MEMORANDUM

TO: Task Force and Resource Personnel
FROM: Dean Wren
DATE: August 29, 1973

I hand you, herewith, a copy of Professor Leedes's final draft of a memorandum with regard to the standard of scrutiny to be used in connection with the constitutionality of statues under equal protection, the discriminating clause in the Virginia Constitution, and the proposed Equal Rights Amendment.

I hope that you will find that this will be of help to you as you proceed with your work.

HGW/pb
Enclosure
I. Laws of Virginia dealing with labor and employment which discriminate on the basis of sex would, in the absence of ERA, be subject to attack in at least three ways.

(a) Under the 14th Amendment to the United States Constitution such discriminatory laws would be subject to judicial review and would be invalid at least to the extent that they are "patently arbitrary" and bear no rational relationship to a legitimate governmental interest. (See Reed v. Reed, 404 U.S. 71 (1971).) It may even be true that such discriminatory laws would be subjected to so-called "strict scrutiny" under the 14th Amendment, even though traditionally such "strict scrutiny" has been reserved for discrimination related to race, alienage, and national origin.

Supreme Court

In the recent Sup. Ct. case of Frontiero v. Richardson, 93 S. Ct. 1764 (1973), the Court struck down a provision of federal law which discriminated on the basis of sex in connection with dependency allowances in the armed services of the United States. The discrimination resulted from a provision which required proof of support where the spouse of the military person was a male but indulged in a presumption of support where the spouse of the military person was a female. Four members of the Court felt that classification on the basis of sex should be treated as a "suspect" classification and subjected to strict scrutiny, without burden being on the government to demonstrate a compelling need for the distinction. One member of the Court concurred in the result without an opinion, one member dissented without an opinion, and three members concurred in the result with an opinion, written by Justice Powell, that sex should not at this time be added "to the narrowly limited group of classifications which are inherently suspect." These concurring justices felt that the discriminatory law involved in the case at bar could readily be invalidated under the traditional approach; i.e., that the discrimination bore no rational
relationship to a legitimate government interest. These justices felt that any decision to extend the strict scrutiny test to sex discrimination should be deferred until a case arises in the Court clearly calling for its application and until the status of the ERA is resolved by the states.

(It should be noted that the Frontiero case arose under the Due Process clause of the 5th Amendment because the law involved was a federal one; in the Reed case, the Equal Protection clause of the 14th Amendment was involved because the case concerned itself with a state statute which discriminated against women as administrators of estates. The Court in Frontiero, however, seemed to draw no distinction as to the treatment to be accorded sex discrimination under the 5th Amendment and the 14th Amendment.)

Thus, though there would seem to be an movement in the direction of treating sex discrimination under the existing federal constitution by the same strict standards which are applied to racial discrimination, the Supreme Court at this time has not clearly resolved the issue.

The issue of the standards of judicial review to be applied in sex discrimination cases is treated more extensively elsewhere in the Task Force’s report. In it, there can be little doubt that the passage of ERA would at the very least result in the application of the strict scrutiny standard to laws which contain sex classifications. Indeed it is quite possible that ERA would result in an even more rigid standard than strict scrutiny, an absolute standard which per se invalidate all statutory sex classification except where based on a unique physical characteristic. (See Emerson, in support of the Equal Rights Amendment, 6 Harv. Civ. Rts. -- Civ. Lib. L. Rev. 225, and Freund, The Equal Rights Amendment Is Not The Way, 6 Harv. Civ. Rts. -- Civ. Lib. L. Rev. 234.)

(b) Article I - Section 2 of the Virginia Constitution, adopted as part of the recent Constitutional Revision of the Commonwealth, contains a provision outlawing government discrimination on the basis of sex except where mere
separation of the sexes is involved. In Archer and Johnson v. Mayes, 213 Va. 633 (1973), the Va. Sup. Ct. in upholding the constitutionality of Virginia statutes which permit women to exempt themselves from jury service in certain circumstances, stated that the new Virginia constitutional provision will invalidate legislation only where such legislation is not rationally related to a legitimate governmental interest. In other words, the Virginia Supreme Court has indicated that the Virginia provision is to be construed in a way similar to the construction of the 14th Amendment to the United States Constitution.

Thus it does not appear that the Virginia Constitution provides the same absolute rule about sex classification that would obtain under the EHA.

(c) There are two provisions of federal statutory law which might directly impinge upon sexual discrimination in labor and employment. One of these is the so-called Equal Pay Act of 1963 which was adopted as an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. 206 (d). Essentially this Act provides that every employer who is covered by the Act must give equal pay for equal work to his employees without regard to sex. Presumably this statute would displace any state statute or regulation which established sex classifications in connection with the payment of wages. (See Rivera v. Division of Industrial Welfare, 265 C.A. 2d 576 (Cal. 1968)). Such statutes are rare and none appears to exist in Virginia.

