



# Center for Military Readiness — Policy Analysis —

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## National Commission Calls for Co-Ed Conscription and National Service: Bad Policy, Questionable Legality, and Alarming Government Expansion

On March 25, the **National Commission on Military, National, and Public Service** issued a **Final Report** recommending that “*Congress amend the **Military Selective Service Act (MSSA)** to eliminate male-only registration and expand draft eligibility to all individuals of the applicable age cohort.*” The commission’s four-word rationale for this change was, “*The time is right.*”

This unpersuasive argument failed to meet congressional expectations for a comprehensive study of the issue. The Commission also failed to make a convincing case for changing the *purpose* of Selective Service, or for replacing Americans’ **Presumption of Freedom** under the U.S. Constitution with a “**Presumption of Service**” directed by the government.<sup>1</sup> Instead of rubber-stamping Commission recommendations, Congress should conduct its own review of the military, legal, and social consequences of drafting young women.

### 1. *Can Congress draft women as well as men?*

**Yes.** Article I, § 8 of the **Constitution of the United States** sets forth the enumerated powers of the **Legislative Branch**, and Congress *could* subject women to the same obligation and burdens of conscription it imposes on men.<sup>2</sup> In the exercise of its constitutional power to raise and support armies, Congress authorized the draft of men to fight in **WWI**, before and during **WWII**, and during conflicts in **Korea** and **Vietnam**, with a few exceptions.<sup>3</sup> The last conscripted soldier was drafted into the **U.S. Army** in 1972.

To maintain a pool of ready conscripts in case the need for a draft arose, Congress provided for the registration of men between the ages of 18 and 25. The **U.S. Supreme Court** deferred to the considered judgment of Congress and upheld its decision to register men but not women for Selective Service.<sup>4</sup> The Court was careful to point out that Congress, not the **Judiciary**, had the constitutional responsibility to raise and support armies. Due to the careful and deliberate consideration Congress gave to the question, including evidence that Congress did not exclude women from draft registration based on antiquated notions about women’s role in society, the Court said that deference to the Legislative Branch was constitutionally required. (Women were not eligible for combat positions at the time.) The Court also recognized that treating men and women as interchangeable would create an unworkable administrative burden.<sup>5</sup>

### 2. *Should Congress draft women as well as men?*

**No.** The considered judgment of Congress in passing the MSSA initially, and in refusing to include women in the reconsidered registration and conscription law enacted in 1980, was that the primary purpose of the draft was to provide “combat replacements” in a catastrophic national emergency.<sup>6</sup> Since the end of the draft in 1972, the **All-Volunteer Force** has become the strongest, best equipped, best led, and best performing military in the history of the world. Over the past five decades the U.S. has engaged in combat operations all around the globe. The All-Volunteer Force has performed magnificently, and there has been no serious call for

conscription to prosecute military operations, even during our longest war in **Afghanistan**. In this matter of national defense, the commonsense maxim, “*if it ain’t broke don’t fix it*,” applies.

### **3. Does opening the combat arms to female volunteers undercut the rationale for an all-male draft?**

**No.** The fact that Congress and the military have opened combat billets to women who *volunteer* and who are otherwise physically capable of serving in a combat unit does not alter empirical findings confirming physical inequalities that would disadvantage women even more if they were *involuntarily* ordered to serve alongside men in the combat arms. Today, no less than in 1981 when *Rostker v. Goldberg* was decided, women and men are not “*similarly situated*” insofar as the physical strength and endurance required to succeed in the deadly environment of the battlefield.<sup>7</sup>

The National Commission’s Final Report glossed over significant results of comprehensive Marine Corps research and field tests over three years. It also failed to mention then-Commandant **Gen. Joseph Dunford**’s request that some **infantry** and **Special Operations Forces** remain all-male, along with research findings that supported it. Due to major gender-related differences in physical strength, speed, and endurance, all-male units with average-ability men outperformed mixed-gender test units with highly qualified women in **69%** of evaluated tasks, including casualty evacuation and hiking under load.<sup>8</sup>

USMC studies showed that *as a group*, women do not have physical strength and endurance equal to men, and they are 2 to 6 times as likely to suffer injuries. In particular, “*Integrated units, compared with all-male units, showed degradations in the time to complete tasks, move under load, and achieve timely effects on target . . . taken together, and in the context of actual combat operations, the cumulative differences can lead to substantial effects on the unit, and the unit’s ability to accomplish the mission.*” Combat power, survivability, and lethality in close combat operations depend on “*rapidity of action.*” In other words, “*Speed is a weapon.*”<sup>9</sup>

