

The Military Selective Service Act's Exemption of Women: It is Time to End It

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*The Congress shall have the Power to . . . provide for the common Defence To raise and support Armies . . . [and t]o provide and maintain a Navy*¹

*If a deeply-rooted military tradition of male-only draft registration is to be ended, it should be accomplished by that branch of government which has the constitutional power to do so and which best represents the "consent of the governed"—the Congress of the United States, the elected representatives of the people.*²

I. Introduction

The Military Selective Service Act (MSSA)³ requires male citizens and legal residents between the ages of eighteen and twenty-six to register for possible conscription in the event of a draft.⁴ Women are exempt from this requirement.⁵ The MSSA exempts women primarily because the draft has been viewed as a mechanism for rapidly inducting troops into combat positions from which women have traditionally been excluded.⁶

Although the exclusion of women from ground combat roles continues, a large majority of military occupational specialties (MOSs) and duty positions are open to women in today's all-volunteer force.⁷ Possible shortages of military recruits are not likely to be limited to combat MOSs and duty positions from which women are excluded. On the contrary, a majority of male conscripts, though eligible for duty in ground combat, would presumably fill positions that could also be filled by women. This is so simply because most military positions are in the support branches, rather than in combat arms.⁸

The time has come for Congress to reconsider its narrow view of the draft as a means only of augmenting combat troop strength. Congress should broaden the intended purpose of the MSSA to include augmenting troop strength in combat support and combat service support roles in which women are eligible to serve. There is little reason to eschew half of the pool of potential recruits, nor to exempt that half of the population from its civic obligations. This proposed change does not

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¹ U.S. CONST. art. I, § 8.

² *Schwartz v. Brodsky*, 265 F. Supp. 2d 130, 135 (D. Mass. 2003). In this case, the U.S. District Court for the District of Massachusetts upheld the male-only registration requirement in the Military Selective Service Act (MSSA). *Id.* This case is discussed in Part V of this article.

³ Military Selective Service Act, 50 U.S.C. App. §§ 451–473 (2000).

⁴ *Id.* § 453.

[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who . . . is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

Id.

⁵ *See id.*

⁶ *Rostker v. Goldberg*, 453 U.S. 57, 76 (1981). *Rostker* is the seminal U.S. Supreme Court case addressing the constitutionality of the male-only registration requirement in the MSSA. *Id.* The plaintiffs challenged the exemption of women from registration obligations on several grounds, among them that the exemption violated equal protection because it discriminated against men. *Id.* at 62 n.2. The Court upheld the statute's exemption of women because women were excluded from combat positions at the time and Congress viewed the draft primarily as a means of obtaining combat replacements. *Id.* at 79.

⁷ MARGARET C. HARRELL ET AL., RAND NATIONAL DEFENSE RESEARCH INSTITUTE, ASSESSING THE ASSIGNMENT POLICY FOR ARMY WOMEN 5–6 (2007) (stating that 92.3 % of Army MOSs and 70.6 % of Army positions overall are open to women).

⁸ *See, e.g.*, JOHN J. MCGRATH, THE OTHER END OF THE SPEAR: THE TOOTH-TO-TAIL RATIO IN MODERN MILITARY OPERATIONS (THE LONG WAR SERIES, OCCASIONAL PAPER 23) (2007) (stating that the "tooth to tail" ratio of Army troops assigned to combat units compared to those assigned to units with support missions is 1 to 2.5 in Iraq). That ratio Army-wide would presumably be even greater, given the array of units and training missions that are not present in a theater of combat operations.

rely on any change in current policy regarding the assignment of women to combat positions,⁹ but any broadening of the assignment opportunities available to women would only underline the desirability and equity of subjecting women to MSSA registration requirements.

Part II of this article briefly summarizes the use of conscription in American history. Part III explains the provisions of the MSSA and the policy considerations underlying the statutory exemption of women from its requirements. Part IV discusses the advantages and disadvantages of using draftees versus an all-volunteer force. Part V details legal and political challenges to the MSSA's exemption of women. Part VI discusses current Department of Defense (DoD) and service assignment policies for women, to include its implementation in the Global War on Terrorism (GWOT). Part VII argues that the utility of conscription for filling non-combat positions dictates that Congress should amend the MSSA to subject women to its registration requirements.

II. Conscription in American History

A. Overview

1. Colonial Era to Civil War

The United States has a long tradition of relying on volunteers to defend it in times of conflict, beginning with colonial militias and continuing to today's all-volunteer force.¹⁰ However, conscription has been used to some degree since the colonial era, when membership in the militia was at times compulsory.¹¹ Since then, conscription has been used throughout America's history to provide for collective defense in times of need.¹²

During the American Revolution, the Continental Congress established quotas for each state's expected troop contribution.¹³ Both Congress and the states preferred volunteers. The states devised various incentives to obtain them, chiefly involving payment of bounties that were roughly equivalent to modern recruiting bonuses.¹⁴ The payment of bounties resulted in a degree of corruption, as Soldiers were known to enlist several times, each time with a different unit, to collect multiple payments.¹⁵

Despite the reference for volunteers, the states were often forced to resort to conscription to meet their quotas.¹⁶ Draftees were allowed to provide substitutes to perform their service, a practice that allowed for volunteers to be paid by private individuals rather than by state or local government.¹⁷ Without a mandated federal draft, Congress passed a resolution in 1778 recommending conscription by the states to meet their troop requirements, if necessary.¹⁸ In a letter to a Congressional committee concerned with military affairs, George Washington wrote:

Voluntary inlistments [sic] seem to be totally out of the question; all the allurements of the most exorbitant bounties and every other inducement, that could be thought of, have been tried in vain, . . . some

⁹ Policies excluding women from combat positions have come under increasing scrutiny due to the growing role of women in recent conflicts. See, e.g., Anna Quindlen, *Not Semi-Soldiers*, NEWSWEEK, Nov. 3, 2007, available at <http://www.newsweek.com/id/67917>; Kathryn Jean Lopez, *An Army of Janes: Democrats and Women at War*, NAT'L REV. ONLINE, Oct. 11, 2007, available at <http://article.nationalreview.com>.

¹⁰ See HEIDI GOLDING & ADEBAYO ADEDEJI, CONGRESSIONAL BUDGET OFFICE, *THE ALL-VOLUNTEER MILITARY: ISSUES AND PERFORMANCE 2* (2007) [hereinafter CBO REPORT].

¹¹ See BERNARD ROSTKER, *I WANT YOU! THE EVOLUTION OF THE ALL-VOLUNTEER FORCE* 19 (2006). Rostker previously served as the Director of Selective Service and is named in the seminal Supreme Court case *Rostker v. Goldberg* regarding the constitutionality of the all-male Selective Service system. See 453 U.S. 57 (1981).

¹² RICHARD V. L. COOPER, *MILITARY MANPOWER AND THE ALL-VOLUNTEER FORCE* 47-56 (1977).

¹³ ROSTKER, *supra* note 11, at 19.

¹⁴ *Id.* at 20.

¹⁵ *Id.* at 19.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 20.

other mode must be concerted, and no other presents itself, that of filling Regiments by drafts from the Militia. This is a disagreeable alternative, but it is an unavoidable one.¹⁹

Following the Revolution, compulsory membership in state militias continued for a short period.²⁰ President Madison proposed national conscription during the War of 1812, but his proposal was defeated in Congress.²¹ Daniel Webster was a prominent foe of national conscription at the time, arguing in response to the proposed conscription bill:

The Constitution is libelled, foully libelled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasure & blood a Magna Carta to be slaves. Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents, & parents from their children, & compel them to fight the battles of any war, in which the folly or wickedness of Government may engage it? . . . I almost disdain to go to quotations & references to prove that such an abominable doctrine has no foundation in the Constitution of the country.²²

By the time of the Mexican War from 1846–1848, mandatory militia service had been replaced by “voluntary membership in local military companies, which Congress allowed to be organized under the militia clause of the Constitution.”²³ During the period between the Revolutionary War and the Civil War, the needs of a small standing army were met with volunteers.²⁴ Indeed, the practice of involuntary service had eroded to such an extent by the 1830s that Alexis de Tocqueville observed: “In America conscription is unknown and men are induced to enlist by bounties. The notions and habits of the people of the United States are so opposed to compulsory recruiting that I do not think it can ever be sanctioned by the laws.”²⁵ De Tocqueville’s assessment may have appeared accurate for several decades, but it was sharply contradicted in the 1860s.

The first large scale use of the draft occurred in what could be viewed as the first American war of the modern industrial age—the Civil War.²⁶ Both sides in the conflict were required to raise armies of a size unimaginable to earlier generations. Whereas American armies participating in earlier conflicts numbered in the thousands,²⁷ the total number of Union and Confederate troops fielded in the Civil War numbered in the millions.²⁸ While the large majority of troops raised by the North and South consisted of volunteers,²⁹ conscription was needed to supplement the forces of both sides.

¹⁹ *Id.* at 19–20 (quoting George Washington, Letter to the Committee of Congress with the Army: Headquarters (Jan. 29, 1778), in *THE WRITING OF GEORGE WASHINGTON FOR THE ORIGINAL MANUSCRIPT SOURCES* 366 (John C. Fitzpatrick ed., 1931–1944)).

²⁰ *Id.* at 21.

²¹ 1 *A HISTORICAL REVIEW OF THE PRINCIPLE OF CITIZEN COMPULSION IN THE RAISING OF ARMIES, BACKGROUNDS OF SELECTIVE SERVICE*, SPECIAL MONOGRAPH NO. 1, at 60–61 (1949).

²² 3 *THE SELECTIVE SERVICE ACT: ITS LEGISLATIVE HISTORY, AMENDMENTS, APPROPRIATIONS, COGNATES, AND PRIOR INSTRUMENTS OF SECURITY*, SPECIAL MONOGRAPH NO. 2, Apps. A–B, at 159–60 (1954) (quoting Webster’s speech on the conscription bill made in the House of Representatives on 9 December 1814).

