompany H.R. 3009, the Trade Act of 2002, and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The question is on agreeing to the motion. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from North Carolina (Mr. HELMS) is necessarily absent.

I further announce that if present and voting the Senator from North Carolina (Mr. HELMS) would vote "no".

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 66, nays 33, as follows:

[Rollcall Vote No. 198 Leg.]

YEAS—66

Allard	Domenici	Landrieu
Allen	Edwards	Lieberman
Baucus	Enzi	Lincoln
Bayh	Feinstein	Lott
Bennett	Fitzgerald	Lugar
Biden	Frist	McCain
Bingaman	Graham	McConnell
Bond	Gramm	Miller
Breaux	Grassley	Murray
Brownback	Gregg	Nelson (FL)
Bunning	Hagel	Nelson (NE)
Burns	Hatch	Nickles
Cantwell	Hutchinson	Roberts
Carper	Hutchison	Santorum
Chafee	Inhofe	Smith (NH)
Cleland	Inouye	Smith (OR)
Cochran	Jeffords	Specter
Collins	Johnson	Thomas
Craig	Kennedy	Thompson
Crapo	Kerry	Voinovich
Daschle	Kohl	Warner
DeWine	Kyl	Wyden

NAYS—33

Akaka	Conrad	Ensign
Boxer	Corzine	Feingold
Byrd	Dayton	Harkin
Campbell	Dodd	Hollings
Carnahan	Dorgan	Leahy
Clinton	Durbin	Levin

Mikulski	Sarbanes	Stabenow
Murkowski	Schumer	Stevens
Reed	Sessions	Thurmond
Reid	Shelby	Torricelli
Rockefeller	Snowe	Wellstone

NOT VOTING—1

Helms

The motion was agreed to.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3009), to extend the Andean Trade Preference Act, to grant additional trade benefits under that Act, and for other purposes, having met, have agreed that the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment, signed by a majority of the conferees on the part of both Houses.

The PRESIDING OFFICER. The Senate will proceed to the consideration of the conference report.

(The report will be printed in the House proceedings of the RECORD)

The PRESIDING OFFICER. The majority leader.

CLOTURE MOTION

Mr. DASCHLE. Madam President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close the debate on the conference report to accompany H.R. 3009, the Andean Trade bill.

Harry Reid, Max Baucus, Dianne Feinstein, Ron Wyden, Robert G. Torricelli, John B. Breaux, Thomas A. Daschle, Thomas R. Carper, Blanche L. Lincoln, Zell Miller, Charles E. Grassley, Larry E. Craig, Phil Gramm, Jon Kyl, Frank H. Murkowski, Trent Lott.

The PRESIDING OFFICER. The majority leader.

EXECUTIVE SESSION

NOMINATION OF D. BROOKS SMITH TO BE UNITED STATES CIRCUIT JUDGE

Mr. DASCHLE. Madam President, I now ask that the Senate proceed to executive session, as provided under the previous order.

The PRESIDING OFFICER. The Senate will proceed to executive session, and the clerk will report the nomination.

The assistant legislative clerk read the nomination of D. Brooks Smith, of Pennsylvania, to be United States Circuit Judge for the Third Circuit.

The PRESIDING OFFICER. There are now 4 hours for debate, evenly divided between the chairman and ranking member.

The Senator from Pennsylvania.

Mr. SPECTER. Madam President, it is with considerable pride that I urge

my colleagues to vote to confirm a very distinguished Federal judge, D. Brooks Smith, now Chief Judge of the Western District of Pennsylvania, whose nomination is now before the Senate for the Court of Appeals for the Third Circuit.

Judge Smith comes to this position with an outstanding academic background, having received his bachelor's degree from Franklin and Marshall College in 1973, his law degree from Dickinson Law School, and then engaged in the active practice of law for 8 years before becoming district attorney of Blair County, PA, a populous county whose county seat is Altoona.

He then became a judge of the Court of Common Pleas of Blair County in 1984, serving for 4 years until he became a judge for the United States District Court for the Western District of Pennsylvania where he is now the chief judge, and for now almost 14 years has had very distinguished service there.

I came to know Judge Smith when he appeared before the bipartisan nominating panel which had been established by Senator Heinz and myself, and I found him very well qualified and have known him on a continuing basis rather well over the course of the past 14 years. I have talked to him on many occasions and met with him on many occasions, discussing problems of the courts administratively, and issues that may come before the Judiciary Committee. He has been an outstanding jurist.

Judge Smith enjoys a unique reputation among all of the people who know him. During his confirmation hearings, large groups of people who knew him rallied to his defense and came forward to attest to his erudition, his scholarship, his good character, and his judicial temperament.

Certain issues have been raised which had delayed the confirmation. One involved a fishing club in which he was a member, but that club did not practice what is called invidious discrimination because it was a social club only. While in confirmation hearings for the district court, he had said he would resign from the club if they did not change their membership rules. It was later determined in 1992 in an opinion of precedential value that the club did not engage in invidious discrimination, so there was no reason for him to leave the club.

An issue arose on a case, where he presided for a relatively brief period of time, as to whether there should have been an earlier recusal. The matter was inquired into, investigated at length by former Gov. Dick Thornburgh and former Attorney General of the United States, and in an elaborate statement, he went through the case in detail and found, as I concluded as well, that the judge had made a timely recusal.

Some issues were also raised as to a speech which Judge Smith made on the Violence Against Women Act. He had concluded that there was not Federal jurisdiction for that particular statute.

I, frankly, disagreed with him about his conclusion on that, as lawyers are wont to do, even lawyers who become judges or lawyers who become Senators. In fact, the Supreme Court of the United States ultimately agreed with Judge Smith on the point.

I mention these issues in passing because I think they are not worth any more comment. The issues were considered at great length by the Judiciary Committee, and in a 12-to-7 vote, the Judiciary Committee recommended Judge Smith's confirmation.

As is well known, Judge Smith's nomination came before the Judiciary Committee at a time of considerable controversy involving the timing and the confirmation of nominees submitted by President Bush.

Senator BIDEN, Senator KOHL, and Senator EDWARDS all voted to confirm Judge Smith in an atmosphere where there was, to say the least, at least some element of partisanship.

I only mention those issues. I think they do not bear any more comment than I have given them.

When a man such as D. Brooks Smith undertakes public service in a Federal judgeship, I think it ought to be noted that there is a very considerable personal and financial sacrifice. I thank Judge Smith for serving on the Federal bench, and I thank all the Federal judges for serving on the Federal courts which are the pillars of justice and the pillars of our democratic society.

Judge Smith has undergone a difficult period in this confirmation process which has taken quite a considerable period of time. I compliment him for his steadfastness and for his determination in staying the course and in working through on this confirmation.

There is no doubt of Judge Smith's qualifications—his educational background, temperament, judicial experience, and experience being a district attorney. Judge Smith has a broad range of experience.

The Third Circuit is in desperate need of judges. They are in an emergency situation. I ask unanimous consent that a letter from Chief Judge Edward R. Becker be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1)

Mr. SPECTER. I am confident, based on my personal knowledge of Judge Smith and his outstanding record, that he will be a credit to the Court of Appeals for the Third Circuit.

I thank my distinguished colleague from Utah and my distinguished colleague from Vermont for permitting me to speak at this time.

EXHIBIT 1

U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT,
Philadelphia, PA, July 15, 2002.

Hon. ARLEN SPECTER,
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR SPECTER: Because the exercise of my responsibility to assure that effi-

cient administration of justice for over 21 million Americans within the Third Judicial Circuit is being seriously impaired by the current impasse in the Senate over judicial nominations, I feel constrained to cry out. A total of eleven—yes eleven—judges within the Third Circuit, whose presence is desperately needed, would, I believe, have been confirmed and entered on duty but for the impasse.

Let me begin with the United States Court of Appeals for the Third Circuit. But for the impasse, Judge D. Brooks Smith would now be on my Court, which has three vacancies, two of them of long standing. I have scheduled him to sit in the early Fall, and we need him. We "borrow" judges in 45% of our cases, which is too much. But that situation pales in comparison with that of the District Court for the Western District of Pennsylvania. There are five vacant judgeships on that Court; as of September 30, 2002, these judgeships will have been vacant for a total of 161.7 months. If it were not for the impasse, the following judges would likely have entered on duty: Joy Flowers Conti, who I understand has resigned from her law firm partnership, anticipating a July swearing-in date (and is now without income); David S. Cercone; Terrence F. McVerry; and Arthur J. Schwab. The Western District is in desperate straits. Motions are piling up, and trials are being delayed.

Other courts within the Third Circuit are similarly disadvantaged. Two nominees to the Middle District of Pennsylvania are awaiting floor votes: John E. Jones, III and Christopher C. Conner, both nominated to fill vacancies that are well over a year old. Two nominees to the Eastern District of Pennsylvania, one of the busiest courts in the nation, are also being held up: Timothy J. Savage and James Knoll Gardner. We also have problems in New Jersey where we have five vacancies. Stanley R. Chesler and William J. Martini are awaiting floor votes. There are also putative nominees for the other three vacancies: Jose Linares, Freda Wolfson, and Robert Kugler, whose progress is obviously being slowed by the impasse. Their presence is needed there to take up the slack caused by my assignment of Senior Judge Alfred Wolin, who had a full docket, to handle the mega-asbestos bankruptcy cases in Delaware, one of the nation's most important judicial assignments.

I have always respected the processes of the United States Senate. I came to the bench from politics, and understand the senatorial prerogatives. I have been tempted to speak out before, yet because of my background, held back. But the current impasse is too much even for me, hence this letter. As a judge of over three decades of experience on the federal bench, I understand the weighing and balancing process, and I believe that it is out of all proportion to the exercise of senatorial prerogative that these eleven nominees (and scores of others) be held up so long. I urge you to press my plea before your colleagues.

Sincerely yours,

EDWARD R. BECKER.

The PRESIDING OFFICER (Mr. DURBIN). The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, I thank the Senator from Utah for yielding me some time, and I also thank the Senator from Vermont for allowing Senator SPECTER and I to speak first on this nominee.

I, too, like Senator SPECTER, am very proud tonight to praise the nomination of Brooks Smith to the Third Circuit Court of Appeals and to congratulate the President on an excellent nominee.

I certainly urge all of my colleagues on both sides of the aisle to vote for his confirmation. I truly hope they look at his record of 17 years of judicial service and experience on both the Federal and State level.

He is someone of paramount integrity, someone who is obviously academically qualified, having been confirmed already as a Federal judge some 13 years ago. He has impeccable credentials academically and professionally prior to being a judge, and I think his service on both the trial court level and the common pleas court of Blair County, as well as on the Federal bench of the western district, now serving as chief judge of the western district, has been exemplary.

