

# Annie Get Your Gun: The Constitution, Women, and Involuntary Service in Combat

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## INTRODUCTION

Does the Constitution *mandate* forcing women to serve in the combat roles against their will? Does it *require* drafting women for that role even if Congress determines that the main purpose is to furnish troops for *ground* combat, and data shows that relatively few women are physically suited for that particular task? Does the Constitution require the government—in the midst of a national emergency requiring the mass mobilization of combat troops—to draft women despite evidence showing the necessary combat arms force can much more rapidly and efficiently be obtained through a male-only draft? These are the questions with which this brief Essay will grapple.

Importantly, this Essay does not question whether or not women who can qualify for ground combat should be entitled to *volunteer*; that is, self-select into such positions. Rather, it only addresses whether a conscription process must be aimed at producing equal numbers of men and women in combat units that specifically require a level of physicality that only a small percentage of women possess.

That said, this Essay also argues that if it is necessary to draft persons for positions for which the data does not demonstrate that women as a group face a particular physical impediment, then the draft must be conducted on a gender-neutral basis. It also contends that it would be wiser policy for Congress to extend draft registration to both genders in order to be prepared to fill the many other positions beyond ground combat that future warfare will likely require.

## I. THE HISTORY OF MALE CONSCRIPTION

The U.S. has conscripted men to serve in most major conflicts since the Civil War, but terminated doing so at the end of the Vietnam War in 1973.<sup>1</sup> Since that time the U.S. has relied exclusively upon what has been called the “All-Volunteer Force (AVF)” to fill its personnel needs.<sup>2</sup> However, in 1980, President Jimmy

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1. *Conscription, HISTORY*, (last updated Jan. 24, 2020) <https://www.history.com/topics/us-gov-ernment/conscription>; Andrew Glass, *U.S. Military Draft Ends, Jan. 27, 1973*, POLITICO (Jan. 27, 2012), <https://www.politico.com/story/2012/01/us-military-draft-ends-jan-27-1973-072085>.

2. See BERNARD D. ROSTKER, RAND CORP., *THE EVOLUTION OF THE ALL-VOLUNTEER FORCE* (2016), [https://www.rand.org/pubs/research\\_briefs/RB9195.html](https://www.rand.org/pubs/research_briefs/RB9195.html) (explaining that the Gates Commission concluded that “the nation’s interests would be better served by an all-volunteer force

Carter, “in response to the Soviet invasion of Afghanistan” and wanting “to ensure the nation could conscript in the future if the need arises,” resumed draft registration.<sup>3</sup>

Draft registration has not historically been the principle issue associated with the military service of women. Although women have served in various military roles throughout American history,<sup>4</sup> they were not officially assigned to positions or organizations expected to be regularly engaged in direct combat.<sup>5</sup> That slowly changed in the early 1990s, and in 1993 Congress repealed the last “remaining prohibitions on women serving on combatant aircraft and vessels.”<sup>6</sup> Nevertheless, women were still barred by Department of Defense (DoD) *policy* from being assigned to certain “combat-related units and military occupations, especially ground combat units.”<sup>7</sup> This policy eroded over time, and in 2015 then Secretary of Defense Ash Carter decided to “proceed with opening all these remaining occupations and positions to women,” adding “that there will be no exceptions.”<sup>8</sup>

Despite these policy changes, the Military Selective Service Act (MSSA) remained largely unchanged.<sup>9</sup> Although current law does not permit an actual draft, registration is required for men between certain ages. Specifically, it provides that:

It shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, 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.<sup>10</sup>

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than by a combination of volunteers and conscripts”).

3. NAT’L COMM’N ON MILITARY, NAT’L, AND PUB. SERV., INTERIM REPORT 8 (Jan. 2019), <https://www.inspire2serve.gov/NCOS%20Interim%20Report.pdf>.

4. See generally *TIMELINE: A History of Women in the US Military*, TASK & PURPOSE (Mar. 8, 2017, 10:50 AM), <https://taskandpurpose.com/timeline-history-women-us-military>.

5. See KRISTY M. KAMARCK, CONG. RESEARCH SERV., R42075, *WOMEN IN COMBAT: ISSUES FOR CONGRESS 1–2* (2016), <https://fas.org/sgp/crs/natsec/R42075.pdf> (discussing the historical evolution of women’s roles in the military).

6. *Id.* at 2.

7. *Id.* at 1.

8. Secretary of Def. Ash Carter, Remarks on the Women-in-Service Review at the Pentagon Press Briefing Room (Dec. 3, 2015) (transcript available at the U.S. Dep’t of Defense). Secretary Carter said in relevant part:

I reviewed these inputs carefully, and today I’m announcing my decision not to make continued exceptions – that is, to proceed with opening all these remaining occupations and positions to women. There will be no exceptions.

This means that as long as they qualify and meet the standards, women will now be able to contribute to our mission in ways they could not before. They’ll be allowed to drive tanks, fire mortars, and lead infantry soldiers into combat. They’ll be able to serve as Army Rangers and Green Berets, Navy SEALs, Marine Corps infantry, Air Force parajumpers, and everything else that previously was open only to men.

9. The Military Selective Service Act, 50 U.S.C. § 3801 (2018).

10. *Id.*

The statute has criminal penalties for non-compliance, albeit rarely enforced.<sup>11</sup> Of more practical impact are the negative *administrative* ramifications for those who fail to register.<sup>12</sup> For example, *USA Today* reports that “Selective Service statistics suggest that more than 1 million men have been denied some government benefit because they weren’t registered for the draft.”<sup>13</sup>

There have been, however, challenges to the system. In 1981 the Supreme Court upheld the constitutionality of the male-only draft in *Rostker v. Goldberg*.<sup>14</sup> The Court noted that while “deference does not mean abdication,”<sup>15</sup> the case nevertheless arose “in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.”<sup>16</sup> It also observed that “[n]ot only is the scope of Congress’ constitutional power in this area broad, but the lack of competence on the part of the courts is marked.”<sup>17</sup>

Indeed, the *Rostker* Court pointedly said that the District Court “was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of Congress’ evaluation of that evidence.”<sup>18</sup> In respect, the Court “conclude[d] that Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act.”<sup>19</sup>

In coming to that holding, the Court said that the “purpose of [draft] registration is to develop a pool of potential combat troops.”<sup>20</sup> It explained:

The reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all Catholic or all-Lutheran, or an all-Republican or all Democratic registration. 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.<sup>21</sup>

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11. *Id.* § 3811(a).

