TESTIMONY OF

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before the

COMMITTEE ON THE

JUDICIARY

U.S. SENATE

HEARINGS ON THE NOMINATION OF

JUSTICE WILLIAM REHNQUIST

AS CHIEF JUSTICE OF THE

UNITED STATES

JULY 31, 1986

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Congress has few responsibilities so heavy as that of selecting the leader for a coordinate branch of government, the sixteenth Chief Justice of the United States. This is not an appointment to a President's administration. The influence of this appointment on our history and our society goes much deeper and will likely last long after the names of the present Cabinet are forgotten and most of the members of the present Senate are no longer here. Senators should reach their own independent judgment on this appointment and should not feel bound by short-term notions of political advantage or loyalty. Supreme Court nominees have been rejected far more frequently than any other presidential nominations because of their great importance and enduring consequences. Of the eight nominations sent to the Senate between 1967 and 1971, for instance, only half were confirmed and Senate action was blocked on President Johnson's nominee for Chief Justice. Several other nominations have not been submitted because of fear of defeats. The Senate has a special responsibility in these nominations and it has been a responsibility Senators have been willing to exercize when basic issues have been at stake.

I urge the Senate to reject the nomination of Justice William Rehnquist as Chief Justice. I do this because I believe that Justice Rehnquist's long and unchanging record of hostility to governmental protection of minority rights renders him unworthy to hold the position of preeminent leadership in the American system of justice. I believe that the appointment is an insult to minorities and women in the U.S.,

that it is part of a concerted strategy of the Reagan Administration to weaken federal protection of civil rights, and that it will endanger the capacity of our political system to cope with very severe problems of inequality in an increasingly multi-racial society and a society where the role of women is becoming ever more important. No modern Justice has been so consistently hostile to enforcement of equal protection of the laws or has embraced so consistently a fundamentalist legal philosophy that so firmly denies any possibility of judicial protection for victims of discrimination.

This testimony will first briefly discuss the nature of the Senate's responsibility in nominations to the Supreme Court. Second, it will describe the role of the courts in protecting minority and women's rights and the critical battles against civil rights enforcement by all branches of government now being waged by the Reagan Administration. Third, it will discuss the wishful thinking about Mr. Rehnquist and misleading testimony by Mr. Rehnquist/ that contributed to his initial confirmation for the Court. Fourth, it will show through statistics and through quotes from his writings and decisions the nature and intensity of his opposition to minority rights during his service on the Court. This account will show that the opposition is fundamental, will quote from his angry and belligerent attacks on other justices when his position fails, and will show that the hostility to minority rights has not abated with his years of service on the court. Fifth, I will suggest that the appointment of an ideological extremist is likely to either deepen polarization on the court or lead the court into

a situation in which it can offer nothing but frustration to a severely divided society where governmental power is increasingly being used to deepen rather than remedy inequalities.

The Role of the Senate. Each time the Senate has faced a controversial Supreme Court nominee in the last twenty years there has been a review of the history of conflicts over appointments and Senate rejections of nominees. In the last century the resistance to Presidents even went to the extreme of changing the size of the Court. In this century nominees and possible nominees have been sharply questioned about their personal and legal background and their orientations toward civil rights, rights of the accused, abortion, and other matters. In a society where the Supreme Court makes the final decision about the contemporary meaning of such sweeping and unspecific constitutional provisions as "due process of law" and in a court where many decisions of great importance for the nation are made by 5-4 votes, it is an insult to the intelligence of the public to suggest that one need only consider a nominees grades in law school. It is perfectly appropriate for the Senate to determine whether or not a nominee has a closed mind to the claims of millions of Americans in minority groups who rarely win legislative battles and rely on the courts for the protection of their basic rights. I do not believe that the Senate should name as leader of our highest court a nominee whose positions are consistently hostile, often even when other conservative justices recognize the need for some kind of response.

When I testified against Mr. Rehnquist's initial appointment fifteen years ago I had to opportunity to discuss both the issues and the responsibility of Senators with a number of Senators and staff members. Three basic questions were on their minds. The first was whether or not Senators owed deference to the President in making the decision. The second was whether or not they should consider anything beyond the intellectual competence of the appointee, and the third was whether or not it was possible to know in advance how a member of the Supreme Court would vote once he was given life tenure and was responsible only to history. A reading of the floor debate shows that these issues remained very much in the forefront as Senators reached their decisions.

Since there has been no seriously contested nomination for the last fifteen years and since Mr. Rehnquist has already outlasted 78 of the 100 Senators in office in 1971 it is important to review those questions and to find out what evidence can be drawn both from the historic record and from Mr. Rehnquist's actual performance as a Justice.

The courts have always played an extraordinary role in our litigious and legalistic society where power is distributed in extremely complex ways, where legislative bodies are dominanted by lawyers, where bureaucratic regulations draw heavily on legal precedents, and where the courts have the final power to declare what the laws and the Constitution mean. Nothing is more traditional in American politics than that there should be a struggle over Supreme Court appointments,

particularly when there are basic legal issues unsettled in the nation and when a President is perceived as trying to extend his partisan views to constrain the next political generation through control of the Supreme Court.

