

In the

Supreme Court of the United States

JAMES R. SCHLESINGER ,
SECRETARY OF DEFENSE, et al.,
Appellants,

V

ROBERT C. BALLARD,
Appellee.

No. 73-776

Washington, D.C.

Tuesday, October 15, 1974

Pages 1 thru 54

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JAMES R. SCHLESINGER, :
SECRETARY OF DEFENSE, et al., :

Appellants, :

v. :

No. 73-776

ROBERT C. BALLARD, :

Appellee. :
----- :

Washington, D. C.,

Tuesday, October 15, 1974.

The above-entitled matter came on for argument at
1:40 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:

MRS. HARRIET S. SHAPIRO, Office of the Solicitor
General, Department of Justice, Washington, D.C.
20530; for the Appellants.

CHARLES R. KHOURY, JR., ESQ., 654 India Street Dock II,
San Diego, California 92101; for the Appellee.

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Mrs. Harriet S. Shapiro,
for the Appellants

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In rebuttal

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Charles R. Khoury, Jr., Esq.,
for the Appellee

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-776, Schlesinger against Ballard.

Mrs. Shapiro, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO,

ON BEHALF OF THE APPELLANTS

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

This case is here on direct appeal by the government from the judgment of a three-judge district court in the Southern District of California. The court enjoined the Navy's discharge of Lieutenant Ballard, and declared the statute requiring his discharge unconstitutional.

Lieutenant Ballard claims, and the court below found, that the Navy's basic separation statute discriminates against men in violation of the Fifth Amendment.

That statute requires Lieutenant Ballard's discharge because he was twice passed over for promotion, although he had less than ten full years of commissioned service.

A special statute, applicable to certain women lieutenants, provides for their discharge after thirteen years of service if they're not selected for promotion.

This three-year difference is the basis of the claim of discrimination.

I think it's important to point out in the first

place that the different treatment doesn't turn simply on sex. In the Corps where women and men fill substantially the same types of jobs, for instance, the Judge Advocate General Corps, the Medical Corps, and the Dental Corps, all officers are subject to the basic statute requiring separation if they are twice passed over for promotion.

Similarly, nurses, men and women, are subject to a thirteen-year statute similar to the one that applies to the line lieutenants.

The special thirteen-year statute applies to women line lieutenants and certain staff women. These women are competing for jobs against men line lieutenants, but the statute provides that women may not serve on naval vessels, except hospital ships and transport ships.

Therefore, the jobs that the women are subject to a special statute may fill are significantly different than the jobs that are filled -- many of the jobs that are filled by the men line lieutenants.

... QUESTION: I take it, we judge this case assuming the validity of that statutory restriction?

MRS. SHAPIRO: Yes. I believe that's -- that is not basically in this case,

Both the special thirteen-year statute and the basic statute providing for separation after being twice passed over reflect the special military philosophy.

In civilian life, if you're reasonably good at your job, you can normally expect to keep it even if you're not promoted. But in the military, that sort of competence is not enough.

Instead, in the military, every officer is periodically compared with his peers. Those best qualified are promoted, the others are separated,

This is a very tough system, but it was developed after World War II to meet the special military need to have the best possible officers available for command.

QUESTION: Mrs. Shapiro, are some male officers ineligible for sea duty?

MRS. SHAPIRO: No, --

QUESTION: And not eligible for other things?

MRS. SHAPIRO: -- there are limited-service officers, limited-duty officers who are not eligible for command at sea.

QUESTION: So they are disadvantaged by the existing system, then?

MRS. SHAPIRO: Not necessarily. They can serve on board ships, but they can't command ships.

On the other hand, women can't serve on board ships at all. Except hospital or transport ships, yes.

QUESTION: Would you have felt any differently if the court below had declared 6401 unconstitutional instead of

the general statute?

MRS. SHAPIRO: As a --

QUESTION: Would you be here today?

MRS. SHAPIRO: As a practical matter, I am not sure that the Navy would have felt nearly as upset about it. For one thing, the Navy has proposed to Congress that the special 6401 statute is no longer necessary, in light of current conditions, under --

QUESTION: Is that the younger of the two statutes, the most recent, more recent?

MRS. SHAPIRO: Yes. Not by very much, but slightly.

Lieutenant Ballard claims that he is not challenging the basic up or out procedures, but, in attacking the Navy's authority to discharge him after he has been passed over twice, he is attacking the procedures, since prompt separation is important to the effective functioning of the procedures. And this is no less true because a different rule applies to a particular small group of officers whose special circumstances justify this different treatment.

QUESTION: Why isn't the up or out rule good for the women?

MRS. SHAPIRO: Well, the up or out rule does apply to certain women, and it applies -- the up or out rule does apply to women. The only difference is that out doesn't occur after two pass-overs, it occurs after thirteen years.

It's basically the same --

QUESTION: Why isn't the out rule good for women, too?

MRS. SHAPIRO: Well, the out rule applies to women, it just doesn't apply as rapidly --

QUESTION: But it doesn't apply to the other.

MRS. SHAPIRO: Pardon?

QUESTION: Why do you have to -- you say that this is a very good rule for the men. Well, why isn't it, quote, "as good a rule" for women? Unquote,

MRS. SHAPIRO: Well, there are several reasons. One of the reasons is that these women -- the women that are affected by it are a relatively small group. They are at a disadvantage in competing with men in the group for sea duty.

QUESTION: And that disadvantage is brought about by the Navy, the same group that made the up and out rule.

MRS. SHAPIRO: Well, it's brought about by the statute, which prohibits them from serving on ships, on combat ships.

QUESTION: The same thing. You can't separate the Navy from -- Congress controls the Navy.

MRS. SHAPIRO: Well, that's true, but the -- as I say, I don't believe that the statute prohibiting women from serving on combat ships is really in this case.

QUESTION: Well, why couldn't you put the out --

what is it -- the up or out rule on women?

MRS. SHAPIRO: Well, you could.

QUESTION: Congress doesn't prohibit that.

MRS. SHAPIRO: Well, Congress says that no -- that women shall not be discharged until after thirteen years of service, if they're not on a promotion list.

QUESTION: Well, in order to conform to Congress, why didn't you say that Navy people who are subject to sea duty shall up or out?

MRS. SHAPIRO: You mean why doesn't the Navy say that?

QUESTION: Unh-hunh.

Instead of making it male and female.

MRS. SHAPIRO: Well, the Congress has said that the --

QUESTION: I don't think that -- couldn't the Navy say that all people subject to sea duty shall either qualify twice or get out?

