



# Center for Military Readiness

## — Policy Analysis —

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### Registration of Women for Selective Service and a Possible Future Draft

#### *New Lawsuit Filed to Force Women Into Selective Service System*

Members of Congress should pay attention to the Obama Administration's January decision to drop military women's exemption from direct ground combat (DGC) units, such as **Army** and **Marine** infantry and **Special Operations Forces**. The Obama Administration's ill-advised, unilateral policy change has already triggered a lawsuit from a men's rights group demanding that young women be equally subject to **Selective Service** registration and possible conscription on the same basis as men.

On April 13, a group called the **National Coalition for Men (NCM)** filed a lawsuit in a California U.S. District Court against the Director of Selective Service, challenging the legality of male-only registration and other obligations, including a possible future draft.<sup>1</sup> The NCM lawsuit is primarily based on statements made by outgoing Secretary of Defense **Leon Panetta** on January 24, 2013. Under incremental policy changes, women will be "allowed" (actually, ordered) to enter direct ground combat (DGC) positions in all branches of the U.S. military.

Citing these policy changes, the NCM complaint predictably claimed, *"Therefore, the sole legal basis for requiring only males to register with the [Selective Service System] SSS for the military draft no longer applies, and Defendants should now treat men and women equally."*

The NCM group has asked the court for *"injunctive relief ordering the Defendants to end the sex-based discrimination in its military draft registration program and to treat men and women equally."*<sup>2</sup> A ruling in favor of this or a similar case in the future could affect the lives of every draft-age daughter, granddaughter, niece or girl-next-door in America.

The **Department of Justice (DoJ)** likely will petition for delay or dismissal of the NCM lawsuit. Motions will stress that the court should show traditional deference while the issue of women in combat is under executive branch study and congressional debate. This would be a logical argument that, in most courtrooms, would prevail.

Logic did not matter, however, in another California court in September 2010. U.S. District Judge **Virginia Phillips** ruled in favor of litigation brought by the **Log Cabin Republicans**, an activist group trying to repeal the 1993 law regarding gays in the military. That debate was intense and still unresolved, but Judge Phillips nevertheless issued a worldwide injunction striking the 1993 law with no deference to Congress whatsoever.<sup>3</sup>

The NCM case is not about the law or concerns about national defense. It is the latest attempt to impose egalitarian ideology on the U.S. military.

#### *The 1981 Supreme Court Rostker v. Goldberg Precedent*

The last time the House of Representatives seriously debated the issue of women in land combat was in **1979, 34 years ago**. Following four days of extensive hearings in the House, Congress successfully resisted a move by then-President **Jimmy Carter** to include women in registration for a possible future draft.

In 1981, the Supreme Court cited that debate in upholding the constitutionality of male-only Selective Service obligations, tying women's exemption directly to Congress' carefully considered decision regarding female personnel. The landmark *Rostker v. Goldberg* ruling concluded that since women were not assigned to direct ground combat, they were not "*similarly situated*" for purposes of Selective Service registration.<sup>4</sup>

**Professor William A. Woodruff** of Campbell School of Law, who retired from the Army as a colonel and served as a Judge Advocate General, quotes the 1981 precedent in explaining its significance today:

*"In Rostker v. Goldberg, 453 U.S. 57 (1981), the Supreme Court deferred to the considered judgment of Congress exercising its Article I, Section 8 power to raise and support armies:*

'The existence of the combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration. The purpose of registration was to prepare for a draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them.... Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.' (453 U.S. at 77-78)

Professor Woodruff further notes that in 1981, the *Rostker* decision was an easy call. Since women were not eligible for direct ground combat, they were not "*similarly situated*" with men and did not have to be treated the same as men under Selective Service law. "*However,*" writes Woodruff, "*If we remove the combat exclusion, the obvious result is that women and men are 'similarly situated' and the justification for Rostker is no longer present.*"

### ***Women in Land Combat Exemption Underlies the Rostker Precedent***

The 1992 **Presidential Commission on the Assignment of Women in the Armed Forces** approved several findings recognizing the importance of the *Rostker* precedent. The Commission noted that the purpose of conscription is to induct what the Supreme Court called "combat replacements" in a time of national emergency. Therefore, if women are not eligible for direct ground combat, Congress could exempt them from registering for the draft. (Commission Finding 4.3, p. C-125).

