

NATIONAL news

WHO IS JOHN ROBERTS?

Lawrence lawyer discusses Supreme Court nominee

by Bob Roehr

Paul M. Smith is an openly gay lawyer who argued and won the landmark 2003 case of *Lawrence vs. Texas*, in which the U.S. Supreme Court struck down the remaining state sodomy laws. He also has a personal and professional history with Supreme Court nominee John G. Roberts that extends back more than 25 years.

Smith offered his unique perspective on queer issues and on Roberts in this exclusive interview.

The two first met through a mutual friend while in law school. Smith was at Yale, where he served as editor in chief of *The Yale Law Journal*, while Roberts was at Harvard, serving as managing editor of *The Harvard Law Review*. Their paths crossed more frequently in 1979 when they clerked for different judges on the U.S. Court of Appeals for the Second Circuit, which is based in New York City.

The following year both moved to Washington, D.C., to clerk for justices on the U.S. Supreme Court—Smith for Lewis F. Powell Jr., Roberts for William H. Rehnquist. The 32 young attorneys who served as clerks that year had frequent contact in the course of their work, over lunch and in other activities such as the fierce basketball games played on the court's court.

"He was pretty conservative when he was a young guy. Where he is now, after a quarter-century of mellowing and being a real lawyers' lawyer, as he has been, and representing the clients who came in the door, as we saw with *Romer*, I'm not sure I know how to judge that."

Smith was not out at the time; in fact, he would marry a woman and only later come to terms with his homosexuality. So, he cautions, the experience says nothing about how Roberts interacted professionally and socially with a gay man.

Smith and Roberts stayed in Washington, both practicing in the small field of appellate law, both rising to leading roles in prominent law firms.

"He was a very nice guy and certainly remains that," Smith said. "So it does not surprise me that he stepped up and helped Jean Dubofsky" when the attorney was preparing to argue *Romer vs. Evans*, the first important gay rights case. The court threw out Colorado's Amendment 2 as discriminating against gays.

Smith became involved with the *Lawrence* case through a more junior member of his firm, Jenner & Block, and started working with

Lambda Legal in writing the appeal to the Supreme Court. As the time approached for oral arguments, Lambda decided to go with the attorney with more experience before the court and asked Smith to argue the case.

"It was not like any other argument that I have given at the Supreme Court. The sense of the historic importance of the occasion was palpable," Smith recalls.

He was somewhat surprised by the broad rather than more narrowly tailored decision when it came down. "There was this sense that



Ruth Harlow of Lambda Legal and Paul M. Smith meet the press after oral arguments on *Lawrence*.

this was one of those cases of a generation."

Smith says he never discussed the case or the decision with Roberts; their paths have diverged through the years.

While there is little question that the nominee is a conservative, that philosophical tent covers many shapes and forms. Smith hopes the Senate Judiciary Committee delves into Roberts' constitutional philosophy.

He also would press on the issues of *stare decisis*, the principle that you do not overrule precedents with which you might not agree, "and whether or not [Roberts] believes there are any limits on the government that are not expressly set forth in the Bill of Rights" that can be deduced from the structure of government. That becomes important in the area of privacy, which is not specified in the Constitution.

Smith describes himself as a political "progressive" who has worked for Democratic clients on reapportionment cases. He joins in the broad praise of Roberts, saying, "I think that John will do very well.... He's very self-assured.... He is one of the most respected members of the [American Bar Association] in this city. He will be a very important justice, however he turns out in terms of some of these votes that everybody is trying to predict. He will be a leader of the court because of his personality and because of his intellect." ■

BOB ROEHR is a free-lance reporter based in Washington, D.C.

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