MRS. SHAPIRO: I don't believe the Navy could say that in light of the current statutes. Congress could say that.

QUESTION: You don't think the Navy could?

MRS. SHAPIRO: No.

QUESTION: Why not?

MRS. SHAPIRO: Well, because Section 6382 --

QUESTION: Well, the Navy has said it, so far as the women are concerned.

I think I'm arguing just words, I think that's my only point.

MRS. SHAPIRO: The problem in the case, Mr. Justice Marshall, is that 6382(a) provides that male officers and women -- well, actually, it provides that all officers except women appointed under Section 5590, --

QUESTION: Right.

MRS. SHAPIRO: -- are -- must be separated after they have twice failed of selection.

QUESTION: There's nothing the Navy could do to get around that. That's the only point I'm trying to get.

MRS. SHAPIRO: No. That's -- that system --

QUESTION: So the only way that can be corrected is to go against the statute itself.

MRS. SHAPIRO: That's correct.

QUESTION: That's what I was trying to get at.

MRS. SHAPIRO: Yes. Sorry.

The basic procedures are those designed by Congress to assure the selection of the best-qualified officers for military command. This is exactly the kind of congressional choice that is entitled to great deference, since it is so closely related to the Navy's ability to fight effectively.

The basic rule requiring the separation of officers

who have been twice passed over for promotion is not, as the court below believed, basically a fiscal or administrative provision. Instead, it's a means of assuring the high quality of the pool from which eligible officers are chosen.

All officers eligible for promotion are annually evaluated against their peers. The best are promoted, but the quality of the pool from which future officers must be selected must also be protected,

Therefore, those officers who have served long enough to show that they are not qualified for promotion must be weeded out. In that way there's additional space in the pool for new officers to enter. They replace not only the best, but also the least qualified.

In other words, the effect of the true pass-over procedure, or the prompt separation of those not selected for promotion, is that you don't just skim the cream off of the eligible pool, but you also take off the bottom layer, so that the quality of the pool remains constant.

Congress has defined the point at which this weeding out --

QUESTION: Mrs. Shapiro, --

MRS. SHAPIRO: Yes?

QUESTION: -- what percentage of lieutenants are passed over twice these days, and come out as lieutenants?

MRS. SHAPIRO: Well, approximately 15 to 30 percent.

The promotion rate is about 85, 70 to 85 percent.

QUESTION: Up to lieutenant commander.

MRS. SHAPIRO: Pardon?

QUESTION: To lieutenant commander.

MRS. SHAPIRO: Yes, this is from lieutenant to lieutenant commander.

The point at which the weeding out occurs is defined in two different ways. The basic provision applies to most officers, including unrestricted line officers, and to men and women in most of the staff corps. It requires separation after the officer has been twice passed over.

That's not a statute that operates as the district court believed on the turn of the calendar. The determination of when an officer has been passed over involves the exercise of a very substantial military judgment, since being passed over does not mean simply that an officer was eligible for promotion, but was not selected; instead, it means that he's served long enough so that the fact that he is not selected should be counted against him.

The determination of when that point occurs is a very complex one. It requires balancing the varying needs of the service for officers, the manpower needs from year to year, and the desirability of having a large enough group from which to select the officers against the need to treat the -- what people -- equally from year to year.

There really are two important points in this procedure. As the need for combat officers increases in national emergencies, the length of service before promotion decreases. That length is currently about nine years as opposed to the peacetime goal of twelve years.

Secondly, the increased need for officers places a heavier drain on the pool of officers eligible for promotion, and makes it increasingly important to assure the high quality of the pool. One way of doing that is by the prompt separation of those passed over.

Since the current promotion rate is 70 to 85 percent, those who, like Lieutenant Ballard, are passed over twice are less qualified than 70 to 85 percent of their peers. Their separation improves the quality of the pool by making spaces in the pool available to others who have not yet been evaluated.

The effect of the decision below is to delay the separation of these least qualified officers for about three years. Since about two hundred lieutenants, subject to the basic rule, are passed over for the second time each year, the potential effect of the decision, under current conditions, would be that about six hundred such officers would have to be retained in the pool of eligible lieutenants.

That means, again, that about nineteen hundred officers in the lower grades, who have not been evaluated,

would have to be separated.

Of course, if the conditions change so that the length of -- the normal length of service is shorter, or that the promotion rates drop, then the number of officers, and the deleterious effect on the pool, would be increased.

In any event, the pool of eligible officers is permanently degraded, and the caliber of officers at all higher levels inevitably suffers.

The thirteen-year rule which is, as I have noted, applicable to certain women officers, was intended to provide for them lengths of service roughly equivalent to those anticipated for the vast majority of officers under peacetime conditions.

QUESTION: Now, when you're talking about officers, are you talking about lieutenants, or all commissioned officers?

MRS. SHAPIRO: Lieutenants, yes, I'm sorry.

QUESTION: Lieutenants.

MRS. SHAPIRO: I'm talking about lieutenants, yes.

QUESTION: Navy lieutenants.

MRS. SHAPIRO: Navy lieutenants, that's right.

QUESTION: Incidentally, is the ratio of the female lieutenants to female lieutenant commanders about the same as male to male in both those categories?

MRS. SHAPIRO: There are less women lieutenant

commanders -- the ratio is lower, yes.

The thirteen-year rule does interfere with the operation of the basic system, since it requires the retention of a few officers who would otherwise be separated. But the effect is not as serious in the female line officer category as it would be if it were applied to all naval lieutenants now subject to the basic rule.

First, the absolute numbers involved are far smaller. In 1972, the year in which Lieutenant Ballard was passed over for the second time, fourteen women officers were held over simply because of the special thirteen-year statute.

QUESTION: Even though they had been passed over --

MRS. SHAPIRO: Passed over twice, yes.

QUESTION: -- for promotion twice?

MRS. SHAPIRO: That's right.

And, in comparison, 230 -- well, 238 male lieutenants were passed over for the second time, except for a few of those who were retained because they were close to retirement, were separated out.

QUESTION: But in peacetime they, too, would have stayed on for almost thirteen years?

MRS. SHAPIRO: Yes. If this --

QUESTION: Well, that would have been predicted average.

MRS. SHAPIRO: That's the normal peacetime --

QUESTION: There's nothing statutory about that, that was just the predicted average time.

MRS. SHAPIRO: Well, the statute says that the normal length of service should be twelve years, and this is the peacetime goal.

QUESTION: Well, actually, is that the statute that's been suspended by the Executive Order?

