I would also say that I am not in the position of being a member of the Ethics Committee that this matter would come before, so at this time I do not have any response one way or the other because I do not know. Otherwise I might be in a conflict of interest between two committees.

But I would say that if there has been any violation, certainly from the Ethics Committee's viewpoint, they would want it thoroughly investigated and thoroughly explored. And if any person has violated any agreement or anything else, I think that they would certainly want to look into it and take appropriate action.

The CHAIRMAN. Any more questions of this panel?

[No response.]

The CHAIRMAN. I again want to express my deep appreciation to the able and distinguished members of this panel who have come and testified. We appreciate your presence and you are now excused.

And we are going to recess now until 1:30. Panel 2 will be on at 1:30.

[Whereupon, at 12:33 p.m., a luncheon recess was taken.]

[Whereupon, at 1:40 p.m., the committee reconvened, Hon. Charles McC. Mathias, Jr., presiding.]

Senator MATHIAS [presiding]. The committee will come to order.

The first panel this afternoon will be Ms. Eleanor Smeal, of the National Organization for Women; Mr. Lawrence Gold, general counsel of the American Federation of Labor and Congress of Industrial Organizations; and Mr. Joseph Rauh, who will appear for the Americans for Democratic Action.

Joe, before you sit down, if you all will rise to be sworn. Raise your right hands. Do you swear the testimony you will give in this proceeding will be the truth, the whole truth and nothing but the truth, so help you God?

Ms. SMEAL. I do.

Mr. GOLD. I do.

Mr. RAUH. I do.

Senator MATHIAS. You did not know how Southern I was when I said "you all." [Laughter.]

Ms. Smeal, do you want to begin the panel's discussion? We will observe the 3-minute rule. The lights will indicate the time.

TESTIMONY OF A PANEL, INCLUDING: ELEANOR CUTRI SMEAL, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN; LAWRENCE GOLD, GENERAL COUNSEL, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; AND JOSEPH L. RAUH, JR., ON BEHALF OF AMERICANS FOR DEMOCRATIC ACTION AND LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Ms. SMEAL. Thank you, Senator.

I am delivering this testimony on behalf of the National Organization for Women and the National Women's Political Caucus. As the president of the National Organization for Women, I am representing the largest feminist organization in the United States, that is interested in eliminating sex discrimination in many different areas.

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The National Women's Political Caucus is the largest organization of its kind. It is a bipartisan organization, determined to eliminate sex discrimination in the political arena.

Our testimony is based upon a review of some 120 law cases that Judge Scalia wrote at the circuit court level. Of course, the bulk of these cases are in the area of administrative law, so we have to only review those cases that cover, on point, those issues that we are very, very concerned with.

Because the court record was very brief—he has only been on that court 4 years—we would also turn to his writings and journals, and we also turned to his speeches for his opinions in the areas of constitutional law.

There are three significant areas that concern us, and for the reason that we stand today to oppose his nomination as Associate Justice of the U.S. Supreme Court. Those three areas are affirmative action; his hostility toward the enforcement of the remedial antidiscrimination laws passed by Congress; and his philosophy on individual constitutional rights.

Let me move quickly to the areas—and, of course, 3 minutes will not give me adequate time to review his writings and his work. But let me move quickly to the area of affirmative action.

He has been quite clear in what he thinks of affirmative action. To quote: "I have grave doubts about the wisdom of where we are going in affirmative action and in equal protection generally."

He goes on to say: "I frankly find this area an embarrassment to teach."

He says that, "There are examples abound to support my suggestion that this area is full of pretense or self-delusion."

He essentially takes the position of being a foe of affirmative action. I do not think an objective person could read his writings and come up with any other conclusion. In fact, he has a concept that as the son of Sicilian immigrants, he shares no burden to repay a debt to a group his ancestors, he believed, never wronged.

I wanted to call attention to his quotes in this area because at a personal level I find it very difficult to sit here in opposition to the nomination of the first Italian-American. I am a person who believes in breaking down barriers and am the daughter of Italian-American immigrants. But my experience has led me to the exact opposite conclusion. I believe it is necessary to have affirmative action.

I am also very, very concerned with his use of the law and the cases. He seeks to strike down or to most limitedly interpret both race and sex discrimination laws, and he seeks to give the most narrow interpretation on remedies.

For example, on the 9-to-0 decision in sexual harassment that was just handed down, he would have been the lone voice against it, saying sexual harassment does not fall under the sex discrimination restraints laws of title VII.

Senator MATHIAS. I am afraid I have to enforce the 3-minute rule. However, the committee will have an opportunity to ask some questions and get back to some of the examples you are interested in.

[Prepared statement follows:]

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Testimony of
Eleanor Cutri Smeal
President, of the National Organization for Women

On Behalf of the National Organization for Women
and the National Women's Political Caucus

Before the Senate Committee on the Judiciary
on the Nomination of Antonin Scalia for Associate Justice
August 5, 1986

I am Eleanor Smeal, president of the National Organization for Women, and I come before the Committee today on behalf of the largest feminist organization in the United States to oppose the appointment of Antonin Scalia as Associate Justice of the U.S. Supreme Court.

While Judge Scalia has sat on the United States Circuit Court for the District of Columbia for only four years, and therefore we do not have an extensive judicial record to review in evaluating his positions on the rights of women and of minority members of our society, we would submit that even his short tenure as judge is sufficient to reveal a hostility toward the enforcement of remedial anti-discrimination laws passed by the Congress.

In addition, we have reviewed those law journal articles and writings prepared for the American Enterprise Institute for Public Policy Research of which we are aware, and which do address the issues of vital concern to us, and we believe these written statements underscore Judge Scalia's hostility to remedies against sex and racial discrimination. Furthermore, we are struck by his penchant to ridicule and to trivialize not just the remedies themselves but the very notion that those who have suffered from discrimination should in any way be given special consideration to end these patterns of discrimination.

I. Opposition to Affirmative Action

Judge Scalia, a foe of affirmative action, has been very careful to couch his opposition in what we are sure he believes to be appropriate language. He acknowledges, for instance, that society owes a debt to the underprivileged, but he makes clear that by this he means those who we would classify as poor economically.

He would not extend the notion of indebtedness to any person or group that has suffered discrimination and has been denied equal opportunities in education or employment simply on the basis of race or sex.

He has, in fact, made a point of ridiculing Justice Powell's decision in the Bakke case as reflecting a racist concept of restorative justice which he reduces to an Anglo-Saxon notion of guilt for the enslavement of the black people in our nation. Judge Scalia is very clear that as the son of Sicilian immigrants, he shares no burden to repay a debt to a group his ancestors never wronged.

At a personal level, as the daughter of Italian immigrants, I can tell this Committee that I wish my parents and grand parents had had the benefits of affirmative action. My experience with ethnic and gender discrimination has led me to a lifetime of strong support of measures to eliminate any kind of discrimination based on race, ethnicity, religion, sex, sexual preference, physical handicap or age -- not sophomoric verbal and mental exercises which are mere justifications for social Darwinism. Judge Scalia's views by no means represent a consensus in the ethnic community which we have common.

On a much broader level, the National Organization for Women finds it unconscionable that a federal appeals judge and a would-be Justice of the Supreme Court would summarily dismiss as unimportant over 200 years of discrimination against a racial minority in America simply because his ancestors didn't directly participate in the discrimination.

We would ask that you consider carefully the scathing ridicule that Judge Scalia's heaped upon the concept of

affirmative action in the Winter, 1979, issue of the Washington University Law Quarterly:

> To remedy this inequity, I have developed a modest proposal, which I call RJHS - the Restorative Justice Handicapping System. I only have applied it thus far to restorative justice for the Negro, since obviously he has been the victim of the most widespread and systematic exploitation in this country; but a similar system could be devised for other creditor-races, creditor-sexes or minority groups. Under my system each individual in society would be assigned at birth Restorative Justice Handicapping points, determined on the basis of his or her ancestry. Obviously, the highest number of points must go to what we may loosely call the Aryans - the Powells, the Whites, the Stewarts, the Burgers, and, in fact, (curiously enough), the entire composition of the present Supreme Court, with the exception of Justice Marshall. This grouping of North European races obviously played the greatest role in the suppression of the American black. But unfortunately, what was good enough for Nazi Germany is not good enough for our purposes. We must further divide the Aryans into subgroups. As I have suggested, the Irish (having arrived later) probably owe less of a racial debt than the Germans, who in turn surely owe less of a racial debt than the English. It will, to be sure, be difficult drawing precise lines and establishing the correct number of handicapping points, but having reviewed the Supreme Court's jurisprudence on abortion, I am convinced that our Justices would not shrink from the task.
>
> Of course, the mere identification of the various degrees of debtor-races is only part of the job. One must in addition account for the dilution of bloodlines by establishing, for example, a half-Italian, half-Irish handicapping score. There are those who will scoff at this as a refinement impossible of achievement, but I am confident it can be done, and can even be extended to take account of dilution of blood in creditor-races as well. Indeed, I am informed (though I have not had the stomach to check) that a system to achieve the latter objective is already in place in federal agencies - specifying, for example, how much dilution of blood deprives one of his racial-creditor status as a "Hispanic" under affirmative action programs. Moreover, it should not be forgotten that we have a rich body of statutory and case law from the Old South to which we can turn for guidance in this exacting task.

We would also ask that the committee note in this particular commentary by Judge Scalia the fact that he holds sex discrimination as even less important that racial discrimination, and that he is blatantly contemptuous of the present Supreme Court for its ruling on the legality of abortion.

II. <u>Opposition to Remedial Provisions for Discrimination in</u>

Employment

In reviewing the few employment cases in which Judge Scalia has participated in his four years on the federal bench, his hostility to remedies for both sex and racial discrimination become even more apparent.

His principal role has been to dissent, to generally oppose the remedial provisions of Title VII laws, and to interpret them so narrowly as to virtually render ineffective the Congressional intent behind the laws.

Mr. Chairperson, members of the Committee, we would again remind this Committee that in a public opinion poll released just two weeks ago 63 percent of Americans said judges should be committed to equal rights for women and minorities. We also would remind this Committee that the notion of equal rights for women and minorities received a higher support level than any President has received since the 1936 general election.

We also would submit that Judge Scalia's record doesn't even approach a commitment to equal rights for women and minorities in our nation.

In Vinson v. Taylor, 753 F. 2d 141 (D.C. Cir. 1985), rehearing denied, 760 F. 2d 1330 (D.C. Cir. 1985), affirmed sub nom Meritor Savings Bank v. Vinson, (S. Ct., July, 1986), Judge Scalia joined a dissent that argued for a rehearing on the grounds that the three-judge panel initially hearing the case had misinterpreted Title VII as it applies to cases of sexual harassment. The original panel had made the following holdings:

(1) sexual harassment in violation of Title VII need not involve an exchange of sexual favors for employment; rather, a discriminatory workplace is sufficient;

(2) a sexual harassment victim does not lose her right to legal redress because she capitulated to sexual advances;

(3) evidence that other employees were harassed is admissible;

(4) evidence as to the victim's dress and personal sexual fantasies is not admissible; and

(5) the employer is liable for its supervisor's harassment of an employee.

Judge Scalia, in dissenting, disagreed with most of these holdings. First, according to the dissenting opinion that he joined, sexual harassment is "individual" and hence not "discrimination in conditions of employment because of gender," and should not be viewed as a violation of Title VII. This extreme position was rejected by all present justices of the Supreme Court in the Vinson case, even by Justice Rehnquist. However, Judge Scalia evidently believes the nonsensical argument that when women are sexually harassed, their sex is not an issue. This notion is as illogical and cruel in its application as is the idea that discrimination on the basis of pregnancy is not sex discrimination.

Second, the dissent claimed that evidence of "voluntary" submission to harassment is a defense. According to the dissent, he evidently believes that a victim of discrimination can have no redress if she ever capitulates to the harassment for fear of retaliation. This view is inconsistent with the remedial purpose of Title VII law in general. A victim of wage discrimination is not, for example, denied a remedy because she accepted work at the discriminatory wage rate.

Third, the dissent claimed that evidence as to the victim's dress and personal fantasies was admissible as "relevant to the question of whether any sexual advances by her supervisor were solicited or voluntarily engaged in," and therefore relevant to "the presence of discriminatory intent."

This outrageous position requires some emphasis because it is based on a belief that how a woman dresses, and the content of her intimate thoughts, are relevant to whether or not someone harassed her. In other words, what the harasser did is based on how the victim looked.

The dissent sought to revive the old defense of "she asked for it," and sought to place the victim on trial in a manner similar to the way that rape victims were once viewed in virtually all state court criminal proceedings. This position is particularly preposterous in view of the fact that, in no other

area of Title VII law, is the victim's dress or personal thought process a defense to discrimination. The dissent, evidently, sought to return to the days when a woman's sexuality was viewed as provocation for assault.

Finally, the dissent opposed any employer liability for sexual harassment. The dissent relied on the limited tort theory of liability that "sexual escapades" should not result in employer liability "because they are personally motivated." The dissent further ignored the fact that, in passing Title VII, Congress chose to reject the limited tort theories of liability. Congress decided that employment discrimination is such a serious, pervasive problem that nothing short of a strong remedy will suffice. The dissent ignored the fact that other forms of employment discrimination, while also potentially "personally motivated," result in employer liability. The dissent made the paradoxical claim that if women are sexually harassed, as women, the harassment is personal.

Judge Scalia's other dissents show similar insensitivity to other types of employment discrimination. In Carter v. Duncan-Huggins, Inc., 727 F. 2d 1225 (D.C. Cir. 1984) the Court considered an appeal of a jury verdict awarding plaintiff $10,000 in damages for discriminatory activities under the Civil Rights Act of 1870, 42 U.S.C. S1981. Plaintiff had alleged racial discrimination in employment. (She was not able to file a suit under Title VII because the employer had less than 15 employees.)

After the jury's verdict, the company sought a judgment n.o.v. (notwithstanding the verdict, also sometimes called a "directed verdict") on the ground that there was insufficient evidence.

The burden in such a request is on the moving party. That is, the employer had to prove that no reasonable jury could have reached the verdict under any circumstances.

