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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.

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).

[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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