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women's issues

THE WHITE HOUSE

WASHINGTON

July 6, 1983

MEMORANDUM FOR MICHAEL K. DEAVER
DEPUTY CHIEF OF STAFF

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Supreme Court Decision Concerning Gender Discrimination in Pensions

This morning a fragmented Supreme Court issued opinions in Arizona v. Norris, and decided that an employer may not offer lower monthly retirement benefits to a woman than to a man who has made the same contributions, simply because of the actuarial fact that women as a group live longer than men. The State of Arizona administers a plan under which contributions to a retirement account are made during the course of an individual's employment with the State. At retirement an employee may choose one of three options offered by private companies participating in the State's plan: (1) receipt of a lump sum payment, (2) periodic payment of a fixed sum for a fixed period, or (3) the most popular option, purchase of an annuity. Because the private companies administering the Arizona plan used standard actuarial tables that reflected the fact that women live longer than men, a woman who elected an annuity would receive smaller monthly payments than a man who had contributed the same amount to the retirement fund.

Five justices -- Marshall, Brennan, White, Stevens, and O'Connor -- concluded that this difference in treatment constituted gender discrimination prohibited by Title VII. This conclusion was based in large part on the Court's prior opinion in Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), in which the Court ruled that an employer could not require women to make larger contributions to a retirement plan to receive the same monthly pension benefits as men. By the same token, women may not receive smaller monthly benefits than men who made the same contributions. The Chief Justice and Justices Powell, Blackmun, and Rehnquist dissented, arguing that Title VII did not prohibit reliance on sound actuarial principles.

Justice O'Connor joined the dissenters to form a majority on the question of appropriate relief. While Justices Marshall, Brennan, White and Stevens argued that relief should be retroactive as well as prospective, the four dissenters and Justice O'Connor concluded that only prospective relief was appropriate. Thus, benefits based on contributions prior to today's decision may be calculated under the existing plan, but benefits based on contributions after today's decision must be calculated without regard to the gender of the beneficiary. Justice O'Connor concluded that making relief prospective only was necessary to avoid bankrupting most existing pension funds.

for prospectivity, I might find it difficult to make today's decision prospective. As reflected in JUSTICE POWELL'S dissent, however, whether *Manhart* foreshadows today's decision is sufficiently debatable that the first criterion of the *Chevron* test does not compel retroactivity here. Therefore, we must examine the remaining criteria of the *Chevron* test as well.

The second criterion is whether retroactivity will further or retard the operation of the statute. *Chevron, supra,* at 106–107. See also *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 421 (1975) (backpay should be denied only for reasons that will not frustrate the central statutory purposes). *Manhart* held that a central purpose of Title VII is to prevent employers from treating individual workers on the basis of sexual or racial group characteristics. Although retroactive application will not retard the achievement of this purpose, that goal in no way requires retroactivity. I see no reason to believe that a retroactive holding is necessary to ensure that pension plan administrators, who may have thought until our decision today that Title VII did not extend to plans involving third-party insurers, will not now quickly conform their plans to ensure that individual employees are allowed equal monthly benefits regardless of sex. See *Manhart, supra,* at 720–721.[3]

In my view, the third criterion—whether retroactive application would impose inequitable results—compels a prospective decision in these circumstances. Many working men and women have based their retirement decisions on expectations of a certain stream of income during retirement. These decisions depend on the existence of adequate reserves

[3] Another goal of Title VII is to make persons whole for injuries suffered from unlawful employment discrimination. See *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 418 (1975). Although this goal would suggest that the present decision should be made retroactive, it does not necessarily control the decision on retroactivity. See *Manhart, supra,* at 719.

only discrimination in *employment*, and thus simply does not reach these other situations.

Unlike these examples, however, the employer here has done more than set aside equal lump sums for all employees. Title VII clearly does not allow an employer to offer a plan to employees under which it will collect equal contributions, hold them in a trust account, and upon retirement disburse greater monthly checks to men than women. Nor could an employer escape Title VII's mandate by using a third-party bank to hold and manage the account. In the situation at issue here, the employer has used third-party insurance companies to administer the plan, but the plan remains essentially a "privileg[e] of employment," and thus is covered by Title VII. 42 U. S. C. § 2000e-2(a)(1).[2]

For these reasons, I join Parts I, II, and III of JUSTICE MARSHALL's opinion. Unlike JUSTICE MARSHALL, however, I would not make our holding retroactive. Rather, for reasons explained below, I agree with JUSTICE POWELL that our decision should be prospective. I therefore join Part III of JUSTICE POWELL's opinion.

In *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 105-109 (1971), we set forth three criteria for determining when to apply a decision of statutory interpretation prospectively. First, the decision must establish a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Id.*, at 106. Ultimately, I find this case controlled by the same principles of Title VII articulated by the Court in *Manhart*. If this first criterion were the sole consideration

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[2] The distinction between employment-related discrimination and discrimination not covered by Title VII is ably discussed by Van Alstyne, Equality for Individuals or Equality for Groups: Implications of the Supreme Court Decision in the Manhart Case, 64 A. A. U. P. Bulletin 150 (1978).

S. 372, 98th Cong., 1st Sess. (1983); H. R. 100, 98th Cong., 1st Sess. (1983).

Although the issue presented for our decision is a narrow one, the answer is far from self-evident. As with many other narrow issues of statutory construction, the general language chosen by Congress does not clearly resolve the precise question. Our polestar, however, must be the intent of Congress, and the guiding lights are the language, structure, and legislative history of Title VII. Our inquiry is made somewhat easier by the fact that this Court, in *City of Los Angeles Department of Water And Power* v. *Manhart*, 435 U. S. 702 (1978), analyzed the intent of the 88th Congress on a related question. The Court in *Manhart* found Title VII's focus on the individual to be dispositive of the present question. Congress in enacting Title VII intended to prohibit an employer from singling out an employee by race or sex for the purpose of imposing a greater burden or denying an equal benefit because of a characteristic statistically identifiable with the group but empirically false in many individual cases. See *Manhart*, 435 U. S., at 708–710.

Despite JUSTICE POWELL's argument, ultimately I am persuaded that the result in *Manhart* is not distinguishable from the present situation. *Manhart* did note that Title VII would allow an employer to set aside equal retirement contributions for each employee and let the retiree purchase whatever annuity his or her accumulated contributions could command on the open market. *Id.*, at 717–718. In that situation, the employer is treating each employee without regard to sex. If an independent insurance company then classifies persons on the basis of sex, the disadvantaged female worker cannot claim she was denied a privilege of employment, any more than she could complain of employment discrimination when the employer pays equal wages in a community where local merchants charge women more than men for identical items. As I stressed above, Title VII covers

SUPREME COURT OF THE UNITED STATES

No. 82-52

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, ETC., ET AL., PETITIONERS *v.* NATHALIE NORRIS ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 6, 1983]

JUSTICE O'CONNOR, concurring.

This case requires us to determine whether Title VII prohibits an employer from offering an annuity plan in which the participating insurance company uses sex-based tables for calculating monthly benefit payments. It is important to stress that our judicial role is simply to discern the intent of the 88th Congress in enacting Title VII of the Civil Rights Act of 1964,[1] a statute covering only discrimination in employment. What we, if sitting as legislators, might consider wise legislative policy is irrelevant to our task. Nor, as JUSTICE MARSHALL notes, *ante*, at 4, n. 4, do we have before us any constitutional challenge. Finally, our decision must ignore (and our holding has no necessary effect on) the larger issue of whether considerations of sex should be barred from all insurance plans, including individual purchases of insurance, an issue that Congress is currently debating. See

[1] The 92nd Congress made important amendments to Title VII, including extending its coverage to state employers such as the State of Arizona. The 1972 Amendments did not change the substantive requirements of Title VII, however. Thus, it is the intent of the 88th Congress that is controlling here.

case, the cost would fall on the State of Arizona. Presumably other state and local governments also would be affected directly by today's decision. Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits. Income, excise and property taxes are being increased. There is no justification for this Court, particularly in view of the question left open in *Manhart*, to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.[12]

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women's benefits. The figures in text assume, as the District Court appeared to hold, see 486 F. Supp. 645, 652, that employers would be required to top up women's benefits.

[12] In this respect, I agree with JUSTICE O'CONNOR that only benefits derived from contributions collected after the effective date of the judgment need be calculated without regard to the sex of the employee. See *post*, at 5 (O'CONNOR, J., concurring).

that the District Court had abused its discretion in awarding such relief. 435 U. S., at 719. As we noted, the employer in *Manhart* may well have assumed that its pension program was lawful. *Id.*, at 720. More importantly, a retroactive remedy would have had a potentially disruptive impact on the operation of the employer's pension plan. The business of underwriting insurance and life annuities requires careful approximation of risk. *Id.*, at 721. Reserves normally are sufficient to cover only the cost of funding and administering the plan. Should an unforeseen contigency occur, such as a drastic change in the legal rules governing pension and insurance funds, both the insurer's solvency and the insured's benefits could be jeopardized. *Ibid.*

This case presents no different considerations. *Manhart* did put all employer-operated pension funds on notice that they could not "requir[e] that men and women make unequal contributions to [the] fund," *id.*, at 717, but it expressly confirmed that an employer could set aside equal contributions and let each retiree purchase whatever benefit his or her contributions could command on the "open market," *id.*, at 718. Given this explicit limitation, an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market.

As in *Manhart*, holding employers liable retroactively would have devasting results. The holding applies to all employer-sponsored pension plans, and the cost of complying with the District Court's award of retroactive relief would range from $817 to $1260 million annually for the next 15 to 30 years.[11] Department of Labor Cost Study 32. In this

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[11] The cost to employers of equalizing benefits varies according to three factors: (i) whether the plan is a defined-contribution or a defined-benefit plan; (ii) whether benefits are to be equalized retroactively or prospectively; and (iii) whether the insurer may reallocate resources between men and women by applying unisex rates to existing reserves or must top up

Sex-based mortality tables reflect objective actuarial experience. Because their use does not entail discrimination in any normal understanding of that term,[9] a court should hesitate to invalidate this long-approved practice on the basis of its own policy judgment.

Congress may choose to forbid the use of any sexual classifications in insurance, but nothing suggests that it intended to do so in Title VII. And certainly the policy underlying Title VII provides no warrant for extending the reach of the statute beyond Congress' intent.

III

The District Court held that Arizona's voluntary pension plan violates Title VII and ordered that future annuity payments to female retirees be made equal to payments received by similarly situated men.[10] 486 F. Supp. 645 (D. Ariz. 1980). The Court of Appeals for the Ninth Circuit affirmed. 671 F. 2d 330 (1982). The Court today affirms the Court of Appeals' judgment insofar as it holds that Arizona's voluntary pension plan violates Title VII. But this finding of a statutory violation provides no basis for approving the retroactive relief awarded by the District Court. To approve this award would be both unprecedented and manifestly unjust.

We recognized in *Manhart* that retroactive relief is normally appropriate in the typical Title VII case, but concluded

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is no reason for assuming that Congress intended to do so in this instance. See n. 7, *supra*.

[9] Indeed, if employers and insurance carriers offer annuities based on unisex mortality tables, men as a class will receive less aggregate benefits than similarly situated women.

[10] As JUSTICE MARSHALL notes, the relief awarded by the District Court is fundamentally retroactive in nature. See *ante*, at 19 (opinion concurring in the judgment in part). Annuity payments are funded by the employee's past contributions and represent a return on those contributions. In order to provide women with the higher level of periodic payments ordered by the District Court, the State of Arizona would be required to fund retroactively the deficiency in past contributions made by its women retirees.

with similar mortality rates. The writing of annuities thus requires that an insurance company group individuals according to attributes that have a significant correlation with mortality. The most accurate classification system would be to identify all attributes that have some verifiable correlation with mortality and divide people into groups accordingly, but the administrative cost of such an undertaking would be prohibitive. Instead of identifying all relevant attributes, most insurance companies classify individuals according to criteria that provide both an accurate and efficient measure of longevity, including a person's age and sex. These particular criteria are readily identifiable, stable, and easily verifiable. See Benston, The Economics of Gender Discrimination in Employee Fringe Benefits: *Manhart* Revisited, 49 U. Chi. L. Rev. 489, 499–501 (1982).

It is this practice—the use of a sex-based group classification—that the majority ultimately condemns. See *ante*, at 8–12 (MARSHALL, J., concurring in the judgment in part). The policies underlying Title VII, rather than supporting the majority's decision, strongly suggest—at least for me—the opposite conclusion. This remedial statute was enacted to eradicate the types of discrimination in employment that then were pervasive in our society. The entire thrust of Title VII is directed against *discrimination*—disparate treatment on the basis of race or sex that intentionally or arbitrarily affects an individual. But as JUSTICE BLACKMUN has stated, life expectancy is a "nonstigmatizing factor that demonstrably differentiates females from males and that is not measurable on an individual basis . . . . [T]here is nothing arbitrary, irrational, or 'discriminatory' about recognizing the objective and accepted . . . disparity in female-male life expectancies in computing rates for retirement plans." *Manhart*, 435 U. S., at 724 (opinion concurring in part and concurring in the judgment). Explicit sexual classifications, to be sure, require close examination, but they are not automatically invalid.[8]

[8] Title VII does not preclude the use of all sex classifications, and there

tributions based on sex, Senator Humphrey apparently assumed that the 1964 Act would have little, if any, impact on existing pension plans." 435 U. S., at 714. This statement was not sufficient, as *Manhart* held, to preclude the application of Title VII to an *employer*-operated plan. See *ibid.* But Senator Humphrey's explanation provides strong support for *Manhart's* recognition that Congress intended Title VII to have *only* that indirect effect on the private insurance industry.

B

As neither the language of the statute nor the legislative history supports its holding, the majority is compelled to rely on its perception of the policy expressed in Title VII. The policy, of course, is broadly to proscribe discrimination in employment practices. But the statute itself focuses specifically on the individual and "precludes treatment of individuals as simply components of a racial, religious, sexual or national class." *Id.*, at 708. This specific focus has little relevance to the business of insurance. See *id.*, at 724 (BLACKMUN, J., concurring in part and concurring in the judgment). Insurance and life annuities exist because it is impossible to measure accurately how long any one individual will live. Insurance companies cannot make individual determinations of life expectancy; they must consider instead the life expectancy of identifiable groups. Given a sufficiently large group of people, an insurance company can predict with considerable reliability the rate and frequency of deaths within the group based on the past mortality experience of similar groups. Title VII's concern for the effect of employment practices on the individual thus is simply inapplicable to the actuarial predictions that must be made in writing insurance and annuities.

C

The accuracy with which an insurance company predicts the rate of mortality depends on its ability to identify groups be discriminatory or that it intended to modify its previous grant by the McCarran-Ferguson Act of exclusive jurisdiction to the States to regulate the terms of protection offered by insurance companies. Rather, the legislative history indicates precisely the opposite.

The only reference to this issue occurs in an explanation of the Act by Senator Humphrey during the debates on the Senate floor. He stated that it was "unmistakably clear" that Title VII did not prohibit different treatment of men and women under industrial benefit plans.[7] See 110 Cong. Rec. 13663–13664 (1964). As we recognized in *Manhart*, "[alt]hough he did not address differences in employee con-

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sound, sex-based annuities—effectively would pre-empt state regulatory authority. In my view, the commands of the McCarran-Ferguson Act are directly relevant to determining Congress' intent in enacting Title VII.

