

Candor Needs Privacy
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Three summers ago, my weekend was interrupted by a call from Archibald Cox, the great Harvard professor and Watergate prosecutor. I had sent him a draft letter being circulated by former Solicitors General protesting a Senate request for materials that judicial nominee Miguel Estrada worked on while in that office. Cox said he had a rule against group letters, but the matter was important enough that he would break it and join the letter with all former Solicitors General then living.

Their unanimous protest against "any attempt to intrude into the office's highly privileged deliberations" stands in contrast to the current call for the release of internal documents from Judge John Roberts' tenure as deputy solicitor general. To disclose such sensitive discussions would undermine our government's ability to litigate cases on behalf of the American people.

Whenever the Solicitor General's office gets involved in a matter, the government's final position is public. In addition, the first of more than 60,000 pages of documents connected to Judge Roberts' tenure in government have already been given to Congress.

What is at stake here, however, is different: the release of internal documents containing candid discussions among the lawyers in the Solicitor General's office preparing to represent the government in court.

These internal discussions have always been covered by the attorney-client, deliberative-process and attorney work-product privileges. And these privileges apply for good reason. The lawyers in the office constantly decide whether to appeal a case, whether to take sides in a pending case, and how to structure an argument. They can't make these decisions without freely and honestly weighing the strengths and weaknesses of different legal arguments.

The free discussions and candid assessments would end if exposed to the publicity and politics of judicial confirmation.

In the words of the former Solicitors General, "Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosure. High-level decision-making requires candor, and candor in turn requires confidentiality."

These were wise words then. They should be heeded now.