S 04-

THE WHITE HOUSE

WASHINGTON

June 11, 1986

MEMORANDUM FOR THE PRESIDENT

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

SUBJECT: Questions for Prospective Supreme Court Nominees

To assist you in choosing among the candidates for possible nomination to the Supreme Court, I have set forth some brief background information together with a number of potential questions for Justice Rehnquist and Judge Scalia. The questions are designed to elicit answers revealing the candidate's philosophy, commitment to being a judge and other personal qualifications. Justice Rehnquist is a candidate for elevation to Chief Justice. Scalia is also a candidate for Chief Justice, or, if you name Justice Rehnquist as Chief Justice Burger's successor, as a candidate for Associate Justice to succeed Justice Rehnquist.

Background on Justice Rehnquist

Justice Rehnquist has been an Associate Justice of the U.S. Supreme Court since 1971, when he was appointed by President Nixon. He has been described as the intellectual leader of the conservative bloc on the Court and has consistently supported federalism and strong law enforcement positions. Justice Rehnquist is 61 years old and questions have been raised about his health and his continuing commitment to the Court's work. Even if his health is good, he may not be able to serve more than 10 to 15 more years. Justice Rehnquist has a proven track record, and observers of the Court believe that he can forge majorities for his positions. Some of Justice Rehnquist's statements when he was a clerk to Justice Jackson, particularly on race relations, could be controversial. (The Justice Department's summary on Justice Rehnquist is attached.)

You should stress to Justice Rehnquist his excellent contributions to the Court's opinions, and the high regard in which he is held by everyone in the Administration.

Questions

1. What are the critical issues that you t hink the Supreme Court will face over the next five to ten years?

2. What role should the Supreme Court play in resolving disputes between Congress and the Executive Branch?

3. In which direction do you see the Court moving on the issue of federalism?

4. Should the Supreme Court continue to move away from the decisions of "the Warren Court" in the area of criminal justice and law enforcement [redacted]

JUSTICE WILLIAM REHNQUIST

Before and during his tenure on the Supreme Court, Justice Rehnquist has established himself as the paridagmatic example of a jurist committed to principles of judicial restraint in all of its contexts. In all areas of constitutional law -- e.g., criminal procedure, due process, civil rights, freedom of press and religion -- Rehnquist's jurisprudence has been scrupulously premised on the principles of federalism and separation of powers and he has resisted any attempt to engage in unwarranted judicial evisceration of traditional values or democratic choices through the invention of "rights" discerned in "penumbras" emanating from a "living" Constitution.

Most notably, Rehnquist pioneered the rehabilitation of federalism principles by his landmark decision in National League of Cities v. Usery, 426 U.S. 833 (1976), which revived, albeit temporarily, the presumed - dead Tenth Amendment as an affirmative safeguard against federal encroachment into the states' sovereign prerogatives. See also Rizzo v. Goode, 423 U.S. 362 (1976) (federal courts are prohibited from entering injunctions against local governments absent clear evidence of a continuing pattern or practice of unlawful activity); Pennhurst v. Halderman, 451 U.S. 1 (1981) (Pennhurst I) (congressional statutes imposed on states pursuant to the spending power must be narrowly construed to avoid infringement of state prerogatives); Pennhurst v. Halderman, 465 U.S. 89 (1984), (Pennhurst II) (Eleventh Amendment prohibits federal courts from requiring states to follow state law) (opinion joined, not authored, by Rehnquist). Indeed, in every important (and unimportant) decision during his time on the Court, Rehnquist has penned or joined the opinion which best reflects the intent of the legislative or constitutional authors, not his own personal policy preferences.

In Roe v. Wade, 410 U.S. 113 (1973), Rehnquist dissented from the Court's creation of a right to abortion on demand. In United Steelworkers v. Weber, 443 U.S. 193 (1979), and all the school desegregation cases, Rehnquist strongly resisted distorting legislative and constitutional principles of nondiscrimination into mandates for a particular degree of racial balance. See, e.g., Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976); Columbus Board of Education v. Penick, 439 U.S. 1348 (1978). His dissenting opinion in Wallace v. Jaffree, 105 S. Ct. 2479 (1985), masterfully demonstrated, through exploration of historical evidence revealing the Framers' intent, that the First Amendment's religion clauses were designed to prevent an establishment, not an acknowledgement or accommodation, of religion, a principle he has adhered to in all the religion cases. He also led the Court's effort to cut back significantly on New York Times v. Sullivan, 376 U.S. 254 (1964), in which the Warren Court, notwithstanding 600 years of common law and the Framers' contrary intent, invented First Amendment immunity for false, libelous statements. See, e.g., Time Inc. v. Firestone, 424 U.S.

