

MEMORANDUM ON SENATE JUDICIARY COMMITTEE
REQUEST FOR MEMORANDA BY JUDGE
JOHN G. ROBERTS, JR. WHILE SERVING AS UNITED STATES
PRINCIPAL DEPUTY SOLICITOR GENERAL¹

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In order to exercise the advice and consent responsibility imposed on the Senate by Art. I, sec. 2 of the Constitution, members of the Senate Judiciary Committee have requested the Department of Justice to provide them with memoranda and other documents relating to 16 cases prepared by Supreme Court nominee Judge John G. Roberts, Jr. during his years of service as Principal Deputy Solicitor General, the “political” Deputy. These memos contain Judge Roberts’ views and comments on the content of briefs filed by the United States with the Supreme Court, certiorari petitions, amicus interventions and recommendations with respect to whether the Government should appeal from the district courts to the Courts of Appeals. Although no formal claim of privilege or other objection has yet been made, it is expected that the Administration will resist the Committee’s request, citing “attorney - client privilege” and perhaps other grounds.

There is no basis in law or policy for the Administration to refuse to provide the Senators with these documents.

I. The Senate’s Constitutional Duty

It is of course axiomatic that responsible exercise of the advice and consent obligation

¹This is an updated and revised version of a memo prepared in May-June 2002 in connection with the nomination of Miguel Estrada to the Court of Appeals for the D.C. Circuit.

with respect to presidential nominations, imposed on Senators under Article I, sec. 2 of the Constitution, is one of a Senator's most important duties. It is a responsibility that only members of the Senate can fulfill, for the appointment process is a power shared only by the President and the Senate. If Senators do not exercise this responsibility with knowledge and care, the fundamental protection afforded for our liberties by our Constitution - a delicately constructed system of checks and balances among the three different branches - cannot function effectively.

Although the advice and consent authority extends to other government officials, it is crucial with respect to the Supreme Court, especially with respect to someone who may serve for 30-40 years in a uniquely unaccountable position of immense power. The burden on the Senate to learn all it can about Judge Roberts' views on the important issues of the day in order to exercise its checking power responsibly and carefully, is thus all the more important.

For these reasons, a candidate for the federal judiciary and especially the Supreme Court does not come before the Senate with a presumption in his or her favor. He or she is not entitled to confirmation simply because the President has made the nomination, for under the Constitution the President proposes but the Senate disposes, and this is a vital part of the checks and balances design. See *The Federalist No. 76* (Hamilton) ("the necessity of its [the Senate's] cooperation in the business of appointments will be a considerable and salutary restraint upon the conduct of the magistrate.") As Deputy Attorney General Timothy Flanigan told the Senate in 1997, "In evaluating judicial nominees, the Senate has often been stymied by its inability to obtain evidence of a nominee's judicial philosophy. . . . I would reverse the presumption and place the burden squarely on the judicial nominee to prove that he or she has a well-thought-out judicial philosophy." *Legal Times* 8/1/05, p. 3.

Judge Roberts' memos as Principal Deputy Solicitor General are especially important in this regard.

The Solicitor General and especially, the Principal Deputy SG, the "political" SG, have immense power to shape the law, both at the Supreme Court level, where the Office represents the United States as both a party and an *amicus curiae*, and at the Court of Appeals level, where the SG has virtually total discretion about whether an adverse district court decision should be

appealed and what arguments should be made.

This is because the SG is not an ordinary government lawyer or advocate. In effect, he is a quasi-judge, often referred to as the “tenth justice.” As Lincoln Caplan describes the Solicitor General’s role:

He does not sit beside the Justices on the bench, but he stands in place of them when he decides which cases should be taken to the Court. For all its dominance, the Supreme Court is a relatively passive institution: the Justices must wait for litigants to raise issues before they can address them. And they rely on the Solicitor General more than anyone else to help choose and present the most pressing matters for review.

