99TH CONGRESS
2d Session

SENATE

EXEC. REPT.
99-19

NOMINATION OF ANTONIN SCALIA TO BE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

SEPTEMBER 8, 1986.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

The Committee on the Judiciary, to which was referred the nomination of Antonin Scalia, of Virginia, to be an Associate Justice of the Supreme Court of the United States, having considered the same, by a unanimous vote of 18 yeas, reports favorably thereon, with the recommendation that the nomination be confirmed by the U.S. Senate.

The Committee has concluded that Judge Scalia is exceptionally well qualified for the position to which he has been nominated.

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On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from Utah [Mr. GARN] and the Senator from Arizona [Mr. GOLDWATER] are necessarily absent.

I further announce that, if present and voting, the Senator from Utah [Mr. GARN] would vote "yea."

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 65, nays 33, as follows:

[Rollcall Vote No. 266 Ex.]

YEAS—65

Abdnor	Gorton	Nickles
Andrews	Gramm	Nunn
Armstrong	Grassley	Packwood
Bentsen	Hatch	Pressler
Boren	Hatfield	Proxmire
Boschwitz	Hawkins	Pryor
Broyhill	Hecht	Quayle
Bumpers	Heflin	Roth
Chafee	Heinz	Rudman
Chiles	Helms	Simpson
Cochran	Hollings	Specter
Cohen	Humphrey	Stafford
D'Amato	Johnston	Stennis
Danforth	Kassebaum	Stevens
DeConcini	Kasten	Symms
Denton	Laxalt	Thurmond
Dixon	Long	Trible
Dole	Lugar	Wallop
Domenici	Mattingly	Warner
Durenberger	McClure	Wilson
Evans	McConnell	Zorinsky
Ford	Murkowski	

NAYS—33

Baucus	Gore	Melcher
Biden	Harkin	Metzenbaum
Bingaman	Hart	Mitchell
Bradley	Inouye	Moynihan
Burdick	Kennedy	Pell
Byrd	Kerry	Riegle
Cranston	Lautenberg	Rockefeller
Dodd	Leahy	Sarbanes
Eagleton	Levin	Sasser
Exon	Mathias	Simon
Glenn	Matsunaga	Weicker

NOT VOTING—2

Garn	Goldwater

So the nomination was confirmed.

□ 2150

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the nomination was confirmed.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BIDEN. Mr. President, I congratulate the Senator from South Carolina and the supporters of Justice Rehnquist. I hope that all that some of us fear of him does not come to fruition. I wish him well on the Court.

I am anxious to get to our next Supreme Court nominee.

The PRESIDING OFFICER. The Senate will come to order. Senators are asked to take their seats, and Senators engaged in conversations are asked to retire to the cloakroom.

THE JUDICIARY

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate proceed to the nomination of Antonin Scalia to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. The nomination will be stated.

The assistant legislative clerk read the nomination of Antonin Scalia, of Virginia, to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Is there objection to the present consideration of the nomination?

There being no objection, the Senate proceeded to consider the nomination.

Mr. STENNIS. Mr. President, may we have order?

The PRESIDING OFFICER. That is an appropriate request. The Senate is not in order. The Senate will be in order. The hour is late, and the matter before us is important. Senators are asked to be in order. Those Senators who wish to confer are asked to retire to the Cloakroom. Those Senators ambling about the Chamber are asked to take their seats or retire to the cloakroom. Staff members on the Republican side and the Democratic side are asked to be silent.

Mr. THURMOND. Mr. President, I rise today to voice my strong support for President Reagan's nomination of Judge Antonin Scalia to be Associate Justice of the U.S. Supreme Court. Judge Scalia is eminently qualified. In 1957, Judge Scalia graduated summa cum laude and No. 1 in his class from Georgetown University. In 1960, he graduated magna cum laude from Harvard law School. While at Harvard he was the note editor of the Harvard Law Review and a Sheldon fellow.

Judge Scalia practiced law with the prestigious firm of Jones, Day, Cockley, & Reavis in Cleveland, OH, from 1961 to 1967. He then embarked on a career as a law professor at the University of Virginia Law School. In 1971, he was appointed general counsel of the Office of Telecommunication Policy, Executive Office of the President. He was appointed Chairman of the Administrative Conference of the United States in 1972. During the period 1974-77, he served as the Assistant Attorney General, Office of legal Counsel, U.S. Department of Justice.

Following his Government service, Judge Scalia again returned to the academic arena. In 1977, he was a professor of law at the University of Chicago Law School. He was also a visiting professor of law at Georgetown Law School, and scholar in residence with the American Enterprise Institute. In 1980 and 1981, he was a visiting professor of law at Stanford University Law School.

Among his many other achievements, Judge Scalia has served as the editor of Regulation magazine. He was chairman of the American Bar Association's Section of Administrative Law, as well as chairman of the ABA's Conference of Section Chairman. He also served on the board of visitors of the J. Reuben Clark Law School of Brigham Young University.

In August 1982, Judge Scalia was confirmed by the Senate for the position of circuit judge for the U.S. Court of Appeals for the District of Columbia Circuit. He has served with distinction in that capacity since that time.

Judge Scalia's nomination to be an Associate Justice of the Supreme Court was received by the Senate on June 24, 1986, and was reported out of committee favorably on August 14, 1986, by a unanimous vote of 18 yeas. The Committee on the Judiciary held 2 days of hearings on the nomination. The nominee was questioned by members of the committee and testimony was heard from 25 witnesses.

A number of very prominent individuals testified in support of Judge Scalia, including Carla Hills, the former Secretary of Housing and Urban Develoment; Erwin Griswold, former Solicitor General of the United States and former dean of Harvard Law School; Gerhard Casper, dean of the University of Chicago School of Law; Paul Verkull, president and professor of law at the College of William and Mary; and Lloyd Cutler, former counsel to President Carter. Based on personal experiences with Judge Scalia, these prominent individuals all gave him extremely high marks for legal ability, writing skills, fairness, integrity, and intellect.

Representatives of the American Bar Association's Standing Committee on Federal Judiciary testified before the Judiciary Committee and stated that Judge Scalia was considered to be well qualified for the position of Associate Justice of the Supreme Court. This is the highest rating given by the ABA's Committee for Supreme Court nominees. The ABA representatives testified concerning the scope of their investigation and the results thereof. The ABA committee interviewed more than 340 persons, of which over 200 were Federal and State judges. Those who knew Judge Scalia spoke enthusiastically of his keen intellect, his careful and thoughtful analysis of legal problems, and his excellent writing ability. They also commented on his congeniality and sense of humor. The Scalia investigation also included interviews with approximately 80 practicing lawyers throughout the United States. The ABA reports that from the standpoint of his intellect and competence, temperament and integrity he is well regarded by almost all of the practicing attorneys who know him. The ABA interviewed more than 60 law school deans and faculty members concerning Judge Scalia's qualifications and he was uniformly praised for his ability, writing skills and intellect. Judge Scalia's opinions issued while on the court of appeals were examined by the dean and a number of law school professors from the University of Michigan, as well as by a separate group of practicing lawyers. Both of

these groups praised his intellectual capacity, his clarity of expression, his ability to analyze complex legal issues, as well as his organizational skills and articulation of ideas.

The picture of Judge Scalia that emerges as a result of the Judiciary Committee's investigation and hearings is that of an individual who has a strong intellectual capacity and is fair and honest. One who issues well reasoned and well written opinions and who possesses a warm and friendly personality. An individual that is not only competent but one that will seek advise when necessary and demonstrates the independent courage of his convictions when appropriate.

Judge Scalia has an excellent record of accomplishments. He had a distinguished academic career as a law professor; he has practiced law from the perspective of both the private sector and as a Government attorney; and, he has served as a judge on the U.S. Court of Appeals. He posses the necessary qualities to serve with distinction in the position for which he has been nominated and I urge my colleagues to vote for confirmation of President Reagan's outstanding selection of Antonin Scalia to be an Associate Justice of the U.S. Supreme Court.

□ 2200

He is well qualified. The American Bar Association gave him the highest rating. The Judiciary Committee investigated him carefully as the FBI did. There was nothing found against him in any way, shape, or form.

I hope he could be confirmed unanimously, and if the Members put their statements in the RECORD we can finish this in 5 minutes.

Mr. BIDEN. Mr. President, as I always do, I will take the advice of my chairman and put my statement in the RECORD.

Today marks the final stage of the process to answer the question "will the Senate advise and consent to the nomination of Antonin Scalia to be an Associate Justice of the U.S. Supreme Court?" The nominee's record has been subjected to an extensive review; the nominee, and numerous witnesses both pro and con, testified before the Judiciary Committee; and the committee, after weighing all the evidence, has voted its unanimous recommendation that the nominee be confirmed. Now, it is the responsibility of the full Senate to consider this nomination.

