The Burger Court Opinion Writing Database

Frontiero v. Richardson

411 U.S. 677 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 7, 1973

Re: No. 71-1694 - Frontiero v. Richardson

Dear Bill:

I have watched the "shuttlecock" memos on the subject of Reed v. Reed and the "suspect" classification problem.

Some may construe Reed as supporting the "suspect" view but I do not. The author of Reed never remotely contemplated such a broad concept but then a lot of people sire offspring unintended! At some point, I will perhaps join someone who expresses the narrow view expressed by Potter, Harry and Lewis.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 8, 1973

Re: No. 71-1694 - Frontiero v. Richardson

Dear Lewis:

I am not sure all the writing is now before us but as of now I would like to join in your separate opinion. May I suggest you consider inserting in line five of the text, page one, the word "every" or "all." With or without my puny effort to mute the outrage of "Womens Lib," I will join.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 28, 1973

Dear Bill:

Please join me in your opinion in No. 71-1694 - Frontiero v. Richardson.

W. O. D.

Mr. Justice Brennan

cc: Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 3, 1973

Dear Bill:

RE: 71-1694, FRONTIERO v. RICHARDSON

Lewis' position in his memo of March 2nd is understandable. There is a marked difference in point of view over sex classifications. For purposes of employment I think the discrimination is as invidious and purposeful as that directed against blacks and aliens. I always thought our 1874 decision which gave rise to the 19th Amendment was invidious discrimination against women which should have been invalidated under the Equal Protection Clause.

This memo is designed only to make clear to you what one member of the Court thinks.

There may be a way for you to sail between Scylla and Charibdis.

William O. Douglas

Mr. Justice Brennan
cc: Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 14, 1973

MEMORANDUM TO THE CONFERENCE

RE: No. 71-1694 - Frontiero v. Laird

As you will note, I have structured this opinion along the lines which reflect what I understood was our agreement at conference. That is, without reaching the question whether sex constitutes a "suspect criterion" calling for "strict scrutiny," the challenged provisions must fall for the reasons stated in Reed. I do feel however that this case would provide an appropriate vehicle for us to recognize sex as a "suspect criterion." And in light of Potter's "Equal Protection Memo" circulated last week, perhaps there is a Court for such an approach. If so, I'd have no difficulty in writing the opinion along those lines.

W.J.B. Jr.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

1st DRAFT

Circulated: 2-14-73

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 71–1694

Sharron A. Frontiero and Joseph Frontiero, Appellants, *v.* Melvin R. Laird, Secretary of Defense, et al.

On Appeal from the United States District Court for the Middle District of Alabama.

[February —, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question before us concerns the right of a female member of the uniformed services [1] to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. 37 U. S. C. § 401 (1); 10 U. S. C. § 1072 (A). A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his sup-

[1] The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U. S. C. § 101 (3); 10 U. S. C. § 1072 (1).

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 28, 1973

MEMORANDUM TO THE CONFERENCE

RE: No. 71-1694 - Frontiero v. Richardson

Since the previous circulation attracted only Lewis' full agreement and Potter's partial agreement, and since Bill Douglas and Byron have indicated a preference for the "suspect criterion" approach, the attached new circulation embodies the latter approach (which is also my own preference).

W. J. B. Jr.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Changes throughout

Please join me JHH

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Brennan, J.

Circulated: _____

Recirculated: 2/28/73

SUPREME COURT OF THE UNITED STATES

No. 71-1694

Sharron A. Frontiero and Joseph Frontiero, Appellants, *v.* Elliot L. Richardson, Secretary of Defense, et al.

On Appeal from the United States District Court for the Middle District of Alabama.

[March —, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question before us concerns the right of a female member of the uniformed services[1] to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. 37 U. S. C. § 401 (1); 10 U. S. C. § 1072 (A). A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his sup-

[1] The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U. S. C. § 101 (3); 10 U. S. C. § 1072 (1).

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

B

Joined 3/1

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 6, 1973

RE: No. 71-1694 - Frontiero v. Richardson

Dear Lewis:

You make a strong argument and I have given it much thought. I come out however still of the view that the "suspect" approach is the proper one and, further, that now is the time, and this is the case, to make that clear. Two reasons primarily underlie my feeling. First, Thurgood's discussion of Reed in his dissent to your Rodriguez convinces me that the only rational explication of Reed is that it rests upon the "suspect" approach. Second, we cannot count on the Equal Rights Amendment to make the Equal Protection issue go away. Eleven states have now voted against ratification (Arkansas, Connecticut, Illinois, Louisiana, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Utah and Virginia). And within the next month or two, at least two, and probably four, more states (Arizona, Mississippi, Missouri and Georgia) are expected to vote against ratification. Since rejection in 13 states is sufficient to kill the Amendment it looks like a lost cause. Although rejections may be rescinded at any time before March 1979, the trend is rather to rescind ratification in some states that have approved it. I therefore don't see that we gain anything by awaiting what is at best an uncertain outcome.

