TESTIMONY OF

AUDREY FEINBERC,

ON BEHALF OF THE NATION INSTITUTE

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON THE NOMINATION OF ANTONIN SCALIA

FOR ASSOCIATE JUSTICE OF THE SUPREME COURT

MR. CHAIRMAN and MEMBERS of the COMMITTEE:

I am Audrey Feinberg, consultant to the Supreme Court Watch project of the Nation Institute. I am also an attorney practicing at Paul, Weiss, Rifkind, Wharton & Garrison in New York City. Since 1984, Supreme Court Watch has monitored the record of nominees to the Supreme Court, providing information to the press, public interest groups and the Senate to foster a more informed debate concerning Supreme Court appointments. The Nation Institute is a non-profit private foundation that sponsors research, conferences and other projects on civil rights, civil liberties and public policy issues.

I have been studying Judge Scalia's views for over a year for the Nation Institute, and have read and analyzed virtually all of his judicial opinions as well as his important public statements.*

A review of Judge Scalia's decisions in the U.S. Circuit Court of Appeals for the District of Columbia shows a record that is far removed from mainstream judicial thought. During his few years on the bench, Judge Scalia's rulings have repeatedly espoused extreme views, far to the right of even traditional conservative legal thought. Judge Scalia's opinions not only reflect extreme results, but are based on a misconstruing of precedents and of accepted methods of legal analysis.

Further, Judge Scalia's decisions reveal a remarkably consistent record of failure to support civil liberties

and civil rights, and of narrowly interpreting the Constitution. In case after case, Judge Scalia has shown a closed mind and continuing insensitivity to the needs of women, minorities and the poor. Since his first public statements on these issues until his most recent judicial opinions, Judge Scalia has shown no change or growth.

The Nation Institute has serious reservations about Judge Scalia's qualifications for the position of Associate Justice. His initial judicial record of extremism and steadfast opposition to enforcing basic constitutional rights -- in the name of strict construction -- demands that the Senate examine his political and judicial views with the strictest scrutiny before elevating him to the Supreme Court.

EXTREMISM IN JUDGE SCALIA'S OPINIONS

In this analysis, I aim to highlight the pattern of extremism that constitutes the core of Judge Scalia's decision-making. I present just a few examples.

First, in the area of sex discrimination, Judge Scalia has taken a position that is even farther to the right than the views of Justice Rehnquist, whom this Committee interviewed last week. The Supreme Court recently unanimously decided that sexual harassment in the workplace is actionable sex discrimination, in the case of Meritor Savings Bank v. Vinson 46 S. Ct. Bul. (CCH) B3183 (June 19, 1986). While the Court split on side issues, the majority opinion by Justice Rehnquist and the concurring and dissenting opinions all agreed that sexual harassment is actionable. Judge Scalia, in the court below, joined in a dissenting opinion that would have ruled the other way, holding that sexual harassment is not discrimination. Judge Scalia called the view that sexual harassment is discrimination "bizarre." 760 F.2d 1330 (1985) (dissenting).

A second example is in the area of racial discrimination. Judge Scalia is opposed to school busing and affirma-

tive action, both tools for combating racial discrimination used by the current Supreme Court. He called affirmative action "the most evil fruit of a fundamentally bad seed." Washington University Law Quarterly (1979).

Judge Scalia also imposes a very high standard on all race discrimination plaintiffs. In the straightforward case of Carter v. Ducan-Huggins, Ltd., in which an individual sued her employer, the type of case generally allowed by conservatives, Judge Scalia, dissenting, would have ruled against the plaintiff. Judge Scalia's view was that "differential treatment" is insufficient to prove discrimination. In this case, the black plaintiff proved at trial that she had received a lower salary and lower bonuses than white employees, had her desk hidden in a back room and had been barred from staff meetings. According to Judge Scalia, this was insufficient to prove discrimination. 727 F.2d 1225 (1984) (dissenting). As the majority of Judge Scalia's court wrote, Judge Scalia's view was "without precedent" and would "effectively eviscerate" discrimination laws.

Another example of extremism is Judge Scalia's views on the First Amendment. In the important libel decision of Tavoulareas v. Piro, now vacated and pending before the full D.C. Circuit, Judge Scalia joined in an opinion that not only ruled against the press, but that harshly criticized Washington Post editor Robert Woodward's policy of seeking "hard hitting investigative stories." 759 F.2d 90 (1985) (MacKinnon, J.) vacated and rehearing en banc granted (June 11, 1985). To most conservatives and liberals alike, investigative journalism is a legitimate and respected practice -- but not to Judge Scalia.

