The original documents are located in Box 46, folder "Supreme Court Justice Nominees" of the Betty Ford White House Papers, 1973-1977 at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

November 13, 1975

Dear Mrs. Ford:

Thank you so much for entertaining the National Council of Negro Women this afternoon. I know they were thrilled--and I always am!

I'm enclosing a very loose list of names we rushed off to Doug Bennett this morning. I thought this might be of interest to you.

Sincerely,

Pat

Patricia S. Lindh
Special Assistant to the President

Mrs. Ford
The White House

THE WHITE HOUSE
WASHINGTON

November 17, 1975

Mrs. Ford:

I spent some time with Elly Peterson yesterday and she was MOST anxious that you were familiar with Mary Coleman, Michigan Supreme Court Justice.

Elly would like you to lobby on Mary Coleman's behalf for the US Supreme Court.

thank you

marba

November 13, 1975

MEMORANDUM FOR: DOUG BENNETT

FROM: PAT LINOH

SUBJECT: Candidates for Supreme Court Justice

This is an unrefined list of candidates for the position of Supreme Court Justice. We are sending it to you for your information and consideration.

BACON, Sylvia - Judge, D.C. Superior Court

COLEMAN, Mary - Judge, Supreme Court of Michigan - Republican

COOPER, Julia - Judge, D.C. Court of Appeals

GRIFFITHS, Martha - attorney, former Congresswoman from Michigan - Democrat

HALL, Cynthia Holcomb - Judge, United States Tax Court

HAUSER, Rita - attorney - New York - Republican

HAYWOOD, Margaret - Judge, Superior Court of D.C.

HILLS, Carla - Secretary, HUD - Republican

HUFSTEDLER, Shirley - Circuit Judge, U.S. Court of Appeals, Ninth Circuit, Los Angeles

JOHNSON, Normalie Holloway - Judge, Superior Court of D.C.

KELLEY, Florence - Judge, New York City

KENNEDY, Cornelia - U.S. District Judge, Eastern District of Michigan - Rep.

KOVACHEVICH, Elizabeth - Judge, Judicial Circuit Court of Florida - Rep.

MENTSCHIKOFF, Soia - Dean of the Law School, University of Miami, Fla.

MURPHY, Betty Southard - Chairman, National Labor Relations Board - Rep.

NELSON, Dorothy - Dean of the Law School, USC - Independent

ROBB, Harriet - Professor of Law, Columbia

SHARP, Susie - Judge, Supreme Court of South Carolina - Democrat

news from the
National Public Information Office
NATIONAL ORGANIZATION FOR WOMEN (NOW)

1266 National Press Building
Washington, D. C. 20045
(202) 638-6054

TO: All recipients of N.O.W. testimony in the matter of the Supreme Court nomininee, John Paul Stevens

DATE: 8 December 1975

RE: future additions, amendments and corr ections in the testimony

___ For your information

___ As per your request

___ As per our conversation

___ Please return

___ Call/Write/See me about this

___ Need your recommendations/ comments/approval

___ Answer or acknowledge on or before _____

REMARKS: Please do not regard this manuscript as finished. N.O.W. reserves the right to make corrections, amendments and additions before final presentation. This is an advance copy for your convenience only and the text is not to be regarded as final.

ERRATUM: page 9. last paragraph. After word 'clear' Insert the following:"The National Organization for Women opposes Judge Stevens confirmation not solely because of Judge Stevens' consistent opposition to women's rights, but more importantly, because Judge Stevens has demonstrated that his legal opinions on women's issues are based on an apparent personal philosophy and not on the facts and laws of the cases before him. The fact that he has consistently opposed women's rights in all those decisions in which he participated while sitting on the Circuit Court raises the questions of whether he can fairly, judiciously and impartially review those cases which would reach him as a Justice of the Supreme Court and whether he could render fair and impartial decisions governed by laws and facts applicable to each case. His history as a Circuit Judge clearly indicates that he cannot. In many of his decisions he has been at odds with his own Circuit. More importantly, he has refused guidance from the Supreme Court decisions on these issues by which he was bound as a Circuit Judge. His decisions have flown in the face of the applicable laws duly passed by a Congress elected by the people,both men and women. Thus,N.O.W. believes that Judge Stevens lacks impartiality--a requisite for appointment to the Supreme Court."

