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IN THE SUPREME COURT OF THE UNITED STATES

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:  
BERNARD ROSTKER, DIRECTOR OF  
SELECTIVE SERVICE, :

Appellant, :

v. :

ROBERT L. GOLDBERG ET AL. :

No. 80-251

-----:  
Washington, D. C.

Tuesday, March 24, 1981

The above-entitled matter came on for oral ar-  
gument before the Supreme Court of the United States  
at 1:11 o'clock p.m.

APPEARANCES:

WADE H. McCREE, JR., ESQ., Solicitor General of the  
United States, U.S. Department of Justice, Washing-  
ton, D.C. 20530; on behalf of the Appellant.

DONALD L. WEINBERG, ESQ., Kohn, Savett, Marion &  
Graf, Suite 1214 IVB Building, 1700 Market Street,  
Philadelphia, PA 19103; on behalf of the Appellees.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

WADE H. McCREE, JR., ESQ.,  
on behalf of the Appellant

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DONALD L. WEINBERG, ESQ.,  
on behalf of the Appellees

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MILLERS FALLS  
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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Rostker v. Goldberg. Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. MCCREE, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. MCCREE: Mr. Chief Justice, and may it please the Court:

This case presents the question whether the Military Selective Service Act by providing for a male-only registration and classification for possible induction into the Armed Services violates the equal protection component of the Fifth Amendment by invidiously discriminating against males.

This is an appeal from the judgment of a three-judge court determining that the male-only registration provision of the Military Selective Service Act offends the Constitution and enjoining proceedings pursuant to that Act.

There is no substantial dispute about the facts giving rise to this controversy. Since 1948 the Military Selective Service Act has provided for the registration of males between the ages of 18 and 26 and their classification and induction into the Armed Services.

QUESTION: Do all males in that age group have to register?

MR. MCCREE: All male citizens and all male resident



1 aliens; only aliens not in non-immigrant status.

2 QUESTION: But all males including ministers and --

3 MR. McCREE: All of them register, Mr. Justice  
4 Stewart. The classification system provides for exemptions  
5 and deferments.

6 This condition continued until 1973 when the  
7 Congress decided to experiment with an all-volunteer Army  
8 and the conscription provision of the statute was removed.  
9 However, the registration and classification provisions con-  
10 tinued, as they do today, in effect. But in 1975 the Presi-  
11 dent decided to discontinue the classification of persons  
12 under the Military Selective Service Act and this was the  
13 condition until 1980 when the President of the United States  
14 sent a message to the Congress indicating his desire because  
15 of foreign policy and military exigencies to reactivate the  
16 registration procedures and he also requested them to extend  
17 the scope of the requirements for registration and classifi-  
18 cation to include females.

19 The three-judge case which was --

20 QUESTION: Might I ask, Mr. Solicitor General, is  
21 the registration statute explicit as to the permissible uses  
22 of the registration lists?

23 MR. McCREE: It is not. It doesn't forbid the list  
24 for any purposes other than that the stated purposes, but  
25 it states the purpose for which it would be used.

1 QUESTION: Well, what I'm getting at, of course, is,  
2 may the registration lists be used, for example, to staff  
3 nonmilitary jobs?

4 MR. McCREE: It may --

5 QUESTION: What I'm thinking about is during the  
6 war, do you recall, when not we, but our allies had all kinds  
7 of registration lists which they then used to bring women into  
8 war industries.

9 MR. McCREE: If you're inquiring for service other  
10 than within the Armed Services, my understanding is that it  
11 does not.

12 QUESTION: It does not.

13 MR. McCREE: It's for induction into the military  
14 services. It's not a universal service act, as I understand  
15 it.

16 QUESTION: Except, I suppose, that people who are in  
17 certain classifications might be assigned outside the mili-  
18 tary?

19 MR. McCREE: That was certainly done under the Act  
20 and I assume it was done lawfully. Noncombatant service,  
21 within the service, and other service related to the national  
22 welfare, I think, was the rubric that was used during World  
23 War II, the Korean War, and the Southeast Asian hostilities.

24 The President requested the Congress to shift funds  
25 from the Department of Defense to the inactive Selective

1 Service machinery to reactivate it, to commence the registra-  
2 tion of males and females, as he requested, under this message  
3 that he sent.

4 The Congress considered the message and by joint  
5 resolution transferred funds from the Department of the De-  
6 fense to the Selective Service Agency to permit it to func-  
7 tion, but denied the request to expand the Selective Service  
8 requirement to have women register. The three-judge case  
9 which had been commenced earlier in Philadelphia was then re-  
10 activated and the Court determined that by reason of the non-  
11 inclusion of women that there was an invidious discrimination  
12 against males, that the statute was unconstitutional because  
13 it offended the Fifth Amendment and it enjoined further  
14 classification.

15 QUESTION: Mr. Solicitor General, you used the term,  
16 "reactivated." When that original action in the three-judge  
17 District Court was brought in '71 -- was it? 1971? -- was the  
18 statute we're now concerned with in the pleadings?

19 MR. McCREE: The statute was still in effect but in  
20 1975 the President discontinued registration under the  
21 statute, so the statute still authorized the President by  
22 proclamation to reinstitute registration.

23 QUESTION: So you have no problem about the action  
24 being the proper vehicle for the issues that are not here?

25 MR. McCREE: We do not raise this in our



1 jurisdictional statement. We don't raise it now. We believe  
2 the matter is properly before the Court and we certainly  
3 would rather have the Court adjudicate it now than to wait  
4 until a genuine emergency with an injunction preventing the  
5 President to act in the best interests of the country.

6 QUESTION: Well, General McCree, may I ask, is the  
7 statute one that simply authorizes the President by proclama-  
8 tion to require registration or that it directs him?

9 MR. McCREE: It authorizes him by proclamation.  
10 It does --

11 QUESTION: And then after this 1980 action in  
12 Congress he did issue a proclamation?

13 MR. McCREE: He did issue a proclamation requiring  
14 young men who were born in 1960 and 1961 to register and then  
15 on a continuing basis persons who were born after January 1,  
16 1963, on or before the 30 days prior to their 18th birthday.  
17 And that is continuing now under a stay granted by this Court  
18 following our appeal from the determination of unconstitu-  
19 tionality.

20 QUESTION: General McCree, I might have missed it.  
21 Have these pleadings been amended?

22 MR. McCREE: Were they amended in the court below,  
23 Mr. Justice?

24 QUESTION: Yes.

25 MR. McCREE: Yes. The pleadings were and parties

1 were added because some of the original parties were beyond  
2 the registration limit at that time, the 26 age. Persons  
3 were added so that there was an appropriate class of persons  
4 who were subject to the requirement of registration.

5 QUESTION: Is it now aimed at the new statute or  
6 the old?

7 MR. McCREE: It is aimed at the old statute because  
8 the statute wasn't changed to require the registration of  
9 women, and it's still a male-only registration statute.

