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.

Had it not been important, I suggest Abe Fortas would have been the Chief Justice of the Supreme Court.

I say to you perception is important and you ought to know whether or not a Justice—how a Justice feels on the presumption of innocence when the U.S. Attorney General suggests that the presumption of innocence in this country, the very foundation of the building of this country, ought to be done away with.

My written statement is here. I apologize for going over. I have been in and out over the last 3 days because we consider this to be a very important nomination.

Senator HATCH. We understand.

Mr. MITCHELL. Thank you

[The prepared statement follows:]

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TESTIMONY OF

CLARENCE M. MITCHELL, III, PRESIDENT

NATIONAL BLACK CAUCUS OF STATE LEGISLATORS

before the

COMMITTEE ON THE JUDICIARY

UNITED STATE SENATE

on the confirmation of

WILLIAM H. REHNQUIST

to be Chief Justice of the United States

July 29, 1986

NBCSL

"A National Network For Political Equality"

Mr. Chairman and Members of the Judiciary Committee:

My name is Clarence M. Mitchell, III, and I testify today on behalf of the National Black Caucus of State Legislators on the nomination of Associate Justice William Rehnquist to be Chief Justice of the United States.

The National Black Caucus of State Legislators opposes the nomination of Associate Justice Rehnquist to be the Chief Justice of the United States. We take this extraordinary position because Mr. Justice Rehnquist's entire public career both on the Court and off demonstrates unmitigated hostility to the interests of minority Americans.

Before I get into the specific reasons why Mr. Justice Rehnquist should not be confirmed, I want this Committee and the full United States Senate to understand how black citizens feel about the institution of the Supreme Court.

For most white Americans the only court they encounter in their entire lives is the traffic court or the small claims court. Only rarely do decisions of state and federal courts affect them personally. For black Americans, the most fundamental questions affecting our daily existence -- even decisions about whether we are persons or property -- are decided by the Supreme Court. It is that Court to which we have turned time and time again over the course of history for judgments on where we can live and go to school, where we can eat and travel, the extent of our political rights, our access to jobs and thus

our very economic existence. Save possibly for American Indians, I doubt that there is any other group of Americans so directly touched by this institution.

Who sits on the Supreme Court in judgment over our lives is therefore of enormous importance to us. In his 15 years on the Court, Justice Rehnquist has consistently voted against the claims of minorities. He has shown a persistent refusal to recognize the deep roots of racism in American life and to permit the federal courts the tools to remedy past racial discrimination and its continuing effects.

Evidence of his hostility of our rights is also apparent in Mr. Rehnquist's private life in Phoenix, Arizona, before he came to the Court. This Committee ought truly to regret that it did not fully examine in 1971 the allegations that are now surfacing about Mr. Rehnquist's purported role in harassing black and Hispanic voters at the polls in the early 1960's. But you can rectify that unfortunate error in these hearings. It would be a shame if this Committee brushed off these charges on the grounds that, even if true, Mr. Rehnquist's activities happened so long ago and have been dimmed by his "brilliant" scholarship and judicial service. And the Senate of the United States should not confirm as Chief Justice a man who is not fully forthcoming in defending himself against the testimony of personal witnesses that he did intimidate minority voters.

Were these allegations about interference with minority voting rights the only cloud hanging over this nomination, they

would be serious enough. But Mr. Justice Rehnquist publicly espoused opposition to a public accommodation ordinance and school desegregation in Phoenix 22 years ago. While he disavowed his earlier position at the time of his confirmation hearing in 1971, the reasoning for his original positions continues to haunt black citizens.

The record shows that Mr. Rehnquist testified in opposition to a public accommodation ordinance before the Phoenix City Council on June 15, 1964. After the City Council unanimously passed the ordinance, Mr. Rehnquist wrote a letter to the editor of the Arizona Republic which was published on June 21, 1964. Mr. Rehnquist distinguished between the power of government to interfere with the rights of private property owners in such "orthodox" matters as zoning, health and safety regulations and the power of government to require private proprietors of public facilities to serve all without regard to race. The former he favored; the latter he opposed by reference to some "historic right" of owners to choose their own customers. Black Americans are offended by this notion that the cleanliness of an eating establishment is more important than the skin color of the person who orders a meal. We well remember that time when black Americans were arrested and jailed for challenging that "historic right" of proprietors to refuse us service.

On the matter of racially segregated schools in Phoenix, Mr. Rehnquist wrote a letter to the Arizona Republic dated September 9, 1967 opposing integration proposals and defending the

neighborhood school concept "which has served us well for countless years." That letter contains an astounding statement that "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society; that we are instead dedicated to a free society...." A free society for whom, I would ask. That sentiment bespeaks an attitude that the white majority's free society is to be valued above the aspirations of minority citizens to be full-fledged and equal partners in that society.

Now you may say to me, Senators, "Why Mr. Mitchell, do you not admit of the capacity of a man to change his mind? Do you forever hold against Mr. Rehnquist the positions he took in the 1960's?" My answer, Senators, is that he may have changed his positions on these issues, and even his rationale. But it is the way in which he balances competing interests on great public questions of the day which bothers me the most. After all, we have a 15-year record of his votes as a Justice of the Supreme Court on civil rights cases to show how he continues to balance those interests.

I leave to my fellow panelists the legal analysis of Mr. Justice Rehnquist's decisions in civil rights cases.

I thank you for the opportunity to testify.

Senator HATCH. We will put all statements in the record as though fully delivered. We will make sure the record is open for additional comments.

Ms. Jones, we will turn to you.

Ms. JONES. Thank you, Senator Hatch, for indicating that my statement will be made part of the record.

Senator HATCH. It will.

STATEMENT OF ELAINE JONES

Ms. JONES. And I just want to indicate that the Legal Defense Fund is well aware that *Rogers* v. *Lawrence* was a constitutional case and not based on the statute, section 2. So with that amendment, I want our statement accepted in the record.

Senator HATCH. Without objection, that will be fine.

Ms. JONES. You know, I think it will be more productive for me to take my 3 minutes and really address some of the concerns that the Senators seem to have been raising over the course of the past couple of days.

I mean, you—others, you know, have talked about the continuum, how Mr. Rehnquist and how law clerk Rehnquist and lawyer Rehnquist and Justice Rehnquist are all part of a continuum.

But, you know, you have asked the question about symbol; you know, what kind of symbol would he make. And I have been trying to give some thought to that because the term—it is hard to explain because a lot of these values are amorphous that we are trying to explain to you

And I thought that an explanation might be, in our Nation, that the Chief Justice is the human symbol of the scales of justice; that is what he is; that is what he is. That is the perception.

And it would also, I dare say, be the feeling in the large majority of the black community that with Mr. Rehnquist as the Chief, that those scales would appear to be tipped.

Now, the question has come up about dissent, how many dissents. I do not think the issue is one of the number of dissents. I think the issue is one of the positions that Mr. Justice Rehnquist has been taking in these cases.

Now, we can look at Bob Jones, you know, and we can look at *Batson* v. *Kentucky*. Now, look at Bob Jones. Certainly, that was dissent. That is not the issue. The Chief Justice of the United States, Mr. Justice Burger, authored that decision.

Now, there are certain kinds of cases that come before the Court that make it clear that we do need a consensus builder on the Court.

Brown v. *Ford* was such a case. What is a consensus builder? What does it take for the Chief to build that consensus? The consensus builder, in my view, means taking Justices who have different points of views and who are from all over the range, and sitting down, finding out areas of agreement, fashioning and crafting an opinion that brings the Nation behind that opinion. And give us the understanding that the opinion we need to respect and follow, and it is an especially important and difficult decision.

In Mr. Justice Rehnquist's case, that's not the kind of consensus builder he would be. For Mr. Justice Rehnquist to build a consen-

sus, he has to have other Justices who think as he thinks. That is quite different.

Senator HATCH. Ms. Jones, your time has expired.

Ms. JONES. Well, thank you very much.

Senator HATCH. Thank you.

[Statement follows:]

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TESTIMONY OF

JULIUS LEVONNE CHAMBERS, DIRECTOR-COUNSEL

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

before the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

on the confirmation of

WILLIAM H. REHNQUIST

to be Chief Justice of the United States

July 29, 1986

Contributions are deductible for U S income tax purposes

The NAACP LEGAL DEFENSE & EDUCATIONAL FUND is not part of the National Association for the Advancement of Colored People although it was founded by it and shares its commitment to equal rights LDF has had for over 25 years a separate Board program staff office and budget

I appreciate the opportunity to be present today to express the views of the NAACP Legal Defense and Educational Fund, Inc. concerning the nomination of Justice Rehnquist to be Chief Justice of the United States. As the Committee may be aware, the Legal Defense Fund has appeared before the Supreme Court in civil rights cases with considerable frequency over the last four decades -- from an era that pre-dates Brown v. Board of Education by many years, through Brown and its companion cases, right up to the Term that has just concluded. Over the course of those years, we have developed a seasoned and tempered perspective on the institution, the function of the Chief Justice, and the views and voting records of nearly two generations of justices. From that perspective we are convinced that Justice Rehnquist should not be confirmed for the position of Chief Justice.

_We_, of course, are _advocates_. Our institutional purpose has been to advance the course of civil rights through use of the tools of the American legal process, and to do so as aggressively and successfully as we can. We expect similar zeal of our adversaries and, in our professional capacities enjoy serious, principled debate. Lawyers in private practice are advocates, but once appointed to the bench as judges, they have an obligation to put advocacy aside and to weigh fairly competing considerations. In civil rights cases, Justice Rehnquist does not meet this standard. While one may ask too much for a judge to shed his or her life's experiences when donning the robes, it hardly asks enough that the judge come to each case with an open mind, a willing ear and the inclination to reach a fair result based on all the circumstances. These qualities are more than desirable; the judicial system in a free society depends on them.

If this is important in any judge, it is especially so in the Chief Justice. Surely these qualities of fairness,

openmindedness and level judgment are of both practical and symbolic significance in the leader of the federal judiciary and the head of the third participant in the task of shaping national policy. In our opinion, the nominee's views on the civil rights of black Americans are so unfavorable, so rooted and so intractable as to dispossess him of the qualities I have mentioned when he confronts civil rights cases. For that reason, the Legal Defense Fund urges the Senate to reject this confirmation.[1]

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[1] At the outset, I want to emphasize that this Committee has the right and indeed the responsibility to inquire into the views of the nominee. In an article which appeared in the Harvard Law Record of October 8, 1959, Mr. Rehnquist himself stated that the Senate must discharge its duty "of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him." The article criticized the Senate for confirming Justice Charles Whittaker without such an inquiry, and placed particular emphasis on the Senate's failure to examine Mr. Whittaker's views on the then recently decided case of Brown v. Board of Education. I might add that the article, while not explicitly attacking Brown, did not exactly brim with enthusiasm for the Supreme Court's decision in that historic case.

Not long ago, the Chairman of this Committee stated as follows:

> [I]t is my contention that the Supreme Court has assumed such a powerful role as a policy maker in the government that the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and the role of the Court in

The earliest record we have of Mr. Rehnquist's views on the subject of civil rights are the memoranda he wrote in 1952-53 as a clerk to Supreme Court Justice Robert H. Jackson. As the committee may recall, Mr. Rehnquist wrote a memorandum supporting the doctrine of "separate but equal" and urging that the landmark Brown case be decided the other way. And though I gather that once before this Committee he disavowed personal adherence to some of the views expressed in that memo, I urge the Committee to study closely the writings of respected historians such as Richard Kluger and Dennis Hutchinson who have logically and persuasively drawn the truth of that disclaimer into serious question. It is also by no means clear from the ensuing record that Mr. Rehnquist has disavowed all of the views contained in that memorandum. Those views -- that the Court cannot and should

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dealing with these issues.

Senator Thurmond spoke those words in July 1968, at the hearing of this Committee concerning the nomination of Associate Justice Abe Fortas to be Chief Justice. This Committee and the entire Senate should and must closely examine Justice Rehnquist's views before voting upon his nomination as Chief Justice of the United States.

not strive to protect the rights of minorities, that the minority has only those rights which the majority bothers to tolerate, and that personal rights are no more sacrosanct than property rights -- have been expressed by Mr. Rehnquist on many other occasions, both before he was appointed to the Court and in many of his opinions on the Court.

For example, during his clerkship with Justice Jackson, Mr. Rehnquist authored two memoranda, remarkably similar in tone, style and content to the Brown memo, urging rejection of a challenge by black Texas citizens to a purportedly "private" democratic primary in which only white citizens were allowed to participate. In one of those memos Mr. Rehnquist criticized the Executive Director of the NAACP and Justices Black and Douglas for being unduly critical of southerners, and stated: "I take a dim view of this pathological search for discrimination" -- which was at least a poorly informed perspective on reality in 1953. In a second memo on the same case, Mr. Rehnquist stated the following:

> It is about time the Court faced the fact that white people in the South don't like the colored people; the constitution... most assuredly did not appoint the Court as a societal watchdog to rear up every time private discrimination raises its admittedly ugly head. To the extent that this decision advances the frontiers of state action and "social gain," it pushes back the frontiers of freedom of association and majority rule.