Much of our attention during the past 2 months has been focused on the nomination of Associate Justice William Rehnquist to the position of Chief Justice. We should not, however, allow our understandable concern with the question of who will lead the coordinate branch of government distract us from our responsibility in considering the equally important question of who will join the institution comprised of only nine men and women that is entrusted with the guardianship of our constitutional heritage.

When we began the consideration of this nomination I stated that the crucial question for me was whether the nominee adhered to a judicial philosophy that would unravel the broad fabric of settled practice. Such a nominee should be rejected because his or her presence on the Court would severely disrupt the delicate process of constitutional adjudication. While I would oppose any nominee with such a rigid and potentially disruptive philosophy, the fact that I may disagree with the nominee about the correct outcome of one or another matter within the legitimate parameters of debate is not enough, by itself, to lead this Senator to oppose a nomination.

Nevertheless, the particulars of a nominee's judicial philosophy should be considered in determining whether his or her appointment would fundamentally alter the balance of the Court. I firmly believe that a diversity of views from liberal to conservative should be represented on the bench. Such diversity contributes to the American people's belief that they can get a fair hearing before openminded judges, a belief that is crucial to continued faith in the judicial system. We should, therefore, proceed with extreme caution before approving the nomination of any individual whose appointment would fundamentally alter, in any direction, the balance of the Court, because—to paraphrase Justice Rehnquist—just as it would be wrong to have nine Justice Rehnquists, it would also be wrong to have nine Justice Brennans on the Court.

Of course, in addition to satisfying the foregoing requirements, before his or her nomination should be favorably considered a nominee to the High Court must possess the professional excellence and integrity we have the right to demand of a Supreme Court Justice.

The nomination of Judge Scalia presents some difficult questions for those of us seeking to determine the impact of his judicial philosophy on settled constitutional practice and the existing balance of this Court.

First, Judge Scalia's limited service on the court of appeals, both in terms of time and the nature of the issues he has addressed, does not provide a sufficient record upon which to make a determination of how his judicial philosophy would impact on settled practice in a number of important areas.

Second, although Judge Scalia's writings as an academic provide us additional information, the utility of that information to this process is in some doubt. As a scholar, Judge Scalia was fond of the provocative argument, and one is never sure when he is asserting his own view. Additionally, Judge Scalia often included policy arguments in his writings, and there is no way to determine from the writings what effect he would give his particular policy preferences in interpreting the Constitution.

Finally, Judge Scalia adopted an extreme view of the proper scope of response by a judicial nominee in a nomination hearing. Adhering to that view he declined to answer questions that might clarify his judicial philosophy. While respecting Judge Scalia's view, I find, as did a number of my colleagues on the Judiciary Committee, that the limitations he has adopted severely hampers the Senate's ability to perform its constitutionally mandated role.

Working within these limitations, I have attempted to ascertain whether Judge Scalia's judicial philosophy raises a concern about his willingness to adhere to settled doctrine in a number of important areas. I was greatly encouraged by Judge Scalia's statement that he does not have an agenda of cases he is seeking to overturn. I was also encouraged by his stated respect for the doctrine of stare decisis and its applicability to the Supreme Court as well as the lower Federal courts.

Although I strongly disagree with Judge Scalia's judicial philosphy in a number of areas, I find his views to be within the legitimate parameters of debate. Judge Scalia's judicial philosophy strikes me as very conservative. I do not, however, find him significantly more conservative than Chief Justice Burger; therefore, I do not have undue concern about the impact of this appointment on the balance of the Court.

Mr. President, I will take less than 2 minutes to summarize.

Mr. President, there is a significant distinction between this nominee and the last one. One is this nominee has demonstrated through his career that he has an intellectual flexibility. He is not a rigid man and he does engage in and is willing to engage in discussion of new ideas, different than those which are the ones that he had been predisposed at that point to hold. He is open, he is straightforward, he is candid.

In addition to that, notwithstanding his conservative bent, there is no indication that the nominee's judicial philosophy would unravel the settled fabric of constitutional law.

Further, given the almost unanimous view that Judge Scalia is a man of the utmost ability, an able judge, and a willing participant in the intellectual give and take crucial to arriving at the consensus that lends credibility to decisions of a court I believe that, despite my differences with many of Judge Scalia's views, the Senate should confirm his nomination to be an associate justice of the United States Supreme Court.

I think he is a fine man. I think he should be on the Court, and I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I did have the opportunity as a member of the Judiciary Committee to hear out this nominee for service on the Supreme Court of the United States. Although I am troubled by some of the views expressed by Judge Scalia in some of the decisions he has written, I too find that Judge Scalia is clearly in the mainstream of thought of our society and I would hope that he would demonstrate the kind of opportunities for growth and sensitivity on many of these issues and questions.

I support the nomination of Judge Scalia to be an Associate Justice of the Supreme Court. This nomination raises fewer of the concerns that have led me to oppose the nomination of Justice Rehnquist to be Chief Justice.

In my view, Justice Rehnquist's career of relentless opposition to fundamental claims involving issues such as racial justice, equal rights for women, freedom of speech, and separation of church and state places him outside the mainstream of American constitutional law as an extremist who should not be confirmed as Chief Justice of the United States.

Judge Scalia has been on the bench only 4 years, and has not ruled on many basic constitutional issues. His record in these areas is less complete than Justice Rehnquist's. On the available record, I disagree with Judge Scalia on women's rights, and it is fair to say that his position on this issue seems as insensitive as Justice Rehnquist's.

I am also concerned about Judge Scalia's writings on two important issues in administrative law, his apparent views that the independent agencies are unconstitutional, and that the courts can undo the New Deal by denying Congress the power to delegate authority to regulatory agencies.

But in other areas that are of major concern to me, it is difficult to maintain that Judge Scalia is outside the mainstream. Should he be confirmed as a Justice, I hope that as a result of his new rank, he will look with greater sensitivity on critical issues, especially race discrimination and the right of women to escape their second-class status under the law and to share fully in the protections of the Constitution.

Finally, the nomination of Judge Scalia presents none of the troubling issues with respect to truthfulness, candor, judicial ethics, and full disclosure that have marred the nomination of Justice Rehnquist.

As a scholar, public official, and Federal judge, Mr. Scalia has demonstrated a brilliant legal intellect and earned the respect—even the affection—of colleagues whose personal philosophies are far different from his own. I will vote in favor of his confirmation.

Mr. METZENBAUM. Mr. President, it is quite obvious that the nomination of Judge Scalia to become a Justice of the Supreme Court is going to pass overwhelmingly in this body. I doubt very much if there will be one negative vote against him.

But I think that that vote is proof positive that the previous vote of some of us who saw fit to vote against Justice Rehnquist had nothing to do with the man's political views.

There is not much question in anybody's mind that Judge Scalia is every bit as conservative as Justice Rehnquist and some stated before our committee that in all probability he is more conservative.

That was not the issue. That is not the issue.

We all agree Judge Scalia is a man of integrity, Judge Scalia is a man of legal ability, Judge Scalia comes to the Supreme Court with an excellent legal background.

So there will be no votes against him or at most one or two.

They will not be based upon his political philosophy.

Those who would argue that the previous votes of 33 Members of this body who voted against the confirmation of Justice Rehnquist had something to do with political ideology I think that will be totally refuted when the vote is concluded in connection with the confirmation of Judge Scalia to become Justice Scalia of the Supreme Court.

I am voting to confirm Judge Scalia to the post of Associate Justice of the Supreme Court.

I have decided to vote for him for several reasons. He is a distinguished member of the legal profession, he is very well-respected, and he is sufficiently respectful of Federal statutory and Constitutional law.

His achievements before his appointment to the court of appeals are well known. He attended a distinguished law school. He was an associate in a major law firm. He taught at some of the finest law schools in the country, and served the United States twice in posts which required Senate confirmation.

He has been praised for both his intellect and his wit.

His integrity has not been questioned.

Since 1982, when he was appointed to the U.S. Court of Appeals, he has written over 100 opinions. These opinions cover a variety of subjects—administrative law, court access, consumer law, labor law, the Freedom of Information Act, and the Constitution.

There is no question that his opinions have been carefully written and well-reasoned. His opinions have garnered the support of a wide cross-section of the court's judges including conservative, moderate, and liberal judges.

There is also no question that some of these opinions are controversial. For example, his opinions on the Freedom of Information Act have been criticized because most have rejected freedom of information requests.

It is not difficult to understand why his decisionmaking in this area has evoked concern. Judge Scalia was quite critical of the Freedom of Information Act before he became a Federal judge. But his Freedom of Information Act opinions have been well-reasoned and unbiased, and his opinions have been joined by various members of the court of appeals. In addition, in the course of his opinions, he has explicitly acknowledged and accepted the goals of the act.

It has also been suggested that Judge Scalia has shown a closed mind and continuing insensitivity to the needs of women, minorities, and the poor "and a steadfast opposition to enforcing basic constitutional rights." These concerns are reasonable given the content of some articles Judge Scalia wrote before he became a judge.

But while I disagree with the results he has reached in some decisions, I must note that he has not shown himself to be hostile to basic constitutional values.

It appears that he has been a fair and openminded judge on the court of appeals. I have every reason to believe that he will maintain this attitude when he joins the Supreme Court of the United States.

My vote should not be misinterpreted as a vote for Presidential prerogative in the selection of Supreme Court Justices.

The Senate has a crucial—and equal role to play in the confirmation process.

I will vote for Judge Scalia, despite his conservative views, because I believe he is qualified.

I will vote for Judge Scalia because I do not believe that his presence on the Court will shift the Court dramatically and dangerously to the right.

I will vote for Judge Scalia because I do not believe that his presence on the Court will endanger the basic individual rights protections Americans enjoy today.

But if the confirmation of future Supreme Court nominees would undermine the role of the Court in the protection of individual rights, I will not hestitate to oppose those nominees.

And if the confirmation of future nominees would threaten the stability of the Court, I will not hesitate to oppose those nominees.

Today, however, I am pleased that no controversy has arisen in connection with this nomination. I am pleased to vote for Judge Scalia and I congratulate him on his inevitable confirmation.

The PRESIDING OFFICER (Mr. WILSON). The majority leader.

Mr. DOLE. Mr. President, are the yeas and nays ordered.

The PRESIDING OFFICER. They are not.

Mr. DOLE. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. DOLE. Mr. President, the Senate now proceeds to consider the nomination of Antonin Scalia to be an Associate Justice of the Supreme Court. In contrast to the nomination of William Rehnquist, this nomination has been a "piece of cake." Perhaps Judge Scalia indirectly benefited from the "controversy" that swirled around the Rehnquist nomination. In any event, it is likely that the Senate will approve this nomination by acclamation. As of the moment, I know of no Senator who is actively opposing Judge Scalia.

Although there may be some indirect benefit that transferred over from all the attention that the Senate has given to Justice Rehnquist, at best, it is a minor factor in this instance. Judge Scalia has such broad and strong support because he is an exceptionally well-qualified candidate.

It is not my intention to dwell at length on extolling the virtues of Mr. Scalia, Mr. President, but I would like to briefly recount some of those qualities which have earned him such broad support in the Senate.

Judge Scalia graduated with honors from Georgetown University and Harvard Law Schol. He has been a law professor and scholar at the Universities of Chicago and Virginia. In the early 1970's, he joined the executive branch of Government and quickly rose to become the Assistant Attorney General, and legal counsel to the Attorney General and the President This, of course, is the chief legal position in the Government. It was the same post occupied by Chief Justice Rehnquist. Judge Scalia also had a distinguished career in private practice in Ohio.

But the academic and professional qualifications are only a part of the dimensions of this man. He is a family man, with nine children. He is a first generation Italian-American, his father having immigrated to this country from Sicily.

He has also a distinguished service on the Circuit Court of Appeals for the District of Columbia for the past 5 years. In that short time, he has authored more than 80 majority opinions. This is quite an accomplishment for a court that, in the past, was often known for its sharp philosophical split. Of his 86 opinions, only 9 were accompanied by minority views. He is one of the Nation's leading experts on administrative law. He is also a recognized authority on the doctrines of separation of powers and federalism.

One of the most impressive opinions was his courageous opinion in the Synar case, which identified the constitutional problems with the Gramm-Rudman-Hollings budget balancing legislation. The Supreme Court later upheld this view.

As in the case of Justice Rehnquist, the American Bar Association gave him its highest rating, unanimously concluding that he was "well qualified" to be elevated to the High Court. The ABA Committee found that Judge Scalia "meets the highest standards of professional competence, judical temperament and integrity and is among the best available for appointment to the Supreme Court."

It is tempting to go on, Mr. President, to extol this man's virtues. To do so, would only be adding more gilt to the proverbial lily. I believe I can truly speak for the entire Senate in this case. He has our full endorsement and support. We wish him Godspeed on his appointment to the Supreme Court. He will be an effective and energetic Justice.

Mr. DODD. Mr. President, when the Senate votes to extend or withhold its consent to the confirmation of Judge Antonin Scalia as Associate Justice of the U.S. Supreme Court, I will cast my vote in favor of the nominee. I rise now to briefly set forth my reasons for supporting this confirmation.

As I explained in some detail in my remarks concerning the nomination of Justice Rehnquist, I believe that each Senator is obligated to scrutinize with exceptional vigor the qualifications of all judicial nominees. We must, in my view, ensure that the nominee has excellent technical and legal skills; is of the highest character and free of any conflicts of interest; and is capable of and committed to upholding the Constitution of the United States.

It is not proper in my view for a Senator to reject a nominee merely because the nominee is a conservative individual or jurist, one who believes that the Court should exercise a relatively guarded role in the interpretation of the Constitution. It is proper, however, to reject a nominee when his temperament and temperature reflect an inability to appreciate and protect the fundamental constitutional rights of all.

Several days ago I voted against the confirmation of Justice Rehnquist. I did so not because Justice Rehnquist is a conservative jurist, but rather because his record reflects a cold indifference toward the constitutional guarantees of equal protection and due process for minorities.

Judge Scalia is, like Justice Rehnquist, what most would call a conservative individual. His views on certain controversial issues of our time undoubtedly differ from my own. That he is conservative or possesses views with which I disagree, however, is not the point. What is the point is whether he is capable of and committed to upholding the fundamental guarantees embodied in the Constitution—the blueprint for this 200-year-old experiment in democracy—which he will be sworn to protect and cultivate.

On balance, the evidence I have reviewed convinces me that Judge Scalia is able and willing to ensure that all litigants are extended the full and equal protection of the Constitution on the basis of the facts as presented in each case and in light of the law as previously decided.

The British biologist Sir Thomas Huxley traveled through America in the late 19th century. At the end of his visit, some American reporters tried to fish from him a compliment about the expanse and wealth of our country. Sir Thomas was uncooperative. He said:

> I cannot say that I am in the slightest degree impressed by your bigness or your material resources. Size is not grandeur, and territory does not make a nation. The issue is . . . what are you going to do with those things?

Judge Scalia is, from all accounts, a highly intelligent individual. Technical competency is not only good, but absolutely necessary in our Federal judges. But like Sir Thomas' perception of superiority, the ultimate test of Judge Scalia's success will not be the keenness of his intellect. With hopeful anticipation, I trust that Judge Scalia will use his intellect to carry out, with all the energy, compassion, and commitment he can muster, one goal above all else: that of protecting the constitutional liberties of us all.

NOMINATION OF ANTONIN SCALIA TO BE AN ASSOCIATE JUSTICE ON THE U.S. SUPREME COURT

Mr. HECHT. Mr. President, I rise today to speak in support of the nomination of Judge Antonin Scalia to be an Associate Justice of the U.S. Supreme Court. Confirmation of this nomination will provide the American judicial system the benefit of Mr. Scalia's intellectual prowess and legal expertise.

By way of background, Judge Scalia's education included an intense curriculum in the classics. Those familiar with the judge's work up to this point have attributed this historical and philosopical background as being instrumental in his perspective viewpoints and decisions. It is also apparent, Mr. President, that this nominee's fine judicial and legal performance is a simple and accurate reflection of his intelligence and determined conviction.

Mr. Scalia graduated as valedictorian from both Xavier High School and Georgetown University, and went on to earn magna cum laude honors from Harvard Law School. Such a record of high scholastic achievement is indicative of dedication and aptitude—two necessary traits for a Supreme Court Justice.

Subsequent to his schooling, Mr. Scalia spent a number of successful years in the private sector, including teaching positions at both the Universities of Chicago and Virginia. The judge began his public service career in 1971, with an appointment by the Nixon administration to the position of general counsel in the Office of Telecommunications Policy. The distinquished Mr. Scalia also served as Chairman of the Administrative Conference of the United States, among other noteworthy positions, before his

1982 swearing in as a judge on the U.S. Circuit Court of Appeals—a court considered by many as second only in importance to the Supreme Court.

Moreover, Mr. President, Judge Scalia's judicial record reflects his conviction that the role of the courts is limited—a role of restraint. Judge Scalia adheres to a commonsense interpretation of the Constitution; understanding that it protects certain basic rights—no more, no less. This is a philosophy with which I concur.

In closing Mr. President, let me simply state that I support Antonio Scalia's nomination, confident in the knowledge that he will bring to this position the same energy, proficiency, and knowledge that he has demonstrated over the last 20 years. Accordingly, I would urge my colleagues to likewise support this nomination.

NOMINATION OF ANTONIN SCALIA TO THE SUPREME COURT

Mr. DECONCINI. Mr. President, although the nomination of Judge Antonin Scalia has been somewhat overshadowed by the controversy over the nomination of Justice William Rehnquist to be Chief Justice, I am quite pleased that he will be confirmed to the Court. I believe that he is eminently qualified for the Supreme Court by way of his intellectual abilities, temperament, and character. I am personally pleased that he will be confirmed to the Court because we share an Italian-American heritage.

Mr. President, our responsibility to thoroughly review and consider the nomination of Judge Scalia is equally as important as it was in the case of Justice Rehnquist. Judge Scalia will likely spend many years on the Court sharing an equal vote with the Chief Justice and the other Associate Justices. Our constitutionally mandated role of advice and consent on the nomination of Judge Scalia is as important as the deliberations we engaged in earlier with respect to Justice Rehnquist. Indeed, Justice Rehnquist would have remained as a voting member of the Supreme Court regardless of the final action of the Senate on his confirmation. Judge Scalia, however, will be a new voice on the Court. Let no one say that the Senate has ignored its duty to closely examine the President's nominee for Associate Justice.

I am pleased that the President has nominated a person with the experience and qualifications of Judge Antonin Scalia. Clearly we have before us a nominee with the requisite legal and judicial experience. The American Bar Association has found that Judge Scalia meets the highest standards of professional competence, judicial temperament, and integrity. I am pleased to concur that he is indeed among the best available candidates for our consideration.

Judge Scalia comes to us from the D.C. Court of Appeals with an outstanding reputation. He is known for his thoroughness and attention to detail. He is clearly a man who will make his presence felt from his first term on ward. He is a hard worker but one who is personable and well liked. Where the requirements of the job are hard, hard work, and collegiality—Judge Scalia will excel.

I take pride, as an Italian-American, in noting Judge Scalia's heritage. In this year that our country has shown so much pride in celebrating the 100th anniversary of the Statue of Liberty, we can take note of the contributions of Antonin Scalia, the son of an immigrant from Italy. He is but another example of a member of an immigrant family who has risen to an outstanding position in our Government and our society. As a first generation Italian-American, Judge Scalia demonstrates that the rapid assimilation of immigrating peoples pumps strength into our country.

Mr. President, I would have preferred that this statement be a thoroughly positive endorsement of the nomination of Judge Scalia. Unfortunately, one aspect of the confirmation process continues to disturb me. I am very disappointed in both Judge Scalia and in Justice Rehnquist for their protectiveness and reticence in answering the questions that I and my colleagues asked them in the Judiciary Committee hearings. I understand the need to avoid issues that will be directly before the Court, but it is very difficult for the committee and for the Senate to fulfill their responsibility when we are unable to question nominees about their judicial philosophies and views on constitutional interpretation. It is apparent to me that nominees are advised by the administration to be as evasive and passive as they can be. I believe that with nominees less qualified than those before us today, this strategy will ultimately fail the administration.

The confirmation process is a constitutional touchstone between the Judiciary and the Congress; a bridge between popularly elected Government and the life tenure of judicial officials. Because of his exemplary record, it will be my pleasure to cast my vote in favor of his confirmation to the Supreme Court.

NOMINATION OF JUDGE ANTONIN SCALIA

Mr. HATCH. Mr. President, perhaps no standard speaks more eloquently to the merits of this nomination than the performance of Judge Scalia on the Court of Appeals for the District of Columbia Circuit. In more than 4 years on that esteemed court, he has written 86 majority opinions and only 9 of these have been accompanied by a dissent. In other words, Judge Scalia has won unanimous approval for his views in nearly 90 percent of his written opinions. Another 90 percent measure of success is found in the rate at which Judge Scalia's positions have been sustained on appeal. The Supreme Court has adopted his views six out of the seven times his cases have been reviewed on appeal by the Court he has been appointed to join. This includes his courageous opinion in the Synar case which identified the separation of powers problems in the budget-cutting Gramm-Rudman law.

These facts are high praise for Judge Scalia from those best positioned to adjudge his stature and ability, his fellow judges. These judicial actions speak barely louder than the words of his judicial colleagues, among whom is Circuit Judge Abner Mikva who hails this appointment as "good for the institution" of the Supreme Court.

From these lofty commendations, the acclaim for Judge Scalia's appointment continues to crescendo. The American Bar Association, with a collegial accord matching that of Judge Scalia's written opinions, "has unanimously concluded that Judge Scalia is well qualified for this appointment. Under the committee's standards," the ABA continues on behalf of America's lawyers and judges, "this means that Judge Scalia meets the highest standards of professional competence, judicial temperament and integrity and is among the best available for appointment to the Supreme Court." It is hard to imagine higher commendation from an organization of lawyers and judges than to call one of their own "among the best avialable for appointment to the Supreme Court."

The Chicago Tribune strikes the same theme by calling Judge Scalia a "lawyer's lawyer: meticulous, measured, determined to read the law as it has been enacted by the people's representatives rather than to impose his own preference upon it." It is interesting to note that many themes are repeated over and over by those examining Judge Scalia's accomplishments. For instance, former Attorney General Edward Levi calls Judge Scalia a "lawyer's lawyer" and states that he "came to know, with awe, how his mind works, his mastery of the law in principle and in practice, his high integrity and commitment to fairness, and his openness to the careful consideration of differing views."

Dean Guido Calabresi of the Yale Law School confesses that he has differed with Judge Scalia on many issues, yet he strikes many of the same themes:

> I have always found him sensitive to points of view different from his own, willing to listen, and though guided, as any good judge should be, by a vision of our Constitution and the roles of judges under it, flexible enough, also as a good judge should be, to respond to the needs of justice in particular cases.

This candid assessment verifies the report of the "Alman of the Federal Judiciary" that Judge Scalia is "highly respected in all categories, admired even by those lawyers who disagree with him."

Over and over the same qualities are admired in Judge Scalia—his fairness, his integrity, his openness to varied viewpoints, his amazing mastery of the law. Judge Scalia is respected as a

lawyer by lawyers, as a judge by judges. In the words of the American Bar Association, this committee is privileged to consider the nomination of an individual who "is among the best available for appointment to the Supreme Court."

CIVIL RIGHTS RECORD

On September 7, the ACLU issued a document entitled "Report on the Civil Liberties Record of Judge Scalia." The timing of the issuance of this report—and a companion piece on Justice Rehnquist—to coincide with the debate on their nominations is apparently pure coincidence, as, according to the authors, its "purpose is not to suggest that the civil liberties record of any candidate ought to determine anyone's position on such candidacy, and the reader is asked not to seek to infer any position on this question from such a report." Despite its purely educational and nonpartisan purpose, however, and despite its claim that it "presents a comprehensive description of Judge Scalia's judicial opinions on civil liberties questions," it is misleading in a number of respects. I would like to correct the record on these points.

THE FIRST AMENDMENT

The report's introductory sentence on Judge Scalia's record claims that "Judge Scalia has decided against the party invoking the protection of the First Amendment in all opinions he has authored in this area." This statement is incorrect. For example, Judge Scalia decided in favor of defendant columnist Jack Anderson on many of his claims of first amendment protection for statements in a column in Liberty Lobby Inc. versus Anderson. For example, he agreed with Anderson's claim that Anderson's statements that Liberty Lobby's president, Willis Carto, represents a trend toward "incipient fascism" and that his record was characterized by "lies and half-truths" were statements of opinion and therefore under the first amendment could not give rise to a libel action, rather than being statements of fact which could give rise to such an action. This argument surely could have been responsibly rejected. As the ACLU reports, he did decide one issue in that case, whether the "clear and convicing" standard for actual malice applies to the plaintiff's burden on summary judgment, contrary to Jack Anderson's claim, and the Supreme Court reversed. The ACLU fails to mention, however, that Justice Brennan, the author of New York Times versus Sullivan, the seminal case applying the first amendment to libel law, dissented from the Supreme Court majority, agreeing instead with Judge Scalia.

The other general way in which the introductory statement is misleading is that it only addresses opinions that Judge Scalia authored. Nevertheless, in the discussion of particular areas, it also notes some opinions Judge Scalia joined, such as Travoulareas versus Piro. The reason the introductory statement does not claim to address all opinions that Judge Scalia wrote or joined is that it would not be defensible as to his complete record. For example, the Washington Post praised Judge Scalia for joining the portion of Judge Bork's majority opinion in Lebron versus WMATA taking an expansive view of first amendment rights, ruling that Washington, DC, could not prohibit the position of an anti-Reagan advertisement on the Metro on the ground that it was deceptive because it would be an unconstitutional prior restraint. As the Post noted:

Judge Bork and Judge Antonin Scalia—two of the court's conservative members—would have reversed Metro's action on even broader grounds if it had been necessary. Both believe that an agency of a political branch of government cannot impose prior restraint on the publication of a political message even if that message is false . . . . That is an interference by the Government with a citizen's right to engage in free political discourse. The court's message is clear and it is right.

The remainder of this section takes issue with statements the ACLU report makes is specific subareas.