Caplan goes on to say:

The influence of the Solicitor at the Court goes beyond helping the Justices set their docket. The Justices also turn to the SG for help on legal problems that appear especially vexing, and two or three dozen times a year they invite him and his office to submit briefs in cases where the government is not a party. In these cases especially, the Justices regard him as a counselor to the Court. But in every case in which he participates, the Justices expect him to take a long view. The Solicitor General advises the Court about the meaning of federal statutes as well as about the Constitution, so his judgments regularly affect the work of the Legislature as much as the Executive and the Judiciary. Lawyers who have worked in the SG’s office like to say that the Solicitor General avoids a conflict between his duty to the Executive Branch, on the one hand, and his respect for the Congress or his deference to the Judiciary, on the other, through a higher loyalty to the law.

Lincoln Caplan, The Tenth Justice, pp. 6-7 (1987).

In more than a few key cases, the SG’s voluntary intervention as an amicus curiae significantly influenced the outcome of the case. In the civil rights area, for example, his interventions in Brown v. Board of Education and in Shelley v. Kraemer were crucial to the outcome. See Caplan 26. And in some cases, the Solicitor General has confessed error in the interests of justice, or refused to sign a brief.

The SG’s role with respect to the Courts of Appeals is also a powerful one, calling for the exercise of judgment and allowing for a great deal of discretion. Because the Supreme Court now handles a very small number of federal appeals, the Courts of Appeals are the courts of last

resort for almost all cases. They set the law for large sections of the country, often for many years. The decision as to whether to take a case to the appellate court is thus of great importance and the SG has the final word. Caplan describes one SG as openly “bragg[ing],

“If the district court in Oklahoma City makes a decision which the United States Attorney doesn’t like, he may well tell the press, ‘I am going to appeal.’ When I see those statements in the press, I say to myself, ‘Yes, he is going to appeal if I say he can.’ but sometimes I don’t.”
Id. at 6.

The SG’s decisions obviously allow a wide range of relatively unfettered and low-visibility discretion. How these decisions are reached and the bases therefor are thus of great importance to the Senate, for they are a very reliable indication of how someone exercising the quasi-judicial authority of the SG will exercise the full judicial power of a judge, and especially a Supreme Court Justice.

Moreover, since these powers make the SG into a policy maker with respect to the shape and enforcement of various areas of substantive law, in some ways he is more important than policy-makers at the various agencies. Senate Judiciary Committee members accordingly have an oversight function with respect to the Office similar to their oversight function with respect to other parts of the Justice Department. They have a right to the memos in pursuance of that separate function.

The Principal Deputy Solicitor General is the second most powerful figure in the SG’s office. The office was created to “monitor” the positions taken by SG career attorneys, Caplan 62-64, and by extension, other government appellate attorneys. As Professor Susan Carle of American University, an appellate attorney in the Civil Rights Division of the Justice Department in 1989-91, when Judge Roberts was Principal Deputy and in charge of supervising the appellate work of the Division, has written, “In his capacity as second-in-charge in the solicitor general’s office, Roberts held a political appointment of great power. The briefs on which his name appeared reflect his considered and thoughtful views. . . . He had the duty to act in the interests of justice as he saw it.” *Legal Times*, Aug. 1, 2005, pp 50, 51.

Access to these memos is thus especially important in Judge Roberts’ case. As revealed

in his writing as a law student, in which he urged broad expansion of property rights, and in his memos and letters while a Special Assistant to the Attorney General in 1981-82, and as Associate White House Counsel in 1982-86, on almost every issue of importance he argued for positions well to the right of such extremely conservative superiors as Ted Olson and Assistant Attorney General William Bradford Reynolds (head of the Civil Rights Division).² At no time did he advocate an expansion or even vigorous support for these rights. He was always on the far right end of the spectrum. For example:

