

LAW REVIEW¹ 23002

January 2023

Should Women Have to Register for the Selective Service? A Discussion on the 50th Anniversary of the End of the Draft

By First Lieutenant Tara Buckles, USMCR²

Subject Index Categories:

- 5.0 – Military Service and Family Obligations
- 9.0 -- Miscellaneous
- 10.2 – Other Supreme Court Cases

2023 is the 50th Anniversary of the End of the Draft

Conscription into the United States Military, what most people know as “the draft” has been used in various periods of conflict throughout the history of the United States.³ The first “modern draft” was held in the 1790s during the French Revolution.⁴ Conscription practices were also used during the Civil War, but were met with serious resistance in the form of bloody riots.⁵ The draft faced its heaviest criticism during the Vietnam War, during which time Selected Service accounted for 20% of the U.S. personnel in uniform and totaled 1,857,304 draftees.⁶ The last man was conscribed on June 30, 1973 and registration was officially suspended in early 1975.⁷

¹ We invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

² Tara, a life member of ROA, is a First Lieutenant in the Marine Corps. Tara holds a B.S. in Business Administration with a second major in Public Policy from the University of North Carolina at Chapel Hill. She graduated cum laude from the University of Pittsburgh School of Law in May 2022 and became a member of the Texas Bar in October 2022. She will go on active duty in the Marine Corps later in 2023. Military title is used for identification only. The views expressed in this article are the views of the author, and not necessarily the views of the Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. Government.

³ *The Draft*, HISTORY (Jan. 24, 2020), <https://www.history.com/topics/us-government/conscription>.

⁴ *Id.*

⁵ *Id.*

⁶ *Historical Timeline*, SELECTIVE SERVICE SYSTEM, <https://www.sss.gov/history-and-records/timeline/>. (last visited Dec. 5, 2022).

⁷ *Id.*

Since 1980, pursuant to the authority of Presidential Proclamation 4771, men are required to register with Selective Service within 30 days of their 18th birthday.⁸ Despite the fact that all men over 18 since 1980 have been required to register for the draft, the US Military has consisted of all-volunteer forces since 1973. Absent a national emergency and a subsequent act of Congress, the all-volunteer military (AVM) will continue.

Prior Court Rulings on the Draft

In 1981, the United States Supreme Court heard *Rostker v. Goldberg*, which addressed the question of whether the Military Selective Service Act (MSSA) violated the Fifth Amendment of the U.S. Constitution by requiring men but not women to register for the draft. The Court ruled that it was not unconstitutional to exclude women from the draft because the purpose of draft registration was to prepare a pool of *combat* troops.⁹ The Constitution requires that people who are similarly situated be treated similarly.¹⁰ At the time, women were ineligible for combat roles, so men and women were “not similarly situated for purposes of a draft or registration of a draft.”¹¹ The Court explained that “Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than ‘equity.’”¹²

However, there is certainly an argument in today’s military landscape that men and women are now similarly situated. The increasing role of women in combat roles began in 1990-91 during the Gulf War, when over 40,000 women were deployed to combat zones despite their ineligibility to serve in direct combat roles.¹³ In 1994, women became eligible to serve in any position except direct ground combat roles, thus introducing women to combat.¹⁴ In 2013, then-Secretary of Defense Leon Panetta announced that women would be permitted in direct ground combat roles, officially lifting the final barrier to women in combat; the first women entered combat in 2015.¹⁵ Since then, women have gone on to graduate from Army Ranger School, Marine Corps Infantry Officer Course, and even the initial stages of Navy SEAL officer assessment and selection.¹⁶ Today, of the 2,395,993 active duty and ready reserve personnel, 398,546 (18.7%), are women.¹⁷

⁸ *Out of Deep Standby*, SELECTIVE SERVICE SYSTEM, <https://www.sss.gov/history-and-records/timeline/>. (last visited Dec. 5, 2022).

⁹ *Rostker v. Goldberg*, 453 U.S. 57 (1981).

¹⁰ *Id.* at 79.

¹¹ *Id.* at 78.

¹² *Id.* at 80.

¹³ Danielle DeSimone, Over 200 Years of Service: The History of Women in the U.S. Military, USO (June 7, 2022), <https://www.uso.org/stories/3005-over-200-years-of-service-the-history-of-women-in-the-us-military>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ DEPARTMENT OF DEFENSE, 2020 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY, TABLE 1.06 (2020).

In 2019, *Kyle-Labell v. Selective Serv. Sys.* was heard in the New Jersey District Court.¹⁸ This case was brought by a 21 year old woman who wished to register in the draft but was prohibited from doing so by the MSSA.¹⁹ She contended that the MSSA is unconstitutional and *Rostker v. Goldberg* should be overturned because women are now permitted to serve in combat roles.²⁰ She argued that womens' equal protection and substantive due process rights under the Fifth Amendment of the Constitution are being violated since women and men are now "similarly situated" in terms of ability to perform combat roles.²¹ However, the district court never answered the question of whether the male-only draft requirement was constitutional, and instead only addressed the Selective Service System's (SSS) motions to dismiss the suit.²² The Judge granted-in-part and denied-in-part the motions to dismiss, meaning that the case was not wholly dismissed and the plaintiff could have continued. However, there was some attorney turnover and the case did not proceed.

