



ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

United States Department of Justice
Washington, D.C. 20530

JMH:LLS:MCL:bw
cc: Harmon
Hammond
Simms
Love
Baird
Strauss
Wilkinson
Hull
Files
Retrieval

MEMORANDUM FOR HONORABLE JOHN WHITE
Deputy Director
Office of Management and Budget

Re: Constitutionality of All-Male Draft
Registration

The President currently has the power under § 3 of the Selective Service Act, 50 U.S.C. App. § 453, to require males between the ages of 18 and 26 to register for possible induction into the military service. His power to induct registrants under that Act expired, with limited exceptions not pertinent here, on July 1, 1973. You have asked for our opinion whether the President may, by proclamation, constitutionally reinstitute a registration program otherwise authorized by § 453 in view of the fact that § 453 does not authorize the registration of females. For reasons stated hereafter, we believe that the congressionally mandated policy expressed in § 453 is constitutionally defensible. We also believe that because Congress is likely to reconsider the basis for this gender-based classification in the context of legislation reinstituting the President's power to induct registrants, the constitutional issues raised by it are generally ripe for a thorough review.

Although the treatment of gender-based classifications by the Supreme Court has not produced to date any general principles that are capable of easy application, we believe that two cases decided by the Court applying the equal protection component of the Fifth Amendment to federal action related to military affairs provide the most likely basis for assessing the constitutionality of the Selective Service Act. In Frontiero v. Richardson, 411 U.S. 677 (1973), the Court, without a majority as to rationale, held unconstitutional a

statutory scheme under which male members of the uniformed services were permitted to claim their spouses as "dependent" for purposes of obtaining increased benefits whereas female members were obliged to demonstrate that their spouses were in fact "dependent." In 1975, the Court read its decision in Frontiero as standing for the proposition that administrative convenience, standing alone, was an insufficient justification under the Constitution for the gender-based classification at issue in that case, Schlesinger v. Ballard, 419 U.S. 498, 510 (1975). In Ballard, the Court upheld the constitutionality of a statutory scheme which at that time treated men and women naval officers differently for purposes of promotion. In reaching its conclusion, the Court stated:

"[T]he operation of the statutes in question results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command. This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' . . . The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, see U.S. Const., Art. I, Section 8, Cls. 12-14, and with the President. See U.S. Const., Art. II, Section 2, Cl. 1." 1/

1/ 419 U.S., at 510 (emphasis added). We note that the language quoted in the text above from Schlesinger v. Ballard regarding judicial deference to Congress in the field of military affairs apparently reflects the Court's response in that case to the argument made by the Solicitor General:

[i]t is particularly important . . . that the courts accord to the legislature significant flexibility as to classification based on sex, because the issue here relates closely to the

[Footnote cont'd on p. 3]

We believe that the language from Ballard quoted above, while not necessary to the Court's holding in that case, strongly indicates a disposition on the part of the Court to apply the equal protection component of the Fifth Amendment with special circumspection in the context of military affairs. Indeed, the Court noted that in 1974 the Department of Defense, "[a]pparently believing that the need for a tenure differential has subsided," had submitted legislation to Congress to eliminate the gender-based distinction at issue in Ballard. Rather than suggesting that this position taken by the Department of Defense before the Congress undermined the Government's argument in that case, the Court stated:

"These developments no more than reinforce the view that it is for Congress, and not for the courts, to decide when the policy goals sought to be served . . . are no longer necessary"

419 U.S., at 510 n.13. The Government's power to require compulsory military service has historically been recognized as a prime object of the Constitution, see Selective Draft Law Cases, 245 U.S. 366, 378 (1918), and thus would logically command greater judicial deference than the governmental interests directly at stake in Frontiero and Ballard.

The circumspection with which the courts have applied equal protection principles in the military arena is nowhere more in evidence than in the context of litigation challenging the constitutionality of the gender-based classification under the Selective Service Act. In United States v. Reiser, 394 F. Supp. 1060, 1066 (D. Mont. 1975), the District Court rejected arguments advanced by the Government that the gender-based classification in the

1/ [Footnote cont'd from p. 2]

organization, maintenance, and effectiveness of the armed forces. In cases such as this the legislature's judgment as to military practicality requires deference.

Brief for the United States, at 9.

