Third Memo

EBBETS CHAVEZ & KOFAX
ATTORNEYS AT LAW, LLP

To: First-Year Associates
From: Brandi Bickering, Senior Partner
Re: Precedent for *United States Army* v. *Connolly et al*.

You will, of course, need to consider precedent in determining whether or not we should accept this case. Attached is relevant case law for the *Connolly* case. As I have noted earlier, the 1996 decision in *United States* v. *Virginia* (*VMI*) may help us with our current case. An older case, *Rostker* v. *Goldberg* (1981) (*Goldberg*), may also be of use. The Supreme Court is going to want to know whether or not *VMI* and/or *Goldberg* apply to Lt. Connolly's situation and why.

In examining *VMI*, keep in mind these questions:

1. *VMI* addressed only education and not the Special Forces. Is this distinction important? Why or why not?
2. What did the Supreme Court say about the lack of a truly parallel program, despite the existence of Virginia Women's Institute for Leadership (VWIL)? Is this important to our case? Why or why not?
3. What did the Supreme Court say about whether the exclusion of women from the Virginia Military Institute was based on real gender differences or archaic notions about women? Is this discussion helpful to our case? Why or why not?
4. Is there anything else in the majority opinion or the dissenting opinion that we should consider or could use when preparing our case?

In examining *Goldberg*, keep in mind these questions:

1. The court found that the military's policy of excluding women from combat was reason enough to justify the exclusion of women from the draft. Did they consider whether or not this exclusion was based on inherent differences between men and women?
2. If women are allowed into the Special Forces, will this open the draft to women as well? Why or why not? What would be the consequences of not drafting women?
3. Is there anything else in the majority opinion or the dissenting opinions that we should consider or could use when preparing our case?

SHORT SUMMARY OF THE *VMI* CASE

CASE HISTORY

Founded in 1839, the Virginia Military Institute (VMI) was a male-only college dedicated to preparing "citizen soldiers" for leadership in civilian life and in the military. In 1990, a female high school student applied for but was denied admission, as many others had been in recent years. She contacted the U.S. Attorney General's office, which filed a lawsuit against the state of Virginia and VMI, claiming the woman's 14th Amendment right to equal protection of the laws was being violated.

The district court hearing the case ruled in VMI's favor. The case was appealed to the Fourth Circuit Court of Appeals, which reversed the lower court and ordered Virginia to do something to fix the constitutional violation. In response, Virginia proposed a parallel program for women: the Virginia Women's Institute for Leadership (VWIL), located at another college. This satisfied the district court and the appeals court, which noted that although the VWIL degree lacked the historical benefit and prestige of a VMI degree, the educational opportunities at the two schools were sufficiently comparable.

In 1996 the case was appealed to the U.S. Supreme Court, which overturned the ruling of the appeals court and required VMI to admit females.

MAJORITY OPINION OF THE SUPREME COURT

The Supreme Court based its decision on the following reasoning:

1. The government must have an "exceedingly persuasive justification"—i.e., a very strong argument—in order to discriminate by gender. Federal and state governments are denying the right to equal protection, the Court said, "when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in, and contribute to society based on their individual talents and capacities." To justify a discriminatory policy, the government must prove that the policy is necessary for "important governmental objectives. The justification ... must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. The heightened review standard ... means that categorization by sex may not be used to create or perpetuate the legal, social, and economic inferiority of women."

Virginia claimed that VMI's rigorous training program would be harmed if women were admitted, but the Court disagreed. The Court admitted that some modifications in housing and training programs would be needed for women. However, it did not accept Virginia's argument that VMI's training methods are "inherently unsuitable to women" because of "gender-based developmental differences" and "typically male or typically female tendencies." A government that controls the "gates to opportunity" may not "exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.' The State's justification for excluding all women from "citizen-soldier" training for which some are qualified ... does not rank as "exceedingly persuasive."

2. In order to not violate the constitution, the government must provide an equal opportunity when it sets up a separate program for women. The Court said, "VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the feeling of tremendous accomplishment commonly experienced by VMI's successful cadets. Virginia maintains that methodological differences are justified by the important differences between men and women in learning and developmental needs, but generalizations about "the way women are," estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. VWIL does not qualify as VMI's equal. The VWIL program is a pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence."

