

Change is a Comin’: Department of Defense Decision to Open All Combat Jobs to Women Necessitates Change to Current Military Selective Service Act

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I. INTRODUCTION

It has been over 40 years since the last military draft in the United States;¹ however, draft registration is still required by males ages 18 to 26 years old.² Throughout the United States' history, women have never been subject to the draft,³ mainly because women could not serve in combat positions, and Congress had determined that, if a military draft needed to be used, it would be for combat troops.⁴

Over the past three years, much progress has been made with regard to women in combat. In 2013, then-Secretary ("Sec'y") of Defense Leon Panetta eliminated the 1994 Direct Ground Combat Definition and Assignment Rule,⁵ "removing the remaining barrier to the integration of women into all military occupational specialties

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1. See *Background of Selective Service*, SELECTIVE SERV. SYS., <https://www.sss.gov/About/History-And-Records/Background-Of-Selective-Service> (last visited Feb. 14, 2017).

2. 50 U.S.C. § 3802 (2016).

3. See *Backgrounder: Women and the Draft*, SELECTIVE SERV. SYS., <https://www.sss.gov/Registration/Women-And-Draft/Backgrounder-Women-and-the-Draft> (last visited Feb. 14, 2017).

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

5. 1994 Direct Ground Combat Definition and Assignment Rule states, "Service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground." David Vergun, *Secretary of Defense Rescinds 'Direct Ground Combat Definition and Assignment Rule'*, ARMY (Jan. 24, 2013), <http://www.army.mil/article/94932/>.

and career fields within the U.S. military.”⁶ Sec’y Panetta gave the Services an opportunity to submit data on what, if any, positions in which women should not be allowed to serve.⁷ After two years of collecting data and submitting recommendations to the Sec’y of Defense, in December 2015, then-Sec’y of Defense Ash Carter determined that all combat positions would be open to women without any exceptions.⁸

With this decision comes many hurdles of implementation and unknown effects on current law, particularly the Military Selective Service Act (“MSSA”). In fact, Congress anticipated that changes like this could potentially have a drastic effect on the MSSA. So, under 10 U.S.C. § 652 the Sec’y of Defense is required to submit a report to Congress on both any changes related to women in combat and the legal analysis of the proposed change on the MSSA.⁹ Since December 2015, Congress has neither attempted to halt the implementation of Sec’y Carter’s decision nor has Congress expressed a belief whether the current MSSA is unconstitutional in light of the recent changes.¹⁰

This question of whether the MSSA is still constitutional is the focus of this article. This article will first provide the text of the MSSA and the seminal United States Supreme Court case, *Rostker v. Goldberg*, precedent on this issue. The article will then provide a background on the current trends regarding women in combat, pending legislation that proposes changes to the MSSA, and two pending district court cases that seek to have the MSSA deemed unconstitutional in light of the recent changes. This article then provides a

6. Memorandum from Sec’y of Def. Ash Carter on Implementation Guidance for the Full Integration of Women in the Armed Forces (Dec. 3, 2015) [hereinafter Memo from Sec’y of Def. Ash Carter], <http://www.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf>.

7. See Luis Martinez, *Pentagon to Allow Women in Combat*, ABC NEWS (Jan. 23, 2013), <http://abcnews.go.com/Politics/women-combat-defense-secretary-leon-panetta-lifts-pentagon/story?id=18295570>.

8. See Matthew Rosenberg & Dave Philipps, *All Combat Roles Now Open to Women, Defense Secretary Says*, N.Y. TIMES (Dec. 3, 2015), http://www.nytimes.com/2015/12/04/us/politics/combat-military-women-ash-carter.html?_r=0.

9. 10 U.S.C. § 652 (2016).

10. See generally *Women and the Draft*, SELECTIVE SERV. SYS., <https://www.sss.gov/Registration/Women-And-Draft> (last visited Feb. 14, 2017) (explaining that Congress has taken no action regarding the related question of whether this requires women to register for the draft).

legal analysis on whether the MSSA is in fact currently unconstitutional, why Congress should act expeditiously to address the unconstitutionality of the MSSA before the courts do, and why Congress should repeal the MSSA. Lastly, this article will conclude with a brief synopsis of the key points of the article.

II. BACKGROUND

To understand the arguments made in this article, it is necessary to understand the current MSSA and the controlling case law regarding the constitutionality of requiring women to register for the draft.

A. *The Military Selective Service Act*

The MSSA is found at 50 U.S.C. § 3802. It states in relevant part:

[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, 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.¹¹

The current Act does not require women to register for the draft; however, there are two pieces of pending legislation in the House of Representatives that seek to amend the act to require women to register¹² or to repeal the act in its entirety.¹³

B. *Rostker v. Goldberg*

The concept of women and the draft is not a recent development. In 1981, the United States Supreme Court addressed this very

11. 50 U.S.C. § 3802 (2016).

12. Draft America's Daughters Act of 2016, H.R. 4478, 114th Cong. § 2 (2016).

13. H.R. 4523, 114th Cong. (2016); *see infra* Part III for detailed discussion on pending legislation.

issue. In the seminal case *Rostker v. Goldberg*, Justice William Rehnquist, writing for the majority, held that:

[S]ince women are excluded from combat service by statute or military policy, men and women are simply not similarly situated for purposes of a draft or registration for a draft, and Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. . . . Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act.¹⁴

Specifically in *Rostker*, several men subject to registration for the draft challenged the constitutionality of the MSSA as a violation of the Fifth Amendment of the United States Constitution, among other grounds.¹⁵ In 1974, a three-judge panel for the U.S. District Court for the Eastern District of Pennsylvania assembled to hear the claim of unlawful gender-based discrimination.¹⁶ On July 1, 1974, that court declined to dismiss the case as moot because “although authority to induct registrants ha[d] lapsed, plaintiffs were still under certain affirmative obligations in connection with registration.”¹⁷ Nearly five years passed before any further action occurred in the case.¹⁸ On June 6, 1979, pursuant to a local rule, a clerk suggested the case be dismissed.¹⁹ After this, additional discovery resulted in the defendants' filing a motion to dismiss based on various justiciability grounds.²⁰ The district court denied the motion, reasoning “that it did not have before it an adequate record on the operation of the Selective Service System and what action would be necessary to reactivate it.”²¹

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

15. *Id.* at 61 & n.2.

16. *Id.* at 61–62.

17. *Id.* at 62.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* (citation omitted).

Later on, in the early 1980s, the Soviet Union invaded Afghanistan.²² Shortly after this, President Jimmy Carter reactivated the draft registration process.²³ President Carter requested that women also be required to register for the draft.²⁴ Congress reactivated the draft but did not require women to register under the MSSA.²⁵ Subsequently, on July 1, 1980, the district court “certified plaintiff class of ‘all male persons who are registered or subject to registration under 50 U.S.C.App. § 453 or are liable for training and service in the armed forces of the United States under 50 U.S.C.App. §§ 454, 456(h) and 467(c).’”²⁶ On July 18, 1980, three days before registration was to commence, a three-judge panel held the MSSA unconstitutional and enjoined registration under the Act.²⁷ On July 19, 1980, the Supreme Court granted the United States’ stay of the order entered by the district court, enjoining the enforcement of the MSSA.²⁸ The next Monday registration began.²⁹

On June 25, 1981, the Supreme Court held that the MSSA’s registration provisions did not violate the Fifth Amendment, reversing the decision of the district court.³⁰ The Court held that “Congress acted well within its constitutional authority to raise and regulate armies and navies when it authorized the registration of men and not women.”³¹ The Court discussed heavily in its opinion the fact that Congress had seriously considered President Carter’s recommendation to draft women.³² The Court noted that the decision to draft men and not women was not an “accidental byproduct of a traditional way of thinking about women,” but instead “Congress’ determination that any future draft would be characterized by a need

22. *The Soviet Invasion of Afghanistan and the U.S. Response, 1978–1980*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1977-1980/soviet-invasion-afghanistan> (last visited Mar. 6m, 2017).

23. *Id.*

24. *Id.*

25. *See id.*

26. *Rostker v. Goldberg*, 453 U.S. 57, 62 (1981) (citing *Goldberg v. Rostker*, 509 F. Supp. 586, 589 (E.D. Pa. 1980)).

27. *Goldberg v. Rostker*, 509 F. Supp. 586 (E.D. Pa. 1980).

28. *Rostker v. Goldberg*, 448 U.S. 1306 (1980).

29. *Rostker v. Goldberg*, 453 U.S. at 64.

30. *See id.* at 83.

31. *Id.* at 57.