- § School Desegregation: He argued that Congress could ban busing for desegregation; his superior, Ted Olson, disagreed.
- § Discrimination Against Women: He advised Attorney General Smith to reject William Bradford Reynolds' recommendation that the Justice Department should intervene on behalf of women prisoners discriminated against in job-training programs.
- § Court-Stripping: He argued that Congress should strip the Supreme Court of authority over abortion, school prayer, busing and other matters; Ted Olson opposed this view, which Roberts expressed in a private letter to Judge Henry J. Friendly.
- § Welfare Recipients; Right to Travel: He criticized the Supreme Court for striking down state laws imposing residency requirements for welfare recipients
- § Civil Right Enforcement - Affirmative Action: He sharply criticized the Civil Rights Commission for recommending affirmative action to combat widespread discrimination
- § Title IX: He criticized efforts to withdraw all federal funds from educational institutions found to violate Title IX and urged the Attorney General not to support an investigation of sex discrimination in sports at the University of Richmond; Congress ultimately mandated such withdrawal.
- § Habeus Corpus; Capital Punishment Cases: He called for severely limiting habeus corpus and appeals in death penalty cases.

²Reynolds' nomination as Associate Attorney General was rejected by the Senate Judiciary Committee because of his hostility to civil rights enforcement.

§ Children of Illegal Immigrants: He criticized the Supreme Court for requiring Texas to educate the children of illegal immigrants in Plyer v. Doe.

§ Disability Rights: He criticized a lower court for requiring a sign-language interpreter for a child who had both a hearing aid and tutors.

§ Voting Rights Act: He opposed efforts to amend the Voting Rights Act by adopting an effects test

Moreover, these memos and letters, some of which are personal, make clear that he was expressing his own deeply-held views, not just as an advocate for a client, but as a counsellor and advisor. Nor were they the views of an immature young man. By the time he left the White House in 1986, he was 31 years old having spent six years at the highest levels of power.

Nevertheless, at no time during these years, did he have final responsibility for the positions taken by the Reagan Administration. In some cases, his positions were considered too extreme and overruled.

As Principal Deputy SG, however, he had virtually final decision-making on positions the United States would take in the Supreme Court, whether to file amicus, briefs, on which side and what to argue, and on which cases to appeal to the Courts of Appeals. And as Susan Carle has written, like any government lawyer he was largely free to take only positions he favored. His positions in such cases as Rust v. Sullivan and Bray v. Alexandria Womens Health Clinic show a hostility to abortion and womens rights; in U.S. v. Fordice to civil rights for minorities; in Lee v Weisman, to church-state separation; in Lujan v. Nat'l Wildlife Federation to both the environment and citizens' access to the courts. All of these were consistent with his earlier positions.

These cases deal, however, with only a small proportion of his work during his three and a half years as the "political deputy." It is therefore vital to know how this mature, experienced lawyer in his middle thirties viewed these issues, so many of which are still current today.

We are assured, however, that Judge Roberts is not an ideologue but a pragmatist

interested primarily in “stability” in “modesty,” and that he has great respect for precedent.³ This is at odds with both what we already know of his record and with the exultant remarks expressed by such prominent ultra-conservatives as Jay Sekulow and Dr. James Dobson.

Who then is Judge Roberts? What does he believe? Americans must know and they have made it clear in numerous polls that they want to know. Everything that can be learned about his principles and attitudes therefore must be brought to light and there are no reasons, either in policy or law, to the contrary. The fourteen memos requested by the Democratic Senators therefore must be produced for they deal with still-current issues that are of the greatest interest to the Senate and are unquestionably appropriate subjects for inquiry at a hearing. They are among the best indication of what he thinks about these matters and how he would act as a judge.

They are also probably among the few reliable indications, for they reflect the mature experienced lawyer. Long-time court-watcher and conservative commentator Bruce Fein observed Judge Roberts’ positions at the Justice Department in his early years “aren’t principles that evaporate or walk away.” Self-serving general statements by a nominee and general comments by friends and colleagues are of little value, for friendship or working together often produces loyalties that cross philosophical and political lines.⁴

³Judge Roberts’ respect for precedent seems rather selective, judging by his dismissal of a five-year D.C. Circuit precedent followed without dissent by all but one of his colleagues and by other Circuits. *Rancho Viejo LLC v. Norton*, 334 F 3d. 1158 (D.C. Cir. 2003) (dissent from denial of rehearing en banc) “Humility” and “judicial restraint” were also in short supply in this case, since Judge Roberts’ view could have seriously undermined the Endangered Species Act.