10 QUESTION: Then that's what's before us, is that  
11 correct?

12 MR. McCREE: That's what's before the Court at this  
13 time, if the Court please.

14 QUESTION: Mr. Solicitor General -- we began inter-  
15 rupting you with our questions and I'm now continuing the  
16 interruption -- you stated that the three-judge district court  
17 held that this statute was constitutionally invalid because  
18 it invidiously discriminated against men?

19 MR. McCREE: Against men.

20 QUESTION: That's clear, is it?

21 MR. McCREE: That's clear. It was a determination  
22 and in fact a challenge was not made that it invidiously  
23 discriminated against women. Other grounds were asserted that  
24 the court didn't pass on. They asserted that it took proper-  
25 ty without due process of law, that it violated the

1 prohibition against involuntary servitude. But those con-  
2 tentions were found to be insufficient and only on the invid-  
3 ious discrimination against males was the statute held  
4 invalid.

5 The court below employed what this Court has  
6 called in some of its decisions an intermediate level of  
7 scrutiny that required that the draft registration be sub-  
8 stantially related to an important governmental objective.  
9 And the court below determined that the findings of the  
10 Congress on the question of military need did not show an  
11 important governmental objective or substantial relation  
12 thereto, and made a very extended examination of what it  
13 regarded the showing that the Government had made.

14 We contend essentially two things here. First we  
15 assert that because this case arises in the context of a  
16 power expressly granted to the Congress by the Constitution,  
17 Article I, Section 8, to raise an army, that the Court should  
18 apply the rational relationship standard in determining this  
19 validity. We submit that raising an army and conducting war  
20 is sui generis.

21 QUESTION: Mr. Solicitor General, would you take  
22 that position if the classification was one that was racially  
23 discriminatory, based on the authority to raise -- ?

24 MR. McCREE: I think we would take that. I think  
25 we might do that, but we would say --



1 QUESTION: If it was decided, it said, would have  
2 registered only negroes and no whites?

3 MR. McCREE: But we would say that that would not  
4 be rationally related to an important governmental objective,  
5 because --

6 QUESTION: I thought a rational basis test doesn't talk  
7 about an important government objective. Legitimate, doesn't  
8 it?

9 MR. McCREE: A rational relationship to a legiti-  
10 mate -- the Court is correct -- a legitimate governmental  
11 objective.

12 QUESTION: And you say that would not be legitimate?

13 MR. McCREE: And we would say that would not be a  
14 legitimate governmental --

15 QUESTION: Then gender-based discrimination could  
16 be supported as related to a legitimate governmental objec-  
17 tive; not racial?

18 MR. McCREE: We submit that it would and --

19 QUESTION: In which case?

20 MR. McCREE: And not racial.

21 QUESTION: How about religious? Only Jews shall be  
22 registered.

23 MR. McCREE: And not religious. We say that it  
24 would not be a legitimate governmental objective.

25 QUESTION: Only gender base; sex?

1 MR. McCREE: We believe gender base is related to  
2 a legitimate governmental relationship for the reason that --

3 QUESTION: And you don't have to say that only  
4 gender base?

5 MR. McCREE: No, not only gender base, but we just  
6 say the gender base would satisfy it.

7 QUESTION: What I'm thinking of, other bases:  
8 race, religion. -- We've always talked about --

9 MR. McCREE: Oh, I think I follow the Court's ques-  
10 tion.

11 QUESTION: We've always talked about something more  
12 than the rational basis aspect.

13 MR. McCREE: I would look at the Court's question  
14 in this way. Historically, and in the interpretations by  
15 this Court, race is no longer an appropriate classification  
16 for the disparate treatment of anybody in this country  
17 anymore. And I think, if I can say anything that  
18 I believe categorically, that's it.

19 QUESTION: Because it's always irrational?

20 MR. McCREE: It's always irrational.

21 QUESTION: No matter what test you apply, it will  
22 always fall.

23 MR. McCREE: It wouldn't pass the first level of  
24 scrutiny.

25 QUESTION: Correct.

1 MR. McCREE: But we think that this matter should  
2 be determined in the first level of scrutiny, as I suggested,  
3 because of the sui generis nature of raising an army to pre-  
4 pare for war. The Congress is full of references to this,  
5 and of course, Article I, Section 8, specifically empowers  
6 the Congress to raise armies, to wage war and make rules for  
7 that in --

8 QUESTION: I take it, in what you said earlier  
9 about always irrationality in the case of racial discrimina-  
10 tion, you're suggesting then Korematsu has been overruled?

11 MR. McCREE: I would think this Court would decide  
12 Korematsu differently today.

13 QUESTION: Of course, Korematsu was decided at a  
14 time when it had not been held that the Due Process Clause  
15 of the Fifth Amendment incorporated the standards of equal  
16 protection. That was first held in Bolling v. Sharpe, if  
17 I'm not mistaken. And Korematsu antedated that decision.

18 MR. McCREE: Well, Korematsu certainly did.  
19 Hirabayashi, was that the other --

20 QUESTION: That was the other one.

21 MR. McCREE: The other one, that was decided with it.  
22 And I would say that even viewing the equal protection com-  
23 ponent of the Fifth Amendment as the Court would now, as  
24 applying, it would decide Korematsu differently.

25 QUESTION: Well, there's a certain truth to the



1 saying that civil liberties get their greatest protection  
2 after the war is over, isn't there?

3 MR. McCREE: I think that's -- I agree. I can't  
4 argue with that. I certainly can't quarrel with that  
5 assertion. But we think that the fact that the Congress  
6 has told the -- the Constitution tells the Congress, you  
7 raise the armies, you make rules for their governance,  
8 vest in them an authority that tells the courts that this is  
9 something that you should approach with great deference  
10 to the congressional primacy in this area.

11 There are many other areas in the Constitution,  
12 as the Court is well aware, that point up this special cir-  
13 cumstance. The writ of habeas corpus, for example, can be  
14 suspended in time of invasion. And the 9th Circuit did up-  
15 hold a suspension of the writ of habeas corpus in World War  
16 II, although there had not been a physical invasion of the  
17 Hawaiian Islands; this court denied certiorari in this case.  
18 But it's some evidence of what the Constitution intended the  
19 relationship of the Court and the Congress and the Executive  
20 Branch to be in this extraordinary circumstance of waging  
21 war or preparing to wage war.

22 QUESTION: Well, is there anything in Article I,  
23 Section 8, that limits the power of Congress to raise and  
24 maintain armies just in time of war?

25 MR. McCREE: No, there is no limitation. It's an

1 authorization just to raise and maintain armies and naval  
2 forces. It doesn't restrict it to time of war at all, and  
3 it tells, as we respectfully submit, it tells the courts  
4 that this is a matter where great deference should be paid  
5 to congressional determination. And the Congress determined  
6 in this case that in the event of a mobilization what would  
7 be necessary would be raising an effective army expedi-  
8 tiously. And to do this it would require flexibility. And  
9 the flexibility that it would be afforded as the record  
10 clearly establishes is to have persons who could perform  
11 combatant as well as noncombatant roles in the Armed Ser-  
12 vices.