32. *Id.* at 60–61.

for combat troops was sufficiently supported by testimony adduced at the hearings so that the courts are not free to make their own judgment on the question.”³³ The Court further provided, “since women are excluded from combat service by statute or military policy, men and women are simply not similarly situated for purposes of a draft or registration for a draft, and Congress’ decision to the authorize the registration of only men, therefore, does not violate the Due Process Clause.”³⁴

The Court spent a great deal of time discussing the ability of Congress to make decisions regarding the national defense and military affairs and Congress’ level of competency compared to the Court’s in these areas, recognizing the especially great weight afforded Congress’ decisions in these areas.³⁵ The Court relied on reasoning in *Gilligan v. Morgan* that states:

[It] is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of the military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.³⁶

The Court stressed the importance of not substituting its judgment for that of Congress in areas that Congress is owed great deference.³⁷ The Court noted “[a]lthough the District Court stressed that it was not intruding on military questions, its opinion was based on assessments of military need and flexibility in a time of mobilization,”³⁸ ignoring the deference owed Congress in this area.³⁹

The Court noted on several occasions that Congress had scrupulously considered the evidence before it to determine that

33. *Id.* at 58.

34. *Id.*

35. *Id.* at 64–67.

36. *Id.* at 65–66 (*citing* *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

37. *See id.* at 66–68.

38. *Id.* at 68.

39. *Id.* at 68–71.

40. *Id.*

41. *Id.* at 71–72.

men—not women—should be required to register under the MSSA.⁴⁰ The Court specifically stated:

In light of the floor debate and the Report of the Senate Armed Services Committee . . . , it is apparent that Congress was fully aware not merely of the many facts and figures presented . . . but of the current thinking as to the place of women in the Armed Services. In such a case, we cannot ignore Congress' broad authority conferred by the Constitution to raise and support armies when we are urged to declare unconstitutional its studied choice of one alternative in preference to another for furthering that goal.⁴¹

The Court stated that this is not an example of Congress acting “unthinkingly” or “reflexively and not for any considered reason.”⁴² The record demonstrates that Congress considered a multitude of resources, including testimony during congressional hearings and floor debates, to make its decision.⁴³ In addition, this evidence built upon hearings that were held the previous year.⁴⁴

Ultimately, the Court found that Congress had done its due diligence in determining that “any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops.”⁴⁵ Because women, at the time, were not able to serve in combat positions, this “clearly indicates the basis for Congress' decision to exempt women from registration.”⁴⁶ The Court reasoned, “[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.”⁴⁷ Because men and women are not similarly situated for the purposes of draft registration, “Congress acted well

42. *Id.* at 72 (citation omitted).

43. *Id.*

44. *Id.* at 72–74.

45. *Id.* at 76.

46. *Id.* at 77.

47. *Id.* at 79.

within its constitutional authority when it authorized the registration of men, and not women, under the [MSSA].”⁴⁸

III. PRESENT DAY TRENDS

A. *Women in Combat Operations*

On December 3, 2015, Sec’y Carter announced that all military occupations would be open to women by January 1, 2016, with no exceptions.⁴⁹ This decision opened up the remaining 220,000 military jobs that previously remained closed to women.⁵⁰ In a memorandum entitled “Implementation Guidance for the Full Integration of Women in the Armed Forces,” Sec’y Carter provided implementation guidance for the Military Departments, further supporting Sec’y Panetta’s decision to eliminate the “1994 Direct Ground Combat Definition and Assignment Rule.”⁵¹ This “remov[ed] the remaining barrier to the integration of women into all military occupational specialties and career fields within the U.S. military.”⁵² Sec’y Carter stated, “Anyone, who can meet operationally relevant and gender neutral standards, regardless of gender, should have the opportunity to serve in any position.”⁵³ Sec’y Carter directed the various Military Departments to provide their full implementation plans no later than January 1, 2016.⁵⁴ Sec’y Carter directed the following concerns to be addressed in the Military Department specific implementation plan: transparent standards, population size, physical demands and physiological differences, conduct and culture, talent management, operating abroad, and assessment and adjustment.⁵⁵ Sec’y Carter’s seven guidelines included:

48. *Id.* at 83.

49. Memo from Sec’y of Def. Ash Carter, *supra* note 6.

50. Dan Lamothe, *In Historic Decision, Pentagon Chief Opens All Jobs in Combat Units to Women*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/12/03/pentagon-chief-to-announce-how-womens-roles-in-the-military-will-expand/>.

51. Memo from Sec’y of Def. Ash Carter, *supra* note 6.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

1. Implementation will be pursued with the objective of improved force effectiveness.
2. Leaders must assign tasks and jobs throughout the force based on ability, not gender.
3. Equal opportunity likely will not mean equal participation by men and women in all specialties, and there will be no quotas.
4. Studies conducted by the services and SOCOM⁵⁶ indicate that on average there are physical and other differences between men and women, and implementation will take this into account.
5. The department will address the fact that some surveys suggest that some service members, men and women, will perceive that integration could damage combat effectiveness.
6. Particularly in the specialties that are newly open to women, survey data and the judgment of service leaders indicate that the performance of small teams is important.
7. The United States and some of its closest friends and allies are committed to having militaries that include men and women, but not all nations share this perspective.⁵⁷

The memorandum dictated that approved implementation plans were to be employed between January 2 and April 1, 2016.⁵⁸ Sec'y Carter concluded his memorandum by stating:

56. SOCOM is the acronym for the United States' Special Operations Command.

57. Cherly Pellerin, *Carter Opens All Military Occupations, Positions to Women*, U.S. DEPT. OF DEF. (Dec. 3, 2015), <http://www.defense.gov/News-Article-View/Article/632536/carter-opens-all-military-occupations-positions-to-women>.

58. Memo from Sec'y of Def. Ash Carter, *supra* note 6.

The responsibility for implementation is not borne solely on the shoulders of women, nor by the forces within the newly integrated career fields; it is borne in equal measure by the entire force and the military and civilian leadership of the Department of Defense. We all share the imperative to preserve and improve the finest fighting force the world has ever known.⁵⁹

This decision came nearly three years after Sec'y Panetta announced the Department of Defense's ("DoD") plan to fully integrate women into previously closed combat positions.⁶⁰ Sec'y Panetta's decision came after receiving a January 9, 2013, letter from General Martin E. Dempsey, the Chairman of the Joint Chiefs of Staff, stating "the time has come to rescind the direct combat exclusion rule for women and to eliminate all unnecessary gender-based barriers to service."⁶¹ The Joint Chiefs of Staff unanimously agreed that women should be allowed to serve in any and all military positions.⁶² At that time, military officials said the decision would be implemented as quickly as possible; however, the Pentagon allowed three years, until January 2016, for final decisions from the services.⁶³ Gen. Dempsey stated, "To implement these initiatives successfully and without sacrificing our warfighting capability or the trust of the American people, we will need time to get it right."⁶⁴

The timeline established under Sec'y Panetta seems to have been followed very closely. Over the past three years, many senior military leaders from the Army, Navy, Air Force, Marine Corps, and Special Operations have studied the integration of women into these positions.⁶⁵ Specifically, as of July 2015, forty-one studies on the

59. *Id.*

60. Memorandum from Sec'y of Def. Leon Panetta on Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule (Jan. 24, 2013), <http://www.defense.gov/news/WISRJointMemo.pdf>.

61. Elisabeth Bumiller & Thom Shanker, *Pentagon Is Set to Lift Combat Ban for Women*, N.Y. TIMES (Jan. 23, 2013), http://www.nytimes.com/2013/01/24/us/pentagon-says-it-is-lifting-ban-on-women-in-combat.html?_r=0.

62. Martinez, *supra* note 7.

63. *Id.*

64. *Id.*

65. Pellerin, *supra* note 57.

topics of unit cohesion, women's health, equipment, gear and uniforms, facilities modification, interest in serving in combat roles (propensity), and international issues were conducted.⁶⁶ In November 2015, Sec'y Carter received the Services' recommendations, data, studies, and surveys regarding which positions, if any, warranted continued exemption.⁶⁷ Only the Marine Corps requested that positions "in areas that included infantry, machine gunner, fire support reconnaissance and others" be exempt.⁶⁸ Marine Gen. Joseph Dunford, the Chairman of the Joint Chiefs of Staff, advocated for certain Marine Corps positions to remain limited to men only.⁶⁹ The Marine Corps' objections stem from a Marine Corps study "suggest[ing] all-male squads are more effective in combat and less likely to be injured than integrated groups."⁷⁰

Ultimately, Sec'y Carter declined to grant the exemptions stating, "we are a joint force and I have decided to make a decision[,] which applies to the entire force."⁷¹ Sec'y Carter stated that the concerns of the Marine Corps can, and will, be addressed during implementation.⁷² Sec'y Carter stated, "They'll [Women will] 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 was previously open only to men."⁷³

Under 10 U.S.C. § 652,⁷⁴ there is a 30-day waiting period for congressional review of any "changes that would open any units or

66. KRISTY N. KAMARCK, CONG. RESEARCH SERV., R42075, WOMEN IN COMBAT: ISSUES FOR CONGRESS 14 (2015), <https://fas.org/sgp/crs/natsec/R42075.pdf>.

67. Pellerin, *supra* note 57.

68. *Id.*

69. Eric Bradner, *U.S. Military Opens Combat Positions to Women*, CNN (Dec. 3, 2015, 4:24 PM), <http://www.cnn.com/2015/12/03/politics/u-s-military-women-combat-positions/>.

