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COMBAT EXCLUSION: AN EQUAL PROTECTION ANALYSIS

A Thesis Presented to
The Judge Advocate General's School
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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45th JUDGE ADVOCATE OFFICER GRADUATE COURSE
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COMBAT EXCLUSION: AN EQUAL PROTECTION ANALYSIS

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Abstract

Although women have participated in war throughout America's history, the Womens' Armed Services Integration Act of 1948 excluded servicewomen from combat positions. Some of those exclusions remain in effect today. Advocates of combat exclusion argue that it is the will of the American people to exclude women from combat because women are not physically or psychologically suited to warfare. In addition, there is public concern about unit cohesion, the protection of women, and the continuity of the American family if women are fully integrated into combat positions. Opponents of combat exclusion argue that the policy does not serve a military purpose, but that it is supported by stereotypical notions that have been disproved by recent history. Additionally, the combat exclusion policy does not meet the standards of the intermediate scrutiny test required by the Supreme Court's 1976 decision in *Craig v. Boren.* A gender-neutral assignment policy which addresses the major societal concerns associated with combat exclusion would pass intermediate scrutiny. Though the conflicting opinions and an equal protection argument against combat exclusion exist, if faced with a challenge, the Supreme Court would probably uphold the current policy because of the great deference that it currently gives to congressional decision making in military matters. That deference, however, is inappropriate when congressional decisions about servicemembers' most basic constitutional rights, such as equal protection, are not based upon military necessity. Therefore, if faced with a challenge to the policy, the Court should not give deference to the military, but should hold

that combat exclusion is unconstitutional, and require the adoption of a gender-neutral assignment policy.

I. Introduction

> Women are not the weak, frail, little flowers that they are advertised. There has never been anything invented yet, including war, that a man would enter into, that a woman wouldent [sic], too.
>
> Will Rogers[1]

"[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[2] Women have participated in the business of war throughout the history of the United States. At times their commitment to national security has been so strong that they have resorted to subterfuge to gain the opportunity to protect and defend America as a part of the military force.[3] Nevertheless, the Womens' Armed Services Integration Act of 1948,[4] which opened the regular active duty components of the military to women, included provisions which excluded women from combat. There has been extensive debate over those provisions in recent years, and some of the restrictions have been modified or lifted.[5] Nevertheless, the core restriction still remains.

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[1] B. STERLING, THE BEST OF WILL ROGERS 160 (1979).

[2] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

[3] *See infra* notes 13-37, and accompanying text (discussing the historical role of women in the military).

[4] Pub. L. No 80-625, ch. 449, 62 Stat. 356-375 (codified in various sections of 10 U.S.C.).

[5] *See infra* notes 47-64, and 178-183, and accompanying text (discussing amendments to the Womens' Armed Services Integration Act).

Advocates of combat exclusion argue that it is the will of the American people to exclude women from combat because women are not physically or psychologically suited to warfare. They further argue that the complete inclusion of women in combat roles would risk national security.[6] Conversely, opponents of exclusion argue that those notions are based upon outdated stereotypes and not supported by recent experience. In addition, combat exclusion of women disadvantages both women and men. The lack of combat experience and assignment opportunities to units which have the possibility of combat duty often places a ceiling on the advancement of military women because they are denied the opportunity to show that they have the tactical and the operational decision making skills that are required of our highest level military leaders.[7] Conversely, men are also disadvantaged because they alone bear the risks and burdens of war. Combat exclusion devalues men's lives by implying that their injury or loss is less important than that of women.[8] In light of the Supreme Court's 1976 decision that statutes which discriminate on the basis of gender must pass intermediate scrutiny,[9] and subsequent Court decisions which imply that the intermediate scrutiny test requires a showing that the statute's purpose would be frustrated by a gender neutral statute,[10] combat exclusion violates the equal protection clause of the United States Constitution.[11]

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[6] *See infra* notes 79-177, and accompanying text (discussing the theories behind combat exclusion and the arguments against these theories).

[7] Pamela R. Jones, Note: *Women in the Crossfire: Should the Court Allow It?*, 78 CORNELL L. REV. 252, 258-60 (1993).

[8] *Id.* at 260-61.

[9] Craig v. Boren, 429 U.S. 190 (1976), discussed *infra* notes 213-216.

[10] *See infra* notes 226-240, and accompanying text (discussing Supreme Court equal protection jurisprudence in gender cases since 1976).

Though the conflicting opinions and a viable equal protection challenge to combat exclusion exist, the issue has never been directly challenged before the Supreme Court. This may be because the Court gives such great deference to congressional action in military matters that a challenge would be futile. That deference, however, is not appropriate when the challenged statutes infringe upon servicemembers' basic constitutional rights, such as equal protection, without furthering a valid military purpose.[12]

Part II of this thesis discusses combat exclusion in terms of its historical development and current application. It begins with a brief historical review of American women's participation in wars. It further discusses the combat exclusion policies of the Womens' Armed Services Integration Act and the arguments used to support them. Finally, it discusses the amendments to the original policy and the current state of combat exclusion. Part III explains the evolution of current Supreme Court equal protection jurisprudence, concentrating on the development of the intermediate scrutiny standard of review for challenges to gender-based statutes. It ends with a discussion of the gender-related cases which the Court has decided since it espoused the intermediate scrutiny standard, explaining the gender-neutrality requirement which those cases imply is an additional third step to the intermediate scrutiny test originally adopted by the Court in 1976. Part IV reviews the

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[11] U.S. CONST. amend. XIV, § 1 (1868).

[12] *See infra* notes 241-280, and accompanying text (discussing arguments for and against judicial deference to Congress in matters affecting the military).

arguments commonly advanced to justify the principle of judicial deference to congressional action regarding the military, and advocates a departure from that deference in cases of statutes and regulations which are not mandated by military necessity, yet impact upon the most basic constitutional rights of servicemembers. Part V evaluates combat exclusion in gender-neutral terms. It analyzes combat exclusion in terms of the three-step intermediate scrutiny standard, thereby demonstrating that the policy would not survive a Supreme Court equal protection review absent the Court's abdication of its judicial role out of deference to Congress in military affairs. Part V concludes by proposing a military assignment policy which addresses the major societal concerns associated with combat exclusion, but which does not discriminate on the basis of gender. Finally, Part VI serves as an epilogue to address briefly the practical implications of a change to the combat exclusion policy in light of the current downsizing of the military and the changing focus from conventional warfare to peace-keeping and stability operations.

II. The Evolution of Combat Exclusion

A. Women in War: A Historical Overview

Approximately 2,000,000 women have served in the American Armed Forces in the more than two centuries since the Revolutionary War.[13] Many of those women have served during wartime and under fire.

[13] Wilma L. Vaught, *In Defense of America: Women Who Serve,* USA TODAY (MAGAZINE), Mar. 1, 1994, at 86.

During the war for American independence it was common practice for the women relatives of soldiers to participate as camp followers. These unofficial support troops, made up of mothers, wives, and daughters of the servicemembers, followed their sons, husbands, and fathers to war, working in the military camps in menial positions such as cooks and laundresses. Many also served as nurses, helping to dress the wounds and relieve the suffering of the injured. For some women, however, this was not enough. They wanted to be part of the action, and went to great lengths to do so. One of the most startling examples is that of Deborah Sampson Garnett who, in 1782, enlisted in the Continental Army's 4th Massachusetts Regiment disguised as Private Robert Shurtleff.[14]

During Garnett's service she was twice wounded. First, during a Tory raid, she sustained a saber-inflicted slash across her head while engaged in hand-to-hand combat. Later, a musket ball embedded in her leg when she was shot during an ambush. Though not mortally wounded, but knowing that soldiers whose wounds were beyond medical treatment were routinely left on the battlefield to die, Garnett told her comrades that her injury was fatal to avoid being taken to a medical facility where her true identity might be discovered. Unfortunately, her ruse did not work, and Garnett was transported to a field medical station. She managed, however, to crawl away and hide while doctors treated other injured soldiers. Garnett treated herself while in hiding and, a few days later, returned to her unit. The musket

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[14] *Id.*

ball remained in her leg, but she was sufficiently recovered to avoid going to the hospital. She was transferred, instead, to Pennsylvania to serve as an orderly to Major General Patterson. While in Philadelphia, Garnett became infected with a fever that was sweeping the city in epidemic proportions. Only after she lost consciousness and was unable to resist medical treatment was her gender discovered. The doctor, however, agreed to keep Garnett's identity secret and she recovered to join the 11th Massachusetts Regiment where she served until the war's end. After the war, Garnett revealed her true identity and was awarded an honorable discharge.[15]

Examples of women sacrificing to serve continued into the Civil War. Of course women served in traditional roles as nurses and cooks, but there are also accounts of women serving as scouts, saboteurs, and spies. The most well known of these was Dr. Mary Walker, the first woman to receive a Congressional Medal of Honor. Dr. Walker gave up her medical practice to join the Union Army as a doctor. Because she was a woman her application was rejected; nevertheless, she volunteered to serve as a nurse. During breaks in action, Dr. Walker traveled behind enemy lines to treat wounded soldiers. While performing these mercy missions she doubled as a spy, taking information that she overheard back to the Union. During one of these medical spy missions Dr. Walker was captured and imprisoned for four months by the Confederate Army. The Union Army obtained her release in a prisoner exchange. Dr. Walker was awarded the Congressional Medal of Honor for her

[15] *Id.*; *see also* HELEN ROGAN, MIXED COMPANY: WOMEN IN THE MODERN MILITARY 120-23 (1981) (detailing Garnett's exploits as well as those of others who assumed combat arms positions during the Revolutionary War).

service. Though it was rescinded in 1917, Dr. Walker refused to return the medal. It was officially restored to her posthumously in 1977.[16]

The Spanish-American War saw the first Army recruitment of women. The women were needed as nurses because of an outbreak of yellow fever. Though recruited by the Army, the nurses did not actually become a part of the force. They served as civilians under contract to the military. One of the contract nurses, Clara Louise Maass, sacrificed her life when she agreed to be bitten by a mosquito believed to be carrying yellow fever as a part of an experiment to help find the source of the disease. Her sacrifice, and the performance of her 1500 fellow nurses, led to the establishment of the Army Nurse Corps in 1901, and the Navy Nurse Corps in 1908.[17]

About 23,000 American nurses served during World War I.[18] All of the Army nurses were auxiliary troops. Even though they wore uniforms, they served without the benefits of rank, officer status, equal pay, or veteran's benefits. The Army also contracted women to serve in the Signal Corps as translators and telephone operators on the front lines in France and England.[19] In the Navy, many nurses served in the same auxiliary capacity as the Army

[16] *Id.; see also* ROGAN, *supra* note 15, at 123; MATTIE E. TREADWELL, THE WOMENS' ARMY CORPS 50 (1954) (both describing the crucial support role played by women in the Civil War).

[17] *Id.; see also* TREADWELL, *supra* note 16, at 6 (discussing the formation of the Army Nurse Corps).

[18] Vaught, *supra* note 13.

[19] *Id.; see also* ROGAN, *supra* note 15, at 124.

nurses. The Navy, however, did enlist some nurses.[20] The Navy also recruited and enlisted approximately 11,000 women yeomen to serve in the Marine Corps and Coast Guard as clerks, translators, and radio electricians.[21] After the war, all of the women contract worker positions were terminated. The auxiliary Nurse Corps' were returned to their peacetime levels, and all of the women who the Navy enlisted as nurses and yeomen were discharged.

Between the World War I and World War II (WWII) military leaders developed proposals to integrate women more fully into mobilization efforts. The peacetime environment, however, lacked the urgency that was required to put the plans in a realistic form. The Nazi blitzkrieg through Europe in 1940 provided the catalyst. In anticipation of massive American involvement in WWII, each service quickly created a women's auxiliary to fill combat support roles.[22] Though the auxiliary units had some of the rank structure and disciplinary characteristics of regular male military units, they did not receive the same levels of pay or benefits of those units. Nevertheless, nearly 400,000 women volunteered to serve.[23] In welcoming the first class of female officers at the Women's Army Auxiliary Corps (WAAC)[24] training, WAAC director Colonel Oveta Culp Hobby reminded them "[y]ou are the first women to serve. Never forget it . . . . You have taken off silk and put on khaki. And

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[20] *See* ROGAN, *supra* note 15, at 124; TREADWELL, *supra* note 16, at 6 (both discussing the service of nurses during WWI).

[21] Vaught, *supra* note 13.

[22] TREADWELL, *supra* note 16, at 6-18 (discussing the formation and use of the various service women's auxiliary units).

[23] Vaught, *supra* note 13.

[24] Later changed to Women's Army Corps (WAC).

all for essentially the same reason--you have a debt and a date. A debt to democracy, and a date with destiny . . . ."[25] By the end of the war members of the WAC had deployed to Europe, North Africa, Southeast Asia, the China-Burma theater, the Middle East, and the Southwest Pacific,[26] where seventy-seven nurses were among those personnel taken prisoner. They remained in captivity in the Philippines for three years.[27] The WACs served with such distinction during WWII that General Douglas MacArthur was quoted as saying "they were soldiers in the same manner as my men were soldiers."[28]

By the beginning of the United States' involvement in the Korean War in 1950, women had been integrated by law into the regular military with the 1948 passage of the Womens' Armed Services Integration Act (Integration Act).[29] Nurses began arriving in the Korean theater within four days of the arrival of the first United States troops.[30] These women served in MASH (Mobile Army Surgical Hospital) units close to the front lines. Besides nurses, however, few women served in Korea, despite the passage of the Integration Act.[31] This situation changed with the Vietnam conflict. More than 7500 American women served in medical, logistics, intelligence, and administration roles in Vietnam. Many of these

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[25] Vaught, *supra* note 13.

[26] ROGAN, *supra* note 15, at 133.

[27] Vaught, *supra* note 13.

[28] ROGAN, *supra* note 15, at 137.

[29] *See infra* notes 38-64, and accompanying text (discussing the Integration Act and its amendments).

[30] Vaught, *supra* note 13.

[31] *Id.*

women faced enemy fire, but they were inadequately trained to fight back. Many were wounded and eight lost their lives.[32]

The United States engaged in two small-scale conflicts following Vietnam. One hundred and ten women participated in the United States' invasion of Grenada, and 600 participated in Operation Just Cause in Panama. Though many women participated in these operations, these were low intensity conflicts. Therefore, these operations did not truly test traditional combat skills of the armed forces involved to the extent that a full-scale conflict does.[33]

America's most recent combat operations took place in the Persian Gulf in 1990 and 1991. During Operations Desert Shield and Desert Storm, over 37,000 women served, constituting 6.8% of the American forces.[34] Approximately fifteen percent of the military jobs performed by soldiers during the conflict were classified as "combat," and about twenty percent were classified as "combat support."[35] Women were precluded from serving in the combat positions; nevertheless, they served in the combat support roles, many of which were near the front lines. Additionally, women served in hundreds of combat service support

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[32] *Id.*

[33] James D. Milko, *Beyond the Persian Gulf Crisis: Expanding the Role of Servicewomen in the United States Military*, 41 AM. U.L. REV. 1301, 1312 (1992).

[34] DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF CONFLICT, FINAL REPORT TO CONGRESS, 647 (1991).

[35] *Id.*

positions. By the end of the conflict thirteen women were fatally injured and two women were taken captive.[36] During the operations, women performed exceptionally well.[37] That performance has led to a new dialogue on the proper roles for women in the armed forces, and the validity of the combat exclusion laws and policies that have existed since women were integrated into regular military service almost fifty years ago.

B. The Development of Combat Exclusion

1. *The Womens' Armed Services Integration Act of 1948*--In 1948 women were integrated into the regular armed forces.[38] After the passage of the Womens' Armed Services Integration Act of 1948, women were no longer considered auxiliary troops. Regular status, however, came with a number of restrictions. First, despite the exemplary service of women from the Revolutionary War through WWII, the Integration Act was passed with specific provisions prohibiting women in the Navy, the Air Force, and the Marines from serving in combat positions.[39] Naval and Air Force women were not allowed assignments on combat vessels or aircraft.[40] Though Congress did not specifically exclude

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[36] Vaught, *supra* note 13.

[37] *See, e.g.* Milko, *supra* note 33, at 1325; Jones *supra* note 7, at 252.

[38] *See* Womens' Armed Services Integration Act of 1948, ch. 449, §§ 101, 201, 301, 62 Stat. 356, 363, 371 (incorporating the WAC as part of the regular Army and authorizing the inclusion of women in the Navy, Air Force and Marines).

[39] *Id.* ch. 449 §§ 101, 201, 301, 62. Stat. 356, 363, 371.