The District Court and the Court of Appeals both denied the employer's request. In its holding, the Court of Appeals reviewed the evidence which was the basis for the verdict. Plaintiff was the company's first, and only, black employee. She was physically segregated from other employees. While she was

expected to make sales, she was also isolated from the showroom floor and from any contact with customers. She was not permitted to answer the telephone. She was the lowest paid full-time employee; she was paid less than other employees with less seniority and similar qualifications. She was awarded smaller bonuses. She also suffered other unequal treatment in her day-to-day work.

Testimony at trial focused on four issues: (1) prohibition against plaintiff's attendance at staff meetings, to which all other employees were invited; (2) denial of parking privileges available to others; (3) denial of a key to the work facility, also available to others; and (4) a racially derogatory anecdote. The Court recited these facts, and found that a jury could reasonably conclude that there was racial discrimination and that it was intentional (motive is a requirement for 42 U.S.C S1981 cases).

Judge Scalia dissented. He believed that there was no evidence of discriminatory treatment and no showing of racial motivation. He found that the company's small size precluded salary comparisons even among similarly qualified employees. He also found that there were reasonable grounds for all of the other distinctions made by the employer in his treatment of the black employee. Finally, he concluded that even if the treatment was discriminatory, there was no showing of racial motive. Thus, he felt that no reasonable person could conclude that the "allegedly differential treatment was race-related."

Judge Scalia had the following to say: "If this case did not call for a directed verdict, it is difficult to imagine any small business hiring a minority employee which does not, in doing so, commit its economic welfare and its good name to the unpredictable speculations of some yet unnamed jury."

Clearly, he not only failed to see plain, naked discrimination when it stared him in the face, he also had total contempt for the jury system by assuming that juries will speculate and ignore the evidence.

Finally, even though Judge Scalia supposedly prides himself on strict application of the law, in this case he ignored the legal standard for directed verdicts, which requires that jury verdicts be reversed only if they are totally implausible.

In Poindexter v. F.B.I., 737 F. 2d 1173 (D.C.Cir, 1173), the Court of Appeals confronted that provision of Title VII which requires trial courts, in their discretion, to find counsel for Title VII plaintiffs who are too poor to afford counsel or who are otherwise unable to obtain counsel. 42 U.S.C. S2000e-5(f)(1).

The majority of the panel found that, in determining whether to appoint counsel, the trial court should consider the ability of the plaintiff to pay for her/his own attorney, the merits of the case, the efforts of the plaintiff to obtain counsel, and the ability of plaintiff to represent her/himself in the absence of counsel. The Court of Appeals then found that the trial court had not considered all of these factors and remanded the case.

Judge Scalia dissented. He agreed with the majority's analysis of the requirements for appointment of counsel. He found that the plaintiff, a black male coding clerk at a GS-6 level, was sufficiently wealthy to hire counsel even after his termination from employment. As one of his reasons for this conclusion, Judge Scalia cited $196 per week of unemployment compensation received by plaintiff.

Obviously Judge Scalia is either unaware of the contemporary cost of living and of obtaining legal counsel, or he deliberately wants to weaken the remedial provisions of Title VII.

A similar situation arose in Trakas v. Quality Brands, 759 F. 2d 185 D.C. Cir. 1985). In this instance, the female plaintiff filed a sex discrimination lawsuit. She subsequently moved from Washington to St. Louis. The trial date was scheduled. Two days before trial, plaintiff advised her counsel that she would be unable to travel to Washington, D.C. because her husband had recently lost his job and she had no funds for the trip. Her counsel sought a continuance.

The trial court denied a continuance and dismissed the case for failure to prosecute. The Court of Appeals found that, in

the special circumstances of the case, this was abuse of discretion and remanded the case.

Judge Scalia dissented, again because of this skepticism about the plaintiff's inability to pay. In his dissent, he referred to plaintiff's husband as an attorney, ignoring the fact that he had recently lost his employment. Again, he ignored the remedial and equitable nature of Title VII law.

III. Philosophical Opposition to Constitutional Rights of Individuals

While Judge Scalia's record in these cases is of grave concern to NOW, we are equally appalled by his philosophical opposition to constitutionally guaranteed rights for individuals.

His notion that the rights of individuals are only those which the majority confers, and not guaranteed by the Constitution regardless of majority views, would, if it became the dominant view, serve to undermine the Constitution and in particular the Bill of Rights which he is sworn to protect and defend.

During a public discussion sponsored by the American Enterprise Institute, Judge Scalia, at that time a visiting scholar for the Institute, made crystal clear his view not only on abortion rights but individual Constitutional rights in general:

> In the abortion situation, for example, what right exists - the right of the woman who wants an abortion to have one, or the right of the unborn child not to be aborted? In the past that was considered to be a societal decision that would be made through the democratic process. But now the courts have shown themselves willing to make that decision for us ...
> The courts' expansion stems, in part, from their function of deciding what are constitutional rights. Much of their activity is in that area, and I think they have gone too far. They have found rights where society never believed they existed.
> The courts have enforced other rights, so-called, on which there is no societal agreement, from the abortion cases, at one extreme, to school dress codes and things of that sort. There is no national consensus about those things and there never has been. The courts have no business being there. That is one of the problems; they are calling rights things which we do not all agree on.

Mr. Chairperson, members of the Committee, I cannot convey adequately the alarm with which the National Organization for Women greeted these words by Judge Scalia.

The very notion that rights are determined by consensus has to rank among the most appalling concepts we have ever encountered.

To begin with, consensus means agreement by almost everyone, if not everyone. Given the definition, I am sure we can all agree that there are few things in our national life in which we have consensus, in light of the broad diversity and make-up of American society.

Just how large a majority must Judge Scalia have to confront in order to deem that there is a consensus on a given question? Will a simple majority suffice? Is a 74 percent majority, enormous by most standards, large enough to convince him?

As we have submitted earlier to this Committee, the latest public opinion poll on the question of abortion shows that 74 percent of Americans support the Supreme Court's 1973 ruling on legalized abortion.

We doubt, however, that this is the real issue for Judge Scalia, anymore than it is the real issue for the National Organization for Women.

NOW believes that women have the right to abortion, as a matter of privacy and of individual rights, regardless of what public opinion polls show.

And we believe Judge Scalia holds the view that no such right exists, regardless of what public opinion polls show. In fact the Reagan Administration has made it abundantly clear that hostility to the Roe v. Wade decision is part of the screening process for nomination to the federal judiciary at all levels.

We would submit that unless the Reagan Administration was totally confident of Judge Scalia's views on abortion rights, his name would not be before this Committee. Period.

But in addition to the abortion issue, which is of crucial importance to our organization, we would ask this Committee to examine closely Judge Scalia's concern that the courts "are calling rights things which we do not all agree on."

Is this simply another way of stating Justice Rehnquist's appalling claim that "in the long run it is the majority who will determine what the constitutional rights of the minority are."

Again, I would refer the Committee to Judge Scalia's standards of general societal agreement and national consensus. As we mentioned earlier the latest public opinion poll on the question of judicial response to racial and sex discrimination shows that 63 percent of Americans believe our judges should be committed to equal rights for women and minorities. Again, is this, a larger majority than elected Ronald Reagan President, large enough to satisfy Judge Scalia's standards?

I believe we know the answer to that, and I believe this Committee does also.

Judge Scalia does not believe the rights of women and minorities are determined by majority opinion any more than we do. Either the Constitution and the laws of our nation confer these rights or they do not, regardless of shifting political majorities.

The fact that the majority now supports these rights is simply a credit to the people of this nation that at long last we have come to recognize, as a people, that in order to remain true to our ideals, we must in fact constantly pursue "liberty and justice for all."

The people of this nation have come to the realization that these rights exist.

We believe it is evidence of Judge Scalia's extremist viewpoint on Constitutional rights that he refuses to concede their existence.

This is not testimony to his independence and intelligence as a jurist. It is testimony to his unfitness to preside as one of a nine-member panel whose job it is to defend Constitutional rights.

In line with Judge Scalia's pronouncements on "national consensus," "societal agreement," and abortion in the AEI panel discussion, he also said that in drawing the line in the area of constitutional rights, "it would fall short of making fundamental, social determinations that ought to be made through

the democratic process, but that the society has not yet made. I think the Court has done that in a number of recent cases. In the busing cases ... there was no need for the courts to say that the inevitable remedy for unlawful segregation is busing. Many other remedies might have been applied. It was not necessary for the courts to step in and say what must be done, especially in the teeth of an apparent societal determination that the costs are too high in terms of other values of the society."

Now, Judge Scalia didn't offer in that discussion any suggestions as to what those "many other remedies" might be, only that he was sure they existed.

What he was really saying, we know from both experience and from other of his writings, is that the Court is only there to rule, not to provide remedies for injustice, and that if the executive and legislative branches choose not to enforce a ruling, then so be it -- regardless of how abominable the injustice.

Does anyone, including Judge Scalia, seriously believe that Southern school systems, not to mention school systems elsewhere, as well as public accommodations in the South, would really have integrated on their own if the Court had not forced enforcement of its ruling?

Does anyone, including Judge Scalia, seriously believe that the majority in this instance would not have continued to deny the black minority in this nation its rights if that majority thought it could get away with it?

Now, in that same discussion which, incidentally, was titled, "An Imperial Judiciary: Fact or Myth?", Judge Scalia went on to say that the Court doesn't always have to "go along with the consensus of the day. The Court may find that the traditional consensus of the society is against the current consensus. If that is the case, then the Court overrides the present beliefs of society on the basis of its historical beliefs. I can understand that."

"But when neither history nor current social perception demands that something be called unlawful, I cannot understand how the Court can find it to be so."

You should know that when confronted with the suggestion that both the traditional consensus and the contemporary consensus were against school desegregation in 1954, Judge Scalia replied that he didn't "believe that is true. Most of the country did not consider separate black schools proper in 1954."

Considering the history of the decade that followed the Brown v. Board of Education, I think we can say with confidence that Martin Luther King, Jr. would have been surprised to learn this from Judge Scalia.

While it is somewhat comforting to know that Judge Scalia ended the discussion of Brown v. Board of Education with the comment that, "In any event, the results of that decision have been very good," we are still left more than a little confused. The results of that decision, after all, also included the remedy of busing, and Judge Scalia doesn't believe the Court should order remedies.

We also find a great deal of danger in Judge Scalia's belief that it is proper for the Court to override the present beliefs of society on the basis of its historical beliefs.

It is staggering to contemplate the list of contemporary beliefs that would be at risk in the hands of a Justice Scalia, certainly sex and racial discrimination being just two areas of belief.

Just as frightening is the fact that Judge Scalia made no provision for the reverse: that it is proper for the Court to override historical beliefs on the basis of the present beliefs of society.

These are just a few instances in which Judge Scalia's logic falls apart upon analysis.

We would ask the Committee also to consider the following commentary from an article written by Judge Scalia in 1980, titled "The Judges are Coming", and reprinted in the Congressional Record of July 21, 1980, at the request of former Congressman Daniel Crane of Illinois:

> Thus, the Congress passes a law requiring the Department of Health, Education and Welfare to assure the elimination of "sex discrimination" in federally assisted educational programs. Everyone applauds. Who, after all, can be in favor of sex discrimination? It soon develops, however (as Congress knew when it passed the law), that "elimination of sex discrimination" is only a slogan. To some, it means little more than equal job opportunity and equal pay for equal work. To others, it includes also the expenditure of equal funds on men's and women's sports; or even the prohibition of all-male or all-female team sports; and to still others (quite seriously) the elimination of father-son dinners, unisex dorms or even unisex toilets. Who is to tell us, then, what the Congress meant - when in point of fact it did not know what it meant, and quite obviously did not want to know for fear of antagonizing one or the other side of the sexual revolution? The answer, of course, is the courts. In lawsuits challenging HEW's actions, they will ultimately develop for us a whole body of law concerning sex discrimination on the basis of virtually no guidance from our elected representatives in Congress.

In this case, Judge Scalia conveniently overlooks the fact that federal regulations were written and enforced by the Department of Health, Education and Welfare to enforce the provisions of Title IX of the Civil Rights Act. These regulations were based upon the public hearings and input and the legislative history of the Act.

He chooses to ignore that these regulations were enacted with a significant measure of success creating a substantial body of experience for Title IX. And, although many institutions of higher learning in our nation did not like being told they could not discriminate on the basis of sex, and still others spent a great deal of time trying to skirt the law, they knew what the regulations said and what they were legally required to do.

The gutting of Title IX was not done by a faint-hearted Congress. It was done by an executive branch that thought the government should be allowed to fund discrimination and that went to the Court to get a ruling allowing it to do so.

Ultimately, it was the Supreme Court that reversed the remedial effects of Title IX: in the face of clear Congressional intent to eliminate sex discrimination in education; in the face of a legislative and regulatory history that showed over a decade of progress in this area; and in the face of majority support in this nation for the elimination of sex discrimination in education.

Mr. Chairperson, members of the Committee, Judge Scalia has demonstrated that he is more than happy to go on the record with his beliefs about sex discrimination and about racial discrimination, even though he actually has had few opportunities to rule in these areas as a Judge.

He could not be more clear in his belief that these areas of law are, at best, a nuisance, and at worst, unworthy of his consideration.

We ask this committee, on behalf of the women of this nation and on behalf of the minority members of our society to reject a nominee to the U.S. Supreme Court who has no intention of using the Constitution and laws of this nation to help move this country toward equal rights and equal opportunities for all its citizens. In fact, reviewing his record and writings on affirmative action, discrimination law and individual rights, he is willing to use the Constitution to obstruct the advancement of equal rights.

We ask this Committee to reject the nomination of Antonin Scalia as Associate Justice of our U.S. Supreme Court.

Thank you.

Senator MATHIAS. Mr. Gold.

STATEMENT OF LAWRENCE GOLD

Mr. GOLD. Thank you, Senator Mathias.

The AFL-CIO was not asked to testify to argue for or against Judge Scalia's nomination, but to voice certain concerns about his conception of the Constitution and of the lawmaking process, and to ask the committee to explore in depth certain issues we believe are of great consequence. Our views are tentative because while we have read all of his legal writings, that effort has yielded only a limited number of relevant pieces of information, principally in his occasional academic pieces. Against that background, we wish to make the following points.

