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Don't Let The Courts Draft Women

The U.S. Constitution gives Congress (not the courts) the power to raise and maintain our army and navy (Art I, Sec. 8). Congress has used that power dozens of times to pass a male-only draft, starting with the Civil War and extending through June of 1980 when it ordered the draft registration of 19- and 20-year-old men (after rejecting the Kassebaum Amendment to require women to register, too).

The U.S. Supreme Court this month will hear arguments in *Rostker v. Goldberg*, a case in which the American Civil Liberties Union, a liberal Harvard law professor, and a couple of men who are refusing to register, are asking the Court to invent a new constitutional rule saying that (1) it is "sex-discriminatory," to exempt women from the draft and therefore (2) men may not be registered and drafted unless women are also registered and drafted. The Supreme Court has agreed to decide this question, and no one knows how the Court will rule.

However, in taking this case, the Supreme Court committed the most outrageous example of sex discrimination in U.S. history. The Court refused to allow a single woman to be a party in the case or a single argument to be made on behalf of the millions of women who will bear the burden (of compulsory service in the army infantry) if the male draft-dodgers and their lawyers win the case.

The briefs defending the exemption of women will be written by the lawyers of the Carter Justice Department, whose clients (President Jimmy Carter, Defense Secretary Harold Brown, and Selective Service Director Bernard Rostker) are all on record in favor of drafting and registering women. The Carter Administration lawyers have refused to make any of the sound, persuasive, traditional, physical, cultural, psychological, religious, moral, or social reasons for our consistent American policy of exempting women from conscription.

We hope the U.S. Supreme Court will rule that it is just as constitutional to exempt women from compulsory military service today as it was during all the previous wars our country has fought. But *if* the Court rules that we cannot draft men unless we draft women too -- that we cannot defend our country unless we send our daughters out to fight along side of our sons -- what can we do to stop such judicial arrogance?

Withdraw Court Jurisdiction

The answer is to withdraw jurisdiction from all federal courts, including the Supreme Court, over all cases pertaining to military conscription. Congress has the constitutional power to do this. For the protection of our young women, our families, our religion, our culture, and the combat-effectiveness of our armed services, Congress has the constitutional obligation to invoke this constitutional remedy for judicial arrogance. The most important function of the federal government is to "provide for the common defense." In our unique American constitutional system of checks and balances, withdrawing jurisdiction from the federal courts is the proper *check* by which Congress can *balance* the system when the judicial branch assumes too much power.

Congress has repeatedly used -- and the Supreme Court has upheld -- the right to withdraw jurisdiction from the federal courts. Liberal Congresses often withdrew jurisdiction from the federal courts on subjects and in periods when liberals did not trust the federal courts. Examples include the Norris-LaGuardia Act of 1932 (which withdrew jurisdiction over injunctions in labor disputes), the Hiram Johnson Acts of 1934 (which withdrew jurisdiction to enjoin the collection of state taxes and to interfere with the enforcement of state public utility rates), and the Emergency Price Control Act of 1942 (which withdrew jurisdiction over certain civil actions).

In 1980, the U.S. Senate passed the Helms Amendment to withdraw jurisdiction from the Supreme Court in cases pertaining to prayer in the public schools. Only through Speaker Tip O'Neill's power and chicanery was this popular bill prevented from coming to a vote in the House in 1980.

If the Supreme Court rules that women must be drafted any time men are drafted (on the alleged grounds that it is "sex-discriminatory" to exempt women), this would be such an outrageous assault on our women, our culture, the combat-effectiveness of our armed services, and our constitutional separation of powers, that it would cry out for immediate action by the Congress. We could not afford to say "oh, we just won't draft men *or* women," because that would simply postpone the problem to be faced at the time of a Pearl-Harbor-type crisis.

A Supreme Court decision requiring the drafting of women would be the worst abuse of judicial power in history. The Court ruled that abortions are legal, but it did not make *you* get an abortion. The Court ordered forced busing, but you can move *your* child to a private school. The Court unleashed the vilest pornography, but it did not make *you* read the smut. The Court

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Congress' Power Over the Federal Courts

What does the U.S. Constitution say about the power of Congress over the U.S. Supreme Court and other federal courts?

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." (Art III, Sec. 1)

"The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." (Art. III, Sec. 2) This is known as the "Exceptions Clause."

