

City of Philadelphia



Council of the City of Philadelphia
Office of the Chief Clerk
Room 402, City Hall
Philadelphia

(Resolution No. 020420)

RESOLUTION

Urging the United States Senate to reject the nomination of Judge D. Brooks Smith to the Third Circuit Court of Appeals.

WHEREAS, The nomination of Pennsylvania district court Judge D. Brooks Smith to the Third Circuit Court of Appeals in Philadelphia was voted out of the US Senate Judiciary Committee on May 23, 2002 by a vote of 12-7; and

WHEREAS, Judge Smith's nomination is opposed by a wide range of public interest organizations. Among the organizations that have formally expressed opposition to Smith's appeals court nomination are People For the American Way, Leadership Conference on Civil Rights, NAACP, Alliance for Justice, National Organization for Women, Community Rights Council, National Women's Law Center, NARAL, Earthjustice, ADA Watch Action Fund, National Partnership for Women & Families, Planned Parenthood, Defenders of Wildlife, National Employment Law Association, Committee for Judicial Independence, NOW Legal Defense and Education Fund, Disability Rights and Education Defense Fund, Feminist Majority, Friends of the Earth, Bazelon Center for Mental Health Law, National Disabled Students Union, and the National Council of Jewish Women; and

WHEREAS, Judge Smith's membership in a discriminatory club, his failure for ten years—in violation of governing ethical standards—to resign from the club despite his commitment to do so during his district court confirmation hearing, and the contradictory explanations he has offered for his actions all raise serious issues about Smith's judgment, willingness to follow rules, and candor; and

WHEREAS, Ethical questions have been raised regarding a highly publicized bank fraud case involving millions of dollars of public school money. Judge Smith continued to preside over and issue orders in the case, even though the fraud claims implicated a bank at which his wife was an employee and in which he had substantial financial interests. Several years later, he took on a related case, recusing himself only after he was requested to do so by one of the attorneys in the case, revealing only his

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wife's involvement and not his own financial interest. On March 14, 2002, after reviewing the facts and the arguments by Smith and his defenders, noted legal ethics professor Monroe Freedman wrote to the Senate Judiciary Committee that Smith committed "repeated and egregious violations of judicial ethics" and that Smith had been "disingenuous before this Committee in defending his unethical conduct." Professor Freedman concluded that as a result, Smith is "not fit to serve as a Federal Circuit Judge"; and

WHEREAS, Since his appointment in 1989, Judge Smith has been reversed by the court of appeals to which he has been nominated 51 times. This is a larger number of reversals than any of the judges approved and rejected by the Senate Judiciary Committee during this Congress for appellate court posts, including Judge Charles Pickering. More important than the number of these reversals, however, is their nature. Many of these reversals concern civil and individual rights, and reflect a disturbing lack of sensitivity towards such rights and a failure to follow clearly established rules of law and appellate court decisions; and

WHEREAS, A number of Smith's reversals have concerned discrimination or other claims by employees. For example, in *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690 (3rd Cir.), cert. denied, 525 U.S. 1012 (1998), the court of appeals unanimously reversed Smith's decision to dismiss a suit by Conrail employees who claimed that years of on-the-job exposure to toxic chemicals was making them sick. Smith had concluded that their lawsuit was barred because they had signed a waiver as part of a settlement of unrelated injury claims against the railroad. The appellate court ruled that Smith's ruling was contrary to the Supreme Court's interpretation of federal law; and

WHEREAS, The Third Circuit unanimously reversed Smith's decision in *Ackerman v. Warnaco*, 55 F.3d 117 (3rd Cir. 1995), in which he upheld a company's unilateral denial of severance benefits to more than 150 employees after they were laid off; and

WHEREAS, In *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407 (3rd Cir.), cert. denied, 502 U.S. 941 (1991), the appellate court unanimously reversed Smith for granting summary judgment against an age discrimination claim as untimely by ruling that the statute of limitations began to run not when the employee was terminated, but instead when he simply received a negative performance review; and

