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TESTIMONY OF

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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

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 querilla 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 Cleveland 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 process 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.