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In the

Supreme Court of the United States

SHARRON A. FRONTIERO and
JOSEPH FRONTIERO,

Appellants,

vs.

MELVIN R. LAIRD, et al.,

Appellees.

No. 71-1694

Washington, D. C.
January 17, 1973

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v.	:	No. 71-1694
MELVIN R. LAIRD, et al., Appellees.	:	

Washington, D. C.

Wednesday, January 17, 1973.

The above-entitled matter came on for argument at 1:28 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOSEPH LEVIN, ESQ., Levin & Dees, P.O. Box 2087, Montgomery, Alabama, 36103; for the Appellants.

RUTH BADER GINSBURG, ESQ., American Civil Liberties Union Foundation 156 Fifth Ave., New York, New York, 10010; for the Amicus Curiae.

SAMUEL HUNTINGTON, ESQ., Department of Justice, Washington, D. C., 20530; for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in No. 71-1694, Frontiero v. Melvin R. Laird, et al.

Mr. Levin.

ORAL ARGUMENT OF JOSEPH LEVIN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEVIN: Mr. Chief Justice, and may it please the Court;

This is a sex discrimination case.

After a short statement of the facts here, I will seek to refute the Government's statistical analysis of the case and point to what we consider to be the insubstantiability of the Government's interest in continuing this particular sex discrimination.

Following this, I will speak briefly about the merits of judging sex classifications by what we consider to be an intermediate test.

Professor Ginsburg, to my left, will then speak on the merits of judging these cases by the standard of strict scrutiny.

A year after entering the Armed Forces in 1968, Lieutenant Sharron Frontiero married Joseph Frontiero.

Because of the statutes which are at issue here, any male member of the Armed Forces would have automatically become entitled to certain housing allowance benefits and

medical benefits.

Lieutenant Frontiero did not.

The statutes giving males in the Armed Forces the irregrettable presumption that their spouses are dependent and grant benefits regardless of the wife's actual financial dependency.

A female must prove that her spouse is, in fact, dependent upon her for more than one-half of his support.

In this case, Lt. Frontiero earned more than three times as much as her husband, Joseph. Her income is approximately $8200. His income is just a little in excess of $2800.

But because Joseph's individual expenses are low his small income meets more than half of his personal expenses.

Sharron was, therefore, denied any supplemental benefits in both housing and medical for her spouse.

It is undisputed that under these statutes, the ones that are at issue here, that a male Armed Forces member would have received these housing and medical benefits.

So we have a two-fold discrimination. The first is procedural.

Women are forced to the burdens and uncertainties of proving that their spouses are, in fact, dependent upon them, while males are given the benefits automatically, and irrefutably.

But more importantly, there is substantive discrimination here.

Males whose wives are not financially dependent upon them,nevertheless,receive these housing and medical benefits.

Women in precisely the same circumstances, identical circumstances, do not receive the benefits.

Government really seeks to explain away this discrimination by saying that it is only a procedural difference, and that since women earn less than men that they can presume for the sake -- and I am talking about women in the general population -- that they can presume for the sake of administrative convenience, or administrative ease, that the male spouses are financially dependent.

We have three relatively simple answers to the Government's contention that lower income shows dependency.

First of all, earning levels don't, alone, necessarily indicate dependency.

Q Does earning level indicate a general tendency, do you think?

MR. LEVIN: I think that earning level -- not necessarily even a general tendency -- I would think that you could say that in the whole population that it does indicate a tendency that men earn more than women.

We don't dispute that. We don't dispute that at all.

But the only reason that Joseph Frontiero's expense -- only because his expenses are low is he technically not one-half financially dependent upon his wife, Sharron Frontiero,

which is the criteria and the standard that women are forced to submit to under these statutes.

And this is in spite of the fact that his income is less than one-third of her income.

So, though we feel that income and expenses are relevant in this case, the Government wants to take into account only income.

If they really believe that income is the only predictor of dependency, then why not make that the standard for determining dependency.

Instead, they take a biological class, women, and they ascribe a status to the entire class without reservation.

If they believe that lower income equals dependency, then let them protect their own interests by making that, that is, income, the criterion and end the sex discrmination.

They could do this with a narrowly drawn statute.

Now, we doubt that what the Government refers to in its brief as -- if I recall it correctly -- "economic facts of life," are really facts at all.

Their own statistics, as set out on page 51 of our own blue brief, show that Armed Forces males actually earn less than females.

Now, if lower income equals dependency, the majority of Armed Forces males who are now granted an irrefutable presumption, would not be able to prove their spouses dependent.

Now, they say that our use of this kind of comparison, is kind of like mixing apples and oranges.

Q Is it a median head count of Armed Forces males and --

MR. LEVIN: Of Armed Forces males, yes.

Q The reason is there is a higher percentage of non-commissioned and commissioned officers among the female, I suppose. That would have to be the reason, wouldn't it?

MR. LEVIN: It very well could be.

Q And we are dealing here with military personnel whose spouses are civilians, are we not?

