

# STAFF MEMORANDUM: Expanding Selective Service Registration to All Americans



*This staff memorandum does not represent official findings or recommendations of the National Commission on Military, National, and Public Service (the “Commission”). Authored by the Commission’s staff, the memorandum presents preliminary summaries of research and analysis that the Commission may consider as it develops its recommendations for the Congress, the President, and the American public.*

*Relevant memoranda will be released in conjunction with the Commission’s public hearings. Staff encourages those with views on issues under discussion during the hearings to provide their input to the Commission at [www.inspire2serve.gov](http://www.inspire2serve.gov) and stands ready to revise its current understanding of these issues in light of new information as the Commission’s work continues.*

The April 24-25, 2019 hearings provide an opportunity for public discussion of policy options the Commission is considering with respect to the *Selective Service System* (“SSS”) and a potential future *draft*. This memorandum is associated with the April 25 hearings and addresses *who* should share the common obligation to defend the nation in a potential future draft. A separate but related memo associated with hearings on April 24 addresses possible modifications to the readiness of the SSS and the structure of a future national mobilization.

## Background

The Military Selective Service Act (“MSSA”) mandates registration of eligible males between the ages of 18 and 26 to provide a pool of individuals for possible induction into the armed forces in the event of a draft.<sup>1</sup> The statute affirms the importance of maintaining an “adequate armed strength” for the armed forces and reserve components and declares that, in a free society, the obligations and privileges of military service should be shared generally to ensure the security of the nation, in accordance with a selection system which is fair and just.

## Policy Options

This memo focuses on policy options that address two specific aspects related to the concept of common obligation:

- 1) Modifying the MSSA to include all Americans, regardless of gender
- 2) Allowing for self-identification as a conscientious objector at the point of registration

The policy options described below assume the continued registration of personnel for a potential future draft under the MSSA. Although the Commission has not announced its position on the issue of maintaining active registration, the determination of who is draft-eligible will be pertinent regardless of the Commission’s recommendations on this matter.

### ***(1) Modify the MSSA to include all Americans, regardless of gender***

The question of registering women for the SSS has been raised at various points throughout history as a result of anticipated military needs, legal concerns, and changing attitudes over the role of women in

---

<sup>1</sup> 50 U.S.C. 3801 et seq.

# STAFF MEMORANDUM: Expanding Selective Service Registration to All Americans



society.<sup>2</sup> President Carter’s 1980 plan to reinstate draft registration after a period of inactivity included provisions to amend the MSSA to include women.<sup>3</sup> However, the subsequent 1981 Supreme Court ruling *Rostker v. Goldberg* upheld the constitutionality of the male-only registration requirement under the premise that the purpose of the SSS was to provide combat replacement troops.<sup>4</sup> Although the MSSA does not define or limit how the Department of Defense (DoD) may assign inductees in the event of a draft, the Court held that men and women were not similarly situated for purposes of draft registration because of then-existing restrictions on women in combat, thereby affirming Congress’ decision to exclude women from SSS registration.<sup>5</sup>

More recently, on February 22, 2019, a federal district court judge in Houston, Texas issued a declaratory judgment finding that all-male registration violates the equal protection principles of the Constitution and can no longer be justified.<sup>6</sup> The district court concluded that, “while historical restrictions on women in the military may have justified past discrimination, men and women are now similarly situated for purposes of a draft or registration for a draft.” The federal district court in New Jersey is also considering this question but has not yet entered judgment.<sup>7</sup>

Although no current plans exist to reinstate conscription, the Commission recognizes that Americans hold varied and considered convictions regarding extending registration for a potential draft to all Americans. Proponents of extending registration argue that *all* Americans share a civic responsibility to defend the nation from enemies.<sup>8</sup> Many also cite the military necessity of maximizing the pool of high-quality conscripts available to serve the nation in an emergency. They highlight the changing nature of warfare, the critical role women play in the day-to-day operations of the All-Volunteer Force (AVF), and the significant contributions of military women on the front lines in Iraq and Afghanistan.<sup>9</sup> In the event of an existential