443 (1976). The same is true of the criminal and prison context, where he has pushed the Court to reverse the excesses of the Warren Court with respect to the exclusionary rule created by Miranda v. Arizona, 384 U.S. 436 (1966), the cases all but abolishing the death penalty and those outlawing legitimate penal practices that "shock the conscience" of liberal judges but not of the Framers. See, e.g., New York v. Quarles, 467 U.S. 649 (1984); Gregg v. Georgia, 428 U.S. 153 (1976); Bell v. Wolfish, 441 U.S. 520 (1979).

Perhaps more importantly, by dint of his personal qualities, intellect and sheer cleverness in reshaping erroneous precedent, Rehnquist has formed a consensus on a generally rudderless Court behind fundamental principles which might well have otherwise been rejected. His landmark desegregation opinion in Spangler, for example, established the fundamental principle that the Constitution does not require racial balance in government programs notwithstanding potentially contrary precedent. His accomplishments in the areas of of federalism, libel and criminal law listed above were similarly achieved in the face of inconsistent precedent. Moreover, virtually every beneficial decision listed above grew out of a small seed of legal principle that Rehnquist had planted in a prior, seemingly innocuous case, thus further demonstrating his mastery at looking beyond the facts of an individual case to gradually achieve fundamental reform in constitutional law. In General Electric Company v. v. Gilbert, 429 U.S. 125 (1976), for example, Rehnquist used a footnote buried in a prior decision, (Geduldig v. Aiello, 417 U.S. 484 (1974)) to establish the principle that pregnancy-based discrimination does not constitute impermissible discrimination on the basis of sex. In Lloyd Corportation v. Tanner, 407 U.S. 551 (1972), Rehnquist persuaded a majority of the Court to distinguish, on the thinnest of reeds, a very recent precedent (Logan Valley, 391 U.S. 308 (1968)), thus effectively reversing the holding that privately-owned shopping centers were state actors for purposes of the First Amendment. He built on this precedent, in turn, to effectively overrule Warren Court precedent that had converted a multitude of purely private activities into "state action" subject to constitutional constraints. See e.g, Moose Lodge v. Irvis, 407 U.S. 163 (1972); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

Further, Rehnquist possesses all the leadership qualities required to make a superb Chief Justice. No one can question the depth of his scholarship or intellect, the clarity of his philosophical vision or his ability to build a consensus to implant that vision in the Court's decisions. Moreover, he enjoys a warm collegial relationship with, and is genuinely respected by, all of his fellow justices, even those with whom he often disagrees. His fourteen year tenure on the Court has given him valuable insights into the predilections of these justices and the politics and machinations of the Court. Although he had significant problems with his back three years ago, this is no longer a real health problem. In sum, Justice Rehnquist would add immeasurably to the development of proper constitutional jurisprudence if appointed as Chief Justice.

ANTONIN SCALIA

Judge Scalia is also an articulate and devoted adherent to the interpretavist theory of adjudication described more extensively in the memorandum on Judge Bork. Scalia's primary focus has been on separation of powers, justiciability and administrative law questions. He has repeatedly emphasized that the judicial role is solely to decide the rights of individuals. Thus, absent an express statutory mandate, he denies standing to persons who seek to have courts resolve generalized grievances and otherwise assiduously ensures that cases are susceptible to judicial review, most notably in a number of ground-breaking opinions on congressional standing. Scalia couples his appreciation for the limited role of the courts with respect for coordinate branches and has written several very significant opinions dealing with the deference due to the Executive, particularly in foreign affairs and the enforcement of laws.

In short, Scalia's judicial philosophy almost precisely mirrors that of Bork, with the exception of one subtle difference in emphasis which may affect their decision-making in a quite narrow range of cases. In seeking to determine the breadth of rights contained in the constitutional text, Scalia would probably be more inclined than Bork to look at the language of the constitutional provision itself, as well as its history, to determine if it grants an affirmative mandate for the judiciary to inject itself into the legislative process. Absent such an affirmative signal, Scalia's natural belief in the majoritarian process and his innate distrust of the judiciary's ability to implement, or even to discern, public policy or popular will, would probably lead him to leave undisturbed the challenged activity. While Bork certainly shares these precepts of judicial restraint, he will be somewhat more inclined in certain circumstances to give broader effect to a "core" constitutional value. Bork would look less to history, and more to the general theory of government reflected by the Constitution's overall structure, to provide guidance on the limits of judicial action. In the broader scheme of things, this divergence is quite minor, but it is the reason that Scalia severely criticized Bork's "sociological jurisprudence" in the Ollman libel case.

