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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1/1

Name of Correspondent: Jeffrey M. ...

☐ MI Mail Report

User Codes: (A) (B) (C)

Subject: G.W. Law Review plans to publish
book "God Save This Honorable Court" -
Request for response

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	86102104		C 86103104
CUst 18	Referral Note: C	86102105		CJ C 86103104
CU FILE	Referral Note: S	86103105		FF A 86103104
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	Referral Note:			

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"
Completion Date = Date of Outgoing

Comments: Lawrence Tribe

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 n - 2 - Ronald Reagan
 n - 3 - Ron
 n - 4 - Dutch
 n - 5 - Ron Reagan
 n - 6 - Ronald
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CLn - First Lady's Correspondence
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CBn - Presidential & First Lady's Correspondence
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 M - Mailgram
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 P - Photo
 R - Report
 S - Sealed
 T - Telegram
 V - Telephone
 X - Miscellaneous
 Y - Study

THE WHITE HOUSE

WASHINGTON

March 4, 1986

Dear Mr. Walker:

Thank you for your letter of February 3. Along with that letter you submitted a copy of a review of Laurence Tribe's God Save This Honorable Court, and suggested that this office consider a response.

I hope you will understand that my current responsibilities do not afford sufficient time to undertake such activity. Thank you for your inquiry, and best of luck with the Law Review.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

Mr. Jeffrey Walker
Book Review Editor
The George Washington Law Review
716 20th Street, N.W., Suite 302
Washington, D.C. 20052

FFF/JGR:jmk
cc: ✓FFfielding
JGRoberts
subject
chron.

THE WHITE HOUSE

WASHINGTON

March 4, 1986

MEMORANDUM FOR FRED F. FIELDING

FROM:

JOHN G. ROBERTS 

SUBJECT:

George Washington Law Review's Article
on Laurence Tribe's God Save This
Honorable Court

Pursuant to our discussion at this morning's staff meeting, I have re-dated my proposed response for your signature.

THE WHITE HOUSE

WASHINGTON

February 6, 1986

MEMORANDUM FOR FRED F. FIELDING

FROM:

JOHN G. ROBERTS 

SUBJECT:

George Washington Law Review's Article
on Laurence Tribe's God Save This
Honorable Court

Jeffrey Walker, Book Review Editor of The George Washington Law Review, has invited you to respond to a review of Professor Tribe's God Save This Honorable Court by Donald Lively, an associate professor of law at the University of Toledo College of Law. Tribe's book -- written with the very specific aim of influencing the confirmation process for the next Supreme Court nominee -- argues that (1) Presidents generally get what they want from Supreme Court justices they appoint, and (2) the Senate should play a more active role in the "advice and consent" process. Lively's review -- trite, sophomoric pabulum -- applauds Tribe and contrasts Tribe's view with that of Justice Rehnquist, who noted in a recent address that justices often frustrate the aims of the Presidents who appoint them.

I am not entirely unbiased, but I found Lively's critique of Rehnquist's views and some of his judicial opinions not only shallow and unconvincing, but an offensive "bashing" calculated to endear the author to liberal academia. Rehnquist's views, for example, are labeled "careless," "reckless," "self-serving," and "disingenuous." The author has not even a modicum of intellectual shame, unabashedly attacking straw men. See p. 7 ("Rehnquist might argue that...").

Frankly, neither this review nor what I have read of Tribe's book strike me as a serious undertaking worthy of response. Some justices live up to the expectations of those who appoint them; some do not. The Senate is free under the Constitution to consider whatever it cares to consider in voting on a nominee. I would simply advise Mr. Walker that we barely have time for light reading, let alone writing reviews.

THE WHITE HOUSE
WASHINGTON

Date 2.18.86

Suspense Date _____

MEMORANDUM FOR: John

FROM: DIANNA G. HOLLAND

ACTION

- ☐ Approved
- ☐ Please handle/review
- ☐ For your information
- ☐ For your recommendation
- ☐ For the files
- ☐ Please see me
- ☐ Please prepare response for
_____ signature
- ☐ As we discussed
- ☐ Return to me for filing

COMMENT

RRP's question mark means -
he's not sure the request
should be turned down -
further thoughts?

THE GEORGE WASHINGTON LAW REVIEW

716 20th STREET, N.W.

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WASHINGTON, D.C. 20052

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891056 cc-

3 February 1986

Honorable Fred Fielding
Counsel to the President
White House
Washington, D.C. 20500

Dear Mr. Fred Fielding:

The George Washington Law Review is planning to publish the enclosed review of Laurence Tribe's God Save This Honorable Court. The topic of the book and the unique scholarship found in the review make it a valuable contribution to the current debate.

I feel that the import of this essay would be raised substantially by the simultaneous publication of a response from your office. I hope that you or some member of your staff will find the review worthy of consideration. I am certain that such a response will serve to further define the parameters of our national debate.

I look forward to speaking with you at your earliest convenience if you are interested in the above proposal.

Sincerely,



Jeffrey Walker
Book Review Editor

"God Save This Honorable Court"* -- and
the Process for Appointing Supreme Court
Justices

Donald E. Lively**

* L. Tribe, God Save This Honorable Court
(Random House 1985)

** Associate Professor, College of Law,
University of Toledo.
J.D., University of California, Los Angeles;
M.S.J., Northwestern University;
A.B., University of California, Berkeley

The appointment of a United States Supreme Court Justice is the product of a constitutional process that divides responsibility between the executive and legislative branches. A president may nominate "Judges of the [S]upreme Court." 1/ The chief executive's choice, however, is subject to "the Advice and Consent of the Senate." 2/ The division of power between the president and upper house is consonant with the fundamental notion that no single branch of government should be dominant. 3/

During two centuries of experience, the division of responsibility between the chief executive and Senate more often than not has been blurred. The Senate on some occasions has been doggedly assertive 4/ and in other instances utterly docile. 5/ Given varying standards of review ranging from a relatively forgiving assessment of "training, experience and judicial temperament" 6/ to a hard focus upon policy values and ideology, 7/ the Senate's general performance has appeared rudderless and inconsistent. Some nominees even have been rejected for reasons totally unrelated to qualification. 8/

