



NATIONAL COMMISSION ON MILITARY, NATIONAL, AND  
PUBLIC SERVICE

Selective Service Stand-Alone Memo for Voting

The following bullet points summarize a policy alternative for modifying the Selective Service System (SSS). The Selective Service Work Group deferred deliberations on this topic to the full Commission. This proposal is designed for consideration in its entirety and is subject to a single vote. *Note: This memo addresses findings focused on the problem statement below and is not intended to address all issues surrounding the proposal.*

**Register all Americans.** *Problem:* The current Military Selective Service Act (MSSA) male-only registration requirement omits approximately 50 percent of the population from availability for the draft in case of national emergency. *Goal:* Provide DoD with access to a broader range of potential conscripts in the event a military draft is required.

- The Commission recommends that Congress amend the MSSA to eliminate male-only registration and expand draft eligibility to all Americans of the applicable age cohort.

### Risk Analysis

- **Public support** for this proposal, as determined by polling data, is divided. This implies support from **elected officials** is also likely to be divided.
- The **Center for Military Readiness (CMR)** is a key stakeholder group opposed to expansion of the registration requirement to women, while still supporting the Selective Service System (SSS) overall. Several **conscientious objector** and **war resister** groups oppose the expansion of registration—in line with beliefs that the SSS should be disestablished. While opinions of **individual members** and **congregations** may vary, few **religious organizations** have taken doctrinal stances on the issue.
- The **SSS** does not take a policy position, but projects that adding women to SSS registration will cost an additional \$38 million over the course of five years. SSS also projects that compliance rates among women would lag behind that of men for several years as the population becomes increasingly aware of the requirement for women to register and secondary registration processes, if maintained, adjust to include women.<sup>1</sup>
- Currently, the **constitutionality** of the all-male registration requirement is being challenged in federal court, and a district court has already found the requirement to be unconstitutional.
- **Policymakers** may seek to justify an important governmental interest in maintaining all-male registration through alternative means, though these approaches are subject to scrutiny. For instance, if the Secretary of Defense reinstates a ban on women in combat roles, the rationale used in *Rostker* could be interpreted as valid. However, reinstating a ban on women in combat would also likely face legal scrutiny.

### Should this proposal be adopted?

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<sup>1</sup> Furthermore, the SSS anticipates that, if asked to implement female registration, paper registration could begin in as soon as 30-45 days, but the SSS Registration, Compliance, Verification database would require 12-14 months to update; other secondary registration systems could require additional time for state authorization and updating their underlying software. Selective Service System, slide presentation: “Registration of Women,” March 4, 2019.

## Register All Americans

- Excluding a large proportion of the U.S. population from registration may limit the ability of DoD to fully meet national security needs in the event of national mobilization, particularly as DoD requires increasingly complex and unique skillsets to support its mission and faces uncertainty surrounding future needs.
- The legal rationale for excluding women from SSS registration is not supported by equal protection clause jurisprudence or current policies on women in military service.

### Background

The Military Selective Service Act (MSSA) mandates registration of eligible males between the ages of 18 and 26 to provide a pool of individuals for induction into the armed forces in the event of a draft.<sup>2</sup> The statute states the purpose of the SSS is to achieve and maintain “an adequate armed strength” and to share the obligations and privileges of serving in the armed forces “in accordance with a system of selection which is fair and just.”<sup>3</sup>

Throughout history, the United States has used draftees for both combat and noncombat roles. Despite this fact, the Supreme Court in a 1981 case, *Rostker v. Goldberg* (*Rostker*), upheld the constitutionality of the all-male draft system based on its view that Congress’ primary purpose in requiring registration was to prepare for a draft of combat-replacement troops.<sup>4</sup> Because of the combat restrictions on women in 1981, the Court held that men and women were not similarly situated for purposes of draft registration.<sup>5</sup>

In 2013, Defense Secretary Leon Panetta announced that the military would open all military jobs to qualified women and, in 2015, Defense Secretary Ash Carter made this official by rescinding the combat-exclusion policy that previously prevented women from serving in certain combat-designated roles.<sup>6</sup> Additionally, Congress called for gender-neutral physical standards in the 2015 National Defense Authorization Act.<sup>7</sup>

