

## **EQUAL PAY FOR EQUAL WORK?— THE DISTRIBUTIONAL EFFECTS OF THE ASSIGNMENT POLICY FOR MILITARY WOMEN**

**CHRISTINA M. DIECKMANN\***

In September 2003, Captain Kellie McCoy was leading a platoon of soldiers in a four-truck convoy on an Iraqi highway between Fallujah and Ramadi when her platoon was ambushed. The lead truck hit an Improvised Explosive Device (IED) as another IED detonated behind it. The enemy rushed the convoy from both sides of the road, firing at the trucks with rifles and rocket-propelled grenades. Captain McCoy's Humvee was the only one that survived the attack; the other three vehicles were badly damaged by the bombs and by small arms fire, and several of the soldiers were wounded. With cover only from the rooftop gunner and her own M-4 carbine, Captain McCoy managed to rescue all of the men from the other trucks while under continuous fire from the attackers, eventually driving the four-seat Humvee loaded with twelve passengers to safety. For her actions that afternoon, Captain McCoy was awarded the Bronze Star.<sup>1</sup>

There was a time in the not-too-distant past when driving a truck between two cities was considered a routine and relatively safe military assignment. Then, as now, a unit undertaking this

---

\* JD, Columbia Law School. Thank you to Professor Michael Graetz for his help and feedback throughout; to Col. Maritza Ryan, Professor and Head, Department of Law, United States Military Academy, for guidance in an unfamiliar subject; and to Pooja Awatramani for her indispensable comments on the working draft. Finally, thank you always to my wonderful family for your love and support.

<sup>1</sup> Richard Sisk, *3 Days into Iraq Tour, Airborne Commander Stares Down Death Bronze Star Hers After Unit Ambushed*, DAILY NEWS (N.Y.), Dec. 26, 2004, at 40.

task would be known as a combat support unit. However, since U.S. military involvement in Afghanistan and Iraq began, the roads in those nations have proved to be anything but safe. Meanwhile, many of the more than 220,000 women who have served in these wars since 2001<sup>2</sup> have undertaken the essential and dangerous job of transporting troops, equipment, and supplies along the desert highways. Military women regularly come under enemy fire in these and other "combat support" capacities.<sup>3</sup>

Yet, nearly two decades after the last statutory bar to women's participation in combat was removed, female service members in the Army, Navy, Air Force and Marine Corps remain barred from positions that involve direct ground combat under a Department of Defense policy.<sup>4</sup> This policy has remained in place even as the days of neat, congruent battlefields and easily identifiable front lines have largely disappeared. And, in response to operational realities on the ground, military women in Iraq and Afghanistan have been engaging in combat operations, sometimes under the radar of the official assignment policy.<sup>5</sup>

For decades, scholars and commentators have debated the constitutional, social, political and military readiness issues surrounding the combat exclusion.<sup>6</sup> The courts have weighed in, giving substantial deference to legislative judgment in the face of statutes and policies that, on their very faces, employ sex-

---

<sup>2</sup> Lizette Alvarez, *G.I. Jane Stealthily Breaks the Combat Barrier*, N.Y. TIMES, Aug. 16, 2009, at A1. The number of women deployed includes both full-time active duty military personnel and reservists. According to recently available Department of Defense (DoD) data, there are 195,991 women on active duty, and another 146,914 in the reserves. OFFICE OF THE SEC'Y, U. S. DEP'T OF DEFENSE, DEMOGRAPHICS 2007: PROFILE OF THE MILITARY COMMUNITY 11, 63 (2009). However, this Article focuses only on women in the active duty force.

<sup>3</sup> See *infra* Part I.C.

<sup>4</sup> See *infra* Part I.B.

<sup>5</sup> See *infra* notes 54–57 and accompanying text.

<sup>6</sup> See *infra* Part II.A.

based classifications.<sup>7</sup> This literature has paid relatively little attention to how women in the military have been impacted economically by their exclusion from combat positions.

This Article aims to assess whether distributional inequalities arise from the Department of Defense policy excluding women from direct ground combat in the U.S. military. Discovering that economic inequality does result from the policy, especially in the upper ranks, it then assesses whether any existing legal framework could remedy the disparities. Finding that none can, the Article concludes with a call for a reassessment of the policy.

Part I lays out the history of the combat exclusion and observes that regardless of the official policy, military women are in fact widely engaged in ground combat operations. Part II discusses the previous scholarly treatment of the policy and argues that the policy's discriminatory effects can be better understood by taking its economic impacts more comprehensively into account. Part III assesses the distributional effects of the combat exclusion, and Part IV asks whether the existing legal frameworks of gender discrimination or Title VII can remedy the policy's disparate impact.

## **I. History of the Combat Exclusion and Its Status Today**

Women have served the U.S. Armed Forces since the Revolutionary War.<sup>8</sup> Before World War II, their service arose mainly in civilian support services such as laundry and food preparation.<sup>9</sup> In World War I, 23,000 women served in the United States and overseas as nurses in the Army Nurse Corps and Navy Nurse Corps.<sup>10</sup> In World War II, women served in the Women's Army Auxiliary Corps (WAAC), in the Navy program

---

<sup>7</sup> See *infra* Part IV.A.

<sup>8</sup> Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL'Y 1011, 1020 (2007).

<sup>9</sup> *Id.*

<sup>10</sup> Connie L. Reeves, *The Military Woman's Vanguard: Nurses, in IT'S OUR MILITARY, TOO!: WOMEN AND THE U.S. MILITARY* 73, 97 (Judith Hicks Stichm ed., 1996).

Women Accepted for Volunteer Emergency Service (WAVES), in the Marine Corps Women's Reserve and in the Coast Guard Women's Reserve.<sup>11</sup> They served in administrative and support capacities, as nurses, and, in smaller numbers, in up-to-then male-only positions such as air traffic controllers, mechanics, and even pilots, shuttling military aircraft from location to location.<sup>12</sup> All told, more than 400,000 women served in the U.S. Armed Forces during World War II.<sup>13</sup>

Following World War II, women were integrated into the standing armed forces of the United States with the adoption of the Women's Armed Services Integration Act of 1948.<sup>14</sup> Under this statute, women's positions were capped at two percent of the total force,<sup>15</sup> and women were explicitly barred from combat positions.<sup>16</sup> Interestingly, the combat exclusion provisions were not part of the original bill, but were proposed as an amendment by Representative Carl Vinson, a Democrat from Georgia, during a 1947 House Armed Services Committee hearing.<sup>17</sup> Though representatives of the armed services did not particularly

---

<sup>11</sup> MARTEN BINKIN & SHIRLEY J. BACH, *WOMEN AND THE MILITARY* 7 (1977).

<sup>12</sup> *Id.*

<sup>13</sup> McSally, *supra* note 8, at 1021.

<sup>14</sup> Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356 (codified as amended in scattered sections of 5 U.S.C., 10 U.S.C., 34 U.S.C. and 50 U.S.C.).

<sup>15</sup> See *id.* §§ 102 (placing a two percent cap on women in the Army), 202 (Navy), 213(b) (Marine Corps), & 302 (Air Force).

<sup>16</sup> See *id.* §§ 210 (excluding Navy women from aircraft on combat missions and all naval vessels except hospital and transport ships), 307(a) (excluding Air Force women from aircraft on combat missions), 104(g) (granting the Secretary of the Army authority to prescribe the duties to which female officers may be assigned). Though the Army was not subject to a statutory combat exclusion, women were always excluded from combat by Army policy. SARA L. ZEIGLER & GREGORY G. GUNDERSON, *MOVING BEYOND G.I. JANE: WOMEN AND THE U.S. MILITARY*, 43 (2005).

<sup>17</sup> Judith Wagner DeCew, *The Combat Exclusion and the Role of Women in the Military*, 10 *HYPATIA* 56, 61 (1995).

seem to support the amendment,<sup>18</sup> once suggested it stuck; though the 1947 bill did not pass, the 1948 bill contained statutory combat exclusions for women in the Navy and Air Force (the Army already had a combat exclusion policy).<sup>19</sup>

In the several decades following the Women's Armed Services Integration Act, the role of women in the military expanded gradually. The combat exclusion's history from this point forward can be viewed in three relatively brief eras. The first runs from the abolition of the draft and transition to an all-volunteer force to the end of the Persian Gulf War; this period is described in Part I.A. below. The second runs from the early years of the Clinton administration to the immediate aftermath of the attacks of September 11, 2001, and is discussed in Part I.B. The final period began with the invasion of Afghanistan in October 2001 and continues to the present day, and is considered in Part I.C.

#### **A. Filling in the Gaps: Expanding Female Enlistment, the Equal Rights Amendment, and the "Risk Rule"**

The first period of women's integration into the U.S. military following World War II was characterized by minimal change through the early 1970s, followed by rapid expansion after the abolition of the draft. The two percent cap established by the Women's Armed Services Integration Act was repealed in 1967, but in 1971 women still only accounted for 1.6% of military personnel.<sup>20</sup> In 1973, the military underwent enormous changes with the end of the draft and the transition to an all-volunteer force.<sup>21</sup> As anticipated, male enlistment declined as a result of this change. Out of necessity, as well as in response to societal pressure, the military began to increase its recruitment

---

<sup>18</sup> *Id.* at 62.

<sup>19</sup> *Id.*

<sup>20</sup> BINKIN & BACH, *supra* note 11, at 14–15.

<sup>21</sup> Military Selective Service Act of 1970, Pub. L. No. 92-129, § 101(a) (35), 85 Stat. 348, 353, *amending* Military Selective Service Act of 1967 § 17(c), 50 U.S.C. app. § 467(c).

of women<sup>22</sup> and to expand the positions open to them. By 1976, women comprised 5.2% of the force.<sup>23</sup> Both the removal of the cap, and especially the end of the draft and the recruitment measures that followed, led to an increase in the number of women in the armed forces. Though few changes were made to the combat exclusion statutes and policies during the 1970s, important changes to military personnel policy enhanced the status of women in the services.<sup>24</sup>

Questions of women entering the draft and combat were extensively discussed in this period during the debates over the Equal Rights Amendment (ERA),<sup>25</sup> a constitutional amendment which, it was generally agreed on both sides, would require

---

<sup>22</sup> Jodi Wilgoren, *A Nation at War: Women in the Military; A New War Brings New Role for Women*, N.Y. TIMES, Mar. 28, 2003, at B1.

<sup>23</sup> BINKIN & BACH, *supra* note 11, at 15. See also Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 108 n.45 (2008) (detailing a variety of studies conducted during the 1970s that discussed the necessity and importance of expanding service opportunities and recruitment of women in the armed forces).

<sup>24</sup> BINKIN & BACH, *supra* note 11, at 17. As a result of the changes, women were permitted to command mixed-gender units, were admitted to the service academies, and were afforded expanded opportunities for training; additionally, the highly discriminatory policy of automatically discharging women who became pregnant while in the military was eliminated.

<sup>25</sup> H.R.J. Res. 208, 92d Cong. (1972). The text of the ERA reads:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section. 3. This amendment shall take effect two years after the date of ratification.

women to register for the draft.<sup>26</sup> In 1980, President Carter also proposed to begin registering women for the Selective Service System.<sup>27</sup> Throughout both the ERA ratification debates and the debates over Carter's proposal, proponents stressed, and opponents disputed, that neither of these changes would require women to undertake combat positions.<sup>28</sup>

The ERA's supporters argued that Congress was still free to ban women from combat under the War Powers Clause.<sup>29</sup> The House's primary sponsor of the Amendment, Representative Martha Griffiths, emphasized that the military would retain its discretion in making troop assignments. Griffiths said, "[T]he draft is equal. That is the thing that is equal. But once you are in the Army you are put where the Army tells you you are going to go. The thing that will happen with women is that they will be the stenographers and telephone operators."<sup>30</sup>

Meanwhile, ERA opponents imagined the Amendment's effects differently. As Phyllis Schlafly, one of the ERA's chief antagonists, put it, "the Equal Rights Amendment will positively make women subject to the draft and for combat duty on an equal basis with men. Most women's libbers admit that this is

---

<sup>26</sup> See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 60–61 (1986). Responding to concerns that the ERA would invalidate the draft and threaten military readiness, authors of an article in the *YALE LAW JOURNAL* explained immediately after the Joint Resolution proposing the ERA was passed that "[r]ecognizing the concern of Congress with maintaining the Armed Forces, courts would construe the Amendment to excise the word 'male' from the two main sections of the [Selective Service Act of 1967], dealing with registration and induction, thereby subjecting all citizens to these duties." Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871, 970–71 (1971).

<sup>27</sup> See Hasday, *supra* note 23, at 114, 108–17 (giving a thorough history of the debates' focus on integrating women into the draft and the effect this change would have on women serving in combat).

<sup>28</sup> *Id.* at 112–14.

<sup>29</sup> MANSBRIDGE, *supra* note 26, at 62.

<sup>30</sup> *Id.* at 63.

what they want.”<sup>31</sup> At the end of the day, public concerns over female assignment to combat contributed to the ERA’s demise.

Still, even after the ERA failed to ratify, women continued to serve in increasingly expanded roles in the military, deploying to three smaller conflicts during the 1980s. First, 170 female Army troops were involved in the 1983 invasion of Grenada.<sup>32</sup> Female troops also assisted in the 1986 air strikes on Libya.<sup>33</sup> Finally, 800 Army women, including two female commanders, participated in the 1989 invasion of Panama.<sup>34</sup>

At the same time, the Department of Defense (DoD) was reassessing its assignment policies. In 1988, the DoD adopted the “Risk Rule,” which established a service-wide policy for the assignment of women. It stated: “risks of direct combat, exposure to hostile fire, or capture are proper criteria for closing positions or units to women.” Positions could be closed to women where the risks of those positions were “equal to, or greater than, risks for direct combat units or positions with which they are normally in close proximity.”<sup>35</sup> The rule was put to the test in the 1991 Persian Gulf War, in which 40,000 female troops were deployed and fifteen were killed.<sup>36</sup> This represented an important turning point in women’s involvement in the U.S. military, comparable to the end of the draft in 1973.

After the end of the Persian Gulf War, the question of whether the combat exclusions were either necessary or defensible arose in earnest for the first time since the ERA.

---

<sup>31</sup> *Id.* at 111.

<sup>32</sup> Judith Hicks Stichm, *Just the Facts, Ma’am*, in *IT’S OUR MILITARY, TOO!: WOMEN AND THE U.S. MILITARY* 60, 69 (Judith Hicks Stichm ed., 1996).

<sup>33</sup> ZEIGLER & GUNDERSON, *supra* note 16, at 42.

<sup>34</sup> Stichm, *supra* note 32.

<sup>35</sup> Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 *HAMLIN J. PUB. L. & POL’Y* 199, 204 (1994).

<sup>36</sup> William L. O’Neill, *Women and Readiness*, in *WOMEN IN THE MILITARY* 171, 172 (Rita James Simon ed., 2001).



debates.<sup>37</sup> In the National Defense Authorization Act passed in 1991, Congress repealed the last statutory prohibitions on women serving on combat aircraft.<sup>38</sup> Senators Sam Nunn, John Warner, John McCain, and John Glenn offered an amendment to the Act to create a commission to "assess the laws and policies restricting the assignment of female service members and [to] make findings on such matters."<sup>39</sup> The fifteen-member commission reported its findings and recommendations in 1992.<sup>40</sup> It recommended that women be excluded from ground combat positions and that these exclusions be formally codified.<sup>41</sup> It furthermore recommended that aircraft combat restrictions be reinstated,<sup>42</sup> and then (somewhat idiosyncratically) recommended that Congress repeal the law prohibiting women from serving on naval combat vessels, and that all Navy vessels except submarines be opened to women.<sup>43</sup> Ignoring all but the commission's combat vessel

---

<sup>37</sup> See Stichm, *supra* note 32.

<sup>38</sup> National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531, 105 Stat. 1290, 1365 (1991).

<sup>39</sup> *Id.* § 541(a).

<sup>40</sup> PRESIDENTIAL COMM'N ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, WOMEN IN COMBAT: REPORT TO THE PRESIDENT (1992) [hereinafter PRESIDENTIAL COMM'N].

<sup>41</sup> *Id.* at 24.

<sup>42</sup> *Id.* at 28.

<sup>43</sup> *Id.* at 31.

recommendation, in 1993, Congress repealed the final remaining statutory prohibition on women serving on combat ships.<sup>44</sup>

### B. Establishment of the Direct Ground Combat Rule

When President Clinton entered office, he appointed Les Aspin to the post of Secretary of Defense. Aspin began to reassess the DoD's assignment policy for women.<sup>45</sup> In 1994, Aspin promulgated the current Department of Defense policy on the assignment of women in the military in a January memorandum. It reads in relevant part:

Rule. Service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground, as defined below.<sup>46</sup>

---

<sup>44</sup> National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541(a), 107 Stat. 1547, 1659 (1993) *repealing* 10 U.S.C. § 6015 (1992), which provided in relevant part:

The Secretary 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.