[40] 10 U.S.C. § 6015, *repealed by* National Defense Authorization Act for Fiscal Year 1994, Pub. L. 103-160, § 541(a), 107 Stat. 1659 (1993) (Section 6015 stated in pertinent part: "The Secretary of the Navy may prescribe the manner in which women . . . of the Regular Navy and Regular Marine Corps shall be trained and qualified for military duty. . . . the kind of duty to which such women members may be assigned and the military

women from combat duty in the Army, the Integration Act gave the Secretary of the Army the leeway to "prescribe the military authority which commissioned officers of the Women's Army Corps may exercise, and the kind of military duty to which they may be assigned."[41] Using this authority combined with the Secretary's authority to "assign, detail, and prescribe the duties of members of the Army . . . and prescribe regulations to carry out his functions, powers, and duties,"[42] the Army developed its own combat exclusion policy. The Army justified its policy by relying on congressional intent as evidenced by the statutory restrictions on women in the Navy and the Air Force.[43] Congress determined that combat exclusion was necessary to promote the government's interest in shielding servicewomen from the risks of enemy fire and capture.[44]

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authority which they may exercise. However, women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions."); 10 U.S.C. § 8549 *repealed by* National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531(a)(1), 105 Stat. 1365, (1991) (Section 8549 stated in pertinent part: "Female members of the Air Force . . . may not be assigned to duty in aircraft engaged in combat missions.").

[41] Womens' Armed Services Integration Act of 1948, ch. 449, § 509A(g), 62 Stat. 359.

[42] 10 U.S.C. § 3013(g) (1994).

[43] *See Women in the Military: Hearings Before the Military Personnel and Compensation Subcomm. of the House Comm. on Armed Services*, 101st Cong., 2d Sess. 24 (1990) [hereinafter *Military Personnel Hearings*] (statement of Lieutenant General A. K. Ono, Deputy Chief of Staff for Personnel, United States Army).

[44] *See* DEPARTMENT OF DEFENSE, TASK FORCE REPORT ON WOMEN IN THE MILITARY 9 (1988) [hereinafter TASK FORCE REPORT], *reprinted in Women in the Military: Hearings Before the Military Personnel and Compensation Subcomm. of the House Comm. on Armed Services*, 100th Cong., 1st and 2d Sess. 142 (1987-and 1988) [hereinafter *Women in the Military Hearings*] (though risks of harm and capture are not specifically mentioned in the statute as the government interests being protected by combat exclusion, the legislative history of the Integration Act points to that as the reason for the restriction).

In addition to the restrictions on combat duty, the Integration Act had other personnel restrictions. The number of women allowed to serve was capped at two percent of total enlisted strength. Female officer strength was limited to ten percent of the number of enlisted women.[45] Finally, women were precluded from attaining rank above lieutenant colonel in the Army and the Air Force, and above commander in the Navy and the Marine Corps.[46] Most of these restrictions, however, were short-lived.

2. *The Modification of the Combat Exclusions*--Less than twenty years after the passage of the Integration Act, Congress took the first steps toward modification of the limits on women's service. In 1967 the restrictions on the number of women allowed to serve and the ranks that they could attain were lifted.[47] Nevertheless, the restriction on combat duty remained. This restriction was a source of confusion to the military branches because Congress never defined the term "combat" in the Integration Act. Therefore, each service was left to determine its own definition of combat and to decide which jobs would be closed to women.[48]

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[45] Womens' Armed Services Integration Act of 1948, ch. 449, §§ 102, 202, 302, 62 Stat. 357, 363, 371 *repealed by* Act of Nov. 8, 1967, Pub. L. No. 90-130, 1, 81 Stat. 374, 376 and by Defense Officer Personnel Management Act, Pub. L. No. 96-513, 202, 94 Stat. 2835, 2878 (1980).

[46] *Id.* ch. 449 §§ 104, 203, 303, 62 Stat. 356-58, 363-64, 371 *repealed by* Act of Nov. 8, 1967, Pub. L. No. 90-130, 1, 81 Stat. 374, 376.

[47] *See supra* notes 45-46.

[48] TASK FORCE REPORT, *supra* note 44, at 9-10, *reprinted in Women in the Military Hearings*, *supra* note 44, at 142-43 (stating that the different service definitions of combat mission were the result of different operational concerns among the branches, nevertheless, the lack of consistency was a major Department of Defense concern).

The Navy defined "combat mission" as one "which has as one of its primary objectives to seek out, reconnoiter, or engage an enemy."[49] Women were prohibited from assignment to any unit, ship, aircraft, or task organization having that type of duty.[50] The Marine Corps expanded the Navy's definition. In addition to prohibiting the assignment of women in "direct combat operations" requiring "seeking out, reconnoitering, or engaging in offensive action," it also excluded women from positions involving great physical risk.[51] The Air Force took combat exclusion the farthest, developing a very expansive definition of restricted assignments. First, it closed aerial combat positions to women. These included those jobs involving "(1) [d]elivery of munitions or other destructive material against an enemy, or (2) [a]erial activity over hostile territory where enemy fire is expected and where risk of capture is substantial."[52] The Air Force further prohibited the assignment of women to duties having a mere "probability of exposure to hostile fire."[53]

The Department of Defense expressed concern that these varying definitions and interpretations of congressional intent went too far. A 1985 Secretary of Defense communication to the armed forces stated "[m]ilitary women can and should be utilized in all

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[49] TASK FORCE REPORT, *supra* note 44, at 12, *reprinted in Women in the Military Hearings*, *supra* note 44, at 145.

[50] *Id.*

[51] TASK FORCE REPORT, *supra* note 44, at 13, *reprinted in Women in the Military Hearings*, *supra* note 44, at 146.

[52] TASK FORCE REPORT, *supra* note 44, at 14, *reprinted in Women in the Military Hearings*, *supra* note 44, at 147.

[53] *Id.*

roles except those explicitly prohibited by the combat exclusion statutes and related policy. The combat exclusion rule should be interpreted to allow as many as possible career opportunities for women to be kept open."[54] The Army took this guidance to heart and developed the most elaborate of the service schemes for determining which positions would be open to women.

The Army defined "direct combat" as "engaging an enemy with individual or crew-served weapons while being exposed to direct enemy fire, a high possibility of direct physical contact with the enemy, and a substantial risk of capture."[55] It then established a Direct Combat Probability Coding system for each different type of job in the Army. Each job, commonly called a military occupational specialty (MOS), was evaluated with respect to the probability that a soldier in that specialty would engage in direct combat. In determining this probability, the Army took into account the duties, mission, tactical doctrine and battlefield location of each MOS. Each MOS was then classified from P1 through P7, with P1 being the highest probability of direct combat. Women were only completely excluded from assignment in P1 positions.[56]

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[54] TASK FORCE REPORT, *supra* note 44, at 9, *reprinted in Women in the Military Hearings*, *supra* note 44, at 142.

[55] TASK FORCE REPORT, *supra* note 44, at 11, *reprinted in Women in the Military Hearings*, *supra* note 44, at 144.

[56] *Id.*

The varying service definitions of combat and how to best accomplish the intent of the combat exclusion policy was one of many issues discussed by a 1988 Department of Defense Task Force on Women in the Military.[57] In order to resolve the inconsistency between the services, the Task Force recommended that the Department of Defense adopt a department-wide Risk Rule. The rule advocated opening to women all noncombat units which had a lesser risk of direct combat than the combat units they supported. In other words, "[t]he Risk Rule prohibits women from serving [only] where the risk of injury, capture, or death is equal to or greater than for men in combat billets."[58] The Secretary of Defense approved and adopted the Task Force's recommendation, thereby establishing a consistent standard for all of the services to apply in evaluating which jobs would be opened to women.

Although the Army already had a very expansive policy on the assignment of women,[59] it reevaluated its Direct Combat Probability Coding in light of the new Risk Rule. The reevaluation resulted in opening an additional 23,000 positions to women.[60] Using the Risk Rule as its standard, the Navy opened assignments on hospital ships, combat logistics

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[57] *Supra* note 44.

[58] William Matthews, *Women Battle "Fighter Mentality"*, ARMY TIMES, Sept. 14, 1992 at 6 (quoting General (retired) Robert T. Herres, Chairman, The Presidential Commission on the Assignment of Women in the Armed Forces).

[59] *See supra* notes 55-56, and accompanying text (discussing Direct Combat Probability Coding).

[60] *Military Personnel Hearings*, *supra* note 43, at 26-27 (statement of Lieutenant General A. K. Ono, United States Army Deputy Chief of Staff for Personnel).

ships, and some combat-equipped frigates to women.[61] The Risk Rule cleared the way for Air Force women to serve as instructor pilots for combat aircraft. The Air Force also began assigning women to civil engineering and heavy construction units.[62] Though the Marine Corps refused to open any aircraft positions to women, claiming that all Marine aircraft engaged in direct combat, it did open security guard positions to women. In addition women Marines began receiving training in defensive operations.[63] All of these changes to combat exclusion policies put women in jobs which opened them to the risk of harm while still shielding them from direct combat. It was with this expanded role that women saw action in the Persian Gulf War.[64]

Congress took a new look at the combat exclusion policy as a result of the performance of women in Operations Desert Shield and Desert Storm. As a part of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Authorization Act), Congress removed the barriers that kept female pilots in the Air Force, the Navy, and the Marine Corps from combat assignments.[65] This advancement, however, was immediately

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[61] *Id.* at 31-34 (statement of Vice Admiral J. M. Boorda, Deputy Chief of Staff for Naval Operations and Chief of Navy Personnel, outlining changes in Navy combat exclusion policies between 1988-1990).

[62] *Id.* at 41-42 (statement of Lieutenant General Thomas Hickey, Air Force Deputy Chief of Staff for Personnel).

[63] *Id.* at 45 (statement of Lieutenant General Norman Smith, Marine Corps Deputy Chief of Staff for Manpower and Reserve Affairs).

[64] *See supra* notes 34-37, and accompanying text (discussing the service of women in Operations Desert Shield and Desert Storm).

[65] National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, §§ 531(a)(1), 531 (b), 105 Stat. 1365 (1991).

put on hold because of another provision in the Authorization Act. The Authorization Act established a Presidential Commission on the Assignment of Women in the Armed Forces (Commission) to study the laws and policies restricting the assignment of servicewomen, and to make findings and recommendations on the issue.[66] In response to this action, the Department of Defense decided not to assign women to combat pilot positions until the Presidential Commission delivered its report. This was possible because the Authorization Act allowed, but did not mandate, the assignment of women to fighter pilot positions.[67]

3. The Presidential Commission's Findings and Recommendations--For eight months the fifteen-member Commission, chaired by retired Air Force General Robert T. Herres, undertook

> a research study to assess the assignment of servicewomen. The Commission reviewed historical and current writings on the subject and invited the opinions of all interested Americans, resulting in over 11,000 letters. In hearings held across the country, . . . [the Commission] received testimony from a wide range of people including members of the United States House of Representatives and Senate, authorities on cultural and religious issues, and scientific and medical experts . . . . [The Commission] studied extensive foreign military experiences relevant to women in the military . . . . [and] heard the views of retired and active duty members of the United States Armed Forces, from junior enlisted to flag and general officer. The Commission conducted three surveys on the role of women in the military, one of the American public, one of a cross-section of military personnel and another of retired flag and general officers. [68]

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[66] *Id.* §§ 541-542, 105 Stat. at 1365-66.

[67] Milko, *supra* note 33, at 1327.

[68] REPORT TO THE PRESIDENT, PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES at i (1992) [hereinafter PRESIDENTIAL COMMISSION REPORT]. Other members of the Commission included Major General Mary E. Clarke, USA (Ret.), Brigadier General Samuel G. Cockerham, USA (Ret.), Elaine Donnelly, Captain Mary M. Finch, USA, Colonel Wm. Darryl Henderson, Ph.D., USA (Ret.), Admiral James R. Hogg, USN (Ret.), Newton N. Minow, Charles S. Moskos, Ph.D., Meredith A. Neizer, Kate Walsh O'Beirne, Ronald D. Ray, General Maxwell Reid Thurman, USA (Ret.), Master Sergeant Sarah F. White, USAF Reserve.

The Presidential Commission delivered its report to President Bush on November 15, 1992. It assessed seventeen separate issues dealing with the assignment of women. Six of the issues involved women's combat roles. The Commission recognized that "there are situations under which women might be assigned to combat positions."[69] In order to make these assignments properly, the Commission recommended the retention of "the DOD Risk Rule as currently implemented."[70] Nevertheless, it was the "sense of the Commission . . . that women should be excluded from direct combat units and positions."[71] In addition, the military should "retain the existing policies" excluding women from Special Operations Forces which "involve small groups infiltrating deep behind enemy lines to gather information or destroy important targets."[72] The Commission also recommended that Congress "[r]epeal existing laws and modify Service policies for servicewomen to serve on combatant vessels except submarines and amphibious vessels."[73] Finally, in a very close vote from which seven commissioners, including four flag officers and an active duty woman aviator, dissented,[74] the Commission recommended reenactment of the provisions

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[69] *Id.* at 22.

[70] *Id.* at 36.

[71] *Id.* at 24.

[72] *Id.* at 34.

[73] *Id.* at 31.

[74] *Id.* at 80-89 (dissents from other combat related decisions are included in pages 90-96 of the Presidential Commission Report).

"prohibiting women from assignment to duty on aircraft engaged in combat missions, which was repealed by Public Law 102-190 for the Navy, and codification of Army policy."[75]

These recommendations seemed somewhat inconsistent. Read as a whole they agreed that women should be assigned to combat units, but not as direct ground combat soldiers or special operations forces, on amphibious vessels or submarines, or as fighter pilots. Though this was the majority view, an alternate view was also presented. Five of the Commission members felt that women should be excluded from all combat positions, explaining that "[t]he Commission heard no compelling evidence that the military *needs* women to fight its wars."[76] Those members felt that "[t]he assignment of women to combat could be justified *only* in the most dire emergency where the nation's very survival is at risk and there is no reasonable alternative."[77]

The Commission's findings have sparked a new dialogue on the proper role of women in combat. The same debate has continued since the 1970s.[78] The arguments for and against keeping women out of combat continue to revolve around the same basic principles.

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[75] *Id.* at 28.

[76] *Id.* at 47 (alternate view) (emphasis in original). The five members who signed the "alternate view" were Brigadier General (Ret.) Cockerham, Ms. Donnelly, Mrs. O'Beirne, Mr. Ray, and Master Sergeant White.

[77] *Id.* at 59 (alternate view) (emphasis in original).

[78] Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 529 (1991) (opining that the rise of the women's movement forced the military and Congress to justify combat exclusion).

a. Physical Limitations--A favorite refrain of advocates of combat exclusion is that women generally lack the physical strength necessary for combat.[79] Though it is true that women are generally not as strong as men, it is not necessarily true that women lack the physical strength necessary for combat. The Presidential Commission investigated this proposition, dividing physical strength into three components: body composition, muscular strength, and cardiorespiratory capacity. "Compared to the average male Army recruit, the average female Army recruit is 4.8 inches shorter, weighs 31.7 pounds less, and has 37.4 pounds less muscle mass and 5.7 pounds more fat."[80] This body composition puts women at a disadvantage when performing aerobic activities and tasks requiring muscular strength.[81] Men and women have the same quality and quantity of muscle tissues and fiber; nevertheless, men exhibit higher muscular strength scores because they have thirty percent more cross-sectional area of muscle fiber than women have.[82] Finally, because of their smaller heart mass, heart volume, and cardiac output, and because their blood transports less oxygen than that of men, women have a lower aerobic capacity. Therefore, they require more oxygen to carry the same load at the same velocity as men.[83] Exclusionists argue that these physical differences between the genders leave women unable to perform critical combat functions on

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[79] *See, e.g.*, Reed, *Women in Combat: A Real Bad Idea*, ARMY TIMES, Jan. 29, 1990 at 62; BRIAN MITCHELL, WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY 156-62 (1989).

[80] PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at C-3.

[81] *Id.*

[82] *Id.* at C-3 to C-4.

[83] *Id.* at C-5.

the battlefield. In fact, some commentators have gone as far as to suggest that placing women in combat positions knowing that these gender differences in physical ability exist would sacrifice national security.[84]

This opinion reflects an inaccurate characterization of modern combat. As the Persian Gulf War experience demonstrated "[t]he modernization of arms and the resultant change in military tactics have altered traditional methods of combat to the point where physical strength is often unrelated to mission success. The deployment of advanced weapons requiring technical aptitude can greatly offset any physical disparities that may exist between servicemen and servicewomen."[85] There are, of course, some military positions for which physical strength is a necessary component for success. This does not, however, justify excluding all women from these positions. A better solution would be to develop realistic strength standards for those positions, and to require all members serving in those positions to meet and maintain those standards.[86] Currently, only the Air Force has a physical strength test that is used to help determine assignments.[87] Unfortunately, that test is inadequate.[88]

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[84] *See, e.g.,* Jeff Tuten, *The Argument Against Female Combatants,* in FEMALE SOLDIERS--COMBATANTS OR NONCOMBATANTS, 237, 247-50 (Nancy L. Goldman, ed., 1982).

