TESTIMONY OF LAURENCE GOLD, GENERAL COUNSEL OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, TO THE JUDICIARY COMMITTEE OF THE U.S. SENATE ON THE NOMINATION OF JUDGE ANTONIN SCALIA TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

August 6, 1986

The AFL-CIO appreciates this opportunity to appear before the Judiciary Committee to testify on the nomination of Judge Antonin Scalia to be an Associate Justice of the Supreme Court. We do not appear at this time to oppose or to support Judge Scalia's nomination but to raise questions about the nominee's views -- as we glean his views from his writings -- concerning the role of Congress in setting national policies and the role of the judiciary in enforcing the Bill of Rights. If we understand those views correctly, they raise serious issues as to what the Constitution means and how we conduct our public life. We discuss these questions in the hope that they will be fully explored in these hearings and out of our sense -- which we share with the Committee -- of the profound importance of this nomination, and of each nomination to the Supreme Court, in light of the Court's major role in the Nation's affairs.

I.

It is appropriate at the outset to state briefly our understanding of the proper role of the Senate in passing on a Supreme Court nomination; without a theory as to the basis on which the Senate may or should act, it is impossible to discuss intelligently whether a particular nominee should be confirmed.

We believe first of all that the contention that the Senate's role in passing on a Supreme Court nomination is merely to assure itself of the nominee's intelligence and character -- a position that seems to have some currency at present -- is unsound. Whatever the merits of that approach may be in deciding whether to confirm a Presidential appointment to the Executive Branch, where the appointee will be assisting the President in performing the President's duty to take care that "the laws [of the United States] be faithfully executed," it makes no sense to suggest that the Senate's role should be equally circumscribed with respect to nominees for the judiciary, an independent branch of government. The Executive Branch and particularly the Cabinet may in some sense "belong" to the President, but surely the Supreme Court does not; it is the Supreme Court of the United States.

Those who would so narrowly limit the role of the Senate in passing on a judicial nominee can find no support for their approach in either the constitutional text or in constitutional history. As Professor Charles Black has stated, the words of Article II, section 2, clause 2 -- the "Advice and Consent" clause -- "make [it] next to impossible" to conclude that the Senate's role is "confined to screening out proven malefactors."[1/] Nor was that the intent of the Constitution's framers; the proceedings of the Constitutional Convention reveal that there was substantial support in the Convention for granting the Senate sole power to appoint judges, and that the Advice and Consent provision emerged as a compromise, one that would place a check on the President's appointment power by, as Hamilton put it, subjecting "the propriety of [the President's] choice to the discussion and determination of a different and independent body."[2/]

Thus, with respect to the shaping of the judiciary, as with respect to so many other matters, the Constitution is indeterminate with respect to the role of Congress; the plan of the framers was to give both the President and Congress a voice, and to leave it to those two bodies to vie continuously with each other for the public sentiment that determines the extent to which the voice of a particular branch will be controlling at particular moments in history.

For two hundred years, the Senate has recognized and asserted its constitutional prerogatives in passing upon Supreme Court nominees. In 1795, the Senate refused to confirm a Supreme Court nominee of President Washington. And during the 1800s, seventeen Supreme Court nominations failed of confirmation for what Professor Rees aptly describes as "political or philosophical reasons."[3/]

In particular, there can be no doubt that, as the Chairman of this Committee, Senator Thurmond, stated in opposing Justice Fortas' nomination to the office of Chief Justice, "the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and the role of the Court in dealing with these issues."[4/] Justice Rehnquist put it this way in an article he authored over 25 years ago: "what could [be] more important to the Senate than [a nominee's] view on equal protection and due process."[5/] Professor Black has elaborated on the point as follows:

> In a world that knows that man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view."[6/]

This is not to say that it would be an appropriate exercise of the Senate's power to refuse to confirm any nominee who does not share, in all particulars, the political or philosophical beliefs of a majority of the Senate. With respect to many issues of the day, a nominee's personal views have little or no bearing on how that nominee will perform the judicial role. And even with respect to those broader issues of politics or philosophy that undoubtedly do shape how a nominee would go about judging, the appointment process would quickly deadlock if each branch of government were to insist on its own version of ideological purity. But there can be no doubt of the propriety of closely examining a nominee's philosophy to determine whether there are, to quote Hamilton, "special and strong reasons" to refuse to confirm that nominee.[7/]

II.

There are two aspects of Judge Scalia's judicial philosophy which we believe merit close scrutiny.

