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.

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The capacity to bear children is the chief reason given in the past for restricting women's opportunity in the areas of employment, and while not articulated openly nowadays by employers, it is still a major reason.

I consider the impact of pregnancy discrimination invidious, to use Justice Rehnquist's own adjectives yesterday, as invidious as racial discrimination.

The *Cleveland Board of Education* v. *Le Fleur* and *Cohen* v. *Chesterfield* are cases involving school board regulations that required pregnant teachers to go on leave 4 or 5 months prior to their due date. In Cleveland, teachers could not return to duty until the regular semester after the child was 3 months old.

Now, you can imagine the impact of these regulations on the pocketbooks of these very women who needed money at that time.

Seven Justices found these regulations in violation of the 14th amendment. Justice Rehnquist dissented, criticizing primarily the Court's resting its invalidation of the regulation on the due process clause rather than equal protection law which he thought would be more appropriate.

It is interesting that Justice Powell, who did rest his concurrence with the majority opinion on the very same equal protection clause, found the regulation irrational. Justice Powell observed that the record, and I am quoting him here, "abound with proof that a principal reason behind the adoption of the regulation was to keep visibly pregnant teachers out of the sight of young children."

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

We will put your full statement in the record.

Ms. NATIVIDAD. Thank you very much.

[Statement follows:]

NATIONAL WOMEN'S POLITICAL CAUCUS
1275 "K" Street N.W. Suite 750. Washington. D.C. 20005 (202) 898-1100

TESTIMONY OF

IRENE NATIVIDAD

CHAIR, NATIONAL WOMEN'S POLITICAL CAUCUS

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON THE NOMINATION OF WILLIAM REHNQUIST FOR CHIEF JUSTICE

JULY 29, 1986

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY. I AM IRENE NATIVIDAD, CHAIR OF THE NATIONAL WOMEN'S POLITICAL CAUCUS, A NATIONWIDE, MULTIPARTISAN ORGANIZATION WITH 77,000 MEMBERS IN 300 STATES AND LOCAL CAUCUSES. WE WORK TO WIN FOR WOMEN EQUAL REPRESENTATION IN ELECTIVE AND APPOINTIVE OFFICE AND WE SPEAK OUT ON ISSUES OF DIRECT CONCERN TO WOMEN. WOMEN'S FULL RIGHTS AS CITIZENS ARE DEPENDENT ON THE SUPREME COURT'S INTERPRETATIONS OF THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSE AND OF LAWS PASSED BY CONGRESS.

WE 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 BIAS AGAINST EQUALITY FOR WOMEN UNDER THE LAW THAT PREVENTS HIM FROM APPLYING HIS REPUTEDLY BRILLIANT INTELLECTUAL AND ANALYTICAL POWERS IN AN OBJECTIVE FASHION TO CASES RELATED TO SEX DISCRIMINATION.

THE OPINION IN GENERAL ELECTRIC COMPANY V. GILBERT, 429 U.S. 125 (1976), WHICH HE WROTE, IGNORED CONSERVATIVE PRINCIPLES OF JUDICIAL INTERPRETATION AND PRECEDENTS OF THE COURT TO REACH A CONCLUSION ADVERSE TO EMPLOYED WOMEN. THE OPINION IS NOT CLEAR, CONCISE, AND LOGICAL AS ONE WOULD EXPECT FROM A JUSTICE OF HIS REPUTED INTELLECT. FORTUNATELY THE CONGRESS CORRECTED THIS DECISION WITH THE PREGNANCY DISCRIMINATION ACT OF 1978, 42 U.S.C. §2000(k), BUT IT DOES NOT HAVE THE POWER TO CHANGE JUSTICE REHNQUIST'S ATTITUDES.

THE QUESTION IN THIS CASE WAS WHETHER EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM A DISABILITY INSURANCE PLAN THAT COVERED ALL OTHER DISABILITIES CONSTITUTED SEX DISCRIMINATION IN VIOLATION OF TITILE VII OF THE CIVIL RIGHTS ACT OF 1964. NOT ONLY DID THE BENEFIT PLAN EXCLUDE PREGNANCY-RELATED DISABILITIES, THE COMPANY IN SOME CASES REQUIRED WOMEN TO CEASE EMPLOYMENT THREE MONTHS PRIOR TO BIRTH AND EIGHT WEEKS FOLLOWING DELIVERY. WHILE ON LEAVE FOR PREGANACY-RELATED DISABILITIES, COVERAGE UNDER THE PLAN CEASED SO THAT UNRELATED DISABILITIES ARISING DURING THE LEAVE WERE NOT COVERED. PLAN COVERAGE CONTINUED FOR 31 DAYS IN THE CASE OF PERSONAL LEAVE, LAYOFF, OR STRIKE.

ALTHOUGH THIS ISSUE HAD BEEN BEFORE SIX CIRCUIT COURTS OF APPEAL AND ALL HAD FOUND THE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM SUCH PLANS VIOLATIVE OF TITLE VII, JUSTICE REHNQUIST DISAGREED.

NOT ONLY DID THIS DECISION IGNORE CONSERVATIVE PRINCIPLES OF JUDICIAL INTERPRETATION AND COURT PRECEDENTS , IT FLEW IN THE FACE OF COMMON SENSE. PREGNANCY AND THE POTENTIALITY OF PREGNANCY HAVE BEEN THE CHIEF RATIONALE IN THE PAST FOR DISCRIMINATION AGAINST WOMEN IN EMPLOYMENT AND EDUCATION.

THE OPINION QUOTES EXTENSIVELY FROM GEDULDIG V. AIELLO, 417 U.S. 484 (1974), WHICH JUSTICE REHNQUIST CONSIDERED CONTROLLING FOR DETERMINING WHETHER SEX DISCRIMINATION EXISTED, ALTHOUGH IT INVOLVED A STATE DISABILITY INSURANCE SYSTEM CHALLENGED UNDER THE 14th AMENDMENT. FOLLOWING ARE EXCERPTS FROM THE PORTIONS HE QUOTED:

> WHILE IT IS TRUE THAT ONLY WOMEN CAN BECOME PREGNANT, IT DOES NOT FOLLOW THAT EVERY LEGISLATIVE CLASSIFICATION CONCERNING PREGNANCY IS A SEX-BASED CLASSIFICATION...NORMAL PREGNANCY IS AN OBJECTIVELY IDENTIFIABLE PHYSICAL CONDITION WITH UNIQUE CHARACTERISITICS.
>
> . . . . . .
>
> THE LACK OF IDENTIY BETWEEN THE EXCLUDED DISABILITY AND GENDER AS SUCH UNDER THIS INSURANCE PROGRAM BECOMES CLEAR UPON THE MOST CURSORY ANALYSIS. THE PROGRAM DIVIDES POTENTIAL RECIPIENTS INTO TWO GROUPS - PREGNANT WOMEN AND NONPREGNANT PERSONS. WHILE THE FIRST GROUP IS EXCLUSIVELY FEMALE, THE SECOND INCLUDES MEMBERS OF BOTH SEXES.
>
> . . . . . .
>
> THERE IS NO RISK FROM WHICH MEN ARE PROTECTED AND WOMEN ARE NOT. LIKEWISE, THERE IS NO RISK FROM WHICH WOMEN ARE PROTECTED AND MEN ARE NOT.

I SUBMIT THIS IS FACILE REASONING, WHICH OBFUSCATES THE ISSUE RATHER THAN CLARIFYING IT. "NORMAL PREGNANCY" IS NOT THE SUBJECT OF THE SUIT - PREGNANCY-RELATED DISABILITIES ARE. PREGNANCY-RELATED DISABILITIES AS THEY RELATE TO EMPLOYMENT ARE NOT "UNIQUE." CHILDBIRTH AND COMPLICATIONS OF PREGANANCY ARE CHARACTERIZED BY THE INABLILITY TO PERFORM REGULAR DUTIES WITH THE PATIENT UNDER THE CARE OF A PHYSICIAN OR OTHER HEALTH PROFESSIONAL AND USUALLY IN A HOSPITAL. HOW IS THIS DIFFERENT FROM OTHER DISABILITIES?