[85] Milko, *supra* note 33, at 1315.

[86] *See, e.g.*, Mady W. Segal, *The Argument for Female Combatants*, in FEMALE SOLDIERS--COMBATANTS OR NONCOMBATANTS? HISTORICAL AND CONTEMPORARY PERSPECTIVES 267, 271 (Nancy L. Goldman ed., 1982); *see also Military Personnel Hearings*, *supra* note 44, at 3 (statement of Representative Schroeder).

[87] UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMM. ON MILITARY PERSONNEL, COMMITTEE ON NATIONAL SECURITY, HOUSE OF REPRESENTATIVES, PHYSICALLY DEMANDING JOBS: SERVICES HAVE LITTLE DATA ON ABILITY OF PERSONNEL TO PERFORM 3 (July 1996) [hereinafter GAO REPORT] ("The Air Force is the only service that requires recruits to take a strength aptitude test. Each Air Force enlisted occupation is categorized into one of eight strength categories, and recruits' test scores are used to screen them for their military occupations. The other services permit virtually any recruit to fill nearly all physically demanding occupations provided they meet cognitive, height/weight, and other standards unrelated to strength capacity and restrict women only from occupations closed by combat exclusion policies.").

It is not enough to say that because men are generally stronger than women, all men should be allowed to serve in combat positions and all women should not. Women's muscular strength increases at a percentage equal to that of men. Therefore, women can improve their strength with training. In addition, there is a significant degree of overlap between male and female strength scores.[89] In other words, some women are already as strong as or stronger than some men, and others can become as strong. Conversely, some men are not as strong as some women.[90] Physically qualified women should not be denied the opportunity to serve in the full range of assignments, especially when they successfully complete the same training as men. It would be more reasonable to determine what strength components make the combat positions different from the noncombat positions, and to test that difference. Those who pass, male or female, should be eligible for combat assignments, and those who fail, male or female, should not.

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[88] *Id.* at 6 ("Since 1982, at least nine studies have been published or presented that raise questions about the validity of the [Air Force] incremental lifting test as a predictor of performance in military occupations, particularly if the test is relied upon as the sole measure of predicted performance.") The National Defense Authorization Act for 1994 required the military to adopt physical performance standards for all occupations in which strength, endurance, or stamina was essential to duty performance. The DOD General Counsel, however, interpreted that mandate to mean that the services did not have to create new standards, but only apply standards that already existed on a gender-neutral basis for any military specialty that is gender-integrated. *Id.* at 3.

[89] PRESIDENTIAL COMMISSION REPORT *supra* note 68, at C-4 to C-5.

[90] *See infra* note 149, and accompanying text (discussing Dutch experience with physical strength tests for combat arms).

In addition to concerns about physical strength, exclusionists argue that reproductive issues, such as menstruation and pregnancy, affect women's ability to perform as combat soldiers. Exclusionists argue that the physical and mental abnormalities that some women experience immediately prior to menstruation, commonly known as premenstrual syndrome, will have an adverse effect on women's abilities to perform their duties consistently.[91] In addition, day-to-day hygiene during menstruation presents a concern.[92] Although there is little empirical data on the effects of menstruation on military women, history seems to show that these concerns are exaggerated. "[F]emale nurses have had a long history of functioning in wartime under primitive, unsanitary conditions without questions being raised about menstruation interfering with the performance of their duties."[93] Some of the little empirical data that is available suggests that most women will likely experience the absence of menses, amenorrhea, in combat situations because of the extreme stress involved.[94] Amenorrhea is "frequently diagnosed among women who are 'serious athletes . . . [and] under severe stress . . . .' "[95] This condition is common among entering women cadets at service academies, eighty percent of whom do not generally experience menstrual cycles from their summer

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[91] Elizabeth V. Gemmette, *Armed Combat: The Women's Movement Mobilizes Troops in Readiness for the Inevitable Constitutional Attack on the Combat Exclusion for Women in the Military* 12 WOMEN'S RTS. L. REP. 89, 91-92 (1990).

[92] *Id.* at 92.

[93] Segal, *supra* note 86, at 274 (footnote omitted).

[94] Wayne E. Dillingham, *The Possibility of American Women Becoming Prisoners of War: Justification for Combat Exclusion Rules?*, 37 FED. B. NEWS & J. 223, 226 (1990).

[95] *Id.* (quoting Burke & Lin, *A Systematic Laboratory Approach to Amenorrhea*, PHYSICIAN ASSISTANT, Aug. 1988, at 102-07).

arrival until the Christmas holidays.[96] This empirical evidence, combined with the experience of nurses in wartime situations, suggests that menstruation in combat situations, if it occurs at all, should not be a major issue.

Pregnancy, also, should not be an issue which dictates military policy concerning combat duty. Pregnancy was an issue during Operations Desert Shield and Desert Storm. In fact, "[i]n the Persian Gulf conflict, pregnancy became the issue to exaggerate."[97] Although many of the women called to deploy could not do so because of pregnancy, others deployed in spite their condition. "One woman hid her pregnancy, led her troops into Kuwait City, and then returned to the states to have her child. Others who could not deploy initially had their babies and re-joined their units six weeks later."[98] In fact, males lost more time to temporary non-duty-related injuries in the Gulf than women did to pregnancy.[99] Excluding all women from combat because some women get pregnant is like excluding all athletic servicemembers because some get sports injuries. A very small portion of a woman's life is spent in pregnancy, and some women never get pregnant. Also, unlike most injuries and other temporary medical conditions, pregnancy can be planned. Some servicewomen plan to have

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[96] *Id.* (citing an interview with Major Alma Guzman, USAF, Nurse Practitioner, Cadet Clinic Primary Care, United States Air Force Academy (Nov. 21, 1989)).

[97] D'Ann Campbell, *Combating the Gender Gulf*, 2 TEMPLE POL. & CIV. RTS. L R 63, 72 (1992).

[98] *Id.* at 73 (citing David H. Hackworth, *War and the Second Sex*, NEWSWEEK, Aug. 5, 1991, at 26 and interview with Lieutenant Colonel Patricia Wise, Chief Historian, Army Nurse Corps, Center of Military History, Washington D.C. (Mar. 13, 1992)).

[99] *Id* at 74. (citing *Women Have What It Takes*, NEWSWEEK, Aug. 5, 1991, at 30).

their children during assignments which do not require deployment.[100] Though the possibility of pregnancy is real, it doesn't make sense to exclude women from combat simply because they have the capacity to reproduce.

The other part of the pregnancy argument is that because women have the unique ability to bear children they must be kept from the dangers of combat in order to ensure the survival of the species. "[S]ince a few men can impregnate many women, more young women than men must survive a war to ensure the continuation of the American society."[101] This is especially true since "a woman's child bearing years would coincide with the years she would be most likely to serve in combat . . . ."[102] This argument, however, has two major flaws. First, it advocates social and cultural values that are not prevalent in American society by assuming that one man will impregnate several women. "While alternate lifestyles are becoming more common, the overwhelming norm in the American society is still monogamous marital relationships."[103] Therefore, as many men need to survive war as do women for American society to continue, yet exclusionists don't advocate keeping men out of combat to ensure reproduction. Second, for American society to die out because of a lack of babies being born, 100% of American women of child bearing age would have to join the

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[100] *See, e.g.,* id. at 73 (citing a March 13, 1992 interview with an anonymous female Army Captain who decided with her husband not to have children so that both could deploy to the Gulf).

[101] *See, e.g.,* Kathy L. Snyder, *An Equal Right to Fight: An Analysis of the Constitutionality of Laws and Policies that Exclude Women from Combat in the United States Military*, 93 W. VA. L. REV. 421, 443 (1990).

[102] *Id.* at 443-44.

[103] *Id.* at 443.

military, be deployed, and be killed or injured to the extent that they could no longer bear children. This is a ridiculous assumption. It is hard to imagine that the species will die out because qualified women are given the opportunity to perform in the full range of jobs in the military. Though the ability to bear children is a real difference that exists between men and women, it is not a reason to exclude women from combat.

b. Psychological Limitations--In addition to the real physical differences between men and women, exclusionists also point to alleged psychological limitations as a reason to keep women out of combat. They argue that women do not have the capacity to be aggressors,[104] nor are they able to handle the stress of combat situations.[105] These are stereotypical notions which ignore women's individuality. There are studies which show that women are less aggressive than men in hypothetical conflict situations, but these studies are based upon group behavior, not individual actions.[106] Even so, approximately thirty percent of men studied are below the median aggression levels in the general population, and the same percentage of women are above the median.[107] The existing combat exclusion rules, nevertheless, would send those less aggressive men to combat and keep the more aggressive women at home simply because of gender. Other studies, which are more on point because they deal specifically with performance in mock combat situations, indicate that women

[104] *See, e.g.,* Tuten, *supra* note 84, at 251-55.

[105] *See, e.g.,* David Hackworth, *War and the Second Sex,* NEWSWEEK, Aug. 5, 1991, at 29.

[106] Karst, *supra* note 78, at 533-35.

[107] *Id.* at 534.

perform well under war-like conditions.[108] Further, the notion of women as unable to handle the stresses of war was disproved during the Operations Desert Shield and Desert Storm.

During the Persian Gulf War, there were numerous examples of women performing under adverse conditions and in stressful situations.[109] Women did their jobs in spite of expectations that they would break down when faced with war.[110] Women kept their missions in mind as they maintained weapons systems, guarded perimeters, led troops, and engaged the enemy. Army Sergeant Bonnie Riddel probably expressed the opinion of most servicewomen when she told a reporter "if it happens while I'm sitting here, and it's a question of me or them, it's going to be them."[111]

c. *Unit Cohesion*--A third argument against woman in combat is that unit cohesion and overall effectiveness would be negatively affected because men will be distracted from their duties by trying to protect their female counterparts.[112] The problem

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[108] *See* Jones, *supra* note 7, at 264 (citing US Army Research Institute for the Behavioral and Social Studies, women in Combat Unit Force Development Test (1977); Women Content in the Army--Reforger 77; Study (REF-WAC 77) and Evaluation of the Women in the Army (EWITA) Study (1977)).

[109] *See, e.g.*, Campbell, *supra* note 97, at 69-71; Milko, *supra* note 33, at 1320-21 (both detailing several examples of women performing under stress in the Operations Desert Shield and Desert Storm).

[110] *See* Jones, *supra* note 7, at 264 (explaining that exclusionists recount an incident during the Panama invasion during which two women truck drivers whose duties took them into the combat area suffered breakdowns, but fail to mention that men are also susceptible and have suffered numerous incidents of "shell shock" and post traumatic stress disorder during and after war).

[111] Campbell, *supra* note 97, at 70 (citing Tony Clifton, *You're Here, They're Here. It's Simple*, NEWSWEEK, Nov. 12, 1990, at 28).

[112] Snyder, *supra* note 101, at 434.

with this argument "is that it crosses the line from gallantry into chauvinism."[113] As they have done in other dangerous professions such as firefighting and police work, men in the military will grow accustomed to working with women servicemembers as they see that the women are capable of performing combat tasks.[114] Nevertheless, exclusionists continue to argue that the sexual attraction between male and female servicemembers would interfere with unit bonding and camaraderie.[115] "The presence of women inhibits male bonding, corrupts allegiance to the hierarchy, and diminishes the desire of men to compete for anything but the attentions of women."[116] Because men would see themselves as rivals for the attention of women in the unit they would not form the alliances that are necessary for success in combat. This desire for the attention of the women would also lead to sexual misconduct, including sexual harassment.[117]

Sexual misconduct was a problem during the Persian Gulf War. During the hearings conducted by the Presidential Commission, one Army wife from Fort Benning referred to the issue of adultery asking, "How many countless wives and children have had their lives destroyed and torn apart simply because the military puts males and females together in a

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[113] *Id.*

[114] *Id.* at 434, 435.

[115] *See, e.g.,* Mitchell, *supra*, note 79, at 190.

[116] *Id.*

[117] PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at 25.

stressful combat zone for a long period of time?"[118] In addition to adultery, fraternization and sexual harassment were also issues that arose during Operations Desert Shield and Desert Storm. While some incidents were serious enough to warrant prosecution,[119] the rate of sexual assault in the Army during the conflict was one-tenth of the rate during peacetime.[120] "The most overt forms of harassment were conducted by men outside of a woman's unit and the most flagrant forms of sexual harassment came from Arab soldiers."[121] This may be because the American women and men who deployed together were more teammates than adversaries during the war. Because the men and women in gender-integrated units experienced the same hardships and difficult conditions, they developed a sense of teamwork and mutual respect.[122]

The Persian Gulf experience confirmed the conclusions reached in previous military experimentation with mixed gender units[123] that unit cohesion is a function of shared values, experiences, activities, and goals, not a function of gender. This conclusion was first reached

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[118] Mark Thompson, *Will Women Be Allowed in Combat? A Commission is Expected to Vote Today in Favor of Women in Combat--But the President and Congress Get the Final Say,* ORLANDO SENTINEL TRIBUNE, Nov. 2, 1992, at A1.

[119] Campbell, *supra* note 97, at 81 (Thirty-three sex crimes, including one gang rape, were recommended for prosecution).

[120] *Id.*

[121] *Id.* at 82.

[122] Milko, *supra* note 33, at 1324-25.

[123] *See, e.g.,* Robin Rogers, *A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII*, 78 CAL. L. REV. 165, 174 (1990) (describing the results of Air Force Studies in combat support units which indicate that "mixed sex units perform as well as or better than all-male units in terms of military proficiency and group morale.").

before the passage of the Integration Act, but it was ignored because of the prevailing public opinion about the proper roles for women.

> In 1942-1943, Army Chief of Staff George Marshall sponsored an experiment that used women in mixed battery anti-aircraft artillery units. He had heard reports from General Dwight D. Eisenhower that British women had performed quite well in anti-aircraft combat duty against the Luftwaffe. To the amazement of senior officers, the experiment showed that *units mixed with men and women in equal proportion performed better than all-male units, and had high unit cohesion or bonding.* The experiment was discontinued, however, when it became clear that American cities would be free from attack, and powerful southern Congressmen, hostile to the Women's Army Corps, threatened to outlaw all overseas roles for women, or even abolish the WAC, if the Army used any women in combat. Chief of Staff Marshall needed the WAC too much, however, to risk that. He was willing to accept an inferior solution to the Luftwaffe threat because the consensus among the Army's staff was the public opinion was not yet ready for women in combat.[124]

Though mixed gender units do bond and perform well, sexual misconduct did occur during the Persian Gulf War, and will probably continue to do so in wartime and in peacetime. This, however, is a leadership challenge, not a reason to keep women out of combat. To limit the assignment of all women because some servicemembers can't control their sexual urges targets the women instead of the true problem. A more reasonable solution would be to take swift and strict action against those servicemembers, male and female, who engage in inappropriate sexual behavior.

d. Public Opinion/Stereotypes--A final argument in favor of combat exclusion is that the American people believe that "[c]ivilized nations . . . do not send their mothers and

[124] Campbell, *supra* note 97, at 65 (footnotes omitted) (emphasis added).

daughters to war."[125] This is simply not true. Several civilized nations have used women in combat in the past, especially when national security was at risk, and others have recently integrated women into their combat forces.[126] Three countries which used women in combat in the past, Russia, Germany, and Israel, no longer do so.[127]

The Soviet Union used women extensively in WWII, though it was not their intention.[128] In order to recruit every available person, the Soviet Union launched a major propaganda campaign aimed at its youth.[129] Women responded, volunteering in massive numbers.[130] At the beginning of the war, women were only used in support units. As male casualties multiplied, however, women were used more extensively. By 1943 women were serving in the Soviet infantry, air defense, armor, artillery, transportation, signal, and medical fields.[131] Nearly a million Soviet women served in the regular and reserve forces throughout the war. 800,000 women were members of the regular Red Army, and 500,000 of those served in combat or combat support positions, including three all-female air regiments. This level of service was allowed because national security was at stake. At war's end, however, total female military strength was reduced to 25,000 and all of the women went back to

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[125] Milko, *supra* note 33, at 1321.

[126] PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at C-21.

[127] *Id.*

[128] *Id.* at C-28.

[129] *Id.*

[130] *Id.* at C-29.

[131] *Id.* at C-28 to C-29.

service support positions.[132] Since the break-up of the Soviet Union, Russia has been reevaluating proper assignment roles for women in the military. Though it is expected to increase the opportunities, there are no plans to open combat units or any positions that would put women in "harm's way."[133]

Like Russia, Germany also used women in combat positions when the necessity arose. During WWII Germany used women's auxiliary units extensively. By the end of the war, over 300,000 German women had been utilized in various jobs to support the war effort.[134] Unfortunately, many of the auxiliary units were captured on the Eastern Front during the war. The German public's reaction to reports that some of these women were executed and others abused during years spent in Eastern Bloc labor camps led Germany to adopt its current policy toward women in the military.[135] The German constitution now prohibits women from military service except in medical specialties or in the military band.[136]

Israel also used its women in combat when national security was at stake. During the 1948 Struggle for Independence, women in Israel served in combat and combat support

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[132] *Id.* at C-29.