The other basic federal statute which might impinge upon labor and employment in the Commonwealth is the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e. This Act places sex in the same category as race, religion, color or national origin and outlaws discrimination by an employer against an employee on any of these bases. It is not altogether clear whether this Act would be construed to replace all state legislation which is "protective" in nature such as the Virginia statute which states that employers must provide "suitable restrooms or seating facilities" for similar employees who are required to stand while working (Va. Code Sec. 40.1 - 34) or the Virginia statute which requires an employer of four or more persons of both sexes to provide separately labeled toilet facilities, Va. Code Sec. 40.1 - 39. It does appear clear, however, that the Civil Rights Act and regulations
promulgated under it by the EEOC render unenforceable state legislation which limits the employment of females at certain hours or in certain kinds of positions because of some presupposition about the characteristics of the sex which ignores individual capacities and qualifications. The only exceptions which are likely to be recognized are the so-called "authenticity" or "genuineness" exceptions; e.g., as in the case of an actor or actress.

(29 C.F.R. Sec. 1604.1):

"(b) (1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

"(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception."

Passage of ERA would have no direct legal impact on either of the pieces of federal legislation referred to above. Insofar as these acts displace or invalidate state law they derive from Congress's power under the 14th Amendment; insofar as they regulate practices of private employers where no "state action" is involved
they derive from Congress's power under the Commerce Clause of the United States Constitution. They could, of course, be modified by Congress to make them either more or less rigorous without regard to whether or not ERA is passed. ERA government discrimination action at the state or federal level would have no direct impact on private employers.

II. The Virginia Code article dealing with Labor and Employment contains very few statutes which involve sex qualifications. Since the time of the adoption of the new Virginia Constitution provisions outlawing such discrimination, the Virginia General Assembly has adopted amendments to a number of statutes dealing with labor and employment to make them sex neutral. For example, Section 40.1-80 formerly contained provisions establishing different rules as to the hours when boys and girls may work. The 1973 amendment treats both sexes alike. For further examples of this kind of amendment, see: Sections 40.1-99, 101, 105, 106, 109, 112. Similarly, the Virginia statute which prohibits females from working in mines or quarries was amended in 1973 to eliminate the prohibition in Section 45.1-32. Similar amendments occurred in those parts of the Code dealing with Workmen's Compensation and with Health. See, for example, the amendment to Section 32-423 dealing with sexual sterilization which formerly provided that no sterilization procedure could be performed within 30 days from the date of the request therefor "on any female who has not theretofore given birth to a child." As amended, the statute extends this protective provision to "any person who has not theretofore become the parent of a child."

There do remain several statutes dealing with labor and occupations which contain sex classifications, see Article 3, Chapter 3 of Title 40.1.

Section 40.1-34 requires that employers provide suitable restrooms or seating facilities for females whose jobs require them to stand while working. It seems doubtful that this statute is invalidated by any existing rule of law. As has been noted above, the 14th Amendment to the United States Constitution and Article 1, Section 11, of the Virginia Constitution are not likely to be applied
with the kind of strictness which would overturn a statute arguably related to a rational objective. The Civil Rights Act of 1964 might be construed as displacing the statute on grounds that it imposes an additional cost to employing females which might result in discriminating against their employment, or on grounds that it discriminates against men by failing to require for them a similar benefit. There seems little doubt that the statute would be invalid under ERA.

Section 40.1-35 places a limitation on the number of hours per day and the number of hours per week for which a female may be employed (the statute is subject to many exceptions - Sec. 40.1-36). This statute may or may not be illegal under the 14th Amendment to the United States Constitution or Article 1, Section 11 of the Virginia Constitution but is almost certainly displaced by the Civil Rights Act since it is based on some stereotypical premise that more women than men are suited for long hours and since its enforcement would result in depriving women of certain kinds of employment and of eligibility for overtime. Of course the statute would also be invalid under ERA. Sections 40.1-37 and 40.1-38 have to do with record-keeping and penalties for violation in connection with 40.1-35 and 36 and are hence invalid to the degree which those sections are invalid.

Section 40.1-39 requires an employer of four or more persons of both sexes to provide separate toilet facilities. It seems likely that this statute continues to be valid under current law. Whether or not it would be invalidated by ERA is debatable. Some have contended that even the strictest application of ERA would not invalidate such statute as this one because of the supervening constitutional protection of the right to privacy. It is not clear, however, that the Supreme Court's recognition of the right to privacy has or will have been articulated in terms which would speak to the question of the separation of the sexes. The right to privacy which begins to emerge from such cases as Griswold v. Connecticut, 381 U.S. 479 (1965) seems intended to protect certain private decisions and private sanctuaries from governmental intrusion. It might be a rather long
step to move from this tentative recognition of a new constitutional right to a position in which the state's interest in segregating toilet facilities is constitutionally guaranteed. Thus it may be that Section 40.1-39 would be suspect under the kind of strict standards of review which ERA is likely to create.

Conclusion:

The passage of the ERA would apparently have little impact on Virginia law pertaining to labor and employment. The provisions of federal law contained in the Equal Pay Act and the Civil Rights Act would not be directly affected by the amendment, though of course the symbolic effect of the amendment's passage might result in more vigorous enforcement.

Most Virginia statutes dealing with labor and employment which contained sex classifications have already been amended by the General Assembly, presumably as a result of passage of Article 1, Section 11 of the Virginia Constitution. Of the remaining statutes which contain sex classification, at least one (that dealing with maximum working hours for women) is already unenforceable under the Civil Rights Act of 1964 and regulations promulgated pursuant thereto, one (that dealing with suitable restrooms and seating facilities for women) is probably now valid but would likely be invalid under ERA, and one (that dealing with separate toilet facilities for the sexes) is valid under existing law and might or might not be invalidated by ERA.