Selective Service Act was essential to the "national security." 2/ On appeal to the Ninth Circuit, the Government prevailed. In a three-paragraph opinion, that court found "a clear rational relationship between the government's legitimate interests, as expressed in the [Selective Service] Act, and the classification by sex" United States v. Reiser, 532 F.2d 673 (9th Cir.), cert. denied, 429 U.S. 838 (1976). 3/

Although not extensively reasoned, we believe that the Ninth Circuit's opinion in United States v. Reiser, supra, is direct and persuasive support for reading Ballard to require especially deferential treatment by the courts of gender-based classification related to military affairs. In addition, the District Court for the District of Delaware has effectively interpreted Ballard in the same manner. See Kovach v. Middendorf, 424 F. Supp. 72, 79 (D. Del. 1976). 4/

2/ The Government's argument in Reiser, as restated by the District Court, was--in the main--as follows:

"Only a limited number of women would be as suited as men for combat assignments, and in order to assure that sufficient numbers of combat qualified soldiers were members of the armed forces, Congress would have to send most of the women of eligible age through the induction process in order to find the qualified few, and it would be unreasonable to disrupt the lives of millions in order to find a very few."

394 F. Supp. at 1066-67.

3/ In Reiser, the Ninth Circuit cited as authority for its decision the case of Campbell v. Beaughler, 519 F.2d 1307, 1309 (9th Cir. 1975) cert. denied, 423 U.S. 1073 (1976). In Campbell the Ninth Circuit read "recent Supreme Court decisions" as requiring "only a rational relationship between legitimate governmental interests and the sex classification" involved and singled out Schlesinger v. Ballard as being particularly pertinent without elaborating on Ballard. See 519 F.2d at 1309.

4/ In Kovach, the District Court explicitly adopted the analysis of the court in United States v. Yingling, 368 F. Supp. 379 (W.D. Pa. 1973), stating in dictum that the

[Footnote cont'd on p. 3]

The Ninth Circuit's disposition of the constitutional attack on the Selective Service Act was not without precedent. Indeed, in a series of cases dating from 1968, various district courts and courts of appeals have upheld the constitutionality of the Selective Service Act against challenges directed to the same gender-based classification involved here. In United States v. Baechler, 509 F.2d 13, 14-15 (4th Cir. 1974), cert. denied, 421 U.S. 993 (1975), the Fourth Circuit, after acknowledging that females then were performing vital services in the armed forces, nevertheless concluded that: "Considering the nature of the demands of military service, we cannot say that Congress had no rational basis for the distinction based on sex." The other cases noted in the margin are of similar effect. 5/ In addition to these cases,

4/ [Footnote cont'd from p. 4]

Selective Service Act would satisfy even a "strict scrutiny" standard because of the "compelling" governmental interest in "providing for the common defense in a manner which would both maximize the efficiency and minimize the expense of raising an army." Analytically, we believe that the reasoning of both the Yingling and Kovach courts suggests that they were applying a classic "rationality" standard.

5/ United States v. Bertram, 477 F.2d 1329 (10th Cir. 1973); United States v. Camara, 451 F.2d 1122 (1st Cir. 1971), cert. denied, 405 U.S. 1074 (1972); United States v. Fallon, 407 F.2d 621 (7th Cir.), cert. denied, 395 U.S. 908 (1969); United States v. Offord, 373 F. Supp. 1117 (E.D. Wis. 1974); United States v. Yingling, 368 F. Supp. 379 (W.D. Pa. 1973); United States v. Dorris, 319 F. Supp. 1306 (W.D. Pa. 1970); United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970); United States v. Clinton, 310 F. Supp. 333 (E.D. La. 1970); United States v. St. Clair, 291 F. Supp. 122 (S.D. N.Y. 1968).

In a memorandum filed in the Supreme Court opposing the granting of a petition for a writ of certiorari in United States v. Baechler, supra, the Solicitor General took the position that the Selective Service Act was passed:

to enable the government to raise an army
for possible combat service and hence the
disparate treatment accorded to males rests

[Footnote cont'd on p. 6]

the constitutionality of the gender-based classification involved here is currently the subject of litigation in a federal district court. 6/

Notwithstanding the fact that the gender-based classification historically maintained in the Selective Service Act has been upheld on many occasions in the past by lower federal courts, it may be argued with some force that the Selective Service Act would no longer pass constitutional muster under recent Supreme Court cases which have articulated a standard of review to be applied to gender-based classification which appears to be more demanding than a mere "rational basis" test. For example, in Califano v. Webster, 430 U.S. 313, 316-17 (1977), the Court reiterated its position, articulated the Term before, that:

"To withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.' Craig v. Boren, 429 U.S. 190, 197 (1976)."7/

5/ [Footnote cont'd from p. 5]

upon a ground of difference having a fair and substantial relation to the object of the legislation. Reed v. Reed, 404 U.S. 71, 76. Cf. Schlesinger v. Ballard, No. 73-776, decided January 15, 1975.

