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).