MRS. SHAPIRO: The eligibility statute has been suspended by the Executive Order.

QUESTION: Well, does that have a relation to this problem?

MRS. SHAPIRO: Yes. Yes.

QUESTION: Yes.

QUESTION: How could a lieutenant be so close to retirement? Well, he would have been a mustang, I guess.

MRS. SHAPIRO: Well, as a matter of fact, Lieutenant Ballard, the real -- I think the real reason that Lieutenant Ballard is so anxious to remain in service --

QUESTION: Is to get his retirement.

MRS. SHAPIRO: -- is because he was -- did have enlisted service.

QUESTION: He had enlisted service.

MRS. SHAPIRO: Yes.

QUESTION: Unh-hunh.

QUESTION: Does the Army and the Air Force have

similar differences in their selection out procedures as between male and female?

MRS. SHAPIRO: No, they don't. On the other hand, their selection out procedures are somewhat different, because both the Army and the Air Force operate on a two-level system. That is, you're promoted in temporary grades, and if you're selected out in the temporary grade, then you revert to the permanent grade and you're not separated until you have been separated and -- passed over in the permanent grade.

So that you -- if Lieutenant Ballard were in the Army or the Air Force, he would still be in service. He would revert to his permanent grade rather than to his temporary grade.

There are justifications for permitting these female officers to serve a few years longer than their male counterparts who have been twice passed over.

First, the special thirteen-year rule permits the retention for a few years of women who would otherwise be separated. It thus helps to improve the proportion of women officers in the Navy; since there are over twenty times as many male officers as female officers, this serves a reasonable legislative purpose.

QUESTION: You're not arguing that their retention, however, should be subject to any different rules than men, should they? Other than this one. I mean, in terms of quality.

MRS. SHAPIRO: No, this -- at least this --

QUESTION: You could just quit passing them over, you could always keep them.

MRS. SHAPIRO: Yes. I'm not sure that that would be a wise policy.

QUESTION: Well, I take it that your goals -- that all the Navy's goals but one could be accomplished by saying women are subject to the same rule as men; namely, out if you're passed over twice. And to save one is that you want to increase the number of women in the --

MRS. SHAPIRO: No. Well, as far as the Navy's goals, perhaps, the other --

QUESTION: Well, you could solve the fact of having an over-supply of lieutenants by simply making the women and the men subject to the same rule.

MRS. SHAPIRO: Yes, that's right. That would solve that problem. But --

QUESTION: And that would put that part of the argument all aside.

But that would still leave the question of whether -- of whether it's a justification for the difference to want more women in the Navy.

MRS. SHAPIRO: Well, the other justification relates to considerations of fairness to the women involved. They've -- promotion rates for women have been significantly slower

than for men, and promotion opportunities more limited.

This was the case until -- certainly until 1967. At that time, many of the statutory restraints applicable to women were removed. The Navy has since then speeded up promotions for women, and finally, in 1972, the length of service before promotion of women line lieutenants equaled those of their male counterparts for the very first time.

Nevertheless, the records of the women who were being retained in 1972, because of the thirteen-year provisions, made -- were made while the slower rates prevailed.

QUESTION: Mrs. Shapiro, --

MRS. SHAPIRO: Yes, sir?

QUESTION: -- when the thirteen-year statute was first enacted, was it at that time fairly close to the length of time that a man had to go to be passed over twice?

MRS. SHAPIRO: The statute was designed to be equivalent to the peacetime goals for men. The actual length of service for men at that time, I don't -- was about the same as it is now.

QUESTION: Why was the statute ever passed, then?

MRS. SHAPIRO: Well, Title 10 includes -- when it was codified in 1947, it included one section that was permanent -- designed for the permanent peacetime military provisions, and then there are other sections that are temporary, national emergency type sections. The permanent

provisions have never come into effect. They come into effect when there are no more reserves in the military.

Finally, the women subject to the thirteen-year provision still suffer a disadvantage in competition with the men for the available jobs in the line category.

About forty percent of all the jobs in that category involve shipboard duty, and women, by statute, can't fill these jobs. Moreover, they compete for the jobs for which they are qualified with men, and in that competition they are disadvantaged because their records reflect the lack of seaboard duty. And the thirteen-year rule serves to counteract these disadvantages to some extent by giving the women somewhat more job security.

As a matter of policy, the Navy has concluded that the thirteen-year rule for women is no longer necessary, since promotion rates are now equal, and therefore they have suggested to the Congress that the special rule, 6401, be eliminated as part of the over-all revision of the military promotion and separation provisions, which are currently before Congress.

QUESTION: Is there any statutory limitation now on promotions for women in the Navy? There used to be, back a generation go, for example, that the -- even the head of the WAVES was a captain, she didn't have flag rank, and that was a matter of statute.

MRS. SHAPIRO: Until 1967, the highest rank that a woman could have, I believe, was captain.

QUESTION: As a matter of statute.

MRS. SHAPIRO: As a matter of statute.

QUESTION: The highest rank to which a woman could -- which a woman could achieve in the Navy, --

MRS. SHAPIRO: Yes.

QUESTION: -- was captain.

MRS. SHAPIRO: Yes, that's no longer true.

QUESTION: There are no limitations? That is, no sex limitations.

MRS. SHAPIRO: No, the only limitation --

QUESTION: Just the limitation on the over-all number of flag officers, I guess.

MRS. SHAPIRO: Yes, that's right. And of course there is this limitation on service aboard ship.

QUESTION: Right.

QUESTION: What was that you said about a proposed new statute?

MRS. SHAPIRO: Hearings were held on it over the summer. It's part of an over-all provision -- an over-all revision of the entire military promotion and retirement provision.

QUESTION: For all services, or just for the Navy?

MRS. SHAPIRO: All services.

Nevertheless, the difference in treatment of which Lieutenant Ballard complains may no longer be necessary, and it may soon be eliminated as a matter of legislative judgment.

QUESTION: When you say "soon be eliminated", that's rather optimistic, isn't it?

MRS. SHAPIRO: Well, it -- it's probably not this year.

QUESTION: Unh-hunh.

MRS. SHAPIRO: The --

QUESTION: Mrs. Shapiro, I think you covered it, but in your figures on the women, do they include the Medical and the Nurse Corps?

MRS. SHAPIRO: No -- the fourteen-year figure -- the fourteen figure?

QUESTION: Unh-hunh.

MRS. SHAPIRO: No, that includes only the women that are subject to this special provision. And it doesn't include the Nurse Corps, which has got another thirteen-year provision.