First, it appears to us that Judge Scalia is intent on demoting Congress from its primary place in making national policy. His views on statutory construction, on standing, on the President's appointment power, on the nondelegation doctrine, and on the legislative veto are tied together by the common thread that in each instance, he would hobble Congress and aggrandize Executive power.

Second, we would suggest that Judge Scalia's conception of the judicial role in interpreting and enforcing the Bill of Rights leaves little, if anything, of substance. His most telling quote is that, "The Bill of Rights to some degree is like a commercial loan: You can only get it if at the time, you do not need it." What that would leave of the legitimacy of *Brown* v. *Board of Education, New York Times* v. *Sullivan,* or *Baker* v. *Carr,* to note only three decisions which we believe were not only right but necessary, is difficult for us to discern.

Finally, we wish to point out that the discontinuity in Judge Scalia's approach to issues concerning the allocation of power between Congress, the President, and the Judiciary, and his approach to issues concerning the power of government over the individual, indicates that his legal positions are not the product of the doctrine of judicial restraint, but of his own social and political views. His inventiveness in finding limitations on the legislative power stands in stark contrast to his quietist position on the guarantees of individual rights.

It is the committee record on these matters that will determine our position on Judge Scalia's nomination, and that we hope will determine the committee's position.

Thank you.

Senator MATHIAS. Thank you.

[Statement follows:]

TESTIMONY OF LAURENCE GOLD, GENERAL COUNSEL OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, TO THE JUDICIARY COMMITTEE OF THE U.S. SENATE ON THE NOMINATION OF JUDGE ANTONIN SCALIA TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

August 6, 1986

The AFL-CIO appreciates this opportunity to appear before the Judiciary Committee to testify on the nomination of Judge Antonin Scalia to be an Associate Justice of the Supreme Court. We do not appear at this time to oppose or to support Judge Scalia's nomination but to raise questions about the nominee's views -- as we glean his views from his writings -- concerning the role of Congress in setting national policies and the role of the judiciary in enforcing the Bill of Rights. If we understand those views correctly, they raise serious issues as to what the Constitution means and how we conduct our public life. We discuss these questions in the hope that they will be fully explored in these hearings and out of our sense -- which we share with the Committee -- of the profound importance of this nomination, and of each nomination to the Supreme Court, in light of the Court's major role in the Nation's affairs.

I.

It is appropriate at the outset to state briefly our understanding of the proper role of the Senate in passing on a Supreme Court nomination; without a theory as to the basis on which the Senate may or should act, it is impossible to discuss intelligently whether a particular nominee should be confirmed.

We believe first of all that the contention that the Senate's role in passing on a Supreme Court nomination is merely to assure itself of the nominee's intelligence and character -- a position that seems to have some currency at present -- is unsound. Whatever the merits of that approach may be in deciding whether to confirm a Presidential appointment to the Executive Branch, where the appointee will be assisting the President in performing the President's duty to take care that "the laws [of the United States] be faithfully executed," it makes no sense to suggest that the Senate's role should be equally circumscribed with respect to nominees for the judiciary, an independent branch of government. The Executive Branch and particularly the Cabinet may in some sense "belong" to the President, but surely the Supreme Court does not; it is the Supreme Court of the United States.

Those who would so narrowly limit the role of the Senate in passing on a judicial nominee can find no support for their approach in either the constitutional text or in constitutional history. As Professor Charles Black has stated, the words of Article II, section 2, clause 2 -- the "Advice and Consent" clause -- "make [it] next to impossible" to conclude that the Senate's role is "confined to screening out proven malefactors."[1] Nor was that the intent of the Constitution's framers; the proceedings of the Constitutional Convention reveal that there was substantial support in the Convention for granting the Senate sole power to appoint judges, and that the Advice and Consent provision emerged as a compromise, one that would place a check on the President's appointment power by, as Hamilton put it, subjecting "the propriety of [the President's] choice to the discussion and determination of a different and independent body."[2]

Thus, with respect to the shaping of the judiciary, as with respect to so many other matters, the Constitution is indeterminate with respect to the role of Congress; the plan of the framers was to give both the President and Congress a voice, and to leave it to those two bodies to vie continuously with each other for the public sentiment that determines the extent to which the voice of a particular branch will be controlling at particular moments in history.

For two hundred years, the Senate has recognized and asserted its constitutional prerogatives in passing upon Supreme Court nominees. In 1795, the Senate refused to confirm a Supreme Court nominee of President Washington. And during the 1800s, seventeen Supreme Court nominations failed of confirmation for what Professor Rees aptly describes as "political or philosophical reasons."[3]

In particular, there can be no doubt that, as the Chairman of this Committee, Senator Thurmond, stated in opposing Justice Fortas' nomination to the office of Chief Justice, "the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and the role of the Court in dealing with these issues."[4] Justice Rehnquist put it this way in an article he authored over 25 years ago: "what could [be] more important to the Senate than [a nominee's] view on equal protection and due process."[5] Professor Black has elaborated on the point as follows:

> In a world that knows that man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view."[6]

This is not to say that it would be an appropriate exercise of the Senate's power to refuse to confirm any nominee who does not share, in all particulars, the political or philosophical beliefs of a majority of the Senate. With respect to many issues of the day, a nominee's personal views have little or no bearing on how that nominee will perform the judicial role. And even with respect to those broader issues of politics or philosophy that undoubtedly do shape how a nominee would go about judging, the appointment process would quickly deadlock if each branch of government were to insist on its own version of ideological purity. But there can be no doubt of the propriety of closely examining a nominee's philosophy to determine whether there are, to quote Hamilton, "special and strong reasons" to refuse to confirm that nominee.[7]

II.

There are two aspects of Judge Scalia's judicial philosophy which we believe merit close scrutiny.

First, as we shall explain, there is substantial reason to doubt whether Judge Scalia accepts the fundamental principle that it is for Congress to make national policy and for the Executive to implement that policy. Judge Scalia's position, as we understand it, is that the Executive should be free to nullify duly-enacted and Presidentially-approved law by refusing to enforce such laws or by enforcing their "plain" terms without seeking to ascertain what Congress intended. This area is an especially appropriate one for congressional attention, because to the extent the President uses his appointment power to select nominees who will transfer power to the Executive at the expense of Congress, it is entirely proper for Congress to refuse to give its consent to such nominations.

The second area to which we invite the Committee's attention concerns Judge Scalia's reading of the Bill of Rights and the Fourteenth Amendment. While the materials are more sketchy, Judge Scalia appears to approach those vital constitutional guarantees in a way that would drain them of their significance. Indeed, it seems safe to conclude that Judge Scalia was nominated in large measure for that very reason, just as Justice Rehnquist undoubtedly was nominated to be Chief Justice because he has consistently refused to enforce the guarantees of the Bill of Rights. And if that is the ground on which these nominations have been made, it is surely proper for the Senate to base its decision on whether to give its consent on these very same grounds. As Professor Black has argued, to offer advice and consent without "consider[ing] the same things that go into the decision is ordinarily "derelict[ion] in . . . duty."[8]

III.

To be precise, the President has not yet nominated Judge Scalia to be an Associate Justice of the Supreme Court but has stated his intention to do so if and only if Justice Rehnquist is confirmed as Chief Justice. Some preliminary words on the nomination actually pending before this Committee, that of Justice Rehnquist to be Chief Justice, are therefore in order.

The AFL-CIO is part of the Leadership Conference on Civil Rights and subscribes to its testimony on Justice Rehnquist's nomination. Because our views were thus represented, and because of the large number of otherwise unrepresented organizations which wished to testify with respect to Justice Rehnquist's nomination, we did not ask to take up the Committee's time during last week's hearings. We would be remiss however if we did not use the occasion of this testimony to state in our own words our reasons for urging the Committee to vote not to confirm Justice Rehnquist as Chief Justice.

In 1971, the AFL-CIO opposed the confirmation of Mr. Rehnquist to be an Associate Justice because, as we stated at that time, his "public record demonstrates him to be an extremist in favor of . . . diminution of personal freedom." We believe that Justice Rehnquist's record on the Supreme Court over the past fifteen years confirms our essential fear: he is an ideologue with a closed mind to the great majority of valid claims based on the Bill of Rights or the Fourteenth Amendment.

In preparation for this testimony, we have reviewed every constitutional decision in which Justice Rehnquist has participated since joining the Court. That review leaves no doubt that on a Court whose majority has been appointed by Presidents Nixon, Ford and Reagan and which takes a quite modest view of the Bill of Rights' protections -- a Court quite unlike the Warren Court -- Justice Rehnquist stands alone in his doctrinaire insensitivity to individual rights. In this context, the number of constitutional cases in which Justice Rehnquist has dissented alone assumes significance, for that number reveals the extent to which Justice Rehnquist falls to the right of an essentially conservative Court. Equally significant are the extreme views Justice Rehnquist has expressed in those isolated dissents -- and in solitary concurring opinions as well -- such as his view that the Equal Protection Clause does not offer protection to all "discrete and insular minorities" but only to blacks[9/], that the First Amendment permits a city to exclude from a public auditorium performances the city views as offensive so long as the city's judgment is not "arbitrary or unreasonable"[10/], or his view that the Establishment Clause allows the government to promote religion so long as it does not aid one particular religion.[11/] The

short of the matter is that on virtually any constitutional issue that comes to the Court, his "no" vote is all too predictable.

It has been argued that Justice Rehnquist's cramped reading of the Bill of Rights is justified by the theory of judicial restraint; the theory that the judiciary should keep its review within narrow limits in order to maximize the freedom of the democratically-elected branches of government to work their will. But of course the entire point of the Bill of Rights is to place limitations on the majority's power. The reason for a written Constitution enforced by an independent Judiciary is to see to it that those limitations are respected. At most, then, the theory of judicial restraint justifies deference to the popular branches in the truly hard cases and not an across-the-board abdication by the judiciary. Thus, in our view, Justice Rehnquist is wrong in the most fundamental respect when he argues that so long as the majority has a reasoned base for discriminating against a minority or for infringing on the freedom of speech or of religion, the majority is privileged to do so.

If, however, Justice Rehnquist were a consistent and faithful practitioner of judicial restraint, there might at least be a credible case to be made for his nomination. But the reality is that he is not; when it suits his ideological purposes -- when there is an opportunity to further his own agenda -- Justice Rehnquist has been the most activist of jurists.

Perhaps the best known and most pronounced example of this tendency is his decision in National League of Cities v. Usery, 426 U.S. 833 (1976), holding unconstitutional an act of Congress requiring public employers to pay their employees the minimum wage. In National League, Justice Rehnquist concluded that although the law in question was "fully within the grant of legislative authority contained in the Commerce Clause," id. at 841, that law violated an "affirmative limitation" on Congress' power, id. at 842, one that interdicts federal legislation that interferes with "the States' freedom to structure integral operations in areas of traditional governmental functions," id. at 852.

To the extent Justice Rehnquist in National League identified a source in the constitutional text for this "affirmative limitation," that source was the Tenth Amendment -- a strange source, indeed, because that Amendment provides, in terms, that "The powers not delegated to the United States by the Constitution . . . are reserved to the States," and thus cannot be read to restrict the powers that are "delegated to the United States by the Constitution." Indeed, one year earlier, Justice Rehnquist acknowledged this very fact.[12/] The reality is, then, that in National League -- unlike in cases involving individual rights[13/] -- Justice Rehnquist was essentially unconcerned

about finding a source in the constitutional text for the limitation on congressional power he expounded.

Justice Rehnquist was likewise unconcerned in National League by the absence of any evidence that the framers of the Constitution affirmatively intended that limitation or by the fact that the limitation had been unknown in constitutional history for almost two hundred years; it was Justice Brennan's dissent in National League that relied on the Federalist Papers, the writings of James Madison, and on decisions of the Supreme Court from McCulloch v. Maryland, 4 Wheat 816 (1819), to Justice Harlan's opinion for the Court in Maryland v. Wirtz, 392 U.S. 18 (1968), (an opinion which National League cavalierly overturned). See 426 at 856-81 (Brennan, J., dissenting). And Justice Rehnquist was equally unconcerned in National League by the anti-democratic thrust of the decision: in National League, the Court, in the name of protecting the States, invalidated laws enacted by Congress and signed by the President and indeed assumed for itself the power to invalidate any federal law which, in the Court's view, goes too far in the direction of undermining the Court's own view of the essentials of State sovereignty.

Justice Rehnquist made no attempt in National League to defend the approach to constitutional adjudication taken there, but in Nevada v. Hall, 440 U.S. 410 (1979), he offered such a defense. The issue in that case was whether, under the federal Constitution, the courts of one State lack jurisdiction over another State which is sued as a defendant. The majority answered that question in the negative because there is nothing in the Constitution which addresses a State court's jurisdiction over other States. Justice Rehnquist dissented, arguing against the "Court's literalism," id., at 434, and in favor of an entirely different analytical method of constitutional interpretation:

> Any document -- particularly a constitution -- is built on certain postulates or assumptions; it draws on shared experience and common understanding. On a certain level, that observation is obvious. Concepts such as "State" and "Bill of Attainder" are not defined in the Constitution and demand external referents. But on a more subtle plane, when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan -- the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning. [440 U.S. at 433.]

We have no quarrel with this statement of how to interpret the constitution. We disagree with National League because we believe Justice Rehnquist followed his personal views rather than the constitutional plan, and not because we challenge the legitimacy of interpreting the Constitution by reference to that "plan" or by reference to the

Constitution's "tacit postulates." Our point is simply this: Justice Rehnquist's statement of approach applies equally to cases in which individuals claim infringement of their rights and to cases in which the States claim infringement of their prerogatives. Yet Justice Rehnquist follows the approach of his Nevada v. Hall dissent only in States' rights individual rights cases.

Justice Rehnquist's decisions thus make clear that he is not following some neutral and principled method of constitutional adjudication but instead is interpreting the Constitution to further a particular ideological agenda, one that is hostile to federal power and indifferent to individual rights. In our view, Justice Rehnquist's unyielding commitment to that agenda -- an agenda that is incompatible with the "constitutional plan" and with the national welfare -- disqualifies him to be Chief Justice of the United States.

IV.

