

NEW YORK STATE

SENATE STANDING COMMITTEE ON JUDICIARY

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Room 124  
The Capitol, Albany, NY

Monday, January 12, 2004  
10:00 AM

PRESIDING: Honorable John A. DeFrancisco  
Chairman

TRANSCRIPT of the  
Committee Session to consider the nomination of  
Robert S. Smith as an Associate Judge of the Court  
of Appeals.


EX D-2

## PRESENT:

Senator John A. DeFrancisco, Chair  
Senator John Marchi  
Senator Dale Volker  
Senator Hugh Farley  
Senator Guy Velella  
Senator Stephen Saland  
Senator Kenneth LaValle  
Senator Raymond Meier  
Senator Michael Balboni  
Senator Serphin Maltese  
Senator John Bonacic  
Senator Dean Skelos  
Senator Kemp Hannon  
Senator Malcolm Smith, Ranking  
Senator Neil D. Breslin  
Senator John Sampson  
Senator Thomas Duane  
Senator Eric Schneiderman  
Senator Carl Andrews  
Senator Martin Connor  
Senator Martin Dilan

1 is unimaginable. On Wednesday morning, we will  
2 be facing James Cahill in a Syracuse courtroom,  
3 having to relive the nightmare of my sister's  
4 assault and murder all over again.

5 CHAIRMAN DeFRANCISCO: Thank you.

6  Elena Sassower, who is our last speaker.

7 MS. SASSOWER: Chairman DeFrancisco,  
8 Committee members, Mr. Smith, good morning.

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

15 We oppose Senate confirmation of Governor  
16 Pataki's appointment of Robert S. Smith to the  
17 New York Court of Appeals. The basis, as relates  
18 to Mr. Smith's qualifications, is his  
19 insensitivity to the appearance, and quite  
20 possibly the reality, that his substantial  
21 financial contributions to Governor Pataki and  
22 the Republican Party would buy him this most  
23 important state court judgeship.

24 This ethical insensitivity is all the more

1 raise, which will be the subject of my testimony.  
2 Nonetheless, I submit herewith and incorporate by  
3 reference CJA's October 16, 2000 report on the  
4 Commission on Judicial Nomination's corruption of  
5 merit selection to the Court of Appeals, as well  
6 as CJA's November 13, 2000 companion report on  
7 the complicity of the bar associations. This, to  
8 substantiate CJA's threshold opposition to  
9 Mr. Smith's confirmation, to wit, that his  
10 appointment is the product of an  
11 unconstitutionally closed and documentably  
12 corrupted merit selection process that fails to  
13 adequately investigate candidate qualifications  
14 and is rife with conflict of interest, and  
15 further, that his confirmation is not properly  
16 before the Committee, as a matter of law, by  
17 reason of the nonconformity of the Commission on  
18 Judicial Nomination's October 15, 2003 written  
19 report of his qualifications with the findings  
20 requirement of Judiciary Law Section 63.3.

21 How much money did Mr. Smith contribute to  
22 Governor Pataki and the Republican Party?  
23 According to the "Buffalo News" analysis of the  
24 past eight years of federal and state campaign

1 contributions from 1995 to 2003 showed:

2 "Smith and his wife have donated at least  
3 \$219,000 to Pataki and state Republican  
4 committees. That does not include tens of  
5 thousands of dollars in additional donations  
6 Smith made to federal GOP candidates and  
7 committees, including President Bush, former  
8 U.S. Senator Alfonse D'Amato, former New York  
9 Mayor Rudolph W. Giuliani, Utah Senator Orrin  
10 Hatch, Kentucky Senator Mitch McConnell and  
11 former senator and now U.S. Attorney General John  
12 D. Ashcroft."

13 Assuredly, Mr. Smith knows the precise  
14 monetary figures, and the public is entitled to  
15 that information. Indeed, the public would  
16 already have these figures had this Committee  
17 required Mr. Smith to complete a  
18 publicly-available questionnaire comparable to  
19 that which the U.S. Senate Judiciary Committee  
20 requires of federal judicial nominees, including  
21 those appointed to the U.S. Supreme Court.

22 Number 17(c) of the U.S. Senate Judiciary  
23 Committee questionnaire specifically requires the  
24 nominee to:

1 response to No. 35 of its questionnaire:

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

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

1           Absent such statement, the ratings conferred  
2           on Mr. Smith by the New York State Bar  
3           Association and the Association of the Bar of the  
4           City of New York are irrelevant, since the only  
5           basis for their evaluation of Mr. Smith's  
6           qualifications was his inclusion as a nominee in  
7           the Commission's written report. If that  
8           inclusion was the project of material  
9           non-disclosure and deceit, he was not  
10          legitimately nominated and there is nothing for  
11          the bar associations to evaluate.

