Women as Warriors After the Gulf War: A Call for the Repeal of All Combat Exclusion Laws

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NOTE

WOMEN AS WARRIORS AFTER THE GULF WAR: A CALL FOR THE REPEAL OF ALL COMBAT EXCLUSION LAWS

The fight was inevitable. The gulf war and the 1989 Panama invasion put servicewomen in the middle of the shooting and the bleeding in a way no previous American war did. More than 35,000 women served in the gulf—and discovered that modern warfare with its wide-ranging maneuver tactics and its long-range weaponry has blurred the old boundaries between "front" and "rear." Women worked in supply units, flew support aircraft, crewed Patriot and Hawk missile units and served aboard Navy tenders. These were not jobs with high combat probability. But 11 women were killed and two taken prisoner. Maj. Marie T. Rossi died when her chopper crashed while on a support mission. Army Specialist Melissa Rathbun-Nealy fell into enemy hands after accidentally driving into Iraqi positions in the desert. Three women died when an Iraqi Scud missile struck their billet near the end of the war. And so the argument: women already share the risks, let them fight equally alongside men. Let women be warriors, too.¹

Women denied opportunities in the military based solely on gender have long challenged the propriety of the combat exclusion laws contained in title X of the United States Code² and the combat policies contained in Army regulations.³ Yet, despite mounting

criticism, many combat exclusion laws and policies remain in force and continue to preclude women from attaining positions of high esteem in the armed forces. Critics have urged Congress to repeal these laws, contending that they violate the equality guarantees embodied in the Fifth Amendment and in title VII of the 1964 Civil Rights Act, and that they frustrate significant military and public policy objectives.

The appeals to Congress arose because the courts have traditionally demonstrated deference to the legislature in military matters. Courts have held title VII inapplicable to uniformed personnel of the armed forces and have rejected equal protection challenges to military policy. Although the United States Supreme Court has never ruled on combat exclusion laws or policies, it has addressed the constitutionality of excluding women from registration for the draft. In the 1981 case of Rostker v. Goldberg, the ban on title VII grounds); Owens v. Brown, 455 F. Supp. 291, 294 (D.D.C. 1978) (challenging Navy combat ban on equal protection grounds).


See Snyder, supra note 5, at 445-48.


453 U.S. 57 (1981). In Rostker, the male petitioners challenged a provision in the Military Selective Service Act ("MSSA") that authorized the president to require that men but not women be registered for military service. Id. at 61. They asserted, inter alia, that the statute violated their equal protection rights. Id. at 61 n.2.

As a result of the Soviet invasion of Afghanistan, President Jimmy Carter decided in 1980 that it was necessary to begin the registration process. Id. at 60. The President sought congressional allocation of funds for registration and also requested that the MSSA be amended to permit the registration of women. Id. Congress chose not to amend the MSSA and allocated just enough funds for the registration of men. Id. at 61. On remand from the
Court upheld the male-only registration system, emphasizing that the judiciary lacks the competence to regulate military affairs.9

Recently, however, Congress responded to criticism of combat exclusion laws by passing the National Defense Authorization Act for Fiscal Years 1992 and 1993 which repealed title X bans against women flying combat missions for the Air Force, Navy, and Marines.10 However, the repeal does not affect the ban against

Third Circuit, the district court, applying the "middle scrutiny" test, found the MSSA violative of equal protection and enjoined registration. Id. at 63. The next day, the Director of Selective Service filed a notice of appeal to the Third Circuit; shortly thereafter Justice Brennan stayed the district court's order, and selective service registration commenced. Id. at 64.

In reviewing the MSSA, the United States Supreme Court demonstrated great deference to Congress, citing the legislature's authority to raise and support armies. Id. at 70-71 (citing U.S. Const. art. I, § 8, cls. 12-14).

Id. at 65-66. The majority did, however, distinguish the MSSA from other gender-based discrimination cases, noting that the MSSA was thoroughly considered by Congress before enactment and was not merely a product of traditional thinking about the roles of women. Id. at 72. However, while the justices implied that they would closely scrutinize gender-based legislation absent evidence of detailed consideration by Congress, the majority actually cited the combat exclusion laws to justify the all-male registration. Id. at 76-77.


The primary factors motivating passage of the legislation were the desires to repeal anachronistic legislation, to improve the nation's defense, and to grant women equal opportunity. See 137 Cong. Rec. S11,412, S11,416 (daily ed. July 31, 1991) (statement of Sen. Kennedy). Excerpts from the debates in Congress concerning the repeal read as follows:

Barriers based on sex discrimination are coming down in every part of our society. The Armed Forces should be no exception. Women should be allowed to play a full role in our national defense, free of any arbitrary and discriminatory restrictions. The only fair and proper test of a women's [sic] role is not gender but ability to do the job.

... The changing nature of modern warfare means that old distinctions are obsolete.

The dangers now extend well behind the lines. As we saw in the Persian Gulf war, military personnel well behind the lines can be killed or wounded. ...

