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A Sisterhood of Arms: Envisioning Conscription and Selective Service Post-Gender Integration of Combat Arms

ERIN R. GOLDBERG†

INTRODUCTION

It was the worst kept secret in the United States military for years: women in combat.¹ Although military doctrine had prevented females from formally serving in frontline combat occupations, few could deny by the late 2000s that women were situated in roles throughout the military that placed them directly on the battlefield. Part of this had to do with a shift in military warfare. The world no longer was engaged in conflicts like those of World War I and II. Now the frontline was wherever the enemy could reach, which, with long-range missiles and mortars and guerilla style tactics, meant just about anywhere. However, part of women's shift to the battlefield was consequential of a greater integration of our military. The United States Armed Forces, in an effort to heavily recruit, re-envisioned itself as the nation's largest

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1. See, e.g., GAYLE TZEMACH LEMMON, *ASHLEY'S WAR* 16 (2015); Mark Thompson, *American Amazons: Hiding in Plain-Jane Sight*, *TIME* (Jan. 28, 2013), <http://nation.time.com/2013/01/28/american-amazons-hiding-in-plain-jane-sight/>.

equal opportunity employer.²

The impact of this re-envisioning produced positive results, but subsequently left an obvious elephant in the room: women were still barred from a small portion of jobs. These positions focused primarily on combat action.³ Combat action roles are found throughout the armed forces and, for administrative simplicity, are collectively referred to as “combat arms.”⁴ However, in January 2013, United States Secretary of Defense Leon Panetta announced that women would be permitted to enlist in combat occupations and serve in combat units, following a two-year evaluation period.⁵ This decision was met with both praise and skepticism.⁶ The

2. See, e.g., Whitney Terrell, *An Army for Everyone*, N.Y. TIMES (July 13, 2016), <http://nytimes.com/2016/07/13/an-army-for-everyone.html>; Jim Tice, *Sexual Orientation Added to Equal Opportunity Program for Soldiers*, ARMY TIMES (Nov. 5, 2015, 2:10 PM), <http://www.armytimes.com/story/military/careers/army/2015/11/05/sexual-orientation-added-equal-opportunity-program-soldiers/75215300/>.

3. Such jobs include, but are not limited to, Infantryman, Armor Crew Chief, Cannon Crewmember, Combat Engineer, Combat Controller, Submarine Crewman, and Special Operations Personnel, such as SEALs, Green Berets, Army Rangers, and Pararescuemen. LAURA L. MILLER ET AL., *THE EXTENT OF RESTRICTIONS ON THE SERVICE OF ACTIVE-COMPONENT MILITARY WOMEN* 27–50 (2012); Andrew Tilghman, *All Combat Jobs Open to Women in the Military*, MILITARY TIMES (Dec. 3, 2015, 5:03 PM), <http://www.militarytimes.com/story/military/pentagon/2015/12/03/carter-telling-military-open-all-combat-jobs-women/76720656/>.

4. See *Army Branches and Tactical Echelons*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/library/policy/army/fm/3-90/appa.htm> (last visited Sept. 1, 2016).

5. Matthew Rosenberg & Dave Phillips, *Pentagon Opens All Combat Jobs to Women*, BOS. GLOBE (Dec. 4, 2015), <https://www.bostonglobe.com/news/nation/2015/12/03/pentagon-chief-military-open-all-combat-jobs-women/xJGNCskwSBFZYBNmHRo1AJ/story.html>; Jerry Votava, *U.S. Military to Permit Women to Serve in Combat Units*, JURIST (Jan. 24, 2013, 3:22 PM), <http://jurist.org/paperchase/2013/01/us-military-to-permit-women-to-serve-in-combat-units.php>.

6. E.g., William Denn, *Women in Combat Roles Would Strengthen the Military*, WASH. POST (Apr. 3, 2014), https://www.washingtonpost.com/opinions/women-in-combat-roles-would-strengthen-the-military/2014/04/03/f0aeb140-bb50-11e3-9a05-c739f29ccb08_story.html; Mike Fredenburg, *Putting Women in*

evaluation period concluded on December 3, 2015, when Defense Secretary Ash Carter declared that women would be able to serve in any military occupational specialty (MOS), to include those that fell under the banner of combat arms.⁷ The Army and the Marine Corps contain the majority of all combat MOSs.⁸

This determination, while profound and arguably overdue, has left a number of questions up in the air. The most noticeable of which, from a legal perspective, is women's exclusion from Selective Service.⁹ Although the American military currently functions as an all-volunteer force, young men are still required to register with the Selective Service Administration upon turning eighteen. Young women do not have to register. This dichotomy was challenged in the 1981 Supreme Court decision *Rostker v. Goldberg*, which held that women were excluded from draft registration because their inability to serve on the frontlines made them less than ideal candidates for conscription.¹⁰ Consequential to the cautious implementation of Defense Secretary Carter's announcement, such a distinction no longer exists. Women now face the very real possibility of registering with the Selective Service and being available for

Combat Is an Even Worse Idea Than You'd Think, NAT'L REV. (July 15, 2015, 4:00 AM), <http://www.nationalreview.com/article/420826/women-in-combat-military-effectiveness-deadly-pentagon>.

7. Dan Lamothe, *In Historic Decision, Pentagon Chief Opens All Jobs in Combat Units to Women*, WASH. POST. (Dec. 3 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/12/03/pentagon-chief-to-announce-how-womens-roles-in-the-military-will-expand/>. MOS is a term used primarily by the Army and the Marine Corps. *What Are MOS Codes?*, MILITARY1 (Mar. 4, 2013), <https://www.military1.com/all-enlistment/31829-what-are-mos-codes/>. The Air Force uses Air Force Specialty Codes (AFSCs) and the Navy uses a rating system. *Id.*

8. *Occupational Outlook Handbook*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/ooh/military/military-careers.htm> (last visited Sept. 1, 2016).

9. *See Women and the Draft*, SELECTIVE SERVICE SYSTEM, <https://www.sss.gov/Registration/Women-And-Draft> (last visited Jan. 16, 2016).

10. 453 U.S. 57 (1981).

the Draft.¹¹ What will this mean for our armed forces? Will the prospect of female draftees force America to re-envision its utilization of conscription?

These are not hypothetical questions either: Congress is marking these same inquiries as it currently debates the merits of including women in Selective Service and any future use of the Draft.¹² Regardless of what lawmakers or the courts determine, the significant and beneficial impact of female draftees must not be underestimated. Female service members bring unique skills and traits to service, some of which their male peers lack.¹³ Furthermore, a gender-neutral Selective Service carries many benefits, most important of which is that it equally invests all genders in any future decision to utilize the Draft.

Creating an equal investment in future conflict would greatly benefit this generation of American youth, which is currently experiencing a large disconnect between those who serve and those who do not. Data shows that the millennial generation is quick to turn to military action but slow to actually enlist in service.¹⁴ Individuals who do serve are often met with doubt and concern from those closest to them.¹⁵ Furthermore, more than two-thirds of this

11. In this Comment, “the Draft” refers to the larger concept of national, modern draft use. Because the use of conscription has taken on many different forms during our country’s lifetime, it is easiest to encompass these differences in a single descriptor—the Draft.

12. Jennifer Steinhauer, *Senate Votes to Require Women to Register for the Draft*, N.Y. TIMES (June 14, 2016), http://www.nytimes.com/2016/06/15/us/politics/congress-women-military-draft.html?_r=0.

13. Ellen L. Haring, *What Women Bring to the Fight*, PARAMETERS, Summer 2013, at 27, 27–28, 31–32.

14. Asma Khalid, *Millennials Want to Send Troops to Fight ISIS, But Don’t Want to Serve*, NPR (Dec. 10, 2015, 10:36 AM), <http://www.npr.org/2015/12/10/459111960/millennials-want-to-send-troops-to-fight-isis-but-not-serve>.

15. See generally CONG. BUDGET OFFICE, THE ALL-VOLUNTEER MILITARY: ISSUES AND PERFORMANCE 7 (2007). As a member of the United States Military, I have experienced this doubt and concern first hand.

generation could not meet the physical or educational requirements to serve in the armed forces.¹⁶ At a time when the United States military is doing all it can to make military service available and appealing, the millennial generation seems to be rejecting this offer en masse.

This Comment aims to rectify how Americans view service in a post-gender integrated force. It also aims to answer many of the growing questions that have arisen following the decision to allow women to serve in combat arms, the biggest of which is the issue surrounding Selective Service. Finally, this Comment will use the recent decision to incorporate females into combat arms, which will lead to an inevitable integration into Selective Service, as a stepping off point to offer possible solutions to the growing disconnect between civilians and service members.

Part I provides a brief background history of the United States military service and its use of the Draft. Part II explores women's history of service and exemption from the Draft and Selective Service, specifically the decision of *Rostker v. Goldberg*. Part III discusses the decision to open up all MOSs to females and the recent disconnect between this generation and military service. It explores the studies that took place throughout each relevant military branch to determine female fitness for combat and the events leading up to the final December 2015 decision. Finally, Part IV examines the generational disconnect between the millennial generation and military service. This final Part explores the options for how gender integration within the military, Selective Service, and any future use of the Draft may develop. It further examines how the recent decision for gender integration in the armed forces can be used as a means of reconnecting this generation with the consequences and realities of military service and war. Part IV also

16. Miriam Jordan, *Recruits' Ineligibility Tests the Military*, WALL ST. J. (June 27, 2014, 6:59 PM), <http://www.wsj.com/articles/recruits-ineligibility-tests-the-military-1403909945>.

explores the potential benefits and consequences to the imminent inclusion of women in combat, and how these outcomes will impact draft readiness.

I. MILITARY SERVICE AND THE DRAFT

A. *The Spirit of the Militia*

Military service is a time-tested value as old as our nation. In some respects, it's even older. Times of need in the Colonial Era required that a viable militia be formed from the available male populace. These men, farmers, and craftsmen, were largely untrained and, in many cases, unreliable.¹⁷ Nevertheless, they were united under the common goal of repelling foreign invaders and, later, in achieving independence.¹⁸ Such common goals helped to forge a spirit of camaraderie and country among those that fought, solidifying the importance of a national militia. Article I of the Constitution imbued Congress with the power to raise and support an army; Article II embodied the power of Commander in Chief within the President.¹⁹ The importance of a national militia even found its way into the Second Amendment of our nation's Bill of Rights.²⁰

On the urging of President Washington, America adopted its now well-known 'dual-military' system: a national standing army and an intermix militia.²¹ The militia spirit continued to present itself in other American military endeavors during the eighteenth and nineteenth centuries. Militias were also employed from the War of 1812

17. DAVID McCULLOUGH, 1776, at 25–37 (2005).

18. *Id.* at 54–55.

