

THE WHITE HOUSE

WASHINGTON

June 5, 1978

MEMORANDUM: EFFECT OF ERA

There are errors in both Ms. Schlafly's and Ms. Alexander's viewpoints. We have attempted to clarify the issues in a brief manner for your readers. However, most of the issues are quite complex and are difficult to study in isolation. No decision involving any of these issues can or should be made without considering all of the factors involved.

Opponents of the ERA have distorted the effects of the ERA by portraying the amendment as one which would force women to use men's restrooms and prisons as well as fight hand-to-hand combat on the front lines. Unfortunately, this distorted view has been accepted -- or at least not effectively refuted -- by many women and men. Quite simply, the Equal Rights Amendment, if passed, would guarantee equal treatment under the laws of the states and the federal government to each individual, regardless of sex. It is 'unisex' insofar as each person will be considered as an individual with unique characteristics and not simply as male or female. It will mean that in most cases sex is no longer a factor to be considered.

The ERA will not negate collateral constitutional rights like the right to privacy; rather the two rights will be considered together with the specific facts of the issue in question. This is the fundamental reason why Ms. Schlafly's list of exemptions is misleading. Women and men will never be forced to use the same public restrooms, hospital rooms, and prisons because in each of these instances the individual's right to privacy would outweigh the right to equal treatment without regard to sex. Rights guaranteed by the Constitution must be respected without question, and when a conflict between two rights arises, the courts will delicately balance those rights and resolve the conflict in favor of the overriding interest. In essence, the ERA will harmoniously complement other guarantees of the Constitution.

It has been argued that the ERA is not necessary since equality under the laws is guaranteed by the Fifth and Fourteenth Amendments. However, those amendments have been interpreted inconsistently and narrowly without a definitive approach to sex equality. The ERA will reduce this ambiguity by establishing a standard that prohibits discrimination because of sex.

Next we address the specific issues raised in the letters:

Social Security Laws

Under the Social Security law, a divorced wife is defined as such only after she has been married for twenty years to the wage earner. In other words, in order for a woman to collect social security benefits from the account of her divorced wage earner husband, she must have been married to him for twenty years. In effect the law generally prevents more than one woman from drawing benefits from the same wage earner's account. However, a former wife can draw benefits for their minor children if the wage earner is their father.

Interestingly enough, until last year a male survivor was precluded from receiving benefits from his deceased wife's account unless he could prove that at the time his wife became eligible for social security benefits he was receiving at least one-half of his support from her. In March 1977 the Supreme Court ruled that this invidious discrimination against women wage earners afforded them less protection for their surviving spouses and held the social security provision unconstitutional.

Women do pay less than men into the Social Security System for two reasons: (1) fewer women than men are employed, and (2) women earn, on the average, much less than men and therefore contribute less to the system. On the average, women earn less than two-thirds of what a man earns for performing the same job with the same qualifications.

It is also true that women receive more than half of all the social security benefits. This statement is misleading for two reasons: first, women who have not been employed receive benefits because of their wage earner husband's contribution to the system. Since women outlive men by a few years they continue to receive benefits for a longer time period thus, overall, women receive more benefits than men. Second, as stated previously, until last year men were unable to collect benefits from their wives' accounts unless they could prove spousal support; this is the major reason why men have collected less. The Supreme Court decision will, of course, lead to an increased number of men who receive benefits from the system.

Divorce

Although divorce laws vary from state to state, most states have no-fault divorce laws and neutral support laws. In other words, regardless of sex, the spouse more able to pay may be required to. California, for example, provides for spousal support if needed by either party. In all states, the wife has the right to control her property, including income. Six states impose no obligation on the wife (or the ex-wife) for the support of her husband (or ex-husband). Some states use sex as a basis for spousal support and although these laws seem to discriminate against men, they actually discriminate against women. Today the courts generally grant support to women only when they are unable to support themselves, usually because of children at home. But because support laws are difficult to enforce, women generally lose in the end (only 14% of divorced wives were awarded alimony in 1975 and only 46% of them were able to collect it regularly). Additionally, some states take fault into consideration when deciding the amount of alimony to award and decrease the award if there is a high fault factor (Census Bureau data indicate that although 8% of all women are divorced only 3.3% receive income from alimony, pensions and annuities combined).

The most common grounds for divorce which apply to either sex are: non-support, adultery, desertion, cruel and barbarous treatment and indignities to the person. There are a few less common grounds which apply only to one sex: a wife's pregnancy by a male other than the husband at the time of marriage, vagrancy on the husband's part, the wife's refusal to move to another state with her husband and her continued absence for two years thereafter. Loss of consortium is not grounds for divorce, but is grounds for suit by either the wife or the husband in 38 states and the District of Columbia. Only six states do not allow a wife to sue her husband for loss of consortium, the remaining six states have abolished the action completely.

Pregnancy and Disability

The Supreme Court has held that under both the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment, it is legal to disallow disability payments to pregnant employees. In one case the court said invidious discrimination must be shown to prove sex discrimination on the part of the employer; in the other case the court said that the distinction made between pregnancy and other disabilities for low wage earners was reasonable because without the exclusion of pregnancy benefits, the comprehensive insurance program would be inaccessible to lower wage employees.

Under the ERA, pregnant employees would be entitled to disability insurance benefits, the same as for any temporary disability. Any classification involving sex would be subjected to the strictest scrutiny under the ERA.

Inheritance Tax

It is true that in some states a wife must prove that she contributed to the estate if she is to inherit the property, free of taxes, when her husband dies. If the woman has spent her life as a homemaker, a contribution is difficult to prove and thus taxes are assessed against her. However, most states have community property laws, or right of survivorship laws, which guarantee the surviving spouse some portion of the estate, usually one-third to one-half. (Georgia is the only state that makes no provision for a guaranteed share for a surviving spouse of either sex.) Your readers should be reminded how important it is that they find out how they hold property with their spouses; state laws vary a great deal.

In summary, it must be re-emphasized that the passage of the Equal Rights Amendment will guarantee that both women and men are treated equally; it will guarantee, among other things, that the language of the sex-based laws will be neutralized and those guarantees will beneficially affect both women and men.