Mr. Askin, you may proceed.

TESTIMONY OF A PANEL CONSISTING OF FRANK ASKIN, PROFESSOR OF LAW, RUTGERS UNIVERSITY, NEWARK, NJ.; GARY ORFIELD, PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF CHICAGO, CHICAGO, IL; AND MELANNE VERVEER, PUBLIC POLICY DIRECTOR, PEOPLE FOR THE AMERICAN WAY, WASHINGTON, DC

Mr. ASKIN. Thank you, Mr. Chairman.

I am Frank Askin. I am a member of the faculty of Rutgers Law School in Newark, NJ, where I have taught constitutional litigation and Federal procedure for the past 29 years.

In 1970, I established the Constitutional Litigation Clinic as part of the academic program at the law school. One of the earliest matters my students and I handled in our clinic was the case of *Tatum* v. *Laird,* about which there has been much comment in the past 2 days.

It is my experience as the chief counsel in the *Tatum* case, which forms the basis of my testimony, because I believe, based on that experience, that serious doubt exists as to whether Justice Rehnquist possesses the judicial temperament appropriate to the Chief Justice of the United States.

My own personal experience suggests that Justice Rehnquist is a most partisan and result oriented jurist. Characteristics which may indeed disable him from being an even-handed, an impartial administrator of what has heretofore been considered the most respected judicial institution on the face of the earth.

I have already submitted a lengthy written statement, and in the time allotted for my oral presentation, it is impossible for me to do more than summarize its conclusions without repeating its evidentiary basis. So let me state in capsule summary that *Tatum* was a case in which I believe Justice Rehnquist breached the most elementary and universal principle of judicial ethics; that no one can be both advocate and judge in the same case.

The fact is that after serving as a most partisan advocate of the government's position on both the law and facts of the case, in testimony before a Senate investigating committee, Justice Rehnquist joined the Supreme Court in time to cast the deciding vote in favor of his own side in the dispute.

It was as if Billy Martin resigned as manager prior to the seventh game of the World Series, and accepted appointment as the umpire.

It was not merely that Justice Rehnquist in a colloquy with Senator Ervin before the Senate's Constitutional Rights Subcommittee expressed his personal opinion on the case, and the very legal issue that he ultimately decided as a member of the Court. That was the least of his ethical sins.

What he did was to transport his own view of a vigorously contested factual dispute into the hallowed marbled halls of justice.

I assure you that the plaintiffs in the *Tatum* case did not have any of their members or advocates sitting in the court's conference and casting a vote on the outcome. I think this is a most important factor for the committee to understand, for in his very facile opin-

ion, refusing to recuse himself in *Tatum,* Justice Rehnquist would have us believe that all he did was join an opinion which affirmed a legal view which he had previously endorsed. Not true.

He signed onto an opinion which endorsed disputed facts of which Assistant Attorney General Rehnquist had been a major proponent. The evidence of the serious allegations is set forth in my written testimony, which I hope the Committee will carefully read and consider.

I recognize that my testimony can be dismissed as the sour grapes of a defeated advocate. That is why I included in my written submission the recorded views of the late Senator Sam Ervin, who wound up being my co-counsel in the Supreme Court after filing an amicus brief. But, in addition to his recorded expressions, I will never forget the incredible disappointment that Senator Ervin expressed at Justice Rehnquist's behavior in *Tatum.*

I must tell you on the Friday before the Monday of the oral argument in *Tatum,* I met with Senator Ervin in his office to discuss that argument. As I was leaving, I resurrected an earlier conversation, and said, "Senator, you know, we still have time to file a motion for recusal of Justice Rehnquist. Do you think we should do it?" He replied to me, "Frank, do not worry. I know Justice Rehnquist. He is very conservative but he is a very honorable man. He will not sit on this case."

Monday morning, the case was called. Senator Ervin and I moved up to the front bench. And again I whispered to him, I said, "Senator, Justice Rehnquist has not left the bench." He was still nonplussed. He said "do not worry, he is not going to participate, he just wants to listen."

It was a year later after Justice Rehnquist cast that deciding vote in *Tatum* that I ran into Senator Ervin in Washington at a conference. And he saw me, and he came striding across the room and he said, Frank, I sure was wrong about Justice Rehnquist, wasn't I?"

[Statement follows:]

THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS
Campus at Newark

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TESTIMONY OF

FRANK ASKIN

Professor of Law, Rutgers Law School, Newark, New Jersey

Prepared for

United States Senate Judiciary Committee Hearing
July 29, 1986
on Confirmation of Justice William Rehnquist
as Chief Justice of the United States

Counsel Frank Askin-Jonathan M Hyman (Administrative Director) - Eric Neisser-Barbara Stark

My name is Frank Askin. I have been a member of the faculty of Rutgers Law School, Newark, New Jersey, for the past 20 years. I served as Special Counsel to the House Committee on Education and Labor during part of the 95th Congress, and served as special counsel to Senator Moynihan during the summer of 1978.*

However, my credential most relevant to the testimony I will give today is that I was chief counsel for the plaintiffs, both in the lower courts and in the Supreme Court, in the case of Laird v. Tatum,408 U.S.1 and 409 U. S.824 (1972). It is my view that the role played by Mr. Justice Rehnquist in the disposition of that case raises the most serious questions as to whether he possesses the judicial temperament appropriate to a Chief Justice of the United States. The fact is that he sat on and cast the deciding vote in a case in which he had been involved in a partisan capacity before being appointed to the bench.

Since I recognize that my views will be immediately suspect as those of a defeated and disgruntled advocate, I must at the outset enlist the support of the late Senator Sam Ervin, whose reputation as a constitutional and legal scholar, as well as his personal integrity, is surely beyond reproach.

Senator Ervin, because of his intimate involvement in both the factual background of the Tatum litigation and the Supreme Court argument itself, was the only other person in a position to be fully aware of Justice Rehnquist's unique role in that matter and the ethical propriety of his insistence on casting the decisive vote when it came before the Court.

Senator Ervin had filed an amicus brief with the Court in Tatum and, as a result, shared part of my oral argument. In essence, he became my co-counsel in the Supreme Court.

In a letter dated 3 years after the Tatum decision, Senator Ervin commented that "Justice Rehnquist ought to have disqualified himself from participating in the case because he had acted as counsel for the Defense Department in the hearing before the Senate Subcommittee on Constitutional Rights." (I attach a full copy of Senator Ervin's letter hereto as Attachment A.)

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* By way of disclaimer, I must also note that while I am also one of the three General Counsel of the American Civil Liberties Union, I speak here today only for myself and do not represent the ACLU, which by its own by-laws is forbidden to support or oppose nominees for elective or appointive public office.

Nor was this the only time Senator Ervin made known his views on Justice Rehnquist's participation in the Tatum decision.On July 14, 1973, Senator Ervin had inserted in the Congressional Record an article concerning the case which had appeared in the Hofstra Law Review, and which Senator Ervin described as "excellent." (Cong. Rec., 7/14/73, S 13481.) In that article, the author commented upon "the serious ethical dilemma Mr. Justice Rehnquist's participation in Laird v. Tatum has posed for himself, the Court and the Constitution." (Id. at S 13485)

Let me state at the outset that with the added wisdom drawn from an additional 14 years of teaching federal procedure and practicing in the federal courts, I am convinced now more than ever that Mr.Justice Rehnquist acted in an ethically improper way in regard to the Tatum case. I believe his actions in regard thereto marked him as an intensely partisan, result-oriented jurist who was willing to evade and avoid the most basic principles of judicial ethics to make sure the case turned out in one particular way -- and more importantly, in favor of his own former "clients."

I recognize these are serious allegations; and in order to substantiate them I must now explain in some detail the factual and procedural history of the case of Tatum v. Laird.

I filed the Tatum complaint in the Federal District Court in the District of Columbia in the early spring of 1970 on behalf of a number of individuals and organizations involved in the civil rights and anti-war movements. The complaint alleged that the United States Army and Department of Defense had established a wide-ranging program of surveillance and infiltration of law-abiding, domestic organizations, maintained the information gathered in computerized data banks and had widely disseminated its intelligence reports to federal, state and local civilian agencies as well as military offices.

It was the theory of the complaint that the Army's Domestic Intelligence Program violated the First Amendment of the United States Constitution, and that the plaintiffs, all of whom had been targets of the military's surveillance program, were the proper parties to seek to enjoin it.

At our initial hearing in the District Court, before the filing of an answer or an opportunity to institute discovery proceedings, the District Judge dismissed the Complaint for failure to state a claim upon which relief could be granted, taking the position that there was nothing in the First Amendment which precluded the Army from carrying out the program described by the plaintiffs.

In April 1971, the Court of Appeals reversed the District Judge and ordered the case remanded for a trial of plaintiffs' allegations. The defendants petitioned for certiorari.

Meanwhile, Senator Ervin's Constitutional Rights Subcommittee opened its own hearings into the Army's Domestic Intelligence Program.

On March 9 and again on March 17, 1971, Mr. Rehnquist, who was then Assistant Attorney General, testified before the Committee on behalf of the Department of Justice. During that testimony, the witness engaged in a wide-ranging discussion both of his views on the power of the Executive Branch to surveil and keep data files on political activists as well as the law and facts, as he viewed them, involved in the case of Tatum v. Laird, then pending before the U.S. Court of Appeals for the District of Columbia.

In one exchange,the witness (now Justice Rehnquist) told Senator Ervin:

> My ... point of disagreement with you is to say whether as in the case of Tatum v. Laird that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government. (Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the United States Senate, 92nd Cong, 1st Sess., on "Federal Data Banks, Computers and the Bill of Rights," Part I, at 864-5. Hereinafter cited as "Hearings.")

In his wide-ranging colloquy with Senator Ervin, Attorney General Rehnquist made clear his disagreement with the substantive constitutional claims of the Tatum plaintiffs and challenged the basic factual predicate of the Tatum complaint: that Army surveillance cast a pall over civilian political activity and chilled its exercise, as the following excerpts demonstrate:

> SENATOR ERVIN: Don't you think a serious constitutional question arises where any government agency undertakes to place people under surveillance for exercising their first amendment rights?
>
> MR. REHNQUIST: .... When you ... say: Isn't a serious constitutional question involved, I am inclined to think not, as I said last week. This practice is undesirable and should be condemned vigorously, but I do not believe it violated the particular constitutional rights of the individuals who are surveyed.
>
> SENATOR ERVIN: ... [D]o you not concede that government could very effectively stifle the exercise of first amendment freedoms by placing people who exercise those freedoms under surveillance?
>
> MR., REHNQUIST: No, I don't think so, Senator. It may have a collateral effect such as that but certainly during the time when the Army was doing things of this nature, and apparently it was fairly generally known it was doing things of this nature, those activities didn't deter 200,000 or 250,000 people from coming to Washington on at least one or two occasions to express their first amendment rights by protesting the war policies of the President.
>
> * * *
>
> SENATOR ERVIN: Well there is also evidence here of photographers having been present at many rallies. Army intelligence agents pretending to be photographers were present at many rallies, took pictures of people, and then made inquiries to identify these people and made dossiers of them. Do you think that is an interference with constitutional rights?
>
> MR. REHNQUIST: I do not, Senator.....I don't think the gathering by itself, so long as it is a public activity, is of constitutional stature. (Hearings, at 861-62.)

It was those exchanges with Senator Ervin -- especially the first, in which the future Justice expressed his view on the precise legal issue upon which he was later to cast the decisive vote in the Supreme Court -- which has most often been cited as the reason why Justice Rehnquist ought to have recused himself from the Tatum argument and decision. See generally, Note, "Justice Rehnquist's Decision to Participate in Laird v. Tatum," 73 Col. L. Rev. 106 (1973); Note, "Laird v. Tatum: The Supreme Court and the First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity," 1 Hofstra L. Rev. 244 (1973).

In fact, it was neither the only nor the most persuasive of the reasons calling for recusal. In my view, the really egregious ethical breach committed by Justice Rehnquist had to do with the fact that he was an advocate, and indeed a "witness" to crucial and disputed factual issues which were resolved and relied upon in the majority opinion of Chief Justice Burger. To my mind, it was shocking that Justice Rehnquist should have joined in an opinion relying upon alleged facts upon which he had already expressed his own biased and partisan view as an advocate before a Senate investigating committee.

Justice Rehnquist's view of the "facts" of the Tatum litigation were clearly expressed by him in his earlier testimony. In his testimony on March 9, 1971, witness Rehnquist categorically told the Senate that the Army had disbanded its domestic intelligence program and that those functions had been turned over to the Justice Department. His testimony was as follows:

> The function of gathering intelligence relating to civil disturbance, which was previously performed by the Army as well as the Department of Justice, has since been transferred to the Internal Security Division of the Justice Department. No information contained in the data base of the Department of the Army's now defunct computer system has been transferred to the Internal Security Division's data base. However, in connection with the case of Tatum v. Laird now pending in the U.S. Court of Appeals for the District of Columbia Circuit, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed. (Hearings, at 601)

There are actually four significant factual assertions contained in that statement of witness Rehnquist:

1) The Army had ceased its domestic intelligence program;
2) The Army's computer system was defunct;
3) No information gathered through the Army's intelligence program had been transferred to the Justice Department;
4) There was only one remaining printout from the Army's computer which was destined for destruction at the conclusion of the Tatum litigation.

I do not question that Mr. Rehnquist believed everything he testified to before the committee. But they were not undisputed and established "facts."* They were factual claims made by the government in response to the Tatum complaint, which were disputed by the plaintiffs, and which plaintiffs never had an opportunity to rebut at an evidentiary hearing -- because District Judge Hart had considered the facts irrelevant and dismissed the complaint on a Rule 12(b)(6) motion to dismiss for failure to state a claim.

However, after the Court of Appeals reversed Judge Hart's ruling and remanded the case for a full evidentiary hearing, the defendants attempted to present these alleged "facts" to the Supreme Court in an effort to make it appear that there was no basis at all to plaintiffs' complaint and that if there ever had been a real controversy at stake it was by then moot, since the Army had dismantled its domestic surveillance program.

Precisely because of this effort by the defendants to create a fictitious factual record in the Supreme Court, the Statement of the Case in the Brief for Respondents opened as follows:

> The only issue before this Court is whether the complaint states a justiciable claim entitling plaintiff's to a hearing. Because much of the government's Statement of the Case is based upon representations and documents which are not properly part of the record, and because the government ignores many of the material allegations made by plaintiffs, we set out in some detail the allegations of the complaint and the facts which underlie them. (Respondents' Brief in the Supreme Court of the United States, October Term, 1971, No. 71-288, at 2.)

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* Indeed, it was subsequently demonstrated that at least some of these claims were patently false, although there is no reason to believe that Attorney General Rehnquist knew it at the time. Presumably, he was merely repeating "facts" which had been supplied to him by the Department of Defense.

Most of Respondents' 19-page Statement of the Case went on to challenge the claims of the defendant (the same claims made by Attorney General Rehnquist before the Ervin Committee) that the Army had ceased its surveillance program and had dismantled its computerized intelligence system, and set forth the record allegations disputing those alleged "facts." Respondents' Statement further pointed out that there was a factual allegation, unchallenged on the record before the Court, that the intelligence information collected under the surveillance program had been disseminated widely to military and civilian agencies of government, a claim apparently disputed by Mr. Rehnquist's testimony that no information had been transferred to the Justice Department's data base. (Because of the centrality of these facts to my main thesis, I am appending the entire Statement of the Case from the Brief of Respondents as Attachment B.)

(I must at this point apologize for the length and detail of this statement. However, I believe the detail is essential to a proper understanding of the role of Mr. Justice Rehnquist in the litigation of this case.)

As a matter of legal analysis, it might be possible to conclude that these "factual" claims asserted by the government in its brief and by Attorney General Rehnquist before the Ervin Committee were irrelevant and unessential to the decision in Tatum, which held that the plaintiffs' complaint was not justiciable. The problem with that analysis lies not only in the fact that the government's lawyers thought it important, but also in the fact that the majority opinion, which Mr. Justice Rehnquist joined, makes much of them.

In establishing the "factual" predicate for the decision, the majority opinion stated:

> By early 1970, Congress became concerned with the scope of the Army's domestic surveillance system; hearings on the matter were held before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. Meanwhile, the Army, in the course of a review of the system, ordered a significant reduction in its scope.

> For example, information referred to in the complaint as the "blacklist" and the records in the computer data bank at Fort Holabird were found unnecessary and were destroyed. One copy of all the material relevant to the instant suit was retained, however, because of the pendency of this litigation. (408 U.S. at 7.)

That language has a remarkable resemblance to the testimony of Attorney General Rehnquist before the Ervin Committee. And -- I cannot over-emphasize -- these "facts" were sharply disputed by the plaintiffs, who did not happen to have any of their "witnesses" sitting on the Court which voted 5 to 4 to uphold the government's position.

In response to the plaintiffs' post-decision motion for rehearing and recusal, Justice Rehnquist minimized his personal connection to the facts of the Tatum case and defended his prior comments on the legal questions with a lengthy discussion which is best summarized by his unexceptional observation that no Justice arrives on the Court with a mind which is "a complete tabula rasa in the area of constitutional adjudication."

The Justice's opinion insisted that his only comment on the "facts" of Tatum at the Ervin Committee hearings was contained in the statement "one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed." This comment totally ignored his personal testimony on the dis-establishment of the Army's intelligence program, an issue much disputed by the plaintiffs but asserted in the majority opinion as if it were established fact. (Mr. Justice Rehnquist's opinion denying plaintiffs' motion for recusal is printed at 409 U.S.824 (1972).)

The fact is that any careful reading of Attorney General Rehnquist's testimony before the Ervin Committee leads to the inescapable conclusion that, as a government attorney, he had been an advocate for a very partisan view of both the facts and the law in Tatum v. Laird and, therefore, could not ethically participate as an impartial judicial officer in its ultimate decision.

As the New York Times commented editorially at the time: "The question is not the Justice's prior views or opinions on matters before the Court; it is rather his prior active involvement in a case itself ..." (New York Times, editorial page, October 12, 1972.)

A similar conclusion was reached by several academic commentators, even without the benefit of a detailed and intimate familiarity with the factual context of the case. A note in the Columbia Law Review concluded as follows:

> Justice Rehnquist did not violate the specific provisions of Section 455 , the only statutory standard to which he was bound. His participation was not, however, consistent with the goal of an impartial judiciary, as embodied in the Code of Judicial Conduct, section 144, section 7 of the Administrative Procedure Act, and Supreme Court pronouncements. Having made widely publicized statements on the factual and legal issues involved in Laird v. Tatum, Justice Rehnquist failed to take adequate cognizance of the need to maintain the "appearance of justice" when he chose to participate in the Laird decision. Although his judgment might have been impartial, his participation in Laird lacked the appearance of impartiality necessary to maintain public confidence in the Supreme Court. (Note, "Justice Rehnquist's Decision to Participate in Laird v. Tatum,"73 Col. L. Rev. 106, 124 (1973).)

The Hofstra Law Review article cited earlier concluded that Mr. Justice Rehnquist's participation posed "a serious ethical dilemma" "for himself, the Court and the Constitution." ("Laird v. Tatum: The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity," 1 Hofstra Law Review 244, 271 (1973).)

Mr. Justice Rehnquist's opinion acknowledged that the question of his recusal was "a fairly debatable one" and that "fair-minded judges might disagree" with his decision. 409 U.S. at 836. He then went on to state that the prospect that his recusal would result in affirmance of the Court of Appeals' decision by an equally-divided court propelled him to decide the case.

This notion that the normal rules of judicial impartiality do not count when the judge's vote may be crucial, seems to turn the doctrine of recusal on its head. As the New York Times observed in the editorial cited earlier: "[T]o argue thus seems only to underscore the impropriety of a former Government representative continuing a Government case on the Supreme Court -- the court of last resort." (NYTimes, Oct. 12, 1972.) Another critical commentary on this aspect of Justice Rehnquist's opinion appears in a recent book on the Supreme Court by Prof. Stephen L. Wasby of the State University of New York at Buffalo. Introducing a discussion of his Tatum opinion, the author says:

> A Justice's participation in a case solely to create a full court is not necessarily proper, as a particular problem involving Justice Rehnquist illustrates. (Wasby, The Supreme Court in the Federal Judicial System, Holt, Rinehart & Winston, 1984, 2d Ed.)

Indeed, even Justice Rehnquist's notion that a split court would have left the principle of law involved "unsettled," 409 U.S.at 837-8, was a bit sophistic. Affirmance of the Court of Appeals' decision in Tatum would really have "settled" nothing. It would merely have permitted a trial of plaintiffs' claims to proceed. Indeed, generally accepted rules of judicial restraint would have counseled against premature Supreme Court determination of such issues without a full factual record -- especially in light of the sharp factual conflict over the continuation of the Army's surveillance program.

With all due respect, there seems to be no other explanation for Justice Rehnquist's participation in Tatum than his desire to shield his former government colleagues from having to defend their (and his) factual claims and contentions in an adversary proceeding.

* * *

It is my concern that the behavior described here reflects a judicial temperament which is so partisan and result-oriented that it raises questions about Mr.Justice Rehnquist's qualifications to be the nation's Chief Magistrate, an office in which the nation reposes its greatest trust for the fair and impartial administration of the Laws of the Land.

While I do not claim to be a careful student of Mr. Justice Rehnquist's judicial output, I am aware that at least one eminent scholar has discerned a similar result-orientedness in the Justice's work product. In an exhaustive survey of Justice Rehnquist's early opinions, Prof. Daniel Shapiro of Harvard Law School produced a lengthy and detailed analysis of what he considered Justice Rehnquist's partisanship, commenting that: "[I]n too many instances Justice Rehnquist's efforts have been impeded by his ideological commitment to a particular result." (Shapiro, "Mr. Justice Rehnquist: A Preliminary Review," 90 Harv. L. Rev. 293, 328 (1976).) See also Riggs and Proffitt, "The Judicial Philosophy of Justice Rehnquist," 16 Akron L. Rev. 555 (1983).

This Committee and the United States Senate has an awesome responsibility when called upon to offer its advice and consent to the appointment of a Chief Justice. The United States Supreme Court is a majestic institution, the most inspiring and respected judicial body in the history of the earth. It has been the bedrock of our constitutional democracy for 200 years. It is the world's leading symbol of equal justice under law. It requires a Chief Justice worthy of the office. I offer these comments in the hope that they may be of some small value in helping in the performance of that function.

United States Senate

WASHINGTON, D.C. 20510

Morganton, North Carolina 28655
June 26, 1975

Professor Louis Menand, III
Department of Political Science
Room 3-234
Massachusetts Institute of Technology
Cambridge, Massachusetts 02139

Dear Professor Menand:

This is to thank you for your letter of June 19, 1975, and the copy of your letter to the Senate Subcommittee on Constitutional Rights which accompanied it.

I have never been able to understand why Chief Justice Burger said so much about the destruction of the surveillance records acquired by the Army during its spying on civilians in his opinion in Laird v. Tatum. The only question before the Supreme Court in that case was the sufficiency of the complaint to state a cause of action. Four of the Justices combined with Justice Rehnquist, who ought to have disqualified himself from participating in the case because he had acted as Counsel for the Defense Department in the hearing before the Senate Subcommittee on Constitutional Rights, held the complaint to be insufficient.

Solicitor General Griswold argued the case for the Defense Department, and repeatedly invoked affidavits which had been offered by the government in the District Court in opposition to a motion of the plaintiff for a temporary restraining order although these affidavits had no relevancy whatsoever to the point being considered by the Supreme Court, as I pointed out to the Supreme Court. Nevertheless, the Solicitor General got away with this, and Chief Justice Burger's opinion is based in large part on what the government said and not on what the complaint alleged.

The suit was a suit for an injunction to prevent threatened injuries. The Chief Justice treated it as if it was a suit for damages, and held that the plaintiff could not maintain the suit unless he could show he had suffered an injury -- instead of the threatened injury which was sought to be averted. I am glad that you have asked for an investigation.

Sincerely yours,

Sam J. Ervin, Jr.

Sam J. Ervin, Jr.

SJE:mm

ATTACHMENT A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, *et al.*,

Petitioners,

—

ARLO TATUM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

Question Presented

Whether the Court of Appeals was correct in holding that respondents' claim—that unauthorized and extensive surveillance by the United States Army of constitutionally protected civilian political activity is an unconstitutional burden on plaintiffs' exercise of their First Amendment rights—was justiciable under Article III.

Statement of the Case

The only issue before this Court is whether the complaint states a justiciable claim entitling plaintiffs[1] to a hearing. Because much of the government's Statement of the Case is based upon representations and documents which are not properly part of the record, and because the government ignores many of the material allegations made by plaintiffs, we set out in some detail the allegations of the complaint and the facts which underlie them.

On February 17, 1970, plaintiffs initiated this action on behalf of themselves and others similarly situated challenging the investigation of civilians engaged in lawful political activity by the United States Army (App. 1, 5-12). Plaintiffs complained that their constitutionally protected activities were being investigated "by military intelligence agents, . . . by anonymous informants, and through the use of photographic and electronic equipment" (App. 9), and that the information collected by the Army through such investigation was being "regularly, widely, and indiscriminately circulated . . . to numerous federal and state agencies" (App. 9, 11), published in a "Blacklist" (App. 9), and stored "in a computerized data bank" (App. 9) and "non-computerized records" (App. 10).

The complaint further alleged that the Army's domestic intelligence operations in the civilian community are unauthorized and overbroad, curtail political expression and debate among civilians, inhibit persons from associating with plaintiffs and thereby injure them and others similarly

[1] Respondents are referred to as plaintiffs throughout this brief.

situated by depriving them of their First Amendment rights of free speech and association and their right peaceably to assemble and to petition the government for redress of grievances (App. 11). Plaintiffs also alleged that the Army's surveillance activities abridge their right of privacy guaranteed by the Fourth, Fifth and Ninth Amendments to the Constitution (App. 8-11).

1. Proceedings in the courts below.

Having filed their complaint on February 17, 1970, plaintiffs filed a motion for a temporary restraining order and preliminary injunction on March 12, 1970, which would require the Army to cease investigating them and to deliver to the court *in camera* all blacklists, publications, records, reports, photographs, recordings, data computer tapes and cards, and other materials maintained by the Army, describing and interpreting their lawful political activities. The motion for a temporary restraining order was denied on March 13. On April 22, plaintiffs appeared before the District Court for an evidentiary hearing on their motion for a preliminary injunction. The court, however, denied their request to proceed with witnesses and documentary evidence (App. 123), denied their motion for a preliminary injunction, and granted the government's motion to dismiss the complaint for failure to state a claim upon which relief could be granted (App. 126, 128). Defendants never filed an answer.

Plaintiffs appealed the dismissal, and on April 27, 1971, the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wilkey in which he was joined fully by Judge Tamm and in part by Judge MacKinnon, reversed

the decision of the District Court on the grounds that the complaint sufficiently stated a cause of action and the controversy between the parties was justiciable (App. 129-48). In remanding the case for full evidentiary proceedings on the motion for a preliminary injunction, the Court of Appeals instructed the District Court to determine (1) the nature and extent of the Army domestic intelligence system, the methods of gathering information, its content and substance, the methods of retention and distribution, and the recipients of the information; (2) what part of the Army domestic intelligence system is unrelated to or not reasonably related to the performance of the Army's statutory and constitutional mission; (3) whether the existence of any overbroad aspects of the intelligence gathering system has or might have an inhibiting effect on the plaintiffs and others similarly situated; and (4) what relief is called for in accordance with the evidence (App. 147-48).

2. Plaintiffs' unchallenged allegations which must be broadly construed and accepted as true in face of the government's motion to dismiss.

A. *Allegations about the plaintiffs and the Army's investigation of their political activities.*

The plaintiffs are four individuals and nine unincorporated associations engaged in lawful political activity, including but not limited to union organizing, public speaking, peaceful assembly, petitioning the government, newspaper editorializing, and educating the public about political issues (App. 6-7). They include government

employees,[2] attorneys,[3] clergymen,[4] pacifists and pacifist organizations,[5] veterans of the armed forces,[6] and groups opposed to American involvement in the war in Southeast Asia[7] (App. (6-7). Members of the plaintiff associations also include current and prospective government employees, students, professionals, and others whose status, employment and livelihood are threatened by the Army's maintenance of files and dossiers on their political activities and associations (App. 10). All of the named plaintiffs have been subjects of political surveillance, and all are believed to be subjects of reports, files, or dossiers maintained by the Army (App. 9).

Exhibit A to the complaint is a document entitled, "USAINTC WEEKLY INTELLIGENCE SUMMARY NUMBER 68-12," containing "items of intelligence interest for the period 0600 hrs., Monday, 11 March 68 to 0600 hrs., Monday 18 March 68" (App. 14). This document is a report on the constitutionally protected political activities of plaintiffs and others similarly situated and, upon information and belief, is representative of similar reports

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[2] The American Federation of State, County & Municipal Employees.

[3] Conrad Lynn and Benjamin N. Wyatt, Jr.

[4] Rev. Albert B. Cleage, Jr. and Clergy and Laymen Concerned about the War in Vietnam.

[5] War Resisters League; Arlo Tatum, the Executive Secretary of the Central Committee for Conscientious Objectors; and Women's Strike for Peace.

[6] Veterans for Peace in Vietnam.

[7] The Vietnam Moratorium Committee; the Vietnam Week Committee of the University of Pennsylvania; the Vietnam Education Group; and Chicago Area Women for Peace.

prepared weekly by military intelligence units. Such reports were widely and indiscriminately distributed to civilian and military officials within the Department of Defense, to civilian officials in federal, state and local governments, and to each military intelligence unit and troop command in the Continental United States as well as Army headquarters in Europe, Alaska, Hawaii and Panama,[8] and were stored in one or more data banks in the Department of the Army (App. 9, 26-27). Typical of the reports concerning the plaintiffs' activities are the following:

> FRIDAY, 15 MARCH 1968:
> PHILADELPHIA, PA.: A. *THE PHILADELPHIA CHAPTER OF THE WOMEN'S STRIKE FOR PEACE* SPONSORED AN ANTI-DRAFT MEETING AT THE FIRST UNITARIAN CHURCH WHICH ATTRACTED AN AUDIENCE OF ABOUT 200 PERSONS. *CONRAD LYNN,* AN AUTHOR OF DRAFT EVASION LITERATURE, REPLACED YALE CHAPLAIN WILLIAM SLOANE COFFIN AS THE PRINCIPAL SPEAKER AT THE MEET-

[8] Exhibit A is expressly directed to: "CG FIRST ARMY (THRU 109TH MI GP); CG, THIRD ARMY (THRU 111TH MI GP); CG FOURTH ARMY (THRU 112TH MI GP); CG, FIFTH ARMY (THRU 113TH MI GP); CG, SIXTH ARMY (THRU 115TH MI GP); CG, XVIII ABN CORPS; CG, III CORPS (THRU DCSI FOURTH ARMY); CG, MDW (THRU 116TH MI GP); CG, 1ST ARMD DIV (THRU DCSI FOURTH ARMY); CG, 2D ARMD DIV (THRU DCSI FOURTH ARMY); CG, 82D ABN DIV (THRU XVIII ABN CORPS); CG, 5TH INF DIV (THRU DCSI FIFTH ARMY); CG, USARHAW (THRU 710TH MI DET); CG, FT DEVENS (THRU 108TH MI CP); CO, 902D MI GP (THRU 116TH MI GP); CO 108TH MI GP; CO, 109TH MI GP; CO, 111TH MI GP; CO, 112TH MI CP; CO, 113TH MI GP; CO, 115TH MI GP; CO, 116TH MI GP; CO, 710 MI DET; DIRECTOR ANMCC (PASS TO DIA ELEMENT); USAINTC LNO, PENTAGON." Eleven other recipients are indicated by code (App. 13-14).

