school admissions is on the road to being reversed. In law faculties, in the judiciary and in the practicing legal bar, however, women have been and continue to be severely restricted in both access and advancement. This is a discrimination that is being addressed by the ABA's Committee on Rights for Women and it is one of the areas in which the National Women's Political Caucus intends to pressure adamantly for redress.

As we stated above, there are women of distinguished legal backgrounds who deserve nomination to both the Supreme Court and to the lower courts in much greater number. We deeply believe that courts should be institutions in which no vestige of discrimination, sexual as well as otherwise, should be permitted to exist.

The National Women's Political Caucus has come to testify before this committee today because the Senate is a part of our representative system and we believe you should have an accurate picture of the opinion of the constituency that you are elected to represent. Women are a majority part of that constituency. In your role of advise and consent, we are not asking you to reject either Mr. Powell or Mr. Rehnquist for the Supreme Court because of their sex. However, we have taken this opportunity to express the discontent of a large segment of the population that a woman has not been nominated as a Justice of the Supreme Court and we wish to state before this committee, as we have expressed in writing to the President, that we fully expect the next Supreme Court vacancy, whenever it shall occur, to be filled by an outstanding woman. We note in closing that our testimony is being delivered to an all-male committee. We would like to issue a friendly warning, gentlemen, these are no longer all-male times.

Senator HART. You don't have to remind me. I recognize it and I feel guilty.

[Laughter.]

Senator HART. Mrs. Heide, do you have a statement?

Mrs. HEIDE. Yes, I do.

Senator HART. Might it not be better if we heard both and then if we have any questions——

TESTIMONY OF WILMA SCOTT HEIDE, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN, INC.—NOW

Mrs. HEIDE. Fine. My appearance here today is an indication that I am nearly incurably optimistic of women receiving justice from this Judiciary Committee, the U.S. Senate, the Congress and the U.S. Government, most evidence being to the contrary. If my statement and recommendations are undervalued or ignored by this committee and the Senate, my remaining optimism about justice for women may be cured. To be candid, I am not certain that the Senate Judiciary Committee, perhaps with some exceptions, without any life experience of living as a woman in an androcentric society, has the capacity or desire to fully understand what I intend to share with you. For the moment, I will give you the benefit of considerable doubt.

I am Wilma Scott Heide, president of NOW, the National Organization for Women, Inc., a behavorial science consultant and a member of the National Equality Committee of the American Civil Liberties Union, the last being for identification only.

The symbol of justice in the United States is a blindfolded woman. The women's movement for rights, liberation, participation and justice is removing the blindfold to challenge the grievous injustices to women and balance the scales of justice. Those excluded from and/or disabled by the law must have a say in rewriting, defining, and interpreting law. If the Senate confirms the Presidential nomination of William H. Rehnquist and Lewis F. Powell, Jr., for the U.S. Supreme Court, justice for women will be ignored or further delayed which means justice denied.

Now, as I begin and develop my testimony, please note my awareness that both nominees are probably bright, decent people as that is traditionally understood and implemented and probably not anti-woman in any conscious, intentional or overtly destructive way of which they are aware. It is precisely the nonconscious, institutionalized, traditional, narrow view of intelligence and decency vis-a-vis women that is the problem and the nominees have demonstrably internalized that behavior and thinking. Let me emphasize: my testimony is not intended and must not be characterized as an attack on the nominees per se as isolated sexists but as a challenge to the institutionalized sexism they manifest being further perpetuated on the Supreme Court and, by extension, throughout society.

To understand my theme that the criteria for qualifications for Supreme Court positions must be fundamentally changed to disqualify sexists and sexism, first, you must understand sexism.

Senator KENNEDY. Miss Heide, could I just possibly interrupt for a question? I am going to have to leave the hearing and I was wondering if I could interrupt just for a question?

Mrs. HEIDE. As long as I may comment afterward.

Senator KENNEDY. Yes, of course.

I was interested in either or both of your responses to the procedures which were followed in the consideration of Judge Mildred Lillie. Are you prepared to make any comment as to the process by which she was selected? Are you prepared to make any comments as to what your evaluation would have been if she had been nominated, or do you prefer not to? We have sort of gone past that, and perhaps you would prefer not to make any kind of judgment on it.

Mrs. HEIDE. My inclination would be, and that is part of the rest of my statement, would be to address ourselves to the criteria and to the method of selection, and that could include any of the announced favorites or possibilities for nomination to the Supreme Court and not directly to any particular individual.

Senator KENNEDY. I know your statement does; I appreciate that. I was just wondering, beyond the statement, whether there was anything you would want to say with regard to her selection as one of the six initially?

Mrs. HEIDE. I think that what we are saying, if I interpret my colleague here accurately, is that we think quite enough has been said about all of those candidates. The issue now is the present nominees, and from those points of view the criteria.

Mrs. KILBERG. I think the caucus would share that viewpoint.

Mrs. HEIDE. Sexism, as I was going to define, and I would like to continue, is behavior applied to the entire social structure and system, including justice, based on beliefs that some physical differences between females and males naturally justifies stereotyping by sex of

learned human roles, beyond the two crucial biological exceptions. You should know that sex role stereotyping of human roles has no valid means of scientific support. Further, sexism accepts implicitly if not explicitly that control of society, its societal value judgments, and its resources by the male sex. The oppression, exclusion, the control of women are predictable and tragically inevitable consequences whether manifested by assumptions that women should be the primary child rearers—a human role, artificial sop of an immobilizing pedestal, or the privatization of the so-called "feminine" virtues proclaimed on Mother's Day and honored in the breach in societal behavior the other 364 days.

Sexism assumes that the concerns of men, while ostensibly the generic word for people but actually meaning males, are the concerns of society when the other half, females, are virtually excluded, that is, are conditioned to know our place. Let me guide you to put sex in its place and understand that justice requires that the transcending humanness of women and men cannot countenance nonconscious or conscious assumptions or behavior about anyone's place. Furthermore, there can be no place on the Supreme Court for anyone who is sexist, however nonconscious and whether male or female.