In response to DoD’s actions, two lawsuits were filed challenging the Selective Service all-male registration system as a violation of the equal protection principles of the Constitution.<sup>8</sup> On February 22, 2019, a federal district court judge in Houston, Texas, issued a declaratory judgment finding that all-male registration is unconstitutional and can no longer be justified following the Pentagon’s decision to open all combat positions in the U.S. military to women.<sup>9</sup> The district court distinguished *Rostker*, saying “[t]he dispositive fact in *Rostker*—that women were ineligible for

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<sup>2</sup> 50 U.S.C. 3801 et seq.

<sup>3</sup> Id.

<sup>4</sup> 453 U.S. 57 (1981).

<sup>5</sup> Id. at 78.

<sup>6</sup> “Fact Sheet: Women in Service Review (WISR) Implementation,” Department of Defense, December 2015, [https://www.defense.gov/Portals/1/Documents/pubs/Fact\\_Sheet\\_WISR\\_FINAL.pdf](https://www.defense.gov/Portals/1/Documents/pubs/Fact_Sheet_WISR_FINAL.pdf).

<sup>7</sup> In 2017, the Army implemented the gender-neutral Occupational Physical Assessment Test for prospective recruits, but the implementation of single-standard physical aptitude tests remains incomplete across the services

<sup>8</sup> See *National Coalition for Men v. Selective Service System*, Civil Action H-16-3362, (S.D. Tx.); *Kyle-Labelle v. Selective Service System*, Civil Action 15-5193 (D. N.J.).

<sup>9</sup> *National Coalition for Men v. Selective Service System*, Civil Action H-16-3362, “Memorandum opinion and Order” (Feb 22, 2019 S.D. Tx.).

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combat—can no longer justify the MSSA’s gender-based discrimination.”<sup>10</sup> The district court concluded that, “while historical restrictions on women in the military may have justified past discrimination, men and women are now similarly situated for purposes of a draft or registration for a draft.”<sup>11</sup>

### Findings

- DoD’s position is that “it would appear imprudent to exclude approximately 50 percent of the population—the female half—from availability for the draft in the case of a national emergency.”<sup>12</sup> Assistant Secretary of Defense James Stewart reinforced this in his testimony to the Commission, arguing that women are already contributing to increased force lethality. Army Chief of Staff Gen. Mark Milley and Marine Corps Commandant Gen. Robert Neller supported expanding SSS registration to women.<sup>13</sup> Gen. Neller testified before the Senate Armed Services Committee that “based on [the] lifting of restrictions for assignment to unit MOS, that every American who is physically qualified should register for the draft.”<sup>14</sup>
- DoD has also stated “the percentage of individuals qualified would not be as variable by gender” in future wars due to the need for personnel to fill noncombat positions.<sup>15</sup> Adding women to the registrant pool would consequently “enhance the ability of the SSS to provide manpower to the DoD in accordance with its force needs.”<sup>16</sup>
- As future military needs for skillsets grow more diverse and complex, ensuring DoD may pull from a larger registrant pool in the event of national mobilization may be necessary to gain access to such skills.
  - Demographic trends indicate the population of young people in America will likely not significantly grow in size over the next 20 years; however, the population eligible for military service or conscription under current standards may shrink given the increasing number of individuals ineligible due to obesity, mental health conditions, and other factors.<sup>17</sup> Only 3 out of 10 young Americans are currently eligible for military service. Even if some standards would be eased in the event of a draft, a broader registrant pool may prove critical to meet DoD’s need for high-quality personnel.<sup>18</sup>

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<sup>10</sup> National Coalition for Men v. Selective Service System, Civil Action H-16-3362, “Memorandum opinion and Order” (Feb 22, 2019 S.D. Tx.).

<sup>11</sup> *Id.*

<sup>12</sup> U.S. Department of Defense, Office of the Under Secretary of Defense for Personnel and Readiness, *Report on the Purpose and Utility of a Registration System for Military Selective Service*, March 12, 2017, 17.

