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ARTICLE

CONSTRUCTING THE CO-ED MILITARY[†]

Elaine Donnelly^{††}

I. INTRODUCTION

The armed forces of the United States are organizationally strong. All branches and communities have proud histories, cultural traditions, and members motivated by patriotism as well as personal career goals. The institutional strength of the military, however, also makes it vulnerable to political pressures that can undermine its culture. Because everyone must follow orders, the armed forces are a prime venue for social engineering. Some civilians believe in “social constructionism”—the idea that fundamental human characteristics, including gender differences other than obvious anatomy, are learned behaviors that can be radically changed. Some want to construct a new gender-free military, putting to the ultimate test theories about the interchangeability of women and men in all roles.

Independent review of social change in the armed forces is critically important. Our gender-integrated volunteer force is at war and undergoing radical organizational and cultural change at the same time. Individual men and women stand between our nation and enemies who would do us harm, but the success of their mission depends on a complex organization that is more demanding than anything in civilian life. This institution asks courageous men and women to surrender their individuality and independence, many of their personal rights, and sometimes their very lives. The rest of us should lend support by guarding the strength and integrity of the institution in which they serve.

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A. *The Importance of Objective Analysis*

On January 27, 1967, a deadly accident occurred that could have stalled America's program of space exploration indefinitely. During a pre-launch test of the Apollo One spacecraft,¹ an electrical spark ignited the pure-oxygen atmosphere inside the cramped capsule, killing astronauts Virgil Grissom, Edward White, and Roger Chafee.² Critics demanded to know why the mechanical and electrical engineers of the National Aeronautic and Space Administration (NASA) failed to recognize the inherent dangers of operating in a pure-oxygen environment. In the aftermath of that tragedy, NASA made choices that are instructive to another institution today: the United States military. In 1967, a pure-oxygen atmosphere was thought to be the best for sustaining human life in orbit; pure-oxygen systems weighed less than mixed-gas systems and had been deployed successfully in the Mercury and Gemini missions.³ This basic assumption would prove to be both flawed and fatal. Moreover, indicators of trouble immediately preceding the fire—including communication problems, a “sour smell” in the spacesuit loop, and a sudden, unexplained rise in oxygen flow to the

1. Apollo One is the official name given retroactively to the Apollo/Saturn 204 (AS-204) spacecraft. See National Air and Space Museum, Apollo One Summary of Events, Jan. 27, 1967, <http://www.nasa.gov/collections/imagery/apollo/AS01/a01sum.htm> (last visited May 1, 2007).

2. Mary C. White, NASA History, Detailed Biographies of Apollo 1 Crew—Epilogue (Aug. 4, 2006), <http://www.hq.nasa.gov/office/pao/History/Apollo204/zorn/epilog.htm>.

3. Conversation with Capt. Walter M. Schirra, U.S. Navy (Ret.), one of the original seven Mercury astronauts, in San Diego, Cal. (Mar. 1994); see also NASA, REPORT OF APOLLO 204 REVIEW BOARD, at pt. IV (Apr. 5, 1967), available at <http://history.nasa.gov/Apollo204/content.html> (“The test was conducted with . . . a 100-percent oxygen atmosphere.”); *id.* at app. D-11-9.

The purge with 100-percent O₂ at above sea-level pressure contributed to the propagation of fire in the Apollo 204 Spacecraft. . . . This was the planned cabin environment for testing and launch, since prelaunch denitrogenation is necessary to forestall the possibility of bends at the mission ambient pressure of 5 pounds per square inch absolute. A comprehensive review of the operational and physiological trade-offs of the various methods of denitrogenation is in progress.

Id.

The Apollo One tragedy had been foreshadowed six years earlier, in 1961, when Valentin Bondarenko, a Soviet cosmonaut trainee, was horribly burned and killed in an accidental fire inside an isolation chamber with a high-oxygen environment. The USSR concealed that calamity from the public for many years. James Oberger observed, “The mere knowledge that a Soviet oxygen-rich fire had killed a cosmonaut might have been enough to forestall an American repetition of the disaster.” See JAMES E. OBERGER, UNCOVERING SOVIET DISASTERS: EXPLORING THE LIMITS OF GLASNOST 170 (1988).

spacesuits—were noted but disregarded. Tragically, only eight seconds after Grissom reported fire in the cockpit, the astronauts perished in a fireball that melted and fused their spacesuits.⁴

NASA temporarily suspended the Apollo program and conducted a full investigation. During that critical time, NASA engineers could have defended their previous assumptions regarding the benefits of a pure-oxygen atmosphere in orbit. They could have defined as their goal the perfection of spacecraft machinery—that is, using pure-oxygen atmospheres in all orbiting spacecraft, with “zero tolerance” of sparks. Instead, NASA engineers challenged and objectively reevaluated the basic assumptions that had guided the space program prior to the fire. As a result, the pure-oxygen system aboard the Apollo spacecraft was replaced with a less volatile mixed-gas atmosphere. Furthermore, redundant backup systems that presumed both imperfection and potential failures were built into all spacecraft systems and machinery. Less than two years after the Apollo One fire, in December 1968, Apollo Eight became the first manned mission to successfully orbit the moon.

This episode in American history teaches lessons that are applicable not only to rocket science but also to social science. The mechanical engineers of NASA objectively reevaluated their basic assumptions, analyzed their mistakes, and implemented steps to prevent predictable and avoidable disasters. By contrast, social engineers out to change the culture of America’s military have refused to reevaluate their basic assumptions and have disregarded the negative consequences of their own mistakes. Young men and women are being asked to risk their lives in the equivalent of a volatile, pure-oxygen atmosphere—an environment that social engineers insist will “work” as long as the military enforces zero tolerance of “sparks.” This theoretical hubris disregards human failings, which are even more common than imperfections in spacecraft machinery. Like NASA, our military cannot operate on presumptions of perfection—especially when lives and national security are at risk.

In recent years of accelerated cultural change in the military, social engineers have taken advantage of certain political sensitivities to stifle objective analysis. To a certain extent, reticence about social problems in the military is understandable—Americans are enormously proud of the men and women who serve in the All-Volunteer Force. Nevertheless, straightforward debate about military social policies does not constitute criticism of men and women in uniform. In many ways, these men and women are like courageous astronauts who do not themselves make the

4. National Air and Space Museum, *supra* note 1.

decisions and policies under which they will live, and sometimes die, in the pursuit of a noble cause.

Pride in our astronauts does not preclude criticism of NASA. When flawed presumptions and engineering mistakes lead to unnecessary disaster and death, Americans and their elected representatives have the right—and, indeed, the responsibility—to demand objective analysis, unflinching candor, accountability for violations of law and policy, and constructive steps to remedy problems that elevate risks. In the same way, Americans have every right to question the flawed assumptions of social engineers who demand radical change in the culture of the military.

There is reason for concern about civilian and military advocates who want to order female soldiers into or near direct ground combat, institutionalize different standards in training and disciplinary matters, and force the acceptance of open homosexuality in military units that offer little or no privacy. Members of Congress have the constitutional responsibility to question such policies, both before and after they are implemented. There are no compelling reasons to elevate risks unnecessarily, or to make military life more difficult and dangerous for the men and women who volunteer to serve.

B. Standard of Review

There has not been an official, comprehensive analysis of social policies involving women in the military since 1992, when Congress established the Presidential Commission on the Assignment of Women in the Armed Forces (“Presidential Commission”).⁵ Congress directed the Presidential

5. *See generally* PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT: WOMEN IN COMBAT (1992) [hereinafter PRESIDENTIAL COMMISSION REPORT]. The fifteen retired military and civilian members of the Presidential Commission, appointed by then-President George H.W. Bush, included both advocates and opponents of women in combat. As a result, the Commission’s findings were comprehensive and not limited to a predetermined “consensus.” Commissioners requested and received testimony and detailed documents from the Department of Defense and all of the service communities throughout twenty-seven days of transcribed meetings in Washington, D.C., Chicago, Los Angeles, and Dallas. Retired officers, enlisted men and women, family-support professionals, members of Congress, combat veterans, religious and cultural leaders, foreign military representatives, training instructors, physiologists, military historians, and active duty men and women testified or spoke to commissioners during twenty-seven field trips to military locations. Members of the military were encouraged to express their opinions freely on either side of a wide variety of issues, provided that they had a rationale. A majority of commissioners voted against the deployment of women in air combat, most direct ground combat communities, and submarines, but they did not object to the presence of women on large surface ships such as aircraft carriers. Commission votes on

Commission to report findings and develop recommendations on a wide range of issues surrounding the deployment of women in ground, sea, and air combat.⁶ Furthermore, the Presidential Commission intensely debated the standard of review to be applied in formulating recommendations—that is, whether higher priority should be assigned to military readiness or to other concerns such as “diversity” and equal employment opportunity. A majority of commissioners supported a resolution assigning higher priority to overarching, classic concerns such as military necessity and effectiveness in time of war.⁷ Some commissioners, however, were reluctant to endorse even a non-binding resolution assigning higher priority to military necessity than to equal opportunity and other considerations.⁸

major recommendations occurred on November 3, 1992, the same day that President Bill Clinton was elected. Congress did not schedule hearings on the Presidential Commission’s recommendations and substantive findings, many of which remain relevant to close combat issues in the news today.

6. The issues considered included the history and nature of warfare, physiology, psychology, sociology, family and cultural values, the legal consequences of a change in regulations affecting military women, and, most importantly, the overarching, classic concerns of the military itself—namely, combat readiness, unit cohesion, and military effectiveness.

7. A consistent case against women in combat was set forth in the “Alternative Views” section of the *Presidential Commission Report*. See PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at 43-79. This section advocated a standard of review articulated by then-Secretary of Defense Richard Cheney on March 26, 1992:

[I]t’s important for us to remember that what we are asked to do here in the Department of Defense is to defend the nation. The only reason we exist is to be prepared to fight and win wars. We’re not a social welfare agency. . . . This is a military organization. Decisions we make have to be taken based upon those kinds of considerations and only those kinds of considerations.

Id. at 43 (alteration added); see also Center for Military Readiness, *The Case Against Women in Combat* (Dec. 12, 2001), <http://www.cmrlink.org/printfriendly.asp?docID=65> (summarizing the Alternative Views section of the *Presidential Commission Report*). The *Presidential Commission Report* also contained statements of individual commissioners who supported women in combat. See PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at 80-121.

8. See Transcript, Meeting of the Presidential Commission, Wash., D.C., Oct. 22, 1992, 6:00 p.m. EST to adjournment (on file with author). Commissioner Kate O’Beirne, sponsor of the non-binding resolution, said, “It seems to me appropriate to adopt a standard of review that our decisions are based on the needs of the military. That’s what [is] paramount in our mind.” *Id.* Commissioner Meredith Neizer disagreed on the need for such a resolution: “It’s military readiness, it’s military effectiveness, but that’s not always the only criteria.” *Id.* Commissioner Darryl Henderson said, “I don’t think we have a mutually exclusive situation here.” *Id.* Commissioner Donnelly added, “[C]oncern about military necessity does not preclude concern about equal opportunity. It’s a matter of priorities. People who are not convinced that women should be in combat are sometimes accused of

Differences of opinion on issues involving gender in the military hinge on the standard of review applied. Some activists expect the military to pay any price and bear any burden to promote careers, equal opportunity, or “diversity” as a primary goal. For example, Lt. Col. Anthony D. Reyes, appointed Chief of an Army Diversity Office established in 2005, advocates a complete repeal of women’s exemptions from all forms of direct combat as a way to promote “workforce diversity” in the ranks of flag officers.⁹ Other activists promote the cause of homosexuals in the military as a civil rights and equal opportunity issue, a stance that assigns higher priority to the desires of individuals than to the needs of the military.

Regardless of the gender-related issue in question, social engineers suggest that “leadership” and “sensitivity training” can solve all problems.¹⁰

being opposed to the rights of women, and it’s not so. That’s not the intent of the resolution.” *Id.* Some commissioners voting against the resolution said they would have preferred a resolution using the phrase “combat effectiveness,” a phrase used in the commission’s authorizing legislation. *Id.* Others noted that federal courts frequently have used the phrase “military necessity” in rulings deferring to the military, and that some policies that are not consistent with military necessity, such as gender-based recruiting quotas, have nothing to do with combat effectiveness. *Id.* Subsequent votes and statements by some commissioners favoring the integration of women into all combat communities indicated a preference for equal opportunity as the priority consideration, even when “performance” was cited as the primary goal. *See, e.g.*, PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at 90-92 (presenting a “Dissent on Ground Combat” signed by three commissioners).

9. LT. COL. ANTHONY D. REYES, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, MILITARY FELLOW RESEARCH REPORT, STRATEGIC OPTIONS FOR MANAGING DIVERSITY IN THE U.S. ARMY ix (June 2006), *available at* <http://www.jointcenter.org/publications1/publication-PDFs/TonyReyes.pdf>. Lt. Col. Reyes noted that only seven to eight percent of black officers enter the combat branches, which account for fifty-nine percent of the Army’s generals. *Id.* at 1-2. He argued that giving women access to the combat “pipeline” would increase diversity in the senior ranks. *Id.* at 2; *see also* Kelly Kennedy, *Women in Combat Arms?*, ARMY TIMES, Nov. 27, 2006, at 16.

Officers holding any grade of admiral or general are referred to as “flag officers” because they are entitled to have a flag designating their rank displayed at their place of duty.

10. *See, e.g.*, 1 SEC’Y OF THE ARMY, SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT 2-3, 15-25 (July 1997) (examining problems with sexual misconduct at Aberdeen Proving Ground and Army training facilities generally; recommending an extra week of “sensitivity” training for all recruits, conducted by diversity experts with a mandate to expand and engineer equal-opportunity programs); *see also* Tranette Ledford & G.E. Willis, *After Aberdeen*, ARMY TIMES, Sept. 22, 1997, at 3-4, 6; Sean D. Naylor, *Values Instruction To Be Added to Basic Training*, ARMY TIMES, Sept. 22, 1997, at 4 (noting that the planned extra week of training would cost the Army the equivalent of “three battalions worth of soldiers”); Philip Shenon, *Army’s Leadership Blamed in Report on Sexual Abuses*, N.Y. TIMES, Sept. 12, 1997, at A1; Editorial, *America’s Lovesick Military*, N.Y. POST, Sept.

This is tantamount to suggesting that perfect machines are sufficient to prevent sparks and combustion in a pure-oxygen environment. This Article will analyze policies that have needlessly complicated social policies in America's military and weakened the foundations of a structure that must remain strong. Objective analysis is the only way to prevent problems that vitiate readiness, discipline, and morale in the only military we have.

II. DOUBLE STANDARDS INVOLVING WOMEN (DSIW) UNDERMINE MILITARY STRUCTURE

Studies of gender in the military usually center on women, but the subject cannot be discussed without also analyzing the men who make and implement the policies designed by social engineers. When feminists and their allies demand policies "for women," Pentagon policymakers appear to become defensive and lose perspective. Men, it seems, cannot objectively deal with issues involving women. In turn, social engineers take advantage of the Pentagon's defensiveness by trying to suspend, circumvent, or redefine standard principles, including the concept of "equality." The idea of equality has been rendered almost meaningless because of inconsistent policies that this Article will refer to as "Double Standards Involving Women," or "DSIW." The acronym applies in many situations created in the pursuit of what feminists envision as a "gender free" or "ungendered" military.¹¹

15, 1997, at 22. Several reports on sexual misconduct at the service academies have advocated more hours of diversity or sensitivity training to increase acceptance of female cadets and midshipmen. *See, e.g.*, REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE MILITARY SERVICE ACADEMIES 37-41 (June 2005) [hereinafter DEFENSE TASK FORCE REPORT], available at http://www.sapr.mil/contents/references/high_gpo_rrc_tx.pdf. Homosexuals are not eligible to serve in the military, but on September 8, 1994, the Department of Defense and the military services were official co-sponsors of a "Diversity Day Training Event," which invited civilian advocates to promote "tolerance" of the homosexual lifestyle and cause with lectures, panel discussions, and videos. *See infra* note 411 and accompanying text.

11. *See, e.g.*, Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 751 (1996) ("[T]here is much to be gained and little to be lost by changing this aspect of military culture from a masculinist vision of unalloyed aggressivity to an ungended vision combining aggressivity with compassion."). In a February 1993 interview with *Vogue* magazine, Barbara S. Pope, former Assistant Navy Secretary for Manpower and Reserve Affairs, commented on reports that investigations of the 1991 Tailhook scandal had become abusive. "We are in the process of weeding out the white male as norm," she said. "We're about changing the culture." *See* Stephanie Guttman, *Sex and the Soldier*, NEW REPUBLIC, Feb. 24, 1997, at 20.

The military is a prime venue for social engineering because everyone in the chain of command must follow orders, and all are ultimately under civilian control. Some advocates suggest that the duty to follow orders is so absolute that dissent on social policies is unprofessional at best and mutinous at worst.¹² If the same standard were applied to the Pentagon's decisions about weapon systems, officers would have to remain silent about poorly designed equipment that creates unnecessary risks or detracts from the effectiveness of military missions. Although the U.S. Constitution properly assigns control of the military to civilians, political correctness within the Pentagon has become a formidable, vitiating force. Despite these political pressures, policy makers should be held accountable for policies that they tolerate or impose on the military—particularly the various, demoralizing forms of DSIW that are harmful to women, men, and the military as a whole.

It must be noted that female soldiers are not the primary cause of DSIW and should not be held responsible for its consequences. Most military women do not make policy—any more than most military men do. The problems evident in gender-integrated units—on land, at sea, and in the air—are usually caused when policymakers depart from sound principles that are applied in all other defense policy matters.

In previous decades, the military proudly led the way for positive social change in matters of civil rights. President Harry Truman signed an Executive Order banning racial segregation in the military¹³—an egalitarian move that advanced the needs of the military without simultaneously requiring changes in the military standards, principles, or culture.¹⁴ To the contrary, the history of gender integration in the military has been marred by convoluted double standards, which are only worsened by official denials that such double standards even exist. Many “experts” fail to acknowledge the double standards that are common knowledge among

12. Military personnel evaluation forms have a checkbox indicating support for equal opportunity (EO) programs. Personnel expressing dissent on EO matters for any reason have been subject to career penalties, including denial of promotions, demotion, or dismissal. *See, e.g.,* Becky Garrison, *Carkhuff Will Stay, but Will He Fly Again?*, NAVY TIMES, Sept. 11, 1995, at 17 (reporting the case of Lt. Cmdr. Ken Carkhuff, a Navy helicopter pilot who was almost dismissed from the Navy because he expressed reservations—but did not disobey orders—regarding women in combat aviation); Rowan Scarborough, *Grounded Navy Pilot Calls Nonflying Jobs Career-Ending*, WASH. TIMES, Aug. 26, 1995, at A2 (same).

13. *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948) (“There shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin . . .”).

14. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-40 (Findings 1.33, 1.33A).

military personnel. Pervasive forms of DSIW—which feminists constantly say they oppose but expect to be implemented anyway—vitiate sound principles necessary to support a strong and ready volunteer force.¹⁵ The best way to improve the status of women would be to end all forms of DSIW in the military, and to restore high, uncompromised standards and sound priorities that benefit women, men, and the armed forces as a whole.

A. Current Department of Defense (DoD) Regulations and Law

Prior to March 2003, America had little experience with female soldiers in or near direct ground combat. The 1991 Persian Gulf War was the largest deployment of female soldiers in modern history, and women served effectively in support roles.¹⁶ Operations Desert Shield and Desert Storm, however, were relatively brief, and the Department of Defense was not able to draw conclusions about the abilities of women in combat roles.¹⁷ Nevertheless, lessons learned in the Persian Gulf War could have been useful in formulating policies that would advance both the interests of

15. See, e.g., BRIAN MITCHELL, *WOMEN IN THE MILITARY: FLIRTING WITH DISASTER* 99-122 (1998). In a chapter titled “DACOWITS 1, Army 0,” Mitchell described the earnest attempt by Army Chief of Staff Gen. Edward C. “Shy” Meyer to analyze the role of female soldiers and establish objective standards for performance commensurate with the demands of given military occupational specialties (MOS) in time of war. His “Women in the Army” (WITA) study began in May 1980 and was initially presented to the Defense Advisory Committee on Women in the Services (DACOWITS) in August 1982. At first DACOWITS welcomed the study, but three months later civilian and former military feminists successfully pressured DACOWITS to oppose the WITA recommendations as “barriers” to women’s careers. By the fall of 1983, Gen. Meyer had retired and a civilian civil rights lawyer with no military experience was appointed Assistant Secretary of the Army for Manpower and Reserve Affairs. As a result, most of the WITA recommendations to close certain positions to women, and to establish objective standards for physically demanding military occupations specialties, were repealed, made optional, or dropped. Following what Mitchell called the “emasculatation” of WITA, there have been no attempts in the Army to establish objective standards for physically challenging occupational specialties; nor are there likely to be any additional attempts in the near future. Instead, the armed forces and military service academies have adopted various gender-norming techniques that evaluate or grade female trainees differently. Gender-normed standards—considered more “fair” for women—give credit for “equal effort” rather than equal results. (Brian Mitchell’s book was originally published in 1989 under the title *Weak Link: The Feminization of the Military*.)

16. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-47 (Finding 1.55). Approximately 37,000 Army, Navy, Marine, and Air Force women deployed in the war. The Commission also received data from the various services indicating that servicewomen experienced a rate of non-deployability of approximately 3:1 in comparison to men in each of the services, largely due to pregnancy. *Id.* at C-120 (Finding 3.54).

17. *Id.* at C-40, C-49 (Findings 1.35, 1.63, respectively).

women and the needs of the military. That opportunity was lost in September 1991, when a sex scandal embarrassed the Navy and put Pentagon officials on the defensive.

1. The Tailhook Turning Point

a. Defensiveness and DSIW

At the 1991 Tailhook Association convention in Las Vegas, a group of male and female naval aviators celebrated the end of the Persian Gulf War by partying wildly. On June 24, 1992, Navy Lt. Paula Coughlin tearfully told ABC News that she had been harassed and physically assaulted by male aviators lined up in a hotel corridor “gauntlet.”¹⁸

Disciplining the male aviators for “conduct unbecoming” and changing Navy culture to prevent a recurrence certainly was justified, but media and political pressures on the Navy became excessively intense. Feminists, their allies in Congress, and the media essentially demanded that all men present at Tailhook ’91 be punished, whether they were guilty of misconduct or not.¹⁹ When a preliminary report on Tailhook was prematurely leaked to the media, then-Secretary of the Navy H. Lawrence Garrett III resigned. Dissatisfied congressional feminists, led by Rep. Patricia Schroeder (D-Colo.), berated the Joint Chiefs for “not getting it.”²⁰ Senior House Armed Services Committee member Schroeder and other angry members of Congress, such as Rep. John Murtha (D-Pa.) and Sen. Arlen Specter (R-Pa.), also threatened to withhold appropriation funds for personnel and weapons systems, and to block military promotions, if Navy officials did not make amends for Tailhook.²¹

18. Transcript, *ABC World News Tonight* (ABC television broadcast June 24, 1992, 6:30 p.m. EST); John Lancaster, *A Gantlet of Terror, Frustration: Navy Pilot Recounts Tailhook Incident*, WASH. POST, June 24, 1992, at A1.

19. See Rowan Scarborough, *Open Season on Navy*, WASH. TIMES, July 20, 1992, at A1.

20. See, e.g., Helen Dewar, *Senate Women Lose Fight To Pull Rank*, WASH. POST, Apr. 20, 1994, at A1 (published with an Associated Press photograph of Rep. Schroeder and eight more congresswomen walking to the Senate to oppose the retirement in rank of Adm. Frank B. Kelso, who was the Chief of Naval Operations during the Tailhook controversy); William Matthews, *The Woman the Pentagon Loves To Hate*, ARMY TIMES, Sept. 7, 1992, at 8; James Webb, *Witch Hunt in the Navy*, N.Y. TIMES, Oct. 6, 1992, at A23.

21. See, e.g., Scarborough, *supra* note 19 (“Rep. Patricia Schroeder, Colorado Democrat, is using Tailhook to promote the women’s movement.”); Matthews, *supra* note 20 (“[Schroeder] has broken a lot of ground for women in the military and a lot of women really respect her. But military men? She threatens them. She is a woman in a position to control the fate of boys’ toys.” (quoting Cathryn Schultz of the Center for Defense Information) (alteration added)).

When the investigation was shifted from the Navy to the Department of Defense Inspector General, the situation began to spin so out of control as to violate the due process rights of the male aviators. In the rush to obtain convictions, overzealous prosecutors gave immunity to junior officers in exchange for testimony against senior commanders, and standard legal safeguards were suspended during intense, abusive interrogations.²² Newspapers nationwide began to report on what became known as the Tailhook “witch-hook”—i.e., unfair punishments of Navy men but not women, even after some men had been cleared of misconduct.²³

Although most cases were dismissed immediately for lack of evidence, thirty-nine male officers received nonjudicial punishment for various types of misconduct, drunkenness, and false statements.²⁴ Cases involving

22. Webb, *supra* note 20; Rowan Scarborough, *Tailhook Judge Fires Prosecutor for Misconduct*, WASH. TIMES, Feb. 1, 1994, at A3; Editorial, *End the Witch Hunt*, SAN DIEGO UNION-TRIB., Feb. 19, 1992, at G2; Peter J. Boyer, *Admiral Boorda's War*, NEW YORKER, Sept. 16, 2006, at 72-75; Col. W. Hays Parks, *Tailhook: What Happened, Why & What's To Be Learned*, U.S. NAVAL INST. PROC., Sept. 1994, at 89-103. Col. Parks described various threats and unnecessarily degrading or intrusive questions used to extract evidence. *Id.* at 102. Regarding the conduct of the Tailhook investigators, Judge Robert E. Wiss of the U.S. Court of Military Appeals wrote:

The assembly-line technique in this case that merged and blurred investigative and justice procedures is troublesome. At best, it reflects a most curiously careless and amateurish approach to a very high-profile case by experienced military lawyers and investigators. At worst, it raises the possibility of a shadiness in respecting the rights of military members caught up in a criminal investigation that cannot be condoned.

Samples v. United States, 38 M.J. 482, 487 (C.M.A. 1994).

23. Webb, *supra* note 20; Boyer, *supra* note 22, at 74 (“The Department of Defense regularly granted immunity to junior officers in the hope of ensnaring their squadron commanders, who thus became permanently ‘implicated’ even if they were subsequently cleared of wrongdoing.”); *see, e.g.*, Richard Cohen, *Keelhauling Commander Stumpf*, WASH. POST, Jan. 12, 1996, at A15; *see also* Robert J. Caldwell, *Closing Tailhook's Bleeding Wound*, SAN DIEGO UNION-TRIB., Dec. 15, 1996, at G-1 (reporting that one officer, Lt. John Cooney, U.S. Navy, was “implicated” and punished despite his insistence that he was not even at Tailhook and despite later verification of his alibi with dated receipts); Editorial, *The Navy's Anita Hill*, DETROIT NEWS, Oct. 24, 1993, at 2B.

24. Parks, *supra* note 22, at 101-03 (noting that the DoD Acting Inspector General had forwarded 140 cases for review—not “referred” them for prosecution—and that more than half were dismissed immediately for lack of evidence or the lack of commission of a criminal offense); *see also* Gregory Vistica, *Tailhook Snagging Men Only, Lets Women Off*, SAN DIEGO UNION-TRIB., Aug. 27, 1993, at A1; Rowan Scarborough, *Navy Morale Sunk by Tailhook Probe*, WASH. TIMES, Mar. 22, 1993, at A1; and Rowan Scarborough, *Only 3 Assault Cases in Tailhook Scandal*, WASH. TIMES, Aug. 16, 1993, at A1.

misconduct by women, however, were treated with a gender-based double standard that had been established by the DoD Inspector General. For example, while men were punished for indecent exposure and engaging in suggestive leg shaving, a female officer known to have been partying topless and several other women who also had participated in heavy drinking, inappropriate touching of men, and the leg shaving ritual, were not punished.²⁵ The same double standard was applied in cases of adultery at Tailhook.²⁶ A female officer told investigators from the Inspector General's office that three officers attempted to gang rape her.²⁷ Subsequently, she admitted that she had lied, stating that she had consensual sex with one of the officers in question but did not want her fiancé to know of her activities.²⁸ The men were punished, but the female officer was not held accountable for her dishonest accusation.²⁹

25. OFFICE OF THE INSPECTOR GENERAL, THE TAILHOOK REPORT, at VIII-1-2 (1993) [hereinafter TAILHOOK REPORT]; Parks, *supra* note 22, at 101 ("DoD IG [Inspector General] policy established for the Tailhook investigation was that it would not include misconduct by female officers.").

26. Parks, *supra* note 22, at 101.

27. *Id.* at 101; Vistica, *supra* note 24; Elaine Donnelly, *The Tailhook Scandals*, NAT'L REV., Mar. 7, 1994, at 61.

28. See Editorial, *Tailhook Fever*, WALL ST. J., Mar. 12, 1996, at A18; Rowan Scarborough, *Tailhook Witness Told Lies*, WASH. TIMES, July 23, 1993, at A1. This statement also is based on numerous interviews with key Navy officials who were involved in or implicated by the Tailhook investigation, including former Navy Judge Advocate General Rear Adm. John "Ted" Gordon, U.S. Navy (Ret.), former Commander of the Naval Investigative Service (NIS) Rear Adm. Duval M. Williams, U.S. Navy (Ret.), Rear Adm. Riley Mixson, U.S. Navy (Ret.), Cmdr. Robert E. Stumpf, USN, and several others who were unjustly punished in various ways.

29. Parks, *supra* note 22, at 101; Donnelly, *supra* note 27. Several flag officers also were unfairly scapegoated in media reports. See Parks, *supra* note 22, at 96-98; Donnelly, *supra* note 27, at 59-60 (based on personal interviews and correspondence in 1993 with Rear Adms. Mixson, Williams, and Gordon). Acting Navy Secretary Sean O'Keefe falsely claimed at a September 1992 news conference that Rear Adms. John Gordon and Duval Williams were retiring as a matter of "conscience." In truth, Adm. Gordon was scheduled to retire at that time; he did not resign due to Tailhook. Four weeks later, Acting Secretary O'Keefe issued a memorandum clearing Rear Adms. Williams, Gordon, and George W. Davis, the Navy Inspector General, of wrongdoing. On Feb. 14, 1995, Sen. Sam Nunn (D-Ga.) inserted a statement in the Congressional Record correcting misinformation about the retirement of Rear Adm. Gordon, the former Navy Judge Advocate General, making it clear that Gordon had not done anything to warrant adverse actions. 141 Cong Rec S2667 (1995) (statement of Sen. Nunn).

In one of the more egregious cases of Tailhook injustice, a career-ending letter of censure was issued to Rear Adm. Riley Mixson in 1993, punishing him for Tailhook convention arrangements made by others in 1991. Rear Adm. Mixson was busy elsewhere at that time,

In February 1994, Capt. William T. Vest, a Navy judge, blasted DoD officials for bungled, amateurish witness interview reports that could not stand up in court.³⁰ Judge Vest justifiably threw out the last of three pending courts-martial due to violations of due process. The Association of Naval Aviation (ANA) reported that at least 152 Navy officers were directly affected by Tailhook-related letters of censure, non-judicial punishments, career-ending correspondence, fines, adverse evaluations, forced resignations, and other adverse actions.³¹ Since there were only three courts-martial, however, dissatisfied feminists created the false impression that the men had gotten off easy.³²

b. Feminists Take Advantage of Navy Scandal

Rep. Patricia Schroeder (D-Colo.) wasted no time seizing upon the Tailhook scandal to force the embarrassed Navy to accept female pilots into tactical aviation. The liberal congresswoman sponsored and passed an amendment in the House version of the 1992 Defense Authorization bill,

serving as Commander Battle Force Red Sea, leading a three carrier battle force and numerous allied ships in the air/surface campaign in Operation Desert Storm. In 2003, Navy Secretary Gordon England convened a board of review, which cleared Mixson's name and removed the unwarranted letter of censure from his file.

In June 2002, another prominent Tailhook target, former Blue Angel Cmdr. Robert E. Stumpf, finally received his deserved promotion to the rank of captain, which had been bureaucratically ensnared in the Senate's "Tailhook Certification" process. Capt. Stumpf, an exemplary officer who probably would have achieved flag rank, celebrated his retroactive promotion on the same day that he retired from the Navy.

30. Scarborough, *supra* note 22; Donnelly, *supra* note 27, at 59-60. Rear Adm. John Gordon, the Navy Judge Advocate General, predicted that numerous violations of due process rights by the Acting DoD Inspector Gen. Derek J. Vander Schaaf, including bungled interviews, would result in the dismissal of all court martial cases. In an interview with *The San Diego Union-Tribune*, Gordon commented, "[T]he politicians took charge, taint[ing] evidence and the process. Improper command influence ruined the investigations and ruined the prosecutions." See Robert J. Caldwell, *Hollywood's Half-True Tailhook*, SAN DIEGO UNION-TRIB., May 28, 1995, at G1. The dismissal of the last three pending courts martial on February 8, 1992, proved Gordon to be correct.

During subsequent litigation brought by Lt. Paula Coughlin against the Tailhook Association and Hilton Hotels, Judge Philip M. Pro, a United States district court judge in Las Vegas, criticized the DoD Inspector General's investigatory techniques and ruled that the report was "largely conclusory and based upon hearsay indicating its lack of trustworthiness." *Coughlin v. Tailhook Ass'n*, No. 93-044 (D. Nev. Sept. 2, 1994); see also John F. Harris, *U.S. Judge Says Tailhook Report Won't Fly*, WASH. POST, Sept. 8, 1994, at A8.

31. Jerry Unruh, *The Flight Plan: Impact of Tailhook*, WINGS OF GOLD (Ass'n of Naval Aviation), Summer 1996, at 12-13.

32. Ellen Goodman, *The Navy Got Away with It*, BOSTON GLOBE, Feb. 11, 1994.

which repealed the law that exempted women from combat aviation.³³ She saw the acceptance of female pilots as the first step in transforming the unruly “culture” of the male-dominated aviation community.³⁴ Rep. Schroeder’s harsh criticism of the Navy pressured the organization to rush the training of women in combat aviation, with tragic consequences.³⁵ Yet, Rep. Schroeder’s demands presented a cultural contradiction. In essence, she and the advocates of women in combat were arguing that violence against women in a Las Vegas hotel corridor was wrong, but combat violence against women, at the hands of the enemy, was perfectly all right.

The illogic of Rep. Schroeder’s position escaped the attention of House Armed Services Committee members who, without prior hearings, hastily approved her amendment to open combat aviation to women. On June 18, 1991, the Senate Armed Services Committee did conduct a comprehensive and balanced hearing on the Schroeder amendment. Several advocates testified in favor of the change, but members of the Joint Chiefs testified in opposition to the legislation.

The Senate legislation that was proposed as a substitute for the Schroeder bill called for the establishment of a presidential commission to study all aspects of the issue. Just prior to the floor vote, then-Secretary of Defense Richard Cheney expressed support for the presidential commission legislation, but equivocated on Rep. Schroeder’s amendment to put women in combat aviation. Taking a “ready, fire, aim” approach, the Senate passed legislation repealing the law regarding women in combat aviation,³⁶ while simultaneously establishing a presidential commission to analyze and report on what that would mean.³⁷

c. The 1992 Presidential Commission Study and Report

Throughout 1992, while the Presidential Commission on the Assignment of Women in the Armed Forces conducted its study, the administration of President George H.W. Bush refrained from assigning women to combat

33. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531, 105 Stat. 1290, 1365 (1991) (opening naval aviation to women and repealing 10 U.S.C. § 8549 (1956), which barred Air Force women from assignment to “duty in aircraft engaged in combat missions”).

34. *Women in the Military: The Tailhook Affair and the Problem of Sexual Harassment: Hearing Before the Subcomm. on Mil. Personnel & Compensation of the H. Comm. on Armed Servs. & Def. Pol’y Panel*, 102d Cong. 25 (Sept. 14, 1992) (statement of Rep. Schroeder).

35. See *infra* Part II.D.

36. Pub. L. No. 102-190, § 531, 105 Stat. at 1365.

37. *Id.* § 541, 105 Stat. at 1450.

aviation. On November 3, 1992, the day that the Presidential Commission voted to oppose the use of women in most types of combat, including aviation, President Bush lost his bid for re-election. Thereafter, in 1993, Congress was preoccupied with then-President Bill Clinton's demand that homosexuals be allowed to serve openly in the military. Although there were no full-scale hearings on the extensive findings and recommendations of the Presidential Commission, Congress repealed the law that exempted women from service on combatant ships.³⁸ Navy officials embarrassed by the Tailhook scandal were reluctant to oppose the legislation. With most combatant ships and aircraft opened to women, nothing remained except Department of Defense regulations exempting women from involuntary assignments in or near direct ground combat units, such as the infantry.

However, Congress was clear in that it did not want the Pentagon to order women into direct ground combat.³⁹ The National Defense Authorization Acts for Fiscal Year 1994 and subsequent years have included language safeguarding congressional oversight on matters of women in combat.⁴⁰ If the Pentagon wants to change these regulations regarding women in ground combat, the Secretary of Defense must approve and formally notify Congress thirty consecutive legislative days (approximately three months) in advance.⁴¹ Such notice must include an

38. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541, 107 Stat. 1547, 1659 (1993) (repealing 10 U.S.C. § 6015 (1991), which barred women from assignment 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)" and from assignment 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").

39. JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 118-19 (1983). Contrary to popular belief, Congress never enacted a statute that specifically exempted women from ground combat. Unlike specific ships and aircraft on combatant missions, ground combat units were more difficult for Congress to define. Members also trusted that the Pentagon would never assign women to ground combat units such as the infantry.

40. *See, e.g.*, Pub. L. No. 103-160, § 541, 107 Stat. at 1659.

41. *Id.* § 542, 107 Stat. at 1659-60. The FY 1994 congressional notification law regarding direct ground combat was reinforced and expanded in the FY 2001 and 2002 NDAA's. *See* National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 573, 114 Stat. 1654, 1654A-136 (2000) (enacting 10 U.S.C. § 6035 (2000) (requiring the Secretary of Defense to give Congress a thirty-day notice before either assigning women to serve aboard submarines or configuring submarines to allow for women's service)); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 591, 115 Stat. 1012, 1125 (2002) (amending the law from FY 1994). The notification law regarding direct ground combat was restated in the FY 2006 NDAA. *See* National Defense

analysis of the effect of the proposed changes on the exemption of young women from Selective Service obligations,⁴² which the Supreme Court previously has tied to their exemption from ground combat.⁴³

d. The Aspin Regulations

On April 28, 1993, then-Secretary of Defense Les Aspin issued a memorandum announcing that he was going to begin the training of female pilots for tactical aviation, promote repeal of the remaining law regarding combatant ships, and make significant changes in DoD regulations regarding the assignment of servicewomen in or near close combat.⁴⁴ On January 13, 1994, Secretary Aspin followed up on his plan by issuing a two-page memorandum setting forth regulations that would govern the assignment of women in or near direct ground combat. In addition, the memorandum provided a definition of what constitutes direct ground combat.⁴⁵ The 1994 regulations, known as the Aspin rules, apply to all the military services and remain in effect today.

With identical letters dated January 21, 1994, Secretary Aspin officially reported the rule changes to the Chairmen and Ranking Members of the House and Senate Armed Services Committees.⁴⁶ The new rule and definition of direct ground combat provided:

A. *Rule.* Service members are eligible to be assigned to all positions for which they are qualified, except that women shall

Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 541(a)(1), 119 Stat. 3136, 3251 (2006) (enacting 10 U.S.C. § 652 (West Supp. 2007)).

Legislation sponsored by Rep. Roscoe Bartlett (R-Md.), and enacted as part of the FY 2001 and 2002 NDAA's, mandated official notice to Congress at least thirty legislative days (when both Houses are in session) before women are assigned to submarines as well as direct ground combat.

42. 10 U.S.C. § 652.

43. *See generally* Rostker v. Goldberg, 453 U.S. 57 (1981).

44. *See* Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Army, Navy, and Air Force et al., Policy on the Assignment of Women in the Armed Forces (Apr. 28, 1993) [hereinafter Policy on the Assignment of Women].

45. *See* Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Army, Navy, and Air Force et al., Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994) [hereinafter Direct Ground Combat Definition and Assignment Rule], available at <http://cmrlink.org/cmnotes/lesaspin%20dgc%20defassign%20rule%20011394.pdf>.

46. *See* Letters from Secretary of Defense Les Aspin to House Armed Services Committee Chairman Ronald V. Dellums and Ranking Member Floyd Spence, and to Senate Armed Services Committee Chairman Sam Nunn and Ranking Member Strom Thurmond (Jan. 21, 1994).

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:

B. *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.⁴⁷

The new combat definition permitted four additional restrictions on the assignment of women:

- Where the Service Secretary attests that the costs of appropriate berthing and privacy arrangements are prohibitive;
- Where units and positions are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women;
- Where units are engaged in long range reconnaissance operations and Special Operations Forces missions; and
- Where job related physical requirements would necessarily exclude the vast majority of women service members.⁴⁸

On July 28, 1994, Aspin's successor, William J. Perry, approved lists of units that would be opened or closed to women, in compliance with the Aspin regulations announced on January 13.⁴⁹

The most significant changes set forth in the Aspin regulations were: (1) the elimination of the so-called "DoD Risk Rule,"⁵⁰ which exempted

47. Direct Ground Combat Definition and Assignment Rule, *supra* note 45.

48. *Id.*

49. Memorandum from Secretary of Defense William Perry to the Secretaries of the Army, Navy, and Air Force et al., Application of the Definition of Direct Ground Combat and Assignment Rule (July 28, 1994) [hereinafter Application of Direct Ground Combat Definition and Rule], available at <http://cmrlink.org/cmrrnotes/wjperry%20letter%20072894>.

50. The Department of Defense established the Risk Rule in 1988 to help standardize the services' assignment of women to hostile areas. In evaluating whether a non-combat position should be closed to women, each service interpreted the DoD Risk Rule according to its own mission requirements. The Risk Rule read as follows:

[R]isks of direct combat, exposure to hostile fire, or capture are proper criteria

women from assignments in close proximity to close combat units, and (2) the removal of the phrase “substantial risk of capture” from the definition of direct ground combat. In general, the DoD Risk Rule had made it possible for women to volunteer for military service without being forced to serve in units operating in or near the front lines of direct ground combat. Although not a perfect standard, the Risk Rule reflected the then-prevailing view that female soldiers in support units should not be needlessly exposed to risk of injury, death, or capture while serving in close proximity with close combat units such as the infantry, armor, field artillery, Marine infantry, and Special Operations Forces.

Eliminating the DoD Risk Rule and changing the definition of direct ground combat made available to women hundreds of military occupational specialties and approximately 80,699 positions on land, as well as a total of 259,199 positions in all the military services, since 1993.⁵¹ These newly opened positions included some brigade-level headquarters of direct ground combat units, and support units that do not routinely “collocate” with direct ground combat units at the battalion level.⁵² The Aspin regulations continued to exempt female soldiers from assignments in smaller direct ground combat battalions, such as the infantry, armor, field artillery, Marine infantry, Special Operations Forces such as the Rangers and Navy SEALs, and Special Operations Forces helicopters. Lastly, the Aspin regulations exempted women from assignment in support units that constantly “collocate” or embed with direct ground combat units such as the infantry.⁵³

for closing non-combat positions or units to women, when the type, degree, and duration of such risk are equal to or greater than the combat units with which they are normally associated within a given theater of operations.

See PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-36 (Findings 1.16, 1.17); see also Center for Military Readiness, *Policy Analysis: Why American Servicewomen Are Serving at Greater Risk* (Apr. 2003), <http://cmrlink.org/CMRNotes/M38V8CCMRRPT16.pdf>.

51. See Dep’t of Defense, Office of the Secretary of Defense, Public Affairs News Release No. 449-94, Positions and Occupations Open to Active Duty Women by Service, As of October 1, 1994 (July 29, 1994); Lists of open and closed positions submitted by the services and approved by Defense Secretary William J. Perry on July 28, 1994 (on file with author); Table provided by Under Secretary of Defense for Personnel & Readiness titled “Positions Opened Since April 1993” on July 28, 1994 (on file with author); see also GEN. ACCOUNTING OFFICE, GENDER ISSUES: INFORMATION ON DOD’S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION (1998), available at <http://www.gao.gov/archive/1999/ns99007.pdf>.

52. Larger brigades, which are composed of several battalions, are composed of approximately 3600 to 3900 soldiers. Smaller battalions usually include 700 to 800 soldiers.

53. See *infra* Part II.A.2.b.

e. Female Soldiers Serving at Greater Risk

The full effect of the rule changes that constituted the Aspin regulations did not become apparent until nine years later. On March 23, 2003, four days into the ground war in Iraq, the 507th Maintenance Unit, operating with a Patriot Missile Battery of the 3rd Infantry Division, took a wrong turn on the road near the city of Nasiriyah and was ambushed.⁵⁴ Absent the DoD Risk Rule, which was abolished in 1994, the gender-integrated support unit was part of a column of support troops accompanying the aggressive 3rd Infantry Division on its way to liberate Baghdad.⁵⁵

Within hours the nation witnessed on television the frightened face of captured Army Spec. Shoshana Johnson on Al Jazeera TV, together with four fellow soldiers. The Iraqi video also showed the bodies of several dead American soldiers, some of whom appeared to have been shot at point blank range.⁵⁶ Among the missing were Pfc. Lori Piestewa, a young single

54. See Richard S. Lowry, *The Story of Jessica Lynch: What Really Happened in Nasiriyah*, DAILY STANDARD (online), Apr. 24, 2007, <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/568yzaz.asp>. Lowry described the actions of Marines who fought at Nasirayah and Army Sergeant Donald Walters, whose vehicle got stuck in the sand. See *id.* Walters was caught fifteen miles behind enemy lines and “resisted for as long as he could. He probably ‘fought to his last bullet.’ He was captured alive and taken to an Iraqi stronghold and later murdered.” *Id.* Lowry added,

The story of the Marines’ battle to secure Nasiriyah is an amazing saga that everyone should read. The battle was filled with individual acts of heroism. A Distinguished Flying Cross, two Navy Crosses, a handful of Silver Stars, and a larger handful of Bronze Stars were awarded for valor in the battle. Sergeant Donald Walters was awarded a Silver Star, as well. Donald was a sandy-haired young man. Some believe that it was an intercepted Iraqi radio report of his ordeal that was somehow attributed to Jessica Lynch, the only blond female in the unit.

Id.; see also Jane McHugh, *Navigation Error Led to Attack on Convoy*, ARMY TIMES, July 21, 2003, available at <http://www.armytimes.com/legacy/new/0-ARMYPAPER-2009767.php>; Howard L. Rosenberg, *Nightline: The Real Story of Pfc. Jessica Lynch’s Convoy* (ABC television broadcast June 17, 2003) (transcript available at <http://abcnews.go.com/Nightline/story?id=128387> (Part 1); <http://abcnews.go.com/Nightline/story?id=128389> (Part 2)); Laura Cruz, *507th “Fought Hard,”* EL PASO TIMES, July 9, 2003, at 1A.

55. If the DoD Risk Rule had still been in effect, it is possible that this and similar support units would have been all-male or, if gender-integrated, assigned elsewhere until the completion of direct ground combat operations, i.e., the direct ground combat attack on Baghdad.

56. Paul Martin, *U.S. Calls Footage of POWs “Disgusting,”* WASH. TIMES, Mar. 24, 2003, at A01.

There were conflicting accounts of how many bodies were visible on the video [broadcast on Al Jazeera], but all agreed that at least four persons could be seen

mother of two toddlers, and nineteen-year-old Pfc. Jessica Lynch.⁵⁷ This was a surprise to many Americans, including the parents of female soldiers, who thought there were rules against women in close combat.⁵⁸

Nine days later, Marines and Special Operations Forces found the body of Pfc. Piastewa in a shallow grave near the civilian hospital where they had rescued Pfc. Jessica Lynch.⁵⁹ In a front page *Washington Post* story that captivated the world, Pfc. Lynch was initially and erroneously described as a teenage “Girl Rambo” warrior who had fired all her ammunition killing Iraqis before she was captured.⁶⁰ Some feminists hailed the capture of Shoshana Johnson and the “GI Jane” image of Pfc. Lynch as examples of women’s ability to fight in combat, which they considered justification for advancement of other feminist goals.⁶¹ Although doctors who had examined

in U.S. Army uniforms, some of them lying in pools of blood. At least two of them appeared to have died from wounds to the head. The video also showed individual interviews with five prisoners, several of whom appeared to be extremely frightened. The one woman among the prisoners [Sp. Shoshawna Johnson] had a large bandage around her ankle, and one of the men was lying on a blanket and had to be assisted to sit up.

Id.; see also Lowry, *supra* note 54.

57. Chris Roberts, Associated Press, *Texas Army Post, Kin Horrified About POWs*, WASH. POST, Mar. 25, 2003.

58. See Lowry, *supra* note 54; Kari Huus, *POW Video Reopens Gender Debate*, MSNBC.COM, Mar. 25, 2003, <http://www.msnbc.com/news/890275.asp>; Cathy Booth Thomas, *Taken by Surprise: This Single Mom Joined the Army To Be a Cook. How Did She Become a POW?*, TIME, Apr. 7, 2003, at 64-65.

59. See Lowry, *supra* note 54 (describing this as the first successful rescue of an American POW since WWII; what made it even more remarkable is that it occurred in the center of a war-torn city and was precisely executed without a single casualty); see also Bill Gertz, *Military Begins Effort To Identify 11 Bodies: Remains Found in Rescue of Lynch*, WASH. TIMES, Apr. 3, 2002, at A1; Joyce Howard Price, *Military Identifies Recovered Bodies*, WASH. TIMES, Apr. 6, 2003, at A1 (in which Air Force Maj. Gen. Gene Renuart of U.S. Central Command in Qatar said, “They did not have shovels in order to dig those graves up, so they dug them up with their hands.”).

60. Susan Schmidt & Vernon Loeb, *She Was Fighting to the Death*, WASH. POST, Apr. 3, 2003, at A1. A flag-bedecked photo of a smiling Jessica Lynch in her uniform highlighted the article, which was republished worldwide. On April 20, 2003, *The Washington Post* ombudsman Michael Getler wrote in an article that the story was thinly sourced and probably not true. Michael Getler, Ombudsman, *Reporting Private Lynch*, WASH. POST, Apr. 20, 2003, at B06; see also Lowry, *supra* note 54 (writing that Lynch and Piastewa were initially taken to the Tykar Military Hospital, which was near the ambush site and later identified as the headquarters of Saddam Hussein’s henchman “Chemical Ali,” where hundreds of gas masks, protective chemical suits, and a torture chamber were found).

61. See, e.g., Editorial, *The Pinking of the Armed Forces*, N.Y. TIMES, Mar. 24, 2003, at A14; Anne Applebaum, *When Women Go to War*, WASH. POST, Mar. 26, 2003, at A17;

Pfc. Lynch in Germany knew otherwise, they and Pentagon officials did not correct the hyped-up legend that had grown up around her. It was not the fault of Pfc. Lynch that her story became distorted—in fact, she courageously told the painful truth in a network television interview and in her book, *I Am a Soldier Too*.⁶²

Pfc. Lynch and her friend Pfc. Piestewa were injured during the ambush and horribly abused in the hours immediately following their capture. According to medical reports, Pfc. Lynch was anally raped, many of her bones were broken, and she barely survived.⁶³ Lynch was unconscious for approximately four hours following the ambush attack on her Humvee. Sexual assault probably occurred during that time, and most likely in the first building where she and other captives were taken, described in some news reports as a Fedayeen headquarters building that included a medical aid station.⁶⁴ At some point the severely injured Pfc. Lynch was taken to the civilian Hussein hospital in Nasiriyah, where she awakened. Iraqi doctors

Richard Sandomir, *Citing Role of Women in War, Burk Raises Pressure on Augusta*, N.Y. TIMES, Mar. 27, 2003, at S1 (describing Martha Burk's campaign to convince the Augusta National Golf Club to admit women because female soldiers were serving in the war).

62. RICK BRAGG, *I AM A SOLDIER TOO: THE JESSICA LYNCH STORY* (2003).

63. *Prime Time Live* (ABC television broadcast Nov. 11, 2003) (transcript on file with author). Medical records from the American hospital in Germany indicated that "[Lynch] was a victim of anal sexual assault . . . [her] body armor and bloody uniform were found in a house near the ambush site." *Id.* The records also noted "the traumatic nature of her peri-anal lesions." *Id.*

64. Bill Gertz, *Coalition Forces Uncover Iraqi Torture Chambers, Graves*, WASH. TIMES, Apr. 23, 2003, at A11 (reporting that U.S. Marines had uncovered a torture chamber near Nasiriyah on April 8; in a "hospital room," the Marines found a car battery next to a metal bed frame that apparently was used as an electric-shock device; and photos of burned and tortured bodies were found nearby); see also *Intelligence Tip, Local Iraqis Help Cited in POW Rescue*, WASH. TIMES, Apr. 3, 2003, at A10. Most reports failed to acknowledge that there were two locations involved, though some reports said the captives were initially taken to a Fedayeen headquarters with a small medical facility placed inside to deter air attacks. *The Washington Times* quoted MSNBC correspondent Kerry Sanders, who accompanied U.S. troops investigating what happened after the ambush, as stating:

The forces found a bloodied U.S. uniform, of a kind used by female soldiers, when they seized another hospital, used by Iraqi forces, in Nasiriyah last week, Mr. Sanders said. MSNBC reported that Pfc. Lynch originally was held at the nearby hospital where Marines found the bloody uniform. They also found a room with a bed and large battery next to it, indicating that it had been used as a torture chamber.

Id. Pfc. Lynch, who was reportedly unconscious for approximately four hours at the first building, has no memory of that time. *Id.* It is possible that video of the captured soldiers, including some who had been shot at point-blank range, was taken at this building, which was subsequently destroyed.

and nurses said they comforted and cared for Lynch until April 1, 2003, when she was rescued by a combined Special Operations Forces Team.⁶⁵

On December 30, 2003, NBC News briefly aired a video obtained from an Iraqi source, which was probably taken at the first facility where the captives had been taken.⁶⁶ The video, which received little public notice when it aired, showed the bloody and bruised faces of Pfc. Lynch and Pfc. Piestewa, the single mother of two toddlers, while in captivity.⁶⁷ Pfc. Lynch appears deathly pale and unconscious, her eyes nearly closed and rolled back, lying on a bed next to her friend, Pfc. Piestewa, who would soon become the first female soldier killed in Iraq. Pfc. Piestewa's battered and loosely bandaged face is shown grimacing in pain when a gloved hand jerks her body around to make her face more visible to the camera.⁶⁸

In her *ABC Prime Time Live* interview with Jessica Lynch, Diane Sawyer asked the wounded soldier whether it was difficult to include the truth in her book. Out of the mouth of a former Army private came words that star-studded generals have not had the courage to say. "Yes, it was," Pfc. Lynch responded. "But, you know, if it did happen, then people need to know that that's what kind of people that they are, and that's how they treat

65. See Lowry, *supra* note 54; Alan Feuer, *Aftereffects: A Hospital Ward; Rescued Soldier's Iraqi Doctors Doubled as Her Guardians*, N.Y. TIMES, Apr. 21, 2003, at A12; Dana Priest, William Booth & Susan Schmidt, *A Broken Body, a Broken Story, Pieced Together*, WASH. POST, June 17, 2003, at A1; Michael Getler, Ombudsman, *A Long, and Incomplete, Correction*, WASH. POST, June 29, 2003, at B06; *Sources Say Jessica Lynch Has Amnesia*, FOXNEWS.COM, May 4, 2003, <http://www.foxnews.com/story/0,2933,85936,00.html>; John Kampfner, *Saving Private Lynch Story "Flawed"* (BBC News broadcast May 15, 2003) (transcript available at <http://newsw.bbc.co.uk/2/hi/programmes/correspondent/3028585.stm>). At some point Pfc. Lynch was taken to the Saddam Hussein General Hospital in Nasiriyah, where she received adequate care prior to her rescue. News accounts about Pfc. Lynch were generally confused for several reasons: the initial hype about Lynch's heroism, the failure of hospital officials in Germany to correct those erroneous news reports, Lynch's own amnesia, gag orders imposed on the Special Operations Forces troops who rescued Lynch, and European suspicions that the rescue had been staged.

66. Richard Engel, *Tape Confirms Iraqis Tried To Save U.S. POWs* (NBC television broadcast Dec. 30, 2003). The headline on this news report is misleading and inconsistent with the troubling Iraqi video, which showed light bandages on the battered faces of the two women. Pfc. Lynch appeared pale and unconscious, while Pfc. Piestewa appeared to be in pain and near death. At the time of the NBC News report, legitimate Iraqi doctors who treated Pfc. Lynch at the Hussein hospital in Nasiriyah were insisting in news interviews that they had given Pfc. Lynch the best care possible. The previously undisclosed Iraqi video apparently was taken of the female captives elsewhere, probably at the first building where Pfc. Lynch and Pfc. Piestewa were taken immediately after the ambush.

67. See *id.*

68. See *id.*

the female soldiers that are over there.”⁶⁹ Feminists suddenly dropped Lynch as their hero and remained largely silent as the death toll of military servicewomen continued to mount.

Americans have been enormously impressed by the courage, loyalty to duty, and patriotism of women who have volunteered to serve in the current war. Support for women in the military is not an issue. Nevertheless, there are questions of policy that remain largely unexamined and unresolved. The Bush Administration has failed to direct Pentagon officials to find a way that female soldiers can proudly serve our country without exposing them to greater, *unequal* risk.

2. Ground Combat: Violations of Policy and Law

a. The Definition of “Combat”

Definitions are important, and the word “combat” is frequently misused. Although Department of Defense (DoD) regulations regarding combat are not solely tied to “front lines,” they do draw important distinctions based on the mission of each different unit. For instance, in the current war, all deployed soldiers are “in harm’s way,” but direct ground combat (DGC) troops are specifically trained to engage and *attack* the enemy, while under fire, with deliberate *offensive* action.

DoD regulations exempt female soldiers from direct ground combat units. Under the associated “collocation rule,” also set forth in the 1994 Aspin regulations, female soldiers are exempt from assignment in support units that are “collocated,” or “embedded,” with direct ground combat battalions below the brigade level. The “collocation rule,” therefore, serves to exempt female soldiers from combined infantry/armor maneuver battalions in the Army’s newly “transformed” modular brigade combat teams (BCTs),⁷⁰ which used to be called “units of action” (UAs). Even in

69. See *Prime Time Live* (ABC television broadcast Nov. 11, 2003); see also Elaine Donnelly, *Jessica Lynch Reality Shatters Amazon Myths*, SAN DIEGO UNION-TRIB., Nov. 30, 2003, at G1.

70. In the early 1990s, following the Persian Gulf War, the Army began to “draw down” and “transform” itself. Army divisions were reorganized as smaller, modular organizations, which were designed to be more flexible and agile than traditional divisions. These modular organizations, initially called “units of action” (UAs), later were named brigade combat teams (BCTs). Units operating with wheeled vehicles were called Interim Brigade Combat Teams (IBCTs), and later Stryker Brigade Combat teams (SBCTs). A typical maneuver battalion in a brigade combat team combines infantry and heavy armor troops (tanks) with a collocated forward support company (FSC), which provides immediate support to the maneuver battalion. Brigade-level support troops come and go intermittently, but collocated FSCs constantly remain with the ground combat maneuver battalions.

modular units, and battlefields that do not have “front lines,” the collocation rule is applicable and should be enforced.

All soldiers in Iraq and Afghanistan are “in harm’s way,” but the missions of infantry, armor, Marine infantry, Special Operations Forces, multiple launch rocket systems, and other specialized units, such as Military Transition Teams that train Iraqi men in combat skills, have not changed. Nor did DoD regulations regarding women in combat change during the Army’s transformation to modular brigade combat teams. Brigade-level troops provide support to combat battalions intermittently, coming and going from larger forward operating bases (FOBs). In contrast, collocated support troops and forward support companies are embedded and remain at the smaller battalion level one hundred percent of the time. Brigade-level units are open to women, but combat-collocated support troops, at the “tip of the spear” battalion level, are *required* by regulation to be all-male.⁷¹

The offensive missions of infantry and Special Operations Forces have not changed, but there are some borderline military occupational specialties that should be reevaluated. For example, military police units in Iraq have taken on new duties that involve more than traditional military law enforcement. That occupation should be reevaluated and possibly divided with occupational titles that reflect actual mission requirements. Gender assignment codes also should be reviewed and revised to comply with existing DoD regulations. If the Army wants to change those rules, Congress must receive notice of proposed changes well in advance, in compliance with laws mandating congressional oversight.⁷²

Some female soldiers and Marines have been assigned to assist infantry units by searching Iraqi civilians in “female search teams” (FSTs). Women performing this duty are in harm’s way and courageous, but since they are not trained to attack the enemy, their mission is not designated “direct ground combat” under the DoD definition. The use of female soldiers and Marines to assist in searches of female Iraqi civilians, or to participate in humanitarian missions, does not justify incremental repeal of women’s land combat exemptions.⁷³ Nor is it prudent to keep assigning American women to perform this role, without training Iraqi women to do female security searches at a future time.

71. Direct Ground Combat Definition and Assignment Rule, *supra* note 45.

72. See *supra* note notes 40-41 and accompanying text.

73. Sandra Jontz, *Marine Raid Breaks Gender Barrier*, STARS & STRIPES (Mideast ed.), May 4, 2005, available at <http://stripes.com/article.asp?section=104&article=28044&archive=true>. This article shows female Marines handing out stuffed animals to children and conducting female civilian searches, among other things.

b. Why the Collocation Rule Matters

The collocation rule improves chances for survival and mission accomplishment in direct ground combat missions, such as the battles to liberate Baghdad in 2003 and Fallujah in November 2004. Soldiers and Marines in those fierce battles benefited from advanced technology, but their tasks still required them to have the ability to carry physical burdens that lie beyond the capabilities of most women.⁷⁴ A collocated maintenance soldier is not trained to attack the enemy in deliberate offensive action, but he may be needed to physically lift and evacuate a wounded infantryman or Marine who has been injured and might die without immediate medical help. Ground combat soldiers today carry between eighty and one hundred pounds on their backs—about the same weight that Roman legionnaires carried in the days of Julius Caesar.⁷⁵

74. See William Gregor, *Not Equipped for Rigors of War*, KANSAS CITY STAR, July 16, 2005, at B7. Dr. Gregor, a retired Army Lieutenant Colonel and military training expert who testified before the Presidential Commission on September 12, 1992, wrote:

The public may not understand the debate over the assignment of women to direct combat roles. After all, Army women have been killed and wounded in the fight in Iraq. However, being subject to hostile fire is not the same as being assigned a direct combat role. The commuters on London's Tube were subject to hostile fire and so are children on the streets of Baghdad The 1982 Women in the Army Policy Review observed that only eight percent of women were capable of performing jobs in the heavy work category and proposed a test for recruits to measure physical potential to be used in assigning occupational specialties. Because the test would have limited career field choices, feminists strongly objected, and it was dropped.

Id.; see also MITCHELL, *supra* note 15, at 104-22; *infra* note 77 and accompanying text.

75. See Elizabeth Weise, *Soldiers in Iraq Carry Extra Load: Back Pain*, USA TODAY, Nov. 21, 2005, at 6D (reporting on a study that found “[m]ore than half of U.S. soldiers who have been medically evacuated from Iraq and treated at two of the military’s large pain treatment centers suffer not from battle wounds but from bad backs”). “Inherent in being a soldier is carrying large weights. Historically, the ideal ‘carry weight’ is a third of your body weight,” said Lt. Col. (Dr.) Frank Christopher, chief of deployment health at Fort Bragg, North Carolina. *Id.* However, many troops in the field carry much more than that—up to 180 pounds, in some cases. See also Matthew Cox & Rick Maze, *Troops Get Extra Armor*, ARMY TIMES, Jan. 23, 2006, at 14 (reporting that side plates in the new “Interceptor” body armor system have nearly doubled the weight of protective vests from sixteen to thirty-one pounds since March 2003). Both Army and Marine officials have warned members of Congress that “Every pound of protective gear hinders combat troops’ ability to hop over walls, search house after house and—when necessary—dive for cover.” *Id.*

As new technologies emerge, the weight burden is likely to increase. See Matthew Cox, *Fielding the Future NOW, From GPS to Helmet-Mounted Displays, Land Warrior Brings Cyberspace to Soldiers*, ARMY TIMES, Sept. 11, 2006, at 14 (showing photos of soldiers in full “Land Warrior” battle gear undergoing testing at Fort Lewis, Wash.). It is likely that

There is no question that female soldiers are brave—this has been proven many times in the current war. But body size, strength, and physical closeness to direct ground combat troops during offensive operations, such as the attacks on Baghdad in March 2003 and Fallujah in November 2004, are factors that are important for survival and mission accomplishment.⁷⁶ In direct ground combat, women do not have an equal opportunity to survive or to help fellow soldiers survive.⁷⁷ Substituting women for men in combat-allocated support units increases danger for everyone, while introducing a host of disciplinary and deployability problems that would detract from unit cohesion, readiness, and morale.

soldiers will someday carry: (1) a helmet-mounted computer display; (2) an audio headset with microphone; (3) a soldier-control unit for the Global Positioning System (GPS); (4) a multi-function laser equipped with an infrared illuminator and pointer; (5) a large rechargeable battery (to supply ten hours of power); (6) a navigation module with a GPS map to track the wearer's position and positions of fellow soldiers; (7) a voice/data radio system for communications from platoon level up to unit headquarters; and (8) a micro-computer processor to manage information flow. *Id.* All of this equipment is estimated to weigh seventeen pounds and will replace items currently in use, which weigh about eight pounds. *Id.* In addition to these burdens, soldiers must also carry weapons, ammunition, food, and water. Indeed, the only item that has gotten lighter in modern military history is freeze-dried coffee.

76. Cox, *supra* note 75; Gregor, *supra* note 74 (“Any male who meets Army entrance standards has the physical stature necessary to achieve the physical requirements for direct combat roles The general population of women is not so physically equipped.”). Dr. William Gregor, a retired Army Colonel and military training expert who testified before the Presidential Commission on September 12, 1992, presented data showing a wide gap in physical capabilities in Army ROTC cadets. See PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-41 (Finding 1.39). Similar findings by Dr. Gregor, presented to the Congressional Commission on Military Training and Gender-Related Issues, see *infra* note 290, on Dec. 2, 1998, are available at <http://www.cmrlink.org/cmrlnotes/gibtapdx.pdf> (last visited Apr. 21, 2007), at Appendix C. The Presidential Commission found that, “[i]n general, women are shorter, weigh less and have less muscle mass and have a greater relative fat content than men. . . . Female dynamic upper torso muscular strength is approximately fifty-sixty percent that of males . . . [and] female aerobic capacity [important for endurance] is approximately seventy to seventy-five percent that of males.” See PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-70 (Findings 2.1.1, 2.1.2, 2.1.3).

77. George Neumayr, *Your Mother's Army*, AM. SPECTATOR, May 2005, at 27. A Marine writing to Neumayr described an incident that occurred during his training of a gender-integrated Marine Reserve unit:

During one training cycle . . . some of the women participated in an urban warfare course. One of them promptly broke her leg doing a spider drop out a window. Her smaller frame could not take the shock of landing after dropping approximately 6 feet while weighed down with all the equipment a Marine is expected to wear in battle.

Id.

Both women and men in the military have a right to expect official compliance with policy and law. If Pentagon officials want to eliminate the collocation rule or any other regulation affecting women, they should make the case for those changes publicly—and in advance—as required by law.

c. The 3rd Infantry (Unit of Action) Brigade Combat Team

In March 2004, the U.S. Army began to depart from both DoD policy and the notification law regarding women in or near ground combat. Local commanders of a newly organized combined infantry/armor battalion, which was based at Fort Stewart, Georgia, and part of the 3rd Infantry Division, improperly assigned a female captain to command a forward support company (FSC), which was collocated with a direct ground combat battalion required by regulation to be all-male. The combined infantry/armor maneuver battalion, part of the “3rd ID,” was one of the first of the Army’s reorganized modular “units of action” to deploy to Iraq.⁷⁸ The battalion-level forward support company in question was designed to collocate or to embed, one hundred percent of the time, with the soldiers of the 4th Battalion, 64th Armored Regiment, known as the 4-64th. As such, the FSC fell under the extant DoD collocation rule, which required its personnel to be all male.⁷⁹

When the situation first became known in March 2004, the Office of the Army General Counsel informed 3rd ID commanders that any attempt to gender-integrate battalion level FSCs embedded with combined infantry/armor direct ground combat battalions, including the 4-64th’s forward support company, would constitute a violation of current policy and the congressional notification law.⁸⁰ Within weeks, the Army Chief of Staff, Gen. Peter Schoomaker, intervened. The 3rd ID Commander, Maj. Gen. William Webster, was told to bring the 4-64th infantry/armor battalion’s FSC back into compliance with Army policy and law. Appropriate reassignments were made, and the situation was resolved satisfactorily for everyone concerned.

However, despite the compliance efforts and reassignments, a second attempt to unilaterally gender-integrate the 4-64th infantry/armor maneuver

78. Correspondence between a known but confidential source at Fort Stewart, Ga., and the author (on file with author).

79. Chain of Command Chart, 4th Battalion, 64th Armored Regiment (Apr. 15, 2004) (on file with author).

80. Telephone conversation between a female judge advocate general (JAG) and the author in Spring 2004; *see also* National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, § 591, 115 Stat. 1012, 1125 (2001) (amending the FY 1994 off-code provision that was ultimately codified at 10 U.S.C. § 652 (West Supp. 2007)).

battalion's collocated FSC apparently was initiated by the DoD Office of Personnel & Readiness, Army Human Resources Command officials, and commanders of the 3rd Infantry Division. Shortly thereafter, soldiers of the 4-64th were ordered to administratively change their unit's modified table of organization and equipment (MTOE)⁸¹ in order to accomplish two things: (1) administratively "assign" the FSC troops to the legally gender-integrated brigade support battalions, *on paper only*; and then (2) physically "attach" the FSC troops back to the maneuver battalion.

In the 3rd ID and other divisions, brigade level positions that are "in harm's way"—but not collocated with direct ground combat units such as the infantry—are legally open to female soldiers. However, the smaller battalion-level direct ground combat (DGC) units, and the support units (FSCs) that collocate with them, are required to be all-male. Soldiers in the formerly all-male forward support company, and the infantry/armor maneuver battalion with which it was collocated, were well aware that the unusual administrative paperwork was contrived as a way to circumvent DoD policy and the congressional notification law.

In the 3rd ID and other reorganized "brigade combat teams," known as BCTs, modular direct ground combat maneuver battalions were ordered to do the same thing. Contrary to the DoD collocation rule, an undisclosed number of female soldiers have been "employed" in FSCs that are physically collocated with direct ground combat battalions.⁸²

81. An Army brigade is composed of approximately 3600 (infantry) to 3900 (heavy armor) soldiers, and battalions include 700 to 800 soldiers. Each Army unit has a table of organization and equipment (TOE) or modified table of organization and equipment (MTOE), which lists every billet and piece of equipment that is assigned to that unit. The MTOE computer chart for personnel includes a column for gender codes, as designated by the Army's "direct combat probability code" (DCPC) system. Units coded "P-1" are open to males only. Units coded "P-2" are open to both genders. In the 3rd ID, soldiers were ordered to remove combat-collocated FSC soldiers from the MTOEs of the combined infantry/armor maneuver battalions. Instead, these personnel were included on the MTOE lists of legally gender-mixed brigade-level support units. This was done even though FSC soldiers, some of them female, were physically "attached" to all-male maneuver battalions. An Army briefing titled "Combat Exclusion Quick Look Options," dated May 10, 2004, admitted that this administrative strategy could be seen as "subterfuge" to circumvent current policy and law. See Dep't of the Army, *Combat Exclusion Quick Look Options 14* (May 10, 2004) [hereinafter *Combat Exclusion Quick Look Options*], available at <http://cmrlink.org/cmrnotes/ce-qlo%20051004.pdf>.

82. E-mail correspondence from sources at Ft. Stewart, Ga. to author (beginning in Mar. 2004) (on file with the author); telephone conversations and meetings between Army and DoD officials at the Pentagon and the author (Spring, Summer 2004); copies of modified table of organization and equipment (MTOE) lists obtained from a confidential source (on file with author). Throughout 2004, Army officials denied there were any female soldiers in

d. Army Admits Strategy of “Subterfuge”

The rationale and blueprint for gender integration in the 3rd ID were set forth in a twenty-two-page Army PowerPoint presentation, titled “Combat Exclusion Quick Look Options.”⁸³ Among other things, the May 10, 2004 presentation attempted to justify circumvention of the collocation rule by drawing a distinction between the 1994 DoD regulations, promulgated by Secretary of Defense Les Aspin, and “additional restrictions” that the Army had in place two years earlier.⁸⁴

This was an odd argument, for three reasons: (1) the 1992 Army regulations in question, AR 600-13,⁸⁵ were superseded by the DoD regulations set forth by Secretary Les Aspin in January 1994;⁸⁶ (2) the Army’s plans to implement the Aspin regulations were approved by Secretary Aspin’s successor, William J. Perry, whose July 28, 1994 memorandum, approving the Army’s list of open and closed units, has not been overruled or changed by a successor;⁸⁷ and (3) the Army’s 1992 rules included a definition of “Direct Combat” that included a Risk Rule, similar to that of the DoD, which exempted female soldiers from direct ground combat and support units involving a “substantial risk of capture.”⁸⁸

the ground combat-located FSCs. However, in an interview with a *Boston Globe* reporter in January 2005, an Army spokesman finally admitted that “scores” of female soldiers were being assigned to FSCs at Fort Stewart, Ga. See Bryan Bender, *U.S. Women Get Closer to Combat*, BOSTON GLOBE, Jan. 26, 2005, at A1.

83. Combat Exclusion Quick Look Options, *supra* note 81, at 3-15.

84. *Id.* at 3, 13-15. This was a questionable attempt to justify or excuse the Secretary of the Army acting on his own, in circumvention of DoD regulations, to place female soldiers in ground combat-located support units. The “additional restrictions” in the Army’s 1992 rules were minor. See *infra* note 85. But even if variations in the language of 1992 Army rules had been substantive, the 1994 Aspin regulations superseded them.