[133] *Id.* at C-28.

[134] *Id.* at C-29.

[135] *Id.*

[136] *Id.*

positions.[137] This service, and the fact that Israel conscripts women,[138] may be why many people believe that the Israeli Defense Force uses women in combat. It does not. The brief period of Israeli women's combat service was never formally recognized by the nation, and was discontinued at the end of the Struggle for Independence.

The Israeli National Service Law was passed in 1959. It requires healthy, single women with no children to serve for two years as enlisted soldiers when they reach the age of eighteen. Those women who want to become officers must serve for two years and six months.[139] Approximately seventy percent of Israeli women serve the two year term. They are prohibited from serving in "combat units or any position which would place them in harm's way."[140] Israeli women are even excluded from combat support positions which would require them to come into direct contact with combat units in wartime. Further, because the Israeli Air Force has a career-length commitment which would preclude women from raising families if they were allowed to become pilots, Israel's policy does not permit women pilots. Women do, however, train male pilots in aircraft simulators.[141]

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[137] *Id.* at C-28.

[138] *Id.* at C-27.

[139] *Id.*

[140] *Id.*

[141] *Id.* at C-25.

In spite of the experiences of the aforementioned nations, several foreign countries do have women serving in combat positions in their militaries. Four[142] of these countries are the Netherlands, Denmark, Canada, and Great Britain.[143] They all use women to different extents, and have had varying success with their attempts to integrate women fully into all levels of their militaries. In 1992 the Royal Women's Army Corps was integrated into the Royal Army, opening up numerous assignment possibilities to women in Great Britain. Although there are no statutory prohibitions against women serving in combat positions, Ministry of Defense policies keep women out of the infantry, the armor, and other ground combat forces.[144] The British Air Force has opened its fighter pilot training to women,[145] and the British Navy has been successful with integration of women into combat positions. In 1990, positions on combatant ships were opened to women. Less than ten percent of women in the British military have volunteered for sea duty; however, the British Navy also has difficulty recruiting men. There has been no drop in combat effectiveness on the ships where women are assigned.[146]

Like Great Britain, the Netherlands has also integrated women into its combat forces. Though all positions in the Dutch Army are open to women, as of 1992 only five percent of

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[142] Norway, Spain, and Belgium also allow women to serve in some combat roles. John T. Correll, *What the Herres Commission Found,* AIR FORCE MAG., Feb. 1993, at 38.

[143] PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at C-21.

[144] *Id.* at C-23.

[145] *Id.* at C-25.

[146] *Id.*

the Dutch Army was female, and the government was having trouble recruiting women.[147] At that time there was only one woman fighter pilot in the Dutch military, and she was still undergoing training.[148] There was also only one woman in the infantry, and none in other ground combat specialties. Dutch authorities reported that eighty percent of the women in the military, and twenty percent of men, failed to meet the physical standards required to enter combat arms.[149] By far the Netherlands' greatest success with women in combat positions is in its Navy. Though women are excluded from the Marines and from submarine assignments, they are assigned on frigates and minehunters. On those ships where women are assigned, approximately ten percent of the crew is female. These mixed-crew ships served successfully in the Persian Gulf War, with women filling positions in the operations and communications arenas.[150]

Denmark also uses women extensively on combatant vessels as well as in ground combat units, though not as fighter pilots. Between 1981 and 1985 Denmark conducted tests of women in combat specialties.[151] In the Navy, eighteen percent of women were lost to attrition, compared to thirteen percent of men. Women spent three percent of their time on sick leave, compared to two percent for men. The Danes admit that, aboard ship, sexual

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[147] *Id.* at C-22.

[148] *Id.* at C-24

[149] *Id.*

[150] *Id.* at C-27.

[151] *Id.* at C-26.

harassment and fraternization are problems that they have had to face. They believe that firm guidance and strong leadership are the keys to controlling these challenges. The Danish tests showed that women performed well during adverse physical conditions such as bad weather and prolonged training periods. Women were also shown to be more conscientious in their work, though they took longer than men to accomplish tasks requiring physical strength.[152] Physical strength is not a major concern with ground combat use of Danish women because, although women and men must meet the same physical standards, those standards are based on group, rather than task specialty requirements. Personnel are assigned with a goal of total unit strength in mind, and each person in the unit is expected to use his or her strengths to compensate for the weaknesses of others.[153]

Canada opened all of its combat positions except submarines to women in 1989.[154] In 1990 the Canadian Forces established programs to ensure that this integration did not sacrifice national security, nor discriminate against women.[155] In order to accomplish successful integration of women into its forces, Canada has modified its physical standards to reflect actual combat requirements, and requires all combat arms troops to meet those requirements.[156] Canada has women in fighter pilot positions[157] and also on combat vessels.

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[152] *Id.*

[153] *Id.* at C-22 to C-23.

[154] *Id.* at C-23.

[155] *Id.* at C-21.

[156] *Id.* at C-23.

[157] *Id.* at C-24.

Canadian Forces policy is for women to make up five to twenty-five percent of mixed-crew vessels. The biggest problem that they have had with integrating women is berthing. In addition to taking into account rank and functional area in shift rotation, they must now also consider gender. This sometimes results in inefficient use of berthing space. Though this issue has caused a leadership challenge, ship commanders generally feel that standards of conduct aboard ship have improved since the integration of women into ship's crews.[158]

International experience aside, another public opinion based argument in favor of combat exclusion is that America will not support a war in which women are being killed and captured.[159] Recent experience refutes this proposition. Americans supported the troops in the Persian Gulf, despite the fact that women were killed and taken prisoner.[160] There was, however, public outrage at reports that one of the female prisoners of war, Specialist Melissa Rathbun-Nealy, was sexually assaulted, and the other, Major Rhonda Cornum, was raped.[161] Consequently, exclusionists argue that the eventuality of sexual assault at the hands of captors is particularly troublesome. These assaults not only dehumanize female prisoners, but they may also cause male prisoners to lose their resolve to escape for fear of leaving the women behind unprotected, or to be more willing to cooperate with their captors in order to

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[158] *Id.* at C-26 to C-27.

[159] Karst, *supra* note 78, at 536.

[160] *See infra* notes 322-323, and accompanying text (discussing women casualties and captives from the Persian Gulf War).

[161] *See, e.g.*, Gilbert Cranberg, *Disinformation of Women POWs*, USA TODAY, Jun. 16, 1992 at 13A; Kirk Spitzer, *Sexual Abuse of United States POWs Withheld by Pentagon*, GANNETT NEWS SERVICE, Jun. 10, 1993 (quoting Presidential Commission member Elaine Donnelly "They are portraying everything as wonderful, fine and rosy, and it wasn't.").

protect their female counterparts.[162] Major Cornum, however, countered these arguments by explaining that all prisoners feel helpless when they cannot help their fellow inmates, regardless of their gender or the type of torture.

> The guards came for Troy [Specialist Dunlap] and marched him into another room down the hall. After a few moments I heard Iraqi voices yelling in English from the room, shouting questions about what we were doing in Iraq. I imagined Troy in the room surrounded by Iraqi soldiers, but he said nothing. Then came the sound of a loud slap as someone hit him across the face. They asked another question, and when Troy didn't answer, they slapped him hard. Again and again, shouted questions; silence as Troy refused to speak; and loud, stinging slaps. Shouting. Silence. Whap, the sound of a hand across Troy's face. I felt terrible, helpless. I remembered being molested on the truck, and how Troy felt so frustrated because he couldn't protect me. Now I was the one who was unable to protect him. I had been helpless from the moment we were captured because of my injuries, but it was far worse to feel helpless for someone else . . . .[163]

Major Cornum admits that the rape was an issue, but she puts it in perspective. In testimony before the Presidential Commission, she said "I asked myself 'Is it going to prevent me from getting out of here? Is there a risk of death attached to it? Is it permanently disabling? Is it permanently disfiguring? Lastly, is it excruciating?' If it doesn't fit into one of those five categories, then it isn't important."[164] She admitted that sexual abuse is "one of the hazards of going to war," but stated that "[t]here are about 400 bad things I can think of and (sexual abuse) is not the worst."[165]

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[162] PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at 28; *see also* Dillingham, *supra* note 94, at 227-28.

[163] Rhonda Cornum, *She Heard Companion Being Slapped*, STAR TRIBUNE, Aug. 12, 1992 at 5E (exerpted from SHE WENT TO WAR, THE RHONDA CORNUM STORY (1992)).

[164] Elaine Sciolino, *Account by POW of Sex Abuse Puts Focus on Women*, COMMERCIAL APPEAL (MEMPHIS) Jun. 29, 1992, at A4.

[165] Spitzer, *supra* note 161.

Besides the POW issue, another concern of the American public is the continuity of the American family in the event of a war which produces large numbers of casualties. "The American public and military faced the problems of deploying large numbers of single and dual-service parents for the first time during the Persian Gulf War . . . . [T]he vast majority of the public and the military were concerned about the effect on children whose parents are deployed in the event of war."[166]

There are approximately 46,000 dual-service parents and approximately 76,000 single parents serving on active duty.[167] Contrary to popular belief, more of the single parent servicemembers are male than female. Thirty-five percent of the single parents are women and sixty-five percent are men.[168] During the Persian Gulf War, about 37,000 children were separated from their single or dual-service parents who were deployed.[169] Though none of those children lost both parents, 140 of them did lose one parent.[170] This fact added an additional concern about the problem of war orphans if both male and female servicemembers are allowed in combat. In polls conducted by the Presidential Commission, sixty-nine percent of the American public and seventy-two percent of military personnel

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[166] PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at 16.

[167] *Id.* at 16

[168] *Id.*

[169] *Id.*

[170] Campbell, *supra* note 97, at 75.

surveyed believed that single women with young children should not be assigned to combat positions. Forty-eight percent of the public and the same percentage of the military believed that single men with young children should not be assigned to those positions. When asked about the assignment of dual-service couples with young children, fifty-five percent of the public and sixty-five percent of military members felt that the wife should be exempt from combat positions. Two percent of the public and one percent of the military felt that the husbands of dual-service couples should be exempt from direct combat.[171]

The problem of a "Parent's War"[172] is new in America. In the past, our wars have been fought mainly by young, single men. Fathers were exempted from the draft in WWII, Korea, and Vietnam, and those fathers who volunteered for active duty were generally not assigned to combat duty.[173] Though the concern about war orphans is very real and not to be taken lightly, the problem does not exist because women are allowed in combat. It exists because military members are older and more mature than in the past,[174] and therefore more stable and more married.[175] While this maturity makes for better, more responsible and reliable solders, sailors, airmen, and Marines, it also means the military has to deal with

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[171] PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at 16, D-2 to D-3.

[172] Campbell, *supra* note 97, at 74-76 (disputing the characterization of Desert Storm as a "Mom's War" and stating that it was more properly a "Parent's War" or a "Father's War").

[173] *Id.* at 75.

[174] *Id.* at 74 (stating that the average age of military members serving in Desert Storm was 27, while the average age in Vietnam was 21).

[175] *Id.* at 75 (noting that in today's Army 75% of male officers, 41% of female officers, 53% of enlisted males and 33% of enlisted females are married).

family concerns. This problem will not be solved by keeping women out of combat, especially when the majority of single parents, and half of each dual-service couple, are men. Currently, the military requires single parents and dual-service couples with young children to have family care plans that detail who will care for their young children when the parents are deployed.[176] Unfortunately, this policy doesn't seem to be enough. The Department of Defense must develop a means to address America's concerns about war orphans, however, keeping women out of combat is not the answer. Because there are more single parent fathers than mothers in the military, and more married men than women,[177] this is not just a women's concern. Though the Presidential Commission cited the effect of war on children as an issue of importance to the American public and the military, discriminating against women in terms of assignment will not resolve this problem because it cuts across gender lines.

C. The Current State of Combat Exclusion

In response to the Presidential Commission's report, Congress lifted the prohibition against women serving on combat vessels in the National Defense Authorization Act for Fiscal Year 1994.[178] This resolved an inconsistency in the law that allowed women to serve on Navy ships as Aviation officers, but in no other capacity.[179] Congress supported the

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[176] *See, e.g.*, DEP'T OF ARMY REG. 600-20, ARMY COMMAND POLICY para. 5-5 (30 Mar. 1988).

[177] *See supra* note 175.

[178] National Defense Authorization Act for Fiscal Year 1994, Pub. L. 103-160, § 541(a), 107 Stat. 1659 (1993).

[179] PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at 31.

dissenter's view[180] with respect to combat aviation by refusing to reenact the restrictions that it had repealed in the earlier Authorization Act. In addition to congressional action, the Department of Defense responded to the Commission's report by partially lifting the ban on women serving in ground combat units, opening those jobs at brigade level and higher.[181] The Department of Defense also developed a new service-wide definition of ground combat, defining it as "engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel."[182] These changes opened over 259,000 additional military positions to women servicemembers, and as of July 1996, 80% of all military jobs had been opened to women.[183] The only positions that remain closed are those in Special Operations Forces, those involving service on submarines and amphibious vessels, and those direct ground combat positions at battalion level and below. Though only a small percentage of positions remain closed to women, the fact that their exclusion is based upon gender, and nothing more, violates the equal protection clause of the Constitution.

III. Equal Protection Jurisprudence

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

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[180] *See supra* notes 74-75, and accompanying text.

[181] GAO REPORT, *supra* note 87, at 2.

[182] *Id.* (quoting a January 13, 1994 Secretary of Defense policy memorandum).

[183] *Id.*

person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.[184]

A. Development of the Three-Tiered Approach

The Fourteenth Amendment to the United States Constitution, ratified on July 28, 1868, contains the Equal Protection Clause. As written, the amendment applies only to the official actions of states. However, in 1954 the Supreme Court, in *Bolling v. Sharpe,*[185] found it applicable to federal government actions by operation of the due process clause of the Fifth Amendment.[186] Although the Fourteenth Amendment was passed as a Reconstruction measure to protect newly freed slaves in post-Civil War America, a literal reading of its broad language demonstrates that it encompasses more than race. The courts have applied its mandate for equal protection in all public aspects of American life. Equal protection jurisprudence requires persons to be treated similarly to the extent that they are the same, and allows for rules that mandate differences in treatment to the extent that there are relevant differences between individuals or groups.[187] A difference is relevant if it bears some empirical relationship to the purpose of the rule.[188] Over time, the Supreme Court has

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[184] U.S. CONST. amend. XIV, § 1 (1868).

[185] 347 U.S. 497 (1954).

[186] In this case the Court held by unanimous decision that school segregation in the District of Columbia was unconstitutional. It could not rely on the Fourteenth Amendment because it applies only to states, but held that "[i]n view of our decision [in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), decided on the same day] that the Constitution prohibits the States from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Bolling at 500.

[187] LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, at 991-94 (1978).

[188] *Id.* § 16-4, at 997-99.

developed a three-tiered approach to determine whether differences in treatment are justified in various circumstances.

1. Rational Basis--The primary standard used to determine if a rule is discriminatory is the rational basis test. Rules that mandate differential treatment are permissible when the government can show that they have a legitimate public purpose, and that there is a rational relationship between their discriminatory effect and the legitimate public purpose. To pass constitutional muster "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[189] This standard is used with cases which do not involve suspect classes, nor are they based on alienage, illegitimacy, or gender. This very low standard of review is highly deferential to legislative bodies. Nevertheless, it does "ensure that classifications rest on something other than a naked preference for one person or group over another."[190]

2. Strict Scrutiny--A more stringent standard of review applies to statutes which differentiate on the basis of race or national origin, and which infringe upon fundamental interests. Governmental action which purposefully discriminates on the basis of race or national origin, or which impairs a fundamental right must be based upon compelling government interests. Furthermore, when challenged, the government must demonstrate that

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[189] F. S. Royster Guana Co. v. Virginia, 253 U.S. 412, 415 (1920).

[190] Cass R. Sustein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713 (1984).

there is no less burdensome means available to accomplish the government objective. This higher standard of review is appropriate because "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[191]

3. *Intermediate Scrutiny*--The intermediate scrutiny standard was the most recent standard espoused by the Court in the equal protection area. It applies to cases which deserve more than rational review because a quasi-suspect class is involved, but which do not rise to the level of strict scrutiny, such as those involving illegitimacy and alienage. It was, however, initially developed to deal with cases involving gender.

