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Veterans Demand E.R.A. Be Amended

Testimony to the U. S. Senate, Committee on the Judiciary Subcommittee on the Constitution, February 21, 1984

All major veterans organizations testified that the Equal Rights Amendment *must* be amended to make sure that it will *not* be used by the Federal courts to wipe out veterans' preference or benefits. Veterans organizations have resolved to defeat E.R.A. unless it is so amended.

Testimony of Dean K. Phillips,
National Judge Advocate
Military Order of the Purple Heart

It is an honor to represent the Military Order of the Purple Heart, chartered in 1958 by Congress to represent the interests of those Americans who sustained wounds while engaged in combat against our nation's enemies. . . .

The issue today is the impact the Equal Rights Amendment may have on veterans' preference. Our organization is aware that last September the President of the League of Women Voters advised Congress that ". . . the broad veterans' preference statute [unsuccessfully] challenged [by the National Organization for Women and other feminist organizations] in *Massachusetts v. Feeney* [442 U.S. 256, 1979], which granted an absolute lifetime preference to veterans seeking public employment in the Massachusetts civil service, would fall in a challenge under the ERA."

We are also aware that last September the President of the National Organization for Women (NOW) also advised Congress that it is often impossible to prove the "intent" (required by *Washington v. Davis*, 426 U.S. 229, 1976) which is necessary to successful pursuit of sex discrimination cases. She concluded that "only by passage of the ERA will women finally secure full and unequivocal acknowledgement of their entitlement to legal equality."

I am aware that NOW was founded in 1966 and that Article III of their bylaws mandated "direct action to bring women into full participation of society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men."

However, one area in which NOW in particular and women's groups in general did not make a sincere effort to exercise "responsibilities in truly equal partnership with men" was service in the military during the Vietnam War. Accordingly, their bemoaning of the privileges earned by men and women who did serve (such as veterans' preference and civil service) has been less sympathetically received in many quarters.

1966 was also the year I gladly gave up my student deferment, which was unfair to those men of my generation who were not inclined to attend college, to enlist in the U.S. Army paratroopers. Base pay for a PFC was less than $122 monthly. Although it was not an overriding factor in my decision to enlist, I was also aware that earlier that year Congress had enacted G.I. Bill and Veterans' Preference Legislation, and that veterans' preference legislation could not be attacked under the Civil Rights Act and would extend to my widow if I were killed or 100% disabled.

As has been the case in most wars, many people were killed and maimed. Every member of my 26-member recon platoon was ultimately wounded at least once, and all but five of us were either killed or so badly wounded that medical evacuation to Japan was required.

I am aware that between 1948 and 1967 Congress had limited the percentage of women in the Armed Forces to no more than two percent. However, any inference that women were beating down the doors of recruiting offices and draft boards demanding to exercise all the responsibilities of society in truly equal partnership with men is dispelled by a 1977 Office of the Secretary of Defense "Use of Women in the Military" Report which observed: "With the advent of the Korean war, an unsuccessful effort was made to recruit some 100,000 women to meet the rapidly expanding manpower requirements. Young women just were not interested in serving, perhaps because of the unpopularity of that war at the time. Between 1948 and 1969, even including nurses, the percentage of women in the military never exceeded 1.5% and averaged 1.2 percent of the total active strength."

Congress lifted the 2% limit in 1967 but, in point of fact, females did not reach 2% of the Armed Forces until more than 5 years later in 1973, after U.S. ground troops were pulled out of Vietnam.

During the decade of the Vietnam War, men repeatedly unsuccessfully pleaded that the male-only draft unfairly denied males the equal protection guaranteed under the Fifth Amendment to the Constitution. Women, of course, were content to enjoy the privilege of exemption from the draft, and NOW and similar organizations did not join in such suits during the war — once again failing to bemoan exemption from the draft from either an equal employment opportunity or equal responsibility standpoint. Thus, the most blatantly sexist policy in our nation's history — the limitation of the drafting of those who would die and be maimed in war — remained limited exclusively to the male sex. By 1969-1970 draftees suffered more than 60% of the U.S. Army casualties.

While NOW avoided facing up to the Vietnam War, that organization passed a welcome home resolution in 1971 which stated: "The National Organization for Women oppose[s] any

state, federal, county, or municipal employment law or program giving special preference to veterans." NOW later confirmed in a letter to me dated 29 July 1979 that the resolution still represented their policy. This, in effect, opposes preferences or programs for even blind and paraplegic veterans.

