Office of the Attorney General
Washington, D. C. 20530

September 9, 1981

TO : Sandra Day O'Connor

FROM : John Roberts
Special Assistant to the Attorney General

SUBJECT : Rees Memorandum

The attached memorandum from Professor Rees to the Subcommittee on Separation of Powers on the proper scope of questioning Supreme Court nominees does not require any modification of the views expressed in your August 28 letter to Senator Helms. Professor Rees argues that the only practical manner in which Senators can discharge their responsibility to ascertain the views of a nominee is to ask specific questions on actual (though nonpending) or hypothetical cases. He stresses that questions on general judicial philosophy are too indeterminate and notes that nominees have often decided cases in a manner inconsistent with the views they expressed on judicial philosophy at their confirmation hearings.

Professor Rees argues that if a nominee stated her views on a specific question it would not be grounds for later disqualification. He relies on Justice Rehnquist's opinion in Laird v. Tatum, dismissing Justice Rehnquist's distinction between statements prior to nomination and those after nomination. According to Rees, statements after nomination would not be disqualifying if the nominee and Senators understood that no promises on future votes were intended. Professor Rees concludes by citing past confirmation hearing practice which he contends supports his view.

The proposition that the only way Senators can ascertain a nominee's views is through questions on specific cases should be rejected. If nominees will lie concerning their philosophy they will lie in response to specific questions as well. The suggestion that a simple understanding that no promise is intended when a nominee answers a specific question will completely remove the disqualification problem is absurd. The appearance of impropriety remains. Professor Rees' citations to past practice do reveal some possible indiscretions, but the generally established practice is as indicated in your letter to Senator Helms, which contains supporting citations.

Memorandum

Subject	Date
Materials for Judge O'Connor -- Format for Summarizing Major Points from Hearings on Supreme Court Nominees	August 17, 1981

To
Ken Starr
David Hiller
John Roberts

From
Carolyn Kuhl CK

The purpose of reviewing and summarizing hearings on the nominations of recent Supreme Court Justices is to pin-point the subject areas on which nominees have been questioned, the identity of the questioner, and such other noteworthy (and useful) occurrences as answers which are particularly insightful or ways of not answering which are particularly persuasive. Keep in mind that Judge O'Connor has already been sent exceprts from these hearings which indicate the types of questions which nominees have refused to answer.

A sample summary is attached. Please include the identity of the questions in parentheses at the end of each summary entry for a question, and the page number in parentheses at the end of each entry.

Attachment

Memorandum

Subject	Date
Areas in Which Various Conservative Groups Have Suggested That the Department Take Action	March 15, 1982

To

The Attorney General

From

Carolyn B. Kuhl
John Roberts JR

At your request, we have prepared a list of issues raised by various conservative groups, and by the President and the Republican platform, which touch on matters within the jurisdiction of the Department of Justice. That list is attached. We have noted the issues on which the Department already has taken action.

Several of these issues may warrant action in the near future. They are discussed below:

Tuition Tax Credit Legislation

Tuition tax credits or educational vouchers are not a new idea. In 1962 in his book Capitalism and Freedom, Milton Friedman proposed a voucher system to encourage competition and further quality education. Although some have argued that granting tax credits to parents whose children attend private school would destroy the public school system and leave the poor with inferior educational opportunities, others contend that more direct competition from private schools would force public schools to improve their standards and would for the first time permit the poor to have an opportunity to attend private schools.

Tuition tax credit legislation raises at least two issues within the purview of Justice Department expertise: the constitutionality of such legislation, and the likelihood that various types of "regulation" of education would, or in the future might, attach themselves to such tax credits. We understand that the White House is drafting a proposed Administration bill on tuition tax credits. It would be beneficial for us to clarify our position on these questions while the legislation is still at the drafting stage.

We suggest that three things be done on this issue: (1) open lines of communication to the White House regarding a possible Administration bill; (2) develop a preliminary paper on the constitutional issues raised by the basic

concept of tuition tax credits (OLC has been doing some work in this area); (3) study whether any restrictions on private school conduct or students' choice of schools would attach to tuition tax credits (other than restrictions specifically set forth in the statute itself) and enumerate the types of restrictions which might be expected to be attached to tuition tax credit grants in the future.

