WASHINGTON
LEGISLATIVE OFFICE

June 9, 2016

RE: Vote "NO" on Lee-Cruz-Inhofe Amendment #4276 to Prevent Women from Registering with the Selective Service System and Stripping Federal Courts of Jurisdiction

Vote "YES" on Paul Amendment #4074 to Repeal the Military Selective Service Act

Dear Senator:

On behalf of the American Civil Liberties Union, we urge you to support the Paul amendment (#4074) to the FY17 National Defense Authorization Act (NDAA) that repeals the Military Selective Service Act. To the extent selective service registration continues to exist, we also urge you to support Section 591 of the NDAA that requires women to register, and to oppose the Lee-Cruz-Inhofe amendment (#4276). Amendment #4276 not only strikes Section 591 from the bill but also strips the federal courts, including the Supreme Court, of jurisdiction to decide the constitutionality of a selective service system that discriminates on the basis of gender.

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

KARIN JOHANSON
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

Congress Should Repeal the Military Selective Service Act

Involuntary military conscription is a violation of civil liberties and constitutional guarantees, including the right to freedom of association, the right to be free from involuntary servitude, and the right to privacy. The present draft registration law, as well as any resumption of actual induction into the armed services by way of a draft, violates fundamental civil liberties, in the absence of an extreme national emergency. Coercing the American people into defending their country has no place in a free and democratic society.

Because Congress should dismantle the selective service system, we urge you to support the Paul amendment (#4074) to repeal the Military Selective Service Act.

Until the Military Selective Service Act is Repealed, Women Should Be Required to Register

Our opposition to the Selective Service System does not diminish our objection to inequities within the draft registration system. Specifically, the wholesale exclusion of women from conscription and registration requirements reflects discriminatory and paternalistic gender stereotypes about women's proper role,[1] constitutes invidious gender-based discrimination, fails to acknowledge women's long service

[1] Court decisions sustaining the all-male registration requirement confirm this interpretation. *See, e.g.*, *United States v. Cook*, 311 F. Supp. 618, 621-22 (W.D. Pa. 1970), quoting *United States v. St. Clair*, 291 F. Supp. 122 (S.D.N.Y. 1968) ("[C]ongress made a legislative judgment that men should be subject to involuntary induction but that women, presumably because they are "still regarded as the center of home and family life," should not. . . . In providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning.").

in our nation's armed forces, and ignores the recent Department of Defense decision to open all combat positions and units to women.

The ACLU has long fought, in the courts and in Congress, to end discriminatory restrictions on women's roles in the military.[2] More than 35 years ago, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), we challenged the constitutionality of a draft registration law that excluded women from its requirements.[3] Then, in 2012, in *Hegar v. Panetta*, No. 3:12-CV-06005 (N.D. Cal.),[4] we challenged the Department of Defense policy and practice of categorically excluding all servicewomen from assignments to units whose primary purpose is to engage in direct ground combat. We argued that the policy and practice were based on outdated stereotypes of women, ignored the realities of the modern military and battlefield conditions, and failed to acknowledge the contributions of women who had been exposed to hostile enemy action, including the many who have died, particularly over the last 15 years in the wars in Iraq and Afghanistan.[5]

In 2013, we celebrated the Department of Defense's decision to repeal the direct ground combat and assignment rule and again, in 2015, when Secretary of Defense Ash Carter announced that the Services and Special Operations Command must open all units and positions to women, without exception. The underlying principle behind repeal of the combat exclusion rule was that no individual who wants to serve her country should be forbidden from competing for or serving in any military capacity because of gender. Instead, every soldier, sailor, airman and Marine must be judged on individual merit, ability, and performance. Merit-based military assignments strengthen and enhance our nation's military readiness and effectiveness.

Given the demise of the combat exclusion policy and the reality of women's service in combat roles, requiring women to register for the draft is an appropriate and necessary government response. This view has bipartisan support within Congress and is supported by top military leaders in our armed forces.[6]

<u>Amendment #4276 Is Unconstitutional Court Stripping and is Premised on Outdated Stereotypes About Women</u>

Amendment #4276 would strike Section 591 from the Senate NDAA and maintain the status quo where only men are required to register with the Selective Service. It requires the Department of Defense to

---

[2] In the 1973 Supreme Court case, *Frontiero v. Richardson*, 411 U.S. 677 (1973), future Justice Ruth Bader Ginsburg represented the ACLU in arguing, successfully, that servicewomen should receive certain family benefits under the same terms as servicemen. The ACLU also challenged the exclusion of female customs service employees from working aboard Navy ships, *Beeman v. Middendorf*, 425 F. Supp. 713 (D.D.C. 1977), and later won a ruling that overturned the statutory prohibition against Navy women serving onboard seagoing ships. *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978). In 1979, the ACLU testified before the House Armed Services Committee, Military Personnel Subcommittee, against policies that prevented women from being assigned to combat jobs and units. *Women in the Military: Hearing Before the Military Personnel Subcomm. of the H. Comm. on Armed Services*, 96th Cong. 252-3 (1979) (statement of Diana A. Steele, Staff Counsel, Women's Rights Project, American Civil Liberties Union). And in 1995, the ACLU successfully sued a state military college over its policy of excluding women. *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995). For additional information on the ACLU's work to end discrimination in the armed forces, *see* ACLU'S WORK TO END DISCRIMINATION IN THE ARMED FORCES (Apr. 2013), *available at* https://www.aclu.org/files/assets/aclu_military_fact_sheet_april_2013_website.pdf. *See also Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU, https://www.aclu.org/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff (last visited June 7, 2016).

