March 26, 1981

DRAFT REGISTRATION: CONGRESS, THE SUPREME COURT, AND THE SEPARATION OF POWERS

INTRODUCTION

On March 24, the Supreme Court heard oral arguments on the constitutionality of the exclusion of women from draft registration. The case, Rostker v. Goldberg (orginally Rowland v. Tarr) was filed nearly ten years ago as a challenge to the constitutionality of the draft itself, not simply to the constitutionality of excluding women. The plaintiffs argued that the draft violated the First, Fifth, and Thirteenth Amendments to the Constitution. The U.S. District Court for the Eastern District of Pennsylvania dismissed the suit in 1972 (341 F. Supp. 339), but, on appeal, the U.S. Circuit Court for the Third District ordered the case revived in order to decide the sole question of whether the exclusion of women was impermissible discrimination under the equal protection "component" of the Fifth Amendment (480 F. 2nd 545, 1973). A special three-judge district court was convened in 1974, but decided only preliminary matters of jurisdiction and justiciability (378 F. Supp. 766). No further action was taken on the case until 1979 when congressional proposals to reinstitute draft registration (President Carter adding his own proposal in 1980) prompted the district court to re-open the case -- eventually deciding that the recently-enacted law requiring the registration of men only was unconstitutional (No. 71-1480, July 18, 1980). The government immediately appealed the decision to the Supreme Court where Justice Brennan, in a decision in camera because the full Court was out of session, stayed the injunction until the full Court could decide the issue (49 LW 3013, July 19, 1980).

This paper examines the intent, meaning, and history of the war powers of Congress, especially the power "to raise and support armies," as provided by Article I of the Constitution; and includes an analysis of the decision of the district court and of certain legal briefs submitted to the Supreme Court on appeal.

THE CONSTITUTION, THE COMMON DEFENSE, AND THE SEPARATION OF POWERS

One of the major deficiencies of the Articles of Confederation was its provisions concerning war and military matters. Thus, in Federalist 23, Hamilton, in urging the adoption of the proposed Constitution, explained that the three "principal purposes" of the proposed Constitution were the regulation of commerce, the conduct of foreign affairs, and "the common defence of the members." In Federalist 22, Hamilton called the Articles of Confederation a dangerous "system of imbecility" with regard to its provisions concerning the army, stating that "The power of raising armies, by the most obvious construction of the Articles of Confederation, is merely a power of making requisitions upon the states for quotas of men. This practice, in the course of the late war, was found replete with obstruction to a vigorous and to an economical system of defence."

Providing for the common defense, then, was to be a power of the national government under the new Constitution. Experience in the War of Independence and subsequent experience under the Articles of Confederation had demonstrated that the authority must be centralized instead of being divided among the states. What was necessary for this power to be effective? "The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support" (Federalist 23). Where should these authorities be located in the national government? The history of monarchies, where the whole authority over war and military matters was lodged in the king, was much in the minds of the Framers of the Constitution. They decided to avoid the dangers of autocratic authority over the common defense by dividing control between the President and the Congress:

> In England, for a long time after the Norman Conquest, the authority of the monarch was almost unlimited. Inroads were gradually made upon the prerogative, in favor of liberty, first by the barons, and afterwards by the people, till the greatest part of its most formidable pretensions became extinct. But it was not till the revolution in 1688, which elevated the Prince of Orange to the throne of Great Britain, that English liberty was completely triumphant. As incident to the undefined power of making war, an acknowledged prerogative of the crown, Charles II had, by his own authority, kept on foot in time of peace a body of 5,000 regular troops. And this number James II increased to 30,000; who were paid out of his civil list. At the revolution, to abolish the exercise of so dangerous an authority, it became an article of the Bill of Rights then framed, that "the raising or keeping a standing army within the kingdom in time of peace, unless with the consent of Parliament, was against law." (Federalist 26) (emphasis in original)

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies, -- all which, by the Constitution under consideration, would appertain to the legislature. (Federalist 69) (emphasis in original)

