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TESTIMONY

OF

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DIRECTOR, WASHINGTON BUREAU

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

BEFORE THE

SENATE COMMITTEE ON THE JUDICIARY

ON THE

NOMINATION OF WILLIAM H. REHNQUIST
FOR

CHIEF JUSTICE, UNITED STATES SUPREME COURT

JULY 29, 1986

Room 106, Senate Dirksen Building

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1

Mr. Chairman, amd members of the Senate Judiciary Committee, I am Althea T. L. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People. I am appearing on behalf of the NAACP's one-half million members in our 2100 branches in the 50 states and the District of Columbia in opposition to the nomination of Mr. William Rehnquist as Chief Justice of the United States Supreme Court.

Our opposition today to Mr. Rehnquist's nomination is a reaffirmation of a position the NAACP took almost 15 years ago before this Committee which was reaffirmed as late as July 3, 1986 at the NAACP's 77th Annual National Convention.

Many persons refuse to predict what a lawyer will do once he/she leaves the political arena and begins a lifetime judicial appointment. The pundits are quick to point out that many individuals, once confirmed as judges, grow in stature, sometimes modifying views they held before gaining a seat on the bench. The NAACP considered this almost a decade and a half ago and felt comfortable at that time, as we do now, in raising the question as to whether Mr. Rehnquist could mete out, to black Americans, equal justice under law. Our response was "no" in 1971 and it is "no" in 1986. This was no idle guess in 1971. In the last few weeks, the NAACP has revisited the Rehnquist record. It is our considered opinion that he has not changed his position rather, the years have more finely tuned his positions on civil rights and racial issues.

Today, the NAACP states for the record that it is our considered opinion that Mr. Rehnquist is out of step with the nation in his interpretation and theories relating to equal justice under the Constitution and laws of the land; hence, we urge the Committee to reject his nomination.

Mr. Chairman, we believe it is appropriate to raise once again some of the issues raised during Mr. Rehnquist's first confirmation hearing. You will recall, from the record, that the Judiciary Committee Report in 1971 summarily dismissed, as "wholly unsubstantiated", the charges by our Maricopa County branch officials and others that Mr. Rehnquist was involved in voter harassment during the 1964 election. Our urgent requests to have Mr. Rehnquist return to the Senate Judiciary Committee for another day of hearings went unheeded. It is the position of the NAACP that, in light of the fact that the nominee's account of his role in the so-called [Phoenix] "Ballot Security" activities during that election was and is challenged by notarized affidavits of witnesses, which we provided in 1971 and again today, together with the recent challenges by three additional witnesses named in the July 25, 1986 edition of the Washington Post, the Committee should probe the nominee regarding his alleged actions.

We do not believe that this is inappropriate given the fact that he is being considered for the position of Chief Justice of the nation's high court which carries with it the power to lead and shape the court for years to come.

OPPOSITION TO CIVIL RIGHTS

In 1964, Mr. Rehnquist is quoted as saying:

"I am opposed to all civil rights laws"

This statement was confirmed and reiterated to me on July 27, 1986 by its originator, former Arizona State Senator Cloves Campbell, the publisher of the Arizona Informant. Mr. Campbell stated that he approached Mr. Rehnquist after a meeting of the Phoenix City Council meeting where Mr. Rehnquist testified and asked why he was opposed to the public accommodations ordinance. Mr. Rehnquist's position on public accommodations was reaffirmed through his letter to the Editor which appeared in the June 21, 1964 issue of the Arizona Republic, a scant two (2) days after the U. S. Congress passed the Civil Rights Act of 1964 by a 73 to 27 vote.

Mr. Rehnquist's stated opposition to "all civil rights laws" can be seen in his writings both on and off the bench.

A. Civil Rights - Voting Rights for Minorities

When my predecessor, Clarence M. Mitchell, Jr., appeared before this Committee urging the rejection of the Rehnquist nomination on the grounds that his record showed:

> "...a consistent pattern of opposition to the rights of black Americans in areas of public accommodations, freedom of expression, education and voting."

Mr. Mitchell told the Committee:

> "...these taken singly or together, raise grave doubts about whether he could mete out to the black citizens of America equal justice under law.

He also pointed out that:

> "there is only one area of civil rights legislation where conservatives, liberals and even some of the deep South members of the Senate and House could reach agreement. That is the right to vote."

Mr. Rehnquist, before his confirmation in 1971, attempted to bar voters from casting their ballots. He was personally present in some precincts when unconscionable attempts were made to prevent elderly and/or timid black citizens from voting. His alleged purpose for being there was to halt abuses by others. In contradiction, there were witnesses who signed sworn affidavits alleging that it was Mr. Rehnquist, himself, who was interfering with citizens' right to vote.

Black citizens alleged that Mr. Rehnquist harassed them at the polls in 1964; that he attempted to make them read portions of the Constitution and refused to let them vote unless they were able to comply with his demand.

The NAACP calls to the Committee's attention the allegations, by the NAACP's leadership in Phoenix and others, that Mr. Rehnquist took an active part in the so-called "Ballot Security " program. The Reverend George Benjamin Brooks, former President of the Maricopa County Branch of the NAACP testified:

> "...as chief of the Republican challengers he [Rehnquist] planned and executed the strategy designed to reduce the number of poor black and poor Mexican-American voters in the crucial 1964 National elections. He trained young, white lawyers and others to invade each black or predominantly black precinct in Phoenix on election day. The people were standing in long lines early in the morning as many were on their way to work. These young, white lawyers had printed cards on which were printed portions of the Constitution and demanded that the challenged voters read from them. It slowed down the voting so much that many voters complained and left. In that election I was the Inspector for the Election Board of Julian Precinct, a predominantly black precinct in South Phoenix. It became so bad that I threatened to call the police to have the challenger and poll watcher arrested for interfering with poor people's right to vote. In some precincts on the Southwest side of Phoenix there were reports of a fight. The scheme was to harass, intimidate and discourage poor black and poor Mexican-Americans from exercising their important vote in that crucial election..."

Mr. Robert Tate, in his affidavit, dated November 12, 1971 stated":

"...I was present at Bethune Precinct, a predominantly black precinct in South Phoenix and witnessed the following incident:

"Mrs. Miller had come to cast her vote at Bethune Precinct. She was encountered within the 50' line by William Rehnquist and requested to recite the Constitution before she could be allowed to vote. Mrs. Miller came to me crying, stating that Rehnquist wanted her to recite the Constitution. A call was placed to Judge Flood's office, a Justice of the Peace in South Phoenix, and Judge Flood came down to the Precinct. At that time Judge Flood deputized Jordan Harris to try and assist me, as a precinct committeeman, to restore order at the precinct. I looked around and saw William Rehnquist and Mr. Harris, who has a deformity in one leg, struggling. I went to the assistance of Mr. Harris. A policeman came in and took Mr. Rehnquist into the principal's office. Shortly thereafter Mr. Rehnquist left Bethune Precinct; however, a little later Mr. Rehnquist returned to the poll and parked his car across the street.

