2006

How Will Alito and Roberts Shape the Court?

Joshua I. Schwartz
George Washington University Law School

Brian K. Landsberg
University of the Pacific, blandsberg@pacific.edu

DEBATE CLUB 1/9/06

HOW WILL ALITO AND ROBERTS SHAPE THE COURT?

Joshua I. Schwartz and Brian K. Landsberg debate.

This Week's Entries: Monday | Tuesday | Wednesday | Thursday | Friday

Chief Justice John G. Roberts and Supreme Court nominee Samuel A. Alito, Jr. have many things in common—they're both Ivy Leaguers, each was a sitting federal judge when nominated, they share a respect for judicial pragmatism. Perhaps more important, both also worked for the Office of the Solicitor General where they fought hard for conservative causes, from overruling *Roe* to limiting the Voting Rights Act.

Those who know the SG's office best believe that it shapes lawyers in significant ways. What would it mean to have these two lawyers who practiced there on the Supreme Court?

Joshua I. Schwartz is Professor of Law at the George Washington University Law School and served in the Office of the Solicitor General from 1981 to 1985. **Brian K. Landsberg** is Professor of Law at the McGeorge School of Law and served in the Department of Justice, Civil Rights Division from 1964 until 1986.

Schwartz: 1/9/06, 10:02 AM
I am pleased to have this opportunity, together with Professor Brian Landsberg, to explore the impact of service in the Solicitor General's Office upon the qualifications of a nominee for the Supreme Court of the United States.

Brian, let me start with some background facts about Judge Alito and Justice Roberts, revealing significant differences, as well as similarities:

Judge Samuel Alito was an Assistant to the Solicitor General from 1981-1985. An Assistant to the S.G. is a line attorney and not a political appointee. Alito served for five years in this small office that handles, among other things, the federal government's litigation in the Supreme Court of the United States, before he moved on to a political appointment as a Deputy Attorney General in the Office of Legal Counsel. Alito was hired for the competitive position as an Assistant to the S.G. from the job of top appellate Assistant United States Attorney in the District of New Jersey. Alito's qualifications for the job as Assistant to the S.G. were typical of those hired in the office, and his workload in the office generally was a typical one. With the exception of a handful of politically sensitive "agenda" cases that Alito handled, there was little to distinguish Alito from any other assistant.

Chief Justice John Roberts also served in the Solicitor General's office, but in a somewhat different capacity. He was the Principal Deputy Solicitor General from October 1989 until January 1993—for most of the term of President George H.W. Bush. The position that Roberts held was known at one time as that of the "political deputy." Indeed, the position was first created in Ronald Reagan's second term because of concern that the senior Deputy Solicitor

General, a career civil servant, lacked a demonstrable commitment to the President's political and legal values.

When the Solicitor General was for some reason recused from a particular case or when the S.G. needed politically-sympathetic counsel, the Principal Deputy Solicitor General would fulfill that role. Although this was Roberts' job for his term in the Solicitor General's office, press accounts indicate that his tenure was distinguished by little visible political influence.

Brian, I think our readers are entitled to know several things about where I am coming from with regard to Judge Alito. I worked together with Sam Alito in the S.G.'s office as a fellow assistant from 1981-1985, and I counted Sam as a friend. On the other hand, I consider myself to be a liberal democrat. Based on what I now know, I support his confirmation.

To get the debate going, let me introduce here propositions that I hope to elaborate on in subsequent postings:

Much of the work of Assistants to the Solicitor General is to evaluate cases for appeal and certiorari, turning many down—over the objections of other government lawyers—for a host of reasons. This job is distinguished by the degree to which the job calls for the exercise of judgment, rather than the exercise of advocacy skills. It is very good training for the bench.

The work of Assistants in the Solicitor General's office trains them in a kind of incrementalist/gradualist approach to the law that emphasizes strong respect for precedent. In another era, this approach would be considered conservative lawyering.

Sam Alito, came naturally to this kind of conservative lawyering, and practiced it throughout his tenure in the S.G.'s Office, including in the rare, but significant, "agenda" cases that he handled.

