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Testimony on the Nomination of William Rehnquist as Chief Justice

Senate Judiciary Committee

Presented by
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Mr. Chairman, the National Gay and Lesbian Task Force joins its colleagues in the civil rights community in opposing the nomination of Justice William Rehnquist as Chief Justice of the United States. Justice Rehnquist, in his career on and off the bench, has demonstrated a singular disregard for fundamental constitutional principles. He has approached major cases involving civil liberties and civil rights with one end in mind: the furtherance of his political and social agenda. In the process, he has disregarded--indeed trampled upon--the constitutional rights of all Americans. This record of dangerous judicial activism should not be rewarded by elevation to the highest judicial post of our nation.

Gay and lesbian Americans have not been exempt from Justice Rehnquist's efforts to limit the rights of minorities. He has supported restrictions on the free speech and free association rights of gays and lesbians and he has endorsed denial of the right to privacy for homosexuals. These positions are threats to all Americans, not just homosexuals, because once we start making exceptions to fundamental constitutional rights for one group, it becomes increasingly easy to allow the government to intrude on the freedoms of others.

I want to focus today on two cases in which Justice Rehnquist participated that demonstrate his support for restricting the rights of minorities; in these cases, gay and lesbian Americans.

In 1978, Justice Rehnquist dissented from a denial of cert. in a case involving a gay student group at the University of Missouri. (Ratchford, President, University of Missouri, et al. v. Gay Lib, et al.) The university had refused recognition to the student group. The U.S. Court of Appeals for the Eighth Circuit, in a decision the Supreme Court chose to leave standing,

said that the denial of recognition had violated the free speech and free association rights of the students. Justice Rehnquist did not see it that way at all. Because the state of Missouri had made sodomy illegal, the state "may prevent or discourage individuals from engaging in speech or conduct which encourages others to violate those laws," Justice Rehnquist said. This was despite a formal statement from the students that they would not advocate illegal activity and the false assumption that the only reason for homosexuals to associate is to advocate sodomy.

In other words, Justice Rehnquist was saying that simply because of their status--their being homosexuals--these students could be denied the right to free speech and free association. He likened the gathering of gay and lesbian students in a social and political organization to "those suffering from measles...,in violation of quarantine regulations,...associat[ing] with others who do not presently have measles, in order to urge repeal of a state law providing that measle sufferers be quarantined. The very act of assembly under these circumstances undercuts a significant interest of the State...."

Our country has long had a tradition that conduct, not status, is punishable; it seems Justice Rehnquist would like to reverse that tradition. By the logic he expressed in this dissent, the state could restrict the association and speech rights of any group that might support directly or indirectly activity that is illegal. Would Justice Rehnquist therefore also outlaw all radical political parties or forbid any group from gathering that advocated civil disobedience?

Justice Rehnquist continued this attack on the fundamental rights of Americans, and in particular those Americans who happen to be gay or lesbian, in last month's decision in Bowers v. Hardwick. He joined in Justice White's majority opinion that is a rhetorical attack on homosexuals and homosexuality rather than a cogent legal analysis of the case presented to the Court. The Court ruled that homosexuals, simply because of their status as homosexuals, do not have a right to privacy in the conduct of their private, consensual sexual activities. Even though the law before the Court outlawed sodomy for homosexuals and heterosexuals, the Court focused only on homosexuals--using social and religious views rather than the law to justify their opinions.

As Justice Blackmun pointed out in his brilliant dissent, "this case is about 'the most comprehensive of rights and the right most valued by civilized men', namely, 'the right to be let alone'." He stated later that "it is precisely because the issue raised by this case touches the heart of what makes

individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority....That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry."

This case raises fundamental issues for all Americans. If the Court can whittle away at the privacy rights of some, they can soon move on to reverse the trend to protection of privacy rights for all. A nominee for Chief Justice of the United States whose views are so antithetical to those embodied in the Constitution must be carefully scrutinized.

Mr. Chairman, my organization represents the interests of the ten percent of the American population--and the ten percent of your constituents--who are lesbian and gay. As citizens of this country we ask for no special favors, merely the same fundamental constitutional rights that all Americans should have. Justice Rehnquist, on the basis of his record, would judge us and deny us our basic constitutional rights of free speech, free association, and privacy simply because of who we are. We are not the only minority group for whom such a record has been established by Justice Rehnquist. And there is no guarantee that this disregard for constitutional protections would not expand over time. Justice Rehnquist has not been an impartial judge: he has demonstrated prejudice against significant portions of the American population in an ill-disguised attempt to impose his personal social agenda--a most dangerous form of judicial activism. The National Gay and Lesbian Task Force therefore urges this committee to reject the nomination of William Rehnquist as Chief Justice of the United States.