85. Army Policy for the Assignment of Female Soldiers, AR 600-13 (effective Apr. 27, 1992) [hereinafter Army Policy for the Assignment of Female Soldiers], available at http://www.armyg1.army.mil/eo/documents/ar600_13.pdf. In its 1992 rules, the Army defined Direct Ground Combat as:

Engaging an enemy with individual or crew served weapons while being exposed to direct enemy fire, a high probability of direct physical contact with the enemy’s personnel, and a substantial risk of capture. Direct combat takes place while closing with the enemy by fire, maneuver, and shock effect in order to destroy or capture the enemy, or while repelling the enemy’s assault by fire, close combat, or counterattack.

Id.

86. Direct Ground Combat Definition and Assignment Rule, *supra* note 45.

87. Application of Direct Ground Combat Definition and Rule, *supra* note 49.

88. Army Policy for the Assignment of Female Soldiers, *supra* note 85.

Secretary Aspin abolished the Risk Rule with his January 1994 memorandum.⁸⁹ Officials trying to claim that the Army's 1992 rules are still in effect have to explain why the former Risk Rule is not in effect as well.

Despite this and other points of misinformation, the May 10, 2004 "Combat Exclusion Quick Look Options" presentation was surprisingly candid about the Army's intentions. At Fort Stewart, commanders of the 4-64th battalion conceded, in response to questions from soldiers, that the sole purpose of the contrived administrative change was to assign female soldiers to the ground combat-located FSC, without making formal changes to the DoD rules and without giving prior notice to Congress as required by law. The commanders' actions were consistent with the May 10 "Quick Look Options" presentation, which included the "caveat" that this course of action "could be perceived as *subterfuge* to avoid [the] congressional reporting *requirement*."⁹⁰ Armor and infantry soldiers at Fort Stewart were aware of the pretense, but it was their duty to follow orders without comment or dissent.

In addition, the "Quick Look Options" presentation conceded that the practice of administratively assigning the forward support company personnel to the legally open brigade level "does not solve collocation restrictions for female Soldier assignments."⁹¹ Indeed, both this plan and a later version of it presented in a November 2004 Pentagon briefing *depended* on a subterfuge strategy.⁹² The entire plan constituted DSIW on an unprecedented scale.

The May 10 "Quick Look Options" presentation suggested that there might not be enough male soldiers to fill the land "combat-located" forward support companies, but Army officials did not provide any documentation to support those concerns.⁹³ If a shortage of men is the problem, breaking the rules to place young women in units required to be all male is not the solution.

As of July 2005, there were more than fifteen million men of military age—eighteen to twenty-four—in the United States.⁹⁴ Given the size of this

89. Direct Ground Combat Definition and Assignment Rule, *supra* note 45.

90. Combat Exclusion Quick Look Options, *supra* note 81, at 14 (emphases added).

91. *Id.* at 11.

92. *See infra* notes 102-03 and accompanying text.

93. Combat Exclusion Quick Look Options, *supra* note 81, at 5.

94. U.S. CENSUS BUREAU, POPULATION DIVISION, ANNUAL ESTIMATES OF THE POPULATION BY SELECTED AGE GROUPS AND SEX FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2005, at T.2, *available at* <http://www.census.gov/popest/national/asrh/NC-EST2005/NC-EST2005-02.xls>.

demographic, a straightforward request from the President, asking young men to consider volunteering for the combat arms, would likely inspire sufficient numbers to respond positively. There is no compelling need to retain gender “goals” (i.e., quotas), which keep the numbers of women and mothers in the military artificially high.⁹⁵ An end to gender quotas in the Army (which already have been dropped by the Navy) would allow and encourage military recruiters to concentrate on young men who are needed for the combat arms.⁹⁶

e. Circumvention of the Congressional Notification Law

In June 2004, the Center for Military Readiness filed a formal request for intervention with the DoD and Army Inspectors General. No apparent action was taken to bring the Army back into compliance with DoD regulations and the congressional notification law. Instead, female soldiers reportedly have been placed in even more land combat-allocated support units—not just in the 3rd ID, but also in the 101st Airborne, the 1st Cavalry, and several more.⁹⁷ Unaware female soldiers have been given assurances that nothing significant has been changed, but men with combat

95. The effect of pressures to maintain gender quotas is illustrated in charts published by the *Chicago Tribune* on March 20, 2005, which cite the DoD as the source. The graph accompanied an article by Kirsten Scharnberg. See Kirsten Scharnberg, *Stresses of Battle Hit Female GIs Hard*, CHI. TRIB., Mar. 20, 2005, at C1. A copy of the graph is available at <http://cmrlink.org/cmnotes/actdtymlperwom032005a.pdf>.

Despite personnel drawdowns in the aftermath of the Persian Gulf War, the percentage of female active duty personnel has stayed at approximately fifteen percent, with seven to ten percent of the troops deployed to the Middle East being women. *All Things Considered: Wounded in War: The Women Serving in Iraq* (NPR radio broadcast Mar. 19, 2005) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=4534450>); Lizette Alvarez, *Jane, We Hardly Knew Ye Died*, N.Y. TIMES, Sept. 24, 2006, § 4, at 1; Women in Military Service for America Memorial Foundation, Inc., www.womensmemorial.org (last visited Apr. 9, 2007).

96. Rick Maze, *More Young Men Say They Are Likely To Join the Military*, AIR FORCE TIMES, Mar. 25, 2002, at 24. The DoD “Youth Attitude Tracking Survey” (YATS) of 10,000 young people found that the percentage of young men who said they were inclined to join the military jumped sharply after September 11, 2001, to the highest level in a decade, but the propensity to serve among women declined. *Id.*

97. Confidential conversations and e-mails between author and known male and female soldiers in the 3rd ID at Ft. Stewart, Ga. (2004–2006), the 101st Airborne at Ft. Campbell, Ky. (December 2004–April 2005), the 4th ID at Fort Hood, Tex. (2004–2007), the 89th Truck Co., Ft. Eustis, Va. (2004–2005), a multiple launch rocket systems (MLRS) unit formerly based in Germany (2004–2005), and Reconnaissance, Surveillance, Target Acquisition (RSTA) Squadrons at Ft. Riley, Kan., and Ft. Benning, Ga. (2005–2006) (on file with author).

experience are aware that regulations are being violated.⁹⁸ In the same way, reports of disruptive behavior and evacuations due to pregnancies are accumulating, but sources have said that reporters rarely ask about such problems, and men are reluctant to discuss them anyway, lest their careers be ruined.⁹⁹ As a result, rule violations and disruptive situations continue with little notice.

In addition, Multiple Launch Rocket Systems (MLRS), and Reconnaissance, Surveillance, Target Acquisition (RSTA) squadrons operating with Stryker Brigade Combat Teams, have been quietly dropped from an Army list of units coded to be all male.¹⁰⁰ This was done without the written approval of the Secretary of Defense and without the legally

98. *See id.* Spc. Stephanie Filus, a mechanic in the 101st Airborne at Fort Campbell, Kentucky, learned in November 2004 that she was going to be assigned to an FSC and deployed to Iraq in 2005. Spc. Filus was assured by local commanders that nothing significant would change, but she understood and resisted the risks of collocation with a direct ground combat maneuver battalion. That assignment was very different from the non-combat position that Spc. Filus had been promised by her recruiter. Spc. Filus' request for discharge was denied, and she was sent to Fort Polk, Louisiana, for training, which she completed successfully. After her second request for discharge was denied, Spc. Filus attempted suicide with pills in the presence of her commanding officer, and was consequently hospitalized. Shortly thereafter, in May 2005, Filus received an honorable discharge.

99. *See id.* According to confidential e-mail correspondence between the author and known officers currently serving in Germany and Iraq (starting in Dec. 2006, on file with author), evacuations due to pregnancy have already occurred in a formerly all-male FSC, where one combat-experienced armor officer used to be assigned. A second known source, a combat-experienced infantry officer, reported that a civil affairs unit had to be completely replaced because a female captain became intimately involved with male Iraqi community leaders, creating a security risk. This officer also noted that reporters and officials never ask about such incidents, and that male officers would not risk comment even if they did.

100. Memorandum from the Army Office of the Deputy Chief of Staff (G-1) to Commander, U.S. Army Training & Doctrine Command, Direct Ground Combat Position Coding (DGCP) of the Reconnaissance, Surveillance, and Target Acquisition (RSTA) Squadron of the Interim (now Stryker) Brigade Combat Team (Apr. 26, 2002), *available at* <http://cmrlink.org/cmrnotes/lemoyne%20memo%20042602.pdf>. This memorandum, signed by Lt. Gen. John M. LeMoyne, confirmed that RSTA squadrons, which came into existence several years after the 1994 Aspin regulations were set forth, were to be coded "P-1" or "male-only" in compliance with the Aspin regulations. However, the *Women in the Army Point Paper* prepared for the Secretary of the Army on January 24, 2005, did not mention RSTA squadrons as units required to be all male. The paper omitted MLRS and also changed the wording of the DoD collocation rule, without authorization by the Secretary of Defense. *See infra* note 106.

required notice to Congress.¹⁰¹ Such actions by Army officials constitute DSIW, which are likely to elevate risks and undermine trust. The most important decisions regarding women in the military are being made bureaucratically by unaccountable officials who use semantics and sophistry to circumvent the plain meaning of law. If it is such a good idea to order women and mothers into or near direct ground combat, Pentagon officials should follow proper procedures, in accordance with the law.

3. The Congressional Debate: 2005

a. Army Changes Rules Without Authorization or Notice

On November 4, 2004, Pentagon officials assured staff members of the House Armed Services Committee that the Army had no intention of repealing the collocation rule.¹⁰² A subsequent closed-door briefing within the Pentagon indicated that the Army was planning to do just that.¹⁰³ When that briefing was reported in *The Washington Times*,¹⁰⁴ Lt. Gen. James Campbell, Staff Director of the Army, issued a memo imposing restrictions on internal documents and warning of “press leaks.”¹⁰⁵ In January 2005, HASC Chairman Duncan Hunter (R-Cal.) began conducting his own investigation to determine what the Army was doing with its female

101. Under the Army’s Direct Combat Probability Code (DCPC) system, also known as the Direct Ground Combat Position (DGCP) system, units required to be all male are designated “P-1” on Tables of Organization & Equipment. Positions that are open to either men or women are coded “P-2.”

102. Headquarters, Department of the Army, “Army Brigade Combat Team Unit of Action and Gender Coding,” presented to senior House Armed Services Committee staff members on November 3, 2004. This presentation was obtained by the author by e-mail from a member of the HASC staff on November 17, 2004.

103. Col. (P) Robert H. Woods, Jr., Director, HRPD, “Patriotic Women of Excellence Contributing to Our Force,” Nov. 29, 2004. According to a Pentagon source, this eleven-page (unnumbered) slide briefing was presented to Lt. Gen. James Campbell, Director of the Army Staff (DAS), at the Pentagon.

104. Rowan Scarborough, *Report Leans Toward Women in Combat*, WASH. TIMES Dec. 13, 2004, at A1. An unclassified e-mail memorandum was sent from Lt. Gen. James Campbell, DAS, to more than forty Army Pentagon officials, on the same day, December 13, 2004, at 10:21 a.m. EST. The message asked for help in dealing with the problem of “Information Security” on pre-decisional internal materials. That is a legitimate concern under normal circumstances, but the intent of this memo was suspicious. Lt. Gen. Campbell’s memo appeared to be generated in response to the *Washington Times* report that Army officials had said one thing about the collocation rule to congressional staff members, but something different in a closed-door meeting at the Pentagon. A few days later, the Army “gag order” became a news story in itself. See *infra* note 105.

105. Rowan Scarborough, *Policy Leak Brings Army Order on Keeping Mum*, WASH. TIMES, Dec. 21, 2004, at A3.

soldiers. Hunter's investigation confirmed that the Army was placing female soldiers in combat-collocated FSCs, while simultaneously claiming that there was no need to inform Congress of such changes. This claim was based on the administrative changes described above, signaled by a subtle revision in DoD regulations. Army officials did not have authority to make such revisions unilaterally, without authorization by the Secretary of Defense.

The unannounced policy changes in question were reflected in a "Women in the Army Point Paper," prepared for the Secretary of the Army on January 24, 2005, which misstated the DoD regulations as follows:

Department of Defense policy (1994) prohibits the assignment of women to units below the brigade level whose primary mission is direct ground combat. Army policy (1992) further prohibits the assignment of women to positions or units which routinely collocate with those units *conducting* an assigned direct ground combat mission.¹⁰⁶

This statement failed to note that Army rules (1992) were superseded by DoD regulations (1994). The "Women in the Army Point Paper" also used the word "conducting," which does not appear in the 1994 DoD regulations.¹⁰⁷ That word, and variations of it that were used by Army officials elsewhere, implied that female soldiers could be placed in or near direct ground combat units, with the understanding that they would be evacuated before the troops began "conducting," "undertaking," or "performing" direct ground combat.

This semantically nuanced difference appears to explain several astonishing statements made by Secretary of the Army Francis J. Harvey in a meeting with this Article's author on February 16, 2005. Secretary Harvey showed the author a document listing twenty-four positions in a typical FSC that would be open to women. When asked how this could be justified, Secretary Harvey claimed that a problem did not exist, because

106. The four-page "Women in the Army Point Paper," which was described as a "draft" but was being implemented anyway, was obtained by the author from the Office of the Secretary of the Army a few days after a meeting with Army Secretary Francis Harvey on February 16, 2005 (emphasis added) [hereinafter *Women in the Army Point Paper*], available at <http://www.cmrlink.org/cmrlnotes/women%20in%20the%20army%20point%20paper%20021805.pdf>.

107. For purposes of comparison, see Direct Ground Combat Definition and Assignment Rule, *supra* note 45.

the female soldiers would not be present when a battle began.¹⁰⁸ In other words, female soldiers would be evacuated from a combat-located FSC just prior to a battle. This author expressed concern about commanding officers who would be required to send female soldiers elsewhere at a time when they would be needed most and further noted that most officers would balk at doing so. Secretary Harvey insisted that soldiers would be required to follow orders. The means by which the female soldiers would be evacuated on the eve of battle was not made clear. In several speeches and articles, Army Chief of Staff Gen. Peter Schoomaker and Secretary Harvey both claimed that women would not be present when troops started “conducting,” “undertaking,” or “performing” direct ground combat.¹⁰⁹ Equivocal words such as this worked to mislead many members of Congress, but not the Chairman of the House Armed Services Committee, Rep. Duncan Hunter.

b. The Hunter/McHugh Amendments

In May 2005, HASC Chairman Rep. Duncan Hunter (R-Cal.), together with the HASC’s Military Personnel Subcommittee Chairman John McHugh (R-N.Y.), co-sponsored amendments to the 2006 Defense Authorization Bill that would have codified current DoD regulations and required the Army to comply with them.¹¹⁰ The first Hunter/McHugh amendment, approved by Chairman McHugh’s subcommittee on May 11,

108. Personal meeting notes (on file with author); see *Women in the Army Point Paper*, *supra* note 106, at 1.

109. Gen. Peter Schoomaker, *The Future of the U.S. Army*, Address at the American Enterprise Institute (Apr. 11, 2005) (transcript available at <http://www.aei.org/events/filter.all,eventID.1011/transcript.asp>); see also Army Secretary Francis Harvey, *A Message from Army Leadership*, *SOLDIERS MAG.* (U.S. Army), Mar. 2005, at 3; *Testimony on the Defense Authorization Request for Fiscal Year 2007 and the Future Years Defense Program: Hearing Before the S. Comm. on the Armed Services*, 109th Cong. (2006) (statements of Sec’y Harvey & Gen. Schoomaker). At that hearing, in answer to a question from SASC Chairman Sen. John Warner (R-Va.), Secretary Harvey mentioned the collocation rule, and said that “we code positions in forward support companies and other companies so that no women will co-locate with a unit performing direct ground combat.” The wiggle word is “performing,” implying that female soldiers may be assigned as long as the unit is not “performing” direct ground combat. Contrary to his insistence that this policy is “totally consistent and compliant with DoD policy,” the DoD collocation rule does not include “-ing” words such as “conducting” or “undertaking,” which could be cited to authorize “employment” of women in land combat-located support units, provided that they are evacuated prior to actual direct ground combat. Chairman Warner apparently missed this point, asking only about women’s career “opportunities.”

110. National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, 109th Cong. (2005).

2005, would have specifically applied current DoD regulations regarding women to the Army's new, modular brigade combat teams (BCTs), and exempted female soldiers from placement in smaller forward support companies (FSCs) that collocate or embed with direct ground combat maneuver battalions one hundred percent of the time.¹¹¹ These collocated FSCs differ from larger gender-integrated support units at the brigade level, where support personnel are "in harm's way," but come and go intermittently.¹¹²

When the Hunter/McHugh amendment passed the Personnel Subcommittee in a nine-to-seven partisan vote on May 11, 2005, congressional feminists and their media allies were nearly apoplectic.¹¹³ In response to the uproar, Hunter and McHugh substituted a new amendment. The second version of the Hunter/McHugh amendment was less specific, but broader than the original, because it would have codified DoD regulations affecting women in all the services, and not just the Army.¹¹⁴ Properly enforced, the Hunter/McHugh amendment still would have

111. The first Hunter/McHugh amendment, approved by the Personnel Subcommittee on May 11, 2005, provided in pertinent part:

(a) PROHIBITION—Female members of the Army may not be assigned to duty in positions in forward support companies.

See Dana Wilkie & Otto Kreisher, *Hunter Plan Bars Women from Army "Forward Support,"* Copley News Serv., May 18, 2005; Andy Pasztor, *House Panel Bars Women from Direct Ground Combat*, WALL ST. J. (online ed.), May 19, 2005; Stephen Dinan, *Panel Acts on Women in Combat*, WASH. TIMES, May 19, 2005, at A1.

112. Army acronyms have changed several times during "transformation" of forces to modular brigade combat teams, but the missions of reorganized direct ground combat (DGC) troops, such as the infantry, armor, and Special Operations Forces, remain substantially the same. The brigade-level units that are open to women under the current regulations are sometimes referred to as brigade support battalions (BSBs), forward support battalions (FSBs), main support battalions (MSBs), or Sustain Brigade Units of Action, equivalent to Division Support Commands stationed on forward operating bases (FOBs). Female soldiers currently are authorized to serve above the brigade level, including the headquarters of direct ground combat units such as the infantry, but not in or collocated with smaller battalions that engage the enemy with deliberate offensive action under fire.

113. See, e.g., Ann Scott Tyson, *More Objections to Women-in-Combat Ban*, WASH. POST, May 18, 2005, at A5; Editorial, *Chauvinism at the Battlefield*, N.Y. TIMES, May 20, 2005, at A24.

114. The second Hunter/McHugh amendment, approved by the full House Armed Services Committee on May 18, 2005, simply would have codified the language of DoD regulations regarding women, including the collocation rule, as established on January 13, 1994, by Secretary of Defense Les Aspin. See "Women in Combat" Provision, Mark-Up of H.R. 1815, National Defense Authorization Act for Fiscal Year 2006 (May 18, 2005) (provided by HASC; on file with author); *supra* note 45.

required the Army to stop violating the 1994 DoD regulations with regard to forward support companies and other direct ground combat-allocated support units, and to refrain from redefining the Aspin regulations without the approval of the Secretary of Defense and the legally required notice to Congress in advance.

During an intense, late-night debate on May 18, 2005, Democrat Committee members Rep. Ike Skelton (D-Mo.), Rep. Vic Snyder (D-Ark.), Rep. Ellen Tauscher (D-N.Y.), and Rep. Loretta Sanchez (D-Cal.) offered amendments that would have stricken or modified the legislation. In a remarkable moment of clarity, Chairman McHugh threw down the gauntlet by challenging his opponents to go ahead and make the case for allowing the Army to assign women to ground combat units without Congress having a say.¹¹⁵ The issue, as Chairmen Hunter and McHugh saw it, was the critical need for civilian control and oversight of the military in this important matter of public policy. That was and remains a perfectly legitimate issue to debate in a major congressional committee—especially since Army officials have provided legislators with constantly changing, dissembling information about the physical placement of female soldiers in or near direct ground combat.

Hunter and McHugh led the Republicans in defeating every crippling amendment on narrow roll call or voice votes. Given the late hour, Republicans stayed largely silent, but Chairmen Hunter and McHugh secured approval of their amendment by the full House Armed Services Committee at 11:08 p.m. EST.¹¹⁶ This surprised reporters, some of whom had already filed stories that did not accurately report the debate. Ultimately, the original Hunter/McHugh legislation was not enacted because then-Secretary of Defense Donald Rumsfeld pressured Chairman Hunter to withdraw the legislation before it was voted on by the full House.

The third version of the Hunter/McHugh legislation, which was adopted by the House on May 25, 2005, did not include language to codify current DoD regulations.¹¹⁷ Instead, the House bill mandated a report from the Secretary of Defense on the subject by March 1, 2006, which was later changed in Conference to March 31, 2006. The approved Hunter/McHugh

115. Personal notes taken during HASC mark-up session, May 18, 2005 (on file with author).

116. See Roll Call of House Armed Services Committee vote on Amendments 91, 92 (May 18, 2005) (provided by HASC; on file with author).

117. See Rowan Scarborough, *GOP Retreats on Women-in-Combat Bill*, WASH. TIMES, May 26, 2005, at A1.

legislation also reaffirmed the law mandating formal notice to Congress of any changes in regulations affecting women in or near ground combat:

If the Secretary of Defense proposes to make any change . . . to the ground combat exclusion policy . . . , the Secretary shall, before any such change is implemented, submit to Congress a report providing notice of the proposed change. Such a change may be implemented only after the end of a period of 60 days of continuous session of Congress . . . following the date on which the report is received.

A change referred to in paragraph (1) is a change that . . . opens to service by female members of the armed forces any category of unit or position that at that time is closed to service by such members¹¹⁸

c. Pentagon Resists Oversight by Congress

Contrary to some news reports, final passage of the Hunter/McHugh amendment would not have removed female soldiers from any positions in which they were legally authorized to serve.¹¹⁹ The amendment would have only codified current DoD regulations adopted in 1994.¹²⁰ Nevertheless, big

118. H. amend. 210 to H.R. 1815, 109th Cong. (2006) *available at* http://www.rules.house.gov/109/specialrules/hr1815/109hr1815_hunter.pdf.

119. Several news articles inaccurately reported that the second version of the Hunter/McHugh amendment would have allowed female soldiers to serve in FSCs. *See, e.g.*, Thom Shanker, *House Bill Would Preserve, and Limit, the Role of Women in Combat Zones*, N.Y. TIMES, May 20, 2005, at A20. A codified collocation rule, however, would have had the same effect as current DoD regulations. *See also* HASC Mark-up of National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, May 18, 2005 (provided by Chairman Hunter; on file with author).

120. *See supra* note 45. A disingenuous Army Public Affairs news release issued on May 19, 2005, titled "Army Statement on Proposed Legislation," ironically, concurred with this view. *See* Dep't of the Army, Public Affairs News Release, Army Statement on Proposed Legislation (May 19, 2005), *available at* http://www4.army.mil/ocpa/read.php?story_id_key=7353. Stating that the Army had reviewed existing law and DoD policies and found itself in compliance, the news release added:

Furthermore, existing DoD and Army policies are in compliance with the legislation being proposed under House Resolution 1815 [the Hunter/McHugh amendment]. Thus, the proposed legislation contained in HR 1815 is unnecessary, does not provide further clarification, and may in fact lead to confusion on the part of commanders and Soldiers.

Id. This admission was inconsistent with a two-sentence letter sent to Chairman Hunter by Lt. Gen. James L. Campbell, DAS, which made the unsupported claim that 21,950 positions would be closed to women if the legislation passed. *See infra* note 133.

guns from liberal media, some members of Congress with feminist views, and officials of the Department of the Army denounced the Hunter/McHugh amendment as if it would have ended the history of women in the military.¹²¹ The campaign to criticize and derail the Hunter/McHugh legislation benefited from months of neglect of the story by major newspapers such as the *Washington Post*, the *New York Times*, and even the *Military Times*. With few exceptions, these publications failed to report on the significant events that had caused Hunter to investigate and act in the first place—events that had been reported in some newspapers since the fall of 2004. For many months, the Army had been bending, breaking, redefining, or circumventing the rules on women in or near direct ground combat, but most news organizations ignored the story until Chairman Hunter took the initiative to sponsor legislation.¹²²

121. On May 11, 2005, separate but identical letters were sent to Chairman Hunter by Army Secretary Harvey and Army Vice Chief of Staff, Gen. Richard A. Cody. See Leo Shane, III, *Army Opposes House Panel's Bid To Bar Women from Combat Support Units*, STARS & STRIPES (European ed.), May 12, 2005, available at <http://stripes.com/article.asp?section=104&article=28244&archive=true>. A news release titled "Women Removed from Combat Support Roles" was issued by Democratic members of the HASC on May 11, 2005. Chairman Hunter also issued a statement on May 11, and on May 24, 2005, Hunter and committee member Rep. Thelma Drake (R-Va.) called a news conference to clarify that the legislation would not affect any female soldiers serving in positions authorized under current DoD regulations. See Rep. Thelma Drake, *Let Lawmakers Decide*, USA TODAY, May 25, 2005, at 13A.

122. See, e.g., Lisa Burgess, *Army Is Considering Adding Women to Its New "Units of Action" Structure*, STARS & STRIPES (European ed.), Oct. 23, 2004, available at <http://stripes.com/article.asp?section=104&article=24225&archive=true>; Lisa Burgess, *Army Secretary Harvey: No Combat for Female GIs in "Transformed" Army*, STARS & STRIPES (European ed.), Jan. 15, 2005, available at <http://stripes.com/article.asp?section=104&article=25642&archive=true>; Rowan Scarborough, *Female Soldiers Eyed for Combat*, WASH. TIMES, Oct. 22, 2004, at A1; Rowan Scarborough, *Army Charged with Ban Violation*, WASH. TIMES, Dec. 9, 2004, at A6; Rowan Scarborough, *Combat Role for Women Confused*, WASH. TIMES (online ed.), April 18, 2005, <http://www.washingtontimes.com/national/20050418-125223-4270r.htm>; Rowan Scarborough, *Report Leans Toward Women in Combat*, WASH. TIMES, Dec. 13, 2004, at A1; Rowan Scarborough, *Policy Leak Brings Army Order on Keeping Mum*, WASH. TIMES, Dec. 21, 2004, at A3; Rowan Scarborough, *Women in Combat Ban Again at Issue*, WASH. TIMES, Feb. 4, 2005, at A1; Vince Crawley, *Army Plans To Officially Put Women on Front Lines*, ARMY TIMES, Nov. 1, 2004; Bryan Bender, *U.S. Women Get Closer to Combat: Some Say Move Imperils Units, Violates Law*, BOSTON GLOBE, Jan. 26, 2005, at A1 [hereinafter Bender, *U.S. Women Get Closer to Combat*]; Bryan Bender, *Army Secretary Rejects Change in Policy on Women in Combat*, BOSTON GLOBE, Jan. 29, 2005, at A11; Robert Burns, *In Unconventional War, Army's Gender Rules Don't Keep Women out of Combat*, ASSOCIATED PRESS, Feb. 26, 2005; Ann Scott Tyson, *For Female GIs, Combat Is a Fact*, WASH. POST, May 13, 2005, at A1 [hereinafter Tyson, *For*

In response to Chairman Hunter's amendment, Army officials initially denied that they were permitting the illicit assignments, but later they used misleading terms and unlikely scenarios to justify the placement of female soldiers in battalion-level units that were required to be all male.¹²³ Four equivocations have been used to circumvent policy and law, which could be summarized as follows:

- *The Selective "Memory" Option.* In the May 10, 2004 "Quick Look Options" briefing; the November 3, 2004 presentation to HASC staff members; and the November 29, 2004 briefing conducted at the Pentagon,¹²⁴ the Army claimed that it could operate under "additional restrictions" in Army rules, effective in 1992.¹²⁵ The 1992 regulation, however, was superseded by the DoD (Aspin) regulations of 1994.¹²⁶ The 1992 Army regulation also included a "Risk Rule," which is no longer in effect.¹²⁷ Divergence from extant DoD regulations cannot be justified by selectively observing part of an obsolete rule—but not all of it.
- *The "Doublethink" Option.* Field commanders were ordered to skirt the rules by "assigning" women to gender-mixed support units at the brigade level while physically placing them in units "attached" to maneuver battalions required to be all-male.¹²⁸

Female GIs, Combat Is a Fact]; Ann Scott Tyson, *More Objections to Women-in-Combat Ban*, WASH. POST, May 18, 2005, at A5; Ann Scott Tyson, *Amendment Targets Role of Female Troops*, WASH. POST, May 19, 2005, at A4.

123. See Bender, *U.S. Women Get Closer to Combat*, *supra* note 122 (reporting that officials of the Third Infantry Division publicly acknowledged they had "added scores of female soldiers to newly created 'forward support companies'").

124. See *supra* notes 81, 102-03.

125. See *supra* note 85.

126. See *supra* notes 45, 50.

127. See *supra* note 85.

128. See *supra* notes 81-82. The Army Public Affairs News Release stated that "[f]irst, the Forward Support Companies are not part of, nor do they work for, units below the brigade level whose primary mission is direct ground combat, such as infantry and armor battalions." Army Statement on Proposed Legislation, *supra* note 120. This disingenuous statement reflects the fiction that forward support company personnel would not be physically collocated with infantry/armor ground combat battalions, due to administrative assignment to a legally gender-integrated brigade level unit.

- *The “Little Bit Pregnant” Option.* Secretary Harvey’s “Women in the Army Point Paper,” dated January 24, 2005, showed arbitrary changes in the gender codes of twenty-four of 225 positions in a typical FSC.¹²⁹ Initial breaches in the rules guaranteed more of the same.¹³⁰
- *The “Beam Me Up, Scotty” Option.* Secretary Harvey’s “Women in the Army Point Paper” revised the collocation rule so that it would only apply when a given unit is “conducting” direct ground combat.¹³¹ However, without extra vehicles and helicopters to evacuate female support soldiers on the eve of battle, field commanders would have more luck acquiring Star Trek “transporter” machines for that purpose.

During the HASC debate, the first in more than a decade, officials continued to change estimates of the number of positions that might have been closed to women if the Hunter/McHugh legislation passed, ranging from a few dozen to a few hundred.¹³² However, on the day before the vote was scheduled, Lt. Gen. James L. Campbell, Director of the Army Staff, sent a vague, two-sentence letter to Chairman Hunter, which was released to the media.¹³³ The letter claimed, without any supporting documentation,

129. Women in the Army Point Paper, *supra* note 106, at 2-4. This document, obtained from the Office of the Secretary of the Army, provided a specific gender code change list of twenty-four of 225 positions in a typical 3rd ID Heavy Unit of Action Forward Support Company (FSC). The number was small but the breach of regulations was significant. Either the Army is in compliance with DoD policy or it is not. “Employing” female soldiers in a support unit embedded with direct ground combat troops effectively repealed the collocation rule without authorization and without the legally required notice to Congress. Having broken that regulatory barrier, Army officials seem unwilling to enforce any regulations regarding women in or near direct ground combat. *See* discussion *infra* Part II.B.1.c.–d.

130. *See* Women in the Army Point Paper, *supra* note 106, at 2-4; discussion *infra* Part II.B.1.c.–d.

131. *See supra* notes 106-09.

132. Statements by Chairman Duncan Hunter and Subcommittee Chairman John McHugh during House Armed Services Committee debate, May 18, 2005 (personal notes on file with author).

133. Letter from Lt. Gen. James L. Campbell, Director of the Army Staff, to Chairman Duncan Hunter (May 17, 2005) (on file with author). This letter, which was inconsistent with the “Army Statement on Proposed Legislation” issued by Army Public Affairs on May 19, claimed that “a total of 21,925 spaces currently open for assignment to female Soldiers would be closed.” The Army has yet to provide figures to justify this figure, which was widely reported in *The Washington Post* and other media just before the House Committee’s

that “21,925 spaces currently open to female Soldiers would be closed”¹³⁴ if the Hunter/McHugh amendment passed. The statement was not credible because the legislation would have simply *codified* the extant Aspin regulations, not altered them. The unsupported figure nevertheless was used to stir up negative press and opposition to the legislation.¹³⁵ Despite repeated inquiries, details to back up the Army’s claim have not been produced.

Army Secretary Francis J. Harvey and Vice Chief of Staff Gen. Richard A. Cody sent letters and dispatched several advocates to block the legislation before it arrived on the House floor.¹³⁶ Then-Secretary of Defense Donald Rumsfeld met privately with Chairman Hunter and reportedly pressured him to withdraw the HASC-approved legislation and replace it with language mandating a formal report to Congress on the status of women in or near land combat.¹³⁷ That report was mandated by the FY 2006 Defense Authorization Act¹³⁸ and was due on March 31, 2006. However, Secretary Rumsfeld and his Under Secretary for Personnel and Readiness, Dr. David S.C. Chu, disregarded the deadline.¹³⁹ The task was diverted to the Rand Corporation, which failed to produce a report in 2006.¹⁴⁰ As this Article goes to press—more than a full year past the deadline for the statute-mandated report to Congress—the Rand report has not yet been released. This irresponsible delay has given Congress an excuse to avoid convening oversight hearings for another full year, and possibly two.

Consequential decisions affecting women are being made without congressional oversight or accountability for the consequences.¹⁴¹ Some

May 18, 2005 vote. In the following week, Army officials continued to complain about “confusion”—confusion that they themselves had created.

134. *Id.*

135. *Id.*; Ann Scott Tyson, *Amendment Targets Role of Female Troops*, WASH. POST, May 19, 2005, at A4. The Campbell letter from Lt. Gen. Campbell was either a complete fabrication or an admission that the Army had been violating current regulations to a greater extent than was previously known.

136. See Army Statement on Proposed Legislation, *supra* note 120.

137. The result of this pressure was the third version of the Hunter/McHugh amendment, as enacted in the NDAA for FY 2006. See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 541(a)(1), 119 Stat. 3136, 3251 (2006) (codifying the Hunter/McHugh amendment at 10 U.S.C. § 652 (West Supp. 2007)).

138. Pub. L. No. 109-163, § 218(c)(3), 119 Stat. at 3172.

139. Letter from Dr. David Chu to Sen. Carl Levin (Apr. 27, 2006) (on file with author).

140. Meeting of an official in the Office of the Under Secretary of Defense for Personnel & Readiness and the author (Mar. 2, 2007).

141. See Drake, *supra* note 121.

legislators on both sides of the aisle have taken this issue seriously, but most seem unconcerned. Members of Congress frequently assert their right to oversee and approve other national defense matters, but issues involving military women are often treated as less important—except when sex scandals occur. This type of double standard is disrespectful to military women, who certainly deserve better.

B. Incrementalism + Consistency = Radical Change

1. Costs of Confusion

In response to a question from a group of journalists in January 2005, President George W. Bush said that his policy was, “No women in [ground] combat.”¹⁴² Nevertheless, the President has not intervened to restore the Army to compliance with DoD policy and the congressional notification law. The risks of allowing this situation to continue are high, especially since social engineers cannot be relied upon to objectively evaluate the results of their own recommendations and decisions.

a. Presidential Intent and Inattention

Even proponents of women in combat should feel uneasy about controversial policies being implemented outside of current policy and law. In May 2005, *Stars and Stripes* ran a story quoting female enlisted women and junior officers saying that they should be allowed to make all decisions about where they should serve.¹⁴³ Another story in the *Washington Post* quoted a female officer defending her decision to send a female medic to serve with an airborne infantry company without asking permission: “Think of the fallout if she had gotten wounded or killed,” the officer said. “I probably would have been brought up on charges for defying Army

I unequivocally support the women in our military and their desires to serve our nation honorably in the armed forces alongside our men. Military policy has been to keep women off the front lines, and it is a policy that the Defense Department should not unilaterally change. I believe any change in this policy must be the responsibility of Congress, so that America’s elected officials can be held accountable.

Id.

142. Rowan Scarborough & Joseph Curl, *Despite Pressure, Bush Vows “No Women in Combat,”* WASH. TIMES, Jan. 12, 2005, at A1.

143. Sandra Jontz & Kevin Dougherty, *Trust Us To Decide Our Role in the Army, Female Servicemembers in Iraq Say*, STARS & STRIPES (Mideast ed.), May 25, 2005, available at <http://www.stripesonline.com/article.asp?section=104&article=28530&archive=true>.

policy.”¹⁴⁴ Such insubordination is a recipe for chaos in a profession that requires discipline and obedience to legitimate authority. It is not acceptable to allow junior officers—or even four-star generals—to make up the rules on their own.

b. Precedents, Compromises and Consequences

There are seven major categories of consequences, resulting from continuation of the status quo, which should be of concern to the Commander in Chief:

Morale. Soldiers are beginning to doubt the judgment of their leaders,¹⁴⁵ although they are rarely asked or permitted to express their concerns publicly. Ordering women into land combat also creates a moral and cultural contradiction: violence against women is all right, as long as it happens at the hands of the enemy.

Legal. Federal courts have repeatedly upheld young women’s exemption from Selective Service obligations because women are not deployed in ground combat. If the ground-combat policy is changed—deliberately or by default—a future legal challenge, brought on behalf of men, would likely succeed. As a result, women would be subject to Selective Service and military obligations on the same basis as men, without a vote of Congress.¹⁴⁶

Political. Families, upon finding that their daughters must register with Selective Service and be subject to combat deployment on the same basis as men if they join the military, are likely to hold accountable all elected officials who allowed these things to happen. Recruiting for the volunteer force also could suffer.