Because of the way he conducted himself as an assistant, movement conservatives like Ed Meese by 1985 likely had real doubts as to whether Alito was "one of them." I suspect that this is what impelled Alito to write the honest, but surprisingly pointed 1985 "job memo" when he applied for the more political job in the Office of Legal Counsel.

Landsberg: 1/9/06, 01:24 PM
Joshua, thank you for setting the stage for our discussion of the impact of service in the Solicitor General's office upon the qualifications of a nominee for the Supreme Court of the United States.

I think you have shown one important distinction between Judge Alito's service in the S.G.'s office and Chief Justice Roberts' service as the political deputy. I would like to elaborate on a couple of other points you made.

First, Alito was, indeed, a line attorney, not a political appointee. As you know, Joshua, there are two types of

line attorney in the Solicitor General's office. Most, like Judge Alito and you, come to the job for a few years and then move on. For them, the job is a training ground and a stepping stone. Others, such as longtime deputy Solicitor General Lawrence Wallace and assistants Irv Gornstein and Ed Kneedler, make a career of the job. All, however, are distinguished by their strong credentials, which generally include serving on a top law review and clerking on a federal court of appeals.

Two questions are implicit in our topic. First, do the positions Alito took as an Assistant to the Solicitor General shed light on his likely positions in Supreme Court cases if he is confirmed? Second, does the experience of serving as an Assistant to the Solicitor General strengthen his qualifications as a Supreme Court nominee?

Joshua, you've made an important point in telling us that much of the work of the assistants is to evaluate cases for appeal and certiorari. Indeed, this is the one aspect of the Solicitor General's staff's work that can be clearly attributed to one person rather than to a team. The briefs that the S.G.'s office files are team products, reflecting the work of agency lawyers, Justice Department litigating division lawyers, Assistants to the Solicitor General, the Deputy Solicitor General, and the Solicitor General. They shed little light on personal views. However, the recommendations whether to appeal or petition for certiorari are made by individuals and then reviewed up the line. They shed more light on personal views.

My own experience dealing with Sam Alito came as a result of my job as Chief of the Appellate Section of the Civil Rights Division. We co-authored a brief in an important affirmative action case, and I could not say who contributed what ideas to that brief. However, I also recall with some concern one of his recommendations. In 1984, Alito considered whether the Solicitor General should file an amicus brief in *Memphis Police Department v. Garner*, on the question whether the Memphis police violated the Constitution when they shot in the back a fleeing unarmed 15 year old burglar. As you note, Alito took a conservative approach; here, that meant he recommended against filing the brief, because United States law enforcement practices were not at stake, just the practices of some states. What disturbed me about his recommendation, however, was that his substantive analysis glossed over the real human tragedy represented by the unnecessary death of this youth, and that he brushed off the argument of staff attorneys in the Civil Rights Division that the shooting amounted to summary punishment, without due process of law. The memorandum reflected careful and thorough legal analysis, but very little understanding of the real world impact of the Memphis practice. My reaction at the time was to write that his approach "would literally destroy one of our most effective civil rights enforcement programs...."

This Week's Entries: Monday | Tuesday | Wednesday | Thursday | Friday

Schwartz: 1/10/06, 05:52 PM
Brian, in your initial posting you broke out two questions to consider—eventually: (1) Whether the positions that Alito took as an Assistant to the S.G. tell us something useful about his likely positions as a Supreme Court Justice? and (2) Whether the experience of serving as an Assistant to the S.G. strengthens Alito's qualifications as a Supreme Court nominee? For reasons of space, no doubt, your Monday posting then focuses exclusively on aspects of the first question.

Let me start today with the second question, though I get to the first at the end of this posting. I suspect that—from an inside the Beltway perspective—one of the least controversial things I said in my initial posting is that the work of assistants to the S.G. is fine training for the bench. For those who have a different background, however, this deserves some elaboration.