NATIONAL ORGANIZATION FOR WOMEN

TESTIMONY OF THE NATIONAL ORGANIZATION FOR WOMEN (N.O.W.)

in the matter of the

Nomination of John Paul Stevens to the Supreme Court of the

United States of America

9 December 1975

Good morning. My name is Margaret Drachsler speaking for the National Organization for Women (NOW), an organization of 60,000 women, with over 700 chapters throughout the country.

I am here to express my grave concern regarding both the nomination of John Paul Stevens to the Supreme Court and the manner in which it was accomplished. This appointment was made by a President who has not been elected to the Presidency and who was never elected to any office by a constituency larger than a Congressional District. Each member of this Committee has a statewide constituency.

At the outset, NOW wishes to express the feelings of millions of women and men today: it is time to have women on the Supreme Court. After 200 years of living under laws written, interpreted, and enforced exclusively by men, we have a right to be judged by a court representative of all people--more than half of whom are women. The President owes us a duty to begin to eliminate the 200 years of discrimination against women. In our judicial system, this could be partially accomplished by appointing a woman to the Supreme Court. He failed us. NOW it has been predicted that the Senate will ignore our plea for justice and confirm yet another man to rule on cases concerning the nation's majority--women. I urge the Committee to exercise great caution in reviewing this nomination. The Committee's responsibility is all the greater in these unique circumstances.

The entire process by which Judge Stevens was selected was dominated by men. The President's policy advisors were all men--only after extensive public outrage did the President even bother to add the names of two women to the list referred to the American Bar Association for evaluation.

The ABA committe which reviewed the President's list of candidates, does not have one woman among its eleven members,[1] although in 1974 women made up 7 percent of all lawyers and judges in the nation[2] and almost

20 percent of law school enrollees.[3] Just as in Title VII cases[4] the courts have increasingly recognized the potential for bias in evaluations of minorities by whites and of women by men, so too the ABA comittee, dominated by white men, cannot be inferred to be without sex or race bias. Thus, it is not surprising that the exceedingly few women who were submitted by the President for evaluation were not given a top score as was Judge Stevens. Nor is it surprising that the man chosen by them has a record of consistent opposition to women's rights. In case after case, he expressly opposed women's interests. These cases are important. They warrant review.

In Rose v. Bridgeport Brass Co., 487 F.2d 804 (7th Cir. 1973), Judge Stevens erroneously construed the law and revealed his lack of understanding of sex discrimination. In Rose, the plaintiff alleged that she had been the victim of discrimination when a job reclassification by the defendant employer resulted in reducing the percentage of women in the job from 55 to 10 percent. Under Title VII, an employment action or practice which is seemingly neutral, but which operates to exclude or adversely impact on a group by race or sex--such as the action involved in this case--is prima facie unlawful.[5] When the plaintiff shows that an employment practice excludes proportionately more women than men, as here, then the burden shifts to the employer to come forward with evidence showing that the practice is compelled by "business necessity".[6] The term "business necessity" in a Title VII context means necessary for the safe and efficient operation of the enterprise.[7]

In Rose, the plaintiff's statistical showing should have shifted the burden of proof to the defendant employer; however, the federal district court erroneously dismissed the plaintiff without shifting this burden. The majority of the Court of Appeals for the Seventh Circuit reversed, stating that the statistical information--

surely raises the possibility that the job reclassification has a discriminatory effect.[8]

Judge Stevens stated in his dissent from the majority that he would have affirmed the district court's decision even though he himself, acknowledged that the lower court had applied the wrong procedural standard in granting summary judgment for the defendant.[9] Judge Stevens based his dissent on what he perceived to be the failure of the plaintiff to include any evidence of discriminatory intent on the part of the employer. Significantly, the Supreme Court, two years earlier, had stated in Griggs v. Duke Power Co., 401 U.S. 424 (1971), a Title VII race discrimination case, that the existence of discriminatory intent is not a prerequisite to making out a Title VII violation. Judge Stevens, however, erroneously construed Griggs not to apply to the sex discrimination case before him.