George Washington, perhaps the most universally revered President, and James Madison, the dominant intellect of the Constitutional Convention, lost appointments on political grounds. Washington's appointment of John Rutledge to be the nation's second Chief Justice was defeated in 1795. Jefferson was bitterly critical of the Supreme Court. Andrew Jackson confronted harsh battles over nominees. Because of their worry over the racial policies of President Andrew Johnson the Republicans who controlled Congress during Reconstruction succeeded in shrinking the Court to eliminate the possibility of more appointments by a hostile President. President U.S. Grant was forced to withdraw two nominations for Chief Justice from the Senate. There have been a number of other defeats, either through negative votes by the Senate, refusal to act on nominees, withdrawal of nominations, or decisions by Presidents that it would be futile to submit the nominees they preferred because of inevitable controversy and possible defeat.

During the last twenty years the Senate refused to act on President Johnson's nomination of Justice Fortas as Chief Justice and Judge Throneberry as Associate Justice. Two of President Nixon's nominees were defeated by votes in the Senate, several more candidates approved by the President were never submitted to the Senate because of strong public criticism, and another, Justice Rehnquist received 26 negative votes. In all of these disputes, as well as in the Senate action rejecting President Hoover's nomination of Judge Parker, ideological issues were very important, although there were often other issues as well.

It is particularly instructive to review the record of the Senate in blocking the nomination of President Johnson's choice as chief justice. Although Justice Fortas later resigned on another issue, the battle in 1968 was partisan and ideological. Leader of the Senate opposition, Sen. Robert Griffin (R-Mich.) and vice presidential nominee Spiro Agnew said that a lameduck president should not be allowed to appoint a Chief Justice whose judgments would so strongly shape the legal future. Sen. Howard Baker (R-Tenn.), future Senate Majority Leader, said that he had "no question concerning the legal capability of Justice Fortas" but that he would oppose him anyway. In a July 1, 1968 speech Sen. Strom Thurmond (R-S.C.) announced his opposition to Fortas on philosophic grounds and claimed that the appointment was a plot between Chief Justice Warren and President Johnson

"because they both want to continue the policies of Chief Justice Warren."

The Republicans were so determined to stop the confirmation that they used a filibuster to prevent a majority vote on the nomination. It was the first time in the history of the Senate that a filibuster had been used to block a presidential nomination. Analysis of the vote on cloture, the vote that led to the President's withdrawal of the nomination, shows that the Senators voted on ideological and partisan grounds. Three-fourths of Republicans and nine-tenths of Southern Democrats voted against cutting off debate while nine-tenths of Northern and Western Democrats voted for cloture. Some of the same Senators who now take the position that there should be quick confirmation of Justice Rehnquist with no searching examination of the consequences of his decisions for the rights of millions of Americans were then quite willing to support a minority veto through the filibuster system to prevent President Johnson from making an appointment they disagreed with. Their success made possible the Burger Court. Chief Justice Burger's unusual decision to resign his office while still in good health now gives President Reagan the possibility of nominating a candidate who may carry the ideals of the Reagan Administration into the next century as the leader of the judicial branch of government. The Senate has both the right and the obligation to determine what this may mean for our common future.

The Civil Rights Situation. My testimony against Justice Rehnquist focuses on his record in the enforcement of the Constitution's guarantee of "equal protection of the laws."

When considering his decisions on minority rights and sex discrimination, however, it is very important to keep in mind the larger context within which the decision about the future of the Supreme Court takes place.

We are in an Administration with a record of hostility to minority interests unmatched in more than a half century. The President ran on an anti-civil rights platform, pledging to change the Constitution and redirect the courts. He received virtually no black support in either campaign and only a small minority of Hispanic votes. He has appointed to key civil rights enforcement offices active opponents of civil rights laws who often use their offices to fight black, Hispanic and women's organizations in the courts and in administrative regulation decisions. The recent extraordinary action of House liberals and moderates in voting to abolish the U.S. Civil Rights Commission, which was put in the hands of strong opponents of civil rights after a quarter century of important bipartisan service is one sign of the current situation. We are in a situation where the Attorney General bitterly attacks the Supreme Court and where his assistants appeal to federal courts to end school desegregation and affirmative action plans.

It is no accident that the President has chosen the Justice who is the most opposed to civil rights litigation. Only the courts have blocked the Reagan efforts to resegregate schools, end affirmative action, and deny governmental responsibility for housing policies that produced segregation and unequal

opportunities. Rehnquist is the Justice most closely in agreement with the Administration's policies, even in the case in which they fought to restore tax subsidies to segregated private education. This appointment is an important part of the effort to reverse the momentum of civil rights.

American society and the American economy are changing rapidly in ways that produce new challenges for all institutions of government. The minority fraction of U.S. population is increasing rapidly and it is clear that the next generation will be by far the most profoundly multiracial in American history. A second very large minority group has emerged, the Hispanics, whose numbers might well exceed those of blacks not far into the next century. The great majority of the new jobs in the society are occupied by women and a rapidly increasing share of children are growing up in households headed by women. Occupational segregation and wage inequality, however, remain very severe. In the 1980's there are many signs of decreasing educational opportunity for black and Hispanic youth even as the economic changes eliminate employment opportunities for those without income. High school dropout rates are rising and the share of minorities going to college declining. Residential segregation has remained almost untouched by extremely weak fair housing policies and new jobs are being concentrated in outlying suburban areas not accessible by workers from segregated inner city communities. Inner city schools and other institutions have to rely on a constantly shrinking share of metropolitan tax resources to deal with an increasingly impoverished and miseducated enrollment.