[7] Senator Humphrey's statement was based on the adoption of the Bennett amendment, which incorporated the affirmative defenses of the Equal Pay Act, 77 Stat. 56, 29 U. S. C. § 206(d), into Title VII. See *County of Washington, Ore.* v. *Gunther*, 452 U. S. 161, 175, n. 15 (1981). Although not free from ambiguity, the legislative history of the Equal Pay Act provides ample support for Senator Humphrey's interpretation of that Act. In explaining the Equal Pay Act's affirmative defenses, the Senate Report on that statute noted that pension costs were "higher for women than men . . . because of the longer life span of women." S. Rep. No. 176, 88th Cong., 1st Sess. 39 (1963). It then explained that the question of additional costs associated with employing women was one "that can only be answered by an ad hoc investigation." *Ibid.* Thus, it concluded that where it could be shown that there were in fact higher costs for women than men, an exception to the Equal Pay Act could be permitted "similar to those . . . for a bona fide seniority system or other exception noted above." *Ibid.*

Even if other meanings might be drawn from the Equal Pay Act's legislative history, the crucial question is how Congress viewed the Equal Pay Act in 1964 when it incorporated it into Title VII. The only relevant legislative history that exists on this point demonstrates unmistakably that Congress perceived—with good reason—that "the 1964 Act [Title VII] would have little, if any, impact on existing pension plans." *Manhart*, 435 U. S., at 714.

Nothing in the language of Title VII supports this pre-emption of state jurisdiction. Nor has the majority identified any evidence in the legislative history that Congress considered the widespread use of sex-based mortality tables to

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to supersede state insurance regulation only when it enacts laws that "specifically relate to the business of insurance," see n. 5, *supra*, the majority offers no satisfactory reason for concluding that Congress intended Title VII to pre-empt this important area of state regulation.

The majority states that the McCarran-Ferguson Act is not relevant because the petitioners did not raise the issue in their brief. See *ante*, at 13–14, n. 17 (MARSHALL, J., concurring in the judgment in part). This misses the point. The question presented is whether Congress intended Title VII to prevent employers from offering their employees—pursuant to state law—actuarially sound, sex-based annuitites. The McCarran-Ferguson Act is explicitly relevant to determining congressional intent. It provides that courts should not presume that Congress intended to supersede state regulation of insurance unless the act in question "specifically relates to the business of insurance." See n. 5, *supra*. It therefore is necessary to consider the applicability of the McCarran-Ferguson Act in determining Congress' intent in Title VII. This presents two questions: whether the action at issue under Title VII involves the "business of insurance" and whether the application of Title VII would "invalidate, impair, or supersede" state law.

No one doubts that the determination of how risk should be spread among classes of insureds is an integral part of the "business of insurance." See *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 213 (1979); *SEC* v. *Variable Annuity Co.*, 359 U. S. 65, 73 (1959). The majority argues, nevertheless, that the McCarran-Ferguson Act is inapposite because Title VII will not supersede any state regulation. Because Title VII applies to employers rather than insurance carriers, the majority asserts that its view of Title VII will not affect the business of insurance. See *ante*, at 13–14, n. 17 (MARSHALL, J., concurring in the judgment in part). This formalistic distinction ignores self-evident facts. State insurance laws, such as Arizona's, allow employers to purchase sex-based annuities for their employees. Title VII, as the majority interprets it, would prohibit employers from purchasing such annuities for their employees. It begs reality to say that a federal law that thus denies the right to do what state insurance law allows does not "invalidate, impair, or supersede" state law. Cf. *SEC* v. *Variable Annuity Co.*, 359 U. S., at 67. The majority's interpretation of Title VII—to the extent it banned the sale of actuarially long-held view that the "continued regulation . . . by the several States of the business of insurance is in the public interest." 15 U. S. C. § 1011; see *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 458–459 (1969). Given the consistent policy of entrusting insurance regulation to the States, the majority is not justified in assuming that Congress intended in 1964 to require the industry to change long-standing actuarial methods, approved over decades by state insurance commissions.[6]

sion, however, was not accepted.

Congress subsequently proposed and adopted a much broader bill. It recognized, as it previously had, the need to accomodate federal antitrust laws and state regulation of insurance. See H. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945). But it also recognized that the decision in *South-Eastern Underwriters Association* had raised questions as to the general validity of state laws governing the business of insurance. Some insurance carriers were reluctant to comply with state regulatory authority, fearing liability for their actions. See *id.*, at 2. Congress thus enacted broad legislation "so that the several States may know that the Congress desires to protect the continued regulation . . . of the business of insurance by the several States." *Ibid.*

The McCarran-Ferguson Act, as adopted, accordingly commits the regulation of the insurance industry presumptively to the States. The introduction to the Act provides that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the] business [of insurance] by the several States." 15 U. S. C. § 1011. Section 2(b) of the Act further provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 29 U. S. C. § 1012(b).

[6] Most state laws regulating insurance and annuities explicitly proscribe "unfair discrimination between persons in the same class." Bailey, Hutchinson & Narber, The Regulatory Challenge to Life Insurance Classification, 25 Drake L. Rev. 779, 783 (1976). Arizona insurance law similarly provides that there shall be "no unfair discrimination between individuals of the same class." Ariz. Rev. Stat. Ann. § 20–448 (1983). Most States, including Arizona, have determined that the use of actuarially sound, sex-based mortality tables comports with this state definition of discrimination. Given the provision of the McCarran-Ferguson Act that Congress intends

no evidence that Congress intended Title VII to work such a change. Nor does *Manhart* support such a sweeping reading of this statute. That case expressly recognized the limited reach of its holding—a limitation grounded in the legislative history of Title VII and the inapplicability of Title VII's policies to the insurance industry.

A

We were careful in *Manhart* to make clear that the question before us was narrow. We stated: "All that is at issue today is a requirement that men and women make unequal contributions to an *employer-operated* pension fund." 435 U. S., at 717 (emphasis added). And our holding was limited expressly to the precise issue before us. We stated that "[a]lthough we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries." *Ibid.*

The Court in *Manhart* had good reason for recognizing the narrow reach of Title VII in the particular area of the insurance industry. Congress has chosen to leave the primary responsibility for regulating the insurance industry to the respective States. See McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.*[5] This Act reflects the

[5] When this Court held for the first time that the federal government had the power to regulate the business of insurance, see *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944) (holding the antitrust laws applicable to the business of insurance), Congress responded by passing the McCarran-Ferguson Act, 59 Stat. 34, 15 U. S. C. § 1011 *et seq.* As initially proposed, the Act had a narrow focus. It would have provided only: "That nothing contained in the Act of July 2, 1890, as amended, known as the Sherman Act, or the Act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise impair the regulation of that business by the several States." S. Rep. No. 1112, 78th Cong., 2d Sess. 2 (1944) (quoting proposed act). This narrow ver-

ministrative ability to underwrite annuities. Or, as in this case, state law may prevent an employer from providing annuities. If unisex annuities are available, an employer may contract with private insurance companies to provide them. It is stipulated, however, that the insurance companies with which Arizona contracts do not provide unisex annuities, nor do insurance companies generally underwrite them. The insurance industry either is prevented by state law from doing so[3] or it views unisex mortality tables as actuarially unsound. An employer, of course, may choose the third option. It simply may decline to offer its employees the right to purchase annuities at a substantial tax saving. It is difficult to see the virtue in such a compelled choice.

II

As indicated above, the consequences of the Court's holding are unlikely to be beneficial. If the cost to employers of offering unisex annuities is prohibitive or if insurance carriers choose not to write such annuities, employees will be denied the opportunity to purchase life annuities—concededly the most advantageous pension plan—at lower cost.[4] If, alternatively, insurance carriers and employers choose to offer these annuities, the heavy cost burden of equalizing benefits probably will be passed on to current employees. There is

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[3] See Cal. Ins. Code Ann. § 790.03(f) (West) (1983) (requiring differentials based on the sex of the individual insured); *Spirt* v. *Teachers Insurance and Annuity Assn.*, 691 F. 2d 1054, 1066 (CA2 1982) (noting that State of New York has disapproved certain uses of unisex rates).

[4] This is precisely what has happened in this case. Faced with the liability resulting from the Court of Appeals' judgment, the State of Arizona discontinued making life annuities available to its employees. Tr. of Oral Arg. 8. Any employee who now wishes to have the security provided by a life annuity must withdraw his or her accrued retirement savings from the state pension plan, pay federal income tax on the amount withdrawn, and then use the remainder to purchase an annuity on the open market—which most likely will be sex-based. The adverse effect of today's holding apparentli will fall primarily on the State's employees.

ployee chooses to take a lump-sum payment, the tax liability will be substantial.[2] The second option ameliorates the tax problem by spreading the receipt of the accrued amount over a fixed period of time. This option, however, does not guard against the possibility that the finite number of payments selected by the employee will fail to provide income for the remainder of his or her life.

The third option—the purchase of a life annuity—resolves both of these problems. It reduces an employee's tax liability by spreading the payments out over time, and it guarantees that the employee will receive a stream of payments for life. State law prevents Arizona from accepting the financial uncertainty of funding life annuities. Ariz. Rev. Stat. Ann. § 38-871(C)(1) (1983). But to achieve tax benefits under federal law, the life annuity must be purchased from a company designated by the retirement plan. Rev. Rul. 72-25, 1972-1 Cum. Bull. 127; Rev. Rul. 68-99, 1968-1 Cum. Bull 193. Accordingly, Arizona contracts with private insurance companies to make life annuities available to its employees. The companies that underwrite the life annuities, as do the vast majority of private insurance companies in the United States, use sex-based mortality tables. Thus, the only effect of Arizona's third option is to allow its employees to purchase at a tax saving the same annuities they otherwise would purchase on the open market.

The Court holds that Arizona's voluntary plan violates Title VII. In the majority's view, Title VII requires an employer to follow one of three courses. An employer must provide unisex annuities itself, contract with insurance companies to provide such annuities, or provide no annuities to its employees. *Ante*, at 17 (MARSHALL, J., concurring in the judgment in part). The first option is largely illusory. Most employers do not have either the financial resources or ad-

[2] The employee will be required to include the entire amount received as income. See 26 U. S. C. § 457; Rev. Rul. 68-99, 1968-1 Cum. Bull 193.

major change in the way the cost of insurance is determined—to the probable detriment of *all* employees. This is contrary to our explicit recognition in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 717 (1978), that Title VII "was [not] intended to revolutionize the insurance and pension industries."

I

The State of Arizona provides its employees with a voluntary pension plan that allows them to defer receipt of a portion of their compensation until retirement. If an employee chooses to participate, an amount designated by the employee is withheld from each paycheck and invested by the State on the employee's behalf. When an employee retires, he or she may receive the amount that has accrued in one of three ways. The employee may withdraw the total amount accrued, arrange for periodic payments of a fixed sum for a fixed time, or use the accrued amount to purchase a life annuity.

There is no contention that the State's plan discriminates between men and women when an employee contributes to the fund. The plan is voluntary and each employee may contribute as much as he or she chooses. Nor does anyone contend that either of the first two methods of repaying the accrued amount at retirement is discriminatory. Thus, if Arizona had adopted the same contribution plan but provided only the first two repayment options, there would be no dispute that its plan complied with Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.* The first two options, however, have disadvantages. If an em-

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unisex rate to both men and women—the cost of providing purely prospective benefits would range from $428 to $676 million each year for at least the next 15 years. Department of Labor Cost Study 31. No one seriously suggests that these costs will not be passed on—in large part—to the annuity beneficiaries or, in the case of state and local governments, to the public.

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ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, ETC., ET AL., PETITIONERS *v.* NATHALIE NORRIS ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 6, 1983]

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE REHNQUIST join as to Parts I and II, dissenting in part and with whom THE CHIEF JUSTICE, JUSTICE BLACKMUN, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join as to Part III, concurring in part.

The Court today holds that an employer may not offer its employees life annuities from a private insurance company that uses actuarially sound, sex-based mortality tables. This holding will have a far-reaching effect on the operation of insurance and pension plans. Employers may be forced to discontinue offering life annuities, or potentially disruptive changes may be required in long-established methods of calculating insurance and pensions.[1] Either course will work a

[1] The cost of continuing to provide annuities may become prohibitive. The *minimum* additional cost necessary to equalize benefits prospectively would range from $85 to $93 million each year for at least the next 15 years. United States Department of Labor, Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits 4 (1983) (hereinafter Department of Labor Cost Study). This minimum cost assumes that employers will be free to use the least costly method of adjusting benefits. This assumption may be unfounded. If employers are required to "top up" benefits—*i. e.*, calculate women's benefits at the rate applicable to men rather than apply a

male employee in this situation should have had sex-neutral tables applied to her pre-*Manhart* contributions, it is only fair that petitioners be required to supplement any benefits coming due after the District Court's judgment by whatever sum is necessary to compensate her for their failure to adopt sex-neutral tables.

If, on the other hand, sex-neutral tables could not have been applied to the pre-*Manhart* contributions of a particular female employee and any similarly situated male employee without violating the male employee's contractual rights, it would be inequitable to award such relief. To do so would be to require petitioners to compensate the female employee for a disparity attributable to pre-*Manhart* conduct even though such conduct might reasonably have been assumed to be lawful and petitioners could not have done anything after *Manhart* to eliminate that disparity short of expending State funds. With respect to any female employee determined to fall in this category, petitioners need only ensure that her monthly benefits are no lower than they would have been had her post-*Manhart* contributions been treated in the same way as those of a similarly situated male employee.

The record does not indicate whether some or all of the male participants in the plan who had not retired at the time *Manhart* was decided[28] had any contractual right to a particular level of benefits that would have been impaired by the application of sex-neutral tables to their pre-*Manhart* contributions. The District Court should address this question on remand.

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third parties to pay the benefits than they would be in had they run the entire plan themselves.

[28] Since the amount of monthly annuity payments is ordinarily fixed by the time of retirement, sex-neutral tables presumably could not have been applied after *Manhart* to male employees who had retired before that decision without violating their contractual rights.

tent that any disparity in benefits coming due after the date of the District Court's judgment is attributable to contributions made after *Manhart*, there is therefore no unfairness in requiring petitioners to pay retired female employees whatever sum is necessary each month to bring them up to the benefit level that they would have enjoyed had their post-*Manhart* contributions been treated in the same way as those of similarly situated male employees.

To the extent, however, that the disparity in benefits that the District Court required petitioners to eliminate is attributable to contributions made before *Manhart*, the court gave insufficient attention to this Court's recognition in *Manhart* that until that decision the use of sex-based tables might reasonably have been assumed to be lawful. Insofar as this portion of the disparity is concerned, the District Court should have inquired into the circumstances in which petitioners, after *Manhart*, could have applied sex-neutral tables to the pre-*Manhart* contributions of a female employee and a similarly situated male employee without violating any contractual rights that the latter might have had on the basis of his pre-*Manhart* contributions. If, in the case of a particular female employee and a similarly situated male employee, petitioners could have applied sex-neutral tables to pre-*Manhart* contributions without violating any contractual right of the male employee, they should have done so in order to prevent further discrimination in the payment of retirement benefits in the wake of this Court's ruling in *Manhart*.[27] Since a fe-

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its plan.

[27] Since the actual calculation and payment of retirement benefits was in the hands of third parties under the Arizona plan, petitioners would not automatically have been able to apply sex-neutral tables to pre-*Manhart* contributions even if pre-existing contractual rights posed no obstacle. However, petitioners were in a position to exert influence on the companies participating in the plan, which depended upon the State for the business generated by the deferred compensation plan, and we see no reason why petitioners should stand in a better position because they engaged

should therefore be routinely awarded once liability is established. When a court directs a change in benefits based on contributions made before the court's order, the court is awarding relief that is fundamentally retroactive in nature. This is true because retirement benefits under a plan such as that at issue here represent a return on contributions which were made during the employee's working years and which were intended to fund the benefits without any additional contributions from any source after retirement.

