



Center for Military Readiness — Policy Analysis —

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Women, War, and Selective Service Obligations

On December 3, 2015, Secretary of Defense **Ashton Carter** unilaterally announced that military women would be eligible for assignment to direct ground combat arms units, with no exceptions. These include **Army** and **Marine infantry, armor, artillery, Special Operations Forces** and **Navy SEALs**. Secretary Carter also made it clear that once a woman joins the military, her assignments will be on the same involuntary basis as men. ¹

The announcement followed several years of comprehensive research conducted by the **U.S. Marine Corps** and other military services. As the Marines stated in a post-research report, superior physical strength and endurance are essential for “*survivability and lethality*” in battle. Then-Commandant **General Joseph Dunford** cited that research in exercising his option to ask that certain units, including the infantry and Special Operations Forces, remain all-male.

The Secretary of Defense disregarded the best professional advice of the Marine Corps. Without a reasoned rationale or explanation of why the option to request exceptions was no longer operative, Secretary Carter ordered implementation of unprecedented policies by April 1, 2016.

The services dutifully produced plans that rely upon dubious strategies to “mitigate” expected problems – most of which cannot be mitigated. Pentagon officials know that **female injury rates** in the combat arms are likely to be double and even higher in load-bearing military occupational specialties (MOSs). Empirical evidence also indicates that slower speed and faster fatigue among women will erode marksmanship accuracy and degrade combat effectiveness.

“Gender-neutral” standards that are equal but lower than before will degrade tough training for men and create resentment that women don’t deserve. Without diligent congressional oversight or public hearings to review research findings that were kept under wraps for months, scores of tangential issues remain unresolved, including concerns about women and **Selective Service**.

In the 1981 ***Rostker v. Goldberg*** decision, the **Supreme Court** upheld the constitutionality of women’s exemption from Selective Service, which was consistent with policies exempting them from direct ground combat. The court recognized that **Congress**, not the lower district court, had the constitutional power to decide whether Selective Service obligations should be imposed on women on the same basis as men.

Now that women are eligible for direct ground combat assignments, would the Supreme Court decide the issue in same way?

Campbell University Law Professor William A. Woodruff has written a well-reasoned paper on the subject, which analyzes possible ways to continue women’s exemption from Selective Service registration and a possible future draft. ² This CMR Policy Analysis presents excerpts of Professor Woodruff’s insightful paper, which deserve serious consideration in Congress and the administration of the next Commander-in-Chief.

Background & Overview

The **Military Selective Service Act (MSSA)** established a contingency system to expedite the induction and training of men needed to replace casualties in a future national mobilization. In 1971, during the **Vietnam War** era, a group of draft-age men filed a lawsuit, called *Rostker v. Goldberg*, which challenged the male-only MSSA on equal protection grounds.

After years of turmoil, the draft was suspended in 1973 and registration requirements were repealed in 1975. But when the Soviet Union invaded **Afghanistan** in 1979, President **Jimmy Carter** called for reinstatement of Selective Service registration and conscription for women as well as men. After extensive hearings, members of the House and Senate agreed to revive MSSA registration, but rejected President Carter's suggestion that women should be included.

As stated in the Senate report, no one is drafted unless there is a need for "combat replacements" in time of war. Women were and still are serving with courage in uniform, but not in the combat arms. Registering equal numbers of women, therefore, or calling them up in a time of national emergency, would be "administratively unworkable and militarily disastrous."³

The congressional debate and reinstatement of the MSSA revived the ten-year old *Rostker* case. In 1981, with a 6-3 vote, the Supreme Court upheld the male-only registration requirement.⁴ The Court said that because women were not "similarly situated" in land combat units, exempting them from the draft did not violate equal protection principles. It was an easy call to make.

It is important to note that civilian women have always supported America's war efforts, and military women are valuable members of the armed forces. It is also true that even in recent wars, where female personnel have served in "harm's way" in combat zones, women have not been assigned to ground combat units such as the infantry. These are fighting teams that seek out and attack the enemy with deliberate offensive action.

