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

mind and a relentless insensitivity to the needs of women, minorities, and the poor, and he has slammed the courthouse doors in the faces of the disadvantaged.

Further, Judge Scalia's record raises serious questions about whether he has a political agenda that is incompatible with the impartiality required of Supreme Court Justices. I will offer just a few examples.

On the subject of sex discrimination, Judge Scalia has taken a position that is even farther to the right than the views of Justice Rehnquist. Unlike Justice Rehnquist in the unanimous opinion of the Supreme Court, Judge Scalia's opinion is that sexual harassment in the workplace is not actionable sex discrimination. I refer the committee to the case of *Meritor Savings Bank* v. *Vinson.*

In addition, Judge Scalia imposes a high burden on all those who sue for race discrimination. The majority of Judge Scalia's court wrote that Judge Scalia's views on race discrimination were "without precedent," and they would "effectively eviscerate" the discrimination laws.

I refer to the case of *Carter* v. *Ducan-Huggins, Ltd.*

Further, Judge Scalia is firmly opposed to affirmative action, calling it "the most evil fruit of a fundamentally bad seed."

I have merely highlighted the callousness to civil rights that seems to animate Judge Scalia's approach to judging. There must be a conscience in the confirmation process.

We urge the members of this committee to weigh whether an extremist, even one as affable as Judge Scalia, belongs on the Supreme Court for the next generation.

Thank you, and I ask that my full written record be submitted to the committee.

Senator MATHIAS. It will.

[Prepared statement of Ms. Feinberg follows:]

TESTIMONY OF

AUDREY FEINBERC,

ON BEHALF OF THE NATION INSTITUTE

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON THE NOMINATION OF ANTONIN SCALIA

FOR ASSOCIATE JUSTICE OF THE SUPREME COURT

MR. CHAIRMAN and MEMBERS of the COMMITTEE:

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

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

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

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

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

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

EXTREMISM IN JUDGE SCALIA'S OPINIONS

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

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

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

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

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

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

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

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

INSENSITIVITY TO CIVIL RIGHTS, CIVIL LIBERTIES AND CONSTITUTIONAL PROTECTIONS

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

Libel and Freedom of the Press

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

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

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

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

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

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

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

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

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

Free Speech

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

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

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

Government Secrecy

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

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

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

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

Regulation (March/April 1982)

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

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

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

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

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

Race Discrimination

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

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

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

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

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

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

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

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

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

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

Sex Discrimination

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

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

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

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

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

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

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

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

Washington University Law Quarterly (1979).

Abortion and Privacy

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

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

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

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

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

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

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

Legal Representation for the Poor

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

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

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

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

Presidential Power in Foreign Policy

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

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

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

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

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

Gun Control

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

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

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

Criminal Law: Exclusionary Rule

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

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

Death Penalty

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

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

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

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

Consumer Protection

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

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

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

Labor

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

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

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

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

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

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

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

Worker Safety

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

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

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

Judicial Philosophy

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

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

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

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

CONCLUSION

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

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

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

Senator MATHIAS. Senator Biden.

Senator BIDEN. Ms. Feinberg, you cited 10 or 12 areas that you looked into his record on.

Has he decided cases in every one of those areas?

Ms. FEINBERG. Yes, he has. He has had at least several cases in all of these areas, and in case after case, he has consistently ruled against civil rights issues, against civil liberties, against women, against blacks, and against the poor.

Senator BIDEN. Let me ask you. Your conclusion is that he in fact is extreme. Is that the phrase you used, or what was the phrase you used?

Ms. FEINBERG. Well, I would agree that he is indeed extreme. And I would in particular point to the sexual harassment case where the Supreme Court recently unanimously ruled that sexual harassment is discrimination. Well, they split on some side issues, and the Court unanimously felt that that in fact was discrimination and, indeed, that opinion was authored, the majority opinion in that case was authored by Justice Rehnquist. And Judge Scalia would not go along with that.

I think someone that is far to the right of every Judge on the current Supreme Court would have to be labeled extreme.

Senator BIDEN. Do you believe that it is his agenda to overrule *Roe* v. *Wade?*

Ms. FEINBERG. Well, he has not explicitly stated anywhere whether he would overrule *Roe* v. *Wade.* He has very harshly criticized the decision, and I think he has made his views on abortion clear. And he has also disparaged the landmark privacy decisions of the Supreme Court, including the *Griswold* case and cases that had nothing to do with abortion. So I think we would have to be extremely concerned about whether he would overrule *Roe* v. *Wade.*

Senator BIDEN. Why do you not tell me what he said again in the *Vinson* v. *Taylor* case? I have that language somewhere.

Ms. FEINBERG. The holding of that case was that sexual harassment was not actionable sex discrimination. And I believe he labeled the idea that it might be actionable as "bizarre."

His view was that the civil rights statutes were not broad enough to encompass something as sexual harassment. I think that is quite a remarkable idea because the standard method of constitutional construction is that civil rights statutes and all remedial statutes shall be interpreted broadly.

The idea that something as horrible and as awful for the victims that experience it as sexual harassment is not considered sex discrimination is quite an unusual proposition.

Senator BIDEN. Did he write the decision?

Ms. FEINBERG. I believe that that was a decision that was written by Judge Bork, in which he joined. It was a 7-to-3 decision of the D.C. Circuit Court of Appeals.

And then it was overruled. That viewpoint was unanimously ruled against by the Supreme Court, which was a 5 to 4 decision, and for which Justice Rehnquist wrote the majority opinion. And the Court was split on some evidentiary issues, but they were unanimous on the view that sexual harassment is discrimination.

Senator BIDEN. Now, does he say in that decision that sexual harassment is not—let me read and I—what language do you rely upon for him for the suggestion? I am not doubting you.

Ms. FEINBERG. I think I have one quote here which might clear that up.

Senator BIDEN. OK.

Ms. FEINBERG. In the *Vinson* case, in his dissent, the opinion which Judge Scalia joined said he was discussing the fact that the civil rights laws might not protect women from unwelcome lesbian advances. And then he said, "That bizarre result suggests that Congress was not thinking of individual harassment at all, but of discrimination and conditions of employment because of gender."

So it seems pretty clear to me from that that he is saying that Congress which had passed title VII and the other sex discrimination statutes did not contemplate that they would cover sexual harassment, and that indeed they should not cover sexual harassment.

Senator BIDEN. The case in question was the——

Ms. FEINBERG. That is the case of *Meritor Savings Bank* v. *Vinson.*

Senator BIDEN. Yes.