A recognition that the relief awarded by the District Court is partly retroactive is only the beginning of the inquiry. Absent special circumstances a victim of a Title VII violation is entitled to whatever retroactive relief is necessary to undo any damage resulting from the violation. See *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 418–419, 421. As to any disparity in benefits that is attributable to contributions made after our decision in *Manhart*, there are no special circumstances justifying the denial of retroactive relief. Our ruling today was clearly foreshadowed by *Manhart*. That decision should have put petitioners on notice that a man and a woman who make the same contributions to a retirement plan must be paid the same monthly benefits.[26] To the ex-

[26] Only one of the several lower court decisions since *Manhart* has accepted the argument that the principle established in that decision is limited to plans that require women to make greater contributions than men, see n. 9, *supra*, and no court has held that an employer can assert as a defense that the calculation and payment of retirement benefits is made by third parties selected by the employer. See also Van Alstyne, *supra*, 64 AAUP Bulletin, at 152–155 (predicting that the the involvement of an independent insurer would not be recognized as a defense and noting that an employer offering a sex-based retirement plan funded by such an insurer would be well advised to act expeditiously to bring himself into compliance with the law). After *Manhart* an employer could not reasonably have assumed that a sex-based plan would be lawful. As explained above, *supra*, at 12–13, Arizona did not simply set aside wages and permit employees to purchase annuities in the open market; it therefore had no basis for assuming that the open-market exception recognized in *Manhart* would apply to

nized that there is a strong presumption that "[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Id.*, at 418–419, quoting *Wicker* v. *Hoppock*, 6 Wall. 94, 99 (1867). Once a violation of the statute has been found, retroactive relief "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U. S., at 421 (footnote omitted). Applying this standard, we held that the mere absence of bad faith on the part of the employer is not a sufficient reason for denying such relief. *Id.*, at 422–423.

Although this Court noted in *Manhart* that "[t]he *Albemarle* presumption in favor of retroactive liability can seldom be overcome," 435 U. S., at 719, the Court concluded that under the circumstances the District Court had abused its discretion in requiring the employer to refund to female employees all contributions they were required to make in excess of the contributions demanded of men. The Court explained that "conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful," since "[t]he courts had been silent on the question, and the administrative agencies had conflicting views." *Id.*, at 720 (footnote omitted). The Court also noted that retroactive relief based on "[d]rastic changes in the legal rules governing pension and insurance funds" can "jeopardiz[e] the insurer's solvency and, ultimately, the insureds' benefits," *id.*, at 721, and that the burden of such relief can fall on innocent third parties. *Id.*, at 722–723.

While the relief ordered here affects only benefit payments made after the date of the District Court's judgment, it does not follow that the relief is wholly prospective in nature, as an injunction concerning future conduct ordinarily is, and medial purposes of Title VII[23] to hold that an employer who adopts a discriminatory fringe benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis.[24] An employer who confronts such a situation must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all.

IV

We turn finally to the relief awarded by the District Court. The court enjoined petitioners to assure that future annuity payments to retired female employees shall be equal to the payments received by similarly situated male employees.[25]

In *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), we emphasized that one of the main purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418. We recog-

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Emp. Cas. 1820, cert. denied, —— U. S. —— (1982); *Farmer* v. *ARA Services, Inc.*, 660 F. 2d 1096, 1104 (CA6 1981); *Grant* v. *Bethlehem Steel Corp.*, 635 F. 2d 1007, 1014 (CA2 1980), cert. denied, 452 U. S. 940 (1981); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 379–380 (CA8 1973); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 799 (CA4), cert. dismissed, 404 U. S. 1006 (1971).

[23] See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418, 421 (1975); *Griggs* v. *Duke Power Co.*, 401 U. S., at 429–430.

[24] Such a result would be particularly anomalous where, as here, the employer made no effort to determine whether third parties would provide the benefit on a neutral basis. Contrast The Chronicle of Higher Education, note 15, *supra*, at 25–26 (explaining how the University of Minnesota obtained agreements from two insurance companies to use sex-neutral annuity tables to calculate annuity benefits for its employees). Far from bargaining for sex-neutral treatment of its employees, Arizona asked companies seeking to participate in its plan to list their annuity rates for men and women separately.

[25] The court did not explain its reasons for choosing this remedy.

Since respondents did not appeal the District Court's refusal to award damages for benefit payments made prior to the court's decision, see n. 5, *supra*, there is no need to consider the correctness of that ruling.

scheme that discriminates among its employees on the basis of race, religion, sex, or national origin violates Title VII regardless of whether third parties are also involved in the discrimination.[21] In this case the State of Arizona was itself a party to contracts concerning the annuities to be offered by the insurance companies, and it is well established that both parties to a discriminatory contract are liable for any discriminatory provisions the contract contains, regardless of which party initially suggested inclusion of the discriminatory provisions.[22] It would be inconsistent with the broad re-

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[21] An analogy may usefully be drawn to our decision in *Ford Motor Co.* v. *NLRB*, 441 U. S. 488 (1979). The employer in that case provided in-plant food services to its employees under a contract with an independent caterer. We held that the prices charged for the food constituted "terms and conditions of employment" under the National Labor Relations Act (NLRA) and were therefore mandatory subjects for collective bargaining. We specifically rejected the employer's argument that, because the food was provided by a third party, the prices did not implicate "'an aspect of the relationship between the employer and employees.'" *Id.*, at 501, quoting *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 176 (1971). We emphasized that the selection of an independent contractor to provide the food did not change the fact that "the matter of in-plant food prices and services is an aspect of the relationship between Ford and its own employees." 441 U. S., at 501.

Just as the issue in *Ford* was whether the employer had refused to bargain with respect to "terms and conditions of employment," 29 U. S. C. § 158(d), the issue here is whether petitioners have discriminated against female employees with respect to "compensation, terms, conditions or privileges of employment." Even more so than in-plant food prices, retirement benefits are matters "of deep concern" to employees, *id.*, at 498, and plainly constitute an aspect of the employment relationship. Indeed, in *Ford* we specifically compared in-plant food services to "other kinds of benefits, such as health insurance, implicating outside suppliers." *Id.*, at 503, n. 15. We do not think it makes any more difference here than it did in *Ford* that the employer engaged third parties to provide a particular benefit rather than directly providing the benefit itself.

[22] See *Williams* v. *New Orleans Steamship Ass'n*, 673 F. 2d 742, 750–751 (CA5 1982), cert. denied, —— U. S. —— (1983); *Williams* v. *Owens-Illinois, Inc.*, 665 F. 2d 918, 926 (CA9), mod. and reh. denied, 28 Fair

whether petitioner's construction of the stipulation is accepted or rejected. It is irrelevant whether any other insurers offered annuities on a sex-neutral basis, since the State did not simply set aside retirement contributions and let employees purchase annuities on the open market. On the contrary, the State provided the opportunity to obtain an annuity as part of its own deferred compensation plan. It invited insurance companies to submit bids outlining the terms on which they would supply retirement benefits[19] and selected the companies that were permitted to participate in the plan. Once the State selected these companies, it entered into contracts with them governing the terms on which benefits were to be provided to employees. Employees enrolling in the plan could obtain retirement benefits only from one of those companies, and no employee could be contacted by a company except as permitted by the State. Ariz. Regs. 2-9-06.A, 2-9-20.A.

Under these circumstances there can be no serious question that petitioners are legally responsible for the discriminatory terms on which annuities are offered by the companies chosen to participate in the plan. Having created a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity only if they invest in one of the companies specifically selected by the State, the State cannot disclaim responsibility for the discriminatory features of the insurers' options.[20] Since employers are ultimately responsible for the "compensation, terms, conditions, [and] privileges of employment" provided to employees, an employer that adopts a fringe-benefit

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[19] The State's contract procurement documents asked the bidders to quote annuity rates for men and women.

[20] See *Peters* v. *Wayne State University*, *supra*, 691 F. 2d, at 238; *EEOC* v. *Colby College*, *supra*, at 1141; Van Alstyne, Equality for Individuals or Equality for Groups: Implications of the Supreme Court Decision in the *Manhart* Case, 64 AAUP Bulletin 150, 152-155 (1978).

It is no defense that all annuities immediately available in the open market may have been based on sex-segregated actuarial tables. In context it is reasonably clear that the stipulation on which petitioners rely means only that all the tables used by the companies taking part in the Arizona plan are based on sex,[18] but our conclusion does not depend upon

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JUSTICE POWELL on classifications based on sex in annuity policies, we may assume that the statute would permit such classifications, for that assumption does not affect our conclusion that the application of Title VII in this case does not supercede the application of any state law regulating "the business of insurance." As the Court of Appeals explained, 671 F. 2d, at 333, the plaintiffs in this case have not challenged the conduct of the business of insurance. No insurance company has been joined as a defendant, and our judgment will in no way preclude any insurance company from offering annuity benefits that are calculated on the basis of sex-segregated actuarial tables. All that is at issue in this case is *an employment practice*: the practice of offering a male employee the opportunity to obtain greater monthly annuity benefits than could be obtained by a similarly situated female employee. It is this conduct of the employer that is prohibited by Title VII. By its own terms, the McCarran-Ferguson Act applies only to the business of insurance and has no application to employment practices. Arizona plainly is not itself involved in the business of insurance, since it has not underwritten any risks. See *Union Labor Life Ins. Co.* v. *Pireno*, —— U. S. ——, —— (1982) (McCarran-Ferguson Act was "intended primarily to protect '*intra*-industry cooperation' in the underwriting or risks") (emphasis in original), quoting *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 221 (1979); *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65, 69 (1959) ("the concept of 'insurance' [for purposes of the McCarran-Ferguson Act] involves some investment risk-taking on the part of the company"). Because the application of Title VII in this case does not supercede any state law governing the business of insurance, see *Spirt* v. *Teachers Ins. & Annuity Ass'n.*, 691 F. 2d, at 1064; *EEOC* v. *Wooster Brush Co.*, 523 F. Supp. 1256, 1266 (N.D. Ohio 1981), we need not decide whether Title VII "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act. Cf. *Women in City Gov't United* v. *City of New York*, 515 F. Supp., at 302–306.

[18] This is the natural reading of the statement, since it appears in the portion of the stipulation discussing the options offered by the companies participating in the State's plan.

> tions for each employee and let each retiree purchase the largest benefits which his or her accumulated contributions could command in the open market." *Id.*, at 717–718 (footnote omitted).

Relying on this caveat, petitioners contend that they have not violated Title VII because the life annuities offered by the companies participating in the Arizona plan reflect what is available in the open market. Petitioners cite a statement in the stipulation of facts entered into in the District Court that "[a]ll tables presently in use provide a larger sum to a male than to a female of equal age, account value and any guaranteed payment period." App. 10.[17]

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[17] Petitioners also emphasize that an employee participating in the Arizona plan can elect to receive a lump-sum payment upon retirement and then "purchase the largest benefits which his or her accumulated contributions could command in the open market." The fact that the lump-sum option permits this has no bearing, however, on whether petitioners have discriminated because of sex in offering an annuity option to its employees. As we have pointed out above, *ante*, at note 10, it is no defense to discrimination in the provision of a fringe benefit that another fringe benefit is provided on a nondiscriminatory basis.

Although petititioners contended in the Court of Appeals that their conduct was exempted from the reach of Title VII by the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.*, they have made no mention of the Act in either their petition for certiorari or their brief on the merits. "[O]nly in the most exceptional cases will we consider issues not raised in the petition," *Stone* v. *Powell*, 428 U. S. 465, 481, n. 15 (1976); see Sup. Ct. R. 21(a), and but for the discussion of the question by JUSTICE POWELL we would have seen no reason to address a contention that petitioners deliberately chose to abandon after it was rejected by the Court of Appeals.

Since JUSTICE POWELL relies on the Act, however, *post*, at 5–7, we think it is appropriate to lay the matter to rest. The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance." 15 U. S. C. § 1012(b). Although there are no reported Arizona cases indicating the effect of the Arizona statute cited by tion decisions has a discriminatory impact even if the class of which he is a member has not been disproportionately denied promotion).

We conclude that it is just as much discrimination "because of . . . sex" to pay a woman lower benefits when she has made the same contributions as a man as it is to make her pay larger contributions to obtain the same benefits.

III

Since petitioners plainly would have violated Title VII if they had run the entire deferred compensation plan themselves, the only remaining question as to liability is whether their conduct is beyond the reach of the statute because it is the companies chosen by petitioners to participate in the plan that calculate and pay the retirement benefits.

Title VII "primarily govern[s] relations between employees and their employer, not between employees and third parties."[16] *Manhart*, 435 U. S., at 718, n. 33. Recognizing this limitation on the reach of the statute, we noted in *Manhart* that

> "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contribu-

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There is no support in either logic or experience for the view, referred to by JUSTICE POWELL, *post*, at 4, that an annuity plan must classify on the basis of sex to be actuarially sound. Neither Title VII nor the Equal Pay Act "makes it unlawful to determine the funding requirements for an establishment's benefit plan by considering the [sexual] composition of the entire force," *Manhart*, 435 U. S., at 718, n. 34, and it is simply not necessary either to exact greater contributions from women than from men or to pay women lower benefits than men. For example, the Minnesota Mutual Life Insurance Company and the Northwestern National Life Insurance Company have offered an annuity plan that treats men and women equally. See The Chronicle of Higher Education, Vol. 25, No. 7, Oct. 13, 1982, at 25–26.

[16] The statute applies to employers and "any agent" of an employer. 42 U. S. C. § 2000e(b).

An individual woman may not be paid lower monthly benefits simply because women as a class live longer than men.[15] Cf. *Connecticut* v. *Teal*, —— U. S. —— (1982) (an individual may object that an employment test used in making promo-

basis of pregnancy, childbirth, or related medical conditions." 42 U. S. C. § 2000e(k) (Supp. IV). See *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, —— U. S. —— (1983).

The enactment of the PDA buttresses our holding in *Manhart* that the greater cost of providing retirement benefits for women as a class cannot justify differential treatment based on sex. 435 U. S., at 716–717. JUSTICE REHNQUIST's opinion for the Court in *Gilbert* relied heavily on the absence of proof that the employer's disability program provided less coverage for women as a class than for men. 429 U. S., at 138–139. In enacting the PDA, Congress recognized that requiring employers to cover pregnancy on the same terms as other disabilities would add approximately $200 million to their total costs, but concluded that the PDA was necessary "to clarify [the] original intent" of Title VII. H. R. Rep. No. 948, 95th Cong., 2d Sess. 4, 9 (1978). Since the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles, see *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, —— U. S., at ——, and n. 16, Congress' decision to forbid special treament of pregnancy despite the special costs associated therewith provides further support for our conclusion in *Manhart* that the greater costs of providing retirement benefits for female employees does not justify the use of a sex-based retirement plan. Cf. *id.*, at ——, n. 24. See also 29 CFR § 1604.9(e) (1982) ("It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.")

[15] As we noted in *Manhart*, "insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions" and has never been deemed a justification for "resort to the classifications proscribed by Title VII." 435 U. S., at 710. It is true that properly designed tests can identify many job qualifications before employment, whereas it cannot be determined in advance when a particular employee will die. See *id.*, at 724 (BLACKMUN, J., concurring in part and concurring in the judgment). For some jobs, however, there may be relevant skills that cannot be identified by testing. Yet Title VII clearly would not permit use of race, national origin, sex, or religion as a proxy for such an employment qualification, regardless of whether a statistical correlation could be established.

tion based on sex stands on the same footing as a distinction based on race unless it falls within one of a few narrow exceptions that are plainly inapplicable here.[13]

What we said in *Manhart* bears repeating: "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." 435 U. S., at 709. The use of of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class, for under the statute "[e]ven a true generalization about [a] class" cannot justify class-based treatment.[14] *Ibid.*

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[13] The exception for bona fide occupational qualifications, 42 U. S. C. § 2000e–2(e), is inapplicable since the terms of a retirement plan have nothing to do with occupational qualifications. The only possible relevant exception recognized in the Bennett Amendment, see n. 8, *supra*, is inapplicable in this case for the same reason it was inapplicable in *Manhart*: a scheme that uses sex to predict longevity is based on sex; it is not based on "any other factor than sex." See 435 U. S., at 712 ("any individual's life expectancy is based on any number of factors, of which sex is only one").

