The CHAIRMAN. Now, the next panel is No. 4: Ms. Eleanor Smeal, National Organization for Women; Ms. Althea Simmons, NAACP; Ms. Judith L. Litchman, executive director, Women's Legal Defense Fund; Ms. Elaine Jones, associate legal counsel, Legal Defense Fund; and Mr. Benjamin Hooks, chairman of the Leadership Conference on Civil Rights.

Senator Biden I believe has asked these to come in tomorrow out of the 4 hours allotted to the minority. And so we will excuse them now and have them come tomorrow.

Panel No. 5: I will ask them to come around, please. Mr. Jack Clayton, Christian Legal Defense Foundation. Is he here? I do not believe he is here. Mr. Gerald Gilbert, president, Federal Bar Association. Mr. Gerald Ringer, Family Research Council of America. Mr. Bruce Fein, United Families Foundation. Mr. McCotter, Americans for Biblical Government.

Mr. Fein, I believe you are the only one here. If you will hold up your hand and be sworn.

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

Mr. FEIN. Yes.

The CHAIRMAN. Have a seat. Now the others who are not here will have the privilege of putting their statements in the record.

TESTIMONY OF BRUCE FEIN, UNITED FAMILIES FOUNDATION, WASHINGTON, DC

The CHAIRMAN. Mr. Fein, you may go ahead and make a statement here of 3 minutes.

Mr. FEIN. Thank you. My name is Bruce Fein, and I am speaking on behalf of United Families of America. United Families strongly supports President Reagan's nomination of Associate Justice William Rehnquist to be Chief Justice of the United States.

The nomination is a fitting occasion for examining the proper role of the Supreme Court in expounding the Constitution. Next year marks the bicentennial of the Constitution and its profound political wisdom that has enabled our Nation to grow and prosper.

The original Constitution provided a mechanism to alter its mandates consistent with the norm of self government, namely, by constitutional amendment. The Bill of Rights, the Civil War Amendments, the amendments prohibiting discrimination in the franchise based gender or age all testify to the capacity of the people to change the Constitution to accord with perceived contemporary needs.

The U.S. Supreme Court was not envisioned by our Founding Fathers as empowered to effectuate changes in the policies of the Constitution through creative interpretation. That was the major reason why Alexander Hamilton characterized the Federal judiciary as the least dangerous branch of government.

If the electorate is not to lose control over its destiny, it must be alert to the interpretive doctrines employed by Justices of the Supreme Court in addressing constitutional questions.

The contemporary Supreme Court is routinely asked to decide issues concerning abortion, church-state relations, reapportionment, liable of public officials, affirmative action, and discrimina-

tion on the basis of gender or handicap with enormous consequences for national public policy.

If the Justices are not constrained by the intent of our constitutional architects in deciding cases involving these issues, then they may transform our Constitution without popular approval as is required in the amendment process.

James Madison, the Father of the Constitution, lectured that if the sense in which the Constitution was accepted and ratified by the Nation be not the guide in expounding it there can be no security for a faithful exercise of its powers.

And Thomas Jefferson warned that our peculiar security is in the possession of a written Constitution. "Let us not make it a blank paper by construction," he stated. Experience testifies to the wisdom of Madison and Jefferson.

When original intent has been rejected by the Supreme Court as the foundation for constitutional interpretation, the Nation has suffered and our ideals of self-government have been mocked.

One thinks, for example, of Supreme Court decisions denouncing child labor laws. Justice Rehnquist deserves applause for his devotion to our constitutional aspirations and deep understanding of the judiciaries constitutional role.

His 14 years on the Supreme Court glitter with both erudition and general attachment to the intent of our Founding Fathers. At time, Justice Rehnquist has spoken in lonely dissent, but Justice Harlan was the sole dissenter from the odious separate but equal doctrine embrassed in Plessy against Ferguson, and Chief Justice Stone was the sole objector to the decision upholding a compulsory flag salute for Jehovah's Witnesses attending public schools in Minersville School District against Gobitis.