Needless to say, Justice Jackson did not adopt this view, joined seven other Justices in voting to invalidate the all-white primary. Terry v. Adams, 345 U.S. 461 (1953). More enlightening for the present purposes is the connection between the views of the young clerk and the behavior of the Phoenix practitioner. I am certain everyone here is aware of the well-documented reports of Mr. Rehnquist's harassment of Black voters at a local Phoenix polling place. I submit to you that his disrespect for the rights of those Black voters has roots in his Terry memoranda, and represents part of a continuum of outlook which informs his judgment on the Court today.

Mr. Rehnquist's apparent hostility to civil rights was not limited to school integration or voting contexts. While in

private practice in Phoenix in 1964, Mr. Rehnquist testified before the Phoenix City Council against a proposed local ordinance forbidding local merchants from refusing to serve black patrons because of race. In opposition to the proposal, Mr. Rehnquist stated that he valued a business proprietor's interest in choosing his customers above a black person's interest in non-discriminatory access to the business. Consistent with the views expressed in both his Brown and Terry memoranda, Mr. Rehnquist stated:

> 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... I think it's a case where thousands of small business proprietors have a right to have their own rights preserved since after all, it is their business.

A week after the ordinance was passed unanimously by the Phoenix City Council, Mr. Rehnquist wrote a letter to the editor of the Arizona Republic in which he not only repeated these views but also expressed the opinion that the measure was socially undesirable. In a comment remarkably similar to views which I

heard repeatedly from whites in my home town of Charlotte, North Carolina in those days, he complained that the only result of such an ordinance would be that

> the unwanted customer and the disliked proprietor are left glowering at one another across the lunch counter.

In Charlotte we may have glowered at each other for a little while, just as in countless communities across America, but not for long; and no one seriously doubts that we are a healthier society today because opinions like that of Mr. Rehnquist were rejected and black citizens were given full access to the conveniences of the community.

There is, regrettably, no reason to believe that Mr. Rehnquist's views have shifted over the years away from sympathy for Jim Crow, in the direction of greater sensitivity to the rights of racial minorities. His opinions and voting record since becoming an Associate Justice surely provide no basis for believing that he has developed any such sensitivity. To the contrary, he has voted on the Court against the claims of racial

minorities with remarkable consistency.

Consistent with Mr. Rehnquist's views on Brown v. Board of Education, Justice Rehnquist has repeatedly voted against minorities in school desegregation cases. For example, in Columbus Board of Education v. Penick, 443 U.S. 449 (1979) and Keyes v. School District No. 1, 413 U.S. 189 (1973), he wrote frightening dissents in which he suggested (443 U.S. at 495-96, 413 U.S. at 257-58) that one of the most important school desegregation precedents, Green v. County School Board, 391 U. S. 430 (1968), should be limited so severely that the integration of our public schools would become practically impossible.

Anyone familiar with the history of school desegregation after Brown v. Board of Education knows that in the 14 years until the Green decision very little progress was made. It was the Green holding that started this nation on the road to genuine desegregation, by recognizing that mere "open door" or "freedom of choice" plans could not eradicate a system of segregation which had been in force in many communities for nearly a century.

Yet Justice Rehnquist, far from being respectful of this historic precedent, has sought to undermine it and return us to an era in which little, if any, desegregation would be possible. He may no longer have any quarrel with Brown itself, but he clearly has considerable disdain for the subsequent decisions of the Court that made Brown work.

His insensitivity to the civil rights of black citizens is not limited to the public school integration context. In Bob Jones University v. United States, 461 U.S. 574 (1983), the Court upheld the determination of the Internal Revenue Service to deny tax-exempt status to private schools practicing racial discrimination. Justice Rehnquist was the sole dissenter. The majority opinion, authored by Chief Justice Burger, found the Mr. Rehnquist's reading of the Internal Revenue Code so bizarre as to allow tax exemptions for "Fagin's school for educating English boys in the art of picking pockets" or "a school for intensive training of subversives for guerilla warfare and terrorism in other countries..." 461 U.S. at 591 n.18.

As recently as the end of this Term, in Firefighters v. Cleveland, ______ U.S. ______, No. 84-1999 (July 2, 1986), Justice Rehnquist dissented from a decision upholding a consent decree under which the City of Cleveland agreed to promotion goals for black firefighters as a means of remedying past racial discrimination. Mr. Rehnquist was of the view that remedying past racial discrimination against black firefighters violated the right of white firefighters, and that no municipality can strike a bargain with its own constituents to undertake broader relief than a court would have been entitled to grant after a trial. Firefighters v. Cleveland and its companion case, Sheet Metal Workers v. E.E.O.C., ____ U.S. ____, No. 84-1656, in which Justice Rehnquist also dissented, are only the latest in a long series of cases in which he has opposed nearly every affirmative effort designed to remedy employment discrimination against blacks. There is reason to question whether his objections are principled, for in his dissent in Steelworkers v. Weber, 443 U.S. 193 (1979), siding with white steelworkers who claimed that they

were discriminated against by a voluntary, private corporate affirmative action plan, he stated that

> [N]o discrimination based on race is benign...
> [N]o action disadvantaging a person because of his color is affirmative.

443 U.S. at 254. In other words, though Mr. Rehnquist maintained that Phoenix merchants, in the exercise of dominion over their businesses, could exclude black patrons, Justice Rehnquist took issue with the private, voluntary exercise of business judgment when those complaining were white.

Consistent with Mr. Rehnquist's harassment of black Phoenix voters, Justice Rehnquist has repeatedly voted against racial minorities in cases concerning the right to vote. In Uvalde Consolidated Independent School District v. United States, 451 U.S. 1002 (1981), he wrote a sole dissent from the denial of certiorari in a case where the Fifth Circuit had merely concluded that a complaint which alleged both dilution of voting rights by an at-large electoral system and a discriminatory purpose on the part of the school district's board was good enough to state a

claim under the Voting Rights Act. The very next term, the Court held that an at-large voting system coupled with proof of discriminatory intent could indeed result in a violation of Section Two of the Voting Rights Act. Rogers v. Lodge, 458 U.S. 613 (1982). Justice Rehnquist voted against that holding as well. As the Committee is well aware, Congress put an end to the debate the following year by amending Section Two to eliminate the use of an "intent" test in voting rights cases.

Although I expect that others may speak more comprehensively on the subject of Justice Rehnquist's extreme deference to the intrusion of criminal justice authorities on personal freedom, Batson v. Kentucky, ___ U. S. ______, No. 84-6263 (April 30, 1986), deserves particular note. In Batson, Justice Rehnquist dissented from a decision prohibiting prosecutors from the practice of peremptorily excluding black prospective jurors from jury service in criminal cases involving black defendants. He expressed the view that there was nothing wrong with this practice, so long as the prosecution was also allowed to use

peremptory challenges to remove white jurors in cases involving white defendants. Apart from its doctrinal shortcomings, the opinion reflects the cynical view that citizens are only able to be rational and respectful of their oaths when a member of another racial group is on trial.

These examples illustrate several flaws in Justice Rehnquist's approach to constitutional adjudication, and in his judicial temperament:

1) He is not respectful of precedent. Like an advocate, rather than a judge, Justice Rehnquist attacks precedents that stand between him and the success of his regressive agenda. His attempt to undermine the long-standing Green decision in school desegregation cases is an excellent example. Only where a precedent that serves his purpose is being challenged does he cry out for faithful adherence to precedent.

2) Far from being respectful of the rights of state and local governments against federal intrusion, he is only too willing to oppose policies of state and local governments if he

disagrees with those policies. In the <u>Cleveland</u> case he was prepared to use a federal statute (as he interpreted it) to strike down an agreement voluntarily entered into by duly elected local officials and their own constituents, seeking to promote racial harmony in their own community.

3) Far from being a non-interventionist, he is an activist who constantly seeks to push the Court in a particular (backward) direction. Accordingly, he gives painstaking and sympathetic analysis to those considerations which he believes require the subordination of civil rights, while the competing civil liberties values receive no such analysis. Confronted with a civil rights claim, he does not pause to consider it dispassionately, but rather bends his critical faculties toward the fashioning of reasons to reject it. Whatever differences fair-minded persons may have about the results of constitutional questions, fair-minded <u>process</u> requires that competing views are evenly considered. Justice Rehnquist has not shown himself to be up to that task in civil rights cases. Confirming him as Chief

Justice would add your imprimatur to that shortcoming.

Conclusion

We may all be justly proud of the enormous strides forward the concepts of fairness and racial justice have taken in American life and thought. And while the people of this country may not be entitled to a zealous advocate of civil rights as their Chief Justice, they are at least entitled to one respectful of the precedents established by the Court and one who views new cases dispassionately. Because we are unable to conclude that Justice Rehnquist will bring to the chief stewardship of the Court those qualities of fairness, openmindedness and level judgment in civil rights cases, we must urge the Senate to reject the nomination.

Senator HATCH. Mr. Hooks, we will turn to you at this point.

STATEMENT OF BENJAMIN L. HOOKS

Mr. HOOKS. Mr. Chairman, my name is Ben Hooks, and I am the chairman of the Leadership Conference on Civil Rights, a coalition of more than 185 groups.

I would like to just reserve a minute for my good friend and general counsel for the Leadership Council, Mr. Joe Rauh.

I am a lawyer, a former judge, and it is not easy to oppose here, to oppose a confirmation for a Chief Justice. I have looked at Mr. Rehnquist's record.

In the 1950's, he wrote a memo to Justice Jackson advocating, I believe, the continuation of *Plessy* v. *Ferguson,* stating in another memo that the Court could not deal with all of these questions where white people in the South hated black people. He did argue as a law clerk for those positions. In the sixties, we find him in Phoenix. In 1964, he testified against public accommodations in Phoenix. The next day when it passed, he wrote a letter to the local newspaper in which he said you will be sorry.

In 1965, he appeared before the State legislature arguing against the public accommodations law. In 1967, in Phoenix, he appeared against school integration. In the 1970's, we do not know exactly what he did, because the papers have not been forthcoming.

In 15 years on the Supreme Court, he has not achieved a better record.

I come from the South. I am 61 years old. I have spent two-thirds of my life in a segregated society and scarcely more than 20 years in a supposedly integrated society. Most of the people I know in the South, white politicians, Congress persons, mayors, Senators, have said the same thing that Justice Rehnquist said. I do not hold against him those things simply because he said them. But what bothers me is that he apparently has not changed.

If eternal vigilance is the price of liberty, then duty dictates, common sense demands, and prudence mandates that we testify against his nomination.

[Statement follows:]

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John E. Jacob *National Urban League*
Elaine Jones *NAACP Legal Defense & Education Fund, Inc.*
Leon Lynch *United Steelworkers of America*
Irene Natividad *National Women's Political Caucus*
Dorothy Ridings *League of Women Voters of the U.S.*
Alexander Schindler *Union of American Hebrew Congregations*
Eleanor Smeal *National Organization for Women*
Patrisha Wright *Disability Rights Education and Defense Fund*
Kenneth Young *AFL-CIO*
Raul Yzaguirre *National Council of La Raza*
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Testimony of the Leadership Conference on Civil Rights

Opposing the Confirmation of William H. Rehnquist to be

Chief Justice of the United States

Benjamin L. Hooks, Chairperson

July 1986

Mr. Chairman and members of the Committee, my name is Benjamin L. Hooks. I am the Chairperson of the Leadership Conference on Civil Rights, a coalition of 185 national organizations representing minorities, women, the disabled, senior citizens, labor, religious groups, and minority businesses and professions. On behalf of the Conference, I want to thank the Committee for allowing us the opportunity to testify today.

The Leadership Conference on Civil Rights strongly opposes the confirmation of William H. Rehnquist to be Chief Justice of the United States. For thirty-five years, William H. Rehnquist has consistently demonstrated a marked hostility to the victims of discrimination. He is an extremist, a man dramatically out of step with the bipartisan consensus on civil rights in this country. The United States Senate must reject his nomination.

In the course of its thirty-six years, only rarely has the Conference taken a position on a judicial nomination. Indeed, over the past five and one half years, the Conference has opposed only four of President Reagan's judicial nominees.

"Equality In a Free, Plural, Democratic Society"

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Each time the nominee has had a history of extremism or incompetence or both. We did oppose Mr. Rehnquist's nomination to be an associate justice 15 years ago. The Rehnquist record then and since demands that we record our opposition to his elevation to the position of Chief Justice.

