We are saying that there are certain things that should be sacrosanct. That the principal of equality of justice for all has to have meaning, and that indeed, people who have views on individual rights and on sex discrimination, that put in question our whole records on how to end discrimination in affirmative action, should not be confirmed, because all we will be doing is reliving the battles of the 1950's and the 1960's again and again, and it is enough.

Senator BIDEN. Thank you.

Senator MATHIAS. Once again, I think, for the second time, I thank you for your attendance at this hearing——

Mr. GOLD. And thank you for your patience, Senator.

Senator MATHIAS [continuing]. And your very helpful comments. We appreciate it.

Mr. RAUH. Thank you, sir.

Senator BIDEN. Thank you all.

Senator MATHIAS. May I inquire if Mr. Roy C. Jones of the Liberty Federation is in the room? Is Mr. Jones in the room?

[No response.]

Senator MATHIAS. Then our third panel will be composed of Mrs. LaHaye, the president of Concerned Women for America; Mr. Bruce Fein of United Families Foundation; Miss Sally Katzen, a lawyer with Wilmer, Cutler & Pickering; and Mr. Jack Fuller, the editorial editor of the Chicago Tribune.

If you will all raise your right hands. Do you swear that the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. LAHAYE. I do.

Mr. FEIN. I do.

Ms. KATZEN. I do.

Mr. FULLER. I do.

TESTIMONY OF A PANEL CONSISTING OF BEVERLY LAHAYE, PRESIDENT, CONCERNED WOMEN FOR AMERICA, WASHINGTON, DC; BRUCE FEIN, UNITED FAMILIES FOUNDATION, WASHINGTON, DC; SALLY KATZEN, WILMER, CUTLER & PICKERING, WASHINGTON, DC; JACK FULLER, EDITORIAL EDITOR, CHICAGO TRIBUNE, CHICAGO, IL

Senator MATHIAS. Mrs. LaHaye, do you want to start? I would remind you of our 3 minute rule. The red light will indicate that 3 minutes have expired.

Without objection, all statements will be included in full in the record, as if read.

Mrs. LAHAYE. I am Beverly LaHaye, president of Concerned Women for America, which is the Nation's largest nonpartisan activist women's group.

We have 565,275 members as of this morning, and we are growing. We are in all 50 States, representing women from many professions, many different races, and many religious backgrounds.

Concerned Women for America was formed to help protect the family, to promote constitutional freedoms and traditional values. CWA lobbies on various issues and has a legal department that recently won a case before the U.S. Supreme Court.

The members of Concerned Women for America support the nomination of Antonin Scalia to the U.S. Supreme Court, and we urge quick Senate approval of his nomination. On credentials alone, Judge Scalia shows sterling qualifications for the Supreme Court.

His scholarly works influence the legal community with their well-reasoned arguments. CWA supports Judge Scalia's nomination largely due to his strong commitment to judicial restraint.

He is a judge that interprets the Constitution in light of the intent of the Framers. He resists the temptation that many judges have fallen into, of creating new constitutional or legal rights out of thin air, when they have no textual or historical justification.

His vigilent philosophy of judicial restraint will help protect the Constitution from judge-made erosion. In these changing times, with many voices espousing their positions, all Americans, men and women, need a written Constitution that stands firm, changed only by the will of the people expressed through the amendment process.

Judges and courts must not sit as unelected perpetual constitutional conventions, and impose their moral values on the majority.

We need judges who live by an active commitment to judicial restraint and respect for the principles placed in the Constitution by the Founding Fathers. Antonin Scalia fills that need. It has been said, and reported, that women's groups all oppose the nominations of Justice Rehnquist and Judge Scalia. As the president of the largest women's organization in the United States, with over half a million members, I am here to inform you that that statement is wrong.

Concerned Women for America has over double the membership of the next largest women's organization, and CWA supports the nomination of Judge Antonin Scalia to the Supreme Court, and William Rehnquist as Chief Justice.

Judge Scalia's intellectual abilities, experience, and deep understanding of the Constitution are plain to all.

Concerned Women For America urges the Senate to confirm Antonin Scalia to the U.S. Supreme Court. Thank you.

[The statement follows:]

Testimony of Beverly LaHaye

President, Concerned Women for America

Concerned Women for America is the nation's largest nonpartisan womens' group with over 560,000 members in all fifty states representing women from all professions, all races and all religious backgrounds. Concerned Women for America was formed to help protect the family, promote constitutional freedoms and traditional values. CWA lobbies on various issues, and has a legal department that recently won a case before the U.S. Supreme Court.[1]

The members of Concerned Women for America support the nomination of Antonin Scalia to the U.S. Supreme Court, and urge quick Senate approval of his nomination.

On credentials alone, Judge Scalia shows sterling qualifications for the Supreme Court. He is a judge on the D.C. Circuit Court of Appeals, served as Assistant Attorney General for the Office of Legal Policy in the Ford Administration, taught at the law school at the University of Chicago and the University of Virginia. His scholarly works influence the legal community with their well-reasoned arguments.

Concerned Women for America supports Judge Scalia's nomination largely due to his strong committment to judicial restraint. He is a judge that interprets the Constitution in light of the intent of the Framers. He resists the temptation that many judges have fallen into of creating new constitutional or legal rights out of thin air, when they have no textual or historical justification.

For example, Judge Scalia refused to rule that the Constitution contains a "right to sodomy." The Supreme Court agreed with that view in a different case presenting the same constitutional issue just this June.

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[1]See Larry Witters v. State of Washington Dept. of Services for the Blind, 474 U.S. ___, 88 L.Ed.2d 846 (1986).

Judge Scalia has also supported the state's constitutional power to impose capital punishment, because the Framers intended states to exercise that power. His vigilant philosophy of judicial restraint will help protect the Constitution from judge-made erosion.