MR. LEVIN: Let's assume that the Government is correct in what they say and that we should not have used --

Q Does this case involve only military personnel whose spouses are civilians?

MR. LEVIN: Yes, sir, it would. That is correct.

Now, let's say that the Government is correct in what they have to say about our analysis that way. They suggest that we should instead use the figure for all women, instead of just women in the working population.

Well, let's do that.

Now, the census shows that for all women -- and this is for everyone over the age of 14, regardless of whether or not they are employed, that for all women there is a median income of $2400.

If we lump the military males' median income which is $3700 with the median income of the female, we come up with $6100 lump sum median.

Now, the dependency standard, we recall, is one-half, in fact, or one-half dependency.

For a woman to fail to provide, that is the wife of an Air Force or any Armed Services member, for her to fail to provide one-half of her own support, she would have to have expenses that total $4800, which would be over 80% of the entire family's income.

Now, we don't think the Government can prove or is saying here that service families wives are such spendthrifts.

I don't believe there is any way to prove it.

But, this whole analytical approach of statistics is extremely misleading. We don't think that it has any particular relevancy in this case, because the crucial aspect of it is the substantive inequality which results here.

And, that is, when you get right down to the bottom, that males who cannot prove their wives dependent, nevertheless receive the benefits.

Women in the identical position do not. And there is no way to cure that.

There is no way to cure that in Sharron Frontiero's case.

Q How many are we talking about in terms of numbers?

I suppose, what, 98-99% of the military personnel are males, or is that too high a percentage?

MR. LEVIN: I don't have access to these percentages. I recall the figures are that there are approximately 1,000,005 married male service members, and that there are somewhere in excess of -- I am told by the Government -- new figures are somewhat in excess of 6,000 married female service members.

Q So it would be a percentage somewhat comparable to that I mentioned?

MR. LEVIN: Very well could be. I have not computed this, but I would say that would be approximate.

Q As I understood it, a good part of the Government's argument is based upon administrative simplicity, is it not?

MR. LEVIN: Mr. Justice, the only part of the Government's argument, their entire argument, is based upon administrative convenience, and that is all that they have alleged here and that is the only justification.

Now, we don't say that this is an illegitimate end, because, of course, it isn't.

But, it in itself, cannot justify the discrimination that exists here.

It it did, any arbitrary cutoff in benefits would be constitutional.

In Shapiro v. Thompson, in Reed v. Reed, we feel that this Court explicitly rejected administrative convenience as

justifying this kind of discrmination.

And, the court in Shapiro explicitly stated that this interest was insufficient regardless of whether measured against the rational basis or the compelling State interest standard.

Now, the Government has proposed that the minimal standard of review be used here.

The Amicus, American Civil Liberties Union, has proposed that the -- and we will argue -- that the strict standard of suspect classification is appropriate for this case.

Now, we, as appellant, suggest that the strict standard applicable -- that the strict standard here does not pose a choice between polar alternatives.

We agree wholeheartedly with what Mr. Justice Powell had to say in Weber v. Aetna, that regardless of the test employed here, that the essential inquiry is inevitably a dual one, what legitimate State interest does the classification promote and what fundamental personal rights -- personal rights -- might the classification endanger.

Now, here, the classification that we are talking about surrounds employment benefits. And this is an area of discrimination in which women have been discriminated against -- have been the object of discrimination, I think, and that is well documented.

The Government's approach employs sort of a reverse

bootstraps theory, where their reasoning is the traditional discrimination in employment should be rewarded by further discrimination in employment benefits, if you look at the figures they attempt to use.

Now, we have got to stack up against the women's right to be free from these inequalities, and what the Government stacks up against the right of women to be free from inequalities is the ease of administration. That's the only thing that they really advance in this case.

Q You say that it is a personal right you are claiming here, following the analysis in Weber. It is a personal right to more money, isn't it?

MR. LEVIN: It is a personal right, Mr. Justice Rehnquist, to be free from discrimination in employment, and --

Q But you can argue any equal protection that way. You are saying, in effect, I want to be free from this discrimination that I claim exists, but I would think if you follow the Weber analogy you've got to see what it is you are claiming, what you would get if your claim were sustained, which is more money, in your case.

MR. LEVIN: I think so too, but I think with the personal right that I am talking about, and I think that the kind of personal right that the Court was talking about -- Mr. Justice Powell was talking about for the Court in Weber was the right to be -- for a group to be free from discrimination.

Here, that is the right for women, as a group, to be free from discrimination, and that you've got to look at the facts involved in that case.

You have to look at the facts and you have to determine whether or not the Government has advanced a sufficient -- or a legitimate, as the language is here, governmental interest.

For example, evidence might be educed to show that a sex difference which related to performance in combat would be a legitimate governmental interest.

It might be. I am not saying it would, but it might be.

Here, the Air Force certainly doesn't claim that the general earning differential, that you see in the population as a whole, would justify discrimination, sex discrimination in basic pay.

So, it certainly couldn't justify sex discrimination in fringe benefits.

We think that Mr. Justice Powell's analysis in Weber is a legitimate method for determining what standard is to be used in this case.