Even among women who have volunteered for the combat arms since 2015, only a small number have demonstrated the desire or physical capabilities to succeed in competition with men in the combat arms.<sup>10</sup> Recent official reports also have shown double attrition rates for women in previously all-male units that engage in deliberate offensive action against the enemy.<sup>11</sup>

Contrary to Commission claims about women’s success in advanced infantry training, these empirical findings and more suggest that involuntary conscription of women would make combat arms units less strong, less fast, more vulnerable to debilitating injuries, less ready for deployment on short notice, and less accurate with offensive weapons during direct ground combat operations.<sup>12</sup>

As the Supreme Court emphasized in *Rostker*, the whole purpose of conscription is to provide combat replacements during mobilization to defend America in a national emergency. Conscripting equal numbers of draft-age men and women and spending time and resources to identify the few women who might be physically qualified for the combat arms would jam up and slow mobilization during a national emergency instead of hastening it.

While President **Jimmy Carter** asked Congress in 1980 to register women for the draft “*based on equity*,” the Supreme Court found that Congress “*was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than ‘equity.’*”<sup>13</sup>

More recently, the Defense Department has acknowledged that reasons other than combat assignments could support exempting women from Selective Service.<sup>14</sup> Qualified women are free to volunteer for military service, and historically, they always have.<sup>15</sup>

#### ***4. Shouldn't Congress act to include women in SS registration before the courts do?***

**No.** In 2019 a federal district court in **Texas** declared that male-only Selective Service registration is unconstitutional.<sup>16</sup> That ruling is now before the **Fifth Circuit Court of Appeals**. The **Department of Justice** has vigorously defended Congress's constitutional authority to decide important matters of national defense, including imposition of Selective Service obligations. A long line of Supreme Court precedent clearly supports the principle that the judiciary owes maximum deference to Congress in matters of national defense, generally, and in matters of conscription, specifically.<sup>17</sup> If Congress rejects the Commission's recommendation to register women for conscription for reasons summarized above, federal courts should defer to the judgment of Congress, which has the constitutional authority to raise, support, and regulate armies.

#### ***5. Should Congress amend the MSSA to authorize conscription "during a national emergency and not solely to provide combat replacements," or establish a cabinet-level Council on Military, National, and Public Service to coordinate "cross agency" efforts?***

**No.** The National Commission recommended that the need for combat replacements should be dropped as the primary rationale for a draft, which would authorize conscription for less than compelling reasons. Unless and until Congress carefully considers the consequences of military conscription for reasons other than the need to raise a military force to repel the nation's enemies, the purpose of conscription should remain combat replacements. Congress also should consider the profoundly negative consequences of the Commission's call for a new, cabinet-level **Council on Military, National, and Public Service**, funded by Congress on a permanent basis. Such a council would be an unprecedented, open-ended expansion of federal government power. Enactment also would amount to Congress abdicating to an executive agency its constitutional power and responsibility to raise armies.<sup>18</sup>

#### ***6. Does Congress have the power to impose mandatory National Service requirements?***

**No.** Article I, § 8 of the Constitution does *not* grant Congress the power to conscript anyone for the **Peace Corps**, **AmeriCorps**, or any other "good cause" or organization, even if Congress deems such service beneficial to the country. Conscription for military service has been upheld as constitutional because of the Constitution's specific grant of the power to raise armies to Congress. Furthermore, the **10<sup>th</sup> Amendment** reserves to the states and to the people powers not delegated to the United States by the Constitution. The states may have the power to compel service by young people, but apart from its power to raise armies, Congress lacks the constitutional authority to impose service requirements on American citizens.

#### ***7. Does the Supreme Court decision upholding a state law requiring men to work on county roads for six days each year mean that Congress can compel a period of national service?***

**No.** *Butler v Perry*, 240 U.S. 328 (1916), held that the state of **Florida**'s power to impose an obligation of service did not violate the **13<sup>th</sup> Amendment**'s prohibition against involuntary servitude. It did *not* hold that Congress had the constitutional power to impose a period of national service. The ordinance in question fell within the general powers of the state to see to it that the roads were in repair. The case did not involve congressional exercise of powers not enumerated in the Constitution.<sup>19</sup>

## 8. What's the Bottom Line?

Intense controversy sparked by “**Draft Our Daughters**” legislation in 2016 produced the National Commission on Military, National, and Public Service. Unfortunately, the Commission’s report lumps together two major issues—mandatory national service and Selective Service registration of women. These are controversial issues of major importance. Each of them deserves independent consideration, and Congress should not hand them off to a new federal bureaucracy. .