In these changing times with many voices espousing their positions, all Americans, men and women, need a written Constitution that stands firm, changed only by the will of the people expressed through the amendment process. Judges and courts must not sit as unelected, perpetual Constitutional Conventions, and impose their moral values on the majority. We need judges who live by an active committment to judicial restraint, and respect for the principles placed in the Constitution by the Founding Fathers. Antonin Scalia fills that need, as does Chief Justice nominee William Rehnquist.

It has been said that womens' groups all oppose the nominations of Justice Rehnquist and Judge Scalia. As the president of the largest women's organization in the United States, with over half a million members, I am here to inform you that that statement is wrong. Concerned Women for America has over double the membership of the National Organization for Women. CWA supports the nomination of Judge Antonin Scalia to the Supreme Court, and William Rehnquist as Chief Justice.

Judge Scalia's intellectual abilities, experience, and deep understanding of the Constitution, are plain to all. Concerned Women for America urges the Senate to confirm Antonin Scalia to the United States Supreme Court.

Senator MATHIAS. Thank you very much. Mr. Fein.

STATEMENT OF BRUCE FEIN

Mr. FEIN. My name is Bruce Fein and I represent United Families of America. United Families enthusiastically urges the Senate to confirm Judge Antonin Scalia as Associate Justice of the United States.

Judge Scalia is more richly endowed with the experience and attributes necessary for outstanding performance on the Supreme Court than any nominee since Charles Evans Hughes over 50 years ago.

Judge Scalia has taught law, and taught law is intellectually tough law. Judge Scalia has occupied high-level positions within the executive branch. The experience has honed Scalia's mind to a deep appreciation of the Constitution's separation of powers, its subtleties, and its indispensability to energetic, accountable, and unoppressive government.

Finally, Judge Scalia has served several years on the U.S. Court of Appeals for the District of Columbia Circuit. His judicial performance has been exemplary. Always well prepared for oral argument, incisive in opinion writing, and a close intellectual companion of any judge searching for a constitutional or statutory principle in expounding the law.

Judge Scalia will bring to the Supreme Court desperately needed mental rigor and analytical power. Three areas of constitutional law illustrate the Court's recent departures from constitutional intent, and substitution of social policy concerns as a basis for decisionmaking. Abortion, obscenity, and church/state issues. Now the *Roe* v. *Wade* case has already been referred to today, and I could perhaps even rely on Senator Biden for suggesting that it was ill-reasoned and not a vindication of the intent of the 14th amendment architects.

Senator BIDEN. That is going a little far. I did not say that.

Mr. FEIN. We can come back to that. But as Senator Biden at least tactitly acknowledged, the Court's opinion consulted ancient attitudes, the Hippocratic oath, the common law, the English statutory law, the American law, the views of the American Medical Association, the views of the American Bar Association, the views of the American Public Health Association, but where were the views of the constitutional architects?

Senator BIDEN. I was not going to fight with you today until this. [Laughter.]

Mr. FEIN. A right of privacy found nowhere in the constitutional text or constitutional history was invoked to justify the Court's general denunciation of laws that regulated abortion in order to safeguard potential life.

And even last month, the Supreme Court extended its right of privacy concept to invalidate a State law that simply required the truthful provision of information relating to the abortion decision, because the Court thought that truthful information might convince the mother to choose childbirth over abortion.

Judge Scalia, we believe, will employ constitutionally pertinent criteria in examining abortion issues, and lead the Court out of its current confusion and constitutional lawlessness.

As Associate Justice White recently warned, the Court is most vulnerable, and comes nearest to illegitimacy, when it deals with judge-made law having little or no cognizable roots in the language or design of the Constitution, and Justice White was speaking for a majority of the Court.

Now as in the case of abortion and in other areas, rectifying the Supreme Court's decision will not require that abortions be restricted.

The rectification will simply return the question to State and local officials to struggle with the anguishing issues involving the fetus, the mother, the father, children, and social ethics.

It would be slanderous to the good name of the American people, and contrary to experience, to suggest that questions of abortion will not be responsibly handled by elected representatives of the people.

I have amplified on similar sentiments regarding abortion and church/state issues. I simply would close with these observations. Responsibility is the mother of courage and individual growth. If in contravention of constitutional intent, the people are denied responsibility over most questions of abortion, obscenity, or church/state relations, then nothing prevents the courts from arrogating responsibility for virtually any contentious public policy issue.

The consequence would be a demoralized citizenry, unconcerned, and untutored in the arts of self-government.

In conclusion, we strongly support Judge Scalia for confirmation as Associate Justice of the Supreme Court.

[Prepared statement follows:]

TESTIMONY OF BRUCE FEIN
ON BEHALF OF UNITED FAMILIES OF AMERICA

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN SUPPORT OF JUDGE ANTONIN SCALIA
NOMINATED AS ASSOCIATE JUSTICE OF THE UNITED STATES

Mr. Chairman and members of the committee,

My name is Bruce Fein and I represent United Families of America. United Families of America enthusiastically urges the Senate to confirm Judge Antonin Scalia as Associate Justice of the United States.

Judge Scalia is more richly endowed with the experience and attributes necessary for outstanding performance on the Supreme Court than any nominee since Charles Evans Hughes over 50 years ago. Judge Scalia has taught law; and "taught" law is intellectually tough law. Judge Scalia has occupied high level positions within the Executive Branch. The experience has honed Scalia's mind to a deep appreciation of the Constitution's separation of powers, its subtleties, and its indispensability to energetic, accountable, and unoppressive government. Finally, Judge Scalia has served several years on the United States Court of Appeals for the District of Columbia Circuit. His judicial performance has been exemplary: always well-prepared for oral argument; incisive in opinion writing; and a close intellectual companion of any judge searching for constitutional or statutory principle in expounding the law.

Judge Scalia will bring to the Supreme Court desperately needed mental rigor and analytical power. Three areas of constitutional law illustrate the Court's recent departures from constitutional intent and substitution of social policy concerns

as a basis for decision-making: abortion, obscenity, and Church-State issues.