12. *Id.* § 3811(f). In addition, the Selective Service tells men:

If you are required to register and you don’t, you will not be eligible for federal student aid, federal job training, or a federal job. You may be prosecuted and face a fine of up to \$250,000 and/or jail time of up to five years. If you’re an immigrant to the U.S., you will not be eligible for citizenship.

*Selective Service*, U.S. GOV’T., <https://www.usa.gov/selective-service> (last visited Jan. 10, 2020).

13. Gregory Korte, *For a Million U.S. Men, Failing to Register for the Draft has Serious, Long-term Consequences*, USA TODAY (Apr. 3, 2019), <https://www.usatoday.com/story/news/nation/2019/04/02/failing-register-draft-women-court-consequences-men/3205425002/>.

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

15. *Id.* at 70.

16. *Id.* at 64–65.

17. *Id.* at 65.

18. *Id.* at 83.

19. *Id.*

20. *Id.*

21. *Id.*

In 2019, U.S. District Judge Gray H. Miller ruled in a lawsuit brought by the National Coalition for Men challenging *Rostker*.<sup>22</sup> Judge Miller found that a male-only draft registration regime was now unconstitutional on equal protection grounds. Miller accepted that “under *Rostker*, the dispositive issue [was] whether men and women [were] *similarly situated* in regard to the draft,”<sup>23</sup> but insisted that “while historical restrictions on women in the military may have justified past discrimination, men and women are now ‘similarly situated’ for purposes of a draft or registration for a draft.”<sup>24</sup>

In *Kyle-Label v. Selective Service*,<sup>25</sup> also decided in 2019, Judge Esther Salas wrestled with a different permutation on the draft registration issue. Her case involved a female plaintiff who was complaining that her equal-protection and substantive due-process rights were being violated because she was not able to register for the draft. In dismissing the plaintiff’s substantive due process claim, Judge Salas recognized the Supreme Court’s reluctance to “expand the concept of substantive due process,”<sup>26</sup> and concluded she would not do so in this case. In coming to that conclusion, she noted that “[a]fter all, joining the military is not a personal right, and by inference neither is registration for the draft.”<sup>27</sup>

Nonetheless, Judge Salas did permit the plaintiff’s suit to go forward on the equal protection claim. She reasoned that since women can now “serve in combat roles, and that Defendants cannot show that the classification drawn is substantially related to achieving the MSSA’s objectives,” the plaintiff had stated “an equal protection claim upon which relief can be granted.”<sup>28</sup>

## II. ARE WOMEN “SIMILARLY SITUATED” AS MEN FOR PURPOSES OF DIRECT COMBAT ROLES?

Filling a need for combat troops remains the focus of the draft registration. In enacting the 2015 National Defense Authorization Act, Congress specifically tasked the National Commission on Military, National, and Public Service to consider “the need for a mechanism to draft large numbers of replacement combat troops.”<sup>29</sup> Despite the obvious attention to the draft in that legislation, Congress nevertheless left undisturbed MSSA’s male-only draft registration requirement.

Although the recent cases raise a number of standing and other justiciability issues, both rely on the notion that the current *Executive Branch policy* which now permits (but does not mandate) women to *voluntarily* serve in all military occupations (including previously barred combat roles) necessarily obviates *Rostker’s* holding as to the *Legislative Branch’s* conclusion that women would not be *involuntarily* required to serve in combat roles. In other words, the judges seem to believe that an Executive Branch policy decision essentially overrules explicit

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22. Nat’l Coal. for Men v. Selective Serv. Sys., 355 F. Supp. 3d 568 (S.D. Tex. 2019).

23. *Id.* at 581.

24. *Id.* at 582.

25. Kyle-Label v. Selective Service, 364 F. Supp. 3d 394 (D.N.J. 2019).

26. *Id.* at 412 (citations omitted).

27. *Id.* at 411.

28. *Id.* at 417.

29. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 551, 130 Stat. 2000, 2130 (2016).

statutory language, and this then essentially obliges government to impose conscription on women—an action neither of the elected branches of government currently seeks to do.

In coming to their respective conclusions, it appears that both judges also believe, among other things, that “combat roles” are an undifferentiated occupational category in the armed forces, and the fact that women may now volunteer to serve in such positions means that women, as a group, are therefore “similarly situated.” Actually, the issue is factually and legally much more nuanced than that construct.

It seems clear from *Rostker* that the draft the Court found constitutional was meant to supply “combat troops” principally for the “combat arms.” Combat arms are mainly those who “participate in direct tactical land combat.”<sup>30</sup> In fact, the Court cited then Senator Roger Jepsen, who said that the personnel “shortage would be in the combat arms. That is why you have drafts.”<sup>31</sup> In addition, *Rostker* also referenced Congressional testimony that spoke of the need for “a pool of ready replacements for ground combat positions.”<sup>32</sup> Thus, the draft as contemplated by *Rostker* anticipates a need not for such combat roles as fighter pilots, missile launch crews, sailors on warships, or cyber warriors, but rather infantrymen, and others specifically engaged in direct ground combat.

The need for a draft to furnish ground combatants—infantry especially—is hardly new. Retired Army Major General Robert Scales pointed out that “fear of dying in infantry” is what impels the need for a draft.<sup>33</sup> He put in bluntly in 2013 when he said:

Let’s be clear. In the past we needed the draft because young American men wouldn’t volunteer to risk death in the Army. No other service drafts, just the Army. There is a huge gap in terms of personal risk between serving in a close combat unit versus doing personal service in a hospital or national park.<sup>34</sup>

Thus, if women—as a whole—are typically *factually* “similarly-situated” as men to serve in the infantry, then it could be that the Constitution would require a conscription scheme that was gender-neutral. However, the fact is that women, as a *group*, are *not* physically “similarly situated” to men to perform key tasks troops directly engaged in ground combat are expected to be able to execute.

