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DATE: January 21, 2004

TO: James McKinley, Jr., Albany Bureau Chief
The New York Times

FROM: Elena Ruth Sassower, Coordinator
Center for Judicial Accountability, Inc. (CJA)

RE: In further support of a New York Times investigative expose of
"merit selection" to the New York Court of Appeals

As discussed, enclosed for your convenience, are:

- (a) the January 15, 2004 Associated Press feed by Joel Stashenko, which appeared on Newsday.com as "*Why Democrats were mum on Pataki high court choice*"; and
- (b) the January 15, 2004 Gannett column, "*Smith's approval exposes flaws in the review process*" by Yancey Roy.

These two pieces reflect the beginnings of probing, intelligent journalism on the subject of "merit selection" to the New York Court of Appeals. This, notwithstanding each piece conceals that the Senators not only failed to question Mr. Smith about his financial contributions, but REFUSED to do so in face of my express assertion of the public's right to that information. Indeed, the sole moment of unscripted "drama" at the "hearing" was at the conclusion of my opposition testimony when I asked that Mr. Smith be called upon to answer the specific questions which my testimony had identified – beginning with the precise amount of his financial contributions¹. Chairman DeFrancisco's response – with Democratic and Republican Senators sitting "idly by" -- was to threaten that I would never again be permitted to testify if I did not keep quiet and return to my seat. The transcript is on order.

¹ As stated in my testimony, quoting The Buffalo News' analysis of eight years of state and federal campaign contributions from 1995-2003:

"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."

As if my testimony – and The Buffalo News reporting of Tom Precious – did not exist, Messrs. Stashenko and Roy rest on a figure of \$155,000 for the five years from 1999-2003

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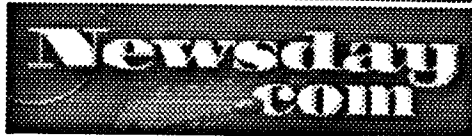
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Why Democrats were mum on Pataki high court choice

By JOEL STASHENKO
Associated Press Writer

January 15, 2004, 5:14 PM EST

ALBANY, N.Y. — State Senate Democrats were silent publicly about the big political contributions the newest member of the state's highest court made to Republican causes because their leaders were satisfied by his private explanations.

Senate Minority Leader David Paterson said Robert S. Smith contacted both him and Sen. Malcolm Smith, the ranking Democrat on the Senate Judiciary Committee, to discuss the contributions and other issues about Gov. George Pataki's nominee prior to this week's confirmation.

"What I had was a private conversation with him to decide whether there needed to be a public inquiry," Paterson said Thursday.

Such cooperation by a top Pataki nominee with Senate Democrats is rare and "we wanted to show a little good faith and we took his answers in private to be the answers he would have given in public," Paterson said.

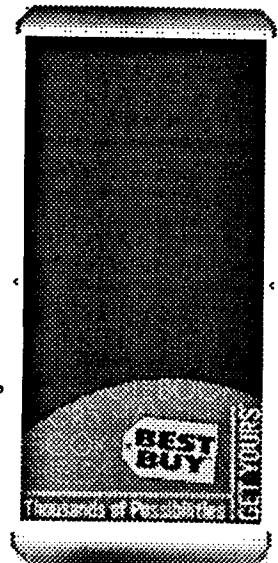
Democrats on the Senate Judiciary Committee would normally have been expected to quiz Smith about the \$155,000 he's contributed to Pataki or Republicans connected with Pataki since 1999, and any possible ties between the donations and Smith's appointment to a seat on the state's highest court.

But no Democrats inquired about the donations at the Judiciary Committee meeting. Soon afterward, Smith was confirmed by the full Senate.

Malcolm Smith, D-Queens, praised Smith's credentials at the hearing and said he liked the sound of the nominee's last name. Sen. Neil Breslin, D-Albany, said the meeting was the most open and in-depth about a prospective Court of Appeals' judge since he'd been on the committee.

Asked by the Republican chairman of the judiciary committee, Sen. John DeFrancisco of Syracuse, about the donations, Smith said: "I did not give ... any contribution in expectation of any quid pro quo. I have never expected it or, to my belief, never got anything except courtesy in exchange for contributions."

Paterson, a Manhattan Democrat, said later there was no way Robert Smith could be expected to respond to the question any differently.



"No one is going to get up and tell the committee, 'Yeah, I did it,'" he said.

Plus, Paterson said, fair-minded state legislators should be limited in how they assail a candidate for a state post for making political contributions.

"There was the fact he gave large contributions _ but that pretty much is the way we conduct politics," Paterson said. "My problems with the contributions is not to change the individuals but to change the system."

Paterson said he'd "love" to get the kind of political contributions that Smith gave Pataki or the committees associated with the governor.