At least half of the time of assistants in the S.G.'s office is spent on evaluating decisions adverse to the government as possible candidates for appeal, or rehearing en banc by a court of appeals, or a cert petition to the Supreme Court. Many or these recommendations made by Assistants to the SG are against seeking further review, even though a government agency and/or lawyers elsewhere in the Department of Justice have recommended the appeal, en banc, or cert petition. An assistant's recommendations against seeking further review in such a case that the government has lost will generally reflect one or more of the following conclusions by the assistant to the S.G.:

. that the government's position argued in the lower courts is *wrong*;
. that the government has failed to preserve (by raising them in the lower courts) key arguments that ideally should be made on appeal;
. that the government has failed to make a factual record in the lower courts that is necessary to support legal arguments that ideally ought to be made on further review in a case of its kind;
. that the government's prospects of success in further appellate review are seriously compromised by poor lawyering by the government lawyers at earlier stages of the proceedings;
. that the facts of the particular case make it an unattractive "vehicle" for advancing the legal arguments that the government would like to advance in a case of its kind; the risk is excessive that the case will become a "hard case that makes bad law"; or
. that the government's position is at best of uncertain strength on the law, and seeking further review accordingly would be an unwise expenditure of the government's limited number of "slots" for seeking certiorari or its limited fund of credibility with the Supreme Court.

Assistants to the SG are trained in applying these criteria. They get used to delivering unwelcome recommendations to government clients and lawyers. Some of these conclusions require a kind of independent judgment, the exercise of which is very good preparation for a future judge or justice.

Others involve the ability to think strategically with a long term horizon as to how best ultimately to establish the government's legal objectives. Still others entail the ability to think about the long run interests of the government, and to moderate the short term policy-driven judgments of the incumbent administration in the White House. Alito clearly has all of these capabilities and abundant experience in their exercise in difficult cases.

Brian, now we are approaching the first issue you identified in your Monday posting. In some instances that have gotten attention in the media, including Alito's memos about official immunity and *Roe v. Wade*, Alito is being criticized from the liberal side for memos written in exercising the case-winowing responsibilities that I am describing. (I am not attributing this to you, of course, Brian.) He is criticized for these memos even though Alito was actually attempting—not always successfully—to moderate the position that the government was going to take. Although one can learn from his corpus of memoranda, taken as a whole, that Alito is inclined to be quite a conservative judge, one has to be very cautious in drawing any strong conclusions from these memos about what Alito's own positions as a Supreme Court Justice would be on specific matters.

This Week's Entries: Monday | Tuesday | Wednesday | Thursday | Friday

Landsberg: 1/11/06, 09:10 AM
Joshua, let's explore further your point that the work an assistant to the Solicitor General performs strengthens Judge Alito's qualifications as a Supreme Court nominee. I suppose the ideal Supreme Court Justice has superb technical skills and the ability to distinguish long term interests from short term policy-driven judgments. The Solicitor General's office does indeed train its lawyers in both the technical side and the balancing of long term and short term interests. I do think, however, that the ideal Supreme Court Justice must also possess more than just technical skill and the ability to distinguish the long term from the short term.

Here we encounter an anomaly. The other qualities we look for in a Supreme Court Justice are more akin to what we might look for in a Solicitor General or Attorney General, rather than in one of their assistants. For the Solicitor General and Attorney General must act on the recommendations they receive from their assistants, just as a Supreme Court Justice must act on the cases that come before him or her. We want Justices with deep wisdom, with gravitas, and with an understanding of the world. We also want a breadth of experience represented on the Supreme Court. As you know, Joshua, some of the great former justices served as Attorney General or Solicitor General; some were governors or senators; even a former President, William Howard Taft, was appointed to the Supreme Court. In recent years, however, a new pattern of appointments has emerged, with a technocratic tinge: Every sitting justice except for Justice O'Connor came to the court after serving as a federal judge on a United States Court of Appeals. Justices Souter and O'Connor are the

only sitting justices who have been elected to high office. So while the training that Judge Alito received many years ago in the Solicitor General's office is valuable, it is no substitute for the other, perhaps intangible, qualities that are so important in a Supreme Court Justice.

Finally, Joshua, let me briefly address the question of whether it makes sense to draw conclusions from Alito's memos as assistant to the Solicitor General. I agree that one should be careful in using these memos to predict his future positions as a Supreme Court Justice. Perhaps today's Judge Alito is more seasoned and wiser than yesterday's young ambitious assistant to the Solicitor General. On the other hand, the memos do provide insight into his thought processes at the time, and it is legitimate to examine his record since then and to ask him questions designed to determine how, if at all, his thinking may have changed over time.