So, the necessary authorities over the common defense were to be national authorities deliberately divided between two of the three branches of the new constitutional government. The safeguard against the dangers of standing armies and the executive's king-like use of them was to lodge the authority to raise and support armies and navies, and prescribe rules for their governance, in the Congress. The Framers made this congressional authority summary and comprehensive. The separation of powers was thorough-going and strict, as can be seen from the Appendix. As if the words of the Constitution were not clear enough, the Federalists explained the intentions of the Framers even more clearly:

> These powers ought to exist without limitation...no constitutional shackles can wisely be imposed on the power which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed over the common defence...there can be no limitation of that authority which is to provide for the defence and protection of the community...Congress has an unlimited discretion to make requisitions of men and money; to govern the army and navy; to direct their operations.... Who so likely to make suitable provisions for the public defence, as that body to which the guardianship of the public safety is confided...? (Federalist 23)

> The whole power of raising armies was lodged in the Legislature not in the Executive....From a close examination it will appear that restraints upon the discretion of the legislature in respect to military establishments in time of peace would be improper to be imposed.... (Federalist 24) (emphasis in original)

> ...cases are likely to occur under our government, as well as under those of other nations, which will sometimes render a military force in time of peace essential to the security of the society, and...it is therefore improper in this respect to control the legislative discretion. (Federalist 25)

> The idea of restraining the legislative authority, in the means of providing for the national defense, is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened....The patriots who effected that memorable revolution, were too temperate, too well-intentioned, to think of any restraint on the legislative discretion...when they referred the exercise of that power to the judgment of the legislature, they had arrived at the ultimate point of precaution which was reconcilable with the safety of the community. (Federalist 26)

The Congress was to provide for war, while the executive, as commander-in-chief, was to conduct the course of war. Neither the Framers nor the Federalists nor the plain words of the Constitution itself contemplated a role for the judiciary in the exercise of this power. In Federalist 78, Hamilton stated that, "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither <u>force</u> nor <u>will</u>, but merely judgment." (emphasis in orginal)

Nevertheless, Hamilton went on to say that "the interpretation of the laws is the proper and peculiar province of the courts," and that "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments." These two passages have been often cited in defense of the modern notion that the federal judiciary was to have final right of revision over any and all laws, both those of Congress and of the states.

But when should the judiciary exercise the "bulwark power" against "legislative encroachments?" Federalist 78 indicates that it is to be an extraordinary power used in extraordinary instances. Hamilton's choice of words is instructive. The judiciary must be on guard when the legislature passes laws inspired by "dangerous innovations...a momentary inclination... immediate mischiefs...occasional ill humors in the society." Even in such cases the judges will be guided by the Constitution, for "They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

It could hardly be maintained that providing for the common defense, being one of the three "principal purposes" of the Constitution, and, by the explicit words of the Constitution, being one of the fundamentally separated powers assigned to the "unlimited discretion" of Congress, is a matter of "dangerous innovation." If cases or controversies concerning military matters are referred to the "fundamental laws," the Constitution, they will be decided in favor of Congress. As is shown in the Appendix, providing for the common defense is probably the foremost single subject matter of the Constitution -- with substantial provisions in Articles I, II, III, IV, and the Fifth and Fourteenth

Amendments. Of the eighteen clauses in Article I, no less than eight deal with Congress' power over the military, military affairs, and war.

Joseph Story, Supreme Court justice and the first great commentator on the Constitution, remarked that:

> And in many cases the decisions of the executive and legislative departments, thus made, become final and conclusive, being from their very nature and character incapable of revision....Thus, Congress, having the power to declare war, to levy taxes, to appropriate money, to regulate intercourse and commerce with foreign nations, their mode of executing these powers can never become the subject of re-examination in any other tribunal....Here (i.e., concerning the military) the power is exclusively confined to the legislative body, to the representatives of the states, and of the people of the states. (Commentary on the Constitution of the United States, 1933, Sections 374, 1179)

THE WAR POWER

The Rostker challenge to the power of Congress "to raise and support armies" (Art. I, Sec. 8) necessarily includes a more comprehensive attack on the ability of the national government to wage war successfully. For this power, the "war power" has always been regarded by the Supreme Court as an aggregate of the specific (particularly Clauses 11-14 of Article I) constitutional grants of power over military affairs. Hamilton's statement in Federalist 23 listing together the various "authorities essential to the common defence" has already been quoted. In McCulloch v. Maryland (1819), Chief Justice John Marshall referred to the power "to wage and conduct war" as one of the "enumerated powers" (4 Wheat 316, 407).

