The Burger Court Opinion Writing Database

Rostker v. Goldberg

464 U.S. 57 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1981

Re: 80-251 - Rostker v. Goldberg

Dear Bill:

I join.

Regards,

WEB

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 12, 1981

No. 80-251 - Rostker v. Goldberg

Dear Bill:

I have no objection to your proposed footnote.

Regards,

WEB

Justice Rehnquist

Copies to Justice Stewart
Justice Blackmun
Justice Powell
Justice Stevens

I share your reservations about the need to say anything more but your change pretty well demolishes the dissenting position. WEB

SUPREME COURT OF THE UNITED STATES

No. A–70

Bernard Rostker, Director of Selective Service, et al., Applicants,
v.
Robert L. Goldberg et al.

On Application for Stay

[July 19, 1980]

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application for a stay pending review on appeal of the July 18, 1980 order of a three-judge District Court for the Eastern District of Pennsylvania invalidating the registration provisions of the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, and enjoining the Government from enforcing them.[1] At stake are the Government's plans

[1] Briefly, the procedural history of this case is as follows: The original complaint was filed in June 1971 by male citizens subject to registration and induction who argued that the Selective Service Act violated several of their constitutional rights, including the right to equal protection of the laws guaranteed by the Fifth Amendment. Application to the United States District Court for the Eastern District of Pennsylvania for the convening of a three-judge court under the then-applicable statute, 28 U. S. C. § 2282, was denied and the suit was dismissed. On review, the United States Court of Appeals for the Third Circuit upheld the dismissal of all claims except that founded upon the failure to conscript females. The Court of Appeals remanded the case to the District Court for a determination of the substantiality of the equal protection claim, and of plaintiffs' standing to raise that issue. On remand, the District Court found that plaintiffs had standing, and convened a three-judge court.

On July 1, 1974, the three-judge court, with Judge Rosenn dissenting, denied defendants' motion to dismiss. *Rowland* v. *Tarr*, 378 F. Supp. 766 (ED Pa. 1974). There were no further proceedings until June 1979, when the court proposed to dismiss the case due to inaction. Additional discovery ensued, and on February 19, 1980, defendants' motion for summary judgment was denied. On July 1, 1980, a plaintiff class of potential

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 18, 1981

RE: No. 80-251 Rostker v. Goldberg

Dear Byron:

Please join me.

Sincerely,

Bill

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 18,1981

RE: No. 80-251 Rostker v. Goldberg

Dear Thurgood:

Please join me.

Sincerely,

Bill

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 6, 1981

Re: 80-251 - Rostker v. Goldberg

Dear Bill:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 13, 1981

Re: No. 80-251, Rostker v. Goldberg

Dear Bill,

I have no serious objection to any of Harry's suggestions.

Sincerely yours,

P.S.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 29, 1981

Re: 80-251 - Rostker v. Goldberg

Dear Bill,

I should have said so before, but I am awaiting the dissent in this case.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 12, 1981

Re: No. 80-251, Rostker v. Goldberg

Dear Bill,

I would have no objection to the new footnote you contemplate.

Sincerely yours,

P.S.

Justice Rehnquist

Copy to The Chief Justice
Justice Blackmun
Justice Powell
Justice Stevens

To: The Chief Justice
Justice Brennan
Justice Stewart
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice White

Circulated: 6-17-81

Recirculated: _____

80-251 - Rostker V. Goldberg

Justice White, dissenting.

I assume what has not been challenged in this case -- that excluding women from combat positions does not offend the Constitution. Granting that, it is self-evident that if during mobilization for war, all non-combat military positions must be filled by combat-qualified personnel available to be moved into combat positions, there would be no occasion whatsoever to have any women in the Army, whether as volunteers or inductees. The Court appears to say, ante pp. ___, that Congress concluded as much and that we should accept that conclusion even though the serious view of the Executive Branch, including the responsible military services, is to the contrary. The Court's position in this regard is most unpersuasive. I perceive little, if

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Blackmun
Powell
Rehnquist
Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 18 JUN 1981

PRINTED

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-251

Bernard Rostker, Director of Selective Service, Appellant, *v.* Robert L. Goldberg et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[June —, 1981]

JUSTICE WHITE, dissenting.