²³ ROSTKER, *supra* note 11, at 21; *see also id.* n.13 (quoting Frederick Morse Cutler, *The History of Military Conscription with Special Reference to the United States* 49 (1922) (unpublished dissertation, Clark University) (describing the rise of voluntary militia service between 1815 and 1846)).

²⁴ *See id.* at 21 n.14.

The Army was disbanded after the Revolution . . . with the exception of one company of soldiers retained to protect the military stores of the nation at West Point and Fort Pitt. By 1798, the Army totaled 2,100. At the start of the War of 1812, about 80,000 volunteers and militia augmented the regular Army of 6,744. At the start of the Mexican War, the regular Army numbered 8,349; at the start of the Civil War, it was 16,367.

Id. (internal citations omitted).

²⁵ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* ch. 13 (1835), available at <http://xroads.virginia.edu/~HYPER/hypertext.html#t>.

²⁶ *See* COOPER, *supra* note 12, at 49 (noting that the North issued 250,000 draft notices, although only 46,000 draftees were actually inducted); BRUCE CATTON, *BRUCE CATTON’S CIVIL WAR* 363–66 (1984) [hereinafter *CATTON’S CIVIL WAR*] (describing the prodigious expansion of Northern industry during the war); BRUCE CATTON, *AMERICA GOES TO WAR: AN INTRODUCTION TO THE CIVIL WAR AND ITS MEANING TO AMERICANS TODAY* 14 (MJB Books 1986) (1958) (stating that “[t]he Civil War was the first of the world’s really modern wars”).

²⁷ *See* ROSTKER, *supra* note 11, at 19–21 (2006); *see also, e.g.*, BENSON BOBRICK, *ANGEL IN THE WHIRLWIND: THE TRIUMPH OF THE AMERICAN REVOLUTION* 455 (Penguin Books 1998) (1997) (stating that the American army that besieged Yorktown consisted of only 9000 soldiers, of which 3500 were militia).

²⁸ *See* CBO REPORT, *supra* note 10, at 3.

²⁹ *Id.*

The Confederacy resorted to national conscription before the Union, passing a draft law on 16 April 1862.³⁰ Bernard Rostker noted that this was “ironic”:

[I]n 1814, those [states] who now made up the Confederacy had argued that it was the right of the states to raise the militia and had blocked President Madison’s proposal for a national—federal—draft. Now, in 1862, it was the “Confederate Congress [that] threw the theory of states’ rights to the winds and enacted the first ‘Conscription Law’.”³¹

The Confederate draft law was far reaching, requiring every able-bodied white male between the ages of eighteen and thirty-five to serve in the Army for three years, as well as extending the enlistments of those who had previously volunteered.³² Twenty-one percent of the Confederate Soldiers during the war were draftees.³³

In contrast, the Union waited until almost a year after the Confederates began their draft to enact its first conscription law, entitled the Enrollment Act, on 3 March 1863.³⁴ The Union draft did not cast as wide a net as its Southern counterpart, but it still resulted in a substantial augmentation of Northern forces. The Union Army inducted roughly 50,000 draftees and another 120,000 substitutes for draftees.³⁵ This meant that the draft accounted, directly and indirectly, for approximately 170,000 of the two to three million Union troops estimated to have served during the course of the war.³⁶ Approximately 87,000 federal draftees paid a commutation fee to avoid military service.³⁷

Payment of bounties was a common element of both Revolutionary and Civil War recruitment strategies due to the reluctance of states to resort to the coercion of a draft.³⁸ Also similar to the Revolutionary War, payment of bounties led to the practice of “bounty jumping,” whereby Soldiers seeking to cash in on those incentives would enlist repeatedly in order to collect the bounties.³⁹ Despite this unscrupulous practice, conscription was a spur to voluntary recruitment because of its effect on the financial incentives that were offered by the states.⁴⁰

Following the conclusion of the Civil War, the United States did not resort to the draft for the remainder of the nineteenth century.⁴¹ The Indian Wars and the Spanish-American War were fought by volunteers.⁴²

2. The Twentieth Century

The United States employed conscription both in times of war and peace during the twentieth century. Draftees served in large numbers in World War I, World War II, the Korean War, and Vietnam.⁴³ They served in peacetime during periods

³⁰ ROSTKER, *supra* note 11, at 22.

³¹ *Id.* n.15 (2006) (quoting in part Frederick Morse Cutler, *The History of Military Conscription with Special Reference to the United States* 172 (1922) (unpublished dissertation, Clark University)).

³² *Id.* at 22.

³³ *Id.* (attributing this information to John Whiteclay Chambers, II, *Conscription*, in *THE READER’S COMPANION TO AMERICAN HISTORY* (Eric Foner & John A. Garraty eds., 1991)).

³⁴ *Id.*

³⁵ CBO REPORT, *supra* note 10, at 3–4.

³⁶ ROSTKER, *supra* note 11, at 22.

³⁷ *Id.* at 23.

³⁸ *See id.*

³⁹ *Id.* Rostker notes that one soldier reputedly enlisted thirty-two times. *Id.* (attributed to Cutler, *supra* note 23, at 64).

⁴⁰ *See id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ CBO REPORT, *supra* note 10, at 3.

preceding World War II, between World War II and the Korean War, and between the Korean War and the Vietnam War.⁴⁴ Conscription ended in 1973 and has since not been resumed.⁴⁵

During World War I, 2.8 million draftees constituted roughly 70% of the U.S. military, partly because voluntary enlistments were halted “so as not to disrupt the ‘orderly’ flow of individuals through the draft system.”⁴⁶ The statute that governed the draft during World War I—the Selective Service Act of 1917—differed substantially from preceding law in that it did not allow for personal substitution, though it did allow deferments for essential work.⁴⁷ “The term Selective Service was used to capture the idea that, while all men of a specific age group—eventually 18 to 45—might be required to register, only some would be selected for military service, an amount that was in line with the total needs of the nation.”⁴⁸ After the conclusion of the war in 1918, the draft was ended and the Army was downsized from almost 4 million Soldiers to a force of 200,000 volunteers by 1920.⁴⁹

Authority for the draft was reinstated in 1940, as the likelihood of United States involvement in World War II increased.⁵⁰ This draft was similar to that of World War I, in that the registration requirement was generally applicable to men of military age—initially those between the ages of twenty-one and thirty-six, later reduced to the ages of twenty-one to twenty-eight.⁵¹ Deferments were authorized for individuals in specified occupations⁵² and for students, but only for the duration of an academic year.⁵³ Fathers and married men were not specifically exempted or deferred, but the President was authorized to defer potential draftees based on their need to support dependents.⁵⁴

Draftees accounted for a similar proportion of American troops during World War II as they did during World War I.⁵⁵ Draftees numbering 10.1 million accounted for almost two-thirds of the American armed forces in World War II. Also similar to World War I, voluntary enlistments were curtailed. In his 1977 analysis of the All-Volunteer Force (AVF), Richard Cooper provided an overview of the history of American conscription, stating:

By 1943, in order to better control and organize crucial production needs, no volunteers were being accepted. The induction process was totally responsible for military manpower procurement as it had been during World War I, and for the rest of the war a variety of regulations and deferments were enacted to meet specific industrial and military needs.⁵⁶

A relatively small number of draftees served during the interim period between the end of World War II and the beginning of the Korean War. Involuntary inductions were suspended in 1949 and legal authority for the draft was set to expire on 25 June 1950.⁵⁷ North Korean forces invaded South Korea on 24 June 1950, however, which led to an extension of the authority for conscription.⁵⁸ Compared to World Wars I and II, the number of draftees declined in the Korean War in

⁴⁴ *Id.* at 2–3.

⁴⁵ *See id.* at 6.

⁴⁶ COOPER, *supra* note 12, at 51.

⁴⁷ *Id.*

⁴⁸ ROSTKER, *supra* note 11, at 24. Rostker notes that 23.9 million men were registered and classified during World War I, but only 2.8 million were drafted. *Id.*

⁴⁹ *Id.* at 25 n.23 (attributed to JOHN WHITECLAY CHAMBERS, II, TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA 252 (1987)).

⁵⁰ COOPER, *supra* note 12, at 52. Cooper states that supporters of a pre-war draft felt that “conscription through selective service was the only way to prepare for our inevitable entry into war.” *Id.*

⁵¹ ROSTKER, *supra* note 11, at 26.

⁵² *Id.* For example, deferments were authorized for “government officials and for those ‘employed in industry, agriculture or other occupations or employments’ who were ‘necessary to the maintenance of public health, interest, and safety.’” *Id.* (quoting in part LEWIS B. HERSHEY, SELECTIVE SERVICE IN PEACETIME: A REPORT TO THE PRESIDENT 35 (1942)).

⁵³ ROSTKER, *supra* note 11, at 26.

⁵⁴ *Id.* (quoting in part HERSHEY, *supra* note 52). Regarding married men and fathers, Rostker states that “[w]hile not specifically mentioning these two classes, the law allowed the President to defer ‘those men in a status with respect to persons dependent on them for support which renders their deferment advisable.’” *Id.*

⁵⁵ COOPER, *supra* note 12, at 52 tbl.4-1. Draftees comprised 59% of the military in 1918 and 61% of the military in 1945. *Id.*

⁵⁶ *Id.* at 54.

⁵⁷ ROSTKER, *supra* note 11, at 27.

⁵⁸ *Id.*

both absolute and relative terms. Roughly 1.5 million troops were drafted during the Korean War,⁵⁹ satisfying about 50% of the military's accession requirements between June 1950 and July 1953.⁶⁰

The U.S. maintained a peacetime draft between the end of the Korean War in 1953 and the beginning of large scale deployments of troops to Vietnam in the 1960s. The number drafted, compared to the number of those eligible, was relatively low.⁶¹ National security commentator Aaron Friedberg commented:

Limited conscription—from Korea to Vietnam—aroused little opposition so long as the number of those drafted remained relatively small, the use to which they were put retained broad public approval, those who preferred to avoid service could do so with relative ease, and the inevitable inquiry of the selection process did not receive undue attention. If one of these parameters changed, support for the draft would weaken; if all of them changed at once, it would disappear altogether.⁶²

As will be discussed in the following section, three of these four parameters changed significantly during the Vietnam War: the number of those drafted did not remain relatively small, the use to which they were put did not retain broad public approval, and the selection process received close, if not undue, attention. The parameter that arguably did not change, the ease of avoiding service, came to represent the unfairness of the draft system and thereby undermined its support.