70. *Id.*

71. Pellerin, *supra* note 57.

72. *Id.*

73. *Id.*

74. 10 U.S.C. § 652 states:

(a) **Rule for ground combat personnel policy.**

(1) If the Secretary of Defense proposes to make any change described in paragraph (2)(A) or (2)(B) to the ground combat exclusion policy or proposes to make a

positions that were previously closed to women.”⁷⁵ Under 10 U.S.C. § 652(a)(3) the Sec’y of Defense is required to provide a report to Congress that includes:

(A) a detailed description of, and justification for, the proposed change; and

(B) *a detailed analysis of legal implication of the proposed change with respect to the constitutionality of the application of the Military Selective Service Act (50 App. U.S.C. 451 et seq.) to males only.*⁷⁶

United States Senator John McCain (Republican (“R”), Arizona) and United States Representative Mac Thornberry (R, Texas), Chairmen of the Senate and House Armed Service Committees, released a joint statement that “they intend to ‘carefully and thoroughly review all relevant documentation related to today’s decision.’”⁷⁷

We expect the Department to send over its implementation plans as quickly as possible to ensure our

change described in paragraph (2)(C), the Secretary shall, not less than 30 calendar days before such change is implemented, submit to Congress a report providing notice of the proposed change.

(2) A change referred to in paragraph (1) is a change that—

(A) closes to female members of the armed forces any category of unit or position that at that time is open to service by such members;

(B) opens to service by female members of the armed forces any category of unit or position that at that time is closed to service by such members; or

(C) opens or closes to the assignment of female members of the armed forces any military career designator as described in paragraph (6).

10 U.S.C.A. § 652(a)(1)–(2) (West 2015).

75. Kamarck, *supra* note 66, at 2.

76. 10 U.S.C.A. § 652(a)(3) (West 2015) (emphasis added); *see also* DETAILED LEGAL ANALYSIS, U.S. DEP’T. OF DEF., <http://www.defense.gov/Portals/1/Documents/wisr-studies/Women%20In%20Service%20Review%20Selective%20Service%20Legal%20Analysis.pdf> (last visited Feb. 14, 2017).

77. Lamothe, *supra* note 50.

Committees have all the information necessary to conduct proper and rigorous oversight We also look forward to receiving the Department's views on any changes to the Selective Service Act that may be required as a result of this decision.⁷⁸

In December 2015, Rep. Thornberry and Rep. Joe Heck (R, Arizona), Chairmen of a Subcommittee on Military Personnel, sent a letter to Sec'y Carter asking 17 additional questions about his December 3, 2015, decision, which was also signed by 16 other committee Republicans.⁷⁹ The questions addressed concerns like "how the Pentagon plans to implement Carter's decision, how the services plan to maintain gender-neutral standards and whether the decision has any legal implications on women registering for the draft."⁸⁰ The letter stated, "Although the department has provided some documentation and briefed the committee, several questions remain The issue of women serving in all previously closed positions is complex and multi-faceted, and the department's decision must be carefully reviewed to evaluate its impact on military readiness."⁸¹ The committee members requested a response from Sec'y Carter by January 3, 2016.⁸² In regard to the MSSA issue, Sec'y Carter only mentioned briefly that "a review of the Selective Service System is prudent, but has not signaled whether he is in favor of opening it to women, eliminating it altogether, or something in between."⁸³

On February 2, 2016, the Senate Armed Services Committee heard testimony on the topic of women in combat, including whether women should be required to register for the draft.⁸⁴ In

78. *Id.*

79. Rebecca Kheel, *Pentagon's Women-in-Combat Push Faces Chilly Headwinds*, THE HILL (Dec. 30, 2015, 6:01 AM), <http://thehill.com/policy/defense/264411-pentagons-women-in-combat-push-faces-chilly-headwinds>.

80. *Id.*

81. *Id.*

82. *Id.*

83. Dan Lamothe, *Make Women Eligible for the Draft? No, New Legislation Says: Ditch the System Entirely.*, WASH. POST (Feb. 11, 2016) [hereinafter Lamothe, *Ditch the System*], <https://www.washingtonpost.com/news/checkpoint/wp/2016/02/11/make-women-eligible-for-the-draft-no-new-legislation-says-ditch-the-system-entirely/>.

84. Merrit Kennedy, *Army, Marine Corps Generals Say Women Should Have To Register For The Draft*, NPR (Feb. 3, 2016, 12:05 PM),

April 2016, the House Armed Services Committee considered a bill proposing a requirement that women register for the draft.⁸⁵ The proposal was ultimately included in the draft 2017 National Defense Authorization Act (“NDAA”) approved by the Committee.⁸⁶ A hearing addressing solely the issue of women in combat has not yet occurred in the House Armed Services Committee.

On March 9, 2016, Sec’y Carter issued a memorandum titled “Approval of Final Implementation Plans for the Full Integration of Women in the Armed Forces,” approving all implementation plans submitted by the relevant Military Departments.⁸⁷ Sec’y Carter concluded his memorandum stating, “You may now execute your plans to open all previously-closed positions, occupations, specialties, career fields, and branches to women.”⁸⁸ Because Congress has yet to enact any law regarding the topic of women in combat, Sec’y Carter’s policy will stand and implementation will proceed pursuant to his March 9, 2016, memorandum. Congress has these options moving forward: 1) “allow this policy to go into effect” or 2) “consider statutory changes that would modify entry requirements or standards for certain occupational specialties.”⁸⁹ “As the new policy is implemented, Congress may continue to monitor the impact of change on recruitment, retention, assignments, and force readiness.”⁹⁰

B. Pending Legislation

There are numerous proposed bills implicating the MSSA. There are proposed pieces of the legislation that seek to defund the

<http://www.npr.org/sections/thetwo-way/2016/02/03/465404486/army-marine-corps-generals-say-women-should-have-to-register-for-the-draft>.

85. Richard Lardner, *House Bill Would Mandate Women to Register for Draft*, U.S. NEWS & WORLD REP. (Apr. 28, 2016, 10:29 AM), <http://www.usnews.com/news/politics/articles/2016-04-28/house-committee-votes-to-require-women-to-register-for-draft>

86. *Id.*

87. Memorandum from Sec’y of Def. Ash Carter on Approval of Final Implementation Plans for the Full Integration of Women in the Armed Forces (Mar. 9, 2016), https://www.defense.gov/Portals/1/Documents/pubs/SIGNED_SD_WISR_Implementation_Memo.pdf.

88. *Id.*

89. Kamarck, *supra* note 66, at 21.

90. *Id.*

Selective Service completely,⁹¹ therefore, making it impossible for it to operate. There are pieces of legislation that prohibit the expenditure of money to implement the requirement for women to register for the draft.⁹² Then there is proposed legislation that seeks to amend or repeal the MSSA entirely.⁹³ But of most importance to this article are the Draft America's Daughters Act of 2016 and H.R. 4523. Each of these bills is drastically different from the other, but both present the two most realistic, constitutional, and reasonable options in addressing the issue at hand. Below is a brief synopsis of the bills and their current status.

1. Draft America's Daughters Act of 2016

On February 4, 2016, Rep. Duncan Hunter (R, California)⁹⁴ introduced H.R. 4478, also known as the Draft America's Daughters Act of 2016.⁹⁵ Rep. Ryan Zinke (R, Montana)⁹⁶ also cosponsored the bill.⁹⁷ If enacted into law, the bill will "amend the Military Se-

91. See H. Amdt. 1232, 114th Cong. (2016), <https://www.congress.gov/amendment/114th-congress/house-amendment/1232/>; Edward Hasbrouck, *House Votes Down Proposal to Defund the Selective Service System*, THE PRACTICAL NOMAD (Jul. 7, 2016), <https://hasbrouck.org/blog/archives/002266.html>.

92. See H. Amdt. 1244, 114th Cong. (2016), <https://www.congress.gov/amendment/114th-congress/house-amendment/1244/>; Hasbrouck, *supra* note 91.

93. See H.R. 1509, 114th Cong. (2015), <https://www.govtrack.us/congress/bills/114/hr1509> (requiring reinstatement of the draft upon a declaration of war or enactment of an authorization on the use of force, and applying Selective Service registration requirements to women); S. 2600, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/senate-bill/2600> (declaring that and change to the persons subject to the duty to register may be made only through an Act of Congress).

94. *Representative Duncan Hunter*, CONGRESS.GOV, <https://www.congress.gov/member/duncan-hunter/H001048?q=%7B%22search%22%3A%5B%22%5C%22hr4478%5C%22%22%5D%7D> (last visited Feb. 17, 2017).

95. Draft America's Daughters Act of 2016, H.R. 4478, 114th Cong. (2016), <https://www.congress.gov/114/bills/hr4478/BILLS-114hr4478ih.pdf>.

96. *Representative Ryan K. Zinke*, CONGRESS.GOV, <https://www.congress.gov/member/ryan-zinke/Z000018> (last visited Apr. 17, 2016).

