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Days may be numbered for male-only draft registration

Ilya Somin is law of professor at George Mason University, adjunct scholar at the Cato Institute, author of "The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain," and "Democracy and Political Ignorance: Why Smaller Government is Smarter."



Male-only draft registration is one of the last bastions of open sex discrimination in U.S. government policy. Under current law, nearly all men between the ages of 18 and 25 are required to register for "selective service," but women are not. While we currently do not have an actual military draft, the registration system is

intended to make it easier to begin conscripting civilians into the armed forces should Congress ever choose to do so. The current male-only registration system ensures that only men would be subject to the draft in such a scenario. But the Pentagon's recent decision to allow women to serve in combat positions previously closed to them suggests that the days of male-only draft registration are likely to be numbered.

There are now two ongoing cases challenging the constitutionality of male-only draft registration: One, *National Coalition for Men v. Selective Service System*, 13-56690, is currently on appeal before the 9th U.S. Circuit Court of Appeals (oral arguments were heard Tuesday), and another brought by parents on behalf of their teenage daughter in New Jersey. One or both of these lawsuits might fail on procedural grounds, particularly the New Jersey case, in which the government could argue that the plaintiff lacks standing. But sooner or later, a case of this type is likely to be decided on the merits. And when that happens, male-only draft registration may well get struck down.

Normally, laws discriminating on the basis of sex are subject to heightened "intermediate scrutiny," meaning courts will only uphold them if they "substantially advance" an "important government interest." The Supreme Court has repeatedly made clear that discriminatory laws cannot be justified on the basis of "overbroad generalizations about the different talents, capacities, or preferences of males and females," a point the court emphasized in *United States v. Virginia*, 518 U.S. 515 (1996), which struck down the exclusion of women from the Virginia Military Institute, a state-run military college. Although the court recognized that it was possible that fewer women than men would be able to succeed at VMI, that did not justify their categorical exclusion. By the same logic, even if women, on average, are not as capable soldiers as men, that does not justify categorically exempting them from draft registration.

The Supreme Court did uphold male-only draft registration against constitutional challenge in *Rostker v. Goldberg*, 453 U.S. 57 (1981). But the majority relied heavily on the fact that women were barred from combat roles, and therefore female draftees would be less valuable to the military than male ones. Since that time, more and more combat roles have been opened up to women, and the Pentagon's most recent policy change will eliminate pretty much all remaining gender-based restrictions. This undercuts *Rostker's* main rationale for a male-only draft.

But Justice William Rehnquist's majority opinion in *Rostker* also relied heavily on the courts' "lack of competence" on national security issues and the consequent need for "healthy deference to legislative and executive judgments in the area of military affairs." That deference might justify upholding male-only draft registration even if all or most combat positions are open to women. A lower court applying heavy deference might still rule that Congress could reasonably assume that female draftees would be

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Government

Cellphone companies overcharged city and county governments, whistleblower claims

Four of the nation's largest cellphone service providers excessively charged dozens of city and county governments in California by more than \$100 million over the last decade, according a lawsuit unsealed this week.

U.S. attorneys offices in California collect more than \$480M this year

Capping off fiscal year 2015, U.S. attorney's offices in each of California's four federal districts announced Tuesday they pulled in more than \$480 million in civil fines and criminal penalties.

Corporate

SF fintech startup grabs new GC

Align Commerce Inc., geared toward small businesses, named Jay D. Hansen as its first general counsel and compliance officer Tuesday. Hansen will oversee all legal affairs for San Francisco-based small biz payments system.

Government

Judges make their case as special committee considers options

Presiding judges from Fresno and Riverside Counties made the trek to San Francisco Tuesday to speak to a special judicial commission on the difficulties their courts face amid heavy caseloads and funding shortages.

Litigation

Judge grants antitrust class against NCAA

U.S. District Judge Claudia Wilken certified an antitrust class action Friday against the National Collegiate Athletics Association that promises to reopen a continuing conflict over what constitutes proper compensation for student athletes.

U.S. Court of Appeals for the 9th Circuit Days may be numbered for male-only draft registration

Male-only draft registration is one of the last bastions of open sex discrimination in U.S. government policy, but two ongoing cases are challenging its constitutionality. By **Ilya Somin**

Perspective

Big deals increasingly mean big data

Companies on both sides of a transaction must understand what promises, legal limits and risks apply to the large data sets at issue in the deal. By **Mary Ellen Callahan, Nancy Libin and Sabrina N. Guenther**

Tax

IRS now has the power to revoke your passport

The right to travel seems pretty fundamental. Even constitutional cases uphold it. And yet, it is also clear that this right can be restricted and regulated. By **Robert W. Wood**

less valuable than male ones, because a much smaller percentage of them would end up being able to serve in combat, even if they are not categorically barred from doing so.

Lower courts applying *Rostker* might thereby still conclude that male-only draft registration is constitutional. If the question returns to the Supreme Court however, it seems likely that *Rostker* will be overruled or at least distinguished. Even if the court is unwilling to overrule it completely, the justices could conclude that its logic does not apply in a world where women are able to serve in all the same roles as men. As compared with 1981, the idea of women serving in combat is far more widely accepted by both elite and public opinion. And sex discrimination in draft registration will be perceived by most of society as an outdated relic of the days when women's roles in the armed forces were severely limited.

If male-only draft registration is to be struck down, *National Coalition for Men* might turn out to be the case that does the trick. In 2013, the district court dismissed the case for lack of "ripeness" because Pentagon policy in force at that time "did not order immediate integration of combat units." However, the Pentagon's recent policy change eliminates that problem. Secretary of Defense Ash Carter announced last week that the order integrating women applies to all combat positions, without exception, beginning on Jan. 2 of next year. The 9th Circuit may well overrule the trial court's procedural dismissal, and compel it to decide the case on the merits.

If courts invalidate male-only draft registration, it would be a valuable step towards gender equality, and potentially a boon for individual liberty. In October, Army Secretary John McHugh suggested that "true and pure equality" between the sexes might require forcing women to register for the draft, along with men. But there is another way to achieve full gender equality in this field: Simply abolish draft registration altogether. That is exactly what would happen if a court were to strike down the current male-only draft registration system. Such a decision would invalidate the present selective service system, but without forcing the government to adopt a new, gender-neutral one. Only Congress could do the latter, and it is unlikely to have the political will to do so in an era where polls show that a majority of the general public and an overwhelming 80 percent of recent veterans oppose the return of conscription. Ending draft registration would make it more difficult to reestablish the draft itself.

Abolishing draft registration is the best way to combine gender equality with liberty for men and women alike. Both sexes would be liberated from the prospect of forced labor imposed by the state. Subjecting people to years of mandatory labor and military discipline is a severe infringement on individual freedom.

Moreover, as economists have long pointed out, conscription creates serious economic dislocations by forcing into the military many people who would be more productive in other occupations. Conscription may seem to save money, because conscripts are not paid as much as volunteers. But the savings are illusory, because the cost of dragging them into service is still borne by the conscripts themselves, and by their would-be employers and customers in the private sector. In addition, especially, in an age of sophisticated, high-technology warfare, professionals who serve by choice tend to make better soldiers than unwilling conscripts.

Both men and women should be allowed to serve in the military on an equal basis, in any positions for which they may be qualified. But neither should be required to do so.

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Litigation

Catch up with the amendments to the federal rules

On Dec. 1, amendments to the Federal Rules of Civil Procedure took effect that should increase cooperation between parties, expedite discovery and encourage parties to think seriously about preservation obligations. By **Neda Shakoori**

Judicial Profile

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Litigation

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