As during the Korean War, the absolute and relative numbers of those drafted were less than those in World Wars I and II. Approximately 1.9 million were drafted during the Vietnam era between August 1964 and March 1973, but draftees accounted for slightly less than half of the enlisted recruits even during the draft's peak from 1966 to 1969.⁶³ The draft ended in 1973,⁶⁴ generally correlating to the withdrawal of significant combat forces from Vietnam.⁶⁵

B. Draft Opposition and Inequities

Any use of conscription is bound to arouse some opposition, whether from the general public or only from those subject to being drafted. The degree of opposition and perceived unfairness to conscription, however, has varied greatly in American history. The most significant protests to American conscription occurred during the Civil War and the Vietnam War.

1. Civil War

The draft inspired fierce opposition in the North during the Civil War due to the unpopularity of the war in some quarters and because of perceived inequities in the conscription system.⁶⁶ In the summer of 1863, the opposition peaked during draft riots in New York City which required federal troops to quell them.⁶⁷ The primary complaint about the conscription law was that it favored the wealthy by allowing draftees to avoid service either by finding a substitute or by paying a commutation fee of \$300.⁶⁸ Thus, the rich could easily avoid service while the working class and poor had no such opportunity. The unfairness of this situation was recognized by national leaders, leading to the abolition of commutation fees and substitutes in

⁵⁹ CBO REPORT, *supra* note 10, at 3.

⁶⁰ *Id.*

⁶¹ ROSTKER, *supra* note 11, at 27–28. Rostker notes that “[i]n 1961, draft calls dropped to 113,000. In 1962, only 76,000 were called, and in 1963, only 119,000 were drafted. In comparison, by January 1962, more than 430,000 draft-eligible men had educational or occupational deferments.” *Id.* at 28.

⁶² *Id.* at 27 (quoting AARON FRIEDBERG, IN THE SHADOW OF THE GARRISON STATE: AMERICA'S ANTI-STATISM AND ITS COLD WAR STRATEGY 179 (2000)).

⁶³ CBO REPORT, *supra* note 10, at 3.

⁶⁴ *Id.* at 6.

⁶⁵ PHILLIP B. DAVIDSON, VIETNAM AT WAR: THE HISTORY: 1946–1975, at 656 (1988). Davidson notes that one of the provisions of the January 1973 Paris Agreement required the withdrawal of U.S. forces from South Vietnam. *Id.*

⁶⁶ See JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN'S OPPONENTS IN THE NORTH 107–11 (2006) (discussing the opposition to conscription in the North during the Civil War and the active defiance it sometimes led to, particularly on the part of the working class and certain immigrant groups).

⁶⁷ *Id.*

⁶⁸ *Id.* at 88.

future drafts.⁶⁹ There was also significant opposition to the draft in the South, where critics believed that national conscription conflicted with the doctrine of states' rights ostensibly being defended by the Confederacy, but no protests on the scale of the New York City riots occurred.⁷⁰

2. Vietnam

The drafts that were instituted for World War I, World War II, and the Korean War were not free of criticism, but they allowed fewer reasons for draft exemptions and did not spark the same sort of protest as that of the Civil War.⁷¹ The Vietnam era draft, however, became notoriously unpopular and served as a prime motivator for protest of the war itself.⁷² Though various grounds for exemption or deferment existed, the most apparently unfair was that which allowed for draft deferments for college and graduate students.⁷³ Because higher education was less available to minorities and the poor, this deferment appeared to favor the predominantly white middle and upper classes, leading to perceptions of favoritism based on both class and race.⁷⁴

In response to such criticisms and the rise in protest against the draft and the war, the draft law was amended in 1969 to permit a draft lottery,⁷⁵ which assigned a prioritized number for potential draftees based upon their birth date.⁷⁶ Those whose birthdays were drawn first were assigned the lowest numbers, and were the most likely to be drafted. This was viewed as a political move on the part of President Nixon and Congress, because it neutralized the draft as a motivating factor for protest by the majority of military age men who were not among the early numbers drawn.⁷⁷ Further amendments eliminated most student deferments.⁷⁸

C. End of the Draftee Military

Pursuant to campaign promises to abolish the draft, President Nixon chartered the President's Commission on an AVF, otherwise known as the Gates Commission after its chairman, former Secretary of Defense Thomas Gates.⁷⁹ In 1970, the Gates Commission recommended that the United States utilize an AVF, but that it retain a conscription system that could be implemented to obtain additional military personnel if needed.⁸⁰ The Commission's report stated:

[Conscription] has been a costly, inequitable, and divisive procedure for recruiting men for the armed forces. It has imposed heavy burdens on a small minority of young men while easing slightly the tax burden on the rest of us. . . . These costs of conscription would have to borne if they were a necessary price

⁶⁹ CBO REPORT, *supra* note 10, at 4.

⁷⁰ ROSTKER, *supra* note 11, at 22 (“The draft was extremely unpopular in the South” but it “fared far better than in the North”); CATTON’S CIVIL WAR, *supra* note 26, at 304. The Governor of Georgia, Joseph E. Brown, stated to Jefferson Davis that “your doctrine [regarding conscription] carried out not only makes Congress supreme over the states at any time when it chooses to exercise the full measure of its power to raise armies, but it places the very existence of state governments subject to the will of Congress.” *Id.*

⁷¹ See ROSTKER, *supra* note 11, at 24–27.

⁷² See generally MYRA MACPHERSON, LONG TIME PASSING: VIETNAM & THE HAUNTED GENERATION 99–112 (1984). MacPherson conducted numerous interviews with men who admitted that their opposition to the Vietnam War was based largely on their own desire to avoid serving in it. *Id.*; see also NORMAN PODHORETZ, WHY WE WERE IN VIETNAM 79 (Touchstone 1983) (1982). Podhoretz does not explore this subject, but notes President Johnson’s reluctance to expand conscription because of the political resistance he expected as a result. PODHORETZ, *supra*.

⁷³ CBO REPORT, *supra* note 10, at 5.

⁷⁴ *Id.*

⁷⁵ Selective Service Amendment Act of 1969, Pub. L. No. 91-124, 83 Stat. 220.

⁷⁶ President Nixon implemented a draft lottery by presidential proclamation. Proclamation No. 3945, 34 Fed. Reg. 19,017 (Nov. 26, 1969).

⁷⁷ See MACPHERSON, *supra* note 72. MacPherson estimated that of the lottery numbers, “the first third drawn were virtually certain to be called, those in the middle had a fifty-fifty chance, and those in the last third . . . were home free.” *Id.* at 148. She noted further that members of the antiwar movement were concerned about a loss of activism among those with high lottery numbers. *Id.* at 149. In the words of one lottery participant, “[p]eople who are free [of the risk of being drafted] seem self-satisfied.” *Id.*

⁷⁸ Pub. L. No. 92-129, tit. I, § 101(a)(1), 85 Stat. 348 (1971).

⁷⁹ THOMAS GATES ET AL., PRESIDENT’S COMMISSION ON AN ALL-VOLUNTEER FORCE (1970).

⁸⁰ *Id.* at iii.

for defending our peace and security. They are intolerable when there is an alternative consistent with our basic national values.⁸¹

Congressional authorization of the draft expired in 1973⁸² and the Selective Service registration requirement was suspended by President Ford in 1975.⁸³ In 1980, President Carter exercised his authority under the MSSA to reinstate the Selective Service registration requirement.⁸⁴ When he did so, he also requested that Congress amend the MSSA to allow for registration and conscription of women.⁸⁵ Congress ultimately elected not to amend the MSSA in that manner, for reasons that will be addressed in Part III.

III. The Military Selective Service Act

A. The MSSA Prior to 1979

The MSSA was initially passed in 1948 in response to the growing threat of communism following World War II.⁸⁶ At the time, the idea of a peacetime draft met with some opposition,⁸⁷ but the need for military preparedness won out, and Congress passed the MSSA.⁸⁸ The draft was in effect from 1948 until the Korean War started in 1950, and was then amended in 1951.⁸⁹ Further amendments were passed in 1967,⁹⁰ 1969,⁹¹ and 1971,⁹² all during the Vietnam War. As mentioned previously, draftees composed approximately half of the enlisted accessions into the military during the Korean conflict from 1950 to 1953, and almost as much during the height of the Vietnam War from 1966 to 1969.⁹³

The draft was subject to relatively little protest during the Korean War and the decade that followed, but this period of calm gave way to division and controversy surrounding the war in Vietnam. As mentioned in the previous section, inequities in the conscript law came under great scrutiny and criticism during the Vietnam War. The relative ease of getting a deferment for middle or upper class men came under fire as the Vietnam War progressed.⁹⁴ Critics assailed the system as being unfair, often while availing themselves of its deferments.⁹⁵ Regardless of the sincerity of the critics, however, there can be no doubt that the availability of various deferments led to abuses.⁹⁶ Draft avoiders sought any and every means at their disposal to avoid the draft.⁹⁷

⁸¹ *Id.* at 9–10.

⁸² Pub. L. No. 92-129, tit. I, § 101(a)(1).

⁸³ Proclamation No. 4360, 40 Fed. Reg. 14,567 (Mar. 29, 1975).

⁸⁴ Bernard Rostker was the Director of Selective Service at the time and he provides a detailed insider's view of the Carter Administration's actions during this period. ROSTKER, *supra* note 11, at 437–41. President Carter announced his intention to renew draft registration in his State of the Union address on 23 January 1980, and subsequently obtained congressional approval of funding for its implementation. *Id.*

⁸⁵ President Carter's recommendation to subject women to the MSSA's requirements was transmitted to Congress in a report on Selective Service required by the Department of Defense Authorization Act of 1980. Pub. L. No. 96-107, 93 Stat. 803. ROSTKER, *supra* note 11, at 441.