QUESTION: And in the Nurse Corps -- excuse me.

QUESTION: How about the Medical Corps?

MRS. SHAPIRO: The Medical Corps, the women are subject to the same two-passover rule.

QUESTION: Unh-hunh. And are there now men in the

Naval Nurse Corps?

MRS. SHAPIRO: Yes. Not very man, but --

QUESTION: Commissioned officers?

MRS. SHAPIRO: Yes.

QUESTION: Not just pharmacists -- commissioned officers, nurses?

MRS. SHAPIRO: Commissioned officer nurses, yes.

QUESTION: It's a new Navy!

[Laughter.]

MRS. SHAPIRO: Right.

If there are no further questions, I'll reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Shapiro.
Mr. Khoury.

ORAL ARGUMENT OF CHARLES R. KHOURY, JR., ESQ.,

ON BEHALF OF THE APPELLEE

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

I am Charles Khoury, and several years ago when Lieutenant Ballard came to my office and asked me for help in this situation, I knew it was a unique case and I was able to discern, after a short time, that it involved the issue which is before the Court now: sex discrimination.

He sought me out because I had been in the Navy for eleven years, and he knew that. I graduated from the Naval

Academy, that accounts for four of those eleven years, and I was familiar with the problems that are involved in promotion. I was familiar with the problems of mustang, and having an individual who walks into your office and has seventeen years of active duty, which is creditable towards a twenty-year retirement, and is about -- and if he were a woman, he would have -- he would be over the top, he'd be able to retire.

And of course this was the overriding issue, this is the overriding concern, as Mrs. Shapiro stated, for Lieutenant Ballard. And it was as simple as that, and is as simple as that.

QUESTION: About how many years has he had?

MR. KHOURY: Well, right now, at this instant, he will retire in February of 1975, which is about four months from now.

QUESTION: So he will have --

MR. KHOURY: I mean, he would -- and that's another issue that I want to talk about, as mootness of this case; but I'm saving that for the end.

QUESTION: Well, let me see if I get it: What he was after was that he be eligible for retirement.

MR. KHOURY: Exactly. And if he were --

QUESTION: And now this lawsuit has accomplished that for him, or will by February, is that it?

MR. KHOURY: Exactly. Exactly, Your Honor.

But let me state what I'm going to talk about, briefly outline. I'm going to talk about the rational basis --

QUESTION: Mrs. Shapiro tells us the statute is going to be repealed, you tell us he gets everything he wants; what are we dealing with here?

MR. KHOURY: Sounds like DeFunis, doesn't it?

But, at any rate, --

QUESTION: I hope not!

[Laughter,]

MR. KHOURY: -- the relief -- I'm going to talk about whether there is any rational basis to support this particular statute, and what relief should be granted, and then, if I'm ready to talk about, why this appeal might be dismissed.

QUESTION: Is it your view that the rational basis test applies?

MR. KHOURY: Your Honor, I feel that the compelling interest test would apply here. However, we're talking about, if the Court were to find a rational basis, I feel that that would also be a compelling interest in this particular situation.

I feel that there's no reason not to apply a compelling interest here, because this is not a Kahn vs. Shevin situation, namely, protective legislation being involved.

QUESTION: That's what Kahn v. Shevin was, wasn't it?

MR. KHOURY: That's right. And so I'm not at all saying -- I'm responding to what Mrs. Shapiro said about a rational basis.

In our brief I talk about compelling interest.

QUESTION: It's not a Florida type case, either. Which is what that was.

MR. KHOURY: But, at any rate, I agree -- I agree that Kahn is not applicable here.

But, basically, what Mrs. Shapiro is saying is that because this is going to cause a great problem, there's a military necessity for doing this. In other words, it's the reasoning backward problem.

And this Court has been faced before with situations where attorneys have said that the courts -- if the Court implements this decision -- in other words, if the Court finds something unconstitutional, it's going to cause a great problem. In integration cases, I'm sure that was argued to the Court, that a great problem would occur in the implementation of a decision by the Court, namely, that integration must occur.

And what Mrs. Shapiro is doing is talking about the relief aspect and then using that -- the difficulty, saying that there's going to be difficult relief, and then using that to say that there's a compelling military necessity to continue the same scheme; namely, a separate system for women,

and a separate system for men, as far as selection out is concerned.

And I submit to the Court that we should not confuse that. And I also want to talk about the figures that are being talked about here, is, namely, in the court below the only people who had the same amount of years as Mr. Ballard did, or more, were nine; nine people. That was an affidavit that was filed by Admiral Forbes, and it's in the Appendix.

So as I -- and of course the court below --

QUESTION: Since you want to talk about figures, what's your basis of nine based on the number, the total number of years he was in the Navy?

MR. KHOURY: That's right.

QUESTION: The total number of years he was a lieutenant --

MR. KHOURY: And enlisted man.

QUESTION: Well, I mean -- all of that?

MR. KHOURY: Officer and enlisted man. I'm talking about total number of years in the Navy, officer and enlisted man. There were nine people who had --

QUESTION: Well, what has that got to do with the issue in this case?

I mean, how many lieutenants did they have, that had never been an enlisted man?

MR. KHOURY: Then her figure -- her figure about

lieutenants who would be covered by the statute, 10 USC 6382, the whole number of lieutenants is correct. In other words, this 200 figure.

QUESTION: Well, what's wrong with that figure?

MR. KHOURY: Well, what I'm talking about, Your Honor, --

QUESTION: The statute only talks about that, isn't that right?

MR. KHOURY: The statute talks --

QUESTION: Does the statute talk about enlisted people?

MR. KHOURY: No.

QUESTION: The people that have enlisted service. They don't talk about that.

MR. KHOURY: No.

QUESTION: The statute you're talking about talks about lieutenants.

MR. KHOURY: Well, let me talk about this, Your Honor, too, since we're talking about the number of people.

QUESTION: You mean something other than the statute? Go right ahead.

MR. KHOURY: How many people are actually going to -- if the Court finds that this is an unconstitutional discrimination, how many lieutenants are actually going to say, "I want to stay in the Navy" for an extra one or two

years"?

Now, ---

QUESTION: You are alleging the class, you tell me. I don't know. How many in that class?

MR. KHOURY: Okay. The point is that she is trying to state --

QUESTION: Well, how many are in your class?

MR. KHOURY: One person. One person, it's not a class action.

QUESTION: Well, how does that become a class? That's an awful large person!

MR. KHOURY: That's exactly right, and that's the point I'm trying to make, is that we're talking about one person here, and the government is arguing that we're going to bring the, you know, have a whole lot of people, six hundred people over a period of three years.