We believe that Mr. Rehnquist's extremism on civil rights is incompatible with that high and special office. Whatever the arguments over the scope of the 14th Amendment to the Constitution, we believe that it is unarguable that the three Civil War Amendments wrote into our basic charter a special national concern for the status and rights of those Americans whose ancestors came here as slaves. That group of Americans today, as when the Amendments were adopted, suffers the consequences of that terrible institution and the practices and attitudes it reflected and begat. One who is out of sympathy with those purposes cannot fulfill the responsibilities of the Chief Justice not only of the Supreme Court but of the Nation.

Before going into this record, I must note that our focus today does not in the least indicate a lack of concern for other defining and disabling characteristics of the Rehnquist record -- his inveterate preference for the State over the individual (an odd characteristic for a purported conservative) and -- perhaps another way of saying the same thing -- his disvaluing of the civil liberties whose protection motivated the Founders of the country to enact the Bill of Rights. Others will develop these aspects of the Rehnquist record, and we concur in their conclusions. It is our role here, however, commensurate with our own history, to protest the proposed elevation of an enemy of civil rights.

Our indictment rests not on a single act, but on an accumulation of evidence. There is, of course, the record that received insufficient attention when Mr. Rehnquist was named to the bench 15 years ago: his opposition to public accommodations and voting activities by and on behalf of blacks in Arizona in his years there as a

lawyer and, most telling and never adequately explained, his now famous memorandum to Justice Robert Jackson on the proper disposition of the then-pending Brown cases -- the landmark school desegregation cases that were before the Court during Rehnquist's clerkship there.[1] The memorandum to Justice Jackson did not receive the inspection and questioning it deserved in 1971, having come to light too late for that. It may now be too late to find the truth as to the origins and explanation of that memorandum. But we do have current evidence of the fact that at the time the memorandum was written, Mr. Rehnquist was wont to argue the merits of its position -- that is, the rightness of the separate-but-equal doctrine (see Washington Post, July 22, 1986, A8 col. 1-2).

Just as William Rehnquist disagreed with the reading of the Constitution unanimously announced by the Court in the Brown cases, he has continued to dissent from the Court's decision in cases involving segregated schools during his tenure on the bench. In the first northern school desegregation case to be decided there, the Keyes case from Colorado, Justice Rehnquist dissented alone.[2] His dissenting opinion not only displayed a rigid and insensitive approach to the inquiry involved when segregation is found in a jurisdiction that (unlike the South) has no history (or no recent history) of a legal requirement of segregated schools, but attacked a landmark in the Court's modern civil rights jurisprudence -- the Green case of 1968[3] in which the Court -- again unanimously -- disposed of the notion that the Constitution does not establish an affirmative duty to integrate but only forbids discrimination.

The next event in this distressing history came five years later in another northern school desegregation case, concerning the Columbus, Ohio school system. The District Court and the Court of Appeals for the 6th Circuit found that the Columbus

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1/Brown v. Board of Educ., 347 U.S. 483 (1954).

2/Keyes v. School Dist. No. 1, 413 U.S. 189, 254 (1973).

3/Green v. County Sch. Bd., 391 U.S. 430 (1968.

school district had engaged in intentional acts of school segregation, that these acts violated the 14th Amendment under applicable Supreme Court decisions, and that a systemwide desegregation remedy was needed.

The remedial plan was scheduled for implementation when school opened in 1978. The school district sought review in the Supreme Court, and it also applied to Justice Stewart (the Justice for that judicial circuit and therefore the person to whom normally such an application would be made) for a stay delaying implementation of the plan until the Supreme Court made a decision on the petition for certiorari. Justice Stewart denied that application on August 3. The Board of Education then went to Justice Rehnquist. He granted the stay, on August 11, 1978.[4]

Justice Rehnquist thus stopped desegregation in its tracks despite the lower courts' finding of intentional, systemwide segregation, despite Justice Stewart's denial of a stay, and most startling of all, despite the Court's established practice of denying delays or stays in implementing desegregation decrees pending appeal (even where review has subsequently been granted), absent some extraordinary circumstances not present here.

When the plaintiffs in the suit asked the Court to set aside the stay, the Solicitor General filed a brief for the United States, which had not previously appeared in the case, stating, "To our knowledge, this Court has never before granted a stay of the implementation of a school desegregation plan found by both a district court and a court of appeals to be appropriate to undo far-reaching constitutional violations in the operation of a school system." (Memorandum for the U.S. as amicus curiae, On Motion to Vacate Stay, Columbus Bd of Educ v Penick, Oct. Term, 1978, No. A-134, p. 11) The Solicitor General concluded that issuance of the stay by Justice Rehnquist was improper (Id., p. 12).

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[4]/Columbus Bd. of Educ. v. Penick, 439 U.S. 1348 (1978).

The Rehnquist stay required undoing in haste elaborate plans for desegregation, thus depriving the black school children of Columbus of their constitutional rights for yet another year.

It is interesting to note that, while the subsequent disposition of the case on the merits is not a measure of the propriety of a stay, when the Court did reach the merits of the Columbus school case it affirmed 7 to 2 the order that Justice Rehnquist so seriously questioned in issuing the stay.[5/] The Justice was, of course, one of the two dissenters.

The final, and perhaps the most glaring, manifestation of Rehnquist's hostility to minority rights and opposition to the courts' role in protecting them, is Justice Rehnquist's dissent from the Court's ruling in the Bob Jones case.[6/] That was the case, we all recall, where the Court rejected the Reagan Administration's shameful decision to abandon the position that segregated private schools do not qualify for tax exemption under federal law -- the case in which the Justice Department shifted the Government to the side of the segregated schools. Again, Justice Rehnquist stood alone, espousing the view that the IRS regulation denying tax exempt status was invalid. Indeed, Justice Rehnquist was so eager to rule against civil rights that he would have reached out to decide that if Congress were to grant tax-exempt status to organizations that practice racial discrimination, that action would not constitute a violation of the Equal Protection Clause. (461 U.S. at 574, n. 4)

For thirty years, the Supreme Court, the Congress, and the Nation have repeatedly and emphatically repudiated the extremist views of William Rehnquist on civil rights issues. The Senate must not allow such a right-wing ideologue to become Chief Justice.

5/Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

6/Bob Jones Univ. v. United States, 461 U.S. 574.

The Senate must not confirm an individual who is dedicated to rendering asunder, as soon as possible, what it took the Supreme Court, the Congress, and the Nation three decades to put together.

A number of organizations in the Leadership Conference do not take positions supporting or opposing confirmations of federal officials, and for that reason, do not join us in this testimony. The Anti-Defamation League, the U.S. Catholic Conference, the American Jewish Congress, and the American Jewish Committee have specifically requested that they not be listed as concurring in this testimony.

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Senator HATCH. Thank you.

Ms. Rogers, we will turn to you and then to Mr. Rauh.

STATEMENT OF ESTELLE ROGERS

Ms. ROGERS. Thank you, Mr. Chairman.

Members of the Judiciary Committee, my name is Estelle Rogers, and I appreciate the opportunity to testify today on behalf of the Federation of Women Lawyers of which I am national director.

I am also testifying on behalf of the Women's Legal Defense Fund and the NOW Legal Defense and Education Fund.

Our opposition to the nomination of William H. Rehnquist as Chief Justice of the United States stems from our concern that Mr. Justice Rehnquist has not demonstrated a commitment to equal justice under law. In fact, the evidence is to the contrary.

Since he has been on the bench, and in his earlier career, he has made a remarkably consistent and concerted effort to restrict and withhold the protections of constitutional rights and liberties from minorities, from the poor, from political dissidents, and from women.

The committee should be aware that in approximately 58 cases in which Mr. Justice Rehnquist has adjudicated a claim involving discrimination on the basis of sex, he has voted against the party asserting the bias 47 times, or nearly 81 percent of the time, while, in the same cases, the decision of the Supreme Court has been adverse to that party only 25 times, less than 43 percent. This is no coincidence.

A reading of the cases leads to the inescapable conclusion that Justice Rehnquist views the scope of constitutional protection for women extremely narrowly. The guarantees of the equal protection clause, for example, can, according to him, be vitiated by almost any governmental explanation for State-sponsored discrimination on the basis of sex. In fact, in the 11 times out of 58 that Justice Rehnquist did vote with the Supreme Court in sex discrimination cases, in only two cases did the claim rest on the basis of the equal protection clause.

It has been said many times during this confirmation process that, in his 15 years as an Associate Justice, Mr. Rehnquist has dissented alone in 54 cases. Although any civil libertarian is tempted to admire his independence of spirit, our concerns run much deeper.

The Constitution according to Rehnquist leads ultimately to the triumph of the State over the individual, in sharp contrast to the finest tradition of the Supreme Court, and in direct opposition to the founding principles of the American Nation. Nowhere is this clearer than in his lone dissent in equal protection cases, which number 12 of the 54 lone dissents.

He has indeed carved out a solitary place for himself on the far frontier of constitutional thought. His steadfast unwillingness to afford the equal protection of the laws to all of the people renders him unqualified for the position of Chief Justice.

Nor is Mr. Justice Rehnquist much more generous with the rights established by Congress in its 20 years of civil rights legislation. Although the Supreme Court majority has consistently held

that title VII of the Civil Rights Act of 1964 prohibits a wide variety of discriminatory practices in hiring, promotion, and compensation, Justice Rehnquist's reading of the statute's coverage is far more restrictive.

The overarching tenets of Justice Rehnquist's judicial philosophy are his deference to State and institutional interests, and his disregard for individual and civil rights.

In his 15 years on the Supreme Court, he has exhibited almost consistent hostility to the rights of women, choosing in case after case to deny or circumscribe venerable constitutional rights.

It truly——

Senator HATCH. Ms. Rogers, your time has expired.

Ms. ROGERS. Thank you, sir.

Senator HATCH. We appreciate it. We will now turn to Mr. Rauh.

STATEMENT OF JOSEPH L. RAUH, JR.

Mr. RAUH. My name is Joseph L. Rauh, Jr. I am general counsel of the Leadership Conference on Civil Rights.

You will forgive me, Mr. Chairman, if I speak from the heart. I was the law clerk to two great Justices 50 years ago, Justices Frankfurter and Cardozo. And I say to you very seriously, Mr. Chairman, this nomination is a desecration of the Supreme Court of the United States.

What we are doing is rewarding a lifetime of opposition to individual rights—a lifetime of that opposition—with the highest judicial and legal post in the country. The Senate cannot let that happen. I do not care whether you look at him as a law clerk—and do not fool yourself that memorandum was his views—or as a lawyer or justice. I challenge any Senator to read the Kugler book on simple Justice and then say the memorandum was not his own views. Then you have all the way through Phoenix when he opposed voting, when he opposed the slightest civil rights law, all the way up through the Court where he opposed everything, dissenting alone in *Bob Jones* and *Keyes*, even dissenting in the *Columbus* case.

No, he cannot change. All stages of his life are so consistent that he is not going to change. Do not try to think you can be hopeful in this situation. No, he will not change.

As a good lawyer, Chairman Hatch, you tried to get him out of his statement that this country is no more committed to an integrated society—you were very good at it—than a segregated society. [Laughter].

But, sir, no matter how good you were in trying to get him out of that, the remainder of the sentence which you said changed it only reinforced it. Because what it says is that we are dedicated to a free society. We were always dedicated to a free society, but we had a segregationist society.

I do not know whether this man is a bigot or not. It is very hard to say. But I do know that the things he has done in his lifetime are the same as they would have been if he were a bigot.

I think it is better to describe him as a statist. He thinks the State is always right. Whether it is women, blacks, Hispanics, homosexuals, aliens, people on welfare, the State always is right

when it denies them their rights. That is no position for a Chief Justice. That is no view for him to hold.

The time has come for the Senate to stand up for its rights. The Senate almost had this job of appointment alone from the framers, and what they did was to turn around and say no, we will split the job between President and Senate. Well, the Senate has got to do the job that the President has failed to do. The Nation has to have a symbol there as the Chief Justice of someone who believes in individual rights, not someone who has devoted his life to the contrary.

Thank you, sir.

Senator HATCH. Thank you, Mr. Rauh.

We will turn to Senator Biden.

Senator BIDEN. Mr. Rauh, is there a distinction between the Justice's records on issues relating to minorities when he is interpreting the Constitution and when he is interpreting the statute? Do you see any distinction?

He offers instances where he has voted with the majority to either expand or confirm the rights of minorities. It seems to me that usually occurs in statutory cases. But I wonder if you would comment?

Mr. RAUH. I see no distinction, sir, but I cannot claim to have read every statutory decision. I think I have read the constitutional ones. I think he follows the same view of limiting individual rights and increasing the powers of the State in both.

Senator BIDEN. Mr. Hooks, is there a distinction between—the Court is characterized as being made up of several conservatives, several liberals, and some centrists.

If one or the other conservatives were to be nominated to the position of Chief, would you be here?

Mr. HOOKS. I have looked at the present Supreme Court, and I am almost of the opinion, speaking off the top of my head, that I do not think that I would be in opposition to any of the sitting Justices. That is my thought.