I assume what has not been challenged in this case—that excluding women from combat positions does not offend the Constitution. Granting that, it is self-evident that if during mobilization for war, all noncombat military positions must be filled by combat-qualified personnel available to be moved into combat positions, there would be no occasion whatsoever to have any women in the Army, whether as volunteers or inductees. The Court appears to say, *ante*, pp. ———, that Congress concluded as much and that we should accept that conclusion even though the serious view of the Executive Branch, including the responsible military services, is to the contrary. The Court's position in this regard is most unpersuasive. I perceive little, if any, indication that Congress itself concluded that every position in the military, no matter how far removed from combat, must be filled with combat-ready men. Common sense and experience in recent wars, where women volunteers were employed in substantial numbers, belie this view of reality. It should not be ascribed to Congress, particularly in the face of the testimony of military authorities, hereafter referred to, that there would be a substantial number of positions in the services that could be filled by women both in peacetime and during mobilization, even though they are ineligible for combat.

I would also have little difficulty agreeing to a reversal if all

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 15, 1981

Re: No. 80-251 - Rostker v. Goldberg

Dear Bill:

I shall circulate a dissent in this case.

Sincerely,

T.M.

Justice Rehnquist

cc: The Conference

80-251

Rostker v. Goldberg

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: 6/10/81

Recirculated: _____

JUSTICE MARSHALL, dissenting.

The Court today places its imprimatur on one of the most potent remaining public expressions of "ancient canards about the proper role of women," Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (MARSHALL, J., concurring). It upholds a statute that requires males but not females to register for the draft, and which thereby categorically excludes women from a fundamental civic obligation. Because I believe the Court's decision is inconsistent with the Constitution's guarantee of equal protection of the laws, I dissent.

I

A

The background to this litigation is set out in the opinion of the Court, ante, at 1-6, and I will not repeat that discussion here. It bears emphasis, however, that the only question presented by this case is whether the exclusion of women from registration under the Military Selective Service Act, 50 U.S.C. App. § 451 et seq. (MSSA) contravenes the equal protection component of the Due Process Clause of the Fifth Amendment. Although the purpose of registration is to assist preparations for drafting civilians into the military, we are not asked to rule on the constitutionality of a statute governing conscription.[1] With the advent of the All-Volunteer Armed

STYLISTIC CHANGES THROUGHOUT.
See PP. 1, 23

22 JUN 1981

1st ~~PRINTED DRAFT~~

SUPREME COURT OF THE UNITED STATES

No. 80-251

Bernard Rostker, Director of Selective Service, Appellant, *v.* Robert L. Goldberg et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[June —, 1981]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court today places its imprimatur on one of the most potent remaining public expressions of "ancient canards about the proper role of women," *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 545 (1971) (MARSHALL, J., concurring). It upholds a statute that requires males but not females to register for the draft, and which thereby categorically excludes women from a fundamental civic obligation. Because I believe the Court's decision is inconsistent with the Constitution's guarantee of equal protection of the laws, I dissent.

I

A

The background to this litigation is set out in the opinion of the Court, *ante,* at 1–6, and I will not repeat that discussion here. It bears emphasis, however, that the only question presented by this case is whether the exclusion of women from registration under the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* (MSSA) contravenes the equal protection component of the Due Process Clause of the Fifth Amendment. Although the purpose of registration is to assist preparations for drafting civilians into the military, *we are not asked to rule on the constitutionality of a statute governing conscription.*[1] With the advent of the All-Volunteer

[1] Given the Court's lengthy discourse on the background to this litiga-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 12, 1981

Re: No. 80-251 - Rostker v. Goldberg

Dear Bill:

I wonder if you would consider the following changes in your opinion:

1. The elimination, on page 14 of the recirculation of May 6, of the first full sentence and the following reference to the Appellees' Brief,

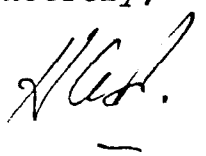
2. The elimination of the sentence beginning with "Whatever one's views," just above the center of page 16,

3. The insertion of the words "in part" in the second sentence of the first full paragraph on page 16. This is the sentence referring to Michael M.

4. Indicating, on pages 16, 20, and 21, where Michael M. is cited, that the opinion there was for only a plurality and not a majority.

