

Women, War, and Draft Registration

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I. Introduction

The recent lifting of restrictions on women serving in direct ground combat military occupational specialties (MOS) has raised the question of whether women should be required to register for the draft. From a policy perspective, one may favor male only registration and conscription or think that principles of equity demand that men and women should share the burden of military conscription equally.² The male only conscription and registration position raises equal protection issues that are not present if both genders are subject to conscription and required to register for the draft. This paper will briefly examine the equal protection issue that is present when only men are required to register for the draft and are subject to conscription.

II. Background: *Rostker v. Goldberg*

The issue of a male only draft registration was decided by SCOTUS in 1981 in the case of *Rostker v. Goldberg*, 453 U.S. 57 (1981), a 6-3 decision upholding the male only registration requirement. Since the matter was settled by SCOTUS in 1981, the legal answer would seem to be clear: if Congress does not include women in the draft it will not violate equal protection principles. But things have changed in the last 35 years and the outcome today is not so certain.³

In *Rostker*, several young men challenged the male only registration requirements of the Military Selective Service Act (MSSA), 50 U.S.C. App. § 451, *et seq.* Plaintiffs claimed the requirement for men but not women to register for the draft violated the equal protection component of the Fifth

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² From a policy perspective, I favor the traditional view that any draft registration should be limited to males because, in my view, the purpose of the draft is to provide a casualty replacement stream for direct ground combat units at a time and under circumstances where our established all volunteer force is inadequate to protect the national interests of the United States. The fact that such positions are now open to women who volunteer and can meet the demanding physical standards required of those positions does not change the reality that most women will not be able to meet those demanding standards and conscription of large numbers of women will not be an efficient way to fill the needed combat billets. I trust that my personal policy views will not slant my legal analysis, but I thought it important that the reader be aware of my policy preferences.

³ The Supreme Court has never addressed the basic question of the constitutionality of a draft or compulsory service requirement in peace time. In 1918, SCOTUS upheld the constitutionality of conscription in time of a declared war. *Selective Draft Law Cases*, 245 U.S. 366 (1918). Subsequent lower court decisions upheld conscription absent a Congressional declaration of war but when the United States was engaged in combat operations. *United States v. Henderson*, 180 F.2d 711 (7th Cir. 1950). *Cf. United States v. O’Brien*, 391 U.S. 367 (1968) (upholding against a free speech challenge O’Brien’s conviction for burning his draft card during a period where there was no declared war though the military was engaged in combat operations in Vietnam.). The larger question of whether the constitution permits conscription absent a national emergency, declared war, or engagement in combat operations that for all intents and purposes amount to war is beyond the scope of this paper.

Amendment's Due Process Clause.⁴ The case, originally filed in 1971 during the Vietnam War, languished in the lower courts with little or no action because the draft was suspended in 1973 and the registration requirement was halted in 1975. When the Soviets invaded Afghanistan in 1979, President Carter decided that registration for the draft was needed to prepare the United States to meet the emerging threats in Southwest Asia. Because the registration requirement, as well as the induction process, had been suspended, it was necessary for Congress to reallocate funds to spin the system back up. Accordingly, President Carter requested Congress to transfer funds from DoD to the Selective Service System to fund the reinstated registration process. In addition to requesting Congress to fund the registration process, President Carter also asked Congress to amend the MSSA to register and conscript women.

Congress agreed that the events in Afghanistan warranted the activation of the registration system but after lengthy consideration balked at requiring women to register and become subject to conscription. The Congressional debate over the issue, however, served to focus attention on the *Rostker* case that had been lying dormant in a Federal Court in Pennsylvania for almost 10 years. The District Court ultimately denied the government's motion to dismiss, certified the case as a class action, and included in the plaintiff class "all male persons who are registered or subject to registration" under the MSSA. Just three days before the start date of the revival of the registration process, the District Court ruled that the male only registration requirement violated the equal protection component of the Due Process Clause of the Fifth Amendment and permanently enjoined the government from registering anyone under the MSSA. The government sought immediate review by SCOTUS and the District Court's injunction was stayed pending review by the Court.

