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TESTIMONY OF ELENA RUTH SASSOWER, COORDINATOR CENTER FOR JUDICIAL ACCOUNTABILITY, INC. (CJA)

In Opposition to Senate Confirmation of Robert S. Smith to the New York Court of Appeals. Presented at the Public Hearing of the New York State Senate Judiciary Committee, Monday, January 12, 2004, Albany, New York.

My name is Elena Ruth Sassower and I am the coordinator and co-founder of the Center for Judicial Accountability, Inc. (CJA), a non-partisan, non-profit citizens' organization dedicated to safeguarding the public interest in judicial selection and discipline.

We oppose Senate confirmation of Governor Pataki's appointment of Robert S. Smith to the New York Court of Appeals. The basis, as relates to Mr. Smith's qualifications, is his insensitivity to the appearance – and quite possibly the reality – that his substantial financial contributions to Governor Pataki and the Republican Party would buy him this most important state court judgeship. This ethical insensitivity is all the more stark and inexcusable coming, as it does, in a year when the public has been bombarded with countless news articles and editorials about the sale of elective judgeships – fueled by District Attorney Hynes' supposed investigations in Brooklyn – as to which Chief Judge Kaye has convened a Commission to Promote Public Confidence in Judicial Elections. None of the paltry sums bandied about as constituting the supposed sale of elective judgeships comes close to the amounts of money Mr. Smith has donated to Governor Pataki and the Republican Party. It is, therefore, CJA's position that, at very least, Mr. Smith must not be confirmed to our state's highest court until a formal investigation has

Ex D-1

been undertaken to determine the extent to which his appointment is the product of monetary considerations.

It is this objection which will be the subject of my testimony. Nonetheless, I submit herewith and incorporate by reference CJA's October 16, 2000 report on the Commission on Judicial Nomination's corruption of "merit selection" to the Court of Appeals, as well as CJA's November 13, 2000 companion report on the complicity of the bar associations. This, to substantiate CJA's threshold opposition to Mr. Smith's confirmation, *to wit*, that his appointment is the product of an unconstitutionally closed and documentably corrupted "merit selection" process that fails to adequately investigate candidate qualifications and is rife with conflict of interest and, further, that his confirmation is not properly before this Committee, *as a matter of law*, by reason of the non-conformity of the Commission on Judicial Nomination's October 15, 2003 "written report" of his qualifications with the "findings" requirement of Judiciary Law §63.3.

How much money did Mr. Smith contribute to Governor Pataki and the Republican Party? According to The Buffalo News[1], analysis of the past eight years of federal and state campaign contributions from 1995 to 2003 showed:

> "Smith and his wife have donated at least $219,000 to Pataki and state Republican committees. That does not include tens of thousands of dollars in additional donations Smith made to federal GOP candidates and committees, including President Bush, former U.S. Senator Alfonse D'Amato, former New York Mayor Rudolph W. Giuliani, Utah Sen. Orrin Hatch, Kentucky Sen. Mitch McConnell and former senator and now U.S. Attorney General John D. Ashcroft."

Assuredly, Mr. Smith knows the precise monetary figures – and the public is entitled to that information. Indeed, the public would already have these figures had this Committee required Mr. Smith to complete a publicly-available questionnaire comparable to that

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[1] *"Local judge bypassed for state's highest court"*, The Buffalo News, 11/5/03, Tom Precious.

which the U.S. Senate Judiciary Committee requires of federal judicial nominees, including those appointed to the U.S. Supreme Court[2]. #17(c) of the U.S. Senate Judiciary Committee questionnaire specifically requires the nominee to:

> "Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity during the last (10) years."

Significantly, no similar item appears on the publicly-inaccessible questionnaire that Mr. Smith was required to complete for the Commission on Judicial Nomination. As a result, the Commission's evaluation of Mr. Smith's candidacy may have been uninformed as to his financial contributions to Governor Pataki and the Republican Party. This is not to say that certain Republican Commission members did not know of Mr. Smith's generosity – and that this was not their impetus in promoting him to the Commission's unsuspecting other members in preference to other "well qualified" candidates. Such would be a further respect in which the Commission's ratings can be "rigged", beyond what is detailed by CJA's October 16, 2000 report.

Mr. Smith must be directly asked whether, in fact, he disclosed to the Commission his financial contributions – as, for instance, during its personal interview of him or in his written response to #35 of its questionnaire:

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[2] Prior to this testimony, I repeatedly inquired as to whether the Committee had required Mr. Smith to complete any publicly-available questionnaire. This is reflected, as well, by CJA's December 19, 2003 letter to Senate Judiciary Committee Chairman DeFrancisco [A-1], which further identified that a blank copy of the U.S. Senate Judiciary Committee's questionnaire was included in the appendix to CJA's January 22, 2003 written testimony in opposition to Senate confirmation of Presiding Court of Claims Judge Susan P. Read to the New York Court of Appeals.

The only publicly-available documents furnished by the Committee were mailed on January 7, 2004 [A-4] and consisted of a cursory one-page resume, various legal briefs on which Mr. Smith's name appears along with other names, and an undated essay, with no indication as to whether it was published anywhere and the details thereof. None of this permits intelligent review and evaluation – and stands in sharp contrast to the kind of integrated, substantial information afforded by a publicly-available questionnaire completed by the nominee.

