ORIGINAL

In the

Supreme Court of the United States

PERSONNEL ADMINISTSATION OF MASSACHUSETTS, ET AL.,	)	
Appellants,	)	
VS	)	No. 78-233
HELEN B. FEENEY,	)	
Appellee.	)	

Washington, D. C.
February 26, 1979

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v.	No. 78-233
HELEN B. FEENEY, Appellee.	

Washington, D. C.

Monday, February 26, 1979

The above-entitled matter came on for argument at 11:01 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY R. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

THOMAS R. KILEY, ESQ., First Assistant Attorney General of Massachusetts, One Ashburton Place, Boston, Massachusetts 02108; on behalf of the Appellants.

RICHARD P. WARD, ESQ., Ropes & Gray, 225 Franklin Street, Boston, Massachusetts 02110; on behalf of the Appellee.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in Personnel Administrator of Massachusetts v. Feeney.

Mr. Kiley, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS R. KILEY, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. KILEY: Mr. Chief Justice, and may it please the Court: My name is Thomas R. Kiley, and I am the First Assistant Attorney General of the Commonwealth of Massachusetts. With me as counsel today is Attorney General Francis X. Bellotti.

We appear today in defense of the Commonwealth's veterans' preference statute, a statute which was codified when challenged, is Massachusett's General Laws, Chapter 31, section 23, and which is set forth in the form in which it existed at that time at page three of our brief.

In essnece, it is a positional veterans' preference statute which places veterans who qualify for civil service jobs by passing examinations at the top of civil service lists of those eligible for appointment to jobs.

This positional preference statute is challenged by Helen B. Feeney, a non-veteran female who alleges that the application of the statute denies her and people of her gendre equal protection of the laws. The thrust of her complaint is that few women are veterans and that application of

the veterans' preference naturally excludes women from civil service jobs.

The case comes to this Court on appeal from a divided three-judge panel of the United States District Court for the District of Massachusetts. That court first decided this case in March of 1976, invalidating the state statute largely on the basis of its impact on women. On our original appeal, you remanded the cause to the District Court for reconsideration in light of Washington v. Davis, a case which we submit repudiated the impact analysis used by the court below.

QUESTION: Is this exclusively an equal protection case?

MR. KILEY: It is explicitly an equal protection case, Mr. Justice Stewart. It could not be a title 7 case. Under title 7, veterans' preference statutes are explicitly excluded.

QUESTION: And no reliance is placed upon the due process clause?

MR. KILEY: It is an equal protection clause case as it has been decided.

QUESTION: And as has been argued, supported?

MR. KILEY: Yes, Mr. Justice Stewart.

The three-judge panel reconsidered this case on the original record and adhered to its original ruling, essentially

agreeing with Mrs. Feeney's basic contention that the veterans' preference statute as applied in Massachusetts invidiously discriminates against women in violation of the equal protection clause. We obviously disagree with that conclusion, but we do not disagree with everything that the District Court had to say in this case, and the areas of agreements are important to emphasize at the outset of the argument because they serve to narrow our focus.

First, nobody seems to contend that the concept of civil service hiring preference for veterans is itself unconstitutional. Each of the judges who considered this case, the parties before this Court and the amicus curiae all seem to start from the premise that veterans' hiring preferences are constitutional in that they further important societal objectives.

QUESTION: That is, there is no claim that -- assume there were an equal number of males and females who are veterans and non-veterans -- there is no claim that the discrimination in favor of veterans and against non-veterans is itself --

MR. KILEY: Unconstitutional.

QUESTION: -- violative of the equal protection clause.

MR. KILEY: And those who challenge the concept of veterans' preference, those who challenge this preference do

not challenge it because of the concept but because they believe this statute goes too far.

QUESTION: And discriminates against females.

MR. KILEY: I think the essence of the District Court's opinion is that there is nothing unconstitutional about the statute even though fewer women benefit, but that this particular statute goes too far.

QUESTION: Well, you refer to the District Court's opinion. You really have to take Judge Campbell's opinion and Judge Tauro's opinion together, don't you, to --

MR. KILEY: Frankly, Mr. Justice Rehnquist, I think I have to take both of their opinions in both of the cases because of the way this particular case happens to come before the court.

To the extent that the disagreement on the form of the particular statute may be appropriately framed in the judicial as opposed to legislative forum, its resolution before this Court may well turn on the operation of the Massachusetts civil service system and the facts of this particular case.

If I accomplish nothing else today, I hope to focus the Court's attention on the operation of the statute and on the facts in this case.

The second statement of the District Court's opinions with which we wholeheartedly concur is the conclusion

that the Massachusetts veterans' preference was not enacted for the purpose of disqualifying women from receiving civil service positions, and its concession that the state's prime objective of aiding those who serve our country in time of war is rational and legitimate.

The third point on which we agree with the lower court is that this case is not a vehicle for an evaluation of the constitutionality of federal enlistment policies, policies which the plaintiff, Mrs. Feeney, presumes amount to a de jure system of sex discrimination in federal military service.

If the plaintiff or a class of women want to challenge the federal enlistment policies, let them do so directly and not collaterally and let the federal government have the opportunity to defend its own statutes and regulations.

We are concerned here today not with the federal policies themselves but solely with the question of the validity of the Massachusetts veterans' preference and the answer to the question turns largely, according to the plaintiffs, on the application, operation and effects of the statute.

Before any analysis of this case, we must begin with an understanding of the Massachusetts civil service system. To begin with, all state jobs are not covered by that system. Forty percent of the jobs, many of the upper level, higher paying, policy-making positions, the kind of

positions this Court discussed in Elrod v. Burns, are not covered by the civil service system at all. Sixty percent of the jobs are and they fall entirely into two categories of jobs. They are the classified labor service and the classified official service, and Mrs. Feeney's challenge in this case goes only to or at least her evidence in this case goes only to the official classified service, one of the two components.

QUESTION: That is the classified official service?

MR. KILEY: Classified official service. I tend to mix up my adjectives, I think.