The Senate's uneven performance invites critical attention to what essentially is a border dispute concerning executive and legislative turf. It has been suggested, at one extreme, that the chief executive has both the power to nominate and appoint, and neither prong of that authority should be impaired. 9/ Such sentiment, unsurprisingly, reflects a presidential viewpoint. 10/ Not far removed from that position, however, is the notion commonly expressed even by senators that the president's ideological preferences and goals

should not be scrutinized and review should be guided by policy neutral criteria. 11/

Justice Rehnquist recently has attempted to dispel concern that Senate meekness, in the presence of an ideologically committed president, might be dangerous. Thus, he has asserted that deliberate efforts by a president to pack the Court are doomed to fail because of an appointee's long-term unpredictability. 12/ God Save This Honorable Court, in large part, is a rebuttal of Rehnquist's argument. 13/ Tribe's premise is that presidents who have appointed Supreme Court Justices generally have had much more reason to be gratified than displeased with their performances. 14/ The record he delineates at minimum engenders doubt concerning the desirability of exchanging a constitutionally mandated check upon and balance against executive power for reliance upon personal unpredictability. History seems to support the premise that a president determined to shape the court to his liking probably will succeed. 14a/

The book has a clear political objective. Given a graying Supreme Court, and a President who has made plain his intent to shape it in his own image, 15/ it affords a rallying point for those who do not relish a federal judiciary bearing a Reagan seal of approval long after a Reagan Administration has ceased to exist. Consistent with the author's political objectives, the book is written for a broad audience. Its mass appeal, however, does not detract from the compelling nature of Tribe's testimony for more careful selection of Supreme Court Justices.

At the outset, Tribe ensures that the reader appreciates how profoundly the Supreme Court influences the nature and quality of his or her life. 16/ By anecdote and observation, he illustrates how what many may assume are indisputable rights -- to jog freely in the park, 17/ use birth control 18/ live in a family unit 19/ or have an expectation of privacy 20/ -- not only were created or fostered by the Supreme Court but remain subject to debate among the Justices. 21/ The prefatory emphasis, upon the reader's personal stake in the substantive views held by a majority of the Court, begets a persuasive thesis for a confirmation process that is careful and complete.

Justice Rehnquist's trivialization of concerns regarding any presidential effort to pack the Court, in contrast, appears careless if not reckless. The book not only refutes Rehnquist's central premise, that Court appointees generally prove to be unpredictable but makes it appear self-serving and disingenuous. Tribe notes that chief executives usually are "surprised" by their appointee's performance when court appointments and ideology were not priority concerns or a nominee's views were not carefully scrutinized. 22/ Unexpected performance thus tends to be the exception rather than the rule.

Careful examination of perhaps the most famous example of a purportedly betrayed president helps further dispel what Tribe denominates as "the myth of the surprised president." 23/ President Eisenhower's displeasure with the opinions of Chief Justice Warren is legendary. 24/ Yet, as Tribe notes, Eisenhower had no reason to be

amazed by Warren's judicial performance. The president, when he nominated Warren, was thinking less about civil rights cases lurking beyond the horizon and more about his political indebtedness to Warren and the unhealthy rancor between the Warren and Nixon factions of the California Republican Party. 25/ The postulate that Eisenhower's nomination of Warren was a payback for helping to swing the 1952 Republican Convention toward Eisenhower and strategy to defuse internecine political warfare in California, is supported by other scholars. 26/ Probably the most frequently cited example in support of the unpredictability hypothesis, therefore, actually is understood better as the product of a presidential nomination relatively unconcerned with ideology or substantive views. 27/

Tribe dismisses, as "the myth of the spineless Senate," 28/ the notion that the upper house should defer to the president with respect to a nominee's ideology. It is a mystery how an assertive Senate role evolved into a debatable issue, especially since many of the same persons who drafted the Constitution later used the confirmation process to assess policy and ideology. 29/ As early as 1795, the Senate rejected a nominee because it disagreed with his substantive views. 30/

The argument for a Senate role that is equal rather than subordinate to the president's, as Tribe notes, is consistent with the constitutional compromise which divided responsibility for appointing Supreme Court Justices. Drafters originally were split between those favoring selection by the president and others who preferred that the

choice be left to the Senate. 31/ James Madison brokered a compromise which created the constitutional power sharing scheme. 32/

Although Tribe argues forcefully the case for an assertive Senate role, he does not directly address possible underlying concerns that have deterred such vitality. The notion that ideology is a presidential rather than a Senate concern, 33/ for instance, may betray a conviction that somehow the selection of judges is supposed to be above politics. 34/ Normative patterns fostered by such a philosophy cut against forthright consideration of policy and ideology. Policy concerns may bestir opposition but, given a credo that disallows consideration of a nominee's substantive views, publicly stated positions are likely to be expressed "in more respectable terms." 35/ Acceptable terminology, such as "competence," "temperament," "experience" and "ethics" thus may disguise what genuinely are policy concerns. An effective argument could have been made, therefore, that the process is demeaned not when the Senate focuses upon values and ideology but when it does so and pretends that it has not. 36/

Tribe's focus upon the performance of persons actually appointed to the Court is not without drawback. Such emphasis is essential for puncturing the "myth of the surprised president." The case for an assertive Senate role, however, seemingly would be reinforced by evidence that history proved its rejection of a nominee to be well-founded. Tribe notes that an opportunity usually does not exist to determine with certainty how an appointee has affected the Court, because it is impossible to know what alternatives would have existed

had he not been confirmed. 37/ A prominent exception was the appointment of Owen Roberts after the Senate's rejection of John J. Parker in 1930. Tribe notes that Parker was rebuffed because enough Senators perceived him to be anti-black and anti-labor. 38/ He also observes that President Hoover's successful substitution of Owen Roberts contributed the swing vote that eventually ensured judicial support of New Deal legislation and averted the constitutional crisis created by President Roosevelt's Court reorganization plan. 39/

Tribe, having merely wondered if a Parker appointment would have altered the Court's direction, forsakes what would have been a profitable scholarly expedition. 40/ A closer look at Parker's later performance as a federal appeals judge would have directed attention to a long overlooked patch of history that reaffirms the value of vigorous Senate scrutiny of a nominee's substantive views. It is undisputed that Parker, as a gubernatorial candidate in North Carolina, publicly expressed white supremacist, anti-black sentiments. The sincerity of his rhetoric has been questioned and doubted in the years since his nomination was rejected. 41/ Judge Parker, however, served on the Fourth Circuit Court of Appeals until 1958. Concern about his attitudes regarding race proved to be especially prophetic when Judge Parker and the Supreme Court confronted each other on what proved to be the touchstone case for school desegregation.

