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**NATIONAL COMMISSION ON MILITARY, NATIONAL, AND
PUBLIC SERVICE
MEMORANDUM FOR THE RECORD**

Subject: October 18 Constitutional Law Scholar Panel

The following is a record of a meeting of the Commissioners, which took place on October 18, 2018, at the Commission’s headquarters in Crystal City, Virginia. At the meeting, four constitutional law scholars discussed the constitutionality and morality of mandatory national service options. The conversation was facilitated by Paul Lekas, and included all Commissioners and some members of the Commission staff. This memorandum is protected by the deliberative process privilege and should be treated as For Official Use Only. This memorandum is not a verbatim transcript of the discussion.

Attendees:

- Constitutional Law Scholar Panelists, in initial speaking order:
 - Ilya Somin, Professor of Law at George Mason University
 - Jessica Bulman-Pozen, Professor of Law at Columbia University, via phone conference
 - Jon Michaels, Professor of Law at University of California, Los Angeles
 - Louis Michael Seidman, Professor of Law at Georgetown University

Key Takeaways:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]



Meeting Discussion

Mr. Lekas introduced the panelists and stated that each law professor would say a few introductory remarks and the floor would be open to questions from the Commissioners.

Mr. Somin argued that mandatory service is morally wrong and unconstitutional. The government should not control people's bodies and mandatory service violates the fundamental principle of a free society that is why we abolished slavery. Rather than forcing service, he suggested paying employees more, tax incentives, or liberalizing immigration policy.

Mr. Somin said that the main constitutional arguments were federalism and Thirteenth Amendment issues. Mandatory forced civilian labor is not one of the enumerated powers given to the federal government, so that authority goes to the states. For the military draft, there is an explicit federal power to raise and support armies, but there is not a similar power for raising civilian forces. Interstate commerce would not be a sufficient reason. In *Sebelius*,¹ the Court held that interstate commerce does not permit Congress to require people to buy insurance. The same argument can apply here. Another argument might be that the federal government has the authority under the necessary and proper clause. However, that is likely not sufficient because it is not proper, and there is no underlying authority.

The Thirteenth Amendment, Mr. Somin said, not only bans slavery but involuntary servitude. Mandatory national service counts as involuntary servitude. The precedent of *Butler v. Perry*,² which upheld a Florida program for forced labor on roads with the alternative being a \$3 tax, is the most supportive for mandatory national service. However, Mr. Somin does not believe the case would be decided the same way today, partly because a \$3 tax alternative is a far less onerous requirement than mandatory service and partly because the goal of the Florida statute was racism (the opinion was also authored by a Jim Crow-era sympathetic Justice) and that would not be justifiable today.

Ms. Bulman-Pozen said that Congress has the broad authority to legislate in this area, especially to increase voluntary service. The power to require mandatory military service is also quite broad, she said, under Article I, sec. 8 of the Constitution. However, Congress does not have the authority to mandate national or public service. Perhaps a program in conjunction with a military service program (such as the options conscientious objectors were allowed to take during Vietnam) would be constitutional, if the public service were related to the military service.

In Ms. Bulman-Pozen's opinion, the important question is the extent of Congressional power: the "proper" part of the "necessary and proper" clause. Smuggling a large compulsion of civilian service into military programs would be challenging and, indeed, the current Chief Justice has raised issues in this area.

Ms. Bulman-Pozen thought a Fifth Amendment Due Process challenge would arise in response to a mandatory service program, but would be unlikely to succeed. First Amendment and RFRA challenges may be likely to be raised and likely to be effective; we would need alternatives even for nonmilitary service and have to think about what would count as compelled speech. She could also

¹ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

² *Butler v. Perry*, 240 U.S. 328 (1916).

see objections arising to the registration system, even if people do not actually serve. Finally, if there were any kind of gender distinction, there would be a due process challenge that would likely be successful, despite *Rostker*.³

Mr. Michaels said he was more interested in incentives and the role of the administrative state. What is the context in which bureaucracy fits into our constitutional order?

