The CHAIRMAN. Our first panel this morning, and if they will please come to the table: Ms. Carla Hills, of the firm of Latham, Watkin & Hills of Washington; dean Gerhard Casper, dean of the University of Chicago School of Law, Chicago, IL; Dean Paul Verkuil, president of the College of William & Mary. If you will come in that order and sit in that same order. Also, Mr. Lloyd Cutler, Wilmer, Cutler & Pickering, Washington, DC. How about Erwin Griswold, is he here? If you will sit in that seat right there, Mr. Griswold.

Now, we are going to give you 3 minutes apiece to express yourselves. If you can do it in less time, that will be fine; but you can take 3 minutes.

Now, if you have got written statements, if you wish to put it in the record, we will put the entire statement in the record.

But first, I will swear you. If you will stand up and hold up your right hand.

Will the testimony given to this Chair be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. HILLS. It will.

Mr. CASPER. It will.

Mr. VERKUIL. It will.

Mr. CUTLER. It will.

Mr. GRISWOLD. It will.

The CHAIRMAN. Have a seat

Ms. Hills, you may proceed.

TESTIMONY OF A PANEL CONSISTING OF CARLA HILLS, LATHAM, WATKINS & HILLS, WASHINGTON, DC; GERHARD CASPER, DEAN, SCHOOL OF LAW, UNIVERSITY OF CHICAGO, CHICAGO, IL; PAUL VERKUIL, PRESIDENT AND PROFESSOR OF LAW, COLLEGE OF WILLIAM AND MARY, WILLIAMSBURG, VA; LLOYD CUTLER, WILMER, CUTLER & PICKERING, WASHINGTON, DC; AND ERWIN GRISWOLD, WASHINGTON, DC

Ms. HILLS. Thank you, Mr. Chairman.

Mr. Chairman, and the distinguished members of this committee: I have worked with, known, admired, and been enriched by the wisdom of Judge Scalia since 1972. He was then chair of the Administrative Conference of the United States, and I was just named to that body.

One cannot imagine a wider group of Federal issues than those addressed by the conference, or a wider divergence of views than those held by its members.

Within intellectual precision, unfailing humor, and relentless fairness Judge Scalia accommodated all opinion and faithfully caused our deliberations to be well recorded.

He was at all times constructive in helping that body build a consensus even when it did not reflect his own judgment.

When I went to lead the Civil Division of the Justice Department in March 1974, I was pleased to learn that my colleagues there held him in the same high regard as did I, a regard that increased when he came to head the Office of Legal Counsel later that year.

Those were difficult days that we shared through the first months of President Ford's administration. Seldom, if ever, have so

many complex and emotional legal issues been so prominent and so controversial.

Yet during that period, and in the years following, when I sought his counsel, from the Department of Housing and Urban Development, he was ever the patient, careful and reasonable adviser.

In writing and by voice, formally and informally, he expressed his view on a wide range of issues, issues often of profound constitutional importance. Never did I perceive or hear an allusion to his having a bias or a leaning. He was respected for his objectivity, clarity, judgment and integrity.

In my view, the Senate has now a rare opportunity to celebrate our Supreme Court by its confirmation of Judge Scalia's appointment to that institution.

The essence of our legal system is its ability to provide a government that rules by law rather than by individual. The fairness of that system depends on the intellectual soundness and, thus, predictability of opinions that emanate from the Supreme Court.

However wise the Justices might be judged on the basis of any number of standards, the acceptance of their ruling by our body politic depends on how the public perceives the Court's work over the course of years. Inarticulate or fragmented decisions serve no purpose; well-reasoned opinions that bind the Court and set forth lucid rationales will serve all of us quite well indeed.

Judge Scalia brings distinction and respect to this Court. His ability to reason, write, and persuade is his hallmark.

That he will do this, all of this, with energy and good humor makes it a happy privilege for me to appear here in support of his confirmation.

The CHAIRMAN. Thank you very much. Dean Casper, we are glad to hear from you.

STATEMENT OF GERHARD CASPER

Mr. CASPER. Mr. Chairman and members of the committee, my name is Gerhard Casper, and I am the dean of the University of Chicago Law School. I am, of course, not appearing before you in my capacity as dean. I am referring to that role only because it made me for 4 years what FBI investigators like to call the nominee's supervisor; though God knows that there are few jobs more challenging than the task of supervising the University of Chicago Law School faculty.

I am well familiar with Judge Scalia's academic work and reasonably familiar with his judicial work. Judge Scalia possesses what I would call a tenacious intellect. He is intellectually refined and takes great pleasure in measuring a problem.

To put it differently: He is exceptionally probing in his investigation of legal matters. He is thoughtful and straightforward.

Of course, Judge Scalia is not a mere technician. He understands fully the intellectual, moral and practical difficulties inherent in most controversial legal issues. The best example from Judge Scalia's writings to illustrate my point is his article on judicial review of administration action in the 1978 Supreme Court Review, of which, incidentally, I am an editor. His article on the Supreme Court decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural*

Resources Defense Council is a masterful and sweeping critique of the D.C. Circuit, the Supreme Court, and Congress failure to update the Administrative Procedure Act.

In recent weeks, I have often been asked what Judge Scalia's ideology is. I have noticed that the distinguished members of this committee also use the term ideology with great frequency. I am frankly not sure what everybody means when they say ideology.

For instance, President Reagan a few weeks ago seemed to employ the term mainly to criticize the opponents of the Manion nomination.

If you ask me what Judge Scalia's view of the Constitution and the rule of law is, I am inclined to answer that he believes that the Constitution and the laws mean what they say, and that it is not beyond human endeavor to determine the meaning of what they say. If you call that ideology, so be it.

I do not mean to suggest that, in my opinion, Judge Scalia is invariably right. I have had many disagreements with him. For instance, on the constitutionality of the legislative veto. But there is no question in my mind that Judge Scalia at all times attempts to be faithful to what we may call the American concept of the rule of law.

Permit me to say a word about how to evaluate judges. There was a time not too long ago when it was considered respectable and valuable for lawyers to sit down and do a painstaking, detailed analysis of a judge's single decision, keeping in mind the dictum of one of the great State judges of all time, former Justice Schaefer of the Illinois Supreme Court who died earlier this year.

The principal stimulus, Justice Schaefer said, comes from the facts of the case. The interaction between fact and law is close and continuous.

Without having studied the subject empirically, I have a sense that this genre of analysis is increasingly disfavored. Its place seems to be taken by more speculative endeavors which seem less interested in understanding the judge than in the approval or disapproval of outcomes.

In this world view, the courts are filled with heroes and villains rather than with professionals to whose professional performance we apply professional standards.

The CHAIRMAN. Your time is up. I have got a red light there.

Mr. CASPER. May I just give you my punch line, Mr. Chairman?

If one applies professional standards to Judge Scalia's case, one must confirm this splendid nomination.

Thank you.

The CHAIRMAN. Thank you very much. We appreciate your appearance.

Mr. Verkuil, how do you pronounce that?

Mr. VERKUIL. Mr. Chairman, it is Verkuil. Thank you for inquiring.

The CHAIRMAN. You are from the College of William and Mary. You are also a professor of law, are you?

Mr. VERKUIL. I am president and professor of law at the College of William and Mary.

The CHAIRMAN. Double duty.

Mr. VERKUIL. Well, I guess you might say that.

The CHAIRMAN. Do you get extra pay for that?

Mr. VERKUIL. I will inquire about that, Senator. I have not separated them.