First, as we shall explain, there is substantial reason to doubt whether Judge Scalia accepts the fundamental principle that it is for Congress to make national policy and for the Executive to implement that policy. Judge Scalia's position, as we understand it, is that the Executive should be free to nullify duly-enacted and Presidentially-approved law by refusing to enforce such laws or by enforcing their "plain" terms without seeking to ascertain what Congress intended. This area is an especially appropriate one for congressional attention, because to the extent the President uses his appointment power to select nominees who will transfer power to the Executive at the expense of Congress, it is entirely proper for Congress to refuse to give its consent to such nominations.

The second area to which we invite the Committee's attention concerns Judge Scalia's reading of the Bill of Rights and the Fourteenth Amendment. While the materials are more sketchy, Judge Scalia appears to approach those vital constitutional guarantees in a way that would drain them of their significance. Indeed, it seems safe to conclude that Judge Scalia was nominated in large measure for that very reason, just as Justice Rehnquist undoubtedly was nominated to be Chief Justice because he has consistently refused to enforce the guarantees of the Bill of Rights. And if that is the ground on which these nominations have been made, it is surely proper for the Senate to base its decision on whether to give its consent on these very same grounds. As Professor Black has argued, to offer advice and consent without "consider[ing] the same things that go into the decision is ordinarily "derelict[ion] in . . . duty."[8/]

III.

To be precise, the President has not yet nominated Judge Scalia to be an Associate Justice of the Supreme Court but has stated his intention to do so if and only if Justice Rehnquist is confirmed as Chief Justice. Some preliminary words on the nomination actually pending before this Committee, that of Justice Rehnquist to be Chief Justice, are therefore in order.

The AFL-CIO is part of the Leadership Conference on Civil Rights and subscribes to its testimony on Justice Rehnquist's nomination. Because our views were thus represented, and because of the large number of otherwise unrepresented organizations which wished to testify with respect to Justice Rehnquist's nomination, we did not ask to take up the Committee's time during last week's hearings. We would be remiss however if we did not use the occasion of this testimony to state in our own words our reasons for urging the Committee to vote not to confirm Justice Rehnquist as Chief Justice.

In 1971, the AFL-CIO opposed the confirmation of Mr. Rehnquist to be an Associate Justice because, as we stated at that time, his "public record demonstrates him to be an extremist in favor of . . . diminution of personal freedom." We believe that Justice Rehnquist's record on the Supreme Court over the past fifteen years confirms our essential fear: he is an ideologue with a closed mind to the great majority of valid claims based on the Bill of Rights or the Fourteenth Amendment.

In preparation for this testimony, we have reviewed every constitutional decision in which Justice Rehnquist has participated since joining the Court. That review leaves no doubt that on a Court whose majority has been appointed by Presidents Nixon, Ford and Reagan and which takes a quite modest view of the Bill of Rights' protections -- a Court quite unlike the Warren Court -- Justice Rehnquist stands alone in his doctrinaire insensitivity to individual rights. In this context, the number of constitutional cases in which Justice Rehnquist has dissented alone assumes significance, for that number reveals the extent to which Justice Rehnquist falls to the right of an essentially conservative Court. Equally significant are the extreme views Justice Rehnquist has expressed in those isolated dissents -- and in solitary concurring opinions as well -- such as his view that the Equal Protection Clause does not offer protection to all "discrete and insular minorities" but only to blacks[9/], that the First Amendment permits a city to exclude from a public auditorium performances the city views as offensive so long as the city's judgment is not "arbitrary or unreasonable"[10/], or his view that the Establishment Clause allows the government to promote religion so long as it does not aid one particular religion.[11/] The

short of the matter is that on virtually any constitutional issue that comes to the Court, his "no" vote is all too predictable.

It has been argued that Justice Rehnquist's cramped reading of the Bill of Rights is justified by the theory of judicial restraint; the theory that the judiciary should keep its review within narrow limits in order to maximize the freedom of the democratically-elected branches of government to work their will. But of course the entire point of the Bill of Rights is to place limitations on the majority's power. The reason for a written Constitution enforced by an independent Judiciary is to see to it that those limitations are respected. At most, then, the theory of judicial restraint justifies deference to the popular branches in the truly hard cases and not an across-the-board abdication by the judiciary. Thus, in our view, Justice Rehnquist is wrong in the most fundamental respect when he argues that so long as the majority has a reasoned base for discriminating against a minority or for infringing on the freedom of speech or of religion, the majority is privileged to do so.

