swear our congressional witnesses, and, certainly, a distinguished Member of the House, it is nice to welcome him as a colleague, and he chairs a committee himself over in the House. I am happy to see him out so bright and early with the other witnesses this morning.

Senator HEFLIN. How about me? I am here, too. I am up bright and early this morning; did not get to bed.

Senator METZENBAUM. My distinguished colleague on the left over here, and, quite often on my right, is always bright and early, no matter what time of the day.

Senator HEFLIN. I think the chairman should be commended, too.

The CHAIRMAN. The Senator from Alabama.

Senator HEFLIN. I think the Chair—I thought I could get your attention when I started talking about you. I said the chairman is to be commended for being here, because the Senate did not get out of session, I believe, until 1:30 last night, and so I think we all do our duty.

The CHAIRMAN. I got 4 hours sleep and did not get any lunch yesterday, and did not get any dinner last night until 1:30.

Senator METZENBAUM. Yes, but the young chairman has more strength and vigor than anybody in the Senate, so that is understandable.

The CHAIRMAN. I do not get tired. All right.

Now we are going to give 3 minutes apiece, that is all we can give, and then have questions, and we hope the statements can be brief and concise, so you can get in all you can in 3 minutes.

But we will put the rest in the record if you have any more, if you have a complete statement, and we hope the questions will not be duplicative, too, because there is no use to go over the same road.

The last few days, some of the members who are not here, they went over the same matter over and over again, and we will try to avoid that all we can this morning.

Now Representative Weiss, we are glad to have you with us and you may proceed.

## TESTIMONY OF A PANEL CONSISTING OF REPRESENTATIVE TED WEISS, PRESIDENT OF AMERICANS FOR DEMOCRATIC ACTION, HOUSE OF REPRESENTATIVES, ELEANOR SMEAL, NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, DC, AND ALTHEA SIMMONS, NAACP, WASHINGTON, DC

Mr. WEISS. Thank you very much, Mr. Chairman. I want to express my appreciation to Mr. Metzenbaum for his kind words.

I have nothing but admiration for all of you, for your doggedness and perseverance in these hearings. But I must add that I do not understand why you have imposed this rigorous schedule of confirmation hearings on yourselves, on Justice Rehnquist, and on the American people.

I have heard many questions about why there is this pell-mell rush to complete in 2 or 3 days such an important matter, a matter affecting the Nation for perhaps decades and decades to come.

Mr. Chairman, members of the committee, I am testifying today both as a Member of Congress, and as president of Americans for Democratic Action.

Although ADA has sometimes had reservations about Supreme Court nominees, rarely have we opposed one. In fact the only nominations we have opposed, besides the nomination of William Rehnquist in 1971, were the nominations of Clement Haynsworth and G. Harold Carswell, nominations which the Senate itself rejected.

But we have found Justice Rehnquist's record so hostile to the rights of minority groups, so unconcerned about the abridgement of constitutional liberties protected under the Bill of Rights, and so polarizing and excessive in its doctrine, that we are compelled to oppose his elevation to the Nation's most important unelected office.

Mr. Chairman, we are convinced, after scrutinizing Justice Rehnquist's record on a broad range of issues, that his positions, as Chief Justice, will further divide this country between the privileged and the poor, between black and Hispanic and white, between men and women, between homosexual and heterosexual, between the majority and the minorities.

We feel that the role of Chief Justice must be filled by someone who will bring the country together, not polarize and embitter it.

We believe that it would be a calamitous mistake for the Senate to confirm as Chief Justice a man whose fundamental views are inimical to the Bill of Rights.

Mr. Chairman, together with the American people, I have had occasion, with the time that I could take away from my other duties, to watch as much of these hearings as I possibly could. And as a former prosecutor, I would characterize him as a "slippery witness." You could hardly recognize him as the person who has held the views that he has enunciated over the years, from the way in which he responded to questions.

I have had occasion to reread some of the testimony given in 1971 by the late distinguished civil rights leader Clarence Mitchell, and Mr. Joseph Rauh, and at that time, they pointed out that Mr. Justice Rehnquist, in 1964, opposed an ordinance allowing public accommodation access to all citizens.

He is the only one who testified in Phoenix, AZ, against that ordinance. He appeared, and excoriated members of the community who demonstrated for civil rights purposes in Phoenix, AZ.

He opposed the elimination of de facto segregation in the high schools of Phoenix, AZ. His voting rights challenges, which you will hear more about today, were established beyond any question of doubt.

All of these actions fit into a piece with the decisions that he has rendered as a Supreme Court Justice since then.

And it also fits in line with the revelations, which I found shocking and offensive, that he had participated in the purchase and sale of homes with restrictive covenants. For a member of the Department of Justice, for a U.S. Supreme Court Justice, to be so insensitive as to have that kind of restrictive clause in a sale of deed is just incomprehensible. I have spoken to any number of lawyers, who agree with me, that his testimony about his lack of knowledge of the restrictive covenants is just incredible.

And as one who has done some real estate work in the course of a prior career, I find it unbelieveable that his lawyers would not

have brought to his attention, as a member of the Supreme Court, the presence of an offensive restrictive clause in his property deed.

So, Mr. Chairman, on the basis of his record, on the basis of his life-time conduct, on the basis of predictability as to what kind of Chief Justice he would be, the ADA urges the Senate to reject Justice Rehnquist's nomination for the position of Chief Justice of the Supreme Court.

[The statement follows:]

TESTIMONY OF CONGRESSMAN TED WEISS
PRESIDENT OF AMERICANS FOR DEMOCRATIC ACTION
ON THE NOMINATION OF WILLIAM REHNQUIST FOR CHIEF JUSTICE
JULY 30, 1986

Mr. Chairman, members of the Committee, I appreciate this opportunity to testify on the nomination of Justice William Rehnquist for Chief Justice of the Supreme Court. I speak today both as a member of Congress from the 17th district of New York, and as President of Americans for Democratic Action.

The ADA believes that the role of Chief Justice should be filled by a person who, whether liberal or conservative, has demonstrated a broad concern for protecting the constitutional rights of all citizens, including minority groups and those who hold minority opinions; and someone whose views on judicial matters are not divisive or ideologically extreme.

Although ADA has sometimes had reservations about Supreme Court nominees, rarely have we opposed one. In fact, the only nominations we opposed, other than William Rehnquist's in 1971, were those of Clement Haynsworth and G. Harrold Carswell, both of which were rejected by the Senate.

But we have found Justice Rehnquist so hostile to the rights of minority groups, so unconcerned about the abridgement of constitutional liberties protected under the Bill of Rights, and so polarizing and excessive in his doctrine, that we are compelled to oppose his elevation to the nation's most important unelected office.

The ADA came before this Committee in 1971 to express its concern about then-Assistant Attorney General Rehnquist's long standing antagonism towards the rights of black Americans to public accomodations, freedom of expression, education and voting. Today, after reviewing his 14 year record as an associate justice, we find our most troubling doubts about Justice Rehnquist have been confirmed. If anything, his antipathy towards civil liberties and minority groups has found dangerous new outlets.

Let me emphasize that we do not oppose Justice Rehnquist as a conservative: we have not opposed nominees who believe that in judicial matters, it is best to move conservatively and with special deference to precedent. Rather, we oppose Justice Rehnquist because

his strident views are so extreme that they have left the Court's conservative voting bloc far behind.

His 47 lone dissents during his tenure on the Court illustrate the radical differences between his views and the views of his eight colleagues. For example, Justice Rehnquist was the sole dissenter in the Bob Jones University case, arguing that even though the university abided by an explicit code of racial discrimination, it should still qualify as a charitable organization, and hence receive federal tax benefits. Justice Rehnquist was impervious to the reasoning of his eight colleagues that status as a federally-recognized charitable organization was inconsistent with racial discrimination.

Another example of his adversarial views about minority groups is found in his dissent from the Court's decision to deny certiorari in Ratchford v. Gay Lib. By deciding not to hear the case, the Supreme Court let stand a lower court ruling that the University of Missouri could not deny an organization of gay men official recognition and access to campus facilities, on the basis of their homosexuality.

Justice Rehnquist's dissent was shocking for its vicious characterization of gay lifestyles and its casual dismissal of the First Amendment rights of the plaintiffs. After first depicting gay people as "akin to...those suffering from measles," Justice Rehnquist went on to argue that the group of gay students is not entitled to their First Amendment rights to peacefully assemble and hold public meetings, because he thought this might eventually lead to instances of sodomy, which was proscribed by Missouri state law.

In these and many other cases, Justice Rehnquist established himself on the fringe of jurisprudence, resolutely opposed to those seeking equal protection under the law. In Duren v. Missouri, he was the lone dissenter from a decision that a state may not automatically exempt women from jury duty, since it results in unfair trials for women; in Frontiero v. Richardson, he was the only dissenter from the Court's ruling that unreasonable discrimination on the basis of sex, in this instance for spousal benefits, is a violation of the Constitution; in Cruz v. Beto, he issued the sole

dissent from the Court's conclusion that a state may not deny a prisoner reasonable opportunities to pursue his faith; in Richmond Newspapers v. Virginia, he was the lone dissenter from a decision that the press and the public have a right of access to criminal trials; and in Hathorn v. Lovorn, he issued the sole dissent from the Court's ruling that state courts are bound to enforce the Voting Rights Act.

These are but a few of many cases in which Justice Rehnquist displayed a belligerence towards civil liberties and equal protection that we feel must disqualify him for the position of Chief Justice.

I would like to make two final points about Justice Rehnquist. First, a close reading of his record on the Court shows that he is not a judicial conservative, as he likes to portray himself. He is rather, a judicial activist with an extreme right-wing agenda. He shows little inclination to move conservatively when an ideological issue is at stake. In fact, he seems ready to reverse much of the progress our nation has made over the last 25 years in the areas of equal protection, voting rights, and civil liberties.

Second, Justice Rehnquist is often said to apply a "majoritarian" analysis to his decisions, deferring whenever possible to the judgement of legislative bodies on contentious constitutional issues. I find this deference towards "elected bodies" distressing and anomalous, in part, because of Justice Rehnquist's 30 year record of hostility to voting rights.

But the more important objection is that this approach ignores the fundamental reason we have a Constitution, a Bill of Rights and a Supreme Court in the first place: to protect the rights of the minority from the excesses of a majority or of the government. A system of "justice" that defers to what is politically popular, rather than constitutionally justified, betrays both the Bill of Rights and the separation of powers.

As an organization dedicated to equal rights for all, the ADA is

alarmed about the implications of having as Chief Justice a man who believes that the Bill of Rights does not extend to groups that are unpopular, or have no political clout.

Mr. Chairman, Americans for Democratic Action has scrutinized Justice Rehnquist's record on issues of equal protection, civil liberties, and voting rights. We believe his positions will further divide this country between the privileged and the poor, between black and Hispanic and white, between men and women, between homosexual and heterosexual, between the majority and the minorities. We feel that the role of Chief Justice must be filled by someone who will bring the country together, not polarize and embitter it. We believe it would be a calamitous mistake -- a mistake that time would not soon forgive -- to confirm as Chief Justice a man whose fundamental views are so inimical to the Bill of Rights.

For these reasons, Mr. Chairman, the ADA urges the Senate to reject Justice Rehnquist's nomination for the position of Chief Justice of the Supreme Court.

The CHAIRMAN. Thank you, Representative Weiss.
Miss Eleanor Smeal, glad to have you.

## STATEMENT OF ELEANOR SMEAL

Ms. SMEAL. Thank you. I am Eleanor Smeal and I am the president of the National Organization for Women, and I have come before the committee today to oppose the appointment of Rehnquist as the Chief Justice of the United States.

I join with the Congressman's remarks, that this hurried procedure does not make it easy for us to present our case. It is almost impossible to state, in 3 minutes, why we object so strenuously.

We have not done this much before in the past. We have in fact chosen our times in objecting to appointments very carefully. This appointment, however, we must stand and object to, for he has taken in the past the most extreme positions on the Court, in imposing or limiting the rights of women, and of minority members of our society, and minority members on the basis of race, on the basis of sexual preference, on the basis of religion—a whole host of areas. NOW in fact finds his views on sex discrimination, and the rights of women, more than reactionary. We find them frightening.

We are submitting today detailed testimony on his viewpoints and on his records in the area of sex discrimination. It is comprehensive. It goes case after case after case.

Yesterday, when he was questioned very friendly by Senator Hatch, the impression was given that this is a man who believes in women's rights. We stay—we are here today to tell you, this is not the record of a person who is supporting women's rights, or minority rights. The record is replete with a trend, with a pattern, with a belief system that allows almost any form of discrimination to go forth.

And so I want to summarize—and I take my role here today as summarizing his record on sex discrimination—but I find his record on race discrimination, his record on civil liberties, and individual rights, in general, as reprehensible. I am just going to confine my remarks to the area of sex discrimination because of my role as president of the National Organization for Women.

Essentially, women have no equal rights amendment before the Constitution, so we are totally dependent upon the interpretation of the due process and the equal protection clauses of the 14th amendment, and on statutes.

Under the due process and equal protection laws, he essentially allows any standard. He calls it a rational standard of review, which says if you come up with any excuse, any reason for sex discrimination, it is OK, he will allow the standard.

Under the statutes, he has, in my opinion, flouted the will of Congress repeatedly, and narrowly interpreted those statutes that would guarantee a prohibition of sex discrimination, and in fact has made it so that you would interpret him that he has gutted those statutes. In the area of right to privacy, he repeatedly says there is none; he cannot read it into the Constitution.

He says he is for judicial restraint. I think it is judicial activism, when he, in fact, goes against the will of the majority of our coun-

try to eliminate the will and the desire to eliminate both sex discrimination and race discrimination.

This is an appointment that will go into the 21st century. Women and members of our society who are prejudiced—who, the Nation's will has been frequently one of discrimination against them deserve better. We deserve a chance in the Supreme Court.

I do not believe that Justice Rehnquist's record will be one that will extend women's rights or minority rights. I believe it will limit them, and severely limit them.

I can tell you that those of us dedicated to the fight for individual rights will look upon the votes of individual Senators on this as whether or not they are indeed for minority rights or women's rights.

A vote to confirm, in our belief, is a vote against women's rights, in the most fundamental sense.

[The statement follows:]

**National Organization for Women, Inc.**

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Testimony of

Eleanor Cutri Smeal

President, National Organization for Women

Before the Senate Committee on the Judiciary

on the Nomination of William Rehnquist for Chief Justice

July 29, 1986

I am Eleanor Smeal, president of the National Organization for Women, and I come before the Committee today on behalf of the largest feminist organization in the United States to oppose the appointment of William H. Rehnquist as Chief Justice of the U.S. Supreme Court.

NOW's opposition to the elevation of Justice Rehnquist to Chief Justice stems from the simple, basic reason that he has taken the most extreme position on the Court in opposing and/or limiting the rights of women and of minority members of our society.

NOW, in fact, finds his views on sex discrimination and the rights of women more than reactionary. We find them frightening.

In taking these positions, Justice Rehnquist frequently has flouted the will of Congress and the previous holdings of the Supreme Court itself. If his views on the legal status of women were to become the dominant view of the Court, there is no doubt that a half century of hard-won gains for women would be undone

by the Court, and the Congress would be faced with the task of enacting and re-enacting laws to prevent sex discrimination in our nation.

I want to state for the record, up front, that NOW's chief concerns have to do with Justice Rehnquist's judicial beliefs and ideology which we believe are out of step with the needs and expectations of Americans in the 1980s and that, therefore, make him unsuitable to lead the third branch of our government in the decades ahead.

And this is a crucial point for us. We are not talking about a limited term or terms of office. We are talking about an awareness that what Justice Rehnquist does if he is made Chief Justice will affect how our nation enters the 21st Century -- whether we go into the new century as a nation united or as a house divided. Whether we enter the 21st Century extending to women and minorities every opportunity and right of full citizenship or we enter dragging our heels in solving these 19th Century problems.

The members of the Committee, as well as each member of th United States Senate, must confront this reality before casting a vote for or against the apppointment of Justice Rehnquist to the position of Chief Justice.

It is not enough to judge him competent to read and to understand the law.

It is not enough to investigate his background and to

declare him free of personal scandal.

And it certainly is not enough to dismiss the implications of his appointment by saying the President of United States has a right to put whomever he chooses in the position of Chief Justice.

The President has no such right, and never has. Not in 1986 and not in 1787 when the framers wrote the U.S. Constitution.

I ask this Committee to remember that the framers of the Constitution first considered giving the U.S. Senate the sole power to appoint justices of the Supreme Court and, only after additonal debate and discussion, did they decide to include the President in that process.

In making this concession, the framers envisioned the Senate to act as a full and equal partner in making the final decision as to whom would sit on the court and whom would lead it.

The reasons, we believe, are obvious.

Appointments to the U.S. Supreme Court are not political appointments. They are not cabinet positions answerable to the political philosophy of the man or woman who happens to occupy the Oval Office at any given time.

These are appointments that, barring death or total debilitation, survive elections to the Oval Office for literally decades in our history.

While it is unquestionably true that a President can have an awesome impact on the direction of the nation, that impact is limited to eight years.

The Chief Justice of the Supreme Court, on the other hand, can wield an awesome impact on the direction of the nation until the day he or she dies.

This is why the Senate has a duty to be a full and equal partner in the selection of the Chief Justice. This is why the Senate has a duty to look beyond legal competence and the possiblity of personal scandal.

You should know that Justice Rehnquist shares NOW's belief that the Senate should look beyond legal qualifications and personal considerations.

Writing for the Harvard Law Record of October 8, 1959, William H. Rehnquist had this to say concerning the appointment of Mr. Justice Whittaker to the Supreme Court and the lack of inquiry by the Senate into Justice Whittaker's political beliefs:

"The Supreme Court, in interpreting the Constitution, is the highest authority in the land, Nor is the law of the Constitution just 'there,' waiting to be appl'ed in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Consitution which have been the most productive of judicial law-making -- the 'due process of law' and the 'equal protection of the law' clauses -- are about the vaguest and most general of any in the instrument. The Court, in Brown v. Board of Education, held in effect that the framers of the Fourteenth

Amendment left it to the Court to decide what 'due process' and 'equal protection' meant. Whether or not the framers thought this, it is sufficient for this discussion that the present court thinks the framers thought it.

"Given the state of things in March, 1957, what could have been more important in the Senate than Mr. Justice Whittaker's views on equal protection and due process? It is high time that those critical of the Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the Constitution has been what the judges say it is. If greater judicial restraint is desired, or a different interpretation of the phrases 'due process' or 'equal protection of the laws,' then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to inquire of men on their way to the Supreme Court something of their views on these questions."

Mr. Chairperson, members of the committee, we agree with Justice Rehnquist that it is crucial for the Senate to inquire into the views of men, and we of course would add women, in regard to due process and equal protection of the laws. We would include the need to inquire into the views of Supreme Court nominees in regard to all areas of the law vis-a-vis sex discrimination and other kinds of discrimination as well.

We have waged a long and difficult struggle in our nation to overcome the effects of past legalized discrimination on enormous

numbers of our citizens. The struggle is not yet over.

But we have made great strides, and we have paid a great price for these gains. We fought the only war ever fought on American soil to shed ourselves of the evil of human slavery and to settle the question of state sovereignty.

We have experienced great social upheavals and great social and political movements to move forward the claims of full equality under the law for the overwhelming majority of our citizens -- claims that over the past half century have taken firm root in the consciousness and the law of America.

Now, in 1986, as we struggle to continue that progress into the next century, it is not time to put someone in the critical role of Chief Justice of the Supreme Court whose vision is of another century, a time past when women and blacks were regarded as little more than chattel and who were routinely treated as persons whose well-being was dependent on the benevolence of white men.

Mr. Chairperson, members of the Committee, the National Organization for Women believes that our nation has come to terms with our past, that we as a nation have made a commitment not to revive nor re-live the injustices of the one hundred seventy-five years to which Justice Rehnquist referred in the Harvard Law Record in 1959.

We know the American people have no desire to re-live the past, or to re-learn the lessons of the darkest chapters in our

history as a nation. In fact, just this past week an opinion poll was released in which 63 percent of Americans said judges should be committed to equal rights for women and minorities.