ING. FOLLOWING THE QUESTION AND ANSWER PERIOD ROBERT EDENBAUM OF THE *CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS* STATED THAT MANY PHILADELPHIA LAWYERS WERE ACCEPTING DRAFT EVASION CASES. THE MEETING ENDED WITHOUT INCIDENT.

B. *REV. ALBERT CLEAGE, JR.* THE FOUNDER OF THE BLACK CHRISTIAN NATIONALIST MOVEMENT IN DETROIT, SPOKE TO AN ESTIMATED 100 PERSONS AT THE EMMANUEL METHODIST CHURCH. CLEAGE SPOKE ON THE TOPIC OF BLACK UNITY AND THE PROBLEMS OF THE GHETTO. THE MEETING WAS PEACEFUL AND POLICE REPORTED NO INCIDENTS (App. 17).*

B. *Allegations of injury to the plaintiffs.*

Paragraph 15 of the complaint alleges that "[t]he purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate plaintiffs and others similarly situated and to deter them from exercising their rights of political expression, protest and dissent from government policies which are protected by the First Amendment by *invading their privacy, damaging their*

* The peaceful political activities of members of the plaintiffs' class are also reported in the Weekly Intelligence Summary, *e.g.*:

WEDNESDAY, 13 MARCH 1968

BROOKLYN, N.Y.: ABOUT 35 PERSONS PARTICIPATED IN A DEMONSTRATION AT THE MAIN GATE OF FORT HAMILTON TO PROTEST THE SCHEDULED INDUCTION OF PETER BEHR. MANY OF THE PROTESTORS DISTRIBUTED LEAFLETS AND FLOWERS TO PERSONS ENTERING THE FORT. THE DEMONSTRATION LASTED APPROXIMATELY ONE AND ONE HALF HOURS AND ENDED WITHOUT INCIDENT (App. 15).

reputations, adversely affecting their employment and their opportunities for employment, and in other ways" (App. 10) (emphasis added). The specific deterrent induced by the Army's surveillance activities is the plaintiffs' "fear [that] they will be made *subjects of reports* in the Army's intelligence network, that *permanent reports of their activities will be maintained* in the Army's data bank, that *their 'profiles' will appear in the so-called 'Blacklist'* and that all of this information will be *released to numerous federal and state agencies* upon request" (App. 11) (emphasis added).

The government's Statement of the Case ignores these allegations of injury, and attempts through the introduction of highly questionable allegations of fact which have not been subjected to cross-examination in court, to convey the impression that Army surveillance is justified.[10] But in appellate review of a successful motion to dismiss, the plaintiffs' allegations of injury must be broadly con-

[10] Rule 12(b)(6) of the Federal Rules of Civil Procedure states, in part: "If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . ." However, having clearly stated that it was treating the government's motion as one made pursuant to Rule 12(b)(6) (App. 128), the District Court was bound to exclude matters outside the pleadings in determining the sufficiency of the complaint. Wright & Miller, *Federal Practice and Procedure,* § 1356 (1969). To do otherwise would have required the court to give plaintiffs ". . . reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b)(6). Having failed, therefore, to give plaintiffs such opportunity to be heard, having excluded their witnesses, and having characterized the government's motion as one brought pursuant to Rule 12(b)(6), the District Court could not have admitted the government's affidavits in considering the motion to dismiss. It should be noted that the government filed four affidavits on April 20, 1970, only two days prior to the District Court hearing. Those affidavits are frequently cited in the government's brief.

strued and taken as true[11] unless they are stated as conclusions of law or are inconsistent or unwarranted deductions of fact.

Specific constitutional injuries to the plaintiffs are legion on the face of the pleadings. Adverse effect on the government employment of members of the plaintiff American Federation of State, County and Municipal Employees stems from their inclusion in Army files and dossiers on civilians "who might be involved in civil disturbance situations"—files which are disseminated by the Army to federal and state agencies (App. 11, 26, 54). Damage to the

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[11] In reviewing the sufficiency of a complaint on a motion to dismiss, this Court has consistently held that "the material allegations of the complaint are taken as admitted." *Jenkins* v. *McKeithen*, 395 U.S. 411, 421 (1969). See also, *California Motor Transport* v. *Trucking Unlimited*, 40 U.S.L.W. 4153, 4155 (January 13, 1972); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 126 (1951).

Since Rule 8(a)(2) of the Federal Rules of Civil Procedure only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," the courts have generally looked with disfavor on Rule 12(b)(6) motions. This is especially true when a "unique" legal theory is propounded (App. 139). See *Shull* v. *Pilot Life Ins. Co.*, 313 F.2d 445, 447 (5th Cir. 1963). In assessing the sufficiency of a complaint, this Court has consistently adhered to the rule enunciated in *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957):

> "In appraising the sufficiency of a complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Therefore, recognizing ". . . that the Federal Rules of Civil Procedure, do not require a claimant to set out in detail the facts upon which he bases his claim," *Conley* v. *Gibson*, *supra*, at 47, the test is whether the material allegations of the complaint, liberally construed, with all ambiguities resolved in favor of the plaintiff, are sufficient to support a claim upon which relief can be granted. See Wright & Miller, *supra*, § 1357, fns. 75-77; Barron & Holtzoff, 1A *Federal Practice and Procedure* § 356, fn. 93 (1960).

plaintiffs' reputations is illustrated in the case of Conrad Lynn, a New York attorney experienced in litigation under the Military and Selective Service Act, who is characterized in an Army intelligence file as "an author of draft evasion literature" (App. 17). A similar characterization is made in an Army file with regard to a member of the Central Committee for Conscientious Objectors (App. 17). The characterization of persons, including plaintiffs and members of their class, whose names appear on an Army "identification list" of civilians (App. 9-11, 25, 27), as individuals "who might be involved in civil disturbance situations" (App. 54) constitutes an immediate threat to their employment and damage to their reputations within the precise terms of the complaint (App. 10). Finally, the injuries and threatened injuries to the privacy, employment and reputations of the plaintiffs are visited upon them solely because they have exercised their First Amendment rights, and they are thus deterred from further vigorous exercise of those rights (App. 10-11), in addition to being deprived of their freedom of association with those citizens who are deterred from "free and open discussion of issues of public importance" (App. 11) for fear of becoming a target of defendants' surveillance network (App. 10-11).

C. *Allegations about the scope of the Army's domestic intelligence system.*

Plaintiffs allege and the government does not deny that the Army has stationed intelligence agents in more than three hundred domestic intelligence units throughout the United States (App. 23, 52); that these agents have intruded themselves into civilian politics by monitoring, re-

porting and interpreting the political and often private activities and associations of civilians (App. 8-10, 23-27); that the Army Intelligence Command maintains an undetermined number of computerized and non-computerized data banks on political protests occurring any place in the United States (App. 9-10, 23); that the information on civilian political protests collected by the Army Intelligence Command has been widely and indiscriminately disseminated to military and civilian agencies of government (App. 9, 27); that the Army Intelligence Command has compiled an identification Blacklist including photographs of civilians "who might cause trouble for the Army" (App. 9, 25); and that Army intelligence agents have infiltrated civilian political organizations[12] and used improper methods to acquire confidential information about private persons[13] (App. 9, 23-24).

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[12] Although the plaintiffs were denied an evidentiary hearing in the District Court, they were prepared to introduce evidence, through the testimony of witnesses who were in the courtroom that Army intelligence agents had infiltrated private social, political and religious groups exercising their freedom of association and their right of privacy. Plaintiffs' counsel made an offer of proof that one such witness, Oliver Allen Peirce, who had served in the Fifth Division, Military Intelligence Detachment at Fort Carson, Colorado, from May 1, 1969 to December 19, 1969, would testify "that he was instructed to infiltrate a group known as the Young Adults Project, an organization composed of a number of church groups in the Colorado Springs area which also included the participation of the Young Democratic organization in the Colorado Springs area; [and] that he was instructed to become a member of this group and to make regular reports on what was going on . . ." (Transcript of Proceedings in the District Court, April 22, 1970, at pp. 29-30).

[13] It is alleged in Appendix B to the complaint, for example, that agents of the 108th Military Intelligence Group in New York City have acquired confidential academic records of students at Columbia University without the knowledge or consent of the students or the University (App. 23-24).

During the two months between the filing of the complaint on February 17, 1970 and oral argument on plaintiffs' motion for a preliminary injunction and on the government's motion to dismiss on April 22, 1970, additional aspects of the Army's surveillance system were revealed through statements made by Army spokesmen under pressure of Congressional inquiry, this lawsuit, and adverse publicity. In letters dated February 25 and 26, 1970 and addressed to plaintiffs' counsel and more than thirty members of Congress (App. 51-55), Robert E. Jordan III, then Army General Counsel, acknowledged that "there have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to be beyond the Army's mission requirements" (App. 54). Mr. Jordan admitted that the Army Intelligence Command maintained a computerized data bank at Fort Holabird, Maryland concerning civilian political activity throughout the nation (App. 52, 55), and distributed an "identification list which included the names and descriptions of individuals who might be involved in civil disturbance situations" (App. 54).[14]

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[14] Although Mr. Jordan asserted that the Fort Holabird computerized data bank would be "discontinued." he made no reference to duplicate and additional information located at other Army record centers (App. 51-55). He also stated that "[n]o computer data bank of civil disturbance information is being maintained" (App. 55), which the plaintiffs contend was inaccurate. Because of the vagueness of Mr. Jordan's letter, Senator Sam J. Ervin, Chairman of the Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, wrote to the the Secretary of the Army on February 27, 1970 to request further information about the scope of the Army's domestic surveillance system (App. 61-62). Senators Abraham Ribicoff and William Fulbright and Congressman Cornelius Gallagher similarly pressed the Secretary for information (App. 63-65, 74-75).

To answer mounting Congressional criticism, Under Secretary of the Army Thaddeus Beal wrote to Congressman Gallagher and Senator Ervin on March 20, 1970 (App. 76-86). He disclosed the existence of a second "identification list . . . on individuals and organizations" prepared by the Counterintelligence Analysis Division (App. 81). Mr. Beal also acknowledged the maintenance by the Army of microfilm data banks on civilian political activity, and stated that such data banks would continue to be compiled and maintained (App. 81). Apart from these admissions, however, the Under Secretary denied the existence of any other intelligence files. Eight days earlier, however, in their motion papers for a temporary restraining order and preliminary injunction, plaintiffs had specifically charged that the defendants were concealing the existence of:

(1) a second computerized national domestic intelligence data bank, much larger than the one at Fort Holabird, maintained by the Continental Army Command at Fort Monroe, Virginia (App. 48);

(2) regional domestic intelligence data banks including files and dossiers on the political activities of individual citizens and organizations maintained by the First, Third, Fourth, Fifth, and Sixth Armies, and the Military District of Washington, D.C.; and by the 108th, 109th, 111th, 112th, 113th, 115th, 116th, and 902nd Military Intelligence Groups, and the 710th Military Intelligence Detachment, at Fort Devens, Massachusetts; Fort Meade, Maryland; Fort MacPherson, Georgia; Fort Sam Houston, Texas; Fort Sheridan, Illinois; San Francisco, California; and Honolulu, Hawaii, respectively (App. 48);

(3) cards and documents stored at the Headquarters of the Army Intelligence Command from which the Fort Hola-

bird domestic intelligence data bank was organized and made operable (App. 48);

(4) a second blacklist, larger than the first, known as the "Compendium" and published by the Counterintelligence Analysis Division of the Army in two volumes entitled, *Counterintelligence Research Project: Organizations and Cities of Interest and Individuals of Interest,* describing politically active individuals and organizations unassociated with the armed forces or with civil disturbances, but believed by the Army to be sources of "dissidence" (App. 48).

3. Events subsequent to the proceedings in the District Court of which the Court should take notice for the sole purpose of determining the justiciability of plaintiffs' claims.

The government's brief discusses events subsequent to the filing of this lawsuit and facts outside the scope of the proceedings in the District Court for the purpose of bolstering that court's decision. Thus, it claims that the Army's investigative activities have been discontinued and that the files and dossiers resulting therefrom have been destroyed (Gov't. Brief, pp. 9-11, 34). It also argues that the allegations of injury to the plaintiffs are unsubstantiated by facts in the record (*Id.,* p. 20). Whether these contentions spring from the government's desire to broaden the issues before this Court or its unwillingness to have the Court test the sufficiency of the pleadings on their face, the plaintiffs are entitled to present a rebuttal. In doing so they request the Court to take notice of two events subsequent to the District Court proceedings in order to complete the record in this case: (1) the transcript of a hearing on a motion for a preliminary injunction made by mem-

bers of the plaintiffs' class in a case involving the same subject matter as the case at bar, *ACLU* v. *Westmoreland,* 70 Civ. 3191 (N.D. Ill. 1970), appeal argued *sub nom. ACLU* v. *Laird,* 71-1159 (7th Cir. 1972), and (2) Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92nd Cong., 1st Sess., February 23-25 and March 2-4, 9-11, 15, and 17, 1971 [hereinafter "the Ervin Hearings."][15]

A. *The partial reforms cited by the government do not prove that the Army's investigation of civilian politics has been discontinued and that the files and dossiers resulting therefrom have been destroyed.*

The government's Statement of the Case attempts to convey the impression that the controversy before the Court is moot.[16] Under these circumstances the plaintiffs are entitled to go outside the record to demonstrate that the case is not moot.[17]

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[15] Even for the purpose of deciding issues on the merits, this Court has taken notice of legislative committee reports, *Carolene Products Co.* v. *United States,* 323 U.S. 18, 28 (1944); cf. *Elliott* v. *Home Loan Bank Board,* 233 F. Supp. 578 (N.D. Cal.) rev'd on other gds., 386 F.2d 42 (9th Cir. 1964), cert. denied 390 U.S. 1011 (1965), and may of course take notice of the record in other proceedings within the federal judicial system, *Brown* v. *Board of Education,* 347 U.S. 483 (1954); see also *Paul* v. *Dade County,* 419 F.2d 10 (5th Cir. 1969), *cert. denied,* 397 U.S. 1065 (1970).

[16] The government having injected the issue of mootness into this case, the plaintiffs would be entitled on remand to offer evidence addressed to that issue. The government, therefore, cannot be heard to object to any proof by the plaintiffs that the Army continues to compile and maintain files and dossiers on civilian political activity, Army regulations to the contrary notwithstanding. Cf. *SEC* v. *Rapp,* 304 F.2d 786 (2d Cir. 1962); *Kirk* v. *United States,* 232 F.2d 763 (9th Cir. 1956).

[17] *See* discussion of mootness at pp. 88-91, *infra.*

The vagueness of the Army directives initiating domestic surveillance, and the equivocal directives purporting to reduce it are exhaustively documented in the Ervin Hearings.[18] Contrary to the assertion by the government that Army surveillance focused on "selected public gatherings . . . that were thought to have a potential for civil disorder" (Gov't. Brief, p. 5), surveillance was neither selective, nor restricted to public gatherings, nor limited to even the broadest definition of potential civil disorders.[19] The directives setting up the Army surveillance program were extremely broad, unlike the narrower "family of contingency plans" referred to by the government in its brief (*Id.*), which related only to the logistics of troop movements.[20]

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[18] *See* Ervin Hearings, Part I, pp. 160, 175, 246-47, 258-59, 280-81, 297, 315, 323, 327, 330, 385, 418, 430; Transcript of Proceedings in the District Court, *ACLU* v. *Westmoreland, supra* [hereinafter "*Westmoreland* Transcript"], p. 629. See also the following colloquy, at p. 418, between Senator Ervin and Secretary Froehlke concerning the latter's prepared statement about the scope of Army surveillance:

> Senator ERVIN: This statement states in effect that it was a very unfortunate thing that many of the things which the military did were not spelled out in any kind of written guideline, and many of them were the result of oral orders and many of them were the result of conversations between the military and civilian law enforcement officers. Is that a fair statement?
>
> Mr. FROEHLKE: That is a fair statement.

[19] Ervin Hearings, Part I, pp. 111-12, 176, 247, 263, 265, 267, 299, 317-18, 337, 376; *Westmoreland* Transcript, pp. 249, 257, 619, 758-59, 818, 847-48.

[20] Ervin Hearings, Part I, pp. 111-12, 261, 280-81, 297, 299, 421, 872; *Westmoreland* Transcript, pp. 201-03, 260, 330, 345, 374, 1066. Secretary Froehlke testified, at p. 421 of the Ervin Hearings, that ". . . both the collection plans of February 1, and May 2, [1968] could be interpreted in such a way that would permit surveillance of almost anybody who is active in a community where there was a civil disturbance. Both plans were very broad." Indeed, as former

While the scope of the Army's investigation of civilians was never defined by civilian authorities prior to the initiation of this lawsuit,[21] subsequent attempts by the Army to destroy the fruits of its investigation have been substantially ineffective. The government maintains, for example, that "spot reports"—the raw data of surveillance—are "destroyed 60 days after publication" (*Id.*, p. 10; App. 80), but it does not disclose that the raw data is first transferred to "agent reports," "after-action reports," "biographic reports," and "summaries of investigations".[22] Furthermore, although the investigative data abstracted from spot reports was no longer computerized after February 1970, non-computerized domestic intelligence reports continue to be maintained by the Army.[23] Similarly, the government contends that the identification list[24] was destroyed in February 1970 (*Id.*, p. 10), but fails to explain that the "order . . . to return" (*Id.*) the 300 copies of the list outside the Army was inexplicably changed at the last minute to an order to destroy all copies, which the Hearings testimony shows has not been carried out.[25] Finally, the government

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agent Joseph Levin, Jr. testified, the breadth of the collection plans resulted in even broader instructions to the agents in the field: "It is the nature of the Army system to expand on requirements as each directive travels down the chain of command. . . . [I]ntelligence requirements at field office level rarely bore any resemblance to the order issued from Fort Holabird or even Group Headquarters." *Id.*, p. 297.

[21] Ervin Hearings, Part I, pp. 115, 146, 151, 154, 156, 163, 202, 206-07, 210, 217-18, 322, 454, 462.

[22] *Id.*, pp. 177, 179, 180, 211, 234-35, 238, 264, 331, 390, 465.

[23] *Id.*, pp. 156, 159, 209-10.

[24] *Id.*, pp. 148, 166, 186, 191-92, 207-08, 211-13, 226-27, 249, 266-67, 269, 277, 455-56, 866; *Westmoreland* Transcript, pp. 455, 887-91, 1029.

[25] Ervin Hearings, Part I, pp. 216, 238, 249, 279-80, 394, 428.

points to a policy letter from the Adjutant General as evidence that domestic surveillance "was severely restricted in June 1970" (*Id.*, pp. 9, 45-52). Apart from this bald assertion, however, there is no basis for concluding that the letter eliminated the activities complained of in this lawsuit. Indeed, as Senator Ervin remarked in a letter to the Secretary of the Army, "the exceptions, qualifications and lack of criteria in your policy letter could lead the average citizen . . . to wonder just how much of a change it represents in government policy." [26]

Other errors and omissions in the government's Statement of the Case cast further doubt on its claim that Army surveillance has ceased. The assertion, for example, that "surveillance activity decreased" after the "Spring and Summer of 1968" (*Id.*, p. 9) flies in the face of the most comprehensive of all Army Collection Plans authorizing political surveillance, which was issued in May of 1969.[27]

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[26] Ervin Hearings, Part II, p. 1102. See also *Id.*, Part I, pp. 102, 214-15, 222, 281, 435; *Westmoreland* Transcript, pp. 536, 540, 912.

[27] Ervin Hearings, Part II, pp. 1731-37. The Plan includes, inter alia, the names and identification numbers of the following organizations to be monitored:

American Friends Service Committee (AFSC)	ZB 00 02 00
Americans for Democratic Action (ADA)	ZA 00 17 81
Committee for Non-Violent Action (CNVA)	ZB 00 87 79
Congress of Racial Equality (CORE)	ZB 00 14 77
Clergy and Laymen Concerned About Vietnam (CLCAV)	ZB 50 05 27
Fifth Avenue Vietnam Peace Committee (FAVPC)	ZB 02 12 68
Institute for the Study of Non-Violence (ISNV)	ZB 50 03 86
Interfaith Peace Mission (IPM)	ZB 50 10 64
National Association for the Advancement of Colored People (NAACP)	ZA 00 04 02
National Committee for a Sane Nuclear Policy (SANE)	ZA 00 90 26

(footnote continued on following page)

By the same token, the government's claim that political intelligence data and the special identification lists "were kept apart" from the Army's investigative files of "personnel, civilian employees and contractors' employees" (*Id.*, p. 8), cannot withstand evidence that the fruits of Army surveillance can now be found in the investigative files of a host of military and civilian agencies.[28]

B. *Plaintiffs have a right to file supplemental pleadings to substantiate their allegations of injury with facts unknown at the time the complaint was filed.*

Although their allegations of injury are more than sufficient to state a cause of action, plaintiffs would be entitled on remand to file supplemental pleadings to bring their complaint up to date.[29] There are at least five categories of

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Southern Christian Leadership Conference (SCLC)	ZB 00 87 94
Student Non-Violent Coordinating Committee (SNCC)	ZB 01 13 29
Veterans and Reservists to End the War in Vietnam (VREWV)	ZA 02 17 70
Veterans for Peace in Vietnam (VPV)	ZB 02 18 03
Women Strike for Peace (WSP)	ZB 01 36 95

[28] This is understandable in light of testimony in the Ervin Hearings that political intelligence data collected as "civil disturbance information" have been filed in security clearance dossiers. Ervin Hearings, Pt. I, p. 230. See also, *Id.*, pp. 151, 156, 160, 212, 216, 223, 225, 234, 259, 275, 323, 423, 428, 465; *Westmoreland* Transcript, pp. 849-50.

[29] An appellate court may, on proper showing, remand a case expressly for the purpose of permitting a party to file supplemental pleadings under Rule 15(d) of the Federal Rules of Civil Procedure, "setting forth transactions, occurrences or events which have happened since the date of the pleading sought to be supplemented." See, e.g., *Case-Swayne Co.* v. *Sunkist Grocers, Inc.*, 369 F.2d 449 (9th Cir. 1966); *Southern Pacific Railroad* v. *Conway*, 115 F.2d 746 (9th Cir. 1940).

allegations pertaining to their injury which the plaintiffs can now substantiate in even greater detail with witnesses who testified at the Ervin Hearings and at the evidentiary hearing in *ACLU* v. *Westmoreland*. First, the plaintiffs can prove the Army has conducted surveillance of wholly private activity;[30] second, that the Army's files and dossiers on civilians have been misused and indiscriminately disseminated;[31] third, that their employment or prospective employment within or without the government is jeopardized by such misuse and indiscriminate dissemination of files and dossiers on civilian political activity;[32] fourth, that their reputations have been damaged and defamed by the Army's investigative activities;[33] and finally, that as a result of the Army's investigation of civilian politics, members of the plaintiff organizations have been deterred from continuing their membership and prospective members have been dissuaded from joining.[34]

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[30] Ervin Hearings, Part I, pp. 171, 185, 198, 200-01, 204, 213, 217, 223, 234, 255, 285-86, 290-91, 294-95, 300, 306, 308-09, 387, 445; *Westmoreland* Transcript, pp. 178-79, 205-06, 216-18, 244, 269, 299-300, 311, 359, 373, 515, 560.

[31] Ervin Hearings, Part I, pp. 151, 153-55, 162, 166, 187, 191-92, 195, 211, 224, 234, 266, 270, 319-20, 460, 465; *Westmoreland* Transcript, pp. 103, 156, 179, 214-16, 653, 708, 759, 1016, 1069.

[32] Ervin Hearings, pp. 183, 231.

[33] *Id.*, pp. 131, 141, 183, 232, 266, 342; *Westmoreland* Transcript, pp. 64, 486-87, 498-99.

[34] *See, e.g.*, Ervin Hearings, Part I, p. 231; *Westmoreland* Transcript, pp. 41, 492, 499.

Senator BIDEN. Did the Chairman swear all of you?

Mr. ASKIN. Yes.

Senator KENNEDY. Just one question.

It has been reported that Senator Ervin after that circumstance regretted his vote in favor of Justice Rehnquist.

Did you ever hear him make that comment?

Mr. ASKIN. That he did not specifically state to me. I know he was quite shocked, disappointed about Justice Rehnquist's participation. That certainly astounded and shocked him.

Senator BIDEN. Without objection.

Ms. Verveer.

Ms. VERVEER. Thank you, Senator.

STATEMENT OF MELANNE VERVEER

My name is Melanne Verveer, and I am testifying on behalf of the 250,000 members of People for the American Way, a nonpartisan citizens' organization dedicated to protecting constitutional liberties.

I ask that my complete statement be included in the record.

Senator BIDEN. Without objection.

Ms. VERVEER. I appreciate this opportunity to express our concern to the committee that the Senate exercise fully its constitutional duty to advise and consent on the nomination of Mr. Justice Rehnquist to our Nation's highest judicial post.

The fact that this nominee is a sitting Justice of the Supreme Court does not diminish the Senate's duty in any sense. The role of the Chief Justice is significant, not only in terms of the responsibilities it carries to administer the Court, but also, and perhaps most importantly, in terms of the highest moral and legal leadership that office embodies for the Nation.

A thorough examination of the nominee and a thorough debate of the issues raised by the nomination are required by the Constitution and demanded by the American public.

We strongly believe that the Senate has a role equal to that of the President in determining who shall sit and preside over the Supreme Court.

People for the American Way commissioned Peter Hart Research Associates to conduct a public opinion survey to determine public attitudes toward the American judicial system and the role the Senate ought to play in the confirmation process. That survey was conducted earlier this month.

While the poll results revealed overwhelming approval of President Reagan, a 73 percent favorable rating, 86 percent of respondents said, it is important for the Senate to play an active role in reviewing nominees for Federal judgeships. And only 18 percent believe that the Senate should go along with the President's choice if the nominee is honest and competent.

By a margin of 78 percent to 16 percent, they endorsed the position that it is important for the Senate to make sure that judges on the Supreme Court represent a balanced point of view, rejecting the position that the Senate should let a President put whomever he wants on the Supreme Court, so long as the person is honest and competent.

When asked to assign priorities among a series of qualities judicial candidates should possess, 74 percent stressed being a fair and openminded person who avoids personal prejudice. Seventy-one percent stressed a spotless record of honesty and personal integrity. And 63 percent placed a very high priority on having a strong commitment to insuring that women and minorities have equal rights under the law.

This sampling of the American electorate in 1986 validates the 200-year-old tradition of the Senate in discharging its responsibility for an independent judgment as mandated by the Constitution.

Throughout its history, the Senate has played the active, independent role envisioned by the framers. The confirmation process has never been limited to questions of mere competence and ethical behavior, despite efforts by some to impose those kinds of limitations.

The social, political, and constitutional views of a nominee have a place in this process. They are the very questions considered by the Chief Executive in recommending a nominee.

Perhaps one of the best descriptions of the appropriateness of careful scrutiny was made by Senator Thurmond during the 1968 debate on the elevation of then-sitting justice—of the then-sitting Justice to be a Chief Justice. At that time, Senator Thurmond said: "It is my contention that the power of the Senate to advise and consent to this appointment should be exercised fully. To contend that we must merely satisfy ourselves that he is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent prescribe. It further serves the end of removing the Supreme Court further away from the democratic process and our system of checks and balances. For these reasons, I believe a most thorough consideration of this appointment is clearly and completely justified."

The Senate must be able to assure the American people that Justice Rehnquist is committed to equal justice under the law, and committed to protecting the cherished constitutional liberties guaranteed by the Bill of Rights.

For the Senate to fail to do so would be a dishonor to the Constitution and a disservice to the Nation.

Senator BIDEN. Thank you very much.

Professor?

[Statement follows:]

Testimony

of

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for
Public Policy

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on

the nomination of

William Rehnquist

to be Chief Justice of the
Supreme Court

before

Senate Judiciary Committee

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I am testifying on behalf of the 250,000 members of People for the American Way, a nonpartisan citizens' organization dedicated to preserving and promoting constitutional liberties. We are concerned that the Judiciary Committee and the Senate fulfill its constitutional duty to "advise and consent" regarding the nomination of Mr. William Rehnquist to our nation's highest judicial post.

The third co-equal branch of the federal government, our judiciary, is responsible for protecting those individual and civil rights guaranteed almost two hundred years ago by the drafters of the Constitution and the Bill of Rights. The Chief Justice of the Supreme Court is the chief guardian of the Constitution. A thorough examination of the nominee and a thorough debate of the issues raised by his nomination are required by the Constitution and demanded by the American public, which strongly believes that the Senate has a role equal to that of the President in determining who shall sit on and preside over the Supreme Court.

This instance is one in which the opinion of the American public solidly reflects our nation's historical tradition. According to a recent national public opinion survey commissioned by People For The American Way, 86% of American voters believe that the Senate should play an active role in reviewing nominees for federal judgeships and make independent decisions regarding judicial nominations. They overwhelmingly reject the proposition

that the "Senate should let a President put whomever he wants on the Supreme Court, so long as the person is honest and competent."

The fact that this nominee is a sitting Justice of the Supreme Court does not diminish the Senate's duty in any sense. The role of the chief justice is significant, not only in terms of the responsibilities it carries to administer the Court, to assign opinions, and to significantly shape the Court's docket; but also in terms of the highest moral and legal leadership it embodies for the nation.

This statement provides an historical perspective of the advise and consent process which conveys important instruction on the independent role of the Senate in building the third branch of government. It is a review of the "original intent" of the Founders and the historical role the Senate has played in judicial confirmations, as well as a summary of the thoughts of our nation's finest constitutional scholars and a selected compilation of statements on the confirmation process made by some of our nation's top policy makers, including the nominee currently under consideration. Lastly, the historical analysis is augmented by the results of a national survey of American voters conducted within the past month by Peter Hart Research Associates. We hope that all of these elements will be useful to the Judiciary Committee and ultimately to the Senate in your deliberations.

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THE IMPORTANCE OF THE SENATE'S ROLE AND THE NATURE OF ADVICE AND CONSENT

The Senate has an independent constitutional responsibility, co-equal to the President's, in the selection of Supreme Court justices. The President's nomination of candidates to the Court constitutes only half of the required procedure. The Constitution suggests that the Senate's half is to be much more than a rubber stamp function. The authority vested in the Senate provides an important check on the overreaching power of the Executive in shaping the third independent, co-equal branch of government. History confirms the significant role that the Senate has played in restraining overly zealous Presidents through its advice and consent function.

Unlike Executive Branch appointees, judges do not serve at the pleasure of the President; they are not members of the President's cabinet. They serve beyond the duration of any one presidency and are designed by the Constitution to be independent of the President and to be a check upon the power of the Chief Executive.

Because of the unusual power inherent in lifetime appointments, it is "wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than the narrowest manner possible, under the Constitution." (Black, Professor Charles, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale Law Journal, pp. 657, 660 (1970).) The Senate brings unique

qualifications to the task. While much is made of presidential prerogative to name judges because voters elected the President, it is important to remember that the voters also elected the Senators. The Senate is just as close to the electorate as the President, perhaps more so because it reflects the will of the electorate in a series of elections over a longer period of time. In fact, Professor Donald Lively has accurately pointed out, "The Senate, because it reflects more accurately the nation's diversity, is capable of ensuring a more representative and accountable Court than than the executive." (Lively, 59 Southern California Law Review 551, 565 (1986).)

Professor Laurence Tribe expanded on this theme in his book, God Save This Honorable Court. In Tribe's words, the Senate keeps the Supreme Court from becoming "narrow, isolated and removed from the many and varied threads that make up the rich tapestry we call America." History, as documented in the debate of the First Constitutional Convention and in The Federalist Papers recognized the Senate's unique qualifications (see history below).

