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SLADE GORTON
WASHINGTON

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SPOKANE, WASHINGTON 99201
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United States Senate

WASHINGTON, D.C. 20510

COMMITTEES:
COMMERCE, SCIENCE AND
TRANSPORTATION
ENVIRONMENT AND
PUBLIC WORKS
BUDGET
SMALL BUSINESS
INDIAN AFFAIRS

August 19, 1982

Dear Colleague:

On August 18th I introduced a bill which would require classifications based on gender, created by the United States or by any State, to be subjected to the same level of judicial scrutiny as classifications based on race. The purpose of this bill is to grant some immediate relief to those Americans who suffer the economic and social burdens of the many state and federal laws which discriminate on the basis of gender.

As I said in my floor statement, which is enclosed, I believe achieving equality of rights under law, regardless of sex, is so imperative that I am not willing to forego consideration of any measure which will contribute to that achievement. At the same time, however, those of us who believe this guarantee should be expressly stated in the Constitution must continue to work toward our goal. I have introduced this proposal at this time, in order to allow interested groups and individuals adequate opportunity to consider the merits of such a proposal and to provide me with sufficient feedback so that I will be in a position to urge the Senate's consideration of this measure early in the 98th Congress.

While I am not now actively seeking cosponsors, I will, of course, include any who do wish to cosponsor, and I would appreciate your comments and/or questions. If you have either, please have your staff contact Marianne McGettigan, of my staff, at 4-2621.

Sincerely,



SLADE GORTON

SG:mmv
Enclosure



United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 97th CONGRESS, SECOND SESSION

Vol. 128

WASHINGTON, WEDNESDAY, AUGUST 18, 1982

No. 114

Senate

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. GORTON (for himself,
Mr. BOSCHWITZ and Mr.
RUDMAN):

S. 2851. A bill relating to compelling governmental interests; to the Committee on the Judiciary.

COMPELLING GOVERNMENTAL INTERESTS IN RELATION TO SEXUAL DISCRIMINATION

Mr. GORTON. Madam President, like many of my colleagues and a majority of Americans, I am disappointed that the equal rights amendment is not now a part of the Constitution of the United States; and I pledge my full support to a renewed ERA effort.

The notion that equality of rights under law, regardless of sex, however, is not merely a fundamental principle which ought to be in the Constitution, it is a matter of grave economic and social consequence for millions of Americans. I am not prepared, therefore, to forego consideration of other means by which to achieve the substance of the equal rights amendment simply because we have not yet succeeded in reaching our final goal of guaranteeing that substance through a constitutional amendment. To forego such alternatives during our quest for that goal would seem to me to admit that the attainment of the substance of the equal rights amendment was something less than imperative. That is a proposition which I cannot accept.

The statutory proposal which I am introducing today, therefore, requires that classifications based on sex, both de jure and de facto, created by the United States or by any State, be subjected to the same level of judicial scrutiny as classifications based on race. At the present time, the Supreme Court will uphold a racial classification only if it is necessary to achieve a compelling governmental interest. A classification based on sex, however, will be upheld if it serves an important governmental interest and is substantially related to the achievement of that interest, a less difficult standard to meet.

I must stress that this proposal does not involve any question of court jurisdiction nor does it seek to substitute Congress view of what the equal protection clause requires for that of the Court. It is intended to be remedial only, making certain actions of the States and the Federal Government illegal, even though they are not unconstitutional. Congress can prohibit such actions by the States if it determines that such actions, while not unconstitutional, nonetheless tend to perpetuate the effects of past sex discrimination. I am convinced that the facts will support such a finding.

I have heard much discussion among my colleagues of possible statutory approaches toward providing greater rights for all persons regardless of sex. Such proposals, as far as I can determine, have all dealt with specific subjects, such as insurance and pension reform. The bill I am introducing today paints with a broader brush than these other measures in that it can be the basis for invalidating existing discriminatory statutes and preventing legislatures from enacting additional discriminatory statutes in the future. It may well be, however, that it will still be necessary for Congress to consider subject-specific legislation to complement this bill.