"After Rehnquist left, I walked over to the police man and asked him the name of the fellow involved in the harassment of Mrs. Miller and the struggle with Mr. Harris. The policeman informed me that his name was William Rehnquist.

"I now remember him from pictures I have seen lately in the papers as the same one involved in the above incident at Bethune Precinct. He did not, at that time, however, wear glasses."

Mr. Jordan Harris, another witness, whose November 12, 1971 notarized statement was introduced into the record in the NAACP's testimony stated:

"...I ws present as a deputized challenger for the Democratic Party in Bethune Precinct, a predominantly Black Precinct in South Phoenix, and witnessed the following incident:

I appeared at the polling place, Bethune Precinct, at approximatel 11 a.m. on the above mentioned date deputized by Judge Flood. When I arrived at the precinct I met with the election board committee and presented my official papers to them as a challenger for the Democratic Party. I met the Party Challenger for the Republican Party, Mr. William Rehnquist at that time. I met with Mr. Rehnquist because I noticed him harassing

> unnecessarily several people at the polls who were attempting to vote. He was attempting to make them recite portions of the Constitution, and refused to let them vote until they were able to comply with his requests. The persons involved were Mrs. Mitchell, Mrs. Campbell and Mrs. Miller. When I noticed he was pulling these people out of the line I then approached him and argued with him about his harassment of the voters. We then engaged in a struggle and the police were called in. Mr. Bob Tate came to my assistance during the struggle. The police then escorted him into the principal's office, Mr. Rehnquist and the police then left by the side door. I know that this man was Mr. Rhenquist because the election board introduced him to me as a challenger for the Republican Party. I believe that he did not leave the polling precinct altogether because I saw him across the street a short time later. He remained at the polling place well after 5 p.m."

The conduct recounted by the witnessses is the same type of conduct which led to the passage of the Voting Rights Act of 1965. It would be difficult for black Americans to believe that a person who harassed voters from the exercise of the most basic of all rights - the right to vote - would accord them justice in a court of law.

Mr. Rehnquist, as Associate Justice, has manifested his opposition to the protection of voting rights for minorities. In City of Rome v. United States, 446 U. S. 156 (1980), the majority held that a city could not unilaterally bail out of the preclearance requirement imposed upon them by Section §5 of the Voting Rights Act. Mr. Rehnquist dissented, arguing that the legislated conduct (requiring the state governmental units to obtain Department of Justice preclearance before a change in voting procedures or requirements would be effective) is necessary to to remedy a previous constitutional violation by the governmental unit

or to prevent purposeful discrimination. In essence, there must be a causal relationship between a specific wrong by the City and the legislated prohibition. The NAACP also sees the use of the legal concept of causation by Mr. Rehnquist in cases of racial discrimination to restrict the application of the Equal Protection Clause of the Fourteenth Amendment.

B. Civil Rights - Public Accommodations

Mr. Rehnquist was not content to challenge black voters who sought to exercise the right of franchise, he also made his views known in the area of public accommodations when he opposed an ordinance being considered by the Phoenix City Council. His written statement said in pertinent part:

> "I am a lawyer without client tonight. I am speaking only for myself. I would like to speak in opposition to the proposed ordinance because I believe that the values it sacrifices are greater than the values it gives. I take it that we are no less the land of the free than we are the land of the equal and so far as the equality of all races concerned insofar as public governmental bodies, treatment by the Federal, State or the Local government is concerned, I think there is no question. But it is the right of anyone, whatever his race, creed or color to have that sort of treatment and I don't think there is any serious complaint that here in Phoenix today such a person doesn't receive that sort of treatment from the governmental bodies. When it comes to the use of private property, that is the corner drug store or the boarding house or what have you. There, I think we--and I think this ordinance departs from the area where you are talking about governmental action which is contributed to by every taxpayer, regardless of race, creed or color. Here you are talking about a man's private property and you are saying, in effect, that people shall have access to that man's property whether he wants it or not. There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of assault on the institution where you are told, not what you can build on your property, but who can come on your property. This, to me is a matter for the most serious consideration and, to me, would lead to the conclusion that the ordinance ought to be rejected.

"What brought people to Phoenix and to Arizona? My guess is no better than anyone else's but I would say it's the idea of the last frontier here in America. Free enterprise and by that I mean not just free enterprise in the sense of the right to make a buck but the right to manage your own affairs as free as possible from the interference of government..." 8

Fortunately, Mr. Chairman and members of the Committee, the Phoenix City Council passed the ordinance. Mr. Rehnquist, after the passage of the ordinance, in a letter to the Editor which appeared in the June 21, 1964 edition of the Arizona Republic wrote:

"I believe that the passage by the Phoenix City Council of the so-called Public Accommodations ordinance is a mistake."

"...the Public Accommodations ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers. By a wave of the legislative hand, hitherto-private businesses are made public facilities, which are open to all persons regardless of the owner's wishes . Such a drastic restriction on the property owner is quite a different matter from orthodox zoning, health and safety regulations which are also limitations on property rights. It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this."

"If in fact discrimination against minorities in Phoenix eating places were well nigh universal, the question would be passed as to whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all..."

"The founders of this nation thought of it as the 'land of the free' just as surely as they thought of it as the 'land of the equal'. Freedom means the right to manage one's own affairs, not only in a manner that is pleasing to all, but in a manner which may displease the majority. To the extent that we substitute, for the decision of each businessman as to how he shall select his customers, the command of the government telling him how he must select them, we give up a measure of our traditional freedom.

Mr. Rehnquist distinguishes rights of the few from what he terms universal [rights] saying: 9

> "Such would be the issues in a city where discrimination was well nigh universal. But statements to the council during its hearings indicated that only a small minority of public facilities in the city did discriminate. The purpose of the ordinance, then, is not to make available a broad range of integrated facilities, but to whip into line the relatively few recalcitrants. The ordinance, of course, does not and cannot remove the basic indignity to the Negro which results from refusing to serve him; that indignity stems from the state of mind of the proprietor who refuses to treat each potential customer on his own merits.
>
> "Abraham Lincoln, speaking of his plan for compensated emancipation, said: 'In giving freedom to the slave, we assure freedom to the free--honorable alike in what we give and in what we preserve.'
>
> "Precisely the reverse may be said of the public accommodations ordinance: Unable to correct the source of the indignity to the Negro, it redresses the situation by placing a separate indignity on the proprietor. It is as barren of accomplishment in what it gives to the Negro as in what it takes from the proprietor. The unwanted customer and the disliked proprietor are left glowering at one another across the lunch counter.
>
> "It is, I believe, impossible to justify the sacrifice of even a portion of our historic freedom for a purpose such as this."