### III. THE PHYSICAL DEMANDS OF GROUND COMBAT

The physical requirements of military service in general are daunting for both genders. Indeed, “only 29 percent of 17 to 24-year-olds in the U.S. are eligible to serve in the Army.”<sup>35</sup> Of the 71 percent who are not eligible, 27 percent are too

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30. *What Does Combat Arms Mean? Combat Arms Meaning, Definition & Explanation*, YouTube (Apr. 18, 2016), [https://www.youtube.com/watch?v=amCehEbkK\\_U](https://www.youtube.com/watch?v=amCehEbkK_U).

31. *Rostker v. Goldberg*, 453 U.S. 57, 76 (1981).

32. *Id.* at 74 (citing the testimony of Assistant Sec’y of Def. Robert B. Pirie, Jr.).

33. Robert H. Scales, *Drafted Armies Are Self-Killing Machines*, WAR ON THE ROCKS (Dec. 6, 2013), <https://warontherocks.com/2013/12/drafted-armies-are-self-killing-machines/>.

34. *Id.*

35. Devon L. Suits, *Army on Track to Meet FY19 Recruitment Goals, Add More Women to Combat Arms*, ARMY NEWS SERV. (May 21, 2019, 1:49 PM), [https://www.army.mil/article/222154/arm\\_y\\_on\\_trac](https://www.army.mil/article/222154/arm_y_on_trac)

physically unfit, and another 32 percent have other medical issues.<sup>36</sup> Once those who can serve and chose to do so get to their military training, women do seem to suffer more injuries. A 2014 Army study showed that in the Army's Basic Combat Training, "49% of women experienced one or more injuries during training," while only 25% of the men did.<sup>37</sup>

Civilian studies similarly show that women, as a group, are not "similarly situated" to men with respect to physical activities central to combat performance. For example, studies show that because of their physiology, men as a group significantly outperform women in almost all sporting activities that—like direct combat positions—require physical strength and aerobic performance.<sup>38</sup> In addition, studies also show that "women are actually more prone than men to suffer many of the most common sports-related injuries."<sup>39</sup> The reason? The "most common explanation is that it's due to basic differences between the bodies of men and women."<sup>40</sup>

This is consistent with what has been found in the military setting with respect to combat-related tasks. In 2017, the *Marine Times* reported that at "boot camp, 3 out of 4 women fail to meet combat standards."<sup>41</sup> Citing a Marine Corps study in January of 2019, Heather McDonald pointed out in the *Wall Street Journal* that:

The all-male [military] teams greatly outperformed the integrated teams, whether on shooting, surmounting obstacles or evacuating casualties. Female Marines were injured at more than six times the rate of men during preliminary training—unsurprising, since men's higher testosterone levels produce stronger bones and muscles. Even the fittest women (which the study participants were) must work at maximal physical capacity when carrying a 100-pound pack or repeatedly loading heavy shells into a cannon.<sup>42</sup>

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k\_to\_meet\_fy19\_recruitment\_goals\_add\_more\_women\_to\_combat\_arms. See also Kim Strong, *71% of Young People Are Ineligible for the Military—and Most Careers, Too*, USA TODAY (May 21, 2019), <https://www.usatoday.com/story/news/nation/2019/05/14/military-service-most-young-people-dont-qualify-careers/3665840002/>.

36. COUNCIL FOR A STRONG AMERICA, READY, WILLING, AND UNABLE TO SERVE 1–2 (2009), [https://strongnation.s3.amazonaws.com/documents/3/ad129721-81c2-430e-a0a972611ec2ad1c.pdf?1469801577&inline;filename=%22Ready%20Willing%20and%20Unable\\_NATIONAL.pdf%22](https://strongnation.s3.amazonaws.com/documents/3/ad129721-81c2-430e-a0a972611ec2ad1c.pdf?1469801577&inline;filename=%22Ready%20Willing%20and%20Unable_NATIONAL.pdf%22).

37. JAN REDMOND ET AL., U.S. ARMY RESEARCH INST. OF ENVTL. MED., QUANTIFICATION OF PHYSICAL ACTIVITY DURING BASIC COMBAT TRAINING AND ASSOCIATED INJURIES 9 (2014), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a610831.pdf>.

38. See Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances The Best Elite Women to Boys and Men*, CTR. FOR SPORTS LAW & POL'Y AT DUKE LAW SCH., <https://web.law.duke.edu/sports/sex-sport/comparative-athletic-performance/> (comparing sports performances between female and male athletes).

39. Robert H. Shmerling, *The Gender Gap in Sports Injuries*, HARV. HEALTH BLOG (Dec. 3, 2015, 9:00 AM), <https://www.health.harvard.edu/blog/the-gender-gap-in-sports-injuries-201512038708>.

40. *Id.*

41. Jeff Schogol, *At Boot Camp, 3 Out of 4 Women Fail to Meet Combat Standards*, MARINE CORPS TIMES (Aug. 11, 2017), <https://www.marinecorpstimes.com/news/your-marine-corps/2017/08/11/at-boot-camp-3-out-of-4-women-fail-to-meet-combat-standards/>.

42. Heather Mac Donald, *Women Don't Belong in Combat Units*, WALL ST. J. (Jan. 16, 2019, 1:38 PM), <https://www.wsj.com/articles/women-dont-belong-in-combat-units-11547411638>.