What power does this Section 1 clause give Congress over lower federal courts?

"There is no question but that Congress has the power to define entirely the jurisdiction of lower federal courts." Prof. Charles E. Rice, "Congress and Supreme Court Jurisdiction," 2.

"All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, Section 1, of the Constitution. Article III left Congress free to establish inferior courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts . . .[The Congressional power to ordain and establish inferior courts includes the power] of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." Chief Justice Harlan F. Stone in *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

Has Congress ever exercised its power to withdraw jurisdiction from the federal courts?

"Examples of Congress' exercise of its power to withdraw particular subjects from the jurisdiction of lower federal courts are the Norris-LaGuardia Act of 1932, which withdrew from the federal courts jurisdiction to issue injunctions in labor disputes, and the Emergency Price Control Act of 1942, which withdrew from federal district courts jurisdiction over certain civil actions. Beyond doubt, therefore, Congress may withdraw particular subjects from the jurisdiction of lower federal courts." Rice, 2.

What power does the Exceptions Clause in the Constitution give Congress to make exceptions to the appellate jurisdiction of the Supreme Court?

The Exceptions Clause was intended to give "the national legislature [Congress] . . . ample authority to make such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove . . . [the] inconveniences" which might arise from the powers given in the Constitution to the federal judiciary. Alexander Hamilton, *Federalist*, No. 80 (emphasis in original). In *Federalist*, No. 81, Hamilton again refers to the fact that "the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all cases referred to them, both subject to any *exceptions* and *regulations* which may be thought advisable."

Has the Supreme Court ever ruled on Congress' power to withdraw the Court's jurisdiction?

The first case was *Ex parte McCardle*, 74 U.S. 506 (1868). "After the Supreme Court heard arguments on the case and while the [Supreme] Court was deliberating, Congress enacted a statute repealing that part of the prior statute which had given the Supreme Court jurisdiction to hear such appeals from the circuit court. The Court . . . dismissed the petition for want of jurisdiction, even though the case had already been argued and was before the Court." Rice, 6.

In the *McCardle* decision, the Court stated: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words. . . . Without jurisdiction the Court cannot proceed at all in any case. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the case. And this is not less clear upon authority than upon principle." 74 U.S. 506, 513-514 (1868).

Chief Justice Chase stated for the Court in *McCardle:* "It is quite clear, therefore, that this Court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer. Counsel seems to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the Court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not affect the jurisdiction which was previously exercised." 74 U.S. 506, 515.

Has the Supreme Court ever ruled against the Exceptions Clause?

"*U.S. v. Klein* . . . is the only Supreme Court decision ever to strike down a statute enacted under the Exceptions Clause. . . . The statute in *Klein* intruded upon the President's pardoning power by attempting 'to deny to pardons granted by the President the effect which this Court has adjudged them to have.' In these major respects the statute involved in *Klein* was wholly different from a statute simply withdrawing appellate jurisdiction over a certain class of cases. Since the *Klein* case, the Supreme Court has not had occasion to define further any limits to the Exceptions Clause." Rice, 9, 11.

Have other Supreme Court Justices spoken about the power of Congress to withdraw jurisdiction?

Chief Justice Waite, in the *Francis Wright* case, referred to "the rule, which has always been acted on since, that while the appellate power of this Court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe." 105 U.S. 381, 385 (1881).

Justice Felix Frankfurther, in his dissenting opinion in *National Insurance Co. v. Tidewater Co.*, noted that "Congress need not establish inferior courts; Con-

gress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice.*" 337 U.S. 582, 655 (1949).

Justice Harlan, in *Glidden v. Zdanok,* said: "Congress has on occasion withdrawn jurisdiction from the Court of Claims to proceed with the disposition of cases pending therein, and has been upheld in so doing by this Court. . . . But that is not incompatible with the possession of Article III judicial power by the tribunal affected. Congress has consistently with that article withdrawn the jurisdiction of this Court to proceed with a case then *sub judice; . . .* its power can be no less when dealing with an inferior federal court." 370 U.S. 530, 567-68 (1962).

Is the *McCardle* case still in good standing?