B. The Development of the Intermediate Scrutiny Test

The Supreme Court's two-tier standard of evaluating equal protection cases using either a "rational basis" or "strict scrutiny" test prevailed until the mid 1970's. Until that time a rational basis analysis was used to evaluate gender challenges.[192] In the early 1970's

[191] United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

[192] *See, e.g.,* Hoyt v. Florida, 368 U.S. 57 (1961) (Upholding a Florida statute which released all women from jury service unless they volunteered for it. The state was acting in pursuit of the general welfare in concluding that a women should be relieved from jury service unless they individually determined that such service was consistent with her own special responsibilities); Goesaert v. Cleary, 335 U.S. 464 (1948) (Upholding a Michigan statute which forbade any woman to act as a bartender unless she was the wife or daughter of the male owner of a licensed liquor establishment. Because bartending by women would give rise to social and moral problems, the legislature rationally limited the work to a defined group whose father's or husband's oversight would minimize those hazards.); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (Upholding a Washington State law which set a minimum wage for women, but not for men. The state had a rational interest in protecting women against employment contracts which may exploit them, leaving them inadequately supported.); Muller v. Oregon, 208 U.S. 412 (1908) (Upholding the constitutionality of an Oregon statute

the Court began to hold gender challenges to a higher standard, though it still claimed to be using a rational basis test.[193] The Court shifted its view thereafter and, considering women a suspect class, applied strict scrutiny to a gender case.[194] The Court soon backed away from this position[195] and, in 1976, developed the intermediate scrutiny test for use in deciding gender challenges.[196] This test heightened the rational basis standard by requiring that classifications be substantially related to an important government interest rather than rationally related to an interest that is merely legitimate. Nevertheless, it does not require the government's purpose to be compelling as does the strict scrutiny test.

1. Reed v. Reed--The Court first applied a more stringent level of scrutiny with a gender classification in *Reed v. Reed*,[197] a 1971 case from Idaho. The case involved two sections of the Idaho probate code.

Richard Reed, the minor child of separated parents Sally and Cecil Reed, died intestate in Idaho. Sally Reed filed for appointment as administratrix of Richard's estate. Cecil Reed filed a competing petition. Idaho Code § 15-312 provided an order of preference

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which limited the number of hours women could work in any one day. The rational basis for the statute was the preservation of the health of women).

[193] *See infra* notes 197-203, and accompanying text (discussing *Reed v. Reed*, 404 U.S. 71 (1971)).

[194] *See infra* notes 204-207, and accompanying text (discussing *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

[195] *See infra* notes 208-213, and accompanying text (discussing jurisprudence in this area subsequent to *Frontiero v. Richardson)*.

[196] *See infra* notes 213-216, and accompanying text (discussing *Craig v. Boren*, 429 U.S. 190 (1976)).

[197] 404 U.S. 71 (1971).

for persons entitled to an intestate deceased's estate. The father or mother of the deceased were the third priority, falling after the spouse or children. Idaho Code § 15-314 compelled a preference for male administrators. Therefore, even though the father and the mother received equal entitlement to administer the estate under §15-312, the operation of §15-314 gave preference to Cecil Reed. Based upon §§ 15-312 and 15-314 of the Idaho Code, the probate court appointed Cecil Reed as administrator of the estate.

The Supreme Court used what it called a rational basis test to determine "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314."[198] The Court first recognized that the state had a legitimate objective to "eliminate one area of controversy when two or more persons, equally entitled under § 15-312, seek letters of administration and thereby present the probate court 'with the issue of which one should be named.' "[199] Nevertheless, it found that § 15-314 did not advance that objective properly. Cecil Reed argued that the preference for males was reasonably related to the statute's objectives because males are better qualified to act as administrator than are women for two reasons. First, "men [are] as a rule more conversant with business affairs than women,"[200] and second, "it is a matter of common knowledge, that women are still not

[198] Reed v. Reed, 404 U.S. 71, 76 (1971).

[199] *Id.*

[200] Frontiero v. Richardson, 411 U.S. 677, 683 (1973), (citing Brief for Appellee in No. 70-4, O.T. 1971, Reed v. Reed, p. 12).

engaged in politics, the professions, business or industry to the extent that men are."[201] The Court rejected this argument, holding instead that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[202]

This was a definite departure from the rational basis analysis traditionally used in evaluating gender-based classifications. Certainly the Idaho legislature's classification was not arbitrary and bore some relation to the object of the statute. Though the Court acknowledged that the state's interest was "not without some legitimacy,"[203] it failed to uphold the classification as rational. This was the first step in the development of a new standard of equal protection analysis.

2. Frontiero v. Richardson--The next great stride in this area occurred two years later with the Supreme Court's plurality decision in *Frontiero v. Richardson.*[204] This was the first and only case in which the leading opinion of the Court expressly referred to women as a suspect class, and stated that legislation applying to them was deserving of strict scrutiny. In *Frontiero,* a married Air Force officer sought increased quarters allowance and medical and

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[201] *Id.* (citing Brief for Appellee in No. O.T. 1971, Reed v. Reed, p. 12-13).

[202] Reed, 404 U.S. at 76.

[203] *Id.*

[204] 411 U.S. 677 (1973).

dental benefits for a family member. The statutes allowing such increased support, 37 U.S.C. §§ 401 and 403, and 10 U.S.C. §§ 1072 and 1076, provided that the spouses of male servicemembers were automatically considered dependents for the purposes of obtaining the increased benefits. The spouses of women servicemembers, however, were only considered dependents under the statutes if they actually relied on their servicemember spouses for over one-half of their support. Lieutenant Frontiero's application for increased benefits was denied because she was a woman whose husband did not rely on her for over half of his support.

Lieutenant Frontiero asserted both procedural and substantive discriminatory impacts of the challenged statutes. Procedurally, servicewomen were required to demonstrate the dependency of their spouses while servicemen were not required to do so. Substantively, servicemen received increased benefits even when they did not provide one-half of their spouse's support, but servicewomen did not. In determining "whether the difference in treatment [between women and men servicemembers] constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment,"[205] the Court began by identifying the legitimate government interest of the statutes. "[S]ince the husband in our society is generally the 'breadwinner' in the family--and the wife typically the 'dependent' partner--it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the

[205] *Id.* at 679.

presumption of dependency to such members."[206] Then, however, in a marked departure from its previous decisions, the lead opinion went on to determine that women were a suspect class and, therefore, classifications based upon gender were deserving of strict scrutiny. In the Court's words,

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." [W]hat differentiates sex from such nonsuspect statuses [sic] as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members . . . . With these considerations in mind, we can only conclude that *classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.*[207]

Since the statutes at issue did not serve a compelling government interest, but provided mere administrative convenience, they did not pass strict scrutiny.

Four Justices (Brennan, Douglas, White, and Marshall) joined in the *Frontiero* decision, while four more (Justices Stewart, Powell, Blackmun, and Burger) concurred with the result, but not with the classification of women as a suspect class. Justice Rehnquist dissented. The Court's decisions over the next three years reflected the disagreement and

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[206] *Id.* at 681 (citing Frontiero v. Laird, 341 F. Supp. 201, 207 (1972)).

[207] Frontiero, 411 U.S. at 686-88 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972), and citing *Developments in the Law--Equal Protection*, 82 HARV. L. REV. 1065, 1173-74 (1969)) (emphasis added).

indecisiveness on the appropriate standard of review for classifications involving gender that was present in *Frontiero*. In some cases, the Court overturned gender classifications but, unwilling to reach equal protection issues, relied on due process to do so.[208] In others, it used a mere rational basis standard to evaluate gender classifications.[209] Finally, in *Stanton v. Stanton*,[210] a case decided two years after *Frontiero*, all of the Justices except Justice Rehnquist reached a consensus. *Stanton* invalidated a Utah statute which provided that the period of minority for males extended to age twenty-one, but ended for females at age eighteen. The statute, therefore, denied child support to female children over the age of eighteen, but to male children only over the age of twenty-one. In reaching its decision the Court failed to find that females were a suspect class. Nevertheless, relying on *Reed v. Reed*, it still held the statute to a higher level of scrutiny than the rational basis test. While conceding that the statute did "have important effect in application,"[211] the Court found that it imposed "criteria wholly unrelated to the objective of that statute."[212] This adoption of the rationale of the concurring members of the *Frontiero* Court that gender classifications were not deserving of strict scrutiny, while acknowledging that more than a rational basis was

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[208] *See, e.g.* Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that the exclusion of women from jury service deprived defendants of their sixth amendment right to a fair and impartial jury); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (invalidating regulations requiring schoolteachers to take maternity leave well before the expected delivery dates of their children).

[209] *See, e.g.,* Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (invalidating a section of the Social Security Act entitling widowed mothers, but not widowed fathers, to benefits based on the earnings of the deceased spouse); Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding a California program that excluded pregnancy-related disabilities from insurance coverage); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding a Florida statute providing a property tax exemption for widows but not widowers).

[210] 421 U.S. 7 (1975).

[211] *Id.* at 17.

[212] *Id.* at 14.

needed to analyze statutes which differentiated on the basis of gender, led the Court to adopt the intermediate scrutiny test in *Craig v. Boren.*[213]

3. Craig v. Boren--In 1976, the Oklahoma code allowed the sale of 3.2% beer to females age eighteen and older. Males, however, had to be twenty-one years old before they could buy the same product. The Oklahoma Attorney General asserted at trial that the reason for the difference was the state's interest in traffic safety. Craig, a male between the ages of eighteen and twenty-one, and Whitner, a 3.2% beer vendor, challenged the statute. Though the Court found that the state's goal of traffic safety was an important government objective, it held that the age differential for purchase of 3.2% beer did not adequately advance the achievement of that goal.

The state introduced a number of statistical surveys designed to demonstrate that males in the target age group had more arrests for drunkenness and driving under the influence of alcohol, were killed or injured in traffic incidents, and were more inclined to drive and drink beer than were females in that age group. Nevertheless, the Court found that the statistical surveys did not "adequately justify the salient features of Oklahoma's gender-based traffic-safety law."[214] The surveys all focused on alcohol generally; none concentrated on 3.2% beer, the subject of the legislation. Many of the surveys did not relate their findings to the age-sex differential involved in the statutes. The survey that did so resulted in a

[213] 429 U.S. 190 (1976).

[214] *Id.* at 202.

finding that only two percent of males within the target age group had alcohol-related driving offenses. The Court compared this two percent correlation to those in *Reed*, *Frontiero*, and other cases in this area[215] which arguably had a closer statistical fit, but which, nevertheless, were found discriminatory because they used gender as a decision-making factor. In holding that the Oklahoma statutes discriminated against males eighteen to twenty-one years of age in violation of the Equal Protection Clause, the Court first articulated the present standard of review for gender classifications: the intermediate scrutiny test. The test as announced has two steps, both of which must be met for gender-based statutes to pass constitutional muster. "[C]lassifications by gender must serve important government objectives and must be substantially related to achievement of those objectives."[216]

C. The Implied Step: Gender-Neutrality

The intermediate scrutiny test espoused in *Craig v. Boren* imposes a more stringent burden than the rational basis test does on government entities which seek to legislate on the basis of gender. First, government objectives in statutes that differentiate on the basis of gender must be important, rather than merely legitimate as with the rational basis test. Legislatures have not had difficulty meeting this higher standard. Generally, the Court considers government interests that are more than merely administrative as important.[217]

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[215] *Id.* at 202-03.

[216] *Id.* at 197.

[217] *See*, e.g., Orr v. Orr, 440 U.S. 268 (1979) (providing for needy spouses is an important government interest); Caban v. Mohammed, 441 U.S. 380 (1979) (the welfare of illegitimate children is an important government interest); Craig v. Boren, 429 U.S. 190 (1976) (traffic safety is an important government interest); *but see*

Second, gender-based classifications must be substantially, rather than rationally, related to accomplishing government objectives. This second hurdle recognizes that sometimes men and women are not similarly situated and that actual differences may justify different treatment.

Though more stringent than rational basis, the intermediate scrutiny standard should not be confused with strict scrutiny. "[T]he idea of strict scrutiny acknowledges that . . . political choices . . . burdening fundamental rights . . . must be subjected to close analysis in order to preserve substantive values of equality and liberty."[218] Like intermediate scrutiny, those classifications which do not survive strict scrutiny fail because of the "looseness of fit between means and ends, or for the weakness of the interest that they purport to serve."[219] Nevertheless, intermediate scrutiny requires government interest to be important, while strict scrutiny requires them to be compelling. Additionally, legislatures must show no less burdensome means are available to reach their interests under strict scrutiny as opposed to a substantial relation under intermediate scrutiny. Therefore, intermediate scrutiny is "more sensitive to the risks of injustice than [rational basis] . . . and yet less blind to the needs of governmental flexibility than [strict scrutiny]."[220]

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (limiting enrollment in nursing school to women is not an important government interest); Rostker v. Goldberg, 453 U.S. 57 (1981) (administrative convenience is an important interest in the military context).

[218] Tribe, *supra* note 187, § 16-6, at 1000.

[219] *Id.* at 1000-01.

[220] *Id.* § 16-30, at 1089.

The key question in intermediate scrutiny cases becomes, therefore, whether the actual or situational differences between genders are significant enough to justify legislation that treats men and women differently. Commentators criticize this second step of the analysis because of the difficulty in determining the parameters of a "substantial relation."[221] Supreme Court cases in this area offer a solution to that problem. The cases imply that there is a third step to the intermediate scrutiny test that resolves this confusion.[222] This third step requires that "in addition to pointing out relevant differences between men and women, the government also advance a sufficiently good reason for not treating the sexes identically."[223] The "gender-neutral" step is an additional requirement, not an alternative to showing that men and women are not similarly situated.[224]

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[221] *See, e. g.,* Karen E. Cathey, Note: *Refining the Methods of Middle Tier Scrutiny: A New Proposal for Equal Protection,* 61 TEXAS LAW REVIEW 1501, 1504 (1983) (intermediate scrutiny has led to confused and contradictory opinions because of the difficulty of applying subjective criteria of "substantial" relation to "important" government interest); E. A. Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr*, 30 SYRACUSE LAW REVIEW 639, 671 (1979) (middle tier scrutiny has no predictable application in part because whether a classification is substantially related to an important government interest is a subjective determination which will be decided differently by courts based upon whether the majority is conservative or liberal).

[222] *See infra* notes 226-240, and accompanying text (discussing the Court's cases in this area subsequent to *Craig v. Boren).*

[223] William R. Engles, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149, 151 (1985); *see also* Tribe, *supra* note 187, § 16-25, at 1006 n. 25 ("Given this intermediate standard, no explicitly gender-based occupational disqualification can be upheld without the clearest showing that a gender-neutral criterion would leave a serious problem unsolved.").

[224] Though feminist legal theorists agree that the gender-neutral approach advanced by Justices Brennan and Marshall in this line of cases is important, at least one such commentator has opined that it conveys a message that sex classifications are only harmful if they are irrational. She advocates a normative theory of review that can deal more adequately with cases in which arguably rational gender classifications stem from particularly sexist gender dynamics. She further argues that such "an increased emphasis in judicial decisions on explicit debate about the values at stake in sex discrimination cases and the harms caused by sex discrimination would contribute significantly to the struggle for equality between the sexes." *See* Ann Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L. J. 913, 952-68 (1983).

> This conclusion follows from the nature of the gender-neutral test, under which the government is required to provide a 'good reason' for not burdening one sex. If the sexes are similarly situated, then by definition the state cannot provide such a reason. Thus, because no statute can meet the gender-neutral requirement without also passing the similarly-situated test, the gender-neutral test encompasses the similarly-situated test. Furthermore, since the gender-neutral test can result in the invalidation of statutes that do pass the similarly-situated test, the gender-neutral requirement is properly regarded as imposed in addition to the similarly-situated test.[225]

Since *Craig v. Boren*, a number of the Court's decisions have either expressly or impliedly required gender-neutrality to uphold gender-based statutes. These opinions demonstrate that gender-neutrality must be addressed for a gender-based classification to pass intermediate scrutiny. Although the Court has not affirmatively stated that this third prong exists, it repeatedly addresses it in its cases, especially when challenged by the dissent. Many times, it is the issue upon the case is decided. Whether stated or not, the Court's opinions evidence that under an intermediate scrutiny test "[t]he burden is on the government to prove both the importance of the asserted objective and the substantial relationship between the classification and that objective. And the State cannot meet that burden without a showing that a gender-neutral statute would be a less effective means of meeting that objective."[226]

1. Orr v. Orr--In *Orr v. Orr*[227] the Court invalidated an Alabama statute which required husbands, but not wives, to pay alimony upon divorce. The Court acknowledged

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[225] Engles, *supra* note 223, at 156.

[226] Michael M. v. Superior Court, 450 U.S. 464, 490 (1981) (Brennan, J. dissenting).