We turn now to the nomination of Judge Scalia and begin by underlining what we said at the outset: we do not at this point urge a particular answer to the question of whether Judge Scalia should be confirmed. Our reason for testifying is that, as we have stated, we believe, after a careful review of Judge Scalia's writings, that deeply troubling questions are raised by his writings, as we read them, on the role of the courts in interpreting the laws that Congress enacts, the role of the Executive in enforcing those laws, and the Constitution's office in limiting the power of Congress and the Executive alike. We discuss those questions in some detail in the hope that by so doing we will stimulate a probing examination of Judge Scalia by the Committee with respect to these matters.

A.

The first respect in which Judge Scalia's public statements give great pause is the theory he has outlined for deciding statutory cases -- cases involving the interpretation and application of legislative enactments. The longstanding and prevailing understanding of the judicial role in such cases is the one Judge Learned Hand expressed best and that the Supreme Court has embraced: the judicial task is to make the "best effort to reconstitute the gamut of values current at the time when the words [of the statute] were uttered,"[14/] because "statutes have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[15/] Stated more simply, the role of the judiciary is, as Justice Story put it, to arrive at that interpretation of a law "which carries into effect the true intent and object of the legislature in the enactment."[16/]

Judge Scalia has a very different understanding. In two speeches that he submitted to this Committee, Judge Scalia takes issue with the proposition "that the intent of th[e legislative] body is what should govern the meaning of the law," and that "interpretative doubts . . . are to be resolved by judicial resort to an intention entertained by the lawmaking body at the time of its enactment."[17/] According to Judge Scalia, "asking what the legislators intended . . . is quite the wrong question."[18/] To him, "[s]tatutes should be interpreted . . . on the basis of what is the most probable meaning of the words of the enactment,"[19/] viz, "by assessing the meaning that would reasonably have been conveyed to a citizen at the time the law was enacted, as modified by the relationship of the statute to later enactments similarly interpreted."[20/]

In our view, this approach to statutory interpretation is flawed in at least two respects. First, as Justice Frankfurter argued, "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."[21/] Justice Frankfurter explained:

> A statute like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute . . . is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment -- that to which it gave rise as well as that which gave to it -- can yield its true meaning.[22/]

Second, the reality is that in most statutory cases the language of a statute is not so clear as to permit of only one possible interpretation or application; as Justice Frankfurter argued in another case, "[o]ne would have to be singularly unmindful of the treachery and versatility of our language" to harbor such a view.[23/] Indeed, "it would be extraordinary" if a case which could be decided by means of "mechanical application of Congress' words to the situation" were deemed "worthy of th[e Supreme] Court's attention."[24/]

It is precisely for this reason that Judge Scalia's approach is so unsettling. For what Judge Scalia ultimately argues is that it is neither possible nor proper to seek the construction that would produce the results Congress intended or the results most consonant with the congressional policies underlying the statute. Rather, Judge Scalia argues, where the language is "plain," it is to be controlling even if the result is not what Congress wanted. And even more importantly, in Judge Scalia's view, in the usual case in which there is some room to differ over the meaning of the words Congress has enacted, the executive and judicial branches are free to place their own gloss on statutes.

Insofar as Judge Scalia's argument rests on his belief that it is not possible to ascertain in a reliable fashion what Congress intended in passing a particular law, we believe he misunderstands the legislative process. To be sure, some of what passes for authoritative "legislative history" is not authoritative at all because it cannot be understood to be an expression of a judgment that Congress as a body made in enacting the law. But in our experience, it ordinarily is possible to gain valuable insight into what Congress intended and how far the Legislature was prepared to go in enacting a particular law by examining what those who sought enactment of a particular piece of legislation identified as the problem to be addressed; the statements of the principal proponents of the legislation, serving as spokesmen for the bill's supporters, as to what they sought (and equally important did not seek) to accomplish; the compromises that the proponents made during the legislative process in their attempt to build majority support; and the compromises and alternatives that the proponents rejected and on which they joined issue with the opponents. To use Judge Hand's words again, it is, we believe, possible to "reconstitute the gamut of values extant" when a statute was passed, and thus to interpret statutes in a manner that furthers those values.

Ultimately, however, Judge Scalia rejects that approach to statutory interpretation in principle. He believes, as he puts it, that "if the members of Congress do not specify, in the law they enact, all the details of its application, they must realize that someone else will have to 'fill in' those details. . . . [T]he theory of our system is that de facto delegation goes initially to the agency administering the law, and, ultimately, to the courts."[25/] In other words, according to Judge Scalia, under "the doctrine of separation of powers . . . once a statute is enacted, its meaning is to be determined on the basis of its text by the Executive officers charged with its enforcement and the Judicial officers charged with its application."[26/]

But while it is of course true that the Executive decides in the first instance what a law means -- there is no plausible way by which Congress can decide that question -- Judge Scalia's formulation begs the critical issue: by what criteria is the Executive (or the Judiciary) to make that decision. What Judge Scalia is arguing is that the Executive is free to interpret statutes -- in his words, to "fill in th[e] details" -- based on the Executive's own conception of sound policy and without regard to, rather than based on, its understanding of Congress' conception. And that reflects a profound disrespect for the legislative process and ultimately for Congress.

Judge Scalia invokes the rubric of separation of powers to defend his theory, but the view he espouses is the antithesis of that doctrine correctly understood, for his approach

would lead to a consolidation of power in the Executive to make as well as to enforce national policy. The correct understanding of the separation of powers doctrine is the one expressed in the Steel Seizure Case:

> [T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to recommending of laws he thinks wise and vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.[27]

A true appreciation of the separation of powers principle thus leads directly to (and underlies) the prevailing approach to statutory interpretation -- an approach whose premise is, as Justice Holmes put it, that "the legislature has the power to decide what the policy of the law shall be" and which therefore concludes that if Congress "has intimated its will, however indirectly, that will should be recognized and obeyed."[28] Judge Scalia rejects Justice Holmes' conclusion because he rejects Holmes' premise.

The significance of the differences between the traditional understanding of the separation-of-powers doctrine as articulated by Holmes and the approach to statutory construction it yields, and the revolutionary views of Judge Scalia, cannot be overstated. Because so much of what Judge Scalia would be called upon to do, if elevated to the Supreme Court, would involve the construction of federal statutes as to which, of course, the Supreme Court has the final say, his approach has the potential to effect a vast shift of policy-making authority from the Congress to the President. That approach therefore warrants the most careful scrutiny by this Committee.

B.

Judge Scalia's premise as to the prerogatives of the President vis-a-vis Congress lead not only to an approach to statutory construction that would allow the President to make policy without regard to Congress' view but also to an approach to constitutional interpretation that would limit Congress' power even further and transfer even more policy-making authority to the Executive.

Consider, for example, Judge Scalia's approach to Article III of the Constitution. That Article states that the "judicial power" of the United States shall extend to "cases or controversies." Based on his view of the separation of powers, Judge Scalia would read into that Article a review that would preclude Congress from subjecting certain types of executive action to judicial review even where Congress concludes that such review is necessary to assure that the Executive faithfully executes the law. According to Judge Scalia, Congress may provide for judicial review of executive action only where those such actions produce "distinctive[]" harm to a particular individual[29], and not where the Executive acts in a way adverse "only to the society at large."[30]

What this means, in concrete terms, is illustrated by a recent dissent by Judge Scalia in a case challenging the Transportation Department's alleged failure to comply with Congress' directives to set fuel economy standards for automobiles at the level which achieves the maximum feasible economy. In that case, the majority (including incidentally former Senator, now Judge, Buckley) found that a citizens group had standing to challenge the Executive's asserted non-compliance with the law. But following his academic writings, Judge Scalia disagreed, arguing that even though Congress had authorized judicial review of the Executive's enforcement of that law at the behest of "[a]ny person who may be adversely affected" by what the Executive had done, no one could challenge the Transportation Department's action in allegedly setting too lax a standard. Judge Scalia contended that while the courts are always open to claims that the Executive has exceeded the bounds set by Congress in regulating the private sector because such regulatory action, by definition, inflicts distinctive harm on those regulated, it is his position that the courts cannot hear claims that the Executive has failed to regulate to the degree Congress mandated because the injury that flows from under-regulation, such as exposure to increased hazards, is one shared in common by all exposed to the hazard.[31/] Stated in more general terms, when the overall public interest is at issue, Congress simply cannot, in Judge Scalia's view, constitutionally bind the President to enforce the laws through the usual means used in a democratic society; the only alternatives Judge Scalia would leave Congress are the use of such extraordinary means as "defunding" or impeachment.

Remarkably, Judge Scalia believes that granting standing in cases such as Center for Auto Safety would work a "judicial infringement upon the people's prerogative to have their elected representatives determine how laws that do not bear upon private rights shall be applied."[32/] But of course the very claim in that case was that "the people "through their "elected representatives" in Congress had made such a decision by the law that was enacted and signed by the President. What was at issue in Center for Auto Safety, then, was whether the Executive could trump Congress' judgment as to the degree of regulation that is desirable or whether, instead, the Judiciary would compel the Executive to enforce Congress' law. In refusing to intervene, Judge Scalia failed to enforce true separation-of-powers principles but instead furthered his consolidation-of-powers notion under which the Executive may overrule the Legislature. To quote Judge Scalia's article:

> Does [my view] mean that so long as no minority interests are affected, "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?" Of course it does -- and a good thing too.[33]

Another way in which Judge Scalia's separation-of-powers theory leads him to a position that would enable the Executive to "los[e] or misdirect[] important legislative purposes" is his interpretation of the Appointments Clause, the clause authorizing the President to appoint executive officials.[34] Since the Supreme Court's decision in Humphrey's Executor v. United States, 295 U.S. 602 (1933), it has been generally understood that this clause does not preclude Congress from enacting laws that establish standards that the President must follow in removing Presidential appointees. On that basis, the constitutionality of the independent regulatory agencies Congress has established to insulate some regulators from the ebb-and-flow of politics -- agencies like the FTC, NLRB, FCC and SEC -- has gone unquestioned.

That Judge Scalia at least harbors doubts as to the constitutionality of independent regulatory agencies is clear from the per curiam opinion he either authored or joined in the Gramm-Rudman case[35] as well as from a paper he delivered to the Supreme Court Historical Society a year ago.[36] Judge Scalia has made clear that he views Humphrey's Executor as "an anomaly" and as not even settling the question whether the President may discharge a member of an independent agency for carrying out statutory responsibilities in a way with which the President disagrees.[37] Moreover, the opinion of the three-judge court in Synar v. United States indicates that Judge Scalia may view the separation-of-powers doctrine to require that all those responsible for regulating must serve at the pleasure of the President, and that therefore Congress lacks the power to enact a law prescribing removal standards for any executive office.[38] It is noteworthy that the Supreme Court affirmed the three-judge court in Synar on a different rationale: the Court found it unconstitutional to vest authority in an officer like the Comptroller General who is completely dependent upon Congress, and the Court did not decide whether it is unconstitutional to vest executive authority in an officer who is independent of the Executive; indeed, the Supreme Court went out of its way to disclaim any intent to "cast[] doubt on the status of independent agencies."[39]

C.

Thus far we have discussed the ways in which Judge Scalia's separation-of-powers theory would lead to the transfer of authority from Congress to the President and in that way threaten the primacy of Congress in making national policy. But Judge Scalia's theory threatens congressional primacy in one further and even more fundamental

respect: in the name of the separation of powers, he seemingly would revive the discredited non-delegation doctrine, the doctrine which holds that the judiciary may invalidate any law which, in its view, contains too little specificity and vests too much authority in the Executive.

The non-delegation doctrine was used by the Supreme Court in the early 1930s to strike down New Deal legislation with which those "Nine Old Men" disagreed;[40/] it has not been used since. Yet in an article written shortly after the Supreme Court's decision in Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980), Judge Scalia expressed sympathy for Justice Rehnquist's opinion in that case which sought to resurrect the non-delegation doctrine in order to invalidate critical portions of the Occupational Safety and Health Act. Judge Scalia argued that "the unconstitutional delegation doctrine is worth hewing from the ice" and urged the Supreme Court to "mak[e] an example of one -- just one -- of the many enactments that appear to violate the [non-delegation] principle out of a hope that [t]he educational effect on Congress might well be substantial."[41/]

Judge Scalia understands that Congress will be unable to pass complex regulatory legislation of sufficient specificity to meet the requirements of Justice Rehnquist's Industrial Union Department opinion. Thus, the necessary effect -- if not the intent -- of this application of separation-of-powers doctrine would be precisely what it was fifty years ago: to thwart the enactment of broad regulatory laws whose substance is anathema to a majority of the court hearing the case.

D.

In sum, there is grave reason to doubt whether Judge Scalia, if confirmed, would respect Congress' lawmaking powers or whether he would, instead, invalidate some laws as too vague and allow the Executive to nullify other laws by enforcing those laws in a manner that disregards Congress' will. Judge Scalia's views in these respects thus merit the most careful scrutiny before Congress decides whether to give its consent to this nomination.

V.

Judge Scalia's approach to constitutional adjudication in the separation-of-powers arena stands in marked contrast to his approach where individual constitutional rights are at stake. The meaning and the role of the Bill of Rights is the final area in which we believe Judge Scalia's nomination raises serious questions.

Starting from the premise that the Bill of Rights is "an embodiment of the fundamental beliefs of our society,"[42/] Judge Scalia believes that the appropriate judicial

role is "not to 'give' it content but wherever possible to discern its content in the traditions and understandings of the nation."[43/] The Bill of Rights "is an invitation, in other words, for the courts to behave in the old-fashioned, common-law mode."[44/] Judge Scalia faults the courts for going further and finding "commands . . . within the Constitution, even though supported by no broad contemporary consensus and even though contrary to the longstanding historical practice."[45/] Indeed, to Judge Scalia

> [I]t would seem . . . a contradiction in terms to suggest that a state practice engaged in, and widely regarded as legitimate, from the early days of the Republic down to the present time, is unconstitutional. I do not care how analytically consistent with analogous precedents such a holding might be . . . If it contradicts a long and consistent understanding of the society . . . it is quite simply wrong.[46/]

To characterize the Constitution in these terms is to deny its most enduring significance. Indeed, Judge Scalia acknowledges that in his view "[t]o some degree, a constitutional guarantee is like a commercial loan; you can only get it if, at the time, you don't really need it. The most important, enduring and stable portions of the Constitution represent such a deep social consensus that one suspects that if they were entirely eliminated, very little would change."[47/]

It is difficult to understand how Brown v. Board of Education, 347 U.S. 483 (1954), is to be justified in principle if the constitutionality of a practice were established by the mere fact that the practice is longstanding and widely viewed as legitimate; certainly racial segregation in the schools met those criteria as of 1954. Similarly, under Judge Scalia's approach, decisions holding sex discrimination to violate the Equal Protection Clause, and decisions treating libel laws as posing First Amendment issues or apportionment laws as posing Equal Protection questions, all would have been plainly erroneous when rendered.