In the gulf war, the technological abilities of our personnel were as important to our victory as their physical strength and courage. There is virtually universal consensus that the women who served in Operation Desert Storm did an outstanding job, including jobs that were, for all practical purposes, combat jobs. ...

... The fact is, women already meet the very demanding standards to fly high performance combat aircraft. They test combat aircraft. They train combat pilots. Id. Later in the debates, Senator Kennedy noted that the Secretary of Defense supported
Women in combat vessels and the many restrictions contained in Army regulations. Although the limited repeal is clearly a step in the right direction, the fact remains that under current regulations, many qualified women may never be permitted to serve in combat positions. In the National Defense Authorization Act, Congress established a commission to study all matters relating to assignments of women in the military. It is hoped that the commis-

the repeal of the combat exclusions, especially in light of women's performance during the Persian Gulf War. Id. at S11,423.

Senator Roth also indicated some of his reasons for supporting the repeal:

The readiness and preparedness of our military defense is a serious matter. When our Nation's future is at stake—and the future of free nations is at stake—we want the most skilled and seasoned men and women on the job.

Make no mistake—military excellence must be our first priority. Our Secretary of Defense must have the greatest flexibility and maneuverability to marshall the forces at his command. We want the best and brightest pilots in the air, not on the ground. We want the best person in the cockpit of a Stealth fighter or B-1 bomber—not the second best.

Mr. President, America is with us on this issue. A Newsweek poll released just this week shows that 63 percent of Americans favor allowing women to fly combat aircraft. The American people know what is good for our military defense is also good for the country. And what is good for the country is excellence, readiness, preparedness, strength, and flexibility.

For anyone who thinks we need more studies, more evidence, I say, look at the record. Women have been pulling G's in high performance aircraft for over 15 years now. Women aviators train our male combat pilots. They test the newest generation aircraft. They fly the space shuttle. Women pilots test FA-18's and C-27's, they fly transport planes and refueling planes, they fly AWACS and helicopters. In fact, women have flown just about every plane that the Pentagon has built in the past three decades. There is no question about their performance, or their experience, in this regard.

Id. at S11,413-14 (statement of Sen. Roth). But see id. at S11,420 (Senator McCain quoting negative attitudes of some high-level military officials). The only substantive objection was that the repeal might result in a draft of women. See id. at S11,420. However, a number of senators harbored minor concerns and were thus enthusiastic about creating a commission to study the matter. See id. at S11,417-18.

1 Helen Dewar, Senate Approves Women in Combat, WASH. POST, Aug. 1, 1991, at Al, A7 (Senate voted to allow women to fly combat missions and authorized suspension of sex-based restrictions for land and sea combat roles while presidential commission studies issue of women's military assignments).

12 See COLLIER, supra note 4, at 8. The author states, "[r]epeal of the combat exclusion provisions would not necessarily result in assignments of women to all combat units because it would be up to each service Secretary to set policy and assign personnel." Id.

13 See 137 CONG. REC. S12,548-601 (daily ed. Aug. 15, 1991). The Commission on the Assignment of Women in the Armed Services Act of 1991 was created to study all matters concerning the assignments of women in the armed forces. Id. Investigating the impact on the armed forces of permitting women to serve in combat roles was a priority for the Commission. Id. Although this appears to be a positive development, some critics of the combat exclusion laws opposed the formation of the commission. See Patricia Ireland, Statement of
sion's findings will result in the expansion of women into combat roles so that qualified women can receive the opportunities they deserve.

This Note examines combat exclusion laws and policies and concludes that they violate the Fifth Amendment and prevent the realization of important social objectives. Part I describes women's roles in the military prior to the adoption of combat exclusion laws and provides the legislative history of the exclusions. Part II argues that although the laws and policies do not violate Title VII, they do contravene equal protection guarantees. Finally, part III explores the policy reasons for repealing combat exclusions and urges that qualified women be permitted to hold combat positions.

I. Women's Roles in the Military and the Legislative History of Combat Exclusion Laws

Women have served crucial roles in the armed forces since at least the fourteenth century, and the extent of their involvement in combat has increased through time.14 In early European armies, women held important military support roles.15 Furthermore, as far back as the seventeenth century, women at times engaged in battle16 and sometimes even disguised themselves as men in order to participate in the fighting effort.17

In this country, women served in militia units during the Revolutionary War18 and were acknowledged for their fighting efforts during the Civil War.19 Nonetheless, with the exception of the Nursing Corps, American women were not officially recruited for positions in the armed forces until World War I.20

NOW Executive Vice President Patricia Ireland Supporting Repeal of Combat Exclusion Laws for Women (July 25, 1991) (news release). The commission is supposed to report its findings to Congress by November 15, 1992. See COLLIER, supra note 4, at 13.