In the landmark 1973 decision of Roe v. Wade, the Supreme Court discovered a broad constitutional right to an abortion in the due process clause of the Fourteenth Amendment, over a century after the Amendment was ratified. The Court held that during the first trimester of pregnancy, abortions must be virtually unregulated; that during the second trimester of pregnancy, regulation of abortions was permissible, but only to further maternal health; and, that during the third trimester of pregnancy, abortions might be prohibited, unless necessary to safeguard the mental or physical health of the mother. The Court added that its announced constitutional code of abortion would change with progress in medical technology that shortened the gestational period when the fetus would be viable outside the womb.

The Roe v. Wade ruling was not a vindication of the intent of the Fourteenth Amendment architects. Rather, the decree vindicated the public policy preferences of a majority on the Supreme Court. That conclusion is reinforced by the fact that the Court's opinion consulted ancient attitudes, the Hippocratic Oath, the common law, the English statutory law, the American law, the views of the American Medical Association, the views of the American Public Health Association, and the views of the American Bar Association, while generally ignoring the intent of the Fourteenth Amendment authors. A right of privacy, found nowhere in the constitutional text or constitutional history, was invoked to justify the Court's general denunciation of laws that regulated abortion in order to safeguard potential life.

Unchained from the Constitution, the Court's right of privacy concept became a juggernaut to invalidate involvement of

concerned fathers or parents in the abortion decision. On the other hand, the Court upheld restrictions on government funding of abortions, and acknowledged a valid state interest in encouraging childbirth over abortion. But then last month, the Court held in Thornburgh v. College of Obstetricians that a state invaded the right to privacy by requiring truthful information relating to the abortion decision that might convince the mother to choose childbirth.

The Supreme Court's creation of a constitutional right to an abortion represents social policy, not legal judgment. That explains why the Court's cluster of abortion rulings are in legal principle irreconcilable; social policy judgments differ from Justice to Justice.

Judge Scalia, we believe, will employ constitutionally pertinent criteria in examining abortion issues, and lead the Court out of its current confusion and constitutional lawlessness. As Associate Justice White recently warned, "the court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made law having little or no cognizable roots in the language or design of the Constitution."

Rectifying the Supreme Court's abortion cases will not require that abortions be restricted. The rectification will simply return the question to State and local officials to struggle with the anguishing issues involving the fetus, the mother, the father, and social ethics. It would be slanderous to the good name of the American people and contrary to experience to suggest that questions of abortion will not be responsibly handled by elected representatives of the people.

The High Court's pronouncements addressing the discretion of elected officials to proscribe or regulate indecent or lewd

speech under the banner of the First Amendment are also unsound. The purpose of the free speech clause was to safeguard political and cognate discussion or expression from government abridgment. As Chief Justice Charles Evans Hughes explained in DeJonge v. Oregon, it is imperative "to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." In addition, Justice Brandeis noted in Whitney v. California that rights of free speech were intended to insure that the deliberative forces in society prevail over the arbitrary on matters of public policy, and to foster the discovery and spread of political truth.

The Supreme Court, however, has nullified government efforts to regulate or prohibit indecent or lewd speech or activity inconsequential to vigorous political debate. In Cohen v. California, for instance, the Court held unconstitutional an effort to punish the public display of the words "F___ the Draft" on the back of a jacket. And in Miller v. California, the Court defined constitutionally unprotected obscenity to include only a very small category of pornography. These rulings may represent wise social policy. But social policy decisions have been assigned to elected branches of government under the Constitution. The Supreme Court's duty is to expound the Constitution in accord with original intent.

Speech or behavior that is designed to arouse sexual desire as opposed to triggering cerebral reflections should be governed by laws enacted by elected representatives. That conclusion is both consistent with the purpose of free speech in our democracy, and respectful of the rights of communities to establish rules of social discourse that fit a local ethos.

The Supreme Court's Church-State rulings are a collection of ad hoc social policy judgments generally heedless of the intent of both the First and Fourteenth Amendments. Organized but voluntary public school prayer, the public posting of the Ten Commandments, or moment-of-silence statutes are unconstitutional, according to the Court, if intended as an endorsement of religion. A State may loan parochial school children textbooks, but it may not loan a film on George Washington, or a film projector to exhibit the film in history class. A State may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school, but therapeutic services must be provided in a different building.

The incoherence of the Court's freedom of religion cases necessarily results from its use of social policy preferences rather than constitutional intent to control its deliberations. Thomas Jefferson's so-called wall of separation metaphor, expressed in a short note to the Danbury Baptist Association, has been invoked by the Court to fasten on States strict limits on aid to nonpublic schools under the aegis of the Fourteenth Amendment. Jefferson, however, was in France when the Bill of Rights was adopted by Congress and ratified by the States. Moreover, the First Amendment was explicitly drafted to exclude any application to the States. Finally, Jefferson was dead when the Fourteenth Amendment was ratified, and there is no cogent evidence that the authors of that 1868 Amendment intended to incorporate Jefferson's wall of separation theory to prohibit State assistance to religious endeavors. In sum, with a few exceptions, the Supreme Court is insincere about elaborating Church-State doctrine consistent with constitutional intent.

The decisions of the Supreme Court that affront constitutional intent may reflect enlightened social policy. If so, then there is good reason to believe many States or localities would embrace such policies voluntarily. But the tired refrain that the people of the United States would repeatedly act oppressively unless prevented by Supreme Court decrees is discredited by experience and common notions of fair play and equity. To be sure, legislatures often act unwisely, and occasionally callously. But the favored constitutional remedy is in the court of public opinion where legislative error may be corrected through the ballot box or otherwise. As Justice Cardozo taught, judges are not justified in overturning laws simply because they offend their sense of morality.