The *Rostker* ruling did not mean that the Supreme Court agreed with Congress on the underlying issue; it affirmed the constitutional right of Congress to decide. The district court had no authority to review the correctness of Congress' decision. The Supreme Court also said that deference was most important when Congress made a "studied choice of one alternative in preference to another."

The *Rostker v. Goldberg* precedent was challenged but upheld several times since 1981, but new litigation is trying to overturn the all-male MSSA by citing recent policy changes.⁵

Consequences of Women's Eligibility for Direct Ground Combat

In the early 1990s, Congress enacted legislation mandating formal notice to Congress in advance of Defense Department changes in rules affecting military women. The notification law also requires a "detailed legal analysis" of the impact of changes on women and Selective Service.

On April 11, 2013, the Department of Defense stated in a formal notice to Congress that even though new positions had been opened to women, the *Rostker* precedent likely would stand because infantry and other direct ground combat units still were designated all-male. The analysis changed, however, following the Defense Secretary Carter's announcement on December 3, 2015. The revised notice states in part:

*"The opening of all direct ground combat positions to women further alters the factual backdrop to the [Supreme] Court's decision in Rostker. The Court in Rostker **did not***

explicitly consider whether other rationales underlying the statute would be sufficient to limit the application of the MSSA to men. The Department will consult with the Department of Justice as appropriate regarding these issues.” (Emphasis added)

Congress, the branch of government having the broad constitutional power to make policy for the military is conspicuously missing from this process.

Congress can and should reassert its authority by codifying Defense Department regulations in effect prior to April 11, 2013, with the stipulation that rules may not be changed without a vote of Congress. This approach, known as **Sound Policy for Women in the Military**, drew wide support in Congress in 2013, but ongoing research discouraged prudent action to preserve women’s military exemptions.⁶

Research and Reality

On January 24, 2012, Secretary of Defense **Leon Panetta** announced the administration’s intent to rescind the 1994 **Direct Ground Combat Assignment Rule (DGCAR)** by January 2016. From April 2012 through August 2015, the Marine Corps took the lead in initiating a series of research projects called the **Women in Service Restrictions Review (WISRR)**.

Most of the research projects ran contrary to the expectations of women-in-combat activists. For example, 29 spirited female officers attempted the **USMC Infantry Officer Course** at Quantico, VA, but none passed. On the less-demanding **Infantry Training Battalion (ITB)** course at Camp Geiger, NC, **165** enlisted women (out of **428**) graduated. For a full year officials prepared female basic trainees at Parris Island, GA, to perform three pull-ups, the male minimum. The requirement was postponed indefinitely because **55%** of women could not meet that standard.

In 2013 the **Naval Health Research Center (NHRC)** conducted tests with hundreds of men and women who volunteered to participate in heavy-lifting armor and artillery combat tasks. In those tests, **19% to 28%** of women failed, compared to **1%** of the men. The Army conducted limited tests to measure physical strength, but the **U.S. Special Operations Command (USSOCOM)** hired the largely-civilian **RAND** Corporation to conduct research surveys and focus groups.⁷

Over nine months in 2014 -15, the Marine Corps conducted unprecedented **Ground Combat Element Integrated Task Force** field tests at west-coast training bases. The **\$38 million GCEITF** used gender-neutral standards to select and deploy both gender-mixed and all-male infantry, armor, and artillery units. The **University of Pittsburgh** scientifically monitored and compared the performances of all units as they performed simulated combat tasks.

Resulting empirical data showed that all-male teams outperformed gender-mixed units **69%** of the time. In some tasks gender-mixed units scored higher, but researchers reported that male “compensations” often relieved women of most heavy lifting. Female injury rates were double those of men, and fatigue following heavy-load marches affected marksmanship and accuracy.

Secretary of the Navy **Ray Mabus**, who never visited the task forces, nevertheless criticized the research. In truth, its only flaw was failure to support pre-conceived expectations. GCEITF findings, which were supposed to demonstrate equality in performance, proved otherwise.

