by imposing restrictive ''prior authorization'' requirements on physicians. This policy is opposed by many patient groups and should not be part of this legislation.

Finally, I am deeply concerned that this bill does not contain a Medicare drug benefit plan. This is a very important issue that remains unresolved by this body. Therefore, I do not support cloture on this bill, nor do I support final passage of the measure. It is my hope that we will revisit this issue soon and craft a bill which will improve the availability of affordable prescription drugs and ensure advances continue in this industry.

Mr. HUTCHINSON. Mr. President, nearly 482,000 seniors in Arkansas desperately need a Medicare prescription drug benefit. Per capita, Arkansas has one of the poorest senior populations in the Nation, which means, more often than not, Arkansas seniors must choose between putting food on the table and buying much needed prescription medicines. I voted in favor of the Graham-Smith-Lincoln Medicare prescription drug compromise today, which has the full support of the AARP, because I believe in providing prescription drug assistance to as many people as possible and to those seniors who need it most. I regret, however, that it leaves out nearly 40 percent of Arkansas seniors and lacks measures to strengthen and protect Medicare. Rather, I believe that a universal benefit, accompanied by responsible Medicare reforms, is the most sensible approach to addressing the rising cost of drugs for our seniors and ensuring the long-term stability of the Medicare program. But most importantly, I am concerned about the impact of the Graham-Smith-Lincoln compromise on local pharmacies.

Seniors need a Medicare prescription drug benefit just as much as they need access to their local pharmacies, particularly in rural states like Arkansas. The discount drug card established under the Graham-Smith-Lincoln compromise is a concept I opposed last week when I voted against the Hagel drug card amendment. Requiring pharmacies to accept discounts while doing nothing to reduce the price at which drugs are bought could force local pharmacies to foot the bill of a Medicare prescription drug amendment. This is simply not right.

To help fix these problems, I filed an amendment to the Graham-Smith-Lincoln compromise which would have struck the drug discount card provisions in the bill as well as a provision giving special treatment for mail order pharmacies. If the Graham-Smith-Lincoln compromise garnered the 60 votes necessary for passage, I was prepared to offer my amendment so the Senate could have an open debate and vote on the impact of such legislation on local pharmacists. Since the Graham-Smith-Lincoln compromise was rejected, this debate will have to wait until another day. In the meantime, I will continue to work for a bipartisan solution that provides Medicare prescription drug coverage for all seniors, and particularly low-income seniors, while also preserving access to local pharmacies.

The PRESIDING OFFICER. Under the previous order, there are 2 minutes remaining equally divided.

Who yields time?

The Senator from New York is recognized.

Mr. SCHUMER. Madam President, again, I urge my colleagues to support this legislation. Admittedly, it is incomplete legislation. We have not extended access, but in terms of cost cutting, this legislation is strong.

The Schumer-McCain provisions will reduce the costs of so many drugs by 60, 65 percent for the senior citizen. For the family who has a child who desperately needs a drug, instead of $100 a prescription, it will only be $30, $35, or $40 a prescription. That is a godsend to many people these days.

These drugs are wonder drugs, but their cost is so high that if you are not very wealthy or don't have a good medical plan, you cannot afford them, and that is an awful choice for people.

This bill achieves the goal of reducing costs and reducing it very significantly—a $60 billion reduction over the next decade to our citizenry. I ask for your support of this measure.

Madam President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. Who yields time?

The Senator from Pennsylvania, Mr. SANTORUM, is recognized.

Mr. SANTORUM. Madam President, I encourage a ''no'' vote on this bill. The Senator from New York says these are wonder drugs. They do not drop out of the air. They come from a tremendous amount of investment from pharmaceutical companies which create new drugs and save people's lives and create a better quality of life for Americans.

We are sacrificing future cures for political payout today, which is cheaper drugs for our folks back home. The long-term consequence of what we are doing today is that more people will die as a result of drugs not being invented because of the reduction in the amount of research and development that will go on because we have now tipped the balance toward generic drug companies, which do no research and investment and create no new drugs.

So understand what you are doing. We are sacrificing, yes, a great vote to say we are going to provide cheaper drugs. But long-term we are providing less cures and a lower quality of life.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall the bill pass?