In 2020, the Court of Appeals for the Fifth Circuit heard *National Coalition for Men v. Selective Service Systems*.²³ This case was originally brought by a group of men who argued that requiring only men to register for the draft violated their Fifth Amendment rights. The lower court agreed with them, and held that *Rostker* no longer controlled because women now serve in combat.²⁴ However, the Court of Appeals reversed the lower court's opinion, ruling in favor of the SSS, holding that the judgment directly contradicted the Supreme Court's decision in *Rostker* and that the Supreme Court is the only Court with authority to amend its precedent.²⁵ The plaintiff filed a petition for writ of certiorari to the United States Supreme Court, which was denied.²⁶ The Supreme Court denied the petition in a statement made by Justice Sotomayor, joined by Justices Breyer and Kavanaugh.²⁷ Justice Sotomayor acknowledged that the role of women in the military has dramatically changed since the Court's decision in *Rostker*, noting that thousands of women have now served in combat roles.²⁸ However, the Court's denial of certiorari was heavily based on the fact that in 2016 Congress created the National Commission on Military, National, and Public Service (NCMNPS).²⁹ The NCMNPS was tasked with "studying whether Selective Service registration should be conducted "regardless of sex."³⁰ The Commission released its report on 25 March 2020, which was before the petition for writ of

¹⁸ *Kyle-Labell v. Selective Serv. Sys.*, 364 F.Supp.3d 394 (D.N.J. 2019).

¹⁹ *Id.* at 400.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 399.

²³ *Nat'l Coalition for Men v. Selective Serv. Sys.*, 969 F.3d 546 (5th Cir. 2020).

²⁴ *Id.* at 548.

²⁵ *Id.* at 547.

²⁶ Petition for Writ of Certiorari, *Nat'l Coalition for Men*, 141 S. Ct. 1815 (No. 20-928).

²⁷ *Id.*

²⁸ *Id.* at 1816.

²⁹ *Id.*

³⁰ *Id.*

certiorari in this case was filed.³¹ This report recommended that Congress “eliminat[e] male-only registration” because it “sends a message to women not only that they are not vital to the defense of the country but also that they are not expected to participate in defending it.”³² In response to this report, the Senate Armed Services Committee held a hearing in which the gender-neutral registration requirement was discussed.³³ The Court referred to these facts to ultimately decide, consistent with a longstanding precedent, to defer to Congress “on matters of national defense and military affairs...while Congress actively weighs the issue.”³⁴

What is the current status of the Selective Service?

Despite the consideration undertaken by Congress in 2021 as a part of the Fiscal Year 2022 National Defense Authorization Act (NDAA), the 2022 legislation did not include an amendment requiring women ages 18-25 to register for Selective Service. Allegedly, the amendment to include women in the draft had bipartisan support in the House and Senate but was dropped during the final closed-door negotiations due to fears it could compromise the rest of the bill.³⁵ Congress passed and President Biden signed the FY2023 NDAA, which also does not include a provision requiring women to register for Selective Service.³⁶ For now, it remains that only men aged 18-25 are required to register for the draft.

ROA’s Resolution for Selective Service Act Registration of Women

ROA adopts resolutions that are in support of its mission to ensure the Reserve Components are strong and ready. These resolutions are established and adopted with input from ROA membership, and later used to direct advocacy efforts with Capitol Hill, the Pentagon, the Department of Veteran Affairs, and other federal agencies.³⁷ In 2013, ROA’s National Council adopted the following resolution, which was later renewed by National Convention in both 2016 and 2019³⁸:

WHEREAS, fully 15.9 percent of active duty and 19.6 percent of National Guard and Reserves are now women

³¹ *Id.*

³² *Id.*; Inspired to Serve: The Final Report of the [NCMNPS].

³³ Petition for Writ of Certiorari, *Nat'l Coalition for Men*, 141 S. Ct. 1815, 1816 (No. 20-928).

³⁴ *Id.*

³⁵ Savannah Behrman, *Lawmakers kill measure that would have required women to register for the Selective Service*, USA TODAY (Dec. 8, 2021, 3:57 PM), <https://www.usatoday.com/story/news/politics/2021/12/08/lawmakers-kill-provision-requiring-women-register-draft/6433960001/>.

³⁶ H.R. 7900, 117th Cong. (2022).

³⁷ *Resolutions by Subject*, RESERVE ORGANIZATION OF AMERICA, <https://www.roa.org/page/subject-index>.

³⁸

(<https://download.militaryonesource.mil/12038/MOS/Reports/2017-demographicsreport.pdf>); and

WHEREAS, in contrast to today's force, the percentage of women in uniform was just 2 percent in 1950; and

WHEREAS, the Secretary of Defense Ashton Carter rescinded the combat exclusion policy "effective immediately"; and

WHEREAS, over 275,000 women have deployed (<https://www.globalsecurity.org/military/library/report/2011/womens-concerns-afghanistan.pdf>); and

WHEREAS, DOD Casualty for Overseas Contingency Operations reported as of August 2019, "171 women have lost their lives and 1,033 had been wounded in action operations" (<https://fas.org/sgp/crs/natsec/R42075.pdf>); and

WHEREAS, an inequality exists between men and women between the ages of 18-26 under the Selective Service Act which does not include registration of women; and

WHEREAS, women should be treated equally as responsible, competent, contributing members of America's society;

NOW, THEREFORE BE IT RESOLVED, that ROA, chartered by Congress, urge Congress, to support amending the Selective Service Act to require the registration of women ages 18-26.

Please join or support ROA

This article is one of 2,300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is more than a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s eight³⁹ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002⁴⁰

³⁹ Congress recently established the United States Space Force as the 8th uniformed service.

⁴⁰ You can also contribute on-line at www.roa.org.