Ms. FEINBERG. In the court below, it had the name of *Vinson* v. *Taylor.*

Senator BIDEN. Right.

How about the *Bouchet* v. *National Urban League?* Are you familiar with that where Judge Scalia affirmed the jury's finding of no sexual harassment without reaching the issue of whether sexual harassment is actionable discrimination?

Ms. FEINBERG. Yes. Some people have cited that case as showing that Judge Scalia may in fact believe that sexual harassment is actionable.

However, what that case found was against the plaintiff, and it reached a finding of no sexual harassment. And therefore I don't think you can infer any views on whether sexual harassment is actionable or not. In fact, that case held that on the particular facts before it, there was no sexual harassment. And it never at all discussed the broader question of whether sexual harassment is actionable sex discrimination.

The Court did not need to get that far in the *Bouchet* case, because they were ruling against the plaintiff and found, as a matter of fact, that there was no sexual harassment.

Senator BIDEN. It may seem like an unfair question I am about to ask you. But if the judicial nominee were here, and they were not on the Court but they were being nominated for the Supreme Court, and they said in testimony that they in fact thought that *Roe* v. *Wade* was wrongly decided, but on all other counts they seemed to have positions recognizing the rights of women in this country, would you testify against that person merely because they disagree on *Roe* v. *Wade*?

Ms. FEINBERG. I would certainly reconsider my testimony. I do not think you can use a litmus test of any one particular issue in judging a nominee. And, of course, it would depend on Judge Scalia's views on every other issue.

Roe v. *Wade* is an important case and a longstanding case and one that is deeply respected by women and women's groups. How-

ever, again I think you have to look at the overall record of the nominee. And in this case we are not talking about one case or even one issue. We are talking about issues ranging from women's rights to race discrimination, to libel and free press, to labor law, to consumer protection, and in all of issues Judge Scalia has come out against people suing to enforce their rights.

So, as far as looking at his record, and I would like to point out that it was hard to determine his views from the questioning by the Senators here. He seemed to be somewhat evasive and reluctant to go on the record with his views. He kept saying I refer you to my record. Look at my record and my writings to see what your opinion of me is going to be.

And what I have done here is look at his record. And in subject after subject, his record has been against civil rights, against civil liberties, and against the poor.

Senator BIDEN. Ms. Feinberg, are you an attorney?

Ms. FEINBERG. Yes, I am; I am practicing at the New York City law firm of Paul, Weiss, Rifkind, Wharton & Garrison.

Senator BIDEN. How long have you been practicing?

Ms. FEINBERG. Five years.

Senator BIDEN. You are very articulate.

Ms. FEINBERG. Thank you.

Senator BIDEN. It's presumptuous of me to suggest, but you are.

Let me ask you, then. Do you believe that Judge Scalia has a closed mind on these issues, that he is not subject to being convinced or changed in his mind?

Ms. FEINBERG. I think you are always in a difficult position in trying to predict what a judge will do in the future. But with Judge Scalia we can only look at his past record, and his past record does indicate a closed mind on certain issues—in particular, race discrimination, sex discrimination, Freedom of Information Act issues, free press issues.

And I would have to say, given his remarkably consistent rulings in this area, that he does have a closed mind, yes.

Senator BIDEN. Did your organization take a position on Justice Rehnquist?

Ms. FEINBERG. No, we did not.

Senator BIDEN. Is it appropriate to ask you why you did not, and why you did on Scalia?

Ms. FEINBERG. Well, the reason is because institutionally we set up a system of volunteer attorneys, such as myself, to study potential Supreme Court nominees, and each of us spent the better part of a year studying someone who might get nominated to the Supreme Court, and we never expected that Justice Rehnquist would be coming here for an additional nomination proceeding.

So that's the only reason we did not. I might add, though, that someone did testify several years ago when Justice O'Connor was nominated for the Supreme Court.

Senator BIDEN. Are you at liberty to tell us who else is coming up next? [Laughter.]

It scares me. How many people have you looked at?

Ms. FEINBERG. Well, we have a list of something like 15 members, and you are welcome to hear the names, if you want. It's our guess, as much as anyone else's.

Senator BIDEN. Well, you were right on one.

Ms. FEINBERG. I seemed to hit the right name, since I chose to spend my time studying Judge Scalia for the past year.

Senator BIDEN. That's remarkable, thank you.

Senator MATHIAS. Senator Metzenbaum.

Senator METZENBAUM. Ms. Feinberg, in the short time that I've had to peruse your written statement, I have to tell you that it's the best statement I've seen submitted by anybody either in connection with Justice Rehnquist or Justice Scalia.

Senator BIDEN. She's been working on it a year. [Laughter.]

Senator METZENBAUM. With all due respect, I'm afraid if my colleague had 3 years he wouldn't have done as well. Neither would I.

Senator BIDEN. You probably wouldn't be able to read it.

Senator METZENBAUM. You have succinctly stated the issue in a number of areas, and then, having done that, made your point.

Ms. FEINBERG. I appreciate the compliment, and again I would give part of the credit to the Nation Institute which set up a system so that we had sufficient time and resources to study the nominee.

If we had tried to do a study like this in the last 2 or 3 weeks since Judge Scalia was nominated, it would have been impossible. Because of the Nation Institute's program of monitoring potential nominees, we have been able to do a comprehensive look like this.

Senator METZENBAUM. When Mr. Fein appeared, I asked him what his group is. What is the Nation Institute?

Ms. FEINBERG. The Nation Institute is a private foundation. It is a research organization with primary concerns on civil rights and civil liberties. It sponsors conferences, research, and investigations.

One of its projects is called the Supreme Court Watch Project, and that project monitors the records of potential Supreme Court nominees.

If you want a more detailed explanation, the executive director of the Nation Institute, Emily Sack, I think is sitting right behind me, and she could explain more fully what their work is.

Senator METZENBAUM. How is it funded?

Ms. FEINBERG. Well, it's a private foundation, and it receives donations from various sources, primarily from people who are interested in civil rights and civil liberties.

Senator METZENBAUM. Tell me, in connection with the *Tavoulareas* decision, you pointed out that Judge Scalia's position was extremely tough, as far as freedom of the press is concerned, and, as I read your submission, you indicated that columnist Safire had called Judge Scalia "the worst enemy of free speech in America today," and columnist Anthony Lewis described the opinion as "a radical departure from existing law" and a "twisting of principle."

Would you tell us a bit about the *Tavoulareas* decision and Judge Scalia's role in that decision?