But now let me qualify that by saying, of course, I have not read their record as close as I have Mr. Rehnquist's record. But as a practicing lawyer, and NAACP is before the Court all of the time, I do not think there is a Justice that—I may not be pleased with all of them, but I do not think I would be in opposition. That is my best.

Senator BIDEN. Ms. Jones, if it could be proven that there has been a progression in Justice Rehnquist's voting record that the cases that were the most objectionable where he has, in fact, imposed the most limited interpretation of the due process and equal protection clauses, if it could be shown that there were progress or growth—growth connotes a value judgment—but change, broadening of the application, would you be in here in opposition still, do you know, or would you give the benefit of the doubt?

Ms. JONES. Senator, I would never say I would not consider new evidence because that is what that would be.

Senator BIDEN. Touché.

Ms. JONES. But on the point that you raised earlier about statutory cases versus constitutional cases, you know, on statutory cases, things ought to be a little different with Mr. Rehnquist because the

Congress has spoken. I mean the Congress, Voting Rights Act, Housing Act, title VI, title VIII, title VII, Disability Act. Congress has declared as a matter of national policy what the law is.

So, in those cases, and especially if you look at the rules of statutory construction, first you go to the language of the statute, and then after that you interpret the statute most broadly as possible.

And it would be interesting to look at Mr. Rehnquist's votes and decisions in statutes that have been passed since 1960, since he has been on the Court, because I think that is the things we would see.

You know, for example, the counsel fee cases. The Congress passed the Counsel Fee Act in 1976 to facilitate bringing civil rights suits into Federal court so that lawyers could act as private attorneys general and get these rights vindicated. There has been 23 cases in the Supreme Court since that statute was passed that Mr. Rehnquist has sat on since he has been here, 23 cases; 8 of those cases were unanimous, so that was Mr. Rehnquist there. And, you know, when you order unanimous cases, having eight other Justices with you, then you get a chance maybe to write the opinion.

Senator BIDEN. My time is moving.

Ms. JONES. OK. I just want to say 14 of those cases, in 14 of those cases, Mr. Rehnquist gave the most narrow interpretation possible. He voted against the interests of the claimant, in 14 of those cases.

Senator BIDEN. Let me put it another way.

One of the reasons why I have to go back and reread the statutory cases, if in fact a case could be made that although this man is a statist, that he always go in the direction of whatever the elected body suggests the law should be, if, in those cases, there is a broad interpretation of the law as it relates to the statutes, as it relates to all others but minorities, but a narrow interpretation as to minorities, it would seem to me that would be a fairly revealing insight into the justice. If, in fact, there is a consistency that he always broadly interprets the State law or the Federal law as statutorily passed, then in fact there is power to be argued.

That is why I asked the question. But I will have to do more of my own research on that. You have been helpful.

I have some questions for Mr. Mitchell maybe on the next round.

I thank you all. My time is up.

Senator HATCH. Thank you.

Senator Grassley.

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

Senator HATCH. Why do we not move to Senator Specter, and then I will move back to Senator Kennedy.

Senator SPECTER. Thank you very much, Mr. Chairman.

Mr. Hooks, you only had a few moments to testify, and you did not refer to the incident involving the poll watching activities.

How heavily do you weigh that, if at all, in your evaluation of Justice Rehnquist?

Mr. HOOKS. I weigh it very heavily. Even though I am an independent now, in my young life in Shelby County in the late forties and fifties, I was a Republican.

And I remember when black voters could not belong to the Democratic Party in my county. And I remember when this nationwide movement started, of whites in the the periods of so-called

black and tan Republicans. And I myself was involved in several of those pushing and shoving incidents. So I know they were happening all over the country.

I do not know anything about Mr Rehnquist being involved except for the fact that we had affidavits from the Phoenix branch of NAACP, six of them, stating it did happen. We have people here to testify today that it did happen, and I saw similar things happen in my county. And I know from meetings that it was happening all over the country at that time as there was an attempt being made to change the composition of the party. And I was very well affected by that.

But the major thing that I wanted to say—may I just take a moment to say this. What someone did, some of those very people that I was in a shoving contest with, you know, 20, 25 years ago, we have since become great friends. But there has been a change of attitude.

I am looking at the New York Times Magazine of March 3, 1985, and I would like to submit it for the record if it has not been, and this is what the magazine article said.

Senator HATCH. Without objection, we will place it in the record.

[Not available at press time.]

Mr. HOOKS. It says "But I can remember arguments we would get in as law clerks in the early fifties"—this is Justice Rehnquist speaking—"and I don't know that my views have changed very much from that time." This is March 3, 1985.

And the next statement he makes is "There is still an acceptable perfectly reasonable argument the other way on *Brown* v. *Board of Education,* and I don't know how much I'll"—I want to read it correctly now; he refuses to say whether he agrees or "whether he wrote them—Whatever I wrote for Jackson was a long time ago and it kind of integrated to something I'm telling you now I find rather difficult."

The thing that puzzles me is in 1985, in this very wide ranging interview, he never one time, as far as I can see, categorically states, without any reservation, that "I don't believe now what I believed then." And this troubles me.

Most of the white politicians with whom I have had to vote in the South have made these kinds of statements. I will sit here and watch Senators and Congress people, and mayors, with tears in their eyes, admit they made them and that we were right, that they were wrong.

But what I fail to see in any of Mr. Rehnquist's decisions is any acknowledgment that he was wrong then which certainly would change my viewpoint now.

So that incident, getting right back to your question, does disturb me somewhat.

Senator SPECTER. Well, Mr. Hooks, Justice Rehnquist has denied that he was involved in any harassing tactics. That whole issue has been a very significant one in these proceedings and we have yet to hear the witnesses so that we can make our own evaluation as factfinders, which I think we have to do.

And my question to you would be that if those allegations are disproven, or the committee feels that they are, would that affect your viewpoint?

Mr. HOOKS. It is very minor as far as I am concerned, really, because what is really important is how he felt in 1964. Look at his pattern. He loses the argument before the Phoenix City Council in 1964. The next day he writes a letter to the paper saying, you will be sorry you did this.

In 1965, 1 year later, he goes to the State legislature to argue against a civil rights law. In 1967, 2 years later, he argues against school desegregation in Phoenix. In the 1970's, I am sure, if you would get the Office of Legal Counsel, you would find that same thing.

That pattern continues from the 1950's through the 1970's and through now. And that is what disturbs me more than anything.

Because, you know, I could be up for confirmation for Chief Justice. And a witness could say I had pushed somebody. And I would have to say I did; and that I am sorry for it, if I am. And I suspect I would be, if I were called on.

So that is important only as it relates to his memory; not to the incident. Let me make very clear: Not to the incident, but as to his recollection of the incident.

Senator SPECTER. I am interested in what all of you think is the appropriate range of discretion. Let me start with you, Ms. Jones, if I may.

Senator HATCH. Senator, your time has expired. Maybe I better interrupt at this point, and turn to somebody else.

Senator SPECTER. I will take it up at the next round.

Senator KENNEDY. I would like to thank our panel very much for, I think; enormously helpful and moving testimony.

Welcome back, good friends who have been at the Judiciary Committee a number of years ago when we were trying to deal with some of the problems which Ben Hooks has spoken so eloquently about, and the others in the panel.

I think in our society today, we have to really ask ourselves why the issue of civil rights is so important. An issue that our Founding Fathers failed, the Supreme Court failed in the *Dred Scott* decision; we fought a civil war on this question. People are wondering why we are looking back at *Brown* v. *Board of Education*. The fact of the unanimous Court, and the lesson and the statement that was made, I think, opened the path for a peaceful revolution in our society. We missed it in the time of the Civil War, but that was an extremely important message.

And that message really resulted, as a result of the Chief Justice of the United States.

And I think that all Americans have to understand that the question of discrimination, in its various forms, is not freedom from the landscape of our society. We can legislate, but we cannot in many instances touch the hearts and souls of our fellow citizens.

Now the real question, I think, on this issue of civil rights and equality is whether we are going to really continue the very significant and important progress, which I think this country can take a great deal of satisfaction from. It has been painful in many parts of the country, including in my own part of the country.

But I suppose I am asking you to speak again about this basic and fundamental question, because I think it is so fundamental.

And that is, whether you have, in your own lifetime, ever been so troubled by any either appointment for any position——

Mr. HOOKS. I think we must——

Senator KENNEDY [continuing]. As you are today about this nominee for this position?

Mr. HOOKS. [continuing]. Recognize that the Chief Justice is important. It is the third branch of government. It is more than first among equals. He does assign the majority opinions where he is on the majority side. He does have the opportunity to preside at the meetings.

I think it is a very important position. But more than that, it speaks to the Nation and to the world, and particularly at this time of apartheid in South Africa and the whole question of where America, stands to elevate to the Chief Justiceship one who has been antiminority, antiwomen and antirights of individuals.

And I thought, Mr. Senator, that your opening statement, if Mr. Chief Justice Rehnquist of the 1950's and '60's had been on that Court, thinking like he thought, we would still be in separated schools; I still would not be able to get a cup of coffee in the restaurant of my choice; I still would not be able to use hotel accommodations.

And I do not think there is anything in this record that changes that. And therefore, I do think it is one of the most important things I have ever testified to.

Senator KENNEDY. Mr. Rauh, would you speak to that?

Do you tremble, as one who, again, as I say, who has been here before the committee, as we in the Senate, as an institution, have been trying to grapple with complex and difficult questions on accommodations, transportation, voting, housing, a whole variety of different aspects of the cancer of, discrimination in our society, which our Founding Fathers felt but were unable to deal with; and whether you really fear that if this nominee is approved for that position, that we are really endangering the continued hope for meaningful progress in this area of such great importance for the United States, and for the United States really as a leader of the world?

Mr. RAUH. I do, sir.

I believe the peaceful civil rights revolution to which you have referred is the happiest event of my life, that we have turned the law upside down, from segregation and discrimination to integration and antidiscrimination.

That will not continue if this man is confirmed as Chief Justice of the United States.

Not only will we stop the further progress that we need, but there will be a throwback.

This is a very, very dangerous situation. I have been here many times, as you say. I have never had one I felt more from the heart.

Senator KENNEDY. The time is up, which I regret.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Mr. Chairman, I have already had my first round. I think that it might be appropriate to defer to Senator Metzenbaum.

The CHAIRMAN. The distinguished Senator.

Senator METZENBAUM. Mr. Chairman, for one question—I understand my colleague from Illinois has to leave for another meeting at 10:30. I understand he wants to ask a question, and I will yield to him for that purpose.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Yes; I thank my colleague, Mr. Chairman.

Dr. Hooks mentioned change that he has seen in people. I would particularly like a response from Joe Rauh, you will forgive me if I say you have seen a little more of all of this than the rest of the witnesses.

One of my questions is, not only in the area of civil rights, but also more generally: Is Justice Rehnquist open-minded?

Mr. RAUH. I have seen no evidence of any open-mindedness whatever. I think anyone reading the constitutional opinions would find that he has followed what he felt was OK in 1952, segregation; that he has followed what he thought was wrong in later periods when he opposed all civil rights legislation.

He is so consistent on his anti-civil-rights position, on what I call his statist position, on his belief that the State is always right and the individual is always wrong, he is so consistent on that that I do not see how anyone could call him open-minded

Senator SIMON. Any comments or reflections from the other witnesses on that.

Mr. MITCHELL. I, Senator, certainly as—in the last 4 years I have chaired, in the State of Maryland, the Senate Executive Nominations Committee, which would be the comparable committee to this committee in my own home State of Maryland.

And as chair of that committee we have had appear before judicial appointees of the Governor. One of the things that we have been able to see from that position is whether or not judicial appointees are open-minded, and whether or not they are fair and impartial.

And when they fail that test, certainly that is a reason for rejection. Not so much philosophy, but whether they are fair and impartial and willing to put aside their own personal views.

And I do not see that in Justice Rehnquist; even if there was a modicum of it I do not think many of us would be here.

Mr. HOOKS. If I may just say, very briefly, that the reason the record convinces me, that when we talk about the cases where—and I just want to repeat this one thing—that I have seen southern politicians change, and that is important. I am not holding against this man all that he said 20 years ago; I am dealing with the fact that I have not seen the change. And I have seen it up and down the South in my travels, in Senators and all of these people. I have seen a genuine change. And if they have not changed, at least they give lip service to it.

Mr. Rehnquist, in my judgment, does not even give lip service to it. And I do not think that a reading of this record would show that he is open-minded. Because where he has agreed with the changes in the civil rights situation, it seems to me it has been grudgingly and of necessity. And wherever he has an opportunity to knock it down, the *Bob Jones* case on some specious reason about statutory authority versus authority given to IRS, and that is not a really good reason; but where he has found anything to hang his hat on

that keep progress from happening, he has done it, in school cases, in employment cases, in that case involving the Moose Lodge, the private property.

