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Editor’s note: The second part of a two-part review of Military Equal Opportunity policies by Aaron Frishberg will appear in our next issue. The first part appeared in the Winter, 2018, issue of On Watch.

EVENT ANNOUNCEMENT

2019 GI Rights Network Conference

Thursday, May 16 - Sunday, May 19 | Chicago

The national GI Rights Network will hold its 2019 annual conference at the Cenacle Retreat and Conference Center in Chicago. It kicks off with a welcoming session on Thursday evening, and runs through noon on Sunday. Readers who are interested in attending should contact Kathy Gilberd at 619-463-2369 or email(AT)nlgmltf.org for more information and registration forms.

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THE END OF MALE-ONLY DRAFT REGISTRATION

One Federal District Court Judge Says, “Unconstitutional.” What Next?

BY DEBORAH H. KARPATKIN

On February 22, 2019, the legal landscape shifted on male-only draft registration. Senior District Court Judge Gray Miller granted summary judgment for plaintiffs in a case challenging the constitutionality of the Military Selective Service Act (MSSA), ruling that the MSSA violated the Fifth Amendment’s Equal Protection Clause by requiring men, but not women, to register for the draft. Nat’l Coal. for Men v. Selective Service System.¹

The MSSA requires, generally, that “every male person residing in the United States ... between the ages of eighteen and twenty-six” must register with the Selective Service System (SSS).² After registering, men have a continuing obligation to update the SSS with any changes in their address or status. Failure to comply can result in fines or imprisonment, along with denial of education loans and other government benefits.³

This article offers an overview and analysis of the case, some thoughts about what may follow from the decision, and some guidance to those who counsel persons regarding draft registration.

OVERVIEW AND ANALYSIS

A. Background: The Military Selective Service Act, Rostker v. Goldberg, Women in Combat, and the Commission

The Military Selective Service Act.⁴ The draft, and draft registration, was discontinued in 1975. In 1980, President Carter reactivated the draft registration process, prompted by the Soviet armed invasion of Afghanistan. President Carter recommended that Congress amend the MSSA to permit the registration and conscription of women as well as men. Congress rejected that recommendation. It allocated the funds necessary only to register males, and declined to amend the MSSA to permit the registration of women.⁵

Rostker v. Goldberg.⁶ In this 1981 decision, the Supreme Court, by a vote of 6-3, rejected plaintiffs’

⁴ 50 U.S.C. §451 et seq.
⁵ Rostker v. Goldberg at 59-61.
⁶ 453 U.S. 57 (1981). Interestingly, Rostker v. Goldberg’s genesis was in a lawsuit filed in 1971 in the Eastern District of Pennsylvania, Rowland v. Tarr. Plaintiffs alleged, inter alia, that the MSSA impermissibly discriminated between males and females. The Third Circuit did not dismiss the discrimination claim, and remanded to the district court, which concluded that the discrimination claim was substantial enough to warrant convening of a three-judge court, and that plaintiffs had standing to sue. After the three-judge court
claims that the MSSA was unconstitutional because it did not require women to register for the draft. In reaching this decision, the Court’s analysis stressed: (1) the Court’s consistent deference to legislative and executive judgments regarding military affairs, as evident in abundant Supreme Court precedent; and (2) the fact that women could not serve in military combat, along with the testimony of military leaders that registering (and inducting) women who could not serve in combat would burden military effectiveness.

_Rostker_ acknowledged that heightened scrutiny applied to this gender-based classification. The court cited _Craig v. Boren_, requiring that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” The Court rejected as a “facile abstraction” the government’s argument for a special kind of scrutiny applicable to the military, notwithstanding the Court’s deference to military decision-making. But, while noting that “deference does not mean abdication,” the Court unsurprisingly concluded that raising armies is an “important governmental interest.” Because women court not serve in combat roles, and Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops,” the Court concluded that Congress’ reasons for excluding women from draft registration were not “unthinking” or “reflexive.”

Accordingly, the Court concluded that the exclusion of women from draft registration, was “not only sufficiently but closely related to Congress’ purpose in authorizing registration.” Citing _Schlesinger v. Ballard_, the Court determined that “the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in this case.” Because women and men are not similarly situated, the Court found no Due Process Clause violation: “The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.”

Justice White (joined by Justice Brennan), and Justice Marshall (also joined by Justice Brennan) dissented.

_Women in Combat._ In 2013, the Department of Defense officially lifted the ban on women in combat. In 2015, the Department of Defense lifted all gender-based restrictions on military service. But in the 2016 National Defense Reauthorization Act, Congress removed a proposal to

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8 Rostker, at 70, 72.
9 _Rostker_, 453 U.S. at 79.
10 419 U.S. 498 (1975)
11 _Rostker_, 453 U.S. at 79.
12 453 U.S. at 86-113.
extend draft registration for women, instead creating the National Commission on Military, National and Public Service.\textsuperscript{15}

\textbf{The National Commission on Military, National and Public Service (“the Commission”).} The Commission was created “to consider whether Congress should modify or abolish the current draft registration requirements.”\textsuperscript{16} For a detailed report on the work of the Commission, please see the article by Edward Hasbrouck, also in this issue.

\section{The NCFM Decisions}

\textbf{Procedural History.} In 2013, plaintiffs National Coalition for Men\textsuperscript{17} and James Lesmeister (not an NCFM member) brought suit in the Central District of California, arguing that because women may now participate in combat, \textit{Rostker v. Goldberg}, which upheld male-only draft registration, was no longer good law.

After dismissal by the California district court on ripeness grounds, the Ninth Circuit reversed and remanded.\textsuperscript{18} On remand, the California district court granted defendants’ motion to dismiss, concluding that NCFM lacked organizational standing. Because plaintiff Lesmeister did not reside in the Central District of California, the district court determined that venue was improper, and transferred the case to the Southern District of Texas, where Lesmeister resided.