[14] In his separate opinion in Manhart, JUSTICE BLACKMUN expressed doubt that that decision could be reconciled with this Court's previous decision in *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976). In *Gilbert* a divided Court held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute discrimination "because of . . . sex" within the meaning of Title VII. The majority reasoned that the special treatment of pregnancy distinguished not between men and women, but between pregnant women and nonpregnant persons of both sexes. *Id.*, at 135. The dissenters in *Gilbert* asserted that "it offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related,'" *id.*, at 149 (BRENNAN, J., dissenting) (citation omitted), and that the special treatment of pregnancy constitutes sex discrimination because "it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.*, at 162 (STEVENS, J., dissenting).

The tension in our cases that JUSTICE BLACKMUN noted in *Manhart* has since been eliminated by the enactment of the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95–555, 92 Stat. 2076, in which Congress overruled *Gilbert* by amending Title VII to establish that "the terms 'because of sex' or 'on the basis of sex' include . . . because of or on the cause a man and a woman who have made equal contributions will obtain annuity policies of roughly equal present actuarial value, petitioners incorrectly assume that Title VII permits an employer to classify employees on the basis of sex in predicting their longevity. Otherwise there would be no basis for postulating that a woman's annuity policy has the same present actuarial value as the policy of a similarly situated man even though her policy provides lower monthly benefits.[12] This underlying assumption—that sex may properly be used to predict longevity—is flatly inconsistent with the basic teaching of *Manhart*: that Title VII requires employers to treat their employees as *individuals*, not "as simply components of a racial, religious, sexual, or national class." 435 U. S., at 708. *Manhart* squarely rejected the notion that, because women as a class live longer than men, an employer may adopt a retirement plan that treats every individual woman less favorably than every individual man. *Id.*, at 716–717.

As we observed in *Manhart*, "[a]ctuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex." *Id.*, at 709 (footnote omitted). If petitioners' interpretation of the statute were correct, such studies could be used as a justification for paying employees of one race lower monthly benefits than employees of another race. We continue to believe that "a statute that was designed to make race irrelevant in the employment market," *ibid.*, citing *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 436 (1971), could not reasonably be construed to permit such a racial classification. And if it would be unlawful to use race-based actuarial tables, it must also be unlawful to use sex-based tables, for under Title VII a distinc-

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[12] See *Spirt* v. *Teachers Ins. & Annuity Ass'n.*, *supra*, 691 F. 2d, at 1061–1062; Brilmayer, Hekeler, Laycock & Sullivan, Sex Discrimiation in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis, 47 U. Chi. L. Rev. 505, 512–514 (1980).

izona plan does not discriminate on the basis of sex because a woman and a man who defer the same amount of compensation will obtain upon retirement annuity policies having approximately the same present actuarial value.[11] Arizona has simply offered its employees a choice among different levels of annuity benefits, any one of which, if offered alone, would be equivalent to the plan at issue in *Manhart*, where the employer determined both the monthly contributions employees were required to make and the level of benefits that they were paid. If a woman participating in the Arizona plan wishes to obtain monthly benefits equal to those obtained by a man, she must make greater monthly contributions than he, just as the female employees in *Manhart* had to make greater contributions to obtain equal benefits. For any particular level of benefits that a woman might wish to receive, she will have to make greater monthly contributions to obtain that level a benefits than a man would have to make. The fact that Arizona has offered a range of discriminatory benefit levels, rather than only one such level, obviously provides no basis whatsoever for distinguishing *Manhart*.

In asserting that the Arizona plan is nondiscriminatory be-

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relationship as to which the employee has no choice. It is likewise irrelevant that the Arizona plan includes two options—the lump-sum option and the fixed-sum-for-a-fixed-period option—that are provided on equal terms to men and women. An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis. Cf. *Mississippi University for Women* v. *Hogan*, —— U. S. ——, ——, n. 8 (1982).

[11] The present actuarial value of an annuity policy is determined by multiplying the present value (in this case, the value at the time of the employee's retirement) of each monthly payment promised by the probability, which is supplied by an actuarial table, that the annuitant will live to receive that payment. An annuity policy issued to a retired female employee under a sex-based retirement plan will have roughly the same present actuarial value as a policy issued to a similarly situated man, since the lower value of each monthly payment she is promised is offset by the likelihood that she will live longer and therefore receive more payments.

> of factors, of which sex is only one. . . . [O]ne cannot 'say that an actuarial distinction based entirely on sex is "based on any other factor than sex." Sex is exactly what it is based on.'" 435 U. S., at 712–713, quoting 553 F. 2d 581, 588 (CA9 1976), and the Equal Pay Act.

We concluded that a plan requiring women to make greater contributions than men discriminates "because of . . . sex" for the simple reason that it treats each woman "'in a manner which but for [her] sex would [have been] different.'" 435 U. S., at 710, quoting Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1174 (1971).

We have no hesitation in holding, as have all but one of the lower courts that have considered the question,[9] that the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage.[10] We reject petitioners' contention that the Ar-

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[9] See *Spirt* v. *Teachers Ins. & Annuity Ass'n.*, 691 F. 2d 1054 (CA2 1982), cert. pending, No. 82–791; *Retired Public Employees' Assn. of California* v. *California*, 677 F. 2d 733 (CA9 1982), cert. pending, No. 82–262; *Women in City Gov't. United* v. *City of New York*, 515 F. Supp. 295 (SDNY 1981); *Hannahs* v. *New York State Teachers' Retirement System*, 26 Fair Emp. Prac. Cas. 527 (SDNY 1981); *Probe* v. *State Teachers' Retirement system*, 27 Fair. Emp. Prac. Cas. 1306 (CD Cal. 1981), appeal docketed, Nos. 81–5865, 81–5866 (CA9 1981); *Shaw* v. *Internat'l Assn. of Machinists & Aerospace Workers*, 24 Fair Emp. Prac. Cas 995 (CD Cal. 1980). Cf. *EEOC* v. *Colby College*, 589 F. 2d 1139 (CA1 1978). See also 29 CFR § 1604.9(f) (1982) ("It shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex").

Only the Sixth Circuit has reached the opposite conclusion. *Peters* v. *Wayne State University*, 691 F. 2d 235 (1981), cert. pending, No. 82–794.

[10] It is irrelevant that females employees in *Manhart* were required to participate in the pension plan, whereas participation in the Arizona deferred compensation plan is voluntary. Title VII forbids all discrimination concerning "compensation, terms, conditions, or privileges of employment," not just discrimination concerning those aspects of the employment

tributions to a pension fund than male employees in order to obtain the same monthly benefits upon retirement. Noting that Title VII's "focus on the individual is unambiguous," *id.*, at 708, we emphasized that the statute prohibits an employer from treating some employees less favorably than others because of their race, religion, sex, or national origin. *Id.*, at 708–709. While women as a class live longer than men, *id.*, at 704, we rejected the argument that the exaction of greater contributions from women was based on a "factor other than sex"—*i. e.*, longevity—and was therefore permissible under the Equal Pay Act:[8]

"[A]ny individual's life expectancy is based on a number

[8] Section 703(h) of Title VII, the so-called Bennett Amendment, provides that Title VII does not prohibit an employer from "differentiat[ing] upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by [the Equal Pay Act]." 78 Stat. 257, 42 U. S. C. § 2000e–2(h).

The Equal Pay Act, 77 Stat. 56, 29 U. S. C. § 206(d), provides in pertinent part:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 77 Stat. 56, 29 U. S. C. § 206(d).

As in ***Manhart***, 435 U. S., at 712, n. 23, we need not decide whether retirement benefits constitute "wages" under the Equal Pay Act, because the Bennett Amendment extends the four exceptions recognized in the Act to all forms of "compensation" covered by Title VII.

sex-based actuarial tables and to pay retired female employees benefits equal to those paid to similarly situated men.[5] The United States Court of Appeals for the Ninth Circuit affirmed, with one judge dissenting. 671 F. 2d 330 (1982). We granted certiorari to decide whether the Arizona plan violates Title VII and whether, if so, the relief ordered by the District Court was proper. —— U. S. —— (1982).

II

We consider first whether petitioners would have violated Title VII if they had run the entire deferred compensation plan themselves, without the participation of any insurance companies. Title VII makes it an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U. S. C. § 2000e–2(a)(1). There is no question that the opportunity to participate in a deferred compensation plan constitutes a "conditio[n] or privileg[e] of employment,"[6] and that retirement benefits constitute a form of "compensation."[7] The issue we must decide is whether it is discrimination "because of . . . sex" to pay a retired woman lower monthly benefits than a man who deferred the same amount of compensation.

In *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978), we held that an employer had violated Title VII by requiring its female employees to make larger con-

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[5] The court subsequently denied respondent's motion to amend the judgment to include an award of retroactive benefits to retired female employees as compensation for the benefits they had lost because the annuity benefits previously paid them had been calculated on the basis of sex-segregated actuarial tables. Respondent did not appeal this ruling.

[6] See *Peters* v. *Missouri-Pacific R. Co.*, 483 F. 2d 490, 492, n. 3 (CA5), cert. denied, 414 U. S. 1002 (1973).

[7] See *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 712, n. 23 (1978).

annuity option. As of the same date, 10 women participating in the plan had retired, and four of those 10 had chosen a life-time annuity. App. 6.

B

On May 3, 1975, respondent Nathalie Norris, an employee in the Arizona Department of Economic Security, elected to participate in the plan. She requested that her deferred compensation be invested in the Lincoln National Life Insurance Company's fixed annuity contract. Shortly thereafter Arizona approved respondent's request and began withholding $199.50 from her salary each month.

On April 25, 1978, after exhausting administrative remedies, respondent brought suit in the United States District Court for the District of Arizona against the State, the Governing Committee, and several individual members of the Committee. Respondent alleged that the defendants were violating § 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U. S. C. § 2000e–2(a), by administering an annuity plan that discriminates on the basis of sex. Respondent requested that the District Court certify a class under Fed. Rules Civ. Proc. 23(b)(2) consisting of all female employees of the State of Arizona "who are enrolled or will in the future enroll in the State Deferred Compensation Plan." Complaint ¶ V.

On March 13, 1980, the District Court certified a class action and granted summary judgment for the plaintiff class,[3] holding that the State's plan violates Title VII.[4] 486 F. Supp. 645. The court directed petitioners to cease using

[3] The material facts concerning the State's deferred compensation plan were set forth in a statement of facts agreed to by all parties. App. 4–13.

[4] Although the District Court concluded that the State's plan violates Title VII, the court went on to consider and reject respondent's separate claim that the plan violates the Equal Protection Clause of the Fourteenth Amendment. 486 F. Supp., at 651. Because respondent did not cross appeal from this ruling, it was not passed on by the Court of Appeals and is not before us.

Once an employee chooses the company in which he wishes to invest and decides the amount of compensation to be deferred each month, the State is responsible for withholding the appropriate sums from the employee's wages and channelling those sums to the company designated by the employee. The State bears the cost of making the necessary payroll deductions and of giving employees time off to attend group meetings to learn about the plan, but it does not contribute any monies to supplement the employees' deferred wages.

For an employee who elects to receive a monthly annuity following retirement, the amount of the employee's monthly benefits depends upon the amount of compensation that the employee deferred (and any earnings thereon), the employee's age at retirement, and the employee's sex. All of the companies selected by the State to participate in the plan use sex-based mortality tables to calculate monthly retirement benefits. App. 12. Under these tables a man receives larger monthly payments than a woman who deferred the same amount of compensation and retired at the same age, because the tables classify annuitants on the basis of sex and women on average live longer than men.[2] Sex is the only factor that the tables use to classify individuals of the same age; the tables do not incorporate other factors correlating with longevity such as smoking habits, alcohol consumption, weight, medical history, or family history. App. 13.

As of August 18, 1978, 1,675 of the State's approximately 35,000 employees were participating in the deferred compensation plan. Of these 1,675 participating employees, 681 were women, and 572 women had elected some form of future

[2] Different insurance companies participating in the plan use different means of classifying individuals on the basis of sex. Several companies use separate tables for men and women. Another company uses a single actuarial table based on male mortality rates, but calculates the annuities to be paid to women by using a six-year "setback," *i. e.*, by treating a woman as if she were a man six years younger and had the life expectancy of a man that age. App. 12.

ing Committee). Ariz. Rev. Stat. Ann. § 38-371 *et seq.*; Ariz. Regs. 2-9-01 *et seq.* Employees who participate in the plan may thereby postpone the receipt of a portion of their wages until retirement. By doing so, they postpone paying federal income tax on the amounts deferred until after retirement, when they receive those amounts and any earnings thereon.[1]

After inviting private companies to submit bids outlining the investment opportunities that they were willing to offer State employees, the State selected several companies to participate in its deferred compensation plan. Many of the companies selected offer three basic retirement options: (1) a single lump-sum payment upon retirement, (2) periodic payments of a fixed sum for a fixed period of time, and (3) monthly annuity payments for the remainder of the employee's life. When an employee decides to take part in the deferred compensation plan, he must designate the company in which he wishes to invest his deferred wages. Employees must choose one of the companies selected by the State to participate in the plan; they are not free to invest their deferred compensation in any other way. At the time an employee enrolls in the plan, he may also select one of the payout options offered by the company that he has chosen, but when he reaches retirement age he is free to switch to one of the company's other options. If at retirement the employee decides to receive a lump-sum payment, he may also purchase any of the options then being offered by the other companies participating in the plan. Many employees find an annuity contract to be the most attractive option, since receipt of a lump sum upon retirement requires payment of taxes on the entire sum in one year, and the choice of a fixed sum for a fixed period requires an employee to speculate as to how long he will live.

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[1] See 26 U. S. C. § 457; Rev. Rul. 72-25; Rev. Rul. 68-99; Rev. Rul. 60-31. Arizona's deferred compensation program was approved by the Internal Revenue Service in 1974.

SUPREME COURT OF THE UNITED STATES

No. 82–52

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, ETC., ET AL., PETITIONERS *v.* NATHALIE NORRIS ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 6, 1983]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE STEVENS, and JUSTICE O'CONNOR join as to Parts I, II, and III, concurring in the judgment in part, and with whom JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE STEVENS join as to Part IV.

In *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978), this Court held that Title VII of the Civil Rights Act of 1964 prohibits an employer from requiring women to make larger contributions in order to obtain the same monthly pension benefits as men. The question presented by this case is whether Title VII also prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly benefits than a man who has made the same contributions.

I

A

Since 1974 the State of Arizona has offered its employees the opportunity to enroll in a deferred compensation plan administered by the Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans (Governlated as provided by the existing terms of the Arizona plan. This position is expressed in Part III of the opinion of JUSTICE POWELL, *post*, p. ——, which is joined by THE CHIEF JUSTICE, JUSTICE BLACKMUN, JUSTICE REHNQUIST, and JUSTICE O'CONNOR. Accordingly, the judgment of the Court of Appeals is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with this opinion. The Clerk is directed to issue the judgment August 1, 1983.

It is so ordered.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 82-52

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, ETC., ET AL., PETITIONERS *v.* NATHALIE NORRIS ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 6, 1983]

PER CURIAM.

