

THE ATTORNEY GENERAL
WASHINGTON

January 7, 1985

Mr. Craig L. Fuller
Assistant to the President
for Cabinet Affairs
The White House
Washington, D.C. 20500

Dear Craig:

Enclosed for the President's records and historical files is a brief history which describes the events which led to the nomination by the President of Justice Sandra Day O'Connor to The Supreme Court.

Since this has obvious historical significance I thought a copy should be with the President's papers.

Sincerely,

Bill

William French Smith

Enclosure

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HISTORY OF THE NOMINATION

OF

JUSTICE SANDRA DAY O'CONNOR

WILLIAM FRENCH SMITH
ATTORNEY GENERAL
OF THE UNITED STATES

SEPTEMBER 1981

HISTORY OF THE NOMINATION
OF
JUSTICE SANDRA DAY O'CONNOR

On September 25, 1981, Sandra Day O'Connor became the first woman to serve as Justice of the United States Supreme Court. This document records the events which led to Justice O'Connor's installment.

On March 4, 1981, Attorney General William French Smith received a telephone call from Vice President Bush advising him that United States Supreme Court Justice Potter Stewart would like to meet with the Attorney General. The Vice President, being a close friend of Justice Stewart, asked the Attorney General to arrange such a meeting. The Attorney General responded that he would do so. He then called Justice Stewart and arranged to meet him at his home at 5136 Palisade Lane, Washington, D.C. on March 26, 1981.

At that meeting, Justice Stewart advised the Attorney General that he intended to resign in early July at the end of the then-current Supreme Court term. He wanted his decision to remain confidential, however, until he thought it would be appropriate to make the matter public, presumably in early June. The Attorney General informed Justice Stewart that he would keep the matter confidential, advising only the President. A general discussion concerning desirable qualifications for a successor

followed. The Attorney General then greeted Mrs. Stewart and left.

The next day, March 27, the Attorney General directed Kenneth W. Starr, Counselor to the Attorney General, to see that research began into prospective candidates for a Supreme Court appointment in the event that a vacancy should develop. With respect to possible women candidates, he furnished a number of names on a handwritten list to Mr. Starr. Whenever the name of a possible woman candidate had come to the Attorney General's attention, he had noted it on a telephone message slip which he kept on his desk. The list included Judge Sandra O'Connor, who was identified as an Arizona appellate court judge. The list did not contain Judge O'Connor's full name.

The Attorney General did not indicate the sources of the names of the various candidates. He simply mentioned that the list was based upon discussions with various people on different matters usually unrelated to judicial appointments. He also did not indicate that any vacancy on the Court was anticipated.

Mr. Starr promptly began to research and compile a list of possible candidates. On one occasion, he asked the Attorney General for the full name of the Arizona appellate judge, since the Attorney General's staff was unable to identify her based upon the information set forth on the handwritten note. (The note apparently no longer exists. Its disposition is undetermined.)

The judicial opinions of all the candidates were gathered together and analyzed by Mr. Starr, Mr. F. Henry Habicht, Special

Assistant to the Attorney General, and Mrs. Emma C. Jordan, who was then serving as a White House Fellow and Special Assistant to the Attorney General. Mr. Habicht reviewed the opinions of Judge O'Connor. Also involved in the analysis of candidates' opinions were Rex E. Lee, Solicitor General; Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy; and Bruce E. Fein, Associate Deputy Attorney General. A list of twenty-one individuals was compiled with appropriate background information. The list was given to the Attorney General for review.

On March 30, 1981, the President was shot and hospitalized. It was therefore not practical to advise him of the impending vacancy until after he had returned from the hospital. On April 21, 1981, the Attorney General met privately with the President in his study on the third floor of the White House. The Attorney General advised him of Justice Stewart's intention and the search for a successor, which by then was well underway.

On May 15, 1981, Mr. Habicht and Mr. Starr gave a preliminary report to the Attorney General regarding various candidates, and on May 28 supplied the Attorney General with briefing memoranda and copies of the candidates' decisions. The Attorney General reviewed these materials and asked the staff to research the records and background of certain other candidates.

The process intensified after Justice Stewart's retirement was formally announced on June 18, 1981. Additional names were added to the list and more information was gathered regarding the writings and records of individuals already identified.

On June 23 the Attorney General met with the President and discussed with him the various candidates. They agreed that Judge O'Connor's background and record, among others, merited further in-depth review. As a result, Mr. Habicht was sent to Phoenix, Arizona, on June 24 and 25 to obtain information concerning Judge O'Connor on a confidential basis.

While Judge O'Connor was a leading candidate at this point, other candidates were also being considered.

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. The staff's goal in reviewing local Arizona sources was to obtain discreetly as much information as possible and to gain an assessment of Judge O'Connor's reputation and interests within the community.

Because of the need for confidentiality, the scope of Mr. Habicht's search was limited. He reviewed the few available legislative journals and newspaper clipping files. He spoke in confidence to certain predetermined Arizona individuals who were in a position to provide helpful information. (Inasmuch as Mr. Habicht was informed that reviewing the "morgue files" in the offices of Arizona newspapers would raise suspicion and speculation, his documentary search was limited to the State Capitol Library in Phoenix.) Arizona does not publish hearing records or detailed legislative journals; therefore, the available journals led only to principal bills sponsored by

then-Senator O'Connor, or bills upon which she had requested that brief comments be published.