WHEREAS, In *Schafer v. Board of Public Educ. of the School Dist. of Pittsburgh, Pa.*, 903 F.2d 243, 250 (3rd Cir. 1990), the Third Circuit unanimously reversed Smith for dismissing a claim that a school district's family leave policy improperly allowed only women, not men, to take unpaid leave for "childrearing" as well as childbirth. Based on such decisions, the National Employment Lawyers Association

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has opposed Smith's confirmation, explaining that his record displays "an attitude inimical to employee and individual civil rights"; and

WHEREAS, In other reversals involving individuals or other plaintiffs against government or corporations, the Third Circuit has specifically criticized Smith for abusing his discretion or failing to follow the law. For example, in *Urrutia v. Harrisburg County Police Dept.*, 91 F.3d 451, 456-457 (3rd Cir. 1996), the appellate court found that Smith had "abused his discretion" in refusing to allow a prisoner to amend a complaint contending that he had been repeatedly stabbed while handcuffed and in the custody of police officers who looked on while failing to take any action; and

WHEREAS, In *Metzgar v. Playskool*, 30 F. 3d 459, 462 (3rd Cir. 1994), three Reagan appointees reversed Smith for dismissing a claim involving death by asphyxiation of a 15-month-old child who had choked on a toy, noting that they were "troubled by the district court's summary judgment disposition" of his parents' claims; and

WHEREAS, In *In re Chambers Development Company*, 148 F.3d 214, 223-225 (3rd Cir. 1998), concerning a claim against a county utility authority, the Third Circuit took the extraordinary step of issuing a writ of mandamus – an unusual direct command to a judge to rule a certain way – against Judge Smith, who had "ignored both the letter and spirit of our mandate" in a prior ruling in the case. As the court of appeals explained, this was a "drastic remedy" that is utilized only "in response to an act amounting to a judicial usurpation of power"; and

WHEREAS, Judge Smith has also been criticized for rulings not later reversed on appeal. For example, the Washington Post expressed concern about his decision in *United States v. Commonwealth of Pennsylvania*, 902 F. Supp. 565 (W.D. Pa. 1995), *aff'd*, 96 F.3d 1436 (3rd Cir. 1996), in which the federal government had sued the state over allegedly substandard conditions in a facility for persons with mental disabilities. As the Post put it, although "care was, in Judge Smith's words, 'frequently not optimal' – maggots were found in one resident's ear, ants on others' bodies – the judge found these to be 'isolated incidents'" and concluded there was no constitutional violation. In another case, *Quirin v. City of Pittsburgh*, 801 F. Supp. 1486 (W.D. Pa. 1992), the National Employment Lawyers Association (NELA) found that Smith had improperly applied the "aggressive" standard of "strict scrutiny," which is reserved for claims of racial, ethnic, and religious discrimination, to strike down an affirmative action policy designed to remedy past discrimination against women. As NELA concluded, such rulings "show a disturbing pattern of disregard and hostility for the rights of minorities and protected classes,"; now therefore

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RESOLVED, BY THE CITY COUNCIL OF PHILADELPHIA, That we hereby strongly urge the United States Senate to reject the nomination of Judge D. Brooks Smith to the Third Circuit Court of Appeals.

RESOLVED FURTHER, That we hereby urge Pennsylvania Senators Specter and Santorum to withdraw their support for the confirmation of Judge D. Brooks Smith to the Third Circuit Court of Appeals.

FURTHER RESOLVED, That a copy of this resolution be sent to all members of the United States Senate as evidence of the grave concern by this legislative body.

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CERTIFICATION: This is a true and correct copy of the original Resolution, Adopted by the Council of the City of Philadelphia on the sixth of June, 2002.

Anna C. Verna
PRESIDENT OF THE COUNCIL

Marie B. Hauser
CHIEF CLERK OF THE COUNCIL

Introduced by: Councilmember Ortiz

Sponsored by: Councilmembers Ortiz, Goode, Cohen, Nutter, Clarke, Reynolds Brown, Miller, DiCicco, Blackwell, Tasco and Mariano