13 QUESTION: Well, Mr. Solicitor General, there wasn't  
14 any evidence, or was there -- was there any evidence before  
15 the Congress that registration of women would negatively af-  
16 fect the military capacity?

17 MR. McCREE: Yes, if the Court pleases. There is  
18 evidence before the Court that although women can perform and  
19 have performed and still do perform effectively and with  
20 great credit in noncombatant roles that they are not eligible  
21 by statute and policy for certain roles in actual close combat  
22 and that it is --

23 QUESTION: Well, does that add up to evidence that  
24 registration of women who surely are being used and could be  
25 used in other capacities than combat, does that add up to

1 any evidence that the registration of women in and of itself  
2 would negatively affect it.

3 MR. McCREE: I think it does, because at this time,  
4 at the time of mobilization, what would be necessary would  
5 be persons who could be rotated among all of the military  
6 roles that might be required, and although women could perform  
7 and do perform and have performed efficiently in the noncom-  
8 batant roles, they couldn't be rotated, and flexibility is  
9 what is needed, initially, at the time of mobilization. There  
10 is evidence that through volunteer activity it is anticipated  
11 that a sufficient number of women would be available in the  
12 event of the mobilization that was projected by the Armed  
13 Services witnesses who testified here --

14 QUESTION: General McCree, am I right in my assump-  
15 tion that no one challenges the statutory provision that  
16 women shall not be sent into combat?

17 MR. McCREE: No one challenges it in this litiga-  
18 tion.

19 QUESTION: Supposing -- I suppose you could concede  
20 that this was an unwise statute that Congress made the wrong  
21 decision in the circumstance but that doesn't make it uncon-  
22 stitutional, is that -- ?

23 MR. McCREE: I would certainly assert that. I think  
24 if we defer to the Congress it really means that we defer to  
25 the right to be wrong. If we just defer to them when we're



1 right, it's not much of -- it's not really deferring.

2 QUESTION: Getting back to this other point about  
3 combat, assuming that women are now on the training list for  
4 astronauts, couldn't they drive an airplane?

5 MR. McCREE: Well, I don't think there's any --

6 QUESTION: In combat?

7 MR. McCREE: I don't think there's any question about  
8 that, but the Congress, by statute, has provided that women  
9 are not eligible to perform certain functions and the Army  
10 has policies that they shall not, too. Now, the fact that a  
11 person can pilot an airplane and even function as crew --

12 QUESTION: And we know some men who cannot.

13 MR. McCREE: And some men who cannot. The Congress  
14 can make this kind of determination if it's something that's  
15 peculiarly committed to them and the military people will do  
16 it too. The problem really --

17 QUESTION: Mr. Solicitor, how did Congress make that  
18 decision? Currently? Perhaps they did when they passed the  
19 law originally? They refused to change it?

20 MR. McCREE: The Congress refused to change  
21 it -- refused to change.

22 QUESTION: Which would have taken legislation?

23 MR. McCREE: Which would have taken legislation.

24 QUESTION: Well, was there a proposal that failed to  
25 come out of committee or was voted down on the floor or what?

1 MR. McCREE: There were proposals in both houses  
2 and on pages 29 through 31 of the Government's brief we set  
3 forth in the margin the committee action where this was con-  
4 sidered fully and --

5 QUESTION: Did it ever get on the floor? Was it  
6 ever voted down, actually? Was it just a committee failing  
7 to report it?

8 MR. McCREE: I believe it was a committee failing  
9 to report it out, but I -

10 QUESTION: There are not so-called congressional  
11 findings?

12 MR. McCREE: No, but this was before the Congress,  
13 and the Congress did enact a joint resolution shifting  
14 funds --

15 QUESTION: Yes?

16 MR. McCREE: -- which means that they considered  
17 this, funds --

18 QUESTION: Yes, they shifted funds for the registra-  
19 tion of males. But there's nothing in that resolution which  
20 indicates what Congress thought about these factors.

21 QUESTION: Mr. McCree, Solicitor General, may I  
22 call your attention to the fact that the conference report  
23 explicitly approved the findings by the Senate Armed Services  
24 Committee, on page 100 of the conference report on the Defense  
25 Department Authorization Act.

1 MR. McCREE: I appreciate that reference and I would  
2 suggest, too, that Senate Report No. 96-826 on page 159 also  
3 adopts the committee report and makes --

4 QUESTION: The conference report was adopted by  
5 both houses?

6 MR. McCREE: By both houses. And it makes this  
7 specific finding that there was no established military need  
8 to include women in the Selective Service System. Now, we  
9 don't contend, in further response to Mr. Justice Marshall,  
10 that women cannot perform a wide variety of roles, but the  
11 military has made this determination and the Congress has  
12 made this determination and it would be against the law to  
13 employ them in certain kinds of military activity at this  
14 time.

15 QUESTION: Mr. Solicitor General, is it not true  
16 that your entire argument assumes that that decision is a  
17 constitutional decision, to keep women out of combat?

18 MR. McCREE: Assumes -- you mean, assumes the  
19 validity of the statute --

20 QUESTION: Yes.

21 MR. McCREE: -- that excludes them from this purpose?

22 QUESTION: Yes.

23 MR. McCREE: It does, but that's not under attack.  
24 No one has attacked this statute. No one has attacked these  
25 policies. And we submit further that it's -- we should defer,



1 the Court should defer to the determination of the military  
2 in a matter as vital as this at this time. Now, it may be  
3 that they'll expand the Selective Service at another time  
4 when it appears that it would be militarily sound to do this.

5 QUESTION: Well, did the military testify against  
6 the registration of women?

7 MR. McCREE: The military initially supported the  
8 registration of women --

9 QUESTION: Yes, registration?

10 MR. McCREE: -- but at the same time testified that  
11 they would not be inducted --

12 QUESTION: Well, yes, but the --

13 MR. McCREE: -- for the purpose of mobilization.

14 QUESTION: But the question is registration, here,  
15 isn't it?

16 MR. McCREE: Mr. Justice White, the question is  
17 registration but registration can't be divorced from classifi-  
18 cation and induction, because they are registered to be eligi-  
19 ble --

20 QUESTION: Well, the people who testified must have  
21 thought they could be separated, because they testified in  
22 favor of registration.

23 MR. McCREE: But they also testified against induc-  
24 tion.

25 QUESTION: So they can be separated?

1 MR. McCREE: Well, they can, for the purposes of  
2 of symbolism. But people are registered in order  
3 to establish an eligible pool of persons who can be inducted.

4 QUESTION: Do we judge this case on the basis that  
5 registration means mobilization of women, or that it just  
6 means registration?

7 MR. McCREE: I just think the Court cannot divorce  
8 from its consideration of registration the purpose for which  
9 it's done.

10 QUESTION: Well, I know, but Mr. Solicitor General --

11 MR. McCREE: It is an arbitrary act to register --

12 QUESTION: The same committee report, if I recall  
13 it, of the Armed Services, in any event, also made a finding,  
14 didn't it, that there were, grave shortages also exist for  
15 Army surgeons and nurses? And might not induction be limited  
16 to registrants, women registrants for jobs like that?