⁸⁶ ROSTKER, *supra* note 11, at 27.

⁸⁷ Senator Robert Taft, for example, stated his opinion of conscription in the spring of 1945, while World War II was still raging in the Pacific: "Military conscription is essentially totalitarian . . . because it is the most extreme form of compulsion, military conscription will be more the test of our whole philosophy than any other policy . . . It is against the fundamental policy of America . . . and if adopted, will color our whole future." COOPER, *supra* note 12, at 56.

⁸⁸ "The Military Selective Service Act" was the short title of the act passed on 24 June 1948, ch. 625, tit. I, § 1, 62 Stat. 604. See DAVIDSON, *supra* note 65 (noting President Johnson's participation in the congressional debate over the MSSA while he was a congressman).

⁸⁹ Act passed on June 19, 1951, ch. 144, tit. I, § 1(a), 65 Stat. 75.

⁹⁰ Military Selective Service Act of 1967, Pub. L. No. 90-40, § 1(1), 81 Stat. 100.

⁹¹ Selective Service Amendment Act of 1969, Pub. L. No. 91-124, 83 Stat. 220 (authorizing a modified selection process).

⁹² Pub. L. No. 92-129, tit. I, § 101(a)(1), 85 Stat. 348 (1971).

⁹³ See *supra* notes 57–63 and accompanying text.

⁹⁴ See MACPHERSON, *supra* note 72, at 30 (stating with regard to various deferments and draft evasion measures that "[d]raft dodging was mainly for the privileged").

⁹⁵ See *id.* at 28–30.

⁹⁶ *Id.* at 36–38.

⁹⁷ *Id.*

From a purely pragmatic standpoint, the essential purpose of a draft is, of course, to provide military manpower in a manner that is administratively manageable. But the overall fairness of the system, or at least public perception of fairness, is crucial to inspiring public confidence and maintaining public support, both for the system itself and for any war fought by a conscripted force.⁹⁸ As a means of fairly distributing the civic obligations of military service across the social spectrum, many viewed the draft as a failure.⁹⁹ The system worked fairly well, however, as a means of providing large numbers of conscripts in an orderly manner.¹⁰⁰ So, while the draft system during the Vietnam War cannot be termed an outright failure, it did fail in the social and political realms, and served as a source of division during the war.¹⁰¹

For reasons discussed earlier, the draft was ended in 1973 and President Ford suspended the registration requirement in 1975.¹⁰² President Carter pardoned Vietnam era violators of the MSSA upon assuming office in January 1977.¹⁰³ Despite various amendments to the MSSA during the 1960s and 1970s,¹⁰⁴ the statute still did not allow for the registration and possible conscription of women.¹⁰⁵

B. Current MSSA

1. 1980 Resumption of Registration

In 1980, President Carter ordered resumption of Selective Service registration in response to the Soviet invasion of Afghanistan¹⁰⁶ and requested that Congress amend the MSSA to authorize the registration of women.¹⁰⁷ The DoD made contingency plans for the inclusion of women in the MSSA, which appeared to some to be a “foregone conclusion.”¹⁰⁸ While Congress agreed to authorize funding of renewed registration, it did not agree to amend the MSSA in the manner requested.¹⁰⁹

Congressional opposition to drafting women centered on the exclusion of women from combat roles.¹¹⁰ Although the purpose of the draft was not limited to providing Soldiers for the combat arms, opponents of including women in the draft perceived that to be its primary purpose.¹¹¹ Other critics simply believed that a majority of women were not suited for

⁹⁸ See CBO REPORT, *supra* note 10, at 5.

⁹⁹ *Id.* Golding and Adedeji wrote:

As the Vietnam War escalated in the mid- and late 1960s, the number of young men who were drafted grew, and opposition to the war and the draft intensified. Concerns about who was called to serve and about the fairness of deferments and exemptions increased. In a 1966 poll, for instance, fewer than half of respondents said the draft was handled fairly in their community.

Id.

¹⁰⁰ See *id.* at 3 (noting that roughly 1.9 million draftees were inducted into the military between 1964 and 1973).

¹⁰¹ GATES ET AL., *supra* note 79, at 9 (noting that after World War II, the draft had been “costly, inequitable, and divisive”). In context, there is no doubt that this conclusion was primarily attributable to the Vietnam era.

¹⁰² See *supra* notes 79–83 and accompanying text.

¹⁰³ Proclamation No. 4483, 3 C.F.R. 4 (1977); Exec. Order No. 11,967, 3 C.F.R. 91 (1977).

¹⁰⁴ See *supra* notes 90–92 and accompanying text.

¹⁰⁵ See *infra* notes 107–113 and accompanying text.

¹⁰⁶ ROSTKER, *supra* note 11, at 438 (describing the desire of the Carter Administration to enhance military readiness as a signal of resolve to the Soviet Union).

¹⁰⁷ See *supra* note 85 and accompanying text.

¹⁰⁸ ROSTKER, *supra* note 11, at 438; see Note, *Women and the Draft: The Constitutionality of All-Male Registration*, 94 HARV. L. REV. 406 (1980–1981) (arguing prior to the Supreme Court’s opinion in *Rostker v. Goldberg*, 453 U.S. 57 (1981), that all-male registration should be struck down as unconstitutional).

¹⁰⁹ Pub. L. No. 96-282, 94 Stat. 552 (1980).

¹¹⁰ *Rostker*, 453 U.S. at 76. The Court noted

Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops. The Senate Report explained, in a specific finding later adopted by both Houses, that “[i]f mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements”

Id. (quoting S. REP. NO. 96-826, at 160 (1980)).

¹¹¹ See, e.g., *id.* at 76. The Court quoted Senator Jepsen, who stated that “the shortage would be in the combat arms. That is why you have drafts.” *Id.*

military service and that those who were already had the opportunity to serve voluntarily.¹¹² Regardless of the reasons, Congress declined to authorize the registration and possible conscription of women.¹¹³

2. *The MSSA since 1980*

President Reagan gave serious consideration to rescinding the Selective Service registration requirement in the early 1980s.¹¹⁴ President Reagan opposed draft registration as a presidential candidate in 1980, stating in a letter to Senator Mark Hatfield:

[P]erhaps the most fundamental objection to draft registration is moral. Only in the most severe national emergency does the government have a claim to the mandatory service of its young people. In any other time, a draft or draft registration destroys the very values that our society is committed to defending.¹¹⁵

Upon assumption of the Presidency, however, President Reagan backed away from that view in deference to strong congressional, public, and military support for continued registration.¹¹⁶ The Joint Chiefs of Staff, for example, opined that,

the act of registration has tended to remind [young men] . . . of the obligation of citizenship and helps to rekindle pride in service and country. Thus, peacetime registration is an important element in terms of civic responsibility—an element that does not run against the grain of the American public.¹¹⁷

Conversely, the Military Manpower Task Force appointed to review various issues related to manning of the AVF came to a different conclusion. The task force recommended against peacetime registration, concluding that the infringement on individual liberty was not justified by peacetime needs.¹¹⁸ Ultimately, President Reagan disagreed with the task force recommendation and chose to continue peacetime registration.¹¹⁹ The registration requirement has been in effect continuously to the present day,¹²⁰ and the MSSA has not been amended in any substantive manner.¹²¹

IV. Draftees Versus the All-Volunteer Force

A. Overview

Whether women should be subject to the MSSA raises the overarching philosophical, political, and pragmatic issues of whether any American should be subject to a draft in the first place. America has always preferred to man its forces with volunteers, but has, throughout history resorted to conscription as necessary depending on circumstances. The decision of whether to staff forces with volunteers, draftees, or a combination thereof has profound implications for the structure,

¹¹² See ROSTKER, *supra* note 11, at 443 (quoting Congresswoman Marjorie Holt, who stated that “the majority of the American women want to stay out of the military”).

¹¹³ *Id.*; see also JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 347–62 (1982). Major General Holm, a retired Air Force officer, wrote that “Congress could not bring itself to shatter 204 years of tradition by including women.” *Id.* at 348.

¹¹⁴ President’s Announcement of the Establishment of the Military Manpower Task Force, July 8, 1981, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=44059>.

¹¹⁵ ROSTKER, *supra* note 11, at 506.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 507 (quoting Memorandum from General David C. Jones, Chairman of the Joint Chiefs of Staff, to the Secretary of Defense (Dec. 4, 1981)).

¹¹⁸ *Id.*

¹¹⁹ President’s Statement About Continuation of the Registration Program Under the Military Selective Service Act, Jan. 7, 1982, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=43019>.

¹²⁰ Military Selective Service Act, 50 U.S.C. App. § 451 (statutory history).

¹²¹ *But see* U.S. SELECTIVE SERVICE AGENCY, FISCAL YEAR 2007 ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES 9 (providing a summary of legislation proposed in 2007 that would have affected the MSSA. Two of the proposed bills are particularly noteworthy). Representative Ron Paul (R-TX.) introduced House Resolution (H.R.) 424 to repeal the MSSA and terminate the Selective Service system altogether. *Id.* Conversely, Representative Charles Rangel (D-NY) introduced The Universal National Service Act of 2007, H.R. 393, requiring all individuals between the ages of eighteen and forty-two, including women, to perform a period of either military or civilian service in support of national defense and homeland security. *Id.* Though these proposed bills were not enacted into law, their respective congressional sponsors continue to support them. See Susan Crabtree, *Rangel to Reintroduce Military Draft Measure*, THE HILL, Jan. 14, 2009; Ron Paul, *On Reinstating the Draft*, TEXAS STRAIGHT TALK, Feb. 16, 2009, http://www.house.gov/htbin/blog_inc?BLOG,tx14_paul,blog,999,All,Item%20not%20found,ID=090216_2679,TEMPLATE=postingdetail.shtml.

training, and effectiveness of those forces. Additionally, the decision raises fundamental philosophical and political issues for the nation itself.