<sup>45</sup> The Commission had also specifically recommended that the Department of Defense's 1988 "Risk Rule" be preserved. *See* PRESIDENTIAL COMM'N, *supra* note 40, at 36.

<sup>46</sup> Memorandum from Sec'y of Defense Les Aspin, for the Sec'y of the Army, Sec'y of the Navy, Sec'y of the Air Force, Chairman, Joint Chiefs of Staff, Assistant Sec'y of Def. (Pers. and Readiness), Assistant Sec'y of Def. (Reserve Affairs) 1 (Jan. 13, 1994), *reproduced in* MARGARET C. HARRELL ET AL., RAND NAT'L DEF. RES. INST. ASSESSING THE ASSIGNMENT POLICY FOR ARMY WOMEN 72 (2007), *available at* [http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND\\_MG590-1.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG590-1.pdf).

The memo also defined “direct ground combat”:

Definition. Direct ground combat is engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.<sup>47</sup>

In addition to the above exclusion, under the policy, women may also be excluded from positions that collocate with direct ground combat units.<sup>48</sup> Thus, the DoD policy<sup>49</sup> imposes significant limits on the positions to which military women can be assigned. Today, approximately eighty percent of positions across the services can be filled by female personnel.<sup>50</sup> However, the policy only applies to assignment, which the DoD defines as a “relatively permanent” placement of units or individuals in an organization,<sup>51</sup> and not to how personnel are utilized once in the

---

<sup>47</sup> *Id.* at 72–73.

<sup>48</sup> *Id.* at 73.

<sup>49</sup> It should be noted that each branch also operates under its own assignment policy. Though these policies differ in various respects from the Department of Defense’s policy (see HARRELL ET AL., *supra* note 46, at 3), the Department of Defense policy operates as a floor. As a statement of general military policy, therefore, the Department of Defense assignment policy is the most sensible reference, and I will refer to it throughout this note for clarity and simplicity.

<sup>50</sup> MARGARET C. HARRELL & LAURA L. MILLER, *MILITARY READINESS: WOMEN ARE NOT A PROBLEM*, RAND CORP. (1997), [http://www.rand.org/pubs/research\\_briefs/RB7515/index1.html](http://www.rand.org/pubs/research_briefs/RB7515/index1.html). For a comprehensive list of Military Occupational Specialties (MOS) from which women are barred, see DEF. DATA MANPOWER CENTER, *ANNUAL REPORT ON STATUS OF FEMALE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES FY2002-06*, 2-6 (2006).

<sup>51</sup> U.S. DEP’T OF DEFENSE, *DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS*, available at [http://www.dtic.mil/doctrinc/dod\\_dictionary/](http://www.dtic.mil/doctrinc/dod_dictionary/) (last visited July 23, 2011) [hereinafter DoD DICTIONARY].

theater of operations.<sup>52</sup> Individuals or larger units of troops can also be temporarily reallocated to meet operational needs; one of the most common means of doing this is attachment, or the “[t]he placement of units or personnel in an organization where such placement is relatively temporary.”<sup>53</sup>

### C. Today: Women Are Serving in Combat

Since the U.S. invasions of Afghanistan and Iraq, attachment has been one of the ways that women have served in combat despite the direct ground combat rule: they have been attached to units to fill manpower shortages as needed, particularly when commanders are confronted with complicated environments in which the battlefield is ill-defined and insurgents are not easily distinguishable from civilians.<sup>54</sup>

There are also certain types of field missions in Iraq and Afghanistan that are more appropriately undertaken by a female soldier. To fight the insurgencies, U.S. forces raid houses and search civilians on credible intelligence of a threat. Since it brings great shame on a woman to be searched by a male soldier or to have male soldiers enter her home when only women are present, teams of female soldiers have been organized to undertake these often-dangerous missions.<sup>55</sup> These include the

---

<sup>52</sup> HARRELL ET AL., *supra* note 46, at 4.

<sup>53</sup> DoD DICTIONARY, *supra* note 51.

<sup>54</sup> See Elizabeth Bumiller, *For Female Marines, Tea Comes with Bullets*, N.Y. TIMES, Oct. 2, 2010, at A1; see also Alvarcz, *supra* note 2 (describing a commander’s *de facto* gender integration of his field artillery battalion, using women who were, on paper, assigned to a different company in the division, to meet his operational needs); Christopher Putko, *USAWC Women in Combat Survey Interpretation*, in WOMEN IN COMBAT COMPENDIUM § 1-2, 9-10 (Michele M. Putko & Douglas V. Johnson II, eds., 2008) (finding that 60% of survey respondents felt that the practice of augmenting direct combat units with support units that include female soldiers violates the Army policy of excluding women from direct ground combat).

<sup>55</sup> ERIN SOLARO, WOMEN IN THE LINE OF FIRE: WHAT YOU SHOULD KNOW ABOUT WOMEN IN THE MILITARY 82–83, 119 (2006); see also Bumiller, *supra* note 54; Michelle Norris, *On the Ground in Iraq: Three Women’s Stories*, NPR (Oct. 2, 2007) [hereinafter Norris, *On the Ground*], available at <http://www.npr.org/tcmplates/story/story.php?storyId=14901578>.

Marine Corps' Female Engagement Teams, popularly known as "lioness" teams, who can be exposed to hostile fire at any time while "outside the wire" (off of a base).<sup>56</sup> Aside from the diplomatic value of this cultural sensitivity, it has also been observed that the mere presence of female soldiers in these situations often tends to deescalate potential conflict by reducing tension and allowing cooler heads to prevail, thus potentially saving both soldier and civilian casualties.<sup>57</sup>

These more formal attachments are one major source of exposure to combat situations for military women. In addition, the nature of battle in the current conflicts is drastically different from the understanding of the term at the time the assignment policy was drafted.<sup>58</sup> In Iraq and Afghanistan today, battlefields are both non-linear and asymmetrical. A non-linear battlefield is one in which there is no clearly defined front, rear, and flanks.<sup>59</sup> In traditional warfare, armies come up against one another in a geographically confined area in which the front is where most of the fighting happens. The rear is relatively safe, and is where most support operations take place.<sup>60</sup> In this type of battle, it is fairly easy to delineate between occupations and positions that

---

<sup>56</sup> See, e.g., Bumiller, *supra* note 54 (describing the regular fire under which such a team came under while deployed in Helmand Province, Afghanistan).

<sup>57</sup> SOLARO, *supra* note 55, at 85 ("The Iraqis viewed the presence of female soldiers not only as a sign of respect, for it meant that Iraqi women would be searched by female, not male, soldiers, but also as a guarantee that any violence would be kept within the realm of what is referred to in the Western tradition as civilized warfare."). See also Bumiller, *supra* note 54 ("To the surprise of some commanders, the female Marines have sometimes connected more readily with Afghan men than have male Marines. Capt. Brandon Turner, the commander of G Company in southern Marja, said, 'You put a lady in front of them, they'll start blabbing at the mouth'.").

<sup>58</sup> HARRELL ET AL., *supra* note 46, at 138-41.

<sup>59</sup> U.S. GOV'T ACCOUNTING OFFICE *sub nom.* U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-99-7, GENDER ISSUES: INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION 9 (1998).

<sup>60</sup> *Id.* at 8-9.

engage in direct ground combat and those that do not,<sup>61</sup> and thus following the DoD assignment policy is reasonably straightforward. Symmetrical force, on the other hand, refers to the defenses the opposition targets and the types of weapons used. "Here, symmetry implies that the enemy would have employed weapons and techniques that were similar to those that the U.S. Military would use."<sup>62</sup>

The wars in Iraq and Afghanistan have involved highly asymmetrical uses of force.<sup>63</sup> "Asymmetrical tactics are those designed by anti-U.S. forces to harm U.S. assets without going up against the 'teeth' of U.S. defenses."<sup>64</sup> Attacks on relatively less-defended convoys, forward operating bases, and civilian targets occur regularly, and this has further blurred the line between "combat" and "combat support." It has been predicted that the type of non-linear, asymmetrical battlefields on which the military has been fighting in Afghanistan and Iraq will be seen regularly in future armed conflicts.<sup>65</sup> This has serious implications with respect to who is exposed to what risks in the theater of operations.

Responding to this situation on the ground in a move that was opposed from the outset by the Pentagon and the White House, Representative Duncan L. Hunter, Chair of the House Armed Services Committee, introduced an amendment to the 2006 National Defense Authorization Act<sup>66</sup> that purported to codify the assignment policy as articulated in the 1994 Aspin

---

<sup>61</sup> HARRELL ET AL., *supra* note 46, at 140–41. Even under these conditions, however, women in certain positions, such as nurses, have always been exposed to combat. For example, during the World War II Battle of Anzio, six Army nurses were killed in action and four others were awarded the Silver Star for courage under fire following the bombing of the hospital tents. McSally, *supra* note 8, at 1021.

<sup>62</sup> HARRELL ET AL., *supra* note 46, at 138.

<sup>63</sup> *Id.* at 139.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> H. Amdt. 210, 109th Cong. (2005).

Memorandum.<sup>67</sup> In support of the amendment, Representative Hunter said, "The nation should not put women into the front lines of combat. In my judgment, we will cross that line soon unless we make a policy decision. . . . The American people have never wanted to have women in combat, and this [amendment] reaffirms that policy."<sup>68</sup> The amendment passed the Personnel Subcommittee on a party-line vote.<sup>69</sup>

Committee Democrats criticized the proposed amendment as one that belittled the success of military women in Iraq.<sup>70</sup> The Army Vice Chief of Staff wrote that "[t]he proposed amendment will cause confusion in the ranks and will send the wrong signal to the brave young men and women fighting the global war on terrorism. This is not the time to create such confusion."<sup>71</sup>

After just one week, Representative Hunter was forced to back down. Following a meeting with Secretary of Defense Donald Rumsfeld, Hunter agreed to a compromise amendment.<sup>72</sup> The DoD was at that time required to report to Congress at least thirty days before it made any changes to the assignment policy;

---

<sup>67</sup> See H.R. Rep. No. 89, at 321–22 (2005). The report criticized the manner in which the Army had been deploying female troops in Iraq, suggesting it violated the collocation policy, and offered a proposed section 574, which the report described as codifying the 1994 DoD direct ground combat exclusion policy.

<sup>68</sup> Bryan Bender, *Combat Support Ban Weighed for Women; Pentagon Opposes GOP Proposal*, BOSTON GLOBE, May 18, 2005, at A1.

<sup>69</sup> Rowan Scarborough, *Hunter Bucks the Top Brass*, WASH. TIMES, May 16, 2005, at A1.

<sup>70</sup> Bender, *supra* note 68.

<sup>71</sup> Scarborough, *supra* note 69.

<sup>72</sup> John Hendren, *Lawmakers Retreat on Women in Combat*, L.A. TIMES, May 26, 2005, at A1.

the new amendment extended this period to sixty days. Otherwise, however, it did not alter the status quo.<sup>73</sup>

The following event illustrates the difficulty of preventing women from entering combat situations in a war marked by non-linear battlefields and asymmetrical uses of force. Abbie was stationed at Camp Warhorse in Baqubah, a city about 50 kilometers northeast of Baghdad.<sup>74</sup> On the night of the mortar attack that almost killed her and several of her comrades, she had gone to the recreation building to check her email.<sup>75</sup> Camp Warhorse, like other forward operating bases in Iraq, was a regular target of insurgent attacks.<sup>76</sup> Abbie did not even have the opportunity to open a browser before the shell crashed through the wall of the building. Seconds later, another hit, and then another.<sup>77</sup> Over the course of the night, six more mortars were aimed at the base, some directly at the base hospital where she and others who had not been hit were bringing the wounded.<sup>78</sup>

---

<sup>73</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 541, 119 Stat. 3136, 3251 (2005). The amendment also commissioned a study on the Army's assignment policy; this study was released in 2007. See HARRELL ET AL., *supra* note 46, at iii.

<sup>74</sup> HELEN BENEDICT, *THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ* 137 (2009).

<sup>75</sup> *Id.* at 137-38.

<sup>76</sup> *Id.* at 137.

<sup>77</sup> *Id.* at 138-39.

<sup>78</sup> *Id.*



The reality is that women in the United States military are serving in combat today.<sup>79</sup> “We have crossed that line in Iraq,” Lt. Colonel Michael A. Baumann stated bluntly. Baumann added that “the military is going to do what the military needs to do. And they are needing to put women in combat.”<sup>80</sup> Admiral Mike Mullen, the current Chairman of the Joint Chiefs of Staff,<sup>81</sup> shared a similar view in a recent speech during the Women and War Conference at the United States Institute of Peace:

In a war where there is no longer a clear delineation between the frontlines and the sidelines, where the war can come at you from any direction. . . . This will be the first generation of veterans where large segments of women returning will have been exposed to some form of combat. And I know what the law says and I know what it requires. But I’d be hard pressed to say that any woman who

---

<sup>79</sup> See Paula Broadwell, Editorial, *Women Soldiers Crucial to U.S. Mission*, BOSTON GLOBE, Aug. 26, 2009 at 13 (“Whether they are in ‘combat units’ or not, women are on the front lines, and they are invaluable.”); Damien Cave, *A Combat Role, and Anguish Too*, N.Y. TIMES, Nov. 1, 2009, at A1 (documenting instances of combat-related Post Traumatic Stress Disorder among female Iraq and Afghanistan veterans); Carolyn Davis, *Women in the Ranks*, PHILA. INQUIRER, Dec. 10, 2009, at D1 (observing that women are serving “in the thick of battle” despite the combat exclusion); Catherine Ross, Editorial, *Home Fires: Women’s Work*, N.Y. TIMES, Feb. 15, 2010, available at <http://opinionator.blogs.nytimes.com/2010/02/15/womens-work/> (describing her experience in Iraq attached to an infantry unit); Ann Scott Tyson, *For Female GIs, Combat is a Fact*, WASH. POST, May 13, 2005 (describing the combat exclusion policy as “archaic and not attainable” in the face of the type of battles being fought in Iraq); Kelley Beaucar Vlahos, *Women at War*, AM. CONSERVATIVE, Apr. 7, 2007 at 15 (“While the Bush administration initially appeared less interested in integration than its predecessor, the decision to invade Iraq in 2003, the miscalculation of the subsequent insurgency and civil war, and the desire to wage a global terror war have made it impossible for the all-volunteer force to function without women in combat roles.”); see also *supra* notes 1–2 and accompanying text.

<sup>80</sup> Alvarez, *supra* note 2.

<sup>81</sup> JCS Bio: Admiral Mike Mullen Chairman of the Joint Chiefs of Staff, JCS.MIL, <http://www.jcs.mil/biography.aspx?ID=9> (last visited July 23, 2011) (Chairman of the Joint Chiefs of Staff is “the highest-ranking officer in the U.S. Armed Forces and the President’s principal military advisor.”).

serves in Afghanistan today or who's served in Iraq over the last few years did so without facing the same risks of their male counterparts.<sup>82</sup>

Casualty and decoration statistics bear further witness to these on-the-ground observations. As of February 28, 2011, 137 women have been killed in Iraq and Afghanistan,<sup>83</sup> and another 751 have been wounded.<sup>84</sup> Among female veterans, 8454 have been diagnosed with post-traumatic stress disorder ("PTSD"), representing a rate of PTSD among women veterans approximately equal to their male counterparts.<sup>85</sup> As of August 2006, 1788 women have been awarded the Combat Action Badge (CAB) for service in Iraq or Afghanistan.<sup>86</sup> The CAB, an Army decoration, is awarded to a member of any branch of the armed forces who is: "performing assigned duties in an area where hostile fire pay or imminent danger pay is authorized,"

---

<sup>82</sup> Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, Keynote Speech at the United States Institute of Peace Women and War Conference (Nov. 4, 2010), at 2–3, *available at* <http://www.usip.org/files/November%204%20Speech%20By%20Admiral%20Mullen.pdf>.

<sup>83</sup> U.S. DEP'T OF DEFENSE, OPERATION IRAQI FREEDOM MILITARY DEATHS, MAR. 19, 2003 THROUGH FEB. 28, 2011, *available at* <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/oif-deaths-total.pdf> (last visited July 23, 2011) (110 women have been killed in Operation Iraqi Freedom); U.S. DEP'T OF DEF., OPERATION ENDURING FREEDOM MILITARY DEATHS, OCT. 7, 2001 THROUGH FEB. 28, 2011, *available at* <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/ocfddeaths.pdf> (last visited July 23, 2011) (27 women have been killed in Operation Enduring Freedom).