<sup>13</sup> “Marine and Army chiefs testify to congress, women should register for draft,” USMC Life, February 2, 2016, <https://www.usmclife.com/2016/02/marine-and-army-chiefs-testify-to-congress-women-should-register-for-draft/>.

<sup>14</sup> U.S. Government Publishing Office, *The Implementation of the Decision to Open All Ground Combat Units to Women*, (Washington, DC: GPO, February 2, 2016), 63.

<sup>15</sup> DoD, *Report on the Purpose and Utility of a Registration System for Military Selective Service*, 17.

<sup>16</sup> *Id.*

<sup>17</sup> Note: See [Eligibility Standards for Military Service](#).

<sup>18</sup> Joint Advertising Marketing Research and Studies, *The Target Population for Military Recruitment: Youth Eligible to Enlist Without a Waiver*, September 2016.

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- o Dr. Jason Dempsey argued that expanding registration is “about fully utilizing the talent and potential of American citizens to meet the challenges of a changing, yet continually dangerous, world,” adding the full integration of women is “essential to the ability of America to meet our national security challenges.”<sup>19</sup>
- Sufficient evidence demonstrates that women are, on average, less physically capable than men,<sup>20</sup> particularly in tests of muscular strength and cardiovascular endurance.<sup>21</sup> However, data do not support the claim that *all* women are less physically capable than men or that women are physically incapable of service in combat roles. As of 2018, over 382 female Marines<sup>22</sup> and 1,000 female soldiers served in ground combat roles<sup>23</sup> and almost 800 Army women—enlisted and officer—had been recruited for or transferred to Army combat occupations, with 18 women having graduated from Ranger School.<sup>24</sup>
- Physical capability is important but may be overemphasized as a measure of lethality. Arguments citing physical capabilities of women as a reason for precluding them from draft registration often point to higher rates of injuries and perceptions of decreased combat readiness.<sup>25</sup> In contrast, Dr. Jacquelyn Schneider highlighted the changing nature of warfare, stating “instead of machinery technicians, future warfare calls for data scientists, network engineers, cloud security specialists, satellite communications engineers...and system development engineers.”<sup>26</sup>

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<sup>19</sup> Jason Dempsey, “Selective Service Hearing: Expanding Registration to All Americans,” April 25, 2019.

<sup>20</sup> Courtright, Stephen H., Brian W. McCormick, Bennett E. Postlethwaite, Cody J. Reeves, and Michael K. Mount, “A Meta-Analysis of Sex Differences in Physical Ability: Revised Estimates and Strategies for Reducing Differences in Selection Contexts,” *Journal of Applied Psychology*, Vol. 98, No. 4, July 2013, pp. 623-641.; Szayna, Thomas S., Eric V. Larson, Angela O'Mahony, Sean Robson, Agnes Gereben Schaefer, Miriam Matthews, J Michael Polich, Lynsay Ayer, Derek Eaton, William Marcellino, Lisa Kraus, Marek N. Posard, James Syme, Zev Winkelman, Cameron Wright, Megan Zander Cotugno, and William Welser IV, *Considerations for Integrating Women into Closed Occupations in U.S. Special Operations Forces*. Santa Monica, CA: RAND Corporation, 2016.  
[https://www.rand.org/pubs/research\\_reports/RR1058.html](https://www.rand.org/pubs/research_reports/RR1058.html). Also available in print form.

<sup>21</sup> Although they do not differ on tests of movement quality, which includes flexibility and balance. See: Szayna, Thomas S., Eric V. Larson, Angela O'Mahony, Sean Robson, Agnes Gereben Schaefer, Miriam Matthews, J Michael Polich, Lynsay Ayer, Derek Eaton, William Marcellino, Lisa Kraus, Marek N. Posard, James Syme, Zev Winkelman, Cameron Wright, Megan Zander Cotugno, and William Welser IV, *Considerations for Integrating Women into Closed Occupations in U.S. Special Operations Forces*. Santa Monica, CA: RAND Corporation, 2016.  
[https://www.rand.org/pubs/research\\_reports/RR1058.html](https://www.rand.org/pubs/research_reports/RR1058.html). Also available in print form.