If Judge Parker in principle adhered to notions of racial equality, he steadfastly declined to demonstrate his convictions. In response to a challenge to official segregation of South Carolina public schools,

Judge Parker concluded that such long-standing policy was well "grounded in reason and experience" and consistent with the Fourteenth Amendment. 42/ Judge Parker's decision was appealed and, having been joined with three other cases, was reversed in Brown v. Board of Education. 43/

Justice Rehnquist might argue that, had Judge Parker actually been appointed to the Supreme Court, his views might have been different. Such a contention would be consistent with Rehnquist's premise that a justice, upon being appointed for life, becomes influenced by "centrifugal forces" that cause an appointee to alter his perspective "when he puts on the robe." 44/ Thus, upon ascending to the high bench, a person theoretically becomes more responsive to the dictates of his conscience and sensitive toward securing a place in history. 45/

The peculiarities of the South Carolina desegregation case, however, afforded Judge Parker significant growth and educational opportunities that he resisted. The argument, that segregation was unconstitutional, was presented by a future Supreme Court Justice. 46/ Judge Parker responded to the plaintiffs' case by facilitating a state ploy to divert the issue from a challenge to official segregation toward consideration of whether the separate facilities were equal. 47/ The strategy enabled the "court to avoid the primary suit." 48/ Judge Parker's response, to the Supreme Court's reversal of his decision and order of desegregation with all deliberate speed, further confirmed the Senate's reservations about

him. 49/ With the case having been remanded to him, Judge Parker coined the aphorism that the Constitution "does not require integration. It merely forbids discrimination." 50/ He also concluded that segregation is permissible, so long as it is not the product of voluntary action. 51/

Given the electricity generated by Brown v. Board of Education, Judge Parker surely was conscious of the opportunity he possessed to secure his place in history. He emerged, however, in the vanguard of Southern obstructionists whose rulings frustrated the Supreme Court. 52/ Parker's judicial legacy includes encouragement and facilitation of official stalling and bad faith. 53/ More than a decade after the Supreme Court ordered South Carolina schools desegregated, the reality of integration had not dawned. 54/

Parker's nomination to the Supreme Court had been rejected, in part, because he was unable to "discard[], if necessary, the old precedents of barbarous days and construe[e] the Constitution and the laws in the light of a modern day, a present civilization." 55/ Senate misgivings, to that effect, evinced reluctance to impose upon the nation a perspective of individual liberties and social values which was not "in consonance with modern views." 56/ Because the Supreme Court may define national policy in such a profound manner, and a single appointee may provide the pivotal vote, it is surprising that the intensity of the Senate's role in assessing Parker's or any other nominee's qualifications even should be controverted. 57/ Debate on all matters of public concern is supposed to "be uninhibited, robust

and wide-open." 58/ The "profound national commitment" to such dialogue assumes the risk that it "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 59/ To the extent one branch of government were exempted from close scrutiny, that central constitutional principle would be undermined.

Despite the Senate's apparently accurate assessment of Parker, an active Senate role is no assurance of perfect performance. The Senate, for instance, may be as vulnerable to bias and prejudice as it is adept at ferreting it out. The anti-Semitic undertones of the debate concerning the Brandeis nomination and Southern opposition to Thurgood Marshall's nomination demonstrate the potential for Senate abuse. 60/ However, deferential review poses a much greater risk. Lost in the course of Senate abdication is the opportunity for input on a momentous decision from a maximum variety of sources. Presumably, the more voices heard and the more concerns heeded, the wiser the ultimate decision will be. 61/ The dangers of bias and prejudice, which undoubtedly were present in connection with the Brandeis and Marshall nominations, are diluted when they must compete with a multiplicity of other preferences and sentiments. The absence of comprehensive inquiry by the Senate would be a debilitating blow to the process of constructing an able and respected Court. Unlike the president, and as Tribe notes, the Senate broadly reflects diversity of the populace and thus is an apt forum for reconciling the various interests affected by an appointment. 62/

Having stated the case for meaningful Senate review, Tribe

cautions against encumbering it with misguided or misleading principles such as "strict constructionism." 63/ Tribe is hardly the first to suggest that "judicial restraint" is not a policy neutral standard. Justice Jackson once observed that "(e)very justice has been accused of legislating and every one has joined in that accusation of others." 64/ Tribe, however, explains why the Senate, when called upon to consider a so-called exponent of judicial restraint, should be wary. The label may be misleading to the extent it is offered as antonymic to judicial activism.