In upholding the Congressional decision to limit registration and conscription to men, the Court reviewed in some detail the long line of cases where the courts appropriately deferred to the judgment of Congress when Congress was exercising its authority under Art. I, §8, cls. 12-14, of the Constitution.⁵

In § II of the opinion, Justice Rehnquist eschewed the temptation to try and refine the level of scrutiny that should be applied in gender discrimination claims arising in the military and, instead, noted the "broad constitutional power" of Congress in military affairs and the relative lack of expertise of the courts in that same area.⁶ This deference is especially appropriate when, as here, Congress made a

⁴ "Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'" *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975) quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁵ See, e.g., *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army."); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (noting judiciary's lack of expertise and competence regarding decisions as to composition, training, equipping and control of military forces.); *Parker v. Levy*, 417 U.S. 733, 756 (1974) (upholding constitutionality of Art. 134, UCMJ, against vagueness and overbreadth challenges because, "Congress is permitted to legislate both with greater breadth and with greater flexibility" in governing the military.); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (recognizing the "broad constitutional power" of Congress to raise and regulate the armed forces.); *Middendorf v. Henry*, 425 U.S. 25 (1976) (Court must give particular deference to Congress' exercise of its Art. I, § 8, power.).

⁶ *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981)

“studied choice of one alternative in preference to another.”⁷ The decision to exclude women from the draft and from registering for the draft “was not the ‘accidental by-product of a traditional way of thinking about females,’” Justice Rehnquist observed.⁸ The Court’s deference to Congress was based upon the Constitution’s textual commitment to Congress in Art. I, § 8, the power and responsibility to raise and support armies, the fact that Congress studied, debated, and seriously considered the issue before deciding not to amend the MSSA, and the Court’s relative lack of expertise and Constitutional authority over military affairs. The Court’s reversal of the lower court’s ruling **does not mean** that SCOTUS examined the evidence before Congress and concluded that Congress was “right” and the President was “wrong” about registering females for the draft.

In § III of the opinion, the Court reviewed in great detail the substance of the committee hearings, reports, and debates within Congress over whether to amend the MSSA. In so doing, the Court noted that “[t]he existence of combat restrictions clearly indicates the basis for Congress’ decision to exempt women from registration.”⁹ But the overarching message in the Court’s analysis was not that Congress was correct in excluding women from registration because they were excluded from combat. Rather, the basis of the Court’s holding was that the District Court had no authority to review the correctness of Congress’ decision in the first place: “the District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of Congress’ evaluation of that evidence.”¹⁰

The lower court was reversed because it conducted an independent review of the entire matter and substituted its judgment for that of Congress. The District Court was wrong, not because it disagreed with Congress on the wisdom of registering women, but because it approached the case with the view that in the exercise of its power of judicial review it could substitute its judgment for that of Congress. Thus, *Rostker* does not mean that registering and conscripting men only violates the Constitution if restrictions on women serving in combat MOSs are lifted.

III. Women and Combat in a post-*Rostker* World

Would *Rostker* be decided the same way if women were not excluded from combat positions? In other words, did the existence of the combat exclusion policy provide the essential underpinning for the *Rostker* decision or would the Court have sustained the Congressional policy even if women were permitted to serve in combat roles?

One might point to the prominence of the combat exclusion policy as the justification for the male only registration and conclude that absent such a policy there is no justification for a male only draft registration requirement. Certainly, the unchallenged existence of the combat exclusion policy lent considerable weight to the *Congressional* decision to not include women in the registration process. But

⁷ *Id.* at 71.

⁸ *Id.* at 74.

⁹ *Id.* at 77.

¹⁰ *Id.* at 82-83 (emphasis in original).

are there other reasons, apart from the combat exclusion policy, that could justify Congress' decision and would withstand the *appropriate* level of review by a court?

