

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

August 5, 2005

Dear Colleague:

As we prepare for hearings on the President's nomination of John G. Roberts, Jr., to be an Associate Justice of the Supreme Court of the United States, we write to offer this brief update on the information we have received so far, on what has been promised and the modest request for documents that we have made of the Administration, and on why we feel it is important for the Committee, the Senate, and the American people to have the benefit of this information before being asked to vote on this lifetime appointment.

We have now come to an agreement with Chairman Specter on a start date of September 6, and other parameters have now been set for the confirmation hearings. Much is being done to prepare the Judiciary Committee and the Senate for this process. In order to be able to meaningfully understand Judge Roberts's relevant career record, the Democratic members of the Judiciary Committee last week made two formal requests to expedite, obtain and help organize the production of the documentary record for the hearings, drawn from his nine-year career in the Executive Branch. This includes a modest request for additional documents not yet provided by the Administration.

There are three major categories of documents in question. The first consists of documents from Judge Roberts's service as Special Assistant to Attorney General William French Smith from 1981 to 1982. The National Archives provided these documents to the Committee through the Department of Justice on July 26, and a few additional documents on August 2. We are currently reviewing them for information relevant to the nomination.

The second category consists of documents relating to Judge Roberts's work for President Reagan as Associate White House Counsel under Counsel Fred Fielding from 1982-1986. A relatively small number of these documents had already been processed and made available to the public at the Reagan Library by the National Archives, but the large majority—up to 75,000 pages, according to press reports—must still undergo reviews required under the Freedom of Information Act and the Presidential Records Act, which includes a possible veto by this White House under an Executive Order issued by President Bush early in his first term.

Although it has been reported in news accounts that the Bush Administration has promised to expedite the review of these documents, the Committee so far has received none of them. As a way of helping the White House work more efficiently and expedite the Senate's review of this nomination, the Democratic members of the Judiciary Committee sent a letter to the White House last week requesting the prioritization of these documents. In that request, Democratic Senators provided a list of the most pertinent files to give the White House a guide for processing key documents first. We

have not heard back from the White House on that request, which was sent more than a week ago.

The third category of documents we seek are specific memoranda relating to 16 particular cases on which John Roberts worked or may have worked while he was a political appointee, serving as the principal deputy to Solicitor General Ken Starr in the Administration of President George H.W. Bush, from 1989-1993. There is significant precedent for asking for these kinds of materials from nominees -- including nominees to the Supreme Court -- and we do not believe that any sort of privilege prevents the Senate from having access to them.

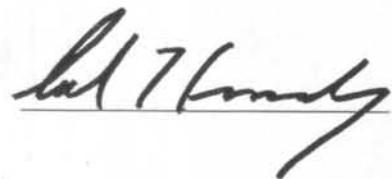
In the past, Senators have been able to examine documents relating to controversial issues or cases on which the nominee worked while at the Department of Justice, and we would like to do the same. These 16 cases were selected from among hundreds that went through the office during Judge Roberts's time there and were carefully selected to help us understand what Judge Roberts's views were on legal arguments in some landmark cases that he either briefed or argued, or in which he may have made significant litigation decisions. From materials Judge Roberts submitted to the White House in 1991 before he was nominated to the D.C. Circuit, it appears his work in the Office of the Solicitor General was quite significant. He explains that he, "had final responsibility for determining whether the United States would seek further review of adverse decisions in some 380 cases," and that he even served as Acting Solicitor General in a number of matters from which Ken Starr was recused. While he is certainly free to answer questions about these cases in his hearing, we believe his contemporaneous writings will be the best evidence of the legal positions he took in these important cases.

As part of our system of checks and balances, the Constitution has divided the authority between the President and Senate when it comes to giving someone a lifetime job on our highest court. There is an important process ahead for the Senate and it is vital that Senators have available the information necessary to fulfill that constitutionally mandated responsibility. The hearings before the Judiciary Committee will be the best opportunity for the Senate -- and the American people -- to learn about Judge Roberts. It is too important a decision to rush through without careful consideration and the necessary information.

If you or your staff have any questions about this process, the documents relating to this nomination or requests that Democratic members have made for material, please do not hesitate to contact us or our Judiciary Committee staff.

Sincerely,

Patrick Leahy

Carl Thomas

Josef Berlin

Herb Kohl

Ilse Kristin

Mum Feigold

Charles Scherer

Dietrich