HIS GROUPING OF RECIPIENTS IGNORES THE FACT THAT MOST OF THE WOMEN IN THE SECOND GROUP HAVE THE POTENTIAL FOR BECOMING PREGNANT. A MORE LOGICAL GROUPING WOULD BE WOMEN, WHO HAVE THE POTENTIAL TO BECOME PREGNANT, AND MEN WHO DO NOT. WOULD JUSTICE REHNQUIST HAVE USED AN ANALAGOUS GROUPING IF SICKLE CELL ANEMIA HAD BEEN THE EXCLUDED DISABILITY?

HERE IS A FURTHER EXAMPLE OF HIS REASONING (NOT QUOTED FROM GEDULDIG):

> PREGNANCY IS OF COURSE CONFINED TO WOMEN, BUT IT IS IN OTHER WAYS SIGNIFICANTLY DIFFERENT FROM THE TYPICAL COVERED DISEASE OR DISABILITY. THE DISTRICT COURT FOUND IT IS NOT A "DISEASE" AT ALL, AND IS OFTEN A VOLUNTARILY UNDERTAKEN AND DESIRED CONDITION.

HERE AGAIN THE OPINION USES LANGUAGE TO OBSCURE THE ISSUE. THE ISSUE RELATES TO PREGANACY-RELATED DISABILITIES RATHER THAN PREGNANCY. HE DOES NOT SPECIFY HOW PREGNANCY-RELATED DISABILITIES ARE "SIGNIFICANTLY DIFFERENT" FROM THE "TYPICAL COVERED DISEASE OR DISABILITY." AS INDICATED ABOVE, WE FIND NO DIFFERENCES IN EMPLOYMENT RELATED CIRCUMSTANCES. THE CLAUSE ABOUT "DISEASE" IS TOTALLY IRRELEVANT.

AS FOR PREGNANCY BEING "VOLUNTARY," IT OFTEN IS NOT. IN ANY EVENT, MORE TO THE POINT, THE GE PLAN COVERED OTHER VOLUNTARY DISABILITIES, SUCH AS ELECTIVE COSMETIC SURGERY, ATTEMPTED SUICIDE, SPORT INJURIES, AND DISABILITIES INCURRED IN THE COMMISSION OF A CRIME OR DURING A FIGHT. IT COVERED ALL DISABILITES PECULIAR TO MEN AND ALL PECULIAR TO WOMEN EXCEPT PREGNANCY-RELATED DISABILITIES.

IN ORDER TO REACH THE CONCLOSION THAT THE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM THE TEMPORARY DISABILITY INSURANCE PLAN OF GE DID NOT VIOLATE TITLE VII, JUSTICE REHNQUIST HAD TO DEAL WITH A GUIDELINE OF THE EQUAL EMPLOYMENT

OPPORTUNITY COMMISSION ISSUED IN 1972, WHICH PROVIDED THAT "DISABILITES CAUSED OR CONTRIBUTED TO BY PREGNANCY...ARE FOR ALL JOB-RELATED PURPOSES, TEMPORARY DISABILITES...(UNDER) ANY HEALTH OR TEMPORARY DISABILITY INSURANCE OR SICK LEAVE PLAN..."

HE DISCOUNTED THE GUIDELINE, CONTRARY TO SUPREME COURT PRECEDENTS, WHICH HAD GIVEN EEOC GUIDELINES "GREAT DEFERENCE," BECAUSE IT WAS ISSUED SEVEN YEARS AFTER THE ACT WAS PASSED AND INTERIM LETTERS BY EEOC'S GENERAL COUNSEL EXPRESSED THE VIEW THAT PREGNANCY IS NOT NECESSARILY INCLUDABLE AS A COMPENSABLE DISABILITY. AS JUSTICE BRENNAN POINTS OUT IN HIS DISSENT, A STUDY OF THE ISSUE BY THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN (A PRESIDENTIALLY-APPOINTED ADVISORY GROUP) RESULTED IN A RECOMMENDATION IN 1970 THAT CHILD BEARING AND COMPLICATIONS OF PREGNANCY BE TREATED FOR JOB-RELATED PURPOSES LIKE ALL OTHER DISABILITIES. THE STUDY FOUND THAT FOR JOB-RELATED PURPOSES, SUCH DISABILITIES ARE NOT DIFFERENT FROM OTHER DISABILITIES.

AS JUSICE BRENNAN POINTS OUT IN HIS DISSENT:

> THEREFORE, WHILE SOME SEVEN YEARS HAD ELAPSED PRIOR TO THE ISSUANCE OF THE 1972 GUIDELINE, AND EARLIER OPINION LETTERS HAD REFUSED TO IMPOSE LIABILITY ON EMPLOYERS DURING THIS PERIOD OF DELIBERATION, NO ONE CAN OR DOES DENY THAT THE FINAL EEOC DETERMINATION FOLLOWED THROUGH AND WELL INFORMED CONSIDERATION...IT IS BITTER IRONY THAT THE CARE THAT PRECEDED PROMULGATION OF THE 1972 GUIDLINE IS TODAY CONDEMNED BY THE COURT AS TARDY INDECISIVENESS, ITS UNWILLINGNESS IRRESPONSIBLY TO CHALLENGE EMPLOYERS' PRACTICES DURING THE FORMATIVE PERIOD IS LABELLED AS EVIDENCE OF INCONSISTENCY, AND THIS INDECISIVENESS AND INCONSISTENCY ARE BOOTSTRAPPED INTO REASONS FOR DENYING THE COMMISSION'S INTERPRETATION ITS DUE DEFERENCE.

> FOR ME, THE 1972 REGULATION REPRESENTS A PARTICULARY CONSCIENTIOUS AND REASONABLE PRODUCT OF EEOC DELIBERATIONS AND, THEREFORE, MERITS OUR "GREAT DEFERENCE." CERTAINLY, I CAN FIND NO BASIS FOR CONCLUDING THAT THE REGULATION IS OUT OF STEP WITH CONGRESSIONAL INTENT...ON THE CONTRARY, PRIOR TO 1972, CONGRESS ENACTED JUST SUCH A PREGNANCY-INCLUSIVE RULE TO GOVERN THE DISTRIBUTION OF BENEFITS FOR "SICKNESS" UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT. 45 U.S.C. § 351 (K)(2). FURTHERMORE, SHORTLY FOLLOWING THE ANNOUNCEMENT OF THE EEOC'S RULE, CONGRESS APPROVED AND THE PRESIDENT SIGNED AN ESSENTIALLY IDENTICAL PROMULGATION BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972...

ALSO ALARMING IS JUSTICE REHNQUIST"S IMPLICATION IN THE LAST PARAGRAPH OF THE DECISION THAT CONGRESS INTENDED THAT THE FOURTEENTH AMENDMENT STANDARD OF DISCRIMINATION BE APPLIED TO SEX DISCRIMINATION UNDER TITLE VII. THIS STATEMENT IS CONTRARY TO A LONG LINE OF PRECEDENT CASES AND INDICATES A FRAME OF MIND HOSTILE TO ANY MEANINGFUL INTERPRETATION OF TITLE VII IN SEX DISCRIMINATION CASES. IT INDICATES A BELIEF THAT SEX DISCRIMINATION SHOULD BE INTERPRETED DIFFERENTLY FROM RACE DISCRIMINATION. (SEE OUR FOLLOWING DISCUSSION OF JUSTICE REHNQUIST'S VIEWS ON THE FOURTEENTH AMENDMENT AND SEX DISCRIMINATION.)

