Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Judge SCALIA. It will.

The CHAIRMAN. Have a seat.

TESTIMONY OF HON. ANTONIN SCALIA, TO BE U.S. SUPREME COURT JUSTICE

The CHAIRMAN. Would you like to introduce your family? You have got a lot of children there, and they may want to——

Judge SCALIA. I would, Senator. They have taken a lot of trouble to get dressed up and come downtown. I think the little ones will probably want to leave after the first recess, but I did want to give them their moment in the limelight here, if I can remember all the names. [Laughter.]

The CHAIRMAN. They are like old friends; you see them all over there. You have nine children. I believe you have eight of them here, don't you?

Judge SCALIA. I think all nine are here, Senator. I think we have a full committee.

My wife, Maureen, is at the right in the front row. Next to her is Meg. Her real name is Margaret but she said I should introduce her as Meg because when she is called Margaret, she is usually in trouble. Catherine, Christopher, Matthew. And in the next row, from the other end, Mary, and my oldest, Ann, Eugene, John, Paul, and that is it.

The CHAIRMAN. You have a good memory.

Judge SCALIA. But do not try me on the ages Senator.

I would also like to introduce, behind me, my law clerk, Patrick Schiltz who has helped me in getting together the materials I will probably need for this hearing.

The CHAIRMAN. Judge, do you care to say anything before we begin questioning? Do you have an opening statement you would like to make?

Judge SCALIA. No, I do not, Senator, except to express my honor at being nominated by the President, and the fact that I am happy to be here and look forward to answering the committee's questions.

The CHAIRMAN. Now I believe Senator Biden suggested we have 20 minutes for the opening round, until we get around, and then, if we have a second round, it will be 10 minutes from then on. The same way we did it in the Rehnquist hearing.

Senator Grassley, did you ever make an opening statement?

Senator GRASSLEY. Yes, sir. I did.

The CHAIRMAN. Thank you. Judge Scalia, there are some very obvious differences in the roles of a circuit court of appeals judge and an Associate Justice of the Supreme Court.

The most glaring difference, I suppose, is that the Supreme Court has the final word on what the law is. It is the final ruling in the appeals ladder, and can be overruled on constitutional interpretations, only by a later Supreme Court decision or by constitutional amendment.

What do you view as other major differences in the role of a circuit court judge and an Associate Justice?

Judge SCALIA. Well, I think you have correctly identified the major one, that there is no one to correct your mistakes when you are up there, except the constitutional amendment process.

In a way, there is a lesser body of law to look to. As a circuit judge, I accept as precedent not just the opinions of the Supreme Court, of course, but the earlier opinions of my own circuit, and accept as very persuasive the opinions of other circuits. So it is a much vaster body of law that I have to consult in order to make my decisions.

At the Supreme Court level, the most persuasive precedent is just Supreme Court precedent, although, to some extent, lower court opinions are looked to, but that body of precedent is not nearly as important.

I think you have put your finger on what the main difference is, and that is that at the circuit court level, the opinions of the Supreme Court are the last word, and we follow them unwaveringly.

At the Supreme Court that is not quite the situation as the Supreme Court is bound to its earlier decisions by the doctrine of stare decisis in which I strongly believe.

Other than that, I suppose it is more difficult to be sitting in a panel of nine judges all the time. On my circuit court we now have 11, and when we sit en banc it is a much more ponderous group to bring to a consensus than is a panel of three, which is the normal panel. I expect that that would be quite a difference.

The CHAIRMAN. Judge Scalia, as we rapidly approach the 200th anniversary of the Constitution of the United States, many Americans have begun to express their views about the reasons for the amazing endurance of that great document.

Would you please share with the committee any views you may have regarding the success of the Constitution, and its accomplishment of being the oldest existing Constitution in the world today.

Judge SCALIA. I will be happy to. I think a lot of Americans do not realize what a——

The CHAIRMAN. Now you do not have to go into the whole history of it.

Judge SCALIA. I will not do it. I will not do it. [Laughter.]

I think most of the questions today will probably be about that portion of the Constitution that is called the Bill of Rights, which is a very important part of it, of course. But if you had to put your finger on what has made our Constitution so enduring, I think it is the original document before the amendments were added.

Because the amendments, by themselves, do not do anything. The Russian constitution probably has better, or at least as good guarantees of personal freedom as our document does. What makes it work, what assures that those words are not just hollow promises, is the structure of government that the original Constitution established, the checks and balances among the three branches, in particular, so that no one of them is able to "run roughshod" over the liberties of the people as those liberties are described in the Bill of Rights.

If I had to put my finger on what it was that has made the difference, that is it.

The CHAIRMAN. Judge Scalia, under the Constitution, certain functions are reserved to the Federal Government and others to

the States, or rather, they have been delegated to the Federal Government, and others reserved to the States.

Would you describe, in a general way, your view of the proper relationship between Federal and State law.

Judge SCALIA. The proper relationship of course is that Federal law is supreme. If the Federal Government acts in a field over which it has authority, State law has to step back.

When that should happen, of course, is most often a question of prudence and that means that it is most often a question for this body to decide, when it wishes to displace State law, and when not. When it does so, that is the end of the matter.

The CHAIRMAN. Judge Scalia, since the announcement of your nomination to be an Associate Justice of the Supreme Court, you have been criticized by some for decisions you have rendered regarding the first amendment and libel. Would you please give the committee your view as to why your interpretation of the first amendment, with regard to libel, led to this criticism.

Judge SCALIA. Well, I have to say it must have been misunderstanding, Senator. I do not know of anything in my opinions, or my writings, that would display anything other than a high regard, and a desire to implement to the utmost the requirements of the first amendment.

As a matter of fact, as Senator Moynihan mentioned this morning, I am the first academic to be nominated to the Court since Frankfurter. I have spent my life in the field that the first amendment is most designed to protect. In addition to having been a scholar, and a writer as a scholar, I think I am one of the few Supreme Court nominees that has been the editor of a magazine.

So why anyone would think that I—if anything—if I were to have a skewed view of the first amendment, Senator, it would be in just the opposite direction.

The CHAIRMAN. Judge Scalia, the Supreme Court's decision in *Marbury* v. *Madison* is viewed as the basis of the Supreme Court's authority to interpret the Constitution and issue decisions which are binding on both the executive and legislative branches.

Do you agree that *Marbury* requires the President and the Congress to always adhere to the Court's interpretation of the Constitution?

Judge SCALIA. Well, *Marbury* is of course one of the great pillars of American law. It is the beginning of the Supreme Court as the interpreter of the Constitution. I hesitate to answer, and indeed think I should not answer the precise question you ask—do I agree that *Marbury* v. *Madison* means that in no instance can either of the other branches call into question the action of the Supreme Court.

As I say, *Marbury* v. *Madison* is one of the pillars of the Constitution. To the extent that you think a nominee would be so foolish, or so extreme as to kick over one of the pillars of the Constitution, I suppose you should not confirm him. But I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury* v. *Madison.*

If you could conclude from anything I have written, or anything I have said, that I would ignore *Marbury* v. *Madison,* I would too be

in trouble, without your asking me specifically my views on *Marbury* v. *Madison.*

The CHAIRMAN. Judge Scalia, 20 years have passed since the *Miranda* v. *Arizona* decision which defined the parameters of police conduct when interrogating suspects in custody.

Since this decision the Supreme Court has limited the scope of *Miranda* violations in some cases.

Do you feel that the efforts and comments of top law enforcement officers throughout the country have had any effects on the Court's views, and what is your general view concerning the warning this decision requires?

Now I want to make this statement: Any question that is asked about decisions of the Court, if you prefer not to answer them, if you will say so.

Judge SCALIA. No; I do not——

The CHAIRMAN. Anything that may come before the Court, I do not want you to feel obligation to answer.

Judge SCALIA. As to the second part, Senator, what do I think of those warnings, I am happy to answer it as a policy matter, assuming the questions is not, you know, what do I think as to the extent to which those warnings, in one circumstance or another, are required by the Constitution.

As a policy matter, I think—as far as I know, everybody thinks—it is a good idea to warn a suspect of his rights as soon as it is practicable. I do not know of anyone who thinks it should be otherwise.

As soon as the suspect is brought within the control of the police, he should have knowledge what his rights are, as a policy matter.

The other part of your question, if I recall, was do I think the Supreme Court has been influenced by the views of police officers and law enforcement officials. I suppose—I do not think the Supreme Court lives in a vacuum. It reads the newspapers. I suppose it is influenced by the reaction of a society to its decisions; at least I hope it is. I think it should be.

One would not know whether one's decisions are doing good or bad unless one consulted the effect of them.

The CHAIRMAN. Judge Scalia, in 1972 the Supreme Court, in *Furman* v. *Georgia,* struck down the death penalty provisions in Federal and State law on the basis that under the statutes the death penalty could be imposed in an arbitrary and capricious manner.

In 1976, the Supreme Court, in a series of cases beginning with *Gregg* v. *Georgia,* held that the death penalty was constitutional when imposed under certain procedures and criteria.

In the years subsequent to these decisions, the Supreme Court has reviewed many challenges to death penalty statutes.

Do you feel that the Supreme Court now provides sufficient guidance in this area?

Judge SCALIA. Whether it provided sufficient guidance, I am not sure I have the data that I would need in order to answer that question.

It is always a difficult problem. One of the hardest problems, I think, for an appellate judge is how broadly one wants to write an opinion. Certainly, providing guidance is one of the purposes of an appellate opinion. So you can write an opinion very broadly, which

will answer all the questions for the next 50 years, or you can write it very narrowly, and just answer this particular case, and let the next one come up when it does.

It is a hard call as to how far you go in one direction or another. I really do not know whether the Supreme Court has been as informative as it could be or should be.

I have to say, not having been there, I am sure they did what they thought was best.

The CHAIRMAN. Judge Scalia, there are approximately 1,300 inmates under death sentences across this country. Many have been on death row now for several years as a result of the endless appeals process.

Would you favor some limitation on the extent of the number of post-trial appeals which allow inmates under death sentences to avoid executions for years after the commission of their crimes?

Judge SCALIA. Well, Senator, nobody likes frivolous appeals, I suppose, in any matter, criminal or civil. But to the extent that your question is asking about legislation, I should not have a view about it. And to the extent that it is asking whether the Supreme Court ought to change its view of what the law requires to provide fewer appeals, I ultimately will have to have an opinion about it, but should not set it forth here.

The CHAIRMAN. Judge Scalia, in the last several decades we have seen a steady increase in the number of regulatory agencies which decide a variety of administrative cases.

I realize that the scope of judicial review of these administrative cases vary from statute to statute. However, as a general rule, do you believe that there is adequate opportunity today for appeal of administrative decisions to the Federal courts, and do you feel that the standard of review for such appeals is appropriate?

Again, I remind you, anything that you feel that you should not answer, any matter that you feel will come before the Court——

Judge SCALIA. No; I do not think that will—I mean, appropriate. I assume you are saying, appropriate. Congress can alter the standard of review considerably.

I am not aware of any great dissatisfaction in the administrative law community. And I think I am fairly familiar with that community, having been a denizen of it for a number of years.

I do not know that there is any great dissatisfaction with the general scope of review of administrative action that now exists, which essentially is an arbitrary and capricious standard. The fine call is for the agency. And the courts look it over to see that it has not been so unreasonable as to be arbitrary or capricious.

As far as I know, it seems to have worked pretty well.

As to whether there is review in enough cases, and there should be review in more cases or in fewer cases, that is really a call for the Congress on which I do not have any particular, special views.

The CHAIRMAN. Judge Scalia, a concern has been expressed with respect to the bureaucracy of the Federal courts; the increase in clerks and support staff; and the supposed insulation of judges from personal decisionmaking.

At the same time, the workload, the increase in complicated cases which raised technical and scientific issues, and other highly

specialized disciplinary matters suggest that judges and justices need more and more specialized assistance.

Do you think that in addition to law clerks the Supreme Court needs to appoint clerks or assistants with particular scientific or professional expertise, or is the solution to take certain issues involving science and other abstruse areas out of the courts altogether?

Or is it some other solution?

Judge SCALIA. No; I think you have them there, Senator.

Personally, and I guess you—no, I do not think you would get as many answers as you asked judges—personally I would not want a scientific expert on my staff. Institutions tend to do what you give them the capability to do. And if you give courts scientifically expert staff, they are going to become bodies that inquire into the scientific rights and wrongs of particular decisions.

And simply the way our system is set up, those scientific judgments have been left to the Congress to make when it passes legislation, and to the Executive to make, to an even greater degree, by delegation from the Congress.

As I said earlier with reference to your question on the standard of review, all the courts are there for is to see whether the agency has followed the proper procedures, which is critically important, and whether in the final judgment the agency reaches, the agency has been within the bounds of reason.

I think I can tell, without a scientific expert, just on the basis of the record in the case, whether it is in the bounds of reason. And I personally would not want the courts to go any further than that, or you are just duplicating the work of administrative agencies.

The CHAIRMAN. Judge Scalia, do you believe that the Court has given sufficient consideration to a relevant economic analysis in evaluating the effects of restraints of trade, and are you satisfied with the guidance that the Court has provided on the proper role of economic analysis in antitrust law?

Judge SCALIA. Senator, antitrust law has never been one of my fields. Indeed, in law school, I never understood it. I later found out, in reading the writings of those who now do understand it, that I should not have understood it because it did not make any sense then.

As to whether the Court has—so I really am in no position. All I can tell you is hearsay, Senator, from those who follow the field. I do understand that the rules have changed in recent years, and that the Court is applying the principles and the data that economists have accumulated over the years regarding the sensible application of the antitrust laws.

But I have not had a single antitrust case since I have been on the D.C. Circuit. And I have not complained about that, either.

The CHAIRMAN. Judge Scalia, Chief Justice Burger and others have complained about the poor quality of advocacy before the Nation's courts, including advocacy before the Supreme Court.

Do you feel that legal representation is poor, and if so, what in your opinion should be done to improve the quality of this representation?

Judge SCALIA. Senator, I can only speak from my own court. And before my court, it is excellent. I cannot speak highly enough about

the bar that practices before me. I think there is an enormous proportion of highly competent lawyers who do fine work not only for their client but for the court in informing us of the issues of law that we have to decide.

On the basis of what I see before my court, which is maybe not a typical court, the advocacy is good.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Thank you, Mr. Chairman.

Our ranking Member, Senator Biden, is currently on the floor with the introduction of legislation dealing with drug regulation, and he will be over here very shortly. But I will proceed, if I might.

Judge Scalia, if you were confirmed, do you expect to overrule the *Roe* v. *Wade*?

Judge SCALIA. Excuse me?

Senator KENNEDY. Do you expect to overrule the *Roe* v. *Wade* Supreme Court decision if you are confirmed?

Judge SCALIA. Senator, I do not think it would be proper for me to answer that question.

The CHAIRMAN. I agree with you. I do not think it is proper to ask any question that he has to act on or may have to act on.

Judge SCALIA. I mean, if I can say why. Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.

Senator KENNEDY. There have been at least some reports that that was one of the considerations in your nomination. There are a lot of other, clearly, strengths which you bring to your own qualifications. But I am interested in what precedence you put on that decision being on the lawbooks. I am interested in your own concept in stare decisis. Do you believe in it? What is it going to take to overrule an existing Supreme Court decision?

Judge SCALIA. As you know, Senator, they are sometimes overruled.

Senator KENNEDY. I am interested in your view.

Judge SCALIA. My view is that they are sometimes overruled. And I think that——

Senator KENNEDY. But what weight do you give them?

Judge SCALIA [continuing]. I will not say that I will never overrule prior Supreme Court precedent.

Senator KENNEDY. Well, what weight do you give the precedents of the Supreme Court? Are they given any weight? Are they given some weight? Are they given a lot of weight? Or does it depend on your view——

Judge SCALIA. It does not depend on my view. It depends on the nature of the precedent, the nature of the issue.

Let us assume that somebody runs in from Princeton University, and on the basis of the latest historical research, he or she has discovered a lost document which shows that it was never intended that the Supreme Court should have the authority to declare a

statute unconstitutional. I would not necessarily reverse *Marbury* v. *Madison* on the basis of something like that.

To some extent, Government even at the Supreme Court level is a practical exercise. There are some things that are done, and when they are done, they are done and you move on. Now, which of those you think are so woven in the fabric of law that mistakes made are too late to correct, and which are not, that is a difficult question to answer. It can only be answered in the context of a particular case, and I do not think that I should answer anything in the context of a particular case.

Senator KENNEDY. Well, do I understand that your answer with regard to Supreme Court decisions is that some of them are more powerful, more significant, than others in terms of how you would view in overruling them or overturning them?

Judge SCALIA. Yes, I think so, Senator. May I supplement——

Senator KENNEDY. And you are not prepared on this issue to say where that decision comes out, as I understand it?

Judge SCALIA. That is right, Senator. And maybe I can be a little more forthcoming in response to your first question.

As you followed it up, you said that some thought that that is why I was going onto the Court.

I assure you, I have no agenda. I am not going onto the Court with a list of things that I want to do. My only agenda is to be a good judge. I decide the cases brought before me. And I try to decide them according to the law as best as I can figure it out. But it is not a programmatic matter, as far as I am concerned.

Senator KENNEDY. Well, that is part of this whole process, giving you an opportunity to speak to those questions. But it is also part of this process to find out what kind of relevancy you give to previous Court decisions, and how significant they are in terms of your own legal experience, and when they might be overturned and when they might not be.

And as I gather from your answer, that is kind of a variable, that some have stronger standing than others, and that that is your view. But in terms of that particular view, you are not prepared to indicate, at least in that case, in the *Roe* v. *Wade* case, where you come out, as to whether you feel that that is a strong precedent or a weak precedent.

But evidently you believe that some precedents are weaker and some are stronger in the doctrine of stare decisis.

Judge SCALIA. That is right, sir. And nobody arguing that case before me should think that he is arguing to somebody who has his mind made up either way.

Senator KENNEDY. Well, then, what is the relevance of the previous decision? Does that have any weight in your mind?

Judge SCALIA. Of course.

Senator KENNEDY. Well, could you tell us how much?

Judge SCALIA. That is the question you asked earlier, Senator. And that is precisely the question——

Senator KENNEDY. I know it.

Well, let me go to another kind of question. You talked about overruling precedents, and that evidently some have a greater weight than others.

I think all of us, certainly here, are familiar with the decision of the Court in the Gramm-Rudman case. We are also less familiar, but increasingly more familiar, of the decision in the district court.

Some have suggested that you might have been the author of the opinion.

Whatever that might be, there is a clear indication about questioning the roles of the independent agencies, and the allocation of certain Executive powers to those independent agencies.

This was I think probably decided in 1935 as to uphold their constitutionality, and I think maybe you would want to comment whether this decision in the district court, how it really fits in to that particular holding about the allocations and the authority of the independent agencies.

Judge SCALIA. I do not think it affects it at all, Senator. The three-judge district court decision in *Synar* decided the case on the assumption that the decision in Humphreys Executor permitted the prohibition by Congress of Presidential removal, except for cause. It was done on that assumption.

Senator KENNEDY. Well, there I think will be an opportunity at greater length to go into that particular decision and to try and draw out what the courts are really saying about the continued strength of the independent agencies in terms of their constitutional standing.

Judge SCALIA. Senator——

Senator KENNEDY. OK.

Judge SCALIA [continuing]. Before that happens, let me tell you a problem I have discussing it even generally, not in the context of a particular Supreme Court case—we have pending, not in the Supreme Court, but before the court that I am now sitting on, so it will be a problem for me whether I am confirmed by the Senate or not—we have pending before us a suit challenging precisely the constitutionality of the restrictions on removal of the Federal Trade Commission. So I am very much constrained about speaking to that.

Senator KENNEDY. Well, let me back up a little bit because I am more concerned about your approach to these issues.

We have seen rather strenuous action in the Congress over the period of 30 or 50 years in terms of creating a safe workplace for the American worker. The Congress addressed the whole abuses in the child labor laws. We have tried to address the issues in terms of sweatshops, other areas where there has been very significant exploitation of the American worker.

One of the newer areas where the Congress has addressed is on the issue of occupational health and safety. This is an area in which the Congress has spoken very clearly. Nonetheless, very few of us in the Senate—I do not think any now, we did have some—are doctors. These are complex issues. And if it is the decision of the Congress and the Senate that these kinds of decisions are going to be relinquished to an independent agency to attempt to provide for what is a congressional responsibility in terms of the protection of the workplace and that we are going to give that function to an agency that will draft various rules and regulations, I am interested in how troubled you are about it, because I have reference to an article that you wrote a note from the benzene case in which Judge

Rehnquist had a dissenting comment, and in which you also expressed a view, which I would think, if it became a majority position, certainly with regards to the occupational health and safety vision, would probably mean that that particular agency would be effectively eliminated.

I am interested in your comments whether or——

Judge SCALIA. You are asking now not about the removal of power but about excessive delegation?

Senator KENNEDY. Yes. Exactly, exactly.

And if I could just add to that. One of the points that you raised is the question of vagueness in terms of the drafting of various statutes.

I was just interested as a legislator trying to find out where we are going, quite frankly with you, Mr. Justice, but also, as someone who has spent a good deal of time, know that certain language has to be vague in order to permit decisions by, say, medical personnel to be able to draft certain flexibility. Hopefully they are not vague, but they provide a degree of flexibility in order to get the job done.

And I am just wondering what message we ought to have in terms of the future if we are going to run into problems with this.

Judge SCALIA. Well, again, I am reluctant to talk about what Scalia will say in the future. I can talk about what he said in the past, and I think you have me on the wrong side on the matter——

Senator KENNEDY. That is good. Help me out.

Judge SCALIA [continuing]. Of broad delegation.

The fact is, in the *Synar* case that we were discussing earlier, the principal attack on the legislation was that it was unconstitutional because of the excessiveness of the delegation. And the three judges of the district court on which I sat rejected that argument. It did not sustain it.

The article that you have there, which is an article from Regulation magazine, that I used to be editor of at one period, I do not think—I think you read it incorrectly if you view it as an attack on the constitutionality of broad delegation. To the contrary, I think, if I recollect the article you are referring to correctly, it displayed quite the opposite view, that it is very difficult for the courts to say how much delegation is too much. It is a very, very difficult question, and I think it expressed the view that, in most cases, the courts are just going to have to leave that constitutional issue to be resolved by the Congress. Congress has an obligation to follow the Constitution as well.

Senator KENNEDY. Well, would I be correct in saying that you would support then a broad congressional mandate in these areas?

Judge SCALIA. I would support a broad congressional mandate that is not unconstitutionally overbroad, yes. [Laughter.]

Senator KENNEDY. The point that——

Judge SCALIA. But, seriously, I am not trying to go around and around. I think I am accurate in saying that my writings do not show that I am likely to be more restrictive on that matter than others.

Senator KENNEDY. I may not assume correctly that in reviewing some of these cases and the articles, that you require a degree of specificity in terms of the legislation, and the opinion that you are not going to breathe life into the words or language of various acts.

And there is a whole series of different references I could read, and I do not want to, I do not want to take the time.

That is what I am concerned about. And I am interested in whatever response you could give. You know the point I am driving at.

