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Comment: Selective Disservice: The Indefensible Discrimination of Draft Registration

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Comment: Selective Disservice: The Indefensible Discrimination of Draft
Registration

COMMENT

SELECTIVE DISSERVICE: THE INDEFENSIBLE DISCRIMINATION OF DRAFT REGISTRATION

WILLIAM A. KAMENS*

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INTRODUCTION

The ongoing U.S. "War on Terror" has prompted calls for the resumption of a military draft¹ and fear of the same,² along with official denials that a draft is anticipated.³ Such exchanges have a familiar ring and are virtually identical to those circulating during the Persian Gulf War.⁴ In 1980, when draft registration resumed after a five-year hiatus,⁵ similar draft anxiety circulated.⁶ The Cold War

1. See Joel Brinkley, *Defying Odds, 2 Lawmakers Push to Bring Back the Draft*, N.Y. TIMES ONLINE, Jan. 27, 2003, at <http://www.nytimes.com/2003/01/27/politics/27cnd-draft.html> (reporting that two senior Democratic members of Congress urged their colleagues to support legislation calling for the reinstatement of the draft for men and women aged eighteen to twenty-six); Darryl Fears, *2 Key Members of Black Caucus Support Military Draft*, WASH. POST, Jan. 3, 2003, at A8 (stating that two prominent members of the Congressional Black Caucus expressed support for a nationwide military draft).

2. See Elaine Rivera, *For Students, Time to Wonder and Worry*, WASH. POST, Jan. 30, 2003, at B3 (discussing the apprehensions of high school students facing the prospect of war with Iraq and the possible implementation of a draft); Michael Corkery, *Uncertainty Looms Large on College Campuses*, PROVIDENCE J., Sept. 22, 2001, at A1 (reporting that Providence area college students worry about possible war and a draft).

3. See Defenselink, *DoD Briefing—Secretary Rumsfeld and Gen. Meyers* (Jan. 7, 2003), at http://www.defenselink.mil/news/Jan2003/t01072003_t0107sd.html (quoting Secretary of Defense, Donald H. Rumsfeld as saying that the Pentagon is not planning to reimplement a draft) (on file with author); Lisa Hoffman, *Reinstitution of Military Draft All but Ruled Out*, CINCINNATI POST, Sept. 20, 2001, at 10A (quoting assurances from Defense Secretary Rumsfeld and others that no draft is envisioned).

4. See Keith Harriston, *Students Anxious Over Mideast; While Supportive of U.S. Action, Many Fear a Draft*, WASH. POST, Sept. 4, 1990, at D1 (presenting student views on the possibility of war in the Persian Gulf and on a draft that, if called, would not exempt college students); Bill McCallister, *Officials Deny Plan to Revive Draft, But Rumors Persist*, WASH. POST, Feb. 3, 1991, at A23 (reporting that the White House and the Department of Defense (DoD) uniformly discounted rumors of reviving the draft).

5. See *Carter Signs Registration Law*, N.Y. TIMES, June 28, 1980, at A7 (reporting President Jimmy Carter's approval of the congressional resolution that provided funding for renewed registration); see also Doug Bandow, *Draft Registration: The Politics*

events that precipitated the draft's return, however, had not resulted and would not result in armed U.S. conflict.⁷

An examination of the modern U.S. armed forces, evolving world affairs, and domestic political and social forces strongly indicates that the United States is unlikely to reinstitute a military draft.⁸ In fact, the possibility of a military draft has become so remote that Selective Service, which administers draft registration and would administer a draft if one were reestablished,⁹ appears increasingly isolated from national defense policy.¹⁰ Within this isolation, Selective Service continues to impose a gender-specific requirement of registration on young men.¹¹ To encourage compliance, Selective Service promotes and orchestrates a variety of punitive actions against violators.¹²

of *Institutional Immortality*, POL'Y ANALYSIS, No. 214, at 3 (Aug. 15, 1994), available at <http://www.cato.org/pubs/pas/pa-214.html> (explaining that Congress initiated military draft registration during World War I, reinstated it for World War II, again shortly after World War II, and the practice continued until 1975).

6. See James Barron, *Students' Anger and Approval Evoked by Call on Draft*, N.Y. TIMES, Jan. 25, 1980, at A12 (presenting reactions of U.S. college students to President Carter's proposal for a renewal of registration, with the students divided between support for such legislation and fear that such action would result in a draft); 76% in *Poll Say War Is Likely in a Few Years*, N.Y. TIMES, Dec. 22, 1981, at A8 (reporting that three out of four Americans polled indicated that war was inevitable and that popular support for the draft was declining); see also *Carter Says Registration Is Not a Major Sacrifice*, N.Y. TIMES, July 25, 1980, at A8 (reporting President Carter's assurance to young men subject to registration that an actual draft was not envisioned).

7. See NOEL E. FIRTH & JAMES H. NOREN, SOVIET DEFENSE SPENDING: A HISTORY OF CIA ESTIMATES, 1950-1990, at 210-211 (1998) (explaining that Soviet military manpower and military construction increased since 1967 and chronicling events in the mid-1980s that led Soviet leaders to anticipate a war with the United States that never came).

8. See *infra* notes 276-84 and accompanying text (arguing that the United States is unlikely to reinstitute the draft).

9. See The Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885 (codified as amended at 50 U.S.C. app. §§ 301-309(a) (2000)) (creating the Selective Service to administer the first peacetime draft).

10. See Doug Bandow, *Time to Kill Draft Registration*, TODAY'S COMMENTARY (Aug. 10, 1999), at <http://www.cato.org/dailys/08-10-99.html> (relating the DoD position that registration has little measurable effect on military mobilization or recruitment) (on file with author).

11. See Military Selective Service Act of 1967 § 3, 50 U.S.C. app. § 453 (2000) (amended 1981) (mandating that all male U.S. citizens and resident aliens between the ages of eighteen and twenty-six are subject to Selective Service registration at a time and manner dictated by Presidential Proclamation). One such Presidential Proclamation imposed certain identification requirements, described the place and time for registration, and explained the manner in which persons were to comply with the registration process. See Proclamation No. 4771, 3 C.F.R. 82 (1981), reprinted in 50 U.S.C. app. § 453, at 16-18 (1994) (calling for the registration of men between the ages of eighteen and twenty-six through the authority granted to the President under the Military Selective Service Act (MSSA)).

12. See Selective Service System, *Benefits and Programs Linked to Registration*, at <http://www.sss.gov/Fsbenefits.htm> (revised Sept. 5, 2000) (describing a range of federal benefits denied to those who fail to register, including student financial aid, job training, federal employment, and additional state imposed sanctions) (on file

In 1981, shortly after registration was reinstated, the U.S. Supreme Court heard *Rostker v. Goldberg*,¹³ a gender-based challenge to the registration requirement.¹⁴ In *Rostker*, the Court reasoned that judicial deference to Congress is particularly appropriate in the context of military affairs.¹⁵ The Court also reasoned that men and women are not similarly situated for purposes of a draft or registration for a draft,¹⁶ and that Congress extensively considered the questions of registering women prior to its decision to reactivate the process of exclusively registering men.¹⁷ Ultimately, the Court concluded that Congress acted within its constitutional power when it authorized the registration of men, and not women, under the Military Selective Service Act (MSSA).¹⁸

The ruling quieted subsequent gender-based challenges to registration.¹⁹ Irrespective of whether the Court's reasoning and conclusion in *Rostker* were correct, no U.S. court since has signaled a retreat from these positions.²⁰

The passage of time and a mounting body of evidence indicate, however, that today's Selective Service does not serve the national

with author).

13. 453 U.S. 57 (1981).

14. *See id.* at 61 n.2 (explaining that *Rostker* actually grew out of a dormant lawsuit, *Rowland v. Tarr*, 378 F. Supp. 766 (E.D. Pa. 1974), from the days of the Vietnam War). The district court in *Rostker* revived *Rowland* by certifying a plaintiff class of all men registered or subject to registration. *Id.* at 61-62.

15. *See id.* at 66 (explaining that recent decisions of the Court reinforce deference to legislative and executive judgments in the area of military affairs).

16. *See id.* at 79 (observing that congressional and executive bans on women serving in combat support a finding that women and men are not similarly situated because the purpose of registration is to develop a pool of potential combat troops).

17. *See id.* at 72 (contradicting appellees' assertion that Congress acted "unthinkingly" in funding registration for men only).

18. *See id.* at 79 (finding that the exemption of women from registration is closely related to Congress's purpose in authorizing draft registration).

19. In the few subsequent challenges to MSSA, the Supreme Court upheld registration enforcement legislation while assuming the validity of the underlying registration requirement itself. *See, e.g.,* *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841 (1984) (arguing unsuccessfully that the Department of Defense Authorization Act of 1983 § 1113(f)(4), 50 U.S.C. app. § 462 (2000), which requires male students between the ages of eighteen and twenty-six to register for the draft prior to receiving federal financial aid, was a bill of attainder and a violation of non-registrants' Fifth Amendment privilege against self-incrimination); *Wayte v. United States*, 470 U.S. 598 (1985) (challenging, without success, the prosecution of a vocal opponent to draft registration for his failure to register, as a form of selective prosecution). The Court has not heard arguments against any aspect of draft registration since 1985.

20. The Supreme Court has not ruled on any challenges to registration since *Rostker*. The only significant challenge to registration following *Rostker* was *Detenber v. Turnage*. *See* 701 F.2d 233 (1st Cir. 1983), *cert. denied*, 463 U.S. 1203 (1983) (rejecting an argument that peacetime registration is a deprivation of liberty without due process of law and reinforcing the concept of judicial deference to the President and Congress in the context of military affairs).

defense purpose presumed by the Court in *Rostker*.²¹ Since that decision, conditions under which the Department of Defense (DoD) evaluated its own personnel needs and upon which the Court partially based its decision have changed drastically.²² Similarly, conditions under which the Court evaluated the need for registration also are markedly different today.²³ Despite sporadic calls for its resumption and numerous instances of U.S. military involvement, no draft has been declared since registration resumed in 1981.²⁴ Registration was originally coupled with an active military draft.²⁵ The current registration has never served a military draft,²⁶ and with each passing year, it becomes more apparent that registration serves no legitimate defense purpose²⁷ and will not be used for conscription,²⁸ the compulsory enrollment of persons for military service.²⁹

This Comment proposes that the current draft registration serves no legitimate national defense purpose. Part I details events leading

21. See *infra* notes 186-98 and accompanying text (discussing altered U.S. defense strategies and priorities, which merit a reevaluation of *Rostker*).

22. See Edwin Dorn, *Sustaining the All-Volunteer Force*, in PROFESSIONAL ON THE FRONT LINE: TWO DECADES OF THE ALL-VOLUNTEER FORCE 3, 19 (J. Eric Fredland et al. eds., 1996) (observing that the percentage of women in the All-Volunteer Force (AVF) rose from three percent in 1973 to twelve percent in 1994); see also Mark J. Eitelberg, *The All-Volunteer Force After Twenty Years*, in PROFESSIONAL ON THE FRONT LINE: TWO DECADES OF THE ALL-VOLUNTEER FORCE 66, 70-77 (J. Eric Fredland et al. eds., 1996) (reporting that the decrease in the number of applicants to the AVF between 1973 and 1992 was accompanied by an equally dramatic rise in the quality of applicants). For example, in 1992, over ninety-five percent of new recruits were high school graduates, versus fifty-two percent in 1973. *Id.* at 71.

23. See *infra* notes 300-30 and accompanying text (discussing the impossibility of a time consuming draft contributing to the rapid mobilization of forces in times of crisis, which renders registration in advance of a draft unnecessary).

24. See CENTER FOR DEFENSE INFORMATION, 2001-2002 MILITARY ALMANAC 50-53 (2002) [hereinafter MILITARY ALMANAC] (reporting selected U.S. military actions after the Vietnam War, which have included actions in Lebanon, Grenada, Libya, Panama, Somalia, the Persian Gulf, and Kosovo).

25. See *Rostker v. Goldberg*, 453 U.S. 57, 59-60 (1981) (asserting that registration is inseparable from induction and thus subject to the same degree of judicial deference); but see *infra* notes 339-41 and accompanying text (reviewing the historic and current separateness of registration and induction); see also Bandow, *supra* note 5, at 8-9 (explaining that prior to the current registration system, registration took place as a part of conscription at the beginning of the two world wars and continued to operate as such until the end of the Vietnam War).

26. See Selective Service System, *Induction Statistics*, at <http://www.sss.gov/induct.htm> (revised Dec. 21, 2001) [hereinafter *Induction Statistics*] (reporting that no one has been inducted into the U.S. military through Selective Service since 1973, prior to reinstatement of registration 1980).

27. See generally *infra* Part III (arguing that registration does not serve current military needs and fails even to adequately accomplish its stated objective).

28. See *infra* notes 280-84 and accompanying text (summarizing the DoD position that registration was not needed and the likelihood of a need for conscripts was extremely remote).

29. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (Merriam-Webster 1983).

to the current registration, traces the history of judicial decisions that support it, and analyzes the Supreme Court's ruling in *Rostker v. Goldberg*.³⁰ Part II discusses changes in the U.S. military which subvert many of the Court's assumptions in *Rostker*, reviews the altered state of world affairs and military strategy,³¹ and examines the evolving role of the All-Volunteer Force (AVF) and women in the military. Part III illustrates the illegitimacy of draft registration as a component of national defense by documenting the irrelevance of registration to military planning, the failure of Selective Service to effectively serve a defense interest, the reasons why the Court should not defer to Congress regarding registration, and the political forces that have maintained registration despite its failure.³² This Comment concludes that the positions asserted by the *Rostker* Court are incompatible with current U.S. defense priorities³³ and the liberty interests of citizens who are subject to registration.

I. FOUNDATIONS OF CURRENT DRAFT REGISTRATION

The current era of Selective Service registration in the United States began in 1980, when President Carter called for the resumption of draft registration in a State of the Union Address.³⁴

30. See *Rostker*, 453 U.S. at 65-67 (affirming the legislative action by deferring to the broad discretionary powers of Congress to raise and regulate the armed forces).

31. See MICHAEL J. MAZARR ET AL., *DESERT STORM: THE GULF WAR AND WHAT WE LEARNED* 160-63 (1993) (asserting that during the years 1989-1992 the context of U.S. military planning shifted from the massive threat posed by the Soviet Union to smaller regional conflicts like the Persian Gulf war, thereby demanding rapid but limited responses coordinated with U.S. allies).

32. See Doug Bandow, *Dubious Draft Registration: It is up to the Incoming Republican Majority to Abolish the Sign-Up and Save \$25 Million a Year*, WASH. TIMES, Dec. 3, 1994, at D3 (arguing that the Clinton Administration's reasons for maintaining registration no longer exist because the threat of war with the Soviet Union had been eliminated and future U.S. military involvement can be supported adequately by the existing active and reserve forces).

33. See Donald H. Rumsfeld, *2002 Department of Defense Annual Report to the President and the Congress* (Aug. 15, 2002) (outlining the projected post-September 11th transformation of national defense, including improvements in technology, mobility, intelligence, and quality of personnel), available at http://www.defenselink.mil/execsec/adr2002/html_files/Message.htm (last visited Feb. 1, 2003).

34. See State of the Union Address (Jan. 23, 1980) in Public Papers of the Presidents of the United States: Jimmy Carter 1980-81 194, 198 (1981) [hereinafter "State of the Union Address"] (announcing President Carter's intention to send draft registration legislation and a budget proposal to Congress, and expressing Carter's hope that a draft would not be needed), available at <http://www.jimmycarterlibrary.org/documents/speeches/su80jec.phtml> (last modified July 21, 2001). President Gerald Ford discontinued draft registration in 1975. See Proclamation No. 4360, 3 C.F.R. § 462 (1971-1975), reprinted in 50 U.S.C. app. § 453, at 347 (2000) (terminating existing registration procedures and announcing that replacement procedures would provide for periodic registration); see also Military Selective Service Act of 1967, § 5, amended by Pub. L. No. 92-129, § 101(9)(d)-(e),

The address focused exclusively on foreign affairs³⁵ and particularly on the Soviet Union, whose recent invasion of Afghanistan Carter condemned.³⁶ The resumption of registration was one of a number of measures Carter called for in response to the invasion.³⁷ Under the MSSA, the President does not have the power to order the registration of women.³⁸ Nevertheless, Carter recommended that Congress amend the MSSA to extend the registration requirement to both men and women.³⁹ After months of often skeptical debate in the House and the Senate,⁴⁰ Congress responded by authorizing funding for the registration of men only.⁴¹ In addition to *Rostker*, several other significant but ultimately unsuccessful legal challenges to the onset of registration followed.⁴² Opposition to registration was ultimately derailed by courts, which extended longstanding judicial acceptance of conscription to registration.⁴³

reprinted in 50 U.S.C. app. § 455 (2000) (authorizing the conscription of up to 270,000 persons into the armed forces through July 1, 1973); Pub. Law 92-129, § 101(29), 65 Stat. 87 (1971) (maintaining Selective Service as an active standby organization even if DoD employs an AVF).

35. See Terence Smith, *The World Has Changed and So Has Jimmy Carter*, N.Y. TIMES, Jan. 20, 1980, at E2 (reporting that in order to devote his oral address to a “global review,” President Carter planned to issue a separate, written State of the Union message to Congress that addressed domestic affairs).

36. See State of the Union Address, *supra* note 34, at 196 (characterizing the Soviet Union’s invasion of Afghanistan as the most serious threat to peace since World War II).

37. See *id.* (calling for a number of other measures, including a U.S.-led boycott of the 1980 Olympic games in Moscow).

38. See Military Selective Service Act of 1967 § 3, 50 U.S.C. app. § 453 (2000) (amended 1981) (granting the President discretionary powers to draft males only).

39. See *Carter Plan on Draft: 20-Year-Olds First in Lottery*, N.Y. TIMES, Feb. 13, 1980, at A17 (reporting President Carter’s formal request to Congress for funding to register both men and women).

40. See Richard Halloran, *President’s Draft Registration Plan Arouses Skepticism at Senate Hearing*, N.Y. TIMES, Feb. 13, 1980, at A12 (quoting comments from Sen. Mark Hatfield that registration was a waste of money that would not aide national defense, and from Sen. Harrison Schmidt that the proposal was a political ploy to distract from more pressing military shortcomings); see also Richard Halloran, *Group in House Expresses Doubt On Draft Signup*, N.Y. TIMES, Feb. 27, 1980, at A16 (reporting opposition to registration in a House Appropriations Subcommittee, which cited reasons ranging from the registration’s inability to enhance national defense to the fact that women were included in Carter’s request). In response to the opposition of the inclusion of women, the Carter Administration amended its request so that registration of men and women would be considered separately. *Id.*

41. See H.R.J. Res. 521, 96th Cong., 126 CONG. REC. 14308 (1980) (enacted) (appropriating \$13 million for the registration of men in a manner to be determined by the President).

42. See cases cited *supra* note 19 (noting cases challenging registration-enforcement without challenging the registration requirement itself).

43. See *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (affirming Congress’s power to make all laws necessary to raise and support armies, including the establishment of registration procedures to insure the availability of conscripts).

A. *The Draft and the Courts*

Prior to the current Selective Service registration, every draft registration in U.S. history was coupled with an active system of conscription.⁴⁴ The history of federal conscription before the mid-twentieth century is brief, consisting of two years during the Civil War⁴⁵ and two years during World War I.⁴⁶ World War II changed that, however, and young men were conscripted every year during the period 1940-1973,⁴⁷ except for a brief experiment with an AVF in 1947.⁴⁸

The first attempt to impose conscription in the United States took place during the War of 1812.⁴⁹ Congress defeated the proposed plan, asserting that the federal government did not have the authority to conscript.⁵⁰ A federal draft was finally imposed during the Civil War,⁵¹ and it led to the first legal challenge to draft laws.⁵² In

44. See James B. Jacobs & Dennis McNamara, *Selective Service Without a Draft*, in 10 ARMED FORCES & SOCIETY 361, 363 (1984) (noting that U.S. registration in both world wars began after draft legislation was introduced).

45. See Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1544-46 (1969) (noting the passage of a draft law in March 1863 and its expiration without renewal in April 1865).

46. See Selective Service System, *Induction Statistics*, at <http://www.sss.gov/induct.htm> (revised Dec. 21, 2001) [hereinafter *Induction Statistics*] (stating that the number of U.S. military inductees during World War I was 516,212 in 1917 and 2,294,084 in 1918) (on file with author).

47. *Id.*

48. See GEORGE Q. FLYNN, *THE DRAFT, 1940-1973*, at 90-95 (1993) (documenting the adoption of an AVF in 1947 in response to pressures from the public and Truman's belief that it was more important to recruit scientists and invest in scientific methods of war than draft civilians). The AVF failed to fill the Army's authorized numbers and was discontinued as the danger of the Cold War became apparent. *Id.* at 100-08.

49. See Michael J. Malbin, *Conscription, The Constitution, and the Framers: An Historical Analysis*, 40 FORDHAM L. REV. 805, 820-21 (1972) (noting that conscription was a component of the apparent favorite of four plans advanced by Secretary of War James Monroe to improve the state of the army in 1814, toward the end of the War of 1812); see also RICHARD V.L. COOPER, *MILITARY MANPOWER AND THE ALL-VOLUNTEER FORCE* 48 & n.8 (1977) (differentiating the plan to draft 40,000 men from modern drafts because under the early plan all men between the ages of eighteen and forty-five were subject to either federal military service or a tax dedicated to the pay of those that did serve—a plan which so infuriated New England states that they refused to raise militias for the war).