The government plays a critical role in private action, so Mr. Somin's arguments that the government can be uninvolved in private life are not based in reality. The constitutional question, according to Mr. Michaels, is a close one and the SCOTUS might reevaluate old jurisprudence. Nonmilitary service and even military service that is mandated may be reviewed. If we look at congressional constitutional powers, this would all be a close call and a lot would depend on how it was presented: time required, potential opt outs, and benefits offered.

Bureaucracy and the civil service is important and should be funded well. Public servants should be protected. The incentives of any voluntary program are key, said Mr. Michaels, because the program can be constitutionally justified. Look at the differences between military and civilian recruiting:

- Funding for advertising and recruiting for the military is much larger than the funding for civilian servants
- The military has ROTC, which allows it to fast track people into careers and increase awareness of their work, while there is no civilian version and
- The military has a strong midcareer training program, and civilian servants do not.

Finally, it is worth considering how many senior political leaders are needed on the top. The high numbers of Schedule C's affect how much consistent leadership is available, and the turnover is disruptive. Our system is based on slow continuity and this can be protected here.

Mr. Siedman said that he felt the Commission and Congress should make their own constitutional decisions and not feel bound by what the Supreme Court might say. It might take a while for the policies to play out, he said, so it is difficult to predict the makeup of the Court and the Court often defers to Congress

Mr. Seidman supports compulsory service because right now a small percentage of the population has carried the burden of fighting wars. He says this as a person who feels guilt about how he behaved during the Vietnam period: taking advantage of his class privilege to avoid the draft. It never occurred to him that someone else had to go to war instead, and maybe died. Today, with no draft, only a small group fights wars. That group is largely rural, lower class, and effectively engaged in forced labor, in Mr. Siedman's opinion, because they have no other way out of their lives with no access to decent healthcare or jobs. These people would have more options with a mandatory national service program. A universal program would also give a common American experience.

Mr. Seidman also thought that it would be constitutional. The biggest challenge is the *Sebelius* case, in which the Chief Justice said in dicta that the ACA exceeds congressional limits because it created interstate commerce that was compelled, rather than merely regulated. But Mr. Seidman thinks that the government forces people to do things they don't want to do all the time, such as jury duty,

³ *Rostker v. Goldberg*, 453 U.S. 57 (1981).

[REDACTED]

filing taxes, and the draft, some of which can be considered compelled labor. Conservatives also argue that for a certain percentage of the year, we are working to pay our income taxes. Mr. Seidman thinks that this case is distinguishable from *Sebelius*, because the draft is not under the commerce clause, but rather “raising and supporting an army.” Using this type of logic, Mr. Seidman believes that we can greatly expand alternative service to cover all Americans.

Registration, Mr. Seidman argued, is constitutional as well, according to the Minnesota purge case.⁴ In *O’Brien*,⁵ the draft card burning case, the Court said that draft cards are necessary for mandatory registration. Similarly, Mr. Seidman thinks that the incentives to engage in service are clearly constitutional: it is a normal spending program.

Ms. James asked Prof. Somin how jury duty fits into the Thirteenth Amendment question.

Mr. Somin said there are lots of ways jury duty could be set up in a better manner. Additionally, jury duty is a poor analogy for mandatory service, even as it stands. It is a much less extensive form of coercion and trial by jury is a constitutional right embedded in the Bill of Rights. Using the Thirteenth Amendment to override a previously recognized constitutional right is a harder argument. Jury duty is both morally distinguishable and has a stronger constitutional underpinning. Mr. Somin said that he would make similar points to several of the analogies Mr. Seidman presented, such as taxation.

Mr. Siedman said that while Mr. Somin was right that jury service might be less onerous than mandatory service, that point should not be overstated. In some parts of the country, jury service can be for a month, six months, or a year (for grand jury). It is true that if you perjure yourself, it is easy to get out of jury duty, but if you tell the truth, it can be quite hard. He could imagine forms of alternative service that are no more onerous than jury duty.

Mr. Michaels said that it is important to think of the context for any recommended service. For example, people see jury service negatively and it is a bad idea to use this analogy. He agreed with Mr. Seidman that the Commission should come up with its own conclusions, but as we present proposals to Congress, we should think of how we present this within the view of citizenship. The packaging for your audience is different than a legal brief.

