Senator TUNNEY. I think that in *Moss* v. *Moffett* which distinguished *Douglas* v. *California*, the court has refused to extend that.

Judge STEVENS. So those two cases can be cited with the trend going in both directions at once. The right to counsel has been extended to misdemeanor cases but not extended to discretionary review.

Senator TUNNEY. Do you have anything that you would care to express on the general subject of right to counsel that might help the committee in any future action?

Judge STEVENS. Yes; I don't hesitate in saying that I think one of the most important aspects of procedural fairness is availability of counsel to the litigant on either side. I could not overemphasize the importance of the lawyer's role in the adversary process and it is unquestionably a matter of major importance in all litigation.

Senator TUNNEY. Judge, I want to thank you very much for the answers that you have given to my questions. I appreciate the fact that your answers were not only direct but also I felt extremely erudite. They demonstrate to me that you are a man of great fairness and great understanding as well as great intellectual capacity. I am very pleased that we have had the opportunity to talk about some of these problems and to have laid out a bit of a record as to what your thinking is on some of these key issues that are going to be coming before the court.

Again I want to congratulate you on your nomination.

Judge STEVENS. Thank you, Senator Tunney.

Chairman EASTLAND. Judge, you are excused.

Judge STEVENS. Thank you, Mr. Chairman.

Chairman EASTLAND. The National Organization for Women. Who represents them? Would you identify yourself for the record, please?

TESTIMONY OF MARGARET DRACHSLER, NATIONAL ORGANIZATION FOR WOMEN (NOW)

Ms. DRACHSLER. My name is Margaret Drachsler. I am here representing the National Organization for Women.

Chairman EASTLAND. You may proceed.

Ms. DRACHSLER. Thank you.

The National Organization for Women (NOW) is an organization of 60,000 women, with over 700 chapters throughout the country.

I am here this afternoon 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. First of all, 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.

In contrast, 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 a woman 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 which is 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 has 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 has been dominated by men. The President's policy advisers were all men. Only after extensive public outrage did the President even bother to add the names of two women to the list of candidates referred to the American Bar Association for evaluation.

The American Bar Association committee which reviewed the President's list of candidates does not have one woman among its 11 members, although in 1974 women made up 7 percent of all lawyers and judges in the Nation and almost 20 percent of law school enrollees. Just as in Civil Rights Act title VII cases, the courts have increasingly recognized the potential for bias in evaluations of minorities by whites and of women by men, so, too, the ABA committee, dominated by white men, cannot be inferred to be without sex or race bias. Thus it is not surprising that in view of the all-male selection system, women who are distinguished members of the judiciary and practicing bar were overlooked in the search for an appointee, nor is it surprising that the exceedingly few women who were submitted by the President for evaluation were not given the top score as was Judge Stevens. Nor further is it surprising that the man chosen by them has a record of consistent opposition to women's rights. In case after case, Judge Stevens has expressly opposed women's interests. These cases are important, and they warrant review.

In—for ease of reading I am going to eliminate the citations which were included in my typewritten testimony—in *Rose* v. *Bridgeport Brass Co.*, 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. When the plaintiff showed 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. The term "business necessity" in the title VII context means necessary for the safe and efficient operation of the enterprise.

In *Rose*, the plaintiff's statistical showing should have shifted the burden of proof to the defendant employer; however, the Federal district court erroneously granted summary judgment to the defendants after erroneously assessing this burden. The majority of the Court of Appeals for the Seventh Circuit reversed and permitted the case to go to trial on the disputed facts, stating that the statistical information "surely raises the possibility that the job reclassification has a discriminatory effect."

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. Judge Stevens was so bound and determined to decide against the plaintiff that he would have denied her her day in court. Instead, ignoring that the record before him was on a motion for summary judgment and even while acknowledging the improper procedure applied by the district court, Judge Stevens accepted the self-serving declarations of the company and ignored the affidavit of the plaintiff which place these declarations into question. Despite the reduction of the number of women working in the plant from 55 percent to 10 percent, which the majority found to be sufficiently suspicious, that together with plaintiff's allegations, entitled it to a trial on the disputed facts, Judge Stevens would have required a showing of a discriminatory motive although the Supreme Court had found such a showing unnecessary.

Two years earlier the Supreme Court had stated in *Griggs* v. *Duke Power Co.*, 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 rejected this guidance.

In 1973, the Supreme Court in *Roe* v. *Wade* and *Doe* v. *Bolton* 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 6 months after the Supreme Court's landmark decision, Judge Stevens ruled in *Doe* v. *Bellin Memorial Hospital* that a women 2 months pregnant, trapped by a severe snowstorm in her own town, 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, 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—that is, State action—to extend the constitutional prohibitions against race discrimination to the hospital. The fourth circuit has applied this rule to the question of a woman's right to choose to bear children. The Court of Appeals for the Sixth Circuit has found a private hospital to reflect sufficient State action on a slightly different rationale. But Judge Stevens seems to bend over backward to limit this basic right to all women and 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, and the Supreme Court has recently declined to review the question. Thus, the law remains 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.

Another case was *Cohen* v. *Illinois Institute of Technology* where Judge Stevens again demonstrated his propensity to find against a female plaintiff. This was a case in which a woman repeatedly was 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." Judge Stevens thus requires civil rights plaintiffs to show affirmative conduct by the State as important to discrimination. However, the Supreme Court, in *Burton* v. *Wilmington Parking Authority*, took a position far more supportive of civil rights when it found mere acquiescence by the State in the discrimination to be sufficient. I am quoting from the *Burton* v. *Wilmington* decision:

> 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.