⁴Judge Roberts’ self-serving statements are especially suspect given his prior advice to his superiors in the White House and actions there. See his advice to Attorney General Smith about responding to both conservative and liberal critics of the Reagan judicial nominees, his comments on his letter to the American Jewish Committee and his advice on the Sandra Day O’Connor Supreme Court nomination.

The memos will also point to important areas of inquiry that might otherwise be overlooked. John Dean's recent book on the Rehnquist Supreme Court nominations describes two memos that Chief Justice Rehnquist had written while in the Justice Department that set forth his views on the incorporation doctrine, recent Supreme Court decisions, provisions of the Bill of Rights and other matters. They were not turned over to the Judiciary Committee, (though they should have been). Had they been made available to the Committee, they would have opened numerous important lines of inquiry. The Rehnquist Choice, pp. 266-70 (2001).

Nor is there any good reason not to turn over the memos. As Part II of this memo explains, there is no legal reason for withholding the memos, and there is no sound policy not to do so. There is no evidence to support the concern that disclosure will exercise some kind of "chilling effect." In-house memos by lawyers and others have been turned over to congressional committees many, many times, as Senator Fred Thompson and others have pointed out, see p.12 below, without the slightest indication that this has had a "chilling" effect. In July 2001, this Administration turned over a memo written by a nominee for a high EPA post when that person worked in the Office of White House Counsel during the administration of President George H.W. Bush. See Groner, Legal Times, June 2, 2002, pp.1, 13.

Indeed Judge Roberts' earlier memos as Special Assistant as the Attorney General and as Associate White House Counsel are already public. Congress has made a judgment that these memos, which relate to sensitive matters that are obviously not only legal but often politically partisan and strategic, can and should be turned over, and as will be seen below, the courts have ruled similarly. If politics and political strategy, the standard stuff of discussions in the White House and in the Attorney General's office must be disclosed, why should discussions of the law not be? As the analysis below shows, such discussions between and among private lawyers about legal matters affecting their private clients must be disclosed. Why should government lawyers' discussions of the business of their clients, the American people, be kept from the people's representatives, in the exercise of what may be their most important constitutional duty?

As Gerald Wetlaufer has written,

we are dealing with circumstances in which the communication that might be

chilled is a communication that the speaker has a clear and strong interest in making. These are people who are presumed to be committed to the success of the agency for which they work and who have a strong incentive to help solve the problems that confront that agency and to get credit for their contributions. Thus, along each of these dimensions, the claim of chilling as a basis for the general deliberative privilege is on the weakest available ground.

Gerald Wetlaufer, Justifying Secrecy: An Objection To The General Deliberative

Privileges, 65 I

II. There Is No Legal Basis for A Claim of Privilege

A. The Senate and Privilege Claims— In General

Congress does not recognize the attorney-client or most other privileges other than the privilege against self-incrimination. As Senator Fred Thompson has observed:

[A]n invocation of the attorney-client privilege is not binding on Congress. It is well established that in exercising its constitutional investigatory powers, Congress possesses discretionary control over witnesses' claims of privilege. It is also undisputed that Congress can exercise its discretion completely without regard to the approach that courts might take with respect to that same claim.

In the 19th century, House committees refused to accede the claims of attorney-client privilege that developed from actions taken during the impeachment trial of Andrew Johnson and in the investigation of the Credit Mobilier scandal. House committees in the 1980's also rejected claims of attorney-client privilege. For example, in 1986, the House voted 352 to 34 to deny the privilege claims of Ferdinand Marcos' attorneys.

The Senate, too, has rejected invocations of attorney-client privilege on numerous occasions. In 1989, the Subcommittee on Nuclear Regulation rejected privilege claims with respect to its investigation of restrictive agreements between nuclear employers and employees who might impact safety.