97. H.R. 4478, *supra* note 95.

lective Service Act to extend the registration and conscription requirements of the Selective Service System, currently applicable only to men between the ages of 18 and 26, to women between those ages to reflect the opening of Combat Arms Military Occupational Specialties to women.”⁹⁸ If enacted, the amendments would become effective 90 days after the later of “(1) the date of the enactment of this Act; or (2) the date on which the Secretary of Defense certifies to Congress that all Combat Arms Military Occupational Specialties are open to qualified female candidates.”⁹⁹

Rep. Hunter, a Marine veteran and avid opponent of the Pentagon’s decision to open all combat jobs to women, stated that “he introduced the bill to force Congress to consider the ramifications of the Pentagon’s recent decision to open all combat jobs to women.”¹⁰⁰ The day he introduced the bill, Rep. Hunter said:

It’s wrong and irresponsible to make wholesale changes to the way America fights its wars without the American people having a say on whether their daughters and sisters will be on the front lines of combat[.] If this administration wants to send 18–20 year old women into combat, to serve and fight on the front lines, then the American people deserve to have this discussion through their elected representatives.¹⁰¹

Rep. Hunter added that “he likely wouldn’t vote for the bill if [it] comes to the House floor and that it’s ‘unfortunate’ he had to introduce it.”¹⁰² He also stated:

The administration made its decision to open all combat specialties without regard for the research and perspective of the Marine Corps and special operations community, or without consideration or care

98. *Id.*

99. *Id.* at 2–3.

100. Rebecca Kheel, *Lawmakers Offer Bill Requiring Women to Register for Draft*, THE HILL (Feb. 4, 2016, 12:52 PM), <http://thehill.com/policy/defense/268226-bill-would-require-women-to-register-for-draft>.

101. *Id.*

102. *Id.*

for whether the draft would have to be opened to both men and women[.] This discussion should have occurred before decision making of any type, but the fact that it didn't now compels Congress to take a [sic] honest and thorough look at the issue.¹⁰³

The cosponsor of the bill and retired military member, Rep Zinke commented:

The decision was made by the Administration against the advice of the U.S. Marine Corps and Special Forces. The natural conclusion of that policy is that this opens young women up to the draft. This is a very important issue that touches the heart of American family, and I believe we need to have an open and honest discussion about it.¹⁰⁴

Army General Mark A. Milley, Chief of Staff for the Army, and Marine Corps General Robert B. Neller, the Marine Corps Commandant, both infantry officers, agreed it is time women be required to register for the draft, especially in light of the recent decision by Sec'y Carter in December 2015 to open all jobs in combat units to female service members.¹⁰⁵ Senator Claire McCaskill (Democrat ("D"), Missouri) solicited their responses during a Senate Armed Services Committee hearing.¹⁰⁶ During the same hearing, Sen. McCaskill also articulated that she was in favor of the change.¹⁰⁷ Gen. Neller declared, "Now that the restrictions that exempted women from [combat jobs] don't exist, then you're a citizen of a United States[.] It doesn't mean you're going to serve, but you go

103. *Id.*

104. Ian Smith, *Should Women Be Required to Register for the Draft?*, FEDSMITH.COM (Feb. 5, 2016), <http://blogs.fedsmith.com/2016/02/05/should-women-be-required-to-register-for-the-draft/>.

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

106. *Id.*

107. *Id.*

register.”¹⁰⁸ In an interview after the hearing, Gen. Neller characterized registering for the draft as a rite of passage for any young American.¹⁰⁹ Gen. Milley provided similar comments stating, “I think that all eligible and qualified men and women should register for the draft[.]”¹¹⁰ These comments were the first of their kind from any senior Department of Defense (“DoD”) official.¹¹¹

In addition to Sen. McCaskill, Sen. John McCain (R, Arizona), Chairman of the Senate Armed Services Committee, supported amending the MSSA to include women stating, it is the “logical conclusion of the decision to open combat positions to women.”¹¹² Presidential candidates Sen. Marco Rubio (R, Florida), former Florida Governor Jeb Bush, and New Jersey Governor Chris Christie all stated their support for requiring women to register for the draft.¹¹³ Sen. Rubio stated specifically:

I have no problem whatsoever with people of either gender serving in combat so long as the minimum requirements necessary to do the job are not compromised. I support that, and obviously, now that that is the case, I do believe that Selective Service should be opened up for both men and women in case a draft is ever instituted.¹¹⁴

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Lamothe, *Ditch the System*, *supra* note 83.

113. Lolita Baldor, *Women in Combat and the Draft: Answers to Your Biggest Questions*, MIL. TIMES (Feb. 16, 2016, 5:08 PM), <http://www.militarytimes.com/story/military/2016/02/16/women-combat-and-draft-answers-your-biggest-questions/80441992/>; Joe Carter, *Will Women Be Forced to Register for the Military Draft?*, THE GOSPEL COALITION (Feb. 9, 2016), <https://www.thegospelcoalition.org/article/will-women-be-forced-to-register-for-the-military-draft/>; *Editorial: Why women should register for the draft*, CHIC. TRIB. (Feb. 9, 2016, 4:04 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-women-draft-selective-service-edit-0210-20160209-story.html>.

114. Morgan Chalfant, *Gender-Integration of Combat Jobs Fuels Legislation, Lawsuits to Impose Draft Registration on Women*, WASH. FREE BEACON

In April 2016, the House of Representatives Armed Services Committee did in fact include a provision in its proposed fiscal year 2017 NDAA requiring women to register for the draft, and as promised, Rep. Hunter voted against the measure.¹¹⁵ Rep. Jackie Speier (D, California) stated, “I actually think if we want equality in this country, if we want women to be treated precisely like men are treated and that they should not be discriminated against, we should be willing to support a universal conscription.”¹¹⁶

Despite this movement, the House Rules Committee in May 2016 deleted the provision from the annual defense authorization bill, squashing any potential for debate on the House floor.¹¹⁷ The House did include in its proposed bill a provision calling for a study to determine “whether the Selective Service is even needed at a time when the armed forces get plenty of qualified volunteers, making the possibility of a draft remote.”¹¹⁸ Furthermore, in June 2016, “the Senate passed a defense authorization bill that would require young women to register for the draft.”¹¹⁹ Ultimately, the version enacted in December 2016 did not contain such a provision but instead called for the Sec’y of Defense to issue a report to the Armed Services

(Feb. 10, 2016, 5:00 AM), <http://freebeacon.com/national-security/gender-integration-of-combat-jobs-fuels-legislation-lawsuits-to-impose-draft-registration-on-women/>.

115. Carlos Muñoz, *Congress Moves to Require Women to Register for Military Draft*, WASH. TIMES (Apr. 28, 2016), <http://www.washington-times.com/news/2016/apr/28/congress-moves-require-women-register-draft/>.

116. Richard Lardner, *House Bill Would Mandate Women to Register for Draft*, U.S. NEWS & WORLD REP. (Apr. 28, 2016, 10:29 AM), <http://www.usnews.com/news/politics/articles/2016-04-28/house-committee-votes-to-require-women-to-register-for-draft>.

117. Leo Shane III, *House Drops Plans to Make Women Register for Draft*, MIL. TIMES (May 17, 2016), <http://www.militarytimes.com/story/military/2016/05/17/ndaa-house-women-draft-stripped/84481376/>.

118. Richard Lardner, *House Approves Measure to Bar Women from Draft Registration*, SEATTLE TIMES (July 7, 2016, 4:15 PM), <http://www.seattletimes.com/nation-world/nation-politics/house-approves-measure-to-bar-women-from-draft-registration/>.

119. Camila Domonoske, *In Defense Bill, Senate Approves Plan For Women To Register For Draft*, NPR (June 15, 2016, 1:19 PM), <http://www.npr.org/sections/thetwo-way/2016/06/15/482168066/in-defense-bill-senate-approves-plan-for-women-to-register-for-draft>.

Committees of the House of Representatives and the Senate detailing whether there is still a need for a draft and thus draft registration.¹²⁰ The report requires a detailed analysis of the benefits both directly and indirectly derived from the Military Selective Service System to include “the extent to which expanding registration to women would impact these benefits.”¹²¹

2. H.R. 4523

On February 10, 2016, Rep. Mike Coffman (R, Colorado)¹²² introduced H.R. 4523, which seeks “[t]o repeal the Military Selective Service Act, and thereby terminate the registration requirements of such Act and eliminate civilian local boards, civilian appeal boards, and similar local agencies of the Selective Service System.”¹²³ Rep. Peter DeFazio (D, Oregon),¹²⁴ Jared Polis (D, Colorado),¹²⁵ Dana Rohrabacher (R, California),¹²⁶ and Jason Chaffetz (R, Utah)¹²⁷ cosponsored the bill.¹²⁸ The bill further requires that:

Not later than 180 days after the date of the enactment of this Act, the assets, contracts, property, and records held by the Selective Service System, and the

120. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000, <https://www.congress.gov/114/bills/s2943/BILLS-114s2943enr.pdf>.

