U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 5, 2005

The Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

This letter responds to your letter dated July 29, 2005, regarding the nomination of Judge John Roberts to be an Associate Justice of the United States Supreme Court. You requested that the Department provide certain materials relating to John Roberts' employment from 1989 until 1993 in the Office of the Solicitor General. As discussed in a letter sent today to Chairman Specter, the Department of Justice looks forward to working with the Committee on the Judiciary to facilitate its consideration of Judge Roberts' nomination. The White House and the Department have already begun providing to the Committee approximately 65,000 pages of documents from Mr. Roberts' time as a special assistant to Attorney General William French Smith and as an Associate Counsel to President Ronald Reagan. Many of these documents already have been provided to the Committee, including a large group that was provided even before Judge Roberts' nomination was formally forwarded to the Senate.

With regard to documents from Mr. Roberts' tenure as a Deputy Solicitor General, the Department is committed to making available to the Committee those documents that can be made public without causing substantial harm to the Solicitor General's ability to represent the United States in ongoing and future litigation. To that end, we have provided to the Committee certain materials relating to Mr. Roberts' employment in the Office of the Solicitor General that we believe may assist the Committee in evaluating his nomination. They include a printout listing all cases acted upon by the Solicitor General for which Mr. Roberts was the assigned Deputy Solicitor General, as well as a list of all such cases in which Mr. Roberts served as the office's decisionmaker, either as Acting Solicitor General (when the Solicitor General was either recused or unavailable) or on behalf of the Solicitor General (in situations in which the relevant authority had effectively been delegated to the Deputy Solicitors General). These same documents, which are not of a deliberative, pre-decisional, or privileged nature and which reflect final decisions, are also being released this week in response to FOIA requests submitted to the Department of Justice.

In addition, Judge Roberts has already provided to the Committee copies of the briefs on the merits filed in the Supreme Court for all cases he argued, either as a government attorney or in private practice, as well as transcripts of the corresponding oral arguments. He has also supplied to the Committee all briefs on the merits filed in the Supreme Court, including amicus briefs, that he signed while in private practice, irrespective of whether he argued the underlying case. We have informed the Chairman that if the Committee requests it, we also will provide briefs on the merits and certiorari petitions, including amicus briefs, in cases on which Mr. Roberts was the Principal Deputy Solicitor General or Acting Solicitor General but that he did not argue. All of these filings are of course matters of public record.

We are unable to provide certain additional, non-public materials relating to Mr. Roberts' employment in the Office of the Solicitor General. In particular, while we of course will provide to the Committee those documents that reflect the Solicitor General's ultimate decision with regard to any case, we cannot provide to the Committee documents disclosing the confidential legal advice and internal deliberations of the attorneys advising the Solicitor General. It is simply contrary to the public interest for these documents to be released. As at lease one member of the Committee has noted, the ultimate client of the Solicitor General is the people of the United States, and it is in their interest that the deliberative processes and attorney-client communications of the office be maintained. These internal discussions among lawyers have always been considered privileged, covered by both the deliberative process privilege and the attorney-client privilege, and the Department has traditionally declined to make public the documents reflecting those deliberations. To release these documents would cause grave harm to the ability of the Solicitor General to fulfill his designated function: representing the interests of the United States in litigation, including in litigation in which the Solicitor General defends the constitutionality of acts of Congress. For the Solicitor General's office to perform its public service effectively, the internal deliberations of the office must remain confidential.

There are good reasons for this policy of continuing confidentiality. First, as we have noted, the public interest in the office's zealous representation of the interests of the United States would be compromised by a breach of that confidentiality. But there is more at stake than the office's ability to win cases. By tradition, the Solicitor General's office is charged not simply with winning cases but also with frankly assessing the strengths and weaknesses in the government's cases and sometimes accepting unfavorable outcomes. The Solicitor General often declines to authorize further review in cases the United States has lost, despite contrary recommendations of other components of the Department of Justice, and in fulfilling that function he depends on the advice of his staff. For that process to work, the office's attorneys must be free to express frank judgments not only about legal arguments but also about the views of their colleagues in the Department of Justice. The public benefits from the office's pursuing correct outcomes rather than victory at all costs; indeed, it is primarily this feature that distinguishes the Department of Justice generally, and the Solicitor General's office particularly, from private lawyers.

Second, release of the documents would place the public servants who work in the office in the unfair position of being asked to provide full and candid legal advice in public. If attorneys believe that their communications with each other and with those whom they represent will become public, they cannot help but be chilled from expressing their candid views on cases' strengths and weaknesses and from presenting legal analysis from all sides of an issue. The office simply could not function effectively if its lawyers were asked to provide full and candid legal advice in spite of the expectation that their work product would be fair game in any subsequent Senate confirmation process. If disclosure occurs here, moreover, the office's attorneys would have every reason to expect future disclosures, with immediate costs for the work of the office and for the public.

For all these reasons, it is therefore not surprising that a 2002 letter from all seven then-living former heads of the Office of the Solicitor General — including both Democratic and Republican appointees — emphasized the harm that would be done from disclosure of the office's internal deliberations. As that letter said, the Solicitor General relies on "frank, honest, and thorough advice" from the attorneys in his office. The Solicitor General's "decisionmaking process require[s] the unbridled, open exchange of ideas — an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure. . . . High-level decisionmaking requires candor, and candor in turn requires confidentiality." In addition, releasing these documents could undermine the effectiveness of the United States in litigating cases now pending or cases that will come up in the future. The issues litigated by the Solicitor General's office often recur, and disclosure of documents discussing the office's legal analysis of those issues could be very damaging to the litigating position of the United States in current or future cases.

Finally, the need for confidentiality is not diminished because Mr. Roberts was a Deputy Solicitor General rather than a staff lawyer. That distinction does not decrease the magnitude of the harm that disclosure of the internal deliberations of the Solicitor General's office would do to the litigating position of the United States and the functional effectiveness of the Solicitor General. In addition, the role of a Deputy Solicitor General is primarily to review and comment on internal memoranda and briefs drafted by staff attorneys. Documents relating to Mr. Roberts are much more likely to be annotations or notes on documents written by other lawyers than documents Mr. Roberts himself drafted. It would be extremely difficult to provide those documents without disclosing the confidential communications and analysis of many other lawyers who worked with Mr. Roberts in the Solicitor General's office or elsewhere in the federal government. Today there are five attorneys serving in the Solicitor General's office, and countless others in other components of the Department of Justice, who served with Mr. Roberts. It would be unfair to all lawyers who serve in the office, and particularly so with respect to those who served with Mr. Roberts, for these internal deliberations to be made public.

We are confident that the 65,000 pages of documents the White House and the Department of Justice are providing to the Committee, and the voluminous documents Judge Roberts has himself provided, will enable the Committee to engage in full, fair, and prompt consideration of Judge Roberts' nomination, without inflicting on the litigating abilities of the United States the grave harm that would flow from disclosure of the relatively few internal deliberative documents not being produced. We estimate that this latter body of documents represents only a small fraction — approximately a tenth — of the total body of documents relating to Mr. Roberts' employment in the White House and the Department of Justice.

Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

Rebecca Seidel DAAG

for William E. Moschella
Assistant Attorney General

cc: The Honorable Arlen Specter
Chairman
Committee on the Judiciary