He is someone who has been a model judge, someone who has steered a course, as most people who have described his nomination, right down the center, someone who follows the law and is very steadfast to what the role of a judge is, which is not to go out and make law but simply to serve in the capacity of meting out justice in a fair and equitable way that meets the expectations of the litigants. He has been highly praised by everyone.

He has gotten a letter of support from almost the entire Pennsylvania congressional delegation, Democrats and Republicans alike. He has been rated well qualified by the ABA and highly recommended by the Allegheny County Bar Association, which is their highest rating. Allegheny County is the bar where the Western District of Pennsylvania is located. He has gotten support from every prior U.S. attorney from Jimmy Carter on through President Clinton's appointments to the U.S. attorney position in the western district. They have all come out in support of him.

His colleagues on the statewide bench from the supreme court, superior court, on down, have written letters of support, both Republicans and Democrats alike, for his nomination.

One of the most disturbing aspects of this nomination was what some on the far left-wing groups have done to try to impeach Judge Smith's integrity. Senator SPECTER reviewed the three things that have been brought up in a 17-year career. Probably the most outrageous of all of them is the fact that Judge Smith belonged—I know this might be shocking to some of my colleagues—to a sportsman club that only has male members. I know that none of my colleagues have ever heard of such a thing, but believe it or not most sportsman clubs in America, I would suggest, have limitations on memberships. If anyone is interested in the opposite, where sportsman clubs limit membership only to women, go to www.womensflyfishing.net, and they will find 60 organizations where only women are permitted to be members.

At this particular club, the Spruce Creek Rod and Gun Club, only men are allowed to be members, but women certainly are allowed on the premises and

allowed to use the facilities. They simply cannot be members of the club.

This club is a beautiful place. It is right in the heart of Pennsylvania. It has attracted many people from around the country because of its fabulous fly fishing. One such person who is an annual visitor, according to his own article on the subject, to this limited club is former President Jimmy Carter.

Former President Jimmy Carter goes to this club to which Judge Smith used to belong. When President Carter was President, my colleagues may recall the incident when the rabbit attacked his boat. That was somewhat of a famous incident during the Carter Presidency. That happened at the Spruce Creek Rod and Gun Club. This is purely a social organization.

When Judge Smith was before the Judiciary Committee, it was unclear whether he should continue to belong to such an organization. He was confirmed nonetheless. He promised at that time, when it was unclear whether that membership was unethical in some respects, that he would try to reverse the policy, and if he was unsuccessful he would resign. Subsequent to that, in 1992, the judicial code was changed and, as Senator SPECTER said, this kind of club does not fall into the ethical category of invidious. Therefore, as a result, he was not required under the judicial conduct code to resign.

Nevertheless, he tried for several years. Every year at their meetings, he would try to have women allowed to become members, but he failed. Eventually, I think after 9 or 10 years, he decided he would give up that quest and leave. This was some 5 years ago.

I understand there are a lot of women's groups that are complaining about this. To be candid, the complaint should be not that he resigned too late but that he is not still there trying to change it. That, to me, would be legitimate, to say he should have continued to stay there to try to get women as members. Instead, he gave up the fight, as some might suggest, and decided simply not to belong.

I think they have sort of missed the point, and the point is—this is ridiculous is really the point. The point that he belonged to this club has nothing to do with his ability to be a jurist. Probably the worst aspect of this whole thing is it brought up this tenor that somehow Judge Smith was anti-woman. Well, we had the president of the NOW organization in his home county, Blair County, former Democratic county commissioner, come to the Senate, to the LBJ room. She did a press conference talking about how Judge Smith, when he was a common pleas court judge, did more to help her in her role as county commissioner than anybody else she met in county government, and that he had an excellent record in regard to violence on women, and a variety of other things, as he did as a common pleas court judge.

Then later on, we heard from members of the women's bar association of western Pennsylvania going on at length about how Judge Smith was the best judge they had to deal with, who was the most respectful of women in the courtroom, most accepting of women in the courtroom.

This is the most frustrating part for the judge, and I know Senator SPECTER commented how difficult a process this has been for him, to be attacked for things that are so spurious and tangential to this whole process, and trying to then frame them for something that he has worked all his life to prove that he was not. It was really unfair.

Senator SPECTER went through the other two issues that have been highlighted. One is a case where he should have recused himself earlier. The trustee in the case, the former Attorney General and Governor, Richard Thornburgh, who said he would have been the aggrieved party in the case, as it turned out, said, no; that Judge Smith handled the case properly and forthrightly. The judge who eventually was assigned the case commented she would have handled the case in the precise manner Judge Smith handled the case. The Securities and Exchange Commission looked at this and stated Judge Smith did nothing improper.

There is absolutely nothing there when it comes to these "improprieties" of Judge Smith on the bench. This is reaching. This is trying to find a reason to oppose someone who has an impeccable record of service in the judicial community of western Pennsylvania, someone who has been outstanding in everything he has attempted. He is an incredibly well-qualified person for this position. He has done nothing but prove that his nomination for the Third Circuit is warranted.

I am very hopeful that my colleagues again on both sides of the aisle—and I thank Senator SPECTER, Senator EDWARDS, Senator KOHL, and Senator BIDEN for their support of this nominee in committee—will be joined by many others on the other side of the aisle to confirm, as the ABA said, a well-qualified, very solid candidate, for the Third Circuit Court of Appeals.

Mr. LEAHY. Mr. President, I yield myself such time as I may consume.

I ask consent that following me, the Presiding Officer recognize the senior Senator from Utah; at 7:50 this evening, without using time from either side, the senior Senator from New Jersey be recognized for 10 minutes; and then we revert back to whichever member of the Judiciary Committee sought recognition.

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

Mr. LEAHY. Mr. President, the Senate is debating the nomination of D. Brooks Smith to the United States Court of Appeals for the Third Circuit. This, incidentally, is the 13th circuit court nominee to be considered by the Senate since the change in Senate ma-

majority and reorganization of the Judiciary Committee fewer than 13 months ago. That is an average of one court of appeals judge a month since the Democratic majority has been in place. That does set a record.

We voted and confirmed three judges yesterday, one a circuit court of appeals judge. There are 10 other judicial nominees on the calendar. All have been approved on the Democratic side of the aisle. We have no objection to going forward with votes on them. I commend the Senator from South Dakota, the majority leader, Senator DASCHLE, who worked very hard to overcome the Republican objections so we can vote on President Bush's nominees to the judiciary.

We set a record on the number of courts of appeals nominees who have been given hearings and votes. We have moved forward, including confirming one yesterday, and we will vote on another circuit court nominee tomorrow. That will be 13 in less than 13 months, plus more than 60 other judicial nominees for whom we have held hearings or on whom we have already voted. This seat on the Third Circuit is another example of the different ways in which the Republican majority and Democratic majority have proceeded.

Today's debate is taking place in broad daylight. Under the Democratic majority, Judge Smith received a hearing less than 4 months after receipt of his ABA peer review. In contrast, Judge Cindrich was previously nominated for the same vacancy on the Third Circuit by President Clinton. He sat there for 10 months. You may wonder what happened at his hearing. He never got a hearing. You may wonder what happened on his vote. He never got a vote. He was never allowed a hearing; he was never allowed a vote. Four months after Judge Smith came up with his ABA papers, we had a hearing.

This is one of the many court of appeals vacancies for which President Clinton nominated qualified and moderate nominees but the Republican majority would not allow a vote—neither a hearing nor a committee vote. Bonnie Campbell, Allen Snyder, and so many others—I am sure they have not been treated as fairly as Judge Smith's nomination.

It is not enough to say some of the Republicans did not want those judicial nominees to be confirmed. I will vote against this nominee. I am the Chairman of the Committee. I could have refused to hold a hearing on Judge Smith. I could have refused to put his nomination on the calendar for a vote in our Committee. I did not. Even though, after the hearing, I made my up my mind to oppose this judge, I allowed the Committee to vote on his nomination and, if he got a majority vote in the Committee, allowed it to come to the Senate floor. That has always been the Democratic practice, and a practice that I follow.

Every Senator, Democrat and Republican, will vote his or her conscience

about the merits of Judge Smith's promotion to the appellate bench. I do not question the conscience of any Senator in doing that. While the course charted by the Democratic Senate to improve the process and hold judicial nominees is an honorable, difficult and time-consuming course, it is a road not taken in many instances by the Republicans in the recent past.

Some nominees, such as Judge Smith, are a portrait of contradiction. Those on the other side can extol his accomplishments and his popularity, but they omit his failings. They minimize his troubling record on ethical issues and his decisions as a judicial officer. Some, we heard tonight, may belittle the genuine concerns raised by many and shared by some Members of this Senate. I believe they are legitimate concerns.

As I said, I could have refused to allow him to have a hearing. I could have refused to allow him to have a vote in the Committee. I did not. I do have genuine concerns.

Some on the other side may try to castigate or caricature those who express opinions that are in opposition to the confirmation of a nominee. They may even choose to vilify those who dare to vote against a nominee who may be popular but who may be flawed in so many important respects. All of these contrasting views and accusations might cause an outside observer to wonder what exactly is the truth. The fundamental questions are whether this particular nominee should be confirmed, whether he should be promoted to a higher court, and whether his record of conduct on and off the bench warrants promotion. A lifetime appointment to review the decisions of other judges is not a right.

With the Supreme Court hearing fewer than 100 cases per year, it is the circuit courts that are really the courts of last resort for thousands of cases each year. These cases affect the Constitution, as well as statutes intended by Congress to protect the rights of all Americans; for example, the right to equal protection of the laws, the right to privacy, as well as the best opportunity to have clean air and clean water, not only for ourselves but for our future generations.

These courts are where Federal regulations will be upheld or overturned, where reproductive rights will be retained or lost, and where intrusive Government action will be allowed or curtailed. They are courts where thousands of individuals have their final appeal in matters affecting their financial future, their health, their lives, their liberty. I believe this record does not demonstrate that Judge D. Brooks Smith merits this promotion.

In saying this, I mean no disrespect to the senior Senator from Pennsylvania, Mr. SPECTER, who strongly supported the confirmation of this nominee, nor disrespect to the nominee who is well-liked by many. I genuinely mean no harm to Judge Smith, no mat-

ter how we vote tomorrow. He has a lifetime appointment and a lifetime salary as a Federal judge. It is fair to say, however, that this nominee's record is problematic in a number of ways. Among my many concerns is the fact that Judge Smith's action creates an appearance that is too often beholden to special interests. The Federal courts are supposed to be an independent judiciary that is not beholden to anyone—the left, the right, or any economic interests. An independent judiciary is the people's bulwark against the loss of their freedom and rights.