JUSTICE REHNQUIST RAN INTO DIFFICULTY IN APPLYING HIS RATIONALE IN GILBERT TO THE NEXT CASE INVOLVING SEX DISCRIMINATION BECAUSE OF PREGNANCY - NASHVILLE GAS CO. V. SATTY, 434 U.S. 136 (1977). IN THIS CASE, THE EMPLOYER NOT ONLY EXCLUDED PREGNANCY-RELATED DISABILITIES FROM ITS SICK LEAVE PLAN, IT ALSO DENIED WOMEN RETURNING TO EMPLOYMENT THEIR ACCUMULATED SENIORITY, WHEREAS EMPLOYEES ON LEAVE FOR ANY OTHER DISABILITY RETAINED SENIORITY AND CONTINUED TO ACCRUE SENIORITY WHILE ON LEAVE. WOMEN RETURNING TO EMPLOYMENT

AFTER CHILDBIRTH WERE TREATED AS NEW APPLICANTS FOR PURPOSES OF BIDDING ON JOBS. THE JUSTICE"S FACILE MIND WAS EQUAL TO THE TASK. HE HELD IN THE MAJORITY OPINION:

> HERE, BY COMPARISON (WITH GILBERT), PETITIONER HAS NOT MERELY REFUSED TO EXTEND TO WOMEN A BENEFIT THAT MEN CANNOT AND DO NOT RECEIVE, BUT HAS IMPOSED ON WOMEN A SUBSTANTIAL BURDEN THAT MEN NEED NOT SUFFER. THE DISTINCTION BETWEEN BENEFITS AND BURDENS IS MORE THAN ONE OF SEMANTICS. 434 U.S. AT 142

JUSTICE STEVENS IN HIS CONCURRING OPINION POINTS UP THE DIFFICULTY OF THE DISTINCTION:

> THE GENERAL PROBLEM IS TO DECIDE WHEN A COMPANY POLICY WHICH ATTACHES A SPECIAL BURDEN TO THE RISK OF ABSENTEEISM CAUSED BY PREGNANCY IS A PRIMA FACIE VIOLATION OF THE STATUTORY PROHIBITION AGAINST SEX DISCRIMINATION. THE ANSWER "ALWAYS," WHICH I HAVE THOUGHT QUITE PLAINLY CORRECT IS FORECLOSED BY THE COURT"S HOLDING IN GILBERT. THE ANSWER "NEVER" WOULD SEEM TO BE DICTATED BY THE COURT'S VIEW THAT A DISCRIMINATION AGAINST PREGNANCY IS "NOT A GENDER-BASED DISCRIMINATION AT ALL." THE COURT HAS, HOWEVER, MADE IT CLEAR THAT THE CORRECT ANSWER IS "SOMETIMES." 434 U.S.at 153

IN A FOOTNOTE, JUSTICE STEVENS NOTES THAT DIFFERENCES BETWEEN BENEFITS AND BURDENS CANNOT PROVIDE A MEANINGFUL TEST OF DISCRIMINATION, SINCE, BY HYPOTHESIS, THE FAVORED CLASS IS ALWAYS BENEFITED AND THE DISFAVORED CLASS IS EQUALLY BURDENED.

THE CONGRESS RESCUED THE COURT FROM JUSTICE REHNQUIST'S MORASS WITH THE PREGNANCY DISCRIMINATION ACT IN 1978, WHICH DEFINES SEX DISCRIMINATION TO INCLUDE DISCRIMINATION BECAUSE OF PREGNANCY, CHILDBIRTH, AND RELATED

MEDICAL CONDITIONS. IT FURTHER PROVIDES THAT "WOMEN AFFECTED BY PREGNANCY, CHILDBIRTH OR RELATED MEDICAL CONDITIONS SHALL BE TREATED THE SAME FOR ALL EMPLOYMENT RELATED PURPOSES, INCLUDING RECEIPT OF BENEFITS UNDER FIRING BENEFIT PROGRAMS, AS OTHER PERSONS NOT SO AFFECTED BUT SIMILAR IN THEIR ABILITY OR INABILITY TO WORK." 42 U.S.C. s 2000(k)

THE ENACTMENT OF THE PREGNANCY DISCRIMINATION ACT DOES NOT ALLAY OUR FEARS ABOUT JUSTICE REHNQUIST'S ATTITUDES CONCERNING SEX DISCRIMINATION. THE FACT THAT HE COULD PERSUADE SIX JUSTICES TO JOIN HIM IN A DECISION BASED ON SOPHISTRY, CONTRARY TO COMMON SENSE AND TO THE DECISIONS OF SIX CIRCUIT COURTS OF APPEAL, AND IN DISREGARD OF CONSERVATIVE PRINCIPLES OF LEGAL INTERPRETATION IS ALARMING.

JUSTICE REHNQUIST'S 1983 DISSENT IN NEWPORT NEWS V. EEOC, 462 U.S. 669, INDICATES NO CHANGE IN ATTITUDE HE INTERPRETED THE PREGNANCY DISCRIMINATION ACT VERY NARROWLY IGNORING EEOC GUIDELINES. THE EEOC INTERPRETATION WAS PUHELD BY THE COURT 7 - 2.

I URGE EVERY MEMBER OF THIS COMMITTEE TO READ THE GILBERT DECISION IN ITS ENTIRETY.

JUSTICE REHNQUIST'S OPINIONS ON CASES CHALLENGING SEX DISCRIMINATORY LAWS UNDER THE FOURTEENTH AMENDMENT ARE ALSO ALARMING. SINCE 1971, WHEN FOR THE FIRST TIME, THE SUPREME COURT FOUND A GENDER-BASED LAW UNCONSTITUTIONAL, REED V. REED, 404 U.S. 71, THE COURT HAS BEEN STRUGGLING TO FIND A STANDARD OF EQUAL PROTECTION ANALYSIS SUITABLE FOR GENDER-BASED CLASSIFICATIONS. JUSTICE REHNQUIST HAS BEEN A DESTRUCTIVE CRITIC. HE HAS NOT EVEN BEEN WILL-

ING TO OVERTURN LAWS THAT ARE CLEARLY DISCRIMINATORY UNDER THE TRADITIONAL RATIONAL BASIS STANDARD.

IN FORNTIERO V. RICHARDSON, 411 U.S. 677 (1973), HE WAS THE ONLY DISSENTER. THIS CASE CHALLENGED THE CONSTITUTIONALITY OF A FEDERAL LAW THAT PROVIDED THAT SPOUSES OF MALE MEMBERS OF THE ARMED SERVICES ARE DEPENDENTS FOR PURPOSES OF INCREASED QUARTERS ALLOWANCES AND MEDICAL AND DENTAL BENEFITS BUT THAT SPOUSES OF FEMALE MEMBERS ARE NOT DEPENDENTS UNLESS THEY ARE IN FACT DEPENDENT FOR OVER ONE-HALF OF THEIR SUPPORT. THE ONLY JUSTIFICATION WAS ADMINISTRATIVE CONVENIENCE.

EIGHT JUSTICES FOUND THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT. JUSTICE REHNQUIST DISSENTED, STATING ONLY THAT HE AGREED WITH THE DECISION OF THE LOWER COURT, WHICH HAD HELD THERE WAS A RATIONAL CONNECTION BETWEEN THE CLASSIFICATION AND A LEGITIMATE GOVERNMENTAL END.

JUSTICE REHNQUIST ALSO DISSENTED IN CLEVELAND BOARD OF EDUCATION V. LA FLEUR AND COHEN V. CHESTERFIELD COUNTY, 414 U.S. 632 (1974). THESE CASES INVOLVED SCHOOL BOARD REGULATIONS THAT REQUIRED PREGNANT TEACHERS TO GO ON LEAVE 4 OR 5MONTHS PRIOR TO THE DUE DATE. IN CLEVELAND THE TEACHER COULD NOT RETURN TO DUTY UNTIL THE NEXT REGULAR SEMESTER AFTER THE CHILD WAS 3 MONTHS OLD.