The documentary search indicated that Judge O'Connor, one of the few lawyers serving in the Arizona legislature during her terms, 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. There was no indication of her having taken any position on abortion.

The individuals interviewed failed to identify any major issues with which Judge O'Connor had been publicly identified other than those listed above. All sources confirmed that Judge O'Connor had earned bipartisan public respect and affection in Arizona both as a family woman and as a professional, and that nothing in her background was disqualifying.

On Thursday, June 25, 1981, the Attorney General placed a telephone call to Judge O'Connor. He told her that he would like to consider her for a federal position and asked if she could come to Washington and meet him at dinner the following Sunday. Judge O'Connor responded that she would have to obtain her doctor's approval because she was recovering from surgery. When she later called the Attorney General to inform him she could travel to Washington, the Attorney General asked if the date of

the dinner meeting could be changed from Sunday to Monday, June 29. He also asked if two representatives from the Department of Justice could visit her in Phoenix on Saturday, June 27.

On Saturday, Mr. Rose and Mr. Starr met with Judge O'Connor in her home in Phoenix. This was the first face-to-face meeting of the Judge and Department officials. The meeting lasted all day and covered a wide variety of subjects, aimed at eliciting Judge O'Connor's views and philosophy. Mr. Rose and Mr. Starr reported by telephone to the Attorney General at the conclusion of the meeting on Saturday evening.

On Monday, June 29, Judge O'Connor flew to Washington for dinner with the Attorney General and Mrs. Smith at the Jefferson Hotel. Mrs. Smith knew Judge O'Connor was being considered for a federal appointment, but she did not know which one.

On the following morning, Tuesday, June 30, 1981, Judge O'Connor had breakfast at the L'Enfant Plaza Hotel with the Attorney General; Edward C. Schmults, Deputy Attorney General; and William P. Clark, Deputy Secretary of State and former Justice of the California Supreme Court. Later that afternoon, also at L'Enfant Plaza Hotel, Judge O'Connor met with the Attorney General; the Deputy Attorney General; Edwin Meese III, Counselor to the President; James A. Baker III, Chief of Staff and Assistant to the President; Michael K. Deaver, Deputy Chief of Staff and Assistant to the President; and Fred F. Fielding, Counsel to the President.

Thereafter, the Attorney General called the President to arrange for him to meet with Judge O'Connor.

The next day, July 1, 1981, during the Attorney General's regular morning staff meeting, Mr. Deaver advised Myra L. Tankersley, Confidential Assistant to the Attorney General, that the President could see the Attorney General and Judge O'Connor at the White House that morning. The Attorney General left his morning staff meeting and arranged through Mr. Deaver a 10:15 a.m. meeting with the President. It was also decided that since there was much speculation in the press about Judge O'Connor, it would be better if the Attorney General went to the White House separately. Miss Tankersley would bring Judge O'Connor to the White House.

Judge O'Connor was attending meetings in Washington and had left with Miss Tankersley telephone numbers by which she could be reached. The Attorney General contacted Judge O'Connor. He advised her that the President wished to meet with her and that Miss Tankersley would meet her in fifteen minutes to escort her to the White House. Judge O'Connor advised that she would be waiting for Miss Tankersley at Dupont Circle, in front of a drug store there, and that for identification purposes she was wearing a lavender suit.

Miss Tankersley met Judge O'Connor and escorted her to Mr. Deaver's office in the White House. The Attorney General was in the Oval Office with the President. The three talked in Mr. Deaver's office for about ten minutes, after which Mr. Deaver left to see if the President was ready to see Judge O'Connor. After approximately five minutes, Mr. Deaver escorted Judge

O'Connor to the Oval Office to meet with the President and the Attorney General. Also present were Mr. Baker and Mr. Meese.

After the meeting concluded, Mr. Deaver brought Judge O'Connor to his office where Miss Tankersley was waiting to take her back to her other meetings.

On Thursday, July 2, 1981, the The Washington Post, in an article by Lou Cannon, broke the story that Judge O'Connor was the leading candidate for the vacancy created by Justice Stewart's retirement.

Deliberations continued over the next few days. On Monday, July 6, 1981, the President telephoned Judge O'Connor in Phoenix. He informed her that he would like to nominate her to fill the vacancy on the United States Supreme Court. She accepted. Prior to telephoning Judge O'Connor, the President had telephoned Senator Barry Goldwater to advise him of his decision.

At the same time, Mr. Starr was doing additional research with respect to the Judge's legislative record on the issue of abortion, particularly in light of news stories which had appeared over the preceding weekend to the effect that certain pro-life groups felt that the Judge's record on abortion was unacceptable. The information was recorded in a memorandum prepared the following morning, July 7, and furnished to the Attorney General.