Because constitutional and legislative language often is indeterminate, 65/ and the collective intent of drafters likewise is so, 66/ any assertion that a justice need only look for its plain and ordinary meaning is mistaken. Constitutional analysis, as Tribe notes, requires not mechanical exercise but comprehension and application of principles upon which the text is predicated. 67/ Chief Justice Taney, in the Dred Scott opinion, articulated the classic sense of judicial restraint in noting that it is not "the province of the Court to decide upon the justice or injustice, the polity or impolity of those laws." 68/ Still, the decision, which greatly damaged public confidence in and support for the Court, was subject to criticism to the extent the judiciary was perceived as "the citadel of Slaveocracy." 69/ It effectively illustrates that, whether the Court intervenes or fails to act, rights may be realigned, redistributed or redefined. Judicial restraint, to the extent it denominates commitment to minimizing curbs upon legislative and executive action, thus may be more synonymous with than distinguishable from judicial activism. 70/

The irony of Justice Rehnquist, emerging to champion the notion that an appointee's long-term unpredictability will safeguard against undue influence by a president, does not escape Tribe. The author thus recounts how President Nixon sought a nominee who would adhere to his tough law and order vision and not use the due process and equal protection clauses as cutting edges against legislative judgment. 71/ Justice Rehnquist had demonstrated his timber by defending secret government surveillance of private citizens, 72/ supporting preventive detention, no-knock searches and expanded eavesdropping and consistently and publicly urging restrained reading of due process and equal protection guarantees. 73/ Rehnquist, at the time of his nomination, had served three years in the Justice Department as head of the Office of Legal Counsel 74/ and was responsible for screening prospective nominees who would share President Nixon's political agenda. 75/ It is doubtful, given his duties within the administration and proclaimed adherence to Nixon's judicial philosophy, that a more reliable and predictable exponent of the president's values could have been appointed.

Consistent with presidential expectations, Justice Rehnquist has demonstrated unswerving allegiance to restrictive use of the due process and equal protection clauses. 76/ His dedication to President Nixon's law and order agenda has been steadfast. Rehnquist has voted to narrow the requirements for Miranda warnings, 77/ create a far-reaching good-faith exception to the

exclusionary rule, 78/ uphold body cavity searches of pretrial detainees 79/ and reverse an appellate court's determination that a 40 year sentence for marijuana possession constituted cruel and unusual punishment. 80/ Rehnquist's loyal performance ultimately affords a particularly powerful rebuttal to his argument that presidents who attempt to pack the Court are doomed to fail. Reduced to their simplest form, Rehnquist's and Tribe's competing visions of a proper process offer a choice between exercise and abdication of responsibility. Particularly given a constitutional system that is wary of concentration and collusion of power, reaction seems a far more preferable response to a Supreme Court nomination than inaction.

FOOTNOTES

1. U.S. Const., Art. II, §5[2].
2. Id.
3. "The basic concept" of separation of powers is that authority is divided among, rather than centered in, any of the three branches of government. *United States v. Nixon*, 418 U.S. 683, 704 (1974).
4. In one 13 month period, the Senate repudiated, by rejection or circumventing tactics, four of five nominees offered by President Tyler to fill two vacancies. See A. P. BLAUSTEIN & R. M. KERSKY, *THE FIRST ONE HUNDRED JUSTICES* 81 (1978). The Radical Republican Senate legislated two seats out of existence and thus denied Andrew Johnson any opportunity to fill vacancies that occurred during his tenure as president. L. PFEFFER, *THIS HONORABLE COURT* 184 (1965). One seat was restored during the Grant Administration, bringing the total number of seats to nine. See id. The willingness of the Senate to contest a nomination vigorously may be a function of presidential popularity, executive and legislative antagonism and the influence of lobbying groups. See H. ABRAHAM, *JUSTICES AND PRESIDENTS* 31-33 (1974); Grossman and Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 Duke L.J. 557, 584-85; Mendelsohn, *Senate Confirmation of Supreme Court Appointments: The Nomination and Rejection of John J. Parker*, 14 Howard L.J. 105, 121-23 (1968).

5. The Senate, in considering President Eisenhower's nomination of Justice Whittaker, bothered only to ascertain that he had been a successful trial attorney, active in organized bar activities and highly regarded by other judges. See Rehnquist, The Making of a Supreme Court Justice, 29 Harv. L. Rec. 7, 8 (Oct. 8, 1959). More than a decade before his own nomination, Rehnquist criticized the Senate's perfunctory confirmation of Whittaker. See id. at 7-10.
6. See id. at 559.
7. Former Justice Rutledge had become unacceptable, when nominated as Chief Justice in 1795, because he opposed the Senate-approved Jay Treaty. See McKay, Selection of United States Supreme Court Justices, 9 Kan. L. Rev. 105, 129 (1960). The Senate, in 1932, refused to confirm President Hoover's nomination of John J. Parker because of perceptions that he was anti-black, anti-labor and thus unable to discard "the old precedents of barbarous days" and read "the Constitution in the light of a modern day, a present civilization." 92 Cong. Rec. 8192 (May 2, 1930) (Sen. Norris). See notes 46 - 59 and accompanying text.

8. It is doubtful whether Justice Rutledge's views regarding the Jay Treaty really were relevant to what his function would have been on the Court. The fact that the Senate had confirmed him as an Associate Justice a few years earlier suggests its rejection of his nomination as Chief Justice was the product of pique.

The Senate also has blocked nominations when it perceived presidential weakness or unpopularity. See, e.g., H. ABRAHAM, JUSTICES AND PRESIDENTS 32 (1974); Halper, Senate Rejection of Supreme Court Nominees, 22 Drake L. Rev. 102, 108-11 (1972). Unelected presidents, such as Tyler, Fillmore and Andrew Johnson thus faced especially combative Senates. See ABRAHAM at 32; Halper at 110. Lame-duck presidents, such as Lyndon Johnson, faced similar resistance.

9. President Nixon asserted that his power to nominate and appoint was intended to be unimpaired. See Letter from Richard M. Nixon to William Saxbe, March 31, 1970, reprinted in 116 Cong. Rec. 10,158 (1970).
10. See id.
11. Senator Marlow Cook wrote to a constituent, in 1969, that "the ideology of the nominee is the responsibility of the President. The Senate's judgment should be made, therefore, solely upon grounds of qualifications." McConnell, Haynsworth and Carswell: A New Senate Standard of Excellence, 59 Ky. L.J. 12, 15 (1970). Senator Proxmire, in supporting Justice Rehnquist's nomination, asserted that the Senate should

confirm a nominee of obvious intellectual capacity -- without considering his substantive views -- unless he would not uphold constitutional guarantees. 117 Cong. Rec. 20,827 (Dec. 8, 1971).