12           As to Governor Pataki, Mr. Smith must be  
13          asked whether, to his knowledge, the Governor  
14          knew of his political contributions. Of course,  
15          this inquiry must also be made directly to  
16          Governor Pataki. I do not believe that the  
17          Governor has ever denied that his appointment of  
18          Mr. Smith was with knowledge of Mr. Smith's  
19          political donations, at least I have not seen any  
20          report of this in the media. At the November 4,  
21          2003 press conference announcing Mr. Smith's  
22          appointment, the Governor acknowledged that he  
23          had met Mr. Smith on occasion. It is reasonable  
24          to assume that such would have included political

1 fundraisers or special events to which generous  
2 donors are invited.

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

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



1 bono representation of death penalty defendants.

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

19 Assembly Speaker Sheldon Silver is quoted as  
20 saying that Mr. Smith's appointment bears "the  
21 taint of political contributions", and as further  
22 stating, "I wish we could have shown the process  
23 to be clean and clear".

24 There is no reason for such past tense

1 wistfulness when a formal investigation can  
2 ensure that the process will be clean and clear  
3 in finding an untainted replacement for  
4 Mr. Smith.

5 CHAIRMAN DeFRANCISCO: Thank you,  
6 Ms. Sassower.

7 MS. SASSOWER: I'll be happy to answer any  
8 questions.

9 CHAIRMAN DeFRANCISCO: No questions.

10 MS. SASSOWER: I would just like to point out  
11 the last footnote in my statement, which, if I  
12 may:

13 The Senate Judiciary Committee and the Senate  
14 have an absolute right to reject the Governor's  
15 appointed nominee. Rejection is expressly  
16 contemplated by Article VI, Section 2(f) of the  
17 New York State Constitution and Judiciary Law  
18 Section 68.3 and Section 68.4. This includes the  
19 rejection of qualified candidates. Indeed, the  
20 very premise of these constitutional and  
21 statutory provisions is that each of the  
22 candidates recommended by the Commission on  
23 Judicial Nomination has already been determined  
24 to be not just qualified but highly qualified by

1 character, temperament, professional aptitude and  
2 experier.ce.

3 CHAIRMAN DeFRANCISCO: Thank you, very much.  
4 Before we take a formal vote, I would first  
5 like to thank you all for your comments.

6 MS. SASSOWER: Would you like to question  
7 Mr. Smith on the contributions issue?

8 CHAIRMAN DeFRANCISCO: Ms. Sassower, I really  
9 try to give everybody an opportunity to be heard  
10 here. There is no one else who testified in the  
11 very nice, informal decorum of this committee  
12 that continues to talk and continues to test the  
13 patience of everybody in this room. We gave you  
14 the opportunity --

15 MS. SASSOWER: You should respond to the very  
16 serious and --

17 CHAIRMAN DeFRANCISCO: Ms. Sassower, if you  
18 don't sit down, I will tell you, as long as I am  
19 chairman, you will never in testify before this  
20 committee again.

21 SENATOR BRESLIN: I would just like to say  
22 that as a member of the party Mr. Smith left, in  
23 all my years, this has been the most open hearing  
24 of the Judicial Committee that I have ever seen

1 and the irony of that is I think Mr. Smith is one  
2 of the best candidates before this committee.  
3 He's very open, very direct and I want to commend  
4 his testimony and I feel quite strongly that  
5 Mr. Smith will be an objective member of the  
6 Court of Appeals, albeit someone who doesn't  
7 share my point of view.

8 CHAIRMAN DeFRANCISCO: Thank you. I was  
9 going to say what was potentially billed as  
10 fireworks with this committee was handled in a  
11 very professional way. Everybody asked what they  
12 wanted to ask and opinions were made part of the  
13 record.

14 With that said, the question on the floor is  
15 whether to send this nominee to the full Senate.

16 All those in favor, say Aye.

17 (Committee members respond Aye)

18 CHAIRMAN DeFRANCISCO: Opposed?

19 (No response by the Committee members)

20 CHAIRMAN DeFRANCISCO: Mr. Smith, you're  
21 unanimously appointed by the Senate today.

22 MR. SMITH: Thank you.

23 (Whereupon the above-entitled proceedings  
24 were adjourned)