On Tuesday, July 7, the President announced at a White House press conference his intention to nominate Judge Sandra O'Connor, after which the Attorney General responded to questions. The President praised her as a person "for all seasons." Judge

O'Connor was in Phoenix at the time of the announcement. Peter Roussel, a press aide on the President's staff, had been assigned to assist her. She held a morning press conference in which she thanked the President for his support.

A two-month process of preparing for the confirmation hearings then began. The hearings were ultimately scheduled for September 10, 1981. There was initial hope that the hearings could be set prior to the August recess of the Senate, but that hope evaporated because of the issue which developed over abortion.

On July 8 and 9, Mr. Starr, Mr. Habicht, and Mr. Fein prepared two briefing books containing a range of materials concerning the Supreme Court, the role of the Justices, excerpts from prior Supreme Court confirmation hearings, and materials on various constitutional issues.

On July 13, the Attorney General and others discussed preparing a draft of a letter which might be sent from the Attorney General to the Judiciary Committee regarding Judge O'Connor. The letter would be similar to one which was placed in the record at Justice Blackmun's confirmation hearings. It was later decided, however, that the Attorney General would not send such a letter. During that week, the Attorney General also discussed preparing additional briefing materials for Judge O'Connor. Mr. Habicht and Miss Carolyn Kuhl, Special Assistant to the Attorney General, began listing additional topics which should be covered.

Judge O'Connor arrived in Washington on Tuesday, July 14. At 9:00 a.m. she met with the Attorney General in his conference room to develop a strategy for making courtesy calls on members of the Senate Judiciary Committee. Also participating in this meeting were Mr. Schmults; Mr. Starr; Mr. Rose; Fred F. Fielding, Counsel to the President; Robert A. McConnell, Assistant Attorney General for Legislative Affairs; and Powell A. Moore, Deputy Assistant to the President for Legislative Affairs. At 12:00 p.m. the participants in the meeting, with the exception of Mr. Moore, had lunch in the Attorney General's dining room.

Later that afternoon, amid much news media attention, the Attorney General accompanied Judge O'Connor on her courtesy calls to members of Congress. Judge O'Connor met with Senator Strom Thurmond of South Carolina, Senator Barry Goldwater of Arizona, Senator Dennis DeConcini of Arizona, Senator Howard Baker of Tennessee, Senator Robert Byrd of Virginia, Senator Joseph Biden of Delaware, Speaker Thomas O'Neill of Massachusetts, and Minority Leader Robert Michel of Illinois.

Based on the subjects raised in the courtesy calls, Judge O'Connor asked for materials on issues concerning constitutional conventions, Congressional efforts to limit areas of the appellate jurisdiction of the Supreme Court, the Hyde Amendment (which denied federal funds for abortions unless the life of the mother was threatened by pregnancy), precedent for refusal of judicial nominees to answer questions concerning topics likely to come before the Court, and several other topics. By the end of that week, the staff had prepared three additional briefing books

on these matters. Another briefing book on still additional topics was sent to Judge O'Connor on August 17.

On July 15, the President hosted a formal ceremony in the Rose Garden of the White House at which he presented Judge O'Connor and made brief remarks. Also participating were the Attorney General and Vice President.

During the week of August 17, Judge O'Connor was given two additional briefing books which included material on some broad policy areas such as prisons and immigration. In that week Judge O'Connor also was given topic summaries and digests of the confirmation hearings of the five most recently appointed Supreme Court Justices.

A response to a letter from Senator Jesse Helms of North Carolina on abortion issues was prepared. On August 21, copies of all briefing materials and copies of all of Judge O'Connor's Arizona Court of Appeals decisions were sent to the White House Counsel.

On August 24, Mr. Starr and Mr. Rose, accompanied by Mr. Richard Hauser and Ms. Sherrie Cooksey of the White House staff, met with Judge O'Connor in Phoenix to prepare for the Senate confirmation hearings. Mr. John O'Connor was present and participated in these preparations. On Tuesday evening, September 1, Judge O'Connor returned to Washington. All day Friday, September 4, was devoted to a "moot court" question-and-answer session in the Attorney General's conference room. Judge O'Connor asked that further briefing materials be

prepared in several additional areas, including homosexuality and parental consent issues.

On Tuesday, September 8, a half-day "moot court" session was held covering, among other issues, 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. A response was prepared in consultation with Judge O'Connor.

The confirmation hearings were held from Wednesday, September 9, to Friday, September 11. Judge O'Connor was escorted to the first of these hearings in the Senate Appropriations Hearing Room of the Dirksen Building by the Attorney General, Mrs. Smith, Senator Thurmond, and Mr. O'Connor. The Attorney General presented Judge O'Connor to the members of the Judiciary Committee. His statement is attached at Tab A. During the course of the hearings, responses were prepared to questions from Senator Gordon J. Humphrey of New Hampshire and Senator Daniel Patrick Moynihan of New York. Judge O'Connor was also given briefing materials on removal of religious institutions' tax exemptions and Second Amendment restrictions on gun control.

Judge O'Connor's nomination was approved unanimously by the Senate Judiciary Committee on September 16 and was confirmed by the full Senate on September 21 by a vote of 99-0. On September 25, 1981, she took the oath of office.

September 1981

William French Smith
Attorney General of the United States