There may well be and the deferential review the Court determined was appropriate in these types of cases would not find such a policy unconstitutional. The combat exclusion policy that existed in *Rostker* made it quite easy to see why Congress did not include women in the MSSA. There was no cause to examine other possible justifications because the combat exclusion policy, which all agreed was appropriate, necessary, and unchallenged provided the contextual framework for the policy debate in Congress. But the basis of the Court's decision in *Rostker* was not that Congress correctly balanced the competing policy choices before it. Rather, the basis of the Court's decision was that a Congressional exercise of Art. I, § 8, powers is entitled to respect and deference by the courts when Congress makes a "studied choice" of the alternatives.¹¹

The recent change in the DoD policy on women in combat, however, raises the question of whether, in light of the new policy, the male only draft now runs afoul of equal protection principles. While women are now eligible for combat positions, we are repeatedly assured that the standards for those positions will not be lowered. Only those who can meet the high standards necessary to fully discharge the duties and actions required on the battlefield will be assigned those duties, we are told. The recent successful completion of the Army's Ranger School by three women indicates that some women will be able to meet those standards. The starting point for any consideration of equal protection principles is to identify two similarly situated classes that are being treated differently. In this case, the question is whether men and women are similarly situated when it comes to their natural abilities to meet the standards required for combat MOSs.

The question for Congress in deciding how to structure the MSSA to provide for the rapid induction of sufficient numbers of civilians who can become combat capable troops to provide the casualty replacement stream in the event of national mobilization is not whether a few or some women can meet the standards for combat positions.¹² Rather, the question is whether the expenditure of time, effort, and resources to cull from the thousands of women who would be drafted the few who might meet the demanding standards required of combat units and enter the casualty replacement stream is a wise use of time, effort, and resources during a time of national mobilization where the very survival of our nation depends upon success on the battlefield. Congress could reasonably, rationally, and appropriately decide that even though women who can meet the high standards of combat positions can volunteer and serve in those positions, the physiological reality is that most women cannot meet those standards while, physiologically, most men can. In light of that reality, Congress could decide that in a period of national mobilization, when time is of the essence, when the blood of our soldiers is being

¹¹ *Id.* at 71.

¹² I assume that Congress would not reauthorize actual conscription absent some national emergency that required a substantially larger military force than feasible under the all-volunteer policy we have followed since the draft ended in 1973. *See note 17, infra.* But that is just my assumption. Congress could decide that a period of mandatory national service was a good thing and reauthorize conscription to facilitate that policy goal. Should Congress elect a national service policy for young people and choose the draft as a way of implementing that policy, different questions of constitutional power and authority would be raised.

spilled on the field of battle, when the situation is so grave that we must abandon the all-volunteer principle that produced the greatest military force in the history of the world we simply cannot afford to devote time and resources to identifying those few women who may qualify. This is especially true in light of the fact that those women who can qualify and who wish to serve are free to volunteer and do so. Excluding the remainder from the draft-eligible pool is an exercise in reasoned judgment to provide for the national defense in a time of crisis, not unlawful gender discrimination. Would men, in that situation, be treated differently? Of course they would be. But if the purpose of the draft is to quickly mobilize and deploy a sufficient number of combat soldiers in a time of national emergency, as opposed to creating a system that guarantees gender equity, limiting the draft to males is reasonable, rational, and appropriate. In this situation men and women are not similarly situated. At least that is the argument.

One might also argue that including women in the draft pool will actually hinder the flexibility, efficiency, and speed necessary to respond to a national crisis. Assume women and men ages 18-26 are represented equally in the population. Assume, also, that any draft call-up would be gender neutral. We would then expect men and women to be called for induction in roughly equal proportions. If 75% of the men can meet the combat standards but only 25% of the women can meet the same standards, considerably more time, effort, and resources would be expended in testing, evaluating, and screening women to identify the 25% who qualify. Congress may well determine that in a time of national emergency devoting resources to a demographic where $\frac{3}{4}$ of the members will be unqualified hinders the ability to efficiently screen the demographic where $\frac{3}{4}$ of the members will be qualified.¹³

Applying the same sort of deferential review to the Congressional action suggested above as the Court applied to the situation before it in *Rostker*, I suggest the Congressional action would be upheld. This assumes, of course, that Congress developed a similar sort of record as was developed when they considered amending the MSSA at the behest of President Carter. It also assumes an Executive Branch willing to defend the Congressional decision in litigation. While the Court in *Rostker* did not review that extensive record to see if they agreed with the conclusions, the existence of the extensive record was influential in the Court finding that Congress appropriately exercised its army powers and deferential review was appropriate.