\textbf{The NCFM 2018 Decision: Standing (NCFM I).} In the Southern District of Texas, plaintiffs added Anthony Davis, a member of NCFM, as a plaintiff. By order dated April 6, 2018, the district court denied defendants’ motion to dismiss, concluding that Lesmeister and Davis had standing because they had suffered an injury in fact from MSSA’s male-only registration requirement. The district court defined plaintiffs’ “injury in fact” as arising not from the alleged constitutional violation, but from the burdens of draft registration, and the penalties for non-compliance: “both have a continuing obligation to update the SSS with changes to their information. That obligation, paired with the requirement to register with the SSS, constitutes an injury sufficient for Article III standing.”\textsuperscript{19}

Because Davis was a member of NCFM, and has standing to sue in his own right, the court ruled that NCFM had associational standing.\textsuperscript{20}

\begin{footnotes}
\item[15] NCFM II at *5-*6.
\item[16] NCFM II at *4.
\item[17] According to its website, the National Coalition for Men is a nonprofit organization founded in 1977, to “promote awareness of how gender based expectations limit men legally, socially and psychologically.” Some characterize the organization as anti-feminist. See, e.g., \url{https://www.salon.com/2018/05/07/mentoo-are-guys-the-real-victims-of-sexism-well-no-but-some-want-to-claim-it-anyway/} (last visited February 27, 2019). In its press release regarding the decision in NCFM II, NCFM said: “Forcing only males to register is an aspect of socially institutionalized male disposability and helps reinforce the stereotypes that support discrimination against men in other areas such as child custody, divorce, criminal sentencing, paternity fraud, education, public benefits, domestic violence services, due process rights, genital autonomy, and more.” \url{https://ncfm.org/2019/02/news/selective-service/ncfm-wins-case-against-the-selective-service-system-to-require-women-to-register/} (last visited February 28, 2019)
\item[18] 640 F. App’x (9th Cir. 2016).
\item[20] Id. at *8-9.
\end{footnotes}
The NCFM 2019 Decision: Ripeness, Separation of Powers (NCFM II). The parties made cross-motions for summary judgment. Before reaching the merits of plaintiffs’ equal protection claims, defendants tried to persuade the court to punt, and not reach the merits. Defendants asserted that the case was not ripe for decision until the Commission issues its report, and Congress has the opportunity to act; that the court had to defer to Congress, on separation of powers grounds; and that the court had inherent power and discretion to stay proceedings.

The district court was not persuaded. It held that plaintiffs’ claims were ripe for decision. The Commission was not due to issue its final report until 2020 and no legislation to add women to draft registration was currently pending. The issue was ripe for decision because plaintiffs showed hardship, in having to comply with the MSSA, and in experiencing its discrimination.

The district court rejected defendants’ separation of powers argument, concluding that it was not required to defer to Congress, citing Rostker, and noting that “Congress does not receive ‘blind deference in the area of military affairs.’”

Finally, the district court rejected defendants’ argument that it should exercise its “inherent power” to stay the case. While defendants argued that a decision on the merits would be disruptive of the Commission’s work, possibly render the Commission’s work moot, and possibly require significant expenditures for compliance, the district court was not persuaded, noting that the case could be stayed indefinitely while waiting for Congress to act on the Commission’s recommendations; that the Commission is not obligated to recommend any particular outcomes; and the Congress is not obligated to act the Commission’s recommendations.

Distinguishing Rostker. Turning to the merits, the district court crucially concluded that Rostker was not controlling, because women were no longer barred from combat service. When Rostker was decided, “men and women, because of the combat restriction, [were] simply not similarly situated for purposes of a draft or registration for a draft” and for that reason, the decision to authorize registration only for men was not unconstitutional. “The dispositive fact in Rostker – that women were ineligible for combat – can no longer justify the MSSA’s gender-based discrimination.”

Equal Protection Standard of Review. Defendants argued for a standard of review lower than strict or intermediate scrutiny, arguing that Rostker applied what amounted to rational basis review. The district court rejected this reading of Rostker, and, per Schlesinger v. Ballard, applied the “intermediate scrutiny” required for gender-based discrimination, albeit with deference due to Congress in military matters.

Going on to the equal protection analysis itself, the district court conducted a detailed, carefully reasoned review of the pernicious nature of laws which treat women and men differently, and of the legal authority rendering those laws unconstitutional.

Raising Armies, or Raising Combat Troops? The district court framed its inquiry narrowly: whether “the MSSA’s male-only registration requirement is substantially related to Congress’s important

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21 NCFM II at *8, citing Rostker, 453 U.S. at 67.
22 NCFM II at *9-*11.
23 Rostker, id. at 78-79.
24 NCFM II at *14.
objective of drafting and raising combat troops.” Looking to the text of the National Defense Authorization Act, the district court noted that “Congress still understands the draft, as it currently exists, to be for the ‘mass mobilization of combat troops.’” In doing so, the district court rejected defendants’ argument for the broader objective: “raising and supporting armies.”

Substantially related? The district court rejected defendants’ arguments that the MSSA’s male-only registration requirement is substantially related to drafting and raising combat troops. The district court rejected defendants’ argued distinction between “eligibility” for combat roles, and conscription into combat roles. Quoting Schlesinger: it “smacks of archaic and overbroad generalizations about women’s preferences,” by assuming “that women are significantly more combat-averse than men.”

Administrative Convenience? The district court also rejected defendants’ administrative convenience argument – that by registering only men, Congress sought to avoid administrative problems caused by “women’s different treatment with regard to dependency, hardship, and physical standards.” According to defendants, it would be inefficient to draft thousands of women when only a small percentage would be physically qualified for combat. This argument was not supported by the record, and did not persuade the district court. Instead, quoting Rostker, the district court treated this argument as “an accidental by-product of a traditional way of thinking about females,” commenting that for today’s combat roles, the average women could conceivably be better suited physically than the average man.

