NATIONAL WOMEN'S POLITICAL CAUCUS
1275 "K" Street N.W. Suite 750. Washington. D.C. 20005 (202) 898-1100

TESTIMONY OF

IRENE NATIVIDAD

CHAIR, NATIONAL WOMEN'S POLITICAL CAUCUS

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON THE NOMINATION OF WILLIAM REHNQUIST FOR CHIEF JUSTICE

JULY 29, 1986

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY. I AM IRENE NATIVIDAD, CHAIR OF THE NATIONAL WOMEN'S POLITICAL CAUCUS, A NATIONWIDE, MULTIPARTISAN ORGANIZATION WITH 77,000 MEMBERS IN 300 STATES AND LOCAL CAUCUSES. WE WORK TO WIN FOR WOMEN EQUAL REPRESENTATION IN ELECTIVE AND APPOINTIVE OFFICE AND WE SPEAK OUT ON ISSUES OF DIRECT CONCERN TO WOMEN. WOMEN'S FULL RIGHTS AS CITIZENS ARE DEPENDENT ON THE SUPREME COURT'S INTERPRETATIONS OF THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSE AND OF LAWS PASSED BY CONGRESS.

WE OPPOSE THE NOMINATION OF JUSTICE WILLIAM REHNQUIST TO BE CHIEF JUSTICE OF THE SUPREME COURT. HIS OPINIONS ON CASES COMING BEFORE THE COURT BETRAY A BIAS AGAINST EQUALITY FOR WOMEN UNDER THE LAW THAT PREVENTS HIM FROM APPLYING HIS REPUTEDLY BRILLIANT INTELLECTUAL AND ANALYTICAL POWERS IN AN OBJECTIVE FASHION TO CASES RELATED TO SEX DISCRIMINATION.

THE OPINION IN GENERAL ELECTRIC COMPANY V. GILBERT, 429 U.S. 125 (1976), WHICH HE WROTE, IGNORED CONSERVATIVE PRINCIPLES OF JUDICIAL INTERPRETATION AND PRECEDENTS OF THE COURT TO REACH A CONCLUSION ADVERSE TO EMPLOYED WOMEN. THE OPINION IS NOT CLEAR, CONCISE, AND LOGICAL AS ONE WOULD EXPECT FROM A JUSTICE OF HIS REPUTED INTELLECT. FORTUNATELY THE CONGRESS CORRECTED THIS DECISION WITH THE PREGNANCY DISCRIMINATION ACT OF 1978, 42 U.S.C. §2000(k), BUT IT DOES NOT HAVE THE POWER TO CHANGE JUSTICE REHNQUIST'S ATTITUDES.

THE QUESTION IN THIS CASE WAS WHETHER EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM A DISABILITY INSURANCE PLAN THAT COVERED ALL OTHER DISABILITIES CONSTITUTED SEX DISCRIMINATION IN VIOLATION OF TITILE VII OF THE CIVIL RIGHTS ACT OF 1964. NOT ONLY DID THE BENEFIT PLAN EXCLUDE PREGNANCY-RELATED DISABILITIES, THE COMPANY IN SOME CASES REQUIRED WOMEN TO CEASE EMPLOYMENT THREE MONTHS PRIOR TO BIRTH AND EIGHT WEEKS FOLLOWING DELIVERY. WHILE ON LEAVE FOR PREGANACY-RELATED DISABILITIES, COVERAGE UNDER THE PLAN CEASED SO THAT UNRELATED DISABILITIES ARISING DURING THE LEAVE WERE NOT COVERED. PLAN COVERAGE CONTINUED FOR 31 DAYS IN THE CASE OF PERSONAL LEAVE, LAYOFF, OR STRIKE.

ALTHOUGH THIS ISSUE HAD BEEN BEFORE SIX CIRCUIT COURTS OF APPEAL AND ALL HAD FOUND THE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM SUCH PLANS VIOLATIVE OF TITLE VII, JUSTICE REHNQUIST DISAGREED.

NOT ONLY DID THIS DECISION IGNORE CONSERVATIVE PRINCIPLES OF JUDICIAL INTERPRETATION AND COURT PRECEDENTS , IT FLEW IN THE FACE OF COMMON SENSE. PREGNANCY AND THE POTENTIALITY OF PREGNANCY HAVE BEEN THE CHIEF RATIONALE IN THE PAST FOR DISCRIMINATION AGAINST WOMEN IN EMPLOYMENT AND EDUCATION.

