

November 25, 2016

The Honorable John McCain
Chairman
Senate Committee on Armed Services
228 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Mac Thornberry
Chairman
House Committee on Armed Services
2216 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jack Reed
Ranking Member
Senate Committee on Armed Services
228 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Adam Smith
Ranking Member
House Committee on Armed Services
2216 Rayburn House Office Building
Washington, D.C. 20515

Re: Comments on the National Defense Authorization Act for Fiscal Year 2017: By Email

Dear Chairmen and Ranking Members:

In your consideration of the conference agreement on the National Defense Authorization Act for Fiscal Year 2017, the National Women's Law Center urges you to adopt the recommendations set forth below, which will strengthen the legislation as it applies to women. Since 1972, the Center has championed policies and laws that help women and girls achieve their potential throughout their lives — at school, at work, at home, and in their communities. As part of these efforts, the Center has worked to ensure the equitable treatment of women in the military for many years.

Discrimination against LGBTQ and Women Workers

Section 1094 of the House-passed version of the NDAA for FY 2017, H.R. 4909 — otherwise known as the “Russell Amendment”—expands religious exemptions under the Civil Rights Act and the Americans with Disabilities Act in a way that effectively allows certain employers receiving federal funds to discriminate against individuals who are not of the same religion or who do not adhere to the employers’ religious views. The Senate-passed version of the bill, S. 2943, contains no similar provision.

Section 1094 of the House bill applies not only to the contractors and grantees of the Department of Defense (DOD) but to any contractor or grantee of all federal agencies. It therefore could embolden a wide array of employers to discriminate against individuals based upon reproductive health care decisions, sexual orientation, gender identity, or actions that are perceived as not aligned with an employer’s religious views—opening the door for discrimination cloaked in the guise of religious liberty. This provision would have far-reaching consequences by jeopardizing job stability for the hundreds of women and LGBTQ individuals, among others, participating in the federal contracting and grantee workforce. For example, under the provision, a religiously affiliated federal contractor could fire an employee because she used birth control or had an abortion, or refuse

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to hire a woman because she lives with her same-sex partner or because she is pregnant and unmarried. The government should not be in the business of funding discrimination, and no one should be disqualified from a job because she accessed reproductive health care, because of her religion, sexual orientation or gender identity, or because her actions do not comport with the religious views of her employer.

The National Women’s Law Center strongly opposes Section 1094 of the House bill and urges that it be excluded from the final conference agreement.

Equitable Parental Leave for Service Members

Parental leave is an important benefit that allows parents crucial time to care for and bond with a child without sacrificing economic security, and promotes positive child health and developmental outcomes. But today in the military, DOD policy and existing law fail to provide men and women with leave for the birth or adoption of a child on an equitable basis.

DOD policy provides 12 weeks of leave to a woman who gives birth, including medical leave to convalesce after giving birth. In contrast, current statutory law, as interpreted by DOD, provides a spouse of a woman who gives birth with only 10 days of leave, and a parent who adopts a child with only 21 days of leave. In the case of adoption by dual service member married couples, only one parent may take that leave.

Since the period of medical convalescence for a woman who gives birth is typically 6-8 weeks, these distinctions privilege a woman who gives birth (4-6 additional weeks of leave) over her spouse (10 days of leave), or over the father of her child to whom she is not married (no leave), and over an adoptive parent (21 days of leave); privilege an adoptive parent (21 days of leave) over the spouse of a woman who gives birth (10 days of leave), and over the unmarried partner of a woman who gives birth (no leave); and privileges a spouse of a woman who gives birth (10 days of leave) over the unmarried partner of a woman who gives birth (no leave). These differences in treatment are based on gender and marital stereotypes about caregiving that do not reflect the reality of many military families and fail to take into consideration varied family situations.

In contrast, in the civilian workforce employees covered by the Family and Medical Leave Act (FMLA) are entitled to 12 weeks of job-protected parental leave upon the birth or adoption of a child, regardless of their sex or marital status, and regardless of whether they are the parent who gave birth. Significantly, the FMLA recognizes that both parents have an important role to play in caregiving.