The CHAIRMAN. You may proceed.

STATEMENT OF PAUL VERKUIL

Mr. VERKUIL. I am here, of course, in my individual capacity.

I would first like to say I am not here to testify in a partisan role or as one who necessarily shares the same views as Judge Scalia on legal issues. I am here to testify about why I believe he will make an outstanding Justice.

I shall emphasize two aspects of his background that bear upon his qualifications for the high post he seeks: his judicial temperament and his legal and scholarly qualifications. Temperament is not easy to describe or predict, but it is the best way I know to get at the quality of fairness that is essential to the judicial role.

My focus is upon Judge Scalia's openmindedness and willingness to engage in legal debate; what I might call his exuberant argumentativeness. These qualities translate into fairmindedness. I first had an opportunity to know Judge Scalia as a professional colleague 15 years ago when he was chairman of the Administrative Conference of the United States and I was a consultant to that organization.

From the outset our professional relationship was marked by a good-humored exchange of views. The first issue I recall debating in depth was the role of the courts on judicial review of informal agency rulemaking. This issue—that is, determining the proper relationship between the courts and agency in the promulgation of rules—has occupied the courts for years. I found Judge Scalia to be a thoughtful, persistent, and insightful student of the law. The article and Conference recommendation that came out of these efforts was much in debt to his efforts.

Later I had the opportunity to work with Judge Scalia on the Administrative Law Section of the American Bar Association during the period he was chairman. Here he not only demonstrated his usual astuteness on the issues, but he displayed a remarkable ability to distill and integrate widely differing views into effective statements of position. In fact, I have never seen a better coalition builder than Scalia. He uses his charm, humor, and intellect, frequently in that order, to bring people to a common position. This quality is indicative of a temperament that will, and I am sure does, serve the judiciary well. It also speaks to his likely success as a Justice on the High Court.

My most extended exposure to Judge Scalia was during the summer of 1984 when we both participated in the Anglo-American Legal Exchange at the invitation of the Chief Justice of the United States. This program dealt with the role of judicial review of administrative action in England and the United States, and involved a visit by a group of eight American lawyers and judges with a like group in the United Kingdom. Judge Scalia led many of the discussion groups and did so in an informed and entertaining manner that made him a favorite of the British team as well as our own.

To a country that is embarking on a more active period of judicial review over administrative action, he offered some sobering words of caution, yet in a manner that rallied many to his side. The ability to build a case, defend it, and where the occasion demands, abandon it is his in substantial measure.

Senator, I see my time is up. I am going to let you refer to my written testimony for his scholarly works which I have commented upon, and I would only conclude that I hope this Justice meets your standards, the demanding standards of the committee and the Senate.

Thank you.

The CHAIRMAN. Thank you very much. You have asked that your statement be put in the record, and we will put it in.

Mr. VERKUIL. Thank you.

[Prepared statement follows:]

Testimony of Paul R. Verkuil
Before the Committee on the Judiciary,
United States Senate,
in support of the nomination
of Antonin Scalia
August 6, 1986

May it please the Committee:

I am president of the College of William and Mary and a Professor of Law. I hold an A.B. from William and Mary (1961) and an LL.B. from the University of Virginia (1967), where I served as an editor of the Law Review. After graduation I practiced law in New York City at the firms of Cravath, Swaine and Moore and Paul, Weiss, Rifkind, Wharton & Garrison. I was professor of law at the University of North Carolina from 1971 to 1978 and Dean of Law at Tulane University from 1978 to 1985. My field of legal specialization is administrative law and government regulation and I have published numerous articles and books on the subject, including Public Control of Business (19[illegible]) (with D. Boies), Administrative Law and Process (1985) (with R. Pierce and S. Shapiro) and Economic Regulation of Business (2d ed 1985) (with T. Morgan and J. Harrison).

I am not here to testify in a partisan role or as one who necessarily shares the same views as Judge Scalia on most legal issues. I am here to testify about the person I know as Nino Scalia and why I believe he will make an outstanding Justice. I shall emphasize two aspects of his background that bear upon his qualifications for the high post he seeks: his judicial temperament and his legal and scholarly qualifications. Temperament is not easy to describe or predict but it is the best way I know to get at the quality of fairness that is essential to the judicial role. My focus is upon Judge Scalia's open mindedness and willingness to engage in legal debate; what might be called his exuberant argumentativeness. These qualities translate into fairmindedness. I first had an opportunity to know Judge Scalia as a professional colleague 15 years ago when he was Chairman of the Administrative Conference of the United States and I was a consultant to that organization. From the outset our professional relationship was marked by a good humored exchange of views. The first issue I recall debating in depth was the role of the courts on judicial review of informal agency rulemaking. This issue, i.e., determining the proper relationship between the courts and agency in the promulgation of rules, has occupied the courts for years. I found Judge Scalia to be a thoughtful, persistent and insightful student of the law. The

article and Conference recommendation that came out of these efforts was much in debt to his efforts. See Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1973); ACUS Rec. 74-4.

Later I had the opportunity to work with Judge Scalia on the Administrative Law Section of the American Bar Association during the period he was chairman. Here he not only demonstrated his usual astuteness on the issues, but he also displayed a remarkable ability to distill and integrate widely differing views into effective statements of position. In fact I have never seen a better coalition builder than Scalia. He uses his charm, humor and intellect, frequently in that order, to bring people to a common position. This quality is indicative of a temperament that will and I'm sure does serve the judiciary well; it also speaks to his likely success as a justice on the high court.

My most recent extended exposure to Judge Scalia was during the summer of 1984 when we both participated in the Anglo-American Legal Exchange at the invitation of the Chief Justice of the United States. This program dealt with the role of judicial review of administrative action in England and the United States and involved a visit by a group of eight American lawyers and judges with a like group in the United Kingdom for two weeks there and a return visit to the United States. Judge Scalia lead many of the discussion groups and did so in an informed and entertaining manner that made him a favorite of the British team as well as his own. To a country that is embarking on a more active period of judicial review over administrative action, he offered some sobering words of caution, yet in a manner that rallied many to his side. The ability to build a case, defend it, and where occasion demands, abandon it is his in substantial measure.

On the scholarly front, Judge Scalia has built a solid reputation during his years in government and on the University of Virginia and Chicago law faculties. The articles I know best are "Procedural Aspects of the Consumer Product Safety Act," 20 U.C.L.A. L. Rev. 899 (1973) (co-authored with Frank Goodman), "Vermont Yankee: The APA, The D.C. Circuit and the Supreme Court," 1978 Sup. Ct. Rev. 345 (1978); and "The ALS Fiasco--A Reprise," 47 U. Chi. L. Rev. 57 (1979). In the first article he laid out a roadmap to understanding the complicated procedures established for the CPSC, especially as they related to judicial review; in the second article he took what was to become his own court to task for ignoring the clear message of the Supreme Court to desist from adding procedural requirements to agency rulemaking as part of the process of judicial review. In the third he dealt directly with a sensitive

subject in the administrative process--the proper role and authority of administrative law judges. Judge Scalia was also instrumental in articulating the rationale for challenging the legislative veto in Chadha v. INS, a case he briefed amici curiae for the American Bar Association.