50. See Friedman, *supra* note 45, at 1542-43 (citing Daniel Webster's attack on the Monroe Plan as beyond the federal power to call upon state militia in times of emergency and contrary to the character of the Constitution); see also DOUG BANDOW, *HUMAN RESOURCES AND DEFENSE MANPOWER* 102 (1989) (noting Congress's refusal to authorize a draft, even in response to the capture of Washington and the burning of the White House, and the threatened secession of several New England states over the issue). *But see* Malbin, *supra* note 49, at 821 (asserting that Congress had the numbers to vote on conscription but was delayed by disagreements over the length of conscription and noting that because the war ended while Congress was in recess, the issue was ultimately rendered moot).

51. Federal Conscription Act, ch. 75, 12 Stat. 731 (1863).

52. See *Kneedler v. Lane*, 45 Pa. 238 (1863) [hereinafter *Kneedler II*] (finding that:

1863, the Pennsylvania Supreme Court upheld the federal draft in *Kneedler v. Lane*.⁵³ That same year, Chief Justice Roger B. Taney, of the U.S. Supreme Court, prepared an opinion in anticipation of a federal court challenge to the Federal Conscription Act,⁵⁴ asserting that the Act was unconstitutional because it assumed powers originally granted to the states.⁵⁵ Chief Justice Taney retired in 1864, having never been presented with the opportunity to utilize the opinion.⁵⁶ Although conscription during the Civil War was an emotionally charged issue,⁵⁷ in actuality, the number of drafted men who served was relatively negligible, amounting to no more than 50,000-100,000 men out of a total Union force exceeding 2.5 million.⁵⁸

(1) Congress's power to raise and support armies granted in Article I, Section 8 of the Constitution includes the power to conscript; (2) as the supreme law of the land, constitutional rights require deference by the states; and (3) because the plaintiffs admitted that they were subject to the Federal Conscription Act and because the Act is constitutional, the plaintiffs deserve no relief in equity and preliminary injunctions must be vacated), *available at* 1863 Pa. LEXIS 152; *but see* Friedman, *supra* note 45, at 1550 (noting that the 3-2 vote in *Kneedler I* against the Civil War draft was, subsequently vacated by a 3-2 vote of the reconstituted court in *Kneedler II*, but three of the six judges considering the matter held that Congress did not have the power to enforce direct conscription, thus narrowing the decision).

53. *See* *Kneedler v. Lane*, 45 Pa. 238, 272 (1863) [hereinafter *Kneedler I*] (concluding the power to conscript is not granted by the Constitution and the federal conscription plan unconstitutionally integrated the federal Army and state militias), *available at* 1863 Pa. LEXIS 151. The Pennsylvania Supreme Court issued an injunction, but the term of Chief Justice Lowrie, the author of the opinion, subsequently expired and his replacement favored the draft. Friedman, *supra* note 45, at 1549-50. The recomposed court vacated the injunction without hearing additional evidence. *Id.*; *see also* *Kneedler II*, 45 Pa. 238 at 295 (vacating the preliminary injunction granted in *Kneedler I*).

54. Ch. 75, 12 Stat. 731.

55. *See* Roger B. Taney, *Thoughts on the Conscription Law of the United States*, in THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION 207, 208-18 (Martin Anderson & Barbara Honegger eds., 1982) (asserting that the power to draft men into armies lies with the states rather than the federal government, and that to allow conscription by both state and federal governments renders the constitutional distinction between the two meaningless).

56. *See* Friedman, *supra* note 45, at 1548 (noting that no challenge to federal conscription reached the Supreme Court by the time Chief Justice Taney retired from the Court).

57. *See* JAMES W. GEARY, WE NEED MEN: THE UNION DRAFT AND THE CIVIL WAR 167 (1991) (explaining that, in addition to inciting draft-related riots in New York City, the draft was perceived by many in the North as a system that forced poor men to fight for the benefit of rich men).

58. *See id.* at 173 (calculating that 3.7% of Union troops were conscripts); *see also* RUSSEL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 210 (1984) (explaining that the federal draft system during the Civil War allowed conscripts to purchase commutation and maintained most of the remaining conscripts as unactivated substitutes, resulting in only 46,347 conscripts actually serving in a total force of 2,666,999 men); EUGENE CONVERSE MURDOCK, PATRIOTISM LIMITED 1862-1865: THE CIVIL WAR DRAFT AND THE BOUNTY SYSTEM 210 (1967) (stating that of the 151,488 men drawn for draft consideration in New York State, only 3,210 were actually drafted, with the remainder failing to report, exempt, or permitted to purchase commutation

World War I brought another federal draft, after a nearly fifty-year hiatus, and this draft produced substantial numbers of men.⁵⁹ This wartime draft resulted in a number of legal challenges, which the Supreme Court ultimately heard collectively.⁶⁰ In a landmark decision, the Court in *Selective Draft Law Cases* unanimously upheld the federal government's power to conscript,⁶¹ a power which it concluded stems from Congress's constitutionally granted powers "to raise and support Armies."⁶² The Court devoted considerable time to analyzing the draft as it was used in the Civil War.⁶³ The Court found support for its conclusion in the rulings of several Confederate state courts that supported the draft,⁶⁴ as well as in *Kneedler*.⁶⁵ The Court was apparently unaware of Chief Justice Taney's undelivered opinion finding the Civil War draft to be unconstitutional.⁶⁶ The Court's portrayal of Civil War history in *Selected Draft Law Cases* conveys the false impression that considerable numbers of men were conscripted and that they played a vital role in the war.⁶⁷

or pay for substitutes).

59. See *Induction Statistics*, *supra* note 46 (reporting a total of 2,810,296 men were conscripted during World War I).

60. *Selective Draft Law Cases*, 245 U.S. 366 (1918).

61. See *id.* at 377 (concluding that the framers of the Constitution intentionally granted Congress the power to conscript).

62. *Id.*; see also U.S. Const. art. I, § 8, cl. 12 ("The Congress shall have the Power . . . [t]o raise and support Armies."); U.S. Const. art. I, § 8, cl. 18 ("The Congress shall have the Power . . . [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing Powers . . .").

63. See *Selective Draft Law Cases*, 245 U.S. at 385-89 (discussing the decision to impose a Civil War draft and asserting that the soldiers garnered through the draft were critical to the Union's success).

64. *Id.* at 388 (citing *In re Pille*, 39 Ala. 459 (1864); *In re Emerson*, 39 Ala. 437 (1864); *Ex Parte Hill*, 38 Ala. 429 (1863); *Parker v. Kaughman*, 34 Ga. 136 (1865); *Barber v. Irwin*, 34 Ga. 27 (1864); *Daly & Fitzgerald v. Harris*, 33 Ga. Supp. 38 (1864); *Jeffers v. Fair*, 33 Ga. 347 (1862); *Summons v. Miller*, 40 Miss. 19 (1864); *Gatlin v. Walton*, 60 N.C. 333 (1864); *Ex Parte Coupland*, 26 Tex. 386 (1862); *Burroughs v. Payton*, 57 Va. 470 (1864)).

65. See *Kneedler II*, 45 Pa. 238, 295 (1863) (vacating the preliminary injunction granted in *Kneedler I*). In *Selective Draft Law Cases*, the U.S. Supreme Court cites *Kneedler II* without mentioning that the Pennsylvania Court's original ruling did not support the draft. See *Selective Draft Law Cases*, 245 U.S. at 388 (citing only the *Kneedler II* decision vacating the preliminary injunctions granted to the plaintiffs and declaring the draft unconstitutional). What was in essence a tie vote at the state court level became a major foundational element of a unanimous Supreme Court vote affirming federal conscription powers fifty-two years later. Friedman, *supra* note 45, at 1544.

66. Taney, *supra* note 55, at 218. See Friedman, *supra* note 45, at 1494-95, 1546 (arguing that the Supreme Court based its decision in the *Selective Draft Law Cases* on superficial evidence and disregarded substantial historical findings to the contrary, including Taney's opinion).

67. See *Selective Draft Law Cases*, 245 U.S. at 387 (stating that 250,000 men were conscripted by the end of 1864). But see WEIGLEY, *supra* note 58, at 210 (placing the total number of conscripts who actually served at 46,347).

The ruling in *Selective Draft Law Cases*, though consistently followed by the Supreme Court,⁶⁸ has been criticized by a wide range of legal scholars and historians.⁶⁹ The decision was announced against a polarized national backdrop, pitting patriotism and nationalism against a significant anti-war movement.⁷⁰ Some modern commentators argue that, despite this ruling, Congress simply does not have the constitutional authority to institute a nationwide draft.⁷¹ Irrespective of academic and historical disagreement, *Selective Draft Law Cases* is the authority upon which the *Rostker* ruling and the current system of draft registration rest.

68. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (citing *Selective Draft Law Cases* for the proposition that it is “beyond question” that Congress has the power to conscript); *Billings v. Truesdell*, 321 U.S. 542, 556 (1944) (citing *Selective Draft Law Cases* and affirming congressional power to raise armies by both enlistment and conscription).

69. See, e.g., David M. Stigler, *Conscription and Constitutional Law*, in 2 STUDIES PREPARED FOR THE PRESIDENT’S COMMISSION ON ALL-VOLUNTEER ARMED FORCE III-6-1, 2-3 (G.P.O. 1970) (faulting the Court’s decision in *Selective Draft Law Cases* for conceding to a nationwide pro-war fervor and arguing that the decision should be read narrowly to apply to only a war-time draft); Friedman, *supra* note 45, at 1551 (criticizing the *Selective Draft Law Cases*’ constitutional analysis for focusing on the Thirteenth Amendment’s prohibition of involuntary servitude while ignoring the early history of the military clauses); JOHN WHITCLAY CHAMBERS II, *TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA* 221 (Free Press 1987) (characterizing the decision more as a product of political forces in the United States at that time and less a product of legal and historical analysis). *But see* LOREN P. BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877-1917*, at 163-64 (Harper 1971) (arguing that the ruling is supported by case law establishing the principle that national emergencies justify extraordinary measures).

70. See Stigler, *supra* note 69, at III-6-2-3 (describing the decision as being heavily influenced by hostility to the anti-war movement). The government went to great lengths to suppress opposition to the war. See Friedman, *supra* note 45, at 1550-51 (noting that this time period witnessed significant erosion of civil liberties and those who spoke out against the war or the draft were jailed under the Espionage Act).

71. See Friedman, *supra* note 45, at 1519 (noting that the question of federal conscription was not discussed at the Constitutional Convention and arguing that the framers of the Constitution were unlikely to believe that Congress had the power to conscript because no other country had those powers at the time); Charles A. Lofgren, *Compulsory Military Service Under the Constitution: The Original Understanding*, in “GOVERNMENT FROM REFLECTION AND CHOICE”: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 68-69 (Oxford 1986) (arguing the understanding of the Constitution at the time of its enactment was that the country would be defended by a state militia system, which had the power to conscript in time of emergency, and a smaller federal standing army that would be composed of non-conscripted professionals); Stigler, *supra* note 69, at III-6-1 (arguing that “there is no clear-cut historical justification for considering any conscription to be mandated or even allowed by the language of the Constitution”). *But see* Malbin, *supra* note 49, at 811 (suggesting that while the only mention of conscription at the Constitutional Convention was a single negative comment by Edmund Randolph, the failure of the Convention to explicitly reject federal conscription following this comment “constitutes an implicit *acceptance*” of federal draft powers).

*B. The Rostker v. Goldberg Standards**1. The origins of Rostker v. Goldberg*

*Rostker v. Goldberg*⁷² stemmed from a Vietnam-era class action, *Rowland v. Tarr*,⁷³ which sought relief from enforcement of draft registration on a variety of grounds, including equal protection.⁷⁴ In *Rowland*, the plaintiffs requested a three-judge panel,⁷⁵ which was required to issue an injunction against enforcement of a federal statute.⁷⁶ Instead, a single judge found that the case involved a political question and granted defendants' motion to dismiss for non-justiciability.⁷⁷ On appeal, all the original counts were dismissed except the equal protection claim.⁷⁸ The case was remanded for determination of the plaintiffs' standing by a three-judge panel.⁷⁹ On remand, the district court ruled that the plaintiffs had standing because the constitutionality of the MSSA was a justiciable issue.⁸⁰ After this victory, the case saw no activity for five years.

In 1979, the attempted dismissal of the case for inactivity brought it back to life.⁸¹ The case was relitigated as *Goldberg v. Rostker*,⁸² reflecting the addition of new lead party Robert Goldberg, and the incoming director of Selective Service, Bernard Rostker.⁸³ At trial, a three-judge panel held that the complete exclusion of women from draft registration was not substantially related to an important

72. 453 U.S. 57 (1981).

73. 341 F. Supp. 339, 340 (E.D. Pa. 1972).

74. The court did not address any of the plaintiffs' claims but instead focused only on the jurisdiction issue. *Id.*

75. See *Rowland*, 341 F. Supp. at 340 (noting that the court does not have clear guidelines regarding when to grant the three-judge hearing).

76. 28 U.S.C. § 2282 (repealed 1976) (requiring a panel of three judges to issue an injunction of a federal statute on constitutional grounds).

77. See *Rowland*, 341 F. Supp. at 342-43 (finding that the determination that the case involved a political question was buttressed by precedent upholding Congress's power to conscript).

78. See *Rowland v. Tarr*, 480 F.2d 545, 546 (3d Cir. 1973) (finding that the plaintiffs' other claims were foreclosed by previous Supreme Court decisions or were non-justiciable because of mootness stemming from the end of the Vietnam War).

79. *Id.* at 547.

80. See *Rowland v. Tarr*, 378 F. Supp. 766, 771-72 (E.D. Pa. 1974) (ruling that plaintiffs' alleged harm as a result of the Act was a matter of objective fact and rejecting the defendants' motion to dismiss).

81. See *Goldberg v. Tarr*, 510 F. Supp. 292, 294 (E.D. Pa. 1980) (discussing how the case was scheduled to be dismissed for inactivity in accordance with a local rule).

82. 509 F. Supp. 586 (E.D. Pa. 1980).

83. See Linda K. Kerber, *A Constitutional Right to be Treated Like . . . Ladies: Women, Civic Obligation, and Military Service*, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 101-102 (1993) (noting that the original plaintiffs dropped out of the case because they began the litigation as an anti-war case and the remaining equal protection claim implied that the plaintiffs agreed with draft—if only it were also applied to women).

government interest.⁸⁴ The court found that the MSSA violated the Fifth Amendment of the Constitution and it permanently enjoined the government from requiring class members to register for the draft under the MSSA.⁸⁵

U.S. Supreme Court Justice William Brennan, sitting as Circuit Justice,⁸⁶ suspended this court order in response to Rostker's in-chambers stay application.⁸⁷ Justice Brennan was persuaded that national security could be endangered by enforcement of the district court's injunction.⁸⁸ The Supreme Court noted probable jurisdiction, and the case was brought directly to the Court.⁸⁹ The *Rostker* case began as an anti-war/anti-draft case.⁹⁰ It ultimately reached the Supreme Court as solely an equal protection case, at a time when the United States was not fighting a war and had no active draft.⁹¹

2. *The Court's analysis in Rostker*

The Supreme Court's decision in *Rostker* upheld registration as it was then and essentially still is today.⁹² In *Rostker*, the only challenge

84. See *Goldberg*, 509 F. Supp. at 605 (finding the MSSA violated equal protection because it failed intermediate scrutiny).

85. See *id.* (finding there was no convincing reason presented to justify the exclusion of women from registration).

86. See 28 U.S.C. § 42 (2000) (giving the Supreme Court the power to assign its Justices to each of the federal circuits); see also Frank Felleman & John C. Wright, Note, *The Powers of the Supreme Justice Acting in an Individual Capacity*, 112 U. PA. L. REV. 981, 984-85 (1964) (describing the work of a circuit justice). A circuit justice received all applications from the assigned circuit, including applications for stays, bail, and time extensions. *Id.* at 985.

87. See *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., Circuit Justice, 3d Cir.) (explaining that a four-part showing must be made to justify the extraordinary measure of a single Circuit Justice staying the enforcement of a district court order: (1) there must be a "reasonable probability" that the Supreme Court will grant certiorari; (2) there must be a "fair probability" that the Court will overturn the lower court order; (3) the applicant must demonstrate irreparable harm from enforcement of the court order; and (4) the balance of the equities must favor the applicant).

88. *Id.* at 1309 (noting that absent a suspension, the lower court's injunction of draft registration would remain in effect even if there was a national crisis).

89. *Rostker v. Goldberg*, 449 U.S. 1009, 1009 (1980) (denying that motion of Stacey Acker et al. for leave to intervene and noting probable jurisdiction).

90. See Kerber, *supra* note 83, at 100-01 (noting that although the original plaintiffs included an equal protection claim, they really saw the case as part of the anti-war movement).

91. See *Rostker v. Goldberg*, 453 U.S. 57, 61-62 (1981) (characterizing the case in its current form as a peacetime challenge to registration transformed from its beginnings as a challenge brought at the height of the Vietnam war).

92. See *id.* at 83 (finding registration of men only does not violate the constitution); Proclamation No. 4771, 3 C.F.R. 82 (1981), reprinted in 50 U.S.C. app. § 453, at 16-18 (1994) (calling for a gradual registration first of those born in 1960, then in 1961, and finally in 1962, with those born in 1963 and subsequent years registering upon their eighteenth birthday). The current requirement calls for all male citizens or permanent resident aliens to register within thirty days of their eighteenth birthday. Selective Service System, *When to Register*, at

to draft registration considered by the Supreme Court,⁹³ the plaintiffs argued that requiring only men to register for the draft violated the Fifth Amendment.⁹⁴ The Court reviewed recommendations made by the DoD and the Carter Administration that women be included in draft registration,⁹⁵ but ultimately found that Congress was justified in rejecting these suggestions.⁹⁶

The majority opinion characterized support for registering women as being motivated by an interest in equality, rather than by military necessity,⁹⁷ and found that Congress was justified in focusing solely on military needs.⁹⁸ The Court gave considerable weight to Congress's own analysis of whether to register and draft women,⁹⁹ and found that Congress adequately considered equal protection issues when deciding to fund the registration of men only.¹⁰⁰ The Court concluded that Congress was within its power in furthering a legitimate military interest to impose registration on men only.¹⁰¹

In finding that registration was a violation of the Due Process Clause of the Fifth Amendment, the district court distinguished inclusion of women in draft registration from the discriminate military induction of women.¹⁰² The Supreme Court, however,

<http://www.sss.gov/when.htm> (revised July 9, 2002) (on file with author).

93. In the only post-*Rostker* challenge of registration, the First Circuit Court of Appeals upheld a lower court ruling affirming draft registration. See *Detenber v. Turnage*, 701 F.2d 233, 234-35 (1st Cir. 1983), *cert. denied*, 463 U.S. 1203 (1983) (challenging draft registration as due process violation). Opposition to the draft is not a recent phenomenon. It was widespread during the Civil War, World War I, and the Vietnam War. See CHAMBERS, *supra* note 69, at 54-55 (noting that conscription during the Civil War produced draft riots and widespread failure to register); FLYNN, *supra* note 48, at 174-76 (Kansas Univ. Press 1993) (describing draft resistance during the Vietnam War such as burning draft cards, protests, and the destruction of records at local recruiting boards); Friedman, *supra* note 45, at 1550-51 (describing the breadth of opposition to the draft in World War I, which included ministers, socialists, and mid-western farmers).

94. See *Rostker*, 453 U.S. at 59 (articulating the issue of the case as whether MSSA regulations authorizing the President to require only males to register violates the Fifth Amendment).

95. See *id.* at 72 (noting that Congress held extensive hearings on the question of requiring women to register).

96. See *id.* at 74 (finding that Congress considered the issue carefully and made its intent clear).

97. *Id.* at 79-80.

98. See *id.* at 80-81 (noting that even those military experts who supported the registration of women were opposed to actually drafting women because they could not be used in combat).

99. *Id.* at 72.

100. See *id.* at 77 (finding that the prohibition of women from combat was a legitimate basis on which to decide not to require women to register for the draft).

101. *Id.* at 83.

102. *Goldberg v. Rostker*, 509 F. Supp. 586, 604-05 (E.D. Pa. 1980) (asserting that registration of women would increase "military flexibility" and induction calls of women could be made according to military need, with no requirement that men and women be drafted in equal numbers).

declined to view the federal power to require registration and the federal power to conscript as separate entities.¹⁰³ The Court cited with approval congressional testimony asserting that the registration is intended to draft and mobilize troops for combat.¹⁰⁴ It added that women are barred from combat by statute, rules, and practice, and thus could not be mobilized by such a draft.¹⁰⁵ Because of the restrictions against women in combat, the Court concluded that women are not similarly situated for the purposes of a draft or registration.¹⁰⁶ The Constitution, the Court held, is therefore not offended by such an exclusion.¹⁰⁷

After reaching the conclusion that women are excluded from combat, the Court examined the potential use of a draft, which would induct women into non-combat roles.¹⁰⁸ Based on Senate testimony, the Court found that only a small number of women might be deployed into non-combat roles in a national emergency.¹⁰⁹ It concluded that this small number would place a burden on the training facilities and produce no additional combat troops.¹¹⁰

The Court's consideration of the role of women in the military appears uninformed by the increased presence of women in the military at that time.¹¹¹ The Court quoted the testimony of General

103. See *Rostker*, 453 U.S. at 75 (citing congressional testimony to support the Court's position that "induction is interlocked with registration" under the MSSA).

104. See *id.* at 76 (emphasizing the need to exercise judicial deference to Congress's clear determination that, in the instance of a draft, there would be a need for combat troops).