Mr. Khazei asked what the constitutional basis was for requiring students to go to high school. Is it because it is done at the state level?

Mr. Somin said that this has a federalism aspect, because the state structure has different powers, and the fact that we allow lots more impositions on children than adults. Personally, Mr. Somin thinks that we sometimes go too far, but we can at least agree that we should not treat adults as children. Usually the claim for children is that public education is a necessity to help them function as adults in the future.

Mr. Siedman said that he does not think people would say slavery is okay if we do it on children. He thinks that if school is forced labor, then the Thirteenth Amendment does apply. There is an unbroken line of lower court cases where people have challenged mandatory service for high school

⁴ It is unclear which case this is, but it might be *Husted v. Randolph Institute*, 584 U.S. __ (2018).

⁵ *United States v. O’Brien*, 391 U.S. 367 (1968).

[REDACTED]

graduation. There is also a line of cases in which the courts have rejected mandatory forced labor on the part of lawyers for indigent cases.

Ms. Bulman-Pozen said that judicial decisions in these areas do not really support the Thirteenth Amendment objection. She agrees with Mr. Seidman on the case law surrounding the Thirteenth Amendment: avoid exploitative uses and support ones with civic and educational purposes. Civics purposes also cover jury duty and military service. She does not think the Thirteenth Amendment argument is strong. But the underlying concern of compulsion and liberty is likely to arise. She could see First Amendment issues or limits on the federal government's power to legislate in this area. That is why bundling military and nonmilitary service makes it more defensible. The question would be raised if nonmilitary service was not a small program, but appeared to be tied to military service only as a work around of constitutional issues—that would likely make courts nervous. That is how *Sebelius* arose. There is a question of how far Congressional powers go and a concern on encroaching on individual liberty.

Mr. Somin said that he wants to echo he thinks the case law (*Butler v. Perry*) is wrong and that more coercion against adults is not okay. He is also worried about avoiding federalism problems by piggybacking nonmilitary service on military service and he pointed to early case law that argues against this approach. Alternative service was about protecting the CO system and minimizing fraud. But if we are really about growing national service, then it is distinct from a draft and not “proper” and it would be a massive power grab.

Mr. Seidman said he does not see how Mr. Somin objects to giving people more choice as anti-libertarian?

Mr. Somin said that the draft only applied to a narrowly selected group of people, not a program that affects all people with the military program just being a cover, that the draft no longer exists, and that more voluntary choices can be provided without coercion.

Mr. Gearan said that we had previously heard about thick and thin citizenship: jury duty, paying taxes, and requiring voting are all a possible part of elevating servicership, which is our goal.

Mr. Michaels said that there is a strong myth of individualism and libertarianism. But we have a deep interconnectedness with the power and privileges of the state, in reality. We use state licenses for professions and student loan benefits and housing programs. It is really hard to disassociate ourselves from the greater community; there is always a big government component. When Mr. Michaels talks about thick citizenship, he wants to underscore it has to be a two-way street. All our benefits come from the state being powerful, even if meddlesome.

Mr. Somin said he thinks this is a dangerous notion. Government involvement is something to decrease, not increase. If we coerce someone in one way, that is not a reason to say why not another. There is a fundamental difference between appropriating a person's person and time versus taking someone's money or paperwork. So the scale and scope are different in this proposal and this is the road to totalitarianism.

Ms. Davidson brought up the civilian and military divide. How does this get impacted by the changing notion of warfare? War does not just happen “over there” and the lines between crime and war are blurring. We need cyber experts and firefighters.

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Mr. Somin said that he opposes the military draft too. The DoD also supports abolishing the draft. It is better to hire people voluntarily; you get better work. For the average American, people are more likely to be killed by lightning than by a terrorist, so we need to keep threats in perspective. If we have non-forced means to address national needs [REDACTED] then that is what we should use.