The doubt about *McCardle* seems to have sprung from one sentence by Justice William O. Douglas in his dissent in the 1962 *Glidden* case, where he said, "There is a serious question whether the *McCardle* case could command a majority view today." But by 1968, Justice Douglas resolved his doubts in favor of *McCardle.* In his concurring opinion in *Flast v. Cohen* in 1968, Douglas said: "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of Section 2, Art. III. See *Ex parte McCardle,* 7 Wall. 506." 392 U.S. 83, 109 (1968).

What, then, is the real meaning of the Exceptions Clause?

"In summary, the holdings of the Supreme Court and the statements of various individual justices compel the conclusion that Congress clearly has power under the Exceptions Clause to withdraw appellate jurisdiction from the Supreme Court in particular classes of cases. Indeed, this power is so strong that an exception will be implied in cases where Congress has not specifically 'granted' appellate jurisdiction to the Court." Rice, 13-14.

Is Congress' power to withdraw jurisdiction limited by what some law professors call the "essential role" of the Supreme Court?

"In addition to the difficulty of determining what is the Supreme Court's 'essential role,' that test would make the Court itself the final arbiter as to the extent of its powers. . . . It is hardly in keeping with the spirit of checks and balances to read such a virtually unlimited power into the Constitution. If the Framers intended so to permit the Supreme Court to define its own jurisdiction even against the will of Congress, it is fair to say that they would have made that intention explicit....

"Even if a wholesale withdrawal of appellate jurisdiction from the Supreme Court were to be unconstitutional as an interference with the Court's 'essential role,' the same could hardly be said of a pin-pointed withdrawal of appellate jurisdiction over a narrowly defined class of cases, such as those involving school prayer or abortion [or the drafting of women]. It could hardly be argued that the 'essential role' of the Supreme Court depends on its exercising appellate jurisdiction in every type of case involving constitutional rights. Such a contention would be contrary to the clear language of the Exceptions Clause and to the consistent indications given by the Supreme Court itself." Rice, 14-15.

Is Congress' power to withdraw jurisdiction limited by the necessity to have constitutional rights uniformly interpreted by the Supreme Court?

Justice Oliver Wendell Holmes said: "I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an act of Congress void." "Law and the Court" in *Collected Legal Papers,* 295-296 (1920).

"The argument that fundamental rights should not be allowed to vary from state to state begs the question of whether there is a fundamental right to uniformity of interpretation by the Supreme Court on every issue involving fundamental rights. The argument overlooks the fact that the Exceptions Clause is itself part of the Constitution. Judging from what the Supreme Court has said about it over the years, it is not only an important element of the system of checks and balances, but one which grants a wide discretion to Congress in its exercise. There is, in short, a fundamental right to have the system of checks and balances maintained in working order. Without that system, the more dramatic personal rights, such as speech, privacy, free exercise of religion, would quickly be reduced to nullities. The right to a preservation of a system of checks and balances is itself one of our most important constitutional rights. . . .

"Only in fairly recent years has the Supreme Court . . . defined new constitutional rights in various areas, such as abortion and school prayer, which are innovative creations of the Supreme Court itself. The argument that the Supreme Court cannot be deprived of jurisdiction to hear appeals when they involve rights which the Court has itself created, is an exercise in bootstrap jurisprudence. It would make the Supreme Court not only supreme but absolutist in some of the most sensitive areas of our constitutional life. Clearly, the Exceptions Clause was designed specifically to prevent such a result." Rice, 16-17.

References

Professor Charles E. Rice, "Congress and Supreme Court Jurisdiction," the American Family Institute, 114 Fifth Street, S.E., Washington, D.C. 20003, $1 per copy.

Congressman Robert K. Dornan and Csaba Vedlik, Jr., "Judicial Supremacy: The Supreme Court on Trial," Nordland Publishing International, 3009 Plumb Street, Houston, Texas 77005 $5.95 per copy.

The Army Wants Women in Combat

Some people have the naive notion that women could be drafted but used exclusively in non-combat, female-type jobs. Such ideas are completely obsolete in the current U.S. Armed Services. The WACs and WAVES have been abolished. We have a fully sex-integrated Army. Current law exempts women from "combat" assignment, but the Army is constantly redefining "combat" to make the definition as narrow as possible. The Army brags about assigning women to "combat-related" and "combat-support" roles.