THE OPINION QUOTES EXTENSIVELY FROM GEDULDIG V. AIELLO, 417 U.S. 484 (1974), WHICH JUSTICE REHNQUIST CONSIDERED CONTROLLING FOR DETERMINING WHETHER SEX DISCRIMINATION EXISTED, ALTHOUGH IT INVOLVED A STATE DISABILITY INSURANCE SYSTEM CHALLENGED UNDER THE 14th AMENDMENT. FOLLOWING ARE EXCERPTS FROM THE PORTIONS HE QUOTED:

> WHILE IT IS TRUE THAT ONLY WOMEN CAN BECOME PREGNANT, IT DOES NOT FOLLOW THAT EVERY LEGISLATIVE CLASSIFICATION CONCERNING PREGNANCY IS A SEX-BASED CLASSIFICATION...NORMAL PREGNANCY IS AN OBJECTIVELY IDENTIFIABLE PHYSICAL CONDITION WITH UNIQUE CHARACTERISITICS.
>
> . . . . . .
>
> THE LACK OF IDENTIY BETWEEN THE EXCLUDED DISABILITY AND GENDER AS SUCH UNDER THIS INSURANCE PROGRAM BECOMES CLEAR UPON THE MOST CURSORY ANALYSIS. THE PROGRAM DIVIDES POTENTIAL RECIPIENTS INTO TWO GROUPS - PREGNANT WOMEN AND NONPREGNANT PERSONS. WHILE THE FIRST GROUP IS EXCLUSIVELY FEMALE, THE SECOND INCLUDES MEMBERS OF BOTH SEXES.
>
> . . . . . .
>
> THERE IS NO RISK FROM WHICH MEN ARE PROTECTED AND WOMEN ARE NOT. LIKEWISE, THERE IS NO RISK FROM WHICH WOMEN ARE PROTECTED AND MEN ARE NOT.

I SUBMIT THIS IS FACILE REASONING, WHICH OBFUSCATES THE ISSUE RATHER THAN CLARIFYING IT. "NORMAL PREGNANCY" IS NOT THE SUBJECT OF THE SUIT - PREGNANCY-RELATED DISABILITIES ARE. PREGNANCY-RELATED DISABILITIES AS THEY RELATE TO EMPLOYMENT ARE NOT "UNIQUE." CHILDBIRTH AND COMPLICATIONS OF PREGANANCY ARE CHARACTERIZED BY THE INABLILITY TO PERFORM REGULAR DUTIES WITH THE PATIENT UNDER THE CARE OF A PHYSICIAN OR OTHER HEALTH PROFESSIONAL AND USUALLY IN A HOSPITAL. HOW IS THIS DIFFERENT FROM OTHER DISABILITIES?

HIS GROUPING OF RECIPIENTS IGNORES THE FACT THAT MOST OF THE WOMEN IN THE SECOND GROUP HAVE THE POTENTIAL FOR BECOMING PREGNANT. A MORE LOGICAL GROUPING WOULD BE WOMEN, WHO HAVE THE POTENTIAL TO BECOME PREGNANT, AND MEN WHO DO NOT. WOULD JUSTICE REHNQUIST HAVE USED AN ANALAGOUS GROUPING IF SICKLE CELL ANEMIA HAD BEEN THE EXCLUDED DISABILITY?

HERE IS A FURTHER EXAMPLE OF HIS REASONING (NOT QUOTED FROM GEDULDIG):

> PREGNANCY IS OF COURSE CONFINED TO WOMEN, BUT IT IS IN OTHER WAYS SIGNIFICANTLY DIFFERENT FROM THE TYPICAL COVERED DISEASE OR DISABILITY. THE DISTRICT COURT FOUND IT IS NOT A "DISEASE" AT ALL, AND IS OFTEN A VOLUNTARILY UNDERTAKEN AND DESIRED CONDITION.

HERE AGAIN THE OPINION USES LANGUAGE TO OBSCURE THE ISSUE. THE ISSUE RELATES TO PREGANACY-RELATED DISABILITIES RATHER THAN PREGNANCY. HE DOES NOT SPECIFY HOW PREGNANCY-RELATED DISABILITIES ARE "SIGNIFICANTLY DIFFERENT" FROM THE "TYPICAL COVERED DISEASE OR DISABILITY." AS INDICATED ABOVE, WE FIND NO DIFFERENCES IN EMPLOYMENT RELATED CIRCUMSTANCES. THE CLAUSE ABOUT "DISEASE" IS TOTALLY IRRELEVANT.

