

July 15, 1982

to: AKS  
from: Marianne

re: Equal Rights Amendment

You had requested that I pull together some information on the Equal Rights Amendment and related issues as the basis for developing a position on the reintroduction of the ERA, future Senate Judiciary Committee action on the amendment, and possible Senate action.

The following memo covers 1) background of development of ERA; 2) issues and controversy over ERA; 3) Wyoming's ratification and AKS campaign position; 4) AKS Senate statements on issue; 5) questions to consider in developing "new" position. There are a host of issues involving the extension of the ratification deadline, but since this issue is not particularly relevant to what you are interested in at this time, this memo will not cover that topic.

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#### 1. BACKGROUND OF DEVELOPMENT OF ERA

ERA was first introduced in Congress 3 years after the 19th Amendment (to provide women's suffrage) was ratified. Since that time -- 1923 -- ERA has been introduced in nearly every Congress and was finally approved by the 92nd Congress in 1972. The text of the proposed amendment is:

Section 1: Equality of rights under the law shall not be denied or abridged by the U.S. or by any State on account of sex.

Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3: This amendment shall take effect two years after the date of ratification.

Prior to 1972, the Senate had passed ERA twice: in 81st Congress (1950) and in 83rd Congress (1953). On both occasions, the measure included what was known as the "Hayden rider", which provided that "the provisions of this article shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex."

Years later in 1970, when the Senate considered the measure again, it adopted two amendments: to exempt women from the draft and to permit

recitation of nondenominational prayers in public schools and other public buildings. Supporters of ERA were so unhappy with these amendments that by unanimous consent the Senate laid aside the proposed ERA and took no further action in that Congress.

When the House passed the ERA the following year in 1971, it rejected two committee amendments which would have: 1) added the words "of any person" to Section 1, and 2) added a section allowing the exemption of women from the draft and holding that the ERA would not impair the validity of any law which "reasonably promotes the health and safety of the people."

The next year (1972), the Senate passed the ERA after rejecting 9 amendments offered by Senator Sam Ervin. The Ervin amendments were:

- exemption of women from compulsory military service/defeated 18-78 nays;
- exemption of women from service in combat units of the Armed Forces/defeated 18-71 nays;
- exemption of any laws which provide protections of exemptions of women/defeated 11-75 nays;
- exemption of any laws which provide protections or exemptions to wives, mothers, or widows/defeated 14-77 nays;
- exemption for any laws which impose upon fathers responsibility for the support of their children/defeated 17-72 nays;
- exemption of any laws which secure privacy to men or women, boys or girls/rejected 11-79 nays;
- exemption for any law which makes punishable as crimes sexual offenses/defeated 17-71 nays;
- provides for a distinction between the rights and responsibilities of male and female persons based on physiological or functional differences and gives Congress the authority to legislate accordingly/defeated 12-78 nays
- Ervin substitute language which provides equality of sexes, with exception for laws which exempt women from compulsory military service, which provide protections for wives, mothers and widows, which give fathers responsibility for children, secure privacy for men and women, and which

make punishable as crimes rape, seduction or other sexual offenses/ defeated 9-82 nays.

After rejection of these amendments, the Senate passed the ERA by a vote of 84-8 on March 22, 1972. Prior to the expiration of the ratification period (extended by Congress from 7 to 10 years in 1978), 35 of the necessary 38 states ratified the Equal Rights Amendment.

## 2. ISSUES AND CONTROVERSY RELATED TO ERA

There are three basic areas of controversy related to ERA: 1) interpretations of its probable effects in some areas; 2) whether there should be room in the law for "reasonable" distinctions in the treatment of men and women, and 3) whether a Constitutional amendment is the proper vehicle for improving the legal status of women.

1) There is general agreement regarding the intent of ERA. The Senate Judiciary Committee report on the bill stated "The basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men and women...The Amendment will affect only governmental action; the private actions and the private relationships of men and women are unaffected." Under ERA every Federal or state law which makes a discriminatory distinction between men and women would be invalid. Both proponents and opponents agree that the ERA would eliminate the use of sex as the sole factor in determining who would be subject to the military draft, who in divorce actions would be awarded custody of children or subject to support, who would be subject to longer jail sentences than others, etc. Thus certain responsibilities or protections now under current law would have to be extended to all persons or eliminated entirely.