Mr. Cloves Campbell, then an Arizona State Senator stated in an affidavit dated November 4, 1971:

> "I, Senator Cloves Campbell, do hereby testify that on or about June 16, 1964, a City Council meeting was held in the City of Phoenix for discussion of an ordinance dealing with public accommodations for all citizens in the City.
>
> "At that Council meeting, Mr. William Rehnquist, the present nominee for the United States Supreme Court spoke in opposition to the proposed ordinance.

> "After the meeting I approached Mr. Rehnquist and asked him why he was opposed to the public accommodations ordinance. He replied, 'I am opposed to all civil rights laws.'"

Mr. Rehnquist was an activist in Phoenix. He also opposed freedom of assembly, where civil rights was concerned. In testimony before an Arizona Legislative Committee, Mr. Rehnquist opposed the State's Civil Rights bill of 1965. Although the Arizona State Legislature did not keep a record of testimony before its Committees or in its state archives, Reverend G. Benjamin Brooks, in his testimony before this Committee in 1971, stated:

> "Well, however, do I recall the evening, late, when Mr. Rehnquist and I had a confrontation on the State Capitol grounds following his appearance. He argued that such a bill violated individual freedom to discriminate. This was the same argument he used against the City of Phoenix ordinance in 1964 at which time he wrote that such ordinances could not remove the 'indignity' suffered by the Negro when he is refused service in a place of public accommodations. But, he added, 'it redresses the situation by placing a separate indignity on the proprietor.'"

Reverend Brooks also stated that Mr. Rehnquist "was the only major person of stature who opposed the Arizona Civil Rights bill..." Reverend Brooks statement was buttressed by the statement of Mr. Moses Campbell (no relation to Senator Campbell), who in a letter dated November 3, 1971 stated:

> "I, Moses Campbell, do hereby attest to the following:
> I. That I was a member of the Civil Rights march on the Capitol building of the State of Arizona in the Spring of 1964.
>
> II. That I was present at the time our Past President, Rev. George Brooks, of the NAACP and Mr. William Rehnquist exchanged bitter recriminations concerning the groups purpose for marching, intimating that the march was communistically inspired.

> III. I believe that owing to the conduct of Mr. Rehnquist in his desire to disrupt and intimidate the Blacks in their peaceful presentation of what they considered just grievances to the State of Arizona's officials, that he has brought irreparable harm and insult to the Blacks of Phoenix, Arizona, and should not be considered for the lofty position as United States Supreme Court Justice."

Mr. Rehnquist's attitude toward civil rights demonstrators is further revealed in his February 14, 1970 letter to the Washington Post (on the G. Harold Carswell Supreme Court nomination). Mr. Rehnquist said:

> "In fairness you ought to state all of the consequences that your position logically brings to train; not merely further expansion of the Constitutional rights of criminal defendants, of pornographers and of demonstrators."

In a speech before the Newark Kiwanis Club, Mr. Rehnquist stated:

> "In the area of public law...disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. If force is required to enforce the law, we must not shirk from its employment."

Mr. Chairman, within this past week, I spoke by telephone with both Mr. Cloves Campbell and the Reverend G. Benjamin Brooks, asking them to refresh their recollection regarding the incidents they submitted in 1971. Mr. Campbell told me that he recalled very clearly the statement of Mr. Rehnquist that he was "opposed to all civil rights laws". Reverend Brooks in a telephone conversation with me on July 28, 1986 stated:

> "Mr. Rehnquist did, in fact, come to the polls, challenging particularly the older voters and I remember old Mr. Killings (sp) who looked unkept struggling through it and reading the piece of literature. We did not sustain the challenge. We let the man vote."

Reverend Brooks, speaking to the incident at the State Capitol stated, during our telephone conversation:

> "He [Rehnquist] met me at the State Capitol to argue the point of civil rights and the illegality of the public accommodations ordinance."

Mr. Chairman, I directed the NAACP's National Voting Rights Campaign in 1964 as a special assignment and recall the incidents reported to the National Office of the NAACP. I had a special concern regarding the Arizona incidents inasmuch as my regular assignment with the NAACP was as West Coast Director for Arizona, Southern California and Nevada. We were monitoring election activities to be sure that the recently passed Civil Rights Act of 1964 was not violated. The eyewitness accounts from Messrs. Tate, Campbell, Brooks and Cloves Campbell raised grave questions regarding the role of Mr. Rehnquist and whether he was candid in his recall during his 1971 appearance before this Committee. There is no doubt in our mind that Mr. Rehnquist was involved. One local newspaper, the Arixona Voice described Mr. Rehnquist as "Major Local Force to Keep People from Voting."

D. Civil Rights - The Fourteenth Amendment

A great deal of attention has been placed in recent weeks on a 1952 memorandum from Mr. Rehnquist to Mr. Justice Jackson which stated:

> "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think Plessy v. Ferguson was right and should be reaffirmed. If the Fourteenth Amendment did not enact Spencer's Social Statics, it just as surely did not enact Myrdahl's American Dilemma."

Mr. Chairman, this statement raises red flags for black Americans who cannot countenance even the thought of retrogression, much less to a period of time when the law of the land was that the black man had no rights that a white man had to respect.

As Associate Justice, Mr. Rehnquist has used various basic legal principles to bring about the bottom line of limiting the Fourteenth Amendment. He has publicly rejected the doctrine that the Bill of Rights is incorporated into the Fourteenth Amendment and thereby made applicable to the states. By so limiting the Fourteenth Amendment, more than one ideological purpose is served. The legal principles used in this fashion by Mr. Rehnquist include:

- limiting the doctrine of "state action" which triggers application of the Equal Protection Clause;
- limiting the protected groups or "suspect classes" entitled to the highest level of judicial scrutiny to protect their rights (Mr. Rehnquist deems only "race" as a suspect class);
- requiring claimants of racial discrimination to prove "intentional" discrimination;
- requiring claimants of racial discrimination to prove causation (legal/proximate cause) between the alleged (intentional) discriminatory acts and harm or wrong suffered by the claimant; and,
- categorizing the controlling legal issue decisive to the case as a procedural or evidentiary issue (even when there is substantial evidence of intentional racial discrimination).