12. See Address by Associate Justice William H. Rehnquist, University of Minnesota, College of Law, Minneapolis, Minnesota 5, 23-27 (Oct. 19, 1984).

13. See L. TRIBE, GOD SAVE THIS HONORABLE COURT (1985).

14. See id. at 50-76.

14a. President Washington, for instance, filled the Court with staunch supporters of a strong federal government. See H. ABRAHAM, JUSTICES AND PRESIDENTS 69 (1974). John Adams likewise sought to appoint Justices with strong federalist sentiments and succeeded in having John Marshall confirmed as Chief Justice. Id. at 72. The Washington and Adams appointments authored decisions which, as pointed out in note 16, have had an enduring effect upon the nation's political and economic structure consistent with Washington's and Adam's vision.

Even a relatively weak President, such as Grant, managed to appoint Justices who left indelible and profound imprints upon the national fabric. Consistent with the president's view that paper currency would promote economic growth, Grant's appointees provided the swing votes that reversed a decision rendered only a few months before to the effect that Congress had no power to issue paper money. See L. PFEFFER, THIS HONORABLE COURT 182-85 (1965).

Presidents, such as Benjamin Harrison, whose record otherwise is generally forgotten or forgettable, still, through the appointment process, had an effect upon the nation disproportionate to his stature and tenure. Harrison appointed Justices committed to upholding economic rights and thus the interests of large business. See H. ABRAHAM, JUSTICES AND PRESIDENTS 137 (1974). Combined with President Cleveland's appointees, they launched the Lochner era of substantive due process review that struck down, as an invasion of liberty of contract, much federal and state social legislation. See id. at 136-44. It was not until nearly half a century later, after President Roosevelt was reelected for the first time and had announced his Court reorganization plan, that the influence of Presidents Harrison's and Cleveland's political agendas began to wane. See West Coast Hotel Company v. Parrish, 300 U.S. 379 (1937). The Court's decision in that case has been described as "(t)he first significant sign of the demise of the Court's use of substantive due process in testing the constitutionality of economic legislation." J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 2d ed. (1983).

15. See, e.g., Brownstein, With or Without Supreme Court Changes, Reagan Will Reshape the Federal Bench, 49 Nat. J. 2338, 2340 (Dec. 8, 1984).
16. His discussion of how the Supreme Court affects everyone's life focuses upon basic liberties, personal autonomy, government checks and balances, minority protection and notions

- of federalism. See L. TRIBE, GOD SAVE THIS HONORABLE COURT 3-30 (1985).
17. See, e.g., Kolender v. Lawson, 467 U.S. ___, 103 S. Ct. 1855 (1983).
 18. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972).
 19. See, e.g., Moore v. East Cleveland, 431 U.S. 494 (1977).
 20. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961).
 21. See L. TRIBE, GOD SAVE THIS HONORABLE COURT 9, 12, 16-17 (1985).
 22. See id. at 50-54.
 23. Tribe examines expectations of those presidents with clear ideological agendas, including Washington, Adams, Jackson, Lincoln, Grant, Benjamin Harrison, Cleveland, Theodore Roosevelt, Taft, Franklin Roosevelt, Truman and Nixon, and concludes they received essentially the performance they wanted from their appointees. See id. at 50-76.
 24. President Eisenhower reportedly was so displeased with the performances of Chief Justice Warren and Justice Brennan that, when asked if he had made any mistakes as president, he answered "(y)es, two, and they are both sitting on the Supreme Court." Id. at 51.
 25. See id. at 52.
 26. See G. WHITE, EARL WARREN: A POLITICAL LIFE 139-44 (1983); B. SCHWARTZ, SUPER CHIEF 21-22 (1983).

27. It is questionable whether presidential claims, that their appointees failed to perform as anticipated, should be taken at face value. Even President Eisenhower, despite claiming the appointment of Earl Warren proved to be a mistake," could not really claim betrayal. See R. Hodder-Williams, The Politics of the Supreme Court 30 (1980) (Eisenhower refers to Warren's appointment as one of his "biggest mistakes.") Eisenhower's nomination of Warren can be regarded as a payback for the latter's assistance in securing the Republican Presidential nomination for Eisenhower in 1952 and a shrewd move designed to defuse political warfare between the more progressive Warren faction and the more conservative Nixon elements of the California Republican Party. See G. WHITE, EARL WARREN: A Political Life 139-44 (1983). B. SCHWARTZ, SUPER CHIEF 21-22 (1983). The performance of Warren, to the extent it was incompatible with Eisenhower's policy preferences, may be understood better as the product of a nomination in which the president was concerned less with promoting or ensuring sympathy for his agenda and more with other political concerns. Such a conclusion is reinforced by Eisenhower's departure, in nominating Warren, from his normal insistence upon judicial experience. See L. PFEFFER, THIS HONORABLE COURT 392 (1974). To the extent non-policy factors determine who is nominated, an appointee's substantive performance logically will be less predictable. Chief Justice Stone's views regarding the constitutionality of federal regulation reportedly would have shocked President Coolidge, who nominated him. See R. SCIGLIANO, The Supreme Court and the Presidency

141 (1971). Again, however, it appears ideological concerns had become secondary to more important agendas. The primary motivating force for the Stone nomination appears to have been the need to appoint someone who, in the wake of the scandal-ridden Harding Administration, whose character was beyond reproach. See L. PFEFFER, THIS HONORABLE COURT 272, 286 (1965). Unpredictability in such contexts, is not a failure by the appointee to meet expectations but the consequence of ideological criteria not being paramount or pertinent to the selection process.

28. L. TRIBE, GOD SAVE THIS HONORABLE COURT 77-92 (1985).
29. Some of the Senators who approved Justice Rutledge's nomination, in 1795, had participated in drafting the Constitution. See id. at 79-80.
30. See 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 134-36 (1935); McKay, Selection of United States Supreme Court Justices, 9 Kan. L. Rev. 105, 129 (1960).
31. See L. PFEFFER, THIS HONORABLE COURT 22 (1965).
32. See id.
33. Senator Kennedy has been quoted to the effect that the Senate's only concern is with a candidate's "background, experience, qualifications, temperament and integrity" rather than ideology. Songer, the Relevance of Policy Values for the Confirmation of Supreme Court Nominees, 13 Law and Society 922, 923 n.1 (1979). See also note 11 supra.