Ms. FEINBERG. Sure; that decision involved the president of Mobil Oil Co. who was suing for libel over an article that claimed that he had set his son up in the shipping business, and had diverted some of Mobil's shipping business to his son.

Judge Scalia joined in the opinion by Judge McKinnon that ruled against the Washington Post on the issue of libel in that case. And I'd like to point out that that decision has now been vacated and is

pending before the full District of Columbia Circuit Court of Appeals.

So the opinion joined by Judge Scalia is not currently the law of the land.

Not only did Judge Scalia rule against the press in that case, but, more importantly, he held that investigative reporting is evidence of malice—the phrase used is "hardhitting investigative stories"—and that searching for such stories is evidence of malice, one of the elements of libel claims.

Senator METZENBAUM. Just to elaborate upon that, the mere fact that a newspaper does, has investigative reporters, is in and of itself proof of malice?

Ms. FEINBERG. That was the holding of the decision, yes.

Senator METZENBAUM. And that was Judge Scalia's holding.

Ms. FEINBERG. Yes, it was.

Senator METZENBAUM. To your knowledge, has any other court ever indicated that the mere fact that a newspaper has investigative reporters is in and of itself proof of malice?

Ms. FEINBERG. No other court has ever done that. Indeed, that is what prompted the strong criticisms from columnists and others about this decision.

Investigative reporting is considered a respectable and legitimate practice of the press. It merely means that the press is digging hard for answers, that they ask questions, that they look at documents, that they do the kind of reporting that any good reporter should do. The idea that investigative reporting is evidence of malice would be news to most reporters. I think when this decision came out it was news to other judges.

Investigative reporting is something that is necessary for the press to do a good job. And it was never disparaged as much as it was in this strong opinion by Judge Scalia.

Senator METZENBAUM. If you follow that to its logical extreme, no newspaper could afford to have investigative reporters because every plaintiff would then have a simple way to get around the earlier decision of the Supreme Court.

Ms. FEINBERG. I think if this decision was the law of the land, which again it's currently vacated so it is not—but if Judge Scalia's decision were the law, reporters would be opening themselves up to libel suits for every story that they wrote that could be called investigative, and the newspaper would go out of business paying millions of dollars in libel fines in a very short time.

Senator METZENBAUM. Let's skip over to a latter point of your memorandum, about Judge Scalia's being insensitive to the needs of the poor for legal representation to protect their rights.

Could you tell us about the dissenting opinion that the Judge had in the case that's to be found on page 17?

Ms. FEINBERG. Yes, the case of *Trakas* v. *Quality Brands*. In that case Judge Scalia would have dismissed a poor woman's sex discrimination claim because she did not have the funds to travel to the place of trial. She said that she would have the funds within 1 month, because her husband had just gotten a new job, and she asked for a 1-month continuance of her trial date. The majority of the District of Columbia Circuit Court went along with her and

granted the continuance, but Judge Scalia wrote a separate dissenting opinion that would have denied her continuance.

I also would like to point out that the woman's poverty resulted from her being fired from her job as a saleswoman, and she claimed the firing was an act of sex discrimination, that she had been fired because her employer wanted an allmale sales force. Because she was out of a job, she did not have the funds to travel to trial. I believe she was traveling from Missouri to Washington for her trial. And she could not afford that, and she wanted a 1-month extension of time.

Rather than grant her a 1-month extension of time, Judge Scalia issued a very harsh decision dismissing her entire case and throwing her out of court.

This case also is the reason why I said he has closed the courthouse doors to the disadvantaged.

Senator METZENBAUM. How do you explain that about Judge Scalia? He appears before us, he's a family man, he seems to be a very sensitive individual, and yet the harshness of that decision with respect to dismissing the case because a woman didn't have the money after she had been fired in order to travel from Missouri to Washington to present her case—it's just somewhat difficult for me to comprehend.

Ms. FEINBERG. I think perhaps it cannot be reconciled with his personal attributes. I think this committee has heard and appreciated his affability, his congeniality, his integrity. But those are not the only qualities that this committee should be looking over. You have to look at his record and his decisions.

And his decisions paint a very different picture of who he is and what he stands for.

Senator METZENBAUM. Thank you very much.

Senator MATHIAS. Senator Simon?

Senator SIMON. Thank you, Mr. Chairman. First, Ms. Feinberg, so I know what we will be working on a year from now, what name are you going to take up next?

Ms. FEINBERG. You can take that up with Ms. Sack.

Ms. SACK. We thought we'd give her a rest.

Ms. FEINBERG. Are you interested in the names?

Senator SIMON. Yes, I am, might as well get a name.

Ms. FEINBERG. This is a tentative list obviously, and we are always adding to it; as quickly as we can find volunteers to research more people, we add more names.

But the current people being looked at include: Robert Bork, William Clark, Frank Easterbrook, Richard Epstein, Thomas Gee, Orrin Hatch of this committee, Cornelia Kennedy, Paul Laxalt, Richard Posner, William French Smith, Ed Meese, Thomas Sowell, Kenneth Starr, J. Clifford Wallace, William Webster, and Ralph Winter. And that's all that I have on this list. And I don't know that in fact we are investigating all of them, but that's the short list that we made up of people that we want to look into at this time.

Senator METZENBAUM. It's enough to give one nightmares.

Ms. FEINBERG. Well, we don't know how many more appointments President Reagan may get a chance to make.

Senator SIMON. Howard Metzenbaum is not on that list? [Laughter.]

Senator METZENBAUM. I'm not available.

Ms. FEINBERG. Would you like to be added?

Senator SIMON. You say in your conclusion that he has demonstrated a lack of commitment to civil rights and liberties. And I don't think there can be too much dispute on that.

Then you say he has shown no potential for change on any of these positions.

There are those who dispute the latter, and in questioning him yesterday he pointed out that he had stood up for a Marxist professor, for example; not a popular position.

How would you respond to that observation.

Ms. FEINBERG. Well, the problem with his dispute is I think you had great difficulty getting him to answer questions about his future decisions or views on issues. So you couldn't find out from him directly whether he thought he might grow or change on certain issues. And what we have to judge him by is his record.

And looking at his record over a long period of time, both his few years as a judge and before that as a professor, he has always held these views. He has been consistent in these views. We have seen little or no change from these positions.

And we can only judge him by the record that we have in front of us. And, based on this record, I see no prospects for major changes in his positions.

Senator SIMON. I have no further questions. Thank you very much, Mr. Chairman.