19. U.S. CONST. art. I, § 8, cl. 12; *id.* art. II., § 2, cl. 1.

20. *Id.* amend. II; BRAD D. LOOKINGBILL, AMERICAN MILITARY: A NARRATIVE HISTORY 58 (2013).

21. *Id.*

to the Civil War to the Spanish-American War.²² These were ordinary citizens taking up the call to defend their land, their property, and their nation.

B. *Twentieth-Century Conflicts: WWI, WWII, Korea, and Vietnam*

Twentieth-century conflicts saw the militia principles re-envisioned. Instead of being called upon to directly protect their homes, young men were conscripted in order to maintain the American way of life against international aggression. An individual's country was "their nation" and "military service was . . . envisioned in far more ambitious terms as a form of national socialization."²³ This theory was put to the test when, on May 18th, 1917, Congress approved a bill prescribing that "all male persons . . . twenty-one and thirty . . . shall be subject to registration in accordance with regulations to be prescribed by the President."²⁴ The law was later amended to include all men eighteen to forty-five, and resulted in almost 2.8 million men being drafted during World War I.²⁵

World War II saw an expansion of registration and draftees. On September 16, 1940, prior to the United States' involvement in World War II, legislation was enacted, which put a draft system into place that would "continue to exist with one short interruption for over 30 years."²⁶ This system

22. *See id.* at 80–83, 157, 202–203.

23. *See* Lars Mjøset & Stephen Van Holde, *Killing for the State, Dying for the Nation*, in *THE COMPARATIVE STUDY OF CONSCRIPTION IN THE ARMED FORCES* 51–52 (Lars Mjøset & Stephen Van Holde eds., 2002) (internal quotations omitted).

24. Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76, 80 (1917).

25. *Induction Statistics*, SELECTIVE SERVICE SYSTEM, <https://www.sss.gov/About/History-And-Records/Induction-Statistics> (last visited Sept. 25, 2016); *World War I Draft Registration Cards*, NAT'L ARCHIVES, <https://www.archives.gov/research/military/ww1/draft-registration/> (last visited Mar. 1, 2016).

26. GEORGE Q. FLYNN, *THE DRAFT 1940–1973*, at 18 (1993).

administered conscription at both a national and local level.²⁷ While many men volunteered for service following the attacks on Pearl Harbor, ten million men were drafted into service between 1940 and 1946.²⁸ The outbreak of the Korean War in 1950 saw conscription in use once again. The Selective Service Act of 1948 required every male, age eighteen to twenty-six, to register.²⁹ Between the eruption of conflict in 1950 and the armistice in 1953, over 1.5 million men were inducted into service.³⁰

The conflict that rings true to most Americans when they hear the phrase “the Draft” is the Vietnam War. In 1969, national guidelines and a televised lottery determined the fate of young men across the country.³¹ Those classified as 1-A (available for service) were drafted and shipped off to Vietnam despite the War’s fervent unpopularity throughout the country.³² Draft resistance and “dodgers” found a calling among young, white men of affluence, while the voices and activism of poor and minority men were notably absent.³³ Overall, by the time Americans withdrew their forces from Vietnam in 1973, Americans were overwhelmingly ready to be rid of the Draft.³⁴

27. *Id.* at 19–22.

28. *Induction Statistics*, *supra* note 25.

29. Military Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604, 605 (1948).

30. *Induction Statistics*, *supra* note 25.

31. Daniel Bergan, *The Draft Lottery and Attitudes Towards the Vietnam War*, 73 PUB. OPINION Q. 379, 381 (2009).

32. MICHAEL FOLEY, CONFRONTING THE WAR MACHINE: DRAFT RESISTANCE DURING THE VIETNAM WAR 49, 52. (2003).

33. *Id.* at 24–25 (internal quotations omitted).

34. FLYNN, *supra* note 26, at 258; Mjøset & Van Holde, *supra* note 23, at 81.

C. *Current State of the Draft and the All-Volunteer Military*

In December 1972, the final lottery of the Selective Service System was held, and on July 1, 1973, legal authority for the Draft expired.³⁵ However, the requirement that young men register for the Draft was reinstated in 1980.³⁶ Under 50 U.S.C. app. § 451, better known as the Military Selective Service Act (MSSA), the President was empowered to require the registration of “every male citizen” and male resident alien between the ages of eighteen and twenty-six.³⁷ A Joint Resolution passed in the House on April 22, and the Senate, on June 12, allocated only enough funds necessary to register men, but not women.³⁸ Thus, due to a lack of funds and the failure of women to qualify for combat service, Congress declined to amend the MSSA to permit the registration of women.³⁹ Following the challenge to the constitutionality of the MSSA in *Rostker v. Goldberg*, Selective Service required that only young men register in preparation for a potential national draft.⁴⁰

The American military has since functioned as an all-volunteer force. Those that serve in either the active or reserve component do so willingly and without compulsion. Proponents of this system argue that there are a number of benefits to this practice. The first benefit, supporters argue, is the overall increased quality of the military under the volunteer system.⁴¹ The theory is simple: morale is higher

35. CONG. BUDGET OFFICE, *supra* note 15, at 6.

36. *Id.*

37. 50 U.S.C. app. §§ 451, 453 (2012).

38. *Rostker v. Goldberg*, 453 U.S. 57, 61 (1981).

39. *Id.*

40. *Id.* at 74–75.

41. CONG. BUDGET OFFICE, *supra* note 15, at 10.

among those who come willingly.⁴² Second, those who volunteer represent a diverse picture of America, rather than just the poor and disenfranchised who could not avoid the call of conscription through occupational or educational deferment. The Department of Defense has made a point of diversifying so that the all-volunteer military force “represent[s] the country it defends.”⁴³ Third, the American public strongly supports, and greatly prefers, the idea of service members enlisting willingly, rather than being conscripted.⁴⁴ Whether the public views a conflict involving American troops as justified or unjustified, consensus still holds that Americans would rather not see citizens turned into soldiers against their will.⁴⁵ Finally, an all-volunteer force is more flexible than a drafted force.⁴⁶ Roles can be filled based on projected needs, not immediate needs. Without the urgency of immediate combat, higher military command can effectively strategize where volunteers may fit into the greater scheme of the military machine.

II. WOMEN’S SERVICE AND EXCLUSION FROM THE DRAFT (*ROSTKER V. GOLDBERG*)

A. *History of Service*

Women have contributed to the United States Armed Forces since the formation of the union. During the

42. See Walt Schubert, *The Draft, the Volunteer Military, and Peace Defense: A Contention*, 4 J. POST KEYNESIAN ECON. 266, 266–67 (1981–1982).

43. DEPT OF DEF., DIVERSITY AND INCLUSION STRATEGIC PLAN 2012–2017, at 4 (2012).

44. See Darren K Carlson, *Public Support for Military Draft Low*, GALLUP (Nov. 18, 2003), <http://www.gallup.com/poll/9727/public-support-military-draft-low.aspx>.

45. *Id.*

46. See generally LOOKINGBILL, *supra* note 20, at 345–47; CONG. BUDGET OFFICE, *supra* note 15, at x (2007).

Revolutionary War, women served by tending to the wounded, mending clothing, and preparing camp.⁴⁷ These were roles that were not formally filled by the United States Army until the twentieth century, making women's service invaluable to the military.⁴⁸ A handful of women even went beyond the calling of camp nurse or seamstress. One of the most well-known stories was that of Mary Corbin. During the Battle of Fort Mifflin, Mary Corbin took over the firing of a cannon when both her husband and his partner were fatally wounded in battle.⁴⁹ Corbin displayed deadly accuracy at firing the cannon, despite being badly injured.⁵⁰ In recognition of her bravery and service to the Union, the United States government eventually awarded her with compensation for her injuries and a lifetime pension.⁵¹

Women also played a crucial role in the Civil War, particularly in medicine. Whether it was on the battlefield or in garrison hospitals, women were able to assert more authoritative roles within the armed forces, both on the Union and Confederacy side.⁵² Dr. Mary E. Walker, a captured Union surgeon, is to this day the only woman to have been awarded the Congressional Medal of Honor, our nation's highest award for valor.⁵³

47. Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL'Y 1010, 1020 (2007).

48. See *History*, WOMEN IN THE ARMY, <http://www.army.mil/women/history> (last visited Jan. 16, 2016).

49. McSally, *supra* note 47, at 1020.

50. Debra Michals, *Margaret Cochran Corbin (1751–1800)*, NAT'L WOMEN'S HISTORY MUSEUM, <https://www.nwhm.org/education-resources/biography/biographies/margaret-cochran-corbin/> (last visited Jan. 14, 2016).

51. *Id.*

52. See McSally, *supra* note 47, at 1020.

53. *Id.* at 1030. See U.S. Nat'l Library of Med., *Dr. Mary Edwards Walker, CHANGING THE FACE OF MEDICINE.*, https://www.nlm.nih.gov/changingthe/faceofmedicine/physicians/biography_325.html (last visited Jan. 14, 2016). Unfortunately, the award was revoked two years before her death due to

Twentieth-century conflicts saw an increased presence of women's service. Women continued to serve in many roles. The Women's Auxiliary Army Corps, later changed to the Women's Army Corps (WAC), offered over 200 different non-combat jobs to women.⁵⁴ Women's Airforce Service Pilots (WASP) allowed women with civilian pilot's licenses to fly military aircraft, although, as a civil service, they were not recognized for their military contributions until 1977.⁵⁵ Still in a voluntary role, women during World War II served both at home and in the European and Pacific Theater in numbers some 350,000 strong.⁵⁶

Due to the total war effort inspired by both World Wars I and II, women also took up a greater role on the American home front.⁵⁷ With a shortage of manpower in the American workforce, women began to fill the roles traditionally held by men. The iconic Rosie the Riveter delivered a message to women across the United States.⁵⁸ The message was clear: your country needs your service.⁵⁹ Finally, in 1948, women's status in the armed forces was officially made permanent with the Women's Armed Services Integration Act.⁶⁰ These permanent roles, however, would generally remain devoid of

confusion over the rightful recipient of the award. *Id.*

54. *American Women in World War II*, HISTORY, <http://www.history.com/topics/world-war-ii/american-women-in-world-war-ii> (last visited Jan. 16, 2016).

