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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71-1694

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SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

*Appellants,*

*v.*

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

*Appellees.*

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION*

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# BRIEF FOR THE APPELLANTS

## OPINION BELOW

The opinion of the District Court is reported at 341 F. Supp. 206 (M.D. Ala. 1972).

## JURISDICTION

This action to declare unconstitutional and to restrain the enforcement of Title 37 U.S.C. Sections 401 and 403, and Title 10 U.S.C. Sections 1072 and 1076, insofar as they require different treatment for female as opposed to male members of the uniformed services, originated through a complaint filed by appellants in the United States District Court for the Middle District of Alabama, Northern Division, on December 23, 1970. Pursuant to Title 28 U.S.C. Sections 2282 and 2284, a three-judge district court was convened to hear and determine the action. On April 5, 1972, the United States District Court for the Middle District of Alabama, Northern Division, sitting as a three-judge court, entered the judgement which is the subject of this appeal. Notice of Appeal to the Supreme Court of the United States was filed in the United States District Court for the Middle District of Alabama, Northern Division, on April 26, 1972. (App.22a)

The jurisdiction of the Supreme Court to review

this decision of the United States District Court on appeal is conferred by Title 28 U.S.C. Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

Probable jurisdiction was noted by this Court on October 10, 1972, ____ U.S. ____ , 41 LW 3165.

## QUESTION PRESENTED

Whether the classification according to sex made by Title 37 U.S.C. Sections 401 and 403, and Title 10 U.S.C. Sections 1072 and 1076, which provide "dependency" allowances automatically for the spouse of male members of the uniformed services, whether or not the spouse is in fact dependent on the member for any of her support, but which provide such allowances for the spouse of female members of the uniformed services only upon a showing that the spouse is in fact dependent on the member for more

than one-half of his support, violates the due process clause of the Fifth Amendment to the United States Constitution.

## STATUTES INVOLVED

Title 37 U.S.C. Sections 401 and 403, Title 10 U.S.C. Sections 1072 and 1076, and Department of Defense Military Pay and Allowance Entitlements Manual, Sec. 30242, are set out in the Appendix.

## STATEMENT OF THE CASE

Appellant Sharron Frontiero joined the Air Force on October 1, 1968, for an obligated period of service of four years. On December 17, 1969, she married appellant Joseph Frontiero, who was and remained a full-time student at Huntingdon College, Montgomery, Alabama. As stated in the agreed stipulation of fact on the basis of which this action was heard and determined, appellant Joseph Frontiero's total expenses are approximately $345.00 per month. With the exception of $205.00 per month which appellant

Joseph Frontiero receives under the educational provisions of the G.I. Bill and $30.00 per month income from a part-time job, appellant Sharron Frontiero provides the sole support for both appellants.

The provisions of 37 U.S.C. Sections 401 and 403 grant a supplemental housing allowance to armed forces members living off-base (Basic Allowance for Quarters-BAQ), the allowance varying with the number of dependents claimed by the armed forces member. Male members are allowed to claim their spouses as dependents, and hence to gain extra benefits, regardless of their wives' actual financial dependency. The statute sets up a different definition of dependency for female service members, allowing the females to claim their spouses as dependents, and hence gain supplemental benefits, only if the husband is in fact dependent upon the female service member for over one-half of his support.1/

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1/ Maxwell Air Force Base (MAFB) does not provide any base housing for the families of married female members of the Air Force. See Appendix p. 11 .

Sections 401 and 403 as applied to women are supplemented by Department of Defense regulations set out in Military Pay and Allowance Entitlements Manual, Section 30242 (January, 1967) (App. 30a). Pursuant to these regulations a male spouse does not qualify as a dependent even if he is in fact dependent upon his wife for more than one-half of his support, unless he is physically or mentally incapable of self-support.

In the fall of 1970, after consulting with her commanding officer and a representative of the Base Legal Office, appellant Sharron Frontiero advised Col. George Jernigan, MAFB Hospital Commander, that she wanted to secure BAQ which would include the additional housing allowance that would have been granted automatically to males with spouses. Col. Jernigan informed her that the regulations prohibited such allowances. In November, 1970, pursuant to the advice of a member of the Inspector General's staff, MAFB, appellant Sharron Frontiero submitted a formal complaint. Approximately one week thereafter,

appellant Sharron Frontiero was informed that the complaint had been reviewed and that she was ineligible for any housing allowance. (App. 12-13 & 25).

Under Title 10 U.S.C., Sections 1072 and 1076, the wife and children of military personnel are entitled to comprehensive medical benefits, regardless of their potential or actual income. However, the husband of a female member of the Armed Forces is not entitled to any medical benefits unless he is "in fact dependent upon" the female member for more than one-half of his support. (*See* App. 27a-29a). Appellant Sharron Frontiero seeks extension of these benefits to her spouse, appellant Joseph Frontiero.

On December 23, 1970, appellants filed a complaint in the United States District Court for the Middle District of Alabama, Northern Division, asserting that the distinctions drawn by these statutes and regulations, insofar as they required different treatment for female and male members of the uniformed services, arbitrarily and unreasonably discriminate against appellants and therefore violate

the due process clause of the Fifth Amendment to the United States Constitution.

Over the dissent of Judge Johnson, the district court held that "the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and . . . are in all respects constitutional." (App. 15a-16a). In arriving at its decision the Court below declared that:

> . . . [T]his Court must ask whether the classification established in the legislation is reasonable and not arbitrary and whether there is a rational connection between the classification and a legitimate governmental end. (App. 9a )

The Court found the necessary "rational connection" by relying upon Congress' conclusive presumption in favor of married servicemen, the purpose of which was "to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives

were actually dependent upon them." (App. 10a)

Appellants appeal from this decision by the three-judge district court.

## SUMMARY OF ARGUMENT

When the government compensates and extends benefits to military personnel, it may not do so in disregard of constitutional commands. *Speiser v. Randall*, 357 U.S. 513 (1958). In extending compensation and benefits, the government may not treat differently persons who are similarly circumstanced. Cf. *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972) (equality in providing workmen's compensation benefits), *Levy v. Louisiana*, 391 U.S. 68 (1968) (equality in extending right to sue for wrongful death), *Schneider v. Rusk*, 377 U.S. 163 (1964) (equality in extending the benefits of citizenship). *See also Rinaldi v. Yeager*, 384 U.S. 305 (1966) (equal extension of free transcripts).

This Court last term for the first time found a state statute which discriminated against women to

be unconstitutional. *Reed v. Reed,* 404 U.S. 71 (1971). Cf. *Stanley v. Illinois,* 405 U.S. 438 (1972). The plaintiffs contend that these concepts of equal protection apply equally to activites by the federal government by virtue of the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe,* 347 U.S. 497 (1954), *Schneider v. Rusk,* 377 U.S. 163 (1964), *Shapiro v. Thompson,* 394 U.S. 618, 641-42 (1969).

The dependency provisions challenged *sub judice* violate this guarantee of equal operation of the laws. The inequality is two-fold:

1) procedurely, women are forced to a greater administrative burden than men, and

2) substantively, males who cannot prove their wives dependent are, by virtue of the non-rebuttable presumption that their wives are dependent, granted additional benefits while women who are in precisely the same circumstance are denied benefits.