The claim that parents need not worry about their daughters being drafted because they could opt for mandatory national service instead begs the question. *Where in the Constitution is there authorization for the federal government to commandeer the lives of young people for less than compelling reasons?* The National Commission’s report and website suggest that all citizens should be “**Inspired to Serve.**” There is a world of difference, however, between inspiration motivated by patriotism and coercion enforced by government.

Volunteer service benefits communities, but there is no evidence that federal government mandates to “serve” others would be more beneficial to society than productive individual life choices, including formation of families. Nor is there any evidence that efforts to “close the military/civilian gap” with universal conscription would unite the nation. Unnecessary mandates to register or conscript young women would divide the nation and weaken national defense, not strengthen it.

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*Prepared by the **Center for Military Readiness**, an independent public policy organization founded in 1993, which reports on and analyzes military/social issues. More information is available at [www.cmrlink.org](http://www.cmrlink.org). – May 2020*

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### Endnotes:

1. [Inspired to Serve: The Final Report of the National Commission on Military, National, and Public Service](#), March 2020, Figure 12: Draft Induction Pipeline, p. 112.
2. Article I, § 8, of the U.S. Constitution sets out the affirmative powers of Congress to provide for the military and national defense needs of the United States. In general, Congress has the power to declare war, raise and support armies, provide and maintain a Navy, make Rules for the Government and Regulation of the land and naval Forces, provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel invasions, provide for organizing, arming, and disciplining the Militia, and for governing them according to disciplines prescribed by Congress.
3. Final Report, March 2020, pp. 87-92. Act of May 18, 1917, c. 15, 40 Stat. 76); upheld by *Selective Draft Law Cases*, 245 U.S. 366 (1918); and Selective Training and Service Act of 1940, 54 Stat. 885; Selective Service Act of 1948, 62 Stat. 604; upheld as constitutional by [United States v. Holmes](#), 387 F.2d 781 (7th Cir.), cert. denied, 391 U.S. 936 (1968).
4. *Rostker v. Goldberg*, 453 U.S. 57 (1981), and CMR Policy Analysis: [Women, War, and Selective Service](#)
5. *Rostker* at 81-83.
6. *Rostker*, at 75-76.
7. See *Rostker* at 79. “As was the case in *Schlesinger v. Ballard*, supra, “the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated” in this case. *Michael M.*, supra, at 469 (plurality opinion). The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.”
8. **Brig. Gen. George W. Smith, Jr.**, USMC, [Memorandum to the Commandant](#), Assessment of Women in Service Assignments, August 18, 2015, and 4-page [Summary](#). In a [Statement for the Record](#), CMR President **Elaine Donnelly** asked that the Commission obtain and make public the September 17, 2015, Memorandum in which then-Commandant Gen. Joseph Dunford reportedly asked that infantry units and Special Operations Forces remain all-male. In correspondence referring to the documents requested by CMR, Chairman **Joseph Heck** indicated that the Marine Corps had provided the documents and a briefing on the **Women in Service Restrictions Review (WISRR)** project in the fall of 2018. Heck added that he would not release the requested documents without authorization. On March 24, 2020,

CMR filed a FOIA request for the documents. The Commission denied the FOIA – this time claiming that it did not have the documents.

CMR is appealing the FOIA denial, which is not consistent with Chairman Heck’s earlier correspondence. If the FOIA denial is true, it can only be concluded that the Commission did not seek, receive, and review the Dunford memo and research results supporting it. The Commission’s Final Report does not even mention the Dunford memo. This suggests that the Commission intentionally refused to even consider highly relevant evidence concerning the detrimental consequences of pretending that women are interchangeable with men in combat arms units such as the infantry. This failure to analyze or accurately report the most scientific research results available thoroughly discredits the Commission’s conclusion that “*the time is right*” to include young women in Selective Service registration for a possible future draft.

<sup>9</sup> **Marine Corps Operational Test and Evaluation Activity (MCOTEA)** Ground Combat Element Integrated Task Force Experimental Assessment Report, 14 August 2015. The Commission Final Report paraphrased a single paragraph from this report but omitted specific details of research results.