If, however, Justice Rehnquist were a consistent and faithful practitioner of judicial restraint, there might at least be a credible case to be made for his nomination. But the reality is that he is not; when it suits his ideological purposes -- when there is an opportunity to further his own agenda -- Justice Rehnquist has been the most activist of jurists.

Perhaps the best known and most pronounced example of this tendency is his decision in National League of Cities v. Usery, 426 U.S. 833 (1976), holding unconstitutional an act of Congress requiring public employers to pay their employees the minimum wage. In National League, Justice Rehnquist concluded that although the law in question was "fully within the grant of legislative authority contained in the Commerce Clause," id. at 841, that law violated an "affirmative limitation" on Congress' power, id. at 842, one that interdicts federal legislation that interferes with "the States' freedom to structure integral operations in areas of traditional governmental functions," id. at 852.

To the extent Justice Rehnquist in National League identified a source in the constitutional text for this "affirmative limitation," that source was the Tenth Amendment -- a strange source, indeed, because that Amendment provides, in terms, that "The powers not delegated to the United States by the Constitution . . . are reserved to the States," and thus cannot be read to restrict the powers that are "delegated to the United States by the Constitution." Indeed, one year earlier, Justice Rehnquist acknowledged this very fact.[12/] The reality is, then, that in National League -- unlike in cases involving individual rights[13/] -- Justice Rehnquist was essentially unconcerned

about finding a source in the constitutional text for the limitation on congressional power he expounded.

Justice Rehnquist was likewise unconcerned in National League by the absence of any evidence that the framers of the Constitution affirmatively intended that limitation or by the fact that the limitation had been unknown in constitutional history for almost two hundred years; it was Justice Brennan's dissent in National League that relied on the Federalist Papers, the writings of James Madison, and on decisions of the Supreme Court from McCulloch v. Maryland, 4 Wheat 816 (1819), to Justice Harlan's opinion for the Court in Maryland v. Wirtz, 392 U.S. 18 (1968), (an opinion which National League cavalierly overturned). See 426 at 856-81 (Brennan, J., dissenting). And Justice Rehnquist was equally unconcerned in National League by the anti-democratic thrust of the decision: in National League, the Court, in the name of protecting the States, invalidated laws enacted by Congress and signed by the President and indeed assumed for itself the power to invalidate any federal law which, in the Court's view, goes too far in the direction of undermining the Court's own view of the essentials of State sovereignty.

Justice Rehnquist made no attempt in National League to defend the approach to constitutional adjudication taken there, but in Nevada v. Hall, 440 U.S. 410 (1979), he offered such a defense. The issue in that case was whether, under the federal Constitution, the courts of one State lack jurisdiction over another State which is sued as a defendant. The majority answered that question in the negative because there is nothing in the Constitution which addresses a State court's jurisdiction over other States. Justice Rehnquist dissented, arguing against the "Court's literalism," id., at 434, and in favor of an entirely different analytical method of constitutional interpretation:

> Any document -- particularly a constitution -- is built on certain postulates or assumptions; it draws on shared experience and common understanding. On a certain level, that observation is obvious. Concepts such as "State" and "Bill of Attainder" are not defined in the Constitution and demand external referents. But on a more subtle plane, when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan -- the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning. [440 U.S. at 433.]

We have no quarrel with this statement of how to interpret the constitution. We disagree with National League because we believe Justice Rehnquist followed his personal views rather than the constitutional plan, and not because we challenge the legitimacy of interpreting the Constitution by reference to that "plan" or by reference to the

Constitution's "tacit postulates." Our point is simply this: Justice Rehnquist's statement of approach applies equally to cases in which individuals claim infringement of their rights and to cases in which the States claim infringement of their prerogatives. Yet Justice Rehnquist follows the approach of his Nevada v. Hall dissent only in States' rights individual rights cases.

Justice Rehnquist's decisions thus make clear that he is not following some neutral and principled method of constitutional adjudication but instead is interpreting the Constitution to further a particular ideological agenda, one that is hostile to federal power and indifferent to individual rights. In our view, Justice Rehnquist's unyielding commitment to that agenda -- an agenda that is incompatible with the "constitutional plan" and with the national welfare -- disqualifies him to be Chief Justice of the United States.

IV.

