

NEW YORK STATE

SENATE STANDING COMMITTEE ON JUDICIARY

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.

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

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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 stark and inexcusable coming, as it does, in a
2 year when the public has been bombarded with
3 countless news articles and editorials about the
4 sale of elective judgeships, fueled by District
5 Attorney Hynes' supposed investigations in
6 Brooklyn, as to which Chief Judge Kaye has
7 convened a Commission to Promote Public
8 Confidence in Judicial Elections.

9 None of the paltry sums bandied about as
10 constituting the supposed sale of elective
11 judgeships comes close to the amounts of money
12 Mr. Smith has donated to Governor Pataki and the
13 Republican Party. It is, therefore, CJA's
14 position that, at the very least, Mr. Smith must
15 not be confirmed to our state's highest court
16 until a formal investigation has been undertaken
17 to determine the extent to which his appointment
18 is the product of monetary considerations.

19 The former Senator Dunne said there is no
20 evidence of a quid pro quo, but evidence is the
21 reason why there must be an investigation to
22 determine the evidence.

23 It is this objection, which former Senator
24 Dunne says is a proper question for the public to

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 "Itemize all political contributions to any
2 individual, campaign organization, political
3 party, political action committee or similar
4 entity during the last 10 years."

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

21 Mr. Smith must be directly asked whether, in
22 fact, he disclosed to the Commission his
23 financial contributions, as, for instance, during
24 its personal interview of him or in his written

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 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 experience.

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)