Much of his administrative law writing, including that which appeared while he edited Regulation magazine, has to do with restraining judicial oversight of agency action. This willingness to let the political process operate in the agency context comes across in his judicial opinions. For example, in Community Nutrition Institute v. Block, 698 F. 2d 1239, 1255 (D.C. Cir. 1983) his dissent on the question of consumer standing under the Agricultural Marketing Agreement Act formed the basis for Justice O'Connor's unanimous opinion in the Supreme Court 467 U.S. 340 (1984). In Chaney v. Heckler, 718 F. 2d 1174, 1192 (D.C. Cir. 1983) rev'd 105 S. Ct. 1649 (1985) his dissent formed the basis of the Court's decision to hold unreviewable an agency's decision not to prosecute. In Synar v. United States, 626 F. Supp 1374 (D.D.C. 1986), the Gramm-Rudman case with which this committee is surely familiar, Judge Scalia participated in the panel that decided the Congressional removal provisions of the Comptroller General were unconstitutional. That decision was upheld by the Supreme Court in Bowsher v. Synar on July 7, 1986. The panel's careful analysis of the leading precedent on removal (Humphrey's Executor v. United States) and its refusal to adopt the broader non-delegation argument of plaintiff has the mark of Scalia's approach--judicial intervention only so far as is necessary to vindicate separation of powers concerns.

This is likely to be a continuing theme for a judge who has reservations about judicial intervention. It is my firm belief, however, that while his views once formed are strongly held they are also consistent across whatever philosophical issue is presented. In this sense Judge Scalia has the makings of another John Marshall Harlan, a judge universally respected for his restraint during the Warren Court years. What strikes me as most relevant from his background with which I am familiar are his commitment to analysis, debate, argument and coalition building. These qualities are important because they suggest a willingness to hear the other side which is the essence of fairness. He has an exceptional talent for judging and I believe he will make a splendid Justice of the Supreme Court, should the Senate see fit to confirm him.

The CHAIRMAN. The Honorable Erwin Griswold. Dean Griswold, we are honored to have you here before us.

STATEMENT OF ERWIN GRISWOLD

Mr. GRISWOLD. Mr. Chairman and members of the committee, I am Erwin Griswold, now a practicing lawyer here in Washington, having been a dean of the Harvard Law School and Solicitor General of the United States, and, I may add, by appointment of President Kennedy, a member of the Civil Rights Commission at a time when it was active and effective.

My first acquaintance with Judge Scalia was more than 25 years ago when he came to the Harvard Law School as a student. I cannot say that I have any memory of him during the first year, but at the end of the first year, he achieved a distinguished record in the very top range of the class. And I did observe him and see him during the next 2 years.

He became a member of the board of the Harvard Law Review and at the end of his second year became note editor of the Law Review, a post which he filled during his third year at school. He received his degree magna cum laude, which meant that he had an A average throughout his work at the law school.

The year following his graduation he spent as a Sheldon Traveling Fellow abroad, and I was a member of the university committee which recommended him to the Harvard Corp. for that appointment.

The next 6 years he spent in private practice in the firm of Jones, Day, Cockley & Reavis in Cleveland. I am now a partner in that firm, but I had no connection with it at the time. This was, however, one thing that occurred to me, and I made some inquiries of why did Scalia leave the firm after 6 years. Was it because it had been intimated to him that he probably was not going to become a partner? I asked a couple of my present partners who were members of the firm at the time, and they said, on the contrary, he was doing very well, he was very highly regarded. He would have soon become a partner, but he found that his interests were broader and he had an urge to teach and he deliberately made the choice himself to move to teaching.

He then went to the University of Virginia Law School. Then he was in Washington as chairman of the Administrative Conference where I saw him on various occasions. Later he became Assistant Attorney General for the Office of Legal Counsel. I not only observed his work there, and it was an office I was familiar with, but I had contact with him where I found that he was tough minded, but fair.

After that, he went to the University of Chicago, wrote Law Review articles, and the past few years has been a judge writing opinions which I have observed. I regard him as a person of top legal quality with a broad mind, great intellectual integrity, and very well qualified to be a Justice of the Supreme Court.

I hope this committee will recommend that he be confirmed.

The CHAIRMAN. Dean Griswold, thank you very much for your appearance.

Mr. Cutler, we will be glad to hear from you.

STATEMENT OF LLOYD N. CUTLER

Mr. CUTLER. Mr. Chairman, I have also filed a written statement, and I will summarize it only briefly.

When I was counsel to President Carter, unfortunately he never had an opportunity to nominate a Justice to the Supreme Court. If such an opportunity had arisen, I probably would not have recommended that he appoint Judge Scalia, even though at that time he was a distinguished professor of law.

The CHAIRMAN. Speak a little louder. We can hardly hear you.

Mr. CUTLER. Yes, sir.

In the unlikely event that I was serving as counsel for President Reagan, I would certainly have included Judge Scalia among the three or four most qualified people in the country for the post.

I make that point because I believe it draws the right distinction between a President's role in nominating a Supreme Court Justice, and the Senate's role in deciding whether to grant its advice and consent.

Since Supreme Court vacancies occur so infrequently, the President has ample reason to select a well-qualified nominee whose broad political and legal philosophy the President believes to be consistent with his own. The President, of course, may be disappointed in the event, as was true of President Teddy Roosevelt in the case of Justice Holmes, and we understand President Eisenhower in the case of Chief Justice Warren and Justice Brennan.

But as the appointing authority, the President certainly has the right to take compatibility of philosophy into account.

The Senate, in contrast, does not play the affirmative role of selecting the nominee, but the negative role of withholding its consent to an improper appointment.

What is an improper appointment? In my view, it is improper to nominate someone who is not professionally qualified, no matter how compatible his views may be with the President. I also believe it is improper to nominate someone, however well qualified professionally, whose ideology so dominates his judicial judgment as to put his impartiality in particular cases into question.

Measured by those standards, it seems to me that the nomination of Judge Scalia is clearly a proper one. You have heard his academic and professional qualifications, and they are certainly very impressive. As for his political and judicial philosophy, I find from reading his opinions that he is nearer the center than the extreme on the major issues that arise in our political and legal system.

Perhaps the best evidence of that is his record on the court of appeals. So far as I can determine, his major opinions on that court have been supported as frequently by what are colloquially called the liberal wing of the court as by the conservative wing. In one recent libel case involving important first amendment values, he was one of five outspoken dissenters, along with four members of the liberal wing. And in the recent Gramm-Rudman opinion—which I did not like on other grounds—his view was sustained by a Supreme Court majority that included three of the so-called liberal members of that Court.

Finally, he possesses a special quality that can never be in oversupply on the Supreme Court, and that is an enthusiasm for appellate argument, a joy in the tough question and the persuasive answer, and an openness about his own State of mind that are of great help to the advocates in the case and to the journalists and scholars who study the work of the Court.

[Prepared statement of Mr. Cutler follows:]

Statement of Lloyd N. Cutler
Before the Committee on the Judiciary, United States Senate,
on the Nomination of the Honorable Antonin Scalia to be
An Associate Justice of the Supreme Court of the United States

At Judge Scalia's request, I am here to present my views concerning his nomination as an Associate Justice of the Supreme Court of the United States.

As some members of this Committee are aware, my political leanings and legal philosophy are a considerable distance from those of the conservative or neo-conservative school. I am neither a confidant nor, on many issues, a supporter of this administration. In the Nixon administration I was ranked Number 13 on the White House enemies list. But based on my professional knowledge of Judge Scalia over the past 20 years, and a close reading of his major court of appeals decisions, I believe he is very well qualified to serve on our highest court, and I urge the Senate to advise and consent to his appointment.

