



Office of the Attorney General

Washington, D. C. 20530

September 9, 1981

TO : Sandra Day O'Connor

FROM : John Roberts *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.