Although *Reed v. Reed, supra,* employed the rational basis test to judge a sex classification, the Court

apparently left open the prospect that strict review would be applied in an appropriate case. *Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 1035 N. 7 (1972). This is such a case. Because the instant classification is neither protectionist *Muller v. Oregon,* 208 U.S. 412 (1908), nor remedial, *Gruenwald v. Gardner,* 390 F.2d 591 (2nd Cir. 1968), *cert. den.* 393 U.S. 982, nor neutral, *Williams v. McNair,* 316 F. Supp. 134 (D.S.C. 1970), *aff'd. mem.* 401 U.S. 95., but rather imposes an additional inequality in an area — employment — where women already suffer from unequal treatment,[2/] this sex classification should be deemed suspect and subjected to strict scrutiny. *McLaughlin v. Florida,* 379 U.S. 184 (1964).

Yet even under the rational basis test the instant classification fails. The defendants first justify the classification on the armed forces' need

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[2/] Indeed the Government specifically points to income inequality as a basis for the classification. See *infra,* p. 47 *et seq.*

to attract more men than women, but the legislative history of these fringe benefit programs conclusivel shows that no such purpose was intended by Congress. Rather Congress intended with these incentives to attract both men and women into re-enlistment.3/

Second, the defendants argue that a desire to lighten their administrative workload justifies the classification *sub judice*. They contend that it is fair to presume males' spouses dependent because women earn less than men. Lt. Frontiero shows in reply that income levels are irrelevant alone in determining dependency. Furthermore, even if lower income level indicates dependency, the armed forces' own statistics show that male military members as a group earn less than civilian females, their wives. But most important, Lt. Frontiero argues that since the classification serves no purpose other than administrative convenience, that purpose alone is in-

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3/ When Congress has intended to get more men and fewer women into a service branch it has accomplished that purpose with statutory ease. *See, eg.*, 10 U.S.C. 8215.

adequate to justify the discrimination.[4] *Reed v. Reed, supra.*

The Government and Lt. Frontiero agreed in the lower court that these classifications do not adopt or promote common law rules on familial dependency. Yet while they do not incorporate the common law, plaintiffs suggest that this discrimination draws on a sex stereotype dating from the heyday of the common law. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873). The facts which served as the basis for that view have so changed, said Mr. Justice Frankfurter for the Court in *United States v. Dege*, 364 U.S. 51 (1960), that women today cannot be stereotyped as the homebound wife. Indeed, latest Labor Department reports show that at some family income levels almost one-half the wives are full-time

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[4] If the Government truly believes that income levels correspond with dependency why not make that the basis for guessing at benefit eligibility? Surely the mere goal of administrative ease could be accomplished by a less drastic means which did not cut such a broad and inaccurate swath as this sex classification. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1939).

members of the work force. (*See infra*, p. 62, n. 65)

Because the discriminatory provision of fringe benefits according to sex is unconstitutional, the instant classification must be struck down. And because striking down the entire benefit program would frustrate Congress' purpose of enticing re-enlistments, Lt. Frontiero takes the position that the defect should be cured by extending the benefits to women on the same basis as they are now granted to men. *Levy v. Louisiana*, 391 U.S. 68 (1968), *Welsh v. United States*, 398 U. S. 333, 355 (1970) (Harlan, J., concurring), *Iowa - Des Moines National Bank v. Bennett*, 284 U.S. 239 (1939) (per Brandeis, J.)

For these reasons the decision below should be REVERSED.

## ARGUMENT

### I.

### INTRODUCTION

Long looked upon as "the usual last resort of con-

stitutional arguments,"[5] the Equal Protection Clause has in the last quarter century re-emerged as a prominent tool in the vindication of individual rights. As it became accepted that government could affect and control parts of our lives once privately shaped, it became increasingly necessary that if government was to be given such powers, the Courts must protect against their abuse by requiring their equal application *Compare Buck v. Bell*, 274 U.S. 200 (1928) with *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In 1949, the same year in which Congress adopted the sex classifications for housing allowances which plaintiffs challenge,[6] Mr. Justice Jackson warned that the

> . . . framers of the Constitution knew . . . that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely,

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[5] Buck v. Bell , 274 U.S. 200, 208 (1928).

[6] See page 40, *infra*.

> nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws will be equal in operation.7/

Lt. Frontiero and her fellow women in the armed forces illustrate these factors well. They recognize Congress' legitimate interest in building up our armed forces for an adequate national defense, with the concommittant growth of medical benefits, housing allowances, and other inducements by which the armed forces compensate their personnel. But as this role of the government has expanded, the women

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7/ *Railway Express Agency v. New York,* 336 U.S. 106, 112-13 (1949) (Jackson J., concurring), cited with approval in *Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 1039 (1972).

in the armed forces ask that it be undertaken with an even-hand toward all personnel. Nothing undermines more the morale of our armed forces and opens the door to arbitrary administration than to allow a small minority of personnel — women — to be singled out for different treatment and diminished compensation.[8/] When the government compensates and extends benefits to its military personnel, it may not do so in disregard of constitutional commands. *Speiser v. Randall*, 357 U.S. 513 (1958). The present dependency definitions in 10 U.S.C. 1076 and 37 U.S.C. 403 do precisely that — in extending compensation and benefits they deny women in the armed forces their constitutional right to the "protection of equal laws," *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *See, Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400 (1972) (equality in

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8/ The proposition is amply demonstrated by the current problems in the Navy concerning unequal treatment of blacks. See Admiral Zumwalt's stand admitting and seeking to cure the evil reported in *Navy Set to Hear Race Grievances*, New York TIMES, p. 1, Col. 1, November 12, 1972.

provision of workmen's compensation benefits), *Levy v. Louisiana*, 391 U. S. 68 (1968) (Equality in extending the right to sue), *Schneider v. Rusk*, 377 U. S. 163 (1964) (equality in extending the benefits of citizenship). *See especially Rinaldi v. Yeager*, 384 U.S. 305 (1966) (equal extension of free transcripts). Cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Speiser v. Randall, supra*.[9/]

## II.

## THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE BARS STATE DISCRIMINATION AGAINST WOMEN ON THE BASIS OF THEIR SEX.

Although passed in specific response to the plight

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9/ The pervasiveness of sex discrimination in our society has been poignantly expressed in prior briefs for this Court. *See, eg.*, Brief for Appellant in *Reed v. Reed*, 404 U.S. 71 (1971), at Brief pages 69-88. Professor Ginsburg's scholarship has also convincingly developed the need for Court leadership in this area. *Id.*, text accompanying notes 4-10. *See also* P. Freund, *The Equal Rights Amendment Is Not The Way*, 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 234, 235-236 (1971). With this backdrop the plaintiffs here limit themselves to showing that the discreet issue now at bar fails to meet the existing strictures of the Constitution.

of newly freed slaves,[10] the Equal Protection Clause has from its early days been read to forbid discrimination against any cognizable community group. *See, eg., Yick Wo v. Hopkins*, 118 U. S. 356 (1886). This Court in *Hernandez v. Texas*, 347 U.S. 476, 478 (1954), recognized that

> [t]hroughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static and from time to time other diferences from the community norm define other groups which need the same protection . . . When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some

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[10] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81, 21 L. Ed. 394, 410 (1873).