<sup>84</sup> U.S. DEP'T OF DEFENSE, OPERATION IRAQI FREEDOM MILITARY WOUNDED IN ACTION, MAR. 19, 2003 THROUGH FEB. 28, 2011, *available at* <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/oif-wounded-total.pdf> (last visited July 23, 2011) (624 women have been wounded in Operation Iraqi Freedom); U.S. DEP'T OF DEF., OPERATION ENDURING FREEDOM MILITARY WOUNDED IN ACTION, OCT. 7, 2001 THROUGH FEB. 28, 2011, *available at* <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/ocfwia.pdf> (last visited July 23, 2011) (127 women have been wounded in Operation Enduring Freedom).

<sup>85</sup> Cavc, *supra* note 79.

<sup>86</sup> HARRELL ET AL., *supra* note 46, at 143 (noting that 1521 female enlisted have received the CAB), 146 (noting that there are 242 female officers), 148 (noting that there are 25 female warrant officers).

and is “personally present and actively engaging or being engaged by the enemy, and performing satisfactorily in accordance with the prescribed rules of engagement.”<sup>87</sup> Meanwhile, the direct ground combat exclusion policy remains in place. Practically speaking, this means that although women may actually be serving and leading troops in combat, evidence of this combat service does not appear in their personnel files, because, “officially,” women cannot be assigned to ground combat units.<sup>88</sup> This raises serious questions about whether it is acceptable not to share the benefits of combat assignment, especially when many women in the military are undertaking its burdens. This Article will return to the question of what benefits arise from assignment to a combat unit in Part III.

## **II. Rationales for and Criticisms of the Combat Exclusion**

As discussed in Part I, women have been excluded from combat by law or policy since the role of women in the U.S. military was formalized more than seventy years ago. Gradual changes have tended to occur in response to pragmatic concerns. Each time conditions on the ground have ushered in such changes, however, voices from across the political spectrum have offered opinions on the prudence and consequences of the proposed new order as compared with the status quo. This section first summarizes the debate and then considers its effect.

### **A. The Debate: Is the Combat Exclusion Policy Objectively Justifiable?**

It is worth taking a moment to discover if, despite the events of the most recent wars, the current DoD assignment policy excluding women from direct combat is defensible. Whether there are legitimate rationales for the DoD’s assignment policy is an important element of the larger question of whether the policy should stand at all. These rationales must not stereotype based on traditional notions of appropriate roles for men and women and must not lump all members of one gender

---

<sup>87</sup> *Combat Action Badge*, ARMY.MIL, <http://www.army.mil/symbols/CombatBadges/action.html> (last visited July 23, 2011).

<sup>88</sup> See *infra* Part III.B.1 (offering further discussion of promotion practices in the U.S. military).

into a category based on "loose-fitting generalities" about members of the group.<sup>89</sup>

The policy decisions of professionals in the Department of Defense have historically been granted significant deference by the courts, Congress and the public.<sup>90</sup> The military places limitations on its personnel that other public employers cannot.<sup>91</sup> Policies that limit constitutional rights among service members for reasons of effective national defense may be necessary in certain situations.<sup>92</sup> But a discriminatory policy that serves no adequate military purpose is simply discriminatory and should be treated in the same way that discriminatory employment policies are treated in the civilian context.

---

<sup>89</sup> *Craig v. Boren*, 429 U.S. 190, 209 (1976).

<sup>90</sup> Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 337 (2005). See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (rejecting a First Amendment challenge to Air Force's refusal to allow Air Force psychologist to wear yarmulke while on duty, the Court stated, "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."); *Rostker v. Goldberg*, 453 U.S. 57, 68–69 (1981) (observing that the U.S. Constitution requires the Court to give heightened deference to Congress in matters concerning military affairs); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments."); *Mindes v. Scaman*, 453 F.2d 197, 201 (5th Cir. 1971) (concluding that, in the absence of exceptional circumstances, internal military affairs should not be reviewed by the courts).

<sup>91</sup> See James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 178 (1984); see also *Goldman*, 475 U.S. at 507; *Parker v. Levy*, 417 U.S. 733, 743–44 (1974) (observing that the Court scrutinizes limitations on soldiers' rights differently than limits on those of civilians); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.").

<sup>92</sup> See Hirschhorn, *supra* note 91, at 186–204 (describing a long line of cases in which the Supreme Court has distinguished the U.S. Military as a "separate community" in which traditional constitutional rights are subordinated to the needs of the organization).

The assignment policy embraces gender-based disparate treatment on its face. Such gender-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>93</sup> While national defense easily qualifies as an important interest, there are serious questions as to whether any of the justifications normally raised in support of the policy render it substantially related to meeting that national security interest. The following rationales for the combat exclusion typify those most regularly cited in its support.<sup>94</sup>

*Physiological differences between women and men.* The most prominent argument in support of excluding women from combat is that women are, on average, physically weaker than men, and thus should be excluded from infantry and other "grunt" positions because of the physical demands of such jobs.<sup>95</sup> Critics have also argued that women, compared with men, are psychologically less conditioned for war<sup>96</sup> and less able to deal with the mental stress of combat.<sup>97</sup> Unequal treatment is

---

<sup>93</sup> *Craig*, 429 U.S. at 197 (1976).

<sup>94</sup> Several thorough treatments of the rationales for the combat exclusion policy and responses to those rationales are available for interested readers. See LORRY M. FENNER & MARIE DEYOUNG, *WOMEN IN COMBAT: CIVIC DUTY OR MILITARY LIABILITY?* (2001), 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, 431-44 (1991).

<sup>95</sup> ZEIGLER & GUNDERSON, *supra* note 16, at 54-56; Arnulfo Urias, *The Politics of Biology: Evolutionary Biology and the Exclusion of Women from Combat*, 14 S. CAL. REV. L. & WOMEN'S STUD. 83, 100-01 (2004).

<sup>96</sup> Kinglsey R. Browne, *Women at War: An Evolutionary Perspective*, 49 BUFF. L. REV. 51, 77-87 (2001).

<sup>97</sup> DeCew, *supra* note 17, at 65.

permissible in the face of real gender differences,<sup>98</sup> one argument goes, so the different assignment policy for women is not a constitutional problem since men and women are not equally situated with respect to physical strength.

There are a number of responses to these arguments. To begin with, the problem of physical strength would be easily solved if the branches were to simply adopt universal, or gender-neutral, qualifications for the various positions.<sup>99</sup> Men and women who meet the gender-neutral standards could serve in the job, while those who do not could fill other positions. Moreover, it has been shown that women who undertook a regimen of physical training experienced marked improvement in strength and endurance tasks, such that they were able to perform these tasks comparably to many men.<sup>100</sup>

A similar response is appropriate to arguments based on psychological traits. Recent statistics from the Department of Veterans Affairs (VA) show that female Operation Iraqi Freedom veterans exposed to combat are suffering from Post-Traumatic

---

<sup>98</sup> See, e.g., *Nguyen v. I.N.S.*, 533 U.S. 53, 62 (2001) (upholding law that treated the foreign-born, illegitimate children of one U.S. citizen and one non-U.S. citizen differently on the basis of whether the mother or the father was the citizen, on the ground that mothers and fathers have different proximal relationships with the child at birth); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) (“[T]he Equal Protection Clause does not ‘demand that a statute necessarily apply equally to all persons’ or require ‘things which are different in fact . . . to be treated in law as though they were the same’.” (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966))).

<sup>99</sup> McSally, *supra* note 8, at 1050–51; Snyder, *supra* note 94, at 433; Krystyna M. Cloutier, *Marching Toward War: Reconnoitering the Use of All Female Platoons*, 40 CONN. L. REV. 1531, 1561 n.228 (2008); see also Laurie J. Sanderson-Walcott, *The Army's Combat Exclusion: An Update*, 16 W. ST. U. L. REV. 665, 672 (1989) (“Although there is no reliable data to support the conviction that women are physically unfit for combat, this fear will persist until women are tested under hostile enemy fire.”). But see Serena Mayeri, *A New E.R.A. or a New ERA? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1260 (2009) (observing that adoption of gender-neutral standards in the military could result in a decrease in the number of women that qualify for some positions).

<sup>100</sup> Urias, *supra* note 95, at 110–11; Alexei Barrionuevo, *Limits Of Military Service Anger Women Soldiers*, NEW ORLEANS TIMES-PICAYUNE, Feb. 25, 1996, at A3.

Stress Disorder and major depression at rates comparable to males;<sup>101</sup> if women were psychologically less able to cope with combat stress, one would expect a disparity in the numbers. As one DoD researcher observed, “[f]emale soldiers are actually handling and dealing with the stress of combat as well as male soldiers are.”<sup>102</sup> It is true that the doctrine of real gender differences allows states to treat men and women differently when an objective distinction between the two sexes renders disparate treatment necessary for the accomplishment of a legitimate state objective.<sup>103</sup> However, the Supreme Court does not allow unequal treatment based on stereotypes or averages of the group to which an individual belongs and has generally

---

<sup>101</sup> *Cave*, *supra* note 79.

<sup>102</sup> *Id.*

<sup>103</sup> *See, e.g., Nguyen*, 533 U.S. at 60–62 (finding no violation of equal protection under the Fifth Amendment Due Process Clause by a statute that imposed more onerous requirements for obtaining U.S. citizenship on the child of unmarried parents, only one of whom is a U.S. citizen, when the citizen parent is the father than when the mother is the citizen, because of “the significant difference between their respective relationships to the potential citizen at the time of birth”); *Rostker v. Goldberg*, 453 U.S. 57, 78–79 (1981) (upholding registration requirements applicable only to men under the Selective Service Act after finding that the purpose of the Act was to raise combat troops; the Court noted that because women are not eligible for combat service, men and women are not similarly situated with respect to the purposes of the Act and thus that unequal gender-based treatment under this statute is permissible); *Michael M.*, 450 U.S. at 469–72 (1981) (upholding, against an Equal Protection Clause challenge, a California statutory rape law that applied only to males having intercourse with a female under the age of 18, on the grounds that “young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse” because only women can become pregnant).

required that people be treated as individuals rather than as members of a group based on immutable characteristics.<sup>104</sup>

*Unit cohesion necessary for an effective fighting force.*

There are two related arguments in this category: first, that men will not fight as effectively alongside women because the men will be compelled to try to protect the women from harm;<sup>105</sup> second, that bonding and group trust are stronger among single-gender units, and that these units perform better than poorly-bonded units.<sup>106</sup>

However, there is little independent evidence to suggest that the first concern actually ever occurs.<sup>107</sup> Indeed, “proponents of the position that inclusion of women would decrease group solidarity are unable to offer any concrete

---

<sup>104</sup> See *United States v. Virginia*, 518 U.S. 515, 533 (1998) (“The [state’s justification for gender-based classification] must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”); *Frontiero v. Richardson*, 411 U.S. 677, 688–89 (1973) (rejecting government’s argument that a statute should be upheld on the ground of administrative convenience, because women tend to be financially dependent upon their husbands while men tend not to be financially dependent upon their wives, when the statute at issue automatically granted housing and medical benefits to wives of male service members but required a female service member to prove her husband’s dependency); *Parham v. Hughes*, 441 U.S. 347, 351 (noting that the traditional presumption of validity afforded legislative enactments may be “undermined when a State has enacted legislation creating classes based upon certain . . . immutable human attributes” such as gender (citing, *inter alia*, *Reed v. Reed*, 404 U.S. 71 (1971))).

<sup>105</sup> Lucinda J. Peach, *Gender Ideology in the Ethics of Women in Combat*, in *IT’S OUR MILITARY, TOO!: WOMEN AND THE U.S. MILITARY* 156, 170 (Judith Hicks Stichm ed., 1996); see also Jamie R. Abrams, *The Collateral Consequences of Masculinizing Violence*, 16 WM. & MARY J. WOMEN & L. 703, 745 (2010) (“These protectionist roles complicate military service in opponents’ view because men are inherently inclined to protect women from enemy harm, risking that they become ‘overprotective’ of their female comrades and may jeopardize the success of a mission.”) (citations omitted).

<sup>106</sup> ZEIGLER & GUNDERSON, *supra* note 16, at 58–59; Urias, *supra* note 95, at 129–31; see also Browne, *supra* note 96, at 97–100 (arguing that men have an evolutionary tendency to form male-male coalitions to compete with other men for scarce resources).

<sup>107</sup> ZEIGLER & GUNDERSON, *supra* note 16, at 46.



evidence or proof to support this position.”<sup>108</sup> As to the second concern, studies and recent anecdotal evidence have found no difference between the performance of all-male units and that of mixed-gender units.<sup>109</sup> This evidence suggests that mixed-gender units may be as effective in combat as those whose members are the same sex.

**Public opinion.** It has long been argued that the American public does not support military women serving in ground combat.<sup>110</sup> Likewise, it is said that the American public is unwilling to tolerate female casualties.<sup>111</sup> A lay caller to a radio program typifies this position: “I think that . . . men should do their best to be the protectors in society, more than women. People [in combat] end up hurt physically, mentally, emotionally and bear those scars throughout their lives, and I just would hate to think of anyone in that situation, especially women.”<sup>112</sup>

However, a July 2009 CBS News/New York Times poll found that fifty-three percent of Americans favor women serving in ground combat.<sup>113</sup> Significantly, among Americans age sixty-five and older, only thirty-seven percent support the proposition that women should serve in combat,<sup>114</sup> which suggests that the percentage of those under age sixty-five supportive of women taking on combat roles is measurably greater than fifty-three

---

<sup>108</sup> Urias, *supra* note 95, at 131.

<sup>109</sup> See Peach, *supra* note 105, at 166–67; Alvarez, *supra* note 2.

<sup>110</sup> See *supra* notes 68–69 and accompanying text; see also *Weekend Edition Saturday: Women in Combat: How You Feel About It* (NPR radio broadcast Feb. 26, 2011), available at <http://www.npr.org/2011/02/26/134083528/Women-In-Combat-How-You-Feel-About-It>.

<sup>111</sup> ZEIGLER & GUNDERSON, *supra* note 16, at 48.

<sup>112</sup> *Weekend Edition Saturday*, *supra* note 110 (comments of Kevin Wilson of Willard, Missouri). The caller also admitted that his “feelings are a little more old-fashioned.” *Id.*

<sup>113</sup> Poll: 53% Support Women in Combat Roles, CBSNEWS.COM, Aug. 15, 2009, <http://www.cbsnews.com/stories/2009/08/15/opinion/polls/main5244312.shtml>.

<sup>114</sup> *Id.*

percent.<sup>115</sup> As of February 2011, 137 female troops have been killed in Operation Iraqi Freedom and Operation Enduring Freedom,<sup>116</sup> and 751 women have been wounded in action.<sup>117</sup> While the Iraq war was certainly unpopular, Americans pointed to a number of reasons for their unhappiness with the war that were unrelated to women's deaths, such as overall troop casualties and the large economic costs of the war.<sup>118</sup>

**Dangers of fraternization.** Finally, it has been argued that if women were allowed in combat, men and women would become romantically involved. The perceived dangers are twofold: first, that sexual harassment as well as consensual sexual relationships will destroy unit cohesion,<sup>119</sup> and second, that women would become pregnant and have to be evacuated from the war zone, which is both expensive and dangerous.<sup>120</sup> However, while intercourse and pregnancy are certainly potential outcomes of mixed-gender units, "consensual 'sex in

---

<sup>115</sup> The disparity among demographic groups on social issues is not unique to the debate on women's exclusion from combat. See generally Patrick J. Egan & Nathaniel Persily, *Court Decisions and Trends in Support for Same-Sex Marriage*, THE POLLING REPORT, Aug. 17, 2009, <http://www.pollingreport.com/penp0908.htm> (observing that demographic change has been a factor in the public's increasing support for same-sex marriage).

<sup>116</sup> See *supra* note 83 and accompanying text.

<sup>117</sup> See *supra* note 84 and accompanying text.

<sup>118</sup> For example, a September 2009 CBS News/New York Times poll that found sixty-seven percent of Americans do not feel that the result in Iraq was worth the cost to the United States—in both dollars and loss of life. CBS News/New York Times, *Afghanistan, the Threat of Terrorism, and Iraq*, CBSNEWS.COM, September 24, 2009, [http://www.cbsnews.com/htdocs/pdf/poll\\_afghanistan\\_092409.pdf](http://www.cbsnews.com/htdocs/pdf/poll_afghanistan_092409.pdf); see also ZEIGLER & GUNDERSON, *supra* note 16, at 49.