SEVEN JUSTICES FOUND THE REGULATIONS IN VIOLATION OF THE FOURTEENTH AMENDMENT. JUSTICE REHNQUIST DISSENTED, CRITICIZING PRIMARILY THE COURT'S RESTING ITS INVALIDATION OF THE REGULATIONS ON THE DUE PROCESS CLAUSE IN-

STEAD OF THE EQUAL PROTECTION CLAUSE. HOWEVER, JUSTICE REHNQUIST DID NOT JOIN IN A SEPARATE CONCURRING OPINION OF JUSTICE POWELL, WHO RESTED HIS CONCURRENCE ON THE EQUAL PROTECTION CLAUSE, FINDING THE REGULATIONS "IRRATIONAL." JUSTICE POWELL OBSERVED THAT THE RECORDS "ABOUND WITH PROOF THAT A PRINCIPAL REASON BEHIND THE ADOPTION OF THE REGULATIONS WAS TO KEEP VISIBLY PREGNANT TEACHERS OUT OF THE SIGHT OF SCHOOL CHILDREN." THE SCHOOL BOARDS ATTEMPTED AFTER THE FACT TO JUSTIFY THE REGULATIONS ON THE NEED FOR CONTINUITY OF TEACHING, A VALID OBJECTIVE. BUT THE REGULATIONS DID NOT PROMOTE CONTINUITY, REQUIRING TEACHERS TO QUIT IN THE MIDDLE OF A SEMESTER WHEN THEY OTHERWISE WOULD HAVE BEEN ABLE TO COMPLETE IT BEFORE THE DUE DATE.

JUSTICE REHNQUIST WAS THE LONE DISSENTER, WITHOUT A WRITTEN OPINION, IN TURNER V. DEPARTMENT OF EMPLOYMENT SECURITY, 423 U.S. 44(1975), INVOLVING A UTAH STATUTE MAKING PREGNANT WOMEN INELIGIBLE FOR UNEMPLOYMENT BENEFITS FOR A PERIOD EXTENDING FROM 12 WEEKS BEFORE EXPECTED DATE OF CHILDBIRTH UNTIL SIX WEEKS AFTER WITH A PRESUMPTION THEY WERE UNAVAILABLE FOR WORK. THE COURT HELD THE LAW NOT CONSTITUTIONALLY VALID SINCE MOST WOMEN ARE ABLE TO WORK.

JUSTICE REHNQUIST DISSENTED IN CRAIG V. BOREN, 429 U.S. 190 (1976), WHICH ESTABLISHED A NEW STANDARD OF REVIEW FOR GENDER-BASED LAWS: "GENDER-BASED CLASSIFICATIONS MUST SERVE IMPORTANT GOVERNMENTAL OBJECTIVES AND MUST BE SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF THOSE OBJECTIVES." THE PLAINTIFF CHALLENGED AN OKLAHOMA LAW PROHIBITING SALE OF 3.2 BEER TO MALES UNDER THE AGE OF 21 AND FEMALES UNDER THE AGE OF 18. THE COURT FOUND THE

LAW UNCONSTITUTIONAL.

JUSTICE REHNQUIST IN HIS DISSENT OBJECTED TO THE INTERMEDIATE STANDARD OF REVIEW GENERALLY AND ALSO TO APPLYING A DIFFERENT STANDARD TO CASES WHERE MALES ARE DISCRIMINATED AGAINST. HE FOUND THE LAW CONSTITUTIONAL UNDER THE STANDARD RATIONAL BASIS ANALYSIS.

JUSTICE REHNQUIST'S GREAT RELUCTANCE TO FIND GENDER-BASED LAWS UNCONSTITUTIONAL IS SOMEWHAT SURPRISING IN THE LIGHT OF TESTIMONY ON THE ERA HE GAVE IN 1971 BEFORE THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES. THERE HE SUMMARIZED THREE CASES BEFORE THE SUPREME COURT CHALLENGING SEX-BASED LAWS UNDER THE FOURTEENTH AMENDMENT AND SPOKE WITH SEEMING APPROVAL OF AT LEAST A MODEST EXPANSION OF THE APPLICATION OF THE FOURTEENTH AMENDMENT:

> RECENT LOWER COURT DECISIONS HAVE TAKEN A BROADER VIEW OF THE 14th AMENDMENT'S PROHIBITIONS IN THIS AREA, AND IT MAY WELL BE THAT THE SUPREME COURT WILL LIKEWISE BROADEN ITS PAST INTERPRETATIONS IN THIS AREA. CERTAINLY EVEN A MODEST EXPANSION OF THE 14th AMENDMENT DECISIONS DEALING WITH SEX WOULD OBVIATE THE MORE EGREGIOUS FORMS OF DIFFERENCES OF TREATMENT WHICH RESULT FROM GOVERNMENTAL ACTIONS. WITH THIS PROSPECT OF EXPANDED CONSTITUTIONAL PROTECTION OF WOMEN'S RIGHTS WITHOUT THE NECESSITY OF AN ADDED CONSTITUTIONAL PROVISION, THE COMMITTEE MIGHT CONCLUDE THAT IT SHOULD AWAIT RESOLUTION OF THE CASES BEFORE IT BY THE SUPREME COURT OF THE UNITED STATES...

WE ARE PARTICULARY ALARMED BY JUSTICE REHNQUIST'S VIEWS ON ABORTION. HE FINDS NO RIGHT TO PRIVACY IN THE CONSTITUTION AND WOULD REVERSE ROE V. WADE. HE HAS VOTED AT EVERY OPPORTUNITY TO RESTRICT ABORTION RIGHTS. OTHER WITNESSES WILL PROVIDE DITAILS ON THESE DECISIONS. ROE V. WADE HAS

EXTRAORDINARILY GREAT MEANING FOR WOMEN; REVERSAL WOULD BE A TRAGEDY.

IN SUMMARY, WE OPPOSE THE ELEVATION OF JUSTICE REHNQUIST TO CHIEF JUSTICE, WHERE HE WOULD HAVE MORE INFLUENCE THAN HE NOW HAS. HIS OPINIONS IN SEX DISCRIMINATION CASES INDICATE THAT HE IS RIGIDLY ATTACHED TO THE PAST VIEW OF WOMEN AS SECOND CLASS CITIZENS. WHEREAS OTHER JUSTICES, THE EXECUTIVE BRANCH, THE LEGISLATIVE BRANCH, AND MOST STATE GOVERNMENTS HAVE RESPONDED POSITIVELY TO WOMEN'S LEGITIMATE DEMANDS FOR FULL CITIZENSHIP, HE HAS NOT.

JUSTICE REHNQUIST'S OPINIONS IN SEX DISCRIMINATION CASES ARE NOT CLEAR, CONCISE, AND WELL REASONED AS ONE WOULD EXPECT FROM HIS REPUTATION FOR LEGAL BRILLIANCE. THEY OFTEN OBFUSCATE OR AVOID THE SUBSTANTIVE ISSUES. HE USES HIS BRILLIANCE TO TORTURE THE LAW TO FIT HIS CONCLUSIONS. WE CAN ONLY CONCLUDE THAT HIS BIASES GET IN THE WAY OF CLEAR, LOGICAL ANALYSIS. HE HAS MORE OFTEN THAN NOT PLAYED THE ROLE OF DISSENTER AND CRITIC, SOMETIMES WITH LITTLE GRACE.

BASED ON HIS RECORD, WE DO NOT BELIEVE HE CAN COALESCE A CENTRIST MAJORITY THAT WOULD HAVE DUE REGARD FOR LEGAL EQUALITY FOR WOMEN.

Senator HATCH. You are very articulate.
Mr. Silard.

STATEMENT OF JOHN SILARD

Mr. SILARD. I am John Silard for the judicial selection project of the Alliance for Justice. And we are here to make a point that has not, so far as I can tell, been made to this committee before.

Senator METZENBAUM. Could you tell us, Mr. Silard, what is the Alliance for Justice?

Mr. SILARD. Well, it is a group of organizations that has come together a year or two ago to concentrate exclusively on the question of judicial appointments. The members are listed on our statement for the committee to know.

Senator METZENBAUM. Start his time running now.

Mr. SILARD. The first necessary qualification of a person appointed to head an organization is that he or she supports the organizational role and mission. Justice Rehnquist lacks that qualification for he strongly objects to the central constitutional role of the Supreme Court as it has developed over the past 200 years.

His opposition is clear and undisguised, and it leads him merely always to vote against the Bill of Rights and against civil rights, and for State's rights.

In my brief time, I can quote only this much from his opinion.

In the Richmond newspapers where the eight Justices said open trial was a constitutional right, he says, Rehnquist says, quite candidly, "It is basically unhealthy to have so much authority concentrated in a small group of lawyers." He means the Supreme Court.

