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The Supreme Court Case on Drafting Women

The most important case now pending before the U.S. Supreme Court is *Rostker v. Goldberg*, the case that poses this question: Although the United States has fought nine wars and never drafted a single woman, and although the Constitution gives Congress (not the courts) the power to raise armies, will the Supreme Court now rule that women must be drafted when men are drafted?

This case reached the Supreme Court under a strange short-circuited procedure after a Federal District Court in Philadelphia suddenly said "yes" to that question, calling it sex-discriminatory to draft men only. The court itself was guilty of the most grievous sex discrimination in history -- it decided the fate of women without ever hearing a single argument from or on behalf of women.

Because of the discriminatory exclusion of women's arguments from this case in the lower Federal Court, sixteen young women have filed a motion to intervene in the U.S. Supreme Court. They are represented by a highly respected constitutional lawyer in Washington, D.C., Mr. Nathan Lewin.

The motion filed by Mr. Lewin makes the most interesting reading because it presents human arguments instead of merely relying on legal jargon and precedents. The eloquent motion articulates the reasons for our traditional U.S. policy of exempting women from the draft, a policy which has been reaffirmed by Congressional legislative decision every time the Selective Service Act has been voted on from the beginning of a U.S. draft through the summer of 1980. If the Supreme Court, through judicial arrogance or usurpation, orders the drafting of women, it will plunge our country into a constitutional, a social, and a military crisis of far-reaching proportions.

The sixteen young women who are seeking to intervene in the case are between the ages of 18 and 26, and therefore would be subject to registration and induction if the Selective Service Act were sex-neutral. They argue that the Supreme Court should hear the sociological, psychological, and religious reasons why women oppose compulsory military service.

The arguments presented by these young women go to the very heart and soul of our civilization, our family integrity, our concept of womanhood, and our ability as a nation to defend ourselves against enemy male troops. Yet they are being totally ignored by the

Justice Department, which is supposed to be defending the male-only draft law.

In their motion, the sixteen young women state that "it is imperative that this [Supreme] Court not determine the constitutionality of an all-male Selective Service System without full presentation and consideration of the reasons, including sociological, psychological and religious grounds, why millions of women oppose compulsory service in the Armed Forces. It is evident from both the Government's position below and its Jurisdictional Statement in this Court that the Government does not intend to press the interests [of women which] . . . warrant the legislative exemption now granted them from registration and induction into the Armed Forces."

The young women state in their motion that they should be allowed to make arguments on behalf of draft-age women because the Government lawyers are refusing to make those arguments. In fact, the entire adversary system of American jurisprudence is being bypassed in this case because, as stated in the young women's motion, "the responsible officials of the Executive Branch, including even the President and the primary named defendant in this case [Bernard Rostker, Director of Selective Service], have publicly disagreed with Congress' judgment that women should be exempt from the draft."

The young women's motion further states that the legislative history of the Selective Service Act demonstrates that the arguments made by the young women (which the Justice Department lawyers refuse to use) were important to Congress in making its decision to exempt all women from registration and the draft. The motion points out that the District Court failed to consider "the overwhelming and unacceptable impact on this country's women of compelling them to participate in military conscription and the undesirable effects such a gender-neutral draft would have on our national resolve."

The young women's motion states that "The consequences of ignoring differences based upon gender and forcing unwilling women into military service are, in the Congress' view, unacceptable to the country as a whole. . . . Congress concluded that while women should be afforded opportunities for freely-chosen employment or a career in the military, women should not, because of values and mores at the very root of our culture, be forced to join the military."

The 16 Young Women's Arguments for

(1) Stacey Acker is a female resident of Alabama and a citizen of the United States. She was born on September 7, 1960. Miss Acker hopes to marry and have children. Registration and potential induction into military service would hinder and disrupt these plans. Miss Acker believes that Congress properly exempted women from registration and compulsory military service because women should not be conscripted during their best child-bearing years and because women who are mothers have a greater responsibility to care for their small children than to engage in military service.