105. See *id.* at 76-77 (enumerating the statutory and policy grounds for excluding women from combat).

106. See *id.* at 78 (reasoning that differential treatment of individuals in a draft based on race or religion can be distinguished from differential treatment of men and women in a draft because male members of different races or religions are "similarly situated" with regards to combat, while women and men, because of combat restrictions placed on women, are "simply not similarly situated" for purposes of a draft or registration).

107. See *id.* at 78-79 (concluding that because Congress has determined that the purpose of registration is to create a pool of combat troops, and because Congress and the Executive have determined that women should not serve in combat: (1) the exemption of women from combat is closely related to Congress's purpose in authorizing registration; and (2) men and women are simply not similarly situated with regard to the draft, so there is no violation of the constitutional requirement that Congress treat similarly situated persons similarly).

108. See *Rostker*, 453 U.S. at 81 (discussing congressional testimony contemplating that, in the event of a draft of 650,000, the military could absorb 80,000 female inductees to fill non-combat positions, enabling men to assume combat roles).

109. See *id.* (deferring to findings of the Senate Armed Services Committee, which rejected the suggestion that all women be registered, but only a "handful" be indicated in an emergency as "confused" and "unsatisfactory" (quoting S. Rep. No. 96-826, at 158 (1980))).

110. See *id.* (citing congressional testimony that "training would be needlessly burdened by women recruits who could not be used in combat" (quoting S. REP. NO. 96-226, at 9 (1979))).

111. See *id.* at 90-92 (Marshall, J., dissenting) (contrasting congressional testimony

Bernard Rogers before a Senate hearing on women and registration, who asserted that all members of the military, regardless of position, may at some point during an emergency have to shoulder a weapon and fight.¹¹² Women in the United States military are prohibited from engaging in combat.¹¹³ The General, and by extension the Court, seemed to say that women have no place in the military because all personnel must be counted on to engage in combat and women cannot do so by law.¹¹⁴

This argument for excluding women from a potential draft is at odds with the view of the Court, which characterized conscription as the source for a stream of ground troops separate from personnel performing routine functions of the military.¹¹⁵ During a war, if that stream is insufficiently maintained because women are excluded from a draft, male non-ground troops must be called into action.¹¹⁶ This

acknowledging and appreciating the expanded role of women in the military with the Court's exclusive focus on women in combat). The Court's hypothetical ratio of women inductees, at approximately twelve percent, is presented with no acknowledgement of the actual numbers of women in the military at the time of the *Rostker* decision. *Id.* at 81. See Martin Binkin & Mark Eitelberg, *Women and Minorities in the All-Volunteer Force*, in *THE ALL-VOLUNTEER FORCE AFTER A DECADE: RETROSPECT AND PROSPECT* 73, 83 (William Bowman et al. eds., 1986) (placing the ratio of women to total military personnel in 1981 at 8.9%). The Supreme Court ruling relied on congressional testimony orchestrated by a Congress that itself appeared uninformed as to the actual role of women in the military. Compare *Rostker*, 453 U.S. at 75 (1981) (citing comments by Sen. Warner equating registration with a draft, which would necessarily exclude women), with JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 445 (rev. ed., 1992) (citing Senator John Warner's surprised observation that during preparations for B-52 strikes launched from England during the Persian Gulf War, "you couldn't distinguish the men from the women . . . The women were loading and fusing the 500 pound bombs the same as the men.").

112. See *Rostker*, 453 U.S. at 82 n.17 (stating that "in an emergency during war, the Army has often had to reach back into the support base, into the supporting elements in the operating base, and pull forward soldiers to fill the ranks in an emergency; that is, to hand them a rifle or give them a tanker suit and put them in the front ranks").

113. See Lorry Fenner, *Either You Need These Women or You Don't*, in *WOMEN IN THE MILITARY* 5, 15, 30 n.18 (Rita James Simon, ed., 2001) (observing that Navy and Air Force women were excluded from combat by law, but Army service policy alone excluded women from combat, and that physical standards could effectively bar women where legislation did not). See also *infra* notes 252-53 and accompanying text (discussing the former combat exclusion rule, known as the "Risk Rule," which banned female U.S. military personnel from proximity to combat, and its replacement in 1994 with a rule that only prohibits such personnel from direct engagement in ground combat).

114. See *Rostker*, 453 U.S. at 82 (reciting General Rogers's testimony to support its position that Congress acted within the permissible exercise of its constitutional powers in excluding women from the draft).

115. *Id.* at 76 (maintaining the primary purpose of the draft is to supply combat troops and thus must consist solely of combat trained men).

116. See *id.* at 98 (Marshall, J., dissenting) (citing Senate testimony from Assistant Secretary of Defense Robert Pirie that the drafting of women for non-combat positions would allow a greater deployment of men into combat positions).

would potentially leave non-combat positions unfilled.¹¹⁷ Support personnel have long considerably outnumbered combat troops, as evidenced by the vast number of military jobs currently open to women despite the ban on women in ground combat.¹¹⁸ Yet the Court, partially basing its decision on exceptional circumstances recounted by Senator Warner,¹¹⁹ endorsed a system under which women might conceivably not even be drafted into a support role until all the men are killed.¹²⁰

In his dissent, Justice White observed that DoD testimony suggested that women, in fact, would be needed should there be a draft.¹²¹ He argued that the probability of women being drafted in unequal numbers did not justify excluding them from registration in furtherance of administrative convenience.¹²² Justice White also characterized the position of both the Court's majority and that of Congress as having ignored "reality," "common sense," and "experience" by ignoring the increasing role that women have played in recent wars.¹²³

117. *See id.* at 100 (Marshall, J., dissenting) (citing Senate testimony from Assistant Secretary of Defense Richard Danzig that in a war-time in which 650,000 were drafted, approximately 80,000 would be drafted to fill non-combat positions).

118. *See infra* notes 253-55 and accompanying text (chronicling a change in restrictions against women serving in many positions in the military, which has opened up ninety percent of military jobs to women); *see also* MICHAEL CLODFELTER, VIETNAM IN MILITARY STATISTICS: A HISTORY OF THE INDOCHINA WARS, 1772-1991, at 238 (1995) (placing the ratio of U.S. ground troops to total number of military personnel in Vietnam at approximately twelve percent).

119. *See Rostker*, 453 U.S. at 83 (citing a particular episode during the Battle of the Bulge where General Patton had to reach back into the military support base and pull forward soldiers to fill ranks in an emergency, to support General Rogers's conclusion that women should be excluded from the draft because combat eligibility is a prerequisite for all positions needing to be filled in a draft).

120. *See id.* at 83 (White, J., dissenting) (voicing his conclusion that the majority's opinion leaves no room for women in the military).

121. *See id.* at 84 (citing military testimony asserting that in a major military mobilization, 80,000 women could be deployed in support roles during the first six months).

122. *Id.* at 85; *see also id.* at 95 (Marshall, J., dissenting) (asserting that "additional cost and administrative inconvenience" are not sufficient arguments to support gender discrimination); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (noting that the relevant Supreme Court jurisprudence rejects the notion of evoking administrative ease and convenience as justification for gender-based classifications); *Frontiero v. Richardson*, 411 U.S. 677, 690-691 (1973) (asserting that administrative convenience cannot alone justify differing treatment according to gender within the armed services); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that classification based upon gender to eliminate an entire class from consideration and thus the workload of probate courts is a violation of the Equal Protection Clause of the Fourteenth Amendment).

123. *Rostker*, 453 U.S. at 83.

3. *The deference granted to Congress by the Rostker Court*

The *Rostker* Court accepted the gender-based classification without imposing a burden on the government to prove that the classification survived the heightened scrutiny traditionally called for.¹²⁴ Instead, the Court shifted this burden to the plaintiff out of deference to Congress.¹²⁵ It is not clear why the majority allocated the burden of proof in this way, though it was strongly questioned in Justice Marshall's dissent.¹²⁶

The Court should have applied heightened scrutiny with the burden placed fully on the government to prove the close and substantial relationship between the discriminatory means employed and the asserted governmental objective,¹²⁷ as has been traditionally done where gender classification is at issue.¹²⁸ The Court, however, readily accepted evidence that supported the assertion that women and men were not similarly situated with regard to combat.¹²⁹ Despite accepting some evidence that women could be drafted into non-combat positions,¹³⁰ the Court also accepted evidence which implied that everyone in the military should be counted on for combat.¹³¹

124. *Id.* at 64-72; *see also Craig*, 429 U.S. at 204 (establishing that the burden of proof that a gender classification is substantially related to an important government interest rests upon the offending party); *Frontiero*, 411 U.S. at 689 (asserting that the government failed to prove that its discriminatory means served its stated end, though the Court had already ruled that end to be impermissibly based on administrative convenience).

125. *Rostker*, 453 U.S. at 68-72 (emphasizing that judicial deference to congressional exercise of authority is "at its apogee" when legislative action involving Congress' ability to raise and support armies and to regulate military matters is challenged).

126. *See id.* at 89 (Marshall, J., dissenting) (asserting that the Court does not abdicate its ultimate responsibility to decide constitutional questions simply because it is required to accord deference to congressional judgements in the area of military affairs).

127. *See id.* at 67 (stating that even in military affairs, Congress is subject to Due Process requirements, yet subsequently extending deference to congressional judgment).

128. *See Craig*, 429 U.S. at 197 (establishing the heightened scrutiny standard for gender classifications, requiring that they be substantially related to serving an important government objective); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996); *Kirchberg v. Feenstra*, 450 U.S. 455, 459-460 (1981); *Orr v. Orr*, 440 U.S. 268, 278 (1979).

129. *See Rostker*, 453 U.S. at 76-77 (embracing Senate testimony that the purpose of a draft in war is to raise combat troops, and women are excluded from combat). *But see* CLODFELTER, *supra* note 118, at 238 (reporting that in 1968, 88% of the 543,000 American troops deployed to Vietnam were support or administrative personnel, creating an image of many non-combat jobs available to women in a war).

130. *See Rostker*, 453 U.S. at 81 (admitting the possibility that some women could be drafted into non-combat positions but accepting Congress's rationalization that this would cause excessive administrative burden).

131. *See supra* notes 112-14 and accompanying text (citing extraordinary circumstances which may require that even support personnel enter combat).

The Court had no trouble connecting a draft of combat troops with a prohibition against women in combat,¹³² and might easily have found that the government could overcome the heightened burden of proof.¹³³

Justice White's observation that Congress and the Court had ignored transformations in the military illustrates this Comment's thesis, that modern military needs do not justify draft registration.¹³⁴ The Court asserted that registration is part of "a united and continuous process designed to raise an army speedily and efficiently."¹³⁵ Citing Senate testimony, the Court founds registration clearly linked to the rapid delivery of inductees and the rapid mobilization of troops.¹³⁶ The Court did not specifically define what it meant by rapidity of induction and mobilization, either in its opinion or in its citation to the Senate testimony. Rather, it focused on why a draft would be needed,¹³⁷ and it deferred to congressional judgment on the question.¹³⁸ The meaning of rapid and efficient deployment that the Court appeared to employ does not, however, correspond with the actual deployment time asserted by Selective Service,¹³⁹ and the efficiency with which such a deployment could serve the needs of a vastly transformed U.S. military.¹⁴⁰

132. See *supra* note 115 and accompanying text (defining a draft as a mechanism for raising combat troops).

133. See Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Army, Navy, and Air Force, the Chairman of the Joint Chiefs of Staff, the Assistant Secretaries of Defense for Personnel and Readiness and for Reserve Affairs (Jan. 13, 1994) [hereinafter Aspin] (noting the current rule regarding deployment of women in the military, which still bans them from ground combat), at <http://www.chinfo.navy.mil/navpalib/people/women/memo0113.txt>.

134. See *Rostker*, 453 U.S. at 83 (illustrating the Court's inattention to the substantial contribution of women volunteers in recent wars).

135. *Id.* at 75 (quoting *Falbo v. United States*, 320 U.S. 549, 553 (1944)).

136. See *id.* (holding that "[a]n ability to mobilize rapidly is essential to the preservation of our national security A functioning registration system is a vital part of any mobilization plan").

137. See *id.* at 76 (citing Senate testimony concluding that a draft was intended to produce combat troops, without reference to how rapidly they would be supplied).

138. *Id.*

139. See Selective Service System, *Sequence of Events*, at <http://www.sss.gov/seq.htm> (revised Apr. 22, 1999) [hereinafter *Sequence of Events*] (stating that Selective Service is required to deliver the first inductee to training camp within 193 days of the declaration of a draft) (on file with author).

140. See Office of the Secretary of Defense, *Report to the President and Congress: A Review of the Continued Requirement for Draft Registration* at 12 (Dec. 1993) [hereinafter *Review*] (concluding that the military would be unable to "absorb a flood of inductees" in the event of a rapid and limited mobilization of the kind envisioned by military planners).

II. THE TRANSFORMATION OF THE MODERN U.S. MILITARY

The contemporary armed forces of the United States are not the armed forces that existed at the time of the *Rostker* decision. World events, most notably the breakup of the Soviet Union and the transformation of several Soviet satellite nations into U.S. allies or neutral countries,¹⁴¹ have dramatically altered U.S. military personnel planning.¹⁴² The Persian Gulf War and U.S. military actions in Panama, Somalia, Bosnia, Kosovo, and elsewhere demonstrate both superior U.S. weapons technology¹⁴³ and an evolving approach to conflict that seeks to minimize direct and/or protracted involvement, and protects U.S. military personnel.¹⁴⁴ The All Volunteer Force (AVF), which began in 1973 and was heavily criticized throughout that decade, has significantly improved its performance and image since the late 1970s and early 1980s.¹⁴⁵ Since its introduction, the character and makeup of military personnel have evolved along with

141. See, e.g., John Yoo, *Politics as Law?: The Anti-ballistic Missile Treaty, The Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 856 (2001) (discussing how “the Soviet Union gradually allowed its satellite nations to disavow communism [and ultimately] broke itself into fifteen independent states”). See also András Balogh, *The Atlantic Dimensions of Central European Security*, in THE FUTURE OF NATO: ENLARGEMENT, RUSSIA, AND EUROPEAN SECURITY 186, 188 (Charles-Philippe David & Jacques Lévesque eds., 1999) (noting the reduced influence Russia wields over former Soviet states). Western Soviet peoples such as the Poles, Czechs, and Hungarians have historically been regarded more as part of Western Europe, and seek stability and security within that renewed association. *Id.* at 186-187.

142. Compare NOEL E. FIRTH & JAMES H. NOREN, SOVIET DEFENSE SPENDING: A HISTORY OF CIA ESTIMATES, 1950-1990, at 210-11 (1998) (reporting revised estimates that place Soviet armed forces personnel strength at just over 5,000,000 in 1988), with MILITARY ALMANAC, *supra* note 24, at 47 (reporting current Russian active troop strength at just over one million). See also Mazarr, *supra* note 31 (discussing the impact that the decline of Soviet military power—once the primary focus of the U.S. military—had on U.S. defense planning).

143. See MILITARY ALMANAC, *supra* note 24, at 11 (noting the vastly superior position held by the United States over its potential enemies in virtually every technologically related area of its military forces).

144. See *id.* at 9-10 (describing and analyzing the development of the post-Cold War military’s focus on rapid and limited deployment, and the tension between the need for troop presence and the desire to minimize casualties). See also *id.* at 50-53 (reporting a total of 824 members of the U.S. armed forces killed in action since the United States withdrew from Vietnam).

145. See Eitelberg, *supra* note 22, at 67-69 (describing the initial failure of the AVF to attract quality recruits, eventually overcome by increased compensation and the military’s increasingly sophisticated approach both to recruiting and to maintaining an environment suited to a volunteer force). While many reasons were given as to why recruitment surged, Eitelberg attributes the turnaround to “the fact that the armed services eventually became more experienced and more adept—along with Congress and manpower research and development complex—at operating an all-volunteer environment.” *Id.* at 68. The recruiting improvement was so dramatic that studies commissioned in the early 1980s to examine AVF shortcomings were obsolete on completion. *Id.*

military technology and strategy.¹⁴⁶ The emphasis in the AVF is on attracting and retaining talented people to fill increasingly specialized roles in a smaller and more efficient military.¹⁴⁷ The emphasis of today's U.S. military spending is on superior weaponry operated by a qualified professional force.¹⁴⁸

A. *Technology, Strategy, and Modern Warfare*

The Persian Gulf War ushered in a new era of technology-centered warfare, showcasing precision-guided munitions ("smart" bombs), stealth (radar evasion) technology, and other advances.¹⁴⁹ President George H. W. Bush hailed these advances as demonstrating "a revolution in warfare."¹⁵⁰ This weaponry garnered a great deal of media attention,¹⁵¹ but was actually atypical of the type of bombs primarily used by the United States during the Gulf War.¹⁵² The

146. See *id.* at 70-82 (charting the improved quality and aptitude of AVF recruits and a greater than five-fold increase in the percentage of personnel that are women, from 1973-1992).

147. Gordon R. Sullivan, *The All-Volunteer Force After Twenty Years*, in PROFESSIONALS ON THE FRONT LINE: TWO DECADES OF THE ALL-VOLUNTEER ARMY 28, 31 (J. Eric Fredland et al. eds., 1996). At the time of this writing, Sullivan was Chief of Staff of the U.S. Army. *About the Editors and Contributors*, PROFESSIONALS ON THE FRONT LINE: TWO DECADES OF THE ALL-VOLUNTEER ARMY 325 (J. Eric Fredland et al. eds., 1996).

148. See MILITARY ALMANAC, *supra* note 24, at 9-10 (observing that current defense initiatives emphasize technologically advanced weapons and mobilization capabilities while expressing satisfaction with standing personnel). See also William Niskanen, *More Defense Spending for Smaller Forces: What Hath DoD Wrought?* POLY ANALYSIS No. 110, at 1 (July 29, 1988) (noting that in 1988, U.S. military spending adjusted for inflation was twenty percent higher than it was during the peak of the Vietnam war in 1968, despite fielding a significantly smaller armed force), available at <http://www.cato.org/pubs/pas/pa110es.html>.

149. See MAZARR, *supra* note 31, at 97-101 (reviewing new weapons technology and characterizing it as the culmination of several decades of developments in war technology and assertions by military analysts that the art of war would soon be revolutionized).

150. Remarks at the United States Air Force Academy Commencement Ceremony in Colorado Springs, Colorado (May 29, 1991), Public Papers of the Presidents of the United States: George Bush 1991 575, 576 (1992) (emphasizing lessons learned in the Persian Gulf War, including "the value of our power [and] . . . the value of stealth"), available at <http://bushlibrary.tamu.edu/papers/1991/91052900.html> (last visited Sept. 10, 2002).

151. See *Hit Smarter, Not Harder? Gulf War Strikes Marked a Sea Change in Air Tactics*, at <http://www.cnn.com/SPECIALS/2001/gulf.war/legacy/airstrikes> (last visited Feb. 2, 2003) (discussing frequently broadcast videotape shot from the nose of a smart bomb, showing the bomb precisely striking an elevator shaft at the Iraqi Air Force communications building in Baghdad, and displaying a still from the footage) (on file with author).

152. See Gen. Buster C. Glosson, *Impact Of Precision Weapons On Air Combat Operations*, AIRPOWER J. (Summer 1993), at <http://www.airpower.maxwell.af.mil/airchronicles/apj/glosson.html> (asserting that while inflicting nearly seventy-five percent of the damage, smart weapons actually only accounted for less than ten percent of the total number of bombs dropped by the United States in the Persian Gulf War) (on file with author). See also MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR: CIVILIAN CASUALTIES DURING THE AIR CAMPAIGN AND VIOLATIONS OF THE

coalition forces in the Persian Gulf War,¹⁵³ particularly the United States, illustrated how modern weapons technology could not only defeat an enemy, but could greatly reduce casualties to personnel.¹⁵⁴

While these advances in warfare technology were undeniably dramatic leaps forward, they also were part of an ongoing evolution among industrialized nations toward weapon-centered warfare.¹⁵⁵ Until recently, the history of warfare was illustrated primarily with the images of army-to-army confrontations,¹⁵⁶ a type of warfare that results in tremendous loss of human life to both sides.¹⁵⁷ Modern military strategy, however, has evolved such that large army-to-army confrontations are no longer the focus of U.S. defense strategy,¹⁵⁸ thereby extending it a great advantage through its emphasis on superior weapons technology.¹⁵⁹ The Persian Gulf War was a watershed event for this evolution of military strategy that dates back to the 1950s and before.¹⁶⁰

LAWS OF WAR 114 (1991) [hereinafter MIDDLE EAST WATCH] (reporting the post-war disclosure that precision guided bombs accounted for only 8.8% of the more than 84,000 tons of bombs dropped during the war).

153. See Steven R. Bowman, *Persian Gulf War: Summary of U.S. and Non-U.S. Forces*, CRS REPORT TO CONGRESS, Feb. 11, 1991, at i-ii (calculating the initial U.S. strike force personnel at over 500,000, in addition to well over 200,000 personnel committed from the countries of Afghanistan, Argentina, Australia, Bahrain, Bangladesh, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Egypt, France, Germany, Greece, Honduras, Hungary, Italy, Kuwait, Morocco, Netherlands, Niger, Norway, Oman, Pakistan, Poland, Portugal, Qatar, Saudi Arabia, Senegal, South Korea, Spain, Syria, Turkey, the United Arab Emirates, and the United Kingdom).

154. See *Gulf War Facts: The Coalition*, at <http://www.cnn.com/SPECIALS/2001/gulf.war/facts/gulfwar/> (last visited Aug. 2, 2002) (noting that the combined coalition suffered 358 casualties, the U.S. forces suffered 293 of these deaths—145 of which were classified as non-battle related) (on file with author). Figures on Iraqi casualties vary, but the minimum is thought to be approximately 100,000. *Id.* But cf. MAZARR, *supra* note 31, at 86 (describing pre-war estimates of allied casualties numbering between 8,000 and 16,000 and Iraqi casualties numbering 60,000).