[227] 440 U.S. 268 (1979)

that the statue had two important state interests: providing for needy spouses and compensating women for past discrimination during marriage.[228] The gender-based law greatly benefited those women who were financially stable, even without their former husbands' support, and disadvantaged those males who had depended upon their former wives' income for financial security. Conversely, a gender-neutral law would have imposed the obligation to pay alimony on the spouse who was most able to pay. There was no advantage to using gender as a proxy for need because the state held hearings to determine the parties' financial circumstances as a routine part of divorce actions. The same hearings could determine if there was, in fact, discrimination during the marriage with no additional cost to the state. "A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer[,] cannot survive equal protection scrutiny."[229]

In this case the Court found that the state satisfied the first step of the intermediate scrutiny test because it had important objectives to justify the statute. The Court then went on to find that, even if the state could satisfy the second step of the test by showing that there was a close enough fit to find that men and women were not similarly situated with respect to the object of the legislation, the statute still could not be upheld. "[E]ven if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still would 'not adequately justify the salient features of' Alabama's

[228] *Id.* at 280.

[229] *Id.* at 282-83.

statutory scheme."[230] The Court invalidated the statute because the state failed to show that a gender-neutral statute would not advance the same objectives, or that it would frustrate the objectives. The Court applied the implied third prong of the intermediate scrutiny test: the implied gender-neutral step.

2. Wengler v. Druggists Mutual Insurance Company--In 1980, the Court once again used the implied gender-neutral step when it reviewed a Missouri statute. The law denied widowers benefits on their wives' work-related deaths unless the men were mentally or physically incapacitated, or could prove dependency on their wives' earnings. The statute provided the benefits to widows with no such showing. The statute, therefore, discriminated against women by providing female wage earners less security for their families. It also discriminated against male survivors who had to prove incapacity or dependency.

The Court in *Wengler v. Druggists Mutual Insurance Company*[231] invalidated the statute because it did not satisfy the gender-neutral test. As with its previous cases, the Court first found that the state's articulated objective, providing for needy spouses, was important.[232] The Court next found that the state had not met the burden of showing that the discriminatory statute substantially met the statutory objective by its statement that " 'the substantive difference in the economic standing of working men and women justifies the

[230] *Id.* at 280 (quoting Craig v. Boren, 429 U.S. 190, 202-03 (1976)).

[231] 446 U.S. 142 (1980).

[232] *Id.* at 151.

advantage' given to widows."[233] Though both steps of the intermediate scrutiny test had been addressed, the Court did not end its analysis. It went on to say that "neither the court below nor appellees in this Court essay any persuasive demonstration as to what the economic consequences to the State or to the beneficiaries might be if, in one way or another, men and women, whether as wage earners or survivors, were treated equally under the workers' compensation law."[234] The state law had not passed the gender-neutral test. Finally, the Court remanded the case for the state court to determine which of two proposed gender-neutral laws would cure the statutory defect.[235]

3. Michael M. v. Superior Court--In 1981, the Court upheld California's statutory rape law. Even though the unlawful sexual intercourse that was the subject of the statute required the participation of a female under the age of eighteen and a male, only males were held criminally liable for violations. A plurality of the Court found that the state had an important interest in preventing teenage pregnancy.[236] It also found that because "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse"[237] the statute's discrimination on the basis of gender was substantially

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[233] *Id.* (quoting *Wengler v. Druggists Mutual Insurance Company*, 583 S. W. 2d. 162, 168 (1979)).

[234] *Id.* at 152.

[235] *Id.* at 152-53 ("We are left with the question of whether the defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows.").

[236] Michael M. v. Superior Court, 450 U.S. 464, 470 (1981).

[237] *Id.* at 471.

related to the achievement of the government's interest.[238] The Court then went on to explain that a gender-neutral statute would not be as effective in accomplishing the State's interests because females would be less likely to report violations of the statute if they would subject themselves to criminal prosecution by doing so.[239] The Brennan dissent challenged this reasoning, advancing the opinion that a gender-neutral law would be a greater deterrent to teenage pregnancy because subjecting both parties to the intercourse to prosecution would have a deterrent effect on both parties, not just males.[240] Regardless of which opinion is correct, it is of key importance that the deciding issue in this case between the plurality and the dissent was whether a gender-neutral statute would accomplish the state's interest. These cases demonstrate that in gender-based cases, the third implied step to the intermediate scrutiny test is paramount.

IV. Deference Doctrine

Just as intermediate scrutiny is the standard of review used by courts to address gender concerns, deference is a judicial doctrine which courts use to balance military necessity against service members' rights when reviewing constitutional challenges to

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[238] *Id.* at 473 ("Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents on the sexes.").

[239] *Id.* at 473-74.

[240] *Id.* at 493-94.

congressional statutes and armed forces regulations. Though servicemembers don't lose their constitutional rights upon entering the military, the reach of those protections is limited by the military's need to ensure discipline and obedience within the force. Therefore, courts traditionally use judicial restraint when considering constitutional questions that impact on military operations in recognition that the day-to-day running of the military is not a judicial concern. In fact, the Court has openly acknowledged that "[t]he military is, by necessity, a specialized society separate from civilian society."[241] This "separate community" rationale is just one of four reasons that the Court and commentators have advanced to justify the Court's "hands-off" approach in military matters. The others include lack of expertise, separation of powers, and cost of error.[242] Though these reasons advanced for adhering to a principle of deference seem compelling at first glance, a closer examination evidences that the rationale are poor explanations for the abdication of the judicial oversight role when servicemembers' basic human rights are at stake.

A. Separate Community Doctrine

The separate community doctrine is the most cited reason for judicial deference to Congressional judgment in military matters. It recognizes that "the military has certain disciplinary needs that do not exist in the civilian context, and thus might not be appreciated

[241] *Parker v. Levy*, 417 U.S. 733, 734 (1974).

[242] Barney F. Bilello, Note: *Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465, 475 (1989).

by a civilian court."[243] This reasoning is based upon assumptions which have been espoused since the 1800s but, until 1974, not in the context of the determination of individual constitutional rights.[244]

In 1974 the Supreme Court, in *Parker v. Levy*,[245] was called upon to review an Army doctor's conviction for conduct unbecoming an officer and conduct prejudicial to good order and discipline in the Armed Forces in violation of Articles 133 and 134 of the Uniform Code of Military Justice (UCMJ). Captain Levy challenged the Articles as vague and overbroad in violation of the First Amendment. In upholding Levy's conviction the Court held that Congress may legislate with greater breadth and flexibility than normal when statutes govern the military.[246] This is because military society is unique and, in order for it to function properly, individual rights must be subordinated to the goals of the organization.[247] This subordination is required because the Armed Forces' war-fighting mission has no

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[243] Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 377 (1995).

[244] *See, e.g.*, United States *ex rel* Toth v. Quarles, 350 U.S. 11 (1955) (reasoning that military necessity justified fewer procedural safeguards at courts-martial than in civilian trials); Burns v. Wilson, 346 U.S. 137 (1953) (binding federal courts to the fact-finding decisions of military courts when reviewing habeas corpus petitions of court-martial defendants); Swain v. United States, 165 U.S. 553 (1897) (holding that civilian courts were not competent to review the construction of military statutes because of a lack of knowledge of military needs and experiences).

[245] 417 U.S. 733 (1974).

[246] *Id.* at 756-57.

[247] *Id.* at 758 ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

counterpart. It is fundamentally different from any other activity.[248] Finally, the failure of this mission would risk national security.[249] Therefore, even though the military is unique from civilian society, it serves civilian interests by ensuring the continued preservation of the American way of life.

Parker v. Levy was the first in a long line of cases in which the Court used the "separate community" rationale to uphold statutes and regulations which deny individual constitutional rights to service members.[250] As these cases demonstrate, at the core of the separate community argument is the proposition that the military is so different from civilian society that it is appropriate to balance its members' constitutional rights differently than the rights of other Americans. Though this may have been true in the past, it is a proposition based upon antiquated notions of the American military.

> The 'society apart' was a valid description of the small 19th century regular Army fighting Indians on the frontier. The description was still largely valid when forces stood garrison or shipboard duty in the 1930's. But by 1974 the

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[248] *Id.* at 743 ("The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' " quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

[249] *Id.* at 759 ("The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself.").

[250] *See, e.g.,* Goldman v. Weinberger 475 U.S. 503 (1986) (preventing an Air Force rabbi from wearing his yarmulke on duty was not a first amendment violation); Rostker v. Goldberg, 453 U.S. 57 (1981) (male only draft registration was not an equal protection violation); Brown v. Glines, 444 U.S. 348 (1980) (requiring commander's approval before Air Force personnel could distribute petitions on the installation was not a first amendment violation); Middendorf v. Henry, 425 U.S. 25 (1976) (subjecting Marines to summary court-martial without the benefit of counsel did not violate the sixth amendment); Greer v. Spock, 424 U.S. 828 (1975) (prohibiting candidates for office from making political speeches and distributing leaflets on a military installation did not violate the first and fifth amendments); Schlesinger v. Ballard, 419 U.S. 498 (1975) (mandatory discharge for males, but not females, who failed to be promoted after being considered twice, was not an equal protection violation).

> military had become a multimillion-person employer involved in almost every aspect of American life.[251]

The view of the military as a society apart that has led the Court to defer to political judgments in a way that it refrains from doing in the civilian context is based on outdated notions. Today's military, however, is not a society apart. It is a large part of American society. Its members come from all segments of the population. The military advertises on television and the radio and even has web sites on the internet.[252] Many high schools and colleges have programs which train young women and men in preparation for active and reserve military service.[253] The military also has incentive programs which provide money for higher education in exchange for service.[254] Because of these types of incentive programs the military attracts its members from many different backgrounds, and many

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[251] Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on a Society Apart,* 51 NOTRE DAME L. REV. 396, 400 (1976).

[252] *See, e.g., U.S. Army Forces Command Home Page* (visited Mar. 24, 1997) <http://www.forscom.army.mil>.

[253] Currently there are over 300 colleges and universities in the United States and its territories which offer Army ROTC programs, and another 500 which offer cross enrollment programs in which the students take their classes at one institution but receive their ROTC training at host school which offers ROTC. *Green to Gold Program* (visited Feb. 27, 1997) <http://www-tradoc.army.mil/rotc/gg.html>; *see also Colleges Offering Army ROTC,* (visited Feb. 27, 1997) <http://www-tradoc.army.mil/rotc/states.html> (for a by-state listing the colleges and universities which offer ROTC). In addition, approximately 1,400 high schools across the United States offer Army Junior ROTC programs. *Junior ROTC* (visited Feb. 27, 1997) <http://www-tradoc.army.mil/rotc/jrotc.html>.

[254] For example, the Army offers a program called "Green to Gold" which gives enlisted soldiers who leave the Army money for college in return for them reentering the service as officers after they finish college. *Green to Gold Program* (visited Feb. 27, 1997) <http://www-tradoc.army.mil/rotc/gg.html>. Another such program is the Montgomery GI Bill which gives personnel who entered the service after 30 June 1985 and serve for at least three years up to $400.00 per month for 36 months for their college education. *Montgomery GI Bill* (visited Feb. 27, 1997) <http://www.utm.edu/admin/finaid/gibill.htm>.

servicemembers return to civilian society to pursue educational opportunities after a short period of service.

The military that Americans enter today is not very different from a large corporation. One might say that the military has its "home office" in Washington, D.C.,[255] with "branch offices" spread throughout the world at various military installations. Because the military is very married,[256] most military installations have various family services,[257] just like large corporations. Also, a lot of military installations are located within small cities and towns. Many military members live in these local communities and become integrated into local activities and organizations. These servicemembers put on military uniforms and go to work on the installation each day, but go home at night to the civilian community. Similarly, their civilian neighbors put on uniforms of business suits, or coveralls each day to go to their jobs, and return to the same community at night. Finally, America also has a large reserve force who, though they work in the civilian world from day-to-day, give a portion of their time to military service on the weekends.[258] Because today's military is more like a specialized profession than a separate community, military members should enjoy the same

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[255] The Secretary of Defense and the Joint Chiefs of Staff of the various military branches have their offices in Washington, D.C.

[256] *See supra* note 175, for statistics.

[257] Most military installations have various spouse organizations, youth activities, and child development services to support the needs of military family members.

[258] There are approximately 953,192 total personnel serving in the Army Reserve and National Guard, Naval Reserve, Marine Corps Reserve, Air National Guard, Air Force Reserve and Coast Guard Reserve. FISCAL YEAR 95 REPORT TO THE RESERVE FORCES POLICY BOARD 52 (March 1996).

constitutional protections as their civilian counterparts when their most basic constitutional rights are at stake.

B. Lack of Expertise

In 1973, the Supreme Court was called upon to review the training, weaponry, and orders of the Ohio National Guard in response to a charge that the Guard illegally violated Kent State University students' rights to speech and assembly, causing injury and death in the process.[259] In refusing to do so the Court stated, "[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essential professional military judgments, subject always to the civilian control of the Legislative and Executive Branches."[260] This "lack of expertise" argument stops just short of a determination that decisions relating to the military are political questions[261] and thereby beyond the scope of judicial review. The argument does recognize that many, though not all, decisions dealing with the military are not appropriately made by the judiciary. What

[259] Gilligan v. Morgan, 413 U.S. 1 (1973).

[260] *Id.* at 10.

[261] The political question doctrine recognizes that certain constitutional questions rest upon internal political policy decisions which cannot be properly explored without infringing upon the rights or powers specifically reserved to a government branch other than the judiciary. The courts, therefore, refuse to review those cases. For a more complete discussion of the doctrine *see* Baker v. Carr, 369 U.S. 186, 208-37 (1962); *see also* Tribe, *supra* note 185, § 3-16, at 71-79.

it does not address is why the Court's lack of expertise in this area is any different from its limited knowledge in other areas.

Each term the Court is called upon review complicated issues in the areas ranging from consumer protection in cable television,[262] to Medicare reimbursement of hospital educational costs,[263] and taxation.[264] Certainly the Justices aren't each individually knowledgeable in all of these areas. When they are lacking in expertise, they form their basis of knowledge by reviewing the lower court decisions and supporting documents and listening to oral argument. Their decisions are not questioned because, though the justices are not experts in every area, "[o]nly the courts are experts in constitutional law, and their view of the proper constitutional balance must therefore prevail."[265] It is hard to imagine what makes the military different in this regard.[266] The only plausible reason for the Court's different

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[262] *See, e.g.,* Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622 (1994) (the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 are content neutral and are not deserving of review using strict scrutiny).

[263] *See, e.g.,* Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994) (the Secretary of Health and Human Services' interpretation of a statute to bar Medicare reimbursement of educational costs that were borne by a hospital's affiliated medical school was a reasonable construction of the statutory language).

[264] *See, e.g.,* Department of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994) (New York's tax regulations do not violate the Indian Trader Statutes by imposing recordkeeping requirements and quantity limitations on cigarette wholesalers selling untaxed cigarettes to reservation Indians); Barlays Bank PLC v. Franchise Tax Board of California, 512 U.S. 298 (1994) (California's corporate income tax, determined using a worldwide reporting scheme, does not violate the Due Process Clause or the Commerce Clause when applied to foreign-based multinational corporations or to domestic corporations' income earned outside of the United States).

[265] James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights* 62 N.C.L. REV. 177, 206 (1984).

[266] *See, e.g., Id.* at 239 ("there is no basis to conclude that the judges are distinctly less able to comprehend the technical aspects of military discipline than any other complex scientific or economic issue with which they are presented."); *see also* Dienes, *When the First Amendment is Not Preferred: The Military and Other "Special Contexts"*, 56 U. CIN. L. REV. 779, 820 n. 163 (1988); Bilello, *supra* note 242, at 480-81.

treatment of the military is that the Constitution has specifically mandated its control by other sources.

C. Separation of Powers

Among a variety of military powers granted to Congress, the United States Constitution specifically grants the power to "make Rules for the Government and Regulation of land and naval Forces."[267] Though the Court has not routinely used this as the sole rationale for deference to Congressional infringement upon servicemembers' rights, it is often mentioned as a supporting factor. For example, in 1976 the Court, in *Middendorf v. Henry*[268] held that Marines were not entitled to counsel at summary courts-martial. In doing so it stated

> In making such an analysis we must give particular deference to the determination of Congress, made under its authority to regulate land and naval forces, U.S. Const., Art I, §8, that counsel should not be provided in summary courts-martial. As we held in *Burns v. Wilson*, 346 U.S. 137, 140 (1953): . . . 'The Framers especially entrusted that task to Congress.'[269]

Not all of the Justices agree, however, that the Framers' mandate was so absolute. When, in 1986, the Court held that an Air Force regulation prohibiting a rabbi from wearing his yarmulke on duty did not violate the rabbi's First Amendment rights,[270] Justice Brennan,

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[267] U.S. CONST. art. I, § 8, cl. 14.

[268] 425 U.S. 25 (1976).

[269] *Id.* at 43.