Declaratory Judgment, Not Injunction. The district court’s grant of summary judgment to plaintiff amounts to a declaration that the MSSA unconstitutionally excludes women from registration. The district court declined to grant injunctive relief, because, while sought in the complaint, it was not briefed by plaintiffs. As of this writing, no notice of appeal or application for a stay has been filed by the Government, but both can be expected. The significance of this: while male-only draft registration has been declared unconstitutional, but because no injunction was issued, the law is still in effect.

What’s Next?

Appeal? While no notice of appeal has yet been filed, the government will likely appeal to the Fifth Circuit, a reliably friendly venue for the government. The government may seek a stay – though without an injunction, the government may conclude that a stay is not needed.

What’s likely to happen on appeal? The track record isn’t good for plaintiffs who challenge military decision-making on constitutional grounds. Typically, deference to military decision-making defeats an otherwise meritorious constitutional challenge. See, e.g., Goldman v. Weinberger (deference to military decision-making in rejecting First Amendment challenge brought by military doctor barred by military regulations from wearing yarmulke); “[Judicial] deference . . . is at its apogee when legislative

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26 NCFM II at *19, quoting Schlesinger, 419 U.S. at 507-508.
27 NCFM II at *25 and FN 6, quoting Rostker at 74.
28 The Supreme Court is likely to grant a stay, even if plaintiffs prevail on appeal. See, e.g., Log Cabin Republicans v. United States, 562 U.S. 1038(2010)(refusing to vacate 9th Circuit’s stay of decision invalidating military “Don’t Ask Don’t Tell” policy.)
action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged (citing Rostker).”

Does “Deference to Military Decision-Making” Defeat “Archaic and Stereotypical Notions” of Gender Roles? Notwithstanding the long jurisprudential history of deference to military decision-making, the legal and social arguments in favor of gender equality are now well established. In 1981, when Rostker was decided, the Supreme Court could avoid undercutting its growing jurisprudence on gender equality with the convenient fact that women were then excluded from combat. Today, that convenient fact is gone. As Linda Greenhouse points out in a recent New York Times article, the district court’s greatest contribution is its unsparing rejection of the “archaic and stereotypical notions” regarding women and military service. In doing so, the district court traced the jurisprudential arc: from Reed v. Reed (1971) and Frontiero v. Richardson (1973), both argued by then ACLU Women’s Rights Project lawyer Ruth Bader Ginsburg, to Justice O’Connor’s 1982 opinion in Mississippi University for Women v. Hogan, the source of the phrase “archaic and stereotypic notions,” to Justice Ginsburg’s 1996 opinion in United States v. Virginia, declaring unconstitutional Virginia Military Institute’s exclusion of women, because any justification for excluding one sex or the other “must not rely on overbroad generalizations about the different talents, capacities or preferences of males or females.”

Amicus? Not yet. From the docket sheets, no mainstream civil rights organizations have aligned themselves with the NCFM plaintiffs. By contrast, the ACLU represented plaintiffs in Rostker, and many organizations participated as amicus including, inter alia, Men’s Rights Inc., the National Organization for Women; and the Women’s Equity Action League Educational and Legal Defense Fund. That could of course change when the case moves up to the Fifth Circuit, or to the Supreme Court.

GUIDANCE FOR ADVOCATES AND COUNSELORS

Notwithstanding the limitations discussed above, the decision, alongside the Commission’s hearings, brings welcome air and sunshine into the decades-long debate about whether draft registration is necessary, and, if so, whether it should include women as well as men. More 18 year olds, and their parents, may be seeking guidance. Here are some likely questions, and suggested responses.

Do women now have to register for the draft? Are men excused from registering? No, and no. No injunctive relief was granted, so the males-only law is still in effect. Mandating registration for

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31 404 U.S. 71 (1971)
32 411 U.S. 677 (1973)
35 Rostker, 452 U.S. at 58
women would require new law.\textsuperscript{36}

**What about collateral legal consequences for non-registrants?** In *Selective Service System v. Minnesota Public Interest Research Group*, \textsuperscript{37} the Supreme Court rejected plaintiffs’ challenge to the MSSA’s denial of federal educational financial assistance as a non-registration penalty, concluding that the penalties did not function as an unlawful bill of attainder, and did not violate the privilege against self-incrimination.\textsuperscript{38} This is still good law. However, the NCFM decision may provide a new legal basis for challenge to these collateral consequences. If male-only draft is unconstitutional, does that render the collateral consequences of non-registration also unconstitutional? The Center on Conscience & War offers additional guidance on the legal consequences faced by non-registrants.\textsuperscript{39}

**Does this Decision Matter?** Yes! Courts are not the only arbiters of the law. Congress counts. People count. Even if the Fifth Circuit (or the Supreme Court) upholds a male-only draft, the public may feel otherwise. If nothing else, the NCFM decision offers a roadmap for why any draft registration scheme should treat men and women equally. In 2020, after the Commission finishes its report, Congress will have an opportunity to act. Some will advocate for no registration at all, or for a registration scheme that treats men and women equally. Other perniciously unfair military policies – for example, DADT, or the rule barring yarmulkes in air force uniforms – eventually yielded to changes in the law. As some have suggested, draft registration for women, if legally required, but so politically unpalatable that Congress may prefer to have no draft at all. As Linda Greenhouse observes, “Where the government’s interest actually lies, though, is far from clear. The military has no appetite for reinstating a draft, which ended in 1973. Women now make up 16 percent of the enlisted forces and 18 percent of the officer corps. The culture wars have moved on to other targets.”\textsuperscript{40}

**Conclusions**

First, the district court decision provides a roadmap for legal re-consideration of the current male-only draft registration process: it frames *Rostker* as legally obsolete because it is tied factually to women’s ineligibility for combat. Second, the district court decision provides a roadmap for advocates to challenge the current male-only draft registration process. Finally, the district court decision provides some support for those who oppose any form of draft registration. More may become clear as NCFM moves forward on appeal, and as the Commission continues, and concludes, its work.

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\textsuperscript{37} 468 U.S. 841 (1984).