155. See FLYNN, *supra* note 48, at 259 (citing the examples of the massive German air assaults at the beginning of World War II and the American use of the atomic bomb at the war's conclusion to illustrate the conquest of technology over traditional warfare).

156. See *id.* (characterizing confrontations between mass formations of troops as the traditional style of war through World War II).

157. See THE WORLD ALMANAC AND BOOK OF FACTS 209 (2001) (indicating that the wars in which the United States suffered the greatest number of deaths were the Civil War (498,333), World War I (116,708), and World War II (407,316)).

158. See MAZARR, *supra* note 31, at 98 (characterizing the large armies that had been used in past wars as slow moving and vulnerable to attacks by smart weapons and mobile ground forces). See also *id.* at 125-157 (describing the allied bombing campaign, which inflicted the bulk of the damage to Iraqi forces in the Persian Gulf War prior to actual army-to-army confrontation, and the subsequent confrontation between Iraqi ground forces and highly mobile allied ground units that focused on hit-and-run strikes rather than protracted engagements).

159. See *id.* (discussing the bombing campaign and mobile allied attack against the Iraqi army in the Persian Gulf War, which resulted in a four-day ground campaign that culminated in an allied victory with few allied casualties).

160. See FLYNN, *supra* note 48, at 259 (tracing the earliest predictions that mass

In 1954, Secretary of State John Foster Dulles introduced the “New Look” policy of defense strategy,¹⁶¹ which emphasized the threat of massive nuclear retaliation as a defensive strategy of deterrence against the Soviet Union.¹⁶² Massive mobilization of men for protracted campaigns was not a component of this strategy, which instead emphasized rapid retaliation by the standing forces.¹⁶³

The first major U.S. military conflict following the development of this philosophy, the Vietnam War, did not neatly fit the “New Look” policy.¹⁶⁴ In this conflict, the United States committed millions of troops over a fourteen-year period and lost well over 50,000 American lives.¹⁶⁵ During the Vietnam conflict, U.S. forces were largely supplied through the use of the draft,¹⁶⁶ despite sufficient draft-age manpower to form an AVF.¹⁶⁷ Although there was a large military reserve force,¹⁶⁸ it went largely unused,¹⁶⁹ and the continued idleness of this force

armies would become obsolete as air war and the use of tactical weapons would become the main methods of waging war).

161. See SAKI DOCKRILL, EISENHOWER’S NEW LOOK NATIONAL SECURITY POLICY, 1953-61 xv (1996) (acknowledging Dulles’s central role in formulating the New Look policy, but asserting that President Eisenhower was more important in its formulation).

162. See *id.* at xii-xvi, 1-5 (indicating that the New Look policy was centered on superior technology instead of large armies in conflict, and it also included covert operations, diplomacy, alliances, and foreign military aid).

163. See HENRY KISSINGER, NUCLEAR WEAPONS AND FOREIGN POLICY 93 (1957) (furthering Dulles’s “New Look” concept by asserting that air war or strategic strikes, rather than protracted ground campaigns, would characterize future large-scale military involvements).

164. See United States Army Center of Military History, *The Army and the New Look*, in AMERICAN MILITARY HISTORY 572, 579-80, at <http://www.army.mil/cmhp-g/books/amh/AMH-26.htm> (updated Apr. 27, 2001) (describing the growth of the conflict in Vietnam between Communist guerilla forces sponsored by the Soviet Union and South Vietnamese forces sponsored by the United States, and the context of conflicts around the world in which the two superpowers sponsored factions but did not engage directly, precluding employment of “New Look” components) (on file with author).

165. See MILITARY ALMANAC, *supra* note 24, at 47 (reporting the total number of U.S. armed services personnel serving in Vietnam as 8,752,000, during the years 1961-1975, with 58,198 Americans killed in action). By way of comparison, casualties, including dead, wounded, and missing, during the three-day Battle of Gettysburg in the American Civil War totaled more than 50,000. CRAIG SYMONDS, A BATTLEFIELD ATLAS OF THE CIVIL WAR 67 (1983).

166. See CHAMBERS, *supra* note 69, at 268 (reporting that sixty percent of enlisted personnel in 1966 were draftees and that an estimated forty to sixty percent of volunteers were influenced by the draft in their decision to enlist).

167. See FLYNN, *supra* note 48, at 228 (stating that the “huge total of 18 year olds [669,000] suggested that it would be possible to recruit an AVF”).

168. See *Report of the President’s Commission on an All-Volunteer Armed Force* 99 (1970) [hereinafter “Gates Commission”] (reporting a reserve force of over 3.25 million men as of June, 1969, over 2.6 million of which were enlisted men). Of these enlisted men, however, approximately seventy-five percent enlisted to avoid the draft. *Id.* at 97.

169. See LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION 50 (1978) (characterizing

reduced the confidence of military planners.¹⁷⁰ In contrast to earlier U.S. wars, the Vietnam War was characterized by small unit actions rather than large battles.¹⁷¹ These ground troop confrontations were coupled with massive bombing against an enemy greatly inferior in size.¹⁷² Nuclear weapons were never a serious option in Vietnam,¹⁷³ and the elusive and insurgent nature of the enemy guerilla forces made strategic bombing problematic.¹⁷⁴

The increased U.S. reliance on air power in Vietnam was clear, however, as the Air Force alone dropped 6,162,000 tons of bombs during the war,¹⁷⁵ compared with 2,150,000 tons dropped during World War II.¹⁷⁶ The reliance on draftees was likewise apparent, as Selective Service conscripted over two million people during the Vietnam War.¹⁷⁷ The loss of American lives in Vietnam, while

President Johnson's reluctance to deploy reserve troops as a political tactic intended to support the appearance that the U.S. involvement in Vietnam was limited).

170. See Kenneth J. Coffey, *Our Nation's Reserve Forces: Where Do We Go From Here?*, in *PROFESSIONALS ON THE FRONT LINE: TWO DECADES OF THE ALL-VOLUNTEER ARMY* 99, 100-01 (J. Eric Fredland et al. eds., 1996) (stating that the "credibility and the overall effectiveness of the guard and reserves suffered badly during this period").

171. See CLODFELTER, *supra* note 118, at 241 (noting that, in contrast to World War II and the Korean War, most U.S. casualties in the Vietnam War came at the hands of the enemy infantry, rather than from ordnance as is typical of larger-scale confrontations).

172. See *id.* at 238 (1995) (placing U.S. force strength in Vietnam in 1967 at 473,000, compared with an estimated enemy ground force of 63,000, but noting that the actual ground combat forces for the United States numbered less than 50,000).

173. See Morris Janowitz, *Beyond Deterrence: Alternative Conceptual Dimensions*, in *THE LIMITS OF MILITARY INTERVENTION* 369, 378-379 (Ellen P. Stern ed., 1977) (asserting that use of tactical nuclear weapons had been considered in support of French Indochinese interests, but strategic U.S. involvement after the French withdraw centered on conventional bombing in an effort to avoid "disaster in the world community").

174. See *id.* (asserting that the initial sustained U.S. bombing was of limited effectiveness, but subsequent improved bombing accuracy helped bring about an eventual cease-fire).

175. See HARRY G. SUMMERS, JR., *VIETNAM WAR ALMANAC* 100 (1985) (noting that "considerable" Navy and Marine Corps bombing is excluded from the six million ton figure attributed to the Air Force).

176. *Id.*; see also *THE UNITED STATES STRATEGIC BOMBING SURVEY: OVER-ALL REPORT* x tbl. 1 (1945) (placing the total bomb tonnage dropped in Europe alone by the combined U.S.-British forces at nearly 2.7 million tons). The bombing increased in the latter stages of both wars. See JEFFREY D. GLASSER, *THE SECRET VIETNAM WAR: THE UNITED STATES AIR FORCE IN THAILAND, 1961-1975*, at 108 (1995) (noting that approximately halfway through the United States' involvement in Vietnam, U.S. forces dropped only one-quarter of their eventual total tonnage). In World War II, over sixty percent of the total bombs dropped by the allies in Europe fell in the last ten months of the war. MARK CLODFELTER, *THE LIMITS OF AIRPOWER: THE AMERICAN BOMBING OF NORTH VIETNAM* 8 (1989); see also U.S. Gov't Printing Office, *THE UNITED STATES STRATEGIC BOMBING SURVEY: OVER-ALL REPORT (EUROPEAN WAR)* 6-8 (1945) (illustrating through graphs the dramatic increase in allied bombing toward the conclusion of World War II).

177. See *Induction Statistics*, *supra* note 46 (reporting yearly Selective Service induction statistics for the years 1964 and 1973, the start and end of the draft, including a high of 382,010 in 1966).

significant, was a fraction of the millions of fatalities.¹⁷⁸ In this regard, the war was an indication of future U.S. military strategy emphasizing limited commitment of resources and minimized risk to U.S. personnel.¹⁷⁹

The Persian Gulf War, the only major U.S. military conflict since Vietnam,¹⁸⁰ was the first major conflict fought without conscripts since the Spanish-American War.¹⁸¹ In the first real test of the AVF, a strategic bombing campaign was followed by a ground campaign that claimed victory after only four days of fighting.¹⁸² This strategy minimized the risk to U.S. personnel by inflicting immense damage on Iraqi forces with bombs and missiles, before meeting the Iraqi forces on the field of battle.¹⁸³ In the hands of an enemy such as Iraq, similar advanced weaponry put U.S. forces at risk and extended the concept of harm's way beyond the front lines of the battlefield.¹⁸⁴ Although U.S. forces in such a scenario are now at risk far behind the front lines, an examination of U.S. war casualties shows a dramatic decline in deaths as a percent of total participants, culminating in minimal Allied casualties in the Gulf War.¹⁸⁵

178. See *News Release*, AGENCE FRANCE PRESSE, at http://www.rjsmith.com/kia_tbl.html#press (Apr. 3, 1995) (reporting Vietnamese government estimates, released on the twentieth anniversary of the official end of the Vietnam War, that approximately four million Vietnamese civilians and more than one million combatants died as a result of war during the years 1954-1975) (on file with author).

179. See *supra* notes 149-60 and accompanying text (surveying technological advances in warfare that were long in development and finally widely and successfully employed by the United States in the Persian Gulf War).

180. See MILITARY ALMANAC, *supra* note 24, at 50-53 (listing eighty-nine selected U.S. military actions between 1975 and 2001, with no other operation approaching the enormity of Operation Desert Storm).

181. See *Induction Statistics*, *supra* note 46 (reporting numbers of men entering the military through the Selective Service System during World War I, World War II, the Korean War and the Vietnam War). See also CHAMBERS, *supra* note 69, at 136-38 (suggesting that a primary reason President Wilson instituted the draft in World War I was to prevent political rival Theodore Roosevelt from raising and leading a volunteer army as Roosevelt had in the Spanish American War).

182. See generally MAZARR, *supra* note 31, at 125-57 (narrating the brief and decisive allied ground campaign in the Gulf War).

183. See *id.* at 99 (describing the near-total destruction of Iraqi forces before the Allied ground forces confronted the Iraqi army).

184. See Presidential Commission on the Assignment of Women in the Armed Forces, *Report to the President*, 93 (GPO 1992) (observing that the transformation of modern warfare has resulted in greater combatant mobility and fluidity of action which, coupled with the advances in the accuracy and destructiveness of weaponry, have undermined the traditional concept of front-line combat).

185. See *Statistical Summary of America's Major Wars*, at <http://www.cwc.lsu.edu/cwc/other/stats/warcost.htm> (last modified June 13, 2001) (comparing casualty ratios in American wars on a per month of war basis, with an approximate steady rise in deaths peaking at World War II, and steadily declining to the Persian Gulf War's lowest rate of U.S. casualties per month since the Mexican-American War) (on file with author).

The Persian Gulf War likely signaled the end of U.S. involvement in major ground-troop confrontations.¹⁸⁶ The decisive defeat of the Iraqi army demonstrated how U.S. superiority in virtually all areas of the military arts allowed the U.S.-led forces to defeat a much larger Iraqi army by employing mobile forces.¹⁸⁷ The U.S. armed forces and the American public were justifiably impressed with this illustration of a new type of war¹⁸⁸ emphasizing rapid strategic response, containment, coalition building, and setting limited goals.¹⁸⁹

After the breakup of the former Soviet Union, U.S. military strategy underwent further revision.¹⁹⁰ The United States' once great military foe was reduced to smaller, poorly trained and poorly equipped armies.¹⁹¹ With no military equal, the United States reduced the size

186. See MAZARR, *supra* note 31, at 98 (likening the U.S. operation in the Persian Gulf to high-tech guerilla warfare, and suggesting that the armies attempting to fight "static linear wars" would become obsolete in much the same way as the cavalry as used against the German advance in World War II).

187. See *supra* notes 182-83 and accompanying text (chronicling the pre-assault bombing and subsequent swift ground war victory of the allied forces). See also MAZARR, *supra* note 31, at 131-32 (placing the size of the defending Iraqi army at approximately 500,000 and the size of the allied army at approximately 250,000).

188. See *supra* notes 149-54 and accompanying text (discussing public perceptions of the advanced weapon technology used in the Persian Gulf War). *But see generally* MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR: CIVILIAN CASUALTIES DURING THE AIR CAMPAIGN AND VIOLATIONS OF THE LAWS OF WAR, *supra* note 152, at 113-28 (discussing the frequent inaccuracy of precision bombing and the fact that most bombing was not precision bombing, despite the impression conveyed to the public by the Pentagon and Bush Administration in an orchestrated media relations effort to promote the success and use of these weapons). After the Gulf War's conclusion, allegations and evidence surfaced of bombs missing targets and hitting civilians instead. *Id.* Ten years later, similar reports surfaced after the United States military involvement in Afghanistan. See Dexter Filkins, *Flaws in U.S. Air War Left Hundreds Dead: Faulty Intelligence and Overwhelming Force Are Seen as Factors in Afghan Toll*, N.Y. TIMES, July 21, 2002, at A1 (reporting a pattern of air strike mistakes that took as many as 400 Afghani civilian lives in eleven locations).

189. See MAZARR, *supra* note 31, at 161-63 (referring to the Persian Gulf War as a "test case of [the] post-cold war concepts" in which the United States would maintain regional stability throughout the world by leading rapid, cooperative deployments of limited duration); DENNIS MENOS, ARMS OVER DIPLOMACY: REFLECTIONS ON THE PERSIAN GULF WAR 84 (1992) (contrasting the success of the allied coalition during the Persian Gulf War with the failure of the United States' protracted and essentially non-cooperative campaign during the Vietnam War). *But see id.* at 86-87 (crediting public relations, exaggeration of Iraqi troop strength, and military control of operations for much of the overwhelming victory, and suggesting that Americans were deceived by an image of a masterful victory when in fact the Allied forces defeated a poorly equipped army and inflicted large amounts of immediate and long-lasting losses on Iraqi civilians); MAZARR, *supra* note 31, at 166-67 (noting that the strategic reason for high-technology weapons, which was not based on limiting U.S. casualties, may have shifted public opposition).

190. See MILITARY ALMANAC, *supra* note 24, at 9-10 (describing the transformation of the U.S. military, which focused primarily on the Soviet Union, an opponent of approximately equal military strength, during the Cold War).

191. See MAZARR, *supra* note 31, at 5-12 (discussing the shift in the focus of U.S. defense priorities from a singular enemy superpower to a variety of potential regional conflicts).

of the AVF by nearly twenty-five percent between 1992 and 2000.¹⁹² Even with the post-Cold War reduction in force, the United States maintains a standing armed force of nearly 1.4 million persons, the second largest standing army in the world after China's 2.5 million.¹⁹³ Mutual agreements between various allies assure adequate forces should conflicts with foreseeable enemies arise.¹⁹⁴ The lessons learned in the Persian Gulf War have been applied to a post-Cold War world of unrivaled U.S. military power and are reflected in the current strategic planning of the armed forces.¹⁹⁵ To better react to escalating regional developments, the current planning emphasizes rapid deployment of smaller forces and strategic placement and use of air and naval forces.¹⁹⁶ The increasing success of the AVF and the increased confidence of the military leaders in the AVF have been major components in this change in strategy.¹⁹⁷ The issue of the draft rarely comes up at all and does not appear to be a part of modern military strategy or analysis.¹⁹⁸

192. MILITARY ALMANAC, *supra* note 24, at 21.

193. *See id.* at 11 (providing a chart entitled "Military Strengths of U.S., Allied, and Selected Other Armed Forces").

194. *See id.* (reporting the number of active and reserve United States and allied troops, primarily South Korean and NATO, to be over fourteen million, compared to the fewer than 8.5 million maintained by potential enemies, as defined by the Department of Defense as including Cuba, Iraq, Iran, Libya, North Korea, Sudan, and Syria, all with lower capabilities in virtually all areas of defense, including communications, intelligence, and training). *See also id.* at 61-64 (surveying the mutual security agreements affecting Europe and Asia which the U.S. is a party to or which augment U.S.-involved security guarantees).

195. *See id.* at 9-10 (describing the move in the armed forces' four branches and among the Joint Chiefs of Staff toward mobility, flexibility, greater technological superiority in weaponry, transportation and communications, and increased allied operations).

196. *See id.* at 9 (noting the Army's goal to mobilize five standing divisions anywhere in the world within thirty days as an example of the current emphasis in defense planning on anticipatory or rapid response to regional trouble spots).

197. *See* Jim Garamone, *DoD Celebrates 25 Years of the All Volunteer Force*, Am. Forces Press Serv., at http://www.defenselink.mil/news/jul1998/n07101998_9807096.html (last visited July 18, 2002) (quoting Deputy Defense Secretary John Hamre, "[the AVF] is far more professional, more stable, largely married, and [it] reflects America," and Undersecretary of Defense for Personnel and Readiness Rudy deLeon "[the AVF] is widely regarded as the most capable and professional force in the world . . . [i]t is the model for militaries around the world . . . [it] won the Cold War and has met every challenge since") (on file with author).

198. *See generally* MILITARY ALMANAC, *supra* note 24 (containing eighty pages of analysis of present and future military challenges, with no mention of conscription, registration, or any related topic); JOHN JESSUP, *A CHRONOLOGY OF CONFLICT AND RESOLUTION, 1945-1985* (1989) (chronicling U.S.-Soviet relations in a detailed 838-page political timeline, without mentioning the U.S. imposition of draft registration in 1980, though President Carter presented the imposition as necessary to send a significant statement to the Soviets). A search of the DoD website finds the draft or registration mentioned only in historical context, in reference to enlisted men's obligation to register, or as part of recruiting campaigns coordinated with Selective Service mailings.

B. *The All-Volunteer Force*

The AVF as it exists today dates to 1973, but for most of U.S. history, the federal armed forces have been a volunteer force.¹⁹⁹ In fact, the United States has used a military draft in only thirty-seven years, primarily between 1940 and 1973.²⁰⁰ The AVF is characterized as a smaller, more career-oriented, better trained, and better qualified force intended to serve modern U.S. military needs without the aid of drafted troops.²⁰¹ The current AVF grew out of a variety of influences, some older than the draft it replaced.²⁰² Questions about fair application of the draft arose increasingly during the Vietnam War as a result of flexible deferment and qualification standards.²⁰³ As general opposition to the Vietnam War grew, so did opposition to the draft, which was seen as making the war possible.²⁰⁴

Major opposition to the draft came from a group of libertarian-leaning Republican members of Congress, including Barry Goldwater, who argued in 1963 that conscription both contradicted the concept of liberty and encouraged inefficient personnel management.²⁰⁵ President Johnson successfully opposed these

199. See COOPER, *supra* note 49, at 46 (stating that the United States has only resorted to conscription during approximately thirty-five years of its existence).

200. See THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION endpages (Martin Anderson et al. eds., 1982) (providing a timeline entitled "Wars and Conscription").

201. See Walter Y. Oi, *Historical Perspectives on the All-Volunteer Force: The Rochester Connection*, in PROFESSIONALS ON THE FRONT LINE: TWO DECADES OF THE ALL-VOLUNTEER ARMY 38, 49 (J. Eric Fredland et al. eds., 1996) (noting the changed demands upon U.S. armed forces and the increased need for highly skilled personnel, which resulted in a better-compensated and smaller AVF).

202. See *id.* at 40 (describing conscription practices just before World War II where exemptions were granted to "farmers, fathers, and conscientious objectors," and African Americans were underrepresented perhaps due to segregationist practices, which would require separate African American officers).

203. See *id.* at 41 (pointing to a rise in draft age population that allowed draft boards to raise minimum standards and more liberally grant deferments). That so much discretion was granted to draft boards, who served on an entirely voluntary basis, eventually resulted in charges of favoritism, and indeed certain groups, including African-Americans, bore a disproportionate share of the defense burden. *Id.*; see also FLYNN, *supra* note 48, at 205-06 (asserting that opposition to the Vietnam War among African Americans grew as they discovered that young African American men were much more likely to be drafted than population percentages would otherwise suggest); STEPHAN M. KOHN, JAILED FOR PEACE: THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS, 1658-1985, at 79-82 (1986) (discussing minority opposition to the Vietnam war and the lack of minority representation in the selection process).

204. Oi, *supra* note 201, at 42. See generally KOHN, *supra* note 203, at 73-99 (chronicling the inextricably linked issues of opposition to war and opposition to conscription).