In Hamilton v. Dillin (1861), the Supreme Court upheld a Civil War act of Congress by referring to "the war powers" without mentioning any specific clause of the Constitution (21 Wall. 73, 96).

In Miller v. U.S. (1870), the Court again upheld war-related statutes of Congress and said that "if, on the contrary, they (i.e., the statutes) are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments" (78 U.S. 268, 304-05). In the Selective Draft Law Cases (1917), the Court upheld conscription by referring to several war provisions of Article I, not only to the power to raise and support armies (245 U.S. 366). In No. Pacific Rlwy. v. North Dakota, ex rel Langer (1919), Chief Justice White called the war power "complete and undivided" (250 U.S. 135, 149). In Lichter v. U.S. (1948), the Court collected together the Preamble; the necessary and proper clause; the

clause for providing and maintaining navies; and the common defense, declaration of war, and commander-in-chief clauses and called them "provisions implementing the Congress and the President with powers to meet the varied demands of war" (334 U.S. 742, 755).

In United States v. Curtis-Wright Corp. (1936), the Court stated that this fundamental power is an attribute of the sovereignty of the nation itself: "It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality" (299 U.S. 304, 316, 318). In Hirabayashi v. U.S. (1943), the Court defined the war power as "the power to wage war successfully" (320 U.S. 81, 93). In Korematsu v. U.S. (1944), the Court referred to the war power of Congress and the executive (323 U.S. 414).

RAISING AND SUPPORTING ARMIES, PROVIDING AND MAINTAINING A NAVY

Article I, Section Eight of the Constitution gives Congress the authority "to raise and support armies,...provide and maintain a navy,...and to make rules for the government and regulation of the land and naval forces." The plaintiff's suit in Rostker is, of course, a direct challenge to these specific powers. As will be seen below, the Supreme Court, following the explicit words and the much-explained original intent of the Constitution, has, in the past, shown an almost total deference to Congress concerning these powers.

In Tarble's Case (1871), the Supreme Court dismissed a state writ of habeas corpus for the discharge of a minor who enlisted in the army without his father's consent. The Court cited the supremacy of federal law saying that:

> Now, among the powers assigned to the national government, is the power to "raise and support armies," and the power "to provide for the government and regulation of the land and naval forces"....It can determine without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. (80 U.S. 397, 408)

In Street v. U.S. (1890), the Court upheld an appropriations act of Congress reducing the size of the armed forces, saying that, "Full power of legislation in the matter of increase and reduction of the army is with Congress" (133 U.S. 299, 307). In

Jacobson v. Massachusetts (1905), the Court, referring to the Privileges and Immunities Clause, dismissed a Fourteenth Amendment challenge to Massachusetts' vaccination law and said, inter alia, "The liberty secured by the Fourteenth Amendment, this Court has said, consists, in part, in the right of a person 'to live and work where he will'...and yet he may be compelled, by force if need be,...to take his place in the ranks of the army of his country..." (197 U.S. 11, 29). In the Selective Draft Law Cases (1917), the Court dismissed a challenge to the conscription law based on a claim that state citizenship was primary when Article I was ratified, saying that, "The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power...to raise and support armies" (245 U.S. 366, 377). In U.S. v. MacIntosh (1931), the Court dismissed a challenge to the federal naturalization law by a plaintiff who claimed that the law's requirement that a citizen be willing to bear arms violated the free speech clause [sic] of the First Amendment. The Court stated that, "Whether any citizen shall be exempt from serving in the armed force of the Nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides" (283 U.S. 605, 623). (MacIntosh was later overruled in Girouard v. U.S., 328 U.S. 61, (1931), but solely on the basis of statutory interpretation -- the MacIntosh Court's statement of the power of Congress not being in question.)