The yeas and nays have been ordered, and 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 result was announced—yeas 78, nays 21, as follows:

[Rollcall Vote No. 201 Leg.]

YEAS—78

Akaka	Dodd	McCain
Allard	Domenici	McConnell
Allen	Dorgan	Mikulski
Baucus	Durbin	Miller
Bayh	Edwards	Murkowski
Biden	Ensign	Murray
Bingaman	Feingold	Nelson (FL)
Boxer	Feinstein	Nelson (NE)
Bunning	Fitzgerald	Reed
Burns	Graham	Reid
Byrd	Grassley	Rockefeller
Campbell	Harkin	Sarbanes
Cantwell	Hollings	Schumer
Carnahan	Hutchinson	Sessions
Carper	Inhofe	Shelby
Chafee	Inouye	Smith (NH)
Cleland	Jeffords	Smith (OR)
Clinton	Johnson	Snowe
Cochran	Kennedy	Specter
Collins	Kerry	Stabenow
Conrad	Kohl	Stevens
Corzine	Landrieu	Thomas
Craig	Leahy	Torricelli
Crapo	Levin	Warner
Daschle	Lieberman	Wellstone
Dayton	Lincoln	Wyden

NAYS—21

Bennett	Gramm	Lugar
Bond	Gregg	Nickles
Breaux	Hagel	Roberts
Brownback	Hatch	Santorum
DeWine	Hutchison	Thompson
Enzi	Kyl	Thurmond
Frist	Lott	Voinovich

NOT VOTING—1

Helms

The bill (S. 812), as amended, was passed, as follows:

Mr. KENNEDY. Madam President, I move to reconsider the vote.

Mr. DASCHLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

EXECUTIVE SESSION

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

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

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

The PRESIDING OFFICER. There are now 5 minutes evenly divided on the nomination. Who yields time?

Mr. LEAHY. Madam President, we have at best a modicum of order in the Senate, but I will proceed.

The record before us does not demonstrate that Judge D. Brooks Smith merits a promotion to the Court of Appeals. He is already serving a lifetime position as a Federal judge, but he continued as a member of a discriminatory club more than a decade after he told

the Senate he would quit. He did not resign until 1999, and then only after this vacancy on the Third Circuit opened up.

It should make no difference whether this club discriminated against women, or people because of their race or creed; it is discriminatory. He acknowledged that continuing in the club would be inconsistent with ethical rules, but he continued to serve there, even after he told Senator Heflin under oath in 1988 that under these rules he would be required to resign.

I believe he did not keep his word. I think this is, frankly, the kind of lapse that, had it been somebody nominated by the previous President, my friends on the other side of the aisle would have voted against him. I think they should vote against this one, even though he is a member of their own party. We have the areas where he did not recuse himself in a case where he had a clear conflict of interest. He took special-interest-funded trips. I think his record as a whole calls into question his sensitivity, his fairness, his impartiality, and his judgment.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Madam President, we debated the issue of Judge Smith's qualifications extensively last night. But by way of brief summary: He has an excellent educational background. He practiced law for 8 years. He served as district attorney of a major county in Pennsylvania. He was a State court judge for 4 years, and in 1988 the bipartisan judicial commission, which Senator Heinz and I had organized, found him qualified. He has served in a very distinguished way for the past almost 14 years on the Federal court in Pittsburgh. He is now the chief judge of the Western District Court. His reputation is excellent. I have known him for the past 14 years and can personally attest to his integrity and his qualification.

When an issue is raised about not resigning from a club and the contention has been made that there was false testimony under oath, that simply is not supported by the facts. When Judge Smith came up for confirmation in 1988, he made the statement that he would resign if he could not change the rules of the fishing club, which was viewed at that time as discriminatory because women were not permitted to join.

In 1992, there was a definitive ruling that a club which did not have business purpose—which is the kind of club that this was—did not practice what is called invidious discrimination. Since the club did not practice invidious discrimination, Judge Smith did not have to resign. Certainly it cannot be said that somebody made a false statement under oath in 1988 when he had an intention at that time to do precisely what he said.