This Week's Entries: Monday | Tuesday | Wednesday | Thursday | Friday

Schwartz: 1/12/06, 09:10 AM
Brian, thanks for your thoughts in your last posting. You argue that Solicitor General's Office training is not, by itself, sufficient to make one a good Justice. Furthermore, you say that we want wisdom, gravitas, and an understanding of the world on the court. I can hardly disagree with either point. But where are those qualities to be found, and how are they to be identified? Accordingly, I think you are undervaluing the importance of having the technical abilities and substantive mastery of law that Sam Alito both learned and honed in his experience in the Office of the Solicitor General.

In addition, I find more ground to hope that, as a Justice of the Supreme Court, Alito will display many of the qualities that you are looking for. In this connection, I was intrigued by your criticism in your first posting of Alito's memorandum for the S.G. recommending against amicus participation in Supreme Court review of *Garner v. Memphis Police Department*. As you know, Brian, the Supreme Court ultimately affirmed the 6th Circuit decision in *Tennessee v. Garner*. The Solicitor General, following Alito's recommendation, filed no brief in the case.

Intrigued by your comments about Alito's memo in *Garner*, I discovered late yesterday that this memo is available online among the documents produced by the Archives in connection with the Alito confirmation hearings. I learned two important things by reading Alito's 1984 memo.

The first concerns the lineup of interested players within the government and their positions. The Office of Legal Policy, a focus of movement conservatism within the Reagan Justice Department, was pushing the Solicitor General to file an amicus brief in the case in support of the Memphis Police. The Civil Rights Division took no official position. It is pretty clear to me that the Civil Rights Division staff wanted to recommend participation on the other side, but that Assistant Attorney General Brad Reynolds refused to permit the division to make that recommendation. And the Criminal

Division opposed amicus participation, asserting that the limitation on law enforcement created by the court of appeals' opinion was no threat to existing federal law enforcement practices. So, in institutional terms, what Sam Alito did was to side with the Criminal Division against the ideologically driven recommendation of the Office of Legal Policy. In doing so, he at least kept the government from actively downplaying or opposing the policy concerns that had animated the Civil Rights Division staff position. Any Assistant to the S.G., imbued with the traditional process conservatism of the office, would have recommended the disposition that Alito did. I think that relatively few would have troubled to recognize that the case presented a morally serious problem, and to explore that problem as Alito did.

This is the second important point that the memo reveals to me: A careful reading of Alito's memo brought back to me clearly why I think he in fact has the very qualities, wanted in a Supreme Court Justice, that you describe. Let our readers judge this 15-page memo for themselves. But for now, I just want to record my own judgment that this was not only a wide-ranging survey of the relevant law, but a serious discussion of the moral and philosophical values—yes, Alito talks explicitly in those terms in the memo—as well as the practical considerations underlying the fleeing felon rule. I suspect that you would have struck a different moral balance, but Alito never even got a Civil Rights Division recommendation elaborating the argument that the federal government should oppose the unrestricted fleeing felon rule. Alito overcame the voice of ideology in the Reagan Administration and prevented the S.G. from filing a brief supporting a position that the Supreme Court ultimately rejected. Brian, I think there is a lot to like in what I see here!

Landsberg: 1/12/06, 01:32 PM
Joshua, supporters of Judge Alito have stressed that we should not dwell on his positions as a young lawyer in the Department of Justice, because much time has passed and he was acting then as an advocate rather than as a judge. Yet you seem to be arguing that his experience from his days as an Assistant to the Solicitor General reflects that he has the very qualities of wisdom, gravitas, and understanding of the world that a Supreme Court Justice should have. I believe that close examination of Alito's memorandum regarding when the police may use deadly force against a fleeing burglar raises very troubling questions about his general approach to sensitive issues of the balance between law enforcement and individual rights. Here's the memorandum I wrote in 1984. Of course, we now have the benefit of the Supreme Court's decision in the case, which reveals the weaknesses in the Alito memorandum.