QUESTION: Can you take care of just one without taking care of the others?

MR. KHOURY: Well, that's what I suggest that the Court do here, is worry about the cases, the class action, when it comes up.

QUESTION: Well, did the lower court take care of one or all? Didn't the lower court go after the whole statute?

MR. KHOURY: One person. And it declared the

statute unconstitutional.

QUESTION: Well, that affects how many people?

MR. KHOURY: Well, as a practical matter, it would affect only those people who opted to take advantage of it. And that's the point I'm trying to make. Do you see what I'm getting at?

QUESTION: Oh.

MR. KHOURY: In other words, it would be only those -- what the Court did -- since the government is talking about the effect of this, let me talk about what happened after this. In other words, a class action was filed, and the court, the three-judge court below allowed individuals to opt whether or not to stay in as if -- for the thirteen years, or to get out. And isn't that the figure that's really important?

And that case hasn't gone to trial yet. That's still down in the district court in San Diego. And that's the point I'm trying to make. We shouldn't be talking about figures that have not been subject to trial.

Now, I'm going to get to that when I talk about an improperly presented federal question, because I really believe that this question has been improperly presented to this Court. Last-minute affidavits.

But I want to go on and talk about this idea of the rationale that the government has put up, saying that they

need this statute, this 10 USC 6382, as opposed from 10 -- and the 10 USC -- there's a rational basis for having the different treatment. That's what I'm talking about.

We're not questioning the selection out procedures. I'm talking about the situation where there's a rational basis, or a compelling interest, to have different treatment for women as opposed to men.

And they talk about a combat need, in other words, a tremendous increase of combat individuals.

Well, from my own experience, that whenever you have an increase -- a necessity of getting combat individuals, the support people are needed. For every combat individual, there are three or four individuals who have to support that individual. And so this need of -- this expanding of the service cuts across just the males, it cuts across that and into the women, also.

And, of course, basically all the government is arguing here is that because this may cause some fiscal inconvenience to the Navy, some fiscal inconvenience to the Navy, then that makes it a military necessity, and there is a compelling interest to have disparate treatment between men and women.

I want to -- we can't argue backwards and say because it's hard, and it may be hard -- and I'm not even conceding that it is, because, as I was talking to Justice

Marshall, we don't know exactly how many people would opt to take advantage of the statute that the women have, the extra -- the thirteen years.

Lieutenant Ballard obviously is opting to take advantage of that, because he can retire. But it's going to be really a very small number of -- and generally mustangs, as Justice Stewart says, and that's the name that the Navy uses, individuals who have been enlisted men and then go into the officer ranks.

And again -- and I want to respond to this -- it was very clear, and the court below found after a trial this this is a very highly qualified officer, and on substantial evidence, this was a very highly qualified officer. And his fitness reports were outstanding. And during the period of the time of the temporary restraining order, he did very well, and there were additional fitness reports which were submitted by his command, showing that they recommended him for promotion every time.

And so it is --

QUESTION: Does this tie in to your constitutional argument at all?

MR. KHOURY: It talks about the turn of the calendar. In other words, that this is only a turn of the calendar. And I'm responding to the government's statement about a less-qualified individual. But it's correct. In other words, the

constitutional issue is whether or not similarly situated people, whether or not a similarly situated woman has the better of a situation, and whether a similarly situated man is discriminated against by a statutory scheme.

QUESTION: That's the basis the court below went on.

MR. KHOURY: Exactly, Your Honor.

And another point that I'm talking about -- that I want to talk about, that has to do with this constitutional issue, is the assertion that women are also subject to the same statute I'm complaining is applied to my man. And that was discussed below and evidence was taken below on that issue, and the court found that no woman had been discharged under 10 USC 6382. That's in the court's, the three-judge court's opinion.

And I wanted to make that perfectly clear, that they found that in fact no woman had been discharged under this statute, which the government is saying, well, it really does apply to some women.

QUESTION: Well, isn't --

QUESTION: Probably because they've all been promoted. Is that the answer?

MR. KHOURY: Namely -- in other words, that no -- well, the government is trying to say that basically that there has been a detriment, in other words, the detriment equally applies to women. And I guess what the Court is

saying is that maybe no woman has ever been passed over that was subject --

QUESTION: Twice.

MR. KHOURY: -- twice, that was subject to the statute. And that's a possible --

QUESTION: Yes.

MR. KHOURY: That's a possible interpretation.

But getting on to the relief now. In other words, we've talked about the fact that there are -- there's a disparate treatment here of men and women similarly situated. Now, what is the relief? And that's really what the government is complaining about. That's really what is hurting the government here, is that they're worried about the relief. Not whether or not there is a constitutional deprivation, because that really has to be clear from the record, especially when it was clear at the time Congress enacted this thirteen-year statute, that they were just trying to make it be the same time as men. And that's very clear from the record. That there was never -- that Congress wasn't attempting any protective legislation or anything of that nature when they enacted this thirteen-year protective statute to women.

QUESTION: Why did the custom change with respect to men, Mr. Khoury? I take it, it hasn't been a result of statute, but simply as a result of practice, that gradually

the period for men has gone down from thirteen years.

MR. KHOURY: Basically, what happened is that a restriction on time and grade was lifted by an executive order, a presidential order, and the latest one was signed by President Johnson in 1968, which took away the restriction that before you used to have to be an ensign a certain amount of time, and then a Lieutenant j.g. a certain amount of time, before you were even eligible for promotion.

QUESTION: Was this accurate in the government's reply brief, that that suspension was made because suspension of normal time and grade provision was -- of these officers was required in times of national emergency, and an Executive Order suspended them as in a time of national emergency; is that right?

MR. KHOURY: Basically it says -- the suspension order says this is a national emergency. One of the affidavits provided by the government says that we've been in a state of national emergency for some many, many years right now, and that's true.

QUESTION: Of course, in the Second World War you had 21-year-old colonels. They did away with all sorts of time and grade procedures.

MR. KHOURY: And they did away with also the up or out procedure, too, during that period of time.

Nobody was getting kicked out during that period of

time, due to passovers, because the President has the authority to suspend all of that.

QUESTION: But if he does in fact suspend it, so that you don't have to spend as much time in grade, doesn't it follow, the natural consequence of that, that the opportunity to judge the man may come up more frequently?

MR. KHOURY: The opportunity to judge the man, he's still going to be subject to two passovers. It means it will come faster, and his total time in service will be less, maybe by three years, and if he's like Lieutenant Ballard, he may, you know, he may not be able to retire. That's the operative effect of it. Not necessarily that he's going to be observed more at all.