34. See Songer, The Relevance of Policy Values for the Confirmation of Supreme Court Nominees, 13 Law and Society 922, 923 (1979).
35. Objections based on political or partisan grounds thus tend to be expressed in terms of concern regarding competence, qualification, temperament or ethics. See id.
36. Most senators who voted against President Nixon's nomination of Clement Haynsworth attributed their opposition to allegations of ethical misconduct in connection with his hearing a case concerning a company in which he owned stock. Although a Democratic Attorney General cleared him of unethical conduct, and the conflict of interest had been regarded as relatively minor, the issue provided a convenient disguise for opposition that actually was motivated by political and ideological concerns regarding, among other things, his views on race and labor issues. See Grossman and Wasby, The Senate and Supreme Court Nominations: Some Reflections, 1972 Duke L.J. 557, 570-71, 75-76.
37. See L. TRIBE, GOD SAVE THIS HONORABLE COURT 34 (1985).
38. See id. at 34, 90-91.
39. See id. It was Justice Roberts who eventually adopted a more deferential posture toward and thus created a more hospitable environment for New Deal legislation. See West Coast Hotel v. Parrish, 300 U.S. 379 (1937). Although he denied his shift was influenced by President Roosevelt's proposal to reorganize the Court, it eliminated the political need for the measure. See L. PFEFFER, THIS HONORABLE COURT 317-21 (1965).

40. See id. at 34.

41. Mendelsohn, Senate Confirmation of Supreme Court Appointments: The Nomination and Rejection of John J. Parker, 14 Howard L.J. 105, 122 (1969) Without explication or citation, one observer has noted that the Senate's refusal to confirm Parker "is now all but universally regarded not only as regrettable but a blunder." H. ABRAHAM, JUSTICES AND PRESIDENTS 189 (1974). However, Parker's subsequent performance as a federal appellate judge, discussed below at notes 46 - 59 and accompanying text, casts significant doubt upon whether Parker was "unfairly rejected" and "would have left a commendable record as a member of the Court." Id. at 186.

42. Briggs v. Elliott, 98 F. Supp. 529, 536 (D.S.C. 1951).

43. 349 U.S. 294 (1954).

44. See Address by Associate Justice William H. Rehnquist, University of Minnesota, College of Law, Minneapolis, Minnesota (October 19, 1984), at 24-25.

45. See id.

46. The plaintiffs were represented by Thurgood Marshall and Spotswood Robinson III, who later became a Judge on the Court of Appeals for the District of Columbia Circuit. Marshall, in particular, has championed exacting judicial scrutiny of classifications burdening persons underrepresented in the political system and for whom the system is less likely to be responsive. See, e.g.,

Harris v. McRae, 448 U.S. 297, 341-42 (1980) (Marshall, J., dissenting); San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973) (Marshall, J., dissenting).

47. Briggs v. Elliott, 98 F. Supp. 529, 539 (D.S.C. 1951) (Waring, J., dissenting).
48. Despite costly trial preparation by the plaintiffs, the last-minute maneuver enabled the court to avoid the challenge to segregation. See id. at 538.
49. A fellow southern judge, dissenting from Parker's opinion in Briggs v. Elliott, had criticized him for a "method of judicial evasion" that would ensure "these very infant plaintiffs ... will probably be bringing suits for their children and grandchildren decades . . . hence." Id. at 540.
—
Judge Parker's response to the Supreme Court's desegregation order facilitated realization of that prophecy.
50. Briggs v. Elliott, 132 F. Supp. 776, 777 (D.S.C. 1955).
51. Id.
52. His role to that effect was noted by the Fifth Circuit in United States v. Jefferson County Board of Education, 372 F.2d 836, 863 (5th Cir. 1966). As a possible dissenter on the Supreme Court, Judge Parker's posture may have been less obstructive than the influence he exerted as an appellate judge responsible for enforcing the Supreme Court's will.

53. Judge Parker endorsed pupil placement laws which have been described as "the most effective technique for perpetuating school segregation." *United States v. Jefferson County Board of Education*, 372 F.2d 836, 853 (5th Cir. 1966). He approved them despite warnings that they would facilitate official stalling and bad faith. See *Briggs v. Elliott*, 98 F. Supp. 529, 538-40 (1951) (Waring, J., dissenting).
54. See *United States v. Jefferson County Board of Education*, 372 F.2d 836, 863 (5th Cir. 1966). The Fifth Circuit noted that it was "not surprising that school officials -- the Briggs dictum dinned into their ears for a decade -- have not now faced up to ... integration." Id. at 863.
55. 96 Cong. Rec. 8192 (May 2, 1980) (Sen. Norris).
56. 92 Cong. Rec. 8110 (May 1, 1980) (Sen. Walsh). See id. at 8037 (April 30, 1980) (Sen. Wagner); 8192 (May 2, 1980) (Sen. Norris).
57. It also is puzzling, given the compromise that divided responsibility between the chief executive and Senate and the upper house's vigorous exercise of its authority at the outset. See notes 31 and 32 and accompanying text.
58. *New York Times Company v. Sullivan*, 376 U.S. 254 (1964).
59. Id.
60. Anti-semitic sentiment, although expressed in the form of concern regarding judicial temperament and ideology, characterized

some Senate opposition to the Brandeis nomination. See McKay, Selection of United States Supreme Court Justices, 9 Kan. L. Rev. 105, 132 (1960). Southern opposition to Thurgood Marshall's nomination was disguised as concern regarding his judicial qualification. See Mendelsohn, Senate Confirmation of Supreme Court Nominees: The Nomination and Rejection of John J. Parker, 14 Howard L.J. 105, 144 (1968).