The ability to carry weight is critical for troops engaged in ground combat. A 2017 report by the Government Accountability Office found that the weight of “the typical total load” carried by “Army and Marine Corps ground combat personnel averaged about 119 and 117 pounds [respectively].”<sup>43</sup>

Because of the pronounced physical differences, it is unlikely for the foreseeable future that there would be numerical gender-equity in the “combat roles” that the male-only draft is aimed to fill. As one expert put it, regardless of what “physical standards will apply for each combat position . . . *it’s unlikely there will ever be equal numbers of men and women in these combat positions . . .* A large reason for that is that men still have an edge when it comes to certain physical abilities.”<sup>44</sup>

That “edge” could mean the difference between life and death on the battlefield. Although women “could have better endurance than men,” research shows that men are “physically stronger than women” and also “have much stronger grips.”<sup>45</sup> Men are also faster than women:

The fastest woman in the world, Florence Griffith Joyner, ran the 100-meter dash in just 10.49 seconds in 1988, and that record remains unbroken. Yet her fastest time wouldn’t have even qualified her for the men’s 2016 Olympic competition, which requires competitors to finish the 100-meter sprint in 10.16 seconds or less.<sup>46</sup>

That said, some women have qualified for combat arms assignments. Since the opening of all combat roles to women of all military specialties, the Army says “more than 1,200 women have been accessed into infantry, armor and field artillery.”<sup>47</sup> However, given that about 34 percent of the over 68,000 people the Army recruits each year are assigned to such occupations,<sup>48</sup> the 1,200 women would constitute only a tiny percentage of the tens of thousands of men in such jobs. The success of some women does not prove that women in general are “similarly situated” to men as to their physical ability to serve in combat roles.

The fact that the numbers are still small, despite the opening of all combat roles to women is significant to military experts. In September 2018, then Secretary of Defense James Mattis, himself a distinguished combat veteran, said the situation in the U.S. military mirrors that of other nations, where “there are too few women in the infantry ranks to even draw a conclusion.”<sup>49</sup> He conceded that there “are a

43. U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-431, PERSONAL PROTECTIVE EQUIPMENT: ARMY AND MARINE CORP ARE PURSUING EFFORT TO REDUCE THE WEIGHT OF ITEMS WORN OR CARRIED IN COMBAT (2017), <https://www.gao.gov/assets/690/684514.pdf>.

44. Tia Ghose, *Women in Combat: Physical Differences May Mean Uphill Battle*, LIVE SCI. (Dec. 7, 2015), <http://www.livescience.com/52998-women-combat-gender-differences.html> (emphasis added).

45. *Id.*

46. *Id.*

47. Kyle Rempfer, *Army ‘Ahead of Schedule’ in Integrating Women in Combat Arms, Outgoing SMA Says as He Departs*, ARMY TIMES (Aug. 16, 2019), <https://www.armytimes.com/news/yourarmy/2019/08/16/army-ahead-of-schedule-in-integrating-women-in-combat-arms-outgoing-sma-says-as-he-departs/>.

48. Kyle Rempfer, *Here’s How the 68,000-soldier Recruiting Goal Broke Down by MOS*, ARMY TIMES (Sept. 27, 2019), <https://www.armytimes.com/news/your-army/2019/09/27/heres-how-the-68000-soldier-recruiting-goal-broke-down-by-mos/>.

49. Sec’y of Def. James N. Mattis, Remarks at the Virginia Military Institute (Sept. 25, 2018), (transcript available at the U.S. Dep’t of Defense).

few stalwart young ladies who are charging into this, but they are too few,” and said that “[c]learly the jury is out on it, but what we’re trying to do is give it every opportunity to succeed if it can.”<sup>50</sup>

#### IV. DOES THE CONSTITUTION REQUIRE INEFFICIENCY IN MASS MOBILIZATION IN A TIME OF CRISIS?

Studies do show that some “hyperfit” women are able to pass some of the military’s most physically grueling courses.<sup>51</sup> Does that mean all women are therefore “similarly-situated” as men for combat roles? Former Marine and Iraq veteran Ms. Jude Eden says no.<sup>52</sup> She argues that the “fact that combat units are now open to women who volunteer for military service doesn’t mean we should draft women who don’t.”

Eden focuses on the inefficiency of drafting women in a time of crisis, contending that “[q]ualifying equal numbers would create a huge and expensive bureaucratic nightmare just when we need to mobilize quickly—all for very little return.”<sup>53</sup> She argues:

Imagine sifting through millions of women to find the few who qualify by minimal standards, yet still have six to 10 times the injury rates. Will this set your daughter up to survive and win against the likes of the Islamic State or any peer adversary? None of them uses women in combat units.

If drafting women means more killed in action and losing the battles they were drafted for, it completely defeats the point.<sup>54</sup>

Speaking before the National Commission on Military, National, and Public Service, Corey Dickstein of *Stars and Stripes* elaborated on Eden’s thesis:

Eden cited a study of an Army brigade combat team in Afghanistan that found during a combat tour in 2012, 58.8 percent of its women were injured while only 21.4 percent of its men suffered injuries. Additionally, she said, a sex-blind study by the British military found women were 7.5 times more likely to suffer injuries conducting the same training as men.<sup>55</sup>

Author Ashley McGuire made a different, but related argument to the National Commission about the consequences of the physical differences between men and women in battlefield settings. As *Millitary.com* reported, “[McGuire] said

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50. *Id.*

51. Lolita Baldor, *Military Studies ‘Hyperfit’ Women Who Pass Grueling Course*, MILITARY TIMES (July 21, 2019), <https://www.militarytimes.com/news/your-military/2019/07/21/military-studies-hyperfit-women-who-pass-grueling-courses/>.

52. Jude Eden, *Marine Veteran: There is No Military Need to Draft Women*, USA TODAY (Mar. 18, 2019, 5:49 PM), <https://www.usatoday.com/story/opinion/2019/03/18/female-marine-veteran-no-military-need-draft-women-editorials-debates/3206570002>.

53. *Id.*

54. *Id.*

55. Corey Dickstein, *Should Women Register for the Draft? Experts Debate as Trump Administration Challenges Court Ruling*, STARS & STRIPES (Apr. 25, 2019), <https://www.stripes.com/news/us/should-women-register-for-the-draft-experts-debate-as-trump-administration-challenges-court-ruling-1.578544>.

drafting women for combat would be patently unfair because women’s physical limitations give them ‘an unequal chance of surviving’ on the frontlines.”<sup>56</sup>

Obviously, in a time of crisis sorting through male conscripts to find those who would most likely be physically able to perform the duties of direct ground combat would be a significantly more efficient approach than trying to find the relatively small numbers of women who could physically qualify. The wisdom of doing so, however, would seem to be a matter for Congress, not the courts.