Military Effectiveness. Military effectiveness will be directly affected if—or, based on past experience, *when*—the training requirements are changed to guarantee “success” for average female trainees in or near direct

144. Tyson, *For Female GIs, Combat Is a Fact*, *supra* note 122.

145. *See supra* note 99.

146. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-127–C-128 (Findings 4.3–4.12). The 1981 *Rostker v. Goldberg* decision regarding Selective Service was reaffirmed by the federal courts most recently in 2003. *See Schwartz v. Brodsky*, 265 F. Supp. 2d 130 (D. Mass. 2003).

If a deeply-rooted military tradition of male-only draft registration is to be ended, it should be accomplished by that branch of government which has the constitutional power to do so and which best represents the “consent of the governed”—the Congress of the United States, the elected representatives of the people.

Id. at 135.

ground combat. Proponents deny this would happen, while simultaneously demanding gender-normed standards that measure “equal effort” instead of equal results.¹⁴⁷ Training in direct ground combat units will have to be made less demanding for men, since female trainees suffer stress fractures and other injuries at far greater rates. Ultimately, lives will be needlessly lost when soldiers who are unable to cope with the physical demands of direct ground combat are *ordered* (not merely *allowed*) into those units anyway.¹⁴⁸

Social/Cultural. Professional behavior between men and women is always desired, but inappropriate relationships frequently occur on either end of a spectrum between hostility and romantic involvements. Problems on the hostility side lead to charges of harassment or worse. Entanglements on the other side encourage breakdowns in discipline and unit cohesion, and sex scandals cause personnel to be removed and units to be demoralized.¹⁴⁹

Readiness/Deployability. Romantic relationships of the type mentioned above frequently lead to pregnancies, escalating childcare costs, single parenthood, family disruption and poverty, and personnel losses before and during deployments.¹⁵⁰

147. See MITCHELL, *supra* note 15, at 99-122 (discussing Gen. Myer’s attempt to implement identical standards for men and women, which was derailed by both DACOWITS and feminist critics).

148. The issue of women in combat is frequently discussed in permissive terms—i.e., should women be “allowed” to serve in combat? In reality, everyone in the military must follow orders and go where they are ordered to go. The Presidential Commission determined that, with the exception of special operations forces and specialized units, “voluntary” combat for women only would not be a workable option, due to the demoralizing effect of such a policy on unit cohesion. See PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-127 (Finding 4.13).

149. In March 2007, NASA experienced turbulence such as this in an apparent love triangle. Navy Capt. Lisa Marie Nowak, an astronaut, drove cross-country to confront Air Force Capt. Colleen Shipman, a rival for the affections of Navy Cmdr. William Oefelein, a space shuttle pilot. See *NASA Fires Astronaut Nowak*, CNN.COM, Mar. 7, 2007, <http://www.cnn.com/2007/TECH/space/03/07/nasa.nowak/index.html>.

150. In February 2005, the Pentagon reported that between 1994 and 2003, a total of 26,446 women were discharged from the services due to pregnancy. It is not clear whether these “unplanned loss” figures include military women who did not deploy or were evacuated from the war zone due to pregnancy. See Memorandum from Dr. David Chu, Under Secretary of Defense for Personnel & Readiness, to Derek Stewart, Director of Defense Capabilities and Management at the GAO (Feb. 7, 2005), *reprinted in* GOV’T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD’S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 42 (Feb. 2005) [hereinafter GAO FINANCIAL COSTS CANNOT BE ESTIMATED], *available at* <http://www.gao.gov/new.items/d05299.pdf>. According to a confidential message from a

Precedent. Once an unchallenged decision is made to place women in some units coded to be all male, there is nothing to prevent extension of the same practice to other direct ground combat units, including the Marine infantry, artillery, armor, Special Operations Forces, Special Operations Forces helicopters, and Military Transition Teams (MTTs). Indications are that incremental changes in extreme directions are already happening.

c. Military Transition (Training) Teams (MTTs)

No one has provided data proving shortages of men for the combat arms. Serious deficiencies could occur, however, if the institutional Army continues to supply Central Command with an unsuitable “inventory” of soldiers who are not eligible for direct ground combat.

Given the status of the Iraqi war at the beginning of 2007, the Army has a great need for experienced combat soldiers who can train Iraqis to defend and secure their own country. This training is being done by small Military Transition Teams—sometimes called Military Training Teams, or most often MTTs—composed of eleven to fifteen soldiers, officers, or Marines with ground combat leadership experience.¹⁵¹ MTT soldiers are embedded with Iraqi units for one year in order to teach them military skills and combat tactics. Given the closeness of the Transition Training Team relationship, and the fact that Iraqi units are usually poorly equipped and under constant attack, MTT personnel are required to be all male.¹⁵² Specialized Army MTT training—which is considered career-enhancing for volunteers—takes place at Fort Riley, Kansas. However, some soldiers are assigned involuntarily to MTTs from battalions operating in Iraq or

soldier serving Iraq in 2006, one of the 3rd ID’s collocated FSCs—which used to be all male under DoD regulations—already has experienced personnel losses and disruptions due to pregnancies in the ranks.

151. Gina Cavallaro, *Small Teams, Big Job*, ARMY TIMES, Feb. 6, 2006, at 8. There are several different types of MTTs, including Special Police Transition Teams, Border Transition Teams, and, in Afghanistan, Embedded Training Teams. Some female soldiers have been involved in such training, located at the Forward Operating Base (FOB) level, but in support roles only. It would make sense for American women to train Iraqi women to perform security searches of female civilians, but it is difficult to determine if this is being done.

152. According to the *Army Times*, “Cultural sensitivities and the same gender rules that apply to the ban on women in direct combat in the U.S. military mean female soldiers can’t join a MTT. But women are involved in similar small-team training activities above the brigade level.” Gina Cavallaro, *MITT Duty a Career-Booster for Soldiers Who Make Team*, ARMY TIMES, Feb. 6, 2006, at 10.

Afghanistan, without receiving special training.¹⁵³ There has been some controversy about soldiers who do not have the experience or training to accomplish the critical mission of the MTTs. In an interview with *Army Times*, Brig. Gen. Dana Pittard spoke very frankly about the failure of the Army to provide the right type of soldiers for this important job. “Only combat vets who inspire confidence,” he said, “need apply.”¹⁵⁴

There are indications that, even though the small eleven- to fifteen-man MTTs are required to be all-male, some deployed women may have been ordered to serve in a battalion-level MTT—a clear violation of current DoD Regulations.¹⁵⁵ Given the Army’s practice of redefining rules without prior notice, it is difficult to determine what is happening in the field, but there is reason for concern. The MTT mission, which is extremely important, should not be undermined by cultural conflicts caused by unauthorized, incremental gender integration in units required to be all male. It is very challenging and difficult enough to train new Iraqi combat troops without forcing men of that culture to accept and embed with female soldiers. Iraqi trainees respect all Americans, including our female soldiers, but MTTs are combat schools, not charm schools. Terrorists who are determined to create anarchy in Iraq by various means, including disruption of the Iraqi/American Training Teams, could easily use cultural prejudice against women and Western culture to alienate male trainees who abjure obedience to women.¹⁵⁶

Unneeded social tensions that encourage indiscipline or international incidents could destroy trust, demoralize American/Iraqi training teams, and seriously undermine efforts to “stand up” more Iraqi combat battalions.¹⁵⁷

153. Gina Cavallaro, *Additional Soldiers To Join Training Teams*, ARMY TIMES, Dec. 11, 2006, at 10.

154. Gina Cavallaro, “*We Could Be Better*”: CO Wants Trainers To Be Better Caliber, Get Higher Priority, ARMY TIMES, Dec. 4, 2006, at 30.

155. Confidential correspondence between a family member/soldier and author (Oct. 2006) (on file with author). This reference is to soldiers reassigned from already-deployed units in Iraq, not those receiving specialized training at Fort Riley, Kansas.

156. The size of this cultural divide is no more visible than in ceremonies to hand over security responsibilities to Iraqi police and soldiers in Najaf province. An event in December 2006 included warriors on horseback, martial arts demonstrations, and, at one point, the tearing apart and eating of a live rabbit by Iraqi soldiers. “The leader bit out the heart with a yell, and passed the blood-soaked remains to comrades, each of whom took a bite.” *Fast Track*, AIR FORCE TIMES, Jan. 1, 2007, at 6 (illustrated with AP photo taken by Alaa Al-Marjani on Dec. 20, 2006).

157. According to a known and reliable male source in Iraq, a female civil-affairs soldier became romantically involved with male Iraqi community leaders, which required that the entire unit be replaced. This demoralizing incident raised security concerns, since the sharing

MTT field commanders want to accomplish their missions well, but they will be blamed for the consequences of socially volatile conditions ignited by predictable “sparks.” International scandals involving sexual harassment, misconduct, or allegations of sexual assault between male Iraqi trainees and American women could be set off by provocative photos or interviews broadcast worldwide.

The Iraqi training mission must be accomplished successfully, so that American troops can eventually withdraw. Combat is not a place for military social experimentation with male troops of another culture who are interested in survival, not sensitivity training.

d. Marine Infantry, Special Operations Forces, SEALs, etc.

Having allowed the Army to circumvent and ignore the DoD collocation rule, what will Pentagon officials say when feminists inevitably demand “career opportunities” in infantry battalions? The devil is not in the details but in the standard of review used to determine policy. If the primary standard and goal is the advancement of women’s careers (instead of military necessity), demands for consistency in all other ground combat units will be implemented incrementally. If Congress abdicates its right and responsibility to provide oversight, further gender integration will have to include Army and Marine infantry, armor, Special Operations Forces, Special Operations Forces helicopters, and Navy SEALs. And if “equal opportunity” is the primary consideration, regulations regarding submarines will be next on the list.

Regardless of the consequences of the current unauthorized changes, Marine infantry and other specialized combat communities will be unable to make the case that they are different from units already integrated with women. At that point, all of the seven consequences listed above will occur at an accelerated pace. Incremental integration will impose all the complications of gender relationships on close combat units, making military life in the combat forces even more difficult and more dangerous than it is now.

of operational plans with an Iraqi of questionable loyalty could increase security problems and overall risks. Two female soldiers who have served under fire in Iraq, one opposed to women in direct ground combat units and one in favor, wrote in e-mail correspondence with this author that it would be a mistake to gender-integrate the MTT Iraqi combat-training units. Confidential correspondence from sources in Iraq to author (Oct.–Nov. 2006; Apr. 2007) (on file with author).

2. What Do Women Want?

a. DACOWITS Downplays Enlisted Women's Views

The vocabulary of this Article acknowledges throughout that one woman's "exclusion" from close combat is another woman's "exemption." On this issue, as on all issues, not all women think alike. Contrary to opinions commonly expressed by the Defense Advisory Committee on Women in the Services (DACOWITS) and civilian feminists, Army surveys have indicated that the majority of military women are strongly opposed to combat assignments.¹⁵⁸ Women are especially opposed if they would be forced into combat on an equal basis with men. Furthermore, in recent decades, particularly during the 1990s, the former DACOWITS committee constantly promoted the repeal of women's combat exemptions and other agenda items favored by feminists.¹⁵⁹ The influential advisory committee

158. ARMY RESEARCH INSTITUTE (ARI), ARMY PERSONNEL SURVEY OFFICE, DIRECT COMBAT ASSIGNMENT POLICY: FINDINGS FROM THE FALL 2001 SAMPLE SURVEY OF MILITARY PERSONNEL, at 1-2 (Fall 2001) [hereinafter ARI, SAMPLE SURVEY], *available at* <http://cmrlink.org/cmnotes/arissmp3q01.pdf>; *see also* Center for Military Readiness, Enlisted Women Opposed to Military Assignments, CMR NOTES, July 2003, at 1, *available at* <http://www.cmrlink.org/viewarticle.asp?f=mc677issue74.pdf>.

159. *See generally* DACOWITS, Recommendations, http://www.dtic.mil/dacowits/table_recommendation_subpage.html (last visited May 7, 2007). At one time, DACOWITS served a useful purpose, making recommendations on a variety of subjects to benefit women in the military. In the 1990s, however, this tax-funded DoD advisory committee became a feminist lobby, promoting women in combat and related causes that assigned priority to women's career opportunities over the needs of the military. The mostly civilian and female members of DACOWITS routinely disregarded the advice of male military officers (but not female officers assigned as advisors to the committee) and rarely reviewed the consequences of their previous recommendations. In 1998, DACOWITS issued a report advocating gender-mixed Army basic training. Committee members had visited several co-ed training bases, but not the Marines' separate-gender training base at Parris Island, South Carolina. *See* Rowan Scarborough, *Panel of Women Hits Training Sexes Apart*, WASH. TIMES, Jan. 20, 1998, at A1.

In the spring of 1998, the committee also endorsed "career opportunities" for women in multiple launch rocket systems (MLRS) and Special Operations Forces helicopters like the ones shot down in the 1993 "Black Hawk Down" incident in Mogadishu, Somalia. *See* DACOWITS, Spring Conference 1998, Recommendations, http://www.dtic.mil/dacowits/history_of_recommendations/hist-rec-spr-98.html (summarizing recommendations). In the spring of 1999, DACOWITS demanded to know why the Navy does not assign female sailors to submarines. Even though the comprehensive Report of the Science Applications International Corporation had been prepared for DACOWITS in 1995, *see* SAIC REPORT, *infra* note 178, and Navy officials reviewed that information for the committee, DACOWITS recommended at its Fall 1999 and Spring 2000 meetings that (1) future submarines be redesigned to accommodate mixed-gender crews; and (2) that female officers

operated as a tax-funded feminist lobby primarily composed of civilian women and a few ambitious female officers. Based on the author's personal observations as a member, the committee rarely heard from enlisted women, even though they outnumber female officers by a ratio of five to one.¹⁶⁰

b. ARI Survey Shows Women Opposed

The unrepresentative nature of DACOWITS may explain why the committee missed the message conveyed by a series of surveys conducted by the Army Research Institute (ARI), which found that most military women do not wish to participate in combat assignments.¹⁶¹ In 2001, for example, question number sixty in the ARI "Sample Survey of Military Personnel" asked military people whether women should be assigned to direct ground combat, which was defined as "engaging an enemy on the ground with individual or crew-served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel."¹⁶² A bar graph slide prepared by ARI further indicated that the low number of enlisted personnel who were in favor of placing women in combat on the same basis as men "had remained stable

be assigned to larger Trident ballistic missile (SSBN) submarines. *See* DACOWITS, Fall Conference 1999, http://www.dtic.mil/dacowits/history_of_recommendations/hist-rec-fall-99.html (summarizing recommendations); Spring Conference 2000, http://www.dtic.mil/dacowits/history_of_recommendations/hist-rec-spr-2000.html (same); *see also* Center for Military Readiness, Issues: DACOWITS, <http://www.cmrlink.org/dacowits.asp> (last visited May 7, 2007); Center for Military Readiness, *End Preferential Treatment for Pentagon Feminists*, CMR NOTES, Apr. 2001, at 1, available at <http://www.cmrlink.org/cmnotes/m7c81issue64a01.pdf>.

At its 50th Anniversary meeting in the spring of 2001, the committee received statements it had requested from the services in the fall of 2000 regarding the next item on their agenda: deploying women in direct ground combat units. That meeting was the last to occur under the committee's original Charter; the Fall 2001 meeting did not take place due to the 9/11 attack on the Pentagon. A few months after the Charter was allowed to expire in February 2002, Deputy Secretary of Defense Paul Wolfowitz announced a new Charter for a smaller advisory committee of the same name, which was directed to study family readiness and related issues. *See* DACOWITS Charter, http://www.dtic.mil/dacowits/tablecharter_subpage.html (last visited May 7, 2007).

160. Personal observation as a former member of the DACOWITS and participant or observer of many committee meetings.

161. *See* ARI, SAMPLE SURVEY, *supra* note 158.

162. Center for Military Readiness, *Enlisted Women Opposed to Combat Assignments*, Sept. 3, 2003, <http://www.cmrlink.org/WomenInCombat.asp?docID=204>.

since the fall of 1993.”¹⁶³ Among female and male officers, levels of support—nineteen percent and twenty percent, respectively—were higher, but still far less than a majority.¹⁶⁴

ARI also asked whether current policy “should be changed so that females can also be ‘involuntarily assigned’ [to combat units].”¹⁶⁵ The results, which should have given the Army pause, indicated that only ten percent of enlisted women wanted the Army to *order* female soldiers into combat units on an involuntary basis.¹⁶⁶ Furthermore, when ARI’s questionnaire inquired about combat assignments on a *voluntary* basis—a hypothetical idea that is not a workable option¹⁶⁷—responses in favor were not much higher.¹⁶⁸ Only twenty-six percent of enlisted women were in favor of voluntary combat for women, as opposed to sixteen percent of the men.¹⁶⁹ Only twenty-nine percent and twelve percent of female and male officers, respectively, were in favor of voluntary combat assignments for women.¹⁷⁰ When the question was asked in terms of “voluntary [combat] assignments for both males and females,” the percentages in favor ranged from a high of thirty-one percent (enlisted women) to a low of seven percent (male officers).¹⁷¹

Such dismal survey results on the women in combat issue presented a problem for Pentagon feminists. Obvious differences between the views of enlisted women and outspoken female officers would undermine the perception that military women uniformly desire “career opportunities” in or near close combat. The answer to the problem was simple: If you do not wish to hear the answer, then stop asking the question. In 2002, the ARI

163. See Army Personnel Survey Office, U.S. Army Research Institute (ARI), Slide Presentation: Sample Survey of Military Personnel, at 2, 6 (June 10, 2003) (“Policy Should Have Involuntary Assignment for Females Also: Officers,” “Policy Should Have Involuntary Assignment for Females Also: Enlisted Personnel”) (on file with author).

164. See *id.*

165. See *id.*

166. See *id.*

167. The Presidential Commission determined that there is no practical way that women could be assigned to combat units only on a voluntary basis. See PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-127 (Finding 4.13).

168. See Army Personnel Survey Office, *supra* note 163, at 3-4, 7-8 (“Policy Should Have Voluntary Assignment for Females: Officers,” “Policy Should Have Voluntary Assignment for Both Males and Females: Officers,” “Policy Should Have Voluntary Assignment for Females: Enlisted Personnel,” “Policy Should Have Voluntary Assignment for Both Males and Females: Enlisted Personnel”).

169. *Id.*

170. *Id.*

171. *Id.*

survey *dropped* the question about women in combat and substituted less consequential inquiries.¹⁷²

It is difficult to think of any other major defense issue where Pentagon officials have such politically correct blinders firmly in place. The omission served to convey the clear message that Army officials simply do not care what men and women think about new combat rules under which they must live—and possibly die.

Media reports about the experiences of women in the current war tend to quote female soldiers who are enthusiastic about the idea of women in combat¹⁷³—estimated by the ARI surveys to be about ten to fifteen percent of women.¹⁷⁴ Even if that percentage is much higher among the female officers who communicate with the media today, there is no evidence that the majority of female soldiers—including those in the enlisted ranks—want to be involuntarily assigned in or near close combat on the same basis as men.

Even if polls and surveys among military personnel showed overwhelming majorities *in support* of women in combat, the Congress and Commander in Chief still should implement policies that rest on sound priorities and put the needs of the military first.

C. *Complications on Co-Ed Submarines*

Unless the Commander in Chief fulfills his responsibility to enforce the congressional notification law regarding women in land combat,¹⁷⁵ a similar statute mandating advance notice before assigning female sailors to

172. ARI, Sample Survey Fall 2002, Survey Instrument (on file with author). Unlike previous ARI Surveys of this kind (in the fall of 1993, 1994, 1997, 1999, and 2001), this survey did not ask any questions about women in combat.

173. Phillip Carter, *War Dames*, WASH. MONTHLY, Dec. 2002, available at <http://www.washingtonmonthly.com/features/2001/0212.carter.html> (“The most important reason [for the new role of women in the military] has been pressure from women within the Army who need combat experience to advance their careers, nearly all of them in the officer corps.”). In the summer of 2004, several male flag officers told this author during meetings at the Pentagon that they favored the lifting of all combat barriers, because that would advance the careers of their own daughters. No data is available, but there appear to be many daughters of high-level military officials who are military service academy graduates and who seek to follow in their fathers’ footsteps to flag rank. Even if career opportunities and promotions were a problem for female officers—but figures presented to DACOWITS since the 1980s indicate that they are not—that would not be sufficient reason to impose involuntary combat obligations on enlisted women, on the same basis as men. See *infra* note 552.

174. ARI SAMPLE SURVEY, *supra* note 158.

175. See 10 U.S.C. § 652 (West Supp. 2007).

submarines, enacted in 2000, will likely have no effect.¹⁷⁶ And if high-level Navy officials decide to yield to feminist demands for “career opportunities” aboard submarines, serious harm could be done to the health of female sailors, their children, male submariners, and the “Silent Service” community as a whole.

1. Feminist Engineering and the “Silent Service”¹⁷⁷

During the Administration of Bill Clinton, then-Secretary of the Navy John H. Dalton issued a memorandum on April 29, 1994, directing the Chief of Naval Operations to assess the cost of ship alterations to “give full consideration to the importance of expanding opportunities for women into the submarine field, as well as the cost effectiveness of the shipboard modifications necessary to facilitate mixed gender crews.”¹⁷⁸ The Science Applications International Corporation (SAIC) prepared for the Navy an eighty-three-page report titled *Submarine Assignment Policy Assessment (SAIC Report)*. The *SAIC Report* set forth definitive information on why it would be unwise to assign female sailors to any class of submarine. This study was given to DACOWITS in 1995, but it was not revealed to the public until the fall of 1999.¹⁷⁹

176. See National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 573, 114 Stat. 1654, 1654A-136 (2000) (enacting 10 U.S.C. § 6035 (2000) (requiring the Secretary of Defense to give Congress a thirty-day notice before either assigning women to serve aboard submarines or configuring submarines to allow for women’s service)).

177. John Howland, a Naval Academy alumnus and former submarine officer, described the term “Silent Service” as follows:

“Silent Service” was a term coined in the World War II era to describe the submarine service and the men who manned the boats in the Pacific. Submarines were the first arm of the military to take the attack to the Japanese following Pearl Harbor. By their nature, they are stealthy weapons. The silence that they do and must maintain when they are in enemy territory is of life or death importance. Submariners are also generally silent about their missions and accomplishments.

E-mail from John Howland to author (Mar. 2007) (on file with author).

178. REPORT OF THE SCIENCE APPLICATIONS INTERNATIONAL CORPORATION (SAIC), SUBMARINE ASSIGNMENT POLICY ASSESSMENT, at A-3 (Feb. 1, 1995) [hereinafter SAIC REPORT], available at <http://www.cmrlink.org/viewarticle.asp?f=sapa%20020195.pdf>.

179. See Navy Responses, Fall 1999 and Spring 2000, *infra* notes 183, 186. The Center for Military Readiness obtained the *SAIC Report* from a knowledgeable source sometime after Secretary of the Navy Richard Danzig delivered a controversial speech advocating gender-mixed submarines in June of 1999. See Robert A. Hamilton, *1995 Report Opposed Putting Women on Subs*, DAY (New London, Conn.), Oct. 23, 1999, at A1; Rowan Scarborough, *Mixed-Sex Sub Crews Panned by Navy Study*, WASH. TIMES, Oct. 28, 1999, at A1.

On June 3, 1999, Secretary Dalton's former Under Secretary and successor Richard Danzig revived the issue during a speech before an annual symposium of the Naval Submarine League in Norfolk, Virginia.¹⁸⁰ Danzig accused the submarine community of being "a white male bastion" and suggested that the Navy might lose political support in Congress if it did not consider gender integration on submarines.¹⁸¹ The Chief of Naval Operations, Adm. Jay Johnson, resisted Danzig's pressure, responding that all-male submarine crews were "the right thing for us."¹⁸²

a. DACOWITS

In the fall of 1999, the Navy responded to an inquiry from the Defense Advisory Committee on Women in the Services (DACOWITS), which the committee had submitted to the Navy following its spring 1999 meeting. In their response, Navy briefers explained the rationale behind Adm. Johnson's position in written responses and a slide presentation before the forty-seven-year-old DACOWITS.¹⁸³ At the time, DACOWITS was a group of twenty-five to thirty-five mostly civilian women appointed by the Secretary of Defense to advise the Pentagon on all issues involving women in the military.¹⁸⁴ The committee disregarded the Navy's briefing and

180. David Brown, *Idea of Women on Subs Met with Varied Response*, NAVY TIMES, June 21, 1999, at 12.

181. Editorial, *No Place for Women*, INDIANAPOLIS STAR, Dec. 1, 1999, at 22.

In a speech loaded with sociological gobbledegook, he [Danzig] warned the "submarine community" last summer to accept women and more minorities or risk being out of touch with society. "The most Narcissus-like thing about creating something in your own image, about being in love with your own image, is the continued and continuous existence of this segment of the Navy as a white male preserve," he told the Naval Submarine League.

Id.

182. Dale Eisman, *Top Admiral Against Women on Subs*, VIRGINIAN PILOT, Sept. 3, 1999, at A14; *CNO Sinks Sub Changes . . . For Now*, NAVY TIMES, Sept. 13, 1999, at 5.

183. Navy Response to DACOWITS, Fall 1999, San Diego, Cal., *presented by* Capt. Bob Holland, U.S. Navy, Submarine Community Management, Nuclear Propulsion Program Management: Submarine Personnel Assignment [hereinafter *Navy Response*, Fall 1999] (consisting of twenty-nine unnumbered slides) (on file with author). Among other things, Capt. Holland's briefing explained that alterations to submarines to accommodate women would further reduce the already below-standard habitability standards for all crew members, while leaving less space for stowage of basic and special equipment required for mission accomplishment. See Andrea Stone, *Navy Resists Idea of Opening Submarines to Women*, USA TODAY, Sept. 14, 1999, at 14A; Robert A. Hamilton, *Committee Urges Female Crew for Subs*, DAY (New London, Conn.), Oct. 29, 1999.

184. See *supra* note 159. For several decades after its founding in 1951, the original committee's research and recommendations were helpful to military women and consistent

passed a resolution recommending that untold millions be spent to accommodate mixed-gender crews on submarines.¹⁸⁵

During DACOWITS's spring 2000 meeting, the Navy presented additional information explaining many reasons why the Navy does not assign female sailors to submarines.¹⁸⁶ Again, the DACOWITS disregarded that information and reaffirmed its unrealistic Fall 1999 resolution, recommending that smaller (Virginia-class) submarines be redesigned to accommodate mixed crews in the future and that female officers be assigned to larger Ohio-class (Trident) ballistic missile (SSBN)

with sound priorities. But starting in the 1990s, the mostly civilian women members undermined the committee's credibility by routinely endorsing problematic feminist causes—particularly co-ed basic training, women in combat, and gender integration on submarines. *See supra* note 159. These recommendations were primarily aimed at advancing the careers of the female officers who, as military representatives to the committee, helped to write them during biannual DACOWITS meetings. Full committee meetings were elaborate four- or five-day affairs, hosted by the various services in Washington, D.C., and at military bases around the country. Meetings involved extensive briefings, field trips, and formal social events. Members making independent visits to military installations were treated with the same protocol status as three-star flag officers. (In the opinion of this author, who was appointed to the DACOWITS in 1984, some committee members took this status much too seriously.) Issues raised during base visit focus groups sometimes led to formal "Requests for Information," which were answered at the next meeting with a written response or a briefing from military service representatives. Following these responses, DACOWITS would vote on formal recommendations, which usually included a "Rationale" stressing career opportunities for women. Recommendations were submitted directly to the Office of the Secretary of Defense, Under Secretary for Personnel & Readiness, and prominently reported in the media on a regular basis. The circular process put pressure on representatives of the military services to satisfy escalating expectations of the committee at each successive meeting.

185. DACOWITS Recommendation No. 1 (Oct. 1, 1999) ("DACOWITS recommends that, beginning now, plans for future submarine platforms (particularly the smaller Virginia class subs), incorporate appropriate berthing and privacy arrangements to accommodate mixed gender crews."). It also recommended that gender-integration begin on larger Ohio-class submarines, armed with (Trident) ballistic missiles (SSBNs), starting with female officers. *See* Recommendations, available at <http://www.dtic.mil/dacowits>; *see also* Stone, *supra* note 183; Hamilton, *supra* note 183. This recommendation alarmed and agitated the submarine community, which demanded action from Congress. The debate intensified in October 1999, when the previously undisclosed *SAIC Report* came to light. *See, e.g.*, Carlisle A.H. Trost, *Not in Our Submarines*, U.S. NAVAL INST. PROC., Sept. 2000, at 2.

186. Navy Response to DACOWITS, Spring 2000, Submarine Personnel Assignment: Briefing Session, at 2 [hereinafter Navy Response, Spring 2000], available at http://www.cmrlink.org/cmnotes/navy-dacowits_0295.pdf. In its response, the Navy referenced the 1995 *SAIC Report*, which had been given to DACOWITS in June 1999.

submarines.¹⁸⁷ In submitting both of these recommendations to the Secretary of Defense, committee members put their own egalitarian agenda ahead of the good of the Silent Service.¹⁸⁸

The DACOWITS also ignored compelling information included in the report of the Science Applications International Corporation, which had been given to the committee in June 1999. Points made by Navy representatives and by the *SAIC Report*, all of which remain equally valid today, included the following:

- “[Alterations for co-ed crews would] further reduce existing below-standard conditions (for both genders); or require the removal of equipment as a space and weight trade-off, which would result in reduced operational capabilities of the ship; or in the extreme, require lengthening of the ship to obtain additional space and weight margin. This option would be very costly.”¹⁸⁹

187. See Andrea Stone, *Too Cramped for Comfort?*, NAVY TIMES, June 5, 2000, at 24; Rowan Scarborough, *Panel Asks Navy To Put Female Officers in Subs*, WASH. TIMES, May 4, 2000, at A1. This recommendation and a similar one approved at the committee's Fall 1999 meeting, see *supra* note 185, seriously discredited DACOWITS. In March 2001, controversy about co-ed submarines was one of several issues raised when DACOWITS's charter was due to be renewed in 2001. Following months of controversy, the Under Secretary of Defense for Personnel & Readiness, Dr. David Chu, allowed DACOWITS's Charter to expire, but he later reconstituted the group with fewer than ten members and a different agenda that focuses on family concerns and related issues, but not women in combat.

188. SAIC REPORT, *supra* note 178, at 10-11. Characteristics of this community are unique in the military:

A U.S. submarine provides stealth, mobility, and firepower and the mere suspicion of its presence dramatically changes the military equation for enemy commanders. U.S. submarines are able to operate alone, unsupported, and undetected—even in enemy waters—for months at a time, limited only by food supplies and the endurance of the crew. There are no onboard maintenance personnel; the operating crew must handle any emergency, including repairs to the most sophisticated equipment. The submarine carries an array of precision weapons that can strike targets ashore, on the surface, or other submarines. It requires no escorts; no tankers; no air cover; no supply ships; and there are no manufacturers' representatives on board. It is the platform of choice for many Special Forces operations.

Id.

189. Navy Response, Fall 1999, *supra* note 183, at slide titled “Submarine Alterations—Projected Costs”; see also Navy Response, Spring 2000, *supra* note 186, at 5.

- Separate quarters for female sailors would further cramp living spaces on all submarines, which already fail to meet the habitability standards applied to surface ships—and to an intolerable degree.¹⁹⁰ fifty enlisted submariners use each shower, compared to twenty-five surface sailors; an enlisted submariner has less than half the storage space of his surface counterpart (three cubic feet vs. seven-and-one-half cubic feet); and vertical space between bunks measures only eighteen inches on submarines, compared to twenty-four inches on ships.¹⁹¹
- Virginia-class attack subs (SSNs) were designed to be smaller than the Seawolf in order to reduce costs. Extensive redesign, as demanded by DACOWITS, “would have two negative effects: further degrade habitability for both genders and require removal of operational equipment reducing warfighting effectiveness.”¹⁹²
- Ship alterations to accommodate women would cost approximately \$5 million per attack sub, not including redesign costs of approximately \$15 million per class, plus an unknown amount for required system changes and associated costs. The Navy’s minimum estimate is that altering a submarine to accommodate women would cost

190. Navy Response, Spring 2000, *supra* note 186, at 5.

A driving factor in the privacy and habitability concerns onboard all submarines is the collocation of showers and toilet facilities, necessitated by the limited available space The common practice onboard some surface ships of using a sign to indicate occupancy by a male/female crewmember would not work satisfactorily for long periods onboard a submarine.

Id.

191. *Id.* at 4; SAIC REPORT, *supra* note 178, at 11-12, Table 2-1.

Submarine designers strive to minimize the size of the ship. This is important to achieve maximum performance within a reasonable power plant design and to avoid unnecessary construction costs. Submarine designers try to take advantage of every cubic foot of space. Living spaces are integrated with electrical and mechanical operating systems. The crew lives in and around the submarine weapon systems.

Id.

192. Rowan Scarborough, *Panel Asks Navy To Put Female Officers in Subs; Military Memo Says the Move “Very Costly,”* WASH. TIMES, May 4, 2000, at A1 (quoting Navy Response Spring 2000, *supra* note 186, at 4).

seventy-eight times more per crewmember than would making comparable alterations on aircraft carriers.¹⁹³

- More importantly, estimates of cost do not reflect the operational hazards of degrading undersea performance characteristics and combat capabilities, which are vastly different from the surface fleet. The crew lives in and around equipment—an existence that has been compared to living inside a clock. “Critical electronic, hydraulic, and high pressure air systems pass through submarine berthing spaces.”¹⁹⁴ Redesignation of space designed for operational equipment could “potentially [impact] the ship’s endurance and/or mission capability.”¹⁹⁵
- A plan to assign female sailors and officers only to larger Trident submarines (SSBNs, also known as “boomers”) would create an unacceptable two-tiered officer community: one group that can serve on any submarine, and another that can only be assigned to Tridents. Without the opportunity to assign sailors to both types of submarines, in order to broaden experience in each, it would become increasingly difficult to maintain a properly balanced and experienced officer community. This would disadvantage women in any fair selection process for command. Additionally, assigning women only to the larger Trident subs would create a perceived inequity within the community.¹⁹⁶

193. Navy Response, Fall 1999, *supra* note 183, at slides titled “Surface Ship Alteration Costs,” “Submarine Alterations—Projected Costs.” It would cost \$5 million, or \$313,000 per person, to reconfigure a Los Angeles-class submarine for gender-mixed crews, compared to \$2 million, or \$4000 per person, to make similar alterations to an aircraft carrier (CVN 68). “These estimates do not include one time design costs of approximately \$15 million per ship class. Nor do the projections consider required system changes and associated costs. Therefore, projected costs may be significantly higher.” *Id.*; *see also* Navy Response, Spring 2000, *supra* note 186, at 5 (mentioning the considerable “opportunity costs” of taking submarines off line to support major shipboard modifications to accommodate mixed gender crews). All of the Navy’s estimated costs, which have not been adjusted for inflation, would be considerably higher today.

194. Navy Response, Spring 2000, *supra* note 186, at 7; SAIC REPORT, *supra* note 178, at 2-4.

195. *See* Navy Response, Spring 2000, *supra* note 186, at 7; SAIC REPORT, *supra* note 178, at 2-4.

196. Navy Response, Spring 2000, *supra* note 186, at 8-9.

b. The SAIC Report

The 1995 *Science Applications International Corporation (SAIC) Report* provided additional information on the complications of co-ed submarines, including a simple drawing that was worth 10,000 words.¹⁹⁷ The drawing illustrated habitability concerns by superimposing the outline of a Boeing 747 aircraft fuselage over the cramped living spaces of an attack submarine. The cabin of a 747 jetliner, in which passengers spend only a few hours while in flight, appears roomier than the space in which submariners must live, work, and sleep for extended periods.

The *SAIC Report* explained that nuclear powered SSBN “boomers” stay submerged for as long as seventy-seven continuous days.¹⁹⁸ SSN (attack) subs deploy for as long as six months at a time, with infrequent port calls.¹⁹⁹ The thought of spending seventy-seven days on a 747 should give pause to any reasonable person. The *SAIC Report* also put the issue into perspective by assigning priority to the needs of the Silent Service:

Considerations of mixed gender crews must be undertaken in the context of the combat effectiveness of the submarine. The Supreme Court has upheld that Title VII of the Civil Rights Act of 1964, which ensures all individuals are treated equally before the law with respect to civilian employment, does not apply to the military profession.

Submarines are unique. They are able to operate alone—submerged and unsupported—undetected in a hostile environment for months at a time, limited only by food supplies and the endurance of the crew.

The vital characteristics of submarines generate competing design requirements, including safety of submerged operations, quieting, equipment accessibility and density. The final design is a trade-off that is dominated by operational effectiveness, engineering constraints and cost.

In parceling out available space, structure and equipment needed for submarine stealth, mobility, endurance and payload take priority over habitability. Non-essentials stay ashore. The

197. SAIC REPORT, *supra* note 178, at 15. The *SAIC Report* was not made public until 1999, when a concerned source provided it to the Center for Military Readiness. See <http://www.cmrlink.org/viewarticle.asp?f=sapa%20020195.pdf>.

198. *Id.* at 16.