15 Id. at 51.
17 Gordon & Ludvigson, supra note 14, at 52.
18 JUNE A. WILLENZ, WOMEN VETERANS: AMERICA'S FORGOTTEN HEROINS 10-11 (1983). From the meager records of military life prior to the 1800s, it is difficult to establish the extent of women's involvement in combat roles. Id. at 10. However, there are numerous accounts of women injuring and killing the enemy, including stories of legendary figures who disguised themselves as men and fought with the troops. Id. at 11.
19 Id. at 12.
20 Id. at 18; see also JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLU-
In World War II, women in Russia, China, Italy, France, and other countries were employed in combat roles.\textsuperscript{21} In contrast, American women, although active in all branches of the armed services, and despite being called upon to train male pilots, were not officially assigned to combat roles.\textsuperscript{22} However, the participation of women in World War II eliminated all doubt regarding their effectiveness in times of national crisis\textsuperscript{23} and prompted a movement in the United States to permanently integrate women into the armed services.

At the end of World War II, the military concluded that providing formal military roles for women would be in the nation’s best interest.\textsuperscript{24} Accordingly, Congress enacted the Women’s Armed Services Integration Act of 1948, thereby granting women permanent status in the Army, Navy, Air Force, and Marine Corps.\textsuperscript{25} However, the Act in its final form contained numerous restrictions, most notably a prohibition against women in combat. The Air Force combat ban, for example, provides that “[f]emale members of the Air Force, except those designated under section 8067 of this title, or appointed with a view to designation under that section, may not be assigned to duty in aircraft engaged in combat missions.”\textsuperscript{26}

\textsuperscript{21} See Gordon & Ludvigson, supra note 14, at 53; see also Helen Rogan, Mixed Company: Women in the Modern Army 85-87 (1981).

\textsuperscript{22} See Holm, supra note 20, at 18-29. The Women’s Army Auxiliary Corps, Women’s Auxiliary Corps, Women Accepted for Voluntary Emergency Service, Semper Paratus—Always Ready, Women’s Air Force Service Pilots, Women’s Auxiliary Ferrying Squadron, and Women’s Flying Training Detachment units, consisting of thousands of women, were formed at various points during World War II. See id.


All told, the women’s record was impressive. . . . Most of their work was tedious, and in many cases, the conditions were deplorable. Still, despite the demorlizing situations and attitudes, the women remained committed to the value of their work. Their attrition levels were the same or lower than the men’s. They were not as prone to get drunk, go AWOL (Absent Without Leave), or violate Articles of War. They were never considered a discipline problem.


\textsuperscript{25} See id. “The primary purpose was to provide a means of mobilizing women in the event of general war.” Hart, supra note 23, at 9.

\textsuperscript{26} 10 U.S.C. § 8549 (1991). The Navy exclusion (reflecting the 1978 amendment), which
tive Vinson failed to provide any substantive support for his views, members of the House who opposed combat exclusion laws were unable to muster the votes required to prevent their incorporation into the bill.\textsuperscript{20} When the bill was returned to the Senate, objections to the exclusion amendment caused the bill to be sent to a conference committee; however, the Senate later accepted the bill without debate.\textsuperscript{31}

It appears that those who advocated the combat exclusions did so because of their stereotypical views of women's roles in society.\textsuperscript{32} This is evidenced by the absence in the congressional discussions of any particular military purpose for the exclusions.\textsuperscript{33} Thus, although no sound basis exists for restricting women to noncombat roles in the military, until recently, nearly forty percent of all armed forces positions were open only to men.\textsuperscript{34}

II. Title VII and Equal Protection Arguments Against Combat Exclusions

A. Title VII

Laws and policies pertaining to the uniformed military have been challenged on title VII grounds without success.\textsuperscript{35} Title VII of

\textsuperscript{20} See id. at 5711-13; see also Gordon & Ludvigson, supra note 14, at 61-62.
\textsuperscript{31} See Gordon & Ludvigson, supra note 14, at 62.
\textsuperscript{32} See id. at 63.
\textsuperscript{33} Id. at 64.
\textsuperscript{34} CAROLYN BECRAFT, WOMEN IN THE MILITARY 2 (Women's Research & Educ. Inst., 1990) [hereinafter BECRAFT, MILITARY]. The percentage of positions available to women in each of the forces are 52% in the Army, 59% in the Navy, 20% in the Marine Corps, 97% in the Air Force, and 100% in the Coast Guard. BECRAFT, MILITARY at 64. BECRAFT, MILITARY at 62.
\textsuperscript{35} See Gonzalez v. Department of Army, 718 F.2d 926, 928 (9th Cir. 1983). The court
Ironically, although this legislation placed a major limitation on our armed forces, it was enacted by Congress without much deliberation or justification and against the express judgment of the military.\textsuperscript{27} The original Senate bill did not contain combat exclusions, and few references were made to women in combat in the Senate Armed Services Committee hearings.\textsuperscript{28} However, through the efforts of the outspoken and persevering Representative Carl Vinson, the combat exclusions were added to the original Senate bill during a House subcommittee meeting.\textsuperscript{29} Although Representa-

\textsuperscript{27}See Owens v. Brown, 455 F. Supp. 291, 309 (D.D.C. 1978) ("[W]hen Congress carved out the disputed exception to the Navy's ability to use women aboard Navy vessels, it acted without serious deliberation, against the expressed judgment of the military . . . ").