61. It is an enduring principle of self-government that "right conclusions are more likely to be gathered out of a multitude of tongues." United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).
62. See L. TRIBE, GOD SAVE THIS HONORABLE COURT 132-35 (1975).
63. See id. at 41-45.
64. R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 80 (1955).
65. See L. TRIBE, GOD SAVE THIS HONORABLE COURT 45-47 (1985).
66. See id.
67. See id. at 43-45.
68. Scott v. Sanford, 60 U.S. (19 How.) 393, 405, 426 (1857).
69. A. T. MASON, THE SUPREME COURT FROM TAFT TO WARREN 16 (1958).
70. Purported judicial restraint even may disguise judicial activism. It has been noted "that these judicial professions of automatism are most insistent when it is obvious that they

are being honored in the breach rather than the observance. They seem to appear less often when statutes are sustained than when they are condemned...." A. T. MASON, THE SUPREME COURT FROM TAFT TO WARREN 37-38 (1958), quoting from T. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 43 (1956).

71. See L. TRIBE, GOD SAVE THIS HONORABLE COURT 74-75 (1985).
72. See id. See also R. HODDER-WILLIAMS, THE POLITICS OF THE U.S. SUPREME COURT 39 (1980); H. ABRAHAM, JUSTICES AND PRESIDENTS 4, 12 (1974).
73. See B. WOODWARD AND S. ARMSTRONG, THE BRETHREN 163. When the issue reached the Supreme Court, Rehnquist did not disqualify himself from hearing it. See Laird v. Tatum, 408 U.S. 1 (1972).
74. See L. TRIBE, GOD SAVE THIS HONORABLE COURT 74-75 (1985).
75. See B. WOODWARD AND S. ARMSTRONG, THE BRETHREN 161.
76. A representative showing of Rehnquist's commitment to judicial restraint, in construing the equal protection guarantee, is exhibited in Craig v. Boren, 429 U.S. 190 at 221 (1976) (Rehnquist, J., dissenting).
77. See, e.g., Rhode Island v. Innis, 446 U.S. 291 (1980); Harris v. New York, 401 U.S. 222 (1971).

78. See *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405 (1984).
79. See *Bell v. Wolfish*, 441 U.S. 520 (1979).
80. *Hutto v. Davis*, 454 U.S. 370 (1982). The case illuminates with graphic clarity Rehnquist's hard-line commitments in the criminal justice area. The attorney who prosecuted Davis had concluded that the sentence was so disproportionate that it constituted a "gross injustice." Id. at 377-78 n.7 (Powell, J., concurring). Because the state legislature since had reduced the maximum penalty to 10 years, it was unnecessary to defer to earlier legislative judgment that had engendered the original sentence. See id. at 379.

JV

ID # 381057 CU

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

FG00601
DBW

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMING

Date Correspondence Received (YY/MM/DD) 1/1/1

Name of Correspondent: Ron Peace

☐ MI Mail Report

User Codes: (A) (B) (C)

Subject: Status of James Brady

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
ELLHOLL	ORIGINATOR	86.02.04			C 86.02.12
Unit 14	Referral Note: D	86.02.05			C 86.02.12 CS
LA Kraw	Referral Note: R	86.02.17	AK	A	86.02.17 CS
W FIEL	Referral Note: S	86.02.12		AK	A 86.02.12
	Referral Note:	1/1			1/1
	Referral Note:				

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"
Completion Date = Date of Outgoing

Comments: Claudia Korte memo attached

Keep this worksheet attached to the original incoming letter.

Send all routing updates to Central Reference (Room 75, OEOP).

Always return completed correspondence record to Central Files.

Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

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No. of Additional Correspondents: _____ Media: 2 Individual Codes: 1230

Prime Subject Code: FB00601 Secondary Subject Codes: JW 00301
PK 00201

PRESIDENTIAL REPLY

Code	Date	Comment	Form
C		Time: _____	P- _____
DSP		Time: _____	Media: _____

SIGNATURE CODES:

CPn - Presidential Correspondence
 n - 0 - Unknown
 n - 1 - Ronald Wilson Reagan
 n - 2 - Ronald Reagan
 n - 3 - Ron
 n - 4 - Dutch
 n - 5 - Ron Reagan
 n - 6 - Ronald
 n - 7 - Ronnie

CLn - First Lady's Correspondence
 n - 0 - Unknown
 n - 1 - Nancy Reagan
 n - 2 - Nancy
 n - 3 - Mrs. Ronald Reagan

CBn - Presidential & First Lady's Correspondence
 n - 1 - Ronald Reagan - Nancy Reagan
 n - 2 - Ron - Nancy

MEDIA CODES:

B - Box/package
 C - Copy
 D - Official document
 G - Message
 H - Handcarried
 L - Letter
 M - Mailgram
 O - Memo
 P - Photo
 R - Report
 S - Sealed
 T - Telegram
 V - Telephone
 X - Miscellaneous
 Y - Study

THE WHITE HOUSE

WASHINGTON

February 12, 1986

Dear Congressman Pease:

Your January 13, 1986 letter to Alan Kranowitz regarding an inquiry you received concerning the employment status of James S. Brady, Assistant to the President and Press Secretary, has been referred to me for further response.

As you know, Jim and other Assistants serve at the pleasure of the President, and the President has repeatedly stated his intention to retain Jim as his Press Secretary for the duration of his Administration. In this capacity, Jim is compensated at Level II of the Executive Schedule under Section 5313 of Title 5 of the United States Code.

After his hospitalization and an intensive therapy program, Jim has been able, fortunately, to come to work at the White House periodically, usually at least once a week. Although he continues medical treatment and a program of rehabilitation, Jim has made a special effort to represent the President at meetings and events focusing on the needs and problems of the handicapped. I am sure you will agree that he is a wonderful inspiration to those who are trying to overcome the effects of traumatic injuries or physical impairments and to lead productive and rewarding lives.

I hope this information proves helpful in responding to your constituent.