To some, conscription offers a cheap and reliable source of manpower to meet the nation's needs.¹²² Moreover, if administered fairly, conscription spreads the burden of defending the nation in an egalitarian manner. To others, however, conscription represents an enormous infringement on personal freedom, and unfairly places the burden of national defense on a relatively few individuals.¹²³ It may also offer a less effective defense than a force of volunteers because draftees may be less motivated and serve for shorter periods of time, thus providing less time for these personnel to master military skills.¹²⁴ This section will briefly describe the relative advantages and disadvantages of both volunteer and draftee forces.

B. Advantages of a Draftee Force

Proponents of a draft generally advocate conscription based on at least one of the following perceived advantages: military effectiveness and cost, fairness, and civic responsibility.¹²⁵

1. Military Effectiveness and Cost

Draftees enhance military effectiveness in two respects. First, conscription essentially guarantees maintenance of force levels required to address national defense needs.¹²⁶

Proponents of the draft have claimed that in the event of another major national crisis, the all-volunteer force would not be able to meet a large, sudden need for additional troops. More basically, draft supporters have questioned whether young people will continue to join the military given the likelihood that they may be required to deploy and fight.¹²⁷

Second, conscription enhances the quality of the overall force by bringing talented individuals into the military who would not otherwise serve.¹²⁸ Some proponents of the draft argue that "individuals of relatively high ability, education, and social status do not normally volunteer for military service . . . [d]rafting those individuals would allow the military to benefit from their talents."¹²⁹ After all, draftees historically have made significant contributions in all of the conflicts in which they have been employed.

Use of draftees may have advantages relative to cost as well. Draftees are cheaper to employ for the obvious reason that financial incentives are not required to induce their enlistment.¹³⁰ "Supporters of the draft have argued that an all-volunteer force would cost more than a draft force because the military would have to pay significantly higher wages to attract and retain volunteers."¹³¹ Lowering personnel costs enables the military to field a larger force, spend more on non-personnel items such as weapons systems, or both.¹³²

¹²² CBO REPORT, *supra* note 10, at 7.

¹²³ See JOHN KEEGAN, A HISTORY OF WARFARE 228 (Vintage Books 1994) (1993) ("Conscription is a tax levied upon a male resident's time at a certain age of life, though to citizens payment of such a tax is also usually presented as a civic duty").

¹²⁴ See ROSTKER, *supra* note 11, at 8 (commenting on the increased professionalism and experience of the AVF).

¹²⁵ CBO REPORT, *supra* note 10, at 7.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *id.* at 8.

¹³¹ *Id.*; see also COOPER, *supra* note 12, at 37–38 (noting that two commissions assigned in the 1960s to study the feasibility of an all-volunteer force concluded that it would be too costly to do away with the draft).

¹³² CBO REPORT, *supra* note 10, at 8.

2. Fairness and Social Impact

Proponents of a draft often argue that conscription would spread the burden of national defense more equitably than the current system, which tends to attract the economically disadvantaged to military service.¹³³

[S]ome supporters of the draft argue that an all-volunteer force creates . . . inequities. They maintain that the current AVF was designed to free the middle and upper classes from even the risk of military service and that lower-income groups or minorities bear a disproportionate share of service and combat. . . . [T]he military is particularly appealing to groups who have relatively poor civilian opportunities . . .¹³⁴

Provided that it is administered fairly, a draft could evenly distribute the risks of military service throughout the population.

Under the current volunteer system, many have argued that a comparatively small part of the population has borne the brunt of fighting the GWOT.¹³⁵ Sociologist David Segal commented that “[t]he military is at war, but the country is not. And the military resents that.”¹³⁶ If this is true, the current conflict may have exacerbated a civilian/military rift that was noted over a decade ago by military correspondent Thomas Ricks, who wrote that “U.S. military personnel of all ranks are feeling increasingly isolated from their own country.”¹³⁷ According to Ricks, the end of the draft in 1973 is a key reason for this “widening gap.”¹³⁸

Moreover, isolation of the military from civilian society can undermine the trust and confidence needed to maintain its proper role in national defense. An article in Washington Post Magazine commented:

[L]ess than half of the civilian population believes military leaders can be relied on to respect civilian control of the military. . . . And while nearly two-thirds of military leaders believe they share the same values as the American people, only about one-third of their civilian counter-parts agree. The vast majority of civilians believe service members are intolerant, stingy, rigid and lacking in creativity.¹³⁹

A draft, if properly administered, would bring a broader cross section of society into the military. Perhaps more importantly, it would create a deeper reservoir of knowledge of and familiarity with the military in the civilian population.¹⁴⁰ This familiarity would presumably breed trust.

3. Civic Responsibility

Military service is a means of inculcating a sense of civic obligation in American citizens.¹⁴¹ “Proponents of the draft [have] argued that each (male) citizen has a *moral responsibility*, or duty, to serve his country and that the draft provided a

¹³³ See, e.g., Drew Brown, *Do We Need to Revive the Draft?*, SEATTLE TIMES, Feb. 4, 2007 (discussing the belief of some that the higher economic classes are underrepresented in the military). See generally KATHY ROTH-DOUQUET & FRANK SCHAEFFER, AWOL: THE UNEXCUSED ABSENCE OF AMERICA’S UPPER CLASSES FROM THE MILITARY—AND HOW IT HURTS OUR COUNTRY (2006) (explaining the absence of the upper classes from the military).

¹³⁴ CBO REPORT, *supra* note 10, at 10.

¹³⁵ Brown, *supra* note 133.

I don’t think it’s necessary that every eligible young man and woman serve But the idea that 300 million Americans send the same 140,000 people again and again and again into combat is absolutely immoral. We’re an enormous and wealthy country, but essentially we’ve taken a small group of people and we expect them to do everything.

Id. (quoting author Frank Schaeffer).

¹³⁶ Kristin Henderson, *Their War*, WASH. POST MAG., July 22, 2007. Henderson’s perspective may be influenced by the fact that her husband is a Navy chaplain. *Id.*

¹³⁷ Thomas E. Ricks, *The Widening Gap Between the Military and Society*, ATLANTIC MONTHLY, July 1997, at 66.

¹³⁸ *Id.*

¹³⁹ Henderson, *supra* note 136.

¹⁴⁰ *Id.*

¹⁴¹ CBO REPORT, *supra* note 10, at 10.

vehicle for institutionalizing this responsibility.”¹⁴² Opponents, meanwhile, argue that conscription contradicts the core American value of individual freedom.¹⁴³

Reliance on a draft also helps foster a close relationship between the military and civilian society at large.¹⁴⁴ When the end of conscription was being debated in the 1960s and 1970s, “[s]ome felt that ending the draft would lead to a professional military ‘elite’ with a separate military ethos, which could pose a threat to civilian authority, individual freedoms, and the nation’s democratic institutions.”¹⁴⁵ Indeed, after the advent of the all-volunteer force, some commentators believed that a rift did develop between the military and society, though not necessarily to the extent of endangering civilian control of the military.¹⁴⁶ A draft would help reinforce the ties between the military and civilian society.

C. Advantages of a Volunteer Force

The advantages offered by a volunteer force are, to a degree, a mirror image of those ostensibly offered by a force of draftees. Advocates of the all-volunteer force believe that reliance on volunteers maximizes military effectiveness, reduces costs, and is in accord with American values.

1. Military Effectiveness and Cost

Volunteer forces offer two apparent advantages over draftees with regard to military effectiveness. First, volunteers are presumably more motivated to learn their craft and perform well.¹⁴⁷ This translates into better personal performance and better performance by the military in the aggregate. Second, volunteers typically serve longer initial tours than conscripts and are more likely to reenlist for subsequent tours of duty.¹⁴⁸ This instills greater proficiency as the force overall will be more experienced and have higher morale.

According to Doug Bandow, a longtime commentator and authority on military manpower affairs:

[t]he AVF by definition brings in people who want to be there, which creates a dramatically more positive dynamic. It is free to discharge soldiers who abuse drugs, perform poorly, or otherwise are ill suited to service life. Draftees, by contrast, must be retained at almost all costs lest indiscipline become a means of escape. . . . Before the advent of the AVF, only 10 percent of first-termers stayed on, compared to about 50 percent today [in 2000]. Moreover, with a draft, the increased difficulties in working with recalcitrant soldiers mean that even experienced noncommissioned officers are less likely to re-up. Thus, a return to conscription would undoubtedly result in a military that lacks experience, stability, and efficiency.¹⁴⁹

The performance of the all-volunteer force in the current conflict supports Bandow’s view. While the hypothetical performance of a conscripted force cannot be known with certainty, most commentators agree that our volunteer military has

¹⁴² COOPER, *supra* note 12, at 35 (describing the debate within the U.S. over eliminating the draft and transitioning to an all-volunteer force in the 1970s).

¹⁴³ CBO REPORT, *supra* note 10, at 10.

¹⁴⁴ COOPER, *supra* note 12, at 36.

¹⁴⁵ *Id.*

¹⁴⁶ See generally Ricks, *supra* note 137, at 66 (discussing the growing insularity of military culture in the 1990s). For an interesting speculation on the possible result of a growing separation between military and civilian culture, see Charles J. Dunlap, Jr., *Origins of the American Military Coup of 2012*, PARAMETERS, Winter 1992-93, at 2–20. Lieutenant Colonel Dunlap extrapolated the expansion of military responsibilities into traditionally non-military roles—such as a law enforcement role in drug interdiction, increased involvement in domestic disaster relief, or other similar roles—along with its increasing cultural separation from civilian society to a hypothetical coup in 2012. Dunlap, *supra*. But see Captain Pete Kilner, *The Alleged “Civil-Military Values Gap”: Ideals vs. Standards* (Feb. 27, 2001) (unpublished paper presented to the Joint Services Conference on Professional Ethics), available at <http://www.usafa.edu/isme/JSCOPE01/Kilner01.html> (arguing that Ricks confuses a “culture” gap, which is not necessarily a negative thing, with a “values” gap, which would be. Kilner argues that Ricks overstates the “values” gap, partly due to the otherwise illogical fact that the civilian population commonly professes great respect and esteem for the military despite allegedly holding different “values.”).

¹⁴⁷ Doug Bandow, *Mend, Never End, the All-Volunteer Force*, ORBIS, June 22, 2000.

¹⁴⁸ See ROSTKER, *supra* note 11, at 8.

¹⁴⁹ Bandow, *supra* note 147, at 463. Mr. Bandow is a senior fellow at the Cato Institute and previously served on the Military Manpower Task Force advising President Reagan. Doug Bandow, *Fighting the War against Terrorism: Elite Forces, Yes; Conscripts, No*, Apr. 10, 2002, available at <http://www.cato.org/pubs/pas/pa-430es.html>.

performed well in the GWOT.¹⁵⁰ It is difficult to imagine that a group of unwilling draftees would have performed better, particularly in view of the increased sophistication of military equipment and tactics.¹⁵¹

Perhaps counter-intuitively, an AVF may also cost less than a force of draftees. While draftees can be paid lower wages than volunteers, other costs associated with conscription may make volunteerism the more economical option. Economists such as Milton Friedman, a member of the Gates Commission, have argued that conscription imposes a hidden tax on draftees to the extent that they are paid below market wages.¹⁵² While this cost may not appear in the defense budget, it is still a cost to society, albeit one that is paid involuntarily by a small number for the benefit of everyone.¹⁵³ Additionally, an all-volunteer force saves the expenses of administering and enforcing draft laws, particularly if there is significant resistance or evasion, while also saving on training costs due to the decreased turnover of personnel in a volunteer force.¹⁵⁴

2. American Values

As mentioned previously, some believe that conscription inherently conflicts with the American emphasis on personal liberty.¹⁵⁵ While the balance between personal freedom and society's need for defenders may shift in times of war, such as the present day, there is philosophical contradiction in coercing an individual to fight for freedom. That tension has lurked in the background of every major use of conscription in American history.¹⁵⁶

D. Arguments For and Against Instituting a Draft

There were few advocates for returning to the draft before the events of 11 September 2001, and the ensuing GWOT.¹⁵⁷ The strain on the armed forces caused by the war has led to renewed calls for conscription.¹⁵⁸ However, there does not appear to be sufficient political support for Congress to authorize a draft.¹⁵⁹

Perhaps ironically, one of the most outspoken advocates of conscription is also an outspoken critic of the war in Iraq, Representative Charles Rangel of New York.¹⁶⁰ Some of his political opponents believe that his support for conscription is based on the supposition that a draft would spark greater protest and opposition to the war, rather than a desire to supply added manpower to win the war.¹⁶¹ Regardless of Congressman Rangel's motivation, this ongoing debate highlights the fear some have that a President is more likely to use force when he has a volunteer force at his disposal, rather than a more representative one of draftees that may bring the cost of war home to a greater swath of the public.¹⁶² In this sense, the perceived isolation of the military makes it easier politically to send it overseas to fight than a force of draftees.

The arguments in favor of a draft are both pragmatic and philosophical. The pragmatic issue is whether we have enough troops to fight and win our nation's wars. At present, there seems to be consensus on both sides of the political aisle that our military needs to get bigger,¹⁶³ but most believe that this can be done while maintaining an all-volunteer force.¹⁶⁴ The

¹⁵⁰ See, e.g., Beth Asch, *Should Uncle Sam Want You? The All-Volunteer Army Is Working Well*, B. GLOBE, Feb. 9, 2003, available at <http://boston.com>.

¹⁵¹ William A. Kamens, Comment, *Selective Disservice: The Indefensible Discrimination of Draft Registration*, 52 AM. U.L. REV. 703 (2003).

¹⁵² See, e.g., GATES ET AL., *supra* note 79, at 12–13 (commenting that “[d]raftees and draft-induced volunteers are paid less than they would require to volunteer. The loss they suffer is a tax-in-kind which for budget purposes is never recorded as a receipt or expenditure”).

¹⁵³ *Id.* at 12–13.

¹⁵⁴ *Id.* at 13.

¹⁵⁵ COOPER, *supra* note 12, at 57.

¹⁵⁶ See *supra* notes 64–81 and accompanying text.

¹⁵⁷ See Bandow, *supra* note 147.

¹⁵⁸ See, e.g., Phillip Carter & Paul Glastris, *The Case for the Draft*, WASH. MONTHLY, Mar. 2005. This article is noteworthy for its novel recommendation to institute a draft of reservists, rather than active duty Soldiers, in order to augment the available pool of military manpower. *Id.*

¹⁵⁹ Brown, *supra* note 133.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See GATES ET AL., *supra* note 79, at 17.

¹⁶³ Michael O'Hanlon, *The Need to Increase the Size of the Deployable Army*, PARAMETERS, Autumn 2004, at 4.

GWOT has strained our all-volunteer military and recruiting has become more difficult.¹⁶⁵ Despite these challenges, volunteer accessions have generally been adequate to maintain necessary force structure.¹⁶⁶ While a draft might make it easier to induct sufficient numbers of service members, there does not appear to be a compelling need to do so at this time. Moreover, the prospect of training thousands of unwilling draftees might be more of a distraction and burden to the armed services than the extra manpower is worth.

Philosophically, do we, as a nation, wish to have the direct human costs of conflict (such as risk of death or injury, and time away from home and family) borne by a comparatively small segment of society? Any apparent injustice to servicemembers is mitigated (at least partially) by their volunteer status, but spreading the burden of fighting our nation's wars enhances unity through a sense of shared sacrifice. This is ultimately a very subjective issue, as it depends on unquantifiable factors such as the national attitude towards the military and the conflicts in which we are engaged. Our apparent military successes in the ongoing GWOT, however, make it difficult to foresee the scales being tipped in favor of a draft in the near future. While we may need a larger military, we do not seem to need one so large that it would require abandonment of current voluntary recruitment practices.

V. Legal and Political Challenges to the Exemption of Women

The exemption of women from Selective Service requirements has not gone unchallenged. Opponents have criticized the exemption on both constitutional and policy grounds. Legally, some view the policy as a violation of constitutional equal protection doctrine. As a matter of policy, some believe that men and women should be subject to the same service obligations.

A. Legal Challenges

1. *Rostker v. Goldberg*

The most significant legal challenge to the MSSA's exemption of women made its way to the U.S. Supreme Court after the registration requirement was reinstated in 1980. In *Rostker v. Goldberg*,¹⁶⁷ the Court upheld the exemption of women from the MSSA. The plaintiffs in *Rostker* were men subject to registration and conscription during in the early 1970s, who alleged that the MSSA's application solely to men violated their due process rights under the Constitution.¹⁶⁸

The case lay dormant for several years after the draft and registration requirements were suspended, but it had not been dismissed.¹⁶⁹ Litigation recommenced in 1979 when the defendants attempted to dismiss the claim in district court and were unsuccessful.¹⁷⁰ The U.S. District Court for the Eastern District of Pennsylvania did not initially rule on the merits of the claim because it lacked sufficient facts on the record.¹⁷¹ After the facts were better developed, the district court ultimately ruled in favor of the plaintiffs regarding their constitutional claim and enjoined the Government from commencing registration.¹⁷² The Director of Selective Service immediately appealed and the injunction was stayed pending resolution of the case by the Supreme Court.¹⁷³

The Supreme Court held that men and women were not similarly situated with respect to a draft that purports to focus on filling combat positions from which women are excluded.¹⁷⁴ Because of this exclusion, the exemption of women from the

¹⁶⁴ *Id.*

¹⁶⁵ CBO REPORT, *supra* note 10, at 1.

¹⁶⁶ Asch, *supra* note 150.

¹⁶⁷ *Rostker v. Goldberg*, 453 U.S. 57 (1981).

¹⁶⁸ *Id.* at 61–62.

¹⁶⁹ *Id.* at 61.

¹⁷⁰ *Goldberg v. Tarr*, 510 F. Supp. 292 (E.D. Pa. 1980).

¹⁷¹ *Id.*

¹⁷² *Goldberg v. Rostker*, 509 F. Supp. 586 (E.D. Pa. 1980) (holding that the male-only registration requirement violated the Equal Protection clause of the Fifth Amendment to the U.S. Constitution).

¹⁷³ *Rostker*, 453 U.S. at 64.

¹⁷⁴ *Id.* at 78.

reach of the MSSA was closely related to Congress' purpose in authorizing draft registration and did not violate the Due Process Clause of the Constitution.¹⁷⁵ The alleged victims of discrimination in this case were men, not women, because while the MSSA placed obligations upon men and exempted women, it did not exclude women from voluntary military service.¹⁷⁶

The Court's majority opinion did not clearly state the controlling legal standard that should be applied to the MSSA's exemption of women. The Court emphasized its deference to Congress in the realm of military policy.¹⁷⁷ It certainly deferred to Congress' characterization of the purpose of the draft, which was to supply combat troops.¹⁷⁸ However, the Court stopped short of agreeing with the Solicitor General's argument that the gender distinction in question should be judged under the lowest form of constitutional scrutiny normally reserved for military matters, which is whether the statute in question is rationally related to a legitimate governmental purpose.¹⁷⁹ Likewise, the Court did not necessarily refuse to apply the heightened form of scrutiny articulated in *Craig v. Boren* for gender-based distinctions, which requires that gender-based discrimination be "substantially related to important governmental interest."¹⁸⁰ Instead, the Court stated:

We do not think that the substantive guarantees of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests as suggested by the Government. Announced degrees of "deference" to legislative judgments, just as levels of "scrutiny" which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. In this case the courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred. Simply labeling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.¹⁸¹

While the Court did not choose between these competing standards, it stated that MSSA's exemption of women nevertheless satisfied them both.¹⁸² The opinion implicitly rejected any higher, "strict scrutiny" standard for the gender-based distinction.¹⁸³ Essentially, the opinion states that no clear standard applies, but that the MSSA would survive scrutiny under any test that could reasonably be applied.