17 MR. McCREE: Yes, if the Court please. But their  
18 needs at this time for mobilization are for persons who would  
19 afford them the maximum flexibility, who even, put in the  
20 nursing situation, initially, could be used for combat, close  
21 combat situation, if required. And they anticipated --

22 QUESTION: How much of that was done in Vietnam?  
23 What percentage of -- do you have any statistic of what the  
24 percentage was of those who went to Vietnam ever actually saw  
25 combat?

1 MR. McCREE: I can't testify about Vietnam. I know  
2 something about World War II, and I know that the attrition  
3 was always at the front. You might have, say, 100 percent  
4 of your personnel and 90 percent may be support and ten per-  
5 cent is actively engaged, but your turnover is in the ten  
6 percent. And then you have to have the flexibility to move  
7 other people in there in times of emergencies. For example,  
8 the Battle of the Bulge at the Ardennes, where cooks, bakers,  
9 everybody who could carry a rifle was pressed into service,  
10 those are roles forbidden today by statute and policy to  
11 women, for women to perform, and the testimony here is that  
12 the initial needs at mobilization would be for persons who  
13 could be rotated into any situation where there may be a  
14 military need and all we are arguing here is that the all-  
15 male registration at this time be granted.

16 QUESTION: Didn't the Director of Selective Service  
17 testify here that if we had to mount an effort in Europe we'd  
18 need 650,000 males and 80,000 women?

19 MR. McCREE: Those are the figures that I recall.

20 QUESTION: Well, wasn't that in support of the idea  
21 that we ought to register women so that we can get that  
22 80,000 even in a period of mobilization?

23 MR. McCREE: He thought the 80,000 women would be  
24 furnished by volunteer --

25 QUESTION: Didn't Admiral Hayward and General Wilson



1 both testify to that effect?

2 MR. McCREE: This was their experience in the light  
3 of females volunteering for the service.

4 QUESTION: You said that initially military people  
5 testified in favor of, Defense Department representatives  
6 testified in favor of registering women. Did they change  
7 their mind, or was that their consistent position?

8 MR. McCREE: The Congress decided against them.  
9 They did not -- no, they did not change their mind.

10 QUESTION: So from a military standpoint there  
11 was not only no objection to registering women but they sup-  
12 ported it?

13 MR. McCREE: Except their testimony has to be under-  
14 stood in the light of their further testimony that even if  
15 we registered them that we would not induct them.

16 QUESTION: I understand, but nevertheless, Congress  
17 overruled them?

18 MR. McCREE: And the Congress, to which the Consti-  
19 tution gave the authority to raise an army, decided in the  
20 light of the testimony that they would like to register  
21 women but they would not induct them, decided not to provide  
22 for the registration of women at this time.

23 QUESTION: There's nothing unusual about the  
24 Congress not agreeing with the Executive Branch on a particu-  
25 lar issue, is there?

1 MR. McCREE: Not in my experience, Mr. Chief  
2 Justice.

3 QUESTION: Mr. Solicitor General, if we don't agree  
4 with you that the rationality test is applicable here but  
5 some heightened test like Craig v. Boren -- your time's  
6 running out -- what have you to say to that if we disagree with  
7 you and say there has to be the heightened scrutiny test?

8 MR. McCREE: We believe that we satisfied Craig  
9 v. Boren. We believe here that this is an important  
10 governmental objective to raise an army and we believe that  
11 registration is substantially related to it, and registration  
12 of men is, in the light of --

13 QUESTION: When you say "substantially related,"  
14 is that because of some finding that women are not needed in  
15 the military, or must there be some burden that the registra-  
16 tion of women would affirmatively cause some kind of problem?

17 MR. McCREE: Oh, I don't think there must be a  
18 showing that women would cause some kind of problem. I think  
19 we have to show --

20 QUESTION: Well, then, would you have to show that  
21 under the heightened scrutiny would you at least have to show  
22 that women are not needed in the military?

23 MR. McCREE: I don't even think we'd have to show  
24 that women are not needed. I think we'd have to show that to  
25 adopt this policy would create a greater likelihood of

1 achieving the important objective, than the rational level  
2 cases that it would be somehow related to achieving that --

3 QUESTION: Wouldn't an adequate answer to Justice  
4 Brennan's question be that you need them in the military but  
5 you don't need to register them?

6 MR. McCREE: I appreciate that suggestion --

7 QUESTION: That was supported -- that was supported,  
8 I repeat, by the testimony of Admiral Hayward and General  
9 Wilson, the Commandant of the Marine Corps that they could  
10 get all they needed on volunteer service.

11 MR. McCREE: Just one other thought, if I may have  
12 just one moment. The Congress may also have determined that  
13 to process women registrants at this time, since we're talk-  
14 ing about 51 percent of the population, they'd need to allo-  
15 cate twice as many resources just for the registration and  
16 classification, and if they're not going to induct at this time --

17 QUESTION: Isn't that just an argument of adminis-  
18 trative convenience?

19 MR. McCREE: I think it's more than that. It's an  
20 argument of talking about finite resources and how they  
21 should be allocated. I see my time has expired. Thank you.

22 MR. CHIEF JUSTICE BURGER: Mr. Weinberg.

23 ORAL ARGUMENT OF DONALD L. WEINBERG, ESQ.,

24 ON BEHALF OF THE APPELLEES

25 MR. WEINBERG: Mr. Chief Justice, and may it please  
the Court:



1 I think there are four propositions, none of which  
2 is seriously disputed in this case, which place into perspec-  
3 tive just what is and what is not at issue in this case. And  
4 I think these are four points of reference of which we ought  
5 not lose sight.

6 First, registering women for the draft does not  
7 dictate any number of women who will be drafted nor the roles  
8 which they would fill if they were drafted. Instead, regis-  
9 tration of women opens the possibility of drafting women to  
10 fill the very positions in which they may now or in the  
11 future serve as volunteers if there is not an adequate rate  
12 of volunteers for those positions.

13 QUESTION: May I interrupt you at this point and  
14 ask, is it not possible that your next suit, if you win this  
15 one, and if women were not drafted on an equal basis with  
16 men, would not the same men who are complaining here today  
17 bring suit on that basis? If not, why?

18 MR. WEINBERG: Well, I don't think that that would  
19 be the case. One of the issues that the District Court  
20 specifically said was not before it and would in fact be  
21 inconsistent with its rationale and the rationale of this  
22 suit is --

23 QUESTION: Inconsistent in what way?

24 MR. WEINBERG: Inconsistent in that the theory of  
25 this suit and the theory of the District Court was that you

1 register people as an inventory.

2 QUESTION: You register them equally.

3 MR. WEINBERG: Register equally as insurance against  
4 an unpredictable future. We don't know what needs are going  
5 to eventuate. We don't know what the assignment policies are  
6 going to be when they do.

7 QUESTION: What interest do your clients have in  
8 having women registered if there are none of them going to be  
9 drafted? It seems here there's no interest whatsoever in  
10 just pure registration.