\textsuperscript{28}Hearings on Women's Armed Services Integration Act of 1947, 80th Cong., 1st Sess. 1-9 (1947). The primary issue considered was whether women should be given permanent and regular status in the armed forces. See id.

\textsuperscript{29}See Hearings Before the Subcomm. on Organization and Mobilization of the House Comm. on Armed Services, 80th Cong., 2d Sess. 5689-5713 (1948). Excerpts of the dialogue between Representative Vinson, the sponsor of the combat exclusion laws, and other representatives follow:

Mr. VINSON. Is there anything in this bill that excludes any assignment for sea duty, that prohibits you from assigning a WAVE officer or an enlisted WAVE to sea duty?

Captain STICKNEY. No, sir.

Mr. VINSON. Do you think it would be quite helpful to the bill to write into the law that they cannot be ordered to sea duty? . . .

Captain STICKNEY. Yes, sir. We do not feel, though, that it was necessary to write that into law, Mr. Vinson.

Mr. VINSON. Well, I think it is a good matter. I think the Congress should take a positive stand on it and not leave it to the discretion of the Secretary. From your remark just a while ago, you said they might be used in communications and recreation work on ships—

Mr. VINSON. I propose an amendment, if somebody will draft it. I am just throwing it out for what it is worth. Those are my views. I think it will strengthen the bill to have it positively understood by Congress that ships are not places to which these women are going to be detailed and nobody has any authority to detail them to serve on ships.

Of course, they are not going to be detailed to serve on ships, but you cannot tell what happens, you know, because somebody might say they need a few of them up there to do communications or other kinds of work and I do not think a
the Civil Rights Act of 1964 can be an effective weapon to combat employment discrimination on the basis of race, religion, sex, or national origin because it can be invoked to terminate a practice that cannot be stricken on constitutional grounds. However, because the Act could interfere with military efficiency, the courts construe it narrowly when internal military functions are implicated. Because neither the language of title VII nor its legislative history indicates that it was meant to apply to the uniformed mili-

focused on indications of a congressional intent to exempt the uniformed military personnel from the relevant section of title VII. Id. (citing Civil Rights Act of 1964, § 717(a), 42 U.S.C. § 2000e-16(a)(1964)); see also Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir.) ("[I]f Congress had intended for the statute to apply to the uniformed personnel of the various armed services it would have said so in unmistakable terms."); cert. denied, 439 U.S. 986 (1978). But see Hill v. Berkman, 635 F. Supp. 1228, 1238 (E.D.N.Y. 1986) ("There is nothing in Title VII to suggest that the uniformed military are an exception to members of military departments' expressly covered under § 2000e-16.").

Writing for the Hill court, Chief Judge Weinstein concluded that the legislative history was ambiguous. Id. at 1236. The court was most persuaded by the language in title X which "seems to lump civilian and military components into the term [military] department." Id. The court also noted that membership in the armed forces is now viewed as a form of employment and thus deserves title VII protection. See id.

Subsequently, however, the Second Circuit, disagreed with Chief Judge Weinstein's analysis and essentially overruled Hill. See Roper v. Department of Army, 832 F.2d 247, 248 (2d Cir. 1987). The court stated that title VII should not be extended to uniformed members of the armed forces because "[m]ilitary service continues to differ materially from civilian employment in that officers and personnel are subject to military law and unable to terminate such employment at will." Id. (citing Johnson v. Alexander, 572 F.2d 1219, 1233 (8th Cir.), cert. denied, 439 U.S. 986 (1978)). The court added that "[t]he relationship between the government and a uniformed member of the military remains unlike the relationship which exists between civilian employer and employee." Id.

26 Title VII provides, in part, the following:
(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or discharge individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.


28 See, e.g., Bledsoe v. Webb, 839 F.2d 1357, 1359-60 (9th Cir. 1988) (examining Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971), which held that courts should not review internal military matters). The Bledsoe court distinguished between civilian and uniformed employees of military departments and held that decisions pertaining to the former, but not to the latter, are justiciable. Id.

The Supreme Court has not yet construed title VII in the military context. However, the Court has interpreted it broadly in other contexts. See Franks v. Bowman Transp. Co., 424 U.S. 747, 763-64 (1976).
tary,\(^\text{39}\) it is submitted that the circuit courts confronted with the question were correct in concluding that uniformed military are not covered by title VII.\(^\text{40}\)

**B. Equal Protection**

In the 1976 case of *Craig v. Boren*,\(^\text{41}\) the Supreme Court devised the now universally applied “middle scrutiny” standard for determining the constitutionality of gender-based classifications.\(^\text{42}\) The middle scrutiny test falls somewhere between “strict scrutiny,” which is applied to classifications based on race and ethnicity, and the “rational basis” test, which is applied to most other

\(^{39}\) *See* *Roper*, 832 F.2d at 247-48. The court focused on Congress’s use of the phrase “military departments,” instead of “armed forces,” in the section of title VII that extended the Act to the military sector and reasoned that the term “military departments” indicated congressional intent to include only civilian employees, not enlisted personnel. *Id.* at 248; *see also* 42 U.S.C. § 2000e-16(a) (1988). The court also examined the legislative history and noted that there was no evidence that Congress desired to have the Equal Employment Opportunity Commission, responsible for enforcing title VII, review the employment practices of the armed forces. *See* *Roper*, 832 F.2d at 247.