In Lichter v. U.S. (1948), the Court, in upholding the Renegotiation Act, stated that Congress can affect property rights by way of the war power:

> Both Acts (i.e., Renegotiation and Selective Service) were a form of mobilization. The language of the Constitution authorizing such measures is broad rather than restrictive. It says "Congress shall have power... to raise and support armes." This places emphasis upon the supporting as well as upon the raising of armies. The power of Congress as to both is inescapably express, not merely implied....The constitutionality of the conscription of manpower for military service is beyond question. The constitutional power of Congress to support the armed forces with equipment and supplies is no less clear and sweeping. (334 U.S. 742, 755)

In U.S. v. O'Brien (1967), the Court upheld provisions of the selective service law prohibiting the destruction of draft cards and overruled a court of appeals decision that permitted the burning of a draft card as an exercise of free speech. The Court stated that "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping....The power of Congress to classify and conscript manpower for military service is beyond question" (391 U.S. 367, 377).

Because the Supreme Court has always upheld the power of Congress to conscript manpower for the armed services, many challenges to the draft have gotten no farther than the federal circuit courts of appeal. Those courts have been just as emphatic as the highest court in their affirmation of Congress' discretionary power over the raising of armed forces. For instance, in Warren v. U.S. (1949), the Tenth Circuit dismissed the First Amendment "free speech" claim of a man who had been convicted of counseling another to refuse to register for the draft, saying: "The constitutional power of Congress to raise armies necessarily connotes the like power to say who shall serve in them and in what way....Who shall be exempt from service in the armed forces is dependent upon the will of Congress....Congress has power to raise armies by conscription in time of peace as well as in time of war" (177 F. 2nd 596, 599, cert. denied). See also Clay v. U.S., 397 F.2d 901 (1968); Breneman v. U.S., 138 F.2d 596 (1949); Bertelson v. Cooney 213 F.2d 275 (1954); Turner v. U.S., 410 F.2d 275 (1969); U.S. v. Butler, 389 F.2d 172 (1968); U.S. v. Fallon, 407 F.2d 621 (1969).

THE WAR POWER AND MILITARY MATTERS; JUDICIAL RECOGNITION OF THE SEPARATION OF POWERS

The Supreme Court has had many occasions to declare its own sense of self-restraint and deference to Congress and the President concerning the war powers. Additionally, the Court has ruled that other clauses of the Constitution must give way to these powers at certain times.

In the Prize Cases (1862), the Court declared that the Commander-in-Chief had broad authority during war to make decisions about the disposition of enemy property and even to decide who was the enemy and who was neutral because "this court must be governed by the decisions and acts of the Political Department of the government to which this power was entrusted" (2 Black 635, 670). In Miller v. U.S. (1870), the Court upheld the seizure of land that was done pursuant to Civil War statutes passed by Congress saying that "if, on the contrary, they (i.e., the statutes) are an exercise of the war powers of the government, it is clear that they are not affected by the restrictions imposed by the 5th and 6th amendments" (78 U.S. 268, 304-5).

In Hirabayashi v. U.S. (1943), the World War II curfew order on Japanese living in the United States was challenged as a violation of the Fifth Amendment and as an unconstitutional delegation of legislative authority. The Court denied the challenge, stating that:

> Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare....Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by

> those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs....If it was an appropriate exercise of the war power, its validity is not impaired because it has restricted the citizen's liberty. (320 U.S. 81, 93, 99)

In Johnson v. Eisentrager (1950), some non-resident aliens captured in World War II claimed that they ought to have the protection of U.S. civil rights laws. The Court disagreed because, "Certainly, it is not the function of the Judiciary to entertain private litigation -- even by a citizen -- which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region" (339 U.S. 763, 789). In Harisiades v. Shaughnessy (1952), another case involving the civil rights of aliens, the Court declared that "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of the government as to be largely immune from judicial inquiry or interference" (342 U.S. 580, 588-89).

In U.S. ex rel Toth v. Quarles (1955), the Court disallowed the bringing to military trial of a discharged man and reprimanded the military for not attending to fighting saying that "Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise" (350 U.S. 11, 17).

