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AMICUS CURIAE BRIEF AGAINST DRAFTING WOMEN

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-251

BERNARD ROSTKER, Director of Selective Service,
Appellant,

v.

ROBERT L. GOLDBERG, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

***AMICUS CURIAE* BRIEF OF STACEY ACKER, CHRISTINA ANDRES, KATHRYN BARR, ALMEDA CANNON, ELIZABETH CREMERS, MONICA DEWIT, MARY DOLEHIDE, ESTHER GLUCKSMAN, ANNA HARRINGTON, LAURA HEADLEE, CORLISS JARRETT, KAREN JOHNSON, PAM PATRICK, FELICITY SMITH, KATHLEEN SULLIVAN and AGNES ZEPEDA**

Stacey Acker and fifteen other female citizens of the United States between the ages of 18 and 26, pursuant to Rule 36 of the Rules of this Court, present this brief on behalf of themselves and millions of other women who will be vitally affected by the disposition of this case.

Interest of The Amicus Curiae

The direct interest of the *amici* in this litigation is plain. Each will be directly affected by the decision of this Court, and all represent the interests of millions of other similarly situated women who will also be directly affected by that decision. If the decision of the district court is affirmed, women will, for the first time in the history of the United States, become subject to registration and induction into the Armed Forces. Despite the possibility of this unprecedented result, there is *no* party to this litigation who represents the interests of *any* woman, or who has made arguments reflective of the interests of women in the outcome of this case. Plaintiffs represent solely their own interests as males subject to registration and induction. That interest is directly contrary to the interests of the *amici* and all women in the continuation of women's historical exemption from registration and induction. The government represents its own interests, which it has framed solely in terms of military efficiency. In fact, the Executive Branch has put itself on record as favoring the registration and induction of women. Thus, the *amici* remain wholly unrepresented in this litigation.

Each of the *amici* believes, for varying reasons with broad societal significance, that Congress acted properly in continuing the historical exemption for women from draft registration and induction found in the Military Selective Service Act, 50 U.S.C. App. §§451 et seq. (hereinafter "MSSA"). They express concerns about the impact of registering and inducting women that represent the broad spectrum of public opinion recently presented to Congress as part of its decision-making process on whether to remove the exemption for women presently found in the MSSA. Their interest in presenting these arguments to the Court is to ensure that this Court's focus is not solely on the impact that a gender-neutral draft law would have on military efficiency, but also on the impact such a law would have on society. To date, because of the limited spectrum of parties in this litigation, the latter impact has been wholly ignored. But only with this dual focus by the Court, on both military efficiency and societal impact, can a fully informed decision be made.

Summary of Argument

Substantively, Congress based its decision to continue the male-only draft on various concerns, including "important societal reasons" such as "unprecedented strains on family life." The impact on society of reversing the long-accepted decision that women should not be *obligated* to serve in the armed forces is directly related to this country's national resolve necessary to a successful defense posture. It is not only legitimate but compelling for Congress to be concerned that such resolve not be weakened by forcing the public to accept a draft registration and induction system that would be unpalatable to the citizenry. Testimony was provided to the Congress to justify such a conclusion, and Congress found, on the basis of this testimony and its own common-sense judgments, that discontinuing the exclusion of women from registration and induction might endanger the entire draft system.

Historically, Congress has made its decisions regarding who should serve in the armed forces by considering not only military concerns, but also the economic, social and psychological needs of the American public. Deferments for clergy, students, married persons, and others traditionally

have found their justification not in military necessity but in other societal needs and concerns. The traditional exemption of women is no different. It grows out of societal concerns about the family unit, the nature of war and its impact on women, and the adverse circumstances necessarily imposed on women in the armed forces. It is both legitimate and compelling for Congress to rely upon these concerns in determining that the country's selective service system should be all-male rather than gender-neutral.