\textsuperscript{38} These laws, commonly called “Solomon” laws after the member of Congress who first introduced them, mandated non-registrants be denied college federal financial aid; federal job training; medical student financial aid; employment with federal executive agencies; and U.S. Citizenship to immigrants. [http://www.centeronconscience.org/co/conscientious-objection-and-the-draft/320-selective-service-registration-coercion-of-conscience.html](http://www.centeronconscience.org/co/conscientious-objection-and-the-draft/320-selective-service-registration-coercion-of-conscience.html) (last visited February 27, 2019)

\textsuperscript{39} Id.

\textsuperscript{40} “Why R.B.G. Matters,” by Linda Greenhouse, New York Times 2/28/19, [https://nyti.ms/2NAnvhI](https://nyti.ms/2NAnvhI)
“A MODERN-DAY DRAFT, IF MARKETED CAREFULLY AND CLEVERLY …”

A preview of what’s ahead for the Selective Service System

**BY EDWARD HASBROUCK**

A modern-day draft, if marketed carefully and cleverly, could foster patriotism via the investment of every family in the nation. A greater involvement of the population to include National (nonmilitary) Service could reach every social demographic within the U.S.

The comments above were included in the recommendations from the Selective Service System made to the National Commission on Military, National, and Public Service (NCMNPS). This report was sent to the NCMNPS in December 2017, but wasn’t made public until February 2019, in response to my FOIA requests and after the conclusion of the first year of nationwide public events and collection of written public comments by the NCMNPS and the issuance of an Interim Report by the NCMNPS last month.

There’s some, but only minimal, acknowledgement in the Selective Service System report of opposition to conscription. But dissent is conceptualized as “protest” (complaint) rather than as resistance (direct action) -- a political, religious, or moral, rather than a practical, impediment to the draft:

Historically, involuntary induction into the Armed Forces has been controversial, has initiated public dissent and protest.... Low registration compliance rates may reflect elements of society that do not have an incentive to serve, or exposure to the value of National or public service. Although many young men fail to register because they are unaware of the requirement (high school dropouts, immigrants, isolated communities), some populations and communities may be averse to service by religious conviction, moral perspective, or social pressures.

There’s no mention at all in the Selective Service System report of the current decades-old Department of Justice policy of nonenforcement of the criminal penalties for willful refusal to register for the draft. But there is an implicit admission that the low level of compliance, coupled with the lack of effective (or feasible) criminal penalties, would create the basis for challenges to the fairness of any draft based on the current incomplete and inaccurate registration database.

In an exercise in wishful thinking, however, the Selective Service System fantasizes that this could be addressed by “careful and clever” marketing -- as though the reluctance of young men to kill and die on the government’s command could be turned around by better targeted advertising (“outreach”):

In order to ensure a fair and equitable draft in a national emergency, it is imperative that as close to 100% of eligible men are in fact registered for Selective Service. One change that would be productive could be a widely expanded, interagency-driven national outreach that addresses all of society (registrants and influencers) with particular attention on a broad array of ‘At risk’ youth, undocumented persons, and elements of society that are not impacted or influenced by automatic registration processes (Driver’s License Legislation,
Alaska Permanent fund, federal employment etc.) A fair and equitable induction process through a lottery system requires full participation by the nation’s eligible citizens....

Registration is the law; the nation should back this up by investing in citizenship activities, to include registration for Selective Service. There should be a consequence, other than loss of some federal benefits, for failure to register. That requires an investment in outreach.

This report and recommendations from the Selective Service System were submitted to the NCMNPS in December 2017, as part of a package of reports from Cabinet departments and independent agencies required by the law that established the NCMNPS during the lame-duck Congressional session after the 2016 elections. The section from the Selective Service System was inexplicably missing from the version of the PDF file containing all the other agencies’ reports initially released by the NCMNPS in response to my FOIA requests, although it was listed in the table of contents.

After I pointed out the unexplained omission, and requested that the NCMNPS conduct an additional search specifically for the Selective Service System report, a replacement version of the compilation of reports created on 31 January 2019 and including the previously missing pages from the Selective Service System was quietly posted this week.

I’m continuing to pursue the other records still not disclosed in response to my FOIA requests to the NCMNPS. Most recently, the NCMNPS released a PowerPoint presentation (PDF version) given to the members of the NCMNPS during their visit to the Selective Service System data center at Naval Station Great Lakes, North Chicago, IL, on 29 June 2018. It gives more detail than has been available previously concerning the sources of the current Selective Service database of registrants for the draft.

The NCMNPS was created in 2016 to study and report to Congress and the President on whether registration with the Selective Service System for military conscription (“the draft”) should be ended, extended to young women as well as young men, extended to older women and men with skills in special demand by the military (in health care, computer science, STEM, foreign languages, etc.), or replaced with something else such as compulsory “national service” with both civilian and military options.

I’ve been following the NCMNPS as closely as its penchant for secrecy has allowed. I attended four of its public events last year (in Boston, Nashua, Denver, and Los Angeles), possibly more than anyone else except the Commission and its staff and contractors; submitted detailed written testimony and personally delivered copies of a petition initiated by Julie Mastrine and signed by more than 25,000 people asking that draft registration be ended rather than extended to women; testified in person at the Commission event in Denver; and obtained and published the most comprehensive collection of records of the Commission’s activities, released in response to my Freedom Of Information Act (FOIA) requests.

Meanwhile, the NCMNPS released its interim report on January 23, 2019. The goal of the interim report is not really to “report” on what the NCMNPS has done, but to set the terms of debate (excluding options like, “Admit that draft registration has failed”), and test the political reaction to some of the proposals the Commission is considering.

The Commission has kept its research plan and all of the results of the research it has conducted and commissioned secret. That means the Commission can cherry-pick which data supports its recommendations, and blackhole contrary data or research reports. As a result, it is impossible to
assess whether the Commission’s research supports its conclusions and recommendations. Little if any weight should be given to conclusions or recommendations based on secret or selectively-released data.