We turn now to the nomination of Judge Scalia and begin by underlining what we said at the outset: we do not at this point urge a particular answer to the question of whether Judge Scalia should be confirmed. Our reason for testifying is that, as we have stated, we believe, after a careful review of Judge Scalia's writings, that deeply troubling questions are raised by his writings, as we read them, on the role of the courts in interpreting the laws that Congress enacts, the role of the Executive in enforcing those laws, and the Constitution's office in limiting the power of Congress and the Executive alike. We discuss those questions in some detail in the hope that by so doing we will stimulate a probing examination of Judge Scalia by the Committee with respect to these matters.

A.

The first respect in which Judge Scalia's public statements give great pause is the theory he has outlined for deciding statutory cases -- cases involving the interpretation and application of legislative enactments. The longstanding and prevailing understanding of the judicial role in such cases is the one Judge Learned Hand expressed best and that the Supreme Court has embraced: the judicial task is to make the "best effort to reconstitute the gamut of values current at the time when the words [of the statute] were uttered,"[14/] because "statutes have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[15/] Stated more simply, the role of the judiciary is, as Justice Story put it, to arrive at that interpretation of a law "which carries into effect the true intent and object of the legislature in the enactment."[16/]

Judge Scalia has a very different understanding. In two speeches that he submitted to this Committee, Judge Scalia takes issue with the proposition "that the intent of th[e legislative] body is what should govern the meaning of the law," and that "interpretative doubts . . . are to be resolved by judicial resort to an intention entertained by the lawmaking body at the time of its enactment."[17/] According to Judge Scalia, "asking what the legislators intended . . . is quite the wrong question."[18/] To him, "[s]tatutes should be interpreted . . . on the basis of what is the most probable meaning of the words of the enactment,"[19/] viz, "by assessing the meaning that would reasonably have been conveyed to a citizen at the time the law was enacted, as modified by the relationship of the statute to later enactments similarly interpreted."[20/]

In our view, this approach to statutory interpretation is flawed in at least two respects. First, as Justice Frankfurter argued, "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."[21/] Justice Frankfurter explained:

> A statute like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute . . . is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment -- that to which it gave rise as well as that which gave to it -- can yield its true meaning.[22/]

Second, the reality is that in most statutory cases the language of a statute is not so clear as to permit of only one possible interpretation or application; as Justice Frankfurter argued in another case, "[o]ne would have to be singularly unmindful of the treachery and versatility of our language" to harbor such a view.[23/] Indeed, "it would be extraordinary" if a case which could be decided by means of "mechanical application of Congress' words to the situation" were deemed "worthy of th[e Supreme] Court's attention."[24/]

It is precisely for this reason that Judge Scalia's approach is so unsettling. For what Judge Scalia ultimately argues is that it is neither possible nor proper to seek the construction that would produce the results Congress intended or the results most consonant with the congressional policies underlying the statute. Rather, Judge Scalia argues, where the language is "plain," it is to be controlling even if the result is not what Congress wanted. And even more importantly, in Judge Scalia's view, in the usual case in which there is some room to differ over the meaning of the words Congress has enacted, the executive and judicial branches are free to place their own gloss on statutes.

Insofar as Judge Scalia's argument rests on his belief that it is not possible to ascertain in a reliable fashion what Congress intended in passing a particular law, we believe he misunderstands the legislative process. To be sure, some of what passes for authoritative "legislative history" is not authoritative at all because it cannot be understood to be an expression of a judgment that Congress as a body made in enacting the law. But in our experience, it ordinarily is possible to gain valuable insight into what Congress intended and how far the Legislature was prepared to go in enacting a particular law by examining what those who sought enactment of a particular piece of legislation identified as the problem to be addressed; the statements of the principal proponents of the legislation, serving as spokesmen for the bill's supporters, as to what they sought (and equally important did not seek) to accomplish; the compromises that the proponents made during the legislative process in their attempt to build majority support; and the compromises and alternatives that the proponents rejected and on which they joined issue with the opponents. To use Judge Hand's words again, it is, we believe, possible to "reconstitute the gamut of values extant" when a statute was passed, and thus to interpret statutes in a manner that furthers those values.