It is stronger than the minimal scrutiny standard which the Government proposes.

We feel that a burden should be placed on both the Government, the Government to show a legitimate Governmental

interest, and on the appellant to show that there is discrimination.

We think that there should be equal burdens here. The test should be stronger than it is now.

Q Do you feel that a statute enacted by the Congress or a statute enacted by the legislature of a State was presumptively constitutional? You don't hear very much about that any more, but when I went to law school, that's what the doctrine was.

MR. LEVIN: I think that that is fine except when the State is classifying different groups, and especially when they are classifying a group which has traditionally been the object of discrimination; and, consequently the lower standard in sex discrimination cases, the minimal scrutiny standard, simply isn't sufficient.

Q Now, it gets so that statutes enacted in that area is only, sort of, step one, isn't it?

MR. LEVIN: Step one, before it is tested.

Well, I think the legislature should consider this in passing legislation.

And they should make sure that you don't have invidious discrimination.

Q The rule of construction to which I referred was sort of based upon the hypothesis that Congress would consider the Constitution before it enacted legislation.

MR. LEVIN: Yes, well --

Q That was the basis of that rule of statutory construction, that the Congress could read the Constitution as well as other people.

MR. LEVIN: Appellants in this case would say that apparently the Congress did not pay too much attention to the Constitution in enacting these particular provisions.

Q The petitioner was a volunteer or was drafted into the Army?

MR. LEVIN: Petitioner was, in a sense, a volunteer. She -- the Air Force put her through some portion of her schooling and in return she was obligated to serve in the Air Force. So, six of one and half a dozen of another.

I would say that probably a volunteer.

I have used more time than I should have. I would like for Professor Ginsburg to speak to the appellants' respective position of strict review that she is going to argue and felt that it was essential in this case that she be given an opportunity to present all argument to the Court.

MR. CHIEF JUSTICE BURGER: Very well.

Mrs. Ginsburg.

ORAL ARGUMENT OF RUTH BADER GINSBURG, ESQ.,

ON BEHALF OF THE AMICUS CURIAE

MRS. GINSBURG: Mr. Chief Justice, and may it please the Court:

Amicus views this case as kin to Reed v. Reed, 404 U.S.

The legislative judgment in both derives from the same stereotype, the man is, or should be, the independent partner in a marital unit. The woman, with an occasional exception, is dependent, sheltered from breadwinning experience.

Appellee stated in answer to interrogatories in this case that they remained totally uninformed on the application of this stereotype to service families; that is, they do not know whether the proportion of wage-earning wives of servicemen is small, large or middle-sized.

What is known is that, by employing the sex criterion, identically situated persons are treated differently. The married serviceman gets benefits for himself, as well as his spouse, regardless of her income. The married service woman is denied medical care for her spouse and quarters allowance for herself, as well as her spouse, even if, as in this case, she supplies over two-thirds the support of the marital unit.

For these reasons, amicus believes that the sex-related means employed by Congress fails to meet the rationality standard. It does not have a fair and substantial relationship to the legislative objective, so that all similarly circumstanced persons shall be treated alike.

Nonetheless, amicus urges the Court to recognize in this case what it has in others, that it writes not only for this

case, and this day alone, but for this type of case.

As was apparent from the decisions cited at pages 27 through 34 of our brief, in lower Federal, as well as State Courts, the standard of review in sex discrimination cases is, to say the least, confused.

A few courts have ranked that as a suspect criterion. Others, including, apparently, the court below in this case, seem to regard the Reed decision as a direction to apply minimal scrutiny, and there are various shades between.

The result is that in many instances the same, or similar, issues are decided differently, depending upon the Court's view of the stringency of review appropriate.

To provide the guidance so badly needed, and because recognition is long overdue, Amicus urges the Court to declare sex a suspect criterion.

This would not be quite the giant step appellees suggest.

As Professor Gunther observed in an analysis of last term's Equal Protection decisions published in the November 1972 Harvard Law Review, it appears that in Reed some special suspicion of sex, as a classifying factor, entered into the Court's analysis.

Appellees concede that the principal ingredient invoking strict scrutiny is present in the sex criterion.

Sex, like race, is a visible, immutable characteristic,

bearing no necessary relationship to a body.

Sex, like race, has been made the basis for unjustified, or at least unproved assumptions, concerning an individual's potential to perform or to contribute to society.

But, appellees point out that although the essential ingredient rendering a classification suspect is present, sex based distinctions, unlike racial distinctions, do not have an especially disfavored constitutional history.

It is clear that the core purpose of the Fourteenth Amendment was to eliminate invidious racial discrimination.

But, why did the framers of the Fourteenth Amendment regard racial as odious? Because a person's skin color bears no necessary relationship to ability. Similarly, as appellees concede, a person's sex bears no necessary relationship to ability.

Moreover, national origin and aliens have been recognized as suspect classifications, although the newcomer to our shores was not the paramount concern of the nation when the Fourteenth Amendment was adopted.