205. See Oi, *supra* note 201, at 41-42 (noting that these critics argued that the draft saved money on salaries in the short term, while losing money in the long term through turnover of personnel and expensive retraining); see also FLYNN, *supra* note 48, at 189 (describing a study of the draft called for in 1964 by President Lyndon Johnson as a response to opposition to the draft from his Republican presidential

Congress members' efforts to launch a study of the draft that focused on economic and liberty issues by producing his own study.²⁰⁶ Johnson's study, however, was not completed until 1965 and was not released for another year.²⁰⁷ A growing number of voices, including civil rights advocates, conscientious objectors, Libertarians, Republicans, and Democrats, forced increasing attention to the issue of the draft.²⁰⁸ As the 1968 presidential elections approached, candidates voiced their opinions on the draft issue to U.S. voters.²⁰⁹ Among those opposed to conscription were former Vice President Richard M. Nixon, who made his opposition part of his 1968 presidential campaign.²¹⁰

Nixon defeated Vice President Hubert Humphrey in the 1968 presidential election,²¹¹ aided in part by voter discontent over the general conduct of the war by the Johnson Administration²¹² and possibly over the draft as well.²¹³ Nixon followed through on his

rival, Barry Goldwater and noting that the study offered little hope of curing problems with the draft).

206. Oi, *supra* note 201, at 41-42.

207. *Id.* at 42.

208. See generally FLYNN, *supra* note 48, at 188-223 (chronicling opposition to the draft, based on legal, moral, economic, social and political concerns, voiced by a varied and expanding array of special interest groups between the 1964 and 1968 presidential elections). While opposition to the draft came from a broad section of the U.S. political and social spectrum, the draft was not always widely unpopular during the Vietnam War. See *id.* at 219 (reporting several polls and surveys that indicated general popular support of the draft in the years 1967-68).

209. See *id.* at 225 (describing the varying degrees to which politicians Eugene McCarthy, George Wallace, Nelson Rockefeller, Hubert Humphrey, and Richard Nixon incorporated discontent over the draft into their campaign platforms).

210. See Richard M. Nixon, *The All-Volunteer Armed Force*, in THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION 603-08 (Martin Anderson & Barbara Honegger eds., 1982) (pledging to end the military draft at the conclusion of the Vietnam War). But see RICHARD NIXON, THE REAL WAR 201 (1980) (reconsidering his opposition to a draft in light of perceived AVF failures). The contrast between Nixon's two views on the draft reveals the political motives dictating his positions. See FLYNN, *supra* note 48, at 225 (asserting that Nixon's vocal opposition to the draft developed as part of his political comeback after losing the 1960 presidential election and the 1962 California governor's race). While this position may have evolved for Nixon, it was not incompatible with the views of many Republicans. *Id.*; see also Oi, *supra* note 201, at 41 (noting that twenty-four House Republicans were also pressing for draft reform in 1964).

211. See Dean Blobaum, *Chicago '68: A Chronology*, at <http://www.geocities.com/Athens/Delphi/1553/c68chron.html> (last visited Jan. 25, 2003) (describing the events in 1967-68 which led the Democratic Party to nominate Hubert Humphrey rather than President Johnson as its candidate in the 1968 election, and noting role of the "Dump Johnson" movement, which was dedicated to putting forth a candidate committed to ending the Vietnam War) (on file with author).

212. See FLYNN, *supra* note 48, at 236 (noting Nixon's recognition of the broad discontent stemming from the Vietnam War, for which the draft stood as a symbol).

213. See Martin Binkin, *Commentary*, in PROFESSIONALS ON THE FRONT LINE: TWO DECADES OF THE ALL-VOLUNTEER ARMY 124, 124 (J. Eric Fredland et al. eds., 1996) (asserting Nixon's anti-draft strategy was as much an instrument to gain the presidency as it was an expression of political ideology). Binkin calls the AVF one of

commitment to create the AVF by appointing the President's Commission on an All-Volunteer Armed Force (Gates Commission), chaired by former Defense Secretary Thomas Gates.²¹⁴ In February 1970, the Gates Commission issued its report, containing views on conscription versus an AVF and budgetary and management recommendations for the implementation of an effective AVF.²¹⁵ The report's findings reprised the assertions of Goldwater and other draft critics that past comparisons of conscription versus an AVF had not accounted for all costs when concluding that conscription was more economical.²¹⁶ Among the report's recommendations were: (1) reconsideration of the importance of reserve forces;²¹⁷ (2) reform of military pay to better recruit volunteers;²¹⁸ (3) a restructuring of ground force personnel;²¹⁹ and (4) maintenance of registration for a standby draft.²²⁰ The implementation of these recommendations

Nixon's "few positive legacies," but stops short of asserting that it actually helped him win the election. *Id.* It is unclear how great a role Nixon's position on the draft actually played in the election. *See FLYNN, supra* note 48, at 226 (contending that voters surveyed did not indicate a popular discontent with the draft). Regardless, Nixon's victory carried the AVF concept into office with him. *See id.* at 236-41 (asserting that Nixon's continuing interest in reforming and eventually eliminating the draft after he took office was tied to his desire to both pacify a discontent over the Vietnam War and court draft age men as supporters of Nixon and the Republican Party).

214. *See* Gates Commission, *supra* note 168, at vii (naming Gates as Chairman of the Advisory Committee of the AVF).

215. *Id.*; *see also* *Studies Prepared for the President's Commission on an All-Volunteer Armed Force* (1970) (containing studies prepared for the Commission upon which the Commission's recommendations were largely based).

216. Gates Commission, *supra* note 168, at 28. The report further pointed to various economic costs tied to drafting young men, such as preventing them from contributing to the economy, disrupting careers, or forcing career and life choices to avoid conscription. *See id.* at 30-33 (noting that the draft also causes unnecessary problems for the military by creating low morale among troops).

217. *See id.* at 40 (observing that reservists were underutilized during the Vietnam War); *see also* Martin Anderson, *The All-Volunteer Force Decision, History and Prospects, in THE ALL-VOLUNTEER FORCE AFTER A DECADE: RETROSPECT AND PROSPECT* 10, 13 (William Bowman et al. eds., 1986) (emphasizing that a well trained and equipped armed forces reserve and National Guard prepared to fight is a far more effective means of improving military combat readiness).

218. *See* Gates Commission, *supra* note 168, at 49 (maintaining that compensation levels in the early years of military service are too low to attract quality recruits); *see also* Oi, *supra* note 201, at 45-46 (asserting that Congress's power to conscript at below market rates kept pay for the first two years of service, the legal maximum term of conscription, artificially low and therefore imposed a "hidden tax" on young men to the benefit of other citizens—particularly the wealthy).

219. *See* Gates Commission, *supra* note 168, at 36-37 (noting that the ground-force centered Army had grown during the Vietnam War, as a percentage of the armed forces as a whole, and that most draftees entered the Army). Because the Navy and Marines rarely had to resort to a draft and the Air Force never did, most experts predicted that maintaining Army ground forces would present the greatest challenge for recruiters in an AVF. *Id.*

220. *See id.* at 119-22 (offering the first credible plan for registration without a draft).

would figure prominently in subsequent analysis of the successes and failures of the AVF.²²¹

Based upon the Gates Commission's recommendations, Congress passed a bill²²² extending the draft until the anticipated end of the Vietnam War²²³ and amending the military pay scale in anticipation of the AVF.²²⁴ Unfortunately, the AVF was not initiated in a particularly supportive atmosphere, having barely overcome strong opposition from a vocal minority in Congress.²²⁵ In addition, the initial reaction to the AVF from the existing military establishment ranged from tepid to openly hostile,²²⁶ while the general public held the military itself in low regard in the aftermath of the Vietnam War.²²⁷

During the 1970s, as the AVF struggled to compete against a strong job market, Congress failed to improve pay for entering recruits and ended GI Bill benefits.²²⁸ In an attempt to meet its recruitment goals,²²⁹ the AVF was forced to reduce recruitment standards,²³⁰ which

221. See MELVIN LAIRD, *PEOPLE, NOT HARDWARE: THE HIGHEST DEFENSE PRIORITY 1* (1980) (discussing the negative effect on recruiting and retention of quality forces caused by congressional and executive failure to fully implement the Gates Commission's proposals for pay increases).

222. See Act of May 5, 1971, Pub. L. No. 92-129, 81 Stat. 649 (1971); see also COOPER, *supra* note 49, at 109 (describing how a compromise between the House of Representatives and the Senate was reached despite large discrepancies in the amount of funding each House wanted to provide for military pay raises).

223. Act of May 5, 1971, Pub. L. No. 92-129, Title I, § 101(9)(d)-(e), 81 Stat. 649, 1439, 1466 (1971).

224. See *id.* § 202(a), 81 Stat. 649, 1439, 1471 (granting significant pay raises at the lowest ranks of the military); see also LAIRD, *supra* note 221, at 20-22 (demonstrating that between 1973 and 1981, service pay declined by twenty-five percent in comparison to minimum wage and by fifteen percent in comparison with the Consumer Price Index). The author of this study, Melvin Laird, served as Secretary of Defense under Nixon during the transition from drafted forces to the AVF. *Id.* at 1.

225. See Anderson, *supra* note 217, at 11 (pointing out that many political leaders opposed the formation of the AVF, and noting that criticism from Congress continued through the AVF's first decade of existence).

226. See *id.* (asserting that the AVF was opposed by most senior military leaders); see also LAIRD, *supra* note 221, at 2-3 (criticizing the military establishment for focusing on hardware and technology to the detriment of the AVF); Charles Moskos & Paul Glasstis, *To Secure and Reassure: This Time a Draft for the Home Front, Too*, WASH. POST, Nov. 4, 2001, at B1 (characterizing the military's general resistance to change as the cause of its resistance to the end of the draft in 1973 and its resistance to the current calls for the end of the AVF).

227. See George C. Herring, *Preparing Not to Refight the Last War: The Impact of the Vietnam War on the U.S. Military*, in *AFTER VIETNAM: LEGACIES OF A LOST WAR* 56, 58 (Charles E. Neu ed., 2000) (describing the effect that the publicly unpopular war had on the image of the military, both to outsiders and to the military itself).

228. See Gary R. Nelson, *The Supply and Quality of First-Term Enlistees Under the All-Volunteer Force*, in *THE ALL-VOLUNTEER FORCE AFTER A DECADE: RETROSPECT AND PROSPECT* 21, 48 (William Bowman et al. eds., 1986) (concluding that the 1976 elimination of the G.I. Bill, the general failure of military pay to keep pace with civilian pay, and rising employment rates created a personnel shortage in the 1970s).

229. See Eitelberg, *supra* note 22, at 71 (observing that enlistment targets are based on both military and budgetary factors).

was followed by increased drug use by military personnel, reduced morale, and negative publicity.²³¹ Despite calls for the resumption of a draft, supporters of the AVF contended that its shortcomings were attributable to the failure to adequately raise pay.²³² Eventually, Congress authorized funds for increased pay, benefits, and recruiting.²³³

By the early 1980s, the AVF had raised its standards,²³⁴ and it has met or exceeded its quota almost every year for the past decade.²³⁵ The recruiting renaissance in the 1980s provided the active and reserve forces that conducted the Persian Gulf War.²³⁶ One indication of how well the AVF performed overall is the fact that from 1990-2000, the military failed to meet its enlistment requirements only twice, in 1998 and 1999,²³⁷ and even then by a margin of less than four percent.²³⁸ The following year, the military easily met its enlistment quota despite increasing the size of the quota.²³⁹

The AVF has consistently filled or nearly filled its ranks, despite a congressional reluctance to recognize that the military must compete

230. See Nelson, *supra* note 228, at 37 (characterizing the rise and fall of recruitment standards with the rise and fall of available personnel as a logical result of the military competing for labor in a free market).

231. See *id.* at 67 (characterizing the AVF as being “on the brink of disaster” at this time). But see Herring, *supra* note 227, at 59-60 (ascribing these trends to the declining fortunes of the U.S. war effort in Vietnam).

232. See Milton Friedman, *Argument Against National Service (Rebuttal)*, in REGISTRATION AND THE DRAFT: PROCEEDINGS OF THE HOOVER-ROCHESTER CONFERENCE ON THE ALL-VOLUNTEER FORCE, 189, 190 (Martin Anderson ed., 1982) (blaming the low number of enlisted soldiers on the failure of Congress to implement the Gates Commission’s recommendations for increased pay).

233. See Dorn, *supra* note 22, at 18 (referencing pay raises of 11.1% in 1981 and 14.3% in 1982).

234. *Id.* at 20 (noting that in 1973 only sixty-six percent of enlisted men had a high school degree, but in 1994 that number was ninety-six percent, and tying this rise in quality to rises in pay and recruiting budgets in the early 1980s, which allowed for greater selectivity in recruiting).

235. See MILITARY ALMANAC, *supra* note 24, at 24 (listing a quota satisfaction rate of 100 percent or greater every year from 1990-2001, except 1998 and 1999).

236. See Neil M. Singer, *Commentary*, PROFESSIONAL ON THE FRONT LINE: TWO DECADES OF THE ALL-VOLUNTEER FORCE 211 (J. Eric Fredland et al. eds., 1996) (observing the success with which the AVF and reserves conducted the Persian Gulf War, while acknowledging that recruitment would be an ongoing issue).

237. See MILITARY ALMANAC, *supra* note 24, at 24 (reporting personnel recruiting shortfalls of 6,167 in 1998 and 7,912 in 1999). As a result of these shortfalls, some in Congress called for a revival of the draft. See *Military Draft No Solution*, CAPITAL TIMES, Aug. 16, 1999, at 8A (reporting Sen. Strom Thurmond’s suggestion that the draft might need to be revived to offset recruiting shortfalls). Additionally, some military recruiters expressed misgivings with the AVF. See Bradley Graham, *The Bugle Sounds But Fewer Answer; Services Rethink Recruiting as Ranks Thin*, WASH. POST, Mar. 13, 1999, at A3 (discussing the dilemma facing military recruiters in trying to interest young men in the military over other competing paths and interests).

238. MILITARY ALMANAC, *supra* note 24, at 24.

239. *Id.*

in the job market for personnel.²⁴⁰ This reluctance has led to inconsistent funding for pay and recruiting.²⁴¹ The need for an enhanced pay scale that compensates more for skill and merit than for time served is an ongoing issue.²⁴² The complex demands of the modern U.S. military require not only more selectivity regarding personnel, but also the ability to retain such personnel for longer periods than a draft would allow.²⁴³ It is difficult to conceive of the military taking a step backward from this position.²⁴⁴

C. *Women in the All-Volunteer Force*

Between 1973, the first year of the AVF, and the 1981 *Rostker* decision, women as a percentage of the U.S. armed forces rose from 2.5% to 8.9%.²⁴⁵ By 1998, that figure reached over fourteen percent.²⁴⁶ Despite the *Rostker* Court's insinuation that women were a marginal element in the military,²⁴⁷ women are an integral part of the current AVF and, through their numbers and contributions, are part of the reason that registration is no longer needed.²⁴⁸ The Persian

240. See BADOW, *supra* note 50, at 126-29 (reviewing the general disagreement about how best to improve recruiting through equity in military pay). Congress often provides additional funds for pay increases only after the military reports drastic shortfalls in certain military professions. See *id.* at 129 (describing congressional appropriations in reaction to low retention rates for pilots and military personnel).

241. See COOPER, *supra* note 49, at 392 (characterizing military pay historically as a "patchwork" system resulting in relatively high pay for officers and relatively low pay for enlisted men); see also MILITARY ALMANAC, *supra* note 24, at 27 (reporting military entry level salary in 2001 as \$16,620).

242. See Oi, *supra* note 201, at 49-50 (calling for a more flexible system of pay, job descriptions, and promotions designed to attract skilled personnel and retain them beyond the military's traditional twenty-year career).

243. See *id.* at 48-49 (emphasizing the changes in technology utilized by the modern military that make age, physical strength, and stamina less important than specialized training).

244. See *id.* at 49 (asserting that the former image of military personnel as common laborers is as outdated as the military draft is obsolete).

245. Binkin & Eitelberg, *supra* note 111, at 83.

246. United States Department of Defense, *Active Duty Strength Male/Female for September 1998*, at <http://web1.whs.osd.mil/mmid/military/ms5.pdf> (last visited Feb. 5, 2003) (stating that as of September 1998 the Marine Corps consisted of 5.65% women, the Navy 13.26%, the Army 14.83%, and the Air Force 18%).

247. See *supra* notes 108-14 and accompanying text (suggesting that the prohibition against women in combat, coupled with the possibility that all personnel may at some point need to fight, severely limits the use of women in the military).

248. See William L. O'Neill, *Women and Readiness*, in *WOMEN IN THE MILITARY* 172, 180 (Rita James Simon ed., 2001) (articulating the DoD position that defense readiness is enhanced by opening up more positions to women). Women are more likely than men to request support positions rather than the combat positions that are open to them. *Id.* at 173. This issue, however, has not been a problem for DoD or prevalent in the public debate. *Id.* Where the *Rostker* Court accepted the government's position that the contribution of women to the military was limited by restrictions against women in combat, DoD simply enlists women for the positions that the women choose and that they are permitted to fill. *Id.*

Gulf War not only highlighted the role of women in the AVF generally, it also showed why traditional notions of women in combat roles are less relevant in the modern style of U.S. warfare.²⁴⁹ The American public's notions of the limitations of women in war also have undergone a significant transformation.²⁵⁰ Following the war, a variety of polls showed that the majority of Americans believe women should be allowed a greater role in the U.S. armed forces, including serving in combat positions.²⁵¹

In 1994, the military retired the "Risk Rule" that defined positions in the military that excluded women based upon the position's proximity to combat,²⁵² and replaced it with a rule that barred women only from direct ground combat.²⁵³ Women are now permitted in more than ninety percent of all job categories in all branches of the armed services.²⁵⁴ The actual number of jobs available to women is heavily tied to the ground combat exclusion rule and the relative level of ground-combat engagement for each branch of service.²⁵⁵ The *Rostker* Court regarded women as outsiders to the military,²⁵⁶ yet women now account for approximately one-seventh of the AVF,²⁵⁷ indicating that it is time to rethink the Court's assumptions.

249. See James Milko, *Beyond the Persian Gulf Crisis: Expanding the Role of Servicewomen in the United States Military*, 41 AM. U. L. REV. 1301, 1315-17 (1992) (noting that the reach of modern weaponry blurs the lines between combatants and support personnel, resulting in a greater integration of participating women into any military operation, and that modern U.S. warfare strategy is much less ground-combat centered).

250. See *id.* at 1322-23 (discussing how the public's opinion of women in combat was transformed by female participation in the Persian Gulf War and the public's evolving views on the issue as influencing the liberalization of combat exclusion rules).

251. See, e.g., *id.* at 1323 (reporting a post-Gulf War Gallup poll finding seventy-nine percent of Americans supported the opening of combat roles to women).

252. See Fenner, *supra* note 113, at 13 (asserting that the end of the "Risk Rule" merely acknowledged a long-standing military practice of ignoring the rule when military need dictated otherwise).

253. See Aspin, *supra* note 133 (stating that "[s]ervice 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 . . .").

254. Mady W. Segal et al., *Gender and the Propensity to Enlist in the U.S. Military*, in WOMEN IN THE MILITARY 49, 49 (Rita James Simon ed., 2001).

255. *Id.* (noting that sixty-two percent of positions in the Marine Corps are open to female service members, followed by seventy percent in the Army, ninety-four percent in the Navy, and ninety-nine percent in the U.S. Air Force).

256. See *supra* notes 108-14 and accompanying text (tying the eligibility of women to participate in the military to their participation in combat, which was prohibited by law and regulations).

257. MILITARY ALMANAC, *supra* note 24.

III. REGISTRATION SERVES NO LEGITIMATE DEFENSE INTEREST

The existence of the Selective Service System without a draft will soon enter its thirtieth year.²⁵⁸ Since 1980, its activities have cost over \$500 million.²⁵⁹ Active registration has been in place for over twenty years, but Selective Service reported compliance levels of eighty-eight percent in 2001—well below its all-time high of ninety-seven percent immediately following the Persian Gulf War.²⁶⁰ It is doubtful that Selective Service contributes significantly to national security, even though it is asserted that Selective Service operates insurance policy against undetermined threats.²⁶¹ In fact, President Clinton raised the issue of Selective Service playing the role of insurance against vague and unforeseen threats.²⁶² In making this assertion, Clinton rejected the advice of his own DoD that elimination of the draft would not hinder military preparedness.²⁶³

If registration makes no legitimate contribution to national security, as statements and actions by the military and others indicate,²⁶⁴ courts should no longer defer to congressional judgment

258. See *supra* note 34 (noting that although registration did not reemerge until 1980, Selective Service continued to register after the draft ended in 1973, and continued to exist after registration was suspended in 1975).

259. *Talking Points: Campaign to End Selective Service Registration*, at http://www.nisbco.org/Talking_Points.htm (last visited Feb. 5, 2003) (arguing for an end to the Selective Service registration program) (on file with author); see also SELECTIVE SERVICE SYSTEM, FISCAL YEAR 2000 ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES (reporting an aggregate budget of \$444.4 million between the years 1983 and 2000), available at <http://www.sss.gov/ssarh.pdf> (last visited Feb. 5, 2003).

260. SELECTIVE SERVICE SYSTEM, FISCAL YEAR 2001 ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES at 8 [hereinafter 2001 ANNUAL REPORT] (comparing the compliance of ninety-seven percent in 1991 with compliance levels of eighty-eight percent in 2001), available at http://www.sss.gov/PDFs/SSS_2001_AnRpt.pdf (last visited Feb. 5, 2003). Just as Operation Desert Storm appeared to encourage registration, there have been reports that compliance has also increased since the attacks of September 11, 2001. See William Lamb, *Draft Boards Stand Ready to Serve if Needed*, ST. LOUIS POST DISPATCH, Oct. 23, 2001, at A6 (reporting anecdotal information indicating a rise in registration following September 11, and reporting Selective Service figures which show ninety-two percent compliance among draft-age men).