QUESTION: Does Massachusetts have the same veterans' preference with respect to each?

MR. KILEY: Yes, we do. In the labor service, there is not the same examination procedures that we go through in the labor section. In fact, the plaintiff and the court below seem to have narrowed the focus even further, conceding that women obtain a significant proportion of the jobs in the category of classified official service, but arguing that they are excluded from upper level higher paying jobs, whatever they may be.

Anyone who applies for a --

QUESTION: In that service?

MR. KILEY: In that service. Anyone who applies for a position in that service is required as a first step to pass

a qualifying examination. On many of the lists that we have seen before us in the record, that qualifying examination weeds out significant numbers of applicants. Those who do pass the examination are placed on eligible lists. But veterans who do not pass that qualifying examination get no form of veterans' preference whatsoever. Those who do pass are placed on eligible lists and the personnel administrator of the commonwealth applying Massachusetts law prepares those lists by listing first disabled veterans, then veterans, then surviving spouses or widows, and finally all others who pass within each group in accordance with their respective examination scores.

QUESTION: It is now surviving spouses and widows or --

MR. KILEY: It is now surviving spouses or parents. At the time of the original challenge --

QUESTION: Widows or mothers, wouldn't it?

MR. KILEY: Widows or widowed parents. It was a sex specific term at that time.

QUESTION: But it no longer is?

MR. KILEY: It no longer is. We have an equal rights amendment in Massachusetts. With its passage, many of the sex specific terms that typified a lot of legislation in the state are gone, this among them.

QUESTION: Does the Massachusetts statute have a

disproportionate effect on older men than on younger men?

MR. KILEY: The Massachusetts statute applies to -- the Massachusetts veterans' preference statute is not durational in its scope. It applies to people of all ages, veterans of all ages.

QUESTION: But people over forty roughy at that cut-off are less likely to be in the military in World War II or similarly World War I.

MR. KILEY: The statute does draw lines on a basis of the time of one's service. The statute is a war-time preference statute. Those who served not in World War II, not in Korea, not in Vietnam and are in the civil service system do not obtain a veterans' preference.

QUESTION: I think I didn't make my question very clear. As it stands, the argument is that it has a disproportionate effect upon women because women generally weren't in the military service, is that it?

MR. KILEY: In the time of war, that's correct, Mr. Chief Justice.

QUESTION: Is it also true that -- let's move it up to age 50 -- that men over age 50 generally were not in military service, in combat?

MR. KILEY: I think 50 is too young. Perhaps 60 is the right age. The class --

QUESTION: I am talking in terms of numbers. How

many men -- what percentage of the armed forces of World War II are over 50 years of age, unless they were colonels or generals?

MR. KILEY: My reference I think, Mr. Chief Justice, is to the age of individuals now and the preferences that operate now. The class of non-eligibles for the veterans' preference includes approximately a million males. The class of preference eligibles includes about 800,000 males, about 16,000 females.

After passing an examination, one waits for a requisition to come from a particular appointing authority. And while there are various methods of certification that the personnel administrator uses, they all share one prime characteristic, and that is that he certifies more names than there are positions to be filled. Moreover, at this stage of the process, at least now in Massachusetts, the personnel administrator may certify a number of minority or women equal to the number of individuals who would be certified under the normal process if he first makes a determination that there has been discrimination against those people on the basis of race, sex, or national origin.

The final step in the appointment process is the actual hiring, and it is made by an appointing authority, not by the personnel administrator. It is important to emphasize that the appointing authority need not appoint those who appear

at the top of the list. Certification guarantees consideration but not appointment, and an appointing authority is free to reach past the individual who appears at the top of the list and hire somebody who appears beneath him or her. Thus, a veteran who is looking at the civil service system from the outside faces two significant barriers to employment. First, he has to pass the civil service examination and then, even if he gets to the top of the list, he may not be hired by the particular appointing authority. It is that sysem that Helen Feeney challenges.

As I stated earlier, she is not a veteran and she never made application to serve in the military, although in World War II she was of an age when her peers, her contemporaries in terms of age were of an age when they were either volunteering or faced conscription. In fact, Helen Feeney's affidavit tells us the reason that she did not enter the service, although she inquired as to admission practices, is that her mother didn't think that the reputation of women in the military at the time was good.

Helen Feeney turned 21 in 1943. She chose not to apply to the military thereafter. Helen Feeney has an expansive employment record, spanning 28 years from 1948 to 1975. The early years of that service fall in private sector jobs. Until 1963, she worked exclusively in the private sector. In 1962, she took and passed her first open competitive civil

service examination. It was for a clerical position, and in 1963 she was appointed to the clerical position in the Massachusetts Civil Defense Agency. She held that clerical position for approximately four years, at which time she took and passed an open promotional examination and became the agency's Federal Funds & Personnel Coordinator. She remained in that position for approximately eight years, until a point within 53 days of the date she filed this particular action. On that date, the Civil Defense Agency was effectively abolished in Massachusetts.

In addition to the two open competitive examinations that she took regarding the Civil Defense Agency, Helen Feeney took and passed approximately seven open examinations in the civil service system in the ten years preceeding this complaint. For one reason or another, she was never appointed to any of the positions for which she applied. But she predicates the complaint largely on two particular positions which she applied for and did not obtain. Those two positions are the head Administrative Assistant to the Solomon Mental Health Center, Exhibit 2 of the appendix pertains to that slot, and to the positions of Administrative Assistant in the Mental Health System generally, and Exhibit 6 in the appendix pertains to that.

Now, I will return to these two positions later in my argument and I will demonstrate that in each instance any

injury that Helen Feeney suffered by virtue of the application of veterans' preference was an injury that she shared in common with male non-veterans and that she would have suffered the same kind of injury whatever the form of veterans' preference had been applied. By that, I mean if a five- and ten-point preference model on the federal system had been in effect.

Before this Court, the plaintiff has recast the issue, if you will, and she now asks the question whether a preference which excludes women from competitive civil service positions by granting men an absolute preference violates the 14th Amendment. Her argument makes it clear that she uses the word "competitive" in this context in the sense that it is used to apply to upper level, higher paying positions.