199. *Id.* at 16-17.

crew must live in and around equipment. There is virtually no space for recreation.

Berthing and sanitary spaces are cramped. “Hot-bunking,” wherein three crew members share two bunks in shifts, is standard operating procedure on attack submarines.

The total living area for more than 130 people is equivalent to a medium-size house. Unencumbered deck space in sleeping areas, toilets, and showers, is about one-half to one-third that afforded to a crew member on a small surface ship.

. . . .

Efforts continue to be made to minimize hot bunking, however the reality is that hot bunking is still required to accomplish sea missions. To reduce the number of crew required to hot bunk, commanding officers will often grant the option of laying down mattresses in the torpedo room where there is some unencumbered deck space. Generally, crew members prefer the inconvenience and lack of privacy involved in these sleeping arrangements to sleeping in shifts on permanent bunks.²⁰⁰

According to the magazine *National Defense*, “A nuclear submarine embodies the highest form of integrated technologies in the world—more complex than even space vehicles—and [it] must operate in a more hostile environment.”²⁰¹

Safety concerns that cannot be engineered away are even more daunting:

- A submarine is analogous to an “undersea aircraft,” which patrols the oceans for months at a time, unsupported and undetected in an environment more hostile than space. “When submerged, even a small breach in a seawater piping system can threaten the ship and all aboard. The closed atmosphere of a submarine creates physical risks. In case of fire, for example, a submarine must quickly get to the surface to evacuate smoke or toxic fumes.”²⁰²
- Addressing the notion that submarines can be “stretched” like town car wedding limousines, SAIC added the

200. *Id.* at 2, 12.

201. Richard H. Gwinn & Don Tanquin, *Submarine Base Viability Relies on Interim Program*, NAT’L DEF., Nov. 1994, at 22, *quoted in* SAIC REPORT, *supra* note 178, at 10.

202. SAIC REPORT, *supra* note 178, at 16.

following: “New sanitary facilities require more piping modifications in submarines, and may in some cases require additional seawater piping or hull penetrations. These are not insignificant modifications Both berthing and sanitary facility modifications require corresponding electrical system changes as well”

- “In both the Los Angeles and Seawolf classes, modifications which attain compliance with the [habitability] standards may not be possible without lengthening the ship” Re-assignment of scarce sanitary facilities to female sailors—restricting, in many cases, fifty percent of facilities to ten percent of the crew—would cause inequities for the men. Cross-rank, single-gender berthing arrangements would disrupt prerogatives of rank in an already-stressful environment.²⁰³
- According to preliminary work done on the new Virginia-class attack submarines, “additional facilities for women would require an increase in length from the baseline design and even then, the facilities [would not be] fully compliant with the [habitability] standards.”²⁰⁴

There is no compelling reason to make submarine living spaces even more cramped, but that is exactly what DACOWITS recommended.

c. Birth Defects and Medical Emergencies

The *SAIC Report* set forth one of the most compelling reasons why submarines should remain all-male. Medical dangers inherent in gynecological emergencies, and insurmountable risks of birth defects to unborn fetus “passengers” who accompany their mothers to work on the sub, could endanger crew members and undermine undersea missions.²⁰⁵ The only female sailors who could safely be assigned to submarines would be women without the physical capability to have children.²⁰⁶

203. *Id.* at 25-27.

204. *Id.* at 26 (citing the Naval Sea Systems Command).

205. *Id.* at 32-36.

206. *Id.*; see also Letter from Rear Adm. Hugh Scott, MC, U.S. Navy (Ret.) to House National Security Committee Chairman Rep. Floyd D. Spence, June 12, 2000 [hereinafter Rear Adm. Scott letter], available at <http://www.cmrlink.org/CMRNoteNotes/HPScott%20061200.pdf>. Dr. Scott, a former medical corpsman and an expert in the field of undersea medicine, provided more detailed information on the high risk of birth defects for the

There are several reasons why pregnancy would be a greater concern on submarines than on surface vessels. First, the primary health risk to pregnant females in submarines is not nuclear power (as might be commonly assumed), but rather it is the constantly recycled air on submarines. On June 12, 2000, Rear Adm. Hugh P. Scott, MC, U.S. Navy (Ret.), an expert in the field of undersea medicine, wrote letters to House and Senate Armed Services Committees, explaining in detail the medical and operational hazards of assigning female sailors of child-bearing age to submarines, due to risks of birth defects caused by elements in a submarine's constantly recycled atmosphere that are safe for adults but not for unborn children. While undertaking clinical tests to conclusively establish these hazards would be impossible without exposing women and children to unacceptable risks in the process,²⁰⁷ Rear Adm. Scott's advice was not mere rhetoric: The Institute of Naval Medicine in the United Kingdom, in a study done for the British Royal Navy in 1997, independently came to similar conclusion.²⁰⁸

As a practical matter, certain atmospheric molecules, such as carbon monoxide and carbon dioxide, cannot be reduced in a submarine's closed undersea environment to a level that is safe for unborn children. Fires, smoking, equipment malfunction, and overheated insulation all produce carbon monoxide, which presents a real threat to a female submariner's unborn child. According to several studies cited by the *SAIC Report*:

The fetus is most sensitive and at the greatest risk in terms of the toxicological effects of the environment during the first three months of gestation.

The major gases present and routinely monitored aboard submarines include: carbon monoxide, carbon dioxide, hydrogen, oxygen, fluorocarbon-12 and fluorocarbon-114.

children of female sailors assigned to submarines, especially in the earliest weeks when they may not be aware of their pregnancy.

207. See Rear Adm. Scott letter, *supra* note 206.

208. A. Brittain, M.R. Dean, H.J. Holden, D.C. Brown & G.H.G. McMillan, *Mixed Manning in Submarines: Foetal Health, Dec. 1997*, in INM REPORT NO. 97074 (1997) (on file with author). This report was approved and released by G.H.G. McMillan, Surgeon Commodore Royal Navy Medical Officer-in-Charge, The Institute for Naval Medicine, Alverstoke, GOSPORT, Hampshire, PO12 2DL RESTRICTED, at 1. It was obtained by the author from David Brown, Head of Submarine and Radiation Medicine Division, Institute of Naval Medicine, on November 25, 1999.

With regard to toxicological considerations, carbon monoxide present in the closed environment of the submarine can have an adverse effect on the development of the fetus. . . . While normal adults have a reserve capacity and compensatory response . . . , the fetus under normal situations can be functioning close to a critical level with respect to tissue oxygen supply, so even moderate carbon monoxide exposure could decrease the oxygen transport capacity of maternal and fetal hemoglobin and result in interference in fetal tissue oxygenation during important developmental stages.²⁰⁹

Second, in addition to the risks inherent in permitting normal pregnancies to occur aboard submarines, gender-integrated submarines would be faced with emergencies such as ruptured ectopic pregnancies, which are life-threatening and untreatable by a medical officer (usually not a doctor) in a sub's closet-sized "sick bay."²¹⁰ The *SAIC Report* noted:

The medical problems sometimes associated with pregnancy, such as ruptured ectopic pregnancy, spontaneous hemorrhagic abortion, or septic abortion would be significantly magnified in the submarine environment. The occurrence of a ruptured ectopic pregnancy is a life threatening emergency that requires a correct diagnosis and a prompt medevac to a medical treatment facility with an obstetrical surgical capacity. In the U.S. there is one [such] pregnancy for each [sixty] diagnosed pregnancies. Eighty percent of ruptured ectopic pregnancies occur between four to eight weeks after the last menstrual period.²¹¹

In his letter to Chairman Spence, Rear Adm. Scott noted, "Testing all women for pregnancy will not remove the risk because the pregnancy test may not be positive in very early pregnancy, the time at which ectopic pregnancy poses the greatest problem."²¹² It would be prudent to conduct mandatory pregnancy tests prior to deployment, but in the past, female officers have rejected mandatory pre-deployment pregnancy tests as an

209. SAIC REPORT, *supra* note 178, at 34-35 (footnotes omitted).

210. Personal observation and trip report of the author during Presidential Commission visit to the USS *Polk* and USS *Scranton* (Sept. 13, 1992).

211. SAIC REPORT, *supra* note 178, at 32-33 (quoting several expert sources in the fields of Navy medicine, obstetrics, and gynecological surgery).

212. See Rear Adm. Scott letter, *supra* note 206, at 3; see also SAIC REPORT, *supra* note 178, at 34.

infringement on women's rights, and intimidated men have capitulated to their demands.²¹³

If a submarine's captain were faced with a female sailor in acute medical distress, or a pregnant sailor who fears birth defects due to carbon monoxide and other toxic elements in the atmosphere, what is the skipper to do? An immediate, unexpected trip to the surface would compromise the sub's undersea mission. In addition, mid-ocean evacuations, accomplished by means of a basket dangling from a helicopter, would be extremely perilous for all concerned, especially when a sub is operating in deep ocean or under polar ice.

Pregnancy is not a minor concern. According to the Center for Naval Analysis, the unplanned loss rate for female sailors on surface ships (twenty-three to twenty-five percent) is more than two-and-one-half times the rate for men (eight to ten percent)—most often due to pregnancy and other medical conditions.²¹⁴ Proportional losses on submarines could compromise stealth missions and have a devastating effect on morale and readiness.²¹⁵

- The unplanned loss of *any* sailor from a small-crewed submarine, which requires 100% manning for continuous eighteen-hour shift cycles, imposes considerable stress on remaining crewmembers. Properly trained replacement personnel, who are usually not available even on surface

213. See NAVAL INSPECTOR GEN., REPORT OF INVESTIGATION ON THE INTEGRATION OF WOMEN INTO CARRIER AIR WING ELEVEN (Feb. 10, 1997) [hereinafter AIR WING ELEVEN REPORT] (on file with author). During the first deployment of female pilots in tactical aviation in 1994, some female officers protested the air wing commander's (CAG's) order for mandatory pregnancy testing. When the CAG rescinded the order, another storm of protest ensued, causing lingering resentment among men and women alike. "No issue was as divisive of men and women as the carrier commanding officer's order that air wing personnel undergo [mandatory] pregnancy testing. The issue was routinely cited by women who were critical of the [CAG's] . . . lack of understanding of women's concerns." *Id.* This incident was so contentious that orders for pregnancy tests have become virtually anathema in the Navy, except under limited circumstances.

214. Rowan Scarborough, *Dropout Rate High for Women on Ships; Navy Finds Readiness Woes*, WASH. TIMES, Mar. 8, 1999, at A1.

215. SAIC REPORT, *supra* note 178, at 41-43. "The submarine's independent operations, often in remote areas, means that access to replacement personnel or assistance from others only occurs in extreme emergencies. If such outside assistance is required, it can be obtained only at the expense of mission readiness or mission performance . . ." *Id.*; see also Rowan Scarborough, *Navy Finds Pregnancy Put at Risk by Sea Duty*, WASH. TIMES, Apr. 6, 1998, at A1; Scarborough, *supra* note 214.

ships, would be even more difficult to find and place on technologically advanced submarines.²¹⁶

- Replacements for unplanned personnel losses would have to match in terms of gender as well as qualifications, since replacement of a female with a male would lessen the hot bunking burden on women and increase it for men, and vice versa.²¹⁷

Normal operations and damage control can be physically demanding on submarines as well as on surface ships. The last Navy study of its kind found that significant percentages of female sailors were unable to perform the following tasks: Stretcher carry, level (38%); Stretcher carry, up and down ladder (88%); Start P250 Pump (75%); and Remove SSTG Pump (99%). None of the men failed to perform any of these tasks, which are commonly performed during shipboard emergencies.²¹⁸ This type of equipment is still used on board Navy ships. Often another sailor is not available to share the load, particularly given narrow shipboard space constraints.

d. Interpersonal Relationships

There are additional reasons why it would be unwise to impose unresolvable social and management problems on the submarine community. The *SAIC Report's* cautionary words to social engineers are

216. SAIC REPORT, *supra* note 178, at 41-42.

Because of the highly technical nature of submarining, the range of skills required to operate and maintain submarines, the small size of the crew and the independent, extended nature of submarine operations, operational submarines are manned at 100 percent of allowance as a matter of policy. Submarines depend upon 100 percent manning to provide the proper number of crew members of the right skills to fight and maintain the ship, and to man all watch stations for day-to-day operations with adequate watch rotation, usually three sections.

Id.

217. *Id.* at 43.

218. *Id.* at 36 (quoting D.W. Robertson & T. Trent, *Documentation of Muscularly Demanding Jobs and Tasks and Validation of an Occupational Strength Test Battery (STB)*, MDTLN REPORT NO. 86-1 (1985)). The Robertson & Trent Study was also cited with diagrams and findings in the PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-8, C-9. A number of submarine wives, speaking with members of the Presidential Commission by phone on October 8, 1992, said that they were most concerned about physical disparities between male and female sailors, which could undermine safety procedures in emergency situations. See Presidential Commission Panel Three Supplementary Trip Report (Oct. 23, 1992) (on file with author).

comparable to the warnings given to NASA mechanical engineers about the dangers of sparks and fire in a pure-oxygen environment.

First, recent experience indicates that inappropriate relationships—ranging from harassment to sexual attraction—will occur and be known to the entire crew. Displays of affection are sure to undermine morale and discipline, since there is no effective way to separate the people involved, short of evacuation. Unplanned surfacings to remove sailors due to inappropriate personal behavior, as well as for medical/pregnancy emergencies, would further compromise the mission.²¹⁹

Second, unrelenting stress and an absence of personal comforts and privacy place a premium on morale and cohesion of the crew. There is no fresh air or communication with the outside world, except for fifty-word family grams that are not private.²²⁰ Divorce rates in the submarine community are already very high.²²¹ Further stress on families, combined with predictable unplanned losses and non-deployability problems, could worsen personnel shortages, instead of improving them.

Lastly, by means of comparison, Norway, Sweden, and Australia assign a few women to small submarines, but brief coastal deployments are nowhere near as demanding as American submarine requirements. On small, thirty-person Swedish subs, men and women change clothes, bunk, and shower in the same spaces. In an interview with *Navy Times*, Swedish sailors said that romantic relationships occurring in submarines are conducted “professionally” and treated with wary acceptance.²²² Such arrangements are incompatible with sound personnel-management practices and American cultural values.²²³

219. SAIC REPORT, *supra* note 178, at 48-49. This point has been demonstrated, ironically, in the highly publicized case of former astronaut Lisa Marie Nowak. *See Nasa Fires Astronaut Nowak*, *supra* note 149.

220. SAIC REPORT, *supra* note 178, at 18-20.

221. Elaine Donnelly, Trip Report to the Presidential Commission Regarding Sept. 13, 1992, Visit to Atlantic Submarine Command at Norfolk, Va. (Jan. 15, 1993); *see also* Elaine M. Grossman, *Crew Wives Want No Women on Subs*, CHI. SUN-TIMES, Feb. 6, 2000, at 29A.

222. Bradley Peniston, *Swedish Subs Serve as Model to U.S. Fleet*, NAVY TIMES, July 5, 1999. Peniston talked to Swedish sailors stationed at Gdynia, Poland, who approved of Sweden's policy of putting female sailors on small submarines since 1989. *Id.* A male officer acknowledged that there is no privacy, and people wind up changing clothes together. *Id.* A female sailor who shares her stateroom with three male officers said, “I think we think differently” from Americans. *Id.* “It’s the natural way of doing it.” *Id.* A chief petty officer from the American guided missile cruiser USS *Hue City* said, “No way would that work.” *Id.* A female lieutenant junior-grade, also from the *Hue City*, agreed, telling the reporter that she was headed for nuclear training for aircraft carriers. *Id.*

223. *See id.*

The Navy's responses to DACOWITS and to the *SAIC Report* made additional points in response to concerns about women's careers. For instance, Navy officials explained that it would not be rational to assign women only to the larger, more spacious nuclear submarines, because submariners must have operational experience in all classes of submarines in order to advance their careers. Limiting women only to larger nuclear submarines would disadvantage women, even while being perceived as preferential treatment unfair to men.²²⁴ Furthermore, opportunities for women in specialized fields, such as nuclear propulsion, are readily available in other advanced classes of ships, such as AEGIS cruisers and Nimitz-class aircraft carriers.²²⁵

The *SAIC Report* and the Navy's Fall 1999 and Spring 2000 responses did not matter to DACOWITS, which nonetheless recommended that women be assigned incrementally to larger Ohio-class (Trident) ballistic missile submarines (SSBNs), and eventually to the new Virginia-class attack submarines, which are much smaller than Los Angeles-class attack subs (SSNs). The Department of the Navy, however, has not changed its official position:

In July 1995, the Secretary of the Navy concurred with the Chief of Naval Operation's recommendation not to open submarines to women. He specified that the issue was to be assessed as the Navy's experience evolved in the Women at Sea program on surface combatants. To date, the information which has become available in the Women at Sea program does not provide a basis for changing this policy. Therefore, in accordance with SECNAVINST 1300.12B, Assignment of Women Members in the Department of the Navy, submarines remain closed to women.²²⁶

2. The Bartlett Amendment Mandating Oversight

Rep. Roscoe Bartlett (R-Md.), a member of the HASC Personnel Subcommittee, recognized that advocates of women on submarines were misguided.²²⁷ Rep. Bartlett also realized that a single incremental step to put

224. Navy Response, Spring 2000, *supra* note 186, at 8.

225. Navy Response, Fall 1999, *supra* note 183, at slide titled "Women in the Nuclear Propulsion Program."

226. Navy Response, Spring 2000, *supra* note 186, at 2-3.

227. See Rep. Roscoe Bartlett, News Release, *Women on Subs Amendment Included in Defense Bill*, Oct. 12, 2000.

female sailors on any class of submarine would inevitably lead to irreversible changes on all classes of subs—all without congressional oversight or approval.²²⁸ Such actions become inevitable when policymakers assign highest priority to equal opportunity and career considerations—at the expense of the needs of the military—and knowingly create career path problems that cannot be solved without taking additional steps in the wrong direction.²²⁹

Noting that “[a]ny policy change of this magnitude simply must undergo review by Congress and public debate,” Rep. Bartlett wisely sponsored and successfully passed an amendment to the National Defense Authorization Act for Fiscal Year 2001, which forbids the use of DoD funds to gender-integrate submarines unless Congress is formally notified thirty legislative days (when both houses of Congress are in session, or approximately three months) in advance.²³⁰

Such a mandate would not be necessary if the power of gender politics in the Pentagon were not so great—both then and now. In 2006, the Chief of Naval Operations, Adm. Mike Mullen, departed from long-standing Navy policy in several speeches and interviews, speaking favorably about the prospect of assigning women to submarines.²³¹ A statement by Adm. Mullen promoting “diversity in the ranks,” which he said should be “mandatory,” apparently has encouraged unnecessary gender quotas at the U.S. Naval Academy,²³² which the Superintendent, Vice Adm. Rodney

As a practical matter, this is a no-brainer. The Constitution reserves the exclusive authority to Congress to make regulations concerning the military. Without this provision, the Administration could have imposed this radical and exorbitantly expensive change over the objections of the Navy, with no public debate or consideration by the Congress.

Id.; see also *supra* note 176.

228. See *supra* note 227.

229. See SAIC REPORT, *supra* note 178. Historically, the typical DACOWITS answer to career limitations for women was to demand the removal of all “barriers,” regardless of the consequences.

230. See Bartlett, *supra* note 227.

231. Andrew Scutro, *Full Steam Ahead*, NAVY TIMES, Feb. 27, 2006, at 14-16. Adm. Mullen was quoted as saying that officials in the submarine community were “looking at” the possibility. In another interview, then-Master Chief Petty Officer Terry Scott was quoted as saying that he favored the inclusion of women on subs because his daughter said when she was eight years old that she wanted to ride on submarines. Mark D. Faram, *Coming Soon? Women on Subs, Pay Parity, Top Enlisted Sailor Says Only Outdated “Culture” Stands in Way*, NAVY TIMES, Feb. 13, 2006, at 12.

232. See Scutro, *supra* note 231, at 15.

Rempt, has promoted as a solution to sexual harassment.²³³ Adm. Mullen and Vice Adm. Rempt seem to be unconcerned about the illogic of creating an artificially large cohort of female officers who are not eligible for assignment to combat communities that must, under DoD regulations and Navy policy, remain all-male.

Marine infantry are sorely needed to train Iraqi men for combat in Iraq, and the undermanned SEAL community is the Navy's number one recruiting priority.²³⁴ The submarine fleet is shrinking, but skilled officers and crewmen are difficult to find. Women cannot fill those billets due to habitability and health considerations. Self-sterilization is not a civilized option. Furthermore, given the most pressing personnel needs of the Navy and Marine Corps, it is not prudent for the Chief of Naval Operations and the Superintendent of the Naval Academy to keep increasing gender quotas, which will produce more female officers than the Navy needs. These discriminatory quotas are an egregious example of double standards involving women (DSIW), and they comprise a self-created demographic dilemma in the making. DSIWs cause otherwise intelligent and honorable men to do irrational things.

D. Double Standards in Naval Aviation

1. Death of an Aviator

The ramp of an aircraft carrier is unforgiving, and the penalty for errors can be death. The story of the first two women trained to fly the F-14

233. *Hearing on Sexual Assault and Violence Against Women in the Military and at the Academies Before the H. Subcomm. on Nat'l Sec., Emerging Threats, & Int'l Relations, of the H. Comm. on Gov't Reform*, 109th Cong. (June 27, 2006) [hereinafter House, Hearing on Sexual Assault and Violence Against Women in the Military and at the Academies] (testimony of Vice Adm. Rempt) (citing TASK FORCE REPORT, *supra* note 10, at 7), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:33682.wais; see also *id.* (statement of Elaine Donnelly). The *Task Force Report* suggested that acceptance of women at the USNA might improve if their numbers were significantly increased. See TASK FORCE REPORT, *supra* note 10, at 22. The theory was based on civilian sociology only, but the USNA nevertheless has increased its percentage of female midshipmen from 15.8% in the Class of 2006 to 22.8% in the Class of 2010.

234. W. Thomas Smith, Jr., *Burning Up SEALS: Misusing Special Warfare Assets*, NAT'L REV. (online ed.), Aug. 31, 2006, <http://article.nationalreview.com/?q=MTY1MDgxOTU2YTU3NWE3ODQyZDAwZTc1OGMxOThhNTU=>. The USNA should be concentrating on meeting the primary recruiting needs of the Navy and Marine Corps today—i.e., men for the combat arms and submarines.

Tomcat demonstrates the dangers of advancing female trainees with special concessions that elevate risks in extremely hazardous occupations.

a. The Kara Hultgreen Story

Shortly after Defense Secretary Les Aspin issued regulations permitting the training of female pilots in tactical aviation,²³⁵ Lt. Kara S. Hultgreen and Lt. Carey Dunai Lohrenz became the first two women trained to fly the F-14 Tomcat.²³⁶

On October 25, 1994, Lt. Hultgreen lost control of her aircraft on approach to the carrier USS *Abraham Lincoln*.²³⁷ Her back seat radar intercept officer barely ejected in time, but Lt. Hultgreen plummeted into the ocean and died.²³⁸ The carrier platform videotape and subsequent investigations confirmed that the primary cause of Hultgreen's mishap was pilot error.²³⁹ The crash was a tragedy but no disgrace, since most aviation mishaps are caused by inadvertent mistakes. This fatal accident was different, however, in that it involved double standards in aviation training—DSIW of the most dangerous kind.

The glide-slope errors that caused Lt. Hultgreen to stall the engine and depart from safe flight on approach to the carrier ramp were similar to mistakes that she had made twice before. Lt. Hultgreen's instructors gave her "pink sheets" marking unsatisfactory performance for similar errors in training. Lt. Hultgreen was well-liked and respected by her colleagues, and

235. See Policy on the Assignment of Women, *supra* note 44.

236. AIR WING ELEVEN REPORT, *supra* note 213, at 23; see also Nancy Klingener, *A Fighting Chance: Female Pilots Finally Will Be Flying Fleet F-14s*, MIAMI HERALD, May 16, 1993, at B6; Scott D. Williams, *Blacklions Fly into Naval Aviation History*, COMPASS (San Diego, Cal.), Sept. 9, 1994, at A1.

237. See Tony Perry, *Navy's 1st Woman Combat Pilot Killed During Training Mission*, L.A. TIMES Oct. 27, 1994, at A12; N.Y. Times News Service, *Female Combat Pilot's Death Sparks Debate*, CHI. TRIB., Oct. 30, 1994, at C3.

238. See, e.g., Perry, *supra* note 237; Michael E. Ruane, *Knight Ridder Newspapers*, ATLANTA J. & CONST., Oct. 27, 1994, at A4; *NBC Nightly News: Navy's First Female Pilot Is Lost at Sea* (NBC television broadcast Oct. 26, 1994); see also MISHAP INVESTIGATION REPORT (Apr. 4, 1995) [hereinafter MIR REPORT], available at http://www.panix.com/~baldwin/hultgreen_mir.txt.

239. MIR REPORT, *supra* note 238, at 12. The MIR analyzed glide slope errors in detailed, technical terms, and summarized: "The causal factors of this mishap and injury are a result of overcontrol, external distraction, cognitive saturation, channelized attention, wear debris, complacency and problem not foreseeable." *Id.* at 16; see also *infra* note 263. This document, normally kept in strict confidence, was initially revealed by *Newsweek* magazine on March 27, 1995. See Becky Garrison, *COs Irked by Handling of Hultgreen Case*, NAVY TIMES, June 5, 1995, at 6.

she probably would have developed into a skilled aviator if given sufficient time.²⁴⁰ Her graduation into carrier aviation, however, was accelerated before she was ready.²⁴¹ The second female trainee, Lt. Carey Lohrenz, washed out of carrier aviation in May 1995.²⁴² Lt. Lohrenz frequently blamed others for the low scores and numerous “pink sheets” that she had received, which were far worse than those earned by Lt. Hultgreen, and historically would have disqualified male aviation trainees.²⁴³ When

240. CENTER FOR MILITARY READINESS, CMR SPECIAL REPORT: DOUBLE STANDARDS IN NAVAL AVIATION 3-6 (Apr. 25, 1995) [hereinafter CMR SPECIAL REPORT] (supported by training records at B1-1–B13-1). This author met and talked with Lt. Hultgreen and other aviators in her squadron, VF-213, during a visit to the San Diego Naval Air Station on October 13, 1994, twelve days before her tragic death. It was obvious that Lt. Hultgreen enjoyed being in the F-14 squadron, and her colleagues held her in high regard.

241. *See infra* notes 256-58.

242. AIR WING ELEVEN REPORT, *supra* note 213 (discussing the REPORT OF THE FIELD NAVAL AVIATION EVALUATION BOARD (FNAEB) 94-103 (June 19, 1995) and individual FNAEB documents referenced in the AIR WING ELEVEN REPORT); *see also infra* note 243. A FNAEB is an administrative board that may be called to evaluate the performance, potential judgment, and motivation for service of the aviator ordered to appear before the board. The FNAEB evaluating the performance of Lt. Lohrenz removed her from carrier aviation but recommended A-3 status, which would permit her to fly non-tactical aircraft. The squadron commander went further in assigning her to B-1 (non-flying) status, and the decision was upheld by a Naval Aviation Evaluation Board (NAEB), which removed her wings on June 17, 1995. In response to letters from Lohrenz’s parents to the Under Secretary of the Navy, Richard Danzig, several investigations ensued. The Air Wing Eleven investigation concluded that, at the time of the FNAEB, “Lt. Lohrenz’s grades were below minimum standards.” AIR WING ELEVEN REPORT, *supra* note 213, at 103. Nevertheless, for questionable reasons, Lohrenz was returned to non-carrier aircraft flight status by a second Naval Aviation Evaluation Board in July 1996. *See Ernest Blazar, Navy Gives Grounded Female Pilot 2nd Chance*, NAVY TIMES, June 30, 1997. After filing a lawsuit against the Navy regarding the release of her records, Lohrenz agreed to leave the Navy in October 1998.

243. REPORT OF THE FNAEB [hereinafter FNAEB REPORT], FRS (Fleet Replacement Squadron) Training Jacket Summary, Memorandum from Commanding Officer, Fighter Squadron 213 to LCDR Warren S. Ryder, USN, at encl. 16 (May 31, 1995) (on file with author); *see also* James W. Crawley, *Navy Grounds Female F-14 Pilot for Evaluation of Flying Skills*, SAN DIEGO UNION-TRIB., June 30, 1995, at B1.

In a statement filed with the FNAEB, the Commanding Officer of the Squadron, Cmdr. F. J. Killian, wrote:

I feel that all the warning signs of impending danger exist, and that my tools, the tripwires set forth by governing instructions, indicate a safety hazard. I believe that to allow her to continue in the carrier environment could in fact put lives at risk, and [I] am unwilling to do that.

FNAEB REPORT, *supra*, at encl. 6. Lt. Jeffrey Trent, Senior Landing Signal Officer (LSO), said in a statement that Lohrenz’s performance was “undisciplined, unresponsive, and

officers in her squadron removed Lt. Lohrenz from carrier aviation following a Field Naval Aviation Evaluation Board (FNAEB), she complained of sex discrimination.²⁴⁴

Several investigations were conducted, but they found no evidence of bias against Lohrenz or other women in Air Wing Eleven.²⁴⁵ Adm. Brent M. Bennit, Commander of the Naval Air Force, U.S. Pacific Fleet, reviewed available documentation and conducted oral interviews with key officers familiar with events leading up to Lohrenz' FNAEB. Adm. Bennit concluded that the decision to terminate Lt. Lohrenz's flight status in the F-14 was "an appropriate decision," due to several documented factors, including, in part: "[c]ontinued substandard carrier landing performance"; "[e]rratic and, at times, dangerously unpredictable carrier landing performance"; "[r]epeated instances of slow or unresponsive compliance with landing signal officer advice or direction"; exhibiting "a consistent and disconcerting tendency to minimize her personal responsibility for her substandard carrier landing performance"; and exhibiting, "[a]t best, a marked tendency to seriously exaggerate her accounts of events or, at

unpredictable." *Id.* at encl. 9. The Commander of the Air Wing (CAG), Capt. Dennis Gillespie, in his "Second Endorsement," dated June 21, 1995, expressed agreement with the *FNAEB Report*: "The buck stops here. Continued and unwarranted effort to achieve mediocrity in the face of 'the ramp' would be an irresponsible act of cowardice on my part." *Id.* at 11-12. The *Air Wing Eleven Report* noted that "[Navy] investigators determined that Lt. Lohrenz went to a FNAEB because those who observed her carrier landings thought she was unresponsive, unpredictable, and unsafe." AIR WING ELEVEN REPORT, *supra* note 213, at 102 ¶ 338.

244. Letter from Lt. Lohrenz to Commander, Naval Air Force (June 18, 1995) (asking for reconsideration of the FNAEB decision to remove her from carrier aviation) (on file with author); *see also* Ernest Blazar, *Wing of Fate: What Went Wrong*, NAVY TIMES, July 14, 1997, at 4.

245. *See, e.g.*, NAVY HOTLINE COMPLETION REPORT 1-35 (Nov. 30, 1995, rev. Jan. 31, 1997) [hereinafter CARMAN REPORT], *published in* AIR WING ELEVEN REPORT, *supra* note 213, at app. Lt. Lohrenz demanded and did receive some revisions in the *Carman Report*, but the conclusion that she had not been a victim of sex discrimination remained. It stated that, "As early as October 1994, certain aspects of Lt. Lohrenz' night carrier landing performance were below minimum carrier qualification standards." CARMAN REPORT, *supra*, at 11. The *Carman Report* (rev.) noted,

When Lt. Lohrenz' commanding officer referred her to a Field Naval Aviator Evaluation Board on 30 May 1995, she ranked 113 of 113 among air wing pilots . . . Lt. Lohrenz received equivalent opportunity to train compared to her contemporaries. Thus, claims that she was not given a reasonable opportunity to succeed are not substantiated.

Id. at 16. It added, "Documentation was provided verifying command level monitoring of aviators whose landing performance tended to be below required standards." *Id.* at 17; *see also* Blazar, *supra* note 244, at 6.

worst, a lack of truthfulness in accepting responsibility for deficiencies.” Adm. Bennit met with Lt. Lohrenz on April 26, 1996, but he denied her request for reinstatement of flight status on June 12, 1996.²⁴⁶

Lt. Lohrenz remained dissatisfied, and her parents sent a letter of complaint to Under Secretary of the Navy Richard Danzig, who promised another investigation.²⁴⁷ In 1996, the Naval Inspector General conducted yet another probe of possible sex discrimination against female aviators in Air Wing Eleven.²⁴⁸ Over a period of months the Navy IG conducted scores of sworn interviews with male and female pilots, wing commanders, instructors, medical personnel, and Pacific Fleet commanders. With only a few minor exceptions no evidence was found to support allegations of discrimination against Lt. Lohrenz or any another female aviator in Air Wing Eleven.²⁴⁹

246. Memorandum from Adm. Brent M. Bennit, Commander Naval Air Force, U.S. Pacific Fleet, Second Endorsement on Lt. Carey D. Lohrenz, USNR, to Chief of Naval Personnel, Subj: Request for Reinstatement of Flight Status, June 12, 1996, at 1-3 (Feb. 28, 1996) (on file with author) [hereinafter Bennit Memo].

247. Letters from Robert and Carol Dunai, the parents of Carey Lohrenz, to high level Navy officials (July 20, 1995; Jan. 9, 1996) (on file with author); *see also* Blazar, *supra* note 244, at 8. In view of the record of unequivocal statements by experts evaluating Lohrenz’s performance first-hand, the solicitous response of Under Secretary Danzig to the Lohrenz FNAEB was unusual. His response, and objectives that the Naval Inspector General set for the huge Air Wing Eleven investigation that followed, were examples of DSIWs, which had become pervasive in the aftermath of the 1991 Tailhook scandal.

248. *See* AIR WING ELEVEN REPORT, *supra* note 213. The Naval Inspector General investigation of Carrier Air Wing Eleven examined the initial work up and deployment of women assigned to combat aviation positions aboard the USS *Lincoln*. The resulting report of the Naval Inspector General was dated February 10, 1997, but it was not released, in redacted form, until July 1997. The report examined the experiences of several female pilots in Air Wing Eleven, but its primary focus was on Lt. Lohrenz, whose parents had sent letters complaining of sex discrimination when she was removed from carrier aviation in May 1995. In 1996, scores of Navy personnel and officials were interviewed under oath, with verbatim transcripts.

249. AIR WING ELEVEN REPORT, *supra* note 213, at 92.

[W]hatever the reason—stress, lack of motor skills, problems with scanning, inability to comprehend what she was being told to do, unwillingness to comply with the signals of the LSOs due to lack of trust or a belief that she knew what was better for her—the bottom line is that a pilot must respond to the signals of the LSO; Lohrenz did not. A pilot who cannot, or will not, follow the directions of the LSO is inherently unsafe and must be removed from the carrier flying environment.

Id. Additional allegations regarding Lohrenz and several other female aviators who claimed or suspected discrimination were found to be minor or unsubstantiated. *See id.* at 149, 154,

Unredacted transcripts of Navy IG interviews and documents, revealed, however, that special concessions had been extended to ensure that the first two women trained to fly the F-14 in combat would not be allowed to fail.²⁵⁰ The squadron commanding officer commented that, after regulations changed in 1993, there was a “race with the Air Force” to get women into combat aviation.²⁵¹ Lts. Hultgreen and Lohrenz technically were *qualified* to fly—both were given keys to the aircraft. The definition and concept of “qualified,” however, was effectively changed to ensure the women’s graduation to the fleet. Instead of pursuing excellence and high standards first, the Navy was giving priority to a political goal: making amends for the Tailhook scandal.²⁵² This was done despite performance problems that historically had not been accepted in aviators aspiring to be pilots in carrier aviation—the Navy’s most hazardous occupation.²⁵³ Questions persisted

165, 172, 185, 195, 198, 208, 211-30; *see also* Robert J. Caldwell, *A Rough Flight for the Navy’s Female Pilots*, SAN DIEGO UNION-TRIB., July 13, 1997, at G1.

250. *See* AIR WING ELEVEN REPORT, *supra* note 213, at 23-26 (publishing many excerpts of sworn statements obtained by Naval Inspector General investigators, but without attribution or identifying information). Unredacted transcripts of Naval Inspector General interviews, obtained by this author during the discovery process of litigation, revealed identifying information and more statements expressing serious concerns about Lt. Lohrenz’s landing techniques, which had preceded her FNAEB and removal from carrier aviation.

251. *Id.* at 41 ¶ 157. Cmdr. Thomas Sobiek, the commanding officer of the F-14 fleet replacement (training) squadron (VF-124), initially denied that there were unusual pressures to graduate the female trainees from the training squadron. He later conceded that Navy public affairs officers were pressuring the training squadron to win “a race with the Air Force” to get women into tactical aviation. *See 60 Minutes: Double Standard?* (CBS television broadcast Apr. 19, 1998) (interview of Cmdr. Thomas Sobiek and Lt. Patrick Burns by Mike Wallace) (transcript on file with author).

252. *See 60 Minutes*, *supra* note 251 (statement of Adm. Stanley Arthur).

