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

May it please the Committee:

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

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

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

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

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

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

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

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

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

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

STATEMENT OF ERWIN GRISWOLD

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

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

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

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

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

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

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

I hope this committee will recommend that he be confirmed.

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

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