There are two over-statements in this formulation of the issue which I want to bring to the attention of the Court. The first is the assertion that the preference afforded to veterans is absolute. As the earlier discussion of the Massachusetts system shows, preference is not absolute in any sense of the word. Veterans first have to pass qualifying examinations in order to benefit from the preference, and then may be passed over for people ranking lower on the eligible lists.

The second major over-statement which courses throughout the argument is that somehow Helen Feeney and women

have been excluded, excluded from the federal military by restrictive policies, are excluded from the Massachusetts civil service system by application of veterans' preference.

We submit that the record in this case just does not support those broad conclus ryo statements. Both the exclusary effects of this statute and of the restrictive federal policies are more fiction than fact. While veterans' preference does benefit a class comprised more significantly of men than females, this adverse incidental impact is not enough to invalidate the statute in an equal protection challenge.

QUESTION: Mr. Kiley, in reading the Massachustts statute, at least as it is described in the District Court opinion, section 23 as I see it just refers to other veterans in order of their composite scores after disabled veterans. Is it a separate statutory provision that provides that they must have been veterans in time of war?

MR. KILEY: Yes, the provision on defining what a veteran is is chapter 4, section 7 of the general laws. It is a definitional section which applies throughout Massachusetts law.

QUESTION: And that is set forth in the brief?

MR. KILEY: It is set forth in the briefs. The statute it cited. It is chapter 4, section 7, and I believe it is clause 43.

Any methodology of equal protection analysis begins with a focus on the classification's facial neutrality of the nature of a particular classification. I do not intend to spend much time on the nature of this particular classification. The statute in question clearly draws lines, but it draws lines not on the basis of one's gender but on the basis of objectively identifiable standards shared by individuals of both sexes. It bestows competitive advantages on individuals, regardless of their sex, who performs military service for the Nation in time of war or who lost a husband, a wife, a son or daughter. Those preference eligibles are objectively identifiable and they are objectively identifiable on the basis of characteristics which have nothing to do with gender.

The pool of eligibles and the pool of ineligibles are both comprised of significant numbers of people of both sexes and under any categorization this statute is facially neutral in terms of gender. However uneven the application of the statute may be, you never obviate that facial neutrality.

In Washington v. Davis, this Court articulated the principle that fits such facially neutral acts will not be invalidated solely on the basis of discriminatory impact. In Arlington Heights, you amplified on that holding and suggested a number of evidentiary factors which can illuminate

the search for discriminatory intent.

One might have thought that the search in this particular case would have been very simple. After all, the District Court the first time around in this case stated that the Massachusetts veterans' preference statute was not enacted for purpose of disqulifying women from receiving civil service appointments, but that the statute's laudable purpose was not enough to insulate it from judicial invalidation. This was because, in view of the District Court, in the context of the 14th Amendment it was the result and not the intent of the Act which mattered.

In spite of the obvious differences between that holding and this Court's holdings in Washington v. Davis and Arlington Heights, in this case the District Court did make a finding on remand of discriminatory intent. And I submit that the methodology that the court used in doing so cannot be condoned by this Court.

QUESTION: Well, I don't read Judge Campbell's opinion to make a finding of discriminatory intent. I read Judge Tauro's opinion to find that.

MR. KILEY: I would suggest that Judge Tauro's opinion makes a specific findings of intent. Judge Campbell articulates the premise, but under Washington v. Davis this is a very difficult case to deal with, and to the extent that one must find discriminatory intent in order to invalidate the

statute, it is there, he votes to invalidate it.

QUESTION: Well, let me read you from page 19a of the jurisdictional statement, where he says -- about the middle of the page -- to be sure the legislature did not wish to harm women, "But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme -- as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are that inevitable, can they meaningfully be described as unintended? Doubtless the impact on women, if considered at all, was regarded as an acceptable 'cost' of aiding veterans." I would read that simply as saying that where the foreseeable consequences are that obvious, they won't save a statute even though the intent was not there to discriminate between men and women.

MR. KILEY: I think that if I might characterize Judge Campbell's opinion, he is saying that foreseeability of impact is the equivalent of a finding of intent, and if the results are inevitable, that that in itself, that predictably discriminatory impact is a substitute for intent. I would submit that awareness of probable disparate effect can never be the constitutional equivalent of a finding of invidious intent to discriminate.

QUESTION: You wouldn't suggest that a court reviewing a statute like this couldn't find as a fact from inevitable consequences that there was in fact discriminatory intent?

MR. KILEY: I think that one can use foreseeability of impact under limited circumstances as a factor in the evidentiary search, in the search for clear and convincing evidence or for substantial evidence that intent exists. But I do not think that foreseeability of impact in and of itself can ever satisfy an intent case, unless the case -- unless the impact is so disparate as that in Yick Wo or Gommilion or the types of cases that this Court discussed in Arlington Heights and in Washington v. Davis.

Legislative awareness of a probable disparate effect is not the constitutional equivalent of purposeful discrimination. The contention of the plaintiff echoed in the opinions of the lower court that the purpose, motive and intent somehow all mean different things in a constitutional sense I think is treated quite well in the Solicitor General's amicus brief. He makes the point that purpose, intent and motive all have the same kind of -- all mean the same thing in constitutional cases and that the Court should be looking for convincing evidence of the motive or motives which influenced a particular governmental act.

Now, the court in this case focused primarily on the impact of the statute, saying that the impact was predictable and that it was devastating, and they pointed essentially to four types of proof of that fact -- Mrs. Feeney's own employment record, the employment record of other women in

the official classified service, some unquantified general statements about the way veterans' preference operates that appear in paragraph 20 of the agreed statement, and then an analysis of fifty lists which were appended to the complaint as examples of thousands of lists -- as an example of lists on which women were harmed by the application of veterans' preference but not as typical lists.

Mrs. Feeney's own employment record doesn't demonstrate the proposition that women were absolutely excluded from upper level civil service jobs and by the application of veterans' preference.