The commission also recognized that subjecting women to any kind of land combat would invite legal challenges with unforeseen and perhaps irreversible legal consequences. (CF 4.7, 4.8, 4.9, p. C-126) This situation, considered a remote possibility in 1992, now has been thrust upon Congress and the American people.

### ***What Will the Obama Administration Do?***

If Department of Justice attorneys move for dismissal of the NCM lawsuit (which may not be a sure thing), they will not be able to rest their case on the solid *Rostker* precedent. This is because the Defense Department carelessly changed the facts on January 24, 2013, when Secretary Panetta repealed all of women's exemptions from direct ground combat at all levels.<sup>5</sup>

The Defense Department has set in motion an incremental process running through 2016 that is set up to give President Obama what he wants. Since he will select for high rank only new military leaders who support his "gender diversity" agenda, the prolonged implementation process is a contrived pretense offering no substance on which to hang a legal case.

Secretary Panetta's unilateral announcement in January was an affront to Congress, which has been effectively cut out of the decision-making process. There is no reason to expect that the Obama administration will be any more respectful of Congress' constitutional authority as events unfold.

In 2004, Secretary of Defense **Chuck Hagel** came out in favor of compulsory military service for all citizens. In 2007, then-Senator **Barack Obama** told CNN that he did not favor a draft, but women should register and be eligible for possible combat duty. As President, Obama hailed Secretary Panetta's recent move to force women into DGC units. Given the stated opinions of the President and Secretary of Defense, it is highly unlikely that this administration intends to retain or fight for women's Selective Service exemptions.

The administration's failure to defend the DOMA in court is instructive. Despite previous assurances that they would enforce the law, the DoJ has now gone on record arguing for repeal of the DOMA.

Even if Congress hired attorneys to defend women's current SS exemption in court, how would they frame their case? Regardless of combat realities justifying the exemption, without statutory backing, attorneys representing the DoJ or Congress would have difficulty arguing in court that too many women in infantry battalions might undermine their fighting ability.

In theory, a future court could look around and find some other reason to uphold women's exemption from SS registration. It is more likely, however, that women's exemption would be declared unconstitutional as a matter of discrimination that violates principles of "equal protection." This is especially so because the administration is implementing recommendations of the Defense Department-endorsed **Military Leadership Diversity Commission**.<sup>6</sup> The **MLDC** is promoting gender-based "diversity metrics" (another name for "quotas"). This concept of group rights would override recognition of individual merit, the key to genuine civil rights and successful racial integration in the military.

### *Legal Concepts and Concerns*

Even if Congress passed a narrow amendment to the **Military Selective Service Act (MSSA)** only, reaffirming congressional intent that women not be made eligible for the draft, this would not be sufficient because the underlying facts and the question before the courts would remain the same: *Are men and women similarly situated when it comes to eligibility for land combat, and does exemption of women from the draft violate equal protection of the law?*

Future court decisions cannot be safely predicted, but Secretary Panetta's statements on January 24 have effectively eliminated the legal premise on which the *Rostker* ruling was based. An activist judge, therefore, could rule in favor of the NCM lawsuit or, more likely, in favor of a similar case filed at a later time.

Unless combat exemptions are restored by Congress, women will remain eligible for land combat and therefore "similarly situated" with men. Unsuspecting civilian women, therefore, would be subject to SS obligations on the same basis as men, including college loan denials and other penalties for failure to comply.

### *Why Shouldn't the Courts Make Women Subject to SS Registration and a Future Draft?*

In the extreme violence of "tip of the spear" direct ground combat, Army and Marine battalions attack the enemy with deliberate offensive action. Great physical strength and endurance are essential for survival and mission accomplishment. In that environment, which goes beyond incident-related combat while "in harm's way,"

women do not have an equal opportunity to survive, or to help fellow soldiers survive.<sup>7</sup> To accommodate women in infantry units, training standards would have to be "gender-normed" and lowered for all, putting everyone at greater risk.