A number of judges and lawyers in Pennsylvania have written to the Senate 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 Senate, have called and e-mailed our office to express their deep concerns about this nomination.

We have heard from many Americans who are concerned about Judge Smith's record as a judge, including, incidentally, a resolution that was passed by the City Council of the City of Philadelphia. It was sent to us after the vote in the Judiciary Committee. It called for his nomination to be rejected.

I am going to put in the RECORD at the end of my statement this City Council resolution, as well as the opinions of two ethics professors.

I am disappointed that Judge Smith's record on and off the bench has resulted in this kind of controversy. As I reviewed his record as a judge, that record raised significant doubts in my mind as well.

The issue for me is whether Judge Smith's record justifies this promotion from the lifetime Federal judgeship he now holds to the higher lifetime Federal judgeship. In this case, it is to a court that is only one step below the Supreme Court. Appellate judges in the circuit courts write opinions that become law, affecting all of us, whether we live in Pennsylvania, Utah, Vermont, or Illinois. I do not believe Judge Smith's record justifies this promotion.

For one thing, he failed to keep his promise to resign from a discriminatory country club. Incidentally, that was not a promise that is something given in a political statement or to somebody in the press in response to an impromptu question. This was a promise Judge Smith made in a sworn statement before the Senate a few years ago. He belonged to a discriminatory club for more than a decade after he swore, after he took an oath, that he would quit if the rules were not changed to allow women to become members, in 1988.

He stood there, he raised his right hand, he swore to tell the truth, and he told us that he would resign if women were not admitted by 1989. He did resign from this Spruce Creek Rod and Gun Club in 1999, 10 years later.

What do you suppose was the thing that finally made him keep his word? A cynic would say that a vacancy had arisen on the court he wanted to be promoted to, and suddenly he thought: Wait a minute. I know I swore to resign by 1989—I had a lifetime judgeship and why do I have to resign from a club I like—but then suddenly, whoops, I might be promoted to even a higher Federal judgeship, maybe I better dust off that promise. I realize I am 10 years late, but better late than never.

I find that extremely troubling.

We had testimony by his supporters in letters that, well, the Spruce Creek is just a little fishing club, an itty-bitty fishing club of no consequence, kind of like a shack in the woods where a group of male friends might store their gear.

It is not exactly an itty-bitty club. This here is the itty-bitty club.

I have a little farmhouse in Vermont. My house probably would fit in the garage of this itty-bitty club. Look at this stately club. The Republicans may have missed one thing when they previously referred to this itty-bitty clubhouse, this inconsequential clubhouse as "rustic." Maybe they didn't realize that, because it is such a stately and important place, it is on the National Registry of Historic Places.

I bet your home, Mr. Presiding Officer, is not on the National Registry of Historic Places. Mine is not on the National Registry of Historic Places. I will bet the senior Senator from Utah's home is not on the National Registry of Historic Places. But this little no-consequence, little tiny fishing club, the itty-bitty fishing club, is on such a prestigious list.

For nearly a century, this itty-bitty fishing club has been an exclusive recreational sportsmen's club that hosts its members and guests at its beautiful clubhouse. It has dining facilities. This itty-bitty clubhouse has fireplaces. It has bedrooms for overnight guests. It is not just a little bend in the road; it sits on hundreds of acres of prime real estate.

We can joke about it. It is obvious that Judge Smith and his supporters thought we would not actually go and find a picture of the club. I think they probably wish that we would not go back to his sworn testimony in which he promised to resign 10 years before he did. But let us be clear about what this is. The sports club—it does not make a difference whether the sport pursued is fishing or golfing. There are a number of women's fly fishing clubs attesting to the interest of women in that sport, and that is fine.

If men want to go off and go fly fishing themselves, that is fine. If women want to go off and go fly fishing, that is fine. But when they have facilities to conduct business and when businesspeople go there to conduct business and that is how you may be able to get ahead in the business world if you exclude women from it, if you say, women, if you want to be in business, you are not going to be able to

join the moguls of the business or legal community here, then it is exclusionary.

Women anglers who might have a fly fishing association could not walk into the Spruce Creek clubhouse. They could not fish in the stream called Spruce Creek that runs through the land owned by the club—unless a man, who is a member, condescended to invite them.

Frankly, it does not make any difference whether you exclude women or you exclude African Americans or you exclude people of particular religious faiths—it is still exclusion. That is why it is particularly troublesome that, when Judge Smith was up here the last time before the Senate seeking a lifetime appointment, he swore in sworn testimony to the Judiciary Committee and to the Senate of the United States that he would resign if he could not promptly get the club to change its exclusionary rules.

Judge Smith did not resign within a year, or 2 years, as he had sworn. In fact, he did not resign within the time that the ethical rules that he was sworn to uphold as a judge required. He did not resign until 10 years later and then only when a new position on a higher court for someone from Western Pennsylvania opened up and he hoped to be appointed to it.

There is no reasonable, logical explanation for why he waited for more than 10 years to follow through except that one: There is now a vacancy on a court that he wanted to go to, the Third Circuit from Western Pennsylvania. Claims that the ethical rules changed to allow his continued membership are groundless.

The reason I stress this is that we have judicial nominations hearings, and the distinguished Senator from Utah, the distinguished Senator from Illinois, we have all sat in these hearings. You ask for certain commitments from judicial nominees because once they are confirmed they have a lifetime position.

When a nominee comes before the Senate 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. Once confirmed, 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 the United States Senate will mean very little. I think that is a bad precedent. I think 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 any consequence.

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, because Judge Ryskamp was on notice that membership in discriminatory clubs was impermissible, but he continued his membership in a discriminatory club anyway.

As a district court nominee of President Reagan in 1986, Judge Ryskamp admitted that he was then a member of the University Club, which had a rule against allowing women as members, and the Riviera Club, which had no race-specific membership rules, but which in practice had no Jewish or African American members. During his 1986 hearing, Senator Simon asked Ryskamp if he thought he should resign from the University Club, and Ryskamp promised the Senate, "I will resign from any club the Committee feels is inappropriate." In 1986, he was not asked specifically about the Riviera Club, which he later said he did not consider to be a discriminatory club. He subsequently resigned from the University Club, but not the Riviera Club.

During his nomination by the first President Bush to the Eleventh Circuit, Judge Ryskamp's two-decade long membership in the Riviera Club was questioned extensively. For example, Senator KENNEDY noted that the fact that the Senate had not specifically asked Judge Ryskamp to resign from the Riviera Club did not lessen his responsibility to follow the ethical rules anyway and resign. I recall that Judge Ryskamp told me that he resigned shortly before his confirmation hearing in March 1991 because his continued membership created the appearance of impropriety, not because, in his view, the Club discriminated. In April 1992, the motion to report favorably Judge Ryskamp's circuit nomination to the floor was defeated. The subsequent motion to send the nomination to the floor without recommendation also failed.

Unlike Judge Smith, Judge Ryskamp never promised to resign from the club at issue, although several Senators believed Judge Ryskamp should have done so following his first confirmation. I think it only reasonable that Judge Smith's conduct regarding his previous promise to the Senate would lead a reasonable person to doubt the sincerity of his assurances to the Senate this year in other areas, as well.

Breaking a promise to the Senate, or misleading the Senate into believing that certain action would be taken, is an independent yet unusually strong reason for the rejection of a judicial nominee. I do not think Judge Smith should be given a promotion after fail-

ing to keep his word to the Senate. If his statements to the Senate in 1988 were not promises, then he most assuredly misled the Senate into believing he was going to resign, and he did not do so within any period that can be considered reasonable. On this basis alone, I feel I must vote against Judge Smith's confirmation to the Third Circuit.

Spruce Creek invidiously discriminates against women. Prior to his nomination to be promoted to the Third Circuit, Judge Smith never informed the Senate that he did not have to keep his promise to the Senate. He acknowledged in both his 1988 and 2001 Senate Questionnaires that the Club violated the ethical rules against judges belonging to clubs that engage in invidious discrimination. In fact, when Judge Smith finally resigned from the Club in December of 1999, he told the Club's president that the Club's men-only membership rules "continue to be at odds with current expectations of Federal judicial conduct." It is only now that questions have been raised about his very late resignation does he belatedly assert for the first time that the Club is "purely social" and so the rules against discriminatory club membership do not apply. The exception he seeks to create would swallow the rule. His 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 to his personal purposes. Public officials should not have to be told, repeatedly, not to belong to clubs that discriminate.

We have received a letter from Professor Stephen Gillers, the Vice Dean of the New York University School of Law, observing that the ethical rules against discriminatory club membership do not apply to purely private social clubs that do not allow business or professional meetings. However, both Professor Gillers and Professor Monroe Friedman, a distinguished ethics scholar, have noted that if club members can or do 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" within the meaning of the Code of Conduct's prohibitions. This is true even if women are allowed, by the men who belong to the club, to attend some or all business and professional meetings hosted by the club's members.

I understand that, in fact, Spruce Creek has always allowed members to host business and professional meetings at its facilities. We know that members have hosted business meetings and gatherings of their professional colleagues at the Club. The President of the Club, who has been a member for decades, told Senate staff that members can use Club facilities for any meetings or occasions they want, without any oversight, but he refused to discuss the specific ways the

Club is used by members for business meetings.

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 or in their profession, cannot invite their colleagues to Spruce Creek for business meetings because they are explicitly and intentionally excluded from membership.

Additionally, according to Professor Gillers, Judge Smith had an obligation to make sure that the Club maintained a purely social purpose, if he was going to claim that his membership was exempt from the ethical rules. He could not merely assume that it did. There is no "don't ask, don't tell" exception to the ethical rules. Given his previous assurances to the Senate and his own admissions up to and including his resignation in 1999, he can hardly assert that the Club is "purely social" now, as an after-the-fact justification for his conduct. He has made no showing in support of this belated contention.

Professor Gillers' view of this obligation to inquire is consistent with the guidance in the Judicial Conference's Compendium to the Code of Conduct for United States Judges. Judge Smith also did not follow the Compendium's advice regularly to re-evaluate club membership policies and practices. Judge Smith also did not seek an ethics opinion from his fellow Federal judges about whether the rules against discriminatory club membership somehow exempted this Club to which he so badly wanted to belong.