I see a consistent strain of what he said in 1964 that the right of the restaurant owner is more important than the right of the individual to be a citizen. I see it in the *Moose* case. I see it in what Joe Rauh refers to as this statism above the individual.

Ms. ROGERS. Senator Simon, if I may speak as the one representative here right now from the women's rights community, I think that one can say on reading all of the women's rights decisions that they are extremely result-oriented. Almost without exception, that they are straining in many cases at the bit to reach the result that he wants to reach. And there does not seem to be very much evidence of openmindedness there.

Ms. JONES. Senator Simon, I would make two comments to that.

One, it would be extremely difficult to come up with an example of Mr. Rehnquist having voted with the majority in upholding the civil rights/civil liberties claim of a black person before the Court in a closely contested case.

That is going to be extremely difficult to find.

And in these cases that are close, four-four cases, if I had a client that was going before the Supreme Court, and it depended on the Chief Justice, I would have to tell that black civil rights plaintiff that more than likely that case would be lost.

The Legal Defense Fund litigates in the Supreme Court. We had 23 cases there this term in some form or another. And when you go there, and you argue, and Mr. Justice Rehnquist as an Associate Justice, sitting over to your right, the second Justice in, is one thing. And when he asks you a question, you know, you just know in a closely contested case, his mind is made up. And so you answer the question in such a way as to educate and hopefully illuminate the other Justices on the Court.

Now, to move Mr. Rehnquist from that position to the Chief Justice, so when you come there and there he is, it is going to affect practitioners, and the impact that it is going to have in terms of civil rights lawyers and civil rights clients across the country, and you are right on target.

That question of perception and symbolism is paramount. And it is critically important on this issue.

Senator SIMON. I thank you.

And I thank you, Mr. Chairman. I hope my time is not charged against Senator Metzenbaum.

Senator METZENBAUM. If it is, I would not have any luck. [Laughter.]

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Chairman.

Mr. Hooks, in the statement your organization issued this week; you said that the Senate must not allow such a rightwing ideologue from becoming Chief Justice.

What harm do you foresee occurring in this country and to the Constitution if Justice Rehnquist does become Chief Justice?

Mr. HOOKS. I think the first harm is the message itself, the symbolism of the message; that a man who openly espoused action against public accommodations; who was against integration in the

school system in his home county; who was involved one way or the other against the right of blacks to vote; who went to the State legislature to lobby against integration. Every act of his life in the 1960's indicated he was not for integration. Who said to our branch president—and we have an affidavit I believe to that effect in one of these pieces of testimony—that he was against all civil rights laws.

In the 1970's there does not appear to be any change. We came to the 1980's to the 1950's, and he was asked the question: You made all these statements as a law clerk, what do you think about it now? I do not think I have changed.

The very symbol of that type of person, after all the years this country spent trying to straighten out the racial question, and then the question of the sexes, now to put that person into the Chief Justiceship—the symbol is bad.

Second, I think that there is authority, and some additional prestige attached to the Chief Justiceship in actually shaping the leadership of the Court. And it certainly would not be in the Earl Warren tradition nor in the Burger tradition.

I do not want to take any longer. Those two things: dangerous as a symbol, and dangerous also in reality.

Senator METZENBAUM. Mr. Rauh; there has been a lot of discussion about the *Arizona* case, the Jackson memo.

You were a clerk for two Supreme Court Judges. You also probably have appeared before committees of the U.S. Congress maybe more than any other individual I know.

As I see it—and I would like to get your view—is the issue with reference to the facts that developed in the voter intimidation cases, is the issue whether they did or did not occur? Or do you see the issue relating very directly to the credibility, to the integrity, to the full representation of Justice Rehnquist?

It seems to me that what somebody did 30 years ago is really not as important as to whether or not—as Mr. Hooks has pointed out, you can take a position, and then you can say, I was wrong, I should not have done it.

Justice Rehnquist has said: I did not do it. It just did not occur. The answer is no.

And I would like to get your perspective on the question.

Mr. RAUH. I agree completely that it is far more important whether he was telling the truth when he came up for Associate Justice than whether in fact he did those things.

If he had walked in in 1971 and said, why, hell, all us Republicans in Arizona were trying to keep the blacks from voting, because they always vote Democratic; and I think that was a terrible thing I did and it was wrong. I do not think anyone would pay any attention to it.

It is his trying to say that it did not happen when there are so many who said that something happened—the degree of what happened is still open—but that something bad happened, there is no argument and thus there is a real credibility issue.

There is a credibility issue on the whole problem of voting. There is a credibility issue on the memorandum. I would challenge anybody to read the Kugler book on this point and not come out with the answer that it was his views, not Jackson's.

There is a credibility problem on that deed up in Vermont. I did not think much of the deed in Maricopa County, AZ, where there was a broad one. But this was specifically typed in. Who in heavens name ever had a deed in which something special was typed in about the Hebrew race and they did not know it was in there?

Of course he knew it was in there. Of course he knew the memorandum was his views. Of course he should have come clean.

Had he come clean on all of these things, I think one might have some sympathy for him.

Senator METZENBAUM. Thank you.

Ms. Jones, how many cases have read—Supreme Court decisions of Justice Rehnquist—in the past several weeks?

Ms. JONES. Oh—the Legal Defense Fund, I would not say that I personally have. I have read quite a few. But my colleagues and I; oh, we read close to 150 cases or more.

Senator METZENBAUM. And in any of the cases, did you find any evidence at all, any indication, that would give you cause for comfort as a member of a minority or as a woman, in reading those decisions?

Ms. JONES. Senator Metzenbaum, the short answer to that is, no, there is no comfort.

But the—you know, Senator Hatch, and I am interested in looking at that list, I understand has introduced a list of some 27 cases in which he said Mr. Rehnquist has favored the civil rights/civil liberties claim. I am interested in looking at that.

Now he mentions *Hamm* v. *South Carolina,* and some of these other cases. You look at these cases of Mr. Rehnquist. He is there when there are seven or at least usually eight other Justices already there. And he will come on to the case, and he will sometimes get the right—the majority opinion.

You will find him usually in civil rights cases in unanimous decisions. That is where you will find him. There are a lot of nine to zero.

Now, when the case is closely contested, on these close votes, you know, these five-fours, you do not find Mr. Rehnquist there.

When you look at the—and what we have been trying to pay particular attention to, and we have not finished, is looking at these statutory cases. Because that gets us out of the whole question of, well, this philosophical approach toward equal protection and due process clause, or expansion of the establishment clause, Congress has already determined what the policy is when there is a Federal statute. And to see how Mr. Rehnquist decides on statutory cases.

And once again, I am sure it is going to show, and we will finish it in the middle of next week or so, those cases, other than the nine-zero cases, you will find him voting in almost every instance to limit the civil rights claim of the black petitioner.

Senator METZENBAUM. I see the image of the chairman as if he were there. The red light is on.

Senator MATHIAS [presiding]. The chairman is here.

Senator METZENBAUM. The chairman is here; excuse me.

I defer to the chairman.

Senator MATHIAS. Senator Heflin.

Senator HEFLIN. Well, Mr. Chairman, a great number of the questions that I had in mind have been asked. But I am a little bit confused.

Mr. Hooks, if you would, quote again that statement from the New York Times 1985 article relative to the Jackson memos. I am not sure that I followed that.

Mr. HOOKS. What I was saying, and I will have to explain it. He was saying as a law clerk he quite often argued for the correctness of the *Plessy* v. *Ferguson*, or the kinds of things stated on the Jackson memorandum, the quotation about "you have to understand that many white people in the South just do not like colored people" and the Court, you know, cannot be a social arbiter. And this is what I was referring to, and it says this: "How do you get your views? he muses." "I do not think anybody has any idea. Obviously there was a long part of my life when I was in high school and the Army, that I simply did not give any thought to these things."

"But I can remember arguments we would get into as law clerks in the early 1950's, and I do not know that my views have changed much from that time." I think that was the particular sentence I read, and I——

Senator HEFLIN. I was thinking more about Justice Jackson's memos.

Mr. HOOKS. All right. Then he says on that, "Asked if his views on *Brown* have changed since that time." Justice Rehnquist replies—and I think this is important—"I think they probably have." "I think."

Senator HEFLIN. You still did not point to whether you were quoting something there from the memoranda that he had written to Justice Jackson, and that is the point I was trying to get to.

Mr. HOOKS. Well, the only thing I said that I think they probably have, he says he now accepts Brown as the law of the land, yet he still maintained, "I think that was a perfectly reasonable argument the other way."

As to the memos discovered by Professor Hutchison, he demurred, refusing to say whether he agrees today with what he wrote then.

Whatever I wrote for Justice Jackson was a long time ago, and I have kind of integrated some—and I am telling you now I find rather difficult. I read these things because I think it shows an ambivalence that even in 1985 he was not willing to say squarely that what he said then was wrong.

And this article, it is a fairly long article, and I only picked out the two parts I think are the most relevant to what we were talking about today.

Senator HEFLIN. Ms. Jones, let me ask you this, somewhat colored by Senator Metzenbaum, but I would like to get your thoughts on it.

There are a number of issues outside of the ideology issue: the recusal issue, the *Laird* case, the voter challenge issue, the memoranda to Justice Jackson, the covenants in the deeds, and then there is, as Senator Metzenbaum has listed, the lessened candor or the credibility.

Now, which of those issues do you feel bothers you the most and why?

Ms. JONES. Senator Heflin, we are talking about the Chief Justice of the U.S. Supreme Court and we are talking about issues of integrity, his ability, sensitivity, credibility. I think all of those issues are critically important issues—ail of them. And I do not think that one is more important than the other. I think they all have to be weighed in this great committee. And I think we need to address each of them.

I am a civil rights practitioner, but I am as intent of practicing before a Justice of the U.S. Supreme Court. It is also important to me that I know what his role has been, if he has had any role, in the activities regarding the message there, whether or not his activities were proper with regard to not recusing himself from *Laird* v. *Tatum.* I think credibility issues are critically important. The whole voting poll-watching, I have no particular information on that, but that is an important issue for this committee to resolve as well as his sensitivity on questions of civil rights.

Senator MATHIAS. Senator Specter.

Senator SPECTER. Mr. Chairman, I have many more questions, but because of the long list of witnesses, I am going to defer any further questions at this time.

Senator MATHIAS. Senator Kennedy.

Senator KENNEDY. Mr. Chairman, I would like to ask Mr. Hooks and Mr. Rauh just a different type of question.

We heard as we went through the hearing last night that the administration has been willing to exercise the doctrine of executive privilege with regards to the information on certain memoranda that Mr. Rehnquist authored when he was in the Justice Department. And this is the same tired, shop-worn, discredited argument that we used to hide the Nixon tapes during Watergate. And I think many of us have to ask what they are attempting to hide now. I mean, what is the 18½ second pause at this time.

Do you find it distressing that the Justice Department in 1986 is still trying to respect the confidentiality of controversial documents of the Nixon administration?

Mr. HOOKS. I do. I will say two things very briefly. No. 1, it disturbs me that, according to the memorandum, and I heard you and Senator Heflin read it the other day, there was no way under that memorandum that President Reagan has written to keep those documents from coming to light. And then they invoked executive privilege, probably following Senator Biden's suggestion made in some kind of way.

But the thing that really bothered me was when the lawyers on the U.S. Government said that if you do not have confidentiality, a lawyer will not be forthcoming. I would hate to think that my profession is so shoddy that if we do not believe that our communications will never come to light that we will not write them. I would like to think that U.S. Government lawyers, whatever they write and to whomever they write it, unless it involves national security, they are willing to let the world see it. And that bothers me. That is a stain on every lawyer in this country to say that we cannot write a decent opinion unless we are sure it is never going to come

to light. And that is what was said, as I recalled it, right from this table.

That bothers me, and I say there must be something to hide or else they would not be invoking that privilege at this time.

Senator KENNEDY. Mr. Rauh, you have been around at this time during certainly that period. Your comment.

Mr. RAUH. It is a rule not only derivative from this committee's action, but it is a rule of law that when you hold back documents that are in your possession, it is presumed that there is something that will hurt you in those documents. And I think there probably is something that will hurt confirmation in those documents.

I think executive privilege has been abused. I think we are seeing more of that here. I think we will get more and more of that. I thought your statement yesterday was exactly right, and it is a shame there is no way to test it. I sat up last night trying to think it through. I should have been asleep, but I was trying to think through how you or we could bring a lawsuit fast enough to help your position on this. I cannot think of anybody with the standing to do that.

But I must say I think it is a shocking thing to engage in cover up on anything as important as the Chief Justice of the United States.

Senator KENNEDY. Well, let me just finally ask: Given what I think is the testimony of Mr. Hooks in reference to this recent New York Times Magazine article that indicate by the words of Mr. Rehnquist himself that his views really had not changed very much, do you not believe that it would be valuable for this committee to gain that information dealing with issues involving civil rights, involving civil liberties, involving first amendment kinds of questions? Do you not think that that would be of value to the American people?

