
HOW TRANSGENDER AND NON-BINARY PEOPLE ARE IGNORED IN THE MALE-ONLY MILITARY DRAFT DEBATE

Michael Conklin*

The constitutionality of an all-male military draft was recently litigated in *National Coalition for Men v. Selective Service System*.¹ This important issue remains undecided as the Supreme Court denied certiorari for *National Coalition for Men* on June 7, 2021.² Unfortunately, the effect this issue will have on transgender and non-binary people is largely being ignored.³ This essay considers how current Selective Service standards are not only psychologically harmful to transgender and non-binary people but also how they negatively affect their ability to receive college financial aid, federal jobs, and job training.

In the 1981 case of *Rostker v. Goldberg*, the Supreme Court upheld the all-male draft because, at the time, women were barred from combat roles.⁴ However, in 2013 the Department of Defense rescinded this ban.⁵ The Supreme Court had the opportunity to overturn the male-only aspect of the draft but it passed on the issue and denied certiorari in *National Coalition for Men*.⁶ But the issue may still be addressed due to a 2020 recommendation from the National Commission on Public Service to require females to register for the draft.⁷

* Powell Endowed Professor of Business Law, Angelo State University.

1. Nat'l Coal. for Men v. Selective Serv. Sys., 969 F.3d 546 (5th Cir. 2020), *cert. denied*, 141 S.Ct. 1815 (2021).

2. *Id.*

3. The petitioner's petition for certiorari does not mention the word "transgender." See Petition for Writ of Certiorari, Nat'l Coal. for Men v. Selective Serv. Sys., 969 F.3d 546 (5th Cir. 2020), *cert. denied*, 141 S.Ct. 1815 (2021) (No. 20-928). Of the briefs filed as of May 25, 2021, only a single amicus brief even mentions the word "transgender." See Brief of the Modern Military Association of America et al. as Amici Curiae Supporting Petitioners, Nat'l Coal. for Men v. Selective Serv. Sys., 969 F.3d 546 (5th Cir. 2020), *cert. denied*, 141 S.Ct. 1815 (2021) (No. 20-928).

4. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

5. Alexandra Kelley, *Supreme Court Asked to Declare the All-Male Military Draft Unconstitutional*, THE HILL (Feb. 19, 2021), <https://thehill.com/changing-america/respect/equality/539575-supreme-court-asked-to-declare-the-all-male-military-draft> [<https://perma.cc/S35L-C8F8>].

6. Nat'l Coal. for Men v. Selective Serv. Sys., 969 F.3d 546 (5th Cir. 2020), *cert. denied*, 141 S.Ct. 1815 (2021).

7. Leo Shane III, *Support for Making Women Register in the Draft, but None for Mandatory Military Service*, *Commission Says*, MIL. TIMES (Mar. 11, 2021), <https://www.militarytimes.com/news/pentagon-congress/2021/03/11/support-for-making-women-register-in-the-draft-but-none-for-mandatory-military-service-commission-says/> [<https://perma.cc/YW9A-EJX6>].

While it has been over forty-five years since America conducted a military draft,⁸ the issue of who must register with the Selective Service is nevertheless highly relevant today. Failing to register with the Selective Service may result in fines of up to \$250,000 and five years in jail, although these penalties are rarely enforced.⁹ More practical implications are that those who do not register with the Selective Service may not be eligible for federal jobs and job training, and it may even prevent immigrants from becoming naturalized.¹⁰ Male college students are ineligible for financial aid, federal grants, and federal work-study programs if they do not register with the Selective Service.¹¹

The Selective Service states that “male person[s]” are required to register.¹² Elsewhere the Selective Service clarifies that gender assigned at birth is used for this purpose.¹³ This places transgender and non-binary people in a difficult position. To make matters worse, one may not register after reaching the age of twenty-seven.¹⁴ Therefore, a transgender or non-binary person who applies for student loans, grants, federal jobs, or job training after age twenty-six could potentially be forever barred from receiving such benefits if they did not previously register.¹⁵ It is understandable that a transgender woman would not think to register with the Selective Service after reading how only “male persons”¹⁶ need to do so.