No one, of course, thinks that the courts can or should solve all of these problems but they do set the context within which issues are formulated.

One of the basic problems faced by minorities and women is their relative powerlessness. They have few representatives within government and at the top levels of private organizations. More seriously,they face a political environment where the representatives of the status quo generally command most of the resources and where politicians often have more to gain from creating fears of change than from responding to minorities. This is particularly true on matters of race relations where anti-change politicians can often exploit racial fears and prejudices of the majority.

These general problems are compounded by the system of minority veto that is so deeply institutionalized in Congress. The Senate filibuster system blocked anti-lynching legislation for almost a half-century, killed a fair housing enforcement bill in 1980, blocked the Grove City legislation, and, in general, makes it virtually impossible to enact any serious civil rights measure apart from voting rights except when there is an extraordinary majority of the kind last seen almost two decades ago.

The Courts become particularly critical to minority groups during periods when political leadership is hostile to their interests. It is understandable, for instance, that women's groups, whose drive for the Equal Rights Amendment was defeated by a conservative movement that assured women that the Supreme Court would attend to discrimination without the ERA are deeply concerned when a hostile Administration attempts to name a Chief Justice who has clearly and repeatedly said that he believes there is nothing in the Constitution that forbids unequal treatment by sex. It is understandable that civil rights groups fighting a Justice Department committed to resegregating integrated school districts does not want to have a Chief Justice with the same attitude.

We are in a period when enforcement of existing civil rights laws has virtually ceased in many areas, when the relative status of minority and female-headed families has deteriorated, when there have been sharp reductions in provision of such basic essentials as welfare payments for poor children, housing, health care, job training, and others. Existing political leadership attacks both the tools to deal with discrimination directly and the programs to help overcome the effects of past discrimination.

Serious litigators for equal rights rarely go to court because they think that the courts will provide speedy and comprehensive remedies. The courts are slow, cautious and usually incremental in their decisions. Civil rights plaintiffs often lose. They go to court because they believe they have rights and there is nowhere else to go.

They believe that it is inherent in the Constitution that minority rights must be protected by the courts regardless of what the popular majority of the moment may wish to do to minorities. If that is not true, the rights are nothing more than empty promises that the majority may chose to dishonor whenever it wishes. In many of Justice Rehnquist's decisions, however, there is no understanding of the fact that minorities often have no real political alternative and that it is precisely under those circumstances that their legal rights become most important and the role of the courts in protecting them most critical.

The Promise of Fairness. When his nomination to the Supreme Court was pending before the Senate, Mr. Rehnquist and his supporters argued that neither his active opposition to civil rights as a private citizen and a Supreme Court clerk nor his work in the Nixon Justice Department should be taken as reflections of his personal attitudes toward civil rights and civil liberties. Descriptions of his early actions were dismissed as inaccurate or no longer relevant. His statements as a Justice Department official were dismissed as "advocacy," not a statement of personal beliefs. Supporters pointed to the surprising evolution of some earlier Justices after their appointments. Rehnquist fed such hopes with statements that he would divorce his personal political attitudes from his role as a Justice. Moderates in the Senate were encouraged to hope that the rigid ideological conservative would metamorphize into a judge who would look at cases with dispassion and come to terms with the profoundly difficult problems of equal rights in a society of deep and persisting inequality.

The American Bar Association report supporting the nomination explained the civil rights and civil liberties statements as "professional advocacy" or statements of legal "philosophy." Arizona State Senator Sandra Day O'Connor, later to join her law school classmate on the Court, commented: "When Bill has expressed concern about any law or ordinance in the area of civil rights, it has been to express a concern for the preservation of individual liberties of which he is a staunch defender in the tradition of the late Justice Black."

Mr. Rehnquist, in explaining the way he would respond to his responsibilities on the court, invoked another great jurist, Justice Frankfurter and repeatedly promised to separate his personal politics from his decisions as much as possible:

> I have always felt that, as I think Justice Frankfurter said, you inevitably take yourself and your background with you to the Court. There is no way you can avoid it, but I think it was Frankfurter who also said, if putting on the robe does not change a man, there is something wrong with that man. I subscribe unreservedly to that philosophy that when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. (Hearings, 156)

The majority report of the Judiciary Committee, recommending that the Senate confirm Mr. Rehnquist as an Associate Justice dismissed many of his statements as vigorous advocacy, not personal views. It found that he had changed his views on public accomodations and that he was not actually opposed to school desegregation. In dealing with a variety of sweeping statements on civil liberties issues, the Senators relied on the advocacy argument, on statements praising freedom of speech, free press, and other civil liberties before the committee, and on favorable excerpts from congressional testimony and speeches. The majority concluded that, "He sees both sides of the difficult questions in this area, which require working out the delicate balance established by the Constitution between the rights of individuals and the duty of government to enforce the laws."(Report, 13-20) Both Mr. Rehnquist and his advocates promised the country a fair and balanced judge who would not be rigidly ideological and would be open to the claims of all who came before the court. He would not be, they argued vigorously and successfully, the kind of judge who would always vote against civil rights and equal protection and whose vote could be easily predicted without even knowing any specifics of a case.