In Gilligan v. Morgan (1972), the Kent State case, a challenge was made to the authority of the governor of Ohio over the National Guard. The Court replied at length:

> It would be inappropriate for a district judge to undertake this responsibility (i.e., the day-to-day control of the military) in the unlikely event that he possessed requisite technical competence to do so....It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible -- as the Judicial Branch is not -- to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of the military forces are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." (emphasis in original) (413 U.S. 1, 8, 10)

In Parker v. Levy (1974), the Court dismissed a challenge to the special status of the Uniform Code of Military Justice saying that "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter" (417 U.S. 733, 756). In Schlesinger v. Ballard (1975), the Court upheld a gender-based distinction in the promotion of naval officers saying that "The responsibility for determining how best our Armed Forces shall attend to that business (i.e., fighting) rests with Congress. Article I, Section 8, Clauses 12-14, and with the President. See U.S. Constitution, Article II, Section 2, Clause 1" (419 U.S. 498, 510). And in Green v. Spock (1975), the Court did not agree with a First Amendment challenge to the regulation of an army base banning political speeches and demonstrations: "This Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensible" (424 U.S. 828, 837).

THE DISTRICT COURT'S DECISION IN ROSTKER* AND THE GOVERNMENT'S APPEAL

The special three-judge district court paid scant attention to the Constitution and the separation of powers, only once referring to any specific clause of the Constitution and likewise only once, in passing -- and then by way of refutation -- mentioning that, "Ordinarily, deference is due to congressional and executive decisions in military matters."

Instead, the court maintained that "the issue before us is whether exclusion of women is substantially related to an important government function" (p. 20), for "we need only decide if there is a substantial relationship between the exclusion of women and the raising of effective armed forces" (p. 22). In order to resolve these issues, the court pursued two lines of reasoning. First, the court had to decide what standard it would use in considering the issues. The standard selected by the court was not the separation of powers, the power of Congress to raise and support armies, or even the Fifth Amendment itself. Instead the court sifted through the judicially-invented and now-prevailing standards of deciding constitutional cases, namely, the familiar "reasonable relationship test," "suspect classifications," the "compelling government interest test," and the "important government test," finally declaring that the last would be the standard for the case at hand, a case of sex discrimination.

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*U.S. District Court for the Eastern District of Pennsylvania; Opinion of the Court Number 71-1480; July 18, 1980; Judges Max Rosenn, Joseph S. Lord, III, Edward N. Cahn. Judge Cahn wrote the opinion for a unanimous court.

Apparently, the challenge to the male-only registration was originally based on the allegation that such registration violated the Due Process Clause of the Fifth Amendment, that amendment having to be selected because the statute concerned was a federal statute. Nevertheless, the case seems to be, and the court mentioned it in passing, one of "equal protection." But the Equal Protection Clause resides not in the Fifth Amendment, but in the Fourteenth, the amendment to the Constitution that deals with prohibitions on state action, not federal action. Long ago, the Supreme Court "incorporated" the Bill of Rights into the Fourteenth Amendment in order to be able to apply the sanctions of the Bill of Rights against the states. The case at hand is an example of how the Fourteenth Amendment has been re-incorporated into the Fifth Amendment, thereby making the Equal Protection Clause a kind of judicially-imposed addendum to the Fifth Amendment's Due Process Clause and allowing courts to impose the sanctions of the Equal Protection Clause against Congress.

That the present case could present a fundamental question of the separation of powers between the Congress and the judiciary concerning the war power was summarily dismissed by the district court when it said that "the test to apply in determining if gender-based discrimination is constitutional should not vary from one factual context to another. The standard is a constant. If any judicial deference is due the Congress it should be extended in the determination of whether the standard is met, not in the definition of what the standard is" (p. 19). In so stating, the court rather explicitly repudiated the assertion of the Supreme Court in Hirabayashi, supra, where the high Court warned that, concerning the exercise of the war power, "it is not for any court to sit in review of the wisdom of their action (i.e., the President's and the Congress') or substitute its judgment for theirs."

In deciding to substitute its judgment for that of Congress, the court scrutinized the legislative history of the congressional act requiring the male registration and came to two conclusions. First, it refuted the findings of fact that the relevant congressional committees had published as the justificaton of the congressional action. Thus, the following statements of Congress were found by the district court to be only "superficially appealing" (p. 29), "incongruous" and "inconsistent" when compared to other acts of Congress concerning women in the military (p. 39), and "not substantially related to any alleged government interest" (p. 41):

- The committee feels strongly that it is not in the best interest of out national defense to register women. (Senate Report 96-226)

- There are military reasons that preclude very large numbers of women from serving. Ibid.