LIBEL

LIBERTY LOBBY VERSUS ANDERSON

In addition to the other points made above about this opinion, it should be noted that the position Judge Scalia took on the particular issue which the ACLU selected out as the litmus test for his views on the first amendment was not surprising. Carter appointee Judge Edwards joined Scalia's opinion, and Time magazine, in fact, indicated that it seemed to be required by prior Supreme Court opinions:

Judge Scalia's view was supported by a now famous footnote in a 1979 Supreme Court ruling written by Chief Justice Warren Burger. In that case, Burger noted that in order to prove "actual malice"—the stiff standard public figures must meet to win a libel case—plaintiffs have the right to inquire into a reporter's "state of mind." Such a complex under-taking, stated the Chief Justice, "does not readily lend itself to summary disposition." Burger's aide sent a message to lower-court judges that led to a surge of libel trials.

By its 6-to-3 decision overturning the Scalia opinion, the Court seemed to say "ignore previous message."

OLLMAN VERSUS EVANS

This case is a good example of why the ACLU's broad claim in its introductory summary that "In virtually every opinion that he has written addressing civil liberties issues, Judge Scalia has decided against the individual," report at II, is completely vacuous. This case involved a marxist professor denied the chairmanship of the department of political science at the University of Maryland, in part, he claimed because of a libelous column by conservative Columnists Evans and Novak. Ollman accordingly brought suit against the columnists for libel, focusing in particular on their statement "Ollman has no status within the (political science) profession, but is a pure and simple activist." They claimed this statement could not form the basis of these facts, it would be impossible to predict which side the ACLU would consider to be the "individual rights" side of a case. Individual rights, including rights of free expression, are at stake for both parties.

TRAVOULAREAS VERSUS PIRO

As noted above, Scalia only joined MacKinnon's opinion in this case. Contrary to the ACLU's claim, it did not "make it easier for plaintiffs to meet the New York Times standard," but simply refused to exclude evidence of a newspaper's editorial policies from the New York Times actual malice calculus. There is no precedent for the exclusion of such evidence, and hence not excluding it neither made it easier nor more difficult to meet the standard. The Court's reliance on the evidence was, however, grounded in part on a statement of Earl Warren's in a concurrence in Curtis versus Butts, who contended that in that case part of the evidence of actual malice was the defendant's editorial policy of "sophisticated muckraking." Earl Warren is not famous for his narrow construction of the bill of rights.

SCOPE OF SPEECH

CCNV VERSUS WATT

The report goes beyond the bounds of zealous advocacy in its portrayal of Scalia's dissent, which does not argue, as the report states, that expressive conduct is entitled to no first amendment protection. Rather, it distinguishes between laws directed at the expressive content of the conduct—which are supposed to receive full strict scrutiny—and laws directed at other aspects of the conduct which happen to affect its expressive content. In particular, the ACLU substituted ellipses for the italicized word in quoting the following paragraph:

• • • to extend *equivalent* protection against laws that affect actions which happen to be conducted for the purpose of "making a point", is to stretch the constitution not only beyond its meaning but beyond reason, and beyond the capacity of any legal system to accommodate.

The omission of the word "equivalent" cannot be explained very readily as a space-saving device. The next paragraph also makes clear that Scalia is not advocating no protection for expressive conduct, but a different level of protection:

The cases find within the first amendment some protection for "expressive conduct" apart from spoken and written thought. The nature and effect of that protection, however, is quite different from the guarantee of freedom of speech narrowly speaking.

Hence the ACLU's statement that Scalia took the view that "conduct engaged in for the purpose of 'making a point', could never warrant first amendment protection" is simply wrong.

Although in general this memorandum is limited to the scope of the ACLU's report and therefore only discusses Scalia's record on the Court of Appeals, a discussion of his first amendment record would be incomplete if it did not note the testimonials

of two people: Jack Fuller, the editorial page editor of the Chicago Tribune; and Floyd Abrams, the New York Times' lawyer and the most distinguished first amendment advocate in the country. Jack Fuller stated before the Judiciary Committee:

(Judge Scalia's) care and caution and meticulousness are, like the laws, the best and most lasting defense against encroachments upon our liberties. And I am more than willing to entrust what to me is the most cherished of our freedoms to an individual like Judge Scalia, whose whole being has been wrapped up in serving and honoring the American legal tradition.

Floyd Abrams wrote the committee as follows:

Judge Scalia and I are * * * intellectual adversaries in that we have serious differences on major matters of constitutional law and public policy. Those differences include, but are not limited to, views expressed in Judge Scalia's judicial opinions with respect to first amendment issues. The issues we differ on matter greatly to me.

Nonetheless, I support the confirmation of Judge Scalia for the following reasons:

First, he is a person of the highest personal character. He is honorable, trustworthy and decent. He is a warm human being who—as this letter may well illustrate—is able to function on a collegial basis with people with whom he differs.

Second, he is a person of the highest intellectual ability. His opinions rank amongst the best-written and the most thoughtful ones of appellate judges in the country. He writes with verve, wit, and intelligence. Given my views, I sometimes find that Judge Scalia's opinions read too persuasively—but that is hardly a black mark against him.

Third, he has an open and inquiring mind. He is not so fixed in his views that he refuses to listen, not so certain of the immutable truth of his views that he is incapable of changing them.

Finally, his views are not only sincerely held by him, but views I respect at the same time that I differ with them. But differently they are not only views that Judge Scalia believes in seriously; they are serious views about serious matters about which serious people can differ.

DISCRIMINATION

The report's statement that "Judge Scalia has never authored an opinion which found racial discrimination" portrays his record misleadingly. When one also includes opinions that he joined to the three opinions the report discussed where that was the issue, it turns out that he voted in favor of the plaintiff in half the race discrimination cases in which he participated: Mitchell versus Baldrige, Tucker versus IBEW, and Bishopp versus District of Columbia, all found race discrimination. Moreover, contrary to the thrust of the report that Scalia seeks to interpose obstacles in the way of race discrimination plaintiffs, one of these cases, Mitchell, simplified the employment discrimination plaintiff's task, in that it held that he need not show as part of his prima facie case that he was more qualified than the selected applicant, but only that he was qualified. U.S. Law Week reported this as a significant victory for employment discrimination plaintiffs.

CRIMINAL LAW AND PROCEDURE

The statement that "Judge Scalia's opinions in this area of the law all decide in favor of the prosecution" is correct, although he has joined some opinions reversing convictions (U.S. versus Lyons, U.S. versus North American Reporting Inc., U.S. versus Kelly, U.S. versus Foster). The defendants' claim he rejected, moreover, would strike most people as pretty wacky: Byers—a defendant claiming the insanity defense and introducing his own expert testimony can be compelled to submit to a state psychiatric exam and is not entitled to a lawyer; Richardson—a court can order a new trial after a mistrial resulting from a hung jury without violation of the double jeopardy clause—as opposed to automatically acquitting the defendant when the jury is hung and thus making a hung jury divided 11 to 1 in favor of conviction equivalent to a unanimous one in favor of acquittal; and Cohen—it does not violate the equal protection clause for Congress to legislate automatic commitment for defendants successfully pleading insanity in District of Columbia and leaving the subject to the States outside of District of Columbia.

GOVERNMENT SECRECY

The statement "Judge Scalia has authored only one opinion holding that the Government must release information" is misleading in that it excludes two cases where the effect of Scalia's ruling is clearly pro disclosure: In Washington Post versus HHS, Scalia reversed a district court ruling that the Government could assert exemption 4 protection. It is true that the result was remand for consideration of the application of another exemption rather than an order to release the information, but Scalia's opinion made release more likely. And in Church of Scientology versus IRS—the panel opinion, rather than the companion en banc one the report discusses—he rejected an argument that 26 U.S.C. 6103 completely preempted the Freedom of Information Act as to information within its scope. Additionally, when the opinions Scalia joined are included, he voted in favor of disclosure six times—in addition to the two mentioned above and ARIEFF, discussed in the ACLU report, Gulf Oil versus Brock, Meeropol versus Meese, and Public Citizen Health Research Group versus FDA, which the Public Bar and the Legal Times considered to be an important prodisclosure case—and against eight times.

EXECUTIVE POWER

If one translates the report's statement "Judge Scalia has consistently prevented plaintiffs from challenging executive actions" to mean what it probably intends, "Judge Scalia takes a narrower view than most judges of standing to challenge agency action." It is correct as far as it goes. It should be noted, however, that he reversed or voted to reverse agencies in at least 14 cases. In one of these, Rainbow Navigation versus Baldrige, found standing to sue and reversed an executive agency's foreign affairs-based determination.

Mr. BYRD. Mr. President, 2 years ago, Judge Antonin Scalia joined in a U.S. Court of Appeals opinion which defined "judicial restraint" as:

The philosophy that courts ought not to invade the domain the Constitution marks out for democratic rather than judicial governance.

That viewpoint was enlarged upon in that same opinion *Dronenburg* v. *Zech* (746 F.2d 1579 (1984)) with the further statement that:

No court should create constitutional rights: That is, rights must be derived by standard modes of legal interpretation from the text, structure, and history of the Constitution.