261. See Robert W. Gambino, *The Selective Service System under Fire*, WASH. TIMES, Oct. 6, 1993, at A21 (relating the former director of Selective Service's remarks that Selective Service provides insurance that adequate forces can be assembled to meet undefined future challenges, "a prudent hedge against the unknown").

262. See *Clinton Backs Continuation of Draft Policy*, BUFF. NEWS, May 19, 1994, at A17 (reporting the President's assertion that registration was "a hedge against unforeseen threats"). President Clinton reprised President Carter's symbolic characterization of registration by adding that eliminating registration might send the wrong signal to our enemies. *Id.*

263. See *id.* (revealing that a DoD report prepared for President Clinton asserted that elimination of registration would have no effect on military preparedness).

264. See Badow, *supra* note 10 (reporting DoD's dismissal of any contribution that registration makes to national defense). Outside of the Selective Service Agency itself, few experts in or out of government assert that registration serves a military

on the issue.²⁶⁵ The preponderance of the evidence indicates that no draft will be called in the foreseeable future.²⁶⁶ In any event, a system of ongoing registration is not necessary to conduct a successful draft, should the need arise.²⁶⁷ The registration requirement should thus be considered as separate from a gender-specific draft of combat troops.²⁶⁸ Removed from the shelter of deference provided to defense-related decisions,²⁶⁹ registration ought to be considered with the same heightened scrutiny required wherever an invidious discrimination based on gender is revealed.²⁷⁰ The gender discrimination imposed by the registration requirement cannot be supported by a claim that it is substantially related to an important government interest or even rationally related to a legitimate government interest.²⁷¹

necessity. *See, e.g., id.* (identifying a report produced by Congress's own Congressional Research Service, which concluded that activating an improved military reserve force would constitute a better response to unforeseen conflicts than would drafting registered civilians).

265. *See Rostker v. Goldberg*, 453 U.S. 57, 89-90 (1981) (Marshall, J., dissenting) (stating that it is ultimately up to the Court to determine if the discriminatory means employed in registration were closely and substantially related to government's stated objective). At the time of his dissent, Justice Marshall voiced no quarrel with registration as a legitimate interest connected to raising and supporting armies. *Id.* at 88.

266. *See infra* notes 376-77 and accompanying text (reporting various statements from within the military that a military draft is unlikely and is not part of current military planning).

267. *See infra* notes 325-26 and accompanying text (discussing prior successful registrations, which began at the onset of war).

268. *See Rostker*, 453 U.S. at 75-77 (concluding that the standard for assessing the discrimination against women in registration ought to be the same as that employed in assessing the discrimination against women in combat). This decision was a reversal of a lower court ruling, which managed to separate the issue of women in registration from the issue of women in combat. *Rostker v. Goldberg*, 509 F. Supp. 586, 597 (E.D. Pa. 1980).

269. *See Rostker*, 453 U.S. at 67 (asserting that Congress must respect the Constitution, but the standards applied by the Court may differ where military affairs are concerned).

270. *See id.* at 87-88 (Marshall, J., dissenting) (stating that under the heightened scrutiny test, "[t]he party defending the challenged classification carries the burden of demonstrating both the importance of the governmental objective it serves and the substantial relationship between the discriminatory means and the asserted end"). *See also* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 727 (2002) (terming the intermediate scrutiny test for gender classifications to be "clearly established").

271. *Compare* *Craig v. Boren*, 429 U.S. 190, 197 (1976) (creating the heightened scrutiny standard whereby a gender classification will survive an Equal Protection challenge if it is substantially related to serving an important government objective), *with* *Penell v. City of San Jose*, 485 U.S. 1, 14 (1988) (employing the rational basis test, under which a law need only be rationally related to a legitimate state interest).

A. *The Armed Forces' Low Regard for Draft Registration*

Initially, it is significant to note that the military does not factor in the use of a draft in planning for military contingencies.²⁷² This view apparently has not been altered by the scope of military actions envisioned by the current Bush Administration against Iraq and other alleged sponsors of terrorism.²⁷³ In fact, the military appears to place more confidence in its AVF and its reserves than it has at any time in the past.²⁷⁴ Military activities since the revival of registration in 1980 have never resulted in a draft.²⁷⁵ The military frequently has expressed its opinion that a draft is unlikely and that ongoing registration is unnecessary.²⁷⁶

A DoD report submitted to President Clinton in 1994 was quite open and explicit in its position on peacetime registration.²⁷⁷ Despite the military's subordinate role to the President,²⁷⁸ the report placed

272. See *Military Draft Wouldn't Be Fair, Army Secretary Says*, SEATTLE POST-INTELLIGENCER, Mar. 27, 1999, at A3 [hereinafter "*Draft Wouldn't Be Fair*"] (reporting comments by Secretary of the Army Louis Caldera on the inherent unfairness and impracticality of a draft because so few additional young soldiers are needed, thus only a small fraction of the draft-age population would actually be conscripted). See also *infra* notes 279-81 and accompanying text (emphasizing the abilities of the AVF and reserve forces to rapidly respond to regional threats envisioned by military planners, eliminating the need for draftees).

273. See Dana Milbank & Mike Allen, *U.S. Will Take Action Against Iraq, Bush Says; 'All Options Are on the Table' Against States That Pose Threat*, WASH. POST, Mar. 14, 2002, at A1 (reporting on President Bush's statements regarding America's war on terror, which cited Iraq, Iran, and North Korea as potential enemies, and invoked the threat of possible limited nuclear attack, but ruled out a draft); see also Doug Bandow, *Fighting the War Against Terrorism: Elite Forces, Yes; Conscripts, No*, POL'Y ANALYSIS No. 430, at 3 (Apr. 10, 2002) (observing that the military is in the midst of a transformation from its former labor-intensive incarnation, which will likely result in further reductions in force while enhancing defensive capabilities), available at <http://www.cato.org/pubs/pas/pa430.pdf>.

274. See, e.g., *infra* note 279 and accompanying text (expressing confidence in the ability to respond to crises by using active and reserve forces rather than relying on drafted troops who are untrained and difficult to mobilize); see also *supra* note 197 and accompanying text (observing that the military's declining interest in a draft is directly tied to their increased confidence in their professional force).

275. See *supra* notes 237-41 and accompanying text (chronicling the scattered support in Congress and within the armed forces for a military draft, which has not come in response to military crises but rather in response to infrequent and relatively small recruiting shortfalls that were instead corrected by raising salaries).

276. See generally *supra* notes 277-84 and accompanying text (surveying military admissions of disregard for draft registration and conscription made both to the press and in the form of reports).

277. See *Review, supra* note 140, at 12 (stating that suspending peacetime registration would present limited risk to national security given the low probability of the need for conscription).

278. Having clarified at length the military position that draft registration and conscription were unnecessary, the report concludes that registration should remain in effect until such time as alternatives have been considered. *Id.* at 12. A cover letter from Vice President Al Gore accompanied the report when presented to President Clinton, in which Gore concurred with the one sentence conclusion,

more confidence in AVF personnel and reserves than in drafted troops.²⁷⁹ The report asserted that reliance on draftees delayed Korean War mobilization by one year, and it concluded that eliminating registration was unlikely to hinder future mobilizations.²⁸⁰ The 1994 report makes the view of the armed forces clear: the elimination of registration would not undermine national security.²⁸¹ The report characterized scenarios that might require a draft as “extremely remote,”²⁸² asserting that with the demise of the Soviet Union, the AVF and reserves were capable of meeting “near-simultaneous commitments,” without resorting to a draft.²⁸³ Current military planning emphasizes evolution beyond the “two major theatre war construct,” projecting instead the need for rapid, limited and decisive response by smaller and more mobile contingents.²⁸⁴

It is not surprising that the military expresses these positions so freely in light of its sustained success with the AVF.²⁸⁵ Since the Persian Gulf War, DoD has emphasized the quality and mobility of its forces in operating the most advanced military technology in the world.²⁸⁶ The military no longer places great emphasis on mass armies, which it feels it cannot rapidly mobilize.²⁸⁷ The DoD view of the AVF is an established fact of U.S. military planning, which greatly

without mentioning the report’s findings. Letter from Vice President Al Gore to President Bill Clinton (Feb. 18, 1994) (on file with author). President Clinton disregarded the report. *See supra* notes 262-63 and accompanying text (examining Clinton’s decision to maintain draft registration, despite the military’s indication that registration did not serve national security interests).

279. *See id.* at 9 (explaining that because the national security threats have shifted from global conflicts to dangers on a regional scale, the need for draftees on short notice is reduced).

280. *Id.* at 12.

281. *See id.* at iii (emphasizing that any potential risk to national security is particularly limited because of the low probability that conscripts would ever be called to service).

282. *See id.* (citing the improved quality of the AVF as sufficient to respond to foreseeable needs).

283. *See Review, supra* note 140, at 12 (minimizing the need for a “safety net on short notice”).

284. *See* Rumsfeld, *supra* note 33, at 2-4 (arguing that planning for such unlikely large-scale operations has interfered with planning for and investing toward the more likely smaller-scale regional responses).

285. *See supra* note 197 and accompanying text (reporting the confidence which leading DoD officials place in the AVF, based upon its actual performance in military actions).

286. *See supra* notes 182-84 and accompanying text (detailing the events of the Persian Gulf War, which demonstrated the success of the modern U.S. military’s smaller and better-trained forces operating advanced warfare technology and minimizing massed army confrontation).

287. *See supra* notes 185-86 and accompanying text (discussing the strategic advantage resulting from the Allied emphasis on force mobility in conducting the Persian Gulf War).

complicates congressional justification for registration.²⁸⁸ It is not clear what interest registration serves if the DoD believes that it will never need draftees.

B. The Ineffectiveness of Registration

1. Selective Service does not fulfill its mandate

In recent years, Selective Service has had great difficulty maintaining its initial success at registering young men.²⁸⁹ Although the Selective Service registration success rate has declined, the agency has always been innovative in its attempts to induce registration or uncover unregistered persons.²⁹⁰ Most of Selective Service's recent successes have involved partnerships with states wherein denial of state benefits is imposed for failure to register.²⁹¹ Whatever Selective Service's actual successes, critics argue that it distorts its own figures to artificially exaggerate the success of its registration rate.²⁹² In addition, Selective Service distorts its registration figures to create the appearance of a larger pool of conscripts than an actual draft would draw from.²⁹³ Selective Service also gives a false impression of its ability to raise draftees by emphasizing the numbers registered

288. See *Rostker v. Goldberg*, 453 U.S. 57, 75-76 (1981) (relying on legislative history, which emphasized that registration was in preparation for the rapid mass mobilization of conscripts in time of national emergency).

289. See Andrea Stone, *Draft Registration Rates are Dropping, Especially in South*, USA TODAY, May 17, 2000, at A8 (reporting an eighty-three percent registration compliance rate among twenty year-olds in the year 2000, compared with the reported rate of ninety-five percent in 1990).

290. See Mary Ann Sieghart, *Greetings . . . Ice Cream Parlor Patrons Invited . . . to Register for the Draft*, WASH. POST, Aug. 3, 1984, at A2 (describing the illegal Selective Service purchase of a list of members of an ice cream buyers club to match the names against their own records and used the list to remind boys who turned eighteen years old to register).

291. See 2001 ANNUAL REPORT, *supra* note 260, at 12 (announcing that through 2001, twenty-nine states had enacted legislation in support of registration containing provisions from denial of state educational aid to denial of motor vehicle licenses).

292. See Richard Halloran, *Compliance With Draft Registration Is Put at 93%*, N.Y. TIMES, Sept. 5, 1980, at A14 (reporting that the percentage of registered men fell below Selective Service expectations even as the base number of those required to register was underestimated to produce a higher percentage); *25% of Draft-Age Men Have Not Yet Registered*, N.Y. TIMES, Nov. 4, 1981, at A14 (reporting Selective Service's revised figures, which painted a much less successful picture of registration efforts, and noting that nearly one-fourth of those required to register had actually registered).

293. The statistic most frequently reported by Selective Service measures the compliance of all men ages eighteen to twenty-five. 2001 ANNUAL REPORT, *supra* note 260, at 8. However, men may register at any point prior to age twenty-six without incurring permanent penalties. *Id.* at 7. The draft plan currently in place requires men to be drafted in ascending order from age twenty and up. *Sequence of Events*, *supra* note 139. Thus, registration can occur well past the likely draft age and still contribute to this statistic of success.

without predicting its ability to successfully contact these registrants.²⁹⁴ Indeed, registrants are useless if they cannot be contacted in the event of a draft—and after registration, Selective Service relies entirely on the registrant to comply with change of address requirements.²⁹⁵

Over the years, Selective Service has navigated a careful course, emphasizing its successes while avoiding controversy.²⁹⁶ To this end, Selective Service issues a bi-monthly periodical containing press releases and other self-promotion, along with testimonials of supportive government officials, particularly members of Congress.²⁹⁷ No one has been charged with failure to comply with registration since 1986.²⁹⁸ Registration critic Doug Bandow, a former Reagan Administration advisor on military personnel issues, explains Selective Service's survival by observing that "government bureaucracies are almost impossible to kill, no matter how outdated."²⁹⁹

294. See Bandow, *supra* note 5, at 10 (contrasting Selective Service's successful national promotion of registration with ongoing questions regarding accuracy of information, ability to update information, and data retrieval). See also Jacobs & McNamara, *supra* note 44, at 363 (reporting on a Selective Service plan, at least as old as the current registration, which could start registration from scratch using current social security and tax information rather than the stale information in draft registration records).

295. See Bandow, *supra* note 5, at 10 (reporting the results of a General Accounting Office survey, which indicated that twenty to forty percent of the addresses maintained by Selective Service may be out of date).

296. See 2001 ANNUAL REPORT, *supra* note 260, at 7-12 (describing Selective Service mechanisms designed to promote the ease of satisfying the registration requirement without appearing confrontational). See also Selective Service System, *Backgrounder: Women and the Draft in America*, at <http://www.sss.gov/wmbkgr.htm> (revised Apr. 5, 2001) [hereinafter "*Backgrounder*"] (restating the official government position as defined by the President, Congress, and history, regarding the exclusion of women from the draft, a position which Selective Service defers to with no apparent attempt to inject its own opinion) (on file with author).

297. See, e.g., Selective Service System, *South Carolina Congressman Floyd Spence Dies*, THE REGISTER, Sept./Oct. 2001, at 4 (reporting the death of a longtime congressional supporter of Selective Service); Selective Service System, *Former U.S. Representative "Jerry" Solomon Dies*, THE REGISTER, Nov./Dec. 2001, at 2 (same).

298. See Seattle Draft and Military Counseling Center, *Questions and Answers About Draft Registration*, at <http://www.scn.org/ip/sdmcc/register.htm> (last visited Feb. 7, 2003) (reporting that twenty-one young men were indicted for refusal to register in the early 1980s, and explaining that prosecutions of registration dodgers stopped because the trials of these men actually caused registration rates to drop) (on file with author).

299. Doug Bandow, *A Dishonorable Discharge for Selective Service*, TODAY'S COMMENTARY, available at <http://www.cato.org/dailys/09-20-99.html> (Sept. 20, 1999) (on file with author).

2. *Effective prior registration does not enhance military preparedness*

a. *A draft cannot contribute to rapid military mobilization*

Regardless of Selective Service successes at registering men, it still must quickly produce soldiers in the event a draft is declared.³⁰⁰ After legislation supporting a draft is in place,³⁰¹ Selective Service estimates that more than six months will elapse before the first draftees report to training camp.³⁰² Whether this timetable assumes that all local draft boards are up and running is unclear, but it is important to note that Selective Service has previously experienced shortages of volunteer personnel necessary to operate draft boards.³⁰³ The fact that registrants are not classified at the time of registration necessarily creates delays, by placing the appeals process after rather than before the notice.³⁰⁴ In addition to these delays, the training of draftees takes approximately fourteen weeks.³⁰⁵ According to current plans, over nine months would elapse before the first draftees were delivered into combat,³⁰⁶ longer than the entire Persian Gulf War.³⁰⁷

300. See Selective Service System, *Agency Mission*, at <http://www.sss.gov/mission.htm> (revised June 25, 2001) (defining Selective Service's foremost priority "to provide manpower to the armed forces in an emergency," which presumably means rapidly) (on file with author).

301. See 2001 ANNUAL REPORT, *supra* note 260, at 2 (stating that a draft will be implemented at the direction of Congress and the President under the authority of the MSSA).

302. *Sequence of Events*, *supra* note 139.

303. See Mark Libbon, *Selective Service Recruiting Volunteers for Board, Debate Continues on Whether Draft Boards Necessary*, NEW ORLEANS TIMES-PICAYUNE, Jan. 31, 2000, at E15 (describing a volunteer personnel crisis in the Selective Service because approximately one-third of draft board members nationwide approached their mandatory maximum of twenty years service). *But see* 2001 ANNUAL REPORT, *supra* note 260, at 28 (reporting that board vacancies ranged from two percent to thirteen percent by region).

304. See Center for Conscience & War, *Basic Draft Information*, at <http://www.nisbco.org/DraftInfo.htm> (updated as of Mar. 1996) (summarizing each step in the draft process from registration through the appeals process) (on file with author); *see also* Ian Jones, *Pacifists Prepare for Possibility of Draft*, NAT. CATH. REP., Oct. 19, 2001, at 7 (reporting a concern among conscientious objectors that, should a draft be called, there are only ten days to establish a claim of exemption from military duty).

305. *Basic Draft Information*, *supra* note 304 (explaining that draftees go through eight weeks of basic training and six additional weeks of advanced programs before they are ready for battle).

306. *See id.* (outlining that under the current draft process, draftees are not even called up to appear for examination and induction until six and one half months after the initial Presidential Proclamation).

307. See *Operation Desert Storm Chronology: Important Events*, at <http://www.desert-storm.com/War/chronology.html> (last visited Jan. 16, 2003) (reporting the Iraqi invasion of Kuwait on August 2, 1990 and Iraq's surrender to Allied forces on March 3, 1991—only seven months after the start of the Persian Gulf War) (on file with author).

The military has minimized the importance of rapidly mobilizing draftees because its active and reserve forces are fully capable of rapidly mobilizing for any foreseeable conflicts.³⁰⁸ Drafted troops would only be required in a prolonged war.³⁰⁹ In addition, military training facilities cannot handle the mass of inductees that a rapid draft would produce.³¹⁰ The military neither wants nor needs draftees, and it cannot use them in the rapid deployment scenario which is the primary case made for Selective Service registration.³¹¹

The actual contribution that registration makes to preparedness has never been clearly spelled out.³¹² Congressional justification for maintaining registration rests partially on the unsubstantiated assertion that registration tangibly strengthens military preparedness.³¹³ In response to questions about the relevance of registration, supporters often cite the importance of the message that registration sends to U.S. citizens and potential enemies.³¹⁴ But the vague, far-fetched scenarios that envision the use of a draft cannot support a claim that a draft would rapidly supply troops, because military planning and Selective Service procedures cannot accommodate such rapid mobilization.³¹⁵

308. See *Review*, *supra* note 140, at 6, 12 (placing active and reserve troop strength at 3.5 million in 1994 and terming that number adequate for any immediate need).

309. *Id.* at 12.

310. *Id.*; see also William Mullen, *Days of the Draft Board Heading for History Books*, CHI. TRIB., July 4, 1993, § 4, at 1 (reporting political scientist Eliot Feldman's military manpower study, which concluded that the Selective Service could produce draftees much faster than the military could possibly employ them, and noting that the sudden influx of draftees would result in shortage of barracks space, hospital beds, and other necessities).

311. See *Review*, *supra* note 140, at 12 (concluding that the military would not be able to absorb the rapid influx of draftees and that ending the draft would not put national security at risk); see also *supra* notes 287-88 and accompanying text (contrasting the difference between the mobilization of draftees envisioned in *Rostker* with the military's concern that draftees cannot be rapidly mobilized).

312. See *supra* notes 261-63 and accompanying text (noting pro-registration comments that characterize registration as insurance against non-specific unforeseen threats).

313. See Jacobs & McNamara, *supra* note 44, at 363 (suggesting that registration advocates may not have been able to furnish sufficient support for the vaguely asserted claim that registration contributed to preparedness).

314. See *infra* notes 365-75 and accompanying text (discussing and analyzing claims of registration's symbolic value and whether this has any military value, which justifies registration).

315. See *infra* notes 316-21 and accompanying text (arguing that Selective Service registration procedures are inaccurate and any time saved by registration in a mass mobilization is insignificant). But see *Rostker v. Goldberg*, 453 U.S. 57, 75 (1981) (characterizing Selective Service registration as an integral component to the rapid mobilization of combat troops).

b. *Perpetual registration is not required to implement a draft in a national emergency*

Even if a draft could quickly mobilize draftees in a national emergency, it is not clear that permanent registration is necessary to support a rapid mobilization.³¹⁶ Selective Service estimates of how much time would be saved by advance registration have varied greatly.³¹⁷ Shortly after President Carter called for renewed registration, a report authored by Selective Service Director Bernard Rostker came to light, which provided support for opponents of registration.³¹⁸ The report recommended that registration be employed only in the event of a mobilization in time of national emergency.³¹⁹ It also contradicted Carter Administration claims that registration would save ninety to a hundred days in a mass-mobilization, asserting that pre-registration would only save seven days.³²⁰

In both World Wars, registration began only after a draft was called, and yet millions of draftees were rapidly produced.³²¹ Selective Service has devised its own plans that would allow mass-drafting without registration by using up-to-date voter, tax, and Social Security records.³²² A DoD report indicated that in the absence of registration, modern data processing and information sources such as the Social Security System and state departments of motor vehicles could be used to quickly produce the same information.³²³ Selective Service nevertheless maintains an inventory of names, at great expense, whose accuracy is questionable.³²⁴ This suggests that while Selective

316. See Jacobs & McNamara, *supra* note 44, at 363 (revealing two Selective Service plans for conducting a draft without advance registration, both of which were less controversial than registration); see also Richard Halloran, *Report by Draft Director Assails Registration Plan*, N.Y. TIMES, Feb. 26, 1980, at A12 (reporting that President Carter disregarded the Selective Service's recommendation against registration).

