Congressional Rationale for Women's Exemption from Draft Registration

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Mr. WARNER. Mr. President, I will momentarily yield the floor. First, however, I would like to read to my colleagues the report of the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee on the rejection of legislation requiring the registration of women.

The report is as follows:

REPORT OF THE SUBCOMMITTEE ON MANPOWER AND PERSONNEL ON THE REJECTION OF LEGISLATION REQUIRING THE REGISTRATION OF YOUNG WOMEN UNDER THE MILITARY SELECTIVE SERVICE ACT

The Subcommittee rejected a proposal to require the registration of young women under the Military Selective Service Act.

Mindful of the Congress' constitutional duty under Article I, section 8, "to raise and support Armies," to "provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval Forces," the committee has carefully analyzed deficiencies in our mobilization capabilities. The Committee has expressed its serious concern over manpower problems that are so severe that the Military Services are not now capable of meeting our national security requirements in terms of manpower in the event of mobilization. Peacetime registration will solve some, but not all, of these problems.

In 1979 the Committee reported a bill (S. 109) mandating peacetime registration of males. President Carter, in his State of the Union Address in January 1980, recognized the need for registration to improve our defense posture. The issue of whether women should be registered became a dominant part of this discussion, confusing the real military issues. The Subcommittee on Manpower and Personnel held several additional hearings in 1980 on the registration plan presented by the President, on the question of including women in the plan, and on the military issues involved in registration and conscription. The Committee remains convinced that registration is vitally necessary and that women should not be included in any registration and induction system. This judgment is based upon the Committee's assessment of the military needs of the nation, and its comprehensive study of the registration issue. It is also based on the Committee's assessment of the societal impact of the registration and possible induction of women.

In the Committee's view, the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat. The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee, and forms the linchpin for any analysis of this problem. History gives examples of women who fought alone and with men during past periods of strife. Women have defended themselves against attack and have been inadvertently drawn into combat activities in defense of their country. Although such examples exist, throughout history women have not regularly participated in combat and no society has ever relied on conscription of women primarily for combat roles. Current law and policy exclude women from being assigned to combat in our military forces, and the Committee reaffirms this policy. The policy precluding the use of women in combat is, in the Committee's view, the most important reason for not including women in a registration system.

Registering women for assignment to combat or assigning women to combat positions in peacetime then would leave the actual performance of sexually mixed units as an experiment to be conducted in war with unknown risk—a risk that the Committee finds miliarily unwarranted and dangerous. Moreover, the Commitee feels that any attempt to assign women to combat positions could affect the national resolve at the time of mobilization, a time of great strain on all aspects of the Nation's resources.

Women now volunteer for military service and are assigned to most military specialties. These volunteers now make an important contribution to our Armed Forces. The number of women in the military has increased significantly in the past few years and is expected to continue to increase. Only 6 percent of the enlisted skills in the Army are closed to women as a result of the exclusion of women from combat. But these include infantry specialists, armor specialists, combat engineers and positions in field artillery and air defense.

It is in these skills, and more specifically in the very large number of positions needed to be filled in infantry and armor skills, where mobilization manpower is so severely short. It is also these skills that are most difficult to recruit for during peacetime. The Personnel Chiefs of the Army and Marine Corps, for example, testified that it is in these combat skills where the All-Volunteer Force has failed to supply sufficient recruits, and where current strengths of combat units is often woefully inadequate. In peacetime, although only 6 percent of Army enlisted skills are closed to women, fully 42 percent of all billets filled by enlisted personnel in the Army are in specialties, skills or units not available to women. These incude noncombat positions in close support units that could come under enemy fire.

All the Military Services testified at length about their mobilization plans, and the place of women in those plans. Both the civilian and military leadership agreed that there was no military need to draft women. Because of the combat restrictions, the need would be primarily for men, and women volunteers would fill the requirements for women. The argument for registration and induction of women, therefore, is not based on military necessity, but on considerations of equity. The Army and the Marine Corps testified that because of present shortages in combat arms and the nature of the emergency situation envisaged, the primary need is for combat replacements from the induction system. Selective Service plans provide for drafting only men during the first 60 days, and only a small number of women would be included in the total drafted for the first 180 days.

In addition, there are other military reasons that preclude very large numbers of women serving. Military flexibility requires that a commander be able to move units or ships quickly. Units or ships not located at the front or not previously scheduled for the front nevertheless must be able to move into action if necessary. In peace and war, significant rotation of personnel is necessary. We should not divide the military into two groups—one in permanent combat and one in permanent support. Large numbers of noncombat positions must be available to which combat troops can return for duty before being redeployed.