AS FOR PREGNANCY BEING "VOLUNTARY," IT OFTEN IS NOT. IN ANY EVENT, MORE TO THE POINT, THE GE PLAN COVERED OTHER VOLUNTARY DISABILITIES, SUCH AS ELECTIVE COSMETIC SURGERY, ATTEMPTED SUICIDE, SPORT INJURIES, AND DISABILITIES INCURRED IN THE COMMISSION OF A CRIME OR DURING A FIGHT. IT COVERED ALL DISABILITES PECULIAR TO MEN AND ALL PECULIAR TO WOMEN EXCEPT PREGNANCY-RELATED DISABILITIES.

IN ORDER TO REACH THE CONCLOSION THAT THE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM THE TEMPORARY DISABILITY INSURANCE PLAN OF GE DID NOT VIOLATE TITLE VII, JUSTICE REHNQUIST HAD TO DEAL WITH A GUIDELINE OF THE EQUAL EMPLOYMENT

OPPORTUNITY COMMISSION ISSUED IN 1972, WHICH PROVIDED THAT "DISABILITES CAUSED OR CONTRIBUTED TO BY PREGNANCY...ARE FOR ALL JOB-RELATED PURPOSES, TEMPORARY DISABILITES...(UNDER) ANY HEALTH OR TEMPORARY DISABILITY INSURANCE OR SICK LEAVE PLAN..."

HE DISCOUNTED THE GUIDELINE, CONTRARY TO SUPREME COURT PRECEDENTS, WHICH HAD GIVEN EEOC GUIDELINES "GREAT DEFERENCE," BECAUSE IT WAS ISSUED SEVEN YEARS AFTER THE ACT WAS PASSED AND INTERIM LETTERS BY EEOC'S GENERAL COUNSEL EXPRESSED THE VIEW THAT PREGNANCY IS NOT NECESSARILY INCLUDABLE AS A COMPENSABLE DISABILITY. AS JUSTICE BRENNAN POINTS OUT IN HIS DISSENT, A STUDY OF THE ISSUE BY THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN (A PRESIDENTIALLY-APPOINTED ADVISORY GROUP) RESULTED IN A RECOMMENDATION IN 1970 THAT CHILD BEARING AND COMPLICATIONS OF PREGNANCY BE TREATED FOR JOB-RELATED PURPOSES LIKE ALL OTHER DISABILITIES. THE STUDY FOUND THAT FOR JOB-RELATED PURPOSES, SUCH DISABILITIES ARE NOT DIFFERENT FROM OTHER DISABILITIES.

AS JUSICE BRENNAN POINTS OUT IN HIS DISSENT:

> THEREFORE, WHILE SOME SEVEN YEARS HAD ELAPSED PRIOR TO THE ISSUANCE OF THE 1972 GUIDELINE, AND EARLIER OPINION LETTERS HAD REFUSED TO IMPOSE LIABILITY ON EMPLOYERS DURING THIS PERIOD OF DELIBERATION, NO ONE CAN OR DOES DENY THAT THE FINAL EEOC DETERMINATION FOLLOWED THROUGH AND WELL INFORMED CONSIDERATION...IT IS BITTER IRONY THAT THE CARE THAT PRECEDED ' PROMULGATION OF THE 1972 GUIDLINE IS TODAY CONDEMNED BY THE COURT AS TARDY INDECISIVENESS, ITS UNWILLINGNESS IRRESPONSIBL Y TO CHALLENGE EMPLOYERS' PRACTICES DURING THE FORMATIVE PERIOD IS LABELLED AS EVIDENCE OF INCONSISTENC Y, AND THIS INDECISIVENESS AND INCONSISTENCY ARE BOOTSTRAPPED INTO REASONS FOR DENYING THE COMMISSION'S INTERPRETATION ITS DUE DEFERENCE.

