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# Verdict

January 29, 2013

[Joanna L. Grossman](#)

## Battle of the Sexes: The Department of Defense Lifts the Restriction on Women in Combat



As he prepared to step down from office, Secretary of Defense Leon Panetta made a **surprising announcement** (<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5183>): that the longstanding restriction on women in combat would be lifted. In declaring the new policy, Panetta observed that women have “shown great courage and sacrifice on and off the battlefield, contributed in unprecedented ways to the military’s mission and proven their ability to serve in an expanding number of roles.” Allowing women access to combat positions, he explained, will help “ensure that the mission is met with the best-qualified and most capable people, regardless of gender.” (The press release is [here](http://www.defense.gov/releases/release.aspx?releaseid=15784) (<http://www.defense.gov/releases/release.aspx?releaseid=15784>).

This announcement comes just two years after the repeal of “Don’t Ask, Don’t Tell,” the policy that forced gays and lesbians in the military to remain closeted. With the lifting of the combat restrictions, the Defense Department has taken another bold step towards equal opportunity in the military.

### Women in the Military: A Brief History

Women began serving in the military in 1948. But prior to the 1970s, women comprised only a small percentage of the U.S. armed forces. Their low participation rates were the product of social, legal, and cultural forces, including (1) quotas restricting the number of female applicants to all branches of service, and (2) the exclusion of women from military academies and training programs.

Moreover, an all-male draft until 1973, and a male-only service registration requirement that began in 1980 exacerbated the already great disparity that existed between the numbers of male and of female service members. That men would have greater and less voluntary participation in the military than women was an accepted principle. As one federal court noted, upholding the constitutionality of the all-male draft against a constitutional challenge: “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.”

The 1970s, however, was a decade of change for the military. The draft was ended, by President Nixon, in 1973. And over the course of the decade, many of the restrictions on women’s military service were eased or eliminated, leading to a significant increase in the number of female service members, from 42,000 in 1973, to 167,000 in 2010, a period during which the total enlisted force shrunk considerably. But despite these changes, and despite the

corresponding development of statutory and constitutional rights against sex discrimination, the military remained reluctant to allow women in combat. Indeed, by federal statute, women—no matter how gifted and capable they might be—could not legally be assigned to combat positions. The reluctance to expose women to combat situations stemmed from concerns about women’s physical ability, their aggressiveness, and their willingness to take risks, as well as concerns about the ability of a gender-integrated unit to function in situations of great stress.

### **The Combat Exclusion: A Stubborn Form of Sex Discrimination**

The male-only registration system was eventually challenged as a violation of the Equal Protection Clause, which had, beginning in the early 1970s, been interpreted to require that courts review sex-based classifications with a suspicious eye. In *Rostker v. Goldberg* (<http://supreme.justia.com/cases/federal/us/453/57/case.html>) (1981), however, the Supreme Court upheld the exclusionary system, relying in large part on the fact that women were excluded from combat. Unlike many other sex-based classifications, which the Court had begun to strike down routinely, the male-only draft was not “an accidental by-product of a traditional way of thinking about females” or an unthinking invocation of stereotypes, the Court majority reasoned. Congress, instead, had purposely exempted women because registration was designed to quickly assemble combat troops, and women, as a group, were excluded from combat. The Court majority implied that the combat exclusion itself was constitutional and, therefore, an appropriate basis on which to craft the registration system. *Rostker* also reflected the Court’s impulse to defer to Congressional judgment on matters involving national security and defense.

The selective service registration requirement still applies only to men. But despite the ruling in *Rostker*, the restrictions on women in combat were relaxed over time, often on a branch-by-branch basis, as support for women’s military service has grown stronger. Between 1991 and 1993, Congress repealed several formal combat prohibitions, which had been in place since 1948. It also created a commission to study regularly the issue of women in combat.

In place of the broad statutory prohibition of women in combat positions, the Department of Defense (DOD) continued to exclude women from certain combat positions as a matter of military policy. It excluded them from “units engaged in direct combat on the ground, assignments where physical requirements are prohibitive and assignments where the costs of appropriate berthing and privacy arrangements are prohibitive.” DOD also invited each branch of the armed forces to propose additional exclusions that could be justified by something other than discrimination. This new policy was reflected in the 1994 Direct Ground Combat Assignment Rule, which declared women eligible for all military positions other than those specifically restricted to men alone. (Jill Hasday has published a wonderful article in the *Georgetown Law Journal* on these developments, entitled “Fighting Women”.)

Until last week, the 1994 Direct Ground Combat Assignment Rule was the primary restriction on women’s military service. It resulted in different levels of restriction by branch. All positions in the Coast Guard were open to women; 99 percent in the Air Force; 88 percent in the Navy; 68 percent in the Marine Corps; and 66 percent in the Army.

In 2012, DOD conducted a review of the remaining combat restrictions, and **issued a report** ([http://www.ncdsv.org/images/DOD\\_RepCongRevLawsPoliciesRegsRestrictingServicesFemaleMembersInUSArmedForces\\_2-2012.pdf](http://www.ncdsv.org/images/DOD_RepCongRevLawsPoliciesRegsRestrictingServicesFemaleMembersInUSArmedForces_2-2012.pdf)) recommending modest changes that would open up some additional combat positions to women. It recommended that women be allowed assignments to direct combat units at the battalion level (as opposed to the larger brigade level previously allowed) and that over 13,000 positions in units that are “co-located” with combat units be opened to women. But the report recommended the continued exclusion of women from infantry positions, Special Operations Forces, long-range reconnaissance operations, and positions with physically demanding tasks that the commission believed most women would not be able to perform.

### **A Welcome About-Face: DOD Reverses the Combat Exclusion Policy**

Despite the recommendations in the 2012 report, or as an expansion of them, Panetta announced the military’s intention to phase out all combat restrictions involving women by 2016. Now, if any branch of the military wants to retain any type of exclusion of women, it must come forward with its justification for doing so, before the implementation date, three years from now. The announcement reflects a comprehensive review by the Joint Chiefs of Staff.

While there may be many factors that prompted Panetta’s decision, three primary ones leap out. First, warfare has changed dramatically over time, due to changes in technology and fighting style. These changes mean that the

connection between physical strength and the ability to participate in combat is not as clear as it once was. The line between combat and non-combat positions has blurred, and the level of danger has spilled over into traditionally safer positions. As the 2012 DOD report noted, “the dynamics of the modern-day battlefield are non-linear, meaning there are no clearly defined front line and safer rear area where combat support operations are performed within a low-risk environment.”

Second, the reality of women’s participation in combat is very different from what the formal policy might suggest. Women are increasingly participating in combat despite the restrictions. This has happened, in part, because the definition of “combat” has changed to include a smaller number of positions, but also in part because commanders can evade the formal rules by using temporary assignments or “attachments” to make use of women in true combat roles. The fates of the 152 women who have been killed in the Iraq and Afghanistan conflicts show that female soldiers are already very much in harm’s way. Overall, the combat exclusion has thus become more fiction than fact. And the consequences for women can be serious. Many high-ranking positions in the U.S. military require front-line combat experience. And the lack of combat experience reduces women’s pay, inhibits their advancement, and limits their later opportunities outside the military. It is also an insult for women to be told they’re not strong enough or tough enough to be doing the jobs they’ve already done—and risked their lives to do well.

Third, DOD was facing multiple lawsuits alleging that the combat exclusion policy was unconstitutional. Although *Rostker* put a damper on such suits, there has been a growing movement to attack the remaining exclusions. And, given the degree to which combat has changed, and the degree to which women already participate in it to a significant extent, it is only getting harder for DOD to insist that women as a group are unfit for combat.

## Conclusion

Panetta’s announcement marks the end of an era, but also the beginning of one. The military must now make even greater efforts to successfully integrate women into the armed forces. Women comprise 15 percent of the current military’s active personnel, a percentage that is likely to grow now that women will face more equal opportunity for advancement and challenge. The task now is to shift from the military’s prior stance of trying to figure out how to exclude women, to trying to figure out how to retain them. This new objective will entail attention, among other things, to the rampant levels of sexual abuse in the military, a problem that has prompted a multitude of studies, hearings, reports, and court proceedings, but shown little sign of abatement.



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