Women's exemption from the MSSA does not perpetuate sexual stereotypes of inferiority, nor does it encourage unequal privileges because of supposedly unequal responsibility. The military laws of the United States give ample opportunity to women to volunteer for service in the armed forces. In fact, women have traditionally volunteered in numbers sufficient to fulfill the armed forces' utilization of service women. There is no challenge here to the armed forces' present limited use of women. Nor is there any claim that the armed forces need more women than have volunteered. Because women are currently fulfilling the needs of the armed forces, and in fact are being encouraged to do so by the government, the possibility of reinforcement of "unequal privileges for unequal responsibilities" is not realistic, nor is it sanctioned by law. Indeed, the Congressional attitude toward women in the military has been increasingly to *encourage* their voluntary participation in military service, thereby undercutting any continuation of outmoded stereotypical attitudes toward women.

The lower court erred in completely ignoring these bases for the Congressional decision to continue the historical exemption for women. It improperly analyzed the constitutionality of the all-male draft in isolation from the social context in which any system of military conscription must take place. Such assessments of the broad social impact of a decision to draft women are within the unique province of Congress to make and are not for the courts to ignore, especially where, as here, questions of our national defense and Congress' power under Article I, §8 are concerned.

In light of Congress' concern about the broad societal impact of a decision to discontinue the exemption for women from the draft, and the compelling and legitimate nature of that concern, its continuation of a draft limited to males was totally justified under any appropriate constitutional standard.

Argument

CONGRESS WAS LEGITIMATELY AND APPROPRIATELY UNWILLING, FOR SOCIETAL REASONS, TO WITHDRAW THE HISTORICAL EXEMPTION OF WOMEN FROM THE MSSA

For the first time in the history of this country, and contrary to the decision of every court that has ever faced the question, the district court in this case has determined that the country's male-only registration and induction system, designed "to raise and support Armies" and "to maintain and support a Navy," Art. I., §8, is unconstitutional because it is not gender-neutral. In doing so, the court made two fundamental errors which require reversal of the decision. *First*, and foremost, the court totally failed to consider the Congressional concern for the broad *societal* impact that removal of the exemption would have. It erroneously posed the determinative question as whether "there is a substantial relationship between the exclusion of women and the raising of effective armed forces" thereby omitting consideration of any legislative policy concerns other than the "raising of effective armed forces." *Second*, it reached its holding in part by determining that the MSSA constitutes gender discrimination and is a "badge of inferiority" which in fact "relegate[s] women to an inferior status." Both errors fatally infect the court's reasoning and holding.

A. Congress Traditionally Has Considered Societal Impact — Not Just Military Needs — In Determining Who Should Be Called Upon For Military Service

Before proceeding to Congress' recent consideration and rejection of a proposal for a gender-neutral MSSA, it is helpful to survey the recent history of the draft system and particularly those exemptions and deferments that have been granted by Congress. For the MSSA is not now, nor has it ever been, universal in its imposition of obligations on residents of the United States. The MSSA has always been, as its name implies, *selective;* contrary to the repeated assertions of the plaintiffs here, not *all* men are required to register and not *all* men are required to serve. Instead, Congress has considered the military needs of the country, balanced those along with the country's other economic and societal needs, added considerations of equity and fairness, and has arrived at periodic judgments as to who should be required to serve in the military, in what order and manner, and at what point in their lives.

The district court framed the question before it in the following terms: "To summarize, we need only decide if there is a substantial relationship between the exclusion of women and the raising of effective armed forces."

If this were the real question, there would be little basis — substantial, rational or otherwise — for excluding *anyone* from registration and induction. But the modern MSSA, since its inception in 1948, has, with very minor variations, limited registration and possible induction to males between the ages of 18 and 26. What justification is there for a restriction of draft-eligible males to this category? The most obvious is that individuals in this age group can be removed, with least social disruption, from their civilian environments and compelled to perform national service. The fact that 18-to-26 year olds are likely to be in better physical condition than 27-to-35 year olds, or that they are likely to have more mature judgment than 14-to-17 year olds are not, by any means, the sole, or even principal reasons why *all* individuals under 18 or over 26 are exempt. In setting the age limits, Congress considered that persons over the age of 26 are more likely to contribute to a productive national economy, and that they ordinarily will have more dependents and have greater family responsibilities than those between the ages of 18 and 26. This basic societal decision controlled draft registration policy uninterruptedly since World War II, if not during the entire modern era.