The Commission’s Web site says that, “The Commission is committed to... learn from those who serve and do not serve,” and, “The Commission seeks to learn more about why people serve and why people may choose not to serve.” But all of the panelists invited to speak at the Commission’s public events to date spoke about why they chose to serve. The Commission has yet to invite any testimony from those who choose not to “serve”, as the Commission defines “service”.

The Commission asked for input from the public, but has chosen to withhold, in their entirety, all of the comments submitted by members of the public, even after I requested them under the Freedom Of Information Act. That means the Commission could, and did, decide which comments to cite in its report, and ignore those raising issues or arguments that the Commission doesn’t want to deal with. Until the comments are made public, we won’t know how the public responded to the Commission’s questions. But I suspect that the 25,000 signers of a petition asking Congress to end draft registration rather than extend it to women, which I presented to the Chair of the Commission at its public event in Los Angeles, constitute the majority of the public submissions to the Commission.

Two points of view, in particular, have been elided from the Commission’s selection and summary of public comments: antiwar feminism, and draft resistance as direct action. The Interim Report notes that the Commission heard from those “who believe that physical differences between men and women would make it impractical or even dangerous to conscript women to serve in combat roles” (i.e. anti-feminist opponents of drafting women, some of whom support drafting men), but doesn’t mention the longstanding strand of feminist opposition to war and conscription. And while the Interim Report notes that, “We have heard from both conscientious objectors who oppose war and feel the act of registration condones violence, and from draft resisters who refuse to register, believing conscription is a violation of their rights,” it treats these solely as political or moral objections. There is no acknowledgement that, as I and others have told the Commission, noncompliance poses a practical barrier to conscription. In falsely restating draft resisters’ position as, “They have argued that current law does not offer any acceptable options for Americans who choose not to register,” the Commission appears to be trying to delude itself into believing that if a civilian service “option” was available, we would no longer object to, or resist, a compulsory “national service” scheme. But in this, they are wrong.

The Interim Report says that, “We are considering several possible ways in which universal service, whether mandatory or not, could be implemented for America’s young people.... [W]e are exploring what a program that requires every American to complete a dedicated period of military, national, or public service might look like.” But a mandate applicable only to young people would not be “universal”. The Interim Report betrays the typically profound and unexamined ageism that underlies the assumption that young people, and only young people, can be compelled to “serve” military or other interests defined by older people. The Commission never mentions the historic and continuing role of youth liberation as one of the sources of objection and resistance to age-based conscription.

Despite having been directed by Congress to assess whether compulsory programs including continued or expanded Selective Service registration and possible compulsory national service are “feasible”, the Commission does not appear to have made any effort to assess whether any compulsory program could be enforced, or if so, how and at what cost. The Commission has taken a
“see no evil, hear no evil” approach to issues of compliance, enforcement, and feasibility, as though the government could impose conscription by waving a magic wand. As I had predicted, there is no mention of enforcement in the Commission’s interim report, in any of the reports to the Commission (including the report from the Department of Justice, which is responsible for investigation and prosecution of draft resisters), or in any of the agendas of Commission meetings released to date. The Commission prefers to talk about service rather than coercion. But conscription or compulsory service is a naive fantasy unless it includes a credible enforcement plan and budget endorsed by the Department of Justice.

The Commission will continue to accept written comments from the public and hold formal hearings during 2019, before announcing its final recommendations in March 2020.

The Commission’s first formal hearing, at American University College of Law in Washington, DC, on February 21, 2019, covered “universal service.” Any such system would have to have a compulsory element, and thus an enforcement mechanism, in order to be universal, and the staff memo on issues and policy options to be discussed at this hearing includes the following:

Ideas on how mandatory service could be structured have been proposed many times over the past several decades, with primary considerations including ensuring compliance and effective programming. Punishments or sanctions for failing to meet a service requirement could range from ineligibility for government benefits or employment to fines or imprisonment. Whatever means are in place to encourage compliance, a well-structured mandatory service program would require a system to monitor participation.

According to Commission staff, however, no witnesses were invited to discuss the issues of compliance, enforcement, and feasibility of continued or expanded draft registration or compulsory service at the hearing. So any discussion of resistance to conscription - as distinct from protest or legal options within the system for Conscientious Objectors - did not take place.

The NCMNPS will also hold two days of public hearings on the future of the Selective Service System, military conscription, and compulsory national “service”, including whether draft registration should be ended, extended to women, or modified in other ways, at Gallaudet University in Washington, DC, on Wednesday and Thursday, April 24th and 25th, 2019.

These two days hearings will cover both whether draft registration should be ended or continued, and if it is continued, whether it should be extended to women. Details of the hearing agenda (two panels of invited witness on each day) and a memorandum by the Commission staff summarizing policy options being considered by the Commission will be posted on the Commission’s Web site two weeks before each hearing. The list of invited witnesses will be posted one week in advance of each hearing.

This is the first time since 1980 that any US government agency has held formal hearings at which members of the public can testify about the draft, draft registration, or the Selective Service System.

At a press conference to announce the release of the Commission’s Interim Report, Brig. General Joe Heck, the Chair of the NCMNPS, said, “We are also taking public comment as we go on our hearing tour. We will reserve a portion of that time to collect public comment in person at those hearings.” But only a limited amount of time will be allocated to uninvited witnesses. Witnesses will be selected
by lot from those who have checked in and gotten tickets on site before the start of each hearing. Those witnesses whose tickets are picked will be given two minutes each to speak to the Commission. The venue for the hearings at Gallaudet University on April 24-25, 2019 holds a maximum of 149 people.

I’ll be there, and I hope to see some of you there. Some MLTF and other NLG members submitted comments to the Commission and came to its public events last year. But none of them, so far as I can tell, spoke explicitly of their commitment or that of the MLTF and other lawyers and legal workers to defend anyone prosecuted for resistance to a draft or compulsory “service”. The Commission needs to hear from those who will resist, especially young women who will resist. And it needs to hear from older men and women including NLG/MLTF members who will defend and support resisters in court, in the court of public opinion, and in and out of prison.