When later circumstances arise, where there is a change of circumstance, nobody can say that what he testified to in 1988 was incorrect at that time, because the circumstances had changed.

When the argument is made that he resigned when a vacancy arose on the Third Circuit, there were lots of vacancies on the Third Circuit in the interim, so that if that was a motivating factor, he could have resigned at an earlier time.

Judge Smith has brought to Washington a virtual army of people who have supported him, including many women.

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

Mr. SPECTER. I urge my colleagues to vote for his confirmation.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Madam President, as much as I like and respect my distinguished colleague from Pennsylvania, I believe Judge Smith did not keep his commitment in testimony before the Senate, did not keep his commitment to Senator Howell Heflin, a commitment that was made under oath. This was the first opening of a Court of Appeals seat from the Western District of Pennsylvania.

When I look at this, I look at the way he misled us in his initial description of the club that he belonged to and then further misled us in his intention. Frankly, I cannot support him. Every Senator can vote how they want. I cannot vote for him.

Mr. KERRY. Mr. President, I regret that I will be opposing Judge Smith's nomination. I regret that this nomination has become a lightning rod for so many.

Let me state at the outset that I disagree very strongly with Judge Smith's rulings on a number of cases. I find serious fault with his stated comments on the Violence Against Women Act. In a 1993 speech, Judge Smith told the Federalist Society that he viewed VAWA as unconstitutional. The text of those remarks read in part ''There is no legitimate constitutional source for this new-found 'civil right' to be free from physical violence.'' I cannot overstate my objections to his callous view of domestic violence.

I understand that Judge Smith has received the American Bar Association's rating of ''well qualified.'' I also understand that Judge Smith has strong support across the political spectrum in western Pennsylvania, his home. We have heard his friends in the Senate point out that he is a respectful, friendly and unbiased judge. These are important qualifications, and I do not doubt them. However, we must look beyond such qualifications when considering a nomination of this importance.

It is critically important that a judge on a Circuit Court of Appeals, the court of last resort for the vast majority of cases, have an ethically spotless record. In 1992, Judge Smith testified under oath that he would leave the Spruce Creek Rod and Gun Club within a couple of years if he could not change the rules of the club preventing women members. He did not do that. It was not until the seat on the Third Circuit Court of Appeals to which he now seeks appointment became vacant that he resigned his membership in the club. To this day he denies any wrongdoing. However, several prominent judicial ethicists have pointed out that he clearly violated the Code of Conduct for U.S. Judges.

There is a model for cases such as Judge Smith's involvement in the Spruce Creek club. Judge Kenneth Ryskamp was denied an appellate court seat in 1991 because of his membership in a country club whose bylaws were uncertain regarding membership diversity. In 1986, he was nominated to be a district court judge, he declared himself to be a member of a club whose bylaws clearly exclude women. He also told the Judiciary Committee that he would resign from that club. He did so almost immediately. Unfortunately, this example stands in stark contrast to the actions of Judge Smith.

Judge Smith also conducted himself poorly in not immediately recusing himself from two cases involving Mid-States Bank which was both his wife's employer and a bank in which he owned significant stock. During his hearing he did agree that he erred in not recusing himself sooner, which I do appreciate. But nevertheless, he exercised judgement that was questionable at best.

The Court of Appeals is the court of last resort for thousands of critical cases each year. Judges who serve there must be in the highest moral standing. Judge Smith's failure to follow-through on a promise to the Senate in a timely matter and his handling of cases involving Mid-States bank are disappointing and call into question that moral standing. Therefore, I reluctantly must oppose his nomination.

Mr. WELLSTONE. Mr. President, I speak today in opposition to the nomination of D. Brooks Smith to the Third Circuit Court of Appeals. I oppose the nominee because I believe serious questions have been raised regarding his ethical integrity and judicial temperament. Mr. Smith misled the Judiciary Committee in 1988 when he promised he would resign from the all-male Spruce Creek Rod and Gun Club. Despite his promise, and after the committee passed a resolution asserting that belonging to exclusive clubs where business is conducted constitutes invidious discrimination, Mr. Smith did not resign. In fact, he did not resign until 1999, when the position on the Third Circuit opened up.