Similarly, the MSSA since 1948, without amendment, has exempted from induction "regular or duly ordained ministers of religion, and students preparing for the ministry." Indeed, ministers of religion have been exempt from induction throughout the entire modern era. And yet, there is no apparent *military* reason or basis for exempting ministers of religion from induction and service in the armed forces. This traditional deferment rests upon a societal judgment that such persons should not be legally obligated to serve in the armed forces. Ministry students and clergymen, as well as men over 26, have been permitted to volunteer for military service — just as women have throughout the modern era. But Congress has never deemed it appropriate to *require* service of ministers or those who are over-age, and the reasons go far beyond military necessity.

Deferments based upon other societal, as opposed to military, reasons have always been a part of our country's selective service system. Thus in 1948 Congress recognized "the vital importance of maintaining our critical manpower resources to the fullest possible extent. Many groups — scientists, research workers, medical practitioners, engineers, industrial workers, to name but a few — make up the complex structure of our national life. All of these groups are important. The maintenance of a flow of persons into these groups is equally important."

Congress therefore created a "National Security Resources Board" to "determine what policies are necessary to best utilize our manpower resources, and prevent their wasteful depletion." It authorized the President to defer from military service all individuals whose continued employment is "found to be necessary to the maintenance of the national health, safety and interest."

Perhaps the most controversial deferment has been for students engaged in higher education. Special treatment for students endured through two wars and approximately 25 years of the MSSA. The Senate Report on the 1948 Act,

quoted earlier, recognized the counter-balancing need to maintain "a flow of persons" into highly educated professions. That judgment, recognized in part in the Congressionally-sanctioned deferment of college and university students, was reaffirmed in 1951, and again after substantial debate in 1967. Throughout this period, the focus of Congressional concern was the societal disruption that might result in the absence of such a deferment.

Finally, and most directly relevant here, Congress consistently has considered the impact of the draft laws on the family unit. Thus, since 1948 the President has been authorized to defer from induction "any or all categories of persons in a status with respect to persons dependent upon them for support which renders their deferment advisable," and further, "to provide for the deferments . . . of any or all categories of persons who have wives or children, or wives and children, and with whom they maintain a bona fide family relationship in their homes." This deferment authority has remained virtually unchallenged since the inception of the post-war MSSA. Yet the exemption of persons with families decreases the pool available for induction, thereby increasing the risk of induction to other eligible males. The reason for the deferment is societal, not military. It is based upon a judgment that the integrity of the family unit should be maintained to the exent possible, even in war time.

Our purpose in discussing these various deferments and exemptions, and their rationale, is not to justify their existence, or to endorse the policies underlying all of them. They demonstrate, however, that the MSSA is a "selective" mechanism for determining who should be compelled to serve in the nation's armed forces, and that Congress' selectivity is frequently based on reasons having nothing to do with military efficiency or preparedness. Challenges to Congressional determinations in this area of the MSSA have been uniformly rejected. The error of the district court here was its premise that Congress must relate its selection process to military needs only. This ignores the established and fundamental character of the MSSA and misapprehends its purpose. The true question in this case is, therefore, whether societal reasons justify, under the appropriate constitutional standard, Congress' conclusion that men should be subject to compulsory service, while women should serve in the armed forces only if they volunteer. We believe that the legislative record and common experience unequivocally support Congress' conclusion.

B. Congress Was Legitimately Concerned Over the Societal Impact of the Compulsory Induction of Women.

Congress explicitly noted that its recent rejection of the Executive Branch proposal to make the military draft gender-neutral was based not only upon its "assessment of the military needs of the nation," but also upon its assessment of "the societal impact of the registration and possible induction of women." After assessing the military reasons for continuing the exemption, the Senate Committee on Armed Services then explained at length its concern over the societal impact of registering and inducting women:

"Finally, the Committee finds that there are important societal reasons for not changing our present male-only system of registration and induction. The question of who should be required to fight for the Nation and how best to accomplish that end is a social issue of the highest order, with sweeping implications for our society. In addition to the military reasons, which the Committee finds compelling, witnesses representing a variety of groups testified before the subcommittee that drafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency. If such a draft occurred at a time of emergency, unpredictable reactions to the fact of female conscription would result. A decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored. The Committee is strongly of the view that such a result, which would occur if women were registered and inducted under the administration plan, is unwise and unacceptable to a large majority of our people."