The subcommittee's formal opinion rejecting the claim of privilege asserted:

We start with the jurisdictional proposition that this Subcommittee possesses the authority to determine the validity of any attorney-client privilege that is asserted before the subcommittee. A committee's or subcommittee's authority to review or compel testimony derives from the constitutional authority of the Congress to conduct investigations and take testimony as necessary to carry out its legislative powers. As an independent branch of government with such constitutional authority, the Congress must necessarily have the independent authority to determine the validity of non-constitutional evidentiary privileges that are asserted before the

Congress.

Importantly, as the Congressional Research Service found, ‘No court has ever questioned the assertion of that prerogative * * *.’ Indeed, a 1990 Federal court decision, *In the Matter of Provident Life & Accident Co.*, found that whatever a court might hold concerning application of a claim of attorney-client privilege in a court proceeding, ‘is not of constitutional dimensions, [and] is certainly not binding on the Congress of the United States.’ Instead, committees, upon assertion of the privilege, have made a determination based on a ‘weighing [of] the legislative need against any possible injury.’

As Senator Thompson also pointed out, this longstanding tradition reflects the basic differences between judicial and legislative spheres:

The attorney-client privilege is not constitutionally based. It is a judge-made doctrine based on policy considerations designed to foster a fair and effective adversary legal system. It theoretically promotes the interest of an individual facing an adversary civil or criminal action.

But the U.S. Senate is not a court. We do not have the authority to make final determinations of legal rights, or to adjudicate individuals’ liberty or property. In fact, it is probably unconstitutional under the separation of powers doctrine for us to be bound by judicially created common law rules of procedure. Under Article I, section 5 of the Constitution, each House determines its own rules. And the rule of this body in connection with attorney-client privilege claims is longstanding and consistent: We balance the legislative need for the information against any possible injury. And, of course, a committee of this body has made that determination.

Senator Thompson also observed that recent Republican presidents were in accord with this position and had acted appropriately:

Richard Nixon did that claim attorney-client privilege. He allowed White House counsel, John Dean, to testify, Ronald Reagan did not claim attorney-client privilege during Iran-Contra. Notes and documents of his White House counsel were produced, along with those of the lawyer for the National Security Council, the lawyer for the Foreign Intelligence Advisory Board, and the

lawyer for the Intelligence Oversight Board. In both of these investigations, those documents were produced without the claim of any sort of privilege.

104 Cong. Rec. S18971- 18974, Dec. 20, 1995, Directing the Senate Legal Counsel to Bring A Civil Action,

Other Senators have taken the same position. For example, Senator Orrin Hatch said in a floor speech earlier that day:

The attorney-client privilege exists as only a narrow exception to broad rules of disclosure. And the privilege exists only as a statutory creation, or by operation of State common law. No statute or Senate or House rule applies the attorney-client privilege to Congress. In fact, both the Senate and the House have explicitly refused to formally include the privilege in their rules. As the Clerk of the House stated in a memorandum opinion in 1985: 'attorney-client privilege cannot be claimed as a matter of right before a congressional committee.' The attorney-client privilege is a rule of evidence that generally applies only in court; it does not apply to Congress which, under article I, section 5 of the Constitution, has the sole authority to 'determine the Rules of its Proceedings.'

The historical practice of congressional committees has borne this out. As Joseph diGenova, a special counsel and former U.S. attorney, has pointed out in an article in today's Wall Street Journal, as early as in the 19th century investigation of the Credit Mobilier scandal, Congress clearly refused to recognize attorney-client privilege. Indeed, in 1934, Senator Hugo Black, later one of the Supreme Court's great liberal justices, as chairman of a committee refused to recognize the privilege. As recently as 1986, a House subcommittee, Committee on Foreign Affairs, Subcommittee on Asian and Pacific Affairs, took pains to note that it need not recognize the privilege asserted by individuals involved in setting up a web of dummy corporations for the Marcos family.

This body cannot simply take the President's claim of privilege against Congress at face value. To do so would be to surrender an important constitutional obligation. We can not compromise the ability of the Congress to conduct investigatory hearings. I ask my colleagues on the other side of the aisle to place partisan politics aside and to support the institutional integrity of this body.