In another libel case, Ollman v. Evans and Novak 750 F.2d 970 (1984) (dissenting), Judge Scalia referred to the landmark Supreme Court case protecting freedom of the press, New York Times v. Sullivan, as fulsome -- meaning "offensively excessive or insincere," "loathsome" and "disgusting."

As the above dissents and now vacated or reversed decisions demonstrate, Judge Scalia is often fundamentally out of step with mainstream judicial interpretations.

INSENSITIVITY TO CIVIL RIGHTS, CIVIL LIBERTIES AND CONSTITUTIONAL PROTECTIONS

I have analyzed Judge Scalia's judicial philosophy, as well as his record in fourteen areas: Libel and Freedom of the Press, Freedom of Speech, Government Secrecy, Race Discrimination, Sex Discrimination, Abortion and Privacy, Legal Representation for the Poor, Presidential Power in Foreign Policy, Gun Control, Criminal Law, Death Penalty, Consumer Protection, Labor, and Worker Safety. Over this wide range of significant legal subjects, Judge Scalia never wavers in his insensitivity and indifference to civil rights, civil liberties, and constitutional protections.

Libel and Freedom of the Press

Judge Scalia has repeatedly ruled against journalists in libel cases. In three important libel decisions, he has systematically attempted to curtail the workings of a vigorous and free press.

In the celebrated libel case of Tavoulareas v. Piro, the President of Mobil Oil Corporation and his son sued the Washington Post and others over articles which stated that the President of Mobil Oil used his influence to set up his son in the shipping business and then diverted some of Mobil Oil's shipping business to his son. Judge Scalia joined in the decision by Judge MacKinnon that ruled against the Washington Post. The decision has since been vacated and is pending before the full U.S. Circuit Court of Appeals for the District of Columbia. 759 F.2d 90 (1985) (MacKinnon, J.), vacated and rehearing en banc granted (June 11, 1985).

The decision in Tavoulareas, as noted above, was critical of the Washington Post's policy of seeking "hard

hitting investigative stories," holding that such policy provided evidence of "malice," an element of libel claims. Testimony concerning the Washington Post's policy had been given by editor Robert Woodward, who formerly helped break the story about the Watergate scandal. The decision put investigative journalists under a cloud of suspicion, potentially subjecting them to a wide range of libel suits.

The Tavoulareas decision was widely criticized, prompting columnist William Safire to call Judge Scalia "the worst enemy of free speech in America today," and columnist Anthony Lewis to describe the opinion as a "radical departure from existing law" and a "twisting of principle."

Judge Scalia also would have ruled against the press in the case of Ollman v. Evans and Novak, 750 F.2d 970 (1984) (dissenting), cert. denied, 105 S. Ct. 2662 (1985), in which a professor at the University of Maryland sued two conservative journalists for an article calling him a Marxist. In a six to five decision, the court dismissed the professor's case, ruling that "the challenged statements are entitled to absolute First Amendment protection as expressions of opinion." Judge Scalia, dissenting, would have allowed the professor to proceed to trial. As noted above, in his dissent, Judge Scalia referred to New York Times v. Sullivan, a landmark case protecting American press freedom, as "fulsomely assur[ing]" the press's interests. "Fulsome" is defined in the dictionary as: "offensively excessive or insincere," "offensive to the senses," "loathsome," and "disgusting."

In another libel decision, later reversed by the Supreme Court, Judge Scalia refused to dismiss a suit by a right-wing group that claimed it had been falsely accused of anti-semitism and fascism by journalist Jack Anderson. Judge Scalia decided that the press cannot win summary judgment, and thus dispose of a libel case early in the proceedings, if the plaintiff presents "reasonable" evidence that he was

libeled. The Supreme Court decided that a plaintiff must present "clear and convincing" evidence of libel, a higher standard, to survive a motion for summary judgment. Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (1984), rev'd, 106 S. Ct. 2505 (1986).

In all three of the important libel cases that have come before him, Judge Scalia has ruled against the press.

Free Speech

In the majority of his free speech cases, Judge Scalia has restricted First Amendment freedoms.