I mean, in the Navy you're observed once a year, no matter what, on your fitness reports. Unless you've been transferred, and then you may have multiple observations.

QUESTION: But that your chance to be promoted from lieutenant would come at a sooner date, by reason of the Executive Order.

MR. KHOURY: That's right. And that's what -- that's exactly right.

But we must look at what Congress intended, and we can't at all say that Congress did not -- Congress would not intend the benefit of the women not be applied to Lieutenant Ballard in this case. I mean, how can it be

asserted that it would be -- that in any way, shape or form that the court below was wrong in applying the 10 USC 6401 to Lieutenant Ballard to cure the -- to grant the relief requested.

QUESTION: Well, if you're right, the court below was wrong. If Congress wouldn't have intended this to apply to Lieutenant Ballard, they should have enforced the congressional intent and not declared the statute unconstitutional.

MR. KHOURY: Oh, I'm not -- I never said -- I never asserted, and didn't mean to give the Court the impression that it was Congress's intent not to apply 6401 to Lieutenant Ballard.

In fact, it's very possible that Congress -- in fact, the record shows that it was Congress's intent to equalize the two services, the two -- the male and the female, when it said thirteen years. That's conceded by the government.

So, in no way, shape or form do I want to state that it was -- that it could be Congress's intent not to give that benefit. Because that's -- I mean, that's the relief that was sought, that's the relief that was granted and there's nothing in the record that would indicate that Congress's intent would be other than to have this man get the same benefit as a woman.

QUESTION: Well, but, why on earth do they have to declare a statute unconstitutional, if you're right about Congress's intent?

MR. KHOURY: Well, that's an Executive -- that was an Executive Order in 1968, and the --

QUESTION: Why wouldn't they just hold the Executive Order was inconsistent with this intent of Congress that you discussed?

MR. KHOURY: No. I wouldn't say that the Executive -- because here's the thing, can we say that Congress would realize that this same statute, or that the suspension of time and grade, or that the President would realize that this suspension of time and grade, which causes the rapid promotion, would also push out a bunch of well-qualified people?

Do you see what I'm getting at? I mean, that's really what the effect is. You want to increase the number -- it's a paradox. You want to increase the size of the military, but, at the same time, because you're suspending the time and grade, a whole bunch of well-qualified people maybe are getting pushed out.

QUESTION: Well, I'm still worried about your statement that this one man, Lieutenant Ballard, Congress meant to give him the same relief he gave women.

MR. KHOURY: Because it's in the record that Congress put thirteen years into the women's statute, so it would equal

the male statute.

QUESTION: Right.

MR. KHOURY: That was their reasoning.

QUESTION: Well, does that apply to the other two hundred that were in the same category as Lieutenant Ballard?

MR. KHOURY: Well, it would apply if, in fact, the Department of Defense Bill --

QUESTION: Well, if the other 214 join in this lawsuit, would it apply to them?

MR. KHOURY: If the other 214 were to join in this lawsuit, they -- depending on how many years they had been in the service prior to this --

QUESTION: Well, what is there in the congressional history that limits it to the number of years?

MR. KHOURY: I'm just saying, Your Honor, that there is -- we can't assume that it would be the intent of Congress to deny Lieutenant Ballard of these extra three years. That's the assumption that we can't make.

QUESTION: Well, I just can't think of Lieutenant Ballard by himself without thinking of those other two hundred and some.

MR. KHOURY: Well, that's a separate lawsuit that may be completely decided by the changing of this law.

QUESTION: Well, I don't know that it's a separate lawsuit. I thought you said they could intervene in this one.

MR. KHOURY: Well, basically we're talking about men who -- they haven't intervened, and we're up to the Supreme Court.

QUESTION: Well, could they?

Of course they could. I read what the judge said. So all two hundred and some of them are now in the same category as women. According to you.

MR. KHOURY: Anybody who was subject to discharge of that statute --

QUESTION: Right.

MR. KHOURY: -- and if the statute is declared unconstitutional, could be subject to that.

QUESTION: Right.

MR. KHOURY: But we -- this is not a class action, even though the government is talking about it like it's a class action.

I'd like to --

QUESTION: You've mentioned several times that this procedure operates to push out well-qualified people. But isn't that inherent in a process of keeping better-qualified people?

MR. KHOURY: We don't attack the selection-out procedure, Your Honor, just as the government stated, we don't attack that. We attack --

QUESTION: Well, I wondered why you'd put so much

emphasis on the fact that -- on the idea that this pushes out well-qualified people. It's bound to be so when you move out of the Vietnam war or any other war into a peacetime period that you begin to tune down your military establishment. And this is a part of that process, isn't it?

MR. KHOURY: But what if you inject sex into that pushing out of well-qualified people? And that's really what our problem is. Because we have no quarrel with the selection -- the up or out selection procedure is a hard, it's a hard procedure. But I'm not attacking it here. I can't, really.

But if it's tied to sex, I can, and have. And --

QUESTION: The government tells us that's part of a compensatory arrangement for the fact that the female officers can't get sea duty, except in limited categories.

MR. KHOURY: Well, I have a hard time with that. I couldn't find any intent of Congress to that effect, and I'm wondering about justifying a discriminatory scheme by saying that it's to make up for another discrimination, and we're not in a tax situation like Kahn vs. Shevin.

What I think the government is trying to do there is to bring this case -- to attempt to bring this case within the rationale of Kahn vs. Shevin, to say that this is really remedial or compensatory legislation. And the record doesn't support that.

QUESTION: Mr. Khoury, --

MR. KHOURY: Yes, sir?

QUESTION: -- getting back to this February date when he would be eligible for retirement, have you had any assurances from the Navy without regard to the outcome of this case that he will be kept on until he's eligible?

MR. KHOURY: No, Your Honor, the Navy -- what we're talking about here is the -- is what actually -- the government stated that these nine people that I mentioned before are subject -- in Mr. Ballard's case, who had -- who did not have twenty years in, or nineteen and a half years, because they round it off to twenty, who did not have that period of time in, they were kept in under 10 USC 1006(e), which is called the continuation program.

And when you get within two years of retirement, you're eligible for that program.

Now, he is very -- he's a lot closer than two years of retirement; he was not within two years of retirement when we brought the lawsuit. He's within four months of retirement right now. And so I feel that the Navy, under 10 USC 1006(e), will go ahead and retire the man anyway.

QUESTION: Even if the judgment below is reversed?