In my former capacity as Counsel to President Carter, I advised him on many judicial appointments. Unfortunately, President Carter was one of the few full term Presidents who never had an opportunity to nominate a Justice of the Supreme Court. If such an opportunity had arisen, I probably would not have urged the nomination of Judge Scalia, even though he was at that time a very distinguished professor of law. But in the unlikely event I were now serving as counsel to President Reagan, I would certainly have included Judge Scalia among the three or four most qualified persons to consider for the present vacancy.

I make this point because I believe it draws the right distinction between a President's role in nominating a Supreme Court Justice and the Senate's role in deciding whether to grant its advice and consent. Since Supreme Court vacancies occur so infrequently, a President has ample reason to select a well-qualified nominee whose broad political and legal philosophy

the President believes to be generally consistent with his own. The President may be disappointed in the event, as were the Presidents who appointed Justice Holmes, Chief Justice Warren and Justice Brennan. But as the appointing authority, the President has the right to take the compatibility of the nominee's broad philosophy into account. The Senate, in contrast, does not play the affirmative role of selecting the nominee, but the negative one of withholding its consent to an improper appointment.

What is an improper appointment? In my view it is improper to nominate someone who is plainly not professionally qualified, however compatible his broad philosophy may be with the President's. I publicly opposed the most recent nominee to the Seventh Circuit on that ground, and I agree with those Senators who voted against him. I also believe it improper to nominate someone, however well qualified professionally, whose ideology so dominates his judicial judgment as to place his impartiality in particular cases into question. For example, anyone who creates a public perception that he would decide all cases involving claimed minority rights for or against that minority does not belong on the Supreme Court or any other federal court.

Measured by these standards it seems to me that the nomination of Judge Scalia is clearly a proper one. His academic and professional credentials are most impressive. In private life, he was an honor graduate of our second best law school, an editor of its law review, an able practising attorney and a distinguished professor of law. In public life, he has served as Chairman of the Administrative Conference of the United States, as Assistant Attorney General in charge of the Office of Legal Counsel, and as a judge of the Court of Appeals for the District of Columbia Circuit.

Turning to his political and judicial philosophy, I find Judge Scalia to be nearer the center than the extremes on the major issues that arise in our political and legal system. While he is a perceptive critic of overregulation, his

administrative law decisions have broadly construed agency powers and congressional intent. While he has spoken out as a law professor against the judicial rationalizations for upholding affirmative action, he has never questioned the objectives of the civil rights laws or their constitutional underpinnings. And while he has strongly defended the executive power against congressional interference, he has upheld broad congressional delegations of legislative power to the executive and independent agencies.

Perhaps the best evidence of whether Judge Scalia is out of tune with the main stream of contemporary judicial thought is his record on the Court of Appeals. So far as I can determine, his major opinions on that court have been supported about as frequently by what is colloquially called the "liberal" wing of that court (including President Carter's four appointees) as by the "conservative" wing. In one recent libel case involving important First Amendment issues, he was one of five outspoken dissenters, along with four from the liberal wing.[1/] And his recent Gramm-Rudman opinion was sustained, despite my own arguments to the contrary, by a Supreme Court majority that included three of the Justices generally classified as among the liberal members of the Court.

Finally, Judge Scalia possesses a special quality that can never be in oversupply on the Supreme Court. He has an enthusiasm for appellate argument, a joy in the tough question and the persuasive answer, and an openness about his own state of mind that are a great help to the advocates in the case and to the journalists and scholars who study the work of the Court. I suspect that he shows the same quality in his conferences with his colleagues, and it is certainly manifest in his judicial opinions. If confirmed, he will add a sparkle to the Supreme Court's proceedings that should enhance its role as the most remarkable and important judicial tribunal in the world today.

1/ Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984).

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. I have no questions.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Mr. Chairman, I cannot imagine a more distinguished panel to render an opinion on an appointment to the Supreme Court. I want to thank each of them for being with us.

I really have very few questions, but this thought does occur. In Judge Scalia's judicial experience, he has had relatively few criminal cases. The District of Columbia Circuit simply does not generate a lot of criminal work.

Do you have any thoughts as to whether that is a limitation in his experience? Do you have any thoughts in general on the breadth of his legal experience and his judicial experience?

The CHAIRMAN. Any of you care to answer that?

Mr. CASPER. Senator Mathias, may I perhaps as a point of personal privilege, first of all, say how much I regret that you will retire from the Senate and from this committee. You have been one of the most enlightened forces in debates on law and constitutional questions. I am deeply regretful that you leave. I cannot believe that you will enjoy what you will do afterwards, but I hope you will.

Senator MATHIAS. I thank you for those kind words and also thank you for the assistance that you have given very generously and spontaneously over these many years.

Mr. CASPER. Thank you, Senator.

Senator, I think while it may be true that Judge Scalia has not had much exposure to criminal law on this circuit, it is also true that the Supreme Court's exposure to criminal law is of a peculiar kind.

Almost all the criminal law cases the Supreme Court takes, are those which involve large constitutional questions. The Supreme Court, after all, does not frequently sit as a court of last resort and review in criminal cases. It will take mostly the cases which matter in terms of constitutional interpretation and there especially those concerning criminal procedure.

I have really no question that Judge Scalia is well qualified to deal with those issues.

Senator MATHIAS. One other question, Mr. Chairman, I might put to Dean Griswold. Present Reagan has appointed an unusually large number of law professors to the courts of appeals in the last few years. This is the first law professor to go to the Supreme Court since Justice Frankfurter.

Does this have any significance for the law faculties of the country?

Mr. GRISWOLD. No, I do not think so. It still remains an outside chance, although, of course, Justice Stone—later Chief Justice Stone—was a dean of the Columbia Law School before he became Attorney General. Other Presidents have appointed a good many professors to the courts of appeals, less often to the district courts because the professors usually have not had trial experience.

But I remember in particular Judge Calvert Magruder, who was Chief Judge of the first circuit for many years and surely one of the distinguished judges of his time.

I do not think that on the whole——

Senator MATHIAS. He had the good fortune to have Maryland roots and to live in Massachusetts.

Mr. CUTLER. Senator Mathias, not having attended the great law school in Massachusetts, I urge you not to overlook for the record Justice Douglas of Yale who survived well after Justice Frankfurter.

Senator MATHIAS. I stand corrected.

Mr. VERKUIL. Senator, I might just add that one effect it will have upon the law professors of America is that they will be sending their articles to Justice Scalia in the hopes that they will be cited by the Supreme Court.

Senator MATHIAS. All right. At any rate you think this will generate economic interest?

Mr. GRISWOLD. Yes.

Mr. VERKUIL. Yes.

Senator MATHIAS. Once again, I thank this panel very much for their help to the committee.

The CHAIRMAN. And as I look at this panel this morning, I do not know that there has been a more prestigious group of people, five people, sitting at one table, since I have been in the Senate. Every one of you have outstanding reputations, professional competence, judicial temperaments, and integrity. You would all make good members of the Supreme Court yourselves.

And I want to thank you for coming here, and taking the time.

The distinguished Senator from Arizona.

Senator DECONCINI. Mr. Chairman, thank you, and I echo those accolades for this panel, and I thank them for taking the time here.

I have great envy for those of you who have had an opportunity to know and work with Judge Scalia. I have not. I know him by reputation.

