The Phyllis Schlafly Report

VOL. 17, NO. 4, SECTION 2 | BOX 618, ALTON, ILLINOIS 62002 | NOVEMBER, 1983

New Testimony on the Old E.R.A.

Excerpts from October 20, 1983 Testimonies to the Subcommittee on Civil and Constitutional Rights of the U. S. House Committee on the Judiciary

Testimony by Professor Henry C. Karlson, Indiana University School of Law

Military Service: Article I, Section 8 of the United States Constitution authorizes Congress "to raise and support Armies . . . to provide and maintain a Navy." There is general agreement among both proponents and opponents of the E.R.A. that it will have a pervasive impact upon this critical Congressional power. Both the language of the amendment, and its legislative history lead to the same conclusion. The amendment does not permit different treatment of the sexes with regard to either voluntary or involuntary military service . . . .

In light of the experience of other nations which have experimented with the use of women as combat troops, the wisdom of the amendment's demand that women in the military be treated the same as men is open to question. Israel in its experiment found that women in combat have significantly higher casualty rates than their male counterparts. It was also discovered that men in combat units that included women had higher casualty rates than similarly situated men in all-male combat units. Based upon these and other findings the government of Israel enacted legislation that prohibits the use of women as direct combat troops. If the E.R.A. becomes part of the United States Constitution, Congress would not have that option.

If the E.R.A. is enacted, it will be necessary to create some sex-neutral method for assigning military personnel to combat units. What at first appears to be an effective and appropriate method, physical testing, becomes upon analysis at best a useless exercise. A test is only effective when the individuals taking it have some motive or desire to do well. Although a number of individuals, both male and female, may have a strong desire to risk their lives in combat and live under the spartan physical conditions of a combat unit in the field, many have no such aspirations. In the event of a military draft, the group both male and female that would not desire to serve in combat will in all probability be rather large.

During the Vietnam war, men drafted into involuntary military service were motivated to do well on their physical training tests by the spector of being required to continue basic training in a "motivational platoon" until they passed their tests. The conditions in a motivational platoon were of a nature that made the possibility of combat appear the lesser evil. If the E.R.A.'s mandate that men and women must be treated the same in the military becomes part of our Constitution, either continued basic training for men unable or unwilling to pass the physical tests necessary for combat qualification must be discontinued, or women who are unable to pass the same tests must also be subject to unending basic training in motivational platoons. This would probably be a majority of women called for military service.

In the event that Congress should find it necessary to reinstate a military draft, the E.R.A. would create great difficulty in dealing with married couples that have children. Although several alternatives for dealing with this problem would exist, each would have a negative impact on either the nation or the ability of the United States to raise a combat force. Congress could, for example, provide that neither parent be subject to the draft. Our experience in past wars indicates that a broad exemption of this nature would greatly reduce the number of people subject to

the draft and have a negative impact upon the ability to raise an army. Although in theory, Congress could require that both parents be drafted, and their child or children be put in a foster home or a government institution, in light of the great harm this would inflict upon many children it does not appear to be a viable alternative.

A future selective service law might provide that in the circumstance of a married couple with children, only one of the parents would be drafted. Unless a sex biased, and therefore under the E.R.A. unconstitutional, criteria is used to determine which parent would be drafted, one-half of those exempted from military service would be males. Even proponents of the E.R.A. agree that on the average men are more likely to be endowed with the physical strength and stamina necessary for combat than women. Exclusion of a large number of males from selection for military service would reduce the ability of a military draft to provide individuals suitable for use as combat troops.

A unique physical characteristic shared by most young women, but no men, is the ability to voluntarily become pregnant. In light of the Supreme Court's decisions dealing with the right to an abortion, pregnancy must be considered a voluntarily maintained physical condition. In the military service, particularly in time of war, this ability to assume and maintain the physical condition of pregnancy permits a woman who does not care for her assignment to voluntarily disable herself. Although a pregnant woman may throughout most of her pregnancy be able to carry on some military duties, particularly in the last months she is not suited for combat duty. My experience as a former military judge gives me the authority to state that many males would never have served in combat if they had the ability to voluntarily disable themselves without any adverse legal or social consequences. I am personally aware of several instances where women in the military become pregnant with the intent of forcing a change in their duty assignment. If females are truly to be treated the same in military service as males, it will be necessary to impose some legal sanctions upon women in the military who permit their pregnancy to continue and thereby voluntarily incapacitate themselves.

