National Organization for Women, Inc.

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Testimony of

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Before the Senate Committee on the Judiciary

on the Nomination of William Rehnquist for Chief Justice

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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.