Petitioners in this case administer a deferred compensation plan for employees of the State of Arizona. The respondent class consists of all female employees who are enrolled in the plan or will enroll in the plan in the future. Certiorari was granted to decide whether Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. §2000e *et seq.*, prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly retirement benefits than a man who has made the same contributions; and whether, if so, the relief awarded by the District Court was proper. The Court holds that this practice does constitute discrimination on the basis of sex in violation of Title VII, and that all retirement benefits derived from contributions made after the decision today must be calculated without regard to the sex of the beneficiary. This position is expressed in Parts I, II, and III of the opinion of JUSTICE MARSHALL, *post*, p. ——, which are joined by JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE STEVENS, and JUSTICE O'CONNOR. The Court further holds that benefits derived from contributions made prior to this decision may be calcuto fund these pensions. A retroactive holding by this Court that employers must disburse greater annuity benefits than the collected contributions can support would jeopardize the entire pension fund. If a fund cannot meet its obligations, "[t]he harm would fall in large part on innocent third parties." *Manhart*, *supra*, at 722–723. This real danger of bankrupting pension funds requires that our decision be made prospective. Such a prospective holding is, of course, consistent with our equitable powers under Title VII to fashion an appropriate remedy. See 42 U. S. C. § 2000e–5(g); *Manhart*, *supra*, at 718–719.

In my view, then, our holding should be made prospective in the following sense. I would require employers to ensure that benefits derived from contributions collected after the effective date of our judgment be calculated without regard to the sex of the employee.[4] For contributions collected before the effective date of our judgment, however, I would allow employers and participating insurers to calculate the resulting benefits as they have in the past.

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[4] In other words, I would require employers to use longevity tables that reflect the average longevity of all their workers. The Equal Pay Act proviso, 29 U. S. C. § 206(d)(1) (proviso), which forbids employers from curing violations of the Act by reducing the wage rate of any employee, would not require that employers "top up" benefits by using male-longevity tables for all workers. First, although the Bennett Amendment of Title VII, 42 U. S. C. § 2000e–2(h), incorporates the Equal Pay Act defenses for disparate "compensation" as well as disparate "wages," see *Manhart*, *supra*, at 712, n. 22, the language of the Equal Pay Act proviso seems to apply only to wages. Thus, it is questionable whether the proviso would apply at all to the retirement plan at issue here. Second, even if the proviso has some relevance here, it should not be read to require a pension plan, whose entire function is actuarially to balance contributions with outgoing benefits, to calculate benefits on the basis of tables that do not reflect the composition of the work force. Cf. *Manhart*, *supra*, at 720, n. 36 (remedy should at least consider "ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan").

JGR

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

September 7, 1983

FOR: FRED F. FIELDING

FROM: SHERRIE M. COOKSEY SMC

SUBJECT: Cabinet Council on Legal Policy Review of Administration Efforts on Behalf of Women

Attached are two memoranda that have been circulated by Dick Darman and Craig Fuller as background information for Thursday's 2 p.m. meeting of the Cabinet Council on Legal Policy.

The purpose of the Cabinet Council meeting, as I understand it, is to respond to the President's request for a briefing on Administration efforts on behalf of legal equity for women. The agenda for the meeting is described as "Women's Issue Review and Recommendations on the 3rd Quarterly Report". Mike Uhlmann advises that a decision memorandum containing recommendations for action by the Cabinet Council will be circulated later today. (Fortunately, however, he described these recommendations to me in advance of that new memorandum.) Additionally, recommendations for legislative proposals on these issues are contained in pages 10-14 of the Attorney General's memorandum of September 7 and on pages 6-7 of its Tab 3.

Set forth below is an overview of the 3rd Quarterly Report and of the Attorney General's recommendations for Administration initiatives. Following that are comments and suggestions for Administration action with respect to these issues in general.

I. Overview of 3rd Quarterly Report

The 3rd Quarterly Report of the Task Force on Legal Equity for Women identifies a total of 140 statutes (or related groups of statutes) reflecting sex-based distinctions.

Twenty-four of those 140 statutes have already been amended to eliminate any sex-based distinctions.

Of the remaining 116 statutes, 51 would be amended by S. 501, the Dole Omnibus bill, which the Administration has endorsed. (Additionally, the Dole bill would correct 13 other statutes not identified in the 3rd Quarterly Report.)

The remaining 65 statutes not addressed by the Dole bill or not already amended can be divided into 3 categories:

(1) Statutes that define persons by gender terms, *e.g.*,

"widows" and "mothers", rather than by sex-neutral terms, e.g., "surviving spouse": The Attorney General states that 47 of the 65 remaining statutes are of this sort and recommends that we seek to amend all of these laws.

(2) Statutes that make distinctions generally intended to favor women: The Attorney General has identified 11 of such statutes, e.g., 29 U.S.C. § 12 which requires that the head of the Women's Bureau of the Department of Labor be a woman, and recommends that all but two be amended to eliminate any gender-based distinctions. The two exceptions are statutes which establish separate promotion boards for male and female naval officers and encourage the integration of women into the economies of developing nations; further study of the effects of amending those statutes is recommended.

(3) Statutes that reflect "fundamental and reasoned decisions to distinguish between women and men": The Attorney General identifies seven such statutes, one set prohibiting the use of women soldiers in combat and another excluding women from the requirements of draft registration. The Attorney General recommends against amending such statutes absent a thorough national debate of those issues.

II. Other Recommendations of the Attorney General

The Attorney General also recommends that, in the context of the Cabinet Councils on Human Resources and Economic Affairs, the Administration should review its positions on sex bias in pensions and insurance and on dependent child care to consider the desirability of formulating new initiatives or supporting existing legislative proposals on these issues. Mike Uhlmann has advised that he believes Thursday's meeting of the Cabinet Council on Legal Policy will not discuss these issues in detail because everyone will agree to continue to review these issues in other forums.

The issue to be addressed on pension reform is whether the Norris decision obviated the need for remedial legislation in this area and whether we should rely on other pending litigation to tie up the loose ends on this issue or rather propose clarifying legislation and regulations. The dependent child care issue is whether the Administration should support Title II of S. 888 which would: (1) expand the available tax deductions for child care, (2) make the dependent care tax credit refundable for those who cannot take advantage of a tax credit because of low incomes, (3) clarify the availability of § 501(c)(3) tax exempt status for certain child care facilities and (4) establish a "seed money" assistance program for child care information. The Cabinet Council on Economic Affairs has opposed Title II as too costly.

III. Comments and Recommendations

On the whole, the recommendations contained in these memoranda regarding the 3rd Quarterly Report are good and should be adopted. One issue which should be specifically addressed prior to adoption of those recommendations, however, is the question of whether we want to neuter those "affirmative action" statutes (see pages 6-7 of Tab 3) which tend to favor women. It is possible that some of those amendments would be opposed by women's groups and, in fact, cited as examples of discriminatory actions by this Administration.

As the discussion of Administration efforts on behalf of women continues, I believe some thought should be given to shifting the burden of proof in this debate. Why not say to the women's groups: "We both know we have irreconcilable differences on the question of the ERA, however, we have amended or supported amending virtually all other Federal statutes which have been identified as sexually discriminatory. If something else, short of the ERA, should be done, please tell us what you recommend." Through such a statement, the burden is placed on the women's groups to come forward with substantive proposals. It is likely that such proposals would include public funding of abortions, quotas, placing women in combat and other socially devisive issues. If so, the debate should then focus on such issues and not on this Administration's alleged insensitivities to women's rights. I recommend that you raise this as a question for consideration in the discussion of these issues; otherwise it is possible that this Administration will be forced to remain defensive about its achievements for women's equity.

Finally, as efforts are made to explain the Administration's record on enforcement of women's rights, I recommend against relying on statistics alone to tell the story. Although it may be an irrefutable fact that this Administration has filed more enforcement cases alleging employment discrimination against women than did the Carter Administration, what is better remembered by the public is that we have obtained the largest award in history against a public employer found to be discriminating against blacks and women, or that we have filed suit against a bank that has a "male only" lunchroom. There should be human explanations to accompany the statistics that are part of our record.

Attachments

cc: John G. Roberts, Jr.

ID #__________ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O · OUTGOING
☐ H · INTERNAL
☐ I · INCOMING
Date Correspondence Received (YY/MM/DD) ___/___/___

Name of Correspondent: CRAIG FULLER

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: Cabinet Council on Legal Policy with the President - September 8, 1983 [illegible] - Women's Issue Review and Recommendation for the 3rd Quarterly Report

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
[illegible]	ORIGINATOR	83/09/07			/ /
Referral Note:					
→ CUATOZ Larry	D	83/09/07		S	83/09/07
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
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5/81

CABINET AFFAIRS STAFFING MEMORANDUM

: 9/7/83 Number: 118853CA Due By: ______

ect: Cabinet Council on Legal Policy with the President - September 8, 1983

2:00 p.m. in the Cabinet Room

	Action	FYI
CABINET MEMBERS	☐	☐
Vice President	✓	☐
State	✓	☐
Treasury	✓	☐
Defense	☐	✓
Attorney General	✓	☐
Interior	✓	☐
Agriculture	☐	✓
Commerce	✓	☐
Labor	✓	☐
HHS	✓	☐
HUD	✓	☐
Transportation	✓	☐
Energy	☐	✓
Education	☐	✓
Counsellor	✓	☐
OMB	✓	☐
CIA	☐	✓
UN	☐	✓
USTR	☐	✓
GSA	☐	☐
EPA	☐	☐
OPM	☐	☐
VA	☐	☐
SBA	☐	☐

	Action	FYI
CEA	☐	✓
CEQ	☐	☐
OSTP	☐	☐
ACUS	✓	☐
______	☐	☐
______	☐	☐
Baker	✓	☐
Deaver	☐	☐
Clark	☐	✓
Darman *(For WH Staffing)*	✓	☐
Harper	✓	☐
Jenkins	☐	✓
~~Fielding~~	✓	☐
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CCCT/Gunn	☐	☐
CCEA/Porter	☐	☐
CCFA/	☐	☐
CCHR/Carleson	☐	☐
CCLP/Uhlmann	✓	☐
CCMA/Bledsoe	☐	☐
CCNRE/	☐	☐

ARKS:

The President will chair a meeting of the Cabinet Council on Legal Policy on Thursday, September 8, 1983 at 2:00 p.m. in the Cabinet Room. The agenda is:

Women's Issue Review and Recommendations on the 3rd Quarterly Report

The background paper for this issue is enclosed.

SEP -7 1983

RN TO: ☐ Craig L. Fuller, Assistant to the President for Cabinet Affairs ☐ Katherine Anderson ✓ Tom Gibson, Associate Director ☐ Don Clarey ☐ Larry Herbolsheimer

Office of the Attorney General
Washington, D.C. 20530

September 7, 1983

MEMORANDUM TO THE MEMBERS OF THE CABINET COUNCIL ON LEGAL POLICY

FROM: William French Smith
Attorney General

In recent months, the Administration has come under attack for an alleged insensitivity to the interests and rights of women. Our critics have charged us with lax enforcement and narrow readings of laws prohibiting sex discrimination; unwillingness to appoint women to significant judicial and executive positions; and failure to follow through on our promises to identify and eliminate gender-based discrimination in federal law.

Although there is room for improvement in almost any aspect of governmental activity, most of this criticism is unjustified. In terms of the enforcement of the laws against sex discrimination, the Administration's record surpasses that of the prior Administration. Moreover, in several cases before the Supreme Court, we have urged a broad reading of the antidiscrimination laws. President Reagan's record on the appointment of women to important Administration posts compares favorably with that of past Administrations. And this Administration has supported a broad range of initiatives -- legislative, regulatory, and administrative -- to eliminate discrimination against women. It is indeed ironic that so many of our achievements have gone unnoticed, while certain unfortunate press exchanges have been magnified into perceived substantive hostility to women's rights.

Some of our critics have attempted to frame public debate on the issue of sex discrimination solely in terms of the Equal Rights Amendment. By claiming that the ERA is the benchmark against which all other antidiscrimination measures must be tested, the Administration's opponents have charged that our opposition to the ERA represents a fundamental antipathy towards all efforts to eliminate sex discrimination. Unfortunately, many now begin their analysis of the Administration's record with the assumption that we oppose women's rights.

The correction of this misperception will not occur overnight. Nevertheless, giving a full account of what the Administration has accomplished in the area of eliminating discrimination against women is an important first step. I am confident that, once our record becomes known, most Americans will recognize the sincerity of our efforts and the scope of our achievements.

I. THE ADMINISTRATION RECORD

A. Enforcement Record of the Department of Justice

The Department of Justice has achieved an exemplary record of enforcement of federal laws prohibiting sex discrimination. The Department has filed 18 cases alleging sex discrimination in employment since January 21, 1981, exceeding the enforcement record compiled by the last Administration during a comparable period. 1/ The Department has also brought suit to prevent denial of credit based on sex or marital status and discrimination against women in educational opportunities. Finally, the Justice Department has vigorously advocated positions on behalf of women's rights in a number of important cases before the Supreme Court.

1. Employment Discrimination

In the employment area, the Department has moved forcefully against public employers who have discriminated on the basis of sex. The Department has filed 18 new lawsuits, and has settled or litigated to a conclusion six employment cases filed during the last Administration. See Tab 1.

The Department filed suit alleging that state police departments in Rhode Island, New Hampshire, Vermont, Massachusetts, Maine, North Little Rock, and New York City discriminated in employment on the basis of sex. In each case, the Department negotiated a consent decree requiring the state to use nondiscriminatory selection criteria and to engage in active efforts to recruit women. The Department obtained similar consent decrees in discrimination suits against the Maryland Transportation Authority, the Clayton County (Ga.) Board of Education, Burlington County (N.J.) College, the Virginia Department of Highways, the Lancaster County (Va.) Sheriff's Office, and the Little Rock (Ark.) police and fire departments. In several of these suits, the Department also obtained back pay awards for the victims of discrimination.

The Department is currently litigating suits against a bank that has a "men only" lunchroom; against the Buffalo Board of Education for violations of the Pregnancy Disability Act; and

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1/ Under this Administration, 21 employment discrimination cases have been filed, 18 of which contained allegations of sex discrimination. During a comparable period of time in the Carter Administration, 17 cases were filed, 16 of which contained allegations of sex discrimination.

against law enforcement authorities in Suffolk County, New York, and Patrick County, Virginia, for sex-discriminatory hiring practices. The Department continues to bring new sex discrimination suits, most recently in a complaint filed August 30, 1983, against the City of Gallup, New Mexico.

In addition, the Department has settled or litigated to a conclusion six cases filed during the last Administration involving sex discrimination. Last year, the Department achieved the largest Title VII recovery against a public employer in the Department's history, obtaining $2.75 million on behalf of 685 women and blacks who were victims of discrimination.

The Department has intervened in Williams v. City of New Orleans, in support of classes of female, Hispanic and white police officers who opposed entry of a consent decree containing a one-to-one promotion quota favoring black officers. The case is under submission to the Fifth Circuit Court of Appeals, sitting en banc. Finally, in the wake of the Supreme Court's holding in Newport News v. EEOC, discussed below, Assistant Attorney General Reynolds has authorized the filing of seven cases alleging discrimination under the Pregnancy Disability Act.

2. Discrimination in the Extension of Credit

The Department has also moved decisively to enforce the protections of the Equal Credit Opportunity Act, attacking discrimination in the extension of credit based on sex or marital status. In this area we have filed two major cases, United States v. AVCO Financial Services, Inc. and United States v. Central State Hospital Credit Union. Two other cases against major credit companies are currently under investigation.

3. Discrimination in Educational Opportunities

The Department has participated in four suits alleging discrimination in provision of educational opportunities.

