



P E R S P E C T I V E

Advice to Solicitor General Must Remain Confidential

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Speaking as former deputy solicitors general who served in the solicitor general's office for a total of 35 years, in both Democratic and Republican administrations, we believe that senatorial requests for Judge John Roberts' confidential memos, written as deputy solicitor general in the first Bush Administration, are unjustifiable and should be withdrawn.

The solicitor general's office is charged with the weighty responsibility of deciding whether to appeal adverse decisions where the United States is a party, whether to seek U.S. Supreme Court review of adverse appellate rulings, how to resolve legal disputes between and among various components of the federal government, deciding when the United States should participate before the U.S. Supreme Court as amicus curiae and what position it should take, and deciding what arguments should be made to the Supreme Court in particular cases.

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The solicitor general's office represents not just the U.S. Justice Department or the executive branch, but the entire federal government, including the Congress.

To perform this important work in thousands of complex cases every year with a staff of only 20 lawyers, the solicitor general depends on frank, honest, and uninhibited advice from staff attorneys like Deputy Solicitor General Roberts. The decision-making process requires an unbridled, open exchange of ideas that cannot take place if attorneys must constantly be looking over their shoulders to consider what the public reaction, and potential impact on their careers, might be should their recommendations subsequently be publicly disclosed and become raw material for their adversaries to attack them. High level decision-making requires candor, and candor requires confidentiality, the

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hallmark of legal advice in our system. As seven former solicitors general or acting solicitors general advised Congress during an earlier confirmation hearing in 2002, "any attempt to intrude in the Office's highly privileged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the United States'

litigation interests—a cost that would also be borne by Congress itself.”

These comments apply equally to writings of a deputy solicitor general, such as John Roberts, as to those of lower level staff attorneys in the solicitor general’s office. All of them provide confidential advice to the ultimate decision maker—the solicitor general—and all would suffer the same chilling effect from the prospect of senatorial oversight of their positions in controversial matters. As the U.S. Supreme Court put it in a leading case decided in 1978, “the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.”

Several members of the solicitor general’s staff have been confirmed by the Senate and are now serving as federal appellate judges: Samuel Alito, Danny Boggs, William Bryson, Frank Easterbrook, Dan Friedman, Michael McConnell, Richard Posner and A. Raymond Randolph. In none of their confirmation hearings were confidential appeal memos from the solicitor general’s office sought or obtained. Other members of the staff of this office will be nominated for government positions in future years. Their confidential legal advice should not be distorted by fear of having it placed in a fishbowl.

While public disclosure of these privileged materials would injure important interests of the federal government, such revelation would shed little light on a judicial nominee. Contrary to the apparent impression of those requesting access, these documents do not reliably reflect the personal policy views of the staff attorney. Each file reaching the solicitor general’s office contains detailed recommendations from trial and agency lawyers, reviewing attorneys within the divisions of the Department of Justice and an assistant to the solicitor general. A deputy solicitor general typically adds his or her own hand-written conclusion to the assistant’s memorandum. The deputy’s views are those of a lawyer

for a client. In controversial, policy-laden cases, the policies that the deputy lays out for the solicitor general’s consideration are generally those of the Administration and may or may not reflect the deputy’s personal preferences. And the evaluation of the legal issues focuses upon whether reasonable arguments can be advanced in support of the position that the policymakers wish to espouse, or whether the particular case satisfies the U.S. Supreme Court’s criteria for review. This is an unreliable basis for determining how the individual would act as a judge. Moreover, contrary to the arguments presented by those demanding access, these procedures and standards apply equally to a “political” deputy solicitor general, such as John Roberts, whose workload in the office does not differ from that of the “career” deputies.

The Senate can inquire into Judge Roberts’ judicial qualifications through many alternative sources, of far greater relevance and utility. Judge Roberts has now written some 60 opinions as a federal appellate judge that illustrate his judicial philosophy and style of legal reasoning. He will be questioned extensively by members of the Judiciary Committee, some of whom already have propounded lengthy lists of issues. The views of Judge Roberts’ colleagues at the Justice Department can be sought, including lawyers of different political persuasions. Of greatest importance, John Roberts has over a decade of experience at the private bar. He has worked with appellate lawyers of every outlook in a wide variety of cases, representing plaintiffs, defendants, state governments and civil rights litigants. They can inform the Senate of Judge Roberts’ professional skills, integrity, approach to legal problems and personal attributes.

There is no reason to sacrifice the confidentiality of internal deliberations within the solicitor general’s office for the purpose of taking the measure of this judge.

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