The significance of using legal principle is that a rational argument is made which may convincingly lead one to agree with the result. Beginning with a basic legal principle, building upon it by reference to precedent, case law, authoritative treatises, etc. one may follow the views of another without divorcing the conclusion reached from the beginning legal principle. It is our considered judgment that Mr. Rehnquist, through the decisions he has written and his dissents, is creating his own precedents, and is, in his own fashion, a judicial activist against civil rights.

Civil Rights - Fourteenth Amendment - Substantive Limitations

(a) State Action v. Private Action

One source of constitutional limitations imposed on state action is the Fourteenth Amendment. The states can not deny persons equal protection of the laws. Although Mr. Rehnquist accepts the legal maxim that state action cannot be "racially discriminatory" state action was restricted in application by him. In the landmark case of Moose Lodge No. 107 v. Irvis, 407 U. S. 163 (1972), blacks were denied drinks by the lodge and argued that such denial violated the Fourteenth Amendment in that state action was present since the state had issued a liquor license to the lodge (a maximum number of licenses were issued by the state). Mr. Rehnquist wrote for the majority of the Court:

> "We conclude that Moose Lodge's refusal to serve food and beverages to a guest by reason of the fact that he was a Negro does not, under the circumstances here presented, violate the Fourteenth Amendment... 407 U.S. at 171,172
>
> "In 1883, this Court in The Civil Rights Cases...set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield,'... 407 U.S. at 172
>
> "In short, while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building... 407 U.S. at 175
>
> "The Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club which it licenses to serve liquor. 407 U.S. at 175
>
> "Appellee was entitled to a decree enjoining the enforcement of §113.09 of the regulations promulgated by the Pennsylvania Liquor Control Board insofar as that regulation requires compliance by Moose Lodge with provisions of its constitution and by-laws containing racially discriminatory provisions. He was entitled to no more." 407 U.S. at 179

In sum, Mr. Rehnquist's position was that the blacks who had been refused food service were only entitled, under the Fourteenth Amendment, not to have the state regulation enforced if that regulation was invoked to uphold the racially discriminatory provisions in the Lodge's constitution.

From another perspective, the Fourteenth Amendment is a restriction on what Mr. Rehnquist has termed "the state's plenary police powers." by extending the scope of "private action" or restricting the acts constituting "state action," Mr. Rehnquist is giving the states more freedom from the constitutional restriction of the Fourteenth Amendment.

(b) Limiting the Protected Groups or "Suspect Classes under the Fourteenth Amendment

The Fourteenth Amendment, notably its Equal Protection Clause is said judiciously to impose a higher standard of review upon the courts to protect the rights of citizens. Mr. Rehnquist limits "suspect class" under the Fourteenth Amendment to race. Classification by gender (sex) is not tantamount to being a "suspect class" (see Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977); Rostker v. Goldberg, 453 U.S. 57 (1981)). In his opinion, alienage is not a "suspect class" (see Sugarman v. Dougall, 414 U.S. 634 (1973)). In his opinion, low-income or poverty does not make one a member of a "suspect class" (see San Antonio School District v. Rodriguez, 422 U.S. 1 (1972)). Age does not make one a member of a "suspect class" (see Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)). Finally, illegitimacy does not make one a member of a "suspect class" (see Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); New Jersey Welfare Righs Organization v. Cahill, 411 U.S. 619 (1973)).

(c) Requiring Proof of Intentional Discrimination

The Fourteenth Amendment's Equal Protection Clause entitles citizens to receive equal treatment in state action and those actions by private people within reach of the Clause. It has been shown in case law that Mr. Justice Rehnquist limits the Equal Protection Clause and the high standard of "strict scrutiny" to differential conduct based on one's race. He further limits, even cases of egregious differential treatment based on raxe by requiring racial minorities to prove "intentional discrimination." This proof of intentional discrimination has been articulated in school discrimination cases (see Wright v. Council of City of Emporia, 407 U. S. 451 (1972); Keyes v. School District No. 1, Denver, 413 U. S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974); Columbus Board of Education v. Penick, 443 U.S. 449 (1979); in employment discrimination cases (see Firefighters v. Stotts, 467 U.S. 561 (1984); in death penalty cases (see Vasquez v. Hillery, U.S. (1986); among other types of alleged unconstitutional racial discrimination.

In Keyes v. School District No. 1, Denver, supra, Mr. Rehnquist, dissenting from the majority opinion of the Supreme Court which held that proof of intentional segregative policy in part of the school district is sufficient to support a finding of a dual school system, argued, in part, that in Denver, unlike Topeka in the Brown v. Board of Education case, 347 U. S. 483 (1954), there is no law mandating segregation. In the words of Mr. Rehnquist:

> "There are significant differences between the proof which would support a claim such as that alleged by plaintiffs in this case, and the total segregation required by statute which existed in Brown. 443 U.S. at 255
>
> "In the Brown cases and later ones that have come before the Court the situation which had invariably obtained at one time was a 'dual' school system mandated by

> law, by a law which prohibited Negroes and whites from attending the same schools. 413 U.S. at 255
>
> "Whatever may be the soundness of that decision in the context of a genuinely 'dual school system, where segregation of the races had once been mandated by law, I can see no constitutional justification for it in a situation such as that which the record shows to have obtained in Denver. 413 U.S. at 258

Continuing in his dissent, Mr. Justice Rehnquist concluded saying:

> "The Court has taken a long leap in this area of constitutional law in equating the district-wide consequences of gerrymandering individual attendance zones in a district where separation of the races was never required by law with statutes or ordinances in other jurisdictions which did so require...since I believe (neither) of these steps is justified by prior decisions of this court, I dissent." 413 U.S. at 265

Clearly, Mr. Justice Rehnquist would have our laws distinguish remedying even racial discrimination based on laws, de jure discrimination, from racial discrimination based on facts, de facto discrimination. Challengers of discriminatory conduct would have to prove intentional discrimination in cases alleging de facto discrimination.

In the hallmark employment discrimination case of Firefighters v. Stotts, supra, Mr. Rehnquist concurred with the majority which found that Title VII had not been violated, neither the Fourteenth Amendment, when in that case there was a bona fide seniority system which had not been contractually modified in view of the economic crisis in Memphis which prompted the city to layoff firemen. (Since black firemen were "last hired" they had less seniority than most white firemen and, as a result, they were laid off in comparatively higher numbers.) In that case, the majority opinion stated:

> "Here, the District Court itself found that the layoff proposal was not adopted with the purpose or intent to discriminate on the basis of race. Nor had the city in agreeing to the decree admitted in any way that it had engaged in intentional discrimina-

> tion. The Court of Appeals was therefore correct in disagreeing with the District Court's holding that the layoff plan was not a bona fide application of the seniority system..." 467 U.S. at 577

In that the majority of the Court found no intentional racial discrimination finding by the District Court and no admission by the city, Justice Rehnquist could agree with the majority in this opinion. This is consistent with his expressed opinion that an Equal Protection Clause violation requires a finding of intentional discrimination.