Abortion: One of the more sensitive questions dealing with the impact of the E.R.A. upon United States jurisprudence is the effect the amendment will have upon legislation dealing with abortion. It is my considered opinion that all legislation attempting to limit the right to an abortion, or to restrict the use of public funds for purposes of abortion, with one possible exception, will be invalidated by the E.R.A. The only exception would be for legislation limiting the ability to obtain, or at least, restricting the method that could be used, in the case of abortions performed after a child in the womb has reached the point where it could continue to exist independent of its mother.

The Hyde Amendment presently restricts the use of federal funds for purposes of abortion. In *Harris v McRae,* a scant majority of the United States Supreme Court ruled that the Hyde Amendment was not a violation of the due process clause of the fifth amendment. In reading this determination the Court followed its usual two-tiered analysis. First the Court determined the legislation did not violate any constitutionally protected right. There is no constitutional right to a tax-funded abortion. Then the Court looked at the second issue and found that the law did not discriminate against a suspect class. If the E.R.A. had been part of the Constitution at the time the Court decided *Harris,* it is doubtful the same result would have been reached.

Legislative history of the Equal Rights Amendment reflects Congressional intention that there be a two-level standard of judicial review. First, general classifications based upon sex are per se outlawed. Second, physical classifications purporting to deal with physical characteristics unique to one sex are subject to strict scrutiny. The ability to become pregnant is a physical characteristic unique to females. In order to uphold a legislative determination that the physical condition of pregnancy should be treated differently, insofar as relates to public funds allocated for medical treatment, then other physical conditions common to both males and females or unique to males, the court would be required to find some compelling state interest that could only be met by the distinction. In light of the 5 to 4 opinion in *Harris,* it is unlikely that the court would find the necessary compelling state interest.

Other legislation that encroaches upon the ability of a woman to obtain an abortion would also be constitutionally suspect if the E.R.A. were adopted. It would in all probability prohibit states from imposing on abortions any restrictions more severe than those placed upon sexually neutral operations. A physician or nurse employed by a public hospital, or in light of the Supreme Court's decision in *Bob Jones University v. Regan* perhaps any hospital granted special tax consideration, could be compelled to participate in or perform abortions. Conscience laws which have been enacted by various jurisdictions to protect the religious freedom of choice by nurses and physicians called upon to participate in or perform abortions will probably not pass constitutional muster under the E.R.A. The only alternatives open to nurses and physicians faced with a conflict between their religious beliefs and burdens imposed upon their employment by a hospital subject to the mandate of the E.R.A. will be either to terminate their employment, or to compromise their religious beliefs.

It should be considered by the Committee that the Equal Rights Amendment will be interpreted and enforced by federal judges who in a great number of cases have shown strong sympathy for the ideology of abortion. If it is the opinion of this committee that the amendment will have no impact upon legislation dealing with abortion, then it would be prudent to recommend an appropriate amendment to the E.R.A.

to ensure courts will not misinterpret congressional intent. A failure to amend the E.R.A. to make it clear that it is the intent of Congress that it have no effect upon the ability of the state and federal governments to deal with abortions must, in light of its legislative history, be considered an open invitation to the federal judiciary to use the E.R.A. to invalidate substantially all state and federal laws dealing with the subject. . . .