> reasonable classification, the guarantees of the Constitution have been violated.[11]

The *Hernandez* language is clear and unambiguous — any cognizable group which is subject to classification and different treatment, without allowable reason, may call upon the Equal Protection Clause for the vindication of its rights.

Women are no exception. Six years ago the District Court below, with Judges Rives and Johnson sitting there as in the instant case, explicitly guaranteed the rights of women as a group as worthy of protection under the Fourteenth Amendment. *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court).[12] In striking down Alabama's statutory exclusion of women from juries,[13] the *White* court noted that

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[11] Cf. Graham v. Richardson, 403 U.S. 365 (1971).

[12] Approved by the Fifth Circuit Court of Appeals in Juelich v. U. S., 403 F. 2d 523 (1968) and Bass v. Mississippi, 381 F.2d 692 (1967).

[13] Cf. Hoyt v. Florida, 368 U.S. 49 (1961), discussed *infra* at page 29.

> [t]he plain effect of this constitutional provision is to prohibit prejudicial disparities before the law. This means prejudicial disparities for all citizens — including women. (251 F. Supp. 408.)

The *White* court has been joined by numerous tribunals in holding a sex classification invalid under the Equal Protection Clause.[14/] Foreshadowing this Court's own words, the decision in *Seidenburg v. McSorley's Old Ale House, Inc.*, 308 F. Supp. 1253 (SDNY 1969), reflected the trend of lower court reasoning:

> Oft quoted principles that "sex is a valid basis for discrimination" or that the state may draw "a sharp line between the sexes"

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[14/] *See, eg.*, U. S. ex rel. *Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968), different sentencing for women; *Karczewski v. Baltimore and O.R.R. Co.*, 274 F. Supp. 169 (N.D. Ill. 1967) [*Compare Miskunas v. Union Carbide Corp.*, 399 F.2d 847 (7th Cir. 1968) (contra) with *Hitaffer v. Argonne Co.*, 183 F.2d 811, 819 (D.C. Cir. 1950)] women's equal right to sue for lost consortium; *Mengelkoch v. Industrial Welfare Commission*, 442 F.2d 1119 (9th Cir. 1971), *amending* 437 F.2d 563, equal job opportunities; *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (S. Ct. Calif. 1971), equal access to public accommodations.

> should not be applied mechanically without regard to the reasonableness of the relationship between the purpose of the discrimination and the sex-based classification . . .
>
> Men and women, if actually *situated similarly* for the purpose in question . . . must be treated alike. Only that action which an informed, intelligent, just-minded, civilized man or woman would rationally favor may be considered reasonable. [308 F. Supp. 1260, Emphasis added.]

Finally, this Court, which had long scutinized sex classifications in light of the Equal Protection Clause, twice last term found state statutes wanting. In *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251 (1971), an Idaho statute which commanded inferior treatment for women in the appointment of administrators of estates was struck down because it provided "dissimilar treatment for men and women who are thus similarly situated," 92 S. Ct. 254. And in *Stanley*

*v. Illinois*, 405 U.S. 438, 92 S. Ct. 1208 (1972), this Court invalidated an Illinois statute which had followed the sex stereotype that fathers want nothing to do with their illegitimate children.

## III.

## CONCEPTS OF EQUAL PROTECTION FOUND IN THE FOURTEENTH AMENDMENT ARE APPLICABLE BY IMPLICATION TO THE FEDERAL GOVERNMENT THROUGH THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

It is far too late a day in our Constitutional development to respect the notion that "the Fifth Amendment contains no equal protection clause."[15] In the last twenty-five years that notion has been eroded and, finally, abandoned. *Hurd v. Hodge*, 334 U.S. 24, 35-36 (1948), began the process by extending the rationale of *Shelly v. Kraemer*[16] to federal action on grounds of "public policy." Any

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[15] *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941), a case to be read, we suggest, more as deferring to Congress' tax power than defining the scope of the Fifth Amendment.

[16] 334. U.S. 1 (1948).

remaining doubt was rather convincingly laid to rest in *Bolling v. Sharpe*, 347 U.S. 497 (1954), in which the Court unanimously held that *Brown v. Board* applied to the schools of the District of Columbia as well as to those of the states, despite the fact that District schools were controlled by the federal government and not subject to the Fourteenth Amendment. "It would be unthinkable," replied the Court with incredulity for the District's argument, *Id.*, at 500, "that the same Constitution would impose a lesser duty on the Federal Government" than on the states. Although Equal Protection and Due Process are not strictly equateable, The Court reasoned, in that the former is more explicit, nevertheless "discrimination may be so unjustifiable as to violative of due process, " *Id.*, at 499.17/

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17/ Certainly our national desire to end employment discrimination applies with equal vigor at both state and federal levels of government. *See* the recent Equal Employment Opportunity Act of 1972. Public Law 92-261, Sec. 717, 92nd Congress (March 24, 1972), 40 U.S.L.W. 51, 54 (1972). Since sex discrimination is no less onerous when undertaken by the federal government, there is no reason in this circumstance to treat state and federal impingements differently. Cf. *Johnson v. Louisiana*, 92 S. Ct. 1620, 1640 (Mr. Justice Powell, concurring).

This Court has continued to regard equal protection as inherent in the Fifth Amendment's Due Process Clause. *See, eg., Schneider v. Rusk,* 377 U.S. 163, 168 (1964) and *Shapiro v. Thompson,* 394 U.S. 618, 641-42 (1969), which illustrate that the judicial analysis under implied equal protection in the Fifth Amendment is identical to that employed under the Fourteenth Amendment. *See also,* Brief for the Appellee (United States), page 28, in *Welsh v. United States,* 398 U.S. 333 (1970).[18/]

## IV.

## THE CHALLENGED STATUTES DISCRIMINATE SOLELY ON THE BASIS OF SEX

Plaintiffs challenge the categorizations according to sex made in 10 U.S.C. 1072, 1076 and 37 U.S.C.

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18/ The Circuits have consistently held to the view that the Equal Protection Clause applies to the federal government "by implication" through the Fifth Amendment's Due Process Clause. *See, Smith v. United States,* 424 F.2d 267 (9th Cir. 1970), *United States v. Horton,* 423 F.2d 474 (4th Cir. 1970), *National Association of Theatre Owners v. FCC,* 420 F.2d 194 (D. C. Cir. 1969), *Johnson v. Powell,* 414 F.2d 1060 (5th Cir. 1969).

401, 403. The cited provisions of Title 10 create in Air Force personnel an entitlement to certain medical services for their dependents, while the cited provisions of Title 37 create a similar entitlement to a basic allowance for quarters (BAQ) as a supplement to salary.

Under the medical program set up by 10 U.S.C. 1072, 1076, and the statutory BAQ system set up by 37 U.S.C. 401, 403, a male is entitled to greater benefits, in the form of medical care for his wife and higher housing stipend solely by virtue of his *unrestricted* right to claim his spouse as a dependent. In both situations the statutes severly limit a female's entitlement to benefits equal to those received by males by providing a different and more restricted definition for who is a female's dependent. While the spouses of male Air Force members are deemed "dependents" regardless of thei actual dependency, spouses of female Air Force members are considered "dependent" only if the husband is in fact over one-half dependent upon his wife for his support.