(2) Christina Andres is a female resident of Florida and a citizen of the United States. She was born on November 28, 1960. Miss Andres does not want to serve in the Armed Forces because she is not prepared to be assigned to military combat. She believes that Congress properly exempted women from registration and compulsory military service because compulsory induction will necessarily lead to assignment to the battlefield, no matter what the job is labelled.

(3) Kathryn Barr is a female resident of Wisconsin and a citizen of the United States. She was born on May 9, 1960. Miss Barr has engaged in competitive sports and knows that she cannot compete successfully against males in any contest which requires upper-body strength. She believes that Congress properly exempted women from registration and compulsory military service because women are unable to match men in this important physical characteristic, which may be a matter of life or death in military combat.

(4) Almeda Cannon is a female resident of Tennessee and a citizen of the United States. She was born on January 27, 1962. Miss Cannon does not want to serve in the Armed Forces because she fears sexual abuse. She believes that Congress properly exempted women from registration and compulsory military service because of the great potential for sexual abuse if women were inducted, as described in Congressional hearings conducted last year.

(5) Elizabeth Cremers is a female resident of Illinois and a citizen of the United States. She was born on June 5, 1961. Miss Cremers does not want to serve in the Armed Forces because she does not want to be responsible for endangering men who serve with her, particularly in combat situations, who might instinctively protect her while jeopardizing their military missions. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that, as a result of instinct and training, many male members of the Armed Forces would not be able to treat women as equals in military situations.

(6) Monica Dewit is a female resident of New Jersey and a citizen of the United States. She was born on June 4, 1962. Miss Dewit does not want to serve in the Armed Forces because she fears that if she were ever captured by the enemy, she could not survive as a prisoner of war. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that if women were inducted into the military and were ever captured in actual conflict, they would be subject to much worse treatment than men.

(7) Mary Dolehide is a female resident of Illinois and a citizen of the United States. She was born on September 5, 1962. Miss Dolehide does not want to register and serve in the Armed Forces because she knows, from having heard the public testimony of Defense Department officials, that there are few practical restraints on the kinds of duties to which the Army may assign female inductees and because certain assignments, particularly those in combat zones, are tasks she cannot and will not perform. She believes that Congress properly exempted women from registration and compulsory military service because it knew that, if inducted, women might be deployed by the Army in combat zones.

(8) Esther Glucksman is a female resident of New York and a citizen of the United States. She was born on January 24, 1960. Miss Glucksman does not want to register and serve in the Armed Forces because she cannot participate in compulsory military service in any capacity, including alternative civilian service, without violating her religious principles, based on Orthodox Jewish law relating to a modesty by women ("tznius"), as authoritatively prescribed by rabbinic decision. She believes that Congress properly exempted women from registration and compulsory military service because it knew that many women in the United States have religious scruples against compulsory military service relating particularly to their status as women.

(9) Anna Harrington is a female resident of Virginia and a citizen of the United States. She was born on June 12, 1962. Miss Harrington does not want to serve in the Armed Forces because she believes that combat and other tasks performed by those in military service are, by tradition and by actual performance, more capably done by men than by women. She knows that she cannot engage in actual combat with enemy male troops, and she believes that women in military service will endanger not only their own lives but those of other soldiers. Miss Harrington believes that Congress properly exempted women from registration and compulsory military service because it recognized that men can fight and do military jobs better than women.

for Exemption from the Military Draft

(10) Laura Headlee is a female resident of Michigan and a citizen of the United States. She was born on March 13, 1961. Miss Headlee does not want to register and serve in the Armed Forces because doing so would conflict with her beliefs, based upon her upbringing and religious background, that men are responsible for protecting the country and women are responsible for maintaining the home and caring for the family. She believes that Congress properly exempted women from registration and compulsory military service because it knew that many women in the United States would find military service, in any capacity, to be an infringement upon their rights of conscience and free exercise of religion.