Each of these obvious examples demonstrates that there are times -- important times -- in which the precise office of the Bill of Rights is to challenge custom and challenge the "contemporary consensus" in order to vindicate the ideals of the Constitution, ideals from which it is all too easy and tempting to depart at any given time. To deny this truth is to drain the Bill of Rights of much of its significance.

Closely related to Judge Scalia's cramped view of the Bill of Rights is his theory of the limited role courts should play in remedying constitutional violations. Judge Scalia seemingly believes that a court should not "apply any remedy which require[] it to conduct continuing supervision of the parties' activities;" on that basis Judge Scalia faults the courts because they "have become deeply involved in day-to-day management of public

school systems, prisons, and state and mental insitutions, in order to assure what they consider an adequate remedying of past constitutional violations."[48/] But if there is one lesson to be learned from the thirty-year history of implementing the decision in Brown v. Board of Education it is that there are times when judicial "supervision of the parties' activities" is essential if constitutional violations are to be cured. To deny the courts that power, as Judge Scalia seemingly would do, is to allow constitutional wrongdoing to persist and thus to vitiate the Constitution's force.

In other areas of constitutional law, Judge Scalia is not nearly so constrained in his judicial approach. When it comes to matters of individual liberty, Judge Scalia urges "judicial restraint in the creation of new rights."[49/] But just as Justice Rehnquist has been anything but restrained in creating "new rights" in the States, so, too, Judge Scalia is not at all restrained in using the separation of powers rubric to create "new rights."

The decision in INS v. Chadha, 462 U.S. 919 (1983), for example, invalidating the legislative veto -- a decision whose result Judge Scalia championed[50/] -- is an act of heroic judicial activism that invalidated over one hundred federal laws, enacted over a fifty-year period, and did so by crafting a new constitutional limitation. Similarly, as we have seen, Judge Scalia appears inclined to hold laws creating independent regulatory agencies to be unconstitutional, notwithstanding the fact that such laws date to the turn of the century, that the popular branches have repeatedly followed this course, and that there is nothing in the Constitution which, in terms, makes such agencies unlawful. And, as noted, Judge Scalia has spoken warmly of the non-delegation doctrine, a doctrine that also has no explicitly constitutional base and that, if resurrected, would necessarily confer on the judiciary a roving commission to invalidate any law that judges found to be too vague.

The short of the matter is simply this. As with Justice Rehnquist, the slogan Judge Scalia offers to rationalize his restricted approach to construing and enforcing the Bill of Rights is refuted by the very approach he applies in other areas of constitutional jurisprudence. And once that slogan is stripped away, there is no escape from the deep disquiet that result from Judge Scalia's analogy of the Bill of Rights to a commercial bank loan, or to the common law, or from Judge Scalia's railings against decisions which are right in constitutional principle but are "supported by no broad contemporary consensus" and "contrary to longstanding historical practice." Here, too, then, we urge the Committee to probe deeply and question sharply, with respect to the philosophy Judge Scalia brings to the task of judging cases arising under the Bill of Rights.

* * *

We submit that the Congress should not confirm a nominee to the Supreme Court of the United States unless satisfied that the perspective Justice is committed to carrying out congressional will in statutory cases, to allowing Congress its primacy in making national policy, and to vindicating the values of the Bill of Rights in constitutional cases. For the reasons we have discussed, Judge Scalia's writings leave grave doubt as to whether he is so committed. Like this Committee, we will resolve those doubts and base our final judgment on his nomination on the record this Committee develops in the course of these hearings.

FOOTNOTES

1/ Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, 658 (1970).

2/ The Federalist No. 76, p. 386, (Bantam 1982).

3/ Rees, Questions for Supreme Court Nominees at Confirmation Hearings, 7 Tex L Rev 9;13, 945 (1983).

4/ 9 R. Mersky & J. Jacobstein, The Supreme Court of the United States Nominations 1916-72 at 180 (1975).

5/ Rehnquist, The Making of a Supreme Court Justice, The Harvard Record (Oct. 8, 1959) p. 7.

6/ Black, supra n. 1, at 663-64.

7/ The Federalist No. 76 supra n. 2.

8/ Black, supra n. 1, at 658.

9/ Eg., Sugarman v. Dougall, 413 U.S. 634 (1973) (dissenting opinion).

10/ Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 572 (1975) (dissenting opinion).

11/ Wallace v. Jaffree, __ U.S. __, 53 L.W. 4465 (1985).

12/ See Fry v. United States, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting).

13/ Eg., Bouds v. Smith, 430 U.S. 817, 840 (1977) (Rehnquist, J., dissenting).

14/ Woodwork Manufacturers v. NLRB, 386 U.S. 612, 620 (1967), quoting a letter by Judge Hand to Justice Frankfurter.

15/ Watt v. Alaska, 451 U.S. 259, 266 (1981), quoting Cabell v. Markham, 148 F. 2d 737, (2d Cir. 1945) (L. Hand, J.), aff'd, 326 U.S. 404.

16/ Minor v. Mechanics' Bank, 1 Pet. 46, 64.

17/ Speech on Use of Legislative History at 5, 15.

18/ Speech on Original Intention at 2.

19/ Id.

20/ Speech on Use of Legislative History at 15.

21/ United States v. Morin, 317 U.S. 424, 431 (1943) (dissenting opinion).

22/ Id.

23/ Sullivan v. Rehimer, 363 U.S. 335, 352 (1960) (dissenting opinion).

24/ Id. at 359.

25/ Uses of Legislative History at 8.

26/ Id. at 15-16.

27/ Youngstown Co. v. Sawyer, 343 U.S. 579, 587 (1952).

28/ Johnson v. U.S., 163 F. 30, 32.

29/ Scalia, The Doctrine of Standing As An Essential Element of the Separation of Powers, 17 Suffolk L. Rev. 881, 894 (1983).

30/ Center for Auto Safety v. NHTSA, __ F.2d __, No. 85-1231 (D.C. Cir. June 20, 1986) (Scalia, J, dissenting).

31/ Id.

32/ Id.

33/ The Doctrine of Standing, supra, at 897 (emphasis added).

34/ Art. II, Sect. 2, clause 2.

35/ Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986), aff'd on other grounds, __ U.S. __, 54 L.W. 5064 (July 7, 1986).

36/ Scalia, Historical Anomalies of Administrative Law, 1985 Sup. Ct. Hist. Soc. Y.B. 103, 106-10.

37/ Id.

38/ See 626 F. Supp. at 1398-99.

39/ 54 L.W. at 5006-08 & n. 4.

40/ Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

41/ Scalia, A Note on the Benzene Case, REGULATION, July-Aug. 1980, at 25, 28.

42/ Scalia, The Judges are Coming, reprinted in 126 Cong. Rec. 18920, 18972 (1980).

43/ Id.

44/ Id.

45/ Id. at 18921.

46/ Id. at 18922.

47/ Scalia, Economic Affairs as Human Affairs, CATO Journal 703, 708 (1985).

48/ The Judges are Coming, supra, at 18921.

49/ The Judges are Coming, supra, at 18921.

50/ Eg., Scalia, The Legislative Veto: A False Remedy for System Overload, REGULATION, Nov.-Dec. 1979, at 19.

Senator MATHIAS. Mr. Rauh.

STATEMENT OF JOSEPH L. RAUH

Mr. RAUH. My name is Joseph L. Rauh, Jr. I appear here this afternoon on behalf of the Americans For Democratic Action and the Leadership Conference on Civil Rights. Mr. Kerr, who was to appear and whose statement is submitted for the record, is unavoidably detained in Pittsburgh.

The Leadership Conference, as Senator Mathias so well knows, is made up of the leading civil rights groups—blacks, Hispanics, women, et cetera—and I speak for them. A few groups do not take positions, but all who do take positions are opposed to Judge Scalia.

I have a preliminary point, sir. I think this committee is out of order. There is no vacancy for which Judge Scalia is being proposed. I know what the trick is. The trick is to make it look to the public as though the Rehnquist confirmation is obvious. But I think after what happened here last week, it is perfectly clear that there is a real question whether Mr. Rehnquist will be confirmed. If he is not confirmed, there is no vacancy.

I think the idea of going ahead with a confirmation of this kind, with a hearing of this kind, for a job for which there is no vacancy, is a terrible mistake.

As far as using my 3 minutes is concerned, I would simply like to say that I think the prestigious prelunch panel proved the case against their own arguments. They answered a question which I thought was a very good question from one of the members of the committee: What is the difference between Scalia and Rehnquist? All you got out of them was no difference.

Well, then, if the decision of the Senate is against Rehnquist, as I hope and trust it will be, I think they made the case against Scalia.

Mr. Kerr makes a very good point in his statement being submitted, in which he says: "Judge Scalia believes in all checks and no balances." If you took his theory, you would still have Plessy against Ferguson; you would not have the *Gideon* case; you would not have Mapp against Ohio; you would not have Loving against Virginia. You would not really have any of the great advances that were made, because, he says, if we have gone on a certain course in society, if we have gone on a certain way, you do not change that until society changes. I do not think that is the way the Constitution is to be read. I have never seen a situation where a judge threw himself, out in the open as clearly, and it is all in the record of this hearing, as Mr. Gold said. Look at this. Look at this record. There is only one way you can decide, and that is that neither Rehnquist nor Scalia should be confirmed.

Thank you. I see my time is up.

[Prepared statement of Mr. Thomas M. Kerr submitted by Mr. Rauh follows:]

TESTIMONY ON THE NOMINATION OF ANTONIN SCALIA

TO THE UNITED STATES SUPREME COURT

August 6, 1986

SUBMITTED BY

THOMAS M. KERR

EXECUTIVE COMMITTEE CHAIRPERSON

AMERICANS FOR DEMOCRATIC ACTION

My name is Thomas M. Kerr. I am chairperson of the National Executive Committee of Americans for Democratic Action. I am a lawyer in Pittsburgh, Pennsylvania and I am a law teacher at Carnegie-Mellon University and the University of Pittsburgh and the Duquesne University School of Law.

The views I express here are those of Americans for Democratic Action and they are my own. (They are not necessarily the views of my law firm or of the universities where I teach.)

ADA is a national public policy organization. Our decision to oppose Justice Scalia was made by the National Executive Committee as a result of concerns expressed below. While I could not, because of a scheduling conflict, appear in person, we are grateful to the committee for this opportunity to submit testimony.

Americans for Democratic Action respectfully urges this committee to deny consent to the appointment of Judge Antonin Scalia to the U.S. Supreme Court.

The present Administration has repeatedly made appointments to important offices of persons who were not expected to carry out the tasks of those offices -- of persons who had expressed their opposition to the purposes of those offices. Appointments to the Legal Services Corporation have been persons known to be opposed to funding legal services to the indigent. The Assistant Attorney General appointed to the Anti-trust Division have gutted restrictive trade practices enforcement. Look at the Civil Rights Division; look at the U.S. Commission on Civil Rights; look at the EPA, NLRB, etc., etc.

We suggest that you consider whether the appointment of Judge Scalia is also such an appointment -- this time to the highest office in the Judicial branch.

We direct your attention to Dr. Scalia's expression of his own philosophy of jurisprudence which was published in the Congressional Record, July 21, 1980, Extension of Remarks, on page 18920-922. (We inquired and were informed that this is available to you in your record already.) This is an extended expression of philosophy which then Professor Scalia had published in 1980 in Panhandle magazine, house organ of the Panhandle Eastern Pipe Line Co.

We suggest you read his views in toto, alongside Federalist Paper #10 of James Madison, alongside DeToqueville, (especially respecting the "tyranny of the majority"), and alongside the Constitution itself.

Judge Scalia reveals a fundamental misinterpretation of the "separation of powers" -- of the system of "checks and balances." **Specifically, he is all for the "checks" but excludes any consideration of the "balances".** For instance, he writes:

> It would seem to me a contradiction in terms to suggest that a state practice engaged in, and widely regarded as legitimate, from the early days of the Republic down to the present time, is "unconstitutional." I do not care how analytically consistent with analogous precedents such a holding might be, nor how socially desirable in the judges' view. If it contradicts a long and continuing understanding of the society--as many of the Supreme Court's recent constitutional decisions referred to earlier in fact do--it is quite simply wrong.

Application of this fiat would have upheld Plessy v. Ferguson rather than provide the liberating rule of Brown; would have continued to deny assistance of legal counsel to indigent accused rather than provide the fundamental fairness of Gideon v. Wainwright; would have encouraged the police of the states to continue to enter our homes and seize our property, rather than provide the protection of Mapp v. Ohio; would have upheld the practice in some states, and widely regarded as legitimate there as late as the 1960's, to punish interracial marriage as a crime, rather than provide the understanding of privacy, dignity and individual choice of Loving v. Virginia; would have sanctioned continuation of state practices in law discriminating against jurors, or administration of estates, or otherwise enjoying the equal protection of the laws, rather than admit women to equality* as the U.S. Supreme Court did in 1971 in Reed v. Reed.

The separation of the powers of government provided in our Constitution was designed to prevent any single entity to possess all, or excessive, power -- we had enough of monarchy. Professor Scalia's thesis would limit judicial power, questions the wisdom of extended legislative activity, and appears to defer greater power to the Executive. This is the separation askew!

Madison, in The Federalist, on the other hand, perceived an essential that there always be some opportunity to redress for each of the "factions" that would inevitably arise in our society.

The equitable "balances" would be provided by the availability of recognition and relief upon application to one of the branches whenever another was closed to the faction's

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*Judge Scalia has demonstrated insensitivity to considerations of women's equality.

In March 1980 the United States Judicial Conference, the governing body of the federal judiciary, endorsed the principle that "it is inappropriate for a judge to hold membership in an organization which practices invidious discrimination."