Ginsburg, J., **delivered the opinion of the Court, in which** Stevens, O'Connor, Kennedy, Souter, **and** Breyer, JJ., **joined.** Rehnquist, C. J., **filed an opinion concurring in the judgment.** Scalia, J., **filed a dissenting opinion.** Thomas, J., **took no part in the consideration or decision of the case.** *(Editor's Note: Justice Thomas did not participate in this decision because his son was a student at VMI.)*

DISSENTING OPINION OF JUSTICE SCALIA

"Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. It rejects the finding that there exist 'gender-based developmental differences' supporting Virginia's restriction of the 'adversative' method to only a men's institution, and the finding that the

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all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: it drastically revises our established standards for reviewing sex-based classifications. And as to history: it counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both states and the federal Government.

The question to be answered ... is whether the exclusion of women from VMI is 'substantially related to an important governmental objective.' It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men's and women's colleges. But beyond that, as the Court of Appeals here stated: 'That single-gender education at the college level is beneficial to both sexes is a fact established in this case. If Virginia were to include women in VMI, the school would eventually find it necessary to drop the adversative system altogether.'"

SHORT SUMMARY OF THE *GOLDBERG* CASE

CASE HISTORY

After the end of the Vietnam War, registration for the military draft was discontinued in 1975. In 1980, because of the Soviet Union's military action in Afghanistan, President Carter decided that it was necessary to reactivate the registration process, and asked Congress to allocate funds for that purpose. He also recommended that Congress permit the registration and conscription (draft) of women as well as men. However, Congress allocated only those funds necessary to register males and declined to amend the Military Selective Service Act to permit the registration of women. Several men, including Robert Goldberg, brought a lawsuit challenging the Act's constitutionality. A three-judge District Court ruled that the Act's gender-based discrimination violated the Due Process Clause of the 5th Amendment and prevented registration under the Act.

The case was appealed to the U.S. Supreme Court, which in 1981 overturned the lower court and ruled that the Military Selective Service Act did not violate the 5th Amendment.

MAJORITY OPINION OF THE SUPREME COURT

The Supreme Court based its decision on the following reasoning:

1. The courts have traditionally deferred to Congress and the President regarding decisions about national defense and the military. The Supreme Court said, "Congress acted well within its constitutional authority to raise and regulate armies and navies when it authorized the registration of men and not women. While Congress is not free to disregard the Constitution when it acts in the area of military affairs, this Court must be particularly careful not to substitute its judgment of what is desirable for that of Congress, or its own evaluation of evidence for a reasonable evaluation by the Legislative Branch.

2. The Court also said, "The question of registering women was extensively considered by Congress in hearings held in response to the President's request for authorization to register women, and its decision to exempt women was not the accidental byproduct of a traditional way of thinking about women. And since women are excluded from combat service by ... military policy, men and women are simply not similarly situated for purposes of a draft or registration for a draft, and Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The testimony of executive and military officials before Congress showed that the argument for registering women was based on considerations of equity, but Congress was entitled, in the exercise of its constitutional

powers, to focus on the question of military need rather than "equity." The District Court, undertaking an independent evaluation of the evidence, exceeded its authority in ignoring Congress' conclusions that whatever the need for women for noncombat roles during mobilization, it could be met by volunteers, and that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility."

Rehnquist, J., **delivered the opinion of the Court, in which** Burger, C. J., **and** Stewart, Blackmun, Powell, **and** Stevens, JJ., **joined.** White, J., **and** Marshall, J., **filed dissenting opinions, in which** Brennan, J., **joined.**

DISSENTING OPINIONS

1. Justice White's dissent was based on his opinion that it would be difficult during wartime to fill all of the noncombat jobs in the military without drafting some women, since not enough volunteers might be available.

2. In Justice Marshall's dissent, he stated that the right to equal protection was being violated by Congress, which based its policy on "ancient canards (false stories) about the proper role of women." He went on to say that even though Congress should have primary authority over military affairs, the courts do have the right to decide questions of constitutionality. "As the Court has pointed out: 'The phrase *war power* cannot be invoked … to support any exercise of congressional power … Even the war power does not remove constitutional limitations safeguarding essential liberties,' *United States* v. *Robel*, (1967). One such 'safeguard of essential liberties' is the Fifth Amendment's guarantee of equal protection of the laws. In my judgment, there simply is no basis for concluding … that excluding women from registration is substantially related to the achievement of an … important governmental interest in maintaining an effective defense." Justice Marshall agreed with Justice White that women might need to be drafted in order to fill noncombat positions in the military. He quoted a Defense Department representative who said:

> *"It is in the interest of national security that, in an emergency requiring the conscription for military service of the Nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18–26 age category will be women."*