If you feel free to make these changes, you have my joinder.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 13, 1981

Re: No. 80-251 - Rostker v. Goldberg

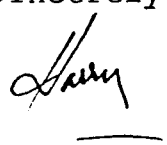
Dear Bill:

Thank you for your sympathetic response to my note of May 12. I shall gladly "recede" on my third suggestion. So far as the first suggestion is concerned, what do you think of the following phrasing to begin Part III on page 13:

> This case is quite different from several of the gender-based discrimination cases we have considered in that, despite appellees' assertions, Congress did not act "unthinkingly" or "reflexively and not for any considered reason." Brief for Appellees 35.

I undoubtedly am overly concerned. It may well be that this is just a matter of emphasis.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 14, 1981

Re: No. 80-251 - Rostker v. Goldberg

Dear Bill:

Please join me in your circulation of May 14.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 15, 1981

Re: No. 80-251 - Rostker v. Goldberg

Dear Bill:

I have no objection to your proposed footnote.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Chief Justice
Mr. Justice Stewart
Mr. Justice Powell
Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 7, 1981

80-251 Rostker v. Goldberg

Dear Bill:

I am writing you a separate "join" note in this case. Your opinion is quite persuasive, although I have rarely seen Justice Rehnquist so "deferential" to anything or anybody!

In my view, Congress would have been irresponsible to have included women in the registration/draft law. We already have an army that probably cannot fight, as thoughtful articles recently in The Atlantic Monthly and the London Economist have documented. The Economist, for example, concluded:

> "Beneath a hard surface, the core is soft and spongy. The American army's weaknesses have to be cured, soon, if it is to face the challenges of the 1980's." The Economist, April 25, 1981, p. 23.

But my purpose in writing is not to share my concerns. Rather, it is to suggest a possible addition or two. For the most part, your opinion relies on generalities in the record of hearings, and particularly with respect to the "policy" against women in combat. It seems to me that the reasons for this policy merit greater emphasis. You do have a good quote commencing on page 23 of your opinion from the Senate Report. I suggest the addition of General Rogers' testimony on page 16 of the Senate Subcommittee Report, 1979, commencing "General Rogers. Mr. Chairman, may I add a footnote . . .", and continuing with his description of emergencies that often require "non-combatant" soldiers to fight.

In recent wars there rarely have been stabilized front lines. With modern mobility on land and in the air, no one can predict when and where fighting may occur. In my

view, there are relatively few places in the armed services for personnel - male or female - who cannot fight.

Apart from the foregoing, another point made by witnesses and included in the Senate Report, relates to "societal reasons". See page 159 of the Senate Report, emphasizing that "drafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency".

Finally, I do not recall that you have included a reference to "administrative problems" that would result from drafting women, such as "housing and different treatment with regard to dependency, hardship and physical standards". Senate Report, p. 159.

In sum, I think the opinion would be strenghtened by greater emphasis on the facts that prompted Congress to reject the President's novel view that military needs should be subordinated to "equitable" considerations.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 7, 1981

80-251 Rostker v. Goldberg

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 12, 1981

80-251 Rostker v. Goldberg

Dear Bill:

I think your proposed footnote will be helpful. It has my approval.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: MAY 1 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-251

Bernard Rostker, Director of Selective Service, Appellant, *v.* Robert L. Goldberg et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[May —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females.

I

Congress is given the power under the Constitution "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." Art. I, § 8, cls. 12–14. Pursuant to this grant of authority Congress has enacted the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* ("the MSSA" or "the Act"). Section 3 of the Act, 50 U. S. C. App. § 453, empowers the President, by proclamation, to require the registration of "every male citizen" and male resident aliens between the ages of 18 and 26. The purpose of this registration is to facilitate any eventual conscription: pursuant to § 4 (a) of the Act, 50 U. S. C. App. § 454 (a), those persons required to register under § 3 are liable for training and service in the Armed Forces. The MSSA registration provision serves no other purpose beyond providing a pool for subsequent induction.

pp 7-13, 19-21

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-251

Bernard Rostker, Director of Selective Service, Appellant, *v.* Robert L. Goldberg et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[May —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females.

I

Congress is given the power under the Constitution "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." Art. I, § 8, cls. 12–14. Pursuant to this grant of authority Congress has enacted the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* ("the MSSA" or "the Act"). Section 3 of the Act, 50 U. S. C. App. § 453, empowers the President, by proclamation, to require the registration of "every male citizen" and male resident aliens between the ages of 18 and 26. The purpose of this registration is to facilitate any eventual conscription: pursuant to § 4 (a) of the Act, 50 U. S. C. App. § 454 (a), those persons required to register under § 3 are liable for training and service in the Armed Forces. The MSSA registration provision serves no other purpose beyond providing a pool for subsequent induction.