MR. KHOURY: Exactly.

QUESTION: And it's on that basis that you're suggesting that this case might be moot and should be dismissed?

MR. KHOURY: Yes, Your Honor. And the reason it's such a late suggestion on my part is that it was -- I just came across Odegaard in that logic, and Odegaard -- DeFunis vs. Odegaard -- yesterday in researching this, and I felt that I must bring that up to the Court.

Also the idea of dismissing this appeal on the idea of the -- that the fact that the federal question hasn't been properly presented. So much of what I've been talking about here has been affidavits, and what the government has been putting forth were presented in affidavits which were presented after the trial in this case, in a motion for new trial. And they have never been responded to by Lieutenant Ballard, because the trial was over.

And that's not a proper way to bring a federal question before this Court, as I said in my brief, and I did raise this in my brief: that the federal question is not properly presented. And it would be best for the Court, if the Court isn't going to rule in favor of me and my client on the merits, it would be best to dismiss the appeal and have the question properly presented.

Or if, again, the Court isn't going to rule in favor of my client on the merits in this case, and find, No. 1, that there was a constitutional deprivation, sex discrimination here, and grant the same relief that was granted below, if the Court --

QUESTION: If the rational basis is applied, Mr. Khoury, does it make much difference whether the arguments are put in the form of an affidavit by an Admiral or whether they're put in the form of an attorney's brief, saying rational people could argue that such-and-such would serve a purpose? I mean, one way you're confronted with it as a statement of fact, another way you're confronted with a legal argument; but it's pretty much the same argument.

MR. KHOURY: Your Honor, the whole point of their affidavits is the Pandora's Box argument that I alluded to before; namely, words to the effect that the Navy is going to come to a screeching halt if the Court implements this relief. Not that there is any discrimination, but that the relief is going to be very hard on the Navy. And that's what I'm contesting -- that I have never had a chance to contest by way of interrogatories. It's never stood the test of trial.

Because, let me say this, that there are actually, in my experience -- and here I'm doing the same thing that I'm saying the government is doing, and I don't want to be testifying; but there are very few people who are going to take advantage of this, so it can't bring the Navy to a screeching halt.

QUESTION: But is this really the way we're trying constitutional cases now? What I'm saying is addressed, perhaps, more to the government than to you: that instead of

making arguments as lawyers as to supporting justifications, you take people's depositions and put them on the witness stand to see what they were thinking when they promulgated a particular regulation?

MR. KHOURY: There are a lot of facts which have been spoken to by the government, which -- in an attempt to support a rational basis, which were never raised before. And that's the -- and I contest their accuracy. I'm contesting that even it is that they make a rational basis, and so that's why --

QUESTION: Well, you're just as able to make that argument now, having seen the affidavit, as you would be had you seen it in their opposing brief.

MR. KHOURY: Oh, no, Your Honor. No. That's not true. I mean, because of the fact that we would be -- I would be able to tell the Court that as a matter of fact it's not two hundred people that are taking advantage of this lawsuit, but maybe twenty. Do you see the difference in that? I mean, that's their -- their whole basis is that this is causing an administrative problem with the Navy, and a money problem with the Navy.

That's really what their whole argument is, Your Honor.

QUESTION: Well, does that meet the rational basis test?

MR. KHOURY: No. I don't think that meets the rational basis test at all.

QUESTION: Mr. Khoury, let me go back to where I started. Did this statute precede the admission of women into the Navy?

MR. KHOURY: 10 USC 6382?

QUESTION: Yes.

MR. KHOURY: Did it precede the admission --

QUESTION: Was it on the books? Was it a practice before the formation of the WAVES?

MR. KHOURY: I -- I can't answer that, Your Honor, in all honesty.

QUESTION: If it were, I suppose, at that time, there isn't any constitutional argument. And the constitutional argument arises only because of the presence of 6401.

MR. KHOURY: That's true.

QUESTION: Then, why isn't 6401 the unconstitutional statute?

MR. KHOURY: Well, the scheme is unconstitutional, and the point is, in the two ways that we approach this, the court below had the decision: what were they going to do; what relief were they going to grant?

And then that's the decision that they had to make, as to try to figure out what Congress intended,

In other words, when you say which statute, I don't

like to say that one or the other is unconstitutional. To argue -- because, for one thing, 10 USC 6382 did not just -- did not combine women in it. So I had to argue that two statutes in the same section, 10 United States Code, operating together, as a whole, were unconstitutional.

Does the Court see what I'm getting at? And that's what my argument was below.

QUESTION: My problem is that I think we had a constitutional system before 6401 was enacted, and because of its enactment, all of a sudden, you're here claiming unconstitutionality of the other statute.

I just wondered if chronology had anything to do with it at all.

MR. KHOURY: I think the chronology would help in figuring out what the intent of Congress is, Your Honor, and that's what the Court has to do when they are granting relief.

In other words, we can conclude on the merits that there's an unconstitutional discrimination. The question is what to do about it. And the court below took the action that they did, and I'm talking about the fact here now that there is ample justification to support their assumption that this is what Congress would do.

Now, unless there are any further questions, I --

QUESTION: I just want to be sure I understand your suggestion that this case may be moot.

MR. KHOURY: Yes, Your Honor, because of the fact that at the time the lawsuit was filed, he did not come within the relief established in this -- and I'm referring -- let me just refer the Court specifically to the brief -- and the government alluded to it in oral argument. But basically, in the government's brief, at page 5, footnote 6, there is a statement about this long-standing policy of the Navy to retire individuals when they've gotten within two years of retirement.

And then there's the Forbes affidavit, which is in Appendix 9a, and then there's also an affidavit, which is not in the Appendix, but is in the record in this case, which was filed by the government, which stated that, yes, in fact, the Navy does have this long-standing policy to retire individuals when they get within two years of retirement. And it's supported by statute, and that's -- and I cited the statute, 10 USC 1006(e). And that he is now within that, and it's my understanding that he's going to be retired on that, that they really -- based on the Navy's long-standing policy, what is there to exempt him from that long-standing policy?

QUESTION: And he's now within -- what -- five months or so?

MR. KHOURY: Right. Well, February 1975.

QUESTION: Whatever that is, next January or February.

MR. KHOURY: Right.

QUESTION: Yes, but --

QUESTION: It's not mandatory, is it?

MR. KHOURY: Let me state what that situation is.

It is not -- it is the long-standing policy, all nine of the officers who were in Lieutenant Ballard's class, in this group of people who were two years, within two years, they were all retired. In the new bill that becomes mandatory.