Two suits have been brought under Title IX of the Education Amendments Act of 1972, which prohibits sex discrimination in any educational program receiving federal financial assistance. In Zentgraf and United States v. Texas A&M, a case brought during the Carter Administration but under negotiation in this Administration, we challenged the university's maintenance of a "Corps of Cadets" in which women's activities are severely curtailed on account of sex. Another suit, Pavey and United States v. University of Alaska, was settled by consent decree in October 1981. There we alleged that Title IX precluded the University from discriminating on the basis of sex in athletic programs. The University agreed to maintain equal facilities and to provide for equal financial aid, recruitment, and publicity in its male and female athletic programs.

In an ongoing suit, United States v. Massachusetts Maritime Academy, brought in 1976 during the Ford Administration, we challenged the academy's maintenance of a males-only admissions policy under Title IV of the Civil Rights Act of 1964. As a result of the suit, the academy has opened its admissions to women, but litigation has proceeded regarding the nature of its admissions criteria and recruitment practices. We are awaiting a decision in that case. The Department also intervened in Canterino v. Wilson, a case against the Kentucky Prison System. The court held that prison authorities had unconstitutionally discriminated against women in educational and training programs.

4. Litigation in the Supreme Court

The Department has repeatedly advocated positions in support of women's rights in cases before the Supreme Court. In the 1981 Term, the Administration argued, albeit unsuccessfully, in Ford Motor Co. v. EEOC that an employer's liability for back pay under the sex discrimination provisions of Title VII was not extinguished by an offer of employment which did not compensate for seniority. Last Term in North Haven Board of Education v. Bell, the Department argued successfully that Title IX reaches and prohibits discriminatory employment practices. And in Newport News v. EEOC, another case argued and decided last Term, the Department successfully contended that an employer could not deny pregnancy disability benefits to the spouse of a male worker when other types of disability benefits are extended to spouses. This is a particularly favorable decision for wives of working husbands who do not have disability benefits through their own employment.

The Department has also taken important positions in furtherance of women's rights in amicus curiae briefs in two major cases before the Supreme Court: TIAA-CREF v. Spirt and Hishon v. King & Spaulding. Last Term the Department argued in Spirt that Title VII of the 1964 Civil Rights Act prohibits an employer from providing unequal pension benefits for men and women employees. The Supreme Court adopted our position in a similar case before it, Norris v. Arizona. In an employment discrimination case that will be heard next Term, Hishon v. King & Spaulding, the Department is arguing that Title VII prohibits law firms from refusing to consider women associates for partnership on an equal basis with their male counterparts.

Finally, in Grove City College v. Bell, another case pending in the Supreme Court, the Justice Department has argued that when the federal government provides grants and loans to students attending a college, the college's financial aid program receives "Federal financial assistance" and is subject to the nondiscrimination requirements of Title IX. This is an aggressive argument in a case of first impression before the Supreme Court. Although the Department has been criticized by women's groups for failing to argue that Title IX applies to the [illegible] institution under such circumstances, the language and legislative history of the statute and the Supreme Court's opinion in the North Haven case all indicate that Congress intended Title IX to be "program-specific."

B. Administration Initiatives

1. Child Support Enforcement

In 1975, the Congress established the Child Support Enforcement Program (CSEP) to foster family responsibility and reduce dependence by families with absent parents on the welfare system. This program was modeled after the highly successful initiative launched in California when President Reagan was governor. The CSEP requires each state to have an approved program of child support enforcement, including measures to establish paternity, locate missing fathers, establish or modify child support orders, and collect court-ordered support payments. The federal government pays much of the cost and provides support services, policy direction, and technical assistance.

The Administration has improved the CSEP in several ways. For instance, the Administration obtained legislation permitting states to make collections for past due child support to AFDC families by having the IRS make offsets to federal tax refunds. $168 million was collected in 1982 through this initiative. The Administration created an interagency working group under the Cabinet Council on Legal Policy which has taken several steps to strengthen federal enforcement assistance, such as providing access to federal records not previously available to locate absent parents. In addition, the Department of Health and Human Services has undertaken several initiatives to strengthen state and local enforcement programs, including providing technical assistance for collections in major urban areas, assisting states in establishing necessary automated systems, and strengthening auditing and informational programs.

The President pledged in his State of the Union Address this year to take further action to promote enforcement of child support laws. In fulfillment of that promise, the Administration recently proposed the "Child Support Enforcement Amendments of 1983." This bill (S. 1691) would require that states adopt several practices that have proven effective in increasing support collections. States would be required to: (1) impose mandatory wage withholding on absent parents more than two months behind in court-ordered child support payments; (2) intercept tax refunds to absent parents who are behind in court-ordered child support; (3) develop procedures to expedite civil hearings on court-ordered child support; and (4) impose fees on nonwelfare parents who use this court-ordered child support collection program.

In addition, the bill would provide financial incentives for states to broaden and improve their child support enforcement efforts. The federal government currently pays 70% of state administrative costs, and then pays states bonuses based upon their AFDC collections. The Administration's bill would provide for incentives based upon both AFDC and non-AFDC performance. Although the percentage of state administrative costs reimbursed by the federal government would be reduced from 70 to 60 percent, total incentive payments would be increased by about $83 million over what would be available under the present incentive structure. This system will reward states that establish superior performance records in collecting on behalf of both AFDC and non-AFDC families.

Finally, the President sought to focus public attention on the important problem of child support enforcement by declaring August 1983 as "National Child Support Enforcement Month".

2. Child Care

The Economic Recovery Tax Act of 1981 contained several provisions to ease the financial burden of child care. First, the Act substantially increased child care tax credits to working parents. For parents who earn less than $10,000 per year, the credit was increased from $400 to $720 per child. The Act also created an incentive for employers to include prepaid day care in their employee benefit packages, by making employer contributions for child care nontaxable to employees.

Consistent with a promise made by the President in his State of the Union Address, the Administration is also proceeding with several initiatives to encourage better private child care. First, the Women's Bureau of the Department of Labor, in conjunction with the Rockefeller Foundation, is funding four demonstration projects to induce employers to provide day care services for working women. The President's Office on Private Sector Initiatives has sought to create a more informed environment in the business community regarding day care alternatives. The White House-based "50 States Project" seeks to identify unnecessary state and local restrictions that inhibit private child care and to encourage local governments to relax those restrictions. Finally, the Administration has encouraged states to use workfare and work-study programs to provide child care.

3. Tax Reform and Other Economic Initiatives

The Administration has implemented a broad array of tax and economic reforms in an effort to eliminate economic discrimination against women. For instance, the Economic Recovery Tax Act greatly reduced the "marriage tax penalty" applicable to two-earner couples by allowing a partial deduction from married couples' combined salaries. The Act also permitted one-earner couples to contribute more to IRAs than individuals. The reduction of estate tax burdens is also of particular benefit to women, since they outlive men by an average of eight years.

Other reforms have included institution of a sex-neutral definition of poverty to ensure that women are evaluated by the same assistance criteria as are men; enactment of a law permitting state courts to divide military retirement benefits in divorce settlements; and enactment of a law authorizing federal agencies to adopt "flexitime" schedules for their employees on a permanent basis.

4. Social Security Reform

On April 20, 1983, President Reagan signed into law legislation (P.L. 98-21) to improve the long and short-term financial condition of the Social Security system. This reform legislation also contained a host of provisions, summarized below, aimed at eliminating economic discrimination against women.

First, Social Security benefits for widows and divorced women were increased. A major change in eligibility provisions will allow divorced spouses who apply for benefits based on a former spouse's earnings (usually women) to be independently eligible for Social Security benefits at age 62. Under previous law, a dependent divorced spouse could not apply for benefits until her former spouse applied, regardless of age. In addition, benefits previously continued only for surviving spouses who remarried after age 60 were extended to younger disabled widow(er)s and disabled, surviving divorced spouses.

Second, certain sex-based distinctions were eliminated. Many of these distinctions had been voided by court decisions. Illegitimate children are eligible for benefits based on their mother's earnings; under previous law, they were eligible for benefits only on their father's earnings. Two provisions will make benefits based on a wife's earning record equal to those based on a husband's earning record: fathers who have in their care an entitled child under age 16 and aged divorced husbands (as well as aged or disabled divorced surviving husbands) may receive benefits on the same basis as similarly situated wives or ex-wives. Childhood disability benefits will be continued for women who marry as well as for men, and Social Security benefits will be continued to an individual, regardless of sex, who is receiving dependents' or survivors' benefits, whether or not his or her spouse is eligible for such benefits.

5. Welfare and Job Placement Reform

This Administration has acted to eliminate sex-based discrimination in the provision of welfare benefits and in federally-supported work incentive programs. The Omnibus Budget Reconciliation Act of 1981 (P.L. 97-35), signed into law by President Reagan on August 13, 1981, provided that federal Aid for Families with Dependent Children funds would be available to families whose "principal earner" was unemployed. Previously, such aid had only been available to families when the father was unemployed. On October 13, 1982, the President signed into law amendments to the Job Training Partnership Act (P.L. 97-300), giving job placement preference to "unemployed parents who are the principal earners" of a family. As previously formulated, the Act had given job placement preference to "unemployed fathers." In short, welfare benefit and job placement statutes that discriminated against single-parent families (often headed by women) have been reformed under the Reagan Administration.

6. Initiatives to Assist Crime Victims

The efforts of the Department of Justice to improve the treatment of victims of crime include a number of initiatives designed to remedy problems important to women. For example, in response to the recommendations of the President's Task Force on Victims of Crime, the Department is creating a Family Violence Task Force under the direction of the Attorney General. This group will be commissioned to study the problem of family violence in all its manifestations and to suggest ways in which government can be more effective in protecting women and children from this kind of assault. In addition, the Justice Department and the FBI are initiating joint conferences to improve the investigation and prosecution of sexual assault crimes and the treatment of victims of such crimes.

7. Appointment of Women to High-Level Positions

This Administration is the first in history to appoint a woman to the United States Supreme Court. President Reagan's nomination of Sandra Day O'Connor, in fulfillment of a promise made in his inaugural address, was a critical step towards true equal opportunity in consideration of qualified persons for this nation's highest court. The President has also appointed five women as federal district court judges and one woman to the new United States Claims Court, for a total of seven appointments of women to the federal bench. Four additional women are currently in the process of being nominated to positions on district courts.

President Reagan has also demonstrated his commitment to women's equality and his respect for their ability by appointing more women to full-time top policy making positions during his first two years in office than any of his predecessors during a similar period. By the end of January 1983, he had selected 99 women, compared to only 91 appointed by the previous Administration in its first two years. There are three women in the Reagan cabinet, more than at any other time in U.S. history.

In all, President Reagan has appointed women to more than 1200 important positions in the White House and throughout the executive branch, including 181 to the Senior Executive Service, 584 to Schedule C positions at a level of GS-13 or higher, and over 325 to part-time advisory boards.

In addition to Justice O'Connor, the President's most significant female appointments include United Nations Ambassador Jeanne Kirkpatrick, Transportation Secretary Elizabeth Dole and Health and Human Services Secretary Margaret Heckler. Women also head the Peace Corps (Loret Ruppe), the Consumer Product Safety Commission (Nancy Steorts), the U.S. Postal Rate Commission (Janet Steiger), and the Federal Labor Relations Authority (Barbara Mahone).

C. Task Force on Legal Equity for Women 2/

1. Executive Order 12336

Executive Order 12336 of December 21, 1981 established the Task Force on Legal Equity for Women "to provide for the systematic elimination of regulatory and procedural barriers which have unfairly precluded women from receiving equal treatment from Federal activities." See Tab 2. Section One of the Order provides that the President shall appoint the Task Force members from among nominees of the heads of 21 specified executive agencies, each of which is to have one representative on the Task Force.

Section Two of the Order provides that each Task Force member is responsible for coordinating and facilitating in his or her respective agency, under the direction of the head of the agency, the implementation of changes ordered by the President in sex-discriminatory federal regulations, policies, and practices. The Task Force is charged with making "periodic reports" to the President on the progress made in implementing the President's directives.

In addition, Section Two of the Order directs the Attorney General to complete a review of federal laws, regulations, policies, and practices which contain language that unjustifiably differentiates, or effectively discriminates, on the basis of sex. The Attorney General is directed to report his findings to the President on a quarterly basis through the Cabinet Council on Legal Policy.

2. Progress Report

The recent public criticism of the Task Force derives primarily from a misperception of the Task Force's mandate as set forth in Executive Order 12336. In fact, the Task

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2/ The Task Force is to be distinguished from the "50 States Project" established by the President in 1981. This Project, based within the White House, seeks to encourage governors to identify and correct state laws and regulations that discriminate against women.

Force was intended not to formulate substantive policy initiatives, but to perform the important but limited task of cataloguing sex-biased language in federal laws and regulations so that such sex bias could be eliminated.

On June 28, 1982, the Task Force prepared, and the Attorney General transmitted to the Cabinet Council on Legal Policy, the First Quarterly Report. The report contained: (1) a list of federal statutes reflecting sex bias (based upon a 1976 computer search performed by President Carter's Task Force on Sex Discrimination); (2) a discussion of selected women's issues; and (3) a summary of the progress made by federal departments and agencies in correcting discrimination in laws and regulations under their respective jurisdictions.

The Task Force's Second Quarterly Report, transmitted on December 3, 1982, announced that the Department of Justice had authorized an updated computer-assisted search of the U.S. Code and Code of Federal Regulations and was in the process of coordinating new agency review efforts. These tasks were reported to be "well underway."

The Third Quarterly Report of the Task Force has been transmitted to the CCLP, but has not yet been acted upon. This is the final report on federal statutes containing distinctions based on sex. The listing is the product of the most comprehensive and thorough computer-assisted review of the U.S. Code ever undertaken to identify gender-based distinctions. The report also summarizes the progress made by agencies in reviewing their laws, regulations, policies, and practices for sex-based distinctions.

Part of the work performed by the Task Force to date has been embodied in legislation. On October 1, 1982, Senator Dole introduced a bill to amend the U.S. Code to eliminate some 64 gender-based distinctions, most of which were identified by the First Quarterly Report of the Task Force. President Reagan wrote a letter on September 27, 1982, endorsing Senator Dole's proposal. This bill has been re-introduced in the 98th Congress as S. 501. We understand that the Senate Judiciary Committee's Subcommittee on the Constitution plans to report out S. 501 on September 16.

II. POSSIBLE ADMINISTRATION INITIATIVES

A. Amendment of Federal Statutes that Contain Sex-Based Distinctions

As noted above, Senator Dole's bill to eliminate sex-based distinctions in the United States Code (S. 501) is substantially based upon the findings of the First Quarterly Report of the Task Force on Legal Equity for Women. Since S. 501 was introduced, however, the Task Force on Legal Equity for Women has issued its Third Quarterly Report to the President through the CCLP. This Report identifies 65 additional federal statutes (or related groups of statutes) that contain sex-based distinctions not covered by the Dole bill. See Tab 3. I would propose that the Administration draft an amendment to the Dole bill to amend most -- although not all -- of the additional provisions identified in the Third Quarterly Report. 3/

By far, the majority (47) of these 65 laws are older provisions that define the persons they affect by terms reflecting gender (such as "widows" and "mothers") rather than by sex-neutral terms (such as "surviving spouses" and "parents"). Although many of these laws are obscure and somewhat inconsequential, their continued existence in the United States Code could adversely affect some women. I would recommend that we seek to have all of these laws amended to eliminate references to gender.