There is no evidence that the nation is ready to include women in the Selective Service System, but if public opinion should change, the decision should be made by elected members of Congress, not the federal courts. A national emergency requiring serious consideration of conscription would be the worst time to force the issue of women being drafted as "combat replacements" on the same basis as men.

Congress should focus its time and efforts on the underlying problem: absence of women's exemption from direct ground combat. This is the elephant in the room, and Congress needs to squarely decide what to do about it. To regain control of the situation, Congress should exercise its authority under Article 1, Section 8 of the U.S. Constitution, and pass legally-sound legislation that will benefit both women and men in the military.

On April 1, 2013, forty-five prominent individuals and organization leaders affiliated with the **Military Culture Coalition** sent a letter to House Armed Services Committee Chairman **Howard P. McKeon**, asking Chairman McKeon to resolve these national defense issues by codifying women's long-standing direct ground combat exemptions.<sup>8</sup>

The best way to show true respect for military women, and to retain sound policy regarding Selective Service, is to "draw the line at the point of the bayonet." Before radical policies become irreversible, Congress must assert its authority and enact reality-based, effective legislation constituting sound policy for women in the military.

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<sup>1</sup> [National Coalition for Men v. U.S. Selective Service System](http://ncfm.org/wp-content/uploads/2013/04/130405-NCFM-Selective-Service-lawsuit-complaint-3.pdf), 13-cv-02391-DSF-MAN, available at: <http://ncfm.org/wp-content/uploads/2013/04/130405-NCFM-Selective-Service-lawsuit-complaint-3.pdf>.

<sup>2</sup> The attorney who filed the complaint is **Marc Angelucci**, Vice President of the NCM, who accepted an award for his group from the **Southern Poverty Leadership Conference's "Campaign for Tolerance"** in 2001.

<sup>3</sup> Judge Virginia Phillips' worldwide injunction forbidding further enforcement of **Section 654, Title 10 USC** (misabeled "**Don't Ask, Don't Tell**") boosted the efforts of judicial and civilian activists who successfully pushed Congress to repeal the 1993 law on the third attempt during the lame-duck session.

<sup>4</sup> The Supreme Court had no trouble determining the intent of Congress in calling for male-only SS registration. And in 2003, another federal court in Massachusetts denied a legal challenge similar to the one filed by the NCM group, upholding the *Rostker* precedent unequivocally. (*Schwartz v. Louis C. Brodsky*)

<sup>5</sup> At his news conference, Secretary Panetta betrayed ignorance of this consequence of his actions, admitting that he did not know "who the hell" the current Director of Selective Service was. That Director, **Larry Romo**, told [National Public Radio](http://www.npr.org/2013/01/30/198888888) on January 30 that he was not made aware of Panetta's decision until he read about it in the media. See Panetta video at [http://www.cmrlink.org/content/home/36560/stealth\\_attack\\_on\\_draft\\_age\\_women](http://www.cmrlink.org/content/home/36560/stealth_attack_on_draft_age_women).

<sup>6</sup> Among other things, the mostly-civilian MLDC recommended that women be assigned to ground combat in order to increase the number of female three- or four-star flag and general officers. None of this is necessary, since Pentagon records have consistently shown that military women are promoted at rates equal to or faster than men.

<sup>7</sup> See list of thirty years of [major studies and reports](http://www.cmrlink.org/data/sites/85/Images/CMRDocuments/Gregor-Info-Paper-20120508.pdf) in United States and allied countries, none of which found that women are the physical equals of men in the close combat environment. Available at: <http://www.cmrlink.org/data/sites/85/Images/CMRDocuments/Gregor-Info-Paper-20120508.pdf>

<sup>8</sup> See <http://cmrlink.org/data/sites/85/CMRDocuments/ChairmanMcKeonLtr-041113.pdf>