

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

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 Internal History of Supreme Court Appointment	Date September 18, 1981
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To
Ken Starr

From
Carolyn Kuhl

As you may recall, I arrived at the Department of Justice on July 13, 1981, the week after Judge O'Connor's appointment was announced. The first briefing book already had been sent to Judge O'Connor by the time I arrived.

On July 13 we discussed preparing a draft of a letter which might be sent from the Attorney General to the Judiciary Committee regarding Judge O'Connor, similar to the letter which was placed in the record at Justice Blackmun's confirmation hearings. During that week we also discussed preparing additional briefing materials for Judge O'Connor. Hank and I began listing additional topics which should be covered.

Judge O'Connor was in Washington making courtesy calls that week. As best I can recall she arrived on Tuesday, July 14. Based on some of the subjects raised in the courtesy calls she asked us to prepare materials for her on issues concerning a possible constitutional convention, removal of appellate jurisdiction from the Supreme Court, affirmative action, the Hyde Amendment, reasons for declining to answer questions concerning Roe v. Wade, and several other topics. By the end of that week we had prepared three briefing books on these matters. Judge O'Connor received Senator Helms' letter during the week of her courtesy calls.

In the following few weeks, Hank and I prepared questions in additional areas we believed might be mentioned in the confirmation hearings. We gave a number of the questions to Ted Olson for distribution to staff attorneys in OLC and also gave some to Bruce Fein and Richard Willard. Hank and I edited the answers and included background materials in some areas. This briefing book was sent to Judge O'Connor on or before August 17.

During the week of August 17 we sent Judge O'Connor two additional briefing books with questions and answers which included some broader policy areas such as prisons and immigration. These books were prepared by John Roberts and me. In that week, we also sent Judge O'Connor topic summaries and digests of the confirmation hearings of the five most recently appointed Supreme Court Justices.

Judge O'Connor requested that we assist her in drafting a response to Senator Helms' letter. I circulated a draft to Judge O'Connor and to the White House the week of August 17.

On August 21 I delivered copies of all briefing materials we had prepared and copies of all Judge O'Connor's Arizona Court of Appeals decisions to the White House Counsel's office.

On August 24 you met with Judge O'Connor in Phoenix. That day you called and requested that John Roberts and I prepare draft responses to Section III of the Senate Judiciary Committee Questionnaire, the questions concerning judicial activism and Judge O'Connor's commitment to equal justice for all. (I had sent the Questionnaire to Judge O'Connor at Bob McConnell's request the previous week.) At your request we sent the draft responses to Judge O'Connor by Federal Express.

On August 25 we met before you left for Vermont. We discussed changes in the response to Senator Helms suggested by Judge O'Connor. We also discussed changes in the proposed response to Section III of the Judiciary Committee Questionnaire. You stated that Judge O'Connor had seemed very well prepared. Judge O'Connor had, however, requested that we prepare a briefing paper on bail reform and additional questions and answers on busing. We sent Judge O'Connor the redrafted version of the response to Senator Helms and a revision of the Judiciary Committee Questionnaire responses via telecopier later in the day on August 25.

During the week of August 24, I spent time coordinating with the White House and Judge O'Connor to finalize the response to Senator Helms, the response to the Judiciary Committee Questionnaire, and a statement of Judge O'Connor's personal views on five subjects in response to a request by Senator Thurmond. On Friday, August 28, all of the above were completed and delivered (Judge O'Connor mailed the letter to Senator Helms from Phoenix). Also on Friday we sent Judge O'Connor the briefing papers on bail and busing, a summary of the cases the Supreme Court has agreed to hear next term, and a U.S. Law Week summary of last term's major decisions.

Judge O'Connor arrived in town on Tuesday evening, September 1. We spent all day Friday, September 4, in a "moot court" question-and-answer session with Judge O'Connor here. Judge O'Connor asked

that briefing materials be prepared in several areas, including homosexuality and parental consent. She also was uncomfortable with her responses to questions on abortion. On Saturday morning, September 5, you and I discussed a series of questions and proposed answers covering abortion and Roe v. Wade.

During the week of August 31 we discussed whether the Attorney General should make a statement at the confirmation hearings. I recommended to the Attorney General that he do so, he agreed, and Bob McConnell broached the subject with the Chairman.

On Tuesday, September 9, we had a half-day "moot court" session with Judge O'Connor, again covering abortion and busing. On that day Judge O'Connor received a letter from Senator Helms again asking her to respond to his questions concerning Roe v. Wade. John Roberts and I worked on a response to that letter.

I attended the confirmation hearings from Wednesday, September 10, until Judge O'Connor was excused as a witness on Friday, September 11. I remained with Judge O'Connor on Friday to watch television coverage of other witnesses. During those three days we prepared responses to questions from Senator Humphrey and to a letter from Senator Moynihan. We also provided Judge O'Connor with briefing materials on removal of religious institutions' tax exemptions and the Second Amendment's restrictions on gun control.

On Friday afternoon, Sherrie Cooksey and I escorted Judge O'Connor to the tea sponsored on her behalf by Mrs. Thurmond.

Memorandum



Subject

Materials for Judge O'Connor --
Format for Summarizing Major
Points from Hearings on Supreme
Court Nominees

Date

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 pinpoint 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 excerpts 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

NOMINATION HEARING OF
WILLIAM H. REHNQUIST

- Q. Can your record fairly be said to reflect the dedication "to the great principle of civil rights"? (Hart) (p. 166).
- Q. How would you justify the Court's departure from Plessy v. Ferguson and subsequent decisions when they were overruled in Brown v. Board of Education? (Hart) (p. 167).
- A. Rehnquist answers prior question by stating that the Justices on the Court at the time of Brown deeply canvassed the historical intent of the Fourteenth Amendment's framers, and the debates on the floor of Congress, and concluded that the Court in Plessy had not correctly interpreted them. He states that it seems to him to be a very proper role for the Court to give due weight to a prior decision but to overrule it if a recanvass of the historical intent of the framers indicates that the earlier Court was wrong. (p. 167).