Brennan 80

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 11, 1981

Re: No. 80-251 Rostker v. Goldberg

Dear Lewis:

Thank you for your "join" and letter of May 7th.

Taking your comments in inverse order, the opinion in its present form does refer to the "administrative problems" of drafting women, quoting on page 23 the language from the Senate Report which you quote in your letter. I would have gone into this concern at greater length, but neither the reports nor hearing testimony did so. If you have read the record more carefully than I, I would cheerfully consider any additional references to the administrative problems it contains.

As to the "societal reasons", I made a conscious decision to leave them out of the opinion. I recognize a strong argument can be made on this score, as was done, for example, in the brief amicus curiae of Stacey Acker, et al. I was less certain that there were five votes to uphold male-only registration on the grounds that women have different roles in family life and in society than men. This would run into some broad language in previous opinions about "sexual stereotyping", most if not all of which I dissented from. Since I felt a solid Court could be lined up behind an opinion based solely on military considerations, I did not think it worthwhile to confuse the case by a possibly divisive discussion of societal considerations.

As to your first suggestion, I do cite to Gen. Rogers' testimony on page 24. I hesitate to include a lengthy quotation, since elaborating the evidentiary support for Congress' determination detracts from the view that decisions such as this one are within Congress' province and

that courts should be loath to go over with a fine-tooth comb the factual basis for Congress' exercise of its constitutional authority. Ample factual support is there, but giving it too much prominence in an opinion might suggest it is necessary in every case. Since I do cite Gen. Rogers' testimony, however, if you feel strongly about the point I am willing to quote it in a footnote to the citation on page 24.

Sincerely,

Ben

Mr. Justice Powell

Yes

WHR agreed

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 13, 1981

Re: No. 80-~~215~~ 251 Rostker v. Goldberg

Dear Harry:

Thank you for your letter of May 12. Subject to any objection from those who have already joined, I am prepared to make some of the changes you suggest. Your suggested change No. 4 is, of course, both factual and accurate and will be made. I am also willing to go along with your suggested change No. 2 - the sentence you have marked for elimination is probably repetitive and adds little if anything to the opinion.

For the reason that I cheerfully accede your suggestion No. 4, I would prefer not to make your suggested change No. 3. The sentence is an historical statement of the plurality's position in Michael M. There the plurality mentioned the California legislature's action and stated "that is enough" to reject the accidental byproduct argument. The rejection of the argument at least insofar as the plurality opinion is written was not simply "in part" because of the California legislature's action.

As to your first suggested change, although I am not wedded to the particular language I do think some sentence is needed to introduce the discussion which follows. Is there an alternative phrasing you would prefer?

Sincerely,

Justice Blackmun

cc: the Conference

p. 24

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–251

Bernard Rostker, Director of Selective Service, Appellant, *v.* Robert L. Goldberg et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[May —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females.

I

Congress is given the power under the Constitution "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." Art. I, § 8, cls. 12–14. Pursuant to this grant of authority Congress has enacted the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* ("the MSSA" or "the Act"). Section 3 of the Act, 50 U. S. C. App. § 453, empowers the President, by proclamation, to require the registration of "every male citizen" and male resident aliens between the ages of 18 and 26. The purpose of this registration is to facilitate any eventual conscription: pursuant to § 4 (a) of the Act, 50 U. S. C. App. § 454 (a), those persons required to register under § 3 are liable for training and service in the Armed Forces. The MSSA registration provision serves no other purpose beyond providing a pool for subsequent induction.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 14, 1981

Re: No. 80-251 Rostker v. Goldberg

Dear Harry:

The language you suggest in your letter of May 13th is fine with me and has been sent to the printer along with the other changes.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

13-14, 16, 20

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated:

Recirculated: MAY 14 1981

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-251

Bernard Rostker, Director of Selective Service, Appellant, *v.* Robert L. Goldberg et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[May —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females.