But the main thrust of the argument against recognition of sex as a suspect criterion, centers on two points.

First, women are a majority.

Second, legislative classification by sex does not, it is asserted, imply the inferiority of women.

With respect to the numbers argument, the numerical

majority was denied even the right to vote until 1920.

Women today face discrimination in employment, as pervasive and more subtle than discrimination encountered by minority groups.

In vocational and higher education, women continue to face restrictive quarters, no longer operative with respect to other population groups, their absence is conspicuous in Federal and State legislative, executive and judicial chambers, in higher Civil Service positions, and in appointed posts in Federal, State and local government.

Surely, no one would suggest that race is not a suspect criterion in the District of Columbia, because the Black population here outnumbers the White.

Moreover, as Mr. Justice Douglas has pointed out most recently in Hadley v. Alabama, 41 L.W. 3205, equal protection and due process of law apply to the majority as well as to the minorities.

Do the sex classifications listed by appellees imply a judgment of inferiority?

Even the court below suggested that they do. That court said it would be remiss if it failed to notice, looking in the background, the subtle injury inflicted on service women, the indignity of being treated differently, so many of them feel.

Sex classifications do stigmatize when, as in Goesaert v. Cleary, 335 U.S., the exclude women from an

occupation thought more appropriate to men.

The sex criterion stigmatizes when it is used to limit hours of work for women only. Hours regulations of the kind involved in Muller v. Oregon, though perhaps reasonable under turn of the Century conditions, today protect women from competing for extra remuneration, higher paying jobs, promotions.

The sex criterion stigmatizes when, as in Hoyt v. Florida, 368, U.S., it assumes that all women are preoccupied with home and children and, therefore, should be spared the basic civic responsibility of serving on a jury.

These distinctions have a common effect. They help keep woman in her place, a place inferior to that occupied by men in our society.

Appellees recognize that there is doubt as to the contemporary validity of the theory that sex classifications do not brand the female sex as inferior, but they advocate a hold-the-line position by this Court unless and until the Equal Rights Amendment comes into force.

Absent the Equal Rights Amendment, appellees assert, no close scrutiny of sex based classifications is warranted.

This Court should stand pat on legislation of the kind involved in this case, legislation making a distinction service women regard as the most gross inequity, the greatest irritant and the most discriminatory provision relating to women in the military service.

But this Court has recognized that the notion of what constitutes equal protection does change.

Proponents, as well as opponents, of the Equal Rights Amendment, believe that clarification of the application of equal protection to the sex criterion is needed and should come from this Court.

Proponents believe that appropriate interpretation of the Fifth and Fourteenth Amendments would secure equal rights and responsibilities for men and women, but they also stress that such interpretation was not yet discernible. And in any event, the amendment would serve an important function in removing even the slightest doubt that equal rights for men and women is fundamental constitutional principle.

In asking the Court to declare sex a suspect criterion, Amicus urges a position forcibly stated in 1837 by Sarah Grintey, noted abolitionist and advocate of equal rights for men and women.

She spoke, not elegantly, but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethern is that they take their feet off our necks."

In conclusion, Amicus joins appellants in requesting this Court to reverse the judgment entered below and remand the case with instructions to grant the relief which is requested in appellants complaint.

Thank you.

CHIEF JUSTICE BURGER: Thank you, Mrs. Ginsburg.

Mr. Huntington.

ORAL ARGUMENT OF SAMUEL HUNTINGTON, ESQ.,

ON BEHALF OF THE APPELLEES

MR. HUNTINGTON: Mr. Chief Justice, and may it please the Court:

The position of the Government in this case is first, that there is a rational basis for the different treatment of male and female members of the Armed Forces in the statutes here under review.

And, second, that the rational basis standard is the proper standard for determining the validity of those statues.

I would like to first address myself to the statutes and then discuss the appropriate standard of review.

I think it would be useful to begin by reviewing the actual impact of the housing allowance and medical care statutes here in issue.

The housing allowance statute is 37 U.S.C. 403 which grants a basic housing allowance to each member of the military for whom on-base housing is not available.

In addition, each such member is entitled to an increased housing allowance if he has one or more dependents, as defined by 37 U.S.C. 401.

Under the scale which is now in existence, for example, a lieutenant in pay grade 2 would be entitled to $138.60 per

month for housing without dependents and $175.80 with dependents, a difference of $37.20.

Now, the particular issue here, of course, concerns under what circumstances a member of the Armed Forces may claim a spouse as a dependent. And, the general rule under the statute is that wives of male members qualify automatically for dependency benefits, whereas, husbands of female members qualify only if dependent, in fact, on their wives for over half their support.

Q Does the housing allowance run right through all of the commissioned and non-commissioned ranks?

MR. HUNTINGTON: Yes, it applies to everyone.

Q It varies in amount, I know.

MR.HUNTINGTON: Yes.

I would like to point out, first --

Q Except those for whom housing is provided by the Government,for the person and his or her family.

MR. HUNTINGTON: Yes, right.

I would like to point out that under --

Q As you put it, discrimination is against the man, is that it?

