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September 28, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

**RE: Nomination of John G. Roberts, Jr. for
Chief Justice of the United States**

Dear Senator Specter:

Please find enclosed the responses of the American Bar Association Standing Committee on Federal Judiciary to questions posed by Senator Leahy following the presentation of our testimony to your committee during the confirmation hearing of Judge John G. Roberts, Jr., to be Chief Justice of the United States.

We appreciate the opportunity to work with you and the members of your committee.

If you have any further questions, please do not hesitate to contact us.

Very truly yours,

Thomas Z. Hayward, Jr.
Chair (2003-2005)

Stephen L. Tober
Chair (2005-2006)

cc: Honorable Patrick J. Leahy
Barr Huefner

**Questions from Senator Patrick Leahy for Stephen Tober, Thomas Hayward and the
American Bar Association's Standing Committee on Federal Judiciary
September 12-15, 2005**

QUESTION

1. The ABA Standing Committee of Federal Judiciary released its initial rating for Judge Roberts's nomination to be Associate Justice on August 17, 2005, just a day and a half after the National Archives released about 5,000 pages of John Roberts's files from his time in the White House, and a day before another 43,000 or more were made public.

Why did the Committee release its rating of Judge Roberts before so many of the relevant documents could be reviewed? I know that ABA President Michael Greco, in a letter of August 23, 2005, indicated that the Committee "routinely has submitted its evaluation several weeks prior to the nominee's scheduled hearing," and that it could continue to review information after the rating was released, but why not wait until as much information as possible could be evaluated?

ANSWER

The Senate Judiciary Committee had requested that we forward to them the evaluation of Judge Roberts within the customary thirty-five (35) days after the nomination was made. The Standing Committee and its investigators worked around the clock to achieve that objective. The documents that were made available prior to the Committee's vote were reviewed by the principal investigator, Pamela A. Bresnahan. The documents and indices released subsequent to the rating were reviewed as indicated in the letter to Senator Specter dated September 14, 2005. As stated therein, the principal investigator reviewed indices and documents of the nominees that were made available by the National Archives and then selected substantive memoranda on diverse subjects that were reviewed by the Chair and forwarded to the Northwestern Reading Committee for its further evaluation and to members of the Standing Committee for their consideration. After Judge Roberts was nominated to be Chief Justice, additional interviews were conducted regarding his managerial ability. The Committee had the opportunity to re-evaluate or change its rating: the nominee's rating remained "Well-Qualified," after subsequent review of the documents released by the National Archives and subsequent review of his management abilities.

QUESTION

2. Your Committee's publication, "Standing Committee on Federal Judiciary, What It Is and How It Works," states that the Committee focuses on three criteria: integrity, professional competence and judicial temperament. It further states that, "in investigating judicial temperament, the Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law." Could you please explain in detail what you learned about Judge Roberts that would indicate he is compassionate and committed to equal justice under the law?

ANSWER

All persons interviewed by the investigators indicated that Judge Roberts was highly qualified in terms of integrity, professional competence and judicial temperament. Several respondents indicated that Judge Roberts was thoughtful, careful and cared deeply about the rule of law and that all persons were treated equally under the rule of law. Our testimony quotes several of their responses.

QUESTION

3. In assessing Judge Roberts's integrity, did you consider the views of legal scholars (see attached) relating to his failure to recuse himself in the *Hamdan* case, as contrasted with his decision to recuse himself from a case in which the ABA was involved?

ANSWER

Yes. We considered the views expressed in the attached articles as well as the analyses of other lawyers and ethics experts who did not agree that Judge Roberts should recuse himself from the *Hamdan* case. The principal investigator, Pamela Bresnahan, who represents lawyers and law firms in professional responsibility matters, also reviewed the press reports and writings of various lawyers regarding *Hamdan* and concluded reasonable minds could differ on the issue of recusal.

QUESTION

4. Did anyone on the Standing Committee or either of your Reading Committees review any documents, including the documents related to the 16 cases requested by the Democratic members of the Judiciary Committee, having to do with Judge Roberts's time as Principal Deputy Solicitor General to Ken Starr?

ANSWER

The question is unclear. We reviewed all of the documents made available by the National Archives.

QUESTION

5. The Practitioner's Reading Committee, one of two reading teams that reviewed the nominee's writings, included four former high-ranking political appointees in the Reagan Department of Justice. One worked closely with the nominee while he was Special Assistant to the Attorney General, while another worked for him in the Office of the Solicitor General. Most notably, the Reading Committee included Professor Charles Fried, whose partisan politics have been clear throughout his career. Professor Fried served as Ronald Reagan's Solicitor General, argued for the Republican Florida House of Representatives in connection with the 2000 election, and is the faculty advisor to the Harvard chapter of the Federalist Society, a highly partisan debating society that is committed to supporting judges with political agendas who would turn the courts dangerously to the right. Indeed, Professor Fried is such an outspoken advocate for Judge

Roberts's nomination that he appeared before this Committee during the nomination hearing to testify in his behalf. Maureen Mahoney, another member of your Reading Committee, not only worked for the nominee at the Department of Justice, she also came to testify in support of this nomination at the recent hearing and described herself as his friend for 25 years, telling how he recommended her for nomination to a federal judgeship several years ago.

Why did your Committee appoint people with such distinctly partisan political affiliations and personal ties to the nominee to a Committee that is supposed to be dedicated to what Michael Greco, President of the ABA, described as a "non-partisan, non-ideological, comprehensive peer review?" Even if you don't believe any of the people involved would have done anything improper, can you understand why there is the appearance of impropriety when people with a possible bias toward the nominee are involved in evaluating his fitness for the Supreme Court? Looking back, do you think it was a mistake to include these people on the Reading Committee? Another Supreme Court nominee will soon be coming to your Committee for evaluation. Will you commit to appointing only objective reviewers with no personal or political ties to the nominee the next time and for the future?

ANSWER

Both Reading Committees included a cross section of the legal and scholarly community, and included prominent Democrats. The committees were selected prior to there being any nomination, so it was impossible to know whether any of the members had relationships with the ultimate nominee. They all concluded, no matter what their party affiliations, that this nominee's writing and professional competence were superb. With regard to Supreme Court nominations going forward, Mr. Tober has requested and has received assurances from the chairs of the new academic and practicing lawyer reading groups now in place that no member of those groups will speak out publicly nor testify on the nomination until such time, if at all, that the entire confirmation process has been concluded and a Senate vote has been taken.

QUESTION

6. Were any of the members of the Practitioner's Reading Committee who were members of the Reagan Administration -- Donald Ayer, Charles Renfrew, Maureen Mahoney or Charles Fried -- involved in reviewing documents from the Reagan Administration relating to the nominee or written by the nominee that were released by the National Archives in connection with this nomination?

ANSWER

No. The Northwestern Law School Committee members reviewed selected documents from the documents that were reviewed by the investigator and the chair.

QUESTION

7. How many documents from the total released by the National Archives did members of the Standing Committee review for themselves, or did they just rely on the report of the Reading Committees?

ANSWER

The Standing Committee's principal investigator reviewed all document indices and representative substantive documents authored by the nominee that were made available by the National Archives. The review by our investigator took well over 100 hours. She selected documents for the Chair to review, who then forwarded documents for review by both the Northwestern Reading Committee and the members of the Standing Committee. After a thorough evaluation of this additional material, the Northwestern Reading Committee did not change its opinion of the nominee, and the Standing Committee did not choose to change its rating of "Well-Qualified."