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## POLITICS AND POLICY

# Judge Roberts's Rules of Law and Order

## While Deputy Solicitor General, the Nominee Saw State Criminal Prosecutions as Priority

By **JESS BRAVIN**

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WASHINGTON -- Defenders and critics of Supreme Court nominee John G. Roberts Jr. have been parsing his position on issues such as abortion, civil rights and school prayer. But one issue that has gotten less public scrutiny has been his staunch law-and-order record.

During Judge Roberts's time as principal deputy solicitor general in the administration of George H.W. Bush, his office chose to get involved in dozens of state cases to limit the rights of criminal defendants. The cases backed state prosecutors seeking to preserve convictions won with warrantless searches and confessions obtained without Miranda warnings about the right to remain silent; to dismiss claims by inmates of "cruel and unusual punishments"; and to validate aggressive law-enforcement techniques, such as sobriety checkpoints and "protective sweeps" of crime-infested dwellings.

According to Judge Roberts himself, promoting law and order -- a bedrock priority of Republican presidents since Richard M. Nixon -- marked his years in the solicitor general's office, at least as much as limiting abortion rights or opposing racial set-asides. That stance set apart the policies of a "conservative Republican solicitor general" from a "liberal Democratic one," he wrote in a 1993 opinion article published in The Wall Street Journal.

"The question is one of priorities," Judge Roberts wrote in that article, observing that of hundreds of friend-of-the-court, or amicus, briefs his solicitor general's office chose to file, one-third backed local prosecutors against criminal suspects. Because state governments "typically find experienced adversaries like the [American Civil Liberties Union] arrayed against them," the solicitor general provided legal ammunition to "help ensure that the states are not hampered...by erroneous constructions of the Constitution," he wrote.

Judge Roberts's tenure in the solicitor general's office has become a flash point over his confirmation. Senate Democrats argue that his record as second in command to Solicitor General Kenneth Starr in the administration of the current president's father offers important clues to his thinking. They want access to behind-the-scenes papers in 16 pivotal cases during his time working in the office, from 1989 to 1993. The Bush administration on Friday refused the Democrats' request, citing lawyer-client and "deliberative process" privileges to withhold the records.

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In that flap, Democrats are focusing on cases involving civil rights, the

## The Tenth Justice

Because of his influence representing the government before the Supreme Court, the U.S. solicitor general is often called the Tenth Justice. Some major cases argued when Judge John Roberts served as No. 2 to Solicitor General Kenneth Starr:

### Abortion clinics:

Defended federal law barring doctors receiving government grants from abortion counseling. Supreme Court agreed, 5-4. *Rust v. Sullivan*, 1991.



**Graduation prayer:** Argued that benedictions at public-school graduations were constitutional. Supreme Court disagreed, 5-4. *Lee v. Weisman*, 1993.

Source: WSJ research

### Flag burning:

Defended federal Flag Protection Act. Supreme Court ruled it unconstitutional, 5-4. *U.S. v. Eichman*, 1990.



### Sobriety checkpoints:

Argued that police sobriety checkpoints were "reasonable" under the Fourth Amendment. Supreme Court agreed, 6-3. *Michigan v. Sitz*, 1990.

environment and privacy issues. Few politicians court criminal suspects as a constituency, and Senate Democrats are unlikely to challenge Judge Roberts, who currently sits on the federal appeals court for the District of Columbia, for siding with law enforcement over defendants and convicts.

Judge Roberts's views may not do much to alter the high court's current direction. Justice Sandra Day O'Connor, whom Judge Roberts has been nominated to succeed, also generally sided with prosecutors.

Still, Judge Roberts could become a more prominent voice on an issue that divides the high court. In a speech Saturday, Justice John Paul Stevens said "serious flaws," including the risk of executing the innocent, plagued the criminal-justice system, the Associated Press reported. Speaking at the American Bar Association convention in Chicago, he also criticized the use of "victim impact" evidence in capital sentencing hearings, saying that it "serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason."