I do not know if you observed any of his testimony here yesterday, but he was probably one of the most evasive nominees I have ever seen. He was far more evasive than Justice Rehnquist, Mrs. O'Connor, or any other nominees that I have asked questions of. His evasiveness caught me somewhat by surprise. Dean Casper, in your statement you indicate that you and other lawyers have analyzed his cases. After this process that you have gone through and knowing him yourself, you can judge how open and direct he is. You can judge if he is nonevasive and "decides it the way it is before him," whatever that comes down to.

I asked him a question on the 14th amendment due process clause. I did not ask him how he was going to rule. I just asked him if he agreed with Justice Rehnquist that there was more than one standard, and he just said, "I can't say. I can't do it."

I then asked him a question on an article in a magazine that he was quoted in in 1982, regarding the Freedom of Information Act, which stated—and I will just read it quickly—"The defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth. The first line of defense against an arbitrary executive is do-it-yourself oversight by the public, and its surrogates, the press." End of quote.

I merely asked Judge Scalia did he stand by that today. And he said, "Well, I don't know." And I just have great envy for those of

you who know him, because I am extremely disappointed. I indicated I—and I probably will vote for him because of his fine reputation. But maybe you can share with me any of those feelings that you think are just hearsay, if that is all they are, of opinions of how you think he would look at at the 14th amendment. I could not find out from him. I have no idea whether or not he agrees with Justice Rehnquist or does not, or has an opinion of his own, without asking him how to rule.

Maybe, Mr. Casper, you have a comment?

Mr. CASPER. Well, Senator DeConcini, I had no opportunity to observe the testimony yesterday. I would just assume that if Judge Scalia was evasive, that he displayed good judgment. It shows what a judicious man he is, in not committing himself too far before your committee, and in particular not as concerns matters which could come before the Court.

Let me say a word about a matter which came up earlier this morning in the testimony of the ABA and in the questioning from Senators, and then respond to another part of your question, Senator DeConcini.

It was often asked this morning whether Judge Scalia was openminded. Well, I am not so sure whether I am openminded. When you listen to the questioning here this morning, you sometimes had the impression that to possess a mind, which is like a sieve, is a virtue. I am not sure it is a virtue.

Obviously, a man of 50 years of age, a law professor, has opinions, and has a framework of analysis. These are limitations on the openmindedness of all of us. Certainly that is true for me. However, there is something very important.

Antonin Scalia was a law professor, and he was a very good law professor. Good law professors know that they are bound to standards of verification, standards of validation.

When I had arguments with my colleague, Professor Scalia, he most certainly could see when the strength of the argument was on my side rather than on his side. That is very important.

Senator DECONCINI. Well, excuse me, Dean Casper. I agree with that. What I guess I am asking, and it certainly was not clear in my observation, first, is that knowing the process of this committee, of what we go through, don't you believe we are entitled to ask him opinions as to what he thinks about the Constitution, without pinning him down—one member asked him how he would vote on *Roe* v. *Wade*.

Well, obviously he cannot and should not comment. But refusing to give us an opinion, or any idea of how he delves into the Constitution, I was extremely disappointed.

And that is why I ask some of you, you know him—you are not in the same boat—but it would be helpful to this Senator, if I had any idea of how he thinks about the Freedom of Information Act, other than a 1982 article.

And I could not get that, and you know him and I do not, and that is my quandry.

Mr. CASPER. Senator, let me respond to that. I do think, of course, that this committee has the right to ask any and every question it wants to ask, as I do indeed believe that its power to consent is plenary.

With respect to the difficulty Judge Scalia is in, there is no controversial issue which you might want to ask about no matter of constitutional law, which will not potentially come before the Court, and so at this point he has to be very reserved.

That was the bad news. But now comes the good news. The good news is that in the case of academics, you are much better off than in the case of most other people.

There are writings. They have a record, a rather elaborate record most of the time, as does Judge Scalia, and while I have not recently discussed his views on the Freedom of Information Act with him, I would rather assume that—it is a good and strong hunch—that if you want to know Scalia's views on the Freedom of Information Act, his article pretty much represents those views, unless of course they become strongly challenged——

Senator DECONCINI. Then why could he not just say so? Professor Griswold, would you have a comment?

Mr. GRISWOLD. Yes. I would like to venture an answer to the question. In the first place, I think this is an extremely delicate and difficult situation——

Senator DECONCINI. I agree.

Mr. GRISWOLD [continuing]. With respect to the nominee. He must not say anything, which somebody else can interpret as a commitment of some kind or other, and even a question about the Freedom of Information Act, which is one of the areas almost sure to come before him at some time, is one in which I can see how it is very difficult.

Now I would like to recount some history. I think that until at least World War II, it was the practice of this committee, and the Senate, not to have any candidate for judicial office appear before the committee for that very reason.

In particular, it is my recollection, though historians can show me to be wrong, that Mr. Brandeis of Boston was not a witness before this committee during the long, drawn out hearings with respect to his nomination.

Other people appeared, other people on both sides, the question was explored very thoroughly, but it was not thought appropriate for the nominee to appear.

Some time after World War II, that changed. I recall that then Professor Frankfurter did appear before this committee with counsel. Dean Acheson was his counsel. And I think that a review of the hearings of that time will show that there were many questions which he thought that it was inappropriate for him to answer. I must say that within very wide limits, I regard it as a plus for Judge Scalia, that he takes a very careful and delicate view as to the range of questions which he feels it is appropriate for him to answer.

Senator DECONCINI. Thank you, Dean Griswold. My problem is, I guess, a little bit of knowledge is dangerous for some people and a little bit of experience may be the same way.

When we had Justice O'Connor here there were some questions she did not answer, but she gave us a personal opinion. She would give her opinion and qualify it, that it was not to be interpreted as an indication of how she would vote on the Bench on different constitutional questions, as did Mr. Rehnquist. Under the tremendous

barrage that he had here of hostility from a few members, he responded to questions about the 14th amendment. Yes, he said that there were two different standards, one for race, and one for sex, based on his opinion. And that it is just a frustrating situation, when such an eminent jurist and an individual as Judge Scalia—and I do not degrade him at all by my comments here—was so unforthcoming. You give an explanation that I have great respect for because you know him, and I do not. And I have to very much rely on testimony, rather than hearing from him, and I would like to have had both. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Iowa.

Senator GRASSLEY. Mr. Chairman, I have a question for Mrs. Hills and Mr. Cutler, as they have served in the executive branch in recent years, and Judge Scalia seems to have strong views on the doctrine of separation of powers; it seems he tends to favor the executive branch on very close questions.

Do you two see anything out of balance, in Judge Scalia's views in this regard—separation of powers?

Ms. HILLS. None whatsoever, Senator. I think Judge Scalia demonstrates great integrity of intellect and has addressed a large number of issues, as the dean aptly said, that there is no issue that you could think of that he has not written about in a rather prolific fashion, and I am not at all concerned about his jurisprudential approach.

Senator GRASSLEY. Mr. Cutler.

Mr. CUTLER. I happened to collaborate with then Professor Scalia in the preparation of the briefs in the legislative veto case, in which our position was upheld by the Supreme Court.

I was also one of the growing number of losing counsel before Judge Scalia in the *Gramm-Rudman* case. I disagreed as you might expect, like any good advocate, with the lower court opinion, but it is worth noting that in the Supreme Court opinion, as I mentioned, the majority included not only Justice Stevens and Justice Marshall, who happened to disagree with Judge Scalia on one ground of the opinion, but also Justice Brennan, who concurred fully in the opinion of the Chief Justice, which I would say concurred fully in the lower court per curiam opinion that I would bet a lunch was written by Judge Scalia.