Senator MATHIAS. Ms. Feinberg, I have just one question. On the copy of your statement there is a list of the board of trustees.

Ms. FEINBERG. Yes.

Senator MATHIAS. Is the position that you have enunciated the position of the board of trustees, or is it your individual view?

Ms. FEINBERG. Well, it is the position of the Nation Institute, and what you should understand is that there is a separate board of the Supreme Court Watch Project of the Nation Institute. And the board of the Supreme Court Watch Project has been consulted about my testimony before I came here today.

Senator MATHIAS. But it is the view of the Institute.

Ms. FEINBERG. Yes.

Senator MATHIAS. I want to join in congratulating you on an excellent presentation.

Ms. FEINBERG. Thank you.

Senator MATHIAS. A very fine statement. Thank you very much for being with us. We appreciate it.

Ms. FEINBERG. Thank you. Further questions?

Senator MATHIAS. No further questions.

[Prepared statement of Kate Michelman follows:]

Testimony

for

National Abortion Rights Action League

On Nomination of Antonin Scalia

to the U.S. Supreme Court

Presented to

Senate Judiciary Committee

by

Kate Michelman

Executive Director

Mr. Chairman, Members of the Senate Judiciary Committee, my name is Kate Michelman and I am here representing the National Abortion Rights Action League, a grassroots political organization with a state and national membership of almost 200,000 women and men. I am NARAL's Executive Director.

The threat to Roe v. Wade[1] imposed by the pending nominations of Antonin Scalia and William Rehnquist is very real. The confirmation of Antonin Scalia and William Rehnquist will, without a doubt, make Roe, and the freedom of women to make private decisions about abortion, more vulnerable than at any time since it was decided in 1973.

If I could speak today to Judge Scalia instead of this committee, I might say to him "Justice, you may be conservative, you may be of a religious faith which opposes abortion, you may prefer to let elected bodies make as many decisions as possible, but Judge Scalia can we count on your fairness? Can we count on you to protect the rights of every citizen of this country, whether they agree with you or not? Can we count on you to recognize the fundamental constitutional rights guaranteed to every individual?"

I cannot speak directly in this way to Judge Scalia, but I can speak to the Senate Judiciary Committee. And so I say to you: Can you trust this man with decisions which will affect the lives and health, the privacy and liberty of millions of American women? Do you believe this nominee has a strong commitment to ensuring that women have equal rights under the law?

As members of the Senate Judiciary Committee you must look at many aspects of a nominee's qualifications and ideology. I am here to point out one important area which you should consider. The women of this nation, and the men who care about them, should be able to count on the members of the U.S. Supreme Court for equal justice under the law.

Without the right to control their reproductive destiny, women are not able to exercise fully their rights to liberty, " to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[2]

Let me repeat that this nominee, and the next nominee to the Supreme Court, will be the deciding votes on whether the Roe v. Wade decision remains as precedent, on the recognition that the right to liberty and privacy includes the right to choose an abortion. This nominee and the next nominee will decide whether women in this country will need to resort to illegal and possibly fatal abortions or will have access to safe legal abortions.

The composition of the Supreme Court is critical to the future of abortion rights. Anti-choice strategists see legislation coupled with litigation as the most likely way to undermine or overturn Roe. There is no shortage of anti-choice laws generating litigation.[3]

Further, we must remember that while Chief Justice Burger has had a mixed record on abortion cases, there is every reason to

believe that Judge Scalia would take a consistent position against women's liberty to make the choice between abortion and delivery.

We know that in the 13 years since Roe was decided there have been at least 14 abortion cases[4] before the Court. There are enough cases currently moving through the courts to realistically expect the Supreme Court to deal with numerous abortion cases in the immediate future.

Further still, we know the pro-choice majority had narrowed to 5-4 at the time of the most recent decision in Thornburgh v. American College of Obstetricians and Gynecologists.[5] A close look at the members of the Court makes it clear that four of the five pro-choice justices are over the age of 76. The probability is high that we will soon lose one or more of the justices who uphold and protect women's constitutional right to abortion.

We must look at the current nominees keeping in mind that new members of the Court are likely to be appointed in the near future. A Court currently unwilling to follow the leadership of a Rehnquist or form a majority with a Scalia may soon become a Court eager to move away from the recognition of individual rights and return women to the days of illegal back alley abortions.

Scalia, who refuses to recognize women's rights, is a danger when he is in the minority, he is an even greater danger if he becomes a part of a majority trying to move women back into the days of illegal and unsafe abortion.

SCALIA'S MAJORITARIAN VIEWS

In nominating Antonin Scalia, President Reagan has selected a judge who is a) personally and ideologically opposed to abortion

rights[6], and who b) believes that the courts should play a very limited role in protecting constitutional rights in cases involving controversial issues.

The intersection of these two views poses a serious threat to the individual liberty of women to make decisions about their lives, as well as to the continued ability of American political and racial minorities, as perennial targets of discrimination, to seek vindication of their constitutional rights in Court.

Scalia's most dangerous view, which he shares with Justice Rehnquist, is his belief that the courts, in analyzing constitutional questions, must abstain from ruling on issues on which there is not a "national consensus."[7]
This is a purely subjective determination. There is no mechanism accurately determining when a national consensus exists. This philosophical approach allows Judge Scalia to decide there was a societal consensus in 1954 at the time of the Brown v. Board of Education decision,[8] but not in 1973 at the time of the Roe decision[9] on the basis of his personal interpretation of history. Once a person with this approach is on the U. S. Supreme Court, we have no further safeguards against his willingness to interpret the law according to his personal views of societal consensus.

Hiding behind claims of judicial restraint, he picks and chooses among rights rather than protecting all fundamental rights as the Supreme Court should.

Perhaps even more frightening is the fact that if Judge Scalia does not like "contemporary consensus" he is willing to refer instead to "traditional consensus."[10]
Scalia's theory of present or past national consensus, or even majority votes by legislative bodies, flies in the face of the

fundamental principles embodied in the Bill of Rights, that the absolute responsibility of the Courts is to uphold the constitutional rights of individuals and minorities, regardless of, and often in spite of, the wishes of the majority.[11]

Roughly defined, the concept of a constitutional right is something than an individual cannot lose to the majority, unless a compelling state interest is invoked. Scalia's majoritarian philosophy though, indicates that the way something becomes a right is that the majority decides it is a right, and that the court should stay away from protecting rights that the majority would not agree with.