Justices White and Marshall wrote dissenting opinions, each noting that draftees would not be exclusively used to fill combat positions.¹⁸⁴ Both noted that while the primary purpose of a draft may be to provide combat troops who had to be male, some of the men drafted would be used in non-combat roles.¹⁸⁵ Justice White pointed out an apparent absurdity in the majority opinion, which at one point seemed to argue that the military required the flexibility to move non-combat troops into combat roles as necessary, thus providing another basis for drafting men exclusively.¹⁸⁶ While this flexibility may indeed be helpful, Justice White noted that "if during mobilization for war, all non-combat military positions must be filled by combat-

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 74 n.11. The majority opinion specifically rejected the contention of the National Organization for Women's amicus curiae brief that stated that the exemption of women discriminated against them. *Id.*; see also HOLM, *supra* note 113. Holm pointed out the dilemma posed to feminists, typically political liberals, by the issue of draft registration. *Id.* at 351-53. Discussing President Carter's proposal in 1980 to apply the MSSA to women, Holm observed that the issue threw feminists into "confusion" because "the feminist movement has its roots in pacifism and many of the [then] current leaders are veterans of the antiwar, antidraft protests of the sixties and early seventies." *Id.* at 351. She wrote that "Carter's . . . decision to call for registration of men and women put feminists on the spot; they were torn between their abhorrence of war and the combat mission of the military profession, on one hand, and their desire that women enjoy the many benefits and advantages of military service . . . on the other." *Id.* Ultimately, however, Holm concluded that feminists "had no choice but to support the President—had had made them an offer they could not refuse." *Id.*

¹⁷⁷ *Rostker*, 453 U.S. at 65-66.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 69-70.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 70.

¹⁸³ *Id.* at 69-70.

¹⁸⁴ *Id.* at 83 (White, J. dissenting), 86 (Marshall, J., dissenting).

¹⁸⁵ *Id.* at 85 (White, J., dissenting), 96 (Marshall, J., dissenting).

¹⁸⁶ *Id.* at 83 (White, J., dissenting).

qualified personnel available to be moved into combat positions, there would be no occasion whatsoever to have any women in the Army, whether as volunteers or inductees.”¹⁸⁷ Justice White argued that the government had not shown that female draftees could not be usefully employed in non-combat roles, rather that it had merely relied on the administrative convenience of limiting the draft to individuals who could fill either combat or non-combat positions.¹⁸⁸ In his view, this was not sufficient to justify the exemption of women.

Justice Marshall focused on the legislative history that revealed that the military services appeared to disagree with Congress, and in fact desired the registration of women.¹⁸⁹ According to his review of the record, “[t]estimony about personnel requirements in the event of a draft established that women could fill at least 80,000 of the 650,000 positions for which conscripts would be inducted.”¹⁹⁰ He agreed that there would be no reason to register women if “it could be guaranteed in advance” that any future draft would only be used to fill positions from which women were excluded.¹⁹¹ That not being the case, however, he believed that the government had failed to demonstrate that the exemption of women was substantially related to the achievement of an important government interest.¹⁹²

The Court’s opinion in *Rostker* appeared to settle the constitutional question involved. Moreover, the unlikely prospects for institution of the draft throughout the 1980s and 1990s probably muted opposition to Selective Service policies. Consequently, there appears to have been little active legal opposition to the exemption of women in the two decades following *Rostker*. That changed following the events of 11 September 2001.

2. *Schwartz v. Brodsky*

The most recent legal challenge of any significance occurred when the MSSA’s exemption of women was challenged in *Schwartz v. Brodsky* in 2003.¹⁹³ The plaintiffs brought suit in U.S. District Court for the District of Massachusetts. They challenged both the constitutionality of the MSSA and provisions of Massachusetts state law that penalized individuals who failed to comply with the MSSA regarding eligibility for state student financial aid.¹⁹⁴

The plaintiffs contended that military assignment policies for women had evolved to such a degree since *Rostker v. Goldberg* was decided in 1981 that the factual underpinning of *Rostker* had eroded.¹⁹⁵ They argued that the expansion of military positions available to women had fundamentally changed the circumstances under which a future draft would be conducted. The district court granted summary judgment to the defendants, however, because the plaintiffs conceded that two essential facts had not changed: first, that the legislative purpose of the MSSA was still to provide for a draft of primarily combat troops; and second, that women were still excluded from combat positions.¹⁹⁶ The court asserted that at least one of these essential facts would have to change in order to call *Rostker*’s holding into question.¹⁹⁷ In granting the defendant’s motion for summary judgment, the court wrote:

[T]he Constitution expressly grants the power “to raise and support Armies,” “to provide and maintain a Navy,” and “to make Rules for the Government and Regulation of the land and naval Forces,” . . . to Congress and not to the Judiciary. The Judiciary has neither the power nor the competence to undertake these awesome responsibilities If a deeply rooted military tradition of male-only draft registration is to be ended, it should be accomplished by that branch of government which has the constitutional power to do

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 85–86.

¹⁸⁹ *Id.* at 90–91 (Marshall, J., dissenting).

¹⁹⁰ *Id.* at 101.

¹⁹¹ *Id.* at 112.

¹⁹² *Id.* (explicitly adopting the test articulated in *Craig v. Boren*, 429 U.S. 190 (1976)).

¹⁹³ 265 F. Supp. 2d 130 (D. Mass. 2003).

¹⁹⁴ *Id.* at 131.

¹⁹⁵ *Id.* at 132; see also Ellen Goodman, *Women in the Draft?*, B. GLOBE, Jan. 16, 2003 (discussing the changed circumstances that had led the plaintiffs to file suit in *Schwartz v. Brodsky*, primarily including the increased exposure of women to combat conditions).

¹⁹⁶ *Schwartz*, 265 F. Supp. 2d at 133.

¹⁹⁷ *Id.*

so and which best represents the “consent of the governed”—the Congress of the United States, the elected representatives of the people.¹⁹⁸

3. Future Legal Challenges

Legal challenges similar to *Schwartz v. Brodsky* can be expected to continue. For example, Harvey Schwartz, the plaintiff’s attorney in *Schwartz*, is currently representing an Internal Revenue Service employee who was fired due to his failure to comply with registration requirements under the MSSA.¹⁹⁹ Regarding *Rostker*, Mr. Schwartz stated, “that decision was based on the status of women in the military at the time, and it’s a whole new world now.”²⁰⁰

It is doubtful that the changes in this “new world” will warrant a reversal of *Rostker*,²⁰¹ though they may invite further litigation.²⁰² As the *Schwartz* court noted, *Rostker* is likely to remain valid case law so long as women are prohibited from combat positions, however those positions are defined by DoD policy, and as long as Congress views the draft as primarily a means of providing combat troops. Any change in the MSSA registration requirements, therefore, is more likely to come from legislative action than a judicial decision.

B. Political Challenges

As mentioned previously, President Carter requested an amendment of the MSSA to authorize the registration and possible conscription of women, and Congress denied this request. However, public attitudes towards women’s participation in the military and in combat have changed markedly since Congress debated amending the MSSA in 1980.²⁰³ Given that public opposition to women in combat may have declined, political reconsideration of the draft’s exemption of women is bound to occur.²⁰⁴

VI. Assignment Policies for Women

A. DOD Policy

As a matter of DOD policy promulgated by Secretary of Defense Les Aspin in 1994, women are currently restricted “from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground.”²⁰⁵ Direct ground combat is defined as

engaging the enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground

¹⁹⁸ *Id.* at 135.

¹⁹⁹ Anna Badkhen, *Man Who Didn’t Register for Draft Sues IRS Over Firing*, B. GLOBE, Jan. 5, 2008, available at http://www.boston.com/news/local/articles/2008/01/05/man_who_didnt_register_for_draft_sues_irs_for_firing. Mr. Schwartz does not share the name of the lead plaintiff in *Schwartz* by accident, as it was his son. *Id.*

²⁰⁰ *Id.*

²⁰¹ *But see* Dale A. Riedel, *By Way of the Dodo: The Unconstitutionality of the Selective Service Act Male-Only Registration Requirement Under Modern Gender-Based Equal Protection*, 29 DAYTON L. REV. 135 (2003) (arguing that the combination of gender-based equal protection jurisprudence and changes in the utilization of women in the armed forces have made the male-only registration requirement unconstitutional).

²⁰² *See, e.g.*, Kamens, *supra* note 151. Kamens argues that the MSSA should no longer discriminate against men by exempting women for several reasons, among them the increased utilization of women in the armed forces since *Rostker* was decided. *Id.* at 758–59. Though Kamens makes interesting and thoughtful points, he argues somewhat perversely that part of the reason that women should no longer be exempted from registration is that pre-draft registration itself serves no useful purpose and therefore does not warrant the judicial deference normally afforded to legislative decisions in military matters. *Id.* at 737–38.

²⁰³ *See, e.g., id.* *See generally* KIRSTEN HOLMSTEDT, BAND OF SISTERS: AMERICAN WOMEN AT WAR IN IRAQ (2007) (describing numerous instances of women being involved in combat operations in Iraq).

²⁰⁴ *But see* Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. OF GENDER L. & POL’Y 815 (2007). Donnelly comments negatively on the increased exposure of female service members to combat conditions. *Id.* Though Selective Service is not the primary focus of the article, Donnelly argues that subjecting women to the draft would be politically unpopular. *Id.* at 850.

