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Improper Advances

Talking dream jobs with the judge out of court.

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Slate.com
August 17, 2005

Four days before President Bush nominated John G. Roberts to the Supreme Court on July 19, an appeals court panel of three judges, including Judge Roberts, handed the Bush administration a big victory in a hotly contested challenge to the president's military commissions. The challenge was brought by Salim Ahmed Hamdan, a Guantanamo detainee. President Bush was a defendant in the case because he had personally, in writing, found "reason to believe" that Hamdan was a terrorist subject to military tribunals. The appeals court upheld the rules the president had authorized for these military commissions, and it rejected Hamdan's human rights claims—including claims for protection under the Geneva Conventions.

At the time, the close proximity of the court's decision and the Roberts nomination suggested no appearance of impropriety. Roberts had been assigned to hear the appeal back in December, and it was argued on April 7. Surely he had decided the case long before the administration first approached him about replacing Supreme Court Justice Sandra Day O'Connor, who had announced her retirement on July 1. As it turns out, however, the timing was not so simple.

The nominee's Aug. 2 answers to a Senate questionnaire reveal that Roberts had several interviews with administration officials contemporaneous with the progress of the Hamdan appeal. One occurred even before the appeal was argued. Attorney General Alberto Gonzales interviewed the judge on April 1. Back then, it was an ailing Chief Justice William H. Rehnquist, not Justice O'Connor, who was expected to retire. The attorney general, of course, heads the Justice Department, which represents the defendants in Hamdan's case. And as White House counsel, Gonzales had advised the president on the requirements of the Geneva Conventions, which were an issue in the case.

The April interview must have gone quite well because Roberts next enjoyed what can only be labeled callback heaven. On May 3, he met with Vice President Dick Cheney; Andrew H. Card Jr., the White House chief of staff; Karl Rove, Bush's chief political strategist; Harriet Miers, the White House legal counsel; Gonzales; and I. Lewis Libby, the vice president's chief of staff. On May 23, Miers interviewed Judge Roberts again.

Hamdan's lawyer was completely in the dark about these interviews until Roberts revealed them to the Senate. (Full disclosure: Professor Luban is a faculty colleague of Hamdan's principal lawyer.) Did administration officials or Roberts ask whether it was proper to conduct interviews for a possible Supreme Court nomination while the judge was adjudicating the government's much-disputed claims of expansive presidential powers? Did they ask whether it was appropriate to do so without informing opposing counsel?

If they had asked, they would have discovered that the interviews violated federal law on the disqualification of judges. Federal law deems public trust in the courts so critical that it requires judges to step aside if their "impartiality might reasonably be questioned," even if the judge is completely impartial as a matter of fact. As Justice John Paul Stevens wrote in a 1988 Supreme Court opinion, "the very purpose of [this law] is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." The requirement of an appearance of impartiality has been cited in situations like the one here, leading to the disqualification of a judge or the reversal of a verdict.

In 1985, a federal appeals court in Chicago cited the requirement of the appearance of impartiality when it ordered the recusal of a federal judge who, planning to leave the bench, had hired a "headhunter" to approach law firms in the city. By mistake—and, in fact, contrary to the judge's instructions—the headhunter contacted two opposing firms in a case then pending before the judge. One firm rejected the overture outright. The other was negative but not quite as definitive. Writing for the Court of Appeals, Judge Richard A. Posner emphasized that the trial judge "is a judge of unblemished honor and sterling character," and that he "is accused of, and has committed, no impropriety." Nevertheless, the court ordered the judge to recuse himself because of the appearance of partiality. "The dignity and independence of the judiciary are diminished when the judge comes before lawyers in the case in the role of a suppliant for employment. The public cannot be confident that a case tried under such conditions will be decided in accordance with the highest traditions of the judiciary." Although both law firms had refused to offer him employment, the court held that "an objective observer might wonder whether [the judge] might not at some unconscious level favor the firm ... that had not as definitively rejected him."