It is also clear that an induction system that provided half men and half women to the training commands in the event of mobilization would be administratively unworkable and militarily disastrous. It has been suggested that all women be registered, but only a handful actually be inducted in an emergency. The Committee finds this a confused and ultimately unsatisfactory solution.

First, the President's proposal does not include any change in section 5(a)(1) of the Military Selective Service Act, which requires that the draft be conducted impartially among those eligible. Administration witnesses admitted that the current language of the law probably precludes induction men and women on any but a random basis, which should produce roughly equal numbers of men and women. Second, it is conceivable that the courts, faced with a Congressional decision to register men and women equally because of equity considerations, will find insufficient justification for them inducting only a token number of women into the Services in an emergency. Indeed, it is hard to see how the equity which is the aim of advocates of an equal registration system is achieved by a system under which a vastly larger number of men than women would actually be called to duty. If the Congress were to mandate equal registration of men and women, therefore, we might well be faced with a situation in which the combat replacements needed in the first 60 days—say 100,000 men—would have to be accompanied by 100,000 women. Faced with this hypothetical, the military witnesses stated that such a situation would be intolerable. It would create monumental strains on the training system, would clog the personnel administration and support systems needlessly, and would impede our defense preparations at a time of great national need.

Other administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards would also exist.

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.

In concluding that a registration and induction system involving only male citizens is the best course to ensure the country's preparedness and its ultimate ability to protect itself, the Committee was mindful of arguments made by some critics of registration that the Constitution requires both men and women to be treated equally. The argument rests on an interpretation of the principle of equal protection that would mandate an equal sharing among men and women of the burden of registration and conscription. The Committee has carefully considered constitutional arguments raised in detailed statements from opponents of a male-only registration and induction system.

In the Committee's view, the arguments for treating men and women equally—so compelling in many areas of our national life—simply cannot overcome the judgment of our military leaders and of the Congress itself that a male-only system best serves our national security. The Supreme Court's most recent teachings in the field of equal protection cannot be read in isolation from its opinions giving great deference to the judgment of Congress and military commanders in dealing the management of military forces and the requirements of military discipline. The Court has made it unmistakably clear that even our most fundamental constitutional rights must in some circumstances be modified in the light of military needs, and that Congress's judgment as to what is necessary to preserve our national security is entitled to great deference.

The Committee took note of an opinion by the Justice Department analyzing the legal issues and concluding that male-only registration is constitutionally defensible. In addition, the Committee's own General Counsel, the Congressional Research Service and several independent legal scholars furnished the Committee with opinions supporting the constitutionality of male-only registration. These documents, along with the opposing views, are reprinted in the Committee's hearings on this matter.

Therefore, while taking seriously the constitutional arguments raised by opponents of a male-only system, the Committee concludes that there is no constitutional impediment to the exclusion of women from registration and induction, and based on the following specific findings rejects the proposal to register women. Further, for the reasons outlined above, the Committee concludes that peacetime registration of men is necessary.

SPECIFIC FINDINGS

(1) Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and makes rules for government and regulation of the land and naval forces, and pursuant to these powers it lies within the discretion of the Congress to determine the occasions for expansion of our armed forces, and the means best suited to such expansion should it prove necessary.

(2) An ability to mobilize rapidly is essential to the preservation of our national security.

(3) A functioning registration system is a vital part of any mobilization plan.

(4) Women make an important contribution to our national defense, and are volunteering in increasing numbers for our armed services.

(5) Women should not be intentionally or routinely placed in combat positions in our military services.

(6) There is no established military need to include women in a selective service system.

(7) Present manpower deficiencies under the All-Volunteer Force are concentrated in the combat arms—infantry, armor, combat engineers, field artillery and air defense.

(8) If mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements.

(9) The need to rotate personnel and the possibility that close support units could come under enemy fire also limits the use of women in non-combat jobs.

(10) If the law required women to be drafted in equal numbers with men, mobilization would be severely impaired because of strains on training facilities and administrative systems.

(11) Under the Administration's proposal there is no proposal for exemption of mothers of young children. The Administration has given insufficient attention to necessary changes in Selective Service rules, such as those governing the induction of young mothers, and to the strains on family life that would result from the registration and possible induction of women.

(12) A registration and induction system which excludes women is constitutional.

Mr. President, I ask unanimous consent to have printed in the RECORD the Yale University letter of May 2, 1980, addressed to Senator NUNN. That letter addresses the issue women and conscription and is signed by three distinguished professors of law at the Yale Law School.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

YALE UNIVERSITY LAW SCHOOL,
New Haven, Conn., May 2, 1980.

Hon. SAM NUNN,
Committee on Armed Services,
U.S. Senate, Washington, D.C.