Justice Rehnquist's Record on the Court.

If there is one thing that is readily apparent from examining the way Justice Rehnquist has voted in more than 3000 cases and the opinions and dissents he has authored is that the critics were right and the supporters were wrong

in their predictions of the meaning of the appointment for litigation affecting minority rights and civil liberties, particularly rights of accused criminals. Mr. Rehnquist immediately placed himself at the extreme right of an increasingly conservative court and has remained there term after term through fifteen years of changing membership and evolving issues. His record in many areas has been almost totally predictable. Whatever the issue, no one on the court is less likely to vote to sustain a claim of minority rights under the equal protection clause and no one is more likely to defend the police against any allegation of unconstitutional action.

One way to understand the extremist nature of his position is to compare it with that of the other conservative justices appointed by President Nixon and President Reagan. One way to look at this question is to use the statistics on Supreme Court voting published annually by the Harvard Law Review and the analysis of the first decade of the Burger Court by Prof. Russell Galloway of the Supreme Court History Project. Galloway's study shows that during the 1969-71 period "the Court underwent one of the most dramatic alterations in its history" as "the liberal wing was decimated and the conservative wing rejuvenated...." When Rehnquist came on the court "control rested in the hands of seven conservatives and moderates led by the conservative four-vote Nixon bloc." The Nixon justices were strengthened in the mid-1970s by the movement of the Court's moderates in a more conservative direction. In these circumstances conservatives dissented far less and

concentrated more on influencing majority decisions that became the law of the land.

As the years passed, each of the other conservative Justices showed some signs of increasing independence of judgment and changing voting patterns as new issues arose. By the October 1977 term of the Court, for instance, both Justice Powell and Justice Blackmun had moved toward more independent patterns of disagreement or agreement on issues on particular cases. Rehnquist remained firmly rooted at the extreme right and had by far the highest dissent rate of the members of the dominant conservative faction. His dissents were often bitter and doctrinaire, even against fellow conservatives who deviated from orthodoxy in response to the special circumstances of the case before them.

The record is particularly striking in the field of equal protection. When I searched Justice Rehnquist's record through the term completed this July via the LEXIS computer system, I was astonished to receive an eight-foot long list of 96 equal protection dissents, five of them this June and July. Reading these dissents one after another for many hours it was very clear that this record was the product of a strongly committed, consistent, and closed mind operating in terms of a philosophy that ignored the realities of American race relations and offered virtually no hope to any minority group that had to rely on judicial protection for its rights.

Professor Davis' 1984 article on Justice Rehnquist's equal protection record offers clear measurements of his

voting record. To that point, she said, "Rehnquist has never voted to uphold a school desegregation plan." Of the seventeen cases of sex classifications in laws that had come before the court, the majority of the justices had struck down more than half but Rehnquist had favored permitting continued different treatment in almost nine-tenths. On the cases about whether it violated equal protection to enact laws treating illegitimate children differently he voted to uphold all of the challenged state laws punishing children for their parents' sins. In a series of cases dealing with the rights of illegal aliens, Rehnquist diverged sharply from the court's majority.

Another study of Justice Rehnquist's record, by Prof. Robert Riggs of the Brigham Young Law School and Thomas D. Proffitt found that he was overwhelmly sympathetic to state and local governments in general when the validity of their actions were challenged. In criminal cases he voted against the rights claimed by the accused criminal in almost nine-tenths of cases from all levels of government. On the other hand he was far less likely than the court majority to vote for access to the federal courts or to sustain claims based on freedom of expression.(see tables 1 and 2).

The overall pattern of Justice Rehnquist's voting, in other words, is clear. He has strongly and consistently supported conservative positions. His record on equal protection and criminal rights cases shows exactly the opposite of what the Senate was told it could expect— a rigid and

Rehnquist Votes Compared With Court Majority For Cases In Which Government Was A Party, Decided By The Supreme Court During Its 1976-1981 Terms

Term	Votes For or Against State/Local Government: Criminal Cases For %	Against	Civil Cases For %	Against	Votes For or Against National Government: Criminal Cases For %	Against	Civil Cases For %	Against
1976								
Rehnquist	19 (86 4)	3	34 (81 0)	8	21 (95.5)	1	19 (86 4)	3
Court Majority	9 (40 9)	13	26 (61 9)	16	18 (81 8)	4	18 (81 8)	4
% Difference	(45 5)		(19.1)		(13 7)		(4 6)	
1977								
Rehnquist	15 (71 4)	6	32 (82 1)	7	14 (82 4)	3	26 (74 3)	9
Court Majority	8 (38 1)	13	22 (56 4)	17	9 (52.9)	8	25 (71 4)	10
% Difference	(33 3)		(25.7)		(29 5)		(2 9)	
1978								
Rehnquist	22 (81 5)	5	26 (74.3)	9	9 (81 8)	2	15 (53 6)	13
Court Majority	13 (48 1)	14	20 (57 1)	15	8 (72 7)	3	15 (53.6)	13
% Difference	(33 4)		(17.2)		(9 1)		(0 0)	
1979								
Rehnquist	19 (95 0)	1	29 (87 9)	4	21 (91 3)	2	27 (64.3)	15
Court Majority	9 (45 0)	11	15 (45 5)	18	14 (60 9)	9	27 (64.3)	15
% Difference	(50 0)		(42 4)		(30 4)		(0 0)	
1980								
Rehnquist	19 (79 2)	5	29 (87 9)	4	10 (100 0)	0	22 (75 9)	7
Court Majority	14 (58 3)	10	21 (63 6)	12	8 (80 0)	2	24 (82 8)	5
% Difference	(20 9)		(24 3)		(20 0)		(- 6 9)	
1981								
Rehnquist	22 (100.0)	0	41 (70 7)	17	9 (90 0)	1	16 (59 3)	11
Court Majority	19 (86 4)	3	25 (43.1)	33	8 (80.0)	2	21 (77 8)	6
% Difference	(13 6)		(27 6)		(10 0)		(- 18.5)	
Total								
Rehnquist	116 (85.3)	20	191 (79 6)	49	84 (90.3)	9	125 (68.3)	58
Court Majority	72 (52 9)	64	129 (53.8)	111	65 (69.9)	28	130 (71.0)	53
% Difference	(32 4)		(25.8)		(20.4)		(-2.7)	

