

Testimony Before the National Commission on Military, National, and Public Service
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Selective Service Hearing: Should Registration be Expanded to
All Americans? – Arguments for expansion

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The Unconstitutionality of Male-Only Military Registration

Chairman Heck and members of the Commission:

Thank you for inviting me. I am a Distinguished McKnight University Professor and the Centennial Professor of Law at the University of Minnesota Law School. I teach constitutional law and sex discrimination law, among other subjects. I have written about the constitutional issues surrounding women's exclusion from military registration and have included my law review article on that subject with my written testimony.¹

In my time today, I would like to make one simple, but fundamental point: Male-only registration is unconstitutional.

I will start by discussing why the end of women's exclusion from combat has fatally undermined the reasoning of *Rostker v. Goldberg*, the Supreme Court decision that upheld the constitutionality of male-only registration in 1981. I will then explain, more broadly, why excluding women from registration is inconsistent with the overarching principles governing the Supreme Court's sex discrimination case law.

¹ See Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96 (2008).

The Court's argument in *Rostker* rested on the fact that women could not serve in many combat positions in 1981. The Court contended that women could be constitutionally excluded from registration because women were excluded from the draft and argued that women could be constitutionally excluded from the draft because women were excluded from combat.

Rostker's reasoning no longer works. Since 2016, the military no longer excludes women from combat positions. Female servicemembers have fought in combat with great success and popular support. *Rostker's* argument for the constitutionality of male-only registration *depended* on women's exclusion from combat positions. *Rostker's* argument has collapsed now that women are no longer barred from combat.

With that in mind, it is time to consider the constitutionality of male-only registration on a clean slate.

The guiding principle that drives the Supreme Court's sex discrimination case law is that the Court is very hostile to laws that: (1) subject men and women to different rules, and (2) are based on sex stereotypes. By sex stereotypes, the Court means assumptions about the differences between men and women that are not true in every case, even though they may be true as generalizations.

For example, the Court has struck down sex-based laws that reflect the sex stereotype that women will and should stay home with children, while men will work in the market. As a generalization, the average woman is more likely to stay home

than the average man. But the Court has explained that this sex stereotype cannot justify sex-based laws because the stereotype is not true in every case.

The exclusion of women from military registration is grounded in sex stereotypes. I have examined the congressional debates and hearings on this issue from the 1980s and reaching back to the 1940s. Throughout the decades, the most common argument for excluding women from registration and the draft has always been the contention that women’s primary obligations are domestic. On this view, men are obligated to serve the nation on the battlefield, while women are responsible for staying home with their children. For example, a 1980 report from the Senate Armed Services Committee explained that it would be “unwise and unacceptable” for a “young mother” to be drafted while “a young father” remained “home with the family in a time of national emergency.”²

As a matter of personal opinion, some Americans may still agree with such sentiments. But as a matter of constitutional law, the Supreme Court’s precedents make clear that sex stereotypes insisting that women belong at home cannot justify laws treating men and women differently.

Other arguments for excluding women from registration similarly reflect constitutionally impermissible sex stereotypes. For example, even if the average man is more likely than the average woman to meet the physical strength requirements for a specific combat position, some women will be able to meet those qualifications as well and should not be excluded simply because they are women.

² S. REP. NO. 96-826, at 159 (1980).

In sum, if Congress would like to continue military registration, the Constitution requires including women along with men.

Thank you for the opportunity to participate in this important hearing.