I don't think I need to point out to this committee that if that opinion poll were translated into electoral terms, the result would be considered a landslide in favor of equal rights for women and minorities.

At the same time, the National Organization for Women submits that Justice Rehnquist is not committed to equal rights for women and minorities and, in fact, appears dedicated to thwarting equal rights at every opportunity.

I. Constitutional Law: Equal Protection and Due Process

In the crucial constitutional areas of due process and equal protection under the law, which are guaranteed to us by the 14th Amendment to the U.S. Constitution, Justice Rehnquist has consistently opposed the review of sex-based classifications with any measurable level of scrutiny. He would uphold sex-discrimination as long as it was "rational." In real terms, this means that he would uphold sex discrimination whenever and wherever a legislator or other government official could come up with a traditional generalization about "all women." He would support sex discrimination on the grounds of administrative convenience alone. Would the U.S. Senate confirm a Chief Justice of the Supreme Court who supported racial or ethnic classifications on the grounds of such thinly disguised prejudice?



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A review of the actual words used by Justice Rehnquist is essential to see the extent of his endorsement of sex discrimination. In one of his earliest cases on the Supreme Court, Frontiero v. Richardson, 411 U.S. 677 (1973), which prohibited sex discrimination in the granting of family benefits to military personnel, Justice Rehnquist dissented. He wanted to permit the military to allow male soldiers to claim wives as dependents automatically, but to deny such benefits to female soldiers. His reasoning was simple: administrative convenience justifies sex discrimination.

In Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), a case that prohibited mandatory leave for pregnant teachers, Justice Rehnquist again dissented. His explanation was that legislators must be permitted to "draw a general line ... short of the delivery room" and he did not wish to interfere with their judgment. His opinion was that a pregnant woman losing her job had no basis for complaint.

In Craig v. Boren, 429 U.S. 190 (1976), a landmark case which first articulated the intermediate level of scrutiny for sex discrimination (an uncertain and rather flimsy level of protection on which women must rely in the absence of the Equal Rights Amendment to the U.S. Constitution), Justice Rehnquist said, in dissent, that sex discrimination should be reviewed with a rational basis test. This case involved a state statute which demanded a higher age requirement for men to purchase beer than

for women to purchase it. The Justice made the astonishing claim that, since the case was filed by a man, there was no need for special attention to the sex-based classification. His reasoning was that historically men have not been discriminated against, hence there is no need to review the classification. His glib words ignored the reality with which we are all too familiar: any sex classification ultimately stereotypes, hurts and discriminates against women.

In Califano v. Goldfarb, 430 U.S. 199 (1977), a case that equalized the survivors' benefits of widows and widowers, Justice Rehnquist also dissented, again on the grounds of administrative convenience. Three years later, he dissented in Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980), a case that equalized workers' compensation death benefits, and expressed his unwillingness to follow Goldfarb.

Thus, we are forced to conclude that when it comes to women's rights, Justice Rehnquist is clearly willing to ignore the usual deference afforded judicial precedent.

In Michael M. v. Superior Court of Sonoma County, 450 U.S. 437 (1981), Justice Rehnquist, writing for the majority, once again reaffirmed the principle of sex discrimination, by finding that men and women can be treated differently under the law because women can become pregnant. This case represents a particularly dangerous kind of logic in light of Gilbert v. General Electric Co. On the one hand, Justice Rehnquist does not

believe that pregnancy discrimination is discrimination on the basis of sex. On the other hand, he permits classifications on the basis of sex because women can and do become pregnant. His logic places women in an intolerable Catch 22: on the one hand, they are victims of legal discrimination because of pregnancy, and, on the other hand, pregnancy discrimination is not a basis for legal relief.

We are aware that Justice Rehnquist has been praised for his skill in legal craftsmanship and for his ability to state his conclusions with elegance. We believe, on the other hand, that his verbal skills merely serve to obfuscate his inconsistent reasoning. For example, in Rostker v. Goldberg, 453 U.S. 57 (1981), Justice Rehnquist justified one form of sex discrimination by reliance on neither logic nor law. Instead, he permitted sex discrimination in one aspect of government simply because sex discrimination already existed elsewhere.

In Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), a case that held invalid a state policy excluding men from nursing school, Justice Rehnquist again dissented. He maintained that the "sexual segregation of students" has a long tradition and many benefits, and that the equal protection standard generally applicable to sex discrimination is inappropriate to the review of such schools. He conveniently ignored the fact that separate schools for women were established not for the sake of the "diversity" in education that he praised, but, instead, because

women were barred from the institutions of higher learning made available to men. In praising Wellesley and Barnard as parallel options to Harvard and Yale, he failed to mention that the women's colleges were established to provide women with an opportunity not otherwise available due to the prevailing norms of sex discrimination. Justice Rehnquist further stated that sex segregation in education was not as invidious as racial segregation, ignoring the harmful stereotypes perpetuated by sex segregation in education.

Even when recognizing that a woman's right to equal protection has been violated, Justice Rehnquist would deny them a remedy. In Kirchberg v. Feenstra, 450 U.S. 455 (1981), a case that invalidated a law permitting a husband to dispose of joint property without the wife's consent, Justice Rehnquist wanted to apply the Court's holding only prospectively.

II. Employment Discrimination

In the area of employment discrimination, Justice Rehnquist has argued for the gutting of federal laws passed by Congress to remedy the pervasive discrimination suffered by women. The two principal statutes involved are the Equal Pay Act and Title VII of the Civil Rights Act of 1964.

I will first address a particularly harmful aspect of employment law, discrimination on the basis of pregnancy, and then discuss other important employment discrimination cases where Justice Rehnquist has shown himself to be the enemy of equal

employment opportunity for women.

In spite of the clear intent of Congress to eradicate sex discrimination in employment, Justice Rehnquist has consistently striven to justify such discrimination wherever possible.

A. Pregnancy Discrimination

Justice Rehnquist's principal approach to pregnancy has been to deny that there is any relationship between discrimination on the basis of pregnancy and discrimination on the basis of sex. He views the world as consisting of three groups of people: men, women, and "pregnant persons." He conveniently ignores the fact that pregnant persons are always women. In so doing, he has repeatedly ignored Congressional intent.

In Gilbert v. General Electric Co., 429 U.S. 125 (1976), Justice Rehnquist, writing for the majority, held that pregnancy-related discrimination is not sex discrimination covered by Title VII of the 1964 civil Rights Act. He reasoned that, although only women became pregnant, the exclusion of pregnancy from a benefits package did not discriminate against women. This cruel distortion of the obvious realities of human life required Congress to pass the Pregnancy Discrimination Amendment to Title VII, specifying that, in fact, discrimination on the basis of pregnancy is discrimination on the basis of sex.

We submit that Justice Rehnquist's illogical reasoning process, if applied to other laws, will make it necessary for Congress to continually pass new laws in order to remedy obvious

distortions of Congressional intent.

Even acknowledging that certain forms of pregnancy-related discrimination may affect women and not men, Justice Rehnquist has limited the scope of recovery and remedy.

In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), (a case that arose before the Pregnancy Discrimination Act), an employee who had been required to take a formal leave of absence during her pregnancy did not receive sick pay and lost all accumulated job seniority. Justice Rehnquist, writing for the majority, found the loss of seniority rights to be discriminatory, because the employer "has imposed on women a substantial burden that men need not suffer."

He distinguished this case from Gilbert, supra, on the grounds that denial of pregnancy health benefits was simply a failure to pay greater economic benefits to women than to men. When it came to the denial of sick pay, Justice Rehnquist found it to be an "extra benefit," not available to men, and therfore not an entitlement of women employees.

He remanded Nashville Gas Co. v. Satty with narrow instructions rendering recovery less likely.

We must also point out that when confronted with blatant discrimination in violation of the Pregnancy Discrimination Amendment to Title VII, as in Newport News Shipbuilding v. EEOC, 462 U.S. 669 (1983), Justice Rehnquist strained to avoid the remedial scope of the law and the clear intent of Congress.

In that case, an employer provided insurance coverage for the pregnancy-related conditions of female employees, but did not fully provide such coverage to the spouses of male employees. The majority of the Supreme Court found that this violated the law since the exclusion of pregnancy from a health plan was gender-based discrimination on its face.

Justice Rehnquist argued to the contrary, claiming that the law did not apply to all employment-related pregnancy issues, but only to pregnant female employees. Thus, even when faced with a law passed to overcome his resistance to the obvious fact that pregnancy-related discrimination is sex discrimination, Justice Rehnquist twists logic in an effort to render the law less helpful to the victims of discrimination.

B. Justifications for Employment Discrimination

In case after case, Justice Rehnquist has tried to avoid the Congressional mandate to eradicate sex discrimination. He has consistently justified various forms of sex discrimination under the guise of "strict construction" of the laws. We believe, in fact, he has tried to rewrite laws.

In Corning Glass Works v. Brennan, 417 U.S. 188 (1974), the Court relied on the Equal Pay Act to find that Corning had discriminated against women by failing to cure its sex-based job assignment and wage system. Justice Rehnquist dissented, on the spurious grounds that the company's dual-salary system, which prohibited women from holding the more lucrative night-time jobs,

was based "on a factor other than sex."

In Dothard v. Rawlinson, 433 U.S. 321 (1977), a Title VII case involving height and weight requirements for prison guards as well as an outright prohibition against female guards in "contact positions," Justice Rehnquist argued for upholding the sex-discriminatory height and weight requirements. He observed that a theory not advanced by the defendants could have been used to justify the discrimination. His theory was that a requirement that an employee have a sufficient "appearance of strength," rather than actual strength, could have been used to support the restrictions. Thus, he would support an employer's stereotypic preference for a culturally accepted norm of strength -- that is, a tall man.

In Washington v. Gunther, 452 U.S. 161 (1981), the Supreme Court held that Title VII provides relief for sex-based wage discrimination even though the male and female jobs involved are not identical. The Court permitted the claim of female guards who complained of intentional wage discrimination to go forward, even though the male job to which they compared their wages was not entirely identical to their jobs.

Justice Rehnquist, relying on the more narrow language of the Equal Pay Act, argued that Title VII should be limited to a review of differences, if any, in wages paid to persons holding identical jobs. His approach would preclude recovery for millions of women working in the sex-segregated workforce.

According to Rehnquist, women who perform work comparable to (as oppose to equal to) that of higher paid males have no cause of action, even if the wage differential is intentionally sex-based. Rehnquist therefore would hold that Title VII does not even prohibit all intentional sex-based employment discrimination.

The Committee should know that Justice Rehnquist's approach to wage discrimination would perpetuate lower pay for women once they retire. In Los Angeles v. Manhart, 435 U.S. 702 (1978), a Title VII case that prohibited the use of gender-based actuarial tables as a basis for requiring greater pension contributions from women employees, Justice Rehnquist joined Chief Justice Burger in arguing for the validity of such discrimination.

We would also ask the Committee to look closely at Justice Rehnquist's clear animosity toward the concept of affirmative action as a remedy for discrimination not only in employment, but in education and other areas as well.

In two of the three major affirmative action decisions handed down by the Court in the term just ended, Justice Rehnquist dissented in those cases in which the Court reaffirmed the legality of affirmative action as a remedy for past discrimination. In the cases of Local No. 93, International Association of Firefighters, AFL-CIO v. City of Cleveland and Local 28 of the Sheet Metal Workers International Association v. Equal Employment Opportunity Commission, the majority flatly refused to uphold the claim that affirmative action is reverse

discrimination against whites.

In the third affirmative action case in which Justice Rehnquist was in the majority, the Court struck down a race conscious lay-off plan for teachers in Wygant v. Jackson Board of Education.

Finally, in one of the few sex discrimination cases in which Justice Rehnquist decided for women, Meritor Savings Bank v. Vinson, Justice Rehnquist demonstrated that, even in cases of blatant discrimination, he will misinterpret Congressional intent so as to limit the remedial strength of the civil rights laws. In this case, the issue was whether or not sexual harassment of an employee constitutes sex discrimination. The Supreme Court concluded the obvious: if an employee is sexually harassed at her place of work, she is suffering from sex discrimination that is prohibited by Title VII. However, Justice Rehnquist, departing from the long-standing policy of the EEOC, concluded that the employer is not necessarily liable for sexual harassment and that the employee must prove the employer's liability in Court. No such limitation on the remedial purpose of Title VII has been applied in other types of prohibited discrimination. In other cases, the employer is automatically liable for the discrimination. However, when it comes to one of the most pervasive, insidious and harmful form of discrimination suffered by women, extra procedural hurdles are viewed as appropriate by Justice Rehnquist.

III. Reproductive Rights

In the area of reproductive rights, we cannot emphasize enough the recognition that, if given the opportunity, Justice Rehnquist will lead the Court to a reversal of the Roe v. Wade decision which made abortion safe and legal for women in our nation.

Justice Rehnquist clearly does not recognize abortion as a fundamental right of women, and his entire history on the Supreme Court supports this contention.

He was one of the two dissenters in the original Roe v. Wade and Doe v. Bolton cases which were decided in 1973, and since that time he has consistently voted with the minority in cases involving the right of abortion:

Belotti v. Baird, 1974; Planned Parenthood of Missouri v. Danforth, 1976; Colautti v. Franklin, 1979; Akron Center for Reproductive Health, Inc. v. City of Akron,1983; Planned Parenthood Association of Kansas City v. Ashcroft, 1983; Simopoulos v. Virginia, 1983, Thornburgh v. American College of Obstetricians and Gynecologists, 1986.

His dissents in the early Roe and Doe cases acknowledged that the right to decide whether or not to have an abortion is a liberty interest protected by the Fourteenth Amendment, but one that can be abridged if the restriction bears a "rational" relation to a valid state objective. In other words, Justice Rehnquist believes the state's interest has primacy over the right

of a woman to make a basic, obviously private decision which has a fundamental impact on her life, health and her economic well-being.

In the later cases, Justice Rehnquist consistently signed onto dissents which would have upheld various restrictions on access to abortion, such as: hospitalization, spousal and parental consent, informed consent, 24-hour waiting periods and requirements that physicians take care to preserve fetal health and life.

But, in the Thornburgh case, he was one of only two justices to argue that Roe v. Wade should actually be overturned, in spite of the fact that the state defending the abortion statute at issue did not request reconsideration of the Roe decision.

We would remind this Committee and all members of the U.S. Senate that prior to 1973 and the Roe v. Wade decision, illegal abortion was a serious public health hazard in our nation.

It was estimated by the President's Commission on Law Enforcement and Administration of Justice in 1967 that an estimated one million illegal abortions were performed each year in this country.

While estimates of annual deaths caused by illegal abortions were difficult to obtain due to the clandestine nature of such abortions, such estimates ran as high as 5,000 to 10,000 deaths per year.

By contrast, where legal abortions were performed by medical

practitioners during this same period, there were only three deaths per 100,000 abortions (which would translate into 10 per 1 million). At the same time, it must be pointed out that the maternal mortality rate during this period was an average of 28 deaths per 100,000 live births.

The Roe v. Wade decision legalizing abortion virtually eliminated the public health hazard caused by illegal abortion. In fact, the Centers for Disease Control report that the risk of dying from childbirth is 13 times greater than that of abortion.

Furthermore, it has been clear since the Roe v. Wade ruling that a majority of Americans support a woman's right to choose abortion despite beliefs to the contrary espoused by Justice Rehnquist and the man who would make him Chief Justice, President Reagan.

Public opinion polls on this question have consistently supported the right of women to choose abortion for more than a decade. This Committee should know that in the same Peter Hart and Associates poll that showed 63 percent of Americans holding the opinion that judges should be committed to equal rights for women and minorities, 74 percent of those polled said they support the Court's 1973 ruling that legalized abortion -- the highest level of support in history.

For NOW, there is no issue that points out more starkly our belief that Justice Rehnquist is, indeed, out of step with the needs and expectations of Americans in the 1980s, particularly

American women who constitute a majority of the population.

Now, this Committee knows that the Roe v.Wade decision is grounded in the right to privacy which the Supreme Court over time has derived from the concept of liberty guaranteed by the first section of the Fourteenth Amendment. The Court also has found the right to privacy to have roots in the First, Fourth, Fifth and Ninth Amendments, as well as in the penumbras of the Bill of Rights.

What this Committee may not know is that Justice Rehnquist rejects the constitutional concept of the right to privacy which the highest Court of this land has recognized for over half a century.

Justice Rehnquist has written and has stated on many occasions that there is no right to privacy in the U.S. Constitution, because he can't find those specific words written there.

NOW finds this especially threatening, not only for abortion rights, but for the right to practice birth control and to engage in private, consensual sexual acts.

We would submit that Justice Rehnquist's concept of the Constitution is dangerously simplistic and reactionary. He rejects out of hand the notion of implied rights and views the Constitution as a static document that is incapable of being adapted to changing times and social progress.

For Justice Rehnquist, if the Constitution doesn't

specifically and explicitly grant a right to the individual, then the individual is entirely at the mercy of shifting political majorities at all levels of government.

We would ask the Committee to consider two other dissents by Justice Rehnquist which have nothing to do with either abortion or the use of birth control, both of which issues are grounded in the right to privacy.

In 1978, Justice Rehnquist dissented from the Court majority in Zablocki v. Redhail, a case in which a Wisconsin statute was struck down that had required a non-custodial parent with support obligations to minor children to obtain court permission before re-marrying.

He rejected the view that marriage was a "fundamental right" and argued that the Wisconsin statute was a "permissible exercise of the state's power to regulate family life."

In yet another case, Moore v. City of East Cleveland, in which the Court struck down zoning laws which prohibited extended family members from living together, Justice Rehnquist joined a dissenting opinion that said the right of an extended family to share a home does not rise to the level of a fundamental interest entitled to protection under the Constitution.

We ask this Committee if anyone of you really believes the state should have the power to regulate when and if a person gets married, and when and if family members should be allowed to live together?

The National Organization for Women does not believe the citizens of this nation are willing to give up their right to privacy because Justice Rehnquist has decreed that it doesn't exist.

Nor do we believe the people of this nation are willing to turn over to the state the power to interfere with personal decisions on marriage and child bearing.

Finally, NOW does not believe that the people of this nation who continue to suffer societal discrimination because of the illogical barriers of sex, race, color, physical disability or age are willing to give up our hard-won gains because Justice Rehnquist believes the courts are not the appropriate branch of government to protect those rights and liberties.

Historically in our nation, the courts have been the one place where those who suffer from discrimination could turn for protection from oppressive government responding to the popular prejudices of any given time.

Justice Rehnquist has made it clear in both his legal opinions and in his writings for various law journals that he believes the Constitution was written to give the state power over the individual and not to protect the individual from the powers of the state. Furthermore, it is his belief that the Bill of Rights and additional amendments to the Constitution that have been added over time and which speak to individual liberties are to be read and applied literally, without interpretation by the

courts.

Given this notion of a "static" document which is to be applied only to the narrow, specific situation that triggered the passage of any particular amendment, Justice Rehnquist has stated on several occasions that, if given the opportunity, he would limit access to the courts by individuals who believe their rights are being violated by the state.

This belief, in fact, was the ground on which he based his opposition to Brown v. Board of Education in the now-infamous 1953 memo to the late Justice Robert Jackson in which he said, "... it is about time the Court faced the fact that white people in the South don't like colored people."

While NOW's role here today is not to present to the Committee Justice Rehnquist's record of opposition to improving the legal status of racial minorities and other minorities in America, we would be remiss in our duty if we didn't point out our grave concerns about this record.

Since we are confident that others will testify extensively to this record, let us just say for the record that we are aware that Justice Rehnquist defended racial segregation in our nation as a lawyer from 1953 through 1967 -- from the period in which he served as law clerk to Justice Jackson through the period he was in private practice in Phoenix, Arizona.

We would remind the Committee that during this 14-year period, Justice Rehnquist made the following comments in regard to

racial segregation in our nation:

1953: The Supreme Court should not "thwart public opinion except in extreme cases" and segregation in the schools is "not one of those extreme cases which commands intervention."

To the argument that the majority may not deprive a minority of its Constitutional rights, he argued that "in the long run it is the majority who will determine what the Constitutional rights of the minority are."

1964: When opposing a Phoenix ordinance designed to prevent racial discrimination in public accomodations, he defined the issue as "whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all."