Sections 522 and 529 of the House bill amend current law to extend the leave available to a spouse of a woman who gives birth from 10 to 14 days and to an adoptive parent from 21 to 36 days in the case of a dual service member married couple, to be shared between them, but fail to remedy the gender and marital distinctions of current military policy and law. Section 532 of the Senate bill amends current DOD policy and current law to provide the “primary caregiver” of a child with six weeks of leave in connection with the birth or adoption of the child, specifying that in the case of a birth mother, this leave commences after completion of medical convalescent leave resulting from the birth of the child (resulting, in a typical case, of 12-14 weeks of leave in total if the primary caregiver is the individual who gives birth). Section 532 provides the “secondary caregiver” of a child, with 21 days of leave in connection with the birth or adoption of the child. Although the changes in the Senate bill help to address the gender-based distinctions in current law and policy, the establishment of a primary-secondary caregiver hierarchy perpetuates unwarranted distinctions

between parents by requiring that one be deemed “primary.” Moreover, although the bill leaves to the Secretary of Defense to prescribe in regulation the definitions of primary and secondary caregiver, it is difficult to see how these identities could be established at the moment of birth or adoption, when the leave period would begin, as neither parent at that point would have provided more care than the other. Instead, the military should hew to the policy decisions incorporated in the Family and Medical Leave Act and be a model for the country by providing, at a minimum, the equivalent number of days of job-protected parental leave that is, like all authorized military leave, paid leave.

The National Women’s Law Center opposes Sections 522 and 529 of the House bill and Section 532 of the Senate bill and urges the inclusion in the final conference agreement of a blended provision that would provide a minimum of 12 weeks of parental leave to all service members, regardless of gender or marital status, in connection with both the birth and adoption of a child.

Executive Order 13673 (Fair Pay and Safe Workplaces) Limitation

Executive Order 13673 (“Fair Pay and Safe Workplaces,” July 31, 2014), requires parties who seek to contract with the federal government to report past violations of labor and employment laws, so that the federal government can take records of significant violations into account in determining to whom to award federal contracts. Section 1095 of the House bill prohibits the application of E.O. 13673 to DOD. Section 829I of the Senate bill limits the application of E.O. 13673 to DOD contractors or subcontractors who have been suspended or debarred as a result of federal labor violations covered by the Executive Order.

The Fair Pay and Safe Workplaces Executive Order is essential to ensuring that federal contracts and the taxpayer dollars that fund them are awarded to employers that comply with key labor laws, including workplace safety laws, anti-discrimination laws, and minimum wage and overtime laws. The Executive Order also helps to expose wage theft by requiring employers to provide employees with wage statements that contain clear calculations of hours worked and overtime pay, and forbids employers with contracts of more than \$1 million from using forced arbitration to deny victims of race discrimination, sex discrimination (including sexual harassment and sexual assault), or religious discrimination their day in court.

DOD contracts constitute approximately two-thirds of all federal contracts. Exempting DOD contracts in whole or in part from the Executive Order under either of these provisions would deny hundreds of thousands of workers critical workplace protections. Many federal contracting jobs pay low wages, subject workers to unsafe conditions, and lack critical benefits. Violations of employees’ rights take a financial toll that women and the families they support can ill-afford. Women are especially likely to work in low-wage jobs, and are vulnerable to wage theft, sexual harassment and other forms of sex discrimination on the job, or retaliation when they try to unionize or enforce their rights. The Fair Pay and Safe Workplaces Executive Order helps ensure that taxpayer dollars will not support these abusive or exploitive working conditions. Exempting or limiting the reach of the Executive Order to DOD contracts undermines the purpose of the Order to ensure that taxpayer dollars are not used to fund discrimination or other violations of key labor laws.

The National Women’s Law Center opposes Section 1095 of the House bill and Section 829I of the Senate bill and urges that these provisions be excluded from the final conference agreement.

Selective Service Registration Requirements

Section 591 of the Senate bill amends the Military Selective Service Act to require registration of women as well as men by January 1, 2018. The House bill contains no such provision.