121. *Id.*

122. *Representative Mike Coffman*, CONGRESS.GOV, <https://www.congress.gov/member/mike-coffman/C001077> (last visited Feb. 17, 2017).

123. H.R. 4523, 114th Cong. (2016).

124. *Representative Peter A. DeFazio*, CONGRESS.GOV, <https://www.congress.gov/member/peter-defazio/D000191> (last visited Feb. 17, 2017).

125. *Representative Jared Polis*, CONGRESS.GOV, <https://www.congress.gov/member/jared-polis/P000598> (last visited Feb. 17, 2017).

126. *Representative Dana Rohrabacher*, CONGRESS.GOV, <https://www.congress.gov/member/dana-rohrabacher/R000409> (last visited Feb. 17, 2017).

127. *Representative Jason Chaffetz*, CONGRESS.GOV, <https://www.congress.gov/member/jason-chaffetz/C001076> (last visited Feb. 17, 2017).

128. *Cosponsors: H.R.4523 – 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/4523/cosponsors> (last visited Feb. 17, 2017). DeFazio, Polis, and Rohrabacher were the original cosponsors, on Feb. 10, 2016; Chaffetz signed on two weeks later, on Feb. 24, 2016; and two other representatives joined as cosponsors in April 2016, and a third in September 2016. *Id.*

unexpended balances of any appropriations available to the Selective Service System, shall be transferred to the Administrator of General Services upon the repeal of the Act. The Director of the Office of Personnel Management shall assist officers and employees of the Selective Service System to transfer to other positions in the executive branch.

Notwithstanding any other provision of law, a person may not be denied a right, privilege, benefit, or employment position under Federal law on the grounds that the person failed to present himself for and submit to registration under section 3 of the Military Selective Service Act (50 U.S.C. 3802), before the repeal of that Act by subsection (a).¹²⁹

After introducing the bill, Rep. Coffman said:

I think we are sort of at the proverbial fork in the road. I know there are a lot of members of Congress who would probably like to ignore this, but I don't think we have a choice. Either you require registration for men and women, or you do away with the system altogether. And I've chosen to do away with the system altogether.¹³⁰

Rep. Coffman served in the Army in the early 1970s and later on in the Marine Corps.¹³¹ Rep. Coffman added that the argument is two-fold;¹³² “fighting wars with professionalized volunteer service members has led to a stronger military than using those who were drafted ‘and don’t want to be there,’” and “eliminating the Selective Service System would save the U.S. government about \$24 million per year.”¹³³

129. Repeal of Military Selective Service Act, H.R.4523, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/house-bill/4523/text>.

130. Lamothe, *Ditch the System*, *supra* note 83.

131. *Id.*

132. *Id.*

133. *Id.*

C. Pending Cases

Very similar to the revival of *Rostker* because of President Carter's decision to order specified groups of males to register for the draft in 1980,¹³⁴ the December 2015 decision by Sec'y Carter to open all combat jobs to women has breathed life into two cases that were once stalled in the lower courts based on the ruling in *Rostker*. These two cases and the arguments relevant to the topic of this article will briefly be discussed below. Note that the portions of these cases that will be included in the sections below are the legal concepts regarding ripeness and failure to state a claim upon which relief can be granted. The issue of standing will not be addressed in this article.

1. National Coalition for Men v. Selective Service System

On April 4, 2013, the National Coalition for Men¹³⁵ and James Lesmeister¹³⁶ filed a complaint against the Selective Service System in the United States District Court for the Central District of California, demanding injunctive and declarative relief "to treat women and men equally by requiring both women and men to register for the military draft."¹³⁷ The complaint alleged that the MSSA violated the Fifth and Fourteenth Amendments of the U.S. Constitution.¹³⁸ Further, the complaint alleged that the Selective Service System "ha[d] been and are enacting, implementing, and/or administering laws, rules and public policies, which discriminate against males by requiring only males to register for the draft under the SSS program."¹³⁹

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

135. National Coalition for Men is an advocacy organization for the equal rights of men and women. Complaint for Declaratory and Injunctive Relief at 3, *National Coalition for Men v. Selective Serv. Sys.*, No. CV13-02391 DSF (MANx), 2013 WL 8481391 (C.D. Cal. Apr. 4, 2013).

136. James Lesmeister is an "18-year-old [sic] male resident and U.S. citizen residing near Houston, Texas," who was required to register with the military by the MSSA and complied upon turning 18 years old. *Id.* at 3.

137. *Id.* at 1-2.

138. *Id.*

139. *Id.* at 5.

On June 19, 2013, Defendants filed a Motion to Dismiss, arguing lack of standing, lack of jurisdiction, and ripeness.¹⁴⁰ Relevant to the topic of this paper is the argument made by Defendants that “Plaintiffs’ claims are unripe because the policy change that forms the basis of their challenge remains in the process of being implemented and is not yet fully in place.”¹⁴¹ Defendants argued that despite the three threshold defenses, “Plaintiffs fail[ed] to state a claim upon which relief can be granted because the law requires deference to the military and Congress in enacting changes in military policies, including the Selective Service registration system.”¹⁴² Defendants argued Congress and the military should be given time to address the issues raised by opening combat positions to women since they are owed deference on the matters of military affairs and national defense.¹⁴³ Plaintiffs countered, arguing:

[T]he very basis on which the majority in *Rostker* relied, that ‘women are excluded from combat service by statute or military policy,’ is officially gone. . . . Whether the changes will take more time to implement is irrelevant to whether the legal basis for the discrimination in the MSSA is still justified under the Constitution.¹⁴⁴

On July 29, 2013, the district court dismissed Plaintiffs’ complaint, finding Plaintiffs had not established the ripeness of the issue.¹⁴⁵ The court found, “Plaintiffs’ assertion is not support by the 2013 Memorandum. Under the 2013 Memorandum, it is far from

140. Defendant’s Reply Memorandum in Support of Motion to Dismiss at 1, Nat’l Coalition for Men v. Selective Serv. Sys., No. CV13-02391 DSF (MANx) (C.D. Cal. 2013).

141. *Id.*

142. *Id.*

143. Defendant’s Reply Memorandum in Support of Motion to Dismiss, *supra* note 140, at 9–10.

144. Plaintiff’s Brief in Opposition to Defendant’s Motion to Dismiss at 12, Nat’l Coalition for Men v. Selective Serv. Sys., CV13-02391 DSF (MANx) (C.D. Cal. 2013).

145. Memorandum in Support of Judgment, Nat’l Coalition for Men v. Selective Serv. Sys., CV13-02391 DSF (MANx) (C.D. Cal. 2013).

certain that 'all combat positions in all branches' will be opened to women."¹⁴⁶ The court further found:

Substantial uncertainty exists as to the extent to which women will be integrated into combat units as a result of the 2013 Memorandum¹⁴⁷ At this time, the constitutionality of the challenged Selective Service rules and procedures "hangs on future contingencies that may or may not occur" and Plaintiffs' challenge is "too impermissibly speculative to present a justiciable controversy."¹⁴⁸

Of particular importance to the present issue examined by this article, the court noted:

After the political branches have decided when, where, and in what capacities women may serve in combat units, a court may then properly consider whether male-only registration remains sufficiently related to Congress' purpose in authorizing registration¹⁴⁹ This deference mandates that Congress and the Executive be provided adequate time and flexibility to fashion appropriate military policy.¹⁵⁰

On September 26, 2013, Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").¹⁵¹ On December 8, 2015, the case was argued and on February 19, 2016, the Ninth Circuit reversed the decision of the district court and remanded the case for further proceedings.¹⁵² The Ninth Circuit noted that much of the uncertainty regarding the role of women in combat had been resolved as the DoD "intends to open all formerly

146. *Id.* at 5.

147. *Id.*

148. *Id.* at 6.

149. *Id.*

150. *Id.* at 7.

151. Notice of Appeal, Nat'l Coalition for Men v. Selective Serv. Sys., CV13-02391 DSF (MANx) (C.D.Cal. 2013).

152. Memorandum in Support of Judgment, Nat'l Coalition for Men v. Selective Serv. Sys., CV13-02391-DSF (MANx) (9th Cir. 2016).

closed positions” to women.¹⁵³ The court found that even despite this change, Plaintiffs “point[ed] to numerous specific changes in statutes, policies, and practices that have happened since the Supreme Court’s decision in *Rostker v. Goldberg*.”¹⁵⁴ This supports the finding that the Plaintiffs’ claims “are ‘definite and concrete, not hypothetical or abstract,’ and so ripe for adjudication.”¹⁵⁵ To date, there has not been any further progress in the district court.