1967: When opposing a proposal by the Phoenix Superintendent of Schools for a voluntary exchange of students to reduce school segregation, he argued taht "we are no more dedicated to an integrated society than we are to a segregated society" in America.

There are those, including Justice Rehnquist himself, who have insisted that his attitude on racial segregation has changed since the time he left Phoenix.

We would submit, however, that his lone dissent in Bob Jones University v. The United States, written a scant three years ago, amply demonstrates that for all his rhetoric to the contrary, Justice Rehnquist is more than willing to continue defending

situations in which institutions in this country wish to practice racial segregation.

In yet another area of law dealing with individual rights and liberties, NOW is aware that when Justice Rehnquist served in the U.S. Department of Justice when it was headed by former Attorney General John Mitchell, he assumed the controversial and questionable role of defending the White House's so-called "inherent right" to use wiretaps against those it deemed subversive.

And we ask this Committee to remember that a question of ethics, if not an actual conflict of interest, arises in his involvement in 1972 in Laird v. Tatum in which the Court held, in a 5-4 decision, that the government could spy on peaceful civil rights and civil liberties meetings and that the persons who were subject to the spying could not bring any First Amendment challenges.

Justice Rehnquist cast what was, in effect, the tie-breaking vote even though as head of the Department of Justice's Office of Legal Counsel he had actively defended the litigated surveillance. We do not consider his explanation sufficient that he did not recuse himself from voting on the case out of concern that the court not be faced with a possible even split in the vote.

Mr. Chairperson, members of the Committee, the National Organization for Women is convinced that this Committee could do nothing more destructive of our nations' future than to place an

ideological extremist in the position of Chief Justice of the U.S. Supreme Court.

We reject the notion being pressed in some quarters that the job of Chief Justice is largely symbolic, and that this person is really just one of nine votes on the Court.

This argument just doesn't hold water. The Chief Justice has enormous influence on the Court. He or she arranges the docket, schedules cases, assigns oppinions to be written, and controls the federal court system. In addition, the Chief Justice has extraordinary power to write majority opinions himself or herself, and the Chief Justice has the ability to exert pressure on other Justices which no Associate Justice can match.

At the same time, we reject the notion that the nomination of Justice Rehnquist as Chief Justice is a nod toward judicial restraint.

With Justice Rehnquist's stated belief that the right to privacy doesn't exist under our Constitution, it is not difficult for one to conclude that decades of precedents in this area of the law are at risk with him leading the Court.

With Justice Rehnquist's stated belief that, except for those individual rights and liberties specifically delineated in the Constitution, all other rights and liberties are at the mercy of shifting political majorities, it is not difficult for one to conclude that our national policies committed to the elimination of sex and racial discrimination are at risk with him leading the

Court.

And with Justice Rehnquist's stated beliefs that the Constitution is an inflexible document that doesn't, nor was ever intended to, anticipate the needs of a changing society, it is not difficult for one to conclude that we as a nation face the very real possibility of a re-interpretation of our Constitution with him leading the Court.

NOW would submit that these possibilities couldn't be farther removed from judicial restraint; that they are, in fact, the epitome of judicial activism.

The National Organization for Women petitions this Committee and the body it represents, the U.S. Senate, to reject the nomination of Justice Rehnquist to become Chief Justice of the Supreme Court.

We further petition this Committee and the U.S. Senate to insist that any further nominee presented by the President be a person who is truly dedicated to the pursuit of liberty and justice for all.

Thank you very much.

The CHAIRMAN. Thank you, Miss Smeal.
Miss Althea T.L. Simmons.

## STATEMENT OF ALTHEA T.L. SIMMONS

Ms. SIMMONS. Mr. Chairman, and members of the committee, I am Althea T. L. Simmons, director of the NAACP's Washington Bureau.

I am appearing on behalf of our half million members in 2,100 branches across the country. We appear in opposition to the nomination of Mr. Rehnquist as Chief Justice.

Our opposition today is a reaffirmation of what the NAACP said almost 15 years ago, when this committee had before it his nomination to the Supreme Court.

We said at that time, we did not believe Mr. Rehnquist could mete out to black Americans equal justice under law. Our response was no in 1971 and also in 1986. It is our opinion that Mr. Justice Rehnquist has not changed his position since he was in Arizona. As a matter of fact, he has fine-tuned his opposition to civil rights and racial issues.

From 1961 to 1965, I was field director for NAACP in Arizona, and during 1964, I was our national director of voter registration education get out the vote campaign.

I recall from my files, that complaints came in about what happened in Arizona. On Sunday, I talked with former Senator Clovis Campbell, to see if he could recall what he had stated at that time. Mr. Campbell said to me: "Justice Rehnquist said to me in 1964, 'I am opposed to all civil rights laws.' " I also spoke with Rev. G. Benjamin Brooks, whose statement we put in the record last time. Reverend Brooks reaffirmed what he had said at that time.

I spoke to Mr. Jordan Harris. The same thing occurred. One of the things that we have looked at is a whole line of cases with reference to race, and we have found out that not only has he been in opposition to the Voting Rights Act, and some of its extensions, but we are concerned mostly about the Jackson memorandum.

I guess I would have to say, Mr. Chairman, and members of the committee, any time you mention *Plessy* v. *Ferguson,* red flags go up for black Americans.

We believe, as a matter of fact, that that was a signal point in this Nation's history. We are concerned about how the Justice has echoed legal—the principal of causation, in a manner where he does not find violation of the equal protection clause, in *Milliken* v. *Bradley,* the school desegregation case. Also, in the *Dayton* case. The *Pasadena* case. In employment cases. You could take *Stotts,* the *Firefighters* case in Cleveland.

In cases where they were challenging Federal legislation that provided for minority set-asides, in death penalty cases, and among others, the exact legal jargon relief.

However, the concept of causation is designable to either argue that actual harm was not caused by the alleged wrongful conduct, or, in the alternative, that the conduct was wrongful but the complaining party was not harmed by it. We are concerned, about his opinion in *Batson* v. *Kentucky.*

We are also concerned about how he has attempted to narrow the 14th amendment to the Constitution. Justice Rehnquist strictly reads the language in title VII to forbid any discrimination, even race-conscious affirmative action plans, designed to ensure equal employment opportunity.

In construing title VII, he has scrutinized the facts of a case for specific discriminatory conduct within the meaning of the act as in *Stotts, Sheet Metal Workers* et cetera.

He also looks closely to see if the legislated or judicial remedy narrowly responds to that conduct. Even when he appears to express an opinion in support of discriminatory conduct against a minority protected by Federal legislation he stops short of finding a statutory violation in the facts.

The NAACP has looked at his race cases and we normally do not submit lengthy testimony, however, this time, Mr. Chairman, our testimony is 36 pages, because we went down a whole line of cases to show that he has not changed his position articulated in Arizona, but that he is opposed to civil rights.

And we are concerned about him being on the bench as a leader and a shaper of the Court, because we realize that he will have a most important position there. You will recall, very recently, that Chief Justice Burger reminded us of the 200th birthday of the signing of the Constitution. I think we should recall that another Chief Justice wrote the majority opinion in one of the most infamous cases in history. I speak of the *Dred Scott* decision.

And you will also recall what the Chief Justice held in that decision that the Constitution was not meant for blacks be they free or slave, and that the black man had no rights that a white man was bound to respect. That decision was so out of touch with the mainstream of political thought, even during a period of slavery, that it hastened the war between the States, and stood as a blot on the Court's history.

Much has been said about the brilliance of Mr. Justice Rehnquist, and the fact that he was first in his law school class at a prestigious institution.

We do not refute that. We remind the committee that even though a person may be a genius, if that person is devoid of compassion, it distorts reality and cripples one's objectivity.

We also believe that some attention should be given to judicial philosophy. We think that is important. As a matter of fact, Mr. Justice Rehnquist said himself it was important.

And we would urge this committee, in your consideration of this nominee, to take a look at the nominee's actions in Arizona in the 1960's, look at his decisions, and then see if he is the person who could best bring about the kind of equality in this Nation that all persons are entitled to. The NAACP opposes his nomination.

The CHAIRMAN. Thank you, Miss Simmons.

[The statement follows:]

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TESTIMONY

OF

ALTHEA T. L. SIMMONS

DIRECTOR, WASHINGTON BUREAU

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

BEFORE THE

SENATE COMMITTEE ON THE JUDICIARY

ON THE

NOMINATION OF WILLIAM H. REHNQUIST
FOR

CHIEF JUSTICE, UNITED STATES SUPREME COURT

JULY 29, 1986

Room 106, Senate Dirksen Building

Mr. Chairman, amd members of the Senate Judiciary Committee, I am Althea T. L. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People. I am appearing on behalf of the NAACP's one-half million members in our 2100 branches in the 50 states and the District of Columbia in opposition to the nomination of Mr. William Rehnquist as Chief Justice of the United States Supreme Court.

Our opposition today to Mr. Rehnquist's nomination is a reaffirmation of a position the NAACP took almost 15 years ago before this Committee which was reaffirmed as late as July 3, 1986 at the NAACP's 77th Annual National Convention.

Many persons refuse to predict what a lawyer will do once he/she leaves the political arena and begins a lifetime judicial appointment. The pundits are quick to point out that many individuals, once confirmed as judges, grow in stature, sometimes modifying views they held before gaining a seat on the bench. The NAACP considered this almost a decade and a half ago and felt comfortable at that time, as we do now, in raising the question as to whether Mr. Rehnquist could mete out, to black Americans, equal justice under law. Our response was "no" in 1971 and it is "no" in 1986. This was no idle guess in 1971. In the last few weeks, the NAACP has revisited the Rehnquist record. It is our considered opinion that he has not changed his position rather, the years have more finely tuned his positions on civil rights and racial issues.

Today, the NAACP states for the record that it is our considered opinion that Mr. Rehnquist is out of step with the nation in his interpretation and theories relating to equal justice under the Constitution and laws of the land; hence, we urge the Committee to reject his nomination.

Mr. Chairman, we believe it is appropriate to raise once again some of the issues raised during Mr. Rehnquist's first confirmation hearing. You will recall, from the record, that the Judiciary Committee Report in 1971 summarily dismissed, as "wholly unsubstantiated", the charges by our Maricopa County branch officials and others that Mr. Rehnquist was involved in voter harassment during the 1964 election. Our urgent requests to have Mr. Rehnquist return to the Senate Judiciary Committee for another day of hearings went unheeded. It is the position of the NAACP that, in light of the fact that the nominee's account of his role in the so-called [Phoenix] "Ballot Security" activities during that election was and is challenged by notarized affidavits of witnesses, which we provided in 1971 and again today, together with the recent challenges by three additional witnesses named in the July 25, 1986 edition of the Washington Post, the Committee should probe the nominee regarding his alleged actions.

We do not believe that this is inappropriate given the fact that he is being considered for the position of Chief Justice of the nation's high court which carries with it the power to lead and shape the court for years to come.

OPPOSITION TO CIVIL RIGHTS

In 1964, Mr. Rehnquist is quoted as saying:

"I am opposed to all civil rights laws"

This statement was confirmed and reiterated to me on July 27, 1986 by its originator, former Arizona State Senator Cloves Campbell, the publisher of the Arizona Informant. Mr. Campbell stated that he approached Mr. Rehnquist after a meeting of the Phoenix City Council meeting where Mr. Rehnquist testified and asked why he was opposed to the public accommodations ordinance. Mr. Rehnquist's position on public accommodations was reaffirmed through his letter to the Editor which appeared in the June 21, 1964 issue of the Arizona Republic, a scant two (2) days after the U. S. Congress passed the Civil Rights Act of 1964 by a 73 to 27 vote.

Mr. Rehnquist's stated opposition to "all civil rights laws" can be seen in his writings both on and off the bench.

A. Civil Rights - Voting Rights for Minorities

When my predecessor, Clarence M. Mitchell, Jr., appeared before this Committee urging the rejection of the Rehnquist nomination on the grounds that his record showed:

> "...a consistent pattern of opposition to the rights of black Americans in areas of public accommodations, freedom of expression, education and voting."

Mr. Mitchell told the Committee:

> "...these taken singly or together, raise grave doubts about whether he could mete out to the black citizens of America equal justice under law.

He also pointed out that:

> "there is only one area of civil rights legislation where conservatives, liberals and even some of the deep South members of the Senate and House could reach agreement. That is the right to vote."

Mr. Rehnquist, before his confirmation in 1971, attempted to bar voters from casting their ballots. He was personally present in some precincts when unconscionable attempts were made to prevent elderly and/or timid black citizens from voting. His alleged purpose for being there was to halt abuses by others. In contradiction, there were witnesses who signed sworn affidavits alleging that it was Mr. Rehnquist, himself, who was interfering with citizens' right to vote.

Black citizens alleged that Mr. Rehnquist harassed them at the polls in 1964; that he attempted to make them read portions of the Constitution and refused to let them vote unless they were able to comply with his demand.

The NAACP calls to the Committee's attention the allegations, by the NAACP's leadership in Phoenix and others, that Mr. Rehnquist took an active part in the so-called "Ballot Security " program. The Reverend George Benjamin Brooks, former President of the Maricopa County Branch of the NAACP testified:

> "...as chief of the Republican challengers he [Rehnquist] planned and executed the strategy designed to reduce the number of poor black and poor Mexican-American voters in the crucial 1964 National elections. He trained young, white lawyers and others to invade each black or predominantly black precinct in Phoenix on election day. The people were standing in long lines early in the morning as many were on their way to work. These young, white lawyers had printed cards on which were printed portions of the Constitution and demanded that the challenged voters read from them. It slowed down the voting so much that many voters complained and left. In that election I was the Inspector for the Election Board of Julian Precinct, a predominantly black precinct in South Phoenix. It became so bad that I threatened to call the police to have the challenger and poll watcher arrested for interfering with poor people's right to vote. In some precincts on the Southwest side of Phoenix there were reports of a fight. The scheme was to harass, intimidate and discourage poor black and poor Mexican-Americans from exercising their important vote in that crucial election..."

Mr. Robert Tate, in his affidavit, dated November 12, 1971 stated":

> "...I was present at Bethune Precinct, a predominantly black precinct in South Phoenix and witnessed the following incident:
>
> "Mrs. Miller had come to cast her vote at Bethune Precinct. She was encountered within the 50' line by William Rehnquist and requested to recite the Constitution before she could be allowed to vote. Mrs. Miller came to me crying, stating that Rehnquist wanted her to recite the Constitution. A call was placed to Judge Flood's office, a Justice of the Peace in South Phoenix, and Judge Flood came down to the Precinct. At that time Judge Flood deputized Jordan Harris to try and assist me, as a precinct committeeman, to restore order at the precinct. I looked around and saw William Rehnquist and Mr. Harris, who has a deformity in one leg, struggling. I went to the assistance of Mr. Harris. A policeman came in and took Mr. Rehnquist into the principal's office. Shortly thereafter Mr. Rehnquist left Bethune Precinct; however, a little later Mr. Rehnquist returned to the poll and parked his car across the street.
>
> "After Rehnquist left, I walked over to the police man and asked him the name of the fellow involved in the harassment of Mrs. Miller and the struggle with Mr. Harris. The policeman informed me that his name was William Rehnquist.
>
> "I now remember him from pictures I have seen lately in the papers as the same one involved in the above incident at Bethune Precinct. He did not, at that time, however, wear glasses."

Mr. Jordan Harris, another witness, whose November 12, 1971 notarized statement was introduced into the record in the NAACP's testimony stated:

> "...I ws present as a deputized challenger for the Democratic Party in Bethune Precinct, a predominantly Black Precinct in South Phoenix, and witnessed the following incident:
>
> I appeared at the polling place, Bethune Precinct, at approximatel 11 a.m. on the above mentioned date deputized by Judge Flood. When I arrived at the precinct I met with the election board committee and presented my official papers to them as a challenger for the Democratic Party. I met the Party Challenger for the Republican Party, Mr. William Rehnquist at that time. I met with Mr. Rehnquist because I noticed him harassing

> unnecessarily several people at the polls who were attempting to vote. He was attempting to make them recite portions of the Constitution, and refused to let them vote until they were able to comply with his requests. The persons involved were Mrs. Mitchell, Mrs. Campbell and Mrs. Miller. When I noticed he was pulling these people out of the line I then approached him and argued with him about his harassment of the voters. We then engaged in a struggle and the police were called in. Mr. Bob Tate came to my assistance during the struggle. The police then escorted him into the principal's office, Mr. Rehnquist and the police then left by the side door. I know that this man was Mr. Rhenquist because the election board introduced him to me as a challenger for the Republican Party. I believe that he did not leave the polling precinct altogether because I saw him across the street a short time later. He remained at the polling place well after 5 p.m."

The conduct recounted by the witnessses is the same type of conduct which led to the passage of the Voting Rights Act of 1965. It would be difficult for black Americans to believe that a person who harassed voters from the exercise of the most basic of all rights - the right to vote - would accord them justice in a court of law.

Mr. Rehnquist, as Associate Justice, has manifested his opposition to the protection of voting rights for minorities. In City of Rome v. United States, 446 U. S. 156 (1980), the majority held that a city could not unilaterally bail out of the preclearance requirement imposed upon them by Section §5 of the Voting Rights Act. Mr. Rehnquist dissented, arguing that the legislated conduct (requiring the state governmental units to obtain Department of Justice preclearance before a change in voting procedures or requirements would be effective) is necessary to to remedy a previous constitutional violation by the governmental unit

or to prevent purposeful discrimination. In essence, there must be a causal relationship between a specific wrong by the City and the legislated prohibition. The NAACP also sees the use of the legal concept of causation by Mr. Rehnquist in cases of racial discrimination to restrict the application of the Equal Protection Clause of the Fourteenth Amendment.

B. Civil Rights - Public Accommodations

Mr. Rehnquist was not content to challenge black voters who sought to exercise the right of franchise, he also made his views known in the area of public accommodations when he opposed an ordinance being considered by the Phoenix City Council. His written statement said in pertinent part:

> "I am a lawyer without client tonight. I am speaking only for myself. I would like to speak in opposition to the proposed ordinance because I believe that the values it sacrifices are greater than the values it gives. I take it that we are no less the land of the free than we are the land of the equal and so far as the equality of all races concerned insofar as public governmental bodies, treatment by the Federal, State or the Local government is concerned, I think there is no question. But it is the right of anyone, whatever his race, creed or color to have that sort of treatment and I don't think there is any serious complaint that here in Phoenix today such a person doesn't receive that sort of treatment from the governmental bodies. When it comes to the use of private property, that is the corner drug store or the boarding house or what have you. There, I think we--and I think this ordinance departs from the area where you are talking about governmental action which is contributed to by every taxpayer, regardless of race, creed or color. Here you are talking about a man's private property and you are saying, in effect, that people shall have access to that man's property whether he wants it or not. There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of assault on the institution where you are told, not what you can build on your property, but who can come on your property. This, to me is a matter for the most serious consideration and, to me, would lead to the conclusion that the ordinance ought to be rejected.

"What brought people to Phoenix and to Arizona? My guess is no better than anyone else's but I would say it's the idea of the last frontier here in America. Free enterprise and by that I mean not just free enterprise in the sense of the right to make a buck but the right to manage your own affairs as free as possible from the interference of government..." 8

Fortunately, Mr. Chairman and members of the Committee, the Phoenix City Council passed the ordinance. Mr. Rehnquist, after the passage of the ordinance, in a letter to the Editor which appeared in the June 21, 1964 edition of the Arizona Republic wrote:

"I believe that the passage by the Phoenix City Council of the so-called Public Accommodations ordinance is a mistake."

"...the Public Accommodations ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers. By a wave of the legislative hand, hitherto-private businesses are made public facilities, which are open to all persons regardless of the owner's wishes . Such a drastic restriction on the property owner is quite a different matter from orthodox zoning, health and safety regulations which are also limitations on property rights. It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this."

"If in fact discrimination against minorities in Phoenix eating places were well nigh universal, the question would be passed as to whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all..,"

"The founders of this nation thought of it as the 'land of the free' just as surely as they thought of it as the 'land of the equal'. Freedom means the right to manage one's own affairs, not only in a manner that is pleasing to all, but in a manner which may displease the majority. To the extent that we substitute, for the decision of each businessman as to how he shall select his customers, the command of the government telling him how he must select them, we give up a measure of our traditional freedom.