Moreover, whether or not the Equal Rights Amendment eventually is ratified, we cannot ignore the fact that Congress and the legislatures of more than half the States have already determined that classifications based upon sex are inherently suspect.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

B— 1
14
Journal 3/1

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

4th DRAFT

Circulated: _____

Recirculated: 3/9/73

SUPREME COURT OF THE UNITED STATES

No. 71-1694

Sharron A. Frontiero and Joseph Frontiero, Appellants, *v.* Elliot L. Richardson, Secretary of Defense, et al.	On Appeal from the United States District Court for the Middle District of Alabama.

[March —, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question before us concerns the right of a female member of the uniformed services[1] to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. 37 U. S. C. § 401 (1); 10 U. S. C. § 1072 (A). A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his sup-

[1] The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U. S. C. § 101 (3); 10 U. S. C. § 1072 (1).

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

13,14

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 5/9/73

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1694

Sharron A. Frontiero and Joseph Frontiero, Appellants, *v.* Elliot L. Richardson, Secretary of Defense, et al.	On Appeal from the United States District Court for the Middle District of Alabama.

[March —, 1973]

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join.

The question before us concerns the right of a female member of the uniformed services[1] to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. 37 U. S. C. § 401 (1); 10 U. S. C. § 1072 (A). A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his sup-

[1] The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U. S. C. § 101 (3); 10 U. S. C. § 1072 (1).

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 15, 1973

71-1694

MEMORANDUM TO THE CONFERENCE

file

RE: No. 72-1298 Commissioner of Internal Revenue v. Moritz

Attached is my recommendation in the above which was held for No. 71-1694 Frontiero v. Richardson listed on page 9 of the Conference List of Thursday, May 17.

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 16, 1973

71-1694 - Frontiero v. Laird

Dear Bill,

I see no need to decide in this case whether sex is a "suspect" criterion, and I would not mention the question in the opinion. I would, therefore, eliminate the first full paragraph on page 5, and substitute a statement that we find that the classification effected by the statute is invidiously discriminatory. (I should suppose that "invidious discrimination" is an equal protection standard to which all could repair, even though the dissenters would not find such discrimination in this case.)

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 5, 1973

No. 71-1694 - Frontiero v. Richardson

Dear Bill,

I agree with the thoughts expressed by Lewis Powell in his letter to you of March 2.

Sincerely yours,

P.S.
I.

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 7, 1973

No. 71-1694, Frontiero v. Richardson

Dear Bill,

I should appreciate your adding the following at the foot of your opinion in this case:

> MR. JUSTICE STEWART concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution. Reed v. Reed, 404 U. S. 71.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 15, 1973

Re: No. 71-1694 - Frontiero v. Laird

Dear Bill:

I think Reed v. Reed applied more than a rational basis test. Thurgood is right about this. If moving beyond the lesser test means that there is a suspect classification, then Reed has already determined that. In any event, I would think that sex is a suspect classification, if for no other reason than the fact that Congress has submitted a constitutional amendment making sex discrimination unconstitutional. I would remain of the same view whether the amendment is adopted or not.

Whether it follows from the existence of a suspect classification that "compelling interest" is the equal protection standard is another matter. I agree with Thurgood that we actually have a spectrum of standards. Rather than talking of a compelling interest, it would be more accurate to say that there will be times--when there is a suspect classification or when the classification impinges on a constitutional right--that we will balance or weigh competing interests. Of course, the more of this we do on the basis of suspect classifications not rooted in the Constitution, the more we approximate the old substantive due process approach.

Sincerely,

Mr. Justice Brennan

Copies to Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 1, 1973

Re: No. 71-1694 - Frontiero v. Richardson

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 1, 1973

Re: No. 71-1694 - Frontiero v. Richardson

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 5, 1973

Re: No. 71-1694 - Frontiero v. Richardson

Dear Bill:

This case has afforded me a good bit of difficulty. After some struggle, I have now concluded that it is not advisable, and certainly not necessary, for us to reach out in this case to hold that sex, like race and national origin and alienage, is a suspect classification. It seems to me that Reed v. Reed is ample precedent here and is all we need and that we should not, by this case, enter the arena of the proposed Equal Rights Amendment. This places me, I believe, essentially where Lewis and Potter are as reflected by their respective letters of March 2 and February 16.