Ultimately, however, Judge Scalia rejects that approach to statutory interpretation in principle. He believes, as he puts it, that "if the members of Congress do not specify, in the law they enact, all the details of its application, they must realize that someone else will have to 'fill in' those details. . . . [T]he theory of our system is that de facto delegation goes initially to the agency administering the law, and, ultimately, to the courts."[25/] In other words, according to Judge Scalia, under "the doctrine of separation of powers . . . once a statute is enacted, its meaning is to be determined on the basis of its text by the Executive officers charged with its enforcement and the Judicial officers charged with its application."[26/]

But while it is of course true that the Executive decides in the first instance what a law means -- there is no plausible way by which Congress can decide that question -- Judge Scalia's formulation begs the critical issue: by what criteria is the Executive (or the Judiciary) to make that decision. What Judge Scalia is arguing is that the Executive is free to interpret statutes -- in his words, to "fill in th[e] details" -- based on the Executive's own conception of sound policy and without regard to, rather than based on, its understanding of Congress' conception. And that reflects a profound disrespect for the legislative process and ultimately for Congress.

Judge Scalia invokes the rubric of separation of powers to defend his theory, but the view he espouses is the antithesis of that doctrine correctly understood, for his approach

would lead to a consolidation of power in the Executive to make as well as to enforce national policy. The correct understanding of the separation of powers doctrine is the one expressed in the Steel Seizure Case:

> [T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to recommending of laws he thinks wise and vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.[27/]

A true appreciation of the separation of powers principle thus leads directly to (and underlies) the prevailing approach to statutory interpretation -- an approach whose premise is, as Justice Holmes put it, that "the legislature has the power to decide what the policy of the law shall be" and which therefore concludes that if Congress "has intimated its will, however indirectly, that will should be recognized and obeyed."[28/] Judge Scalia rejects Justice Holmes' conclusion because he rejects Holmes' premise.

The significance of the differences between the traditional understanding of the separation-of-powers doctrine as articulated by Holmes and the approach to statutory construction it yields, and the revolutionary views of Judge Scalia, cannot be overstated. Because so much of what Judge Scalia would be called upon to do, if elevated to the Supreme Court, would involve the construction of federal statutes as to which, of course, the Supreme Court has the final say, his approach has the potential to effect a vast shift of policy-making authority from the Congress to the President. That approach therefore warrants the most careful scrutiny by this Committee.

B.

Judge Scalia's premise as to the prerogatives of the President vis-a-vis Congress lead not only to an approach to statutory construction that would allow the President to make policy without regard to Congress' view but also to an approach to constitutional interpretation that would limit Congress' power even further and transfer even more policy-making authority to the Executive.

Consider, for example, Judge Scalia's approach to Article III of the Constitution. That Article states that the "judicial power" of the United States shall extend to "cases or controversies." Based on his view of the separation of powers, Judge Scalia would read into that Article a review that would preclude Congress from subjecting certain types of executive action to judicial review even where Congress concludes that such review is necessary to assure that the Executive faithfully executes the law. According to Judge Scalia, Congress may provide for judicial review of executive action only where those such actions produce "distinctive[]" harm to a particular individual[29/], and not where the Executive acts in a way adverse "only to the society at large."[30/]

What this means, in concrete terms, is illustrated by a recent dissent by Judge Scalia in a case challenging the Transportation Department's alleged failure to comply with Congress' directives to set fuel economy standards for automobiles at the level which achieves the maximum feasible economy. In that case, the majority (including incidentally former Senator, now Judge, Buckley) found that a citizens group had standing to challenge the Executive's asserted non-compliance with the law. But following his academic writings, Judge Scalia disagreed, arguing that even though Congress had authorized judicial review of the Executive's enforcement of that law at the behest of "[a]ny person who may be adversely affected" by what the Executive had done, no one could challenge the Transportation Department's action in allegedly setting too lax a standard. Judge Scalia contended that while the courts are always open to claims that the Executive has exceeded the bounds set by Congress in regulating the private sector because such regulatory action, by definition, inflicts distinctive harm on those regulated, it is his position that the courts cannot hear claims that the Executive has failed to regulate to the degree Congress mandated because the injury that flows from under-regulation, such as exposure to increased hazards, is one shared in common by all exposed to the hazard.[31/] Stated in more general terms, when the overall public interest is at issue, Congress simply cannot, in Judge Scalia's view, constitutionally bind the President to enforce the laws through the usual means used in a democratic society; the only alternatives Judge Scalia would leave Congress are the use of such extraordinary means as "defunding" or impeachment.