MR. HUNTINGTON: I didn't mean to imply that --

(laughter)

I would like to point out that the -- that under 37 U.S.C. 420, in the case of an interservice marriage, neither the

husband nor the wife may claim his or her spouse as a dependent.

Now, this fact has considerable importance here, for a significant majority of married women in the Armed Forces are married to military men.

Now, while the record is silent on this matter, the Senate report issued on the proposals in Congress last year to amend the statute contained a letter from the General Counsel of the Department of Defense, which is in point.

In the letter, at page 4 of the report, that's Senate Report 921218, it is noted that a recently completed survey of married women in the Air Force showed that 25% of the officers were married, but that only 4% of the officers were married to civilians.

And the percentage of all women in the Air Force married to civilians is even smaller.

In not being able to claim their husbands as dependents, military women married to military men are not discriminated against since their husbands could not claim them either.

Similarly, a female member --

Q The only way for the woman to get equality is to put her husband in the army, is that right?

MR. HUNTINGTON: That would be one way, yes sir.

This is also true that these women married to military men are not discriminated against with respect to medical benefits because under 10 U.S.C. 1074, both the husband and the wife would

qualify for medical benefits.

Well, in short, then, the only women who are treated differently than their male counterparts are those women who are married to civilians.

Now, in our view, one does not have to search far to discover a rational basis for Congress' decision to treat married men and married women differently with respect to dependency benefits.

We start with the basic purpose of the two statutes, and the basic purpose is to provide housing allowance and medical benefits for dependents in order to establish a compensation pattern which would attract career personnel into the Armed Forces.

In Congress' view, this would enable the military to compete with the civilian sector of the economy for married people.

Now, in establishing these benefits, Congress had to determine what proof of dependency it would require.

Now, an examination of the statute shows that where it was very likely that a military person would be supporting certain relatives, dependency benefits were conferred automatically. Where it would be less likely, or unusual, that a military member would be supporting a person, proof of dependency was required.

Also, under 37 U.S.C. 401, a serviceman's wife and

minor children automatically qualify for dependency benefits. Whereas, his older children and his parents would qualify only if dependent in fact.

And, since women generally do not provide the main support for their husband, children or parents, service women were required to establish dependency in fact in each case.

Let me state this another way. Taking the over one million married military men as a group, a significant majority of their wives are dependent on them.

Under these circumstances, it is rational to decide to grant all married men dependency benefits for their wives automatically, rather than undertaking the heavy administrative burden of determining dependency in fact in each case.

On the other hand, taking the one or two thousand military women who are married to civilians, as a group, an overwhelming majority of their husbands are not dependent upon them.

Under these circumstances, it is rational to examine individually the few instances where a military woman might have a dependent husband.

Q In regards to relationship, are you going to square this with Reed v. Reed, I assume?

MR. HUNTINGTON: Yes, we think Reed v. Reed is distinguishable.

Let me just address myself to the statistical basis

for our statement that the majority of women are dependent upon their husbands.

The ACLU cites in their brief the fact that 60% of all women living with their husbands are gainfully employed.

Well, the converse of this fact, of course, is that 40% of all married women are not employed.

Moreover, of those who work, as other figures cited in the ACLU brief indicate, only a portion work full time.

In preparing for this argument, I looked at the --

Q You mean like 90%, or what? Or do you know what the --

MR. HUNTINGTON: Well, I think the figure in their brief was that 43% of women are in the labor force, and 18% work full time.

Q 18%.

MR. HUNTINGTON: That's at page 45 of the ACLU brief.

Now, in the Statistical Abstract of the United States, which is a document which is cited in our brief, there is a table that shows that in 1970, in white families where both the husband and the wife work, and the husband is under 35, the mean contribution of the wife to the total family income was 27.1%. That's the table at page 327 of the Statistical Abstract.

In comparable black families, the mean contribution of the wife was slightly higher, 33.4%.

In short, there can be no question but that husbands still provide the primary income in most families. In many

families, they provide the only income. In the remaining families, their aggragate contribution to the total family income totally eclipses the aggragate contribution of working wives.

Now, if that is true today, we submit that 23 years ago and 17 years ago when these statutes here were passed it was true to an even greater extent.

Now, on the other side of the coin, it can hardly be disputed that most men are not dependent upon their wives.

As we note in our brief, almost all married men work, and in families where both the husband and the wife work the husband's income is generally well above the wife's.

Q Is there some danger of fraud in this area? Is that part of the Government's aim?

Let's assume that you are trying to determine if a parent or older children are dependent. Do you just take an affidavit, or what do you do?

MR. HUNTINGTON: They fill out a form listing their expenses.

Q That's the end of it, isn't it?

MR. HUNTINGTON: I believe that probably is.

Q Is that the large administrative burden you are talking about.

MR. HUNTINGTON: Well, for a million and a half men to have to examine a million and a half forms, I submit would be

an administrative burden.

Q I agree it is a burden, but I am just trying to find out how much of a burden it is. If it is making an affidavit and then somebody would have to read them.