Judge Smith now says that he did not seek an ethics opinion because it was so clear to him that the ethics rules did not apply to this Club after amendments in 1992 that supposedly let him off the hook. This is another implausible and self-serving assertion. As Professor Gillers noted, the 1992 amendments to the Code of Conduct for United States Judges without a doubt strengthened the prohibition against discriminatory club membership by adopting the language of the ABA code referred to in the Senate Questionnaire that Judge Smith promised to follow when he swore to the Senate that he would resign. The only significant difference is that the rule Judge Smith promised to follow in 1988 allowed judges one year to get discriminatory rules changed or resign, while the 1992 rule gave judges up to two years, from learning of discrimination according to the Code's new, tougher rules, to change the club's practices or resign. Yet, Judge Smith did not resign in 1989, 1990, 1991, 1992, 1993, or 1994. He did not resign until a chance for a higher position in the Federal courts became available in 1999.

I recall that more than a decade ago the Senate Judiciary Committee considered this issue at length. There was testimony from women and men from across the country describing the im-

port of discriminatory private clubs on the women and people of color excluded. From time to time, I suppose, reminders of these lessons are necessary.

In 1990, 2 years after Judge Smith was confirmed and promised the Senate that he would resign from the men-only Spruce Creek Club, the Senate Judiciary Committee passed a sense of the Committee resolution on the issue of discriminatory clubs. The resolution stated that discrimination at clubs where business is conducted and which intentionally exclude women and minorities is "invidious" and "conflicts with the appearance of impartiality required of persons who may serve in the federal judiciary." The Committee's resolution that was adopted on August 2, 1990, provides a bright-line rule for public officials. It defines the clubs at issue as those where members bring business clients or professional associates to the club for conferences, meetings, meals, or use of the facilities. Spruce Creek meets this definition. It is also obviously a place where contacts valuable for business purposes, employment and professional advancement are formed. The Club, by arbitrarily and intentionally excluding women from membership, practices invidious discrimination as defined by the Senate Judiciary Committee. Public officials should not have to be told repeatedly not to belong to clubs that discriminate.

All judges, no matter how popular, have a solemn obligation to "avoid the appearance of impropriety in all activities," under both the Judicial Conference's Code of Conduct for United States Judges and the ABA's model code. That is because, in the words of those codes, "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."

This prohibition applies "to both the professional and personal conduct of a judge." The Judiciary Committee's club resolution similarly sets a high standard of conduct for Federal judges in their personal conduct with regard to club memberships and association. Judge Smith has failed in those obligations. He may very well be a nice person and courteous to women litigants in his courtroom, but that does not excuse him from following the ethical rules that govern his conduct as a lifetime appointee to the Federal courts. Ethical rules apply to all judges equally, regardless of popularity.

Judge Smith had an obligation to resign from the Spruce Creek Rod and Gun Club, both by virtue of his promise to the Senate and because of his responsibilities under the ethical codes, and he failed to do so in a timely fash-

ion. His conduct should not be rewarded with a promotion.

I would also like to set the record straight on one final related point. Supporters of Judge Smith have referenced President Jimmy Carter visiting the Club. According to Carter's memoirs, however, one time in the late 1970s President Carter and the First Lady were invited by the "Spruce Creek Hunting and Fishing Club for a day of fishing on a portion of their leased stream." That day, they met the man who actually owned that parcel of land and thereafter they visited and stayed at his farm, not the Club. The chapter in his book called "Spruce Creek" relates to the creek, not the Club. There is no evidence that President Carter has ever endorsed the Club's intentional, invidious discrimination against women.

Judge Smith failed to recuse himself promptly from conflicts of interest. I am also concerned about Judge Smith's late recusal, or disqualification, in two cases involving his substantial financial investments. According to two distinguished professors of legal ethics, Professor Gillers and Professor Friedman, Judge Smith also violated ethical rules due to his late recusal from the Black cases, a 1997 investment fraud case and a related 1999 criminal case. This is because it is undisputably true that Judge Smith and his wife had substantial investments (valued at between \$200,000 and \$500,000 together) in the bank or holding company that faced significant financial liability in those cases and because his wife also worked at the bank.

In one of those cases, Judge Smith waited five months to recuse himself. In the other case, he waited about a week to recuse himself after realizing that the bank was involved, but he issued significant orders in the intervening period. In both cases, Judge Smith revealed only his wife's employment at the bank to the lawyers in the cases. He never disclosed their substantial financial investments to the lawyers in either the civil or the criminal case. Judge Smith contends that he was not required to recuse himself but did so only in "an abundance of caution." He also contends, basically, that nobody was harmed by his late recusal.

In the opinions of two ethics experts, however, Judge Smith was required to recuse himself from any case in which the judge or his spouse has any interest that could be substantially affected by the outcome of the case, in accordance with the rules passed by Congress in 28 U.S.C. § 455 (a) and (b) (4), and with cases of the Supreme Court and Third Circuit. These rules against conflicts of interest, which are intended "to avoid even the appearance of partiality," are largely self-enforcing. Parties may not know that a judge has substantial financial investments affected by the case and may not move to disqualify a judge unless the judge fully discloses such information. Judge Smith, again reading ethical rules narrowly, did not

do so. Such facts do not give one confidence in his conduct on the bench.

I do think this Senate should take seriously a lifetime appointee's failure to follow ethical rules, in this area and others, such as discriminatory club membership. It is problematic to confirm someone to the Court of Appeals who would read the ethical obligations so narrowly. This is especially so because, under the structure of the Federal courts, it is the circuit court judges who preside over ethics complaints against lower federal judges. I do not think those who read such rules narrowly should be elevated and given that special responsibility.

Judge Smith's remarks as a Federal District Court judge: Another troubling area is Judge Smith's insensitive and activist speeches. A number of these remarks call into question Judge Smith's judgment and fairness. For example, as a sitting federal judge he has given speeches in which he calls "legal spam" cases that affect the rights of ordinary Americans, such as cases involving their financial security, social security appeals, pension plan collection cases, and bankruptcy appeals. Such a characterization is shocking for its insensitivity to the importance of such cases to the individuals seeking a fair hearing of their claims in federal court. It calls into question how seriously Judge Smith has taken his oath as judge to administer justice to all persons equally and to "do equal right to the poor and to the rich."

Judge Smith also spoke out in favor of parties being required to pay each other's costs in responding to discovery requests. That idea—like the idea of requiring the loser in a case to pay the winner's expenses, which he also endorsed has been widely rejected because it would impose significant financial burdens on individuals suing corporations, for example, for personal injuries caused by a defective product. Such a rule could make it impossible for individuals to pursue legitimate grievances for which Congress has provided a federal court forum.

Another concern is Judge Smith's speeches to conservative ideological groups in which he basically gives advisory opinions about the constitutionality of federal statutes. For example, in 1993, as a sitting judge, he gave a far-reaching speech to the Federalist Society in which he advised the audience that the proposed Violence Against Women Act (VAWA) was unconstitutional. He said this landmark legislation could not be justified as within the power of the federal government. He was also very critical of Congress's extensive findings of fact in VAWA, calling them a "promiscuous invocation of the Commerce Clause." This lack of deference and respect to the legislative findings of a co-equal branch of government is troubling.

Judge Smith told the Federalist Society his own principles for deciding such cases: "First, ask whether the subject matter is within the power of

the national government by express delegation in the text of the [C]onstitution, or impliedly through a historically honest reading of the necessary and proper clause. If not stop!" Such a subjectively narrow reading of the Constitution could ostensibly result in the overturning of many laws intended to protect the rights of individuals. He assured the Senate at his recent hearing that he would not read the Constitution so narrowly if he were promoted, but in 1988 he also assured the Senate that he would resign from a discriminatory club the following year, a promise he did not keep. I am not sure his assurances on the important issue of the scope of Congressional power should be credited now.

Similarly, Judge Smith gave a speech at the 1997 National Convention of the Federalist Society on "The Federalization of Criminal Law." In it he criticized the invocation of federal jurisdiction via the Commerce Clause in a "routine" car bombing case under 18 U.S.C. § 844, as well as the "rape-shield" amendments to the Federal Rules of Evidence which generally bars evidence of a rape victim's sexual history. Judge Smith took issue with federal intrusion into these areas of the law, stating that using that statute in car bombing cases and rules like the rape-shield rule reflect "elitism: a mind set on the part of Congress and some federal prosecutors that the state court systems can't be trusted to 'get it right' . . . never mind the text of the Constitution." Such statements are unsettling. It seems as though Judge Smith has a deep distrust that Congress does not follow the Constitution, despite the precedent that requires judges to give congressional enactments a presumption of constitutionality.

Judge Smith has also written an article endorsing an idea he calls "benign judicial activism" in which a judge intervenes early in a case to help reach a speedy and just resolution. While this idea has superficial appeal, in practice this approach may not be so benign. In about half of Judge Smith's more than 50 reversals, the Third Circuit reversed his decisions either to grant summary judgment in whole or in part to defendants in civil cases or to dismiss plaintiffs' complaints with prejudice. In a number of such reversals which span his years on the bench the Third Circuit took issue with his early intervention in cases in ways that denied plaintiffs the opportunity to have their cases adjudicated or tried on the merits. Thus, the Court of Appeals to which Judge Smith is now nominated has repeatedly reversed decisions of his which improvidently granted summary judgment or dismissals in favor of civil defendants, often big, corporate defendants. This pattern, combined with his speeches and conduct, raises concern.

Judge Smith's participation in seminars at resorts paid for by special interests is problematic. Another area of concern is that Judge Smith has at-

tended a large number of educational seminars funded by corporations and groups with an interest in interpreting the law a particular way, in a politically or ideologically conservative way favoring corporate interests. As a sitting federal judge, Judge Smith has spent more than 72 days on junkets at luxury resorts on trips valued at more than \$37,000 which were funded by corporations and conservative special interest groups. Judge Smith has taken three trips to seminars funded by the Foundation for Research on Economics and the Environment (FREE), which promotes "free market environmentalism," opposes environmental regulations, and gives lectures on topics like "Liberty and the Environment: A Case for Principled Judicial Activism." He has also taken nine trips funded by the Law and Economics Center (LEC), which is affiliated with George Mason Law School and which sponsors seminars with anti-regulatory bent on topics like "Misconceptions about Environmental Pollution and Cancer."

My colleague on the Senate Judiciary Committee, Senator FEINGOLD, has spent a great deal of time trying to address the problem of these junkets. The current ethical rules do not clearly prohibit such judicial education seminars at luxury resorts paid for by special interests, and it is difficult for outsiders to obtain information about who is really footing the bill. According to one report, however, Judge Smith has presided over at least two dozen cases involving corporations that funded LEC and he is one of the most frequent fliers to such seminars. I do think it is difficult to maintain the appearance of impartiality under such circumstances. It is axiomatic that judges must be perceived as fair and impartial, and actually be so, for our system of justice to work. I am troubled by Judge Smith's insensitivity to such matters.

