

Detailed Legal Analysis

The Department's notification under Section 652, title 10, United States Code, notifies Congress that, based on a comprehensive review of military assignment policies, the Department will open all positions to the assignment of women, thereby providing men and women the same opportunities to serve in all positions based on their abilities and qualifications. Section 652 requires that such notifications include a detailed analysis of the legal implications of the proposed change with respect to the constitutionality of the application of the Military Selective Service Act (50 App. U.S.C. 451 et seq.) (MSAA or Act) to males only. *See* 10 U.S.C. § 652(a)(3)(B).

The MSSA requires that every male citizen of the United States, and every other male person residing in the United States, between the ages of eighteen and twenty-six, register at such time or place, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed. 50 U.S.C. App. § 453(a).

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the United States Supreme Court considered the constitutionality of male-only draft registration under the Act and upheld the Act. The Court held that the Act's male-only registration provisions did not violate the Fifth Amendment to the United States Constitution because men and women were not similarly situated for purposes of a draft or registration, in that women were excluded from combat by statute and military policy. The Court found that Congress acted within its constitutional authority to raise and regulate armies and navies when it authorized the registration of men and not women. The Court made clear that its "precedents requiring deference to Congress in military affairs" were implicated in the case. *Id.* at 69.

In *Rostker*, the Court recognized that the decision by Congress to exclude women from the registration requirement was not the "accidental by-product of a traditional way of thinking about females" but rather was the subject of considerable national attention and public debate, and was extensively considered by Congress in hearings, floor debates, and in committee. *Id.* at 74 (internal quotation marks omitted). The Court deferred to Congress' explanation that "[i]f mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements." *Id.* at 76 (internal quotation marks omitted). Additionally, the Court noted that women were not similarly situated to men for purposes of the Act because of their exclusion from assignments to certain units whose primary mission is to engage in direct combat on the ground. *See id.* at 76-78.

The landscape on the assignment of women has changed since *Rostker* was decided. Since the *Rostker* decision, sections 8549 and 6015 of title 10, U.S.C. (prohibiting the assignment of women to aircraft engaged in combat and vessels engaged in combat, respectively) have been repealed. On February 8, 2012, the Department rescinded its co-location restriction on the assignment of women, and approved an exception to the 1994 Direct Ground Combat

Definition and Assignment Rule that allowed the assignment of women to select direct ground combat units in specific occupations at the battalion level and above. On January 24, 2013, the Department rescinded its 1994 Direct Ground Combat Definition and Assignment Rule, which prohibited the assignment of women to certain units and positions. In rescinding the 1994 policy, the Department established a way forward, using the guiding principles and milestones developed by the Joint Chiefs of Staff, to integrate women into all then-closed positions as expeditiously as possible, considering good order and judicious use of fiscal resources, no later than January 1, 2016. Throughout this process, the Department has kept Congress abreast of its changes through briefings and required notifications.

The opening of all direct ground combat positions to women further alters the factual backdrop to the Court's decision in *Rostker*. The Court in *Rostker* did not explicitly consider whether other rationales underlying the statute would be sufficient to limit the application of the MSSA to men. The Department will consult with the Department of Justice as appropriate regarding these issues.