In *Rostker*, the Court readily acknowledged arguments “that a small number of women could be drafted for noncombat roles” and this would free up men for combat roles.<sup>57</sup> The Court found, however, that “Congress simply did not consider it worth the added burdens of including women in draft and registration plan.” It concluded that “[i]t is not for this Court to dismiss such problems as insignificant in the context of military preparedness and the exigencies of a future mobilization.”<sup>58</sup>

#### V. DOES IT MATTER IF WOMEN ARE NOT PHYSICALLY “SIMILARLY-SITUATED” AS MEN?

In *National Coalition for Men*, Judge Miller conceded that equal protection principles could not ignore biological differences between men and women<sup>59</sup> but was nevertheless dismissive of the government’s evidence regarding ongoing concerns “about female physical ability” claiming that they “do not appear to have been a significant factor in Congress’s decision-making process regarding the MSSA.” He went on to say that had “Congress compared male and female rates of physical eligibility, for example, and concluded that it was not administratively wise to draft women, the court may have been bound to defer to Congress’s judgment.”<sup>60</sup>

Judge Miller then engaged in his own assessment of the physical requirement of combat roles asserting that:

The average woman could conceivably be *better* suited physically for some of today’s combat positions than the average man, depending on which skills the position required. Combat roles no longer uniformly require sheer size or muscle.<sup>61</sup>

In engaging in his own personal assessment of the importance of physical ability in combat roles—not to mention his blinkered understanding of the kind of combat roles a draft-driven mass mobilization would seek to address—Judge Miller did exactly what *Rostker* cautioned courts against doing when it said that the “District Court was quite wrong in undertaking an independent evaluation of

56. Patricia Kime, *Drafting Women Could Diminish Combat Effectiveness, Vet Says*, MILITARY.COM (Apr. 25, 2019), <https://www.military.com/daily-news/2019/04/25/drafting-women-could-diminish-combat-effectiveness-vet-says.html>.

57. *Rostker v. Goldberg*, 453, U.S. 57, 81 (1981).

58. *Id.*

59. See *Nat’l Coal. For Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568, 581 (S.D. Tex. 2019) (citing *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001) (explaining that *Tuan Anh Nguyen* acknowledged that equal protection did not prohibit recognition of biological differences between the sexes).

60. *Id.*

61. *Id.* at n.6.

this evidence, rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence."

It is puzzling that Judge Miller seemed to think he needed more evidence to conclude that men have the kinds of physical advantages over women that would make them—as a group—more likely to produce troops suitable for the combat arms. There was nothing to prevent him from recognizing that the "ample scientific evidence of males' physical advantages over females" was long-justified; take for example, the lawfulness of women-only sports teams.<sup>62</sup> Emilie Kao points out that:

In 1972, Congress passed Title IX of the 1972 Educational Amendments to the Civil Rights Act, which ordered schools to create separate athletic teams for women. Congress didn't simply tell schools to let women compete for spots on men's teams. That would have been self-defeating, as only a few exceptional female athletes would win spots due to men's greater physical power, strength, and speed.<sup>63</sup>

Actually, the military routinely discriminates on bases that would often be unlawful in a civilian setting, but have been long-accepted. For example, the military has strict requirements related to physical attributes: age,<sup>64</sup> height and weight,<sup>65</sup> physical fitness,<sup>66</sup> and medical conditions.<sup>67</sup> None of these standards are illegal filters for military service as this expert explains:

Unlike many civilian employers, the military is allowed to discriminate in some areas based on the nature of its work. For example, it doesn't hire or retain those who, because of their age, disability, or physical fitness are unable to perform military duties, which can take place in harsh environments including combat zones.<sup>68</sup>

In fact, the MSSA—being, as Congress established it, a "selective" service process—sets upper and lower age limits for the draft even though there are likely

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62. Emilie Kao, *How Pelosi's "Equality Act" Would Ruin Women's Sports*, HERITAGE FOUND. (Apr. 24, 2019), <https://www.heritage.org/gender/commentary/how-pelosis-equality-act-would-ruin-womens-sports>.

63. *Id.*

64. See U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE INSTRUCTION NUMBER 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, & INDUCTION §2a (2018), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130426p.pdf?ver=2018-10-26-085822-050> (discussing basic eligibility criteria for the military, including age requirements).

65. See, e.g., Elie Piha, *Army Height and Weight Standards*, OPERATION MILITARY KIDS (Apr. 8, 2019), <https://www.operationmilitarykids.org/army-height-and-weight-standards/> (discussing height and weight standards in the army).

66. See generally U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE INSTRUCTION NUMBER 1308.3, PHYSICAL FITNESS AND BODY FAT PROGRAMS PROCEDURES (2002), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130803p.pdf>.

67. See generally U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE INSTRUCTION NUMBER 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION INTO THE MILITARY SERVICES (2018), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf?ver=2018-05-04-113917-883>.

68. *Equal Opportunity Policies in the Military*, FINDLAW, <https://military.findlaw.com/administrative-issues/benefits/equal-opportunity-policies-in-the-military.html> (last visited Dec. 15, 2019).

individuals outside of them who could perform military duties successfully. This age discrimination is a reasonable effort to optimize the chances of the group so defined to meet the needs of combat arms troops. No court has ever held, for example, that the military is required as a matter of equal protection to induct anyone outside of its age parameters.