(11) Corliss Jarrett is a female resident of Tennessee and a citizen of the United States. She was born on February 11, 1962. Miss Jarrett is the mother of a baby, and she has no husband. She does not want to serve in the Armed Forces because she will not be able adequately to care for her child while she is in military service. Miss Jarrett believes that Congress properly exempted women from registration and compulsory military service because it recognized that single mothers of small children are more greatly needed to care for their children than are single fathers, and that even the uncertainty of possible induction would disrupt the upbringing of these children.

(12) Karen Johnson is a female resident of Tennessee and a citizen of the United States. She was born on October 21, 1960. Miss Johnson does not want to serve in the Armed Forces because her right of privacy would be violated in military life, which is governed by male culture, and which accepts body contact, foul language, and personally offensive remarks which she, as a lady, finds obnoxious. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that involuntary induction into the Armed Forces would subject many women in the United States to invasions of privacy and mental suffering relating directly to their identity and self-image as females.

(13) Pam Patrick is a female resident of North Carolina and a citizen of the United States. She was born on April 4, 1961. Miss Patrick does not want to serve in the Armed Forces because her upbringing as a Christian woman has taught her that women should produce life, not destroy it. She believes that she cannot be trained to kill, even if she were never actually assigned to combat duty. She also fears physical injury which might result from training or combat. Miss Patrick believes that Congress properly exempted women from registration and compulsory military service

because it recognized that many women in the United States would be unable, by reason of their upbringing as women and their feminine self-image, to participate in any way in a governmental function dedicated to the destruction of human life, and that physical disfigurement would be much more devastating to women than to men.

(14) Felicity Smith is a female resident of Missouri and a citizen of the United States. She was born on January 30, 1960. Miss Smith does not want to serve in the Armed Forces because she would find intolerable the lack of privacy in daily military life, particularly the dressing, bathing, toilet and sleeping facilities. These aspects of military life are contrary to her nature as a woman and to the personal behavior and habits which are part of her feminine nature. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that many women in the United States would be unable to accept the military's infringements on privacy which would conflict with values with which they were raised.

(15) Kathleen Sullivan is a female resident of Illinois and a citizen of the United States. She was born on May 8, 1958. Miss Sullivan is engaged to be married to a man who has completed his military service. Her prospective husband would, therefore, not be subject to induction. The possibility that Miss Sullivan would be subject to involuntary induction would have a drastic effect on the prospective family's plans to have children. Miss Sullivan believes that Congress properly exempted women from registration and compulsory military service because even the possibility of involuntary induction of women would seriously affect the personal family decisions of many married couples. [Kathleen Sullivan is now Mrs. Christopher Lawlor.]

(16) Agnes Zepeda is a female resident of Washington and a citizen of the United States. She was born on October 5, 1959. She does not want to serve in the Armed Forces because she knows, from having grown up with brothers in the family, that she is unable to equal men in performing tasks which require physical strength and agility, and she does not want the national defense to depend on her ability to perform physically taxing jobs. She believes that Congress properly exempted women from registration and compulsory military service because Congress knows that most tasks to be performed in military service could be done better by men than by women.

All the above is quoted directly from the motion filed in the U.S. Supreme Court in *Rostker v. Goldberg*, in the October Term, 1980.

An Unusual Alliance Against the Draft

16 Women Seek Rarely Granted Intervention in Court Case

By Fred Barbash
Washington Post Staff Writer

One woman believes that compulsory military service would violate her orthodox Jewish beliefs. Another argues that she might be molested by men in the Army. A third simply feels that men can do the job better. They all believe a draft of women is a gross breach of American tradition.

The women, along with 13 others, believe that these and other arguments — what they call the real arguments in favor of the all-male draft — are being ignored in the lawsuit now awaiting Supreme Court acceptance. They have asked the justices for permission to participate in the case.

The women form an alliance as unusual as the one that brought them together. Among the organizers were a rabbi from Baltimore, anti-Equal Rights Amendment activist Phyllis Schlafly and a prominent Washington lawyer who once worked in the civil rights division of the Justice Department.