104 Cong. Rec. S18962, Dec. 20, 1995.

B. Specific Privilege Claims

1. The Attorney-Client Privilege

The White house claims that the privilege allows it to withhold the fourteen memos requested by the Democratic Senators. Government lawyers do not and should not have this privilege. For example, former Assistant Attorney General - Office of Legal Policy and now Georgetown Law School Professor Viet Dinh flatly rejects the notion of such a privilege. A government lawyer's "employer is not a single person but the United States of America," he explained a few years ago. Legal Times, Sept. 7, 1998, p. S42; see also id., March 5, 2001. Professor Ronald Rotunda of George Mason University Law School has declared that "government lawyers work for the government, and not the particular individual whose offices happen to be down the hall," adding "the government cannot plead attorney-client privilege against itself." Legal Times, Aug. 3, 1998, p.1. And Judge Roberts declared four years ago, when nominated to the Court of Appeals by President George W. Bush, "When I served as principal deputy solicitor general, my sole client was the United States." David Savage, LA Times, July 29, 2005. Both the "United States of America" and the "government" obviously include the United States Senate, especially when it is engaged in fulfilling its unique constitutionally mandated responsibility.

The courts agree. The Eighth, District of Columbia and most recently, the Seventh Circuit have ruled that government lawyers are not entitled to claim the attorney-client privilege except in Freedom of Information Act cases. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997); In re Bruce Lindsey, 158 F.3d 1263 (D.C. Cir., 1998); In re: A Witness Before A Special Grand Jury, 2002 U.S. App. LEXIS 7477 (7th Cir. April 23, 2002). (A FOIA request by a member of the general public for documents in the possession of the government which requires no specific justification is of course quite different from a demand by the Senate in the furtherance of its constitutional responsibility.) Although the three cases denied a claim of attorney-client privilege against a grand jury investigation, the Senate's constitutionally

mandated advice-and-consent responsibility with respect to a lifetime appointment to the federal courts is at least as weighty a reason for requiring disclosure of these memos as is a grand jury proceeding dealing with a particular crime. Commenting on another Congressional context, Professor Paul Rice notes:

The logic of the Lindsey decision raises another significant question relating to differences between the branches: Is there no government privilege for purposes of congressional subpoenas? Although Congress is not responsible for prosecuting individual criminal acts, its legislative responsibilities are, in many respects, far more important to the public than the resolution of a single criminal matter.

Paul Rice, Legal Times, Nov. 30, 1998, p.23.

Professor Rice's comment is certainly applicable to the Senate's advice-and-consent responsibility.

Even if the privilege were applicable to Senate advice-and-consent inquiries, it would not support the claim in this context because the conditions for the applicability of the privilege have not been met. These conditions, each of which must be satisfied, were first stated by Wigmore as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 Wigmore on Evidence (McNaughton ed.), p. 904

Judge Charles Wyzanski restated these elements in *United States v. United Shoe Machinery Corp.*:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence

of strangers (c) for the purpose of securing primarily either (I) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

89 F. Supp. 357, 358-59 (D. Mass. 1950). See Paul Rice, The Attorney-Client

Privilege

Unless there is a showing that the memos contain information divulged by the “client” in confidence for the purpose of securing legal advice - and no such showing has been made or even proffered - the privilege does not apply. This is because the privilege belongs only to the client, and does not belong to the lawyer except derivatively. A lawyer’s communications are protected only because they might inadvertently or otherwise divulge what the client told the lawyer in confidence. For this reason, no privilege has been allowed for a government lawyer’s interpretation of an agency regulation, Coastal States Gas v. Department of Energy, 617 F. 2d 854, 863 (D.C.Cir. 1980), a government lawyer’s opinions, evaluations and recommendations, Community S& L Ass’n v. FHLBB, 68 F.R.D. 378, 382 (D.C. Wis. 1975); and a private lawyer’s opinion letter. American Standard Co. v. Pfizer, 828 F. 2d 734, 746 (Fed. Cir. 1987). The basis for these rulings is that there was no showing that the opinions, recommendations, etc. in question would have divulged any confidential information from a client. There is no plausible likelihood of any such divulgence in this context, for the Senate seeks only Judge Roberts’ own views. And even if, contrary to fact, there were such a possibility, no showing thereof has been made.