55. *Id.*

56. *Id.*

57. *History*, *supra* note 48; see Jennifer E. Sturiale, *Passage of Community Property Laws, 1939–1947: Was “More Than Money” Involved?*, 11 MICH. J. GENDER & L. 213, 231–33 (2005).

58. See generally *Rosie the Riveter*, HISTORY, <http://www.history.com/topics/world-war-ii/rosie-the-riveter> (last visited Sept. 27, 2016).

59. Sturiale, *supra* note 57, at 232.

60. Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356; Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 105 (2008).

formal and informal combat participation until the late twentieth and early twenty-first century.⁶¹

B. *Draft Exclusion and Challenges*

Despite women's long history of military service, they have been notably exempt from conscription. Such exclusion was a result of both traditional and practical reasoning.⁶² The American mindset until the mid to late twentieth century was that a woman's sphere was almost solely domestic, and, as such, women's roles in military affairs should be limited to either a clerical or nursing capacity.⁶³ Furthermore, the role of soldier, sailor, or Marine was seen as too rigorous for what was viewed as the genetically weaker sex.⁶⁴

However, throughout the century, women further engrained themselves into the DNA of the American military. Still, their involvement in military endeavors was always in a voluntary capacity, and never in a primary combat role.⁶⁵ Because of their exclusion from frontline

61. McSally, *supra* note 47, at 1023–27.

62. The average infantryman carries upwards of one hundred pounds of gear. Anna Vander Broek, *The Things They Carried—An Infantryman's Supplies 1918–2028*, FORBES (June 5, 2008, 6:00 PM), http://www.forbes.com/2008/06/05/infantry-supplies-equipment-tech-logistics08-cx_avb_0605_carry.html. Between his weapon, ammunition, rations, water, and other assortment of equipment, it is a sizable weight to carry. Women's ability to carry this physical load is one of many reasons why they have been considered less than desirable to serve as infantrymen.

63. Krystyna K. Cloutier, Note, *Marching Toward War: Reconnoitering the Use of All Female Platoons*, 40 CONN. L. REV. 1531, 1533 (2008).

64. Debra Bell, *Arguing for and Against Women in Combat, in 1978*, U.S. NEWS & WORLD REP. (May 15, 2013, 3:00 PM), <http://www.usnews.com/news/blogs/press-past/2013/05/15/arguing-for-and-against-women-in-combat-in-1978>.

65. Women were barred from serving in direct combat related positions in both the Army and the Marine Corps. See generally *Assignment of Army and Marine Corps Women Under the New Definition of Ground Combat: Hearing Before the Military Forces and Pers. Subcomm. of the Comm. on Armed Servs.*,

combat units or direct combat positions, women were excluded from draft consideration. The closest women came to facing the Draft was during World War II when there was a shortage of military nurses.⁶⁶ Ultimately, when Selective Service became a standby option following the Vietnam War, and President Carter reinstated registration in 1980, women were again notably excluded.⁶⁷

1. *Rostker v. Goldberg*

Women's exclusion from the Draft came to a head in the Supreme Court case *Rostker v. Goldberg*.⁶⁸ The question presented in the 1981 case was whether the MSSA, codified as 50 U.S.C. app. § 451 *et. seq.*⁶⁹, violated the Fifth Amendment of the United States Constitution by requiring that only males register for the Draft.⁷⁰ The District Court found that the Act had violated the Due Process Clause of the Fifth Amendment and subsequently struck down the MSSA.⁷¹

To reach this decision, the District Court applied the "important government interest," or intermediate scrutiny, test that was articulated in *Craig v. Boren*.⁷² The availability of women, the District Court found, only helped to increase

103d Cong. (1994). Women were also restricted from serving in frontline or hazardous positions within the Air Force and Navy. *See MILLER ET AL., supra* note 3, at 27–28, 43–50.

66. *Backgrounder: Women and the Draft*, SELECTIVE SERVICE SYSTEM (Dec. 2015), <https://www.sss.gov/Registration/Women-And-Draft/Backgrounder-Women-and-the-Draft>.

67. *Id.*

68. 453 U.S. 57 (1981).

69. 50 U.S.C. app. § 451 *et. seq.* (2012).

70. *Rostker*, 453 U.S. at 59.

71. *Id.* at 63.

72. *Id.* (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

flexibility within the Armed Forces, not hinder it.⁷³ The Director of Selective Service filed a notice of appeal, and the Third Circuit stayed the District Court's decision.⁷⁴ Nevertheless, registration of young men for the Draft commenced on July 21, 1980.⁷⁵ The Supreme Court granted certiorari. The question presented to the Court was whether the MSSA violated the Fifth Amendment to the United States Constitution by authorizing the President to require the registration of males but not females.⁷⁶ After hearing arguments on March 24, 1981, the Court issued a 6-3 decision on June 25, 1981, to overturn the stay of the appellate court.⁷⁷

a. *Majority Opinion.* The majority opinion, written by Justice Rehnquist, arrived at its decision by finely examining the purpose of the Draft against the roles that women could fill within the armed forces.⁷⁸ The Court first looked at whether deference should be given to Congress in this matter, and then turned to whether female exclusion from the Draft was justifiable.⁷⁹

First, the Court acknowledged that it must grant "great weight to the decisions of Congress," especially in matters of an act's constitutionality.⁸⁰ However, Justice Rehnquist noted that the Court traditionally afforded Congress even greater deference in matters of national defense and military

73. *Id.*

74. *Id.* at 64.

75. *Id.*

76. *Id.* at 59.

77. *Id.* at 57, 58, 83.

78. *Id.* at 81–83.

79. *Id.* at 70–79.

80. *Id.* at 64 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)) (internal quotations omitted).

affairs.⁸¹ This deference, the Court acknowledged, came largely from Article I, Section 8 of the United States Constitution, which affords Congress the ability to raise and support armies.⁸²

Furthermore, the majority wrote, military and national defense were two areas in which the Court admitted it grossly lacked competence to judge.⁸³ It is “difficult”, the Court noted, “to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essential professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.”⁸⁴

In regard to the substantive due process challenge before it, the Court acknowledged *Schlesinger v. Ballard*⁸⁵, a similar due process challenge brought by male Naval officers concerning longer periods to attain promotion for female officers in relation to their male colleagues.⁸⁶ In *Schlesinger*, the Court held that the “overbroad generalizations” that applied to other gender-discrimination cases were not present.⁸⁷ The Court reasoned the difference in treatment of male and female naval officers reflected “the demonstrable fact that male and female line officers in the Navy [were] *not* similarly situated with respect to opportunities for professional service.”⁸⁸ The Court held that females did not

81. *Id.* at 64–65.

82. *Id.* at 88 (citing US. CONST. art. I, § 8, cl. 12).

83. *Id.* at 65–66.

84. *Id.* (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)) (emphasis in original).

85. 419 U.S. 498 (1975).

86. *Rostker*, 453 U.S. at 67.

87. *Schlesinger*, 419 U.S. at 506–07.

88. *Id.* at 508 (emphasis in original).

have the same opportunities for promotion within the Navy as their male counterparts, and therefore it was not unconstitutional for Congress to distinguish between them.⁸⁹

Justice Rehnquist and the majority of the *Rostker* Court were not swayed by the Appellees “efforts to divorce draft registration from its military and national defense context,” thereby hoping to lessen Congress’s persuasive impact.⁹⁰ The Court acknowledged that decisions concerning registration and the Draft were directly tied to judgments concerning military operations and needs.⁹¹ Although the Court recognized that a label of “military” did not give the legislature automatic deference regarding the issues at hand, it conceded that the broad constitutional power afforded to Congress in military matters was not overreached in this matter.⁹²

Second, the Court weighed the use of the intermediate scrutiny test applied by the District Court from *Craig v. Boren*, in which a gender classification must serve or be substantially related to the achievement of an important government interest.⁹³ It looked at debate over female exemption from Selective Service registration that had occurred in both the House and the Senate, prior to reaching the desk of the Court.⁹⁴ The House Subcommittee on Military Personnel of the House Armed Services Committee conducted hearings regarding female draft exclusion and proposed H.R. 6569, a bill that would have required everyone

89. *Id.*

90. *Rostker*, 453 U.S. at 68.

91. *Id.*

92. *Id.* at 70–72.

93. *Id.* at 63 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

94. *Id.* at 74–79. See, e.g., S. REP. NO. 96-826, at 155–161(1980); *Registration of Women: Hearing on H.R. 6569 Before the Military Pers. Subcomm. of the Comm. on Armed Servs.*, 96th Cong. (1980); 126 CONG. REC. 8601-02 (1980).

to register for Selective Service.⁹⁵ However, the bill was ultimately tabled.⁹⁶

In 1980, the Senate introduced a bill at the behest of the President to include women in Selective Service, to act as a companion to the bill introduced in the House of Representatives.⁹⁷ However, three months later, Senate Report No. 96-826 (Senate Report) rejected such a proposal.⁹⁸ In its report, the Senate concluded that women should not be included in any draft registration because of the “military needs of the Nation, and . . . the committee’s assessment of the societal impact of the registration and possible induction of women.”⁹⁹ Ultimately, a Joint Resolution allocating funds for the Selective Service System passed without the inclusion of females and with only enough funds authorized to cover the registration of males.¹⁰⁰

The Supreme Court took Congress’s discussion and deliberative process on whether to include females in the MSSA to heart when it deliberated the constitutionality of the Act.¹⁰¹ These determinations made by Congress, the Court resolved, were sufficiently examined and supported by testimony and fact.¹⁰² The Court noted that the legislative decisions surrounding female exclusion from the MSSA did not focus on the traditional roles of females.¹⁰³ Instead, Congress’s focus, and subsequently the Court’s focus, was the registration’s purpose to provide a pool for the Draft and the

95. 126 CONG. REC. 3510 (1980).

96. *Rostker*, 453 U.S. at 73.

97. 126 CONG. REC. 5857 (1980) (statement of Senator Nunn).

98. S. REP. NO. 96-826, at 156–161.

99. *Id.* at 157.

100. *Rostker*, 453 U.S. at 72; 126 CONG. REC. 8601-02, 8619-21 (1980).

101. *See Rostker* 453 U.S. at 74–75.

102. *Id.* at 76.

103. *Id.* at 74.