The result of this classification is a two-fold discrimination:

1) Procedure — women are forced to the burden and vagaries of proving their spouses' dependency while male military personnel need offer no proof; indeed, the presumption for men is *non-rebuttable;*

2) Substance — since the presumption in favor of males is non-rebuttable, males whose wives are not financially dependent — and the numbers are by no means few[19/] — are granted additional benefits while women in precisely the same circumstance are denied benefits.

The essence of Lt. Frontiero's challenge is that Sections 1072 and 401, in drawing a distinction between men and women similarly circumstanced and specifying burdensome treatment and diminished benfits for women, make an arbitrary and invidiously discriminatory classification in violation of women's rights to have the "protection of equal laws," *Yick Wo v. Hopkins, supra,* at 369. *Reed v. Reed, supra,*

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19/ See *infra,* p. 51 .

92 S. Ct. at 253.

V.

STANDARDS OF REVIEW: THIS CLASSIFICATION DEMANDS STRICT SCRUTINY

Although in *Reed v. Reed, supra,* the more usual rational basis test was employed to strike down a discriminatory sex classification, that standard was apparently applied because the Idaho statute in question failed even to meet the strictures of such "loose review." *See, Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 1035 N. 7 (1972). Lt. Frontiero likewise submits that the federal government's discriminatory grant of fringe benefits has no rational basis and fails to meet the reasonableness test. However, the plaintiffs submit as well that this is a case peculiarly appropriate for strict review.20/

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20/ Cf. *Shapiro v. Thompson,* 394 U.S. 618, 638 (1969), where the challenged statute was reviewed under the "compelling state interest" standard, even though it was admitted that the justifications advanced by defendants failed to meet the arbitrariness standard.

A.

It must be patently obvious that the statutes at issue here do not comprise protective legislation, for they neither protect against possible physical abuses to physiologically weaker women, *Muller v. Oregon*, 208 U.S. 412 (1908), *Goesart v. Cleary*, 335 U.S. 464 (1948),[21] nor protect against obstruction of home-making duties, *Hoyt v. Florida*, 368 U.S. 49 (1961).[22] Neither is this legislation designed to

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[21] Lt. Frontiero by no means suggests that protective legislation is excusable. The Senate Judiciary Committee recently noted, S. Rep. No. 92-689, 92nd Cong., 2d Sess. 20, 1972, that "it is under the guise of protection that much of the sex discrimination in this country has been perpetrated." Rather plaintiffs suggest that what standard of review to apply to such situations, so different from the situaction *sub judice*, is a question which need not be reached in the present case. For fuller discussion of the importance of the early decisions upholding protective legislation, *see* Appellant's Brief in *Reed v. Reed, supra*.

[22] Lt. Frontiero is by her very military status no ordinary housewife — or so the armed forces contend. *See, Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *cert. granted* 41 U.S.L.W. 3220 (10-24-72).

rectify discrimination and to restore equality to women who have had fewer employment opportunities in the past. *Gruenwald v. Gardner,* 390 F.2d 591, 592 (2nd Cir. 1968), *cert. den.* 393 U.S. 982. Cf. *Jones v. Alfred Mayer Co.,* 392 U.S. 409 (1968) and *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), involving true remedial legislation to rectify discrimination. Rather the legislation challenged here seizes upon a group, women, who have historically suffered employment discrimination[23/] and diminished opportunities for employment, [24/] and uses that inferior economic status as a justification for heaping on further discrimination [25/] — reduced housing and medical benefits which men in the same circumstance

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[23/] See T. Murphy, *Female Wage Discrimination,* 39 U. CIN. L. REV. 615 (1970).

[24/] Gruenwald v. Gardner , 390 F.2d at 592.

[25/] The defendants' brief below, after noting that women had fewer jobs than men and generally less income, cited that inferior status as a rational basis for assuming females to be dependent on their husbands Defendants' Memorandum, page 10.

automatically receive. Cf. *United States v. Gaston County, North Carolina,* 395 U.S. 285, 296-97 (1969), holding that in a situation where blacks have been denied equal educational opportunities, a county may not make educational attainments a prerequisite to voting.

The instant statutory classification, in that it uses inequality as a basis for imposing further inequality and has defined those to be burdened in terms of an entire biological group, 26/ has made "as invidious discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942).

The plaintiffs' argument does not require that

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26/ Indeed, one court has suggested that it is for this very reason of all-inclusiveness that sex classifications should *always* be considered suspect:

> . . . The characteristic of sex frequently bears no relation to ability to perform or contribute to society . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members . . . [*Sail'er Inn, v. Kirby,* 5 Cal. 3d 1, 485 P.2d 529 (1971)]

every classification by sex be held "suspect," thereby forbidding any legislative distinction between men and women.[27] True protective, remedial or even neutral (*eg.*, separate restrooms) statutes could be judged by the rational basis test, as in *Gruenwald v. Gardner,* 390 F.2d at 592. Cf. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). However, statutes like the ones at bar, which impose further inequities in a subject matter area, employment, where remedial rather than oppressive measures are concededly needed,[28] must surely carry a much heavier burden of justification.[29]

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[27] Cf. *Bullock v. Carter,* 405 U.S. 134, 92 S. Ct. 849, 855056 (1972), where strict review, although not applicable to the topic generally was held to apply in certain egregious circumstances.

[28] P. Freund, *The Equal Rights Amendment Is Not The Way,* 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 234 (1971

[29] The distinction between burdensome and protective legislation has been twice noted by district courts, once affirmed by this Court. *Kirstein v. Rector & Visitors of University of Virginia,* 309 F. Supp. 184, 187 (D.Va. 1970) (strict review of burdensome classification), *Williams v. McNair,* 316 F. Supp. 134, 138 (D.S.C. 1970) (three judges) (Haynesworth, CJ., applying rational basis test to neutral classification *aff'd.* 401 U.S. 95 (1971).

For this reason, Lt. Frontiero submits that the instant sex classification should be treated as suspect and upheld only if shown to be "necessary and not merely rationally related" to the accomplishment of a permissible governmental purpose. *McLaughlin v. Florida,* 379 U.S. 184 (1964).

B.

Despite our position that the instant burdensome classification by sex is suspect, and therefore subject to strict scrutiny, the plaintiffs submit that the challenged statutes fail even to meet the traditional reasonableness test. Although sometimes referred to as "loose review," this standard still demands much from the legislator. As Mr. Justice Brandeis stated in *Quaker City Cab Co., v. Commonwealth of Pennsylvania,* 277 U.S. 389, 406 (dissenting opinion),

> [w]e call that action reasonable which an informed intelligent, just-minded civilized man could rationally favor. In passing upon leg-

> islation. . . we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that *all actually situated similarly will be treated alike*. . . .[Emphasis Added]

Compare *Reed v. Reed, supra,* 92 S. Ct. 251, where the Court last term stated the reasonableness test in a similar manner.