Pentagon officials keep insisting that gender-neutral standards will ensure high standards. In his paper, excerpted below, Prof. Woodruff suggests that these assertions, combined with the full record of research on women in combat, may provide an alternative rationale for maintaining the

exemption of young women from mandatory Selective Service.

The Purpose of Selective Service Obligations

The Military Selective Service Act was written to provide for the rapid induction of sufficient numbers of civilians capable of replacing casualties fighting in a major national emergency. If the draft were reinstated, some women might be able to meet minimal qualifications, but that is not a sufficient reason for determining that *all* women should be subject to Selective Service mandates. Writes Prof. Woodruff:

“Rather, the question is whether **the expenditure of time, effort, and resources to cull from the thousands of women who would be drafted the few who might meet the demanding standards** required of combat units, and enter the casualty replacement stream, is a wise use of time, effort, and resources during a time of national mobilization where the very survival of our nation depends upon success on the battlefield.

“Congress could reasonably, rationally, and appropriately decide that even though women who can meet the high standards of combat positions can volunteer and serve in those positions, the physiological reality is that **most women cannot meet those standards while, physiologically, most men can.**

“In light of that reality, Congress could decide that in a period of national mobilization, when time is of the essence, when the blood of our soldiers is being spilled on the field of battle, when the situation is so grave that we must abandon the all-volunteer principle that produced the greatest military force in the history of the world, **we simply cannot afford to devote time and resources to identifying those few women who may qualify.**

“**This is especially true in light of the fact that those women who can qualify and who wish to serve are free to volunteer to do so.** Excluding the remainder from the draft-eligible pool is an exercise in reasoned judgment to provide for the national defense in a time of crisis, not unlawful gender discrimination. . . .

“Would men, in that situation, be treated differently? Of course they would be. But if the purpose of the draft is to quickly mobilize and deploy a sufficient number of combat soldiers in a time of national emergency, as opposed to creating a system that guarantees gender equity, **limiting the draft to males is reasonable, rational, and appropriate. In this situation men and women are not similarly situated.**” (pp. 4-5)

Given the substantial body of highly-credible empirical findings that WISRR research projects produced since 2012, Congress could justifiably decide that in a time of future national emergency, it would not be worth it for Selective Service to seek and find a small percentage of females who might meet minimal infantry qualifications.

In a future court of law, however, it would be necessary to support such a claim with fact-based information. Congress must preserve and expand the solid record that supports such a position, in order to avoid charges that women’s combat exemptions are based on irrational beliefs or prejudice. Arguments in favor of retaining women’s exemption from Selective Service could be persuasive if they are based on reality-based data and findings that the Pentagon already has.

Making a Case Based on Facts

The argument could be made that including women in the draft pool could actually *hinder* the flexibility, efficiency, and speed necessary to respond to a national crisis. As Prof. Woodruff explains, if Selective Service called up women and men ages **18-26** in roughly equal numbers, the administrative burden of finding the theoretical one-in-four woman who might be qualified would make it more difficult to find better-qualified persons:

“If **75%** of the men can meet the combat standards but only **25%** of the women can meet the same standards, considerably more time, effort, and resources would be expended in testing, evaluating, and screening women to identify the 25% who qualify.

“Congress may well determine that in a time of national emergency, devoting resources to a demographic where three-fourths of the members will be unqualified hinders the ability to efficiently screen [potential draftees.]”⁸

“Applying the same sort of deferential review to the Congressional action suggested above as the Court applied to the situation before it in *Rostker*, **I suggest the Congressional action would be upheld.**” (p. 5)

The argument as outlined assumes that Congress has developed a strong, fact-based record of credible information that is comparable to that developed after extensive hearings in 1979. Otherwise, a decision to treat women differently than men could be dismissed as cultural bias.