> FOR ME, THE 1972 REGULATION REPRESENTS A PARTICULARY CONSCIENTIOUS AND REASONABLE PRODUCT OF EEOC DELIBERATIONS AND, THEREFORE, MERITS OUR "GREAT DEFERENCE." CERTAINLY, I CAN FIND NO BASIS FOR CONCLUDING THAT THE REGULATION IS OUT OF STEP WITH CONGRESSIONAL INTENT...ON THE CONTRARY, PRIOR TO 1972, CONGRESS ENACTED JUST SUCH A PREGNANCY-INCLUSIVE RULE TO GOVERN THE DISTRIBUTION OF BENEFITS FOR "SICKNESS" UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT. 45 U.S.C. § 351 (K)(2). FURTHERMORE, SHORTLY FOLLOWING THE ANNOUNCEMENT OF THE EEOC'S RULE, CONGRESS APPROVED AND THE PRESIDENT SIGNED AN ESSENTIALLY IDENTICAL PROMULGATION BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972...

ALSO ALARMING IS JUSTICE REHNQUIST"S IMPLICATION IN THE LAST PARAGRAPH OF THE DECISION THAT CONGRESS INTENDED THAT THE FOURTEENTH AMENDMENT STANDARD OF DISCRIMINATION BE APPLIED TO SEX DISCRIMINATION UNDER TITLE VII. THIS STATEMENT IS CONTRARY TO A LONG LINE OF PRECEDENT CASES AND INDICATES A FRAME OF MIND HOSTILE TO ANY MEANINGFUL INTERPRETATION OF TITLE VII IN SEX DISCRIMINATION CASES. IT INDICATES A BELIEF THAT SEX DISCRIMINATION SHOULD BE INTERPRETED DIFFERENTLY FROM RACE DISCRIMINATION. (SEE OUR FOLLOWING DISCUSSION OF JUSTICE REHNQUIST'S VIEWS ON THE FOURTEENTH AMENDMENT AND SEX DISCRIMINATION.)

JUSTICE REHNQUIST RAN INTO DIFFICULTY IN APPLYING HIS RATIONALE IN GILBERT TO THE NEXT CASE INVOLVING SEX DISCRIMINATION BECAUSE OF PREGNANCY - NASHVILLE GAS CO. V. SATTY, 434 U.S. 136 (1977). IN THIS CASE, THE EMPLOYER NOT ONLY EXCLUDED PREGNANCY-RELATED DISABILITIES FROM ITS SICK LEAVE PLAN, IT ALSO DENIED WOMEN RETURNING TO EMPLOYMENT THEIR ACCUMULATED SENIORITY, WHEREAS EMPLOYEES ON LEAVE FOR ANY OTHER DISABILITY RETAINED SENIORITY AND CONTINUED TO ACCRUE SENIORITY WHILE ON LEAVE. WOMEN RETURNING TO EMPLOYMENT

AFTER CHILDBIRTH WERE TREATED AS NEW APPLICANTS FOR PURPOSES OF BIDDING ON JOBS. THE JUSTICE"S FACILE MIND WAS EQUAL TO THE TASK. HE HELD IN THE MAJORITY OPINION:

> HERE, BY COMPARISON (WITH GILBERT), PETITIONER HAS NOT MERELY REFUSED TO EXTEND TO WOMEN A BENEFIT THAT MEN CANNOT AND DO NOT RECEIVE, BUT HAS IMPOSED ON WOMEN A SUBSTANTIAL BURDEN THAT MEN NEED NOT SUFFER. THE DISTINCTION BETWEEN BENEFITS AND BURDENS IS MORE THAN ONE OF SEMANTICS. 434 U.S. AT 142

JUSTICE STEVENS IN HIS CONCURRING OPINION POINTS UP THE DIFFICULTY OF THE DISTINCTION:

> THE GENERAL PROBLEM IS TO DECIDE WHEN A COMPANY POLICY WHICH ATTACHES A SPECIAL BURDEN TO THE RISK OF ABSENTEEISM CAUSED BY PREGNANCY IS A PRIMA FACIE VIOLATION OF THE STATUTORY PROHIBITION AGAINST SEX DISCRIMINATION. THE ANSWER "ALWAYS," WHICH I HAVE THOUGHT QUITE PLAINLY CORRECT IS FORECLOSED BY THE COURT"S HOLDING IN GILBERT. THE ANSWER "NEVER" WOULD SEEM TO BE DICTATED BY THE COURT'S VIEW THAT A DISCRIMINATION AGAINST PREGNANCY IS "NOT A GENDER-BASED DISCRIMINATION AT ALL." THE COURT HAS, HOWEVER, MADE IT CLEAR THAT THE CORRECT ANSWER IS "SOMETIMES." 434 U.S.at 153

IN A FOOTNOTE, JUSTICE STEVENS NOTES THAT DIFFERENCES BETWEEN BENEFITS AND BURDENS CANNOT PROVIDE A MEANINGFUL TEST OF DISCRIMINATION, SINCE, BY HYPOTHESIS, THE FAVORED CLASS IS ALWAYS BENEFITED AND THE DISFAVORED CLASS IS EQUALLY BURDENED.