\(^{40}\) *See* *Roper*, 832 F.2d at 248; *see also* Spain v. Ball, 928 F.2d 61, 62 (2d Cir. 1991) (applicant for military service unsuccessfully challenged Navy’s age discrimination); Doe v. Garrett, 903 F.2d 1455, 1461 (11th Cir. 1990) (HIV-infected naval reserve member unsuccessfully challenged his release), *cert. denied*, 111 S. Ct. 1102 (1991); Gonzalez v. Department of Army, 718 F.2d 926, 927-28 (9th Cir. 1983) (title VII held inapplicable to army Major’s charge of racial discrimination); Johnson v. Alexander, 572 F.2d 1219, 1223-24 (8th Cir.) (unsuccessful racial discrimination challenge by prospective uniformed member of army), *cert. denied*, 439 U.S. 986 (1978).

The Tenth Circuit held that commissioned officers of the Public Health Service (“PHS”) are exempt from title VII. *See* Salazar v. Heckler, 787 F.2d 527, 530-31 (10th Cir. 1986). *But see* Milbert v. Koop, 830 F.2d 354, 358 (D.C. Cir. 1987) (commissioned officers not exempt from title VII). The *Milbert* court in reaching its decision assumed that members of the armed forces were exempt and distinguished between commissioned officers of the PHS and members of the armed forces. *Id.*

Thus far, only a district court has held title VII applicable to the uniformed military. *See* Hill v. Berkman, 635 F. Supp. 1228, 1227-38 (E.D.N.Y. 1986). Chief Judge Weinstein acknowledged that case law pointed to the contrary, but believed that the statutory language and legislative history of title VII were ambiguous. *See id.* at 1233-38. Nevertheless, petitioner Hill ultimately did not obtain judicial relief because the court held that “being male is a bona fide occupational qualification for a job that is by federal law and present national policy restricted to men.” *Id.* at 1243. Although the opinion of the *Hill* court reflects a great deal of analysis, the premise on which it is based, that title VII applies unless its language clearly indicates that it does not, is questionable.

\(^{41}\) 429 U.S. 190 (1976).

\(^{42}\) *See* G. Sidney Buchanan, *Women in Combat: An Essay On Ultimate Rights and Responsibilities*, 28 Hous. L. Rev. 503, 504 (1991) (“In the period since 1976, the Court, in determining the validity of gender classifications, has regularly employed the *Craig* test as a term of art with only slight, and probably insignificant, variations in language.”).
classifications. Under the "middle scrutiny" test, those in support of a gender-based law or policy must show that it is substantially related to a significant governmental objective. The case of Orr v. Orr, involving a state law under which wives could not be ordered to pay alimony upon divorce, provides one example of a statute that failed to withstand middle scrutiny. Declaring the law unconstitutional, the Orr Court observed that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."

Middle scrutiny was applied to a combat exclusion law in 1978, and the statute was held to be unconstitutionally overbroad. Owens v. Brown involved a class action challenge to the Navy's rule that women could not be assigned to duty on "vessels of the Navy other than hospital ships and transports." Determining that the law was based on gender stereotypes rather than on military objectives, the court concluded that the exclusion was not substantially related to a significant governmental interest. The

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43 See Craig, 429 U.S. at 197. Although the Craig Court was not the first to recognize that a standard stricter than the rational basis test was appropriate for gender-based classifications, it was the first to articulate the new standard. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (indicating that the inherently suspect nature of sex discrimination subjects it to "close judicial scrutiny"); Reed v. Reed, 404 U.S. 71, 76 (1971) (purporting to apply "rational basis" standard, but actually employing higher standard).

44 See Craig, 429 U.S. at 197.
46 Id. at 283.
48 Id. at 294 n.1.
49 See id. at 307. Judge Sirica, writing for the court, said, "[T]he extent that it represents a generalization about women that even the highest defense authorities concede is unsound, it is not 'substantially related to the achievement of . . . [important governmental] objectives.' " Id. at 299 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)). Before articulating the holding of the case, Judge Sirica provided backgrounds of some of the women challenging the combat law, emphasizing how much each woman's military advancement was stifled solely because of her gender. See id. at 295-96. He provided the following background of a female lieutenant commander:

Plaintiff Kathleen Byerly is a naval officer with approximately twelve years of experience. Ranked as a lieutenant commander, and recognized by the Navy as a distinguished officer, she holds the position of Aide and Flag Secretary to the Commander Training Command in the Pacific Fleet. . . [b]ut unlike male officers with comparable backgrounds and experience, she is precluded by section 6015's absolute prohibition from advancing to the prized position of shipboard command. This is solely because the command of a vessel necessarily involves an assignment at sea and because plaintiff Byerly is a female.

Id. at 296.
exclusion was then modified, resulting in an expansion of women’s opportunities to serve on naval ships. However, the Navy and the other branches of the military continue to restrict women’s roles. Thus the prospects for women’s advancement in the armed forces remain severely limited.

