Judicial
Selection
Project

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TESTIMONY OF THE

JUDICIAL SELECTION PROJECT

ON THE NOMINATION OF

WILLIAM H. REHNQUIST

AS CHIEF JUSTICE OF THE UNITED STATES

JULY 29, 1986

My name is John Silard, and I am testifying on behalf of the Judicial Selection Project of the Alliance for Justice. I appreciate the opportunity to appear before this Committee today.

The Judicial Selection Project is a coalition of lawyers, academics, and representatives of civil rights, labor and public interest organizations that was formed in January 1985 to monitor appointments to the federal courts. The Project reviews nominees' backgrounds on issues such as their records on equity and fairness, committment to equal justice, pro bono activities, and other matters that reflect on judicial temperament or professional competence. We believe that maintaining a strong, independent judiciary is essential to our democratic system.

In our nearly two hundred year history as a nation, Chief Justices of the United States have been of various views and persuasions. Never before, however, has a jurist been proposed for the sensitive role of Chief who questions the basic constitutional function of the Supreme Court and who has put himself far outside the spectrum of views held by the other members of the Court he is being proposed to lead. In case after case, Justice William H. Rehnquist has consistently applied his preference for judicial abstention rather than vindication of constitutional guarantees, particularly those contained in the Bill of Rights. He has thus aligned himself over and over again against federal protection for racial and religious minorities, aliens, criminal defendants, and the poor

and disadvantaged.

One central question which the Judicial Selection Project believes the Senate must address on the pending nomination is whether it is appropriate to elevate to the role of Chief Justice a jurist who so clearly rejects the constitutional function of the Supreme Court and whose beliefs are so far beyond the spectrum of views of the other Justices. The office of Chief Justice calls for an individual who believes in the role of the Court as it has developed over the last two hundred years and whose views are somewhere within the spectrum of views embraced by the other eight Justices. To suggest that Justice Rehnquist cannot meet these two requirements is not, of course, to say that he is unqualified to be a sitting member of the Court. However, considerations of respect for the Court as an institution and of the leadership role of the Chief Justice are dispositive in a case such as this, for national interests far beyond a nominee's mere legal qualifications are necessarily presented by the choice of a Chief Justice.

More than fifty lone dissents by Justice Rehnquist from rulings by the rest of the Court attest how far he has placed himself from his colleagues. These fifty lone dissents against the Court's interpretations of constitutional and statutory rights in a wide variety of circumstances bespeak Justice Rehnquist's truly extreme position, as underscored by the fact that in all of these cases he has opposed not only the liberals and moderates but also such genuine conservatives as Justices Burger and O'Connor. Indeed, Justice Rehnquist's lone dissents

do not merely reflect a "conservative" philosophy, but a rejection of the central constitutional role of the Supreme Court as an institution.

Three historical propositions are at the heart of the developed role of the Supreme Court in our society as guardian of the federal Constitution. First, there was Chief Justice Marshall's landmark decision in Marbury v. Madison, which conclusively confirmed the power of the Supreme Court to uphold the federal Constitution. A vital part of this governing principle is the role of the Supreme Court in protecting the basic liberties of the powerless against infringement by the political majorities which may control other branches of government. A second crucial proposition is that espoused by the Supreme Court almost 200 years ago in McCulloch v. Maryland. This historic "supremacy" case established the vital concept that national interests must predominate over state choices in areas of national constitutional concern. With some candor, Justice Rehnquist has challenged the bedrock principles of both Marbury and McCulloch when they call for members of the Supreme Court to provide federal constitutional protections.

A third premise underlying our democratic society is the incorporation doctrine, which through the Fourteenth Amendment guarantees our basic liberties against infringement by the states. Time and again, however, Justice Rehnquist rejects the fundamental Bill of Rights protections incorporated in the Constitution's first ten amendments. Almost never does he find within the Bill of Rights meaningful protections against

violations of free speech and press, due process, cruel and unusual punishment, and religious freedom. Nor does he find protection against invidious discrimination by the state. He advocates wide latitude for the states, even where it can be shown that officials are violating cherished federal constitutional rights.