QUESTION: General Kiley, you are not seriously contending, are you, that this veterans' preference doesn't have an extremely discriminatory impact on women, that 98 percent or some such percentage of all the veterans in Massachusetts are males? Is that correct?

MR. KILEY: I am contending that the impact of this particular statute has been consistently over-stated. I do it on this basis: Helen Feeney herself held a significant civil service position. The single largest group of individuals hired in the ten-year period, if they are based on both sex and veterans' status, is non-veteran females. They obtained 42.2 percent of all of the jobs in the ten-year period.

QUESTION: In this classification?

MR. KILEY: In this classification -- far out-stripping male veterans, far out-stripping male non-veterans.

QUESTION: Why should that be with the veterans' preference?

MR. KILEY: All I am saying, Mr. Justice Stewart, is --

QUESTION: Well, why is it with the veterans' preference?

MR. KILEY: My own personal view is that traditionally men and women do not always compete for the same jobs. We submitted an affidavit of Wallace Counts which pertains to a two-month period after the court originally invalidated this veterans' preference statute in 1976 and have demonstrated that on 61 percent of the lists compiled in that time-frame, veterans' preference would have made no difference on the gender classification of those certified 61 percent of the times. Men and women do not simply always compete.

QUESTION: That is ancient history now, isn't it? Remember, we had a case about a woman who wanted to be a prison guard in Alabama.

MR. KILEY: I do. I remember the case well.

QUESTION: Do you remember that case?

MR. KILEY: I do.

QUESTION: That was out of the ordinary, wasn't it?

MR. KILEY: I don't know whether it was out of the

ordinary.

QUESTION: Well, aren't all civil rights individual rights?

MR. KILEY: Certainly. Certainly.

QUESTION: And isn't that ordinary right be just as important --

MR. KILEY: Yes, Mr. Justice Marshall. All I am suggesting is that in this record, in the time frame that we have this evidence, women obtained significantly more jobs than --

QUESTION: Well, the record I think I can remember is "certain jobs."

MR. KILEY: The figures we have --

QUESTION: That is typical, isn't it?

MR. KILEY: The figures that we have --

QUESTION That hasn't gone yet, has it?

MR. KILEY: The figures which we have, Mr. Justice Marshall, are for the entire official classified service. Now, the court would extrapolate from fifty lists which were appended as examples of lists on which women were harmed -- the court would extrapolate the conclusion that somehow women are excluded from upper level positions, but those positions are listed in the appendix at pages 94 to 96, and those positions, I think if the Court will look at them, do not demonstrate or are not themselves upper level positions.

There are positions on there like school bus monitor, telephone operator, teacher's aide -- those aren't the kind of upper level positions that the court can be talking about when they say women are excluded from upper level, higher paying positions.

The broad general statements that common awareness tell us are true, that women and men don't always compete, that in some instances veterans' preference will hire more women than men, those are truisms, but they do not support the --

QUESTION: I will also give you a truism, that a lot of women don't even bother taking the test because they are not veterans and they know they can't overcome the great big handicap.

MR. KILEY: It may be, it is somewhat speculative. The only indication in this record that that is the case is that Helen Feeney in her affidavit says in some instances she herself did not take examinations.

What I am suggesting is that, after Washington v. Davis and after Arlington Heights, a lower court has to look for clear evidence, hard evidence that there is an invidious intent to discriminate. The impact in this case on this record does not demonstrate that kind of impact.

QUESTION: Mr. Kiley, do you take the position that the legislature must have specifically intended to harm women

before this --

MR. KILEY: I think that there has to be a motivating factor which if it is not characterized as an intent to harm women, is an intent to perpetuate archaic and over-broad stereotypical notions about the roles of women. There has to be a motivating factor which is in some way invidious.

QUESTION: Is there any big medical truck like the one for TB that you drive up to the legislature and have them all go through and find out what was on their mind?

MR. KILEY: No.

QUESTION: Well, what other way could we do it?

MR. KILEY: No, I am not --

QUESTION: What other way could we do it?

MR. KILEY: I think that the Court has articulates the way in which the lower court looks for motivation, and you look to every scintilla of subjective or objective evidence that one can find. You have articulated evidentiary factors.

All I am saying in this case is that those evidentiary factors do not support an inference of intent, and that minimum rationality applies.

Now, under traditional standards of equal protection analysis and minimum rationality, we are not concerned with the wisdom of a particular statute. There is no requirement that the Massachusetts legislature served every conceivable social value in formulating their civil service system and

their veterans' preference statute. There can be no better example of the need for elbow room for state legislatures than in the area of distributing civil service jobs to veterans, minorities, women, and still balancing the interests of the state in an effective federal work force.

Indeed, the fact is that legislators throughout this country grappling with these weighty problems have adopted a myriad of approaches to veterans' preference statutes. Almost no two of them are alike.

By suggesting that minimum rationality applies, however, I don't mean to imply that somehow affording benefits to veterans is a less worthy social goal than other remedial social policies. We are not talking about -- we are talking about a group of individuals who themselves have sacrificed in time of war and are deserving -- have borne the battle in time of war and are deserving of the nation's approval.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kiley.

Mr. Ward.

ORAL ARGUMENT OF RICHARD P. WARD, ESQ.,

ON BEHALF OF THE APPELLEE

MR. WARD: Mr. Chief Justice, and may it please the Court: I am Richard Ward, and I represent the appellee, Helen B. Feeney.

Before turning to the difficult legal questions

presented by this case, whether the adverse and disastrous impact upon women is in fact a deliberate discrimination sufficient so that this Court should pay perhaps some less deference to the legislative judgments, and then applying that standard to the question of whether or not the profit objectives are in fact substantially well served by Massachusetts' choice of an absolute and permanent form of preference.

In light of the Commonwealth's argument, it is important to understand exactly how this absolute preference system works and to understand the significant systematic adverse impact on women. And I don't believe that the Commonwealth has carefully enough demonstrated or indeed admitted what that impact is.