Remarkably, Judge Scalia believes that granting standing in cases such as Center for Auto Safety would work a "judicial infringement upon the people's prerogative to have their elected representatives determine how laws that do not bear upon private rights shall be applied."[32/] But of course the very claim in that case was that "the people "through their "elected representatives" in Congress had made such a decision by the law that was enacted and signed by the President. What was at issue in Center for Auto Safety, then, was whether the Executive could trump Congress' judgment as to the degree of regulation that is desirable or whether, instead, the Judiciary would compel the Executive to enforce Congress' law. In refusing to intervene, Judge Scalia failed to enforce true separation-of-powers principles but instead furthered his consolidation-of-powers notion under which the Executive may overrule the Legislature. To quote Judge Scalia's article:

> Does [my view] mean that so long as no minority interests are affected, "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?" Of course it does -- and a good thing too.[33]

Another way in which Judge Scalia's separation-of-powers theory leads him to a position that would enable the Executive to "los[e] or misdirect[] important legislative purposes" is his interpretation of the Appointments Clause, the clause authorizing the President to appoint executive officials.[34] Since the Supreme Court's decision in Humphrey's Executor v. United States, 295 U.S. 602 (1933), it has been generally understood that this clause does not preclude Congress from enacting laws that establish standards that the President must follow in removing Presidential appointees. On that basis, the constitutionality of the independent regulatory agencies Congress has established to insulate some regulators from the ebb-and-flow of politics -- agencies like the FTC, NLRB, FCC and SEC -- has gone unquestioned.

That Judge Scalia at least harbors doubts as to the constitutionality of independent regulatory agencies is clear from the per curiam opinion he either authored or joined in the Gramm-Rudman case[35] as well as from a paper he delivered to the Supreme Court Historical Society a year ago.[36] Judge Scalia has made clear that he views Humphrey's Executor as "an anomaly" and as not even settling the question whether the President may discharge a member of an independent agency for carrying out statutory responsibilities in a way with which the President disagrees.[37] Moreover, the opinion of the three-judge court in Synar v. United States indicates that Judge Scalia may view the separation-of-powers doctrine to require that all those responsible for regulating must serve at the pleasure of the President, and that therefore Congress lacks the power to enact a law prescribing removal standards for any executive office.[38] It is noteworthy that the Supreme Court affirmed the three-judge court in Synar on a different rationale: the Court found it unconstitutional to vest authority in an officer like the Comptroller General who is completely dependent upon Congress, and the Court did not decide whether it is unconstitutional to vest executive authority in an officer who is independent of the Executive; indeed, the Supreme Court went out of its way to disclaim any intent to "cast[] doubt on the status of independent agencies."[39]

C.

Thus far we have discussed the ways in which Judge Scalia's separation-of-powers theory would lead to the transfer of authority from Congress to the President and in that way threaten the primacy of Congress in making national policy. But Judge Scalia's theory threatens congressional primacy in one further and even more fundamental

respect: in the name of the separation of powers, he seemingly would revive the discredited non-delegation doctrine, the doctrine which holds that the judiciary may invalidate any law which, in its view, contains too little specificity and vests too much authority in the Executive.

The non-delegation doctrine was used by the Supreme Court in the early 1930s to strike down New Deal legislation with which those "Nine Old Men" disagreed;[40] it has not been used since. Yet in an article written shortly after the Supreme Court's decision in Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980), Judge Scalia expressed sympathy for Justice Rehnquist's opinion in that case which sought to resurrect the non-delegation doctrine in order to invalidate critical portions of the Occupational Safety and Health Act. Judge Scalia argued that "the unconstitutional delegation doctrine is worth hewing from the ice" and urged the Supreme Court to "mak[e] an example of one -- just one -- of the many enactments that appear to violate the [non-delegation] principle out of a hope that [t]he educational effect on Congress might well be substantial."[41]

Judge Scalia understands that Congress will be unable to pass complex regulatory legislation of sufficient specificity to meet the requirements of Justice Rehnquist's Industrial Union Department opinion. Thus, the necessary effect -- if not the intent -- of this application of separation-of-powers doctrine would be precisely what it was fifty years ago: to thwart the enactment of broad regulatory laws whose substance is anathema to a majority of the court hearing the case.

D.

In sum, there is grave reason to doubt whether Judge Scalia, if confirmed, would respect Congress' lawmaking powers or whether he would, instead, invalidate some laws as too vague and allow the Executive to nullify other laws by enforcing those laws in a manner that disregards Congress' will. Judge Scalia's views in these respects thus merit the most careful scrutiny before Congress decides whether to give its consent to this nomination.

V.

Judge Scalia's approach to constitutional adjudication in the separation-of-powers arena stands in marked contrast to his approach where individual constitutional rights are at stake. The meaning and the role of the Bill of Rights is the final area in which we believe Judge Scalia's nomination raises serious questions.