In a recent death penalty case, similarly Justice Rehnquist argued for the necessity of intentional discrimination as part of the requisite legal elements for a violation of the Equal Protection Clause. In Vasquez v. Hillery, supra, the majority of the Court held that the 1962 indictment and later conviction of a black man, Booker T. Hillery, by a grand jury sworn in after blacks were systematically excluded, required the court to reverse the conviction. In that case, affidavits supported Hillery's previous allegations of racial discrimination in that no black had ever served on the grand jury in Kings County where Mr. Hillery was indicted and convicted. Mr. Justice Rehnquist joined Chief Justice Burger and Justice Powell in Mr. Powell's written dissent, saying in part:

> "The point appears to be that an all-white grand jury from which blacks are systematically excluded might be influenced by race in determining whether to indict and for what charge. Since the state may not imprison respondent for a crime if one of its elements is his race, the argument goes, his con-conviction must be set aside.
>
> "This reasoning ignores established principles of equal protection jurisprudence. We have consistently declined (as argued in the dissent) to find a violation of the Equal Protection Clause absent a finding of intentional discrimination...There has been no showing in this case...that the grand jury declined to indict

> white suspects in the face of similarly strong evidence. Nor is it sensible to assume that impermissible discrimination might have occurred simply because the grand jury had no black members. (emphasis added).

In spite of the egregious factual situation that a black man was indicted, which led to his conviction, by an all-white grand jury, in a jurisdiction which had never had a single black on a grand jury, Justice Rehnquist adhered to the legal requirement of a finding of intentional discrimination before a case of racial discrimination violative of the Equal Protection Clause could arguably be made.

(d) Requiring Proof of Causation

Justice Rehnquist has echoed the legal principle of "causation" in a manner to find no violation of the Equal Protection Clause in the school desegregation case of Milliken v. Bradley, 418 U.S. 717 (1974); Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976); Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979); in employment discrimination cases (see Firefighters v. Stotts, supra; Firefighters v. Cleveland, U.S. (1986)); in the cases challenging federal legislation providing for minority business set-asides (see Fullilove v. Klutznick, 448 U.S. 448 (1980)); in death penalty cases (see Vasquez v. Hillery, supra; Batson v. Kentucky, U.S. (1986); Turner v. Murray, U.S. (1986), among others. The exact legal jargon varies; however, the concept of "causation" is discernible to either argue that the actual harm was not caused by the alleged wrongful conduct or that the conduct was wrongful but the complaining party was not harmed by it.

In the case of Dayton Board of Education v. Brinkman, the Court of Appeals had found that intentional racial discrimination in violation of the Equal Protection Clause. Factually, in the 1950's, 77.6 percent of the students went to school in which one race accounted for at least

90 percent of the student body. Four schools were 100 percent black and 54.3 percent of the black students went to these four schools. Suit was brought in 1972 (and incurred two Supreme Court opinions - Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) and Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979)). The majority of the Court, in 1979, upheld the appellate court finding of intentional discrimination violating the Equal Protection Clause.

Justice Rehnquist dissented from the finding of a 14th Amendment violation saying:

> "Both the Court of Appeals for the Sixth Circuit and this Court used their respective Columbus (Board of Education v. Penick) opinions as a roadmap, and for for the reasons I could not subscribe to the affirmative duty, the forseeability test, the cavalier treatment of causality, and the false hope of Keyes and Swann rebuttal in Columbus, I cannot subscribe to them here. (emphasis added in underlinings other than for case names). 443 U.S. at 542

Continuing with the logic of "causation," Justice Rehnquist argued:

> "The District Judge in Dayton did not employ a post-1954 'affirmative duty' test. Violations he did identify were found not have any causal relationship to existing conditions of segregation in the Dayton school system. He did not employ a forseeability test for intent, hold the school system responsible for residential segregation, or impugn the neigborhood school policy as an esplanation for some existing one race schools. In short, the Dayton and Columbus district judges had completely different ideas on what the law required. As I am sure my Brother Stewart agrees, it is for reviewing courts to make those requirements clear." (emphasis added except for "is" which is underlined as well in the dissent) 443 U.S. at 543

Here Justice Rehnquist stressed that it is not sufficient to have even intentional racial segregation or discrimination. Also, one must prove that the conduct had a "causal relationship" to the racial segregation in the schools. In sum, the wrongful conduct must have caused the harm.

The other side to "causation," finding specific wrongful conduct is brought to the fore by Justice Rehnquist in Fullilove et. al v. Klutznick, Secretary of Commerce, et. al., supra. In that case the majority of the Court upheld federal legislation providing for government regulations requiring that 10 percent of federal public works contracts be set-aside for minority business. Justice Rehnquist joined Justice Stewart in his dissent arguing:

> "But even assuming that Congress has the power, under §5 of the Fourteenth Amendment or some otber constitutional provision, to remedy previous illegal racial discrimination, there is no evidence that Congress has in the past engaged in racial discrimination in its disbursement of fedeal contracting funds. the MBE (Minority Business Enterprise) provision thus pushes the limits of any such justification far beyond the equal protection standard of the Constitution. Certainly, nothing in the Constitution gives Congress any greater authority to impose detriments on the basis of race than is afforded the Judicial Branch. And a judicial decree that imposes burdens on the vasis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination." (emphasis added). 448 U.S. at 527, 528

Justice Rehnquist, perhaps, overlooks that Congress legislates usually after public hearings, it makes findings in the public interest or need and can legislate programs based on these findings. Perhaps he overlooks that congress is not restrained by the judicially-imposed concept of "causation." Nevertheless, Justice Rehnquist, in his dissent, stressed the need to tailor remedial provisions to remedy the "actual effects" of "illegal" race discrimination--the wrongful conduct.

Justice Rehnquist's use of "causation" to limit the legal remedy in response to wrongful conduct is seen clearly in Firefighters v. Stotts, 467 U. S. 561 (1984). In that case, a majority of the Court invalidated

an affirmative action plan which was deemed to modify a consent decree. (Under the plan the City could not adhere strictly to seniority in deciding which firemen to layoff in response to the City's economic crisis.) Justice Rehnquist concurred in the majority opinion written by Justice White, which stated:

> "If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster...however,...mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." (emphasis added) 467 U.S. at 578

Clearly, emphasis is placed on requiring "each individual" to prove harm, "impact," on the individual by the wrongful conduct, "the discriminatory practice."