253. *Id.* In many conversations with this author, Lt. Patrick J. (Jerry) Burns, a former radar intercept officer (RIO) and F-14 instructor who had trained Lt. Lohrenz, stated that carrier qualification historically had been defined by high standards and competency, not minimal standards and mediocrity. This same belief was stated by other naval aviators. *See, e.g.,* AIR WING ELEVEN REPORT, *supra* note 213, at 91 (“Everyone [interviewed] was consistent in their description of Lt. Lohrenz’ typical pass, which she said was high and fast or overpowered . . . to many of the LSOs [landing signal officers], her technique presented the profile of the classic ramp strike they all feared.”). Lt. Burns documented his statements with records of carrier qualification washout rates of F-14 aviators from January 1986 to July 1994, which were subsequently published in the *CMR Special Report*, *see supra* note 240, at B5-1–B5-14. *See also* Aff. of Lt. Patrick Jerome “Pipper” Burns, USN (Ret.), at 52, *Lohrenz v. Donnelly & CMR*, 223 F. Supp. 2d 25 (D.D.C. 2002) (No. Civ. 96-777) (on file with author) [hereinafter Burns Affidavit].

about the readiness and *competency* of the two women—particularly Carey Dunai Lohrenz—to fly the F-14 Tomcat in combat.²⁵⁴

Prior to the death of Lt. Hultgreen, Lt. Patrick Burns and others in the training squadron expressed concerns about the competency of the two female pilots to the training squadron (VF-124) commanding officer, Cmdr. Thomas Sobiek, but were told that the women were going to graduate, *no matter what*.²⁵⁵ Navy officials normally do not speculate on the cause of aircraft mishaps. In this case, Navy spokesmen began almost immediately to mislead the public about the circumstances of Lt. Hultgreen's crash and the controversial training that preceded it.²⁵⁶

In the days and weeks following the death of Lt. Hultgreen, Navy officials continued to insist that she had been fully qualified to fly an F-14. Aviators who knew of problems in the training of Lt. Hultgreen and, to a greater degree, Lt. Lohrenz, expressed their dissatisfaction publicly but anonymously in the San Diego area. Months later, evidence came to light that there was good reason for their concerns.

I reject the notion, as stated by Plaintiff Lohrenz during her December 7, 1999, deposition, that it was not a matter of general public concern whether some female pilots were receiving preferential treatment in order to qualify for carrier aviation. Both of these women [Hultgreen and Lohrenz] were technically "qualified," but the issue was competence to fly the F-14. I saw this as a life and death issue, and it still is.

Id.; see also *infra* note 275.

254. See Pat Flynn, *Pilot Qualified, Files Show*, SAN DIEGO UNION-TRIB., Nov. 20, 1994, at A1; Editorial, *An Inevitable First*, NAVY TIMES, Nov. 7, 1994. During this interim time, following the death of Lt. Hultgreen and prior to publication of the *CMR Special Report*, see *supra* note 240, rumors about double standards in the training of both women were widespread in the San Diego naval aviation community. Some speculators who did not have first-hand information may have confused the training records of Lt. Hultgreen with those of her colleague, Lt. Lohrenz, which were far worse. Training records retained by Lt. Burns—an F-14 instructor who feared that one of the women would die and that the Navy would try to deny double standards that elevated risks for both women—did constitute first-hand information. Copies of the records published in the *CMR Special Report*, which Rear Adm. Lyle Bien had conceded were "largely accurate" in his January 1995 report, drew distinctions between Lt. Hultgreen and the second female F-14 aviator, who was identified only as "Pilot B." See also Bien Report, *infra* note 271.

255. See *60 Minutes*, *supra* note 251. Contradicting his previous denials to Naval Inspector General investigators, Cmdr. Sobiek admitted on *60 Minutes* that he did say something to squadron instructors that could have been interpreted as pressure to graduate the female aviators, no matter what. See AIR WING ELEVEN REPORT, *supra* note 213, at 27.

256. Eric Schmitt, *Miramar Pilot's Death Revives Issue of Women's Military Roles*, SAN DIEGO UNION-TRIB., Oct. 30, 1994, at A6; Flynn, *supra* note 254.

During the Air Wing Eleven investigation, one of the Navy IG witnesses, Lt. Cmdr. Rheinhart Wilke, testified that he had previously evaluated the performance of Lt. Hultgreen during her second attempt to carrier qualify, which took place on July 19–21, 1994. Lt. Cmdr. Wilke told investigators that he had recommended a Field Naval Aviation Evaluation Board (FNAEB) to review Lt. Hultgreen's performance before granting her carrier qualification.²⁵⁷ An Evaluation Board proceeding might have delayed her graduation to the fleet, but she probably would have improved and eventually succeeded as an F-14 pilot. Lt. Cmdr. Wilke's recommendation was overruled, and Lt. Hultgreen was assigned to a squadron on the carrier *Lincoln*.²⁵⁸

Three months after the women's carrier qualification, on October 25, 1994, Lt. Cmdr. Wilke was a senior landing signal officer on the *Lincoln*. It was Wilke's voice heard on the chilling videotape of Hultgreen's crash, pleading with her to "Raise your gear!" apply "Power, power!" and finally "Eject!" Hultgreen was unable to regain control of the plane to make a second approach, or to save her own life by ejecting in time. During testimony given to the Naval Inspector General on July 3, 1996, which was not mentioned in the publicly released report, Lt. Cmdr. Wilke said, "Watching Kara Hultgreen die was the worst thing in my life."²⁵⁹

On February 28, 1995, Navy officials in San Diego conducted a news conference releasing the Judge Advocate General Manual (JAGMAN) report on the fatal crash.²⁶⁰ The videotape was shown and broadcast

257. Interview of Lt. Cmdr. Rhinehart Wilke before Naval Inspector General, in Naval Air Station San Diego., Cal. (July 3, 1996) (unredacted transcript on file with author). During the Air Wing Eleven Investigation, few questions were asked about the death of Lt. Kara Hultgreen or the training that preceded her fatal mishap on October 25, 1994. Unredacted copies of interview transcripts were provided to this author in the course of litigation discovery.

258. *Id.* The redacted copy of the Naval Inspector's General's Report, released to the public in July 1997, did not include any reference to this significant statement by Lt. Cmdr. Wilke. Exposure of his testimony would have called into question the judgment of Navy officials and advocates who created the perception of a "race with the Air Force" to get female pilots into combat aviation.

259. *Id.*

260. Naval Air Force, U.S. Pacific Fleet News Release No. 09-95, Navy Releases Investigation Findings on F-14 Accident (Oct. 1994) (Feb. 29, 1995) (announcing release of the public JUDGE ADVOCATE GEN. MANUAL (JAGMAN) REPORT (Feb. 28, 1995) [hereinafter JAGMAN REPORT]); see also Pat Flynn, *Hultgreen Cleared of Blame in F-14 Crash*, SAN DIEGO UNION-TRIB., Feb. 28, 1995, at A1 [hereinafter Flynn, *Hultgreen Cleared of Blame*]; Pat Flynn, *F-14's Fate Sealed in Split Seconds*, SAN DIEGO UNION-TRIB., Mar. 1, 1995, at

repeatedly on network television. Although technical details contained in that report indicated that the pilot had precipitated the engine stall and caused the aircraft to depart from controlled flight,²⁶¹ Navy Public Affairs officials continued to suggest that engine failure, not pilot error, was the primary cause of the crash.²⁶² The Navy's dissembling caused even more controversy nationwide, particularly within the aviation community.²⁶³ During subsequent testimony given during a deposition, Lohrenz admitted that she knew her colleagues would be agitated by the controversy, and that she herself was incredulous about statements being made about the cause of Lt. Hultgreen's crash.²⁶⁴ *San Diego Union-Tribune* Insight Editor Robert J. Caldwell later reported that simulator tests had been rigged to show that engine failure was the primary cause of Lt. Hultgreen's mishap.²⁶⁵

A1; Dana Priest, *Female Pilot's Crash Blamed on Engine Stall*, WASH. POST, Mar. 1, 1995, at A7.

261. JAGMAN REPORT, *supra* note 260, at 27 (Finding 13) ("Her response was dual engine wave off technique and this unwittingly exacerbated the single engine situation by increasing left yaw and setting an AOA (angle of attack) in excess of NATOPS (flight manual) recommended single engine wave off procedures.").

262. See, e.g., Flynn, *Hultgreen Cleared of Blame*, *supra* note 260; *Nightline* (ABC broadcast Feb. 28, 1995); Editorial, Robert J. Caldwell, *Hultgreen Case Puts the Navy's Credibility at Risk Again*, SAN DIEGO UNION-TRIB., Mar. 26, 1995, at G1; *A Whitewash Serves No Purpose*, SOUNDINGS (Norfolk, Va.), Mar. 8, 1995; Becky Garrison, *What Killed Hultgreen?*, NAVY TIMES, Mar. 13, 1995, at 3.

263. See MIR REPORT, *supra* note 238, at 12-13. The confidential Mishap Investigation Report, revealed by persons unknown, was far more explicit than the JAGMAN Report, but consistent with it. The MIR analyzed in detail five errors made by Kara Hultgreen, the "Mishap Pilot," or "MP," which caused her to depart from safe flight and crash into the sea. They were summarized as follows: (1) "MP's attempt to salvage overshooting approach with left rudder led to reduced engine compressor stall margin, contributing to left engine compressor stall"; (2) "MP failed to execute proper single engine waveoff procedures"; (3) "MP failed to inform MR (mishap radar intercept officer, in the back seat) of single engine emergency"; (4) "MP failed to respond to LSO (landing signal officer) calls"; and (5) "MP failed to make timely decision to eject." *Id.* It should be noted that most aviation mishaps are caused by pilot errors. These realities do not detract from the respect owed to Lt. Hultgreen, a pioneering aviator. See also MITCHELL, *supra* note 15, at 300-02; Rowan Scarborough, *Pilot Error Acknowledged*, WASH. TIMES, Apr. 13, 1995, at A1; Becky Garrison, *Internal Report Confirms Hultgreen's Error*, NAVY TIMES, Apr. 3, 1995.

264. Deposition of Carey D. Lohrenz at 373-76, Lohrenz vs. Donnelly & CMR, No. 96-777 (D.D.C. Dec. 6, 1999) (transcript on file with author).

265. Robert J. Caldwell, *Were the Simulator Tests Rigged?*, SAN DIEGO UNION-TRIB., Apr. 9, 1995, at G1; GREGORY VISTICA, FALL FROM GLORY: THE MEN WHO SUNK THE U.S. NAVY 386-87 (1995). Vistica noted that the Navy went to great lengths to prove that mechanical failure had caused the Hultgreen mishap—even raising the aircraft from the sea to study the engines, which was not an ordinary practice:

b. The Truth Comes to Light

Lt. Patrick (Jerry) Burns, F-14 instructor and naval flight officer, was present at an all-officers meeting in the summer of 1994, during which his commander made it clear that the women would graduate to the fleet, no matter what.²⁶⁶ Lt. Burns had two major concerns: (1) that one of the

Test results, however, revealed that both engines were working fine, with the exception of a malfunctioning valve, which in itself is not enough to ground an aircraft. The Navy even manipulated and rigged a simulator test so the majority of the naval aviators trying to replicate Hultgreen's crash could do nothing but crash. Without the rigged restrictions, most of the pilots would have survived. . . . When stories about [the secret Mishap Investigation Report] appeared first in *Newsweek*, then *The Los Angeles Times*, the Navy tried to discredit them, claiming they were inaccurate. And when Robert Caldwell, a former Army veteran and conservative columnist at *The San Diego Union-Tribune*, began lifting the veil on the admirals' obfuscation of the facts, the Navy resorted to personal attacks on his character in an effort to undermine his thorough reporting. The Navy's public affairs officers then began calling reporters to warn them off the story. Interest in the mishap investigation report was so high because it clearly contradicted the Navy's official position, that Rear Admiral Kendell Pease, the chief of public affairs, had released a memorandum for correspondents [regarding "errors of fact" about the MIR]. . . . Commander Stephen Pietropaoli, a Navy spokesman, even bragged to H. G. Reza of *The Los Angeles Times* that he had kept *The Boston Globe* and *The Washington Post* from publishing stories.

Id.; see also Editorial, *The Crash of Kara Hultgreen*, DETROIT NEWS, Apr. 9, 1995.

The nation has been led to believe that mechanical failure caused the fatal crash last October of Lt. Kara Hultgreen, the Navy's first female combat pilot. Now comes an internal investigation, leaked online, citing pilot error as the primary factor in the crash Without question, Lt. Hultgreen was a brave and committed pilot. Whether she was sufficiently trained and qualified for carrier duty, however, is a matter of some dispute. Double standards are an unfortunate consequence of the political decision to expand opportunities for women [Release] of the public [JAGMAN] report was a masterpiece of obfuscation Lt. Hultgreen wished only to be judged against her fellow pilots. By applying a double standard, the Navy has heaped dishonor upon her memory, and put other pilots at risk.

Id.

266. The training squadron commander, Cmdr. Thomas Sobiek, flatly denied that he had made such a suggestion in his interview with the Naval Inspector General. See AIR WING ELEVEN REPORT, *supra* note 213, at 29 (inquiring about this understanding: "A: That is a flat-ass lie. And whoever told you that, if they were under oath, should be taken to task."). But during his interview with Mike Wallace, Cmdr. Sobiek admitted that he may have conveyed that impression, and he added that some female pilots were advanced in combat aviation ahead of many men who were kept waiting or forced to resign. See *60 Minutes*, *supra* note 251. Another aviator told Naval Inspector General investigators on July 5, 1996,

women would die in an F-14 mishap; and (2) that, should a crash occur, Navy authorities would try to deny that its own double standards in training the women had led to the crash.²⁶⁷ Lt. Burns was, unfortunately, correct on both counts. Lt. Burns had expressed his concerns to local commanders several times, but they refused to acknowledge or correct the situation.²⁶⁸ When communications broke down completely, Lt. Burns contacted the Center for Military Readiness and asked for assistance in conveying his concerns about safety to the highest levels of the Navy.²⁶⁹ Lt. Burns was not opposed to women participating in combat aviation, but he did not want to see another aviator die due to compromises and double standards in training. In a letter dated January 16, 1995, Elaine Donnelly of the Center for Military Readiness asked Sen. Strom Thurmond (R-S.C.), then-Chairman of the Senate Armed Services Committee, to investigate whether the statements and detailed information provided by her confidential source, Lt. Burns, were true.²⁷⁰

Donnelly met to discuss the matter with the Vice Chief of Naval Operations, Adm. Stanley Arthur, on January 6, February 8, and March 24, 1995. She also met with the Chief of Naval Operations, Adm. Jeremy (Mike) Boorda, on March 6, 1995. Rear Adm. Lyle Bien, who was sent to San Diego to investigate the situation, reported to Adm. Arthur that

that he remembered Cmdr. Sobiek saying, "Read my lips. These women will make it to the fleet, and they will make it on time, period, and we'll do what it takes to get them there." See Testimony of William G. Bond, USN, in Naval Station San Diego, Cal. (July 5, 1996) (transcript on file with author).

267. Burns Affidavit, *supra* note 253, at 25-27. Burns wrote that he had asked for the assistance of the Center for Military Readiness because his local chain of command had been unresponsive to his concerns, and because he

felt that it was imperative that Congress and senior officers within the Department of Defense (DoD) be made aware of what was happening within the Department of the Navy: that lives were being lost or put at risk, assets destroyed, and millions of tax dollars wasted in order to execute what amounted to little more than a questionable and ineffective public relations campaign intended to "make amends for the Tailhook scandal."

Id.

268. *Id.* at 26; see also Interview of Lt. Patrick Jerome Burns, USN, at the Office of the Naval Inspector General, Washington Navy Yard, Wash., D.C. (Dec. 19, 1996) (transcript on file with author); Memorandum from Vice Adm. J.R. Fitzgerald, Naval Inspector General, to Vice Chief of Naval Operations, Subj: Investigation into the Unauthorized Release of Flight Training Records (Jan. 10, 1997) (on file with author).

269. Telephone conversation between Lt. Patrick Burns and author (Nov. 27, 1994); Letter from Lt. Patrick Burns to author (Dec. 15, 1994) (on file with author).

270. Letter from Elaine Donnelly, Center for Military Readiness, to Sen. Strom Thurmond, U.S. Senate (Jan 16, 1995) [hereinafter Thurmond Letter] (on file with author).

Donnelly's information was "largely accurate."²⁷¹ An experienced aviator reviewing Lt. Lohrenz's records told Donnelly that they were the worst he had ever seen.²⁷²

In the hopes that disclosure of the information would enable Navy personnel and Americans to engage in a responsible discussion that would lead to constructive reforms, the Center for Military Readiness published the twenty-page *CMR Special Report: Double Standards in Naval Aviation* on April 25, 1995.²⁷³ The meticulously researched report included 104 pages of related documents and training records showing numerous "pink sheets" and low scores given to the women in training.²⁷⁴ These were the same records that the January 1995 investigation had found to be "largely accurate."²⁷⁵

271. Report of Rear Adm. Lyle G. Bien to Commander, Naval Air Force, U.S. Pacific Fleet, Subj: Preliminary Inquiry into the Circumstances Connected with the Allegation That Standards Used To Qualify Naval Aviators for Assignment to Operational F-14 Tomcat Squadrons from September 1993 Until the Present Varied with Gender of the Officer in Training (Jan. 31, 1995) (on file with author) [hereinafter, Bien Report] (referring to CMR letter Jan. 16, 1995 ("reference (b)"): "We found the facts contained in reference (b) to be largely accurate."); see also Robert J. Caldwell, *Navy Admits "Concessions" for Female F-14 Pilots*, SAN DIEGO UNION-TRIB., Mar. 2, 1997, at G1; MITCHELL, *supra* note 15, at 298-302.

272. Dep. of Capt. W.S. Orr, U.S. Navy (Ret.), at 115, *Lohrenz v. Donnelly & CMR*, 223 F. Supp. 2d 25 (D.D.C. 2002) (No. Civ. 96-777) (transcript on file with author). Orr, an experienced aviator, affirmed that, even though the training records that Donnelly had shown him in 1995 did not include every flight, "What I saw was enough information for me to believe that there was substandard performance that would never have been accepted in any other environment that I have been exposed to." *Id.*

273. See CMR SPECIAL REPORT, *supra* note 253. A condensed version of this report is available at <http://www.cmrlink.org/viewarticle.asp?f=87mr11cmrrpt09j95.pdf>.

274. *Id.*; see also Rowan Scarborough, *Navy Accused of Giving Women Special Treatment*, WASH. TIMES, Apr. 28, 1995, at A1; Robert Caldwell, *Navy Files Cast Doubt on "Gender Neutral,"* SAN DIEGO UNION-TRIB., May 14, 1995, at G1; David Stump, *A Double Standard?*, SOUNDINGS, Apr. 26, 1995, at A1.

275. On April 22, 1996, Lt. Lohrenz filed a libel suit against the Center for Military Readiness and *The Washington Times*, claiming that the publication of this report caused her to be washed out of carrier aviation. On August 16, 2002, the U.S. District Court for the District of Columbia dismissed the case, ruling that Lohrenz was a limited-purpose public figure and that Donnelly had good reason to question the Navy's "party line" on double standards in training. See *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25 (D.D.C. 2002), *aff'd*, 350 F.3d 1272 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 1042 (2004); see also MITCHELL, *supra* note 15, at 288-302.

2. The Dangers of DSIW in Carrier Aviation Training

At the time Lt. Lohrenz was removed from carrier aviation by a FNAEB in May 1995, she ranked 113th of 113 pilots and washed out because her flying techniques were “unsafe, undisciplined, and unpredictable.”²⁷⁶ Senior landing signal officers testified that her flawed “high and fast” flying patterns, combined with her tendency to blame others for her own mistakes and to disregard instructions, made Lt. Lohrenz an “accident waiting to happen.”²⁷⁷

Lt. Lohrenz’s rocky F-14 training records, the same ones published by CMR, were among the documents considered by the evaluation board, but she did not take the opportunity to challenge those records. The Air Wing Eleven investigation revealed that Lt. Lohrenz had been on a “watch list” for poor performance as early as January 3, 1995²⁷⁸—well before Donnelly’s initial letter to Sen. Thurmond,²⁷⁹ which Lt. Lohrenz later claimed had ruined her career.²⁸⁰

During an interview with reporter Mike Wallace of CBS *60 Minutes* on April 19, 1998, former Vice Chief of Naval Operations (Vice CNO) Adm. Stanley Arthur said that the Navy had hoped that putting women on aircraft carriers would help its “image problems.” He added, “This was a way that we could at least demonstrate that the . . . [apparent] reluctance of the Navy to deal properly with women coming out of Tailhook could be put aside; that we were in fact, not the ogres that we were painted to be.”²⁸¹ During a sworn deposition taken on April 28, 2000, Adm. Arthur admitted under

276. See Bennitt Memo, *supra* note 246; see also CARMAN REPORT, *supra* note 245, at 16.

277. See Bennitt Memo, *supra* note 246; see also FNAEB REPORT, *supra* note 243, at 7. Lt. Lohrenz’s carrier landing performance has been sub-standard. Her performance in that regime has been declining since January 1995. This performance has declined to the point that it is unsafe. Due to this documented substandard, unpredictable and unsafe performance, she should be allowed to continue performing in the carrier-based environment.

Id.

278. CARMAN REPORT, *supra* note 245, at 17.

279. See Thurmond Letter, *supra* note 270.

280. See *Lohrenz*, 223 F. Supp. 2d at 33. Contrary to Lohrenz’s complaint, the January 16, 1995, letter to Senate Armed Services Committee Chairman Sen. Strom Thurmond was a private letter of inquiry and a request for his assistance in determining if the information received from Donnelly’s known but unnamed source, Lt. Burns, was accurate. At the time the letter was sent to Sen. Thurmond and referred to Navy officials for investigation, Lohrenz already was on a “watch list” due to poor performance. See CARMAN REPORT, *supra* note 245, at 17. The CMR *Special Report* was not published until April 25, 1995.

281. See *60 Minutes*, *supra* note 251.

cross-examination that “in this case we sent people to the fleet not qualified.”²⁸²

This stunning statement confirmed a mountain of evidence that Navy officials had vainly tried to keep from coming to light. What had begun as a public relations campaign ended in the death of a pioneering female pilot. Lt. Hultgreen was the victim of political correctness and DSIW taken to an extreme.

On June 12, 1995, *The San Diego Union-Tribune* published a news photograph of the ruined F-14 aircraft in which Lt. Hultgreen had died.²⁸³ The caption beneath the photo read, “The F-14 is an unforgiving aircraft. Its safe operation is an issue that is bigger and more important than any individual pilot.”²⁸⁴ That photo and caption summarized an issue that has yet to be acknowledged by Navy leaders, much less resolved.

The *CMR Special Report* was published with the hope that Navy officials would affirm the importance of high, uncompromised standards in all forms of naval aviation training.²⁸⁵ By all accounts, female pilots are

282. Dep. of Adm. Arthur at 192-93, *Lohrenz v. Donnelly & CMR*, 223 F. Supp. 2d 25 (D.D.C. 2002) (No. Civ. 96-777) (transcript on file with author). During the same deposition, Adm. Arthur admitted that he had not examined the training records of the two women personally, but he understood that the women were doing well. That information, he said, probably came from the Chief of Naval Information, Rear Adm. Kendell Pease, known as CHINFO. Dep. of Adm. Arthur, *supra*, at 135-37. The Navy public affairs office, known as CHINFO, was identified in the Air Wing Eleven report as the orchestrator of much of the media attention given to issues surrounding the female aviators before and after the death of Lt. Hultgreen. See AIR WING ELEVEN REPORT, *supra* note 213, at 39; Conversation between Lt. Hultgreen and author at Naval Air Station San Diego, Cal. (Oct. 13, 1994). Rear Adm. Pease also testified on April 28, 2000, that he had no firsthand knowledge of the training records of Lts. Hultgreen and Lohrenz. Dep. of Adm. Pease at 41-42, *Lohrenz*, 223 F. Supp. 2d 25 (D.D.C. 2002) (No. Civ. 96-777) (transcript on file with author).

283. Photo by Sean Haffey of the *San Diego Union-Tribune*, accompanying article by Robert J. Caldwell, *For Naval Aviation, Gender Quotas Don't Fly*, SAN DIEGO UNION-TRIB., June 12, 1995, at G1.

284. *Id.* Unlike the usual practice when male pilots crash in the ocean, which is to only seek recovery of the human remains, this aircraft was retrieved from the ocean at a reported cost of \$100,000, even though there was video of the mishap and there were no nuclear weapons on board. See Becky Garrison, *The Grounding of Morale at Air Wing 11*, NAVY TIMES, Mar. 18, 1996, at 6; *Navy Finds, Retrieves Body of Pilot Lt. Kara Hultgreen*, ORLANDO SENTINEL, Nov. 16, 1994, at A20.

285. CMR SPECIAL REPORT, *supra* note 253, at 1-2.

Background and Purpose: The question at issue here is not whether women should serve in combat squadrons, but whether women—and all naval aviation trainees—should be held to the same high standards that have reduced accident rates in recent years Double standards and concessions that heighten inherent risks—for the sake of women or any other favored group—are simply

performing courageously and well in the current war. Repercussions from the Tailhook incident are long past. But high, uncompromised standards do not spontaneously come into being by themselves—military leaders should insist on excellence as the highest priority, especially in hazardous occupations such as carrier aviation. This is why it is important to understand the story of Kara Hultgreen. Will Navy officials remember the hard lessons learned?

In a June 2006 speech, Chief of Naval Operations Adm. Mike Mullen promoted “diversity” as what he called a “strategic imperative” at all levels of the Navy.²⁸⁶ After his remarks, Adm. Mullen was asked what role qualifications play in increasing diversity. Mullen responded, “I think I have seen a stunning number of examples where we thought more qualified was really more qualified, where it wasn’t. So I don’t want to get stuck on an absolute definition of more qualified.”²⁸⁷

Diversity and high standards should not be in conflict, but an overemphasis on diversity as a “strategic imperative” could result in compromises that detract from the pursuit of excellence and non-discrimination as primary institutional goals.²⁸⁸ It will take wise, unwavering leadership to avoid past mistakes and to maintain sound priorities. If high-level officials really want to advance the status of women in the military, they should consciously address the issue of compromises in training and other forms of DSIW that are dangerous and demoralizing to women and men alike.²⁸⁹

indefensible Above all, CMR hopes that disclosure of this information will enable Navy personnel, family members, and the American people to engage in a responsible discussion that leads to constructive reforms, before heightened risks result in the needless loss of more young lives.

Id.

286. Adm. Mike Mullen, Remarks at the Patuxent River Naval Air Systems Command “Total Force Diversity Day” Luncheon (June 26, 2006); Brian Seraile, NAWCAD (Naval Air Systems Command) Public Affairs, *CNO Delivers Message of Diversity*, NAVY TIMES, June 29, 2006; Andrew Scutro, *CNO Stresses Need for Diversity*, NAVY TIMES, June 29, 2006.

287. See Seraile, *supra* note 286.

288. See *supra* notes 286, 288.

289. See *supra* note 285.

III. GOOD ORDER AND DISCIPLINE

A. *Aberdeen to Abu Ghraib*

In March 2004, graphic photographs of decadent behavior at the Abu Ghraib prison in Iraq were published and broadcast worldwide. Outraged members of Congress demanded to know why and how the Army had allowed such a thing to happen. But the scandal, repugnant as it was, should not have been a complete surprise. Abu Ghraib was not the first or only place where poor training, indiscipline, and inadequate supervision created prime conditions for sexual misconduct within the military.

The admirable service of the majority of our female soldiers has been—and should be—documented. The purpose of this discussion is to analyze personnel policies that have tried to test the theory that men and women are interchangeable beings in what could be described as a New Gender Order. Scandals involving sexual misconduct in the military are not isolated incidents. They are indicators of a social experiment gone wrong.

1. Co-Ed Basic Training

a. Gender-Normed Illusions

In the fall of 1994, civilian policy makers led by Sara Lister, Assistant Secretary of the Army for Manpower and Reserve Affairs, effectively forced Army officials to accept co-ed basic training. This was a policy trade-off to avoid implementation of her plans to assign women to some direct ground combat positions.²⁹⁰ The plan for gender-integrated basic training disregarded the results of a prior experiment with Army co-ed basic training that had been tried and discontinued once before.²⁹¹

Gender-integrated basic training is based on the unrealistic assumption that men and women are interchangeable in all military roles. The concept tries to circumvent or disguise physical differences with gender-normed

290. 1 FINAL REPORT OF THE CONGRESSIONAL COMMISSION ON MILITARY TRAINING AND GENDER-RELATED ISSUES 219-22, 228-30 (July 1999) [hereinafter CONGRESSIONAL COMMISSION ON MILITARY TRAINING AND GENDER-RELATED ISSUES]; see also Eric Schmitt, *Generals Oppose Combat by Women: Secretary Withdraws Plan After Bitter Disagreement*, N.Y. TIMES, June 17, 1994, at A1 (reporting on the withdrawal of Secretary Togo West's controversial June 1, 1994, memorandum ordering gender integration in close combat units, such as multiple launch rocket systems (MLRS) and Special Operations Forces (SOF) helicopters).

291. A five-year experiment with gender-integrated basic training that began during the Carter Administration was terminated in 1981 because women were suffering too many injuries and men were not being challenged enough. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-78 (Finding 2.4.1A).

training standards that reward equal effort rather than equal results. Advocates make the disingenuous claim that men and women are doing the same things with identical rating systems, even though everyone knows that they are not.

Gender norming is to social engineering what false façades are to poorly designed buildings. To create the *appearance* of “equality,” scoring and rating/qualification systems are adjusted in various ways to make it “fair” for women in physical training exercises. Every service is different, but the Navy Fitness Standards for males and females, age twenty to twenty-four, demonstrate how gender-normed scores and rating systems work to create the illusion of “equality.”²⁹²

- In the 1.5-mile run, the Navy PRT Score minimum is fifty points. To achieve a “Satisfactory/Medium” rating (and fifty points), a man must run 1.5 miles in thirteen minutes and fifteen seconds, or 13:15.²⁹³ To earn the same 50 points, a woman must run 1.5 miles in fifteen minutes and fifteen seconds, or 15:15.²⁹⁴ She is given a two-minute advantage, but due to the gender-normed scoring system, her performance is rated as “equal” to that of the man, earning her the same fifty points.²⁹⁵
- In the push-up category, male trainees must do forty-two pushups for a minimum score;²⁹⁶ women must do seventeen.²⁹⁷ Men must swim 500 yards in 12:15;²⁹⁸ women get 14:00 to do the same thing.²⁹⁹ Under the Navy PRT rules, all scores are averaged and measured against a rating system, in categories ranging from “Outstanding” (High, Medium, and Low) down to “Probationary.”³⁰⁰

292. Compare Navy Fitness Standards, Male, Age 20–24, Oct. 1, 2002, <http://usmilitary.about.com/od/navy/l/blfitmale20to24.htm> [hereinafter Navy, Male Standards], with Navy Fitness Standards, Female, Age 20–24, Oct. 1, 2002, <http://usmilitary.about.com/library/milinfo/navfitness/blfemale20-24.htm> [hereinafter Navy, Female Standards].

293. Navy, Male Standards, *supra* note 292.

294. Navy, Female Standards, *supra* note 292.

295. See Navy, Male Standards, *supra* note 292; Navy, Female Standards, *supra* note 292.

296. Navy, Male Standards, *supra* note 292.

297. Navy, Female Standards, *supra* note 292.

298. Navy, Male Standards, *supra* note 292.

299. Navy, Female Standards, *supra* note 292.

300. Navy, Male Standards, *supra* note 292; Navy, Female Standards, *supra* note 292.

- Turning to the highest scores and ratings, in order to get an “Outstanding/High” rating a man must do eighty-seven pushups, do the 1.5-mile run in 8:30, and do the 500-yard swim in 6:30.³⁰¹ Achievements required for women to earn the same top rating are forty-eight, 9:47, and 7:15, respectively.³⁰²
- The “curl-up” category in the PRT test is the only one with requirements identical for both sexes.³⁰³ However, the standard really ought to be higher for women because their bodies have more strength in the midsection. The physiology is related to the female potential for pregnancy. Of greater importance in the military context, however, is upper body strength and aerobic capacity for endurance—qualities in which men have an undisputed advantage.³⁰⁴

Gender-normed rating systems are misleading because they award equal “points” for unequal accomplishment. This explains why some female soldiers attempt to convince credulous reporters that they have to meet the same standards, i.e., “points” as their male colleagues. Nevertheless, sensible women and men in the military understand the illusion.

A 1997 study done for the Army by a Senior Review Panel—largely composed of officials responsible for or supportive of gender-integrated basic training—detected doubts about gender-normed standards.³⁰⁵ Among military men surveyed, sixty percent were either “not sure” or “disagreed” that “[t]he soldiers in this company have enough skills that I would trust them with my life in combat.”³⁰⁶ The combined figure for women was seventy-four percent.³⁰⁷

Another survey done by the Center for Strategic and International Studies (CSIS) found that only thirty-six percent of male and female

301. Navy, Male Standards, *supra* note 292.

302. Navy, Female Standards, *supra* note 292.

303. Compare Navy, Male Standards, *supra* note 292, with Navy, Female Standards, *supra* note 292.

304. See, e.g., PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-70–C-71 (Findings 2.1.1, 2.1.2, 2.1.3, 2.1.4B, 2.1.5).

305. Steven Komarow, *Soldiers Lack Confidence in Their Officers*, USA TODAY, Sept. 12, 1997, at A1; Steven Komarow, *Boot Camp Training Goes Back to Basics*, USA TODAY, Sept. 12, 1997, at A4.

306. See generally SEC’Y OF THE ARMY, 2 SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT, at A19 (July 1997) (discussing survey question 24).

307. *Id.*

respondents agreed that female personnel would pull their fair share of the load in combat or hazardous situations.³⁰⁸ These findings were not a reflection of sexism but instead showed an honest concern about mission accomplishment and survival.

In Great Britain in 1997, Army Training Regiment commanders at Purbright Barracks, Surrey, noted that co-ed basic training was causing many young women to drop out early, due to injuries to their lower limbs. Restoration of all female platoons for a one-year trial in 1996 reduced women's injury rates by fifty percent, and first-time pass rates increased from fifty percent to seventy percent. Incidents of sexual misconduct between instructors and recruits also decreased significantly.³⁰⁹

The trust that soldiers have in buddies who are capable of saving their lives is part of the cohesion that binds soldiers together in small military units. The definition of "unit cohesion," as presented to the Presidential Commission, uses the word "survival" three times in one paragraph.³¹⁰

308. CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS), *AMERICAN MILITARY CULTURE IN THE 21ST CENTURY* 27 (Feb. 2000).

309. Michael Evans, *Army Hits the Target with Female Units*, LONDON SUNDAY TIMES, Feb. 8, 1999; see also Correspondence between Lt. Col. Simon Vandeleur, Army Training Regiment, Alexander Barracks, Purbright, Woking, Surrey, U.K., and author (Feb. 10-19, 1999) (on file with author).

Despite this success, another experiment with "gender-free" (co-ed) training began in 1998. Minister of Defence Geoffrey Hoon, who took office in October 1999, initiated a two-year "Army Study into Combat Effectiveness and Gender," raising expectations that women soon would be assigned to infantry units. But women participating in "gender-free" training along with the men suffered twice as many stress fractures and were eight times more likely to be discharged with back pain, tendon injuries, and bone fractures. See David Derbyshire, *Tougher Army Training Doubles Female Injuries*, LONDON TELEGRAPH (online ed.), Jan. 2, 2002, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=news/2002/01/03/narmy03.xml>; Kate O'Beirne, *The Empire Strikes Back*, NAT'L REV. ONLINE, June 26, 2001, available at <http://www.nationalreview.com/kob/kob062601.shtml>.

A system of "gender-fair" training allowing for physical differences was restored, and the Ministry of Defence decided that female soldiers would not be assigned to direct ground combat units. See Michael Evans, LONDON TIMES ONLINE, *Women Pay Painful Price for Equal Military Training*, Mar. 22, 2005, available at <http://www.timesonline.co.uk/tol/news/uk/article434024.ece>; Michael Smith, *British Won't Put Women on Front Lines*, DAILY TIMES (Pakistan) (online ed.), May 26, 2002, available at http://dailytimes.com.pk/default.asp?page=story_26-5-2002_pg4_2.

310. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-80 (Finding 2.5.1).

Cohesion is the relationship that develops in a unit or group where (1) members share common values and experiences; (2) individuals in the group conform to group norms and behavior in order to ensure group survival and goals; (3) members lose their personal identify in favor of a group identity; (4) members focus on group activities and goals; (5) unit members become totally dependent

Questions about the physical abilities of female soldiers in extreme, close-combat circumstances create an element of hesitation and doubt that women cannot overcome. Social engineers demand “education” to teach illusions about the physical capabilities of women. Soldiers are more interested in reality. Soldiers willing to put their lives at risk cannot forget that there are no gender-normed scores on the battlefield.

b. Sex Scandals and Soldierization

Co-ed basic training assigns higher priority to *faux* “equality” than to the fundamental purpose of the exercise. In a process known as “soldierization,” ordinary civilians are transformed and shaped into disciplined soldiers. Soldierization requires concentration and sound leadership—not illusions or distractions that can be avoided if men and women are initially trained separately.