Draft's purpose to fill the need for combat troops.¹⁰⁴ Harkening back to the Senate Report, the Supreme Court noted that any shortages in manpower that occurred during wartime, which would require the use of a draft force, would primarily occur in the combat arms roles.¹⁰⁵ Because women could not fill these roles, requiring women to be drafted in equal numbers with men would only impair the strength of a draft force.¹⁰⁶

Rejecting the District Court's application of the *Boren* intermediate scrutiny test, the Supreme Court, taking from the Senate Report, held that "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."¹⁰⁷ Such a distinction, the Court acknowledged, is not invidious or unnecessarily biased. It is just a matter of legislative, executive, and biological restriction.¹⁰⁸ However, the Supreme Court ultimately held that, regardless of reason, the Constitution only requires that Congress treat those similarly situated equally, and not that it engage in "gestures of superficial equality."¹⁰⁹ Once again drawing from the Senate Report, the Supreme Court rejected any demand for equity in the face of military necessity.¹¹⁰ The Court stated, "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.'"¹¹¹

104. *Id.* at 75.

105. *Id.* at 76; S. REP. NO. 96-826, at 160 (1980).

106. S. REP. NO. 96-826, at 160.

107. *Rostker*, 453 U.S. at 78.

108. *Id.* at 74–79.

109. *Id.* at 78–79.

110. *Id.* at 79–80.

111. *Id.* at 80.

The majority further rejected the notion that drafted women could simply be used to fill non-combat roles. First, the Court notes that the Senate Report ultimately did not think it worth the added burden of including women in future draft and registration plans, only to have to filter them into specific non-combat military jobs.¹¹² Second, the Court and Congress both believed that volunteers could meet any non-combat roles during a mobilization.¹¹³ Finally and most significantly, staffing non-combat roles with only women would be crippling to military flexibility.¹¹⁴ Such flexibility required that troops and equipment be able to go to the frontline at a moments notice.¹¹⁵ The Court agreed with the Senate Report rejecting a Selective Service structure that encouraged two separate groups within the military: permanent combat and permanent support.¹¹⁶ The Supreme Court ultimately reversed the decision of the District Court, ruling that the District Court overstepped its bounds and engaged in an independent evaluation when it should have deferred to the examination of evidence conducted by Congress.¹¹⁷

b. *Dissent.* Justice Marshall wrote the primary dissent.¹¹⁸ He emphasized that the only question presented in this case was the constitutionality of excluding women from registration under the MSSA based on the Fifth Amendment of the Constitution, and that the Court should have restrained itself from meandering into other issues

112. *Id.* at 81.

113. *Id.*

114. *Id.* at 81–82.

115. *Id.*

116. *Id.* at 82.

117. *Id.* at 82–83.

118. *Id.* at 86 (Marshall, J., dissenting).

unrelated to the question presented.¹¹⁹ Instead, he claimed the majority decided to supplement the findings of Congress with decisions the Court believes that Congress could and should have made.¹²⁰ The decision to do so, Justice Marshall writes, contradicts the actual findings of the Senate Report and subsequent congressional hearings, which indicated no support for the Court's conclusion that including women in Selective Service and utilizing them in limited numbers in the event of a draft would be a burden on training and administrative resources.¹²¹

The dissent maintained that the majority fundamentally misinterpreted the findings of the Senate Report and based its decision on a narrow view of the question presented.¹²² The majority claimed to have excluded women from Selective Service based on the findings of the Senate Report, which determined that women could not fill combat positions and that combat positions would be the "primary" need in a draft.¹²³ However, the dissent points out that not all fillable positions in the event of a draft would be in the field of combat arms: support personnel would also be needed.¹²⁴

Furthermore, the dissent points out that the Department of Defense already recognized the need for draft-eligible support personnel and had recognized women's ability to fill these roles during a hearing with the Subcommittee on Military Personnel of the House Committee on Armed Services.¹²⁵ Assistant Secretary of Defense Pirie testified that during wartime:

119. *Id.* at 86–87.

120. *Id.* at 112.

121. *Id.* at 109–11.

122. *Id.* at 106–11.

123. *Id.* at 76 (majority opinion) (quoting S. REP. NO. 96-826, at 160 (1980)).

124. *Id.* at 97–98 (Marshall, J., dissenting).

125. *Id.* at 98.

Not only will [the United States] need to expand combat arms...but [it] also will need to expand the support establishment at the same time to allow combat arms to carry out their function successfully. The support establishment now uses women very effectively, and in wartime I think the same would be true.¹²⁶

In fact, the Department of Defense calculated that approximately 80,000 women conscripts could be efficiently utilized in non-combat roles in the event of a conflict requiring use of the Draft.¹²⁷ Finally, both the Department of Defense and the four Service Chiefs agreed there was no military reason for not registering women in the Draft.¹²⁸ For these reasons, the dissent claimed it would have affirmed the decision of the district court.¹²⁹

2. Post-*Rostker*

Although the Court in *Rostker* determined women were unfit to be draftees, the United States Military continued to integrate women further into its ranks. Women were given more job opportunities in the armed forces and continued to fill vital voluntary roles, in both enlisted and officer capacities.¹³⁰ The service academies had already seen their first female cadets due to President Ford's signing of Public Law 94-106 in 1975.¹³¹ Female attendance at these academies continued to grow exponentially, albeit with much

126. *Id.* (quoting *Registration of Women: Hearing H.R. 6569 before Subcomm. on the Military Pers. of the House Comm. on Armed Servs.*, 96th Cong., 17 (1980)).

127. *Id.* at 107.

128. *Id.* at 98–99.

129. *Id.* at 113.

130. SARA L. ZEIGLER & GREGORY G. GUNDERSON, MOVING BEYOND G.I. JANE: WOMEN AND THE MILITARY 43–44 (2005).

131. Department of Defense Appropriation Authorization Act, 1976, Pub. L. No. 94-106, 89 Stat. 531, 537–38 (1975). The service academies are the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the United States Coast Guard Academy.

resistance and hardship.¹³² Furthermore, physical and hygienic accommodations were made to encourage female growth in certain military careers, such as gender-adjusted physical training standards and grooming standards.¹³³ As the concept of frontline warfare diminished, women continuously played integral and less restricted roles in the Gulf War conflict and the War on Terror.¹³⁴

III. GENDER INTEGRATION OF COMBAT ARMS

A. *January 2013 Proposal and December 2015 Reaffirmation*

Although *Rostker* determined the constitutionality of female inclusion in Selective Service, time and conflict advancement has only made the question of women in combat even murkier. United States involvement in the War on Terror has already resulted in more than 150 female casualties¹³⁵ and over 1000 female service members wounded.¹³⁶ While some may note these numbers are still relatively small in comparison to the almost 7000 male casualties that have resulted from Operation Iraqi Freedom and Operation Enduring Freedom, such numbers can no longer support the lie that women were not and are not

132. See Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 326, 345 (2005).

133. See, e.g., DEP'T OF THE ARMY, ARMY FIELD MANUAL 7-22, app. A (2012); DEP'T OF THE ARMY, ARMY REGULATION 670-1 (2015).

134. See, e.g., Thompson, *supra* note 1.

135. Casualty in this manner is defined as it is in the dictionary to mean a service member lost to service through death. *Casualty*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/casualty> (last visited Oct. 28, 2016).

136. KRISTY N. KAMARCK, CONG. RESEARCH SERV., WOMEN IN COMBAT: ISSUES FOR CONGRESS 1 (2015); *Faces of the Fallen*, WASH. POST, <http://apps.washingtonpost.com/national/fallen/> (last visited Aug. 29, 2016).

serving, and dying, in combat.¹³⁷

Finally, in 2013, the Department of Defense decided to re-evaluate the restrictions on women in combat. Outgoing Defense Secretary Leon Panetta announced on January 24, 2013, that the ban on female service members in combat roles would be lifted, barring any requests by the military branches for an exception to policy.¹³⁸ Secretary Panetta claimed that this decision was made upon recommendations from the Joint Chiefs of Staff and as a result of shifting policy change throughout the military, particularly the repeal of Don't Ask, Don't Tell.¹³⁹ The Secretary's proposal gave the senior commanders of the services until 2016 to request an exemption to policy.¹⁴⁰

During the almost three years between Secretary Panetta's announcement and the 2016 deadline, each branch of the military engaged in some form of gender-inclusive combat evaluation. The two services with the largest number of ground troops, the Army and the Marine Corps, conducted the most significant studies. One Army study concluded that women were twice as likely to suffer injuries in combat training as their male colleagues.¹⁴¹ A Marine study conducted independently, but around the same time as the Army study, enforced these statistics as present among its ranks. A nine-month test involving 400 male and 100 female Marines showed that not only did women in infantry roles

137. See *Faces of the Fallen*, *supra* note 136.

138. Ernesto Londoño, *Pentagon Removes Ban on Women in Combat*, WASH. POST (Jan. 24, 2013), https://www.washingtonpost.com/world/national-security/pentagon-to-remove-ban-on-women-in-combat/2013/01/23/6c8a86f6-659e-11e2-85f5-a8a9228e55e7_story.html.

139. *Id.*

140. *Id.*

141. Rowan Scarborough, *Army Stats Show That Women Are Injured Twice as Often as Men in Combat Training*, WASH. TIMES (Aug. 26, 2015), <http://www.washingtontimes.com/news/2015/aug/26/army-stats-show-that-women-are-injured-twice-as-often/?page=all>.

get hurt twice as much as their male counterparts, but that gender mixed infantry squads were also outperformed by all male infantry squads.¹⁴²

The Army also practically tested the realities of women in combat positions during this time period by opening one of its most difficult schools to females for the first time ever. In April 2015, the Army conducted its first gender integrated Ranger course.¹⁴³ Ranger School is well established as one of the most difficult courses in the entire United States military. It helps to refine leadership under grueling mental and physical conditions.¹⁴⁴ Those who enter the course run and ruck march countless miles,¹⁴⁵ carry upwards of fifty pounds of gear continuously, mountaineer, parachute, and conduct various combat simulated patrols. All of this is performed over sixty-two days, with very little sleep and limited calorie intake.¹⁴⁶ The pass rate for the course normally hovers between 40% and 50%.¹⁴⁷ Those who

142. *U.S. Marines Study: Women in Combat Injured More Often Than Men*, UPI (Sept. 10, 2015), http://www.upi.com/Top_News/US/2015/09/10/US-Marines-study-Women-in-combat-injured-more-often-than-men/6121441908304/.

143. Jim Michaels, *Army Ranger School Tests if Women Are up to Grueling Challenge*, USA TODAY (Apr. 22, 2015, 10:32 PM), <http://www.usatoday.com/story/news/nation/2015/04/22/ranger-school-women-infantry-ft-benning/26196703/>.