Specifically, the aspect of limiting the legal remedy, even in violations of the Equal Employment Opportunities Act (Civil Rights Act of 1964 - Title VII) is argued in the following quote:

> "That policy (behind Title VII §706(g)) is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the Congressional debates." (emphasis added) 467 U.S. at 580

While the legal jargon, "make-whole relief" has been added, the basic legal principle of "causation" is redressed to limit a remedy legally obtainable only to those who actually suffered from the illegal conduct.

Justice Rehnquist states the doctrine of "causation" most clearly in his dissent in Vasquez v. Hillery, supra:

> "The scope of the remedy depends in part on the nature and deegree of the harm caused by the wrong."

He criticized the majority which set aside the conviction and said:

> "Once the inference of racial bias in the decision to indict is placed to one side, as it must be under our precedents, it is impossible to conclude that the discriminatory conduct selection of Kings County's grand jurors caused respondent to suffer any cognizable injury." (emphasis added)

In Batson v. Kentucky, supra, the majority reversed the conviction of a black man for the death of a white person because the prosecutor used his peremptory challenges to exclude blacks from the jury. The majority held this violated the Equal Protection Clause as well as the Sixth Amendment. Justice Rehnquist said in his dissent:

> "Petitioner in the instant case failed to make a sufficient showing to overcome the presumption announced in Swain that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below."

In another case, a black man was denied his request to even question jurors about their racial prejudices in his trial for the death of a white person. The majority court reversed the death penalty sentence as well as the conviction in ruling that the Equal Protection Clause was violated alongwith the Sixth Amendment. Again, Justice Rehnquist dissented:

> "The facts of this case demonstrate why it is necessary and unwise for this Court to rule, as a matter of constitutional law, that a trial judge always must inquire racial bias in a case involving an interracial murder, rather than leaving that decision to be made on a case-by-case basis." (The majority said inquiry into racial bias was required when the defendant requested it; this necessitates a request by the defendant to initiate the inquiry and is not to be forthcoming from the trial judge.)

Justice Rehnquist continued:

> "Nothing in this record suggests that racial bias played any role in the juror's deliberations... Without further evidence that race can be expected to be a factor in such trials, there is no justification for departing from the rule of Ham and Ristaino"

He dissented against the majority ruling that the trial judge is to honor defendant's request to ask jurors questions of their racial bias. He also objected to scientific evidence, placed in the record, which indicated the racial application of death penalty statutes. Justice Rehnquist limited the weight accorded this evidence by, in essence, arguing the study conducted had no statistics on the administration of the particular death penalty statute in Virginia (the state of the trial). In so limiting the evidence introduced, and not permitting proferred evidence, the Justice analytically concluded:

> "There is nothing in the record of this trial that reflects racial overtones of any kind. From voir dire through the close of trial, no circumstances suggests that the trial judge's refusal to inquire particularly into racial bias posed 'an impermissible threat to the fair trial guaranteed by due process.' This case illustrates that it is unnecessary for the Court to adopt a per se rule that constitutionalizes the unjustifiable presumption that jurors are racially biased."

Justice Rehnquist even argues the opposite of the principle of "causation," e. g., that failure of the plaintiffs to show their harm was caused by racial discrimination is tantamount to showing their harm was caused by a reason other than racial discrimination. Notice in Firefighters v. Cleveland, supra, Justice Rehnquist and Chief Justice Burger dissented saying:

> "Here the failure of the district Court to make any finding that the minority firemen who will receive preferential promotions were the victims of racial discrimination requires us to conclude on this record that the City's failure to advance them was not on 'account of race, color, religion, sex, or national origin'" (emphasis added)

In sum, Justice Rehnquist uses "causation" in any of its aspects to limit application of the Equal Protection Clause.

Avoiding Use of the Fourteenth Amendment by Issue Classification

Justice Rehnquist has so turned the issue in legal procedural questions which would not have addressed even egregious racial disparity. For example, in Vasquez v. Hillery, supra, Justice Rehnquist dissented arguing:

> "The court has firmly established the principle that error that does not affect the outcome of a prosecution cannot justify reversing an otherwise valid conviction."

Throughout his dissent, he argues on the basis of harmless-error as distinguished from prejudicial error. This issue is an evidentiary issue. Justice Rehnquist did not rely on the fact that no blacks had ever served on the grand jury in Kings County. Instead, he argued:

> "In this case, the grand jury error did not affect the failure of respondent's trial or otherwise injure the respondent in any recognizable way. I would therefore reverse the Court of Apopeals."

In Batson v. Kentucky, supra, the majority of the Court reversed a death penalty case because blacks were systematically excluded from the jury by the prosecutor's use of the peremptory challenges. Justice Justice Rehnquist takes the position that the central issue in that case is not a question of racial discrimination but rather as a permissible use of peremptory challenges. His analysis highlighted the distinction and utility of peremptory challenges as compared to challenges for cause and ended by holding inviolate the legal principle of peremptory challenges. In so doing, Justice Rehnquist discounted the majority analysis stating:

> "Neither of these statements has anything to do with the 'evidentiary burden' necessary to establish an equal protection claim in this context, and both

> statements are directly contrary to the view of the Equal Protection Clause shared by the majority and the dissenters in Swain."

In refocusing the legal issue decisive of the case outcome, Justice Rehnquist said:

> "I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as 'a necessary part of trial by jury'. In my view, there is simply nothing unequal' about the State using its peremptory challenges to strike (all) blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on" (emphasis added).

Arguing that the use of peremptories is permissible even in cases of intentional racial exclusion, he says:

> "This case-specific use of peremptory challenges does not single out blacks, or members of any other race for that matter, for discriminatory treatment. Such use of peremptories is at best based upon seat-of-the pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across the board to jurors of all races and nationalities, I do not see... how their use violates the Equal Protection Clause."

His conclusion in the case is that:

> "Plaintiff in the instant case failed to make a sufficient showing to overcome the presumption announced in Swain that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below."

In concluding these comments on selected opinions of Justice Rehnquist, it is the NAACP's considered opinion that the results of his opinions is

to limit the scope or application of the Fourteenth Amendment. Justice Rehnquist is certainly not extending the scope of the Fourteenth Amendment in claims of racial discrimination made by black Americans. To the contrary, perhaps he is consciously "extending" it to claims of discrimination made by white Americans. In any event, his actions are not in recognition of the historically social, political, and economic unequal and inferior treatment black Americans have experienced and are experiencing under the law and in reality. Rather, his arguable basis for "extending" the Fourteenth Amendment to claims made by white Americans is that the amendment protects <u>any</u> citizen.