<sup>119</sup> Browne, *supra* note 96, at 178; Steven Lee Myers, *Living and Fighting Alongside Men, and Fitting In*, N.Y. TIMES, Aug. 17, 2009, at A1; see also Abrams, *supra* note 105, at 745 (quoting retired Admiral Robert F. Dunn, who stated, "You put men and women together and they get attracted to one another. It's prejudicial to good order and discipline in the ship. You get favoritism and little trysts and circles that develop.").

<sup>120</sup> See Browne, *supra* note 96, at 190; ZEIGLER & GUNDERSON, *supra* note 16, at 51–54.

the foxholes' occurs a lot more frequently in fiction than in real life. . . . Historical evidence and recent interviews indicate that people in crisis situations are less interested in sex than in security and comradeship."<sup>121</sup> In any case, fraternization is already a possibility today, when women serve in combat support positions.<sup>122</sup>

## **B. Negative Consequences of the Combat Exclusion for Female Soldiers**

Given that the justifications underlying the combat exclusion appear to be on shaky ground, especially following the increased *de facto* entry of military women into combat during the wars in Afghanistan and Iraq, the possibility that the policy measurably harms women is all the more troubling. In fact, whether the combat exclusion policy is justified or not, there is little debate that it harms female soldiers. This harm has been identified in two primary ways in the existing literature. The first is that the policy harms the status of women in the military by reinforcing the perception that women are less capable than men. The second is that the combat exclusion results in decreased opportunities for employment, promotion and training among women, both those who are already part of the uniformed military and those seeking to join.

**Loss of status.** The policy diminishes the psychic value of women's contributions to active-duty military service and leads to women being treated as second-class citizens within the military.<sup>123</sup> As West Point Cadet Chelsea Haviland put it, "I think a lot of males still have that same perspective of, 'women aren't capable.' So, the second you limit women on the front lines of combat, it enhances that division more."<sup>124</sup> Toward the end of

---

<sup>121</sup> Lorry M. Fenner, *Moving Targets*, in *WOMEN IN COMBAT: CIVIC DUTY OR MILITARY LIABILITY?* 3, 15 (Fenner & deYoung eds., 2001).

<sup>122</sup> Myers, *supra* note 119.

<sup>123</sup> Peach, *supra* note 105, at 176.

<sup>124</sup> Amy Katz, *The Future of Women Serving in Combat Being Debated*, VOANEWS.COM, May 23, 2005, <http://www.voanews.com/english/news/a-13-2005-05-23-voa16-66384252.html>.

his time as chair of the House Armed Service Committee, Les Aspin himself—the author of the current combat exclusion rule—observed that combat exclusion policies relegated military women to second-class status.<sup>125</sup> This reinforces gender stereotypes already present within the military and perpetuates systemic problems of sexual harassment and assault.<sup>126</sup> And, because concepts of full citizenship have throughout this country's history been tied to military service, women's exclusion from the most archetypical military role—combat service—leads to the conclusion that women are fundamentally less-than-full citizens and service members.<sup>127</sup>

***Loss of opportunity.*** It has also been observed that the exclusion of women from combat results in diminished

---

<sup>125</sup> Melissa Healy, *U.S. Military Chiefs Oppose Combat Roles for Women*, L.A. TIMES, July 31, 1992, at 1. A Stanford sociologist likewise observed, “[a]s long as women are restricted from combat, they will be considered second-class citizens in the military.” Barrionuevo, *supra* note 100 (quoting Christine Williams of the Center for Advanced Study in the Behavioral Sciences at Stanford University).

<sup>126</sup> Indeed, reported cases of sexual assault are on the rise in the U.S. military today. Editorial, *Pentagon Falls Short in Tackling Sexual Assault in the Ranks*, USA TODAY, Mar. 2, 2011, at 8A; Ashley Parker, *Lawsuit Says the Military is Rife with Sexual Abuse*, N.Y. TIMES, Feb. 16, 2011, at A18; Michelle Norris, *All Things Considered: Reported Cases of Sexual Assault in Military Rise*, NPR (Oct. 4, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=15005484>.

<sup>127</sup> See Blythe Lcszkay, *Feminism on the Front Lines*, 14 HASTINGS WOMEN'S L.J. 133, 140–43 (2003). The Israeli military has faced similar issues related to gender integration. As per Noya Rimalt:

[A]s men were assigned the primary role in the nation's defense throughout the years, militarized masculinity became an integral aspect of the normative definition of citizenship. While the Jewish male who served in combat roles and risked his life for the collective was marked as the ultimate patriot, the Jewish woman in her auxiliary roles was only “freeing a man for combat.”

Noya Rimalt, *Women in the Sphere of Masculinity: The Double-Edged Sword of Women's Integration in the Military*, 14 DUKE J. GENDER L. & POL'Y 1097, 1103 (2007).

employment, promotion and training opportunities.<sup>128</sup> In his majority opinion for the court in *Schlesinger v. Ballard*,<sup>129</sup> Justice Stewart observed that female Naval officers, by virtue of their exclusion from combat service, lost the opportunity to build records of service comparable to male officers and thus were at a disadvantage in competition for promotion.<sup>130</sup> During testimony before the House Armed Services Committee that took place around the same time the current combat exclusion policy was developed, and speaking in favor of the combat ban, then-Air Force Chief of Staff General Merrill A. McPeak stated baldly: "I believe the combat exclusion law is discrimination against women . . . . [I]t works to their disadvantage in a career context."<sup>131</sup> Most recently, the Military Leadership Diversity Commission, established by Congress in 2009, has recommended that the combat exclusion policy be repealed specifically because of the limitations it places on career advancement for women.<sup>132</sup> However, no attempts have been made to measure the impact that combat exclusion policies have on earnings and advancement for women in the United States

---

<sup>128</sup> See Pamela R. Jones, *Women in the Crossfire: Should the Court Allow it?*, 78 CORNELL L. REV. 252, 258–60 (1993); Leszkay, *supra* note 127, at 140–41.

<sup>129</sup> *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

<sup>130</sup> *Id.* at 508.

<sup>131</sup> Michael R. Gordon, *Military Chiefs Admit Need To Curb Sexual Harassment*, N.Y. TIMES, July 31, 1992, at A10.

<sup>132</sup> MILITARY LEADERSHIP DIVERSITY COMM'N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY (FINAL REPORT) 66–67, 71 (2011), available at [http://mldc.whs.mil/download/documents/Final%20Report/MLDC\\_Final\\_Report.pdf](http://mldc.whs.mil/download/documents/Final%20Report/MLDC_Final_Report.pdf) ("Recommendation 9—DoD and the Services should eliminate the 'combat exclusion policies' for women, including the removal of barriers and inconsistencies, to create a level playing field for all qualified servicemembers.").

Armed Forces.<sup>133</sup> The next section assesses these economic impacts in the modern military.

### III. Economic Impact of the Combat Exclusion Policy

The above-discussed, less-than-tangible consequences of the combat exclusion policy are certainly undesirable. However, they appear to have provided insufficient teeth upon which challenges to the policy can be based.<sup>134</sup> This raises the issue that this article seeks to address: does the U.S. military's combat exclusion policy for women result in inequalities of economic distribution as between male and female service members? This section answers that question in the affirmative.

There has long been a gap between the wages of men and women in the United States. Even as the gap has narrowed over the last few decades, women in the civilian workforce earn, on average, only seventy-seven cents for every dollar earned by men.<sup>135</sup> The gender wage gap also exists within a broad range of occupations: from information systems managers to high school teachers to lawyers, women's average earnings are less than

---

<sup>133</sup> Some studies have generally assessed differences in promotion rates and other opportunities for women in the U.S. military. See, e.g., J. Normal Baldwin, *The Promotion Record of the United States Army: Glass Ceilings in the Officer Corps*, 56 PUB. ADMIN. REV. 199 (1996) (assessing data from Army promotion boards between 1980 and 1993 and finding that women and minorities are promoted at lower rates than white men, especially in the upper ranks); James B. Stuart & Juanita M. Firestone, *Looking for a Few Good Men: Predicting Patterns of Retention, Promotion, and Accession of Minority and Women Officers*, 4 AM. J. OF ECON. & SOC. 435 (1992) (analyzing promotion and retention rates of female and minority officers between 1979 and 1988 using statistical regression methods, finding that promotion rates in these groups are comparatively low and predicting that the representation of women and minorities in the officer corps would remain low if current recruitment practices continue unchanged).

<sup>134</sup> See *infra*, Part IV, for a discussion of unsuccessful challenges to the combat exclusion policy.

<sup>135</sup> Andréa Ford & Deirdre van Dyk, *Then & Now: A Statistical Look Back, from the 1970s to Today*, TIME, Oct. 26, 2009, at 27.

men's.<sup>136</sup> This is not so in the armed forces.<sup>137</sup> In the military, basic pay is standardized across grades and years of service across all of the branches, regardless of occupational specialty.<sup>138</sup> So, for example, a female first lieutenant (grade O-2) who has served in the Air Force for three years as an air traffic controller earns \$4149 per month in basic pay; a male first lieutenant who has served three years in the Army assigned to the field artillery likewise earns \$4149 per month in basic pay.<sup>139</sup> At the most fundamental level, then, men and women in the military receive equal pay, regardless of the combat or non-combat role of their assignment.

As years pass, however, a number of factors underscore inequalities in the system; these inequalities are traceable, to varying degrees, to the DoD assignment policy for military women. Income inequality is seen in three key areas. First, women are promoted in substantially smaller numbers than men to the general officer ranks (grades O-7 through O-10).<sup>140</sup> Second, because retirement benefits are tied to salary at retirement, women who have missed out on a promotion to a higher grade or have left the military with fewer years of service will receive lower retirement benefits. Third, because of the assignment policy, women tend to be concentrated in particular non-combat jobs or occupational specialties. These occupational specialties provide less opportunity for advancement than comparable combat-related occupational specialties. The combat exclusion policy is naturally not the singular cause for these inequalities, but it is a factor in each.

---

<sup>136</sup> U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABASE 55, 57 (2009).

<sup>137</sup> Sanderson-Walcott, *supra* note 99, at 669.

<sup>138</sup> See DEFENSE FIN. AND ACCOUNTING SERV., U.S. DEP'T OF DEFENSE, 2009 MILITARY PAY TABLES, available at <http://www.dfas.mil/militarypay/militarypaytables/2009MilitaryPayTables.pdf>.

<sup>139</sup> *Id.*

<sup>140</sup> For an explanation of military ranks and promotion practices, see *infra*. Part III.A.

### A. Sources of Economic Inequality: Loss of Opportunity for Promotion to the Highest Ranks

This Article explores the question of what economic consequences flow from the combat exclusion policy by assessing promotion in the officer ranks. In this section, it will be shown that women are underrepresented in the highest ranks of the armed forces, and that this underrepresentation is very likely correlated to the combat exclusion policy. Promotion practices in the U.S. military are codified by statute and regulation and are highly regimented when compared to the promotion practices of private employers. Because this system is likely to be unfamiliar to many readers, a brief explanation of this system follows.

#### 1. Promotion of Officers in the U.S. Military

Generally, the military consists of enlisted personnel,<sup>141</sup> warrant officers<sup>142</sup> and commissioned officers.<sup>143</sup> The Air Force has no warrant officers. Enlisted personnel rank from E-1 to E-9, with E-1 being the entry-level rank and E-9 the highest.<sup>144</sup> Warrant officers rank from W-1 to W-5.<sup>145</sup> Commissioned officers rank from O-1 to O-10.<sup>146</sup> Commissioned officers begin their careers as Second Lieutenants, or Ensigns in the Navy, at

---

<sup>141</sup> *Enlisted Rank Insignias*, DEFENSE.GOV, <http://www.defense.gov/specials/insignias/enlisted.html> (last visited July 23, 2011) [hereinafter *Enlisted Rank Insignias*].

<sup>142</sup> Warrant officers are individuals in the Army, Navy, and Marine Corps who rank above all enlisted personnel (grades E-1 to E-10) and below all commissioned officers (grades O-1 to O-10). These officers are commissioned by the U.S. President at the W-2 grade, and serve as specialists in various fields. See DEP'T OF THE ARMY, DA PAM 200-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT 19-21 (2010).

<sup>143</sup> *Officer Rank Insignias*, DEFENSE.GOV, <http://www.defense.gov/specials/insignias/officers.html> (last visited July 23, 2011) [hereinafter *Officer Rank Insignias*].

<sup>144</sup> See *Enlisted Rank Insignias*, *supra* note 141.

<sup>145</sup> See *Officer Rank Insignias*, *supra* note 143.

<sup>146</sup> *Id.*



the grade of O-1.<sup>147</sup> Under typical circumstances, an officer starts at grade O-1 and must work his or her way up sequentially through the grades without skipping any.<sup>148</sup>

The higher the grade, the fewer individuals there are at each grade.<sup>149</sup> The total number of officers at the rank of Major, Lieutenant Colonel and Colonel (O-4 through O-6) are limited by statute based on the number of personnel in each branch.<sup>150</sup> The number of General Officers, or Flag Officers in the Navy, (O-7 through O-10) permitted is also limited by statute.<sup>151</sup> Currently, the limits on General and Flag Officers are 230 individuals in the Army, 160 for the Navy, 208 in the Air Force, and 60 in the Marine Corps.<sup>152</sup> These numbers are further subdivided so that the largest number is in the rank of Brigadier General, or Rear Admiral (lower half) (O-7), and only a handful of individuals within the four branches may serve in the rank of Four-Star General or Admiral (O-10).<sup>153</sup>

The promotion process for officers was made uniform across the services in Title I of the Defense Officer Personnel Management Act.<sup>154</sup> Promotion decisions are made by a selection board, which is convened by the secretary of a military department whenever "the needs of the service require."<sup>155</sup> To be eligible for promotion, officers must be in the "promotion

---

<sup>147</sup> 10 U.S.C. § 741(a).

<sup>148</sup> See DEP'T OF THE ARMY, *supra* note 142, at 35.

<sup>149</sup> See Table 1, *infra*.

<sup>150</sup> 10 U.S.C. § 523(a)(1).

<sup>151</sup> 10 U.S.C. § 526.

<sup>152</sup> 10 U.S.C. § 526(a).

<sup>153</sup> 10 U.S.C. § 525(a).

<sup>154</sup> Defense Officer Personnel Management Act of 1980, Pub L. No. 96-513, 94 Stat. 2835, codified in 10 U.S.C. §§ 611 *et seq.*

<sup>155</sup> 10 U.S.C. § 611(a).

zone”<sup>156</sup> and must meet minimum time-in-grade requirements.<sup>157</sup> After reviewing the officer’s personnel file, which includes information about current and previous assignments, leadership experience, awards, decorations and discipline,<sup>158</sup> the selection board makes a report that includes the names of officers recommended for promotion.<sup>159</sup> This list is reviewed by the secretary of the respective department and the Secretary of Defense and then transmitted to the President for approval.<sup>160</sup>

Particularly at the lower grades of O-1 and O-2, promotion is fairly automatic and lockstep, as officers commissioned at the same time are on the same promotion cycle.<sup>161</sup> To move into the higher ranks, however, selection boards review officers’ military personnel files carefully, and not all eligible candidates are promoted.<sup>162</sup> A position must be available within an officer’s “competitive category,” or occupation, if she is to be considered

---

<sup>156</sup> 10 U.S.C. § 623. The promotion zone is established by the Secretary of the military department at the time a selection board is convened. The term “promotion zone” is an eligibility category, inclusion in which is based on years of service at a particular grade in a specific job category and whether the individual has been considered for the same promotion during a previous promotion period for that job category. 10 U.S.C. § 645.

<sup>157</sup> 10 U.S.C. § 619. Additionally, those officers below the promotion zone but found to be “exceptionally well-qualified for promotion” by the secretary of the military department concerned may be recommended for consideration by that secretary. 10 U.S.C. § 619(c)(2)(a).

<sup>158</sup> *About Military Service Records and Official Military Personnel Files*, NAT’L ARCHIVES, <http://www.archives.gov/veterans/military-service-records/about-service-records.html> (last visited July 23, 2011).

<sup>159</sup> 10 U.S.C. § 616–17.

<sup>160</sup> 10 U.S.C. § 618.

<sup>161</sup> Jones, *supra* note 128, at 258.