While the Court has sometimes stated under the rational basis test that a government may eradicate some "evils of the same genus" without erradicating all, *REA v. New York,* 336 U.S. 106, 110 (1949), or that it may regulate one portion of a problem without dealing with the entire problem, *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955), those observations have no relevance here. In each of those cases the Court pointed to some substantial difference in circumstances, 336 U.S. at 110, 348 U.S. at 489, which would have justified the differing treatment. Furthermore, the legislative history of the benefit

system here challenged shows beyond doubt that Congress intended to solve the evil of low pay for both men and women.30/ Congress simply went about that task in an arbitrary and unreasonable manner when it enacted different definitions of dependency for men and women.

C.

This Court has increasingly realized that choosing which test to apply is no substitute for the difficult job of actually judging the substantiality of relevant interests and the degree to which they are restricted or advanced by the contested legislation. *See, Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 1405 (1972).31/ Cf. *Bullock v. Carter,*

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30/ *See,* pages 40-45, *infra.*

31/ Surely women as a group are no less able to change their sex status than illegitimate children are to change their inferior status. Each incurs liabilities on the basis of a condition which is both unchangeable and unrelated to individual capacities.

405 U.S. 134, (1972). *Carrington v. Rash,* 380 U.S. 89, (1965). The plaintiffs implicitly recognized this situation when, in arguing for strict scrutiny, *supra* at page 29 , we contended that a sex classification needn't always be suspect.

The plaintiffs submit that at the very least no permissible state interest may be furthered by a classification which seizes upon the previously disadvantaged in order to define a class subject to additional unequal treatment. Cf. *United States v. Gaston County,* 395 U.S. 285, 296-97 (1969). Furthermore, the government's interest in this administrative procedure, its justification for this inequality, is nothing but mere administrative ease. Since that interest may be furthered by more precise and less drastic means, Lt. Frontiero suggests that it is insufficient to justify the discrimination against her as a woman. (See pp. 52-53 infra.)

In short the government's interest in ease of administration cannot by any test justify the further visitation of inequalities upon women which the pre-

sent dependency definitions enact. Such discrimination runs counter to our basic concepts of fairness and equality inherent in due process.

## VI.

## THE GOVERNMENT'S JUSTIFICATIONS FOR THE DISCRIMINATION HAVE NO RATIONAL BASIS AND ARE INSUBSTANTIAL

The governmental defendants sought to establish the reasonableness of the challenged sex classification, its rational relation to the objective of the statute, by proposing two purposes for the statutes as justifications for the discrimination:

A) the need of the armed forces to attract more men than women — hence the propriety of offering greater benefits to men;[32/]

B) the desire to lighten the administrative workload — based on the rationale that because, it is contended, men earn more than women, men's spouses may be presumed to be

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32/ Defendants' Memorandum at 7.

dependent.[33]

The plaintiffs submit that both of these justifications fail.

Purpose (a)

The Need to Attract More Men

The defendants claimed below that the

> provision of additional benefits to male members of the Air Force [is justified] in view of the structure of our Armed Forces to rely heavily on men, a structure necessitated by physical differences between men and women.[34]

The Government prevailed with that argument in *United States v. Cook*, 311 F. Supp. 618 (W.D. Pa., 1970), regarding the necessity of conscripting males only, and having found it to work there, we suggest, the Government raises it again here.

The plaintiffs will rebut this rationale for the

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[33] *Id.* at 9.

[34] Defendants' Memorandum in Support of Motion at 5; repeated in Defendants Memorandum at 7.

statutes by showing that it is wholly contrived and is diametrically opposed to the real purpose of the statutes as stated in Congressional debate. Moreover, even assuming that this were the real basis for Congress' distinction between men and women, the different dependency definitions do not reasonably relate even to this hypothetical purpose of the statutes. The affect of this classification upon attaining a desired ratio of men to women in the armed services is truly negligible, remote, and speculative.

While it is true that a discriminatory classification may be sustained under the rational basis test "if any state of facts reasonably may be conceived to justify it," *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), the conceived justifications may be rebutted by showing that they were never intended by the legislature or by showing affirmatively that the legislature had a contrary intent incompatible with that hypothesized. *See, eg., Eisenstadt v. Baird*, 405 U.S. 645, 92 S. Ct. 1029, 1036-38 (1972)

*Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 92 S. Ct. at 1405-06 (1972). The legislative history of the housing allowance bill and of the medical benefits bill conclusively show that far from intending to attract a disproportionate number of men int the armed services, these statutes were aimed at attrac ting both men and women and as many of each as possible

The statutes at issue here, although enacted seven years apart, have effectively identical dependency provisions. 10 U.S.C. 1072, 1076, dealing with medical benefits, goes back to H.R. 9429 (1956), while 33 U.S.C. 401, 403, concerning living allowances, is derived from H.R. 5007 (1949). It will not be necessary to consider each bill separately, however, for it is clear from Congressional debate that each was inten to remedy the same evil. Both bills were sponsored an reported out of the same committee by the same Congressman, Mr. Kilday of Texas, who ascribed the same purpose to both bills.35/

In both 1949 and 1956 the Armed Forces faced the

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35/ See Notes 37 and 40, *infra*.

very critical problem of retaining skilled personnel in the services in the face of the higher wages and extra benefits offered by private industry. It was this critical need to keep trained workers that provided the motivation and purpose for both statutes.[36] Congressman Kilday noted in support of the medical benefits bill that its purpose was to put the Armed Forces "on a competitive basis with business and industry" in the area of fringe benefits,[37] so as to attract "career personnel" through re-enlistment.[38]

The purpose of the bill was *not* to attract more men than women by a disproportionate grant of fringe benefits. Senator Saltonstall, ranking minority committee member speaking in bi-partisan support of the medical bill, made clear that both men and women — since both possessed needed skills and training — were to be enticed into re-enlisting:

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[36] Congressional *Record*, 84th Cong., 2d Sess. Vol. 102, 3847 at 3849-50 (remarks of Mr. Kilday).

[37] *Id.* at 3850, col. 2.

[38] *Id.*

> This single bill is not in itself an answer to all our manpower problems, of course. It does, however, to my mind, represent a long step forward toward the attainment of our objective, namely, the completely adequate defense of the United States not alone in terms of weapons and material but, more important, in terms of the *men and women* ready, willing, and able to devote themselves without interruption of career to the building up of the Nation's security.39/

The same considerations carried the day when Congress considered the allowances bill (BAQ being one of the allowances). Mr. Kilday spoke of Congress fear of losing trained personnel if adequate benefits were not paid.40/ Others spoke on the same need for

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39/ Congressional *Record*, 84th Cong. 2nd Sess., Vol. 102, 8042 at 8043, col. 1. [Emphasis Added].

40/ Congressional *Record*, 81st Cong. 1st Sess., Vol. 95, 7656 at 7662. *See also* the letter of General Eisenhower, *Id.*, at 7662-63.

retaining those whom the Army had already trained,[41] and Congressman Price gave the reason such trained people were needed:

> The United States armed services today are highly technical organizations geared to split-second timing and complex machinery. Each depends for efficient operations upon specially trained *men and women*.[42]

In short, Congress recognized a need to provide greater fringe benefits to Armed Forces members so as to attract trained career personnel — men and women alike. In the face of such a *stated* need for both men and women with skills, it is demonstrably unreasonable to conceive that Congress wanted to attract back more men than women. Statements of the Congressmen and Senators reveal a clear hope that both women and men would be enticed to rejoin — and as many of each as possible.