> "Set forth any information not elicited by this questionnaire which would affect, favorably or unfavorably, your eligibility for the office for which you are a candidate or bear upon the Commission's consideration of your candidacy."

Mr. Smith's nomination by the Commission on Judicial Nomination cannot stand if he did not inform the Commission of his largesse to Governor Pataki and the Republican Party – or if the Commission did not otherwise ascertain such fact from its purported "investigation" of him, as for instance, by a computer search of campaign contributions filed with the New York State Board of Elections and Federal Election Commission, as was readily accomplished by the media within hours of the Governor's announcement of Mr. Smith's appointment. Certainly, it cannot stand without a statement from the Commission that knowledge of Mr. Smith's contributions by all members would have made no difference in their "consideration" of the pool of candidates that culminated in their October 15, 2003 "written report" nominating seven, Mr. Smith among them.

Absent such statement, the ratings conferred on Mr. Smith by the New York State Bar Association and the Association of the Bar of the City of New York are irrelevant – since the only basis for their evaluation of Mr. Smith's qualifications was his inclusion as a nominee in the Commission's "written report". If that inclusion was the product of material non-disclosure and deceit, he was not legitimately nominated and there is nothing for the bar associations to evaluate.

As to Governor Pataki, Mr. Smith must be asked whether, to his knowledge, the Governor knew of his political contributions. Of course, this inquiry must also be made directly to Governor Pataki[3]. I do not believe that the Governor has ever denied that his

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[3] Notwithstanding the Governor's press spokesman has insisted that the Governor's "decisions on nominations are made solely on the merits" ["*Gov Taps Donor for Top Court*", New York Post, 11/5/03, Fredric Dicker], the Executive Chamber has failed to furnish CJA with requested publicly-available materials pertaining to Governor Pataki's appointment of Mr. Smith. This includes Mr. Smith's financial statement which he was required to submit as part of his application for the Court of Appeals and which the

appointment of Mr. Smith was with knowledge of Mr. Smith's political donations – at least I have not seen any report of this in the media. At the November 4, 2003 press conference announcing Mr. Smith's appointment, the Governor acknowledged that he had met Mr. Smith on occasion[4]. It is reasonable to assume that such would have included political fundraisers or special events to which generous donors are invited.

It is entirely possible that even before this appointment, Mr. Smith had already been favored with a "return" on his political contributions. According to a December 4, 2003 Newsday article[5], it was "at Pataki's request" that Mr. Smith had earlier been designated as "special counsel" in a lawsuit challenging the Legislature's bailout to New York City – for which the state set aside $500,000 for its contract with Mr. Smith's law firm – with $236,000 already billed. That remunerative "special counsel" arrangements may be earmarked for financial patrons and benefactors, such as Mr. Smith , is itself worthy of official investigation[6] and press attention.

Governor Pataki came to office in 1994 on a pledge to restore the death penalty and he did restore it by legislation now being challenged at the Court of Appeals. It makes no sense, except as a "payback", that he would risk it by appointing Mr. Smith, whose publicly-expressed reservations about the death penalty are reinforced by his *pro bono* representation of death penalty defendants.

Governor is mandated to make publicly available pursuant to Judiciary Law §63.4 [A-5; A-7; A-9].

4 *See, inter alia, "Pataki campaign contributor nominated to Court of Appeals"*, The Ithaca Journal, 11/5/03, Michael Gormley (AP).

5 *"Pataki Donor Could Gain From City Bond Sale"*, Newsday, 12/4/03, Dan Janison.

6 CJA's own investigation has gotten as far as written requests to the New York State Comptroller and to the Chairwoman of the Local Government Assistance Corporation for information, as well as for documents pursuant to F.O.I.L. [A-10; A-14].

In appointing Mr. Smith to the Court of Appeals, Governor Pataki passed over six other nominees designated as "well qualified" by the Commission on Judicial Nomination's "written report" – including Appellate Division, Fourth Department Presiding Justice Eugene Pigott, Jr., whose appointment would have rectified the Court's gross geographic imbalance. You may be sure that each of these six nominees not only believes that he was equally, if not more, qualified than Mr. Smith, but that it was Mr. Smith's political contributions that "tipped the scales". Examination of the Committee's non-conforming "written report" does nothing to dispel that notion or to ensure their trust – and that of the public -- in the "merit" of the nominating process.

Assembly Speaker Sheldon Silver is quoted[7] as saying that Mr. Smith's appointment bears "the taint of political contributions", and as further stating, "I wish we could have shown the process to be clean and clear". There is no reason for such past tense wistfulness when a formal investigation can ensure that the process will be "clean and clear" in finding an untainted replacement for Mr. Smith[8].

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[7] "*Trust, But Verify*", New York Post, editorial, 11/7/03.

[8] The Senate Judiciary Committee and the Senate have an absolute right to reject the Governor's appointed nominee. Rejection is expressly contemplated by Article VI, §2f of the NYS Constitution and Judiciary Law §68.3 and §68.4. This includes the rejection of "qualified" candidates. Indeed, the very premise of these constitutional and statutory provisions is that each of the candidates recommended by the Commission on Judicial Nomination has already been determined to be not just "qualified", but "highly qualified" by "character, temperament, professional aptitude and experience" [Article VI, §§2c, d(4); Judiciary Law §63.1].