In the fall and winter of 1984, a criminal-trial judge in the District of Columbia was discussing a managerial position with the Department of Justice while the local U.S. attorney's office—which is part of the department—was prosecuting an intent-to-kill case before him. Following the conviction and sentence, the judge was offered the department job and accepted. On appeal, the United States conceded that the judge had acted improperly by presiding at the trial during the employment negotiations. It argued, however, that the conviction should not be overturned. The appeals court disagreed. Relying on Judge Posner's opinion in the Chicago case, as well as the rules of judicial ethics, the court vacated the conviction even though the defendant did not "claim that his trial was unfair or that the [the judge] was actually biased against him." The court was "persuaded that an objective observer might have difficulty understanding that [the judge] did not ... realize ... that others might question his impartiality."

So, the problem in Hamdan is not that Roberts may have cast his vote to improve his chances of promotion. We believe he is a man of integrity who voted as he thought the law required. The problem is that if one side that very much wants to win a certain case can secretly approach the judge about a dream job while the case is still under active consideration, and especially if the judge shows interest in the job, the public's trust in the judiciary (not to mention the opposing party's) suffers because the public can never know how the approach may have affected the judge's thinking. Perhaps, as Judge Posner wrote, the judge may have been influenced even in ways that he may not consciously recognize.

A further complication here is that Roberts' vote was not a mere add-on. His vote was decisive on a key question of presidential power that now confronts the nation. Although all three judges reached the same bottom line in the case, they were divided on whether the Geneva Conventions grant basic human rights to prisoners like Hamdan who don't qualify for other Geneva protections. The lower court had held that some provisions do. Judge Roberts and a second judge rejected that view. The third judge said Geneva did apply, but found it premature to resolve the issues it raised. Hamdan has since asked the Supreme Court to hear the case.

Roberts did not have to sit out every case involving the government, no matter how routine, while he was being interviewed for the Supreme Court position. The government litigates too many cases for that to make any sense. But Hamdan was not merely suing the government. He was suing the president, who had authorized the military commissions and who had personally designated Hamdan for a commission trial, explaining that "there is reason to believe that [Hamdan] was ... involved in terrorism."

Moreover, the Hamdan appeal is the polar opposite of routine for at least two reasons. First, its issues are central to the much-disputed claims of broad presidential power in the war on terror. Second, the court's decision on the Geneva Conventions has a spillover effect on the legality of controversial interrogation techniques used by the government at Guantanamo and elsewhere.

That is because the same provision of the Geneva Conventions that would protect Hamdan from unfair trials also protects detainees from cruel, humiliating, or degrading treatment. The D.C. Circuit's decision rejecting the Geneva Conventions' trial protections—a decision that hinged on Roberts' vote—also strips away an important legal safeguard against cruel and humiliating treatment that may fall just short of torture.

Given the case's importance, then, when Gonzales interviewed Roberts for a possible Supreme Court seat on April 1, the judge should have withdrawn from the Hamdan appeal. Or he and Gonzales, as the opposing lawyer, should have revealed the interview to Hamdan's lawyer, who could then have decided whether to make a formal recusal motion. The need to do one or the other became acute—indeed incontrovertible—when arrangements were made for the May 3 interview with six high government officials. (We don't know how long before May 3 the arrangements were made.)

We do not cite these events to raise questions about Roberts' fitness for the Supreme Court. In the rush of business, his oversight may be understandable. What is immediately at stake, however, is the appearance of justice in the Hamdan case and the proper resolution of an important legal question about the limits on presidential power. Although the procedural rules are murky, it may yet be possible for Judge Roberts to withdraw his vote retroactively. That would at least eliminate the precedential effect of the opinion on whether the Geneva Conventions grant minimum human rights to Hamdan and others in his position. Better yet, the Supreme Court can remove the opinion's precedential effect by taking the Hamdan case and reversing it.

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