Next, I want to describe how the behavior of the two nominees should disqualify them for the Supreme Court by virtue of their acts of commission and omission. I want to include the basic injustice of the President's criteria for nomination, the consequences of "strict constructionist" philosophy, the effect of unawareness on apparent "justice," the masculine mystique as part of the problem of injustice, some questions to ask yourselves and the nominees, the values of the feminist criteria for justice and society, and urgent recommendations to you, the Senate, the nominees, and the President.

The dimensions of what I intend to develop include and transcend the potential absence of women from the Court and thus require your patient attention to allow and indeed encourage me the time to guide your reconceptualization of the Supreme Court, its role and membership. That means I will not docilely countenance an abbreviation of my oral testimony however aware I am that the committee, not I, is conducting the hearings. Any attempt at abbreviation will be, in fact, an injustice that would deny you and others interested the opportunity to reconceptualize justice for the entire human family.

First, the President's criteria for acceptable nominees included finding the best man as stated by his press secretary until corrected by the protests of the National Women's Political Caucus on whose national policy council I function. The President and his staff since watch their language, if not their behavior. Next, the President emphasizes the need for "strict constructionists." However that is interpreted, it is unjust for women. "Strict constructionism" sometimes means a literal interpretation and application of the Constitution and its guarantees. When the Constitution was written, a Negro male was considered three-fifths of a person and no woman was considered any fraction of a person in a legal sense. Women were excluded from the writing, the content and intent of the Constitution. The myopic vision of our forefathers, the exclusion of our foremothers, remains virtually unchanged and any "strict constructionist" could apply that concept of justice with impunity today and tomorrow until and unless the 48-

year-old proposed equal rights amendment to the Constitution passes the Congress and is ratified by the appropriate number of States. More on that later.

Another interpretation of the "strict constructionist" is that a court would be guided by precedent. Still, women would be virtually without hope for human justice. Let me cite only a few of the numerous examples. Remember most sex discrimination is so pervasive, considered so normal if sexist as to not arrive at any court let alone persuade the Supreme Court to even hear and conceivably rule justly on their merits in the context of even existing human rights laws. The Supreme Court in 1948 in *Goesaert* v. *Cleary*—335 U.S. 464, 1948—ruled in the opinion of otherwise enlightened Felix Frankfurter that women had no right to be bartenders. Sixty-eight years earlier, the denial of occupational opportunity based on national origin was "the essence of slavery itself" according to the Supreme Court, quite correctly ruling 85 years ago—*Yick Wo* v. *Hopkins*, 118 U.S. 356, 370, 1886. Eighty-five years ago occupational exclusion of or limitation of a Chinese male was slavery, yet 62 years later and even today the same treatment of women is viewed as morally, legally and socially appropriate to protect women's special responsibilities for home and family. Slavery is slavery whether the victims are Chinese, Negroes, or women of every race.

Again, in the U.S. Supreme Court case of *Hoyt* v. *Florida*—368 U.S. 57, 1961—as recently as 1961, found no suspicion of denial of equal protection of the laws when only 10 of 10,000 jurors were women and justified this because "woman is still regarded as the center of home and family life" and even coopted women in their own limitations by requiring women not men to affirmatively register for jury service if she determines this "consistent with her own special responsibilities." Stereotyped psychological conditioning momentarily aside, this is blatant sex discrimination. If the courts are going to adjudicate the place of all nonescaping women but of no men, then the Government has the responsibility to publicly legislate this subtle slavery and provide fair labor standards including wages and promotions for all "housewives" and mothers, not leave it to the largesse of their males privately.

Bringing the Court up to date, by calendar but not conceptually, within the past year the U.S. Supreme Court in *Phillips* v. *Martin Marietta*—91 U.S.C. 496, 1970—showed remarkable lack of sensitivity to, insight about, and acceptance of women's human rights under title VII of the 1964 Civil Rights Act. NOW and other women's rights groups filed amicus curiae briefs in that case. The court ruled that Martin Marietta, in denying employment to a woman with preschool age children but not to men with preschool age children, had a different hiring policy based on sex and this could not be allowed. However, in vacating and remanding the case to a lower court for more facts, the Supreme court's decision also allowed that sex-plus discrimination could be legally allowed as a policy.

The plus factor is the presence of preschool age children. This is sex discrimination when applied to women only whatever the traditions. It is precisely the time-honored but discriminatory traditions the law was designed to eliminate.

However, at least as unjust and insensitive as the Court's sexist action and avoidance of the issue was, the Courts' approach and behavior, with the partial exception of Justice Marshall, who also

happens to be the only Justice with a female law clerk. One suspects he also understands things about discrimination that few white males comprehend. There are 10 recorded cases of laughter in the proceedings and in none of these instances is there a laughing matter at issue. I invite your reference to an article in the Women's Rights Law Reporter for a frightening verbatim account of much of the oral argument on that case. Also, a Harvard Civil Rights, Civil Liberties Law Review article commenting on one typical exchange notes:

> This exchange, which may accurately reflect the dominant attitude toward sex discrimination in the United States, does not augur well for the major doctrinal expansion that will be necessary to reverse the historic patterns of legal inequality.

Finally, for this point, I ask you to carefully consider the following profound observation from my friend Jean Witter, president of Pittsburgh NOW:

> It is possible to make a case that all Supreme Court decisions which involved women are unconstitutional, since there has never been a woman on the Supreme Court.
>
> This line of reasoning follows directly from the Supreme Court's own decision, *Hernandez* v. *Texas*, 347 U.S. 475–478, 1954.
>
> In this case Hernandez who was of Mexican descent was acquitted by the Supreme Court decision because the selection of the jury that convicted Hernandez violated the 14th Amendment in that citizens of Mexican descent were excluded by practive from jury service.
>
> Certainly women have been excluded by practive from the Supreme Court since a woman has never been appointed to the Court. If the Supreme Court in *Hernandez* v. *Texas* is valid for jury selection, perhaps the same reasoning can be applied to the appointment of Supreme Court justices.
>
> If the selection of appointed justices excludes a certain large class of people, not a small minority, then that group by exclusion is denied the equal protection of the 14th Amendment.

Furthermore, the Supreme Court's frequent decisions not to hear cases of sex discrimination must be considered suspect. Again quoting Jean Witter:

> By not nominating a single woman to the Supreme Court, the President has violated his own Executive Order 11478, Equal Employment in the Federal Government, August 8, 1969, which states:
>
> "SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in the federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex or national origin."