2. Kyle v. Selective Service System

On July 3, 2015, Allison Kyle, on behalf of her daughter E.K.L., filed a complaint against the Selective Service System, alleging that the MSSA violates the Fifth Amendment of the U.S. Constitution “by requiring only males and not females to register with the Selective Service and prohibiting females from registering.”¹⁵⁶ Specifically, in May 2015 and on October 22, 2015, E.K.L., a 17 year-old female, attempted to register with the Selective Service System but was refused because she was a woman and the Selective Service System does not register women.¹⁵⁷ E.K.L. argued

The changes in opportunities for women in the military and society over the last three and a half decades along with the Congress’s and Pentagon’s ongoing policies to open up combat and combat support roles in the military to females who qualify for those positions mean that males and females are now similarly situated with respect to draft registration. Therefore, by continuing to require only males to register while not requiring females and prohibiting females from

153. *Id.* at 2.

154. *Id.* at 3.

155. *Id.*

156. Complaint at 1, *Kyle v. Selective Serv. Sys.*, 2:15-CV-005193 (D. N.J. 2015).

157. *Id.* at 2; *see also* Amended Complaint at 2, *Kyle v. Selective Serv. Sys.*, 2:15-CV-05193 (D. N.J. 2015).

registering discriminates against both sexes in violation of equal protection as incorporated into the Fifth Amendment of the U.S. Constitution.¹⁵⁸

On October 2, 2015, Defendants filed a Motion to Dismiss, arguing lack of standing, ripeness and failure to state a claim upon which relief can be granted.¹⁵⁹ In regard to ripeness, Defendants' arguments were very similar to those made in *Nat'l Coalition for Men*, providing that Congress and the DoD are in the process of implementing procedures to open up all combat positions to women, and the courts should not interfere before Congress has had an opportunity to act.¹⁶⁰ Because Congress is engaged in this ongoing dialogue to determine the effects of this new policy on the MSSA¹⁶¹ and due to the deference owed Congress on matters of military affairs and national security, Defendants argued that the case was not ripe.¹⁶² Judicial interference prior to an act of Congress is premature and contrary to established U.S. Supreme Court precedent.¹⁶³ The Defendants further contend that because the new women-in-combat policy has not been fully implemented and therefore many combat positions still remain closed to women, that *Rostker* governs the issue, requiring dismissal of the Plaintiff's equal protection claims.¹⁶⁴

On October 22, 2015, Plaintiff filed an amended complaint, adding Plaintiff Patricia Pinto, further factual bases, and legal arguments.¹⁶⁵ Ms. Pinto attempted to register with the Selective Service System on January 27, 2015, when she was 21 years-old, and October 7, 2015, when she was 22 years-old.¹⁶⁶ She was prevented from registering because the Selective Service will not register women.¹⁶⁷

158. *Id.* at 3.

159. Defendant's Memorandum in Support of Motion to Dismiss, *Kyle v. Selective Serv. Sys.*, 2:15-CV-05193 (D. N.J. 2015).

160. *Id.* at 17–23.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 23–24.

165. Amended Complaint, *Kyle v. Selective Serv. Sys.*, 2:15-CV-05193 (D. N.J. 2015).

166. *Id.* at 3.

167. *Id.*

On November 23, 2015, Defendants filed another Motion to Dismiss Plaintiffs' Amended Complaint, arguing once again lack of standing, ripeness, and failure to state a claim upon which relief can be granted, presenting similar arguments as the first motion to dismiss.¹⁶⁸ On December 14, 2015, the court deemed the Defendants' October 2, 2015, motion to dismiss moot because of the subsequent filing of Plaintiffs' Amended Complaint.¹⁶⁹

On December 21, 2015, Plaintiffs' filed their brief in opposition to Defendants' Motion to Dismiss.¹⁷⁰ In their brief, Plaintiffs argued that because all combat positions are now open to women, men and women are similarly situated for purposes of draft registration.¹⁷¹ Plaintiffs argue that they are not asking the court to overrule *Rostker* but to simply follow the ruling by the court in that case.¹⁷² Plaintiffs contend that since women and men are now both similarly situated for draft purposes, the exclusion of women violates the Fifth Amendment and the MSSA is unconstitutional.¹⁷³ This is on par with the *Rostker* decision.¹⁷⁴

Plaintiffs further argue that under 10 U.S.C. § 652 Congress has been given notifications of the changes being made by DoD in regard to women in combat and therefore have been given an opportunity to act on multiple occasions.¹⁷⁵ In addition, the Sec'y of Defense is required to provide legal analysis on the effect of such changes on the MSSA.¹⁷⁶ "Congress might amend the MSSA to include females, it may do away with registration completely, or it may do nothing. . . ."¹⁷⁷ Here, Plaintiffs argue that by Congress not implementing any changes to the MSSA after § 652 notifications, it is implying that the MSSA is still constitutional and does not need

168. Defendant's Memorandum in Support of Motion to Dismiss, *supra* note 159, at 17–30.

169. Letter Order, *Kyle v. Selective Serv. Sys.*, 2:15-cv-05193-ES-JAD (D. N.J. 2015).

170. Brief in Opposition Defendant's Motion to Dismiss, *Kyle v. Selective Serv. Sys.*, 2:15-cv-05193-ES-JAD, (D. N.J. 2015).

171. *Id.* at 10–14.

172. *Id.* at 10.

173. *Id.*

174. *Id.*

175. *Id.* at 26–28.

176. *Id.*

177. *Id.* at 27.

to be amended.¹⁷⁸ This, Plaintiffs' contend, is inaction by Congress in an area in which it has had opportunity to act; therefore, judicial interference is appropriate, and the issue is ripe for consideration.¹⁷⁹

On January 7, 2016, Defendants filed a memorandum further supporting its motion to dismiss.¹⁸⁰ Defendants argued that Congress has not had enough time to thoroughly review the impacts of Sec'y Carter's December 2015 decision to open all combat jobs to women on the constitutionality of the MSSA.¹⁸¹ Defendants argue that this review is separate and apart from the review done under § 652 and requires its own congressional hearing and legislative action.¹⁸² Defendants contend that judicial interference prior to Congressional consideration of the issue is premature.¹⁸³ Furthermore, Defendants provided that Congress is not failing to act because it has been actively engaged in dialogue on the issue and making steps toward determining a resolution.¹⁸⁴ Lastly, Defendants argue that *Rostker* is controlling precedent, providing that the MSSA is constitutional.¹⁸⁵ To challenge the MSSA prior to action by the political branches is contradictory to controlling precedent.¹⁸⁶ Additionally,

Congress may find that the evolving role of women in combat warrants a change in the MSSA's registration requirements to include women, or may decide to maintain the current requirements based on other evidence that could be established in hearings or recorded in new congressional findings. The relief Plaintiffs seek would deprive the political branches

178. *Id.* at 26–28.

179. *Id.*

180. Defendants' Reply Memorandum of Law in Further Support of Motion to Dismiss Plaintiffs' Amended Complaint, *Kyle v. Selective Serv. Sys.*, No. 2:15-cv-05193-ES-JAD (D. N.J. Jan. 7, 2016).

181. *Id.* at 4–10.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* 13–14.

186. *Id.*

of the opportunity to apply their expertise to an issue on which they are accorded broad discretion¹⁸⁷

On January 19, 2016, oral arguments were heard on the motion to dismiss.¹⁸⁸ To date, the district court has not yet issued a ruling.

IV. CHANGE IS A COMIN'

A. *Rostker and the New DoD Policy*

With an understanding of the ruling in *Rostker* and the new DoD Policy on women in combat, the questions remain how these are to be interpreted in light of one another and to what extent this will have on the constitutionality of the current MSSA.

First, the *Rostker* Court recognized that Congress, under the authority vested in it by the Constitution, determined that the primary need for a draft at that time (1980) would be for combat troops; therefore, there was no need to require women to register for the draft because women could not serve in combat positions.¹⁸⁹ The new DoD policy read in conjunction with *Rostker* seems to suggest that if Congress still believes that a draft would only need to utilize combat troops, then women would be required to register for the draft because they can now serve in combat positions;¹⁹⁰ however, there is a possibility that Congress might find some legitimate basis for why a draft would need to be utilized.¹⁹¹ This seems unlikely; however, based on the ruling in *Rostker* where the Congressional record seemed to extensively focus on a need for combat troops, and the current debates, which seem to focus on the same need. Following the holding in *Rostker*, if Congress is able to articulate that it's

187. *Id.*

188. See Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) & (6), *Kyle v. Selective Serv. Sys.*, No. 2:15-cv-05193-ES-JAD, (D. N.J. Dec. 21, 2015).

189. *Rostker v. Goldberg*, 453 U.S. 57, 76–77 (1981).

190. See *supra* text accompanying note 78; see generally *Rostker*, 453 U.S. 57 (concluding that because the purpose of the draft was “to develop a pool of potential combat troops,” the exclusion of women from registration was “not invidious, but [a] realistic[] reflect[ion]”).

191. See generally DETAILED LEGAL ANALYSIS, *supra* note 76 (indicating that the DoD would consider alternative rationales sufficient to limit the application of MSSA to men in light of opening combat roles to women).

decision to exclude a particular group of persons from draft registration is based on a well-reasoned, well-researched articulable purpose, then it seems the courts would give great deference to that decision.¹⁹² It is difficult to picture another articulable basis to exclude a group of persons from draft registration, though.