Judge Smith's reversals for dismissing plaintiffs' claims: I am also concerned about the unsettling anti-plaintiff pattern in Judge Smith's judicial decisions. Judge Smith's published and unpublished decisions reveal numerous instances in which he has been more solicitous to corporations than to plaintiffs and pro se litigants. Judge Smith has been reversed by the Third Circuit dozens of times for denying plaintiffs the opportunity to try the merits of their cases. In cases involving personal injuries, toxic torts, employee rights, and civil rights claims by prisoners, Judge Smith has been reversed for improvidently granting defendants' motions for summary judgment, prematurely dismissing plaintiffs' complaints, and inappropriately denying motions for injunctive relief without giving the plaintiffs a hearing.

Overall, Judge Smith has been reversed 51 times, including 18 unpublished reversals, in 14 years. In contrast, Judge Pickering was reversed 28 times in 11 years and Judge Barrington Parker, one of President Bush's nominees who was confirmed last fall, was

reversed nine times in 11 years on the district court bench. The Third Circuit's reversals suggest that Judge Smith's political philosophy greatly influences the outcome in cases before him. Of the many problematic reversals and published, as well as unpublished, decisions of Judge Smith on the district court, three are particularly illustrative of his approach to claims of plaintiffs, but there are many others that raise concerns.

In *Metzgar v. Playskool*, 30 F.3d 459 (3d Cir. 1994), for example, three Reagan appointees reversed Judge Smith's dismissal by summary judgment to the corporate defendant that had been sued for the death of a 15-month-old child who choked on a wooden block marketed without a warning label. Judge Smith granted summary judgment to the corporation on his theory that choking is an obvious danger and therefore no express warning was necessary. The Third Circuit was "troubled" by Judge Smith's analysis and his reliance on flawed statistics. The appellate court concluded that Judge Smith should have given the jury a chance to consider whether the blocks were so obviously dangerous that no specific warning was needed for parents of toddlers.

In *Wicker v. Consolidated Rail Corporation*, 143 F.3d 690 (3d Cir. 1998), Judge Smith was reversed for granting summary judgment to an employer sued under the Federal Employees Liability Act (FELA) for injuries caused by exposure to toxic solvents, degreasers and paints illegally dumped and buried by the employer. Smith granted the corporation's motion for summary judgment on the ground that the workers had signed a release settling prior, unrelated injury claims against the railroad. The Third Circuit reversed and held that FELA was intended to protect workers in these situations and that the releases seized on by Smith were invalid.

In *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994), Judge Smith improvidently granted summary judgment to a city that refused to allow the plaintiff and his Pentecostal ministry access to tent revival meetings in violation of their rights under the Free Exercise Clause of the First Amendment. The city had intentionally locked a recently-erected gate to impede access to the Christian revival meetings. Judge Smith concluded erroneously that these actions, even if manifesting anti-Christian bias, did not constitute a substantial burden on the exercise of their religion. The Third Circuit reversed, holding that Judge Smith's analysis was "inappropriate for a free exercise claim involving intentional burdening of religious exercise" because "[a]pplying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immunity from the protection of the First Amendment." The Third Circuit completely disagreed with Judge

Smith's hostile decision in which he stated that the plaintiff's "invocation of the First Amendment provisions guaranteeing religious liberty in so glaring a piece of spiteful litigation is insulting to the principles protected by that constitutional amendment." I was shocked by Judge Smith's rough and disrespectful treatment of the legitimate claims of people of faith in this case.

This unsettling pattern created by Judge Smith's judicial decisions, his high level of participation in right wing, special interest-funded junkets, his activist and insensitive speeches, his late recusal in cases involving his substantial financial interests, and his very belated resignation from a discriminatory club create a very unfavorable impression. Judge Smith's defense to each of these significant problems seems to be that he actually is a fair judge despite the appearance that he is not. I am not convinced that his record warrants a promotion to a higher court.

Judge Smith's cramped and self-serving approach to the ethical rules that are supposed to govern federal judges is particularly troubling. He seems to think he is above the rules. His actual record of conduct on and off the bench creates a negative impression that is not reflected in Judge Smith's apparent popularity among his friends. I have no doubt that Judge Smith is an intelligent and charismatic person. What his record as a whole, not just as a colleague or friend, calls into question is his sensitivity, his fairness, his impartiality and his judgment. It calls into question how seriously he has taken his promises and assurances to the Senate in the past and recently, as well as how seriously he has taken his oath as judge to administer justice to all persons equally and to do equal right to the poor and to the rich. The record Judge Smith's own record of performance as a federal judge over these past 14 years does not merit his promotion to one of the highest courts in the land. Based on that record, I will vote against confirmation.

My good friend from Utah is waiting patiently. I withhold the remainder of my time.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, hearing my colleague, one might forget that this is the U.S. Senate rather than some whacky politically correct college campus—Berkeley on the Potomac. The fact is, this judge is one of the most respected judges in all of Pennsylvania. He has virtually everybody in western Pennsylvania on his side. He has served 14 years on the Federal bench and has done a very good job in doing so. He is highly respected and has the highest rating from the American Bar Association—the gold standard, according to our colleagues from the other side. And he did not break his word.

The fact is, the law was different than was explained to him when he ap-

peared before the committee, and it is still different than the distinguished Senator from Vermont has been making out here today.

I often hear my colleagues talk about the Clinton nominees who were left at the end of the 106th Congress, but I rarely hear them mention the 54 nominees who were left at the end of the Democratic-controlled 102nd Congress when George Herbert Walker Bush was President. If we are going to waste our time looking back on nominations past instead of looking ahead, let's not forget the 54 nominees the Democratic-controlled Senate left at the end of the 102nd. That is 13 more than the number of Clinton nominees left at the end of the 106th whom we hear so much about, and about 17 of them didn't have a chance anyway. The rest of them there were for reasons. Some of them, the blue slips weren't returned by Senators. You can't call them up.

I don't really think to talk about past congressional action on nominations in any way furthers the work we have been doing as a committee. However, it is difficult to listen to only a select portion of what has occurred in the past without trying to set the record straight. Those Bush 1 nominees who were never confirmed are just as important as these Clinton nominees who have been complained about, and there were far more of them than there were Clinton nominees left over. It is just a matter of fact. Whoever is President, you have some nominees left over. But there were a lot more left over by Democrats than there were by Republicans.

Let me name some of them: Jay C. Waldman of the Third Circuit, nominated for the Third Circuit; Franklin Van Antwerpen, Third Circuit; Lillian R. BeVier, Fourth Circuit; Terrence W. Boyle, Fourth Circuit, who has been sitting here for 14 months, nominated again 10 years later; Francis Keating II, current Governor of Oklahoma, the Tenth Circuit; Sidney A. Fitzwater, Fifth Circuit; John G. Roberts, again, nominated by the second Bush 10 years later, sat there all those months in the first Bush, and now he is sitting here for 14 months in this administration; John A. Smietanka, Sixth Circuit; Frederico Moreno, Eleventh Circuit; Justin P. Wilson, Sixth Circuit; James R. McGregor, Western District of Pennsylvania; Edmund Kavanagh, Northern District of New York; Thomas Sholtz, Southern District of Florida; Andrew O'Rourke, Southern District of New York.

There are plenty of names and an awful lot more than were left at the end of the Clinton administration, and with very little justification. They have seldom mentioned that the all-time confirmation champion was Ronald Reagan with 382 judges. He had 6 years of a favorable party Senate. His own party controlled the Senate. He got 382 judges through. President Clinton, with the opposition party controlling the Senate, with me as chairman,

as a member of the opposition party, got 377 judges through, virtually the same number as the all-time confirmation champion, Ronald Reagan.

Continuing my list of judges: Tony Graham, Northern District of Oklahoma; Carlos Bea, Northern District of California; James Franklin Southern District of Georgia; David Trager, Eastern District of New York; Kenneth Carr, Western District of Texas; James Jackson, Northern District of Ohio; Terral Smith, Western District of Texas; Paul Schechtman, Southern District of New York; Percy Anderson, Central District of California; recently confirmed; Lawrence Davis, Eastern District of Missouri; Andrew Hane, Southern District of Texas; recently confirmed; Russell Lloyd, Southern District of Texas; John Walter, Central District of California; recently confirmed; Gene Vougt, Western District of Missouri; Manuel Quintana, Southern District of New York; Charles Banks, Eastern District of Arkansas; Robert Hunter, Northern District of Alabama; Maureen Mahoney, Eastern District of Virginia; James Mitchell, District of Nebraska; Ronald Leighton, District of Oklahoma; William Quarles, District of Maryland; James McIntyre, Southern District of California; Leonard Davis, Eastern Northern District of Texas; recently confirmed; Douglas Drushal, Northern District of Ohio; Christopher Hagy, Northern District of Georgia; Lewis Leonatti, Eastern District of Missouri; Raymond Finch, Northern District of Vermont; James McMonagle, Northern District of Ohio; Katherine Armentrout, District of Maryland; Larry Hicks, District of Nevada; Richard Casey, Southern District of New York; Edgar Campbell, Middle District of Georgia; Joanna Seyvert, Eastern District of New York; Robert Kostelka, Western Northern District of Louisiana; Richard Dorr, Western District of Missouri; has had a hearing; James Payne, District of Oklahoma, confirmed this congress; Walter Prince, District of Massachusetts; George O'Toole, Jr., District of Massachusetts; William Dimetroulas, Southern District of Florida; Henry Saad, Eastern District of Michigan—not to mention Kenneth Ryskamp, who, like Charles Pickering, was voted down in committee and never received a full Senate vote.

Let me also say I am going to get into this because I didn't think we would get down to the point where we started talking about a 115-member club that is a social club, not a business club, and virtually everybody knows it. To make that the big brouhaha that this is supposed to be is just almost beyond belief to me. I didn't want to have to talk about that, but I will be happy to.

I rise today to express my strong support for Judge D. Brooks Smith whom the President nominated on September

10 of last year for the Third Circuit Court of Appeals to be confirmed today or tomorrow. It has been over 5 months since his committee hearing. It has been over 60 days since the Judiciary Committee reported Judge Smith's nomination favorably to the Senate. I am disappointed, however, with the treatment Judge Smith is getting from those whose well-funded business it is to oppose President Bush's nominees.