<sup>162</sup> 10 U.S.C. § 615(a)(2). See Jones, *supra* note 128 at 258. Additionally, in the case of officers being considered for promotion to a General or Flag officer grade, the selection board shall consider “any credible information of an adverse nature, including any substantiated adverse finding or conclusion from an officially documented investigation or inquiry.” 10 U.S.C. § 615(a)(3).

for promotion.<sup>163</sup> An individual officer not promoted the first time she is eligible for promotion will be considered again the next time positions become available.<sup>164</sup> Below the grade of Colonel, or Captain in the Navy (O-6), the military also has an "up-or-out" policy, under which officers who twice fail to be promoted after consideration by a selection board are required to leave the military.<sup>165</sup> When coupled with the DoD's assignment policy for women, this results in systemic inequalities along gender lines.

## 2. Women in the General and Flag Officer Ranks

By far the most striking imbalance along gender lines is seen in the highest ranks. Tables A1 through A6 show the distribution of personnel by gender in the officer corps of each branch and at each rank within those branches over the past six years. To look at any single year in isolation, however, is to see an incomplete piece of the larger picture, particularly with respect to the highest ranks where there are few women and small numerical fluctuations result in large percentage changes.<sup>166</sup> It is helpful, therefore, to look at several years

---

<sup>163</sup> 10 U.S.C. § 619(c)(1).

<sup>164</sup> 10 U.S.C. § 619(b).

<sup>165</sup> 10 U.S.C. § 632. *See Schlesinger v. Ballard*, 419 U.S. 498, 502-03 (1975) ("If the officers who failed to be promoted remained in the service, the promotion of younger officers through the ranks would be retarded. Accordingly, a basic 'up or out' philosophy was developed to maintain effective leadership by heightening competition for the higher ranks while providing junior officers with incentive and opportunity for promotion.").

<sup>166</sup> The Military Leadership Diversity Commission noted a similar problem in assessing promotion *rates*:

[T]he consideration of flag/general officer promotion rates requires an important caveat. The racial and ethnic minority and female representation in the eligible populations for promotion to O-7, O-8, and O-9 can be very small. In those circumstances, a single promotion can cause a minority promotion rate to change substantially.

MILITARY LEADERSHIP DIVERSITY COMM'N, *supra* note 132, at 78. Promotion rates are not considered in this Article because comprehensive data on promotion rates is not publicly available.

averaged together, which provides a more generally applicable picture of the data. Table 1 contains averages, expressed in terms of both actual numbers and percentage distribution, of male and female officers between 2005 and 2010. As can be seen in Table 1, the percentage of female officers generally declines with increasing rank. A significant drop in numbers of female officers is seen between Major and Lt. Colonel (O-3 and O-4), but nowhere is the decline more pronounced than in the difference between Colonel and Brigadier General (O-6 and O-7). The percentage of females at the O-7 rank is close to half of the percentage at the O-6 rank in the Army and the Navy. In the Marines, the percentage change is small, though there are already very few female colonels in the Marines. The Air Force, on the other hand, provides an interesting contrast to the other branches: over time, roughly 11.3 percent of the Air Force's brigadier generals are women, and the difference between O-6 and O-7 is actually smaller than the difference between O-5 and O-6.

**Table 1—Officers by Rank and Gender in the U.S. Armed Forces****Six Year Average, Sept. 30, 2005–Sept. 30, 2010**

		O-1	O-2	O-3	O-4
Army	Male	7,789 80.6%	5,996 79.4%	21,084 80.8%	13,404 86.1%
	Female	1,870 19.4%	1,554 20.6%	5,008 19.2%	2,170 13.9%
Navy	Male	5,189 81.4%	5,193 82.5%	14,174 83.5%	8,963 86.7%
	Female	1,183 18.6%	1,101 17.5%	2,798 16.5%	1,380 13.3%
Marine Corps	Male	2,734 92.1%	2,824 91.7%	5,315 93.4%	3,539 96.6%
	Female	235 7.9%	254 8.3%	377 6.6%	124 3.4%
Air Force	Male	5,647 77.8%	6,287 77.7%	18,696 79.5%	12,381 83.6%
	Female	1,612 22.2%	1,806 22.3%	4,810 20.5%	2,427 16.4%
DoD Totals	Male	21,360 81.3%	20,309 81.2%	59,268 82.0%	38,288 86.3%
	Female	4,899 18.7%	4,714 18.8%	12,993 18.0%	6,101 13.7%

Source: This table averages the data that appears in tables A1–A6 in the Appendix. Note: Numbers greater than 99 have been rounded to the nearest whole number, while those less than 99 are rounded to the tenth.

O-5	O-6	O-7	O-8	O-9	O-10	Total
8,082 87.3%	3,600 88.3%	148 94.0%	89.7 95.4%	49 98.0%	11 97.3%	60,253 83.1%
1,179 12.7%	476 11.7%	9.5 6.0%	4.3 4.6%	1 2.0%	0.3 2.7%	12,272 16.9%
5,965 87.2%	2,888 88.2%	107 93.0%	64.3 92.5%	34.7 96.4%	10 100%	42,596 84.7%
875 12.8%	385 11.8%	8 7.0%	5.2 7.5%	1.3 3.6%	0 0%	7,735 15.4%
1,811 97.9%	671 97.1%	39 97.5%	23.7 96.0%	16 97.0%	4.3 100%	16,977 94.2%
39.2 2.1%	20.2 2.9%	1 2.5%	1 4.0%	0.5 3.0%	0 0%	1,052 5.8%
8,818 87.0%	3,157 88.4%	131 88.7%	91.3 93.5%	36 97.3%	12.5 100%	55,257 81.7%
1,318 13.0%	415 11.6%	16.7 11.3%	6.3 6.6%	1 2.7%	0 0%	12,412 18.3%
24,675 87.9%	10,317 88.8%	425 92.4%	268 94.1%	136 97.3%	37.8 99.2%	175,084 84.0%
3,412 12.1%	1,296 11.2%	35.2 7.6%	16.8 5.9%	3.8 2.7%	0.3 0.8%	33,471 16.0%

Because each of the services has different practices, policies, and cultures, differences between their promotion practices should not be overstated. One point of comparison is telling, however: in the Air Force, 99.7% of all positions are open to women;<sup>167</sup> in the Army and Navy, the percentage of positions open to women is 70%<sup>168</sup> and 91% (officially, though the actual number is lower because of space limitations in living quarters available aboard ships),<sup>169</sup> respectively. This suggests a connection between the exclusion of women from combat and lower rates of promotion to high-ranking positions: the Air Force, which does not engage in direct ground combat to speak of, excludes women from very few positions, only two of which are officer positions,<sup>170</sup> and has a high percentage of female brigadier generals. On the other hand, the Army<sup>171</sup> and Navy<sup>172</sup> exclude women from many positions and have significantly

---

<sup>167</sup> HARRELL & MILLER, *supra* note 50.

<sup>168</sup> HARRELL ET AL., *supra* note 46, at 6.

<sup>169</sup> HARRELL & MILLER, *supra* note 50.

<sup>170</sup> DEFENSE ADVISORY COMM. ON WOMEN IN THE SERVS., U. S. DEP'T OF DEFENSE, ANNUAL REPORT ON STATUS OF FEMALE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES FY 2002–06, 3 (2006). Those excluded positions are 11XXU & 12XXU: Pilot and Navigator Air Liaison Officer.

<sup>171</sup> *Id.* at 2. The officer positions from which women are excluded in the Army are: Infantry Officer, Armor Officer, Cavalry Officer, Special Forces Officer, and all Ranger positions.

<sup>172</sup> *Id.* at 4–5. Navy women are outright excluded from the the position of Special Warfare SEAL Officer. Many positions are also closed because they collocate with direct ground combat units; among officer positions, these include: Special Operations Officer integrated with Special Forces Units, Surface Warfare Officer, and Medical and Chaplain Corps Officers in the Infantry Regiment, Tank Battalion, Assault Amphibian Battalion, Light Armored Reconnaissance Battalion, Combat Assault Battalion, Force Reconnaissance Battalion, and Combat Engineer Battalion. Finally, women are excluded from service on Submarines and Patrol Coastal ships because of the cost associated with retrofitting these ships to provide appropriate berthing and privacy arrangements. The Navy has recently announced its intention to repeal the ban on women serving on submarines. Terence R. Peck, *Women Serving in Navy Continue Reaching Milestones*, NAVY.MIL (Mar. 6, 2010, 5:34:00 PM), [http://www.navy.mil/search/display.asp?story\\_id=51758](http://www.navy.mil/search/display.asp?story_id=51758).

lower percentages of female O-7 level officers. In those branches, most of the general and flag officers come from the combat arms,<sup>173</sup> so one would reasonably expect exclusion from those positions to correlate with fewer promotions to the rank of general or flag officer. As the Military Leadership Diversity Commission recently observed,

[E]xclusion from [combat] occupations has a considerable influence on advancement to higher positions. For example, in 2006, 92.3 percent of all Army occupations were open to women. However, the remaining 7.7 percent of Army occupations were the combat arms occupations of infantry, armor, artillery, cavalry, and special forces, which are closed to women because of the current DoD policies that exclude women from direct ground combat. This relatively small percentage of combat arms occupations was held by 29.4 percent of all Army personnel and, in this case, was held exclusively by men. Additionally, 2006 data show that, in the Army, *80 percent of general officers (ranks O-7 and above) came from combat arms occupations.*

....

Finally, the structural barriers that keep racial/ethnic minorities and women from entering tactical/operational career fields also function as barriers to obtaining command assignments. That is, the lower representation of racial/ethnic minorities and women in tactical/operational career fields means that those servicemembers have fewer opportunities for command.<sup>174</sup>

---

<sup>173</sup> See, e.g., Peach, *supra* note 105, at 175.

<sup>174</sup> MILITARY LEADERSHIP DIVERSITY COMM'N, *supra* note 132, at 67 (emphasis in original) (citations omitted).



There is an additional concern. As described in Part I.C, women in the military today are, in fact, serving in combat. But because they cannot be assigned to combat positions, women in the theater of operations are formally assigned to a non-combat unit and attached to a unit engaged in combat.<sup>175</sup> This attachment does not appear in the soldier's personnel file,<sup>176</sup> and thus even if a woman has gained substantial experience leading units in combat, which is often an important and persuasive factor in selection boards' considerations,<sup>177</sup> she will not get credit for this work. This circumstance results in outright discrimination, in the sense that men and women who *are* similarly situated with respect to experience will be treated differently on the basis of their sex. The only reason the woman's personnel file does not contain evidence of her combat experience is that she is prohibited, on the basis of her sex, from being formally assigned to a combat position.

Failure of promotion has measurable economic consequences. Imagine a hypothetical pair of officers in the Army. They entered in the same year, twenty-five years ago, and have both attained the rank of Colonel (O-6). Currently, they both earn \$9,262.20 per month.<sup>178</sup> The female is a Civil Affairs Officer, which is technically a non-combat occupation; Civil

---

<sup>175</sup> See generally Alvarcz, *supra* note 2.

<sup>176</sup> Interview with Maritza Ryan, Colonel, Dep't of Law, U.S. Military Academy (Oct. 27, 2009) (on file with the author).

<sup>177</sup> Peach, *supra* note 105, at 175. During a recent NPR broadcast about the combat exclusion policy, a commentator noted:

[The combat exclusion] affects how women are promoted. If they can't say they served in such-and-such combat unit, then it doesn't get them on the fast track to certain promotions. There are some jobs, if you could check that box that says I commanded troops in combat, it puts you on a really direct route to getting the top jobs.

*Talk of the Nation: Female Troops: Combat Ban Out Of Step With Reality* (NPR radio broadcast Mar. 1, 2011) (statement of Rachel Martin, NPR national security correspondent), available at <http://www.npr.org/2011/03/01/134168091/Female-Troops-Combat-Ban-Out-Of-Step-With-Reality>.

<sup>178</sup> DEFENSE FIN. AND ACCOUNTING SERV., *supra* note 138.

Affairs soldiers have nonetheless been regularly exposed to combat operations in Iraq and Afghanistan because the nature of their work—mitigating the impact of military operations on civilians during war and rebuilding civilian infrastructure once hostilities have subsided<sup>179</sup>—necessitates that substantial time be spent outside the wire, where an active insurgency is still underway. The man is an Infantry Officer. This year, a general officer position has opened up. A selection board is convened and the man is notified that he is in the promotion zone for his competitive category. The woman, as a combat support officer, is not being considered for this position. The man secures the promotion and becomes a brigadier general, and his pay immediately increases to \$11,007.30 per month. The man is now earning \$1,745.10 per month more than his female counterpart, or \$20,941.20 more per year.

Of course, there are reasons aside from the combat exclusion that women are less represented in the highest ranks. For one, because individuals who have attained the general officer rank today began their military career many years ago, some of the disparity at the top is simply a result of the relatively smaller number of women who joined before the early 1980s.<sup>180</sup> Some of the reasons also track civilian trends: women leave voluntarily at higher rates than men to raise children and care for ailing family members, but, in contrast to civilian employment, it is difficult if not impossible to return to a military career once formally separated.<sup>181</sup> It takes decades of service to reach the O-7 grade, and many women choose to leave before they are in a position to be considered for that promotion. Another reason is more specific to the military: sexual harassment remains a serious issue in the military, and many female veterans report

---

<sup>179</sup> PUBLIC AFFAIRS OFFICE, U.S. ARMY CIVIL AFFAIRS & PSYCHOLOGICAL OPERATIONS COMMAND (AIRBORNE), CIVIL AFFAIRS OFFICIAL FACT SHEET (2009), available at <http://www.usacapoc.army.mil/pdf/facts-ca.pdf>.

<sup>180</sup> BINKIN & BACH, *supra* note 11, at 15; see also *supra* Part I.A.

<sup>181</sup> Interview with Col. Ryan, *supra* note 176.

leaving the services in specific response to harassment.<sup>182</sup> This harassment, in turn, is at least in part related to women's exclusion from the combat arms, as that exclusion reinforces the notion that women are inferior to men.<sup>183</sup> Finally, some women may leave because they perceive that they have fewer opportunities for promotion.<sup>184</sup> A more sophisticated statistical analysis would be useful to determine just what effect these various factors have on promotions within the officer ranks.

### **B. Sources of Economic Inequality: Retirement and Veterans Benefits**

In addition to the economic consequences that arise from missing out on promotion while in the military, further losses are likely to accrue at retirement. A brief explanation of military retirement will be useful here. Members of the active duty military become eligible for retirement benefits if they serve a minimum of twenty years on active duty before they retire, and

---

<sup>182</sup> Christine Hansen, executive director of the Miles Foundation, a nonprofit organization that tracks sexual assault in the military, estimates that of the military women with whom she works, only one-third of these sexual assault survivors have been able to remain in the service, even when they wish to do so. Norris, *Three Women's Stories*, *supra* note 55.

<sup>183</sup> See BENEDICT, *supra* note 74, at 227 (arguing that the DoD should "[o]fficially recognize that women are fighting in combat in Iraq, instead of only acknowledging that 'women are exposed to combat danger,' as the DoD now phrases it. Many women believe such recognition will win them more respect and so reduce sexual violence, and there is logic to the argument, for at the root of every sexual abuse is the assumption that women are inferior or the wish to prove them so.").

<sup>184</sup> The majority of female service members believe that women have fewer opportunities for promotion because of the combat exclusion. See, e.g., Laura L. Miller, *Feminism and the Exclusion of Army Women from Combat*, 16 GENDER ISSUES 33, 48 (1998) (detailing the results of a survey of Army enlisted women and officers asking about the combat exclusion; fifty percent of respondents felt that the combat exclusion hurt enlisted women's promotion opportunities, and sixty-one percent of female officers felt that the exclusion hurt female officers' promotion opportunities); Judith Hicks Stichm, *Army Opinions About Women in the Army*, in WOMEN IN THE MILITARY 80 (Rita J. Simon ed., 2001) (a plurality of female soldiers of all grades surveyed did not disagree with the statement that: "A woman cannot advance in the Army as quickly as a man because certain combat areas are closed to women.").

payments are calculated from basic pay at retirement<sup>185</sup>—that is, the pay an individual receives in the year in which he retires based on the Basic Pay Table.<sup>186</sup> For an individual who enlisted immediately after he turned eighteen, retirement eligibility arrives while he is still quite young, so potential benefits are substantial. Additionally, one whose service began on or after August 1, 1986 can elect, after the end of his fifteenth year in the military, to participate in a program in which he will receive a \$30,000 bonus upon retirement if he serves for a minimum of thirty years (and whose retirement pay is subject to a penalty multiplier if he retires before accruing thirty years).<sup>187</sup> During fiscal year 2008, \$36.9 billion in non-disability retirement pay was paid to 1.47 million veterans.<sup>188</sup>

In fiscal year 2008, 95.1% of all active duty non-disability retirement recipients were men, while only 4.9% were women.<sup>189</sup> Accounting for all living retirees, it is no surprise that the numbers are so skewed: In 1965, women accounted for just one percent of military personnel,<sup>190</sup> and in 1979, women still accounted for only five percent of personnel.<sup>191</sup> Among those who retired during fiscal year 2008, however, the numbers are closer to women's current representation as a percent of the military: of 34,468 retirees, 88.3% were men and 11.7% were

---

<sup>185</sup> OFFICE OF THE ACTUARY, U. S. DEP'T OF DEFENSE, STATISTICAL REPORT ON THE MILITARY RETIREMENT SYSTEM FOR THE FISCAL YEAR 2008 5 (2009).

<sup>186</sup> DEFENSE FIN. AND ACCOUNTING SERV., *supra* note 138. Basic pay does not include any of the additional incentives and allowances paid to personnel, such as a housing allowance, hazardous duty incentive pay, or a family separation allowance. *Id.*; see also *infra* note 194 for further details about the calculation of retirement pay.

<sup>187</sup> *Id.*

<sup>188</sup> OFFICE OF THE ACTUARY, *supra* note 185, at 6.

<sup>189</sup> *Id.* at 193.

<sup>190</sup> JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION, 177 (rev. ed. 1992) (the total number of uniformed military personnel in 1965 was 2,655,000, of whom 30,600 were women).

<sup>191</sup> Vojdik, *supra* note 90, at 323.

women, and there is no significant difference between these numbers in the officer and enlisted ranks.<sup>192</sup>

There are two potential sources of economic harm to women resulting from the assignment policy embedded in this system. First, some women, conscious of missing out on promotions and also of the less tangible loss of status issues discussed earlier, may retire from the military prior to 20 years of service. Second, as discussed in Part III.B.1, women are promoted into the highest ranks at lower rates than their male counterparts, and part of the reason for this is that women are excluded from positions involving combat leadership, which is generally required for a general or flag officer position.<sup>193</sup> The cost of being passed over for promotion of just one grade is very high in retirement.

In addition to lower pay cumulatively received while in the service, retirement pay will likewise be lower because retirement pay is calculated from basic pay at retirement.<sup>194</sup> For example, consider a man and a woman who are both officers and who both entered the Army on the same day in 1983, when they were both twenty-five years old, and who retired on the same day twenty-five years later. The only difference between them is their respective jobs, or occupational specialties. The man, a cavalry officer, retired as a Brigadier General (O-7) and the woman, an information systems management officer, retired as a Colonel (O-6). In this case, the man would receive \$6,410 per

---

<sup>192</sup> OFFICE OF THE ACTUARY, *supra* note 185, at 194.

<sup>193</sup> MILITARY LEADERSHIP DIVERSITY COMM'N, *supra* note 132, at 63-64 ("For both the [Active Component] and the [Reserve Component] officer corps, data indicate that flag/general officers were, in the periods under consideration, disproportionately drawn from tactical/operational (i.e., combat) career fields."); Peach, *supra* note 105, at 175.

<sup>194</sup> For those who began their service before September 8, 1980, retirement pay is equal to final basic pay  $\times$  0.025  $\times$  years of service. OFFICE OF THE ACTUARY, *supra* note 185, at 6. For those whose service began on or after September 8, 1980 the calculation uses the average of the highest thirty-six months of basic pay instead of final basic pay. *Id.* Finally, retirement pay is adjusted to the Consumer Price Index annually. *Id.* Additionally, twenty-year retirees may receive Civil Service retirement benefits concurrently, and may also participate fully in Social Security, receiving benefits when eligible. *Id.* at 11-12.

month in gross retirement pay,<sup>195</sup> while the woman would gross \$5,303 monthly.<sup>196</sup> This is a difference of \$13,284 annually. These two people were 50 years old at retirement; based on DoD's internal actuarial tables, the woman is expected to live for another 34.5 years and the man is expected to live for another 33.2 years. If these two live out exactly their expected lifetimes, the man will receive a total of \$2.55 million in retirement pay until his death, *not* adjusted for inflation. The woman will receive \$2.2 million, also not inflation-adjusted. Though both have done quite well, the woman will receive \$358,302 less in 2008 dollars during her retirement than the man. Such a discrepancy raises serious concerns.

### **C. Sources of Economic Inequality: Concentration of Women in Certain Employment Categories**

A final source of inequality arising from the combat exclusion is related to the types of jobs military women tend to hold. Women in the military are concentrated in certain occupational categories. Table sets 2 and 3 show the military's job categories and the number and percentage of people of each gender who work in each category, in the enlisted and officer ranks, respectively. In each of the services, enlisted women are concentrated in administrative, supply and (in all but the Marines, who have no medical personnel) medical occupations. Career field concentration is even more pronounced in the officer ranks, where well over fifty percent of Army, Navy, and Air Force women are engaged in health care, administration, or supply; more than forty percent of female officers in the Marines work in administration or supply.

---

<sup>195</sup> *Id.* at 250.

<sup>196</sup> *Id.* at 251.

**Table 2a—Occupational Area of Active Duty Enlisted Members****Fiscal Year 2007**

		Infantry, Gun crews, Seamanship	Electronics	Communi- cations	Medical	Other Technical
Army	M	109,980	21,105	46,718	24,866	13,228
	F	897	2,416	4,787	10,388	2,942
	All	110,877	23,521	51,505	35,254	16,170
Navy	M	21,340	28,674	20,259	17,837	6,162
	F	3,711	2,898	4,872	5,959	455
	All	25,051	31,572	25,131	23,796	6,617
Air Force	M	24,389	21,010	17,396	10,285	8,942
	F	3,919	1,604	5,371	10,098	1,661
	All	28,308	22,614	22,767	20,383	10,603
Marine Corps	M	41,404	9,479	10,662	0	3,798
	F	154	501	951	0	339
	All	41,558	9,980	11,613	0	4,137
DoD Total	M	197,113	80,268	95,035	52,988	32,130
	F	8,681	7,419	15,981	26,445	5,397
	All	205,794	87,687	111,016	79,433	37,527

Source: DEPUTY UNDERSECRETARY FOR MILITARY PERSONNEL POLICY, POPULATION REPRESENTATION IN THE MILITARY SERVICES FY 2007, Appendix B, 33, <http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2007/appendixb/appendixb.pdf>.

Adminis- trators	Electrical	Craftsmen	Supply	Other	Total
41,121	56,041	9,150	50,178	2,597	374,984
20,969	4,044	975	10,534	165	58,117
62,090	60,085	10,125	60,712	2,762	433,101
22,656	76,551	14,476	15,938	15,801	239,694
7,104	7,477	1,287	3,363	4,018	41,144
29,760	84,028	15,763	19,301	19,819	280,838
34,707	58,860	10,195	10,804	14,189	210,777
18,694	3,648	803	2,802	3,995	52,595
53,401	62,508	10,998	13,606	18,184	263,372
21,314	24,895	4,233	16,571	23,817	156,173
3,828	1,193	270	1,592	1,740	10,568
25,142	26,088	4,503	18,163	25,557	166,741
119,798	216,347	38,054	93,491	56,404	981,628
50,595	16,362	3,335	18,291	9,918	162,424
170,393	232,709	41,389	111,782	66,322	1,144,052



**Table 2b—Occupational Area of Active Duty Enlisted Members****By Percentage**

		Infantry, Gun crews, Seamanship	Electronics	Communi- cations	Medical	Other Technical
Army	M	29.33%	5.63%	12.46%	6.63%	3.53%
	F	1.54%	4.16%	8.24%	17.87%	5.06%
	All	25.60%	5.43%	11.89%	8.14%	3.73%
Navy	M	8.90%	11.96%	8.45%	7.44%	2.57%
	F	9.02%	7.04%	11.84%	14.48%	1.11%
	All	8.92%	11.24%	8.95%	8.47%	2.36%
Air Force	M	11.57%	9.97%	8.25%	4.88%	4.24%
	F	7.45%	3.05%	10.21%	19.20%	3.16%
	All	10.75%	8.59%	8.64%	7.74%	4.03%
Marine Corps	M	26.51%	6.07%	6.83%	0.00%	2.43%
	F	1.46%	4.74%	9.00%	0.00%	3.21%
	All	24.92%	5.99%	6.96%	0.00%	2.48%
DoD Total	M	20.08%	8.18%	9.68%	5.40%	3.27%
	F	5.34%	4.57%	9.84%	16.28%	3.32%
	All	17.99%	7.66%	9.70%	6.94%	3.28%

Source: DEPUTY UNDERSECRETARY FOR MILITARY PERSONNEL POLICY, POPULATION REPRESENTATION IN THE MILITARY SERVICES FY 2007, Appendix B, at 34, <http://prhome.defensc.gov/MPP/ACCESSION%20POLICY/PopRep2007/appendixb/appendixb.pdf>.

Adminis- trators	Electrical	Craftsmen	Supply	Other	Total
10.97%	14.94%	2.44%	13.38%	0.69%	100%
36.08%	6.96%	1.68%	18.13%	0.28%	100%
14.34%	13.87%	2.34%	14.02%	0.64%	100%
9.45%	31.94%	6.04%	6.65%	6.59%	100%
17.27%	18.17%	3.13%	8.17%	9.77%	100%
10.60%	29.92%	5.61%	6.87%	7.06%	100%
16.47%	27.93%	4.84%	5.13%	6.73%	100%
35.54%	6.94%	1.53%	5.33%	7.60%	100%
20.28%	23.73%	4.18%	5.17%	6.90%	100%
13.65%	15.94%	2.71%	10.61%	15.25%	100%
36.22%	11.29%	2.55%	15.06%	16.46%	100%
15.08%	15.65%	2.70%	10.89%	15.33%	100%
12.20%	22.04%	3.88%	9.52%	5.75%	100%
31.15%	10.07%	2.05%	11.26%	6.11%	100%
14.89%	20.34%	3.62%	9.77%	5.80%	100%

**Table 3a—Occupational Area of Active Duty Officer Corps.****Fiscal Year 2007**

		General Officers	Tactical Operations	Intelligence	Engineering & Maintenance
Army	M	302	22,844	3,768	8,677
	F	14	669	905	1,963
	All	316	23,513	4,673	10,640
Navy	M	211	18,676	1,878	4,669
	F	13	1,351	361	279
	All	224	20,027	2,239	4,948
Air Force	M	265	21,070	2,680	8,316
	F	21	1,455	871	1,293
	All	286	22,525	3,551	9,609
Marine Corps	M	81	8,253	840	1,288
	F	3	181	41	83
	All	84	8,434	881	1,371
DoD Total	M	859	70,843	9,166	22,950
	F	51	3,656	2,178	3,618
	All	910	74,499	11,344	26,568

Source: DEPUTY UNDERSECRETARY FOR MILITARY PERSONNEL POLICY, POPULATION REPRESENTATION IN THE MILITARY SERVICES FY 2007, Appendix B, at 43, <http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2007/appendixb/appendixb.pdf>.

Scientists & Professional	Heath Care	Adminis- tration	Supply, Procuremen t & Allied	Other	Total
5,059	9,416	3,559	4,659	729	59,013
663	4,930	1,365	1,235	80	11,824
5,722	14,346	4,924	5,894	809	70,837
1,679	6,276	1,658	2,154	5,096	42,297
371	3,541	559	326	724	7,525
2,050	9,817	2,217	2,480	5,820	49,822
3,541	6,395	2,768	4,172	4,370	53,577
808	4,466	1,198	1,126	574	11,812
4,349	10,861	3,966	5,298	4,944	65,389
393	0	798	1,972	2,530	16,155
43	0	197	229	237	1,014
436	0	995	2,201	2,767	17,169
10,672	22,087	8,783	12,957	12,725	171,042
1,885	12,937	3,319	2,916	1,615	32,175
12,557	35,024	12,102	15,873	14,340	203,217

**Table 3b—Occupational Area of Active Duty Officer Corps.  
By Percentage**

		General Officers	Tactical Operations	Intelligence	Engineering & Maintenance
Army	M	0.51%	38.71%	6.39%	14.70%
	F	0.12%	5.66%	7.65%	16.60%
	All	0.45%	33.19%	6.60%	15.02%
Navy	M	0.50%	44.15%	4.44%	11.04%
	F	0.17%	17.95%	4.80%	3.71%
	All	0.45%	40.20%	4.49%	9.93%
Air Force	M	0.49%	39.33%	5.00%	15.52%
	F	0.18%	12.32%	7.37%	10.95%
	All	0.44%	34.45%	5.43%	14.70%
Marine Corps	M	0.50%	51.09%	5.20%	7.97%
	F	0.30%	17.85%	4.04%	8.19%
	All	0.49%	49.12%	5.13%	7.99%
DoD Total	M	0.50%	41.42%	5.36%	13.42%
	F	0.16%	11.36%	6.77%	11.24%
	All	0.45%	36.66%	5.58%	13.07%

Source: DEPUTY UNDERSECRETARY FOR MILITARY PERSONNEL  
POLICY, POPULATION REPRESENTATION IN THE MILITARY SERVICES  
FY 2007, Appendix B, at 44, [http://prhome.defense.gov/MPP/ACCESSION  
%20POLICY/PopRep2007/appendixb/appendixb.pdf](http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2007/appendixb/appendixb.pdf).

Scientists & Professional	Health Care	Administration	Supply, Procurement & Allied	Other	Total
8.57%	15.96%	6.03%	7.89%	1.24%	100%
5.61%	41.69%	11.54%	10.44%	0.68%	100%
8.08%	20.25%	6.95%	8.32%	1.14%	100%
3.97%	14.84%	3.92%	5.09%	12.05%	100%
4.93%	47.06%	7.43%	4.33%	9.62%	100%
4.11%	19.70%	4.45%	4.98%	11.68%	100%
6.61%	11.94%	5.17%	7.79%	8.16%	100%
6.84%	37.81%	10.14%	9.53%	4.86%	100%
6.65%	16.61%	6.07%	8.10%	7.56%	100%
2.43%	0.00%	4.94%	12.21%	15.66%	100%
4.24%	0.00%	19.43%	22.58%	23.37%	100%
2.54%	0.00%	5.80%	12.82%	16.12%	100%
6.24%	12.91%	5.13%	7.58%	7.44%	100%
5.86%	40.21%	10.32%	9.06%	5.02%	100%
6.18%	17.23%	5.96%	7.81%	7.06%	100%

Individuals do have some choice as to the occupational specialty they are assigned, but placement is also based on military test scores and need.<sup>197</sup> Even given the heavy concentrations of women in the health, administrative, and supply fields, trends show that women are slowly moving into historically male-only technical and combat-related fields.<sup>198</sup> This trend toward greater occupational distribution could eventually help to mitigate the economic disparities described in this section, but at present these changes are too recent for empirical analysis.

Economic opportunity is limited when there is less possibility of promotion to higher ranks from a particular field. As it turns out, there is less opportunity for promotion to the higher ranks in the supply, administrative, and medical career fields.<sup>199</sup> In fact, the Army recently, and for the first time ever, promoted an officer to the rank of four-star general (O-10) in a supply occupation. With that promotion, General Ann E. Dunwoody, Commanding General of the U.S. Army Materiel

---

<sup>197</sup> M. REBECCA KILBURN ET AL., ESTIMATING AFQT SCORES FOR NATIONAL EDUCATIONAL LONGITUDINAL STUDY (NELS) RESPONDENTS 5 (1998), available at [http://www.rand.org/pubs/monograph\\_reports/2009/MR818.pdf](http://www.rand.org/pubs/monograph_reports/2009/MR818.pdf).

<sup>198</sup> U.S. GOV'T ACCOUNTING OFFICE *sub nom.* U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-99-212, TRENDS IN THE OCCUPATIONAL DISTRIBUTION OF MILITARY WOMEN 4 (1998).

<sup>199</sup> See, e.g., MILITARY LEADERSHIP DIVERSITY COMM'N, *supra* note 132, at 63–64 (finding that a disproportionate number of general officers are drawn from combat fields). In addition, because the combat exclusion prevents women from taking certain jobs at all, and the military is actively involved in efforts to increase female recruitment and retention, the logical conclusion is that men who wish to enter fields with high concentrations of women may actually encounter barriers to entry and promotion in those fields, while being systematically more likely to be shunted into an occupation in the combat arms. To the extent that some less-than-willing men are assigned to a combat position that would otherwise have been filled by a willing female had she not been excluded from the job, those men lose out. Further study is needed on these last two points. There is unfortunately a dearth of publicly available data on promotion rates by occupation and sex. The Department of Defense should release more information on this subject so that the public can fully understand the effects of the combat exclusion policy.

Command, became the military's first female four-star general.<sup>200</sup>

Once again, the combat exclusion is not the sole culprit here. Women in the military have historically served in high percentages in medical, administration, and supply fields, and some degree of path dependency is bound to develop.<sup>201</sup> Moreover, civilian women are represented in large numbers in medical and administrative work,<sup>202</sup> so, to the extent that personnel have a say, it should be no surprise that military women are choosing similar fields to their civilian counterparts. Still, it is impossible to ignore the fact that women are, by official policy, excluded from a large number of positions that tend to direct their holders into positions of leadership.

The discussion in the above three sections highlights the economic inequalities that result from the Department of Defense policy of prohibiting women from assignment to units below the brigade level whose primary mission is direct ground combat. Once again, it is important to highlight the point that there are a number of reasons why women are promoted to the highest ranks in low numbers, leave the military at higher rates than their male counterparts, and are concentrated in occupations that have fewer opportunities for promotion to the highest ranks. However, as has been shown, the combat exclusion is a significant factor in the resulting economic disparities.

---

<sup>200</sup> Rachel L. Swarns, *In Quiet Ascent, Commanding a New Role for Women in the Military*, N.Y. TIMES, June 30, 2008, at A17; *Army General is Nation's First Four-Star Woman*, CNN.COM, Nov. 14, 2008, [http://articles.cnn.com/2008-11-14/us/woman.4.star.general\\_1\\_fourth-star-army-materiel-command-military-history](http://articles.cnn.com/2008-11-14/us/woman.4.star.general_1_fourth-star-army-materiel-command-military-history).

<sup>201</sup> BINKIN & BACH, *supra* note 11, at 5.

<sup>202</sup> Indeed, the Department of Labor finds that women are employed in largest numbers in administrative and health care fields, estimating that in the U.S. in 2010, 8.2 million women (approximately 12.5% of working women) work as secretaries, receptionists, auditors, clerks, or accountants—or managers of same, while 4.3 million (6.5%) are nurses or nurse's aides. U.S. DEP'T OF LABOR, 20 LEADING OCCUPATIONS OF EMPLOYED WOMEN: 2010 ANNUAL AVERAGES (2010), <http://www.dol.gov/wb/factsheets/20lead2010.htm>. Still, the concentration of women in those fields is much higher in the armed forces because job categories are generally far more limited in the military than in the rest of the country. See U.S. GOV'T ACCOUNTING OFFICE, *supra* note 198, at 28.



#### **IV. Existing Remedial Schemes Cannot Address These Disparate Effects**

Despite evidence of serious inequalities resulting from the combat exclusion policy for military women, it is unlikely that claims based in either the Due Process Clause of the Constitution or Title VII of the Civil Rights Act of 1964 could remedy the inequalities. Courts are highly deferential to congressional and executive judgments concerning the military, and Title VII has been construed by lower courts not to apply to the uniformed military. These realities strongly suggest that the most likely avenue by which the distributional inequalities could be redressed is via a change in the military's own internal policy.

##### **A. Constitutional Claims in the Courts**

As discussed in Part II, *supra*, the courts of the United States are highly solicitous to the policy judgments of the DoD.<sup>203</sup> Moreover, courts have tended to treat the military as a "separate community," in which individual rights are more readily subordinated to the needs of the larger organization.<sup>204</sup> These same courts have accepted the combat exclusion policy for women for almost thirty years. Though the policies and pre-1993 laws have never been challenged on Fifth Amendment due process or any other grounds,<sup>205</sup> the reasoning in the seminal case of *Rostker v. Goldberg* was based explicitly on the acceptability of military policies excluding women from combat positions.<sup>206</sup> *Rostker* involved a challenge to the Military Selective Service Act (MSSA) by a group of men who argued that requiring men but not women to register for the draft discriminated between males and females in violation of the

---

<sup>203</sup> See *supra* note 90 and accompanying text.

<sup>204</sup> See *supra* notes 91–92 and accompanying text.

<sup>205</sup> Vojdik, *supra* note 90, at 323.

<sup>206</sup> *Rostker*, 453 U.S. 57 (1981).

Fifth Amendment.<sup>207</sup> Justice Rehnquist's majority opinion deferred heavily to congressional decisions on military matters,<sup>208</sup> and, purporting to apply intermediate scrutiny,<sup>209</sup> found the registration of only men to be constitutionally permissible since "[m]en and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft."<sup>210</sup> The Court did not discuss the question of whether the 'combat restrictions' were themselves constitutional, at least in part because the plaintiffs did not raise this issue,<sup>211</sup> but the majority accepted the statutory and policy prohibitions on women serving in the combat arms almost without comment.<sup>212</sup>

Since the 1981 decision, very few cases have challenged *Rostker*. Recently, however, two separate cases brought in the District of Massachusetts have challenged the Military Selective Service Act on gender discrimination grounds. The plaintiffs in *Schwartz v. Brodsky* were three young men and one young woman who claimed that the MSSA violated the Fifth Amendment Due Process clause.<sup>213</sup> This claim was identical to the plaintiffs' claim in *Rostker*, that the Selective Service Act's requirement that only men must register for the draft violates the Due Process Clause of the Fifth Amendment. The district court, after pointing out that women are still excluded from combat positions in the armed forces, again deferred to Congress and relied heavily on *Rostker* to dismiss the lawsuit.<sup>214</sup> The plaintiffs

---

<sup>207</sup> *Id.* at 61–62.

<sup>208</sup> *Id.* at 65.

<sup>209</sup> *Id.* at 70.

<sup>210</sup> *Id.* at 78.

<sup>211</sup> Hasday, *supra* note 23.

<sup>212</sup> *Rostker*, 453 U.S. at 76–77.

<sup>213</sup> *Schwartz v. Brodsky*, 265 F.Supp.2d 130, 131 (Mass. Dist. Ct. 2003) (dismissing the female plaintiff from the suit for lack of standing).

<sup>214</sup> *Id.* at 133–34.

chose not to follow through with their appeal,<sup>215</sup> so the suit ended in the district court.

Then, in *Elgin v. United States*, a new group of Massachusetts plaintiffs challenged as an unconstitutional bill of attainder—that is, an act of a legislature that serves to subject an individual or group to state-imposed penalties without benefit of a judicial trial—a federal law that prohibited men who had not registered with the Selective Service from executive branch service, and also challenged the MSSA as a facial violation of the Fifth Amendment Due Process clause.<sup>216</sup> Plaintiffs prevailed on their bill of attainder claim, but the district court relied exclusively on *Rostker* to dismiss the due process claim, observing that the plaintiffs' claim was identical to the *Rostker* plaintiffs' claim and that none of the factual circumstances had changed since that case was decided.<sup>217</sup>

It is questionable whether the court in *Elgin* was correct to say that the factual circumstances of the claims have not changed since *Rostker*. In fact, the several statutory bases for the services' combat exclusion have been repealed, and the DoD assignment policy has been narrowed. Substantially more women—in both absolute and proportional terms—are now serving in the armed forces, and women are actually serving in combat.<sup>218</sup> It is not even strictly correct to say that women are prohibited from engaging in direct ground combat; the policy states that women are not to be *assigned* to units below the brigade level whose primary mission is direct ground combat, but there is no prohibition on how female troops are utilized once actually in the theater of operations.<sup>219</sup> That said, it is likely

---

<sup>215</sup> See Hasday, *supra* note 23, at 132.

<sup>216</sup> *Elgin v. United States*, 594 F. Supp. 2d 133, 136 (Mass. Dist. Ct. 2009).

<sup>217</sup> *Id.* at 145–48.

<sup>218</sup> See *supra* Part I for an historical overview of the statutes and policies related to women in combat, and the expanding and often under-the-radar involvement of military women in combat operations since the beginning of the War on Terror.

<sup>219</sup> HARRELL ET AL., *supra* note 46, at 4.

accurate that "a court would probably be unwilling to find a male-only combat position inconsistent with equal protection,"<sup>220</sup> especially if the district court's decisions in *Schwartz* and *Elgin* are any indication of the level of deference that federal courts are currently disposed to grant to the DoD and Congress on this issue.

### B. Title VII Claims

Just as constitutional claims under the Equal Protection and Due Process Clauses provide an inadequate vehicle to redress inequalities resulting from the combat exclusion, so too does Title VII. In a civilian context, the apparent wage and retirement benefit disparities described in Part III would be ripe for a Title VII disparate treatment claim.<sup>221</sup> Such a claim, however, would almost certainly fail if presented against the U.S. military. This is because, as discussed below, the Circuit Courts have been unanimous in finding that Title VII does not apply to the uniformed military.

Title VII was amended by the Equal Employment Opportunity Act of 1972, which made certain federal government agencies subject to prohibitions on employment discrimination.<sup>222</sup> Under section 717(a) of Title VII, discriminatory practices are prohibited in "[a]ll personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5."<sup>223</sup> Simply stated, the plain language of the statute

---

<sup>220</sup> Hasday, *supra* note 23, at 159. *But see* Vojdik, *supra* note 90, at 315–16 (arguing that after *United States v. Virginia* the Court should apply anti-subordination theory to strike down the combat exclusion as a policy that "subordinate[s] women as a class, denying them access to power and privilege."), 336–37.

<sup>221</sup> 42 U.S.C. § 2000e-17.

<sup>222</sup> Pub. L. No. 92-261, 86 Stat. 111 (1972), codified at 42 U.S.C. § 2000e-16.

<sup>223</sup> 42 U.S.C. § 2000e-16(a). The military departments defined in 5 U.S.C. § 102 are the Army, the Navy (of which the Marine Corps is a part), and the Air Force.

appears to apply to any employee of or applicant to the Army, Navy (including the Marine Corps),<sup>224</sup> or Air Force, uniformed or civilian. This statute gives rise to a disparate treatment claim. The heart of such a claim is that an individual is being purposefully discriminated against on the basis of her membership in a protected class, such as race or gender.<sup>225</sup> Despite the fact that the DoD's current assignment policy for women is facially discriminatory, results in fewer opportunities for advancement and produces quantifiable pay inequalities, Title VII has been found to not apply to the uniformed military.

For example, in *Gonzalez v. Department of Army*, an officer holding the rank of Major who was also a Puerto Rico native alleged that he had been passed over for promotion and eventually terminated from the Army because of intentional discrimination on the basis of his race.<sup>226</sup> He grounded his claim in section 717(a) and argued that the "statutory language is unambiguous and compels the conclusion that Title VII's coverage extends to both civilian employees and uniformed members of the Army, Navy, and Air Force."<sup>227</sup> The Ninth Circuit affirmed the lower court's dismissal, finding that 42 U.S.C. § 2000e-16(a) applies only to civilian employees of the

---

<sup>224</sup> *U.S. Navy Organization: An Overview*, NAVY.MIL, <http://www.navy.mil/navydata/organization/org-over.asp> (last visited July 23, 2011).

<sup>225</sup> *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977). Religion, sex, or national origin can, however, be legal grounds for an employment classification if it "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(c)(1). See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (holding that an Alabama prison regulation that prohibited women from working as maximum-security prison guards was defensible as a bona fide occupational qualification (BFOQ) because Alabama prisons are exceptionally dangerous, female guards would be particular targets for assault, and this posed a safety risk to all prison personnel). This is often called a *BFOQ defense* and "is applicable to employment practices that purposefully discriminate on the basis of sex." *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670, 674 (1980).

<sup>226</sup> *Gonzalez v. Dep't of Army*, 718 F.2d 926, 927 (9th Cir. 1983).

<sup>227</sup> *Id.*

military departments.<sup>228</sup> In so finding, the court compared the definition of "military department" contained in both 10 U.S.C. § 101(7) and 5 U.S.C. § 102—which is referenced in section 717(a)—with the definition of "armed forces" contained in 10 U.S.C. § 101(4):

The two differing definitions show that Congress intended a distinction between "military departments" and "armed forces," the former consisting of civilian employees, the latter of uniformed military personnel. . . . We conclude, therefore, that the term "military departments" in section 717(a) of Title VII, when read in the context of the statutory definitions to which it refers, can be fairly understood to include only civilian employees of the Army, Navy, and Air Force and not both civilian employees and enlisted personnel as appellant argues.<sup>229</sup>

The Court also considered the section's legislative history and similarly concluded that Congress could not have intended to vastly expand the jurisdiction of the Equal Employment Opportunity Commission beyond the bounds of authority its predecessor agency enjoyed.<sup>230</sup>

The Eighth Circuit had previously come to a similar conclusion in *Johnson v. Alexander*, a case in which an African American man sought to enlist in the Army and was rejected.<sup>231</sup> In refusing to hear his section 717(a) race discrimination claims, the court stated:

From our consideration of the record and of the briefs and arguments it is clear to us that at

---

<sup>228</sup>228 *Id.* at 928.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Johnson v. Alexander*, 572 F.2d 1219, 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978).

the heart of plaintiff's claim is the premise that the relationship between the government and a uniformed member of the Army, Navy, Marine Corps, Air Force or Coast Guard is that of employer-employee, and that an applicant for enlistment in one of those armed services is an applicant for "employment" and should have his application judged by Title VII standards. We cannot accept that premise and accordingly cannot accept counsels' conclusions based thereon.

While military service possesses some of the characteristics of ordinary civilian employment, it differs materially from such employment in a number of respects that immediately spring to mind, and the peculiar status of uniformed personnel of our armed forces has frequently been recognized by the courts. . . .

....

There is no question that Congress intended for [section] 717(a) to afford protection against discrimination to civilian employees and applicants for civilian employment in the Departments of the Army, Navy and Air Force. But we think that if Congress had intended for the statute to apply to the uniformed personnel of the various armed services it would have said so in unmistakable terms. We agree with the district court that neither Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States.<sup>232</sup>

Likewise, in affirming the dismissal of a reservist's race and sex discrimination claims in *Roper v. Department of Army*, the

---

<sup>232</sup> *Id.* at 1223 (footnotes omitted).

Second Circuit agreed that Congress intended to apply section 717(a) only to civilian employees of the military.<sup>233</sup>

Generally speaking, the courts have proved unwilling to step in to overturn all but the most open and egregious constitutional violations by the U.S. military, and have suggested that the political branches are the more appropriate fora for changes in military policy.<sup>234</sup> Though it appears that a Title VII claim, as discussed above, would most likely be unsuccessful, the combat exclusion has not been directly challenged in the federal courts. More so than in decades past, evidence exists today that women are quantifiably harmed by the policy, giving potential litigants a stronger position than ever before to challenge it on constitutional grounds. Still, the most likely avenue for timely and effective remediation of the inequalities described in this article remains congressional or executive action.

## CONCLUSION

It is a simple and unavoidable fact that military women are serving in combat today. They are exposed to the dangers of combat, are fighting and commanding troops in the field, and are performing missions that cannot be done by male soldiers at great personal risk. The number of female veterans coming home physically and psychologically wounded has increased. And yet, in many instances, women in the military are being economically harmed by the assignment policies under which they serve.

This Article has shown how the DoD's assignment policy excluding women from direct ground combat positions can result in serious economic inequalities between women and men. Specifically, it limits both the jobs women may be assigned to do

---

<sup>233</sup> *Roper v. Dep't of Army*, 832 F.2d 247, 248 (2nd Cir. 1987) *overruling* *Hill v. Berkman*, 635 F.Supp 1228 (E.D.N.Y. 1986) (holding that that Title VII applied to the uniformed military).

<sup>234</sup> *Hasday*, *supra* note 23, at 159; *see, e.g., Frontiero*, 411 U.S. 677 (1973) (finding unconstitutional a policy that automatically gave spousal benefits to male service members but required female service members to demonstrate that their husbands were dependent upon them before the same benefits would be granted).



and opportunities for advancement within those roles. Similarly, as a result of early separation or limited promotion, it affects the retirement benefits for which women may be eligible. More complex statistical analysis could provide useful insights into the exact effects of various factors, but even a simple inquiry demonstrates striking results.

Traditional avenues of discrimination remediation are likely to provide little relief in this case. Title VII-based claims appear to be foreclosed to members of the uniformed military by the unanimous holdings of the federal circuits that have addressed the issue. Meanwhile, equal protection claims have rarely been successful as applied to the military, and the Supreme Court has never before been troubled by inequalities arising from combat exclusion policies. Yet the Court has also never been confronted with a direct claim of discrimination resulting from the assignment policy for military women, while the evidence coming in from every source shows that women are both serving in combat and are measurably harmed by the policy excluding them from the very roles that so many are taking on anyway. Courts are slow workers, however, and it appears today that either Congress or the executive is in the best position to provide immediate relief from this discriminatory policy.