In November 1996, two years after the Army began mixing women with men in basic training, sex scandals at Aberdeen Proving Ground in Maryland made headlines nationwide.³¹¹ Male drill sergeants were abusing female trainees there and at the Army’s basic training camps.³¹² Rape or “consexploitation”—consensual but exploitive sex—occurred between instructors and trainees at several Army training bases. Whether voluntary or coerced, such misconduct was and is contrary to military law and is inherently disruptive to good order and discipline.³¹³

In the ensuing uproar about Aberdeen, then-Secretary of Defense William Cohen appointed former Sen. Nancy Kassebaum-Baker (R-Kan.) to head an independent advisory committee to study the issue in 1997. In its concise, unequivocal report, the Kassebaum-Baker Committee *unanimously*

on each other for the completion of their mission or survival; and (6) group members must meet all standards of performance and behavior in order not to threaten group survival.

Id.

311. See, e.g., Elizabeth Gleick, *Scandal in the Military: Reports of Rape at Army Training Base Suggest That the Services’ Tolerance for Sexual Harassment Is More than Zero*, TIME, Nov. 25, 1996, at 28.

312. See *id.*

313. See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552(a)(1), (f), 119 Stat. 3136, 3256–63 (2006) (amending 10 U.S.C. § 920 (effective October 1, 2007) (codifying the Uniform Code of Military Justice, Article 120) to include “rape, sexual assault, and other sexual misconduct”). As of the printing of this article, the *Manual for Courts-Martial* has not been changed to reflect the new law. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, Art. 120 (2005) [hereinafter MCM], available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

declared, “[Co-ed basic training] is resulting in less discipline, less unit cohesion, and more distraction from training programs.”³¹⁴

In 1998, the House followed the Kassebaum-Baker Committee’s recommendations and passed legislation to end co-ed basic training.³¹⁵ The Senate stalled and set up another commission to study the issue. The ideologically divided Congressional Commission on Military Training and Gender-Related Issues did a thorough study, resulting in a 1999 report that filled four volumes. In a significant admission, the commission concluded: “Whether [gender-integrated basic training] improves the readiness or the performance of the operational force is subjective.”³¹⁶

The same sort of damning faint praise appeared in a 2002 briefing presented to the Secretary of the Army, which endorsed gender-integrated basic training but conceded that the program was “not efficient” and was “effective” only in sociological terms.³¹⁷ Various “inefficiencies” documented in that and previous official reports included the following:

- Less discipline, less unit cohesion, and more distraction from training programs;
- Voluntary and involuntary misconduct, due to an emotionally volatile environment for which immature recruits are not prepared;

314. REPORT OF THE FEDERAL ADVISORY COMMITTEE ON GENDER-INTEGRATED TRAINING AND RELATED ISSUES TO THE SECRETARY OF DEFENSE 15 (Dec. 16, 1997) [hereinafter KASSEBAUM-BAKER COMMISSION REPORT]; see Rowan Scarborough, *Segregate the Sexes, Panel Urges Military*, WASH. TIMES, Dec. 16, 1997, at A1; Charles Moskos, *The Folly of Comparing Race and Gender in the Army*, WASH. POST, Jan. 4, 1998, at C1; John Hillen, *Prudent Triumph of Common Sense*, WASH. TIMES, Dec. 18, 1997, at A18; Bill Gertz & Rowan Scarborough, *Inside the Ring*, WASH. TIMES, Jan. 31, 2003, at A7.

315. See Military Recruit Training Policy Restoration Act of 1997, H.R. 1559, 105th Cong. (1st Sess. 1997) (proposing to mandate separate basic training regimens for men and women within each service branch).

316. CONGRESSIONAL COMMISSION ON MILITARY TRAINING AND GENDER-RELATED ISSUES, *supra* note 290, at 122.

317. At the request of Rep. Duncan Hunter (R-Cal.) and Rep. Roscoe Bartlett (R-Md.), the Center for Military Readiness compiled a comprehensive report listing dozens of reasons why the Army should end co-ed basic training. See CENTER FOR MILITARY READINESS, SUMMARY OF RELEVANT FINDINGS AND RECOMMENDATIONS: ARMY GENDER-INTEGRATED BASIC TRAINING (GIBT), 1993–2002 (May 2003), available at <http://www.cmrlink.org/cmnotes/gibtsp01.pdf>, with Appendices A–D available at <http://www.cmrlink.org/cmnotes/gibttapdx.pdf>. Rep. Bartlett subsequently placed the eighteen-page document into the Congressional Record. See 149 CONG. REC. E1223–26 (daily ed. June 11, 2003) (statement of Rep. Bartlett); see also Rowan Scarborough, *Army Endorses Mixed-Sex Training*, WASH. TIMES, Jan. 27, 2003, at A1.

- Higher physical injury and sick-call rates that detract from primary training objectives;
- Diversion from essential training time due to interpersonal distractions and the need for an extra week of costly “sensitivity training” (mandated after Aberdeen);
- A perceived decline in the overall quality and discipline of gender-integrated basic training; lack of confidence in the abilities of fellow soldiers; and the need to provide remedial instruction to compensate for military skills not learned in basic training;
- Re-defined or lowered standards, gender-normed scores, and elimination of physically demanding exercises so that women will succeed;
- Additional stress on instructors who must deal with different physical abilities and psychological needs of male and female recruits;
- Contrivances to reduce the risk of scandal, such as extra changing rooms, security equipment, and personnel hours to monitor barracks activities, and “no talk, no touch” rules, which interfere with informal contacts between recruits and instructors;
- No evidence of objective, military-oriented benefits from gender-integrated basic training (social effects primarily benefited women in subjective ways); and
- Little or no evidence that restoration of separate-gender training would have negative consequences for women or men.³¹⁸

Army leaders were close to announcing a decision to end gender-integrated basic training in the fall of 2001. The September 11 attacks, however, diverted their attention to urgent requirements of the war. Secretary of the Army Thomas L. White, a former business executive, also was distracted for months by corporate scandals involving Enron, his former employer. As a result, the Army stuck with the status quo, instead of

318. See generally SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT, *supra* note 10; KASSEBAUM-BAKER COMMISSION REPORT, *supra* note 314; CONGRESSIONAL COMMISSION ON MILITARY TRAINING AND GENDER-RELATED ISSUES, *supra* note 290.

restoring separate-gender basic training. That format, which is known to produce better results for women as well as men, is still being used by the Marine Corps.³¹⁹

Military discipline does not just happen—it must be taught. Basic training is the building block on which the “soldierization” process rests. To improve discipline that deters misconduct in the ranks, men and women should be trained separately until they learn basic principles and are mature enough to live by them.

2. The “Ungendered” Military

a. Abu Ghraib

Two years after the war began in Iraq, the Abu Ghraib sex scandal broke. Photos of naked Iraqis at the mercy of undisciplined male and female soldiers enraged the media and members of Congress, who demanded action to end sexual misconduct in the military. By October of 2005, twelve major investigations had been conducted, one of which was headed by former Nixon-Ford Administration Secretary of Defense James Schlesinger.³²⁰

Secretary Schlesinger’s Independent Panel report concluded that abuses at Abu Ghraib prison were not related to prisoner interrogations. Panel Chairman Schlesinger, however, described the atmosphere there as an “Animal House on the night shift.”³²¹ In testimony before a military court, Pfc. Lynndie England, the soldier photographed holding a leash attached to the neck of an Iraqi man, confirmed that attempts to embarrass the prisoners

319. See KASSEBAUM-BAKER COMMISSION REPORT, *supra* note 314, at 16. The Commission found that the Marines’ single-sex approach was producing “impressive levels of confidence, team building, and *esprit de corps* in all female platoons at the Parris Island base.”

320. See *generally* REPORT OF THE INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS (Aug. 24, 2004) [hereinafter REPORT OF THE INDEPENDENT PANEL]; James Schlesinger, *The Truth About Our Soldiers*, WALL ST. J., Sept. 9, 2004, at A16.

321. CNN, *Report: Abu Ghraib was “‘Animal House’ at Night”* (Aug. 25, 2004) (quoting Independent Panel Chairman Arthur Schlesinger, who noted, speaking at a news conference, “There was sadism on the night shift at Abu Ghraib, sadism that was certainly not authorized.”); see also REPORT OF THE INDEPENDENT PANEL, *supra* note 320, at 13 (“The aberrant behavior on the night shift in Cell Block 1 at Abu Ghraib would have been avoided with proper training, leadership and oversight.”); Allen G. Breed, *Witness: Iraq Abuse Photos “Just for Fun,”* ASSOCIATED PRESS, Aug. 4, 2004, available at <http://www.pakistanidefenceforum.com/lofiversion/index.php/t34466.html>; *Third Soldier Guilty in Abu Ghraib Case*, ARMY TIMES, Nov. 15, 2004, at 5 (regarding plea bargain of Spc. Megan Ambuhl).

were made not to soften them up for interrogation purposes, but for the amusement of the guards and their girlfriends.³²²

A *Wall Street Journal* editorial commenting on this finding quoted a military source who had seen all of the photos—not just the ones released to the press—and noted that they were date and time stamped.³²³

The sequence begins with naked photos of Ms. England and her boyfriend, convicted abuse ringleader Charles Graner. It progresses to photos of the two engaged in lewd acts, and then to photos involving other soldiers in lewd acts. Finally, the detainees enter the pictures. In other words, the Abu Ghraib crew degraded themselves before they degraded any Iraqis.³²⁴

In an intellectually honest op-ed, self-identified feminist Barbara Ehrenreich confessed she was unsettled and heartbroken by the pictures coming out of Abu Ghraib:

I had no illusions about the U.S. Mission in Iraq—whatever exactly it is—but it turns out that I did have some illusions about women.

Of the seven U.S. soldiers now charged with sickening forms of abuse at Abu Ghraib, three are women: Spc. Megan Ambuhl, Pfc. Lynndie England and Spc. Sabrina Harman.

. . . .

Here, in these photos from Abu Ghraib, you have everything that the Islamic fundamentalists believe characterizes Western culture, all nicely arranged in one hideous image—imperial arrogance, sexual depravity . . . and gender equality.

. . . .

. . . Secretly, I had hoped that the presence of women would over time change the military, making it more respectful of other people and cultures, more capable of genuine peacekeeping. That's what I thought, but I don't think that anymore.

A certain kind of feminism, or perhaps I should say a certain kind of feminist naivete, died in Abu Ghraib. . . .

322. Thomas E. Ricks, *Incidents Grew in Severity, Report Says*, WASH. POST, Aug. 26, 2004, at A17; Schlesinger, *supra* note 320.

323. Review & Outlook, *"Torture" on Trial*, WALL ST. J., May 4, 2005, at A18.

324. *Id.*

. . . .

You can't even argue, in the case of Abu Ghraib, that the problem was there just weren't enough women in the military hierarchy to stop the abuses. The prison was directed by a woman, Brig. Gen. Janis Karpinski. The top U.S. intelligence officer in Iraq, who was also responsible for reviewing the status of detainees before their release, was Maj. Gen. Barbara Fast. . . .

. . . .

The struggles for peace and social justice and against imperialist and racist arrogance, cannot, I am truly sorry to say, be folded into the struggle for gender equality.³²⁵

Ehrenreich's candor in reevaluating her previous beliefs is admirable but rare in feminist circles. The elitist philosophy that women are inherently superior and incapable of doing anything wrong is widespread, prejudicial, and just as misguided as the idea that all men are perfect. Human beings are flawed. Military policies must recognize and consciously work to counter failings that are present among women as well as men.

Stripped to its essence, Abu Ghraib began with sexual misconduct between one man and two women who were competing for his attention. Lynndie England had Charles Graner's baby, but he married Megan Ambuhl, who pleaded guilty to reduced charges for her actions at Abu Ghraib.³²⁶

The psychological dynamics of this triangle, as described in *The New York Times*, are not difficult to understand.³²⁷ According to reports, England posed with the leash to please Graner. He gave her photos of detainees masturbating as a birthday gift for her. Sexual misconduct escalated into gross indecency and cruelty against prisoners. Unlike Barbara Ehrenreich, social engineers have not been intellectually honest enough to figure out where their assumptions went wrong. The theory that sexuality is of no consequence helped to create a combustible atmosphere that ignited with explosive military and political consequences.

325. Barbara Ehrenreich, *Feminism's Assumptions Upended*, L.A. TIMES, May 16, 2004, at M1.

326. Kate Zernike, *Behind Failed Abu Ghraib Plea, a Tangle of Bonds and Betrayals*, N.Y. TIMES, May 10, 2005, at A1.

327. *Id.*

b. Camp Bucca

The female soldiers of Abu Ghraib, including the one- and two-star generals responsible for the military police and intelligence operations there, were by no means typical of our women in uniform. There is no “typical” female soldier; they come in all kinds. The discussion here is about personnel policies that either support or detract from discipline in the military.

Images of partying civilian “girls gone wild,” flashed in racy videos sold on the Internet, coarsen and degrade our culture. When similar behavior develops in a military setting, disciplined enemies can take advantage of the distraction. Witness an October 2004 going-away party for the departing 160th MP Battalion at Camp Bucca, Iraq, as reported by the New York *Daily News*:

In front of a cheering male audience, two young women wearing only bras and panties throw themselves into a mud-filled plastic kiddie pool and roll around in a wild wrestling match. At one point a man in the audience raises a water bottle and douses the entwined pair.

At another, a “referee” moves in to break up the scantily clad grapplers.

A young blond lifts her T-shirt to expose her breasts. A brunette turns her back to the camera and exposes her thong undies.

These scenes, taken from 30 photos leaked to the New York *Daily News*, could have been snapped at an out-of-control frat party.

But this happened a world away from any American college.

The photos were taken in Camp Bucca, the military prison at Umm Qasr in the hot sands of southern Iraq near the Kuwaiti border.

The women are not co-eds but military policewomen who had left their uniforms in a pile not far off.

The men are soldiers, too. Most of them wore T-shirts emblazoned with Army logos, but at least one was still wearing his uniform.

Some were sergeants, including the referee, and some allegedly were drunk.

The photos were taken last October 30, in the same period when enemy detainees were being transferred to Camp Bucca from Abu Ghraib, the prison made notorious by photos of Americans torturing naked Iraqis.³²⁸

The article also reported allegations that sergeants were lending rooms for sexual encounters.³²⁹

Pvt. Deanna Allen, a nineteen-year-old prison guard with the 105th MP Battalion, was the only participant whose name appeared in connection with punishment for the infamous October 30, 2004, mud-wrestling match.³³⁰ After a photo of Allen exposing her breasts appeared in the New York *Daily News* in February 2005, she was forced out of the military with a general discharge. She returned to Fort Bragg, North Carolina, for medical treatment, where she complained about the loss of her veterans benefits and said she would appeal.³³¹

Up until that time, Camp Bucca was thought to be a model camp because prisoners were not being abused. The salacious mud wrestling photos and allegations quickly vanished from public awareness,³³² but the situation at Camp Bucca was more unsettled than met the eye.

On January 31 and April 1, 2005, scores of Iraqi prisoners staged two violent uprisings and, on March 25, 2005, came dangerously close to pulling off a massive prison break.³³³ According to *The Washington Post*, the prisoners began constructing a 357-foot “Great Escape” tunnel in January 2005.³³⁴ An inmate released on May 27, 2005, said, “It was a military operation. It was very organized, and it was very disciplined. If only 200 people would have escaped, it would have been a blow to the Americans.”³³⁵

328. Brian Kates, *Out of Control at Camp Crazy!*, DAILY NEWS (N.Y.), Feb. 6, 2005, at 29 (italics added).

329. *See id.*

330. *See id.*

331. Brian Kates, *She’s Mud as Hell*, DAILY NEWS (N.Y.), Mar. 22, 2005, at 27.

332. Compare Bradley Graham, *Prisoner Uprising in Iraq Exposes New Risk for U.S.*, WASH. POST, Feb. 21, 2005, at A1 (mentioning the mud-wrestling incident), with Steve Fainaru & Anthony Shadid, *In Iraq Jail, Resistance Goes Underground*, WASH. POST, Aug. 24, 2005, at A01 (not mentioning the mud-wrestling incident only six months later).

333. Graham, *supra* note 332.

334. *Id.*

335. Fainaru & Shadid, *supra* note 332.

Hours before the planned prison break, on March 24, 2005, an informant tipped off the Americans.³³⁶ They discovered and destroyed the remarkably engineered tunnel, which had narrow walls as smooth and strong as concrete, sculpted with water and possibly milk.³³⁷ About a week later, the prisoners began a full-scale riot that raged for four days. “The violence was just absolutely incredible,” said one soldier.³³⁸ Cinderblock rocks, taken from a mosque that the military had kept off limits to the guards, were thrown at the guards with surprising precision.³³⁹ The sheer volume of the well-aimed barrage caused the soldier to have an epiphany: “I realized . . . these guys have been fighting riots and wars a lot longer than we have. They have been fighting this way for hundreds of years.”³⁴⁰

Is the word “duh” in the dictionary yet? How else would one describe this belated awareness of cultural differences between American guards and cunning prisoners in a war zone? The Iraqis knew exactly how to take advantage of Western “sensitivity” to their religion and mosque in the aftermath of Abu Ghraib. In the same way, future adversaries will find ways to take advantage of weaknesses in American military culture, including weaknesses caused by social experimentation with human sexuality.

The soldiers of the 105th MP battalion, some of whom were present at the mud wrestling party with the 160th MP unit in October, were not solely responsible for the unruly behavior of the MP mud wrestlers. Nor were battalion-level commanders primarily responsible for the politically correct but naïve restrictions on the prison guards or the quality of the training provided to male and female soldiers before they deployed to Iraq. The sexually charged mudfest in October 2004—which occurred even *after* Abu Ghraib—betrayed a weakness in co-ed military culture that enemy prisoners were quick to exploit. The responsibility for chaos at Camp Bucca should be laid at the feet of Department of Defense officials and Army policymakers who underestimated our adversaries and assumed that it was all right to impose known “inefficiencies,” such as co-ed basic training, on the gender-integrated force.

Uniformed and civilian Pentagon officials should be held accountable for serious miscalculations in a social engineering project gone awry. It is not enough to punish a nineteen-year-old “girl gone wild” at Camp Bucca.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

c. Social Fiction: The New Gender Order

During a 1996 debate about the wisdom of housing men and women in co-ed tents in Bosnia, then-Rep. Patricia Schroeder (D-Colo.) suggested that American colleges and the congressional page system proved that a “desexegrated” environment is workable.³⁴¹ Also, in 1996, Duke Law Professor Madeline Morris suggested that, in an “ungendered” military, “masculinist attitudes” and sexual complications could be reduced by a concerted effort to instill what she called the “incest taboo.”³⁴²

The full inclusion of women would require adjustment of the mechanisms for continued minimization of sexual relationships within units. Just as military units have traditionally been “a band of brothers,” gender integrated units would have to be carefully shaped and defined as a band of brothers and sisters between whom sexual relationships would be unacceptable. The incest taboo approach would amount to a broadened fraternization policy, prohibiting not only inappropriate relationships between ranks but also sexual relationships regardless of rank within military units.³⁴³

Some soldiers do relate to each other as brothers and sisters in the military. Deep bonds of friendship can develop in almost any profession. But in close-combat environments where soldiers depend on each other for *survival*, Prof. Morris’ prescriptions for a socially engineered military “incest taboo” and other types of “social fiction” were no more realistic than science fiction.³⁴⁴

When social problems develop in co-ed training or on active duty, professionals in the “victim advocate” or “diversity” industry request more funds to fix problems that their own philosophy and previous programs

341. *Good Morning America* (ABC television broadcast, Nov. 18, 1996) (Rep. Patricia Schroeder appearing opposite then-Rep. Robert Livingston (R-La.)).

342. Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 747-60 (1996).

343. *Id.* at 757.

344. E.g., in the 1996 feature film *Star Trek: First Contact*, an android character named Lt. Cmdr. Data was equipped with an “emotion chip” to help him experience human emotions and sexuality. The enemy Borg Queen tied up Lt. Cmdr. Data and attempted to extract information from him by activating the emotion chip, making him vulnerable to her seduction. The science-fiction screenplay was entertaining, but military social policy cannot be based on the social fiction that human emotions can be “deactivated” at will. See *Star Trek: First Contact*, Synopsis, <http://www.startrek.com/startrek/view/series/MOV/008/synopsis.html> (last visited Apr. 12, 2007).

helped to create.³⁴⁵ Mandatory, continuous sensitivity training is supposed to instill politically correct attitudes. In the New Gender Order, military people are supposed to be immune to the full range of emotions associated with hostilities, tensions, and attractions. This is social engineering—elitist experimentation with the lives of other people. But when spark-induced “explosions” occur, as they so often have from Aberdeen to Abu Ghraib, social engineers rarely get the blame.

There is no compelling need—particularly in a time of war—to ask our military to engage in a vast social experiment designed to test the limits of human sexuality.

d. Morality and Morale

Sexual misconduct is not peculiar to the Army alone. Officials in all the armed services keep trying to implement policies based on the notion that sexual relationships can be managed perfectly and prevented from veering to extremes on either end of the emotional spectrum. Social engineers seem to think that, with a few sensitivity training sessions here and a few courts-martial there, the most basal human feelings can be contained and managed in a volatile, “pure oxygen” environment, without predictable sparks. And if problems do arise, “masculinist” men—not women—are always to blame.

Most men and women in the military conduct themselves like professionals; the nation is proud of all who volunteer to serve. Nevertheless, there have been a number of recent news stories highlighting problems in the co-ed military, as illustrated by the partial list of headlines below:

*Not So Ship Shape: Admirals Are Concerned About the Unprofessional Attitudes, Behaviors of Sailors.*³⁴⁶

*Warship or L♥veboat? One Destroyer. 19 Months. 13 Cases of Fraternization and/or Adultery. And the Courts-Martial Aren't Over Yet.*³⁴⁷

345. Sean D. Naylor, *Values Instruction To Be Added to Basic Training*, ARMY TIMES, Sept. 22, 1997, at 4. This article reported Army plans to extend basic training from eight weeks to nine, a move that would cost the Army's force structure three battalions of soldiers.

346. William H. McMichael, *Not So Ship Shape: Admirals Are Concerned About the Unprofessional Attitudes, Behaviors of Sailors*, NAVY TIMES, Nov. 22, 2004, at 8-9.

347. William H. McMichael, *Warship or Loveboat? One Destroyer. 19 Months. 13 Cases of Fraternization and/or Adultery. And the Courts-Martial Aren't Over Yet*, NAVY TIMES, Nov. 21, 2005, at 14 (regarding the destroyer U.S.S. *Chung Hoon*).

*Pimping Alleged at Patrick, NCO Arranged for Subordinate to Have Sex.*³⁴⁸

*Cutter CO Relieved After "Inappropriate Relationship."*³⁴⁹

*Adultery, Fraternization, Drugs, Graft & Guns: The Disturbing Tale of a Brand-New Destroyer.*³⁵⁰

*Captain Given 60 Days in Patrick [AFB] Sex Case: Verdict Allows Honorable Discharge.*³⁵¹

*Some KY Guard Women May Have Posed Nude.*³⁵²

Stories about sexual misconduct appear frequently in military newspapers. However, with the exception of occasional wire-service dispatches and sensational photo-illustrated stories such as Abu Ghraib, headlines like these rarely show up in *The New York Times* or *The Washington Post*. The exception is military sex scandals that center on allegations of harassment or abuse of women at the service academies.

If a tree falls in the woods but no one hears, did it really fall? And if demoralizing problems happen in the military, but they are not reported in *The New York Times* and *The Washington Post*, do they really happen? They do, and they are ignored at great peril.

B. The Military Service Academies

In recent years, most of the attention regarding military sex scandals has focused on the military service academies. Women who accuse male colleagues of sexual assault or rape are automatically labeled "victims," even before it is known that a crime has been committed. News and commentaries fitting this template have led to dozens of congressional

348. Rod Hafemeister, *Pimping Alleged at Patrick: NCO Arranged for Subordinate To Have Sex*, AIR FORCE TIMES, June 19, 2006, at 8, available at <http://www.airforceots.com/portal/modules.php?name=News&file=article?sid=115>.

349. *Cutter CO Relieved After "Inappropriate Relationship,"* NAVY TIMES, June 28, 2004.

350. William H. McMichael, *Adultery, Fraternization, Drugs, Graft & Guns: The Disturbing Tale of a Brand-New Destroyer*, NAVY TIMES, Jan. 20, 2006, at 14 (regarding the U.S.S. *Monsen*).

351. *Captain Given 60 Days in Patrick [AFB] Sex Case: Verdict Allows Honorable Discharge*, AIR FORCE TIMES, Sept. 25, 2006, at 10.

352. Andrew Wolfson, *Some Ky. Guard Women May Have Posed Nude*, COURIER-J. (Louisville, Ky.), Sept. 28, 2006, at 1A.

hearings, investigations, Pentagon task forces, advisory committees, and relentless criticism of “masculinist” men in the military.

1. Mixed Signals on the Severn River

This author began using the phrase “double standards involving women,” or DSIW, shortly after a Task Force Report on Sexual Harassment at the Military Service Academies was presented to the U.S. Naval Academy (USNA) Board of Visitors in August 2005.³⁵³ Many of the panel’s forty-four recommendations, largely crafted by civilian “victim advocate” professionals, were contrary to sound military principles and potentially harmful to morale at the academy.³⁵⁴

Sen. Barbara Mikulski (D-Md.), a member of the Board of Visitors, did not seem to notice flaws in the Task Force Report. Instead, she berated Superintendent Vice Adm. Rodney Rempt for not doing enough to protect women from allegedly abusive midshipmen.³⁵⁵ Adm. Rempt announced several responses to the Task Force Report, including a “zero tolerance” policy against sexual harassment.³⁵⁶

a. Blue Language and Lt. Black

Into the gender-war crossfire wandered Lt. Bryan Black, a USNA instructor, who had used graphic profanity in the presence of a female midshipman.³⁵⁷ He apologized and she accepted, but another female officer decided that Black’s apology for that incident—and another incident—were not sincere enough.³⁵⁸ The Black case rose to the desk of Superintendent Rempt, who overruled a Marine investigator’s recommendation for a letter of reprimand, which probably would have ended Black’s military career. Lest anyone think he was soft on sailors who use profane language, Rempt

353. DEFENSE TASK FORCE REPORT, *supra* note 10. An analysis of the report is available at <http://www.cmrlink.org/viewarticle.asp?f=cmr-pa%20092105a.pdf>.

354. Center for Military Readiness, CMR Notes, DoD Task Force Proposals Target Men of West Point & Annapolis (Nov. 2005), *available at* <http://www.cmrlink.org/search.asp>.

355. Bradley Olson, *Mikulski Presses Naval Academy Officials on Harassment*, BALT. SUN, Sept. 21, 2005, at 7A; Christopher Munsey, *Culture Change Needed at West Point, Panel Says*, ARMY TIMES, Sept. 5, 2005, at 13.

356. Bradley Olson, *Admiral Hammers on Gender Inequity*, BALT. SUN, Feb. 27, 2006, at 1.

357. Andrew Scutro, *Foul Comments; Academy Instructor's Remarks Land Him in Court-Martial*, NAVY TIMES, Jan. 30, 2006, at 8; Earl Kelly, *Academy Professor Unfairly Targeted for Sex Comments?*, CAPITAL (Annapolis) (online ed.), Jan. 14, 2006, http://www.hometownannapolis.com/cgi-bin/read/2006/01_14-40/NAV.

358. Kelly, *supra* note 357.

ordered a Special Court Martial and filed charges of “conduct unbecoming an officer” against the hapless Lt. Black.³⁵⁹

But Adm. Rempt’s zero tolerance policy had an asterisk beside it. In the same week that Lt. Black’s story made national news, the Superintendent invited all midshipmen to attend campus performances of a civilian play called *Sex Signals*.³⁶⁰ Actors performing the racy, interactive play, which was subsidized by the Academy, used the same vulgarities that Lt. Black had used.³⁶¹ Four-letter words and slang for intimate body parts were perfectly acceptable, it seemed, provided that they were recited by civilian actors in an “educational” production that was supposed to teach midshipmen about date rape.³⁶²

Crude language is rude and unprofessional; it should be discouraged or punished in appropriate ways. But are women truly helpless when they hear mild cuss words that don’t make sailors blush? In a December 2005 survey of sexual harassment at the military academies, one hundred percent of

359. *Id.* According to Lt. Black’s attorney, Charles Gittins, the Superintendent wanted to conduct Black’s Article 15 (non-judicial punishment) hearing publicly, in order to make an example of him. *Id.*; see also *The Situation: “Swearing Like a Sailor” Gets Navy Man in Trouble* (MSNBC television broadcast Jan. 19, 2006) (transcript available at <http://www.msnbc.msn.com/id/10928032>); Rowan Scarborough, *Naval Academy Teacher Cautioned over Language*, WASH. TIMES, Sept. 2, 2006, at A07. Article 15 (nonjudicial punishment) hearings are usually conducted in private. See Scutro, *supra* note 357. Realizing that such a spectacle would be neither objective nor fair, Black opted for a court-martial, which offered better protection for his rights. See *id.* The Superintendent decided to proceed with the court-martial, but the outcome was delayed for almost a year. See Scarborough, *supra*. After months of controversy and criticism for what was perceived as an over-zealous prosecution, Adm. Rempt transferred the case to another Navy authority, who dismissed the case and ordered the same type of letter of reprimand that Lt. Black was prepared to accept in the first place. *Id.*

360. E-mail from Vice Adm. Rodney P. Rempt to nonmids@unsa.edu, Subject: Faculty and Staff Invitation, (Jan. 4, 2006) (inviting USNA faculty, staff, and their families to join members of the Class of 2007 for performances of the interactive play *Sex Signals* at Mahan Hall on the USNA campus on January 9, 10, and 11, 2006, at 7:30 p.m.). The e-mail acknowledged that the production is geared to college students with discussions of dating, sex, and date rape. *Id.* The e-mail recommended that due to “graphic language,” children under the age of thirteen should not attend. *Id.*; see also *infra* note 362.

361. *Id.*; see also Center for Military Readiness, *Naval Academy Prosecution Taken to PC Extreme* (Jan. 13, 2006), <http://www.cmrlink.org/social.asp?docID=261>.

362. Letter from Attorney Charles Gittins to Vice Adm. Rodney Rempt (Jan. 11, 2006) (on file with author). Gittins, a USNA alumnus who witnessed the play, criticized its raunchy language, which he considered inappropriate for the Academy’s Mahan Hall, and noted that the players had presented misinformation about “date rape” that conflicted with military law.

Naval Academy women who did not file official complaints said they thought they could handle such problems themselves.³⁶³

When it comes to the oxymoronic etiquette of profanity, there are no easy answers. Some women like to compete with men who use profanity as performance art. Witness the book *Love My Rifle More Than You*, written by former Army sergeant Kayla Williams about her experiences in Iraq.³⁶⁴ The provocative book takes the prize for equal-opportunity raunchiness in a gender-mixed environment.³⁶⁵

Some women expect men to be protectors, while others fume if a man extends simple courtesies to women under his command. In the minefield of sexual politics, what's a military guy to do? Miss Manners wouldn't have a clue.

b. Inconsistency and Favoritism

The Superintendent could help Naval Academy women most by working to avoid the perception and reality of double standards involving women. The following incidents are prime examples of DSIW:

- In June 2006, Annapolis *Capital* reporter Earl Kelly quoted two unnamed, former midshipmen who said they knew a female company commander who did not take the physical readiness test, but lied and said that she did.³⁶⁶ Investigators recommended her dismissal, but Commandant of Midshipmen Capt. Bruce Grooms "overrode the decision because 'she is a woman in power' and the Naval Academy is under pressure to recruit and retain female midshipmen."³⁶⁷ So much for the USNA Honor Concept,

363. DEFENSE MANPOWER DATA CENTER, SERVICE ACADEMY 2005 SEXUAL HARASSMENT AND ASSAULT SURVEY vi (Dec. 23, 2005) [hereinafter SASA 2005], available at <http://www.sapr.mil/contents/references/DMDC%20Academy%202005%20Survey.pdf>. This survey was conducted in response to section 527 of the National Defense Authorization Act for FY 2004 and was the second in a series of annual surveys that will continue through 2008. An analysis of this and previous surveys is available at <http://www.cmrlink.org/social.asp?docID=260> (last visited Apr. 12, 2007).

364. KAYLA WILLIAMS & MICHAEL E. STAUB, *LOVE MY RIFLE MORE THAN YOU: YOUNG AND FEMALE IN THE U.S. ARMY* (2005).

365. *Id.*; see also Kathleen Parker, *Guys & Dolls: The Facts of Life About Co-Ed Combat*, WEEKLY STANDARD, Oct. 31, 2005, at 38.

366. Earl Kelly, *Mids Say Discipline Is Not Consistent*, CAPITAL (Annapolis), June 6, 2006, at A1.

367. *Id.*

which directs midshipmen to “Tell the truth and ensure that the full truth is known . . . do not lie.”³⁶⁸

- In Fall 2004, a male midshipman used mild profanity with an angry female colleague who responded in kind.³⁶⁹ The man was dismissed and ordered to repay the cost of his education, but the woman graduated normally in 2005.³⁷⁰ USNA spokesmen claimed to be unaware of any case fitting the description, dissembling with stock replies claiming “fair and equitable treatment for all.”³⁷¹
- A male midshipman who asked a reporter not to use his name said that he was dismissed from the Academy for having consensual sex with a female midshipman.³⁷² The brief summer “fling” occurred during a ten-day training exercise away from the yard in July.³⁷³ He added that his partner and three more female midshipmen who engaged in similar activities were counseled, but not punished.³⁷⁴ A USNA spokesman cited privacy concerns in refusing to discuss the case with the reporter.³⁷⁵ Nor did the spokesman provide information on the number of midshipmen—either cumulatively or by gender—who had been discharged in the previous two years for sexual harassment, assault, or misconduct.³⁷⁶

Harsh discipline of male midshipmen for certain offenses, which are excused when committed by female midshipmen, constitutes double standards that are divisive and demoralizing in the fullest sense of the word. Most women in the military are not responsible for DSIW in disciplinary matters, but the resulting backlash and hard feelings are harmful to women

368. U.S. Naval Academy, Honor Concept, <http://www.usna.edu/OfficerDevelopment/honor/honorconcept.html> (last visited Apr. 12, 2007).

369. E-mail correspondence and telephone conversation between confidential sources and author (May 2006) (on file with author).

370. *Id.*

371. *Id.*; E-mails from USNA spokesmen to author (Mar. 3, 2006–May 19, 2006) (on file with author).

372. Earl Kelly, *Academy Double Standard on Sex Dismissals?*, CAPITAL (Annapolis), Mar. 6, 2006, at A1.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

and men alike. Double standards of any kind weaken the structural integrity of the military as an institution.

2. Rape and Victimology

The most controversial examples of double standards and misconduct at the Military Service Academies have involved charges of assault and rape. In January 2003, *ABC News* set off a wave of publicity and criticism about allegations of rape at the Air Force Academy.³⁷⁷ Several full-scale investigations and congressional hearings were conducted to determine how those cases had been handled. Some of the details footnoted in a report by an Air Force Working Group read like pornographic movie scripts, but records showed that most of the cases had been handled properly, under military law.³⁷⁸

Media critics and professional victim advocates remained dissatisfied because, in their view, all accusations of assault are credible and any punishment short of court-martial and jail means that the case was mishandled and unfair to the “victim.”³⁷⁹ Several more investigations of sexual misconduct at the academies were conducted, creating opportunities for professional victim advocates seeking Department of Defense funds and prestige.

a. DoD Office of Victim Advocate (OVA)

Sensational scandals at the Air Force and Naval Academies were intensified by release of the Service Academy 2005 Sexual Harassment and Assault Survey (SASA)—the first of a series of annual polls of military academy cadets and midshipmen, which was done on an anonymous basis.³⁸⁰ Most news reports about the 2005 survey failed to notice that its findings regarding incidents of sexual harassment did not differentiate between minor incidents and serious offenses. Nor did the survey differentiate between allegations and substantiated cases. News reports

377. Lynn Sherr, *Rape Without Repercussion? Women Say Assaults Are Not Prosecuted at Air Force Academy* (ABC News television broadcast Feb. 28, 2003).

378. OFFICE OF THE GENERAL COUNSEL, U.S. AIR FORCE, THE REPORT OF THE WORKING GROUP CONCERNING THE DETERRENCE OF AND RESPONSE TO INCIDENTS OF SEXUAL ASSAULT AT THE U.S. AIR FORCE ACADEMY 156-64 (June 2003), *available at* http://www.usafatoday.com/docs/usafa_report.pdf.

379. Christine Hansen, The Miles Foundation, Inc., A Considerable Sacrifice: The Costs of Sexual Violence in the U.S. Armed Forces (Sept. 16, 2005) (presented at the Military Culture and Gender Conference, University of Buffalo, N.Y.), *available at* <http://www.law.buffalo.edu/BALDYCENTER/pdfs/MilCult05Hansen.pdf>.

380. SASA 2005, *supra* note 363.

nationwide accused West Point of having the worst record of the three,³⁸¹ creating the impression that the U.S. Military Academy is a sexual battleground for female cadets. A closer look at survey numbers revealed that anonymous reports of assault at the military service academies are relatively few and probably comparable to or lower than incidents in the civilian world.

For example, six percent (thirty-seven of 618) women at the Military Academy, five percent (thirty-five of 693) women at the Naval Academy, and four percent (thirty of 738) women at the Air Force Academy reported some sort of sexual assault, defined most often as “unwanted touching of a sexual nature.”³⁸² Even one case is too many, but perspective is in order. All the bad publicity aimed at West Point, tagged with the largest number (six percent), resulted from anonymous reports from only seven more women than those who reported assaults at the Air Force Academy. Exaggerated reports of this kind are not helpful to the military, or to female cadets and midshipmen. They do create perceptions, however, as well as a potential growth industry for professional “victim advocates.”