Due to the limited time remaining in this session, it is obvious that I am not introducing this bill with the intention of actively pursuing its passage in this Congress. Moreover, because of the somewhat unique approach taken in the bill, I cannot and do not expect an immediate response to it from those groups which have worked so diligently for the ratification of the equal rights amendment. I appreciate the fact that in the next several months these groups, as well as the Congress, must give due consideration to a variety of approaches and remedies. I hope, however, that by introducing the bill at this time it will be included in any such discussion and that I will receive sufficient feedback on it in the

coming months to be able to urge its consideration by the Senate early in the 98th Congress.

I trust that those reviewing this proposal will do so with open minds and give serious thought to the utility of such a measure as a method of dealing promptly with the current denial of economic and social rights to so many Americans.

Madam President, I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2851

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

PURPOSE AND FINDINGS

SEC. 1. (a) Congress finds and declares that—

(1) classifications based on sex have often resulted in individuals being relegated to an inferior legal status without regard to individual capability, worth or need; and,

(2) classifications based on sex which are not necessary to achieve a compelling governmental interest tend to perpetuate the effects of past sex discrimination; and,

(3) classifications based on sex are inherently invidious and suspect.

(b) In light of the findings contained in this section and in order to secure the equal protection of the laws for all persons regardless of sex, Congress, pursuant to the necessary and proper clause of article I of the Constitution of the United States, and pursuant to section 5 of the fourteenth amendment to the Constitution of the United States, enacts this Act.

CLASSIFICATIONS BASED ON SEX

SEC. 2. (a) Each person has the right to be free from any classification based on sex and made by the United States unless such classification is necessary to achieve a compelling interest of the United States.

(b) No State shall make a classification based on sex unless such classification is necessary to achieve a compelling interest of the State.

(c) Every person who, under color of any Federal or State law, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to a classification based on sex which is not necessary to achieve a compelling governmental interest shall be liable to the person injured in an action at law, suit in equity, or other proper proceedings for redress.

RELIEF

SEC. 3. (a) Any person aggrieved by a violation of this Act may bring a civil action in the appropriate district court of the United States for such legal and equitable relief as may be appropriate: *Provided*, That, no cause of action for damages may arise under this Act until one year after the date of enactment of this Act.

(b) The Attorney General may bring an action for declaratory or injunctive relief in any appropriate case in which the Attorney General determines that the rights of persons aggrieved under this Act will be served by bringing such action.

DEFINITIONS

SEC. 4. (a) The term "State" as used in this Act includes each of the several States, any Commonwealth or territory of the United States, and any political subdivision thereof.

(b) The term "law" as used in this Act includes any statute, ordinance, rule, regulation or the administration thereof, or any custom or usage.

(c) The term "classification based on sex" as used in this Act includes any de jure, gender-based classification and any law of the United States or of any State which has a disparate impact on individuals of different gender who are otherwise similarly situated

APPLICATION

SEC. 5. (a) If any provisions of this Act or the application of this Act to any person or circumstance is judicially determined to be invalid, the remainder of the Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

(b) This Act shall supersede any inconsistent provision of Federal law.

MEMORANDUM

THE WHITE HOUSE
WASHINGTON
February 22, 1983

FOR: MIKE UHLMANN
FROM: JUDY JOHNSTON
SUBJECT: Attached Correspondence

Attached is a letter to the President from Representative Kramer et al regarding H.J. Res. 1 and the Administration's alternative.

Ken Duberstein has forwarded the letter to OPD for preparation of a draft reply Please note that the President has expressed interest in the proposal so our action should not get buried.

May I please have a draft reply for Ken Duberstein's signature by COB 2/28.