- Registering women for assignment to combat or assigning women to combat positions in peacetime then would leave the actual performance of sexually mixed units in an experiment to be conducted in war with unknown risk -- a risk that the committee finds militarily unwarranted and dangerous. Ibid.

- Article I, Section 8 of the Constitution commits exclusively to Congress the powers to raise and support armies. (Report of the Subcommittee on Manpower and Personnel)

- There is no military need to include women in a selective service system. Ibid.

- A registration and induction system which excludes women is constitutional. Ibid.

Instead of these judgments of Congress, the district court decided to affirm the judgments of the President, the Department of Defense, and the Joint Chiefs of Staff, all of whom had testified for the registration of women but whose arguments had been rejected by Congress. So, it can be seen that the court effected four substitutions of judgment. First, it substituted its own judgment for that of Congress. Secondly, it substituted the judgment of the President for that of Congress as if the President, in addition to being Commander-in-Chief, had some part of the power to raise and support armies. Third, it substituted the judgment of the Department of Defense for that of Congress as if that department, in addition to bearing the responsibility of fighting, had the power to provide for the common defense. And fourth, it substituted the judgment of the Joint Chiefs of Staff for that of Congress as if Clause 14 of Article I provided that the armed forces shall make rules "for the government and regulation" of the Congress.

The government's brief (by Solicitor General Wade H. McCree, Jr.) seeks to refute the decision of the district court in two ways. First, the government argues that Article I, Section 8 is relevant to the case at hand and that the Supreme Court should pay substantial attention to it. Quoting MacIntosh, the government contends that, "Because the war powers are textually committed to Congress, they necessarily confer plenary authority to say 'who shall serve and in what way'" (p. 10). For that reason, "it would be inappropriate for a district court to adopt a standard of review that permitted it to substitute its judgment for that of Congress" (p. 10). Pursuant to its Article I powers, Congress made "a sensitive policy choice whose resolution in a democracy is best left to the legislature" (p. 10).

Secondly, the government argues that the judgment of Congress was indeed "closely and substantially related to an important purpose" (p. 12), that purpose being no less than providing "for a military emergency with maximum speed and efficiency" (p. 12). Furthermore, the district court erred in considering "registration

in isolation...and failed to regard it as the first step in the conscription process" (p. 13).

THE BRIEF OF THE PLAINTIFFS/APPELLEES[1] AND THAT OF THE NATIONAL ORGANIZATION OF WOMEN[2]

The brief for the plaintiffs/appellees argues that since "this is a sex-discrimination case" (p. 7), the government has the "burden of demonstrating a close and substantial relationship between the gender classification and an important purpose actually contemplated by the statute" (p. 5). Any claims of deference due Congress because of Article I, Section 8, must fall to the claims of what the brief, like the decision of the district court, vaguely refers to as "Due Process/Equal Protection." (p. 18). At any rate the case is only of "tangential military character" (p. 5).

Finally, "Adoption of Appellant's position would result in a dangerous and open-ended position. If the power to raise armies or to wage war justifies a lower standard of review for gender classifications it would justify a lower standard for racial classifications as well. Even a registration law excluding blacks might be permissible on the ground that minorities are already over-represented in the armed forces, thus making it unnecessary to draft them and 'rational' not to" (p. 17).

The brief of the National Organization of Women (NOW), amicus curiae on behalf of the plaintiffs, concedes that the case involves the constitutionality of the male-only registration and whether such a registration "violates the fifth amendment to the United States Constitution" (p. 2). What clause of the Fifth Amendment is supposed to have been violated is never mentioned, nor is any clause of Article I ever mentioned, nor is any clause at all of the Constitution ever cited again, except for footnote references to the Fourteenth and Twenty-Sixth Amendments.

Instead, NOW primarily bases its "constitutional" arguments on no less than seventy-two sociological, psychological, socio-psychological, psycho-sociological, economic, historical, and feminist treatises, books, research papers, studies, and articles -- including one from Sports Illustrated.

To NOW, the case is one of "sex discrimination, pure and simple" (p. 4). Presumably, this statement is the justification

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1 Filed March 2, 1981. Donald Weinberg, counsel of record, joined by the American Civil Liberties Union, and Lawrence Tribe, professor of constitutional law at Harvard University. The ACLU has long been involved in suits challenging the constitutionality of conscription.