<sup>22</sup> Lolita C. Baldor, “Mattis: Jury Is out on Women Succeeding in Combat Jobs,” *Military Times*, September 26, 2018, <https://www.militarytimes.com/news/your-military/2018/09/25/mattis-jury-is-out-on-women-succeeding-in-combat-jobs/>; Marine Corps Operational Test and Evaluation Activity, “Ground Combat Element Integrated Task Force, Experimental Assessment Report.”

<sup>23</sup> Lolita C. Baldor, “Mattis: Jury is out on women succeeding in combat jobs.”

<sup>24</sup> Of those female soldiers, 51 officers and 253 enlisted women were serving in the infantry branch. Lolita C. Baldor, “Mattis: Jury is out on women succeeding in combat jobs.”

<sup>25</sup> U.S. Library of Congress, Congressional Research Service, *The Selective Service System and Draft Registration: Issues for Congress*, by Kristy N. Kamarck, R44452 (2016).

<sup>26</sup> Schneider, Jacquelyn, “Testimony for National Commission on Military, National, and Public Service April 24, 2019, Gallaudet University.”

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- Compliance with the proposal to register women may vary based on public support, which is likely influenced by differing perceptions of women in combat and the broader role of women in society. American public opinion on the issue of registering women is divided, with a slight majority of respondents in favor.<sup>27</sup>
- Constitutionality of a male-only registration system is unlikely to withstand legal scrutiny. The transformation of women’s military role since *Rostker* makes the opinion inconsistent with equal protection jurisprudence because the claimed government interest—limiting the draft to those who can serve in combat roles—is no longer valid.<sup>28</sup> This is the reasoning adopted by the federal district court this year that ruled the current system is unconstitutional. However, the *Rostker* opinion relies on congressional intent to read a narrower purpose than the MSSA states<sup>29</sup> and the current litigation is likely to challenge, and potentially disrupt, that interpretation.

### Recommendation and Implementations

For the purposes of deliberation, the italicized text below serves as the foundation of potential recommendations and should be the focus of decision-making. Detailed descriptions of how to implement recommended changes are offered to illustrate a means of achieving the desired outcomes.

- *The Commission recommends that Congress amend the MSSA to eliminate male-only registration and expand draft eligibility to all individuals of the applicable age cohort.*
- A. Amend section 3802(a) of the MSSA to strike the term “male” from the phrases “male citizen” and “male person” and to change the term “himself” to “themselves.”<sup>30</sup>

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<sup>27</sup> See, Primer: [Opinions on the Draft and Selective Service System](#). JAMRS, YouGov, and Rasmussen indicate around 60 percent of male respondents support female registration. When averaged, these three polls indicate almost 51 percent of the total respondent populations are in favor of female registration. Recent data from the 2019 Harvard Institute of Politics (IOP) poll sampled 18- to 29-year-olds, finding about 24 percent believe all Americans regardless of gender should be subject to conscription, about 30 percent do not believe this, and almost 46 percent are unsure. IOP trends indicated respondents are unsure or neutral in response to many questions. It is important to note respondents who refused or did not answer were dropped from statistical analysis in determining these percentages. Additionally, the survey question specifically prompted for ground combat, written as “If the United States responded to an existential or major threat to the United States or its foreign policy interests by using conscripts, many would face significant risk, including in ground combat. Do you think all Americans, regardless of gender, should be subject to such conscription?”

<sup>28</sup> In 1976, the Supreme Court determined that heightened scrutiny applied to sex-based state action, meaning that if the government chooses to treat men and women differently, this difference must be substantially related to an important government interest. *Craig v. Boren*, 429 U.S. 190, 97. (1976). The burden is on the government to establish an “exceedingly persuasive justification” for a sex-based classification to be valid. *Mississippi University for Women v. Hogan*, 458 U.S. 718. (1982).

<sup>29</sup> 50 U.S.C. 3801.

<sup>30</sup> Section 3802(a) reads, in part: “Except as otherwise provided in this chapter it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.”