Selective Service

By: William Bavier

Henry Tucker, an employee of the Federal Deposit Insurance Corporation (FDIC) for 17 years, was forced to resign [amidst threats of dismissal] once Selective Service investigators discovered that he failed to register for Selective Service when he was 18[1]. Such a failure disqualifies the violator from federal employment, government benefits and penalties of $250,000 and up to five years in prison. The issue is whether mandatory registration for Selective Service is unconstitutional and whether Tucker can be rightfully forced to resign due to statues that became effective after he was an employee.

The Military Selective Service Act (MSSA)[2] requires that males present themselves for registration with the Selective Service System between the ages of eighteen and twenty-six. There is also a separate federal statute, which states that men who deliberately fail to register under the MSSA are disallowed for employment by a federal executive agency[3]. When that employment standard was imposed, it was no longer possible for Tucker to register with the Selective Service System. Therefore he was effectively in retroactive violation. Research shows that courts examine a variety of factors to what the intent to register consists of, including (1) the employment bar imposed by § 3328[4] as an unconstitutional bill of attainder and (2) that the MSSA targets men specifically, but not women, which violates the equal protection of the Constitution.

The first factor examines the employment bar imposed by § 3328[5] as an unconstitutional bill of attainder, which benefits Tucker's claim of being unjust because that legislation specifically punishes men. When an individual seeks federal employment under the MSSA, they cannot justly be denied a right under federal law for failing to register if "the person shows by a preponderance of the evidence that the failure was not a knowing and willful failure to register."[6]

When an individual applies for a position within the executive agency of the Federal Government the Office of Personnel Management (OPM), it must find that the individual's failure to register "was neither knowing nor willful." According to *Clark v. Office of Personnel Management*[7], the burden of proof is on the applicant but this burden is not easily refutable.

[1] *Elgin v. U.S.*, 594 F.Supp.2d 133 (2009).
[2] Military Selective Service Act (MSSA), 50 App. U.S.C. §§ 451-473.
[3] 5 U.S.C. §3328(a)(2).
[4] Id.
[5] Id.
[6] 50 App. U.S.C. §462(g)(2)
[7] *Clark v. Office of Personnel Management*, 95 F.3d 1167 (1996).

In this ruling, the presumption of knowledge was deemed effectively indisputable. Similarly, in another case involving the conviction of an individual's failure to register with the Selective Service System, the Court of Appeals stated that his failure to register was not "knowing" or "willful" because he never learned of the Selective Service registration requirement while eligible to register, despite being born in the United States[8]. In the case of Henry Tucker, who wanted to maintain employment with an executive agency of the federal government, it is unquestionable that he was rejected from a federal executive position when the pertinent employer agency learned that Tucker failed to register with the Selective Service System. The failure of the database, which alleges easy identification of individuals who fail to register should have disallowed Tucker from attaining employment at the FDIC. Furthermore, the elaborate procedures, such as the database established for discovering knowledge or willfulness under § 3328[9] gives the appearance of indirectly relieving Tucker's responsibility of his failure to register.

Just as the eligibility of an individual employed by the U.S. Mint, despite being born in the United States, convinced the OPM that his failure to register was not "knowing" or "willful" because he never learned of the Selective Service registration requirement while eligible to register, such as is the case in *United States v. Boucher*[10]; Tucker can argue the same in his case. In practice, further actual determination beyond the lack of registration must be demonstrated. However, Tucker must show that he is entitled to remain employed by providing evidence that his failure to register was not "knowing" or "willful". For these reasons, the court will rule Tucker's innocence in that the "knowingly and willfully" requirement of § 3328[11] nearly makes the targeted individual more difficult to ascertain and it does not eliminate the targeted person from the scope of the bill of attainder.

The second factor states that the MSSA requiring men but not women to register for the Selective Service System violates the equal protection obligation inherent in the U.S. Constitution. This also benefits Tucker's claim of unconstitutionality because it clearly targets men. The Fifth and Fourteenth Amendments are specifically violated under § 451-473. The Fourteenth Amendment clearly states "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." Although the Fifth Amendment does not specifically contain an equal protection clause, the due process clause of the Fifth Amendment has been interpreted by the courts to include an equal protection requirement. The MSSA § 451-473 purposely singles out a person or class. The claim of equal protection claim is being severely violated because the MSSA discriminates on the basis of sex alone.

[8] *United States v. Boucher*, 509 F.2d 991 (1975).
[9] 5 U.S.C. §3328(a)(2).
[10] *United States v. Boucher*, 509 F.2d 991 (1975).
[11] 5 U.S.C. §3328(a)(2).

The MSSA sex-based registration system was not deemed a violation of the Fifth Amendment by the Supreme Court in *Rostker v. Goldberg*[12]. The government's objective acknowledged in *Rostker*[13] was "to develop a pool of potential combat troops," and that limiting registration to male applicants was argued to be strictly related to that concern because Congress had determined that females were not capable of serving as combat troops. However, the Supreme Court's position in *Rostker*[14] should no longer be applicable today since there is no evidence that the sole purpose of the draft would be to supply combat troops nor that female exclusion would serve as a suitable means to realize the government objective, as determined in *Samuel Schwartz et al. v. Lewis C. Brodsky*.[15] The exclusion of women from combat positions was a critical issue in the Supreme Court's assessment in *Rostker*[16], but the conditions today have changed [to a great degree]. Currently military policy currently authorizes women to fill countless combat positions. Therefore, the exclusion of women from registration with the Selective Service System is no longer noticeably related to a significant governmental objective.[17]

CONCLUSION

The facts of the Tucker case illustrate that he was unfairly targeted simply because he was a male. If he was of the opposite sex he would certainly be eligible to retain his employment with the FDIC and as a matter of fact it would not have even come into question. The countless number of positions available to women in the armed forces has greatly increased and the percentage of the armed forces personnel, who are female, has drastically grown in size as well. Furthermore, in *Schwartz*[18], the male-only draft registration is argued to be irrelevant to an imperative governmental objective. Currently, women attend all of the military academies and their recognition in the armed forces is best demonstrated in common reference to the "men and women" in Iraq saying. Since the theories of a "significant governmental objective" and "to develop a pool of potential combat troops" have been discredited, Tucker was arguably singled out for being the wrong sex. It is true that although women are now accepted in combat positions, the range of their combat participation has not yet reached the level of male military personnel. Yet for Tucker, it still remains inexcusable and a severe violation of the equal protection obligation of the Constitution that women are not mandated to register for Selective

[12] *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[13] *Id.*
[14] *Id.*
[15] *Samuel Schwartz et al. v. Lewis C. Brodsky*, 265 F. Supp.2d 130 (2003).
[16] *Rostker v. Goldberg*, 453 U.S. 57 (1981).
[17] *Samuel Schwartz et al. v. Lewis C. Brodsky*, 265 F. Supp.2d 130 (2003).
[18] *Samuel Schwartz et al. v. Lewis C. Brodsky*, 265 F. Supp.2d 130 (2003).

Service. For these reasons, the court will likely conclude that the Military Selective Service Act[19] is a violation of the Constitution's equal protection guarantees.

[19] Military Selective Service Act (MSSA), 50 App. U.S.C. §§ 451-47.