Mr. Michaels said that Mr. Somin was absolutely right. Cyber is the latest frontier, but not the first way we have had to think about military preparedness and the role of security in the world. There were ports, anthrax, public health risks, etc. in the past. His understanding is that most definitions of national security has expanded and we are already at the point where we need to mobilize for unconventional war. That is a reality. Even a military draft would require expanding other service programs. The Pentagon is resistant to the draft because it sees inductees as not well-trained or motivated. In the old days, the military looked at poor nutrition of their population at large and pushed for food stamps. So the military can push for civil changes.

Mr. Allard said that if we had a draft, people could declare being CO's, but that does not negate their obligation to serve. Rather, they would have to serve for two years in some capacity. Thoughts?

Mr. Seidman said that yes, mandatory national service is not novel. It is similar to past programs and just larger. The Pentagon opposition to the draft would likely not extend to mandatory national service, because it could then maintain its standards and less qualified people could perform other service opportunities.

Mr. Somin said that as a constitutional matter, there is a big difference on using alternative service as an enforcement program versus an expanded program. He also emphasized that he opposed the draft in all forms. Pentagon might be okay with keeping standards in this new situation, but then the service sector would have untrained and non-motivated civilian workers. There are lots of other ways to promote voluntary service, including tax incentives, higher pay, better work, etc.

Mr. Kilgannon said that Mr. Seidman appeared to approve of the mandatory national service program, but described military service as forced labor. Also, Mr. Seidman referenced the Vietnam era when the draft ended as a time when divides in society were healed, so why does he now want the draft back to heal societal divides?

Mr. Siedman said that he should be clear when people argue against “forced labor,” they should recognize that people in the military often go there because they really don’t feel like they have other options. As to the second point, he was tremendously relieved when Nixon ended the draft, but he has come to change his mind. When you have a small group bearing all of the cost and other people do not have to suffer, Mr. Siedman does not think that helps national unity.

Mr. Somin said that people who meet the military standards generally do have other job options. Even if they don’t, then the solution should be to help that group have better voluntary job options (like the military is currently a voluntary option), rather than have more coercive action.

Mr. Khazei said he has never served in the military and admires the people who have. He is concerned about a constitutional republic that was founded because of citizen soldiers, which relies on a professional soldier set with everyone else ignoring it. What does it mean for our republic when the people impacted by war decisions are so small?

Ms. Bulman-Pozen said she thought that was a real concern and there is a way to tackle this question with legislative proposals. Rangel’s repeated proposals for universal national service is an

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example—the point is to force this other conversation about the U.S. military engagements and how we make decisions. There is a way of taking this mandate in a different direction. Across the 20th century, the connection between the military and citizenship and political solidarity has been linked closely to voting. The 20th Amendment was about being old enough to fight and old enough to vote. It might be worth broadening the questions the Commission is addressing to see how we can foster citizenship and obligations for all of us.

Mr. Somin said he had three points. (1) If you actually have a military draft, there is still only a small population that sees combat. In WWII, only a few thousand people ever saw combat. (2) It is wrong to say that people not in the military don't have skin in the game. People pay taxes, people's friends and family are in the military, and we have other restrictions placed on us. (3) It is wrong to assume that if everyone fought, we would have fewer wars. Survey data does not support that. Both historically (during Vietnam) and today, people in the military support war more than the general population. Attitudes are not based on narrow self-interest and whether we will see combat or not. Most people's views on war are based on what they think is in their public interest.

Mr. Siedman said that he does not agree that everyone has skin the game. We are not paying higher taxes for the war; our grandkids will. Not everyone knows someone in the military, and it is a shrinking pool. With a broader lens, the true question is the question of what keeps a constitutional republic together. It is not a document, but a sense of common purpose and we need to exercise constraint when we disagree. The fewer opportunities for that common purpose, the less national cohesion, and the more you see our country weaken.

Mr. Michaels said that he thinks this is the essential question and wants to find a good way to address it. He is worried about putting war on a small group and paying for it on a credit card. The only military he knows are the active duty JAGs in his graduate program. We all live in bubbles. It is important to think of packaging engagement and service, and the military as an engine of social progress is key. They can address issues that the rest of us can't. Disassociating ourselves from the central enterprise hurts us all.

Mr. Lekas concluded by thanking the participants for their time.