In regard to the constitutionality of the current MSSA, if Congress' opinion is still that a draft would only need to utilize troops for combat positions, it appears that men and women are now similarly situated because combat jobs are no longer limited to men.¹⁹³ Absent some other basis to exclude women that is supported by congressional testimony, evidence, and research, it would appear that the current MSSA is unconstitutional because it violates the Due Process Clause of the Fifth Amendment.¹⁹⁴

B. Congress Needs to Act

If the MSSA is unconstitutional, there are two options for Congress, ignore or address.

1. Ignore the MSSA

Congress could choose to leave the MSSA unchanged; however, doing this leaves the door wide open for a court to declare the MSSA unconstitutional, similar to what happened in *Rostker*. In the two cases discussed above,¹⁹⁵ the courts have demonstrated that, at the very least, the issue of whether the MSSA is unconstitutional is ripe for review. While there has been no formal ruling striking down the MSSA as unconstitutional, the evidence available at this time, as discussed earlier, points to the fact that the MSSA will likely be ruled unconstitutional if Congress does not amend or repeal the MSSA on its own. If that were to happen, like in *Rostker*, registration under the Act will be enjoined.¹⁹⁶ It will then rest with the United States to decide whether it would petition the next level appellate court to stay the order of the lower court to resolve the issue

192. See *id.*

193. See *supra* notes 187–89 and accompanying text.

194. See *Rostker*, 453 U.S. at 76–80; DETAILED LEGAL ANALYSIS, *supra* note 76; David Welna, *Should American Women Have to Register for the Draft?*, NPR (Dec. 17, 2015, 5:13 AM), <http://www.npr.org/2015/12/17/460082475/should-american-women-have-to-register-for-the-draft>.

195. See *supra* Section III.B.

196. See *Rostker*, 453 U.S. at 63.

of constitutionality or leave the decision by the lower court untouched.

If no action is taken by the United States, then draft registration will no longer be required under the law if § 3802 is deemed unconstitutional; however, if only § 3802 is struck down, then this creates several problems for the United States. Currently, the Selective Service System is the administrative agency tasked with executing the provisions of the MSSA.¹⁹⁷ If only the portion of the statute requiring draft registration for males is struck down, that still leaves the other provisions of the Act intact. This means that the Selective Service System would still exist, essentially leaving an administrative agency that costs the United States' government approximately \$24 million per year without the ability to exercise its sole function—draft registration.¹⁹⁸ In addition, a situation of this type would affect other government agencies because failure to register affects benefits that are regulated by other agencies, such as federal student financial aid, state-funded student financial aid, most federal employment, some state employment, security clearance for contractors, job training under the Workforce Investment Act, and U.S. citizenship for immigrant men.¹⁹⁹ A decision like the one by the *Rostker* district court would cause significant confusion across the federal government and some state governments. In a situation like that, in order for the Selective Service System to be abolished completely, Congress would eventually need to repeal the MSSA altogether.

2. Address the MSSA

Because eventual congressional action is inevitable, the preferred course of action is for Congress to directly address the problem before any court has the opportunity to rule on the issue. While Sec'y Carter has not issued an opinion specifically on whether women should be required to register for the draft, on February 2, 2016, he did state that he believed Congress should decide whether

197. See *Agency Mission*, SELECTIVE SERV. SYS., <https://www.sss.gov/About/Agency-Mission> (last visited on Feb. 17, 2017).

198. See 50 U.S.C. § 3809 (2016).

199. *Benefits and Penalties*, SELECTIVE SERV. SYS., <https://www.sss.gov/Registration/Why-Register/Benefits-and-Penalties> (last visited Feb. 17, 2017).

women should be forced to register.²⁰⁰ In December 2015, Josh Earnest, a White House spokesman, also stated that:

The Defense Department has prepared an analysis of how the Pentagon change could affect the U.S. Military Selective Service Act. . . . We're going to work with Congress to look at that analysis, to review it, to get others' opinions and determine if additional reforms or changes are necessary in light of this decision.²⁰¹

This would give Congress the opportunity to fully understand its options and make the best decision for the United States. Congress should seek to address this issue immediately, before a court has the opportunity to strike down the MSSA as unconstitutional. This response would also prevent the potential chaotic aftermath of a district court decision as discussed above. As discussed earlier, certain U.S. representatives, U.S. senators, and presidential candidates have recognized the need for Congress to step in before the courts do. This is supported by the two pending pieces of legislation that were introduced in the House of Representatives and the Senate Armed Forces Committee hearing held on February 2, 2016, where discussion on the issue occurred; however, there has not been a specific Congressional hearing devoted exclusively to this question.

It seems that some U.S. senators want to preserve the right of Congress to make a decision on this issue as well. On February 25, 2014, Sen. Mike Lee (R, Utah) introduced S.2600, "A bill to amend the Military Selective Service Act to provide that any modification to the duty to register for purposes of the Military Selective Service Act may be made only through an Act of Congress, and for other purposes," with co-sponsorship from Sen. Ted Cruz (R,

200. Lamothe, *Ditch the System*, *supra* note 83.

201. Kathleen Hennessey, *White House Revisits Exclusion of Women from Military Draft*, MIL. TIMES (Dec. 4, 2015), <http://www.militarytimes.com/story/military/pentagon/2015/12/04/white-house-revisits-exclusion-women-military-draft/76794064/>; *see also* DETAILED LEGAL ANALYSIS, *supra* note 76 (indicating the DoD's intent to review any other rationale that might favor excluding the registration of women).

Texas),²⁰² Sen. Rubio (R, Florida),²⁰³ Sen. Ben Sasse (R, Nebraska),²⁰⁴ Sen. Bill Cassidy (R, Louisiana),²⁰⁵ Sen. David Vitter (R, Louisiana),²⁰⁶ and Sen. James Risch (R, Idaho).²⁰⁷ The bill²⁰⁸ would amend the MSSA to include:

(a) Modification Only Through Act Of [sic] Congress.—Section 3 of the Military Selective Service Act (50 U.S.C. 3802) is amended by adding at the end the following new subsection:

(c) Any modification or change to the persons subject to the duty to register pursuant to this section may be made only through an Act of Congress.

(b) Prohibition On Court Jurisdiction Of Claims Regarding Class Of Persons With Duty To Register.—No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question or claim, whether filed before, on, or after the date of enactment of this Act, pertaining to the interpretation of, or the validity under the Constitution of, the class of persons subject to the duty to register for purposes

202. *Senator Ted Cruz*, CONGRESS.GOV, <https://www.congress.gov/member/ted-cruz/C001098> (last visited Feb. 18, 2017).

203. *Senator Marco Rubio*, CONGRESS.GOV, <https://www.congress.gov/member/marco-rubio/R000595> (last visited Feb. 18, 2017).

204. *Senator Ben Sasse*, CONGRESS.GOV, <https://www.congress.gov/member/ben-sasse/S001197> (last visited Feb. 18, 2017).

205. *Senator Bill Cassidy*, CONGRESS.GOV, <https://www.congress.gov/member/bill-cassidy/C001075> (last visited Feb. 18, 2017).

206. *Senator David Vitter*, CONGRESS.GOV, <https://www.congress.gov/member/david-vitter/V000127> (last visited Feb. 18, 2017).

207. *Senator James E. Risch*, CONGRESS.GOV, <https://www.congress.gov/member/james-risch/R000584> (last visited Feb. 18, 2017).

208. *Cosponsors: S.2600 – 114th Congress (2015-2016)*, *supra* note 128.

of the Military Selective Service Act (50 U.S.C. 3801 et seq.).²⁰⁹

This bill is currently referred to the Senate Committee on Armed Services.²¹⁰ It is unlikely we will see any movement on this bill anytime soon, but it is evidence that at least some Senators believe Congress is better equipped to make decisions regarding draft registration, which would be in line with the *Rostker* Court's recognition of the level of deference owed Congress on issues of military affairs and national security.²¹¹ This was, in fact, a bedrock principle upon which the *Rostker* Court relied.²¹²

All fingers point to Congress as the body that is best qualified and best able to address the issue of whether women should register under the MSSA. Congress should embrace this responsibility and move expeditiously to solve the issue before a court is forced to rule on the constitutionality of § 3802 of the MSSA, which seems likely to happen within the next year or so.

C. Repeal the MSSA and Enact H.R. 4523

Congress should act expeditiously in repealing the MSSA by enacting H.R. 4523. There are two primary reasons why this is the best avenue of resolution for the current issue. There is no longer a need for the MSSA, and repealing the MSSA will save the United States money.

1. MSSA No Longer Needed

The United States has not used a military draft in over forty years,²¹³ and it is not expected to use it ever again.²¹⁴ Rep. Coffman

209. *Text - S.2600 - 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/2600/text> (last visited Feb. 18, 2017).

210. *Committees - S.2600 - 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/2600/committees> (last visited Feb. 18, 2017).

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

212. *Id.*

213. *Background of Selective Service*, *supra* note 1.

