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STATEMENT OF J. H. McQUISTON

on Nomination of Antonin Scalia
to the Supreme Court

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Mr Chairman and Members of the Committee:

McQuiston Associates is a "think tank" which is deeply involved with the Competition in Contracting Act (CICA) and the Equal Access to Justice Act (EAJA). Thus I have been analyzing the responses of many judges to important questions of policy generated therefrom, and have had to assess the extent to which the strong personal views of some judges have colored their opinions. Of particular concern has been how the personal views of a few strong-willed judges have actually caused major disruptions of the power-balance between the three Branches of government. "Judicial activism" we apply to foot-dragging as well as leaping ahead, if by so doing the will of Congressional statutes is thwarted in favor of the Executive.

Madison quoted Montesquieu, regarding the danger of a linkup between judges and the Executive:

> "Were [the power of judging] joined to the executive power, the judge might behave with all the violence of an oppressor." Federalist, No 47.

Because Art III prohibits federal judges from issuing advisory opinions, only rarely can we find out beforehand if the judge has a natural bias toward the Executive. But in a series of recent stinging attacks upon Congress, Judge Scalia leaves no doubt that his heart and head are entirely bound to the Executive and that he will use that loyalty in an "activist" manner if the situation presents itself. And in gratuitous remarks in Hirschey v FERC ("Hirschey III"), 777 F2d 1, 6 (1985), he counseled the Executive to act more aggressively against the relief which Congress just reenacted as P.L. 99-80.

Senator Levin said Nov 7, 1985, at S15038, that a federal judge must be compassionate, sensitive, committed to fairness, and forthright, to discharge properly the judicial duties. Nowhere are these qualities more necessary than for a Justice of the Supreme Court. I believe Hirschey III emphatically proves that Judge Scalia, betrothed to the Executive, simply does not measure up to the above standard and should not be elevated at this time.

Justice Rehnquist, in Walters v Natl Assn of Radiation Survivors, 53 LW 4947 (1985), quoted:

> "[C]ounsel can often perform useful functions * *. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty." Walters at 4953.

Such conduct of course would be reprehensible if practised by a judge. Yet, I submit that each of Judge Scalia's utterances in Hirschey III can only be classified as coming from a pseudo-counsel to the Executive. None can be reconciled with the kind of objectivity which Congress and the people of the United States expect their judges to exhibit. Certainly not a Justice of the Supreme Court.

Judge Scalia cannot plead ignorance of the Art III bar to spouting irrelevancies in judicial decisions. Yet the first paragraph of his comment in Hirschey III is devoted to saying that "the dictum discussed below" has no bearing on the outcome of the case.

Thereafter, he admits that the cost to recover Hirschey's expenses, no mean amount, exceeded the cost of litigating the case-in-chief, solely because the losing

agency objected to compensation so vigorously. Even though Congress stated the policy of EAJA was to alleviate such disparate costs, and that Courts were to interpret EAJA liberally in favor of applicants so the recovery cost would not inhibit recovery, Scalia spontaneously exhorted the Executive to explore more "loopholes" next time, the better to frighten-off anyone else seeking the protection of this remedial legislation. His tight-fisted attitude cannot mark compassion, or sensitivity, or fairness for the downtrodden.

Even more clearly & presently dangerous to the Republic and the ability to get the Congressional mandates "faithfully executed" and enforced, he crusades in Hirschey III to reform the way in which the Judiciary has traditionally divined the intent of Congress. He would substitute his personal idea of the law for the explicit declarations set forth in official Congressional Reports (not to mention censoring floor debates). We would be at the mercy of judicial whim rather than abiding by the carefully-crafted thoughts of those Congress entrusted with various fine points.

Also, he proposed that ambiguities discovered or manufactured by courts could not be corrected by succeeding Congresses without entirely re-stating in statutory form the former language, even though the restaters possess the power to "repeal and re-enact" as they wish any prior statute at any time. In effect, he would give the power to legislate to the Judicial Branch and deny it to the Congress.

These astounding propositions are the hallmark of either an "airhead" or a judicial activist of the most dangerous kind: an anarchist. Judge Scalia proposed that judges should resolve questions of law in disregard of Congress:

> "not on the basis of what the committee report said, but on the basis of what we judged to be the most rational reconciliation of the relevant provisions of law Congress had adopted." Hirschey III at 8 (emphasis added)

Judge Scalia's attack on the way Congress is organized cannot stand against Art I Sec 5 Cl 2, which expressly permits each House to "determine the Rules of its Proceedings." But for him to mount such a divisive attack in the face of tradition, long-entrenched caselaw, and the Constitution, reveals perhaps the extent to which he is prepared to be the Executive's apologist and hatchet-man. Such a person would not help unite the badly-divided Supreme Court.

But there is even more of concern to Congress in Hirschey III. To "prove" his ridiculous propositions, Judge Scalia set forth a fragment of a debate on a tax bill to say that the Judiciary Committee of the other House was infantile. If such "proof" is how Judge Scalia influences the Judicial Branch, then surely Hirschey III stands for incompetence. But otherwise, this "proof" clearly stands for danger to our society.

Moreover, the citation at n.1 clearly distorts the actual debate and answer given by Senator Dole, as reference to the Record clearly shows. The actual Record refutes Judge Scalia completely. Nor is that debate even remotely illustrative of how Congressional intent is to be divined, in the eyes of other judges. Nor will the House debate on EAJA support Judge Scalia's wild claim.

I urge this Committee to examine carefully Judge Scalia's outburst in Hirschey III. I believe there is just no option thereafter for the members except to deny confirmation at this time.

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