Judge SCALIA. I think I know——

Senator KENNEDY. I do not want to—I speak to delegation, but I am talking about specificity in areas which I think the Congress has acted in terms of the protection of the elderly and in terms of the protection of health and safety, and a whole wide range of areas of protections in health and safety. And I am just interested in not only the constitutional question of the allocation of powers, but also the specificity that you require in order to permit these to be upheld.

Judge SCALIA. Senator, I think again—I think you have me wrong. I have criticized, and I think I have often said in my writings and in my speeches that Congress should be more specific; that the more specific Congress can be, the more democratic the judgment is, because if Congress is not specific, the judgment is made by the courts, and the courts are not democratic institutions.

So I have criticized what seemed to me as a policy matter the overgenerality of the statutes. But the reason I criticize them is precisely because even though they are overgeneral, they will, by and large, be upheld and implemented by the courts. And the courts will determine what they mean. I do not think that that is ordinarily the better way to do it to the extent that Congress has the time, and I know that is a problem.

The import of my earlier writings was that Congress ought to try to be more specific. But that does not speak, Senator, to whether if it chooses not to be more specific, the law will be unconstitutional.

Senator KENNEDY. That is helpful.

In an earlier response to the chairman's questions on the free speech, on the *Ollman* v. *Evans,* and your dissent.

Your conservative colleague, Judge Bork, evidently criticized your dissent, noting that you were—I think he mentioned advocating your judicial function by your view of free speech.

How do you respond to what Judge Bork said?

Judge SCALIA. Well, I guess I would respond that my dissent was joined by my liberal colleagues, Judge Wald and Judge Edwards. I leave it there.

Senator KENNEDY. You had in an area that this committee is interested in, and that is the question of executive privilege, being able to obtain certain documents.

I noticed in your exchange with Senator Muskie you were talking about—this time they were talking about the *Nixon* case. And Senator Muskie concluded in his question, then, in your judgment, the right of the Congress to military and diplomatic secrets stand at a lower level than the right of the President to withhold those secrets, as a question And you said "No, sir." And then you continued along, "I don't mean to denigrate the congressional"—I will include it all in the record, Mr. Chairman, if I may, that statement.

[Not available at press time.]

Senator KENNEDY [reading]:

I don't mean to denigrate the congressional power. They both, the Congress and the Executive have the right to assert their prerogatives. When it comes to an im-

passe, the Congress has means at its disposal to have its will prevail. The means are indicated in my testimony. The most effective is the withholding of funds from the Executive. The refusal to confirm Presidential nominees was also used several times under President Nixon, if I recall, to elicit information which had been previously denied. The Senate simply would not confirm nominees until the information was turned over.

I wonder if you still affirm that wonderful judicious statement and comment that is based upon all the excellent reviews that have been given to you? I imagine you still want to hold to that?

Judge SCALIA. It is true, Senator. How can I withdraw from it?

Senator KENNEDY. I do not know whether I should ask you whether you want to expand on that or not, whether I——

Judge SCALIA. It is one of the means that the Congress has at its disposal.

Senator KENNEDY. In another area, Judge Scalia, this is on the questions of the national security and individual rights.

We have gone through a rather important period in past history, in the early seventies, where we were trying to balance national security interests against the first amendment, and we have seen—recent history has taught us to scrutinize the claims of the executive branch in the possibility of inhibiting free speech and association of press and right of dissent under the names of national security.

And I just was interested in hearing your own attitude how you as an individual viewed their role, whether you view the role as an umpire in our federal system with a competing first amendment—between the first amendment and national security claims, or are you going to give the complete basic and overwhelming presumption to those who make the claim, or are you going to examine in some detail the background for such a claim, or how you will approach the issue generally?

Judge SCALIA. Well, I will certainly approach it with an awareness of the importance of both of the elements that are in contention there, of the first amendment as of normal importance in the ability of the people to speak, to learn and, on the other hand, the national security interest is often of great importance.

That is the worst problem about being a judge. It is never something on one side. I mean you can be criticized for coming out against the first amendment, and one never hears what is on the other side of that case. There is always some important interest on the other side or it would not be a case.

I cannot be any more specific in response to your question except to say that I am seriously interested in both of the principles, both of the concerns that arise in those cases. I am aware of the importance of the first amendment, and will give it the full weight that the Constitution accords it.

Senator KENNEDY. The reason I bring that up is because when it was alleged in charge for national security reasons, we found the gross abuse of all these individual rights and preassembly during another period, the early period of the 1970's where we had extensive unauthorized unconstitutional wiretapping, of mass surveillance, questions of first amendment rights.

I hear my time is up. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr. Chairman.

Judge Scalia, as you well know, one of the special qualities a judge must have is the ability to put aside very deeply held personal beliefs in order to apply the law and the Constitution fairly and equitably to every litigant who stands before him.

Your exchange with Senator Kennedy on the subject of *Roe* v. *Wade* suggests an area where you have written—and I am not trying now to lead you down the pathways of the future. We will look back to the road of the past.

You have written on the subject of *Roe* v. *Wade,* and while I do not pretend to be an expert on every word you have written, I believe you have expressed doubts about that decision, both on moral as well as jurisprudential grounds.

Judge SCALIA. I am not sure the latter is true, Senator. I think I may have criticized the decision, but I do not recall passing moral judgment on the issue.

But I agree with your opening statement, that one of the primary qualifications for a judge is to set aside personal views.

Senator MATHIAS. However it may be with your article on *Roe* v. *Wade,* the problem remains. What does a judge do about a very deeply held personal position, a personal moral conviction, which may be pertinent to a matter before the Court?

Judge SCALIA. Well, Senator, one of the moral obligations that a judge has is the obligation to live in a democratic society and to be bound by the determinations of that democratic society. If he feels that he cannot be, then he should not be sitting as a judge.

There are doubtless laws on the books apart from abortion that I might not agree with, that I might think are misguided, perhaps some that I might even think in the largest sense are immoral in the results that they produce. In no way would I let that influence my determination of how they apply. And if indeed I felt that I could not separate my repugnance for the law from my impartial judgment of what the Constitution permits the society to do, I would recuse myself from the case.

Senator MATHIAS. I had a similar conversation with Judge Noonan of the ninth circuit at the time his nomination was before this committee. He has very strong feeling on the abortion question. But he came out at about the position that you have just expressed, that it would be necessary, if not desirable, for him to recuse himself on cases that touched so closely on that issue in which he had been an advocate, a strong spokesman working in that field.

Judge SCALIA. That is not quite what I said, Senator. I did not say that I would recuse myself in the——

Senator MATHIAS. Well, that is where I wanted to press you. How would you deal with the problem?

Judge SCALIA. I do not know what Judge Noonan told you. Judge Noonan had indeed written considerably in the field and had been one of the leading advocates.

Senator MATHIAS. He was a strong activist and was affiliated with a number of activist organizations.

Judge SCALIA. I do not think I fall into that category.

Senator MATHIAS. Under what circumstances would you think a judge who had not had that kind of a background should recuse himself?

Judge SCALIA. Only where he himself is personally convinced that he cannot decide the question impartially because he feels so strongly about the morality of the issue. And it is not at all unusual for Justices to have to confront such cases. *United States* v. *Reynolds,* for example, which held that it was constitutional for a State to prohibit bigamy. Now, that was certainly a moral issue. The issue of monogamy for the Justices sitting on that case. They obviously—at least many of them must have had religious views about the matter and they did not feel it necessary, those who had those views, to disqualify themselves. And I do not think that any judge has to unless he or she is personally convinced that the issue has so beclouded his or her judgment that the Constitution would not be applied impartially.

I do not intend to disqualify myself except where that is the case, as far as the type of question you ask about is concerned.

Senator MATHIAS. When you were with us in 1982, you said:

> I would disqualify myself in any case in which I believe my connection with one of the litigants, or any other circumstances, would cause my judgment to be distorted in favor of one of the parties. I would further disqualify myself if the situation arose in which even though my judgment would not be distorted, a reasonable person would believe that my judgment would be distorted. That does not mean anyone in the world but a reasonable person.

Judge SCALIA. That is right.

Senator MATHIAS. Is that the position that you will carry with you from the court of appeals to the Supreme Court?

Judge SCALIA. Yes, it is, Senator. And what I am further saying is that I do not think that reasonable people think that the moral views that judges may hold on one piece of legislation or one decision or another so automatically beclouds their judgment that they must disqualify themselves.

I do not think that the records of the Supreme Court could possibly be read to establish that as the basis of disqualification on bigamy, on capital punishment, on an enormous number of things that men and women on the Court have had strong moral views doubtless and have sat nonetheless.

Senator MATHIAS. Now, you very carefully, and I think properly, limited this problem by saying that does not mean anybody in the world but a reasonable person.

But if a reasonable litigant actually believed that your judgment would be distorted because of some strong personal bias or belief, would that dissuade you from sitting on a case?

Judge SCALIA. I think the statute reads that way, Senator. I have the statute somewhere. I am quite sure that the way you put it is about the way the statute reads, requiring disqualification. If I may, title 28, United States Code, section 455: "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Senator MATHIAS. Turning to the matter of precedents, as a member of the court of appeals you are bound by the precedents established by the Supreme Court. But you will very soon be in a

position to change the precedents, to overturn them. So your view of the value of precedents is important.

During Justice Rehnquist's first confirmation, he said that a precedent might be less authoritative if it had stood for a shorter period of time or if it was a decision by a sharply divided court. He reiterated that view last week.

Would you agree with that general sentiment?

Judge SCALIA. Well, I think the length of time is a considerably important factor. The *Marbury* v. *Madison* example that I gave in response to Senator Kennedy.

I am not sure that I agree with Justice Rehnquist that the closeness of the prior decision makes that much difference. I mean, if *Marbury* v. *Madison* had been 5 to 4, I am not sure I would reverse it today.

But I can understand how some judges might consider that that is an appropriate factor as well.

I agree—I certainly agree with the former. The latter would not have occurred to me, but maybe.

Senator MATHIAS. One area of law that has produced shifting majorities, and some very sharp dissent, is affirmative action. Some commentators have noted that after some years of ferment, the Court is reaching a consensus.

One of those observers is Justice O'Connor. She wrote in a concurring opinion in *Wyant* v. *Jackson Board of Education* that "the Court is in agreement that remedying past or present racial discrimination by a State actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. The Court has forged a degree of unanimity. It is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently narrowly tailored or substantially related to the correction of prior discrimination."

Do you think it is a fair observation that the Court's affirmative action decisions represent a fair measure of consensus or a degree of unanimity so that an affirmative action program that benefits persons other than the identified victims of discrimination is permissible under the Constitution?

Judge SCALIA. Senator, I really do not think I should give my view. You are talking about an area in which it is a sure thing that there are going to be a lot more—the one thing you can say for sure about the Supreme Court decisions is that they have not answered all the questions.

There is doubtless going to be a lot more litigation in that field. And I do not think here that I should commit myself to a point of view.

If that is Justice O'Connor's opinion, and the position of a majority of the Court, that does not prove that it will not be argued to the contrary. And I have spoken my piece about stare decisis, but stare decisis is quite different from committing myself to a view before the committee that is responsible for confirming me to the Court.

Senator MATHIAS. Does the kind of consensus that Justice O'Connor mentions have any precedental value in your view?

Judge SCALIA. Oh, I do not think it all has to be in a single majority opinion. I mean, if you have three separate opinions that add up to five justices for a particular principle of law, that principle of law has been found in that case.

Senator MATHIAS. The chairman raised the subject of the death penalty. I suspect that you have had a minimum number of the petitions on your current court from the prisoners on death row.

Judge SCALIA. Very few, Senator, because we do not have a Federal prison within our jurisdiction. It is over in the Fourth Circuit.

Senator MATHIAS. In the other circuits, these petitions are very frequent, and the Supreme Court is constantly confronted with these petitions. And it has been a controversial, area of Court activity. It has been criticized on procedural grounds.

On the one hand, the death row petitioner usually arrives at the Supreme Court, as the chairman has suggested, at the end of a very long and tortuous road of appeals and collateral attacks and every kind of procedural gambit that can be imagined. There is pressure of every sort to decide the petition very quickly and to bring finality to the case even if it requires summary action.

On the other hand, because the penalty is irrevocable, the argument is made that each one of the petitions should be very carefully examined and weighed, and the execution date stayed until there has been full consideration.

Have you had an opportunity to consider how these competing pressures ought to be balanced? How much process is due to the death row inmate whose petition arrives at the Supreme Court just on the very eve of the day of execution?

Judge SCALIA. Senator, to tell you the truth, that really is a subject that I have not given thought to. And it is scary, is it not? I do not know. I think that must be a very hard call.

I cannot imagine a more important issue. And you have painted the considerations on the other side. All I can say is, I will do my best.

Senator MATHIAS. It must be one of the most difficult issues to face any public official, whether it is a governor who has a death warrant presented for his signature, or whether it is a judge signing a final order. But it is one area of responsibility that I will not be envying.

Judge SCALIA. No; I do not look forward to that as the most enjoyable part of the job, Senator.

Senator MATHIAS. In recent years, the Court has very rarely spoken with a single voice in major cases. There have been a proliferation of individual opinions, concurring opinions, dissenting opinions, separate opinions by Justices. Many of the cases that address very crucial issues are decided by a patchwork of opinions.

The result has some unfortunate aspects. The value of the decisions of the Supreme Court as precedent is diminished. And litigants can be confused about what the law really is, or they may be encouraged to make a second try to get a clearer or more favorable result.

Second, there is a concern about the effect of these increasingly sharp public disagreements on the collegiality of the Court.

As a circuit judge, have you found that the proliferation of independent opinions on the part of the Supreme Court has impeded

the ability of either lawyers or judges to glean the reasoning to support a particular decision?

Judge SCALIA. Oh, unquestionably, Senator. I do not think there is any doubt about that, including in some very important and difficult areas.

I guess the case that comes immediately to mind is the *Bakke* case on affirmative action, where what is said to be the holding of the Court is really the holding of the opinion of only one of the Justices, Justice Powell, because there were three opinions, one for four of the Justices, Justice Powell, and one for the other four. And the four that Justice Powell joined became the majority. So his opinion is quoted as the opinion of the Court.

It makes for a very confusing situation. I do not know what the solution is, except for self-restraint, I suppose. I have not been notable for writing separately on the Court that I sit on; notable for the quantity, I hope to mean.

As you know, other systems get along without it entirely. The European system typically has an unsigned opinion for the entire court, and you either win over the majority to your view, or your view does not appear.

One can run a system that way. But that is not in keeping with the rugged individualism of the common law judge, which is a quality that I think we want to retain. So I do think you need to leave room for dissents and concurrences. All I say is, it takes some self-restraint, and I hope to bring it to bear.

Senator MATHIAS. Well, I do not know that Members of the Senate are in any position to criticize verbosity on the part of others.

I see my time has expired.

The CHAIRMAN. The distinguished ranking member.

Senator BIDEN. Thank you, Mr. Chairman.

I apologize, Judge. I was on the floor with the introduction of another bill regarding the drug problem, and I am sorry not to have heard your original statement.

I want to pursue several areas. I will not be able to get them done in one round; but it will not be too many.

Let us start, if you will I have read all the speeches that I could find that you have written, and I find a very interesting—and I mean that sincerely—analysis of the newfound, newly enunciated doctrine of original intent. From the speeches that I have read, I cannot tell, and I am not being smart when I say this, whether your analysis of original meaning was one you meant, or whether it was done with tongue in cheek. I am unsure because you start off the speech in which you enunciate your doctrine by saying:

> When I was in law teaching, I was fond of doing what is called teaching against the class. That is, taking positions that the students were almost certain to disagree with in order to generate some discussion, if not productive thought.
>
> I have tended to take a similar contrary approach in public talks. It is neither any fun nor any use preaching to the choir.

Judge SCALIA. I am trying to fight against that here, Senator.

Senator BIDEN. I beg your pardon?

Judge SCALIA. I am trying to fight against that inclination here.

Senator BIDEN. Well, let yourself go. Because it is pretty boring so far. [Laughter.]

And it may be more interesting. And we may get a chance to see who you are a little bit more.

I am not suggesting that you are attempting to hide behind the argument that many use, which is, that may come before the Court; therefore I can never discuss it.

Everything may come before the Court. There is nothing in American public life that may not come before the Court; nothing. Therefore, if you applied that across the board, you would not be able to speak to anything.

But let us speak to what your speech is, and not to your cases. I want to go to your cases on freedom of speech issues next, but let us start off with this if we could.

There has been a lot of debate recently involving several members of the Court as well as Attorney General Meese about the so-called original intent doctrine. In fact in a recent speech at the Attorney General's Conference on Economic Freedoms, you offered some views on the subject and suggested that the doctrine would be better understood as that of, quote, original meaning, end of quote, rather than original intent.

Would you tell us what you mean by original meaning, as a means by which a judge should interpret the Constitution?

Judge SCALIA. Yes; I will be happy too. But you ought to begin by noting that in that speech, I did not advocate the original intent doctrine. I just said that it should be known as the original meaning doctrine.

Senator BIDEN. Well, that is what I am trying to figure out.

Judge SCALIA. Yes, well I will be happy to explain——

Senator BIDEN. Let me back up. Why do you not tell us how you view the interpretation of the Constitution? Do you view it as a living Constitution, to use that, quote, term of art? Do you view it as having to look to the original meaning, the original intent?

Who are you, Judge Scalia?

Judge SCALIA. That is a good question, Senator.

I am embarrassed to say this. I am 50 years old, grown up, and everything. I cannot say that I have a fully framed omnibus view of the Constitution.

Now, there are those who do who have written pieces on constitutional interpretation, and here is the matrix, and here is how you do it.

I think it is fair to say you would not regard me as someone who would be likely to use the phrase, living Constitution.

On the other hand, I am not sure you can say, he is pure and simply an original meaning—I will be happy to explain the difference between original meaning and original intent. It is not worth it. It is not a big difference.

Senator BIDEN. What do you think?

Judge SCALIA. What I think is that the Constitution is obviously not meant to be evolvable so easily that in effect a court of nine judges can treat it as though it is a bring-along-with-me statute and fill it up with whatever content the current times seem to require.

To a large degree, it is intended to be an insulation against the current times, against the passions of the moment that may cause individual liberties to be disregarded, and it has served that func-

tion valuably very often. So I would never use the phrase, living Constitution.

Now, there is within that phrase, however, the notion that a certain amount of development of constitutional doctrine occurs, and I think there is room for that. I frankly—the strict original intentist, I think, would say that even such a clause as the cruel and unusual punishment clause would have to mean precisely the same thing today that it meant in 1789.

Senator BIDEN. That it would have to mean that?

Judge SCALIA. Yes, so that if lashing was fine then, lashing would be fine now. I am not sure I agree with that. I think that there are some provisions of the Constitution that may have a certain amount of evolutionary content within them.

I have never been—what should I say—as I said earlier, I have not developed a full constitutional matrix. You are right, though, in suspecting me to be more inclined to the original meaning than I am to a phrase like "living Constitution."

Senator BIDEN. I am not being smart when I say, Judge, I do not suspect you of anything? I mean, truly.

Judge SCALIA. I did not mean it that way.

Senator BIDEN. As I read your speech—you talked about quote the speech. We have the speech.

For the record, what the judge meant was, he said that he essentially has one speech a year that he gives when he is invited to the law schools and other places as a sitting judge. He does others, but that is one. And he referred to the speech. And the speech had been one relating to the value of congressional input beyond the face of the statutes that we pass, and also this notion of original meaning, original intent.

I could read this both ways. I mean, I can read your speeches as saying you are being a devil's advocate and being a provocateur, on the one hand. I just hope you do not mean it. I am serious when I say that.

For example, if you mean—if you subscribe to the view that you articulate as to what original meaning means, then I have real problems voting for a judge who holds that view. But the way you just explained it, it seems as though you are not totally wedded to that view; that you lean that way, but for example, in the area of cruel and unusual punishment you see room for evolution, I assume you would argue the same regarding the 14th amendment. I assume you would say you could have gotten from *Plessy* to *Brown,* I hope.

Judge SCALIA. I have always had trouble with lashing, Senator. I have always had trouble thinking that that is constitutional. And if I have trouble with that——

Senator BIDEN. Are you being serious or being a wise guy?

Judge SCALIA. I am being serious, no; I am being serious.

Senator BIDEN. I just wanted to make sure.

Now, I have trouble with a number of these interpretations. For example, there has been much written lately on original intent; which is not what you have been saying, I acknowledge.

I have real trouble with that notion—that doctrine. But let's skip that for now. I will come back to that in a little bit, because my time is running out and I want to speak to another area.

One issue you talk about, where you have written, and where you have, quote, judged, has been the issue relating to independent regulatory agencies.

And again, I want to make sure I understand the parameters of your interpretation of the role, if any, of independent regulatory agencies. So let us not be case specific; let us be philosophical for a moment.

As I read your writings and your cases, you basically say the following:

That the Founding Fathers came up with three coequal branches of Government; that somewhere in the late eighteen hundreds, along came the Congress and set up an independent regulatory agency; that Congress gave to the head of that agency executive powers; and that Congress has repeated that in subsequent years, from 1890 through today; and if, in fact, the head of an independent regulatory agency is not serving at the pleasure of the President, that is, able to be fired by the President, relieved without cause by the President, then, what the Congress has attempted to do is unconstitutional, i.e., they have essentially established a quasi-executive branch of the government, which is a fourth branch of government sitting out here.

As I read your writing, you say that is unconstitutional. Now is that an accurate reading of your position relating to independent agencies?

Judge SCALIA. Senator, I think you were out of the room when I was asked about independent agencies before. I would love to talk about independent agencies. It has been an area—an abiding interest of mine. And my writings will have to speak for themselves.

But I have a real special problem when it comes to discussing this topic. Which is, not just that the case will come before the Supreme Court if I am confirmed, but that I have a case before my present court, mounting precisely the kind of constitutional case you have just described. It is currently before the court on which I sit. And I really think I should not be discussing the——

Senator BIDEN. Before the chairman rules, I will not follow up—even though his ruling would be wrong—I will not follow up on it.

The CHAIRMAN. I will not rule, then, if you are not going to ask any more questions. [Laughter.]

Judge SCALIA. Could I say this, though, Senator, which speaks not to the constitutionality of it at all, but to the fact that it may be—there may be less to it than meets the eye. Because I have found that there is not much difference, if indeed there is any difference, in modern times between the independent agencies, in the proper sense, and other executive agencies. Indeed, many people do not know which is which. The Food and Drug Administration, for example. Most people think it is an independent agency. It is not an independent agency. It is an executive branch agency. Yet it seems to be as independent of Presidential improper influence as one of the independents.

Senator BIDEN. Well, maybe we can talk about it that way. If you take a look at the Fed, the rationale for the Fed being an independent agency is equally as strong today as it was when it was set in place.

I cannot imagine the chaos that would be caused in international monetary markets if, tomorrow, the President of the United States had the power to relieve at will—you need not respond to this—but relieve at will the head of the Fed. Because everybody knows that every President, Democrat or Republican, in times of economic dif-

ficulty, tries very hard to speed up the money supply about 8 months before an election. I mean, that is a fact of political life. Were I the President, perish the thought, I might think of that myself. Were Senator Hatch President, I am sure he might think of that.