11 MR. WEINBERG: Well, I don't think that that's  
12 true, that we can say that none will be drafted. The impor-  
13 tant point is, we don't know who will be drafted. If most --

14 QUESTION: But you must assume that some of them  
15 will be drafted or there's nothing worth fighting about.

16 MR. WEINBERG: It is safe to assume, I think, that  
17 over --

18 QUESTION: Therefore there is a connection between  
19 registration and drafting, so your first proposition is wrong.

20 MR. WEINBERG: No, Your Honor, I have to disagree  
21 with that. There is, of course, a connection between regis-  
22 tration and drafting. But what's important is that the con-  
23 nection is not that we draft everyone we register or that we  
24 draft randomly --

25 QUESTION: Do you concede that the Government may

1 draft in unequal numbers, that they could set quotas that  
2 75 percent of the draftees will be male and 25 percent will  
3 be female? Do you concede that?

4 MR. WEINBERG: I would concede, indeed, I would  
5 embrace the point that the military needs at the time that  
6 mobilization is necessary ought to dictate the proportion in  
7 which men or women are drafted.

8 QUESTION: And do you concede that there are  
9 different military needs for men and for women?

10 MR. WEINBERG: There may be at a given time.

11 QUESTION: But today? They need 650,000 men and  
12 80,000 women. Is that a legitimate constitutional differ-  
13 ence in need?

14 MR. WEINBERG: It would support a differential  
15 induction. It would not support a differential registration.

16 QUESTION: But you would concede that a differen-  
17 tial induction would be constitutionally permissible?

18 MR. WEINBERG: Yes; based upon military needs.

19 QUESTION: Mr. Weinberg, if you continue to prevail  
20 in this case, does that mean that every past registration and  
21 conscription act of this country is unconstitutional?

22 MR. WEINBERG: I don't believe that that would be  
23 the case. Questions of constitutionality and retroactivity  
24 would, I think, generally be resolved against the retroac-  
25 tivity of the decision. In a case like this I would note



1 that both the factual setting and the legal standard have  
2 been developing over time and I don't see the kinds of clear  
3 signposts to retroactivity that are usually associated with  
4 rendering a finding of unconstitutionality to be --

5 MR. WEINBERG: Pardon? ~~the veterans' preference acts?~~

6 QUESTION: How about veterans' preference acts  
7 dating from previous draft acts?

8 MR. WEINBERG: I think that the Court decided that  
9 in Feeney and noting in Feeney that the result of the  
10 veterans' preference winds up disproportionately favoring  
11 men was a function of the service, which, incidentally, was  
12 a result of the inequality of conscription, among other things.  
13 I don't think that that would require the voiding of any  
14 veterans' preference statutes because the fact is still that  
15 the people served and earned their veterans' preference as  
16 opposed to being registered to serve. And I think that, again,  
17 we come to the question, we can no more say who would have  
18 been drafted than we can say who will be drafted. And it's  
19 that, particularly that prospective uncertainty that we don't  
20 know today what the military needs will be if and when we  
21 ever have to draft, that is really the distinction between  
22 registration on the one hand and conscription on the other.

23 QUESTION: Mr. Weinberg, up to now your arguments,  
24 at least as I follow it, is that there were better ways to  
25 do it than Congress did, there were more logical ways, but,

1 does that make it, the failure to do that, does that  
2 make it unconstitutional?

3 MR. WEINBERG: Well, we go well beyond saying --

4 QUESTION: You haven't got that far yet?

5 MR. WEINBERG: That's true, Your Honor. We do go  
6 well beyond saying that what Congress did was merely illogi-  
7 cal. It was in fact directly contrary to the ostensible  
8 purpose, the declared purpose of the statute and for that  
9 reason could even be fairly characterized as not having a  
10 rational relationship to a legitimate articulated or obvious  
11 governmental interest.

12 QUESTION: Yet you don't challenge the statute that  
13 prohibits the use of women in certain combat positions?

14 MR. WEINBERG: With all due respect, Mr. Justice  
15 Rehnquist, we deny the existence of such a statute. With  
16 respect to the Army, there is none. With respect to the  
17 Navy, there is no statute barring women from combat, merely  
18 from assignment to ships or airplanes with combat missions.  
19 For example, in the Navy, women are eligible for assignment  
20 to the Seals, which is the Navy version of the Green Beret  
21 Special Forces.

22 QUESTION: Would a decision in your favor here have  
23 any effect on Navy policies?

24 MR. WEINBERG: You mean the statute?

25 QUESTION: Right.

1 MR. WEINBERG: It would not directly implicate that  
2 statute. I would point out that for now several years both  
3 the Air Force and the Navy, which are the only two services  
4 subject to such statutes, have been requesting the repeal of  
5 such statutes on grounds having absolutely nothing to do  
6 with registration or the draft, but merely having to do with  
7 their own military management. So what we're really talking  
8 about is, I think, the Army situation where the Army now has  
9 the right to decide assignment questions according to its own  
10 lights, according to its own perceived needs, and I think  
11 this is one of the things which distinguishes particularly  
12 Admiral Hayward's testimony, because when he said, we will  
13 be able to fill it, he was talking about the Navy and the  
14 naval requirement for women is very small because the freedom  
15 of assignment in the Navy is very small. In the Army it's  
16 a very different case.

17 QUESTION: You don't challenge here the freedom of  
18 assignment in the -- rather, the limitation of freedom of  
19 assignment in the Navy or the Air Force?

20 MR. WEINBERG: This case does not raise that.

21 QUESTION: And you don't challenge it?

22 MR. WEINBERG: No. It's irrelevant to the decision  
23 of this case.

24 QUESTION: Well, we judge this case on the assump-  
25 tion that that is valid.



1 MR. WEINBERG: That is correct. Indeed, the --  
2 one of the most important points that I would hope to make  
3 is that the District Court assumed the continuing applica-  
4 bility of all current limitations in all services on numbers  
5 and assignments of women, and still found as a fact that  
6 all-male registration did not enhance military flexibility  
7 or the ability of the nation to respond to the full range  
8 of possible futures which might confront us. More important-  
9 ly, in fact, it found that the exclusion of women from regis-  
10 tration undermined military flexibility and that is a finding  
11 of fact which has not been attacked here as clearly  
12 erroneous. And on the record, I submit, could not be at-  
13 tacked as clearly erroneous --

14 QUESTION: Mr. Weinberg, the District Court's  
15 analysis, of course, was in the context of the heightened  
16 scrutiny test, the Craig v. Boren test, wasn't it?

17 MR. WEINBERG: Yes, Your Honor.

18 QUESTION: Suppose we don't agree that was correct,  
19 what have you to say to the Government's argument that in  
20 any event what ought to be applied here is the rational  
21 basis test, and by any measure that that test is satisfied?