Moreover, the Supreme Court itself frequently errs and expounds harsh or unsentimental constitutional doctrine. High Court decisions holding unconstitutional the 1875 Civil Rights Act, the income tax, child labor laws, minimum wage laws, and laws protective of union activity all testify to Justice Jackson's epigram: the Supreme Court is not final because it is infallible; it is deemed infallible because it is final.

Responsibility is the mother of courage and individual growth. If, in contravention of constitutional intent, the people are denied responsibility over most questions of abortion, obscenity, or Church-State relations, then nothing prevents the courts from arrogating responsibility for virtually any contentious public policy issue. The consequence would be a demoralized citizenry unconcerned and untutored in the arts of self-government.

Judge Scalia, we believe, recognizes the significance of constitutional intent, doctrinal coherence, and predictability in the evolution of constitutional jurisprudence in a Nation founded on the creed of government by the consent of the governed. We believe Judge Scalia would help to extricate the Court from its uninspiring meanderings into the political and social policy thickets. We thus recommend his confirmation as Associate Justice of the Supreme Court.

Senator MATHIAS. Thank you very much. Miss Katzen.
Ms. KATZEN. Thank you.

STATEMENT OF SALLY KATZEN

My name is Sally Katzen. I am a lawyer in private practice—a partner at Wilmer, Cutler & Pickering here in Washington.

I am speaking today on behalf of myself alone in support of the nomination of Judge Scalia.

As you know, several women's groups have voiced concern about Judge Scalia. I understand that they are concerned because, based on his opinions and other statements, they believe that if he were confirmed he would undo much of what the women's movement has accomplished in the courts in the last decade.

In essence they disagree with Judge Scalia's position on a number of issues of importance to women.

I, too, disagree with Judge Scalia on many of these issues. But whereas they believe him to be closeminded, or perhaps affected by a personal bias against or insensitivity to women, my experience is very much to the contrary.

As Dean Verkuil noted this morning, Judge Scalia, who was then Professor Scalia, served as the chairman of the administrative law section of the American Bar Association in 1980–81. I had been elected to the council of the section, which is the decisionmaking body, in August 1980, when I was serving as the general counsel of the Council on Wage and Price Stability in the Carter administration.

My 3-year term on the council of the administrative law section coincided with Judge Scalia's tenure as chairman-elect, chairman, and past immediate chairman. As a result I had an opportunity to see firsthand Judge Scalia's stewardship of the administrative law section, and how he chose to exercise the leadership role that he had.

During those years I found Judge Scalia to be very bright; with strong analytical skills, well versed on administrative law issues, and intellectually curious.

He rarely, if ever, accepted arguments or contentions just because they were forcefully presented. He frequently challenged positions, including his own, in a spirit of collegial decisionmaking and debate. He attempted to bring his colleagues around to his point of view, but he was equally willing to be persuaded by well-reasoned, well-documented arguments. And I wish to stress that he never demonstrated any bias against or insensitivity to women, nor did he ever indicate that discrimination against women is appropriate, or even acceptable.

On the contrary, during these years, when he had no basis for knowing that his statements and actions would be subject to the intense scrutiny to which they are now being subjected, he was fair and nondiscriminating to all members of the section. He solicited and listened to my views, notwithstanding that we often disagreed, and, as best I recall, he related or responded to the other women in the section with the same courtesy and respect, treating us no differently than our male colleagues.

In fact, it is my clear impression that he actively encouraged women to participate in the work of the section. As chairman-elect, he appointed 6 women as chairs of committees, and 16 as vice-chairs of committees, and he appointed a woman to the 3-person nominating committee, which had the responsibility for selecting the following year's officers and council members.

When I served on the nominating committee several years later, I undertook as one of my assignments to poll past chairmen to get their views as to bright young, or not-so-young, rising stars. And I recall that Judge Scalia was very enthusiastic about women in leadership roles in the section generally, and very high on some women candidates in particular.

I should add that in the last few years I have appeared before Judge Scalia in oral arguments in the District of Columbia Circuit. And the traits that I discerned in the early eighties—being well prepared, analytically quick, and intellectually curious and fair—were very much evident in his performance on the bench.

I, therefore, urge your favorable consideration and confirmation of Judge Scalia to be Associate Justice on the Supreme Court.

Senator MATHIAS. Thank you, Ms. Katzen.

Mr. Fuller.

STATEMENT OF JACK FULLER

Mr. FULLER. I am Jack Fuller. I am editorial page editor of the Chicago Tribune.

Though I do not speak today in the voice of the newspaper, since it confines its say to the printed page, I should tell you at the outset that the Tribune has applauded Judge Scalia's nomination. In editorial published in the newspaper of June 18, 1986, the Tribune praised Judge Scalia's "reputation for intelligence, intellectual honesty and convincing argument" and went on to characterize him as "a lawyer's lawyer: meticulous, measured, determined to read the law as it has been enacted by the people's representatives rather than to impose his own preference upon it."

I am here——

Senator BIDEN. We would be surprised if you were here and it did not.

Mr. FULLER. I have known Judge Scalia for more—I do not know why you would be.

I have known Judge Scalia for more than a decade since working with him in the Department of Justice where I served as a special assistant to the Attorney General at that time, Edward Levi.

In the Department I worked with Judge Scalia closely on a wide range of issues of Federal legal policy, many of them difficult constitutional matters that touched on fundamental concerns of liberty and the structure of constitutional government.

Judge Scalia brought to bear the lawyerly virtues of attention to detail, close analysis and clear, direct expression.

He was openminded in the examination of legal questions, and scrupulously honest in the presentation of his views.

If character, intelligence, legal craftsmanship and a passionate regard for the tradition and responsibility of the law are the marks

of excellence in a justice of the Supreme Court, then Judge Scalia will fit and honor that high office.