Senator GRASSLEY. Then I would ask all to respond to accusations, that perhaps maybe he is too rigid, too ideological.

Ms. HILLS. Senator, my 15 years of experience working closely with Judge Scalia belies the accusation that he has a rigid mind. I heard the statement made by the representatives of the American Bar Association, preceding us, suggested that there were one or two comments, that he may have strong views, closely held.

But balance that suggestion against the fact that he is perhaps one of the best prepared judges on the appellate court here. It is very difficult to have studied the briefs, engaged in argument with your law clerks, and emerge without some view of the particular case with some precise questions.

He is overwhelmingly applauded at the bar, by lawyers who have appeared before him, for the excellence of his preparation, and for his ability to participate qualitatively in the discussion. So rigid he is not; intelligent, he very much is.

Mr. CUTLER. I agree with what Ms. Hills has said as to Judge Scalia in particular. As to your hypothetical, I think yes, a nominee could be so ideologically convinced on a particular set of issues, that he would give the public perception of having his mind closed on cases that came before the Court.

The illustration I used in my written statement was, any nominee who gave the public perception that he would decide any case involving a claim of minority rights either always for, or always against, the minority group does not belong on the Supreme Court or any other Federal Court.

Senator GRASSLEY. Anybody else?

Mr. VERKUIL. Senator, I would just add also that I do personally think that ideological qualifications could be examined, and I would be uncomfortable at extreme ends.

This is certainly not that case, with this nominee, from my experience. I think he is a conservative person, but he is someone who practices judicial restraint and will do so, whatever the issue.

The *Synar* case is, in my view, a good example of that. He participated in the decision but did not strike the statute down by the much broader basis of nondelegation, which I think would have given this body much more difficulty, in a continuing sense. He was much more narrow in his view of how that separation of powers issue ought to have been resolved. I think that is the kind of approach he would take to legal issues generally, in the future, no matter what their political cast might be.

Mr. CASPER. Senator, I agree with the other members of the panel. In my opening statement I criticized the use of the term ideological. I do not really know what it means. Ideology is usually what the other person has, and not what I have, and it is my opponent who is ideological while I am fairminded and oriented only toward the truth. Ideology, of course, in one meaning is a comprehensive world view, such as that of the Communist Party of the Soviet Union, or something like that. Its ideology.

The question is, what is Judge Scalia's view? I do not think he is ideological. I think he is deeply committed to constitutional government as it has developed up in the United States, and to his view of it. Now I disagree with some of his views on that matter, but he is definitely committed to the rule of law. Now that you can call an ideology of course. I would not.

Senator GRASSLEY. Mr. Chairman, I yield back my time.

The CHAIRMAN. The distinguished Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Chairman, like so many others, on both sides of the aisle, on this committee, I am supposed to be at another matter of Senate duties here on the Hill today, but I agree that this is such a prestigious and, in many ways, unique panel. Certainly one of the most prestigious ones I have seen in the various committees I sit on, and in the 12 years I have been here in the Senate.

And so, while I will owe apologies to those of my colleagues who wanted me to be at the other matter, I did not want to leave before I had a chance to hear each of them speak, and hear some of the questions and answers.

I have some of the same concerns expressed by Senator DeConcini on the question of the Freedom of Information Act. I had a

long discussion, in my own questions of Judge Scalia, about that yesterday. I discussed it at great length with him in my office, back 2 or 3 weeks ago.

I am concerned because I think we are in era where the questions of first amendment, of freedom of the press, of the ability to look into what our Government is doing, and to determine when our Government makes mistakes, as well as when it does something right—all of these things I think are under more attack than at any time in my adult life.

I cannot think of a time when there were more forces, more individuals, and in fact, many people who know better attacking the ability of the press to go into stories in detail of people's rights of free speech, untrammeled speech, all the various first amendment matters. An attempt was made a couple years ago in the Congress to gut the Freedom of Information Act. That is only because a number of us were to stand up that were able to stop it.

So I think the questions asked by the distinguished Senator from Arizona were legitimate questions. I am concerned that they were not answered as fully as I think someone could without stepping over that line that a designee to a court cannot step over; that is, a line which requires him to give answers here to prejudging cases.

On the other hand, I do also, though, commend Judge Scalia for offering, in response to a question I asked, to recuse himself from a case coming up which also raises serious first amendment issues and one in which it was legitimate for him to recuse himself.

I might ask the panel, you obviously know Judge Scalia well, have analyzed his works, and know him. I would also assume that each of you have analyzed the statements, the cases and the positions of Justice Rehnquist at some length.

Do any of you see any significant ideological differences between Judge Scalia and Justice Rehnquist?

Mr. Cutler, I will be glad to start with you and just go down the line, if you would like.

Mr. CUTLER. Well, it is a difficult question, I think, for most of us. We are drawing shades of——

Senator LEAHY. What about significant differences?

Mr. CUTLER. I do not see any significant difference myself. I think in the case of Justice Rehnquist we now have some 12 to 14 years of his opinions on the Court. We have not seen much of the jurist Scalia up to now, but I will bet another lunch that we will see several cases every year in the Supreme Court, if you confirm Judge Scalia, with Scalia on one side and Rehnquist on the other.

It is very hard to typecast members of that Court.

Senator LEAHY. Does that go to their judicial interpretation or ideology? How is it difficult?

Mr. CUTLER. Well, it shows, I think, that their sense of what is judicially right in a particular case will overcome their broad ideology or philosophy.

I will give you one example that involves Judge Scalia, and that is the *Liberty Lobby* libel case decided in the Supreme Court this year, in which Judge Scalia's views were reversed by the Supreme Court. There were two dissenters in that case who agreed with one another and with Judge Scalia, and their names were Rehnquist and Brennan.

So in an important first amendment case, Bill Rehnquist and Bill Brennan could be on the same side against the majority of the Supreme Court. That suggests to me that their so-called ideology and philosophy is a lot less important than the way they see a particular case.

Senator LEAHY. For those who do thumbnail sketches of Justices, they normally do not put Justice Rehnquist and Justice Brennan on the same thumbnail.

Mr. CUTLER. No; they would not. And it may be, if you made one of those Harvard Law Review analyses of all the opinions of the Court in the course of the year, you could separate them quite widely.

Senator LEAHY. I understand. Dean Griswold, I also appreciate so much having you here. When you were Solicitor General, I had the opportunity on more than one occasion to hear you argue, watch you, and I always found that as a lawyer one of the greatest thrills I had. I appreciate having you here.

How would you respond to the same question? And I must admit that in asking the question—and I understand Mr. Cutler's answer that this is something you can spend hours on going back and forth. And I do not mean to in any way detract from the question. I want to emphasize that I know it is something you could go on for hours and put the shadings back and forth.

But, Dean Griswold?

Mr. GRISWOLD. Senator, I will venture an answer. In short, I do not think that there is that much difference. I think there may be an appearance of difference which I do not regard as very significant.

And let me try to explain that. I think that Justice Rehnquist is something of a loner. I think he does his own thinking, comes to his own conclusions, and in the past has felt a considerable pressure to state that conclusion.

On the other hand, Judge Scalia is a very gregarious person. He thinks in terms of what the other judges are thinking, and he has not expressed himself so widely or so emphatically as Justice Rehnquist has sometimes in the past.