Both the Harlan and Stone dissents later became the law of the land when a majority of the Supreme Court accepted their views. United Families of America urges the Senate to confirm Associate Justice William Rehnquist as Chief Justice of the United States. Thank you, Mr. Chairman.

[Statement follows:].

TESTIMONY OF BRUCE FEIN
ON BEHALF OF UNITED FAMILIES OF AMERICA

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN SUPPORT OF ASSOCIATE JUSTICE WILLIAM REHNQUIST
NOMINATED AS CHIEF JUSTICE OF THE UNITED STATES

Mr. Chairman and members of the committee,

My name is Bruce Fein and I am speaking on behalf of United Families of America. United Families of America strongly supports President Reagan's nomination of Associate Justice William Rehnquist to be Chief Justice of the United States.

The nomination is a fitting occasion for examining the proper role of the Supreme Court in expounding the Constitution. Next year marks the bicentennial of the Constitution, and its profound political wisdom that has enabled our Nation to grow and prosper. Despite some initial flaws, the original Constitution provided a mechanism to alter its mandates consistent with the norm of self-government: namely, by constitutional amendment. The Bill of Rights, the Civil War Amendments, the Amendments prohibiting discrimination in the franchise based on gender or age all testify to the capacity of the people to change the Constitution to accord with perceived contemporary needs. The United States Supreme Court [in other words] was not envisioned by our Founding Fathers as empowered to effectuate changes in the policies of the Constitution through creative interpretation. That was a major reason why Alexander Hamilton characterized the federal judiciary as the "least dangerous branch" of government.

If the electorate is not to lose control over its destiny, it must be alert to the interpretive doctrines employed by Justices of the Supreme Court in addressing constitutional questions. As Alexis de Tocqueville presciently observed,

"[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one." Thus, the contemporary Supreme Court is routinely asked to decide questions concerning abortion, Church-State relations, reapportionment, libel of public officials, affirmative action, and discrimination on the basis of gender or handicap with enormous consequences for national public policy. If Justices on the Supreme Court are not constrained by the intent of our constitutional architects in deciding cases involving these issues, then they may transform our Constitution without popular approval, as is required in the amendment process.

James Madison, the father of the Constitution, lectured that if "the sense in which the Constitution was accepted and ratified by the Nation...be not the guide in expounding it, there can be no security...for a faithful exercise of its powers." And venerated Thomas Jefferson warned that "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction..." Experience testifies to the wisdom of Madison and Jefferson. When original intent has been rejected by the Supreme Court as the foundation for constitutional interpretation, the Nation has suffered and our ideals of self-government have been mocked. One thinks, for example, of Supreme Court decisions denouncing child labor laws.

Justice Rehnquist deserves applause for his devotion to our constitutional aspirations and deep understanding of the judiciary's constitutional role. His fourteen years on the Supreme Court glitter with both erudition and general attachment to the intent of our Founding Fathers. At times, Justice Rehnquist has spoken in lonely dissent. But Justice Harlan was the sole dissenter from the odious separate-but-equal doctrine embraced in Plessy v. Ferguson. And Chief Justice Stone was the sole objector to the decision upholding a compulsory flag salute for Jehovah's Witnesses attending public schools in Minersville School District v. Gobitis. Both the Harlan and Stone dissents later became the law of the land when a majority of the Supreme Court accepted their views.

Justice Rehnquist, we believe, like the esteemed Judge Learned Hand, rejects the idea that judges should play the role of Platonic Guardians in governing the country. His judicial record is spotless. United Families of America urges the Senate to confirm Associate Justice William Rehnquist as Chief Justice of the United States.

Senator BIDEN. Mr. Fein, I am glad to meet you. I watched you on television one night. I think you are a very bright guy. I think you are dead wrong, but I think you are very bright, I really do. I am not kidding. I was impressed. I was truly impressed with you.

Let me ask you: Do you think Justice Rehnquist's record reflects a Justice who in fact subscribes to your definition of original intent?