In upholding the male-only registration law in Rostker v. Goldberg, the Supreme Court demonstrated great deference to Congress in the area of military legislation. Consequently, the ex-

The argument that the exclusions protect women from the perils of war, for example, has been discredited by military experts who point out that no distinct front line exists on the modern battlefield. See Office of Representative Patricia Schroeder, House of Representatives, Fact Sheet Women in Combat 2 (101st Cong., 2d Sess., Jan. 20, 1990). Representative Schroeder has asserted that although

the Army evaluates the jobs they open to women in terms of their theoretical proximity to the battlefield[,] . . . the realities of modern warfare, whether missiles or guerrilla tactics, make it difficult to define a field of battle. Military personnel, regardless of their position, are likely to be exposed to danger. . . . While women are barred from assignment to the jobs that are most likely to face direct combat, they are assigned to support and service support positions that bring them into the battlefield on a regular basis.

Snyder, supra note 5, at 430 (citing Experimental Program for Women in Army Combat Units: Hearings on H.R. 3868 Before the Subcommittee on Military Personnel and Compensation of the House Comm. on Armed Services, 101st Cong., 2d Sess. 6 (1990)).

Because women provide battle group support, arguably, it is even more likely that they will be exposed to danger than if they were on the front line. “This is because contemporary battle doctrine . . . now calls first for striking supply lines in the rear of the battle area in order to destroy the logistical base of the opposing force and thereby cripple the combat arm of the force.” Golar, supra note 5, at 24.

See supra note 26 and accompanying text; see also Hart, supra note 23, at 13 (“amendment . . . allowed the navy to assign women aboard combat ships for a period not to exceed 180 days”); Golar, supra note 5, at 11-12 (“[T]his change still left the core of the Navy, the combat fleet, with no women.”).

The Department of Defense draft of the Defense Officer Personnel Management Act (“DOPMA”) would have totally repealed the combat exclusions in 10 U.S.C. §§ 6015, 8549 in 1973; however, to expedite the passage of the DOPMA, the portion about repealing combat exclusions was eliminated. Golar, supra note 5, at 12. In return, Congress asked the Secretary of Defense and the services to clarify the word “combat,” which they did in 1978. Id. at 13. In 1979 the Defense Department again proposed repeal of the exclusions, but no decision was made with regard to this matter. Id.

453 U.S. 57 (1981) (6-3 decision). Courts have tended to dispose of equal protection issues by consigning the matters involved to the realm of internal military affairs until thoroughly exhausting those avenues. See Hodges v. Callaway, 449 F.2d 417, 422 (5th Cir. 1974). “The army should be afforded every opportunity to interpret and apply its own regulations. Exhaustion is required.” Id. But see Vance v. United States, 434 F. Supp. 826, 832 (N.D. Tex.) (exhaustion not required in “purely legal” claim over which military possesses no special knowledge), aff’d, 565 F.2d 1214 (5th Cir. 1977).

See Rostker, 453 U.S. at 60-61. In contrast, when the Owens court was confronted with the question of whether the combat exclusion issue was justiciable, it responded as follows:
clusion laws have been considered military matters and the courts have been reluctant to intervene. However, it is suggested that critical distinctions between the Military Selective Service Act ("MSSA") in *Rostker* and the combat exclusion laws dictate that less deferential treatment be accorded the latter. Specifically, unlike the combat exclusion laws, the MSSA received national attention and was enacted following lengthy deliberation by Congress. Notwithstanding *Rostker*, some of the current Supreme Court Justices are not inclined to defer to Congress on constitutional mat-

Whether the deference due particular military determinations rises to the level of occasioning nonreviewability is a question that varies from case to case and turns on the degree to which the specific determinations are laden with discretion and the likelihood that judicial resolution will involve the courts in an inappropriate degree of supervision over primary military activities. *Owens*, 455 F. Supp. at 300. The court then cited a number of other circuits that reviewed military actions to make certain they were constitutional. See *id.* at 301.

"See *Snyder*, supra note 5, at 429. "*Rostker* provides an impediment to a challenge on the constitutionality of statutes and policies restricting women from combat." *Id.* Most courts have viewed *Rostker* as mandating a *laissez faire* attitude toward military policy. See, e.g., *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1010 (8th Cir. 1989) (discharged National Guard member unsuccessfully sought correction of records and reinstatement); *Mendrano v. Smith*, 797 F.2d 1538, 1545-47 (10th Cir. 1986) (discharged Army private unsuccessfully sought jury trial). Others have not completely disregarded these cases, but opted instead for a moderate position by balancing the parties' assertions giving due weight to the competing interests. See *Goldman v. Secretary of Defense*, 734 F.2d 1531, 1536 (D.C. Cir. 1984) (captain in Air Force unsuccessfully challenged regulation preventing him from wearing yarmulke), *aff'd sub nom. Goldman v. Weinberger*, 475 U.S. 503 (1986).