It is wonderful that they exercise executive privilege to the U.S. Judiciary Committee, they are exercising it to the American people, are they not? And the result of that position, in spite of President Reagan's mandates to the various agencies, they are effectively saying for national security reasons, we cannot get the memoranda on the questions of civil rights and civil liberties.

And I know you were here at the time when we considered Mr. Rehnquist last time. We got information after the hearings were over because it was not forthcoming. We got information when we were debating the question on the Senate floor and had no opportunity to inquire. And I would say that was a disservice to this committee and to the Senate because we failed.

I was wondering, given the fact that you followed the earlier hearings and have followed these hearings—Mr. Rauh certainly has, and I am sure the others did as well. But I am interested in your response.

Mr. HOOKS. Yes; I think it is very important that those documents should have been forthcoming. If they were documents that actually referred to the national security, they of course should have been cut out. But I remembered, in that period of time when Mr. Rehnquist also made the statement, that nonviolent civil disobedience should be punished as much as violent, as I got the quotation. I cannot remember. I think it is in this article. And as one

of those who worked with Dr. King, as one of those who believed in the concept of nonviolent civil disobedience, as one of those who advocates in South Africa now, that we not have a bloody revolution but a nonviolent approach to this. It bothers me when the Chief Justice designee says that that is entitled to the same kind of punishment, as I read his statement, that violent disobedience would have, because it is a longstanding practice of this great country that if we are willing to pay the price, we can nonviolently prove our point.

The NAACP stoked its legal reputation—on nonviolent protest, putting people on streetcars to test Jim Crowe laws and then going through the court. And I so much respect, so passionately believe in the rule of law that it disturbs me that we are putting into office a person who apparently does not believe in that rule of law as I do.

Senator KENNEDY. Thank you. I will just ask Elaine Jones if she would provide for the committee information on the Justice Rehnquist decisions involving claims of race discrimination based on statutes rather than the Constitution, if she would provide that memoranda—because the time is moving along—for the record, I would appreciate it.

Ms. JONES. I would be happy to do that.

Senator KENNEDY. Thank you very much.

[Information follows:]

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August 8, 1986

The Honorable Strom Thurmond
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing to provide the additional information requested at the August 1, 1986 hearing regarding the nomination of Justice Rehnquist to serve as Chief Justice. We respectfully request that this letter be made a part of the record of the hearings on the nomination of Justice Rehnquist.

(1) We have identified 33 cases in which Justice Rehnquist voted in favor of a black complainant in a race discrimination case. Of these, 31 were unanimous opinions; in the two remaining cases only a single Justice voted against the black complainant. A list of these decisions is set out in Table A.

(2) We have identified 14 race discrimination cases brought by or on behalf of blacks in which Justice Rehnquist cast the deciding vote. These include nine cases in which the rest of the Court was evenly divided, and four cases in which, because only eight Justices participated, a vote by Justice Rehnquist in support of the complainant would have had the effect of upholding by an equally divided vote a favorable decision in the Court below. In the remaining case, Arlington Heights v. MCDH, Justice Rehnquist's vote determined whether the lower court would be permitted to consider on remand the plaintiffs' racial discrimination claim. In every one of these cases Justice Rehnquist cast the deciding vote against the civil rights claimant. None of these cases involved a dispute about quotas, and none of these cases concerned whether a particular statute or constitutional provision forbade practices with a discriminatory affect, or were limited to instances of intentional discrimination. A list of these decisions is set forth in Table B.

(3) At last week's hearing we urged the Committee to review with particular care Justice Rehnquist's record regarding the interpretation and application of twentieth century civil rights statutes. We believe that aspect of the nominee's record is important for several reasons. First, because such cases involve considerations of statutory construction, and are thus governed by well established rules of statutory construction, a nominee's

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The Honorable Strom Thurmond
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constitutional philosophy should have little impact. Second, Justice Rehnquist has explained that his decisions on constitutional cases derives in part from a reluctance to override the will of the majority as expressed in legislation; in statutory cases, however, it is the will of the majority as expressed by Congress, which the Supreme Court is asked to enforce. Third, prior to becoming a member of the Court, Justice Rehnquist on several occasions voiced opposition to the adoption of certain civil rights measures. Justice Rehnquist's actual record with regard to statutory civil rights cases is the best evidence as to whether he has been influenced as a judge by his personal disagreement with this legislation.

We have identified a total of 83 cases since 1971 in which there has been some disagreement within the Court as to the interpretation or application of a twentieth century civil rights statute.[1] These cases involve more than a dozen different laws covering employment, housing, voting, and federal assistance programs, and prohibiting discrimination on a variety of grounds, including race, sex, national origin, age, and disability. Only four of these cases involved a dispute about quotas or affirmative action.[2] Only two of these cases concerned whether a particular statute forbade practices with a discriminatory effect, or was limited to instances of intentional discrimination.[3] Because these are cases in which the interpretation or application of a civil rights statute was sufficiently debatable that members of this Court reached different conclusions, it would not, of course, be reasonable to expect Justice Rhenquist to vote in every case for the result more favorable to the civil rights plaintiffs. The Court as a whole reached such a favorable result in slightly less than half of these cases.

Among the 83 cases in which members of the Court have disagreed about the interpretation or application of a twentieth century civil rights statute, Justice Rehnquist has joined on 80

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1 This analysis does not include cases in which Justice Rehnquist joined unanimous opinions rejecting or sustaining a claim under one of these statutes.

2 Firefighters v. Cleveland (July 2, 1986); Sheetmetal Workers v. EEOC (July 2, 1986); Firefighters v. Stotts, 81 L. Ed. 2d, March 4, 1983 (1984); Steelworkers v. Weber, 44 U.S. 480 (1979).

3 Board of Education v.Harris, 444 U.S. 130 (1979) (Emergency School Aid Act); Guardian Association v. Civil Service Commission, 463 U.S. 582 (1982) (Title VI)

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occasions for the interpretation or application least favorable to minorities, women, the elderly, or the disabled. In two cases, Albemarle Paper Company v. Moody and Dothard v. Rawlinson, Justice Rhenquist's interpretation of Title VII was less favorable to minorities and women than the standard adopted by the majority in each of those cases, but more favorable than the standard and result urged by a sole dissenter in each case. In only one of the 83 disputed cases, Cannon v. University of Chicago, did Justice Rehnquist vote for the interpretation of the law that was advanced by the civil rights plaintiffs. A complete list of the 83 cases is set out in Table C.

There are a number of Supreme Court decisions which, although they originally arose out of a civil rights controversy were resolved by the Court on another basis, were disposed of in a manner not relevant to the attached tables. In categorizing cases for the tables, some judgment calls were at times required, but they did not affect the overall pattern revealed by the study.

Yours sincerely,

Elaine R. Jones

Eric Schnapper

Enclosures

cc: The Honorable Joseph R. Biden
The Honorable Edward M. Kennedy
The Honorable Howard M. Metzenbaum

TABLE A

Rehnquist Decisions in Favor of Black Complainants

I. Unanimous Decisions

Ham v. South Carolina, 409 U.S. 524 (1973) (black criminal defendant entitled to voir dire the jurors about their racial attitudes) (9-0 opinions for defendant) (Rehnquist wrote majority opinion).

Test v. United States, 420 U.S. 28 (1975) (9-0 decision holding criminal defendant entitled to inspect jury roles to prove discrimination) (Rehnquist joined per curiam decision).

McDonnell-Douglas v. Green, 411 U.S. 792 (1973) (9-0 opinion overturning dismissal of discrimination claim and setting standards for remand) (Rehnquist joined majority opinion).

Chandler v. Roudebush, 425 U.S. 840 (1976) (9-0 decision holding that federal employee alleging discrimination entitled to trial de novo) (Rehnquist joined majority opinion).

Teamsters v. United States, 431 U.S. 324 (1976) (finding of intentional discrimination) (9-0 decision finding discrimination) (Rehnquist joined majority opinion).

Carson v. American Brands, 450 U.S. 79 (1981) (9-0 decision holding refusal to approve Title VII consent decree is an appealable order) (Rehnquist joined majority opinion).

EEOC v. Shell Oil Co., 466 U.S. 54 (1984) (9-0 decision sustaining EEOC subpoena) (Rehnquist joined concurring opinion).

Cooper v. Federal Reserve Board, 81 L. Ed. 2d 718 (1984) (8-0 decision holding rejection of class claim does not bar individual claim) (Rehnquist joined majority opinion).

University of Tennessee v. Elliott, 54 USLW 5084 (1986) (9-0 decision holding that unreviewed state administrative proceedings do not have preclusive effect on Title VII claims) (Rehnquist joined majority opinion).

Bazemore v. Friday, 54 USLW 4972 (1986) (9-0 decision holding that under Title VII the defendant Extension Service had a duty to eradicate salary disparities between white and black workers that originated prior to the effective date of Title VII). (Rehnquist joined with majority).

U.S. v. Scotland Neck Board of Education, 407 U.S. 484 (1972) (creation of separate school district prevented desegregation) (9-0 opinion finds new district unconstitutional) (Rehnquist joined concurring opinion).

Norwood v. Harrison, 413 U.S. 455 (1973) (9-0 decision holds states may not provide textbooks to segregated private schools) (Rehnquist joined majority opinion).

Milliken v. Bradley, 418 U.S. 717 (1974) (9-0 opinion upholding remedial programs for segregated school system) (Rehnquist joined majority opinion).

White v. Regester, 412 U.S. 755 (1973) (9-0 opinion held that at-large plan unconstitutionally diluted votes of blacks and hispanics) (Rehnquist joined majority opinion).

Connor v. Waller, 421 U.S. 656 (1975) (8-0 decision holding redistricting plan is subject to § 5 of Voting Rights Act) (Rehnquist joined majority opinion).

Briscoe v. Bell, 432 U.S. 404 (1977) (9-0 holding state cannot challenge § 5 coverage) (Rehnquist joined majority opinion).

Connor v. Coleman, 440 U.S. 612 (1979) (8-1 decision directing district court to frame redistricting plan) (dissenter would have granted stronger remedy) (Rehnquist joined majority opinion).

Blanding v. DuBose, 454 U.S. 393 (1982) (9-0 decision holding letter was not request for preclearance within meaning of § 5) (Rehnquist's separate opinion concurred in the result but denounced § 5).

McCain v. Lybrand, 465 U.S. 236 (1983) (9-0 decision holding mailing of statute to Attorney General did not constitute § 5 submission absenting request for preclearance) (Rehnquist concurred in judgment).

NAACP v. Hampton County, 84 L. Ed 2d 124 (1985) (9-0 decision holding election law changes subject to § 5) (Rehnquist concurred in judgment).

Hunter v. Underwood, 85 L. Ed. 2d 222 (1985) (8-0 decision holding state law disenfranchising misdemeanants unconstitutional due to racial purpose) (Rehnquist wrote majority opinion).

Thornburg v. Gingles, 54 USLW 4877 (1986) (9-0 decision upholding § 2 challenge to general at-large districts) (Rehnquist joined majority opinion as to those districts, but urged adoption of staneard more favorable to defendants)

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) (9-0 decision holding whites may challenge exclusion of blacks under Title VIII) (Rehnquist joined majority opinion).

Hills v. Gautreaux, 425 U.S. 284 (1976) (8-0 decision upholding authority of district court to order multi-city housing remedy) (Rehnquist joined majority opinion).

Havens Realty v. Coleman, 455 U.S. 363 (1981) (9-0 decision holding "testers" can sue under Title VIII) (Rehnquist joined majority opinion).

Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431 (1973) (9-0 decison holding exclusion of blacks from swimming pool violates § 1982) (Rehnquist joined majority opinion).

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (9-0 decision limits use of city facilities by segregated schools) (Rehnquist joins majority opinion).

Kush v. Rutledge, 460 U.S. 719 (1983) (9-0 decision holding § 1985(2) does not require allegation of racial animus) (Rehnquist joined majority opinion).

Palmore v. Sidoti, 466 U.S. 429 (1984) (9-0 decision holding state cannot deny custody of child because mother married a black) (Rehnquist joined majority opinion).

Burnett v. Grattan, 82 L. Ed. 2d 36 (1984) (9-0 decision rejecting 6-month limitation period for filing § 1983 complaint) (Rehnquist wrote concurring opinion).

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (9-0 decision holding that an employee's statutory right to trial de novo under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement) (Rehnquist joined majority opinion)

II. Non-unanimous Decisions

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (7-1 decision holding employer testing unlawful, and requiring back pay in most Title VII cases) (Rehnquist joined majority and filed concurring opinion).