In an opinion dated the day after he was nominated to the Supreme Court, Judge Scalia approved the Reagan administration's labeling of three Canadian films on acid rain and the nuclear freeze as "political propaganda." One of the three films, a documentary on acid rain, had been nominated for an Academy Award. The plaintiffs charged that the government labeling, which discouraged distribution of the films, violated the First Amendment. Block v. Meese, slip op. 84-5318 (June 18, 1986).

Further, in a dissent later upheld by a 7-2 decision of the Supreme Court, Judge Scalia wrote that free speech does not encompass non-verbal protests. Judge Scalia permitted the Park Service to remove a group that camped on the Mall in Washington, D.C. to draw attention to the plight of the homeless. Community for Creative Non-Violence v. Watt, 703 F.2d 586 (1983) (dissenting), rev'd sub nom. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). Judge Scalia also joined in an opinion upholding a criminal fine imposed on a woman who stood on the White House sidewalk while holding a cloth banner. United States v. Grace, 778 F.2d 818 (1985) (per curiam). But see Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (1984) (Bork, J.) (involving a clear cut prior restraint on speech).

Government Secrecy

Judge Scalia has repeatedly supported government secrecy, ruling against reporters and others attempting to get information.

In the significant case of In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (1985), reporters sought access to papers filed in court in the libel case by the President of Mobil Oil against the Washington Post. Judge Scalia, writing the majority opinion, denied the reporters' request and upheld the court's right to keep the papers secret. Moreover, Judge Scalia ruled that there is no First Amendment right to see papers filed in a court case prior to the judgment, and there is at best a weak right to see papers after the judgment.

In addition, prior to coming to the bench, Judge Scalia criticized the 1974 amendments to the Freedom of Information Act which provide for public access to government files labeling them "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost/ Benefit Analysis Ignored." He further wrote:

> The defects of The Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth -- that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public, and its surrogate, the press.

Regulation (March/April 1982)

On the bench, Judge Scalia has repeatedly upheld government secrecy against requests for information made under the Freedom of Information Act. For example, Judge Scalia has decided that the F.B.I. need not disclose photographs of a peace march allegedly obtained while investigating Kennedy's assassination. Shaw v. F.B.I., 749 F.2d 58 (1984). He also joined in a decision by Judge Bork that limited access to F.B.I. and other files on the Rosenbergs, who were executed in 1951 for allegedly transmitting information to the Soviet Union about the development of the atomic bomb. Meeropol v. Meese, 790 F.2d 942 (1986) (Bork, J.).

Even in less highly visible cases, Judge Scalia has written opinions favoring government secrecy. He allowed the I.R.S. to withhold information, even when the taxpayer's name and identity were deleted. Church of Scientology v. IRS, slip op. 83-1856 (en banc May 27, 1986) (7-3 decision). He refused to order the government to turn over lists of eligible voters in a union election to the union. International Brotherhood of Teamsters v. National Mediation Board, 712 F.2d 1495 (1983). He also allowed the government to keep secret a liquor manufacturer's information return. Ryan v. Bureau of Alcohol, Tobacco and Firearms, 715 F.2d 644 (1983). He further would have kept secret documents involving foreign policy. Washington Post Co. v. U.S. Department of State, slip op. 80-2469 (Dec. 28, 1982) (denial of rehearing en banc) (dissenting), panel decision vacated as moot, 464 U.S. 979 (1983); but see, Arief v. U.S. Department of the Navy, 712 F.2d 1462 (1983) (Navy must disclose prescription drugs physicians prescribed to Congressmen).

Judge Scalia has also joined in several other opinions that have denied access to government files. Hill v. U.S. Air Force, slip op. 85-5805 (July 18, 1986) (per curiam) (Air Force need not search further for files on civilian employee); Weisberg v. Webster, 749 F.2d 864 (1984) (Wilkey, J.) (FOIA plaintiff's failure to respond to discovery results in dismissal of request concerning President Kennedy's assassination); Ripskis v. Department of Housing and Urban Development, 746 F.2d 1 (1984) (per curiam) (denies disclosure of employee evaluations); Center for Auto Safety v. EPA, 731 F.2d 16 (1984) (Richey, J.) (denies further disclosure of information on auto emmissions); Miller v. Casey, 730 F.2d 773 (1984) (Wilkey, J.) (denies disclosure of historical material on Albania during World War II); but see Public Citizen Health Research Group v. FDA, 704 F.2d 1280

(1983) (Edwards, J.) (remands for possible further disclosure of scientific studies on intraocular lenses).