A recent article in the official U.S. Army Magazine called *Soldiers* promotes the radical notion that American women should be sent into combat to fight our nation's battles. The article, entitled "The Army's Assault on Sexism," is obviously designed to promote public acceptance of this notion and the eventual repeal of the last remaining legal barriers that exempt women from the front lines of warfare. "Sexism" means a system that allows different roles for men and women in the armed services, and this article proves that the Army is determined to eliminate all differences of treatment.

This article shows the kind of treatment young women would receive if they were drafted into the army.

The article states, "There are no legal restrictions against Army women serving in combat or in a combat MOS." Then the article explains that women can now be "called upon to defend their unit or participate in a counter attack or something like that."

After thus claiming the legal authority to use women in such roles, the article says "we don't envision women *routinely* in the trenches, participating in hand-to-hand combat or engaging the enemy with individual or crew-served weapons." (emphasis added) The key word here is "routinely"; obviously, you must assume that it *is* permissible to put women in those roles or tasks just so long as it is not "routine."

But now go back and reread the sentence in the preceding paragraph stating that women can be used to participate in a "counter attack." This is one of the most demanding and dangerous of all military missions; to counterattack means to meet head on and try to eject an enemy after he has overrun your defenses.

Perhaps, in the peculiar semantics of this article, a "counter attack" isn't "routine"; that is, it doesn't happen "regularly" or every day. But "counter attacks" can be necessary at any time, and they certainly do require "participating in hand-to-hand combat or engaging the enemy with individual or crew-served weapons."

An analysis of this article, therefore, reveals that the Army is claiming that it can assign servicewomen to *any* job including the defense of their units and counter attacks, but the Army doesn't "envision" keeping women "routinely" or constantly in trenches or hand-to-hand combat. The distance between what the Army claims it can legally do to women, and what it doesn't "envision" doing, is too small to fit a woman into.

This revealing article on "Sexism" is not just an oddball idea published in an unauthorized magazine. *Soldiers* is subtitled "The Official U.S. Army Magazine," it carries the names of Army Secretary Clifford L. Alexander, Jr. and Chief of Staff Gen. E.C. Meyer on its masthead, and it boasts that its purpose is "to provide timely, factual information on policies, plans, operations and technical developments of the Department of the Army." The article quotes repeatedly from Lt. Col. Robert I.C. Hawley III, who is identified as a "Department of the Army expert on enlisted women personnel management programs."

The article on "Sexism" goes on to assert that its policy (of the non-routine use of women in hand-to-hand combat and in engaging the enemy in counter attacks, etc.) "coincides with the will of Congress . . . and probably the will of the overwhelming majority of the American people." Not a shred of evidence for such an allegation was offered, and indeed it is a complete departure from all assurances given to Congress.

The assertion that there are "no legal restrictions against Army women serving in combat" falsifies the intent of the law. The laws specifically prohibit women from combat assignment in the Navy and the Air Force.

The only reason why the Army law passed at the same time didn't specifically spell out the same prohibition is that it was unthinkable that the Army would place women in ground combat. The intent of Congress was certainly to exclude women from Army combat.

The article on "Sexism" completely dispels any illusion that women in the Army can be treated like ladies. It says: "Once in the Army, women are expected to undergo basically the same training as men. That runs from individual weapons qualification to unit defensive and offensive techniques normally included in basic training. The training is generally the same."

What about privacy? "Men and women in the Army have the same living accommodations. . . . Men and women are separated to provide a reasonable amount of privacy. Sometimes that's a partition or a wall."

The "sometimes" privacy and the "non-routine hand-to-hand counter attacks" are the realities of Army life for women today. If the Supreme Court rules that our young women must be drafted involuntarily into that life in the name of "sex equality," the uproar in America will be far greater than that evoked by the Vietnam War.

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banned prayer from public schools, but it cannot prohibit *you* from praying.

But the draft is a compulsory matter. If the Supreme Court rules that young women *must* be drafted any time men are drafted, then, when a national emergency comes, unwilling 19- and 20-year-old girls (or perhaps girls age 18 to 26) will be forced into basic training, taught to kill, and sent into battle.

The Supreme Court decision could be changed by a constitutional amendment, but that takes too long. A war could be fought and lost before that process were ever completed. The best method is for Congress to pass a bill (by a simple majority in each House) to remove jurisdiction from any federal or Supreme Court over conscription laws.

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