

SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL



September 24, 1981

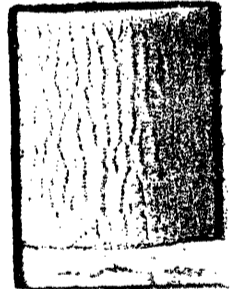
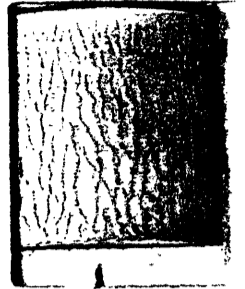
TO: Ken Starr
✓ Hank Habicht
David Hiller
Tex Lezar
John Roberts
Chips Stewart

FM: Carolyn Kuhl

Attached is a list of Circuit Court judges who are or will soon be eligible to retire. As I mentioned at a recent staff meeting, we should be keeping a look-out for replacement candidates.

Attachment

*File
Court
Judicial Selection*



FEDERAL JUDGES ELIGIBLE TO RETIRE THROUGH 1981

SUPREME COURT

Burger, Warren E.		9-17-72
Brennan, William J.		10-16-71
Marshall, Thurgood		7-2-78
Blackmun, Harry A.		11-4-74

FIRST CIRCUIT

None

SECOND CIRCUIT

Kaufman, Irving R.	New York	6-24-75
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THIRD CIRCUIT

Seitz, Collins J.	Delaware	7-18-81
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FOURTH CIRCUIT

Russell, Donald S.	South Carolina	1-4-77
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FIFTH CIRCUIT

None

SIXTH CIRCUIT

Edwards, George C.	Michigan	8-6-79
Weick, Paul C.	Ohio	8-25-69

SEVENTH CIRCUIT

Cummings, Walter J.	Illinois	8-15-81
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EIGHTH CIRCUIT

None

NINTH CIRCUIT

None

TENTH CIRCUIT

Seth, Oliver	New Mexico	5-30-80
Doyle, William E.	Colorado	10-2-76

ELEVENTH CIRCUIT

Coleman, James P.	Mississippi	8-16-80
Brown, John R.	Texas	12-10-74
Ainsworth, Robert	Louisiana	10-31-76
Garza, Reynaldo	Texas	7-7-80

DISTRICT OF COLUMBIA CIRCUIT

Wright, J. Skelly		1-14-76
Tamm, Edward A.		4-21-71
Robinson, Spottswood W.		7-26-81
Robb, Roger		5-9-79
MacKinnon, George E.		6-16-79

Memorandum



Subject

My Participation in the Recent Supreme Court Appointment and Confirmation Process

Date

September 18, 1981

To

Kenneth W. Starr
Counselor to the
Attorney General

From

Hank Habicht *HH*
Special Assistant
the Attorney General

Since the pre-Inaugural transition period there had been discussions among senior Department of Justice staff regarding the task of preparing a slate of well-qualified candidates for the Supreme Court, should a vacancy arise. The Attorney General took this responsibility seriously. He almost immediately began making inquiries among leaders of the bar regarding well-qualified candidates, and asked his staff to begin compiling lists. Beginning in March, I reviewed materials which had been compiled during the Administration of Attorney General Levi, as well as case reports and legal writings, with a view to developing a preliminary slate of candidates whose intellectual credentials, personal integrity and judicial philosophy appeared to meet the high standards of the President and the Attorney General.

In late March or early April, the Attorney General told Ken Starr and me that the task of compiling a list of qualified candidates for the Court had become "high priority". I now know that his sense of urgency was induced by his meeting with then-Associate Justice Potter Stewart, though at the time he did not let on about any pending vacancies.

The Attorney General gave us a few names which he wanted us to investigate thoroughly as a first priority. Among those names were five women -- Sandra O'Connor, Cornelia Kennedy, Carolyn Randall, Mary Coleman and Amalya Kearse. These women were all sitting judges. I read most or all of the published opinions and writings of Judge O'Connor, Judge Kennedy and Judge Randall and investigated their biographical data through other sources. Ken Starr evaluated Judge Kearse and Emma Jordan evaluated Chief Justice Coleman. On approximately May 15, 1981, I reported preliminarily to the Attorney General regarding these candidates and on May 28, supplied the Attorney General with briefing memoranda and copies of the decisions of these women judges, and suggested that Judges O'Connor and Kennedy warranted his serious consideration.

The Attorney General set out to review these voluminous materials and asked me to research the records of certain other candidates, such as Robert Bork and Dallin Oaks, and to compile a list of other attractive candidates and a summary of their backgrounds. In consultation with Rex Lee, Jon Rose, Ken Starr, Bruce Fein and other knowledgeable Department officials, I compiled by June 19 a list of 21 individuals (attached) with brief background memoranda for the Attorney General's review.

Our review continued after Justice Stewart's retirement was formally announced. Additional names were added to our list (such as William Webster, Rex Lee and Carol Dinkins) and more information was gathered regarding the writings and records of individuals already identified. The Attorney General was given periodic reports by Ken Starr or me and I am aware that he consulted with a number of other persons before he met with the President to discuss specific candidates.

On approximately June 23, I learned from Ken Starr that the President and Attorney General had agreed that Judge Sandra Day O'Connor's background and record were extremely impressive. Inasmuch as her career in the three branches of Arizona state government was less nationally-known than the records of some of the other final candidates, the Attorney General asked me to travel to Phoenix during June 24-25 to find out more about her record through local sources.