Thanks.

cc: Emily Rock

*Judy -
I have been in touch with
Duberstein's folks about this.
Dressendorfer is to get back to me
on how they want to proceed.
It may be preferable to have
a mtg. with Kramer rather
than a formal written response.
In any event, it's leg. affairs' call
at this point. Mike
3.1.83*

HUD16

**WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET**

- O - OUTGOING
- H - INTERNAL
- I - INCOMING

Date Correspondence Received (YY/MM/DD) 83102105

Name of Correspondent: Ken Korman

MI Mail Report User Codes: (A) _____ (B) _____ (C) _____

Subject: Respects the President's support for a bill that will promote equal rights for women.

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>SA Duke</u>	ORIGINATOR	<u>83102105</u>	<u>KD</u>	<u>A</u>	<u>83102115</u>
<input checked="" type="checkbox"/> <u>PD Rock</u>	Referral Note: <u>DCS</u>	<u>83102118</u>			<u>1 1</u>
	Referral Note:	<u>1 1</u>			<u>1 1</u>
	Referral Note:	<u>1 1</u>			<u>1 1</u>
	Referral Note:	<u>1 1</u>			<u>1 1</u>

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
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:

- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments: _____

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 Always return completed correspondence record to Central Files.
 Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

February 15, 1983

Dear Ken:

On behalf of the President, I would like to thank you for the recent letter which you cosigned with your colleagues regarding your legislative alternative to H.J. Res. 1, dealing with the ERA.

The President was pleased to hear from you on this matter, and I assure you that we will be taking a close look at your proposal. We look forward to working with you on this very important issue.

With best wishes,

Sincerely,

Kenneth M. Duberstein
Assistant to the President

The Honorable Ken Kramer
House of Representatives
Washington, D.C. 20515

KMD/CMP/sy6-KMD2

cc: w/copy o inc., Emily Rock - for DRAFT response
w/copy of inc., Dee Jepsen - FYI
(PLEASE NOTE: On the President's Log of Congressional Mail, the President indicated that we should look into this proposal.)

WH RECORDS MANAGEMENT HAS RETAINED ORIG. INC.

1
KD
Congress of the United States

House of Representatives

Washington, D.C. 20515

February 1, 1983

123027

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

As you know, your Administration and Republicans on the Hill have been unfairly branded as being anti-women. Certainly this is not the case, as demonstrated by your recent appointment of women to the Cabinet. Nevertheless, we can expect this argument to be renewed when the House takes up the Equal Rights Amendment.

Moreover, we can expect Members who support ERA to be much more vocal on this issue than in previous Congresses. "Tip" O'Neill and others have already vowed to make ERA a top legislative priority during the 98th Congress. To this end, ERA has been designated as H.J.Res.1.

Today, we have just introduced a bill which is similar to one sponsored by Congressman Kramer during the 97th Congress. This legislation would, under the equal protection clause of the 14th Amendment, make sex a "suspect classification" in order to "establish a uniform nationwide standard governing classifications based on gender." The bill applies to federal, state, and local governments by prohibiting any government from making or enforcing by law a classification based upon gender unless such classification is "necessary to achieve a compelling government interest and is the least burdensome alternative possible." Under the bill, the President or Congress would have the power to declare that a compelling interest exists which is the least burdensome alternative in classifications relating to national defense. This will allow for the appropriate handling of issues relating to women in combat and the draft.

The question arises whether Congress has the constitutional power to enact such a bill. According to a September 27, 1982, Congressional Research Service analysis, the basis of Congress' authority to enact such legislation is rooted in both Article I of the Constitution, the "necessary and proper clause," and, with respect to state action, Section 5 of the 14th Amendment to the Constitution which gives Congress the authority to enforce its provisions by "appropriate" legislation. Importantly, there is precedent for upholding such constitutional power.