Congress has recognized that such generalized conclusions make sense. For example, in 2012, after meeting an “ultra-marathon runner who was denied enlistment in the Army for being a few months over the maximum age,” a Congressman introduced a bill to “allow people of any age to join the military as long as they could meet the minimum health and fitness requirements.”<sup>69</sup> In defeating the proposal, Representative Susan Davis of the Armed Services Committee personnel panel was reported as saying that as to enlisting older personnel the “risks outnumbered gains.” Additionally, she said older personnel were “not only more likely to become injured, but [would] also take more time to recover than their younger counterparts.”<sup>70</sup>

Clearly, in terms of combat capability, physical capabilities and durability are vitally important. In a time of national crisis requiring a mass mobilization in order to produce more combat troops, it is logical for the armed forces to make reasoned decisions about the physical abilities of people as a *group*. Thus, the fact that a *policy* no longer bars women from volunteering for combat roles does not mean therefore that all women must, as a matter of Constitutional imperative, be subject to involuntary induction into positions intended for combat troops.

Although it is possible that the Court would continue defer to a Congressional determination that a male-only draft was appropriate notwithstanding the opening of combat roles to women, it appears unassailable that the physical differences between men and women as a group would justify the lawfulness of a draft aimed at providing combat troops. Women as a group are simply not “similarly situated” to men for combat roles. A policy change will not make anyone bigger, stronger, or faster.

#### VI. SHOULD WOMEN NEVERTHELESS BE CONSCRIPTED TO SERVE IN COMBAT ROLES DESPITE NOT BEING PHYSICALLY “SIMILARLY SITUATED”?

The involuntary service of anyone would seem to sound in the Thirteenth Amendment’s prohibition on involuntary servitude.<sup>71</sup> However, in the 1918 case of *Arver v. United States*<sup>72</sup>—sometimes referred to as the “Selective Draft Cases”—the Supreme Court tackled that exact issue. Citing various provisions of the

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69. Jeff Ousley, *Military Age Restrictions: How Old is Too Old to Serve?*, VETERANS UNITED HOME LOANS (June 21, 2018), <https://www.veteransunited.com/network/military-age-restrictions-how-old-is-too-old-to-serve/>.

70. *Id.*

71. The Thirteenth Amendment provides:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. CONST. amend. XIII.

72. *Arver v. United States*, 245 U.S. 366 (1918).

Constitution, the Court found that it very clearly permitted the government to compel military service. As to the Thirteenth Amendment claim, the Court said:

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.<sup>73</sup>

While military service may be required, is it also true that, consistent with the Constitution, women can be forced to serve in an infantry role? It seems so: in *Jacobson v. Massachusetts*,<sup>74</sup> the Supreme Court said (in dicta) that someone “may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.”<sup>75</sup>

Thus, it would seem that women could be required to *try* to qualify for the infantry. Would this mean some women might deliberately fail in order to avoid service? Maybe, but there could be serious consequences. Consider that the Uniform Code of Military Justice (UCMJ) criminalizes “malingering.”<sup>76</sup> According to the Manual for Courts-Martial, the “essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service.”<sup>77</sup>

#### VII. ARE WOMEN “SIMILARLY SITUATED” IN TERMS OF DISPOSITION TO SERVE?

There is a reluctance to serve in the military in any capacity among young Americans of both genders. In 2019, the Army reported that of all the seventeen to twenty-four year-olds in the U.S., “only one in eight has a propensity to enlist in the military.”<sup>78</sup> This is so despite the fact that the vast majority of Americans are “very positive” about the military.<sup>79</sup> Writing in *Task & Purpose*, Mike Connelly pointed out that “millennials are in line with every other demographic group in America in supporting increased security measures, use of force, and military

73. *Id.* at 390.

74. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

75. *Id.* at 29 (1905).

76. UCMJ art. 83 codified as 10 U.S.C. § 883 (2018) provides:

Any person subject to this chapter who, with the intent to avoid work, duty, or service—

(1) feigns illness, physical disablement, mental lapse, or mental derangement; or

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.

77. MANUAL FOR COURTS-MARTIAL, UNITED STATES, IV-9 (2019 ed.).

78. Suits, *supra* note 35.

79. Frank Newport, *Memorial Day Finds Americans Very Positive About Military*, GALLUP (May 25, 2018), <https://news.gallup.com/opinion/polling-matters/235013/memorial-day-finds-americans-positve-military.aspx>.

service.”<sup>80</sup> The issue, Connelly says, is that they “just don’t want to be the ones to do it.”<sup>81</sup>

Regardless, the percentage of women in the military is increasing—it is now around 17 percent—and the number of women in leadership positions is likewise growing.<sup>82</sup> However, absent a draft, it is difficult to envision a situation where the number of women in the armed forces would begin to approach the percentage in American society. Women are simply much less likely than men to voluntarily serve in the military.

The Congressional Research Service (CRS) notes that in “recent youth polls, the percent of young women who said that they would ‘probably’ or ‘definitely’ be serving in the military in the next few years was 8% relative to 18% for men.”<sup>83</sup> Importantly, CRS also reports that:

Some have questioned whether the opening of direct combat roles to women would have an effect on female propensity to serve. DOD surveys have found that 35% of new recruits reported that this policy change made them more likely to serve; however only 2% of female recruits wanted a combat specialty in Armor, Artillery, or Infantry.<sup>84</sup>

It also seems clear that most women do not want to register for the draft. A 2016 poll found that only 39 percent of women thought they should be required to register, while 61 percent of men believed they should.<sup>85</sup> A 2019 poll was very similar: “[s]ixty percent (60%) of men think women should have to register for the draft just like they do. But only 40% of women agree.”<sup>86</sup>

Although not asked about the draft, *per se*, a poll of active-duty troops and veterans published by *Smithsonian Magazine* in early 2019 found that only 70 percent of respondents overall supported the “deployment of female troops in ground combat situations” but 88% of women did.<sup>87</sup> However, the same survey showed that 67 percent of the still-serving troops and the veterans (including 33 percent of the women) believed that “gender-mixed basic training reduce[d] physical training standards.”<sup>88</sup>

80. Mike Connelly, *Why are so Few Millennials Willing to Join the Military?*, TASK & PURPOSE (Feb. 18, 2016) <https://taskandpurpose.com/why-are-so-few-millennials-willing-to-join-the-military>.