---

<sup>2</sup> For arguments related to: military needs during World War II, see Pamela D. Toler, “The first time the U.S. considered drafting women – 75 years ago,” *The Washington Post*, March 21, 2019, [https://www.washingtonpost.com/outlook/2019/03/21/first-time-us-considered-drafting-women-years-ago/?noredirect=on&utm\\_term=.db7095471bef](https://www.washingtonpost.com/outlook/2019/03/21/first-time-us-considered-drafting-women-years-ago/?noredirect=on&utm_term=.db7095471bef); equal protection under the law, see Russell Spivak and Adam Aliano, “G.I. Jane and the Selective Service: Equal Protection Challenges to Male-Only Selective Service in the Modern Military,” *Harvard Journal on Legislation*, Volume 55, Number 1 (August 5, 2016), <https://harvardjol.com/2016/08/05/gi-jane-and-the-selective-service-equal-protection-challenges-to-male-only-selective-service-in-the-modern-military>; the rights of women and their changing role in society, see Linda Greenhouse, “Women Join Battle on All-Male Draft,” *The New York Times*, March 22, 1981, <https://www.nytimes.com/1981/03/22/us/women-join-battle-on-all-male-draft.html>.

<sup>3</sup> Kristy N. Kamarck, “The Selective Service System and Draft Registration: Issues for Congress,” Congressional Research Service, Updated February 27, 2019: 13.

<sup>4</sup> 453 U.S. 57 (1981).

<sup>5</sup> 453 U.S. at 78.

<sup>6</sup> *Nat’l Coalition for Men v. Selective Service System*, Civil Action H-16-3362, “Memorandum opinion and Order” (Feb 22, 2019 S.D. Tx.).

<sup>7</sup> *Kyle-Label v. Selective Service System*, Civil Action 15-5193 (D. N.J.).

<sup>8</sup> Editorial Board, “Sign women up, too: Women are up to the task of full citizenship,” *Pittsburgh Post-Gazette*, March 1, 2019, <https://www.post-gazette.com/opinion/editorials/2019/03/01/Draft-women-selective-service-US-military-full-citizenship/stories/201903010043>.

<sup>9</sup> Rachel A. McCaffrey, “The Case for Women Entering a Draft,” *National Defense Magazine*, March 7, 2019, <http://www.nationaldefensemagazine.org/articles/2019/3/7/the-case-for-women-entering-a-draft>.

# STAFF MEMORANDUM: Expanding Selective Service Registration to All Americans



threat, many argue that the nation will need every able-bodied individual to ensure the defense and security of the nation.

Opponents of extending registration to all Americans cite women's lower average physical capabilities as an impediment to military service in the event of conscription.<sup>10</sup> Some also express concerns that this means women will not be qualified at the same rates as men, and that a diminished ratio of eligible to ineligible candidates will impose a time-consuming and unnecessary barrier to accessing personnel at a time when the nation is likely facing significant threats. Others believe that women and men have equal, but complementary, roles in society based on biological differences and object to requiring women to register for a potential draft on moral grounds. Some share concerns over 'special risks' women may face during military service, primarily sexual assault.

## *(2) Allowing for self-identification as a conscientious objector at the point of registration*

While the MSSA is predicated on an equal obligation for all men within a given age range to be available for the draft, the United States has supported the rights of conscientious objectors to seek alternative service.<sup>11</sup> The MSSA exempts any person from combatant training and service in the armed forces if that person, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.<sup>12</sup> The Supreme Court has expanded conscientious objector status to include all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, do not allow them to participate in war.<sup>13</sup> To ensure fairness, the Supreme Court clarified that an individual's conscientious objection must be to all war, rather than a particular war.<sup>14</sup>

Under current law, in the event of a draft, the SSS would administer an Alternative Service Program (ASP) to provide non-military work to a conscientious objector who was ordered to service through the draft. Some conscientious objectors believe the legal obligation to register itself is in violation of their religious or ethical objections to war and suggest that they should be exempted from the registration process; others within the community advocate for including a mechanism allowing individuals to indicate a desire to apply for conscientious objector status at the point of registration. This mechanism may be the option to check a box or provide a statement indicating a desire to claim conscientious objector status in the event of a draft.