Senator BAYH. Miss Heide, may I interrupt?

Would it also be helpful to point out that, although the decision in the *Phillips* v. *Martin Marietta* case was right in the eyes of those of us who feel that Mrs. Phillips had been discriminated against on the basis of sex, the basis for presenting that case and the Government brief did not argue the constitutional question, but that the ground was the equal employment section of the 1964 civil rights statute?

Mrs. HEIDE. Yes; that is correct. However lengthy what I am saying, it may be I am only hitting some of the highlights so you are bringing up one other.

Senator BAYH. That is a critical distinction, I think, when you are talking about how the Supreme Court looks at women. Reference to a statute should have been unnecessary because women should be given the equal protection guaranteed in the 14th amendment of the Constitution.

Mrs. HEIDE. I think I have already indicated the Supreme Court has never accepted that and I think this is simply one more manifestation.

Now if I may——

Senator BAYH. I suggest—since we have our fingers crossed—that it doesn't strengthen your case to say that at this moment they are not taking any cases because we know that there are several up there and we have our fingers crossed.

Mrs. HEIDE. Yes; they have taken some. I don't think I have said they have not taken any.

Senator BAYH. You were quoting Mrs. Witter to that effect, were you not, on their refusal to take cases?

Mrs. HEIDE. I think it is a refusal to take some cases, not all cases, and I think that is an important distinction.

[Reading:]

Again, President Nixon in his memorandum of March 28, 1969, states: "I am determined that the executive branch of the Government leads the way as an equal opportunity employer."

In summary, the President's search for Justices who will exercise judicial constraint not activism addresses itself only to criminal law, only parts of civil rights law and absolutely ignores the need for understanding of and commitment to existing civil rights laws for all citizens and the need for creative law interpretation to balance the systematic injustices to women much of it by law itself.

I hereby publicly protest the President's disregard of the letter and spirit of his own Executive order and civil rights laws, his own manifest unawareness of the depths, dimensions, and pervasiveness of injustice to women. I only regret that he is apparently beyond the law and redress of our grievances, short of impeachment. Perhaps he and you could only understand his patronizing of women if we reversed the Cabinet from all-male to all-female, invited the Cabinet members to bring their husbands to a meeting and then said, "I am proud of the men who don't hold office but hold the hands of the women who do." If women were in a position to do that, it might be called matronizing and it would be equally as undesirable and sexist as if he, in fact, did vis-a-vis his own Cabinet.

Next, I will speak to the injustice of unawareness and sloppy work as evidenced first by Mr. Rehnquist and acts of omission that reflect the record of Mr. Powell to portend injustice likely for women if these two were confirmed for the Supreme Court.

First, Mr. Rehnquist's April 1, 1971, testimony on the proposed equal rights amendment to the Constitution and the Women's Equality Act are models of equivocation, unscholarly research, and lack of clarity that makes one wonder if the date of his testimony is prophetic of the kind of opinions he might write in the tragic possibility of his appointment. Members of the House Judiciary Subcommittee were confused as indicated in their questions:

Mr. MCCLORY. Since the answer to the question with regard to whether or not women would be subject to the draft seems to be yes, it would be helpful if the Attorney General would express some kind of positive opinion on what the impact of the Equal Rights amendment would be, because I can't interpret your answer to indicate one way or the other, and I would like to know. I think it is important to us to know what our highest legal authority feels.

Mr. REHNQUIST. I fully agree with you, sir. Unfortunately, the Attorney General works with the same language everybody else works with and the value of

his opinion generally comes just like the value of any lawyer's opinion, from an examination of precedents and other similar cases and in this situation he is, unfortunately, writing on a clean slate. To simply take these words and say they do or do not apply to a particular situation is not the sort of opinion that a lawyer ordinarily feels very comfortable giving.

Now, the language of the Equal Rights amendment, I think, is vey clear. It says equality of rights under the law shall not be denied or abridged by the United States or any of the States and it means simply the sex, race, color, creed, national origin, height, weight, education, economic resources, or anything is a violating criteria for denial of or abridgment of rights.

Obviously, we should spare Mr. Rehnquist from the opinion—writing of momentous Supreme Court opinions for which there is no opportunity to ask clarifying questions and additional clarifying addendum as the House Subcommittee Chairman Edwards needed to do. I refer you to study the full record of Mr. Rehnquist's appearance which further includes this exchange:

Mr. WIGGINS. Let's directly confront the question. Do you feel the Constitutional amendment is necessary to implement the Federal policy you have enunciated, that is, no discrimination on the basis of sex?

Mr. REHNQUIST. No, I don't. I think one could do it by statute.

Mr. WIGGINS. Then, I think my observation is correct. Your answer indicates that the amendment is unnecessary and my query is why are you in support of an unnecessary amendment?

Mr. REHNQUIST. Because the President has committed himself to it and the importance of a general statement in the Constitution establishing the principles of equality of women outweighs the disadvantages that might flow from enactment of the amendment.

Senator Hruska indicated that Mr. Rehnquist had said he, if he were at odds with the position of the administration, would resign. I think this statement indicates that he is at odds and he has not resigned.

Clearly with friends like this, proponents of the amendment and women's justice need no additional enemies. On August 10, 1970, the first time the equal rights amendment passed the House, Congresswoman Martha Griffith stated:

There never was a time when decisions of the Supreme Court could not have done everything we ask today. The Court has held for 98 years that woman, as a class, are not entitled to equal protection of the laws. They are not "persons" within the meaning of the Constitution.

Mr. Rehnquist does not think the amendment necessary, accepts the assignment to speak for the administration's alleged favoring of it, says he prefers the legislative approach, is equivocal or in opposition to some of that proposed legislation, knows the administration is not an active advocate of such legislation, and yet this man is a confirmation away from being a Supreme Court Justice. We are not so stupid or uncaring about human justice to accept such a nominee of either sex. That must be your view.