I

Congress is given the power under the Constitution "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." Art. I, § 8, cls. 12–14. Pursuant to this grant of authority Congress has enacted the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* ("the MSSA" or "the Act"). Section 3 of the Act, 50 U. S. C. App. § 453, empowers the President, by proclamation, to require the registration of "every male citizen" and male resident aliens between the ages of 18 and 26. The purpose of this registration is to facilitate any eventual conscription: pursuant to § 4 (a) of the Act, 50 U. S. C. App. § 454 (a), those persons required to register under § 3 are liable for training and service in the Armed Forces. The MSSA registration provision serves no other purpose beyond providing a pool for subsequent induction.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

I see no problem w/ the proposed footnote. PS

Dear Bill,
I think your proposed footnote will be helpful. It has my approval

June 12, 1981

MEMORANDUM TO THE CHIEF JUSTICE
JUSTICE STEWART
JUSTICE BLACKMUN
JUSTICE POWELL
JUSTICE STEVENS

Re: No. 80-251 Rostker v. Goldberg

You have been chosen from the field of nine to receive this communication because each of you has had the foresight and prescience to join my proposed opinion for the Court in this case. The only point in Thurgood's dissent that I am considering responding to is his contention on page 13 that if a peacetime draft were held the Court could "be forced to declare the male-only registration program unconstitutional" because the present opinion focuses on Congress' determination that registration was linked to a possible future draft characterized by a need for combat troops. I believe there are two significant errors in this reasoning.

First, the constitutional validity of male-only registration would not be affected by a peacetime draft. Inductees could challenge the peacetime draft itself, but male-only registration would be valid for the reasons stated in our opinion.

More importantly, a draft of combat troops of the sort anticipated by Congress need not at all be limited to actual wartime, and Congress, although focusing on mobilization, recognized this. If a peacetime draft were held the need would also be for combat or combat-eligible troops. See S. Rep. No. 96-826, at 160 ("Present manpower deficiencies under the All- Volunteer Force are concentrated in the combat arms--infantry, armor, combat engineers, field

artillery and air defense."). Congress recognized that its considerations concerning registration of women, based on the perceived need in the event of a draft for combat troops, applied both to wartime and peacetime conscription. See, e.g., id., at 157 ("registering women for assignment to combat or assigning women to combat positions in peacetime...would leave the actual performance of sexually mixed units as an experiment to be conducted in war with unknown risk") (emphasis supplied). Some of Congress' reasons for exempting women from registration explicitly applied both to peacetime and wartime conscription. See, e.g., id., at 158 ("In peace and war, significant rotation of personnel is necessary."). Certainly Congress and the Executive do not have to await the actual outbreak of hostilities if they decide there exists a need for a draft of combat or combat-eligible troops.

Although I am not convinced that it is necessary to say anything, do any of you have objections to a footnote along the following lines, perhaps added at the end of the block quotation on page 20 of the May 14 draft?:

> The dissent's suggestion that since Congress focused on the need for combat troops in authorizing male-only registration the Court "could be forced to declare the male-only registration program unconstitutional" in the event of a peacetime draft misreads our opinion. The perceived need for combat or combat-eligible troops in the event of a draft was not limited to a wartime draft. See, e.g., S. Rep. No. 96-826, supra, at 157 (considering problems associated with "[r]egistering women for assignment to combat or assigning women to combat positions in peacetime"); id., at 157 (need for rotation between combat and non-combat positions "[i]n peace and war").

Sincerely,

STYLISTIC

6, 20

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

Mr. Justice Rehnquist

Circulated:

Circulated: JUN 15 1981

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-251

Bernard Rostker, Director of Selective Service, Appellant, *v.* Robert L. Goldberg et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[May —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females.

I

Congress is given the power under the Constitution "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." Art. I, § 8, cls. 12-14. Pursuant to this grant of authority Congress has enacted the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* ("the MSSA" or "the Act"). Section 3 of the Act, 50 U. S. C. App. § 453, empowers the President, by proclamation, to require the registration of "every male citizen" and male resident aliens between the ages of 18 and 26. The purpose of this registration is to facilitate any eventual conscription: pursuant to § 4 (a) of the Act, 50 U. S. C. App. § 454 (a), those persons required to register under § 3 are liable for training and service in the Armed Forces. The MSSA registration provision serves no other purpose beyond providing a pool for subsequent induction.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 8, 1981

Re: 80-251 - Rostker v. Goldberg

Dear Bill:

Please join me.

Respectfully,

John

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 12, 1981

Re: 80-251 - Rostker v. Goldberg

Dear Bill:

The new footnote is acceptable to me.

Respectfully,

Justice Rehnquist

cc: The Chief Justice
Justice Stewart
Justice Blackmun
Justice Powell