[270] Goldman v. Weinberger, 475 U.S. 503 (1986).

in a dissent joined by Justice Marshall, opined "[t]he Court's response to Goldman's request is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity."[271] In so stating, Justice Brennan recognized that, just like Congress, the judiciary also has a specific constitutional mandate. That is to decide "cases . . . arising under [the] Constitution and the Laws of the United States . . . ."[272] Since the 1803 decision in *Marbury v. Madison*,[273] it has been a basic premise of our legal and governmental system that, as "the final reviewer of constitutionality"[274] the judiciary "has the burden of deciding how closely to scrutinize decisions made by other branches."[275] Nevertheless, in cases concerning the individual rights of military members it seems that the Court has forgotten that "[c]ongressional enactments in the area of military affairs must, like all other laws, be judged by the standards of the Constitution."[276]

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[271] *Id.* at 513-14 (Brennan, J. dissenting).

[272] U.S. CONST. art. III, § 2.

[273] 5 U.S. (1 Cranch) 137 (1803).

[274] Linda Sugin, Note: *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 856 (1987).

[275] *Id.*

[276] Rostker v. Goldberg, 453 U.S. 57, 112 (1981) (Marshall, J. dissenting).

D. Cost of Error

Assuming that the Framers did intend for the judiciary to balance congressional decision-making in military matters against individual servicemembers' rights, the cost of judicial error in these cases may still justify the deference given to Congress. At least one commentator, James M. Hirschhorn, believes that in deciding these cases "the Court must consider the likelihood that it will be mistaken and the consequences of error."[277] The Court, he argues, has the mandate of determining the constitutional reach of United States policy as it applies internally to United States citizens. But, since the military's primary purpose is waging war, and since war is directed externally, the Court necessarily oversteps its bounds if it makes decisions that may affect the ability of the military to carry out its warfighting purpose. Decisions which advance constitutional rights at the cost of the discipline that is so crucial to success at war may so hamper future military effectiveness that they sacrifice national security. This is especially dangerous because the complete reach of these decisions may not be seen in peacetime. It is entirely possible that the consequences of judicial error will not become apparent until the nation is at war and unable to take corrective action.[278]

While this position has intellectual merit, it is "greatly overstated . . . [and] . . . clearly speculative."[279] "In light of the infinite number of factors that combine to make an effective

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[277] Hirschhorn, *supra* note 265, at 181.

[278] *Id.* at 236-40.

[279] Bilello, *supra* note 242, at 481.

military force, it is difficult to imagine that judicial invalidation of regulations similar to those which the Court has upheld will be seriously cited by future historians as a primary or even collateral cause of an American military defeat."[280]

E. Deference in Military-Related Gender Cases

The Supreme Court has heard only three military-related gender cases. The most recent case, *Rostker v. Goldberg,*[281] was in 1981. In that case the court upheld challenged all-male draft registration policies. In the court's opinion, "[t]he existence of combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration."[282] The Court supported this decision using the separation of powers and lack of expertise rationale. "This court has consistently recognized Congress' 'broad constitutional power' to raise and regulate armies and navies. Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked."[283]

In the case prior to that, *Schlesinger v. Ballard,*[284] the Court also used a separation of powers rationale, deferring to Congress' exercise of its "broad constitutional power"[285] to

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[280] *Id.*

[281] 453 U.S. 57 (9181); *see infra* notes 292-307, and accompanying text (discussing Supreme Court's decision in *Rostker v. Goldberg* in detail).

[282] *Id.* at 77.

[283] *Id.* at 65 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 510 (9175) (citations omitted).

[284] 419 U.S. 498 (1975).

[285] *Id.* at 510.

uphold a challenged Navy promotion policy. In 1975, male officers were separated from the military if they failed to be promoted twice, regardless of how long they had been in the service.[286] Women officers, on the other hand, were not considered for mandatory discharge for lack of selection for promotion unless they had served for thirteen years.[287] In holding that the different promotion policies for men and women did not violate equal protection, the Court agreed with the Government's reasoning that,

> women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital or transport ships. Thus, in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants. In enacting and retaining § 6401, Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs."[288]

The Court, however, refused to defer to Congress' view in *Frontiero v. Richardson,*[289] a 1973 case which declared unconstitutional a federal statute which allowed male soldiers automatic dependent status for their wives, but required a showing of actual dependency for the husbands of female soldiers to be granted the same status. In so doing it recognized that just because "an equal protection claim arises from statutes concerning

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[286] 10 U.S.C. 6382 (1956) (repealed 1980).

[287] 10 U.S.C. 6401 (1956) (repealed 1980).

[288] Ballard, 419 U.S. at 508 (citations omitted).

[289] 411 U.S. 677 (1973); *see supra* notes 204-207, and accompanying text (discussing the Court's decision in detail).

military personnel policy does not itself mandate deference to the congressional determination, at least if the sex-based classification is not itself relevant to and justified by military purposes."[290]

In both *Schlesinger v. Ballard* and *Rostker v. Goldberg*, Congress justified statutes that discriminated on the basis of gender because women were excluded from combat, and in both cases the Court deferred to Congressional decision making. Those cases assumed that the underlying reason for Congress' decision, combat exclusion, was itself relevant to and justified by military purposes. The following intermediate scrutiny equal protection analysis of combat exclusion shows, however, that the policy is not substantially related to any military purpose, or even to the purpose for which it was established. The Court, therefore, should not give deference to Congress' determinations based upon the exclusions; nor, if faced with a challenge, should it allow the continuance of the policy that only men should serve in combat.

V. An Equal Protection Analysis of Combat Exclusion

A. Gender, Combat, and Deference--Rostker v. Goldberg

In 1981 the Court for the first time addressed gender, deference to congressional decision making concerning the military, and combat in the same decision.[291] This was in

[290] Jones, *supra* note 7, at 272.

response to President Carter's 1980 reactivation of registration for the draft under the provisions of the Military Selective Service Act (Act).[292] The Act required only males to register for the draft; several men challenged its constitutionality. This led the Court to the first military-related gender discrimination case since *Craig v. Boren* established the intermediate scrutiny standard for reviewing such cases. The Court upheld the male-only draft registration. After addressing the great deference that is afforded in the areas of national security and military affairs,[293] the court addressed the gender-discrimination issue. The Court found that the purpose of the legislation was "to prepare for a draft of combat troops."[294] It further found that the exclusion of women from registration was "not only sufficiently but also closely related to Congress' purpose in authorizing registration"[295] since "[w]omen as a group . . . are not eligible for combat."[296] Both of the dissenting opinions in the case were based upon the gender-neutral issue. Justice White, joined by Justice Brennan, focused his dissent on the fact that some women would be needed to fill noncombat positions in the case of a draft, so a gender-neutral law would advance the government's purposes.[297] Justice Marshall, also joined by Justice Brennan, focused his dissent on the proposition that a gender-neutral statute was required unless it would keep the government from meeting the

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[291] Rostker v. Goldberg, 453 U.S. 57 (1981).

[292] 50 U.S.C. §§ 451-454.

[293] Goldberg, 453 U.S. at 64-72.

[294] *Id.* at 77.

[295] *Id.* at 79.

[296] *Id.* at 76.

[297] *Id.* at 85-86 (White, J., dissenting).

statute's objectives.[298] Though the majority did not seem to address Justice White's concerns, it did attempt to answer Justice Marshall. Using the assertions put forth by Congress, the majority reasoned that "training would be needlessly burdened by women recruits who could not be used in combat . . . . whatever the need for women for noncombat roles during mobilization, . . . it could be met by volunteers . . . . [S]taffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility."[299] In so doing, the Court justified one constitutionally questionable gender classification--male only draft registration, in terms of another equally questionable gender classification--the exclusion of women from combat. The concept of combat exclusion was not questioned during the case, however, because of the differing views of the executive branch and the legislature, the "gender-neutral" rationale put forth by Congress to support male only registration were challenged.

When President Carter asked Congress to reactivate the Military Selective Service Act, he also asked that it include women in the draft registration. During the hearings on the issue before the Senate and House Committees on Armed Services, Department of Defense officials agreed that there would be a primary need for combat troops and deployable support personnel in the event of a draft. Nevertheless, these military officials recognized that there would also be a need to fill non-combat positions.

> Not only will we need to expand combat arms, . . . we will also need to expand the support establishment at the same time to allow the combat troops

[298] *Id.* at 94 (Marshall, J., dissenting).

[299] *Id.* at 81-82.

> to carry out their function successfully . . . . It is in the interest of national security that, in an emergency requiring the conscription for military service of the Nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best people for some military jobs in the 18-26 age category will be women . . . . Our conclusion is that there are good reasons for registering [women]. Our conclusion is even more strongly that there are not good reasons for refusing to register them.[300]

As this quote emphasizes, even the military recognized that the true issue was not whether women could serve in combat, as the majority stated, but whether excluding women from registration for the draft was substantially related to the Act's stated purpose, providing a pool of persons for induction into the Armed Forces. Justice Marshall emphasized this point in his dissent, pointing out that the Military Selective Service Act does not limit Congress to reinstating the draft only in times of war. If Congress decided that a volunteer force was inadequate to meet national security needs in peacetime, it could reinstate conscription then.[301] Marshall argued,

> both Congress and the Court have lost sight of the important distinction between registration and conscription. Registration provides 'an inventory of what the available strength is within the military qualified pool in this country.' Conscription supplies the military with the personnel needed to respond to a particular exigency. . . . [T]he majority simply assumes that registration prepares for a draft in which every draftee must be available for assignment to combat.[302]

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[300] *Id.* at 98-99 (Marshall, J. dissenting) (quoting Assistant Secretary of Defense Pirie and Deputy Assistant Secretary of Defense Danzig at the 1980 Hearings before the Senate Committee on Armed Services and the Subcommittee on Military Personnel of the House Committee on Armed Services).

[301] *Id.* at 95-96 (Marshall, J. dissenting).

[302] *Id.* at 96-97 (Marshall, J. dissenting) (quoting General Rogers at the 1979 Hearings on Reinstitution of Procedures for Registration Under the Military Selective Service Act before the Senate Armed Services Committee).

The military also recognized that, even in the case of a draft for purposes of mobilization, a gender-neutral statute would provide a pool of conscripts as good as, if not better, than one that discriminated on the basis of gender. In fact, the Department of Defense officials specifically disclaimed the majority position that women volunteers precluded the need for conscripting women by stating that, taking into account the estimated number of women volunteers, in the first six months of a major mobilization approximately 80,000 women draftees could still be used to fill noncombat positions.[303]

Though the major actors, Congress and the military, could not agree on whether women should be registered, the Court gave deference to Congress stating, "[t]his is not, however, merely a case involving the customary deference accorded congressional decisions. This case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other areas has the Court accorded Congress greater deference."[304] The Court completely ignored that the Department of Defense is a part of the executive branch which advises the President on military matters. In this case, the Department was acting in support of the desires of the President. Just as the Constitution gives Congress powers over the military, it gives the President similar powers in his role as Commander in Chief of the Armed Forces.[305] Finally, it gives the judiciary the power and the responsibility

[303] *Id.* at 84 (White, J. dissenting) (citing depositions of Director of Selective Service Bernard Rostker and Principal Deputy Assistant Secretary of Defense Richard Danzig for the 1980 Hearings before the Senate Committee on Armed Services and the Subcommittee on Military Personnel of the House Committee on Armed Services).

[304] *Id* at 64-65.

[305] U.S. CONST. art II, § 2, cl. 1.

to resolve constitutional controversies.[306] There is no plainer constitutional controversy than when the President and Congress disagree over the proper parameters for our military. Yet, even in the face of this clash between co-equal government branches, the Court deferred to Congress without even seriously examining the President's viewpoints. In fact, it chastised the District Court for doing so.[307] It is exactly that type of willful blindness to the existence of a controversy which demonstrates that the Court has abdicated its constitutionally mandated role in reviewing legislation and regulations which deny fundamental rights to military members.[308]

The debate in *Rostker v. Goldberg* evidenced that, even in 1980, military action based on statutorily-limited roles for women in the armed forces was a tenuous proposition. Combat exclusion was at the root of that controversy; nevertheless the constitutional validity of the policy was not expressly challenged. Interestingly, its validity was also not conceded.[309] The issue was simply avoided as irrelevant. Though lingering social mores grounded in gender stereotypes may have precluded a deeper look into the baseline issue of combat exclusion in 1980, the performance of women in the military in recent history has

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[306] U.S. CONST. art III, § 2.

[307] Rostker v. Goldberg, 453 U.S. 57, 81 (1981) ("there was testimony that in the event of a draft of 650,000 the military could absorb some 80,000 female inductees . . . . In relying on this testimony in striking down the MSSA, the District Court palpably exceeded its authority when it ignored Congress' considered response to this line of reasoning.").

[308] *See supra* notes 241-290, and accompanying text (discussing deference to congressional decision making in military matters).

[309] "Appellees do not concede the constitutional validity of these restrictions on women in combat, but they have taken the position that their validity is irrelevant for purposes of this case." Goldberg, 453 U.S. at 86 n. 2 (Marshall, J. dissenting).

changed many of those opinions. When intermediate scrutiny is applied to combat exclusion today, the policy does not pass constitutional muster.

B. Applying The Intermediate Scrutiny Test To Combat Exclusion

The Womens' Armed Services Integration Act was passed in 1948, almost thirty years before the Supreme Court decided *Craig v. Boren*. At that time gender-based legislation was generally upheld because it was evaluated using a rational basis test.[310] That test requires classifications to be reasonably related to accomplishing legitimate government interests. Combat exclusion passed the rational basis test because excluding women from combat positions was, at that time, a reasonable means of accomplishing the government's interest in keeping women from the risks of harm and capture. This is especially true considering the nature of warfare in 1948. Hand-to-hand combat was the rule. The advanced technology and modern weapons systems which have elevated warfighting to a science which requires technical skill as much as, if not more than, brute force, had not yet been developed. In addition, gender roles in society were very different than they are today. Men were protectors and women were protected. These factors coupled with the low level of scrutiny required by the rational basis test validated combat exclusion. Currently, however, the intermediate scrutiny test is used to evaluate classifications based upon gender. That test has an implied gender-neutral prong which has been developed in case law. When the statutory

[310] *See supra* note 192.

mandate for excluding women from combat is evaluated using an intermediate scrutiny test which includes the third gender-neutral step, it fails.

1. Important Government Interest--The first step in the intermediate scrutiny test is that the government interest furthered by the challenged statute must be important. The rules excluding women from combat were passed with a government goal of shielding women from the risks of enemy fire and capture.[311] Though most commentators assume that is a reasonable and important government interest,[312] this author does not. A nation that has a military composed of women and men should be concerned with shielding all of its soldiers, sailors, airmen, and Marines from these risks, not just the women.[313] In combat, there will be casualties and captives. That is the nature of war. "Death and suffering are no worse for women than men. To say that it's 'unnecessary' to subject women to 'unspeakable agony' when they have lots of other opportunities and challenges is just one more emotional argument that ignores the reality of the military world . . . ."[314] A servicemember coming home in a body bag is a terrible tragedy. It is no less egregious, however, when the body is

[311] *See supra* note 44, and accompanying text.

[312] *See, e.g.*, G. Sidney Buchanan, *Women in Combat: An Essay on Ultimate Rights and Responsibilities*, 28 HOUS. L. REV. 503, 521.

[313] Karst, *supra* note 78, at 537 (although they argue that the nation would suffer great shock if women are killed in war, proponents of combat exclusion do not seriously suggest that women's lives are more important than those of men).

[314] Mary E. Coe, Letter to the Editor, WASH. POST, May 12, 1993, at A18 (responding to a May 5, 1993 letter to the editor entitled *Women and the Agonies of War*, written by Richard Rhodes).

that of a man instead of a woman. It is no less tragic when a parent loses a son rather than a daughter, or a child loses a father instead of a mother.[315]

Though the Court usually finds the stated government purposes for laws important,[316] it failed to do so in *Mississippi University for Women v. Hogan.*[317] In holding that limiting enrollment in nursing school to women was not an important government interest, the Court stated "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or protect members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[318] Protecting women who volunteer to serve in the armed forces from the natural risks of their chosen profession is a paternalistic notion based upon nothing but archaic stereotypes. Absent a great amount of deference to Congress because this is a military matter, this government interest would not pass the first hurdle in the *Craig v. Boren* intermediate scrutiny test.

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[315] Snyder, *supra* note 101, at 442 ("The argument is that the 'image of a female soldier being brought home in a body bag is somehow more hideous than that of a male soldier. However, it is hard for anyone to argue that a women's life is more sacred than a man's.' As Lieutenant Roberta Spillane comments about the American public: '[w]hen children die it hurts, regardless of gender. So if they're not ready for their daughters to be killed in combat protecting this country, they'd better reconsider just how ready they are that their sons are doing it.' ") (footnotes omitted).

[316] *See supra* note 217, and accompanying text.

[317] 458 U.S. 718 (1982).

[318] *Id.* at 725.

2. *Substantial Relation*--Assuming for the sake of argument that shielding women from the risks of harm and capture is an important government interest, combat exclusion must still be substantially related to achieving that interest. It is not.

a. Physical Limitations--Exclusionists argue that the general difference in male and female physiology[319] makes combat exclusion substantially related to achieving the important government interest in shielding women from the risks of enemy fire and capture. Women are not strong enough for direct combat, therefore, keeping women out of direct combat positions keeps them safe. The Persian Gulf War experience demonstrated that this is untrue.