The remaining 18 statutory provisions make distinctions among men and women that are more substantive. Eleven of these statutes contain distinctions that are generally intended to favor women, such as the law (29 U.S.C. § 12) requiring that the Director of the Women's Bureau of the Department of Labor be a woman and the statute (36 U.S.C. § 671) that stipulates that at least one of the eight national officers of AMVETS must be a woman. With the exception of two laws that I think should be studied more closely, I would recommend that this group of statutes be amended to eliminate gender-based distinctions. 4/

3/ The Third Quarterly Report of the Task Force identifies a total of 140 statutes (or related groups of statutes) reflecting sex-based distinctions. 24 of these statutes have already been amended to eliminate the distinctions. Nineteen of these changes occurred under this Administration, and most resulted from legislation we sponsored. Of the 116 remaining statutes containing sex-based distinctions, 51 would be corrected by the current version of the Dole bill.

4/ These two laws are found in Titles 10 and 22 of the United States Code. The first set of statutes (10 U.S.C. §§ 5896-5899) establish separate promotion boards for male and female naval officers. Although the existence of separate promotion boards may indicate discrimination between the sexes, the statutes on their face do not discriminate between men and women in promotions or other personnel practices. Accordingly, it may be impossible without further study to determine what the impact of these statutes has been. A second pair of statutes, 22 U.S.C.

Finally, there are two sets of statutory provisions (seven statutes) of major import that I would recommend against amending at this time. These are statutes that reflect very fundamental and reasoned decisions to distinguish between women and men. One set of provisions establishes prohibitions on the use of women soldiers in combat. A second set of provisions excludes women from the requirement of draft registration. It is possible that Congress, upon further consideration, will decide to reverse itself on these statutes and to change these long-established policies. However, we should not recommend amendment of these laws without a thorough, nationwide debate over the extent to which we want to obliterate all distinctions between the sexes. 5/

B. Legislative Proposals

In several areas relating to women's rights, the Administration has been asked to take a position on pending legislation or has considered introducing legislation of its own. For the most part, these measures are within the jurisdiction of, and have been considered by, the Cabinet Council on Human Resources and the Cabinet Council on Economic Affairs. Within the context of those two groups, I would recommend that the Administration review its position on these proposals and consider the desirability of formulating initiatives or supporting existing bills. The following list is illustrative of these issues, not exhaustive.

1. Sex Bias in Pensions and Insurance

a. Proposals to Prohibit Use of Sex-Based Actuarial Tables in Calculating Pensions

The Administration is committed to the elimination of discrimination against women in pension programs. In his State

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4/ §§ 2151(k) and 2225, generally encourages the integration of women into the national economies of developing nations, and stipulates various actions that the government should take toward this end. While these provisions clearly contain sex-based distinctions, their focus on foreign aid and foreign relations suggests that they, too, be given further study.

5/ I also would recommend against the amendment of 25 U.S.C. § 342 at this time. This statute allows the resettlement of the Southern Ute tribe by a majority vote of the male tribe members. Although this statute clearly is discriminatory on its face, as a matter of the United States' relations with the Southern Ute tribe, it should not be amended until there [illegible] an opportunity to consult with the tribe.

of the Union Address this year, President Reagan stated that the Administration would take action to remedy inequities in pensions. A press release accompanying the address stated that the Administration would "submit legislation to remedy inequities based on sex in employer pension systems."

We have taken a number of steps to implement these goals. Last Term, the Department filed a brief with the Supreme Court in TIAA-CREF v. Spirt arguing that Title VII prohibits the use of sex-segregated actuarial tables to calculate employee retirement benefits. Our position was adopted by the Supreme Court in June in a second, similar case, Arizona v. Norris.

During the past several months, various working groups within the government also have been meeting to discuss possible legislation in the pension area. To a substantial degree, the Supreme Court's decision in Norris has preempted the need for remedial legislation. However, some unresolved questions remain as to how the sex-neutral requirements of Norris are to be implemented. The Administration should consider whether clarifying legislation or regulations might be appropriate, or whether these questions are better left to the courts.

b. Proposals To Prohibit All Sex-Based Insurance Classifications

Several bills have already been introduced in Congress which would prohibit use of sex-based distinctions not only with respect to pensions, but all other forms of insurance as well. These bills would have dramatic practical, legal, and economic ramifications which may be undesirable and, in some respects, disadvantageous to women.

c. Other Pension Equity Issues

Title I of the Economic Equity Act (S. 888) would amend a number of provisions in ERISA and the Internal Revenue Code governing private pension plans and civil retirement plans. Certain provisions for private pension reform would aid "women as workers" -- for example, by lowering the age of participation in pension plans from 25 to 21 and modifying the "break-in-service" rules to give credit for employer-approved maternity or paternity leave. Other provisions would aid "women as spouses" -- for instance, by promoting election and payment of survivor's benefits and by establishing pensions as a legitimate property right. S. 888 would also entitle persons married to civil service employees for at least 10 years the right to a pro rata share of the benefits earned during marriage, and mandate survivor's benefits in the absence of a waiver by the spouse and former spouse. The Retirement Equity Act (S. 19) contains provisions similar to, although not identical to, provisions in Title I of S. 888.

In testimony last month before the Senate Finance Committee, John Chapoton, Assistant Secretary of the Treasury for Tax Policy, stated that the Administration supported "most" of the pension provisions of both bills, but suggested that certain specific changes were necessary to "assure that we aid the maximum number of women and that the administrative burden on pension plans is minimized."

3. Dependent Care

As noted above, the Administration has taken some significant steps to encourage availability of dependent care. Title II of S. 888 contains several further proposals in this area. First, the bill would treat a greater percentage of child care expenditures as necessary business expenses. Second, the bill would make the dependent care tax credit refundable for those whose income is so low that they lack sufficient tax liability to make use of the credit. Third, the bill would clarify that child care facilities fulfilling certain specified criteria qualify for tax-exempt status under §501(c)(3) of the Internal Revenue Code. Finally, the bill would establish a "seed money" assistance program to establish child care information and referral services. The Cabinet Council on Economic Affairs has opposed supporting Title II on the grounds that it would increase the deficit by $.7 billion a year.

4. Social Security Amendments

Several legislative proposals have been introduced in the 98th Congress aimed at further eliminating sex-based discrimination under the Social Security system. These proposals would: (1) establish a working spouse benefit payable in addition to the dependent spouse benefit to recognize the Social Security tax contributions of second earners (H.R. 203); (2) increase from five to ten the number of years of low earnings dropped in computing the covered earnings history for a worker caring for small children at least six months out of the year (H.R. 2741); (3) reduce from ten to five the number of years of marriage that are necessary before a dependent divorced spouse is eligible for benefits on an ex-spouse's earnings record in the case of late-life divorces (H.R. 336); (4) allow disabled widows to receive benefits at any age (H.R. 2743); (5) provide transitional benefits for widowed persons at the age of 50 (a majority are women) to allow them to adjust to the loss of the deceased spouse's income (H.R. 2745); and (6) allow a husband and wife to combine their earnings during marriage for Social Security benefit purposes upon retirement or divorce, and to equalize the benefits payable on retirement, if they have not so elected (H.R. 337, H.R. 2742, and S. 3).

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ENFORCEMENT OF LAWS PROHIBITING DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF SEX

Following is a list of the eighteen cases brought by this Administration alleging sex discrimination in employment:

1. United States v. Rhode Island. Brought in March of 1981, this suit alleges employment discrimination against women by the state police. A consent decree was entered in March 1982 in which the state agreed to employ and promote women on a nondiscriminatory basis and to engage in a vigorous recruitment effort designed to attract women into the pool of applicants as state troopers.

2. United States v. Maryland. This suit was filed in April 1981 and alleged sex discrimination by the state's transportation authority. A consent decree remedying the violation was entered the same month.

3. United States v. New York City. A complaint was filed in July 1981 alleging employment discrimination based on sex, race and national origin by the city police department. A consent decree was entered in November 1981 ordering the city to halt its discriminatory practices and to engage in active efforts to recruit women and minorities into the police force.

4. United States v. New Hampshire. The complaint, filed in September 1981, alleged discrimination against women by the state police department. A consent decree settling the case has been entered.

5. United States v. Vermont. The complaint and consent decree were filed in December 1981. The state police department has agreed to discontinue its sexually discriminatory practices and to engage in active efforts to recruit women as state troopers.

6. United States v. North Little Rock, Arkansas. The case was filed in April 1982, and a consent decree was entered in April 1983 ordering the city to halt its discriminatory practices and to engage in active efforts to recruit both blacks and women. A back pay award of $172,000 was obtained for the individual discriminatees.

7. United States v. Clayton County Board of Education (Georgia). In a complaint filed in May 1982, the Department alleged discrimination based on sex and race in the employment of teachers and principals. The case has been settled, the county agreeing to utilize nondiscriminatory hiring and promotion criteria and to engage in active efforts to recruit women and blacks.

8. United States v. Massachusetts State Police. The case was filed and a consent decree entered in September 1982. The state has agreed to use nondiscriminatory selection criteria and to engage in active efforts to recruit women as state troopers.

9. United States v. Burlington County College (New Jersey). This case was filed in December 1982 and a consent decree entered in January 1983, in which the Department obtained affirmative relief for female faculty members, including back pay totalling almost $300,000. The Department had alleged that the college had discriminated against incumbent female faculty members by paying them lesser wages and failing to promote them on an equal basis with their counterparts.

10. United States v. Whitney National Bank. The complaint, filed in November 1982, alleges discrimination in employment based on sex and race, citing specifically the bank's "men only" lunchroom, limited to white males. The case is still in the discovery stage.

11. United States v. Virginia Department of Highways. The complaint was filed by the United States on behalf of black and women employees and applicants. A consent decree was entered in March 1983 in which the Department of Highways agreed to use nondiscriminatory employment criteria and to engage in active efforts to recruit women and blacks. Individual back pay awards were obtained for the female discriminatees.

12. United States v. Lancaster County Sheriff's Department (Virginia). The case was resolved by consent decree entered in May 1983, in which the sheriff's office agreed to engage in active efforts to recruit women and to hire women as field deputies on a nondiscriminatory basis. Specific affirmative relief was obtained for the individual female complainant.

13. United States v. Buffalo Board of Education (New York). The complaint, filed in April 1983, alleges unlawful discrimination under the Pregnancy Disability Act (1978 Amendments to Title VII). The case is in litigation.

14. United States v. Maine State Police. The complaint was filed and a consent decree entered the same day in this suit in which the Department alleged sex discrimination in the employment of state troopers. The state police agreed to recruit women applicants actively and to hire them as state troopers on a nondiscriminatory basis.

15. United States v. Little Rock, Arkansas. The suit was filed and a consent decree entered in June 1983. The Department had alleged that the police and fire departments had discriminated in the hiring of women and minorities.

16. United States v. Suffolk County, New York. Filed in June 1983, the case is still in litigation. The Department has alleged that the Suffolk County police department has refused to hire or promote women or blacks on account of their sex and race.

17. United States v. Patrick County, Virginia. Filed in June 1983, the case is still in litigation. The Department has alleged that the Patrick County Sheriff's Department has discriminated against women and blacks in public employment.

18. United States v. Gallup, New Mexico. In a complaint filed on August 30, 1983, the Department has alleged that the City of Gallup discriminates in public employment against women and American (Navajo) Indians based upon sex and national origin.

In addition, the Department has either settled or litigated to a conclusion the following six cases alleging sex discrimination in employment filed during the prior Administration:

1. United States v. Buffalo Fire Department -- This case went to trial in March 1983. The Department argued that physical agility tests were not job-related and had a disparate impact on the hiring of women. We are awaiting a decision.

2. United States v. Duquesne Light Co. -- This case was recently settled, and affirmative relief was obtained for blacks and females who had alleged race and sex discrimination in Duquesne Light's hiring practices.

3. United States v. State of Indiana. The Department of Justice obtained a consent decree in May 1983 in which the state agreed to open jobs as guards in the state prisons to women.

4. United States v. Nassau County, New York. A consent decree was obtained in April 1982 in which the county agreed to recruit blacks and females actively and to hire and promote blacks and females without discrimination. Back pay of approximately $1 million was awarded the individual discriminatees.

5. United States v. Nassau County Sheriff's Department. In April 1982 the Sheriff's Department agreed in a consent decree to halt its exclusion of women and to recruit women actively to work as guards in the county jails.

6. United States v. Fairfax County, Virginia. In this case, the Department obtained a record-breaking back pay award for individual victims of the county's employment discrimination. Over two-thirds of the discriminatees awarded relief (459 of 685) were women.

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Federal Register
Vol. 46, No. 246
Wednesday, December 23, 1981

Presidential Documents

Title 3—

The President

Executive Order 12336 of December 21, 1981

The Task Force on Legal Equity for Women

By the authority vested in me as President by the Constitution of the United States of America, and in order to provide for the systematic elimination of regulatory and procedural barriers which have unfairly precluded women from receiving equal treatment from Federal activities, it is hereby ordered as follows:

Section 1. *Establishment.* (a) There is established the Task Force on Legal Equity for Women.

(b) The Task Force members shall be appointed by the President from among nominees by the heads of the following Executive agencies, each of which shall have one representative on the Task Force.

(1) Department of State.

(2) Department of The Treasury.

(3) Department of Defense.

(4) Department of Justice.

(5) Department of The Interior.

(6) Department of Agriculture.

(7) Department of Commerce.

(8) Department of Labor.

(9) Department of Health and Human Services.

(10) Department of Housing and Urban Development.

(11) Department of Transportation.

(12) Department of Energy.

(13) Department of Education.

(14) Agency for International Development.

(15) Veterans Administration.

(16) Office of Management and Budget.

(17) International Communication Agency.

(18) Office of Personnel Management.

(19) Environmental Protection Agency.

(20) ACTION.

(21) Small Business Administration.

(c) The President shall designate one of the members to chair the Task Force. Other agencies may be invited to participate in the functions of the Task Force.

Sec. 2. *Functions.* (a) The members of the Task Force shall be responsible for coordinating and facilitating in their respective agencies, under the direction of the head of their agency, the implementation of changes ordered by the President in sex-discriminatory Federal regulations, policies, and practices.

(b) The Task Force shall periodically report to the President on the progress made throughout the Government in implementing the President's directives.

(c) The Attorney General shall complete the review of Federal laws, regulations, policies, and practices which contain language that unjustifiably differentiates, or which effectively discriminates, on the basis of sex. The Attorney General or his designee shall, on a quarterly basis, report his findings to the President through the Cabinet Council on Human Resources.

Sec. 3. *Administration.* (a) The head of each Executive agency shall, to the extent permitted by law, provide the Task Force with such information and advice as the Task Force may identify as being useful to fulfill its functions.

(b) The agency with its representative chairing the Task Force shall, to the extent permitted by law, provide the Task Force with such administrative support as may be necessary for the effective performance of its functions.

(c) The head of each agency represented on the Task Force shall, to the extent permitted by law, furnish its representative such administrative support as is necessary and appropriate.

Sec. 4. *General Provisions.* (a) Section 1-101(h) of Executive Order No. 12250, as amended, is revoked.

(b) Executive Order No. 12135 is revoked.

(c) Section 6 of Executive Order No. 12050, as amended, is revoked.

Ronald Reagan

THE WHITE HOUSE,
December 21, 1981.

Editorial Note: The President's remarks of Dec. 21, 1981, on signing Executive Order 12336, are printed in the Weekly Compilation of Presidential Documents (vol. 17, no. 52).

[FR Doc. 81-36750
Filed 12-21-81; 2:43 pm]
Billing code 3195-01-M

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The Third Quarterly Report of the Attorney General to the President prepared pursuant to Executive Order No. 12336 identifies 140 statutes that contain sex-based distinctions. Of these statutes, 24 already have been corrected; 64 more would be corrected by a pending bill (S. 501) that Senator Dole has introduced. 1/ However, there remain 65 statutes that contain sex-based distinctions which the Dole bill would not correct.