But I think that if, apart from the way it is expressed, you look at what the positions actually are in a series of cases, you would find that Justice Rehnquist is not as conservative as he is commonly regarded to be. I would not want to say that Judge Scalia is more conservative than he is commonly regarded to be. But I will stand on my opening statement. I do not think there is that much difference, and I have tried to suggest an explanation which makes reasonable people think that there may be such a difference.

Senator LEAHY. Thank you very much, sir.

Mr. VERKUIL. Senator Leahy, I would just like to say I am here to testify on behalf of Judge Scalia's nomination, and I would prefer not to engage in comparisons.

I would add a point, though, about your concern—also Senator DeConcini's concern—over the Freedom of Information Act article and Judge Scalia's positions. As I recall that article, it was in Regulation magazine. It is called something like "The Freedom of Information Act Has No Clothes."

It was meant to be provocative. He was trying to sell copies.

Senator LEAHY. It was. It was.

Mr. VERKUIL. It was, I am sure.

If I recall the article and the substance of it correctly, to allay your concerns about the first amendment issue, is that his concern, and not only his but many people's concern with the Freedom of Information Act is not that its current utilization somehow helps the press; but what it does is help the large users of FOIA who are businesses seeking competitive information. And it imposes enormous cost on the Government to implement it.

And I really believe that the thrust of his comments went to that, not to the first amendment concerns, the access to the press, but more or less to the fact that the instrument designed for the press, if you will, for the public to know has become the favorite of competitors seeking business information. And that has imposed many burdens on the Government.

Senator LEAHY. Sir?

Mr. CASPER. May I just follow up on that, Senator? I entirely agree with Mr. Verkuil in his assessment of the Freedom of Information Act article. Judge Scalia, when he was an academic, in any event, but I am sure it is a quality which continues—possessed a highly developed sense of the absurd, especially when it comes to discovering unintended consequences of regulatory reform, a field in which he is a master. And that was really his main concern with respect to the Freedom of Information Act.

Here is this great liberal reform measure, and see who uses it most? Businesses to find out about their competitors. And that suggests a very important point, Senator. Even the Freedom of Information Act is not all good. The Freedom of Information Act does not only impose burdens on the Government which perhaps a former head of the Office of Legal Counsel might have been critical of, but rather it also imposes burdens on the rest of us.

There is a lot of privacy which goes when the Freedom of Information Act is invoked, and privacy supposedly is also a prime constitutional value.

Ms. HILLS. Senator, I have nothing to add with respect to your question on the comparison issue. I would urge you to understand that a candidate who is asked about a particular statute or a particular amendment finds himself in extremely difficult circumstance. These cases come to the Court on particular facts, and it is the Justice's obligation to give an opinion based upon those facts. Statements made at a confirmation could prove to be enormously embarrassing and really not too helpful in these circumstances, in my view, to this committee.

Senator LEAHY. And you would prefer not to answer the question on comparison of the ideology of the two?

Ms. HILLS. Oh, no. I simply said I could add no more than that that had been contributed so much more articulately by my colleagues on the panel.

Senator LEAHY. Thank you very much. The red light has gone on. My time is up.

I would like to maybe at some other time discuss further the aspects of the Freedom of Information Act, because I do have some very strong views on that.

Mr. Chairman, I appreciate your courtesy in letting the time run over.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. I have no questions at this time.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. You were asked by Senator Leahy to give your views on the close alignment of the ideology views of Judge Scalia and Justice Rehnquist.

Now, let me ask you your opinion of Judge Scalia as a consensus builder on the appellate court, and what do you anticipate that he would contribute or not contribute or detract from consensus building on the Supreme Court?

Ms. HILLS. Are you addressing that question to a particular panelist?

Senator HEFLIN. I will address it to all of you.

Ms. HILLS. I would be most delighted to address that question, having personally worked closely with Judge Scalia at the Administrative Conference at the Department of Justice and subsequently on American Bar Association activities.

He has a phenomenal capacity to draw together diverse points of view and to build a consensus. He is inordinately articulate and can better phrase the issue than almost any other lawyer that I know.

So as a consensus builder, he is without peer, in my opinion.

Mr. CASPER. I agree with Secretary Hills, Senator, and I do think it is important to have somebody on the Court who approaches the Court from that perspective, because the divisiveness of the Supreme Court of the United States in recent years, I think, has become a real and considerable problem.

Mr. VERKUIL. That is the heart of my testimony, Senator.

Mr. GRISWOLD. I think I would say at this point, as I did when I appeared before this committee in support of the nomination of Justice Rehnquist, that I think that Justice Rehnquist, if he is confirmed as Chief Justice, will in fact be much more of a consensus builder than he has been as a Justice. All the evidence indicates that his internal relations are good, and he will have a new pressure to lead the Court, which I think he will rise up to.

I recognize that this is the hearing on Judge Scalia, but the question makes that observation relevant.

Senator HEFLIN. Mr. Cutler.

Mr. CUTLER. I would say his qualities as a consensus builder are so strong that if had turned to politics instead of the bench, I would not want him running for my seat.

Senator HEFLIN. All right, sir. Now, we have pretty much unanimity on consensus building and his abilities there. We have heard your expression, each of you individually, on the similarities of ideology between Associate Justice Rehnquist and Judge Scalia.

Assuming that both were on the Court and that President Reagan appointed two additional members to the Supreme Court with similarities of ideology and the consensus ability of Judge Scalia and the titular position of Justice Rehnquist as Chief Justice, would you expect that the Court would follow a sizably different trend than it is presently following in the field of civil rights,

women's rights, freedom of the press, freedom of speech, and basic constitutional rights?

Mr. GRISWOLD. The whole history of these things has been that, generally speaking, there is not a great change resulting from changes in the people on the Court. I think it could well be that if there is a more conservative majority on the Court that there will be less reaching out, less extending the law than there has been in the past.

On the other hand, I would not anticipate that there would be widespread overruling of past decisions, repudiation of what was done in the past. I would anticipate that the Court would continue to build on what has been done, although it might not build as fast in some directions as some people might want.

Mr. VERKUIL. If President Reagan had the opportunity to appoint four members of the Court as you hypothesize, Senator Heflin, certainly it would be a different Court.

It occurs to me, however, that President Nixon had that opportunity, and the Court that Chief Justice Burger has just indicated a willingness to stand down from, is probably not all as conservative as many would have thought at the time those appointments were made.

So I am not sure one can predict with any assurance exactly where it will be 10, 20 years out, even though obviously a President would like to leave a mark in that sense after his term of office is over.

Mr. CASPER. Senator, if I may say two things about that. First of all, four Reagan appointments are, of course, unlikely. Assuming four appointments, I wish there would be then more diversity.

But it is very important to remember two things: The Supreme Court and the country are not really radically out of step at all times; and, of course, also the Supreme Court agenda changes as the country changes its own agenda.

Therefore, it is very hard to know where the Supreme Court will be 5, 6 years down the road because it is very hard for us to predict the agenda. But I think it is very important to remember that many of the issues coming before the Supreme Court, even those styled constitutional in some form or another, are actually issues which come there as matters of interpretation, of longstanding law, statutes, and so on.

If you do not like what the Supreme Court does in some areas, you can recapture a lot of power by passing more liberal or more enlightened or more forthcoming legislation in all areas of life.

Let me just give you an example. Judge Scalia had to pass recently on a case which involved attaching the label "political propaganda" to an import of a film from Canada. And he upheld the labeling. Well, this was done under an extremely offensive act of Congress, and you should not get upset about the Supreme Court or other judges not upholding first amendment values when you have it in your power to see to it that the first amendment values are incorporated into the statutes.

