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# WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

- O - OUTGOING
- H - INTERNAL
- I - INCOMING  
Date Correspondence Received (YY/MM/DD)   /  /

Name of Correspondent: Peter J. Wallison

MI Mail Report      User Codes: (A) \_\_\_\_\_ (B) \_\_\_\_\_ (C) \_\_\_\_\_

Subject: Executive Privilege - Scalia

**ROUTE TO:**

**ACTION**

**DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>cu holl</u>	ORIGINATOR	<u>86108106</u>		<u>@</u>	<u>86108106</u>
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<u>cu wall</u>	<u>A/c</u>	<u>86108106</u>		<u>@</u>	<u>86108106</u>
	Referral Note:	<u>angle 86 PJSW memo to the President</u>			
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- ACTION CODES:**
- A - Appropriate Action
  - C - Comment/Recommendation
  - D - Draft Response
  - F - Furnish Fact Sheet to be used as Enclosure

- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

- DISPOSITION CODES:**
- A - Answered
  - B - Non-Special Referral
  - C - Completed
  - S - Suspended

**FOR OUTGOING CORRESPONDENCE:**  
 Type of Response = Initials of Signer  
 Code = "A"  
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Comments: \_\_\_\_\_

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THE WHITE HOUSE

WASHINGTON

73534400

August 6, 1986

RESTRICTED - White House Counsel's Office

MEMORANDUM FOR THE PRESIDENT

FROM: PETER J. WALLISON  
COUNSEL TO THE PRESIDENT

ORIGINAL SIGNED BY PJW

SUBJECT: Executive Privilege

This memorandum sets out the reasons for resisting the request of the Senate Judiciary Committee for copies of certain documents prepared or used by Judge Scalia when he was head of the Justice Department's Office of Legal Counsel between 1974 and 1977.

Background

1. Yesterday, with the release to the Senate of certain documents prepared or used by Justice Rehnquist when he was head of the Justice Department's Office of Legal Counsel, we established a precedent that a Senate Committee engaged in the confirmation process may have access to the files of a nominee who was an official of this or a former administration.
2. The Committee has now requested documents from the files of Judge Scalia when he was head of the Justice Department's Office of Legal Counsel between 1974 and 1977.
3. This request offers us the opportunity to limit substantially the scope of the precedent established yesterday, because almost all the Rehnquist papers we released relate to alleged "abuses" of civil liberties or civil rights during the Nixon Administration.
4. The Scalia papers do not relate to any alleged wrongdoing. Thus, we can draw the line by saying that the President waived executive privilege for the Rehnquist documents because they were requested to clear the air concerning Watergate-related abuses, but that this issue is not present in the case of the Scalia documents.

5. This would establish the principle that a Senate Committee is not entitled to documents in the files of the Executive Branch unless there is a credible allegation of wrongdoing that would be resolved by disclosure of the files.

### Policy Issues

Whether we should give up the papers demanded by the Committee raises policy questions that go well beyond the Rehnquist and Scalia nominations - as important as these nominations are:

1. If we contribute to the establishment of the principle that a Senate committee can have general access to Executive Branch files whenever the President has nominated a person who has served in this or any other Administration, any nomination in the future can be held up by a Senate committee's request for access to the nominee's files.

If the request is denied the Senate Committee will refuse to act. On the other hand, if the request is granted, the resulting fishing expedition may result in embarrassing disclosures, whether or not related directly to the nominee, that may jeopardize the nomination.

Should the Democrats take control of the Senate in 1986, even highly qualified nominees -- as we have in this case -- could be stopped by the simple device of demanding disclosure of their former files. The President's power of appointment would, in this category of cases, be seriously impaired.

2. More generally, a requirement of disclosure would "chill" communications within the Executive Branch. Even communications between the President and his staff might have to be disclosed if a staff member is nominated for a position that is subject to Senate confirmation.

The current reluctance to put advice or questions in writing -- already a serious problem because of leaks to the press -- would be magnified by a legitimate concern that at some time in the future all such communications would be exposed to public view in a confirmation in process.

3. In the specific case of legal advice -- which is raised by the Committee's requests for documents from the Office of Legal Counsel -- disclosure would "chill" requests from the entire government for advice from the one office that is intended to provide the most dispassionate legal analysis of difficult issues.

Just as in the case of the lawyer/client privilege in the private sector, if the privilege were to be compromised clients would not disclose facts to lawyers and the ability of lawyers to provide guidance would be effectively eliminated.