What a refreshing approach to constitutional interpretation. No notions of applying contemporary standards, or today's values, or 20th century notions to help us figure out constitutional meaning. Just the plain, old fashioned, lawyerly notion that the Constitution means the same thing today as it did when it was crafted by those brilliant minds almost 200 years ago.

I would like to offer just two examples of Judge Scalia's application of his philosophy: First, a demonstration of his approach to the meaning of the Constitution; and then, an example of his exercise of judicial restraint.

In 1983, there was an appeal before Judge Scalia's court which involved the right of protesters to sleep in Lafayette Park, across from the White House. *Community for Non-Violence* v. *Watt* (703 F.2D 586 (1983); Rev., 468 U.S. 288 (1984)) dissenting from the court's majority decision, Judge Scalia said he did not believe that, "sleeping is or ever can be speech for first amendment purposes. That this should seem a bold assertion is a commentary upon how far judicial and scholarly discussion has strayed from common and commonsense understanding."

That, to my way of thinking, reflects the approach of a strict constructionist, in the very best sense of that term.

As an example of Judge Scalia's belief in judicial restraint, I would remind my colleagues of his dissenting opinion in a death penalty case in 1983, *Chaney* v. *Heckler* (718 F.2D 1174 (1983); 53 U.S. Law Week 4385 (1985)), in which the majority of the court had issued an opinion requiring the Food and Drug Administration to consider whether the lethal injection of condemned prisoners met F.D.A. standards for safe and effective drugs. Pointing out that the FDA had no authority over such drugs because they were not the kind of consumer drugs that Congress intended the FDA to regulate, Judge Scalia wrote:

The condemned prisoner executed by injection is no more the "consumer" of the

drug than is the prisoner executed by firing squad a consumer of the bullets.

Judge Scalia then went on to say that even if the FDA did have jurisdiction over the drugs involved, it would also have the right to decide not to exercise its authority without being second guessed by the courts. He criticized the court's majority for interfering in extrajudicial matters, and he argued that the majority's decision had "less to do with assuring safe and effective drugs than with preventing the States' constitutionally permissible imposition of capital punishment."

Approaching his task with that kind of philosophy, and with that kind of candor, Judge Scalia will be a most welcome addition to the Supreme Court of the United States.

I am delighted to vote in favor of this nomination.

Mrs. HAWKINS. Mr. President, I request that my colleagues join me today in supporting President Reagan's nomination of Judge Antonin Scalia to serve as Associate Justice on the U.S. Supreme Court. Judge Scalia is a renowned legal scholar and judicial activist. His credentials and professional undertakings have proven him a worthy and well qualified nominee.

Article II, section 2 of the Constitution instructs the Senate to make an independent decision regarding the character and fitness of every nominee. The framers did not intend this power of advice and consent to warrant a vote based on the political beliefs of nominess. I advocate Judge Scalia's consideration based on merit.

In his 20 years of work as law professor, government official, and appellate judge, Antonin Scalia has written over 20 articles and his 84 majority decisions while on the U.S. Circuit Court of Appeals for the District of Columbia have established him as an incisive writer. During the past 4 years of judgeship his decisions have consistently displayed integrity. His wisdom and reverence for our Constitution are evidenced in his treatment of such issues as the first amendment, affirmative action, and the separation of powers.

Judge Scalia was educated at the University of Fribourg, Switzerland, and received his bachelor of arts from Georgetown University, graduating summa cum laude in 1957. In 1960 he graduated magna cum laude from Harvard University Law School where he edited the Harvard Law Review. He was admitted to the Ohio Bar in 1961 and the Virginia Bar in 1970. Judge Scalia was a Harvard University Sheldon Fellow from 1960-61 and privately practiced law in Cleveland, OH, between 1961 and 1967.

He served in the Nixon administration as general counsel in the Office of Telecommunications Policy and then acted as chairman of the Administrative Conference of the United States. Judge Scalia served as Assistant Attorney General in charge of the Office of Legal Counsel, where he dealt with subjects such as the ownership of Richard Nixon's Presidential papers and permissible intelligence-gathering activities of the CIA and FBI. He also remained in close contact with legal establishments. He was a scholar in residence at the American Enterprise Institute and edited their Regulation magazine from 1979-82. He also acted as chairman of the American Bar Association Section of Administrative Law and as chairman of the ABA Conference of Section Chairmen. He has taught law at the University of Chicago, Stanford University, Georgetown University, and the University of Virginia.

Judge Scalia's experience and training would enable him to consider expertly and in a broad historical and philosophical context the diverse array of Supreme Court issues. He is clearly an adept advocate of his views and would bring to the Court his firm sense of the Constitution and the role of judges in the legal system. It is without reservation that I recommend Judge Antonin Scalia to you today for confirmation as Associate Justice of the U.S. Supreme Court.

Mr. CRANSTON. Mr. President, after careful consideration I have decided to support the nomination of Antonin Scalia to be Associate Justice of the Supreme Court.

I have given this nomination the same careful scrutiny which I gave to the nomination of William H. Rehnquist to be Chief Justice.

In fact, as I have said more than once in the past several weeks, I believe the serious consideration by each Senator of Federal judicial nominations—especially for the Supreme Court—is a constitutionally required duty.

Each Senator is obligated to decide whether he will give or withhold consent to the President's judicial nominees.

Earlier, I set forth at length my view of the tests I thought the Founding Fathers intended us to see in rendering this judgment, and the history of how the Senate has carried out that intent.

It may be surprising to some on the other side of the aisle that I have reached the conclusion I have—indeed, that I would even consider reaching the conclusion I have—with respect to a strong conservative like Antonin Scalia.

In the debate on the Rehnquist nomination, some Rehnquist supporters on this floor used words that I believe demean the Senate and the serious deliberations that confirmation of a nominee to the Supreme Court should involve.

They attempted to raise suspicions about the motives of nearly every Senator who had any question about the fitness of the nominee, and they blurred over, ignored, misstated, or argued the irrelevance of facts leading to those questions.

Adverse witnesses before the Judiciary Committee were similarly browbeaten, including those who came to the Judiciary Committee to testify out of no apparent motive except their sense of duty to this Nation.

I believe such tactics demean those who use them and demean the Senate.

To hear a Senator during the Rehnquist debate tell it—using words like "diatribe" to describe the speech of a Senator, charging that opponents of Rehnquist "assume the worst in everything," that they make "ludicrous" charges, that "they resolve every ambiguity against Mr. Rehnquist"—no one on this side of the aisle, at least no one who has been labeled as a "liberal" by those who find such labels useful, could vote to sustain any Reagan judicial nominee for the Supreme Court.

For, Rehnquist's advocates have repeatedly charged, that is really the only judgment opponents of Mr. Rehnquist's nomination were making: That he is too conservative for us.

Well, Mr. President, that is not the case, and many of us opposing the Rehnquist nomination have told them that it is not the case.

Those who automatically support President Reagan's judicial nominations may be perfectly sincere about their view of what was happening here.

They may well believe that the only thing at issue here is whether the nominee is conservative enough, or too conservative, and see their own duty as placing their rubberstamp on any nominee to the bench that President Reagan sends us, so long as he is far enough to the right, even though they might not accord the same courtesy to another President.

They may see it as a duty to help the President "win," and to use any available means to accomplish that result.

But that is not how I see my constitutional responsibility, Mr. President. I believe that each nominee is entitled to fair consideration and that the Nation is entitled to the Senate's considered judgment on each nomination, before we approve awarding the Nation's highest judicial offices to anyone for the rest of his or her life.

I believe that Judge Scalia, like Justice Rehnquist before him, has educational credentials enough, is bright enough, and experienced enough to be a Justice of the Supreme Court.

Unlike William Rehnquist, however, I do not find that he has other characteristics or views, or that he has said or done anything, which disqualify him for the Supreme Court.

And, Mr. President, that is in spite of the fact that I believe that in some ways Judge Scalia is more conservative than Justice Rehnquist.

I have examined Judge Scalia's writings and statements with some care.

I find impressive the fact that he makes distinctions such as the one re-

flected in the following 1984 Scalia statement:

They [conservatives] must decide whether they really believe, as they have been saying, that the courts are doing too much, or whether they are actually nursing the less principaled grievance that the courts have not been doing what *they* [emphasis in original] want.

I am prepared to accept at face value, Judge Scalia's assurance to Senator KENNEDY:

I assure you I have no agenda. I am not going on the Court with a list of things I want to do. My only agenda is to be a good judge.

I have no reason to doubt Judge Scalia's credibility, as I did with Justice Rehnquist.

Judge Scalia also testified before the Senate Judiciary Committee:

There are countless laws on the books that I might not agree with, aside from abortion, that I might think are misguided, even immoral. In no way would I let that influence how I might apply them.

I am prepared, too, to take this assurance at face value.