2 Filed March 2, 1981. Attorneys Barbara Brown, Solamn G. Lippman, Thomas J. Hart, Phyllis M. Ain, and the NOW Legal Defense and Education Fund.

for the complete ignoring of Article I and the war powers of Congress.

NOW proffers the same argument as the district court: the judgment of Congress was wrong and should be substituted. The exclusion of women "disserves" military readiness for, inter alia:

- Women are better students than men, therefore, better soldiers. (p. 6)
- Strength is not a reasonable justification for excluding women because "A person trained in the martial arts can defeat a larger opponent." (p. 7)
- The "child-bearing potential" of women is not a good reason for excluding women because some women are sterile, others do not want children, and others can defer children. (p. 9)
- The alleged "sensitive nature" of women is a canard. (pp. 9-10)
- "Other fears expressed by opponents of registering women bear a striking resemblance to the apprehensions that preceded racial integration in the military." (p. 10)
- Women have, in the past, served in combat roles "but usually unofficially or disguised as men." (p. 15)

The exclusion of women "reinforces deeply-held stereotypes" and consigns them to "second-class citizenship." The effects of excluding women are:

- "Women are disrespected for their 'non-male' characteristics and resented for what is perceived as their 'easy time.'" (p. 20)
- It increases the liklihood that women will be raped. (p. 20)
- It decreases the liklihood that women will be elected to public office. (p. 24)
- It prevents women from getting highly-paid, highly-skilled jobs in civilian life because "the military is our largest vocational and professional training institution." (p. 27)

Overall, the judgment of Congress was made from a perspective of "never-never land" (p. 17). The Supreme Court should "see people as individuals" (p. 28) in order to prevent stereotyping because "Stereotypes are reinforced by psychological processes that distort reality and then create expectations that influence behavior to fit the distortion" (p. 18).

CONCLUSION

The several cases cited above have demonstrated that the Supreme Court has often agreed with the Federalists about the constitutional existence of an aggregate "war power." The problems in distinguishing between individual grants of power concerning war, that most extraordinary and important governmental act, seem obvious: Is it not true that the power to "declare" war implies the power to "wage" war? When do "raising" and "providing" end and "supporting" and "maintaining" begin? When do "supporting" and "maintaining" end, and when does "government and regulation of the land and naval forces" begin? Is it not true that "providing for the common defense" necessarily means the power to prepare for war? Should not the war power be, as Federalist 23 argues, "co-extensive with all the possible combinations of such circumstances"? Is not a military force in time of peace "essential," as Federalist 25 maintains, "to the security of the society"?

Hamilton maintained that the preparation for and conduct of war was one of the three "principal" purposes of the Constitution. Just as important was the constitutional decision to lodge this power in the Congress, for the legislative branch was the proper "ultimate point of precaution" both of the responsibility for and the dangers of military force. In the past, the Supreme Court has acknowledged that this fundamental separation of powers is "inescapably express" and has upheld this authority of Congress against challenges based on Article I; the First, Fifth, Sixth, Thirteenth, and Fourteenth Amendments; and on such bedrock principles of law as habeas corpus, civil rights, and property rights.

Since there is no war at present, Rostker is a direct challenge to the ability of Congress to prepare for war and, therefore, is an attack on the specific congressional powers "to raise...," "to provide...," and "to make rules...." Solicitor General Wade McCree argues that registration must be considered the first step in the process of conscription. The Supreme Court has always upheld the power of Congress to conscript troops, but the Court has never had the occasion to consider the constitutionality of conscription in peacetime. It would seem that if, according to Jacobsen, supra, Congress has the power to "compel" a man "to take his place in the ranks of the army of his country," Congress has the equal power to compel him (or her) not to take his (or her) place in the ranks of the army.

The decision of the district court and the briefs of the plantiffs/appellees and of NOW are instructive examples of the current state of constitutional law. Today, the clauses of the Constitution providing for "rights," especially the rights in the First, Fifth, and Fourteenth Amendments, reign supreme; while the clauses of the Constitution providing for the "powers" of government, the first six Articles, are relegated to inferior status, or, as the district court's decision and the two briefs evidence, are almost ignored.

