

# Stock Daily Dish

## **The military's male-only draft registration is unconstitutional, a judge ruled. What comes next is unknown**

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WASHINGTON – A ruling by a federal judge finding it unconstitutional to require men, but not women, to register for a draft into the U.S. military has revived a debate about whether the system should be altered or ended.

But the decision, which does not order the government to revise the registration requirement, also raises a question: What happens next?

The Selective Service System, first created at the outset of World War I, requires men ages 18 to 25 to register and was last used to send draftees to combat during the Vietnam War. But whether it is constitutional has been debated for years, especially after the Obama administration rescinded a policy in 2015 that prevented women from serving in most ground-combat roles.

U.S. District Judge Gray Miller said in his ruling Friday that times have changed and the government can no longer justify the male-only system's "gender-based discrimination."

"While historical restrictions on women in the military may have justified past discrimination, men and women are now 'similarly situated for purposes of a draft or registration for a draft,'" Miller, a judge in Houston, wrote in his .

"If there ever was a time to discuss 'the place of women in the Armed Services,' that time has passed."

The decision is unlikely to be the last word in the long-running debate. The case was brought by the National Coalition for Men, a nonprofit men's rights organization, and two draft-aged men, one in Texas and the other in California.

"This ruling is going to force the government eventually to either get rid of the selective service requirement or require both sexes to register. It's got to be one or the other," said the coalition's attorney Marc Angelucci.

A Pentagon spokeswoman, Air Force Lt. Col. Carla Gleason, referred questions about the ruling to the Justice Department.

"We need and appreciate every qualified patriot who is willing and able to serve," she said.

The Justice Department declined to comment or to say whether the government would appeal.

Because the decision does not include an injunction blocking the government from continuing with the current requirement, the question remains: “How do you fix this?” said Eugene R. Fidell, who teaches military law at Yale Law School.

“By getting rid of draft registration for everybody or imposing draft registration for women? The judge hasn’t ruled on that,” he said. “Either of those outcomes would satisfy an equal protection claim.”

Government lawyers in the case had urged the judge to defer to Congress on military affairs and to put off a decision while a National Commission on Military, National, and Public Service considers whether lawmakers should revise draft registration requirements.

But the judge noted that the commission is not due to issue a final report until 2020, and that Congress has debated the requirement “for decades with no definite end in sight,” wrote Miller, a nominee of president George W. Bush.

Miller acknowledged that his ruling is at odds with a 1981 Supreme Court decision that upheld the constitutionality of a male-only registration requirement. But the high court’s holding in the case *Rostker v. Goldberg* is not directly on point, the judge found, because women are now eligible to serve in combat roles.

The chairman of the national commission, Joe Heck, said in a statement Monday that the court’s decision makes the work of the commission “all the more important and relevant” as it prepares to propose recommendations.

“The Commission is studying a wide range of possible changes, including not only whether women should register, but whether the nation needs a registration system,” Heck said in a statement. “The district court’s opinion means change is inevitable and the status quo is untenable.”

The commission plans to hold hearings on April 24 and 25 at Gallaudet University in Washington to examine options. In an interim report released in January, it said that it is “carefully considering and actively seeking input” to address whether to expand the registration requirement to include women.

In December, Ash Carter, the former Pentagon chief who opened combat jobs to women, said in a report for the Harvard Kennedy School that the question about whether women should register for the draft “arose immediately” after the combat exclusion policy was rescinded.

“At the time, I said that it stands to reason that if women are admitted to all positions in the military, they should be subject to the draft,” he wrote. “However, the law remains that women are not currently required to register. In fact, it does not matter much to me, since I do not want a draft. I want to be able to pick who joins us.”

The top officers in the Army and Marine Corps, Gens. Mark A. Milley and Robert B. Neller, also have said that they are in favor of women registering for the draft.

Others have argued that the United States is due to ditch the Selective System entirely.

Christopher Preble, a Navy veteran and defense analyst with the libertarian Cato Institute, said Monday that he is glad the debate over whether women should register for the draft has prompted the United States to revisit the need for the Selective Service System.

“We know from bitter experience that the manner in which people are chosen from that pool is not equitable,” he said, referring to the ways in which some people avoided military service, including through deferments. “It wasn’t in Vietnam, and it wouldn’t be in the present era. And so I just don’t see the rationale for registration, which implies that every male at that age is expected to be called in service in the event of a national emergency.”

The coalition and the individuals behind the court challenge – Anthony Davis and James Lesmeister – argued that the male-only requirement violated the equal protection clause of the 5th Amendment.

“We take no position on whether there should be a draft,” said Angelucci, their attorney. “We just feel if there is mandatory requirement it should not be discriminatory based on sex.”