

TESTIMONY OF BRUCE FEIN
ON BEHALF OF UNITED FAMILIES OF AMERICA

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN SUPPORT OF ASSOCIATE JUSTICE WILLIAM REHNQUIST
NOMINATED AS CHIEF JUSTICE OF THE UNITED STATES

Mr. Chairman and members of the committee,

My name is Bruce Fein and I am speaking on behalf of United Families of America. United Families of America strongly supports President Reagan's nomination of Associate Justice William Rehnquist to be Chief Justice of the United States.

The nomination is a fitting occasion for examining the proper role of the Supreme Court in expounding the Constitution. Next year marks the bicentennial of the Constitution, and its profound political wisdom that has enabled our Nation to grow and prosper. Despite some initial flaws, the original Constitution provided a mechanism to alter its mandates consistent with the norm of self-government: namely, by constitutional amendment. The Bill of Rights, the Civil War Amendments, the Amendments prohibiting discrimination in the franchise based on gender or age all testify to the capacity of the people to change the Constitution to accord with perceived contemporary needs. The United States Supreme Court [in other words] was not envisioned by our Founding Fathers as empowered to effectuate changes in the policies of the Constitution through creative interpretation. That was a major reason why Alexander Hamilton characterized the federal judiciary as the "least dangerous branch" of government.

If the electorate is not to lose control over its destiny, it must be alert to the interpretive doctrines employed by Justices of the Supreme Court in addressing constitutional questions. As Alexis de Tocqueville presciently observed,

"[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one." Thus, the contemporary Supreme Court is routinely asked to decide questions concerning abortion, Church-State relations, reapportionment, libel of public officials, affirmative action, and discrimination on the basis of gender or handicap with enormous consequences for national public policy. If Justices on the Supreme Court are not constrained by the intent of our constitutional architects in deciding cases involving these issues, then they may transform our Constitution without popular approval, as is required in the amendment process.

James Madison, the father of the Constitution, lectured that if "the sense in which the Constitution was accepted and ratified by the Nation...be not the guide in expounding it, there can be no security...for a faithful exercise of its powers." And venerated Thomas Jefferson warned that "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction..." Experience testifies to the wisdom of Madison and Jefferson. When original intent has been rejected by the Supreme Court as the foundation for constitutional interpretation, the Nation has suffered and our ideals of self-government have been mocked. One thinks, for example, of Supreme Court decisions denouncing child labor laws.

Justice Rehnquist deserves applause for his devotion to our constitutional aspirations and deep understanding of the judiciary's constitutional role. His fourteen years on the Supreme Court glitter with both erudition and general attachment to the intent of our Founding Fathers. At times, Justice Rehnquist has spoken in lonely dissent. But Justice Harlan was the sole dissenter from the odious separate-but-equal doctrine embraced in Plessy v. Ferguson. And Chief Justice Stone was the sole objector to the decision upholding a compulsory flag salute for Jehovah's Witnesses attending public schools in Minersville School District v. Gobitis. Both the Harlan and Stone dissents later became the law of the land when a majority of the Supreme Court accepted their views.

Justice Rehnquist, we believe, like the esteemed Judge Learned Hand, rejects the idea that judges should play the role of Platonic Guardians in governing the country. His judicial record is spotless. United Families of America urges the Senate to confirm Associate Justice William Rehnquist as Chief Justice of the United States.