Let me say something further, that in the new bill that the government was talking about, he has no problem. Not -- none of these people have any problem in this new bill. They all have equity, they get large equity payments, a lot of this -- this is taken care of.

But it's true, Your Honor, it's this 10 --

QUESTION: Yes, but the policy involved will reserve appointment according to that --

MR. KHOURY: That's right. In other words, --

QUESTION: So your thought is that under this -- at this juncture, however this case comes out, he'd probably get a reserve appointment, --

MR. KHOURY: Exactly.

QUESTION: -- so that he could retire in February.

MR. KHOURY: Exactly.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything

further, Mrs. Shapiro?

QUESTION: I just have one other question on that. If he gets the reserve appointment, will that entitle him to stay in a total of thirteen years after having been passed over twice?

MR. KHOURY: Oh, well, it will just --

QUESTION: Will that equalize him with a woman -- a woman similarly situated?

MR. KHOURY: Right. As a practical -- yes, Your Honor. As a practical matter, he'll be able to stay in until retirement, which his retirement is -- well, his retirement actually -- even if he stays in until February 16th, 1975, that's retirement, that's nineteen and a half years. He'll be in nineteen and a half years February 16th, 1975.

QUESTION: But that still doesn't give him what a woman would have, I think, does it? Thirteen years. As a lieutenant.

MR. KHOURY: Very close to it.

QUESTION: As a lieutenant.

MR. KHOURY: It will be very close to it, very close to it, Your Honor.

QUESTION: Mr. Khoury, I believe our practice in cases where we find the case is moot is to vacate the judgment below and direct the action be dismissed. So that you would, in effect, lose the benefit of your district court judgment

if we, as I understand it, if we concluded it was moot.

Is that agreeable to you?

MR. KHOURY: Well, Your Honor, I was -- in dismissing -- I'm talking about that in the context of dismissing the appeal.

QUESTION: Well, but --

MR. KHOURY: I thought if the Court would dismiss the appeal on the grounds of, No. 1, if the -- if, for example, it was an improperly presented federal question --

QUESTION: If a case is moot, though, under our Munsingwear case, we vacate the judgment below and direct that the action be dismissed.

QUESTION: That's different from a dismissal of the appeal if it's improperly brought.

A judgment in the latter case stands, but in the former, a dismissal is moot, vacation it doesn't.

MR. KHOURY: Well, I -- may I suggest something to the Court, then? Because this is a very important point, and I'm only raising it for the first time.

I would like to submit a brief on this, an additional brief on this issue, because it is so important. And, obviously, I don't want, in any way, shape or form, to be asking the Court to do something that will undercut the victory that was won below, and so I would ask to be able to submit a brief.

QUESTION: Suppose the government were to say to us

today, We're going to apply this policy, put him on a reserve appointment status, so that then he can be retired in February. Would you still object to a vacation and dismissal of the action as moot?

MR. KHOURY: The Court puts me in a tough position.

I don't see how, if the -- if my client is going to be, is to get this retirement which was really the ultimate of the lawsuit, I don't see how I could object.

Thank you.

QUESTION: What about that, Mrs. Shapiro?

MR. CHIEF JUSTICE BURGER: Mrs. Shapiro.

REBUTTAL ARGUMENT OF MRS. HARRIET S. SHAPIRO,

ON BEHALF OF THE APPELLANTS

MRS. SHAPIRO: Yes. The --

QUESTION: Well, what about that, is it true?

As your footnote 5 says, circumstances like this, that within two years of retirement, as he now is, if you follow the practice, whether you have to do it or not, is to give him a reserve appointment and let him finish out for retirement.

MRS. SHAPIRO: That is the policy. But this is certainly a special situation. The only reason that he is still in service is because the Navy has been enjoined from discharging him. And that is not the same kind of a situation.

If this Court should decide that the injunction was properly issued, the Secretary of the Navy has not made up his

mind what he would do. As a matter of fact, he's waiting to see how this case comes out.

QUESTION: Well, you could still win the case, and the injunction could still have been properly issued, couldn't it?

MRS. SHAPIRO: I --

QUESTION: Well, what about -- I suppose until an appeal was finally over, until the case was finally over, an injunction could have been outstanding.

MRS. SHAPIRO: Well, the injunction against discharging him, I believe is based on the conclusion that the statute was --

QUESTION: Final conclusion on the merits?

MRS. SHAPIRO: Yes, there's a permanent injunction that we're under, that -- the reason for the injunction --

QUESTION: Was there a preliminary injunction issued?

MRS. SHAPIRO: Yes, there was.

QUESTION: Of course, if there's an affirmance, then what's your situation?

MRS. SHAPIRO: If there's -- yes, if there's affirmance -- the Secretary of the Navy hasn't decided. He doesn't -- I mean, he --

QUESTION: Well, if the injunction remains, you can't discharge him.

MRS. SHAPIRO: That's true. Yes -- oh, I see -- yes, that's true.

QUESTION: That's right, and in February he may retire.

MRS. SHAPIRO: That's right. Well, we can't discharge him until -- for thirteen years.

QUESTION: And you can't even discharge him in February, you have to hold him --

MRS. SHAPIRO: We have to hold him for --

QUESTION: -- prior to the expiration -- you can't discharge him prior to the expiration of thirteen years of commissioned service.

MRS. SHAPIRO: Yes. This is --

QUESTION: Making the same, equivalent, as though he were a female.

MRS. SHAPIRO: We would hope that if the Court found that there was an unconstitutional discrimination, it would -- we would have the -- the relief would indicate that if the special statute were repealed, why, he wouldn't have to be kept for the thirteen years. That, you know, the --

QUESTION: Well, I would suppose, if it were repealed, you would go back to the district court and tell them so, and let them decide in the first instance what happened.

MRS. SHAPIRO: Yes. Yes.

QUESTION: We wouldn't decide that on an iffy basis

here, would we?

MRS. SHAPIRO: No. No.

QUESTON: Who knows.

MRS. SHAPIRO: The only other point I wanted to make was that the class actions that Mr. Khoury referred to are pending in the district court, and, as a matter of fact, we're under injunctions prohibiting the discharge of the people that are involved in those cases. Lieutenant Ballard would have been discharged in June of '72. There's one case involving lieutenants who would have been discharged in June of '73, and the other in June of '74. And those cases are being held, pending the outcome of this case.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Shapiro, and Mr. Khoury.

The case is submitted.

[Whereupon, at 2:44 o'clock, p.m., the case in the above-entitled matter was submitted.]

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