Limiting Interference in State and Local School Systems

A pervasive theme in the sources we examined is a desire to reduce federal regulation of schools, public and private. Congress has attached a fairly large number of requirements to a variety of federal funding programs which affect schools. While these are primarily the responsibility of the Department of Education, questions concerning the scope of federal funding restrictions are raised in a number of lawsuits being handled by the Justice Department. Moreover, the Department has regulations regarding implementation of Title VI restrictions on federal funding, and has taken the lead in drafting regulations to implement Section 504 of the Rehabilitation Act which imposes various requirements on schools which accept federal funding.

We suggest that the Department, perhaps in conjunction with the Department of Education, review in a comprehensive way the major lawsuits pending in this area, as well as the implementing regulations of statutes which impose requirements on state and local schools to determine the scope of regulation required by law.

Monitoring of Department Litigation

Conservatives complain that litigating decisions are not sufficiently monitored from Washington, with the result that over-zealous or misinformed U.S. Attorneys bring lawsuits that do not comport with the Administration program. Mandate for Leadership, 404-405. The announcement of the Department policy to encourage judicial restraint by advancing certain arguments highlighted the need for some means of communicating policy to the field offices and monitoring compliance. At present we really have no way of guaranteeing that our policy is being implemented in the field. This question could be raised with the U.S. Attorneys' Advisory Committee and the Executive Office, with the participation of the Solicitor General's Office, which is responsible for appeal decisions.

Formalize Policy Initiatives

Many of the conservative policies pursued by the Department, such as the decisions not to seek busing or hiring

quotas, not to rely on the Keyes presumption in school cases, and the various judicial restraint initiatives, have not been formalized in any way and could be instantly reversed when a new administration took office. Some areas are not suitable for formalization in legislation, regulations, or executive orders, but some are and should be given permanence. Heritage Year End Report, 157. In certain areas -- busing and quotas, for example -- it makes eminent sense to pursue legislation to guarantee that our policies cannot be easily undone. A review of policy initiatives could be undertaken to determine in each instance whether it is appropriate to formalize the initiative and, if so, in what form. The Office of Legal Policy should be involved in this effort.

Develop Alternatives To Court Litigation

Conservative distaste for the growing influence of courts in society suggests the development of alternatives to litigation which are less dependent on the fiat of unelected jurists. There is considerable pressure from a number of quarters for dispute resolution mechanisms that are cheaper, quicker, and more responsive than court litigation. The Chief Justice has called for greater use of arbitration, as has the ABA, and certain Christian fundamentalist groups have formed negotiation programs. Exploring some of these areas would be fully consistent with a desire to abate the influence of the courts and also to ease the burden on them. Promotion of non-judicial resolution mechanisms is actually a non-partisan goal which would receive widespread support. We have already made some progress in this area with the Community Relations Service mediation program for civil rights disputes in the Seventh Circuit.

ISSUES CONCERNING THE DEPARTMENT OF JUSTICE RAISED BY CONSERVATIVE SOURCES

Administration of Department

Establish a centralized system for monitoring major litigation, including that of U.S. Attorney offices, to coordinate policy. (M 405, YE 158) */

Centralize United States litigation authority fully within the Department. Includes: (1) legislative action to reverse current statutory independent litigating authority, (2) establish principle that no more authority outside Department of Justice without the Attorney General's consent, (3) negotiate agreements with agencies to limit independent litigation. (M 416). (action taken: Task Force on Litigation Authority)

Consider whether it is advisable to publish prosecutorial discretion guidelines, as Civiletti decided to do. (M 432-433).

Issue formal orders and regulations, and pursue Executive Orders, to solidify current positions such as those on standing and quotas. (YE 154).

Recruit policy and staff level people "with an understanding of the proper role of government in a free society." (YE 157).

Courts

Judges: Appoint those who recognize limits of the judicial function; consider pay raises to attract suitable candidates. (M 414). (action taken)

Issue OLC opinion to guide agencies on the political question doctrine. Issue legal opinion restricting agencies from supporting intervenor programs for "public interest" groups; forbid them unless explicitly authorized by Congress. (M 418-420).

