

## Detailed Legal Analysis

This notification informs Congress of the Department's intent to open 1,348 positions in 56 military occupational specialties to women in the 160<sup>th</sup> Special Operations Aviation Regiment. The positions identified herein are not positions with a primary mission to engage in direct combat on the ground as defined by the now rescinded 1994 Direct Ground Combat Rule and Assignment (DGCR) policy.

The DGCR policy prohibited the assignment of women to certain units whose primary mission was to engage in direct combat on the ground. The DGCR policy also provided the Services with the option of imposing further limitations on assignment of women based on prohibitive costs for berthing and privacy arrangements, co-location, long range reconnaissance operations or special operations forces missions, or physical requirements.

### Military Selective Service Act to males only.

The Military Selective Service Act (Act), 50 U.S.C. App. 451 *et seq.*, requires the registration for possible military service of males but not females. The purpose of the registration is to facilitate induction and training in the Armed Forces.

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the United States Supreme Court considered the constitutionality of the male-only draft 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 women, who were excluded from combat by statute or military policy, were not similarly situated to men for the purpose of a draft or registration, and 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 stated its "most recent teachings in the field of equal protection cannot be read in isolation from its opinions giving great deference to the judgment of Congress and military commanders in dealing [with] the management of military forces and the requirements of military discipline." *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 71. 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." 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.

Since the *Rostker* decision, sections 8539 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 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. The rescission of the policy did not automatically open all previously closed positions to women, but rather effectively removed the last policy barrier to the assignment of women to ground combat positions and units. 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 currently closed positions as expeditiously as possible, considering good order and judicious use of fiscal resources, no later than January 1, 2016. As the Department undertakes a deliberate and thoughtful review and develops detailed implementation plans, previously closed positions will open unless an exception is granted to keep an occupational specialty or position closed. Opening all positions without a deliberate and thoughtful approach could be detrimental to mission accomplishment and impede the ability of men and women to succeed in their positions.

Although these developments may alter the factual backdrop to the Court's decision in *Rostker*, it remains the case that certain occupational specialties, such as infantry, still remain closed to women. Moreover, the Court in *Rostker* did not consider whether other rationales underlying the statute are sufficient to limit the application of the Military Selective Service Act to men.