Legal Defense Fund

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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

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)

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]

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[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).

Webb v. Board of Education, 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).

Evans v. Jeff D., 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).

Riverside v. Rivera, 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).

Library of Congress v. Shaw, 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).

Pennsylvania v. Delaware Valley Clean Air Counsel, 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.