In short, the judicial opinions of Justice Rehnquist manifest actions consistent with his opposition to civil rights laws. He has focused the Fourteenth Amendment away from discrimination against black Americans and other minority groups and toward protection for white Americans. He has employed legal principles of limiting the concept of "state action," requiring proof of intentional discrimination; insisting upon a causal relationship or causation between the discriminatory conduct and the harm complained of or the remedy sought; classifying the legal issue decisive of the case's outcome as a procedural issue rather than the substantive meaning of the Amendment - all with the effect of limiting the reach of the Fourteenth Amendment.

LIMITATIONS ON FEDERAL LEGISLATIVE POWER

A. The Tenth Amendment

Justice Rehnquist re-introduced and expanded upon the use of the Tenth Amendment as a substantive limitation on the exercise of federal authority. This observation was made in "The Compleat Jeffersonian: Justice Rehnquist and Federalism", 91 Yale Law Journal, 1317 (1982).

Mr. Rehnquist's views on limitations on federal power was evident in his dissent on the merits in Fry v. United States, 421 U. S. 542 (1975) wherein the Pay Board under the Economic Stabilization Act disallowed a portion of a pay increase voted by the State legislature. The Supreme Court affirmed the decision of the Temporary Emergency Court of Appeals disallowing the increase, acknowledging in the majority opinion that the Tenth Amendment "expressly declares the Constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system". But the Court opined that "we are convinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty", 421 U. S. 542 (1975) n. 7.

Justice Rehnquist drew a distinction between "asserting an affirmative constitutional right" and "asserting an absence of Congressional legislative authority." He averred that the holding of the court was contrary to "a concept of constitutional federalism which should...limit federal power under the Commerce clause, 421 U. S. at 554. He contended that Ohio had an "affirmative constitutional right", as a state, to be free of economic regulation by Congress under its Commerce power. He noted that the "states right limiting Congress' power in Fry has "no explicit constitutional source."

His opportunity to further develop his theory of state sovereignty came in 1976 when he wrote for the court in National League of Cities v. Usery, 426 U. S. 833 (1976). Justice Rehnquist "reintroduced state sovereignty as a functioning legal limitation on the federal legislative power. While the case may be an aberration in the jurisprudence of the court, it is central to Justice Rehnquist's view of constitutional law.

B. Judicial Review of Federal Legislation

It is observable that Justice Rehnquist applies "a higher level of scrutiny to federal action than he does to state action (see "The Compleat Jeffersonian", supra).

Limiting Congressional Authority

Justice Rehnquist argues that courts must hear attacks on federal, but not state laws in a legal argument that Congress has exceeded its authority. Restrictions have been judicially imposed upon congressional exercise of authority under the spending power (see Pennhurst State School Hospital v. Halderman, 451 U. S. 1 (1981))and also authority under the Commerce Clause (see Hodel v. Virginia Surface Mining and Reclamation Association, 452 U. S. 265 (1981)).

In the case of Hodel, Justice Rehnquist insisted on sharp examination of the connection between interstate commerce, the asserted basis for congressional action, and the legislated conduct. Justice Rehnquist said:

> "In short, unlike the reserved police powers of the states, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause." (452 U. S. at 311).

First, it should be noted that federal authority under the Commerce Clause was deemed plenary in nature. However, Justice Rehnquist argues that state action under its police powers are plenary in nature. Second, the limitation on state power is a specific constitutional provision limiting state action (e.g. the Fourteenth Amendment).

His argument to restrict congressional legislative authority by arguing that Congress exceeded its authority is apparent in Fullilove v. Klutznick, Secretary of Commerce, U. S. (1980). In that case,

Mr. Rehnquist joined Justice Stevens in a dissent (written by Justice Stevens) stating that:

> "The command of the equal protection guarantee is simple but unequivocal: In the words of the Fourteenth Amendment. 'No State shall...deny to any person...the equal protection of the laws.' Nothing in this language singles out some 'persons' for more 'equal' treatment than others."
>
> "No one disputes the self-evident proposition that Congress has broad discretion under its Spending Power to disburse the revenues of the United States ...and to set conditions on the receipt of the funds disbursed. No one disputes that Congress has the authority under the Commerce Clause to regulate contracting practices on federally funded public works projects, or that it enjoys broad powers under §5 of the Fourteenth Amendment 'to enforce by appropriate legislation' the provisions of that Amendment...If a law is unconstitutional, it is no less unconstitutional just because it is a product of the Congress of the United States."
>
> "On its face, the minority business enterprise provision at issue in this case denies the equal protection of the law...One class of contracting firms--defined solely according to the racial and ethnic attributes of their owners--is, however, excepted from the full rigor of these requirements respect to a percentage of each federal grant. The statute, on its face, and in effect, thus bars a class to which the petitioners belong from having the opportunity to receive a government benefit and bars the members of that class solely on the basis of their race or ethnic background. This is precisely the kind of law that the guarantee of equal protection forbids."

Narrow Interpretation of the Extent of Legislated Conduct

Justice Rehnquist has given undue emphasis and placed controlling weight upon one or two statutory words to negate the application of the proscribed conduct. The bottom line is that a party's conduct is not within the scope of the kind of conduct prohibited by Congress.

Congress enacted Title VII of the Civil Rights Act of 1964 which generally prohibits employment discrimination based on race, sex, national origin, etc. Justice Rehnquist strictly reads the language to forbid any discrimination, even race-conscious affirmative action plans designed to ensure equal employment opportunities. In United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U. S. 193 (1979), Mr. Rehnquist in his dissent states:

> "It may be that one or more of the principal sponsors of Title VII would have preferred to see a provision allowing preferential treatment of minorities written into the bill. Such a provision, however, would have to have been expressly or impliedly excepted from Title VII's explicit prohibition on all racial discrimination in employment. There is no such exception in the Act." 443 U. S. at 222.
>
> "To be sure, the reality of employment discrimination against negroes provided the primary impetus for passage of Title VII. But this fact, by no means supports the proposition that congress intended to leave employers free to discrimiante against white persons." 443 U. S. at 229.
>
> "Here, however, the legisltive history of Title VII is as clear as the language of §§703 (a) and (d) and it irrefutably demonstrates that Congress intended meant what it said in §§703 (a) and (d) --that no racial discrimination in employment is permissible under Title VII, not even preferential treatment of minorities to correct racial imbalance." 443 U. S. at 230.
>
> "Indeed, had Congress intended to except voluntary, race-conscious preferential treatment from the blanket prohibition on racial discrimination in §§703 (a) and (d), it surely could have drafted language better suited to the task than §§703(j)." 443 U. S. at 253.
>
> "There is perhaps no device more destructive to the notion of equality than the numerus clausus-- the quota. Whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to

> prefer another. In passing Title VII Congress outlawed all racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative." 443 U. S. at 254.
>
> "We are told simply that Kaiser's racially discriminatory admission quota 'falls on the permissible side of the line.' ...Later courts will face the impossible task of reaping the whirlwind." 443 U. S, at 255.