Additionally, the Supreme Court has transmogrified the constitutional rights themselves into generalities. Originally, the rights were closely associated with governmental powers and with federalism, the Bill of Rights being a collection of restrictions against the powers of the national government and the Fourteenth Amendment being a restriction against the powers of the state governments. But, today, according to numerous decisions of the Court, the Fourteenth Amendment has swallowed up the Bill of Rights with the result that the Bill of Rights is now applicable to acts of the states. In the present case, the plantiffs/appellees and amici, basing their claims on other decisions of the Court, maintain that the Due Process Clause of the Fifth Amendment has turned on the Fourteenth Amendment and swallowed the Equal Protection Clause. The inevitable effect of this kind of logic has been the severing of even the rights themselves from the Constitution. In Rostker, the appellees and amici ask the Court to make a decision based on some kind of vague, general standard of "constitutionality."

Nevertheless, in order to decide cases regarding the "constitutionality" of governmental acts relating to civil rights, the Supreme Court has invented its own specific standards, e.g., "strict scrutiny" of such acts. But the arguments presented in the case at hand seem to indicate that the boundaries of even those standards are beginning to dissolve. Thus, the briefs of the plaintiffs/appellees, NOW, and the decision of the district court, while paying almost no attention to Article I, Section 8, and scant attention to either the Due Process Clause of the Fifth Amendment or the Equal Protection Clause of the Fourteenth Amendment, discuss at great length, inter alia, the distinctions among:

"strict scrutiny"	"permissible government purpose"
"heightened scrutiny"	"important government interest"
"intermediate scrutiny"	"important government objectives"
"minimal scrutiny"	"proper government purpose"
"suspect classifications"	"proper government function"
"rational basis"	"compelling state interest"
"minimally rational basis"	"substantial relationship"
"reasonable relationship test"	"close and substantial relationship"

Even these standards play a minor role in the brief of the National Organization of Women. In basing most of its arguments on the social sciences, NOW presents a prime example of the behaviorist view of constitutional law. The Court has often, in the modern era, accepted the testimony of the social sciences

when dealing with various issues of social policy. The most famous examples of this are the school busing cases of the late 1960s and early 1970s in which the 1968 Coleman report on school segregation was cited with approval again and again by the courts as justification for the imposition of the "remedy" of school busing. Equally famous has been Coleman's repudiation, in 1978, of his own 1968 study. But the damage has been done, and busing is a fact of life for school districts across the country.

As has been mentioned, both the plaintiffs/appellees and NOW offer the accusation that the rationale for excluding women from registration must, perforce, be the same as the rationale for excluding blacks. In using that argument, the briefs ask the Supreme Court to regard sex discrimination as a "suspect classification" (i.e., invalid by presumption). While the Court has clearly ruled that almost all racial classifications are "suspect," it so far has deliberately refused to apply the same standard to all sex classifications. If the Court elevates sex discrimination to that level, especially in a case repudiating such a "principal" constitutional doctrine as Congress' separated power over the military, then it will have ruled that no constitutional standard is more important.

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APPENDIX

CONSTITUTIONAL CLAUSES CONCERNING WAR, THE MILITARY, AND MILITARY AFFAIRS

Article I, Section 8

The Congress shall have power
to...provide for common defense
To declare war, grant letters of marque and reprisal, and make rules concerning captures of land and water;
To raise and support armies,
To provide and maintain a navy;
To make rules for the government and regulation of the land and naval forces;
To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;
To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the apppointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
To exercise exclusive legislation in all cases whatsoever...and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

Article I, Section 9

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Article I, Section 10

No state shall grant letters of marque and reprisal....No state shall, without the consent of Congress,...keep troops, or ships of war in time of peace...or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Article II, Section 2

The president shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into actual service of the United States.

Article II, Section 3

He...shall commission all the officers of the United States.

Article III, Section 3

Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. The Congress shall have power to declare the punishment for treason....

Article IV, Section 4

The United States...shall protect each (i.e., the states) against invasion.

5th Amendment

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

14th Amendment, Section 3

No person shall be a Senator or Representative of Congress, or elector of President or Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by two-thirds vote of each House, remove such disability.

14th Amendment, Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.