In short, Judge Scalia narrowly interprets the Freedom of Information Act to deny disclosure of government information in the vast majority of cases that have come before him.

Race Discrimination

Judge Scalia opposes affirmative action and school busing as remedies for discrimination. He also imposes a high burden on those who bring lawsuits for race discrimination, even in straightforward cases involving individuals suing their employers.

In the case of Carter v. Duncan-Huggins, Ltd., as described above, a black employee of a fabric and furniture showroom proved that she had been treated differently from white employees -- she had received a lower salary, received lower bonuses, had her desk hidden in a back room, and been barred from staff meetings. The majority of the court decided that she had a valid claim for race discrimination. Judge Scalia, dissenting, would have dismissed the employee's claim because "differential treatment" is insufficient to prove discrimination. The majority of the court criticized Judge Scalia's opinion as "without precedent," stating that it would "effectively eviscerate" a major discrimination statute. 727 F.2d 1225 (1984) (dissenting).

Judge Scalia has also ruled against blacks asserting discrimination claims in several other cases: Toney v. Block, 705 F.2d 1364 (1983); Poindexter v. F.B.I., 737 F.2d 1173 (1984) (concurring in part and dissenting in part); Morris v. Washington Metropolitan Area Transit Authority, slip op. 84-5306 (Jan. 17, 1986) (Bork, J.). In a claim of reverse discrimination by white firemen, Judge Scalia joined the majority in overturning the lower court's trial verdict

to rule in favor of the whites. Bishop v. District of Columbia, 788 F.2d 781 (1986) (Silberman, J.).

On the issue of affirmative action, Judge Scalia, prior to coming to the bench, wrote:

> I am, in short, opposed to racial affirmative action for reasons of both principle and practicality.

Judge Scalia then went on to call affirmative action "the most evil fruit of a fundamentally bad seed." Washington University Law Quarterly (1979).

Judge Scalia, prior to coming to the bench, also strongly complained about court-imposed school busing to desegregate schools, stating:

> In the busing cases, which you mentioned, there was no need for the courts to say that the inevitable remedy for unlawful segregation is busing. Many other remedies might have been applied.

An Imperial Judiciary: Fact or Myth, American Enterprise Institute (Dec. 12, 1978).

Sex Discrimination

Judge Scalia has shown himself to be insensitive to victims of sexual harassment and sex discrimination.

As noted above, the Supreme Court recently ruled unanimously that sexual harassment is actionable discrimination under the civil rights laws, although it then split on side issues such as what evidence is admissible in sexual harassment trials. In a dissent from a denial of a motion for a hearing en banc below, Judge Bork, joined by Judges Scalia and Starr, suggested that sexual harassment claims are not actionable discrimination. The opinion notes "the awkwardness of classifying sexual advances as 'discrimination.'" The opinion goes on to state that the civil rights laws do not protect women from unwelcome lesbian advances, and:

> [t]hat bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender.

Vinson v. Taylor, 760 F.2d 1330 (1985) (dissenting), aff'd, Meritor Savings Bank, FSB v. Vinson, 46 S. Ct. Bul. (CCH) B3183 (June 19, 1986). Therefore, Judge Scalia's views on sexual harassment were rejected unanimously by the Supreme Court.

In another case, Judge Scalia affirmed a jury's finding of no sexual harassment, without reaching the issue of whether sexual harassment is actionable discrimination. Bouchet v. National Urban League Inc., 730 F.2d 799 (1984).

Also, Judge Scalia joined in an opinion that refused to invalidate a company's policy of forcing women of childbearing age to choose between being sterilized or losing their jobs. The jobs entailed possible exposure to lead. Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444 (1984) (Bork, J.).

In addition, Judge Scalia opposes affirmative action as a remedy for sex discrimination, writing:

> Sex-based affirmative action presents somewhat different constitutional issues [than racial affirmative action] but it seems to me an equally poor idea.

Washington University Law Quarterly (1979).

Abortion and Privacy

Judge Scalia is firmly opposed to a woman's legal right to abortion, as enunciated in the Supreme Court case of Roe v. Wade, 410 U.S. 113 (1973).