The Senate is obligated to give careful scrutiny to all judicial appointments, but its responsibility in the case of Supreme Court appointments is even greater. In a recent letter to the Chicago Tribune, leading constitutional scholar Philip Kurland set forth comprehensive criteria for Senate consideration:

> A federal judge should be qualified by reason of his training in the law, his experience at the bar, his commitment to community service, his breadth of vision and compassion for the human condition, even a little learning, and, perhaps most important, a judicial temperament, which means a recognition that a judge is not a partisan, that his disinterestedness is the essence of his function. And it is here that a zealot or an ideologue fails the test of judicial office. And it is up to the Senate Judiciary Committee to assure itself that a judicial candidate measures up on all scores. The question ought not to be whether a judicial nominee's ideology comports with a President's or a Senator's. It is whether such mode of thought reveals a rigidity which could make a mockery of the rule of law by placing it in the hands of one who could only use it for personal ends rather than those of the Constitution, the laws of the United States, and established judicial precedents.

Meaningful "advice and consent" must include examination of a nominee's judicial, political and social philosophy. If the President is guided by policy considerations in the choice of a nominee, the authority obligated to render advice and consent should address those same concerns.

Joseph P. Harris, in his book The Advice and Consent of the Senate published in 1953, summarized those considerations as follows:

> In making nominations to the Supreme Court, the President, as leader of his party, has necessarily taken political considerations into account, but they have been of a rather different type from those that are controlling in the appointment of judges to lower courts. Conservative Presidents have usually nominated conservatives to the Supreme Court, and liberal or progressive

> Presidents have similarly chosen persons favorable to their programs. There can be no valid criticism of this practice. The Senate, as well as the President, has given primary attention to the philosophy, outlook, attitude and record of nominees to the Supreme Court with regard to social and economic problems of society. The contests that have taken place in the last fifty years over nominations to the Supreme Court have been concerned almost wholly with such issues, though not openly so....
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> * * * * *
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> Writing in 1930, Frankfurter strongly defended the action of the Senate in considering the philosophy and outlook of a nominee to the Supreme Court. 'The meaning of "due process,"' he stated, 'and the content of terms like "liberty" are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views . . . . Let us face the fact that five Justices of the Supreme Court <u>are</u> molders of policy, rather than the impersonal vehicles of revealed truth.' In an often quoted statement, Chief Justice Hughes, when he was governor of New York,. once said: "We are under a Constitution, but the Constitution is what the judges say it is.'
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> It is entirely appropriate for the Senate, as well as the President, to consider the social and economic philosophy of persons nominated to the Supreme Court. With the changed functions of the Court, considerations of this kind are more pertinent than the legal attainments and experience of nominees....

In 1970, Professor Charles L. Black premised his article on the concept that "a judge's judicial work is ... influenced and formed by his whole life view, by his economic and political comprehensions, and by his sense, sharp or vague of where justice

lies in respect of the great questions of his time." Professor Black concluded,

> [T]here is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a 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 be 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.

In 1971, a legal memorandum was prepared by law professors Paul Brest, Thomas C. Grey and Arnold M. Paul on the Senate's proper role in considering Supreme Court nominees. The professors reached two general conclusions upon review of the historical precedent:

> 1. There has never been a time when a nominee's social and political viewpoints were not generally considered relevant to his suitability for appointment to the Supreme Court; and
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> 2. Those Senators who have urged considering and have considered a nominee's substantive views come from no one political camp: they span the range from Whig to Democrat, Republican to Progressive, liberal to conservative.

In conclusion they offered a well-defined standard to be invoked by the Senate:

> [T]he Senate should consider whether a nominee for the Supreme Court has a clear and demonstrated commitment to basic constitutional values. The Supreme Court has the ultimate responsibility of protecting our constitutional system of government. Underlying this system are certain fundamental values, which however changing in scope and meaning for different historical periods, have remained paramount. Among the most basic of these are the rule of law, the protection of individual liberties against arbitrary governmental action, and the equality of man.
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> Reasonable men, committed to these values, will of course differ as to their scope and as to the proper means of implementing them. This suggests that a Senator should not vote against a nominee because of bare disagreement with him on one or two narrow issues. But where a Senator believes that a nominee's views, as revealed by his past and present statements and actions, depart fundamentally from what the Senator sees as basic constitutional values, it is his constitutional responsibility to vote against confirmation on that ground alone.

More recently in God Save This Honorable Court, Professor Tribe argued that the Senate is constitutionally entitled and obligated to make its own independent judgment about whether confirmation of a Supreme Court nominee would be in the best interest of the country:

> Some constitutional landmarks are so crucial to our sense of what America is all about that their dismantling should be considered off-limits, and candidates who would be at all likely to upend them should therefore be considered unfit.
>
> Such outer boundaries exist on both ends of the traditional political spectrum, and may appropriately look a bit different to each

> member of the Senate. On some boundaries, though, all should be able to agree.

Tribe included within those boundaries support for the Supreme Court's decision in Brown v. Board of Education, the incorporation doctrine, and the principle of "one person, one vote."

Professor Tribe also noted lines of inquiry that would be improper: "Litmus tests that seek out a candidate's unswerving commitment to upholding or reversing a particular legal precedent are simply not an acceptable part of the appointment process."

In summary, Tribe stated:

> Both branches owe a duty to the nation to satisfy themselves that a Supreme Court appointee's scale of constitutional values, on the full range of questions likely to come to the Court in the foreseeable future, represents a principled version of the value system envisioned by the Constitution.
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> It is by now obvious that Senators cannot intelligently fulfill their constitutional role in the appointment process without knowing where Supreme Court nominees stand on important precedents and issues. Probing questions must be asked, and responsive answers must be given.

In a review of Professor Tribe's book, Duke University law professor Walter Dellinger offered yet another view:

> In deciding whether to consent to a Supreme Court nominee's appointment, a senator certainly ought to probe for evidence of intelligence, integrity and open-mindedness -- a willingness to be persuaded by cogent argument. Whether a senator will also take philosophy into account should depend to a large degree upon whether the president has done so in making the nomination.

Many constitutional scholars, including Professor Dellinger, have argued that consideration of whether the balance of the Court will shift is also a valid consideration and one documented throughout history. According to Professor Dellinger,

> [W]hen a president does attempt to direct the Court's future course by submitting a nominee known to be committed to a particular philosophy, it should be a completely sufficient basis for a senator's negative vote that the nominee's philosophy is one the senator believes would be bad for the country. In making this judgment, a senator should consider the present composition of the Court, and how this appointment would affect the Court's overall balance and diversity. (The New Republic, December 16, 1985, p. 41.)

The debates at the Constitutional Convention and the Federalist Papers confirm that one of the Senate's fundamental functions in confirming judicial nominees is to prevent partisan, ideological court packing by a President determined on remaking the Supreme Court to mirror his views. Candidates who represent a drastic shift in the Court's equilibrium to one extreme are worthy of rejection if a Senator believes the shift would be harmful to the nation. Each Senator has the obligation to consider a nominee in the context of the President's past nominations and intentions on future nominations to fully weigh considerations of balance on the Court.

There is no tradition of Senators refraining from taking into consideration a large range of factors during the confirmation process to fulfill their duty of "advise and

consent". To claim otherwise is to reject the lessons of history.

CONSTITUTIONAL HISTORY OF ADVISE AND CONSENT

The intent of the Framers was clearly that the Senate should play an active, independent role in evaluating the Supreme Court nominees. Early in its deliberations, the Convention voted to lodge exclusive power for the appointment of the judiciary in the Senate. Attempts to confer this power on the President or to diminish the role of the Senate were soundly defeated.

Only towards the conclusion of the Convention did the Framers belatedly agree to a co-equal role for the Chief Executive in the judicial appointments process. Governor Morris described the Senate's role in the Convention's final plans as the power "to appoint judges nominated to them by the President."

The debate over ratification of the Constitution, as described in The Federalist Papers reinforces an active Senate role in the appointment of Supreme Court justices.

THE CONSTITUTIONAL CONVENTION

The proceedings of the Constitutional Convention document the Framers' intention to confer on the Senate an active role in the selection of Supreme Court justices.

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The first plan, introduced on May 29, 1787, that recommended a mechanism for appointing justices provided that "a National Judiciary be established...to be chosen by the National Legislature." The "Virginia plan" was amended by June 19 to give the Senate the power of appointment, and the provision remained in the draft version of the Constitution throughout most of the Convention.

Arguments during the Convention centered on two alternatives: one in which the power of appointment would rest with the Senate, and another in which the power of appointment would rest with the Executive.

The delegates arguing in favor of Senate appointment feared excessive power in the Executive, saying that appointment by the Executive was a "dangerous prerogative" because it might "even give him [the Executive] an influence over the Judiciary department itself." Furthermore, they were concerned that control of appointment would be "leaning too much toward Monarchy."

Delegates also believed that the legislature, "being taken from all the States" would be "best informed of characters and most capable of making a fit choice." It was argued that the Senate "would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom. They would bring into their deliberations a more diffusive knowledge of

characters. It would be less easy for candidates to intrigue with them, than with the Executive Magistrate."

Proponents for executive appointment argued that it would be advantageous to place the responsibility for appointment in one person and that the President be better informed about the qualifications of potential members of the judiciary.

The debates over the method of appointment of federal judges continued throughout the Convention. Alexander Hamilton argued for a co-equal role for the Senate and President and introduced his resolution on June 5, 1787. James Madison also voiced his concern over empowering the appointment power exclusively in either the Senate or the Executive. On the one hand, Madison said he disliked placing control in the Legislature because it would be too large a body to make appointments. He also believed it would be dangerous to give the Executive sole power. He concluded, however, that he would rather give the power to the Senate, because they would be "sufficiently stable and independent to follow their deliberate judgments." By June 19, the Convention approved a motion that the Justices be "appointed by the second branch of the National Legislature."

The issue was raised again on July 18, when a motion was made referring the appointment of judges to the Executive. This motion failed, 6-2. Another motion, that "judges be nominated and appointed by the Executive by and with the advice and consent of the Second branch" was also rejected.

On July 21, James Madison offered a motion that the Executive nominate judges. The nomination would stand unless disapproved by 2/3 of the Senate. After objections were raised over the 2/3 requirement, Madison amended his motion to "the Executive should nominate, and such nominations should become appointments unless disagreed to by the Senate." The motion failed, 6-3. The Convention then proceeded on a 6-3 vote to retain the clause "as it stands by which the Judges are to be appointed by the Second branch," effectively defeating a passive role for the Senate.

The provision was included in the August 6 draft reported by the Committee on Detail and was later referred to the Committee of Eleven, where the present compromise of co-equal roles for the Senate and President was achieved. On September 7, the Convention adopted the compromise version unanimously.

The compromise underscores the intent of the Framers to give the Senate an active role in the appointment process. Its unanimous adoption indicates that the supporters of exclusive Senate appointment powers were convinced of an equal role for the Senate with the President under the compromise.

FEDERALIST PAPERS

Although the debate over ratification of the Constitution does not provide much detail on the appointment of the judiciary, The Federalist Papers argue for an active Senate role in the

process. The Federalist Papers 76 and 77 written by Alexander Hamilton, an advocate of a powerful Executive, addressed appointment to the judiciary and confirmed that the co-equal role for the Senate and Chief Executive would have a salutary effect on the quality of judicial appointments.

In Federalist 76, Hamilton argued that the Senate would be a check on favoritism by the President and would provide stability:

> It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.
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> It will readily be comprehended that a man who had himself the sole disposition of offices would be governed much more by his private inclination and interests than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body and entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism or an unbecoming pursuit of popularity to the observation of a body whose opinion would have great weight in forming that of the public could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."

In Federalist Paper 77, Hamilton answered the allegation that the Senate might have undue influence over the President: "If by influencing the President be meant restraining him, this is precisely what must have been intended."

Also, in number 77, Hamilton said the Senate would check any excessive Executive power: "In the only instance in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States, would, by that plan, be subjected to the control of a branch of the legislative body."

The Framers clearly intended to give the Senate the authority and responsibility to play an active, independent role in the "advice and consent" process.

THE SENATE ROLE IN PREVIOUS CONFIRMATIONS

Throughout its history, the Senate has played the active, independent role envisioned by the Framers. Indeed, the Senate has refused to confirm nearly one out of every four nominations submitted for its "advice and consent." The Senate's reasons for refusing confirmation have ranged from competence and temperament to constitutional philosophy and political views. The historical record clearly shows that the nominees' social and constitutional viewpoints have been considered relevant to Senate review for appointment to the Supreme Court. Furthermore, these issues, as legitimate concerns in the confirmation process, have been raised by Senators whose views span the political spectrum. The process

has never been limited to questions of mere competence and ethical behavior.

As early as the second term of George Washington's administration, the Senate rejected the nomination of John Rutledge to be Chief Justice because he violently attacked the Jay Treaty which was strongly supported by the Federalists. President Madison's nomination of Alexander Wolcott was rejected by the Senate because a majority of the Senate believed that he lacked the necessary legal qualifications for a Supreme Court justice. During the 19th century, only four nominations were rejected for reasons relating to qualification, whereas 17 were rejected for political or philosophical reasons.

In 1930, President Hoover's nomination of John Parker was rejected by a Republican Senate because of his inflammatory racial statements and discredited economic views. Many Senators also were concerned that his appointment could tip the balance on the Court, making it "reactionary."

In recent history, Abe Fortas' nomination was withdrawn after a stormy Senate debate. Thirty-two Senators addressed the question of the nominee's political and constitutional views. Senator Thurmond, for example, argued during the Fortas debate that "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 role of the Court in dealing with these issues."

Two of President Nixon's nominees were turned back by the Senate. Although alleged ethical improprieties were central to the Haynsworth debate, the nominee's views on labor law and race relations also figured prominently. G. Harrold Carswell, in addition to being considered unqualified, was rejected because of his lack of commitment to equal justice and racial insensitivity.

As even a cursory review of the historical record makes clear, the Senate, in applying its constitutional mandate to "advise and consent," has always acted on a broader criteria than just academic and professional credentials. The Senate's approach has been comprehensive, not restricted and perfunctory.

Because the Constitution offers no standards for Senate review, Senators historically have voted according to what they believed, in their independent judgment, to be in the best interests of the country. In so doing, they have considered the social, economic, political and judicial views of a nominee -- the very questions considered by the Chief Executive in recommending a judicial nominee. The Senate has also weighed the nominees in the context of a President's other appointments to the Supreme Court to ensure philosophical balance on the Court.

THE PERSPECTIVES OF POLICYMAKERS

During the past twenty years, the Senate has deliberated on eight nominations to the Supreme Court, one being the elevation of a sitting Justice to the post of Chief Justice. Five of those

nominees were confirmed. During the course of debate and in related comment, the role of the Senate was explored in ways that may be useful to the Senate's current consideration.

During the 1968 debate on the elevation of Justice Abe Fortas to be Chief Justice, Senator Thurmond summarized the appropriateness of careful scrutiny by the Senate:

> Mr. President, the Senate faces an historic and momentous decision in the question of whether or not to recommend the confirmation of the nomination of Justice Abe Fortas to be Chief Justice of the United States. We must each be cognizant of the consequences which are likely to flow from the action we take on this appointment. If the nomination is confirmed, we may well be effecting the policy of the Supreme Court for 20 years or more. Supreme Court Justices are not elected every 2 years -- or every 4 or 6 years. The Supreme Court is not responsive to the democratic process. It is, essentially, the most undemocratic institution in our system of government.
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> ....Even the most casual student of the Supreme Court must admit that the decisions of the Court affect the lives of Americans in most fundamental ways -- certainly as fundamentally as the decisions reached by Members of Congress or by the President, all of whom are elected by the people. When the Supreme Court makes such decisions we are perilously close to government without the consent of the governed.
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> Therefore, it is my contention that the power of the Senate to advise and consent to this appointment should be exercised fully. To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent have prescribed. It further serves the end of removing the

> Supreme Court even further away from the democratic process and our system of checks and balances. For these reasons, I believe a most thorough consideration of this appointment is completely justified.

During the same debate, Senator Ernest Hollings called for an examination of the nominee's philosophy:

> The question before us today is not one of Fortas' ability as a judge or an attorney, for he is obviously a talented one...it is a question of the philosophy of the prospective Chief Justice and the philosophy of the body he aspires to lead. Let's make no mistake about it; the two are inextricably bound.

Senator Sam Ervin was an active participant in the Fortas battle. In a statement for the Judiciary Committee Report on the Fortas nomination, he wrote:

> The Senate's role in the selection of a Supreme Court Justice is plainly equal to that of the President and it is the Senate's constitutional duty to ascertain whether a Supreme Court nominee is qualified in every sense of the word.
>
> The advise and consent power is not limited to academic training, experience and character but extends to the broader question of the nominee's judicial philosophy which includes his willingness to subject himself to restraint inherent in the judicial process.

Senator Ervin had enunciated those principles before. During the confirmation hearings of Justice Potter Stewart, in 1959, he questioned "why the Constitution was so foolish as to suggest that the nominee for the Supreme Court ought to be confirmed by the Senate" if the Senate was "not to be permitted to find out what [the nominee's] attitude is toward the

Constitution, or what his philosophy is." "Just give [the Executive] absolute power in the first place," he concluded.

Senator Fannin relied on a memo by William Rehnquist, then a private attorney, to defend ideological scrutiny of the nominee during the Fortas battle. Mr. Rehnquist's first published remarks on the confirmation process appeared in a 1959 article for the Harvard Law Record:

> The Supreme Court, in interpreting the constitution, is the highest authority in the land. Nor is the law of the constitution just "there," waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Constitution which have been most productive of judicial law-making - the "due process of law" and "equal protection of the laws" clauses --- are about the vaguest and most general of any in the instrument....
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> It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws", then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

Justice Rehnquist also commented on the Senate's role in a 1975 law review article, entitled "Political Battles for Judicial Independence": "Those on their way to the Supreme Court may be

judged by broader standards than merely moral rectitude and legal learning."

During the Senate's deliberations over the nomination of G. Harrold Carswell to the Supreme Court, President Richard Nixon wrote to the Senate attempting to define the Senate's role in the narrowest way possible:

> What is centrally at issue in this nomination is the constitutional responsibility of the President to appoint members of the Court -- and whether this responsibility can be frustrated by those who wish to substitute their own philosophy or their own subjective judgment for that of the one person entrusted by the Constitution with the power of appointment. The question arises whether I, as President of the United States, shall be accorded the same right of choice in naming Supreme Court Justices which as been freely accorded to my predecessors of both parties.
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> I respect the right of any Senator to differ with my selection. It would be extraordinary if the President and 100 Senators were to agree unanimously as to any nominee. The fact remains, under the Constitution it is the duty of the President to appoint and of the Senate to advise and consent. But if the Senate attempts to substitute its judgment as to who should be appointed the traditional constitutional balance is in jeopardy and the duty of the President under the Constitution impaired.
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> For this reason, the current debate transcends the wisdom of this or any other appointment. If the charges against Judge Carswell were supportable, the issue would be wholly different. But if, as I believe the charges are baseless, what is at stake is the preservation of the traditional constitutional relationships of the President and the Congress.

President Nixon's interpretation was soundly rejected by the Senate when it voted against the Carswell nomination.

One of the strongest advocates of an equal role for the Senate in the confirmation process was selected to oversee the judicial selection process at the Justice Department under Attorney General Edwin Meese and performed that function until several months ago. In 1983, Grover Rees, then an assistant professor of law at the University of Texas, wrote:

> [T]he Constitution suggests no distinction between the criteria the President should use to `nominate' judges and those the Senate should use in exercising its `advice and consent' function....Both the diction and the sentence structure suggest a process of proposal and disposal rather than a unilateral decision subject to Senate veto only in extraordinary cases....
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> The most obvious reading of the provision for appointment of Justices is that nobody should be appointed to the Court unless the President and a majority of the Senators believe he would be a good Justice. ("Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution," 17 Georgia Law Review 913, (1983).)

In an article in which he argued that the Senate should scrutinize the ideology of Supreme Court nominees, Mr. Rees concluded,

> Whether one accepts a constructionist or a nonconstructionist model of judicial review, a prospective judge's views on constitutional questions ought to be regarded by the President and the Senate as relevant to that

> prospect's qualification for judicial office....
>
> Since the responsibility of Senators to choose good Supreme Court Justices is just as great as that of the President, and since nominees' opinions on constitutional questions are relevant to their qualification, the practice of nominees' refusing to answer such questions should be changed.

In an earlier memo prepared by Rees while serving on the staff of the Senate Subcommittee on Separation of Powers, he argued:

> If a Senator may legitimately vote to confirm or reject a nominee because of the nominee's positions on questions of constitutional law or related questions of social and economic policy --- and especially if, as Black and Rehnquist suggest, a Senator may have a duty to base his vote at least partly on the nominee's views --- then the Senator ought to have some way of ascertaining what these views are.

These statements reflect the view that, although it is the President's prerogative to make appointments that will shape the court according to his philosophy, it is the Senate's responsibility to reject those nominations it does not consider to be in the best interests of the country.

NATIONAL ATTITUDES REGARDING THE SENATE'S ROLE

Support for an independent judgment by the Senate was recently confirmed in a recent survey of the American electorate on this and related issues. People For The American Way recently commissioned a poll to determine public attitudes toward the American judicial system, the standards the public wants

applied in the selection of federal judges and the role the Senate ought to play in the confirmation process. The survey was conducted earlier this month by Peter D. Hart Research Associates among a representative sample of the American electorate.

The survey and a complete analysis of the results are appended to the testimony. However, we would like to highlight the key findings, particularly as they relate to the considerations of this committee in reviewing judicial nominations.

While the poll results revealed overwhelming approval of President Reagan - a 73% favorable rating - 86% of the respondents say it is very or quite important for the Senate to play an active role in reviewing nominees for federal judgeships. Only 18% believe the Senate should go along with the President's choice, if the nominee is honest and competent. It is unmistakably clear that American voters want the Senate to be an equal partner with the President in forming the third branch of government.

In describing the role of the Senate, the voters stressed active participation and independence. By a margin of 78% to 16%, they endorsed the position that "it is important for the Senate to make sure that judges on the Supreme Court represent a balanced point of view," rejecting the position that the "Senate should let a President put whomever he wants on the Supreme Court, so long as the person is honest and competent."

Voters surveyed were asked to choose factors that would be valid grounds for opposition to a president's nominee. 83% indicated that statements demonstrating racial prejudice should be disqualifying; cheating in law school (79%); the American Bar Association finding that qualifications are only the bare minimum (68%); conviction for drunk driving (59%); and a commitment to repealing the Supreme Court decision that protects a woman's right to choice on abortion (57%).

When asked to assign priorities among a series of qualities judicial candidates should possess, 74% stressed being a "fair and open-minded person who avoids personal prejudice"; 71% stressed "having a spotless record of honesty and personal integrity" and 63% placed a very high priority on "having a strong commitment to ensuring that women and minorities have equal rights under the law."

By contrast, voters put the lowest priority on ideological considerations. Only 18%, for example, put a high degree of importance on "having a very conservative philosophy on issues" and only 10% stressed the importance of "having a very liberal philosophy." Furthermore, only 22% think that "taking a strong 'pro-life' position in opposition to legalized abortion" should be a high priority.

In short, this sampling of the American electorate in 1986 validates the 200-year-old tradition of the Senate in discharging its responsibility for an independent judgment, as mandated by

the Constitution. The survey indicates that the American people, by overwhelming margins, endorse a thorough and independent evaluation of judicial nominees that puts stress on fairness, open-mindedness and a commitment to equal rights. Further, the electorate supports the position that the Senate, through its advise and consent responsibilities, must ensure that justices on the Supreme Court represent a "balanced point of view."

CONCLUSION

In considering the nomination of William Rehnquist to be Chief Justice, the Senate has a constitutional obligation to reaffirm its historic mandate to render an independent judgment, after a thorough review of the nominee's record, as to whether the nomination is in our nation's best interest. The Senate must be able to assure the American people that Justice Rehnquist is committed to equal justice under the law and committed to protecting the cherished constitutional liberties guaranteed by the Bill of Rights. For the Senate to fail to do so would dishonor the Constitution and be a disservice to the nation.

A SURVEY OF ATTITUDES TOWARD THE AMERICAN JUDICIAL SYSTEM

July 1986

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Introduction

This report presents the findings of a survey conducted by Peter D. Hart Research Associates, Inc., among a representative sample of the American electorate.

Between July 10 and July 14, 1986, Hart Research conducted telephone interviews with 1,000 adults who report that they regularly vote in federal and state elections. Individual interviews lasted an average of 25 minutes.

Respondents were selected by scientific random sampling techniques and the use of a random-digit dialing system. With a sample of this size, the statistical margin of error at the 95% confidence level is plus or minus 3%.

This survey was commissioned by People for the American Way. The research was supervised by Geoffrey D. Garin, President of Hart Research.

This report conforms with the disclosure standards of the American Association of Public Opinion Research and the National Council on Public Polls.

Overview of Key Findings Concerning The Courts and Court Appointments

Familiarity with the Judiciary

- Three-fifths of all Americans feel they are generally familiar with the workings of the U.S. Supreme Court. Overall, 59% report that they know a lot (21%) or some (38%) about the Supreme Court; 26% say they know just a little about the Court, and 15% say they know hardly anything about it. When asked about their familiarity with the entire federal court system, 51% say they know a lot or some about it, while 32% know just a little or hardly anything about it. The Supreme Court ranks somewhat below the U.S. Congress in voter familiarity; 67% say they know a lot or some about the Congress.

- Large majorities of the electorate indicate familiarity with specific facts about the court system. For example, 80% say they know that there are nine judges on the Supreme Court. Seventy-eight percent say they know that a presidential nominee to the federal courts must be approved by a majority vote of the U.S. Senate. Seventy-eight percent say they know that federal court judgeships are lifetime appointments.

- Despite his recent nomination as chief justice of the Supreme Court, substantive familiarity with William Rehnquist is a distinctly minority phenomenon among the electorate. Sandra Day O'Connor is somewhat more widely known.

  --Just 30% of the voters say they are familiar with William Rehnquist and know something about him, another 28% say they just know his name, and 42% are unfamiliar with his name. Among those with an opinion of Justice Rehnquist, 12% are mainly favorable, 10% are neutral, and 5% are mainly unfavorable.

  --Sixty percent of the voters say they know something about Sandra Day O'Connor, 20% say they just know her name, and 20% say they are unfamiliar with her name. Among those who report an impression of her, 39% are mainly favorable, 16% are neutral, and 3% are mainly unfavorable.

  --Three-fifths of all voters say they know something about Edwin Meese, and 28% say they just know his name; 12% report they are unfamiliar with Mr. Meese's name. Among those with an opinion, 16% are mainly favorable toward the Attorney General, 23% are neutral, and 16% are mainly unfavorable.

Criteria for Court Appointments

- From among twelve considerations, voters place the highest priority on three qualities in the selection of federal judges:

  --Seventy-four percent stress the importance of "being a fair and open-minded person who avoids personal prejudice."

  --Seventy-one percent assign the highest rating to "having a spotless record of honesty and personal integrity."

  --Sixty-three percent place very high priority on "having a strong commitment to ensuring that women and minorities have equal rights under the law."

- Three other factors are rated as highly important by a near majority of the electorate: "having a distinguished record of experience as a lawyer" (46%), "having a distinguished record of service in other judicial positions" (45%), and "taking a strong 'law and order' approach on issues involving law enforcement" (45%).

- Of the twelve considerations presented to them, voters put the lowest priority on ideological considerations. Just 18%, for example, place a high degree of importance on "having a very conservative philosophy on issues," and only 10% stress the importance of "having a very liberal philosophy."

- Just 22% think that "taking a strong 'pro-life' position in opposition to legalized abortion" should be a priority consideration in the selection of federal judges.

The Senate's Role in Judicial Appointments

- The vast majority of voters consistently express support for the ideas that the Senate should play an active role in reviewing a judicial nominee and that it should make an independent decision about whether a president's nominee is in the best interests of the country.

  --Eighty-six percent say it is very or quite important for the Senate to play an active role in reviewing a president's selection for a federal judgeship, including 69% who feel this is very important.

  --When given a choice, 75% say the Senate should make an independent decision about whether the president's selection is in the country's best interests, while only 18% say the Senate should go along with the president's choice if the person is honest and competent.

  --By a margin of 78% to 16%, voters endorse the position that "it is important for the Senate to make sure that judges on the Supreme Court represent a balanced point of view" over the position that "the Senate should let a president put whomever he wants on the Supreme Court, so long as the person is honest and competent."

  --Seventy-eight percent of all voters agree with the idea that "under our system of checks and balances, it would be wrong to give a president too much power to impose his philosophy on the Supreme Court."

- Voters were asked whether each of ten factors would be a valid reason for the Senate to oppose a president's selection for a federal judgeship. Majorities say seven factors would be valid reasons for Senate opposition:

  --"The person has made statements about black people that indicate he is prejudiced against them" (83%);

  --"The person had been caught cheating in law school" (79%);

  --"The American Bar Association has said the person's qualifications are only the bare minimum" (68%);

  --"The person has been a supporter of the Socialist Party" (67%);

  --"The person has been a supporter of the John Birch Society" (62%);

  --"The person has been convicted of drunk driving" (59%);

  --"The person is committed to repealing the Supreme Court decision that protects a woman's right to choice on abortion" (57%).

Using the Abortion Issue as a "Litmus Test" for Judges

- Fully 74% of all voters say they support the Supreme Court decision that "leaves the choice on abortion mainly up to a woman and her doctor, without government interference," while 20% feel this decision should be reversed. Clear majorities among virtually all demographic subgroups support the decision--ranging from 85% among non-fundamentalist Protestants, 80% among voters in white-collar households, and 80% among college-educated voters, to 59% among born-again Protestants, 68% among Catholics, 68% among voters with no education beyond high school, and 69% among blue collar workers.

- By an overwhelming margin of 77% to 14%, voters believe it is a bad idea for a president to "consider only people who believe government should be able to restrict a woman's right to choice on abortion" in making federal court appointments. This includes a 60% majority of the electorate who strongly feel that this is a bad idea. Opposition is the rule throughout the range of subgroups--including Republicans (by 71% to 16%) and conservatives (by 68% to 20%). Even those who believe the Supreme Court's abortion decision should be reversed say, by a margin of 59% to 31%, that it would be wrong to make this position a prerequisite for a court appointment.

Positions on Constitutional Issues

- When asked about the Supreme Court decision that "requires police to inform suspects of their rights, including the right to have a lawyer present when being questioned by the police," 86% say they support this decision and 9% say the decision should be reversed.

- By 71% to 17%, voters say they support the Court decisions that "require the government to maintain a strict separation of church and state." At the same time, however, voters say by 52% to 37% that they favor reversing the decision that "bans officially organized group prayer in the public schools."

- By 46% to 36%, voters support the decisions that "permit employers to use affirmative action hiring goals for minorities and women, to make up for past discrimination."

- Ninety-six percent of all voters agree that "state and local governments should be required to abide by the Bill of Rights."

- By 53% to 38%, voters oppose the assertion that Attorney General Meese "is doing the right thing by using the power of his office to put pressure on stores to stop selling Playboy and Penthouse."

- By 76% to 17%, voters concur that "the Supreme Court should consider changing times and modern realities in applying the principles of the Constitution." By 57% to 34%, voters reject the assertion that "the Supreme Court should only consider the original intent of the Founding Fathers when they wrote the Constitution 200 years ago."

TABLES

A KEY TO THE SYMBOLS USED IN THESE TABLES

(m)	Multiple responses accepted; totals may be greater than 100%.
@	Percentages calculated only on the basis of those respondents who expressed an opinion; "not sure" responses excluded from calculations.
+	Base too small to be statistically reliable.
++	Base too small to be statistically analyzed.
(VOL)	Volunteered response.
NA	Not applicable.