81. *Id.*

82. KRISTY M. KAMARCK, CONG. RESEARCH SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 29 (2019), <https://fas.org/sgp/crs/natsec/R44321.pdf>.

83. *Id.* at 31–32.

84. *Id.* at 32 (emphasis added).

85. Stephanie Akin, *Women and the Draft: They’re Divided Over Registration*, ROLL CALL (June 28, 2016, 5:56 AM), <https://www.rollcall.com/politics/women-draft-poll-shows-dont-favor-registration> (citing an Economist/YouGov poll from June 2016).

86. *Men Favor Military Draft for Women A Lot More Than Women Do*, RASMUSSEN REP. (Mar. 2019), [https://www.rasmussenreports.com/public\\_content/politics/current\\_events/us\\_military/men\\_favor\\_military\\_draft\\_for\\_women\\_a\\_lot\\_more\\_than\\_women\\_do](https://www.rasmussenreports.com/public_content/politics/current_events/us_military/men_favor_military_draft_for_women_a_lot_more_than_women_do).

87. Terrence Monmaney, *New Poll of U.S. Troops and Veterans Reveals Their Thoughts on Current Military Policies*, SMITHSONIAN MAG. (Jan. 2019), <https://www.smithsonianmag.com/arts-culture/new-poll-us-troops-veterans-reveals-thoughts-current-military-policies-180971134/>.

88. *Id.*

Given the policy permitting women to volunteer for combat roles, Congress may determine that it is unnecessary—and unhelpful to the armed forces—to draft unwilling women to attempt service in direct combat positions for which they are not, in general, as physically suited as men.

#### VIII. HAS TECHNOLOGY FUNDAMENTALLY ALTERED THE NEED FOR COMBAT TROOPS?

There is no shortage of analysts who argue that the “future of war is cyber,”<sup>89</sup> or that “we are entering “a new era of machine-driven warfare” where robots will dominate the battlefield.<sup>90</sup> These developments could offset the physical requirements currently demanded of ground combat troops. Accordingly, do we still need to prepare for a mass mobilization designed to produce combat troops? For the moment, it still seems so.

The fact is that as important as these technological developments may be—particularly in the future—they have not yet proven to be decisive in any major conflict. In the meantime, experts believe we live in an age of “great-power competition” with “rising China and a vindictive Russia.”<sup>91</sup> China has, we are told, engaged in a “military buildup of historic scale,” and Russia has significantly “rebuilt its military.”<sup>92</sup> Consequently, the U.S. is preparing for a land war against both Russia and China.<sup>93</sup> Even a conflict with Iran could result in enormous demands for combat troops.<sup>94</sup> In addition, the U.S. could also have to deal militarily with North Korea, which fields an army of a million troops.<sup>95</sup>

In 2017, the current Chairman of the Joint Chiefs of Staff General Mark Milley insisted that notwithstanding advances in military technology, “[t]o impose your political will on the enemy typically requires you, at the end of the day, to close with and destroy that enemy up close with ground forces.”<sup>96</sup> In short, while the

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89. See, e.g., Anna Johansson, *The Future of War is Cyber*, TNW (Jan. 21, 2019), <https://thenextweb.com/contributors/2019/01/21/the-future-of-war-is-cyber/>.

90. Zachary Fryer-Biggs, *Coming Soon to a Battlefield: Robots That Can Kill*, ATLANTIC (Sept. 3, 2019), <https://www.theatlantic.com/technology/archive/2019/09/killer-robots-and-new-era-machine-driven-warfare/597130/>.

91. Elbridge A. Colby & A. Wess Mitchell, *The Age of Great-Power Competition*, FOREIGN AFFAIRS (Jan./Feb. 2020), <https://www.foreignaffairs.com/articles/2019-12-10/age-great-power-competition>.

92. *Id.*

93. Kris Osborn, *The U.S. Is Preparing For a Land War Against both Russia and China*, NAT'L INTEREST (Nov. 30, 2019), <https://nationalinterest.org/blog/buzz/us-preparing-land-war-against-both-russia-and-china-100137>.

94. See Todd South et al., *What War with Iran Could Look Like*, MILITARY TIMES (June 4, 2019), <https://www.militarytimes.com/news/2019/06/04/what-war-with-iran-could-look-like/> (discussing Iran's “total force strength”).

95. See Sebastian Roblin, *Think About This: North Korea Has a 1 Million Man Army (And Its People Starve)*, NAT'L INTEREST (Oct. 17, 2019), <https://nationalinterest.org/blog/buzz/think-about-north-korea-has-1-million-man-army-and-its-people-starve-88921> (noting that the Korean People's Army is “among the largest in the world, counting around a million personnel”).

96. Meghann Myers, *Milley: Future Wars Will Be Long, They'll Be Fought on the Ground, and Spec Ops Won't Save Us*, MILITARY TIMES (July 27, 2017), <https://www.armytimes.com/news/yourarmy/2017/07/27/milley-future-wars-will-be-long-theyll-be-fought-on-the-ground-and-spec-ops-wont-save-us/>.

“likelihood that the United States will have to fight a really big war—one that requires many hundreds of thousands of troops, with high levels of destructiveness and casualties—remains low . . . the consequences would be enormous.”<sup>97</sup>

Nevertheless, scientific advances may make it possible for larger numbers of women to serve in the combat arms. Because there are women who have successfully completed “some of the military’s most arduous physical and mental courses” which could qualify them for assignments to elite organizations such as Special Forces, the Army is conducting a scientific study to answer this question: “Who are these ‘hyperfit’ women and what makes them so competitive?”<sup>98</sup> The results of that examination may enable significant numbers of women to qualify for combat service, and to serve in such roles without an elevated risk of injury.

In addition, the Army is also testing exoskeleton devices that allow “a soldier to transfer the weight of the load from his or her frame to the device.”<sup>99</sup> This could diminish the physical requirement that is impeding larger numbers of women from qualifying for ground combat roles. Yet none of these efforts appear ready for mass implementation in the near future.