While Judge Scalia has not decided an abortion case, he discussed his views about abortion in a debate, stating:

> In the abortion situation, for example, what right exists - the right of the woman who wants an abortion to have one, or the right of the unborn child not to be aborted?
>
> * * *
>
> But the courts have enforced other rights, so-called, on which there is no societal agreement, from the abortion cases, at one extreme, to school dress codes and things of that sort. There is no national consensus about those things and there never has been.

> The courts have no business being there. That is one of the problems; they are calling rights things which we do not all agree on.

An Imperial Judiciary: Fact or Myth, American Enterprise Institute (Dec. 12, 1978).

Joining in an opinion by Judge Bork, Judge Scalia was highly critical of the Supreme Court's privacy decisions, stating that "no principle is discernible in [the] decisions." Dronenburg v. Zech, 746 F.2d 1579 (1984) (Bork, J., denial of rehearing en banc) (upholding Navy regulation discharging homosexuals).

Judge Scalia also joined in an opinion that authorized the Reagan administration to cut off government funds to Planned Parenthood in Utah. Instead, the funds would go to the Utah State Department of Health, which had a history of refusing to provide confidential family planning services to minors. Planned Parenthood Association v. Schweiker, 700 F.2d 710 (1983) (McGowan).

Legal Representation for the Poor

Judge Scalia has proved insensitive to the needs of the poor for legal representation to protect their rights.

In a dissenting opinion, Judge Scalia would have dismissed a poor woman's sex discrimination claim because she did not have the funds to travel from Missouri to Washington, D.C. for trial. The woman said she would have sufficient funds in a month. Her poverty resulted from her being fired from her job as a saleswoman, and she alleged that she was fired because her employer wanted an all-male salesforce. The majority of the Court granted the woman a continuance of her trial date. Trakas v. Quality Brands, Inc., 759 F.2d 185 (1985) (dissenting).

Judge Scalia also joined in an opinion that authorized the government to terminate funding to the National Juvenile Law Center, a nonprofit group that brought suits on behalf of children. The Law Center alleged that the govern-

ment was attempting to halt litigation pending against it. National Juvenile Law Center v. Regency, 738 F.2d 455 (1984) (per curiam).

Presidential Power in Foreign Policy

Judge Scalia has closed the courthouse doors to cases involving foreign policy or military policy. He grants the President almost complete power to decide issues of foreign or military policy, to the exclusion of the courts and Congress.

In the case of Sanchez-Espinoza v. Reagan, 770 F.2d 202 (1985), a group of Congressmen and Nicaraguan citizens sued to stop the Reagan Administration from sending secret aid, channeled through the C.I.A., to the Contras in Nicaragua. Congress had refused to appropriate such aid. Judge Scalia ruled that he would not reach the merits of the case, deciding that the courts should not get involved in such issues.

In the case of Arellano v. Weinberger, Honduran citizens sued to stop the seizure of their ranches for use as sites for military bases. The majority of the court permitted the case to proceed. Judge Scalia, dissenting, would not have let the court get involved in a military issue. As he wrote, "we cannot expect or require the Commander-in-Chief to take us (much less the plaintiffs) into his confidence regarding the activities now in hand." 745 F.2d 1500 (1984) (dissenting), vacated and remanded, 105 S.Ct. 2353 (1985), on remand, 788 F.2d 762 (1986) (dismissed as moot).

A notable exception to Judge Scalia's general deference to the President, is a dissenting opinion to a denial of a rehearing en banc, that would have heard the claims of Japanese-Americans interned during World War II. Judge Scalia and three other judges joined in an opinion by Judge Bork that criticized a "rule of absolute deference to the political branches whenever 'military necessity' is claimed however irrelevant and however spurious." Hohri v.

United States, slip. op. 84-5460 (June 13, 1986) (Bork, J. dissenting) (denial of rehearing en banc). Apparently Judge Scalia is willing to second-guess a past President, but not President Reagan. He has consistently supported President Reagan's executive power to conduct foreign policy in Latin America.

Gun Control

Judge Scalia has increased the availability of handguns in this country.

Judge Scalia ruled that under the Gun Control Act, the federal government could issue firearms dealers' licenses to people without bona fide commercial enterprises and without separate business premises and significant commercial operations. National Coalition to Ban Handguns v. Bureau of Alcohol, Tobacco & Firearms, 715 F.2d 632 (1983).