Judge Scalia joined the Cosmos Club in 1971. The Club discriminates against women in its membership and access. Several unsuccessful attempts have been made to change this policy.

Justice Scalia was apparently not asked about his membership when he was first nominated in 1982. He did not resign from the Cosmos Club until December 1985 -- 3 months after Senator Paul Simon insisted that then nominee Lawerence Silberman resign from the Cosmos.

interest. Let us illustrate: when labor sought redress from the imbalance of power as between themselves and large corporate employers they found the judiciary closed to them -- unsympathetic judges issued and upheld injunctions. So labor found redress by applying to another power -- the legislature (states, workmen's compensation, safety, etc.). When the black minority sought redress from the terrible collection of oppressive racist laws they found legislatures closed to them(continuing Jim Crow laws; Congress refused for 40 years to enact anti-lynching laws), so they found redress in another branch, the judiciary, the only branch open to them at the time. The legislatures ignored the interests of blacks, but were amenable to the concerns of labor; the judiciary discouraged the interests of labor, but were amenable to the concerns of blacks. Each faction found a branch helpful to them. And so it should be for the as yet unknown "factions" in our near or distant future.

It is contrary to this ideal social contract to diminish the power of any of the branches or excessively concentrate power in just one of them. But we suggest that this is precisely the objective of Judge Scalia's jurisprudence.

Also, a civilized society must consider the interest of the individual or the few, protecting them from the "tyranny of majority". In his article Professor Scalia complains "Public schools cannot begin the day with voluntary nondenominational prayer...No crime can carry a mandatory death penalty. Abortion cannot be prohibited by law. Public high school students cannot be prevented from wearing symbols of political protest to class...Adolescents must be allowed to purchase contraceptives without their parent's consent..." He makes it clear that he deplores these holdings. But these are concerns of [different] minorities. These interests, as against those of the powerful present majority, must be especially assigned to the courts, rather than the elected branches, for protection.

In an excellent article in District Lawyer, September 1985(written and published before these appointments), Circuit Judge Abner J. Mikva said:

> "A President may certainly nominate judges who share his world view. What a President may not do is use the nomination process as a means to amend the Constitution or recast important constitutional precedents. A President may want judges who start out sharing his values. What he ought not seek is judges who forget or are willing to forego the anti-majoritarian purpose of the Bill of Rights."

We agree with this, and respectfully submit that this proposed appointment does seek to recast constitutional precedents, does propose a Justice willing to forego the anti-majoritarian purpose of the Bill of Rights, and that therefore the Senate should not consent.

Senator MATHIAS. Thank you very much, Mr. Rauh.

Let me start with Ms. Smeal. You quoted from a lecture that Judge Scalia had given, that it was "an embarrassment" to teach on the subject of affirmative action.

Do you know the date of that lecture?

Ms. SMEAL. It is 1979, I believe—yes, the winter of 1979. At least, it appeared in the Law Quarterly at that date.

Senator MATHIAS. That was prior to the recent decision in which Justice O'Connor noted that the Court had reached a consensus in this area.

Ms. SMEAL. Yes.

Senator MATHIAS. Won't that affect the situation? Won't this new "consensus" be articulated in a very strong way to sustain the doctrine of affirmative action?

Ms. SMEAL. Well, I noticed, sir, that I think it was you, Senator, who asked him this question yesterday, or at least Judge Scalia was asked the question about the new consensus that was articulated by Judge O'Connor. And essentially what he said was that he did not answer. He did not assume that there was a new consensus, nor did he assume that whatever the new consensus for would be affirmed. He said it would depend on what five judges would say.

Essentially from his writings, I would have to say that I think that he will not be a person supporting a strong consensus for affirmative action. I think that he will try to find every loophole.

You do not have to find this just in his writings such as a Law Journal article like this; you can look at his own court cases. I admit there are not many of them, but he talks about intent; he talks about is there intent to discriminate on the basis of race. And essentially I think my ears are very attuned to the words of the opponents of affirmative action. Those who are opposed now want us to say that there really is not discrimination unless there is an intent to discriminate, a motive.

And when you go down that path, you really are not going to see much discrimination. You are going to only be able to see it when it bites you in the nose. And yet, even in some cases where I would say that it was naked discrimination—I cite another case where a woman was totally segregated in her workplace et cetera—he did not see this as really apparent discrimination.

So I would say from his interpretation of the cases and his views on affirmative action that he will be a part of that consensus narrowing it. And let us face it, the decisions on affirmative action, some parts of them have been very close, 5-to-4 decisions. And so I think that he could indeed cast a vote against that would be decisive.

Senator MATHIAS. Mr. Rauh, you said the prelunch panel had come to the conclusion that there is very little difference between Justice Rehnquist and Judge Scalia. Without challenging either you or them, let me suggest that for the purposes of the confirmation hearing, it might be more interesting for the committee to speculate about the difference between Judge Scalia and the departing member of the Court, Chief Justice Burger.

What differences do you see there?

Mr. RAUH. May I first say that one of the members of the prelunch panel spoke of you and what you had done, and I felt remiss that I had not done that when I testified last week.

I can think of no one that the civil rights movement is going to miss more, or that I will personally miss more, than you, Senator Mathias. You and Clarence Mitchell and I go back a long way together—I guess I go back the longest way—and I do not know of anyone who has done as much for the cause of civil rights as you have. At times, I wonder, heavens, what courage it took. You were not in a State where the minorities were such a big part, but in a State with southern tradition. That you should have been able to accomplish what you have is remarkable and I personally want to thank you from the bottom of my heart.

Senator MATHIAS. You are extremely generous, and I appreciate it. I appreciate those sentiments all the more because I know they are not unanimous. [Laughter.]

Mr. RAUH. With respect to a comparison of Judge Scalia and Chief Justice Burger, I would say there will be a significant drift to the right as a result of that change. Justice Burger really only dealt with the interstices of the matter when he dealt with one of the Warren advances. In other words, Justice Burger did not try to reverse much of the Warren court. There were times when he nibbled at it. I am not saying that Justice Burger does not have some pretty bad decisions. But they are not a head-on collision with the Warren court. I think Judge Scalia is going to take a head-on collision course for the things he wants to change.

Furthermore, one should say of Justice Burger that there are some things there that are great advances. Many people have referred to the abortion decision as a great advance on the civil rights front, but I will not go into that, as that happens to be an issue on which the Leadership Conference does not have a position. We are a coalition of 185 organizations, and some of the Catholic groups do not agree with the majority in that respect.

But you have the busing case, at Charlotte-Mecklenburg. That was a tremendous advance for civil rights. He has seen both sides on affirmative action. It illustrates the point I am making, that he was not trying to upset what the Warren court did. He simply on occasion drew it back a bit.

I think the shift of Scalia for Burger is going to have a real major effect. Now, one may say, well, you have to wait for one more justice, and so forth. I do not know whether that is true. Some of the 5-to-4 decisions where Burger was on the liberal side may go.

This is a very serious thing that is being considered here in regard to Judge Scalia, and I agree with you that from the point of view of the long run of the court, the substitution of Scalia for Burger is probably a greater right-wing swing than the substitution of Rehnquist in the Chief Judge spot for Chief Judge Burger.

Senator MATHIAS. Would you like to comment on that, Mr. Gold?

Mr. GOLD. Yes, thank you, Senator.

To judge him from his writings in periodicals—his judicial opinions are not that numerous, and as a junior member of the D.C. Circuit, he seems to have drawn his fair share of the less enviable assignments in opinionwriting—that Judge Scalia is a much more

doctrinaire person than Chief Justice Burger has shown himself to be.

I am uncomfortable with treating both what I would call the questions concerning the allocation of power between the different branches of the Government and the questions concerning the Bill of Rights as conservative—liberal issues of left-right issues. On the questions concerning the role of Congress, it seems to me, as we note in our testimony, that Judge Scalia promises to be a more wrong-headed judge than Chief Justice Burger ever was. Again, while we have very little information on how he would view the Constitution in terms of his judicial writings, what we do know suggests that Judge Scalia takes an extremely skeptical view of judicial enforcement of the basic guarantees of the Bill of Rights.

The one point, and probably the only point, I agree with the distinguished panel which preceded us on is that if you judge from the secondary writings, Judge Scalia's decisions concerning the Bill of Rights are apt to look very, very much like Justice Rehnquist's over the past 15 years—in other words, decisions taking a more limited view of those guarantees than the average of a group of jurists who overall take a very limited view. And in those terms we were very disappointed to hear what we did hear of yesterday's testimony. It was our hope and continues to be our hope, that this committee will be able to ascertain more about Judge Scalia's overall approach on Bill of Rights questions. Right now we do not know much, and what we do know is most disconcerting.

Ms. SMEAL. I just wanted to throw in—in the area of sex discrimination, he would be definitely a move to the right from Burger. For example, in that sexual harassment case that was just decided, part of it was a 5-to-4 decision on whether the person should be strictly liable. According to Judge Scalia's interpretation of the decision at the lower level, he would have had no liability on this case for an employer, which would have been narrowing title VII even more.

And on individual rights, what he keeps saying is that he thinks the Court should not invent any right, and what rights are to him is what the majority says they are, or whether there is a consensus about a right. And if we have to depend on consensus for rights for women, we have a long way to go. And then he even modifies it and says it either has to be a current consensus or a past consensus.

Well, obviously, we cannot look to past history for consensus for equality for women—and what does he call a consensus? What percentage? Majority? Much more than majority? According to the dictionary, it means almost everyone.

So I think he would be definitely narrowing the rights. And of course, the right to privacy, he has disparaged. He has said that he would not be for it. And of course, Burger did vote for *Roe* v. *Wade*.

Senator MATHIAS. Well, I thank all of you for being with us.

Mr. RAUH. Senator, some of the Democratic Senators had indicated they did want to question us.

Senator MATHIAS. I was just about to address that problem.

Mr. RAUH. Thank you, sir.

Senator MATHIAS. I have just been advised that there are some developments in the Senate which have delayed other members of the committee.

First of all, let me say that your written statements will all be included in the record as if read.

We will keep the record open, because all Senators from both sides who have been delayed and unable to be here may have questions. We can propound those questions to you in writing, or we can call you back as the need may be, and subject to your availability.

Mr. RAUH. Can we remain here in the hope that we would be heard further after the vote? I understand there is a cloture vote at 2; is that right, sir?

Senator MATHIAS. Well, that is apparently being delayed, but that is one of the uncertainties of this moment.

I suggest that we take a 45-minute recess, at which time we will resume. If you are able to stay, and if there are questions for you, you can address them then.

Mr. RAUH. I have talked to the two panelists, and they will stay.

Senator MATHIAS. We will stand in recess for 45 minutes.

[Recess.]

Senator GRASSLEY [presiding]. The hearing of the Committee on the Judiciary will reconvene. And at the adjournment, or at the recess, there was a suggestion that other members may want to ask panel two questions.

On the Democrats' side are there members desiring to ask questions of panel too? If so, we will call them back.

Senator METZENBAUM. Panel 2 was——

Senator GRASSLEY. Smeal, Gold, and Rauh.

Senator SIMON. Mr. Chairman, I would just have one question.

Senator GRASSLEY. Allright then panel 2 will come back to the table.

And staff advises the panel that they are still under oath. We will go to the Senator from Illinois.

Senator SIMON. Forgive me for not being here. Larry Gold, I guess I am directing this question to you.

The position of the AFL–CIO on both nominees.

Mr. GOLD. Senator, in the testimony we filed we outline our position, and it is the following:

First of all, we oppose the nomination of Justice Rehnquist to be Chief Justice. We opposed his nomination to be an Associate Justice, and 15 years on the Court have unfortunately confirmed that we were right in opposing him at that time.

We opposed him primarily because his record on individual rights is one of the most negative and unforthcoming of any judge in recent memory.

With regard to Judge Scalia, we have posed a series of questions. His judicial record is so much shorter than Justice Rehnquist's, his writings are so relatively sparse that we are not yet prepared to take a position. We do hope that the committee will explore those questions. As I did in my statement, I want to particularly underline our intense concern about Judge Scalia's stated positions with regard to the relative power of Congress to make national policy.

We find his views on statutory construction, on the freedom of the executive branch to disregard congressional intent, on standing—particularly with regard to challenges to the nonenforcement of broadly phrased congressional acts by the executive, on the nondelegation doctrine and his rejection, so far as we can judge from his writings, of congressional power to set up independent agencies and otherwise to control the executive branch to assure fair and effective enforcement of congressional action, to be all part of a piece which tends to shift power to the Executive, to limit Congress' power, and to make it extraordinarily difficult for Congress to act effectively to regulate the myriad of things, particularly in the economic life of the country that need to be regulated in the public interest.

If Congress is not willing to protect its own prerogatives in this regard, nobody will. And to the extent that the appointment power is used by the President to affect the balance of power between the legislative and the executive branch, we look to this committee to satisfy itself that either we are wrong or not to confirm this nominee.

In that regard I want to say that our position in no way is one without self interest. The labor movement has attempted to make its way by lobbying, by political action, by making arguments to the popular branches. We are content overall, against a background of a Bill of Rights, to proceed in that way. We do not believe that Congress' authority in the areas not covered by the Bill of Rights ought to be ceded to the executive branch.

We press these views on all members of the committee, both the Republican members and the Democrats, the conservatives and the liberals, because we think these balance-of-power issues are not ones which divide the Congress in the same way that certain of the other issues that judicial nominations raise may do.

Senator SIMON. I thank you.

I might add for the members of the committee that I have received a letter from Justice Rehnquist informing me that he has resigned from the Alfalfa Club.

Senator GRASSLEY. The Senator from Ohio.

Senator METZENBAUM. Mr. Chairman, I just have a couple of questions. I was not here earlier when Ms. Smeal testified. NOW, I understand, opposes the confirmation of Judge Scalia?

Ms. SMEAL. Yes, I am speaking for NOW and the National Women's Political Caucus, also.

Senator METZENBAUM. And which group?

Ms. SMEAL. The National Women's Political Caucus.

Senator METZENBAUM. And do you find acceptable the distinction that the judge made between discrimination against women, that which is described by the American Bar Association as invidious discrimination?