Furthermore, we are concerned about Mr. Rehnquist's knowledge about the importance of legislative history. His statements in hearings on the equal rights amendment indicate that he does not consider legislative history of any great importance in interpreting constitutional amendments. He said:

Second, while the legislative history may be a valuable tool in both drafting a statute and interpreting it, its use in conjunction with a Constitutional amendment is more doubtful. Logically, it would appear that legislative history would not be particularly persuasive unless it could be shown that not only the

Congress but the ratifying legislatures of three-quarters of the states were fully aware of an ambiguity in the language of the amendment, and of the legislative reports or debates which purported to clarify that ambiguity. (Reference page 312 of House hearings.)

In serving as a Supreme Court Justice, how much weight would he give to the intent of Congress in interpreting the equal rights amendment or other constitutional amendments?

That constitutional history is very important is supported by Antieneau's Modern Constitutional Law, pages 711–714; *Jones* v. *Mayer Co.*, 392 U.S. 437; *Brown* v. *Board of Education*, 347 U.S. 483; and *U.S.* v. *California*, 332 U.S. 92, 1946. The constitutional law professors testifying for the amendment believed the legislative history to be quite important. See page 164, 351, and 401 of the 1971 House hearings.

There are numerous other concerns Mr. Rehnquist's testimony raises, of which I will include only a few more, but I am quite willing to go into them in as much detail as you accept as necessary, but remind you that his documented statement show unawareness of problems affecting women, when documented material is even more readily accessible to him than those of us from miles away working as volunteer activists economically disadvantaged, is profoundly disturbing and another reason for disqualification. Anyhow, in his statement on the equal rights amendment, he assumes there are statistically reliable sex and race differences in the likelihood a mortgage applicant will repay a mortgage. He stated that—

The goal of ending race discrimination was given a higher priority by Congress in passing the 1968 act than whatever increment in accuracy was gained by using race as a predictor. The decision whether the goal of ending sex discrimination is to be given a similarly higher priority should be made in the light of more information than we have about the financing practices affected.

There are several things about this statement that bother us. What factual basis did he have for the assumption that race or sex are factors in repayment of mortgages? What evidence is there that "future income" is a factor as contrasted with present income?

Mr. Rehnquist's testimony on alimony and support reflect lack of scholarship and of insight to the real status of women.

The only nationwide study of support and alimony was made by the Support Committee of the Family Law Section American Bar Association in 1965. Monograph No. 1 of the Family Law Section sets forth the results of a survey of 575 domestic relations court judges, friends of the court and commissioners of domestic relations. This study indicates that alimony is awarded in a very small percentage cases. A California judge states, page 3:

In this county permanent alimony is given in less than 2 percent of all divorces and then only where the marriage has been of long duration, and the wife is too old to be employable, the wife is ill, particularly if the husband's behavior was a contributing cause, or other highly unusual factors exist. Temporary alimony is given, pendente lite or for some portion of the interlocutory period in less than 10 percent of all divorces, chiefly to give the wife a breathing space to find employment.

A Nevada judge comments:

A healthy young woman should not be permitted to go on indefinitely living on alimony. Her outlook is more healthy and her life a good deal more full as an active member of the community and not as a kept woman.

The Foote, Levy and Sander textbook on family law, referred to above, found alimony "infrequently sought and even less often obtained," page 937.

The wife's capacity to earn was taken into account in setting alimony by 98 percent of the judges in the Quenstedt-Winkler study. The leading cases in Arizona on alimony list as the primary factor to be considered the needs of the wife and her ability to support herself. A 1970 case states specifically:

> The husband should not be required to pay alimony unless the court finds it necessary for the support and maintenance of his wife. *Reich* v. *Reich*, 474 P. 2d 457.

The evidence available thus clearly indicates that men are not responsible for supporting divorced or separated wives without regard to their capacity to support themselves.

With respect to child support, the data available indicate that payments are less than enough to furnish half of the support of the children. A chart submitted by a Michigan court—Quenstedt-Winkler study—indicates that with three dependents, including the wife, the family support payments would be approximately half of the man's net income, net after income tax, FICA, hospitalization, life insurance, union dues, and retirement plan payments, none of which are specifically provided for for women. It is clear that these payments would not furnish half the support of the children in most families. Even these small payments are frequently not adhered to. One court commented:

> However, we find that in the great number of cases we are unable to adhere to the chart because of excessive amounts of financial obligations and limited earnings; also in many cases the man has more than one family.

In a survey referred to in Foote, Levy and Sander, page 937, made in Maryland and Ohio in the early 1930's, in half the cases the weekly alimony and support payments were between $5 and $9 per week, equivalent to $11.65 and $20.97 in today's dollars. The median was $33 per month, equivalent to $76.89 today.

I would like to insert in the record here a letter from a woman in Elyria, Ohio, which is typical of the complaints we hear. She is a clerk-typist working fulltime with a takehome pay of $310 per month. Her former husband is employed fulltime as a carpenter, earning overtime. The court awarded her $15 per week for each of two children. Her husband is $410 behind in payments, which she is unable to collect. The children have not had dental care for 2 years and she finds it difficult to buy books, proper food and clothing for the children. It is obvious her husband is not contributing half the support of the children, let alone supporting his wife. This case also illustrates the lax enforcement of support laws, which all authorities agree is a major primary problem.

In summary, Mr. Rehnquist's glib and unsupported statements about a husband's duty to support his wife without regard to her ability to support herself perpetuate a legal myth that has done great damage to this country, especially to its women.

When the latest data indicate that 27 percent of the women who entered into teenage marriages in the past 20 years are divorced, it is high time that our girls be apprized of the facts about alimony and

child support and likelihood of divorce in teenage marriages. Perhaps more of them would prepare themselves vocationally and wait until they are older for marriage. The divorce rate for women married after the teens was 14 percent.

I do not suggest that Mr. Rehnquist was deliberately misleading. I do suggest that this handling of this subject is symptomatic of his philosophy, which concerns itself with the welfare of the white middle-class male—and his wife and daughters as adjuncts to him. We have noted in reviewing some of the court cases relating to alimony and child support that very generous property, alimony, and child support settlements are made among the wealthy. However, these cases and other materials leave the impression that in middle and lower income groups the welfare of the husband and his prospects for remarriage are given much greater weight than the wife's and children's welfare and that no weight whatever is given to her prospects for remarriage. In other words where the divorce results in economic hardship, greater hardship is visited on the wife and children than on the husband.