In the *Feeney* case (*Personnel Administrator of Massachusetts et al v. Feeney*, 442 U.S. 256, 1979), referred to before Congress last September by the League of Women Voters and NOW, the U.S. Supreme Court upheld a Massachusetts veterans' preference despite complaints from organizations such as NOW that it benefited male veterans at the expense of female non-veterans. The Court observed that preference statute was neutral on its face, and benefited both male and female veterans, and was not intended to discriminate against women as a class. Accordingly, the Court held that the statute did not deny women equal protection of the law. In reaching its decision, the 7-to-2 majority cited the *Washington v. Davis* standard that, in order to prove invidious discrimination under the equal protection argument, a woman non-veteran must prove there was an actual intent on the part of the legislature to discriminate against women when it enacted the preference statute.

In my role as the Special Assistant to the Veterans Administration General Counsel in 1978, I assisted in the preparation of the legal memorandum which persuaded the Solicitor General to file an *amicus* brief in support of veterans' preference in *Feeney*. We pointed out that the status of female non-veterans did not call into play the "strict scrutiny" test and that veterans' preference statutes must only demonstrate a rational basis to survive an equal protection challenge. Our concern in 1979 was that Federal veterans' preference statutes had a similar legislative history as the Massachusetts statute in question, and that an adverse decision in *Feeney* could lead to an avalanche of constitutional challenges of even less generous forms of veterans' preference under the guise that legislative bodies intended to discriminate against female non-veterans since it was a known fact that only 2% of veterans were female.

In February 1980, President Carter inadvertently forced NOW's hand on the issue of the draft by announcing that both young men and women should be required to register for the draft. Heretofore, NOW and most other feminist organizations' policy was to take a "low profile" on the issue of the draft. Only after Carter's 1980 announcement did "feminists" in their 30's and 40's, who avoided service during Vietnam, publicly state that it was acceptable to them if younger women of the 1980's faced draft laws and military service. This inconsistency was not well received by the 20-year-old women who were so generously, if not abruptly, thrust into the role of equality of responsibility by their once-reluctant older sisters.

Subsequent to the 1980 Carter draft registration announcement, a case filed by a male challenging the male-only draft during Vietnam was reborn and found its way to the Supreme Court. NOW finally came out of the closet — 15 years late — and filed an *amicus* brief in 1981 stating that "the requirement to register . . . for induction into the Armed Forces . . . if imposed at all . . . must be imposed equitably on all members of society who are capable of serving, irrespective of gender."

In a press conference announcing their brief (overdue by more than a decade) NOW President Eleanor Smeal incredibly stated that past exclusion from the draft had discriminated *against* women, rather than in their favor, by robbing women ". . . of the psychological knowledge that they can defend themselves."

In June 1981 the Supreme Court voted 6-to-3 to uphold the constitutionality of male-only draft registration (*Rostker v. Goldberg*, 453 U.S. 57). This rule turned on Congress's constitutional authority under Article I, Section 8 (as did Federal court decisions in similar cases during Vietnam) to raise and maintain an armed forces.

NOW and its allies shed crocodile tears over the *Rostker* decision. Two years later, NOW began winning additional enemies for the ERA by announcing that the ERA's enactment is necessary for an attack on veterans' preference previously upheld in *Feeney*.

While the Military Order of the Purple Heart has previously not taken a position for or against the ERA, we will now be giving serious consideration at our National Convention in August to seeking an amendment to the ERA to protect veterans' preference. Such an amendment would be similar to Title VII of the Civil Rights Act of 1964 which reads in part: "Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights or preference for veterans."

Testimony of Donald H. Schwab, National Legislative Service Director Veterans of Foreign Wars

Mr. Chairman, the Veterans of Foreign Wars currently has no resolution addressing a proposed Equal Rights Amendment to the Constitution. No doubt the voting delegates to our most recent National Convention were under the impression this matter had been laid to rest since the Equal Rights Amendment proposed by Congress on March 22, 1972, failed ratification by the requisite 38 states for adoption. Obviously, such is not the case. Notwithstanding, we do have a vested interest in and strong positions regarding veterans' preference, veterans' entitlements, and no women in combat where they would be subjected to close combat with the enemy.