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (7-1 decision upholding district lines drawn in race conscious manner to comply with § 5) (Rehnquist joined majority opinion).[1]

[1] In Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), Justice Rehnquist joined 6-3 majority holding that exhaustion of administrative remedies is not required under § 1983. Although this precedent is helpful to plaintiffs presenting Civil Rights claims, the plaintiff in Patsy was a white alleging reverse discrimination.

TABLE B

Cases in Which Justice Rehnquist Cast Deciding Vote

Mayor v. Educational Equality League, 415 U.S. 604 (1974) (5-4 decision holding plaintiffs failed to prove racial discrimination in the selection of city officials) (Rehnquist joined in majority opinion).

Delaware College v. Ricks, 449 U.S. 250 (1980) (5-4 decision construing Title VII such that plaintiffs charge was untimely) (Rehnquist joined majority opinion).

American Tobacco Co. v. Patterson, 71 L. Ed. 2d 748 (5-4 decision holding that § 703(h) is not limited to seniority systems adopted before the effective date of the Act.) (Rehnquist was in majority).

Guardians Association v. Civil Service Commission, 463 U.S. 582 (1982) (5-4 decision holding only injunction but not damages can be awarded under Title VI for an employment practice with a discriminatory impact) (Rehnquist wrote concurring opinion).

Milliken v. Bradley, 418 U.S. 717 (1974) (5-4 decision rejecting interdistrict desegregation remedy) (Rehnquist joins majority opinion).

Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (5-4 decision holding period of limitations for filing Title VII charge is tolled during consideration of grievance or arbitration)

Bazemore v. Friday, 54 USLW 4972 (1986) (5-4 decision limiting obligation of state to desegregate de jure system) (Rehnquist joined majority opinion)

Warth v. Seldin, 422 U.S. 490 (1975) (5-4 decision holding plaintiffs lack standing to challenge allegedly discriminatory zoning) (Rehnquist joined majority opinion).

California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) (4-3 decision holding challenged discriminatory practice was immune from attack) (Rehnquist joined majority opinion).

Allen v. Wright, 82 L. Ed. 2d 556 (1984) (5-3 decision holding black parents lack standing to challenge grant of tax exempt status to segregated private schools) (Rehnquist joined majority opinion).

City of Richmond v. United States, 422 U.S. 358 (5-3 decision that annexation plan did not violate § 5) (Rehnquist joined majority opinion).

Beer v. United States, 425 U.S. 130 (1976) (5-3 decision holding § 5 prohibits only retrogressive election law changes) (Rehnquist joined majority opinion).

Rizzo v. Goode, 423 U.S. 362 (1976) (5-3 decision holding plaintiffs failed to prove sufficient incidents of police brutality towards blacks to justify injunction) (Rehnquist wrote majority opinion).

Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977) (5-3 decision holding plaintiff had not proved refusal of rezoning was racially motivated) (Rehnquist joined majority opinion).

TABLE C

Cases In Which Members of Supreme Court Disagreed as to the Interpretation or Application of a Twentieth Century Civil Rights Statute

(1) Title VI

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (5-4 decision holding medical school admission plan violated Title VI) (Rehnquist joined in concurring opinion).

Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983) (5-4 decision holding only injunction but not damages can be awarded under Title VI for an employment practice with a discriminatory impact) (Rehnquist wrote concurring opinion).

Bazemore v. Friday, 54 USLW 4972 (1986) (5-4 decision limiting obligation of state to desegregate de jure system) (Rehnquist joined majority opinion).

(2) Title VII - Race

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (6-3 decision holding that filing of a Title VII charge does not toll the § 1981 limitations period) (Rehnquist joined majority opinion).

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (7-1 decision holding employer testing unlawful and requiring back pay in most Title VII cases) (Rehnquist joined majority and filed concurring opinion).

Franks v. Bowman Transportaiton Co., 424 U.S. 747 (1976) (5-3 decision holding that minorities denied a job are entitled to make whole seniority relief) (Rehnquist joined dissenting opinion).

Washington v. Davis, 426 U.S. 229 (1976) (6-2 decision rejecting Title VII claim of discrimination) (Rehnquist joined majority opinion)

National Education Association v. South Carolina, 434 U.S. 102 (1978) (5-2 decision holding Title VII not violated by teacher examination disqualifyiing 83% of all black teachers but only 17.5% of whites) (Rehnquist joined summary affirmance).

Brown v. GSA, 425 U.S. 820 (1976) (6-2 decision holding Title VII precludes all other remedies for employment discrimination against federal employees) (Rehnquist joined majority opinion).

Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 299 (1976) (5-4 decision holding period of limitations for filing Title VII charge is not tolled during consideration of grievance or arbitration).

Teamsters v. United States, 431 U.S. 324 (1976) (7-2 decision holding employers may use seniority system that perpetuates the effect of past discrimination) (Rehnquist joined majority opinion).

Hazelwood School District v. United States, 433 U.S. 299 (1977) (8-1 decision holding that plaintiff made out a prima facie case of discrimination but defendant entitled to adduce more evidence) (Rehnquist joined majority opinion) (Court of Appeals found discrimination and was reversed)

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) (7-2 decision reversing Court of Appeals finding of discrimination) (Rehnquist wrote majority opinion).

New York Transit Authority v. Beazer, 440 U.S. 568 (1979) (6-3 and 5-4 decision reversing district court finding of Title VII violation) (Rehnquist joined majority opinion).

Steelworkers v. Weber, 443 U.S. 480 (1979) (5-2 decision upholding voluntary affirmative action plan) (Rehnquist wrote dissenting opinion).

California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) (4-3 decision holding challenged discriminatory practice was immune from attack) (Rehnquist joined majority opinion).

Delaware College v. Ricks, 449 U.S. 250 (1980) (5-4 decision construing Title VII such that plaintiffs charge was untimely) (Rehnquist joined majority opinion).

Connecticut v. Teal, 457 U.S. 440 (1982) (5-4 decision holding Title VII applies to any subpart of a selection procedure with a disparate impact) (Rehnquist joined dissenting opinion).

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (6-3 decision holding filing with court of EEOC right-to-sue letter does not toll period of limitations) (Rehnquist joined majority).

Firefighters v. Stotts, 81 L. Ed 2d 483 (1984) (6-3 decision holding district could not modify a Title VII consent decree to require racially-based layoffs) (Rehnquist concurred in majority opinion).

Sheetmetal Workers v. EEOC, 54 LW 4984 (1986) (5-4 decision upholding court ordered affirmative action in Title VII case) (Rehnquist wrote dissenting opinion).

Firefighters v. Cleveland (July 1986) (6-3 decision upholding Title VII affirmative action settlement) (Rehnquist wrote dissenting opinion).

American Tobacco Co. v. Patterson, 456 U.S. 63 (5-4 decision holding that § 703(h) is not limited to seniority systems adopted before the effective date of the Act) (Rehnquist joined majority opinion).

(3) Title VII - Sex/National Origin/Religion

Cecilia v. Espinoza, 414 U.S. 86 (1973) (8-1 decision holding Title VII does not forbid discrimination on ground of alienage) (Rehnquist joined majority opinion) (National origin)

General Electric v. Gilbert, 429 U.S. 125 (1976) (6-3 decision holding Title VII permits exclusion of pregnancy related disability benefits from disability plans) (Rehnquist wrote majority opinion) (sex)

United Airlines v Evans, 431 U.S. 553 (1977) (7-2 decision holding Title VII does not forbid application of seniority system that perpetuates effects of past Title VII violation) (Rehnquist joined majority opinion) (sex)

Trans World Airlines v. Hardison, 432 U.S. 63 (1977) (7-2 decision holding that Title VII did not require employer to accommodate religious needs of employee) (Rehnquist joined majority opinion) (religion)

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) (7-2 decision holding Title VII establishes no limitation period for EEOC initiated enforcement action) (Rehnquist wrote dissenting opinion) (sex)

Dothard v. Rawlinson, 433 U.S. 321 (1977) (8-1 decision finding Title VII violation as to non-contact positions; Rehnquist concurring opinion adopted intermediate standard) (7-2 decision holding Title VII not violated as to contact position; Rehnquist joined majority opinion) (sex)

Los Angeles Department of Water v. Manhart, 435 U.S. 702 (1978) (6-2 decision holding unlawful under Title VII smaller pensions for female employees) (Rehnquist joined dissenting opinion) (sex)

Board of Trustees v. Sweeney, 439 U.S. 24 (1978) (5-4 decision vacating district court finding of unlawful intentional discrimination) (Rehnquist joined majority opinion) (sex)

Davis v. Passman, 442 U.S. 228 (1979) (5-4 decision holding exclusion of Congressional employees from Title VII coverage did not bar sex discrimination claim by such employees under § 1331) (Rehnquist joined dissenting opinions) (sex)

General Telephone v. EEOC, 446 U.S. 318 (1980) (5-4 decision holding EEOC may seek class-wide relief under Title VII without resort to rule 23) (Rehnquist joined dissenting opinion) (sex)

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) (6-3 decision establishing more stringent interpretation of deadline for filing Title VII charge) (Rehnquist joins majority opinion) (religion)

Washington v. Gunther, 452 U.S. 161 (1981) (5-4 decision holding Title VII forbids employer to set lower salary for a job because the position is held by women) (Rehnquist wrote dissenting opinion) (sex)

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) (5-4 decision holding adverse determination of State law discrimination claim precludes litigation of Title VII claim) (Rehnquist joined majority opinion) (National origin-Religion)

Ford Motor Company v. EEOC, 458 U.S. 219 (1982) (6-3 decision limiting back pay where defendant employer makes certain job offers) (Rehnquist joined majority opinion) (sex)

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) (5-4 decision holding Manhart violated by employer offering only discriminatory third party pension plans) (Rehnquist joined dissenting opinion) (sex)

Meritor Savings Bank v. Vinson, 54 USLW 4703 (1986) (5-4 establishing limits on employer legal responsibility under Title VII for sexual harassment by supervisors) (Rehnquist wrote majority opinion) (sex)

(4) Title VIII

Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979) (7-2 decision holding city and certain individuals can sue under § 812 of Title VIII) (Rehnquist wrote dissenting opinion, limiting § 812 to "direct victims" of discrimination).

(5) Title IX

Cannon v. University of Chicago, 441 U.S. 677 (1979) (6-3 decision holding there is a private right of action under Title IX) (Rehnquist wrote concurring opinion).

North Haven Board of Education v. Bell, 456 U.S. 512 (1982) (6-3 decision holding employment discrimination is covered by Title IX) (Rehnquist joined dissenting opinion).

Grove City College v. Bell, 465 U.S. (6-2 decision limiting scope of Title IX coverage) (Rehnquist joined majority opinion).

(6) Voting Rights Act

Taylor v. McKeithen, 407 U.S. 191 (1972) (districting allegedly gerrymandered to prevent election of blacks) (5-3 decision orders appellate court to explain why it overturned district court order for plaintiff) (Rehnquist wrote dissenting opinion).

Georgia v. United States, 411 U.S. 528 (1973) (6-3 decision holding Attorney General can reject § 5 submission if state fails to establish nondiscriminatory purpose and effect) (Rehnquist joined dissenting opinion).

NAACP V. New York, 413 U.S. 345 (1973) (7-2 decision denies NAACP right to intervene in section 5 bailout suit) (Rehnquist joined majority opinion).

City of Richmond v. United States, 422 U.S. 358 (5-3 decision that annexation plan did not violate § 5) (Rehnquist joined majority opinion).

Beer v. United States, 425 U.S. 130 (1976) (5-3 decision holding § 5 prohibits only retrogressive election law changes) Rehnquist joined majority opinion)

Morris v. Gressette, 432 U.S. 491 (1977) (7-2 decision holding Attorney General's refusal to object under § 5 not subject to judicial review) (Rehnquist joined majority opinion).

United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978) (6-3 decision holding § 5 applies to political subdivisions as well as to states) (Rehnquist joined dissenting opinion).

Wise v. Lipscomb, 437 U.S. 535 (1978) (6-3 decision holding Dallas redistricting not subject to § 5) (Rehnquist wrote concurring opinion).

Dougherty County v. White, 439 U.S. 32 (1978) (5-4 decision holding board of education rule subject to § 5) (Rehnquist joined dissenting opinion).

United States v. Mississippi, 444 U.S. 1050 (1980) (6-3 decision rejecting challenge to redistricting plan under § 5) (Rehnquist joined majority opinion).

City of Mobile v. Bolden, 446 U.S. 55 (1980) (6-3 decision holding at-large elections did not violate § 2) (Rehnquist joined majority opinion).

City of Rome v. United States, 446 U.S. 156 (1980) (6-3 decision holding city election law change subject to § 5) (Rehnquist wrote dissenting opinion holding Voting Rights Act unconstitutional as applied).

McDaniel v. Sanchez, 452 U.S. 130 (1981) (7-2 decision holding reapportionment subject to § 5) (Rehnquist joined dissenting opinion urging § 5 did not apply).