There are two other reasons why the conditions for the privilege have not been met. The first is that the privilege has been held to be inapplicable where the communication is between one lawyer and another on the same side of a controversy, as is true here. Communications between one lawyer and another on the law or even on litigation strategy on behalf of a client, are not privileged unless the communication contains information obtained from the client. In In re Sunrise Litigation, an attorney sought the privilege for a communication to other lawyers in his firm. Finding no precedent for such a claim, the Court denied it. 130

F.R.D. 560, 572 (E..D. Pa. 1989).⁵

Secondly, the “client” is the United States, or at least the United States Government, of course including the Senate. But as Professor Rotunda and Assistant Attorney General Dinh both pointed out, a lawyer has no privilege against his client.

Thus, even if, contrary to long-standing practice, the Senate were to consider the attorney-client claim, the prerequisites for the privilege have not been satisfied.

What the D.C. Circuit said when denying the privilege to White House Deputy Counsel Bruce Lindsey would seem to apply to this claim. Noting the fact that even conversations between the President and the Vice President on security and other vital matters may have to be revealed, the Court observed:

Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President’s conversation with the most junior lawyer in the White House Counsel’s office is deserving of more protection from disclosure in a grand jury investigation than a President’s discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.
158 F.3d at 1273.

2. Executive Privilege

It is possible that a claim of executive privilege will be made. As the D.C.Circuit noted several years ago, such a claim has two versions: a claim of *presidential privilege*, available only to the President and to some of his close advisers, and a claim of a common law *deliberative privilege*, available in appropriate circumstances to members of the executive branch. In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997). Apart from the Senate’s long-standing refusal to

⁵The lawyer making the claim sought to argue that he was consulting the other lawyers as a “client” but the court found that some of the lawyers who were consulted also represented the first lawyer’s outside client, Sunrise, and denied the privilege. 572n. 35.

honor almost all claims of privilege, only the second could be invoked here and that should be denied on its merits.

As the D.C. Circuit explained,

The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need. This need determination is to be made flexibly on a case-by-case, ad hoc basis. “[E]ach time [the deliberative process privilege] is asserted the district court must undertake a fresh balancing on the competing interests,” taking into account factors such as “the relevance of the evidence,” “the availability of other evidence,” “the seriousness of the litigation,” “the role of the government,” and the “possibility of future timidity by government employees.” For example, where there is reason to believe the documents sought may shed light on government misconduct, “the privilege is routinely denied,” on the grounds that shielding internal government deliberations in this context does not serve “the public’s interest in honest, effective government.”
121 F.3d at 737-38(citations omitted)

In this case, the need is clear: the Senate’s duty to obtain all relevant information in order to fulfill its advise and consent function.

Moreover, certain conditions must be met before the claim of deliberative privilege can be even considered, each of which reflects important concerns.

As the leading text on federal testimonial privileges sums up the matter:

Executive privileges other than those that cover state secrets are not absolute. They are, instead, conditional or qualified and may be overridden by the litigant’s relative need for the information in the context of the particular case. The particular factors indicating that disclosure will have adverse effects upon the public interest must be balanced against the demonstrated need of the party for the materials sought. If the demonstrated need of the party is found to be of more weight, the privilege must yield.
Larkin, Federal Testimonial Privileges Section 5.03, pp. 5-85- 86 (1996)

Here, the need is great — the memos are the best available source of the nominee’s approach to the Constitution and the law — and the claims of a “chilling” effect from disclosure

are vague, general and contradicted by centuries of experience.

3. Work Product

It is possible that some kind of work product privilege will be raised. That too, has no relevance here, and for two reasons.

1. The work-product doctrine was developed primarily to ensure that a party to a litigation does not seek the benefit of the opposing party's work. The leading case is Hickman v Taylor, where the Supreme Court stated the issue as follows:

This case presents an important problem under the Federal Rules of Civil Procedure as to the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen.