One issue of interpretation, however, still under disagreement is whether the existence of separate restrooms, prisons and dormitories for males and females would be permissible under ERA. One point of view is that the right to privacy established in a Supreme Court case (Griswold v. Connecticut 1965) would permit a separation of the sexes with respect to

such places as public restrooms and sleeping quarters. The opposing view is that the most recent Constitutional amendment would take precedence over all other sections of the Constitution with which it is inconsistent, and to allow separate restrooms and dormitories would revive the "separate but equal" doctrine. Opponents of ERA also argue that the Supreme Court has not yet clearly defined the right to privacy and therefore it is impossible to ascertain how this principle would fare in interpretations of the ERA. Proponents argue that separate restrooms in no way discriminates on the basis of sex and does not violate the ERA.

2) The second disagreement concerns the argument whether it is in the best interests of the women in the United States to establish absolute equality of treatment under law. There are some who argue that it is appropriate to recognize unique characteristics or traditional societal roles under law, while the opposing view maintains that all citizens should share equally the rights and responsibilities of citizenship.

3) The final area of concern surrounding the ERA is whether a Constitutional amendment is the best way to improve the legal status of women in the U.S. One point of view is that the 14th Amendment, if properly interpreted, would nullify every law lacking a rational basis which makes a distinction between men and women. This view is closely aligned with the notion that men and women should not always receive equal treatment under law. Relying on the 14th Amendment would appear to give more flexibility than the ERA would.

Those who support this view cite a Supreme Court decision (Reed v. Reed 1971) which gives strong indication that sex-based discrimination is in violation of equal protection clause of 14th Amendment. (In this case, Court ruled as unconstitutional an Idaho statute which gave male relative preference over female relatives as administrators of estates. This case represented the first time the Court had struck down a law which discriminated against women.) Since Reed there have been several other cases -- as recent as 1977 -- which struck down gender

classifications.

On the other hand, several recent Supreme Court decisions have upheld gender classifications which discriminated against men and in favor of women -- on the basis that they are intended to overcome historic discrimination against women.

Because of this fact that gender discriminations have not been struck down with consistency by the Supreme Court in recent years, supporters of ERA argue that there is a need for a clear rule that gender classifications are suspect and that they must be justified by showing a compelling interest in order to be sustained. To date, the Court has not held that sex discrimination is "suspect" under the equal protection clause of the 14th Amendment, thus leaving the burden of proof on a complaining woman that a sex-based discrimination is unreasonable.

### 3. WYOMING'S RATIFICATION OF ERA AND AKS CAMPAIGN STATEMENTS

Wyoming ratified ERA on January 26, 1973. The House voted 41-20 on Jan. 15, 1973 and the Senate approved the bill 17-12 on Jan. 24, 1973. An effort to rescind the ratification was defeated on January 22, 1977 by a vote of 16-14 in the Senate. Wyoming is among the 16 states who have specific equal rights provisions in their constitutions.

The following is the text from the AKS Position Papers from the campaign:

#### ERA

I voted against the ERA in the Wyoming legislature because I felt it would unnecessarily duplicate the clear language in the Wyoming Constitution assuring women full rights.

I strongly favor the concept of equal rights for women. The issue of equal pay for equal work has been of particular interest to me. I successfully sponsored an amendment to the Wyoming Retirement System that gave women the same retirement benefits as men.

With regard to ERA, I am also troubled by the ambiguity surrounding the issue of women possibly serving in the combat role in our armed forces. Furthermore, although I favor equal rights, I am not certain that any positive results would result from only the symbolism of ERA ratification.

ERA Ratification -- Extension of the Deadline

I oppose the extension of the deadline for ERA ratification. My reasons for that was not based solely on the issue itself. I simply feel that seven years is enough time to ratify any constitutional amendment if it has the level of popular support expected by the Founding Fathers to be required for amendments. If much more time is given -- as has happened with ERA -- there is a risk that amendments will be ratified that never really have such support. This risk certainly exists with respect to ERA.