The courts rarely smile upon efforts to intervene in a case. Intervention, which may allow someone not originally involved in a case to participate in written and oral arguments, is reserved for rare instances when the court is convinced that the intervenor has a major stake in a case and no voice defending it. Permission is especially unusual — almost unheard of — at the Supreme Court level.

If nothing else, however, the group will have attracted some attention to its arguments against drafting women and will have made sure that someone at the court hears them before the routine rush of "friend-of-the-court" briefs.

They also will have succeeded in stirring up their opposition — the lawyers and plaintiffs who brought the challenge to the all-male draft. A three-judge panel in Philadelphia ruled July 18 that Congress' reason for excluding women from the draft registration program — military flexibility — was constitutionally insufficient. There was nothing about sexual abuse, religious scruples, female capabilities or tradition mentioned.

The women would "transform the proceedings . . . into a trial of nebulous issues of socio-psychology," those lawyers have told the court in response to the women's effort.

It is, of course, just such issues that the women feel ought to be tried in this case.

Karen Johnson, for example, told the court that service in the armed forces would violate her right to privacy. Military life is "governed by male culture . . . and accepts body contact, foul language and personally offensive remarks which [she] as a lady finds obnoxious."

Felicity Smith, of Missouri, said she too would find "intolerable the lack of privacy, particularly the dressing, bathing, toilet and sleeping facilities. These aspects of military life," she told the court, "are contrary to her nature as a woman and to the personal behavior and habits which are part of her feminine nature."

Agnes Zepeda said she knows, "from having grown up with brothers in the family, that she is unable to equal men in performing tasks which require physical strength and agility, and she does not want the national defense to depend on her ability to perform physically taxing jobs."

Anna Harrington, of Virginia, does not want women drafted because she believes "that combat and other tasks performed by those in the military service are, by tradition and by actual performance, more capably done by men than by women."

Almeda Cannon, of Tennessee, said she "fears sexual abuse" in the military.

And Esther Glucksman, an orthodox Jew, said service would violate the Jewish tradition of *tznius*, or female modesty.

It was that concern that brought into the fray two people not ordinarily associated with Phyllis Schlafly's anti-women's liberation cause: Rabbi Herman Neuberger and Washington lawyer Nathan Lewin.

The orthodox Jewish community is "very much aroused" by the notion of drafting women, said Neuberger, who heads Ner Israel Rabbinic College just outside Baltimore. "The education of our girls are strictly home concentrated. We don't want to expose them to the military in any form or fashion.

"Their rigid upbringing is not prepared

for it and the exposure would be very detrimental to their values" and those of their families. Neuberger is chairman of a national organization called The Orthodox Coalition Against the Draft. It was Neuberger who recruited Lewin, prominent for his previous defense of Jewish causes and a former Justice Department official under Ramsay Clark.

Neither is uncomfortable about the alliance with Schlafly. "We have a community of interest with anybody who wants to oppose the draft" of women, the rabbi said.

"I think this position is entirely consistent with the civil libertarian view," Lewin said, "if you recognize that there are a substantial number of women whose views of their own self-image are really offended by the notion of compulsory military service."

Lewin and Schlafly said that there is no adversary contest in the case as it stands. One side, the plaintiffs, wants women included in the draft. The other side, the Department of Justice and the Selective Service, just got through arguing on Capitol Hill in favor of including women in the draft. Congress' refusal to go along with those administration arguments now makes it necessary for the Justice Department to defend that position.

"The people on both sides have the same position," Schlafly said. "They are not representing the interests of these girls. The whole notion of deciding this case without taking into consideration that point of view is shocking."

The strongest factor working against the intervention, lawyers say, is the failure of the group to attempt to intervene when the case was being considered by federal judges in Philadelphia over the last nine years. Schlafly said that she and the others were unaware of the existence of that case. They did attempt to join the suit filed last year by the American Civil Liberties Union in federal court in Washington. But consideration of that case was postponed pending resolution of the Philadelphia case.

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