I have warned before of the growing power of the extreme left of mainstream special interest groups upon the judicial confirmation process. Almost all of them are right here in this town. My colleagues know full well that when I was chairman of the Judiciary Committee, I did not welcome conservative groups telling the committee how to vote and what to do. I told them to get lost. I even directed my staff to refuse briefings from them and even meetings with them. But the evidence indicates a very different relationship now to liberal special interest groups that seem to call the shots.

Newspapers from the Wall Street Journal to the Washington Post have commented on these liberal special interest groups and on their control of this process. But it is not a matter of opinion; here is the evidence. I would like to have printed in the RECORD evidence of this unfortunate relationship. First is a fundraising letter from People for the American Way taking credit for the rather shameless defeat of Judge Charles Pickering's nomination; second, a letter from a liberal Hispanic organization telling the committee not to bring up the nomination of Miguel Estrada until August to give them time to prepare a Pickering-like campaign against him. The President nominated Miguel Estrada over 1 full year ago. He would be the first Hispanic to sit on the Nation's second most influential court. But the Democratic leadership refuses to give him a hearing. Now I think we know why.

Lastly, I want to have printed in the RECORD a press release from the National Organization For Women, issued just hours after the Judiciary Committee voted to report favorably the nomination of Judge Brooks Smith to the full Senate. It appears that NOW and other radical liberal groups have demanded that the Democrat leadership come to the floor and fight to defeat Judge Smith.

I ask unanimous consent that the documents I have just referenced be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

PEOPLE FOR THE AMERICAN WAY,
Washington, DC, April 5, 2002.

In the past couple of weeks, the Wall Street Journal's notoriously right-wing editorial board has twice attacked People For the American Way—and me personally—in particularly venomous language. Being

called a "race-card specialist" is not the best way to start the day. (You think I'd be used to it given that the Journal's editorial board has run more than two dozen attacks on me over the years, especially during my tenure at the Leadership Conference on Civil Rights as I chaired the successful coalition battle to keep Robert Bork off the U.S. Supreme Court.)

But there's good news in those unfair and inaccurate poison-pen editorials. As a long-time progressive ally recently reminded me, they don't come after us like that unless they think we're winning.

In this case their fears were well founded. On March 14, the Senate Judiciary Committee voted to reject the nomination of Judge Charles Pickering to a lifetime appointment to the U.S. Circuit Court of Appeals. People For the American Way played a crucial leadership role in the broad progressive coalition effort to defeat this nomination in the face of attacks from the far right, the GOP Senate leadership, and the White House. Even before the vote, the far right had been coming after us with all the rhetorical fury they can muster. I can only imagine what will happen now that it is clear we won't let them complete their ideological takeover of the federal courts without a fight.

Pat Robertson recently told millions of his television viewers that People For the American Way is "bad news for America. They don't tell the truth, and what they're doing is essentially smearing this man." Robertson's son Gordon, the heir apparent to the evangelist's empire, used the same television platform to accuse People For the American Way of "anti-Christian bigotry," telling viewers we opposed Pickering because he is a Christian. Phyllis Schlafly's Eagle Forum has denounced People For the American Way and our allies as an "Unholy Alliance" while calling Democratic members of the Senate Judiciary Committee the "Tyrannical Ten."

Ultra-conservative senators like Trent Lott, Orrin Hatch and Mitch McConnell have gone after us and other Pickering critics. And right-wing pundits on the Internet are even worse, making totally irresponsible and inflammatory remarks.

The increasing frequency and harshness of the attacks directed against People For the American Way reflect more than anything else our leadership role in the progressive movement and the effectiveness of our work. We've been accused of aiding America's enemies for standing up to Attorney General John Ashcroft and his assaults on the Constitution. We've been attacked as anti-Christian bigots for defending separation of church and state. And now we're being attacked for fighting to preserve the federal courts as a refuge for people seeking to have their civil rights and civil liberties protected.

The recent Judiciary Committee vote was the first victory in what will certainly be a long and fierce struggle over the future of the federal judiciary and the rights and freedoms protected by our Constitution.

I hope that you will take this opportunity to become a member of People For the American Way or to continue your support. At this watershed moment in our history, we would be proud and honored to march forward with you as our partner.

Sincerely,

RALPH G. NEAS,
President.

MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, NATIONAL ASSOCIATION OF LATINO ELECTED & APPOINTED OFFICIALS, NATIONAL COUNCIL OF LA RAZA, NATIONAL PUERTO RICAN COALITION, PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND,

Washington, DC, May 1, 2002.

Hon. PATRICK LEAHY,

Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As national Latino civil rights organizations, we write on a matter of great importance to U.S. Latinos, and all Americans—the nomination of Miguel Estrada to the D.C. Circuit Court of Appeals. Although historically we have expressed our views on judicial nominees with different levels of frequency, we are united in our view that all federal judicial appointments are important because they are life-long appointments, because they are positions of great symbolism, and because federal judges interpret the U.S. Constitution and federal laws serving as the balance to the legislative and executive branches of the federal government. While the Supreme Court is the highest court, the appellate courts wield considerable power. During its most recent term, the Supreme Court heard only 83 cases, while the circuit courts decided 57,000 cases. As a practical matter, circuit courts set the precedent in most areas of federal law.

We are united at this time around our belief that Mr. Estrada's nomination deserves full, thoughtful, and deliberate consideration. The President proposes to place Mr. Estrada, who has no judicial experience, on arguably the single most important federal appeals court to decide a myriad of statutory and regulatory issues that directly affect the Latino community. Every appointment to a powerful court is important as we recently witness in the Supreme Court's 5-4 decision in Hoffman Plastics that stripped undocumented workers of certain labor law protections. This decision, which inevitably will result in increased exploitation of the undocumented, as well as weaker labor standards for all low-wage workers, underscores the importance of nominations such as this one, not just to Hispanics, but all Americans.

This decision comes on the heels of a series of Supreme Court decisions which, in our view, have unnecessarily and incorrectly narrowed civil rights and other protections for Latinos. While we look to see if judicial nominees meet certain basic requirements such as honesty, integrity, character, temperament, and intellect, we also look for qualities that go beyond the minimum requirements. We look to see if a nominee, regardless of race or ethnicity, has a demonstrated commitment to protecting the rights of ordinary U.S. residents and to preserving and expanding the progress that has been made on civil rights, including rights protected through core provisions in the Constitution, such as the Equal Protection Clause and Due Process Clause, as well as through the statutory provisions that protect our legal rights.

We are aware that some are demanding a commitment from you and the Judiciary Committee to announce a date certain for action on Mr. Estrada's nomination. We agree with the proposition that every nominee deserves timely consideration. For this reason, we urged the Senate to act on the nomination of Judge Richard Paez to the Ninth Circuit Court of Appeals, who was forced to wait for four years before being confirmed. We also believe, however, that if a nominee's record is sparse the Judiciary Committee should allow sufficient time for those interested in evaluating his record, in-

cluding the U.S. Senate, to complete a thorough and comprehensive review of the nominee's record. We therefore respectfully request that you consider scheduling a hearing no earlier than August, prior to the scheduled recess. This leaves sufficient time for action prior to adjournment if his record is strong enough to receive substantial bipartisan support.

In the interim, we pledge to conduct a fair and thoughtful assessment of Mr. Estrada's record, and to communicate our views on his nomination to you, Ranking Member Hatch, and other Committee members in a timely manner.

Sincerely,

ANTONIA HERNANDEZ,
President and General
Counsel, Mexican
American Legal De-
fense and Edu-
cational Fund.

RAUL YZAGUIRRE,
President, National
Council of La Raza.

MANUEL MIRABAL,
President, National
Puerto Rican Coali-
tion.

JUAN FIGUEROA,
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Counsel, Puerto
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Fund.

ARTURO VARGAS,
Executive Director,
National Association
of Latino Elected
and Appointed Offi-
cials.

[From the National Organization for Women,
May 23, 2002]

JUDICIARY COMMITTEE VOTE INSULTS WOMEN;
NOW VOWS CAMPAIGN IN FULL SENATE
(By Kim Gandy)

The field of credible Democrats running for President was significantly narrowed today when two rumored candidates insulted every employed woman, every woman in business, and every woman who has been a victim of violence in this country. In casting their votes to promote Judge D. Brooks Smith to the Third Circuit Court of Appeals, only one step below the Supreme Court, rumored candidates Sen. Joseph Biden, D-Del., and Sen. John Edwards, D-N.C., disregarded the extensive evidence of unethical behavior and discriminatory conduct that caused the Washington Post, New York Times and Los Angeles Times to oppose Smith's confirmation.

In an embarrassingly convoluted rationale, Biden expressed disappointment in Smith's strong criticism of the Violence Against Women Act (VAWA), but said it would be a "double standard" to vote against Smith because Supreme Court Chief Justice William Rehnquist held a similar opinion on VAWA. Apparently Biden doesn't recall that his vote for Rehnquist was cast many years before VAWA was even introduced. As for a "double standard," someone should tell Sen. Biden that double nothing is still nothing. Biden's previous leadership on violence against women is just that—previous. He has jettisoned it in favor of friendship—his stated presumption of supporting any nominee sponsored by Sen. Arlen Specter, R-Pa. No doubt the people of Delaware will want to know that they have elected a Republican from Pennsylvania to represent them.

Another Presidential wanna-be, Sen. Edwards, hid out in his office across the hall from the hearing, and didn't even have the courage to case his "Yes" vote in public. Sen. Herbert Kohl, D-Wis., joined all of the

committee Republicans, whose cowardly votes betrayed the women of their states by recommending elevation of a judge whose repeated "ethical lapses" deserve censure, not promotion.

The Senate's reputation as an "Old Boys Club" was reinforced by today's vote, in which both of the women on the Judiciary Committee voted against Smith, but he won anyway because 12 of the 17 men voted in his favor. To promote a judge who will have to decide on cases of discrimination, when that judge has himself cavalierly participated in discrimination and even ruled in favor of discriminatory practices, is the height of irresponsibility by those who are charged with that duty.

NOW commends both of the women who serve on the Judiciary Committee, Senators Dianne Feinstein, D-Calif., and Maria Cantwell, D-Wash., whose votes against confirming Smith spoke volumes, as well as Committee Chair Patrick Leahy, D-Vt., who spoke eloquently about discrimination against women, and Senators Richard Durbin, D-Ill., Russ Feingold, D-Wis., Edward Kennedy, D-Mass., and Charles Schumer, D-N.Y.