IV. Scope of Review in a Post-*Rostker* World

Time has passed since *Rostker*. The entire make-up of the Court has changed. None of the six justices in the *Rostker* majority are still on the Court. Neither are the three dissenters. The Court's equal protection jurisprudence has evolved and the Court is more willing to apply a more exacting level of

¹³ The 25% and 75% figures are used merely to illustrate the point. I am not suggesting that those figures represent the actual percentages of females and males in the general population who would meet the standard set for combat positions. Furthermore, if the gap between men and women in their qualifications for the combat positions is not nearly as great, either because the standards are lowered, gender normed, or simply because men and women are much more alike in strength, speed, and stamina than previously thought, this argument loses its logical force. In fact, as the gap approaches zero it becomes an argument *for* including women in the draft.

scrutiny to claims of gender discrimination.¹⁴ The Court's historical deference to Executive and Congressional exercise of power over military affairs may not be as broad as it once was.¹⁵ In addition, the culture has changed. Women's opportunities in society generally, and the military specifically, have expanded. The nature of war has changed. Some would argue that instead of the brutal trench warfare of WW I, the massive armored/infantry assaults of WW II, the pitched battles for plots of frozen ground in the mountains of Korea, and the close-quarters jungle combat that typified Vietnam, the conflicts that necessitated the draft, modern war is more like a computer game. The physical attributes that were necessary to maintain combat effectiveness in those environments, they argue, are not the same as those needed on today's digital battlefield.

Under the traditional scope of judicial review of military actions, whether those arguments should dictate a different policy is for Congress under its Art. I, § 8, powers. If, after careful and deliberate consideration, Congress rejects those arguments and concludes that in the grave and dire circumstances that would justify conscription in the first place the most effective, efficient, and realistic way to get sufficient combat troops to the front line is to conscript only males, it is not within the power of the judiciary to second guess that conclusion. The same approach employed by the *Rostker* Court would result in an affirmance of the Congressional action even if the combat exclusion policy is no longer in place. There is no guarantee, however, that the current Court would apply the deferential review it used in *Rostker*. Application of a more exacting standard may lead to a different result.¹⁶

If Congress limited conscription and registration to men only it would mean, of course, that men are treated differently than women. Men have to register and women do not. But the question for Congress in this situation is not gender equality. The question is the combat effectiveness of the military and the survival of the nation.¹⁷ If gender equality was the goal it follows that affirmative action to

¹⁴ See, e.g., *United States v. Virginia, et al.*, 518 U.S. 515, 534 (1996) (State of Virginia had no "exceedingly persuasive justification" to maintain Virginia Military Institute's Corps of Cadets as male only.) *United States v. Virginia* did not involve an exercise of Congressional power under Art. I, § 8. Accordingly, the heightened standard of review applied by the Court to Virginia's male only cadet corps may be tempered somewhat by the traditional deference shown by the Court in reviewing Congress' military affairs powers. How much that heightened scrutiny is tempered by the tradition of deference is unknowable at this point, but the dissent by Justice Marshall in *Rostker* where he applied heightened scrutiny and concluded that the male-only registration requirement was unconstitutional, even when women were excluded from combat, provides a roadmap. *Rostker v. Goldberg*, 453 U.S. 57, 86-113 (1981).

¹⁵ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (Rejecting government argument that Court should abstain from *habeas corpus* review sought by Guantanamo Bay detainee scheduled for trial by military commission authorized by Detainee Treatment Act).

¹⁶ See, *Rostker v. Goldberg*, 453 U.S. 57, 86-113 (1981) (Marshall, J., dissenting).