In 1973, the Supreme Court in Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179, held that a woman has an absolute right to choose whether to have an abortion during the first trimester of pregnancy and a qualified right thereafter. The guarantee of this Constitutional right has not been forthcoming, however, to hundreds of thousands of women who live in areas where the only available medical facilities close their doors to women and their doctors seeking to exercise this right.

Judge Stevens is partly responsible for this tragic development. Some six months after the Supreme Court's landmark decision, Judge Stevens ruled, in Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973), that a woman two months pregnant, trapped by a severe snowstorm in her own county--which contained only private hospitals which refused to allow her doctor to terminate her pregnancy--was not entitled to relief. Bellin Memorial Hospital was regulated by the State of Wisconsin and had received extensive Federal funding under the Hill Burton Act[10] as well as other

Federal programs.

In a case challenging race discrimination by a private hospital with Hill Burton funds, the Court of Appeals for the Fourth Circuit found, in 1963, that there was sufficient state government involvement ("state action") to extend the constitutional prohibitions against race discrimination to the hospital.[11] The Fourth Circuit[12] has applied this rule to the question of a woman's right to choose. The Court of Appeals for the Sixth Circuit has found a private hospital to reflect sufficient state action on a slightly different rationale.[13] But Judge Stevens, seeming to bend over backwards to limit this basic right due all women, rejected the Fourth Circuit precedent, finding the amount of state involvement insufficient to require Bellin Memorial Hospital to open its doors to the plaintiff's doctor.

The courts of appeals are currently divided on this issue,[14] and the Supreme Court recently declined to review the question.[15] Thus, the law will remain unsettled. Nevertheless, it cannot be overemphasized that the women of this nation will view a vote to approve Judge Stevens as a vote to limit the rights of many women to choose whether to have a child.

The opinion of Judge Stevens in Dyer v. Blair, 390 F.Supp. 1291 (7th Cir. 1975), provided yet another example of this tendency. The facts were that the Illinois Senate had voted on the Equal Rights Amendment (ERA) during the 77th General Assembly and, on the strength of a simple majority, entered in its journal that ERA had passed and referred ERA to the House of Representatives. The House did not act during that session. When the 78th General Assembly was convened, opponents of ERA engineered a procedural change, the "Rule 42". Rule 42 required proposed amendments to the federal Constitution to pass by a three-fifths vote rather than a simple majority. When the vote was taken in the House, ERA received more votes than required

for a simple majority, but fewer than three-fifths. It was declared to have failed. As might have been expected, Judge Stevens upheld the three-fifths rule, the practical effect of which was to defeat ERA in the State of Illinois.

In Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), rehearing en banc denied, the Seventh Circuit Court of Appeals was presented a fact pattern in which most laypersons would have found sex discrimination. Mary Burke Sprogis, a stewardess with United, had been discharged for violating the company's rule that stewardesses must be single and remain so. The company had no such rule governing male stewards, nor did it apply the policy against marriage to other female employees. In other words, all women who worked as cabin attendants were prohibited from marrying; all men who worked as cabin attendants were permitted to marry and retain their employment.

The EEOC, charged with the responsibility of enforcing Title VII's mandate, had had no trouble finding sex discrimination, having a regulation that covered the situation. The trial court had had no trouble finding sex discrimination, granting plaintiff's motion for summary judgment. Nor did the majority of the Court of Appeals.

The majority held that Section 703(a)(1) is not confined to explicit discrimination based solely on sex (at 1198), noting a Congressional intention to eliminate the "irrational impediments to job opportunities and employment which have plagued women in the past," and that "the effect of the statute is not to be diluted because the discrimination adversely affects only a portion of the protected class".