I believe you have accurately described the bureaucratic scenario, Joshua. The Solicitor General had received one ideologically driven recommendation to support the police right to use deadly force against a fifteen year old unarmed fleeing burglar. He had received another recommendation to stay out of the case, since federal law enforcement agencies would not use deadly force in such circumstances. The Civil

Rights Division had not made a formal recommendation, but Alito had a Civil Rights Division staff memorandum that argued that the arbitrary use of deadly force, not reasonably related to a legitimate goal, is punishment and therefore is forbidden by the due process clause. The Civil Rights Division has the responsibility of prosecuting law enforcement officers who willfully deprive individuals of life or liberty without due process of law, so the case potentially affected an important Department of Justice program.

The Alito memorandum brushes off the Civil Rights Division staff recommendation in one brief paragraph. Its reasoning on this point is very weak and distorts the Civil Rights Division staff position. Alito argued: "If shooting a fleeing felony suspect is punishment, ... then such a suspect may never be shot." But the Division attorneys had referred only to "arbitrary" shootings that were "not reasonably related to a legitimate goal." I would think that we want Supreme Court Justices whose opinions accurately portray and respond to the positions of the parties. This paragraph does not do so.

Most of the Alito memorandum discusses the Fourth Amendment. I acknowledged in my response that he had provided a "thoughtful and complete review of the weaknesses of the Court of Appeals" analysis. However, I pointed out several shortcomings of the Alito Fourth Amendment analysis. The Supreme Court ultimately ruled, contrary to Alito, that the shooting violated the Fourth Amendment. Alito argued that killing a fleeing felon was not a "seizure". The Supreme Court ruled that it was. Most remarkably, he argued that "the state is justified in using whatever force is necessary to enforce its laws." This position would entirely eviscerate the Fourth Amendment's requirement that the seizure be "reasonable," as the Supreme Court subsequently held.

Joshua, I agree that Alito resisted the ideological recommendation to file a brief supporting the use of deadly force. However, what is troubling is the insensitivity to individual rights in his legal analysis. Part of the Supreme Court's job is to protect individuals from government intrusions into individual rights. If we are to look to Alito's experience in the Solicitor General's office as a clue to what kind of justice he would be, this memorandum seems very troubling indeed.

This Week's Entries: Monday | Tuesday | Wednesday | Thursday | Friday

Schwartz: 1/13/06, 08:23 AM

Brian, you are quite right to detect a subtle tension among some of the arguments made in favor of Judge Alito. Of course, not all of these arguments are ones that I have made and some are ones that I would not embrace. Obviously, Judge Alito's confirmation may be supported from a number of perspectives, just as it could be opposed from varying perspectives. Nonetheless, I think I should try to confront your point head on in this, my final posting.

To be sure, I have argued that some of Alito's critics have unfairly criticized him on the basis of some of the memos he wrote, including some that he wrote as an Assistant to the Solicitor General. But my point never was that nothing can be learned from memos of this kind. Instead I have tried to explain that these memos have to be put in an institutional context, as I tried to do for the *Garner* memo that we have already discussed. One thing that I learned from Garner was that Alito found a way to avoid advocating the position ultimately rejected by the Supreme Court and thus reined in a piece of the ideologically-driven agenda of the Reagan Justice Department. And although I understand that you disagree with Alito's moral and philosophical calculus in *Garner*, I invite our readers to see for themselves whether they do not agree that his memo shows him to be a subtle and serious "judge" of the relevant considerations.

Similarly, I think it significant that in his much-discussed memos Alito opposed taking the extreme positions favored by certain Reagan political appointees on both the overruling of *Roe v. Wade* and on official immunity for illegal wiretapping. These suggest to me a tendency to seek a less extreme position than ideological warriors on the right might prefer, even though Alito may personally have substantial sympathy for the objectives of the right in these cases.

Please note that unlike some of the liberal friends of Judge Alito, I am not suggesting here, and have never suggested, that he is not quite conservative in his judicial philosophy. That he surely is. But I am suggesting that his memos demonstrate that while he shares some of the values of the contemporary conservative legal movement, he also shows an adherence to a different set of genuinely conservative values: gradualism, incrementalism, respect for precedent, concern about unintended consequences, and opposition to judicial activism. There is lot to like and respect in those values and they are likely to have the practical effect of moderating Alito's positions on a wide range of hot-button issues. In sum, I think Alito's memos provided significant, though subtle, evidence that he is was likely to be—as he has in fact been on the bench—a judicial conservative in both of these significantly different senses.