Scalia's theory of law based on the morality of the elected majority is reflected in Dronenburg v. Zech, where, in discussing the right to privacy Judge Scalia joined Judge Bork in an opinion which stated:

> When the constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.[12]

If an individual whose liberty is being violated is not able to turn to the courts, she or he is without much recourse. This raises a difficult barrier for abortion rights: who defines national consensus? A specific judge? Current public opinion? Past traditions? The majority vote of Congress? And what happens in the not unheard of situation where the actions of Congress do not seem to reflect public opinion?

SCALIA'S ABORTION VIEWS

While Judge Scalia has never decided a case dealing specifically with abortion rights, from his public statements he can be expected to vote against women's rights to make private choices.[13]

In discussing abortion at an American Enterprise Institute for Public Policy research forum Scalia stated,

> "We have no quarrel when the right in question is one that the whole society agrees upon," but of rights that could be overidden by the majority, specifically including abortion, Scalia added, "the courts have no business being there. That is one of the problems; they are calling rights things which we do not all agree on."[14]

Because for some abortion is a morally complex issue, Scalia would defer to the various judgements of the 50 state legislatures, the hundreds of local legislatiave bodies--where decision making is often based on what is politically expedient today rather than on a reasoned application of constitutional principles and precedents. He would defer to political bodies rather than affirm constitutional rights that allow individual women to weigh for themselves their life circumstances and the moral questions and make a personal decision.

As a Supreme Court Justice, Antonin Scalia, in all likelihood, would rule that the liberty to make a personal private decision about abortion is not a fundamental right protected from quirky interference by temporary legislative majorities. This will have a tremendous impact on the lives of the women of this country, as letters from women who have had abortions demonstrate:

> Becoming pregnant just two months after the birth of her first child, [my mother] was not well recovered from this experience. Her doctor was concerned for her health, but in 1940 there were no options. She and my father chose to abort this child, fearful her health was too fragile to manage another pregnancy so soon. Done by a backstreet butcher, the abortion put my mother's life in jeopardy and led to complications which nearly killed her during her pregnancy with me a few months later. She and I were in the hospital for 21 days following my birth and her health was permanently ruined. She underwent a hysterectomy by the age of 30 and has had two spinal fusions to attempt to repair the damage done to her body because of her pregnancies. (L-5)

> I think the thing I will always remember most vividly was walking up three flights of darkened stairs and down that pitchy corridor and knocking at the door at the end of it, not knowing what lie behind it, not knowing whether I would ever walk back down those stairs again. More than the incredible filth of the

place, and my fear on seeing it that I would surely become infected; more than the fact that the man was an alcoholic, that he was drinking throughout the procedure, a whiskey glass in one hand, a sharp instrument in the other; more than the indescribable pain, the most intense pain I have ever been subject to; more than the humiliation of being told, "You can take your pants down now, but you shoulda'--ha!ha!--kept 'em on before;" more than the degradation of being asked to perform a deviate sex act after he had aborted me (he offered me 20 of my 1000 bucks back for a "quick blow job"); more than the hemorrhaging and the peritonitis and the hospitalization that followed; more even that the gut-twisting fear of being "found out" and locked away for perhaps 20 years; more than all of these things, those pitchy stairs and that dank, dark hallway and the door at the end of it stay with me and chills my blood still.

Because I saw in that darkness the clear and distinct possibility that at the age of 23 I might very well be taking the last walk of my life; that I might never again see my two children, or my husband, or anything else of this world. (L-2)

This is not a letter about an abortion. I wish it were. Instead, it is about an incident which took place over forty years ago in a small mid-western town on the bank of the original "Old Mill Stream". One night a young girl jumped off the railroad bridge to be drowned in that river. I will always remember the town coming alive with gossip over the fact that she was pregnant and unmarried. . . I could imagine the young girl's despair as she made her decision to end her life rather than face the stigma of giving illegitimate birth. . .I still grieve for the girl. (L-6)

My job on the assembly line at the plant was going well and I needed that job desperately to support the kids. Also I had started night school to improve my chances to get a better job. I just couldn't have another baby--5 kids were enough for me to support.

I felt badly for a day or two after the abortion. I didn't like the idea of having to go thru with it. But it was the right thing for me to do. If I had had the baby I would have had to quit my job and go on welfare. Instead I was able to make ends meet and get the kids thru school. (L-19)

To this day I am profoundly grateful for having been able to have a safe abortion. To this day I am not a mother, which has been my choice. I have been safe and lucky in not becoming pregnant again. I love people and work in a helping profession which gives me much satisfaction. (L-21)

I am a junior in college and am putting myself through because my father has been unemployed and my mother barely makes enough to support the rest of the family. I have promised to help put my brother through when I graduate next year and its his turn. I was using a diaphragm for birth control but I got pregnant

anyhow. There is no way I could continue this pregnancy because of my responsibilities to my family. I never wanted to be pregnant and if abortion were not legal I would do one on myself. (L-22)

I had an abortion in 1949 because I could not go through with a loveless marriage for the sake of a child I did not want. . . The benefits were incalculable. I was able to terminate the pregnancy, to complete my education, start a professional career, and three years later marry a man I did love. We subsequently had three beautiful children by choice, children who were welcomed with joy, cherished always, and raised with deep pleasure because we attained economic security and the maturity necessary to provide properly for them. (L-29)

SCALIA'S VIEWS ON WOMEN'S RIGHTS

There are cases in which Scalia has shown himself hostile to the rights of women and minorities. For example, in Vinson v. Taylor, in which the Supreme Court upheld the D.C. Court of Appeals' decision that sexual harassment constitutes discrimination in violation of Title VII, Scalia joined Judge Bork at the appellate level in a dissenting opinion which uses language which insults and degrades women. The dissent characterizes a supervisor's sexual harassment of an employee as mere sexual "dalliance" and "solicitation" of sexual favors; the plaintiff's problems are ignored or trivialized while Scalia and Bork play intellectual games with the combinations and permutations resulting from mixing and matching hetero-, homo- and bisexual supervisors and employees. Scalia's concurrence in this decision indicates a great insensitivity to the real and serious problems of sex discrimination in our society.

Scalia's dissent in Carter v. Duncan-Huggins, Ltd., in which the D.C. Court of Appeals upheld a lower court finding that a black employee had been intentionally discriminated against by her employer, reflects a similar insensitivity to the problems of race discrimination. Scalia would have disregarded the clear evidence of intentional discrimination and formulated a principle that would have effectively prevented employees in small businesses from ever proving discrimination.