¹⁷ I do not use "survival of the nation" merely as a rhetorical device. Since 1973 we have successfully fought wars without resort to conscription. During the run-up to the first Gulf War, I was in a meeting with the Army Deputy Chief of Staff for Personnel and other senior staff in the Pentagon where the topic of discussion was how to fill the casualty replacement stream with combat capable soldiers in what then was expected to be a long and bloody battle to eject the Iraqi army from Kuwait. Seeking authority to reactivate the draft and conscript citizens was immediately ruled out by the senior Army leadership. In the considered opinion of the uniformed leadership charged with fighting our nation's wars, the nature of the threat to the United States was far short of what they believed would support conscription. Instead of seeking to reactivate the draft, the decision was made to use the Reserve and National Guard if necessary to keep front line units combat capable. Fortunately, the war was over in

overcome the history of invidious discrimination against women that excluded them from combat positions would be appropriate. Only when women and men populate front line combat units on an equal basis and sustain casualties on an equal basis would the goal have been achieved. I have not heard the proponents of lifting combat restrictions on women argue that gender equality requires that men and women should be equally represented in combat MOSs and combat casualty statistics. The lack of such argument is an implicit recognition that the physiological differences between men and women are such that men and women are not similarly situated when it comes to being able to perform to the standards required of combat positions. If they are not similarly situated, the very premise of an equal protection claim is lacking.¹⁸

There are currently at least two lawsuits working their way through the courts asking the judiciary to reconsider the *Rostker* holding in light of the recent change in DoD policy.¹⁹ Should the courts find the change in policy undermines the reasonableness of the Congressional decision and the male only registration requirement violates Equal Protection, the precise effect of the decision on the MSSA registration system will depend upon several factors. If the male plaintiffs in the *National Coalition of Men* litigation prevail, the net result would be that men do not have to register; to require them to do so would violate their right to equal protection of the laws. The court would not “rewrite” the MSSA. That is the function of Congress. If Congress believed a registration process was necessary it could reinstate the registration requirement consistent with court’s decision and include women. Alternatively, if Congress undertook a careful and deliberate study of the issue and decided that including females in the draft when very few would ever qualify for combat units would divert time and resources from the important task of developing combat capable troops, even though no policy precluded qualified women volunteers from serving in combat, a *Rostker* deferential standard of review should sustain the Congressional decision in challenges brought subsequent to the Congressional action. A more exacting scope of review, like that applied by the Court in *United States v. Virginia*, the VMI case, may reach a different result.

If the plaintiff in the *Kyle* litigation prevails, the court would most likely order the Selective Service Director to register the plaintiff. Unless the case is certified as a class action or the Executive Branch decides, as a matter of policy, to accept the District Court’s judgment and apply its reasoning to the

100 hours and we did not have to test the system. Furthermore, we have now been engaged in ongoing combat operations in Iraq and Afghanistan for 15 years, the operational tempo has been extremely high, and no one has seriously suggested the draft was necessary to maintain adequate combat forces. Whether policy makers have considered the matter and deliberately decided that conscription was not necessary to adequately prosecute the war or if the political will to reinstate the draft has been lacking makes no difference. The fact is that we have been engaged in a shooting war for 15 years without conscripting a single soldier. The likelihood that we will in the future is virtually non-existent.

¹⁸ See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (male and female naval officers not similarly situated and no equal protection violation where promotion regulations gave female officers a longer period than male officers before separation for non-selection for promotion.).

¹⁹ *National Coalition of Men, et al., v. Selective Service System*, No. 2:13-cv-02391-DSF-MAN (9th Cir. Feb. 19, 2016)(finding challenge to male only draft was ripe for adjudication in light of new DoD policy lifting combat restrictions for women, reversing District Court’s dismissal of the case, and remanding the case to the lower court); *Kyle v. Selective Service System, et al.*, No. 2:15-cv-05193-ES-JAD, (U.S.D.C. N.J., July 3, 2015).