Mr. FEIN. I think the answer is largely yes. On the other hand, one recognizes that a Justice on the Supreme Court, unlike someone who maybe sits like me as a commentator, is dealing in a collegial body that is bound by a host of precedents that may not exactly reflect one's own interpretation.

Senator BIDEN. Why is he bound by any precedent?

Mr. FEIN. Simply because there is a need for stability and predictability in the law that at times outweighs one's desire simply to fashion as though one was writing tabula rasa.

Those institutional concerns do not bind someone who is simply a commentator, a critic, or someone who praises a particular decision of the Court.

Senator BIDEN. Knowing and having read Justice Rehnquist's writings, as we both have, do you think in fact that is the reason Justice Rehnquist has signed on to a number of the decisions confirming—decisions such as *Baker* v. *Carr,* decisions relating to the child labor laws to which you referred to? Do you think that is the only reason he has signed on?

Mr. FEIN. Well, he was not there, as he explained earlier, to author those opinions when *Baker* v. *Carr* was decided in 1962.

Senator BIDEN. No, but what he pointed out was there are follow-on cases that relate to those principles. In order to reach the conclusion he reached in those other cases, he had to accept the proposition that his tack was the majority position taken in both those cases.

Do you think he has accepted that as a consequence of his desire to be collegial or because he believes it, based on having read what he has written?

Mr. FEIN. I think it is somewhat in between those two alternatives.

Senator BIDEN. So do I.

Mr. FEIN. I think there is a need for predictability in the law. You cannot have a system function if on every occasion when an issue arises the Court is going to go back and re-examine every precedent since 1789. I think in many cases if he were sitting and the issue was to be decided without any past history, he would not have agreed with many of those Warren Court decisions.

Senator BIDEN. The Justice Department is probably in an apoplexy with your testimony, but I think you are being honest and I agree with your interpretation, both of what original intent means and what Justice Rehnquist's instincts are.

Well, my time is up. By the way, I would love you to come by my office sometime, seriously. I am serious. I invite you to come by because I would love to discuss these issues with you and convert you.

Mr. FEIN. I will accept the invitation, Senator.

The CHAIRMAN. He is a good talker. He might persuade you.

Senator BIDEN. He is a good talker. I have listened. He is extremely bright, and unlike many of the conservatives on the right—and I am not being smart, Mr. Chairman. Unlike many conservative commentators, he knows his facts and he is consistent and he is honest, and he is consistently wrong.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator BIDEN. He is really good.

Senator DECONCINI. In assessing Judge Rehnquist, your support for Justice Rehnquist as a Chief Justice, what was the number one criteria that you decided met what you thought was needed for this position?

Mr. FEIN. I think what is most important is constitutional philosophy as a bedrock foundation. There are other components of Rehnquist's background that I think commend himself for confirmation.

For example, his collegiality, his recognition that working in a body where he is not the sole decider and working in an institution where there is a need for predictability, for a so-called massing the Court. That's a term that Chief Justice William Howard Taft used. That he would be an excellent Chief not only in terms of his own understanding of the constitutional role of the Court, but also on recognizing the limits of one person, even as a Chief, to have his way on every occasion and thereby at times working to obtain a consensus that is very much needed to have a predictability in the law which has really been lacking over the last decade.

Senator DECONCINI. Mr. Fein, do I take it, then, from that answer that, in your opinion, the number one criteria to be a Supreme Court Chief Justice is a philosophical approach that you represent and that you feel that Justice Rehnquist represents?

Mr. FEIN. Yes, and I think that would really be true for all of the Justices, for the Associate Justices as well. Consensus-building is more important for the Chief than it is for an Associate Justice.

Senator DECONCINI. I take it from that that you put the philosophy above experience, ability to write, past performance in the profession.

A hypothetical, if you had someone of the philosophy of Justice Rehnquist, or yourself, who had never served on the bench, and yet you had an experienced jurist, say, of 15 years who did not meet that philosophical test, you would decide with the one that had the philosophical bent that you subscribe to versus the one that had the experience. Is that correct?