Mr. Rehnquist distinguishes rights of the few from what he terms universal [rights] saying:

> "Such would be the issues in a city where discrimination was well nigh universal. But statements to the council during its hearings indicated that only a small minority of public facilities in the city did discriminate. The purpose of the ordinance, then, is not to make available a broad range of integrated facilities, but to whip into line the relatively few recalcitrants. The ordinance, of course, does not and cannot remove the basic indignity to the Negro which results from refusing to serve him; that indignity stems from the state of mind of the proprietor who refuses to treat each potential customer on his own merits.
>
> "Abraham Lincoln, speaking of his plan for compensated emancipation, said: 'In giving freedom to the slave, we assure freedom to the free--honorable alike in what we give and in what we preserve.'
>
> "Precisely the reverse may be said of the public accommodations ordinance: Unable to correct the source of the indignity to the Negro, it redresses the situation by placing a separate indignity on the proprietor. It is as barren of accomplishment in what it gives to the Negro as in what it takes from the proprietor. The unwanted customer and the disliked proprietor are left glowering at one another across the lunch counter.
>
> "It is, I believe, impossible to justify the sacrifice of even a portion of our historic freedom for a purpose such as this."

Mr. Cloves Campbell, then an Arizona State Senator stated in an affidavit dated November 4, 1971:

> "I, Senator Cloves Campbell, do hereby testify that on or about June 16, 1964, a City Council meeting was held in the City of Phoenix for discussion of an ordinance dealing with public accommodations for all citizens in the City.
>
> "At that Council meeting, Mr. William Rehnquist, the present nominee for the United States Supreme Court spoke in opposition to the proposed ordinance.

> "After the meeting I approached Mr. Rehnquist and asked him why he was opposed to the public accommodations ordinance. He replied, 'I am opposed to all civil rights laws.'"

Mr. Rehnquist was an activist in Phoenix. He also opposed freedom of assembly, where civil rights was concerned. In testimony before an Arizona Legislative Committee, Mr. Rehnquist opposed the State's Civil Rights bill of 1965. Although the Arizona State Legislature did not keep a record of testimony before its Committees or in its state archives, Reverend G. Benjamin Brooks, in his testimony before this Committee in 1971, stated:

> "Well, however, do I recall the evening, late, when Mr. Rehnquist and I had a confrontation on the State Capitol grounds following his appearance. He argued that such a bill violated individual freedom to discriminate. This was the same argument he used against the City of Phoenix ordinance in 1964 at which time he wrote that such ordinances could not remove the 'indignity' suffered by the Negro when he is refused service in a place of public accommodations. But, he added, 'it redresses the situation by placing a separate indignity on the proprietor.'"

Reverend Brooks also stated that Mr. Rehnquist "was the only major person of stature who opposed the Arizona Civil Rights bill..." Reverend Brooks statement was buttressed by the statement of Mr. Moses Campbell (no relation to Senator Campbell), who in a letter dated November 3, 1971 stated:

> "I, Moses Campbell, do hereby attest to the following:
> I. That I was a member of the Civil Rights march on the Capitol building of the State of Arizona in the Spring of 1964.
>
> II. That I was present at the time our Past President, Rev. George Brooks, of the NAACP and Mr. William Rehnquist exchanged bitter recriminations concerning the groups purpose for marching, intimating that the march was communistically inspired.

11

III. I believe that owing to the conduct of Mr. Rehnquist in his desire to disrupt and intimidate the Blacks in their peaceful presentation of what they considered just grievances to the State of Arizona's officials, that he has brought irreparable harm and insult to the Blacks of Phoenix, Arizona, and should not be considered for the lofty position as United States Supreme Court Justice."

Mr. Rehnquist's attitude toward civil rights demonstrators is further revealed in his February 14, 1970 letter to the Washington Post (on the G. Harold Carswell Supreme Court nomination). Mr. Rehnquist said:

"In fairness you ought to state all of the consequences that your position logically brings to train; not merely further expansion of the Constitutional rights of criminal defendants, of pornographers and of demonstrators."

In a speech before the Newark Kiwanis Club, Mr. Rehnquist stated:

"In the area of public law...disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. If force is required to enforce the law, we must not shirk from its employment."

Mr. Chairman, within this past week, I spoke by telephone with both Mr. Cloves Campbell and the Reverend G. Benjamin Brooks, asking them to refresh their recollection regarding the incidents they submitted in 1971. Mr. Campbell told me that he recalled very clearly the statement of Mr. Rehnquist that he was "opposed to all civil rights laws". Reverend Brooks in a telephone conversation with me on July 28, 1986 stated:

"Mr. Rehnquist did, in fact, come to the polls, challenging particularly the older voters and I remember old Mr. Killings (sp) who looked unkept struggling through it and reading the piece of literature. We did not sustain the challenge. We let the man vote."

Reverend Brooks, speaking to the incident at the State Capitol 12
stated, during our telephone conversation:

> "He [Rehnquist] met me at the State Capitol to argue the point of civil rights and the illegality of the public accommodations ordinance."

Mr. Chairman, I directed the NAACP's National Voting Rights Campaign in 1964 as a special assignment and recall the incidents reported to the National Office of the NAACP. I had a special concern regarding the Arizona incidents inasmuch as my regular assignment with the NAACP was as West Coast Director for Arizona, Southern California and Nevada. We were monitoring election activities to be sure that the recently passed Civil Rights Act of 1964 was not violated. The eyewitness accounts from Messrs. Tate, Campbell, Brooks and Cloves Campbell raised grave questions regarding the role of Mr. Rehnquist and whether he was candid in his recall during his 1971 appearance before this Committee. There is no doubt in our mind that Mr. Rehnquist was involved. One local newspaper, the Arixona Voice described Mr. Rehnquist as "Major Local Force to Keep People from Voting."

D. Civil Rights - The Fourteenth Amendment

A great deal of attention has been placed in recent weeks on a 1952 memorandum from Mr. Rehnquist to Mr. Justice Jackson which stated:

> "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think Plessy v. Ferguson was right and should be reaffirmed. If the Fourteenth Amendment did not enact Spencer's Social Statics, it just as surely did not enact Myrdahl's American Dilemma."

Mr. Chairman, this statement raises red flags for black Americans who cannot countenance even the thought of retrogression, much less to a period of time when the law of the land was that the black man had no rights that a white man had to respect.

As Associate Justice, Mr. Rehnquist has used various basic legal principles to bring about the bottom line of limiting the Fourteenth Amendment. He has publicly rejected the doctrine that the Bill of Rights is incorporated into the Fourteenth Amendment and thereby made applicable to the states. By so limiting the Fourteenth Amendment, more than one ideological purpose is served. The legal principles used in this fashion by Mr. Rehnquist include:

- limiting the doctrine of "state action" which triggers application of the Equal Protection Clause;
- limiting the protected groups or "suspect classes" entitled to the highest level of judicial scrutiny to protect their rights (Mr. Rehnquist deems only "race" as a suspect class);
- requiring claimants of racial discrimination to prove "intentional" discrimination;
- requiring claimants of racial discrimination to prove causation (legal/proximate cause) between the alleged (intentional) discriminatory acts and harm or wrong suffered by the claimant; and,
- categorizing the controlling legal issue decisive to the case as a procedural or evidentiary issue (even when there is substantial evidence of intentional racial discrimination).

The significance of using legal principle is that a rational argument is made which may convincingly lead one to agree with the result. Beginning with a basic legal principle, building upon it by reference to precedent, case law, authoritative treatises, etc. one may follow the views of another without divorcing the conclusion reached from the beginning legal principle. It is our considered judgment that Mr. Rehnquist, through the decisions he has written and his dissents, is creating his own precedents, and is, in his own fashion, a judicial activist against civil rights.

Civil Rights - Fourteenth Amendment - Substantive Limitations

(a) State Action v. Private Action

One source of constitutional limitations imposed on state action is the Fourteenth Amendment. The states can not deny persons equal protection of the laws. Although Mr. Rehnquist accepts the legal maxim that state action cannot be "racially discriminatory" state action was restricted in application by him. In the landmark case of Moose Lodge No. 107 v. Irvis, 407 U. S. 163 (1972), blacks were denied drinks by the lodge and argued that such denial violated the Fourteenth Amendment in that state action was present since the state had issued a liquor license to the lodge (a maximum number of licenses were issued by the state). Mr. Rehnquist wrote for the majority of the Court:

> "We conclude that Moose Lodge's refusal to serve food and beverages to a guest by reason of the fact that he was a Negro does not, under the circumstances here presented, violate the Fourteenth Amendment... 407 U.S. at 171,172
>
> "In 1883, this Court in The Civil Rights Cases...set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield,'... 407 U.S. at 172
>
> "In short, while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building... 407 U.S. at 175
>
> "The Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club which it licenses to serve liquor. 407 U.S. at 175
>
> "Appellee was entitled to a decree enjoining the enforcement of §113.09 of the regulations promulgated by the Pennsylvania Liquor Control Board insofar as that regulation requires compliance by Moose Lodge with provisions of its constitution and by-laws containing racially discriminatory provisions. He was entitled to no more." 407 U.S. at 179

In sum, Mr. Rehnquist's position was that the blacks who had been refused food service were only entitled, under the Fourteenth Amendment, not to have the state regulation enforced if that regulation was invoked to uphold the racially discriminatory provisions in the Lodge's constitution.

From another perspective, the Fourteenth Amendment is a restriction on what Mr. Rehnquist has termed "the state's plenary police powers." by extending the scope of "private action" or restricting the acts constituting "state action," Mr. Rehnquist is giving the states more freedom from the constitutional restriction of the Fourteenth Amendment.

(b) Limiting the Protected Groups or "Suspect Classes under the Fourteenth Amendment

The Fourteenth Amendment, notably its Equal Protection Clause is said judiciously to impose a higher standard of review upon the courts to protect the rights of citizens. Mr. Rehnquist limits "suspect class" under the Fourteenth Amendment to race. Classification by gender (sex) is not tantamount to being a "suspect class" (see Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977); Rostker v. Goldberg, 453 U.S. 57 (1981)). In his opinion, alienage is not a "suspect class" (see Sugarman v. Dougall, 414 U.S. 634 (1973)). In his opinion, low-income or poverty does not make one a member of a "suspect class" (see San Antonio School District v. Rodriquez, 422 U.S. 1 (1972)). Age does not make one a member of a "suspect class" (see Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)). Finally, illegitimacy does not make one a member of a "suspect class" (see Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); New Jersey Welfare Righs Organization v. Cahill, 411 U.S. 619 (1973)).

(c) Requiring Proof of Intentional Discrimination

The Fourteenth Amendment's Equal Protection Clause entitles citizens to receive equal treatment in state action and those actions by private people within reach of the Clause. It has been shown in case law that Mr. Justice Rehnquist limits the Equal Protection Clause and the high standard of "strict scrutiny" to differential conduct based on one's race. He further limits, even cases of egregious differential treatment based on raxe by requiring racial minorities to prove "intentional discrimination." This proof of intentional discrimination has been articulated in school discrimination cases (see Wright v. Council of City of Emporia, 407 U. S. 451 (1972); Keyes v. School District No. 1, Denver, 413 U. S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974); Columbus Board of Education v. Penick, 443 U.S. 449 (1979); in employment discrimination cases (see Firefighters v. Stotts, 467 U.S. 561 (1984); in death penalty cases (see Vasquez v. Hillery, U.S. (1986); among other types of alleged unconstitutional racial discrimination.

In Keyes v. School District No. 1, Denver, supra, Mr. Rehnquist, dissenting from the majority opinion of the Supreme Court which held that proof of intentional segregative policy in part of the school district is sufficient to support a finding of a dual school system, argued, in part, that in Denver, unlike Topeka in the Brown v. Board of Education case, 347 U. S. 483 (1954), there is no law mandating segregation. In the words of Mr. Rehnquist:

> "There are significant differences between the proof which would support a claim such as that alleged by plaintiffs in this case, and the total segregation required by statute which existed in Brown. 443 U.S. at 255
>
> "In the Brown cases and later ones that have come before the Court the situation which had invariably obtained at one time was a 'dual' school system mandated by

> law, by a law which prohibited Negroes and whites from attending the same schools. 413 U.S. at 255
>
> "Whatever may be the soundness of that decision in the context of a genuinely 'dual school system, where segregation of the races had once been mandated by law, I can see no constitutional justification for it in a situation such as that which the record shows to have obtained in Denver. 413 U.S. at 258

Continuing in his dissent, Mr. Justice Rehnquist concluded saying:

> "The Court has taken a long leap in this area of constitutional law in equating the district-wide consequences of gerrymandering individual attendance zones in a district where separation of the races was never required by law with statutes or ordinances in other jurisdictions which did so require...since I believe (neither) of these steps is justified by prior decisions of this court, I dissent." 413 U.S. at 265

Clearly, Mr. Justice Rehnquist would have our laws distinguish remedying even racial discrimination based on laws, de jure discrimination, from racial discrimination based on facts, de facto discrimination. Challengers of discriminatory conduct would have to prove intentional discrimination in cases alleging de facto discrimination.

In the hallmark employment discrimination case of Firefighters v. Stotts, supra, Mr. Rehnquist concurred with the majority which found that Title VII had not been violated, neither the Fourteenth Amendment, when in that case there was a bona fide seniority system which had not been contractually modified in view of the economic crisis in Memphis which prompted the city to layoff firemen. (Since black firemen were "last hired" they had less seniority than most white firemen and, as a result, they were laid off in comparatively higher numbers.) In that case, the majority opinion stated:

> "Here, the District Court itself found that the layoff proposal was not adopted with the purpose or intent to discriminate on the basis of race. Nor had the city in agreeing to the decree admitted in any way that it had engaged in intentional discrimina-

> tion. The Court of Appeals was therefore correct in disagreeing with the District Court's holding that the layoff plan was not a bona fide application of the seniority system..." 467 U.S. at 577

In that the majority of the Court found no intentional racial discrimination finding by the District Court and no admission by the city, Justice Rehnquist could agree with the majority in this opinion. This is consistent with his expressed opinion that an Equal Protection Clause violation requires a finding of intentional discrimination.

In a recent death penalty case, similarly Justice Rehnquist argued for the necessity of intentional discrimination as part of the requisite legal elements for a violation of the Equal Protection Clause. In Vasquez v. Hillery, supra, the majority of the Court held that the 1962 indictment and later conviction of a black man, Booker T. Hillery, by a grand jury sworn in after blacks were systematically excluded, required the court to reverse the conviction. In that case, affidavits supported Hillery's previous allegations of racial discrimination in that no black had ever served on the grand jury in Kings County where Mr. Hillery was indicted and convicted. Mr. Justice Rehnquist joined Chief Justice Burger and Justice Powell in Mr. Powell's written dissent, saying in part:

> "The point appears to be that an all-white grand jury from which blacks are systematically excluded might be influenced by race in determining whether to indict and for what charge. Since the state may not imprison respondent for a crime if one of its elements is his race, the argument goes, his conconviction must be set aside.
>
> "This reasoning ignores established principles of equal protection jurisprudence. We have consistently declined (as argued in the dissent) to find a violation of the Equal Protection Clause absent a finding of intentional discrimination...There has been no showing in this case...that the grand jury declined to indict

> white suspects in the face of similarly strong evidence. Nor is it sensible to assume that impermissible discrimination might have occurred simply because the grand jury had no black members. (emphasis added).

In spite of the egregious factual situation that a black man was indicted, which led to his conviction, by an all-white grand jury, in a jurisdiction which had never had a single black on a grand jury, Justice Rehnquist adhered to the legal requirement of a finding of intentional discrimination before a case of racial discrimination violative of the Equal Protection Clause could arguably be made.

(d) Requiring Proof of Causation

Justice Rehnquist has echoed the legal principle of "causation" in a manner to find no violation of the Equal Protection Clause in the school desegregation case of Milliken v. Bradley, 418 U.S. 717 (1974); Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976); Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979); in employment discrimination cases (see Firefighters v. Stotts, supra; Firefighters v. Cleveland, U.S. (1986)); in the cases challenging federal legislation providing for minority business set-asides (see Fullilove v. Klutznick, 448 U.S. 448 (1980)); in death penalty cases (see Vasquez v. Hillery, supra; Batson v. Kentucky, U.S. (1986); Turner v. Murray, U.S. (1986), among others. The exact legal jargon varies; however, the concept of "causation" is discernible to either argue that the actual harm was not caused by the alleged wrongful conduct or that the conduct was wrongful but the complaining party was not harmed by it.

In the case of Dayton Board of Education v. Brinkman, the Court of Appeals had found that intentional racial discrimination in violation of the Equal Protection Clause. Factually, in the 1950's, 77.6 percent of the students went to school in which one race accounted for at least

90 percent of the student body. Four schools were 100 percent black and 54.3 percent of the black students went to these four schools. Suit was brought in 1972 (and incurred two Supreme Court opinions - Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) and Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979)). The majority of the Court, in 1979, upheld the appellate court finding of intentional discrimination violating the Equal Protection Clause.

Justice Rehnquist dissented from the finding of a 14th Amendment violation saying:

> "Both the Court of Appeals for the Sixth Circuit and this Court used their respective Columbus (Board of Education v. Penick) opinions as a roadmap, and for for the reasons I could not subscribe to the affirmative duty, the forseeability test, the cavalier treatment of causality, and the false hope of Keyes and Swann rebuttal in Columbus, I cannot subscribe to them here. (emphasis added in underlinings other than for case names). 443 U.S. at 542

Continuing with the logic of "causation," Justice Rehnquist argued:

> "The District Judge in Dayton did not employ a post-1954 'affirmative duty' test. Violations he did identify were found not have any causal relationship to existing conditions of segregation in the Dayton school system. He did not employ a forseeability test for intent, hold the school system responsible for residential segregation, or impugn the neigborhood school policy as an esplanation for some existing one race schools. In short, the Dayton and Columbus district judges had completely different ideas on what the law required. As I am sure my Brother Stewart agrees, it is for reviewing courts to make those requirements clear." (emphasis added except for "is" which is underlined as well in the dissent) 443 U.S. at 543

Here Justice Rehnquist stressed that it is not sufficient to have even intentional racial segregation or discrimination. Also, one must prove that the conduct had a "causal relationship" to the racial segregation in the schools. In sum, the wrongful conduct must have caused the harm.

The other side to "causation," finding specific wrongful conduct is brought to the fore by Justice Rehnquist in Fullilove et. al v. Klutznick, Secretary of Commerce, et. al., supra. In that case the majority of the Court upheld federal legislation providing for government regulations requiring that 10 percent of federal public works contracts be set-aside for minority business. Justice Rehnquist joined Justice Stewart in his dissent arguing:

> "But even assuming that Congress has the power, under §5 of the Fourteenth Amendment or some otber constitutional provision, to remedy previous illegal racial discrimination, there is no evidence that Congress has in the past engaged in racial discrimination in its disbursement of fedeal contracting funds. the MBE (Minority Business Enterprise) provision thus pushes the limits of any such justification far beyond the equal protection standard of the Constitution. Certainly, nothing in the Constitution gives Congress any greater authority to impose detriments on the basis of race than is afforded the Judicial Branch. And a judicial decree that imposes burdens on the vasis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination." (emphasis added). 448 U.S. at 527, 528

Justice Rehnquist, perhaps, overlooks that Congress legislates usually after public hearings, it makes findings in the public interest or need and can legislate programs based on these findings. Perhaps he overlooks that congress is not restrained by the judicially-imposed concept of "causation." Nevertheless, Justice Rehnquist, in his dissent, stressed the need to tailor remedial provisions to remedy the "actual effects" of "illegal" race discrimination--the wrongful conduct.

Justice Rehnquist's use of "causation" to limit the legal remedy in response to wrongful conduct is seen clearly in Firefighters v. Stotts, 467 U. S. 561 (1984). In that case, a majority of the Court invalidated

an affirmative action plan which was deemed to modify a consent decree. (Under the plan the City could not adhere strictly to seniority in deciding which firemen to layoff in response to the City's economic crisis.) Justice Rehnquist concurred in the majority opinion written by Justice White, which stated:

> "If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster...however,...mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." (emphasis added) 467 U.S. at 578

Clearly, emphasis is placed on requiring "each individual" to prove harm, "impact," on the individual by the wrongful conduct, "the discriminatory practice."