DEAR SENATOR NUNN: We are glad to respond to your request for our opinion on the constitutionality of conscription limited to men. This letter will not consider whether the United States should restore the draft at this time, or whether it is wise policy to draft men without drafting women. It will be confined to the question whether recent judicial rulings on equality between the sexes under the Constitution—or, indeed, the possible ratification of the Equal Rights Amendment—would prevent Congress from drafting men for the armed forces without also drafting women.

We conclude that it is and will continue to be possible for Congress to conscript men, or women, or both men and women, in the exercise of its constitutional discretion to raise and support the armed forces it deems necessary and proper to defend the interests of the nation. If Congress should decide that the conscription of men is an appropriate way to create the kind of armed forces the United States requires to deal with threats to its security, as Congress perceives those threats, no court could challenge its decision. Under the Constitution as it stands, and under the Equal Rights Amendment, if it should be ratified, Congressional decisions of this order are "political questions" entrusted by the Constitution to the judgment of Congress. In such instances, the sole restraints which protect the people against the abuse of authority, as Chief Justice Marshall remarked of a related Constitutional power, that of declaring war, are "the wisdom and the discretion of Congress, their identity with people, and the influence which their constituents possess at elections."

The ultimate test for law, Justice Holmes often pointed out, is that it makes sense—make sense, he carefully insisted, in terms of what is regarded as just and convenient by a particular culture at a particular stage in its historical development. To understand law, Holmes wrote:

"Other tools are needed besides logic. It is something to show that the consistency of the system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

In the perspective of Holmes' standard, the question whether Congress can raise military forces by conscripting men of a certain age answers itself. Those who wonder whether conscripting men without conscripting women would violate modern constitutional rules about the equal dignity of men and women are simply pressing precedent beyond the boundaries of logic and good sense. Recent judicial decisions on the subject rightly demand punctilious equality between men and women in systems of education and social security, for example, and in various administrative arrangements of the military establishment where the situation of men and women is in fact the same. But the considerations of policy governing those cases cannot be applied mechanically to the altogether different problem of organizing, training, and using the armed forces in combat.

The duty and power of Congress "to raise and support" a military establishment are its ultimate responsibilities. In the end, the survival of the Republic depends upon the skill, leadership, and spirit of its armed forces. Now, as always, they are the foundation of the state. In the exercise of its constitutional authority, Congress must determine what kind of armed forces are needed to defend the vital interests of the United States, both by deterring war and, if deterrence fails, by winning it.

Like every other power under the Constitution, the war power is subject to a number of constitutional limitations, some enforced by the courts, and others by custom and by the political process.

Analysis of the question you have posed should begin with two related axioms the Supreme Court has invoked several times in discussing the constitutional character of the war power. The first is that "the war power is the power to wage war successfully", in the telling words of Chief Justice Hughes. The second is Justice Goldberg's comment that the Constitution "is not a sucide pact". These twin axioms color the interpretation of every aspect of the war power.

That being said, it is equally axiomatic that the war powers of Congress and of the President are to be read with and limited by the other provisions of the Constitution. The signers of this letter are firm advocates of the view that the war powers of Congress and of the President are subject to constitutional scrutiny by the courts in appropriate cases and by Congress and by public opinion in all cases.[1]

One class of constitutional limitations on the exercise of the war power is represented by Ex parte Milligan, 71 U.S. (4 Wall.) 2 (186), and Reid v. Covert, 354 U.S. 1 (1957), two decisions of supreme importance in maintaining the balance between the civil and the military power. Those cases struck down as unconstitutional laws under which civilians were tried by military tribunals. There is little challenge nowadays to the proposition that civilians be tried in civil courts and not before courts-martial or military commissions when—in the opinion of the courts—it is possible for the courts to function.[2]

Gillette v. United States, 401 U.S. 437 (1971), represents another familiar and important constitutional problem with respect to the powers of Congress over the military system. In that case, the Supreme Court rejected the claim that it was unconstitutional for Congress to exempt from military service only those who by reason of religious training and belief are conscientiously opposed to participation in war in any form. One of the appellants in Gillette objected to participation in the Vietnam conflict because of his "humanist approach to religion", the other, a devout Catholic, because he thought the Vietnam war was an "unjust war" under Catholic doctrine. Neither appellant would refuse to serve in wars he con-

[1] See E. V. Rostow, *The Japanese American Cases—a Disaster*, 54 Yale Law Journal 489 (1945).

[2] It must be conceded that Korematsu v. United States, 323 U.S. 214 (1944), and Ex parte Quirin, 317 U.S. 1 (1942), qualify the force of this generalization.