This risk could have been further reduced, if in addition to extending the deadline, Congress had authorized states to rescind prior ratification. Unfortunately, Congress refused to grant such authority.

To me this represents "ends-justify-means" thinking by supporters, which is very hazardous. The federal Constitution is the most important guarantee of our liberty. If the political pressure of special interests is allowed to tamper with the Constitution, we will all lose. If the American people no longer regard the highest law of the land as legitimate because unfair procedures are used -- as has occurred with extension of the ERA ratification deadline -- then the common faith in our Constitutional system which holds the diverse factions in our society together will be weakened.

4. AKS SENATE STATEMENTS ON ERA

The first CMS we developed on the issue of ERA was essentially your campaign statement. However, a year ago, in July 1981, you decided to expand the language somewhat. The following is the current CMS on ERA:

Thank you for contacting me concerning my position on the Federal Equal Rights Amendment to the U.S. Constitution. I appreciate your interest in my views and I welcome this opportunity to share with you my thoughts on this issue.

While a member of the Wyoming Legislature I did not vote in favor of the Equal Rights Amendment since I felt it would only unnecessarily duplicate the already clear language of the original Wyoming Constitution which assured women full rights. In addition, there were many additional statutory measures on Wyoming's law books which supplemented the original statute granting women the right to vote. That novel concept (for that period of our history!) was met with such an extraordinary response throughout the world that the Wyoming Legislature in subsequent sessions included many other most significant "rights" for women -- rights that had never been dealt with in any legislative body. As I perceived it, the Equal Rights Amendment would have expunged those specific laws in favor of women from the statute books.

In addition, I was not certain then -- neither am I now -- as to what really might result from the ERA ratification -- other than the symbolism of the action.

I have always been one to believe that the only real way for women to achieve equality in the workplace, in education, and in all aspects of the economic arena is to actually do something! By that I mean that economic protest is the key. Boycott the supermarket which pays the lower salaries to women than men -- withdraw money from the bank which purposely fails to promote competent women to management positions -- don't do business with the company that exploits women. Those seem like very realistic approaches to me.

I strongly favor the concept of equal rights for women -- especially equal pay for equal work. That issue has always been of particular interest to me. While in the State Legislature I was the author of an amendment to the Wyoming State Retirement System that gave women the same retirement benefits as men -- abolishing a decades' old prejudice.

In addition, I have consistently voted -- as a member of the United States Senate -- to provide indigent women under the Medicaid Program with the same abortion rights available to the wealthy -- as long as abortion continues as a legally acceptable surgical procedure in the United States of America -- which it certainly is at the present time.

I intend to continue to approach and weigh carefully each issue of particular concern to women in the Equality State -- having an open mind and a willingness to consider each and every proposal and the arguments pro and con -- as they are presented to me.

I thank you for this opportunity of expression. I trust you will continue to bring your interests and concerns to my attention.

With kind regards,

##### 5. QUESTIONS TO CONSIDER IN DEVELOPING NEW POSITION

- ERA may be necessary to clarify sex-discrimination policy in U.S. since Supreme Court decisions have not been consistent as they relate to right to privacy under 14th Amendment. Perhaps a Constitutional Amendment is the only vehicle to guarantee equal rights for women.
- Only 16 states guarantee rights for women in their own constitutions. As a state legislator, AKS did not perceive need for ERA in Wyoming -- since Wyoming Constitution has those guarantees; but now as Federal legislator, has additional responsibility of surveying national picture on this question.
- if ERA is only a symbol -- as some opponents charge -- can it be demonstrated that progress has been made in Federal and state laws to

ban discrimination based on sex? Furthermore, should the question of women's rights be left up to state courts, if there is a fundamental equality for all American women at stake which should not vary from state to state?

--perhaps amendments to the new ERA amendment should be considered --  
as they were during previous Congressional debates/to clarify some  
of those areas of concern which opponents have pressed during the  
10 year ratification process.

*Marianne*