Q.4a. T1

INDICATIONS OF HOW MUCH RESPONDENT KNOWS ABOUT SELECTED BRANCHES OF GOVERNMENT

	A Lot %	Some %	Just A Little %	Hardly Anything %
The U.S. Congress	27	40	25	8
Respondent's state legislature	22	38	27	13
The U.S. Supreme Court	21	38	26	15
Respondent's state and local courts	22	35	30	13
The federal court system	15	36	32	17

Q.4a. T2

INDICATIONS OF HOW MUCH RESPONDENT KNOWS ABOUT
THE U.S. SUPREME COURT AND THE FEDERAL COURT SYSTEM

	- - U.S. Supreme Court - - -			- - - Federal Courts - - -		
	A Lot/ Some %	Just A Little/ Hardly Anything %	Not Sure %	A Lot/ Some %	Just A Little/ Hardly Anything %	Not Sure %
All Voters	59	41	-	51	49	-
Republicans	66	34	-	58	41	1
Independents	52	47	1	49	51	-
Democrats	55	44	1	45	54	1
Age 18-24	60	40	-	53	47	-
Age 25-34	58	42	-	52	48	-
Age 35-49	63	37	-	55	45	-
Age 50-64	60	40	-	51	49	-
Age 65 and over	52	47	1	45	53	2
Upper income white collar workers	74	26	-	64	36	-
Lower income white collar workers	67	33	-	56	43	1
Blue collar workers	48	52	-	42	58	-
Retirees	52	46	2	46	53	1
College graduates	77	23	-	68	32	-
Some college	62	37	1	52	47	1
High school or less	45	55	-	39	61	-
Whites	60	40	-	52	48	-
Blacks	49	50	1	47	53	-

Q.5. T3

INDICATIONS OF WHETHER RESPONDENT ALREADY KNEW SELECTED FACTS ABOUT THE FEDERAL COURT SYSTEM

	Already Knew %	Had Not Known Before %	Not Sure %
There are nine judges, or "justices," on the Supreme Court	80	19	1
Once the president selects a person to serve on the Supreme Court and other federal courts, the selection must be approved by a majority vote of the United States Senate	78	21	1
Supreme Court judges and other federal judges are appointed to a lifetime position on the court	78	22	-

Q.5. T4

INDICATIONS OF WHETHER RESPONDENT ALREADY KNEW SELECTED FACTS ABOUT THE FEDERAL COURT SYSTEM

There are nine judges, or "justices," on the Supreme Court.

	Proportion Who Already Knew %
All Voters	80
Republicans	84
Independents	80
Democrats	77
Age 18-24	86
Age 25-34	75
Age 35-49	84
Age 50-64	78
Age 65 and over	81
Upper income white collar workers	88
Lower income white collar workers	81
Blue collar workers	76
Retirees	79
College graduates	93
Some college	81
High school or less	71
Whites	81
Blacks	74

(cont'd)

Q.5. T4 (cont'd)

INDICATIONS OF WHETHER RESPONDENT ALREADY KNEW SELECTED FACTS ABOUT THE FEDERAL COURT SYSTEM

Once the president selects a person to serve on the Supreme Court and other federal courts, the selection must be approved by a majority vote of the United States Senate.

	Proportion Who Already Knew %
All Voters	78
Republicans	79
Independents	76
Democrats	78
Age 18-24	72
Age 25-34	75
Age 35-49	79
Age 50-64	77
Age 65 and over	83
Upper income white collar workers	84
Lower income white collar workers	84
Blue collar workers	70
Retirees	79
College graduates	87
Some college	80
High school or less	70
Whites	78
Blacks	74

(cont'd)

Q.5. T4 (cont'd)

INDICATIONS OF WHETHER RESPONDENT ALREADY KNEW SELECTED FACTS ABOUT THE FEDERAL COURT SYSTEM

Supreme Court judges and other federal judges are appointed to a lifetime position on the court.

	Proportion Who Already Knew %
All Voters	78
Republicans	84
Independents	75
Democrats	74
Age 18-24	75
Age 25-34	70
Age 35-49	80
Age 50-64	79
Age 65 and over	84
Upper income white collar workers	93
Lower income white collar workers	81
Blue collar workers	66
Retirees	80
College graduates	93
Some college	84
High school or less	63
Whites	81
Blacks	56

Q.3. T5

FAMILIARITY WITH SELECTED PUBLIC FIGURES, AND ATTITUDES TOWARDS THOSE FIGURES AMONG RESPONDENTS WHO ARE FAMILIAR WITH THEM

	Know Something About Public Figure					
	Mainly Favorable %	Neutral %	Mainly Unfavorable %	Not Sure Of Opinion %	Just Know The Name %	Unfamiliar With Name %
Sandra Day O'Connor	39	16	3	2	20	20
Edwin Meese	16	23	16	5	28	12
William Rehnquist	12	10	5	3	28	42

Q.3. T6

FAMILIARITY WITH SANDRA DAY O'CONNOR, AND ATTITUDES TOWARD HER
AMONG RESPONDENTS WHO ARE FAMILIAR WITH HER

	- - - Know Something About Her - - - -					
	Mainly Favorable %	Neutral %	Mainly Unfavorable %	Not Sure Of Opinion %	Just Know The Name %	Unfamiliar With Name %
All Voters	39	16	3	2	20	20
Republicans	46	13	2	2	18	19
Independents	32	16	2	3	27	20
Democrats	36	18	4	2	18	22
Age 18-24	35	21	5	4	19	16
Age 25-34	38	15	4	1	19	23
Age 35-49	39	15	3	2	20	21
Age 50-64	38	16	1	2	24	19
Age 65 and over	39	15	3	3	18	22
Upper income white collar workers	55	15	4	3	13	10
Lower income white collar workers	34	20	4	3	19	20
Blue collar workers	29	12	2	2	29	26
Retirees	42	13	3	1	18	23
College graduates	50	19	5	3	11	12
Some college	39	16	2	3	17	23
High school or less	31	13	2	1	29	24
Whites	40	16	3	2	19	20
Blacks	24	12	3	1	30	30

Q.3. T7

FAMILIARITY WITH EDWIN MEESE, AND ATTITUDES TOWARD HIM
AMONG RESPONDENTS WHO ARE FAMILIAR WITH HIM

	- - - Know Something About Him - - - -					
	Mainly Favorable %	Neutral %	Mainly Unfavorable %	Not Sure Of Opinion %	Just Know The Name %	Unfamiliar With Name %
All Voters	16	23	16	5	28	12
Republicans	28	24	8	3	25	12
Independents	10	28	16	5	30	11
Democrats	9	20	23	5	30	13
Age 18-24	13	19	13	2	29	24
Age 25-34	13	27	12	4	33	11
Age 35-49	16	22	18	5	26	13
Age 50-64	16	23	19	5	27	10
Age 65 and over	19	25	16	6	26	8
Upper income white collar workers	23	29	19	5	18	6
Lower income white collar workers	16	28	16	4	26	10
Blue collar workers	10	19	14	5	35	17
Retirees	14	24	18	3	31	10
College graduates	21	25	27	4	18	5
Some college	17	25	15	6	27	10
High school or less	11	21	9	4	36	19
Whites	17	24	15	4	29	11
Blacks	5	22	22	4	28	19

Q.3. T8

FAMILIARITY WITH WILLIAM REHNQUIST, AND ATTITUDES TOWARD HIM
AMONG RESPONDENTS WHO ARE FAMILIAR WITH HIM

	- - - Know Something About Him - - - -					
	Mainly Favorable %	Neutral %	Mainly Unfavorable %	Not Sure Of Opinion %	Just Know The Name %	Unfamiliar With Name %
All Voters	12	10	5	3	28	42
Republicans	20	9	1	2	29	39
Independents	7	8	4	5	30	46
Democrats	7	12	8	3	26	44
Age 18-24	9	4	6	2	26	53
Age 25-34	10	9	4	3	24	50
Age 35-49	12	9	5	2	30	42
Age 50-64	12	12	5	4	31	36
Age 65 and over	14	11	4	4	28	39
Upper income white collar workers	22	12	5	3	30	28
Lower income white collar workers	12	10	7	3	31	37
Blue collar workers	4	6	3	3	26	58
Retirees	13	12	6	3	25	41
College graduates	24	14	7	2	27	26
Some college	8	10	5	5	30	42
High school or less	5	6	3	3	27	56
Whites	13	10	4	3	28	42
Blacks	2	5	6	1	33	53

Q.7. T9

RATINGS OF SELECTED CONSIDERATIONS FOR CHOOSING FEDERAL JUDGES @[1]

	Mean Score #	Very Important (9-10) %	(7-8) %	(5-6) %	Not So Important (1-4) %	(Not Sure %
Being a fair and open-minded person who avoids personal prejudice	8.9	74	19	3	4	(1)
Having a spotless record for honesty and personal integrity	8.8	71	18	7	4	-
Having a strong commitment to ensuring that minorities and women have equal rights under the law	8.5	63	24	9	4	(1)
Taking a strong "law-and-order" approach on issues involving law enforcement	8.1	45	39	12	4	(1)
Having a distinguished record of service in other judicial positions	7.9	45	34	16	5	(1)
Having a distinguished record of experience as a lawyer	7.8	46	31	16	7	(1)
Being rated as highly qualified by the American Bar Association and other lawyers' groups	7.5	33	42	18	7	(1)
Being a religious person who believes in God	6.9	38	21	21	20	(1)
Having a strong commitment to the principle of separation of church and state	6.9	29	32	25	14	(2)
Having a very conservative philosophy on issues	6.0	18	28	32	22	(3)
Taking a strong "pro-life" position in opposition to legalized abortion	5.3	22	16	22	40	(4)
Having a very liberal philosophy on issues	5.2	10	20	37	33	(4)

[1]Based on a ten-point scale on which a rating of "10" means the respondent thinks the quality is very important for consideration in selecting federal judges and a rating of "1" means it is not very important.

Q.7. T10

PROPORTIONS WHO SAY SELECTED CONSIDERATIONS ARE VERY IMPORTANT IN CHOOSING FEDERAL JUDGES, WITH GROUPS MOST AND LEAST LIKELY TO SAY VERY IMPORTANT @[1]

	Proportion Who Say Very Important (9-10) %	Groups Most Likely To Say Very Important:	%	Groups Least Likely To Say Very Important:	%
Being a fair and open-minded person who avoids personal prejudice	74			Age 65 and over	63
				Retirees	65
Having a spotless record for honesty and personal integrity	71	Above-average awareness on courts	80	Age 18-24	61
		Republicans	77	Below-average awareness on courts	63
		Conservatives	76	Liberals	65
		Age 50-64	76	Blacks	66
		Upper income white collar workers	76		
		Reagan voters	75		
Having a strong commitment to ensuring that minorities and women have equal rights under the law	63	Blacks	83	Consistently support presidential discretion	53
		Mondale voters	71	Republicans	58
		Blue collar workers	70		
		Independents	68		
		Liberals	68		
		Retirees	68		
Having a distinguished record of experience as a lawyer	46	Blacks	64	College graduates	37
		Age 65 and over	53	Men	39
		Women	52	Consistently support presidential discretion	41
		Retirees	51	South	41
				Upper income white collar workers	40
Having a distinguished record of service in other judicial positions	45	Above-average awareness on courts	55	Below-average awareness on courts	29
		College graduates	53	Age 18-24	33
		Upper income white collar workers	51	Consistently support presidential discretion	35
		West	51	Age 65 and over	37
				Born-again Protestants	38
				Retirees	39
				High school or less	39
				Moderates	40
Taking a strong "law-and-order" approach on issues involving law enforcement	45	Conservatives	58	Mondale voters	34
		Republicans	56	Liberals	34
		Consistently support presidential discretion	53	College graduates	37
				Lower income white collar workers	38
		Above-average awareness on courts	51	Democrats	38
		Reagan voters	51	Age 25-34	39
		Some college	50		
Being a religious person who believes in God	38	Born-again Protestants	68	College graduates	22
		Blacks	63	Above-average awareness on courts	23
		Age 65 and over	56	Upper income white collar workers	25
		Retirees	54	Age 18-24	28
		Below-average awareness on courts	51	Age 25-34	29
		High school or less	50	Liberals	30
		Conservatives	49	Catholics	32
		South	48	Northeast	33
		Women	44	Protestants/not born-again	33

(cont'd)

[1] Based on a ten-point scale on which a rating of "10" means the respondent thinks the quality is very important for consideration in selecting federal judges and a rating of "1" means it is not very important.

Q.7. T10 (cont'd)

PROPORTIONS WHO SAY SELECTED CONSIDERATIONS ARE VERY IMPORTANT IN CHOOSING FEDERAL JUDGES, WITH GROUPS MOST AND LEAST LIKELY TO SAY VERY IMPORTANT @[1]

	Proportion Who Say Very Important (9-10) %	Groups Most Likely To Say Very Important: %	Groups Least Likely To Say Very Important: %
Being rated as highly qualified by the American Bar Association and other lawyers' groups	33	Blacks 49 Other Protestants/ not born-again 38	Catholics 26 Consistently support presidential discretion 27 Mixed/neutral on Senate role 28
Having a strong commitment to the principle of separation of church and state	29	West 37 Mondale voters 36 Age 50-64 36 Above-average awareness on courts 36 Age 65 and over 34	Age 18-24 19 Below-average awareness on courts 24
Taking a strong "pro-life" position in opposition to legalized abortion	22	High school or less 31 Born-again Protestants 31 Consistently support presidential discretion 30 Age 65 and over 29 Conservatives 27	Protestants/not born-again 14 Mondale voters 15 College graduates 16 Above-average awareness on courts 17 Liberals 17
Having a very conservative philosophy on issues	18	Blacks 32 Consistently support presidential discretion 30 Age 65 and over 28 Born-again Protestants 26 Below-average awareness on courts 25 Conservatives 25 High school or less 24	Above-average awareness on courts 10 College graduates 11 Liberals 12 Upper income white collar workers 12 Men 13 Age 25-34 13
Having a very liberal philosophy on issues	10	Blacks 23 Below-average awareness on courts 17	College graduates 4 Above-average awareness on courts 4

[1] Based on a ten-point scale on which a rating of "10" means the respondent thinks the quality is very important for consideration in selecting federal judges and a rating of "1" means it is not very important.

Q.10a,b,11b. T11

PERCEPTIONS OF HOW IMPORTANT IT IS THAT THE SENATE TAKE AN ACTIVE ROLE REVIEWING THE PRESIDENT'S FEDERAL JUDGESHIP APPOINTMENTS

	Very Important %	Quite Important %	Just Somewhat Important %	Not Really Important %	Not Sure %
All Voters	69	17	10	3	1
Republicans	60	22	13	4	1
Independents	69	18	10	3	-
Democrats	78	12	7	2	1

PERCEPTIONS OF WHETHER THE SENATE SHOULD GO ALONG WITH THE PRESIDENT'S FEDERAL JUDGESHIP APPOINTMENTS OR SHOULD MAKE AN INDEPENDENT DECISION

	Make Independent Decision %	Senate Should Go Along %	Depends (VOL) %	Not Sure %
All Voters	75	18	5	2
Republicans	68	25	5	2
Independents	80	13	5	2
Democrats	78	15	4	3

PERCEPTIONS OF HOW THE SENATE SHOULD DEAL WITH SUPREME COURT APPOINTMENTS

Position A: The Senate should let a president put whomever he wants on the Supreme Court, so long as the person is honest and competent.

Position B: It is important for the Senate to make sure that the judges on the Supreme Court represent a balanced point of view

	Position A %	Position B %	Some Of Both (VOL) %	Not Sure %
All Voters	16	78	4	2
Republicans	25	69	4	2
Independents	12	82	5	1
Democrats	11	83	4	2

Q.11a. T12

PERCEPTIONS OF WHETHER SELECTED REASONS FOR SENATE OPPOSITION TO A FEDERAL COURT APPOINTMENT ARE VALID

	Valid %	Not Valid %	Depends (VOL) %
The person has made statements about black people that indicate he is prejudiced against them	83	14	3
The person had been caught cheating in law school	79	18	3
The American Bar Association has said the person's qualifications are only the bare minimum	68	28	4
The person has been a supporter of the Socialist Party	67	29	4
The person has been a supporter of the John Birch Society	62	32	6
The person has been convicted of drunk driving	59	32	9
The person is committed to repealing the Supreme Court decision that protects a woman's right to choice on abortion	57	38	5
The person's philosophy tends to be very liberal, rather than moderate	40	52	8
The person's philosophy tends to be very conservative, rather than moderate	35	56	9
The person's views and legal interpretations tend to put him in a small minority among his fellow judges	30	63	7

PROPORTIONS WHO SAY SELECTED REASONS FOR SENATE OPPOSITION TO A FEDERAL COURT APPOINTMENT ARE VALID AND NOT VALID, WITH GROUPS MOST LIKELY TO TAKE EACH POSITION

	Proportion Who Say Valid %	Groups Most Likely To Say Valid	%	Proportion Who Say Not Valid %	Groups Most Likely To Say Not Valid	%
The person has made statements about black people that indicate he is prejudiced against them	83	Liberals	89	14	Below-average awareness on courts	22
		Upper income white collar workers	89		Age 65 and over	22
		Lower income white collar workers	89		Retirees	22
		West	88		Blue collar workers	19
		Mondale voters	88			
The person had been caught cheating in law school	79	West	87	18		
		Age 18-24	84			
		Age 25-34	84			
The American Bar Association has said the person's qualifications are only the bare minimum	68	Age 18-24	78	28	Consistently support presidential discretion	44
		Above-average awareness on courts	75		Below-average awareness on courts	35
		Upper income white collar workers	75		Retirees	34
		Blacks	74			
		Mondale voters	74			
		College graduates	73			
The person has been a supporter of the Socialist Party	67	Republicans	77	29	Blacks	40
		Conservatives	74		Mondale voters	40
		Upper income white collar workers	74		Age 65 and over	40
		Reagan voters	74		Age 18-24	37
		West	72		Liberals	37
		Age 35-49	72		Retirees	35
					Democrats	34
The person has been a supporter of the John Birch Society	62	Upper income white collar workers	71	32	Age 18-24	44
		College graduates	70		Blue collar workers	41
		Mondale voters	70		Below-average awareness on courts	40
		Liberals	69		Consistently support presidential discretion	40
		West	68		High school or less	39
		Above-average awareness on courts	67		Conservatives	38
		Lower income white collar workers	67		Born-again Protestants	38
					South	37

(cont'd)

PROPORTIONS WHO SAY SELECTED REASONS FOR SENATE OPPOSITION TO A FEDERAL COURT APPOINTMENT ARE VALID AND NOT VALID, WITH GROUPS MOST LIKELY TO TAKE EACH POSITION

	Proportion Who Say Valid %	Groups Most Likely To Say Valid	%	Proportion Who Say Not Valid %	Groups Most Likely To Say Not Valid	%
The person has been convicted of drunk driving	59	Conservatives	66	32	Men	40
		Women	66		Above-average awareness on courts	38
		Below-average awareness on courts	65		College graduates	38
		High school or less	65		Catholics	38
		Age 65 and over	64			
		Born-again Protestants	64			
The person is committed to repealing the Supreme Court decision that protects a woman's right to choice on abortion	57	Mondale voters	66	38	Conservatives	44
		West	64		Men	44
		Liberals	63		Republicans	43
		Retirees	63		Age 35-49	43
		Protestants/not born-again	62		Catholics	43
The person's philosophy tends to be very liberal, rather than moderate	40	Age 65 and over	50	52	Liberals	66
		Retirees	50		Age 25-34	63
		Born-again Protestants	49		Consistently support presidential discretion	59
		Conservatives	48		Above-average awareness on courts	57
		Republicans	46		Midwest	57
		Mixed/neutral on Senate role	45			
		South	45			
		Age 50-64	45			
		Blacks	45			
The person's philosophy tends to be very conservative, rather than moderate	35	Retirees	46	56	Consistently support presidential discretion	68
		Blacks	46		Age 25-34	66
		Age 65 and over	44		Age 18-24	65
		Women	41		Men	63
		High school or less	40		Upper income white collar workers	63
					Independents	62
					College graduates	62
The person's views and legal interpretations tend to put him in a small minority among his fellow judges	30	Age 65 and over	41	63	Age 18-24	70
		Retirees	41		Blue collar workers	70
		Below-average awareness on courts	35		Northeast	69
		Mixed/neutral on Senate role	35			

Q.6. T14

INDICATIONS OF WHETHER RESPONDENT SUPPORTS OR WOULD REVERSE SELECTED SUPREME COURT DECISIONS

	Support %	Reverse %	Some Of Both/ Depends (VOL) %	Not Sure/ No Opinion %
The decision that requires the police to inform suspects of their rights, including the right to have a lawyer present when being questioned by the police	86	9	3	2
The decision that leaves the choice on abortion mainly up to a woman and her doctor, without government interference	74	20	3	3
The decisions that require the government to maintain a strict separation of church and state	71	17	5	7
The decisions that permit employers to use affirmative action hiring goals for minorities and women to make up for past discrimination	46	36	6	12
The decision that bans officially organized group prayer in the public schools	37	52	6	5

Q.6. T15

INDICATIONS OF WHETHER RESPONDENT SUPPORTS OR WOULD REVERSE A SELECTED SUPREME COURT DECISION

The decision that leaves the choice on abortion mainly up to a woman and her doctor, without government interference.

	Support %	Reverse %	Some Of Both/ Depends %	Not Sure/ No Opinion %
All Voters	74	20	3	3
Republicans	68	24	4	4
Independents	77	16	4	3
Democrats	76	18	3	3
Men	73	18	4	5
Women	74	21	3	2
Age 18-24	76	19	5	-
Age 25-34	78	18	2	2
Age 35-49	72	21	3	4
Age 50-64	75	17	5	3
Age 65 and over	67	24	3	6
Upper income white collar workers	80	16	3	1
Lower income white collar workers	81	14	2	3
Blue collar workers	69	22	5	4
Retirees	67	25	4	4
College graduates	80	16	2	2
Some college	76	18	4	2
High school or less	68	23	4	5
Born-again Protestants	59	30	5	6
Other Protestants/ not born-again	85	9	3	3
Catholics	68	26	3	3

Q.8. T16

PERCEPTIONS OF WHETHER IT IS A GOOD IDEA FOR A PRESIDENT TO CONSIDER AS FEDERAL COURT APPOINTEES ONLY THOSE WHO BELIEVE GOVERNMENT SHOULD BE ABLE TO RESTRICT A WOMAN'S RIGHT TO CHOICE ON ABORTION

	Good Idea, Feel Strongly %	Good Idea, No Strong Feelings %	Bad Idea, Feel Strongly %	Bad Idea, No Strong Feelings %	Depends (VOL) %	Not Sure %
All Voters	10	4	60	17	4	5
Republicans	12	4	52	19	6	7
Independents	8	3	66	17	3	3
Democrats	10	5	61	16	4	4
Men	10	4	60	18	4	4
Women	11	4	59	17	4	5
Age 18-24	12	4	58	20	2	4
Age 25-34	8	4	68	13	4	3
Age 35-49	11	3	62	17	4	3
Age 50-64	9	4	57	20	5	5
Age 65 and over	15	6	49	16	5	9
Upper income white collar workers	7	5	65	20	2	1
Lower income white collar workers	11	3	59	19	5	3
Blue collar workers	11	3	63	14	3	6
Retirees	13	5	48	18	7	9
College graduates	8	4	62	20	3	3
Some college	8	2	64	15	5	6
High school or less	13	6	54	17	5	5
Born-again Protestants	15	6	54	13	7	5
Other Protestants/not born-again	9	3	60	20	3	5
Catholics	11	5	56	19	4	5

Q.12. T17

REACTIONS TO A SELECTED STATEMENT

As attorney general, Ed Meese is doing the right thing by using the power of his office to put pressure on stores to stop selling Playboy and Penthouse.

	Agree %	Disagree %	Not Sure %
All Voters	38	53	9
Republicans	42	51	7
Independents	39	52	9
Democrats	33	55	12
Men	30	63	7
Women	45	44	11
Age 18-24	23	68	9
Age 25-34	29	62	9
Age 35-49	36	58	6
Age 50-64	43	47	10
Age 65 and over	54	31	15
Upper income white collar workers	23	70	7
Lower income white collar workers	38	54	8
Blue collar workers	37	53	10
Retirees	52	35	13
College graduates	29	63	8
Some college	36	55	9
High school or less	44	45	11

Q.12. T18

REACTIONS TO SELECTED STATEMENTS ABOUT THE SUPREME COURT

	In making decisions, the Supreme Court should consider changing times and modern realities in applying the principles of the Constitution			In making decisions, the Supreme Court should only consider the original intent of the Founding Fathers when they wrote the Constitution 200 years ago		
	Agree %	Disagree %	Not Sure %	Agree %	Disagree %	Not Sure %
All Voters	76	17	7	34	57	9
Republicans	72	22	6	36	56	8
Independents	77	15	8	32	58	10
Democrats	78	15	7	34	58	8
Men	77	17	6	36	58	6
Women	74	18	8	32	57	11
Age 18-24	79	17	4	38	55	7
Age 25-34	81	13	6	29	66	5
Age 35-49	74	19	7	31	61	8
Age 50-64	77	16	7	31	57	12
Age 65 and over	68	21	11	50	38	12
Upper income white collar workers	79	16	5	27	63	10
Lower income white collar workers	81	13	6	33	61	6
Blue collar workers	78	16	6	35	60	5
Retirees	65	23	12	44	42	14
College graduates	77	17	6	30	62	8
Some college	76	18	6	30	60	10
High school or less	75	17	8	40	52	8

APPENDIX

Peter D. Hart Research Associates, Inc.
1724 Connecticut Avenue N.W.
Washington, D.C. 20009
202/234-5570

Interviewer: 1000 RESPONDENTS
County: July 10-14, 1986
State: _____

Respondent: Male 50 4-1 Female 50 -2

Study #2414	AREA	SAMPLE POINT	EQBM	DATE
National--Courts P.C.				
July 1986	___	_____	___	July _____, 1986
	5	6 7 8	9	10 11

I'm calling from Peter D. Hart Research Associates, the national public opinion polling firm based in Washington, D.C. We are conducting a survey to find out what Americans are thinking on some issues, and I'd really appreciate the chance to get your opinions on a few questions. But first, could you tell me how many men/women age 18 or older live here and are at home now? _____ (write in)

(IF ONLY ONE, BEGIN INTERVIEW. IF MORE THAN ONE, LOOK AT CATEGORY MARKED BELOW AND ASK TO SPEAK WITH THAT PERSON.)

TWO AT HOME	THREE OR MORE AT HOME
___ INTERVIEW YOUNGER	___ INTERVIEW YOUNGEST
___ INTERVIEW OLDER	___ INTERVIEW 2ND YOUNGEST
	___ INTERVIEW OLDEST

1a. First of all, could you tell me if you are eligible to vote at this address?

Yes, eligible to vote.....	100	-1 CONTINUE
No, not eligible.....	-	-2 TERMINATE AND
Not sure.....	-	-3 DO NOT COUNT

1b. When there are elections for offices like president, governor, or senator, do you vote in nearly all of these elections, most of them, about half of them, less than half, or hardly any of them?

Nearly all.....	71	-1
Most.....	20	-2 CONTINUE
About half.....	9	-3
Less than half.....	-	-4 TERMINATE AND
Hardly any.....	-	-5 DO NOT COUNT
Not sure.....	-	-6 TOWARD QUOTA

2a. Generally speaking, how do you feel about the way Ronald Reagan is handling the job of president--do you strongly approve, mildly approve, mildly disapprove, or strongly disapprove?

Strongly approve.....	38	-1
Mildly approve.....	35	-2
Mildly disapprove.....	11	-3
Strongly disapprove.....	13	-4
Not sure.....	3	-5

2b. Using a scale of 1 to 5, I'd like you to rate your feelings toward the Reagan Administration's approach to a few issues. If you have a lot of confidence in the Reagan Administration's approach on a particular issue, select a number closer to 5. If you have doubts and concerns about the Reagan Administration's approach, select a number closer to 1. You can use any number between 1 and 5 to show how you feel. If you are not sure or have no opinion about a particular item, just say so. (ASK RESPONDENT IF HE/SHE UNDERSTANDS THE SCALE. THEN READ EACH ITEM AND ASK FOR RATING. IF RESPONDENT IS NOT SURE OR HAS NO OPINION ON A PARTICULAR ITEM, RECORD A "6.")

	4+5	1+2	Cannot Rate
Promoting economic growth.....	46	22	4
Reforming the tax system so it is fair to the middle class.....	35	37	5
Dealing with the federal budget deficit.....	25	40	6
Protecting the civil rights of women and minorities.....	34	34	6
Working for nuclear arms control.....	39	15	5
Protecting the environment from toxic wastes.....	26	41	8
Selecting highly qualified judges to the federal courts.....	41	24	13

3. I'm going to mention the names of a few public figures. For each one, please tell me if you know something about this person. Just know the name, or are not familiar with the name. (FOR EACH NAME, BELOW ASK:) How about (READ NAME)--do you know something about this person, do you just know the name, or aren't you familiar with this name?

(IF "KNOW SOMETHING ABOUT THE PERSON," ASK:) Would you say your opinion of (READ NAME) is mainly favorable, neutral, or mainly unfavorable?

A) Edwin Meese

KNOW SOMETHING ABOUT HIM		
Mainly favorable	16	-1
Neutral	23	-2
Mainly unfavorable	16	-3
Not sure of opinion	5	-4
JUST KNOW THE NAME	28	-5
UNFAMILIAR WITH NAME	12	-6

B) William Rehnquist

KNOW SOMETHING ABOUT HIM		
Mainly favorable	12	-1
Neutral	10	-2
Mainly unfavorable	5	-3
Not sure of opinion	3	-4
JUST KNOW THE NAME	28	-5
UNFAMILIAR WITH NAME	42	-6

C) Sandra Day O'Connor

KNOW SOMETHING ABOUT HER		
Mainly favorable	39	-1
Neutral	16	-2
Mainly unfavorable	3	-3
Not sure of opinion	2	-4
JUST KNOW THE NAME	20	-5
UNFAMILIAR WITH NAME	20	-6

(FORM A)

4a. I'd like to find out how familiar you are with some different branches of government--in terms of what they generally do and how they operate. For each one I mention, please tell me if you feel you know a lot about that branch of government, know some about it, know just a little about it, or know hardly anything at all about it. (FOR EACH ITEM LISTED BELOW, ASK:) *How much do you feel you know about* (READ ITEM)--a lot, some, just a little, or hardly anything at all?

	A Lot		Some		Just A Little		Hardly Anything		Not Sure	
The U.S. Congress.....	27	-1	40	-2	25	-3	8	-4	-	-5
Your state legislature...	22	-1	38	-2	27	-3	13	-4	-	-5
Your state and local courts.....	22	-1	35	-2	30	-3	13	-4	-	-5
The federal court system.	15	-1	36	-2	32	-3	17	-4	-	-5
The U.S. Supreme Court...	21	-1	38	-2	26	-3	15	-4	-	-5

4b. What are your main impressions--both favorable and unfavorable--of the U.S. Supreme Court and the decisions it has made in recent years? (PROBE:) In what ways has the Supreme Court had a positive influence? What decisions has it made that you particularly support? (PROBE:) In what ways has the Supreme Court had a negative influence? What decisions has it made that you particularly would want to see changed?

5. Many people know less about the Supreme Court than about other parts of the government, and there are many Americans who are unfamiliar with how judges are appointed to the federal courts. I'm going to read you some facts about the federal court system; for each one, I'd like you to tell me if this is something you already knew or something you may not have known before. (READ EACH ITEM AND ASK:) Is this something you already knew or something you may not have known before?

A) There are nine judges, or "justices," on the Supreme Court.

Already knew.....	80	-1
Had not known before.....	19	-2
Not sure.....	1	-3

B) Once the president selects a person to serve on the Supreme Court and other federal courts, the selection must be approved by a majority vote of the United States Senate.

Already knew.....	78	-1
Had not known before.....	21	-2
Not sure.....	1	-3

C) Supreme Court judges and other federal judges are appointed to a lifetime position on the court.

Already knew.....	78	-1
Had not known before.....	22	-2
Not sure.....	-	-3

6. I'm going to read you some decisions that the Supreme Court has made on various issues. For each one, please tell me if you tend to support this decision or tend to feel the decision should be reversed. If you have no opinion on a particular issue, feel free to say so. (READ EACH ITEM AND ASK:) Do you tend to support this decision or tend to feel the decision should be reversed?

A) The decision that leaves the choice on abortion mainly up to a woman and her doctor, without government interference.

Support	74	-1
Reverse	20	-2
Some of both/depends (VOL)	1	-3
Not sure/no opinion	3	-4

B) The decision that requires the police to inform suspects of their rights, including the right to have a lawyer present when being questioned by the police.

Support	86	-1
Reverse	9	-2
Some of both/depends (VOL)	3	-3
Not sure/no opinion	2	-4

C) The decisions that require the government to maintain a strict separation of church and state.

Support	71	-1
Reverse	17	-2
Some of both/depends (VOL)	5	-3
Not sure/no opinion	7	-4

D) The decision that bans officially organized group prayer in the public schools.

Support	37	-1
Reverse	52	-2
Some of both/depends (VOL)	6	-3
Not sure/no opinion	5	-4

E) The decisions that permit employers to use affirmative action hiring goals for minorities and women to make up for past discrimination.

Support	46	-1
Reverse	36	-2
Some of both/depends (VOL)	6	-3
Not sure/no opinion	12	-4

7. There has been a good deal of talk lately about what factors should be considered in appointments to the Supreme Court and the other federal courts. I'm going to read you some possible considerations for selecting federal judges, and I'd like you to rate the importance of each one on a scale of 1 to 10. If you think a particular consideration is very important, pick a number around 8, 9, or 10. If you think a consideration is of medium importance, pick a number around 5 or 6. And if you think a consideration is not so important, you should pick a number around 1, 2, or 3. You can select any number between 1 and 10, but only use the number 10 if you think something is of the utmost importance. (ASK RESPONDENT IF HE/SHE UNDERSTANDS THE SCALE. THEN READ ITEM AND ASK FOR RATING. IF RESPONDENT IS NOT SURE ON A PARTICULAR ITEM, RECORD THE LETTER "A.")

	Median #	9-10	7-8	5-6	1-4
A) Being rated as highly qualified by the American Bar Association and other lawyers' groups	7.4	33	42	18	7
B) Having a strong commitment to the principle of separation of church and state	6.9	29	32	25	14
C) Taking a strong "law-and-order" approach on issues involving law enforcement	7.8	45	39	12	4
D) Having a distinguished record of service in other judicial positions	7.7	45	34	16	5
E) Taking a strong "pro-life" position in opposition to legalized abortion	4.6	22	16	22	40
F) Having a spotless record for honesty and personal integrity	9.1	71	18	7	4
G) Having a strong commitment to ensuring that minorities and women have equal rights under the law	8.7	63	24	9	4
H) Having a distinguished record of experience as a lawyer	7.8	46	31	16	7
I) Being a religious person who believes in God	7.1	38	21	21	20
J) Being a fair and open-minded person who avoids personal prejudice	9.1	74	19	3	4
K) Having a very conservative philosophy on issues	5.6	16	28	32	22
L) Having a very liberal philosophy on issues	4.6	10	20	37	33

8. In making appointments to the federal courts, do you think it is a good idea or a bad idea for a president to consider only people who believe government should be able to restrict a woman's right to choice on abortion? (IF RESPONDENT SAYS "GOOD IDEA" OR "BAD IDEA," ASK:) And do you feel strongly about that?

Good idea, feel strongly	10	-1
Good idea, no strong feelings	4	-2
Bad idea, feel strongly	60	-3
Bad idea, no strong feelings	17	-4
Depends (VOL)	4	-5
Not sure	5	-6

(FORM A ONLY:)
9. What particular concerns would you have if nearly all the judges on the Supreme Court were conservatives? (PROBE:) In what areas do you think a very conservative Supreme Court might make the wrong kinds of decisions or go too far?

(FORM B ONLY:)
9. What particular concerns would you have if nearly all the judges on the Supreme Court were liberals? (PROBE:) In what areas do you think a very liberal Supreme Court might make the wrong kinds of decisions or go too far?

10a. Once the president selects the person he wants to appoint to a federal judgeship, the U.S. Senate must approve the selection by a majority vote. How important do you think it is for the Senate to play an active role in reviewing the president's selection--very important, quite important, just somewhat important, or not really important?

Very important.....	69	-1
Quite important.....	17	-2
Just somewhat important..	10	-3
Not really important.....	3	-4
Not sure.....	1	-5

10b. Generally speaking, do you think the Senate should go along with the president's selection if the person is honest and competent, or do you think the Senate should make an independent decision about whether the president's selection is in the best interests of the country?

Senate should go along...	18	-1
Make independent decision	75	-2
Depends (VOL).....	5	-3
Not sure.....	2	-4

11a. I'm going to read you some reasons that senators might have for opposing a president's selection for a federal judgeship. For each one I mention, please tell me whether or not you think this would be a valid reason for the Senate to oppose a federal court appointment. (READ EACH REASON AND ASK:) Do you think this is a valid reason for the Senate to oppose a federal court appointment?

	Valid		Not Valid		Depends (VOL)		(Not Sure)	
A) The person has been convicted of drunk driving.....	59	-1	32	-2	9	-3	(1)	-4
B) The person has been a supporter of the John Birch Society.....	62	-1	32	-2	6	-3	(2)	-4
C) The American Bar Association has said the person's qualifications are only the bare minimum.....	68	-1	28	-2	4	-3	(6)	-4
D) The person is committed to repealing the Supreme Court decision that protects a woman's right to choice on abortion.	57	-1	38	-2	5	-3	(6)	-4
E) The person's views and legal interpretations tend to put him in a small minority among his fellow judges....	30	-1	63	-2	7	-3	(10)	-4
F) The person has been a supporter of the Socialist Party.....	67	-1	29	-2	4	-3	(8)	-4
G) The person has made statements about black people that indicate he is prejudiced against them.....	83	-1	14	-2	3	-3	(3)	-4
H) The person had been caught cheating in law school.....	79	-1	16	-2	3	-3	(2)	-4
I) The person's philosophy tends to be very liberal, rather than moderate..	40	-1	52	-2	8	-3	(7)	-4
J) The person's philosophy tends to be very conservative, rather than moderate..	35	-1	56	-2	9	-3	(8)	-4

11b. I'm going to read you two positions people might take on how the Senate should deal with Supreme Court appointments. Please tell me which position comes closer to your own point of view. (READ POSITIONS SLOWLY.)

Position A: The Senate should let a president put whomever he wants on the Supreme Court, so long as the person is honest and competent.

Position B: It is important for the Senate to make sure that the judges on the Supreme Court represent a balanced point of view.

Position A.....	16	-1
Position B.....	78	-2
Some of both (VOL)..	4	-3
Not sure.....	2	-4

12. Now I want to read you a few short statements. For each one, please tell me if you tend to agree or disagree with the statement. (READ EACH STATEMENT AND ASK:) Do you tend to agree or disagree?

	Agree		Dis-agree		Not Sure	
A) Jerry Falwell and other right wing groups have too much influence over the appointment of federal judges.....	37	-1	36	-2	27	-3
B) State and local governments should be required to abide by the Bill of Rights....	96	-1	2	-2	2	-3
C) In making decisions, the Supreme Court should consider changing times and modern realities in applying the principles of the Constitution.....	76	-1	17	-2	7	-3
D) In making decisions, the Supreme Court should only consider the original intent of the Founding Fathers when they wrote the Constitution 200 years ago..	34	-1	57	-2	9	-3
E) As attorney general, Ed Meese is doing the right thing by using the power of his office to put pressure on stores to stop selling Playboy and Penthouse.....	38	-1	53	-2	9	-3
F) Under our system of checks and balances, it would be wrong to give a president too much power to impose his philosophy on the Supreme Court.....	78	-1	15	-2	7	-3
G) The American Bar Association and other lawyers' groups have too much influence over the appointment of federal judges....	34	-1	36	-2	30	-3
H) The Reagan Administration has appointed too many lower court judges who do not meet high standards of excellence.....	29	-1	31	-2	40	-3

FACTUAL INFORMATION : These last few questions are for statistical purposes only.

F1. In what age group are you? (READ LIST.)

18-24.....	10	-1	50-64.....	24	-4
25-34.....	22	-2	65 and over.....	16	-5
35-49.....	28	-3	Refused.....	-	-6

F2. What type of work does the head of the household usually do? What is the job called? (BE SURE TO CLASSIFY PROPERLY. WRITE JOB DESCRIPTION IN SPACE BELOW. IF HEAD OF HOUSEHOLD IS UNEMPLOYED, GET USUAL OCCUPATION.)

High-level professional.....	7	-1	Skilled labor....	29	-6
Middle-level professional.....	13	-2	Semi- and unskilled labor	4	-7
Executive, manager...	7	-3	Farm, ranch.....	1	-8
Sales, proprietor....	10	-4	Housewife.....	1	-9
White collar.....	10	-5	Retired.....	18	-0
			Student.....	-	-A
			Other (describe below).....	-	-B

JOB DESCRIPTION: _____

_____

F3 (ASK ONLY OF WOMEN.) Do you, yourself, work outside the home full-time, work outside the home part-time, or don't you work outside the home?

Work full-time.....	21	-1	Don't work.....	20	-3
Work part-time.....	9	-2	Not sure/refused..	-	-4

F4. What is the last grade of school you have completed?

8th grade or less.	4	-1	Some college.....	17	-4
Some high school..	7	-2	2-year college grad	11	-5
High school graduate.....	32	-3	4-year college grad	29	-6
			Not sure.....	-	-7

F5a. What is your religious preference?

Protestant		
Baptist.....	22	-1
Methodist.....	9	-2
Presbyterian/Episcopalian.....	8	-3
Other Protestant.....	14	-4
Catholic	26	-5
Jewish	2	-6
Latter-Day Saints/(Mormons)	1	-7
Other	8	-8
None/no religion	10	-9

F5b. Would you call yourself a born-again Christian--that is, have you personally had a conversion experience related to Jesus Christ?

Yes.....	30	-1	Not sure.....	4	-3
No.....	66	-2			

F6. Regardless of how you may vote, how would you describe your overall point of view in terms of the political parties? Would you say you are mostly Democratic, leaning Democratic, completely Independent, leaning Republican, or mostly Republican?

Mostly Democratic.....	27	-1	Leaning Republican	14	-4
Leaning Democratic....	12	-2	Mostly Republican.	19	-5
Completely Independent	26	-3	Not sure.....	2	-6

F7. When you think about your political point of view, would you describe your views as very liberal, fairly liberal, moderate, fairly conservative, or very conservative?

Very liberal....	6	-1	Fairly conservative	23	-4
Fairly liberal..	17	-2	Very conservative..	8	-5
Moderate.....	42	-3	Not sure.....	4	-6

F8. Did you get a chance to vote in the 1984 presidential election between Ronald Reagan and Walter Mondale? (IF "YES," ASK:) For whom did you vote--Reagan or Mondale?

Voted--Reagan	57	-1
Voted--Mondale	26	-2
Voted--Other/refused/can't recall	7	-3
Did not vote/can't recall if voted	10	-4

F9. For statistical purposes only, we need to know your total family income for 1985. I will read you a list of categories and you just tell me which one best represents your total family income.

Less than $10,000.	9	-1	$30,000 to $35,000	10	-6
$10,000 to $15,000	10	-2	$35,000 to $40,000	7	-7
$15,000 to $20,000	10	-3	$40,000 to $50,000	9	-8
$20,000 to $25,000	11	-4	More than $50,000.	12	-9
$25,000 to $30,000	10	-5	Not sure/refused	12	-0

F10. What is your race?

White	86	-1
Black	10	-2
Hispanic	2	-3
Asian	1	-4
Not sure	1	-5

May we please have your name and the town in which you live for validation purposes?

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10 minutes to 15 minutes	8	-2
16 minutes to 20 minutes	23	-3
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26 minutes to 30 minutes	20	-5
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STATEMENT OF GARY ORFIELD

Mr. ORFIELD. Thank you very much, Senator.

I have a statement for the record.

Senator BIDEN. It will be put in the record in its entirety.

Mr. ORFIELD. Thank you.

Mr. Chairman, I am a political scientist at the University of Chicago. My name is Gary Orfield, and I have been studying civil rights for the last 20 years. I participated in the first hearings on Mr. Rehnquist's confirmation.

I am just going to summarize a small part of my written statement. And I am going to try to address several issues about civil rights. To put that in a context I would like to say the reason I think we should pay particular attention to these issues is because we are choosing the leader of the judicial branch of government, the American system of justice. And if there is one thing that that system of justice has as a very special responsibility, it is giving reality to the guarantees that hold true in our system regardless of what the popular majority of the moment thinks, especially for those people who have neither the power nor the resources to protect their own rights without governmental action.

I would like to take several aspects of this question. First of all, on these issues, is Mr. Justice Rehnquist an extremist?

Second, has he shown flexibility as time has gone along? Is there any sign of redemption or improvement in his record?

Third, does he, when he differentiates the levels of protection, in effect actually exclude many other groups, other than blacks, from any kind of real constitutional protection.

Fourth, in the area of civil rights itself, even though he says policies should have strict scrutiny, has he adopted a series of devices, in terms of access to courts, standards of proof, standards of remedy, and so forth, which, in effect, mean that even when you have a violation you cannot get a remedy from the court? So that the right actually recedes into relative insignificance.

Are there, in his opinions, signs that he is really very insensitive, and primarily is looking to protect and represent the rights of whites in American society?

When Justice Rehnquist appeared before the Committee in 1971, and again today, he quoted Felix Frankfurter who said that if putting on the robe does not change a man, there is something wrong with that man.

We all know what Mr. Rehnquist's opinions were before be went on the Supreme Court. He was opposed to civil rights; it is perfectly clear. When he went on the court, did he change?

When he went on the court, according to the tabulations of the Harvard Law Review, and a variety of other articles, including one from a University of Delaware professor, Senator Biden, he immediately went to the extreme right in the voting patterns of the court, and he has remained there every term since he has been on the court.

It did not change. It was perfectly consistent with his political values before he went on the court.

His votes became extremely predictable in many areas of policy. Nine out of ten times women came claiming discrimination before the court, he voted no; he did not recognize the rights.

Nine out of ten times police and law enforcement officials came to the court, he voted yes for their side of the conflict of rights.

In the cases of claiming rights for illegitimate children, he simply did not recognize them at all. He believed that there was always justification for the discrimination.

In the area of civil rights, Justice Rehnquist believes that the Fourteenth Amendment does address civil rights issues, at least those that existed in the 1860's. It is very unclear about whether he believes that they address any of the more recent problems that have developed in our society as we have become an urban society, and as we have become a very complex, much more multiracial society, and inequality has grown in many dangerous ways.

There is a consistent record in his civil rights decisions of a lack of sympathy, of a lack of understanding about the problem that is really there, of a treatment of those questions as if they were intellectual puzzles rather than very serious human problems, and adoption of many kinds of ideological, technical and philosophic devices that almost always result in the plaintiffs losing.

Now, I think it is very important to understand several things. First of all, for plaintiffs other than blacks, they lose at the beginning because he believes that they should only get a rational basis level of scrutiny, and there has only been one case since the 1930's where the Court has applied that standard and the plaintiffs have won. So that if you choose the rational basis standard of scrutiny, you just lose; you are gone.

Now if you choose the so-called strict standard, as it is applied by Justice Rehnquist, you lose anyway if you are a black plaintiff, because you lose on the standard of proof. He wants you to prove every single individual was intentionally discriminated against, every single school was intentionally built segregated, and prove it without any doubt, and not look at just the results but try to get a confession; and even then to limit the remedies very drastically.

Now one of the most disturbing things about his opinions as I read through scores of the dissents the last few weeks is that there is an almost hysterical tone in the opinions, especially on school desegregation and affirmative action, where he adopts phrases like "integration über alles," quoting or comparing a decision to the Nazi anthem. Or where he says that an affirmative action decision is something out of Orwell's 1984, and it is a big lie, and there is doublespeak. It is not judicial language; it is political language. And it is a language of looking at the conflict from a white standpoint.

There is a terrible insensitivity in the description of the problems that are brought to the Court, and an extremely overactive opposition that often embraces what you would see in the vocal white resistance to civil rights policy.

There does not seem to be any concern about what the result is for the minority plaintiffs who have proven a violation. If the remedy does not work, that does not matter. The remedy has to be limited; the power of the courts has to be limited; and it is extraordinarily difficult to get any kind of remedy.

In my estimation, having been involved in more than a dozen major school desegregation cases, it would be impossible ever to desegregate a school system under the standards that Mr. Rehnquist has set up.

Most major school systems in the country that have desegregation plans in urban areas would go back to segregated schools under these standards.

I think that this is the kind of thing we are talking about; a very far-reaching, extremely conservative, very consistent and very hostile record. Not that it is not sincerely believed in, and not that Mr. Rehnquist is not a wonderful person.

The logic of his philosophy means that the plaintiffs lose in equal rights cases.

I would like to submit for the record an article by professor Sue Davis of the University of Delaware, called Justice Rehnquist's Equal Protection Clause, from the Nebraska Law Review. She reviews many of these decisions and shows how systematically the plaintiffs lose in each of these areas.

The CHAIRMAN. Without objection, so ordered.

Thank you very much.

[Nebraska Law Review article and prepared statement follows:]

Sue Davis*

Justice Rehnquist's Equal Protection Clause: An Interim Analysis

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I. INTRODUCTION

More than a decade has passed since William H. Rehnquist became an Associate Justice of the United States Supreme Court. The Court's most conservative member, with a propensity toward dissenting alone, Rehnquist has often been perceived by Supreme Court observers as somewhat isolated—a Justice whose views are not likely to be accepted by a majority of the Court.[1] Belying such an image, however, is the fact that Rehnquist has written the opinion in many important cases, that he and Chief Justice Burger often vote together, and that when he and the Chief Justice are in

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1. Rydell, *Mr. Justice Rehnquist and Judicial Self-Restraint*, 26 HASTINGS L.J. 875, 876 (1975).

the majority, the Chief Justice is quite likely to assign the opinion to Rehnquist. Moreover, with five Justices over the age of seventy currently serving on the Court, it is likely that there will be one or more new Supreme Court Justices within the next few years who will share Rehnquist's ideological persuasion. Indeed, it is possible that Rehnquist may emerge in the near future as the leader of a dominant conservative bloc of the Supreme Court.

The purpose of this article is twofold: first, it seeks to clarify Rehnquist's judicial philosophy by analyzing his equal protection opinions, and second, it attempts to determine whether his influence among the other members of the Court is expanding. Justice Rehnquist has offered explanations of his judicial philosophy in public addresses as well as in his judicial opinions. The article entitled, *The Notion of a Living Constitution*[2] (hereinafter referred to as *The Living Constitution*), is Rehnquist's most explicit statement of a judicial philosophy based on a belief in the democratic nature of the United States' Constitution. In Rehnquist's view, the Constitution gives the popularly elected branches of government, not the judiciary, the responsibility of balancing rights and interests, and of determining the goals of the political system. Such a perception of the American constitutional system provides the theoretical basis for Rehnquist's approach to constitutional interpretation.

This article compares the views expressed in Rehnquist's article, *The Living Constitution*, with Rehnquist's equal protection opinions in order to demonstrate that Rehnquist has a coherent judicial philosophy that is reflected in his judicial opinions. In order to test the hypothesis that Rehnquist's influence among the other justices is increasing, this article analyzes the Supreme Court's voting in the equal protection cases in which Rehnquist has participated. Also, an analysis of Rehnquist's judicial philosophy requires that a brief overview of the Supreme Court's equal protection jurisprudence be given.[3]

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2. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).
3. Section II of this article provides a brief overview of the Supreme Court's equal protection jurisprudence as a background for Rehnquist's approach to equal protection. For extensive analyses of the equal protection doctrine, see A. BONNICKSEN, CIVIL RIGHTS AND LIBERTIES: PRINCIPLES OF INTERPRETATION ch. 5 (1982); Barret, *Judicial Supervision of Legislative Classifications—A More Modest Rule for Equal Protection?*, 1976 B.Y.U. L. REV. 89; Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 1979 COLUM. L. REV. 1023; *Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975).

II. MODERN EQUAL PROTECTION DOCTRINE

The United States Supreme Court's use of the due process clause during the early years of the twentieth century (to scrutinize and often to invalidate federal and state laws regulating the economy) provided the foundation for the later emergence of the equal protection clause as an important tool of judicial intervention. Chief Justice Stone's well-known "fourth footnote" in *United States v. Carolene Products Co.*,[4] signaled the Court's withdrawal from an intensive review of economic regulations and its movement toward the more lenient standard of "rational review." Stone's footnote also suggested an increased scrutiny of legislation infringing on the rights specifically protected by the Constitution, as well as the rights of "discrete and insular minorities."[5] Therefore, Stone's footnote in *Carolene Products* provided the basis for the development of the Court's double standard: deference to legislative decisions in the economic realm but activism in the area of personal rights. When Justice Douglas used the equal protection clause in *Skinner v. Oklahoma*[6] to invalidate a state law that provided for compulsory sterilization after multiple convictions for certain types of felonies, he emphasized that such legislation interfered with the fundamental liberties of marriage and procreation. In *Korematsu v. United States*,[7] Justice Black made explicit the notion that race is a suspect classification and, therefore, requires the most stringent standard of review.[8]

Justice Stone's footnote in *Carolene Products*, Douglas's em-

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4. 304 U.S. 144 (1938).
5. The fourth footnote of *Carolene Products* reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities maybe a special condition, which tends, seriously, to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. 144, 152 n.4 (citations omitted).
6. 316 U.S. 535 (1942).
7. 323 U.S. 214 (1944).
8. *See* Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879) (suggesting for the first time that race may be a suspect classification).

phasis on fundamental rights in *Skinner*, and Black's reiteration, in Korematsu, that race is a suspect classification, provided the framework for what was to become the Warren Court's two-tier approach to equal protection: the traditional "rational basis" test, which required only that a classification be rationally related to achieving a legitimate end when economic regulations were challenged; and the "strict scrutiny" test, which required that a classification be the only means of achieving a compelling state interest when the challenged legislation involved racial classifications or fundamental rights.

Chief Justice Earl Warren, in describing the traditional rationality standard in *McGowen v. Maryland*,[9] stated:

> The Fourteenth Amendment permits the States a wide scope for discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.[10]

The fact that the rational basis test has resulted in the invalidation of only one classification since the 1930's,[11] reveals the deferential, inconsequential nature of the requirement of "rationality." In contrast, the strict scrutiny test has been characterized as "strict in theory, fatal in fact."[12] As Chief Justice Warren stated in *Loving v. Virginia*,[13] "if [racial classifications] are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[14] In short, with the two-tier approach, the Court's choice of the tier virtually predetermines the result.

Race was clearly one suspect classification that demanded strict scrutiny; but the Warren Court suggested that there might be additional suspect classifications—illegitimacy and wealth, for example.[15] The Court has also used the strict scrutiny test to in-

9. 366 U.S. 420 (1961).
10. *Id.* at 425-26.
11. Morey v. Doud, 354 U.S. 457 (1957), *overruled*, City of New Orleans v. Dukes, 427 U.S. 297 (1976).
12. G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 611 (10th ed. 1980).
13. 388 U.S. 1 (1976).
14. *Id.* at 11.
15. In Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), the Court invalidated state laws that distinguished between legitimate and illegitimate children for the purpose of recovering death benefits. Although the Court in *Levy* expressly used the rational basis test, Justice Douglas suggested that illegitimacy might be considered suspect when he stated: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly

validate legislative classifications which infringe fundamental interests. Such interests include: interstate travel,[16] voting,[17] criminal appeals,[18] and marriage.[19] In addition, the Warren Court issued tantalizing statements during the 1960's implying that there might be additional fundamental interests, such as welfare benefits, housing, and education, yet to be found within the text of the Constitution.[20]

Although the Burger Court has not rejected the fundamental interests concept established by the Warren Court, it has refused to extend this strand of equal protection beyond those fundamental interests established during the 1960's.[21] In particular, the Court has refused to extend the suspect label to classifications based on illegitimacy and sex. The Burger Court has, however, added a third standard of review to the Warren Court's two-tier approach: an intermediate standard that falls between the maximum scrutiny standard, which is demanded when racial classifications are challenged, and the minimum scrutiny standard, which is required when economic regulations are involved. The Burger court has used this intermediate standard to invalidate legislative classifications based on illegitimacy and sex without actually declaring those categories to be suspect. In doing so, the Court has held that classifications based on illegitimacy and sex must be substantially related to an important governmental interest.[22] This intermediate

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'persons' within the meaning of The Equal Protection Clause . . . ." Levy v. Louisiana, 391 U.S. 68, 70 (1968). Regarding wealth as a suspect classification, Justice Douglas stated: "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (citations omitted).

16. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).
17. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
18. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).
19. *See* Loving v. Virginia, 388 U.S. 1 (1967).
20. Much of the speculation about the possible expansion of fundamental interests arose over dicta contained in Shapiro v. Thompson, 394 U.S. 619 (1969). Justice Brennan's majority opinion in *Shapiro* interpreted the facts of the case as involving a denial of "welfare aid upon which may depend the ability of the families to obtain their very means to subsist—food, shelter, and other necessities of life." *Id.* at 627. Justice Harlan's dissent criticized Brennan's "cryptic suggestion, . . . that the 'compelling interest' test is applicable merely because the result of the classification may be to deny the appellees 'food, shelter, and other necessities of life'. . . ." *Id.* at 661.
21. In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), Justice Powell stated that wealth was not a suspect classification and education was not a fundamental interest.
22. For example, in Craig v. Boren, 429 U.S. 190 (1976), Justice Brennan stated that "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and

standard has not been accepted by all members of the Court; indeed, in those cases where the standard has been applied, the results have not been predictable. However, the intermediate standard has been regarded as one of the important innovations of the Burger Court, providing a realistic, flexible method of judging classifications based on legitimacy and sex.[23] Rehnquist, however, has remained adamantly opposed to the three-tier approach, preferring instead to adhere to his own version of the traditional two-tier analysis, i.e., that minimum scrutiny should be applied to all classifications except those based on race, and that the Court should carefully avoid the use of the maximum scrutiny test, even where racial classifications are involved. The basis for Rehnquist's opposition to the intermediate standard, as well as the basis for Rehnquist's judicial philosophy, has been articulated in his article, *The Living Constitution.*[24]

III. *THE LIVING CONSTITUTION*

In *The Living Constitution*, Rehnquist quotes Abraham Lincoln's first inaugural address to capture the essence of his judicial philosophy:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that extent tribunal.[25]

Rehnquist develops this theme throughout his article, presenting a view of the Constitution that is consistent with Lincoln's indictment of what Lincoln believed to be judicial usurpation of the democratic process.

Three closely related, and perhaps overlapping, premises can be identified in Rehnquist's professed judicial philosophy. The first premise is that the American political system, as envisioned by the framers of the Constitution and established by the Constitution, is a democracy. Second, in a democratic system, laws must be made according to the established process rather than imposed

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must be substantially related to [the] achievement of those objectives." *Id.* at 197.

23. Justice Marshall's "sliding scale" approach, which was first articulated in Dunn v. Blumstein, 405 U.S. 330 (1970), and elaborated in his dissent in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), reveals the inadequacies of the two-tier approach. Marshall refers to the Court's equal protection analysis as a spectrum of standards.

24. Rehnquist, *supra* note 2.

25. *Id.* at 702 (quoting THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (R. Basler ed. 1953)).

from outside the political arena. The third premise is that the only "democratic" method of interpreting the Constitution is to examine the words of the document and to interpret those words in conformity with the original intention of the framers of the Constitution. Taken together, these three premises prescribe a very limited judicial role in interpreting the Constitution. In fact, judicial review comes to be viewed as counter-majoritarian and ultimately as an undesirable obstacle to the democratic process.

Rehnquist views the Constitution as a democratic document, a document which represents the original will of the people as described by Chief Justice John Marshall in *Marbury v. Madison*.[26] But, while Marshall applied the notion of the Constitution as reflecting the original will of the people to defend judicial review (arguing that the judiciary was responsible for interpreting and giving meaning to the Constitution), Rehnquist uses this notion to limit and ultimately to condemn judicial intervention in the acts of other branches of government. Marshall, writing in 1803, was close enough in time to the ratification of the Constitution to argue convincingly that the Constitution was genuinely a fundamental charter that had emanated from the people.[27] Today, Rehnquist argues that judges are no longer guardians of the Constitution; instead, they constitute "a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers, concerning what is best for the country."[28] The judiciary has become the destroyer of democracy rather than its protector.

In Rehnquist's view, it is not the proper function of the judiciary to keep the political system in tune with the times; the Constitution gave this responsibility to the popularly elected branches of government. Moreover, while the limits placed on state and federal governments were designed to ensure that the government would not transgress the rights established in the Constitution, these limits should be viewed as procedural constraints rather than substantive directives. Although the Constitution provided for the separation of powers, it did not obligate the government to solve substantive problems—Congress, the Presidency, state legislatures and governors have the authority to choose not to take action to resolve problems. In Rehnquist's view, the judiciary's role becomes one of simply ensuring that the other branches of government do not go beyond the explicit limits of the authority vested in them by the Constitution, not one of judging the substance of their policies.

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26. 5 U.S. 137 (1803).
27. Rehnquist, *supra* note 2, at 697.
28. *Id.* at 698.

The second premise of Rehnquist's argument in *The Living Constitution* has been characterized as a relativistic theory of constitutional interpretation.[29] Essentially, Rehnquist argues that no value can be demonstrated to be intrinsically superior to any other. A particular value is authoritative only when it is favored by a majority of the Court. Rehnquist states: "The laws that emerge after a typical political struggle in which various individual judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law."[30] Although the people may have strong, deeply felt values, those values remain merely personal until they become law, either by legislation or by Constitutional amendment. The minority has no authority to impose its value judgments on the country, even if the minority happens to be the Supreme Court. This element of Rehnquist's judicial philosophy constitutes a moral relativism that ultimately rests on majority rule to define society's values. As its necessary corollary, this theory removes from the judiciary the responsibility of keeping popular opinion in check. It does not consider the possibility that the majority may be wrong; rather, it denies the notion of the existence of natural law or rights. In essence, Rehnquist's relativism would lead to the rejection of the Supreme Court's role as the guardian of individual rights against an unjust or errant majority.

Finally, Rehnquist's approach to constitutional interpretation has also been aptly characterized as immanent positivistism.[31] His method of interpreting the Constitution is to rely on the words and clauses of the document itself, confining their meaning to the words of that text. Where the words do not suffice, he searches for the intent of the framers of the Constitution. As Walter Murphy has articulated, there are numerous problems with such an approach.[32] For example, it is questionable whether the true intent of the framers can ever be adequately discerned. However, such problems have not seemed to have deterred Rehnquist's emphasis on the American political system as a democracy, or on moral relativism and immanent positivism as an approach to interpreting the Constitution. Together, these theories add up to a philosophy of judicial restraint or, possibly, of wholesale judicial abdication of the Court's review power to the popularly elected branches of government.

29. Justice, *A Relativistic Constitution*, 52 U. COLO. L. REV. 19 (1980).
30. Rehnquist, *supra* note 2, at 704.
31. Harris, *Bonding Word and Polity: The Logic of American Constitutionalism*, 76 AM. POL. SCI. REV. 34 (1982).
32. *See, e.g.*, Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980); Murphy, Book Review, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 YALE L.J. 1752 (1978).

IV. REHNQUIST'S RATIONALITY REQUIREMENT: "FACILE ABSTRACTIONS . . . TO JUSTIFY A RESULT"

Justice Rehnquist has described the Supreme Court's decisions, with the exception of those involving classifications based on race, as "an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principles."[33] His scrupulously crafted dissents have proliferated in response to the majority's propensity toward invalidating legislative classifications based on sex, illegitimacy, or alienage. The Court's position with regard to each of these classifications will now be reviewed in greater detail.

A. Sex Classifications

The Supreme Court has determined that classifications based on sex "must serve important governmental objectives and must be substantially related to achievement of those objectives."[34] Furthermore, the governmental objectives of administrative ease and convenience are not themselves sufficient to sustain classifications which are based on archaic and overbroad generalizations and "gross, stereotyped distinctions between the sexes."[35] In fact, the Supreme Court has stated that under this standard, the state must show that a gender-neutral statute would be a less effective means of achieving the stated objective.[36]

During Rehnquist's tenure, the Court has invalidated sex classifications in nine out of the seventeen cases to reach the Court.[37] The list of sex-based laws which the Court has invalidated includes: an Oklahoma law which set the age for purchase of 3.2 beer at eighteen for females and twenty-one for males;[38] a provision of the social security laws which allowed a widower to receive survivors' benefits only if he was receiving one-half of his support from his wife;[39] an Alabama statute which required husbands, but not wives, to pay alimony;[40] a New York law that permitted an unwed mother, but not an unwed father, to block the adoption of a

33. Trimble v. Gordon, 430 U.S. 762, 777 (1977).
34. Craig v. Boren, 429 U.S. 190, 197 (1977).
35. Frontiero v. Richardson, 411 U.S. 677, 685 (1973).
36. Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980).
37. Sex classifications were invalidated in the following cases: Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengeler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1977); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).
38. Craig v. Boren, 429 U.S. 190 (1976).
39. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).
40. Orr v. Orr, 440 U.S. 268 (1979).

child by withholding consent;[41] and a provision of the Missouri workmen's compensation laws that denied a widower benefits from his wife's work-related death unless he proved dependence on her earnings, but granted a widow such benefits regardless of any dependence.[42]

Rehnquist has disagreed with the majority in seven of the nine cases in which the Court invalidated classifications based on sex.[43] His objections to the majority's decisions emanate from his theory of constitutional interpretation. Rehnquist argued in *The Living Constitution*[44] that the proper method of constitutional interpretation is to first look at the language of the document and then to the original intent of the framers. According to Rehnquist, the original legislative intent of the fourteenth amendment was to prohibit the states from treating blacks differently than whites. He argues that it is inappropriate for the Court to extend strict scrutiny of legislative classifications beyond the arena of racial discrimination. Therefore, while Rehnquist admits that racial classifications are presumptively invalid, he holds that, as to all other classifications, the principle of equal protection simply requires "that persons similarly situated should be treated similarly."[45]

Rehnquist also rejects the Court's intermediate standard of review as being too subjective. How is the Court to know what objectives are important, or whether a law is substantially related to the achievement of such an objective? Rehnquist argues that these phrases are so "diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legisla-

41. Caban v. Mohammed, 441 U.S. 380 (1979).

42. Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980).

43. Rehnquist agreed with the majority in two cases. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), was a unanimous decision in which the Court invalidated a provision of the Social Security Act that allowed a widower to receive survivor's benefits only if he could show that he had been receiving one-half of his support from his wife. Rehnquist wrote a concurring opinion in which he argued that there was no rational basis for distinguishing between mothers and fathers when the interest of the child in receiving the full time attention of the remaining parent was at stake.

In Kirchberg v. Feenstra, 450 U.S. 455 (1981), the Court unanimously invalidated a Louisiana statute that gave a husband, as "head and master" of property jointly owned with his wife, the right to dispose of jointly held property without the wife's consent. Rehnquist joined Stewart's concurring opinion which emphasized that the decision did not apply to transactions executed before the lower court decision.

44. *See supra* note 2.

45. The "similarly situated" language comes from F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920): "[T]he classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 415.

tion, masquerading as judgments whether such legislation is directed at 'important' objectives, or whether the relationship to those objectives is 'substantial' enough."[46] Questions concerning governmental objectives are appropriately left to elected officials; judges are simply not equipped with the data or the expertise to handle them. Since sex classifications do not warrant strict scrutiny and the intermediate standard of review is too subjective, the only standard which can be applied to test sex-based classifications under the Rehnquist approach is the rational basis test. He has argued that challenged sex classifications do not necessarily fail this minimum requirement.[47] Using language from opinions in which the Court has upheld economic regulations against equal protection challenges,[48] Rehnquist pays maximum deference to legislative decisions. If Rehnquist can discover any *conceivable* relationship, no matter how tenuous, between a classification and its stated purpose, he will vote to uphold the law. Thus, Rehnquist's standard of review clearly presupposes the result; it is an approach that renders the equal protection clause inconsequential when applied to sex-based classifications.

In gender-based classification cases, Rehnquist has added a curious line of reasoning to his objections to the use of the intermediate standard of review. He has argued that even if the Court were to use heightened scrutiny when women are discriminated against, men should not be able to challenge legislation that disadvantages them.[49] This is because our American society has no tradition of discrimination against males, implying that women need special protection because of past discriminatory practices. However, Rehnquist would be quick to add that, while women may need special protection, such protection is not to be found in the equal protection clause.

When a majority of the Court has invalidated sex classifications, Rehnquist has contended, in dissent, that under the proper standard of review the challenged legislation would easily stand. Although the Court has generally remained unreceptive to Rehnquist's argument, it has, on two occasions, used the rational basis test to invalidate legislative classifications based on sex.[50] One

46. Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).
47. *See*, e.g., Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976). Shapiro argued that Rehnquist's rational basis test requires only that a challenged classification not be entirely counterproductive with respect to the purposes of the legislation in which it is contained.
48. For example, Rehnquist often quotes from McGowan v. Maryland, 366 U.S. 420 (1961), and F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).
49. Craig v. Boren, 429 U.S. 190, 218-221 (1976) (Rehnquist, J., dissenting).
50. Michael M. v. Superior Court, 450 U.S. 464 (1981); Rostker v. Goldberg, 453 U.S. 57 (1981).

such case involved a California statutory rape law which made men criminally liable for engaging in sexual intercourse with females under the age of eighteen. The California Supreme Court subjected the law to strict scrutiny and found the classification to be justified by the compelling state interest of preventing teenage pregnancies. When the United States Supreme Court decided the case, Rehnquist, speaking for four justices, used the rational basis test to uphold the law. In doing so, he made only a slight concession to the Court's customary use of the intermediate standard of review for sex classifications: "[T]he traditional minimum rationality test takes on a *somewhat* 'sharper focus' when gender-based classifications are challenged."[51] The purpose of the law, he found, was to discourage illicit sexual intercourse with minor females. There may have been a variety of reasons for the state to seek such a purpose, e.g., concern about teenage pregnancies, protecting young females from physical injury, and promoting various religious and moral attitudes towards pre-marital sex. The state has a strong interest in such a purpose because illegitimate pregnancies often result in abortions and additions to the welfare rolls. Because only women become pregnant, it was obvious to Rehnquist that men and women are not similarly situated with respect to the problems and the risks of sexual intercourse.

Rehnquist's use of the phrase "similarly situated" shifts the focus of analysis away from the question of whether a classification is substantially related to an important governmental objective. In effect, Rehnquist employs this phrase in order to slide the standard of review to one of minimum scrutiny. While an important question under the intermediate standard is whether a sex-neutral statute would be as effective as the one which was challenged, under Rehnquist's "similarly situated" approach this element of the inquiry merely asks whether a sex-neutral classification would substantially advance important governmental interests.[52] In the California statutory rape case, for example, he asserted that a sex-neutral statute would not only be unenforceable, but also that young females suffer sufficiently from the consequences of sexual intercourse and, therefore, may reasonably be excluded from legal punishment—a criminal sanction that falls solely on males serves to equalize its deterrent effect. Thus, the inquiry has been turned on its head in the sense that sex-neutral classifications must be defended and compared with the challenged classifications that are based on sex.

The statutory rape case was a five-to-four decision, but Rehn-

51. Michael M. v Superior Court, 450 U.S. 464, 468 (1981).
52. Justice Brennan emphasized this point in his dissent. *Id.* at 488-89 (Brennan, J., dissenting).

quist's opinion commanded only a four-person plurality, indicating that a majority will not subscribe to the implications of the "similarly situated" analysis. However, in a case dealing with sex discrimination implicit in a draft registration requirement,[53] Rehnquist again used the "similarly situated" language, and there were no concurring opinions in the six-to-three decision. The Military Selective Service Act, which authorized the President to require the registration of men, but not women, was challenged as a violation of the equal protection component of the due process clause. Rehnquist emphasized that, normally great weight must be given to decisions of Congress, but that in this case even greater deference should be accorded to the legislative branch because the case arose in the context of Congress' authority over national defense and military affairs where "the scope of Congress' constitutional power . . . [is] broad, [and] the lack of competence on the part of the courts is marked."[54]

Distinguishing previous cases in which the Court invalidated sex classifications, Rehnquist asserted that the decision to exempt women from registration was not an accidental by-product of traditional thinking about women. Indeed, Congress had good reason to exempt women: "[Congress] determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops."[55] Since women by law were not eligible for combat, it was reasonable for Congress to conclude that they would not be needed in the event of a draft and that there was no reason to register them. Rehnquist's conclusion regarding combat restrictions on women was based on the fact that men and women are not similarly situated for purposes of a draft or registration for a draft. Although such a statement appears to invoke the rational basis standard, Rehnquist expressly declined to apply a specific standard of review to the draft registration scheme. He justified his reticence by stating that "[a]nnounced degrees of 'deference' to legislative judgments, just as levels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result."[56]

The draft registration case was special in the sense that it in-

53. Rostker v. Goldberg, 453 U.S. 57 (1981).
54. *Id.* at 65.
55. *Id.* at 76.
56. *Id.* at 69. As Justices Marshall and White argued in their dissenting opinions, a substantial number of people in a conscripted military force would fill noncombat positions. Marshall contended that the exclusion of women from registration has no substantial relation to the government's interest in maintaining an effective defense. It was estimated that 80,000 people would have to be drafted for noncombat positions.

volved national defense. Thus, the majority's agreement with Rehnquist's deferential approach to the draft registration scheme is not at all surprising. Still, it must be noted that Rehnquist's deference to Congress in this area is consistent with his deferential approach to the Social Security Act. Rehnquist has objected to challenges to the Social Security Act's provisions on grounds that special deference should be given to social insurance legislation since it has undergone so many changes over the years that a nice fit between a classification and the objective of the legislation is impossible and because administrative convenience is particularly important to the success of entitlement programs.[57]

Rehnquist's opinions in the area of sex classifications are nothing if not consistent. His minimum scrutiny/maximum deference approach allows him to presume a rational basis for virtually any legislative scheme that treats men and women differently. Rehnquist's approach to sex classifications constitutes exactly what he purports to avoid: a set of "facile abstractions" used to justify a predetermined result—that of upholding the legislation against constitutional attack.

B. Illegitimacy

Legislative provisions that distinguish between illegitimate and legitimate children for purposes of inheritance,[58] the right to recovery for wrongful death,[59] welfare benefits,[60] and social security for surviving dependent children,[61] which have been challenged under the equal protection clause, have not been uniformly subjected to the intermediate standard of review. Although the level of scrutiny is less clear in the case of illegitimacy classifications than it is in sex classifications, the Court has invalidated illegitimacy classifications in five out of the ten cases that it has decided. Rehnquist dissented in each of the five cases.[62]

Rehnquist voices essentially the same objections to the majority's approach toward illegitimacy cases as he does to the Court's sex classification rulings. He argues that equal protection does not require that a states enactment be logical; rather, its only requirement is "that there be some conceivable set of facts that may jus-

57. Califano v. Goldfarb, 430 U.S. 199, 225 (1977) (Rehnquist, J., dissenting).
58. Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977).
59. Levy v. Louisiana, 391 U.S. 68 (1968).
60. New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).
61. Matthew v. Lucas, 427 U.S. 495 (1976).
62. The Court invalidated illegitimacy classifications in the following cases: Trimble v. Gordon, 430 U.S. 762 (1977); Jimenez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972).

tify the classification involved."[63] Rehnquist's dissent in *Trimble v. Gordon*[64] illustrates his approach in dealing with illegitimacy classifications as well as his general equal protection philosophy. The Court, in a five-to-four decision in *Trimble*, invalidated a provision in an Illinois law that allowed illegitimate children to inherit by intestate succession from their mothers only; yet legitimate children were allowed to inherit by intestate succession from both their fathers and mothers. Rehnquist complained that the Court's approach was confusing because it failed to specify the level of scrutiny employed. Additionally, he argued that the Court should not have focused its attention on the purpose of the law or the motive of the legislature in passing it. Because there will always be some imperfection in the fit between legislative motives and the means of accomplishing legislative goals, the Court, by examining such motives, has put itself in the position of deciding how much imperfection to allow and what alternative forms of legislation are available. The crux of the problem, according to Rehnquist, is that judges are no better equipped to make these assessments than are legislators. The result of this judicial "meddling" is that "we have created on the premises of the Equal Protection Clause a school for legislators, whereby opinions of this Court are written to instruct them in a better understanding of how to accomplish their ordinary legislative tasks."[65] In short, as far as Rehnquist is concerned, a standard of review which is more stringent than that of mere rationality necessarily results in the judicial interjection of the Court's values into the legislative democratic process.

C. Alienage

In 1971, the Supreme Court declared that "classifications based on alienage, like those based on . . . race, are inherently suspect and subject to close judicial scrutiny."[66] The Court, however, has not followed through on this pronouncement. When classifications based on alienage have been questioned, the Court's standard of review has been similarly undefined. Adding to this uncertainty is the fact that the Court employs a double standard with respect to federal and state alienage-based classifications: "[O]verriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a state."[67] However, there are two reasons that classifications based on alienage present a

63. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 183 (1972).
64. 439 U.S. 762 (1977).
65. *Id.* at 784.
66. Graham v. Richardson, 403 U.S. 365, 372 (1971).
67. Hampton v. Mow Sun Wong, 426 U.S. 88, 101 (1976).

somewhat different problem from those based on sex and illegitimacy. First, the concept of citizenship itself implies the existence of favored status for members of a specified group: alienage may be a relevant classification where illegitimacy and sex are not. Second, unlike illegitimacy or gender, alienage is not an irrevocable personal trait; an alien can eventually change his status by following specific procedures to obtain United States citizenship.

In 1973, the Supreme Court employed maximum scrutiny to invalidate a Connecticut statute that excluded resident aliens from law practice[68] and a New York law that excluded noncitizens from holding permanent positions in the competitive, classified civil service.[69] In a dissenting opinion which responded to both cases, Rehnquist emphasized the importance of the concept of citizenship. The Constitution, he argued, makes a distinction between citizens and aliens eleven times: "Citizenship [is symbolic of] a status in the relationship with a society which is continuing and more basic than mere presence or residence."[70] He asserted that the Court, without any constitutional basis, was arbitrarily awarding special protection to particular groups of people. He emphasized that aliens can change their status and become American citizens. In Justice Rehnquist's opinion, it is not unreasonable to require aliens to demonstrate an understanding of the American political and social structure and a dedication to American values by going through the naturalization process.[71]

Where classifications based on alienage are embedded in statutes controlling employment, the Court uniformally defers to the legislative wisdom of the state. For example, the Court, in 1978 and 1979, upheld certain state laws which barred aliens from employment as state troopers[72] and listed citizenship as a requirement for the certification of public school teachers.[73] In 1982, the Court upheld a California statute that made citizenship a prerequisite to employment in any state, county, or local governmental position which bestows upon the employee the powers of a peace officer.[74]

68. In re Griffiths, 413 U.S. 717 (1973).
69. Sugarman v. Dougall, 413 U.S. 634 (1973).
70. *Id.* at 652.
71. In Examining Bd. of Eng'rs., Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976), the majority, applying strict scrutiny, invalidated a Puerto Rico statute that permitted only United States citizens to practice as civil engineers. Rehnquist, dissenting in part, argued that the equal protection clause of the fourteenth amendment did not apply because Puerto Rico is not a state, and the equal protection component of the due process clause of the fifth amendment did not apply because the law in question was not enacted by Congress, but by the Puerto Rico legislature, instead.
72. Foley v. Connelie, 435 U.S. 291 (1978).
73. Ambach v. Norwick, 441 U.S. 68 (1979).
74. Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

Finally, in a 1973 case, the Court stated the exception to the rule of strict scrutiny of legislation involving alienage classifications: "[S]crutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."[75] The subsequent cases suggest that the exception has devoured the rule, and that, at least in the area of classifications based on alienage, it appears that Rehnquist's position now commands a majority.

Rehnquist's equal protection opinions involving classifications based on sex, legitimacy, and alienage clearly conform to his professed judicial philosophy. His insistence that the Court apply strict scrutiny only where racial classifications are involved is consistent with his positivistic approach to constitutional interpretation, i.e., that interpretation of the fourteenth amendment should adhere to the original intention of the framers of the Constitution. Rehnquist is undaunted by the problems that accompany such an approach. Additionally, his opinions are consistent with his view of the American constitutional system as a democracy in which the function of judicial review is simply to prevent the popularly elected branches from transgressing the limits of their authority, rather than one to solve substantive problems. Rehnquist's adamant objection to the judiciary's taking an active role in invalidating legislation that results from the political process is consistent with his emphasis on the democratic nature of the Constitution. Finally, Rehnquist's opinions are consistent with his assertion that policy should be made by the majority rather than imposed by a minority from outside the political arena. His reliance on majority rule is ultimately relativistic in the sense that policy made through proper procedures may discriminate against certain, nonracial, groups without violating the equal protection clause. Discrimination, per se, is not prohibited; conversely, equality is not an authoritative value. The equal protection clause, in Rehnquist's opinion, is clearly not a substantive guarantee of equality.

V. RACIAL EQUALITY: REHNQUIST'S OBSTACLE COURSE

One immediate purpose of the fourteenth amendment was to prevent states from passing legislation which treated blacks differently from whites. Classifications based on race are presumptively invalid. Therefore, cases involving racial classifications are relatively easy to decide. The determining factor for Rehnquist in these "relatively easy" decisions is the presence of purposeful discrimination through legislation or other official policy. In the absence of purposeful discrimination, there is no equal protection

75. Sugarman v. Dougall, 413 U.S. 634, 648 (1973).

violation. Rehnquist has, in effect, erected obstacles to the utilization of the equal protection clause even when racial classifications are involved. His approach to the state action requirement and his approach to the closely related *de jure/de facto* distinction illustrates the limited nature of Rehnquist's interpretation of the equal protection clause.

A. Significant State Involvement in Racial Discrimination: A New State Action Formula

While the Supreme Court has consistently held that government involvement in racial discrimination is a prerequisite for invoking the protections of the fourteenth amendment, members of the Supreme Court have disagreed on the degree of involvement which is required. In *Moose Lodge No. 107 v. Irvis*,[76] a case involving a liquor licensing scheme of a private club which refused to admit blacks to its restaurant and cocktail lounge, Rehnquist, for the majority, expressed his view that the required degree of state action was absent. The state liquor license, he held, did not sufficiently implicate the state in the racial discrimination practiced by the club. He argued that the presence of "any sort of benefit or service at all from the state," or any state regulation, does not itself amount to significant state involvement.[77] He also distinguished an earlier case, *Burton v. Wilmington Parking Authority*,[78] in which the Supreme Court found that a restaurant that leased its space from a state agency, and was located within a building owned and operated by that agency, had a sufficiently close relationship with the state to come under the restrictions of the fourteenth amendment. In *Burton*, there was such a close relationship between the restaurant and the state that the latter was deemed a participant in the discriminatory activity. In contrast, the private club, as Rehnquist pointed out, was located on private land and was not open to the public—it was a private social club in a private building. The liquor license did not sufficiently implicate the state in racial discrimination despite the fact that the state arguably involved itself extensively in the operations of the business by virtue of its issuing a liquor license. *Burton* emphasized the impossibility of stating a precise formula for determining when government involvement is sufficient to call into question the equal protection clause.[79] Rehnquist, however, appeared to reject this flexible approach in favor of the more stringent requirement that the state must directly and specifically "foster or encourage racial discrimi-

76. 407 U.S. 163 (1972).
77. *Id.* at 173.
78. 365 U.S. 715 (1961).
79. *Id.* at 722.

nation" before any equal protection claim can arise.[80]

A more demanding state action requirement would make it more difficult for members of minority groups to challenge racially discriminatory practices which would indirectly result from state action. Rehnquist's approach to state action implies that state regulation of business or industry will not be sufficient to invoke the provisions of the fourteenth amendment when "private" entities directly engage in racially discriminatory practices.[81] Whatever its result, his approach to the state action requirement is predictible given his positivistic interpretation of the fourteenth amendment. A high level of government involvement must be present before action may be properly considered action of the state for fourteenth amendment purposes.

B. School Desegregation: The De Jure/De Facto *Distinction*

In 1968, exasperated by the slow pace at which school desegregation was occurring, in spite of the Court's mandate to use "all deliberate speed,"[82] the Supreme Court charged public school boards, which had operated dual school systems pursuant to state laws existing in 1954, with an affirmative duty to eliminate racial discrimination.[83] Thus, southern school systems that had practiced *de jure* segregation in 1954, and remained segregated, were clearly under an obligation to eliminate their dual systems. The legal status of segregated schools in northern cities, where proof of ongoing purposeful discrimination was made difficult by the fact that such segregation was not explicitly sanctioned by law, was unclear. Were such school systems obligated to desegregate?

Under the Supreme Court's early rulings in cases involving southern schools,[84] it was anticipated that northern school systems would not come under the Court's desegregation mandate; theoretically, since segregation of northern schools was not supported by state action, it must be considered to be *de facto*, as opposed to *de jure*, discrimination. Thus, such segregation would be considered to be beyond that ambit of the equal protection clause. A majority of the Court, however, has taken an approach to north-

80. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972).

81. Rehnquist authored two other opinions involving the state action question, but the cases did not involve racial discrimination or equal protection. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

82. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

83. Green v. County School Bd., 391 U.S 430 (1968).

84. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S 430 (1968).

ern school desegregation cases which renders the *de jure/de facto* distinction less clear than the earlier southern cases indicated.

The northern school desegregation issue was first presented to the United States Supreme Court a year after Justice Rehnquist took his position on the bench. Since that time, he has persistently objected to the way the majority has treated the issue of northern desegregation.[85] In 1973, Rehnquist lodged the sole dissent to the majority's holding that a district-wide desegregation plan in Denver was justified on a finding of intentional discrimination in only one part of the district.[86] Rehnquist emphasized the factual differences between the segregation that existed in the Denver schools from that which existed in the southern school systems. More basically, he objected to the Court's imposition in 1968 of the "affirmative duty" to desegregate, characterizing it as an unexplained extension of *Brown v. Board of Education*. While Rehnquist conceded that such a duty exists, he maintained that it should be applied only to southern school systems where segregation had once been mandated by law.

Rehnquist viewed the Court's reasoning in two northern school desegregation cases decided in 1979[87] as a further unwarranted departure from the *de jure/de facto* distinction. In both of these cases, the majority held that school boards which intentionally maintained dual school systems in 1954, and which continued to maintain them, must show why they have not taken necessary steps to desegregate. These school boards bear the heavy burden of showing that their actions, promoting the dual school systems, serve important and legitimate ends. In *Columbus Bd. of Educ. v. Penick*, the Court stated that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."[88] The Court still requires a finding of *de jure* segregation as shown by the school boards' (or administrators') purposeful segregative action in order to justify a legally imposed remedy for racially imbalanced schools. The 1979 cases, however, facilitate findings of purposeful segregation by their reliance on proof of intentional segregation in 1954, as well as on the "foreseeable and anticipated disparate impact" of school authorities' actions.

Rehnquist is adamantly opposed to what he refers to as the Court's "new methodology." First, he argues that there is no reason to look at a school's actions before 1954, unless the school has a

85. *Contra* Milliken v. Bradley, 418 U.S. 717 (1974).
86. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).
87. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*).
88. 443 U.S. 449, 464 (1979).

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history of legally mandated racial segregation. Presumably, this means that schools which were not *legally* segregated in 1954, should not be made to bear the responsibility of achieving a unitary system. Second, he argues that the burden of showing a discriminatory purpose should lie with the plaintiffs, and when there is no evidence to prove or disprove the justification offered by a school board for its actions, the Court should not hold that there is a violation of a constitutional right. Rehnquist's approach to desegregation is clear. In order to justify the imposition of a remedy for racially imbalanced schools, the lower courts must find some action on the part of the school board which intentionally discriminated against minority students. If such violations are found, the Court must then determine how great a segregative impact the violations have on the racial distribution of the schools. The remedy must only redress the difference; if past violations are found to have occurred, the proper remedy "is to restore those integrated educational opportunities that would now exist but for purposefully discriminatory school board conduct."[89] In short, Rehnquist's approach would make it considerably more difficult to challenge racially segregated schools. Rehnquist's approach would also limit the remedy to the correction of the actual violation.

Rehnquist has never voted to uphold a school desegregation plan.[90] In light of recent congressional overtures aimed at preventing the judiciary from expanding its policy of desegregation, it might be prudent for the Court to keep a low profile in this area. Should Congress actually attempt to limit the judiciary's remedial powers with regard to desegregation, Rehnquist could be expected to side with Congress. Indeed, Rehnquist might take advantage of such an opportunity and attempt to overturn many of the important school desegregation rulings handed down by the Supreme Court. Although Rehnquist surely would not go so far as to repudiate *Brown*,[91] he would interpret it narrowly as applying only to le-

89. *Id.* at 524.

90. In United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972), a unanimous decisions which involved a state law which created a new school district in Halifax County, North Carolina, the Court held that if the new school district hindered the dismantling of the dual system, the implementation of the legislation could be enjoined.

91. *But see* R. KLUGER, SIMPLE JUSTICE 606-11 (1975). As a law clerk, Rehnquist prepared a memo for Justice Robert Jackson to be used by Jackson in developing his arguments for conference on the *Brown* case. Rehnquist's memo, entitled "A Random Thought on the Segregation Cases," contained the following passage:

> One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed

gally authorized or mandated segregated schools, and would gladly repudiate its successors, which, in his view, have rendered the *de jure/de facto* distinction meaningless.

VI. REHNQUIST ASCENDANT? A VOTING ANALYSIS

Is Justice Rehnquist's influence among the other members of the Supreme Court increasing? Is his version of the equal protection clause likely to gain majority support? Are we likely to see him authoring more majority opinions upholding sex-, illegitimacy-, and alienage-based classifications, and invalidating school desegregation plans? After examining Rehnquist's judicial opinions in 1975, John R. Rydell concluded that Rehnquist's approach to equal protection was not likely to become the dominant view of the present Court.[92] Other contemporary observers of Rehnquist's behavior on the Court have asserted that he is the source of vision that currently informs the work of the Supreme Court. In 1982, Owen Fiss and Charles Krauthammer asserted that Rehnquist is emerging as the leader of a conservative bloc consisting of Burger, Powell, White, and O'Connor, and that his influence is likely to expand given his relative youth and the likely pattern of future appointments.[93] Thus, the early image of Rehnquist standing alone in "right field" may soon fade as he rises to prominence in the conservative Court of the 1980's.

While Rehnquist has been in the minority in many of the equal protection cases, he has also been a most vocal dissenter,[94] and he has also spoken for the majority in several important decisions. Thus, a reading of the Court's equal protection opinions seems to indicate that Rehnquist might be an emerging leader on the Court. To test this impression, this section provides an analysis of the votes in all of the equal protection cases which Rehnquist participated in through 1981.[95] Using data from eighty-eight cases, majority percentages and dissent rates for each justice, and interagreement scores for all pairs of justices, were computed in

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> off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying on the sentiments of a transient majority of nine men.
>
> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. . . .

92. Rydell, *supra* note 1, at 875.
93. Fiss & Krauthammer, *The Rehnquist Court*, THE NEW REPUBLIC, Mar. 10, 1982, at 14-21.
94. Rehnquist filed an opinion in twenty-four of the twenty-eight cases in which he dissented.
95. All non-unanimous equal protection cases decided in full, as well as *per curiam* decisions that elicited dissenting opinions, have been included in the analysis. A complete list of cases is available upon request from the author.

order to determine whether Rehnquist's interpretation of the equal protection clause is likely to be shared by a majority of the Supreme Court.

A. Majority-Dissent Percentages

As Table 1 indicates, Rehnquist voted with the majority in 67.8 percent of the non-unanimous cases in which he participated. This majority participation score indicates that five of the other Justices voted with the majority a higher percentage of the time than he did.[96] He dissented twenty-eight times; in eleven of those cases he dissented alone. Also, he filed an opinion in all but four of the twenty-eight cases.

TABLE 1
Dissents and Majority Participation (Non-unanimous Equal Protection cases 1972-1981)

Justice	Number of Cases	Majority Participation		Dissents	
		N	PCT	N	PCT
Powell	87	79	90.8	8	9.1
Blackman	88	76	86.4	12	13.6
Stewart	88	74	84.1	14	15.9
Burger	88	74	84.1	14	15.9
White	87	68	78.2	19	21.8
Rehnquist	87	59	67.8	28	32.2
Stevens	49	32	65.3	17	34.7
Brennan	88	39	44.3	49	55.7
Douglas	37	15	40.5	22	59.5
Marshall	87	34	39.1	53	60.9

A gross analysis of dissenting and majority participation rates is misleading because of the relatively large number of equal protection cases that involved challenges to economic legislation. In these cases, the Court used the rational basis test to uphold the law, and Rehnquist voted with the majority. If, however, the cases are divided into seven categories based on the type of classification which was challenged,[97] a clear pattern does emerge.[98] Rehnquist, in terms of majority participation, ranks sixth in race cases, eighth in gender cases, last in both alienage and illegitimacy cases, and fourth in economic regulation cases.

96. *See* Heck, *Civil Liberties Patterns in the Burger Court, 1975-78*, 34 W. POL. Q. 193 (1981).

97. The seven case types of challenged classifications are: race, gender, illegitimacy, alienage, voting, poverty, and other.

98. However the number of cases is far too small to provide statistical reliability of the findings.

B. Bloc and Time Series Analysis

The majority participation percentage permits a general assessment of Rehnquist's position in relation to the other members of the Court; this does not indicate, however, that the majority subscribes to his interpretation of the equal protection clause. The question of whether other members of the Court may be moving closer to Rehnquist's views remains; neither a "bloc" analysis, nor a "time series" analysis, currently supports an affirmative reply.

TABLE 2
Matrix of Interagreement: Non-unanimous Equal Protection Cases 1972-1981

MRSH	BRN	DOUG	STVN	WHTE	STEW	BLKM	POW	BURG	REHN
—	95.3	89.2	54.2	55.9	36.7	36.7	32.6	24.1	5.9
	—	86.5	61.3	60.8	39.8	42.0	36.8	28.2	11.4
		—	—	44.4	51.3	35.1	38.9	32.2	5.4
			—	53.1	57.2	57.1	70.1	46.9	43.8
				—	62.0	71.2	68.6	64.3	48.9
					—	75.0	81.5	81.8	70.1
						—	89.1	81.7	67.8
							—	86.2	72.1
								—	81.5
									—

Court cohesion = 55
Sprague criterion = 78

In the bloc analysis, the interagreement percentages indicate that "Rehnquist's bloc" consists of no more than two justices. There appear to be two blocs at opposite ends of the spectrum: Brennan and Marshall received a score of 95.3 percent on interagreement, and Burger and Rehnquist scored 81.5 percent on interagreement. The interagreement scores for Powell, Blackman, and Burger are all sufficiently high for them to be characterized as a bloc, with Rehnquist being a marginal member (at best). Thus, the "Rehnquist bloc" consists of only Rehnquist and Burger.