Mr. Smith appears to subscribe to a general judicial philosophy that neglects the rights of women, institutionalized persons, consumers, workers, prisoners and disabled persons. His judgments have been reversed by the Third Circuit Court of Appeals 51 times—a larger number of reversals

than any of the Appellate Court Nominees who have come before the Judiciary Committee this Congress. Many of these reversals concerned decisions affecting civil and individual rights and indicate a disturbing lack of sensitivity and failure to follow established rules of law and appellate court decisions when it comes to those rights.

I am particularly concerned about Mr. Smith's reported view that the Violence Against Women Act is unconstitutional. I believe the Act is a lifeline to women in danger around the country and find Mr. Smith's view to be extreme. He is not in my view a suitable judge to serve one level below the Supreme Court.

Ms. CANTWELL. Mr. President, I have carefully considered the record of Judge D. Brooks Smith, who has been nominated to the Third Circuit Court of Appeals, and it is with regret that I will be voting not to elevate Judge Smith. While I believe that he is intellectually qualified and personally respect, the fact remains that when he was confirmed as a judge to the District Court by this committee in 1988, Judge Smith stated under oath that he would follow the ethical rules governing Federal judges and resign from a discriminatory club if he was unable to change the men-only rule. Judge Smith failed to change that rule, but did not resign from the Club until more than a decade later, in December of 1999.

Since it became known that Judge Smith had not withdrawn from the club, he has made an attempt to justify his inaction by claiming the club is purely social and is thus does not engage in pervasive discrimination. While I believe that there is little difference between a club that affirmatively denies membership to women, and a club that denies membership to African Americans or to people of a particular religious affiliation, the issue is not whether or not the club's discriminatory membership policies are or are not ''pervasive.'' The issue is that Judge Smith told this Committee under oath that he would resign from the club and he did not do so.

Federal judges are appointed to lifetime terms and the confirmation process is the only democratic check on individuals conduct, unless he or she is appointed to a higher position. If a promise to the Committee like the one Judge Smith made can be so broken with no consequence, then promises and assurances made by other nominees to this Committee will mean very little.

I am also disturbed by Judge Smith's judicial decisions in the gender discrimination context. In at least two cases, Judge Smith's application of legal and constitutional standards for deciding gender discrimination complaints raises serious concerns about his willingness to reach decisions fairly and in a manner consistent with precedent in the Third Circuit. In Shafer v. Board of Education, Judge Smith dismissed the suit filed by a male teacher challenging his school board's family leave policy which entitled women, and not men, to one year unpaid leave for childbirth or ''childrearing.'' The Third Circuit reversed, finding the policy to be in violation of the father's Title VII rights. In Quirin v. City of Pittsburgh, Judge Smith interpreted the law in a way that made it nearly impossible for the City of Pittsburgh to remedy past discrimination in its hiring of only male firefighters, and he applied the law in a manner inconsistent with established precedent.

Judge Smith also has engaged in other questionable conduct. He has exercised dubious judgment in failing to promptly withdraw from a case that involved a bank in which he had a very significant investment, he has attended more corporate funded trips than any other sitting federal judge, and he has given speeches expressing his views of the constitutionality of statutes that could be challenged in cases before him. The combination of these factors suggests that Judge Smith simply has ethical blind spots that call into question his suitability to serve on the Circuit Court.

I am concerned by Judge Smith's failure to follow precedent and his troubling record of reversals, and by his actions on the bench that fail to meet the very highest standards of the legal profession. In addition, his failure to promptly abide by the promise given to this Committee in 1988 and withdraw from the Spruce Creek Rod and Gun club is simply a failure that cannot be ignored. Therefore, I cannot support his elevation to the Third Circuit.

Mr. HATCH. Mr. President, I stand in support of the confirmation of D. Brooks Smith, who has been nominated to be a judge on the Third Circuit Court of Appeals. Judge Smith is currently the Chief Judge for the Western District of Pennsylvania. He has compiled an impressive record as a judge since 1988, when, at age 36, he became one of the youngest Federal judges in the country. Prior to that, Judge Smith has served as a state court judge, as a prosecutor, and as a private practitioner with a law firm in Altoona, Pennsylvania. He is a 1973 graduate of Franklin and Marshall College and a 1976 graduate of the Dickinson School of Law in Pennsylvania.