Nothing in the reasoning of Mr. Justice Marshall in *Marbury* required this Court to broaden the use of the supremacy clause to smother a healthy pluralism which would otherwise exist in a national government and facing 50 States. He does not believe in the Bill of Rights and in the 14th amendment as charters of protection against State action because, as he puts it, it smothers a healthy pluralism in our society.

A case, such as *Carter* v. *Kentucky,* in which he dissents alone once more, demonstrates his point. Eight Justices say that a defendant who has not taken the stand exercising his right to silence, may have the jury instructed not to take his exercise of his constitutional right against him. Now, Justice Rehnquist never takes issue that the jury, in the absence of that instruction, might convict simply because the defendant chose his right to silence, nor does he assert any State interest to squelch a proper instruction to the jurors. He simply says we cannot interfere with trial judges' decisions on instructions to jurors. He is an abolitionist when it comes to the Bill of Rights and the 14th amendment as charters to restrain State violation of human rights.

Now, such a person cannot lead. It is a General who says, gentlemen—on his horse he says soldiers, advance to the rear. And that is where Justice Rehnquist is. He is candid in saying so. He does not think we have gone in the right direction in the last 50 years. But, as long as he is on the Court, he can atone that position, he is an inappropriate Chief Justice.

May I, Mr. Chairman, answer one question I was asked before about the 54 lone dissents?

The point of the 54 lone dissents is not just that there are 54, but that Justice Rehnquist always, I mean always comes up against the Federal Constitution on these 54 occasions. And he does so in expressing his view not the proper role of the Supreme Court to give force to the Bill of Rights and the 14th amendment.

He just is entirely inappropriate. He cannot lead the charge because he does not believe in the battle.

And that is the conclusion of my testimony, Mr. Chairman.

[Statement follows:]

# Judicial Selection Project

Mailing address 600 New Jersey Avenue, N W ■ Washington, D C 20001
Street address 25 E Street, N W ■ Washington, D.C 20001 ■ Telephone: 202/624-1247

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TESTIMONY OF THE

JUDICIAL SELECTION PROJECT

ON THE NOMINATION OF

WILLIAM H. REHNQUIST

AS CHIEF JUSTICE OF THE UNITED STATES

JULY 29, 1986

*A Project of the Alliance for Justice*

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My name is John Silard, and I am testifying on behalf of the Judicial Selection Project of the ALliance for Justice. I appreciate the opportunity to appear before this Committee today.

The Judicial Selection Project is a coalition of lawyers, academics, and representatives of civil rights, labor and public interest organizations that was formed in January 1985 to monitor appointments to the federal courts. The Project reviews nominees' backgrounds on issues such as their records on equity and fairness, committment to equal justice, pro bono activities, and other matters that reflect on judicial temperament or professional competence. We believe that maintaining a strong, independent judiciary is essential to our democratic system.

In our nearly two hundred year history as a nation, Chief Justices of the United States have been of various views and persuasions. Never before, however, has a jurist been proposed for the sensitive role of Chief who questions the basic constitutional function of the Supreme Court and who has put himself far outside the spectrum of views held by the other members of the Court he is being proposed to lead. In case after case, Justice WIlliam H. Rehnquist has consistently applied his preference for judicial abstention rather than vindication of constitutional guarantees, particularly those contained in the Bill of Rights. He has thus aligned himself over and over again against federal protection for racial and religious minorities, aliens, criminal defendants, and the poor

and disadvantaged.

One central question which the Judicial Selection Project believes the Senate must address on the pending nomination is whether it is appropriate to elevate to the role of Chief Justice a jurist who so clearly rejects the constitutional function of the Supreme Court and whose beliefs are so far beyond the spectrum of views of the other Justices. The office of Chief Justice calls for an individual who believes in the role of the Court as it has developed over the last two hundred years and whose views are somewhere within the spectrum of views embraced by the other eight Justices. To suggest that Justice Rehnquist cannot meet these two requirements is not, of course, to say that he is unqualified to be a sitting member of the Court. However, considerations of respect for the Court as an institution and of the leadership role of the Chief Justice are dispositive in a case such as this, for national interests far beyond a nominee's mere legal qualifications are necessarily presented by the choice of a Chief Justice.

More than fifty lone dissents by Justice Rehnquist from rulings by the rest of the Court attest how far he has placed himself from his colleagues. These fifty lone dissents against the Court's interpretations of constitutional and statutory rights in a wide variety of circumstances bespeak Justice Rehnquist's truly extreme position, as underscored by the fact that in all of these cases he has opposed not only the liberals and moderates but also such genuine conservatives as Justices Burger and O'Connor. Indeed, Justice Rehnquist's lone dissents

do not merely reflect a "conservative" philosophy, but a rejection of the central constitutional role of the Supreme Court as an institution.

Three historical propositions are at the heart of the developed role of the Supreme Court in our society as guardian of the federal Constitution. First, there was Chief Justice Marshall's landmark decision in Marbury v. Madison, which conclusively confirmed the power of the Supreme Court to uphold the federal Constitution. A vital part of this governing principle is the role of the Supreme Court in protecting the basic liberties of the powerless against infringement by the political majorities which may control other branches of government. A second crucial proposition is that espoused by the Supreme Court almost 200 years ago in McCulloch v. Maryland. This historic "supremacy" case established the vital concept that national interests must predominate over state choices in areas of national constitutional concern. With some candor, Justice Rehnquist has challenged the bedrock principles of both Marbury and McCulloch when they call for members of the Supreme Court to provide federal constitutional protections.

A third premise underlying our democratic society is the incorporation doctrine, which through the Fourteenth Amendment guarantees our basic liberties against infringement by the states. Time and again, however, Justice Rehnquist rejects the fundamental Bill of Rights protections incorporated in the Constitution's first ten amendments. Almost never does he find within the Bill of Rights meaningful protections against

violations of free speech and press, due process, cruel and unusual punishment, and religious freedom. Nor does he find protection against invidious discrimination by the state. He advocates wide latitude for the states, even where it can be shown that officials are violating cherished federal constitutional rights.

Justice Rehnquist's idiosyncratic position may be illustrated by a review of even a few of his many lone dissents.

It would be hard to imagine a constitutional guarantee historically more profound than that against government support for racial discrimination, but in Justice Rehnquist's view there is no constitutional restraint on such conduct by either the Congress or the States. In the Court's decision in Bob Jones University v. United States, 461 U.S. 574 (1983), Chief Justice Burger found that racially exclusive schools are not entitled to the tax-exempt status of charitable organizations under the Internal Revenue Code. The Court stated that "racial discrimination in education violates deeply and widely accepted views of elementary justice," and that the elimination of such discrimination is a national policy embodied in the Internal Revenue Code.

Justice Rehnquist's sole dissent is a technical exercise in statutory construction, concluding that Congress intended to give the benefit of tax deduction even for donations to racially segregating schools. There is the remarkable further conclusion that the Constitution permits Congress to grant tax

exemptions to organizations that discriminate on the basis of race absent a showing of a discriminatory purpose by Congress. This startling conclusion demonstrates Rehnquist's view that the Constitution provides little or no restraint upon actions which injure fundamental principles of freedom and equality.

Justice Rehnquist's lone dissent in Keyes v. School District No. 1, 413 U.S. 189 (1973), similarly illustrates this point. He protests any requirement of affirmative desegregation where there had been segregation practices without a system-wide segregation rule. Nowhere does he make clear the basis for his constitution-defeating position that desegregation can be required where there has been a formal written rule, but not where purposeful segregation practices have been pursued by the school authorities.

The unwillingness to protect the rights of minorities extends to aliens, illegitimate children, native Americans, members of religious minorities and other examples of the most powerless in our society. In Sugarman v. Dougall, 413 U.S. 634 (1973), eight Justices struck down a law which limited employment in the state's civil service to United States citizens. In so ruling, the Court affirmed that aliens are entitled to protection from invidious discrimination under the Fourteenth Amendment. Justice Rehnquist alone rejected the conclusion, stating "aliens as a class are not familiar with how we as individuals treat others and how we expect government to treat us." He argued that the Fourteenth Amendment was not designed to protect any "discrete and insular minorities" other

than racial minorities.