THE CONGRESS RESCUED THE COURT FROM JUSTICE REHNQUIST'S MORASS WITH THE PREGNANCY DISCRIMINATION ACT IN 1978, WHICH DEFINES SEX DISCRIMINATION TO INCLUDE DISCRIMINATION BECAUSE OF PREGNANCY, CHILDBIRTH, AND RELATED

MEDICAL CONDITIONS. IT FURTHER PROVIDES THAT "WOMEN AFFECTED BY PREGNANCY, CHILDBIRTH OR RELATED MEDICAL CONDITIONS SHALL BE TREATED THE SAME FOR ALL EMPLOYMENT RELATED PURPOSES, INCLUDING RECEIPT OF BENEFITS UNDER FIRING BENEFIT PROGRAMS, AS OTHER PERSONS NOT SO AFFECTED BUT SIMILAR IN THEIR ABILITY OR INABILITY TO WORK." 42 U.S.C. s 2000(k)

THE ENACTMENT OF THE PREGNANCY DISCRIMINATION ACT DOES NOT ALLAY OUR FEARS ABOUT JUSTICE REHNQUIST'S ATTITUDES CONCERNING SEX DISCRIMINATION. THE FACT THAT HE COULD PERSUADE SIX JUSTICES TO JOIN HIM IN A DECISION BASED ON SOPHISTRY, CONTRARY TO COMMON SENSE AND TO THE DECISIONS OF SIX CIRCUIT COURTS OF APPEAL, AND IN DISREGARD OF CONSERVATIVE PRINCIPLES OF LEGAL INTERPRETATION IS ALARMING.

JUSTICE REHNQUIST'S 1983 DISSENT IN NEWPORT NEWS V. EEOC, 462 U.S. 669, INDICATES NO CHANGE IN ATTITUDE HE INTERPRETED THE PREGNANCY DISCRIMINATION ACT VERY NARROWLY IGNORING EEOC GUIDELINES. THE EEOC INTERPRETATION WAS PUHELD BY THE COURT 7 - 2.

I URGE EVERY MEMBER OF THIS COMMITTEE TO READ THE GILBERT DECISION IN ITS ENTIRETY.

JUSTICE REHNQUIST'S OPINIONS ON CASES CHALLENGING SEX DISCRIMINATORY LAWS UNDER THE FOURTEENTH AMENDMENT ARE ALSO ALARMING. SINCE 1971, WHEN FOR THE FIRST TIME, THE SUPREME COURT FOUND A GENDER-BASED LAW UNCONSTITUTIONAL, REED V. REED, 404 U.S. 71, THE COURT HAS BEEN STRUGGLING TO FIND A STANDARD OF EQUAL PROTECTION ANALYSIS SUITABLE FOR GENDER-BASED CLASSIFICATIONS. JUSTICE REHNQUIST HAS BEEN A DESTRUCTIVE CRITIC. HE HAS NOT EVEN BEEN WILL-

ING TO OVERTURN LAWS THAT ARE CLEARLY DISCRIMINATORY UNDER THE TRADITIONAL RATIONAL BASIS STANDARD.

IN FORNTIERO V. RICHARDSON, 411 U.S. 677 (1973), HE WAS THE ONLY DISSENTER. THIS CASE CHALLENGED THE CONSTITUTIONALITY OF A FEDERAL LAW THAT PROVIDED THAT SPOUSES OF MALE MEMBERS OF THE ARMED SERVICES ARE DEPENDENTS FOR PURPOSES OF INCREASED QUARTERS ALLOWANCES AND MEDICAL AND DENTAL BENEFITS BUT THAT SPOUSES OF FEMALE MEMBERS ARE NOT DEPENDENTS UNLESS THEY ARE IN FACT DEPENDENT FOR OVER ONE-HALF OF THEIR SUPPORT. THE ONLY JUSTIFICATION WAS ADMINISTRATIVE CONVENIENCE.