144. Laura Wagner, *2 Women Are Graduating from Army Ranger School-What Does It Mean?*, NPR (Aug. 18, 2015, 5:10 PM), <http://www.npr.org/sections/thetwo-way/2015/08/18/432763326/two-women-are-graduating-from-army-ranger-school-what-does-it-mean>.

145. A ruck march is a forced march at a controlled pace with a typical load of thirty-five to sixty pounds strapped to the individual's back and the individual's weapon carried at the ready. Stew Smith, *What is a Ruck? Great Question*, MILITARY.COM, <http://www.military.com/military-fitness/army-workouts/training-for-ruck-marches>.

146. Marina Koren, *What Does it Take to Become a U.S. Army Ranger*, THE ATLANTIC (Aug. 21, 2015), <http://www.theatlantic.com/national/archive/2015/08/women-army-ranger-military/401984/>. See, e.g., U.S. ARMY, RANGER SCHOOL PREPARATION, <http://www.benning.army.mil/infantry/rtb/content/PDF/Ranger%20School%20Prep.pdf?25AUG2014.pdf> (last visited Feb. 1, 2016).

147. U.S. Army, *Ranger School Stats 2011–2015*, RANGER AND AIRBORNE

successfully navigate the course earn the honor of wearing the coveted black and yellow Ranger tab on the left arm of their uniform.¹⁴⁸

Nineteen women began the course: three women ultimately completed it.¹⁴⁹ Captain Kristen Griest¹⁵⁰ and Lieutenant Shaye Haver were the first two to complete the course, and Major Lisa Jester completed the course a few months later, with all three completions occurring after a number of recycles.¹⁵¹ All three graduated on the same course as their male counterparts. There were no special modifications made to accommodate their differences in physicality.¹⁵² Yet there were those who claim that the

TRAINING BRIGADE, <http://www.benning.army.mil/infantry/ARTB/> (last visited Aug. 14, 2016).

148. Koren, *supra* note 146.

149. Dan Lamothe, *Army Ranger School Has a Groundbreaking New Graduate: Lisa Jester, 37, Engineer and Mother*, WASH. POST (Oct. 12, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/10/12/army-ranger-school-has-a-groundbreaking-new-graduate-lisa-jester-37-engineer-and-mother/>; Richard A. Oppel, Jr. & Dave Philipps, *2 Women Set to Graduate From Ranger School are Experienced Officers*, N.Y. TIMES (Aug. 19, 2015), http://www.nytimes.com/2015/08/20/us/women-army-ranger-school-kristen-griest-shaye-haver.html?_r=0.

150. After completing the Maneuver Captains Career Course, Captain Griest is also the first woman in United States Army history to branch Infantry. Michelle Tan, *Meet the Army's First Female Infantry Officer*, ARMYTIMES.COM (Apr. 27, 2016, 6:57 PM), <http://www.armytimes.com/story/military/careers/army/officer/2016/04/27/meet-armys-first-female-infantry-officer/83591066/>. She transferred from her original branch, Military Police, to Infantry. *Id.*

151. See Michelle Tan, *Third Female Ranger Student to Recycle Swamp Phase*, ARMYTIMES (Sept. 15, 2015), <http://www.armytimes.com/story/military/careers/army/2015/09/15/third-female-ranger-student-recycle-swamp-phase/72302334/>. Recycles occur when a candidate fails to complete one aspect of the three phase course, respectively known as Benning, Mountain, and Swamp, and is given the opportunity to retry the specific phase. See, e.g., *id.*; U.S. Army, *Student Information: Ranger School*, U.S. ARMY MANEUVER CTR. OF EXCELLENCE, <http://www.benning.army.mil/infantry/ARTB/StudentInformation/> (last visited Aug. 30, 2016).

152. Michelle Tan, *Ranger School: Many Do-Overs Rare, Not Unprecedented*, ARMYTIMES (Sept. 18, 2015), <https://www.armytimes.com/story/military/careers/army/2015/09/18/ranger-school-many-do-overs-rare-not-unprecedented/>

women received preferential treatment.¹⁵³ Nevertheless, Major Jim Hathaway, who oversaw the women's training at Ranger School noted that military cadre could have "video recorded every patrol and you would still say that we 'gave' it away. Nothing we say will change your opinion."¹⁵⁴ Regardless of public impression, the Army decided to permanently open Ranger School to females following the success of the three women.¹⁵⁵ It can be noted, however, that at the time of writing this Comment, no other females have successfully completed the Ranger course.¹⁵⁶ Following the opening of Ranger School to women on a permanent basis, the United States Navy announced its intention to open the prestigious Navy SEALs course to women in 2016.¹⁵⁷ It plans to do so without making any changes in the standards of the course.¹⁵⁸

On December 3, 2015, despite the mixed feedback from the independent studies conducted by the branches of the Armed Forces, Secretary Ash Carter declared that the Pentagon would officially be opening all combat jobs to

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153. Dan Lamothe, *Ranger School Officer Combats Rumors About How Women Passed in Pointed Facebook Post*, WASH. POST (Aug. 20, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/08/20/ranger-school-officer-combats-rumors-about-how-women-passed-in-pointed-facebook-post/>.

154. *Id.*

155. Memorandum from John M. McHugh, Sec'y of the Army, on the Expansion of Ranger Course Attendance to Female Soldiers (Aug. 31, 2015).

156. Dan Lamothe, *Army Faces Public Relations Dilemma as It Moves Forward with Women in Ranger School*, WASH. POST (Nov. 10, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/11/10/army-faces-public-relations-dilemma-as-it-moves-forward-with-women-in-ranger-school/>.

157. Meghann Myers, *Navy SEALs Won't Change Standards for Women, Admiral Says*, USA TODAY (Dec. 21, 2015, 11:46 AM), <http://www.usatoday.com/story/news/nation-now/2015/12/21/navy-seals-wont-change-standards-women-admiral-says/77695072/>.

158. *Id.*

women.¹⁵⁹ “There will be no exceptions,” Carter stated, erasing the hopes of the Marine Corps, which had requested an exemption from integrating females into combat arms professions.¹⁶⁰ Carter believed that the services should function under uniform policies, and therefore denied the Marine Corps request.¹⁶¹ All the services had to implement their integration plans beginning April 1, 2016.¹⁶²

The Army is well into its transition. Current female soldiers, officers, or enlisted, can request to change their jobs to combat positions, and some already have.¹⁶³ Female cadets and candidates at West Point, ROTC, or Officer Candidate School can also request a combat arms branch for their future military career.¹⁶⁴ We are beginning to see the early results of these requests. The first gender-integrated Infantry Basic Officer Leaders Course graduated with ten female lieutenants on October 26, 2016.¹⁶⁵ Similar to their

159. Matthew Rosenberg & Dave Philipps, *All Combat Roles Now Open to Women, Defense Secretary Says*, N.Y. TIMES (Dec. 3, 2015), <http://www.nytimes.com/2015/12/04/us/politics/combat-military-women-ash-carter.html>.

160. *Id.* (internal quotations omitted).

161. *Id.*

162. Leo Shane III, *Questions, Frustration as Women Prepare to Join Combat Units*, MILITARY TIMES (Feb. 10, 2016), <http://www.militarytimes.com/story/military/2016/02/10/women-combat-jobs-congress-generals-pentagon-leaders/79876228/>.

163. *See, e.g.*, Michelle Tan, *This Sergeant Is the Army's First Female Enlisted Infantry Soldier*, ARMY TIMES (May 27, 2016), <http://www.armytimes.com/story/military/careers/army/2016/05/27/sergeant-armys-first-female-enlisted-infantry-soldier/85040916/>.

164. *See generally* Gayle Tzemach Lemmon, *When Women Lead Soldiers into Battle: The Age of the Female Combat Office Is Coming*, THE ATLANTIC (Sept. 9, 2016), <http://www.theatlantic.com/international/archive/2016/09/women-combat-leaders/498800/>.

165. Meghann Myers, *Ten Women Graduate from the Army's First Integrated Infantry Officer Course*, ARMY TIMES (Oct. 26, 2016), <https://www.armytimes.com/articles/ten-women-graduate-from-the-armys-first-integrated-infantry-officer-course>.

officer counterparts, new female enlisted recruits have been afforded the opportunity to select Infantryman or 11X, as it is coded, as their initial MOS.¹⁶⁶ However, rather than ship them off to basic training immediately, these women have been put in a delayed entry program, with their projected basic training ship dates coming in mid-2017.¹⁶⁷

The Marines have also begun to open infantry positions to women.¹⁶⁸ Part of the Marine's plan for integrating women into combat roles includes placing female leadership in positions that directly correlate to where the integration is occurring.¹⁶⁹ This plan will allow lower enlisted combat arms females to have a reliable chain of command to which they can turn in this historic transition period. As seen with the Army, this type of plan will require a delay in placing new Marines into their positions until later in 2016.¹⁷⁰

B. *New Challenges and Opportunities*

A gender inclusive Selective Service provides an equal playing field for all future conscription occurring within the United States. In the ongoing battle for equality, frontline military service may not have been the first place that many social advocates for gender equity would have thought to look. However, the events of the last two years and the seemingly inevitable gender integration of the Selective

166. Kevin Lilley, *Army Enlists First Female Infantry Recruit*, ARMY TIMES (Apr. 8, 2016), <https://www.armytimes.com/story/military/careers/army/enlisted/2016/04/08/army-enlists-first-female-infantry-recruit/82807418/>.

167. Adam Ashton, *Snohomish Teen is Second Woman to Enlist in Infantry: "I May Be Small, But I'm Not Fragile,"* THE OLYMPIAN (Apr. 13, 2016, 7:23 AM), <http://www.theolympian.com/news/local/military/article71649942.html>.

168. Hope Hodge Seck, *Marine Corps Approves First Two Women for Infantry Positions*, MILITARY.COM (May 10, 2016), <http://www.military.com/daily-news/2016/05/10/marine-corps-approves-first-two-women-for-infantry-positions.html>.

169. *Id.*

170. *Id.*

Service provide a rare opportunity to not only reevaluate social policies that harbor inequality, but also to re-envision such policies so that they better serve the populace.

1. Advantages of a Gender-Integrated Selective Service Pool

The social, economic, and cultural advantages of gender-integrated conscription are numerous. A gender-integrated draft ensures that America can meet any personnel requirements that arise during a time of war.¹⁷¹ The *Rostker* decision no longer best represents how to utilize young Americans in a draft scenario. While the Draft is primarily utilized to backfill combat arms positions, all roles within the military will eventually need to be supplemented. Not only will women be able to contribute towards meeting the nation's need for frontline military personnel, but they will also be able to equally supplement supportive roles, such as supply, transportation, mechanics, intelligence, and aviation.