Although the Committee spoke of various "societal reasons," it specified one primary concern — "the strains on family life that would result from the registration and possible induction of women." This general conclusion was supported by the statement of the U.S. Catholic Conference in testimony before the Senate Subcommittee on Manpower and Personnel that "the disruptive effects of [enacting a gender-neutral MSSA] on several dimensions of our social fabric outweigh the benefits which could be achieved by these measures," with particular reference to "the traditional concern of Catholic bishops and all Christian pastors . . . with the welfare of the family." A similar position was taken by the Orthodox Jewish Coalition on Registration of Women for the Selective Service System:

> "Furthermore, we believe that the inclusion of women in the Selective Service System would irreparably subvert the family unit in America, which is already battered and in grave danger. The American family, with the woman as its stabilizing element, would suffer a severe disruption. Registration of women would engender a rootlessness and a moral decimation in American society which can cause a more radical change than would an invading army."

Dr. Harold Voth of the Menninger Foundation, testifying before the House Subcommittee on Military Personnel in November 1979, expressed concern over the impact of increased use of women in the military, and particularly its adverse effect on the family. See also the remarks of Congresswoman Holt.

The threat to "family life" which was feared by Congress and by the witnesses who testified against expanding the draft to include women is not a mere imprecise generalization. The legal obligation to register and be subject to induction produces uncertainty; the individual subject to the legal obligation and those dependent upon that individual cannot be sure that he or she will continue in whatever voluntary civilian surrounding he or she chooses. This uncertainty — insofar as it affects the family — has a much more severe impact if women are subject to the legal obligation than if it is limited to men.

First, only women can become pregnant and bear children. Even slight uncertainty as to when and how she will be required to fulfill a draft obligation can seriously affect a woman's plans in this regard. A prospective father's absence from his home surroundings is acceptable, even if not desirable; a mother-to-be may not want to carry her pregnancy while in military service.

Second, the potential absence of a mother from a home is still more likely to be disruptive than the potential absence of a father. Family unity — or even family planning — will be much more adversely affected by the fear that a mother may be called away for national service than by an equivalent fear regarding a father. This difference was graphically demonstrated by Senator Nunn when, in the course of Congressional hearings, he was told that under the Executive Branch's proposal, mothers might be drafted, leaving fathers to care for the children and the home:

> "You are going to be drafting women, not putting them in combat, but putting them in the military service and perhaps leaving their husbands at home to take care of the children. Anyone who thinks this society is prepared for that kind of shock is either operating in a different environment than I am or in a dream world."

Third, even where children are not a factor, the wife's actual or potential extended absence from the home is more likely, under contemporary norms, to impose an unacceptable strain on the family unit.

These concerns cannot readily be dismissed as the "outmoded baggage of sexual stereotypes." Few would question the value that the family unit provides to our national life, both in peacetime and in war. To dismiss Congressional attempts to ensure a continuation of the benefits of the family unit as "sexual stereotyping" misses the point, for it is vitally important to the national resolve to minimize strains on that unit. The historical exemption of women from the draft has

ensured a certainty to the family unit that would not otherwise be there. Couples with children know, for example, that the mother can choose to remain with the children, no matter what the emergency. Subjecting women to the draft, however, would remove that confidence. The value of that certainty cannot be emphasized enough, and its continuation was a legitimate and compelling reason for Congress to exempt women from the obligations of the MSSA.

Legitimate gender-related concerns other than those centering on the family also justify limiting *involuntary* military service to men. The *amici* have expressed many of these concerns in their petition to intervene filed in *Barnett v. Rostker*. We believe that large numbers of women in this country share those views, and they are known to the Congress. Specifically, it remains a fact that women are less accustomed to, and less willing to accept the invasions of personal privacy which are a hallmark of military life than are men. As a result of religious training or family uprbringing, many more women than men have ingrained feelings of modesty which are irreconcilable with military life. It is also a fact that in our contemporary society women have more reason to fear sexual abuse than do men, and the opportunities for such abuse are heightened when individuals are removed from ordinary civilian society and gathered onto military bases. Similarly undeniable is the fact that millions of women in this country — as well as millions of men — view military combat, and all the activities which support and surround military combat, as repugnant and inappropriate to the female gender.