Of course, anyone who has been reading the newspapers in the past few months knows that it would be impossible to comment on Judge Smith's credentials without mentioning the attack he has come under from the usual liberal lobbyist interest groups in Washington. As President Reagan would say, there they go again.

An editorial in Pittsburgh Post-Gazette noted,

> Critics of Smith, many aligned with Democratic Party interests, say he has been too quick to dismiss valid lawsuits brought by individuals against corporations, and too eager to travel to conferences paid for by businesses with interests in federal litigation. . . . But outside Washington's world of partisan poliitics, Smith seems to have no enemies, only admirers. Those who have watched him work say an exemplary 14-year record on the federal bench in Western Pennsylvania is being twisted by political opportunities. 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.

Well, it is an election year and we know the left of mainstream groups will not miss an opportunity to flex their muscles.

Those groups who are working to discredit Judge Smith apparently believe that President Bush's circuit court nominees deserve to have their records distorted and their reputations dragged through the mud. I think that no 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, that ''opposing a nominee should not mean destroying him.''

Referring to our last confirmation hearing, 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 hope that my colleagues in the Senate 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 willing to put their talents to work in the public service. Again, I fully support a thorough and genuine review of a nominee's record and temperament, and in no way do I think we should shy away from our constitutional role of providing advice and consent.

We did that in the case of D. Brooks Smith and have found him to be one of the finist jurists serving today. The President was right to nominate him, we will do well to confirm him.

Mr. DURBIN. Mr. President, I have the utmost respect for Senator ARLEN SPECTER. During the Clinton Presidency, Senator SPECTER angered many in his own party by standing up to conservative special interest groups and supporting well-qualified mainstream judicial nominees, many of whom waited months or years for a confirmation hearing.

That said, Judge D. Brooks Smith of Pennsylvania has a track record that troubles me. His conservatism is not in dispute, on display in a 1993 speech to the ultra-conservative Federalist Society criticizing the Violence Against Women Act. He articulated a vision of constitutional federalism directly at odds with Congress's power to pass that important legislation, and many other important federal initiatives to fight crime, such as the highly successful ''Weed and Seed'' program. The Supreme Court subsequently invalidated a small portion of the Violence Against

Women Act, but Judge Smith's vision well exceeds the Court's own.

Judge Smith has also engaged in conduct that raises serious ethical questions.

First, as you have heard, Judge Smith has a long association with a prestigious private club that has a formal policy barring women from membership. Exclusive clubs are serious business, forging important commercial ties and blocking women from full opportunity in society. Justice Sandra Day O'Connor, who was offered a job as a legal secretary out of Stanford Law School, has endorsed limits on such clubs, noting that the government has a ''profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society.''

We can debate back and forth the merits of whether the Spruce Creek Club is or is not a ''purely social'' organization, at least one club member told the Judiciary Committee investigator that he has attended several business conferences at the club. For me, though, it is even more significant that Judge Smith told this same Judiciary Committee in 1988 that he would comply with the ABA Code of Judicial Conduct and resign from the club if it did not change its policies. To his credit, he did try to change the policies. But he did not follow through on his commitment and resign for 10 more years.

Second, as a district court judge, Judge Smith sat on two fraud cases in which he and his wife had a conflict of interest. He did recuse himself from these cases, but only after a period of time had passed in which he was well aware of the conflict and continued to issue orders in both cases. His defense, that none of the parties asked him to recuse himself earlier, is weakened by the fact that he never told the parties, before or after, of his $100,000 plus investment in the bank in question.

Finally, I am troubled by Judge Smith's frequent attendance at judicial seminars sponsored by special interest groups and funded by corporations with litigation pending before his court. Most importantly, he remains to this day unwilling to report the value of those seminars on his financial disclosure forms and unwilling to accept responsibility to be attentive to the corporate sponsors of those seminars. Both of these positions are inconsistent with an advisory opinion of the Judicial Conference's Committee on Codes of Conduct.

For these, reasons, I am constrained to oppose Judge Smith's nomination.