Justice Rehnquist's idiosyncratic position may be illustrated by a review of even a few of his many lone dissents.

It would be hard to imagine a constitutional guarantee historically more profound than that against government support for racial discrimination, but in Justice Rehnquist's view there is no constitutional restraint on such conduct by either the Congress or the States. In the Court's decision in Bob Jones University v. United States, 461 U.S. 574 (1983), Chief Justice Burger found that racially exclusive schools are not entitled to the tax-exempt status of charitable organizations under the Internal Revenue Code. The Court stated that "racial discrimination in education violates deeply and widely accepted views of elementary justice," and that the elimination of such discrimination is a national policy embodied in the Internal Revenue Code.

Justice Rehnquist's sole dissent is a technical exercise in statutory construction, concluding that Congress intended to give the benefit of tax deduction even for donations to racially segregating schools. There is the remarkable further conclusion that the Constitution permits Congress to grant tax

exemptions to organizations that discriminate on the basis of race absent a showing of a discriminatory purpose by Congress. This startling conclusion demonstrates Rehnquist's view that the Constitution provides little or no restraint upon actions which injure fundamental principles of freedom and equality.

Justice Rehnquist's lone dissent in Keyes v. School District No. 1, 413 U.S. 189 (1973), similarly illustrates this point. He protests any requirement of affirmative desegregation where there had been segregation practices without a system-wide segregation rule. Nowhere does he make clear the basis for his constitution-defeating position that desegregation can be required where there has been a formal written rule, but not where purposeful segregation practices have been pursued by the school authorities.

The unwillingness to protect the rights of minorities extends to aliens, illegitimate children, native Americans, members of religious minorities and other examples of the most powerless in our society. In Sugarman v. Dougall, 413 U.S. 634 (1973), eight Justices struck down a law which limited employment in the state's civil service to United States citizens. In so ruling, the Court affirmed that aliens are entitled to protection from invidious discrimination under the Fourteenth Amendment. Justice Rehnquist alone rejected the conclusion, stating "aliens as a class are not familiar with how we as individuals treat others and how we expect government to treat us." He argued that the Fourteenth Amendment was not designed to protect any "discrete and insular minorities" other

than racial minorities.

Illegitimate children fare no better under Justice Rehnquist's nullifying view of the Constitution. In Jimenez v. Weinberger, 417 U.S. 628 (1978), the opinion of Chief Justice Burger for eight members of the Court found unconstitutional a statute which excluded illegitimate children from public welfare benefits. The opinion emphasizes that visiting the condemnation of the parents' misconduct on the head of an innocent child is illogical and unjust. Imposing disabilities on the innocent children "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."

Justice Rehnquist dissents alone, finding a rational basis for the exclusion of illegitimate children's benefits. He wrote that the Court should not strike down legislative decisions for the sole reason that they treat some group of individuals less favorably than others. Nowhere does he address the Burger opinion's rejection of the outmoded view that illegitimate children are undeserving. Apparently the mere possibility of false benefit claims is enough for Justice Rehnquist to approve wholesale state exclusion of illegitimate children from public benefits.

Zablocki v. Redhail, 434 U.S. 374 (1978), involved a state law requiring prior approval for marriage for persons under court orders of support for minor children. The Supreme Court struck down the law and reaffirmed the fundamental character of the right to marry. Justice Rehnquist, however, viewed the law

as a "permissible exercise of the state's authority to regulate", even though he concedes that it would make marriage financially impossible for a segment of the population. Thus, Justice Rehnquist would permit the state to regulate even where it interferes with one of the most intimate and fundamental personal freedoms, and does so in the case of a statute that particularly singles out the poor, who are most commonly the subject of orders for support of minor children.