If facts are effectively presented and supported with relevant research findings, it would be possible to reaffirm what was stated the last time the U.S. Senate published a report on the issue: “[A]n induction system that provided half men and half women to the training commands in the event of mobilization would be administratively unworkable and militarily disastrous.”⁹

Deference to Congress’ Right to Decide

The Supreme Court cited women’s combat exemption to uphold the male-only Selective Service system in *Rostker*. But as the Department of Defense said in the notice to Congress cited above, it is possible that there are alternative rationales available to achieve the same result.

Under **Article I, Section 8** of the **U.S. Constitution**, Congress has the express power to raise and support armies, provide and maintain a Navy, and make rules for the land and naval forces. That power, specifically conferred by the text of the Constitution on an equal and coordinate branch of government, is plenary and the Supreme Court has no power to second guess. Consider:

- Congress can affirmatively decide or passively condone women serving in direct ground combat roles, but the fact remains that most women cannot meet minimum standards in occupations that are most likely to be needed during a time of national mobilization.
- In the Army and Marine Corps, the largest communities are infantry. The purpose of conscription is not to induct support troops; it is to provide an effective casualty replacement stream if it is needed to fight and win a major, nation-threatening war.
- If the standard of review is military necessity, not gender equity, registering or drafting persons from a demographic pool where the greatest number of qualified individuals will be

found – namely, male Americans – is a reasonable, rational, and appropriate way for Congress to discharge its responsibility to “raise and support” armies.

- In discharging its power to raise and support armies, Congress can let women have it both ways: Some may choose to serve in combat if they can meet the standards, but because most women won’t be physically qualified, it would be a major waste of time, energy, and resources to draft women in time of national emergency.

It must be noted that future court decisions are always unpredictable, and the circumstances surrounding a potential future debate have changed since *Rostker*. The Supreme Court’s equal protection jurisprudence has evolved, and the Court’s historical deference to Executive and Congressional exercise of power over military affairs may not be as broad as it once was.

Still, it would be prudent for Congress to lay the groundwork needed to pursue all courses of action when and if the current Selective Service law requires a principled defense.

The Need for Complete Records to Sustain Selective Service Exemption

During a February 2, 2016, **Senate Armed Services Committee** hearing, Chairman **John McCain** (R-AZ) moved that research documents produced during the three-year course of studies be included in the record of the hearing.¹⁰ Voluminous, technical reports, most of which had been withheld from public view, belatedly appeared on the Defense Department website.¹¹

The list is useful but incomplete and lacking the context recommended by the **Center for Strategic and International Studies (CSIS)**, the designated “**red team**” that the Marine Corps brought in to monitor research projects from an independent perspective.

The 16-person CSIS red team visited sites preparing to participate in the GCEITF task force exercises, which CSIS described as “*unprecedented in their scale and scope.*” However, the red team’s independent observations ended in May 2015, before field exercises took place.¹²

This was unfortunate, for reasons stated in the July 2015 CSIS red team report: “Ultimately . . . the credibility of the totality of the research will rest on **how the Corps synthesizes the vast amount of disparate research findings it has accumulated.**” (p. 5)

CSIS advised that the research synthesis should include: “Identification and categorization of the various studies in an intuitive, **transparent way,**” and “**a transparent weighting scheme for how the data from the different lines of research will be used.**” CSIS further recommended that the Marine Corps “thoroughly and objectively describe the basis for any inter-service difference . . . about the need for a policy exception for similar positions or specialties.”

This was sound advice that, unfortunately, has not been followed. In order to build a complete record for the future, members of Congress should obtain and make public the recommended synthesis of complex documents and reports from many sources that supported the Commandant’s request for exceptions. Closed-door briefings do not suffice.

Preservation of young women’s Selective Service exemption may depend on Congress or a future administration making the case in a credible, public way. Truth remains true even if the current administration chooses to ignore it.

What Should Congress Do?

Because current political realities could change after the next presidential election, members of Congress should hold hearings with independent experts to evaluate results of research regarding women in direct ground combat. The best option would be for Congress to consider codification of Sound Policy for Women in the Military, while taking steps to pursue other options and rationales regarding Selective Service.