Edward Hasbrouck is a legal worker in San Francisco with the Identity Project (PapersPlease.org). He has been a member of the NLG and the MLTF since the early 1980s, when he was an organizer with the National Resistance Committee and co-editor of Resistance News. He publishes a Web site about the draft, draft registration, draft resistance, and the Selective Service System at Resisters.info.

Editor’s note for those reading a hard copy: Hyperlinks in this article can be accessed via the online version on Ed’s blog at https://hasbrouck.org/blog/archives/002334.html. Ed will continue to update this story in subsequent posts, also on that blog.

‘PROACTIVE AND PROTECTIVE’ C.O. REGISTRY SET UP AHEAD OF EXPECTED EXTENSION OF DRAFT REGISTRATION TO WOMEN

- Interfaith church offers free registry for all opposed to war and concerned about military conscription
- The Objector Registry is available at objector.church/register

The first ever Objector Registry offers a declaration of conscience for anyone to assert their moral opposition to war, regardless of age, gender, or religious affiliation. This serves to create a protective record of beliefs and actions with which to oppose a later forced draft.

“How do we help shield our youth, aged 14-25, from forced military conscription? Our experience tells us that our registry is the most effective and practical way to begin to protect them right now,” said Jeff Paterson, Objector Church Director. “While young women are facing a very real and new threat, we want to encourage Americans of all genders and ages to sign up and bet on a better future for themselves and others.”

On January 23rd the National Commission on Military, National, and Public Service released their congressionally mandated Interim Report which noted, “With respect to the Selective Service System,
we are considering options that could: Expand the registration requirement for the Selective Service System to include women [and] identify individuals who possess critical skills the nation might need.”

As all combat roles are now open to women, the men-only registration requirement is now likely unconstitutional, an impetus behind the creation of the Commission.

Every young man living in the US, age 18 through 25, is currently required by law to register for a future draft. Yet there has been no way *until now* for an individual to register their objection to war. In the case of conscription, draft boards evaluate exemption claims of conscientious objectors in large part based on an already documented history of beliefs and actions. The Objector Church’s national registry exists to provide this form of proactive resistance to war and defense of life.

The registry is provided by the Objector Church, an interfaith peace and justice community founded on religious humanism, and Courage to Resist, a project of the church best known for organizing the successful campaign to free whistleblower Chelsea Manning. Objector Church ministers James Branum and Jeff Paterson have assisted hundreds of military service members with conscientious objection guidance since 2007.

*Source: Press release from the Objector Church.*

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**WHEN RESERVISTS LIVE DISTANT FROM THEIR UNIT**

**BY BILL GALVIN AND MARIA SANTELLI**

Staff, Center on Conscience and War

Imagine: you just worked a full week at your civilian job. Friday evening comes, but instead of going home and getting a good night’s rest before drill weekend, you have to get in the car and drive six (or more) hours to drill. The next day, with just a few hours of sleep on the floor of the armory, you are up before the sun to perform two full days of rigorous military training. Sunday night, you get back in the car to head home, exhausted. Your Sergeant pats you on the back and tells you to be sure to drink a couple of Red Bulls and text him when you get home.

This is not safe, and it is not lawful. Yet, every day, the GI Rights Hotline gets multiple calls from Reservists and National Guard members who are being told they must travel excessive distances to drill. Even though someone may have moved hundreds – or even thousands - of miles away from their unit, commanders and non-commissioned officers (NCOs) frequently will not offer the slightest hint of support or relief.

Federal regulations define the “maximum distance a member of a Reserve component may travel involuntarily between residence and drill training site.” For *enlisted members*, that distance is

“A 100-mile radius of the drill site that does not exceed a distance that can be traveled by automobile under average conditions of traffic, weather, and roads within 3 hours. This applies only to those units that normally conduct four drills on 2 consecutive days during the training year, if Government meals and quarters are provided at the base where the unit drills” (32 CFR par. 100.6).
For officers, or for enlisted personnel in units that do not normally drill on 2 consecutive days, the maximum distance is 50 miles, and 1½ hours driving time. For a member commuting between 50 and 100 miles, the unit must provide a place to sleep and meals.

While most folks are assigned to units that are within the commuting distance, people can end up outside of the commuting distance if they change their residence for work, school, or a variety of other personal reasons. Sometimes units relocate or become inactivated. At times, Reserve members will agree to voluntarily travel beyond the maximum commuting distance for various reasons.

Each branch of the military has regulations about maximum commuting distance, and, as usual, Army regulations provide the most detail.

Army Regulation 135-91, which details Reserve participation requirements, defines the “Maximum Involuntary Travel Distance” in paragraph 5-5. The language is virtually identical to the CFR cited above. This regulation also gives good detail on the procedures to follow when an individual soldier relocates their permanent residence. Paragraphs 4-19 through 4-24 instruct the soldier on their responsibilities, with respect to notifying their command of their relocation, and the command on their role in assisting the soldier in their transition. The soldier must notify the unit commander, in writing as soon as they know about the upcoming move, providing their new address when they have it. “[S]oldiers who give notice of relocation will be transferred/reassigned to the area of their new address” (AR 135-91 par. 4-19.b(1)).

The unit commander has the responsibility to help the soldier find a new unit that is within commuting distance of their new location. For those in the Guard, the commander should seek assistance of the appropriate State Adjutant General. For Reservists, the commander should seek help from the Major U.S. Army Reserve Command through the USAR REQUEST System. The gaining unit commander determines whether or not to accept the soldier based upon “vacancy and qualification criteria.” If the transfer has not happened by the time the soldier moves, they are to be granted a 90-day leave of absence while placement in a new unit is arranged. That means that the soldier is not required to be drilling at the old unit or even re-scheduling training (RST - making up missed drills) at a temporary placement near their new home. A soldier also cannot be forced to re-class in order to find permanent placement in a new unit (DODI 1215.13, enclosure 3).

If, following the end of the leave of absence, a new unit has not been found that is within commuting distance, has an opening in the soldier’s MOS and is willing to accept soldier as a transfer, then “[o]n the 95th day . . . the soldier may be reassigned/transferred to the IRR” (AR 135-91, Paragraph 4-24).