Source of Tables: R. Riggs and T. Profitt, "The Judicial Philosophy of Justice Rehnquist," 16 Akron L. Rev. 55E.

TABLE 2

Rehnquist Votes Compared With Court Majority For Cases Raising Issues Of The Exercise Of Federal Court Jurisdiction, Freedom Of Expression, And The Validity Of State Acts, Decided By The Supreme Court During Its 1976-1981 Terms

Term	Votes For or Against Validity of States Acts: For %	Against	Votes For or Against Federal Jurisdiction: For %	Against	Votes For or Against Freedom of Expression: For %	Against
1976						
Rehnquist	58 (85 3)	10	4 (19 0)	17	2 (15 4)	11
Court Majority	38 (55 9)	30	7 (33.3)	14	6 (46 2)	7
% Difference	(29 4)		(- 14.3)		(- 30.8)	
1977						
Rehnquist	54 (78.3)	15	5 (33 3)	10	2 (18.2)	9
Court Majority	34 (49.3)	35	7 (46 7)	8	4 (36.4)	7
% Difference	(29 0)		(- 13.4)		(- 18 2)	
1978						
Rehnquist	53 (79 1)	14	10 (40 0)	15	1 (14 3)	6
Court Majority	38 (56 7)	29	11 (44 0)	14	1 (14 3)	6
% Difference	(22 4)		(- 4 0)		(0.0)	
1979						
Rehnquist	52 (85.2)	9	13 (50 0)	13	0 (0 0)	12
Court Majority	27 (44 3)	34	22 (84 6)	4	7 (58 3)	5
% Difference	(40.9)		(- 34 6)		(- 58 3)	
1980						
Rehnquist	52 (77 6)	15	5 (21 7)	18	0 (0 0)	7
Court Majority	38 (56 7)	29	9 (39 1)	14	3 (42 9)	4
% Difference	(20 9)		(- 17 4)		(- 42 9)	
1981						
Rehnquist	64 (77 1)	19	18 (36.7)	31	5 (38 5)	8
Court Majority	39 (47 0)	44	24 (49.0)	25	7 (53 8)	6
% Difference	(30 1)		(- 12.3)		(- 15.3)	
Total						
Rehnquist	333 (80 2)	82	55 (34 6)	104	10 (15 9)	53
Court Majority	214 (51 6)	201	80 (50.3)	79	28 (44.4)	35
% Difference	(28.6)		(- 15.7)		(- 28.5)	

closed mind, less sympathetic to plaintiffs claiming Constititional rights than any other Justice in recent history. There is very little evidence that the robe has changed the man.

The general pattern is distressing but it adds a great deal to the statistical analysis to read individual decisions. In his response to the great issues that came before the court, both the implications of Rehnquist's legal and political philosophy and the nature of his personal values become much clearer.

Rehnquist's opinions on minority rights issues rarely show any serious effort to understand either the nature of the substantive problem or the extent to which a group has come to court because it has been totally impossible for them to obtain any recognition of their rights from the elected branches of government for a very long time. These questions are irrelevant, in Rehnqist's view because he believes that the Constitution offers virtually no protection against governmental action to women and many other groups and only minimal protection to minority groups that can surmount extraordinary burdens of proof. Often he disposes of equal rights claims on technical grounds, treating the issue as simply one or deductive logic.

His values come out most clearly, however, in dissents, when he passionately disagrees with some action the Court's majority has taken, particularly in the fields of school desegregation and affirmative action. In these cases the legal technician gives way to the angry partisan using

a combination of bitter attacks, cynical satire, and predictions of doom.

Rehnquist's dissent in Steelworkers v. Weber , 443 U.S. 193, assails the Court's approval of a voluntary agreement by labor and management to implement minority hiring goals to overcome a history of discrimination in the firm. In his dissent, Justice Rehnquist accuses his colleagues of engaging in the doublespeak and big lie techniques described in George Orwell's, 1984 , a biting satire of a totalitarian state that constantly engages in official lies. He claims that the majority is concocting false "legislative history: and engaging in "a tour de force reminiscent not of juristssuch as Hale, Holmes, and Hughes, but of escape artists such as Houdini...." He is characteristically uninterested in the nature of the problem the agreement was supposed to address, saying merely that virtually no black craftsmen had been hired earlier because "few were available in the Gramercy area...." We do not learn why they weren't available or why workers could be found after the voluntary plan was adopted. That is not relevant. In his conclusion, Rehnquist describes affirmative action as "a creator of castes, a two-edged sword that must demean one to prefer another." He warns apocalyptically that "later courts will face the impossible task of reaping the whirlwind."