The majority rejected United's claims that the no-marriage rule reflected a bona fide occupation qualification. In so doing, it followed the precedent of Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

Stevens, dissenting from this reasoned opinion, strained mightily to find no discrimination, revealing an extraordinary lack of sensitivity to the problems women face in the marketplace. This lack of sensitivity makes his nomination to the uniquely powerful Supreme Court unacceptable to women.

Stevens found no discrimination present, asserting that United had discriminated in favor of women since it hired more female attendants than male. He appeared totally unaware that in most of the worst cases of race discrimination, blacks have been disproportionately hired into specific jobs, a phenomenon which has been given the name "affected class" in the law of employment discrimination. He argued, in addition, that United did offer defrocked stewardesses ground jobs if their seniority and qualifications permitted. This argument obviously fails to meet the central issue of any discrimination, namely the disparate treatment. If it has any bearing at all, it can only go to the question of damages. Next, he glossed over the disparate treatment accorded female cabin attendants by viewing the no marriage rule, rather than as an invasion of a fundamental freedom, as an employment qualification. At no time in his argument did he analyze the central question: did this so-called qualification have rational connection with job performance?

Finally, he questioned the deference the majority paid to the regulations of the EEOC which were squarely in point. Finding that Mrs. Sprogis had not been discharged because of her sex, he dispensed with the contrary EEOC regulation in one sentence. To do so, of course, runs counter to the authority of the Supreme Court itself. The Supreme Court had spoken to this point in Griggs v. Duke Power Co., 401 U.S. 424, 434, some three months before argument was heard in the Sprogis case. Judge Stevens did not attempt to distinguish the language of the Supreme

Court. He made no mention of it whatever, despite the fact that the majority from whom he dissented cited it. This summer the Supreme Court reaffirmed the point in Moody v. Albemarle Paper Co., 43 L.W. 4880, June 24, 1975, so it cannot be argued that the Court has ever espoused the Stevens' position.

We also note that the case list prepared by the American Bar Association has incorrectly credited Judge Stevens with writing the majority opinion, whereas, in point of fact, he dissented from it.

Judge Stevens' propensity to find against female plaintiffs was again demonstrated in Cohen v. Illinois Institute of Technology, 74-1930, (7th Cir. October 28, 1975), a case in which a woman, repeatedly denied tenure, alleged sex discrimination by a private higher-education institution receiving federal and state funds. In his opinion, Judge Stevens denied the plaintiff any discovery rights to establish facts supporting her state action claim on the grounds that she had failed to allege that the state had "affirmatively supported or expressly approved any discriminatory act or policy, or even had actual knowledge of any such discrimination".[16]

Judge Stevens thus requires civil rights plaintiffs to show affirmative conduct by the state in support of discrimination. However, the Supreme Court in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), took a position far more supportive of civil rights, when it found mere acquiescence by the state in the discrimination to be sufficient:

> By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service [to blacks], but has elected to place its power, property and prestige behind the admitted discrimination.[17]

Moreover, the burden imposed by Judge Stevens on the woman in this case

went far beyond that required by other courts of appeals considering similar claims by women asserting their rights to equal employment.[18]

The important thing to remember about Judge Stevens' participation in Bowe v. Colgate, 489 F.2d 896 (7th Cir. 1973), is that the real decision of this case had been made by the Court of Appeals before his appointment. Therefore, his silent acquiescence in the unanimous court's opinion on the limited and secondary issues presented when Bowe v. Colgate was appealed the second time cannot be taken as evidence of sensitivity to women's issues. Judge Stevens has never been the author of an opinion on behalf of a woman litigating a "women's issue". He wrote some 240 opinions during his tenure.