Reverse Carter Administration position not to regularly contest standing. (M 441). (action taken)

*/ M - Mandate for Leadership (Heritage Foundation)
YE- Heritage Foundation Year-End Report
NR- National Review
CD- Conservative Digest
HE- Human Events
I - Reagan and Bush on the Issues
RP- Republican Platform

Halt practice of collusive litigation with "public interest" groups as has occurred in the past. (M 442). (action taken)

Support certain court-stripping proposals in the areas of busing, voluntary prayer, and abortion. (NR 6/26, 1/23/81, CD June, HE 8/15).

Protest Supreme Court's intrusion into family structure through denial of parents' obligation and right to guide their minor children. (R 5).

Work for appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life. (R 17).

Seek out women to appoint to lower federal courts. (Statement by President 10/14/80).

Seek alternatives to courts for resolving differences between individuals. (Quotation of President Reagan in Keepers Voice 10/80).

Push for abolition of Legal Services Corporation. (HE 2/7/81).

Crime

Push for litigative reversal of the Enmons opinion on labor extortion. Perhaps revoke labor exemption only for serious felonies to make action politically palatable. (M 424, YE 159).

Abandon endangerment offense and increased penalties for regulatory offenses in the Criminal Code. (M 425). (action taken)

Abandon several aspects of the Criminal Code: intent, increase in white collar offenses, expansion of corporate liability for unauthorized actions of non-officers. Reconsider whole codification concept. (YE 155-156, HE 8/15).

Achieve bail reform; move away from fictitious money bond system. (M 429). (legislation proposed)

Modify exclusionary rule. (HE 10/24). (legislation at OLA)

Support community crime fighting efforts, such as neighborhood crime watch and court monitoring programs; state and local agencies are the most effective crime fighters. (I 65, 70, R 9).

Mandatory sentences for commission of armed felonies. (I 70, R 9).

No gun registration. (I 70, R 9) Reject any attempt to pass a gun control law. (Speech by President to Am. Council on Consumer Interests 10/80).

Support congressional initiatives to remove provisions of Gun Control Act of 1968 that do not significantly impact crime but rather restrain law-abiding citizen in legitimate use of firearms (R 9).

Death penalty should be applied by the federal government as an appropriate penalty for certain major crimes. (R 9) (Quotation of President in Law Enforcement (1980)).

Restore ability of FBI to act effectively in the area of drug abuse. (R 9). (action taken)

Support efforts to crack down on sale and advertising of drug paraphernalia. (R 9)

Let local government determine sentencing, parole, and treatment of juveniles. (Quotations of President in Keepers Voice 10/80).

Intelligence

Enact an agents identities bill. (M 428, HE 10/3). (legislation proposed)

Broadly define 5 U.S.C. 7531 "national security," permitting dismissal of employees for this reason. (M 434).

Propose broad amendments to the FOIA, protecting law enforcement information and confidential commercial information. (M 438). (action taken)

Civil Rights

Repeal Section 202(1) of E.O. 11246, requiring government contractors to take affirmative action. (M 448). Also repeal 29 U.S.C. Section 793, requiring government contractors to take affirmative action to hire the handicapped. (M 449, YE 162).

Amend 42 U.S.C. 2000 et seq. to reverse Fullilove v. Klutznick (M 449).

Issue executive orders barring suit unless there is clear evidence of intent to discriminate -- do not rely on impact or mere statistics. (M 449).

Support Freedom from Quotas legislation. (M 450).

Don't stand in way of Education Department in redefining what constitutes federal financial assistance. (HE 12/26).

Strictly limit interference by federal departments in state and local school systems (I 59).

Support voluntary integration plans such as magnet schools. (I 59). (action taken)

Oppose forced busing because it diverts money and attention from increasing the quality of education in individual schools. (I 59, R 6). (action taken)

Partnership between the Federal Executive and the 50 governors to eliminate or correct discriminatory laws at the federal and state levels (I 65). (Speech by President in Detroit 7-17-80).

Equal opportunity should not be jeopardized by reliance on quotas, ratios, and numerical requirements. (R 4). (action taken)

Repeal federal restrictions and rewrite federal standards which hinder minorities from finding employment, starting a business, gaining work experience or enjoying the fruits of their labor. (R 14).