One of the important functions of the Supreme Court is to explain the law to the people it serves. Judge Scalia brings to this work a remarkably clear and vivid writing style. As a writer myself, I must tell you that I read Judge Scalia's articles and opinions with a deep sense of professional envy. The Supreme Court, like all institutions of self government, ultimately depends on public understanding and acceptance. Judge Scalia's gift for writing will serve the institution and the public well.

Finally, I do not believe, as some of my colleagues in journalism do, that Judge Scalia lacks the proper reverence for the value of free expression.

First of all, I do not think that we in the press should succumb to the temptation to behave like a single-interest lobby group, demanding lock-step agreement in every doctrinal dispute that touches upon its own particular interest. In a matter such as an evaluation of a person for a position on the Supreme Court, the press 're-sponsibility, like this committee's or the public's, is to measure the individual against the much broader and appropriate standard of character, skill, intelligence, and commitment to the rule of law.

Second, through my years of acquaintance with Judge Scalia, I have come to know him as a man utterly committed to free debate of public issues. As an executive branch official, as a writer, as an editor, and as a scholar, he has not only articulated his belief in the importance of free debate; he has lived it.

I have no doubt that as a Justice of the Supreme Court he will take serious the Court's responsibility as a guardian of the system of free expression.

Finally, I believe that a careful, lawyerly excellence, of the sort that has marked Judge Scalia's career, is the best indicator of what he will accomplish on the Supreme Court.

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

Senator MATHIAS. Thank you, Mr. Fuller.

Senator Biden.

Senator BIDEN. Sir, is it usual for you to testify. I mean, is it a precedent?

Mr. FULLER. It is highly unusual for me to know very well a nominee for the Supreme Court of the United States. It is very unusual for me to testify on someone's behalf.

Senator BIDEN. Ms. Katzen, I want to speak to you later about the guy sitting behind me, and about what kind of job he did. I have been informed that I should disclose to the staff that my staff person used to be accountable to Ms. Katzen in her law firm. I would like to talk to you later about him, if I may.

Ms. KATZEN. Well trained, is he not?

Senator BIDEN. Well trained. He has done a heck of a job, as a matter of fact.

Ms. KATZEN. I am sure.

Senator BIDEN. Mr. Fein, is there a right of privacy in the Constitution?

Mr. FEIN. There certainly is not in explicit terms. However, there are certain privacy values definitely protected by the Constitution. The first amendment, for example, protects absolutely the freedom of belief. It also protects a freedom of religion.

The fourth amendment——

Senator BIDEN. How about the ninth amendment?

Mr. FEIN. The ninth amendment does not protect anything. Indeed, the Supreme Court was required to refer to it as having emanations and penumbras in order to define some substantive significance to the ninth amendment. A majority of the Supreme Court has never thought that it itself conferred any right of privacy, but privacy values are protected in the Supreme Court; not explicitly. It was intended to preserve certain core elements.

Senator BIDEN. Can you tell me what some of those rights of privacy are that are protected——

Mr. FEIN. Certainly. The fourth amendment right against unreasonable searches or seizures.

Senator BIDEN. But they are all enumerated.

Mr. FEIN. They are enumerated.

Senator BIDEN. Are there any unenumerated rights of privacy?

Mr. FEIN. In the Constitution?

Senator BIDEN. Yes.

Mr. FEIN. No.

Senator BIDEN. No more questions.

Thank you very much.

Senator MATHIAS. Senator Metzenbaum.

Senator METZENBAUM. Mr. Fein, I heard you on TV the other day when Senator Biden invited you to his office. I was just curious to know what this United Families deal is. How many thousands of members do you have?

Mr. FEIN. I will provide you with a specific number if you would like that.

Senator METZENBAUM. I did not ask for a specific number. I wanted the thousands. Do you have 1,000, 5,000, 100?

Mr. FEIN. I do not know, Senator.

Senator METZENBAUM. Is it not a fact, Mr. Fein, it is a paper organization. It is your organization, and it is just funded by some right wing conservatives. Is that not actually the fact?

Mr. FEIN. No, I think that is absolutely false, Mr. Senator.

Senator METZENBAUM. Tell me the truth. Where do you get your money?

Mr. FEIN. I did not found the organization. And I can refer you to those who run it on a day-to-day basis in Washington and provide any of the details with regard to the funding and the expenditures, et cetera.

But I had nothing to do with the foundation of this particular organization.

Senator METZENBAUM. But you are very smart. Tell us about the organization. What is it? I mean, it is just a name. I have never heard of it before.

Mr. FEIN. I am not intimately familiar with the United Families of America. I can tell you, I had nothing to do with its foundation.

I have sympathy with their views in promoting family values. They contacted me and asked that I prepare testimony and represent them in these proceedings and that is my association with this organization.

Senator METZENBAUM. You were with Gray & Co. at one part of your life?

Mr. FEIN. At one time, yes, sir.

Senator METZENBAUM. Did you hold a position with this administration at any point?

Mr. FEIN. Yes, I did.

Senator METZENBAUM. What did you do?

Mr. FEIN. I was Associate Deputy Attorney General for 2 years during the first term of the Reagan administration. I served for 2 following years approximately at the Federal Communications Commission as general counsel.

Senator METZENBAUM. And who asked you to speak?

Mr. FEIN. United Families of America asked me to represent them here.

Senator METZENBAUM. Are you a private, practicing lawyer; is that it?

Mr. FEIN. Yes, I am.

Senator METZENBAUM. And you are just here as counsel for the organization, an organization about which you know absolutely nothing?

Mr. FEIN. I think that is an overstatement, but I am counsel for them at this proceeding, yes, sir.

Senator METZENBAUM. Well, tell me what you know.

I guess what I am really asking you is: You are asked to come here to speak on behaf of an organization.

Mr. FEIN. It is an organization that promotes the family values in the United States, as a matter of law and policy.