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[41] *Id.*, at 7664 (Mr. Short), 7666 (Mr. Havenner). 7667 (Mr. Bates), 7671 (Mr. Johnson).

[42] *Id.*, at 7671. [Emphasis Added].

Two further factors should be noted. First, with regard to the medical benefits bill, it was specifically stated in Congressional debate that another reason for its passage, in addition to providing career incentives, was to equalize the medical benefits offered to members of the various services.[43/] To suggest that Congress intentionally chose women for unequal benefits ascribes a mean and unworthy motive to Congress. Second, and more to the point, when Congress has decided that a disproportionate number of women is necessary for one branch of the services, it has accomplished that purpose with statutory ease. See, *eg.*, 10 U.S.C. 8215, limiting to 2% the number of women enlistees and officers in the regular Air Force. Cf. AIR FORCE MANUAL 36-5 Department of Air Force, Sections 2-2n, 2-13(d)(2), 3-1(a)(19) (September 30, 1970).

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[43/] Congressional *Record*, Vol. 102, *supra* at 3848-49 (remarks of Mr. Kilday in colloquy with Messrs. Arends, Boland and Gross), and 3851, col. 2 (Mr. Kilday).

In summary, nothing in the Congressional debates lends any credence to defendants' contention that these statutes were purposely drawn so as to procure more men for the Armed Forces than women. Indeed, the explicitness with which Congress has legislated when it truly desired to limit the number of women and the clarity of the legislative history in showing that Congress with these benefits intended to attract back both men and women affirmatively demonstrate that this suggested purpose of these statutes is wholly fabricated.

Yet even if one assumes that Congress intended to grant disproportionate benefits in order to attract more men, the discrimination practiced by the statute bears not rational relation to this hypothetical purpose. Like the administrative benefits in *Carrington v. Rash,* 380 U.S. 89 (1965), the goal of attracting more males and fewer females is in this context too remote and speculative to justify the discrimination. Its affect, if any, is "negligible," and therefore has no rational relation to the hypo-

thetical purpose. *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 406 (1928) (Brandeis, J., dissenting).

Plaintiffs submit that the very idea of diminishing the re-enlistment of women relative to men by providing fewer medical and housing benefits to the families of women is not only speculative, it is barbaric. With the Armed Forces currently spending millions of dollars in advertising its benefits to women, it is the ultimate *non sequitur* for defendants to say that these challenged statutes, with their technical and involved definitions, would have any appreciable affect in lowering the enlistment rate of women. Indeed, the only affect of the statute is to discriminate against women who are already members of the Armed Forces. 44/

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44/ The argument that these discriminatory dependency provisions rationally relate to the statutory purpose because the statutes' very purpose was to discriminate seems almost a curiosity — or an admission of improper purpose. The argument that discrimination was not inequality because it applied uniformly against the victim class has not bee a new issue in this Court since *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and it was rejected there. *See also, Carrington v. Rash*, 380 U.S. 89, 93 (1965).

Purpose (b)

Lightening the Administrative Burden
by Presuming Males' Spouses Dependent

The defendants in their brief below[45/] characterized the dependency definitions at issue here as enacting a statutory presumption that males' spouses were dependent, while refusing to allow the presumption for females. They argue that this presumption, made admittedly only to lighten the administrative workload of bearing both men and women, is justified because women earn less than men.

The defendants treated as self-evident the proposition that difference in income levels somehow determines which family member is dependent. Lt. Frontiero contends (1) that there is no rational relationship between income levels and dependency, and (2) that, even if there is a relation, armed force statistical studies clearly show that military males earn less than civilian females (their spouses).

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45/ Defendants' Memorandum at 9.

Furthermore, the plaintiffs insist (3) that since the presumption serves no other purpose than to lighten administrative workloads, by forcing only women to a hearing, it is insufficient to justify the discrimination which it occasions.

The defendants argued below that since men in the general population earn more than women in the general population , the armed forces administrators may assume that spouses of military men are"dependent" on their husbands and that the spouses of military women are not "dependent." The plaintiffs contend that such income figures alone have no rational relationship to determining dependency. This is because whether a person is "one-half dependent" 46/ on his spouses' income varies not just with income but also with total expenses.

The Frontiero's illustrate this point perfectly. Joseph's income (at $205.00 per month) is less than one-half of Sharron's base income of $443.70 per

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46/ This is the language of each statute. Appendix page 23a-29a.

month.[47] By the defendants' reasoning Joseph, with an income lower by half, should be the "dependent" of Sharron. But this is false, for Joseph's expenses are only $354.00 per month and his $205.00 income pays over one-half of that total. Thus, since dependency varies not only with income but also with expenses, there is absolutely no rational connection between income levels and "one-half dependency." Any presumption based on such figures is *ipso facto* unreasonable.[48]

What happens, however, if one takes the view that

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[47] Appendix at 49-50.(Stipulation of Facts).

[48] By analogy, could it be shown that the ability to pass a bar exam was greater among children from high income parents, would it be reasonable to pass them automatically and subject only poor students to the exam? Very likely not, for we know that ability to pass the bar, although it may be higher among students from high income families due to better educational opportunities, also depends upon native intelligence and what even poor students have learned with lesser educational opportunities. Thus to judge on the basis of one criterion, when many are involved, would be unreasonable. The same is true in the case *sub judice*.

the income figures and the statutory presumption based on them are at least sufficient to serve as a "rough accommodation"[49] to solve the problems of government? Of course the true answer to that view is that even rough accommodations are included under the reasonableness test and must have a rational basis[50] — and we have shown that the income statistics have no rational relation to predicting dependency. However, let us assume for the defendants' sake that income figures are relevant in predicting dependency, *i.e.*, that the lower income may be taken as a rough indication of dependency. What do we find?

Now, the defendants submitted below that we should compare the income of men and women in the general population,[51] but it is well known that males in the armed forces draw a much lower salary than males i

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[49] Dandridge v. Williams, 397 U.S. 471, 485 (1970),

[50] *Id.*

[51] Defendants' Memorandum at 10.

population generally.[52] Therefore, in exploring the dependency of males' wives, one must compare *males in the military* with *women in the general population* (that is, the military males' wives).

These figures for military males, compiled by the Executive Department itself in a report to guide our governmental policies toward our military men and women, show the following:

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|---|---|
| Median Income of Male in Armed Forces | $3686[53] |
| Median Income of Female in General Population | $5323[54] |

Since the average military male earns less than civilian females, by the defendants' own logic — "the lower income indicates dependency" — most

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[52] The Report of the President's Commission on an All Volunteer Armed Force (1970) *passim*. *See also*, pages 40-41 *supra*.

[53] The Report of the President's Commission on an All Volunteer Armed Force, Table 5-I at p. 51, Table A-II at p. 181 (1970). See Addendum.

[54] U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Fact Sheet on the Earnings Gap 1 (December 1, 1971) (median for 1970).

armed forces males could not prove their wives' dependency. The armed forces' argument that they may reasonably presume males' spouses dependent is completely exploded.