Everybody knows that. Everybody knows that that is precisely what Presidents have attempted to do; and would do.

If in fact the Chairman of the Board of the Federal Reserve System were to operate at the will of the Executive, I truly believe we would have economic chaos, worldwide, not nationwide. Because the fact of the matter is that, as the Hoover Commission noted in 1949, these are all a means of insulating regulation from partisan influence and favoritism.

And there is great concern about that. But I will try another tack. I have to think of an imaginative way to get you to talk about this critical issue without being overruled by the chairman. So let me move to another subject.

Freedom of speech: Something near and dear to the chairman's heart.

I am only kidding, Mr. Chairman.

Let me ask you: The first amendment to the Constitution states: Congress shall make no laws abridging the freedom of speech.

How do you define speech, Judge?

Judge SCALIA. I define speech as any communicative activity.

Senator BIDEN. Can it be nonverbal?

Judge SCALIA. Yes.

Senator BIDEN. Can it be nonverbal and also not written?

Judge SCALIA. Yes.

Senator BIDEN. So freedom of speech can encompass physical actions?

Judge SCALIA. Yes, sir.

Senator BIDEN. Good. That is a relief, because as I read your case, what I viewed as your dissent in the *Watt* case, I wondered whether or not you could——

Judge SCALIA. Yes. Well—do you want to talk about it?

Senator BIDEN. I would like you to amplify, if you would.

Judge SCALIA. Let us talk about that. *Watt* was a case in which what was at issue was sleeping as communicative activity.

Senator BIDEN. Yes.

Judge SCALIA. I did not say in the separate opinion that I wrote in that case, and that opinion was a dissent——

Senator BIDEN. Correct.

Judge SCALIA [continuing]. Of our court. That dissent was vindicated by the Supreme Court, as far as the outcome was concerned.

Senator BIDEN. But a different rationale.

Judge SCALIA. Not the rationale.

What I said was that for purposes of the heightened protections that are accorded, sleeping could not be speech. That is to say, I did not say that one could prohibit sleeping merely for the purpose of eliminating the communicative aspect of sleeping, if there is any.

It was alleged that there was in this case, because people wanted to sleep in the national park across from the White House in order to demonstrate that there were homeless. And it was alleged that the sleeping was a communicative activity.

I did not say that the Government could seek to prohibit that communication without running afoul of the heightened standards of the first amendment. If they passed a law that allows all other sleeping but only prohibits sleeping where it is intended to communicate, then it would be invalidated.

But what I did say was, where you have a general law that just applies to an activity which in itself is normally not communicative, such as sleeping, spitting, whatever you like; clenching your fist, for example; such a law would not be subject to the heightened standards of the first amendment.

That is to say, if there is ordinary justification for it, it is fine. It does not have to meet the high need, the no other available alternative requirements of the first amendment.

Whereas, when you are dealing with communicative activity, naturally communicative activity—writing, speech, and so forth—any law, even if it is general, across the board, has to meet those higher standards.

Senator BIDEN. But if you walk in and you sit down in a place that you are not allowed to protest an action that is being taken in that place, does that require the heightened justification? Or does that fall within the same category as the spoken word?

Judge SCALIA. No; I would think that that law—no; I cannot imagine that you are entitled to—that would allow you to disobey any law that does not have a very serious governmental purpose, just for the purpose of showing your contempt of that law.

For example, the best way to communicate your contempt for a law against spitting in the street is to spit in the street. How better to show your contempt for that law, except by disobeying it?

Senator BIDEN. Let me be more specific. Let us say you take a physical action like sitting down to protest a law that has nothing to do with preventing people from sitting. It has to do with whether or not black folk can be served in restaurants. And they say, no; you cannot. So you sit out there on the sidewalk.

Now, clearly, the physical action being taken is not being taken to demonstrate that the law against sitting down——

Judge SCALIA. That is right.

Senator BIDEN [continuing]. Is in fact wrong. It is being taken to demonstrate another law, unrelated to the physical action, is incorrect.

Does that situation require a heightened standard?

Judge SCALIA. I think not, Senator.

In fact, it seems to me it happens all the time when people protest in front of some embassies. Those laws are not subjected to heightened scrutiny, I do not believe. They are just laws that you cannot be at a certain location.

If you want to protest, as a means of civil disobedience, and take the penalty, that is fine. But if the law is not itself directed against demonstrations or against communication, I do not think it is the kind of law that in and of itself requires the heightened scrutiny.

That was the only point I was making in——

Senator BIDEN. That is very helpful to me. I am not being smart when I say that. That puts my mind at ease a great deal.

Judge SCALIA. And listen, I may be talked out of that. I am just explaining to you what I was saying in CCNY.

Senator BIDEN. No; do not let them talk you out of it.

Judge SCALIA. And I am not saying that I would hold that way in the future.

Senator BIDEN. Let me be specific, what I was referring to.

You quote in your dissent: In other words, the only first amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter, so far as the first amendment guarantees are concerned. If so, the court then proceeds to determine whether there is substantial justification for the proscription just as it does in free speech cases.

Your explanation has been helpful to me. I hope you will continue to do this with me for a couple of rounds.

Judge SCALIA. I thought it worked. I mean, the explanation.

Senator BIDEN. No, no; it does. But you understand how, without that explanation, that it is possible someone could read a more restrictive application; at least it was my concern.

Judge SCALIA. I will have to write longer opinions.

Senator BIDEN. It was one of those areas of ambiguity, that I would like to talk to you about, how you deal with that with legislative ambiguity.

Judge SCALIA. OK; thank you.

The CHAIRMAN. When the judge rules with you is a good time to stop.

Judge SCALIA. I think that is a good idea, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Thank you, Mr. Chairman.

Judge, you are doing fine. There was some suggestion that the *Synar* case was attacking certain precedents of the Supreme Court, for instance, Humphreys Executor. And that particular case among others was not an instance of judicial activism, but a decision based on the interpretation of clear constitutional language. Basically, the language in the Constitution said that the executive power shall be vested in the President.

Moreover, the opinion demonstrates your commitment to law over policy preferences. It is not inconsequential that even though Gramm-Rudman's objective, that is, cutting deficits, is one of the preferences that you have been for in the past, nevertheless, you joined the per curiam opinion finding that particular section of Gramm-Rudman unconstitutional.

What it shows to me is, one, you interpret the language of the Constitution directly, and two, you can decide against your own policy objectives.

It suggests to me that you are more wedded to the law and good judgment than to dictating the outcome of particular cases in accordance with your own personal views. And I thought that was an interesting case.

As a judge, how do you insure that your own policy preferences do not conflict with your own legal judgments?

Judge SCALIA. Well, Senator, I suppose that that is the hardest thing to do. Although it takes, I guess, a certain cast of mind which is probably called judicial or judicious.

I think my record shows that I have done that. I do not think the *Gramm-Rudman* case is the only one.

Senator HATCH. No, I do not either.

Judge SCALIA. It was mentioned earlier that a lot of my opinions are in the regulatory field; that is a field in which I used to labor. Administrative law was one of the subjects that I taught, and as I mentioned earlier, I was editor of Regulation magazine. And one of my policy preferences in those days was deregulation. But an examination of my opinions will show that I have fully enforced actions by agencies that go in precisely the opposite direction; and indeed, I have stopped agencies from going in a deregulatory direction when it seemed to me, however unwise it might have been as a policy matter, the statute simply did not let them do it.

So it is doable, is all I am saying, Senator. And I think I can do it.

Senator HATCH. That is great.

I personally believe that the Supreme Court will benefit a great deal from your expertise in administrative law. I expect you to become the person who can really untangle some of the thickets that have existed on the Supreme Court through the whole lifetime of the Court in that particular area.

Let us move to free speech. We have had some comments about your decisions in free speech. Let me go to the *Ollman* case, for instance.

In that case, the plaintiff was a Marxist professor. He claimed that articles in a newspaper actually defaming his views cost him his position as a department chairman at the University of Maryland.

This became, in the eyes of people around Washington and around the country, a liberal cause celebre.

You sided with the professor, as did four of the five leading liberals on the court—if the judges can be so categorized. And sometimes you have to question that on the D.C. Court of Appeals.

Judge SCALIA. I think that is right, Senator.

Senator HATCH. Still, you are accused of being weak on free speech because you voted against the newspapers. I just want to point out that it seems to me that there are important free speech arguments on Professor Ollman's side as well. In other words, there were two sides to that case. And you mentioned that there is another side to the *Ollman* case.

From his vantage point, he has rights to speak and hold constitutional opinions or other opinions that are controversial. He brought a defamation suit in order to vindicate those rights against the newspapers.

Lies and libel should not properly be a part of robust and uninhibited exchanges of ideas. For this reason, the first amendment has always tendered less protection to libel speech than to other forms of expression.

I can imagine that if you had voted against Ollman, you could have been maligned for voting against a Marxist professor because of his unpopular views. There were two sides to this free speech issue.

Either way, somebody could have accused you of being weak, on first amendment rights and privileges, and especially, in this case, free speech.

That particular case demonstrates that there are generally two sides to almost every case.

Now what steps do you take as a judge to insure that you are going to give a fair hearing to both sides of any issue that comes before you?

Judge SCALIA. Well, the start of it is, Senator, that I—maybe it is a quirky cast of mind, I do not know, but I like playing with statutes and finding out what they mean. And that is where I start from; not, where would I like to come out in this particular case. And I think that is what any good judge—how any good judge approaches the matter.

And from there, you obviously have to read, with attention, the briefs of both sides; listen to the arguments of both sides; and not make up your mind firmly. You cannot help getting intimations of which way you are leaning as you go along. But do not make up your mind firmly until you are all done with everything, including the oral argument and including listening to the comments of your colleagues in the conference after oral argument.

It is a difficult process. But I do not think it takes a superhuman effort to come out a way that you do not think is sound as a policy matter. You learn very soon that the policy calls are not yours to make. And there are a lot of cases where you have to come out with decisions where you think that the direction it may be moving the society or the agency is the wrong one; but that is not your job to figure out. The Constitution gives those calls to other people who, by definition, know better, because they are democratically elected.

Senator HATCH. The point is that there are two sides to these cases. You have deliberated and listened to both sides. You have had much criticism from the first amendment, free speech, standpoint from certain journalists and others.

Judge SCALIA. I have not understood that, Senator. I have really not understood——

Senator HATCH. I have not either.

Judge SCALIA [continuing]. The basis for that at all. Because I do not think my record on the first amendment is at all illiberal, if you want to use that word.

Senator HATCH. There is room to disagree. But on the other hand, there is room to disagree both ways. That is the point I am making. It hardly makes you someone who is making an onslaught on first amendment rights and privileges.

I would point out a couple of other cases that I think are important to show your legal reasoning and what you have done on the bench.

In Liberty Lobby—that was the *Jack Anderson* case—you held that many allegedly libelous statements were actually entitled to first amendment privileges and protections.

For instance, you would have extended protection to Jack Anderson's assertion that the plaintiffs were Nazis, on the basis that this is an opinion, and therefore, it is protected, as I understand it.

In other aspects of the case, however, you said that the statements were actionable as libel. I would hasten to point out that in that particular case, you were joined in your opinion by a person who some would call a "liberal"—Judge Edwards. And on appeal, you were joined in the opinion by a mixed group of Justices, Mr. Justice Brennan, Mr. Justice Burger, Chief Justice Burger, and of course, Mr. Justice Rehnquist.

Judge SCALIA. In dissent, alas.

Senator HATCH. That is right. They were in dissent. They would have affirmed though your result. This shows that there can be room for disagreement.

In the *Tavoulareas* case, which was the Washington Post case, you joined an opinion saying that aggressive, investigative reporting could be evidence of actual malice, which is an element, of course, of a libel action.

Now this was actually borrowed from the 1967 *Butz* case, written by Chief Justice Earl Warren, who few would consider to be an enemy of free speech.

The reason I am bringing these out is because in the criticisms that have arisen, you deserve to be given fairer treatment than you have been given, even though there is room for disagreement in these very controversial and difficult areas.

You did a terrific job of explaining what symbolic speech is in your explanation of the *Community for Creative Non-Violence* v. *Watt*, where you held that demonstrators were permitted to demonstrate around the clock in two D.C. parks, but you denied permission for people to sleep in temporary shantytowns right across from the White House.

I hasten to point out, that you did not challenge the established doctrine that some forms of conduct are symbolic speech, and therefore entitled to first amendment protection.

You find, however, that sleep is not expressive conduct, and you expressed that very well here today. Even though there are those who are on the other side from you in these cases, you are not, in my opinion, insensitive to first amendment rights and privileges. There are, as in all of these cases, two sides. I want to compliment you for being able to listen to both sides.

Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman.

Judge Scalia, my colleague, Senator Biden, touched on the 14th amendment. Realizing that cases are pending before you now, or in the future, I would like to pursue it a little bit.

Justice Rehnquist was questioned quite extensively on his interpretation of the 14th amendment's equal protection clause.

His interpretation of this clause is that the framers intended that it only apply to racial discrimination, and maybe its cousin, national origin discrimination.

Justice Rehnquist would disagree with those who have argued before the Supreme Court that there are suspect qualifications such as sex, alienage, and illegitimacy; that there are fundamental interests protected by the equal protection clause such as the right to vote, right to travel, interest in marriage and family.

Do you agree with this restrictive interpretation of the equal protection clause? What is your interpretation of that clause?

Judge SCALIA. Well, I am not sure the description of—I did not hear all——

Senator DECONCINI. How do you interpret the equal protection clause?

Judge SCALIA. Well, I would be surprised if I heard Justice Rehnquist say it only applied to racial——

Senator DECONCINI. Well, he did not say it only applied, but he said a separate standard in the 14th amendment, as I recall his testimony, as it applied to sex or alienage or illegitimacy——

Judge SCALIA. That is right.

Senator DECONCINI [continuing]. Different than as it applied to race——

Judge SCALIA. So-called suspect categories.

Senator DECONCINI [continuing]. And maybe origin, national origin?

Judge SCALIA. Right. That is the current Supreme Court law on the subject and I do not think I should be in the position of saying whether I agree or disagree with the Supreme Court law on the subject, which is not to suggest at all, that I have any doubt about it any more than I necessarily have any doubt about *Marbury* v. *Madison.*

Senator DECONCINI. Well, do you think there is, in the 14th amendment equal protection clause, a standard separate for sex discrimination as there is for racial discrimination? Can you just tell me your own opinion on that?

Judge SCALIA. I do not think I should, Senator, because that may well be an issue argued before the Court, and I do not want to be in a position of having, in connection, as a condition of my confirmation——

Senator DECONCINI. Well, I understand that.

Judge SCALIA. Giving——

Senator DECONCINI. I understand that.

Judge SCALIA [continuing]. An indication of how I would come out on it.

Senator DECONCINI. Yes, I understand, Judge Scalia, but I think it is fair for us to ask what your feelings are on whether or not there may be more than one standard. Disregard the question as I put it.

Do you think that under the equal protection clause, that there is more than one standard in that clause?

Judge SCALIA. Under current law, there certainly is, yes.

Senator DECONCINI. And are you comfortable with that, or just what is your philosophy or feeling about it? I am not asking you to commit yourself, how you are going to vote on a case. I would just like to know a little bit——

Judge SCALIA. I know you are not asking me to commit myself.

Senator DECONCINI [continuing]. How you feel about that equal protection clause. I know you are not putting it in the context

Judge SCALIA. I know you are not putting it in the context, how would you vote, but when you are asking that question, in the context of whether you will vote for me to go on the Court—the reason you are asking the question, and the reason I am making my re-

sponse is clearly so that you will know whether this individual will vote in a way that you think will make him a good Justice.

Senator DECONCINI. No, that is not necessarily so. I have pretty well committed myself to vote for you, based on your experience and qualifications, even if I happen to disagree with you.

I have voted for a lot of judges and I plan to vote for Justice Rehnquist and I disagree with him. I voted for Patricia Wald who sits on your court, and I disagree with her on many, many decisions. I disagreed with many of her opinions that she held when she was at the Justice Department.

I still voted for her. I asked her several questions, even questions about abortion, and she told me what her beliefs were, not how she was going to decide cases.

Judge SCALIA. But that is quite different.

Senator DECONCINI. And I went ahead and voted for her.

Judge SCALIA. But that is quite different. I will tell you, you know, my personal beliefs on abortion if——

Senator DECONCINI. Well, I do not know, I do not remember if I asked her about the 14th amendment, but my question is whether or not you think there are several standards of the 14th amendment. You obviously do not want to answer that.

Judge SCALIA. Senator, the reason I—I do not want to suggest it is a hard question.

Senator DECONCINI. Oh, I agree with you. I am not suggesting it is easy.

Judge SCALIA. But that is not just a slippery slope; it is a precipice. From then on, I am put to the task of deciding which of those questions are hard ones, and which are not hard ones. So it might still be debatable, and there is no way that I can successfully negotiate my way through such line drawing.

I just cannot do it, and, I think the only way to be sure that I am not impairing my ability to be impartial, and to be regarded as impartial in future cases before the Court, is simply to respectfully decline to give an opinion on whether any of the existing law on the Supreme Court is right, or wrong.

Senator DECONCINI. And I am not asking, Judge Scalia, is the existing law right or wrong.

Just for the record—and you are not going to answer, obviously. Just for the record, I'm not asking you do you agree, or disagree with the Supreme Court. I am even changing my question: Do you agree or disagree with Justice Rehnquist? I just simply ask: under the 14th amendment, equal protection, do you think there is more than one standard there? That is all I ask you. If you do not want to answer it, you are a free man, and you do not have to.

Let me ask you another question. In the Washington University Law Quarterly, you wrote a statement to the effect that affirmative action programs should benefit those who are truly disadvantaged and poor, and should not be for the advantage of the children of the prosperous or well educated.

And having said that, let me say that I tend to think there is a lot of merit to that. But let me ask you this question, in a hypothetical sense, Judge, not on any case you are going to rule on now.

Don't we have to acknowledge we have special societal problems in our inner cities. They have become increasingly populated by

minorities, with a large number of people—particularly children and women, and teenagers, and young adults—who need some assistance. Isn't it necessary that all three branches of our Government take special notice of these people instead of leaving them to the lives of what they have today?

And isn't it permissible for legislators to design programs for the benefit of those populated groups who are disproportionally disadvantaged, even if these programs also benefit the individuals who are not targeted?

Now what I would like to know is, how should the courts, if at all, participate in an effort to solve this societal problem?

Judge SCALIA. I am happy to answer the last half. I think courts should be, obviously, as concerned about massive societal problems, such as the problem of discrimination in this country as either of the other two branches.

Senator DECONCINI. That is encouraging. Thank you.

Now, Judge Scalia, in another article in a Regulation magazine, 1982, entitled, "Freedom of Information Act Has No Clothes," you argued that the defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth.

You defined this obsession as the belief that the first line of defense against an arbitrary Executive is a do-it-yourself oversight by the public and its surrogates, the press. Now do you continue to believe that the Freedom of Information Act goes too far, or am I misinterpreting that article, or that paragraph I read to you?

Judge SCALIA. Yes, I have tried to avoid making any public statements on controversial issues of public and political policy since I have been a judge, and I think I should adhere to it.

What I wrote in that article is in print, and I guess you can hold it to me as being my views at that time.

Senator DECONCINI. Are they still your views, then? I guess that is the next question.

Judge SCALIA. I do not think I should say. As far as a litigant who has to appear before me is concerned, it is troublesome enough to them, I suppose, that I once wrote views on one side or another like that, to reaffirm them after I am a sitting judge who——

Senator DECONCINI. Well, is it safe to say——

Judge SCALIA [continuing]. Whether I am confirmed or not, and especially if I am not confirmed, we will be having a lot more FOIA cases in the future.

Senator DECONCINI. Well is it safe to say that since 1982, your view is unknown?

Judge SCALIA. Yes. Let's say it that way and——

Senator DECONCINI. So in 1982, it was pretty clear, and now, you do not know.

Judge SCALIA. Yes. I guess if we put it that—it is unknown. Now let's not say that I do not know.

Senator DECONCINI. It is unknown.

Judge SCALIA. But if you want me to—if you have concern on the Freedom of Information Act, I have been critical, not of the entire concept of the act, and not indeed of the original act, but just of some aspects of the 1974 amendments.

I think my record, sitting on the District of Columbia circuit, shows that I have applied the act, including those portions of it that I was not enamored of, fairly, and, indeed, if I have any landmark decisions regarding the Freedom of Information Act, I suspect they go in the direction of broadening its application, rather than narrowing.

Senator DECONCINI. Except for the recent amendments?

Judge SCALIA. Except for—excuse me?

Senator DECONCINI. Except for the recent amendments? You indicated that you had some problems with the——

Judge SCALIA. No, no. I am saying my decisions on the court, as far as interpreting the Freedom of Information Act is concerned, if any of those were really significant decisions that made significant law, I think the ones that would fall into that category were in the direction of expanding the access under the Freedom of Information Act, rather than narrowing it.

Senator DECONCINI. But you would——

Judge SCALIA. I can go into chapter and verse on that, but it is very dull stuff, Senator.

Senator DECONCINI. As far as you can comment, you would advocate less restrictions on disclosure? You know, am I interpreting that correctly, or would you advocate more?

Judge SCALIA. Currently, Senator, I would advocate neither because it is not my business anymore. You write it; I will enforce it.

Senator DECONCINI. Well, that is an easy way out of answering the question, Judge, in my opinion.

Without asking you to side in a disagreement between Justice Rehnquist and Justice Burger, I would like to know your opinion from the viewpoint of the circuit court judge, of the operation of the Federal courts, and particularly, the Supreme Court.

Would you like to see the Supreme Court in a position to be able to grant more certiorari petitions and circuit court opinions?

Judge SCALIA. Oh, I think it would be wonderful. I do not know how, physically, they could do it and keep up with the——

Senator DECONCINI. Well, let me just bring up this: Justice Rehnquist testified that he felt that the Court was not overworked. I do not know if you are aware of that, or not.

Justice Burger has been a great proponent of convincing many of us that, indeed, there needs to be many changes so the Court is not overworked.

I am just interested in your opinion, and maybe you do not have one because maybe there is going to be a case before the Court on it. I do not know.

But do you think the Supreme Court is overworked? What is your analysis of that Court?

Judge SCALIA. Not having been up there, I do not know. I could say this, though: that I think, as a lower court judge, what is much more troubling than the fact that the Supreme Court does not decide more cases, is the fact that the cases they do decide are often decided with three and four opinions. So that it is very difficult for the court of appeals judge to know what they are telling us to do.

I am not sure which direction it is better to go: to write more opinions or to write fewer opinions, but spend more time getting

together on one opinion for the whole Court. If you asked—if you took a poll of court of appeals judges, I would bet you they would pick the latter.

Senator DECONCINI. Yes. Thank you, Judge. What about addressing this problem for me: Congress is presently considering legislation to create, on a trial basis, an intercircuit panel to resolve the conflicts between the various circuit courts. How do you feel about that?

Judge SCALIA. Well, let me give you the court of appeals judge's point of view again. The immediate effect of it, of course, is to render judges who are now sitting on the second highest court in the land, judges sitting in the third highest court in the land, and that is not likely to make——

Senator DECONCINI. How do you feel about it, Judge?