It is disturbing to think that a man with the insensitivity reflected in these cases will in the future make U.S. Supreme Court decisions affecting women's lives.

CONCLUSION

The National Abortion Rights Action League urges you to vote against Antonin Scalia's confirmation as a Justice of the United States Supreme Court, in order to preserve the fundamental constitutional right of American women to make an individual decision about whether or not to choose an abortion--a decision which can affect almost every other aspect of her life.

FOOTNOTES

[1] 410 U.S. 113 (1973)

[2] Meyer v. Nebraska, 262 U.S. 390, 399 (1923)

[3] See document The Threat to Roe: A Legal Analysis by Harmon and Weiss (submitted with testimony by NARAL Board Chair at hearing of Senate Judiciary Committee on William Rehnquist nomination to Chief Justice, July 1986) for examples of cases pending. Much of this testimony draws on the Harmon & Weiss analysis.

[4] Doe v. Bolton 410 U.S. 179
Planned Parenthood of Missouri v. Danforth 428 U.S. 52
Singleton v. Wulff 428 U.S. 106
Guste v. Jackson 429 U.S. 399
Maher v. Roe 432 U.S. 464
Poelker v. Doe 432 U.S. 519
Colautti v. Franklin 439 U.S. 379
Harris v. McRae 448 U.S. 297
Williams v. Zbarz 448 U.S. 358
H.L. etc. v. Matheson 450 U.S. 398
Planned Parenthood Association v. Ashcroft 462 U.S. 476
Akron v. Akron Center for Reproductive Rights 462 U.S. 416
Diamond v. Charles 54 U.S.L.W. 4418 (1986)
Thornburgh v. ACOG 54 U.S.L.W. 4618 (1986)

[5] supra

[6] Congressional Quarterly June 21, 1986 page 1401

[7] An Imperial Judiciary: Fact or Myth? an edited transcript of an American Enterprise Institute Public Policy Forum held on December 12, 1978 page 21

[8]id. at 36-37

[9]id. at 21

[10]"Mr. Scalia: But I am not talking about just the contemporary consensus. I am not saying the Court always has to go along with the consensus of the day. The Court may find that the traditional consensus of the society is against the current consensus. If that is the case, then the Court overrides the present beliefs of society on the basis of its historical beliefs. I can understand that." id. at 36.

[11]Justice Stevens, concurring in Thornburgh, supra at 4627, reminds us that this is not a new idea. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

[12] Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984)

[13]id. at 7, 21, 35

[14]id. at 21

May 15, 1985

Dear President Reagan,

Since you seem to feel that women's rights to control their lives should be curtailed, I encourage you to listen to my story.

My mother had an illegal abortion between the birth of my sister and myself (we were only 18 months apart). She had a congenital spinal defect and pregnancies were very hard on her. Becoming pregnant just two months after the birth of her first child, she was not well recovered from this experience. Her doctor was concerned for her health, but in 1940 there were no options. She and my father chose to abort this child, fearful that her health was too fragile to manage another pregnancy so soon. Done by a backstreet butcher, the abortion put my mother's life in jeopardy and led to complications which nearly killed her during her pregnancy with me a few months later. She and I were inthe hospital for 21 days following my birth and her health was permanently ruined. She underwent a hysterectomy by age 30 and has had two spinal fusions to attempt to repair the damage done to her body because of her pregnancies.

I was more fortunate than she but also have a difficult story to tell. I had problem pregnancies culminating with the birth of my daughter by emergency caesarean section September 2, 1970. While nursing her, I decided to use a Dalken Shield to prevent further pregnancies (I had a son and a daughter and did not feel physically capable of going through another pregnancy having miscarried three times and having given birth to twins who died at birth all in the five year span between my children). Unknown to me, the Shield worked its way through the caesarean scar and lodged on the top of the uterus. I had been using contraceptive creams to prevent pregnancies before resorting to the IUD but kept having urinary tract infections because of them. So my urologist hospitalized me and performed a cystoscopic exploration which included 16 X rays of my kidneys, bladder, ureters, and urethra. To my obstetrician's and my horror, I was then two weeks pregnant due to the failure of the IUD. He did not know where it was, but he did not feel that I was physically capable of another pregnancy at that time (9 months after my caesarean).

Furthermore, he felt certain that the fetus would be seriously deformed as a result of the X ray exposure. So while neither he, my husband, nor I wanted this child, I could not easily get an abortion. My doctor sent me to a psychiatrist who had to coach me how to fail a psychiatric exam to prove that I was not capable of enduring another pregnancy at that time. I failed my exam and the abortion was approved (by whomever decided such matters of life and death in Arizona in 1971).

The abortion was performed but the IUD did not come out. I had to have major surgery three months later (when my obstetrician felt I was healthy enough to undergo yet another such procedure - three in one year). When he found the notorious Dalken Shield enbedded in the caesarean scar within the abdomen, he was certain that he had done the correct thing: the caesarean scar could not have held for the duration of the pregnancy - both the child and I would have died leaving two very young children without a mother for the rest of their lives.

Fortunately, I had good care and my health was not ruined as my mothers had been. I have thoroughly enjoyed both my children and feel very fortunate to have been entrusted with two lovely, healthy, vital young lives to raise. And I feel they were fortunate to have been able to have me for their mother. I have since divorced their father who became an alcoholic and have successfully single parented them. My son is a sophomore at ASU majoring in accounting; my daughter graduated as the outstanding female student of her large junior high - based on academic, musical and extra curricular activities. I have earned two masters degrees and a PhD since that time and am a psychologist at . I feel that I have had an important impact on many lives. Had I not died, had I been forced to raise a seriously impaired child, all of us would have suffered incredibly. Statistics for families with seriously deformed children are pathetic. Everyone's life is irreparably diminished.

And <u>you</u> want to take this right away from us. How dare you play God with my life, my children's lives, or our futures. We have the right to have determination over the quality of our lives. Don't force us back into the hell holes of the illegal abortionists. Let us make our choices based on our own reasonings: no one else should have control over decisions that impact the very existence of women and their children but the women themselves. So my unborn child had rights? To destroy the rest of us? I disagree. And we all know that unwanted children are abused, neglected children. Let us bring healthy young lives into this already crowded world - born of parents who want them, who will cherish them, nurture and provide for them. Don't set us back to the dark alleys of the dark ages.

Emphatically,

Connie

Connie

April 17, 1985

Dear President Reagan:

You recently celebrated your 74th birthday. Congratulations. Some three decades past, I recall wondering if I would be around for my 24th. I very nearly wasn't, and I'd like to tell you a little about that.