Throughout the search process, the Attorney General had emphasized the need for confidentiality, recognizing the interests of individual candidates and the obvious costs of fueling public speculation about this critically important process. Therefore, our goal in reviewing local Arizona sources was very discreetly to determine those issues upon which Judge O'Connor had been outspoken and active in Arizona public life and to gain an assessment of her general reputation within the local and state community. Put another way, we sought to ensure that nothing significant in Judge O'Connor's local record contradicted the otherwise favorable impression which the Attorney General had developed in Washington.

At this time, Judge O'Connor had not yet been contacted by the Department of Justice and the need for confidentiality remained strong. Thus, the scope of my search was necessarily constrained. It was anticipated that if my search in Phoenix yielded favorable results, Judge O'Connor would then be contacted and interviewed at length.

I reviewed the few legislative journals available, reviewed newspaper clipping files, and spoke in confidence to certain Arizona civic, judicial and legislative leaders. Inasmuch as I was informed that reviewing the "morgue files" in the offices of Arizona

newspapers would raise suspicion and speculation, my documentary search was limited to the State Capitol Library in Phoenix. Moreover, Arizona does not publish hearing records or detailed legislative journals; therefore, the available journals alone only led me to principal bills sponsored by Judge O'Connor, or bills upon which then-Senator O'Connor had requested that brief comments be published.

The documentary search demonstrated that Judge O'Connor, as one of the few lawyers then in the legislature, was publicly identified with three principal issues: 1. Administration of criminal and civil justice (including death penalty legislation, increased penalties for drug offenders, improved prisons and mental institutions and merit selection of judges); 2. State revenue law reform along the lines of California's Proposition 13; and 3. Women's rights, including amending provisions of Arizona Statutes which appeared unduly discriminatory against women.

I spoke with three individuals identified by Rex Lee and Bob McConnell as being both knowledgeable and discreet. Each of these persons had a unique perspective on Judge O'Connor's career and personality. Marshall Humphrey is a former President of the Arizona State Senate, a Republican leader and is extremely familiar with Judge O'Connor's political career. Presiding Judge Robert Broomfield of the Maricopa County Superior Court was Presiding Judge when Judge O'Connor served on that court from 1974-79. Finally, I spoke with John Kyl, a former law partner of Rex Lee, and a leader in the Arizona state Bar.

These interviews failed to identify major issues other than those listed above with which Judge O'Connor had been publicly identified. Moreover, all sources confirmed that Judge O'Connor had earned the highest bipartisan public respect and affection in Arizona both as a family woman and professional, and that nothing in her background could be remotely viewed as disqualifying.

Immediately following this review, the Attorney General contacted Judge O'Connor, who both corroborated our preliminary search efforts and supplied further information concerning her record in the State Senate and elsewhere which we then followed up prior to her nomination by President Reagan.

During the first two weeks in July, I exhaustively reviewed newspaper clippings supplied by the FBI. These dated back to 1965 and documented Judge O'Connor's career in Arizona. I put together a clipping file to help Judge O'Connor predict potential areas of Senate questioning.

On July 8-9, Ken Starr, Bruce Fein and I compiled two briefing books. One contained significant writings by Bickel, Holmes and others on theories of judicial restraint, articles regarding Roe v. Wade, and excerpts of prior Supreme Court confirmation hearings. The second book contained questions

and answers on a range of constitutional issues which I compiled with the help of Ken Starr, Bruce Fein, the Office of Legal Counsel and numerous others.

Because of other projects at the Department which became pressing, I began to share responsibility for the compilation of later briefing books with Carolyn Kuhl in mid-July, and John Roberts in August. During and after Judge O'Connor's courtesy calls on July 14-17, we were able to identify an array of issues which were likely to be posed to Judge O'Connor by the Senate Judiciary Committee. Carolyn and I immediately prepared three books on issues such as affirmative action, Justice Rehnquist's Laird v. Tatum opinion, the Tenth Amendment, constitutional conventions and the Hyde Amendment, among others. We also set out to prepare a complete briefing book of issues and answers. Carolyn and I each took approximately half the topics, and either drafted our own answers or farmed questions out to OLC, Bruce Fein and Richard Willard and then edited them to conform to a consistent style and tone. This book was sent to Judge O'Connor on or about August 15.

With the arrival of John Roberts in mid-August, I returned principally to other responsibilities, although when Senator Hatch sent over an extensive briefing book during the last week in August, Carolyn, John and I divided up the new topics raised and prepared briefing papers for Judge O'Connor.

The foregoing, to the best of my current recollection, catalogues my nearly six months' participation in the Attorney General's Supreme Court project. Please advise if you would like more detail.

(June 15, 1981)

The following is a preliminary alphabetical listing of strong candidates for review, additions and deletions:

Judge Arlin M. Adams (Third Circuit)

Philip Areeda

Robert Bork

Judge Anthony Kennedy (Ninth Circuit)

Philip Kurland

Dallin Oaks

Antonin Scalia

Philip Tone

Judge Clifford Wallace (Ninth Circuit)

Judge Malcolm Wilkey (D.C. Circuit)

Judge Sylvia Bacon (D.C. Superior Court)

Justice Mary Coleman (Michigan Supreme Court)

Elizabeth Dole

Rita Hauser

Carla Hills

Judge Amalya Kearse (Second Circuit)

Judge Cornelia Kennedy (Sixth Circuit)

Soia Mentschikoff (Dean, University of Miami Law School)

Judge Sandra D. O'Connor (Arizona Court of Appeals)

Justice Ellen Peters (Connecticut Supreme Court)

Judge Carolyn Randall (Fifth Circuit)