Illegitimate children fare no better under Justice Rehnquist's nullifying view of the Constitution. In Jimenez v. Weinberger, 417 U.S. 628 (1978), the opinion of Chief Justice Burger for eight members of the Court found unconstitutional a statute which excluded illegitimate children from public welfare benefits. The opinion emphasizes that visiting the condemnation of the parents' misconduct on the head of an innocent child is illogical and unjust. Imposing disabilities on the innocent children "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."

Justice Rehnquist dissents alone, finding a rational basis for the exclusion of illegitimate children's benefits. He wrote that the Court should not strike down legislative decisions for the sole reason that they treat some group of individuals less favorably than others. Nowhere does he address the Burger opinion's rejection of the outmoded view that illegitimate children are undeserving. Apparently the mere possibility of false benefit claims is enough for Justice Rehnquist to approve wholesale state exclusion of illegitimate children from public benefits.

Zablocki v. Redhail, 434 U.S. 374 (1978), involved a state law requiring prior approval for marriage for persons under court orders of support for minor children. The Supreme Court struck down the law and reaffirmed the fundamental character of the right to marry. Justice Rehnquist, however, viewed the law

as a "permissible exercise of the state's authority to regulate", even though he concedes that it would make marriage financially impossible for a segment of the population. Thus, Justice Rehnquist would permit the state to regulate even where it interferes with one of the most intimate and fundamental personal freedoms, and does so in the case of a statute that particularly singles out the poor, who are most commonly the subject of orders for support of minor children.

These dissents illustrate the great lengths Justice Rehnquist goes to in deferring to states when it comes to individual rights. In Sugarman, he rejects application of the Equal Protection clause to suspect classes other than race. Governmental action is upheld even if it denies aliens government employment or harms illegitimate children, women or the poor, who, like many blacks, are powerless and vulnerable.

Justice Rehnquist advances states' rights through application of the abstention doctrine. A theme which runs throughout these dissents is the notion that federal courts should not interfere with state proceedings even where constitutional issues are concerned.

Justice Rehnquist also votes to limit or nullify the impact of the First Amendment on the states. Thomas v. Review Board, 450 U.S. 707 (1981). The opinion, written by Chief Justice Burger, barred a state from denying unemployment compensation to a Jehovah's Witness who had refused to perform military procurement work. Justice Burger emphasized that where "the State conditions receipt of an important benefit upon conduct

proscribed by a religious faith ... thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."

Justice Rehnquist, arguing alone for untrammelled state power, writes that the state need not "conform that statute to the dictates of religious conscience of any group." In sum, Justice Rehnquist would approve, state laws that make denial of state benefits the price for exercising an employee's genuine religious views.

On the other hand, where the state wanted to allow religious interference with secular concerns, Justice Rehnquist alone found no First Amendment problem. In Larkin v. Grendel's Den, 459 U.S. 116 (1982), eight Justices found a state law giving churches the power to forbid bars in their vicinity to be an improper delegation of governmental licensing authority. Justice Burger, writing for the Court, stated that "the structure of our government has, for the preservation of civil liberty, rescued temporal institutions from religious interference." Justice Rehnquist disregarded the constitutionally forbidden entanglement of church and state, instead protesting the "heavy First Amendment artillery that the Court fires at this sensible and unobjectionable" statute.

Justice Rehnquist was also the only member of the Court who would have allowed a state to deny a prisoner the right to practice his religion. In Cruz v. Beto, 405 U.S. 319 (1972), eight members of the Court held that it violated the First Amendment for prison officials to deny a Buddhist the same

opportunity to practice his faith as those prisoners who followed more conventional religions. Justice Rehnquist took the position that the Court should not interfere with the prison officials unless the discrimination could not be justified under any rational hypothesis. Because it could cost more to provide religious services for small sects, Justice Rehnquist found it reasonable for the state to deny the right to worship to members of those sects. This dissent again reveals Justice Rehnquist's troubling precept that Bill of Rights guarantees as fundamental as that of religious freedom bow merely to the interest of the state's convenience and cost.

In other cases involving criminal justice, Justice Rehnquist has given broad rights to the state and a denial of constitutional protection to the individual. In Taylor v. Louisiana, 419 U.S. 522 (1975), only Justice Rehnquist would have allowed the state to continue a jury system which excluded women, a group which comprises over half the population. He was the sole justice to dissent from the Court's ruling that the Fourth Amendment bars a state patrolman from randomly stopping and searching automobiles without any warrant or cause to believe that a violation of law is occurring. Delaware v. Prouce, 440 U.S. 648 (1979).

In Carter v. Kentucky, 450 U.S. 288 (1981), eight Justices agreed that a criminal defendant not testifying in his own defense is constitutionally entitled to have the jury instructed that it may draw no inference from his exercise of the right to remain silent. The opinion underscored (305) that

a "failure to limit the jurors' speculation on the meaning of that silence . . . exacts an impermissible toll on the full and free exercise of the privilege." The constitutional right against forced testimony by defendant, the Court noted (299), "reflects many of our most fundamental values and most noble aspirations . . . "

Rehnquist's lone dissent is noteworthy for its failure to suggest why the defendant's right to silence should not be protected by a "no inference" instruction to the jury, without which a defendant's exercise of his right to silence might often become the very basis of jury conviction. Rehnquist protests allowing the defendant to "take from the trial judge any control over the instructions . . . " This dissent again fails to deal with the specific assertion upon which the majority opinion is based; instead, it simply finds vindication of that constitutional right and undue intrusion on the discretion of the state courts. Viewed as Justice Rehnquist views it as merely a matter of state authority -- not even of any strongly asserted state counter-interest -- it becomes clear that Justice Rehnquist basically does not accept Marbury when it comes to the preservation of Bill of Rights guarantees.

Justice Rehnquist also differed from his colleagues in a historic case involving openness of criminal trials, Richmond Newspapers v. Commonwealth of Virginia, 448 U.S. 555 (1980). The majority opinion by Chief Justice Burger struck down a state court order closing a criminal trial to the public and

the press, calling openness "one of the essential qualities of a court of justice." Never pausing to refute the persuasive historical evidence set forth in the majority opinion, Justice Rehnquist instead voices in lone dissent an abstentionist principle so broad as to encompass not only public trials, but essentially all Bill of Rights guarantees. He illustrates his hostility to judicial review, stating that:

> to rein in, as the Court has done over the past generation, all of the decision-making power over how justice shall be administered . . . is a task that no Court consisting of nine persons, however gifted, is equal to . . . it is basically unhealthy to have so much authority concentrated in a small group of lawyers . . . nothing in the reasoning of Mr. Justice Marshall in Marbury v. Madison requires that this Court, through ever-broadening use of the Supremacy Clause, smother a healthy pluralism which would otherwise exist in a national government embracing 50 States.

It is particularly noteworthy how far Justice Rehnquist proceeds to rely on this broad abstentionist principle rather than on any effort to justify the secret trial which offends Anglo--American traditions.

Even in cases involving the most fundamental right, Justice Rehnquist would defer to the states. In Lockett v. Ohio, 438 U.S. 586 (1978), the opinion by Chief Justice Burger struck down a state statute which precluded a defendant from showing any aspect of his character or record in mitigation on the question of the sentence in a capital case. The Court found that the statute created the risk that the death penalty would be imposed in cases where it is not appropriate, and that "when the choice is between life and death, that risk is unacceptable."

The lone dissent by Justice Rehnquist asserted that the state was not required to accept any mitigating evidence, apparently in the view that the Eighth Amendment assures no more than a fair trial of guilt or innocence. In Justice Rehnquist's view, even life itself is not a sufficiently compelling right to deserve constitutional protection against its arbitrary denial.