Mr. Chairman, when hearings were held by the appropriate Subcommittee of the House Judiciary Committee on September 14, 1983, the President of the League of Women Voters stated in part, ". . . the broad veterans' preference statute challenged in *Massachusetts v. Feeney*, which granted an absolute lifetime preference to veterans seeking public employment in the Massachusetts civil service, would fall in a challenge under the ERA." Apparently, the dissenting opinion of Mr. Justice Marshall, joined by Mr. Justice Brennan, in the U.S. Supreme Court case, *Personnel Administrator of Massachusetts et al v. Feeney*, would be used as the vehicle to challenge, first, the Massachusetts law and, then, having established a precedent, all other veterans' preference laws. In addition, in correspondence with the Executive Director of our VFW Washington Office, Cooper T. Holt, the Honorable F. James Sensenbrenner, Jr., the Ranking Minority Member, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U.S. House of Representatives, opined, "If what Ms. Ridings says is true, the same rationale which would overturn veterans' preference in public employment could be extended to prohibit veterans' preference in education and other areas."

In view of the foregoing, the National Commander-In-Chief of the VFW, Clifford G. Olson, Jr., wrote to the Chairman and all members of the House Judiciary Committee and, then, all members of the House of Representatives that, unless H.J. Res. 1 was amended, it would be wholly unacceptable to the more than 2.6 million men and women of the VFW and our Ladies Auxiliary. Specifically, Mr. Olson requested the legislation be amended as follows:

1. "This article shall not be construed to affect any benefit or preference given by the United States or any state to veterans," and

2. "This article shall not be construed to require the assignment of women to military combat."

Our position is unchanged and will remain so indefinitely.

As is a matter of record, Mr. Chairman, on November 15, 1983, H.J. Res. 1, proposing an Equal Rights Amendment to the Constitution, failed passage in the House of Representatives. The vote was 278 yeas to 147 nays with one member voting "present" and nine not voting. The Speaker of the

House brought the measure up under Suspension of the Rules which permitted no amendments and only 40 minutes of debate. This is a procedure normally used for noncontroversial legislation and not something as far reaching as a proposed amendment to the Constitution.

Mr. Chairman, when veterans' preference came under unprecedented attack in the House of Representatives in 1977, the hue and cry of women's activist groups was the same as it is today — that they are second-class citizens because their opportunity to acquire veterans' preference was so limited that they face almost insurmountable obstacles in competing with veterans for Federal employment. The fact is, Mr. Chairman, women never met their enlistment quotas during World War II, the Korean Conflict, or Vietnam. However, women did serve during these periods of war or conflict. As a result, at that time there were enough women with veterans' preference, 881.4 thousand, to fill nearly all the Federal civil service jobs then held by women, 893.5 thousand. Some 577,000 women were entitled to veterans' preference in their own right and 304.4 thousand women had derivative entitlement predicated upon death of a serviceman or the fact that the veteran was permanently and totally disabled due to service-connected causes.

How do women fare in Federal employment today? Appended to my testimony, Mr. Chairman, is a chart prepared by the Office of Personnel Management for the fiscal year 1982, the most recent available. As indicated thereon, total Federal hires were 367,000 and 168,456 or 46 percent, were women. Total veteran hires were 82,944 or 22.6 percent of total hires and 6,636 or eight percent, were women. Figures obtained from the Office of Personnel Management by telephone last week reveal:

1. There are presently 1,976,987 Federal employees;
2. 1.2 million are men, of whom 726,272 or 36.5 percent of the total work force, enjoy veterans' preference;
3. 776,000 are women, representing 39.2 percent of Federal employees;
4. 44,997 women employees or 5.8 percent, enjoy veterans' preference;
5. 16,117 employees are entitled to 10 point veterans' preference, and 13,748 of these or 85.3 percent are women.

Therefore, Mr. Chairman, the thesis that women are, in fact, suffering loss of Federal employment because of veterans' preference is without foundation.

With respect to no women in combat, we are, of course, very much aware that some women, particularly nurses, have been subjected to enemy fire. However, we must all hope that the United States of America never approaches such desperate straits that we must consider the training and assignment of women to ground, air and sea jobs which would require them to aggressively seek out, close with and destroy the enemy.

Mr. Chairman, if any proposed Equal Rights Amendment sent to the states for ratification is not amended as previously stated, I can assure you that the Veterans of Foreign Wars will use every resource at our disposal to defeat its ratification in every state.

It is inconceivable, Mr. Chairman, that women activists who enjoy freedom ensured by the sacrifices of veterans would now turn on their benefactors and seek to eliminate their benefits so dearly bought. Apparently, too many forget too soon the sacrifices that veterans made in giving years from their lives, years from their families and years from their personal endeavors if not, also, their physical or mental health.