These dissents illustrate the great lengths Justice Rehnquist goes to in deferring to states when it comes to individual rights. In Sugarman, he rejects application of the Equal Protection clause to suspect classes other than race. Governmental action is upheld even if it denies aliens government employment or harms illegitimate children, women or the poor, who, like many blacks, are powerless and vulnerable.

Justice Rehnquist advances states' rights through application of the abstention doctrine. A theme which runs throughout these dissents is the notion that federal courts should not interfere with state proceedings even where constitutional issues are concerned.

Justice Rehnquist also votes to limit or nullify the impact of the First Amendment on the states. Thomas v. Review Board, 450 U.S. 707 (1981). The opinion, written by Chief Justice Burger, barred a state from denying unemployment compensation to a Jehovah's Witness who had refused to perform military procurement work. Justice Burger emphasized that where "the State conditions receipt of an important benefit upon conduct

proscribed by a religious faith ... thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."

Justice Rehnquist, arguing alone for untrammelled state power, writes that the state need not "conform that statute to the dictates of religious conscience of any group." In sum, Justice Rehnquist would approve, state laws that make denial of state benefits the price for exercising an employee's genuine religious views.

On the other hand, where the state wanted to allow religious interference with secular concerns, Justice Rehnquist alone found no First Amendment problem. In Larkin v. Grendel's Den, 459 U.S. 116 (1982), eight Justices found a state law giving churches the power to forbid bars in their vicinity to be an improper delegation of governmental licensing authority. Justice Burger, writing for the Court, stated that "the structure of our government has, for the preservation of civil liberty, rescued temporal institutions from religious interference." Justice Rehnquist disregarded the constitutionally forbidden entanglement of church and state, instead protesting the "heavy First Amendment artillery that the Court fires at this sensible and unobjectionable" statute.

Justice Rehnquist was also the only member of the Court who would have allowed a state to deny a prisoner the right to practice his religion. In Cruz v. Beto, 405 U.S. 319 (1972), eight members of the Court held that it violated the First Amendment for prison officials to deny a Buddhist the same

opportunity to practice his faith as those prisoners who followed more conventional religions. Justice Rehnquist took the position that the Court should not interfere with the prison officials unless the discrimination could not be justified under any rational hypothesis. Because it could cost more to provide religious services for small sects, Justice Rehnquist found it reasonable for the state to deny the right to worship to members of those sects. This dissent again reveals Justice Rehnquist's troubling precept that Bill of Rights guarantees as fundamental as that of religious freedom bow merely to the interest of the state's convenience and cost.

In other cases involving criminal justice, Justice Rehnquist has given broad rights to the state and a denial of constitutional protection to the individual. In Taylor v. Louisiana, 419 U.S. 522 (1975), only Justice Rehnquist would have allowed the state to continue a jury system which excluded women, a group which comprises over half the population. He was the sole justice to dissent from the Court's ruling that the Fourth Amendment bars a state patrolman from randomly stopping and searching automobiles without any warrant or cause to believe that a violation of law is occurring. Delaware v. Prouce, 440 U.S. 648 (1979).

In Carter v. Kentucky, 450 U.S. 288 (1981), eight Justices agreed that a criminal defendant not testifying in his own defense is constitutionally entitled to have the jury instructed that it may draw no inference from his exercise of the right to remain silent. The opinion underscored (305) that

a "failure to limit the jurors' speculation on the meaning of that silence . . . exacts an impermissible toll on the full and free exercise of the privilege." The constitutional right against forced testimony by defendant, the Court noted (299), "reflects many of our most fundamental values and most noble aspirations . . . "

Rehnquist's lone dissent is noteworthy for its failure to suggest why the defendant's right to silence should not be protected by a "no inference" instruction to the jury, without which a defendant's exercise of his right to silence might often become the very basis of jury conviction. Rehnquist protests allowing the defendant to "take from the trial judge any control over the instructions . . . " This dissent again fails to deal with the specific assertion upon which the majority opinion is based; instead, it simply finds vindication of that constitutional right and undue intrusion on the discretion of the state courts. Viewed as Justice Rehnquist views it as merely a matter of state authority -- not even of any strongly asserted state counter-interest -- it becomes clear that Justice Rehnquist basically does not accept Marbury when it comes to the preservation of Bill of Rights guarantees.