Senator METZENBAUM. Well, my understanding of the organization is that it is just a paper organization that does not exist, it does not have members. So I asked you how many members, you said you do not know. You are very smart. That is the second time I have said that, so I might pull you out in order to give me some indication as to, truly, what is the United Families Foundation if it is something more than a front organization?

Mr. FEIN. Mr. Senator, I gave you the complete reservoir of my knowledge as to the values it promotes and the fact that I had nothing to do with its inception as an organization. And I would be speaking on things of which I was ignorant if I hazarded a guess.

Senator METZENBAUM. Who is the president?

Mr. FEIN. Excuse me.

Senator METZENBAUM. Who is the president?

Mr. FEIN. Bob Bartleson is the one who I spoke with in regard to preparing the testimony and appearing here today and last week as well.

Senator METZENBAUM. He is the president, is he?

Mr. FEIN. I do not know what his particular title is. He is the one who operates the Washington office.

Senator METZENBAUM. I have no further questions.

Senator BIDEN. I have a couple of questions after you.

Mr. FEIN. Mr. Chairman, could I ask that there be held open the record to permit the information to be included that would refute the allegation that the United Families of America is simply a paper organization?

Senator MATHIAS. The record will be open. And I think Senator Metzenbaum would be glad to have you provide that information.

Mr. FEIN. Thank you, Mr. Chairman.

[The following was received for the record:]

BRUCE FEIN & ASSOCIATES

562 INNSBRUCK AVENUE, GREAT FALLS, VIRGINIA 22066 BRUCE FEIN PRESIDENT 703/759-5011

August 7, 1986

Senator Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I testified on behalf of United Families of America on August 6, 1986 in support of Judge Scalia's nomination to be Associate Justice of the United States. During my testimony, Senator Howard Metzenbaum falsely suggested that United Families of America was a mere "paper organization" that I had concocted for some unstated purpose.

As I testified under oath at the hearing, I had no involvement in the formation of United Families of America. It is a substantial organization.

United Families of America was incorporated in Virginia in 1978. Its estimated budget for 1985 was $450,000, and its projected budget for 1986 is $500,000.

The Chairman of the Board of Directors is Cliff Cummings, 10303 Conejo Lane, Oakton, Virginia, 22124. Gordon Jones, Kent Bradford, and Susan Roylance complete the Board's membership. The staff of United Families of America include Bob Bartleson, Executive Director, Lowell Soury, Shaun Henry, and Chuck McFall.

The primary mission of United Families of America is lobbying the federal government in support of policies sympathetic to traditional family values and family life. A national grass-roots organization, United Families of America has devoted considerable effort to achieving tax reform for the family, preventing psychological abuse in the classroom, and voicing opposition to abortion.

The United Families Foundation is a section 501(c)(3) tax exempt organization. Organized in 1980 under South Carolina law, United Families Foundation has 40,000 to 50,000 members. The Foundation promotes acceptance and support for traditional family structures, values, and relationships. The main sources of financial support for the Foundation include The Anschutz Foundation, Mr. Roger Milliken, Miss Florence Manning, Mrs. Ruth Hallum, and Mr. Robert Perry.

I respectfully request that this letter be included in the record as a supplement to my August 6, 1986 statement supporting Senate confirmation of Judge Scalia as Associate Justice of the United States. If Senator Metzenbaum or any other Member of the Judiciary Committee desires further information about either United Families of America or United Families Foundation, I would be delighted to provide the same for inclusion in the record or otherwise.

Sincerely,

Bruce E. Fein

Bruce E. Fein

Senator METZENBAUM. Incidentally, may I just ask one more question?

According to the designation on our sheet, it indicates you are appearing on behalf of the United Families Foundation. You state you are appearing on behalf of United Families of America.

Is there a foundation——

I guess I am just asking you, what is the fact?

Mr. FEIN. I am representing United Families of America. My understanding is that there is a foundation that is a separate organizational unit, but when the record is held open, I will provide the details on the relationship between the two.

Senator METZENBAUM. Thank you.

Senator MATHIAS. Senator Biden.

Senator BIDEN. Mr. Chairman.

Mrs. LaHaye, let me ask you. Concerned Women for America, which you stated is the largest women's organization, nonpartisan women's organization, I think, is the phrase you used; is your organization involved in the trial that is attempting to withdraw certain books from schools because they violate Christian values?

Mrs. LAHAYE. We are involved in a trial in Tennessee. But let me just correct that for the record.

Senator BIDEN. I would like to know what it is.

Mrs. LAHAYE. We are not trying to withdraw books from the school at all.

Senator BIDEN. What are you trying to do?

Mrs. LAHAYE. We are simply asking for seven families to have the right to have an alternative textbook in the Hawkins County School District.

Senator BIDEN. And the alternative textbooks, for example——

Mrs. LAHAYE. They requested the textbooks called, Open Court, published by Open Court. The readers that they are being asked to read in the school, or forced to read, is the Holt series readers.

Senator BIDEN. But your organization has no objection to the schools, for example, including the story of Leonardo da Vinci?

Mrs. LAHAYE. No, not at all; that was false reporting.

Senator BIDEN. This press reporting——

Mrs. LAHAYE. That is not correct.

Senator BIDEN. I mean, that is kind of crazy; you would agree, right?

Mrs. LAHAYE. You are right. We are not that crazy.

Senator BIDEN. Or a visit from Mars should be taken out——

Mrs. LAHAYE. No, those have all been misquoted.

Senator BIDEN. It says, the visit from Mars, for example, seemed to Mrs. Frost to embody, through transfer or telepathy, supernatural attributes that are properly God's alone, therefore the children should not read it.

You do not believe in that, do you?

Mrs. LAHAYE. The things they were objecting to, really, causing them to experience other religions and not the history. They approve of the history. But they did not want to——

Senator BIDEN. Did that experience another religion?

Mrs. LAHAYE. No, I am not saying that is. This is part of their testimony. They did not disapprove of the Three Bears, as some of the press reported they did.