#### CONCLUSION

This Essay argues that consistent with the Constitution, Congress can mandate the registration and drafting of women. That said, the Constitution also does not *require* the inclusion of women in order to make draft registration lawful. The MSSA was clearly designed to provide troops for the combat arms, and it takes more than merely changing a policy to permit women to volunteer for such service to make women “similarly situated” as men for that particular responsibility.

Constitutionally, there is a conversion of three key principles at play: 1) there is no Constitutional right to serve in the armed forces;<sup>100</sup> 2) “equal protection principles do not prohibit acknowledgment of biological differences between genders;”<sup>101</sup> and 3) in matters of the military and national security, there is “perhaps in no other area [in which the Supreme] Court accorded Congress greater deference.”<sup>102</sup>

Normatively, the U.S.’s male-only conscription architecture seems to be in accord with the vast majority of nations. Of the 195 recognized countries, the Pew Research Center says that only sixty have active conscription, and only eleven

97. David Barno & Nora Bensahel, *Preparing for the Next Big War*, WAR ON THE ROCKS (Jan. 26, 2016), <https://warontherocks.com/2016/01/preparing-for-the-next-big-war/>.

98. Baldor, *supra* note 51 (discussing how medical researchers have launched a voluntary study on women who have succeeded in “traditionally male trainings”).

99. Compare Todd South, *This Army Unit Will be First to Test an Exoskeleton That Lightens Combat Load*, ARMY TIMES (June 5, 2018), <https://www.armytimes.com/news/your-army/2018/06/05/this-armyunit-will-be-first-to-test-an-exoskeleton-that-lightens-combat-load/>, with Jennifer Chu, *Movement-enhancing Exoskeletons May Impair Decision Making*, MIT NEWS (Oct. 4, 2018), <http://news.mit.edu/2018/movement-enhancing-exoskeletons-impair-decision-making-1004>.

100. See *supra* notes 22–27 and accompanying text.

101. See *supra* note 59 and accompanying text.

102. *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981).

draft women.<sup>103</sup> About seventeen countries (with or without conscription) do, however, *permit* women to serve on combat roles if they volunteer, but the numbers seem to be small. Even in the Israeli Defense Force, only about 7 percent of the women serve in combat positions.<sup>104</sup> It appears that very few, if any, countries *require* women to serve in combat specialties.

That said, the policy of allowing women to volunteer to serve in combat positions is well-reasoned. It enables the U.S. to take advantage of those women with the physicality and motivation to succeed in such roles. At the same time, it also makes sense to acknowledge that women, as a group, are not “similarly situated” to men in terms of the physical capabilities direct combat roles require.

Yet there is the reality that the sacrifice of military service does fall grossly disproportionately on males. Only 8 percent of Americans are veterans, and of that number just 10 percent are women.<sup>105</sup> Perhaps more importantly, the casualties in the post 9/11 conflicts have been overwhelming male.<sup>106</sup> This invites a much larger and much-needed national conversation about the nature of a citizen’s responsibilities to the country.<sup>107</sup> Congress was wise to authorize the National Commission on Military, National, and Public Service with a charter “to develop recommendations to inspire more Americans—specifically young people—to participate in military, national, and public service and to review the military selective service process.”<sup>108</sup>

It is not hard to imagine the National Commission recommending both men and women register for the draft. If so, it could be a recognition that other roles—cyber expertise for example—are actually harder to fill than combat roles.<sup>109</sup> It could also require the registration database to be robust enough so as to identify and potentially make available to the nation people with a range of skill sets— even for duty outside the armed services.<sup>110</sup>

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103. Drew DeSilver, *Fewer Than a Third of Countries Currently Have a Military Draft; Most Exclude Women*, PEW RESEARCH CTR.: FACTTANK (Apr. 23, 2019), <https://www.pewresearch.org/facttank/2019/04/23/fewer-than-a-third-of-countries-currently-have-a-military-draft-most-exclude-women/>.

104. Idit Shafran Gittleman, *Female Service in the IDF: The Challenge of an ‘Integrated’ Army*, LAWFARE (Feb. 28, 2018), <https://www.lawfareblog.com/female-service-idf-challenge-integrated-army>.

105. News Release, U.S. Dep’t of Labor, *Employment Situation of Veterans—2018* (Mar. 21, 2019), <https://www.bls.gov/news.release/pdf/vet.pdf>.

106. For example, of the 2,349 U.S. troops killed in Operation Enduring Freedom in Afghanistan, 2,297 were male. See NESE F. DEBRUYNE, CONG. RESEARCH SERV., RL 32492 AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 11 (2019) (showing data on military deaths in the Operation Enduring Freedom of Afghanistan). Of the 4,419 killed on Operation Iraqi Freedom, 4,308 were men. See *id.* at 15.

107. See, e.g., Charles Dunlap, *Can We Talk? The Obligation of Military Service*, WAR ON THE ROCKS, (June 20, 2018), <https://warontherocks.com/2018/06/can-we-talk-the-obligation-of-military-service/>.

108. *Who We Are*, NAT’L COMM’N ON MILITARY, NAT’L, & PUB. SERV., <https://www.inspire2serve.gov/content/who-we-are> (last visited Dec. 15, 2019).

109. See, e.g., Justin Lynch, *Inside the Pentagon’s Struggle to Build a Cyber Force*, FIFTH DOMAIN (Oct. 29, 2018), <https://www.fifthdomain.com/dod/2018/10/29/inside-the-pentagons-struggle-to-build-a-cyber-force/>.

110. For example, the National Oceanic and Atmospheric Administration Commissioned Officer Corps, and the United States Public Health Service Commissioned Corps, are both uniformed services subject to the Uniform Code of Military Justice, but are not “armed” services. See Blake Stilwell, *These*

In the meantime, however, courts need to respect the fact the Congress is quite cognizant of current requirements of the male-only draft and has chosen to keep it in place to await the results of the Commission. In this particular matter of national security and defense, courts ought to defer to the elected branches of government as to what facts and determinations constitute making one group “similarly situated” to another. Judicial speculation, particularly when their lack of expertise is so evident, is not just erroneous—it puts at risk the nation’s security.