Specifically, the aspect of limiting the legal remedy, even in violations of the Equal Employment Opportunities Act (Civil Rights Act of 1964 - Title VII) is argued in the following quote:

> "That policy (behind Title VII §706(g)) is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the Congressional debates." (emphasis added) 467 U.S. at 580

While the legal jargon, "make-whole relief" has been added, the basic legal principle of "causation" is redressed to limit a remedy legally obtainable only to those who actually suffered from the illegal conduct.

Justice Rehnquist states the doctrine of "causation" most clearly in his dissent in Vasquez v. Hillery, supra:

> "The scope of the remedy depends in part on the nature and deegree of the harm caused by the wrong."

He criticized the majority which set aside the conviction and said:

> "Once the inference of racial bias in the decision to indict is placed to one side, as it must be under our precedents, it is impossible to conclude that the discriminatory conduct selection of Kings County's grand jurors caused respondent to suffer any cognizable injury." (emphasis added)

In Batson v. Kentucky, supra, the majority reversed the conviction of a black man for the death of a white person because the prosecutor used his peremptory challenges to exclude blacks from the jury. The majority held this violated the Equal Protection Clause as well as the Sixth Amendment. Justice Rehnquist said in his dissent:

> "Petitioner in the instant case failed to make a sufficient showing to overcome the presumption announced in Swain that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below."

In another case, a black man was denied his request to even question jurors about their racial prejudices in his trial for the death of a white person. The majority court reversed the death penalty sentence as well as the conviction in ruling that the Equal Protection Clause was violated alongwith the Sixth Amendment. Again, Justice Rehnquist dissented:

> "The facts of this case demonstrate why it is necessary and unwise for this Court to rule, as a matter of constitutional law, that a trial judge always must inquire racial bias in a case involving an interracial murder, rather than leaving that decision to be made on a case-by-case basis." (The majority said inquiry into racial bias was required when the defendant requested it; this necessitates a request by the defendant to initiate the inquiry and is not to be forthcoming from the trial judge.)

Justice Rehnquist continued:

> "Nothing in this record suggests that racial bias played any role in the juror's deliberations... Without further evidence that race can be expected to be a factor in such trials, there is no justification for departing from the rule of Ham and Ristaino"

He dissented against the majority ruling that the trial judge is to honor defendant's request to ask jurors questions of their racial bias. He also objected to scientific evidence, placed in the record, which indicated the racial application of death penalty statutes. Justice Rehnquist limited the weight accorded this evidence by, in essence, arguing the study conducted had no statistics on the administration of the particular death penalty statute in Virginia (the state of the trial). In so limiting the evidence introduced, and not permitting proferred evidence, the Justice analytically concluded:

> "There is nothing in the record of this trial that reflects racial overtones of any kind. From voir dire through the close of trial, no circumstances suggests that the trial judge's refusal to inquire particularly into racial bias posed 'an impermissible threat to the fair trial guaranteed by due process.' This case illustrates that it is unnecessary for the Court to adopt a per se rule that constitutionalizes the unjustifiable presumption that jurors are racially biased."

Justice Rehnquist even argues the opposite of the principle of "causation," e. g., that failure of the plaintiffs to show their harm was caused by racial discrimination is tantamount to showing their harm was caused by a reason other than racial discrimination. Notice in Firefighters v. Cleveland, supra, Justice Rehnquist and Chief Justice Burger dissented saying:

> "Here the failure of the district Court to make any finding that the minority firemen who will receive preferential promotions were the victims of racial discrimination requires us to conclude on this record that the City's failure to advance them was not on 'account of race, color, religion, sex, or national origin'" (emphasis added)

In sum, Justice Rehnquist uses "causation" in any of its aspects to limit application of the Equal Protection Clause.

Avoiding Use of the Fourteenth Amendment by Issue Classification

Justice Rehnquist has so turned the issue in legal procedural questions which would not have addressed even egregious racial disparity. For example, in Vasquez v. Hillery, supra, Justice Rehnquist dissented arguing:

> "The court has firmly established the principle that error that does not affect the outcome of a prosecution cannot justify reversing an otherwise valid conviction."

Throughout his dissent, he argues on the basis of harmless-error as distinguished from prejudicial error. This issue is an evidentiary issue. Justice Rehnquist did not rely on the fact that no blacks had ever served on the grand jury in Kings County. Instead, he argued:

> "In this case, the grand jury error did not affect the failure of respondent's trial or otherwise injure the respondent in any recognizable way. I would therefore reverse the Court of Apopeals."

In Batson v. Kentucky, supra, the majority of the Court reversed a death penalty case because blacks were systematically excluded from the jury by the prosecutor's use of the peremptory challenges. Justice Justice Rehnquist takes the position that the central issue in that case is not a question of racial discrimination but rather as a permissible use of peremptory challenges. His analysis highlighted the distinction and utility of peremptory challenges as compared to challenges for cause and ended by holding inviolate the legal principle of peremptory challenges. In so doing, Justice Rehnquist discounted the majority analysis stating:

> "Neither of these statements has anything to do with the 'evidentiary burden' necessary to establish an equal protection claim in this context, and both

> statements are directly contrary to the view of the Equal Protection Clause shared by the majority and the dissenters in Swain."

In refocusing the legal issue decisive of the case outcome, Justice Rehnquist said:

> "I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as 'a necessary part of trial by jury'. In my view, there is simply nothing unequal' about the State using its peremptory challenges to strike (all) blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on" (emphasis added).

Arguing that the use of peremptories is permissible even in cases of intentional racial exclusion, he says:

> "This case-specific use of peremptory challenges does not single out blacks, or members of any other race for that matter, for discriminatory treatment. Such use of peremptories is at best based upon seat-of-the pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across the board to jurors of all races and nationalities, I do not see... how their use violates the Equal Protection Clause."

His conclusion in the case is that:

> "Plaintiff in the instant case failed to make a sufficient showing to overcome the presumption announced in Swain that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below."

In concluding these comments on selected opinions of Justice Rehnquist, it is the NAACP's considered opinion that the results of his opinions is

to limit the scope or application of the Fourteenth Amendment. Justice Rehnquist is certainly not extending the scope of the Fourteenth Amendment in claims of racial discrimination made by black Americans. To the contrary, perhaps he is consciously "extending" it to claims of discrimination made by white Americans. In any event, his actions are not in recognition of the historically social, political, and economic unequal and inferior treatment black Americans have experienced and are experiencing under the law and in reality. Rather, his arguable basis for "extending" the Fourteenth Amendment to claims made by white Americans is that the amendment protects any citizen.

In short, the judicial opinions of Justice Rehnquist manifest actions consistent with his opposition to civil rights laws. He has focused the Fourteenth Amendment away from discrimination against black Americans and other minority groups and toward protection for white Americans. He has employed legal principles of limiting the concept of "state action," requiring proof of intentional discrimination; insisting upon a causal relationship or causation between the discriminatory conduct and the harm complained of or the remedy sought; classifying the legal issue decisive of the case's outcome as a procedural issue rather than the substantive meaning of the Amendment - all with the effect of limiting the reach of the Fourteenth Amendment.

## LIMITATIONS ON FEDERAL LEGISLATIVE POWER

### A. The Tenth Amendment

Justice Rehnquist re-introduced and expanded upon the use of the Tenth Amendment as a substantive limitation on the exercise of federal authority. This observation was made in "The Compleat Jeffersonian: Justice Rehnquist and Federalism", 91 Yale Law Journal, 1317 (1982).

Mr. Rehnquist's views on limitations on federal power was evident in his dissent on the merits in Fry v. United States, 421 U. S. 542 (1975) wherein the Pay Board under the Economic Stabilization Act disallowed a portion of a pay increase voted by the State legislature. The Supreme Court affirmed the decision of the Temporary Emergency Court of Appeals disallowing the increase, acknowledging in the majority opinion that the Tenth Amendment "expressly declares the Constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system". But the Court opined that "we are convinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty", 421 U. S. 542 (1975) n. 7.

Justice Rehnquist drew a distinction between "asserting an affirmative constitutional right" and "asserting an absence of Congressional legislative authority." He averred that the holding of the court was contrary to "a concept of constitutional federalism which should...limit federal power under the Commerce clause, 421 U. S. at 554. He contended that Ohio had an "affirmative constitutional right", as a state, to be free of economic regulation by Congress under its Commerce power. He noted that the "states right limiting Congress' power in Fry has "no explicit constitutional source."

His opportunity to further develop his theory of state sovereignty came in 1976 when he wrote for the court in National League of Cities v. Usery, 426 U. S. 833 (1976). Justice Rehnquist "reintroduced state sovereignty as a functioning legal limitation on the federal legislative power. While the case may be an aberration in the jurisprudence of the court, it is central to Justice Rehnquist's view of constitutional law.

B. Judicial Review of Federal Legislation

It is observable that Justice Rehnquist applies "a higher level of scrutiny to federal action than he does to state action (see "The Compleat Jeffersonian", supra).

Limiting Congressional Authority

Justice Rehnquist argues that courts must hear attacks on federal, but not state laws in a legal argument that Congress has exceeded its authority. Restrictions have been judicially imposed upon congressional exercise of authority under the spending power (see Pennhurst State School Hospital v. Halderman, 451 U. S. 1 (1981))and also authority under the Commerce Clause (see Hodel v. Virginia Surface Mining and Reclamation Association, 452 U. S. 265 (1981)).

In the case of Hodel, Justice Rehnquist insisted on sharp examination of the connection between interstate commerce, the asserted basis for congressional action, and the legislated conduct. Justice Rehnquist said:

> "In short, unlike the reserved police powers of the states, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause." (452 U. S. at 311).

First, it should be noted that federal authority under the Commerce Clause was deemed plenary in nature. However, Justice Rehnquist argues that state action under its police powers are plenary in nature. Second, the limitation on state power is a specific constitutional provision limiting state action (e.g. the Fourteenth Amendment).

His argument to restrict congressional legislative authority by arguing that Congress exceeded its authority is apparent in Fullilove v. Klutznick, Secretary of Commerce, U. S. (1980). In that case,

Mr. Rehnquist joined Justice Stevens in a dissent (written by Justice Stevens) stating that:

> "The command of the equal protection guarantee is simple but unequivocal: In the words of the Fourteenth Amendment. 'No State shall...deny to any person...the equal protection of the laws.' Nothing in this language singles out some 'persons' for more 'equal' treatment than others."
>
> "No one disputes the self-evident proposition that Congress has broad discretion under its Spending Power to disburse the revenues of the United States ...and to set conditions on the receipt of the funds disbursed. No one disputes that Congress has the authority under the Commerce Clause to regulate contracting practices on federally funded public works projects, or that it enjoys broad powers under §5 of the Fourteenth Amendment 'to enforce by appropriate legislation' the provisions of that Amendment...If a law is unconstitutional, it is no less unconstitutional just because it is a product of the Congress of the United States."
>
> "On its face, the minority business enterprise provision at issue in this case denies the equal protection of the law...One class of contracting firms--defined solely according to the racial and ethnic attributes of their owners--is, however, excepted from the full rigor of these requirements respect to a percentage of each federal grant. The statute, on its face, and in effect, thus bars a class to which the petitioners belong from having the opportunity to receive a government benefit and bars the members of that class solely on the basis of their race or ethnic background. This is precisely the kind of law that the guarantee of equal protection forbids."

Narrow Interpretation of the Extent of Legislated Conduct

Justice Rehnquist has given undue emphasis and placed controlling weight upon one or two statutory words to negate the application of the proscribed conduct. The bottom line is that a party's conduct is not within the scope of the kind of conduct prohibited by Congress.

Congress enacted Title VII of the Civil Rights Act of 1964 which generally prohibits employment discrimination based on race, sex, national origin, etc. Justice Rehnquist strictly reads the language to forbid any discrimination, even race-conscious affirmative action plans designed to ensure equal employment opportunities. In United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U. S. 193 (1979), Mr. Rehnquist in his dissent states:

> "It may be that one or more of the principal sponsors of Title VII would have preferred to see a provision allowing preferential treatment of minorities written into the bill. Such a provision, however, would have to have been expressly or impliedly excepted from Title VII's explicit prohibition on all racial discrimination in employment. There is no such exception in the Act." 443 U. S. at 222.
>
> "To be sure, the reality of employment discrimination against negroes provided the primary impetus for passage of Title VII. But this fact, by no means supports the proposition that congress intended to leave employers free to discrimiante against white persons." 443 U. S. at 229.
>
> "Here, however, the legisltive history of Title VII is as clear as the language of §§703 (a) and (d) and it irrefutably demonstrates that Congress intended meant what it said in §§703 (a) and (d) --that no racial discrimination in employment is permissible under Title VII, not even preferential treatment of minorities to correct racial imbalance." 443 U. S. at 230.
>
> "Indeed, had Congress intended to except voluntary, race-conscious preferential treatment from the blanket prohibition on racial discrimination in §§703 (a) and (d), it surely could have drafted language better suited to the task than §§703(j)." 443 U. S. at 253.
>
> "There is perhaps no device more destructive to the notion of equality than the numerus clausus-- the quota. Whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to

> prefer another. In passing Title VII Congress outlawed all racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative." 443 U. S. at 254.
>
> "We are told simply that Kaiser's racially discriminatory admission quota 'falls on the permissible side of the line.' ...Later courts will face the impossible task of reaping the whirlwind." 443 U. S, at 255.

Causal Relationship between Constitutional Violation and Legislated Conduct

Congress has constitutional authority, under §5 of the Fourteenth Amendment to enact legislation to carry out the purposes of the Amendment. Mr. Justice Rehnquist argued in City of Rome v. U. S., 446 U. S. 156 (1980) that this legislated action must be necessary to remedy the constitutional violation. In that case, the §5 preclearance provision of the Voting Rights Act imposed on state governmental units by Congress was held by the majority not to allow the states to unilaterally escape preclearance. Justice Rehnquist dissented arguing this congressional legislated adherence by a preclearance requirement was beyond the authority of the Congress.

In construing Title VII, Justice Rehnquist has looked keenly for specific discriminatory conduct within the meaning of the acts prohibited by Title VII to see if the legislated or judicial remedy narrowly responds to that conduct.

In Local Number 93, International Association of Firefighters, AFL-CIO-CLC, Petitioner v. City of Cleveland, U. S. (1986), Justice Rehnquist and Chief Justice Burger dissented, arguing:

> "There was no requirement in the (District Court) decree that the minority beneficiaries have been actual victims of the city's allegedly discriminatory policies. One would have thought that this question was governed by our opinion only two Terms ago in Stotts." U. S. at

> "I would adhere to these well considered observations (in Stotts and Railway Employees v. Wright), which properly restrain the scope of a consent decree to that of implementation of the federal statute pursuant to which the decree is entered." U. S. at

> "Even if I did not regard Stotts as controlling, I would conclude...that §706 (g) bars the relief which the District Court granted in this case."

In Local 28 of the Sheet Metal Workers International Association and Local 28 Joint Apprenticeship Committee, Petitioners v. Equal Employment Opportunity Commission, U. S. (1986), Justice Rehnquist and Chief Justice Burger dissented arguing:

> "I express my belief that §706 (g) (of Title VII) forbids a court from ordering racial preferences that effectively displace non-minorities except to minority individuals who have been the actual victims of a particular employer's racial discrimination...I explain (in Local Number 93 v. City of Cleveland) that both the language and the legislative history of §706 (g), clearly support this reading of §706(g), and that this Court stated as much just two Terms ago in Firefighters v. Stotts."

Even when Mr. Rehnquist apepars to express an opinion in support of discriminatory conduct against a minority protected by federal legislation, he stops short of finding a statutory violation in the facts. In Meritor Savings Bank v. Vinson U. S. (1986), the court ruled that "a claim of 'hostile environment' sex discrimination in the workplace is actionable under Title VII." This means that there exists a legal cause of action; however, the court stopped short of finding an actual Title VII violation from which the plaintiff (a black woman) could have been given relief by the court. For legal reasons, the case was sent back to the lower court. (It had been dismissed for failure to state a legal claim upon which relief could be granted by the court.) Justice Rehnquist wrote for the majority emphasizing that an employer could be liable for sex harassment. However, the dissent of Justice

Marshall, Brennan, Blackmun and Stevens went on to say that:

> "I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave 'notice' of the offense."

Weight Given by the Senate to a Judicial Nominee's Philosophy

Judicial Philosophy

Much has been made of the need to focus on issues other than judicial philosophy in the consideration of nominees to the federal bench. The NAACP does not oppose that point of view; rather it is our belief that ideology or philosophy has an important bearing on fitness for a judicial position and consequently it should not be excluded from active consideration in determining the fitness of an individual to serve on the bench.

I am sure that the Committee recalls that President Nixon, on October 21, 1971, in announcing the Rehnquist nomination, averred that judicial philosophy was one of the major considerations governing his choice of Mr. Rehnquist. This point of view was also espoused by Mr. Rehnquist himself in a 1959 Harvard Law Record article which was quoted in the November 11, 1971 New York Times at p. C 47: Mr. Rehnquist wrote:

> "Specifically, until the Senate restores the practice of thoroughly examining inside of the judicial philosophy of the Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process. As of this writing, the most recent Supreme Court Justice to be confirmed was Senator Charles Evans Whittaker. Examination of the Congressional Record of debate relating to his confirmation would reveal a startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation."

He urged the Senate to:

> "restore its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him..."

We concur with that position. The NAACP maintains that a lifetime appointment to the High court is the most important appointment any President can make. It gains added significance when the nominee is being considered for the position of Chief Justice. The Chief Justice has the opportunity to lead and shape the court for decades to come. Justice Rehnquist has already served almost a decade and one-half.

The importance of the Supreme Court was considered by the framers of the Constitution when they quite wisely did not entrust the selection of its members to either the President not to the other co-equal branches of the government. The Framers decided that such a momumental task must be a shared responsibility between the President and the Senate.

Many have said that the only reason that Justice Rehnquist is being opposed is because of ideology or philosophy. That is a sound reason for the consideration of judicial temperament and philosophy. In researching our files, I came across a copy of the November 7, 1971 Congressional Record which sets out the Brest, Grey and Paul memorandum. According to these learned professors, the Senate during the 19th century refused to confirm some 21 nominees to the U. S. Supreme Court base, in large part, on political views; at least 7 nominees' political philosophy was a major issue during the 20th century.

Mr. Chairman and members of the Committee, the National Association for the Advancement of Colored People believes that judicial philosophy should be a prime consideration in considering this nominee.

Chief Justice Burger has reminded us of the impending 200th birthday of the signing of the Constitution. We should remember that another Chief Justice wrote the majority opinion in one of the most infamous cases in the Court's history. I speak of the Dred Scott decision. Chief Justice Taney held that the Constitution was not meant for blacks, be they free or slave, and that the black man has no rights that the white man was bound to respect. This decision was so out of touch with the mainstream of political thought, even during a period of slavery, that it hastened the War between the States and it has stood as a monumental blot on the Court's history.

In conclusion, there has been a lot of talk about the brilliance of the nominee and the fact that he was first in his law school class at a prestigious institution. We do not refute that, but we remind the members of the Senate that genius, devoid of compassion, distorts reality and cripples one's objectivity.

Thank you for this opportunity to be heard.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. How long have you been a member of Congress?

Mr. WEISS. Almost 10 years now.

Senator METZENBAUM. And you chair which committee?

Mr. WEISS. The Subcommittee on Intergovernmental Relations and Human Resources, of the Government Operations Committee.

Senator METZENBAUM. Before you came to the Congress, you were a prosecutor?

Mr. WEISS. I served for 4 years as an assistant district attorney in New York County.

Senator METZENBAUM. Do I understand you to say that you have pretty much been listening to the testimony that this committee has been taking in the past several days?

Mr. WEISS. Every moment that I could, Senator.

Senator METZENBAUM. Based upon your experience as a practicing lawyer, as a prosecutor, as a Member of Congress chairing a committee, do you have an opinion as to the Justice's credibility with respect to the Arizona matter, with respect to the Jackson memo, with respect to indicating that he had not seen, was not aware of the restrictive covenants on his property? Do you have an opinion as to his credibility in his answers on those subjects?