Rather than resulting in diminution of support rights for women and children, I would like to suggest that the equal rights amendment could very well result in greater rights. I believe a case could be made under the equal rights amendment that courts must require divorced spouses to contribute in a fashion that would not leave the spouse with the children in a worse financial bind than the other spouse.

Mr. Rehnquist's conclusion that alimony laws allowing alimony only to wives would be invalidated is not supported by any legal authority or the legislative history—only by Mr. Rehnquist's also unsupported belief that legislative history is of limited importance in interpreting a constitutional amendment.

In summary, we find that Mr. Rehnquist's testimony on the Equal Rights Amendment does not indicate a scholarly approach or a broad concern for all economic classes.

Mr. Rehnquist's myths permeate our society, consciously or unconsciously influence females' educational, occupational, aspirational choices and opportunities, lead to grief for millions of women and is significantly responsible for the size of our public assistance roles, 65 to 85 percent of which include women and their dependent children, a tragically disproportionate percentage of which are already unjustly disadvantaged minorities. Further, these recipients are grudgingly granted mere survival relief, insulted for needing it, and are not recognized as part of the larger society of all the rest of us, everyone of whom receives public welfare in the form of public transportation, libraries, higher education, highways, et cetera, et cetera.

The facts, stripped of legal sophistry with which antiwomen and thus inhumane people garb them are that the average woman, employed only as housewife-domestic, living with her husband can get only what he wants to hand out; a separated or divorced woman is unlikely to get any alimony and if she has children, she is likely to have to contribute more than half to their support and if she has finessed her societal oppression, will work incredibly hard to be absolutely independent of her former spouse in spite of systematic documented employment discrimination.

As a civil libertarian, but not speaking for the American Civil Liberties Union, I deplore Mr. Rehnquist's acceptance and/or advocacy of:

(1) Pretrial detention of criminal suspects;

(2) Endorsement of illegally obtained evidence;

(3) Government data banks on people in violation of rights to privacy;

(4) Arrest of suspects without warrants or due process of law:

(5) Muzzle of free speech of government employees;

(6) Denial of first amendment rights of free assembly;

(7) Defending the legality of reviving the Subversive Activities Control Board and giving it Justice Department powers to designate organizations as communistic.

Indeed, the thrust of Mr. Rehnquist's views are a proclivity or compulsion to control other people and limit or narrowly conceptualize human rights for all who are not affluent white males, that is, those outside the economic-legal-judicial system of the white patriarchy. This kind of thinking-behavior-control of other reflects remarkably, in the legal context, the "white masculine mystique" that has knowingly or unknowingly created or perpetuated injustices for the majority of our citizens. I have detailed only a few of Mr. Rehnquist's known acts of commission that have or can guarantee perpetuated human injustice. His acts of omission, that is, affirmative steps that he might have taken to extend justice but didn't, are relatively less well known to me, besides I think I have made NOW's case for Mr. Rehnquist's own disqualification of himself to fully serve justice of the full human family on the U.S. Supreme Court. I trust he will have the intelligence and fairness to withdraw his name and, if not, you must not confirm his nomination.

Mr. Rehnquist's documented objections to legally opening public accommodations to all citizens and integrated education are not known to have changed from 1967. NOW supports opposition to him on these substantial grounds. As an individual, formerly a Pennsylvania human relations commissioner who chaired the Education Committee working constantly for integrated education, I find this nominee's views narrow, lacking in insight about the requirements for the freedom he thinks he espoused and yet two more reasons to view his appointment as an unjust act.

The instance of Mr. Lewis F. Powell's nomination speaks more to the acts of omission of justice referred to above though I have no evidence that Mr. Powell's views of women are other than the normal, that is, sexist by internalization of cultural biases. The absence of any documented evidence of his affirmative action vis-a-vis women as president of the male-dominated and influential American Bar Association alone disqualifies him or any comparable nominee to serve on the Supreme Court. To do nothing for a class of people is no better than doing something overtly and unjustly against a class of people. At least, the latter galvanizes people to indignation and action.

Therefore, in the 1960's, when Mr. Powell was in active leadership in the American Bar Association, the Senate Foreign Relations Committee, on recommendation of this Bar Association Committee, did not approve the United Nations Convention on the Political Rights of

Women which means a belief in the right of women to vote and hold national office. The ABA has not supported the equal rights amendment, and prominent members vigorously have opposed it with irrelevant sexual hangups about concern for separate restrooms when the issue is privacy of separate toilet units that other countries, airlines, buses, and trains manage nicely. ABA members have also protested the amendment on the false issue of so-called protective legislation for women which is superimposed restriction of employment opportunity.

That issue itself is moot with the supercedence of title VII of the 1964 Civil Rights Act and increasing numbers of State attorney generals are forced by evidence to rule earlier State acts repealed or impliedly repealed. If Mr. Powell was aware or cared, where was his leadership, his testimony for justice?

During Mr. Powell's ABA presidency, on what issues affecting women did ABA take a stand? What was that stand? Where did Mr. Powell stand? Or was there any concern by Mr. Powell for the overt and covert discrimination against women and the need for profound, systematic change in the legal profession to make it hospitable to women? How many recommendations did he make of women for judgships? There are still only 4 of the 5,000 Federal judges who are women. Did he ever recommend an affirmative action program for women in the Federal or State judiciary? Does it bother him that there have never even been female pages in the Supreme Court? Has he facilitated or resisted the activism of feminists to humanize and androgynize—which is balance by sex—the legal profession? Does the paradox of women as moral arbitrars proclaimed on Mother's Day and near exclusion from public moral and judicial leadership strike him as inconsistent and of significant issue to require national action or at least his own?

What is the situation of women in Mr. Powell's own law firm? Are there any? What assignments do they receive? Is he an affirmative action employer for all excluded minorities including women, the cultural minority? Where was Mr. Powell's voice as president of the ABA in 1964 when House Rules Committee Chairman Howard Smith, of Powell's own State of Virginia, inserted sex into the 1964 Civil Rights Act in an attempt to kill it? That was an insult to every ethnic, racial, and religious minority and to every female in the country. A sensitive president of the ABA would speak his outrage, if indeed, he was.