Does it make you and your members feel better if it is not invidious, just plain, good old——

Ms. SMEAL. I am so glad you asked the question of me. Obviously, his statement about the Cosmos Club, that he did not think that it was a club that engaged in invidious discrimination when it totally excludes women is distressing and upsetting.

But I personally think it reflects what he has written on the subject of sex discrimination. Essentially, he does not view it as strongly as he does on race, and on race discrimiation he is disparaging.

There is a lot of ridicule and hostility, but really a lot of joking around about the remedial solutions that are—I think it is more demeaning when you joke. In the decision on sexual harassment, he does not see it as sex discrimination or as something that a lawyer would have any liability on. Because it is personal.

Well, if all sex discrimination could be looked at as personal, and in this position, he has the most extreme position. Because even the Court—he did not view it as a form of discrimination at all. And 9 to 0 they did now.

But on liability, he has a position that was not even voiced.

So I would, it was upsetting. How could anybody say it was not an unfair form of discrimination or harmful form or invidious that you exclude women simply because they are women, in this day and age.

Senator METZENBAUM. Mr. Rauh, you are appearing on behalf of——

Mr. RAUH. I appear this afternoon, sir, on behalf of the Americans for Democratic Action and the Leadership Conference on Civil Rights.

I spoke for both when I said that we feel very strongly that the shift to the right that Judge Scalia would mean over Chief Justice Burger would make a very tremendous difference.

I guess if I had to put it in a simple sentence, I would say: Judge Scalia has ice water in his veins, when a Supreme Court Justice ought to have a feeling of compassion.

He makes jokes—Ms. Smeal made that point too—he makes jokes about things we believe in deeply. He laughs at affirmative action. That has been quoted in the record here.

I cannot understand putting on the Supreme Court someone who laughs at affirmative action. I am not saying I am right, that you have to do everything I want on affirmative action. I am saying it is a serious problem.

How do we remedy past wrongs that have been done women and blacks and Hispanics? That is a serious problem that ought to be discussed.

Judge Scalia, as a professor, laughed at that problem. I say, he is not qualified to be on the Supreme Court.

Senator METZENBAUM. Does the Leadership Conference take a position for or against Judge Scalia's confirmation?

Mr. RAUH. The Leadership Conference voted unanimously in its executive session to oppose both Justice Rehnquist and Judge Scalia.

Senator METZENBAUM. Mr. Gold, I read your statement, which I read to indicate, maybe. You say: "Like this committee, we will resolve these doubts and base our final judgment on his nomination on the record that this committee develops in the course of these hearings."

We have now heard from Judge Scalia. The rest of the witnesses are either pro or con. They will indicate their positions. There will probably be no great surprises.

But the inquiry concerning Judge Scalia himself is now concluded.

On the basis of that, how does the AFL-CIO vote?

Mr. GOLD. I have to admit to you, Senator Metzenbaum, that yesterday the AFL-CIO Executive Council was meeting and we were tending to the business of that meeting, which comes once every quarter.

I have not had an opportunity to review the transcript or to see the television tapes. I only know what I heard this morning from Senators DeConcini and Heflin, and it does not sound as if Judge Scalia was very forthcoming in responding to inquiries on his position.

Senator METZENBAUM. Neither are you. I do not know what you are saying. You are saying that there are lots of problems, but we cannot vote maybe. And I think that when your views—you think they are important enough to come up here and testify. I think that if the AFL-CIO or any other group comes before us, you just cannot say, we are concerned; now it is your baby. Because without taking a position, I do not find——

Mr. GOLD. Senator, first of all, I never despair about the possibility of reasoned discussion. And second, we have no intention of taking no position. We want to know more than we know now before we take a position; and I am never ashamed of proceeding in that way.

Senator METZENBAUM. Well, I would hope that before this matter comes to the floor, at a very minimum, that if you have a position, you share it with us, and not to wring your hands in dismay after that decision has been arrived at.

Mr. GOLD. We have never been shy at stating our views, and there is not enough time with all of the things that are going on to wring one's hands.

Senator METZENBAUM. Thank you.

Senator GRASSLEY. Senator Biden.

Senator BIDEN. Thank you.

A question for all three of you. Yesterday, Judge Scalia indicated, as he put it, and I quote, "he has no fully framed omnibus view of the Constitution; that he is not committed to any particular agenda on the Court; and that he would recuse himself if he felt so strongly on a moral or personal basis that he could not rule impartially."

How do you square these comments with your assessment of Judge Scalia?

Ms. SMEAL. I find it very difficult. I mean, the Judge is a professor. He has, I would say, in my humble opinion, a well-developed view of the Constitution. I do not happen to agree with it, but it is certainly developed. He has written about it.

His notion about individual rights, that they must be based on a consensus, either a present consensus or a past consensus, I feel just fly in the face of everything we know about individual rights and the pursuit of them, in the history, the 200-year history of our country.

I do not understand how he thinks we could have fought racial discrimination if we had to wait for a consensus. I do not under-

stand how we are ever going to fight successfully any form of discrimination if we have to wait for consensus.

He uses his words very, very carefully. He also has an idea that essentially what rights are are what the majority says. Democracy, I think he referred to it again yesterday. But I view, and I think that those of us fighting for elimination of discrimination, that there are certain guarantees and rights under the Constitution that are not according to the whim of what the majority might be at a given time.

So anyway, I think he has a very well-developed view.

As far as about recusing himself, if you notice, when he was asked questions on abortion or *Roe* v. *Wade,* he did not say he would recuse himself. He said he did not have an opinion on this, but in my view of his writings, he was very critical of the *Roe* v. *Wade* decision.

Senator BIDEN. On its substance or its logic? Because I have reviewed his writings, too. And I could not find that. It would be very helpful to me if you could point that out to me—I do not mean to put you on the spot. You do not have to do it now, but before we close this vote out. As I reviewed his writings, there was not any particular place where he argued or he said, that *Roe* v. *Wade* was in fact incorrectly decided.

It is in fact pretty—now, there may be someplace where he said that, but I would like to know.

And second, there is an overwhelming universal criticism by proponents of prochoice and opponents of prochoice that *Roe* v. *Wade* was not a very well reasoned decision. Most constitutional scholars do not offer that as an example, whether they are for or against abortion, of a decision that is well written and well reasoned. It is not the conclusion, but the opinion is not offered as the way to write a decision.

And so with that understanding. I searched long and hard. And I asked my staff—excuse me—and we could not find anything that I would be able to say that Judge Scalia indicated that *Roe* v. *Wade* was wrongly decided.

Ms. SMEAL. Senator, it was my understanding—and I will show you our quotes or our cites—is, that he uses it as an illustration of when the Court invents a right that is not specified anywhere else and is not a consensus in the public and not a consensus in the past, and therefore, was erroneous.

I mean, that is the only inference that you can draw from his illustrations, that it was the invention of a right.

Senator BIDEN. I apologize for not being here for your testimony As you know we had a little tempest in a teapot here a moment ago that I have been spending more of my time during the Scalia hearings being a traffic cop than I have been being able to thoroughly and consistently interrogate Judge Scalia.

But I will read your statement. And I apologize, because I take your criticisms and your position very seriously. And I will go back and read the statement.

But if it is not in the statement with any specificity, to the extent that you can augment the statement, I would find it very helpful.

Ms. SMEAL. It is in the statement briefly. But we will augment it. We feel strongly that this is—he illustrates it, he uses this as an example. But also, frankly, it troubles me when he says that rights must be based on a consensus. The word consensus even worries me, because if you look it up in a dictionary, that means almost everyone must agree. And if women are going to wait that long, my children, grandchildren and their children's children will not be seeing equality for American women.

Senator BIDEN. Well, let me point out one other thing. And I would like to let Mr. Rauh comment on this, because it is a good place to, if you will, to jump off to the next point and ask Mr. Rauh to comment.

When I pressed him yesterday, before I was humorously and somewhat summarily cut off by the distinguished Senator from Maryland, I understood that he was making a real distinction based on his use of the phrase consensus, the word consensus.

My understanding of his response to my question along the lines of whether or not you require a societal consensus to confirm a right that was not explicitly granted under the Constitution, under his doctrine of original meaning, which he distanced himself from with some rapidity, that he said that no Senator—I am paraphrasing—no Senator, you do not require a consensus to acknowledge a right existing where in fact it is clear that there was the intent that a right was to exist. And he made a distinction between race discrimination and the 14th amendment, which did not require a consensus even though it did not specifically mention race, and other rights that might or might not be viewed in the context of the ninth amendment or any other amendment.

And the second thing—and this is more a recitation, Mr. Rauh, than a question, but I would like you to respond to these three, because I think all three fit—the third piece was that, as I saw it, he was making the case that he acknowledged the existence of certain rights within the Constitution that were not specifically enumerated within the Constitution. And I quite frankly found that if you took only his answer, his answer was a fairly reasoned, rational answer. Because as he points out, the Court, all members of the Court, all sitting members of the Court—I will put it another way, none of the sitting members of the Court have used the same standard for determining whether or not discrimination existed as a consequence of the violation of the due process clause or equal protection clause of the 14th amendment.

None of them used the same standard under the 14th amendment judging discrimination against women as against blacks. They all make gradations.

Now, how does it paint him outside the mainstream, if that is necessary, and you may conclude it is not? How is he markedly different than any other judge?

Because Ms. Smeal makes a compelling case that women should be treated precisely like blacks for the purposes of the 14th amendment. Yet not a single Justice, to the best of my knowledge, has so treated them.

How do you respond to those three areas?

Mr. RAUH. It is very hard to even remember the three areas, but I will do the best I can, Senator.

First, on the question of whether he has an agenda. Judge Scalia is fooling somebody. He is either fooling the President of the United States or he is trying to fool this committee.

The President of the United States, in a speech yesterday, said that through the appointment of over 40 percent of the courts, meaning lower Federal lower courts, and the Supreme Court, he, the President, had an agenda on abortion, prayer, and other matters.

The President had a talk with Judge Scalia before he appointed him, and either Judge Scalia fooled the President that he had an agenda or he is fooling you when he says he does not. I do not know which way it goes, but I do know that he cannot have it both ways.

Second, on the question of consensus, I would like to say that is not what Judge Scalia wrote, Senator Biden. He wrote that if there is something in our society where rights are fixed for a long time, you cannot change that until you get a consensus. He says that, for example, you would still have *Plessy* and *Ferguson.* My God, we had it for almost 60 years.

Senator BIDEN. But his response to that was that was clearly not what he meant.

Mr. RAUH. All I can say is that is nonsense. All I listen to are these people saying he is probably the most articulate writer in America, and now he is telling you he did not mean exactly what he said.

Again he is trying to have it both ways. He is a great writer, he gets everything exactly right, he is the most articulate man in America. But now on a most important subject like this, he says he did not mean what he said.

Third, I am not enough of a scholar on sex discrimination to say that every Supreme Court Judge has accepted a differentiation between race and sex. They may have; I am not sure, but at least Judge Scalia has always gone for the lowest standard, the one that will make it the hardest to prove discrimination against women.

Senator BIDEN. Well, let me ask you again before the record closes out, because it is a very important point to make, and I want to be fair to him, and I must acknowledge I am inclined to the view that you hold.

But if I look at his writing, he did not say what we are saying. He said, and I ask you to read, not at this moment, but if you read the so-called Panhandle speech where he in fact makes the assertions that we are speaking to here. He says, and I quote,

> I do not care how analytically consistent with analogous precedence such a holding might be nor how socially desirable in the judge's view. If it contradicts a long and continuing understanding of our society, as many of the Supreme Court's recent constitutional decisions referred to earlier do in fact, it's quite simply wrong. There will be no relief from the most far-reaching intrusion in the modern society until the Supreme Court returns to essentially common law view of approach to constitutional interpretation.

Then you go back and look at what he has referred to. He has not referred to any race matters; he has not referred to any matters. He has referred to the question of obscenity, discipline for high school students, prayer in school, and I do not know what else. I will have to go back and read it. But he does not refer, he

does not refer to abortion, women, race, or the things that concern me the most.

In fact, if he is as skillful a writer as we say, he is just that. He says, referring back to what he spoke to earlier. In the above paragraph, he talks about certain things that are established, and he makes reference that race and other things are established.

The reason why I asked him the question I did yesterday, Mr. Rauh, is that if he subscribed to that position, then it seems to me, ironic as it may seem, he is going to be hard pressed to overrule *Roe* v. *Wade*. Because if, in fact, he argues that there is in fact precedent, unless there is a clear consensus to change it, *Roe* v. *Wade* occurred 18—How many years ago now?

Ms. SMEAL. 1972.

Senator BIDEN. 1972. So, what is that, 16 years ago or 14 years ago.

Ms. SMEAL. 1973.

Senator BIDEN. 1973; 13 years ago.

I became a Senator because I could not add. But, all kidding aside, you know, it seems to me that you could easily make the argument that in fact he would be bound by that statement to in fact uphold *Roe* v. *Wade*.

Ms. SMEAL. Do you not read other statements?

Senator BIDEN. Sure, yes. No, I do. I truly want to know this. I am not playing a game.

Ms. SMEAL. Well, here is a statement on the abortion situation, for example, what right exists? The right of a woman who wants an abortion to have one, or the right of the unborn child not to be aborted? He goes on for some things, and then says:

> The Court has enforced other rights so-called on which there is no societal agreement from the abortion cases at one extreme to school dress codes and things of that sort. There is no national consensus about those things and never has been. The Court has no business being there. That is one of the problems. They are calling rights things which we do not all agree on.

And there is stuff in the middle, you know, to the bottom line——

Senator BIDEN. What are you reading from? Can you tell me that? My time is up. I am sorry. But tell me what are you reading from if you could, is it on a statement?

Ms. SMEAL. I am reading from an article, but I will give you the exact cite on it.

Senator BIDEN. OK. You do not have to do it now. And I will come back because I did not realize my colleague was waiting. I apologize.

Senator HEFLIN. It is all right. Go ahead.

Mr. RAUH. May I finish my answer?

Senator BIDEN. Sure.

Mr. RAUH. I am very glad that Ms. Smeal gave you that quote because I think it was a very good one.

I was going to read you the same thing you read me. It is the same quote from Judge Scalia.

The fact that he refers to a part of the constitutional problems and uses those as an example certainly means that he does not say the same thing with regard to race and sex. Indeed, since race and sex are really more important than these kinds of problems, and

discrimination, it seems to me, much more important, say, than pornography, discrimination is the heart of our problem in America today.

