

University of Michigan Journal of Law Reform Caveat

Volume 46 | Issue 1

2012

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Recommended Citation

James Santiago, Comment, *If Female, Skip to Question #23*, 46 U. MICH. J. L. REFORM CAVEAT 47 (2012). Available at: https://repository.law.umich.edu/mjlr_caveat/vol46/iss1/10

This Comment was originally cited as Volume 2 of the University of Michigan Journal of Law Reform Online. Volumes 1, 2, and 3 of MJLR Online have been renumbered 45, 46, and 47 respectively. These updated Volume numbers correspond to their companion print Volumes. Additionally, the University of Michigan Journal of Law Reform Online was renamed Caveat in 2015.

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JOURNAL of LAW REFORM ONLINE

COMMENT

IF FEMALE, SKIP TO QUESTION #23

James Santiago*

The requirement that only men register with the Selective Service System¹ is in need of reform for many reasons. One reason that has largely been unexplored is the public's disconnect with the military and the recent wars in Iraq and Afghanistan. Women are actively engaged in those wars in our all-volunteer force, but women are not required to register with the Selective Service. Failure to register can have tremendous legal consequences for men, such as ineligibility for student loans with an answer of "no" to question #22 on the Free Application for Federal Student Aid (FAFSA).² There are many consequences of such a system—such as a disparity in treatment between similarly situated men and women—but another social consequence is the lack of a broad-based public interest when our nation goes to war.

The Supreme Court in *Rostker v. Goldberg* held that it is constitutional to require only men to register for the draft with the Selective Service System.³ In its holding, the Court exhibited great deference to the judgment of the military and to Congress, finding that women were not eligible for combat roles,⁴ even after President Jimmy Carter recommended that women be included in Selective Service registration.⁵ More than thirty years after this decision, the continuation of this policy makes little sense in our nation today. Now our country is at war, with both men and women involved in the effort, but the nation as a whole is not.

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1. 50 U.S.C. § 453 (2006).

2. Free Application for Federal Student Aid July 1, 2012–June 30, 2013, U.S. DEPT OF EDUC. (2012), available at www.fafsa.ed.gov/fotw1213/pdf/PdfFafsa12-13.pdf (last visited Sept. 16, 2012).

3. 453 U.S. 57 (1981).

4. *Id.* at 78–79.

5. See *Backgrounder: Women and the Draft in America*, SELECTIVE SERV. SYS., <http://www.sss.gov/wmbkgr.htm> (last updated Apr. 30, 2002).

In the time since *Rostker*, women have developed a more prominent place in our society and in the military. The war in Iraq, which lasted more than eight years, is now over, and the ongoing war in Afghanistan is the longest in the nation's history. In this era of modern warfare, women are no longer restricted to support roles in the military; they are engaged in de facto combat. Although women still primarily serve in traditional non-combat roles, it is increasingly difficult to define combat in modern unconventional wars. They are now at the actual and hypothetical frontlines. Even though legislation prevents women from serving in some combat roles,⁶ women are still subject to the same ambushes and Improvised Explosive Devices (IEDs) as their male counterparts in Afghanistan. They have also been taken as Prisoners of War (POWs), wounded, and killed-in-action.⁷ Furthermore, women may be eligible for combat roles that men simply cannot perform. Women can interact with native women, because local customs may prohibit unrelated men and women from touching or speaking with each other,⁸ and they can also use their sexuality to a certain extent as a weapon in the interrogation room.⁹ Conversely, there may still be some roles exclusively for men.

A change in public policy regarding the draft or Selective Service will always be a controversial issue, but so too is the national decision to commit our youth to the defense of the liberties we cherish. The Department of Defense last addressed the issue of mobilization requirements for the Selective Service System in 1994 on President Bill Clinton's request, but it affirmed the decision in *Rostker*.¹⁰ However, the Department of Defense did acknowledge that policies regarding women in the military need periodic review in light of the evolving role of women in combat.¹¹

Currently, less than 1 percent of the population has fought in

6. See 10 U.S.C. § 652 (2006).

7. 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 U. DAYTON L. REV. 135, 160, 163 (2003).

8. See Daniel E. Faltas, *Beyond the Burqa, Beyond the Camouflage: The Inclusion of Female Combatants in the U.S. Military as Legally and Culturally Imperative to Winning the War Against Terrorism in Afghanistan*, 12 RUTGERS RACE & L. REV. 99, 102 (2011).

9. See Carol D. Leonnig & Dana Priest, *Detainees Accuse Female Interrogators*, WASH. POST, Feb. 10, 2005, at A01.

10. See *Backgrounder: Women and the Draft in America*, supra note 5.

11. See *id.*

these wars and it is this same 1 percent that has assumed 100 percent of the burden,¹² with some men and women making multiple combat deployments (this author among them) while their families wait at home. Meanwhile, only half of the young adults in the nation must register with the Selective Service to be eligible for the draft. Granted, one of the greatest strengths of the military is that it is an all-volunteer force and this proposal in no way suggests compulsory service; rather, it suggests national unity.