EIGHT JUSTICES FOUND THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT. JUSTICE REHNQUIST DISSENTED, STATING ONLY THAT HE AGREED WITH THE DECISION OF THE LOWER COURT, WHICH HAD HELD THERE WAS A RATIONAL CONNECTION BETWEEN THE CLASSIFICATION AND A LEGITIMATE GOVERNMENTAL END.

JUSTICE REHNQUIST ALSO DISSENTED IN CLEVELAND BOARD OF EDUCATION V. LA FLEUR AND COHEN V. CHESTERFIELD COUNTY, 414 U.S. 632 (1974). THESE CASES INVOLVED SCHOOL BOARD REGULATIONS THAT REQUIRED PREGNANT TEACHERS TO GO ON LEAVE 4 OR 5MONTHS PRIOR TO THE DUE DATE. IN CLEVELAND THE TEACHER COULD NOT RETURN TO DUTY UNTIL THE NEXT REGULAR SEMESTER AFTER THE CHILD WAS 3 MONTHS OLD.

SEVEN JUSTICES FOUND THE REGULATIONS IN VIOLATION OF THE FOURTEENTH AMENDMENT. JUSTICE REHNQUIST DISSENTED, CRITICIZING PRIMARILY THE COURT'S RESTING ITS INVALIDATION OF THE REGULATIONS ON THE DUE PROCESS CLAUSE IN-

STEAD OF THE EQUAL PROTECTION CLAUSE. HOWEVER, JUSTICE REHNQUIST DID NOT JOIN IN A SEPARATE CONCURRING OPINION OF JUSTICE POWELL, WHO RESTED HIS CONCURRENCE ON THE EQUAL PROTECTION CLAUSE, FINDING THE REGULATIONS "IRRATIONAL." JUSTICE POWELL OBSERVED THAT THE RECORDS "ABOUND WITH PROOF THAT A PRINCIPAL REASON BEHIND THE ADOPTION OF THE REGULATIONS WAS TO KEEP VISIBLY PREGNANT TEACHERS OUT OF THE SIGHT OF SCHOOL CHILDREN." THE SCHOOL BOARDS ATTEMPTED AFTER THE FACT TO JUSTIFY THE REGULATIONS ON THE NEED FOR CONTINUITY OF TEACHING, A VALID OBJECTIVE. BUT THE REGULATIONS DID NOT PROMOTE CONTINUITY, REQUIRING TEACHERS TO QUIT IN THE MIDDLE OF A SEMESTER WHEN THEY OTHERWISE WOULD HAVE BEEN ABLE TO COMPLETE IT BEFORE THE DUE DATE.

JUSTICE REHNQUIST WAS THE LONE DISSENTER, WITHOUT A WRITTEN OPINION, IN TURNER V. DEPARTMENT OF EMPLOYMENT SECURITY, 423 U.S. 44(1975), INVOLVING A UTAH STATUTE MAKING PREGNANT WOMEN INELIGIBLE FOR UNEMPLOYMENT BENEFITS FOR A PERIOD EXTENDING FROM 12 WEEKS BEFORE EXPECTED DATE OF CHILDBIRTH UNTIL SIX WEEKS AFTER WITH A PRESUMPTION THEY WERE UNAVAILABLE FOR WORK. THE COURT HELD THE LAW NOT CONSTITUTIONALLY VALID SINCE MOST WOMEN ARE ABLE TO WORK.

JUSTICE REHNQUIST DISSENTED IN CRAIG V. BOREN, 429 U.S. 190 (1976), WHICH ESTABLISHED A NEW STANDARD OF REVIEW FOR GENDER-BASED LAWS: "GENDER-BASED CLASSIFICATIONS MUST SERVE IMPORTANT GOVERNMENTAL OBJECTIVES AND MUST BE SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF THOSE OBJECTIVES." THE PLAINTIFF CHALLENGED AN OKLAHOMA LAW PROHIBITING SALE OF 3.2 BEER TO MALES UNDER THE AGE OF 21 AND FEMALES UNDER THE AGE OF 18. THE COURT FOUND THE

LAW UNCONSTITUTIONAL.

JUSTICE REHNQUIST IN HIS DISSENT OBJECTED TO THE INTERMEDIATE STANDARD OF REVIEW GENERALLY AND ALSO TO APPLYING A DIFFERENT STANDARD TO CASES WHERE MALES ARE DISCRIMINATED AGAINST. HE FOUND THE LAW CONSTITUTIONAL UNDER THE STANDARD RATIONAL BASIS ANALYSIS.