In case it is not obvious why this matters, let us talk for a moment, in closing, about *Roe v. Wade*. Although I have absolutely no private knowledge of this matter, I think it is certainly likely that Sam Alito still believes that *Roe* was wrongly decided as an initial matter. As you know, Brian, many quite liberal law professors who are pro-choice as a matter of policy have great difficulty with the judicial activist aspect of *Roe* that almost surely troubles Alito. (Many in this liberal crowd also believe that the overruling of *Roe* might be one of the best possible things that could happen for the political fortunes of the Democratic party.) At the same time, Alito's process-oriented conservatism reassures me that he would think long and hard before ever voting to overrule *Roe*. I expect he would be inclined to find ways to avoid addressing that issue unless it were unavoidably squarely presented; he would not reach out to confront the issue. And you know well, Brian, how much flexibility the Supreme Court has to avoid sensitive matters when it wants

to.

And were the issue about *Roe* ever squarely and unavoidably presented, I suspect Alito would lose a lot of sleep in deciding how to vote. Here's my final point: If we were not—almost all of us—so sure that our own positions on *Roe*, whatever they are—are the only tenable ones—isn't that exactly what you would want in a Supreme Court Justice?

Landsberg: 1/13/06, 06:49 PM

Joshua, we seem to agree on one basic point: Judge Alito's experience in the Solicitor General's office sheds light on his likely general approach to deciding cases, but does not tell us a lot about how he would decide a particular substantive issue. Even though the Solicitor General has sometimes been called the Tenth Justice, both the Solicitor General and Assistants to the S.G. ultimately function as attorneys for a client. While the client is the United States, the interests of the client are generally identified by looking to the policies of the president. A justice, on the other hand, has no client. Judge Alito has testified that as a judge he puts his personal ideology aside and tries to rule based on the law and the facts. There is no reason to question that testimony. So I am not suggesting, for example, that if the issue of shooting a fleeing suspect were to come before the court again, a Justice Alito would take the same position that he took as an assistant to the Solicitor General.

My deeper concern, Joshua, is what the Alito memorandum about the *Garner* case shows about his likely general approach to deciding cases. As you point out, there is much to applaud in his memorandum, since he does resist the ideological agenda that one group of Justice Department lawyers urged on him. However, if that memorandum is typical of his general approach, there is also much to trouble us. The memorandum represents more than the conservative values you mention of gradualism, incrementalism, respect for precedent, concern about unintended consequences, and opposition to judicial activism. It is an example of rationalizing an archaic and outmoded rule, while giving short shrift to the value of individual life, rejecting the carefully considered positions of the American Law Institute, and ignoring changes in our society. Although the court has said the concept of reasonableness found in the Fourth Amendment requires balancing of values, the Alito memorandum elevates the value of questionable law enforcement techniques that federal law enforcement agencies had rejected. At the same time, it places little value on the individual's right to be free from arbitrary deprivation of life.

Finally, you pose the question of what we should predict about Judge Alito's approach to *Roe v. Wade* if he becomes Justice Alito. I agree that he is unlikely to use a blunderbuss to blast *Roe* out of the judicial canon. However, this is one area where he is also unlikely to simply accept the status quo. Rather, using those conservative values of gradualism and incrementalism,

we are likely to see him nibble away at the foundations of *Roe*. I'm sure you recall, Joshua, that the NAACP was unable to overturn *Plessy v. Ferguson*'s separate but equal doctrine overnight. Its litigation gradually eroded the foundations of that doctrine, and eventually *Brown v. Board of Education* held the doctrine was wrong. The question that troubles supporters of *Roe* is whether Judge Alito will contribute to its erosion if confirmed. If enough decisions undermine *Roe*, is it not likely that at that point a Justice Alito will say that the Constitution does not recognize a woman's right to choose? Perhaps he would lose some sleep in the process, as you suggest. But if, at the end of that night, individual liberties lose out to governmental power, women will take no comfort from his sleeplessness. It seems clear that for many of Judge Alito's supporters and many of his opponents, it is the substance of the law, not the process by which it is determined, that is driving the debate.