Judge Scalia also refused to allow the widow of a robbery victim killed with a stolen gun to sue the owner of the unregistered gun. Romero v. National Rifle Association, 749 F.2d 77 (1984).

Criminal Law: Exclusionary Rule

Judge Scalia has strongly criticized the exclusionary rule, which requires judges to exclude from criminal trials evidence obtained by unconstitutional means.

In a dissenting opinion in a case involving double jeopardy issues, Judge Scalia made a special point of attacking the exclusionary rule, which was not at issue. He harshly criticized the majority's opinion because it will "bring the criminal law process into greater public disrepute than the exclusionary rule, . . ." and it will "more certainly release the guilty than does the exclusionary rule." United States v. Richardson, 702 F.2d 1079 (1983) (dissenting), rev'd, 468 U.S. 317 (1984). But see United States v. Lyons, 706 F.2d 321 (1983) (Edwards, J.) (simply enforcing, but not expressly approving of the exclusionary rule).

Death Penalty

Judge Scalia strongly supports the death penalty. Prior to coming on the bench, Judge Scalia disagreed with the Supreme Court's death penalty opinions, stating:

> An example would be the Court's decision on capital punishment. There is simply no historical justification for that, nor could the Court claim to be expressing a consensus of modern society. It is just not true.

An Imperial Judiciary: Fact or Myth, American Enterprise Institute (Dec. 12, 1978).

Further, Judge Scalia dissented from the majority of the court's decision that the FDA was obligated to regulate lethal injections, writing that the majority was enlisting the F.D.A. in "preventing the states' constitutionally permissible imposition of capital punishment." Chaney v. Heckler, 718 F.2d 1174 (1983)(dissenting), rev'd, 105 S. Ct. 1649 (1985).

Consumer Protection

Judge Scalia has denied consumers' claims for better labeling of food and has often closed the courthouse doors to suits by consumers.

Judge Scalia decided that meat products need not be labeled to indicate mechanical deboning, which leaves some bone in products such as frankfurters and sausages. Community Nutrition Institute v. Block, 749 F.2d 50 (1984).

Further, Judge Scalia wrote that consumers had no standing to sue the government over orders that raised the price of milk. Community Nutrition Institute v. Block, 698 F.2d 1239 (1983) (concurring in part and dissenting in part), rev'd, 467 U.S. 340 (1984). He also held that a consumer unrepresented by a lawyer could not initiate a second suit concerning a defective car, when his first pleadings were deficient. Dozier v. Ford Motor Co., 702 F.2d 1189 (1983).

Labor

In a series of significant labor cases, Judge Scalia restricted unions' ability to sue on behalf of their members, to enforce collective bargaining agreements, and to organize a workforce.

In an important decision joined by Judge Scalia, and then reversed by the Supreme Court, Judge Scalia would have denied unions standing to sue on behalf of their members in many circumstances. In this case, the union was suing to obtain government training aid for auto workers laid-off due to competition from foreign imports. International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Donovan, 746 F.2d 839 (1984) (Haynsworth, J.), rev'd, 91 L. Ed. 2d 228 (1986). In a companion case, Judge Scalia decided that courts do not have the power to review the Labor Department's allocation of training aid to workers. 746 F.2d 855 (1984), cert. denied, 106 S. Ct. 81 (1985). See also California Human Development Corp. v. Brock, 762 F.2d 1044 (1985) (concurring) (court cannot review distribution of funds to states for training of migrant farm workers.)

In another important case, Judge Scalia effectively destroyed the benefit to unions of many collective bargaining agreements. Judge Scalia joined in an opinion upholding the NLRB's ruling that an employer can shift work to a non-union division when a union fails to agree to midterm contract concessions. The NLRB's position was the result of some deft political maneuvering. The NLRB had initially ruled in favor of the union in 1982, but then snatched the case back from the courts and changed its mind in 1984, after a majority of its members became Reagan appointees. International Union, United Automobile, Aerospace and Agricultural Implement Workers v. NLRB, ("Milwaukee Springs") 765 F.2d 175 (1985) (Edwards, J.).