NOW intends to seek a filibuster in the Senate against Judge Smith's confirmation, and will urge every Senator to participate who cares about protecting the last 40 years of progress women have made. The Judiciary Committee's vote for D. Brooks Smith made a mockery of judicial standards. Unless the full Senate reverses, it will send a message to women that they can't expect to have civil rights—or ethics—taken seriously by the Senate or the courts.

Mr. HATCH. Referring in the most vitriolic terms to my friends, Senators Biden and Edwards, voting for Judge Smith in committee, NOW begins by saying:

The field of credible Democrats running for President was significantly narrowed today. . . .

This is simply because these Senators exercised their independent judgment and supported Judge Smith. Honoring the President's prerogative to nominate judges should hardly be a cause to attack my Democrat colleagues or take them out of a potential Presidential candidacy or race.

Rather than speak further about Judge Smith's enemies, I would like to speak about his friends. I think an editorial in the liberal Pittsburgh Post-Gazette put Judge Smith's nomination best when they wrote:

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 in 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 this Senate 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, which I read faithfully everyday and respect in many ways—but not in this instance.

But given the bipartisan 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 to escape, relax, and fish.

If this is the kind of thing that members of the body use 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.

In fact, 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.womensflyfishing.net*, which lists the 60 or so women-only fishing clubs across the country.

We are far from those days when prestigious downtown clubs kept women out of their facilities, and in any case that is not the nature of Judge Smith's family-oriented, fly-fishing club. The special interest groups out to get Judge Smith on this count are proving that when the only tool you have is a hammer, everything you see starts looking like a nail.

In fact, there is a rich mosaic of single gender social clubs in this country that are entirely unobjectionable to any reasonable person. You should not be surprised to know, Mr. President, that this country is well-served by over 6,500 women's only clubs of every size.

Are Judge Smith's opponents in this Senate really prepared to say that the members of the important Francesca Club in San Francisco or the powerful Raleigh Women's Club, or the Junior Leagues throughout the South and all over the country, 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 before the Judiciary Committee, 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.

Mr. President, the building you saw has a living room, a kitchen, two bathrooms, and six bedrooms on the second floor. It is not a great big building, even though they blew up a picture to make it look like it was. Even if it was, it is used only for social purposes, and then by a membership of 115.

By the way, that club does not have public accommodations. It does not serve food to the public. It does not do business with the public.

No legalistic parsing of words can change this fact, even though any motivated lawyer can certainly confuse

the issue, as we have seen in the Judiciary Committee.

It is not surprising, of course, that the Judge Smith's detractors have chosen 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, the Judicial Conference adopted standards pursuant to Supreme Court's decisions. It made clear that there was nothing—absolutely 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, who currently serves as Chief Judge for the Western District of Pennsylvania, has earned a reputation for competence, fairness, and judicial temperament during 14 years as a Federal judge.

I used to practice law in that district and tried cases in the Federal District Court of Western Pennsylvania.

Judge Smith was appointed to that job at age 36—he was one of the youngest Federal judges in the country—and he came to it with experience as a state court judge, as a prosecutor, and as a private practitioner.

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 three times.

The accounts of the people who know Brooks Smith best 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 fairmindedness, if not decency.

Judge Smith, who is currently the Chief Judge for the Western District of Pennsylvania, has earned a reputation for competence, fairness, and judicial temperament during his 13½ years as a Federal judge. He was appointed to that job at age 36—he was one of the youngest Federal judges in the country—and he came to it with experience as a State-court judge, as a prosecutor, and as a private practitioner.

I briefly recount Judge Smith's record 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 or religion or his of 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 1950s by asking a single infamous question intruding into the freedom of association. I was ashamed when the Judiciary Committee echoed this question last year by questioning nominees about the Federalist Society, as distinguished an association of lawyers as there could be. Now the special interest groups are asking the Senate to deny the President's nominee a confirmation on the basis of a fly fishing club.

I fear the American people, are going to roll their eyes at the Senate with these type of accusations. But the truth of it is that if we disregard 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 Thurmond 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. President, 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."

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. Judge Smith's former club has only 115 members. It has been around for a lot of years and has had both women and men enjoy the benefits.

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." They foster pluralism.

I for one stand by our freedom of association. As Justice Thurmond 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, Senators 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 opponents of Judge Smith, who have seen fit to probe Judge Smith's views on *Griswold*, voted against him for exercising privacy rights emanating from that very case.

The special interest groups that are working to discredit Judge Smith apparently think that President Bush's circuit court nominees deserve to have their records distorted and their reputations dragged through the mud. But I don't think that any judicial nominee

deserves such treatment, and that was something I practiced as chairman for 6 of President Clinton's 8 years in office.

I strongly agree with the Washington Post editorial of February 19, 2002, and nobody would suggest the Washington Post is a conservative newspaper, that "opposing a nominee should not mean destroying him." The Post pointed out, "The need on the part of liberal groups and Democratic senators to portray a nominee as a Neanderthal—all the while denying they are doing so—in order to justify voting him down is the latest example of the degradation of the confirmation process."

I continue to hope that my colleagues will be sensitive to the dangers to the judiciary and to the reputation of this body that will certainly result from the repeated practice of degrading honorable and accomplished people who are will to put their talents to work in the public service. I urge my colleagues to examine Judge Smith on his record, and not on superficial and unsubstantiated allegations.

When Judge Smith comes for a vote we will have the opportunity to show that the senate 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.

My colleague has made a point in the past that somehow men's clubs are problematic and powerful and that women's clubs are somehow different and poorer. That is not a problem. I have a photo of an all-women's club. This is the Sulgrave Club of Washington. I, for one, believe they have a right to have an all-women's club.

If my colleagues have trouble seeing the club, it is a mansion. It is not just a living room, kitchen, and six bedrooms upstairs. It is the building behind the Jaguar, the Lexis and, of course, the Mercedes. It is not itty-bitty by anybody's stretch of the imagination. And it is probably in a historical landmark situation.

My colleague has also mentioned the ethicists who have written to condemn Judge Smith. Other ethicists have written to support Judge Smith.

One of these Democrat ethicists, by the way, is the one standing on the car. If my colleagues cannot see it because it is a little dark, maybe the camera can come in a little closer. That is one of the ethicists they can get to write almost any opinion they want. This ethicist has argued in favor of introducing false testimony into a trial and argued perjured testimony to a jury.

This is a photograph of another of the regulars who write to denounce President Bush's nominees. I might add, again, he is the one standing on top of the police car. We expect to have a lot of other letters from this particular ethicist.

This is the type of stuff we are putting up with. I think it is time to stop

it. I think it is legitimate for people to differ on a judge's qualification from time to time, but there is little or no reason to differ on this one. This is a good man.

I hold a license in that area. I know the top lawyers in that area. I tried against a number of the top lawyers in that area. I have to say I do not know any of them who are not in favor of Judge Smith, and that ought to count more than some of these bits of calumny that have been thrown his way by some who do not like President Bush's nominees.

Mr. KENNEDY. Mr. President, I will vote against the confirmation of Judge D. Brooks Smith to the United States Court of Appeals for the Third Circuit. While Judge Smith is an intelligent jurist, I believe that his serious ethical lapses, and his record of reversals by the Third Circuit in cases concerning civil rights, and the rights of workers, environmental protection and consumer safety suggest that Smith has not met his burden of showing that he should be elevated to the Third Circuit.

Judge Smith's handling of his membership in the Spruce Creek Rod and Gun club, a club whose by-laws explicitly forbid the admission of women, gives me great concern. I am disturbed by Judge Smith's failure to resign from the Spruce Creek Club in a timely manner despite his sworn oral and explicit written promise to this committee at the time of his 1988 confirmation hearing. Smith promised that if he was unsuccessful in trying to change the club's membership policies he would resign, but he failed to do so for another 11 years, until 1999.

Rather than provide a simple explanation, or an apology, for his failure to fulfill this promise, Judge Smith claimed at his hearing that the Judicial Code of Conduct, the ethical rules governing judges, did not actually require resignation from the club. According to Smith, the Spruce Creek Club is purely a social club and is thus exempt from the rules. This strikes me as disingenuous. Judge Smith's 1999 resignation letter to Spruce Creek made clear that he was resigning from the club because its male-only admissions policies "continue to be at odds with current expectations of Federal judicial conduct," suggesting that he knew the club's membership policy was in conflict with the Judicial Code of Conduct.

Contrary to Judge Smith's representations, it also appears that the Spruce Creek Club is not merely a social club, but a place where business is conducted. Three ethicists, including one who wrote at the behest of the Ranking Minority Member of the Judiciary Committee, have written that if the Spruce Creek Club can be used for business purposes, its exclusion of women would violate the Judicial Code of Conduct. The President of Spruce Creek Club has acknowledged that members of this club are allowed to host a variety of meetings on the premises, and

the committee has learned that business and political meetings have been held at the club. The Code of Judicial Conduct is clear that exclusion of women, minorities, and others from clubs where business is conducted is prohibited. In addition, in 1990, this committee adopted a resolution stating that membership in organizations that practice invidious discrimination was inappropriate for a judicial nominee. The resolution reflects our belief that because such membership "may be viewed as a tacit endorsement of the discriminatory practices, it conflicts with the appearance of impartiality" that is required of federal judges. We recognized that exclusion of women and racial, ethnic or religious minorities from social clubs that also perform business denies these groups opportunities to make contacts with important members of the community, contacts that are often crucial to professional advancement.

I am also troubled by Judge Smith's approach to cases implicating Federal rights important to victims of discrimination, workers and the disabled, and his disturbing, consistent pattern of favoring business and employers in these cases. Judge Smith has been reversed 51 times by the Third Circuit, often by panels of conservative judges. In many of these cases, Smith takes a narrow view of the laws protecting plaintiffs against abuses by businesses and employers.

For instance, in *Wicker v. Conrail*, a case brought under the Federal Employer's Liability Act, FELA, Judge Smith was reversed by the Third Circuit for dismissing claims by workers who were exposed to toxic chemicals at their job site. The company knew the job site was contaminated, but the workers did not, yet Smith found that the workers had waived their claims by signing a general release settling prior, unrelated injury claims. The Third Circuit reversed, holding that claims relating to unknown risks cannot be waived under FELA, and emphasized the Supreme Court's directive, ignored by Judge Smith, that FELA be given a "proemployee" construction.