In *Goldman*, an orthodox Jew and ordained rabbi challenged, on First Amendment grounds, an Air Force regulation that prevented him from wearing his yarmulke while he was in uniform. *Goldman*, 734 F.2d at 1535. Petitioner Goldman urged the court to use the standard employed in other First Amendment cases, the "strict scrutiny" test. *Id.* The court declined to use the strict test, showing great deference for the military legislation. *Id.* at 1536. Writing for the court, Senior Circuit Judge Swygert said, "The Supreme Court discussed a similar dispute concerning the appropriate level of scrutiny of a sex-based classification in the military context in *Rostker v. Goldberg*. . . . It rejected suggestions that consideration of the weighty interests on each side be used to refine the test under which the classification should be judged." *Id.*

See *Rostker*, 453 U.S. at 70-71. In justifying the deference accorded Congress in the review of MSSA, Chief Justice Rehnquist stated,

This case is quite different from several of the gender-based discrimination cases we have considered in that, despite appellees' assertions, Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason' . . . . The question of registering women for the draft not only received considerable national attention and was the subject of wide-ranging public debate, but also was extensively considered by Congress in hearings, floor debate, and in committee. Hearings held by both Houses of Congress in response to the President's request for authorization to register women adduced extensive testimony and evidence concerning the issue.

*Id.* at 72.
ters, regardless of the consideration given to a particular law.\textsuperscript{55}

If the courts scrutinize existing combat exclusion laws, it is submitted that the laws will be deemed unconstitutional for lacking a substantial relation to any important governmental objective. Presumably, the exclusion laws and policies were intended to increase military effectiveness; virtually no one in the military contends that permitting women in many of the combat positions would decrease efficiency.\textsuperscript{66} Instead, it appears that such a change could actually increase effectiveness by expanding the pool of qualified candidates for military duty.\textsuperscript{57}

The absence of a relationship between the combat exclusions and military efficiency is vividly illustrated by an examination of the positions classified as “combat.” Each of the services has been charged with formulating criteria for labeling a position “combat,” and each has developed its own elastic standard.\textsuperscript{58} Many of the “combat” positions, unavailable to women, are unlikely to involve any exposure to battle conditions.\textsuperscript{66} An extreme example is the


\textsuperscript{56} See Snyder, \textit{supra} note 5, at 431. “The government would be able to satisfy the first step of the \textit{Craig} test by arguing that the maintenance of an effective national defense is an important governmental objective. But [it] could not meet the second step... because the exclusion of women from combat is not substantially related to maintaining an effective military force.” Id.; see also Note, \textit{Women and the Draft: The Constitutionality of All-Male Registration}, 94 HARV. L. REV. 406, 411 (1980) (“Nearly unanimous opinion within the military establishment confirms that the participation of women contributes to, rather than detracts from, military effectiveness.”).

\textsuperscript{57} See Golar, \textit{supra} note 5, at 22. The author states, Demographically, the pool of males eligible for military service has been shrinking from a 1978 level of 2.13 million men reaching the age of 18, to a predicted 1992 level of 1.61 million, with no rise expected until the turn of the century. As for the quality of personnel, in 1980 more than 25% of all new male recruits and almost 50% of the Army’s male recruits had abilities “below average.” Further, during the 1980’s many top male technicians were recruited away from the services to lucrative jobs in the private sector... [t]hus, the availability of a sufficient number of qualified males is not assured.

\textit{Id.} (footnotes omitted).

\textsuperscript{58} See \textit{id.} at 16. “Both the interpretation and the definitions have changed over time. Generally these changes have been the subtle and sometimes not-so-subtle efforts of the various branches to skirt the restrictions imposed on women’s roles in combat and to move women into more combat-related positions.” \textit{Id.}

\textsuperscript{59} Snyder, \textit{supra} note 5, at 444. “The combat exclusion laws even close off job opportunities to women that do not involve combat.” \textit{Id.} Such occupations as “plumber” and “interior electrician” have been deemed “combat” positions. Kenneth L. Karst, \textit{The Pursuit of
Army's ban on female biochemists because of the position's classification of biochemist as a "combat support role." 

III. POLICY REASONS FOR PERMITTING WOMEN TO ASSUME COMBAT ROLES

While it is obvious that combat exclusions inhibit the progress of women in the armed services, it is submitted that they also result in a weaker military and may contribute to discrimination against women in our society. Currently, women comprise about eleven percent of the armed forces. However, because women are denied the opportunity to achieve the highest military positions, the most able are not likely to pursue military careers. Consequently, the pool of candidates qualified for military service is reduced, and this nation's military effectiveness is impaired. Furthermore, because of the widespread belief that the military is "central to the entire social order," any discrimination against women in the military may result in subordination, stigmatization, and harassment of women in all walks of life.