In a decision handed down less than a month ago, Local Number 93 v. City of Cleveland, Slip Opinion, July 2, 1986, Rehnquist continued this battle. He attacked the Court's decision sustaining a voluntary consent agreement between the firefighters union and the Cleveland city government

providing policies to increase the promotions of black and Hispanic firemen. He called it "simply incredible" that the majority "virtually read out of existence" the evidence on Congress' intent. He argued that the plan harmed whites and that no minority worker should receive any special treatment unless that individual could "prove that the discriminatory practice had an impact on him." There was, once again, no significant discussion of the nature of the historic discrimination, the desirability of voluntary change, or the likelihood that the remedy he preferred would have worked.

Another dissent came this June in Sheet Metal Workers International Assoc. v. EEOC, 54 LW 4984 (June 24, 1986) The Court's majority found the order of the lower court to be "properly and narrowly tailored to further the Government's compelling interest in remedying past discrimination." Rehnquist's dissent objected to "ordering racial preferences that effectively displace non-minorities." Here and elsewhere we find the special solicitude for the rights of whites that is so characteristic of the policy of the Reagan Justice Department and the Reagan civil rights offices.

Rehnquist has also been the leading dissenter on school desegregation. His dissent in the 1973 Denver case, Keyes v. School Dist. No. 1, Denver, Colorado,413 U.S. 189, was the first major dissent after eighteen years of unity by the court following the 1954 decision. He called this decision extending desegregation to Northern cities a "drastic extension of Brown." Since that time there have been no significant expansions of desegregation law, primarily because

the Nixon majority cut off the possibility of city-suburban desegregation in most circumstances in its 5-4 decision in the Detroit case. Nonetheless, Justice Rehnquist has very strongly objected to the Court's permitting metropolitan desegregation to take place in Wilmington, Deleware and to the Court's reaffirmation of the Denver decision in the 1979 Dayton and Columbus cases. Had Rehnquist's position prevailed there would have been large-scale return of minority students to segregated schools.

When the Supreme Court declined to review the Wilmington order in 1975, Rehnquist dissented, calling the remedy "more Draconian than any ever approved by this court." He claimed that his colleagues were ignoring the Detroit decision and accepting "total substitution of judicial for popular control of local education." (Deleware State Board of Ed.. v. Evans, 446 U.S. 923). In another dissent at a later stage of the case he said, "My dissent ... is based on my conviction that it is extraordinarily slipshod judicial procedure as well as my conviction that it is incorrect."(Buchanan v. Evans, 423 U.S. 963)

Rehnquist's role was much more extensive in the case of Columbus, Ohio, which led to the last major decision by the Supreme Court to the present. Columbus was due to implement a large desegregation plan in September 1978. In mid-August, after the Justice for the Circuit, Potter Stewart, rejected an application for a stay, Rehnquist signed a stay that cancelled the entire desegregation plan affecting 42,000 students just before school opened. When the case was heard

later by the full Court and the decision rejected his preference for requiring proof of violations for each individual school to be desegregated he dissented very strongly, denouncing the decision as "as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system." He attacked his brethern for "lick and a promise" opinions and a "radical new approach" which created a "tight noose" on school boards.

He claimed that the Supreme Court, in reaffirming the Keyes decision, was following a policy he described as "integration über alles," a takeoff on the Nazi anthem. He charged the majority with creating a "loaded game board" and acting like "Platonic Guardians", superceding local democracy. The decision, he said, violated the "intellectual integrity" of the Court. As in the case of affirmative action, he used the image of dictatorship to describe civil rights plans.

In one striking part of his Columbus dissent, Rehnquist clearly identified with the Court's white critics. "Our people," he wrote, "instinctively resent coercion, and perhaps most of all when it affects their children and the opportunities that only education affords them." Obviously, "our people" referred to the white opponents not the black supporters of the court order. Nor was there anything about the black allegations, which had convinced the majority, that their children had been coerced into segregated schools and denied the "opportunities that only education affords them." (Columbus Board of Ed. v. Penick, 443 U.S. 449.)

It would be possible to extend this discussion of cases, quoting from dissents finding it permissible for school boards to take books they don't like out of libraries, supporting discrimination against illegitimate children, allowing school boards to arbitrarily fire teachers early in their pregnancies, allowing resident aliens to be denied benefits of college assistance programs, allowing a property qualification for voting and many others. Two other examples from the field of minority rights, however, should suffice to illustrate Rehnquist's approach. The first deals with the battle over tax privileges for openly discriminatory private schools. The second with rights of Indian tribes.