MSSA nationwide, the holding would only grant relief to the named plaintiff and the male-only registration requirement would remain in effect for the rest of the country. Of course, other courts faced with similar cases may find a ruling favorable to the *Kyle* plaintiff persuasive and enter similar judgments in other cases. The fact remains that in either the *National Coalition of Men* or the *Kyle* litigation, a favorable ruling for the plaintiff could fundamentally change the registration process unless Congress legislatively reestablishes the male-only draft and registration system and either the President signs the bill or it is passed over a veto.

V. Limiting Federal Court Jurisdiction in a Post-*Rostker* World

Some have suggested that one way to insure against judicial interference is for Congress to pass legislation reaffirming the male only registration requirement and to include a proviso in the bill to withdraw jurisdiction from the federal courts to review challenges to the male only draft and registration requirement. Article III of the Constitution vests the “judicial power of the United States” in the Supreme Court and in inferior courts created by Congress under the Legislative powers in Article I. It is well settled that in creating the inferior federal courts Congress did not and has not extended to those courts the full scope of the judicial power under Article III. For example, in Art. III, § 2, the judicial power (jurisdiction) extends to controversies between “citizens of different states.” In granting lower federal courts jurisdiction to hear cases between “citizens of different states,” Congress imposed some restrictions on the scope of that jurisdiction. Under 29 U.S.C. § 1332, federal courts have diversity jurisdiction only if the amount in controversy exceeds \$75,000. In other words, Congress has the power to define and refine, to some extent, the power of federal courts to hear cases.

The unanswered question in the current context is whether Congress could insulate the male only draft registration from all judicial review by including a proviso in legislation that would withdraw federal question jurisdiction (28 U.S.C. § 1331) over challenges to that particular statute. This same argument has been urged in other contexts.²⁰ School busing, school prayer, and abortion all come to mind as examples of cases where limiting federal court jurisdiction would give the legislature free reign and insulate its actions from review by an Article III court. Interestingly, and despite urgings from committed activists, Congress has never tested its power to withdraw jurisdiction in any of those contentious areas.

Federal judicial opinions are full of comments like, “Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies” to which Article III of the Constitution extends the judicial power of the United States. *Sheldon v. Sill*, 49 U.S. 441, 449 (1850). The Supreme Court, however, has never held that a federal court did not have the jurisdiction to review a constitutional challenge to an act of Congress when brought by a plaintiff with standing, the issue was ripe for judicial review, did not seek an advisory opinion, and did not fall within the political question doctrine. But, to my knowledge, Congress has never sought to test the scope of its power to define the jurisdiction of the inferior courts by withdrawing jurisdiction from the federal courts to avoid judicial

²⁰ In the Detainee Treatment Act (DTA), Congress attempted to insulate the decisions of military commissions from judicial review but the Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) found, on the basis of statutory construction, that the language of the DTA did not strip the Court of jurisdiction to hear the petition for *habeas corpus*.

review of its own actions. As noted above, such action has been urged from time to time, but never taken. Furthermore, even if Congress did limit the jurisdiction of the lower courts that it created, there is an even more serious question as to whether Congress could so limit the jurisdiction of the Supreme Court.²¹

Because Congress has never pressed the issue it has never been tested in litigation. It might seem anomalous that if Congress says a court does not have jurisdiction that the matter would still be decided by a court. But courts always have the power to determine whether they have jurisdiction. Commentators over the years have frequently expressed reservations about whether Congress can foreclose judicial review of constitutional challenges. To do so, they argue, would essentially write the Judicial Branch out of our tripartite system of government. One of the “checks” in the “checks and balances” scheme that underlies our system is the judiciary’s power to declare acts of Congress unconstitutional.²²

While a jurisdiction withdrawal provision in a statute will have textual support in Article III, it is by no means certain that a federal court, appropriately deciding the scope of its own jurisdiction, will give it the effect intended by Congress. A court may find that an attempt to insulate from judicial review constitutional challenges to Legislative actions that are otherwise justiciable under Article III is, itself, unconstitutional.