Similarly, in *Ackerman v. Warnaco*, the Third Circuit reversed Smith for granting summary judgment to the company with regard to ERISA claims brought by former employees who were denied promised severance pay after the company, unbeknownst to the workers, changed its written policy to deny severance pay shortly before laying off the workers. Again, in *Unity Real Estate v. Hudson*, Smith ruled against workers in a case concerning the Coal Industry Retiree Health Benefit Act. Amazingly, Smith held that coal act, which Congress passed in 1992 to require companies to enforce collective bargaining agreements promising lifetime health benefits for longtime workers, amounted to an unconstitutional taking. One year later, in a similar case, the Third Circuit effectively overruled Smith's holding on this

score, noting that every Court of Appeals to have considered a "takings" challenge to the coal act had rejected it.

In addition, Judge Smith has a disturbing pattern of ruling against plaintiffs in civil rights cases. For instance, in *United States v. Pennsylvania*, Judge Smith ruled that an institution for the mentally disabled, whose violations included serving pest-infested food, improperly confining residents, failing to provide appropriate medical treatment, and overmedicating residents—did not violate the Constitution's due process clause. In another case, *Schaefer v. Board of Public Education*, Judge Smith was reversed by the Third Circuit, for dismissing the sex discrimination claim of a male teacher who claimed that the school board's family leave policy, which entitled women, but not men, to one year of unpaid leave for childbirth or "childrearing" violated Title VII.

Judge Smith's pattern of ruling in favor of business is particularly troubling when coupled with his frequent attendance at seminars funded by pro-business corporations and groups. Judge Smith spent more than 72 days on junkets at luxury resorts. The trips were valued at more than \$37,000 and sponsored by groups that promote "free market environmentalism," and oppose environmental regulations. I am troubled by the appearance of partiality caused by Judge Smith's frequent attendance at such junkets given the pro-business pattern of his rulings.

Judge Smith's narrow view of congressional power to pass legislation under the commerce clause, as expressed in a 1993 speech to the Federalist Society, also gives me great concern. In this speech, Judge Smith criticized the Violence Against Women's Act, which passed both Houses of Congress by overwhelming majorities, as exceeding Congress's power under the commerce clause. Judge Smith advanced a cramped reading of Congress' commerce clause power, stating that "the Framers' primary, if not sole, reason for giving Congress authority over interstate commerce was to permit the national government to eliminate trade barriers." Not only would Judge Smith's reading of the commerce clause render Congress powerless to pass statutes like the Violence Against Women's Act but, under Judge Smith's reasoning, it appears that any Congressional enactment other than those aimed at eliminating trade barriers would be constitutionally suspect, including statutes such as the Fair Labor Standards Act, the Equal Pay Act, the Clean Air Act, and the Clean Water Act.

In sum, I do not believe that Judge Smith has shown he has the integrity and commitment to core constitutional values required to justify his elevation to the Third Circuit. I therefore oppose his nomination.

Mr. HATCH. Mr. President, I ask unanimous consent that I be allowed to speak as in morning business.

The PRESIDING OFFICER (Mr. SCHUMER). Without objection, it is so ordered.

(The remarks of Mr. HATCH are printed in today's RECORD under "Morning Business.")

Mr. HATCH. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SCHUMER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. REID). Without objection, it is so ordered.

Mr. SCHUMER. Mr. President, I will say a word about the nomination of D. Brooks Smith to the Third Circuit. For me, my concerns with Judge Smith are not about ethics but about ideology. My questions are about his record. My worries are about what kind of judge he has been at the trial level and what kind of judge he will be at the appellate level.

Time and time again, the President says he is going to nominate conservatives in the mold of Justices Scalia and Thomas. Every indication is that he is following through with that promise.

At least by my standards, that is not OK. I certainly want legal excellence at the highest order. Diversity ought to be at the highest courts. We ought not have a bench of all like men. But I also want moderation and ideological balance. Unfortunately, as they nominate judge after judge, hard right, out of the mainstream, far further to the right than President Clinton's nominees were to the left, it is clear that this administration is committed to imbalance on the courts. Frankly, that is a strategy I cannot get behind.

When it comes to D. Brooks Smith, there are some red flags raised. As a city district court judge, he gave a speech in which he criticized the constitutionality of the Violence Against Women Act, something I am pretty proud of because I was the author, along with Congresswoman LOUISE SLAUGHTER in the House of Representatives. Senator BIDEN did a great job here in the Senate. Now, this was years before the Supreme Court had addressed the Violence Against Women Act and when there was still a possibility it would come before him as a judge. That is some very unjudge-like behavior.

I asked him some simple, written questions about his views on the law. I asked him about his views on the right to privacy. I asked him to reconcile his views on VAWA with his views on other Federal laws such as the Endangered Species Act. The response I got, I regret to say, was inadequate.

Judge Smith told me what the precedence said, not what he personally believes.

That might be OK if you are a nominee to the district court where you do

not have as much of a chance to make law. These days when you are nominated to an appellate court, when the Supreme Court takes virtually 75 cases a year, that argument does not fly. So I wrote back to Judge Smith, and again I asked him about his views. I made it clear I wanted to know about his personal views, not what the law was, but what his personal views were because we all know that influences a judge greatly when they make decisions.

This idea that judges are part of an ideological system and read the law in the same way is poppycock.

Why is it judges nominated by Democratic nominees read the law differently than judges nominated by Republican nominees? We know ideology plays a role. There is nothing wrong with that. But we ought to let it into our decisionmaking.

Judge Smith dodged again.

I think I am entitled to know what a nominee thinks. I am not going to go about blindly confirming nominees to lifetime seats on the Federal courts without those answers. I am not going to vote to give the judge a lifetime appointment, tremendous power, the most unaccountable power that our Founding Fathers gave to any single person. I am not going to give that judge the power to invalidate the laws passed in this legislative, duly elected body; laws that protect privacy, laws that protect working people, laws that protect women, the environment. I am not going to give a judge the power to validate those laws unless I know what they think of our power, the Congress's power as a coequal branch of Government, when it comes to these important issues.

I have an obligation on behalf of the 19 million New Yorkers I represent to learn those views. They want to know if the judge is too far left or too far right. They want to know about things that affect their lives: How much money they are going to make; safety in the workplace; how the environment is going to be treated; and if they are a member of a minority group, how the judge regards civil rights. They want to know this. I want to know.

I am not going to make the mistake that this body made with Clarence Thomas, who came before this body. I was not here then. I was in the House. We don't, of course, vote on judges. He said he had no views on *Roe v. Wade*. I am not making that mistake again. I don't think any Member should. We all know Judge Thomas had strong views on *Roe v. Wade*, but he came here and said he had none, he had never discussed it.

If D. Brooks Smith had given me legitimate answers to my questions, I might have supported him. But his answers were not answers at all.

Now, I understand we cannot ask judges to precommit themselves on issues that come before them, even though that is what Judge Smith did in his VAWA speech. I don't want to put nominees in that position. When it

comes to issues already decided, when it comes to discussing their judicial philosophy, when it comes to Supreme Court cases that will never come before this judge, I don't get why we shouldn't know what that judge thinks.

Every semester, first year law students are asked to critique Supreme Court opinions. But someone up for a Federal judgeship will not tell us what they think about the seminal Supreme Court cases?

On the latest nominee for whom we had a hearing, Judge Owen, I asked her views. She said she doesn't think that way. She was asked to write papers in law school. She was asked to make opinions this way. She did not want to tell us.

There is a trend here. There is a trend. They don't want us to know what they think because they are so far out of the mainstream that they never could get picked if they told us their real views. They would never get supported by this body. They will not be honest about their views regarding *Brown v. Board of Education* or *Korematus v. United States* or *Miranda v. Arizona* or *Roe v. Wade*?

Judge Smith says what he thinks about the constitutionality of a statute the Supreme Court has yet to rule on, but he will not say what he thinks about Supreme Court opinions that have already been issued? Something is wrong with that. This nominee has it all turned around and it doesn't make sense.

The fact is, we are in the midst of a conservative judicial revolution. The very same people who decried the liberal activists, who took too many things too far—I am very critical of some of those opinions—are now doing the same thing themselves. When the hard right members of the conservative movement in the 1980s realized they could only get so much of their agenda implemented through elected branches because they were too far over for the American people, they turned their focus to the courts. They started a campaign that ran through the Reagan administration, through the first Bush administration, and continues through this administration. President Bush would like to portray himself as a moderate to the American people. Maybe he is. When I talk to him he sounds that way to me, one-on-one.

But if you look at who he nominates, there is hardly a moderate among them, particularly at the appellate court level. The nominees are committed to an ideological agenda which turns the clock back to maybe the 1930s, maybe the 1890s. They hate the Government and its power, by and large. They think the Federal Government has far too much power, which, let me tell you, in our post-September 11 world makes no sense.

So for the better part of the last decade, the commerce clause has been under assault and a whole host of laws protecting women, senior citizens, the disabled, and the environment have

been invalidated. Now they turn their attention to the spending clause. To the average person, this sounds like mine-numbing stuff. But unfortunately, it has real impact on real people and it has to stop.

D. Brooks Smith is going to become a judge. We all know he has the vote. Tomorrow morning he will join a long line of judges, confirmed by the Senate, who appear to be intent on curtail- ing congressional power to protect the people who elect us.

At some point this Senate needs to wake up to the fact that our President and his Department of Justice are playing by different rules when it comes to nominating judges. They are using ideology as litmus tests, and then, when we want to ask about ideology, they say no, that is off the table. They are doing it to the detriment of the courts and the people the courts are supposed to protect.

I yield the floor.

THE PRESIDING OFFICER. In my capacity as a Senator from Nevada, I suggest the absence of a quorum.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

THE PRESIDING OFFICER (Mr. SCHUMER). Without objection, it is so ordered.

THE PRESIDING OFFICER. Under the previous order, the Chair now recognizes the Senator from New Jersey, Mr. TORRICELLI.

SENATE ETHICS COMMITTEE INVESTIGATION OF SENATOR ROBERT TORRICELLI

Mr. TORRICELLI. Mr. President, for the last 7 months, the Senate Ethics Committee has reviewed documents and statements relating to allegations made against me by a former political contributor and friend. I am now in receipt of the conclusions of the committee.

I thank the members of the Ethics Committee for their hours of deliberation. I also apologize to each of them for subjecting them to the painful ordeal of sitting in judgment of a colleague.

In closing its preliminary inquiry into this matter, the Ethics Committee has concluded that in several specific instances rules of the Senate were violated. As a consequence, the committee has admonished me. I want my colleagues in the Senate to know that I agree with the committee's conclusions, fully accept their findings, and take full personal responsibility.

It has always been my contention that I believed that at no time did I accept any gifts or violate any Senate rules. The committee has concluded otherwise in several circumstances and directed me to make immediate payment in several instances to assure full compliance with the rules of the Senate. I will comply immediately.