[3] In *Rostker*, the Court upheld the exclusion of women as consistent with equal protection because it concluded that Congress intended the registration system to be used to prepare for a draft of combat troops. The justices reasoned that because women were excluded from serving in combat, they were not similarly situated to men and therefore did not have to register.

[4] The case is still pending in the Northern District of California.

[5] *See also Hegar, et. al. v. Panetta – Plaintiffs*, ACLU, https://www.aclu.org/hegar-et-al-v-panetta-plaintiffs?redirect=womens-rights/hegar-et-al-v-panetta-plaintiffs (last visited June 6, 2016).

[6] Army Chief of Staff Gen. Mark Milley and Marine Corps Commandant Gen. Robert B. Neller testified before the Senate Armed Services Committee that women should be required to register for future military drafts. *See* Dan Lamothe, *Army and Marine Corps chiefs: It's time for women to register for the draft*, WASH. POST, Feb. 2, 2016, *available at* https://www.washingtonpost.com/news/checkpoint/wp/2016/02/02/army-and-marine-corps-chiefs-its-time-for-women-to-register-for-the-draft/; *see also* Richard Lardner, *Air force secretary supports draft registration for women. A.P., available at* http://www.stripes.com/news/air-force/air-force-secretary-supports-draft-registration-for-women-1.413084.

submit a report on the need for a centralized registration system for military selective service and an assessment on whether women should also register. The amendment would be unprecedented in prohibiting the Supreme Court and any federal court from hearing or deciding any claim questioning the constitutionality of an all-male draft registration process.

This amendment is premised on anachronistic ideas about women's role in society and in the armed forces. Women have served in our military, with honor and distinction, for decades and, more recently, have been serving in combat in the air, sea, and on the ground. Indeed, it is this record of achievement by women across the forces that led the Department of Defense to lift the combat exclusion policy. There is no doubt that if a military draft should ever be reinstated, women will be able to stand alongside men to meet our nation's needs. Thus, there is no reason to exclude women from any registration requirement imposed on men.

The amendment should also be rejected because it engages in dangerous and unconstitutional court-stripping. Scholars and jurists have long debated the extent to which Congress may restrict the jurisdiction of the lower federal courts and limit the appellate jurisdiction of the Supreme Court. Most have concluded that while the scope of the congressional authority may not be explicit, it is certainly limited by separation of powers, due process of law, and other constitutional provisions and that legislative self-restraint is necessary and appropriate.[7] But, in certain cases, Congress must refrain from acting altogether to avoid grave harm to our democracy. Denying the Supreme Court of jurisdiction to decide whether a statute violates fundamental protections is without modern precedent. There is broad consensus, across the ideological spectrum, that

> [c]ongressional limits on the ability of federal courts to review constitutional issues can undermine the federal judiciary's crucial role in the constitutional system. . . Perhaps most important, legislation precluding court jurisdiction that prevents the judiciary from invalidating unconstitutional laws is impermissible. Neither Congress nor state legislatures may use their powers to keep courts from performing their essential function of upholding the Constitution.[8]

As discussed previously, the repeal of the combat exclusion policy undermines the Supreme Court's conclusion in *Rostker v. Goldberg, supra,* that women's exclusion from selective service requirements has a rational basis under the Constitution. Additionally, at least one case is currently working its way through the court system that will soon prompt a new look at *Rostker*. Amendment #4276's stripping the courts of jurisdiction to consider such a question, at the very moment it has become most relevant, reflects its true purpose: to maintain the discriminatory status quo by preventing the federal courts from doing their job. We urge you to vote "NO" on the amendment.

Please contact Vania Leveille, Senior Legislative Counsel, at vleveille@aclu.org or 202-715-0806 with any questions.

Sincerely,

Karin Johanson
Director

Vania Leveille
Senior Legislative Counsel

---

[7] *See* Ronald Weich, UPSETTING CHECKS AND BALANCES: AN ACLU REPORT ON CONGRESSIONAL HOSTILITY TOWARD THE COURTS IN TIMES OF CRISIS (2001), *available at* https://www.aclu.org/report/report-upsetting-checks-and-balances-congressional-hostility-toward-courts-times-crisis; UNCERTAIN JUSTICE: POLITICS IN AMERICA'S COURTS (2000), *available at* http://www.constitutionproject.org/pdf/uncertain_justice.pdf

[8] UNCERTAIN JUSTICE at 217.