317. See Doug Bandow, *Draft Registration: It's Time to Repeal Carter's Final Legacy*, POL'Y ANALYSIS No. 86 (May 7, 1987) (suggesting that the widely varying claims for the improved mobilization provided by advance registration are tied to political currents and bear little relation to actual mobilization requirements), at <http://www.cato.org/pubs/pas/pa086es.html> (on file with author).

318. See Halloran, *supra* note 316, at A12 (reporting registration opponent Senator Mark Hatfield's release of a Selective Service document, which cast doubt on the President's claims that registration would speed up mobilization).

319. See *id.* (detailing Rostker's recommendation to President Carter, which the Carter Administration rejected).

320. *Id.*

321. Jacobs & McNamara, *supra* note 44, at 363 (noting that millions of draftees were registered in one day, after draft legislation was signed).

322. See *id.* (stating that the draftees derived from these lists would be sent draft notices that would be followed by face to face registration).

323. See *Review*, *supra* note 140, at 10 (discussing the effects of eliminating draft registration).

324. See Bandow, *supra* note 5, at 10 (citing a GAO survey that suggested that one-

Service once claimed that it did not even need prior registration to affect rapid mass-mobilization, it now is unable to contribute to such a mobilization even with registration in place.³²⁵

Selective Service's obliviousness to its image in other government agencies is illustrated by a Selective Service website posting about the exclusion of women from the draft, which cites data from a 1998 General Accounting Office ("GAO") study.³²⁶ The 1998 GAO study examined the impact on the budget of registering women with the Selective Service.³²⁷ The study concluded, without explaining, that excluding women from registration was consistent with the DoD policy of prohibiting women from participating in direct ground combat.³²⁸ The 1998 study creates an ironic contrast to another GAO study, released in 2002, which found the likelihood that a draft might be needed to be so remote that it recommended shutting Selective Service down.³²⁹ The study further asserted that the system could be started virtually from scratch for approximately the same amount of money as Selective Service spends per year.³³⁰

C. Congress's Registration Decisions Should Be Given No Weight

1. The deference granted by the *Rostker* Court to Congress's draft registration legislation

In granting deference to Congress's decision to impose draft registration, the *Rostker* Court asserted that such deference to Congress is customary.³³¹ The Court found that the constitutionality of the gender classification had been duly considered by Congress.³³²

fifth to two-fifths of registered names have unusable addresses).

325. See Jacobs & McNamara, *supra* note 44, at 363 (suggesting that the stirring image of mass-mobilization in World War II contributes to a nostalgic desire to maintain the institution even though it can no longer contribute efficiently).

326. See *Backgrounder*, *supra* note 296 (restating the official government position as defined by the President, Congress, and history, regarding the exclusion of women from the draft, a position which Selective Service adopts as its own) (on file with author).

327. See *id.* (reporting that the GAO study examined the costs of registering women and concluded that registering women would require amending the MSSA).

328. See *id.* (explaining that the GAO study did not address advantages or disadvantages of including women in the draft, or make policy recommendations).

329. SUPPORTING CONGRESSIONAL OVERSIGHT: BUDGETARY IMPLICATIONS OF SELECTED GAO WORK FOR FISCAL YEAR 2003, at 24-25 (Apr. 2002) (indicating the costs that would be saved if Selective Service were terminated), available at <http://www.gao.gov/new.items/d02576.pdf>.

330. See *id.* (describing that it would take more than one year and \$23 million dollars to reactivate the Selective Service, which is currently in "deep standby" status).

331. See *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (stating that deference to Congress is "certainly appropriate" because the lawmakers specifically considered the MSSA's constitutionality).

332. *Id.* But see *supra* notes 245-57 and accompanying text (discussing the

The Court added that this deference, even where constitutional issues are at stake, is given greater weight where national security is at issue.³³³

In support of this position, the Court cited prior decisions, which upheld government actions in the name of national defense that might otherwise have been deemed constitutionally impermissible.³³⁴ The cases that the Court cited, however, share one common element: they uphold military authority over military personnel, facilities and functions.³³⁵ The only case cited that involved a civilian dealt with a man who was denied access to a military base to make a political speech.³³⁶ Registration, on the other hand, imposes a defense-related requirement upon millions of civilians.³³⁷ The Court's consideration of this imposition of defense-related authority over the civilian realm consists of citing, with approval, congressional testimony asserting that registration and the draft cannot be considered separately.³³⁸

2. *Under current circumstances, the Court owes no deference to Congress's registration decisions*

Strictly speaking, perpetual registration is not a military interest inseparable from a draft.³³⁹ Drafts have occurred without advance registration,³⁴⁰ and the current registration has long existed without a

changing and expanded role of women in the military).

333. See *Rostker*, 453 U.S. at 64-65 (explaining that this case does not "merely" involve the deference customarily given to Congress, but also involves national defense and the military in which the Court grants even greater deference to Congress).

334. See *id.* at 66-67 (citing multiple cases in which the Court accorded deference to Congress and the Executive over First Amendment and Due Process challenges).

335. See *id.* (citing *Parker v. Levy*, 417 U.S. 733 (1974) (rejecting a challenge to the Uniform Code of Military Justice for vagueness); *Middendorf v. Henry*, 425 U.S. 25 (1976) (giving deference to Congress under its power to regulate naval forces in a summary court martial case); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (rejecting a Due Process challenge to the Navy policy of giving females a longer period to be promoted than males, in order to continue service); *Brown v. Glines*, 444 U.S. 348 (1980) (upholding a prior restraint on the right to petition for military personnel)).

336. *Id.* (citing *Greer v. Spock*, 424 U.S. 828 (1976)).

337. See 2001 ANNUAL REPORT, *supra* note 260, at back end page (reporting a total of 13,610,098 draft-eligible registrants as of Sept. 30, 2001, with well over one million entering the pool every year).

338. See *Rostker*, 453 U.S. at 68 (stating that "[r]egistration is not an end in itself in the civilian world but rather the first step in the induction process into the military one, and Congress specifically linked its consideration of registration to induction . . ."). The Court cites congressional testimony, which implies or directly asserts that the two are inseparable. *Id.* at 68, 75-76, 79.

339. See *Bandow*, *supra* note 299 (discussing how registration is an outdated policy and unnecessary for mobilizing civilians in case of war).

340. See *id.* (asserting that Selective Service, starting from scratch with no advance registration, produced conscripts within seventy-three days in World War I and within sixty-three days prior to World War II).

draft.³⁴¹ The Selective Service was created as a separate agency within the government.³⁴² Congressional intent assures the agency's continued independence.³⁴³ The Court itself has recognized that induction into the military and acceptance into the military are separate processes.³⁴⁴ While the Court has distinguished conscription and acceptance into the military from actual induction into the military, induction will generally follow acceptance.³⁴⁵ While registration was long considered together with conscription and induction as a sequential transition from civilian to military life,³⁴⁶ the current registration stands alone, clearly the least integral of the three.³⁴⁷ Regardless, twenty-two years of registration without a draft has caused registrations to be inextricably linked to inductions that do not in fact take place.³⁴⁸ The disconnect between registration and legitimate military planning dictates a reexamination of the deference that the Court granted Congress in *Rostker*.³⁴⁹

341. See *id.* (observing that although President Carter reinstated registration, there has been no draft); see also Jacobs & McNamara, *supra* note 44, at 363 (noting that in both World War I and World War II, millions of men were registered in a single day, after the introduction of draft legislation). That so many registered so quickly in the face of certain armed conflict raises the question of whether this registration even facilitates a draft. See *id.* (discussing equally effective alternatives to registration).

342. See Selective Service System, *Background of Selective Service*, at <http://www.sss.gov/backgr.htm> (revised June 25, 2001) (providing a brief history of the selective service) (on file with author).

343. See Military Selective Service Act of 1967, 50 U.S.C. app. § 451(f) (2000) (stating that “[t]he Congress further declares that the Selective Service System should remain administratively independent of any other agency, including the Department of Defense.”).

344. See *Billings v. Truesdell*, 321 U.S. 542, 553-54 (1944) (holding that under selective service regulations, drafting or acceptance into the military is distinguishable from induction into the military). The Court asserted that induction into the military marked the end of a Selective Service System administered process through which draftees are examined for suitability for service. *Id.* at 548. The Court concluded that induction formed the line between civil and military authority, and that prior to induction, a draftee remained subject to civilian laws. *Id.* at 559.

345. See *Sequence of Events*, *supra* note 139 (describing the draft as a process which necessarily culminates with induction into the military, unless the draftee is found unfit for service or receives a deferment or exemption).

346. See *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (rejecting efforts to separate consideration of the constitutionality of registration from consideration of the constitutionality of a draft).

347. See *supra* notes 339-41 and accompanying text (noting significant past examples of mass conscription and induction without prior registration, as well as the current registration's long existence without serving a draft).

348. See *Rostker*, 453 U.S. at 68 (asserting that Congress specifically linked registration to induction, rather than establishing registration as an independent entity).

349. See *id.* at 66 (“The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court.”).

In *Rostker*, the Court reaffirmed its lack of competence in the area of military affairs.³⁵⁰ The Court found that the military was best suited to make military decisions, subject to the control of elected officials.³⁵¹ But, in doing so, the Court deferred to Congress, which overruled the DoD position in support of the registration of women.³⁵² The Court justified its deference by asserting that the DoD supported gender-neutral registration in the interest of equity only.³⁵³ Such a justification can hardly apply now, as DoD's disinterest in draft registration is gender-neutral.³⁵⁴ Regarding military affairs, the Court may be justified in deferring to the competence of the military, but the *Rostker* Court offered no evidence that Congress possessed comparably superior competence in military affairs.³⁵⁵ The current members of the Supreme Court possess *en toto* military experience comparable to that of the members of Congress.³⁵⁶

In 1998, the Twenty-first Century National Security Study Group, an independent organization established by the Department of Defense,³⁵⁷ undertook a series of studies on U.S. approaches to international and defense issues.³⁵⁸ One of the Group's most pointed criticisms was directed toward the members of Congress.³⁵⁹ In general, the Group noted the lack of knowledge and interest on the

350. See *id.* at 65 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (stating that "it is difficult to conceive of an area of governmental activity in which the courts have less competence.")).

351. *Id.* at 65-66.

352. See *id.* at 63 (citing military testimony, which asserted that woman registrants would increase military flexibility).

353. *Id.* at 73.

354. See *supra* notes 277-84 and accompanying text (describing a DoD report, which indicates the general belief that registration is simply not that important).

355. See *Rostker*, 453 U.S. at 65-66 (characterizing decisions regarding the military as best made by professional military, though subject to civilian control).

356. Compare Thomas E. Ricks, *The Widening Gap Between the Military and Society*, ATLANTIC MONTHLY, July 1997, at <http://www.theatlantic.com/issues/97jul/milisoc.htm> (asserting that congressional disinterest in military affairs can be tied to the fact that only one-third of the members of Congress have military experience versus two-thirds during Vietnam) (on file with author), with *The Justices of the Supreme Court*, at <http://a257.g.akamaitech.net/7/2572422/14mar20010800/www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Sept. 7, 2002) (noting that Chief Justice Rehnquist and Justice Stevens are military veterans and that Justice Kennedy served in the California Army National Guard) (on file with author). See also generally THE SUPREME COURT JUSTICES 446-505 (Clare Cushman ed., 1995) (reporting that seven of the nine justices that served on the *Rostker* court had military experience).

357. See *The National Security Study Charter Update*, at http://www.nssg.gov/About_Us/Charter/charter.htm (last visited Sept. 9, 2002) (stating that the Group is supported by the President, Congress, and DoD) (on file with author).

358. See MILITARY ALMANAC, *supra* note 24, at 5 (calling the reports collectively an "action plan" for the new Administration and the Congress).

359. The 21st Century National Security Study Group, PHASE III REPORT: ROADMAP FOR NATIONAL SECURITY: IMPERATIVE FOR CHANGE, at 110-115 (2001), available at <http://www.nssg.gov/PhaseIIIFR.pdf> (last visited July 20, 2002).

part of Congress regarding foreign and defense affairs,³⁶⁰ and the report urged congressional leaders to take steps to educate newer members.³⁶¹ It also urged that Congress become more open to outside consultation on complex defense issues.³⁶² At present, Congress possesses no special competence with which to contradict the military view that registration is not a national security issue.³⁶³ Its decision to maintain gender-specific registration should be subject to heightened scrutiny.³⁶⁴

In reexamining its deference to Congress on the issue of registration, today's Court would have to consider whether legitimate national security interests are keeping registration in place, or whether it is being maintained for other reasons.³⁶⁵ When President Carter called for the reinstatement of the draft, he declared that its purpose was to "demonstrate [America's] resolve as a nation."³⁶⁶ Former Carter military advisor Richard Danzig has asserted that he and his colleagues saw the registration issue as purely symbolic.³⁶⁷ Within the Carter Administration, it was assumed that a drafted force could not be rapidly mobilized in an emergency and registration information would quickly become outdated.³⁶⁸

Critics have asserted that registration was and remains nothing more than a symbolic gesture, which fails even on that minimal level.³⁶⁹ Prior to becoming President, Ronald Reagan pointed out

360. *Id.*

361. *Id.* at 111.

362. *Id.* at 114.

363. No member of Congress has persuasively contradicted the military position on registration and the draft, and in the face of the detailed arguments from the military and registration critics against registration, congressional arguments appear incredibly uninformed. *See, e.g.,* Sig Christenson, *Officials Speak Against Move to Close Selective Service System*, SAN ANTONIO EXPRESS-NEWS, July 30, 1999, at B1 (quoting several members of Congress from Texas who assert that eliminating registration would send a message that the United States is not concerned about readiness and undermine recruiting by creating a false sense of security). Such assertions fail to answer the military charge that registration does not contribute to readiness, nor do they explain why a registration that does not contribute to readiness is not itself contributing to a false sense of security.

364. *See supra* notes 121-33 and accompanying (analyzing the deference accorded Congress in *Rostker* which undermined the heightened scrutiny applied).

365. *See, e.g., Review, supra* note 140, at iii (citing several symbolic values that are attached to registration while discounting any significant military value).

366. Kohn, *supra* note 203, at 101.

367. Kerber, *supra* note 83, at 117 (citing an interview with Danzig).

368. *Id.*

369. *See* Jacobs & McNamara, *supra* note 44, at 363-64 (elaborating on the symbolism of President Carter's registration proposal as one of several measures, including the U.S.-led boycott of the 1980 Olympic Games in Moscow and a U.S. embargo on grain and technology sales to the Soviet Union, which were implemented in response to the Soviet Union's invasion of Afghanistan). The boycott was intended to embarrass the Soviets, and the embargo to penalize them. *Id.* at 364. However, it has never been quite clear exactly what draft registration was

that advanced weaponry and an experienced standing army and reserves would symbolize U.S. resolve much better than a registrant pool.³⁷⁰ The controversy over registration in fact might have been counterproductive, indicating to the Soviets that conscription would be met by even greater resistance.³⁷¹ Registration critic Martin Anderson, a former advisor to President Nixon, referred to Carter's message to the Soviet Union by reinstating registration as "a weak and possibly dangerous response."³⁷² Anderson assumed that the Soviets would better understand concrete steps toward a stronger military and would see through the symbolic gesture, which, in turn, provided a false sense of security to Americans.³⁷³ It appears that there was a common understanding that the introduction of draft registration was not actually intended to aid in military defense.³⁷⁴ The *Rostker* Court made no assertion that registration as a symbol alone sufficiently satisfies the definition of national security interest.³⁷⁵

3. *The political motivations behind registration decisions*

Considering the current state of the U.S. armed forces, U.S. military alliances, and the threat posed by potential U.S. enemies, military actions that might lead to the imposition of a draft are highly implausible.³⁷⁶ Several times since the revival of registration, recruiting shortfalls or grave world events have resulted in scattered

intended to do, since registration alone does not improve the military. *Id.*; see also Bandow, *supra* note 32, at D3 (challenging President Clinton's statement that the suspension of draft registration would send the wrong message to U.S. enemies such as North Korea and Iraq, asserting that such countries pay no attention to the status of draft registration, focusing instead on tangible U.S. foreign policy gestures).

370. Bandow, *supra* note 317.

371. Jacobs & McNamara, *supra* note 44, at 365.

372. Anderson, *supra* note 217, at 12.

373. *Id.*; see also Jacobs & McNamara, *supra* note 44, at 364-65 (asserting that registration was likely unnecessary to convince the Soviets that the United States would both defend its interests around the world and draft an army should war require it).

374. See Jacobs & McNamara, *supra* note 44, at 363 (indicating that the symbolic purpose filled a vacuum left by the failure to show registration's actual contribution to military preparedness).

375. *Rostker v. Goldberg*, 453 U.S. 57, 75 (1981) (linking the exclusion of women from registration specifically to the drafting of registrants for combat); see John Lancaster, *No More Draft? Pentagon Concedes Selective Service System May Not Be Necessary*, WASH. POST, Mar. 4, 1994, at A5 (characterizing a 1994 DoD report as extolling the symbolic value of peacetime registration even as the report concedes that registration has little foreseeable defense value).

376. See Weiser, *supra* note 284 (citing a report produced by the Army War College which concluded that the only scenario in which a draft might be used is if the United States simultaneously undertakes multiple military campaigns around the world, a scenario which the report characterized as extremely unlikely). Further, Lt. Col. Brian Byrne, a Marine Corps manpower official, commented that "the draft is something we've given every little consideration to." *Id.*

calls for the revival of the draft.³⁷⁷ These events notwithstanding, since 1981, no presidential administration has ever seriously considered a draft, though all have supported registration.³⁷⁸

The imposition of a draft in support of a military operation would pose serious political consequences for an administration and for members of Congress.³⁷⁹ It appears that registration continues because it has sufficient support in Congress.³⁸⁰ Although registration affects many,³⁸¹ it is largely complied with and imposes penalties for noncompliance on only a small fraction of the group it affects.³⁸² After thirty years without a draft, compliance likely would be far lower with respect to a draft than compliance with mere registration.³⁸³ Congressional support for a draft likely would be weak because the draft has far reaching effects for entire families,³⁸⁴ particularly for those called to serve.³⁸⁵ General opposition to a draft might be

377. See Graham, *supra* note 237, at A3 (reporting that military recruiting shortfalls have inspired some within the military to consider reviving the draft, even as they acknowledge that a revival is unlikely).

378. See Badow, *supra* note 10 (reviewing the various reasons for supporting draft registration offered by every administration from President Carter to President Clinton). Since its revival, every administration has publicly supported registration. *Id.*

379. See McCallister, *supra* note 4, at A23 (reporting that widespread political resistance resulted when the United States previously instituted a draft subsequent to entering a war).

380. See *infra* note 389 and accompanying text (documenting Selective Service survival through a 1993 congressional vote that threatened its existence).

381. See 2001 ANNUAL REPORT, *supra* note 260, at back end page (indicating that 2,946,115 men reached the age of 18 and registered during the 2001 fiscal year).

382. See *id.* at 8 (noting that approximately ten percent of those obligated to register do not, and suggesting that lack of awareness of the requirement is the cause of most non-compliance); see also *supra* note 298 and accompanying text (reporting that prosecutions for failure to register dropped significantly after the trial of several men who failed to register resulted in declining registration).

383. See Cassio Furtado, *Poll: Many College Students Would Dodge Military Draft. Understanding Seen as Better Curb on Terror*, DETROIT FREE PRESS, June 21, 2002, at 7A (printing results of a poll showing thirty-seven percent of male college students surveyed said they would try to evade a draft if it were called today). This statistic suggests that many young men may not connect registration with any actual military service obligation. Furthermore, a theoretical thirty-seven percent draft non-compliance rate would shift the burden onto those complying, eroding the fairness of a draft that even Selective Service admits would be inherently unfair. See *Draft Wouldn't Be Fair*, *supra* note 272 (suggesting that a likely limited draft drawing from a large pool of registrants unfairly places the burden of service on a small, random group).

384. See Rumsfeld, *supra* note 33, at 39-40 (acknowledging the burden of disruption placed on families of service personnel, particularly those called up from the reserves). See also *Detenber v. Turnage*, 701 F.2d 233, 234-35 (noting that registration is much less a physical intrusion and restriction than that imposed by the draft).

385. See Carl Weiser, *Does Anybody Feel a Draft? Some Calling For Return to Required Military Duty*, TULSA WORLD, Jan. 27, 2002, at A-2 (noting one poll that indicated seventy-seven percent support among the general public for a military draft, but reporting another poll that indicated two-thirds of draft age college students who

further bolstered by the current draft laws, which dispense with the complex and flexible system of deferments that former drafts contained.³⁸⁶ If a draft today were as equitable as the current draft laws mandate, influential opposition might come from well-connected individuals who were not able to avoid service as they did in the Vietnam War.³⁸⁷

After the Persian Gulf War, Congress attempted to end registration multiple times.³⁸⁸ These efforts were characterized by bipartisan support³⁸⁹ and the argument that registration's expense is not

might have to actually serve would oppose a military draft). *See also supra* note 208 and accompanying text (discussing the wide scope and influence of the anti-draft movement during the Vietnam War, particularly the opposition of young men subject to the draft, even though such views were always minority views).