Furthermore, integrating females into Selective Service creates the opportunity for a more diverse military service. Women are more likely to hold a high school or college degree than their male counterparts.¹⁷² Female service members offer a different outlook on life and provide a unique perspective to problem solving.¹⁷³ They have shown how crucial these abilities are while acting as part of the Marines' Lioness Program, spearheaded to work patrol checkpoints

171. See LOOKINGBILL, *supra* note 20, at 344.

172. Jeff Guo, *Women Are Dominating Men at College. Blame Sexism*, WASH. POST (Dec. 11, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/12/11/women-are-dominating-men-at-college-blame-sexism/>.

173. Gayle Tzemach Lemmon, *The Army's All-Women Special Ops Teams Show Us How We'll Win Tomorrow's Wars*, WASH. POST. (May 19, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/19/the-armys-all-women-special-ops-teams-show-us-how-well-win-tomorrows-wars/>.

and house-to-house searches, or Cultural Support Teams (CSTs) and Female Engagement Teams (FETs), which worked with Special Operations in Iraq and Afghanistan.¹⁷⁴ Women were able to enter female spaces in Iraq and Afghanistan—places where male service members were forbidden to go—in order to gain vital intelligence on the living conditions of the populace and location of the enemy.¹⁷⁵ Along with this, women approach conflict resolution differently than their male counterparts. Some scholarship suggests that women are the better of the sexes when it comes to defusing conflict and working with civilians in peacekeeping situations.¹⁷⁶

Furthermore, Secretary of the Army, John McHugh, acknowledged that, regarding women in the military, “[i]f your objective is true and pure equality then you have to look at all aspects.”¹⁷⁷ One of these aspects, he noted, includes the Draft.¹⁷⁸ The top leaders of the United States Armed Forces agree with this conclusion as well.¹⁷⁹ General Mark A. Milley, Chief of Staff of the Army, and General Robert B. Neller, Marine Corps Commandant, both expressed their belief that women should have to, at the very least, register with Selective Service.¹⁸⁰ General Neller stated, “Now that the restrictions that exempted women from [combat jobs] don’t exist, then you’re a citizen of a United States . . . It

174. *Id.*

175. *See id.*

176. ZEIGLER & GUNDERSON, *supra* note 130, at 4.

177. Richard Sisk, *Women Will Likely Have to Register for the Draft, Army Secretary Says*, MILITARY.COM (Oct. 12, 2015), <http://m.military.com/daily-news/2015/10/12/women-likely-have-register-draft-army-secretary-says.html>.

178. *Id.*

179. Dan Lamothe, *Army and Marine Corps Chiefs: It’s Time for Women to Register for the Draft*, WASH. POST (Feb. 2, 2016, 11:53 AM), https://www.washingtonpost.com/news/checkpoint/wp/2016/02/02/army-and-marine-corps-chiefs-its-time-for-women-to-register-for-the-draft/?tid=sm_fb.

180. *Id.*

doesn't mean you're going to serve, but you go register.”¹⁸¹

Female integration of combat roles and gender inclusive Selective Service registration comport with the country's general shift in social and economic policy geared towards gender equality. The military already engages in equal gender pay through its system of pay centered on rank and years in service.¹⁸² Gender integration of combat positions will now allow for equal opportunities throughout the United States Armed Forces. Women will begin to fill these combat roles in greater numbers. Consequently, should the Draft need to occur to supplement our nation's military, women will be able to more equitably fill combat roles if they were drafted. Finally, including women in combat roles and any future use of the Draft would allow women to finally achieve what some consider to be “full citizenship.”¹⁸³ Critics have often equated military service with fulfilling true American citizenship, although they rarely mention women in this equation because of their social roles.¹⁸⁴ By removing the stigma of women in combat and including them in draft registration, full citizenship could finally be possible for future generations of women.

Finally, a gender-integrated Selective Service and subsequent use of conscription might also help towards solving one of the largest and most toxic problems in the military: sexual assault. While sexual assault has been

181. *Id.* (internal quotations omitted).

182. *Military Pay Charts—1949 to 2016*, DEF. FIN. AND ACCOUNT SERV. (Oct. 22, 2016), <http://www.dfas.mil/militarymembers/payentitlements/military-pay-charts.html>.

183. Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 105 (2008).

184. *Id.* at 105 (“Discussions of military service and full citizenship have historically made little, if any, mention of whether women were full citizens. In fact, women's military service was severely restricted historically in order to express and enforce the conviction that women's special domestic responsibilities precluded full participation in public roles.”).

present within the ranks of the armed forces for many years, the last half dozen years have seen a large push within the military to snuff out what appears to be an epidemic of sexual violence against both male and female service members alike. The Department of Defense reported a 53% jump in victim reports in between 2012 and 2013 with a total of 5518 reports being filed.¹⁸⁵ This number jumped again by 11% in 2014, with 6131 reports filed in that year.¹⁸⁶ Among female service members 4.3% reported experiencing unwanted sexual contact, while 0.9% of males reported experiencing unwanted sexual contact.¹⁸⁷ To combat these numbers, the Department of Defense reported a five-part plan: prevention, investigation, accountability, advocacy, and assessment.¹⁸⁸

The first part of the plan, prevention, focuses on changing the culture and the environment of the military.¹⁸⁹ The Department of Defense notes that prevention aims at creating “an environment where sexist behaviors, sexual harassment, and sexual assault are not condoned, tolerated, or ignored.”¹⁹⁰ Efforts towards achieving this goal have included “gender-responsive and culturally competent programs for leaders and Service members to address healthy relationships, active bystander intervention, social courage, and core values that support the establishment of mutual respect.”¹⁹¹

So how could a gender integrated Selective Service pool and the Draft positively impact the sexual assault epidemic

185. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014, at 6, 7 (2015).

186. *Id.* at 6.

187. *Id.* at 8.

188. *Id.* at 12–13.

189. *Id.* at 19.

190. *Id.*

191. *Id.* at 21.

within the military? First, more female enlisted and officer service members would better reflect the gender distribution that is evident outside of the military. This could greatly change the culture under which service members currently operate, which is now comprised of only around a 15% female population.¹⁹² Second, integrating females into the eligible draft force would create a more diverse leadership pool. A gender-balanced leadership pool could pay dividends towards eliminating a sexist environment by filling more roles held predominantly by male service members with female service members. This would allow lower enlisted females to feel as though they could be more open with their concerns regarding sexual assault and sexual harassment. Finally, interaction with more female service members derived from a gender-integrated draft would change the environment in which male service members served. In what is colloquially known as the “good ol’ boys club,” men seem to promote in greater numbers and in higher positions.¹⁹³ Incorporating more women into service in a greater variety of roles would help women permeate some of those spaces.¹⁹⁴

192. Michelle Andrews, *Women in Combat Zones Can Have Trouble Getting Contraceptives*, NPR (Aug. 11, 2015, 9:14 AM), <http://www.npr.org/sections/health-shots/2015/08/11/431382325/women-in-combat-zones-can-have-trouble-getting-contraceptives>; Eileen Patten & Kim Parker, *Women in the U.S. Military: Growing Share, Distinctive Profile*, PEW RESEARCH CTR. (Dec. 22, 2011), <http://www.pewsocialtrends.org/2011/12/22/women-in-the-u-s-military-growing-share-distinctive-profile/>.

193. See Jamie L. Callahan & Lesley Tomaszewski, *Navigating the Good Ol’ Boys Club: Women, Marginality, and Communities of Practice in a Military Non-Profit Organization*, 29 *STUD. CONTINUING EDUC.* 259, 267–69 (2007).

194. I would not purport to explore every detail surrounding the sexual assault epidemic within the military. The topic is vast and deserves more attention than I could provide here. However, I would be remiss not to acknowledge the positives that could be derived from a Selective Service and future draft force that was more gender-balanced, especially in the area of sexual assault.

2. Potential Obstacles to Female Service Members in Combat Roles

Despite the benefits of gender integration of combat roles, there are those who believe that gender integration will not come without a price. Pushback on the gender integration policy has come from all levels of the military and government: from the elite to the average, from the grunts to the policy makers. Lower standards seem to be the primary concern.

Special Operations Forces (Army Rangers, Green Berets, Delta Force, Navy SEALs, MARSOC, Air Force Pararescuemen, and others) overwhelmingly spoke out against women in Special Operations roles.¹⁹⁵ In a survey conducted by the Rand Corporation, these elite servicemen feared that allowing women to serve among them in a Special Operations capacity would hurt overall effectiveness and lower the rigorous standards upheld through each service.¹⁹⁶ Furthermore, they feared allowing women in their ranks might deter men from serving in such dangerous positions.¹⁹⁷

The fear of lowered standards is not just a Special Operations concern. In the Army, positions such as Infantry, Armor, Cavalry Scout, Artillery, and Combat Engineer, also maintain rigorous physical standards for which the jobs demands. While all soldiers receive basic combat training, those pursuing combat jobs receive advanced training focused primarily on combat realities: proficiency in a number of heavy weapons and systems, ruck marching, heightened endurance conditioning, combat medical aid,

195. Of the 7600 Special Operators that took the survey, 85% stated that they were opposed to opening Special Operations jobs to women. Lolita Baldor, *U.S. Special Operators Say No to Women in Special Operations Jobs*, MILITARY.COM (Dec. 11, 2015), <http://www.military.com/daily-news/2015/12/11/us-special-operators-say-no-to-women-in-special-operations-jobs.html>.

196. *Id.*

197. *Id.*

tactical exercises, and additional land navigation skills.¹⁹⁸ These advanced training focuses are more extensive than those for non-combat positions.¹⁹⁹

Current and former soldiers share concerns over what female integration of these jobs might mean. Julie Pulley, a former Army Captain and Airborne soldier, offered her take in a Wall Street Journal opinion piece in September 2015.²⁰⁰ While she compliments Captain Griest and Lieutenant Haver on their completion of the Ranger course, she notes that the infantry branch presents larger obstacles.²⁰¹ Women, she notes, carry the burden of pregnancy and the potential of being injured in greater numbers than men.²⁰² Because of this, it is argued that women serving in equal numbers to their male peers within the infantry may only result in less capable infantry personnel and greater risks toward those that are capable, as they pick up the slack for women unable to maintain the standards.²⁰³

Fears of lower standards have permeated even the highest level of the American military hegemony. Despite Secretary Carter's reassurance that combat role standards

198. See, e.g., *Soldier Life: Infantry School*, U.S. ARMY, <http://www.goarmy.com/soldier-life/becoming-a-soldier/advanced-individual-training/infantry.html> (last visited Feb. 28, 2016); *Careers & Jobs: Cavalry Scout (19D)*, U.S. ARMY, <http://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/combat/cavalry-scout.html> (last visited Sept. 29, 2016); *Careers & Jobs: Combat Engineer (12B)*, U.S. ARMY, <http://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/construction-engineering/combat-engineer.html> (last visited Sept. 29, 2009); *Soldier Life: Basic Combat Training*, U.S. ARMY, <http://www.goarmy.com/soldier-life/becoming-a-soldier/basic-combat-training.html> (last visited Sept. 1, 2016).