Most of Brother Kiley's argument rests on the fact that 42 percent of the persons over a ten-year period who obtained jobs were female. That entirely misses the thrust of this action, the thrust of Helen Feeney's case, and indeed the basis of the court's decision below. It also misses the admission of one of the prime defendants in this case, the Director of Civil Service, who himself stated for the court exactly how the system worked, especially in light of more recent changes in the civil service system, where now they have what are called banded examinations for large numbers of positions which large numbers of persons apply, including

large numbers of veterans who are principally male and large numbers of non-veterans for upper level or positions of significance who are principally female.

The Director of Civil Service, in his testimony to the court below in the form of affidavit, said that the system would work as follows: Women will continue to be employed primarily in the relatively low-paying entry level clerical positions for which men traditionally do not apply.

He goes on to say, however, for the relatively high paying civil service positions, such as programmers, planners, psychologists, administrative assistants, head administrative assistants, et cetera, the continued use of the veterans' preference statute will result in few if any female eligibles being considered and appointed to such positions. Thus, it is not a true demonstration of the effect upon women simply to point to the fact that 42 percent of all the persons hird were female. They are principally being hired as secretaries, in the stereotypic jobs for which Massachusetts for seventy-five years has allowed women to obtain and allowed women to obtain in more rigorous, explicit sex distinctions in terms of the practice for seventy-five years of recruiting on the basis of sex, the female jobs and male jobs.

This is the thrust of the action and one must understand exactly how this veterans' preference system works.

Although referred to below as an absolute preference -- and, indeed, this Court is faced with the most extreme form of preference, what is generally known as an absolute preference. The Commonwealth, of course, refers to it here as a positional preference. It doesn't sound so bad. But it is an absolute preference in the following sense.

What it does is it places a head on an eligible list. An eligible list determines who will be certified and considered for jobs and the persons that are at the top of the eligible list, those are the persons who get the job because it --

QUESTION: Must they get the job?

MR. WARD: Yes, Your Honor, it has been stipulated by the Commonwealth and is in the agreed statement.

QUESTION: Must the number one person get the job?

MR. WARD: Not necessarily. Three names are certified --

QUESTION: What if number three is a non-veteran, may he be picked?

MR. WARD: Yes, Your Honor, if he is certified. The problem with the system is there are so many veterans applying for jobs of significance that the veterans all go to the top of the list, about all non-veterans, regardless of the score. So it is absolute in that sense, and that is the sense in which it distinguishes this form of preference from

a point preference, which only gives veterans some help or moves them up somewhat relatively, but doesn't move them as a group to the top of the list.

Essentially the way it works -- and I think one of the best lists to look at is in Exhibit 7, which is the administrative assistant list, and that is one of these banded examinations, for which 43 administrative assistant positions are available --

QUESTION: What page, do you happen to know?

MR. WARD: Pardon?

QUESTION: What page is Exhibit 7 on, do you happen to know?

MR. WARD: Not off the top of my head.

QUESTION: Well, I can probably find it. Go ahead.

MR. WARD: It can be found.

QUESTION: I see, page 132.

MR. WARD: Yes, Your Honor.

There are approximately 176 people that were found ineligible. Twenty-three percent of the eligibles upon that administrative assistant list, that is Exhibit 7, were females. As a result of the application of the preference, however, in terms of the top 43 positions on that list to be certified, to be considered for these 43 jobs, no females were on the eligible list.

QUESTION: Do you think the average veteran

non-disabled has the same argument to make as you are making now with respect to disabled veterans?

MR. WARD: No, Your Honor, I don't believe so. Some of them may, if the court at some point articulates the standard for persons who are handicapped. Some male non-veterans, through no fault of their own, are also discriminated against. But what sets apart the discrimination against women in this case from the discrimination against non-veteran males is the very basis upon which we suggest that this should be considered a deliberate discrimination against females, and that is principally because of the fact that the veteran classification amounts to a condition precedent to being able to obtain a job and it necessarily incorporates by reference the decades of discrimination against women in terms -- by the military, in terms of entry into the military. Whole categories of women were not allowed into the service, and whether that is right or wrong or lawful or unlawful as far as the military is concerned, nonetheless it is a discrimination. Whole categories of women, women who happened to be married were not allowed in the service, Women who had minor children, the female parent were not allowed in the service. Women had to wait until age 21, otherwise they needed parental consent. Males over the age of 18 did not need parental consent.

QUESTION: Is it also discriminatory to bar women

from combat and then make combat service the basis of the preference?

MR. WARD: I believe it would be, Your Honor, in the following sense. It could have --

QUESTION: Are women permitted in combat service now under the existing law?

MR. WARD: Generally not, Your Honor. But the discrimination, of course, is far more -- was more severe than that, resulting in really the systematic exclusion of women from the military. And the decision that is at stake is the judgment of the Commonwealth of Massachusetts, how will it run its public employment system. And what it has done, whether there is justification for that discrimination against the military, is taken all those restrictions by making the veterans' classification, as the court found below, a replacement for testing as the determining factor as to who appears on the top of the list. Massachusetts has incorporated wholesale all these entry level restrictions of the military into its public employment system, and it is that judgment for which the Commonwealth of Massachusetts, we submit, should be held responsible.

QUESTION: Mr. Ward, is there any way under your argument where Massachusetts could retain the preference for disabled veterans and nonetheless give it up for non-disabled veterans?

MR. WARD: Your Honor, in terms of the record presented to the court below -- and, for example, Exhibit 12 -- one would see that the number of disabled veterans that apply is relatively minor in number as to the number of disabled veterans who apply and are eligible, is relatively minor in comparison with the total number of veterans. As a result, the impact indeed would be much less severe if they simply had a preference for veterans, whether or not an absolute preference for disabled veterans would indeed still have the inevitable systematic exclusionary effect on women which leads to, as what the court found below, the mere blanket exclusion of women from all upper level jobs of interest to male. We don't know on this record, but we think there might well be a distinction. That would be a lesser form of preference.