Proponents of this option argue that early identification will respect religious liberty and assist in establishing documentation of an individual's objection to war. Such a provision would not bind the United States in any way and does not assure the registrant will be granted such status.

Opponents of this option are concerned that self-identification at the time of registration would obscure the fact that the current system requires an external evaluation to determine conscientious objector status, which

---

<sup>10</sup> Elaine Donnelly, "Statement for the Record – National Commission on Military, National, Public Service," Center for Military Readiness, November 15, 2018.

<https://cmrlink.org/data/sites/85/CMRDocuments/StatementforRecordSelectSvcCommission111518.pdf>.

<sup>11</sup> Currently, a Selective Service registrant can make a claim for classification as a conscientious objector after receiving a notice of induction during draft activation. If their classification is granted by a local selective service board, the registrant is placed in the ASP. For more information, see "Conscientious Objection and Alternative Service," Selective Service System, 2019, <https://www.sss.gov/consobj>.

<sup>12</sup> 50 U.S.C. § 3806(j)

<sup>13</sup> *Welsh v. United States*, 398 U.S. 333, 340 (1970).

<sup>14</sup> *Gillette v. United States*, 401 U.S. 437, 460 (1971).

# STAFF MEMORANDUM: Expanding Selective Service Registration to All Americans



would only occur at the time of conscription. Some raise concerns that individuals who indicate their intent to file as conscientious objectors will expect to be categorized as such if inducted.<sup>15</sup> Others argue that special procedures for this population will lead to inequities in service and the potential conflation of conscientious objection by those with philosophical or political objections to a specific conflict, rather than religious or ethical objections to war.

## Issues to Consider

Policy alternatives that explore *who* should share the common obligation to defend the nation in a potential future draft are both relevant and highly salient to policymakers, institutional stakeholders, and the American public. The Commission has examined survey responses to questions regarding views on requiring women to register for a possible military draft which vary by age and gender of the respondent as well as question wording and order. It has also captured thousands of public comments from individuals interested in the Commission's mandate, and sought to hear from individuals and organizations reflecting every sector of society – many of whom have passionate perspectives on the alternatives under consideration.<sup>16</sup> The Commission acknowledges this does not capture the full breadth of public opinion on the issue or the salience of the alternative to the American populace. Other considerations include:

## **Needs of the Nation**

Although the DoD has no current plans to rely on conscription, the nation has historically relied upon the SSS to provide personnel to fight and win the nation's wars and asserts the United States must retain the ability to respond to unanticipated crises.<sup>17</sup> Some argue that for all but the most global of conflicts or threats to the homeland, the number of men of primary draft age required to preserve national security is sufficient. Others assert the future remains uncertain and question why the United States would limit itself to conscripting only 50% of the population in advance of a conflict without knowledge of what threat may require the use of a draft. Under current standards for the AVF, only 3 out of 10 young Americans are eligible for military service; thus, a broader, deeper registrant pool would be critical to increase the SSS's ability to provide personnel to DoD.<sup>18</sup>

---

<sup>15</sup> If a Selective Service registrant is dissatisfied with their Selective Service classification, they can submit a reclassification request to their local Selective Service board. If the registrant is dissatisfied with his Local Board's decision about his reclassification request, they can initiate an appeal to the District Appeal Board and in turn to the president through the National Appeal Board. "Board Member Facts," Selective Service System, 2019, <https://www.sss.gov/Volunteers/Board-Member-Program/Board-Member-Facts>.