Sincerely,

0148-010001-101

Fred F. Fielding
Counsel to the President

The Honorable Don J. Pease
U.S. House of Representatives
Washington, D. C. 20515

bcc: Claudia Korte

FFF:DBW:k1
FFFfielding ✓
DBWaller
Subject
Chren

THE WHITE HOUSE

WASHINGTON

February 11, 1986

FOR: FRED F. FIELDING
FROM: DAVID B. WALLER *DBW*
SUBJECT: Inquiry re Employment Status of Jim Brady

Attached for your recommended signature is a letter to Congressman Don Pease concerning a constituent inquiry he received regarding the employment and pay status of Jim Brady.

THE WHITE HOUSE
WASHINGTON

Feb. 3, 1986

TO: JOHN ROBERTS

Over the weekend I saw the
attached on Jim Brady in
Sunday's PARADE Magazine
where it says he comes in
one day a week, so my draft
wouldn't seem to be an
adequate reply to this
inquiry.

Claudia Korte

Want the facts? Get them? Write Walter Scott, 140 N. Hamilton Dr., Beverly Hills, Calif. 90210, or phone (213) 651-3375. Fall

WALTER SCOTT Personality

Q I believe I was in school with Rep. Dan Rostenkowski (D., Ill.), powerful chairman of the House Ways and Means Committee, some 40 years ago. How old is Rostenkowski? Did he ever attend St. John's Military Academy in Delafield, Wis., and under what name?—J.S., Mesa, Ariz.

A Rostenkowski is 68. He attended St. John's Military Academy under the name Dan Rosten.

Q A steak dinner is riding on this bet, so you'd better be right. Which of the following men is President Reagan's official press secretary: Larry Speakes, Pat Buchanan or Jim Brady?—Mel McDowell, Lansing, Mich.

A James Brady—although wounded by John Hinckley Jr. on March 30, 1981, and disabled—still retains the title Assistant to the President and Press Secretary. Brady makes it to his White House office about once a week. Officially, he is the President's press secretary. Larry Speakes' title is Assistant to the President and Principal Deputy Press Secretary. F to the President, is

Claudia Korte

Over the weekend I saw the
attached on Jim Brady in
Sunday's PARADE Magazine
where it says he comes in
one day a week, so my draft
wouldn't seem to be an
adequate reply to this
inquiry.

TO: JOHN ROBERTS

Feb. 3, 1986

THE WHITE HOUSE
WASHINGTON

PRESERVATION COPY

THE WHITE HOUSE

WASHINGTON

January 31, 1986

TO: JOHN ROBERTS
Counsel's Office

RE: Inquiry of Cong. Don Pease
(D/Ohio) About Status
of JAMES BRADY

It seems to me Counsel's Office should really handle something like this. I will do whatever I can, but need your guidance.

Central Files had nothing I could use as a precedent; nor does for WH Personnel. Sally McElroy, Mr. Brady's secretary, tells me she is unaware of anyone having to respond to a similar request.

Rather than a written response, perhaps it could best be handled by a phone call to Bill Gould, the AA. That way, we might find out what particular "questions" the constituent has in mind. If you decide that a light, friendly reply is all that is warranted, I have drafted something for your review and editing. Finally, I wonder if I should also run this by the President's physician to see if he has any suggestions.

Thank you.


CLAUDIA KORTE
Presidential Messages
18-OEOB/Ext. 2941

DRAFT

Dear Don/Congressman Pease:

Alan Kranowitz has passed along to me your letter concerning an inquiry you received about the employment status of James S. Brady, Special Assistant to the President and Press Secretary.

As you know, Jim serves, as do other Special Assistants, at the pleasure of the President. After his hospitalization and an intensive therapy program, fortunately Jim was able to return to the White House and resume work. Of course, he still continues medical treatment and a program of rehabilitation, but he is here in the Press Office on a regular basis and performs duties and assignments for the President.

In addition to his Press Office responsibilities, Jim has also made a special effort to represent the President at meetings and events focusing on the needs and problems of the handicapped. I'm sure you will agree that he is a wonderful inspiration to those who are trying to overcome traumatic injuries and physical impairments to lead productive and rewarding lives.

Sincerely,

Oglesby/Fielding/Higgins

THE WHITE HOUSE
WASHINGTON

January 17, 1986

Dear Don:

Thank you for your recent letter.

Your interest is appreciated, and please know that I have brought your inquiry to the attention of the appropriate White House office for a prompt response.

With best wishes.

Cordially,



Alan M. Kranowitz
Deputy Assistant to the President

The Honorable Don J. Pease
House of Representatives
Washington, D.C. 20515

cc: Claudia Kortel for action
Thank you.

DON J. PEASE
13TH DISTRICT, OHIO

1127 LONGWORTH BUILDING
WASHINGTON, D.C. 20515
(202) 225-3401

COMMITTEE ON
WAYS AND MEANS
SUBCOMMITTEE ON TRADE
SUBCOMMITTEE ON
PUBLIC ASSISTANCE AND
UNEMPLOYMENT COMPENSATION

Congress of the United States
House of Representatives
Washington, D.C. 20515

January 13, 1986

Mr. Alan Kranowitz
House Legislative Liaison
White House
Washington, D.C. 20500

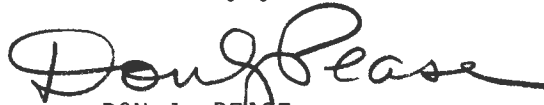
Dear Mr. Kranowitz:

A valued constituent of mine has raised a number of questions concerning the status of Press Secretary Brady.

My constituent would like to know if it is true that Mr. Brady continues to receive his full salary as Press Secretary even though it has been nearly five years since he has been able to do the job. If this is true, my constituent would like to know the legal basis for the continuation. Is there not some disability program for which Mr. Brady should be eligible?

I would appreciate your looking into and responding to the questions my constituent has raised. I look forward to your prompt reply.

Sincerely yours,



DON J. PEASE
Member of Congress

DJP/sb

ADMINISTRATIVE ASSISTANT:
BILL GOOLD

DISTRICT OFFICE:

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MR. JOHN WALKER
THE CENTRE, ASHLAND
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