Mr. FEINGOLD. Mr. President, I will vote ''no'' on the nomination of D. Brooks Smith to the U.S. Court of Appeals for the Third Circuit. Let me take a few minus to explain my decision.

First, let me not that I did not reach this decision lightly. After this vote, we will have considered 64 judicial nominations of President Bush on the floor and I will have voted against only two. And this will be the first Court of Appeals nominee I have voted against on the floor. I voted against one other nominee in Committee, while I have voted in favor of 12 circuit court nominations.

I also want again to commend the chairman of the Judiciary Committee and the majority leader for the way that they have handled judicial nominations. The pressure is intense, and the criticism quite harsh. It is my view that a process that gives a nominee a hearing, and then a vote in the committee, and then a vote on the floor is not an unfair process; it is the way the Senate is supposed to work.

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

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

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

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

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

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

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

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

> Well, first of all, Senator, I think the most important step would be to attempt an amendment to the bylaws. Failing that, I believe an additional step would and could be—and I would support, and have indicated to at least one member of the club that I would support and attempt—an application for membership from a woman. Failing that, I believe that I would be required to resign.
>
> I think it would be necessary for me to await an annual meeting which is, as I understand it—and I preface it with ''as I understand it'' because I have not been an active member in any real sense of the word, but I believe there to be an annual meeting every April—and I believe I would have to await that point in time to at least attempt a bylaws amendment.

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

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

> After considerable thought, and not without a measure of regret, I hereby submit my resignation from membership in the Spruce

Creek Rod and Gun Club, effective immediately. Certain of the Club's exclusive membership provisions, which I do not expect will change, continue to be at odds with certain expectations of federal judicial conduct.

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

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

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

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

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

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

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

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

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

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

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

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

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

In addition, there is the question of Judge Smith's failure to recuse himself in two cases in 1997—SEC v. Black and United States v. Black. These are very complicated cases, so I sought the advice of two legal ethics experts. After reviewing Judge Smith's testimony and written answers to questions and all of the other materials submitted to the Judiciary Committee on this issue from both supporters and opponents of Judge Smith, both Professor Gillers and Professor Freedman conclude that Judge Smith violated the judicial disqualification statute, 28 U.S.C. §455, by not recusing himself earlier in SEC v. Black, and by not recusing himself immediately upon being assigned the criminal matter in United States v. Black. Professor Freedman called his violations ''among the most serious I have seen.''

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

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

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

The Senator from Nevada.

ORDER OF PROCEDURE

Mr. REID. Madam President, on behalf of the majority leader, I ask unanimous consent that following the vote on the matter now pending, Judge Smith, we proceed to H.R. 5010, the Department of Defense appropriations bill.

The PRESIDING OFFICER. Is there objection?

Mr. MCCAIN. Reserving the right to object.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. I object to proceeding until I see the managers' amendment.

Mr. REID. There is no managers' amendment.

Mr. MCCAIN. On DOD appropriations?

Mr. REID. No.

I yield to my friend from Alaska.

Mr. STEVENS. We offered a list of amendments to staff. We informed the staff and we will be happy to show them the amendments when we see the amendments that Senator MCCAIN intends to offer.

Mr. REID. I also say that I misspoke. The majority leader does not need unanimous consent on his behalf.

I say to my friend from Arizona, as we have talked on a number of occasions on previous bills, any package of managers' amendments the Senator from Arizona will have a chance to review.

I withdraw the unanimous consent request and announce on behalf of the majority leader that following the vote on Judge Smith, the Senate will move to H.R. 5010, the Department of Defense appropriations bill.

Mr. BYRD. Reserving the right to object, and I will not object, let me say to the distinguished Senator from Arizona, that not only he will see the managers' amendments, but I will insist on the managers' amendments being read on all appropriations bills for the attention of the full Senate.

Mr. MCCAIN. Reserving the right to object, I thank the Senator from West Virginia.

We have had many occasions where late at night managers' amendments were agreed to without anyone ever having seen or heard of them. And I would still like to see the managers' amendment before some time late tomorrow night when everyone wants to get out of here and leave and I am the bad guy again. I want to see what is in the managers' amendment package.