Mr. WEISS. I do, Senator.

Senator METZENBAUM. Would you care to state that opinion?

Mr. WEISS. In totality, as I watched and I listened to Justice Rehnquist, and heard the numbers of "I can't recall's" and "I don't remember's," spoken in a very soft and easy, laid-back manner, which nonetheless did not respond directly to many questions, and knowing some of the facts, having reviewed the history of his actions in Arizona and his apparent role regarding the restrictive covenants, it was my judgment that some of that testimony was incredible. I could not believe it.

Senator METZENBAUM. You oppose on behalf of your organization his confirmation. In your opinion, what is the single-most important reason why Justice Rehnquist should not be confirmed as Chief Justice?

Mr. WEISS. It is my sense that Justice Rehnquist simply does not understand the importance of a written Constitution and the Bill of Rights as the guidepost for the judicial determination of cases. And the Bill of Rights, it seems to me, is something that he can and will and has manipulated in a way that will achieve predetermined results. It seems to me that someone with that kind of predilection and record would be detrimental to the future of this Nation as the Chief Justice of the United States.

Senator METZENBAUM. The Justice indicated in a statement at an earlier point that we are no more committed to an integrated society than we are to a segregated society.

Do you have an opinion as to the importance and relevance of that kind of statement and its impact upon the community as a whole?

Mr. WEISS. Yes. If the Justice really believes that, then he must be in the tiniest part of 1 percent of the American people who have that view. I think that we have a national commitment to an integrated society. And if he starts with the premise that we do not

and that the Constitution itself does not push us in that direction, then I think we can only have under his leadership a Supreme Court that will be at odds with the Nation.

Senator METZENBAUM. Based upon your review of his record, do you feel that the Chief Justice has exhibited a commitment to equal justice under the law?

Mr. WEISS. Whatever his own intentions and motivations may be, the result, as my fellow panelists have said and as I have said, in case after case, is that equal justice is in fact denied to minority positions, minority plaintiffs, to women, to people on the basis of sexual orientation. The State's position seems to be paramount in most of his decisions. On the basis of results, I do not think he has shown a commitment to equality of justice.

Senator METZENBAUM. Thank you, Congressman.

Ms. Smeal, has the National Organization of Women testified on many occasions with respect to the confirmation or in opposition to confirmation of judges before the U.S. Senate?

Ms. SMEAL. No. We have testified only very infrequently. The last appointee of Mr. Reagan, Justice Sandra Day O'Connor, we stood here to vote for confirmation.

Senator METZENBAUM. You did what?

Ms. SMEAL. We recommended confirmation.

Senator METZENBAUM. So that last time you appeared here supporting the nomination of Justice Sandra Day O'Connor.

Ms. SMEAL. Right.

Senator METZENBAUM. Since then, you have not been before the Congress?

Ms. SMEAL. Not in testimony.

Senator METZENBAUM. Let me ask you whether you care to discuss some of the specific cases. You gave us a group, and I know the time precluded you from spelling out those cases. But I wonder if you would care to addresss yourself to one or two that you consider more important or highlight the issue.

Ms. SMEAL. Yes. Thank you.

We have grouped the cases that we reviewed under three different headings. One was the due process and equal protection clauses, and what we said that with our ERA, of course, this is so important to American women; it is the basic guarantee.

Essentially under these clauses, he has ruled repeatedly—and it is not just one or two cases, but repeatedly—that it is OK to discriminate on the basis of sex as long as the State or business has a reason to do so. He calls it the rational test.

The reason, by the way, does not have to be concocted at the time the legislation is passed. It can be concocted years later at the time of the lawsuit. Just any reason, any excuse, even mere administrative convenience is OK for having a pattern of sex discrimination.

He is particularly remiss in this when it comes to discrimination on the basis of pregnancy. Essentially on the basis of pregnancy, and there is a lot of these cases, one, a Cleveland case for the Board of Education, by the way, Senator, a case that prohibited school boards from placing pregnant teachers on mandatory unpaid leave in the fourth month of pregnancy. He dissented, and he said essentially that the legislators had to be permitted to draw a gener-

al line just short of the delivery room. In other words, he did not wish to interfere with any judgment, and he excused their essentially causing pregnant women to lose their job just for administrative convenience.

There is case after case. As a matter of fact, when you go to statutes—in other words, his precedents under the area of the due process clause of the 14th amendment are just dreadful, but then he even did this when Congress explicitly passed laws to guarantee no discrimination.

For example, under title VII, for years it was interpreted that sex discrimination, discrimination in the area of pregnancy was sex discrimination. But he wrote and he actually invented a new classification. He said in *GE* v. *Gilbert* there are three types of people: There are men, there are women, and there are pregnant people; and that in essence, he did not see discrimination on the basis of pregnancy as anything to do with sex discrimination.

And so what happened, we as a movement had to go to Congress again to pass a Pregnancy Discrimination Act to prevent this type of interpretation. And then we go back in more cases, and he in essence would interpret that act in the most narrow of ways.

In fact, we think that what will happen if his viewpoints become dominant—and surely as Chief Justice he will have more sway—is that we will have to come back to Congress again and again for more and more statutes to carefully delineate what we mean when we say that there should be no discrimination on the basis of sex.

Senator METZENBAUM. If the Justice is confirmed by the Senate for the position of Chief Justice, do you feel that the women of America will have a concern as to their ability to obtain equal justice under the law before the Supreme Court?

Ms. SMEAL. There is no question of it. In fact, there is no question in my opinion if his views become dominant that the whole avenue of appealing to the courts for our rights will be indeed narrowed, and in some places actually closed.

That is one of the reasons I cannot stress more that the need to reject this appointment, because for us, it has been one of the few avenues of progress. Essentially, for women's rights, we have had to resort to the courts repeatedly. That is where most of the gains have been. He would close or so gut this avenue or change its direction that we would indeed, I think, be going backward.

Senator METZENBAUM. Ms. Simmons, there is some question whether Justice Rehnquist should be judged by his civil rights activities in the 1960's. Let me then ask you to assess his civil rights activities since he joined the Supreme Court.

What effect has his presence had on the important civil rights guarantees under our Constitution, especially the equal protection clause?

Ms. SIMMONS. There have been a lot of effects. In some of his decisions, take, for example, he has actually taken the position that there must be proof of intentional discrimination. And there are a long line of cases.

If you take *Keyes* v. *the School District of Denver,* Mr. Rehnquist there dissented from the majority opinion in that case which held that proof of intentional discrimination, segregation policy on the

part of the School District was sufficient to support a finding of a dual school system.

Mr. Rehnquist at that time said that there were significant differences between the proof to support that claim with reference to segregation required by statute, which exists in the *Brown* case. He also said that in that case he felt that you had to have proof of intentional segregated policy. That concerns us.

Or if you take, for example, the case of *Batson* v. *Kentucky,* where the majority of the Court reversed the death penalty because blacks were systematically excluded from the jury by the prosecutor through preemptory challenges. The way he analyzed that was that neither of those statements had anything to do with the evidentiary burden that is necessary to establish equal protection in that particular context.

Or, for example, if you will take his position that he makes a distinction between de jure and de facto. And if you take the *Firefighters* v. *Stotts* case, Mr. Rehnquist concurred there with the majority to find that title VII had not been violated.

Senator METZENBAUM. Do you not get some satisfaction in knowing that Justice Rehnquist's position is that it is all right to keep blacks off juries in connection with cases having to do with black defendants as long as you keep Hispanics off juries with respect to cases having to do with Hispanic defendants and whites off white juries in cases having to do with white defendants? Does that not give you some comfort knowing that?

Ms. SIMMONS. It does not, Senator.

Senator METZENBAUM. I did not think it would.

Ms. SIMMONS. We believe that is disingenuous.

Senator METZENBAUM. Do you feel that that kind of protection or that comment in reference to it is all right to keep blacks off juries in connection with cases having to do with black defendants as long as you keep whites off juries having to do with white defendants sends a special kind of message to blacks of America?

Ms. SIMMONS. I think it sends the kind of message to blacks in America that what he is trying to do is narrow the scope of the equal protection clause; that he would want to provide rights for all Americans. He forgets the historical context, and we are concerned about that.

Senator METZENBAUM. Thank you. Mr. Chairman, I did want to point out that Mr. Mitchell who was to be on this panel did arrive. I hope we can take him with the next panel.

The CHAIRMAN. He can come on up now if he wants to. No, we will take him the next panel.

Senator METZENBAUM. Fine.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. I will just reserve my time.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. Is Mr. Mitchell going to testify now or with the next panel? If he wishes to go ahead, I can wait.

The CHAIRMAN. We will just hold him for the next panel in a few minutes.

Senator HEFLIN. Let me ask each of you a question. For the first question, there are three assumptions that I would like you to make. First is, assuming that the nominee Justice is confirmed,

assume that he is confirmed, and that Justice Scalia is placed on the Court. That is the first assumption.

The second assumption is that Justice Rehnquist does not turn out to be any more of a consensusbuilder as Chief Justice than he has as an Associate Justice—due to individual factors or whatever.

And third, that Ronald Reagan does not appoint any other nominees to the Court. He does not appoint any other Justices to the Court during his term of office.

Now, making those three assumptions, how do you think William Rehnquist as Chief Justice will affect the decisionmaking function of the Supreme Court any more than at present?

Mr. WEISS. I am not sure if I have a good enough crystal ball for that, Senator. I think that certainly Justice Rehnquist has the intellectual capacity and the ego in a positive sense, and the will and determination to exercise his role as the Chief Justice. And it is my sense that the Associate Justices will defer to him in his role as the administrator and as the assigner of cases.

So I do not think that the presence of any other new member or the existing members can in any way take away the powers that he would be granted as the Chief Justice. Whether or not he will be able to build a consensus on the Court still remains to be seen, but certainly he will be in a more powerful position to do that as the Chief Justice than he has been as an Associate Justice.

As to the last assumption, I can only say Amen.

Ms. SMEAL. As the Chief Justice, he has several roles, one of which is indeed symbolic but certainly important. You are putting in that position the most extreme position against women's rights and minority rights, in no way a person in any form of a mainstream or centrist, absolutely the extreme position in opposition.

And I know there has been a lot of inferences here that Burger and Rehnquist are two peas in a pod or very much alike. But if you review their decisions, they certainly are not. The decisions of Mr. Rehnquist are definitely in the area of women's rights more extreme. In the area of right to privacy, I will just remind you that Burger was in the majority on that decision, and Mr. Rehnquist was in the minority on that decision.

In the whole area of affirmative action, Mr. Rehnquist is dependably the most extreme person in opposition or limiting. So you would have the person who convenes the Conference, who sets the tone, the most conservative—but I think that word is being used wrong here. I do not believe this is conservative. This is not trying to keep a status quo. This is trying to go backward. That is why I use the word with care reactionary. It is to go back in time, before, to a previous state. And for women, I mean, this constant harking back to the intention of the framers and a static view of the Constitution only to use literal words will eliminate women. Because in the literal sense of the word, even under the 14th amendment, there was no intent for women to have equal rights. But surely to God, this Constitution must be looked upon as a living document, one that keeps up with the times and the changing positions of people in our society, and certainly the changing roles of women in our society.

So I think it makes a great deal of difference, a great deal.

Ms. SIMMONS. I think if Mr. Justice Rehnquist, Senator Heflin, was coming here for a position on the Supreme Court, sure, we would oppose him, based on some of the actions we know about.

But I think that with him here in the role as Chief Justice with the opportunity to lead and shape the Court, we have grave reservations.

We listened with care to his testimony and we are not convinced. We are concerned about the position he took in the Jackson memorandum where he indicates what he thought about the *Plessy* decision.

We are concerned about what I call, and what they refer to sometimes pejoratively, as judicial activism. I see Mr. Justice Rehnquist as being an activist and trying to take us back pre-*Brown*. The NAACP believes that if he did become Chief Justice, and we have not completed our examination of Judge Scalia's record, that you would have a shift in the Court so that you would not have as many 5-to-4 decisions I think that you would have Mr. Justice Rehnquist being certain to assign cases based on an attempt to shift the Court the way he feels the 14th amendment should be interpreted, and that is narrowing of the 14th amendment.

And for persons who are the descendants of a slavery background such a narrowing of the 14th amendment is unconscionable in America. We believe that something has to be done to try and make minority Americans first-class citizens in this country. And we do not see, based on the actions of Mr. Justice Rehnquist, that he is moving in that direction. Therefore, it is the NAACP's position that it would be an unconscionable thing for persons whose skin is the color of mine if he became Chief Justice.

Senator HEFLIN. Well, let me ask you one other question.

Take the first two assumptions, assume the swap of Scalia for Burger makes no difference as to ideology and the consensusbuilding ability remains the same with Rehnquist as at present.

Now, assume Ronald Reagan appoints two additional members during his term of office. What affect do you think that the presence of Chief Justice Rehnquist would have upon the decisionmaking function of the Court as compared to the present?

Ms. SIMMONS. I do not see Mr. Justice Rehnquist as a consensusbuilder. I am formerly from Texas. We have a phrase there you call maverick. I see him as a maverick. And he would not be able to build consensus as necessary on cases such as the *Brown* case, or that would be necessary in other cases of such magnitude. I do not see that.

Mr. WEISS. Senator, it seems to me that you have just created at the very least a 6-to-3 majority for Mr. Rehnquist's position, with him in the saddle calling all the shots as the Chief Justice that are within his power to call.

And it seems to me that we would then face a dreadful period in American history.

Ms. SMEAL. If that scenario was the case, then all of his extreme positions, he would flaunt them. It would become—they would be unbridled. In fact, the hope for women's rights and minority rights, for us ever to be equal citizens in the next 25 to 30 years, it would be dashed from going to the courts. We would have to have pro-

found constitutional change coming from the legislatures and from Congress and through the referendum process.

In fact, I think it would throw us into turmoil. Certainly no slow evolutionary change, but you would have to have much more drastic change. And you would open all of the old fights only with much more intensity and much more bitterness and much more cynicism upon those of them who have fought so hard for human rights, because we have not only been down the path, we have been led down the primrose path.

I cannot believe that we would be contemplating this in this decade.

Senator HEFLIN. Well, the difference between those two questions, really, as to the severity that you spoke of is not dependent so much on William Rehnquist as on Ronald Reagan, is it?

Ms. SMEAL. No; it is not, because Ronald Reagan could elevate—there could be other people of that political persuasion elevated that would not be so extreme.

Sandra Day O'Connor would not be this extreme. You could go on with a whole host of people. You are taking a person who has almost a joy at writing extreme language. The positions that he writes are not tempered in any way. And I think that there are a lot of scenarios that you could write that would not be, even with the same person appointing, would not be as bad.

This would be the worst case scenario. That is why you see all of us up here. You see an absolute united civil rights and women's right and civil libertarian community appalled. I mean we know who won the election in 1984. But this is preposterous, that you put the most extreme position in the highest position of the third branch. And there has to be some temperance. There has to be some recognition that in these views there was no consensus to undo the interpretation of the 14th amendment and civil rights and women's rights in the election of 1984. That was not what was at issue, but that is what will be the result, that is what will be the legacy. There was no election or referendum to do this.

Mr. WEISS. Senator, may I add one word?

It seems to me that you have asked a very, very profound question. Because much of the discussion so far has been premised on the Court continuing as is in its philosophical complexion with Justice Rehnquist as the Chief Justice.

And you have now factored in the future and the recognition that the Court is dynamic. Given the composition of the Court, there will have to be changes, whether Ronald Reagan or another President makes them. And you have to look at Justice Rehnquist not as he will be for, say, the next 2 or 5 years with the rest of the Court being what it is now, with the exception of perhaps the Scalia confirmation, but what it will be in the future.

And I think that you clearly opened a very, very serious line of thought.

Senator HEFLIN. That is all I have.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman.

First of all, I want to welcome my former House colleague, Ted Weiss, here as well as the other witnesses.

Ms. Simmons, you were here until the last witness testified last night—I say that for the benefit of Dr. Hooks back there so he knows you were putting in your time. Hope you get overtime for it. [Laughter.]

Last night I asked Dean Griswold about the symbolic role of the Chief Justice and Dean Griswold said that he thought that, as Chief Justice, Justice Rehnquist might not influence his colleagues but be influenced by his colleagues to moderate his position.

Do you have any reaction to that?

Ms. SIMMONS. Yes, I do, Senator.

With due respect to the learned deans I disagree. When you take a look at the record of Mr. Justice Rehnquist, I do not see a person who is influenced by others. I see a person who influences others.

I think that symbolically it would send a message to black America, to women in America, and I am black and female so I have a double dose of it, you send a message that we are not concerned about the rights of minorities, that we are concerned only about ideology.

And I think in this great country of ours, we have to be concerned, be certain that every group is able to feed at the table. And I do not see Mr. Justice Rehnquist, despite what he said when he was on the witness stand—he said that he would cheerfully do this and he would be able to do the other—I do not see him as a consensus builder. I see him as shifting the Court. And I think that is what it is like.

Senator SIMON. Ms. Smeal.

Ms. SMEAL. Well, I think there is one remarkable thing, and when you look at the record of Justice Rehnquist, is his consistency of behavior since his days as a law clerk for Justice Jackson. I think the reason people ask us why do we bring up the past so much, we bring it up because it, in fact, in this case has been attributed to the future. He has not changed. It has been a consistent pattern from his days as a law clerk to his days as an attorney, to his days in the Court, from his early decisions to now. He has been remarkably consistent in opposition to individual rights in this country.

And I cannot see that he would move. I think that he, in getting more power, would just be—I have a feeling now that he would have no restraint. I think it would go just in the opposite direction.

Mr. WEISS. On two occasions in the course of your hearings, Justice Rehnquist himself indicated that he did not expect that he would change.

And he also said, on at least one occasion, that people bring to the bench the philosophy that they had before they got there.

So he certainly is not expecting to see any kind of major changes, and his record certainly indicates, that he is very, very consistent.

Senator SIMON. One final question.

There are some who argue that we are not changing any votes by this shift. And then the question comes up, how important is the Chief Justice simply as a symbol? The very thing you referred to, Ms. Simmons.

Ms. SIMMONS. I think the Chief Justice's symbol is extremely important.

I recall some 26 years ago when I joined the staff of NAACP. The Supreme Court was the supreme symbol of equality for black Americans. The NAACP always took cases with the firm intent of going to the Supreme Court to get justice. And I think that with Mr. Justice Rehnquist as Chief Justice, we could not do that.

And, symbolically, a message would be sent to black America that you cannot be heard, you cannot receive justice, because black Americans are not going to forget the allegations with reference to the ballot security project. They are not going to forget that. Because to black Americans the right to vote is the most basic right of all rights.

Ms. SMEAL. In the first place, I do think there is a change in votes, and I want to emphasize that. This man has had 54 lone dissents. His position has been the most extreme.

In replacing Burger, you are going to be replacing him with two men, if they are both confirmed, who would, in more cases than not, and certainly in more cases than Burger, vote against the rights of individuals and, indeed, in the area of right to privacy, you have two much more extreme viewpoints. And, of course, that is very important for women's rights and birth control.

So there is no question in my mind that in due process, equal protection and interpretations of the statutes, and in affirmative action and the whole standard of review for sex discrimination, you are getting—you have lost the vote. You are going further away from equal justice.

So I do believe you cannot just say this is trading two types of the exact same type of ideology. It is not. We are going to lose more cases for women and minorities with this combination.

Now, in addition to this one symbol, I was trying to think, you know, you teach schoolchildren a lot about what justice means by the human beings who occupy the highest positions in our country. You teach black children and white children and young girls and young boys a lot by looking at the history and the background of the great leaders of our day. Look at the background that we are about to select for the Chief Justice of this Court, a background that, at best, raises many questions about what did he believe, about the rights of minorities? Not when he was, you know, a little boy but, in fact, when he was a grown adult, a practicing attorney. It is not one that you would want to reveal much about.

And then I still say, and I commend Senator Kennedy for pushing so hard yesterday, that you cannot have in the background so many questions in why were not certain papers released? What did those papers and memos say? Surely, this is not a symbol that one teaches any kind of concept of equality of justice for all standing above in advance of one's time. It is just the reverse.