Ms. HILLS. Senator, I would say that if the President were so fortunate as to have two more appointments and they were equally as good as Judge Scalia, the practicing bar, of which I am a part, would be fortunate in having fewer fragmented decisions and

greater clarity and lucidity in expression, which would be a great help to the public at large and to the body politic. That was, in fact, one of the points I sought to make in my opening remarks.

Senator HEFLIN. You did not answer my question. My question was, would you expect the trend to change relative to certain constitutional rights, not the fragmentation of the opinions.

Ms. HILLS. I find it difficult, where there are fragmented opinions, to discern the trend, and that is what troubles the bar. And forgive me, because I have adopted and endorse the remarks that have been made preceding me. I have just added my small postcript to them, acknowledging the limitations of time; but I do adopt the earlier comments of my colleagues on the panel.

Senator HEFLIN. Well, that is all right.

Ms. HILLS. And I think the trend is very difficult, in the four areas that you specified, often, to find.

Senator HEFLIN. Well, you have answered it now. Thank you.

Mr. CUTLER. Senator Heflin, the bete noire of the neoconservative legal philosophers today is the Warren court. The Warren court included the Chief Justice, Justice Brennan, Justice Harlan, Justice Stewart, all, I believe, appointed by President Eisenhower, the first Republican President in a great many years.

They were pillars of the Warren court decisions in the fields of minority rights and first amendment rights, among others. I certainly am not going to sit here and say to you I think the trend of this Court's opinions is going to be exactly the same if President Reagan has four appointees as if President Carter had had four appointees. But it may turn out—and history tends to confirm this, not only the institutional history of the Court, but the tremendous value of the lifetime appointment—that whatever President Reagan's intentions or his advisers' intentions may have been, he may be in for a big surprise, and the Court may stick to the values that you and every member of this panel think are important.

Senator HEFLIN. Well, basically, to summarize, here is a distinguished group of legal scholars, practitioners and leaders in the legal profession, and you do not have as many fears as some have in this area. Is that a fair summary?

Mr. CUTLER. Yes, sir.

Mr. VERKUIL. Yes, sir.

Senator HEFLIN. All right. That is all.

The CHAIRMAN. Are you through, Judge?

Senator HEFLIN. Yes.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman. I shall be very brief.

First, I agree, Mr. Chairman—Mr Chairman, if I may have your attention—if I may have your attention, Mr. Chairman, I agree with you that this is a very distinguished panel, as fine a panel as we have ever had.

And I note that they are very credible because three of the five members of the panel opposed the Manion nomination, Mr. Chairman. I think that gives them added credibility here. [Laughter.]

The CHAIRMAN. Well, anybody can make a mistake sometime. [Laughter.]

Senator SIMON. My question has been addressed by the panel, but I would like to comment. I am one who has not made a com-

mitment on this nominee. I am leaning toward voting for him, but the question which is uppermost in my mind—and I mention this for the benefit of other witnesses who will be testifying—is the question of openmindedness.

Mr. Cutler, you phrased it well when you said that we should reject a nominee, and I am quoting now, "whose ideology so dominates his thinking that he cannot make impartial judgments."

I am concerned in the affirmative action and the first amendment area. Will Judge Scalia be as openminded as President Verkuil has suggested in his remarks? That is my concern. You have addressed it, and I appreciate your appearing here today.

I have no questions, Mr. Chairman.

Senator HATCH. Let me just say something Mr. Chairman.

The CHAIRMAN. Senator Hatch, do you want to ask any questions?

Senator HATCH. I do not know of a more distinguished panel we could have before this committee. I have listened to what you have had to say. It is not only impressive, but erudite and accurate. I want to compliment all of you for coming here and testifying to this committee.

I have admiration for each of you.

The CHAIRMAN. I want to interrupt the proceedings just for a moment here to make an announcement.

There has been an apparent leak of information contained in confidential internal Department of Justice documents provided yesterday to this committee. This is a serious breach of the agreement we reached on the review of these documents. It is also a breach of trust.

Staff reading these documents was admonished yesterday about unauthorized disclosure of any information in the Office of Legal Counsel documents. I am personally angered by this action and consider it irresponsible and unbecoming of anyone entrusted with the task of living by the letter and spirit of the agreement we reached on these documents.

That is precisely why the President was reluctant about turning over these documents in the first place.

As chairman of the committee, I will not tolerate these kinds of disclosures. These are confidential documents and, as such, are not within the public domain. For that reason, I am today asking that the FBI determine whether the matter should be investigated.

Senator HATCH. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Mr. Chairman, to my knowledge, I am the only Senator who has looked at every page of these documents, other than the six Senate staffers who have been reviewing them.

I will not discuss any of the contents of those memorandums, but I can assure everybody that these were legal memorandums on legal issues. I do not think any true lawyer would find fault with the memorandums themselves.

You might differ with legal opinions and different interpretations of legal cases, but I do not think anybody would differ with them.

Frankly, the memorandums basically contain advice to their clients that would not be objectionable to any lawyer or citizen upon

careful review, although lawyers differ on various legal cases, interpretations of legal cases.

It was my understanding that these documents were to be held fully confidential. That was the only reason they were to be shared with members of this committee—that is to aid in this constitutional process. If they have, in fact, been leaked, it is an ethical violation of the highest order under these circumstances.

I respect every colleague on this committee. Every colleague has acquitted himself well, but I also have been privy to basically all of the outside of committee discussions. And I have been privy to some of the other discussions as well. There have been some threats heard around here. There has been a tendency not to be totally fair in the Rehnquist hearing. I have been very disappointed in that because we are not just talking about any nomination; we are talking about the nomination for the Chief Justice of the United States. That is pretty important.

I am really disappointed if any of the staffers have disclosed one line of those documents. Activists on either side could point to a line here or a line there that they might not like. But, basically, they could not say that these were not appropriate legal memorandums or that they gave inappropriate legal advice.

I want to put that in the record. I agree with you, Mr. Chairman. I will join with you if the committee rules and ethics rules of the Senate have been violated. I will join with you in doing everything I can to see that that is rectified.

It is terribly disturbing to me because we worked out among Senators and staff a totally inviolate agreement. If this is the way these matters are going to be handled, then it lends not only great credibility, but it lends absolute legal sanction to any President saying I will never give up any confidential legal memorandums from the Office of Legal Policy. It is that simple.

I would not blame any President for not wanting to have that office intruded upon by a legislative process.

Executive privilege is a time-honored constitutional claim. There is not many a constitutional authorities alive who would say that if the President held his ground and refused to give up those documents, that the Supreme Court of the United States would have forced him to release them.

The Supreme Court would have undoubtedly reached the conclusion that it was a political question, even though there are lots of other questions and peripheral questions surrounding that issue.

It is very disappointing to me. If it is true, something has to be done about it.

Thank you, Mr. Chairman. I did not want to be raving, but I just am very disappointed.

Senator HEFLIN. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. I know nothing about this and I happen to be the only Democrat that is present. There may well be some type of response that they would like to make. I think a good deal of charges are being made and the opportunity is being taken here, perhaps unfairly—I am just saying perhaps; I am not saying it has been—to make certain charges.

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

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

The CHAIRMAN. Any more questions of this panel?

[No response.]

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

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

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

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

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

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

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

Ms. SMEAL. I do.

Mr. GOLD. I do.

Mr. RAUH. I do.

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

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

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

Ms. SMEAL. Thank you, Senator.

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