Scalia is obviously a superb intellect and scholar who has produced an extraordinarily impressive body of academic writings on a broad range of issues, particularly administrative law. He has also written probably the most important opinions of any appellate court judge during the last 4 years, without a single mistake. While he has not focused on the "big picture" jurisprudential questions to quite the same extent as Bork, his writings on separation of powers and jurisdictional questions reflect a fundamental, well-developed theory of jurisprudence in an area that had received all too little attention. He also reasons and writes with great insight and flair,

which gives additional influence to his opinions and articles. He has been particularly diligent in ferreting out bad dicta in his colleagues' opinions and otherwise aggressively attempted to reshape the law through dissents and en banc review. Like Bork, he would not slavishly adhere to erroneous precedent. More so than Bork, he is generally respected as a superb technician on "nuts and bolts" legal questions.

Scalia is an extremely personable man, although potentially prone to an occasional outburst of temper, and is an extremely articulate and persuasive advocate, either in court or less formal fora. Unlike Bork, he would have to undergo a relatively brief "get-acquainted" period on the Supreme Court and it is conceivable that he might rub one of his colleagues the wrong way. Scalia's background as a private practitioner for six years, a law professor at the Unviersity of Virginia, Georgetown, and Chicago, Counsel to the Office of Telecommunications, Assistant Attorney General for the Office of Legal Counsel, and a judge on the U.S. Court of Appeals for the D.C. Circuit, makes abundantly clear his technical qualifications. While he received only a "qualified" rating from the American Bar Association for the D.C. Circuit, this can only be described as slanderous nonsense. Scalia just turned 50 years old and exercises regularly. Although he smokes heavily, and drinks, he should have a lengthy career on the Court.

Background on Judge Scalia

You appointed Antonin Scalia to the U.S. Court of Appeals for the District of Columbia Circuit in 1982. If you nominated him to the Supreme Court, he would be the first Italian-American to receive that honor. Judge Scalia is regarded as one of the intellectual leaders, along with Judge Bork and Justice Rehnquist, of judicial conservatism. Judge Scalia served as Assistant Attorney General in the Ford Administration, and has been a professor of law at the University of Chicago, Stanford and other top schools. He is an expert in administrative law and has argued against excessive government regulation. His judicial decisions have strongly supported the principle of "separation of powers." He has thus recognized the importance of deference to the Executive Branch in matters involving the military and the conduct of foreign relations. Judge Scalia is regarded as a forceful individual capable of personal as well as intellectual leadership. He is 50 years old. (The Justice Department's summary on Judge Scalia is attached.)

You should stress to Judge Scalia your admiration for his work on the D.C. Court of Appeals.

Questions

1. What are the critical issues that you think the Supreme Court will face over the next five to ten years?

2. What role should the Supreme Court play in resolving disputes between Congress and the Executive Branch?

3. In which direction do you see the Court moving on the issue of federalism?

4. Should the Supreme Court continue to move away from the decisions of "the Warren Court" in the area of criminal justice and law enforcement, or has a reasonable equilibrium been reached?

5. How should judges interpret the Constitution and define rights?

6. Given the current composition of the Court, how would you establish a consensus among the Justices for your views?

7. Are there any personal or health reasons why you would not be able to make a full commitment to this position?

8. Do you have any hesitancy whatsoever taking on the great responsibility of work on the Supreme Court?

9. Is there any reason why you might not want to go through a confirmation process at this time?

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release June 17, 1986

The President today announced his intention to nominate Associate Justice William H. Rehnquist to be the next Chief Justice of the United States. He would succeed Chief Justice Warren E. Burger. Justice Rehnquist was named to the United States Supreme Court in 1971 by President Nixon.

Prior to joining the Supreme Court, Justice Rehnquist served in the Department of Justice as Assistant Attorney General for the Office of Legal Counsel from 1969-1971. He practiced law as a partner with several firms in Phoenix, Arizona from 1953-1969. He was a law clerk to Supreme Court Justice Robert H. Jackson in 1952-1953.

Justice Rehnquist was graduated first in his class from the Stanford Law School in 1952. He received his B.A., with great distinction, from Stanford University, where he was a member of Phi Beta Kappa. He also received M.A. degrees in political science from Stanford in 1948 and from Harvard University in 1949.

Justice Rehnquist is married to the former Natalie Cornell, and they have three children. He was born on October 1, 1924 in Milwaukee, Wisconsin.

# # #