

THE

DAILY

Op-Ed: Supremely unsecretive

A more leak-prone high court would change the institution for the worse

By Walter Olson Saturday, July 7, 2012

Profiles of Chief Justice John Roberts suggest he's keen on protecting the Supreme Court's interests as an institution, wants it to speak with a more unified voice than it did in the Rehnquist era, and sees himself as a leader, no less than Antonin Scalia, of the court's conservative wing. What a terrible month he's been having on all three fronts.

By adopting a "saving construction" for Obamacare widely seen as unconvincing — the equivalent of nudging a golf ball a few feet from the weeds back onto the fairway — Roberts found himself stranded between disapproving foursomes of his colleagues, a lonely isthmus on which it's the chief, rather than the cheese, who stands alone.

True, Roberts did manage to assemble a 7-2 majority (corralling Justices Stephen Breyer and Elena Kagan) behind the idea that some conditions on federal grant programs are unconstitutionally coercive toward the states. That sleeper Spending Clause holding is important, but it's hasn't gotten wide press attention yet since it's not the game the spectators came to see.

So the court is fractured, and plenty of conservatives now see the chief as someone willing to hold a finger in the political wind at principle's expense. That's nothing new in itself (see "Burger Court").

What is new and highly disturbing is the way 1st Street NE, not long ago reputed nearly leakproof, has emerged as Washington's newest great public fountain, most spectacularly in Jan Crawford's Sunday CBS report based on details that could only have come from deep inside the court. Other writers followed with reports explicitly based on court leaks.

Worst of all, it's now clear that deliberations at the court leaked before all the justices had made up their minds — which, in a disastrous portent for the court's political independence, led to outside campaigns aimed at the wavering Roberts. In a May 14 speech, to quote one report at the time, Sen. Patrick Leahy, D-Vt., "directly addressed Chief Justice John Roberts, urging him in a sharply partisan tone" not to overturn the law.

Washington lawyer Stewart Baker has pointed out how strange that timing was: Since conference had been held six weeks earlier, anyone not in possession of confidential

information would have assumed it far too late to persuade Roberts of anything. What did Leahy — and other Washington actors who jumped into the same debate in May — know, and when did they know it?

Not long ago, almost everyone would have deemed it flagrantly improper for outsiders to pressure individual Supreme Court justices to vote one way or another in pending cases. If deliberations are now to be laid open to public scrutiny through leaks — so that we learn who's still uncommitted and might be reachable on which issues — we can expect such pressure to become routine. And the independence from political interference that the Framers planned — and on which the court's authority rests — will have become a thing of the past.

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