We are told Mr. Powell is a millionaire, a stockholder in some 30 companies, a director of several. Questions of corporate social responsibility are therefore relevant. Has Mr. Powell ever voted for independent stockholder resolutions? Has he ever initiated any especially in the area of corporate social responsibility? Has he ever voted against any management resolutions which are frequently pro-status quo or pro-profits whatever the consequence to people? Are there any women let alone parity of the sexes on any of these boards of directors and if not, has Mr. Powell used his considerable prestige to promote this? What, if anything, has been his role in insisting the companies of which he is stockholder and/or director be affirmative action employers including women of all races?

Has Mr. Powell promoted cumulative voting so small stockholders can be heard? Has he facilitated access to meetings for all interested

parties? Has he upheld, promoted, or resisted proposed secret stockholder ballots so, for example, employee-stockholders can vote their wishes without fear of reprisals?

Getting back to the ABA, does Mr. Powell recognize that the very existence of a national association of women lawyers is still present reflection of their segregation and unmet needs within the ABA? Does Mr. Powell realize that man must stop using their sex to gain unearned prerogatives in the law and elsewhere? Because we have no evidence that Mr. Powell exercised positive action-leadership in acts of commission, we must conclude his acts of omission vis-a-vis women disqualify him to make the Constitution a living document to balance the scales of justice. We oppose Mr. Powell's confirmation for appointment to the Supreme Court, in the event he himself does not voluntarily withdraw as disqualified based on the reasonable criteria we advocate.

Finally, we would remind this Judiciary Committee that one does not have to be a lawyer to be a member of the Supreme Court. A behavioral analysis, and that is my profession, of the job of Supreme Court Justice reveals the following to be true: A Justice or Associate Justice is in the business of value judgments. A social behavioral scientist is professionally better qualified on many grounds than a lawyer. The was merely codified standards of what the people at any given time have considered appropriate social behavior and relationships. Legal scholars, law clerks, lawyers as technicians can and do the legal research necessary for a Supreme Court Justice.

Some of my best friends are attorneys. Many tell me frequently the nonlawyer, unencumbered by legal jargon and technical encumbrances, comes up with the most profound insights vis-a-vis the law. Jean Witter, quoted earlier, is one of many such nonlawyer examples of refreshing approaches to justice. Knowing many of you on this committee are attorneys, I have no wish to embarrass anyone here today. Even less do I, speaking for NOW, intend to countenance the continued exclusion, oppression, limitation, impoverishment of our sisters, mothers, and daughters consequent to the "masculine mystique" view and concept of justice whether exercised by men or women.

This country, this world, need the behavioral revolution of the women's movement for full justice. We will not be defined by male-oriented law as a class based on our sex. Anatomy for women, as for men, is a part of our destiny. Our child-rearing, homemaking, bread-winning, and leadership responsibilities are no greater and no lesser than that of our partner sex. Our decisions about life roles, life styles, life options—will be our own, not superimposed. We care too much for ourselves, for whatever children we choose to have, and the potential of men to be humane for us to allow it to be otherwise.

The myth and the reality that behind every great man is a woman is potentially manipulative and immature. For a society, not merely an individual to be great, a more mature model of women and men as equal partners in and out of the home will be created. We are not advocating uni-sex, we are creating uni-people. Stereotyping of people by sex, race, nationality, religion, polarizes people. Far from killing so-called love between the sexes, we intend to end the battle of the sexes and create a society in which women and men can live fully, freely, independently and/or together as friends, lovers, sisters, and brothers unencumbered by false poses, superimposed duty, psychological, legal, or any other oppression.

Concluding, President Nixon reportedly saw Ibsen's play, "The Doll's House," the tale of a woman expected to be a doll-like wife and her struggle to be an adult. Afterward, he was quoted as saying, "It's a part any woman wants to play, on the stage or in real life." If Mr. Nixon and you believe this, then the following are feminist actions you must take. The feminists might be the only believers in true democracy, and as I have sat here for these 2 days of hearings I had the distinct impression we were talking about an all male club.

The definition of a feminist is a person who believes women are people; that human rights are indivisible; a person who is committed to creating the legal, economic, social, political, and religious equality, not sameness, of the sexes as "A matter of simple justice," which happens to be the title of the President's own Task Force Report on Women's Rights and Responsibilities. I am a feminist. You, the Senate, the President, the suggested nominees, can behave like feminists by having the courage to:

(1) Reject/withdraw the names of William Rehnquist and Lewis F. Powell, Jr., for membership on the Supreme Court;

(2) Insist on the feminist criteria of justice and justices for any role in the Federal judiciary.

Such is the nature of my incurable optimism. I did not come here for a cure. I came here to be treated and to demand that my sisters, mothers, mothers-in-law, and daughters be treated as persons, not a sex who is a subclass of men, generic or specific. Sooner or later everyone must be a feminist. We will not be co-opted by pleasantries or patronizing. We intend to co-opt you, the President, and everyone else.

Now, I want to publicly thank all the dedicated feminists-humanists whose inputs are part of this testimony. It is they and all the antifeminists and therefore antihumans in other ways who motivate me to press on. It is still true this country and no individual can be healthy when half slave and half free however subtle that slavery and when the freedom is more apparent than real. As a matter of democratic justice, now insists that you act affirmatively on our just recommendations. As senators for all the people, you can do no less; as leaders speaking to the future, you have the opportunity to do more.

I would like to ask permission to have appended to my testimony for the record the following:

Mr. Chairman, if I may, I would like to include an article "The Double Standard of Justice: Women's Rights Under the Constitution," from the Valparaiso University Law Review.

I would like to—you indicated earlier I could—include the letter of the woman from Elyria, Ohio.

I would like to include the median earnings, Department of Labor and other Government bureaus.

I would like to include an item from the Marriage and Divorce Committee of the New York National Organization for Women Chapter, called "Reflections on Contemporary Dilemmas in American Family Law."

I would like to include the study I cited earlier, "What are our Domestic Relations Judges Thinking?" Monograph of the Section of Family Law, American Bar Association.

Thank you very much.

Senator HART. Without objection, they will be received.