MR. HUNTINGTON: Making an affidavit and then somebody reading it and making a determination as to whether it is justified. I think that is exactly what's involved.

I suppose if evidence came to the military's attention that the affidavit was false, they would have to investigate further.

Q Wouldn't it be the other? How about letting the women claim -- you could treat women the same as men the other way, I suppose.

MR. HUNTINGTON: You mean deny them benefits altogether, not even give them a chance to show --

Q No, treat them like --

MR. HUNTINGTON: Oh, treat them the way men -- well, certainly, Congress could do that.

Q Save a whole lot of money that way.

MR. HUNTINGTON: The proposal before Congress in the last Congress and will probably be resubmitted this time is to amend the statute to treat women exactly the same way.

What I am saying here is --

Q Would that include a requirement to show dependency, or would it be a presumption?

MR. HUNTINGTON: No, there would be no requirement. Dependency benefits for spouse and minor children would be conferred automatically both on men and on women.

Q The Senate bill would give the petitioners exactly what they are asking for here?

MR. HUNTINGTON: Yes, that's right.

MR. HUNTINGTON: But, we submit that while that may be a good suggestion and Congress may adopt it, there is a rational basis for the classification made in these statutes, and that it is the different statistical characteristics of married military men,as a group,compared with married military women, as a group, which justify the different treatment here.

Q Those statistics haven't been consistent, I am sure, have they? For 40 years?

MR. HUNTINGTON: Been consistent for 40 years?

No, --

Q Of course. They vary every year.

MR. HUNTINGTON: The statistics I gave were for the current year, or the last couple of years.

Q And that was not what the statute was based on.

MR. HUNTINGTON: The statute was based on the situation 20 years ago.

Q Is there any evidence in the legislative history that they considered those factors?

MR. HUNTINGTON: No, there is not. The legislative

history simply indicates that the statute was designed to give --

Q That women are women and men are men.

MR. HUNTINGTON: -- benefits for dependents.

Q Is there anything in the legislative history other than there should be a distinction made between men and women in the Armed Services? Is there anything else in the legislative history on this statute other than that?

MR. HUNTINGTON: Well, there is not even that. The statute speaks for itself on that point. The only thing in the legislative history is that by giving allowances for dependents you would compensate military personnel better so that you could compete with the civilian sector of the economy.

Now, I still say that it is apparent that Congress wrestled with the question of how do you determine who is a dependent, and that it was rational for them to determine that in the case of men you assume that wives are dependent automatically because, treating the class of men as a whole, that is generally true. Treating the class of women, it is generally not true.

Q So you based it on the whole general class of women and the whole general class of men, period.

MR. HUNTINGTON: Period, right. But we submit that --

Q And that's a rational basis?

MR. HUNTINGTON: Yes. We submit it is a rational basis because there are statistical differences between the two

classes, which justify --

Q And what statistical differences did Congress consider? You said none.

MR. HUNTINGTON: I said the legislative history doesn't indicate that they looked at it. The legislative history is fairly silent. I say you don't have to go very far to find an underlying rational here. I think that this is fairly apparent. I don't believe that this is the type of case where you have to strain your imagination to dream up some conceivable rationale behind the statute. I think the rationale, as I have indicated, is one which, if it doesn't leap at you from the statute, is one which is fairly apparent.

Q What leaps at me is that women are women and men are men and you can draw that difference and that difference only and base money on it.

MR. HUNTINGTON: Well, I would submit simply that there are statistical differences here which do justify the different treatment.

I would like to turn now to the Reed v. Reed case. In that case, as you will recall, the court reviewed an Idaho statute which provided that when competing applications to administer an estate were filed by a man and a woman in the same priority group, the man was to be given preference and appointed.

Now, there was no evidence in the record that men, as

a class, were better administrators than women, and the court rejected the contention that the measure was justified to save litigation costs.

In short, there are no differences in the two classes of applicants, men and women, which justify the discrimination.

By contrast, there are very real and relevant statistical differences between married military men, as a class, and married military women, which justify -- in our view justify -- the classifications under review in this case.

I would like to turn now to the question of the appropriate standard to be applied under the Due Process clause of the Fifth Amendment to determine the validity of these statutes.

To begin with, as this Court has held in numerous cases, traditional principles of equal protection developed under the Fourteenth Amendment are relevant in considering attacks under the Fifth Amendment, alleging that Federal statutes unjustifiably discriminate between differenct classes of individuals.

Now, as already has been touched upon here today, the traditional equal protection test is the rational basis test. Although originally developed in cases involving statutes regulating business, the test has been applied in recent years to cases involving economic and social benefits.

Now, as both Mr. Levin and Professor Ginsburg have

pointed out, the Court has imposed a stricter standard of review with respect to statutory classification in two types of cases, those involving classifications which affect fundamental personal rights and those involving inherently suspect classifications.

As far as the personal rights are concerned, I would disagree with Mr. Levin that personal rights of the type which bring into play this standard are involved here.