Testimony by Hon. Herbert H. Bateman, Congressman and former State Legislator

. . . Section Two of the proposed Amendment empowers the Congress to enforce the Amendment by appropriate legislation. This simple, direct language of Section Two is to deny to the states and their legislative bodies any lawful role in some of the most vital, far-reaching aspects of social policy, including alimony, dower and curtesy, domestic relations, marital and property rights generally and what else no one knows. In my view, all this power should not be granted to or assumed by the Federal Government. Yet this proposed Amendment would mandate that the Congress exercise the power, even if the Congress chose not to do so. Prior Congresses even rejected efforts to amend Section Two to provide that "Congress and the *several states* shall have power *within their respective jurisdiction* to enforce this article by appropriate legislation." Again the legislative history dictates a negative position if the states are to retain even their already seriously eroded powers.

The House of Representatives has rejected language that would have denied to the Amendment the effect of impairing any law of the U.S. or a state which reasonably promotes the health and safety of the people. In the Senate an Amendment which would have provided that "neither the U.S. nor any state shall make any legal distinction between the rights and responsibilities of male and female persons unless such distinction is based on physiological or functional differences between them" was rejected.

Amendatory language that the terms of this proposed Amendment "not impair the validity of laws exempting women from military service or extending protection or exemptions to wives, mothers or widows or laws imposing upon fathers responsibility for support of children, or securing privacy to men, women, or boys or girls, or punishment as crime rape, seduction or other sexual offenses" was rejected in prior congressional action on this proposal.

A provision that the Amendment not deny the power to *extend* to females any right or protection sanctioned by the 5th or 14th articles of amendment was rejected. Also rejected was language which would have sanctioned higher educational institutions enrolling only men or only women, even though the rejected language would not have allowed institutions admitting both sexes to accept only a certain percentage of one sex or the other.

The core of the problem with this proposal is that it was proposed, advanced, advocated and insisted upon in an absolutist context. For more reasons and on account of more specific aspects of its legislative history than time allows me to relate, I regard it as being essentially a directive that government shall not at any level, in any circumstance, have regard to or recognize differences between men and women. . . .

Testimony by Hon. Charles E. Wiggins, Attorney and former Congressman

. . . The most troublesome problem is job assignments in the military. It is contrary to good sense and jeopardizes our national security interests to compel the integration of *all* units on the basis of sex. My military background is in the infantry, both in garrison and in combat situations. The job of an infantry man in combat is not one in which civility plays much of a role. Fatigue, fear, obedience, strength, endurance and team work are the relevant personal factors.

I have no doubt that an infantry platoon, integrated with a half-dozen or so exceptional women, could fight, but I also have no doubt that it could not fight as well, or have the same chance of winning, as one composed only of men. At the rifle platoon level, combat can become much like an athletic contest. An integrated team of men and women will almost certainly lose to one composed only of men if the only rule of the game is survival.

Moreover, personal relationships should not be permitted to develop at such a level which may interfere with command decisions.

So far as I know, no nation has ever gone so far as to compel the integration of its front line forces on the basis of sex, and we should not do so.

A second illustration. Presumably, both men and women would be integrated into our federal prison system, both as guards and as prisoners. I believe all will concede that some functions are best performed by either men or women, especially in dealing with prisoners of the same sex. How would such a gender-based job assignment square with the constitutional amendment? Some say that the E.R.A. would not overcome other constitutional protections, such as the constitutionally based right of privacy, and that recognition of such privacy interests would tolerate appropriate gender based-job assignments.

I believe this argument misconceives the nature of the right of privacy. The right of privacy is not owned by the government to be asserted by it against nonconsenting individuals. It is a personal right. In short, I may protect my privacy, under certain circumstances, against governmental action; the government may not do so on my behalf, if I don't claim this right for myself.

In a prison situation, who can be too sure that a group of prisoners of either sex would not actively seek an integrated guard structure, or that a particular male guard would not actively seek assignment bringing him into intimate contact with consenting female

prisoners? The government may be offended by such intimacy, but I am not so sure it can justify a disregard of the command of the E.R.A. on the basis of the government's claim of a privacy interests.

Testimony of Judith Finn, Labor Economist and Writer

ERA and Social Security: The charge that Social Security discriminates against women is contrary to the long-acknowledged fact that Social Security has been made sex neutral through various congressional amendments to the Social Security Act and by several Supreme Court decisions. Informed opinion is nearly unanimous in recognizing these facts. Women are treated the same as men under Social Security law. Both men and women are eligible for the wife's benefit. Women who choose to have a career or who must work for a considerable part of their lives have the same protection that comparable men have, and their benefits are calculated in exactly the same manner regardless of their sex or marital status.