Sincerely,

Harry

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 14, 1973

Re: No. 71-1694 - Frontiero v. Richardson

Dear Lewis:

Please join me in your circulation of March 12 concurring in the judgment.

Sincerely,

H. A. B.

Mr. Justice Powell

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 14, 1973

Re: No. 71-1694 - Frontiero v. Richardson

Dear Lewis:

Please join me in your circulation of March 12 concurring in the judgment.

Sincerely,

H. A. B.

Mr. Justice Powell

Copies to the Conference

yes

P.S. (To Mr. Justice Powell only) I may be suffering from a mental block, but I seem to have trouble with the last sentence of the paragraph at the top of page 2. My difficulty lies in the words "reflects inappropriate respect." I think my concern would evaporate if those words were replaced with "does not reflect appropriate respect" or something similar thereto.

H.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 15, 1973

Re: No. 71-1694 Frontiero v. Laird

Dear Bill:

Please join me.

I see no reason to consider whether sex is a "suspect" classification in this case. Perhaps we can avoid confronting that issue until we know the outcome of the Equal Rights Amendment.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 2, 1973

No. 71-1694 - Frontiero v. Richardson

Dear Bill:

This refers to your third draft opinion in the above case, in which you have now gone all the way in holding that sex is a "suspect classification."

My principal concern about going this far at this time, as indicated in my earlier letter, is that it places the Court in the position of preempting the amendatory process initiated by the Congress. If the Equal Rights Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. If, on the other hand, this Court puts "sex" in the same category as "race" we will have assumed a decisional responsibility (not within the democratic process) unnecessary to the decision of this case, and at the very time that legislatures around the country are debating the genuine pros and cons of how far it is wise, fair and prudent to subject both sexes ~~to identical responsibilities as well as rights~~.

The point of this letter is not to debate the merits of the Equal Rights Amendment, as to which reasonable persons obviously may differ. Rather, it is to question the desirability of this Court reaching out to anticipate a major political decision which is currently in process of resolution by the duly prescribed constitutional process.

I joined your opinion in its original draft on the authority of Reed v. Reed. This is as far as we need go in the case now before us. If and when it becomes necessary to consider whether sex is a suspect classification, I will find the issue a difficult one. Women

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

certainly have not been treated as being fungible with men (thank God!). Yet, the reasons for different treatment have in no way resembled the purposeful and invidious discrimination directed against blacks and aliens. Nor may it be said any longer that, as a class, women are a discrete minority barred from effective participation in the political process.

For these reasons, I cannot join your new opinion and will await further circulations.

Sincerely,

Lewis

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

1st DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: MAR 12 1973

No. 71-1694

Recirculated: _____

Sharron A. Frontiero and Joseph Frontiero, Appellants, *v.* Melvin R. Laird, Secretary of Defense, et al.	On Appeal from the United States District Court for the Middle District of Alabama.

[March —, 1973]

MR. JUSTICE POWELL, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against service women in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of the Court which holds that classifications based upon sex, "like classifications based upon race, alienage, and national origin," are "inherently suspect and must therefore be subjected to close judicial scrutiny." *Supra,* at 5. It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. *Reed* v. *Reed,* 404 U. S. 71 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

2nd DRAFT

From: Powell, J.

Circulated: _____

Recirculated: 3-15-73

SUPREME COURT OF THE UNITED STATES

No. 71-1694

Sharron A. Frontiero and Joseph Frontiero, Appellants, *v.* Melvin R. Laird, Secretary of Defense, et al.	On Appeal from the United States District Court for the Middle District of Alabama.

[March —, 1973]

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against service women in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of the Court which holds that classifications based upon sex, "like classifications based upon race, alienage, and national origin," are "inherently suspect and must therefore be subjected to close judicial scrutiny." *Supra,* at 5. It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. *Reed* v. *Reed,* 404 U. S. 71 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 8, 1973

Re: No. 71-1694 - Frontiero v. Richardson

Dear Bill:

Would you please add, wherever appropriate following the conclusion of your opinion in this case, a squib to the following effect: "Mr. Justice Rehnquist dissents for the reasons stated by Judge Rives in his opinion for the District Court, Frontiero v. Laird, 341 F. Supp. 201 (1972)."

Sincerely,

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS