BEYOND THE PERSIAN GULF CRISIS: EXPANDING THE ROLE OF SERVICEWOMEN IN THE UNITED STATES MILITARY

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"I swore the same oath that everybody else who is in the military did. It is not by exception, it is not by exclusion. I swore to defend the country, my country and my Constitution. So that is my opinion."

—Major Barbara Kucharczyk

INTRODUCTION

The role of the combat soldier in the United States military is a position that traditionally has been denied to women in American society. While women have played a vital part in the functioning of the armed forces, at no time in our past has there ever been substantial participation of women in combat. In 1948, the United States Congress passed statutory restrictions prohibiting women from


2. See George H. Quester, The Problem, in FEMALE SOLDIERS—COMBATANTS OR NONCOMBATANTS? HISTORICAL AND CONTEMPORARY PERSPECTIVES 217, 218 (Nancy L. Goldman ed., 1982) (reviewing history of female participation in American armed forces and concluding it has not been substantial); see also S. REP. No. 826, 96th Cong., 2d Sess. 157 (1980), reprinted in 1980 U.S.C.C.A.N. 2612, 2647 (remarking that while women have at times been inadvertently drawn into combat, throughout history they have not regularly participated in battle). For examples of isolated incidents of American women engaging in combat, see infra note 8 and accompanying text.
serving in combat positions in the Navy and the Air Force. This congressional action reflected a general widespread perception of the era regarding the proper role of women in society. Since that time, the Army, reading the Navy and Air Force statutes as signifying a congressional intent to bar women from all combat, promulgated internal regulations prohibiting women from combat assignment.

Recent events in the Persian Gulf have presented an opportunity for reexamination of the wisdom of these exclusions. This Comment seeks to reassess the traditional arguments for and against prohibiting women from combat in the context of the Persian Gulf War experience. The Comment further examines changes to the statutory restrictions promulgated by Congress as a direct result of the war. While recent action by Congress is a very positive step in opening military positions to qualified women, this Comment asserts that further action is required. In particular, the Comment contends that combat positions should be opened to qualified women on a volunteer basis. Finally, the Comment suggests that opening com-

The Secretary of the Navy may prescribe the manner in which women . . . of the Regular Navy and the Regular Marine Corps shall be trained and qualified for military duty. The Secretary may prescribe the kind of duty to which such women members may be assigned and the military 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.

Id. For a discussion of recent changes in this statute, see infra note 149 and accompanying text.


6. The Secretary of the Army is given statutory discretion to promulgate such regulations under 10 U.S.C. § 3013(g) (1988), which states in relevant part: "The Secretary of the Army may—(1) assign, detail, and prescribe the duties of members of the Army . . . and (3) prescribe regulations to carry out his functions, powers, and duties under this title." The Army asserts that its exclusion of women from combat positions is based on congressional intent, as demonstrated by congressional enactment of the statutory restrictions. See Military Personnel Hearings, supra note 1, at 24 (statement of Lieutenant General A.K. Ono, Deputy Chief of Staff for Personnel, U.S. Army) (stating that Army's rules prohibiting women from combat are in compliance with intent of Congress, interpreted in light of exclusions that apply to Navy and Air Force).
bat positions to women on a volunteer basis would not result in the overturning of the male-only draft registration law.

Part I briefly summarizes the historical role of women in the armed forces and details the birth and evolution of the prohibitions of women in combat. Part II analyzes the major arguments surrounding combat exclusions in light of the lessons learned from the Persian Gulf War. Part III examines recent changes in the restrictions and identifies a concern regarding the opening of combat positions to women: whether elimination of combat prohibitions would mandate the conscription of women in any future draft. Part IV discusses the likely status of the current draft registration law if all combat restrictions are ultimately lifted. Part V concludes by recommending a future course of action for further opening of the military to women.

I. Women in the Military and the Prohibition from Combat

A. Women in Wartime

Throughout the military history of the United States, women have served the nation's armed forces with bravery and valor. In the War of American Independence, women aided the revolutionary effort by diligently performing nursing and supporting roles, and on occasion, by engaging in combat alongside male soldiers of the Continental Army. Later in the American Civil War, women again functioned in traditional roles of support.

As the United States became involved in the First and Second

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7. In this Comment, all laws and policies prohibiting women from combat will hereinafter be referred to as the "combat exclusions."

8. See HELEN ROGAN, MIXED COMPANY 120-23 (1981) (detailing exploits of several female revolutionary war heroes). The most famous female participant of the Revolutionary War, Deborah Sampson Gannett, disguised herself as a man in order to enlist in the 4th Massachusetts Regiment. Id. at 121. Weakened by wounds suffered in battle, Gannett succumbed to a severe fever and was hospitalized, where her attending physician discovered her sex. Id. at 122. The doctor agreed to keep Gannett's gender a secret, and on recovery she joined the 11th Massachusetts Regiment. Id. Following the war, Gannett revealed her true identity to the public and received an honorable discharge. Id. Other women similarly distinguished themselves in the heat of battle during the war. Id. at 120-23. Margaret Corbin, who assumed her husband's position at the cannon after he was killed in combat, was wounded and suffered permanent injuries. Id. at 121. Likewise, Mary Hays suffered battle wounds when she took over her felled husband's position at the cannon. Id. Both women received government pensions after the war, and Corbin is buried in the West Point Cemetery. Id.

9. See id. at 123 (stating that majority of women who participated in Civil War performed traditional supportive chores as nurses and laundresses rather than engaging in direct combat). See generally MATTIE E. TREADWELL, THE WOMEN'S ARMY CORPS 6 (1954) (describing role of women in U.S. Army from 1776 through World War II). The Civil War experience demonstrated a greater need for organization in these crucial support services, as highlighted by the fact that problems with medical care during the conflict resulted partially from the absence of an official, integrated nurse corps. Id. at 50.
World Wars, participation of women in the U.S. military gradually increased. During World War I, a modest number of American women served as nurses at hospital units in France. Furthermore, in response to a request by General George Pershing, American civilian women were employed under contract as auxiliaries near the front lines of battle. These groups of women were referred to as auxiliaries because, although uniformed, they had no actual military status.

With the onset of World War II, the use of women's auxiliaries became widespread. Nazi Germany's rapid blitzkrieg through Europe in 1940 quickly prompted the creation of a women's auxiliary service for each branch of the U.S. military. Although the auxiliary corps experienced early difficulties involving supply shortages and logistical problems, the demand for their services quickly escalated. In the summer of 1943, the Women's Army Auxiliary Corps (WAAC) was transformed by law into the Women's Army Corps.

10. See Rogan, supra note 8, at 124 (noting that Army and Navy retained services of over 23,000 women nurses during World War I, many of whom served under hazardous conditions). Congress established the Army Nurse Corps in 1901. Treadwell, supra note 9, at 6. The Army Nurse Corps functioned as a military organization yet operated without the benefits of Army rank, officer status, or equal pay. Id. The fact that female nurses served in a uniformed military corps, however, represented a significant early step toward the full integration of women in the armed forces. Id.; see infra note 11 (explaining differences in military status between nurses employed by Army and those employed by Navy and Marine Corps).

11. Rogan, supra note 8, at 124. One hundred and thirty French-speaking American women served as telephone operators under hazardous conditions at the front lines in response to General Pershing's request. Id. These women, prohibited by law from enlistment, served under contract to the U.S. Army and received none of the medical, housing, and other benefits afforded to servicemen. Id. Unlike the Army, however, the Navy actually enlisted a small number of women in the Navy and Marine Corps as nurses during the war. See Quester, supra note 2, at 218 (noting that similar move to enlist women in Army met with congressional opposition despite support of General Pershing). At the war's end, demobilization involved the discharge of women, and thereby returned the military to its all-male status. Id. at 219.

12. See Treadwell, supra note 9, at 6 (analogizing status of Army Nurse Corps to Women's Army Auxiliary Corps (WAAC)—a "military organization, but without Army rank, officer status, equal pay, or Army benefits such as retirement and veteran's rights").

13. See Treadwell, supra note 9, at 6 (describing formation of women's auxiliary services). During the period between the First and Second World Wars, various proposals were formulated involving the future mobilization of women in wartime. Id. These proposals were never fully developed, however, because the peacetime environment lacked the general urgency needed to illustrate the necessity for such a plan. Id. This sense of security was shattered by Hitler's early victories in Europe, which subsequently provided impetus for the establishment of women's auxiliary services. Id. Thus, the WAAC (Women's Auxiliary Army Corps) and the WAVES (Women Accepted for Voluntary Emergency Service) were created for the Army and Navy, respectively. Id. The Marine Corps and Coast Guard also provided women's auxiliaries. Id. Membership in these auxiliary corps did not entail full military status; instead, the auxiliaries were subjected to rank structures, disciplinary schemes, and levels of pay and benefits that differed from those of the regular military. Id.; see id. at 10-18 (providing detailed account of stillborn plans to fully include women in Army in period between two World Wars).

14. See Rogan, supra note 8, at 131-34 (explaining that while women initially served only at aircraft warning service posts, demand for their services soon spread throughout service companies). Many of these women performed clerical and administrative duties. Id. at 134.
(WAC) to facilitate greater efficiency in the functioning of the auxiliary services. By the end of World War II, the WAC had been deployed throughout every major U.S. military theater in the world.

B. The Creation of the Exclusions

In recognition of the contributions made by women, Congress passed the Women's Armed Services Integration Act of 1948, opening regular active duty components of the military to servicewomen. The Act, however, also established restrictions that curtailed the total number of women permitted in the military and placed a ceiling on the rank they could attain. It further contained exclusions prohibiting the assignment of women to naval vessels and combat aircraft. Although restrictions on the number and rank of female military personnel were eventually lifted in 1967, the statutory ban against women in combat remained encoded in law.
1. Inconsistent definitions of “combat mission”

Despite its enactment of the statutory restrictions, Congress, unfortunately, never explicitly defined the term “combat mission,” leaving the interpretation of combat to the individual military departments. Thus, each branch of the armed services has struggled to determine the jobs and missions in which women are eligible to participate. The Department of Defense addressed this lack of clarity in a 1988 Task Force Report on issues concerning women in the military. According to the Report, definitions of combat have varied among the armed forces as military doctrines and technologies have changed through time. Moreover, each branch has read the statutory restrictions against women in combat as an indication of congressional intent to shield women from the risks of enemy fire or capture. At the same time, however, the branches have used different risk thresholds to determine which positions should be opened to women. These varying interpretations of congressional intent have led to the closure to women of noncombat positions not explicitly covered in the statutory restrictions.

21. See Department of Defense, Task Force Report on Women in the Military (1988) [hereinafter Task Force Report], reprinted in Women in the Military Hearings, supra note 5, at 142 (noting that while Department of Defense has occasionally issued general guidance regarding scope of combat exclusions, interpretation of statutes has been left to military departments).

22. See Hill v. Berkman, 635 F. Supp. 1228, 1234 (E.D.N.Y. 1986) (stating that American military has wrestled for decades with problem of whether and how to include women). In Hill, the plaintiff joined the Army to become a nuclear biological and chemical specialist (NBCS). Id. at 1231. In September 1982, after qualifying for the position and going through substantial pre-training drills, the Army closed 23 positions, including the NBCS, to women on the basis that the jobs would likely expose them to combat. Id. Hill was given an honorable discharge. Id. In October 1983, the Army reclassified the NBCS position as noncombat. Id. at 1232. The court held that closure of the position did not support a claim by Hill of unlawful discrimination, and noted that the subsequent reopening of the NBCS position to women indicated good faith on the part of the Army. Id. at 1242.

23. See infra notes 24-33 and accompanying text (summarizing Task Force Report findings regarding varied interpretations of “combat” by different branches of armed forces).

24. See Task Force Report, supra note 21, at 9, reprinted in Women in the Military Hearings, supra note 5, at 142 (stating that differences in mission organization and operational practices lead to varied definitions of “combat mission” by services).

25. See Task Force Report, supra note 21, at 9-10, reprinted in Women in the Military Hearings, supra note 5, at 142-43 (asserting that differences among services in interpreting risk of exposure to hostile fire or capture is of greatest concern to Department of Defense Task Force). The Task Force Report clarified that the legislative histories of the statutory exclusions support the notion that the exclusions were promulgated to protect women from such risks, even though the risks of harm or capture are not explicitly mentioned in the statutes. Task Force Report, supra note 21, at 9, reprinted in Women in the Military Hearings, supra note 5, at 142.

26. Task Force Report, supra note 21, at 10, reprinted in Women in the Military Hearings, supra note 5, at 143. According to the report, the prohibition of women from such positions goes beyond that suggested in the Secretary of Defense’s 1985 communication to the armed forces regarding combat exclusions. Id. The Secretary stated in 1985 that “[m]ilitary women can and should be utilized in all roles except those explicitly prohibited by the combat exclusion statutes and related policy. The combat exclusion rule should be interpreted to allow as
In response to these inconsistent definitions of "combat mission," the Task Force Report recommended that the Secretary of Defense issue guidance to the armed services clarifying this definition and indicating the appropriate method of risk assessment to be used to determine which noncombat duties should be closed to women.\textsuperscript{27} The Task Force Report noted that each branch of the service employed distinct assignment policies concerning servicewomen.\textsuperscript{28} At this time, the Army used a coding system designed to integrate women into all positions except those involving the "highest probability of direct combat."\textsuperscript{29}

The Navy, meanwhile, defined a "combat mission" as "a mission of a unit, ship, aircraft or task organization which has as one of its primary objectives to seek out, reconnoiter, or engage an enemy."\textsuperscript{30} The Marine Corps defined "direct combat operations" as "seeking out, reconnoitering, or engaging in offensive action," and further prohibited women from being assigned to positions involving the greatest physical risk.\textsuperscript{31} Finally, the Air Force designated aerial combat as "(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."\textsuperscript{32} The regulations also prohibited assignment of women to duties and units "where there is a probability of exposure to hostile fire and many as possible career opportunities for women to be kept open." Task Force Report, supra note 21, at 9, reprinted in Women in the Military Hearings, supra note 5, at 142.

27. See Task Force Report, supra note 21, at 10, reprinted in Women in the Military Hearings, supra note 5, at 143 (asserting that use of risk assessment in decisions to exclude women from noncombat positions merits special attention).


29. Task Force Report, supra note 21, at 11, reprinted in Women in the Military Hearings, supra note 5, at 144. "Direct combat" is defined as follows:

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. Direct combat takes place while closing with the enemy by fire, maneuver, or shock effect in order to destroy or capture, or while repelling assault by fire, close combat, or counterattack.

Id. The Army's Direct Combat Probability Coding (DCPC) System evaluates each position (called Military Occupational Specialty or Area of Concentration) based on its specific duties and on the tactical doctrine, mission, and location on the battlefield of the unit to which a person filling that position would be assigned. Id. Women are prohibited from serving in positions coded as P1, designating the highest probability of direct combat. Id.


substantial risk of capture." 33

The Task Force Report recommended that the Secretary of Defense adopt a standardized rule on the use of risk in determining positions for servicewomen. 34 Under this rule, noncombat units or positions would be closed to women only if the type, degree, and duration of risk of direct combat, exposure to hostile fire, or capture was as great in these units or positions as in the combat units regularly supported by noncombat positions. 35 Shortly thereafter, the Secretary of Defense did adopt the rule along with other recommendations directed to the service branches. 36 The services responded to the rule by revising their policies, resulting in the creation of additional openings for women in the Army, 37 Navy, 38 Air Force, 39 and Marines. 40

33. TASK FORCE REPORT, supra note 21, at 14, reprinted in Women in the Military Hearings, supra note 5, at 147. The report noted that closure of units or positions to women based on a mere probability of exposure to hostile fire and risk of capture was not specifically required by law. Id.

34. See TASK FORCE REPORT, supra note 21, at 10, reprinted in Women in the Military Hearings, supra note 5, at 143 (stating that risk threshold must bear a proper nexus to combat).

35. See TASK FORCE REPORT, supra note 21, at 10, reprinted in Women in the Military Hearings, supra note 5, at 143 (asserting that noncombat units or positions should be open to women if risk associated with jobs is "less than [that associated with] land, air, or sea combat units" that the noncombat positions support).

36. See Military Personnel Hearings, supra note 1, at 14, 15-18 (statement of Christopher Jehn, Assistant Secretary of Defense) (outlining recommendations adopted by Secretary concerning combat exclusions). Mr. Jehn noted that the Defense Department's adoption of the "risk rule" standardized definitions of combat exclusions throughout the military and contributed to the expansion of career opportunities for women. Id. at 16.

37. See Military Personnel Hearings, supra note 1, at 25, 26-27 (statement of Lieutenant General A.K. Ono, Deputy Chief of Staff for Personnel, U.S. Army) (stating reviews of Direct Combat Probability Coding (DCPC) system in light of new "risk rule" opened over 23,000 positions to assignment of women).

38. See Military Personnel Hearings, supra note 1, at 31-34 (statement of Vice Admiral J.M. Boorda, Deputy Chief of Naval Operations and Chief of Navy Personnel, U.S. Navy) (outlining changes in Navy's combat exclusion policies since issuance of Department of Defense Task Force Report). The Navy redefined "combat mission" to mean "a mission of an individual unit, ship or aircraft that individually, or collectively as a naval task organization, has as one of its primary objectives to seek out, reconnoiter, and engage the enemy. The normal defensive posture of all operating units is not included within the definition." Id. at 32. This new classification allowed the Navy to open three classes of ships, 24 ships in total, for the permanent assignment of women. Id.

39. See Military Personnel Hearings, supra note 1, at 41-42 (statement of Lieutenant General Thomas Hickey, Deputy Chief of Staff, Personnel, U.S. Air Force) (noting that reviews of combat-related positions have opened Red Horse and Mobile Aerial Port Squadrons as well as numerous other aircraft squadrons to assignment of women). Red Horse squadrons are units that specialize in civil engineering, including the construction and maintenance of landing strips and other heavy construction projects. Women May Join Seabees, ENGINEERING NEWS-RECORD, Mar. 10, 1988, at 23.

40. See Military Personnel Hearings, supra note 1, at 45 (statement of Lieutenant General Norman Smith, Deputy Chief of Staff, Manpower and Reserve Affairs, U.S. Marine Corps) (stating that women now serve as Marine Security Guards and receive same training for defensive combat operations as men).
C. The Exclusions Since the 1970s

Despite this history of inconsistency in the application of the combat exclusions, there was very little controversy surrounding the prohibition of women in combat until the 1970s. The emergence of the women's rights movement during this period sparked criticism of the exclusions themselves and forced supporters to defend the restrictive policies. Since that time, criticism has grown. The battle lines have not been drawn in the federal courts, however, because there have been few constitutional challenges to the exclusions. In fact, when combat exclusions have been addressed in litigation, courts have mostly relied on them for support in upholding other challenged military policies and laws, such as those

41. See Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 UCLA L. Rev. 499, 529 (1991) (asserting that before rise of women's movement neither military nor Congress perceived any need to provide justifications for combat exclusions). Professor Karst notes that an expectation that the Equal Rights Amendment would be ratified may have led the military to accelerate the opening of positions to women. Id.; see Jeff Tuten, The Argument Against Female Combatants, in FEMALE SOLDIERS—COMBATANTS OR NONCOMBATANTS? 237, 246 (Nancy L. Goldman ed., 1982) (identifying women's movement as impetus behind women's changing role in military). For a discussion of the debate between opponents and supporters of combat exclusions, see Part II of this Comment.

42. See Hill v. Berkman, 635 F. Supp. 1228, 1238 (E.D.N.Y. 1986) (commenting that court has found no challenge to exclusionary statutes in reported case law). Despite the statement of the court in Hill, it appears that there has been at least one case dealing with a constitutional challenge to 10 U.S.C. § 6015, the federal statute that provides "women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions. . . ." 10 U.S.C. § 6015 (1988); see Kovach v. Middendorf, 424 F. Supp. 72, 79 (D. Del. 1976) (holding that disparate classifications of men and women mandated by section 6015 do not violate female plaintiff's equal protection rights). In Kovach, the plaintiff challenged a Navy policy that granted a disproportionately low number of Naval Reserve Officers Training Corps (NROTC) scholarships to women as compared to men and established different eligibility standards for men and women. Id. at 74. The plaintiff conceded that if the policy was deemed to be rationally related to a legitimate governmental purpose, then the combat exclusion in 10 U.S.C. § 6015 would be constitutionally valid and thus appropriate for regulation of the Navy. Id. at 77. Recognizing Congress's broad power to provide for the national defense, the court held that regardless of whether a strict scrutiny or traditional standard of review was applied, the statute was constitutionally sustainable. Id. at 79. Interestingly, the reason that combat exclusions have generally not been challenged on constitutional grounds is because of a general perception that such challenges would be futile in light of courts' customary standard of review in military matters. See Robin Rogers, Comment, A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII, 78 CAL. L. Rev. 165, 181 (1990) (asserting that any challenge to combat exclusions on equal protection grounds would almost certainly fail due to cursory review usually used in matters of military policy). For more on judicial deference to the military, see Part IV of this Comment.
involved in a combat exclusion policy.

Outside the federal courts, however, fierce debate has surrounded the question of whether women should be prohibited from engaging in combat. The court upheld the constitutionality of the combat exclusion statute and held that the scholastic officer in the Navy, appellee was passed over a second time for promotion and involvements involving mandatory discharge schemes, hair length regulations, allocation of military scholarships, service entrance requirements, and the selective service registration law.

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43. See Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) (upholding mandatory discharge of appellee under 10 U.S.C. § 6382(a), which requires that male officers who have not been promoted in nine years be discharged from service). After serving over nine years as a commissioned officer in the Navy, appellee was passed over a second time for promotion and given a mandatory discharge under the statute. Id. at 499. Appellee asserted that had he been a female officer he would have been entitled by statute to thirteen years of commissioned service before being discharged for want of promotion. Id. at 500. Thus, he claimed that application of the statute to him was unconstitutional discrimination based on sex, violative of the Due Process Clause of the Fifth Amendment. Id. The Court noted that combat restrictions prevent most female lieutenants from compiling records of seagoing service comparable to those of male officers. Id. at 508. Male and female Navy lieutenants, the Court continued, are not similarly situated and the statute granting females a longer period of service is consistent with the goal of providing women fair opportunity for promotion. Id. at 508-09.

44. See Campbell v. Beauglough, 519 F.2d 1307, 1308 (9th Cir. 1975) (holding that Marine Corps' regulations setting different standards for male and female hairstyles do not offend equal protection laws), cert. denied, 423 U.S. 1073 (1976). Appellants, male enlisted Marine reservists, challenged regulations that prohibited males from wearing hairpieces but allowed females to wear short wigs. Id. The military defended the regulations by arguing that wigs present a safety hazard in their interference with gas masks and earphones used in mine detecting units. Id. Furthermore, the Marine Corps alleged that wigs interfere with the uniformity the Corps seeks to promote in its combat units. Id. The Court of Appeals for the Ninth Circuit held that prohibition of wigs for males is rationally related to the safety and compatibility of the Marines. Id. at 1309. The court added that its holding was reinforced by the fact that, as a result of combat exclusion rules, female Marines do not train for combat, wear gas masks, or operate mine detectors. Id.

45. See Kovach v. Middendorf, 424 F. Supp. 72, 79 (D. Del. 1976) (denying plaintiff's equal protection claim). The district court stated that a naval policy setting stricter eligibility standards for women and granting a disproportionately high number of NROTC scholarships to men is based on the fact that the Navy needs greater numbers of male officers than female officers, because women are statutorily prohibited from serving on combat vessels. Id. at 77. The court upheld the constitutionality of the combat exclusion statute and held that the scholarship policy was therefore rationally related to the provision and maintenance of the Navy, a legitimate governmental purpose. Id. at 77, 79.

46. See Lewis v. United States Army, 697 F. Supp. 1385, 1393 (E.D. Pa. 1988) (concluding that Army policy setting higher requirements for female enlistees does not violate due process or equal protection standards). In Lewis, the plaintiff brought suit challenging an Army and Army National Guard policy that provided for the acceptance of a limited number of male General Educational Development (GED) certificate holders into the service but required all female enlistees to be either a high school graduate or holder of a GED certificate and fifteen hours of college credit. Id. at 1386. The Army argued that because women are prohibited from combat, a greater number of male than female soldiers is needed to fill troop requirements, and thus different standards for male and female enlistees are necessary. Id. at 1391. The district court found that men and women are not similarly situated in the armed forces because of the combat exclusion policy and, therefore, that it is not unreasonable for the Army to impose stricter enlistment standards on women recruits. Id. at 1393.

47. See Rostker v. Goldberg, 453 U.S. 57, 83 (1981) (upholding male-only registration law under Military Selective Service Act). The Supreme Court found that the purpose of military registration is to prepare for a draft of combat troops. Id. at 76. Because women are not eligible for combat, the Court held that requiring only males to register for a potential draft did not violate the Due Process Clause. Id. at 78-79. For a more complete discussion of Rostker, see Part IV of this Comment.
ing in combat. Lawmakers, scholars, and military personnel alike have contended that excluding women from combat substantially impairs a servicewoman’s opportunities for promotion to higher ranks because the ultimate function of the armed forces is to engage in combat. Critics of combat restrictions also argue that the strategies and technological advancements of modern warfare have made the exclusions a relic of an outdated past. On the other hand, proponents of the exclusions assert that these policies are in harmony with the will of the American people. The supporters also argue that combat restrictions are essential to the maintenance of a strong national defense. This argument is premised on the belief that women are both physically and psychologically less suited for warfare than men and, therefore, are unable to endure the rigors of combat against enemy forces which would be almost certainly

48. See Mary Griffin, Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military, 96 YALE L.J. 2082, 2085 (1987) (stating that exclusion from combat precludes servicewomen from many senior command positions); Military Personnel Hearings, supra note 1, at 4 (statement of Rep. Patricia Schroeder, Chairwoman, Military Installations and Facilities) (asserting that combat exclusion closes many routes of advancement to servicewomen); id. at 90 (statement of Capt. Priscilla Locke, U.S. Army, Personnel Distribution Officer) (stating belief that wide range of job assignments and experiences necessary for advancement to higher ranks is not available because portion of Air Defense Artillery branch is closed to servicewomen); id. at 88-89 (statement of Capt. Kathleen Conley, U.S. Air Force, Instructor, Department of Management) (contending that combat experience is core value of military profession and exclusion from combat inevitably slows advancement to senior ranks). But see id. at 75 (statement of Master Sergeant Anne Wright, U.S. Air Force, Aircraft Load Master) (commenting that her military career has never been jeopardized by restricted access to combat positions); id. at 75-76 (statement of Gunnery Sergeant Jane Justice, U.S. Marine Corps, Aviation Enlisted Assignment Monitor) (asserting that her career opportunities have been equal to those of male counterparts).

49. See 137 CONG. REC. S11,413 (daily ed. July 31, 1991) (statement of Sen. Roth) (arguing that statutory restriction of female pilots in combat aircraft is as outdated in modern service as World War II propeller plane); Women in the Military Hearings, supra note 5, at 75 (statement of Martin Ferber, Senior Associate Director, National Security and International Affairs Division, General Accounting Office) (asserting that application of 40-year-old statutes in context of modern warfare and changing role of women in society creates dilemma for armed services). At the time the statutory exclusions were passed in the late 1940s, some members of Congress believed that women lacked the physical strength to engage in combat and that society would not tolerate placing women in such positions. Id. Today, changes in equipment and strategies have made technical skills at least as important as physical abilities in combat. Id. Furthermore, the role of women in modern society has changed, enabling women to pursue many careers that were closed to them in the late 1940s. Id. Given these changes, the statutory exclusions have become outdated. Id.

50. See infra notes 118-23 and accompanying text (explaining arguments used by supporters of combat exclusions to support contention that exclusions are consistent with views of American public).

51. See Tuten, supra note 41, at 261 (arguing that military’s job is not to act as equal opportunity employer but to provide for common defense). Tuten asserts that using the armed services for societal experiments such as the integration of women into combat roles places national security in jeopardy. Id.; see Rogers, supra note 42, at 171 (noting that central justification offered for combat exclusion is military necessity). Theorists who take this position argue that use of female combatants would weaken national defense. Id. This theory is premised on actual or perceived physical, psychological, and social differences between men and women. Id.
composed entirely of men.\textsuperscript{52} 

While debate surrounding combat exclusions proliferated during the 1970s, the issue did not become prominent in the public domain because the U.S. armed forces saw relatively little large-scale combat following the Vietnam War.\textsuperscript{53} Although women participated in the United States invasions of Grenada and Panama, the type of massive military operation needed to conduct a thorough analysis of the arguments for and against the combat exclusions did not come to pass during the 1970s or 1980s.\textsuperscript{54} This situation changed, however, in August of 1990, when the small, oil-rich, Middle Eastern country of Kuwait was invaded by its larger neighbor, Iraq.\textsuperscript{55} In response to Iraq’s invasion of Kuwait, President Bush ordered the implementation of “Operation Desert Shield,” a massive build-up of troops and military hardware in the Persian Gulf region.\textsuperscript{56} Operation Desert Shield was designed to enforce economic sanctions imposed by the United Nations on Iraq, prevent further advancement by the Iraqi military, and achieve the liberation of Kuwait from Iraqi
forces. After gaining allied support and the approval of the United Nations, "Operation Desert Storm" commenced in January 1991. The resulting Persian Gulf War provided an opportunity for examination of the appropriateness of combat exclusions in the context of a modern wartime situation. Ultimately, the experience of U.S. servicewomen in the Gulf conflict has demonstrated that the time has come to fully integrate qualified women into all areas of military service.

II. THE WAR IN THE GULF—AN ANALYSIS OF THE ARGUMENTS SURROUNDING THE COMBAT EXCLUSIONS

The involvement of the U.S. armed forces in Operation Desert Storm provides a modern context for analyzing the traditional arguments surrounding combat exclusions. The Persian Gulf War resulted in the largest concentrated wartime deployment of uniformed American servicewomen in United States military history. Approximately 32,000 of the 539,000 American troops sent to the Gulf theater were women. During the conflict, women served with distinction, bravery, and courage. Five U.S. servicewomen were killed in action, eight more lost their lives in nonhostile circumstances, and at least nineteen other women were wounded. The following sections of this Comment analyze the major arguments surrounding combat exclusions in light of the experiences of the Persian Gulf War.

57. Id. (describing deployment of forces in Operation Desert Shield); see supra note 56 (listing countries comprising allied forces).
59. See Priest, supra note 54, at A31 (quoting Lieutenant Colonel Michael Karpicus, Assistant Director, Personnel Division, Department of Defense) ("[Women] were deployed as an integral part of the overall Desert Storm effort, in every facet of combat support. That has not happened before."). The role of women in combat can be examined in a detailed and realistic way based on the more extensive combat experiences of servicewomen in the Gulf War.
61. Priest, supra note 54, at A31; see Amy Eskind, A Post-Gulf Memorial Day, 1991: Arms and the Woman, Wash. Post, May 26, 1991, at D3 (stating that Persian Gulf War was first war in nation's history in which women participated on grand scale).
62. See infra note 117 and accompanying text (discussing evidence of bravery of female soldiers during Gulf War).
A. Physical Abilities and the Risk of Harm

A common theme advanced by those in favor of combat exclusions focuses on the physical differences between men and women. Supporters of the restrictions contend that women generally lack the physical strength necessary for success in close combat. In fact, several federal court decisions have relied on this belief in cases involving women and the military. Strength, speed, and endurance, anthropomorphic requirements that can be crucial to mission success, are viewed as inherently male attributes. This position not only reinforces the notion that the exclusions are necessary for combat effectiveness, but also serves to justify the view that the restrictions are necessary to protect women from the risks of harm in warfare.

Critics of combat restrictions counter that even if such physical differences exist generally between the sexes, women should be given the opportunity to meet specific physical tests for combat eligibility rather than be subjected to a blanket exclusion. Further-

64. See Tuten, supra note 41, at 247-50 (asserting that women are inferior to men in terms of physical requirements needed for ground warfare).
66. See Tuten, supra note 41, at 247 (noting that in general men are larger, heavier, stronger, faster, have greater endurance, and more muscle and bone mass than women). Tuten contends that these sex-based attributes can influence combat-critical factors such as the distance one can throw a grenade and the temperatures one can tolerate and therefore mandate the exclusion of "weaker" women from combat. Id. at 147-48.
67. See supra note 25 and accompanying text (discussing role of combat exclusions in protecting women from harm).
68. See Mady Wechsler Segal, The Argument for Female Combatants, in FEMALE SOLDIERS—COMBATANTS OR NONCOMBATANTS? HISTORICAL AND CONTEMPORARY PERSPECTIVES 267, 271 (Nancy L. Goldman ed., 1982) (stressing importance of not equating average relative physical strength between men and women with scenario where all men and no women are physically capable). Segal contends that specific requirements related to combat tasks, rather than gender, should constitute the selection criteria for combat eligibility. Id.; see Military Personnel Hearings, supra note 1, at 3 (statement of Rep. Schroeder) (asserting that selection for combat should be based on compliance with certain standards rather than on gender). Representative Schroeder suggested that combat exclusions may actually weaken the military in the event that not enough eligible men are found to fill all combat positions, because women are automatically precluded from holding these positions. Id. at 3-4. Other commentators note that physical differences between the sexes actually favor women for certain jobs. See Rogers, supra note 42, at 172 (noting that small, agile women may be better able to maneuver in close quarters than larger men); An Overview of U.S. Commitments and the Forces Available To Meet Them: Hearings Before the Subcomm. on Military Personnel and Compensation of the House Comm. on Armed Services, 98th Cong., 1st Sess. 398 (1983) (statement of Richard Hunter, Former Staff Director,
more, the 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 development of advanced weapons requiring technical aptitude can greatly offset any physical disparities that may exist between servicemen and servicewomen.

The events of the Persian Gulf War dramatically illustrated how technological modernization affects combat. Even before any substantial close combat had begun, allied bombing raids inflicted massive losses on Iraqi forces. Precision bombs were dropped from safe distances by U.S. pilots and then guided by sophisticated laser guidance systems to their intended targets. On the front lines, American ground forces were armed with a "new generation" of high-tech weapons. The decisive allied victory in the Persian Gulf War was achieved in large part through the superior technology and training of the allied forces as compared to their Iraqi counterparts, rather than by physical strength of individual soldiers during close combat.

Military Personnel Policy, Office of Secretary of Defense) (noting that lower weight of female pilots could allow loading of extra 50-100 pounds of fuel for aircraft carrier landings).

69. See Segal, supra note 68, at 272 (discussing modern tendency of military tasks to emphasize technical expertise over physical strength).

70. See Segal, supra note 68, at 272 (noting that many jobs on naval ships and combat aircraft are not dependent on physical skills); see also Rogers, supra note 42, at 172 (asserting that gun is great equalizer of physical differences in most close combat situations); Karst, supra note 41, at 532 (contending that even Defense Department has abandoned argument that women lack necessary physical capability for combat because modern warfare makes strength irrelevant to most combat jobs); 137 Cong. Rec. S11,413 (daily ed. July 31, 1991) (statement of Sen. Roth) (stating that technology has put women on level playing field with men in air combat).


73. See Charles Lane, High Tech in Low Places, Newsweek, Feb. 4, 1991, at 48 (noting that while ground war with Iraq would likely be grueling and violent, allied forces were equipped with various high-tech weapons and superior electronic battlefield reconnaissance). Many of these weapons had not been tested in actual combat prior to the Gulf War. Id.; see Charles Babcock, M-1 Tanks Quickly Demonstrate Superiority, Wash. Post, Feb. 27, 1991, at A28 (detailing battle range and superior technological design of M-1 tank in comparison to Soviet-built Iraqi tanks).

74. See Coll, supra note 71, at A10 (reporting that superior U.S. technology allowed allied forces to attack and destroy Iraqi Republican Guard tanks without putting own armor at risk);
Opponents of the exclusions contend that these same advances in technology and strategy negate one of the combat exclusions’ primary justifications: protection of women from the risks of warfare. Supply and logistical support units consisting of servicewomen and servicemen are primary targets under modern battle strategies. These units also become vulnerable to attack because they are often required to advance into enemy territory to resupply front-line troops. In addition, the scope of modern weaponry is not limited to combat positions and functions. As witnessed during the Persian Gulf War, advanced weapons and arms are capable of traveling great distances before striking intended targets. The result is that in contemporary combat conditions, the lines of battle are blurred, and servicewomen are thereby placed in real-world danger despite their legal exclusion from combat operations.

For example, Iraqi weaponry and allied ground tactics significantly reduced the distinction between front lines and “safe” rear lines. During the air battle, bases in eastern Saudi Arabia, located hundreds of miles away from the front lines to the north, were the targets of frequent Iraqi Scud missile attacks. Although the missiles were often inaccurate or were intercepted by allied Patriot missiles, one Scud pierced air defenses and struck a U.S. barracks in Dhahran, Saudi Arabia. This attack, which killed twenty-eight

Col. David Hackworth, War and the Second Sex, Newsweek, Aug. 5, 1991, at 24, 25 (stating that poorly led Iraqi Army allowed itself to be defeated by allied technology). Colonel Hackworth notes, however, that a future war might be “less hospitable to high-tech weapons. Ground war is not dead.” Id. Colonel Hackworth also argues that women would be disadvantaged in a more traditional ground war in which strength and endurance play a greater role. Id.

75. See Women in the Military Hearings, supra note 5, at 69 (statement of Martin Ferber, Associate Director, National Security and International Affairs Division, General Accounting Office) (asserting that success of combat exclusions in preventing exposure of women to risks of combat is questionable due to complexity of modern warfare).

76. See Military Personnel Hearings, supra note 1, at 3, (statement of Rep. Schroeder) (stating that servicewomen in communication and supply lines are in area of great danger as current battle doctrine of most countries is to knock-out these lines before attacking front lines).

77. See Women in the Military Hearings, supra note 5, at 69 (statement of Martin Ferber, Senior Associate Director, National Security and International Affairs Division, General Accounting Office) (observing that women may serve in forward support battalions where they may be injured or killed). On some temporary excursions, there is no limit to how far forward servicewomen in support battalions may travel. Id.

78. See Segal, supra note 68, at 268 (observing that while thermonuclear attack is most extreme example of how modernization of warfare can blur location of combat zone, conditions of modern warfare routinely place people miles away from front into “lethal zone”).

79. See Segal, supra note 68, at 268 (noting that modern warfare fails to differentiate between front-line and rear-guard troops or even between military and civilian personnel).


Army reservists, resulted in the single greatest allied loss of the war.\textsuperscript{82} In addition, numerous distant targets in Israel, a nonparticipant in the allied war effort, were also subjected to Iraqi missile attacks.\textsuperscript{83}

Furthermore, on the ground and in the air, noncombat supply and support troops were continually sent into hostile territory during the allied campaign.\textsuperscript{84} Factors such as distance, the desert environment, and the allied attack plan forced the location of "rear" supply depots closer to the front lines than many combat units.\textsuperscript{85} After the start of the ground war, female pilots routinely ferried troops and supplies into areas not yet secured by allied ground forces.\textsuperscript{86} American servicewomen suffered casualties while dutifully performing these missions.\textsuperscript{87} The Persian Gulf War clearly demonstrated that the protectionist goal of combat exclusions has been effectively neutralized by the ever-expanding modern battleground.

B. Pregnancy

Another argument raised by supporters of combat exclusions is that the ability to bear children weighs in favor of excluding women from combat.\textsuperscript{88} Although the Pentagon rarely discloses precise statistics, estimates reveal that somewhere between ten to fifteen percent of all servicewomen become pregnant each year.\textsuperscript{89} Genuine concerns surround these figures, as supporters of the combat exclusions contend that the American people will never allow pregnant

\textsuperscript{82} Id. Some of the reservists killed in the attack held duties generally unrelated to combat; several were water purification specialists. Id. Three of the reservists who perished in the attack were women. Eskin, \textit{supra} note 61, at D3.


\textsuperscript{84} See Priest, \textit{supra} note 54, at A1 (discussing flights of support troops including female pilots over enemy territory).

\textsuperscript{85} See Molly Moore, \textit{Rear Guard Meets Front Lines}, WASH. POST, Feb. 18, 1991, at A32 (reporting that logistical factors and attack plan that varied dramatically from traditional warfighting doctrine exposed allied support troops to substantial risk). The logistical problems posed by the rapid advance of allied forces during the ground war also required the rapid construction of supply bases in Iraqi territory as that territory was being captured. Benjamin Weiser, \textit{Fast Advance Poses Logistics Challenge}, WASH. POST, Feb. 26, 1991, at A9.

\textsuperscript{86} See Priest, \textit{supra} note 54, at A1 (stating that women regularly piloted Chinook and Huey helicopters, and C-130, C-141, and C-5 planes on support missions, often into hostile territory).

\textsuperscript{87} Eskin, \textit{supra} note 61, at D3. Specialist Cindy Beaudoin, a medic in a support unit, was killed by a land mine while trying to avoid an apparent attack. Sergeant Cheryl O'Brien, an avionics mechanic, was killed when the helicopter in which she was riding was shot down over enemy territory. Id.

\textsuperscript{88} See Tuten, \textit{supra} note 41, at 251 (arguing that capacity of female soldiers to bear children is another physiological factor weighing against assignment of women to combat).

\textsuperscript{89} Hackworth, \textit{supra} note 74, at 27 (stating that pregnancy is perennial military problem and that reports of pregnancy among servicewomen soared during Persian Gulf War).
women to be sent into combat. Exclusion supporters contend that pregnancy also physically limits women from performing certain strenuous jobs. Thus, pregnancy is equated with nonavailability; defenders of the exclusions posit that pregnancy prevents servicewomen from fulfilling their assigned duties and thereby impairs the combat effectiveness of the entire military. Furthermore, the financial costs incurred by replacing pregnant servicewomen in certain combat positions could be great.

Critics of combat exclusions do not deny that pregnancy can interfere with job performance. They are quick to note, however, that pregnant servicewomen are often held solely responsible for their conditions in circumstances where the servicewoman has been impregnated by a fellow serviceman. The military's practice, according to this argument, has been to consider the issue as a problem associated with the female soldier while averting blame from the male soldier. In addition, critics of the exclusions assert that females should no more be excluded from combat service because of their biological capacity to bear children than should males be excluded because of a propensity to succumb to certain illnesses or disabilities.

According to some reports, the pregnancy rate of U.S. servicewomen involved in the Persian Gulf War was substantial. Some support units sent to the Gulf were understaffed in the early

90. See Tuten, supra note 41, at 251 (stating that while public's view has recently become more liberal concerning women in military, it is unlikely society will ever tolerate presence of pregnant women in combat).
91. See Karst, supra note 41, at 535 n.144 (identifying argument that pregnancy disables women from performing stressful duties, thereby potentially interfering with mission performance).
93. See Hackworth, supra note 74, at 29 (observing that cost of training F-16 fighter pilot is $6 million and that pregnancy would prevent female combat pilot from flying plane, thereby necessitating costly training of replacement).
94. See Segal, supra note 68, at 272 (noting that contingency plans must be formulated for reassignment and replacement of pregnant servicewomen when condition interferes with job performance). Segal asserts, however, that women can continue to perform strenuous jobs early in their pregnancies. Id.
95. See Barkalow, supra note 92, at 30 (noting military's tendency to consider pregnancy as issue affecting women only).
96. See Barkalow, supra note 92, at 30 (arguing that servicemen are often held blameless for pregnancy of servicewomen); Barbara Kantrowitz et al., The Right to Fight, NEWSWEEK, Aug. 5, 1991, at 22, 23 (quoting Rep. Schroeder) (commenting on high pregnancy rate on one Navy ship in Persian Gulf and stating that "unless there was a star shining over that ship, I'd say it takes two"). Schroeder further stated that blaming only servicewomen for pregnancy while averting blame from equally culpable servicemen casts doubts on the adequacy of the military disciplinary system. Id.
97. See Segal, supra note 68, at 273 (contending that ability to bear children is no reason to exclude women, just as ability to catch flu or venereal disease is no reason to exclude men).
98. See Hackworth, supra note 74, at 29 (stating that more than 1200 pregnant women
stages of deployment because pregnant soldiers had to be left behind. In addition, as military operations continued, the number of servicewomen that became pregnant increased. By mid-February 1991, over 1200 pregnant servicewomen had been evacuated from the campaign.

Before establishing that this argument justifying the combat exclusions is conclusive, the problem must be put in perspective. While proponents of combat exclusions view the nonavailability of pregnant servicewomen as a justification for prohibiting the assignment of women to combat positions, it is important to note that more servicemen in the Gulf were unable to carry out their assignments as a result of various nonduty-related injuries than were servicewomen because of pregnancy. According to the head physician at the triage center on Andrews Air Force Base, sport injuries produced the greatest number of casualties among male U.S. troops in the Gulf War.

C. Psychological Characteristics

Another argument often cited in support of combat exclusions focuses on alleged psychological differences between men and women. Proponents of the exclusions assert that women lack the necessary psychological aggressiveness to succeed in combat. Other observers question whether women can withstand the trauma associated with the horrors of warfare. Critics of the combat exclusions respond to this psychological argument on several
grounds. First, they argue that any differences between the aggression levels of men and women are generalizations that ignore the individual characteristics of particular persons.107 Second, opponents of the exclusions suggest that these generalizations are reinforced by the fact that women are prevented from training for combat.108 This alleged lack of aggressiveness has not prevented women from working and excelling in other demanding fields such as law enforcement and medicine.109 Critics of the combat exclusions deny that bravery under fire is dependent entirely on an aggressive predisposition.110 Finally, opponents assert that uncontrolled aggression is counterproductive to the modern soldier, who must often be calm and technically proficient.111

Scientific and theoretical arguments aside, the Gulf War provided numerous examples of servicewomen performing admirably under conditions in which timid persons of either sex would likely have faltered. For example, the Army awarded the Bronze Star to Lieutenant Colonel Roslyn Goff who led 800 soldiers through Iraqi minefields and inspired her battalion to excellence under fire.112 Sergeant Kitty Bussell, armed with an M-16 rifle and a pistol, provided a show of force when Iraqi soldiers at a prisoner of war camp rioted against unarmed guards.113 On entering the compound, Sergeant Bussell refused to yield to a Saudi interpreter who argued that the situation was too dangerous for a woman, and she and the other guards proceeded to quell the riot.114 Other servicewomen routinely flew refueling tanker planes deep into Iraqi airspace, well within range of enemy surface-to-air missiles and anti-aircraft fire.115 Women serving as military police on airbases in Saudi Arabia vigorously maintained that they would forcefully meet any attack

107. See Karst, supra note 41, at 533-34 (contending that studies of gender and aggression identify only average group tendencies, not individual tendencies).
108. See Rogers, supra note 42, at 173 (asserting that notion of females being less aggressive than males is questionable because women might gain aggressive tendencies if actually allowed to train for combat).
109. Segal, supra note 68, at 275 (contending that women have performed successfully in many rigorous professional fields formerly closed to them).
110. See Karst, supra note 41, at 535 (arguing that aggression and courage are not synonymous). According to Karst, one need not be naturally aggressive in order to act with bravery. Id.
111. See Karst, supra note 41, at 535 (contending that raw aggression can be counterproductive in combat situations requiring technical skill).
113. See Eskind, supra note 61, at D3 (discussing Bussell's actions during POW riot).
114. Eskind, supra note 61, at D3.
115. See Eskind, supra note 61, at D3 (summarizing air missions of Captain Anne Weaver, who flew her refueling tanker as far as 250 miles into Iraqi airspace).
on the bases where they were stationed. While a quantitative assessment of aggressiveness is elusive, certainly no one can question the bravery displayed by U.S. servicewomen during the Gulf War.

D. Societal Views, Stereotyping, and Public Opinion

Additional lines of defense surrounding the combat exclusions center on the manner in which society symbolically views its female members. One court summarized the traditional stereotype of women by stating that "men must provide the first line of defense while women keep the home fires burning." Proponents of this concept contend that the country must protect women as the symbol of motherhood. Civilized nations, the argument continues, do not send their mothers and daughters to war.

The logical extension of this idea is that combat exclusions are imperative to national defense because images of women being killed and captured in battle would so severely traumatize the American public that the nation's resolve to conduct war would be jeopardized. Consequently, military commanders would hesitate to deploy combat units consisting of servicewomen due to a fear of damaging morale and patriotism at the homefront. These as-

116. See Gugliotta, supra note 80, at A19 (noting resentment of military policewoman when asked whether she would use her weapon if under attack). Though Iraqi forces never ventured far into Saudi Arabia, several other servicewomen interviewed stated that they would not hesitate to open fire if the need arose. Id.

117. See 137 CONG. REC. S11432 (daily ed. July 31, 1991) (statement of Sen. Leahy) (declaring that victory over Saddam Hussein, Iraqi dictator, would not have been possible without courageous service of women in the Gulf); 137 CONG. REC. H2002 (daily ed. Mar. 21, 1991) (statement of Rep. Rangel) (stating that heroic role women played in Persian Gulf forever changed perception of female military capabilities); Hackworth, supra note 74, at 24-25 (asserting that bravery of women is not issue surrounding combat exclusion because Gulf War proved heroism is not gender dependent).

118. Chandler v. Callaway, No. C-74-1249 RHS at 4-5 (N.D. Cal. Nov. 1, 1974) (LEXIS, Genfed library, Dist file). In this case, the court upheld the constitutionality of differing educational requirements for male and female enlistees in the United States Army based on the Army's combat exclusion. Id.

119. See Karst, supra note 41, at 536 (identifying protection of women as symbols of femininity and motherhood as motivation behind combat exclusions).

120. See Rogers, supra note 42, at 175 (proposing that protection of daughters and wives from horrors of combat is one fundamental reason for exclusion).

121. See Karst, supra note 41, at 536 (identifying concern that pain engendered by occurrence of female casualties will weaken national resolve and threaten military's mission).

122. See Karst, supra note 41, at 536 (highlighting concern shared by defenders of exclusions regarding hesitancy on part of decisionmakers to deploy integrated combat units). United States servicewomen have previously been held as prisoners of war. For a discussion of an actual POW camp that housed United States servicewomen during World War II, see Helen Rogan, Mixed Company 258-71 (1981) (describing harsh conditions and heroism of nurses in prison camp in Santo Tomas, Philippines). The lessons of Santo Tomas provide some evidence that the existence of female prisoners of war can invoke troubling feelings of guilt and anxiety among the American people and the military. Sixty-seven women spent nearly three years in Santo Tomas under harsh conditions in which they sometimes resorted to eating dogs, rats, and bugs for sustenance. Id. at 258, 270. During the recapture of the
sumptions are supported by the contention that policies prohibiting women from combat are in accord with the will of the American people.123

The events of the Persian Gulf War have quieted many of these arguments made by the proponents of the combat exclusions. Five servicewomen were killed in action during the conflict.124 Furthermore, for the first time since World War II, American servicewomen were taken as prisoners of war.125 The predicted traumatization of the nation, however, did not occur.126 Some public concern was expressed when the deployment of servicewomen who were also mothers resulted in their separation from young children at home; however, much of this concern was directed primarily toward children of single-parent households in which the parent was sent to the Gulf War.127

Philippines, General Douglass MacArthur reportedly instructed his forces to advance to Manila as quickly as possible in order to free these women. Id. MacArthur visited the camp after its liberation and was apparently shaken by the condition of the prisoners. Id. But see Karst, supra note 41, at 537-38 (stating that concern about female prisoners of war being subjected to rape is well-founded). Karst argues, however, that the choice whether to assume this risk should not be taken away from servicewomen through the combat exclusions. Id. at 538.

123. See Hill v. Berkman, 635 F. Supp. 1228, 1238 (E.D.N.Y. 1986) (observing that sex discrimination in form of combat prohibitions is said to have approval of American public); see also Military Personnel Hearings, supra note 1, at 24 (statement of General A.K. Ono, Deputy Chief of Staff for Personnel, Department of the Army) (asserting that Army regulations prohibiting women from combat are in compliance with will of American people).

124. See supra notes 60-63 and accompanying text (detailing deployment of American servicewomen in Persian Gulf War).

125. See Edward Walsh, "As Brave as Stallone... Beautiful as Brooke Shields", WASH. POST, Mar. 6, 1991, at A23 (describing specialist Melissa Rathbun-Nealy's tenure as prisoner of war in Persian Gulf conflict). Rathbun-Nealy, captured after suffering bullet and shrapnel wounds while driving a heavy-duty truck near the Kuwait border, was held for more than one month by Iraqi forces and thus became the first American female POW since World War II. Rathbun-Nealy was apparently treated well in captivity and the experience reportedly did not change her views that women should be deployed near combat zones in time of war. Id. A second female prisoner of war in the Gulf conflict, Army Major Rhonda Cornum, suffered wounds during a mission to rescue the pilot of a downed F-16. Eskind, supra note 61, at D3. Cornum was captured when the helicopter carrying the rescue crew was shot down. Id. Five crew members died in the crash. Id. Cornum, a flight surgeon who volunteered for the mission, was held as a POW for one week. Id. Critics of those who believe servicewomen casual-ties would traumatize the nation argue that while it is tragic for women to lose their lives in battle, it is tragic when any person is killed in war. See 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, 442 (1991) (questioning soundness of any nation's decision to conduct war that risks only lives of its sons). The argument that the nation would suffer greater shock if women are killed in combat seems to suggest that women's lives are worth more than the lives of young men, a position not seriously advocated by proponents or opponents of the exclusions. Karst, supra note 41, at 537. This sentiment was echoed by the mother of one of the servicewomen killed in the Scud missile attack on Dhahran, who responded to a question regarding the value of servicewomen's lives as compared to men's by stating, "I don't think people really consider whether they're a man or a woman. I just say they're a person." Priest, supra note 54, at A51.

126. See text accompanying infra note 131 (discussing nation's acceptance of women's role in Gulf War).

127. See Opinion Watch, Newsweek, Aug. 5, 1991, at 27 (reporting Gallup Poll showing that
The role of women in American society has evolved since 1948 when the statutory combat exclusions were first enacted by Congress.\textsuperscript{128} Despite contentions that combat exclusions reflect the will of the people, public opinion polls indicate that Americans favor some type of role for women in combat.\textsuperscript{129} One poll conducted by the Gallup Organization four months after the allied victory in the Persian Gulf revealed that seventy-nine percent of Americans believe that women should be granted combat assignments.\textsuperscript{130} This sentiment, as expressed by the public during and after the Gulf War, influenced those who are entrusted with national security. Following the close of the War, the Department of Defense observed that "one of the lessons we have learned from Operation Desert Storm is the extent to which the Nation accepted the significant role of women in combat."\textsuperscript{131}

\textbf{E. Unit Cohesion}

Supporters of combat exclusions also argue that the assignment of women to combat units would have a devastating effect on unit cohesion. Commentators and military personnel assert that male bonding among soldiers plays a crucial part in the success of a combat unit.\textsuperscript{132} Defenders of the combat exclusions argue that placing

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\textsuperscript{128} See \textit{Women in the Military Hearings}, supra note 5, at 67 (statement of Martin Ferber, Senior Associate Director, National Security and International Affairs Division, General Accounting Office) (asserting that role of women in society has changed dramatically since 1948).

\textsuperscript{129} See \textit{Military Personnel Hearings}, supra note 1, at 4 (statement of Rep. Schroeder) (quoting New York Times/CBS poll dated January 13-15, 1990 showing that 72\% of Americans believe "women members of the armed forces should be allowed to serve in combat units if they wanted to and were qualified"); see Elaine Sciolino, \textit{Battle Lines are Shifting on Women in War}, N.Y. TIMES, Jan. 25, 1991, at A1 (citing poll).

\textsuperscript{130} \textit{Opinion Watch}, supra note 127, at 27. Of this 79\%, 53\% said that women should be assigned combat duties only if they want them, while 26\% responded that women should be given combat duties on the same terms as men. \textit{Id.} Only 18\% of respondents said that women should never be granted combat assignments. \textit{Id.} The poll had a margin of error of plus or minus five percentage points. \textit{Id.}


\textsuperscript{132} See Tuten, supra note 41, at 251 (arguing that military unit effectiveness is due more
women into these units could destroy male bonding and, therefore, interfere with a mission's success. Exclusion proponents allege that assignment of women to combat units may create resistance and resentment among the men, thereby damaging the spirit of the fighting force. The ironic corollary to this contention is that the men in the unit might also react by competing for the affections of the women, thereby engaging in unnecessary risk-taking, overprotecting the women, and diverting attention from a mission's objectives.

Critics refute these assumptions by noting that military experimentation with mixed male and female combat support units has demonstrated that the groups perform their duties with as much, if not more, proficiency and esprit de corps as all-male units. For example, when left to work out divisions of labor, mixed units have fostered constructive competitiveness between and among the sexes, which has led to increased unit motivation and efficiency. In addition, the intense personal bonds that promote heroism and self-sacrifice within groups of closely-knit people are not necessarily gender dependent, but rather form when group members of any sex discover feelings of shared responsibility under stressful conditions.

During the Persian Gulf War, teamwork and mutual respect developed between servicemen and servicewomen. As with any opera-
tion consisting of more than one-half million personnel, not all servicemen emerged from the Gulf War with newfound feelings of camaraderie for their fellow servicewomen. A new relationship based on respect derived from shared hardships, however, seemed to develop between male and female soldiers in the Gulf. Servicewomen found that once their male counterparts saw that they could work with as much dedication as any serviceman, the men’s initial doubts vanished and the servicewomen were quickly accepted into the “team.” Before her death, Army Major Marie Rossi, whose helicopter crashed in northern Saudi Arabia after the War’s end, stated, “I think if you talk to the women who are professionals in the military, we see ourselves as soldiers. . . . What I am doing is no greater or less than the man who is flying next to me.”

F. Lessons from the Persian Gulf War

The Persian Gulf War has shown that the policies excluding servicewomen from combat no longer serve a fully justifiable purpose. Warfare has acquired a strikingly advanced nature that rewards the possessor of superior technology. Technological advances, in combination with current military strategies, thwart old-fashioned attempts to protect women by segregating them from positions of direct combat. Like their male counterparts in the Persian Gulf, servicewomen took great risks and performed heroically in hostile situations. Moreover, the American public recognizes the performance of servicewomen and supports the opening of combat positions to qualified servicewomen under certain conditions.

Congress should take affirmative steps mandating that all combat positions be open to all competent servicemembers, regardless of

140. See Hackworth, supra note 74, at 26 (quoting Specialist Peter Cardin, XVIII Airborne Corps) (“I was raised to protect the female. I couldn’t handle being in a tank or infantry squad with a woman. It would blow unit esprit and destroy male bonding.”).

141. See Barkalow, supra note 92, at 30 (stating that nurturing relationship developed between men and women soldiers in Persian Gulf). Captain Barkalow, one of the first women graduates of West Point Academy, volunteered to go to the Persian Gulf. Id. Barkalow noted that the argument used against women regarding the importance of “bonding” in combat units was used similarly against black soldiers before the Vietnam War, but “[w]hen the bullets started flying, that argument went away pretty fast.” Id. According to Barkalow, an analogous situation developed in the Persian Gulf theater. Id.

142. See Gugliotta, supra note 80, at A19 (reporting that successful performance of duties by servicewomen fostered heightened cooperation between women and men).

143. Female Pilot, Three Others Die in Crash, WASH. POST, Mar. 4, 1991, at A17. Major Rossi piloted several supply missions into Iraq during the first hours of the ground war, transporting ammunition and fuel to the 101st and 82nd Airborne Divisions. Id.

144. See supra notes 128-31 and accompanying text (examining change in American opinion that now favors increased role, including voluntary combat duty, for women in military). Public opinion on the issue of nonvoluntary combat service by women, however, is an entirely different matter. For a discussion of this issue, see infra note 157 and accompanying text.
sex. The qualifying requirements for each position should be the same for both genders.\textsuperscript{145} Opening positions to women who meet the given qualifications will provide the military with a larger pool of qualified personnel from which to fill combat positions.\textsuperscript{146} As outlined in the next section, Congress' recent changes in the statutory combat exclusions represent a positive, albeit small, step toward elimination of the outdated restrictions.

III. Winds of Change

A move to repeal the statutory restrictions applying to female military aviators was set into motion as a direct result of the professionalism displayed by servicewomen in the Persian Gulf War.\textsuperscript{147} This action culminated on December 5, 1991, when the President signed the National Defense Authorization Act for Fiscal Years 1992 and

\textsuperscript{145} Currently, each branch of the service employs a system called "gender norming" by which different standards are used to measure average physical abilities between men and women. \textit{See} Hackworth, \textit{supra} note 64, at 25-26 (stating that gender norming by military is complaint of both servicemen and servicewomen). Under gender norming, the standards for achieving maximum fitness ratings are lower for women than for men. \textit{Id.} In the proposed situation in which women could qualify for combat positions, there should be one set of qualifications for all applicants to insure that each combat position is filled by the best person for that position.

\textsuperscript{146} \textit{See} Military Personnel Hearings, \textit{supra} note 1, at 7 (statement of Rep. Schroeder) (arguing that combat exclusion laws weaken military by precluding use of qualified female soldiers). Representative Schroeder makes a strong argument in support of the notion that exclusion of women from combat weakens the armed forces. By automatically foreclosing combat positions to female recruits, the military is compelled to resort to a larger pool of male volunteers to maintain a combat-ready force. \textit{Id.} In order to attract the requisite number of men to fulfill this pool, the military is forced to lower its eligibility standards, with resultant potential adverse impact on the quality of the military. \textit{Id.; see also} 137 \textit{CONG. REC.} S 11,416 (daily ed. July 31, 1991) (statement of Sen. Kennedy) (maintaining that combat exclusions impair national security by denying some women, despite superior qualifications, access to particular jobs).

\textsuperscript{147} During floor debate over repeal of the statutory exclusions, members of the Senate frequently alluded to the contributions made by women during the Gulf War. \textit{See} 137 \textit{CONG. REC.} S11,413 (daily ed. July 31, 1991) (statement of Sen. Warner) (pointing to Persian Gulf War as lesson regarding contributions servicewomen can make); \textit{id.} at S11,416 (statement of Sen. Kennedy) (asserting that women of Operation Desert Storm performed admirably in combat situations and urging repeal of statutory restrictions relating to female pilots); \textit{id.} at S11,417 (statement of Sen. Glenn) (noting that interest in expanding role of women in military is understandable due to women's recent competent performance in Persian Gulf conflict); \textit{id.} at S11,420 (statement of Sen. McCain) (declaring that excellent performance of servicewomen was amply proven in Gulf War); \textit{id.} at S11,429 (statement of Sen. Thurmond) (expressing that Gulf War proves women can withstand stress of combat); \textit{id.} at S11,432 (statement of Sen. Leahy) (stating that performance of women in Persian Gulf demands review of combat restrictions); \textit{id.} at S11,434 (statement of Sen. Roth) (asserting that Operation Desert Storm indicates women pilots can successfully fly combat missions); \textit{id.} at S11,435 (statement of Sen. Adams) (contending that Desert Storm shows that distinction between combat and noncombat has no practical reality). Similar comments were made in the House of Representatives. \textit{See} 137 \textit{CONG. REC.} H2003 (daily ed. Mar. 21, 1991) (statement of Rep. Swett) (stating that invaluable presence of servicewomen in Persian Gulf demonstrates time has come to remove remaining barriers and promote women's full integration into armed forces).
1993 into law. As part of the Act, Congress removed the legal barriers applying to female pilots in the Air Force, Navy, and Marine Corps. The Act also establishes a new Commission on the Assignment of Women in the Armed Forces to study laws and policies that restrict duty assignments to servicewomen. This Commission must issue a report of its findings to the President by November 15, 1992. In order to conduct assignment tests, the Commission has the authority to temporarily waive any law or policy restricting women from combat positions.

While the repeal of the statutory exclusions applying to female aviators is a positive step in expanding the role of servicewomen in the military, the expansion is somewhat limited in scope. The armed services are not statutorily required to use female pilots in combat, but are simply no longer legally precluded from making such assignments. Furthermore, various concerned parties have accused the Department of Defense of using the newly created Commission as a tactic for delaying the opening of combat flights to qualified servicewomen. Viewed in this context, Congress is unlikely to pass legislation requiring the integration of willing, able women into other military combat positions in the near future.

149. See id. § 531, 105 Stat. at 1365 (repealing prohibition on women flying Navy, Marine Corps, and Air Force combat missions).
150. Id. §§ 541-542, 105 Stat. at 1365-66.
151. Id. § 543(a), 105 Stat. at 1367.
152. Id. § 550, 105 Stat. at 1370.
153. See 137 CONG. REC. 511,415 (daily ed. July 31, 1991) (statement of Sen. Roth) (stating that removal of statutory restrictions on female pilots will not result in dramatic changes for women in military). Senator Roth likened repeal of the restrictions to "pinpoint laser surgery" that would simply lift legal barriers and allow the military to decide how to best use these personnel rather than "major surgery" that would reconfigure the composition of the armed forces. Id.

The Secretary of Defense may prescribe the kind of military duty to which such women members may be assigned and the military authority which they may exercise. However, women may not be assigned to duty on vessels that are engaged in combat missions (other than as aviation officers as part of an air wing or other air element assigned to such a vessel) nor may they be assigned to other than temporary duty on other vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions.

Id. § 531(b), 105 Stat. at 1365 (to be codified at 10 U.S.C. § 6015). The restrictions on female pilots in the Air Force were simply repealed. Id. § 531(a), 105 Stat. at 1365.
155. See Juan J. Walte, Battle: Women in War, USA TODAY, Apr. 21, 1992, at 4A (reporting that servicewomen and lawmakers have contended Commission is being used to delay placement of female pilots into combat jets). The Secretary of Defense has decided to restrict servicewomen from flying combat jets until the Commission concludes its study. Id.
A primary reason for the Legislature's hesitancy, despite the professionalism displayed by women in the Gulf War, is linked with the question whether women should face the same combat liabilities as men. The American public has expressed doubt on the issue of combat liabilities; only a minority of Americans feel that women should be required to hold combat duty on the same terms as men. In Congress, there is significant concern that opening combat positions to women will abrogate the United States Supreme Court decision in *Rostker v. Goldberg*. *Rostker* upheld the Military Selective Service Act, a federal law requiring male-only draft registration. The relationship between the assignment of women to combat and registration or conscription of women under the Military Selective Service Act has significant legal and political implications, as evidenced by the congressional-prescribed duty of the Commission on the Assignment of Women in the Armed Forces to study this issue specifically. The relationship ultimately provokes the inquiry of whether the statutory opening of all combat positions to qualified women on a volunteer basis would lead the Supreme Court to eliminate the male-only registration and draft law.

IV. LIFTING THE EXCLUSIONS: THE EFFECT ON THE DRAFT LAW

A. The Military Selective Service Act and Rostker v. Goldberg

The Military Selective Service Act (MSSA) confers on the President the authority to require every male person between the ages of

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156. *See* Charles Moskos, *Army Women, THE ATLANTIC MONTHLY*, Aug. 1990, at 71, 78 (stating that core question is not simply whether positions should be opened to women but whether servicewomen should be given choice of whether they desire assignment to combat role, a decision servicemen are presently not entitled to make).

157. *See* Opinion Watch, supra note 127, at 27 (citing Gallup Poll finding that only 26% of Americans polled indicated that women should receive combat assignments on same basis as men; 53% said women should be assigned combat duty only on voluntary basis; 18% responded that women should never be assigned to combat).


159. *See* Rostker v. Goldberg, 453 U.S. 57, 76-79 (1981) (reasoning that registration of only men for combat duty does not violate Due Process Clause because women are not eligible for combat service). The sensitivity of some members of Congress concerning the viability of the male-only draft law was clearly demonstrated in recent debate. *See* 137 CONG. REC. S11,418 (daily ed. July 31, 1991) (statement of Sen. Glenn) (noting that assigning women to combat duty may affect constitutionality of registration law); id. at S11,421 (statement of Sen. McCain) (stating that repeal of statutory restrictions might necessitate registering women for draft); id. at S11,431 (statement of Sen. Nunn) (raising question of whether women should be subject to draft on same basis as men); id. at S11,435 (statement of Sen. Mikulski) (inquiring whether allowing women to fly combat missions would lead to overturning of *Rostker v. Goldberg*).

eighteen and twenty-six to submit to registration.161 These men become liable for training and service in the U.S. military should conscription of civilians become necessary to maintain the strength of the armed forces.162 Though the registration process was discontinued in 1975, President Jimmy Carter sought its reactivation after the Soviet Union invaded Afghanistan in 1980.163 Subsequently, President Carter requested that Congress amend the MSSA to permit the registration of both men and women and asked that the funds necessary for their registration be transferred to the Selective Service System.164 After lengthy consideration of the issue, Congress opted not to amend the Act as President Carter requested, and instead allocated only the funds required for the registration of young men.165

1. The equal protection challenge

The reactivation of male-only registration was immediately challenged on equal protection grounds by a class of male plaintiffs who were subject to obligations under the MSSA.166 Three days before implementation of registration, the United States District Court for the Eastern District of Pennsylvania held that because the government failed to meet its burden of justifying the gender-based classifications of the Act, the MSSA unconstitutionally discriminated between men and women.167 After examining recent Supreme Court decisions, the court concluded that the appropriate standard of review for gender-based classifications was the "important government interest" test articulated by the Supreme Court in Craig v. Boren.168 According to this test, a gender-based classification can

162. Id. § 451.
164. Rostker, 453 U.S. at 60.
165. Id. at 61.
166. See id. at 61-64 (detailing lawsuit's long history prior to reaching Supreme Court). In addition to the equal protection challenge, the plaintiffs further alleged that the MSSA imposed involuntary servitude on young males, abridged freedoms of expression and assembly, and constituted deprivation of property without due process of law. Id. at 64 n.2. These claims were eventually dismissed, leaving only the equal protection claim. Id.
168. See Goldberg, 509 F. Supp. at 593 (setting forth intermediate scrutiny test that requires
withstand an equal protection challenge only if the classification is shown to bear a substantial relationship to an important governmental interest. Applying this test, the district court held that the total exclusion of women from military registration did not serve an important government objective and was not substantially related to any alleged governmental interest.

2. The Supreme Court decision: Rostker v. Goldberg

Prior to the Supreme Court's consideration of the issue, there was speculation that the complete exclusion of women from military registration could not survive middle-tier equal protection scrutiny under Craig. This speculation was dashed when the district court's ruling was quickly reversed by the United States Supreme Court in Rostker v. Goldberg. The Court's decision in Rostker demonstrated that customary modes of constitutional review do not always apply in matters involving the armed forces.

Justice Rehnquist's opinion in Rostker does not elucidate the precise standard of review used by the Court to evaluate the gender classification. In response to the Solicitor General's argument

\footnote{Craig v. Boren, 429 U.S. 190, 197 (1976).}

\footnote{Goldberg, 509 F. Supp. at 605 (asserting that although military flexibility in particular emergencies may require under-utilization of female inductees, complete exclusion of women from pool of registrants is counterproductive).}

\footnote{See Note, Women and the Draft: The Constitutionality of All-Male Registration, 94 HARV. L. REV. 406, 418 (1980) (suggesting that categorical exclusion of women registrants reflects general sexism rather than prudent military decisionmaking). In light of valuable contributions that women have made to the military, continued exclusion would not likely survive middle-tier scrutiny under Craig.}

\footnote{See S. REP. No. 826, 96th Cong., 2d Sess. 159-60 (1980), reprinted in 1980 U.S.C.C.A.N. 2612, 2649-50 (asserting that Supreme Court's most recent equal protection decisions cannot be read in isolation from opinions granting Congress great deference in management of military); Linda E. Bloch, Equal Protection—Due Process—Provisions of Military Selective Service Act Authorizing Registration of Males but Not Females, Do Not Violate the Fifth Amendment, 59 U. DET. J. URB. L. 241, 248 (1982) (noting that in assessment of male-only registration it is not enough to simply apply Craig standard without allowing for judicial deference in areas implicating national security). The Senate report states that "[t]he Court has made it unmistakably clear that even our most fundamental constitutional rights must in some circumstances be modified in the light of military needs, and that Congress' judgment as to what is necessary to preserve our national security is entitled to great deference." S. REP. No. 826, at 159-60. For further discussion of judicial deference in military matters, see infra notes 184-93 and accompanying text.}

\footnote{Rostker v. Goldberg, 453 U.S. 57, 69-70 (1981) (resisting Solicitor General's attempts to pigeonhole Court's due process analysis); Bloch, supra note 173, at 249 (suggesting that majority opinion appeared to intentionally obscure standard of review). The Court's analysis of the means prong of the Craig test was no more stringent than a rational basis
that the rational relationship test be used, the Court noted that degrees of deference and levels of scrutiny can easily "become facile abstractions used to justify a result." The Court asserted, however, that raising and supporting armies is an important governmental interest, and that exempting women from combat is not only sufficiently but closely related to Congress' purpose in authorizing registration.

Specifically, the Court determined that the issues of registration and conscription are intrinsically linked because the sole purpose of registration is to provide a pool of potential inductees for the draft. Furthermore, the Court opined that any future draft would be premised on a need for combat troops. The Court determined, therefore, that the purpose of registration is "to prepare for a draft of combat troops." Although the Constitution mandates that Congress treat similarly situated persons similarly, the Court concluded that men and women are not similarly situated for purposes of draft registration because of statutory restrictions excluding women from combat. Thus, the Court found that Congress' decision to register only men did not violate the Due Process Clause.

B. Judicial Review in Matters Involving the Military

The decision in Rostker, as well as any examination concerning the effect that assignment of women to combat units would have on the draft registration law, must be understood in the context of the great deference the judiciary affords to the legislature in matters

scrutiny. Id.; see also Snyder, supra note 125, at 427 (stating that Justice Rehnquist equivocated about standard used to review MSSA).

175. Rostker, 453 U.S. at 69. The rational relationship test would require that the Court "scrutinize the MSSA only to determine if the distinction drawn between men and women bears a rational relation to some legitimate Government purpose." Id.

176. Id. at 69-70. The Court asserted that further refinement in the applicable tests would not advance certainty in the law, and suggested that "[s]imply labeling the legislative decision 'military' on the one hand or 'gender-based' on the other does not automatically guide a court to the correct constitutional result." Id.

177. Id. at 70.

178. Id. at 79. But cf. Bloch, supra note 173, at 250 (contending that Court's equal protection analysis in Rostker was premised on only enough evidentiary support to satisfy rational relationship test).

179. See Rostker, 453 U.S. at 75 (stating that only those registered can be drafted). The Court observed that during debate on the registration law, Congress had clearly linked the need for registration with anticipation of a subsequent draft. Id.

180. Id. at 76. The Court noted that Congress' findings concerning the draft and combat troops were substantial enough to preclude independent study by the courts. Id.

181. Id. (emphasis in original).

182. Id. at 78, 79.

183. See id. at 78-79 (stating that congressional and executive decision restricting women from combat "fully justifies Congress in not authorizing their registration" for draft). This is an instance that reflects the fact that men and women simply are not similarly situated. Id. at 79.
volving the armed services. The United States Constitution grants Congress broad powers over the creation, maintenance, and regulation of the military.\footnote{184} On at least one occasion, the Supreme Court has noted that these powers reflect an explicit grant of plenary authority by the Framers of the Constitution to Congress in matters involving the armed forces.\footnote{185}

Accordingly, the Court has often declined to interfere in matters it views as affecting military affairs and national security. As a result, a sweeping form of deference has appeared in cases ranging from basic free speech issues\footnote{186} to cases involving the burning of Selective Service registration certificates\footnote{187} and the banning of homosex-

\footnote{184. U.S. CONST. art. I, § 8, cl. 11-16. In these clauses, Congress is granted the power to "declare War, ... raise and support Armies, ... provide and maintain a Navy; ... make Rules for the Government and Regulation of the land and naval Forces; ... provide for calling forth the Militia ... provide for organizing, arming, and disciplining, the Militia ..."

185. See Chappell v. Wallace, 462 U.S. 296, 301 (1983) (stating that Framers of Constitution clearly contemplated that Congress have plenary authority over creation and maintenance of military). Because many of the Framers were themselves military men who were familiar with the differences between military and civilian life, the Court suggested that the Framers had anticipated issues similar to those raised in Chappell and had incorporated solutions in the Constitution. \textit{Id.} at 300-01. The respondents in Chappell brought an action against their superior officers, alleging that they received threats, low evaluations, undesirable duty assignments, and unusually harsh disciplinary measures because of their minority race. \textit{Id.} at 297. After observing that Congress had not provided a damages remedy for claims by military personnel against superior officers for violations of their constitutional rights, the Court stated that any judicial action would undermine congressional authority in this area. \textit{Id.} at 304. Although common law causes of action by military subordinates against their superiors had been entertained in the past, the Court asserted that the establishment of a modern military justice system prevents such actions. See \textit{id.} at 305 n.2 (distinguishing Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1852)). Dinsman recognized the existence of a firmly-rooted common law action by servicemen against commanding officers for damages suffered from punishment, and differed from Chappell by not requesting the Court to imply new causes of action. \textit{Id.}; Dinsman, 53 U.S. (12 How.) at 401-03. Thus, the Court in Chappell held that military personnel could not maintain suits for damages against superior officers for alleged constitutional violations. Chappell, 462 U.S. at 305.

186. See Greer v. Spock, 424 U.S. 828, 838-40 (1975) (upholding military regulation banning speeches, demonstrations, and distribution of partisan political literature on military reservation). The Court held that respondents, political candidates of the People's Party and Socialist Workers' Party, had no generalized constitutional right to make speeches or distribute leaflets on the base. \textit{Id.} at 832, 838-40. Furthermore, the Court stated that there is nothing in the Constitution that stops military commanders from acting to prevent what they perceive to be "a clear danger to the loyalty, discipline, or morale of troops on the base under their command." \textit{Id.} at 840. Unlike public streets and parks which have traditionally served as havens for free speech and assembly, federal military institutions are not places where First Amendment liberties are rigorously protected. \textit{Id.; see also} Brown v. Glines, 444 U.S. 348, 353 (1980) (sustaining Air Force regulation prohibiting servicemembers from circulating petition without approval of base commander). The Court in Brown stated that the Air Force regulation was valid for the same reason that the Army regulations were upheld in Spock. \textit{Id.}

187. See United States v. O'Brien, 391 U.S. 367, 386 (1968) (upholding respondent's conviction for violating law requiring selective service registrants to have personal possession of registration certificates at all times). O'Brien burned his card to protest the Vietnam War. \textit{Id.} at 369. In affirming the statute under which O'Brien was convicted, the Court deferred judgment to Congress' broad powers to make laws concerning the raising and supporting of armies. \textit{Id.} at 377.
uals from the military. The hesitancy on the part of the judiciary to review military decisions closely was effectively summarized by the Supreme Court in Orloff v. Willoughby. After refusing to review whether a petitioner's duty assignment fell within the specialist category mandated by his status as a doctor, the Court stated that "judges are not given the task of running the Army."190

At the heart of this assertion is the Supreme Court's self-perceived lack of competence to review policies that relate to military functions, organization, and control.191 Thus, when the Supreme Court reviews discrimination claims against the armed forces, it consistently concludes that the military is a community apart from civilian society whose judgments are the ultimate responsibility of the

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188. See Ben-Shalom v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989) (upholding Army regulation making admitted homosexuality cause for mandatory discharge), cert. denied, 494 U.S. 1004 (1990). After invoking Supreme Court precedent holding that there is no fundamental right to engage in sodomy, the Seventh Circuit stated that it was "unwilling to substitute a mere judge-made rule for the Army's regulation. . . ." Id.

189. 345 U.S. 85 (1953).

190. Orloff v. Willoughby, 345 U.S. 83, 93 (1953). In Orloff, the petitioner was inducted into the Army pursuant to a statute authorizing the conscription of "medical and allied specialist categories." Id. at 94. The petitioner, when required to complete a loyalty certificate, refused to disclose whether he had ever been a member of any communist organization. Id. at 89-90. Petitioner was therefore denied commission as an officer and assigned to laboratory technician work. Id. at 83-86. In response, the petitioner argued that denial of a commission violated his rights because physicians and other specially qualified personnel were usually entitled, upon induction, to privileged rank. Id. at 85. The petitioner consequently brought action against the Army, seeking either a commission or a discharge. Id. at 87. In refusing this appeal, the Court stated that the responsibility for establishing procedures through which such grievances can be settled lies with Congress and with the President, not with the courts. Id. at 93-94. The Court also refused to revise petitioner's duty orders, stating that "[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." Id. at 94.

191. See Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (acknowledging that courts have less competence in military matters than in any other governmental sphere). In Gilligan, respondents brought an action seeking: (1) injunctive relief restraining the Governor of Ohio from "prematurely" ordering National Guard troops into action during future civil disorders and preventing Guard leaders from future violations of students' constitutional rights; and (2) a declaratory judgment holding section 2923.55 of the Ohio Revised Code unconstitutional for insulating law enforcement personnel from liability for using "necessary and proper force" in riots. Id. at 3. This action arose from a May 1970 incident at Kent State University in which the National Guard injured and killed a number of students. Id. The United States Court of Appeals for the Sixth Circuit narrowed the respondents' cause of action to whether there is a pattern of training, weaponry, and orders in the Ohio National Guard that makes use of lethal force inevitable in situations where such use is ordinarily unnecessary. Morgan v. Rhodes, 456 F.2d 608, 612 (6th Cir. 1972), rev'd sub nom. Gilligan v. Morgan, 413 U.S. 1 (1973). The Supreme Court granted certiorari on this issue but held that no justiciable controversy was presented. Gilligan, 413 U.S. at 11. The Court noted that the Constitution vests authority for training the militia in the states according to the discipline prescribed by Congress. Id. at 6, 10 (citing U.S. Const. art. I, § 8, cl. 16). The Court further stated that decisions as to the training and control of a military force are military judgments subject to control by the legislative and executive branches of government. Id. Thus, the Court concluded that "[i]t is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system. . . ." Id. at 10.
elected branches of Government.\textsuperscript{192} This judicial philosophy ultimately bestows sweeping judicial deference on Congress regarding issues involving the armed forces.\textsuperscript{193}

C. Rostker's Broadening of the Deference Doctrine

In \textit{Rostker v. Goldberg},\textsuperscript{194} the Supreme Court demonstrated great sensitivity to this doctrine of deference to congressional decisions regarding the military.\textsuperscript{195} Before evaluating the merits of the constitutional challenge in \textit{Rostker}, the Court went to substantial lengths to summarize its prior decisions outlining the wisdom of the legislative branch in matters involving the armed services.\textsuperscript{196} To accentuate this point, the Court specifically noted that the registration process falls within Congress' authority over national defense and military affairs, an area in which the legislature has enjoyed the utmost judicial deference.\textsuperscript{197}

The degree of latitude afforded to Congress in \textit{Rostker} can best be contextualized by recognizing that Congress' refusal to register wo-


\textsuperscript{193} See \textit{Chappell}, 462 U.S. at 301 (noting that courts have acted in conformity with view that Congress has plenary authority in military matters); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) (observing that responsibility for determining how armed forces should best maintain military readiness rests with Congress); \textit{Parker}, 417 U.S. at 756 (explaining that Congress is permitted to legislate with more breadth and greater flexibility when prescribing rules for military than when making rules for civilian society). Judicial deference in matters involving the military, however, has been criticized by some scholars as bordering on judicial abdication. See \textit{Karst}, supra note 41, at 564 (stating that "[i]n the last two decades the idea that judges have virtually nothing to say about any issue involving the military has grown like a weed"). Although a certain degree of judicial reluctance to interfere in the armed services' daily operation is necessary for the military to carry out its assigned functions, there is a danger that this deference may constitute relinquishment of judicial authority by judges predisposed to granting Congress broad constitutional immunities in matters involving the military. \textit{Id.} at 564-65. Some fear that this deference is tantamount to creating a military exception to the Bill of Rights. \textit{Id.} at 565; see \textit{Griffin}, supra note 48, at 2104-05 (contending that despite courts' alleged lack of expertise in military matters, responsibility for assessing constitutionality of discrimination claims rests with judiciary). Griffin points out that the courts have not demonstrated any greater competence in sensitive areas such as prisons and government employment, and yet the judiciary has not approached claims in these settings with the same deference provided to military matters. \textit{Id.} at 2104.

\textsuperscript{194} 453 U.S. 57 (1981).

\textsuperscript{195} See \textit{Karst}, supra note 41, at 566 (asserting that extreme form of deference demonstrated by the Court in \textit{Rostker} carried "principle of deference to new heights").


\textsuperscript{197} \textit{Id.} at 64-65. The Court stated that "[t]his is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." \textit{Id.}
men was contrary to the expressed requests and recommendations of the President, the Secretary of Defense, and high-ranking members of the military.\textsuperscript{198} Despite this input from the executive branch and the military urging registration of females, the Court found the general, overall legislative history behind the congressional decision not to register women as sufficient to determine that Congress had adequately considered the issue before acting.\textsuperscript{199} The Court emphasized that Congress had considered and debated alternatives to male-only registration,\textsuperscript{200} was aware of statistics presented by witnesses concerning military strength,\textsuperscript{201} and was sensitive to current opinions regarding women in the armed forces.\textsuperscript{202} This degree of deference and cursory review of congressional decisionmaking apparent in \textit{Rostker} is a crucial consideration when analyzing whether

\textsuperscript{198} See House Comm. on Armed Services, 96th Cong., 2d Sess., Presidential Recommendations for Selective Service Reform 23 (Comm. Print 1980) (concluding that women should be subject to registration, induction, and training for service in U.S. military). President Carter advanced three arguments to explain why women should be registered and made eligible for the draft: (1) women already constitute a large segment of the military and have proved they could perform their duties well; (2) an amendment of the Selective Service Act permitting the registration of women would double the size of the pool of persons available to be drafted and would free men for combat jobs in the event of a draft; and (3) a male-only induction would be inequitable. \textit{Id.} at 22. According to the President, equity would be achieved "when both men and women are asked to serve in proportion to the ability of the Armed Forces to use them effectively." \textit{Id.} at 23. Like the President, members of the military and Defense Department were willing to advocate the registration of women, albeit to a lesser extent. See Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services, 96th Cong., 2d Sess. 109 (1980) [hereinafter \textit{Hearings on S. 2294}] (statement of Secretary Brown, Department of Defense) (opposing conscription of women but acknowledging that registering women reduces risk of constitutional challenges to future drafts). According to Secretary Brown, conscription of women is unnecessary as long as voluntary enlistment provides an adequate level of women in the military. \textit{Id.} Conscription of women would be effective, however, in preemptively preventing injunctions that could delay peacetime and emergency drafts. \textit{Id.}; see also \textit{id.} at 171 (statement of General Clifford Alexander, Secretary of the Army) (asserting that registration of women would not mean that they would be drafted in event of conscription but merely assists military in determining women’s location during period of mobilization). But see Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on Military Posture and H.R. 6495 [H.R. 6974] Before the House Comm. on Armed Services, 96th Cong., 2d Sess. 1009 (1980) (statement of General Bernard Rogers, Commander in Chief, U.S. European Command) (contending that women should be registered and made eligible for conscription as matter of equity and to bolster total pool of persons available for draft).

\textsuperscript{199} See \textit{Rostker}, 453 U.S. at 74-75 (reasoning that because Congress thoroughly considered the application of MSSA to women, legislative history is highly relevant in assessing constitutional validity of women’s exemption from registration). The Court noted that when congressional action is challenged on equal protection grounds, the Court’s task is merely to determine whether the action denies equal protection of the laws. \textit{Id.} It is not the Court’s function to retroactively interpose itself into the debate and choose an alternative action. \textit{Id.} at 70.

\textsuperscript{200} \textit{Id.} at 70.

\textsuperscript{201} \textit{Id.} at 71.

\textsuperscript{202} See \textit{id.} at 71 (stating that when Congress fully considers facts and current public opinion regarding registration of women, Congress’ broad powers to raise and support armies should not be trumped by judiciary).
the elimination of the combat exclusions would jeopardize the constitutionality of the male-only registration law.

D. The Future of Rostker

It is argued that the demise of combat exclusions will require women to submit to draft registration, because with the legal barriers removed, women would be similarly situated to men. This hypothesis is misplaced. The enactment of carefully-considered legislation allowing for the voluntary assignment of women to combat positions, but expressly intending not to disturb the existing Selective Service law, would not invalidate Rostker. Assuming that any future draft would still be premised on a need for combat troops, the fact that women could refuse combat assignment while men could not suggests that men and women would still not be similarly situated for purposes of a draft. Given the unparalleled deference granted to Congress by the Court in matters of national defense, it is unlikely that such a law would be overturned on equal protection grounds. There is no indication that the Court is moving toward stricter judicial scrutiny in areas involving the military. Furthermore, if recent congressional debate and activity is any indication, future laws altering the combat exclusions will likely be the product of the same type of legislative debate and sensitivity to current opinion that the Court approved of in Rostker.

V. Conclusions—Beyond the Persian Gulf Crisis

It is time to open all areas of military service, including combat

203. Snyder, supra note 125, at 428; see supra note 159 and accompanying text (discussing affect repeal of exclusions would have on draft law).

204. The drafting of large numbers of people who could then refuse combat assignment could have severe consequences for national security. See Hearings on S. 2294, supra note 198, at 95 (statement of Sen. Nunn) (identifying problem of drafting noncombat personnel in emergency situations). Senator Nunn noted that the availability of training facilities is a limiting factor that influences the number of people the military can assign to active service. Id. If the facilities are used to train personnel who ultimately may not enter into combat, the total number of personnel available for combat in the early stages of a conflict will be diminished. Id. This result defeats the purpose of emergency call-ups. Id.

205. One of the most recent important decisions in this area is Goldman v. Weinberger, 475 U.S. 503 (1986). Goldman upheld an Air Force regulation prohibiting the petitioner, an Orthodox Jew, from wearing a yarmulke while on duty. Id. at 510. In denying petitioner's freedom of expression claim, the Court noted: "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. . . . The essence of military service is the subordination of the desires and interests of the individual to the needs of the service." Id. at 507 (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).

206. See supra notes 147-59 and accompanying text (detailing exhaustiveness of recent congressional debate regarding women's exclusion from combat); see also supra notes 159-65 and accompanying text (summarizing Supreme Court's review of legislative history in Rostker).
positions, to qualified persons regardless of gender. Repealing statutory restrictions on women in combat aircraft is a positive beginning, not a satisfactory end. The Persian Gulf War has shattered the traditional justifications for combat exclusions. Preventing capable and willing women from participating in combat works an injustice on women, the military, and the nation.

Combat positions should be opened to all qualified women on a volunteer basis. This recommendation may disturb those who feel that, in order to achieve true equality in society, women must be subjected to the exact same liabilities as men. On the other hand, it will certainly be contrary to the thoughts of those who wish to preserve the combat exclusions. Nevertheless, a large segment of the American public, while remaining firmly opposed to requiring women to fight, has recognized that qualified, willing servicewomen deserve the opportunity to serve their country free from anachronistic gender-based constraints.

Fear that opening combat positions to women on a voluntary basis would overturn the male-only draft and draft registration law should not hinder the expansion of women's role in the military. Congress enjoys broad judicial deference in regulating the armed forces. The Supreme Court will not overturn a thoughtful congressional decision that further opens the military to women but maintains current draft and registration policies. As evinced by commendable performance in the Persian Gulf War and steadfast diligence in the armed services throughout history, women have more than earned the right to fight for their country should the United States become involved in future armed conflict. As a nation, we should not wait until a future war, however, to recognize what we know today. The combat exclusions should no longer constitute a barrier for well-qualified, professional servicewomen who can get the job done.

207. See Hearings on S. 2294, supra note 198, at 1710 (statement of Judy Goldsmith, Vice President-Executive, National Organization for Women (NOW)) (asserting that if registration and draft are instituted, they must include women as matter of equity). Though NOW opposed the reinstatement of draft registration in general during hearings concerning reactivation of the MSSA, the organization contended that if registration was commenced, women and men both must be included in order to promote equity among the genders. Id. The extension of such an argument would seem to assert that qualified women should also face the same combat liabilities as qualified men as a matter of equity.