22 MR. WEINBERG: Well, the finding of fact that  
23 military flexibility is in fact undermined by exclusion does  
24 not depend upon what test is used in the analysis. That's  
25 a finding of fact that is based directly on the testimony of

1 the military, and I would only comment here what the testi-  
2 mony of all of the Joint Chiefs was, and that was, we should  
3 register --

4 QUESTION: What's this go to, the legitimacy of  
5 the Government interest? What?

6 MR. WEINBERG: Pardon?

7 QUESTION: What does it go to? The legitimacy of  
8 the governmental interest?

9 MR. WEINBERG: No, Your Honor. We certainly would  
10 concede the legitimacy of the governmental interest in raising  
11 an adequate armed force. That is indeed the statutory pur-  
12 pose. What it would go to is the rational relationship, or on  
13 a heightened scrutiny basis, the substantial and close rela-  
14 tionship to that interest, and in fact the finding of facts  
15 here as supported by the overwhelming record is that the  
16 exclusion of women from registration, which means excluding  
17 them from the pool of people to whom we can turn in time of  
18 war, in time of emergency, for the skills that we know they do  
19 possess and the very skills that we have sought to bring into  
20 the Armed Forces by increasing the female volunteer rate  
21 and the level of volunteer soldiers, we would exclude our-  
22 selves from being able to turn to those and the District Court  
23 found, and I submit, correctly, certainly not clearly errone-  
24 ously, that that objective is undermined by excluding women  
25 from the registration pool.

1 QUESTION: Wouldn't that objective be equally  
2 undermined by excluding everybody under 18 and everybody  
3 over 26?

4 MR. WEINBERG: I think not. We again have a great  
5 body of --

6 QUESTION: That includes an awful lot of people  
7 with a lot of different and varied experiences.

8 MR. WEINBERG: Yes, it does.

9 QUESTION: That the military could well use, I sup-  
10 pose.

11 MR. WEINBERG: And under certain circumstances,  
12 eligibility for induction continues well past the age of 26.  
13 The important thing is, here we focus on registration.

14 QUESTION: You did not attack the constitutional  
15 validity of the statute based upon its discrimination in  
16 favor of everybody in this country under 18 years of age and  
17 everybody in this country over 26 years of age?

18 MR. WEINBERG: No, Your Honor, for two reasons I  
19 don't think an age discrimination case would have been appro-  
20 priate. First, the age discrimination standard is clearly  
21 the lowest standard. And, more importantly, there are a great  
22 number of reasons consistent with the statute, particularly the  
23 maintenance of a strong economy and to minimize as equitable, fair,  
24 disruption of life that would be supported by limiting the  
25 exposure and -- here again, we're talking of exposure



1 of induction.

2 QUESTION: We're only talking about registration.

3 MR. WEINBERG: And that's what I'm saying, that --

4 QUESTION: Because from what you suggest, you  
5 might as well register everybody over 26 and get a much  
6 larger pool to draw from. There are a lot of retirees, for  
7 example, who can perform noncombatant service very well.

8 QUESTION: And a lot of former servicemen are over  
9 26 --

10 MR. WEINBERG: And to the extent that they generally  
11 have continued service obligations and so are within the  
12 reach of the statute.

13 QUESTION: That's not necessarily true at all.  
14 When you're mustered out you're generally given the option  
15 whether to remain in the reserve or not, and I at least, speaking  
16 from my own experience in the Second World War, I opted for  
17 just getting out.

18 QUESTION: How do you distinguish the policy ques-  
19 tion involved in fixing the ages and the policy question  
20 made at this stage for limited purposes of excluding women?  
21 Aren't they equally policy decisions by Congress, whether  
22 wise or unwise?

23 MR. WEINBERG: Well, to start with, the policy  
24 decision to exclude women which was made in 1948 was not a  
25 considered decision at all. There was a good deal of

1 testimony as to what a suitable age for exposure to service  
2 would be. There was no such consideration of including or  
3 excluding women using traditional statutory interpretation  
4 methods, the contemporaneous statutory history before the  
5 same committees, the same Congress, at the same time, the  
6 Women's Armed Service Integration Act, I think was quite  
7 fairly characterized by the District Court as having been  
8 passed in an atmosphere permeated with chauvinism.  
9 There were -- the only testimony --

10 QUESTION: Since when is it the function of the  
11 courts to inquire into the atmosphere in which the Legisla-  
12 tive Branch acts?

13 MR. WEINBERG: Where the atmosphere is shown in  
14 specific testimony, in specific stating of issues.

15 QUESTION: Well, in a case of our Court, this Court,  
16 that -- do you suggest that that's a proper criterion?

17 MR. WEINBERG: I think that in the Arlington Heights  
18 case where the question came up, starting, if it's not clear  
19 on its face, we then look for congressional intent, indeed,  
20 in this very statute on the amendment that was considered in  
21 O'Brien, where you looked to whether there was any evidence  
22 of an improper intent. Now, in that case, of course, you  
23 found that there was none. In the case that's before you  
24 today, the clear testimony and the clear statements before  
25 Congress in 1948 to the effect that, well, no one would want

1 a Wave officer commanding him, that the men would object to  
2 being under the command of women, that women would get  
3 married and so never qualify for pensions; the entire atmos-  
4 phere -- and, perhaps atmosphere was the wrong word for  
5 the District Court to use. -- But the record is clear that  
6 there was nothing beyond stereotypical consideration.

7 QUESTION: Well, Mr. Weinberg, if we disagree with  
8 the District Court and with you that there ought to be a  
9 heightened scrutiny standard here and agree with the  
10 Government that that it should just be the rational basis  
11 test, can we affirm the judgment of the District Court?

12 MR. WEINBERG: Yes, I believe you can.

13 QUESTION: How?

14 MR. WEINBERG: Particularly, because the defense  
15 for the statute even under the rational relationship test  
16 is the military flexibility argument that the Solicitor  
17 General has described and because that argument simply does  
18 not relate in any rational way to either the facts or the  
19 intent of the statute, the function of the statute.

20 QUESTION: Yes, but if it's just a rational rela-  
21 tionship, I would think if you, unless you disbelieve that  
22 you could get as many women as you wanted, or that were  
23 needed, on a voluntary basis, it would be quite rational to  
24 decide not to go through the entire rigamarole of registra-  
25 tion and the drafting of women just to get the ones you could



1 get without any expense whatsoever.

2 MR. WEINBERG: Well, in fact, there is no substan-  
3 tial basis in the record for believing that we can with con-  
4 fidence predict that we will be --

5 QUESTION: Well, is there any basis for our believ-  
6 ing that we can't?

7 MR. WEINBERG: Yes.

8 QUESTION: In the record?

9 MR. WEINBERG: In the record. We have history, to  
10 start with, that --

11 QUESTION: Well what record are you talking about?

12 MR. WEINBERG: The record before the trial court  
13 and the record before Congress. There was great overlap  
14 between the two.

15 QUESTION: What if we read the record different than you  
16 did and then thought that there was not only ample basis in  
17 the record but a finding, and evidence, that you can get  
18 the women without registration? What then, under the  
19 rational relationship test?