329 U.S. 495, 497 (1947) (emphasis added)

In other words, the doctrine is designed to ensure that, as Justice Robert Jackson commented, "discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." Id. at 516 (concurring opinion). See also In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 923-24 (8th Cir. 1997) (doctrine relates to materials prepared by opposing counsel). Obviously, this has nothing to do with the Senate's need for information to meet its constitutional obligations.

2. The issue before the Senate is the state of Judge Roberts' mind, when he was in a decision making capacity on issues that are still current. Where the issue is the lawyer's state of mind, the law is clear that no work-product claim or other privilege is available, Holmgren v. State Farm Ins. Co., 976 F. 2d 573, 577 (9th Cir. 1992) and cases cited; Handguards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 932-33 (N.D. Calif. 1976), nor is there any other basis for withholding information from Senators.

Conclusion

Government officials, particularly in the executive branch, develop a penchant for secrecy. Partly this is for psychological reasons: the possession of a secret enhances the official's sense of his own importance. Also, there is the distrust of outsiders that is the inevitable result of the partisan environment in which much of government is conducted. Finally, there is a genuine, sometimes well-founded fear of political or other embarrassment.

For these and other reasons, effort to maintain secrecy for government documents especially when they underline capital governmental decisions as these memoranda carry a particularly heavy burden of proof. That burden has not been met here.

Constitutional imperatives, long-established congressional and presidential positions and practice, and the law of privilege all require that Judge Roberts' memos as Principal Deputy Solicitor General be provided to the members of the Senate Judiciary Committee who have requested them.

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Addendum

By letter dated June 24, 2002, in connection with the nomination of Miguel Estrada to the Court of Appeals for the D.C. Circuit, eight former Solicitors General expressed concern that government “attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from further disclosure.” This is inherently implausible. As noted in the main memo, despite the Justice Department’s claim that it has a “longstanding policy” against such disclosure, the Department has often turned over to the Senate Judiciary Committee in-house memos by government attorneys in connection with judicial and other nominations including the nominations of Supreme Court Justices William Rehnquist, Stephen Breyer, Ninth Circuit Judges Stephen Trott, Judge Robert Bork and Justice Department nominee William Bradford Reynolds. In 2001, the Administration turned over memos written by a nominee for an EPA post when he worked in the Office of the White House Counsel directly advising the President during the first Bush administration. There is no evidence whatsoever that turning over these memos has frightened government lawyers into not “giving their honest, independent analysis.”

Moreover, under the Presidential Records Act, even a lawyer’s memos to the President are made public within twelve years after a president leaves office, and now Judge Roberts’ has been. Are communications between government lawyers more sacred than communications to the president?

It is also rather surprising to see warnings by Kenneth Starr and Archibald Cox about the dire consequences of divulging communications by government lawyers. It was Starr who brought the cases requiring Clinton Presidential Counsel Bruce Lindsey to divulge confidential communications to the President, requiring testimony and notes of discussions Hillary Clinton and both White House and private counsel. And it was Cox who first pierced the veil of confidentiality for advice to the president when he successfully demanded the documents and

tapes recording to President Nixon's conversations with his advisers.

It should be noted that former Solicitor General Walter Dellinger, who signed the letter and supported non-disclosure of Mr. Estrada's memos does not believe his opposition to disclosure applies to Judge Roberts. In a recent Washington Post OpEd, he wrote:

“Unlike Estrada, Roberts was writing memos not as a civil service lawyer but as a senior political appointee in a policymaking position, and the judgeship at stake isn't any federal judgeship but the Supreme Court itself. These factors and the announced release of volumes of earlier memos to the White House Counsel - undistinguishable as a matter of law from memos to the solicitor general – suggest that the memos to the latter will be made public as well.”

Washington Post, July 27, 2005.

What the Supreme Court said in the Nixon case still holds true and is applicable to the Roberts memos: “[W]e cannot conclude that advisers [to the President] will be moved to temper the candor of their remarks by the infrequent occasions of disclosure.” If an attorney does temper his or her advice in hopes of a future nomination, that attorney has no business holding a position of public trust, either as a government lawyer or in the nominated position.