The exclusion of women from registration was upheld in *Rostker v. Goldberg*, 453 U.S. 57 (1981), based on a Supreme Court determination that registration was intended to prepare for a draft of combat troops, and women were generally precluded from serving in combat. In today's military, however, women have undertaken combat roles in the air, on the sea and on the ground. As of December 2015, there is no longer any DOD policy that restricts the assignment of women to any position or unit for which they qualify, including in direct ground combat. Accordingly, if the nation continues to require selective service registration for men, it should also require it for women.

The National Women's Law Center supports the inclusion of Section 591 of the Senate bill in the final conference agreement.

Both the Senate and House bills contain provisions requiring an assessment of the selective service system.

Section 528 of the House bill requires a report by July 1, 2017, from the Secretary of Defense to the Senate and House Armed Services Committees on the current and future need for a centralized registration system, including the benefits derived therefrom, an analysis of functions that would have to be assumed by DOD in the absence of national registration, an analysis of changing the focus from mass mobilization of combat troops to mobilization of all military specialties, and a detailed analysis of DOD's personnel needs in the event of an emergency requiring mass mobilization. It also requires a review by the Comptroller General of the procedures used by DOD in evaluating selective service requirements.

Sections 1066-1073 of the Senate bill take a broader view, establishing an independent National Commission on Military, National, and Public Service to review the future of the selective service system. These provisions require an 11-member Commission to also consider ways to foster a sense of service among the youth of the nation and ways to increase their participation to meet national security and public service needs. They require the Commission to examine whether the current global security environment demands a selective service process to produce large numbers of combat troops or whether it would be more appropriate to focus on critical skills and abilities that may be needed. They require the Commission to develop recommendations and report to the President and Congress within 30 months of its establishment.

The continuing need for the selective service system should be evaluated. The House provision, however, requires little more than the report Congress mandated just four years ago. Section 587 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. No. 112-81) required the Comptroller General to report to the Senate and House Armed Services Committees on the military necessity of the selective service system and the fiscal and national security considerations of various alternatives. In response to the 2012 mandate, on June 12 of that year, the Government Accountability Office (GAO) issued a report, "DOD Should Reevaluate Requirements for the Selective Service System" (GAO-12-623). GAO found that DOD had not evaluated the need for the selective service system since 1994, during which time the security environment and strategy had changed significantly, and that restructuring or disestablishing the selective service system requires consideration of various fiscal and national security implications. The requirement in the

House bill for another DOD study on the current and future need for centralized registration is similar to the work done by GAO and DOD back in 2012.

In contrast, the National Commission on Military, National and Public Service, as provided in the Senate bill, would bring a fresh look to this issue in a broader context. The deliberate recommendations of an independent Commission would aid DOD and Congress in decision-making on this important public policy matter more than another DOD study.

The National Women’s Law Center supports the inclusion of Sections 1066-1073 of the Senate bill in the final conference agreement.

Responsibility for Standards and Qualifications for Military Specialties

Section 531 of the Senate bill provides that the responsibility for establishing, approving and modifying the criteria, standards and qualifications for military specialty codes within that Armed Force shall be “vested solely” with the Chief of Staff of that Force, except that the responsibility for “gender-based criteria, standards, and qualifications for military specialties” shall remain with the Secretary of Defense. The Commandant of the Marine Corps is deemed to be the Chief of Staff of the Marine Corps for purposes of this provision. The exception presumably is intended to distinguish standards for military jobs (vested in the Chiefs of Staff) from standards for general physical fitness (vested in the Secretary of Defense) because the latter are gender-based as well as age-based. The House bill contains no similar provision.

The Senate report sheds no light on the basis for Section 531, and provides no reason for altering the long-standing practice of military Chiefs of Staff working closely with their civilian Service Secretaries to establish military policy, including standards for military specialties. This lack of explanation for the provision is surprising, given that the provision threatens to upend a basic principle of U.S. democracy -- civilian control of the military.

To the extent the provision is a response to the recent disagreement between the Commandant of the Marine Corps and the Secretary of the Navy and Secretary of Defense on whether the standards for certain military occupational specialties in the Marine Corps, but no other Service, should be based on gender, it is both unwarranted and unwise. The adoption of this provision would seemingly permit the Commandant – or any other Service Chief – to reverse the decision of Secretary of Defense Ash Carter and to allow standards for military jobs to be based on gender or, potentially, race or sexual orientation. Although any of these bases for military occupational standards would likely be ruled unconstitutional, leaving the final decision on standards for military occupational standards to the Service Chiefs has the potential for fostering other disagreements as well, and for severely undermining civilian control of the military.