(The material referred to was received and is on file with the committee.)

Senator HART. If I respond by saying that you speak the truth, we do our thing as if in fact it is a man's world, I hope you will not say that is the kind of pleasantry and patronizing remarks that you don't want to hear. I do understand. I understand it more clearly today than I did 5 years ago. My wife speaks very eloquently to me of examples of my own failures. I am aware of the deeply held discrimination, unconscious in most cases, against women, and the price that our country pays for it. If I say much more you are going to jump me for being either patronizing or mouthing pleasantries.

Mrs. HEIDE. Mr. Hart, I have no intentions to jump you or anybody else. I have no desire to see any manifestations of any individual guilt. What would persuade me, and what will persuade the increasing number of aware women and men, is that we have found our voice, and effective action. In this instance on the case of nominations for the Supreme Court and the criteria of Justices, they have excluded large human and humane dimensions. It is the actions that will persuade us.

Senator HART. If our actions fail of perfection, would you nonetheless say that it is better that we seek to find some indication, in one or both of these nominees, of the need to apply the 14th amendment even when it involves the reversal of customs which have become embodied over a long history in this country? Isn't that in part a description of the plight of women in this country?

Mrs. HEIDE. That is part of it. We certainly have continuing hope for the application of the 14th amendment and all amendments in the interest of women. But even that is no guarantee without an equal rights amendment to the Constitution if that is what you are getting to, because that might be applied at the discretion of any particular Supreme Court and we have no evidence at this point in time that we can count on that discretion.

Senator HART. I did note your comment—I can't find it at the moment—about Justice Thurgood Marshall who perhaps himself having been on the receiving end is pretty hard-nosed about discriminatory practices. I had in mind such an indication of a greater sensitiveness to discrimination being directed against others.

Senator Bayh?

Senator BAYH. Mrs. Heide and Mrs. Kilberg, I appreciate the fact that you gave us the benefit of your thoughts for the record.

Some might say that the rather detailed and thorough discussion which you have brought to the committee relative to the feeling of frustration of women today has no direct relationship to the qualifications or lack thereof of a given Supreme Court Justice. I don't share that view. I would hope the President would take advantage of an opportunity like this not only to speak eloquently of women on the Court but also to nominate a woman to the Court, not because she was a woman or not just because of tokenism which many of you have been subjected to, but because a well-qualified legal mind, a compassionate human being with all the qualities necessary to sit on the Court, also happens to be a woman.

Mrs. HEIDE. You realize, Senator Bayh, we are talking about women and not just a woman. I know you know it.

Senator BAYH. Yes, but I was hopeful that a woman would be appointed, not just any woman, but one who would have the legal credentials and the human compassion that should be embodied in any nominee to sit on that Court. It seems to me that in 200 years of

history, if we are really looking at everybody equally, we could find someone who would have those credentials and also a woman. If not, this is an indictment of the decisionmaking process by which people are put on the Supreme Court.

I remember very well when news reached me at Rutgers University of Justice Black's decision to retire and I immediately turned to an aide and said, "Let's get busy and let's suggest, send to the President, the names of three or four women who are examples of the kind of women he would find qualified and suggest that he appoint that woman to the Court." We did send a letter but, unfortunately—perhaps this was overstepping my boundary when I did this. I would just like to make one observation: We have been working together to try to get the equal rights amendment passed and it seems to me to be totally inconsistent to argue, on the one hand, the sensitivity of a judge relative to women's rights is not important and, on the other, to argue that the women's rights amendment is important.

I would just like to go one step further: I feel it really is not an answer to the problem to amend the Constitution with equal rights amendment. If we do not have judges on that Court who have compassion and concern for the problems that confront women, we will face the same type of discrimination that existed for 100 years after those famous amendments were put in the Constitution following the Civil War that directly prohibited discrimination on the basis of race. And so I think your concern over the sensitivity of nominees that will interpret this amendment, if we get it in the Constitution, is very well taken.

Mrs. Kilberg, as a lawyer, let me just ask you one quick, specific question.

Could you give us a bit of personal experience about the manner in which the "system" discriminates against women who are law students and prospective attorneys? Could you give us your personal experience or the experience of others that you have communicated with so far as this discrimination is concerned?

Mrs. KILBERG. I would be pleased to give you my personal experience.

I got out of college in 1965 and spent a year in graduate school and then decided, in 1966, I wanted to go to law school. I found that many, many law schools, very, very substantially discriminated and discouraged women applications completely. At Vassar College where I went to college, I do not believe any law schools came onto the campus to recruit as they did in most of the male and coeducational institutions. Once at law school, I found I was one of nine girls out of a class of 165.

Senator BAYH. Where did you go to law school?

Mrs. KILBERG. Yale in New Haven. Yale is very proud of its record. My math is terrible, but that is less than 5 percent, it is less than one-twentieth of the class. But the year after that they began to draft boys out of the first year of law school to go fight in the war, and while Yale raised their next year's entering class up to 300, and Harvard did the same and has approximately 500 students in the class, you can see it is really a small percentage. But one of them—I don't want to misquote him—one of the admission deans at Harvard said, "We might as well take women, rather than homosexuals or cripples." At the time it seemed very funny but it is not funny at all.

In the last year in law school, many firms, New York and California firms in particular, would come and interview students, and were less than pleased to see a woman come to the door. Their first questions were: "When are you going to get married? When are you going to have children? You are going to go where your husband goes; you are not interested in practicing long with this firm."

Others unfortunately—it was not unfortunate, it was usual—had their cocktail parties at Morey's. Well, those who have gone to Yale Law School know that Morey's is an all-male establishment and women are not allowed in. Again, I am not accusing them of being conscious of it; but it was something that hit me hard and certainly hit some of my classmates, who were more serious than I was about a law firm, very hard, and some of the brightest girls in our class had very great difficulty either in getting a clerkship or going into a law firm.