Senator BIDEN. I see.

Mrs. LAHAYE. Or Cinderella.

Senator BIDEN. Because it is kind of confusing. It says:

Mr. Farris is one of four lawyers on the staff of Concerned Women for America who are representing a dozen Hawkins County residents who are seeking alternative books for their children. The Washington-based organization was founded by Beverly LaHaye, who is married to television evangelist Tim LaHaye, a strategist for the religious right. That is how it is characterized.

Mrs. LAHAYE. One correction.

Senator BIDEN. In fairness to you, I am reading from the New York Times.

Mrs. LAHAYE. He has never been a TV evangelist, but they can call him what they wish.

Senator BIDEN. I cannot read this writing, whoever gave me this note. So if you rewrite it, I can read it.

I cannot read the books or the writing; I am getting old.

It says, Concerned Women also paid a Tennessee lawyer to represent Mrs. Frost in a separate case earlier this year in which she was awarded $70,000 in damages by a jury for false arrest. The local police officer had arrested Mrs. Frost for trespassing when she came to try to remove one of her children from a reading class at school. The officials acknowledged that the arrest was not authorized by the local ordinance.

The textbooks are being defended here by lawyers retained by the insurance company of Hawkins County, by Tennessee Advocate General William H. Farmer, and by five lawyers of the prominent Washington firm of Wilmer, Cutler & Pickering. And the plot thickens. [Laughter.]

Ms. KATZEN. It is worse than you suspect.

Senator BIDEN. The next thing I am going to find out is that my staff guy was on this case.

Is that the note you are passing me?

Ms. KATZEN. If I may, Senator, I would note for the record that——

Senator BIDEN. Your husband was a school board lawyer?

Ms. KATZEN. Yes, sir; my husband was the lead trial counsel for the school board on the other side of the case from Mrs. LeHaye.

Senator BIDEN. This is like Dallas.

Ms. KATZEN. But I think it demonstrates an important point. As was mentioned this morning, Judge Scalia's qualifications are such that he has earned the respect of people across the political spectrun. Mrs. LeHaye and I are both appearing here today in support of Judge Scalia, and it may be the only thing we agree on.

Mrs. LAHAYE. I think that would be very true.

Senator MATHIAS. At least there does not seem to be much diversity of opinion at Wilmer, Cutler & Pickering.

Senator BIDEN. The firm agreed to contribute its time and talent to the case after being approached by the People for the American Way, an American civil liberties lobby founded by television producer Normal Lear to monitor the religious right.

Well, you have helped me clear up what seemed to be an inconsistency. And at some point, if we have the time, I would like to know how you reach an editorial decision. But it is the first time in

my 14 years here, other than speaking on a first amendment issue, that there has been an editor that showed up.

Mr. FULLER. I thought I was speaking on a first amendment issue.

Senator BIDEN. Oh, are you? You are speaking on behalf——

Mr. FULLER. I thought there had been a lot of concern on the part of this committee and some parts of the press about Judge Scalia's attitudes toward the first amendment.

Senator BIDEN. Yes, but you went way beyond that.

That is all right. I am just pointing out that I have never seen that before. There is nothing wrong with that. I welcome you here, I truly do.

Mr. FULLER. Thank you.

Senator BIDEN. Because after reading some of your editorials, I am as confused as you are listening to us.

Senator MATHIAS. I do not think we should forget the most recent editorial writer we had here.

Senator BIDEN. Who is that?

Senator MATHIAS. J. Harvie Wilkinson.

Senator BIDEN. That is true. How could I forget J. Harvie. I do not have any further questions. Thank you.

Senator MATHIAS. Senator Metzenbaum.

Senator METZENBAUM. I was not here when you spoke, Mrs. LaHaye. But did I hear somebody say that your organization is the largest women's organization in the country?

Mrs. LAHAYE. I am quoting what Time magazine said. Time magazine gave credit to that about 4 or 5 months ago.

Senator METZENBAUM. How many members are there in your organization?

Mrs. LAHAYE. We have 565,275 as of this morning, and it changes everyday.

Senator METZENBAUM. They are all dues-paying members?

Mrs. LAHAYE. Yes, they have all identified on paper that they want to be part of CWA.

Senator METZENBAUM. And are you the president?

Mrs. LAHAYE. Yes, I am; and the founder.

Senator METZENBAUM. And how do you get your membership?

Mrs. LAHAYE. Through many different means. Through personal appearances where I speak, through books I may have written, or contacts—we have area representatives all over the United States, and they solicit members in their area.

And when we have a court case like Senator Biden just referred to, that gives us new members because——

Senator BIDEN. I would not give him all your secrets.

Mrs. LAHAYE. OK; I will save a few.

Senator METZENBAUM. And where are you most active, north, south, or all over the country?

Mrs. LAHAYE. Oh, our biggest membership is in California. We are all over the United States.

Senator METZENBAUM. Did I hear you say that you were concerned about the school books that are used in the South?

Mrs. LAHAYE. No, that would be too general. The specific books, called the Holt series readers, that one series that is published for elementary school grades, that seven families have objected to. And

they simply asked that the school board approve alternative books for them to read. Which other—the classes were reading three or four different kinds of books at one time. They asked for an alternative book for their children. The school board denied that request, and then expelled the children from school when they would not read the books.

Senator METZENBAUM. Let me ask you, do you think it would be good policy if outside groups, or in groups, for that matter, those who have children in school, started to try to tell the school boards where their children go to school—or even if they do not go to their school—what choice of books should be used in the classroom? Do you think that is good policy?

Mrs. LAHAYE. Well, I think it is not good policy for the education system becoming a wedge between the parent and the child which was what we were seeing happening.

Senator METZENBAUM. I know that point of view of yours, but I do not think you answered my question.

The question was do you think it is good policy for some group of parents in the school, or a group such as yours outside the school, to be telling a school board what books should or should not be? Forgetting about what the books are, do you think that is a good policy?