Judge SCALIA. As a policy matter for the country?

Senator DECONCINI. Yes. Do you think it has merits, or do you think it is not necessary, or what?

Judge SCALIA. I think it is terrible, and the only question is whether the alternative is more terrible. I do not think anybody is happy about having a four-level court structure. It is more cumbersome. It is more expensive for litigants.

Senator DECONCINI. So unless the case was made that it was necessary, you do not think——

Judge SCALIA. I think that is so, but I do not think any—I do not think that is telling you anything that is very useful.

Senator DECONCINI. But there has been some debate here as to whether or not those judges should be taken from the various circuit courts or whether they should be appointed by the Supreme Court. A suggestion was made in the markup that they be appointed by the President and confirmed by the Senate.

Do you have an opinion of what you think would be best for that intercircuit panel, if, indeed, it was established? Where the judges come from.

Judge SCALIA. Certainly, if it is to be made a permanent thing, it seems to me you should do it right, and have the appointments the way article III judges are normally appointed to courts—appointment by the President to that court, a nomination by the President to that court, advice and consent of the Senate.

Senator DECONCINI. How about on a trial basis, which is the way the legislation did pass the Judiciary Committee? Do you have an opinion? I am only looking for something to——

Judge SCALIA. Yes. I do not know. I think it is a close call, whether——

Senator DECONCINI. You are on the bench.

Judge SCALIA [continuing]. On a trial basis, a quick and dirty trial, you want to do it on some different basis, I could see doing it that way, temporarily.

Senator DECONCINI. Judge, I have been interested in formulating a constitutional provision for judicial discipline short of impeachment. The Congress did pass the Judicial Discipline and Tenure Act several years ago. That act required circuit courts to set up a procedure for discipline.

Do you know if the District of Columbia circuit court has set up such a procedure?

Judge SCALIA. Yes. I think all the courts have a circuit council, now, that implements the act.

Senator DECONCINI. Do you know the experience the courts have had with this act? Has there been many complaints, or——

Judge SCALIA. Yes. I think complaints are many—no, I would not say many, but there are complaints and the complaints are processed.

I am not sure that the fact that you do not—that the procedure is not very visible to you, or to anyone else, means that the procedure is not working.

It is working, and maybe the fact that it is working well simply stops many of these things from coming to public attention when they otherwise would.

Senator DECONCINI. Do you know if there have been complaints filed and some action taken on them?

Judge SCALIA. Oh, yes. Yes; I do.

Senator DECONCINI. Do you know if there has been any discipline? I am not going to ask you who or what. But do you know if there have ever been any discipline discussions relating to your circuit or any other circuit?

Judge SCALIA. I do not know, Senator. Oh, I am sure, if you say my circuit, or any other circuit, I am sure there have been.

Senator DECONCINI. Well, I am not aware of any. I just wondered if, through the grapevine of the Judicary Conference, if you knew of any. I am not going to ask you to be specific. Do you know of any disciplinary actions that have been taken as a result of that judicial——

Judge SCALIA. Well, I think there was one in our circuit, as a matter of fact.

Senator DECONCINI. Thank you.

Judge SCALIA. At least one.

Senator DECONCINI. Many critics of the so-called bureaucracy have been strangely silent, it seems to me, for the last few years. It is almost as if the criticism might have been motivated out of politics. That never happens in this town. We know that.

I am interested to read in Regulation Magazine, AEI's magazine. Your advice to the President concerning the bureaucracy. And you wrote:

> Replacing their bureaucracy with our bureaucracy does not solve the underlying difficulty. The point is that no bureaucracy should be making basic social judgments. It is perverse to delight in our ability to change the law without changing the law.

What do you think can be done legislatively and what can be done judicially to rein in the bureaucracy?

Judge SCALIA. Well, let me begin by saying I have never been a bad mouther of the bureaucracy. Most of the people I have known in the government, and I have worked in the executive branch in three different positions, most of them are good, hard-working, talented, dedicated people, and trying not to pervert the law but, to the contrary, implement it.

The problem I was addressing there was simply the fact it is the same point I was discussing with Senator Kennedy earlier as a matter of fact. It is a problem of excessive delegation. Too many of

the basic judgments are simply not made in the statute. They are left to be made by the agency that implements it.

To the extent that can be avoided, that is the way to go. Otherwise, when you change an administration, without any vote to change the law, suddenly the same law is being administered in a different direction, and that swing can be more or less extreme depending upon how specific the statute itself.

Senator DECONCINI. Does the judiciary play any role in that?

Judge SCALIA. The judiciary stops the swing from going beyond the bounds of the reasonable. But when it is drawn with sufficient vagueness, even the reasonable swing is a pretty broad one.

I am sure Congress is aware of the problem. It is a hard one to get a hold onto.

Senator DECONCINI. Thank you. Thank you, Judge.

Thank you, Mr. Chairman.

The CHAIRMAN. After Senator Grassley, we will take a 10-minute recess.

The distinguished Senator from Iowa.

Senator GRASSLEY. Thank you, Mr. Chairman.

It is my understanding that much of the work of the District of Columbia circuit involves the regulatory agency cases and administrative law, and you have obviously thought and written a great deal about those issues. And I think it is fair to suggest that, if confirmed, you are going to play a special role in future Supreme Court cases in those areas.

I am interested in the area of administrative law from my chairmanship of a subcommittee here of this committee. Now I understand you to be an outspoken opponent of the legislative veto. You have criticized Congress for—and these are your words—"passing laws with strings attached."

And I personally disagree with your view because I am opposed to the tremendous amount of legislating done by faceless bureaucrats who are not elected by anyone.

So I would like to explore the subject of the legislative veto.

What if Congress enacts legislative veto legislation that satisfies, one, bicameral passage, and, two, the presentment requirements set out in the Constitution, is that not about all that is constitutionally required?

Judge SCALIA. Those are the only two problems that were raised against the type of veto that was struck down in *Chadha*. And I suppose if those two requirements, if those two problems were overcome, the problem would be eliminated. But I am not sure you would still call it a legislative veto.

Senator GRASSLEY. Well, in writings that you have done in the Administrative Law Review articles, 1976; Regulation magazine in February 1981; Regulation magazine in December 1979, you cite only those two constitutional imperfections.

So your view today then is similar to what you had previously written?

Judge SCALIA. Well, what matters today is not my view of what I previously wrote, but what the Supreme Court subsequently decided, that is subsequent to what I previously wrote, the *Chadha* case.

Senator GRASSLEY. Well, assume again——

Judge SCALIA. I think you are presenting to me a situation in which the two defects discussed or identified in *Chadha* were eliminated on the basis of *Chadha*——

Senator GRASSLEY. Assume again that a legislative veto statute then would meet the *Chadha* test.

Do you not agree that a legislative veto serves a virtue in today's age where it is so difficult for Congress to legislate policy, statute by statute, against a backdrop that we find ourselves in here of constantly changing issues?

Judge SCALIA. Senator, as I told Senator Kennedy, one of the things I have always been concerned about, and my writings show it, is the problem of excessive delegation by Congress to the agencies. It is an awfully hard problem to deal with. To the extent that there is a device that will enable Congress to review more closely the activities of the agency, that is desirable. There is some way to get proper legislative attention to what the agencies have done by way of implementing earlier statutes.

Senator GRASSLEY. Well, you accept the environment and decide within that environment, I hope, that Congress reacts; that we cannot anticipate crises, and that I hope you accept that it is unreasonable to expect Congress to do otherwise, and then accept the fact that that is why Congress delegates authority to agency expertise.

Judge SCALIA. Right. I understand. I think that is right.

Senator GRASSLEY. I think we all agree with the Constitution lasting 200 years now, and hopefully for another 200 years, that we have found our Founding Fathers to be very practical people.

I have a hunch that given the range of agencies that we now have today, whether it be FERC or the FCC or the Consumer Products Safety Commission, and you can go on and on, which, of course, they, writing 200 years ago, could have never dreamed of, that they might find the veto a fair and practical way to deal with bureaucracy today.

Do you disagree with that?

Judge SCALIA. It is conceivable that had they envisioned the kind of a system that would develop, they would have made provision in the Constitution for a legislative veto. Although, as the Supreme Court has said, they did not. That is what the Supreme Court has said to date.

Senator GRASSLEY. Well, what the Supreme Court said to date is what Congress passed for a legislative veto up until *Chadha*, that those forms of legislative veto are unconstitutional.

You are said to be a free market advocate who favors economic deregulation. I made reference to the fact that you had written for Regulation magazine, and you said you had edited it; that is kind of a gospel of deregulation.

I am not going to ask you to comment on any specific regulation, but can you give me some indication of what factors you consider when faced with a constitutional challenge to economic regulations?

Judge SCALIA. I do not recall that I have been confronted with a constitutional challenge to economic regulations during the entire time I sat on the Court I am now sitting on. In fact, the constitutional challenges to economic regulation are pretty rare nowadays.

Most of the challenges are on the basis of whether the statute permitted the economic regulation in question.

I really would not even know where to begin to grapple with the question you ask. I am sure the experience of my circuit is not different from the experience of most circuits. It is very rare that economic regulation nowadays is challenged on constitutional grounds.

Senator GRASSLEY. Well, along that——

Judge SCALIA. You know, equal protection challenges have just not fared very well in the last half century anyway. And that would be the normal source of attack.

Senator GRASSLEY. Well, must a regulation be more than simply wrong headed for it to be overturned?

Judge SCALIA. Oh, absolutely. Yes.

It would have to be more, and the agency's action would have to be more than wrong headed to be overturned on statutory grounds as well. It can be reasonably wrong headed, and we will approve it.

Senator GRASSLEY. In a case decided last year, *Hirschey* v. *FERC*, involving the Equal Access to Justice Act, you took the occasion to comment on what role legislative history and committee reports play in judicial interpretation. And I hope it is fair for me to conclude that you showed a great deal of hostility toward committee reports in that writing.

You wrote in a concurring opinion, and I quote, "I think it's time for courts to become concerned about the fact that routine deference to the detail of committee reports and the predictable expansion in detail with routine deference has produced have converted a system of judicial construction into a system of committee staff prescription."

Now, that is pretty doggone strong language.

Let me first ask how important is legislative history to you?

Judge SCALIA. I think it is a significant factor in interpreting a statute. I have used it in my opinions.

Senator GRASSLEY. Well, let me ask you how come you do not repeat the usual answer that we get that, you do refer to it, if the language of the statute itself is not clear to the judges interpreting?

Judge SCALIA. Well, I guess I did not repeat that because I——

Senator GRASSLEY. It is so obvious?

Judge SCALIA. It is so obvious and——

Senator GRASSLEY. But you accept——

Judge SCALIA. One, it is so obvious and, two, because we do not normally have a lawsuit in front of us if the language of the statute is clear. Almost invariably, the language of the statute is argued to mean one thing by one side and another thing by another side. And where that is the case, legislative history——

Senator GRASSLEY. Are you going to be then turning to the legislative history that frequently, as you say that the statute is hardly ever clear?

Judge SCALIA. I will use what seems to me reliable legislative history when it is available to be used.

The trouble with legislative history, Senator, is figuring out what is reliable and what is not reliable. That is the trouble with it.

Senator GRASSLEY. Well, I want to tell you as one who has served in Congress for 12 years, legislative history is very important to

those of us here who want further detailed expression of that legislative intent. All right.

You are not suggesting that for committee reports to have any meaning, that they must be actually written rather than merely approved by Members of Congress? Are you suggesting that?

Judge SCALIA. I do not want to pin myself down to a commitment to use any particular type of legislative history or not to use any particular type of legislative history. I am just saying I will not exclude it as a basis for my decisions as I have not in the past. And that it depends on what the significant legislative history is and how genuine a representation of the congressional intent it seems to be.

Senator GRASSLEY. Well, let me be a little more specific.

When you decide a case and look to the legislative history to help you, is it meaningless for a committee report to suggest that a court has misinterpreted an earlier statute?

Judge SCALIA. In the *Hirschey* case, which you are talking about, it seems so to me because the statute had not been changed. The statute was reenacted unchanged, although it would have been easy to clarify the provision that was ambiguous and that had been the subject of the earlier court decision.

What happened, it seemed to me, as best I could read the legislative history, was that the body as a whole had no intent concerning that earlier decision, probably did not even know of that earlier decision. But the committee at most, and perhaps only the committee staff for all one knows, did have views about that opinion and put it in the committee report.

But it is, of course, the view of the whole Congress that counts.

Now, if the act had been amended in some respect, and if this statement in the committee report were an explanation of why that amendment which came out of the committee was suggested, then it would have had more weight. But here the statute was enacted entirely unamended, and the statement in the committee report seemed to me almost a dictum. It had nothing to do with the bill that was on the floor.

Senator GRASSLEY. Well, I think the facts are that there were a number of changes made in successive reauthorizations to that legislation.

Judge SCALIA. No, I said unamended in the respect that had been the source of ambiguity which was the subject of the prior court decision. Yes, the act was amended in other respects, but there was no amendment to which this particular language in the committee report had any relevance.

Senator GRASSLEY. Would it be improper for Congress to ratify, so to speak, a correct court decision by stating that in the committee report?

Judge SCALIA. Can Congress ratify a court decision?

Senator GRASSLEY. Well, what I am saying——

Judge SCALIA. Senator, Congress does not act in committee reports. I will say that flat out. Congress acts by passing a law. The only value of the committee reports——

Senator GRASSLEY. I am speaking to the point of Congress accepting a view of a court decision and expressing that in the committee

report. And then that being legislative history toward what Congress intended to some extent.

And I am talking about a correct interpretation.

Judge SCALIA. I think that the statement in the committee report would have to be an explanation of something that Congress did in the statute. If it were an explanation of something that Congress did in the statute, and it shows that what Congress did in the statute was based upon thus and such an interpretation of a prior or an acceptance of a prior opinion, then it would be of value.

Senator GRASSLEY. Well, suppose Congress sees two different court interpretations of the same statute, and Congress says this is the one that we intended?

Judge SCALIA. In the law? No problem.

Senator GRASSLEY. In the committee report as a statement of congressional intent?

Judge SCALIA. I would not think that was of any relevance unless Congress had done something in the law of which that statement in the committee report was an explanation.

Senator GRASSLEY. Suppose it is Congress' judgment that what we said 5 to 10 years ago is exactly what we intended and we still intend to say it, it does not need a change in the statute, and we are saying, as between two decisions, with opposing views, that this is the one we like.

What is wrong with that as a judgment by Congress telling the courts how we want the statute interpreted in the future?

Judge SCALIA. If I could know that that was what the whole Congress meant, there would be no problem about that at all. But I do not know it when all I see is a single committee report. I cannot tell if that is what the whole Congress meant just from looking at a single committee report where Congress has taken no action on the face of its statute to which that report is somehow tied, which that report explains where it is just passing a law. And the committee that happens to have jurisdiction over that area makes a comment——

Senator GRASSLEY. Obviously we are talking about a committee report that would follow legislative reauthorization or some other form of congressional enactment for that specific Congress by which the report came.

Judge SCALIA. My only point, Senator, is I do not think that that gives the committee the right to opine on all matters pertaining to that law, not to those matters which the committee is bringing before the full Congress.

And mind you, all I am seeking to do, and it is a problem for any judge using legislative history, is to try to figure out what the intent of the Congress is and to what extent this expresssion, whether it be on the floor by a single Senator, that is a problem sometimes too, or whether it be in a committee report, whether that genuinely represents what the whole body intended. So that we are sure that we are not disenfranchising the Congress and getting you, as a member of the Senate, committed to a position which in fact you knew nothing about and would disagree with.

Senator GRASSLEY. Well, the reason why I ask these questions is that I detect something in your writing, whether it is on the Gramm-Rudman law, the legislative veto, or this example I just

gave, I sense a very critical view of how Congress tries to get things done. Do you think I am being too sensitive about it?

Judge SCALIA. Honestly, Senator, I have no criticism whatever about the way Congress tries to get things done. You can get things done any way you like, and that is your affair, and I understand the problems you confront in trying to get it done, the problems that you try to grapple with with the legislative veto, and the kinds of problems you are referring to that can be handled by committee reports.

No, I——

Senator GRASSLEY. Your background is primarily academic. You have also had a stint in the executive branch. But you never served in the legislative branch. And, of course, I am not suggesting that you should.

Judge SCALIA. I am sorry I did not, Senator. I frankly have gotten a good look at the territory of the law. The one slice of life I did not get a peek at was Hill work, although I dealt with the Hill to some extent when I was in the executive branch.

Senator GRASSLEY. I would like to ask if you think the fact that you have not served in the legislative branch might explain a lack of deference to the methods of the legislative branch in how we choose to do our job within the political constraints that we have to account for here?

Judge SCALIA. No; I do not think so, Senator, because some of the criticisms that I have made about committee reports, for example, have been made by Members of the Senate.

You certainly could not explain it that way as far as their criticism is concerned.

Senator GRASSLEY. But none of those Senators who might criticize the specific committee report that shows that same lack of respect for the committee report because they would be involved in the committee report and almost every piece of legislation that comes before them and that they have to vote on.

Mr. Chairman, I have no more questions.

The CHAIRMAN. Ask one more question. Oh, you are through.

We intended to take a recess right now. I understand they are going to have a vote in the Senate in a little bit. We have to take a recess then. So, if you do not object, we will go on for a few more minutes if that is all right with you.

Senator LEAHY. Mr. Chairman, could I just ask one question.

If the vote is put off, what will we do then?

The CHAIRMAN. We will stop for a recess. I will try to find out when the vote is coming.

Are you next?

Senator LEAHY. I am next. I just did not want to delay the committee.

The CHAIRMAN. You can go ahead now.

Senator LEAHY. Why do we not wait because Judge Scalia has also had a long time here?

Judge SCALIA. Well, I am amenable——

The CHAIRMAN. We want to save all the time we can. And he says he is willing to go on for a few more minutes.

I call on you now.

Senator LEAHY. Thank you, Mr. Chairman.

The Chairman is absolutely right in saying that the vote has been scheduled, but they keep putting it off and off and off. That is part of that legislative procedure that you and I have discussed in the past, too.

Judge Scalia, yesterday's Wall Street Journal quotes Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit as saying the words fairness and justice are terms which have no content.

I am interested in your views. Does the word "justice" have content to you?

Judge SCALIA. Yes; I think it has a content. I would be surprised if what Judge Posner meant was not simply that at least at the margins, and it is usually at the margins that we are talking when we have litigation in front of us, people disagree as to what justice requires.

But, you know, I believe it has content and fairness has content.

Senator LEAHY. I pass it along because it jumped out at me when I read that knowing that the first line in the Constitution says, "We, the people of the United States, in order to form a more perfect union and establish justice," and so on, that the——

Judge SCALIA. He should not have put it that way. He should have known better.

Senator LEAHY. I suspect he probably feels that way today too.

Senator HEFLIN. Maybe the Wall Street Journal should not have put it that way.

Senator LEAHY. Maybe the Wall Street Journal, Judge Heflin said——

Judge SCALIA. I am sure he does not mean anything different either, Senator.

Senator LEAHY. Judge Scalia, you have been an outspoken critic of the Freedom of Information Act. And you have written and spoken out against the 1974 amendments to FOIA.

At the time these amendments were passed, were you the Assistant Attorney General in the Office of the Legal Counsel?

Judge SCALIA. Yes; I was.

Senator LEAHY. Did you have an opportunity to review those amendments and recommend to President Ford whether he sign or veto those amendments?

Judge SCALIA. Yes; I did.

Senator LEAHY. What was your advice to President Ford?

Judge SCALIA. Is this public knowledge, Senator? I do not know. If it is not, I think I probably should not disclose it unless the President wants me to.

The President vetoed the amendments. And I think he set forth in his veto message what his principal concerns were. The major one was the requirement of the amendments that courts review de novo justifications for withholding national security.

Senator LEAHY. As you are saying, do you agree with that veto?

Judge SCALIA. You come to the same question that do I now——

Senator LEAHY. Do you now favor that veto?

Judge SCALIA. I do not have any views on such matters now, Senator.

Senator LEAHY. Did you agree with the veto at the time?

Judge SCALIA. I have no compunction in answering at all, except for the attorney-client relationship that I had——

Senator LEAHY. Let me just ask, in your own personal legal opinion, did that veto comport with your own personal legal views of the Freedom of Information Act?

Judge SCALIA. I think it comes to answering the same thing, and I really—I think I should not in deference to the attorney-client relationship I had with the——

Senator LEAHY. Well, without—and I am really not trying to find——

Judge SCALIA. I criticized those amendments, Senator. I think you have in front of you—I mean I am in print as having criticized those amendments.

I might also add, however, that when I was Chairman of the Administrative Conference of the United States, I testified before Congress in favor of proposed amendments to the Freedom of Information Act, and in favor of proposed application of the Freedom of Information Act by the agencies that were in the direction of liberalizing some disclosures. So I——

Senator LEAHY. But going to the 1974 amendments which you did write about and you spoke out against——

Judge SCALIA. Yes.

Senator LEAHY [continuing]. The President then vetoed the amendments which you wrote about, spoke out against.

Judge SCALIA. Yes.

Senator LEAHY. The Congress overwhelmingly overrode that veto. Because of that, would you have any difficulties in upholding the law as it is currently written?

Judge SCALIA. No; none whatever, Senator. I have upheld it as it is currently written. And I am not sure whether Congress simply overrode the veto or made—did they make one minor change before they overrode the veto?

Senator LEAHY. You vote up or down on the vote, Judge.

Judge SCALIA. OK.

Senator LEAHY. We do not even get a chance for the staff to go and write a report.

Judge SCALIA. That is right. I suppose that is right. They did override and not pass the amended bill.

Senator LEAHY. But when we discussed this, am I correct in summarizing our conversation that you said the law was clearly written, and that Freedom of Information Act cases which you have heard were never particularly difficult to resolve?

Judge SCALIA. But you must have misheard the latter. Some of the most—I can name a couple—some of the most complex cases I have had were FOIA cases. I think——

Senator LEAHY. Was that because of the facts or because of the law?

Judge SCALIA. Both. But probably more often the law.

Church of Scientology is one of the cases. I commend it to your attention as an incredibly complex opinion, both the panel opinion of the three judges, which I wrote, and the en banc court opinion which I wrote. It is one of the most complex pieces of statutory interpretation that I had to set my hands to.

Senator LEAHY. Do you find the Freedom of Information Act a clear act irrespective of how you may have felt about it, felt about the 1974 amendments? Do you find it a clearly written act?

Judge SCALIA. I would not—if you ask me for an example of a vague statute, the Freedom of Information Act is what I would—is not what I would immediately pick out. There are some areas where, after I guess a couple of decades of experience now, the statute could be made more precise. But if you ask me for a vague statute, that is not what I would mention as a prototype.

Senator LEAHY. Well, it was enacted before I was here so I have no fight with authorship one way or the other. I am not involved in it.

But I do want to—it is an act that keeps coming back to us, and it is one that I have been very involved with since.

And do I understand that the act is, as these acts go, a clear act? It is not a vague act?