Let me begin by saying that I have been married 38 years; I am the mother of 5 wanted and thoroughly loved children; the grandmother of 3; and the victim of a rapist and an illegal abortionist.

In the mid-1950's I was very brutally raped, and this act resulted in pregnancy. At first suspicion that this might be the case, I went immediately to my doctor, told him what had happened and pleaded for help. But of course He couldn't give it. To have performed an abortion would have meant chancing up to 20 years in prison, both for him and for me.

Turned away by this reputable physician, I went to another, considerably less reputable. This second doctor's sense of ethics left much to be desired--his practice consisted primarily of pushing amphetamines; but even he felt that performing an abortion, no matter what the reason, was just too risky an undertaking.

Knowing nowhere else to turn, and completely terrified by all I had heard about the local abortionist, I went home and proceeded to try all the sundry 'home remedy' things I had heard of--things like deliberately throwing myself down a flight of stairs, scalding the lower half of my anatomy in hot tubs, pounding on my abdomen with a meat mallet, even drinking a full pint of castor oil, which I assure you is no enviable feat.

The single notable effect of all these efforts and more was that I became very black and blue and about a month more pregnant than I had been when I started. And so, as a final desperate measure, I took the only option left. I went to see the local back-alley abortionist--the man who had no cause to fear the police because he was paying them off.

I think the thing I will always remember most vividly, Mr. Reagan, was walking up those three flights of darkened stairs and down that pitchy corridor and knocking at the door at the end of it, not knowing what lie behind it, not knowing whether I would ever walk back down those stairs again. More than the incredible filth of the place, and my fear on seeing it that I would surely become infected; more than the fact that the man was an alcoholic, that he was drinking throughout the procedure, a whiskey glass in one hand, a sharp instrument in the other; more than the indescribable pain, the most intense pain I have ever been subject to; more than the humiliation of being told, "You can take your pants down now, but you shoulda'--ha!ha!--kept 'em on before"; more than the degradation of being asked to perform a deviate sex act after he had aborted me (he offered me 20 of my 1000 bucks back for a "quick blow job"); more than the hemorrhaging and the peritonitus and the hospitalization that followed; more even than the gut-twisting fear of being 'found out' and locked away for perhaps 20 years; more than all of these things, those pitchy stairs and that dank, dark hallway and the door at the end of it stay with me and chill my blood still.

Because I saw in that darkness the clear and distinct possibility that at the age of 23 I might very well be taking the last walk of my life;that I might never again see my two children, or my husband, or anything else of this world.

And still, knowing this, knowing that my 24th birthday might never be, I had no choice. I had to walk through that door, because not to have would have meant giving birth to the offspring of a literal fiend; and for me, the terror of that fate was worse than death.

Thirty years later, I still have nightmares about those dark stairs and that dark hall and what was on the other side of that door. And I resent them. I resent more than any words can say what I had to endure to terminate an unbearable pregnancy. But I resent even more the idea that ANY WOMAN should, for ANY REASON, ever again be forced to endure the same.

My experience, sad to say, is far from unique. I could speak to you days on end of like experiences. Women white, women black, women young, women old, women known to the medical books only by their initials and their perforated or Lysol-damaged wombs and their resultant infections and suffering and, all too frequently, eventual deaths.

Women really too young to be called women, victims of the dirty knife, undergoing hysterectomies at 16. Women with bottles of household disinfectants, sometimes even lye, who had no use for a hysterectomy, nothing left to perform one on. Desperate, hopeless women with bent heads and unbent coathangers, screaming in the night, dead at 23. Women for whom the phrase "right to life" was without meaning or substance. Women murdered, as surely as putting a gun to their heads, by a blue-nosed and hypocritical society that lauded What Might Be and condemned What Was.

The man who raped me left me for dead. And I very nearly was. The man who aborted me could not have cared less if I had died. And again, I very nearly did. But a miss is as good as a mile. And I did make my 21th birthday. And despite all the horror, physical, psychological and financial, I consider myself very lucky. I am still able to Speak Out. The real tragedy of those pre-1973 days of State and Church controlled wombs is: those countless women who can only speak to you from the grave.

In their memory, I want to tell you and the world today that to speak of a 'right to life' and deny simultaneously the right to LIVE that life, fully and in accord with ones own rational dictates, is the most odious of paradoxes. It is an hypocrisy that ranks right up there with establishing a 'right to sexual freedom' for all eunuchs.

And finally, it is an insult to anyone worthy of the title 'Homo sapiens'.

Sincerely,

Sherry Mathis

Sherry Mathis

Peoria, IL 61603

April 15, 1985

Dear TARAL:

This is not a letter about an abortion. I wish it were. Instead, it is about an incident which took place over forty years ago in a small mid-western town on the banks of the original "Old Mill Stream."

One night a young girl jumped off the railroad bridge to be drowned in that river. I will always remember the town coming alive with gossip over the fact that she was pregnant and unmarried.

I was enormously moved by what to me was a terrible tragedy. I could imagine the young girl's despair as she made her decision to end her life rather than face the stigma of giving illegitimate birth. You must remember this was a mid-western town where "traditional values"--to use a current phrase--were the only acceptable standards.

I was young and did not even know the term "abortion" at the time. Perhaps the young girl didn't either. Even if she had, there would have been no place in that small town where she could have obtained one.

I still grieve for the girl. She should not have had to pay with her life for that one mistake.

And we must not now condemn other women to the same fate. If we allow the current efforts of the anti-abortionists to succeed, and return us to the "old values," that is exactly what will happen in many cases. If a girl who finds herself pregnant does know about abortion, she may lose her life under the knife of an illegal abortionist. If she does not, she may so despair of her wrecked life that she will find a way to suicide. Either way, it is a terrible waste of a precious life--the woman's.

Jan Brazill

El Paso, Texas 79936

April 28, 1995
Date

L 19

Dear President Reagan,

I am a 45 year old woman who had an abortion in 1972. Except for my mother I have never told anyone about this. However, I was raised a Catholic and although I started using birth control after my 5th child, because 5 kids are enough for anyone, I never expected to have to make a decision about abortion.

My husband had always been a heavy drinker, but when he began physically abusing me around after drinking I knew I could not keep on living with him. I had been able to go to work when the youngest boy started kindergarten, and although it would be hard to support the kids by myself it would be better than living with the drunk and fighting.