There is, therefore, simply no rational connection between income levels and the armed forces' statutory presumption that males can prove their spouses' dependency. The armed forces' own statistics indicate no reasonable basis for a presumption for males; indeed, such figures rebut that very presumption.

At another level, this defense argument points up the extent of the discrimination Lt. Frontiero faces. If the Government really believes that lower income alone can accurately predict dependency, why not make *that* criterion the basis for easing the administrative burden? Why ascribe that condition to a second group, women? At the very least when burdens are distributed upon women, forcing them to receive fewer benefits (when men in the same circumstance receive benefits by virtue of an irrebuttable pre-

sumption), the statutory classification should be drawn as narrowly as possible. Cf. *see, Dean Milk Co. v. City of Madison* 340 U.S. 349, 354 (1951) (discrimination in the economic context), *Shneider v. State,* 308 U.S. 147, 162 (1939), Cf. *Levy v. Louisiana,* 391 U.S. 73 (1968), *King v. Smith,* 392 U.S. 309 (1968). And since the Government, by its own rationale, can accomplish its purpose of lightening the administrative workload by narrowly presuming dependent all spouses with income lower than that of the military member, the present classification by sex is grossly overinclusive and unreasonable.

Yet, even aside from the fact that these sex classifications have no rational basis, they suffer a more basic problem. The classification serves no other purpose than to lighten the administrative workload. It is easier work, the Government contends, if it can grant benefits to males automatically and force only women to the burden of proving their spouses' dependency. Indeed, the District Court upheld the sex discrimination on the basis that a

classification

> made to facilitate administration of the law does not violate the equal protection guarantee of the Constitution if it does not unduly burden or oppress one of the classes upon which it operates. See *Adams v. City of Milwaukee*, 228 U.S. 572 (1913).55/

It would perhaps be the ultimate irony of this sex classification that it should be upheld with citation to a sixty-year-old case involving the regulation of cows and milk. That was the situation in the *Adams* case, *supra*. However, aside from the irony of milk and cows controlling women's rights, the *Adams* case on purely legal grounds has no place in deciding the instant controversey.

The statute and classification in *Adams* reasonably accomplished the great governmental con-

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55/ Appendix at p. 11a , reported in 341 F. Supp at 207 . After a conclusory finding of no administative burden, the court below never considered the substantive inequality the dependency provisions created, Cf. p. 37 *supra* of this brief.

cern of ensuring a pure and unadulterated food supply for the citizenry. 225 U.S. at 583-83. The difference in classification and treatment was justified as necessary to vindicate this substantive concern. *Id.* at 581. By contrast the statutory classification challenged here serves no purpose other than to lighten an administrative workload. Such an interest has repeatedly been held insufficient to justify the resulting discrimination, regardless of the standard of review applied. *See, eg.,Carrington v. Rash*, 380 U.S. 89, 96 (1965) (no standard of review specified) where administrative benefits were held to be too "remote" to justify the discrimination. Cf. *Shapiro v. Thompson*, 394 U.S. 618, at 633-38 (1969).56/ And, of course, in *Reed v. Reed, supra*, just last term, it was the "administrative convenience" argument which was rejected by

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56/ *Dandridge v. Williams*, 397 U.S. 471 (1969), by contrast, was not a case involving administrative convenience. There, as in *Adams v. Milwaukee, supra*, the state was advancing a substantive state policy, the welfare goal of keeping marginally employed families from earning less than welfare recipients received.

this Court in a unanimous opinion after analysis under the rational basis test.

Indeed, the dependency rules challenged here are almost indistinguishable from the mandatory preference rule struck down in *Reed* — under the guise of procedural convenience, they foster substantive inequality. Since the presumption in favor of males is automatic and non-rebuttable, males whose wives are not financially dependent — and the armed forces' statistics show that the numbers are by no means few[57/] — are granted benefits while women in precisely the same circumstance are denied benefits. While lightenin the administrative burden, the different dependency rules fail to heed the command of *Reed v. Reed* that all similarly circumstanced shall be treated alike.

## VII.

## THE ISSUES AT BAR ARE DISCREET AND SUSCEPTIBLE TO JUDICIAL RESOLUTION

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57/ See page 51 *supra*. Fully half of the armed forces males (those below the median) have incomes below the average for civilian females — the class in which their wives would fall.

Several commentators have suggested wide-ranging inequities in the common law rules relating to family relationships and dependency. *See, eg.*, M. Hughes, *And Then There Were Two*, 23 Hast. L. J. 233 (1971). Those rules must stand and fall on their own merits,[58] however, for the Government admits, and Lt. Frontiero agrees, that the statutes at bar do not draw from or incorporate common law. As the Government stated below, "Congress has provided the benefits at issue solely to members of our Armed Forces. This entails consideration of factors entirely different from those which might be reflected in adoption of a general common law rule. . . ."[59]

That the legislation at bar does not rely upon the common law is apparent from a brief review of the

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[58] *See, eg.*, Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.* 405 U.S. 970 (1972).

[59] Defendants' Supplemental Memorandum at 2. See also note 22 *supra* relating to the Armed Forces' peculiar demand upon women.

the duties that system imposed upon husband and wife.[60/] The husband at common law was duty bound to support his wife, yet, while the wife owed her husband no explicit reciprocal duty to "support" him, she was duty-bound to render him services and to turn over to him all her earnings. See 41 CJS 413,"Husband and Wife," Section 17, and the cases there noted. The common law view of marriage envisioned man and wife as a single entity. That entity was sustained by man's work and earnings and by his wife's work and earnings, 41 CJS 404-414. *U. S. v. Dege,* 364 U.S. 51 (1960).

Thus, in its totality, the common law decreed that both husband and wife were obligated to sustain each other: the wife duty-bound to render services and give her earnings to her husband and the husband

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60/ The District Court in requesting briefs on this issue apparently worried over the notion that since the states' common law imposed a duty upon husband to support their wives, the armed forces might consider the wives dependents. This view of course ignores the reciprocal common law duty of a wife to give her earnings to support her husband. See text at this note and defendants' statement, *supra*, p. 57.

duty-bound to support his wife.[61] Accordingly, the plaintiffs conclude that the common law rules in fact established mutual duties of wife and husband to support each other, and that there resulted a mutual inter-dependence between husband and wife. From such common law relationships it is impossible to infer that only the wife is always her husband's dependent, as the statutes *sub judice* decreed.

While Lt. Frontiero agrees with the Government that the challenged statutes can only be read as an attempt to guess actual dependency, and do not incorporate the old common law rules, she does suggest that the true basis for this discriminatory legislation can be traced to a sex stereotype which predominated in the heyday of the common law — that stereotype was woman as the dependent homebound wife. *See, Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130

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[61] Part of the problem here is the rhetoric of the common law which favored the male. The wife did not "support" her husband — she was instead duty-bound to give him her money and services and he then supported himself.

141-142 (1873); *Nolin v. Pearson,* 191 Mass. 283, 284-285 (1906). *See, Equal Rights for Women: A Symposium,* 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 215 (1971) especially Comment, *A Little Dearer Than His Horse: Legal Stereotypes and the Feminine Personality, Id.,* 260.

Whatever may be said for the merits of the notion that men should earn while women keep house, that idea simply does not conform to our present societal structure. To continue in light of changed circumstances to hold to the antiquated view that women are always controlled by and dependent on their husbands, this Court warned in *United States v. Dege,* 364 U.S. 51, 54 (1960) (per Frankfurter, J.),

> would require us to disregard the vast changes in the status of woman — the extension of her rights and correlative duties — whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country.

Although the opinion in *Dege* was given in interpretation of a federal statute and not in reply to a constitutional challenge, *Id.* at 52, such an inordinate change in circumstances would surely leave the classification predicated upon those facts baseless.62/ And that was precisely Justice Frankfurter's point — that our national society and woman's role in its economic life have so changed as to leave no basis for any longer considering the wife controlled by, dependent upon, and merged with her husband in one legal entity. *Id.* at 54.63/

Labor Department statistics bear out Justice Frankfurter's perception that married women are no longer confined to household duties. Almost three-

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62/ *See* Edwards v. California, 314 U.S. 160, 174 (1941), Papachriston v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 844 n.5., 846-47 (1972).

63/ Compare *Strauder v. West Virginia,* 100 U.S. 303, 310 (1880)(dictum), finding the common law exclusion of women from juries perfectly acceptable in that age, with *White v. Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (three judges), striking down Alabama's statute which had adopted the common law exclusion of women.

fifths of all women workers are married and living with their husbands,64/ and in certain income ranges almost half the wives are holding down regular jobs.65/

Whatever may be said for local variations where the notion of the home-bound wife might carry some validity, 66/ in our *national* life and commerce in which Congress has here legislated, the antiquated facts that these dependency definitions reflect has long ago passed into history. *United States v. Dege, supra* at 54. That mold-covered doctrine and

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64/ U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Women Workers Today 4 (1971).

65/ *Id., eg.,* in the income range in which husbands earn between $5,000 and $6,999, forty-six percent of their wives are in the labor force.

66/ *See, Hoyt v. Florida,* 368 U.S. 57, 62 (1961). It is interesting to note as indicative of woman's emancipation that Florida, which had seen a basis for treating women differently in 1961, amended its jury statute in 1967 to treat men and women substantially equally in the matter of exemptions. See Comment, *A Little Dearer Than His Horse: Legal Stereotypes and the Feminine Personality,* 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 260, 262 N. 18. Fla. Stat. Ann. Section 40.01 *as* amended Laws 1967, c. 67-154, Section 1.

lifestyle cannot provide a rational basis for today's sex classification. 67/

## VIII.

## RELIEF: BENEFITS SHOULD BE EXTENDED TO WOMEN ON THE SAME BASIS AS TO MEN

Contrary to the prevailing notion of an earlier era, it is no longer accepted that in granting a "privilege" a legislature may establish any sort of classification it fancies. *Speiser v. Randall*, 357 U.S. 513 (1958). *See also, Shapiro v. Thompson*, 394 U.S. 618, 627 N. 6 (1969), *Sherbert v. Verner*, 37 U.S. 398 (1963), Van Alstyne, *The Demise of the Right - Privilege Distinction in Constitutional Law*,

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67/ Said Mr. Justice Holmes,

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists out of imitation of the past. [Holmes, Collected Legal Papers 187 (1920), reprinting *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).]

81 HARV. L. REV. 1439 (1968).

When the District Court characterized relief for Lt. Frontiero as a "windfall," Judge Johnson rightly called it a throwback to the days of right-privilege distinctions. 68/ And, of course, if granted equal benefits, Lt. Frontiero would be getting no more a "windfall" than all those males who automatically claim their spouses as dependents.69/ In *Levy v. Louisiana,* 391 U.S. 68 (1968), the state granted to certain dependents benefits unknown at common law. Who would suggest that *Levy's* command to extend those benefits to uncovered illegitimate children constituted a "windfall" for those plaintiffs?

Of course, the problem of whether to extend benefits to women does not fairly relate to the substantive issue of constitutionality, but rather bears upon the question of what relief this Court could or

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68/ Appendix 21a(Johnson, C.J. dissenting) p. 21 reported in 341 F. Supp. at 211.

69/ The number who cannot prove their wives dependent is substantial. See pages 51 & 52 and note. 57, *supra*.

should order. Whenever a court finds an unconstitutional classification and unequal treatment, it must then decide whether to remedy the defect by declaring the statute equally operative upon all persons similarly situated or by declaring the statute inoperative as to all of them. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

Plaintiffs suggest that the intent of Congress ought to guide the Court on this issue. In such a situation said Mr. Justice Harlan, *Welsh v. United States*, 398 U.S. 333, 355 (1970), the Court is "to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional." In the present case we have found that Congress enacted this statute after perceiving a specific need for bestowing medical and housing benefits upon armed forces personnel and their families.[70/] It would, therefore, frustrate the very

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70/ See page 41 *supra*.

purpose of these statutes were the Court to render them wholly inoperative. *See, Levy v. Louisiana,* 391 U.S. 68 (1968), *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164, 92 S. Ct. 1400 (1972), where benefits were extended to effectuate the statutory purpose. Cf. *Skinner v. Oklahoma,* 316 U.S. 535 (1942), Court refused to extend sterilization punishment to all thieves.

Similarly, it would do no violence to Congress' intent to allow women to claim their husbands automatically as dependents. Congress has already followed that form with respect to men. In fact, considering the Government's stated desire for administrative convenience, it is extremely unlikely that Congress would impose the administrative interview burden upon its military men and administrative staff.[71/] In such a situation a constitutional de-

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71/ Said Congressman Kilday, the sponser, regardin a similar aspect of these statutes, "We are not intere in setting up a lot of clerks to handle a lot of paper work like that." Congressional *Record*, 84th Cong. 2nd Sess., Vol. 102, 3849.

fact should be cured by judicial direction that the benefits be extended unless Congress shall manifest its intent otherwise.[72/]

## CONCLUSION

For the reasons stated above Lt. Frontiero and her husband ask that the judgment of the District Court be REVERSED and that the discriminatory dependency provisions here challenged be declared unconstitutional. The plaintiffs further request that until Congress shall manifest its intent to the contrary the defendants be required to extend medical and housing benefits to women on the same basis as they are extended to men.

Respectfully submitted,

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72/ *See*, Iowa-Des Moines National Bank v. Bennett 284 U.S. 239 (1939) (per Brandeis, J.).

ADDENDUM

Statistics on Median Income of Military Personnel

Source: The Report of the President's Commission on an All-Volunteer Armed Force - 1970

Table 5-I:

A. "First term personnel" who are enlisted men comprise fifty-nine per cent of total armed forces personnel ($\frac{1,974,000}{3,365,000} = 59\%$).

"First term personnel" are defined as those with less than four years' service. Thus, we observe that fifty-nine per cent of all armed forces personnel are enlisted men of less than four years' service.

Table A-11

B. Such personnel are shown to have a maximum earning capacity of $3,686.

C. Since 59% of all personnel earn at the $3,686 rate, it is reasonable to assume that 50% (the median) earn less than $3,686.

NOTE:

The real median is probably much less than even the $3,686 figure, since that figure is the 59%-ile earning level; the 50%-ile level, that is, the median, must be even lower.