The foregoing brief review of a handful of Justice Rehnquist's numerous lone dissents highlights themes that are found throughout his Supreme Court opinions. What is demonstrated by his lone dissents is first of all the depth and range of his abstentionism, applying it as he would to every minority group, every Bill of Rights principle, and even to life and death questions. No constitutionally protected interest of federalism or fairness, of liberty or equality will rise to a level where Justice Rehnquist is willing to impose significant federal constitutional limitations on the states.

It is not unfair to call Justice Rehnquist an abolitionist, for the extent of his erosion of the guiding principle of Marbury v. Madison, and thereby of the constitutional protections found in the Bill of Rights, would amount to abolition of the Supreme Court's vital role and its central task: the vindication of the federal Constitution. That is not a conclusion unfairly drawn from his years on the Court; it largely reflects his own candidly stated insistence on the overriding importance of state's rights and the limits of the Supreme Court's capacity and authority.

Our concern is not only that Justice Rehnquist will continue to strike a different balance of substantive interests

than the other Justices. Rather, what is at the heart of his view is a far more fundamental principle that questions the role of the the Supreme Court itself in preserving federal constitutional rights.

If this is a fair characterization of Justice Rehnquist's view, the question arises whether the Senate should elevate to the position of Chief Justice of the United States a member of the Supreme Court so out of sympathy with the basic role and function of the Court. We believe that the answer is no. Never in our history has a Chief Justice so undermined and demeaned the Supreme Court as an institution. As one who rejects the Supreme Court's central constitutional task, Justice Rehnquist is clearly an inappropriate choice to lead and represent our highest Court.

Senator HATCH. Thank you Mr. Silard.

Senator BIDEN. Thank you I apologize for the rush.

Senator HATCH. Thank you. We appreciate having you here.

And at this particular point we will take just a short recess, but let me say that the Democrats on the committee have asked for 10 witnesses at this point and we have 5 of them who are here. There are five more that we do not know where they are.

Senator METZENBAUM. Mr. Chairman, I want to say that I have been asked to read into the record the FBI affidavits in connection with some of those who could not make it. I hope you will permit me.

Senator HATCH. Those who are here are Mr. James Brosnahan, Melvin Mirkin, Charles Pine, Sidney Smity, and Manuel Pena.

Those who are not here are Quincy Hopper, Nelson McGriff, Fred LaDene, Michael Shapiro, and Arthur Ross.

Who has asked you to read out of the FBI affidavits?

Senator METZENBAUM. We have the LaDene affidavit, we have the Arthur Ross—these were given to the FBI.

Senator HATCH. Do we have copies of those affidavits?

Senator METZENBAUM. Oh, yes.

Senator HATCH. Do we have copies?

Senator METZENBAUM. Mr. Chairman, if you would rather have Duke Short read them, I have no particular——

Senator HATCH. No. We would be happy to let you read them. Which affidavits are you going to read?

Senator METZENBAUM. LaDene, Ross, McGriff——

Senator HATCH. Is there any reason why they are not here?

Senator METZENBAUM. Yes. I think Mr. LaDene says in his, I just was reading that myself, that by the nature of the interview, LaDene advised that, due to time constraints, he would prefer to be interviewed over the telephone, as he was very busy and was not going to go to Washington to testify because of his time schedule.

Now, there is one saving grace about Mr. LaDene that you should know, and that is that he was chairman of the Republican Party for Maricopa County in 1962, and I thought that would impress you.

Senator HATCH. Is he the only Republican?

Senator METZENBAUM. Well, I am not certain about that. I have not checked the politics of the others.

Senator HATCH. I have a feeling that he may be.

Is he presently a Republican?

Senator METZENBAUM. I think that he is the chairman of National——

Senator LEAHY. Can we get a blood test?

Senator HATCH. You do not have to go into that data.

Senator LEAHY. Can we get a blood test, Mr. Chairman?

Senator HATCH. That is what I was wondering!

You have got Mr. McGriff, Mr. LaDene, and Mr. Ross. Are there any others?

Senator METZENBAUM. Yes; there is Mr. Shapiro who had a death in his family. He may not be able to come.

We have requested the FBI interview him, and he should be able to testify. His father-in-law died, and we understand his mother-in-law is ill as well, his mother, I guess it is.

Senator HATCH. The only 1 remaining of the 10 witnesses is Quincy Hopper. Do you know if Quincy Hopper is here?

Senator METZENBAUM. We do not know his status yet.

Senator HATCH. All right. We have five witnesses present, one who might be present, and Quincy Hopper who may also appear.

Senator METZENBAUM. Mr. Chairman, in the interest of time, if you will, I would be willing to start reading these. But I gather you and Senator Biden are going to go into a conference, is that right?

Senator HATCH. No, I do not think so.

Let us just have a short recess.

Senator METZENBAUM. Mr. Chairman, I am not being smart, but since we are so close in time, and I think we should, but can we extend the hour, this 15-minute period?

Senator HATCH. Senator Thurmond has told me not to do that, but I feel you are going to have enough time. Let us just see what we can do to shorten the time. We will certainly do everything we can to accommodate you. However, a lot of it depends on how long you are going to interrogate.

Let me ask the other two panels that the committee has called to come to the back, if they would. Simpson Cox, Vincent Maggiore, Edward Cassidy, William Turner, Ralph Staggs, Jim Bush, Fred Robert Shaw, Gordon Marshall, and George Randolph.

If these people are here, would you come into the area behind the hearing room.

Senator LEAHY. Sir, just a moment.

Before we go, what I think was—well, Senator Biden is still here. We had, the Senator knows, because we had an agricultural matter on the floor late last night. I was bouncing back and forth between the floor and here, and had this question of what we were going to do on the material that originally had been—we were to receive from the Justice Department, and then executive privilege was invoked.

Then back on that same agricultural matter on the floor this morning, I am just curious, where do we stand now? What is the situation?

Senator HATCH. Let us just take a short recess.

[Recess].

The CHAIRMAN. I have just been informed that our negotiators on textiles in Geneva have caved in. It is a terrible situation. And I am going now to find out some more details about the facts.

I am going to ask Senator Hatch to take over in just a minute.

The commitment I had from the President in 1980, and confirmed in 1982, is that the import growth will be kept in line with the domestic growth. The import growth is 33 percent; domestic growth is 3 percent. In the last year, our exports of textiles have amounted to $3 billion; imports of textiles coming into this country and taking the jobs from our own people have amounted to $20 billion, an $18 billion differential. That is completely unreasonable. It is closing down the textile mills in this country, and it is throwing thousands of people out of jobs. There is just no excuse in this.

Now I want to say that in view of this situation, I see nothing left but to override the President's veto on this textile bill. We were hoping this arrangement they were going to work out over

there would bring some relief. Instead of that I am informed that our negotiators caved in.

Senator Hatch, I am going to ask you take the chair in just a minute.

The distinguished Senator from Alabama I believe wanted to comment.

Senator HEFLIN. I have gained seniority today on textiles, because I am vitally interested in this issue. It affects thousands and thousands of jobs in my State. We have had disaster there in terms of drought, and caving in on these multifiber agreements is another great disaster to us. I do want to join Senator Thurmond in doing some investigation on it, but I will return. I have been here, and I will leave a staffperson who will hear every bit of the evidence

Senator KENNEDY. Mr. Chairman.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Will you be back at the hearing later in the course of the day?

The CHAIRMAN. Yes, I will be back

Senator KENNEDY. Because when you return, I would hope that we would have an opportunity to inquire of you whether we will have the chance to convene the full Judiciary Committee to make a judgment and a determination as to how we are going to proceed on the position that has been taken by the legal counsel's office on the willingness to deny this committee certain information, certain memoranda, certain documents.

I know you stated your position on this last evening I had not intended to raise it at this particular moment. We have had an opportunity to talk to other members of the committee. But I do feel that we have sufficient members 142 of this committee, Republican and Democrat alike, to meet the requirement of the rules of the committee, to convene the committee and find out what way we might proceed We would like to do this as a point of accommodation. I am very much aware of your strongly-held views. But we do under the committee rules have the right to request a meeting of the committee.

I want to indicate at this time, Mr. Chairman, that the extent that there was any understanding and agreement about the way our committee was going to proceed is based upon the understanding of the calling of various witnesses and the availability of various information that was going to be essential to our being able to make a judgment and make decision.