In a lecture at Duke University in 2010, former Secretary of Defense Robert M. Gates elaborated on the benefits of an all-volunteer force and how the military leadership is “overwhelmingly opposed” to reinstating the draft.¹³ Today’s modern force retains a greater level of education and experience: when the draft was in place, less than 20 percent of enlisted Army soldiers had more than four years of military experience compared to the 50 percent of today’s soldiers.¹⁴ Secretary Gates went on to describe the wars in Iraq and Afghanistan as an “abstraction” for many civilians or “something for other people to do.”¹⁵ As evidence of this abstraction, he made reference to the decreasing number of children in the country who had parents who served in the military, disparities in the number of service members based on geography, and the removal of ROTC programs from elite universities in response to the “Don’t Ask, Don’t Tell” policy.¹⁶ Despite this, males at those universities are still required to register with the Selective Service in order to receive federal aid and student loans. They must answer “yes” to question #22.

Despite this growing disconnect between the public and the military, after September 11, 2001, President George W. Bush encouraged the public not to sacrifice, but to “enjoy life” and to

12. THE WHITE HOUSE, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA’S COMMITMENT1 (2011).

13. Robert M. Gates, Secretary of Defense, Lecture at Duke University on an All-Volunteer Force (Sept. 29, 2010), *available at* <http://www.defense.gov/speeches/speech.aspx?speechid=1508>.

14. *Id.*

15. *Id.*

16. *Id.*

“get down to Disney World in Florida.”¹⁷ This disconnect encourages our citizens to spend and not to sacrifice, which is one more justification for universal registration with the Selective Service. This separation between the public and the military is best summed up in an interview between television stars Oprah Winfrey and Tom Brokaw, covering the bravest families in America.¹⁸ In that interview, Brokaw said that if you do not know someone serving in Iraq or Afghanistan, or even a family in your town that has someone serving, then you do not really care about the wars or the people who fight them.¹⁹ Brokaw called for us to “re-enlist as citizens” and to raise our consciousness about these wars.²⁰ These wars will be finite, and all of us will have true solidarity with the troops and their families, only when we have a vested interest as a unified nation in the outcome of these wars.

The Selective Service System applies to only half the population by using a suspect classification based on sex. What would the perspective of the nation be if all Americans were subject to a draft? Scholars have addressed the constitutionality of the issues identified in *Rostker*, the modern role of women in combat, and the impact of the repeal of the Don't Ask, Don't Tell policy on women in the military.²¹ But no one has apparently addressed how these issues collectively evidence a general disconnect among the public, the military, and the wars in Iraq and Afghanistan.

A legislative decision is needed to require women to register with the Selective Service. That decision will have to be made by a Congress whose current members are comprised of the lowest number of veterans since World War II²² and a disproportionate

17. Justin Fox, *A Look Back at Bush's Economic Missteps*, TIME (Jan. 19, 2009), http://www.time.com/time/specials/packages/article/0,28804,1872229_1872230_1872236,00.html.

18. *The Bravest Families in America*, OPRAH, http://www.oprah.com/oprahshow/The-Bravest-Families-in-America_1/1 (last visited Sept. 5, 2012).

19. *Id.*

20. *Id.*

21. See, e.g., Angela Rollins, *Act Like a Lady!: Reconsidering Gender Stereotypes & the Exclusion of Women from Combat in Light of Challenges to "Don't Ask, Don't Tell"*, 36 S. ILL. U. L.J. 355, 364 (2012).

22. Gregory Korte, *Today's Congress Has Fewer Veterans: Military Representation at Post-WWII Low: 22%*, USA TODAY, Nov. 11, 2011, at A1.

number of men in comparison to women.²³ Expanding the pool that is required to register with the Selective Service is not necessarily something that will eliminate or should eliminate all sex-based segregation in the military, but it will provide a greater integration between the military and a detached public. Although the chances of a draft are highly unlikely, especially in light of the military's preference for an all-volunteer force, expanding the Selective Service to women is one more way to promote solidarity in a nation where all should be equally called to serve. It is not realistic to think that a prospective male student who answers "yes" to question #22 will feel some connection to the ongoing war in Afghanistan. But if the issue of female registration with the Selective Service were brought to light on the national stage during a time of war, it may give people the opportunity to realize that Afghanistan is not an abstract war.

In her speech at the 2012 Democratic National Convention, then-Congressional Candidate Tammy Duckworth, herself a wounded veteran, best exemplified the suitability of women in combat.²⁴ To Representative-elect Duckworth, service in a time of war is not a theoretical concept or something that other people do: Representative-elect Duckworth, her father, and her husband are all veterans.²⁵ At the convention, Duckworth said, "America's daughters are just as capable of defending liberty as her sons."²⁶ Now that she has been elected to Congress,²⁷ perhaps her public service will raise awareness from both the female and veteran perspectives in a legislature that is dominated by men who have never served. Duckworth is a woman and she is a veteran; the irony is that she did not have to serve, nor would she be drafted to serve.

23. See *Historical Data: 112th Congress, 2011–2013*, WOMEN IN CONGRESS (Sept. 30, 2012), <http://womenincongress.house.gov/historical-data/representatives-senators-by-congress.html?congress=112>.

24. Tammy Duckworth, Address at the Democratic National Convention (Sep. 4, 2012), available at <http://www.politico.com/news/stories/0912/80673.html>.

25. *Id.*

26. *Id.*

27. Dave McKinney, *Duckworth Unseats Walsh in Much-Watched Suburban Race for Congress*, CHI. SUN-TIMES (Nov. 13, 2012, 2:45 PM), <http://www.suntimes.com/news/elections/16151530-505/dem-tammy-duckworth-ahead-in-early-returns.html>.