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.