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.

The opinion of Judge Stevens in *Dyer* v. *Blair* provided another example of this opposition to women's rights. The facts were that the Illinois Senate had voted on the equal rights amendment 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 the ERA engineered a procedural change in rule 42. Rule 42 required proposed amendments to the Federal Constitution to be passed 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. 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*, rehearing en banc denied, the Seventh Circuit Court of Appeals was presented a fact pattern 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 in order to continue their jobs. The company had no such rule regarding male stewards, nor did it apply the policy against marriage to any other female employees. In other words, all women who worked as cabin attendants were prohibited from marrying, and all men who worked as cabin attendants were permitted to marry and retain their employment.

The Equal Employment Opportunity Commission, charged with responsibility of enforcing title VII's mandate, and having a regulation that covered the situation, had no trouble finding sex discrimina-

tion. Similarly, the trial court had not trouble finding sex discrimination and thus granted plaintiff's motion for summary judgment. Nor did the majority of the court of appeals have any trouble in finding sex discrimination in this case.

The majority held section 703(a)(1) of the Equal Employment Opportunity Act is not confined to explicit discrimination based solely on sex, 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 occupational qualification, and in so doing, it followed the precedent of *Diaz* v. *Pan American World Airways, Inc.*

Judge Stevens, dissenting from this, found no discrimination and revealed an extraordinary lack of sensitivity to the problems women face in the marketplace, as well as an extraordinary lack of sensitivity to the Equal Employment Opportunity Act.

This lack of sensitivity makes his nomination to the uniquely powerful Supreme Court unacceptable to women. Judge Stevens found no discrimination present in this case, asserting that United had discriminataed 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, for example, blacks had been disproportionately hired in 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, mainly the disparate treatment. If substitute employment has any bearing at all, they can only go to the question of damages.

Next he glossed over the disparate treatment afforded 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 the so-called qualification have any 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 Ms. Sprongis 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.* some 3 months before argument was even heard in the *Sprongis* 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 past summer the Supreme Court reaffirmed this point in *Moody* v. *Albemarle Paper Co.*

Thus, the Supreme Court has never espoused, nor does it now espouse, the Stevens position.

We also note that the case list prepared by the American Bar Association has incorrectly credited Judge Stevens with writing a majority opinion in the *Sprongis* case, whereas in point of fact he wrote a lone dissent.

The important thing to remember about Judge Stevens' participation in *Rowe* v. *Colgate* is that the real decision in this case had been made by the Court of Appeals before his appointment. Therefore his silent acquiescence to the unanimous court's opinion on the limited and secondary issues presented when *Rowe* 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 woman's issue in the 240 opinions he has written during his tenure. To prove this point, some discussion of the *Rowe* opinion is necessary. In 1967 the trial court had received this case in which the employer had permitted women to work in only 4 of its 17 departments. In these four departments the highest pay available was equal to the lowest pay in the 13 other departments where only men were employed.

The trial court found discrimination and awarded damages to 12 plaintiffs. When it was appealed to the Seventh Circuit Court of Appeals, the appellate court expanded the class entitled to recovery and held 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, affected 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 a second time. It was only at this juncture that the case came within the purview of Judge Stevens, 6 years after the pretrial finding of discrimination had been made by the trial court, and 4 years after the appellate court had enlarged the class and established the additional ground.

The second time the basic issues were only whether: One, to order plant seniority to replace departmental seniority which the circuit court declined to do and two, that 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 this record of antagonism to women's rights on the part of Judge Stevens is clear. We oppose his confirmation. We oppose his confirmation not solely because of his 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 these decisions in which he participated while sitting in the circuit court raises the question of whether he can fairly, judiciously, and impartially review those cases which will reach him as a Justice on the Supreme Court, and whether he could render fair and impartial decisions governed by the laws and facts applicable to each case.

His history as circut judge clearly indicates that he cannot. In many of his decisions he has been at odds with his own circuit and

other circuits. More importantly, he has rejected guidance from the Supreme Court decisions on these issues by which decisions he was bound as a circuit judge. His decisions have flown in the face of the applicable law as duly passed by Congress, elected by the people, both men and women.

Thus, NOW believes that Judge Stevens lacks the vision and impartiality requisite for appointment to the Supreme Court of the United States.

I thank you for listening to this testimony and if there are any questions I will be happy to answer.

Senator TUNNEY. Just one question. I was wondering if you could tell us to what extent your view on this nomination is colored by the fact that you would have preferred to have had a woman appointed to the court by the President? The reason I ask the question is that I know that there were many women who were very disappointed that the President did not name a woman to the court. The arguments that were advanced by you and others are understandable. The question of course is whether or not a nominee designated by the President should be rejected just on the grounds that the person is not a woman. And so I am curious to know to what extent you feel that your view is colored by the fact that Judge Stevens is not a woman?

Ms. DREXLER. Senator, we are not opposing Judge Stevens only because he is a man. That is of secondary importance. The reason we are opposing this nomination and the ground on which this man is disqualified from being a member of the Supreme Court of the United States is because of his consistent opposition to women's rights and the fact that his decisions seem to be colored by his own personal philosophy. We would not be down here opposing just anyone who who was nominated to the court just because that person was a man.

We are here specifically because of Judge Stevens' stands on these legal issues.

Senator TUNNEY. Thank you.

Chairman EASTLAND. Thank you.

We will recess now.

[Whereupon, at 4 p.m., the committee recessed to reconvene subject to the call of the Chair.]