I for one would feel that stonewalling on this request by the administration and denying us the opportunity to gain this kind of information effectively vitiates my own understanding of the nature of the agreement. It may not in others, but it does mine. And I would no longer feel bound by any previous agreement. That is an independent judgment and an independent decision, but one strongly held.

But I do want to indicate as you are going off now to other meetings, that I do feel that there is very substantial support among the members of the committee not only on this side but on your side to try to find a way and a means to address the request for information. I have characterized, and I think it is myself intolerable, that

there has been a denial to this committee of selected information. But I do want to indicate that I would hope when you return to be able to raise this in a more formal way if we are not able to resolve it in a more informal way to permit the committee to meet and to also work out some kind of mechanism for the obtaining of these documents.

I wanted to indicate that to the chairman now since it appears that the chairman is going to have to, for the reasons he has outlined, absent himself from chairing these particular hearings.

Senator BIDEN. Mr. Chairman, if I may for just a moment, to put it a slightly different way, we have a problem and a division on the committee. After the witnesses are finished, all the witnesses, not to bring back new witnesses, but after that is done, we really think it would be a good idea if the committee were convened for the purpose of us settling the issue of access to documents and requests for subpoena. And I would join in asking that, that we meet after the witnesses are completed.

The CHAIRMAN. Well, I cannot say that we can meet today. The administration has declared executive privilege, which they have a right to do, and so far as I am concerned, that is closed. Now, our agreement was to provide prompt production of all reasonable requests for information pertaining to the nominee. And this request, as I just said, is not reasonable. And I have already cooperated in helping to obtain all other documents that have been requested, so I see no reason to pursue this particular matter further at this time. We can consider it further——

Senator BIDEN. Mr. Chairman, let me just give you one reason. It may be that 10 members of the committee want to pursue it. That is sufficient reason. [Laughter].

And I am not being smart when I say that, I truly am not. But I think at least, before we break out of this agreement, and Senator Kennedy may or may not feel obliged to break out of the agreement that we had overall with both Justices, that before this breaks down, which we took so long to set up, why don't we at least as a committee meet, any way you want to do it, to decide whether or not under the committee rules, there are 10 people who want to subpoena. If not, then in fact, we have finished——

The CHAIRMAN. I will be back for the hearing later.

Right now, Senator Hatch will take the Chair.

Are you all ready to go ahead?

Senator BIDEN. We are all ready to go ahead. I hope we are going to add at least a half an hour onto our time for these witnesses.

The CHAIRMAN. We have not cut your time.

Senator HATCH. We have.

Senator BIDEN. Oh. Well, we recessed for about half an hour. Well, we will fight about that when the time comes. I am sure that the distinguished chairman from Utah will, as he always does, give every witness ample and fair time to testify. [Laughter].

And in fact he usually does that.

Senator HATCH [presiding]. As a matter of fact, I usually do.

Senator KENNEDY. Yes; I would hope we would. I for one, whatever process or procedures that are necessary, would be quite prepared to stay here, even if this official forum is closed, to find a room and invite members of the public as well as members of the

press to listen to any of the others who do not feel that they have had sufficient time. And we are quite capable and able of doing that.

Senator HATCH [presiding]. Let us move ahead. We have important witnesses on both sides here.

As I understand it, there are five witnesses here. I am going to read the first five names. Those of us on this side of the table would have preferred to have had all these witnesses here so that they could be interrogated by both sides. It is a better thing to do, especially when we are talking about a Supreme Court Justice. The witnesses should respect this panel enough to be here. And some of them cannot. There is one who has a death in the family. We certainly understand that.

But the others, I think, could have been here. To accommodate the minority on this matter, we will call to the table the ones who are here. I will go down through the list of 10. When I reach one who is not here, I will ask the minority if they have a statement by that person, even though there will be no cross-examination. Let us also understand that. Let us all understand the weight that should be given to that. My personal feeling is that if people feel strongly about the confirmation of Justice Rehnquist they should be here, especially since the Committee would pay their expenses. They should be here. To accommodate the minority, we are going to allow Senator Metzenbaum to read a statement by some of these.

So we will call at this time to the table Mr. James Brosnahan, from Berkeley, CA; Mr. Melvin Mirkin, from Phoenix, AZ. As I understand it, Quincy Hopper has not shown up yet. Senator Metzenbaum does not have a statement for him.

Senator METZENBAUM. That is correct, Mr. Chairman.

Senator HATCH. We will strike Quincy Hopper.

Do you have a statement by Mr. Snelson McGriff from Phoenix, AZ?

Senator MATHIAS. I would hope we would not strike anybody.

Senator HATCH. All we are saying is they are not here.

Senator MATHIAS. They could turn up.

Senator HATCH. If he turns up during this time frame, of course. That is all I meant.

Do you have a statement by Mr. Snelson McGriff? Why don't you read that into the record?

Senator METZENBAUM. Well, I think, Mr. Chairman—you are very kind, and I appreciate it—I think if we hear the actual witnesses first—I have talked to some of my colleagues, and I think they would prefer that, then we could go back to those who are not present.

Senator HATCH. All right. Since Mr. Charles Pine, Mr. Sydney Smith, and Mr. Manuel Pena are here, we will call them to the stand. Mr Pine is from Phoenix, AZ, Mr. Sydney Smith is from La Jolla, CA; and Mr. Manuel Pena, from Phoenix.

We are happy to welcome all of you here

As I understand it, Senator Metzenbaum has statements from Snelson McGriff, Fred LaDene, Michael Shapiro, and Arthur Ross.

Senator METZENBAUM. Not from Michael Shapiro. We are asking the FBI to get one. He is the one who had the death in his family. But you do have statements from the other three, Mr. Chairman.

Senator HATCH. We have agreed that we will not read from FBI reports. You can read statements and give the dates of those statements.

Senator DECONCINI. Mr. Chairman, Mr. Chairman, I have not participated in any such—to proceed as I did yesterday and make statements in the record as to the source of those things—my sources——

Senator HATCH. All we have agreed to is that we will not cite the FBI reports. We can certainly read statements. The Senator knows what we are doing here. We will go through these five witnesses starting with Mr. Brosnahan and then we will move on to the affidavits or statements afterward.

We welcome all of you here. If you will stand, we will swear you all in.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you, God?

Mr. BROSNAHAN. I do.

Mr. PINE. I do.

Mr. MIRKIN. I do.

Mr. SMITH. I do.

Mr. PENA. I do.

Senator HATCH. Thank you.

We welcome you to the committee, and we look forward to taking your testimony. We will give each of you 3 minutes. I will have to cut it off then.

Mr. Brosnahan.

**TESTIMONY OF A PANEL, INCLUDING: JAMES BROSNAHAN, BERKELEY, CA; MELVIN MERKIN, PHOENIX, AZ; CHARLES PINE, PHOENIX, AZ; SYDNEY SMITH, LA JOLLA, CA; AND MANUEL PENA, PHOENIX, AZ**

Mr. BROSNAHAN. Mr. Chairman, thank you very much.

My name is Jim Brosnahan. I was born and raised in Massachusetts, graduating from Boston College in 1956; and after my wife and I graduated from the Harvard Law School in 1959, we moved to Arizona, on April 10, 1961, and between that date and February 1963, I was an assistant U.S. attorney, prosecuting criminal cases in Phoenix.

In 1963, I left Arizona and moved to San Francisco, where I also served as an assistant U.S. attorney prosecuting criminal cases. I am now in private practice in that city.

I am appearing today at the request, as I understand it, of the Democratic members of this committee. I have never volunteered any information about the events of 1962

Mr. Chairman, I am here today for one reason, having practiced in the law courts for 27 years, and that is this committee is entitled to evidence if you want it, and it should be as accurate as it can possibly be.

On election day in November 1962 in Phoenix, AZ, several assistant U.S. attorneys were assigned the task of receiving complaints alleging illegal interference with the voting process. As complaints came in, an assistant U.S. attorney, accompanied by an FBI agent would be dispatched to the precinct involved.