The other branches of the military do not provide as many procedural details in their regulations, but the basic policy applies in all branches.

AFI 36-2110, paragraph 8.3 contains the rules for relocation of Air Force reservists, who should be reassigned to the same job they hold prior to moving. And for members of the Air National Guard, “when members change their place of residence... [and] are located outside a reasonable commuting distance of their present unit and not within a reasonable commuting distance of another ANG or Reserve unit, the member may request to be separated or discharged. . .” (AFI 36-3209, paragraph 3.12.3.4.).

For those in the Navy, the procedures are spelled out in MILPERSMAN 1133-062, paragraph 5.d. For the Coast Guard, the guidance is found in COMDTINST M1001.28C.5.C.
For Marine Reservists, the Marine Corps Reserve Administrative Management Manual (MCRAMM), para 4.1.d. spells out the procedure for members who move. The most significant difference for Marines is that they can transfer to units that do not have an opening for their MOS. The Manual actually says, “When there is more than one SMCR unit within reasonable commuting distance, the mandatory participant will be joined to the unit for which the Marine is most closely MOS qualified” (MCRAMM 4.1.d(1)(a)4.).

To be clear: no Reservist can be required to travel more than 100 miles between where they reside and where they are assigned to drill. So if the command has no authority to require someone to travel an excessive distance, they also do not have the authority to charge them with an unauthorized or unexcused absence if they don’t come to drill.

**THE PROBLEM**

Commands routinely charge Reservists with unexcused absences if they refuse or are unable to volunteer to travel the excessive distance. A frequent refrain: “You chose to move. The Army [or Navy, etc.] didn’t make you move. You have a contract and an obligation to this unit, so you must come to drill or you will be marked AWOL or UA (unauthorized absence) for this drill.” Missing nine unexcused absences in a 12-month period gives the command authorization to separate the member, and if the paper trail documenting the excessive distance is not robust, the command could get away with giving the member a characterization of Other Than Honorable (OTH).

Often the Hotline receives calls from someone who has been traveling hundreds of miles to drill for many months because they didn’t know about this regulation and their unit didn’t tell them. When financial hardship (a member is not automatically entitled to reimbursement of travel expenses, such as airfare or rental car) or car trouble causes the member to reach the end of their rope and say they can no longer make the excessively long trip, they are often threatened, ridiculed, and coerced by their command. One notable case was a member who had been transferred for his civilian job from Texas to Indonesia. He was flying back to drill with the Texas National Guard every month, at a personal expense of $2000 per weekend. His unit never once indicated that doing anything but flying back to Texas each month was even an option. After amassing a mountain of personal debt, the soldier finally reached out to the Hotline, and we were able to advise him of the regulation his command was willfully violating.

We also have heard from callers who turned down lucrative job offers or other opportunities after their unit told them they couldn’t move because they were obligated to the local unit.

Unfortunately, simply calling attention to the appropriate regulation does not usually resolve the problem. Commands often fire back, saying “that regulation doesn’t apply to you,” or “that’s an old regulation,” and they become even more entrenched in refusing to follow the regulation. In these cases, a strong paper trail and tenacity on the part of the member are key. A good paper trail would consist of a memo citing the regulation, documenting the circumstances that resulted in the member traveling the excessive distance, and documenting any hardship the travel causes. It can also be helpful for the member to make the direct request for the relief that they seek (e.g., transfer to a closer unit, if possible, or transfer to non-drilling Reserve status – IRR or ING). Sometimes a member can make progress by directly questioning the command on why they believe it is okay for them to try to force the member to travel the excessive distance: “Please provide me with a copy of the regulation that gives you that authority.” No such authority exists. But the commands don’t give up that easily. We have seen commands literally make things up. A California National Guard
commander actually stated that there was a California law that superseded Army regulations and gave the Guard the authority to violate the commuting distance rule. (Spoiler: there is no such law.)

Sometimes we try to talk with the command and reason with them. The approach that has had some success is this: It is clear that the intent of the regulation – and the spirit of the Reserve component - is to allow individuals to have a thriving civilian life, as well as a part-time military career. If the member was in the active duty, the military would control most aspects of their life, including where they live. But when a member joins the Reserves or the National Guard, they understand that they are committed to a weekend a month, a couple weeks a year, and that they are on call, if needed. Otherwise, they live a normal civilian life, in which they may have a family, a job or be in school. Civilian life takes them where it will, and the regulations are written with this understanding.

Frustratingly, reasoning usually doesn’t work, and an Article 138 letter requesting redress or congressional intervention may be required to convince the command that they are required to follow the regulations.

What often happens when the member stops traveling the long distance to drill is that the unit will mark them unexcused (give them U’s). When a Reservist has accumulated eight U’s, the unit is authorized to warn them that they are approaching unsatisfactory status, and at nine U’s, they can be separated. For National Guard members in a handful of aggressive states, members could also face the additional risk of an arrest warrant being issued for unexcused absences. This is not what should happen, and can be prevented with a strong paper trail meticulously documenting the relevant issues and the failure of the command to follow the regulations. It is important to advise Reservists to be proactive in communicating with their commands. Most commands ignore verbal pleas from members, and many will ignore even written documentation, so consistent follow up by the member is critical to ensure a positive outcome. We recommend that correspondence be made in a way that is trackable, such as email or certified mail.

When a member receives notice that they are approaching unsatisfactory participation status for not attending drill, they must respond – hopefully by drawing the command’s attention to the already established documentary paper trail, and increasing it with any new evidence acquired since the last communication. When they eventually get the packet informing them that they are being discharged with an OTH for unsatisfactory participation, among those papers will be a series of rights they may elect as a channel to fight the discharge, the characterization, or both. Those rights include examining the evidence being used against you; entering evidence on your own behalf; and having access to a military attorney to assist you in preparing your case. This is exactly why a meticulous paper trail documenting the chain of events is critical. If an OTH is threatened, every member has a right to a separation board to argue their case; if the characterization offered is Honorable or General Under Honorable Conditions, only members with six years or more of service are entitled to the board.