Mrs. LAHAYE. Well, a good policy is a very general statement, and this happened many times. We had people reporting that the books they object to may have had a story of the Bible in it or creation in it. So it has been going on for a long time where parents have objected and tried to see that the school would support basically, basically what they are trying to teach their children at home without conflict.

Senator METZENBAUM. Well, I understand that. But I do not understand what kind of a miracle it would be if Concerned Women for American was at the school board advocating certain books be on or off the list, or that NOW would be there with another group of books, or concerned women lawyers would be there for another group of books——

Mrs. LAHAYE. Yes, sir; that was not the case, that was not what they were doing.

They merely asked for the open court series, which is already on the approved list for the Tennessee Education Association. It is already on their approved list. So it is not new books they would be purchasing. They asked that their children could be granted the privilege of reading those books.

Senator METZENBAUM. I just say that whenever I hear of somebody interfering with the choice of books for school, I do have some concerns. And maybe that is the right thing to do, but I myself am doubtful.

Mrs. LAHAYE. The courts will be deciding very soon.

Senator MATHIAS. We have two more panels who are anxiously awaiting to give their testimony.

Let me call on Senator Simon and see if he has any questions for this panel.

Senator SIMON. Just one question. My friend Jack Fuller, from the Chicago Tribune, mentioned this quote from Judge Scalia, written before he was a judge.

He says:

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

Does that bother you at all?

Mr. FULLER. Well, let me tell you what I think about Judge Scalia's attitude toward the Freedom of Information.

My understanding of Judge Scalia, and it is from what I have read of what he has done and from reading his opinions, my understanding of his approach is that he is very differential to the legislative branch of Government in enforcing the rules that the legislative branch writes.

My prediction, and you can never predict these things very well, is that this Congress would have few difficulties with Judge Scalia overruling its intention in the enactment of legislation like the Freedom of Information Act. It is very fundamental to his approach that those decisions be left to the majoritarian institutions.

So he may have, and I think he does have—he does oppose parts of the Freedom of Information Act, but I do not think there is a very grave risk that he would try to eviscerate that law from the Court. That is just exactly the kind of approach he would not take, I think.

Senator SIMON. The statement indicates that the obsession with the press as the first line of defense against an arbitrary executive is at the root of defects in the Freedom of Information Act.

Mr. FULLER. Well, I am, of course, fully in favor of do-it-yourself oversight on the part of the press.

Senator SIMON. I would think so.

Mr. FULLER. But I also think that I understand what he was writing about, and what I think he is writing about is his view that the first line of defense of liberty is really in the majoritarian institutions of the government. That is through the separation of powers and those constitutional provisions that you have the first line of defense—the oversight, not of the press in his view, but the oversight of this institution.

I happen to think that the press plays a very important function in that whole process, but I think I understand what he is trying to drive at, too.

Senator SIMON. All right. I would just add that I am probably going to be voting for him. I do have some concerns in this whole first amendment area. His record so far, and it is a limited record, is not one which shows great sensitivity to freedom of the press and freedom of speech.

I have no further questions.

Senator BIDEN. Mr. Chairman, could I have 30 seconds?

Less I appear in an editorial, let me point out that I want to compliment you. I think your testimony, Mr. Fuller, warrants some considerable credibility in light of the positions you have taken on other nominees that have come up also. It clearly is one that demonstrates you have a consistent demand for excellence on the part of the judiciary, and I compliment you on your good judgment.

Senator MATHIAS. Did you say it was a breath of comprehension?

Senator BIDEN. Yes, it was the comprehension.

Senator METZENBAUM. The Chicago Trib is not making editorial endorsements yet in the Presidential Democratic primaries, are they?

Mr. FULLER. We certainly have not.

Senator METZENBAUM. I was hoping.

Senator MATHIAS. The Chair feels constrained to bring this hearing back to the subject.

Thank you all very much for being with us. We appreciate you being here.

Our fourth panel is Anne Ladky, executive director, Women Employed; Ms. Joan Messing Graff, executive director of the Legal Aid Society of San Francisco; Ms. Audrey Feinberg of the Nation Institute, of NY; Ms. Kate Michelman of the National Abortion Rights Action League.

Ms. FEINBERG. Am I it?

Senator MATHIAS. You are the only one.

Will you please raise your right hand?

Do you swear that 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. FEINBERG. Yes, I do.

Shall I proceed?

Senator MATHIAS. As you know, our rules ask you to make a 3-minute oral presentation. Your full statement will appear in the record.

Senator SIMON. Mr. Chairman, since the other members of the panel are not here, I assume we will enter their statements in the record?

Senator MATHIAS. Their statements will be received in the record if they are received by the committee in a timely fashion.

I might repeat that the record will be open until 4 o'clock on Friday afternoon.

TESTIMONY OF AUDREY FEINBERG, THE NATION INSTITUTE, NEW YORK, NY

Ms. FEINBERG. Members of the committee, I am Audrey Feinberg, an attorney with the New York City law firm of Paul, Weiss, Rifkind, Wharton and Garrison, and I am appearing on behalf of The Nation Institute. It is a foundation dedicated to the protection of civil rights and civil liberties. The Nation Institute is deeply concerned by the record of Judge Scalia for two reasons.

First, a review of Judge Scalia's decisions reveals a record that is far removed from mainstream judicial thought. During his few years on the bench, Judge Scalia's rulings have reflected extreme views, far to the right of even traditional conservative legal opinions.

Second, Judge Scalia's decisions reveal a remarkably consistent record of failure to support civil rights and civil liberties.

I have examined Judge Scalia's opinions in 14 areas, including sex and race discrimination, freedom of speech and press, privacy, legal representation for the poor, Presidential power in foreign policy, gun control, criminal law, consumer protection, labor law, and other areas. In case after case, Judge Scalia has shown a closed