Mr. Chairman, also appended to my testimony are the following resolutions passed by the voting delegates to our 84th National Convention held in New Orleans, Louisiana, August 12-19, 1983: Resolution No. 444 — "No Women in Combat Jobs" and Resolution No. 610 — "Veterans' Preference."

Testimony of E. Philip Riggin, National Legislative Commission Director The American Legion

As wartime veterans, we constitute a class of individuals unlike any other differentiated class. This is because veterans were exclusively created by actions of the Federal Government.

As we understand it, the view that a constitutional challenge would end veterans' preference if ERA is adopted stems from a prediction that the definition of discrimination would change. Currently, the test for discrimination requires the presence of intent to discriminate. If ERA is adopted, it is said, the intent would be replaced by an effect test. Accordingly, even if Congress never intended to discriminate against women when it approved veterans' preference, the fact that a preponderance of veterans are males constitutes the same effect and must therefore be unconstitutional discrimination.

Mr. Chairman, given the predictions of several legal scholars, it may be that veterans' preference might be found discriminatory if ERA in its present form is added to the Constitution. Because of the importance of veterans' preference as a principle, it deserves some historical treatment for background purposes.

There is no doubt that the Veterans' Preference Act of 1944 represents one of the fundamental elements of veterans' benefits. It is designed to provide an eligible veteran with a hand up, not a hand out, for the sacrifice made for his country. We can trace a form of veterans' preference back to this nation's beginnings when military service counted favorably in the selections of officials and subordinate employees in the customs service. However, it was not until 1865 that Congress enacted legislation that provided preferential appointment to civil offices for those veterans honorably discharged as a result of wounds or sickness.

Congress subsequently expanded this limited preference in 1876, in 1912 and again in 1919 with the Census Act. It was not until World War II, however, that the most dramatic change in veterans' preference came about.

Veterans' preference was and continued to be regarded as a clear policy statement by Congress. Specifically, veterans were to receive priority in Federal employment because of their wartime sacrifices and because the normal course of their civilian lives was interrupted by the nation's call to arms.

Even in 1944, as now, veterans' preference was challenged. Then, the Civil Service Commission opposed an absolute preference for all veterans in all Federal positions as being inconsistent with a merit system, even though it agreed with veterans' preference in principle. As a result, then as now, veterans' preference in Federal employment is not absolute.

At present, veterans' preference affords assistance to wartime veterans on entry into Federal or state service and affords protection to wartime veterans during Reduction In Force (RIF) actions. Veterans' preference has no bearing in promotions or career advancement. Likewise it does not extend to the Senior Executive Service, excepted positions such as doctors or lawyers, temporary or seasonal employment, or even in abolition of function such as when one agency's functions are absorbed by another. In fact, since the Civil Service Reform Act of 1978 (5 USC 2108), no veteran with 20 or more years of military service, no veteran discharged after October 14, 1976 and no veteran discharged from military service with the rank of major or above is covered by veterans' preference.

Perhaps, the strongest statement regarding the legitimacy of veterans' preference was made when the constitutionality of a Massachusetts veterans' preference statute was upheld by the Supreme Court in *Personnel Administrator of Massachusetts v. Feeney*, 442 US 256 (1979).

Mr. Chairman, were it not for the predictions of several legal scholars that veterans' preference would be held discriminatory if ERA is adopted, the American Legion would

have no purpose in participating in today's hearing. This, quite simply, is because the Legion has no nationally mandated position to express on ERA, favorable or otherwise. It is significant, however, to note that the American Legion, since its inception, has not only permitted but has encouraged membership by women veterans.

However, because of these legal predictions and because of our belief in veterans' preference, we have no choice but to urge this Committee and Congress in the strongest possible terms to add specific language to the ERA resolution shielding veterans from any potential court decision holding veterans' preference or veterans' programs unconstitutional.

As defenders of the readjustment interests of the nation's wartime veterans, we are simply unwilling to leave their economic fate to chance. If veterans' preference was ultimately found unconstitutionally discriminatory against women we, as a society, would have a difficult time reconciling that with the fact that men have primarily been called upon in all of our past wars. In Vietnam alone, some 57,000 males died. Any sexual discrimination that results from veterans' preference is a result of this long history of male service in the military.

Testimony of Lt. Col. David J. Passamaneck, U.S.A. (Ret.) National Legislative Director, AMVETS

AMVETS believes, without reservations, that preference in hiring and retention in the Civil Service is a right for life of war veterans, a right which they have earned through the unparalleled sacrifices which military service demands. The varying levels of sacrifice of individual veterans in no way detracts from the equal jeopardy to which all are subjected when they don the uniform of their country. The preference in favor of the hiring of veterans is one affirmative action program which is based on performance and achievement and not racial or sexual accident of birth.