214. Tina Griego, *America May Never Have a Draft Again. But We're Still Punishing Low-Income Men for Not Registering*, WASH. POST (Oct. 16, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/10/16/america-may->

stated, “The Selective Service is a bureaucracy that needs to die because it no longer serves a viable purpose. . . . Even during the height of the War in Iraq and Afghanistan the DoD never considered using the draft.”²¹⁵ Rep. Coffman added:

Maintaining the Selective Service simply makes no sense. In 1973, the last draftee entered the Army and since then, despite the first Gulf War and subsequent wars in Iraq and Afghanistan, the Pentagon has never considered reinstating the draft. . . . Our all-volunteer military has given us the most elite fighting force in the history of this country.²¹⁶

In fact, our all-volunteer force has waged wars in the Persian Gulf, Afghanistan, Iraq, and conducted combat operations in Grenada, Beirut, Libya, Panama, Somalia, Haiti, Yugoslavia and the Philippines.²¹⁷ All of this was done without a draft.²¹⁸

Evidence also supports the contention that Congress and the military do not want to utilize a draft.²¹⁹ In 2004,

the House of Representatives defeated a bill that would have required “all young persons in the United States, including women, perform a period of military service or a period of civilian service in furtherance of the national defense and homeland security.” . . . In 2003, the Department of Defense agreed with President George W. Bush that on modern, high-tech battlefields, a highly-trained professional military force made up totally of volunteers would fare better

never-have-a-draft-again-but-were-still-punishing-low-income-men-for-not-registering/.

215. *Id.*

216. Press Release, Mike Coffman, House of Representatives, Coffman Introduces Legislation to Abolish Selective Serv. (Feb. 11, 2016), <http://coffman.house.gov/media-center/press-releases/coffman-introduces-legislation-to-abolish-selective-service>.

217. Robert Longley, *Are the Selective Service System and the Draft Still Needed?*, ABOUT.COM, <http://usgovinfo.about.com/od/defenseandsecurity/a/Is-the-Draft-Still-Needed.htm> (last updated Aug. 23, 2016).

218. *Id.*

219. *See Text - S.2600 - 114th Congress (2015-2016)*, *supra* note 209.

against the new “terrorist” enemy than a pool of draftees who had been forced to serve.²²⁰

Then-Sec’y of Defense Donald Rumsfeld noted “that draftees are ‘churned’ through the military with only minimal training and a desire to leave the service as soon as possible.”²²¹

Even though it is anticipated that the draft will never be used again, having the draft in place may cause more harm than good. Failure to register for the draft can have major repercussions for young men.²²² Many males who fail to register between the ages of 18 and 26 are paying an extremely high price.²²³ Men, who may not have known that they needed to register, are now penalized by not being able to receive federal and state financial aid, drivers licenses, citizenship, job training benefits, etc.²²⁴ The men paying this price are often those that need these benefits the most.²²⁵ Oftentimes, these men did not “knowingly and willfully” violate the statute.²²⁶ They simply did not know they were supposed to register.²²⁷ Rep. DeFazio stated:

We haven’t utilized the draft since 1973, yet young men who don’t register for the selective service are still penalized by the U.S. government, particularly with regard to their federal student loans. We need to get rid of this mean-spirited and outdated system and trust that if the need should arise Americans—both male and female—will answer the call to defend our nation.²²⁸

220. See Longley, *supra* note 217.

221. *Id.*

222. Griego, *supra* note 214.

221. *Benefits and Penalties*, SELECTIVE SERV. SYS., <https://www.sss.gov/Registration/Why-Register/Benefits-and-Penalties> (last visited Feb. 18, 2017).

222. *Id.*

223. Griego, *supra* note 214.

226. *Id.*

227. *Id.*

228. Press Release, Mike Coffman, *supra* note 216.

The Selective Service System is not able to track the number of males that pay this price each year but “estimates it’s in the tens of thousands every year.”²²⁹ Another interesting point is that the Department of Justice has not prosecuted anyone for violation of the MSSA since 1986, “the potential for punishment is there, however: A fine of up to \$250,000 and/or up to five years in prison.”²³⁰

“[U]ntil the day comes that the United States is engaged in a declared war and the nation’s security is violated—or Congress passes [the] National Service Act—there is no reason for the Selective Service System;” as the drafter of the National Service Act, Rep. Charles Rangel (D, New York), stated, “Having people penalized for not registering is a fraud.”²³¹

In the fiscal year 2017 NDAA, Congress seemed to be entertaining the idea of repealing the MSSA due to lack of necessity.²³² It tasked the DoD and a newly established National Commission on Military, National, and Public Service with reviewing military selective service process and whether it is still needed.²³³

2. Repealing the MSSA Saves Money

At this point, the Selective Service System is essentially a multi-million-dollar system that collects names and serves no other purpose. As discussed earlier, the draft has not been utilized in over 40 years, and, in fact, from 1975 to 1980 males were not even required to register.²³⁴ For nearly half a century, the United States has spent approximately \$24 million yearly²³⁵ on a system that will likely never be utilized again. During a time when the United States

229. Griego, *supra* note 214.

230. *Id.*

231. *Id.*

232. Pub. L. No. 114-328, 130 Stat. 2000.

233. *Id.*

234. *Background of Selective Service, supra* note 1.

235. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-623, NATIONAL SECURITY: DOD SHOULD REEVALUATE REQUIREMENTS FOR THE SELECTIVE SERVICE SYSTEM (2012), <http://www.gao.gov/assets/600/591441.pdf>.

is faced with an overwhelming deficit,²³⁶ it makes complete sense to repeal the MSSA.

In June 2012, the United States Government Accountability Office (GAO) issued a report that stated, if the Selective Service System was disestablished, the United States would save \$17.9 million in the first year and \$24.4 million dollars thereafter.²³⁷

Selective Service System officials said that while other databases could be used for a registration database, these databases might not lead to a fair and equitable draft because they would not be as complete and would therefore put some portions of the population at a higher risk of being drafted than others.²³⁸

The question is why does this matter if the chances of actually needing to use a draft are negligible?

Additionally, based on testimony from Selective Service System officials, it appears that the current system is under sourced to meet DoD requirements for inductees if a draft was utilized.²³⁹ Not to mention the \$24.4 million operating budget does not include the additional budget that would be necessary if a military draft was utilized.²⁴⁰ The Selective Service System would need an additional \$465 million if a military draft was instituted to provide the necessary troops to the DoD.²⁴¹ It is worth noting that the figures being relied upon by the Selective Service System in this estimate are from 1994.²⁴² As part of its report, GAO emphasized the need for DoD to develop current data and determine whether the Selective Service System is even necessary.²⁴³

Selective Service System officials mentioned in the report that “the Selective Service System demonstrates a feeling of resolve

236. Christopher Chantrell, *What is the Deficit?*, U.S. GOV'T SPENDING, http://www.usgovernmentspending.com/federal_deficit_chart.html (last visited Feb. 18, 2017).

237. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 236.

238. *Id.*

239. *Id.* at 4.

240. *Id.* at 11.

241. *Id.* at 12.

242. *Id.*

243. *Id.* at 16.

on the part of the United States to potential adversaries.”²⁴⁴ “[R]egistering with the Selective Service System may be the only link some young men will have to military service and the all-volunteer force” and “provide[s] a hedge against unforeseen threats.”²⁴⁵ First, the United States continues to experience terror attacks within its borders and responds to such attacks with forces overseas without the need of a military draft, so the argument that the Selective Service System makes the United States appear stronger or more capable to our enemies does not warrant much weight. The remaining arguments do not merit keeping a multi-million-dollar agency up and running for the foreseeable future, especially in light of the recent developments that will likely necessitate the registration of females for the draft. By adding this responsibility to the agency, the budget will also need to be increased, therefore, requiring more money for the immediate future with no anticipated need for the foreseeable future. Rep. Rohrabacher stated, “Conscription will not save us money in the national defense and it is not consistent with American’s best tradition of freedom and liberty.”²⁴⁶

V. CONCLUSION

In summary, recent developments regarding women in combat have sparked an interesting situation that requires action by one of two bodies: Congress or the courts. Since women and men both have the option to serve in combat jobs, they are similarly situated for purposes of the draft.²⁴⁷ Following the reasoning in *Rostker*, unless Congress can provide some other legitimate purpose for only requiring men to register under the MSSA, it would appear that the MSSA is a violation of the Fifth Amendment.²⁴⁸ Congress needs to act expeditiously to deal with this issue before a court strikes down the statute as unconstitutional, creating chaos for not only federal agencies but also some state agencies. Based on the state of our military affairs and the federal budget, Congress should immedi-

244. *Id.* at 12.

245. *Id.*

246. Press Release, Mike Coffman, *supra* note 216.

247. *See generally* Vergun, *supra* note 5 (discussing the rescission of the DoD provision forbidding women from engaging in combat jobs).

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

ately repeal the MSSA by approving H.R. 4523 because the Selective Service System is no longer needed and its elimination will save the United States money.