The Bob Jones Univ. case (461 U.S. 574) was one of the most celebrated of recent years, featuring a dramatic change of position by the Reagan Justice Department, an extraordinary appointment of an advocate for the government's former position by the Supreme Court, a major congressional controvery and an embarassing defeat for the Administration in court. Rehnquist found nothing wrong with the policy of tax exemptions for segregated schools, finding that Congress had no intent to deny them when it acted in 1894 and 1913 on tax legislation. He said that it would not violate the equal protection clause of the Constitution if Congress were to pass a law granting exemptions to "organizations that practice racial discrimination." Unless someone could prove that their practices were "intended" to discriminate, policies that had the effect of discrimating could not only be accepted but subsidized.(footnote 4).

Few groups have had a more miserable experience dealing with both state and federal governments than American Indians. Solemn promises and eternal guarantees have been violated with monotonous regularity. As an extremely small and impoverished part of the population, often subject to severe local discrimination, Indians rarely have success in achieving political reforms. The degree to which the federal courts will protect the rights of the Indians and their tribes is an important test of American justice.

In a 1980 decision, Washington v. Confederated Tribes, Rehnquist dissents from a majority decision saying that there is no need to balance interests to determine the tax immunity of a tribe (an issue which is of the greatest importance in determining the viability of tribal economic activities) but that the courts should simply enforce whatever they think Congress wished. In a footnote that has a peculiarly ironic ring for students of Indian history, Justice Rehnquist attempts to offer reassurance:

> ... Indian tribes are always subject to protection by Congress. This source of protection is more than adequate to preclude any unwarranted interference with tribal self-government. Congress, and not the judiciary, is the forum charged with the responsibility of extending the necessary level of protection.... (447 U.S. 134, footnote 11)

Many tribes have, of course, been "protected" out of almost all of their resources and many of their rights and immunities. A similar attitude appears in other cases, including one just decided, Three Affiliated Tribes v. Wold Engineering, Slip Opinion, June 16, 1986, in which he dissents from Justice O'Connor's opinion against a North Dakota state law denying

tribal access to state courts unless the tribe waives its sovereign immunity on all issues under state law. In characteristic Rehnquist fashion the decisions are abstract and ideological, there is no grappling with the realities of the problems encountered by the powerless, and history is recast in a way that simply denies the conflict between democratic institutions and minority rights that is so fundamental in the history and law of minority rights litigation.

The Basis and Significance of the Record.

Mr. Rehnquist's record on the rights of minorities and women is no accident. It grows directly out of a legal philosophy that makes it almost impossible for minorities to win in court. It is a philosophy based on a radical rejection of the extension in the protection against discrimination that grows out of almost a half-century of litigation and landmark Supreme Court decisions. Rehnquist believes that those precedents are largely based on a misunderstanding of the Constitution and that he has the correct understanding of the intent of the framers. In Mr. Rehnquist's view, spelled out in many decisions and in his article,"The Notion of a Living Constitution," the framers of the Fourteenth Amendment, for example, had no intention to protect women or any other non-racial minority group against discrimination and thus there is no constitutional basis for a serious challenge to unequal laws. So far as minorities are concerned, he believes that the 14th Amendment was intended to address the problems of the last century in

the South, not the problems of contemporary blacks and Hispanics.

When claims are raised by racial minorites, who, Rehnquist concedes, do have a right to come to court under the Fourteenth Amendment, a number of the other elements of his legal philosophy come into play. He favors policies making it more difficult to come into federal courts by favoring state court jurisdiction and limiting standing. He believes that it is not sufficient for racial minorities to prove that official decisions had the consistent and foreseeable consequence of discrimination but that they must also prove the intent to discriminate, something that is exceedingly difficult given the reluctance of officials to admit to racial prejudice or intentional violations of minority rights. Even if there is intent, he favors a standard of proof that would require civil rights lawyers to show that each individual school was intentionally segregated and that each individual minority worker receiving a remedy was personally victimized by discrimination. Under his standards it is doubtful that all the civil rights lawyers in the U.S. could desegregate thoroughly one major corporation or one major urban school district. Certainly there would be no trial court capable of handling the volume of evidence that would be required. Such a standard would, in all probability, end school desegregation litigation and reduce employment discimination cases to a relatively small number of individual grievances. Affirmative action requirements would vanish and school districts would be free to dismantle desegregation

plans affecting millions of students, sending the black and Hispanic children back to their segregated and unequal schools.

Mr. Rehnquist's jurisprudence does not discuss the question of whether or not a remedy will work or whether or not it will solve the problem the minority plaintiffs bring to court. (He does, however, discuss with urgent concern the effect of court-ordered remedies on whites.) His concern is with limiting the range of judicial action to the greatest possible extent, not with assuring that the institutions are changed so that the operate in genuinely not racial ways or provide genuinely equal opportunities to the groups previously victimized by discrimination.

One of the most disturbing elements of Rehnquist's decisions is the way in which his ideology and philosophy swamp any serious treatment of the facts of the case and the situation of the individual or group appealing for justice. The reader finds not a searching and illuminating consideration of the particular problem and a difficult balancing of rights, practical conditions, and possible remedies, but the forcing of the particular facts into a preformed mold, even if it requires filtering out much of reality.

At its worst, the Rehnquist technique devolves into recreating the facts to fit the preconceptions, ignoring important parts of reality and slanting both the description of the facts and the opposing legal arguments in ways that result in a systematic distortion of the case's central features.