I would say a fortiori what he is saying about those examples he is saying about race, and he intended it to be interpreted that way.

Senator BIDEN. But he specifically said yesterday he did not intend it to be read.

Mr. RAUH. There is no logic in saying that this applies to the less important things—that his views apply to the less important issues and not the more important issues.

Senator BIDEN. Well, I have no argument with you on philosophy. I do have an argument with you on interpretation of what he is saying. I mean because in fact if anyway you wanted to say something?

Mr. GOLD. I find it difficult to determine whether Judge Scalia has an agenda or not, and that is one of the reasons we submitted the kind of testimony we submitted. I am very interested in what you told us about his responses yesterday. He has written relatively few judicial opinions on matters of great substance. Much of what we brought to your attention is in these occasional academic pieces, most of which are not extraordinarily profound at least as we read them.

It seems to us to go back to what I have said several times, that what Judge Scalia has chosen to say—and one of the panelists who preceded us said there is a great advantage in having an academic nominated for the Court because he leaves a record in his writings of the kind that a practicing lawyer does not—does seem to be an agenda. And it is an agenda primarily designed to hobble the affirmative use of Federal Legislative power and to transfer, as we said, to the extent that the Legislature chooses to act, the final trump card from the legislature to the Executive.

Senator BIDEN. Assume that to be the case, is that a radical view or is that just a difference in philosophy?

Mr. GOLD. To me it does not matter whether it is a radical view——

Senator BIDEN. Well, it does to me. I am asking you whether you think it is.

Mr. GOLD. I think that it is one which profoundly changes the balance of power that the Constitution envisages. To say that it is radical; to say whether it is shared by others, to me, that is not the question. I would hope that the question for Members of the Senate is whether the view is deeply held and sufficiently wrong; the President should not be able to steal a march in that particular way.

Senator BIDEN. Well, do you philosophically agree or disagree with him? What you think is wrong and what I think is wrong is not what a majority of this committee thinks is wrong probably.

Mr. GOLD. It may be or it may not. To us the test is whether the nominee's view of the Constitution is sufficiently wrong that he is not worthy of confirmation in the considered judgment of 50 Senators plus 1.

Senator BIDEN. That is what is right and wrong, right, 50 plus 1?

Mr. GOLD. It is 50 plus 1 people making up their minds about what is right or wrong.

Senator BIDEN. Yes.

I do not have any further questions; back to you.

Senator HEFLIN. Let me make one comment which is, speaking about well-reasoned opinions and consensus building. Sometimes well-reasoned opinions are sacrificed in order to build a consensus of a majority.

Let me ask you basically the same question that I asked the other panel, and which they established, I think fairly well, two assumptions that would be involved in this question.

One, Judge Scalia is an excellent consensus builder, and second, he and Justice Rehnquist are closely aligned with some distinctions, as they pointed out, in ideology.

Basing those assumptions that they are closely aligned, and that he is an excellent consensus builder, and make the further assumption that President Reagan appoints two other members of the Court during his term of office. Then the question is: What would be the trend of such Court is the first question; the second is whether you would expect any wholesale reversal of present holdings in areas that you might want to identify; and, third, what position do you predict that history would give Judge Scalia if such a reversal movement occurred?

Each of you can answer.

Ms. SMEAL. Well, on the first part, building a consensus, you know, it is very hard to tell that except that if he builds a consensus against what he has written on the subjects of minority rights and women's rights, and all I can deal with is what he has either publicly stated or written, and his cases, it will be one that will pretty much gut affirmative action as we know it.

It will be, for sex discrimination, even more disastrous because there are—to give you, just in quoting it under title IX, he writes an article in which he questions what sex discrimination and the federally assisted educational programs means, finds these too vague, even though they are Federal regulations that have been in force since 1974 saying what they mean.

He says sexual harassment is individual and it is not discrimination in conditions of employment because of gender, and should not be viewed as a violation of title VII.

Right now that is the most extreme position. That is even to the right of Mr. Rehnquist. So if he and Rehnquist build a consensus into that viewpoint, we are undoing literally the gains of the last 25 years for women's rights under the law. And, of course, on race, it would be narrowing the remedial corrections of the past because he questions whether the Court should enforce the measures to correct past discrimination. And without enforcement, I just do not think you can wait around for magic consensus.

So, I think that it would be a disaster, and that is why I think it is important enough for me and for all organizations to be up here testifying. I think that more people should think that the philosophical viewpoint of these judges are important enough to disjudge on them themselves. I mean these are hard—everybody has to go with what they have before them. But to me it indicates a direction away from the dream of equality for all.

I do not think we have in 1986 going into the 21st century, I do not think we should be rehashing and rehashing these 19th centu-

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ry problems under all kinds of rubrics the role of the Court, the role this. But every time he discussed the role of the Court—and, by the way, Senator Biden, that article that I had, that other quote on abortion was an imperial judiciary, in fact it was a public discussion in the American Enterprise Institute of 1978.

But every time he discussed does the role of the Court go too far, his examples on moral social discrimination type questions. That is why we are up here. The examples given on the area of sex discrimination, or the area of racial discrimination, and they are the ones that I think need the most protection of a Constitution that is not viewed as one of just getting consensus of the day or the past, for heaven sakes, where indeed we had a deplorable history of discrimination on the basis of race, ethnicity, and of sex.

So I feel it is enough for us to be concerned about, but I think that we put too much on people's affability, too much on people's ability to write, and we should take those as given, that people are good-natured, and that they can write well. I think that what they write about should be what the issue is.

Mr. RAUH. Senator Heflin, my answer to your question on consensus building is that you do not build a consensus from an extreme. I do not care how much affability you have, how much charm—and there was testimony about this great affability and great charm. You do not build a consensus from one end; you build it from some more moderate position.

Second, I think he and Chief Justice Rehnquist are very closely aligned. I agree with the three lawyer panel, this morning that their views are very close.

Finally, with the idea of two more Rehnquist/Scalia type appointments, which I take it is the presumption of your question, God help us is just one of the things I would answer. In addition to that I would say the favorable affirmative action cases will be overruled; school prayer cases will be overruled; abortion cases will be overruled. And that is not the worst of it.

Rehnquist has been trying to get certiorari almost every time we win a big civil rights case in a court of appeals. These four would have all the votes they need for certiorari. They could make the good courts of appeal say uncle on their support of civil rights. Your very fine fourth and fifth circuits are going to go by the boards. They are going to have to follow Rehnquist and Scalia, even on factual things, because Rehnquist can get certiorari. You get four judges on that Court like Rehnquist and Scalia, and it will be disaster not only with the cases they are going to reverse, but with the reversal of the decisions enforcing the things that are the law now.

And I say that would be a tragedy for our country.

Mr. GOLD. I have never met Judge Scalia and I cannot comment on his affability or his consensus-making powers. In terms of our best judgment from his writings, and as the panel members this morning said, his votes are very likely to be similar to Justice Rehnquist's. We have different degrees of certainty about what we know, but that would seem to be the probabilities, aside from what yesterday's discussion may have revealed. Most to the point, though, is that the questions you raise get us back to the discussion I was having with Senator Biden.

There is no doubt, from what we know about the appointing process as it is being practiced, that the President and his advisors have certain tests that they are applying to nominees.

These are not individuals who have made their reputation through broad acceptance——

Senator BIDEN. A priori, that would mean anyone that this administration sent up would be bad, right? Any person at all?

Mr. GOLD. I would begin with a healthy skepticism, and Senator Heflin's question is if the views of those who know him far better than I do that Judge Scalia lines up with Justice Rehnquist are taken as correct, and if two more people who share those views are appointed, what kind of a Court would you have?

I am trying to answer that question, and I am saying that the kind of Court you would have would be a Court which would rarely, if ever, uphold claims of individual right, and it would be a Court structured on my hypothesis, to perform in precisely that way. And that brings us to the question of the role of the Senate. It seems to us the role of the Senate is in the system of checks and balances, to determine whether or not the President's tendency has to be checked and balanced; I see no escape from that, and it seems to me, as we argue in our testimony, it is inherent in the constitutional plan. The President does not have the right to shape the judiciary. He has the power of the initiative. And then there are 100 people with very difficult decisions to make about what the Constitution means, when enough is enough, and what the role of the Court is, both with regard to the legislative power, and with regard to the guarantees of individual rights.

Senator BIDEN. I understand the point. If the Senator would yield for a question.

Senator HEFLIN. Yes.

Senator BIDEN. I just remind my friend, that in 1988, we will have a different President, and it may be a President who shares the point of view that I have, which is generally consistent with the point of view represented by the panel. And we may not have the Senate, and I hope we do not get read back all the remarks that were made here today, about who has what choices and under what circumstances.

I am not at all certain, by the standard that you are outlining for me, which is technically correct, in my view, from a reading of the intentions of the Founding Fathers, that if in fact, were I advising the next President of the United States, and I found myself three Thurgood Marshall's, and sent them up here, that in fact there would be no prospect of those three Thurgood Marshall's being put on the Court, applying the reasoning that you are applying here, if in fact the Senate were controlled by the Republican Party still.

Mr. RAUH. May I remind the Senator from Delaware, that you have a good case for reading things back to the other side. When Abe Fortas was nominated for Chief Justice, the chairman of this committee—and there are undoubtedly others in that category in the Senate today—opposed Fortas on philosophical grounds, would not permit a hurry up, filibustered it and beat it. And they beat it through having a third, plus one, who said, "Well, all we're interested in is Fortas's philosophy." The issue of Wolfson and greed

had not come up at that time, and what they did was to beat him on philosophy.

I hope that you will read some of that record back to them. You have got a chance now. It is up to——

Senator BIDEN. I will read the record back to them but I hope I act more responsibly than they did.

Mr. RAUH. I hope so, too, sir.

Ms. SMEAL. Well, Senator——

Mr. GOLD. I am sorry. If I could finish with one point in light of what——

Senator BIDEN. It is up to the Senator from Alabama.

Senator HEFLIN. Well, since they are answering your questions and since they are attacking you on this position, I think it is proper for you to go ahead.

Mr. GOLD. I hope we are not attacking Senator Biden. It would be both foolish and unworthy. He is raising serious issues.

We did not choose to testify against Justice Stevens. We did not oppose Justice Harlan. There are different types of nominations. There are nominations of people who promise to bring a wide disinterestedness to their task. We have the capacity—I know you have the capacity—and I believe there are, many Republicans who have the capacity to judge nominations of that kind on their merits.

Senator BIDEN. I am about where you are; great doubt but no decision. When you make a decision, then you can lecture me on my making a decision, and before my friend from Maryland who takes great pride in making comments about when I am speaking, I will yield before he has a chance to say anything more.

Senator MATHIAS. No, I am just the servant.

Senator BIDEN. Of the people.

Senator MATHIAS. Of the committee.

Ms. SMEAL. I am dying over here because this thing on philosophy——

Senator BIDEN. I yield. I yield to him.

Ms. SMEAL. Can I answer that?

Senator BIDEN. It is up to the chairman.

Ms. SMEAL. I just want—it is just a comment on his question about if anybody coming up here would be opposed, and that this is a philosophical, bad precedent.

Senator MATHIAS. Did you want to respond?

Senator BIDEN. I have no statement. I would like to hear her answer but I do not want to run the risk of your wrath. I would rather them have it.

Senator MATHIAS. I am never wrathful.

Senator BIDEN. Well, why don't you let her answer the question, then.

Ms. SMEAL. All I wanted to say, real quickly, is, that I think that you would not have to worry if in 1988 it changed, and anything like this was quoted back, because I think we should come to a point in the United States of America, that we are not rediscussing race discrimination and sex discrimination every 4 years.

I think we have been very careful. We are not giving partisan Republican or Democratic philosophical, broad sweep testimony here.

We are saying that there are certain things that should be sacrosanct. That the principal of equality of justice for all has to have meaning, and that indeed, people who have views on individual rights and on sex discrimination, that put in question our whole records on how to end discrimination in affirmative action, should not be confirmed, because all we will be doing is reliving the battles of the 1950's and the 1960's again and again, and it is enough.

Senator BIDEN. Thank you.

Senator MATHIAS. Once again, I think, for the second time, I thank you for your attendance at this hearing——

Mr. GOLD. And thank you for your patience, Senator.

Senator MATHIAS [continuing]. And your very helpful comments. We appreciate it.

Mr. RAUH. Thank you, sir.

Senator BIDEN. Thank you all.

Senator MATHIAS. May I inquire if Mr. Roy C. Jones of the Liberty Federation is in the room? Is Mr. Jones in the room?

[No response.]

Senator MATHIAS. Then our third panel will be composed of Mrs. LaHaye, the president of Concerned Women for America; Mr. Bruce Fein of United Families Foundation; Miss Sally Katzen, a lawyer with Wilmer, Cutler & Pickering; and Mr. Jack Fuller, the editorial editor of the Chicago Tribune.

If you will all raise your right hands. Do you swear that the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. LAHAYE. I do.

Mr. FEIN. I do.

Ms. KATZEN. I do.

Mr. FULLER. I do.

TESTIMONY OF A PANEL CONSISTING OF BEVERLY LAHAYE, PRESIDENT, CONCERNED WOMEN FOR AMERICA, WASHINGTON, DC; BRUCE FEIN, UNITED FAMILIES FOUNDATION, WASHINGTON, DC; SALLY KATZEN, WILMER, CUTLER & PICKERING, WASHINGTON, DC; JACK FULLER, EDITORIAL EDITOR, CHICAGO TRIBUNE, CHICAGO, IL

Senator MATHIAS. Mrs. LaHaye, do you want to start? I would remind you of our 3 minute rule. The red light will indicate that 3 minutes have expired.

Without objection, all statements will be included in full in the record, as if read.

Mrs. LAHAYE. I am Beverly LaHaye, president of Concerned Women for America, which is the Nation's largest nonpartisan activist women's group.

We have 565,275 members as of this morning, and we are growing. We are in all 50 States, representing women from many professions, many different races, and many religious backgrounds.

Concerned Women for America was formed to help protect the family, to promote constitutional freedoms and traditional values. CWA lobbies on various issues and has a legal department that recently won a case before the U.S. Supreme Court.