Hathorn v. Lovorn, 457 U.S. 255 (1982) (8-1 decision holding state courts can enforce § 5) (Rehnquist wrote dissenting opinion).

Rogers v. Lodge, 458 U.S. 613 (1982) (6-3 decision finding at-large election plan adopted for unconstitutional racially discriminatory purpose) (Rehnquist joined dissenting opinion).

Port Arthur v. United States, 459 U.S. 159 (1982) (6-3 decision holding redistricting plan violated § 5) (Rehnquist joined dissenting opinion).

Lockhart v. United States, 460 U.S. 175 (1983) (6-3 decision holding election plan did not violate § 5) (Rehnquist joined majority opinion).

Thornburg v. Gingles, 54 USLW 4877 (1986) (6-3 division as to standard for proving § 2 standard) (Rehnquist concurred in result but joined concurring opinion proposing standard more favorable to defendants).

(7) Discrimination Against Disabled

State School v. Halderman, 451 U.S. 1 (1981) (6-3 decision holding § 6010 of Developmentally Disabled Assistance and Bill of Rights Act creates no legally enforceable rights) (Rehnquist wrote majority opinion).

Board of Education v. Rawley, 458 U.S. 176 (1982) (6-3 decision holding Education for All Handicapped Children Act does not require sign language interpreter for deaf child) (Rehnquist wrote majority opinion).

Community Television v. Gottfried, 459 U.S. 498 (1983) (6-3 decision holding FCC is not obligated to consider station's compliance with §504 in renewing license) (Rehnquist joined majority opinion).

Atascaden State Hospital v. Scanlon, 87 L. Ed. 2d 171 (1985) (5-4 decision holding a plaintiff can never obtain damages against a state for violation of § 504) (Rehnquist joined majority opinion).

U.S. Department of Transportation v. Paralyzed Veterans, 54 USLW 4854 (6-3 decision holding that airline using federally-assisted airports may discriminate against the handicapped despite § 504) (Rehnquist joined majority opinion).

(8) Age Discrimination In Employmnet Act

United Airlines, Inc. v. McMann, 434 U.S. 92 (1977) (6-3 decision holding ADEA does not prohibit mandatory retirement of 60 year old worker under bona fide pre-Act senority plan) (Rehnquist joined majority opinion)

Oscar Meyer and Co. v. Evans, 441 U.S. 750 (1979) (5-4 decision holding plaintiff need not resort to state administrative procedure prior to filing suit under ADEA) (Rehnquist joined dissenting opinion).

Lehman v. Nakshian, 453 U.S. 156 (1981) (5-4 decision holding there is no right to jury trial in an ADEA suit against the federal government) (Rehnquist joined the majority opinion).

(9) Pregnancy Discrimination Act

Newport News Shipbuilding v. EEOC, 462 U.S. 669 (1983), (7-2 decision holding Act forbids distinction in pregnancy benefits between male workers with spouses and female workers with spouses) (Rehnquist wrote dissenting opinion).

(10) Emergency School Aid Act

Board of Education v. Harris, 444 U.S. 130 (1979) (6-3 decision holding claim under Emergency School Aid Act can be based on discriminatory impact alone) (Rehnquist joined dissenting opinion).

(11) Counsel Fee Statutes

Hutto v. Finney, 437 U.S. 678 (1978) (5-4 decision upholding the Court of Appeals award of attorney's fees under Civil Rights Attorney's Fees Awards Act of 1976) (Rehnquist wrote dissenting opinion).

Hanrahan v. Hampton, 446 U.S. 754 (1980) (7-1 decision denying fees under 1976 Attorney Fees Act for interim success) (Rehnquist joined concurring opinion).

New York Gaslight Club v. Carey, 447 U.S. 54 (1980) (7-2 decision upholding the award of attorney's fees in a Title VII action to successful complaining party for services in state administrative and judicial proceedings) (Rehnquist joined dissenting opinion).

Maine v. Thiboutot, 448 U.S. 1 (1980) (6-3 decision holding that 1976 Attorney's Fees Act applies to all litigation under § 1983) (Rehnquist joined dissenting opinion)

Hughes v. Rowe, 449 U.S. 5 (1980) (7-2 decision holding Attorney's Fees Act did not authorize award against prison inmate) (Rehnquist wrote dissenting opinion).

Hensley v. Eckerhart, 461 U.S. 424 (1983) (5-4 decision establishing standards for determining the size of fee award under 1976 Attorney's Fee Act) (Rehnquist joined majority opinion).

Pulliam v. Allen, 466 U.S. 522 (1984) (5-4 decision holding judicial immunity not a bar to award of attorney's fees under 1976 Attorney's Fee Act) (Rehnquist joined dissenting opinion).

<u>Webb v. Board of Education</u>, 471 U.S. (1985) (6-2 decision holding that attorney's fees are not available under 1976 Attorney's Fee Act for time spent on optional administrative proceedings prior to filing civil rights action under § 1983) (Rehnquist joined majority opinion).

<u>Evans v. Jeff D.</u>, 54 USLW 4359 (1986) (6-3 decision holding that Court may approve civil rights class action settlement provision for plaintiffs' waiver of claim for attorney's fees under 1976 Attorney's Fees Act) (Rehnquist joined majority opinion).

<u>Riverside v. Rivera</u>, 54 U.S.L.W. 4845 (5-4 decision upholding District Court's award of attorney's fees under 1976 Attorney's Fees Act) (Rehnquist wrote dissenting opinion).

<u>Library of Congress v. Shaw</u>, 54 U.S.L.W. 4951 (1986) (6-3 opinion holding no interest is available on fee awards against Federal agencies under Title VII) (Rehnquist joined majority opinion).

<u>Pennsylvania v. Delaware Valley Clean Air Counsel</u>, 54 U.S.L.W. 5017 (1986) (6-3 opinion holding that the lower courts apply § 304(d) Clean Air Act) (Rehnquist joined majority opinion).

Senator MATHIAS. I have just one question. I do not solicit your views on racial covenants because I know each of you so well that I could, I am sure, predict what you would say.

I would like to put this hypothetical question to you, and I have to make it hypothetical because of the state of the record at this point. I cannot make it more specific.

Would you think there is a difference between the acceptance of a deed containing racial covenants, and making a deed containing racial covenants?

Mr. HOOKS. I would have to say at the outset yes, but if I may just make one further statement. I had practiced law before I assumed my present position, a long time. I have owned maybe one or two pieces of property, and I must confess that most deeds have a boilerplate language in them, and I do not always read it carefully.

But one of the things I learned in law school and from the first lawyer I practiced with, if anything is typed in, you had better read that because you do not know that, but what they may give with one hand they may take with the other. And I do not know of any lawyer, if you want to talk about brilliance and competence, then I would have to question a lawyer who would take a deed, take or give a deed that contained a restrictive covenant that is typed in. And my understanding is in the *Vermont* case that was typed in. And most lawyers, as Congressman Weiss said this morning, look very carefully at anything that is typed into a printed form or that is rubbed out or erased, because that is usually where the changes are made. And I think that, while there is a difference, it is still not that much different between my accepting a deed that has a restrictive covenant and my giving a deed. Because in both cases, I think, I am more than a passive participant.

Senator MATHIAS. Thank you all for being here. It is a great pleasure.

Senator KENNEDY. Mr. Chairman, just one point of information. Up our part of the country, Mr. Hooks, up in Vermont, Massachusetts, when you buy land up there, you know, it is stone fence to stone fence. Robert Frost wrote about that so eloquently. And people that buy land up in our part of the country in those rural back areas really take a good look at what those covenants or what those titles are. Because it goes back 200, sometimes 300 hundred years. And the first thing that they tell you up our way is you had better make sure, you had better get a good look, better get a hard look at some of these matters.

It may be different in other parts of the country, but I must say that most of the people up our way usually take a very hard and thorough look at these matters before they put their money down.

Senator MATHIAS. Senator Mitchell.

Mr. MITCHELL. Mr. Chairman, just in response, and I had just gotten to this point when my time ran out on my initial statement. The point of perception and the message that this sends, which is extremely important during these times, we are increasing our numbers of black elected officials throughout the country, making the effort to participate in the process. The message that it sends is I guess best summed up by a young black entrepreneur from California whose name was John Grayson, who said that one of the

problems that confused him was why black religious fundamentalists and white religious fundamentalists basically believed in the same things but ended up on opposite ends. He said he finally with his computer training boiled it down to the fact of role models, and that he discovered that blacks, by and large, had adopted as a role model Jesus, who was all-forgiving, turned the other cheek, love thy brother and that sort of thing; but that white religious fundamentalists had adopted the role model of God.

Now, God will send a flood on you. God will punish you if you do wrong. And so we find ourselves now in a situation where we are sending a message by the attempted appointment of a Sessions, by the attempted nomination of this kind of Supreme Court Chief Justice nominee that even blacks now ought to maybe change role models and begin to adopt the role models of the white religious fundamentalists who will punish you when you do wrong and deal with you in that way.

So I think that legalities are fine but also perception, and the message you send is crucially important at this time.

The CHAIRMAN. Any more questions from anybody?

[No response.]

The CHAIRMAN. Thank you, members of the panel, very much for your appearance here and your testimony.

We will now call the next panel: Ms Susan Nicholas, Women's Law Project; Mr. John Silard, Judicial Selection Project; Ms. Irene Natividad, National Women's Political Caucus.

Senator BIDEN. Mr. Chairman, I would like to respectfully suggest, although I am anxious to hear their testimony, that time is running out. I would respectfully suggest since they were unable to be here last night—is that correct?

Mr. SHORT. This is part of panel six.

Senator BIDEN. This is part of panel six I requested for today last night?

Mr. SHORT. Yes, sir, that is correct.

Senator BIDEN. I did that, did I?

Mr. SHORT. Yes, sir.

Senator BIDEN. I thought you would tell me that. As much as I want to hear your testimony, I want to make sure where we are with regard to the witnesses that have come all the way from Arizona so that we do not run out of time without those witnesses having an opportunity to testify. And unless any of my colleagues on my side object, I would respectfully suggest that we would hold this panel to determine whether or not we have the time after the witnesses from Arizona. Because the worst of all worlds would be for them to have flown here——

Senator METZENBAUM. May I suggest a compromise?

Senator BIDEN. Sure.

Senator METZENBAUM. What if we just gave each of these witnesses 3 minutes to speak and we all of us waived our opportunity to question.

Senator BIDEN. A good idea.

Senator METZENBAUM. Before we do that, Mr. Chairman, I had spoken with Duke before about the witnesses coming forth and perhaps meeting in the back room. We do not know who they are. We have not had a chance to talk with them, and I think it would be

helpful if the staff on both sides have a chance to at least meet the witnesses. If you would be good enough to request them to do that, Mr. Chairman, I would appreciate it.

The CHAIRMAN. No objection. We will do that.

Senator BIDEN. All the Arizona witnesses come around the back. Just meet in the back room.

Senator METZENBAUM. All of the witnesses from out of town, Arizona, California.

The CHAIRMAN. You may proceed.

TESTIMONY OF PANEL CONSISTING OF IRENE NATIVIDAD, NATIONAL WOMEN'S POLITICAL CAUCUS, AND JOHN SILARD, JUDICIAL SELECTION PROJECT

Ms. NATIVIDAD. Mr. Chairman and members of the committee, I too would like to hear the Arizona witnesses, but I thank you for giving me this opportunity to speak to you today.

The CHAIRMAN. You might state your name and who you represent.

Ms. NATIVIDAD. I am Irene Natividad. I am chair of the National Women's Political Caucus which is a nationwide bipartisan organization with 77,000 members and 300 State and local caucuses.

Our primary work is to gain equal representation for women in elective and appointed office, and we speak out on issues of direct concern to women.

As was said before, and which I would like to underline, women's full rights as citizens are dependent on the Supreme Court's interpretations of the due process clause and equal protection clauses of the 14th amendment and of laws passed by Congress. This is important for all of us to note because, as was said before and which needs repetition, women do make up the majority of the people in this country.

It is for this reason that we in the National Women's Political Caucus oppose the nomination of Justice William Rehnquist to be Chief Justice of the Supreme Court. His opinions on cases coming before the Court betray a consistent bias against equality for women under the law that prevents him from applying his seemingly brilliant intellectual and analytical powers in an objective fashion to cases related to sex discrimination.

Furthermore, it is our view that his opinions portray an attitude which is out of sync, to use the vernacular, with the reality faced by women nowadays.

A 19th century mind set about women has no place in the 21st century where we know we will still see Justice Rehnquist.

Our complete testimony is on file and it cites a number of cases in which Justice Rehnquist interpreted the 14th amendment and title VII very narrowly and very often to the disadvantage of women.

In the short time I am allotted, I will discuss a couple of pregnancy discrimination cases which illustrate my point.

One of the realities of the 20th century American woman is that she works outside the home, many times because she has to, so that we now comprise 44 percent of the labor force.