While each person will decide the best way to respond, and some are just so burnout from what very well could have been months of wrangling with their command over this, we do not recommend signing anything that amounts to waiving their rights and consenting to this discharge, especially with an OTH. Often, commands will offer or members can request a “conditional waiver” of their rights, meaning they won’t contest the discharge on the condition that they receive an honorable discharge (or sometimes a general under honorable), as they did not violate military regulations.
RELATED PROBLEMS

Sometimes commands say the person cannot be transferred to a unit nearer to their home because they are flagged, or because they don’t have a recent medical clearance, or some other basis. In such cases, it is important to inform the command that regardless of these things, there is still no regulation that requires the member to travel outside the maximum involuntary travel distance. One option for the command would be for them to be retained in their original unit while these things are being resolved but allowed to drill with a unit that is within commuting distance of their current residence. According to DOD regulations, many flags are transferrable, but some state regulations are stricter and will not allow transfer under certain conditions, such as failed PT.

As mentioned at the beginning of this article, reservists sometimes agree to travel a distance outside of the maximum commuting distance. In such cases they usually signed a waiver to that effect. Commands will sometimes use this to deny a unit transfer. In one such case, the member lived just a couple miles outside of the commuting distance and was willing to travel the distance. When she moved hundreds of miles away, the unit claimed they didn’t have to transfer her because she had already submitted a waiver. In these cases, it can helpful to document what has changed in the member’s life that no longer allows them to “volunteer” to travel the excessive distance, and as we all know by now, they cannot be required to do so.

A GI Rights counselor, frustrated with the obstinacy of commands, passes this request along to MLTF: “It drives us crazy the amount of time we have to spend on these cases, and it would really be beneficial to the cause if there were some court case that could settle once and for all that a command is acting against the law when they insist someone continue to drive beyond commuting distance or face penalties. I know it’s a long shot, but maybe someone in MLTF would be inspired to take up the cause.”

But until that happens, we are standing by to take these calls on the Maximum Commuting Distance Hotline, sometimes known as the GI Rights Hotline (girightshotline.org).

The Center on Conscience and War’s website is at centeronconscience.org.

TRANSGENDER BAN UPDATE

BY JEFF LAKE

As the year 2019 began, the administration’s attempt to ban military service by transgender people was blocked by four nationwide injunctions in Washington State, California, Washington D.C. and in Maryland. In November, 2018, the Justice Department had petitioned the United States Supreme Court and asked that the injunctions in Washington State, California and Washington D.C. be stayed claiming that it was “of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination.” The government’s motion to dissolve the injunction in Maryland was pending.

On January 4, 2019, the injunction issued in Washington D.C. was overturned on appeal. The Court of
Appeals for the District of Columbia concluded, “we must recognize that the Mattis Plan plausibly relies upon the ‘considered professional judgment’ of ‘appropriate military officials,’ and appears to permit some transgender individuals to serve in the military consistent with established military mental health, physical health, and sex-based standards. In light of the substantial constitutional arguments and the apparent showing that the policy accommodates at least some of Plaintiffs’ interests, we think that the public interest weighs in favor of dissolving the injunction.” This ruling left the three other injunctions in place, so it was of limited impact. The case in D.C. will now proceed to trial where the assumptions stated by the Court of Appeals can be tested with real facts.

On January 22, 2019, the U.S. Supreme Court responded to the Justice Department’s petition from November. The court issued “Orders in Pending Cases” and stated that in both the Washington State and California cases, the injunctions were now stayed pending the disposition of the Government’s appeal in both cases. The Order noted that Justices Ginsburg, Breyer, Sotomayor and Kagan were not in agreement. Thus, the injunctions are now stayed by was of a simple unsigned order from the Supreme Court.

Following these decisions, the injunction issued in Maryland remains as of the publication date of this issue of On Watch. The day after the U.S. Supreme Court rulings, the Justice Department notified the Maryland court that it intended to file a motion to strike down the injunction there immediately. The Department’s filing asserted that the judge in Maryland had no choice but to follow the U.S. Supreme Court’s decision. The Department of Defense has indicated that because the injunction is still in place there has been no immediate change in policy.

In Congress, resolutions have now been introduced in both the House and the Senate opposing the ban on transgender military enlistment and service. In the Senate, the resolution was brought by Kirsten Gillibrand, a candidate for President in 2020. Senator Gillibrand also brought Blake Dremann, a transgender Navy Lieutenant Commander and President of SPART*A (Servicemembers, Partners, Allies for Respect and Tolerance for All), as her guest to the State of the Union address. Presumably, if Senator Gillibrand does become President, then any ban in effect as of January, 2021 will be repealed quickly.

So, it seems that after an initial round of success, the higher courts are more reticent to challenge the administration when it comes to military policy. The good news, if any, is that the cases will proceed to trial in front of judges who have already issued injunctions and found, at least initially, that the policies are unconstitutional. The bad news, of course, is that those who are ready and willing to serve in the military will be discriminated against due to the prejudices and political whims of those in the White House and the Pentagon.

The MLTF will continue to follow developments regarding this issue. Please subscribe to On Watch to learn about the latest news and court rulings.

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THE MILITARY LAW TASK FORCE of THE NATIONAL LAWYERS GUILD

ON WATCH is published quarterly by the Military Law Task Force of the National Lawyers Guild. Subscriptions are free with MLTF dues ($25), or $20 annually for non-members.

We welcome comments, criticism, assistance from Guild members, subscribers and others interested in military, draft or veterans law.

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Each issue is made available to the public on our website approximately one month after distribution to subscribers. A digital archive of back issues of this newsletter can be found on our website. See nlgmltf.org/onwatch/.

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The National Lawyers Guild’s Military Law Task Force includes attorneys, legal workers, law students and “barracks lawyers” interested in draft, military and veterans issues. The Task Force publishes On Watch as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects.

The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more sacred than property interests.

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