Of course, what the court is faced with here is one of the most extreme forms in terms of, as the court below said, a broad-brush approach.

QUESTION: I was asking under your argument whether a disabled veteran preference could survive. Is your answer yes or no?

MR. WARD: The answer is a disabled veteran would still constitute to the extent it produced a disproportionate impact on women, because of the incorporation of the military discrimination, it would still be an intentional

discrimination against women and is deliberate, but it might well survive the heightened level of scrutiny accorded by this Court in terms of whether or not the means chosen being reasonably tailored to disabled veterans who perhaps are in the most need of rehabilitation or some readjustment assistance, that might well pass the so-called middle level scrutiny because it is a more finely tailored means. But I think it would still be a deliberate discrimination, Your Honor, but it perhaps might pass muster under the substantial relation test.

QUESTION: in Washington v. Davis, does the intentional or deliberate or knowing discrimination against a particular group -- in this case, women -- have to be a discrimination against that group as women, an intention to discriminate against women, or can it just -- what if it is simply, as it appears on the face of this statute, an intention to discriminate against non-veterans, with knowledge that many more women are non-veterans than men?

MR. WARD: I believe, Your Honor, that under Washington v. Davis, in order to invoke this Court's somewhat heightened level of scrutiny, we have to show that the discrimination is a deliberate one against women, and we believe the record adequately substantiates that fact.

QUESTION: So that discrimination against non-veterans, which it clearly is on its face --

MR. WARD: Yes, it is.

QUESTION: -- with the knowledge that there are many more non-veterans who are women than there are men who are non-veterans, is not enough?

MR. WARD: Well, with the knowledge of the -- that may well be enough, Your Honor, because --

QUESTION: I am asking about your view of what Washington v. Davis requires.

MR. WARD: I believe that is enough, given the history of discrimination by the military against the entry level of women into the military and given the Commonwealth's wholesale transfer of those entry level requirements by making the veteran classification the condition precedent to being able to --

QUESTION: Well, all that adds up just to knowledge on the part of the Massachusetts legislature.

MR. WARD: -- the knowledge that they will have a disproportionate impact on women.

QUESTION: Yes.

MR. WARD: Yes, Your Honor. That is enough we believe to show a deliberate discrimination.

QUESTION: Well, that is the foreseeable consequences.

MR. WARD: Yes, Your Honor --

QUESTION: Exactly.

MR. WARD: -- and we believe that it is not just

foreseeable, as the court below indicated, it is somewhat more than foreseeable, it is inevitable given the chosen scheme.

QUESTION: In any equal protection case then, if you get into court and you make the record and show that this supposedly facial neutral statute has a disproportionate impact, you are then telling the legislature that it has an impact, and if the legislature leaves it in effect, it is automatically foreseeable impact and you would always get your injunction.

MR. WARD: Well, we have -- yes, Mr. Justice White, and that is the problem with just relying solely on the foreseeable consequences test.

QUESTION: Well, what else do you rely on?

MR. WARD: We rely on two other principal factors. First of all, the fact that we make a distinction between foreseeability and inevitability. We don't believe those problems of the foreseeability test --

QUESTION: But in my example, the judge says to the attorney general of the state, "Now, we've made these findings and if you want me to say it is inevitable, it is because that is just what the facts show." You will always get your injunction.

MR. WARD: Okay. That may be in terms of looking at the facts and looking back. But in addition --

QUESTION: We are looking forward, he says I am not

looking for damages, I want an injunction.

MR. WARD: That's true, too, Your Honor. We believe this case shows a deliberate discrimination against women for the --

QUESTION: Foreseeable consequences will always be enough then, as you have --

MR. WARD: Not necessarily every foreseeable consequence. We believe that you have to analyze, as the court has suggested, all the facts and circumstances, and this --

QUESTION: Mr. Ward, let me just, right on this point -- 98 percent of the veterans are male, I guess, and 2 percent are women.

MR. WARD: That's correct, Your Honor.

QUESTION: Now, there are all sorts of veterans' preferences -- GI Bill of Rights for schooling and loans and all the rest of it, and every one of those preferences, the legislature must have known that 98 percent of the beneficiaries of the preference would be male, and your reasoning your apply equally to those, I take it?

MR. WARD: We don't think so, Your Honor.

QUESTION: Why not?

MR. WARD: In that merely the absence of a benefit not --

QUESTION Are you drawing a distinction between burdens and benefits?

MR. WARD: Yes, Your Honor, and we think here --

QUESTION: It is constitutional to discriminate by giving one class benefits, whereas that is okay, but it is bad if you burden a class, is that your point?

MR. WARD: Under some circumstances, we believe that is the lie, Your Honor. In the following sense, we deal here with --

QUESTION: Is there any case that has suggested that?

MR. WARD: Well, the distinction in terms of the pregnancy case brought by the court in terms of Nashville Gas Co. v. Satty --

QUESTION: Statutory.

MR. WARD: Statutory, but the Court did suggest that you are dealing with a different type of problem when you in fact burden the group, and here we have a group that has historically been u rdened in the employment context. We have women, women constitute two-thirds of the non-veterans and virtually all the women are in the non-veteran category. Massachusetts sets up a preference so absolute that systematically they are excluded from every job of interest for males.

And to get back to Mr. Justice White's question, we do have additional evidence. If foreseeability and inevitability is not enough to satisfy this Court's view of when is

enough proof shown that we will hold the state responsible because of a deliberate and purposeful discrimination, we must bear in mind that this particular classification on its face incorporates essentially by reference the military discrimination, but more than that, we have the entire legislative history.

In examination of the legislative history of the public employment system in Massachusetts, it shows that for 85 years the Commonwealth intended to expressly treat males and females differently; right along with its reason for having the policy for having an absolute preference, the Commonwealth also had a policy of separately requisitioning and recruiting on the basis of male jobs and female jobs, and there is substantial evidence in the record that shows this. Exhibits 64 through 79 --

QUESTION: Mr. Ward, if you pursue that argument, it seems to me you have an even stronger case against the federal statutes that discriminate because there is a history in the military of discriminating between men and women, so this clearly would invalidate all of the federal veterans' preferenes, I suppose.