## APPENDIX

**Table A1—Officers by Rank and Gender in the U.S. Armed Forces****September 30, 2010**

		O-1	O-2	O-3	O-4
Army	Male	8,531 81.2%	6,588 79.6%	22,982 79.9%	14,243 85.1%
	Female	1,975 18.8%	1,687 20.4%	5,768 20.1%	2,489 14.9%
Navy	Male	5,431 80.4%	5,231 80.2%	13,674 83.0%	8,946 86.3%
	Female	1,323 19.6%	1,289 19.8%	2,809 17.0%	1,422 13.7%
Marine Corps	Male	2,816 91.9%	3,330 92.0%	5,765 93.5%	3,640 95.8%
	Female	247 8.1%	289 8.0%	402 6.5%	160 4.2%
Air Force	Male	5,294 77.8%	5,477 77.0%	18,653 79.0%	11,893 82.6%
	Female	1,511 22.2%	1,632 23.0%	4,944 21.0%	2,502 17.4%
DoD Totals	Male	22,072 81.4%	20,626 80.8%	61,074 81.4%	38,722 85.5%
	Female	5,056 18.6%	4,897 19.2%	13,923 18.6%	6,573 14.5%

Source: DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/ GRADE (Sept. 30, 2010), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1009.pdf>; DEP'T OF DEF., FEMALE ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (Sept. 30, 2010), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1009f.pdf>.

O-5	O-6	O-7	O-8	O-9	O-10	Total
8,436 87.4%	3,873 88.9%	146 93.0%	94 94.0%	48 98.0%	11 91.7%	64,952 82.6%
1,215 12.6%	483 11.1%	11 7.0%	6 6.0%	1 2.0%	1 8.3%	13,636 17.4%
6,140 88.3%	3,008 87.7%	116 89.9%	67 88.2%	40 97.6%	11 100%	42,664 84.0%
817 11.7%	420 12.3%	13 10.1%	9 11.8%	1 2.4%	0 0%	8,103 16.0%
1,839 98.1%	665 96.9%	38 100%	28 93.3%	19 100%	4 100%	18,144 94.0%
36 1.9%	21 3.1%	0 0%	2 6.7%	0 0%	0 0%	1,157 6.0%
8,971 87.2%	3,261 88.4%	144 91.1%	93 89.4%	40 97.6%	12 100%	53,838 81.3%
1,319 12.8%	429 11.6%	14 8.9%	11 10.6%	1 2.4%	0 0%	12,363 18.7%
25,386 88.2%	10,807 88.9%	444 92.1%	282 91.0%	147 98.0%	38 97.4%	179,598 83.6%
3,387 11.8%	1,353 11.1%	38 7.9%	28 9.0%	3 2.0%	1 2.6%	35,259 16.4%

**Table A2—Officers by Rank and Gender in the U.S. Armed Forces****September 30, 2009**

		O-1	O-2	O-3	O-4
<b>Army</b>	<b>Male</b>	8,243 80.8%	6,546 79.8%	21,634 80.2%	13,529 85.8%
	<b>Female</b>	1,957 19.2%	1,657 20.2%	5,346 19.8%	2,246 14.2%
<b>Navy</b>	<b>Male</b>	5,302 80.6%	5,139 81.2%	13,569 83.3%	8,963 86.9%
	<b>Female</b>	1,277 20.5%	1,203 6.8%	2,713 16.4%	1,353 13.1%
<b>Marine Corps</b>	<b>Male</b>	3,021 92.2%	2,859 92.6%	5,508 93.2%	3,613 96.2%
	<b>Female</b>	257 7.8%	229 7.4%	405 6.8%	144 3.8%
<b>Air Force</b>	<b>Male</b>	5,296 77.8%	5,590 77.6%	18,563 79.5%	11,636 82.8%
	<b>Female</b>	1,510 22.2%	1,618 22.4%	4,801 20.5%	2,409 17.2%
<b>DoD Totals</b>	<b>Male</b>	21,862 81.4%	20,188 81.1%	59,274 81.7%	37,741 86.0%
	<b>Female</b>	5,001 18.6%	4,707 18.9%	13,265 18.3%	6,152 14.0%

Source: DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/ GRADE (Sept. 30, 2009), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0909.pdf>; DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (WOMEN ONLY) (Sept. 30, 2009), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0909f.pdf>.

O-5	O-6	O-7	O-8	O-9	O-10	Total
8,323 86.9%	3,786 88.5%	150 92.0%	91 95.8%	51 98.1%	10 90.9%	62,363 82.8%
1,255 13.1%	494 11.5%	13 8.0%	4 4.2%	1 1.9%	1 9.1%	12,974 17.2%
6,017 87.6%	2,921 88.0%	105 91.3%	61 89.7%	41 97.6%	11 100%	42,183 84.4%
851 12.4%	398 12.0%	10 8.7%	7 10.3%	1 2.4%	0 0%	7,813 15.6%
1,828 97.9%	667 97.2%	40 97.6%	22 95.7%	17 100%	4 100%	17,579 94.1%
40 2.1%	19 2.8%	1 2.4%	1 4.3%	0 0%	0 0%	1,096 5.9%
8,752 86.8%	3,275 89.1%	139 89.1%	96 90.6%	38 97.4%	14 100%	53,399 81.5%
1,330 13.2%	401 10.9%	17 10.9%	10 9.4%	1 2.6%	0 0%	12,097 18.5%
24,920 87.8%	10,649 89.0%	434 91.4%	270 92.5%	147 98.0%	39 97.5%	175,524 83.8%
3,476 12.2%	1,312 11.0%	41 8.6%	22 7.5%	3 2.0%	1 2.5%	33,980 16.2%

**A3—Officers by Rank and Gender in the U.S. Armed Forces****September 30, 2008**

		<b>O-1</b>	<b>O-2</b>	<b>O-3</b>	<b>O-4</b>
<b>Army</b>	<b>Male</b>	8,146 80.7%	5,987 79.8%	20,867 80.6%	13,206 86.2%
	<b>Female</b>	1,951 19.3%	1,514 20.2%	5,019 19.4%	2,117 13.8%
<b>Navy</b>	<b>Male</b>	5,189 80.9%	5,115 82.9%	13,886 83.6%	8,991 86.8%
	<b>Female</b>	1,227 19.1%	1,056 17.1%	2,727 16.4%	1,369 13.2%
<b>Marine Corps</b>	<b>Male</b>	3,040 92.1%	2,635 92.3%	5,390 93.3%	3,568 96.2%
	<b>Female</b>	260 7.9%	219 7.7%	387 6.7%	140 3.8%
<b>Air Force</b>	<b>Male</b>	5,118 77.2%	5,737 77.4%	18,191 80.0%	11,646 82.9%
	<b>Female</b>	1,513 22.8%	1,671 22.6%	4,543 20.0%	2,407 17.1%
<b>DoD Totals</b>	<b>Male</b>	21,493 81.3%	19,474 81.4%	58,334 82.1%	37,411 86.1%
	<b>Female</b>	4,951 18.7%	4,460 18.6%	12,676 17.9%	6,033 13.9%

Source: DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/ GRADE (Sept. 30, 2008), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0809.pdf>; DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (WOMEN ONLY) (Sept. 30, 2008), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0809f.pdf>.

O-5	O-6	O-7	O-8	O-9	O-10	Total
8,162 87.3%	3,692 88.2%	153 93.9%	81 97.6%	51 96.2%	12 100%	60,357 83.1%
1,185 12.7%	493 11.8%	10 6.1%	2 2.4%	2 3.8%	0 0%	12,293 16.9%
5,846 86.9%	2,853 88.3%	109 95.6%	65 92.3%	36 94.7%	10 100%	42,095 84.6%
885 13.1%	378 11.7%	5 4.4%	5 7.7%	2 5.3%	0 0%	7,654 15.4%
1,824 98.0%	671 97.1%	40 97.6%	26 96.3%	16 94.1%	4 100%	17,214 94.2%
37 2.0%	20 2.9%	1 2.4%	1 3.7%	1 5.9%	0 0%	1,066 5.8%
8,831 87.0%	3,147 88.9%	126 85.7%	95 95.0%	34 97.1%	11 100%	52,936 81.7%
1,317 13.0%	391 11.1%	21 14.3%	5 5.0%	1 2.9%	0 0%	11,869 18.3%
24,663 87.8%	10,363 89.0%	428 92.0%	262 95.3%	137 95.8%	37 100%	172,602 84.0%
3,424 12.2%	1,282 11.0%	37 8.6%	13 4.7%	6 4.2%	0 0%	32,882 16.0%



### A4—Officers by Rank and Gender in the U.S. Armed Forces September 30, 2007

		O-1	O-2	O-3	O-4
Army	Male	7,827 80.6%	5,477 80.2%	20,459 80.9%	13,247 86.3%
	Female	1,889 19.4%	1,355 19.8%	4,825 19.1%	2,100 13.7%
Navy	Male	5,149 81.9%	5,006 83.5%	14,283 83.6%	9,031 87.3%
	Female	1,141 18.1%	991 16.5%	2,802 16.4%	1,315 12.7%
Marine Corps	Male	2,775 92.2%	2,699 91.8%	5,222 93.2%	3,526 97.1%
	Female	234 7.8%	242 8.2%	380 6.8%	106 2.9%
Air Force	Male	5,523 78.8%	5,952 77.7%	18,053 79.9%	12,464 84.0%
	Female	1,490 21.2%	1,704 22.3%	4,530 20.1%	2,374 16.0%
DoD Totals	Male	21,274 81.7%	19,134 81.7%	58,017 82.2%	38,268 86.7%
	Female	4,754 18.3%	4,292 18.3%	12,537 17.8%	5,895 13.3%

Source: DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (Sept. 30, 2007), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0709.pdf>; DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (WOMEN ONLY) (Sept. 30, 2007), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0709f.pdf>.

O-5	O-6	O-7	O-8	O-9	O-10	Total
8,001 87.6%	3,549 88.0%	145 94.2%	87 95.6%	51 98.1%	11 100%	58,854 83.3%
1,135 12.4%	485 12.0%	9 5.8%	4 4.4%	1 1.9%	0 0%	11,803 16.7%
5,832 86.6%	2,763 88.4%	102 92.7%	66 97.1%	30 93.8%	11 100%	42,273 84.9%
906 13.4%	364 11.6%	8 7.3%	2 2.9%	2 6.2%	0 0%	7,531 15.1%
1,812 97.8%	679 97.1%	40 97.6%	23 95.8%	14 93.3%	4 100%	16,794 94.2%
41 2.2%	20 2.9%	1 2.4%	1 4.2%	1 6.7%	0 0%	1,026 5.8%
8,639 86.9%	2,991 87.8%	126 88.1%	94 96.9%	31 96.9%	14 100%	53,887 82.0%
1,301 13.1%	415 12.2%	17 11.9%	3 3.1%	1 3.1%	0 0%	11,835 18.0%
24,284 87.8%	9982 88.6%	413 92.2%	270 96.4%	126 96.2%	40 100%	171,808 84.2%
3,383 12.2%	1,284 11.4%	35 7.8%	10 3.6%	5 3.8%	0 0%	32,195 15.8%

**Table A5—Officers by Rank and Gender in the U.S. Armed Forces September 30, 2006**

		O-1	O-2	O-3	O-4
Army	Male	7,063 80.5%	5,501 78.6%	20,112 81.5%	13,376 86.7%
	Female	1,709 19.5%	1,499 21.4%	4,569 18.5%	2,052 13.3%
Navy	Male	5,038 82.5%	5,106 83.7%	14,868 83.7%	8,897 86.8%
	Female	1,065 17.5%	992 16.3%	2,899 16.3%	1,353 13.2%
Marine Corps	Male	2,433 92.1%	2,732 91.0%	5,008 93.5%	3,446 97.2%
	Female	208 7.9%	269 9.0%	350 6.5%	100 2.8%
Air Force	Male	5,967 78.0%	6,858 78.2%	19,140 79.4%	13,433 84.4%
	Female	1,685 22.0%	1,908 21.8%	4,979 20.6%	2,477 15.6%
DoD Totals	Male	20,501 81.5%	20,197 81.2%	59,128 82.2%	39,152 86.7%
	Female	4,667 18.5%	4,668 18.8%	12,797 17.8%	5,982 13.3%

Source: DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/ GRADE (Sept. 30, 2006), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0609.pdf>; DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (WOMEN ONLY) (Sept. 30, 2006), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0609f.pdf>.

O-5	O-6	O-7	O-8	O-9	O-10	Total
7,596 87.1%	3,373 88.1%	146 94.2%	91 95.8%	48 98.0%	12 100%	57,318 83.4%
1,127 12.9%	454 11.9%	9 5.8%	4 4.2%	1 2.0%	0 0%	11,424 16.6%
5,899 87.0%	2,819 88.6%	107 94.7%	68 97.1%	31 93.9%	9 100%	42,842 85.0%
885 13.0%	363 11.4%	6 5.3%	2 2.9%	2 6.1%	0 0%	7,567 15.0%
1,776 97.9%	679 97.1%	37 94.9%	23 100%	15 93.8%	5 100%	16,154 94.2%
38 2.1%	20 2.9%	2 5.1%	0 0%	1 6.2%	0 0%	988 5.8%
8,896 87.0%	3,146 88.0%	126 86.9%	89 95.7%	36 97.3%	12 100%	57,703 81.8%
1,333 13.0%	430 12.0%	19 13.1%	4 4.3%	1 2.7%	0 0%	12,836 18.2%
24,165 87.7%	10,017 88.8%	416 92.0%	271 96.4%	130 96.3%	38 100%	174,015 84.1%
3,383 12.3%	1,267 11.2%	36 8.0%	10 3.6%	5 3.7%	0 0%	32,815 15.9%

**Table A6—Officers and Gender in the U.S. Armed Forces  
September 30, 2005**

		O-1	O-2	O-3	O-4	O-5
Army	Male	6,926 79.9%	5,879 78.5%	20,449 81.9%	12,822 86.4%	7,975 87.3%
	Female	1,740 20.1%	1,611 21.5%	4,518 18.1%	2,013 13.6%	1,159 12.7%
Navy	Male	5,027 82.6%	[5,562] [83.8%]	[14,761] [83.9%]	8,950 85.9%	6,055 87.0%
	Female	1,062 17.4%	[1,073] [16.2%]	[2,837] [16.1%]	1,465 14.1%	906 13.0%
Marine Corps	Male	2,320 91.9%	2,689 90.7%	4,997 93.7%	3,443 97.3%	1,785 97.6%
	Female	204 8.1%	277 9.3%	337 6.3%	96 2.7%	43 2.4%
Air Force	Male	6,686 77.3%	8,105 77.9%	19,576 79.4%	13,216 84.7%	8,819 87.1%
	Female	1,960 22.7%	2,300 22.1%	5,065 20.6%	2,394 15.3%	1,310 12.9%
DoD Totals	Male	20,959	[22,235] [80.9%]	[59,783] [82.4%]	38,431 86.6%	24,634 87.8%
	Female	4,966 19.2%	[5,261] [19.1%]	[12,757] [17.6%]	5,968 13.4%	3,418 12.2%

Source: DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (Sept. 30, 2005), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/RG0509.pdf>; DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (WOMEN ONLY) (Sept. 30, 2005), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0509f.pdf>. Note: It appears highly likely that a transcription error occurred in columns O-2 and O-3 in the "women only" data for the Navy, above. The bracketed numbers reflect the author's remedy of this apparent error by replacing the data that originally appeared in the O-2 grade with that from the O-3 grade, and vice-versa. All data affected by this change is bracketed.

O-5	O-6	O-7	O-8	O-9	O-10	Total
7,975 87.3%	3,328 88.2%	147 96.7%	94 94.0%	45 100%	10 100%	57,675 83.4%
1,159 12.7%	447 11.8%	5 3.3%	6 6.0%	0 9%	0 0%	11,499 16.6%
6,055 87.0%	2,963 88.4%	104 94.5%	59 90.8%	30 100%	8 100%	43,519 84.9%
906 13.0%	387 11.6%	6 5.5%	6 9.2%	0 0%	0 0%	7,742 15.1%
1,785 97.6%	666 96.9%	39 97.5%	20 95.2%	15 100%	5 100%	15,979 94.2%
43 2.4%	21 3.1%	1 2.5%	1 4.8%	0 0%	0 0%	980 5.8%
8,819 87.1%	3,124 88.0%	125 91.2%	81 94.2%	37 97.4%	12 100%	59,781 81.6%
1,310 12.9%	424 12.0%	12 8.8%	5 5.8%	1 2.6%	0 0%	13,471 18.4%
24,634 87.8%	10,081 88.7%	415 94.5%	254 93.4%	127 99.2%	35 100%	176,954 84.0%
3,418 12.2%	1,279 11.3%	24 5.5%	18 6.6%	1 0.8%	0 0%	33,692 16.0%