These problems are skillfully illustrated in an analysis way in which Rehnquist reshaped the case of a Louisville man claiming that his rights had been violated by the printing of his name and photo in a widely distributed police brochure entitled "Active Shoplifters" even though he had never been tried or convicted of the offense. Professor Robert Weisberg analyzes the way in which the issues in this case are restructured in Rehnquist's opinion to justify denial of the plaintiff's claim. Rehnquist's statement of the facts of the case, for instance, is the first sign of the problem. Before the reader ever learns about the claim of the Louisville man there are twenty lines setting up the problem from the perspective of the local police. By the time we find out about the plaintiff's allegation "the reader has assimilated a pleasant picture of two dutiful officers ... who 'agreed to combine their efforts' to prevent crime, all of this 'during the Christmas season.'" The uncomfortable fact that a man who was never tried should be presumed innocent and not publically proclaimed as guilty and as a continuing "active shoplifter" led to a strange characterization. Rehnquist said that "his guilt or innocence of that offense had never been resolved, although later the shoplifting charge was 'finally dismissed.'" The process of stacking the deck proceeds:

To appreciate the structure of *Paul v. Davis*, we need only start with Justice Rehnquist's overt compartmentalization. Prior to part I, he sets forth the "facts."[292] These fifty-nine lines thus are made to seem almost by-the-way; yet, as we have indicated, they serve a vital coloring function.[293] It is only in the sixty-four lines that constitute part I,[294] however, that Justice Rehnquist educes his basic structuring thesis: Davis, through the temerity of his claim, challenges an ordered system of law. Masterful in its progression, this part builds on the reader's skepticism, imbued earlier, about a respondent who, after all, *had been arrested*.[295] Justice Rehnquist continues to depict Davis as opposing, in turn, the basic premises of the federal system,[296] the police who are trying "to calm the fears of an aroused populace,"[297] the natural limits of legal liability,[298] and the studious reflectiveness of the Court itself.[299] . . . .

Justice Rehnquist cogently chooses words to set Davis up against one or more of his audience's basic values. We noted the centrality to substance of the embellishing words "concededly," "transmuted," "drafted," and "shepherded."[301] The concluding phrase, "a study of our decisions convinces us they do not support the construction urged by respondent,"[302] climaxes the mounting sense of uneasiness about Davis. Davis has challenged the police, and, according to Justice Rehnquist, the legislative drafters of a noble amendment; but his gravest offense, it seems, is attempting to distort the studious processes of the Supreme Court itself. . . .

To convince his audience that the court below should have been more reflective, Justice Rehnquist immediately introduces the primary formal device of the rest of the opinion: the positing of "premises" from which his logic seems inevitably to flow. But these premises, usually expressed in what Cardozo called the "type magesterial,"[304] are often crafted out of Justice Rehnquist's whole cloth.

The analysis offers many more examples, but they are not important here. The basic observation of Professor Weisberg and my basic impression in reading scores of opinions and dissents is that all too often they read like preconceived decisions seeking a rationale, often at considerable cost in ignoring or distorting the facts. This approach helps to explain the extrme conclusions that Rehnquist reaches compared with his fellow conservatives.

Mr. Rehnquist's orientation toward politics and toward issues on the court has been one of extraordinary consistency and predictability and there are no signs of significant growth or change. He has never believed that law should change existing racial arrangments, except to deal with a few individual problems. For the rest, Rehnquist believes that the courts should do nothing, that governmental action is counterproductive, that the white majority will take care of any real problems through the democratic process, and that there should never be remedies that aid blacks or Hispanics as a group in ways that deprive whites of some opportunities.

One dominant impression of Mr. Rehnquist's writing is that he lives in another country. It is a country where minority legal claims are only intellectual puzzles and where those claims and the half century of decisions implementing them are misguided. It is a world where blacks and Hispanics coming to court asking for more and different governmental action are almost always wrong and where police defending their kinds of controversial governmental action are almost always right. It is a world where a main threat to the social order is from courts which are unfair to whites and to local control.

The basic problem is not that Justice Rehnquist does not believe what he writes or that he does not often express it in an interesting or arresting way. The problem is that there is little relationship between the historic and contemporary experiencs of minority people in the U.S. and the version that exists in Rehnquist's mind.

Were Rehnquist to lead a court with the kind of majority that could be created by two or three additional appointments we would risk repeating one of the most disgraceful stories in our legal history, the Supreme Court's emasculation of the laws and constitutional amendments of the Reconstruction which culminated in the 1896 Plessy decision. The courts accepted and legitimated the erection of the system of de jure segregation in the South and closed the door to minority litigants, with few exceptions, for almost sixty years. The specific issues would be different but the consequences would be very similar if Rehnquist's views became the law of the land.

If minorities and women are to share confidence in our legal system and hope for justice and opportunity in our society, it is very important that leading figures in the white community take this nomination seriously as a statement about our future. We are not selecting a law professor or a philosopher. We are selecting the leader of our system of justice, a leader who may serve into the next century. I believe that most Americans and most members of Congress are proud of what we have accomplished in moving toward equal rights and few wish to turn backwards. This nomination is a symbol of retreat and reaction from our common dream. It would threaten shrinkage of the rights of millions of Americans. I urge the members of the Senate to withhold their consent and to advise the President to submit a nomination of a Chief Justice who can help a deeply divided court deal with the problems of a divided society with growing inequality.