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DEBATE ON DRAFTING WOMEN

In a crowded courtroom, with a long line of people waiting outside, the U.S. Supreme Court heard oral arguments recently on the case which CBS has described as the most important of this term. It could be the most important of the century.

This is the case in which the American Civil Liberties Union, a couple of draft dodgers, and a leftwing professor at the Harvard Law School are asking the high Court to affirm a lower federal court's discovery of a new Fifth Amendment right that no one else has detected in two centuries: the right of a man not to be drafted unless women are also drafted into the armed services. The decision is expected by the end of June.

The case was argued for the ACLU side by Donald L. Weinberg, and the Supreme Court Justices did a good job of exposing the holes and inconsistencies in his argument. The Harvard law professor didn't appear; some say because he now realizes the case is a loser.

Justice Powell asked Weinberg if his next case would be to challenge the "sex discrimination" of the laws that exempt women from military combat duty. Weinberg hedged and evaded. Justice Rehnquist pressed him further. Weinberg claimed that question was irrelevant to this case; of course, it is one of the most relevant of all questions.

If, by some legerdemain, the Fifth Amendment is discovered to prohibit any difference of treatment between men and women in regard to draft registration, how could any difference of treatment on account of sex be reimposed, constitutionally, after men and women are in the army? No one can answer that question.

Weinberg's entire argument for the mandatory registering of women was based on the assumption that sex is not a permissible factor on which Congress may make a difference of treatment. But Justice Stevens showed up Weinberg's inconsistency in making him admit that an armed forces quota of 75% men and 25% women would be acceptable, and that the present ratio of 650,000 men and 80,000 women is also acceptable.

Weinberg claimed that the exemption of women from the draft excludes millions of persons who have valuable skills and experience which the armed forces can use. Justice

(more)

Stewart pointed out with consummate clarity that there are millions of persons under age 18 and over age 26 who likewise have skills and experience that the armed forces can use. Weinberg lamely replied, "We did not attack the age discrimination" because it is based on the need to maintain a strong economy and to avoid disruption of society. (He didn't seem to realize that those same factors argue for the exemption of women.)

Weinberg claimed that Congress' decision to exempt women from the draft law was not the result of a "considered discussion," but came about in an "atmosphere permeated with chauvinism." Chief Justice Burger asked, "Since when is it the function of the courts to inquire into the 'atmosphere' in Congress?" Good question.

Weinberg tried to claim that the burden of proof should be on the government to prove a need to exclude women. Justice Stewart reacted quickly to that impertinence. "No," he said, "it is up to you to show why the statute is invalid. Congress exercised its explicit constitutional power [under Article I]. The [male-only draft registration] statute is presumptively valid."

Weinberg tried to claim that this case involves registration only, is merely an "inventory" of names, and has nothing to do with the military draft. Justice Stevens admonished him that "you must assume a connection between the draft and registration." And, indeed, you must. This registration is not for any other purpose.

The male-only draft registration law was defended by Soliciter General Wade McCree. His principal argument was that the law exempts women from military combat duty, the purpose of the draft is to fill combat jobs, so Congress has a constitutional right to exempt women (who cannot legally fill combat jobs) from the draft and draft registration.

It is unfortunate that McCree refused to use many of the powerful physical, historical, family, common-sense, and family arguments for the exemption of women from the draft. Everyone with common sense knows that women are different from men; we don't need any Congressional "findings" to prove that self-evident truth.

The notion that American women must be drafted to fight a Soviet army that is 99.5 percent male is simply repugnant to a civilized society. The purpose of the armed forces is to be ready to fight to defend our nation, and all historical evidence proves that men can fight better than women.

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