The sex-based distinctions found in these statutes fall into the following three categories: (1) sex-based distinctions containing references to gender whose amendment the Administration should support; (2) sex-based distinctions that tend to favor women (see text at note 4); and (3) sex-based distinctions that bar women from engaging in certain activities whose amendment the Administration should oppose (see text at note 5).

I. Sex-Based Distinctions Containing References to Gender Whose Amendment the Administration Should Support

33 U.S.C. §857-4 - Commissary privileges extended to widows of members of the National Oceanic and Atmospheric Administration Uniformed Services.

10 U.S.C. §311(a) - Militia consists of "all able-bodied males at least 17 years of age ... and of female citizens of the United States who are commissioned officers of the National Guard."

10 U.S.C. §520 Note, Pub. L. No. 97-252, §403 - Limits the number of males enlisted or inducted into the Army during FY '83, who are not high school graduates to 35% of all males joining that year.

10 U.S.C. §772(c) - Allows retired officers of Army, Air Force, Navy, and Marine Corps to wear retired-grade uniforms, but a retired officer of Navy Nurse Corps may wear her retired-grade uniforms only under conditions prescribed by Secretary of Navy.

10 U.S.C. §1451 - Provides for reductions in monthly annuities for a widow with one dependent child by the lesser of (a) an amount equal to mother's benefit under title II of the Social Security Act, or (b) an amount equal to 40% of the monthly annuity to which entitled.

37 U.S.C. §551 - Includes "wife" and not husband in the definition of dependent of a member of the uniformed service for the purpose of payments to missing persons.

1/ These 64 statutes include 13 <u>not</u> identified in the Third Quarterly Report.

50 U.S.C App. §§530(1) and 530(4) - Prohibits eviction from house of wife, children, or other dependents of person in military service. A related provision is found at §530(4).

70 Stat. 124 (1980) - Provides for burial in national cemeteries of the remains of commissioned officers of the United States Public Health Service who were detailed for duty with the Army or Navy during World War I, and of the wife, widow, or minor child. Also, at the discretion of the Secretary of the Army, the remains of the wife, widow, or children may be removed from the national cemetery proper to the post section if, upon death, the related officer is not buried in the same or adjoining gravesite.

50 U.S.C. App. §1593 - Separate provisions for retirement grade and pay of members of the Army Nurse Corps and females appointed under §1591.

50 U.S.C. App. §1595 - Computation of length of service of female dietetic and physical therapy personnel.

50 U.S.C. App. §1596 - No uniform allowance for women appointees of Army Nurse Corps; rather a completed issue of uniforms, insignia, etc. will be provided.

50 U.S.C. App. §1597 - Blanket appointment of female officers in Army Nurse Corps and Army Medical Service by President.

50 U.S.C. App. §1598 - Transportation allowances for women appointees in Army Nurse Corps and Army Medical Service.

14 U.S.C. §§372, 373 - Provides that "male citizens in civil life may be enlisted as, and male enlisted members of the Coast Guard with their consent may be designated as, aviation cadets." Although these statutes remain in the United States Code the Coast Guard no longer has aviation cadets.

14 U.S.C. §487 - Provides for procurement and sale of items to Coast Guard officers, enlisted men, and to their widows. (This provision originally applied to certain isolated stations for which the Coast Guard purchased goods for resale. These purchases are no longer made. However, surviving spouses have [illegible] privileges.)

33 U.S.C. §§773-775 - Provides for benefits to "widows" of Lighthouse Service Personnel. (Lighthouse personnel have been phased out beginning in 1941 and there are presently none. There are no known female lighthouse personnel and therefore no class of "widowers." There are some widows of lighthouse personnel presently receiving benefits under the Act.)

10 U.S.C. §6915 - Provisions for appointment of enlisted members of Naval Reserve and Marine Corps Reserve as student aviation pilots.

10 U.S.C. §6964 - Midshipman sentenced to imprisonment for hazing may not be confined with men convicted of crimes or misdemeanors.

42 U.S.C. §411 - Establishes rules for crediting earnings for persons who are self-employed. In community property states all of the income derived from a trade or business is treated as income of the husband "unless the wife exercises substantially all of the management and control of such trade or business ..." This provision was held to be unconstitutional in <u>Hester</u> v. <u>Harris</u>, 631 F.2d 53 (5th Cir. 1980); <u>Carrasco</u> v. <u>Secretary of Health, Education and Welfare</u>, 628 F.2d 624 (1st Cir. 1980); and <u>Becker</u> v. <u>Harris</u>, 493 F. Supp. 991 (E.D. Cal. 1980). <u>See</u> 20 C.F.R. §404.1086.

42 U.S.C. §413(a) - Defines "quarter of coverage" for purposes of determining insured status. There is a savings provision for people who reached retirement age between Jan. 1, 1955 and July 1, 1957 and had too few quarters of coverage to be eligible because earnings were credited in the quarter in which they were paid instead of when they were earned. Retirement age at that time was 62 for women and 65 for men.

42 U.S.C. §415(f)(5) - Provides for recomputation of benefits for survivors of men who died between age 62 and age 65 using the date of death as the computation point. This provision only applies to men who would have reached age 65 before 1972 because age 62 is the computation point for women and for younger men.

42 U.S.C. §602(a)(19)(G)(iv) - Permits a mother to choose among available child care services, but not to refuse such services. Amended by Pub. L. No. 96-272, 94 Stat. 512 (1980) but discriminatory provisions were not changed.

42 U.S.C. §1307 - Provides penalties for obtaining information from the Social Security system by misrepresentation. Applies to various individuals including divorced wives but does not include divorced husbands.

8 U.S.C. §1431 - A child born outside U.S. of alien parents or an alien parent and a citizen parent who subsequently lost citizenship, automatically becomes a citizen upon naturalization of both parents, or if the child is illegitimate, upon naturalization of the mother providing that other requirements are met.

25 U.S.C. §933(c) - Provides that tribal assets (Catawba tribe) remaining after distribution are to be appraised without including any improvements placed on an assignment by an assignee, or his wife or children.

25 U.S.C. §973(c) - Provides that payment for selections of tribal land (Ponca tribe) for homesite purposes does not include any improvement or repairs made by member, his wife, children, or heirs.

43 U.S.C. §271 - Provisions contain substantive discrimination and relate to entry on public lands and benefits flowing from such entry.

49 U.S.C. §10722 - Common carriers subject to jurisdiction of the Interstate Commerce Commission may provide free transportation to employee' families: family includes the widow but not the widower of an employee.

42 U.S.C. §1986 - Provides for damages to the "widow" (if none, to the "next of kin") of a deceased person as a result of a wrongful conspiracy in violation of §1985.

30 U.S.C. §934 - Provision utilizing the discriminatory definition of "dependent" and "widow."

33 U.S.C. §909(b) - Under the Longshoremen and Harbor Worker's Compensation Act, death benefits are paid to a widow or widower, (if the deceased has no child), during a widowhood, but only during dependent widowerhood, with two year's compensation, in one sum upon remarriage.

33 U.S.C. §909(c) - Death benefits provided under above Act where there is more than one surviving child of the deceased, but no widow or dependent husband.

33 U.S.C. §909(g) - Compensation provided under Act to nonresident aliens or aliens about to become residents are to be the same as for residents, except for dependents in a foreign country which is provided only to a surviving wife and child or children.

33 U.S.C. §914(j) - Reference to American Experience Table of Mortality and the remarriage tables of the Dutch Royal Insurance Institution for the probability of remarriage of the surviving wife.

45 U.S.C. §231a(c)(4) - Entitles a divorced wife, but not a divorced husband, to an annuity.

26 U.S.C. §1402(a)(5)(A) - Provides that for purpose of defining net earnings from self-employment in community property jurisdictions, all gross income and deductions attributable to a trade or business shall be treated as gross income and deductions of the husband unless the wife exercises substantially all of the management and control of such trade or business, in which case all such gross income and deductions shall be treated as the gross income and deduction of the wife.

18 U.S.C. §2421 - Prohibits transportation across state lines, of any woman or girl, for the purpose of prostitution, debauchery, or other immoral purposes.

18 U.S.C. §2422 - Prohibits coercion or enticement of any woman or girl to cross state lines for purposes of prostitution, debauchery, or other immoral purposes.

18 U.S.C. §3056 - Refers to the President of the United States, his wife, his widow and "until her remarriage."

5 U.S.C. §5561 - Dependent of an employee of an Executive agency or military department is defined to include a wife but not a husband.

12 U.S.C. §1715m(g) - When a serviceman (who has been issued a housing certificate) dies while on active duty in armed forces of U.S., Coast Guard, or National Oceanic and Atmospheric Administration, leaving a surviving widow as owner of the property, the period of ownership is extended for 2 years from date of death or date the widow disposes of the property, whichever is first.

15 U.S.C. §1052(c) - Provides that no trademark may be registered if it includes the name, signature, or portrait of a deceased President of the U.S. during the lifetime of his widow unless she provides written consent.

24 U.S.C. §165 - Pensions of male inmates of St. Elizabeth's Hospital to be used for the benefit of the pensioner and in the case of a male pensioner, his wife, minor children, and dependent parents, or if a female pensioner, for the benefit of her minor children.

24 U.S.C. §191 - St. Elizabeth's Hospital may admit insane persons including men who were insane while in military service, and become insane again after discharge.

28 U.S.C. §604 - Although the Judicial Survivors Annuities Reform Act and Pub. L. No. 96-504 extended payment of annuities from "widows" to "widows and widowers," the duties listed for the Director of the Administrative Office of the United States courts were not expanded to include the payment of annuities to widowers.

42 U.S.C. §1652 - Provides for benefits to dependents of aliens and non-nationals which include a surviving spouse residing in the United States, but if the surviving spouse is residing outside the United States, only a female surviving spouse is entitled to benefits.

48 U.S.C. §§1413, 1415, 1418 - Provides for the protection of rights of the widows of discoverers of guano islands.

48 U.S.C. §1461 - No polygamist, bigamist, or person cohabiting with more than one woman, and no woman cohabiting with any person so described is eligible to vote or hold office in any

United States territory or other place over which the United States has exclusive jurisdiction.

II. Sex-Based Distinctions that Tend to Favor Women

A. Statutes that Should be Amended Immediately

10 U.S.C. §2102 as amended by Pub. L. No. 95-485, title VIII, §809, 92 Stat. 1623 - Military colleges allowing women to enroll must provide the opportunity, but may not require participation in military training.

10 U.S.C. §8848 - Different years for men and women for separation of officers or transfers to retired reserve.

10 U.S.C. §6403 - Separate statute determining how Secretary of Navy can eliminate Naval Reserve and Marine Corps Reserve women officers from active status. [Note: Technical Amendments made, but not cured by Pub. L. No. 96-513, §503(49)(A)-(D) (1980).]

29 U.S.C. §12 - President must appoint a woman as Director of Women's Bureau, Department of Labor.

36 U.S.C. §671 - Requires that one of the eight national officers of AMVETs be a woman.

B. Statutes that Require Further Study

10 U.S.C. §5896 - Reserve officers to be recommended for promotion - separate subsections for eligible women. [Note: Amended but not cured by Pub. L. No. 96-513, §503(34) (1980).]

10 U.S.C. §5897 - Certification of reports by selection boards for promotion of reserve officers. Separate treatment of women and men.

10 U.S.C. §5898 - Submission of selection board reports to President for approval. Separate treatment of women officers.

10 U.S.C. §[illegible] - Promotion zones for reserve officers. Separate provisions for women.

22 U.S.C. §2151(k) - Requires that the Foreign Relations Assistance Act be administered to give particular attention to programs that tend to integrate women into the national economies of developing countries. Requires that up to $10,000,000 each fiscal year be used to encourage the participation of integration of women in the development process by supporting activities that increase their productivity and income earning capacity. It does not authorize a separate development assistance program for women.

22 U.S.C. §2225 - Requests the President to instruct U.S. representatives to international organizations to carry out their duties, so as "to encourage and promote the integration of women into the national economies of member and recipient countries and into professional and policymaking positions of such organizations." The President is also requested to take into account the progress or lack thereof by such organizations in furthering the above goals in making U.S. contributions to these organizations.

III. Sex-Based Distinctions that Bar Women from Engaging in Certain Activities Whose Amendment the Administration Should Oppose

25 U.S.C. §342 - Permits removal of Southern Utes to new reservation with consent of the majority of the adult male tribal members.

10 U.S.C. §8549 - Female members of the Air Force may not be assigned to aircraft engaged in combat missions.

10 U.S.C. §6015 - Women not to be assigned to combat duty nor to vessels other than hospital and transport ships. Amended by Pub. L. No. 95-485, § 808 to provide:

> "... [W]omen may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions."

50 U.S.C. App. §453 - Male citizens must register for draft. See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding constitutionality of all male registration for draft).

50 U.S.C. App. §455 - Men selected for training and service.

50 U.S.C. App. §456 - Deferments relating to men.

50 U.S.C. App. § 466 - Men in definition.

WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

e: 9/7/83 Number: 118853CA Due By:

ject: Cabinet Council on Legal Policy with the President - September 8, 1983

2:00 p.m. in the Cabinet Room

CABINET MEMBERS	Action	FYI
Vice President	✓	
State	✓	
Treasury	✓	
Defense		✓
Attorney General	✓	
Interior	✓	
Agriculture		✓
Commerce	✓	
Labor	✓	
HHS	✓	
HUD	✓	
Transportation	✓	
Energy		✓
Education		✓
Counsellor	✓	
OMB	✓	
CIA		✓
UN		✓
USTR		✓
GSA		
EPA		
OPM		
VA		
SBA		

	Action	FYI
CEA		✓
CEQ		
OSTP		
ACUS	✓	
Baker	✓	
Deaver		
Clark		✓
Darman *(For WH Staffing)*	✓	
Harper	✓	
Jenkins		✓
Fielding	✓	
CCCT/Gunn		
CCEA/Porter		
CCFA/		
CCHR/Carleson		
CCLP/Uhlmann	✓	
CCMA/Bledsoe		
CCNRE/		

MARKS:

The President will chair a meeting of the Cabinet Council on Legal Policy on Thursday, September 8, 1983 at 2:00 p.m. in the Cabinet Room. The agenda is:

Women's Issue Review and Recommendations on the 3rd Quarterly Report

The background paper for this issue is enclosed.

SEP -7 1983

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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release | September 8, 1983

STATEMENT BY THE
PRINCIPAL DEPUTY PRESS SECRETARY

At today's meeting of the [redacted] the President reviewed the attached report of the Attorney General and took several actions to eliminate gender-based distinctions in Federal statutes.

The principal focus of the Cabinet Council's meeting concerned the review of the Third Quarterly Report of the Attorney General to the President prepared pursuant to the President's Executive Order 12336. The report identified 140 statutes or related groups of statutes that contain sex-based distinctions. Of these statutes, 24 have already been corrected. Fifty-one additional statutes would be corrected by pending legislation supported by the Administration. The Cabinet Council considered those remaining statutes not covered by pending legislation.

The President approved the recommendation to propose amendments to 47 statutes that generally define the persons they affect by terms reflecting gender rather than by sex-neutral terms. These items are presented at Tab 3, pages 1-6, in the attached memorandum from the Attorney General.

The President decided not to propose amendments to eleven other statutes which make more substantive distinctions between men and women. These statutes tend to favor women.

Additionally, seven statutes identified in the Third Quarterly Report were not recommended for change because they were viewed as reflecting reasoned decisions to distinguish between women and men. There are two sets of statutes in this category. One set establishes prohibitions on the use of women soldiers in combat and the other set of statutes excludes women from the requirement of draft registration.

All of the statutes reviewed today are listed at Tab C in the attached memorandum from the Attorney General.

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