199. See, e.g., *supra* note 198.

200. Julie Pulley, Opinion, *Women in the Infantry? No Thanks*, WALL. ST. J. (Sept. 14, 2015, 7:03 PM), <http://www.wsj.com/articles/women-in-the-infantry-no-thanks-1442271810>.

201. *Id.*

202. *Id.*

203. *Id.*; see also Vojdik, *supra* note 132, at 332, 335.

would remain the same, the Marine Corps have already sought an exception to policy to keep the Corps infantry male only.²⁰⁴ One of the top Marine commanders, General John Kelly of the U.S. Southern Command, suggested that there will be “great pressure” to lower standards because so few females will be able to meet the demanding standards of such jobs like infantry Marine.²⁰⁵

However, not all scholarship suggests that integrating women into combat roles will result in lower standards. Some point out that not only have thousands of women performed the physical tasks that they were assigned within the military, but many have also exceeded the expectations of these physical tasks.²⁰⁶ Furthermore, the shortcomings of women in certain areas of physicality may not be a result of their ability, but their conditioning.²⁰⁷ This lack of conditioning can point to critical flaws within training systems that benefit both male and female service members, thereby helping to improve standards, not critically weaken them.²⁰⁸ Thus, the addition of females into combat arms roles may help to better shape the profession, rather than reduce its standards.

Another potential obstacle towards women’s integration into combat arms roles is a general reluctance of women to volunteer. While there are undoubtedly females who desire to serve in such positions, the question remains as to how

204. Rowan Scarborough, *Ashton Carter Promises Same Standards for Women in Combat Roles*, WASH. TIMES (Dec. 3, 2015), <http://www.washingtontimes.com/news/2015/dec/3/ash-carter-promises-same-standards-for-women-in-co/?page=all>.

205. Lolita Baldor, *Debate Over Women in Combat Continues to Roil Marine Corps*, YAHOO NEWS (Jan. 9, 2016), <https://www.yahoo.com/news/debate-over-women-combat-continues-roil-marine-corps-075907735.html>.

206. See LORRY M. FENNER & MARIE E. DEYOUNG, *WOMEN IN COMBAT: CIVIC DUTY OR MILITARY LIABILITY?* 7 (2001).

207. *Id.* at 8.

208. *See id.* at 7–9.

many will take the plunge and either enlist, branch, or re-branch to combat arms. As of August 2016, Sergeant Major of the Army Dan Dailey acknowledged that the Army was still looking for more women to “join [the] ranks as cavalry scouts, armor crewmen, fire support specialists and infantrymen Unfortunately, we have not had a sufficient number of serving female soldiers and [noncommissioned officers] volunteer to transfer into these mentorship and leadership roles.”²⁰⁹ The same recruiting problems seem to also be plaguing the Marine Corps, where no women are currently attending or slated to attend the Infantry Officer Course.²¹⁰ While this initial reluctance might be discouraging, as with past female barriers broken in the armed services, it is likely that it will take time for women to develop a larger presence in what were once male dominated roles.

IV. OPPORTUNITY FOR RE-ENVISIONING SERVICE.

A. *A Generational Disconnect*

America’s radical shift in military gender perception is occurring in the midst of a larger cultural shift in the military. Young Americans are being barred from military service in astronomical numbers. Whether it is due to criminal record, physical deficiency, mental illness, lack of education, or body modification, such as tattoos or piercings, the millennial generation is being turned away from service at a historic rate.²¹¹ One study found that 75% of seventeen

209. Michelle Tan, *SMA: Army Needs Female Soldiers to Step Up for Combat Jobs*, Army Times (Aug. 1, 2016), <http://www.armytimes.com/story/military/2016/08/01/sma-army-needs-female-soldiers-step-up-combat-jobs/87931290/> (internal quotations omitted).

210. Julie Pulley, *The Truth About the Military Gender Integration Debate*, CNN (Sept. 28, 2016, 4:03 PM), <http://www.cnn.com/2016/09/28/opinions/military-gender-integration-debate-pulley/>.

211. See *Education, Employment, & the Military*, YOUTH.GOV, <http://youth.gov/>

to twenty-four year olds are unable to enlist in the United States military.²¹² Another study found that only 1% of American youth are both eligible to serve and interested in pursuing service.²¹³

On top of the generational inability to serve, American youth are also voluntarily distancing themselves from service as well. This is evident in a number of areas. In the rise of Middle Eastern conflict, primarily spurred by actions of the Islamic State of Iraq and Syria, better known as ISIS, American debate has largely centered on whether a boots on the ground strategy would be the most effective. Millennials believe that this is the correct route.²¹⁴ However, almost two-thirds admit that they would not want to personally take part in the fight.²¹⁵ Much of this mentality derives from this generation's deep distrust of their government.²¹⁶ In addition, more Americans are pursuing higher education than ever before, foregoing the opportunities and experiences of military service.²¹⁷

The general American public often seems unsure of how to approach or handle the military. For many, those that serve have become something of a prized enigma: praiseworthy, but not relatable. Revered, but removed from the populace at large.²¹⁸ As one commentator notes, "we love

youth-topics/challenges-education-employment-and-military (last visited Jan. 16, 2016).

212. MISSION: READINESS, READY, WILLING, AND UNABLE TO SERVE 1 (2009).

213. Nolan Feeney, *Pentagon: 7 in 10 Youths Would Fail to Qualify for Military Service*, TIME (June 29, 2014), <http://time.com/2938158/youth-fail-to-qualify-military-service/>.

214. Khalid, *supra* note 14.

215. *Id.*

216. *Id.*

217. See Sara Murray, *Grads Head to College in Record Numbers*, WALL ST. J. (April 28, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703832204575210244203411342>.

218. See David Zucchino and David Cloud, *Special Report: U.S. Military and*

the troops, but we'd rather not think about them."²¹⁹ This is a far cry from the attitude our culture had towards those that served during World War II, where 10% of the American populace participated in active-duty service and many families had at least one member in uniform.²²⁰ This is also very different from the images of Vietnam shown on television screens across the United States, and the national call to "bring our boys home." Instead, the Global War on Terrorism, save for the catalyst event of September 11, 2001, has resulted in a blissful discord between the American public and the truths of war.²²¹ This is a generation that is more comfortable with glamorized, but often exaggerated, media representations such as *The Hurt Locker*, *Jarhead*, and *American Sniper*, than it is with turning on CNN or BBC and seeing the realities and consequences of almost fifteen years of war. If the military and the civilian realms continue to maintain a separate existence, this chasm of disassociation will only grow larger. Gender integrating Selective Service might seem like a minor feat, but it is a move in the right direction toward changing the environment surrounding how Americans view women's roles in the military and the larger societal impact of America's involvement in conflict.

B. *The Consequences of Gender Integration, What a Gender Inclusive Selective Service and Draft Could Look Like, and the Possibility of Selective Service Discontinuance*

The imminent gender integration of the United States Armed Forces signals the arrival of female inclusion for

Civilians are Increasingly Divided, L.A. TIMES (May 24, 2015, 10:05 PM), <http://www.latimes.com/nation/la-na-warrior-main-20150524-story.html>.

219. James Fallows, *The Tragedy of the American Military*, THE ATLANTIC, Jan.–Feb. 2015, at 73, 74.

220. *Id.*

221. *See id.* at 76–77.

Selective Service registration. This would mean that any future use of the Draft would include both genders for consideration, unless otherwise specified.²²² At the time of publishing this Comment, both the House and the Senate were already taking steps towards this direction.²²³ Debates within both chambers of Congress focused largely on physical ability, military need, and traditional female gender roles.²²⁴

Conversely, the Department of Defense, the heads of the United States Armed Forces, and the United States Congress may elect to not place drafted women, or all drafted women, into combat roles, despite their eligibility for these positions. As Justice Marshall suggested in his dissent in *Rostker*, just because women could be registered under Selective Service does not mean that they will be drafted, and even if they are drafted, they may not be forced to fill combat arms roles.²²⁵

Selective Service registration for both genders will simply increase the pool of available manpower, regardless of whether those registered are selected for combat positions. There appears to be three clear routes for utilizing women in Selective Service: (1) the government can have women available for Selective Service, but elect not to draft them; (2) the government can choose to draft them, but not fill combat roles with females; or (3) the government can draft females and mandate that women attempt to fill combat roles. Furthermore, there is also the outlier possibility that Selective Service and the Draft may be done away with altogether. Each of these options deserves its own examination.

222. See Katie McGuire, Note, *Equal Protection Under the Military Selective Service Act: Revisiting Rostker and the Exclusion of Women from the MSSA's Mandate*, 66 ALA. L. REV. 691, 692–93 (2014).

223. Steinhauer, *supra* note 12.

224. See Pulley, *supra* note 210; Steinhauer, *supra* note 12.

225. *Rostker v. Goldberg*, 453 U.S. 57, 96–98 (1980) (Marshall, J., dissenting).

First, women may be forced to register with Selective Service, but Congress might elect not to draft them at all should a draft be initiated. This choice seems unlikely. In the event that an all-volunteer force can no longer fill the personnel needs of the American military, it seems improbable that Congress would willingly reject half of its available draft-eligible populace. Also, following the December 2015 decision to gender-integrate all military occupations, women are now “similarly situated” to their male counterparts and able to fill any role that a draft military might require.²²⁶ As such, rejecting all females for Selective Service would be done purely on principle by the most ardent conservatives. Furthermore, such a decision would not comport with the vision of gender equality that has seized the United States during the last decade or so.