The frequent charges of discrimination against women have elevated the problems that certain groups made up primarily of women have under Social Security above countless other concerns of equal importance. These are not matters of sex discrimination in the present system, and the answers cannot be found in further sex neutrality.

Another way to measure how Social Security affects women is to determine whether women as a group set as favorable a return for the taxes they pay as men do. When measured this way, women get an even higher return from their Social Security taxes than men, because women tend to live longer and retire earlier than men and therefore collect benefits longer. Because their average wages are lower, women also receive a greater advantage from the weighted-benefit formula. These two factors outweigh the fact that more secondary benefits are paid on the basis of men's wage records than on women's.

If we compare the total taxes paid to the total benefits received by women beneficiaries, either on the basis of their own or their husbands' earnings, women over the next 75 years will pay 33 percent of the taxes and receive about 50 percent of the benefits. When measured in terms of return from Social Security taxes, it simply cannot be argued that women in the aggregate are disadvantaged by Social Security. Some women get benefits from Social Security without paying any Social Security taxes.

However, if we restrict the comparison to women working in covered employment, we still find no evidence that women are short-changed. If we compare the taxes paid by working women to the benefits based on earnings of women and received by all types of beneficiaries, we find that the cost of paying benefits to women workers and their dependents is higher than the cost of paying benefits to men workers and their dependents. Indeed, if separate systems were established, women workers would have to pay Social Security taxes that are about 9 percent higher than men would have to pay. Since women pay the same Social Security tax rate as men, this means that women in the labor force get a higher return for their taxes than men do. Therefore, it cannot be said that the present Social Security system is unfair to women workers as compared to men workers.

The real concern here is the relative rate of return to taxes paid between two types of families each obviously including a man and a woman. In a system of social insurance there is no reason to expect that the rate of return to different groups in different situations will be the same. The important point here is that this concern has nothing to do with discrimination, inequities against women, or a disparate impact on women or working women. Thus the Equal Rights Amendment would surely have no impact on the Social Security system. . . .

ERA and the Pay Gap: There is no evidence that the ERA would reduce the pay gap. I have examined the earnings gap in the states that already have a state ERA and find that the earnings gap does not differ significantly from states that do not have state ERAs. . . .

Employment discrimination is already illegal and violations of the law would still go through the appropriate agency which is the EEOC. Further, the earnings gap cannot be construed to be a result of the lack of sex neutrality in our employment laws. The ERA advocates have failed to provide any evidence of how ERA would reduce the pay gap. . . .

Governor Lamm of Colorado appeared before this committee and told of the benefits to women that have resulted from the passage in his state of the state ERA. He said, for example, that the proportion of women in the labor force has increased and women are better off economically in Colorado since its ERA was passed. I have looked at the pay gap in the states that have passed state ERAs and I find no evidence that it differs significantly from the pay gap in states that do not have ERAs. In Colorado, for example, the median earnings for women employed full-time, year round in 1980 was 60.2 percent of the median earnings of Colorado males, as reported in the recently published statistics from the 1980 Census. This is indistinguishable from the national average in 1980. The Colorado ERA which has language similiar to Section 1 of the proposed Federal ERA was passed in 1972. If at least 50 percent of the pay gap is due to sex discrimination as proponents argue, and if an ERA could be counted on to reduce sex discrimination and thus the pay gap, isn't it time that the proponents explain the failure of the State ERAs to substantially reduce the pay gap? . . .

Sworn Statement of Ownership

The Phyllis Schlafly Report is published monthly at Box 618, Alton, Illinois 62002.

Publisher: Phyllis Schlafly, Fairmount, Alton, Illinois 62002. Editor: Same. Owner: Eagle Trust Fund. Known bond-holders, mortgagees, or other security holders, none.

Information on circulation not required as no advertising is carried.