Even for transgender males—who are explicitly exempt from the Selective Service because their birth certificates say female—significant problems may arise under the current system. For example, imagine a transgender male who has changed all legal documentation except his birth certificate to male. When he fills out his Free Application for Federal Student Aid form to attend college, he will be flagged as a male who is not registered with the Selective Service. Beyond the hassle of dealing with bureaucratic red tape, this will likely require him to disclose that he was gendered as female at birth. Such a requirement may place a young transgender male in an uncomfortable position.

The current Selective Service standard of using birth certificate gender is further problematic because it is possible for adults to change the gender listed

8. *Vietnam Lotteries*, SELECTIVE SERV. SYS., <https://www.sss.gov/history-and-records/vietnam-lotteries/> [<https://perma.cc/UUP9-XPR8>].

9. Brian O’Connell, *Changes May Be Coming for Selective Service and Financial Aid*, SAVING FOR COLL. (Apr. 21, 2021), <https://www.savingforcollege.com/article/changes-may-be-coming-for-selective-service-and-financial-aid> [<https://perma.cc/5XFH-84UQ>].

10. *Id.*

11. *Id.*

12. 50 U.S.C. 49 §3802 (2018).

13. *Frequently Asked Questions*, SELECTIVE SERV. SYS., <https://www.sss.gov/faq/> (last visited June 27, 2021) [<https://perma.cc/9NMB-BX4B>].

14. O’Connell, *supra* note 9.

15. *Selective Service Registration*, FINAID, <https://finaid.org/students/selectiveservice> (last visited June 27, 2021) [<https://perma.cc/7HV8-LXKA>] (“Male students who did not register with the Selective Service and are now age 26 or older are ineligible for Federal student aid and other Federal and state benefits.”).

16. §3802.

on their birth certificates.¹⁷ Additionally, some states allow the issuance and amending of birth certificate gender to non-binary.¹⁸

Making matters even worse, the likelihood of these problems is exacerbated when one considers those with fluid gender identities. Such individuals may have data mismatches of their gender on various documents and government and school records. This may be perceived by school and governmental administrators as inconsistencies to be flagged for greater scrutiny.

While these issues that transgender people face regarding the Selective Service are less severe than many of the other challenges they face in society, these problems are made more poignant due to their unnecessary nature. A future Supreme Court ruling overturning the now outdated precedent in *Rostker* would benefit transgender people not only by avoiding a bureaucratic hassle and potential loss of benefits but also by affirming their place in society as equals. As the Service Commission in 2020 explained regarding the effects on women, “[m]ale-only registration sends a message to women not only that they are not vital to the defense of the country but also that they are not expected to participate in defending it.”¹⁹ This same logic is applicable to the dignitary harm imposed on transgender and non-binary people. Furthermore, by classifying transgender men as women and transgender women as men, an implicit message is communicated that they are not “really” male and female, respectively.²⁰

It is unfortunate that this is just one example of how transgender people are often overlooked in the legal system.²¹ Fortunately, there is an easy fix. By recognizing the grounds for upholding the male-only draft in *Rostker* are now invalid, overturning the now obsolete precedent not only advances gender equality but also benefits transgender and non-binary people.

17. See, e.g., *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL (Sept. 17, 2018), <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> [<https://perma.cc/WCF8-XDAW>].

18. *Non-Binary Birth Certificates and State IDs: Full Guide*, US BIRTH CERTIFICATES, <https://www.usbirthcertificates.com/articles/gender-neutral-birth-certificates-states> (last visited June 27, 2021) [<https://perma.cc/7GC5-ZVZ>].

19. NAT'L COMM'N ON MIL., NAT'L, & PUB. SERV., *THE FINAL REPORT OF THE NATIONAL COMMISSION ON MILITARY, NATIONAL, AND PUBLIC SERVICE 118* (2020), <https://inspire2serve.gov/sites/default/files/final-report/Final%20Report.pdf> [<https://perma.cc/SB7F-TGQZ>].

20. Further problematic is that the Selective Service refers to transgender males as “born female” and transgender females as “born male.” *Selective Service - Who Must Register*, SELECTIVE SERV. SYS., <https://www.sss.gov/wp-content/uploads/2020/11/WhoMustRegisterChart.pdf> (last visited June 27, 2021) [<https://perma.cc/CJ8U-2KCB>].

21. See, e.g., Michael Conklin, *Good for Thee, but Not for Me: How Bisexuals Are Overlooked in Title VII Sexual Orientation Arguments*, 11 U. MIA. RACE & SOC. JUST. L. REV. 33 (2020).