386. *See* 50 U.S.C. app. § 456 (2000) (outlining deferment and exemptions from training and service); 50 U.S.C. app. § 456(h)(i)(2) (stating that “[a]ny person who while satisfactorily pursuing a full-time course of instruction at a college [or] university . . . shall . . . have his induction [into the draft] postponed (A) until the end of the semester or term, or academic year in the case of his last academic year, or (B) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier”); *see also* Selective Service System, *How the Draft has Changed Since Vietnam*, at <http://www.sss.gov/viet.htm> (revised Apr. 22, 1999) (describing the elimination of the Vietnam era deferment, which required only proof that a man was a full time student, in favor of deferment that allowed only the completion of the current semester) (on file with author).

387. *See Military Service Records*, WASH. POST, Oct. 13, 1992, at A19 (stating that former Vice President Dan Quayle, former President Bill Clinton, former Speaker of the House Newt Gingrich, and President George W. Bush all avoided active military service during the Vietnam War using means that would not be available today); *see also* Howard Schneider, *Dyson Was Against The Vietnam War; Record Shows He Was Conscientious Objector*, WASH. POST, Aug. 29, 1990, at D1 (revealing that Maryland Congressman Roy P. Dyson, an ardent advocate of a strong U.S. military, after four years of student deferment, claimed conscientious objector status during the Vietnam War). Conscientious objector status is reserved for those individuals, by reason of “religious training and belief,” conscientiously oppose war in any form. *See* 50 U.S.C. app. § 456(j) (2000). This excludes political, sociological or philosophical views and personal moral codes. *Id.*; *see generally* Jim Lobe, *Chicken Hawks as Cheerleaders*, FOREIGN POL’Y IN FOCUS, Sept. 6, 2002, at http://www.presentdanger.org/commentary/2002/0209chickenhawks_body.html (documenting the lack of military experience among Bush Administration officials who are advocating war with Iraq, including Vice-President Richard Cheney, National Security Council Advisor Elliot Abrams, and Chairman of the Secretary of Defense’s Policy Board Richard Perle) (on file with author).

388. *See* 145 Cong. Rec. H7954-55 (daily ed. Sept. 8, 1999) (reporting a 207-202 House votes to discontinue funding for the Selective Service); 139 Cong. Rec. H4115 (daily ed. June 28, 1993) (indicating a 232-187 House Vote to shut down the Selective Service); 139 Cong. Rec. S12103 (daily ed. Sept. 26, 1993) (noting the Senate’s vote to keep the Selective Service alive); *see also* Guy Gugliotta, *Capital Notebook: Now, Selective Service Is Receiving The Notice*, WASH. POST, Aug. 17, 1993, at A19 (reporting a 207-202 House vote to discontinue funding for the Selective Service); *Military Draft in Jeopardy: GOP Threatens to Abolish Agency*, FORT. LAUDERDALE SUN-SENTINEL, July 16, 1995, at 8A (reporting a move headed by Rep. Newt Gingrich and Rep. Dick Armey to shut down the Selective Service).

389. *See, e.g.*, J. Craig Crawford, *Washington Letter: Not Much Noise in Battle to Save Selective Service*, ORLANDO SENTINEL, July 11, 1993, at A-10 (noting that a House bill to end Selective Service found support and opposition in like numbers of Democrats

justified by the stated purpose served.³⁹⁰ While congressional efforts to end Selective Service ultimately failed, only a narrow margin kept Selective Service afloat in each instance.³⁹¹

Opposition to registration may present little political risk for left-liberal or right-libertarian incumbents.³⁹² Such non-centrist views easily accommodate such opposition, and have already been endorsed by their supporters.³⁹³ However, the patriotic overtones that frequently intertwine with the issue of registration may prove more problematic to centrist Democrats and Republicans, for whom the wrong choice might become an issue during a reelection campaign.³⁹⁴ With the 108th Congress possessing no great competence regarding military affairs,³⁹⁵ a bare majority keeps Selective Service alive.³⁹⁶ It seems then that members of Congress must choose between maintaining registration, regardless of its national defense value, and

and Republicans).

390. *See id.* (reporting Congresswoman Patricia Schroeder's characterization of Selective Service as a "relic" in voting against appropriating money for it); *see also* Gugliotta, *supra* note 388, at A19 (noting Rep. Fortney Stark's comment: "Why would we [Congress] spend \$30 million a year to a list of names of young men who turn 18? It eludes me.").

391. *See, e.g.,* Kenneth J. Cooper, *The People's Business: Government, Crime and Courts. How Georgians Voted in Congress. Key Senate Votes*, ATLANTA CONST., Sept. 26, 1993, at G3 (reporting a 58-41 Senate vote to maintain Selective Service following a House vote to close the agency).

392. *See supra* note 208 and accompanying text (chronicling the rise of opposition to the draft during the Vietnam War, beginning with the Libertarian right and the radical left of the political spectrum, and only gradually gaining support from the political mainstream).

393. Texas Republican Representative Ron Paul, a chief sponsor of anti-registration legislation, is a former Libertarian Party presidential candidate who received the highest rating of any House member from the Republican Liberty Party. Republican Liberty Party, *Liberty Index*, at http://www.republicanliberty.org/libdex/LI2001_Over.htm (last visited Oct. 19, 2002) (on file with author). California Democratic Representative Pete Stark, another frequent sponsor of anti-registration legislation, was one of three House members from that state to receive an "A" or higher rating from California Peace Action, out of a total delegation of fifty-two. California Peace Action, 2001 Congressional Report Cards, at <http://www.californiapeaceaction.org/resources/documents/reportcards2001/reportcards.htm> (updated Jan. 24, 2003) (on file with author).

394. *See* Helan Dewar, *War on Terror Colors The Battle for Congress: Rivals Make Use of 'Nonpartisan' Issue*, WASH. POST, July 5, 2002, at A1, A4 (reporting a prevalent strategy, used by Republican political candidates in 2002, to examine defense-related votes of Democratic rivals and attempt to question the patriotism of the Democrat based upon the voting record); *see also* Brian Faler, *Osama, Saddam and Max? Cleland Cries Foul*, WASH. POST, Oct. 14, 2002, at A4 (reporting a negative ad campaign used by an opponent of Georgia Senator Max Cleland, which portrayed Cleland's votes against certain aspects of President Bush's Homeland security program as indicative of Cleland's lack of courage in the face of terrorism). Cleland is a decorated veteran who lost an arm and both legs during the Vietnam War. *Id.*

395. *See supra* notes 359-64 and accompanying text (characterizing Congress as an institution as lacking knowledge and interest in military affairs).

396. *See* Kenneth J. Cooper, *supra* note 391, at G3 and accompanying text (noting that frequently only one House of Congress favors registration).

allowing a vote against registration to potentially become a campaign issue.³⁹⁷ The Supreme Court should not defer to the wisdom of this slim majority, whose judgment is guided by the influence of non-defense interests, such as reelection.³⁹⁸

VI. THE FUTURE OF DRAFT REGISTRATION

By October, 2002, the United States indicated its intention to again go to war with Iraq.³⁹⁹ This prospect is coupled with renewed warnings of terrorist attacks against the United States.⁴⁰⁰ In the immediate aftermath of September 11th, Secretary Rumsfeld was noncommittal about whether a military draft was indeed in the future.⁴⁰¹ More recently, Rumsfeld asserted that there was “not a chance” of a military draft being reinstated.⁴⁰² Despite reports that Rumsfeld has been at odds with the armed forces,⁴⁰³ the conflicts center on greater civilian control over military functions than over personnel issues.⁴⁰⁴

A resolution calling for the elimination of Selective Service was been introduced by Reps. Ron Paul, Cynthia McKinney, and Pete

397. See Bandow, *supra* note 299 (construing President Clinton’s support of registration as a political choice directly linked to Clinton’s own draft evasion).

398. See *Rostker v. Goldberg*, 453 U.S. 57, 65-66 (1981) (acknowledging legislative and executive branch oversight of military affairs, while asserting that the military is best informed to make judgments on military affairs). The *Rostker* Court added that Congress, although accorded great deference in its military decisions, is nonetheless generally subject to the Due Process Clause of the Constitution. *Id.* at 67.

399. See Dana Milbank, *Bush Bids to End Impasse at U.N., Outlines Iraq Plan*, WASH. POST, Oct. 12, 2002, at A1, A11 (noting President Bush’s increased confidence after Congress overwhelmingly approved the use of force in Iraq).

400. See Dana Priest & Susan Schmidt, *Al Qaeda Threat Has Increased, Tenet Says: Panel Told Recent Attacks Evoke Pre-9/11 Dangers*, WASH. POST, Oct. 18, 2002, at A1 (indicating CIA Director George Tenet’s view that a string of terrorist attacks around the world could be a prelude to more attacks on U.S. soil).

401. See Department of Defense, *DoD News Briefing—Secretary Rumsfeld*, at http://www.defenselink.mil/news/Sep2001/t09252001_t0925sd.html (Sept. 25, 2001) (characterizing a draft as “not something that we’ve addressed, and . . . not something that is immediately before us. There’s no question but we may have to make additional call-ups under the emergency authority.”) (on file with author). Rumsfeld added that he did not foresee a draft taking place. *Id.*

402. See Selective Service System, *Statement: Status of the SSS After the September 11th Terrorist Attacks on the U.S.*, at <http://www.sss.gov/statement.htm> (revised Sept. 30, 2002) (posting Rumsfeld’s September 18, 2002 assertion that a draft was not needed because the military attracts and retains sufficient personnel) (on file with author).

403. See Vernon Loeb & Thomas E. Ricks, *Rumsfeld’s Style, Goals Strain Ties in Pentagon: ‘Transformation’ Effort Spawns Issues of Control*, WASH. POST, Oct. 16, 2002, at A10 (reporting tension between Rumsfeld and the branches of the armed forces, including a conflict with the Army over the maintenance of large traditional ground forces, which the Army favors, versus Rumsfeld’s desire to further modernize the armed forces to an “information age” force for the 21st Century).

404. *Id.* (reporting the dissatisfaction between the Secretaries of the Army, Navy, and Air Force, resulting from a perceived lack of autonomy and input on major decision making).

Stark in 2002.⁴⁰⁵ The resolution noted that the armed services have had no trouble filling their ranks on the basis of voluntary service.⁴⁰⁶ The resolution even noted with a touch of irony that Russia is eliminating its military draft.⁴⁰⁷ The resolution was referred to the Committee on Armed Services,⁴⁰⁸ and will not likely go far in the current wartime atmosphere.⁴⁰⁹

In contrast, Rep. Nick Smith introduced the Universal Military Training Act of 2001.⁴¹⁰ This bill demonstrates the lack of military knowledge possessed by some in Congress.⁴¹¹ The bill calls for all men between the ages of eighteen and twenty-two to be conscripted or volunteer for military training for a period of six months to one year, essentially requiring all men to train for the reserves.⁴¹² The bill graciously allows women to volunteer for such training.⁴¹³ Peace activists are not amused by the symbolism of such a draconian proposal, asserting that it, like draft registration, is an advertisement for war.⁴¹⁴

While Congress stands deadlocked, those subject to registration face an ever greater array of sanctions for non-compliance, including greater difficulty obtaining a driver's license.⁴¹⁵ The denial of a driver's license may actually punish individuals such as immigrants, a group that Selective Service itself acknowledges may not register simply because they do not understand the requirement.⁴¹⁶

405. H.R. Con. Res. 368, 107th Cong. (2002).

406. *Id.* at 2.

407. *Id.*

408. *Id.* at 1.

409. *See supra* note 394 and accompanying text (noting the danger that congressional votes against military legislation may be cast by political opponents as unpatriotic).

410. H.R. 3598, 107th Cong. (2001).

411. *See supra* notes 355-63 and accompanying text (analyzing the presumed abilities of Congress to oversee military affairs).

412. Universal Military Training Act of 2001, H.R. 3598, 107th Cong. § 4(a) (2001).

413. *Id.* § 3(b).

414. *See* Mario Hardy Ramirez, *Central Committee for Conscientious Objectors Position Paper: The Universal Military Training and Service Act of 2001—H.R. 3598*, at <http://www.objector.org/positionpaper.html> (last visited Oct. 15, 2002) (conceding that the bill will not likely pass but expressing alarm that it could even be introduced) (on file with author). The Position Paper quotes J.E. McNeil, director of the Center for Conscience and War, as asserting that such a proposal has no defense purpose and is an indoctrination into militarism. *Id.*

415. *See* Selective Service System, *State/Commonwealth Legislation*, at <http://www.sss.gov/FSstateleg.htm> (last visited July 21, 2002) (examining state legislation that supports the Selective Service registration requirements) (on file with author). A majority of states have conditioned the receipt of a driver's license and financial aid on registration). *Id.*

416. *See infra* note 420 and accompanying text (asserting that non-registration sanctions disproportionately affect low-income and immigrant men who fail to register in disproportionate numbers).

Additionally, male immigrants who fail to register prior to the age of twenty-six are ineligible for citizenship.⁴¹⁷ Members of this group would be among the immediate beneficiaries should a court rule the current draft registration unconstitutional and registration and sanctions cease.⁴¹⁸

CONCLUSION

Selective Service registration's failure to contribute to national defense begs the question whether such registration would survive a contemporary constitutional attack.⁴¹⁹ Prospects for a military draft are remote, and those negatively affected by their failure to register are a largely underrepresented, underinformed and silent minority.⁴²⁰ The issue of draft registration rarely raises widespread concern except during infrequent large-scale military operations,⁴²¹ and even then has not resulted in judicial review or legislative revision of registration.⁴²² Consequently, the possibility that a challenge to registration will make its way to the Supreme Court in the near future may be as remote as the possibility of a military draft itself.⁴²³

417. Selective Service System, *Benefits and Programs Linked to Registration*, at <http://www.sss.gov/FSbenefits.htm> (last visited July 21, 2002) (stating that the U.S. Immigration and Naturalization Service makes registration with Selective Service a prerequisite to U.S. citizenship if the man arrived in the United States before his twenty-sixth birthday) (on file with author).

418. It is possible, however, that a successful challenge to registration might simply uphold a gender neutral registration. See Leslie Ann Rowley, *Gender Discrimination and the Military Selective Service Act: Would the MSSA Pass Constitutional Muster Today?*, 36 DUQ. L. REV. 171, 184 (suggesting that a legal challenge to MSSA today might result in the inclusion of women in registration, rather than the elimination of registration).

419. See *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981) (introducing the decision as examining the discrimination in registration, without comment on the justification for registration).

420. See Selective Service System, FISCAL YEAR 1999 ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES 6 (1999), available at <http://www.sss.gov/PDFs/regisweb.pdf> (last visited July 26, 2002) (quoting Selective Service Director Gil Coronado's comment that the low registration rates among minority and immigrant men may be creating a permanent underclass of persons cut off from a wide range of benefits) (on file with author).

421. See *supra* notes 1-6 and accompanying text (chronicling the public debate about registration that accompanied escalating U.S.-Soviet tensions, the Persian Gulf War, and military actions following September 11, 2001).

422. See *supra* notes 19-20 and accompanying text (discussing the few legal challenges that followed *Rostker* in the 1980s, none since 1985).

423. In light of judicial and legislative reluctance to revise current Selective Service requirements, it may take a wartime draft to force the issue of inequity. See *Background*, *supra* note 296 (alluding to the vastly changed role of women in the military). See generally Fenner, *supra* note 113, at 23-26 (connecting a more gender neutral military obligation with women's attainment of equal voice and citizenship). But see Rowley, *supra* note 418, at 184 (asserting that a legal challenge to MSSA today might result in the inclusion of women in registration, even without a draft, because men and women are much more similarly situated with regard to combat than they

Under *Rostker*, Congress is sheltered by its asserted constitutional power and continues to impose an unfair burden on young men.⁴²⁴ This burden is justified as preparation for a conscription that is unlikely to ever take place and as support to a military that does not want conscripts.⁴²⁵ Further, the ever-widening gap between draft registration and actual military functions undermines the justification for gender discriminations.⁴²⁶ Women and men may or may not be similarly situated with regard to serving in combat, but they are identically situated with regard to registration if there will never be a draft, as appears likely.⁴²⁷ These circumstances differ from those under which *Rostker* was decided, and they call for a reassessment of the standards established.⁴²⁸

Changed circumstances have not altered the continued imposition of an invidious classification, which requires men to register or face penalties if they do not.⁴²⁹ Applying the standards and evidence used

were when *Rostker* was decided). See also *infra* notes 430-33 and accompanying text (detailing changed circumstances regarding numbers and duties of women in the military, as well as the methods of fighting war, that would affect a Supreme Court analysis of registration, as well as Selective Service and DoD acknowledgements that the analysis would necessarily differ from that employed by the *Rostker* court).

424. See *supra* notes 124-33 and accompanying text (analyzing the deference granted to Congress by the *Rostker* Court regarding defense-related decisions).

425. See John Lancaster, *No More Draft? Pentagon Concedes Selective Service System May Not Be Necessary*, WASH. POST, Mar. 4, 1994, at A5 (quoting a DoD report to Congress that asserted "with reduced force levels combined with two decades of successful experience with raising and maintaining a volunteer force, . . . recent victorious wartime experiences, and the quality of active and reserve personnel, it is highly unlikely that we will have to reinstate the draft in the foreseeable future.").

426. See *supra* notes 102-07 and accompanying text (discussing the Court's view that registration was wholly integrated with conscription and induction into the military, primarily for combat duties from which women are prohibited, thus providing a basis for the exclusion of women from registration).

427. The *Rostker* Court rejected the rational relation standard that the government asked it to employ in analyzing the gender discrimination question. 453 U.S. 57, 69-70 (1981). Instead it employed a greatly restricted heightened scrutiny standard, which placed a burden on the complaining party to overcome the presumption that the sexes were differently situated with regard to military service. See *id.* at 94 (Marshall, J., dissenting) (observing that the *Rostker* Court has required appellees to prove that "a gender-neutral classification would substantially advance important government interests," rather than requiring the government to prove the same for gender-based classifications); see also *United States v. Virginia*, 518 U.S. 515, 533 (1996) (asserting that where official classification based on gender is concerned, "the burden of justification is demanding and it rests entirely on the State").

428. The *Rostker* majority invoked scenarios requiring the drafting of large numbers of primarily combat personnel, and reasoned that such a scenario offered only a marginal role for women, which justified excluding them completely. See *supra* notes 111-40 and accompanying text (discussing the shortcomings of that analysis at the time and the greater shortcomings of applying that analysis under current military circumstances).

429. These consequences are not insignificant. Approximately 2,946,115 men were obligated to register during the years 2000-2001. 2001 ANNUAL REPORT, *supra* note 260, at back end page. More than ten percent of them can be expected not to register, based upon current Selective Service statistics. *Id.* at 8. Among the benefits

by the *Rostker* Court, the current Court would have much more difficulty upholding such a classification today.⁴³⁰ Women are a much greater part of the contemporary armed forces.⁴³¹ Furthermore, the armed forces are far less ground-force centered,⁴³² with a higher number of behind-the-lines support staff than at any time in U.S. military history.⁴³³

It is clear that if a draft were somehow needed, there would be a great need for both women and men.⁴³⁴ It is clearer still that the draft does not figure significantly in the future of the U.S. armed forces, and that registration has outlived its original justification.⁴³⁵ Nothing about the makeup of the current Court suggests that registration would be held unconstitutional.⁴³⁶ The world has changed considerably, however, and such a decision would be in step with current U.S. defense needs and with the more enduring U.S. ideals of liberty and equality.

denied non-registrants are federal student loans. *Id.* at 7. The federal government makes available up to \$35,000 in Stafford loans to college students in a full-time four-year program. Dept of Educ., Stafford Loans at <http://www.ed.gov/prog-info/SFA/studentguide/2000-1/staffordlimits.html> (last visited Aug. 9, 2002) (on file with author). If ten percent of the non-registrants in these years alone applied for college loans and were denied, the funds denied would total more than \$10 billion. See also *supra* notes 415-17 and accompanying text (surveying other benefits and privileges denied non-registrants, including drivers licenses and citizenship).

430. See *Backgrounder*, *supra* note 296 (quoting the conclusion of a DoD report that noted that much of the congressional testimony relied upon by the *Rostker* Court would be "inappropriate" to apply today due to the vastly changed circumstances in the military, most particularly regarding the altered role of women).

431. See *supra* notes 254-55 and accompanying text (reporting the steady rise in numbers of women in the military).

432. See CLODFELTER, *supra* note 118, at 238 (placing the percent of U.S. ground troops to its total force at approximately ten percent in 1967, down from approximately forty percent in World War II).

433. See *id.* at 238-39 (attributing the shifting ratio of support personnel to total personnel in U.S. military operations both to the demands of modern weaponry and to the comforts required by the modern soldier). See also *supra* notes 254-55 and accompanying text (discussing the growth in percentage of jobs in the military open to women, which is now approaching ninety percent, an indication of the percentage of jobs that are not classified as combat positions).

434. The DoD recognizes this need despite the statutory combat limitation placed on women. See O'Neill, *supra* note 248, at 180 (characterizing the current military practice of accepting and assigning women into the armed forces with far less prejudice than in the past, deploying them where individual preference, abilities, and regulations dictate, with less regard for the differently situated status).

435. See Bandow, *supra* note 10 (asserting that President Carter called for draft registration as a demonstration of strength in the face of Soviet aggression). Today the United States is an unrivaled world power, yet draft registration remains. *Id.*

436. The three dissenting votes in *Rostker*, Justices White, Marshall, and Brennan, are no longer on the Court. The author of the *Rostker* decision, Justice Rehnquist, has since been elevated to Chief Justice.