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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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August 10, 2005

Honorable Patrick J. Leahy
Ranking Member
Senate Judiciary Committee

Dear Pat:

I declined to co-sign with you and other Judiciary Committee members a letter dated July 29, 2005 to Attorney General Gonzales requesting records on Judge John G. Roberts, Jr.'s work in the Solicitor General's Office. I wanted to study the applicable law and see what materials would be available from the 13,000 plus pages (with some 50,00 additional pages of documents anticipated) on Judge Roberts' work as Special Assistant to Attorney General William French Smith and later as Associate White House Counsel. I noted that your request has caused some media comment and that Senator Harry Reid, the Democrat Leader, recently renewed your request.

Based upon the applicable law and the considerable volume of documents already released on Judge Roberts, it is my judgment that the Administration is not wrong in declining to provide documents from Judge Roberts' tenure in the Solicitor General's Office. In a 1997 decision by the Court of Appeals for the District of Columbia Circuit in the case captioned In Re Sealed Case, the Court analyzes in some detail the deliberative process privilege. While the privilege is not absolute, it is my conclusion that the absence of any issue of misconduct and the extensive disclosure of numerous other relevant documents prepared by Judge Roberts support the White House conclusion to protect in this case the deliberative process which is designed to allow:

"...the Government to withhold documents and other materials that would reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated' "

In Re Sealed Case

The deliberative process privilege is very important to avoid the chilling effect or potentially paralyzing effect on lawyers in the Solicitor General's office who would understandably be reluctant or unwilling to give their candid views if they thought they would later be subject to public scrutiny. That is why seven former Solicitors General, Democrats and Republicans alike, opposed requests by certain Senators for the records as to Miguel Estrada. This issue transcends partisan politics, Republicans versus Democrats, in judicial confirmations, even for the Supreme Court, because the shoe may be on the other foot with Republicans seeking similar information in the future.

The situation in the confirmation hearings on Chief Justice Rehnquist and Judge Bork were substantially different and have little bearing on this case. The materials requested pursuant to Chief Justice Rehnquist's nomination hearings involved materials that were unrelated to the preparation of government cases for litigation. With respect to Judge Bork, the Committee received access to a limited number of materials related to three specific and narrow subjects of particular interest to Senators. Two of those matters were related to Judge Bork's involvement in Watergate-related issues and concerned allegations of possible official misconduct. By far the vast majority of documents Judge Bork either authored or received during his tenure as Solicitor General were neither sought by the Committee nor produced by the Justice Department. In addition, the limited category of documents the Committee received did not reveal the internal deliberative recommendations or analysis of Assistants to the Solicitor General regarding matters being litigated in the courts.

Unlike the confirmation hearing involving Mr. Miguel Estrada, who had no so-called paper trail, there are extensive documents already available which may provide insights into Judge Roberts' judicial philosophy and can be the basis for questioning at his confirmation hearing. While many of the available writings were prepared on behalf of superiors and clients and might not indicate Judge Roberts personal positions, they offer a similar basis for questioning which would be provided by documents from his work in the Solicitor General's Office.

Some of the materials already made available include:

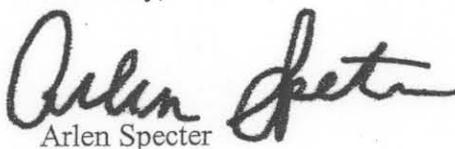
- (1) An exhaustive 1981 thirty-six page memorandum to the Attorney General from John Roberts, Special Assistant to the Attorney General, supporting the constitutionality of proposals to divest the Supreme Court of appellate jurisdiction;
- (2) A 1982 memorandum to the Attorney General from John Roberts supporting the more restrictive intent to discriminate test over the discriminatory effects test under the Voting Rights Act;
- (3) An extensive draft of an article on judicial restraint prepared by John Roberts for submission by Attorney General William French Smith to the American Bar Association Journal, which criticized the concept of "fundamental rights" not found in the Constitution's text, citing Griswold v. Connecticut (1965) as an example;
- (4) An additional memo from John Roberts to the Attorney General dated December 11, 1981, summarizing a lecture by then Solicitor General Erwin Griswold in which Griswold criticizes Roe v. Wade (1973);
- (5) The Government's brief in Rust v. Sullivan, filed on September 7, 1990, in which John Roberts was one of six attorneys listed on the Solicitor General's brief which

- reiterated the Administration's position that Roe v. Wade was wrongly decided;
- (6) Judge Roberts' response to questioning at his Circuit Court confirmation hearing in which he describes Roe v. Wade as "settled law;"
 - (7) A May 24, 1985 Roberts memorandum recommending that President Reagan not endorse a Kentucky effort to put "In God We Trust" plaques in all public schools;
 - (8) A February 10, 1986 draft letter by Roberts for the Deputy White House Counsel, which stated that "the President has no intention of granting special treatment to abortion clinic bombers" and that those who violently targeted abortion clinics "should be prosecuted to the full extent of the law";
 - (9) Roberts' memorandum agreeing with the recommendation of Assistant Attorney General William Bradford Reynolds not to appeal a district court judge's decision refusing to expand the scope of Title IX of the Education Amendments of 1972;
 - (10) Roberts' writing favoring a narrow interpretation in Suter v. Artist M. (1992) arguing that children in Illinois had no privately enforceable right to child welfare services because the federal law was "too vague and amorphous" to be enforced by federal judges;
 - (11) Roberts' brief on behalf of the United States in Lee v. Weisman (1992) defending prayers at public school graduation ceremonies because "ceremonial acknowledgments of religion" pose no danger to religious liberty, a position rejected by the Supreme Court in a 5-4 ruling. ;
 - (12) Roberts' brief in an important environmental case, Lujan v. Defenders of Wildlife (1992), in which he won a decision for the United States making it harder for environmentalists to challenge governmental policies because the conservationists could not prove they were "actually injured";
 - (13) Roberts' briefs in two school desegregation cases, Oklahoma City v. Dowell (1991) and Freeman v. Pitts (1992), in which he successfully urged the Supreme Court to halt busing plans;
 - (14) Newspaper accounts that Roberts reputedly helped prepare lawyers who argued in support of gay rights in Roemer v. Evans (1996);
 - (15) As detailed in his Judiciary Committee questionnaire, Judge Roberts listed among his pro bono activities work representing District of Columbia residents receiving general assistance benefits; the representation of a death row inmate who was assaulted by prison guards; and the successful representation of a defendant

against the federal government's effort to assess civil penalties against him after he had previously been convicted of a federal crime involving the same conduct.

I am advised that on August 11, 2005, there will be a release by the Reagan Library and the National Archives of a substantial additional volume of Judge Roberts' documents which will most probably significantly add to the list enumerated in this letter. I am also writing to White House Counsel Harriet Miers that all documents, to be made available, reach you as soon as possible, but in no event later than August 22, 2005.

Sincerely,


Arlen Specter

AS/ph

Hand Deliver