To prove my point, some discussion of the Bowe opinion is necessary. In 1967, the trial court had received this case in which the employer had permitted women to work in only four of its seventeen departments. In these four departments, the highest pay available was equal to the lowest pay in the thirteen other departments where only men were employed. The trial court found discrimination (Bowe v. Colgate-Palmolive Co., 272 F.Supp. 332 (S.D.Ind., 1967)) and awarded damages to twelve plaintiffs. When it was appealed to the Seventh Circuit Court of Appeals, the appellate court expanded the class entitled to recovery and held that the defendant was also committing an unlawful employment practice in its exclusion of women from jobs requiring the lifting of more than 35 pounds. The trial court then issued an injunction which opened all jobs without discrimination as to sex, effected certain changes in seniority and awarded back pay to some 54 females. Some of the class members were satisfied with the trial court's remedies, but others were not and appealed. It was only at this juncture that the case came within purview of Judge Stevens, six years after the pretrial finding of

discrimination had been made by the trial court, and four years after the appellate court had enlarged the class and established the additional ground. The second time the basic issues were only whether (1) to order plant seniority to replace departmental seniority, which the Circuit Court declined to do, and (2) the trial court had correctly computed back pay--and there some modifications were ordered.

The point is clear. Judge Stevens was not sitting when the basic issues came to the court, and should not be credited for them. When the case returned to the court, his most positive role was that he refrained from dissenting on the disposition of the minor issues presented at that time.

In conclusion, the National Organization for Women believes that from this record an antagonism to women's rights on the part of Judge Stevens is clear. For this reason, we oppose his confirmation. Thank you.

I will now submit myself for questions.

FOOTNOTES

1. Telephone interview with Mr. L. Potter, Executive Assistant to the President, American Bar Association, December 5, 1975.

2. U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review 28 (November 1975).

3. Id. at 50. In 1974, more than 23 percent of first year law students were women. Id.

4. See, e.g., Muller v. U.S. Steel Corp., 509 F.2d 923 (10th Cir. 1975); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 93 S.Ct. 319 (1972); Rowe v. General Motors, 457 F.2d 348 (5th Cir. 1969).

5. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Coopersmith v. Roudebush, 10 C.C.H. Emp. Prac. Dec. ¶ 10,354 (D.C.Cir. 1975); Davis v. Washington, 512 F.2d 956 (D.C.Cir. 1975), cert. granted, __U.S.__ (1975); Boston Chapter, NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, __U.S.__ (1975); Rogers v. International Paper Co., 510 F. 2d 1340 (8th Cir. 1975); Harper v. T.W.A., No. 75-1039 (8th Cir. November 18, 1975); Shack v. Southworth, 10 C.C.H. Emp. Prac. Dec. ¶ 10,342 (6th Cir. 1975); Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Gregory v. Litton Systs., 472 F.2d 631 (9th Cir. 1973); Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Bridgeport Guardians v. Members of Bridgeport Civil Service Commission, 482 F.2d 387 (2d Cir. 1973); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); and Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

6. Griggs v. Duke Power Co., supra at 4.

7. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

8. 487 F.2d 809.

9. The district court, in treating the defendant's motion to dismiss as a motion for summary judgment pursuant to Fed. Rules Civ. Proc. 12(b), erroneously held the plaintiff to a preponderance of the evidence test. (487 F.2d 813)

10. 42 U.S.C. § 291, et seq.

11. Simikins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964).

12. Doe v. Charleston Area Medical Center, Inc., No. 75-1161 (4th Cir. November 6, 1975); Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974).

13. O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973).
14. Cases reaching a conclusion contrary to that of the 4th and 6th Circuits include: Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc., 507 F.2d 1103 (9th Cir. 1974); Barrett v. United Hospital, 376 F.Supp. 791 (S.D.N.Y.), aff'd mem., 506 F.2d 1395 (2d Cir. 1974); Allen v. Sisters of St. Joseph, 361 F.Supp. 1212 (N.D.Tex. 1973), appeal dismissed, 490 F.2d 81 (5th Cir. 1974). Cf. Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

15. Greco v. Orange Memorial Hospital, No. 75-432, cert. denied, 44 L.W. 3328 (December 2, 1975).

16. Slip at 6.

17. Id. at 725.

18. See, e.g., Braden v. University of Pittsburgh, 477 F.2d 1 (3rd Cir. 1973).