Causal Relationship between Constitutional Violation and Legislated Conduct

Congress has constitutional authority, under §5 of the Fourteenth Amendment to enact legislation to carry out the purposes of the Amendment. Mr. Justice Rehnquist argued in City of Rome v. U. S., 446 U. S. 156 (1980) that this legislated action must be necessary to remedy the constitutional violation. In that case, the §5 preclearance provision of the Voting Rights Act imposed on state governmental units by Congress was held by the majority not to allow the states to unilaterally escape preclearance. Justice Rehnquist dissented arguing this congressional legislated adherence by a preclearance requirement was beyond the authority of the Congress.

In construing Title VII, Justice Rehnquist has looked keenly for specific discriminatory conduct within the meaning of the acts prohibited by Title VII to see if the legislated or judicial remedy narrowly responds to that conduct.

In Local Number 93, International Association of Firefighters, AFL-CIO-CLC, Petitioner v. City of Cleveland, U. S. (1986), Justice Rehnquist and Chief Justice Burger dissented, arguing:

> "There was no requirement in the (District Court) decree that the minority beneficiaries have been actual victims of the city's allegedly discriminatory policies. One would have thought that this question was governed by our opinion only two Terms ago in Stotts." U. S. at

> "I would adhere to these well considered observations (in Stotts and Railway Employees v. Wright), which properly restrain the scope of a consent decree to that of implementation of the federal statute pursuant to which the decree is entered." U. S. at

> "Even if I did not regard Stotts as controlling, I would conclude...that §706 (g) bars the relief which the District Court granted in this case."

In Local 28 of the Sheet Metal Workers International Association and Local 28 Joint Apprenticeship Committee, Petitioners v. Equal Employment Opportunity Commission, U. S. (1986), Justice Rehnquist and Chief Justice Burger dissented arguing:

> "I express my belief that §706 (g) (of Title VII) forbids a court from ordering racial preferences that effectively displace non-minorities except to minority individuals who have been the actual victims of a particular employer's racial discrimination...I explain (in Local Number 93 v. City of Cleveland) that both the language and the legislative history of §706 (g), clearly support this reading of §706(g), and that this Court stated as much just two Terms ago in Firefighters v. Stotts."

Even when Mr. Rehnquist apepars to express an opinion in support of discriminatory conduct against a minority protected by federal legislation, he stops short of finding a statutory violation in the facts. In Meritor Savings Bank v. Vinson U. S. (1986), the court ruled that "a claim of 'hostile environment' sex discrimination in the workplace is actionable under Title VII." This means that there exists a legal cause of action; however, the court stopped short of finding an actual Title VII violation from which the plaintiff (a black woman) could have been given relief by the court. For legal reasons, the case was sent back to the lower court. (It had been dismissed for failure to state a legal claim upon which relief could be granted by the court.) Justice Rehnquist wrote for the majority emphasizing that an employer could be liable for sex harassment. However, the dissent of Justice

Marshall, Brennan, Blackmun and Stevens went on to say that:

> "I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave 'notice' of the offense."

Weight Given by the Senate to a Judicial Nominee's Philosophy

Judicial Philosophy

Much has been made of the need to focus on issues other than judicial philosophy in the consideration of nominees to the federal bench. The NAACP does not oppose that point of view; rather it is our belief that ideology or philosophy has an important bearing on fitness for a judicial position and consequently it should not be excluded from active consideration in determining the fitness of an individual to serve on the bench.

I am sure that the Committee recalls that President Nixon, on October 21, 1971, in announcing the Rehnquist nomination, averred that judicial philosophy was one of the major considerations governing his choice of Mr. Rehnquist. This point of view was also espoused by Mr. Rehnquist himself in a 1959 Harvard Law Record article which was quoted in the November 11, 1971 New York Times at p. C 47: Mr. Rehnquist wrote:

> "Specifically, until the Senate restores the practice of thoroughly examining inside of the judicial philosophy of the Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process. As of this writing, the most recent Supreme Court Justice to be confirmed was Senator Charles Evans Whittaker. Examination of the Congressional Record of debate relating to his confirmation would reveal a startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation."

He urged the Senate to:

> "restore its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him..."

We concur with that position. The NAACP maintains that a lifetime appointment to the High court is the most important appointment any President can make. It gains added significance when the nominee is being considered for the position of Chief Justice. The Chief Justice has the opportunity to lead and shape the court for decades to come. Justice Rehnquist has already served almost a decade and one-half.

The importance of the Supreme Court was considered by the framers of the Constitution when they quite wisely did not entrust the selection of its members to either the President not to the other co-equal branches of the government. The Framers decided that such a momumental task must be a shared responsibility between the President and the Senate.

Many have said that the only reason that Justice Rehnquist is being opposed is because of ideology or philosophy. That is a sound reason for the consideration of judicial temperament and philosophy. In researching our files, I came across a copy of the November 7, 1971 Congressional Record which sets out the Brest, Grey and Paul memorandum. According to these learned professors, the Senate during the 19th century refused to confirm some 21 nominees to the U. S. Supreme Court base, in large part, on political views; at least 7 nominees' political philosophy was a major issue during the 20th century.

Mr. Chairman and members of the Committee, the National Association for the Advancement of Colored People believes that judicial philosophy should be a prime consideration in considering this nominee.

Chief Justice Burger has reminded us of the impending 200th birthday of the signing of the Constitution. We should remember that another Chief Justice wrote the majority opinion in one of the most infamous cases in the Court's history. I speak of the Dred Scott decision. Chief Justice Taney held that the Constitution was not meant for blacks, be they free or slave, and that the black man has no rights that the white man was bound to respect. This decision was so out of touch with the mainstream of political thought, even during a period of slavery, that it hastened the War between the States and it has stood as a monumental blot on the Court's history.

In conclusion, there has been a lot of talk about the brilliance of the nominee and the fact that he was first in his law school class at a prestigious institution. We do not refute that, but we remind the members of the Senate that genius, devoid of compassion, distorts reality and cripples one's objectivity.

Thank you for this opportunity to be heard.