The rights are to dependency benefits. These are the same type of economic benefits which were under review in the Dandridge case, and I think it is not the type of personal rights which were under consideration in the Weber case which involved the relationship between illegitimate children and legitmate children within the family unit.

So we would say that the strict view, if it is going to apply at all in this case, it must be because sex is a suspect classification.

Let me just comment briefly on Professor Gunther's article in the Harvard Law Review. He suggested there that, in recent cases, this Court has not been limited simply to ond of the polar extremes, but that in reviewing statutes, the Court has been taking a fairly close look, even when applying the rational basis test, to determine whether there is in fact some Government interest involved which can -- which is readily apparent and you don't have to stretch the imagination to come

up with it.

We would submit that in this case the classification here would stand scrutiny under that type of approach.

I would like now to turn to Professor Ginsburg's argument that classifications based on sex are suspect for equal protection and due process purposes.

To begin with, as Professor Ginsburg acknowledges, this Court has never treated classifications based on sex as inherently suspect, and only last term, in Reed v. Reed, applied the traditional rational basis test.

In our view, the Court should not now abandon the traditional test and treat sex classifications as suspect.

Just last week, in the Cross decision, which upheld the $50 filing fee requirement as a precondition to discharge in bankruptcy, the Court referred to the suspect criteria of race, nationality and alienage.

Now, race classifications, of course, have an especially disfavored status in our constitutional history, and each of the three classifications, in the words of Justice Blackmun in Graham v. Richardson, involves, and I quote, "a discreet and insular minority for whom heightened judicial solicitude is appropriate."

Now, these minorities generally lack the political power to protect their own interests.

We are not contending that women have achieved equal

political power with men.

The statistics cited by Professor Ginsburg as to the number of women in high government positions and State and Federal legislatures are certainly not in dispute, and they are very small.

What we do suggest is that because they are a numerical majority in the population as a whole they have been exercising substantial and growing political influence upon State and Federal legislatures.

At the Federal level, as summarized in the ACLU's brief, there has been considerable legislative activity in amending statutes containing classifications based on sex.

Proposed legislation to amend these statutes, as I have already stated, was before Congress last year and undoubtedly will be before Congress this year.

And, also, of course, the Equal Rights Amendment, which was passed last year is evidence -- is an indication of the influence women who favor the amendment have been able to exert.

There is another reason for not expanding the category of suspect classifications to include women. Unlike classifications based on race, nationality or alienage, classifications based on sex frequently are not arbitrary but reflect actual differences between the sexes which are relevant to the purposes of the statutes containing the classifications.

Now, we contend here that the dependency statutes, for example, do not discriminate against women because of their femininity. They treat women differently because women, as a class, are less likely to have dependents than men.

Similarly, the Florida statute upheld in Hoyt v. Florida, did not excuse women from jury duty because they were inferior but excused them because of the fact that women, as a class, were more likely than men to have family responsibilities making it impractical for them to serve as jurors.

Application of the rational basis test permits the courts to consider statues on a case by case basis to determine which classifications are based on valid factual or physiological differences between the sexes, and which classifications, like the one struck down in Reed and Reed, are arbitrary and not based on sex differences.

On the other hand, denominating sex classifications as suspect would subject all statutes containing sex classifications to strict review, and could result in invalidating many of them, whether or not individual classifications reflect acknowledged factual or physiological differences.

Q When you talk about the generality of women being less likely to have dependents, you mean dependents in this narrow sense, financially?

MR. HUNTINGTON: Dependents, as defined -- yes, dependents --

Q In terms of children --

MR. HUNTINGTON: No, in terms of dependent spouses, is what I mean.

Well, in closing, let me simply state that we have no quarrel with the drive of many women to achieve equality by attacking statutes enacted in a different era that may reflect antiquated notions of the respective roles of the sexes.

We submit, however, that the plea for across-the-board change, rather than case by case consideration, is better addressed to the legislatures rather than to the courts.

In conclusion, the judgment of the District Court should be affirmed.

Thank you.

Q Could I ask you, if we agree with the other side, what do you understand the consequence would be?

MR. HUNTINGTON: I understand the consequence would be that you would extend the same benefits to women. I think --

Q What would we strike down?

MR. HUNTINGTON: You would strike down the portion of the statute which says that women have to establish dependency, in fact, in order to claim their husband as --

Q If we strike that provision down which provides for their allowance, how do they get the allowance?

MR. HUNTINGTON: You would only strike down as far as it requires them to establish dependency in fact in order

to claim --

Q If you didn't strike down the discrimination, the other way of doing it would be to say that -- is that no one must prove dependency.

MR. HUNTINGTON: I would think that would definitely not be the preferable alternative.

Q I didn't say it was preferable. I wondered how do you know which one --

MR. HUNTINGTON: Well, I think the inquiry here would be what Congress would have wished had it been faced with the situation of not being able to make this classification.

And I think that the conclusion would have to be that they would wish that the -

Q If we just strike down that particular part of a statute, of a provision, just those particular words?

MR. HUNTINGTON: Yes, that's right.

Q And then they construe all the other relevant statutes to mean men and women wherever it says men, or --

MR. HUNTINGTON: Well, just in this narrow context.