Mr. WEISS. Senator, I had in my opening statement occasion to refer to Justice Rehnquist's days in Arizona around the peak of the civil rights fights in 1964.

At that time, he appeared before the city council in Phoenix, AZ, arguing against an ordinance to provide equal access to public accommodations. A little later that same year, one of my constituents, a young man named Andrew Goodman, together with two other young Americans, was killed as participants in what was called Mississippi Summer, having gone down to Mississippi in an

effort to open the system both for voting rights and for equal access to all facilities that all Americans should have equal access to.

Justice Rehnquist was during that period also challenging the right of black and Hispanic voters to participate in elections. Now, to elevate that man to the Chief Justice's position is quite a different thing from having him as the single most radical minority Associate Justice on the Supreme Court. It, in essence, tells all of America and the rest of the world where we are. And I just do not think that that is the kind of symbol that America ought to project.

Senator SIMON. I thank you.

Thank you, Mr. Chairman.

Senator HATCH [presiding]. Senator DeConcini, I think, is next.

Senator DECONCINI. Mr. Chairman, I have no questions.

Senator HATCH. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I too want to join in welcoming the panel here, and also welcoming Clarence Mitchell whose family has a very long and important tradition before this committee on issues of civil rights. And we welcome the opportunity to hear Clarence Mitchell.

Congressman, we thank you for coming. You have referenced the ballot security program. You really did not have much chance to get into the background of that program. It really was a euphemism to deny blacks and browns the right to vote, is that not the bottom line, assessment of that program?

Mr. WEISS. That is the way the history seems to be.

Senator KENNEDY. You know, the sanitized explanation is that while we have allegations, we have charges about difficulties in various precincts, the fact is that was organized by one political party, utilized by that political party to harass members of the other political party in carefully targeted precincts.

And in this case it was to harass blacks and browns in precincts in Maricopa County, in Phoenix. And certainly one of the principal architects of that program was Mr. Rehnquist at a time when this country was attempting to address the issues of the right to vote, the Voting Rights Act.

And as you recall, your friends from New York, I can remember Schwerner and Goodman, Cheyney, who met their tragic fates in an attempt to try to ensure that citizens in this country were going to have that right to vote. And around that same period of time, whether it is 1958–60, 1960 to 1964, this nominee was involved in an intimate way in a program to ensure that individuals were going to be denied that right.

We will hear later direct testimony by people that have not got any ax to bare, but say that he was personally involved. We will hear their testimony.

So I welcome the fact that you have raised this issue.

I want to again thank Ellie Smeal and Althea for coming here this morning and for speaking.

They both talked about the question or the criteria that ought to be used. I, too, have reached the conclusion that this nominee is outside of the parameters in terms of consideration, positive and favorable consideration.

I am just wondering, very briefly, because we are running into the time—of the number of nominees that you, either NOW or the NAACP have really opposed in recent time, can you tell me—it seems to me you have been up here on some of the particular nominees for Federal district sometimes, and some of the circuit courts. But I was just trying to think back over the 24 years I have been here, I am trying to find out whether this is business as usual. This will be the charge. Well, they are back here again. Or whether this is a question, now, Ms. Simmons, representing the NAACP, the reason why you are here is because you believe that the membership you represent will effect, if this nominee is elevated to the office of Chief Justice, will be so outside the basic framework of what would be considered to be acceptable parameters in terms of political philosophy that your membership would have lost all hope.

The specific question is, how many times have you been up here on the recent nominees, and I think finally, although you have each answered it, but one that I think is important for the Members of the Senate and the American people to hear is, how distressed would your membership be every time they see thet Court sit and the robes around this particular Chief Justice if he is elevated.

Ms. SIMMONS. Recently, Senator, we have opposed Fitzwater——

Senator KENNEDY. I am talking the Supreme Court now.

Ms. SIMMONS. Supreme Court. Haynesworth, Carswell.

Senator KENNEDY. Haynesworth and Carswell. Both rejected.

Ms. SIMMONS. Right.

Senator KENNEDY. Both rejected by the Senate of the United States.

You commented and testified on both of those nominees, and the—you listened to, obviously, and helped in making a case for a variety of different considerations. But that goes back.

Since then we have had Blackmun. Since then we have had Powell. Since then we have had Sandra Day O'Connor. They might not have been the kinds of nominees that you would have recommended, but I do not remember your being up here and testifying.

Ms. Smeal?

Ms. SMEAL. We have been up here very few times.

Senator KENNEDY. Just on the Supreme Court.

Ms. SMEAL. I understand Betty Friedan, who was our founder, testified against Carswell. I believe that we might have testified against one other. We stood here testifying for Sandra Day O'Connor. But very, very few times. We did not do a total review.

Senator KENNEDY. Well, this is a point, that whether we are talking about Powell or Blackmun or Sandra Day O'Connor, others, they, at least as I understand from your positions, conversations with the various groups, they felt that your various constituencies, the groups that you represent, still would have a sense that justice could be obtained.

And as I understand the bottom line in reviewing your testimony, you believe that if this nominee is elevated to this position, that your members—we will start off with you, Ms. Simmons—your membership will be so distressed, so distraught, that they may very well lose hope that they can find equal justice under law?

Ms. SIMMONS. Senator, our Resolutions Committee did not come out with a resolution on Mr. Justice Rehnquist. When we hit the floor with resolutions, before we could take up anything, the membership insisted, in convention, that we be sent back to the drawingboard, and to come out with a resolution opposing Justice Rehnquist.

That is how they felt about it.

Senator KENNEDY. And that is based on both the legal and other kinds of activities.

Ms. SMEAL. Well, the entire feminist community is in opposition to these appointments. And the feminist legal community is especially alarmed.

Remember, women do not have an equal rights amendment. So you are elevating to the highest position the person who has the loosest standard of interpretation, the weakest under the due process and equal protection clause, on the current Court.

Essentially, we are very vulnerable; very fragile position. And he has taken a position, essentially, that any kind of sex discrimination, if you can think of any kind of excuse or reason, is OK.

So we are just very united that this is the worst possible choice for this high position that we could see. And indeed, I think, would fundamentally change how we would approach advancing women's rights, if this became the dominant view. And certainly even as a symbol will greatly affect the process of how we go about effecting change for women's rights in our country.

Senator KENNEDY. If the record would show that both organizations, going back to Haynesworth, Carswell, Blackmun, Powell, and O'Connor, that with regard to the NOW group, they supported O'Connor and were not opposed to any of the others. And with regard to the various civil rights groups, the NAACP only opposed Carswell and Haynesworth which were rejected by the Senate.

And I welcome the fact, I think it is of especial importance, that we hear the message that you have given to us this morning. I think it is an important message. I think it is much more attuned and reflective of what is the real, accurate viewpoint of millions of Americans, women in our society, others in our society who care about the whole issue of second class citizens, whether in our society—this is an important message that has been given by you, Ellie Smeal, and Althea Simmons.

I think it is really a message about what this country is about, which direction we are going to go in in terms of the future. And I welcome the fact—eloquent statements. And I thank you very much for raising the consciousness both of this institution, and hopefully, across this country.

And I hope it is a message that will be heard.

Thank you.

Senator HATCH. Senator Biden.

Senator BIDEN. Thank you.

I apologize to the panel for not being here. We are marking up the South African sanctions bill in the Foreign Relations Committee at this very moment, and I will be coming in and out.

How the three of you who have testified so far respond to the point made by the Senator from Utah, that in fact Mr. Justice

Rehnquist has not been in dissent the most of any Justice, that he has not been the lone dissenter as he has been painted.

I believe the Senator from Utah cited statistics showing that other Justices, Justice, had a single dissent record that was higher.

And second, how do you respond to the argument that what happened 35 years ago should not be the test; the test should be what his performance has been on the Supreme Court the last 15 years?

Mr. WEISS. Some of the testimony that I heard late last night on television indicated that the statistics that Harvard keeps year after year have found that Justice Rehnquist is the single most frequent dissenter, especially in the area of civil liberties and civil rights.

Perhaps that is really the key; the areas in which those dissents have taken place.

In looking at Justice Rehnquist's record, we are not just going back to things that took place 35 years ago. We are going back to things that took place in 1964, 1966, 1968, 1969, and 1974, in addition to the record that he compiled as a Supreme Court Justice.

This is especially important in light of his own acknowledgement that he brings to his new position, as he did to the Supreme Court, the philosophy that he had before he got here.

I think all of those matters are absolutely relevant as he seeks to assume this new important position.

Senator BIDEN. Thank you.

Ms. Smeal.

Ms. SMEAL. I think some of his lone dissents are particularly revealing of how difficult it is for him to change his mind on certain issues.

I think the *Bob Jones* dissent is one of the most revealing. Here he is the lone dissent on whether or not the IRS regulations, tax exemption, can be given to a university that practiced a form of racial discrimination, or segregation. And as the lone dissent I think he totally, so narrowly, legalistically interprets what the whole temper of the times—he would allow segregation under the IRS rules. And totally shows to me how determined he is to extend his past into the future.

I think the reason why it is appropriate to bring up the past is because it in fact does—is constantly reiterated and is constantly reaffirmed by what he does as a Supreme Court Justice. And his record substantiates that he has not changed.

I was trying to think, when a symbol—the symbol really is of a person who has practiced some forms of segregation, and brings that past, which none of us can be very proud of, into the present; maybe not using those terms, but by so interpreting the law that would make it possible.

I was trying to think when Senator Kennedy—have we ever opposed—who have we opposed before here. And I think—we did not review that, it has been so infrequent. But somewhere in the back of my brain I think that we opposed Justice Stevens because of some of his immediate—right before he was elevated, some practices on sex discrimination.

Now I can tell you though, if he was to be elevated to the Chief Justice, even if we had opposed him, we would rapidly have changed our minds.

Senator KENNEDY. What kind of judge do you think he has turned out to be?

Ms. SMEAL. Because he has turned out to be a Justice that many times supports the elimination of sex discrimination and other forms of discrimination, and he is for women's rights.

I would be the first to say that if we did that—and I think we might have—that we were—that we had made a mistake, and by golly, he can show that he can interpret the law so that he could extend more rights to people.

But on this person, whatever was done in 1971, and I do not know if we testified against Mr. Rehnquist in 1971—if 49 we did not, we should have and we missed the boat. And by golly this record of the last 15 years leaves no doubt where he is going to be as Chief Justice. He will be a leader, and I see him standing in the doorway for progress for both my daughter and my granddaughter if he stays there that long.

Senator BIDEN. Let me ask you a followup question, and then I will ask you to answer both, Althea, if I may. And I do not want it to keep you too long, because we are limited in time, and I am afraid we are not going to get all the panels in.

The charge will be made that in fact you are, quote, a single-issue person, and the organization you represent is, the NAACP is, quote, a single-issue group, that is the charge that is made.

Let me ask you the following question. If, in fact, the nominee were sent to the Senate from the Supreme Court, and the nominee's record on women's rights was in compliance with what your organization stands for but for the fact that that nominee had written a law review article saying *Roe* v. *Wade* was a bad decision and should be overturned; but in every other thing that had occurred, statutory interpretation, other constitutional questions, application of the 14th amendment, applying the same standard to women as to minorities, to blacks, would you be here testifying against that nominee, if the only thing on the record that disagreed what you stand for as an organization, as saying that *Roe* v. *Wade* should be overruled.

Ms. SMEAL. You notice when I started my testimony—I do not know if you were in the room, Senator—I said that I was here in the role as president of NOW and I was going to limit my remarks to sex discrimination.

But I will be frank that I felt limited in that role, because I view that his most shocking positions on the record—it is a whole pattern on how he views minorities.

In fact, his records in minority rights, individual rights, civil liberties, across the board, I find so disturbing.

Not that I am apologizing for representing women; we are over half the population of this Nation. And I just get rankled when I hear that we are a single issue. I mean any Justice that cannot look at women's rights in the most broadest sense—give us a break; for heaven's sake, after 200 years of discrimination—should alone be rejected on that premise alone.

But I understand the peculiar standards that we still have for women. And I do know that on race discrimination there is more of a consensus in our Nation that it is wrong than on sex discrimination.

And so it is just shocking that we would be considering for the highest position—by the way, I also feel——

Senator BIDEN. Ms. Smeal, I am not sure you have answered my question.

Ms. SMEAL. On *Roe* v. *Wade* alone—I feel that on *Roe* v. *Wade* alone you could make the case that the President of the United States, or any group, that wanted to change the position, that they could appoint Justices to change it.

However, I still think that would be going around how you amend the Constitution of the United States.

Senator BIDEN. Thank you.

Ms. SMEAL. I think the Constitution should be amended by a three-fourths vote of both Houses of Congress, and two-thirds vote of the States—just the reverse, two-thirds vote of both Houses of the Congress; three-fourths of the State.

That is why I have not answered you. Because I do not know what I would do on that alone.

Senator BIDEN. I think you are being honest about that, and I appreciate it.

Ms. Simmons, let me ask you a question, if I may.

The standards that should be applied in choosing a Justice of the Supreme Court, in this case a Chief Justice of the Supreme Court, standards that should be used by the U.S. Senate:

Is it your position that if we disagree with the ideology of the nominee, that we should vote against that nominee, notwithstanding the fact that they be, by all other standards, you know, decent, honorable, bright, capable. But they just have a different philosophy.

Or is it your position that their philosophy has to be beyond the mainstream of American politics to be rejected?

We keep using the term, "extreme." One saying, for example, saying I disagree with the philosophy of some of my colleagues and some of the sitting Justices, but I must admit that they are within the mainstream of American politics; that they in fact are not outlandish differences. I have differences with mainstream Republicans on their philosophy, and some Democrats.

But there are others whose philosophy seems to be outside the mainstream, that they are so unusual, that they are so on the edge of what is acceptable in this society, that they are in a different category.

What argument are you making? Is it, merely because I disagree politically with a nominee, I should vote against him? Or: that nominee has to be on the edge, beyond the pale, before—assuming all other things—they are qualified in other respects?

Ms. SIMMONS. My response is those who are beyond the pale, outside of the mainstream. That is important.

Senator BIDEN. That is helpful. Because what I worry about is, I worry about this nominee to start with.

Ms. SIMMONS. We do, too.

Senator BIDEN. Beyond that, what I really worry about is the argument that says the President is being political—and he clearly is, and he has a right to be, I guess. And therefore, we have a right, under the Constitution as I read it and constitutional history.

For example, George Washington's Chief Justice Rutledge, Nominee Mr. Rutledge was rejected by the U.S. Senate. This is not a new notion.

But what worries me is if we start to get into saying because the President can choose ideology and the person that he wants, we in fact should make ideological judgments here. And I worry about the symbol. We are talking symbols here. I worry that what may happen is that if it gets down—if the public ever perceives that it in fact it is really nothing more than a political struggle between a President and the Congress, between two political parties, the people of the Court are persons who in fact are nothing more than reflections of one ideology over another, then I think that that citadel of justice—I will never forget Clarence Mitchell's father sitting before us describing with obviously heartfelt and deeply felt meaning the Supreme Court of the United States as the citadel of justice and the place at which people could go and so on. And he talked about what would happen if that changed, if the cobwebs began to grow in the hallways. It was the most moving speech I have heard in this Chamber.

And I worry that if we let it get down to that, that although constitutionally that may be able to be done, it would be a real serious, serious blow for justice for this country, the perception of it.

Mr. WEISS. In this situation, Senator, you do not have that problem.

Senator BIDEN. I am not suggesting I do. I want to make sure I understand what you all are saying, so that when you leave here, it is not suggested that the reason why you are opposing Justice Rehnquist—if in fact it is not the reason—is merely because you disagree with his philosophy, which is a mainstream philosophy, but because you believe that his philosophy and his application of his philosophy as a judge is so on the outer edge of the accepted bounds of the American political system that he warrants not being on the Court. There are two different questions.

And there are very bright women and men who make the argument that in fact you do not have to do that. You just established you disagree with him, and a U.S. Senator, if you disagree with the philosophy and their voting record, vote against him. I acknowledge that has a constitutional basis. I think it is a political weakness, and that is the only reason for my asking the question.

Ms. SIMMONS. I think it should be considered in the context of all the other things.

Senator BIDEN. Agreed.

Ms. SIMMONS. And I hope we do not lean over so far backwards that we rule that out because we are afraid the opposition might say something different.

Senator BIDEN. No, and clearly the administration will not rule it out.

Ms. SMEAL. Senator, on ideology, I think that what we are talking about is not in ordinary terms Republican or Democrat. It goes way beyond partisan politics. This is ideology in its truest sense of judicial beliefs of what do you believe the words due process, equal protection, is there a right to privacy in the Constitution, what is the role of women in the Constitution, how does sex discrimination—how can it be defended under our current laws without an

equal rights amendment. These to me are the questions that should be asked.

Senator BIDEN. I think they are legitimate questions, and I think you asking him, highlight them. I find, quite frankly, that if one claims they are a strict constructionist, I can understand that. If they are literalists like the Attorney General, for example, says he is, but if one suggests they are strict constructionists and then goes behind the face of the words to find meaning in what the framers meant—which is also a legitimate exercise of those who are more the legal realist—if you do that, you go behind the face of the words of the Constitution, then it seems to me we can get to look at what you say.

My confusion in the decision for me is in part going to determine, I am going back and rereading Mr. Justice Rehnquist's cases as it relates to his discussion with me yesterday on the 14th amendment. He acknowledges that this says all persons, and then he acknowledges that you have a different standard to determine within that.

Now, if he is a strict constructionist, how do you get to that point? How do you get to acknowledging there is a different standard? That is my question. I have got to do a little more research on that. It is clear he puts the highest burden—he puts women and corporations in the same category, literally, not figuratively—literally. And he puts blacks in the highest category, and he puts other racism minorities probably most of the time in that category, but he would not speak to that specifically.

So I have to check, go back and look at it. I thank the Chair. I realize we have to move on. I thank the witnesses for taking the time. You have made a valuable contribution.

Senator DECONCINI. Mr. Chairman.

Senator HATCH. Senator DeConcini.

Senator DECONCINI. May I just follow up? I got here late, and that is why I did not ask any questions. I wanted to listen to the testimony here, and I appreciate the line of questioning, particularly that the Senator from Delaware has pursued, because I think it is important here, and I know that this is not the hearing for Judge Scalia. But, Ms. Simmons, do you know what the NAACP will do regarding his nomination?

Ms. SIMMONS. We are in the process now of going over his record to see whether or not we wish to testify.

Senator DECONCINI. So you do not know whether you are going to support him or oppose him?

Ms. SIMMONS. I do not know as yet.

Senator DECONCINI. Ms. Smeal?

Ms. SMEAL. We are going to oppose.

Senator DECONCINI. You are going to oppose him. On the philosophical grounds, I presume?

Ms. SMEAL. Yes. We think that his record obviously is not as extensive as Justice Rehnquist's, but in the legal record that we have, it is even worse on women's rights.

Senator DECONCINI. Than Justice Rehnquist's?

Ms. SMEAL. And we can document that.

Senator DECONCINI. Congressman?

Mr. WEISS. We will be opposing him.

Senator DECONCINI. You will be opposing?

Mr. WEISS. Yes.

Senator DECONCINI. Mr. Mitchell?

The CHAIRMAN. On the next panel.

Mr. MITCHELL. We have not taken a position, but I have not testified.

Senator DECONCINI. I take it from this exchange this morning—and I am sorry that I missed your statements. I am going to read them, I can assure you—that obviously in this selection process, and I suspect that this goes not only to the Supreme Court but to the circuit court of appeals and to the district courts, that each of you and the organizations that you represent believe that the philosophical approach of a Justice and that performance, if they have experience in that on the Court, rather than the quality of his or her ability to write and to interpret or experience in practice of law is more important. Is that fair, my observation here for each of you?

Ms. SMEAL. It should go without saying that whoever we are appointing to this high position can write and can understand the law and is qualified in the skills. This goes to their positions.

Senator DECONCINI. Well, if you had a judge who had 15, 20 years on the bench who met all those qualifications, that is not enough to overcome an ideological difference. Is that fair to say in your judgment?

Ms. SIMMONS. I think that ideology is important. I think ideology alone should not be the standard.

Senator DECONCINI. Excuse me, Ms. Simmons?

