



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 6, 2006

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

Dear Senator Leahy:

I write in response to your letters dated December 7, 2005, and December 20, 2005, regarding your request that the Department release certain documents from Judge Alito's service at the Department, including in the Office of the Solicitor General (OSG) and the Office of Legal Counsel (OLC). As you know, we have been working closely with the Committee on the Judiciary to facilitate the Committee's consideration of Judge Alito's nomination, and we look forward to continuing to do so.

Judge Alito and the Department have already provided to the Committee a voluminous set of documents relating to Judge Alito's decades of public service. Judge Alito has sat on the federal appellate bench for more than 15 years, and his decisions in that capacity represent the best evidence of his judicial philosophy and of the manner in which he approaches judicial decision-making. As part of Judge Alito's response to the Committee's questionnaire, the Committee was provided with a list of the more than 1,000 published decisions issued by panels on which Judge Alito sat, including the more than 340 opinions Judge Alito wrote. All of these published opinions are publicly available. The Committee was also provided with a list of the more than 3,800 unpublished opinions issued by panels on which Judge Alito sat and with copies of all of the unpublished opinions provided by the United States Court of Appeals for the Third Circuit.

The Committee also has for its consideration an extensive collection of documents from Judge Alito's more than twelve years of Executive Branch service. Judge Alito has produced a number of briefs and other documents from his tenure as an Assistant United States Attorney for the District of New Jersey and then the United States Attorney for that district. With regard to documents relating to Judge Alito's tenure in OSG, Judge Alito provided with his questionnaire approximately 1,700 pages of briefs on which his name appeared or for which he was responsible. In addition, the Department provided a list from OSG's records of cases to which Judge Alito was assigned in that office. As to documents from Judge Alito's service in OLC, your letter appears to be premised on a misunderstanding of the breadth of the Department's disclosure. You state that of the OLC opinions Judge Alito signed, "[f]our . . . are publicly available, and the Department has recently provided a fifth." In fact, the Department has released approximately 115 documents, many of them opinions or other advice, totaling more than 475 pages relating to Judge Alito's service in OLC.

The Honorable Patrick J. Leahy
Page Two

In addition to the documents the Department and Judge Alito have produced, the National Archives and Records Administration (NARA) has released more than 1,300 pages of documents relating to Judge Alito's Executive Branch service. These documents bring to more than 36,000 the total pages of documents relating to Judge Alito's legal career that have been produced by Judge Alito, the Department, and NARA. And this number does not include the many thousands of pages of published opinions Judge Alito authored or joined during his 15-year tenure on the U.S. Court of Appeals.

Your letters request that, in addition to the many documents from Judge Alito's OSG service that the Department has already released, the Department make public internal deliberative memoranda that Judge Alito wrote while serving in OSG. The Department has made available information regarding Judge Alito's tenure in that office that can be made public without compromising the Solicitor General's ability to litigate cases effectively on behalf of the United States. As we advised the Committee during the proceedings relating to the nomination of Chief Justice Roberts, however, the Department cannot disclose the internal deliberations of the Solicitor General's office. The highly confidential nature of those internal deliberations is widely recognized, and the Department has traditionally declined to disclose them. To disclose those deliberations would harm the litigating abilities of the United States. This confidentiality protects the public interest in the office's zealous representation of the interests of the United States, including the pursuit of right outcomes rather than victory at all costs. It would chill the exchange of full and candid advice, and it would be unfair to OSG's dedicated public servants, to require the office's lawyers to provide their legal advice with the expectation that that advice might eventually become public.

We note also that your letter of August 12, 2005, regarding the nomination of Chief Justice Roberts argued that documents relating to Chief Justice Roberts's own OSG service should be made public because the Chief Justice served as "a political appointee in a leadership position, politically responsible for making high-level decisions," which you differentiated from the career positions within OSG. The Committee ultimately did not request, and the Department did not release, internal deliberative documents regarding Chief Justice Roberts's OSG service. By its own terms, your argument necessarily implies that the case for public release of internal OSG documents is less compelling when the nominee in question served as a career attorney within that office. That is of course the very role in which Judge Alito served.

Your second letter states that the inclusion of three OSG memoranda among the documents released by NARA "represents a waiver of any privilege that could apply to Judge Alito's OSG memoranda." You appear to be arguing that the release of even a single internal OSG memorandum Judge Alito prepared — a release outside the Department's control — somehow mandates that the Department release *all* internal OSG memoranda Judge Alito prepared. There is no legal basis for this argument. Similarly, it is not true that the need for, and value of, confidentiality in OSG's internal deliberations is obviated by the release by NARA of three internal OSG memoranda.

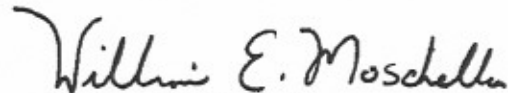
Regarding Judge Alito's service in OLC, your letters request that the Department release certain documents from Judge Alito's tenure there that have not already been released, including in response to Freedom of Information Act (FOIA) requests. Although most of the memoranda

The Honorable Patrick J. Leahy
Page Three

that Judge Alito signed have been released, a small fraction have not and should not be released due to their continuing law enforcement, litigation strategy, privacy, or other particular sensitivity.

In short, Judge Alito, the Department of Justice, and NARA have released voluminous documents relating to Judge Alito's long and distinguished public service. We remain committed to providing the Committee full and prompt assistance in its consideration of Judge Alito's nomination. Please do not hesitate to contact us if we may be of further aid.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Arlen Specter
Chairman
Committee on the Judiciary