Starting from the premise that the Bill of Rights is "an embodiment of the fundamental beliefs of our society,"[42] Judge Scalia believes that the appropriate judicial

role is "not to 'give' it content but wherever possible to discern its content in the traditions and understandings of the nation."[43/] The Bill of Rights "is an invitation, in other words, for the courts to behave in the old-fashioned, common-law mode."[44/] Judge Scalia faults the courts for going further and finding "commands . . . within the Constitution, even though supported by no broad contemporary consensus and even though contrary to the longstanding historical practice."[45/] Indeed, to Judge Scalia

> [I]t would seem . . . 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 analogous precedents such a holding might be . . . If it contradicts a long and consistent understanding of the society . . . it is quite simply wrong.[46/]

To characterize the Constitution in these terms is to deny its most enduring significance. Indeed, Judge Scalia acknowledges that in his view "[t]o some degree, a constitutional guarantee is like a commercial loan; you can only get it if, at the time, you don't really need it. The most important, enduring and stable portions of the Constitution represent such a deep social consensus that one suspects that if they were entirely eliminated, very little would change."[47/]

It is difficult to understand how Brown v. Board of Education, 347 U.S. 483 (1954), is to be justified in principle if the constitutionality of a practice were established by the mere fact that the practice is longstanding and widely viewed as legitimate; certainly racial segregation in the schools met those criteria as of 1954. Similarly, under Judge Scalia's approach, decisions holding sex discrimination to violate the Equal Protection Clause, and decisions treating libel laws as posing First Amendment issues or apportionment laws as posing Equal Protection questions, all would have been plainly erroneous when rendered.

Each of these obvious examples demonstrates that there are times -- important times -- in which the precise office of the Bill of Rights is to challenge custom and challenge the "contemporary consensus" in order to vindicate the ideals of the Constitution, ideals from which it is all too easy and tempting to depart at any given time. To deny this truth is to drain the Bill of Rights of much of its significance.

Closely related to Judge Scalia's cramped view of the Bill of Rights is his theory of the limited role courts should play in remedying constitutional violations. Judge Scalia seemingly believes that a court should not "apply any remedy which require[] it to conduct continuing supervision of the parties' activities;" on that basis Judge Scalia faults the courts because they "have become deeply involved in day-to-day management of public

school systems, prisons, and state and mental insitutions, in order to assure what they consider an adequate remedying of past constitutional violations."[48/] But if there is one lesson to be learned from the thirty-year history of implementing the decision in Brown v. Board of Education it is that there are times when judicial "supervision of the parties' activities" is essential if constitutional violations are to be cured. To deny the courts that power, as Judge Scalia seemingly would do, is to allow constitutional wrongdoing to persist and thus to vitiate the Constitution's force.

In other areas of constitutional law, Judge Scalia is not nearly so constrained in his judicial approach. When it comes to matters of individual liberty, Judge Scalia urges "judicial restraint in the creation of new rights."[49/] But just as Justice Rehnquist has been anything but restrained in creating "new rights" in the States, so, too, Judge Scalia is not at all restrained in using the separation of powers rubric to create "new rights."

The decision in INS v. Chadha, 462 U.S. 919 (1983), for example, invalidating the legislative veto -- a decision whose result Judge Scalia championed[50/] -- is an act of heroic judicial activism that invalidated over one hundred federal laws, enacted over a fifty-year period, and did so by crafting a new constitutional limitation. Similarly, as we have seen, Judge Scalia appears inclined to hold laws creating independent regulatory agencies to be unconstitutional, notwithstanding the fact that such laws date to the turn of the century, that the popular branches have repeatedly followed this course, and that there is nothing in the Constitution which, in terms, makes such agencies unlawful. And, as noted, Judge Scalia has spoken warmly of the non-delegation doctrine, a doctrine that also has no explicitly constitutional base and that, if resurrected, would necessarily confer on the judiciary a roving commission to invalidate any law that judges found to be too vague.

The short of the matter is simply this. As with Justice Rehnquist, the slogan Judge Scalia offers to rationalize his restricted approach to construing and enforcing the Bill of Rights is refuted by the very approach he applies in other areas of constitutional jurisprudence. And once that slogan is stripped away, there is no escape from the deep disquiet that result from Judge Scalia's analogy of the Bill of Rights to a commercial bank loan, or to the common law, or from Judge Scalia's railings against decisions which are right in constitutional principle but are "supported by no broad contemporary consensus" and "contrary to longstanding historical practice." Here, too, then, we urge the Committee to probe deeply and question sharply, with respect to the philosophy Judge Scalia brings to the task of judging cases arising under the Bill of Rights.