It is not an illegitimate request to see the managers' amendment package before they vote on final passage, which then puts us in the uncomfortable position of having to be delayed. I think it is a fair request on the part of the taxpayers of America to see what we are voting.

Mr. REID. I yield to the Senator from Alaska.

Mr. STEVENS. Madam President, I am informed that 20 minutes ago those amendments went to Senator MCCAIN's office and we have not seen his amendments. We ask that we see his amendments, too. We cannot put a managers' package together until we see them all.

Mr. REID. Madam President, I ask the Senator from Arizona, do you have any problem with DOD appropriations after this vote?

Mr. MCCAIN. I don't.

I would like to say, any amendment that I have will be debated and voted on. I don't have the privilege of proposing a managers' amendment.

Mr. REID. Has the Senator withdrawn his objection?

Mr. BYRD. Parliamentary inquiry.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. The Senator does not need consent, does he? The consent has already been given some days ago.

Mr. REID. As has been explained to me, the majority leader at this time—and I—can call this up, but would have to be, as I understand it, some later time.

I am asking for a time certain and that is why the Senator from Arizona, as I understand, has no problem bringing it up after this next matter.

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

Mr. LEAHY. I ask for the yeas and nays on the pending nomination.

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

The question is, will the Senate advise and consent to the nomination of D. Brooks Smith, of Pennsylvania, to be United States Circuit Judge for the Third Circuit? On this question the yeas and nays have been ordered and the clerk will call the roll.

The 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 ''Yea''.

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

The result was announced—yeas 64, nays 35, as follows:

[Rollcall Vote No. 202 Ex.]

YEAS—64

Allard	Edwards	McConnell
Allen	Ensign	Miller
Bayh	Enzi	Murkowski
Bennett	Fitzgerald	Nelson (FL)
Biden	Frist	Nelson (NE)
Bond	Graham	Nickles
Breaux	Gramm	Roberts
Brownback	Grassley	Santorum
Bunning	Gregg	Sessions
Burns	Hagel	Shelby
Byrd	Hatch	Smith (NH)
Campbell	Hollings	Smith (OR)
Carnahan	Hutchinson	Snowe
Carper	Hutchison	Specter
Chafee	Inhofe	Stevens
Cochran	Kohl	Thomas
Collins	Kyl	Thompson
Craig	Landrieu	Thurmond
Crapo	Lincoln	Voinovich
DeWine	Lott	Warner
Domenici	Lugar	
Dorgan	McCain	

NAYS—35

Akaka	Durbin	Mikulski
Baucus	Feingold	Murray
Bingaman	Feinstein	Reed
Boxer	Harkin	Reid
Cantwell	Inouye	Rockefeller
Cleland	Jeffords	Sarbanes
Clinton	Johnson	Schumer
Conrad	Kennedy	Stabenow
Corzine	Kerry	Torricelli
Daschle	Leahy	Wellstone
Dayton	Levin	Wyden
Dodd	Lieberman	

NOT VOTING—1

Helms

The nomination was confirmed.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will return to legislative session.

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2003

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of H.R. 5010, which the clerk will report by title.

The legislative clerk read as follows:

A bill (H.R. 5010) making appropriations for the Department of Defense for fiscal year ending September 30, 2003, and for other purposes.

The Senate proceeded to consider the bill which had been reported from the Committee on Appropriations with an amendment.

[Strike the part shown in bold brackets and insert in lieu thereof the part shown in italic.]

H.R. 5010

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2003, for military functions administered by the Department of Defense, and for other purposes, namely:

[TITLE I

[MILITARY PERSONNEL

[MILITARY PERSONNEL, ARMY

[For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty (except members of reserve components provided for elsewhere), cadets, and aviation cadets; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $26,832,217,000.

[MILITARY PERSONNEL, NAVY

[For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $21,874,395,000.

[MILITARY PERSONNEL, MARINE CORPS

[For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Marine Corps on active duty (except members of the Reserve provided for elsewhere); and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $8,504,172,000.

[MILITARY PERSONNEL, AIR FORCE

[For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Air Force on active duty (except members of reserve components provided for elsewhere), cadets, and aviation cadets; and for payments pursuant to section