In addition, Judge Scalia restricted a union's ability to organize a workforce. Judge Scalia joined in an

opinion holding that even if "an employer has committed, 'outrageous' and 'pervasive' unfair labor practices" during an organizing campaign, the NLRB has no power to grant the union bargaining status absent a manifestation of majority employee support. Conair Corp. v. NLRB, 721 F.2d 1355 (1983) (Ginsburg, J. and Wald, J.), cert. denied, 467 U.S. 1241 (1984).

In a dispute between a union and an individual worker, as opposed to a union and an employer, Judge Scalia sided with the union against the individual. Judge Scalia joined in a decision that dismissed a suit by an employee who lost her job when a union boycotted Soviet cargo in protest of the Soviet invasion of Afghanistan. Charvet v. International Longshoremen's Association, 736 F.2d 1572 (1984) (Edwards, J.).

Judge Scalia has issued mixed opinions on employers' obligation to bargain. E.g., Department of the Treasury v. FLRA, slip op. 83-1355 (June 7, 1985), (employer need not bargain with union); American Federation of Government Employees v. FLRA, 702 F.2d 1183 (1983) (employer must bargain with union). Judge Scalia has also ruled for both unions and employers regarding unfair labor practices. E.g., see National Association of Government Employees v. FLRA, 770 F.2d 1223 (1985) (union); Road Sprinkler Fitters Local Union No. 669 v. NLRB, 778 F.2d 8 (1985) (employer); Drukker Communications, Inc. v. NLRB, 700 F.2d 727 (1983) (employer).

Worker Safety

Judge Scalia generally refuses to punish companies for violating worker safety standards.

In one case in which Judge Scalia dissented, the court fined a manufacturer of anti-tank test missiles $10,000 for unsafe working conditions causing an explosion that injured six workers. Ensign-Bickford Co. v. OSHRC, 717 F.2d 1419 (1983) (dissenting), cert. denied, 466 U.S. 937 (1984).

In at least two other cases, Judge Scalia ruled with the majority of the panel against worker safety. Gates & Fox Co. v. OSHRC, 790 F.2d 154 (1986) (Scalia, J.); In re United Steel Workers of America, 783 F.2d 1117 (1986) (per curiam). See Donovan v. Williams Enterprises Inc., 744 F.2d 170 (1984) (Bork, J.) (ruling in part against employer and in part for employer); but see Brock v. Cathedral Bluffs Shale Oil Co., slip op. 84-1492 (July 29, 1986).

Judicial Philosophy

Judge Scalia is a strong advocate of judicial restraint -- limiting the role of courts in our society and restricting access to the courts. These restrictions prevent individuals from suing to uphold their civil liberties and civil rights, and in effect promote the strong in our society over the weak.

Judge Scalia's view of judicial restraint includes a narrow interpretation of standing rules and other technical legal concepts resulting in greatly restricted access to the courts. This restricted access is particularly damaging to individuals and public interest groups trying to sue to protect their rights. E.g., Center for Auto Safety v. National Highway Traffic Safety Administration, slip op. 85-1231, 85-1348 (June 20, 1986) (dissenting) (denying standing to sue over fuel economy standards for cars and light trucks); International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Donovan, 746 F.2d 855 (1984) (Haynsworth, J.), rev'd, 91 L. Ed. 2d 228 (1986) (denying standing to union suing for training benefits for its members).

Judge Scalia's justification for judicial restraint is that the unelected courts should defer to the democratically elected branches. However, in practice, Judge Scalia generally defers only to the President and his unelected bureaucracy, and not to Congress. E.g., Sanchez-Espinoza v.

Reagan, 770 F.2d 202 (1985) (approving President Reagan's aid to Nicaragua over the objection of Congressmen).

CONCLUSION

Judge Scalia's opinions on a wide range of issues reflect extreme conservative views that are outside the mainstream of established judicial analysis. Moreover, he has demonstrated a lack of commitment to civil rights and liberties and has shown no potential for change on any of these positions.

As a foundation dedicated to the promotion of civil rights and liberties and to the enforcement of the Constitution, the Nation Institute is deeply disturbed by the record of Judge Scalia. If confirmed, Judge Scalia is likely to serve on the Supreme Court into the twenty-first century. With this in mind, the Senate should carefully evaluate whether Judge Scalia's restrictive views on the basic protections of our Constitution are best suited for guiding the nation, not just for today, but for far into the future.

---

* I gratefully acknowledge the research assistance of Nancy DiFrancesco in preparing this testimony.