JUSTICE REHNQUIST'S GREAT RELUCTANCE TO FIND GENDER-BASED LAWS UNCONSTITUTIONAL IS SOMEWHAT SURPRISING IN THE LIGHT OF TESTIMONY ON THE ERA HE GAVE IN 1971 BEFORE THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES. THERE HE SUMMARIZED THREE CASES BEFORE THE SUPREME COURT CHALLENGING SEX-BASED LAWS UNDER THE FOURTEENTH AMENDMENT AND SPOKE WITH SEEMING APPROVAL OF AT LEAST A MODEST EXPANSION OF THE APPLICATION OF THE FOURTEENTH AMENDMENT:

> RECENT LOWER COURT DECISIONS HAVE TAKEN A BROADER VIEW OF THE 14th AMENDMENT'S PROHIBITIONS IN THIS AREA, AND IT MAY WELL BE THAT THE SUPREME COURT WILL LIKEWISE BROADEN ITS PAST INTERPRETATIONS IN THIS AREA. CERTAINLY EVEN A MODEST EXPANSION OF THE 14th AMENDMENT DECISIONS DEALING WITH SEX WOULD OBVIATE THE MORE EGREGIOUS FORMS OF DIFFERENCES OF TREATMENT WHICH RESULT FROM GOVERNMENTAL ACTIONS. WITH THIS PROSPECT OF EXPANDED CONSTITUTIONAL PROTECTION OF WOMEN'S RIGHTS WITHOUT THE NECESSITY OF AN ADDED CONSTITUTIONAL PROVISION, THE COMMITTEE MIGHT CONCLUDE THAT IT SHOULD AWAIT RESOLUTION OF THE CASES BEFORE IT BY THE SUPREME COURT OF THE UNITED STATES...

WE ARE PARTICULARY ALARMED BY JUSTICE REHNQUIST'S VIEWS ON ABORTION. HE FINDS NO RIGHT TO PRIVACY IN THE CONSTITUTION AND WOULD REVERSE ROE V. WADE. HE HAS VOTED AT EVERY OPPORTUNITY TO RESTRICT ABORTION RIGHTS. OTHER WITNESSES WILL PROVIDE DITAILS ON THESE DECISIONS. ROE V. WADE HAS

EXTRAORDINARILY GREAT MEANING FOR WOMEN; REVERSAL WOULD BE A TRAGEDY.

IN SUMMARY, WE OPPOSE THE ELEVATION OF JUSTICE REHNQUIST TO CHIEF JUSTICE, WHERE HE WOULD HAVE MORE INFLUENCE THAN HE NOW HAS. HIS OPINIONS IN SEX DISCRIMINATION CASES INDICATE THAT HE IS RIGIDLY ATTACHED TO THE PAST VIEW OF WOMEN AS SECOND CLASS CITIZENS. WHEREAS OTHER JUSTICES, THE EXECUTIVE BRANCH, THE LEGISLATIVE BRANCH, AND MOST STATE GOVERNMENTS HAVE RESPONDED POSITIVELY TO WOMEN'S LEGITIMATE DEMANDS FOR FULL CITIZENSHIP, HE HAS NOT.

JUSTICE REHNQUIST'S OPINIONS IN SEX DISCRIMINATION CASES ARE NOT CLEAR, CONCISE, AND WELL REASONED AS ONE WOULD EXPECT FROM HIS REPUTATION FOR LEGAL BRILLIANCE. THEY OFTEN OBFUSCATE OR AVOID THE SUBSTANTIVE ISSUES. HE USES HIS BRILLIANCE TO TORTURE THE LAW TO FIT HIS CONCLUSIONS. WE CAN ONLY CONCLUDE THAT HIS BIASES GET IN THE WAY OF CLEAR, LOGICAL ANALYSIS. HE HAS MORE OFTEN THAN NOT PLAYED THE ROLE OF DISSENTER AND CRITIC, SOMETIMES WITH LITTLE GRACE.

BASED ON HIS RECORD, WE DO NOT BELIEVE HE CAN COALESCE A CENTRIST MAJORITY THAT WOULD HAVE DUE REGARD FOR LEGAL EQUALITY FOR WOMEN.