STATEMENT OF GARY ORFIELD

Mr. ORFIELD. Thank you very much, Senator.

I have a statement for the record.

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

Mr. ORFIELD. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The CHAIRMAN. Without objection, so ordered.

Thank you very much.

[Nebraska Law Review article and prepared statement follows:]