MR. WARD: We think not, Your Honor. Again, one might find that --

QUESTION: Your burden benefit distinction?

MR. WARD: -- all the veterans' preferences

constitute some deliberate discrimination against women, but they might be tailored finely enough to their purposes that they would pass the appropriate level of scrutiny.

QUESTION: Your brief makes a pretty persuasive argument that they weren't very finely tailored.

MR. WARD: Not in this case, Your Honor. In this one --

QUESTION: No, I am talking about the federal ones. You have discussed those in your brief, in the military, and you quite persuasively show that they were not finely tailored.

MR. WARD: Well, with respect to the --

QUESTION: Male and female.

MR. WARD: Certainly, in terms of the military restrictions, they are not very well tailored, and that leads to the fact that this statute should essentially be treated as an explicit distinction between males and females in terms of its effec of excluding women from public service jobs.

QUESTION: But you made two points of saying that foreseeability isn't enough. One is you said there is a difference between inevitability and foreseeability, and, sceondly, you say if the governing body has a history of treating males and females differently, you look especially closely at it. I submit to you that both of those arguments would condemn all the federal veterans' preference legislation.

MR. WARD: They would then -- not necessarily condemn them, Your Honor, it would make us conclude that they also constituted deliberate discrimination against women. But as the amicus brief for the Department of Defense showed, the U.S. Civil Service Commission study of the effect upon women of a point system shows that it has a much less significant impact on women, and in terms of whether or not this statute does particularly meet its goals, when you bear in mind that this statute originally was passed back in the days in the 19th century when the assumption was that women would not be looking for upper level jobs, and when you look at the specific statutes and you see the requisitioning policy --

QUESTION: They weren't looking for stenographic jobs either, do you remember?

MR. WARD: They --

QUESTION: Do you remember? Only men could run those machines, women couldn't run them.

MR. WARD: That's right, Your Honor.

QUESTION: Women couldn't run them.

MR. WARD: Except there is evidence in the record that shows that right about the time in the early -- the end of the 19th century and the beginning of this century, the Commonwealth was at least starting to realize that perhaps some women could run those stenographic machines, and that is why they carved out and didn't apply the preference and they

tried to so-called protect women's jobs. The clear history of this civil service system is a history of expressed deliberate distinctions between male jobs and female jobs, and running along with that history was a decision to have an absolute preference.

QUESTION: Well, if history alone is enough to condemn any law that has any sort of a discriminatory impact against women, and if history alone is enough to show intent, then any law passed by any state would be constitutionally invalid because up until fairly well along in this century no state allowed women to vote.

MR. WARD: That is correct, Mr. Justice Stewart, and that is why we don't say that the fact that this statute was passed in the 19th century is in and of itself enough to condemn it. We add that specific legislative history, the administrative history to the fact that the manner of using this preference, incorporating wholesale the military's discrimination renders the statute essentially one which explicitly distinguishes between males and females in terms of who in fact will receive jobs in the Commonwealth of Massachusetts, and that is the way the statute works. It works as if you had incorporated all the military discrimination in terms of entry level into the military right into the public employment system. This runs with a history of explicit distinctions between the sexes for seventy-five

years in terms of the hiring and requisitioning policies.

QUESTION: You say it runs with the explicit distinction. Do you think that the Massachusetts legislature when it passed its Veterans' Preference Act thought this will be another good way to keep women in their place, or do you think it thought we want to do something for the people who have been veterans?

MR. WARD: Your Honor, obviously the ultimate purpose was to drive some aid or help in some way to veterans. That was the ultimate purpose. Okay. But as this Court has recognized, there are various factors that detrmine the decision and constitute motivating factors. And if you express it in terms of a desire to get women or to harm women, we all shrink back. That is not discrimination. Products of a male dominated society are not going to want to harm women.

What in fact happened, Mr. Justice Rehnquist, back there in the 19th century is that the legislature assumed that women either would not or should not be interested in upper level jobs.

QUESTION: I was talking about the Veterans' Preference Act.

MR. WARD: Yes.

QUESTION: Was that passed in the 19th century?

MR. WARD: It was passed, the first one in 1884 and the one that parallels the one we have now was passed in 1896.

And when they passed it, Mr. Justice Rehnquist, what they did was they basically said this preference will not apply to jobs especially calling for women. The statutes on their face throughout the years show expressly a desire to distinguish between men and women because women's jobs could be protected, again based on the stereotype that women should not or would not be looking for upper level jobs. That is where, if you are going to get into subjective motivation, this history literally leaps out at you and shows that Massachusetts intended and has continued to intend to deal differently with males and females under the stereotype that there are women's jobs and there are male's jobs.

QUESTION: Of course, that isn't the approach that the District Court took, is it?

MR. WARD: The District Court relied basically, Mr. Justice White, on the objective evidence.

QUESTION: I know, but the answer is no, that was not their approach?

MR. WARD: Well, they certainly were aware of it. It was argued, and in a footnote in the last decision they show that it at least suggested --

QUESTION: But that isn't the way they arrived at their intent.

MR. WARD: No, it is not, Your Honor.

QUESTION: Would it be foreseeable that this Act

would exclude a great many handicapped, disabled people?

MR. WARD: Yes, it would, Your Honor, because they again, through no fault of their own, were not allowed into the military, and it would.

QUESTION: And also, as I suggested to your colleague, it would certainly exclude foreseeably most of the people over age 45 or 50?

MR. WARD: And looking at the fact that it is mostly young persons that go in, it in one sense would in terms of the persons who obtain a preference in terms of what age they were when it was most likely that you would go into the service.

QUESTION: So that the consequence of this, in terms of impact, is not limited to women, it hits a great many categories of people, does it not?

MR. WARD: That is correct, Mr. Chief Justice, but women are the most severely affected because virtually all women are non-veterans. Non-veteran is the inferior classification here --

QUESTION: Well, all disabled, handicapped people, all, not most, are --

MR. WARD: Well, that's true, but two-thirds of the non-veterans, Your Honor, are women, and virtually all women are non-veterans.

QUESTION: Does it make any difference whether the

category or group against whom discrimination is asserted is a small group or a large group?

MR. WARD: No, Your Honor, but the group asserting it, Mrs. Feeney happens to be a member of a class of women and that is the one that is before the Court. The handicapped may well have an equally compelling argument under the equal protection clause. We deal here with the facts of the case of a woman, and we are looking at the standards applied by this Court.

So to summarize, basically we would feel that the wholesale incorporation of the military's discrimination against women into the public employment system, combined with the inevitability of the exclusionary effect virtually totals -- Judge Campbell below said it constitutes a mere blanket exclusion of women from the whole segment or a major segment of employment, and it goes a long way towards making upper level public employment in Massachusetts a male preserve.

Based on those two objective factors and the legislative history, we think clearly that this is at least a deliberate and purposeful discrimination against women. And when we turn now to the question of what is the appropriate standard, and we look to the standard that has been applied by this Court in cases involving discrimination against women, we see that the Court asks whether or not the classification served an important governmental objective and whether or

not the means chosen to substantially relate it to the achievement of those objectives.

And the one question the Commonwealth could not answer when asked below, and the one question that the Commonwealth does not address itself to here is why have such an extreme form of preference, an absolute and permanent one, one that lasts throughout a veteran's lifetime and gives women virtually no chance, no matter how much ability is shown by an individual woman, does not give any of those women a chance for any of these upper level jobs. And that is the question we have to ask ourselves.

This is not a case of any preference, simply a head start, but we are challenging this form as an extreme form of preference in which only a handful of states have a similar type of preference. Most states, of course, have the more modest point preference.

And when you look at the profit goals offered by the state, we see that this particular form of preference does not well serve those goals. First, we hear from the Attorney General and from the Commonwealth in their brief a lot of solicitude about readjustment back to civilian life, a lot of solicitude for the recently discharged veteran.

When we look at the absolute and permanent form of preference, and we ask what does it do for the recently discharged veterans, and again if we look at Exhibit 7, the

administrative assistant list, we see that it does very little for the discharged veteran. In fact, of the 96 veterans on the two major lists, Exhibits 7 and 9, the administrative assistant list and the other longer list, the counsel list, we find that 40 of the veterans were discharged in the 1940's, 20 in the 1950's, and 15 in the 1960's. Only 3 of the top 25 on the eligible list for administrative assistant had been discharged within five years of service, because it such an extreme preference, so broad, a permanent preference. It tends in fact to reward or to give benefit to the persons who are longest out of the service. It also gives them additional benefit in terms that they rank relatively higher within that preference category than their most recently discharged veterans, in that the scores are also a function of how much training and experience you have. So the longer you are out of the service, the higher score you will have.

On those two lists, the average year of discharge was 1956, a full 19 years before the establishment of the lists. So when we look at this extreme form of preference, we see that it does not really well serve the veteran most in need of some readjustment assistance. And as the Commonwealth has pointed out, it is also the fact that a lot of veterans can't pass the test. These are the persons that logically are most in need of some readjustments.

QUESTION: What is the definition of veteran in

Massachusetts?

MR. WARD: It is very broad, Your Honor, and it includes anyone that served during the period between 1940 and 1975, for most of that period simply a minimum of 90 days, and during about nine of those years a period of 180 days. So it is extremely broad. And in terms of the other rationale, the --

QUESTION: Including periods when there were no military activities going on?

MR. WARD: That's right. It sweeps broadly. Again, it is an extreme form of preference, not well tailored to any of the profit goals. There is certainly no evidence whatsoever that the profit goal of encouraging enlistment, if that is a particularly important interest to a state, is served at all, no factual rationale.

And in terms of the broadly stated reward rationale, we simply say with regard to that, that is a broad statement of a goal. There has to be some limit when you say that your goal is simply to reward veterans. For example, the state couldn't really say that only veterans could practice law in the Commonwealth of Massachusetts or only the children of veterans. There has to be some limit. And when we look at the --

QUESTION: You are not, as I understand it at least, attacking the veterans' preference as such. Your claim on

behalf of your client isn't that she is a non-veteran but, rather, that she is a woman, is that correct?

MR. WARD: That's correct, Your Honor.

QUESTION: Isn't that right?

MR. WARD: And the effect on women is invidious here. It violates the basic concept of our system, that burdens should be imposed based on some wrongdoing or individual responsibility. Or as this Court recognized in Frontiero, what the effect of this is by excluding women as a class, it invidiously relegates the entire class of females to --

QUESTION: But the excluded class is not just women, no.

MR. WARD: That is correct, Your Honor.

QUESTION: Isn't it equally invidious on the non-veteran male?

MR. WARD: Not equally, given the history of discrimination against women, particularly in employment.

QUESTION: Well, the economic impact is the same on a non-veteran male.

MR. WARD: It works the same on other non-veterans, Your Honor.

QUESTION: I am asking whether or not there is any such claim in this case.

MR. WARD: I am making the claim for Helen Feeney

who --

QUESTION: And the class of females to which she belongs.

MR. WARD: -- who, as this Court has recognized, has suffered a long history of discrimination and that the job market has been particularly inhospitable to women seeking any but the lowest jobs. That is what distinguishes the women from the men. The men have not been invidiously discriminated against in employment. In here, Massachusetts perpetuates the very stereotypes that constituted the premise upon which this statute was passed, women should be in women's jobs and men should be in men's jobs. And while they have removed some of the more express discrimination, the effect of this statute and its original design and premise produces the exact same result, women could not obtain jobs of interest to men and they are necessarily perpetuating the stereotype as to what jobs males should obtain and what jobs females should obtain in the Commonwealth of Massachusetts.

We believe that it goes much too far and it constitutes invidious discrimination and we ask the Court to strike it down.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 12:00 o'clock noon, the case in the above-entitled matter was submitted.)