I have no reason to conclude that Judge Scalia is an ideological extremist who first forms conclusions, then reasons backward to justify them.

I have looked carefully at decisions Judge Scalia has rendered on fundamental rights and constitutional protections for civil liberties.

I do not know whether—if I were on a court with Judge Scalia—I would have reached the same conclusions he did. Reasonable men can, and we probably would have—reached different conclusions in many of those cases, especially those that narrowly interpret the constitutional protections for freedom of the press, individual rights and civil liberties.

But in the particular framework of each of these cases, I did not find Judge Scalia's views were based on prejudgment or ideology, but on his interpretation of the facts before the Court.

And, unlike Justice Rehnquist, who so often dissented alone, even from the very conservative majority of the particular Supreme Court on which he sits, I noted that Judge Scalia much more often had the support of some or most of his judicial colleagues for his views.

Were I the President of the United States, I would have found a different nominee for the Supreme Court.

But that is not a proper basis for the judgment I am called upon to make as a U.S. Senator.

I have no reason to doubt the truthfulness, the ethics, or the fairness of Judge Scalia. And I have never believed, said, or implied that his mere conservativeness would disqualify him to be a Justice, even of this already conservative Supreme Court.

As a result, I will vote for this nomination.

Mr. LEVIN. Mr. President, 2 days ago, I stated the reasons for my opposition to the nomination of Justice Rehnquist for Chief Justice. I did not oppose Justice Rehnquist's nomination becuase he is a "conservative." I opposed his nomination because, after a careful study of his record, I concluded that he doesn't properly recognize the Federal courts' role as the guarantor of individual rights, and that his explanations of past actions and statements have not been candid or credible.

We are now voting on another Supreme Court nominee, Judge Antonin Scalia of the D.C. Circuit Court of Appeals. Judge Scalia is also considered to be a "conservative", and I will vote to confirm him.

There are important policy issues on which Judge Scalia and I disagree. But there is no indication that this nominee's policy values are inconsistent with the fundamental principles of American law. There is also no indication that the nominee is so controlled by ideology that ideology distorts his judgment. On the contrary, my impression is that Judge Scalia will be a fair and openminded Supreme Court Justice who will listen to all the arguments, examine all the facts, and decide cases judicially.

I probably will not find all of his decisions to my liking. I probably will not always agree with the reasoning he uses to arrive at his decisions. But his reasoning is likely to be straightforward, clearly expressed, and worthy of respect if not agreement.

I was somewhat troubled by a press account I read soon after Judge Scalia's nomination was announced which discussed his decision not to recuse himself in a 1985 case, Western Union Telegraph Co. versus FCC. Three years earlier, Mr. Scalia had performed consulting services for one of the litigants in this case, AT&T. He faced the question of whether his prior connection with AT&T would bring his impartiality into doubt, and whether, therefore, he should disqualify himself.

The Federal statute (title 28, section 455) says that:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Speaking to the press through a law clerk, Judge Scalia said that his participation in Western Union versus FCC was proper because sufficient time had passed since his involvement with AT&T. His law clerk also said that Judge Scalia had checked with D.C. Circuit Chief Judge Spottswood W. Robinson III "to make sure that 3 years was an adequate time period." (Washington Post, June 22, 1986)

Since I wanted to hear what Judge Scalia himself had to say about this, I asked him in a letter of July 29, 1986 if he did in fact consult with Chief Judge Robinson on the question of whether he should disqualify himself from this case, an if so, what advice the Chief Judge had given him.

Judge Scalia's answer was simple and direct. He told me in a letter of July 30:

I consulted Chief Judge Robinson on the question whether 3 years of disqualification from matters involving AT&T was sufficient to elimnate any appearance of impropriety arising from the fact that I had done consulting work for that company in the past. He advised me that in his view 3 years was ample.

This response satisfied my concerns. Judge Scalia apparently carefully considered the statute on disqualification, consulted with the Chief Judge of his Circuit, and concluded, with the Chief Judge's concurrence, that it was not improper for him to sit on the case. The decision was a judgment call, not an automatic disqualification, and another judge might have decided differently. But I believe that he went about making this decision in the proper way.

I was also troubled by Judge Scalia's response to a question at the news conference where his nomination was announced. He seemed to stumble when asked questions about whether he had gone through a screening process conducted by the Justice Department or whether any administration officials had posed questions to him regarding his views on specific issues.

Because I feel so strongly that this type of "prescreening" process threatens the independence of the Federal judiciary, I decided to ask the nominee directly whether he had gone through such a process. In a letter of August 15, 1986, I asked Judge Scalia the following question:

Did any employees of the Executive Branch or individuals at the request of employees of the Executive Branch ask you any questions about your position on issues that might come before the Supreme Court? If so, please list the issues mentioned, the persons who mentioned them and your answers.

Judge Scalia responded to me on August 19. Again, his response was straightforward:

In connection with my nomination, I have been asked no question by any Executive Branch employee concerning issues that might come before the Supreme Court, nor, to my knowledge, have I been asked any such question by an individual at the request of an Executive Branch employee.

I was satisfied with this response of Judge Scalia's. I have seen no other evidence indicating that he was questioned by administration officials concerning his views on particular issues, and I believe his denial of having been questioned in this way.

This nominee clearly has outstanding intellectual ability. I have found nothing to indicate that he lacks integrity. I will vote to confirm Judge Scalia as an Associate Justice of the Supreme Court.

Mr. DOMENICI. Mr. President, it is a distinct pleasure to rise in support of the nomination of Antonin Scalia to be Associate Justice of the Supreme Court of the United States.

Judge Scalia is a man of strong intellect, integrity, leadership, and achievement. In his 4 years on the court of appeals, he has demonstrated that his powers of legal analysis and his writing abilities are of the highest quality. By his qualifications, experience, and character, he has proven himself to be worthy of the position of Justice of the Supreme Court.

A Supreme Court Justice must be a person with unquestioned integrity: he or she must be honest, ethical, and fair.

A Supreme Court Justice must be a person with strength of character: he or she must possess the courage to render decisions in accordance with the Constitution and the laws of the United States.

A Supreme Court Justice must be a person with human compassion: he or she must respect both the rights of the individual and the rights of society and must be dedicated to providing equal justice under the law.

A Supreme Court Justice must be a person with proper judicial temperament: he or she must understand and appreciate the genius of our federal system and of the delicate checks and balances between the branches of the National Government.

Judge Scalia possesses these qualities.

Judge Scalia has had a distinguished career. Few individuals have been appointed to the Supreme Court with the outstanding qualifications that Judge Scalia possesses. It is a telling comment that the Judiciary Committee, which reviewed this nomination, came to the unanimous conclusion that Judge Scalia should be confirmed by this body.

The report on the nomination also testifies to Judge Scalia's outstanding qualifications. You see, it's only two sentences long. This doesn't mean that the Judiciary Committee didn't carefully review Judge Scalia's qualifications. To the contrary, they made an exhausting review. Anyone who has been around this body for any length of time knows that the shorter the report, the less controversy there is about the nomination. It's only when someone has something bad to say that we write a long report. When everyone is in agreement that the nominee is well-qualified, we write up a short report. So the good news for Judge Scalia is that the report on his nomination is only two sentences long.

But I can't help but feel that we have short-changed Judge Scalia a little bit. The public is entitled to know just how exceptionally well-qualified Judge Scalia is. I'd like to take a few moments to review those qualifications.

Judge Scalia attended Georgetown University and graduated summa cum laude. He graduated magna cum laude from Harvard Law School, where he was the notes editor of the Harvard Law Review. After graduating from law school, he served as a graduate fellow at Harvard. He then was associated with the prestigious Cleveland law firm of Jones, Day, Cockley & Reavis for 6 years. Subsequently, he taught law at the University of Virginia before becoming general counsel of the Office of Telecommunications Policy. He also served as Chairman of the Administrative Conference of the United States. In 1974, he was appointed Assistant Attorney General in charge of the Office of Legal Counsel in the Ford administration. He then taught law at the University of Chicago School of Law. He also was a visiting professor at Stanford Law School and Georgetown Law Center, a visiting scholar at the American Enterprise Institute, and chairman of the administrative law section of the American Bar Association. In 1982, President Reagan appointed him to the U.S. Court of Appeals for the District of Columbia Circuit, considered by many to be the preeminent circuit court in the Nation. He has served on that court with distinction since then. That is many lifetimes worth of achievement for most of us.

Judge Scalia is a man of outstanding intellectual abilities. Anybody who doubts that should go look at the copies of the Federal Reporter which contain his legal opinions. As a scholar and a judge, he has made many contributions to our jurisprudence on administrative law, separation of powers, libel and slander law, and many other areas. Judge Scalia, by all accounts, is well respected by his colleagues on the bench. He is a legal scholar with few equals and has served very capably on the court of appeals.