Q That's what I am talking about, in these statutes.

MR. HUNTINGTON: In 37, 401.

Q So we would strike down one statute and rework some others, or at least --

MR. HUNTINGTON: Well, no, just within the definition part itself would be the only -- if you simply said that the

same standard had to apply to women as applies to men.

Q Why couldn't we just as easily say that since the allowance -- if that were the conclusion -- is discriminatory, all allowances are stricken?

MR. HUNTINGTON: Well, I think that would fly right in the face of the purpose of Congress in adopting the dependency statutes to begin with.

Q Any more so than except as to numbers?

MR. HUNTINGTON: Well, I think numbers are quite relevant when you are talking about a million and a half men and only a couple of a thousand women married to civilians.

Q You don't want us to strike the allowances for men?

MR. HUNTINGTON: No, we don't want you to strike that and we don't want you to require that the men's applications for dependency allowances be examined --

Q Well, in Section 401 of the definition, says that a dependent of a member of the service is one, his spouse, two, his unmarried minor child, and then down below it says, however, a person is not a dependent of a female member unless he is in fact dependent on her for over half his support.

Now, what do we strike down?

MR. HUNTINGTON: That sentence.

Q Then there are no provisions for a man being a dependent, because up above it is his spouse.

MR. HUNTINGTON: Well, I think his means her in this

context.

(laughter)

Q Obviously, if it is unconstitutional to discriminate, it must, is that it?

MR. HUNTINGTON: Well, the statute has always been construed --

Q Well, it doesn't, it isn't though. That means his. It means his because it treats the other one --

MR. HUNTINGTON: Well, take the next one, his unmarried legitimate child.

Q So you do have to change the meaning of his in one, don't we?

We have to make it his or her.

MR. HUNTINGTON: If you want to do a complete job, you could do it, but the way --

(laughter)

-- but the way the statute has been construed, his is interchangeable with her there.

Q Can we assume that the petitioners in this case are not in favor of cutting out all of the allowances that the wives get?

MR. HUNTINGTON: You can certainly assume that, and we are not suggesting that you do that.

Thank you.

MR. CHIEF JUSTICE BURGER: You have three minutes left,

Mr. Levin, if you wish to use it.

Q How would you answer Mr. Justice White's question?

MR. LEVIN: About which provision of the statute should be struck?

Q Rewritten.

MR. LEVIN: First of all, I don't think you get into any trouble by striking that portion that begins "however" and ends "support."

Q Why?

MR. LEVIN: Because I don't believe that his means his in the masculine --

Q It means that now, doesn't it?

MR. LEVIN: No, sir, it doesn't mean it now, because the only limitation you have is down here, "is not a dependent of a female member," unless he is, in fact, dependent on her for over one-half his support.

Q What page of what document?

MR. LEVIN: I am looking at page 23(a) of the Appendix, last paragraph.

But I certainly wouldn't construe his in the masculine or feminine sense --

Q Back up one sentence. That's what we are really talking about.

MR. LEVIN: I believe that that would extend the benefits to all, yes, sir.

REBUTTAL ARGUMENT OF JOSEPH J. LEVIN, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEVIN: I think the Government has misconstrued the basic question here, and the basic purpose of the statutes.

The basic purpose of these statutes, and the legislative history shows this, is to extend these benefits to men and women. That's the language that the legislature used, and the proponents of the legislation used, and the idea was to encourage re-enlistment of men and women.

And it is said more than once, and that is the legislative history, anything anything else would be inconsistent with the basic purpose of the statutes.

I think we lose sight of the issue that no matter how many figures are thrown up to the court, that, nevertheless, you get right down to rock bottom, women who are identically situated to men, as in the case of Lieutenant Frontiero, don't receive either housing benefits or medical benefits, and there can be no justification for that kind of situation.

The Government talked in terms of forms that have to be filled out. I know from military experience that there are a hundred forms that have to be filled out when you go in, [illegible] Men, all service people, have to inform the Government as to how many dependents they have, and a variety of other items, in order to determine initially what kind of payments they might be eligible to receive.

So you are not asking for any -- if you extend it all the way around, you certainly wouldn't be asking for any extension. You would just have to acquire a quality of proof, if you prefer to call it that.

The Senate bill that has been discussed by the Government, of course, is speculative, and its only prospective, as I read it, would not apply whatsoever to assist Lieutenant Frontiero and her husband.

I think in Reed v. Reed that the lower court there talked in terms of a difference in the experience of men and women and attempted to justify the classification that way.

Well, statistics in that case could just as easily have shown that there are more men in this world than there are women and, consequently, they have more experience, so the classification would then be justified, once again, under the administrative convenience justification.

I think you get into a problem when you try and ask the question: what is the definition of dependency?

The Government seems to want to use one-half dependent in the case of women who are seeking to have their husbands as dependents, but to use another classification, that is, just general dependency or breadwinning in the case of men.

And we think that this cannot in any way be justified.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

(Whereupon, at 2:29 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)