<sup>16</sup> For differences in polling responses, see "Most Women Oppose Having to Register for the Draft," Rasmussen Reports, February 10, 2016,

[http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/february\\_2016/most\\_women\\_oppose\\_having\\_to\\_register\\_for\\_the\\_draft](http://www.rasmussenreports.com/public_content/politics/general_politics/february_2016/most_women_oppose_having_to_register_for_the_draft), and Stephanie Akin, "Women and the Draft: They're Divided Over Registration," Roll Call, June 28, 2016, <https://www.rollcall.com/news/politics/women-draft-poll-shows-dont-favor-registration>.

<sup>17</sup> Office of the Under Secretary of Defense for Personnel and Readiness, *Report on the Purpose and Utility of a Registration System for Military Selective Service*, 2017, [https://tw-media.washtimes.com/media/misc/2017/10/25/SSS\\_Report\\_FINAL\\_10\\_July.pdf](https://tw-media.washtimes.com/media/misc/2017/10/25/SSS_Report_FINAL_10_July.pdf).

<sup>18</sup> According to the 2013 study commissioned by the DoD, 29.3% of women and 28.9% of men ages 17-24 are "recruitable" under the standards of the All-Volunteer Force. Joint Advertising Marketing Research and Studies, *The Target Population for Military Recruitment: Youth Eligible to Enlist Without a Waiver*, September 2016,

# **STAFF MEMORANDUM: Expanding Selective Service Registration to All Americans**



## **Equality**

The United States is a nation founded in part on principles of equality. These principles, developed through two centuries of Supreme Court jurisprudence, prohibit the government from discriminating on the basis of sex or gender except to achieve an important governmental interest. As applied to the SSS, some argue the MSSA's exclusion of women constitutes unlawful discrimination in violation of the equal protection principles of the U.S. Constitution with respect to both the potential obligation to serve and sanctions for failing to register. They assert men and women must bear the same burdens in defense of the nation to be equal citizens. In parallel, some assert the sanctions levied against men who fail to register with the SSS are unlawful, because men face an unequal burden in assuming sanctions for failing to register under the MSSA.

## **Individual Liberty**

The United States strongly values individual liberty. Individual liberty, however, is not absolute; in many cases, it is subject to balancing against the needs of the nation as a whole. As applied to the SSS, the law supports military conscription of draft-eligible men to provide for the common defense based on the premise of equal sacrifice. If Congress and the President enact a draft, the law allows the needs of the nation to prevail despite the impact of conscription on individual liberty. While some argue the United States should disallow conscription entirely, the question of balancing the rights of individuals with a fair and equitable system of common obligation is likely to persist.

## **A 'Fair and Just' Selection System**

Although the United States has relied on conscription in the past, the draft has historically been seen as a viable alternative to voluntary military service only when "there is a generally held belief that all are participating with equal sacrifice."<sup>19</sup> Indeed, perceptions of the utility and fairness of the draft during the Vietnam conflict led to significant changes in the structure of the nation's military and was, in part, responsible for the shift to an AVF in 1973.

While 'equal sacrifice' may only truly be possible if everyone serves, to support as equal a process as possible, a just and fair draft may be one where all who are eligible should be available for selection, and if selected, treated consistently in their evaluation for service. The current system supports 'equal sacrifice' through a random lottery of registered and eligible personnel.

---

*The April public hearings of the National Commission on Military, National, and Public Service are intended to generate discussion of issues surrounding selective service in America. Feedback can be shared at [www.inspire2serve.gov/content/share-your-thoughts](http://www.inspire2serve.gov/content/share-your-thoughts).*

---

<https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/Sept2016/JAMRS%20RFI%202014.pdf?ver=2016-09-09-164855-510>.

<sup>19</sup> Bernard Rostker, "America Goes to War: Managing the Force During Times of Stress and Uncertainty," (Santa Monica, CA: RAND Corporation, 2007), 32.