In sum, Judge Scalia is eminently qualified for the position for which he has been nominated. he has had a distinquished career so far, and now he is properly poised to proceed to the pinnacle of his profession.

I know that some Members of this body have strong ideological differences with Judge Scalia. I respect them for that. It is heartening to see, however, that the Members of this body realize that the vote on this nomination should rest on whether Judge Scalia is qualified, not whether a majority of this body agrees or disagrees with his personal philosophy.

Under the Constitution, the Senate has the duty to offer "advice and consent" on judicial nominees. Congress must scrutinize the nominee to determine whether he or she possesses the qualities that the people have a right to expect in judges. Congress, however, must respect a President's right to appoint qualified persons to the judiciary.

There is an important reason for the Senate to respect the President's choices of qualified judicial nominees. Our constitutional system is a marvelous set of checks and balances. One of the checks on the power of the judiciary is power of the President to appoint men and women who share his vision of the nature of our society and the role of Government.

As long as a nominee is otherwise qualified, the nominee's personal philosophy should not be a consideration unless that philosophy undermines the fundamental principles of our constitutional system or the nominee's dedication to his or her ideological principles is so strong that he or she cannot be an impartial judge. In the absence of such concerns, the Senate must respect the right of a President to nominate qualified candidates of his choosing.

The evidence of Judge Scalia's commitment to our constitutional system and his ability to judge impartially is abundantly clear from his tenure on the court of appeals. His personal ideology, therefore, should play no role in our decision on whether to confirm him.

I would also like to add that it is a distinct pleasure for me to speak on Judge Scalia's behalf because he is a personal friend. I'm sure my colleagues have read the wonderful tributes to Judge Scalia. Every time you read one of these, you see terms such as articulate, energetic, gregarious, intelligent, and quick-witted. I can assure you that these descriptions are 100 percent accurate.

Judge Scalia's nomination is meaningful to me for another reason, as he is the first American of Italian extraction to be nominated to serve on the Supreme Court. This is a magnificent symbol to the Italian-Americans of this Nation that they truly can share in all that this great country has to offer.

President Reagan has repeatedly said that he will pick the very best men and women he can find to serve on our Nation's courts. In this case, he has fulfilled that promise. Judge Scalia is the very best.

In this case, the best also happens to be of Italian extraction. Judge Scalia's father came here from Italy as a young man. His mother also was the daughter of immigrants from Italy. There are millions of Italian-Americans in this country, many of whom started with nothing, many of whom started with immigrant parents who may not have been able to read or write English, such as mine.

Obviously, it is with great pride that we witness one who shares our history and our traditions nominated to serve on the highest court of the Nation. Of course, Italian-Americans are Americans first and last. It is because we are Americans that we applaud a fellow Italian-American's achievement of the American dream. This is truly a success for Italian-Americans and obviously a magnificent success for the American tradition. I have no doubt that Judge Scalia will serve with distinction on the Supreme Court and will make all Americans proud to call him one of their own.

Mr. President, a nominee for Supreme Court Justice of the United States must possess the highest standards of integrity, ethics, and commitment to the cause of justice. He or she must be an individual of proven ability and judgment. Judge Scalia has been thoroughly examined to determine whether he possesses these qualities, and he has not been found wanting. I, therefore, wholeheartedly support this nomination and urge my colleagues to do the same.

I thank the Chair.

Mr. DOLE. This will be the last vote this evening.

The PRESIDING OFFICER. Are there any other Senators desiring to be heard on this matter?

If not, the question is, "Shall the Senate advise and consent to the nomination of Antonin Scalia to be Associate Justice of the Supreme Court of the United States?"

The yeas and nays have been ordered and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from Utah [Mr. GARN] and the Senator from Arizona [Mr. GOLDWATER] are necessarily absent.

I further announce that, if present and voting, the Senator from Utah [Mr. GARN] would each vote "yea".

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 98, nays 0, as follows:

[Rollcall Vote No. 267 Ex.]

YEAS—98

Abdnor	Gore	Metzenbaum
Andrews	Gorton	Mitchell
Armstrong	Gramm	Moynihan
Baucus	Grassley	Murkowski
Bentsen	Harkin	Nickles
Biden	Hart	Nunn
Bingaman	Hatch	Packwood
Boren	Hatfield	Pell
Boschwitz	Hawkins	Pressler
Bradley	Hecht	Proxmire
Broyhill	Heflin	Pryor
Bumpers	Heinz	Quayle
Burdick	Helms	Riegle
Byrd	Hollings	Rockefeller
Chafee	Humphrey	Roth
Chiles	Inouye	Rudman
Cochran	Johnston	Sarbanes
Cohen	Kassebaum	Sasser
Cranston	Kasten	Simon
D'Amato	Kennedy	Simpson
Danforth	Kerry	Specter
DeConcini	Lautenberg	Stafford
Denton	Laxalt	Stennis
Dixon	Leahy	Stevens
Dodd	Levin	Symms
Dole	Long	Thurmond
Domenici	Lugar	Trible
Durenberger	Mathias	Wallop
Eagleton	Matsunaga	Warner
Evans	Mattingly	Weicker
Exon	McClure	Wilson
Ford	McConnell	Zorinsky
Glenn	Melcher	

NOT VOTING—2

Garn	Goldwater

So the nomination was confirmed.

□ 2220

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the nomination was confirmed.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. THURMOND. Mr. President, I ask unanimous consent that the President be immediately notified that the Senate has confirmed the nominations of Chief Justice Rehnquist and Justice Scalia.

The PRESIDING OFFICER. Without objection, it is so ordered.

LEGISLATIVE SESSION

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate resume legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senate resumed legislative session.

OMNIBUS BUDGET RECONCILIATION ACT, 1987

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The majority leader.

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate turn to the consideration of Calendar No. 750, S. 2706, the Budget Reconciliation Act.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 2706) to provide for reconciliation pursuant to section 2 of the concurrent resolution on the budget for fiscal year 1987 (S. Con. Res. 120, 99th Congress).

The Senate proceeded to the immediate consideration of the bill.

The PRESIDING OFFICER. Who yields time?

Mr. DOMENICI addressed the Chair.

The PRESIDING OFFICER. The Senator from New Mexico is recognized.

Mr. DOMENICI. Mr. President, I wonder if the distinguished majority leader will assign the time to the Senator from New Mexico to handle the bill as prescribed by the Budget Act.

Mr. BYRD addressed the Chair.

The PRESIDING OFFICER. The minority leader is recognized.

Mr. BYRD. Mr. President, I will assign a time on this side to Mr. CHILES. I take it there will be no more than brief opening statements this evening.

Mr. DOLE. Mr. President, I will assign time on this side to the distinguished chairman of the Budget Committee, Senator DOMENICI.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. DOMENICI. Mr. President, we are not going to use a lot of time here tonight on this reconciliation bill. But let me just give a quick, brief summary of what it is and where we are, and why we are calling it up.

First of all, I think everybody should know that this is a reconciliation bill that was reported out by the various committees of the U.S. Senate pursuant to the budget resolution. Consequently, it is a bona fide reconciliation bill as prescribed by the Budget Act and its various amendments. It is therefore under a time agreement as stated in that law, and subject to certain constraints and limitations with reference to amendments.

As I understand it, unless the U.S. Senate decides to change the rule, there are 20 hours of debate equally divided, and amendments are limited both as to time and scope.

This reconciliation bill is the result of a budget resolution earlier in the year that sought to bring the deficit within the prescribed reduction levels of the Gramm-Rudman-Hollings Deficit Reduction Limitation Act.

The scoring now, if you were to cost it out to see what it does to the deficit, is about $3.4 to $3.7 billion. I regret to tell the Senate that even if we passed it in its current form in its entirety, and clearly there are many controversial measures within it, but even if we did, it would be a long way from compliance. It would be many billions of dollars short of what is required at the present time to avoid an across-the-board sequester that is currently pending by way of an order at the desk of $19.4 billion in outlays equally divided between defense as prescribed in the law, and domestic programs that are not exempt across the board.

It is a long ways from what we will need even under our projections for the rest of the year. Nonetheless, the Senate should understand that Friday before we recess this U.S. Senate, there is a rather onerous task confronting us.

Pending at the desk is the across-the-board temporary sequester that would comply with the Budget Act at this point in history and bring the deficit as of now based upon all things that have transpired down to $144 billion. It is going to be very dificult for us to avoid voting on that sequester. But we have been working in a bipartisan manner, Senator CHILES advising his side of the aisle, and I advising our side on the Friday event, that temporary sequester, what it really means, and how we might in a bona fide manner seek to avoid a sequester by producing additional savings to this $3.7 billion reconciliation bill so as to put us in a position where we could say to ourselves and to the people of this country, we do not need the sequester because we did our work.

We got the requisite savings and asset sales and/or revenues all added up which will avoid a sequester and still permit us to say we are within the $154 billion limit that we will expect to comply with by the beginning of the next fiscal year, October 1, or thereabouts.