²⁰⁵ Memorandum from Sec’y of Defense to Sec’y of the Army, et al., subject: Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994).

combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.²⁰⁶

The DOD policy authorized, but did not require, additional restrictions at the discretion of the services provided that such restrictions were justified by specified criteria. Restrictions were authorized in the following instances: (1) where the Service Secretary attests that the costs of the appropriate berthing and privacy arrangements are prohibitive; (2) where units and positions are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women; (3) where units are engaged in long range reconnaissance operations and Special Operations Forces missions; and, (4) where job related physical requirements would necessarily exclude the vast majority of women Service members.²⁰⁷

Secretary Aspin promulgated this policy partially in response to Congress's repeal of statutory prohibitions on the assignment of women to combat ships²⁰⁸ and aircraft.²⁰⁹ Ground combat restrictions have always been a matter of policy, rather than statutory.²¹⁰ The Aspin policy broadened the array of assignments available to women relative to the previous policy, which was governed by the so-called "risk rule."²¹¹ The risk rule prohibited the assignment of women to "occupations or units characterized by the risk of exposure to direct combat, hostile fire, or capture."²¹² Experiences during the Persian Gulf War in 1990–1991, however, provided evidence that the risk rule was not practical and led to revision of the policy.²¹³

As a result of the 1994 policy, "women are now eligible to serve in more than [90] percent of all job categories in all branches of the armed forces."²¹⁴ In the Army, 92.3% of MOSs and 70.6% of positions overall are open to women.²¹⁵ In short, a large majority of occupational specialties and duty assignments are open to women even in the Army—the service that is presumably most affected, along with the Marine Corps—by the DoD restrictions.

When Congress repealed the prohibitions on women serving in combat aircraft and on combat ships, it anticipated that DOD would revise its assignment policy for women.²¹⁶ Congress foresaw that changes in assignment policy could have implications for the constitutionality of the exemption of women from Selective Service obligations.²¹⁷ Consequently, section 542(b) of the National Defense Authorization Act for 1994 obligated the Secretary to notify Congress of any changes regarding the assignment policy for ground combat and to prepare a report assessing their implications for Selective Service's exemption of women.²¹⁸ Secretary Aspin did not believe that his revision of policy required such a report, however, because it did not lift the prohibition against assigning women to ground combat positions.²¹⁹

B. Army Policy

Army policy regarding the assignment of women is contained in AR 600-13,²²⁰ which states:

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1659, § 541 (1993) [hereinafter NDAA 1994] (repealing 10 U.S.C. § 6015).

²⁰⁹ National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1365, § 531 (1991) (repealing 10 U.S.C. § 8549).

²¹⁰ HARRELL ET AL., *supra* note 7.

²¹¹ *Id.* at 1.

²¹² *Id.*

²¹³ Kamens, *supra* note 151, at 736.

²¹⁴ *Id.*

²¹⁵ HARRELL ET AL., *supra* note 7, at 5–6.

²¹⁶ *Id.*

²¹⁷ CTR. FOR MILITARY READINESS, WOMEN IN LAND COMBAT: WHY AMERICAN SERVICEWOMEN ARE SERVING AT GREATER RISK, CMR REPORT NO. 16 (2003) [hereinafter WOMEN IN LAND COMBAT].

²¹⁸ *Id.*; see NDAA 1994, *supra* note 208, § 542(b).

²¹⁹ WOMEN IN LAND COMBAT, *supra* note 217.

²²⁰ U.S. DEP'T OF ARMY, REG. 600-13, ARMY POLICY FOR THE ASSIGNMENT OF FEMALE SOLDIERS (27 Mar. 1992).

The Army's assignment policy for female soldiers allows women to serve in any officer or enlisted specialty or position except in those specialties, positions, or units (battalion size or smaller) which are assigned routine missions to engage in direct Combat, or which collocate routinely with units assigned a direct combat mission.²²¹

The regulation further defines direct combat in the following manner:

Engaging an enemy with individual or crew served weapons while being exposed to direct enemy fire, a high probability of direct physical contact with the enemy's personnel and a substantial risk of capture. Direct combat takes place while closing with the enemy by fire, maneuver, and shock effect in order to destroy or capture the enemy, or while repelling the enemy's assault by fire, close combat, or counterattack.²²²

The Rand Institute performed a study in 2007 assessing the Army's assignment policies for women.²²³ The authors of the study summarized the differences between the DOD and Army policies as follows:

There are several important differences between the Army and the DoD policies. First, the DoD policy restricts the assignment of women to units whose *primary* mission is direct ground combat, whereas the Army restricts assignment to units that have a *routine* mission of direct combat. Second, the Army also restricts assignment to units that collocate with direct combat units. Third, the Army and DoD policies define *combat* differently: The Army's definition of *direct combat* includes a requirement that there be a risk of capture, but also includes "repelling the enemy's assault." These differences are significant, and it is notable that the Army did not update its policy when Congress repealed the legal restrictions against women serving in combat aircraft positions and on combatant ships nor when Aspin revised the DoD policy in 1994.²²⁴

The increase in the number of positions open to women and the non-linear battlefields encountered in the war in Iraq have combined to expose women to ground combat on a scale not seen in earlier conflicts.²²⁵ Many support units that frequently collocate with combat units contain significant numbers of female Soldiers.²²⁶ Further, the Army's inclusion of "repelling an assault" in the definition of direct ground combat would appear to exclude the assignment of women to units that are likely to be attacked, which includes many of those units performing combat support and combat service support functions in Iraq and Afghanistan.²²⁷ Ironically, the RAND study concluded that the Army's practices in the current conflict generally comply with DoD policy, but violate its own more restrictive internal policies.²²⁸

C. The GWOT

The restrictions on assignments for women have come into conflict with the realities of the non-linear battlespace so often experienced by our service members in the GWOT. The Rand Institute's report on Army assignment policies noted particular problems regarding the assignment of women to forward support elements that were often collocated with combat units.²²⁹ Logistics units in which women are thoroughly integrated have come into frequent contact with the enemy.²³⁰

²²¹ *Id.* para. 1-12(a).

²²² *Id.* glossary.

²²³ HARRELL ET AL., *supra* note 7.

²²⁴ *Id.* at 3.

²²⁵ *See* HOLMSTEDT, *supra* note 203.

²²⁶ HARRELL ET AL., *supra* note 7.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

There are abundant examples of women being drawn into ground combat. Sergeant Leigh Ann Hester, for example, won a Silver Star for her heroic action in a small arms engagement with insurgents in Iraq.²³¹ A total of 1,763 women had qualified for the Army's Combat Action Badge (CAB) in either Iraq or Afghanistan as of August 2006.²³² Enlisted CAB recipients as of that date were most likely to serve as military police, truck drivers, and logistics specialists,²³³ all of which are MOSs generally open to women. Though the DOD and Army policies reduce the likelihood of women being involved in ground combat, they certainly do not eliminate the possibility and in practice it seems to happen frequently.²³⁴

VII. Resolution

Selective Service's emphasis on providing combat replacements is outdated and contrary to the nation's best interest for five primary reasons. First, the draft has never been limited to the sole purpose of providing combat troops. Second, although combat troops sustain higher casualty rates, casualty rates sustained by support troops are not low enough to obviate the need for support replacements in the event of any large scale conflict. Third, though male conscripts may provide more assignment flexibility, the inclusion of female draftees is only a minimal administrative burden. This is particularly true given that the large majority of assignments are open to women under current policies. Fourth, fairness and equity dictate spreading the burden of national defense across as wide a cross-section of society as is reasonably possible. It is not fair to men to place the exclusive burden of involuntary military service on them if women are qualified and eligible to perform most of the same duties. Last, if part of the purpose of Selective Service is to inculcate a sense of civic obligation in the population, then including women would only enhance that objective.

Congress should jettison the view that the primary goal of a draft is to provide combat troops. The goal of a draft should be to provide military manpower in whatever occupational specialties are needed at the time. This may include combat support and combat service support specialties currently open to women.

A proposal to amend the MSSA to include women would undoubtedly be considered in the context of the debate over allowing women into combat positions. While related, these issues should not be confused. Changing draft eligibility is a separate issue from differing utilization of male and female conscripts upon their accession into the armed forces. Subjecting women to the registration requirements of the MSSA does not logically depend on any changes to current assignment policies. Women can fill most of the positions for which male draftees would be eligible. The exemption of women from the draft is a byproduct of an era when the role of women in the military was much more limited than it is today.

VIII. Conclusion

Congress should change the law to reflect that in a time of need, America may draw upon the talents and abilities of all of its citizens who are otherwise eligible for military service. The American ethic is essentially egalitarian, and so too should be our system of conscription. The evolution of our conscription laws towards greater inclusion and the fairest possible allocation of duties and responsibilities demands the inclusion of women. This change, however, does not appear to be required by the Constitution and therefore cannot and should not be mandated by the judiciary.²³⁵ As the court wisely noted

²³¹ HOLMSTEDT, *supra* note 203, at 309.

²³² HARRELL ET AL., *supra* note 7, App. H.

²³³ *Id.* App. H, tbl.2.

²³⁴ See generally HOLMSTEDT, *supra* note 203. But see Kingsley R. Browne, *Women at War: An Evolutionary Perspective*, 49 BUFF. L. REV. 51, 246 (2001). The apparent success of female Soldiers engaged in combat operations is an interesting counterpoint to the skepticism expressed by one critic in a thought-provoking, but undoubtedly controversial, law review article published before the GWOT had started. Kingsley R. Brown, a law professor and opponent of utilizing women in combat roles, perceived a trend towards allowing greater exposure of women to combat operations and wrote the following:

But what happens if we keep moving in the same direction [towards allowing women in combat] and a few years from now find ourselves engaged in a major conflict with large numbers of women in combat positions? If it turns out that it really does not work, will the people find out about it? If the "great experiment" is acknowledged to be a failure, the nation's military and civilian leaders will have to acknowledge the sacrifice of the lives of the nation's sons and daughters in a misguided pursuit of "gender justice." There is little in the history of this nation or any nation that makes such an admission a likely prospect. Instead, regardless of actual performance, the experiment would almost certainly be labeled a success.

Id. at 246. Professor Browne's cynicism notwithstanding, it appears that women are too tightly woven into the fabric of the American military to easily shield them from the risks of combat, regardless of how anyone feels about it.

²³⁵ See *supra* notes 167–202 and accompanying text.

in *Schwartz v. Brodsky*, the tradition of male-only conscription is best changed if that reflects the will of the people as expressed through Congress.