The tenacious efforts of various interest groups antithetical to national defense and military service to curtail, or completely remove, veterans' preference is consistent wth the quasi-treasonous conduct of so many inhabitants of this country during the Vietnam War, conduct which contributed in no small way to the tragic result of that war. Fortunately, those efforts were almost entirely unsuccessful. They only succeeded in scornfully punishing retired veterans with the rank of 0-4 or above by limiting their use of preference under Public Law 95-454. However, those who would denigrate military service by chipping away at veterans' preference, have not let up in their incessant efforts.

One of those efforts, of course has been to question all veterans' programs as violations of the concept of gender equality by applying the radical philosophy of equality of numerical result rather than equality of opportunity. This philosophy is similar in result, if not in intent,. to the Nuremberg Laws directed against Jews in Germany under the Nazis. The Supreme Court in *Feeney* officially recognized that veterans, men and women, are special people and entitled to special benefits administered by the government they served. AMVETS takes no specific position on ERA. (Indeed our last National Convention voted down a resolution opposing it.) However, if there is to be an ERA, then we would urge that clear and specific language be included therein defining equality as equality of opportunity and not numerical equality of result, and specifically excluding all veterans' preference and entitlement programs, state or Federal, and manning and training criteria of our armed forces, from the effects of the Amendment. Without such mandatory language, the courts, inspired by the fraternity of left-wing law school professors, will assuredly interpret ERA so as to viciously attack veterans' programs as well as the standards of tactical management of our armed forces, consistent with the perverted logic of at least one Federal court in connection with so-called comparability of worth.

It is quite clear that ERA will be used by many of its most vigorous supporters as another tool against veterans and the national defense establishment in general, not necessarily because of their belief in equality but because of their deeper hostility to the legitimate security interest of this country and the noncommunist west.

AMVETS advocates the repeal of the restrictions on veterans' preference enacted as Public Law 95-454 and opposes all efforts to curtail or abandon preference for veterans in Federal or state hiring and retention, regardless of any racial or sexual considerations which may form elements of other legislative programs, including ERA. Preference in hiring and retention for all war veterans, regardless of race or sex has been an honored keystone of our national policy since the close of World War II. Let's keep it that way and strengthen the policy where necessary.

Testimony of Gary L. McDowell, Assistant Professor of Political Science Newcomb College of Tulane University, New Orleans

. . . Professor Ann Freedman of Rutgers Law School, a leading legal theoretician of the ERA, has argued before the House of Representatives that "strict judicial scrutiny under the ERA would be required if a neutral rule that has a disparate impact on members of one sex is traceable to or perpetuates discriminatory patterns similar to those associated with racial discrimination." The analysis of Justices Marshall's and Brennan's dissent in *Feeney*, Professor Freedman believes, "illustrates the approach required by the ERA."

Professor Thomas Emerson of Yale also testified to the fact that the "outcome of *Feeney* would plainly be different under the ERA." As Professor Emerson went on to explain: "While the Massachusetts' veterans' preference statute considered in *Feeney* may not have denied 'equal protection of the laws' (14th Amendment), *it certainly denies 'equality of rights under the law.'* The fact that there was not overt intention to harm women would not be decisive; the result arising from habitual patterns of exclusion was there for all to see and feel. (*Cong. Rec. H559*, February 7, 1984).

As leading legal authorities on the Equal Rights Amendment, the view of Professors Freedman and Emerson would surely be influential in shaping the sorts of arguments that would be brought to bear on the question of *intent* versus *impact* in the flood of litigation that would undoubtedly be released by the ratification of the ERA.

This view is not one that is merely whispered in scholarly closets; the legal profession has been greatly influenced by it. Martha Barnett of the American Bar Association has argued in favor of supplanting the standard of *discriminatory intent* with the standard of *discriminatory impact*. "The principle of equality," she suggested, "is rendered impotent if it cannot reach laws which effectively exclude women from employment for which they are fully qualified and competent." (*Cong. Rec., H559*)

It is these three factors, then — the ambiguity of the proposed amendment; a judiciary somewhat divided on the question of *intent* versus *impact*; and the rather clear position of those most likely to press for the impact standard in litigation under the ERA — that I believe would come together and lead to the abandonment of the standard of *intent* in favor of the standard of *impact* and thus lead to veterans' preference programs being declared unconstitutional violations of "equality of rights under the law."

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