The National Women’s Law Center opposes Section 531 of the Senate bill and urges its exclusion from the final conference agreement.

Other provisions affecting military women

1. Funding for museums and memorials highlighting the role of women in the military

Both Section 340 of the Senate bill and Section 2853 of the House bill contain provisions that authorize, in different ways, funding for museums and memorials that highlight the role of women in the military. The Senate provision authorizes \$5 million in support and permits the Secretary of Defense to enter into a contract with a non-profit organization to perform necessary activities of

acquisition, installation and maintenance of exhibits and facilities. The House provision does not specify an authorized amount of financial support but requires the Secretary of Defense to report to the congressional defense committees before entering into a contract with a non-profit for the acquisition, installation and maintenance of exhibits and facilities, with the report describing, among other things, how the contract is in the best interest of DOD.

An important and appropriate function of the Department of Defense is to preserve the record of the critical contributions women have made and are making to our national defense, and to educate both service members and the public about these contributions. The Senate provision advancing this function is generally preferable to the House version, because the latter's requirement of a report to Congress before contracting with a non-profit to perform the necessary activities is unwarranted and wrongly suggests that there is more reason for congressional oversight of DOD expenditures on behalf of service women than for oversight of other expenditures that may involve many more millions of dollars. The Senate bill should not limit the authorized expenditures, however, given that recognition of service women's contributions is long overdue; rather, it should authorize a minimum of \$5 million in expenditures.

The National Women's Law Center urges the inclusion of Section 340 of the Senate bill in the final conference agreement, with a change in the language of the provision to authorize a minimum rather than a maximum expenditure of \$5 million.

2. Consideration of PTSD and TBI in Discharge Review Board proceedings

Section 536A of the Senate bill codifies guidance given by the Secretary of Defense in 2014 that Discharge Review Boards should consider previously unrecognized post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) using a "liberal consideration" standard in Board review of requests for upgrade of less-than-honorable discharges, and clarifies that it applies to Board consideration of cases involving PTSD or TBI related to military sexual trauma. The House bill contains no similar provision.

The Senate provision would help ensure that petitions for discharge upgrades, including from individuals who have suffered military sexual trauma, are treated appropriately when unrecognized PTSD or TBI may have been a factor in behavior leading to separation from service.

The National Women's Law Center supports Section 536A of the Senate bill and urges its inclusion in the final conference agreement.

3. Reports to Congress on the progress of women in newly opened military positions

Sections 593 and 594 of the Senate bill establish mechanisms for reporting to Congress on matters relating to women in newly opened military specialties and units. Section 593 requires annual reports by the Army, the Marine Corps and the U.S. Special Operations Command on progress in integrating women into previously closed military jobs. Section 594 requires the Secretary of Defense to make a one-time report describing the career progression track for entry-level and laterally moved service women for positions opened as a result of the Secretary of Defense's December 2015 decision to open all previously closed military occupational specialties to women. These two provisions would be helpful to both DOD and Congress in assessing the status of integration efforts and determining the extent to which improvements may be needed.

The National Women's Law Center supports the inclusion of Section 593 and Section 594 of the Senate bill in the final conference agreement.

4. *Combatting retaliation against service members who report sexual assault*

Sections 541-544 of the Senate bill and Section 546 of the House bill contain measures designed to improve investigation, training and reporting with respect to retaliation against service members who report incidents of sexual assault. The recent DOD report on sexual assault in the military found that about two-thirds of service women who reported a sexual assault in 2014 also experienced some kind of social or professional retaliation for doing so demonstrating that retaliation is a serious problem in the military. These provisions would help improve DOD's efforts to prohibit retaliation.

The National Women's Law Center supports Sections 541-544 of the Senate bill and Section 546 of the House bill and urges their inclusion in the final conference agreement.

Thank you for consideration of these recommended resolutions of the final conference agreement on the NDAA for FY 2017. If you would like to discuss further any of the recommendations, please do not hesitate to contact us.

Sincerely,



Nancy Duff Campbell
Co-President