In contrast, Judge Roberts's office fought to help states speed executions by limiting appeals and to reverse a state-court ruling that such victim-impact statements violated the Eighth Amendment, which guarantees protection from "cruel and unusual punishments."

Already on the court's next term, which begins Oct. 3, are cases pitting condemned prisoners against prosecutors eager to cut off their appeals and others testing the limits of landmark Warren Court rulings that created the Miranda warning and enforced the exclusionary rule, which bars admission of evidence police obtained in violation of constitutional rights, such as the Fourth Amendment protection from "unreasonable searches and seizures."

Several of the positions the solicitor general took under Judge Roberts could re-emerge under a new context: the war on terrorism. Judge Roberts's office intervened to overturn state-court rulings that sobriety checkpoints and bus sweeps -- where police officers board a bus at random and question the passengers -- ran afoul of the Constitution. Judge Roberts's office acknowledged that an "individualized suspicion" generally is required before a search, but contended that the threats of drunk driving and drug trafficking rendered such general searches reasonable under the circumstances. With New York police adopting a policy to search the bags of subway riders, and similar policies under consideration elsewhere, the high court is likely to face again the question of what is "reasonable" in the post-Sept. 11, 2001, era.

Cases already on the court's docket echo many of the issues the solicitor general joined during Judge Roberts's

tenure. In June, for instance, the court agreed to decide whether new DNA evidence suggesting a Tennessee inmate's innocence was enough to block his execution.

In 1992, Judge Roberts helped prepare a brief arguing that if a defendant was convicted in a fair trial, it was constitutional to execute him regardless of new evidence suggesting his innocence. A 6-3 Supreme Court agreed, and the Texas inmate was executed four months later.

Conservatives long have complained that judge-made rules such as the Miranda warning, intended to deter police misconduct, come at too high a cost -- protecting the guilty -- and under Judge Roberts, the solicitor general's office fought to pare them back. In 1989, for instance, the office backed Illinois prosecutors fighting a state-court decision that threw out a drug conviction because police searched a home with neither a warrant nor permission of its occupant, but rather on the say-so of an "infrequent visitor." A 6-3 Supreme Court sided with the solicitor general, finding that the police, though mistaken, "reasonably" believed the visitor had authority to let them search the home.

The court will hear a related question this fall -- whether police can search a home when one occupant consents and the other objects.

To be sure, Judge Roberts wrote in the 1993 Journal opinion article that his office didn't "support the states reflexively" if convincing legal arguments couldn't be found. Indeed, on rare occasion the office sided against the state, as in a 1991 case in which it argued that a lower court made it too hard for an inmate beaten by guards to prove he had suffered an unconstitutional "cruel and unusual" punishment.

Moreover, as a political appointee with no experience as a prosecutor, Judge Roberts often left criminal cases to others in the Justice Department. In private practice, he, like other attorneys, sometimes represented criminal defendants to fulfill his pro bono obligation. With his internal memorandums withheld by the Bush administration, Judge Roberts's personal views on any particular position taken by his office are uncertain.

His 1993 article sought to call attention to the solicitor general's criminal-justice record while he served in the office -- in contrast with the priorities of the incoming Democratic solicitor general, Yale law professor Drew Days. Judge Roberts may have been particularly sensitive to such partisan distinctions at the time, as Senate Democrats recently had blocked his nomination to the appeals court by the first President Bush so that his successor, Bill Clinton, could fill the vacancy.

Judge Roberts wrote that the solicitor general's amicus briefs could make the difference at the Supreme Court, citing studies showing that the side the government backs "prevails about 75% of the time."

Then there is the other 25%.

On Election Day 1992, Judge Roberts himself argued before the Supreme Court that police should be able to falsely promise prisoners leniency in exchange for confessions, and that convicts had no right to raise Miranda violations in federal habeas corpus petitions if the claim already had been made in state court. A 5-4 Supreme Court rejected the argument.

In a sense, however, the opinion could be marked as a victory for the solicitor general's office. The court-appointed private attorney representing the prisoner was Seth Waxman -- who later would serve as solicitor general under President Clinton.

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