Paterson made his comments to radio station WROW in Albany and to The Associated Press.

Smith, a private Manhattan attorney with no previous judicial experience, said he had been a frequent giver to Republican causes and candidates he supported since switching his party enrollment from Democrat to Republican in the late 1980s.

Both the Judiciary Committee and the full Senate confirmed the 59-year-old Smith unanimously by voice votes to the open seat on the seven-member Court of Appeals. An associate judgeship on the court pays \$151,200 a year and Smith has already started hearing cases on the court.

Paterson said the target of Senate Democrats is not Smith, whom he said he was very impressed with, but current state campaign finance procedures. Many qualified commissioners, judicial candidates and others for public service are also heavy campaign contributors to the administration hiring them, he said.

Paterson said he was worried about making a candidate for public office like Smith a pawn in a bigger Albany dispute.

"I don't want to diminish the interest in qualified people for either rising to the level of being appointed to important boards, the judiciary or other places based on actions they took that were legal as though there may be a taint or maybe a quid pro quo at times," he said.

Republicans on the Judiciary Committee, too, were restrained in their questioning of Smith. Their worries centered around questions over his stance on the death penalty, which the Republican-controlled Senate staunchly supports. Smith said he would uphold the law legislators installed in 1995 unless there were legal or constitutional infirmities.

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Smith's approval exposes flaws in the review process

The appointment of a new judge to New York's highest court this week exposed how anemic our system of checks and balances can be.

Here's how it's supposed to go: A Court of Appeals candidate appears before the Senate to see if he is right for the job. And on Monday, Gov. George Pataki's nominee, Robert S. Smith, a private Manhattan lawyer, was reviewed. But the inspection of his background, abilities and character came up short. Instead, here's what we got:

■ **Rubber-stamping:** The outcome was never in doubt despite declarations from some senators that they were on the fence about Smith. The Senate never rejects a Court of Appeals nomination from the governor. That especially wasn't going to happen in this instance, with a Republican-led Senate weighing an appointment by a Republican governor.

If Smith's 90-minute question-and-answer session before the Judiciary Committee was lengthy by New York standards, it remained perfunctory.

"If Governor Pataki thinks you're the man for the job, then you have my vote," said Sen. John Bonacic, R-Mt. Hope, capturing the essence of the hearing.

Compare that to the scrutiny given to nominees to the U.S. Supreme Court. Remember Clarence Thomas? In New York, polite questions and testimonials get characterized as a prolonged review.

■ **Soapboxing:** Several senators turned the forum into a gripe session about the Court of Appeals. It's taken the law into its own hands and away from the state Legislature, they claimed.

How dare judges trump legislators, some said. How dare they come to their own conclusions? When legislators questioned Smith about the "separation of powers" among branches of government, they implied that not all branches, especially the judiciary, are equal.

The court is "not supposed to overrule the Legislature," Sen. George Maziarz, R-North Tonawanda, said when the full Senate voted on Smith.

Maziarz's beef? A recent death-penalty case.



Yancey Roy

Last fall, the court voted 4-2 to overturn the death sentence of a Syracuse man who sneaked into his wife's hospital room to poison her with cyanide. The court said that legally, the case didn't meet the conditions necessary to trigger capital punishment — conditions laid down by the Legislature.

Maziarz said the four judges who overturned the Syracuse death-penalty case did so because of "their own personal beliefs" about capital punishment. Never mind that the author of the decision, Judge Albert Rosenblatt, once sentenced a man to death.

Upping the politics, Maziarz said he considered voting thumbs-down on Smith to send a message to the court "that this legislative body was extremely disappointed in their decision." But no one would really vote no.

■ **Turning a blind eye to money and politics.** Democrats have long complained about having no role in the appointment of judges. So what did they say about the \$155,000 Smith and his wife have given Pataki and other Republican campaign committees over the last five years? Zip. Nada.

Democrats flinched. They failed to ask Smith one question. About anything.

Sen. Malcolm Smith, D-Queens, the ranking Democrat on the Judiciary Committee, cut short a trip to India to return to New York to say the nominee had "tremendous credentials." How helpful.

Another, Sen. Reuben Diaz Sr., D-Bronx, read aloud the nominee's campaign donations and said he had concerns about them. But Diaz said he met with Democratic leaders and "I got cleared

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up." Huh?

In the end, the Senate unani- mously confirmed Smith, 59, who has a prolific record. He graduat- ed No. 1 from Columbia Universi- ty Law School. He has worked ex- tensively on commercial and civil cases and on death-penalty cases. Folks all agreed he's well-qualified for the job.

But if he weren't, you have to wonder if the hearings would have uncovered that.

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