

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

August 12, 2005

The Honorable Alberto Gonzales
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Gonzales:

We write in response to your letter of last Friday rejecting our limited request for documents relating to any work done by Judge John G. Roberts, Jr., on a small number of important cases during the time that he served as Principal Deputy Solicitor General. We are disappointed by your response and urge you to reconsider. We would welcome the chance to meet with you in person to discuss your concerns and our concerns.

We have been concerned by media reports that the Administration is delaying the release of White House Counsel documents it has promised to turn over. Your decision to deny access to even the limited group of documents we requested from Judge Roberts's time as Principal Deputy Solicitor General, the most important period of his Executive Branch service, is all the more disturbing.

The Judiciary Committee is entitled to a complete understanding of Judge Roberts's role in the Office of the Solicitor General (OSG) in the 16 cases identified in our July 29th letter. Of the various administration positions he held, his service as the "political" deputy in the OSG may well be the most relevant for evaluating the Supreme Court nomination. He had an even more significant policy role there than in his previous positions, and his approach to his work as an appellate advocate before the Supreme Court may particularly illuminate his views on judicial decision-making. Since he was also in a considerably more senior position, he had had more time to refine his legal analysis and question his previous views, and documents from that period may provide even more insight than the highly revealing documents from earlier in his career.

As you know, the records we have received so far were already publicly available, and suggest that Judge Roberts, while working for the Attorney General earlier in his career, had strong views about such vital issues as access to the courts, women's rights to equal treatment, the right to privacy, and the scope of civil rights laws. It is therefore especially important for us to examine his later work on these issues in cases before the OSG in order to get a sense of his approach to these and other key rights and values at a different time in his career. In addition, the internal documents from that period will help us to evaluate whether the views in the publicly available OSG briefs representing the Bush Administration were also shared by Judge Roberts personally, and to evaluate the progression and consistency of his legal reasoning and analysis throughout his career.

In a 1991 resume, Judge Roberts himself emphasized that he had “final responsibility for determining whether the United States would seek further review of adverse decisions in some 380 cases” by that point in his service at the OSG. This statement makes clear the importance of his work in that Office and the amount of discretion he commanded there. Nonetheless, of these 380 cases, and the many others that were handled by the OSG during his tenure, we have requested only documents relating to 16 cases that appeared to raise key issues vital to the rights of all Americans.

These documents were prepared by attorneys in the OSG acting for the American people. We are requesting them for use by the Senate in the exercise of the Senate’s explicit constitutional responsibility, and they are therefore not subject to the attorney-client privilege. Judiciary Committee Chairman Specter, in his letter relating to the documents we have requested, did not lend support to any claim of attorney-client privilege. Indeed, former Senator Fred Thompson, who is helping the White House with this nomination, previously said of the attorney-client privilege that, “[i]n case after case, the courts have concluded that allowing it to be used against Congress would be an impediment to Congress’ obligation and duty to get to the truth and carry out its investigative and oversight responsibilities.” Former Senator Thompson noted that even President Nixon, with his expansive concept of presidential power, did not claim such a privilege when White House Counsel John Dean testified, and that President Reagan did not claim the privilege when notes and memoranda of lawyers were produced in the inquiry into Iran-Contra. [Congressional Record, Dec. 20, 1995.] Similarly, Senator Orrin Hatch has said: “The attorney-client privilege exists as only a narrow exception to broad rules of disclosure. And the privilege exists only as a statutory creation, or by operation of State common law. No statute or Senate or House rule applies the attorney-client privilege to Congress. In fact, both the Senate and the House have explicitly refused to formally include the privilege in their rules.” [Congressional Record, Dec. 20, 1995.]

It is instructive to look at the reasoning of the Court of Appeals for the District of Columbia Circuit, when that court declined in 1998 to recognize the attorney-client privilege claim of Deputy White House Counsel Bruce Lindsey. The Court emphasized that even the most sensitive conversations between the President and his top advisors may have to be revealed to a grand jury, and the Court further stated that conversations with legal advisers should be treated no differently:

Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President’s conversation with the most junior lawyer in the White House ... is deserving of more protection from disclosure in a grand jury investigation than a President’s discussions with ... a Cabinet Secretary. ... [W]e do not believe lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters. ... [I]t would be contrary to tradition, common understanding, and our governmental system for the

attorney-client privilege to attach to White House Counsel in the same manner as private counsel. *In re Lindsey*, 158 F.3d 1273, 1278 (D.C. Cir. 1998).

This case makes clear that documents from the White House Counsel's office are not subject to the attorney-client privilege; as to the documents at issue here arising from the OSG, which represents the American people rather than the President specifically, the inapplicability of any privilege is even clearer. And, as noted above, any privilege that might apply in a grand jury context would not apply to a document request from Congress. Indeed, in one case cited as recognizing limited privileges, the D.C. Circuit emphasized that its holding was in the grand jury context and not applicable to Congress. The Court wrote: "[W]e take no position on how the institutional needs of Congress and the President should be balanced." *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

Moreover, as you are aware, the Department of Justice has provided similar documents in the consideration of numerous past nominees. When Robert Bork was nominated to the Supreme Court, the last time a Supreme Court nominee had served in the OSG, the Department of Justice provided documents from his time as Solicitor General, including both documents on Watergate-related issues and others concerning substantive matters of interest to Senators. Those documents were provided in a spirit of compromise pursuant to a limited request from members of the Senate Judiciary Committee, much like the request we made with respect to Judge Roberts. Similarly, the Committee requested and received internal memoranda drafted by Justice Rehnquist, as well as internal Department of Justice memoranda relating to the nominations of Benjamin Civiletti to be Attorney General and Stephen Trott to be a Ninth Circuit judge, and others. In fact, the White House has released documents from Judge Roberts's time as a legal advisor to the Attorney General – documents which the National Archives would have made public anyway – without offering any principled distinction as to why the documents from the OSG should not be released as well.

You stated in your letter last Friday that OSG documents must be kept confidential in order to protect the free flow of ideas among attorneys within the office. It is important to note, however, that Judge Roberts was not a career attorney within that office. He was a political appointee in a leadership position, politically responsible for making high-level policy decisions. As such, he could not have expected, nor was he entitled to, any confidentiality protection that some argue should apply to the advice of career staff attorneys. Former Acting Solicitor General Walter Dellinger, who had opposed Senate efforts to obtain Miguel Estrada's OSG documents, pointed out in a recent op-ed article in the *Washington Post* that Judge Roberts's case is different and distinguishable because he was a policy-making and decision-making official in the OSG and because he has been nominated to be one of the nine Justices of the Supreme Court. In contrast, Mr. Estrada was a line attorney in the Office and was nominated to one of the hundreds of judgeships on the nation's many courts of appeals.

You expressed concerns in your letter about protecting the confidentiality of other attorneys in the OSG whose memos were reviewed and commented upon by Roberts. We would welcome working with you to address these and any other confidentiality

concerns that may arise as to particular documents. In past nominations, including those of Judge Bork to the Supreme Court and Justice Rehnquist to be Chief Justice, there were discussions back and forth between Senators and the Department of Justice about the production of documents leading ultimately to mutually satisfactory solutions. We look forward to such a process now and would welcome speaking with you in person to discuss these issues further.

We appreciate your prompt attention to this matter, and we hope that we can resolve this fundamental important issue expeditiously so that the Committee will have adequate time to review the requested documents in preparation for Judge Roberts' hearing. Thank you for your cooperation with this request.

Sincerely,

Patrick Leahy
Joe Biden

Ed Kennedy
Herb Kohl

Dianne Feinstein

Bill Clinton

Charles Schumer

Murphy D. Feingold