* * *

We submit that the Congress should not confirm a nominee to the Supreme Court of the United States unless satisfied that the perspective Justice is committed to carrying out congressional will in statutory cases, to allowing Congress its primacy in making national policy, and to vindicating the values of the Bill of Rights in constitutional cases. For the reasons we have discussed, Judge Scalia's writings leave grave doubt as to whether he is so committed. Like this Committee, we will resolve those doubts and base our final judgment on his nomination on the record this Committee develops in the course of these hearings.

FOOTNOTES

1/ Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, 658 (1970).

2/ The Federalist No. 76, p. 386, (Bantam 1982).

3/ Rees, Questions for Supreme Court Nominees at Confirmation Hearings, 7 Tex L Rev 9;13, 945 (1983).

4/ 9 R. Mersky & J. Jacobstein, The Supreme Court of the United States Nominations 1916-72 at 180 (1975).

5/ Rehnquist, The Making of a Supreme Court Justice, The Harvard Record (Oct. 8, 1959) p. 7.

6/ Black, supra n. 1, at 663-64.

7/ The Federalist No. 76 supra n. 2.

8/ Black, supra n. 1, at 658.

9/ Eg., Sugarman v. Dougall, 413 U.S. 634 (1973) (dissenting opinion).

10/ Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 572 (1975) (dissenting opinion).

11/ Wallace v. Jaffree, __ U.S. __, 53 L.W. 4465 (1985).

12/ See Fry v. United States, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting).

13/ Eg., Bouds v. Smith, 430 U.S. 817, 840 (1977) (Rehnquist, J., dissenting).

14/ Woodwork Manufacturers v. NLRB, 386 U.S. 612, 620 (1967), quoting a letter by Judge Hand to Justice Frankfurter.

15/ Watt v. Alaska, 451 U.S. 259, 266 (1981), quoting Cabell v. Markham, 148 F. 2d 737, (2d Cir. 1945) (L. Hand, J.), aff'd, 326 U.S. 404.

16/ Minor v. Mechanics' Bank, 1 Pet. 46, 64.

17/ Speech on Use of Legislative History at 5, 15.

18/ Speech on Original Intention at 2.

19/ Id.

20/ Speech on Use of Legislative History at 15.

21/ United States v. Moria, 317 U.S. 424, 431 (1943) (dissenting opinion).

22/ Id.

23/ Sullivan v. Rehimer, 363 U.S. 335, 352 (1960) (dissenting opinion).

24/ Id. at 359.

25/ Uses of Legislative History at 8.

26/ Id. at 15-16.

27/ Youngstown Co. v. Sawyer, 343 U.S. 579, 587 (1952).

28/ Johnson v. U.S., 163 F. 30, 32.

29/ Scalia, The Doctrine of Standing As An Essential Element of the Separation of Powers, 17 Suffolk L. Rev. 881, 894 (1983).

30/ Center for Auto Safety v. NHTSA, __ F.2d __, No. 85-1231 (D.C. Cir. June 20, 1986) (Scalia, J, dissenting).

31/ Id.

32/ Id.

33/ The Doctrine of Standing, supra, at 897 (emphasis added).

34/ Art. II, Sect. 2, clause 2.

35/ Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986), aff'd on other grounds, __ U.S. __, 54 L.W. 5064 (July 7, 1986).

36/ Scalia, Historical Anomalies of Administrative Law, 1985 Sup. Ct. Hist. Soc. Y.B. 103, 106-10.

37/ Id.

38/ See 626 F. Supp. at 1398-99.

39/ 54 L.W. at 5006-08 & n. 4.

40/ Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

41/ Scalia, A Note on the Benzene Case, REGULATION, July-Aug. 1980, at 25, 28.

42/ Scalia, The Judges are Coming, reprinted in 126 Cong. Rec. 18920, 18972 (1980).

43/ Id.

44/ Id.

45/ Id. at 18921.

46/ Id. at 18922.

47/ Scalia, Economic Affairs as Human Affairs, CATO Journal 703, 708 (1985).

48/ The Judges are Coming, supra, at 18921.

49/ The Judges are Coming, supra, at 18921.

50/ Eg., Scalia, The Legislative Veto: A False Remedy for System Overload, REGULATION, Nov.-Dec. 1979, at 19.