Judge SCALIA. I do not know what you mean by a vague—almost any piece of legislation you can say that there are some areas that could be more specific. There are certainly some portions of FOIA that are like that. How specific Congress wants to be, you know, is always a question in every statute.

The problem with FOIA, Senator, is that unlike most statutes that Congress passes, it is not addressed to a single agency so, you know, it is addressed to OSHA or to the Food and Drug Administration. So that with such a statute even if it has a certain amount of vagueness, you are going to get a standardized interpretation by one single agency.

The problem with FOIA is that it goes out there to every agency in the executive branch. So to the extent that there is any vagueness at all in FOIA, that vagueness is going to have to be resolved at the district court level, because each agency might resolve the vagueness somewhat differently.

Now, the Justice Department tries to—at least it used to in the days when I was there—try to get the agencies to come up with a uniform interpretation. But I think you can say that there are special needs for precision when you have a statute that is a cross-cutting statute.

Senator LEAHY. But there is a lot of acts that go that way. A lot of your employment acts, employment practices, and so on are the same way.

Judge SCALIA. I think that is so. Although most of those are in much more detail—I have no particular—I do not know what you are driving at is what I am trying to say.

I suspect that there are some legislative proposals to——

Senator LEAHY. No; No. My concern about the FOIA, you will be having FOIA cases I am sure before the Supreme Court, where you were in opposition in 1974, and I want to know, in your mind, does that opposition create a problem for you in hearing FOIA cases now?

Judge SCALIA. No; Senator, I was asked that question earlier, I think when you were out of the room. And one of the things I said then, and I stand by it now, is that to the extent that I made significant law in the FOIA field, I have had a lot of FOIA cases—I do not know what the score is—but to the extent I have made signifi-

cant law, I think it is in the direction of broadening access rather than restricting access.

Senator LEAHY. I will go back to the transcript of your earlier answer. One of the problems that happened to us in all these things, we have four or five matters going on at once. Around the corner the Appropriations Committee is meeting, which I also serve on——

Judge SCALIA. I understand that.

Senator LEAHY. Judge Scalia, do you recall—well, I recall that just last year the *Western Union Telegraph Co.* v. *FCC* as a case involving AT&T and MCI?

Judge SCALIA. Yes; I do, Senator

Senator LEAHY. Were you asked to recuse yourself in that case by any of the parties or litigants?

Judge SCALIA. No; I was not, Senator.

Senator LEAHY. In 1982, you were not on the bench, you had received a consulting fee from AT&T in an antitrust case between them and MCI.

Did you feel that that was close enough in time or significant enough in the involvement to call upon yourself to recuse yourself?

Judge SCALIA. No; I did not, Senator. I had not been counsel for AT&T—I mean I had not had a longstanding attorney-client relationship with them or anything like that. I had simply done a one-shot job of consulting with them I guess 2 years or so before I went on the bench, and the compensation may have been just the very year I went on the bench. And once before I had taught a seminar for some of their executives about communications law one afternoon. That was the only association I had with them.

It seemed to me that 2 or 3 years disqualification from AT&T matters would be more than enough to eliminate any appearance of impropriety. In all of these cases, of course, it is not just a matter of an interest on just one side and no interest on the other side. It is a cost to the court when I have to disqualify myself, of course, and it is unfair to the litigants. If there is no proper reason for disqualification, they are entitled to get a shot at the full bench of judges and not just hit the full bench minus one or two.

So I decided that I would recuse myself for a period of 3 years. I informed the clerk of the court that I would not participate in any AT&T matters. So that means that I am, as a practical matter, disqualified from all common carrier litigation which is a good chunk of D.C. Circuit business.

After 3 years, I instructed the clerk to put me back in the pool for AT&T cases.

Senator LEAHY. You did not agree with Mr. Friedman, the former dean of Hofstra Law School, who disagreed with your recusal?

Judge SCALIA. No, not at all, Senator. And I do not know anybody else that agrees with him either. I have had nobody that has told me that he or she thought that 3 years' worth of disqualification for that kind of prior financial connection with AT&T would not be more than enough.

Senator LEAHY. In another case, you wrote the decision in Block versus Meese which dealt with the labeling of foreign films as propaganda. One of the three films involved—let us see, one was an

Academy Award winning film on nuclear war, two dealt with acid rain. In the decisions, they said label them as propaganda.

Now, next term, as I understand it, the Supreme Court will hear a *California* case, not a *D.C.* case but a *California* case, dealing with the same issue and, in fact, the same films.

Is that one which you would feel that you should recuse yourself on?

Judge SCALIA. I have been thinking about that, Senator. What do you think? I think that is a close one. It is not the same case, it is just the same issue of law. But the case is really——

Senator LEAHY. I am not giving dissent. I do not think that I am on President Reagan's short list for a judicial nomination. Even though he would have a chance to get both an Irishman and an Italian at the same time.

Judge SCALIA. All I can say, Senator, is that I am thinking very hard about disqualifying myself from it. They are the same films, not the same parties in the litigation, but they are the same films, not just the same issue, but the very same films involved. I think I will probably disqualify myself, recuse myself.

Senator LEAHY. I might say only because——

Judge SCALIA. I would not want to argue to me in that case.

Senator LEAHY. Only because you had asked me the question on it, I would reach the conclusion that one should recuse himself.

Judge SCALIA. "In for a nickel, in for a dime," I may as well, yes, I will recuse myself, Senator. I feel uncertain enough about it that I do not think I ought to go near it.

Senator LEAHY. Look at it this way. If I were to get you out, I would have to watch the films again.

Judge SCALIA. I never watch the films that are part of litigation.

Senator LEAHY. Back in an area—and I would like to go into you served under Attorney General Levy, who conducted a pretty extensive review of the domestic security program of the FBI and the Justice Department. He ultimately issued guidelines as to the appropriate scope and conduct of domestic security investigations. They were revised by Attorney General Smith, but they are basically the same guidelines, the Levy guidelines are basically what we use today.

Judge SCALIA. I do not think so, Senator.

Senator LEAHY. No?

Judge SCALIA. No.

Senator LEAHY. Well, how do they differ today?

Judge SCALIA. Well, I do not know the extent of the difference. All I know is that the intelligence community so-called did not like the Levy guidelines at all, and that the Smith guidelines were thought to be the more acceptable. I know there are differences. I do not know what they are.

Senator LEAHY. Wearing another hat, I deal with those same intelligence agencies, and I do not see an awful lot of difference. That is why I was curious what you might.

Judge SCALIA. I have been out of that field for a long time except that I know that some of my former associates in the intelligence community clearly did not love the Levy guidelines. And I thought that some of the impetus for the changes was from those people.

Senator LEAHY. Did you work on the development of those guidelines?

Judge SCALIA. I believe that Mary Lawton, who was my deputy at the Office of Legal Counsel, was the prime worker with the Bureau and the other intelligence agencies in developing the guidelines.

Senator LEAHY. Who is still involved in that field?

Judge SCALIA. I am sure Mary has now gone on from the Office of Legal Counsel to I think a whole new post just dealing with intelligence matters.

Senator LEAHY. Did you have any occasion during that time to consider whether Congress had the constitutional authority to legislate restrictions on the scope and conduct of such investigation?

Judge SCALIA. Did I have any? I do not think I had any occasion to consider it, Senator, because I do not think there is any question that Congress does.

Senator LEAHY. I am sorry, I did not hear the last.

Judge SCALIA. I am not aware that it was ever in question that Congress had authority to act in the field.

Senator LEAHY. Was the FBI's Cointelpro Program underway when you joined the Justice Department? I am having a little trouble recalling myself when it ended.

Judge SCALIA. Oh, I am sure it was all over by then, Senator.

Senator LEAHY. Did you have any occasion in the Office of Legal Counsel to render an opinion as to the scope or the authority or the legality of domestic security investigations generally that you recall?

Judge SCALIA. Not that I recall, Senator. Not that I recall.

Senator LEAHY. In the standard questionnaire, an area that I always find of interest, judges were asked, "What actions in your professional and personal life evidence your concern for equal justice under the law"?

And you answered the question in part by referring to your work in support of legislation to overturn the document of sovereign immunity.

Can you describe the kind of work you did as Assistant—I am sorry, Mr. Chairman. I did not realize my time was up.

The CHAIRMAN. Your time is up.

The distinguished Senator from Alabama.

Senator HEFLIN. Judge Scalia, Senator Grassley asked you about legislative history, bearing down hard on the issue of the committee reports.

I have had the privilege of reading some of your writings, including a speech that you delivered in the fall of 1985 and the spring of 1986 at various law schools.

Judge SCALIA. That was the speech, Senator.

Senator HEFLIN. A speech on the use of legislative history. And just to refresh your recollection, because I sort of agree with you on the priority that you give to the committee report, you quote from a Senate debate, a floor debate, on a tax bill in 1982 where Senator Armstrong and Senator Dole are involved. Senator Armstrong points out the fallacies of what the committee report does, and how often it—just for everybody's edification, he asked him, did any Senator write the committee report? And Dole answered, I would

have to check. Does the Senator know of any Senator who wrote the committee report? He said he might be able to identify, but he would have to search. But he goes on to say staff.

And he said, "Has the Senator from Kansas, the Chairman of the Finance Committee, read the committee report in its entirety?"

And Senator Dole answers: "I am working on it; it is not a best-seller, but I am working on it."

And then he said, "Did the members of the Finance Committee vote on the committee report?"

Senator Dole says, "No."

Senator Armstrong says: "Mr. President, the reason I raise the issue is not perhaps apparent on the surface. Let me just state this: The report itself was not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the U.S. Senate."

And you mentioned—I mean, and Senator Armstrong goes on, and he says, "If any jurist or administrative bureaucrat, tax practitioners, or others, who might chance upon the written record of this proceeding, let me just make the point that this is not the law. It is not voted on. It is not subject to amendment. We should discipline ourselves to the task of expressing congressional intent in the statute."

That is from the Congressional Record, July 19, 1982.

You state, ironically, but understandably enough—this is in your speech—the more the courts have relied upon committee reports in recent years, the less reliable they have become.

And then at the end of your speech, you state this: "For the purpose I suppose I would rank most highly legislative history consisting of amendments defeated on the floor, where it appears clear that the reasons for the defeat was a rejection of a particular course, now said to be contained in the unamended text.

"I suppose next to that would be extended Floor debate, at least in circumstances which occasionally occur, where the final text is actually being crafted on the floor."

And then you state: "At the bottom of my list I would place what heretofore seems to have been placed at the top, the Committee report."

So I think you have expressed pretty well in your speech the reason why the committee reports are not given a great deal of credence relative to legislative history.

Judge SCALIA. I am glad Senator Grassley is not here, Senator.

Senator HEFLIN. Well, maybe his staff will tell him, and I will talk to him about it. But I thought that might be interesting to clarify, and why I think, frankly, that there has been too much reliance by congressional bodies on the committee report. I have been one that has been arguing that that is a wrong practice.

Let me ask you this: In the Washington University Law Quarterly, you stated in an article entitled, "The Disease as Cure"—this is a commentary on the—in order to get beyond racism, we must first take account of race—you state: "I am, in short, opposed to racial affirmative action for reasons of both principle and practicality."

And you went on to say that: "I strongly favor what might be called, but for the coloration the term has acquired in the context

of its past use, affirmative action programs of many types of help for the poor and the disadvantaged."

Judge, would you define what you meant by principle and practicality in the first quote, and what type of affirmative actions you do favor?

Judge SCALIA. As to the latter, I think what I was saying was—let me set it in context once again, Senator. This was not when I was a judge. It was a speech I gave—in fact it was on a panel on which now-Judge Edwards, who was then also an academic at the University of Michigan, and it was a panel about affirmative action as a policy; not its constitutionality; not its legality. And I was speaking as, in those days, a law professor who could have views on such policy matters.

When I said I would favor certain types of affirmative action programs, I was referring to affirmative action programs in favor of the poor and disadvantaged, even when it turned out that every one of the poor people or every one of the disadvantaged people favored by a particular program turned out to be of a particular race. I said that, of course, would make no difference.

But the basis for the affirmative action, the basis for the favoritism was the poverty or the disadvantage.

What I expressed myself in opposition to, on policy grounds, was favoring a group solely on racial or ethnic grounds, and not on the basis of poverty or disadvantage.

As to the practical and principled problems I found with the latter type of affirmative action, one of the things I mentioned—I guess the two things are, No. 1, when you favor one person because of his race, you are automatically disfavoring another one because of his race.

And I think the second consideration I pointed out was that to an extent it deprives the members of the race who are given a special advantage of the fruits of their labors, because they are sometimes regarded as having achieved those fruits only because of affirmative action, whereas they could have made it without it. And there is no way that they can demonstrate that.

Those are, as I say, policy views of mine at the time. I think they are views held by other reasonable people. They are views disagreed with by the Congress. And that is why one has a Congress. Those views have nothing to do with the way I will apply whatever affirmative action laws are enacted by the Congress.

Senator HEFLIN. In your questionnaire, you list your various positions, jobs. You mention in—quoting from page 13 of your questionnaire, it says:

> In my final executive post as Assistant Attorney General for the Office of Legal Counsel, September, 1974, to January 1977, I was legal adviser to the Attorney General, and through him, directly to the executive branch. The Office of Legal Counsel drafts the Attorney General's opinions; much more frequently issues its own opinions under the Attorney General's delegated authority to the White House or executive agency. The questions I dealt with were multifarious, covering all aspects of Federal constitutional or statutory law.

Then you say the job also involved a substantial amount of congressional testimony on such issues as executive privilege and a legislative veto.

I wonder if you recall any of the congressional testimony pertaining to executive privilege, to whom it was given in Congress, House or Senate, and the committee, or any time pertaining to that?

Judge SCALIA. Senator, unless I am mistaken, it was both before the Senate and the House. I think it was before Judiciary in both Houses. But I am sure I can get that for you. I am sure it is all a matter of public——

Senator HEFLIN. You remember what the issue was about, or how the circumstances arose?

Judge SCALIA. I think mostly it was executive privilege in general; the whole doctrine of executive privilege was then at issue with regard to a number of different matters that the Congress had on the stove with the executive.

And I do not recall right now any specific issue of executive privilege, where it involved the withholding of any particular document or set of documents and where I was testifying.

But I can get it for you. I am sure there is a record of it. All that testimony——

Senator HEFLIN. Well, I am sure there is a record. I thought maybe you might give us enough to identify where we might look to see what you might have said pertaining to that particular time.

You do not remember what the issue was that brought you to Congress?

Judge SCALIA. No, at the time, Senator, I remember—I think I was on a panel. I think it was a panel before a committee concerning whether there was any such thing. This was before the Supreme Court's decision in *United States* v. *Nixon,* so there had been no court decision which, in so many words, had affirmed the existence of such an animal as executive privilege. And it was a matter of great interest to the Congress at that time.

I was on a panel, as I recall, with Raoul Berger from Harvard who was an opponent of the existence of any executive privilege.

Senator HEFLIN. Do you remember whether or not your President at that particular time, the time you were Assistant Attorney General, Office of Legal Counsel, whether or not he had issued an Executive order which, in effect, expressed the viewpoint that cooperation with Congress should be followed, and that Congress should be allowed to see all documents except, and then list the exceptions?

At the time, the President whom you were serving under, whom I assume was Ford—were you also under Nixon?

Judge SCALIA. No, I did not serve under President Nixon. He was out of office before I was confirmed.

Senator HEFLIN. Did President Ford at that time issue any Executive order which in effect described and limited the use of executive privilege?

Judge SCALIA. Yes, Senator, but not in the manner in which you describe. The way it was limited was not describing the subject matters, but rather, describing the procedure for its assertion. And the procedure was a rigorous one. It could not ultimately be asserted by an executive officer without, as I recall, the approval of—I think it required the President's personal approval before it could be asserted.

So it is a big deal, the executive branch does not take it lightly.

Now, very often, when an agency is asked for documents, it will say, we are reluctant to turn them over. And there is a preliminary process of negotiation. But if it really comes down to hard core, adamant positions on both sides that cannot be resolved, before the agency can say, we will not comply with this subpoena for the documents, we will not turn them over, the procedures required that there be—as I recall it—approval by the President with the advice of the Attorney General on the matter.

And as far as I know, I am quite confident that that is still in effect, or something like it. We did not take it lightly, Senator. It is always a regrettable confrontation between the two branches.

The CHAIRMAN. Mr. Short, we have got a vote on.

Mr. SHORT. Yes, sir. The chairman would like you to recess if you are through.

Senator HEFLIN. All right.

Senator LEAHY [presiding]. What we are going to do is, once you have finished your questions, is to recess, because we are also going to have a meeting of the Judiciary Committee.

Senator HEFLIN. Well, I have several other questions I want to ask. If I still have time, I would rather come back and do it.

Senator LEAHY. How much time does Senator Heflin have?

Mr. SHORT. Well, we still have time before the 5-minute vote.

Senator HEFLIN. I have 15 minutes left. I did not take but 5.

Mr. SHORT. You have 5 minutes left.

Senator LEAHY. You have 5 minutes left.

Senator HEFLIN. That is wrong.

Senator SIMON. Just one inquiry. Are we going to recess and come back in later this evening, or come back tomorrow?

Mr. SHORT. Only until 5:15, Senator. We will recess until 5:15.

Senator SIMON. 5:15, OK.

Mr. SHORT. And we will start again at 5:15.

Senator HEFLIN. In other words, we are going to recess now until 5:15?

Mr. SHORT. Yes, sir.

Senator LEAHY. Unless you want to finish your 5 minutes.

Senator HEFLIN. No; we will recess now.

Senator LEAHY. Then, we will recess then. And this might be an indication, Judge Scalia, that notwithstanding the dire prophecies that you were going to be faced with a mass of vultures up here, it shows you how relaxed everybody has been if it has come all the way down to having me as acting chairman at this point.

We will stand in recess until quarter past five.

[Recess.]

The CHAIRMAN. The question arose about certain documents that the Democrats want to see, that are contained at the Justice Department, concerning Justice Rehnquist.

I appointed the able and distinguished Senator from Nevada, Senator Paul Laxalt, to work with the Democrats to see if it could be worked out.

They have reached an agreement, and I am going to request Senator Laxalt now to announce the agreement.

Senator LAXALT. I thank the chairman.

We have been working for several days—and by we, I mean most of the members of this committee—in an effort to try to work out a compromise in connection with the requested documents.

And what we have had is a classic conflict between the executive and the legislative branch.

Very frankly, the problem was not so much a lack of cooperation on the part of the Executive; they wanted to cooperate. But they did not want, in the process, to create harmful precedents or to get in the way of the whole executive privilege doctrine.

So it was a matter of scope what documents would be produced under what circumstances.

And after endless negotiations—actually, when I look back on it, I think the Marcos mission was a cakewalk compared to this one. As someone pointed out, I did have several more Marcoses to deal with in this situation.

But we have finally arrived at an agreement defining the documents that will be made available by Justice to the membership of this committee and certain staff. That examination will be conducted immediately starting tonight, and sometime tomorrow the Senators will be meeting to discuss staff recommendations and questions.

The long and short of it is that the conflict has been resolved. In my objective opinion, the needs and desires of this committee and the legislative branch to conduct a full and complete inquiry has been properly balanced by the need of the Executive to protect confidential and sensitive documents within the exercise of executive privilege.

So what we essentially have here is the rolling back, a limited release of the imposition of executive privilege. And I think, Mr. Chairman, that we have a good compromise, and I would like to compliment and thank and commend the various colleagues that worked with me for these last several days.

Senator BIDEN. Mr. Chairman.

The CHAIRMAN. Go ahead.

Senator BIDEN. Mr. Chairman, I would like to publicly compliment Senator Laxalt. I, quite frankly, think it was Senator Laxalt's diligence in this matter that allowed a result to be produced. Because everyone trusts him. The administration trusts him; I trust him; all my colleagues trust him. No. 1.

No. 2, you should not be misled by the comments of the Senator saying, limited access. We are getting an access to all we asked for. Everything we asked for is being made available under the circumstances. When I say everything, I mean everything in the last request, there were seven categories we set out.

Senator LAXALT. I was speaking of the first request, which was much broader.

Senator BIDEN. I know. I just did not want the press to come up and say, well, what did you not get that you wanted. From our standpoint, from my standpoint, the administration is not holding back anything that is relevant to our inquiry here. As you pointed out, there have been several staff designees, three in the majority, three in the minority, who will get a chance to look at this. And every Senator has a right to look at them. And I know that we

intend on looking at them. We will late tomorrow afternoon or early evening, do a final review of those documents.

And the last point I would like to make is that in fact it was not merely Democrats who were requesting these documents. There were 10 people on this committee, including two Republicans, who felt it was important that these documents be produced.

I compliment again my colleague, Senator Laxalt, and the chairman for his good judgment in appointing Senator Laxalt, and the Justice Department for cooperating. And as far as we are concerned, unless any of my colleagues wish to speak, the matter has been amicably resolved.

Senator KENNEDY. Just for a moment, Mr. Chairman, and I will not delay our consideration of Judge Scalia. But as one of the members on this side that initially requested these documents, and as one that made the statement that the administration's position of executive privilege is basically stonewalling the committee and the American people, and permitting the Senate of the United States to perform its function in advising and consenting under the Constitution on the particular nominee, I welcome the reversal of the administration to those requests.

I believe that these requests were not being made in behalf of individuals. They are being made in behalf of the Senate Judiciary Committee, in behalf of the Senate, and in behalf of the American people, so that we could fulfill our function. We will have an opportunity to examine the various documents, the memorandums, the various notes—all of the information relating to matters from which Mr. Rehnquist had recused himself as a Supreme Court Justice—the May Day demonstrations, wiretapping, the whole *Laird* v. *Tatum* case, and other measures involving civil rights and civil liberties.

I believe that this is a very substantial victory for the Constitution and for the constitutional process, and for the American people and for the Senate. So I regret it has taken us the several days to get this far, but I welcome the fact that we are here, and I, too, want to join in commending those who spent the time and effort to assure that we were going to gain that measure.

I want to make it very clear at the outset, in reviewing the various holdings on the issue of executive privilege, I did not feel that the arguments that were being put forward by the Office of Legal Counsel held water. I do not think it holds water on the requests that have been made by Senator Nunn in terms of trying to gain various information with regards to our negotiating position on ABM—the Soviets have it—the negotiating debates and discussions and notes—we, the Senate of the United States were denied it. And I welcome the fact that we have made progress in this area, and I am very hopeful that the soundness and the responsible attitude which has been assumed now by the Department will apply to other areas so that we can truly fulfill the mandate of President Reagan when he said that when information is requested by the various committees in order to fulfill their responsibilities, they will be able to receive it.

I thank the Chair.

Senator METZENBAUM. Mr. Chairman.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. Mr. Chairman, I just want to say publicly that I think the American people owe a great debt of gratitude to the Senator from Nevada, Paul Laxalt, because there is no secret that this issue and confrontation on the matter of executive privilege was rapidly escalating to the point where it was about to becloud the entire question of the confirmation of Justice Rehnquist. And I feel certain that if Paul Laxalt had not inserted himself into the issue, at the request of some of us, I think it would have gotten out of hand; I think it would have proceeded to the matter of subpoenas, and the entire unraveling of that kind of issue.