<sup>10</sup> CMR: [New Army Combat Fitness Test: 84% of Women Fail](#), Nov. 2019; Jeff Schogol, *Marine Corps Times*, [At Boot Camp 3 out of 4 Women Fail to Meet Combat Standards](#), Aug. 11, 2017; **Julie Pulley** and **Hugh P. Scott**, *Los Angeles Times* Op-Ed, [What Military Recruiters Aren’t Telling Women: You’ll Face Disproportionate Health Risks](#), July 25, 2017; and Shawn Snow, *Marine Corps Times*, [Where Are the Female Marines?](#) Mar. 5, 2018.

<sup>11</sup> CMR: [Pentagon Reports: Female Attrition Rates Twice as High in Formerly All-Male Ground Combat Units](#), *Center for Military Readiness*, May 2020.

<sup>12</sup> The Final Report makes several misleading claims, failing to mention, for example, that approximately **38** women attempted the USMC **Infantry Officer Course (IOC)** since 2012. Two passed after evaluation standards were adjusted, and one of the two left the Marine Corps. CMR: [Have the Marines Lowered Combat Endurance Test Standards?](#), Feb. 19, 2018, and Philip Athey, *Marine Corps Times*, [First Female Infantry Marine Officer Leaves Corps as Commandant Calls for More Women at Infantry Officer Course](#), Feb. 25, 2020. The Commission cites women’s graduation from the Army’s **Ranger School** course as an example of standards remaining high, without mentioning credible evidence of special treatment that allowed the first two women to pass. (pp. 117-118) See CMR [Review](#) of book by **James Hasson**: [Stand Down – How Social Justice Warriors Are Sabotaging America’s Military](#), 2019.

<sup>13</sup> *Rostker* at 79-80.

<sup>14</sup> Department of Defense, [Detailed Legal Analysis](#), “*The Court in Rostker did not explicitly consider whether other rationales underlying the statute would be sufficient to limit the application of the MSSA to men.*” The Supreme Court in *Rostker* also noted that Congress expressly rejected the notion that women could be included in the draft for non-combat roles because, “*staffing noncombat positions with women [via conscription] during a mobilization would be positively detrimental to the important goal of military flexibility.*” *Rostker* at 81-82.

<sup>15</sup> In considering whether to include women in the draft at the request of President Carter in 1980, Congress found that women volunteers would be more than adequate to meet the military’s noncombat needs. *Rostker* at 81. Neither the National Commission nor anyone else has suggested that the volunteer spirit in women is less today than it was in 1980. Accordingly, we can expect qualified and capable women to volunteer for both combat and noncombat positions in sufficient numbers to eliminate the need and administrative burdens and hurdles that conscripting women, generally, would create in time of a national emergency.

<sup>16</sup> **National Coalition for Men v. Selective Service System**, 355 F. Supp. 568 (S.D. Tex. 2019) See CMR: [Court Order to “Draft Our Daughters” Caused by Congressional Indifference](#).

<sup>17</sup> See *Rostker* at 64-72 (reviewing cases holding that deference to Congress is appropriate in matters of national defense).

<sup>18</sup> Final Report, pp. 22-24. The February 2019 National Commission [Staff Memorandum: Universal Service](#) suggested ways to enforce mandatory universal national service (MUNS) with sticks and carrots, such as denial of benefits for non-compliance or a tax-free award for every American, granted at birth but only received after government-directed service. (p. 5) see testimony of **Doug Bandow** of the **Cato Institute**, [Mandatory Universal National Service: A Dystopian Vision for a Free Society](#), Feb. 21, 2019.

<sup>19</sup> The Florida statute at issue was passed in 1913 and may well have been aimed at conscripting poor blacks to perform free manual labor for the state under the guise of a facially neutral law. The Court’s opinion did not even hint at any consideration of that issue, but modern courts would certainly be far more sensitive to such a misuse of the state’s general power to impose duties and obligations on the residents of that state. As noted in the text above, Congress has only the powers enumerated in the Constitution and does not have a general police power from which such an obligation to impose national service requirements can arise. Some states have adopted a public service component in various school curricula, a power reserved to the states under the 10<sup>th</sup> Amendment. Instead of analyzing whether state, local, and private efforts to promote volunteerism are deficient, the Commission recommended creating an entirely new federal bureaucracy.