## Analysis

The Scalia nomination provides an ideal opportunity to assert executive privilege and make it stick. Although we released the Rehnquist papers before there was any opportunity for pressures to be brought to bear on the Senate Committee, yesterday's Washington Post editorial (attached) suggests that eventually the Committee would have received the message that their request for documents was regarded generally as an irresponsible smokescreen.

This appearance will be even stronger with respect to the Scalia nomination, because he is a much more sympathetic figure than Rehnquist and the documents were not requested because of any concern that Scalia had assisted in an abuse of civil liberties or civil rights while he was at the Justice Department.

Moreover, and perhaps most important, Scalia has a major constituency group that strongly favors his nomination and would react with dismay and anger if it appeared that the Senate Committee was holding up his nomination because of a dispute with the President over a few documents.

## Recommendation

I recommend that we refuse to give up the Scalia documents and thus re-establish the broad principle that the Senate is not entitled to review the former files of the President's nominees without a credible allegation of wrongdoing.

## The Rehnquist Fight

IT IS THE past 15 years in the professional life of William Rehnquist that the Senate should be studying, not the 15 before that. Much is being rehashed that was gone over before, when Justice Rehnquist was being confirmed for his present job. As is the current trend, those who oppose the justice are attempting to get him on personal-misconduct grounds, rather than the aboveboard substantive questions of political and legal philosophy that are really at issue. For there are, in fact, plenty of reasons for scrutinizing the nomination of Mr. Rehnquist to be chief justice without resorting to what has been going on so far in the Judiciary Committee's inquiry.

Questions have been raised there about a confidential memorandum written by a young law clerk, an alleged incident of voter harassment a quarter of a century ago and the presence of old restrictive covenants on two pieces of real estate owned by the nominee. His answers have not been wholly satisfying, but few people in public life would be able to defend all the opinions held or acts taken in youth or in more recent years gone by—least of all some of the senators who are leading the charge against Justice Rehnquist now. Many, in the Senate and elsewhere, resisted school desegregation and other civil rights advances during the years in question concerning Mr. Rehnquist, and many—including some now challenging him—were the product of political machines not exactly famous for their devotion to fair elections or the sanctity of an opponent's ballot once it had been cast.

Accusations of this variety against Mr. Rehnquist can be overcome by a firm declaration that the nominee—like many other public figures—has changed with the times. In a way, they let him off the hook, and the same may be said of the raising of the restrictive covenant question. Restrictive covenants of the kind found in the deeds to Justice Rehnquist's property are obnoxious even if they are unenforceable. A decent response on the part of a property owner who knew they were on his deed would be to insist on some written disclaimer's being appended to the document. But Justice Rehnquist maintains that he was unaware of the covenants, and it is not unreasonable to suppose that this is true. Restrictive covenants were common in this country

many years ago; there was one on a house owned by John F. Kennedy; millions of Americans would be surprised to find them in their own property deeds.

The argument that Justice Rehnquist is an extremist because he has so often been a lone dissenter is weak and diverting, too. There is nothing inherently wrong with sticking to your guns when everyone else thinks you're wrong. Justices Douglas and Harlan did that more often than Justice Rehnquist, and both were lauded for it. In recent years, Justice Stevens—the quintessential centrist on the current court—has dissented alone more than the nominee has.

What the Senate should be considering is not statistics but substance. What was each case about? What were the grounds for the dissent? Was the dissenting position reasonable, even if all the other justices disagreed? What does Justice Rehnquist believe now about civil rights and individual liberties, and how are those views reflected in his work on the court?

Fifteen years ago, this paper opposed Justice Rehnquist's nomination to the Supreme Court. Our concerns at that time were not about the 1952 memorandum or the 1962 voting incident—both of which were raised and considered. Our position was based on a fear that the nominee's views on questions of civil liberties in particular would be reflected in opinions that consistently favored the state over the individual. With this concern still at the heart of the controversy over the nomination, we believe the Senate should turn to a thoughtful, careful and rigorous analysis of Justice Rehnquist's opinions and his writing and his speeches.

We would add that on the matter of executive privilege as well, while it would be interesting and no doubt informative to review Justice Rehnquist's files from the early 1970s, we don't believe that material is essential to the Senate's task since a voluminous record of the nominee's views on legal and constitutional issues is already available. If his views disqualify him for the high office to which he has been named—and that is surely a live possibility to which we intend to return—it will be more clearly and conclusively revealed by reviewing his public papers and present positions.