After we separated, I stopped taking the pill because I had no intention of having sex with anyone. About four months later he came pounding on the door. I didn't want the kids' grandma or the neighbors to hear so I let him in. Before he would leave he forced himself on me and I became pregnant.

My job on the assembly line at the plant was going well and I needed that job desperately to support the kids. Also I had started night school to improve my chances to get a better job. I just couldn't have another baby — 5 kids were enough for me to support.

I felt badly for a day or two after the abortion. I didn't like the idea of having to go thru with it. But it was the right thing for me to do. If I had had the baby, I would have had to quit my job and go on welfare. Instead I was able to make enough $ to get the kids thru school.

I think it is terrible that women are made to feel guilty about abortion. I feel proud of myself for what I've accomplished.

Name Jeanette

Address [illegible] 600 35 ZIP CODE

Oakland, Ca.
Apr 22, 1985

Senator Pete Wilson
c/o CARAL
4110 Geary Blvd.
San Francisco

Dear Senator Wilson:

In response to NARAL's suggestion that we, who have safely undergone illegal abortions (and those who have undergone unsafe, illegal abortions) let our feelings be known about our experience, I am writing this letter.

When I was 24yrs old, I had a illegal abortion. A contraceptive method failed, and I knew I was not ready to raise a family. I worked in the day, went to school at night. My husband was in graduate school — our marriage was

unstable and have later divorced.

To this day I am profoundly grateful for having been able to have a safe abortion. To this day I am not a mother, which ~~is~~ has been my choice. I have been safe and lucky in not becoming pregnant again. I love people and work in a helping profession which gives me much satisfaction.

Please help preserve our freedom of choice.

Sincerely,
Susan

I am a junior in college and am putting myself through because my father has been unemployed and my mother barely makes enough to support the rest of the family. I have promised to help put my brother through when I graduate next year and it's his turn. I was using a diaphragm for birth control but I got pregnant anyhow. There is no way I could continue this pregnancy because of my responsibilities to my family. I never wanted to be pregnant and if abortion were not legal I would do one on myself. I believe women need to have the right to choose for themselves. No one can make another's decision because no one knows your own life circumstances.

Pam
15360

May 16, 1985

Dear Members of Congress and Mr. Reagan:

I am breaking a 34 year silence about my abortion because it is essential for you to know what it is like to have lived this experience. I believe you need to open yourself to what it is really like for women. Since it is physically impossible for male government officials and elected representatives to be unwillingly pregnant, it behooves you to listen and learn with enough humility to avoid the incredible arrogance with which this issue is so often approached. I hope you will learn to view women's lives and reproductive choices with enough respect to insure that they will never again be subject to unconstitutional restrictions.

I had an abortion in 1949 because I could not go through with a loveless marriage for the sake of a child I did not want. I can still remember with horror, the feelings of helplessness, despair, shame, guilt, desperation and anger that engulfed me. I was luckier than most women in 1949, however. I was able to terminate the pregnancy. The benefits to me were incalculable. I was able to complete my education, start a professional career, and, three years later, marry a man I did love. We subsequently had three beautiful children by choice, children who were welcomed with joy, cherished always, and raised with deep pleasure because we had attained economic security and the maturity necessary to provide properly for them.

I was and shall always be profoundly grateful that the choice to have a safe abortion was presented to me. I am certain that it saved me from disastrous life-long consequences ensuing from divorce and the grinding poverty of single parenthood. I have NEVER, EVER, even for one moment regretted my decision to end the pregnancy. What I do regret is the fact that I had to do it illegally and in secrecy. Because I could not choose abortion freely and in privacy as is now guaranteed by the constitution, I have struggled with 36 years of suppressed anger, guilt and shame—certainly not over the decision to abort, but over the punitive and diminishing effect of the puritannical sexual double standard which held abortion to be immoral. The fact that only women were subjected to vilification and contempt while the men's part in the issue was completely ignored, and still is for the most part, is a continuing source of outrage to me.

Women will never willingly return to the horrors and injustices of illegal abortions again. We will be silent no more—those of us who can afford the painful price. Your mothers, wives, daughters, friends and relatives, millions of us are among the silent who cannot come forward with their truth. Those of us who can, carry their burden and insist that abortion must remain legal, safe and accessible to avoid another millenium of agony and peril.

Sincerely,

Jane Roe

Jane Roe
Tucson, AZ 85718

Senator MATHIAS. Our next panel will be composed of Dr. Robert L. Maddox, executive director of Americans United for the Separation of Church and State; and Mr. Peter Weiss of the Center for Constitutional Rights. Ms. Dudley is not here.

Gentlemen, if you will 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?

Dr. MADDOX. I do.

Mr. WEISS. I do.

Senator MATHIAS. Dr. Maddox, do you want to start? I remind you of the 3-minute rule and also of the fact that your full statement will be included in the record.

TESTIMONY OF ROBERT L. MADDOX, EXECUTIVE DIRECTOR, AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE, AND PETER WEISS, VICE PRESIDENT, CENTER FOR CONSTITUTIONAL RIGHTS

Dr. MADDOX. Thank you. I am Robert Maddox, executive director of Americans United for Separation of Church and State. We are a 39-year-old national organization dedicated to the preservation of religious liberty and the separation of church and state.

We represent within our membership some 50,000 people, a broad spectrum of religious and political viewpoints, but we are all united in the conviction that separation of church and state is essential.

We of Americans United believe that religious liberty is the preeminent liberty of the American Republic, the benchmark of all other civil liberties.

We believe in the inherent strength of the American religious community to manage its own affairs, to make its own mark, and to impart a sense of values to the Nation.

This rich and diverse community does not need propping up by the Government and should at all costs remain free from Government entanglement.

Therefore we respectfully suggest that the Senate consider carefully the appointment of an individual to the Supreme Court who seems hostile to the time-honored principle of the separation of church and state. Judge Scalia, in testimony before the U.S. Congress, and in other ways, has criticized the direction this Court has taken in its decisions on religious liberty.

In 1978 he testified on behalf of a bill to give tuition tax credits to patrons of private and parochial schools. He supported the bill; Americans United opposed the bill. At that session, in our opinion, Mr. Scalia demonstrated a disregard for the establishment clause of the first amendment. He told the Senate not to worry about the question of whether tuition tax credits were constitutional, but to decide on the basis of what the fundamental traditions of the society require—those words coming from a man who has been characterized as a strict constructionist.

He argued that the denial of tuition tax credits to parents of students at religious schools was an antireligious result that the Framers of the Constitution had not intended.