Congress is not constitutionally obliged to disregard the overwhelming sentiment in the nation that a difference between the sexes is justified in the area of military service. Indeed, an accurate measure of public opinion on this sensitive subject is an important element in insuring that the system of military conscription is a workable one. For, as Senator Heflin noted, "the opposition to registering women is so widespread and pervasive that if young women were required to register, it might jeopardize the whole registration program." Consequently, Congress expressed concern over "unpredictable reactions to the fact of female conscription," fearing that such reactions might weaken the national resolve.

Given these serious Congressional fears over the acceptability of a gender-neutral draft to the American public, the continuation of the exemption for women was eminently sound. Even granting that sexual roles in our society are in a process of turmoil and change, Congress is not required to pioneer every social transition, particularly when the nation's military defense needs are at stake. To be sure, a Congressional decision which would affirmatively discriminate against a racial, ethnic or religious minority could not be sustained by this Court simply because it is supported by public opinion. But that is not this case. No disadvantaged group or historically isolated minority is being asked to sacrifice or shoulder an unequal burden. Even the district court here recognized that young males are *not* in need of special protection, and it is that group, not a disadvantaged minority, which is called upon to serve.

National defense is among the highest of the country's priorities. It places a heavy burden upon the shoulders of our Executive and Congressional leaders. Congress has decided, in this instance and at this time in our nation's history, that the societal impact of reversing the centuries-old exemption for women from the draft would have unacceptable consequences for the nation and, consequently, for our military preparedness and national resolve. That judgment of Congress is entitled to great weight in the courts.

C. The Exemption of Women from Registration and Induction Is Consistent With Encouragement of Women Volunteers.

A fundamental error committed by the court below was its assumption that there is conflict between two totally consistent policies of present law with regard to women's service in the armed forces. The court called it "incongruous" that Congress is expanding the utilization of women in the military while it "endorses legislation excluding women from the pool of registrants available for induction." If "military necessity" were, indeed, the sole relevant standard, there would be substantial incongruity in the simultaneous pursuit of these two policies. But Congress' legitimate consideration of other factors makes it eminently reasonable — indeed, compellingly reasonable — for Congress to encourage women *volunteers* while exempting women from compulsory conscription.

The MSSA, from its inception and through succeeding amendments, has required that only males register for possible induction into the armed forces. Although women have never been legally obligated to register and serve, Congress has long authorized and encouraged volunteer service by women in the military, extending even to the opening of the military service academies to women. Indeed, the district court relied heavily in its decision on evidence of the proficiency of women volunteers in the armed forces.

Encouragement of women volunteers does not mean, however, that all women should be subjected involuntarily to possible military service. For the reasons we have previously stated in this brief it is appropriate that women be given the option of serving or not serving the nation in a military capacity.

To give them that option, by means of the MSSA's exemption for women, plainly does not constitute "a badge of inferiority" that "stigmatizes women." The district court, in characterizing the effect of the law in this way, relied upon recent cases decided by this Court striking down statutes that benefitted women at the expense of men. But the statutes in none of the cited cases are similar to this statutory scheme, because the federal laws relating to military service encourage the *voluntary* participation of women in the armed forces.

The plaintiffs have filled the record with references to the present and expected increased role of women in the military and to their integration into the service from what had been a separate "women's force." The district court said that "the experience of women in the all volunteer army has been a success story," and that the "extensive utilization of females in the military . . . will substantially increase." Women have not been "relegate[d] to an inferior status" by a "seemingly well-intended classification," but have been given ample opportunities while being liberated from unsound obligations which have no justification other than superficial even-handedness. There being no intentional or unintentional adverse effect on women because of their exemption from registration and induction, Congress' decision to continue that exemption, based upon the societal impact if it were terminated, is entirely legitimate and compelling.

Conclusion

For the foregoing reasons, the judgment of the district court should be reversed, with directions to enter judgment for the appellant.

Respectfully submitted,

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