Second, women could be drafted from the Selective Service pool, but placed into non-combat roles or given preference to fill non-combat roles. This option seems viable and likely to be the choice pushed for by moderates or those who straddle the line between gender equality and physical capability. This option has the benefit of maintaining the illusion of equality by incorporating women in the Draft with the familiarity of keeping women from roles that see direct action. But as recent military conflicts have proved, this option would only be a farce in keeping women from direct combat.²²⁷ Even forced into non-combat roles, women would still find themselves fighting and dying as they do now. This option would also continue to place the burden of the most difficult aspects of warfare on men, subsequently taking away from the purported goal of a gender inclusive service.

Third, women could be drafted and made to fill vacant combat positions so long as they are physically and mentally able to meet the requirements of the combat positions they

226. *See id.* at 79.

227. *See* Thompson, *supra* note 1.

purport to fill. This concept has been envisioned before. In Sara Zeigler and Gregory Gunderson's *Moving Beyond G.I. Jane*, the authors offered six recommendations in order to best utilize the United States Armed Forces.²²⁸ These recommendations were developing standards, applying standards, conscription, promotions, integrating women into combat units, and development of an all-female unit.²²⁹ Five of these six recommendations directly impact the selection of quality, gender-neutral combat troops. As the third recommendation, conscription, notes, "draftees will have to meet the necessary qualifications to be assigned to the combat arms. If an individual cannot meet the necessary standards, whether male or female, they will not be allowed to serve in combat."²³⁰ This standard could be applied to any draft force in the future, without compromising on the rigid standards necessary to maintain mission readiness.

The pros to this system are numerous. A greater pool from which to draw combat troops will help to ensure that one gender demographic does not carry too heavy of a burden in a future draft. Furthermore, it ensures that a more diverse group of soldiers, sailors, airmen, and Marines will be filling the gaps of our nation's military needs. Future drafts do not have to suffer the same ills as the Draft of the Vietnam War. Furthermore, future conflicts do not need to be fought on the backs of poor, disenfranchised young men. Women of all backgrounds can begin to share that burden as well, hopefully equitably distributing the hardship of war.

Nevertheless, the idea of female draftees filling combat roles also has potential cons. A grim reality of war is the loss of life. Combat arms see the highest mortality rate of any

228. ZIEGLER & GUNDERSON, *supra* note 130, at 68–71.

229. *Id.*

230. *Id.* at 69.

other job in the military.²³¹ There are those who might question whether the American public is ready to see or hear of women dying en masse on the evening news, in the way they saw young men dying en masse during the Vietnam War. Furthermore, women also carry the possibility of pregnancy. In a gender mixed environment, the risk of pregnancy may increase, leading to combat ineffectiveness and wasted resources.²³² In that same line of thinking, there are also questions on how the loss of a generation of young women to war would impact birth rates or marriage rates throughout the country.

Finally, it remains possible that the debate over the merits of including women in Selective Service might not even come to bear fruit. There are those who argue—because of the voluntary nature of our military and because of our society’s general aversion to the Draft—we should simply do away with Selective Service all together. These individuals point to the fact that our Nation’s interests are best served by a military that willingly volunteers to take up arms and that the wars we fight no longer require the use of a readily available Selective Service.²³³ Those voices have grown stronger, and gained new support, following the buzz

231. See Sydney J. Freedberg, Jr., *The Fallen: A Profile of U.S. Troops Killed in Iraq and Afghanistan*, GOV’T. EXEC. (May 28, 2004), <http://www.govexec.com/defense/2004/05/the-fallen-a-profile-of-us-troops-killed-in-iraq-and-afghanistan/>; see generally MATTHEW S. GOLDBERG, CONG. BUDGET OFFICE, UPDATED DEATH AND INJURY RATES OF U.S. MILITARY PERSONNEL DURING THE CONFLICTS IN IRAQ AND AFGHANISTAN (2014).

232. This is a reality that the military already experiences. Unintended pregnancies in the military are 50% higher than those of women in the general population. Andrews, *supra* note 192. Furthermore, women already have a difficult time obtaining contraception while deployed, which exacerbates the problem even more. See *id.*

233. Christopher Preble, *Don’t Make Women Register for the Draft. Just End Draft Registration for Everyone*, WASH. POST (Feb. 5, 2016), https://www.washingtonpost.com/posteverything/wp/2016/02/05/dont-make-women-register-for-the-draft-just-end-draft-registration-for-everyone/?postshare=3761454689973807&tid=ss_tw-bottom.

surrounding gender integration of combat arms.²³⁴ While this viewpoint has value and may come to pass someday, it seems unlikely this will be the direction that Congress will choose. Selective Service provides a relatively low cost means of providing manpower projections to the federal government, which can be used whenever necessary.²³⁵ As one representative put it, Selective Service is a “small price to pay for an agency that has the potential to avert a crisis should the Draft ever need to be reinstated.”²³⁶ Furthermore, it is simple and non-obstructive in its execution. Young men register once upon turning eighteen, can now do so online, and only need to contact the Selective Service System if they have an address change between the ages of eighteen and twenty-six.²³⁷ Such simple constraints seem like a small price to pay for our nation to maintain a constant state of military readiness.

C. *Mending the Generational Disconnect Through Gender Inclusive Selective Service and Conscription*

On the outset, female inclusion in Selective Service registration might have little pay off. The United States is currently reducing its voluntary military force and

234. Leading the call to eliminate the draft is Senator Rand Paul, whose proposal to do away with Selective Service ultimately failed. See David Weigel, *Rand Paul's Tribute to Muhammad Ali: Trying to End Selective Service*, WASH. POST (June 6, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/06/06/rand-pauls-tribute-to-muhammad-ali-trying-to-end-selective-service/>. Paul's proposal was motivated by, and named in honor of, the late Muhammad Ali. *Id.*

235. Richard Lardner, *House Approves Measure to Bar Women from Draft Registration*, ASSOCIATED PRESS (July 7, 2016, 7:13 PM), <http://www.militarytimes.com/story/military/capitol-hill/2016/07/07/house-approves-measure-bar-women-draft-registration/86830536/>.

236. *Id.* (internal quotations omitted).

237. *Change of Information—Address and Personal Information*, SELECTIVE SERVICE SYSTEM, <https://www.sss.gov/home/address-change> (last visited July 6, 2016).

withdrawing from two separate conflicts spanning almost two decades.²³⁸ It is unlikely that we will see the need for conscription to be used anytime soon. But, should the need arrive for a draft force or should America choose to initiate mandatory conscription, a gender inclusive system would greatly help in bridging a generational disconnect with the military. Following the Vietnam War, millions of young men returned home to a country that did not understand their service or their struggle. Fifty percent of the American community—women—could not relate to what these young men had experienced. If the Draft were employed in a future American military conflict, a gender-integrated force would serve as a better snapshot of American youth. With women serving side-by-side with men, it would allow a greater percentage of the American populace to empathize with those returning home from overseas service.

Furthermore, a gender inclusive Selective Service and draft military would better connect American youth with America's civil service roots. Our country was founded on the militia principle: the concept that when the time came to defend our values and our nation, our people would heed the call.²³⁹ That is not to say that millions have not already answered that call or that military service should be a requirement for all private citizens. Not everyone is made to be a soldier or a Marine. Nevertheless, military service would better unite millennials and future generations to the foundations of our nation. Moreover, the registration of all

238. Mark Landler, *U.S. Troops to Leave Afghanistan by End of 2016*, N.Y. TIMES (May 27, 2014), http://www.nytimes.com/2014/05/28/world/asia/us-to-complete-afghan-pullout-by-end-of-2016-obama-to-say.html?_r=0; Lt. Clarence E. McKnight Jr., *Military Cutbacks: The Perils of Downsizing*, HUFFINGTON POST (Aug. 27, 2015, 5:50 PM), http://www.huffingtonpost.com/lt-gen-clarence-e-mcknight-jr-/military-cutbacks_b_8048414.html.

239. See Meyer Kestnbaum, *Citizen-Soldiers, National Service and the Mass Army: The Birth of Conscription in Revolutionary Europe and North America*, in 20 THE COMPARATIVE STUDY OF CONSCRIPTION IN THE ARMED FORCES 126 (Lars Mjøset & Stephen Van Holde eds., 2002).

available citizens with the Selective Service System invests both men and women equally into any future decisions made to go to war or employ the Draft. Giving young women and men a balanced stake in the consequences of combat might inevitably change the direction of an international conflict.

CONCLUSION

Military service has long been considered part and parcel of national civic service. Those who answered the call to service during World War II have been labeled America's Greatest Generation, even though a good majority of those that served were drafted.²⁴⁰ Whether they came voluntarily or through conscription, they answered the Nation's call in a dire moment. For that, they have earned themselves a permanent place of reverence in the hearts and minds of Americans. Looking forward, while use of the Draft may not be imminent, Selective Service allows our nation the flexibility to respond quickly should the need for more manpower arise. Throughout the history of our country, this has been a burden that has fallen on young men. Due to recent actions by the Secretary of Defense, it need not remain this way. Young women across the country will very likely be required to register with Selective Service. *Rostker v. Goldberg* no longer holds weight under the premise that women are not similarly situated to serve as their male counterparts.²⁴¹ Thus, the opening of combat arms roles to women signals a shift in both American military policy, but also American civil mindset.

Female registration with the Selective Service System and any subsequent draft will have repercussions that are felt at every level of military and civilian life. The United States Armed Forces will need to determine what roles they

240. TOM BROKAW, THE GREATEST GENERATION *passim* (1998); *Induction Statistics*, *supra* note 25.

241. 453 U.S. 57, 79 (1981).

envision women playing in any future conflict. With the recent history of women facing direct action and the inclusion of women into combat arms roles, it is safe to say that such roles may include some nature of combat. Furthermore, a gender integrated Selective Service pool and draft would pay great dividends towards resolving a disconnect between the civilians of this generation and military service. It would allow American youth to better connect with the civic service roots of this nation and allow both genders to feel as though they are equally invested in any future military conflict.

In a perfect world, the Draft would not be needed. Our conflicts could be resolved peacefully, without the need for conscripted troops pulled from their lives and forced to the battlefield. But the history of humanity, particularly that of our Nation, shows this perfect world to exist only in dreams. The United States of America will continue to be involved in military engagements all over the world, and some of these engagements, as they have previously, will require the use of conscripted personnel. However, going forward the pool of available draftees should greatly increase due to the gender integration of all military occupations. Women will finally be added to the equation of combat, serving beside, or in conjunction with, their male counterparts. And with that equality of opportunity will come with it the equality of civic service. In some future litigation or Congressional action, *Rostker v. Goldberg* will be inoperative due to its outdated views on women in combat. Women will finally take the plunge and register their names with the Selective Service System, thereby providing balance to any future use of conscription.