I think Paul Laxalt has served the Nation well in not permitting that to develop. I think the President owes him a great debt of gratitude, and as his reward, I think he ought to send him to South Africa to get some matters resolved over there.

I think that is a fine way for you to conclude your career in the Senate, Paul, but you have done a great job on this, I will say that.

Senator LAXALT Thank you, Howard. You are all heart. [Laughter.]

The CHAIRMAN. Any other comments?

Senator HEFLIN. I will tell you, if you do not quit talking like that, you are going to give him a big head; he might decide to run for President. [Laughter.]

The CHAIRMAN. When I spoke a few minutes ago about the Democrats asking for documents, I should have said "a majority of Democrats." There were two Republicans on our side, Senator Specter and Senator Mathias, and I want to make that correction.

Are there any other comments?

[No response.]

The CHAIRMAN. If not, now, we will continue with the hearing.

Senator Laxalt, we thank you again for your good work.

Senator LAXALT. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Heflin, I believe you have 5 minutes remaining.

Senator HEFLIN. Judge Scalia, a lot has been written in the paper about your belief in federalism, and the early decisions of the U.S. Supreme Court certainly recognize the essential role of the States in our Federal system of Government.

Justice Chase, in the case of *Texas* v. *White,* declared that the Constitution, "all of its provisions look to an indestructible union composed of indestructible States." And of course, the 10th amendment, we know about that.

I would like you to give us your general philosophy of the role of the judiciary relative to federalism.

Judge SCALIA. Well, I can give you my view of what it has been up to now, anyway, or at least in this century. The fact is, it seems to me, that the primary defender of the constitutional balance, the Federal Government versus the States—maybe "versus" is not the way to put it—but the primary institution to strike the right balance is the Congress. It is a principle of the Constitution that there are certain responsibilities that belong to the State and some that belong to the Federal Government, but it is essentially the function of the Congress—the Congress, which takes the same oath to uphold and defend the constitution that I do as a judge, to have that constitutional prescription in mind when it enacts the laws.

And I think the history of this century, at least, shows that by and large those congressional determinations will be respected by the courts.

Senator HEFLIN. Well, there are certain people of diverse ideologies that seem to embrace the concept of one Federal legislative act as the cure for any major problems. These widely diverse groups, the extreme liberals and the extreme right-wingers, seem to at least agree on the fact of trying to find a single cure for problems that they consider to be monumental problems.

For example, the extreme right now seems to want a Federal cure in the area of abortion, gun control, tort reform, labor violence.

Does your belief in constitutional government include a belief that there should be a deference to the States in seeking solutions in areas that traditionally and historically have been considered to be in the jurisdiction of State government?

Judge SCALIA. Certainly as a member of the legislature, Senator, that would be my view. I think my writings show that, that I take seriously one of the checks and balances, which are the ultimate protection of individual liberties in the Constitution—one of them is the fact that you have not just a unified, centralized Government, but also 50 independent States, and that the work of Government is divided between those two entities.

As to whether that question is of much relevance to me in the vast majority if not all of the cases I have to decide, that is quite a different issue. I think what I am saying is that on the basis of the court's past decisions, at any rate, the main protection for that is in the policymaking area, is in the Congress. The court's struggles to prescribe what is the proper role of the Federal Government vis-a-vis the State have essentially been abandoned for quite a while.

Senator HEFLIN. You do not care to comment on what you think from a position of being a member of the judiciary would be, as opposed to legislative, as you have stated?

Judge SCALIA. I think that is right, Senator. I think what the Supreme Court decisions on the subject show is that it is very hard to find a distinct justiciable line between those matters that are appropriate for the States and those that are appropriate for the Federal Government, that finding that line is much easier for a legislator than for a court, and by and large the courts have not interfered.

I expect there will be more arguments urging that they do so in the future, and I will of course keep an open mind.

Senator HEFLIN. Let me ask you about an issue. You have spent some time as head of the administrative conference and have written a good deal on administrative law and have taught administrative law.

We now have a situation where we have administrative law judges. The administrative law judges outnumber the U.S. district court judges and the circuit court of appeals judges, I believe, more than 2 to 1—something in that neighborhood, and these are approximate ballpark figures, of about 1,400 administrative law judges as opposed to about 700 of the other type judges.

Senator SPECTER [presiding]. Senator Heflin, if I might interrupt you, your time has expired. You may finish this question and proceed with the answer.

Senator HEFLIN. Well, there have been proposals to try to establish an independent corps of administrative law judges. Do you have any opinions relative to proposals to establish an independent corps of administrative law judges?

Judge SCALIA. I wrote an article some years ago, Senator, in which I essentially supported the concept of a corps of administrative law judges, but the quid pro quo for establishing the corps—right now, of course, each agency has its own judges; the corps proposal is that there be a central depository of administrative law judges, in ALJ court, in effect, which would decide cases from all agencies with maybe specialized panels of that court. I wrote a piece that thought that that concept was worth exploring, provided that what went along with it would be the understanding that all administrative law judges would not all be the same grade level, as they now essentially are in each agency. And in most agencies, it is a very high level.

It seemed to me in that article, at least, that what we should be moving for is a career administrative judiciary, which is what most other legal systems have, so that you could—many of the administrative matters that need to be decided do not take as experienced, as seasoned, as knowledgeable, as expert a judge as a major rate-making case, and it would make sense to have judges of varying degrees of experience and hence varying grade levels who can work their way up through the corps and ultimately be assigned to the most difficult cases.

Senator SPECTER. Judge Scalia, as I had suggested in a very brief opening statement, the questions that I have for you are limited to what I consider to be the "rockbed" propositions on the authority of the Court to decide questions of finality on the interpretation of the Constitution, as decided in *Marbury* v. *Madison*. This includes the issue of the Court's jurisdiction to make those decisions in the context of efforts by Congress to circumvent the court's power by cutting off jurisdiction. Another concern I hate is the issue of the incorporation doctrine.

Starting with *Marbury* v. *Madison,* I believe you testified earlier that this case, which establishes the basic power of the Supreme Court to decide the final interpretation of the Constitution, is a settled issue as far as you are concerned?

Judge SCALIA. I said, Senator, it is a pillar of our system. I do not want to say that anything is a settled issue as far as I am concerned. If somebody wants to come in and challenge *Marbury* v. *Madison,* I will listen to that person. But it is obviously a pillar of our current system.

Whether I would be likely to kick away *Marbury* v. *Madison,* given not only what I have just said, but also what I have said concerning my respect for the principle of stare decisis, I think you will have to judge on the basis of my record as a judge in the court of appeals, and your judgment as to whether I am, I suppose, on that issue sufficiently intemperate or extreme.

But I really do not want to say with respect to any decision that I would not listen to a litigant who wants to challenge it. I invite

you and urge you to make your judgment. I think the question you are asking is quite a relevant question, and I would not want to confirm anybody that I believed would destroy certain decisions. But I think the way you have to come to that judgment is on the basis of my past record as a thoughtful moderate lawyer and judge, and on the basis of my writings and my records in the past.

I do not want to be in the position of saying as to any case that I would not overrule it.

Senator SPECTER. Well, you have just used a magic word, Judge Scalia—"moderate". Do you consider yourself a "moderate" judge?

Judge SCALIA. I suppose everybody considers himself a "moderate", Senator, I do.

Senator SPECTER. Well, I do not know about that——

Judge SCALIA. Well, maybe everybody does not. I do, anyway.

Senator SPECTER. I think you have come pretty close to saying that you consider *Marbury* v. *Madison* an indispensable part of constitutional law in establishing the authority of the Supreme Court of the United States to interpret the Constitution, but you have not quite said it. You said it is a pillar.

Judge SCALIA. It is certainly an essential part of the system that we now have.

Senator SPECTER. Well, I will infer "yes" from your answer, although you have not directly said it. I think maybe I even say you have implied it.

Let me move on to the issue of the jurisdiction of the Court. I am appreciative of the fact that that is an issue which could come before the Court. I hope it does not. There is ex parte McCardle, and *United States* v. *Klein;* and I am sure you are familiar with the line of questioning that I undertook with Justice Rehnquist on that subject.

It seems to me that where you have the issue of jurisdiction, and Congress can legislate and say that the Supreme Court of the United States no longer has jurisdiction, for example, on first amendment rights of speech, press, and religion, that the pillar of our system is gone. The result is that the Court no longer has the authority to decide constitutional questions.

Thus, let me ask you the question that Justice Rehnquist did answer, without any binding promises. Do you think that the Court would have to have the authority, even in the face of a congressional enactment trying to take away its jurisdiction, to retain the power to decide the fundamental questions of first amendment—speech, press, and religion?

Judge SCALIA. Senator, I am afraid I am at the same place on that that I was on *Marbury* v. *Madison.* In fact, I think ex parte McCardle was probably described too generously as being a decision of the Supreme Court that seemed to indicate on the one hand that the jurisdiction could be taken awav entirely, and then *United States* v. *Klein* suggesting to the contrary. Ex parte McCardle actually did not quite go even so far as to allow the jurisdiction to be taken away. It allowed the habeas corpus jurisdiction to be taken away under one statute, and the Court went to some pains in the opinion to point out that this is not to say that there is no habeas corpus relief at all. There is just no habeas corpus relief under the particular statute as to which Congress had withdrawn it.

So I do not think that there is an opinion on the books that is even as possibly antagonistic to your view as ex parte McCardle has been described.

I share your concern with the ability of Congress to remove jurisdiction entirely from the Supreme Court. It is obviously a jolt to the system, to put it mildly. I just do not want to be, and do not think I properly can be, in a position of saying that I would rule unconstitutional any piece of legislation that does that. Again, I think I must ask you to judge what I am likely to do on the basis of your estimation of my legal views, my loyalty to the meaning of the Constitution as you understand it.

Senator SPECTER. Would you say that the jurisdiction of the Court on speech, press, and religion is a pillar of our system?

Judge SCALIA. I think the jurisdiction of the Court on any matter, is obviously a pillar of the system that we have.

Senator SPECTER. All right. You are talking about pillars; you are putting it on the same level as *Marbury* v. *Madison,* so that that is an advance.

Judge Scalia, the problem that I find with the limitation as to what you are willing to testify about is that it does not give a commitment to certain very basic principles. I have not asked you to go very far, and I would not, as I do not think there is any doubt about your confirmation as we are sitting here at the moment. But there is a real problem institutionally because of the attitude and the responses which you give—and I respect them totally. I am not asking you what you are going to decide with respect to controversial issues that you know are going to be coming up, where if you answer one way, you are going to make one group of Senators mad, and if you answer another way, you are going to make another group of Senators mad. I am basing this on *Marbury* v. *Madison* and the jurisdiction of the Court, as pillars. The question I have for you is how does a Senator make a judgment on what a Supreme Court nominee is going to do if we do not get really categorical answers to fundamental questions like that?

Judge SCALIA. I think it is very hard, Senator, when you are dealing with someone that does not have a track record, where you cannot read that individual's opinions in the past dealing with the important features of the Constitution and of statutes, seeing how that person deals with the materials, seeing that person's veneration for the important principles that you are concerned about.

In my case, you have 4 years of that; you have extensive writings on administrative law and constitutional law from the years when I was a professor; you have testimony and statements that I made when I was in the executive branch.

I am as sympathetic to your problem as you said you are to mine. I think at least in the present circumstances, as I see my responsibilities anyway, my problem with answering the easy question, Senator, is that what is an easy question for you may be a hard question for somebody else. And as I commented earlier, it is not a slippery slope; it is a precipice. *Marbury* v. *Madison,* we all agree about, jurisdiction of the court; it goes from one to the next. And I am very unable to say this is the line where it suddenly has become a doubtful question. That indeed is prejudicing future litigants, who should be able to come up and argue that we have

seen—you know, *Plessy* v. *Ferguson* might have been considered a settled question at one time, but a litigant should have been able to come in and say, "It is wrong," and get a judge who has not committed himself to a committee as a condition of his confirmation to adhering to it. That is what I am struggling with, and I hope you have enough material to judge my reasonableness and my fidelity to the Constitution to assure you that on matters that you consider "rockbed" and that are "rockbed", I would not pull the structure down.

Senator SPECTER. Let me give you an absurd hypothetical. Suppose someone wanted to litigate your responsibility under the oath you will take to uphold the Constitution. Would you hear litigants on that question?

Judge SCALIA. I will hear a litigant in my present court on any question, Senator, and I have heard some fairly far—out arguments. In the Supreme Court, I will not have to do that, because we have some option as to whether we decide to take a case or not. But in theory, I think I have to make myself available to any argument.

Senator SPECTER. Let me take this one step further. If you are confirmed, will you take an oath to uphold the Constitution?

Judge SCALIA. I certainly will.

Senator SPECTER. Of course you will. Will you let somebody litigate, after you are on the Supreme Court, the question of whether you have an obligation, under your oath, to uphold the Constitution?

Judge SCALIA. I think you have finally gone over the edge of absurdity so much that I have to say: Of course not.

Senator SPECTER. Well, wonderful. We have gotten a finale.

Judge SCALIA. I am on the precipice, you are telling me, now.

Senator SPECTER. Now, that is a definite answer, and a conclusive answer, and that is a commitment.

As I review the answers by Supreme Court Justice nominees, there has been a large number of exceptions where nominees simply do not answer questions. I think that is justified in the highly controversial settings where it is imminent that that question is going to come up, and there is sharp difference of opinion on it—and maybe on more practical grounds, where getting into those areas is going to place the nomination in jeopardy in terms of the confirmation process.

I believe very firmly that if you are talking about the issues we have discussed so far, *Marbury* v. *Madison*, the authority of the court, or the jurisdictional issue, that we really ought to be able to have those answered positively in terms of commitment.

But your failure to answer it is not going to cause me to vote against you.

Judge SCALIA. Well, I hope not, but I do not want you to think less of me for failure to answer. I thought about this issue a long time, because the one thing you know is going to come up in every judicial confirmation hearing, in particular Supreme Court confirmation hearing, is this issue of what questions can you answer; and it is a constant problem, and I realize that some nominees have tried to answer some questions and not answered the other. I thought long and hard about that problem, and I came to this con-

clusion, that if indeed it is obvious, then you do not need an answer, because your judgment of my record and my reasonableness and my moderation will lead you to conclude, heck, it is so obvious, anybody that we think is not a nutty-nutty would have to come out that way.

If, on the other hand, it is not obvious, then I am really prejudicing future litigants. So taking all that balance into account, I just concluded that the only safe position that I can take in conscience is to simply not say that there is any particular case regarding which I would absolutely vote against a litigant who urges a position that is contrary to it.

Senator SPECTER. Well, the problem with that, Judge Scalia, is that if we take what is obvious, then we look at your record, we look at your writings, and we do not need a hearing.

Judge SCALIA. Well, no, no. I think you have to look at my writings and ask me about my writings and test those writings to see what I meant about some elements of them. I have been questioned about cases that I have written, and I am happy to respond to answers about what they meant, and why what I said in them or what I did in them is not bad. I have been very open on those, and will continue to be. It is just predictions as to how I will vote in the future that I am drawing the line at.

Senator SPECTER. Let me ask you questions about the incorporation doctrine, because I want to put those in the record.

Would you say that the double jeopardy clause of the 5th amendment is incorporated under the due process clause of the 14th amendment, as decided in 1969 in *Benton* v. *Maryland?*

Judge SCALIA. Yes; I will say that is an accepted part of current law.

Senator SPECTER. Would you say that the self-incrimination and just compensation clauses decided in *Malloy* v. *Hogan* and *Chicago B&O Railroad* v. *City of Chicago,* respectfully, are a settled matter of, constitutional law?

Judge SCALIA. They certainly have been clearly settled by the Supreme Court.

Senator SPECTER. And would you say the same thing as to the incorporation of the clauses of assembly and petition, press, speech, and religion; that the 14th amendment due process clause incorporates them?

Judge SCALIA. Indeed. It would be quite a jolt to the existing system to suddenly discover that those series of protections against State actions do not exist.

Senator SPECTER. What about the speedy trial, public trial and jury trial provisions of the 6th amendment; are they incorporated under the due process clause?

Judge SCALIA. Indeed.

Senator SPECTER. And impartial trial, notices of charges, confrontation, compulsory process, right to counsel, under the 6th amendment; are they incorporated by the due process clause of the 14th amendment?

Judge SCALIA. That is what the cases have held, and it would be a massive change to go back on them.

Senator SPECTER. And similarly, is the cruel and unusual punishment clause of the 8th amendment, incorporated by the due process of the 14th amendment?

Judge SCALIA. The same answer, Senator.

Senator SPECTER. Would you say those would come under the category of "pillars of constitutional law"?

Judge SCALIA. *Marbury* v. *Madison* is a pillar; if that is a pillar, I do not know what—I would just say it is a very accepted and settled part of our current system, and it would be an enormous change to go back.

Senator SPECTER. Thank you, Judge Scalia.

Senator Metzenbaum.

Senator SIMON. Mr. Chairman.

Senator SPECTER. Senator Simon.

Senator SIMON. Oh, maybe Senator Metzenbaum has not——

Senator SPECTER. Senator Metzenbaum has not had his round yet, Senator Simon.

Senator SIMON. I apologize. I thought he had had his questions. I am sorry.

Senator METZENBAUM. Judge Scalia, in an article—I might say parenthetically, you have been very patient; this has been a long day, and you must be a bit weary, and your family must be wearier, and I am glad the younger members went home—in an article entitled, "The Judges are Coming," you made this statement:

> It would seem to be a contradiction in terms to suggest that a State practice engaged in and widely regarded as legitimate from the early days of the Republic down to the present time, is unconstitutional. I do not care how analytically consistent with analagous precedents such a holding might be, nor how socially desirable in a judge's view. If it contradicts a long and continuing understanding of the society, as many of the Supreme Court's recent Constitutional decisions referred to earlier, in fact, do, it is quite simply wrong.

The problem I have with that statement is that the Supreme Court throughout history has had the responsibility to declare that certain widely accepted practices violate the Constitution—for example, deciding that segregated schools were unconstitutional, and that legislative districts had to be apportioned fairly.

Are you saying that as a Supreme Court Justice, you would oppose decisions which prohibited widely accepted practice? Stated another way, does that mean if a Gallup poll says 80 percent of the people have a particular point of view, and a court decision to the contrary, in your opinion, are those decisions quite simply wrong?

Judge SCALIA. Can I talk about what I meant when I wrote that article, instead of putting it in the context of what I would do?

Senator METZENBAUM. I am not asking what you would do.

Judge SCALIA. Right. The point I was trying to make, Senator, was simply this. There is an ongoing debate that has always been ongoing, but it is more publicly known now, about strict constructionism versus a more evolutionary theory of the Constitution. And I am speaking particularly about decisions of the court that give content to provisions of the Constitution that are not sufficiently explicit to strike down particular practices. If a practice that constitutes plainly racial discrimination existed in all the States, it would make no difference whether it existed from the beginning of the 14th amendment down to the present. If it is facially contrary

to the language, obviously, there is no problem. And that is not the situation I was referring to.

I was referring to the situation where a court is giving content to in particular the due process clause of the 14th amendment, what particular substantive protections that might incorporate. And what I felt, and it was the point of that article, was that the judges have authority to give such content, no doubt, but I do not know how a judge intuits that a particular practice is contrary to our most fundamental beliefs, to the most fundamental beliefs of our society, when it is one that was in existence when the Constitutional provision in question was adopted and is still in existence.

Now, when I say a practice that is in existence, I am not referring to a Gallup poll. I am referring to the understandings of the people, reflected in the legislation that their representatives have adopted. I would find it very difficult, I was saying in that article, to strike down a provision on the basis of substantive due process in particular where it is a provision that State legislatures generally adopted at the time the 14th amendment was passed and continue to generally adopt. When you leave that point of departure, you are left to the individual preferences of the judges. And I am not comfortable with imposing my moral views on the society. I need something to look to. And what I look to is the understanding of the people.

A strict constructionist would say use only the understanding at the time of the 14th amendment. The evolutionist would say no, the understanding today as well. Whichever of those two you use—and as I said in some earlier questioning, I am a little wishy-washy on that point—but whichever of the two you use, it seems to me that either one or the other has to reflect the new right that you have found. If it was neither these when the 14th amendment was adopted nor is there today, then it seems to me, I was saying in that article, I am making it up.

Senator METZENBAUM. Well, it seems that you are saying that the Constitution means what the majority says it means. I have difficulty with this whole majority approach. And your language is clear: "If it contradicts a long and continuing understanding of the society, as many of the Supreme Court's recent constitutional decisions referred to earlier in fact do, it is quite simply wrong." That is a very bold statement. Maybe "bold" is even a mild word.

Judge SCALIA. Well, maybe I should not take it on frontally, but let me do it. I would even—it is true in a way, it seems to me, that a constitution has to have ultimately majoritarian underpinnings. To be sure a constitution is a document that protects against future democratic excesses. But when it is adopted, it is adopted by democratic process. That is what legitimates it.

And the point I was making in that article is if the majority that adopted it did not believe this unspecified right, which is not reflected clearly in the language, if their laws at the time do not reflect that that right existed, nor do the laws at the present date reflect that the society believes that right exists, I worry about my deciding that it exists. I worry that I am not reflecting the most fundamental, deeply felt beliefs of our society, which is what a constitution means, but rather, I am reflecting the most deeply felt beliefs of Scalia, which is not what I want to impose on the society.

Senator METZENBAUM. Judge, the real problem I have with your article and your statements today relates to the fact—and I am sure you remember it—that when the Kefauver Committee was active, I was not here in this body, but I remember there was a great hue and cry to repeal the fifth amendment. Everybody taking the fifth was per se practically a bad person, we ought to repeal the amendment, and that will solve it so they cannot take the fifth. And then I have a recollection of somebody's poll—and I do not know whose, whether it was Gallup or somebody else—checking with people as to their views on each of the separate constitutional amendments to the Bill of Rights.

Overwhelmingly, the American people indicated they do not support that concept. Now I sit here concerned, is this new Justice of the Supreme Court going to start to find ways to change that Bill of Rights? Because it is one of the toughest things to do, and that is to stand up for an unpopular point of view on the basis that that is a person's constitutional right.

I guess I remember one case, the case in Illinois where the Nazis were picketing or they were marching, and the Jewish community came out, en masse, to try to stop them from doing it.

And I remember the American Civil Liberties Union got into great trouble because——

Judge SCALIA. Skokie, as I recall.

Senator METZENBAUM. Pardon?

Judge SCALIA. Skokie.

Senator METZENBAUM. Skokie. That is right. And in that case, the American Civil Liberties Union lost a lot of its members, but they stood up for what they thought were their constitutional rights, even though it would be unpopular.

I am worried about your going on the Court and reacting—a 15-minute rollcall vote. I guess they inform the Republican Senators as well as Democrats. I think I may have cut you off. Had you finished?

Judge SCALIA. You just made a statement, but I do not disagree with your concern. All I can say to it is that the views I expressed certainly do not reflect the notion that I will be swayed by Gallup polls, or by current public opinion. "To the contrary, if, there is an established constitutional right that has been set forth in the Constitution, or, even if not set forth very explicitly, is clearly established by the practices of the society, I would assuredly not allow the mere fact that the current society, inflamed by one passion, prejudice, or another, wants to stomp it out. I would not allow that to affect my judgment; quite to the contrary.

Senator METZENBAUM. Let me ask you a little bit——

Judge SCALIA. I do not mind taking unpopular positions, Senator.

Senator METZENBAUM. Let me ask you a personal matter, about your membership in the Cosmos Club. I think you were a member?

Judge SCALIA. Yes, sir.

Senator METZENBAUM. You were a member from 1971 to December 1985. I think the Cosmos Club excludes women from its membership, and I think the ABA's position is that the membership of a judge in an organization that practices discrimination gives rise to perceptions by minorities, women, and others, that a judge is not impartial toward minority groups. And the ABA Standing Commit-

tee on Ethics and Professional Responsibilities has been considering the impact on the judiciary, of judges who belong to discriminatory clubs. And the Judicial Conference, in 1981, adopted a resolution, that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination.

And then in 1983, the ABA Ethics Committee submitted to the house of delegates proposed amendments on the membership of judges in private discriminatory clubs.

More than half the population is female, and the women of the country have some concern, and rightful concern, about a jurist who undoubtedly knew about some of these provisions of the ABA but, nevertheless was a member of this club.

Do you want to comment on that?

Judge SCALIA. Well, I certainly agree, Senator, that a judge should not be a member of a club that practices invidious discrimination. I think the issue is whether that was invidious discrimination or not.

I certainly would not belong to a club that practiced racial discrimination, which I do not think there is any basis for socialization on the basis of race. That there is any difference in company on the basis of the color of a person's skin or ethnic background.

Senator METZENBAUM. Did you know the Cosmos Club discriminated against women, or did not have any women members?

Judge SCALIA. I knew that it was a men's club, and what I was going to go on to say is that I do not consider that an invidious discrimination. I think there are a lot of other people who likewise do not consider it invidious discrimination. I realize there are those that disagree, that do not like organizations like the Knights of Columbus, or for that matter, the Boy Scouts, and think that that should not be an all-male organization.

I happen not to have felt that way and thus was a member of the Cosmos Club. When I first joined it, Senator, was when I first came up to Washington to work in the executive branch. I lived in the club for about 6 months while my family was still in Charlottesville.

One of the facilities of living there was that it was a men's club. Now I understand there are people who feel differently about it. I am sensitive to their views toward the end of the period that I was a membership of the club—that I was a member in the club.

I was especially uncomfortable because I know that some of the judges on my court took the opposite view of whether there should be clubs of that sort.

I happen to disagree. I am no longer a member. That is all I can say.

Senator METZENBAUM. I note you used a rather interesting story to illustrate one of your objections of affirmative action, and that is the story of Tonto and the Lone Ranger. In it I think you tell the story in Indian dialect and English. I will not read the whole story, but it is a cute story, but the English dialect of the Indian, I am not quite so sure about. Everyone who knows you says that you are quite adept with the English language; in fact, that you have exceptional verbal talent.

What do you think the Indians of this country might feel about your reciting that story with some of the quotes?

Judge SCALIA. Would you read the quote where I use the——

Senator METZENBAUM. Yes. John Minor Wisdom speaks of restorative justice. "I am reminded of the story about Lone Ranger and his faithful Indian companion, Tonto. If you recall the famous radio serial, you know that Tonto never said much, but what he did say was, disguised beneath a Hollywood Indian dialect, wisdom of an absolutely Solomonic caliber. On one occasion, it seems that the Lone Ranger was galloping along with Tonto, heading eastward, when they saw coming toward them a large band of Mohawk Indians in full war dress."

"The Lone Ranger reins in his horse, turns to Tonto, and asks Tonto, 'What should we do?' Tonto says, 'Ugh, ride 'em west.' "

"So when they reel around and gallop off to the west, suddenly they encounter a large band of Sioux heading straight toward them. The Lone Ranger asks Tonto, 'What shall we do?' " Tonto says, 'Ugh, ride 'em north.' "

"So they turn around and ride north, and sure enough, there is a whole tribe of Iroquois heading straight toward them. The Lone Ranger says, 'Tonto, what shall we do?' and Tonto says, 'Ugh, ride 'em south,' which they do until they see a war party of Apaches coming right for them."

"The Lone Ranger asks Tonto, 'What shall we do?' Tonto says, 'Ugh. What do you mean we, white man?' "

It is a rather cute story but I wonder if your use of an Indian dialect would offend the Indians.

Judge SCALIA. I am fully aware of that sensitivity, Senator, which was why, when I began the story, I made it clear that Tonto's wisdom was always Solomonic, but it was disguised between what I referred to there as a "Hollywood Indian dialect."

That is a disparaging term. I am fully aware that Indians do not talk that way. It is how Hollywood portrayed them. I thought I made it very clear in what I wrote, that Indians do not talk that way, but that is the way Hollywood wrongfully portrays them.

Now if that is not enough of a disclaimer and the story has to be stricken from everyone's repertoire, I think that would be a great loss.

And it does not work in non-Hollywood Indian. It really does not.

The CHAIRMAN. Senator, you have one more minute.

Senator METZENBAUM. There is now a pending request for certain memorandums that we have worked out in connection with Justice Rehnquist. He waived any objection to our having that information. Do you have any objection to our obtaining information from the Justice Department concerning your efforts while you were there?

Judge SCALIA. Personally, Senator, you know, I have no personal objection to it. There was nothing I did at the Justice Department that was other than honorable. I would be less than honest if I did not say, that having worked in the Office of Legal Counsel, and defended its prerogatives for 3½ years or so, I am concerned about the institution, about the effect that such a probing, or more specifically, the awareness of the fact that whatever the head of the Office of Legal Counsel writes will henceforth, should he ever be subjected to questioning in connection with a confirmation—which

is very likely because most heads of the Office of Legal Counsel, or many of them, at least, go on to later Government positions.

I think it would be harmful to the Office, if it is known that everything he puts down on paper by way of advice to the Attorney General, or to the agencies, will be made public.

I fear that it may make his advice less frank, less forthright than it otherwise would be. That is purely an institutional objection. It is up to the President to defend that institution. Personally, I have—I am not ashamed of anything I did while I was there.

Senator METZENBAUM. And you have no personal objection?

Judge SCALIA. I have no personal objection, sir.

Senator METZENBAUM. I have no further questions.

The CHAIRMAN. We will take a recess. The first, after the recess, will be the distinguished Senator from Illinois.

Senator SIMON. I thank you, Mr. Chairman.

[Recess.]

Senator SIMON [presiding]. I think we can resume.

When you are least in seniority, there are some plusses. You get to hear all the questions, and you get to have some feel for what the nominee stands for.

Let me throw you a softball question. You will be one of the leaders of the law in this Nation. You have been a law professor at Stanford, and the University of Chicago and University of Virginia, I believe.

In 1970, we had 270,000 lawyers in this country. We now have 640,000, graduating about 39,000 a year. There are those who believe the numbers are so high that it can present problems for our society.

Do you have any reflections on this? And if so this is a problem, what do we do about it?

Judge SCALIA. I share the perception that there is a problem, Senator. I am not entirely sure what to do about it. To some extent the problem feeds on itself, of course. The story of the fellow sitting in a train, and the gentleman next to him asks him what he does, and he says, "I'm a lawyer," and the fellow says, "Gee, what do you know. We used to have a lawyer in my home town. Poor devil, he could hardly make a living. Then another lawyer moved in, and now they're both doing fine."

To some extent, the very increase in the number of lawyers creates yet greater litigiousness. I do not know whether it is—it does seem to be a trend that is beginning to slow down a little bit.

The answers that are being sought are alternative dispute resolution mechanisms, other than the courts, and my understanding is that there is some success with those mechanisms.

Unfortunately, the resort to those mechanisms is in itself something of an admission of failure. People want to resort to them because the courts are too crowded, it takes too long to get justice there, and it is too expensive, which is a sad commentary.

I am afraid I just do not have an answer. I share your perception of the problem.

Senator SIMON. All right. It was not a question you expected to be asked during this hearing, I have an idea.

Judge SCALIA. No. I did not.

Senator SIMON. Let me read from a staff memorandum, along with your opinion. It draws this conclusion; "From these and the other cases included in this book, it is easy to see where Scalia's sympathies lie. He will interpret civil rights statutes narrowly. In cases of race discrimination, the plaintiff will have a very difficult time proving his case because of the high standards Scalia imposes on race cases. The same will be true with gender discrimination. To be sure, the Court will have an ardent enemy of affirmative action in Scalia, and in future cases, he can be expected to leave his mark."

"In his article—quoting from an article in Washington University Law Quarterly—you say: 'Justice Powell's opinion on affirmative action, which we must work with as the law of the land, strikes me as an excellent compromise between two committees of the American Bar Association on some insignificant legislative proposal; but it is thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution.' "

Do you have any comments on my staff's conclusion in looking at that area of your decisions, and any reflections on your Washington University article?

Judge SCALIA. Well, we discussed that article a little earlier, and as I said there, it was addressing mainly the policy of affirmative action, not its constitutionality. Whether it was desirable I—that is of course a disagreement concerning the means to the end. I do not think—I hope there is no doubt about my commitment to—or there should be no doubt about my commitment to a society without discrimination. I am—if the notion there is that I am hostile to the laws that seek to eliminate that, that is simply not true.

I am, in a way, having any animosity toward racial minorities, in my case would be a form of self-hate. I am a member of a racial minority myself, suffered, I expect, some minor discrimination in my years; nothing compared to what other racial groups have suffered. But it does not take a whole lot to make you know that it is bad stuff.

My wife's mother remembers the days—she is a Fitzgerald from Boston. I wish Senator Kennedy were here to know that. But she remembers the days when there were signs in Boston that said: "No Irish need apply." I find all of that terribly offensive.

I am a product of the melting pot in New York, grew up with people of all religious and ethnic backgrounds. When I lived in your State, Senator, I did not live in a monochrome suburb, but I lived in Hyde Park, and my kids went to school, a school that was at least 40 percent, maybe more than that, black; not white. My kids socialized with and dated people of all races.

I have absolutely no racial prejudices, and I think I am probably at least as antagonistic as the average American, and probably much more so toward racial discrimination. Beyond that, I can just say that I disagreed with affirmative action, in that article, as the way to eliminate it. The side effects that I saw, that could be worse than what the particular affirmative action program would eliminate.

In any case, those policy views will not inform my decisions from the Supreme Court, as I do not think they have informed my opinions on the court of appeals.

I think that it would be a different matter if those opinions showed any racial hostility, or hostility toward the laws, and I do not think they do.

Senator SIMON. Let me phrase the question a little differently. Let's use an imaginary scene at the White House, which might have taken place.

The President asks the Attorney General, "Get me the six best names you can get in the Nation," and he comes up with six names. One was named Jones, one Smith, and he looks through, and one is named Scalia.

And the President says, "It would be a good thing to have an Italian American on the Supreme Court."

Is there anything fundamentally wrong with the President making a decision on that basis, in part, assuming a field of equally qualified candidates?

Judge SCALIA. Fundamentally, fundamentally wrong in—you mean on legal—or morally wrong?

Senator SIMON. From the viewpoint of the theory of government?

Judge SCALIA. No; I think that it is a good thing. Certainly, in my own hiring practices, I have tried to have a mix of people among my law clerks, and elsewhere. No, I cannot say that that is——

Senator SIMON. OK. When Congress sees a plant where there are 2,000 whites and no blacks, we say as you award contracts in the defense area, let's try and encourage employers to follow practices which promote opportunities for all people.

We are not saying you should hire people who are not qualified, but that our society should provide opportunities for everyone.

In the abstract, do you find that type of legislation offensive from a legal point of view?

Judge SCALIA. That article actually came from a speech that I gave which became an article in the Washington University Law Review. I had policy views; I have tried not to have them—not have any public ones anyway, since I have been a judge.

So I would like not to comment on it as a policy matter. I just want to note that there is a difference between the first hypothetical you gave me and that. And the difference is this. It is the President saying, you know, it seems to me to be good to hire a Puerto Rican or whatever as his own voluntary decision; and, on the other hand, saying the President or anybody must hire an Italian or a Puerto Rican or a certain percentage of them. The difference is that when you adopt the latter situation, you are automatically excluding some people from consideration.

Now, that makes a difference just as a policy matter. So it's a slightly different question.

I guess that what my Washington University piece would say is that in the days when I had policy views I didn't think it was a good idea. That has nothing to do with whether I would enforce it vigorously if it's passed by Congress.

Senator SIMON. I guess my experience has been and maybe yours, too, that if you have policy views inevitably they creep up or creep out or appear when you are on the Supreme Court, or in any other position.

But I guess what you are telling me is that this is a policy matter for Congress to decide and that you do not see a constitutional prohibition to Congress moving ahead.

Judge SCALIA. Well, I guess we can get into the question of whether the latter is a pillar or not, but I would like not to express a view on the constitutionality of the matter. But certainly the policy of the matter is entirely Congress'. I am certainly in sympathy with the objective of Congress. Whether I am in sympathy with the particular means Congress has pursued to that objective, I assure you will have nothing to do with my decision.

I understand that it's hard, but it's a discipline that a good judge has, and I think it's one that I have.

Senator SIMON. Let me shift to another line of questioning. After looking at your decisions in the first amendment area, my staff draws this conclusion: "In all three of the important libel cases that have come before him, Judge Scalia has ruled against the press."

I received a memo from my colleague, Senator Dodd of Connecticut, expressing some concerns in this area as well. You have in part answered this question of one of my colleagues—but are there any general comments you would like to make in response to this characterization of your stands?

Judge SCALIA. I'd be happy to talk about the three cases, if you'd like. What three was he referring to?

Senator SIMON. One was the Mobil Tavoulareas, if I am pronouncing it correctly.

Judge SCALIA. Well, that is the one case, one of very few cases, I can't talk about because it's still before our court on petition for rehearing, but I can at least note that it was not my opinion. It was the opinion of Judge McKinnon in which I joined.

Now, the holding of the case was on a factual matter. I think I had better not try to defend the holding at all, except to note that the opinion was not mine, it was an opinion in which I joined.

Senator SIMON. But you believe that characterization of your decision is not an accurate characterization.

Judge SCALIA. I think sometimes you win, sometimes you lose. The fact that I joined an opinion against the press doesn't prove anything.

What are the other opinions, Senator? I think I can probably guess.

Senator SIMON. The other one that is quoted here quite a bit is *Ollman* v.——

Judge SCALIA. *Evans and Novak* v. *Ollman.* Senator Hatch said a few words about that case earlier. It really, as I think he pointed out, is a sort of damned-if-you-do-damned-if-you-don't situation. I could have been criticized as being against Marxists had I come out the other way. It was a suit by a Marxist against a conservative columnist.

The fact is that my dissent in that case—it's a dissent that they are referring to—was joined in by, if I recollect correctly, Chief Judge Robinson. The position that I took was joined in by Judge Robinson, Judge Wright, Judge Edwards, and Judge Wald. My opinion itself was joined in by Judge Edwards and Judge Wald.

I don't think that that is any indication of a bias against the first amendment, unless all of those judges are deemed to have the same bias, which I would doubt.

The specific issue in the case was whether a particular—it was a very narrow issue. We were all in agreement on the basic principles of first amendment law, that it was libelous if it was not an opinion; it was not libelous if it was an opinion.

And the issue before the court was whether the statement that this Marxist professor, who was up for appointment as the chairman of the department of political science at the University of Maryland—the statement that he had no status in his profession, was not taken seriously by his colleagues, something to that effect, whether that was libel. I thought that that was not a statement of opinion but a statement of fact, that he was not highly regarded by his colleagues. And, in fact, in traditional libel law, the classic libel is to say that you are not regarded as competent by your professional associates.

I just don't believe there is anything in there that is antagonistic to the first amendment. I think the opinion that I wrote, which largely responded to Judge Bork's concurrence, had a statement which was quoted bv a columnist to the effect that public figures getting a good amount of bumping from the press was fulsomely assured by *New York Times* v. *Sullivan.* It somehow came out in the press as though I was saying that the freedom of the press was fulsomely assured by *New York Times* v. *Sullivan.* I wasn't saying that at all. I was saying that the fact that public figures will get a good amount of bumping was fulsomely assured, by which I mean assured not only sufficiently but more than sufficiently.

I don't think there is anything in that statement that demonstrates an antagonism toward the first amendment.

And the last case, Senator, was what? I would welcome any opportunity to——

Senator SIMON. I think you've adequately covered it here.

Let me shift to another area. You testified in 1981 on the tuition tax credit case, and you said—Senator Moynihan was taking your testimony: "The Court's decisions in this field set forth neither a settled nor a consistent nor even a rational line of authority that you could rely on, even if you wanted to."

You were not aware that you were going to be a nominee for the Supreme Court when you said that.

Do you have any general reflections on the whole church-state issue?

Judge SCALIA. I suppose it doesn't give any indication how I'm going to vote on any particular case to say that I don't think that statement would be much altered today, and I doubt whether there are very many people who would disagree with it, with the possible exception of—well, even the "rational"—the decisions are very difficult to reconcile with one another, the decisions that are on the books.

The rationale that is adopted in one case does not fit entirely well with the cases that have been cited in the past. I think that's common ground among the people who discuss the establishment clause cases. Whether the cases are thought of as being right or

wrong, I think there is general agreement that it is one of the messiest areas of constitutional jurisprudence.

Senator SIMON. Well, assuming that, are basic traditions pretty sound in the whole church-state area?

Judge SCALIA. Basic traditions?

Senator SIMON. Yes.

Judge SCALIA. I'm not sure what you mean by "basic traditions," Senator.

Senator SIMON. Interpretation of the constitutional principles in this area as they have emerged over the past two centuries.

Judge SCALIA. Well, I think what's sound is that—what's accepted—the problem in the area, Senator, is a problem that largely arises because of a natural conflict between the establishment clause and the freedom-of-religion clause. Both of those interests are very important. People ought to be able to practice their religion freely, and yet the Government cannot establish religion.

So you get cases like the case of the Jehovah's witness, who, being a sabbatarian, wants to have Saturday off instead of Sunday, and wants to draw unemployment compensation when she's been offered a job that requires work on Saturday and turned it down.

And the way the Court resolved the case was to say it violated the freedom-of-religion clause for a State not to allow her to draw unemployment compensation simply because she refused to accept a job that would require her to work on Saturday.

Well, yes, that does protect freedom of religion, but, on the other hand, doesn't that somehow amount to an establishment of religion to have the State make a special rule to accommodate the religious belief of this sabbatarian?

That's the problem that runs throughout these cases, and that's the reason they are very hard to figure. On some occasions the Court seems to be giving more weight to the freedom-of-religion section of the first amendment, on other occasions it seems to be giving more weight to the establishment clause section.

If I had to pick an area in the whole area of constitutional law that is in an unsettled state, I think that that's the one. I think many commentators would agree.

Senator SIMON. I see my time is up, Mr. Chairman. Thank you.

Senator DENTON [presiding]. The Senator from Illinois is correct, and the second round will involve, according to previous announcement of Senator Thurmond, 10 minutes each, and the Senator from Delaware is next.

Senator BIDEN. I'm sorry, I thought we were going to yield to my colleague. I appreciate that, and I will yield to my colleague from Alabama. Then maybe I could ask my questions.

Senator DENTON. The senior Senator from Alabama.

Senator HEFLIN. You've been previously asked about the intercircuit tribunal. However, the question is phrased as to whether or not the appointing power ought to be the Chief Justice or the President.

Under the proposed legislation, a temporary court of existing officers of the United States, who have already been confirmed under the Constitution—the selection of those judges has been debated. There seem to be two alternatives, one being the—well, there would be three alternatives, one being the Chief Justice appointing

them, another being the circuit themselves selecting their judge, and the third being the Supreme Court instead of the Chief Justice—all nine members of the Supreme Court doing the selecting.

Do you have any opinion on which you consider the better method of those three?

Judge SCALIA. It sounds like the least of the evils offered, Senator, doesn't it? There are problems with all of them.

It's very hard to envision a court getting together for such a purpose, to select one of its number to be the designee or for the Supreme Court to select particular individual judges. It amounts to the kind of designation of ability and primacy that I would—I certainly wouldn't want to do it as a member of a court of appeals, I wouldn't particularly want to do it as a member of the Supreme Court either.

Your judgment on that is as good as mine, Senator. I guess that having the Chief Justice do it is the least evil—but there are problems with that, too. It doesn't give you the spectrum of opinion that having a body of people do it would.

Some questions don't have any good answers, Senator.

Senator HEFLIN. Well, sometimes you can't get people to state a position.

But let me ask you on another matter. We've got an issue before Congress now on the impeachment of a Federal judge. The House of Representatives has brought articles of impeachment which are an indictment. The Senate is supposed to sit as a trial judge. For the judiciary this appears to be a rather cumbersome process. Some of the States have had other procedures for removal of judges—and I'm not trying to prejudge or do anything pertaining to the one before us—I just wondered if you have any thoughts on any innovations or improvements pertaining to problems that could arise with judges on the Federal branch.

Judge SCALIA. Well, giving this answer now that I'm a judge does make it sound as though it's self-pleading, but I had the same view before I became a judge. It is a cumbersome process—I think it should be a cumbersome process. I think it's the major protection for the independence of the judiciary. The bases of impeachment are somewhat vague, and the bases that past Congresses have sought to use in the most prominent cases are pretty vague.

It seems to me that it is an important protection to the independence of a judge to be able to decide cases as he sees them, that removing him is a lot of trouble.

Senator HEFLIN. Well, some of the States have had various methods; some have had the equivalent of House action taken or a judiciary inquiry commission, and then have a court of the judiciary, which is largely composed of judges, and may also be some lawyers. Others have had commissions which deal with the disciplinary and removal matter.

You don't have any feeling about those, or you think impeachment is more of a protection of independence than those methods?

Judge SCALIA. I think much more so. It's not as though the framers didn't know that they were establishing something that was very cumbersome and very difficult. They were out of step with many of the Colonies at the time in what they provided for the judiciary.

One of the major debates at the Convention was the provision on the judiciary, giving them life tenure, for example.

Our Federal judiciary is out of step with the States in many other respects. Many States have mandatory retirement ages, as you know; many States still, I believe, have election of judges. And all of those things were considered and rejected in favor of an extraordinarily strong—extraordinarily, more so than most of the Colonies then and more so than most of the States now—an extraordinarily strong and independent Federal judiciary. I think it was a conscious decision by the framers, and I happen to think that it was a good one.

But I understand, especially at a time when the Congress has plenty else to do, to have to sit in a trial of a judge is cumbersome.

Senator HEFLIN. I believe that's all the questions I have at this time, Mr. Chairman.

Senator DENTON. The Senator from Delaware.

Senator BIDEN. Thank you. You've had a long day, Mr. Justice, but from the time I've been here it seems like you've had a pretty good day. And let me at least close out my questioning by asking for a couple of clarifications, and also to go a little bit into privacy questions, the ninth amendment. I understand that, in response to a question from Senator Metzenbaum, you indicated that you would not belong to a club that discriminated based on race, but you would not feel bound not to belong to a club that discriminated based on sex, is that correct?

Judge SCALIA. That isn't quite what I said, Senator. I said that I regarded the two as quite different, and I would think that a club that discriminates on the basis of race or on the basis of religion, that would be invidious discrimination. I think the jury's out on whether it's invidious discrimination to have a men's club. That's what I said.

Senator BIDEN. I didn't hear the last part.

Judge SCALIA. I think that there is room for disagreement on whether a social club that is a men's club or a women's club is invidious to the other sex.

Senator BIDEN. Could it be invidious if in fact the effect of keeping women out was to have a detrimental impact upon their ability to do business, if they were businesswomen, or participate in sport, if they were sportswomen?

Judge SCALIA. I can see that, Senator, yes.

Senator BIDEN. In what context would you place those clubs which would discriminate based upon nationality?

Judge SCALIA. Well, you know, there is sort of affirmative and negative discrimination, I suppose. I have been a member of Italian-American clubs, members who share a common heritage. The exclusion of others is not an invidious exclusion at all. And likewise religious clubs, Knights of Columbus and whatnot; they exclude people of other religions, not invidiously, but just because they get together to celebrate what they have in common.

I think that's the key to it, whether the exclusion is an invidious one or not.

Senator BIDEN. If in fact there was a club or organization that included not one group, but a group of people who shared nothing

in common other than the fact they didn't like the Irish or the Italians——

Judge SCALIA. Yes, I think that would be invidious.

Senator BIDEN. You've been questioned on this already, but in your—let me make sure I have the right title of the article—article referred to as the Panhandle magazine article you stated certain views?

Judge SCALIA. Yes, sir.

Senator BIDEN. I understand that one of my colleagues quoted you, the provision that said "I do not care how analytically consistent with analogous precedent such a holding might be, nor how socially desirable in the judge's view, if it contradicts a long and continued understanding of the society, as many of the Supreme Court recent constitutional decisions referred to earlier in fact do, it is quite simply wrong. There will be no relief from the most farreaching intrusions of the modern judiciary until the Supreme Court returns to this essentially common law approach to constitutional interpretation."

Now, as I understand it, if in fact it were a long-established societal view, it would—why don't you explain it to me.

Judge SCALIA. Let me try, Senator. I am deeply mistrustful of my ability, without any guidance other than my own intuition, to say what are the deepest and most profound beliefs of our society. And that's what it means to say that something is constitutionally required. It is in accordance with the deepest and most profound beliefs of our society.

I find it difficult to come to the conclusion that something qualifies for that description when neither at the time the constitutional provision in question was enacted, was it in fact the practice of the society, as demonstrated by the laws the society enacted, nor at the present time is it that way.

Now, I can understand—and you get into the debate between the evolutionists and the original-meaning types when you say, well, what if everybody now thinks it's awful and there are no laws on the books of this sort today, but there were in 1789, so it must be constitutional—it seems to me that's a good debate. But I find it very difficult to say that it is contrary to our most fundamental beliefs when both in 1789 and today all of the States permit the practice in question, whatever it may be.

Once you don't give me that to hang onto, Senator, I worry that I am left with nothing to tell me what are our most profound beliefs except my own little voice inside. And I do not want to govern this society on the basis of that.

Senator BIDEN. Well, let's talk about the 9th amendment in that context.

The decisions—and I don't expect you to comment on how you would rule—that have arisen that have been somewhat controversial, where the right of privacy is asserted as being a right that is protected or recognized under the 9th amendment—I guess that maybe is the place to start. If you believe that implicit in the 9th amendment is a recognition of a right called the right of privacy—not to what extent it applies, but that there is such a thing as the right to privacy.

Judge SCALIA. I think that's in effect asking me to rule on cases. I can say that the Supreme Court has held that there is such a thing as a right of privacy. But they haven't tied it to the 9th amendment. As far as I know, there is no Supreme Court holding that rests any right exclusively on the 9th amendment. They may include the 9th in a litany of amendments from which various penumbras emanate, and the 9th was among them.

Senator BIDEN. Do you believe that there is such a thing as a constitutional right to privacy, not delineating whether, for example, the right to terminate a pregnancy relates to the right to privacy or the right to engage in homosexual activities in your home is a right to privacy, or the right to use contraceptives in your home is a right—but, in a philosophic sense, is there such a thing as a constitutionally protected right to privacy?

Judge SCALIA. I don't think I could answer that, Senator, without violating the line I've tried to hold.

Senator BIDEN. I don't know how you——

Judge SCALIA. I can tell you that that is what certainly a number of Supreme Court opinions now say.

Senator BIDEN. Well——

Judge SCALIA. You know, somebody may come in and say, just as somebody might come in and say *Marbury* v. *Madison* was wrong, that it doesn't exist.

I do not want to be put in the position of having to tell, you know, I'm sorry, I believe in the right of privacy, because I told the committee, in connection with considering my nomination, that I believe in it.

Senator BIDEN. Well, the fact that you believe in the right to privacy doesn't mean that a case before you in fact rises to the level of being protected by that right. I think you are being a little bit disingenuous with me here. If in fact you conclude that there is an existing right to privacy that in no way predisposes you to have to rule one way or the other about whether or not a claimed right is encompassed by the provision.

Judge SCALIA. Senator, I beg to differ. There have been scholarly criticisms of the whole notion of right to privacy.

Senator BIDEN. Oh, I agree.

Judge SCALIA. And it's not at all inconceivable that that criticism will be reflected in a brief before the Supreme Court, and I don't——

Senator BIDEN. That may very well be, but it doesn't—in other words, if the right to privacy exists, if you believe the right to privacy exists—and I believe you have stated in—excuse me one moment.

[Senator Biden consults with staff.]

Senator BIDEN. I believe, and I can't pin down where you said it—it is in an article?

Judge SCALIA. I don't think you'll find it in——

Senator BIDEN. In the Panhandle article, didn't you say that the right to privacy is one of the deepest and most profoundly held beliefs in our society?

Judge SCALIA. I don't recall having said that, Senator.

Senator BIDEN. I'm sorry, I misspoke. What was being referred to was your answer to me earlier saying that in order to meet your

test it has to be one of the deepest and most profoundly held views in society.

Do you have any doubt the right to privacy is one of those deeply and profoundly held views of American society? Forget the Constitution—let's just talk politics, you and me.

Judge SCALIA. It's very hard to answer—you began this line of questioning by answering me never mind what the right of privacy consists of. I can't answer that question without knowing what you mean by the right of privacy.

Senator BIDEN. True, you can acknowledge whether or not you believe there is in fact—let's just start over again, clean the slate.

Do you believe that Americans as a whole believe that that they have inherent right to privacy—that they think they have a right to privacy? Do you think that is a deeply and profoundly held belief by American society, whether it's found in the Constitution or found in natural law or found in their Bible or found in the Talmud? As a society, do you have any doubt that Americans believe it?

Judge SCALIA. No, I'll give you that, Senator.

Senator BIDEN. Good man, I tell you we're getting there—all right.

Now, having said that, is there any doubt in your mind that the 9th amendment, in conjunction with other amendments as it relates to particular assertions of particular rights of privacy—if I can find the 9th amendment here so I don't misquote it—do you have the 9th amendment sitting there? Dig it out for me, will you? Roman numerals confuse me, Judge.

Judge SCALIA. Let's see if yours is the same as mine—I have one here, too. [Laughter.]

Senator BIDEN. I almost read the 11th. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Is there any doubt in your mind that the people, at the time and now, believe they have retained the right to privacy, whatever that means?

Judge SCALIA. No, I think there is no doubt in my mind of that.

Senator BIDEN. Second, if in fact—well, I don't have to go any further actually, because in fact it seems to me that in some form or other there is a constitutionally protected right of privacy. What that means remains to be seen, whether it means the right to engage in homosexual activity in one's bedroom or anything else remains—I'm not going to ask you to comment on that.

But let me—I guess my time is—I know my time is up—but let me pursue this one step further, if I may.

When I look at your musings—and I don't mean that in a derogatory way, because I love to read what you've written, I love the way you go about it, I wish I had had you in class. I'm probably too old to have had you in class, but you're the kind of guy that I would have liked to have had in class. I could have gotten by with you because we could have talked about philosophy and as long as you didn't ask me what the case stood for, I'd be all right.

But when I tie your musings on original meaning and original intent, where I must admit I put you more in the school of the original-intent fellows than I do in the living Constitution area, I

begin to be concerned. And then when I take your second stated principle in the Panhandle article, which is basically that if it is a long-held societal view that has been in effect recognized through constitutional interpretation, case law, Supreme Court cases, then you would be very reluctant to overturn it.

Do I read that correctly, or am I putting words in your mouth?

Judge SCALIA. No. Yes, I think that's a fair statement.

Senator BIDEN. Now, the irony of all ironies is that the people who are concerned about you, some who are concerned about you, women's groups—prochoice women's groups who are concerned about you—they worry you will use that rationale to overturn *Roe* v. *Wade*

Ironically, it seems to me, you could read your view as saying that if that hangs in the law another 10 or 15 years, it would be awful hard—you would by your own test have trouble overruling *Roe* v. *Wade.*

So I guess what I am asking, without asking about *Roe* v. *Wade,* is whether there is a time frame? If it's on the books, if it is settled constitutional law for an extended period of time, and the argument to overturn that settled constitutional principle does not in fact meet the test of on its face being consistent with what the correct constitutional principle is, do you have to stick with what the settled law is?

You know, I know how that sounds—but you are making it understandably hard for me, because you can't talk about specific cases.

Judge SCALIA. I agree with the statement that longstanding cases are more difficult to overrule than recent cases.

Senator BIDEN. What do you have to find, as a matter of constitutional principle, to overrule longstanding cases? And I am not talking about any one case now. Constitutional principle enshrined, it's been there, reaffirmed by cases for 20 or 25 years—what do you have to find as a logic to overturn it?

Judge SCALIA. Well, in every case, Senator, you have to find that it's simply wrong, that it's not a correct interpretation of the Constitution.

Senator BIDEN. OK, that's what we are getting at.

Judge SCALIA. You begin with that. But, as I've said, some cases that are so old, even if you waved in my face a document proving that they were wrong when decided in 1803, I think you'd have to say, sorry, too late.

Senator BIDEN. How about 1969?

Judge SCALIA. Well, that's not 1803. All I can say is——

Senator BIDEN. I am really trying to get a sense of time.

Judge SCALIA. I don't want to mislead you into thinking it's just a function of time.

Senator BIDEN. No, I don't want to read it as just a function of time. As I understand it, if in fact enough time has passed, and notwithstanding the fact that you could argue that it was wrongly decided at the time because it was an overgenerous interpretation of a recognized right, it becomes settled practice, and the argument to overturn it is not that it was an incorrect decision 25 years ago because it was too expansive, but the argument required to over-

turn it is that clearly on its face they disregarded the clear intention of the Constitution? Case in point: *Plessy* v. *Ferguson.*

Senator MATHIAS [presiding]. May I interrupt the Senator from Delaware. He asks the question: "When is the wine aged?"

Senator BIDEN. Well, I understand——

Senator MATHIAS. I would say the wine's time has come.

Senator BIDEN. I understand that, but I appreciate his biting humor—but I thought this was a serious line of questioning, but I will cease and let my——

Senator MATHIAS. Well, it's not a question of cutting you off. The Senator from Illinois has been waiting.

Senator BIDEN. The Senator from Illinois just asked questions, he can ask them again—I have no further questions. Thank you very much.

Senator SIMON. I thank you, Mr. Chairman, if I am being recognized.

After the most recent dialog, you may wish to decline to answer this next question on your constitutional right of privacy, Judge.

May I ask why you resigned from the Cosmos Club?

Judge SCALIA. The basic reason I resigned, Senator—I think I described earlier how I had first become a member, I used the club a lot, I lived there for 6 months, I used it a lot when I was in Chicago because when I came up to Washington to testify or to do any other business, which I often did, since ad law was my field, I would stay there.

I came to use it very infrequently when I was a member of the court that I now sit on, which is at the other side of town. So I found I was having lunch there maybe twice a year, and I quickly calculated that it was costing me something like $250 a lunch. It didn't seem to me to be worth the trouble.

Senator SIMON. That's a pretty expensive lunch.

Judge SCALIA. It is an expensive lunch.

Senator SIMON. But did you leave the club in part because you felt uncomfortable with the regulations of the club?

Judge SCALIA. I would hesitate to say that, Senator. I don't know whether that alone would have done it. I told you that I was uncomfortable at doing something, which, although I thought it was perfectly OK, was offensive to friends whose feelings I am concerned about.

But I can't say that that alone was the reason.

Senator SIMON. One other question, and I will be very brief. You made a speech on legislative intent in which you said: "if I were writing on a blank slate, I suppose I could call into question the fundamental premise upon which all use of legislative history is based."

And then a little later on in the same speech you say, "As an intermediate Federal judge, I can hardly ignore legislative history when I know it will be used by the Supreme Court."

Now, you will become part of the Supreme Court. Do you still believe, if you were writing on a blank slate, you would call all of legislative history into question?

Judge SCALIA. Yes. If I could create the world anew, I suppose I still would, but I will no more be able to create the world anew

when I am sitting on the Supreme Court than I could when I was sitting on the court of appeals, if I ever get to sit up there.

And if the burden of your question is whether I would utterly ignore legislative history on the Supreme Court, the answer is no, I would not.

Senator SIMON. I have no further questions, Mr. Chairman.

Senator MATHIAS. Senator Heflin.

Senator HEFLIN. I only have one or two questions

Judge Scalia, I noticed you smoke a pipe. It may well be that someday you may have to rule in the right of privacy as to whether or not an individual can smoke a pipe in his study or in his bedroom, so I hope you take care of us smokers one of these days.

I have no further questions

Senator MATHIAS. I have just one or two questions, Judge.

You have already testified concerning your approach to legislative history. In your judgment, what weight ought to be given to a committee report in identifying the intent of Congress in enacting the legislation which a report accompanies?

I think Senator Grassley asked you about a rather unusual situation——

Judge SCALIA. Yes, right.

Senator MATHIAS. Let's leave that aside, and just look at it as a general matter.

Judge SCALIA. Senator, as a general matter, I am not as enamored of committee reports as authoritative expositors as some judges are. I may say, by the way, that my view on that matter is not idiosyncratic.

There are—my impression is that a number of judges have come to feel that the process has gotten out of whack; that, to some extent, because the courts have used committee reports to such degree, the committee reports are no longer as accurate a device as they used to be.

It is sort of the phenomenon of when the cameras go—it is sort of the phenomenon of your never being able to look at yourself in the mirror and see what you really look like because you know you are looking at yourself, and it is the same thing with committee reports.

Once it was clear that the courts were going to use them all the time, they certainly became a device not to inform the rest of the body as to what the intent of the bill was, but rather they became avowedly a device to make some legislative history and tell the courts how to hold this way or that way.

Once that happens, they become less reliable as a real indication of what the whole body thought it was voting on. That is why I am sorry if it does not please some of the Senators, but I just have to say that I am more suspicious of them than some judges may be.

Senator MATHIAS. I raise the matter not merely because of how it reflects on your views as a judge. It also could be helpful to us in our committee practices. It is a matter of more than ordinary interest.

A case decided by the Supreme Court this term, the *Gingles* case, *Thornburg* v. *Gingles,* turned in part on whether the report of this committee or some remarks on the floor better expressed the intent of Congress on the Voting Rights Amendments of 1982.

Several members of the committee filed an amicus brief on the issue. Ultimately, the court agreed with us, stating that "we have repeatedly recognized that the authoritative source for legislative intent lies in the committee reports on the bill."

Now, I gather that you would feel there might be some circumstances in which that much recognition should not be controlling.

Judge SCALIA. I doubt very much, Senator, whether I would not use committee reports at all when I am on the Supreme Court, but I do think that the view I am expressing of greater skepticism than has been brought to bear upon them in the past is, unless I mistake my guess, the wave of the future.

I think the courts sometimes are beginning to feel that they are being——

Senator MATHIAS. I hope the committee will listen to what you are saying, because I take that as a constructive criticism. We should make every effort to do better on committee reports and make them more helpful.

Judge SCALIA. It is not the quality of the report or the work that has gone into them, both of which are fine. The essential ingredient, however, is for the court to know that when the Senate voted on the bill, that is what the full Senate meant.

And if there is some way that the actual attention of the whole body to that particular item, which very often is such a subsidiary item that one really has to wonder whether the notion that the full Senate had in mind this one statement in a multipage report—whether that is not utterly fictional, and if it is fictional, then it does not really represent the intent of the Senate when they voted. That is the problem.

Senator MATHIAS. I would have to agree with you. It is a fairly rare event where the committee itself has any argument over the language of the report, and occasionally it happens where a line is written in or a line is stricken out, but that is, I think, the exception rather than the rule.

The subject of judicial activism is one that is important to the chairman. You published an article last year in which you noted the tendency to regard the courts as an alternate legislature whose charge differs from that of the ordinary legislature in the respect that while the latter may enact into law good ideas, the former may enact into law only unquestionably good ideas, which, since they are so unquestionably good, must be part of the Constitution.

You went on to say that "every era raises its own particular threat to constitutional democracy and the attitude of mind, thus caricatured, represents the distinctive threat of our time."

I do not think anybody would disagree that unbridled judicial activism is a bad thing. Certainly, Thomas Jefferson believed that. Did you mean to say that it is the distinctive threat of our time?

Judge SCALIA. Oh, you are right; that may have been too broad a statement. In the context in which I was speaking, it is the distinctive threat with relationship to the judicial process of our time, I think, if there is one failing, and perhaps in our entire governmental process bearing upon the relationship among the three branches.

Senator MATHIAS. I would agree with the thrust of your remarks earlier today in which you said that if legislatures were more pre-

cise, there would not need to be so much judicial activism. Sometimes we invite judicial activism.

The one-man, one-vote cases, for example, came about as a result not of legislative imprecision, but rather legislative stalemate on the subject, and it represented a clear example of legislative failure which invited judicial activism. It really demanded judicial activism in a case in which it apparently was a necessary resort under the Constitution to deal with a problem of major proportion, the malapportionment of congressional districts.

I am glad you have put that characterization into context.

Judge SCALIA. I am sorry that article has gotten the most attention. It is, doubtless, the—of all my articles, it is the one I am least proud of. I am not ashamed of it, but it was a couple-of-page thing in a rather popular, as opposed to scholarly publication—probably not even very popular, but at least not scholarly.

Senator MATHIAS. Well, I have just one more question, and that is on the question of original intent, a very popular subject for articles, lectures, speeches.

What is your approach to this rather arcane subject?

Judge SCALIA. Well, it is where I start from, Senator. I think the first step is to—and I use the term "original meaning" rather than "original intent," which is maybe something of a quibble, but I think that one is bound by the meaning of the Constitution to the society to which it was promulgated.

And if somebody should discover that the secret intent of the framers was quite different from what the words seem to connote, it would not make any difference.

In any case, I start from the original meaning, and I think there is room for dispute as to to what extent some of those elements of meaning are evolvable, such as the cruel and unusual punishment clause.

The starting point, in any case, is the text of the document and what it meant to the society that adopted it. I think it is part of my whole philosophy, which is essentially a democratic philosophy that even the Constitution is, at bottom, at bottom, a democratic document.

It was adopted by the people's acceptance of it, by their voting for it, and its legitimacy depends upon democratic adoption at the time it was enacted. Now, some of its provisions may have envisioned varying application with varying circumstances. That is a subject of some dispute and a point on which I am quite wishy-washy.

But I am clear on the fact that the original meaning is the starting point and the beginning of wisdom.

Senator MATHIAS. Well, my time is up, but the chairman will indulge me just to finish that question. What happens if the starting point is zero? For instance, the whole range of public school issues are beyond any scope of the Founders' original intent because there was not a public school system at that time. Many of the public school questions that have come before the Court could not have been precisely forecast by the Founders because you are talking about a whole institution that has been invented since their deaths.

Judge SCALIA. On those types of issues, Senator, where the law has to be applied to circumstances that just did not exist at the time, you obviously have to decide as a judge what resolution would most comport with the application of that clause to the circumstances that did exist at the time and try to make it fit.

Senator MATHIAS. Thank you very much, Judge Scalia.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I have no further questions. If the judge would not mind, I would appreciate it if we could keep the record open so if any of my colleagues have questions they want to submit in writing we could include them in the record.

The CHAIRMAN. Thank you, Senator. Without objection, we will do that. How long would you want to keep it open, Senator, until Thursday?

Senator SIMON. If we could keep it open—how about keeping it open until Friday?

The CHAIRMAN. Friday?

Senator SIMON. Friday.

The CHAIRMAN. All right. At your request, we will do that. We will keep the record open for any questions that any member of the committee wishes to propound to Judge Scalia until Friday. Friday, say, at 4 o'clock would that be satisfactory?

Senator SIMON. Fair enough.

The CHAIRMAN. Any member who desires to submit questions by 4 o'clock Friday, it will be agreeable.

Judge Scalia, I want to commend you for the way you have handled yourself in this hearing. I think you are one of the best-qualified men that has come before us to be a judge on the circuit court or Supreme Court.

Your successful law practice, professor of law in four different law schools—at least in three, and then I believe you were a visiting professor at Stanford—and I have been impressed that you possess the qualities we need in a judge, and that is in judicial temperament and the other things I mentioned this morning.

I think you will be able to assist the other judges on the Court, too, in arriving at a consensus. I have a feeling that you are not only a good musician, but you are a persuasive talker, and with your great legal knowledge, I think you will be able to help with a consensus.

You have a reputation for being a hard worker, a man of great analytical skills, sound judgment, congenial personality, and all of these qualities, I think, will be of great benefit to you on the highest Court in our land.

The American Bar Association has found you well qualified. That is the highest rating they can give you, and they will be testifying tomorrow as the first witness tomorrow.

But I just want to say to you that we are fortunate, I think, to have a man like you to be appointed to the Supreme Court, and I commend President Reagan for appointing you and I wish you well on the Bench and I am sure you will have a successful tenure.

I do not think it will be necessary now for you to come back anymore; if so, we will let you know. You are welcome to come back tomorrow. There are some other witnesses; some are for you and

some are against you, if you want to be here, but it will not be necessary.

Judge SCALIA. Thank you, Mr. Chairman. May I thank the committee for its courtesy, and I have genuinely enjoyed being here.

The CHAIRMAN. The distinguished Senator from Illinois, did you have any comment that you wanted to make at this time?

Senator SIMON. I have nothing further.

The CHAIRMAN. The distinguished Senator from Maryland, do you have any comments?

Senator MATHIAS. Mr. Chairman, I join with you in congratulating Judge Scalia on a very fine performance before this committee. We have seen a good many judicial nominees who have come here and I do not think any of them have surpassed Judge Scalia in the manner in which he has addressed the questions and the kind of thoughtful responses that he has given to the committee.

As I suggested a minute ago, some of his comments may be helpful to us in the conduct of our own business, so we appreciate your being here.

Judge SCALIA. Thank you, Senator.

The CHAIRMAN. We will begin at 10 tomorrow, and after we get through with the American Bar Association, we are going to allow 3 minutes to the other witnesses, and we want to finish this hearing tomorrow.

We now stand in recess until 10 tomorrow.

[Whereupon, at 7:58 p.m., the committee was adjourned, to reconvene at 10 a.m., Wednesday, August 6, 1986.]