

STATEMENT OF LLOYD N. CUTLER

Mr. CUTLER. Mr. Chairman, I have also filed a written statement, and I will summarize it only briefly.

When I was counsel to President Carter, unfortunately he never had an opportunity to nominate a Justice to the Supreme Court. If such an opportunity had arisen, I probably would not have recommended that he appoint Judge Scalia, even though at that time he was a distinguished professor of law.

The CHAIRMAN. Speak a little louder. We can hardly hear you.

Mr. CUTLER. Yes, sir.

In the unlikely event that I was serving as counsel for President Reagan, I would certainly have included Judge Scalia among the three or four most qualified people in the country for the post.

I make that point because I believe it draws the right distinction between a President's role in nominating a Supreme Court Justice, and the Senate's role in deciding whether to grant its advice and consent.

Since Supreme Court vacancies occur so infrequently, the President has ample reason to select a well-qualified nominee whose broad political and legal philosophy the President believes to be consistent with his own. The President, of course, may be disappointed in the event, as was true of President Teddy Roosevelt in the case of Justice Holmes, and we understand President Eisenhower in the case of Chief Justice Warren and Justice Brennan.

But as the appointing authority, the President certainly has the right to take compatibility of philosophy into account.

The Senate, in contrast, does not play the affirmative role of selecting the nominee, but the negative role of withholding its consent to an improper appointment.

What is an improper appointment? In my view, it is improper to nominate someone who is not professionally qualified, no matter how compatible his views may be with the President. I also believe it is improper to nominate someone, however well qualified professionally, whose ideology so dominates his judicial judgment as to put his impartiality in particular cases into question.

Measured by those standards, it seems to me that the nomination of Judge Scalia is clearly a proper one. You have heard his academic and professional qualifications, and they are certainly very impressive. As for his political and judicial philosophy, I find from reading his opinions that he is nearer the center than the extreme on the major issues that arise in our political and legal system.

Perhaps the best evidence of that is his record on the court of appeals. So far as I can determine, his major opinions on that court have been supported as frequently by what are colloquially called the liberal wing of the court as by the conservative wing. In one recent libel case involving important first amendment values, he was one of five outspoken dissenters, along with four members of the liberal wing. And in the recent Gramm-Rudman opinion—which I did not like on other grounds—his view was sustained by a Supreme Court majority that included three of the so-called liberal members of that Court.

Finally, he possesses a special quality that can never be in oversupply on the Supreme Court, and that is an enthusiasm for appellate argument, a joy in the tough question and the persuasive answer, and an openness about his own State of mind that are of great help to the advocates in the case and to the journalists and scholars who study the work of the Court.

[Prepared statement of Mr. Cutler follows:]