The fact that such a course of action has been suggested to remedy federal court “interference” in various issues over the years, Congress has consistently refused to follow that route, and when Congress did attempt to exclude the courts the attempt failed,²³ indicates that Congress does not believe it would be effective or that the issue in question is not of sufficient importance to serve as the vehicle to test the reach of Congress’ power to prescribe the jurisdiction of the federal courts. My point is that Congress may attach such a jurisdiction limiting provision to a bill providing for male only registration, but it is no guarantee that the courts will agree that the provision constitutionally limits the jurisdiction of the court.²⁴

VI. Conclusion

In light of the foregoing, what should Congress do? If Congress is satisfied that the current MSSA strikes the right balance it need do nothing. The current MSSA is still the law until Congress changes it or the

²¹ Assuming Congress withheld jurisdiction from the Federal District Courts a case could still reach the Supreme Court on a petition for writ of *certiorari* to a State supreme court. I note, however, that Art. III also gives Congress the authority to limit the appellate jurisdiction of the Supreme Court, which, if effective, would preclude review of a State supreme court decision.

²² *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.”).

²³ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²⁴ Legal scholars who have studied the issue in some detail generally agree that a provision that seeks to completely insulate Legislative or Executive action from judicial review in the face of a constitutional challenge is itself, unconstitutional. A review of the arguments and analysis of both sides of that issue is beyond the scope of this paper.

courts declare it unconstitutional. If Congress believes that combat positions should not be open to women, they can so restrict those positions to men only.²⁵ *Rostker* teaches that the courts will not second guess Congress on that issue if the record demonstrates Congress carefully considered the issue before taking action. If Congress should so restrict access to direct ground combat units, it follows that they can restrict draft registration only to men for the reasons set out in *Rostker*. Should the Court apply a less deferential scope of review, the outcome would not be so certain.

Should Congress not disturb the new DoD policy opening of direct ground combat positions to women, can they still restrict draft registration to men only? That is the *status quo*. The Executive Branch has lifted the combat exclusion *policy* but the MSSA still limits draft registration to men only. If, as suggested above, Congress develops the appropriate record, there is a viable argument that the courts should defer to the Legislative Branch's judgment. There is, of course, no guarantee that today's Court would embrace that argument. Further, in light of Congress' refusal to withdraw jurisdiction from the courts when faced with equally or more contentious issues in the past, one must wonder whether such a bill would pass in this instance and, if it does, whether the votes would be present to override a veto.²⁶ Thus, the question is whether it is worth the energy to even propose such an approach.

At this point, if Congress does nothing the male only registration remains in effect until some court strikes it down. Should that occur then Congress will be faced with the question of whether to codify ground combat exclusions and reenact a male only MSSA to line up the policy with that was affirmed in *Rostker*. If it does take such action and the bill is signed or a veto is overridden it will, no doubt, be subject to another round of litigation and we will have to await the outcome.

Alternatively, Congress could leave the DoD policy on women in combat undisturbed but reconsider whether registration and conscription are still necessary, and if so, whether registration and conscription should be limited to males. Assuming Congress determined there was still a need for a pool of potential conscripts, that the fundamental purpose of conscription was to fill combat positions, that men are, in general, more likely than women to qualify for such positions, and that the circumstances that justify the need for conscription would be such that drafting men and women in equal measure would hinder the selection of those who could meet the standards for combat positions in a timely and efficient manner, a male only registration requirement *may* survive judicial review. Whether such a registration provision would survive judicial review will depend upon the scope of review applied by the courts and the extent of the Congressional record supporting the male only registration requirement.

²⁵ Congress may accomplish that goal by enacting specific legislation restricting certain positions to men or it may prohibit DoD from spending any appropriated funds to implement the policy announced by Sec. Carter in December 2015 lifting the combat restrictions. In either situation, the legislative action would have to survive a potential filibuster in the Senate, pass both houses of Congress and be signed by the President, or have sufficient congressional support to override a presidential veto. There would also be the expected litigation where the scope of review, the extent of the Congressional consideration, and the vigorousness of the defense of Congressional action by DoJ would all influence the outcome.

²⁶ A veto proof Congress or a sympathetic President and a filibuster proof Senate would be necessary for such a bill to become law.