20 MR. WEINBERG: If it could be stated that we can  
21 safely predict that there would not arise a situation where  
22 volunteers would be inadequate, that would be a different  
23 situation, but that's not what we face with registration.

24 QUESTION: Well, that isn't what I asked you. Would  
25 that satisfy the rational relationship test?

1 MR. WEINBERG: Yes, if we had a guarantee, yes,  
2 it really would not be needed; the answer is yes. And that  
3 goes, I think, to the very distinction between registration,  
4 which is insurance against failing to have volunteers and  
5 providing against the broad range of unpredictable futures  
6 which do confront us, and conscription, which is the decision  
7 when one of those futures becomes our present, to say, these  
8 are what our needs are. We either have or don't have enough  
9 volunteers; we need to draft for certain positions.

10 QUESTION: Well, Mr. Weinberg, finally, why isn't  
11 the rationality test, in light of the clauses of the Constitu-  
12 tion we're dealing with, the proper test here?

13 MR. WEINBERG: First of all, this Court, although  
14 often asked to, has never accepted a military relationship  
15 or national defense exception to normal standards of consti-  
16 tutional scrutiny.

17 QUESTION: What about Schlesinger v. Ballard?

18 QUESTION: And Parker v. Levy?

19 MR. WEINBERG: Parker, like Glines and Huff, and  
20 Greer v. Spock, are so-called military enclave cases, and  
21 they all go off on Parker v. Levy's language about the mili-  
22 tary being a separate society unto itself internally requir-  
23 ing for matters of discipline and base morale a separate stan-  
24 dard. This statute --

25 QUESTION: And we said there that the constitutional

1 First Amendment overbreadth attack that was available in the  
2 nonmilitary context was not available in the military con-  
3 text.

4 MR. WEINBERG: That's within a military enclave.  
5 This is not a military enclave case, this is more like Snepp.  
6 Indeed, I think that's the only situation where this particu-  
7 lar Act has been brought into question. And there the Court  
8 required the Government to show that the distinction drawn  
9 was strictly justified by a substantial governmental  
10 interest in waiting for it.

11 QUESTION: What about Ballard?

12 MR. WEINBERG: With Schlesinger v. Ballard, there  
13 are a number of distinguishing characteristics --

14 QUESTION: That was within the military as well.

15 MR. WEINBERG: Pardon?

16 QUESTION: That was within the military.

17 MR. WEINBERG: That was most directly within the  
18 military. It was an internal matter to the military where it  
19 was promotion geared to the military's express desire for the  
20 proper pyramid of promotions. Frontiero was also internal to  
21 the military.

22 QUESTION: What was the holding in Frontiero?

23 MR. WEINBERG: In Frontiero the holding, I believe,  
24 was that the distinction drawn --

25 QUESTION: This was in the military?



1 MR. WEINBERG: It was within the military, but  
2 because the distinction drawn was based on stereotype, it  
3 failed the heightened scrutiny.

4 QUESTION: Failed heightened scrutiny?

5 MR. WEINBERG: Heightened scrutiny.

6 QUESTION: Not the rational relationship?

7 MR. WEINBERG: Definitely not the rational rela-  
8 tionship.

9 QUESTION: It was not a Court opinion in *Frontiero*,  
10 is that correct?

11 MR. WEINBERG: There was a plurality opinion in  
12 *Frontiero* --

13 QUESTION: Not a Court opinion, so it's difficult  
14 to say what it was based on.

15 QUESTION: What was the fifth vote based on?

16 MR. WEINBERG: The fifth vote was based on -- I  
17 believe, Your Honor, that the fifth vote was based upon an  
18 application of a test that went far beyond rational basis.  
19 It was in effect, I think, a heightened --

20 QUESTION: *Reed v. Reed*, wasn't it?

21 MR. WEINBERG: It was *Reed*; exactly.

22 QUESTION: Why doesn't *Reed* apply?

23 MR. WEINBERG: It's a heightened scrutiny but --

24 QUESTION: Well, the test is a test of the Equal  
25 Protection Clause of the Fourteenth Amendment as --

1 MR. WEINBERG: As it applies to gender, which was a  
2 close and substantial relationship.

3 QUESTION: Reed v. Reed just says this Court scru-  
4 tinizes cases that are brought before it.

5 MR. WEINBERG: It looks for a substantial relation-  
6 ship, and that, I think, Craig v. Boren says that's what  
7 Reed says. Schlesinger's important, really for the ways in  
8 which it differs from this case. Every case, I think, in  
9 this Court that has ever cited Schlesinger, and has purported  
10 to follow Schlesinger, has emphasized that Schlesinger was a  
11 compensatory amelioratory act, that in fact it was uniquely  
12 so, because the very men who brought that action were the  
13 precise men who had benefited from the assignment differen-  
14 tial, which means access to promotion differential, and so  
15 that case really is perhaps the archetype of compensatory --

16 QUESTION: Like Kahn and Shevin?

17 MR. WEINBERG: Like Kahn and Shevin. It is usually  
18 cited seriatim to Kahn and Shevin. The other thing is, of  
19 course, Schlesinger was an internal military case, and most  
20 importantly, as far as I can see, differentiating it between  
21 this case, other than the internal military matter, is that  
22 the basis of classification was not simply gender. The expli-  
23 cit basis of classification was gender except where the access  
24 to the promotions was equal, at which point there was no dif-  
25 ferentiation. This Court emphasized it, I think, at least

1 three times in Schlesinger, that where men and women, for  
2 instance, in the Medical Corps or the Legal Corps -- several  
3 other corps -- had equal access to assignments geared to  
4 foster promotions, there was no difference in the time per-  
5 mitted to achieve promotion. And that, I think, is very,  
6 very important.

7 The other thing is that historically Schlesinger  
8 was not based, even arguably, on stereotypes. It was demon-  
9 strably based upon a recent congressional reconsideration  
10 in 1967, in fact, of precisely what was going on. They  
11 found that there was still a gap in assignability, and there  
12 was still a gap, most particularly in how long it was taking  
13 men and women to achieve promotions. And so Congress there  
14 did reenact, literally, as opposed to what happened here,  
15 major provisions of that entire series of statutes, so there  
16 really was congressional consideration there. That's not the  
17 case here.

18 QUESTION: Mr. Weinberg, before you -- I see your  
19 light has gone on -- before you sit down, I'd be interested  
20 in hearing what the other three of the four points are that  
21 were controlling.

22 MR. WEINBERG: Thank you, Your Honor. I think the  
23 only one that didn't come up, actually, in the questioning is  
24 that in order to justify male-only registration, the burden of  
25 the appellant at trial and to prove that it was accomplished at trial



1 here, was to prove a need to exclude women from registration.

2 QUESTION: Well, it seems to me -- maybe I'm out  
3 of step, but it seems to me you have the cart before the  
4 horse. I don't think, I have never understood that it was  
5 up to the Government to justify an act of Congress. I had  
6 thought that an act of Congress is presumptively valid, and  
7 that it's up to you to show why it's invalid.