6/ A civil suit challenging the constitutionality of the Selective Service Act on a variety of grounds has been pending since 1971 in the Eastern District of Pennsylvania. Goldberg v. Tarr, Civ. No. 71-1480 (E.D. Pa., three-judge court). In 1973 the Court of Appeals for the Third Circuit vacated the judgment of the district court dismissing the plaintiffs' sex discrimination count, and remanded for a determination on, inter alia, the plaintiffs' standing to sue. Rowland v. Tarr, 480 F.2d 545 (3d Cir. 1973). In the fall of 1979 the government once again moved to dismiss on grounds of mootness and standing; the motion was argued in December, and is awaiting decision by the court.

7/ This language from Boren has since been repeated in Orr v. Orr, 440 U.S. 268, 279 (1979) and Caban v. Mohammed, 441 U.S. 380, 388 (1979).

Should the Court disagree with the lower courts' reading of Ballard and, instead, require the Government to demonstrate both an "important governmental objective" and a substantial relationship between the gender-based classification and that objective, the constitutionality of the Selective Service Act becomes considerably more problematical.

We have no doubt that the general objective of that Act involves an important governmental interest sufficient to pass muster under the first prong of the Boren test. As indicated above, the power of the Government to require compulsory service is a primary object of the Constitution. Cf. Owens v. Brown, 455 F. Supp. 291, 304-05 (D.D.C. 1978). As put in Owens, however, the remaining "question concerns the degree of correlation that must be shown between the differences in treatment accorded to men and women and the objectives sought to be achieved." 8/

Establishing a correlation between the objective of the Selective Service Act and the gender-based classification found in that Act presents both practical and analytical problems that are not so easily overcome as they have proven to be under a lesser standard of review.

On the practical side, the absence of any specific congressional consideration of the statistical relationship between the number of persons subject to registration and conscription and the objective of obtaining sufficient combat troops--the primary argument historically advanced by the Government and accepted by the courts to sustain the Selective Service Act--would suggest the importance of considering current empirical evidence, which could be collected by the Department of Defense, of the existence of such a relationship. 9/ This evidence would presumably provide a

8/ In Owens, plaintiffs successfully challenged the absolute statutory bar to Navy women's serving on any but hospital ships. In its opinion, which was not appealed, the court did not refer to the Kovach case, in which the same statute was held constitutional. See note 4, supra. The statute was subsequently amended by Congress to permit the assignment of Navy women to noncombat shipboard duties.

9/ We understand that the Department of Defense is prepared to provide analyses to demonstrate that, on the best evidence available, conscription under the Selective Service Act would have to involve substantially greater numbers

[Footnote cont'd on p. 8]

basis for demonstrating both increased costs to the Government and substantial and unnecessary disruption to the lives of persons that would result from a draft of males and females.

Analytically, we believe the linchpin of a successful argument supporting the constitutionality of an all-male registration under a stricter standard is the proposition that Congress may, as a matter of substantive constitutional law, prohibit the service of females in actual combat based on either generalization regarding their physical characteristics or on psychological factors. We believe that this proposition, which would appear to be the underlying basis for most of the court decisions in this area, would be accepted by the courts. Once this proposition were accepted, and assuming the relationship discussed in the preceding paragraph had been established, we believe the Court would find that whatever incidental "burden" or stigma might be placed on females by virtue of the Selective Service Act itself would largely be neutralized by the ability of females to volunteer for service in the armed forces and justified by any substantial efficiency gained through that Act in producing persons for combat duty.

Viewed from the perspective of the constitutional rights of males, and assuming Congress' power to prevent females from filling combat positions, the constitutional injury suffered by a male under the Selective Service Act would be the burdens imposed by the registration requirement, and the greater probability that he would be drafted to fill a noncombat position. If a male subject to registration (and induction) under the Selective Service Act could convince a court that the Government could, with relative ease, fashion the registration/conscription process in such a way as to conscript separately for combat and

9/ [Footnote cont'd from p. 7]

to achieve enough persons fit for combat were the gender-based classification in the Selective Service Act to be eliminated. We also note that current analyses suggesting a basis for the gender-based classification in the Selective Service Act are "entitled to consideration" in litigation challenging the Act. See Owens v. Brown, 455 F. Supp. 291, 306 n.55 (D.D.C. 1978).

noncombat positions, the rationale for the constitutionality of the Act might as a factual matter be reduced to one of administrative convenience. Thus, under the higher standard of scrutiny articulated in Boren, it would be necessary for the Government to produce contemporaneous evidence establishing substantial and unavoidable costs, financial and otherwise, in the administration of such a registration/conscription system in order to uphold the Act.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel