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Legal Sidebar

Expanding the Selective Service: Legal Issues Surrounding Women and the Draft

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Should American women be required to register for the draft alongside their male counterparts? On March 25, 2020, the National Commission on Military, National, and Public Service (the Commission) released a report addressing this and other questions relating to military, national, and public service. The Commission recommended that women should be required to register with the Selective Service System and be included in any future draft. While the Commission considered changes to the law, recent court decisions have taken diverging views on whether the current male-only registration requirement is constitutional. Most recently, on August 13, 2020, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) ruled that a nearly forty-year-old Supreme Court case, which held that male-only registration is constitutional, is still controlling law.

This Sidebar provides a brief legal background of the Selective Service System, including legal consequences of failing to register. It next describes judicial challenges to the male-only draft and legislative efforts to require women to register. The Sidebar then discusses the creation and conclusions of the Commission. Finally, it examines issues for Congress.

Legal Background

The Selective Service System is governed by the Military Selective Service Act (MSSA), which Congress enacted in 1948 and last substantively amended in 1971. Under the MSSA, the President may issue a proclamation requiring all male U.S. citizens and most male noncitizen residents of the United States between the ages of 18 and 26 to register with the Selective Service. The current registration period began when President Carter issued Presidential Proclamation 4771 in 1980. (For more information about the Selective Service System, see CRS Report R44452, *The Selective Service System and Draft Registration: Issues for Congress*, by Kristy N. Kamarck.)

The main purpose of Selective Service registration is to "rapidly provide[] personnel in a fair and equitable manner" through a military draft when necessary for national security. Activation of the draft does not require a state of war. Instead, the President can activate the draft when "required to provide and maintain the strength of the Armed Forces."

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A man who must register with the Selective Service and knowingly fails, neglects, or refuses to do so may be convicted of a felony punishable by up to five years in prison, a fine up to $250,000, or both. Beyond these criminal penalties, a man required to register who knowingly fails to do so is ineligible for executive branch employment; cannot receive federal student aid, including grants and loans; and may not participate in federal job training programs. Failure to register may also affect a noncitizen resident's ability to become a U.S. citizen. In addition, many states have laws making state employment or education benefits contingent on Selective Service registration.

An individual who fails to register may avoid penalties in two ways. First, there is a five-year statute of limitations on prosecution for failing to register. Second, a man who fails to register "may not be denied a right, privilege, or benefit under Federal law" if (1) he is no longer required to register and (2) he can show that his failure to register was not "knowing and willful."

Legal History of Women and the Draft

Since the most recent amendments to the MSSA in 1971, Congress, the President, and the courts have each considered whether to require women to register with the Selective Service. In 1979, Congress asked President Carter "whether women should be subject to registration under [the MSSA] and to induction for training and service in the Armed Forces." President Carter responded that there was "no distinction possible, on the basis of ability or performance, that would allow [him] to exclude women from an obligation to register." Although Congress approved supplemental appropriations for the Selective Service System in June 1980, the Senate rejected an amendment to that measure that would have required women to register with the Selective Service. As a result, when President Carter reinstated Selective Service registration in July 1980, it applied to men only.

Judicial Challenges

The first major court decision addressing male-only registration came a year after President Carter reinstated Selective Service registration. In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Supreme Court considered whether male-only registration violated the Constitution's Due Process Clause of the Fifth Amendment. (Among other things, the Fifth Amendment guarantees equal protection under federal laws.) The Supreme Court ruled that male-only registration was constitutional, reasoning that "[m]en and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft."

The next challenge came more than twenty years later in *Schwartz v. Brodsky*, 265 F. Supp. 2d 130 (D. Mass. 2003). In that case, a group of Massachusetts students, both male and female, challenged the male-only registration requirement as violating their equal protection rights. The court rejected the students' arguments. It explained that *Rostker* relied on "two key factual underpinnings"—(1) that the purpose of Selective Service registration was to facilitate a draft of combat troops and (2) that women were ineligible to serve in combat. Because neither of these facts had changed since the *Rostker* decision, the court dismissed the students' claims.

In 2009, a judge reached a similar result in *Elgin v. United States*, 594 F. Supp. 2d 133 (D. Mass. 2009). The court rejected the plaintiffs' equal protection challenge to the MSSA, explaining that "there has not been a sufficient change in the material circumstances underpinning the Court's equal protection analysis in *Rostker* to justify relitigation of the issue at this time in this case." The U.S. Court of Appeals for the First Circuit (First Circuit) later vacated the district court's decision for reasons unrelated to the MSSA's constitutionality, holding that the lower court lacked jurisdiction over the case. The Supreme Court upheld the First Circuit's decision.

But in 2019, two district courts revisited the issue and concluded that *Rostker* may no longer be good law. First, in *Kyle-Labell v. Selective Service System*, 364 F. Supp. 3d 394 (D.N.J. 2019), a group of women challenged the male-only registration requirement. The government asked the court to dismiss the case, relying on *Rostker*. The court declined to dismiss the case, ruling that because women can now serve in combat roles, the facts of the current case were different than those underlying *Rostker*. The case remains pending before the U.S. District Court for the District of New Jersey.

Second, in *National Coalition for Men v. Selective Service System*, 355 F. Supp. 3d 568 (S.D. Tex. 2019), the U.S. District Court for the Southern District of Texas considered a group of men's challenge to the male-only registration requirement. As in *Kyle-Labell*, the court explained that *Rostker* did not control the outcome of the case, because "[t]he dispositive fact in *Rostker*—that women were ineligible for combat—can no longer justify the [Selective Service Act]'s gender-based discrimination, because women can serve in combat." After rejecting the government's arguments that requiring women to register would impose an undue administrative burden and that conscription of women could lead to "'potential tradeoffs' for the military," the court held that the all-male registration requirement violated the Constitution and ruled for the plaintiffs.

The government appealed the decision, and on August 13, 2020, the Fifth Circuit reversed the district court's ruling. The Fifth Circuit acknowledged that the facts underpinning *Rostker* had changed but held that it could not "'ignore a decision from the Supreme Court unless directed to do so by the Court itself.'" The court concluded that the men's claims were foreclosed by *Rostker* and dismissed their case. The National Coalition for Men can seek review by the full Fifth Circuit, sitting en banc, or by the Supreme Court.

Legislative Proposals and Congressional Actions

Along with these judicial challenges to all-male registration, there have been several legislative attempts since 1980 to require women to register with the Selective Service. Most recently, both the 113th and 114th Congresses considered stand-alone bills that would require women to register with the Selective Service, though none of the bills advanced out of committee.

More notably, Section 591 of the Senate-passed version of the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA) would have required women to register with the Selective Service. In its report accompanying the bill, the Senate Armed Services Committee recommended that Congress amend the MSSA to require women to register. The Committee explained that "the ban of females serving in ground combat units has been lifted by the Department of Defense, and as such, there is no further justification to apply the selective service act to males only." Although the final version of the FY17 NDAA did not require women to register with the Selective Service, it created a commission—the National Commission on Military, National, and Public Service—to consider that and other issues.

The Commission and Its Report

When Congress created the Commission in the FY17 NDAA, it tasked the Commission with reviewing the Selective Service registration process and considering ways to increase military, public, and national service. To that end, Congress required the Commission to investigate and report on several questions, including whether the Selective Service System "should include mandatory registration by all citizens and residents, regardless of sex." Congress required the Commission to issue its final report no later than thirty months after the Commission's establishment.

In its final report, issued March 25, 2020, the Commission recommended that both men and women should be required to register with the Selective Service. It noted that requiring women to register "evoked a range of passionate and heartfelt views," with "a slight majority" of the public "support[ing]

women's registration." It explained, however, that expanding registration would "allow[] the President to leverage the full range of talent and skills available during a national mobilization." The Commission also found that "the current disparate treatment of women unacceptably excludes women from a fundamental civic obligation and reinforces gender stereotypes about the role of women, undermining national security." The Commission's report included a legislative proposal that would, among other things, amend the MSSA to require women to register.

Congressional Considerations

Whether to require women to register for the Selective Service is a debate that has spanned four decades. As the Commission noted, "public opinion data on whether to expand registration to women is mixed, with no overwhelmingly dominant public voice in this debate." But the Commission ultimately recommended that Congress amend the MSSA to require women to register. And courts have recently disagreed as to whether the male-only registration requirement in the current MSSA is unconstitutional.

Congress may seek to respond to the Commission's recommendation and the ongoing litigation. If Congress chooses to act, it could do so in several ways. For example:

- Congress could follow the Commission's recommendation and amend the MSSA to require women to register for the Selective Service. This option would likely moot the pending court cases and call into question the continued validity of *Rostker*.
- Congress could respond to the pending litigation by amending the MSSA to provide a new justification for why women should not be required to register. Courts would have to consider whether the new rationale warrants treating men and women differently, and the courts could still find the male-only registration requirement unconstitutional.
- Congress could repeal the MSSA. This option would also likely moot the pending court cases. It might, however, arguably raise national security and military readiness concerns.

Congress could also choose not to act. In that case, the pending cases would move forward, and the fate of the current MSSA would rest with the courts. Given the precedential value of *Rostker* and the conflict between *Kyle-Labell* and *National Coalition for Men*, it would likely take a Supreme Court decision to resolve the debate judicially.

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