Ms. SIMMONS. Ideology alone should not be it.

Senator DECONCINI. Should not be the standard separately.

Ms. SIMMONS. That is right. All those things go into the hopper when you are talking in terms of the person who will be leading the Court.

Senator DECONCINI. Right, based on a scale of 1 to 4, 1 to 10, whatever it is, where would you place ideology? No. 1?

Ms. SIMMONS. I had not thought about it that way.

Senator DECONCINI. Ms. Smeal?

Ms. SMEAL. Well, I think what you believe on due process, equal protection, and justice is very important.

Senator DECONCINI. I do, too.

Ms. SMEAL. And I would say of the high importance. I also happen to think behavior and record is important, too, and when I said that, I did not mean to be flippant when I said one should assume a person at this highest capacity is good at writing legal opinions and interpreting them.

But I think that there is a lot of questions on this appointment. One is how he views individual rights. I do not think one of the things we even mentioned was how he views the power of the majority. He essentially does not see a guarantee of minority rights. He views that minority rights are what the majority says they are, which I think is contrary to our history.

Senator DECONCINI. Let me get back to my question, if I can. I take it from your answer that you feel this ideology or belief or philosophy is the highest of the criterias, if you want to segregate them?

Ms. SMEAL. Yes, I do, but I also happen to think on this one his behavior is also very important.

Senator DECONCINI. I understand.

Ms. SMEAL. I happen to believe his behavior in Arizona and——

Senator DECONCINI. I got that. I am trying to distinguish myself, quite frankly, because I have somewhat felt that the qualifications and capabilities of individuals should be first. And your testimony is helpful, quite frankly.

How about you?

Mr. WEISS. If the ideology, Senator, is so strong that it distorts and colors and directs the decisions, then it must be given strong consideration. That is what has happened, I think, in Justice Rehnquist's case. It is not just abstract ideology. He has taken the ideology that he displayed in private practice, and used it in his work as a member of the Department of Justice and as a Supreme Court Justice. However he has to shape his decisions on the court, he comes out where he was philosophically and ideologically before he ever became a Supreme Court Justice.

Senator DECONCINI. And you would apply that same standard if it was far to the left?

Mr. WEISS. I think that is absolutely right. If in fact he used that to come to decisions before—looking at what the facts are and what the law is.

Senator DECONCINI. In other words, if you had a Justice or a person nominated who had taken what you consider—it might differ as to what is considered far left positions involving the Communist involvement in our society or something that maybe you and I would not agree, you would think that would be an ideological prohibition, too?

Mr. WEISS. Within the bounds of the Constitution. If the Constitution says that people have the right of free speech and free assembly and free association, no matter who they are, then you cannot say, well, if you are a Communist, you cannot do that.

Senator DECONCINI. No; but if they were involved in treason and there was evidence there and you have to interpret the Constitution not to include that as——

Mr. WEISS. Absolutely right. That is right.

Senator DECONCINI. You would feel that that ideology, let us say it is on the left—maybe it would be interpreted to be on the right—but let us say it is on the left, that would be the No. 1 criteria, too, in your judgment?

Mr. WEISS. I think so. That is right.

Senator DECONCINI. Thank you. Mr. Mitchell, do you care to comment?

Mr. MITCHELL. Senator, I have not been sworn yet, and I am part of the next panel.

Senator DECONCINI. I am sorry. I thought you were part of this.

Senator HATCH. We are going to have him on the next panel, Senator.

Senator DECONCINI. Thank you. I have no further questions.

Ms. SMEAL. Senator, when you said about competency, just think of yourself as a person who would be defending minority rights. It would be better to have an incompetent opponent than an extremely brilliant opponent. So for those of us concerned about individual

rights, that he is supposed to be so brilliant only makes a person who would be more skillful in denying individual rights.

Senator DECONCINI. Well, Ms. Smeal, let me just say in my judgment that this is not always the case. But I think in my limited experience of a few years of practice and in business and in life that people who do have good intellect, capability of reading and reasoning, even if I happen to disagree with that reasoning, also have the capacity often to come to conclusions that I may agree with one day and disagree with another day. And I think we have had some history on the Supreme Court where we have had some surprises based on what we thought.

And you mentioned Justice Stevens. I am not equating that to Justice Rehnquist because they both have sat there, and you have testified that he has not made that transition or change. But it seems to me like you are better off with someone who is intelligent and going to read the law and study it, because maybe you have got some hope of persuading him, assuming that they are there before you with your case.

Thank you, Mr. Chairman.

Senator HATCH. Thank you. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Ms. Smeal, as I understand it, your comments on behavior are focusing on the issues relating to Justice Rehnquist's conduct as a poll-watcher, correct?

Ms. SMEAL. Yes.

Senator SPECTER. Is there anything else that you focus on specifically?

Ms. SMEAL. Well, in my testimony, my public testimony here, I have focused primarily on sex discrimination and his record on sex discrimination and his interpretation which has been very restrictive. But we do mention that we are concerned also with his whole question when he was in the Office of Legal Counsel, the *Laird* v. *Tatum* decision which he did not recuse himself from. It troubles us, you know. He talks about the young barbarian on the campuses during the late 1960's and early 1970's. Remember, that is the birth of not only tremendous activity for peace in our country, but tremendous activity for women's rights in our country. And I do not understand why this executive privilege would stop us from seeing these legal memorandums that he wrote. From a woman and a person who has been—I have been on the forefront of the fight for individual rights. At various times, I believe, through government documents that NOW has gotten through the Freedom of Information Act that we have been wiretapped, that our loyalty has been questioned, even though the only thing we have ever really pushed is fuller rights for women.

I would like to know more about his record vis-a-vis what he advised the Nixon Department of Justice in wiretapping and how he treated, I believe, groups like us that were, I think, in the finest tradition, really, of advancing individual liberties in our country.

Senator SPECTER. Thus, when you talk about behavior, you are talking about more than the poll-watching activity.

Ms. SMEAL. Yes, I am.

Senator SPECTER. You are referring to his failure to recuse himself from the case, *Laird* v. *Tatum.*

Ms. SMEAL. Right, and I am also talking about what did he do in the Justice Department as Assistant Attorney General and for the Office of Legal Counsel in those days.

I do not know that whole record, but I do know he did not recuse himself. I do know that the Justice Department had a vigorous record of doing some questionable things.

Senator SPECTOR. Do you have any specific reason to believe that he was personally involved in any of the activities relating to the wiretap issue?

Ms. SMEAL. The only thing I know is I guess what I read in the newspapers, but I would feel a whole lot better if the Senate and the public could see his memorandum of that time.

And when I said a whole pattern of behavior, though, I was really referring to the public pattern. And we all know from the earliest days as a law clerk through his practice as an attorney, through that ballot thing, that he tended to be on the side of those fighting against minority rights and fighting really to justify patterns of segregation which I think are not justifiable.

Senator SPECTER. Ms. Smeal, if those records were available and it was determined that Justice Rehnquist was not involved in any of the activities that you have described, such as wiretapping or other activities you consider to be repressive, would that change your ultimate conclusion as to opposing his nomination for Chief Justice?

Ms. SMEAL. I think that all of us would feel better if we could see those papers. You know, I stand on my testimony that I think ideology and his beliefs on women's rights and minority rights and individual rights, his record as a Justice is the most important.

But when they are trying to say is it the only thing, I do not think it is the only thing. There is a pattern of behavior, some of which I find that we know I find questionable; the other I do not know and think that we as a public have a right to know.

Senator SPECTER. It would not necessarily change your ultimate conclusion, but you think, as a matter of public record and as a matter of fairness, that it ought to be before the Senate and the people.

Ms. SMEAL. Right.

Senator SPECTER. Ms. Simmons, how heavily do you weigh the issue of the poll-watching activities? I ask you that because, as of this moment, we have not heard from those witnesses although we are about to. One of the items that weighs on this committee is an evaluation on credibility. Mr. Justice Rehnquist has denied the charges as they have been relayed to him from affidavits. Now we have to hear from the people who were directly involved to see precisely what it is they have to say and the quality of their recollections, since the activities took place so long ago.

My question to you is, how heavily do you weigh those accusations with regard to the position you have taken in opposition to Justice Rehnquist?

Ms. SIMMONS. I think they should be weighed heavily, Senator, and I will tell you why. Last time we had affidavits from persons who had actually witnessed conduct, and you recall in the report of the committee they indicated that was wholly unsubstantiated.

This time I also called and spoke to a number of those persons whose affidavits we put in in 1971, and they reaffirmed what they had said at that time. The Reverend G. Benjamin Brooks, the former Senator Cloves Campbell.

In addition to that, as I said earlier this morning, I was field director for Arizona for NAACP in southern California at the time. In addition to that, I was on special assignment directing our national voter registration/voter education campaign.

So I had coming into my office the same information as was put in the record in 1971 with reference to the complaint about Mr. Rehnquist and the poll watching incident in addition to other incidents about the Public Accommodations Act.

I think that this is important because it actually starts us seeing the man, and when you take a look at the poll watching incident, you take a look at his conduct with reference to the city council and Public Accommodations Law, the Civil Rights march on the Capitol, what he said according to Senator Cloves Campbell that he opposed all Civil Rights laws, then you take a look at his decisions, that pattern emerges crystal clear.

And another thing, I think that the right to vote is so basic for black Americans that we perceive this as something truly fundamental, and therefore we put a lot of weight on that. We think this committee ought to and to look in the context of how he has emerged from that time to where he is today.

Senator SPECTER. Ms. Simmons, were you the field representative in Arizona at the time these poll-watching incidents occurred?

Ms. SIMMONS. Yes, I was field representative for Arizona and southern California and Nevada.

Senator SPECTER. What years did you hold that position?

Ms. SIMMONS. 1961 through 1965.

Senator SPECTER. Did you have occasion to talk to these people personally at that time?

Ms. SIMMONS. I did, sir.

Senator SPECTER. About how many of them?

Ms. SIMMONS. Senator Cloves Campbell at that time, the Reverend G. Benjamin Brooks who had led our branch there for a number of years, and they had sent in—since I was doing the massive voter registration campaign as a special assignment, we were concerned about denials of the right to vote, and we had gotten a lot of complaints in.

So I had that kind of firsthand contact.

Senator SPECTER. So your conversations with those people were contemporaneous with the events?

Ms. SIMMONS. That is correct, sir.

Senator SPECTER. Congressman Weiss, a question or two for you. The discretion and authority of the President in making Supreme Court nominations, including nominating the Chief Justice, is a very major concern here.

The President, presumably, has made a very careful choice. These matters are all before him and before his advisers. As a veteran of the political process, what is your view as to the weight this committee and the Senate ought to give to his discretion and his authority in this matter?

Mr. WEISS. Senator, 15 years ago, Mr. Joseph Rauh, who I believe is with us today, testified on behalf of the ADA and included in the record an article written by Prof. Charles Black in which Professor Black shows the rights of the Senate to be equal to those of the President in approving judicial appointees on the "advice and consent" grounds.

So it seems to me that the Senate has the full right to look totally at the merits of the nomination, whether it is for the Associate Justice or for the Chief Justice of the Supreme Court. I think that the Senate has demonstrated over the years, as have most American organizations, that all other things being equal, they will accept an approved recommendation of the President. But historically that has not always been the case, and I believe that you have to balance the desire to defer to the President with the Senate's own constitutional obligations and review what the role of that nominee will be in the years and decades ahead in the very important position that he or she has been nominated for.

Senator Heflin had, before you arrived, asked how we would view the nomination of Justice Rehnquist assuming that there were a couple of other changes that would take place during President Reagan's term of office.

And it really starts you thinking about the importance of the Rehnquist nomination in a Court composed differently than it is right now. So I think that you have the right to really look at the totality of Justice Rehnquist, his behavior, his background, his decisions, his philosophy and what you expect American society to be when he assumes that position.

Senator SPECTER. You are saying that you would disagree with those who say that there is wide discretion. You would say that it is not discretionary at all, that the Senate has equal status with the President through the Senate's advice and consent responsibility under the Constitution.

Mr. WEISS. The President has wide discretion to nominate. You have equally wide discretion to determine whether, in fact, you are going to confirm that nomination.

Senator SPECTER. Well, he does not have wide discretion to nominate. He has the absolute power to nominate. There is no question about that.

Mr WEISS. That is about as wide as you can get.

Senator SPECTER. No, I do not think so. It is not discretionary at all. It is absolute. When you talk about discretion in the law, there is the doctrine of abuse of discretion, so that discretion means that you have latitude but there are bounds to latitude.

But the question I pose is, do you think that we are on equal terms with the President, that we ought to have as much to say about a Supreme Court nominee or the designation of the Chief Justice as does the President.

Mr. WEISS. It is my understanding, and it has perhaps not been as deep a reading as Senator Biden's, for example, that originally the constitutional framers wanted to give the power to appoint Supreme Court justices to the Senate, and that ultimately they compromised to establish the current system.

So, yes, I think that the Senate has equal power in that determination

Senator HATCH. Some of the framers, not all of them, or it would be in the Constitution.

Senator BIDEN. Mr. Chairman, may I make a comment?

Senator SPECTER. May I proceed? I just have another question or two.

Senator HATCH. Yes.

Senator BIDEN. The reason I say it is the chairman has told us that the witnesses that we have called in opposition are limited to a total of 4 hours. We have been on the same panel almost 2 hours now, and we have another 10 witnesses, and I know the chairman is big hearted but I doubt whether he is going to come in and tell us we have more time, and so that is the reason I say it. I am anxious to hear the question but if the answers could be shorter.

Senator SPECTER. I have a brief question. These proceedings obviously have very heavy political overtones, and the President has made his nomination in the face of the 1984 election returns.

Do you think, notwithstanding that, that the Senate and President are on equal grounds as to their roles in this selection. I ask you that as a very experienced person in political life.

Mr. WEISS. I was elected the same time the President was, and it seems to me that my constituents did not say, OK, because the President was elected we do not expect you to exercise your independent judgment and thought. I think that the Senate is in the same position.

Senator SPECTER. Well, we were all elected, too, that is true.

Thank you very much, Mr. Chairman.

Senator HATCH. Thank you, Senator Specter.

Senator Grassley, do you have any questions?

Senator GRASSLEY. I have no questions of this panel.

Senator HATCH. Thank you very much. Are there any further questions?

[No response.]

Senator HATCH. Let me just take a minute and make a couple of comments. Congressman Weiss, we are happy to welcome you and the others here.

In regard to dissenting in the last four terms we have built a pretty good record, but you are incorrect with regard to Rehnquist even being the lone dissenter. Within the last four terms Justice Rehnquist has written 73 opinions of the Court. That is more than any other single Justice.

He is writing an awful lot of the majority opinions today and is in the majority in many ways. I understand how you feel about that. In regard to civil rights and women's rights, I might add Ms. Smeal, that you indicated that he basically does nothing for women, especially with regard to sex discrimination. However, during the last term he wrote the leading sex discrimination case or at least the sex harassment case in the workplace.

He also joined the majority in the *Roberts* v. *Jaycees* case that prohibited sex discrimination by a club. I do not want to go through all the cases, but there is also the *Hamm* v. *South Carolina, Law* v. *Nichols*, and *Palmer* v. *Sadaty*.

He decided that a State could not remove a child from a mother who was married to a black man. Something that should not have been done, but was done. *White* v. *Register*, one of the all time im-

portant voting rights decision cases struck down a Texas at large voting plan as unconstitutional because it would have diluted minority strength.

And you could go through case after case. I understand your point. You disagree with a lot of the cases. You have every right to do so. But on the other hand, let us recognize that his record like all Supreme Court Justices is one that cuts across the board.

I find fault with some of his decisions, but I also find fault with their decisions from time to time, too. It is just natural that we differ on these things. That is why it is such a great institution because there is a wide disparity of belief in certain areas, yet there are matters they all agree on. *Brown* v. *Board of Education* is one of them.

Let me end it with that statement. We will call the next panel.

Ms. SIMMONS. Mr. Chairman, may I, please?

Senator HATCH. Yes.

Ms. SIMMONS. I note that I inadvertently gave a wrong name in answer to a question. May I change that, please?

Senator HATCH. Surely.

Ms. SIMMONS. I talked to Mr. Robert Tate, not Jordan Harris. I could not find Jordan Harris.

Senator HATCH. That is fine. We will correct the record. Thank you for coming. We appreciate your being here.

Senator KENNEDY. Mr. Chairman, not to take the time of the committee now, but can they give a response to that last question. Could they file that for the record? I think it is important.

Senator HATCH. Yes We will keep the record open.

[Not available at press time.]

Senator HATCH. Mr. Mitchell, we are sorry you had to sit there and wait. We appreciate you being here. We are going to call Clarence Mitchell III, who is president of the National Black Caucus of State Legislators. Ms. Elaine Jones, the associate legal counsel for the Legal Defense Fund out of New York, NY. Mr. Benjamin Hooks who is chairman of the Leadership Conference on Civil Rights here in Washington, DC, and Ms. Estelle Rogers, who is with the Federation of Women Lawyers from New York, NY. Also, Mr. Joseph Rauh, attorney practicing here in Washington.

Do you all swear to tell the whole truth and nothing but the truth, so help you God?

Mr. MITCHELL. I do.

Ms. JONES. I do.

Ms. ROGERS. I do.

Mr. HOOKS. I do.

Mr. RAUH. I do.

Senator HATCH. Thank you. Mr. Mitchell, we will begin with you. We are going to be pretty tight on the time allotted each witness.

Senator BIDEN. Mr. Chairman, before we begin, I would like to suggest that we limit on the first round our questions to 5 minutes—our questions to 5 minutes on the first round.

Senator HATCH. On this panel.

Senator BIDEN. On this panel.

Senator HATCH. That will be fine. Is there any objection?

[No response.]

Senator HATCH. We are limiting the testimony to 3 minutes. However, we will be fair to everybody.

Mr. Mitchell, we will begin with you.

**TESTIMONY OF A PANEL CONSISTING OF: CLARENCE MITCHELL III, PRESIDENT, NATIONAL BLACK CAUCUS OF STATE LEGISLATORS, WASHINGTON, DC; ELAINE JONES, ASSOCIATE LEGAL COUNSEL, LEGAL DEFENSE FUND, NEW YORK, NY; ESTELLE ROGERS, LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ORGANIZATION FOR WOMEN, NEW YORK, NY; BENJAMIN L. HOOKS, CHAIRPERSON, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WASHINGTON, DC; AND JOSEPH RAUH, LEADERSHIP CONFERENCE ON CIVIL RIGHTS**

Mr. MITCHELL. Mr. Chairman and distinguished members of the Senate Judiciary Committee, my name is Clarence Mitchell III. I have been a Maryland State legislator for 24 years, all of my adult life, and I testify today as president of the National Black Caucus of State Legislators on the nomination of Associate Justice William Rehnquist to be Chief Justice of the United States.

I come to you with certain deep emotions because it was not too long ago that I sat in a room like this while my father, the late Clarence Mitchell, Jr., testified before this committee in opposition to the nominations of supposed Justices Haynesworth and Carswell.

And I come to you in certainly a spirit of optimism because my father had such great faith in the ability of the U.S. Senate to respond in justice and in fair responses when conditions were perceived to be unfair.

The National Black Caucus of State Legislators, an organization of some 396 black State legislators from 42 States, opposes this nomination because Mr. Justice Rehnquist's entire public career, both on the Court and off the Court, demonstrates unmitigated hostility to the interest of minority Americans.

Even the perception of this Justice's actions leads us to believe that he is racist, that he is antifemale, and that it sends a dangerous message to black America if this committee confirms that appointment.

It sends a dangerous message at a time when we are in the forefront of efforts on South Africa to end apartheid in South Africa, when across the length and breadth of judicial appointments over the last few years a very subtle message is being sent that black America can no longer begin to rely on the Federal courts for relief; that women can no longer rely on the Federal courts for relief.

I commend this committee for the action you took in rejecting the nomination of Jefferson Beauregard Sessions III, who used the tools of the Justice Department to harass blacks in the Black Belt of Alabama—black elected officials, black civil rights leaders—in an effort to intimidate the overwhelming turnout of blacks in those areas just when they were beginning to make progress.

I suggest to you that this appointment is just as dangerous. I suggest to you that the perception of the Chief Justice is important.