Education

Support tuition tax credits. (CD April, HE 8/15, I 59, R 6).
Support federal experimentation with educational vouchers. (I 59)
Clear away tangle of regulation that has driven up expenses and tuition of colleges and universities. (R 6).

Social Issues

Support Human Life Bill. (NR 3/20, CD Dec.) Support enactment of constitutional amendment to restore protection of unborn child's right to life. Oppose use of federal monies to pay for abortion where life of mother is in no danger. (I 53, R 4).

Support Republican initiatives in Congress to restore the right of individuals to participate in voluntary, non-denominational prayer in schools and other public facilities. (R 6).

Oppose passage of ERA. (Statement by President 10/14/80).

Administrative Law

Support legislative veto. (HE 8/15, I 38, R 14). Support increased presidential authority to veto regulations. (I 38).

Support Bumpers. (HE 8/15, R 14).

Support legislation to require the federal government to provide restitution to those who have been wrongfully injured by agency actions. (R 14).

Oppose use of tax monies by any federal agency to pay expenses of intervenors in the rulemaking process. (R 14).

Changes in the Administrative Procedure Act to give citizens the same constitutional protections before a government agency that they have in a courtroom. (R 14).

Require agencies to publish in the Federal Register all rules and statements of policy before they are adopted. (R 14).

Guarantee written notice and an opportunity to submit facts and arguments in any adjudicatory proceeding. (R 14).

Require that an agency decision be consistent with prior decisions unless otherwise provided by law. (R 14).

Permit judicial review without exhaustion of administrative remedies. (R 14).

Memorandum

Subject	Date
Solicitor General Briefs in EEOC cases	June 16, 1982

To The Attorney General From John Roberts JR

Recent events indicate the need for greater coordination between the Civil Rights Division and the Solicitor General's office with respect to the development of Department of Justice positions before the Supreme Court in cases referred by the Equal Employment Opportunity Commission (EEOC). EEOC has responsibility for private employment discrimination, while our Civil Rights Division has parallel responsibility for public employment discrimination. The Civil Rights Division and EEOC frequently rely on the same statutes and regulations, and the issues which arise in EEOC cases are in most instances identical to the issues arising in Civil Rights Division cases. When an EEOC case goes to the Supreme Court, the Solicitor General's office typically works off a draft prepared by EEOC, and only intermittently consults with the Civil Rights Division concerning the position to be taken in the case. Thus, a Department of Justice position before the Supreme Court is developed without the advice of the Civil Rights Division, even though the issues are of great significance to the Civil Rights Division. For a variety of reasons the Solicitor General's office cannot be considered sufficiently sensitive to the policy views of the Civil Rights Division. Therefore, the end result is that Department policy in the civil rights area is not sufficiently addressed when the Solicitor General's office presents arguments on behalf of EEOC.

This is not merely a theoretical problem. This term two cases referred from EEOC presented significant issues in the civil rights area. In each instance, the Solicitor General's office, in consultation with EEOC, presented arguments to the Supreme Court which were totally inconsistent not only with general Administration policies but with specific and announced priorities of your own. In the American Tobacco case, the Solicitor General's office and EEOC presented an argument that would have expanded the effects test in employment cases -- despite the clear philosophical oppostion to the effects test by the Department, most clearly articulated in the voting rights area. In the

Kremer case, the Solicitor General's office and EEOC argued against federal courts giving res judicata effect to state court determinations in discrimination cases -- despite the clear thrust by the Department to enhance and respect state courts and encourage finality in litigation. Fortunately, the Solicitor General's office and EEOC lost in these cases, each time by a vote of 5-4. This in itself demonstrates that the arguments presented by the Solicitor General's office were in no sense compelled by the law.

I think it would be helpful in avoiding such problems in the future if the Civil Rights Division were fully involved in EEOC cases reaching the Solicitor General's office. The issues often overlap, and the policy input of the Civil Rights Division is needed. Neither EEOC nor the Solicitor General's office itself satisfies the concern that the policy objectives of the Department be addressed. I recommend that you direct the Solicitor General's office to keep the Civil Rights Division fully advised of all EEOC filings, and to solicit their views as they would in a case coming from the Civil Rights Division itself.

cc: Ken Starr
Carolyn Kuhl