8 MR. WEINBERG: Except where that act draws some  
9 form of discriminatory -

10 QUESTION: Well, as the Solicitor General has point-  
11 ed out, Congress here exercised one of its explicit powers  
12 under the Constitution and with that you don't agree? You  
13 do agree.

14 MR. WEINBERG: If it was an assignment that --

15 QUESTION: And I didn't understand the Solicitor  
16 General to suggest, and I hope he didn't suggest, that Con-  
17 gress even in the exercise of an explicit power such as this  
18 is not governed by the explicit prohibitions in the Constitu-  
19 tion, and one of them is contained in the Fifth Amendment, and  
20 that's the one upon which you rely. And that's really the  
21 issue here. But the statute is presumptively valid, isn't it,  
22 like any statute enacted by any legislature?

23 MR. WEINBERG: I think not, as this Court said as  
24 recently as --

25 QUESTION: There is no question of the power.

1 MR. WEINBERG: There's no question of the power --

2 QUESTION: And the question is, is that power  
3 limited or prohibited?

4 MR. WEINBERG: I would go one step further, as this  
5 Court has repeatedly said, when a legislature, including  
6 Congress, enacts a statute based upon gender and the distinc-  
7 tion of gender is on the face of the statute, it is based upon  
8 gender, it is the burden of those defending the statute to  
9 come forth and establish by empirical evidence, in fact --

10 QUESTION: Well, perhaps -- maybe the Court has  
11 said that, but I trust I never have because I don't think  
12 they're defending a statute, I think you're attacking it.

13 MR. WEINBERG: But, Your Honor, once the attack  
14 shows that it was gender-based discrimination, this Court --

15 QUESTION: But doesn't the burden shift as soon as  
16 the Government does -- and you've conceded they've done here --  
17 show there's a difference in military need based on sex?  
18 You conceded that's permissible.

19 MR. WEINBERG: Your Honor, that would affect regis-  
20 tration only if two different statutes were involved, one, a  
21 statutory prohibition on women participating in certain close  
22 combat activities, and the other, more importantly, a change  
23 in the Military Selective Service Act limiting the induction  
24 of people to people who will be assigned to those prohibited  
25 roles, because otherwise we are conflicting with history and

1 Congress did not mean to conflict with history because we  
2 have always, as the testimony of General Tice and all the  
3 generals is clear, we have always drafted a very substantial,  
4 indeed, often a majority of draftees specifically for the  
5 noncombat areas. And most importantly, the argument of flex-  
6 ibility was specifically refuted by General Abrams and other  
7 generals in the testimony because we are saying that there is  
8 a certain number of women that the military wants to have,  
9 welcomes, thinks is the optimal number for the defense of the  
10 country.

11           You cannot at the one point say that that is the  
12 military opinion and at the same time say that if those  
13 slots are filled with draftees rather than volunteers, we  
14 undermine flexibility. The testimony of every Defense  
15 Department witness and every military witness was that all of  
16 those criteria, the reach-back, the flexibility, the rotation,  
17 the promotion rotations, the assignment rotation, were all  
18 taken fully into account when the military said, please let  
19 us register women, and let us decide whether they should be  
20 drafted, if and when the time for a draft comes.

21           General Abrams said that he didn't favor  
22 drafting women at the time because he didn't favor drafting  
23 men at the time. They were in an all-volunteer mode, as he  
24 said, and that since present needs for both men and women  
25 were being met with volunteers, he didn't favor drafting



1 anybody at that time. Secretary Brown kept saying to Congress,  
2 let us register people now; and then, when we see what the  
3 need is, we can draft them. This was what we came within a  
4 hair's-breadth of doing in World War II with respect to  
5 nurses.

6 I would only point that the utilization question is  
7 contrary to what the Government says. For example, ministers  
8 are required --

9 QUESTION: I would just ask if the case would be  
10 different in constitutional terms if the military had taken  
11 the position, we don't like women, we don't want any of them  
12 in the Army? Would it be a different constitutional issue?

13 MR. WEINBERG: It would be a different matter of  
14 somehow meeting an evidentiary burden.

15 QUESTION: Which they might have said in 1948, by  
16 the way.

17 MR. WEINBERG: They didn't. As a matter of fact,  
18 General Eisenhower's statement to the Congress in 1948 was,  
19 if we ever have another war, we have got to draft women.  
20 And that was based upon their performance even in the more  
21 limited numbers and roles that were used in World War II.  
22 I would point out that --

23 QUESTION: Mr. Weinberg, you have emphasized the  
24 testimony and I quite agree with you, if I were in your place  
25 I would, of some of the military men. I think you can find

1 conflicting statements if you read it all. But what I want to  
2 ask you is this. The Armed Services Committee of the United  
3 States Senate by a vote of 12 to 5 reached an entirely dif-  
4 ferent result from the one that you reached, and they heard  
5 the testimony, not only this year but they've been hearing it  
6 for years. Now, did the District Court reject specifically  
7 a single one of the 11 findings made by the Senate Armed  
8 Services Committee that were in turn approved by the conferees  
9 of both houses and in turn by both houses of Congress?

10 MR. WEINBERG: Yes, I think the District Court  
11 specifically rejected a number of them.

12 QUESTION: All eleven? All eleven? If so, do we  
13 accept the rejection by the District Court that tried a lawsuit  
14 that were contrary to the findings of the United States  
15 Congress?

16 QUESTION: We can read the testimony as well as the  
17 district judge could read it.

18 QUESTION: And if so what authority justifies us in  
19 doing that?

20 QUESTION: Perhaps that the Kassel opinion handed  
21 down this morning.

22 MR. WEINBERG: I have not had the opportunity to  
23 read that. The treatment of what happened in 1980 as con-  
24 gressional action was -- the conference report said that there  
25 was no need to include women. It did not find an affirmative

1 need to exclude women. Again, Congress was dealing, I think,  
2 with the wrong question in that respect. More importantly,  
3 perhaps, the activity of Congress in 1980 was not a reenact-  
4 ment or reconsideration of this situation. The appropriations  
5 aspect of it, the House Joint Resolution, didn't even mention  
6 the word "registration." It was a transfer of otherwise unob-  
7 ligated funds from the Air Force to Selective Service for  
8 the purpose of salaries and expenses. I think Ex Parte Endo  
9 with its requirement for explicit mention of a particular  
10 expenditure rationale says that that would not suffice.

11 Now, with respect to S. 2294, the Authorizations  
12 Act, again --

13 MR. CHIEF JUSTICE BURGER: I think you're going  
14 beyond Justice Powell's question now. Your time has expired,  
15 unless Justice Powell wishes to -- ? Yes, your time has  
16 expired. The case is submitted, gentlemen. Thank you very  
17 much.

18 (Whereupon, at 2:15 o'clock p.m. the case in the  
19 above-entitled matter was submitted.)  
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21  
22  
23  
24  
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CERTIFICATE

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5 of the United States in the matter of:

6 No. 80-251

7 BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE

8 V.

9 ROBERT L. GOLDBERG ET AL.

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11 and that these pages constitute the original transcript of the  
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