The most important question for Congress to consider is the combat effectiveness of the military and the survival of the nation. Advocates of “no exceptions” with regard to the combat arms admit that the numbers of minimally-qualified women will be few. Prof. Woodruff notes that the lack of an argument that men and women should be represented in equal numbers is:

“. . . an implicit recognition that the physiological differences between men and women are such that **men and women are not similarly situated when it comes to being able to perform to the standards required of combat positions.** If they are not similarly situated, the **very premise of an equal protection claim is lacking.**” (p. 7, emphasis added)

Prof. Woodruff also comments on possible outcomes of litigation pending in federal courts:

“If the plaintiffs in the National Coalition for Men litigation prevail and the court holds that the recent DOD policy change undermines the reasonableness of the Congressional decision, and the male-only registration requirement violates Equal Protection, **it would strike down the MSSA and no one would have to register. The courts would not rewrite the MSSA to include women.** That is the function of Congress. If Congress believed a registration process was necessary it could reinstate the registration requirement.

“As noted above, **if Congress undertook a careful and deliberate study of the issue** and decided that including females in the draft when very few would ever qualify for combat units would divert time and resources from the important task of developing combat capable troops, even though no policy precluded qualified women volunteers from serving in combat, **a *Rostker* deferential standard of review should sustain the Congressional decision.** A more exacting scope of review, like that applied by the Court in *United States v. Virginia*, the **VMI** case, may reach a different result.” (p. 7, emphasis added)

Prof. Woodruff’s paper discusses some of the legislative options being considered in Congress, which are still in progress and beyond the scope of this CMR Policy Analysis. He adds,

“Can Congress still restrict draft registration to men only? That is the *status quo*. . . . If, as suggested above, Congress develops the appropriate record, there is a viable argument that the courts should defer to the Legislative Branch’s judgment. There is, of course, no guarantee that today’s Court would embrace that argument.” (pp. 9-10)

All options must be measured against sound priorities that support our men and women in uniform and strengthen the **All-Volunteer Force**. Congress has the constitutional right and responsibility to make policies for the military, and diligent oversight is long overdue. ■

1. Department of Defense News Briefing [Transcript](#), Dec. 3, 2015.

2. Prof. William A. Woodruff, [Women, War, and Draft Registration](#), April 2016. Prof. Woodruff retired as a Colonel in the Army Judge Advocate General's Corps. In that professional capacity, he often was involved in military/social legal matters and policy-making discussions.
3. Report of the Subcommittee on Manpower & Personnel on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act, [Congressional Record, June 10, 1980, p. S6531](#).
4. [Rostker v. Goldberg](#), 453 U.S. 57, 65 (1981)
5. In 2013 the **National Coalition of Men (NCM)** filed a lawsuit challenging the Selective Service law in view of recent changes in regulations affecting women in the military. A California district court dismissed the case, but the NCM appealed to the **Ninth Circuit of Appeals**. In view of recent policy changes, the Ninth Circuit reversed and remanded the case back to the district court. [National Coalition for Men and James Lesmeister vs. Selective Service System, Lawrence G. Romo](#), No. 13-56690, Ninth Circuit Court of Appeals, Feb. 19, 2016.
6. [Statement](#) of Elaine Donnelly for House Armed Services Committee Subcommittee on Personnel, Hearing on Women in Service Review, July 24, 2013.
7. Since the 1990s the largely-civilian contractor has consistently promoted the women-in-land combat cause.
8. The 25% and 75% figures are used merely to illustrate the point; they are not intended to represent the actual percentages of females and males who would meet minimum standard set for combat positions. However, the rough percentages are similar to deficiencies in performance evident during various WISRR research projects.
9. Senate Report, Footnote #3, *supra*.
10. CMR was invited to submit a [Statement for the Record](#) of the February 2, 2016 hearing, which is summarized and posted here: [Executive Summary](#)
11. Department of Defense: [Women in Service Restriction Review Studies](#).
12. Center for Strategic and International Studies (CSIS) [Marine Corps Force Integration Plan Red Team: Final Report](#), July 2015, pp. 4-6.