In 1966, the City of Rome, Georgia, instituted electoral changes such as annexing outlying areas and requiring a majority instead of a plurality vote for members of the city commission. Under the Voting Rights Act of 1965, which was enacted by Congress pursuant to the enforcement provision of the 15th Amendment, Rome could not promulgate electoral changes unless they were

The President
February 1, 1983
Page 2

approved by the attorney general. The attorney general and lower federal courts disapproved Rome's electoral changes because such changes would, in effect, dilute black voting strength and thus were discriminatory.

In City of Rome v. the United States, 446 U.S. 156 (1980), the Supreme Court upheld the constitutionality of the Voting Rights Act and stated that the act's ban on electoral changes that were discriminatory was in effect an appropriate method of promoting 15th Amendment purposes. Thus, the court found that Congress had acted within its power to enforce the 15th Amendment. The 14th Amendment enforcement provision, which is the basis for the applicability of this bill to state and local government, is similar to that in the 15th Amendment.

The 97th Congress passed the Voting Rights Act extension, again pursuant to the enforcement provision of the 15th Amendment. Senate Judiciary Committee Report No. 97-417 states that the extension "is a clearly constitutional exercise of congressional power under Article I and the 14th and 15th Amendments. By now the breadth of congressional power to enforce these provisions is hornbook law..."

In July 1982, the Supreme Court decided another landmark case in Mississippi University for Women v. Hogan, 102 S.Ct. 3331 (1982). The case involved a male student who was denied admission to a state-supported professional nursing school solely because of his sex. The university contended that such action was lawful in light of a Mississippi state anti-discrimination statute which contained a provision exempting "any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex..." Justice O'Connor delivered the Court's opinion that the university violated the male student's constitutional right to equal protection of the law under the 14th Amendment by refusing to admit him to the university's nursing school. The court stated that a statute or policy that classifies individuals on the basis of sex can be justified only if the classification "serves important governmental objectives" and is "substantially related to the achievement of those objectives."

The decision in Mississippi is especially noteworthy. Prior to 1971, the Supreme Court did not use the equal protection clause of the 14th Amendment in sex-discrimination cases. Since 1971, while the Supreme Court has been using the equal protection clause in such cases, it has not applied the rigorous test of "strict scrutiny" which it applies to race and national origin cases. The decision in Mississippi implies that the court is moving closer to the test of strict scrutiny that is mandated in the bill.

In closing, we feel the bill would successfully address the issue of sex discrimination without risking the unintended consequences of a constitutional amendment which reads in absolute terms. Thus, it constitutes a viable alternative. Your

The President
February 1, 1983
Page 3

support would not only enhance its chances of passage, but would also demonstrate that the Administration is serious in advancing, guaranteeing, and promoting equal rights for women.

We look forward to your comments.

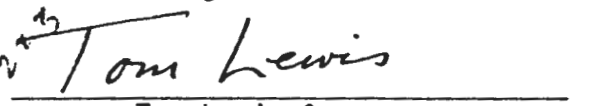
Sincerely,

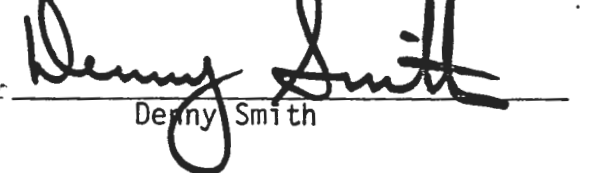
Ken 2/29


Ken Kramer

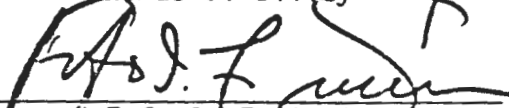
George 1/65


George Hansen

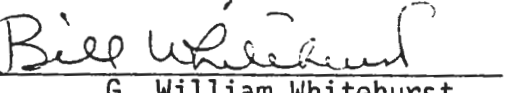
Tom 2/23

Tom Lewis

Denny 2/26

Denny Smith

Tom 2/29

Thomas J. Bliley

7/23/86

Fofa I. F. Sunia

John 10/1

John J. Duncan

Bill 4/17

G. William Whitehurst