The time series analysis is even less useful on the important question of whether Rehnquist's influence has increased with his tenure on the Court. A comparison of Rehnquist's majority and dissenting votes by year is outlined in Table 3.

TABLE 3
Rehnquist's Majority/Dissent Votes 1972-1981

Court Term	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980
Majority Vote	3	8	9	3	7	8	3	10	2	5
Dissenting	2	7	3	1	2	5	1	4	3	0
Total	5	15	12	4	9	13	4	14	5	5
Percentage Majority	60	53.5	75	75	77.7	61.5	75	71.4	40	100

Although the collection of cases used was too small to provide statistically reliable results, no pattern of emerging leadership is discernible.

VII. CONCLUSION

In Rehnquist's view, the fourteenth amendment was not intended to be an affirmative guarantee of equality. Its purpose was simply to prohibit the states from treating blacks and whites differently under the law. Such a view is consistent with his belief in immanent positivism, requiring adherence to the text of the Constitution and reliance on the original intention of the framers of the Constitution—even if their intent is not discernable. Rehnquist consistently argues that the rational basis test is the proper standard of review where racial discrimination is not implicated. Even when race is involved, Rehnquist is very reluctant to use the equal protection clause unless he finds discrimination that is both purposeful and officially sanctioned. His approach to equal protection analysis flows from his view of the limited role of the judiciary in the American political system. Rehnquist believes the Supreme Court should pay maximum deference to the decisions of popularly elected officials. The states, in particular, should be given maximum leeway to determine the best solution to their problems. Rehnquist's faith in the ultimate fairness of majoritarianism seems to be the key to his emphasis on state autonomy and to his minimum scrutiny/maximum deference approach to equal protection.

The analysis of voting data does not support the thesis that Rehnquist's influence among the other members of the Court is increasing. However, the number of cases utilized in the analysis was clearly inadequate for the task of indicating patterns of change over time. Another variable which adversely affects the reliability of the analysis of the voting data is the fact that there is a new justice on the Court, and it is too soon to analyze her voting behavior. In the next few years, it will be important to observe whether Justice O'Connor will align herself with the Rehnquist/Burger bloc. Looking toward the future, it is clear that if two new Justices

are appointed by a conservative republican President, the balance of power could shift in Rehnquist's favor.

The possibility of a Supreme Court majority subscribing to Rehnquist's interpretation of the equal protection clause has serious implications. Despite Justice Stone's footnote in the 1938 case of *Carolene Products*, which suggested that the fourteenth amendment might give special protection to members of groups which have been traditionally disfavored and excluded from the political process,[99] the Supreme Court did not actually begin to give serious meaning to the equal protection clause until 1954. Since then, however, the Court has led the American political system—first in the quest for racial equality, and then in efforts to achieve equality for women and other traditionally powerless groups. By its willingness to take an active role in interpreting the equal protection clause, the Court has undertaken the responsibility of shaping and defining an evolving concept of equality. If a majority of the justices were to accept Rehnquist's view of equal protection, the Court would no longer perform such a role. Members of "discrete and insular" minorities, who have turned to the judicial system because relief was not available from the democratic process, would find the courts unresponsive as well. The result of a Rehnquist-led majority would be an equal protection clause that offers little protection to racial minorities; virtually no protection to women, aliens and illegitimates; and no "special" preferential treatment to members of traditionally disadvantaged groups. Members of such groups would have no legal recourse if the political process did not offer them an opportunity to challenge discriminatory policy. On a more general level, Rehnquist's relativistic version of the equal protection clause would render equality a value that would forever remain merely personal, and without intrinsic moral worth, since the goal of equality can never be enacted into law through a democratic process.

99. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

TESTIMONY OF

GARY ORFIELD

PROFESSOR OF POLITICAL SCIENCE, PUBLIC POLICY AND EDUCATION

UNIVERSITY OF CHICAGO

before the

COMMITTEE ON THE

JUDICIARY

U.S. SENATE

HEARINGS ON THE NOMINATION OF

JUSTICE WILLIAM REHNQUIST

AS CHIEF JUSTICE OF THE

UNITED STATES

JULY 31, 1986

Congress has few responsibilities so heavy as that of selecting the leader for a coordinate branch of government, the sixteenth Chief Justice of the United States. This is not an appointment to a President's administration. The influence of this appointment on our history and our society goes much deeper and will likely last long after the names of the present Cabinet are forgotten and most of the members of the present Senate are no longer here. Senators should reach their own independent judgment on this appointment and should not feel bound by short-term notions of political advantage or loyalty. Supreme Court nominees have been rejected far more frequently than any other presidential nominations because of their great importance and enduring consequences. Of the eight nominations sent to the Senate between 1967 and 1971, for instance, only half were confirmed and Senate action was blocked on President Johnson's nominee for Chief Justice. Several other nominations have not been submitted because of fear of defeats. The Senate has a special responsibility in these nominations and it has been a responsibility Senators have been willing to exercize when basic issues have been at stake.

I urge the Senate to reject the nomination of Justice William Rehnquist as Chief Justice. I do this because I believe that Justice Rehnquist's long and unchanging record of hostility to governmental protection of minority rights renders him unworthy to hold the position of preeminent leadership in the American system of justice. I believe that the appointment is an insult to minorities and women in the U.S.,

that it is part of a concerted strategy of the Reagan Administration to weaken federal protection of civil rights, and that it will endanger the capacity of our political system to cope with very severe problems of inequality in an increasingly multi-racial society and a society where the role of women is becoming ever more important. No modern Justice has been so consistently hostile to enforcement of equal protection of the laws or has embraced so consistently a fundamentalist legal philosophy that so firmly denies any possibility of judicial protection for victims of discrimination.

This testimony will first briefly discuss the nature of the Senate's responsibility in nominations to the Supreme Court. Second, it will describe the role of the courts in protecting minority and women's rights and the critical battles against civil rights enforcement by all branches of government now being waged by the Reagan Administration. Third, it will discuss the wishful thinking about Mr. Rehnquist and misleading testimony by Mr. Rehnquist/ that contributed to his initial confirmation for the Court. Fourth, it will show through statistics and through quotes from his writings and decisions the nature and intensity of his opposition to minority rights during his service on the Court. This account will show that the opposition is fundamental, will quote from his angry and belligerent attacks on other justices when his position fails, and will show that the hostility to minority rights has not abated with his years of service on the court. Fifth, I will suggest that the appointment of an ideological extremist is likely to either deepen polarization on the court or lead the court into

a situation in which it can offer nothing but frustration to a severely divided society where governmental power is increasingly being used to deepen rather than remedy inequalities.

The Role of the Senate. Each time the Senate has faced a controversial Supreme Court nominee in the last twenty years there has been a review of the history of conflicts over appointments and Senate rejections of nominees. In the last century the resistance to Presidents even went to the extreme of changing the size of the Court. In this century nominees and possible nominees have been sharply questioned about their personal and legal background and their orientations toward civil rights, rights of the accused, abortion, and other matters. In a society where the Supreme Court makes the final decision about the contemporary meaning of such sweeping and unspecific constitutional provisions as "due process of law" and in a court where many decisions of great importance for the nation are made by 5-4 votes, it is an insult to the intelligence of the public to suggest that one need only consider a nominees grades in law school. It is perfectly appropriate for the Senate to determine whether or not a nominee has a closed mind to the claims of millions of Americans in minority groups who rarely win legislative battles and rely on the courts for the protection of their basic rights. I do not believe that the Senate should name as leader of our highest court a nominee whose positions are consistently hostile, often even when other conservative justices recognize the need for some kind of response.

When I testified against Mr. Rehnquist's initial appointment fifteen years ago I had to opportunity to discuss both the issues and the responsibility of Senators with a number of Senators and staff members. Three basic questions were on their minds. The first was whether or not Senators owed deference to the President in making the decision. The second was whether or not they should consider anything beyond the intellectual competence of the appointee, and the third was whether or not it was possible to know in advance how a member of the Supreme Court would vote once he was given life tenure and was responsible only to history. A reading of the floor debate shows that these issues remained very much in the forefront as Senators reached their decisions.

Since there has been no seriously contested nomination for the last fifteen years and since Mr. Rehnquist has already outlasted 78 of the 100 Senators in office in 1971 it is important to review those questions and to find out what evidence can be drawn both from the historic record and from Mr. Rehnquist's actual performance as a Justice.

The courts have always played an extraordinary role in our litigious and legalistic society where power is distributed in extremely complex ways, where legislative bodies are dominanted by lawyers, where bureaucratic regulations draw heavily on legal precedents, and where the courts have the final power to declare what the laws and the Constitution mean. Nothing is more traditional in American politics than that there should be a struggle over Supreme Court appointments,

particularly when there are basic legal issues unsettled in the nation and when a President is perceived as trying to extend his partisan views to constrain the next political generation through control of the Supreme Court.

George Washington, perhaps the most universally revered President, and James Madison, the dominant intellect of the Constitutional Convention, lost appointments on political grounds. Washington's appointment of John Rutledge to be the nation's second Chief Justice was defeated in 1795. Jefferson was bitterly critical of the Supreme Court. Andrew Jackson confronted harsh battles over nominees. Because of their worry over the racial policies of President Andrew Johnson the Republicans who controlled Congress during Reconstruction succeeded in shrinking the Court to eliminate the possibility of more appointments by a hostile President. President U.S. Grant was forced to withdraw two nominations for Chief Justice from the Senate. There have been a number of other defeats, either through negative votes by the Senate, refusal to act on nominees, withdrawal of nominations, or decisions by Presidents that it would be futile to submit the nominees they preferred because of inevitable controversy and possible defeat.

During the last twenty years the Senate refused to act on President Johnson's nomination of Justice Fortas as Chief Justice and Judge Throneberry as Associate Justice. Two of President Nixon's nominees were defeated by votes in the Senate, several more candidates approved by the President were never submitted to the Senate because of strong public criticism, and another, Justice Rehnquist received 26 negative votes. In all of these disputes, as well as in the Senate action rejecting President Hoover's nomination of Judge Parker, ideological issues were very important, although there were often other issues as well.

It is particularly instructive to review the record of the Senate in blocking the nomination of President Johnson's choice as chief justice. Although Justice Fortas later resigned on another issue, the battle in 1968 was partisan and ideological. Leader of the Senate opposition, Sen. Robert Griffin (R-Mich.) and vice presidential nominee Spiro Agnew said that a lameduck president should not be allowed to appoint a Chief Justice whose judgments would so strongly shape the legal future. Sen. Howard Baker (R-Tenn.), future Senate Majority Leader, said that he had "no question concerning the legal capability of Justice Fortas" but that he would oppose him anyway. In a July 1, 1968 speech Sen. Strom Thurmond (R-S.C.) announced his opposition to Fortas on philosophic grounds and claimed that the appointment was a plot between Chief Justice Warren and President Johnson

"because they both want to continue the policies of Chief Justice Warren."

The Republicans were so determined to stop the confirmation that they used a filibuster to prevent a majority vote on the nomination. It was the first time in the history of the Senate that a filibuster had been used to block a presidential nomination. Analysis of the vote on cloture, the vote that led to the President's withdrawal of the nomination, shows that the Senators voted on ideological and partisan grounds. Three-fourths of Republicans and nine-tenths of Southern Democrats voted against cutting off debate while nine-tenths of Northern and Western Democrats voted for cloture. Some of the same Senators who now take the position that there should be quick confirmation of Justice Rehnquist with no searching examination of the consequences of his decisions for the rights of millions of Americans were then quite willing to support a minority veto through the filibuster system to prevent President Johnson from making an appointment they disagreed with. Their success made possible the Burger Court. Chief Justice Burger's unusual decision to resign his office while still in good health now gives President Reagan the possibility of nominating a candidate who may carry the ideals of the Reagan Administration into the next century as the leader of the judicial branch of government. The Senate has both the right and the obligation to determine what this may mean for our common future.

The Civil Rights Situation. My testimony against Justice Rehnquist focuses on his record in the enforcement of the Constitution's guarantee of "equal protection of the laws."

When considering his decisions on minority rights and sex discrimination, however, it is very important to keep in mind the larger context within which the decision about the future of the Supreme Court takes place.

We are in an Administration with a record of hostility to minority interests unmatched in more than a half century. The President ran on an anti-civil rights platform, pledging to change the Constitution and redirect the courts. He received virtually no black support in either campaign and only a small minority of Hispanic votes. He has appointed to key civil rights enforcement offices active opponents of civil rights laws who often use their offices to fight black, Hispanic and women's organizations in the courts and in administrative regulation decisions. The recent extraordinary action of House liberals and moderates in voting to abolish the U.S. Civil Rights Commission, which was put in the hands of strong opponents of civil rights after a quarter century of important bipartisan service is one sign of the current situation. We are in a situation where the Attorney General bitterly attacks the Supreme Court and where his assistants appeal to federal courts to end school desegregation and affirmative action plans.

It is no accident that the President has chosen the Justice who is the most opposed to civil rights litigation. Only the courts have blocked the Reagan efforts to resegregate schools, end affirmative action, and deny governmental responsibility for housing policies that produced segregation and unequal

opportunities. Rehnquist is the Justice most closely in agreement with the Administration's policies, even in the case in which they fought to restore tax subsidies to segregated private education. This appointment is an important part of the effort to reverse the momentum of civil rights.

American society and the American economy are changing rapidly in ways that produce new challenges for all institutions of government. The minority fraction of U.S. population is increasing rapidly and it is clear that the next generation will be by far the most profoundly multiracial in American history. A second very large minority group has emerged, the Hispanics, whose numbers might well exceed those of blacks not far into the next century. The great majority of the new jobs in the society are occupied by women and a rapidly increasing share of children are growing up in households headed by women. Occupational segregation and wage inequality, however, remain very severe. In the 1980's there are many signs of decreasing educational opportunity for black and Hispanic youth even as the economic changes eliminate employment opportunities for those without income. High school dropout rates are rising and the share of minorities going to college declining. Residential segregation has remained almost untouched by extremely weak fair housing policies and new jobs are being concentrated in outlying suburban areas not accessible by workers from segregated inner city communities. Inner city schools and other institutions have to rely on a constantly shrinking share of metropolitan tax resources to deal with an increasingly impoverished and miseducated enrollment.

No one, of course, thinks that the courts can or should solve all of these problems but they do set the context within which issues are formulated.

One of the basic problems faced by minorities and women is their relative powerlessness. They have few representatives within government and at the top levels of private organizations. More seriously,they face a political environment where the representatives of the status quo generally command most of the resources and where politicians often have more to gain from creating fears of change than from responding to minorities. This is particularly true on matters of race relations where anti-change politicians can often exploit racial fears and prejudices of the majority.

These general problems are compounded by the system of minority veto that is so deeply institutionized in Congress. The Senate filibuster system blocked anti-lynching legislation for almost a half-century, killed a fair housing enforcement bill in 1980, blocked the Grove City legislation, and, in general, makes it virtually impossible to enact any serious civil rights measure apart from voting rights except when there is an extraordinary majority of the kind last seen almost two decades ago.

The Courts become particularly critical to minority groups during periods when political leadership is hostile to their interests. It is understandable, for instance, that women's groups, whose drive for the Equal Rights Amendment was defeated by a conservative movement that assured women that the Supreme Court would attend to discrimination without the ERA are deeply concerned when a hostile Administration attempts to name a Chief Justice who has clearly and repeatedly said that he believes there is nothing in the Constitution that forbids unequal treatment by sex. It is understandable that civil rights groups fighting a Justice Department committed to resegregating integrated school districts does not want to have a Chief Justice with the same attitude.

We are in a period when enforcement of existing civil rights laws has virtually ceased in many areas, when the relative status of minority and female-headed families has deteriorated, when there have been sharp reductions in provision of such basic essentials as welfare payments for poor children, housing, health care, job training, and others. Existing political leadership attacks both the tools to deal with discrimination directly and the programs to help overcome the effects of past discrimination.

Serious litigators for equal rights rarely go to court because they think that the courts will provide speedy and comprehensive remedies. The courts are slow, cautious and usually incremental in their decisions. Civil rights plaintiffs often lose. They go to court because they believe they have rights and there is nowhere else to go.

They believe that it is inherent in the Constitution that minority rights must be protected by the courts regardless of what the popular majority of the moment may wish to do to minorities. If that is not true, the rights are nothing more than empty promises that the majority may chose to dishonor whenever it wishes. In many of Justice Rehnquist's decisions, however, there is no understanding of the fact that minorities often have no real political alternative and that it is precisely under those circumstances that their legal rights become most important and the role of the courts in protecting them most critical.

The Promise of Fairness. When his nomination to the Supreme Court was pending before the Senate, Mr. Rehnquist and his supporters argued that neither his active opposition to civil rights as a private citizen and a Supreme Court clerk nor his work in the Nixon Justice Department should be taken as reflections of his personal attitudes toward civil rights and civil liberties. Descriptions of his early actions were dismissed as inaccurate or no longer relevant. His statements as a Justice Department official were dismissed as "advocacy," not a statement of personal beliefs. Supporters pointed to the surprising evolution of some earlier Justices after their appointments. Rehnquist fed such hopes with statements that he would divorce his personal political attitudes from his role as a Justice. Moderates in the Senate were encouraged to hope that the rigid ideological conservative would metamorphize into a judge who would look at cases with dispassion and come to terms with the profoundly difficult problems of equal rights in a society of deep and persisting inequality.

The American Bar Association report supporting the nomination explained the civil rights and civil liberties statements as "professional advocacy" or statements of legal "philosophy." Arizona State Senator Sandra Day O'Connor, later to join her law school classmate on the Court, commented: "When Bill has expressed concern about any law or ordinance in the area of civil rights, it has been to express a concern for the preservation of individual liberties of which he is a staunch defender in the tradition of the late Justice Black."

Mr. Rehnquist, in explaining the way he would respond to his responsibilities on the court, invoked another great jurist, Justice Frankfurter and repeatedly promised to separate his personal politics from his decisions as much as possible:

> I have always felt that, as I think Justice Frankfurter said, you inevitably take yourself and your background with you to the Court. There is no way you can avoid it, but I think it was Frankfurter who also said, if putting on the robe does not change a man, there is something wrong with that man. I subscribe unreservedly to that philosophy that when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. (Hearings, 156)

The majority report of the Judiciary Committee, recommending that the Senate confirm Mr. Rehnquist as an Associate Justice dismissed many of his statements as vigorous advocacy, not personal views. It found that he had changed his views on public accomodations and that he was not actually opposed to school desegregation. In dealing with a variety of sweeping statements on civil liberties issues, the Senators relied on the advocacy argument, on statements praising freedom of speech, free press, and other civil liberties before the committee, and on favorable excerpts from congressional testimony and speeches. The majority concluded that, "He sees both sides of the difficult questions in this area, which require working out the delicate balance established by the Constitution between the rights of individuals and the duty of government to enforce the laws."(Report, 13-20) Both Mr. Rehnquist and his advocates promised the country a fair and balanced judge who would not be rigidly ideological and would be open to the claims of all who came before the court. He would not be, they argued vigorously and successfully, the kind of judge who would always vote against civil rights and equal protection and whose vote could be easily predicted without even knowing any specifics of a case.

Justice Rehnquist's Record on the Court.

If there is one thing that is readily apparent from examining the way Justice Rehnquist has voted in more than 3000 cases and the opinions and dissents he has authored is that the critics were right and the supporters were wrong

in their predictions of the meaning of the appointment for litigation affecting minority rights and civil liberties, particularly rights of accused criminals. Mr. Rehnquist immediately placed himself at the extreme right of an increasingly conservative court and has remained there term after term through fifteen years of changing membership and evolving issues. His record in many areas has been almost totally predictable. Whatever the issue, no one on the court is less likely to vote to sustain a claim of minority rights under the equal protection clause and no one is more likely to defend the police against any allegation of unconstitutional action.

One way to understand the extremist nature of his position is to compare it with that of the other conservative justices appointed by President Nixon and President Reagan. One way to look at this question is to use the statistics on Supreme Court voting published annually by the Harvard Law Review and the analysis of the first decade of the Burger Court by Prof. Russell Galloway of the Supreme Court History Project. Galloway's study shows that during the 1969-71 period "the Court underwent one of the most dramatic alterations in its history" as "the liberal wing was decimated and the conservative wing rejuvenated...." When Rehnquist came on the court "control rested in the hands of seven conservatives and moderates led by the conservative four-vote Nixon bloc." The Nixon justices were strengthened in the mid-1970s by the movement of the Court's moderates in a more conservative direction. In these circumstances conservatives dissented far less and

concentrated more on influencing majority decisions that became the law of the land.

As the years passed, each of the other conservative Justices showed some signs of increasing independence of judgment and changing voting patterns as new issues arose. By the October 1977 term of the Court, for instance, both Justice Powell and Justice Blackmun had moved toward more independent patterns of disagreement or agreement on issues on particular cases. Rehnquist remained firmly rooted at the extreme right and had by far the highest dissent rate of the members of the dominant conservative faction. His dissents were often bitter and doctrinaire, even against fellow conservatives who deviated from orthodoxy in response to the special circumstances of the case before them.

The record is particularly striking in the field of equal protection. When I searched Justice Rehnquist's record through the term completed this July via the LEXIS computer system, I was astonished to receive an eight-foot long list of 96 equal protection dissents, five of them this June and July. Reading these dissents one after another for many hours it was very clear that this record was the product of a strongly committed, consistent, and closed mind operating in terms of a philosophy that ignored the realities of American race relations and offered virtually no hope to any minority group that had to rely on judicial protection for its rights.

Professor Davis' 1984 article on Justice Rehnquist's equal protection record offers clear measurements of his

voting record. To that point, she said, "Rehnquist has never voted to uphold a school desegregation plan." Of the seventeen cases of sex classifications in laws that had come before the court, the majority of the justices had struck down more than half but Rehnquist had favored permitting continued different treatment in almost nine-tenths. On the cases about whether it violated equal protection to enact laws treating illegitimate children differently he voted to uphold all of the challenged state laws punishing children for their parents' sins. In a series of cases dealing with the rights of illegal aliens, Rehnquist diverged sharply from the court's majority.

Another study of Justice Rehnquist's record, by Prof. Robert Riggs of the Brigham Young Law School and Thomas D. Proffitt found that he was overwhelmly sympathetic to state and local governments in general when the validity of their actions were challenged. In criminal cases he voted against the rights claimed by the accused criminal in almost nine-tenths of cases from all levels of government. On the other hand he was far less likely than the court majority to vote for access to the federal courts or to sustain claims based on freedom of expression.(see tables 1 and 2).

The overall pattern of Justice Rehnquist's voting, in other words, is clear. He has strongly and consistently supported conservative positions. His record on equal protection and criminal rights cases shows exactly the opposite of what the Senate was told it could expect— a rigid and

Rehnquist Votes Compared With Court Majority For Cases In Which Government Was A Party, Decided By The Supreme Court During Its 1976-1981 Terms

Term	Votes For or Against State/Local Government: Criminal Cases For %	Against	Civil Cases For %	Against	Votes For or Against National Government: Criminal Cases For %	Against	Civil Cases For %	Against
1976								
Rehnquist	19 (86 4)	3	34 (81 0)	8	21 (95.5)	1	19 (86 4)	3
Court Majority	9 (40 9)	13	26 (61 9)	16	18 (81 8)	4	18 (81 8)	4
% Difference	(45 5)		(19.1)		(13 7)		(4 6)	
1977								
Rehnquist	15 (71 4)	6	32 (82 1)	7	14 (82 4)	3	26 (74 3)	9
Court Majority	8 (38 1)	13	22 (56 4)	17	9 (52.9)	8	25 (71 4)	10
% Difference	(33 3)		(25.7)		(29 5)		(2 9)	
1978								
Rehnquist	22 (81 5)	5	26 (74.3)	9	9 (81 8)	2	15 (53 6)	13
Court Majority	13 (48 1)	14	20 (57 1)	15	8 (72 7)	3	15 (53.6)	13
% Difference	(33 4)		(17.2)		(9 1)		(0 0)	
1979								
Rehnquist	19 (95 0)	1	29 (87 9)	4	21 (91 3)	2	27 (64.3)	15
Court Majority	9 (45 0)	11	15 (45 5)	18	14 (60 9)	9	27 (64.3)	15
% Difference	(50 0)		(42 4)		(30 4)		(0 0)	
1980								
Rehnquist	19 (79 2)	5	29 (87 9)	4	10 (100 0)	0	22 (75 9)	7
Court Majority	14 (58 3)	10	21 (63 6)	12	8 (80 0)	2	24 (82 8)	5
% Difference	(20 9)		(24 3)		(20 0)		(- 6 9)	
1981								
Rehnquist	22 (100.0)	0	41 (70 7)	17	9 (90 0)	1	16 (59 3)	11
Court Majority	19 (86 4)	3	25 (43.1)	33	8 (80.0)	2	21 (77 8)	6
% Difference	(13 6)		(27 6)		(10 0)		(- 18.5)	
Total								
Rehnquist	116 (85.3)	20	191 (79 6)	49	84 (90.3)	9	125 (68.3)	58
Court Majority	72 (52 9)	64	129 (53.8)	111	65 (69.9)	28	130 (71.0)	53
% Difference	(32 4)		(25.8)		(20.4)		(- 2.7)	

Source of Tables: R. Riggs and T. Profitt, "The Judicial Philosophy of Justice Rehnquist," 16 Akron L. Rev. 55[illegible].

TABLE 2

Rehnquist Votes Compared With Court Majority For Cases Raising Issues Of The Exercise Of Federal Court Jurisdiction, Freedom Of Expression, And The Validity Of State Acts, Decided By The Supreme Court During Its 1976-1981 Terms

Term	Votes For or Against Validity of States Acts For %	Against	Votes For or Against Federal Jurisdiction For %	Against	Votes For or Against Freedom of Expression For %	Against
1976						
Rehnquist	58 (85 3)	10	4 (19 0)	17	2 (15 4)	11
Court Majority	38 (55 9)	30	7 (33.3)	14	6 (46 2)	7
% Difference	(29 4)		(- 14.3)		(- 30.8)	
1977						
Rehnquist	54 (78.3)	15	5 (33 3)	10	2 (18.2)	9
Court Majority	34 (49.3)	35	7 (46 7)	8	4 (36.4)	7
% Difference	(29 0)		(- 13.4)		(- 18 2)	
1978						
Rehnquist	53 (79 1)	14	10 (40 0)	15	1 (14 3)	6
Court Majority	38 (56 7)	29	11 (44 0)	14	1 (14 3)	6
% Difference	(22 4)		(- 4 0)		(0.0)	
1979						
Rehnquist	52 (85.2)	9	13 (50 0)	13	0 (0 0)	12
Court Majority	27 (44 3)	34	22 (84 6)	4	7 (58 3)	5
% Difference	(40.9)		(- 34 6)		(- 58 3)	
1980						
Rehnquist	52 (77 6)	15	5 (21 7)	18	0 (0 0)	7
Court Majority	38 (56 7)	29	9 (39 1)	14	3 (42 9)	4
% Difference	(20 9)		(- 17 4)		(- 42 9)	
1981						
Rehnquist	64 (77 1)	19	18 (36.7)	31	5 (38 5)	8
Court Majority	39 (47 0)	44	24 (49.0)	25	7 (53 8)	6
% Difference	(30 1)		(- 12.3)		(- 15.3)	
Total						
Rehnquist	333 (80 2)	82	55 (34 6)	104	10 (15 9)	53
Court Majority	214 (51 6)	201	80 (50.3)	79	28 (44.4)	35
% Difference	(28.6)		(- 15.7)		(- 28.5)	

closed mind, less sympathetic to plaintiffs claiming Constitutional rights than any other Justice in recent history. There is very little evidence that the robe has changed the man.

The general pattern is distressing but it adds a great deal to the statistical analysis to read individual decisions. In his response to the great issues that came before the court, both the implications of Rehnquist's legal and political philosophy and the nature of his personal values become much clearer.

Rehnquist's opinions on minority rights issues rarely show any serious effort to understand either the nature of the substantive problem or the extent to which a group has come to court because it has been totally impossible for them to obtain any recognition of their rights from the elected branches of government for a very long time. These questions are irrelevant, in Rehnqist's view because he believes that the Constitution offers virtually no protection against governmental action to women and many other groups and only minimal protection to minority groups that can surmount extraordinary burdens of proof. Often he disposes of equal rights claims on technical grounds, treating the issue as simply one of deductive logic.

His values come out most clearly, however, in dissents, when he passionately disagrees with some action the Court's majority has taken, particularly in the fields of school desegregation and affirmative action. In these cases the legal technician gives way to the angry partisan using

a combination of bitter attacks, cynical satire, and predictions of doom.

Rehnquist's dissent in Steelworkers v. Weber, 443 U.S. 193, assails the Court's approval of a voluntary agreement by labor and management to implement minority hiring goals to overcome a history of discrimination in the firm. In his dissent, Justice Rehnquist accuses his colleagues of engaging in the doublespeak and big lie techniques described in George Orwell's, 1984, a biting satire of a totalitarian state that constantly engages in official lies. He claims that the majority is concocting false "legislative history: and engaging in "a tour de force reminiscent not of juristssuch as Hale, Holmes, and Hughes, but of escape artists such as Houdini...." He is characteristically uninterested in the nature of the problem the agreement was supposed to address, saying merely that virtually no black craftsmen had been hired earlier because "few were available in the Gramercy area...." We do not learn why they weren't available or why workers could be found after the voluntary plan was adopted. That is not relevant. In his conclusion, Rehnquist describes affirmative action as "a creator of castes, a two-edged sword that must demean one to prefer another." He warns apocalyptically that "later courts will face the impossible task of reaping the whirlwind."

In a decision handed down less than a month ago, Local Number 93 v. City of Cleveland, Slip Opinion, July 2, 1986, Rehnquist continued this battle. He attacked the Court's decision sustaining a voluntary consent agreement between the firefighters union and the Cleveland city government

providing policies to increase the promotions of black and Hispanic firemen. He called it "simply incredible" that the majority "virtually read out of existence" the evidence on Congress' intent. He argued that the plan harmed whites and that no minority worker should receive any special treatment unless that individual could "prove that the discriminatory practice had an impact on him." There was, once again, no significant discussion of the nature of the historic discrimination, the desirability of voluntary change, or the likelihood that the remedy he preferred would have worked.

Another dissent came this June in Sheet Metal Workers International Assoc. v. EEOC, 54 LW 4984 (June 24, 1986) The Court's majority found the order of the lower court to be "properly and narrowly tailored to further the Government's compelling interest in remedying past discrimination." Rehnquist's dissent objected to "ordering racial preferences that effectively displace non-minorities." Here and elsewhere we find the special solicitude for the rights of whites that is so characteristic of the policy of the Reagan Justice Department and the Reagan civil rights offices.

Rehnquist has also been the leading dissenter on school desegregation. His dissent in the 1973 Denver case, Keyes v. School Dist. No. 1, Denver, Colorado,413 U.S. 189, was the first major dissent after eighteen years of unity by the court following the 1954 decision. He called this decision extending desegregation to Northern cities a "drastic extension of Brown." Since that time there have been no significant expansions of desegregation law, primarily because

the Nixon majority cut off the possibility of city-suburban desegregation in most circumstances in its 5-4 decision in the Detroit case. Nonetheless, Justice Rehnquist has very strongly objected to the Court's permitting metropolitan desegregation to take place in Wilmington, Deleware and to the Court's reaffirmation of the Denver decision in the 1979 Dayton and Columbus cases. Had Rehnquist's position prevailed there would have been large-scale return of minority students to segregated schools.