Mr. FEIN. Yes, I would. However, I would add that I would not believe that the one I did not give first approval to would be unqualified to serve on the Supreme Court. It is simply that in my estimation, in evaluating the important role of the Supreme Court and where the evolution of jurisprudence is likely to lead in an enlightened fashion or retrogressive from a particular perspective, that philosophy would be more important in my judgment.

Senator DECONCINI. What is Justice White or Justice Brennan or Justice Stevens or somebody like that, or Justice Marshall, had been nominated for Chief Justice? Would you rule them out because of their philosophical difference?

Mr. FEIN. I would not rule them out as being unqualified.

Senator DECONCINI. Would you support them if they had been nominated?

Mr. FEIN. No, I would not have enthusiastically supported them. On the other hand, I would testify that they were qualified to become Chief Justice of the United States. That is a different criteria than, say, well, I am enthusiastic that they have received the appointment.

Senator DECONCINI. I agree. But you would not think that they should not be seated as Chief Justice.

Mr. FEIN. That is correct.

Senator DECONCINI. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. One question. You know where Senator Biden comes from philosophically. You know where Paul Simon comes from philosophically. If you were a member of the Senate Judiciary Committee and you were of our political philosophy rather than yours, would you vote to confirm Justice Rehnquist or would you not?

Mr. FEIN. I would vote to confirm the nomination of William Rehnquist. But I would like to briefly enlarge on a major reason for that conclusion.

From my examination of the role of the Senate in the confirmation process, as understood by Hamilton in the Federalist Papers and in examining the evolution of the appointments power, it seems to me that there was a deliberate effort to fasten on one individual accountability for choosing a particular nominee for the Supreme Court with a particular philosophy. And therefore, as Hamilton explained in the Federalist Papers, he envisioned rejection of nominees on the basis of cronyism, on the basis of corruption, or incompetence. He did not envision the Senate in the confirmation role as trying to screen out nominees on the basis of philosophy.

And in light of the importance that I think needs to be given to holding a President accountable for his nominees and how they fashion jurisprudence, it is important for the Senate to be very reserved in seeking to reject a candidate for the Supreme Court simply because of a philosophical disagreement with the President.

Senator SIMON. So you would disagree with Justice Rehnquist's article in the Harvard Law Record back in 1959 in which he says we ought to examine that very, very carefully.

Mr. FEIN. Well, I am not so sure I would disagree in this sense, Mr. Senator: That I think it is important that during the conformation proceedings, there is aggressive questioning so that the candidate's philosophy is known to all the people. Otherwise, there is not an ability to fasten accountability on the President if a nomination comes up and he is quickly confirmed, and there is not a full and complete exploration of what his philosophical views are. So I am in total agreement that it is very important to illuminate and to inform the American public through questions as to what a candidate's philosophy is. But that is a different function than deciding when it comes to voting to approve or disapprove a candidate to use a philosophical test.

Senator SIMON. One other thing. After you meet with Joe Biden, let me know whether you convert him or he converts you. Thank you, Mr. Fein.

Senator BIDEN. Mr. Chairman, before you release this witness, I know we are going really rapidly, so I cannot help but just to ask two more questions.

You believe that the function of the Senate is to illuminate but that illumination should not shed any light on how we vote.

Mr. FEIN. I am saying that illumination is not necessarily congruent with the considerations that affect your vote. It is what Woodrow Wilson referred to as the informing function of Congress.

Senator BIDEN. I understand.

Mr. FEIN. Which he thought was its most important function.

Senator BIDEN. In fact, you are aware of the debate that Hamilton's point of view was in the minority, are you not, at the time of the Federalist Papers? He did in fact write——

Mr. FEIN. Hamilton authored the Federalist Papers.

Senator BIDEN. I know. He authored the Federalist Papers, but you are aware of that his view—not in the Federalist Papers—but his view at the time was a minority view? You are aware of that. The Constitution debates took place in 1787. You are aware that in fact he was outvoted?

Mr. FEIN. Yes, I think you are referring to a different issue. Hamilton had proposed——

Senator BIDEN. The role of the Senate.

Mr. FEIN [continuing]. An exceedingly strong executive in the Constitutional Convention which was not accepted.

Senator BIDEN. He also proposed, along with others, and was outvoted on two occasions. He also proposed that in fact the President be the one to not only propose, but to dispose of who the nominee to the Court should be in the appointment power.

He in fact was, in the Virginia plan, clearly his view was not the majority view. But without delaying, let me ask you one other question. You were telling me that if Justice Brennan were picked by this President—well, if Justice Brennan were picked by this President, rabbits would be dogs. It is not likely.

But if Justice Brennan were picked by——

Mr. FEIN. Remember, Earl Warren was picked by Dwight Eisenhower.

Senator BIDEN. Yes, but he did not know any better, and everybody knows Justice Brennan.

If Senator DeConcini is elected President in 1988, he is sure to pick me as his Attorney General. And if that occurs and I recommend to him Brennan and, God forbid, something happens to Rehnquist, he resigns; do you mean to tell me you would be here testifying on behalf of and suggesting we vote for Brennan to be Chief Justice.

Senator DECONCINI. That is what he said.

Senator BIDEN. I want to hear him say it again.

Mr. FEIN. What I said was that I would testify that he was qualified to be Chief Justice of the United States. Yes, I would.

Senator BIDEN. Is that different than supporting him for Chief Justice?

Mr. FEIN. I think it is. I think one can say one is qualified for an office but not be an enthusiastic supporter of that particular candidate.

Senator BIDEN. Now you are sounding like a politician, but thank you.

Mr. FEIN. I think you recognize that distinction all the time. You may vote to confirm someone to be Secretary of State because you think they are qualified. You may not be an enthusiastic supporter of them, but you think that an appropriate decision that someone has to make.

Senator BIDEN. Good. I look forward to seeing you. I really do.

The CHAIRMAN. I want to thank you very much. You have proved to be very articulate, and we appreciate your presence.

Mr. FEIN. Thank you, Mr. Chairman and the committee.

The CHAIRMAN. Now, panel 6 is Ms. Estelle Rogers, N.O.W. Legal Defense and Education Fund; Ms. Susan Nicholas, Women's Law Project; Ms. Nancy Broff, Judicial Selection Project; Ms. Irene Natividad, national chair, National Women's Political Caucus. The distinguished ranking member has asked that these be heard tomorrow so we will carry that panel over.

The next panel is panel No. 7, and I will ask them to come around. Ms. Barbara Dudley, executive director, National Lawyers Guild; Mr. William Kunstler, Center for Constitutional Rights; Ms. Nancy Ross, executive director, Rainbow Lobby; Mr. Dennis Balske, legal director of The Southern Poverty Center; and Ms. Beverly Treumann, executive director, NICA—Nuevo Instituto de Centro-America.

Mr. Kunstler is the only one here.

Senator BIDEN. Let the record show that they are not waving to one another.

The CHAIRMAN. Do you swear that the testimony that you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KUNSTLER. I do.

The CHAIRMAN. I want to announce that the other members—Ms. Dudley or Ms. Ross or Mr. Balske or Ms. Treuman—if they care to place statements in the record, we will be glad to have them do so.

TESTIMONY OF WILLIAM KUNSTLER, CENTER FOR CONSTITUTIONAL RIGHTS, NEW YORK, NY

Mr. KUNSTLER. May I proceed, Mr. Chairman?

The CHAIRMAN. You may proceed, for 3 minutes.

Mr. KUNSTLER. Mr. Chairman, my statement I have already submitted for the record, and I am not going to repeat. I am going to break up the cascade of plaudits that have come, as you probably expected.

I am a founder and vice president of the Center for Constitutional Rights in New York City, and without belaboring the point, its 20 years have been spent in trying to further the Constitution.

In relation to my association with that organization, I was one of the lawyers in *United States* v. *United States District Court.* I argued it in the District Court, and I argued it in the Circuit Court,