One thing has nothing to do with law at all. When I first came to Washington, I discovered that I would make phone calls and not get any answers back. I discovered finally that when I didn't have a secretary—I didn't have one for the first 3 weeks—I didn't get an answer. When I placed my secretary on the phone I would get the answer back because the guy realized that I was not a secretary. When you call up somebody on a Senate staff and say, "My name is John Smith," then you get a response. When you call up and say, "My name is Bobby Green," which it was at that time, they call you back and say they are busy or in conference. The guy's secretary is part of the problem. She has been conditioned automatically to assume the person she is talking to is not a professional and therefore does not deserve an answer. I think that attitude has to change also. Those are some very small examples. I could go on and on but I wouldn't want to take up the committee's time.

Senator BAYH. Have either of you noticed any improvement in this practice over the last couple of years?

Mrs. KILBERG. To a certain degree I think, there has been an improvement, because I think we have raised people's consciousness. I am not convinced today there has been an improvement that men have really felt. You know, they do it because it is now more appropriate and they are more sensitive about the question because they have been beat over the head by us a little bit. I am not sure they really believe what they say today but I would like to give them the benefit of the doubt.

Mrs. HEIDE. I would like to comment on that. I think one can point to some quantitative changes. I think that the significant qualitative changes are yet to come. I would like to suggest that fully to understand what we are talking about, and I am sure you know, both of you Senators, at least, know, that we have hardly cleared our throats on this issue here today, that before you understand what we are talking about, people, women and man, must begin to accept and prepare both our boys and our girls to accept all the responsibilities and opportunities in life: and to boys and men particularly that must include child rearing. I think that is probably the toughest issue and the gut level one that they have to face, because they assume that women are going to be the primary rearers and then, if they can manage, to squeeze something else in their life.

Is it that new change that we look at child rearing as a human role for people, and stop depriving men of the potentially humanizing experience of nurturing another individual on a day-to-day basis that I think is fundamental. The stereotyping begins with the assumption that there are certain roles for women, when with the crucial biological exceptions that we all know this is simply a matter of tradition, a matter of practice, that does not have any scientific, human validity.

Senator HART. I don't apologize or explain for asking the question. I am confident you will not misinterpret my purpose. It is for a better understanding. Given that explanation, is there any American male over 21 who is free of this fault?

Mrs. HEIDE. I won't accept that; I don't think that those who have been conditioned to believe and behave as what we call sexist in shorthand are confined to the males, and I don't think it is a matter of all males not understanding and that all females do.

Senator HART. I am sure there are some females who do not have this hangup. I am pursuing this question——

Mrs. HEIDE. Are you saying any man?

Senator HART. Is there any man?

Mrs. HEIDE. Of course.

Senator HART. Over 21?

Mrs. HEIDE. Oh, yes.

Senator HART. Who has grown up in our culture who is not subject to the criticism of having this sexist attitude?

Mrs. HEIDE. Well, there are men who are feminists just as there are women. You remember that my definition said person. I think that it is virtually impossible with the pervasive nature of sexism for you to take the arbitrary age of 21 to be absolutely free of it. But to the extent possible in our conscious behavior, yes, there are both women and men who are feminists, and I think it is clear that we are not talking about men versus women at all.

Mrs. KILBERG. I would like to add that some of us are married to such men, as I am.

Mrs. HEIDE. Yes, I wouldn't be married to any man who was not.

Senator HART. I am not sure what my wife would say with respect to it. I have hope, I have my fingers crossed, but you are describing clearly a rare exception. Are we not all the inheritors of our culture, our geography, our century? And is there anything more apt to be predictable than the result to an individual in 1970 who has lived in the 20th century? Isn't it almost a certainty that that person will be unconscious of it even though he believes himself to be sensitive of some of the denials?

Mrs. HEIDE. I don't think we are in disagreement with you. I suspect you may be more optimistic than you sound. You did say that we asked people to behave like feminists even if they did not at this point fully believe in it. Simply the behavior in ways that affect other people will be a giant step.

Senator HART. Thank you.

Senator BAYH. I don't know a Member of the Senate who is more concerned about examining the depths of his own soul than my friend from Michigan. He sets a commendable example for the rest of us. I appreciate the contribution you have made.

I am tempted, Mrs. Heide, because I think I know you well enough, to ask if maybe the term "feminist" itself isn't self-defeating in what you are trying to accomplish?

Mrs. HEIDE. Well, it is the language we have to work with, although one of the things, as you know, that we are trying to do is to create a new language. What we have now that you call English is manglish, but that is the only tool we have to work with.

Senator BAYH. In the culture we all have become accustomed to, a "feminist" implies prejudice to all males and "sexist" implies prejudice to all females. Maybe we need some other words that indicate there are both men and women who fit into both of those categories and that what we are after is to look at everybody equally, which has not been the case for our society.

I appreciate the contributions both of you have made.

Senator HART. Thank you very much. At the direction of the chairman, we are recessing until 2:15.

(Whereupon, at 1:15 p.m., the hearing was recessed, to reconvene at 2:15 p.m., this date.)

AFTERNOON SESSION

The CHAIRMAN. We have a Congressman to testify.

Mr. MCCLOSKEY. Thank you.

The CHAIRMAN. Mr. Congressman, identify yourself for the record.

STATEMENT OF HON. PAUL N. McCLOSKEY, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MCCLOSKEY. Mr. Chairman, I have known Bill Rehnquist for over 20 years, since we attended Stanford Law School together in 1950.

I believe him to be a man of the highest character, integrity and professional ability. Both his personal and professional reputation in the Stanford legal community, among fellow students, professors, and lawyers, reflects my own belief and the personal respect I have expressed.

Mr. Rehnquist's stated political philosophy is probably diametrically opposed to my own. We disagree on the most basic and deeply held views in the field of civil rights, on the powers of the President, the relationsip between the executive and the Congress with respect to the war in Indochina, and on the balance between the Government police powers and individual rights.

In the single instance in which Mr. Rehnquist has appeared before my own Subcommittee on Governmental Information in the House of Representatives, we have sharply disagreed and debated the executive's historic claim of executive privilege with respect to information necessary to congressional deliberations.

Nevertheless, it is my opinion that the greatest base for our national strength and security remains the absolute separation between political beliefs and law. We are a government of law, not of men. Perhaps the highest judicial obligation of a Supreme Court Justice is to insure that their judicial opinions respect this separation between politics and law. I consider it the most basic element in maintaining public respect for the law that it be absolutely divorced from political influence and opinion.