When the Supreme Court declined to review the Wilmington order in 1975, Rehnquist dissented, calling the remedy "more Draconian than any ever approved by this court." He claimed that his colleagues were ignoring the Detroit decision and accepting "total substitution of judicial for popular control of local education." (Deleware State Board of Ed.. v. Evans, 446 U.S. 923). In another dissent at a later stage of the case he said, "My dissent ... is based on my conviction that it is extraordinarily slipshod judicial procedure as well as my conviction that it is incorrect."(Buchanan v. Evans, 423 U.S. 963)

Rehnquist's role was much more extensive in the case of Columbus, Ohio, which led to the last major decision by the Supreme Court to the present. Columbus was due to implement a large desegregation plan in September 1978. In mid-August, after the Justice for the Circuit, Potter Stewart, rejected an application for a stay, Rehnquist signed a stay that cancelled the entire desegregation plan affecting 42,000 students just before school opened. When the case was heard

later by the full Court and the decision rejected his preference for requiring proof of violations for each individual school to be desegregated he dissented very strongly, denouncing the decision as "as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system." He attacked his brethern for "lick and a promise" opinions and a "radical new approach" which created a "tight noose" on school boards.

He claimed that the Supreme Court, in reaffirming the Keyes decision, was following a policy he described as "integration über alles," a takeoff on the Nazi anthem. He charged the majority with creating a "loaded game board" and acting like "Platonic Guardians", superceding local democracy. The decision, he said, violated the "intellectual integrity" of the Court. As in the case of affirmative action, he used the image of dictatorship to describe civil rights plans.

In one striking part of his Columbus dissent, Rehnquist clearly identified with the Court's white critics. "Our people," he wrote, "instinctively resent coercion, and perhaps most of all when it affects their children and the opportunities that only education affords them." Obviously, "our people" referred to the white opponents not the black supporters of the court order. Nor was there anything about the black allegations, which had convinced the majority, that their children had been coerced into segregated schools and denied the "opportunities that only education affords them." (Columbus Board of Ed. v. Penick, 443 U.S. 449.)

It would be possible to extend this discussion of cases, quoting from dissents finding it permissible for school boards to take books they don't like out of libraries, supporting discrimination against illegitimate children, allowing school boards to arbitrarily fire teachers early in their pregnancies, allowing resident aliens to be denied benefits of college assistance programs, allowing a property qualification for voting and many others. Two other examples from the field of minority rights, however, should suffice to illustrate Rehnquist's approach. The first deals with the battle over tax privileges for openly discriminatory private schools. The second with rights of Indian tribes.

The Bob Jones Univ. case (461 U.S. 574) was one of the most celebrated of recent years, featuring a dramatic change of position by the Reagan Justice Department, an extraordinary appointment of an advocate for the government's former position by the Supreme Court, a major congressional controvery and an embarassing defeat for the Administration in court. Rehnquist found nothing wrong with the policy of tax exemptions for segregated schools, finding that Congress had no intent to deny them when it acted in 1894 and 1913 on tax legislation. He said that it would not violate the equal protection clause of the Constitution if Congress were to pass a law granting exemptions to "organizations that practice racial discrimination." Unless someone could prove that their practices were "intended" to discriminate, policies that had the effect of discrimating could not only be accepted but subsidized.(footnote 4).

Few groups have had a more miserable experience dealing with both state and federal governments than American Indians. Solemn promises and eternal guarantees have been violated with monotonous regularity. As an extremely small and impoverished part of the population, often subject to severe local discrimination, Indians rarely have success in achieving political reforms. The degree to which the federal courts will protect the rights of the Indians and their tribes is an important test of American justice.

In a 1980 decision, Washington v. Confederated Tribes, Rehnquist dissents from a majority decision saying that there is no need to balance interests to determine the tax immunity of a tribe (an issue which is of the greatest importance in determining the viability of tribal economic activities) but that the courts should simply enforce whatever they think Congress wished. In a footnote that has a peculiarly ironic ring for students of Indian history, Justice Rehnquist attempts to offer reassurance:

> ... Indian tribes are always subject to protection by Congress. This source of protection is more than adequate to preclude any unwarranted interference with tribal self-government. Congress, and not the judiciary, is the forum charged with the responsibility of extending the necessary level of protection.... (447 U.S. 134, footnote 11)

Many tribes have, of course, been "protected" out of almost all of their resources and many of their rights and immunities. A similar attitude appears in other cases, including one just decided, Three Affiliated Tribes v. Wold Engineering, Slip Opinion, June 16, 1986, in which he dissents from Justice O'Connor's opinion against a North Dakota state law denying

tribal access to state courts unless the tribe waives its sovereign immunity on all issues under state law. In characteristic Rehnquist fashion the decisions are abstract and ideological, there is no grappling with the realities of the problems encountered by the powerless, and history is recast in a way that simply denies the conflict between democratic institutions and minority rights that is so fundamental in the history and law of minority rights litigation.

The Basis and Significance of the Record.

Mr. Rehnquist's record on the rights of minorities and women is no accident. It grows directly out of a legal philosophy that makes it almost impossible for minorities to win in court. It is a philosophy based on a radical rejection of the extension in the protection against discrimination that grows out of almost a half-century of litigation and landmark Supreme Court decisions. Rehnquist believes that those precedents are largely based on a misunderstanding of the Constitution and that he has the correct understanding of the intent of the framers. In Mr. Rehnquist's view, spelled out in many decisions and in his article,"The Notion of a Living Constitution," the framers of the Fourteenth Amendment, for example, had no intention to protect women or any other non-racial minority group against discrimination and thus there is no constitutional basis for a serious challenge to unequal laws. So far as minorities are concerned, he believes that the 14th Amendment was intended to address the problems of the last century in

the South, not the problems of contemporary blacks and Hispanics.

When claims are raised by racial minorites, who, Rehnquist concedes, do have a right to come to court under the Fourteenth Amendment, a number of the other elements of his legal philosophy come into play. He favors policies making it more difficult to come into federal courts by favoring state court jurisdiction and limiting standing. He believes that it is not sufficient for racial minorities to prove that official decisions had the consistent and foreseeable consequence of discrimination but that they must also prove the intent to discriminate, something that is exceedingly difficult given the reluctance of officials to admit to racial prejudice or intentional violations of minority rights. Even if there is intent, he favors a standard of proof that would require civil rights lawyers to show that each individual school was intentionally segregated and that each individual minority worker receiving a remedy was personally victimized by discrimination. Under his standards it is doubtful that all the civil rights lawyers in the U.S. could desegregate thoroughly one major corporation or one major urban school district. Certainly there would be no trial court capable of handling the volume of evidence that would be required. Such a standard would, in all probability, end school desegregation litigation and reduce employment discimination cases to a relatively small number of individual grievances. Affirmative action requirements would vanish and school districts would be free to dismantle desegregation

plans affecting millions of students, sending the black and Hispanic children back to their segregated and unequal schools.

Mr. Rehnquist's jurisprudence does not discuss the question of whether or not a remedy will work or whether or not it will solve the problem the minority plaintiffs bring to court. (He does, however, discuss with urgent concern the effect of court-ordered remedies on whites.) His concern is with limiting the range of judicial action to the greatest possible extent, not with assuring that the institutions are changed so that the operate in genuinely not racial ways or provide genuinely equal opportunities to the groups previously victimized by discrimination.

One of the most disturbing elements of Rehnquist's decisions is the way in which his ideology and philosophy swamp any serious treatment of the facts of the case and the situation of the individual or group appealing for justice. The reader finds not a searching and illuminating consideration of the particular problem and a difficult balancing of rights, practical conditions, and possible remedies, but the forcing of the particular facts into a preformed mold, even if it requires filtering out much of reality.

At its worst, the Rehnquist technique devolves into recreating the facts to fit the preconceptions, ignoring important parts of reality and slanting both the description of the facts and the opposing legal arguments in ways that result in a systematic distortion of the case's central features.

These problems are skillfully illustrated in an analysis way in which Rehnquist reshaped the case of a Louisville man claiming that his rights had been violated by the printing of his name and photo in a widely distributed police brochure entitled "Active Shoplifters" even though he had never been tried or convicted of the offense. Professor Robert Weisberg analyzes the way in which the issues in this case are restructured in Rehnquist's opinion to justify denial of the plaintiff's claim. Rehnquist's statement of the facts of the case, for instance, is the first sign of the problem. Before the reader ever learns about the claim of the Louisville man there are twenty lines setting up the problem from the perspective of the local police. By the time we find out about the plaintiff's allegation "the reader has assimilated a pleasant picture of two dutiful officers ... who 'agreed to combine their efforts' to prevent crime, all of this 'during the Christmas season.'" The uncomfortable fact that a man who was never tried should be presumed innocent and not publically proclaimed as guilty and as a continuing "active shoplifter" led to a strange characterization. Rehnquist said that "his guilt or innocence of that offense had never been resolved, although later the shoplifting charge was 'finally dismissed.'" The process of stacking the deck proceeds:

To appreciate the structure of *Paul v. Davis*, we need only start with Justice Rehnquist's overt compartmentalization. Prior to part I, he sets forth the "facts."[292] These fifty-nine lines thus are made to seem almost by-the-way; yet, as we have indicated, they serve a vital coloring function.[293] It is only in the sixty-four lines that constitute part I,[294] however, that Justice Rehnquist educes his basic structuring thesis: Davis, through the temerity of his claim, challenges an ordered system of law. Masterful in its progression, this part builds on the reader's skepticism, imbued earlier, about a respondent who, after all, *had been arrested*.[295] Justice Rehnquist continues to depict Davis as opposing, in turn, the basic premises of the federal system,[296] the police who are trying "to calm the fears of an aroused populace,"[297] the natural limits of legal liability,[298] and the studious reflectiveness of the Court itself.[299] . . . .

Justice Rehnquist cogently chooses words to set Davis up against one or more of his audience's basic values. We noted the centrality to substance of the embellishing words "concededly," "transmuted," "drafted," and "shepherded."[301] The concluding phrase, "a study of our decisions convinces us they do not support the construction urged by respondent,"[302] climaxes the mounting sense of uneasiness about Davis. Davis has challenged the police, and, according to Justice Rehnquist, the legislative drafters of a noble amendment; but his gravest offense, it seems, is attempting to distort the studious processes of the Supreme Court itself. . . .

To convince his audience that the court below should have been more reflective, Justice Rehnquist immediately introduces the primary formal device of the rest of the opinion: the positing of "premises" from which his logic seems inevitably to flow. But these premises, usually expressed in what Cardozo called the "type magesterial,"[304] are often crafted out of Justice Rehnquist's whole cloth.

The analysis offers many more examples, but they are not important here. The basic observation of Professor Weisberg and my basic impression in reading scores of opinions and dissents is that all too often they read like preconceived decisions seeking a rationale, often at considerable cost in ignoring or distorting the facts. This approach helps to explain the extrme conclusions that Rehnquist reaches compared with his fellow conservatives.

Mr. Rehnquist's orientation toward politics and toward issues on the court has been one of extraordinary consistency and predictability and there are no signs of significant growth or change. He has never believed that law should change existing racial arrangments, except to deal with a few individual problems. For the rest, Rehnquist believes that the courts should do nothing, that governmental action is counterproductive, that the white majority will take care of any real problems through the democratic process, and that there should never be remedies that aid blacks or Hispanics as a group in ways that deprive whites of some opportunities.

One dominant impression of Mr. Rehnquist's writing is that he lives in another country. It is a country where minority legal claims are only intellectual puzzles and where those claims and the half century of decisions implementing them are misguided. It is a world where blacks and Hispanics coming to court asking for more and different governmental action are almost always wrong and where police defending their kinds of controversial governmental action are almost always right. It is a world where a main threat to the social order is from courts which are unfair to whites and to local control.

The basic problem is not that Justice Rehnquist does not believe what he writes or that he does not often express it in an interesting or arresting way. The problem is that there is little relationship between the historic and contemporary experiencs of minority people in the U.S. and the version that exists in Rehnquist's mind.

Were Rehnquist to lead a court with the kind of majority that could be created by two or three additional appointments we would risk repeating one of the most disgraceful stories in our legal history, the Supreme Court's emasculation of the laws and constitutional amendments of the Reconstruction which culminated in the 1896 Plessy decision. The courts accepted and legitimated the erection of the system of de jure segregation in the South and closed the door to minority litigants, with few exceptions, for almost sixty years. The specific issues would be different but the consequences would be very similar if Rehnquist's views became the law of the land.

If minorities and women are to share confidence in our legal system and hope for justice and opportunity in our society, it is very important that leading figures in the white community take this nomination seriously as a statement about our future. We are not selecting a law professor or a philosopher. We are selecting the leader of our system of justice, a leader who may serve into the next century. I believe that most Americans and most members of Congress are proud of what we have accomplished in moving toward equal rights and few wish to turn backwards. This nomination is a symbol of retreat and reaction from our common dream. It would threaten shrinkage of the rights of millions of Americans. I urge the members of the Senate to withhold their consent and to advise the President to submit a nomination of a Chief Justice who can help a deeply divided court deal with the problems of a divided society with growing inequality.

The CHAIRMAN. The distinguished Senator from Delaware.

Senator BIDEN. One brief question for each of you, a different question.

Mr. Askin, how do you respond to the assertion made that Justice Rehnquist was left with a Hobson's choice in the *Laird* v. *Tatum* case—it is getting late; almost 11:00 o'clock—*Tatum* case, to which you spoke, and that is, that had he not sat and voted, the Court would have been deadlocked and the Nation would have been deadlocked on a very critical issue?

Mr. ASKIN. There was no Hobson's choice at all. The only thing that would have happened, if Justice Rehnquist had recused himself, there would have been a trial; perfectly reasonable thing to happen. There would have been a trial. We would have had an evidentiary hearing, which was the appropriate thing to happen; not to make a decision based on factual claims and assertions, including Justice Rehnquist's own testimony as Attorney General before the Senate Investigating Committee, where there has never been an evidentiary hearing, and never a trial.

Senator BIDEN. Thank you.

Mr. ASKIN. There was no Hobson's choice whatsoever. There was a very clear choice—that he should not have participated, and we would have gone ahead and had a trial. No law would have really been created at all.

Senator BIDEN. Ms. Verveer, what is the single most important objection that your organization has to Justice Rehnquist? Is it because he will impact more heavily on the direction of the Court as Chief Justice, or because it is a second shot at a sitting Justice—do you understand what I am getting at?

Ms. VERVEER. Senator, we have not taken a formal position on the nomination. What we are here to——

The CHAIRMAN. If you do not mind, speak in your loudspeaker there.

Ms. VERVEER. The organization has not taken a formal position on the nomination. But we have a number of concerns that I think have been articulated very clearly over the last 2 days. And I think those surround the two major issues, of his commitment to equal justice, and his commitment to the constitutional liberties guaranteed by the Bill of Rights.

And we are here to urge the Senate to assure the American people where he stands on these issues so they can have the kinds of assurance I think that they demand.

Senator BIDEN. Thank you very much.

Professor, it is good to see you. You are one of the foremost people in the country on matters relating to 14th amendment questions.

How do you respond to the assertion that, notwithstanding your description, Justice Rehnquist finds himself in a solid minority—not the majority at this point, but a solid minority—on a number of the issues that you raised as being so extreme?

In other words, his extreme views seem to be shared by more than himself on the Court. Are there more than one extremist on the Court, or is he different than he stated? Do you understand what I am driving at?

Mr. ORFIELD. Yes.

I think it has been a conservative court since 1971, by any reasonable standard. There are many conservative majorities on that Court.

The thing that distinguishes Justice Rehnquist is that every term he is always at the extreme conservative edge. As he said more or less himself today, and according to the Harvard Law Review's published analysis every term, and he is there. And if you look at individual issues, especially these kinds of equal protection issues, that is where he is as well.

You see each of the other conservative judges going through some kind of evolution and some kind of deepening. I think that that is something that we often see in the trial courts when we are having civil rights cases. We see judges confronting the kinds of terrible problems there are in our society, and thinking about the hard choices, and realizing that the political process is not going to solve them all. So you see other judges moving and making different kinds of decisions. But every year you see Justice Rehnquist in exactly the same place.

Senator BIDEN. I thought it was interesting that the two cases which Justice Rehnquist cited to show growth and that he changed his mind were cases where he changed his mind to become more restrictive in applying constitutional principles.

Mr. ORFIELD. Another thing that you see is, that if you analyze the dissents, among the dominant conservative group, he has by far the most dissents. And he often dissents fairly angrily against his own conservative colleagues when he thinks they make a mistake, like approving an affirmative action——

Senator BIDEN. It is clear to me he is the most conservative. I just have not made up my mind, and I am going back to reread, and read in the first instance, about half a dozen cases which were mentioned here, as to whether or not he can accurately be characterized as extreme.

But at any rate, I appreciate your testimony and your explanation, and the entire statement has been put in the record, and I am anxious to read it all.

For my part, I thank you all.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Mr. Askin, do you believe that the Justice violated the canons of ethics in participating in the decision in the *Tatum* case?

Mr. ASKIN. I believe he violated the most basic canon of all, that you cannot be both an advocate and a judge in the same case.

I think that canon is taken for granted.

Senator KENNEDY. Well, he talked about his obligation and his duty to sit. He spent a good deal of time of that in his memorandums that he has made available to this committee. He indicated that if he failed to meet that duty, he was failing to meet his responsibility, and quoted a lot of cases before the Supreme Court.

Mr. ASKIN. I think he invented a bizarre doctrine which no one has cited since, that somehow or other, when your vote really counts, then you do not recuse yourself. That is the time when you do recuse yourself, when your vote is going to be decisive.

He said, if your vote is really meaningful, then you cannot do it. Even though you have a conflict, you have to sit. That is turning the rules of ethics on their head.

Senator KENNEDY. In his memorandums, he indicates that you cannot go to the Court without some view of the Constitution; that he responds to constitutional issues in a broad way and that he has to apply them; and that therefore he had a duty to sit. Although it referred to various constitutional questions and issues, in his memorandums he talked about the application of law in his exchange with Senator Ervin.

What is your response to that aspect of his memorandum that justifies his duty to sit?

Mr. ASKIN. I believe his memorandum concealed more than it revealed. He makes vague statements. This is his——

Senator KENNEDY. Are you making the charge that it was dishonest, intellectually dishonest?

Mr. ASKIN. I think it was flimsy. Yes, I think it concealed a lot. I am not going to characterize, but I think it was very flimsy. I think it concealed an awful lot of the truth.

Senator KENNEDY. Well, why would he do that? What would be his motivation?

Mr. ASKIN. Well, the only motivation I can discern is that he wanted to protect his former colleagues in the Justice Department—and clients, they were really his clients—because he represented them before Senator Ervin's committee—from having to stand trial.

That is all that was going to happen. To go back to Senator Biden's earlier question, I should point out this complaint was dismissed in the District Court on motion; there was never any evidentiary hearing. The District judge said the complaint on its face failed to state a claim. He threw it out. There was never any evidentiary—the Court of Appeals reversed that. In a two-to-one decision, the Court of Appeals said plaintiffs have a right to have a hearing and a trial, and if they can prove their allegations, they may be entitled to an injunction enjoining the Army from carrying out its domestic intelligence program.

So we still had never had an evidentiary hearing when it gets to the Supreme Court. The only thing that would have happened if the Court of Appeals' decision had been affirmed, we would have gone back and finally had a hearing on the plaintiff's allegations that the Army was engaging in this illegal and illicit program of spying on civilian political activity. That is all that would have happened.

Senator KENNEDY. And this was at a time that he was a counsel for the Defense Department; is that correct?

Mr. ASKIN. That is correct. He represented them before Senator Ervin's committee.

Senator KENNEDY. And this is at a time when allegedly he was writing or making decisions about what could be done in terms of surveillance of American citizens; what could be done with regards to the military in terms of public demonstrations in opposition to the war.

He was counsel for the Defense Department. He was writing memorandas on this. He had indicated what his position before was

going to be, in response to Senator Ervin's statement. He still made the judgment to cast the deciding vote. And as a result of that, as I characterized earlier, there was a denial of discovery that could have revealed a whole host of irregularities, potential violations of civil rights and civil liberties, as we later saw as a result of the plumbers, the Houston plan, the whole range.

Now, do you find—let me just ask you out of the blue—do you find it somewhat interesting that in the request of the members of the Committee to the Office of Legal Counsel that we are being denied the various memoranda of Mr. Rehnquist on those types of activity?

Mr. ASKIN. Absolutely, Senator.

Senator KENNEDY. Do you think it is important for this committee to get them?

Mr. ASKIN. It is extremely important.

Senator KENNEDY. Why?

Mr. ASKIN. Because it is probably time that we got to the bottom of this thing.

Senator KENNEDY. Why is that important? That was a long time ago.

Mr. ASKIN. Oh, I do not think it is so long ago. I think we still live with it. There are indications of resurrection of surveillance activity today, more of this kind of spying on political activity. I think we ought to get to the bottom of what was going on back then, and indeed if Justice Rehnquist had not cast that deciding vote in 1972, maybe we would have gotten those memorandums in our discovery at trial. We might not still be fighting for them 14 years later if he had not cast that deciding vote, but had let this case go to trial, and we would have gotten to the bottom then of what had been going on.

Senator KENNEDY. What we are talking about is the range of activities including wiretapping of individuals, the penetration of domestic organizations that were in opposition at that time. We are talking about the active surveillance, the use of the American military in terms of surveillance of American citizens, probably the greatest threat in terms of individual rights and liberties of American citizens in recent times.

What we are talking about is our committee being denied the kinds of indications of how Mr. Rehnquist views First Amendment, civil rights, civil liberties at an extremely important time. And that might be of value to the American people in instructing their members of the Senate on their value of these liberties.

Mr. ASKIN. Absolutely, Senator Kennedy. And I think it would also be good to know whether the future Chief Justice of the United States really had some participation in this. I have no idea. It would have been nice to get to the bottom of it.

Senator KENNEDY. It would be reassuring to the American people——

Mr. ASKIN. Yes, it would be.

Senator KENNEDY [continuing]. If it was demonstrated as a result of those that he had a strong commitment to those rights and liberties, and that, I think, would be very, very instructive and important that they understand that and we do not know that.

Mr. ASKIN. That is correct.

Senator KENNEDY. And he has indicated—I think it is important for the record—that he is prepared to see that that material is available.

Mr. ASKIN. I heard him say that today.

Senator KENNEDY. But it is, I think, a disservice to the American people that we are not permitted to get that. I thank the Chair.

The CHAIRMAN. The distinguished Senator from Vermont.

Senator LEAHY. Mr. Chairman, I will be brief. I just have a question for Professor Askin. Earlier in the testimony, yesterday, in fact, I asked a whole series of questions of Justice Rehnquist regarding *Laird* v. *Tatum* and went very much into the question of whether he was aware when he was at the Department of Justice of any of the disputed evidentiary facts in *Laird* v. *Tatum.* And I think it is a fair summary of Justice Rehnquist's testimony to say that according to him he was unaware while at the Department of Justice of any of the disputed evidentiary facts in *Laird* v. *Tatum.* Is that your understanding and recollection?

Mr. ASKIN. Senator, the problem is he may not have known the facts. The problem is he testified before Senator Ervin's committee as if he did know the facts and then voted on those facts, those alleged facts in the Supreme Court while the plaintiffs were standing outside saying we want a hearing on these facts. The basic fact was had the Army discontinued its domestic intelligence program. That was fact No. 1. The Army said, well, we really do not do it anymore. This case is really moot. You are making a tempest out of a teapot. Assistant Attorney General Rehnquist went before the Irvin committee, testified to that fact. Maybe the Army told him that. I do not know if he was testifying from his own personal knowledge. He told Senator Ervin's committee as follows. He does not quote the whole statement in his memorandum. He says,

> The function of gathering intelligence relating to civil disturbance which was previously performed by the Army as well as the Department of Justice has since been transferred to the Justice Department. No information contained in the data base of the Department of the Army's now defunct computer system has been transferred to the Internal Security Division's data base.

Now, that was a fundamental fact issue. The plaintiffs in Tatum were screaming, "We do not believe they have disbanded it." There was never an evidentiary hearing. The Government only claimed that in their briefs. There was never a hearing. We had evidence to the contrary, indications to the contrary. We wanted a hearing.

Assistant Attorney General Rehnquist tells this to the Ervin committee. The Government tells it to the Supreme Court in its brief. It shows up in the majority opinion for which Justice Rehnquist becomes the fifth vote: Well, the Army has dismantled their system anyway; there is really nothing going on. But that was a basic evidentiary dispute that nobody ever had a hearing over.

Senator LEAHY. So your assumption is, based on what he said in the Ervin committee, that he was aware of some of the disputed evidentiary facts.

Mr. ASKIN. Well, he claimed to be. Whether he really knew or not, I do not know. He claimed it. He testified to this as a fact and then voted for it in the majority opinion. And we said it was not a fact.

Senator LEAHY. In fact, he said you did not have standing, did he not?

Mr. ASKIN. Well, ultimately, he said there is no standing. But he had already also testified before Senator Ervin that we had no standing.

Senator LEAHY. That is right. But he testified before Senator Ervin you did not and then he found that.

Mr. ASKIN. And then he does not quote that statement in his memorandum either. He says, well, I made some comment on the law before Senator Ervin's committee, but he never quotes the sentence: "My point of disagreement with you, Senator, is to say whether, as in the case of Tatum versus Laird," et cetera, et cetera, and then goes on to say, "There, there is no justiciability," which he then goes on the court and in time to vote for it. It is a rather, I think, bizarre episode in judicial ethics, very frankly.

Senator LEAHY. Thank you. This is a point I wanted to cover because about 90 percent of the questions I have asked Justice Rehnquist in these 2 days of hearings has been on the *Tatum* case. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. I believe I will not ask any questions. I will try to expedite it.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman. I am sorry I was not here for the testimony of the three witnesses, but I have been glancing through the testimony. Professor Orfield, if I can just read a few sentences from your testimony:

> One of the basic problems faced by minorities and women is their relative powerlessness. They have few representatives within Government and at the top levels of private organizations. More seriously, they face a political environment where the representatives of the status quo generally command most of the resources, where politicians often have more to gain from creating fears of change than from responding to minorities. This is particularly true on matters of race relations where antichange politicians can often exploit racial fears and prejudices of the majority.

For that reason—and I accept what you have to say—it seems to me the position of Chief Justice is important beyond the vote cast; it is that symbolic role that I have asked you people about. As you have studied the record of Justice Rehnquist, have you seen change or moderation in his record as it deals with minorities?

Mr. ORFIELD. No. Even the decisions that were handed down early this month were consistent with this entire record. Within the last 2 months there were decisions on affirmative action. Both held against affirmative action, two dissents. There was a case very recently on Indian affairs that was very disturbing in that he said any problems that Indians had could be taken care of by Congress. That would protect them; the courts did not really need to. He disagreed with Justice O'Connor on that one. I find his record one of stunning consistency. Among all of the political or judicial figures I have looked at, the level of agreement throughout his entire career in terms of where he comes out on these kinds of issues is astonishingly consistent, and it goes up right to the present. And he said here today that you could not really expect substantial change, that his basic values were what you would be seeing in all likeli-

hood in the future. And I believe that is true. The robe did not change Justice Rehnquist.

Senator SIMON. You may have heard Dean Griswold testify.

Mr. ORFIELD. Yes.

Senator SIMON. He said he thinks that rather than the Chief Justice designate influencing others, as Chief Justice the others might influence him. I gather you differ with that judgment.

Mr. ORFIELD. I think what one would have to say, unless Mr. Rehnquist's life is going to change in some kind of really sudden way, like Paul on the road to Damascus; it seems to me that what we have seen is what we have got. I was here in 1971 and many Senators and their staff people were saying that then, that once he gets on the Court he will be different, that it will be like Justice Black or like Justice Frankfurter, who he referred to frequently in his testimony in 1971. He was not. It was exactly like William Rehnquist, the private citizen, and William Rehnquist, the Nixon administration official. The Justice was exactly the same and he has continued to be. I think that the really disturbing thing about this is that this is the first time, so far as I know, at least in modern history, when we have somebody who has a perfectly clear record of almost always deciding against minority interests who we are about to put in charge of our basic system of justice in this country at a time when we have pretty serious and deepening racial cleavages and tremendous social change is going on in the role of women and other groups. I think it is a very reckless thing to do.

Senator SIMON. I thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Any more questions on the part of anyone? If not——

Senator HEFLIN. Let me ask one thing, Mr. Orfield. You mentioned that you participated in the confirmation process of Justice Rehnquist then. Did you testify?

Mr. ORFIELD. Yes.

Senator HEFLIN. Did you testify against him?

Mr. ORFIELD. Yes, I did.

The CHAIRMAN. Any other questions?

We thank you for your presence and your testimony. You are now excused. Our last panel is panel No. 10. I request these witnesses to come forward if they are here: Mr. Robert Ellis Smith, publisher, Privacy Journal. Is he here? Ms. Darlene Kalke, Center for Immigrants Rights. Is she here? Ms. Anne Ladky, Women Employed. Is she here? Ms. Marjorie Fujiki, staff attorney, Equal Rights Advocates. Is she here? Are not any of those people here?

We will allow them to put their statements in the record if they would like to do so. Any witnesses whose names I have called tonight who were not here, we will permit them to put their statements in the record.

We have 28 people to testify tomorrow. We will start at 8 o'clock in the morning. The minority has 4 hours and I will take just 2 hours. Is there anything, Senator Kennedy, you would like to say before we go?

Senator KENNEDY. Thank you very much, Mr. Chairman. I look forward to tomorrow's hearing.

The CHAIRMAN. Senator Heflin, would you like to say anything?

Senator HEFLIN. I am ready to go home.

Senator KENNEDY. May I ask one?

Senator SIMON. Yes. I just might mention that Senator Clarence Mitchell was called earlier this evening. He was not able to be here, but would like to be listed tomorrow morning as a witness. I indicated to him that I thought we would try and accommodate him.

Senator KENNEDY. Clarence Mitchell, Mr. Chairman.

The CHAIRMAN. He will be here tomorrow, you say?

Senator SIMON. He will be here tomorrow morning at 8 o'clock.

The CHAIRMAN. I think we have his name on the list with Ben Hooks and the others.

Senator SIMON. Yes.

Senator KENNEDY. Could I ask a question?

The CHAIRMAN. Yes, go ahead.

Senator KENNEDY. Mr. Chairman, we had the response of the Justice Department in denying our request under executive privilege for certain documents. I would like to suggest that the committee take the other important step of perhaps subpoenaing those documents. I know what we have to do is we get a majority of the members of the committee that would support such a subpoena, but I want to indicate to the Chair that I would favor such action. I will work with my colleagues to try and see if we cannot follow the procedures of the committee to see if we cannot obtain those documents. I wanted to indicate to the Chair tonight that that is the course that I am going to attempt to follow. I do not know what success I will have, but I think from the witnesses this evening, we have seen why obtaining this material is even more important for a balanced and informed judgment by the members of the Senate. I cannot expect that our distinguished Chairman would agree with me, but I have found that there are members of our panel who are supporting the Justice who may very well support this type of request. It does not have to be an overall, general subpoena. It can be targeted on the matters which have been of principal concern to the members of this committee. But I did want to put the Chair on notice that this is something that I am hopeful will be able to be achieved and that we will follow up with the Chair and the other members of the committee tomorrow on this.

The CHAIRMAN. I might say that I consider the matter closed. The Justice Department has claimed executive privilege, and as far as I am concerned, that terminates it.

If there is nothing else now, we are going to recess until 8 o'clock tomorrow morning at which time we will begin testimony again in this matter. We now stand in recess.

[Whereupon, at 11:18 p.m. the committee was adjourned to reconvene at 8 a.m. Friday, August 1, 1986.]