Justice Rehnquist also differed from his colleagues in a historic case involving openness of criminal trials, Richmond Newspapers v. Commonwealth of Virginia, 448 U.S. 555 (1980). The majority opinion by Chief Justice Burger struck down a state court order closing a criminal trial to the public and

the press, calling openness "one of the essential qualities of a court of justice." Never pausing to refute the persuasive historical evidence set forth in the majority opinion, Justice Rehnquist instead voices in lone dissent an abstentionist principle so broad as to encompass not only public trials, but essentially all Bill of Rights guarantees. He illustrates his hostility to judicial review, stating that:

> to rein in, as the Court has done over the past generation, all of the decision-making power over how justice shall be administered . . . is a task that no Court consisting of nine persons, however gifted, is equal to . . . it is basically unhealthy to have so much authority concentrated in a small group of lawyers . . . nothing in the reasoning of Mr. Justice Marshall in Marbury v. Madison requires that this Court, through ever-broadening use of the Supremacy Clause, smother a healthy pluralism which would otherwise exist in a national government embracing 50 States.

It is particularly noteworthy how far Justice Rehnquist proceeds to rely on this broad abstentionist principle rather than on any effort to justify the secret trial which offends Anglo--American traditions.

Even in cases involving the most fundamental right, Justice Rehnquist would defer to the states. In Lockett v. Ohio, 438 U.S. 586 (1978), the opinion by Chief Justice Burger struck down a state statute which precluded a defendant from showing any aspect of his character or record in mitigation on the question of the sentence in a capital case. The Court found that the statute created the risk that the death penalty would be imposed in cases where it is not appropriate, and that "when the choice is between life and death, that risk is unacceptable."

The lone dissent by Justice Rehnquist asserted that the state was not required to accept any mitigating evidence, apparently in the view that the Eighth Amendment assures no more than a fair trial of guilt or innocence. In Justice Rehnquist's view, even life itself is not a sufficiently compelling right to deserve constitutional protection against its arbitrary denial.

The foregoing brief review of a handful of Justice Rehnquist's numerous lone dissents highlights themes that are found throughout his Supreme Court opinions. What is demonstrated by his lone dissents is first of all the depth and range of his abstentionism, applying it as he would to every minority group, every Bill of Rights principle, and even to life and death questions. No constitutionally protected interest of federalism or fairness, of liberty or equality will rise to a level where Justice Rehnquist is willing to impose significant federal constitutional limitations on the states.

It is not unfair to call Justice Rehnquist an abolitionist, for the extent of his erosion of the guiding principle of Marbury v. Madison, and thereby of the constitutional protections found in the Bill of Rights, would amount to abolition of the Supreme Court's vital role and its central task: the vindication of the federal Constitution. That is not a conclusion unfairly drawn from his years on the Court; it largely reflects his own candidly stated insistence on the overriding importance of state's rights and the limits of the Supreme Court's capacity and authority.

Our concern is not only that Justice Rehnquist will continue to strike a different balance of substantive interests

than the other Justices. Rather, what is at the heart of his view is a far more fundamental principle that questions the role of the the Supreme Court itself in preserving federal constitutional rights.

If this is a fair characterization of Justice Rehnquist's view, the question arises whether the Senate should elevate to the position of Chief Justice of the United States a member of the Supreme Court so out of sympathy with the basic role and function of the Court. We believe that the answer is no. Never in our history has a Chief Justice so undermined and demeaned the Supreme Court as an institution. As one who rejects the Supreme Court's central constitutional task, Justice Rehnquist is clearly an inappropriate choice to lead and represent our highest Court.