It is submitted that the costs attributable to the exclusion laws are without any substantial justification. With the advanced technology employed by the military, physical strength has become less important and technical skills and hand-eye coordination have become more important attributes for success in combat.
roles. Thus, women who can pass the appropriate tests should be deemed qualified for combat positions. Advocates of combat exclusions assert that military men will find the presence of women in their combat units distracting and that “male bonding” will be destroyed. However, this argument ignores the recent positive experience of sex-integration in other workplaces such as the police force. As more women enter the workplace, “their presence becomes less and less remarkable” and their status evolves from “ornaments to tokens to valued co-workers.” The assumption that a law or practice should remain intact merely because people refuse to adjust their attitudes and expectations has been rejected and is indeed dangerous.

In recent years, several countries, most notably Canada, have considered the issues surrounding the exclusion of women from

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67 See Golar, supra note 5, at 34; see also Karst, supra note 59, at 532. Most combat jobs do not require physical strength at a level that will exclude large numbers of women, . . . [t]he lighter rifle is only a minor example of a much larger development in combat technology: as time goes on, combat, . . . relies less and less on muscle power, more and more on firepower.

68 See Dothard v. Rawlinson, 433 U.S. 321, 328-32 (1977) (woman challenged height and weight criteria for position of prison guard on title VII grounds). Dothard held that physical requirements that are not truly job-related may not be used as a basis for excluding women from positions for which they are otherwise qualified. Id. at 331.

69 See Hart, supra note 23, at 17. On the average, women are well-qualified for these roles. See The Registration and Drafting of Women in 1980 3-4 (Nat’l Org. for Women Position Paper, Wash., D.C., 1980) (tests show women perform as well as men in combat roles). Women entering the service generally have higher educational levels than men. Becraft, Military, supra note 34, at 2. Because of the advanced technology used in military weapon systems, education is becoming an increasingly important factor in determining who qualifies for the service. Collier, supra note 4, at 5.

Although men have scored higher than women in electronics, general mechanics, and motor mechanics on army aptitude tests, these differences are to be expected because of the educational and cultural differences between men and women. Id. Proper training has been shown to reduce this gap; therefore, such test results are not indicative of properly trained women. Id.

70 Karst, supra note 59, at 536-37. The author notes that society is also concerned about protecting women. Id. at 536. However, “women casualties on civilian police forces or the publicized deaths of women astronauts have not brought cries of outrage from the public.” Hart, supra note 23, at 20.

71 Karst, supra note 59, at 538-39. Even in fire departments, which have clung stubbornly to gender-based classifications, women are assuming more responsibility. Id. at 539.

72 Id. (discussing impact of women on police force).

73 The Supreme Court has accepted that society is changing rapidly and has responded by striking down numerous gender-based classifications premised on the “old breadwinner-homemaker” dichotomy. See Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts and Feminism, 7 Women’s Rts. L. Rep. 175, 178-79 (1982).
combat, and have repealed their combat exclusion laws. In contrast, while Americans boast that the United States is the most progressive country in the world in granting freedom and opportunity to its citizens, we continue to uphold laws and policies that restrict opportunities and whose burdens far outweigh their benefits. An enlightened and progressive society must be flexible enough to repeal such laws and to prohibit such policies.

CONCLUSION

After years of struggle in the courts, those urging repeal of combat exclusion laws finally have been acknowledged. Congress has recognized that the United States cannot maintain military legislation that violates the Constitution, restricts opportunities, and detracts from national security. It is hoped that the National Defense Authorization Act will result in the acceptance of women

**BECRAFT, PERSIAN GULF, supra** note 34, at 2. The author notes the following developments:

Many other countries, which, like the U.S., have been faced with declining numbers of young men eligible for military service during the last decade, have increased the numbers and job opportunities for women. For example:

In January 1990 the British opened seagoing positions on combat ships of the Royal Navy to women.

Five NATO nations have no combat exclusion laws or policies: Canada, Denmark, Luxembourg, Norway, and Portugal. In addition, Greece, the Netherlands, and Turkey have no statutory restrictions, although they do have selected policies. Italy and Spain are the only NATO nations that exclude women from military service.

Women in Canada and Denmark are trained as fighter pilots. (Ironically, the U.S. Air Force has trained Danish women fighter pilots but will not train U.S. Air Force women pilots to fly fighter aircraft.)

Although women in the Israeli armed forces are restricted to noncombatant roles, Israeli women, like Israeli men, are generally subject to military conscription (there are some exemptions from compulsory service for women). Women are assigned to front-line combat units; if the unit is deployed on a combat mission the women are evacuated.

Approximately 6,000 women serve in support roles in Japan's Self-Defense Forces. *Id.* However, others present America's relative standing in a different light. *See* Women *Play Increasing Role in Military, 16 Mil. L. Rep. 1001, 1022 c.2 (1988).*

The American use of women is matched only by Canada, where they are 9% of the total. Even the commonly believed Israeli experience is largely myth. Women serve mostly as clerks, drivers, cooks, and the like, functions largely reserved for them in the pre-1973 U.S. military. They are barred from combat. By contrast, the Soviet Union, with severe demographic problems and a legal equality that predates the U.S., has less than 1%, as cooks, clerks, and medical personnel, traditional jobs in that country.

*Id.*
into all areas of the armed forces based on their abilities and that attempts to restrict anyone’s career opportunities within the military establishment will be enjoined by the courts.

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