In modern warfare, prime targets include logistics centers and supply routes,[320] the realm of combat support and combat service support troops. Women have served in these areas since World War I. When the Integration Act was passed in 1948, it may have been true that combat support jobs were limited to the rear area and direct combat occurred on the front lines. That is no longer true. As America's weapons get better, so do our enemies'. During the Persian Gulf War, Iraqi missiles targeted areas in Saudi Arabia and Israel,

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[319] *See supra* notes 79-103, and accompanying text (discussing the physiological differences between men and women).

[320] Milko, *supra* note 33, at 1316; *see also* FIELD MANUAL (FM) 100-5, OPERATIONS 6-14 (June 1993) ("Deep operations, combined with simultaneous close operations, might be decisive in one operation, while in another, deep operations set the conditions for future close operations to be decisive . . . . Deep operations are those directed against enemy forces and functions beyond the close battle . . . . The deep battle is designed to nullify the enemy's firepower, disrupt his [command and control] , destroy his supplies, and break his morale. . . . Successful deep operations attack the enemy's functions, such as his command, logistics, and air defense, while also destroying his combat forces.").

locations that were separated from the front lines by hundreds of miles.[321] One of these attacks killed twenty-eight reservists who held combat support and combat service support jobs. Three of those victims were women.[322] The two women taken captive in the Persian Gulf War were also serving in combat support positions. Major Rhonda Cornum was a flight surgeon on a search-and-rescue mission when her helicopter was shot down over Iraq, and Specialist Melissa Rathbun-Nealy was serving as a transport operator when she was captured.[323] These examples indicate that excluding women from direct combat because of physiological differences between the genders does little to protect women from the risks of capture or hostile fire. Today's battlefield has no front lines or rear area. Every soldier deployed to the war zone faces similar risks. Therefore, physical differences between the genders are not valid reasons for determining that the gender-based restrictions on direct combat are substantially related to achieving the government's protectionist objective.

b. Psychological Limitations--Neither are the alleged psychological weaknesses of women[324] a valid reason for claiming that combat exclusion is substantially related to keeping women from the risks of hostile fire or capture. Unlike physical limitations which actually exist, the psychological weaknesses are based on stereotypical

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[321] *Id.* (citing Guy Gugliotta, *Scuds Put United States Women on Front Line*, WASH. POST, Jan 28, 1991, at A19; Dana Priest, *Pennsylvania Mourns 11 Scud Victims*, WASH. POST, Feb. 28, 1991, at A33; William Claiborne, *Israel Reports No Damage In Scud Strikes,* WASH. POST, Feb. 3, 1991, at A26).

[322] *Id.* (citing Amy Eskind, *A Post-Gulf Memorial Day 1991: Arms and the Woman*, WASH. POST, May 26, 1991, at D3).

[323] Carleton E. Bryant, *5 Ex-POWs Receive Purple Hearts*, WASH. TIMES, Mar. 14, 1991, at A8.

[324] *See supra* notes 104-111, and accompanying text (discussing the arguments surrounding women's psychological limits).

notions that have been perpetuated throughout American history. Though there are surveys which correlate aggressiveness and gender, they do not focus on combat-like situations. Studies which do so belie the notion that women are not equipped to perform in combat.[325] In *Craig v. Boren*[326] the Court struck down a gender-based statute even though the state had statistical surveys to verify its claims. The Court held that the surveys did not provide a close enough correlation between the tested factors and gender.[327] Because the surveys relating gender and aggressiveness have not tested behavior in combat-like situations, they present the same problem. Any assertions based upon those surveys that women soldiers, sailors, airmen, and Marines will not be able to handle war are pure speculation. Those assertions perpetuate gender stereotypes that the studies which measure female performance in simulated combat situations and the Persian Gulf War showed to be untrue. There is no substantial relation between gender and psychological limitations that would justify keeping women out of combat positions to protect them.

c. *Unit Cohesion*--The argument that keeping women out of combat units protects them form the danger of sexual harassment and assault from their male counterparts, who will compete for their attention instead of bonding with each other, is also flawed. Women in the Persian Gulf experienced ninety percent less sexual harassment than military women do in peacetime.[328] Additionally, the fear that units would not bond was unrealized.

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[325] *See supra* note 108, and accompanying text.

[326] 429 U.S. 190 (1976).

[327] *See supra* notes 213-216, and accompanying text (discussing the decision in *Craig v. Boren).*

[328] *See* Campbell, *supra* note 97, at 81.

Historical accounts[329] and recent data from integrated noncombat aviation units with demanding missions showed that "cohesion either remained at the same level as in the all-male unit[s] or improved after the entry of women into the unit."[330] If there is a substantial relation between the presence of women in a unit and cohesion, it is a positive correlation, not a negative one. Because more cohesive units perform better, their members should have less risk of harm than members of other units. Therefore, the government's objective of reducing the risks of harm and capture is actually frustrated, not furthered, by keeping women out of combat units, since gender-integrated units are more cohesive than all-male units.

d. Public Opinion/Stereotypes--The final argument that the fears of the American public form the basis of a substantial relationship between combat exclusion and gender is also unsupported. The experiences of other nations prove that women can be successfully integrated into combat positions. Additionally, the American public's concern with the treatment of American POWs is not going to be resolved by combat exclusion. The treatment of women prisoners is not going to change because the prisoners are captured from combat units instead of support units. Specialist Rathbun-Nealy and Major Cornum were both captured while serving in combat support assignments, yet both of them were sexually assaulted. Would the assault have been worse had they been assigned to combat units?

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[329] *See supra* notes 123-124, and accompanying text (discussing experiments with women in gender-integrated combat and combat support units).

[330] PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at 81.

Probably not. Whether a servicemember is assigned to a combat unit is not related to how far their captors will go in violating the Geneva Conventions.

Neither is combat assignment substantially related to the public concern about war orphans. In war, servicemembers die in the rear areas as well as on the front lines. Children lose parents that are nurses and truck drivers as well as infantry soldiers and cannoneers. This is not a problem that is going to be solved by keeping women out of combat, especially when the majority of the single parents in our military are men.

3. Gender-Neutrality--As this analysis indicates, a gender-neutral standard for combat will accomplish the same government interests as combat-exclusion accomplishes, and will not impede Congress' stated objective of protecting women from the risks of harm. Everyone deployed to a war zone is in danger because of the nature of warfare today. Precluding the use of qualified female solders in combat positions actually weakens the military because it is not the most efficient and effective use of our resources. "Military readiness [not gender] should be the driving concern regarding assignment policies."[331] If the true concern is protecting our servicemembers from the risks of harm and capture while maintaining national security, "[s]electing the best qualified person for a position, regardless of gender"[332] will accomplish that task the best.

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[331] *Id.* at 22 (discussing the Presidential Commission recommendation that there are circumstances under which women might be assigned to combat positions).

[332] *Id.*

Because combat exclusion is not substantially related to Congress' purpose in adopting it, and because a gender-neutral combat policy will serve the same purpose while actually improving the effectiveness of our military, the Court should not defer to the will of Congress if faced with a challenge to the policy. Instead, it should declare that combat exclusion is an unconstitutional violation of the equal protection rights of both male and female servicemembers.

C. A Better Rule

Though combat exclusion of all women and inclusion of all men does not pass intermediate scrutiny, the military must have some way of determining which servicemembers will go to combat. In developing that policy, it should take into account real issues, such as physical capabilities, as well as the most pressing concern of the American public, the eventuality of large numbers of war orphans. All servicemembers should be eligible for all assignment opportunities within the Armed Forces, including combat positions, as long as they can meet the operational requirements, unless they have young children who might be orphaned by their combat service.

1. Occupational Standards--Because there are some physical performance standards which differentiate combat positions from combat support and combat service support positions, each service should develop realistic and specific strength, endurance, and stamina standards for combat arms branches. These standards may differ from service to service

because of the differing combat missions of the Army, the Navy, the Air Force, and the Marine Corps. During initial entry training for enlisted servicemembers and as a pre-commissioning requirement for officers, each servicemember should be tested on those standards. Those who pass should be considered for permanent assignment to combat arms positions. Others should be assigned to combat support or combat service support specialties.

In addition to meeting the baseline service standard for combat duty, enlisted soldiers, sailors, airmen, and Marines who receive advanced individual training in combat-related specialties, and officers who go to combat arms officer basic courses, should have to meet specific requirements for their particular specialties. Each branch within each service should establish specific and realistic task standards for the direct combat-related specialties within that branch. Soldiers who qualify for combat duty should be required to meet those additional task standards as a prerequisite to graduation from training and permanent assignment within a direct combat specialty. Each of those personnel should also be required to re-certify that they meet the basic combat standards and the additional specialty standards each year.

This rule focuses on the development and enforcement of realistic performance standards for combat duty. That is the key to making sure that combat effectiveness does not suffer. Requiring both male and female servicemembers to meet the requirements will ensure that only the best qualified personnel are assigned to each position. This policy should not be

confused with one which allows servicemembers to volunteer for combat duty. Under the proposed rule every initial entry trainee and officer candidate will be tested to determine if they meet the basic combat standards. The pool of those eligible for combat specialties will come from those test results and assignments to that training will be made according to the needs of the military, not the desires of individual servicemembers. The only personnel whose combat duty will be determined on a volunteer basis will be those affected by the exemption for parents of young children.

2. *Family Considerations*--In addition to ensuring that any rule for assignment includes realistic physical standards, the military must also consider the family issues that were of concern to the American public during the Persian Gulf Conflict. Therefore, single parents and one member of each dual-service couple should be exempt from assignment to deployable positions if they have children under the age of four.[333] Individual servicemembers who fall into these categories, but who still wish to be assigned to combat duty should be so assigned if they request a waiver from their exemption and also establish that their children will receive proper care in the event of their deployment or death.

The exemption for single parents and dual service couples with children under the age of four is important because it does address a true concern of the American people and of the

[333] During a study conducted by the Presidential Commission, "[e]xpert testimony and literature almost universally cited the period from birth to three years as the most critical and vulnerable in the child's life -- a period during which even the best substitute care may not alleviate the devastating effects of a long-term separation from a single parent or both parents in a two-parent family." PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at 17.

military. Since both male and female servicemembers are single parents, both should be given the opportunity to ensure that their young children aren't orphaned because of a war. They should also have the ability to waive that opportunity if they so desire. Also, both members of a dual-service couple should face the risks of deployment equally, while still being able to ensure that their young children will be left with at least one parent should a war arise. For that reason the service, not the couple, will determine which member of a dual service couple with young children will be deployed. The determination will not be based upon gender or whether the member is in a combat specialty or a combat support or service support specialty, except to the extent that the specialty that is most needed by the military at the time will take precedence for deployment. This policy addresses the concerns of the American public without unfairly subjecting servicewomen to a "mommy track"[334] that could affect their future opportunities. Finally, only exempting parents with the youngest children should still enable the military to accomplish its mission.[335]

[334] *See* Campbell, *supra* note 97, at 75-76.

[335] *Id.* at 76 (discussing a concern expressed by Former Defense Secretary Cheney and Former Joint Chiefs of Staff Chairman Powell that exempting all single parents and dual-service couples from deployment would weaken military capability).

VI. Future Implications

A. Economics

Supporters of combat exclusion argue that in light of current downsizing, expanding women's role is not cost effective. The additional costs to modify facilities and to train women for war are unjustified.[336] This argument is flawed for a number of reasons. First, the military calculates any expenditures into the budget that is approved by Congress. All of the recent statutory changes to the combat exclusion policy have been encompassed in the annual Authorization Acts, which Congress uses to give the military the money to accomplish its missions. Congress will ensure that America can afford any changes that are required, and that they are cost effective. Second, any major changes to facilities or vessels would be limited expenditures because they would be one-time modifications. It is questionable, however, whether any such changes would be needed. Even in the instance of berthing on ships, other militaries which have integrated women into their forces have solved the problem by modifying sleep rotation, not modifying the vessel.[337] Finally, additional training costs, if any, associated with putting women in combat positions should not be substantial. The military already trains combat troops. That training should not have to be changed to integrate women. The military will have to develop the combat fitness tests which will be given to all servicemembers, and the individual skill tests for combat-related

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[336] *See* Jones, *supra* note 7, at 267 (citing economic arguments used to justify combat exclusion).

[337] PRESIDENTIAL COMMISSION REPORT, *supra* note 68, at C-26 to C-27.

specialties. The proposed rule does not advocate changing the standards or the training requirements for combat duty unless those standards are unrealistic for the duty to be performed. It simply advocates allowing women the opportunity to meet those requirements.

B. Changing Operations

Finally, supporters of combat exclusion argue that today's military no longer fights conventional wars. The current focus is on Operations Other than War, such as peacekeeping and humanitarian assistance. Because the law does not prohibit women from participating in these operations, the combat exclusion policy has already been overcome by events. A change would have no practical effect.

While it is true that the operations in which the American military has been involved since the Gulf War have not been conventional wars, there is no reason to believe that this will continue to be the case forever. The world is constantly changing, and with change comes resistance. Though we would all like to believe that there will never be another full scale war, we cannot be sure of that. An effective national defense strategy hopes for peace, but plans war. America must always plan for the eventuality of a full scale war. If Congress and the military fail to address the concerns about women in combat, America will find itself in the same vulnerable position that mandated the development of the women's auxiliaries at the beginning of World War II.[338]

[338] *See supra* note 22, and accompanying text.

VII. Conclusion

The combat exclusion policies mandated by the Womens' Armed Services Integration Act almost fifty years ago are outdated. Though most of the restrictions have been lifted by statutory and policy changes, some limits on the combat service of women still remain. These restrictions, which are based solely on gender, do not pass the intermediate scrutiny test espoused by the Supreme Court in *Craig v. Boren,* and refined in later Court decisions. The restrictions are based on stereotypical notions reminiscent of women's roles in American society at the time of the passage of the Integration Act. Times, however, have changed. Women's performance in the Persian Gulf War evidenced this change in both the capabilities of American servicewomen and the attitudes of the American public. There should be a corresponding change to the combat exclusion policy. Such a change is supported by recent history and mandated by our Constitution.

Congress and the military should adopt a gender-neutral assignment policy which focuses on the physical capabilities required for service in various military positions before the issue is challenged in court. Though the Supreme Court currently gives great deference to congressional decision making in military matters, because of the changing nature of the military that deference is no longer appropriate in situations where infringement upon servicemembers' basic human rights is not required by military necessity. Since equal protection under the laws is such a basic right, and since combat exclusion is not mandated

by military necessity, deference should not be given in this area. If the issue reaches the Supreme Court, the Court will be forced by its precedent in the gender discrimination arena to hold that the current law is unconstitutional.

APPENDIX
DOD Assignment Policy - Proposed Rule

All servicemembers will be eligible for all duty assignments in their respective branches of service, subject to the following conditions:

1. Occupational Standards

a. Each service will develop realistic basic combat physical performance standards, based upon that services' combat requirements. Each servicemember will be tested on these standards during initial entry training. Only those who meet the standards will be eligible for advanced individual training in a direct combat-related specialty.

b. Each direct combat-related military occupational specialty will further adopt specific performance standards which test the strength, endurance, and stamina characteristics essential to successful duty performance within that specialty. Each servicemember assigned to that specialty will meet those standards before being permanently assigned to a direct combat position.

c. Each service member assigned to a direct combat position will be tested yearly on the basic combat standards as well as the occupational specialty standards. Those who fail to meet the standards will take a re-test within 30 days. Those who fail to meet the standards on the re-test will be reclassified.

d. Any servicemember who desires a reclassification into a direct combat-related specialty will be required to meet the basic combat standards, as well as the occupational specialty performance standards, before beginning training in the direct combat-related specialty.

2. Family Considerations

a. Single parent servicemembers with children under the age of four are exempt from assignment to deployable positions. Those single parent servicemembers with children under the

age of four who desire duty with deployment possibilities must request a waiver from this policy. Waivers will be granted only in cases where the servicemember can produce a working family care plan, executed within 30 days of the request for waiver. The waiver must be renewed each year until all children of the single parent reach age four. At each renewal the servicemember must produce a family care plan updated within 30 days of the renewal date.

b. Only one parent of dual-service couples with children under the age of four will be assigned to a deployable position. If both parents are otherwise eligible for combat-related duty or deployment, the determination of which parent will be deployed will be based upon the needs of the service. Those dual-service couples with children under the age of four who both desire assignments with deployment possibilities must request a waiver from this policy. The request for waiver must be signed by both servicemembers. Waivers will be granted only in cases where the dual-service couple can produce a working family care plan, executed within 30 days of the request for waiver. The waiver must be renewed each year until all children of the dual-service couple reach age four. At each renewal the couple must produce a family care plan updated within 30 days of the renewal date.