In 2004, Rep. Louise Slaughter (D-N.Y.) sponsored a ninety-five-page bill that would have authorized more than \$218.6 million for an Office of Victim Advocate (OVA) in the Pentagon.³⁸³ This costly piece of feminist “pork,” or even a fraction of the proposed funding, would empower civilian feminists who seem to believe that men are innocent only until they are accused.³⁸⁴ In 2006, The Wellesley College Centers for Women produced a \$50,000 report commissioned by DoD on “prospects” for a Pentagon OVA—but DoD did not endorse the proposal.³⁸⁵ Establishment of such an office would have been a huge mistake. Victim advocates almost always consider accusers to be “victims” even before it is known that a crime has been committed. They also react in horror any time expert investigators

381. *Id.* at 13-15 (“Survey Methodology”); see also Lolita C. Baldor, *Military School Sex Harassment Continues*, ASSOCIATED PRESS, Dec. 28, 2005; Josh White, *Air Force Academy Shows Improvement*, WASH. POST, Dec. 23, 2005, at A02; Rowan Scarborough, *Military Academies See Less Harassment*, WASH. TIMES, Jan. 9, 2006, at A1.

382. SASA 2005, *supra* note 363, at iv-vii (“Executive Summary”); Center for Military Readiness, *Sex Survey Scolding Unfair to Service Academies* (Jan. 11, 2006), www.cmrlink.org/SOCIAL.ASP?DOCID=260 (last visited Apr. 4, 2007).

383. Dep’t of Defense Office of the Victim Advocate Act of 2004, H.R. 4587, 108th Cong. (2004).

384. See Center for Military Readiness, *Pentagon Doesn’t Need an Office of Male Bashing* (Dec. 1, 2005), <http://www.cmrlink.org/social.asp?docID=257>.

385. Bryan Bender, *Wellesley College Advised Pentagon on Victim Office*, BOSTON GLOBE, Dec. 10, 2005, at A1.

suggest that false allegations of sexual assault are common and distinguishable from truthful ones.³⁸⁶

The DoD Sexual Assault Prevention and Response Office (SAPRO) has established some useful guidelines to strike a balance between the privacy of accusers and the rights of the accused.³⁸⁷ There is no need for a Pentagon Office of the Victim Advocate, which would operate as an “Office of Male Bashing” that all DoD officials would fear to challenge. Such an office in the Pentagon would nuclearize the war between the sexes by meddling in distant “he said, she said” disputes that are local and highly emotional.³⁸⁸ Sexual harassment problems should be handled at the local level, with full respect for the rights of the accused.

b. Alcohol and the Owens Case

Even though alcohol is supposed to be off limits to cadets and midshipmen, it is almost always present in military service academy sex scandals. So it was in the 2006 case of former USNA quarterback Lamar Owens, who was accused of raping a female midshipman in Bancroft

386. See Center for Military Readiness, Sex, Lies, and Rape (Sept. 4, 2006), <http://www.cmrlink.org/social.asp?DocID=276>.

387. Dep’t of Defense, Office of the Assistant Secretary of Defense (Public Affairs), DoD Issues Confidentiality Policy for Sexual Assault Victims (Mar. 18, 2005), <http://www.defenselink.mil/releases/release.aspx?releaseid=8320>; Memorandum from Deputy Secretary of Defense to Secretaries of the Military Departments, Confidentiality Policy for Victims of Sexual Assault (Mar. 16, 2005), available at <http://www.defenselink.mil/news/Mar2005/d20050318dsd.pdf>; see also Dep’t of Defense Directive No. 6495.1, Sexual Assault Prevention and Response (SAPR) Program (Oct. 6, 2005), available at <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>; K.C. McClain, *We’re Making Progress*, USA TODAY, Mar. 27, 2005, at 14A.

388. The Defense Department opposed OVA legislation that was reintroduced in 2006. See Military Domestic and Sexual Violence Response Act of 2006, H.R. 5212, § 111, 109th Cong. (2006). On June 12, 2006, the DoD Office of Domestic Violence issued this statement:

An office of the OVA is unnecessary. DoD is committed to maintaining a strong focus on preventing these crimes, effectively responding to them and holding offenders accountable for their actions. In the military, the responsibility for maintaining this focus lies with commanders, not with victim advocates. While victim advocates are important, victims often times need additional resources within the military community. Victims need strong support from commanders and other responders to ensure that medical, legal and investigative systems remove barriers to reporting, reduce bureaucratic hurdles for victims and survivors, and ensure access to treatment services.

See Telephone call and facsimile from Pentagon official to author (June 12, 2006) (on file with author).

Hall.³⁸⁹ The Academy granted legal immunity to the accuser, an admitted binge drinker, but the unnecessary privilege backfired.³⁹⁰ Legal immunity did not help to lift the fog of alcohol that blurred both parties' memories of what happened that night.³⁹¹

Reasonable doubt remained, so Owens was acquitted of rape.³⁹² He was convicted of conduct unbecoming an officer, but the jury recommended no punishment.³⁹³ Superintendent Rempt referred the case to the Secretary of the Navy, recommending that Owens be expelled for "unsatisfactory conduct," but not be required to repay the cost of his education. Navy Secretary Donald Winter approved the expulsion, but also ordered that Owens repay \$90,000 of the \$136,000 cost of his education—the smaller amount in recognition of Owens' contributions to the academy as an athlete. As of this writing, Owens' defense team is appealing that order. In contrast, Owens' accuser, a known binge drinker who had been given immunity for her testimony, was allowed to graduate normally. The Academy's intervention in what should have been an unbiased trial left the Superintendent with a troubled female officer, a muddled message about alcohol, and a glaring example of DSIW that demoralized the Academy for months.³⁹⁴

389. See Bradley Olson, *Mid Tells Jury of Rape in Her Dorm: Defense Attacks Credibility, Says Navy QB Had Consensual Sex*, BALT. SUN, July 12, 2006, at 1A; Earl Kelly, *Judge Blasts Prosecution in Owens' Trial*, CAPITAL (Annapolis), July 14, 2006, at A1; Steve Vogel, *Superintendent Faulted over Rape Case E-Mails*, WASH. POST, July 7, 2006, at B04; Bradley Olson, *Message Is Focus in Rape Case: Woman Might Have Invited Quarterback to Her Dorm Room at Naval Academy*, BALT. SUN, July 13, 2006, at 1B; Arlo Wagner, *Alcohol an Issue in Accuser's Recall*, WASH. TIMES, July 18, 2006, at B3.

390. See Stuart Taylor, Jr., *"Rape" and the Navy's P.C. Policy*, NAT'L J., Apr. 9, 2007 (reporting that Vice Adm. Rempt, the USNA Superintendent and "convening authority" in the Owens case, told alumnus Peter Optekar at a social event that he had to submit Owens to a court martial: "Pete, I had no other choice. If I did not take him to a GCM, we would have had every feminist organization and the ACLU after us.").

391. See Arlo Wagner, *Alcohol an Issue in Accuser's Recall*, WASH. TIMES, July 18, 2006, at B3.

392. Nathan Barney, *Owens Cleared of Rape Charge*, WASH. TIMES, July 22, 2006, at B1.

393. *Id.*; Derrill Holly, *Military Jury: No Punishment for Navy Quarterback*, ASSOCIATED PRESS, July 21, 2006.

394. Nia-Malika Henderson, *Annapolis Alderwoman Seeks Support for Owens*, BALT. SUN, Feb. 7, 2007, at 3B; Chris Amos, *Worthy of Commission?*, NAVY TIMES, Mar. 12, 2007, at 8; Bradley Olson, *Owens, Alumni Plead for Support: Navy Ex-Quarterback Uses Web To Ask for Character References*, BALT. SUN, Feb. 17, 2007, at 1A; Earl Kelly, *Academy Criticized for Unequal Punishment: Some Say Owens Trial Proves Double Standard for Female Midshipmen*, CAPITAL (Annapolis), Aug. 20, 2006, at A1; Bradley

c. Guilt by Accusation

In 2004, DoD Inspector Gen. Joseph E. Schmitz conducted an extensive survey to measure opinions on sexual harassment and assault at the military service academies. Among other things, the Schmitz DoD IG Report, released in March 2005, found that fraudulent complaints are perceived as a problem by an average of seventy-three percent of women at the Air Force Academy, West Point, and Annapolis. The comparable average percentage for men at all three academies was seventy-two percent.³⁹⁵

Figures of that size indicate a problem worthy of further investigation and honest plans to reduce the problem, not cover it up. But in the Sexual Harassment and Assault (SASA) Survey of December 2005, described as a “baseline” in a series of authorized studies, there were no questions about fraudulent complaints.³⁹⁶ Nor did the SASA 2005 ask any questions about concerns that standards have been lowered, even though statements about such concerns were identified by the GAO in 1991 and 1994 as the second most prominent form of sexual harassment at the academies.³⁹⁷

In 2006, many news stories created the misimpression that sexual harassment and assaults were increasing at the military service academies. Reporters frequently repeated questionable figures obtained from victim advocates, who seem to believe every allegation to be true and consider a case to be mishandled if the accused person is not court martialed and sent to jail. The truth was that numbers of women alleging harassment were remarkably small, and on a downward trend.³⁹⁸

Military officials should not endorse the notion that men are always wrong and women are always right—a suggestion as ludicrous as the idea that all women think alike. Men who assault women should be punished. Women who drink to excess or make false accusations should be punished,

Olson, *Mid Vows To Fight Expulsion: Owens' Lawyer Also Objects to Order To Repay Navy \$90,000 Navy for Education*, BALT. SUN, Apr. 14, 2007, at 5B.

395. OFFICE OF THE INSPECTOR GENERAL OF THE DEP'T OF DEFENSE, REPORT OF THE SERVICE ACADEMY SEXUAL ASSAULT AND LEADERSHIP SURVEY xi n.15 (Mar. 4, 2005), available at <http://www.dodig.mil/Inspections/IPO/reports/Final%20Survey%20Report.pdf>; see also Daniel de Vise, *Defense Dept. Surveys Academy Sex Assaults*, WASH. POST, Mar. 19, 2005, at A01; Robert F. Dorr, *Lies and Victims' Inaction Have Skewed Service Academies' Sex Assault Reports*, NAVY TIMES, Apr. 25, 2005, at 46.

396. See *supra* note 363.

397. GEN. ACCOUNTING OFFICE, DOD SERVICE ACADEMIES: MORE ACTIONS NEEDED TO ELIMINATE SEXUAL HARASSMENT 3 (Jan. 1994), available at <http://archive.gao.gov/t2pbat4/150664.pdf> (“The most common forms of harassment were derogatory personal comments and comments that standards had been lowered for women.”).

398. Center for Military Readiness, *supra* note 382.

too. Mishandled accusations of rape are not about sex; they are about power—the power of women over men.

C. The 1993 Law Regarding Homosexual Conduct

A common thread in the debates about social policy in the military centers on the institution's unique character, culture, and mission. The armed forces exist to defend the republic—a purpose that sets the military apart from all other institutions in the civilian world.

Advocates of allowing homosexuals to serve in the military almost always discuss the issue in terms of civil rights. But participation in the military is sometimes a duty; it is never a right. Title VII of the Civil Rights Act of 1964 does not apply to the military.³⁹⁹

The issue was discussed in a comprehensive law review article by Professor William A. Woodruff of the Norman Adrian Wiggins School of Law at Campbell University:

The American Armed Forces are unique. In a government based upon the consent of the governed, the military is autocratic. In a society that treasures individual freedom, the soldier must conform and sacrifice individual freedom for mission accomplishment. In a country where the right to speak one's mind is paramount, the soldier is called upon to defend that right while not enjoying its full extent. To some, it is paradoxical that the defenders of freedom must forfeit their own freedom. Consider the mission of the military, however, and the paradox vanishes. The mission of the United States Armed Forces is to fight and win our nation's wars. It takes an army to do that, not a debating society. . . .

. . . Wars are won not by individuals, but by units functioning under extremely difficult circumstances. . . .

399. See PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-40 (Finding 1.32).

Title VII has not been legally applied to the military in recognition of the fact that its provision could impose constraints on the United States by which potential military opponents, not operating under the same constraints, might derive an advantage. Warfare is a supranational survival contest in which opposing sides vie for any advantage; unilateral policies adopted to promote principles other than military necessity may place the adopting party at increased risk of defeat.

Id.

In the final analysis, all military rules, regulations, policies, traditions, and customs are related to, and in some manner support, the ultimate goal of combat effectiveness.⁴⁰⁰

As famously articulated by the Supreme Court in *Goldman v. Weinberger*,

[W]e have repeatedly held that the military is, by necessity, a specialized society separate from civilian society. The military must insist upon a respect for duty and a discipline without counterpart in civilian life, in order to prepare for and perform its vital role.

... The essence of military service is the subordination of the desires and interests of the individual to the needs of the service.⁴⁰¹

The military guards individual rights, but it must be guided by different rules. This principle should inform all discussions about social policies, including the question of homosexuals in the military.

1. Congressional Oversight

a. Clinton Vows To Repeal Department of Defense Regulations

The contemporary public debate about homosexuals in the military began in 1992, when former Arkansas Governor Bill Clinton challenged President George H.W. Bush for re-election. President Bush did not raise the issue much during the campaign, but homosexual activist groups contributed heavily to the campaign of Bill Clinton and Al Gore and expected Clinton to deliver on his promise to “lift the ban” on homosexuals in the military.⁴⁰²

Shortly after the election, on Veterans Day, President-elect Clinton vowed to deliver on his campaign promise and announced his intention to change policies that excluded homosexuals from the military.⁴⁰³ At the time,

400. William A. Woodruff, *Homosexuality and Military Service*, 64 UMKC L. REV. 121, 123-24 (Fall 1995). Prior to retiring from active duty in the Judge Advocate General's Corps, Professor Woodruff served as Chief of the Litigation Division in the Office of the Judge Advocate General, where he was responsible for defending the Army's interests in civil litigation, including litigation challenges to the homosexual exclusion policy. *Id.*

401. *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (citations, internal quotation marks, and alteration omitted).

402. See J. Jennings Moss, *Clinton To Allow Gays in Military*, WASH. TIMES, Nov. 12, 1992, at A1; J. Jennings Moss, *Gays See Clinton Backing Agenda*, WASH. TIMES, Jan. 20, 1993, at A8.

403. See Bill Gertz, *Nunn Defies Clinton on Gays in Military*, WASH. TIMES, Nov. 16, 1992, at A1; Bill Gertz, *Clinton To Move Fast for Gays in the Military*, WASH. TIMES, Jan.

the ban was not inscribed in law, but in Department of Defense directives that were adopted in 1981.⁴⁰⁴ On January 29, 1993, the newly inaugurated president ordered the Department of Defense to cease asking “the question” about homosexuality, which used to appear on military induction papers.⁴⁰⁵ This change was described as an “interim policy,” pending further review by Congress and the Defense Department.⁴⁰⁶

A storm of spontaneous opposition ensued. Many congressional offices needed extra staff to answer thousands of phone calls and letters protesting the president’s move, and it quickly became apparent that even a Congress controlled by the president’s own party would not permit the Administration to repeal the ban on homosexuals in the military arbitrarily.⁴⁰⁷ Then-

22, 1993, at A4; Chandler Burr, *Friendly Fire: How Politics Shaped Policy on Gays in the Military*, CAL. LAW., June 1994, at 54-55. In his article, Burr reported that about an hour after his swearing-in, President Clinton saw Rep. Gerry Studds (D-Mass.), one of two openly gay members of the House, in the Capitol rotunda. “[S]haking his hand, [President Clinton] said with deep conviction, ‘I’m going to do this, Gerry.’ ‘This’ was Clinton’s campaign promise to lift the ban on gay and lesbian soldiers in the military.” *Id.* A few weeks later, Clinton intimate Paul Begala was present at the inception of the Campaign for Military Service, an *ad hoc* coalition of the American Civil Liberties Union, People for the American Way, the National Organization for Women, and other groups that joined together to do the lobbying, public relations, and vote counting.

404. See Dep’t of Defense Directive No. 1332.14, *Enlisted Administrative Separations* (Jan. 15, 1981); Dep’t of Defense Directive No. 1332.30, *Separation of Regular Commissioned Officers*, at encl. 2 (Jan. 15, 1981); Woodruff, *supra* note 400, at 131-32 nn.56 & 60, reprinted in 32 C.F.R. pt. 41, app. A, ¶ (H). Both directives were republished in 1982. See also Memorandum from Deputy Secretary of Defense to Military Departments (Jan. 16, 1981) (“I am promulgating today a change to DoD Directive 1332.14 (Enlisted Administrative Separations), including a completely new Enclosure 8 on Homosexuality. The revision contains no change in policy. It reaffirms that homosexuality is incompatible with military service.”). Although these changes were put into place under the Carter administration, the directive on Enlisted Administrative Separation was again revised in 1982. See Dep’t of Defense Directive No. 1332.14, *Enlisted Administrative Separations* (Jan. 28, 1982), available at <http://dont.stanford.edu/regulations/regulation41.pdf>. The 1982 revision did not affect the policy on homosexuality. Nevertheless, the 1982 date has caused some to erroneously attribute this language to the Reagan administration.

405. Memorandum from President Clinton to the Secretary of Defense, Ending Discrimination on the Basis of Sexual Orientation in the Armed Forces (Jan. 29, 1993), available at <http://dont.stanford.edu/regulations/pres1-29-93.pdf>.

406. See *id.*

407. See Michael Hedges, *Support for Gay Ban Seen As Spontaneous*, WASH. TIMES, Feb. 2, 1993, at A1; Rowan Scarborough & Ronald A. Taylor, *Clinton Seeks a Deal To Avoid Battle on Ban*, WASH. TIMES, Jan. 28, 1993, at A1. Veterans, conservative, and pro-family groups were relatively unprepared for the controversy because it had not been widely debated during the 1992 presidential race. Following extensive hearings, members of Congress and staff eventually formulated a legislative strategy.

Secretary of Defense Les Aspin formed an internal Military Working Group and charged the panel to come up with a suitable plan for accommodating homosexuals in the military by July 15, 1993.⁴⁰⁸ The Joint Chiefs and military experts argued for continuation of the status quo, but task force members were under pressure from the White House and activist groups to devise a plan to accommodate gays in the military.

Feeling political backlash, in March 1993, President Clinton said at a news conference that he might consider a plan that would allow homosexuals in the military but restrict them from certain assignments. Self-identified homosexual Bob Hattoy, Associate Director of Presidential Personnel and an advisor to Clinton on the issue, flatly rejected that option.⁴⁰⁹ The internal and public debate intensified when a coalition called the Gay, Lesbian, and Bisexual Military Freedom Project drew up a list of “recommendations” that left no doubt that activists would not be satisfied with the option of homosexuals serving in the military discreetly. The wish list included, *inter alia*: (1) an Executive Order to ban discrimination based on homosexual or bisexual orientation or conduct in the armed forces; (2) an end to all discharge procedures for homosexual orientation or conduct; (3) training programs on the acceptance of homosexual or bisexual personnel into the military, on the same basis as racial and gender issues; and (4) an official Defense Department committee, similar to the Defense Advisory Committee on Women in the Services (DACOWITS), to advise the Secretary on matters relating to homosexuals and bisexuals in the armed

408. Memorandum from the Military Working Group to the Secretary of Defense, Recommended DoD Homosexual Policy Outline (June 8, 1993); *see also* Peter Copeland, *Gay-Sex Video Set for Battle*, WASH. TIMES, Mar. 15, 1993, at A1; Rowan Scarborough, *Study Urges Ban on Overt Gays: Pentagon Report To Seek Compromise*, WASH. TIMES, May 21, 1993, at A1; Eric Schmitt, *Pentagon Speeds Plan To Lift Gay Ban*, N.Y. TIMES, Apr. 15, 1993, at A20; Rowan Scarborough, *Gay-Ban Supporters Seek Equal Time with Pentagon*, WASH. TIMES, May 25, 1993, at A3; Rowan Scarborough, *Aspin Policy Follows “Don’t Ask, Don’t Tell,”* WASH. TIMES, June 22, 1993, at A1. The Military Working Group did not meet with opponents of President Clinton’s plan until June 8, 1993—the date they submitted their policy outline to Secretary Aspin.

409. Richard H.P. Sia, *Top Military Officers Favor Gays Staying in Closet*, BALT. SUN, FEB. 23, 1993, available at <http://www.cs.cmu.edu/afs/cs.cmu.edu/user/scotts/bulgarians/joint-chiefs-ban.html>; Joyce Price, *Clinton Aide Rips Deal on Gay Ban*, WASH. TIMES, Mar. 25, 1993, at A1; Paul Bedard, *Clinton Softens Gay Plan*, WASH. TIMES, Mar. 24, 1993, at A1; Rowan Scarborough, *Senator Questions [Bernard] Nussbaum’s Role in Gay-Ban Case*, WASH. TIMES, Apr. 7, 1994, at A4.

forces.⁴¹⁰ Some items on the wish list were partially granted by the Clinton Administration in 1994.⁴¹¹

Homosexual activist groups staged a large (though not as large as planned) rally in Washington, D.C., on April 25, 1993. Organizers promoted the march as what would be “the largest civil rights demonstration in [U.S.] history” and were disappointed when President Clinton did not promise to be there in person.⁴¹² The event included bizarre elements that were aired on C-SPAN, including some provocatively dressed marchers and a group holding up posters depicting President Clinton with a “Pinocchio” nose.⁴¹³ President Clinton did not show up at the rally, but he met in the Oval Office with a large group of organizers, who consulted frequently with officials from the Departments of Defense and Justice on legislative and legal strategies to advance the cause of homosexuals in the military.⁴¹⁴

410. See Rowan Scarborough, *Gay Rights Groups Ready Wish List for Military in Case Ban Is Lifted*, WASH. TIMES, Feb. 10, 1993, at A1. The Gay, Lesbian, and Bisexual Military Freedom Project was a coalition of nine human rights and gay activist organizations, including: Gay, Lesbian, Bisexual Veterans of America; American Civil Liberties Union; American Psychological Association; the Human Rights Campaign Fund; National Gay and Lesbian Task Force; Military Law Task Force; National Lawyer’s Guild; Lambda Legal Defense and Educational Fund; and Queer Nation. See *id.*

411. On September 8, 1994, the Department of Defense co-sponsored a day-long “Diversity Day Training Event” in Arlington’s Crystal City near the Pentagon with eighteen other government agencies. The program featured lectures, panel discussions, exhibits, workshops, and video presentations, including a video titled “On Being Gay.” *Id.*; see also Rowan Scarborough, *Navy Officers Balk at Pro-Gay Seminar*, WASH. TIMES, Sept. 8, 1994, at A1; Dep’t of the Navy, Memorandum for All Hands from the Cmdr. G.R. Stermer, Naval Sea Systems, Subj.: *Diversity Day 1994 Training Event*, Aug. 26, 1994; Elaine Donnelly, Heritage Foundation Lecture No. 522, *Social Experimentation in the Military* (Apr. 3, 1995) (transcript available at <http://www.heritage.org/Research/NationalSecurity/HL522.cfm>).

412. Gary Lee & Linda Wheeler, *Gay-Rights March Organizers Say 1 Million May Participate*, WASH. POST, Mar. 19, 1993, at A41; Joyce Price, *Possible Clinton No-Show Angers Gay March Leaders*, WASH. TIMES, Apr. 15, 1993, at A4; Joyce Price, *Clinton Plans Hookup to Gay-Rights Rally: Meets Leaders in Oval Office*, WASH. TIMES, Apr. 17, 1993, at A1; Cindy Loose, *Gay Activists Summon Their Hopes, Resolve*, WASH. POST, Apr. 18, 1993, at A1.

413. Michael Hedges & J. Jennings Moss, “*The Queer ‘90s’: 300,000 March To Celebrate Rites with Demand for Rights*,” WASH. TIMES, Apr. 26, 1993, at A1; Ruth Fremson, Photo (Apr. 25, 1993) (showing estimated 300,000 marchers); Kenneth Lambert, Photo (Apr. 25, 1993) (showing Pinocchio signs); Michael Hedges, *Emotions Bared, Among Other Things*, WASH. TIMES, Apr. 26, 1993, at A1; Michael Hedges, *Were Marchers Just Too Far “Out”?*, WASH. TIMES, Apr. 27, 1993, at A1.

414. See Burr, *supra* note 403, at 57-61, 98-100.

Members of the Joint Chiefs of Staff were in an awkward situation, but they did their best to resist the president's original, radical plan without challenging his authority as Commander-in-Chief.⁴¹⁵ Following pressure from Secretary of Defense Les Aspin, all of the chiefs of staff were lined up behind President Clinton for a media event at Fort McNair, Washington, D.C., when President Clinton announced his "Don't Ask, Don't Tell" proposal on July 19, 1993.⁴¹⁶ Departing significantly from DoD directives in effect since 1981, President Clinton's July 19 policy maintained that "Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct."⁴¹⁷

b. Congress Exercises Oversight Responsibilities

Enactment of Clinton's proposal appeared possible at first, but in response to political pressure, members of Congress became engaged. They exercised effective oversight by asking a lot of questions. For example, in May 1993, Senate Armed Services Committee Chairman Sam Nunn (D-Ga.) and Ranking Member John Warner (R-Va.) visited several ships and submarines at Naval Station Norfolk, Virginia. An Associated Press photo of that visit showed the senators crouched down to solicit the opinions of three men occupying cramped sleeping spaces in the torpedo room of the nuclear attack submarine USS *Montpelier*.⁴¹⁸ One gay activist leader called Nunn's tour an "inflammatory spectacle," while another denounced Sen. Nunn as a "bigot" for having any hearings at all.⁴¹⁹

415. See Sia, *supra* note 409; Detroit News Wire Services, *Top Brass: Rethink Gay Ban Lift*, DETROIT NEWS, Jan. 25, 1993, at A1.

416. See Grant Willis, *Don't Ask, Don't Tell, Don't Pursue: Despite Compromise on Gay Ban, Congress Will Get the Last Word*, ARMY TIMES, Aug. 2, 1993, at 12.

417. See Dep't of Defense Directive No. 1332.14, Enlisted Administrative Separations, at encl. 3 ¶ E3.A1.1.8.1.1 (1994), available at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>; cf. Dep't of Defense Instr. 5505.8, Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations, at §§ 4, 6, & encl. 2 (2005), available at http://www.dtic.mil/whs/directives/corres/pdf/i55058_012405/i55058p.pdf. The "Don't Ask, Don't Tell" concept announced by Clinton on July 19, 1993, formed the basis for congressional testimony by Defense Department officials, and for enforcement regulations announced on December 22, 1993, with DoD News Release No. 605-93, available at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1100.pdf.

418. Steve Helber, Photo, ASSOCIATED PRESS, May 11, 1993.

419. Richard A. Ryan, *Senators Take Gay Battle to Sea*, DETROIT NEWS, May 11, 1993, at 1A.; Rowan Scarborough, *Witnesses Detail Risks of Lifting Ban*, WASH. TIMES, Mar. 30, 1993, at A1.

Various drafts of a “Don’t Ask, Don’t Tell” type proposal started to emerge and draw fire from both sides.⁴²⁰ Proponents of gays in the military saw them as a betrayal of their justified expectations, while opponents criticized such proposals as incremental steps in the wrong direction. During this time both Houses held a total of twelve legislative hearings, which heard from diverse panels of experts and advocates on all sides of the issue.⁴²¹

Immediately following President Clinton’s announcement on July 19, 1993, the House and Senate Armed Services Committees heard testimony from several prominent officials, including Secretary of Defense Les Aspin, DoD General Counsel Jamie Gorelick, Joint Chiefs Chairman Gen. Colin Powell, the Chief of Staff of each of the services, and key members of the Pentagon’s Military Working Group. Under close questioning, all gave candid answers that revealed serious flaws in the July 19 “Don’t Ask, Don’t Tell” concept; in both Houses of Congress, members started to question and

420. See Rowan Scarborough, *Furor Grows Over Gay-Ban Policy*, WASH. TIMES, June 23, 1993, at A1; Burr, *supra* note 403, at 56-57. Burr described the concerns of activist lawyer Chai Feldblum, who tried to achieve a significant (though limited) step in favor of gays in the military by going along with the original “compromise” reportedly agreed to by President Clinton and Sen. Sam Nunn. Under what Burr described as the “Clinton-Nunn political deal,” “service members who stated they were gay would be placed on inactive reserve, stripped of pay and benefits—essentially given a suspended discharge. (Those found to have had sex were still expelled under the new terms, which, in Clinton’s formulation, separated homosexual ‘status’ from homosexual ‘conduct.’)” *Id.* But attorney Chai Feldblum, an activist with the Campaign for Military Service Coalition, became “increasingly concerned” about Clinton’s “‘status versus conduct’ distinction, which the president repeated whenever he was asked about his forthcoming policy.” She and fellow activist Tom Stoddard, who headed the Campaign for Military Service and met with Clinton at the White House on April 16, 1993, maintained that the distinction should be “status versus misconduct.” They recognized that Clinton’s “status versus conduct” concept was an “artificial distinction as unworkable as accepting left-handed soldiers while forbidding them from shooting left-handed.” See *id.* Those opposed to gays in the military recognized the same anomaly.

421. See Woodruff, *supra* note 400, at 144. The Senate Armed Service Committee conducted hearings on the policy generally on March 29, 31, April 29, May 7, 10, and 11, 1993. *Id.* at 144 n.137 (citing *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. 255-56 (1993)). Oversight hearings on the Administration’s July 19, 1993 policy were held on July 20, 21, and 22, 1993. *Id.* (citing *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. 255-56 (1993)). Oversight hearings in the House were held July 21, 22, and 23, 1993. *Id.* (citing *Assessment of the Plan To Lift the Ban on Homosexuality in the Military: Hearings Before the Mil. Forces & Personnel Subcomm. of the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. (1993)).

doubt the wisdom of “Don’t Ask, Don’t Tell.”⁴²² Then-Rep. James Talent (R-Mo.) commented,

when I listened to the Chiefs and the Secretary yesterday, what I basically heard them saying was that they had resolved this debate in favor of essentially keeping the old policy, . . . [but] [w]hen I read the policy as a totality . . . [it] doesn’t seem consistent with what I understood the Secretary and the Chiefs have been saying about the policy.⁴²³

The sticking point was an inherent inconsistency that could be easily exploited by activist lawyers challenging the policy in court: If homosexuality is not a disqualifying characteristic, how can the armed forces justify dismissal of a person who merely reveals the presence of such a characteristic? Members of Congress recognized that such a policy would be unenforceable, unworkable, and indefensible in court.

With the exception of Clinton administration insiders trying to finesse what had become a hot-potato issue, and a few gay leaders who were willing to accept compromise in order to avoid codification of the ban on gays in the military,⁴²⁴ there were no significant constituencies advocating passage of “Don’t Ask, Don’t Tell” by Congress. Following extensive floor debate in both Houses, Congress rejected President Clinton’s “Don’t Ask, Don’t Tell” proposal with

422. See Woodruff, *supra* note 400, at 149-50 (citing *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. 255-56 (1993); *Assessment of the Plan To Lift the Ban on Homosexuality in the Military: Hearings Before the Mil. Forces & Personnel Subcomm. of the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. (1993)). Senators on both sides of the aisle, including SASC Chairman Sam Nunn (D-Ga.) and Dan Coats (R-Ind.), expressed concern that the courts would “find inconsistencies in the policies as written,” and interpret them in a way that would hinder the goal of maintaining military effectiveness and unit cohesion. *Id.* at 150.

423. *Id.* (quoting *Assessment of the Plan To Lift the Ban on Homosexuality in the Military: Hearings Before the Mil. Forces & Personnel Subcomm. of the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. (1993)).

424. Jim Abrams, Associated Press, *Nunn, Frank Trade Jabs Over Gays*, DETROIT NEWS, May 31, 1993, at 1A; Rick Maze, *Frank Talk About Compromise: Gay Congressman Backs “Don’t Ask, Don’t Tell” To Avert Gay-Ban Law*, ARMY TIMES, May 31, 1993, at 8. These articles reported on a version of “Don’t Ask, Don’t Tell,” proposed by Rep. Barney Frank (D-Mass.), which would have drawn a line between “on-base” and “off-base” behavior. The proposal was seen as a way to provide “political cover” to Clinton, but gay activists rejected it. Marvin Liebman of the radical group Queer Nation, for example, said in response, “We will not accept compromise. We will not tolerate appeasement.” *See id.*

overwhelming, veto-proof bipartisan majorities.⁴²⁵ Instead, Congress passed a law that continued the pre-Clinton (1981) policy of excluding homosexuals from the military.⁴²⁶ In so doing, members wisely chose language almost identical to the 1981 DoD Directives regarding homosexuality, which had already been challenged and upheld as constitutional by the federal courts.⁴²⁷ Congress allowed President Clinton's "interim policy" of not asking questions of inductees regarding homosexuality to stand—with the provision that a future Secretary of Defense can restore such questions, without additional legislation, if the needs of the service require it.⁴²⁸

Legislation dealing with intensely controversial issues does not become law by accident. In this case, Congress codified the policy in place long before Clinton took office. Contrary to frequent misstatements of the law then and now, there is no way that bipartisan, veto-proof majorities would have passed a law making it "easier" for homosexuals to serve. Rep. Steve Buyer (R-Ind.), then-Chairman of the HASC Personnel Subcommittee, underscored the point in a December 16, 1999, memorandum to his colleagues:

425. On Sept. 9, 1993, the Senate approved language in the FY 1994 Defense Authorization bill that codified the homosexual ban, using language almost identical to that in the Defense Department directive that had been in place since 1981. *See supra* note 404 and accompanying text. An amendment offered by Sen. Barbara Boxer (D-Cal.), which would have allowed the president to decide policy regarding gays in the military, was defeated on Sept. 9, 1993, on a bipartisan sixty-three to thirty-three vote. S. amend. 783 to S. 1298, 103d Cong. (1993). On Sept. 28, the House rejected a similar amendment, sponsored by Rep. Martin Meehan (D-Mass.) and Rep. Patricia Schroeder (D-Colo.), which would have stricken the Senate-approved language and expressed the sense that the issue should be decided by the President and his advisors. H. amend. 315 to H.R. 2401, 103d Cong. (1993). The Meehan/Schroeder amendment was defeated on a bipartisan roll-call vote, 264 to 169. *Id.*; *see also* Rowan Scarborough, *Schroeder, Meehan Hope To Alter Compromise on Gays in Military*, WASH. TIMES, Sept. 8, 1993, at A4; Rowan Scarborough, *Gay-Ban Deal Nearer to Becoming Law*, WASH. TIMES, Sept. 29, 1993, at A4; Rowan Scarborough, *Senators Reaffirm Gay Ban: Boxer's Challenge Rejected by 63-33*, WASH. TIMES, Sept. 10, 1993, at A1 [hereinafter Scarborough, *Senators Reaffirm Gay Ban*].

426. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670 (1993) (codified at 10 U.S.C. § 654 (2000)) (reprinted *infra* Appendix A).

427. *See* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); *see also* Scarborough, *Senators Reaffirm Gay Ban*, *supra* note 425.

428. *See* Pub. L. No. 103-160, § 571(d), 107 Stat. at 1673 (reprinted *infra* Appendix A).

Although some would assert that section 654 of Title 10, United States Code . . . embodied the compromise now referred to as “Don’t Ask, Don’t Tell,” there is no evidence to suggest that the Congress believed the new law to be anything other than a continuation of a firm prohibition against military service for homosexuals that had been the historical policy. The law, as well as accompanying legislative findings and explanatory report language, makes absolutely clear that known homosexuals, identified based on acts or self admission, must be separated from the military. After extensive testimony and debate, the Congress made a calculated judgment to confirm the continued bar to the service of homosexuals in the military. The case supporting the Congressional position is well documented and compelling.

. . . .

Those that claim that the “Don’t Ask, Don’t Tell” policy has failed simply do not understand the underlying law. The prospect of a homosexual openly serving in the military was never contemplated by the Congress and any policy that suggests that the military should be receptive to the service of homosexuals is in direct violation of the law.⁴²⁹

c. Conditional Compromise

In the course of debate, Congress considered whether the armed forces should be required to assume the risk that homosexuals would remain celibate. The Senate Report addressed the issue directly:

It would be irrational . . . to develop military personnel policies on the basis that all gays and lesbians will remain celibate. . . . [W]hen a person indicates that he or she has a propensity or intent to engage in homosexual acts, the armed forces are not required to wait until the person engages in that act before taking personnel action.⁴³⁰

429. Memorandum from Rep. Steve Buyer to Members of the Republican Conference (Dec. 16, 1999), *available at* www.cmrlink.org/cmrnotes/buyer121699.pdf.

430. S. REP. NO. 103-112, at 284 (1993) (maintaining that it would be “irrational . . . to develop military personnel policies on the basis that all gays and lesbians will remain celibate”).

The House Report also discussed the possibility of accommodating homosexuals, provided that they refrain from homosexual acts:

[A]ny effort to create as a matter of policy a sanctuary in the military where homosexuals could serve discreetly and still be subject to separation for proscribed conduct would be a policy inimical to unit cohesion . . . and discipline, unenforceable in the field, and open to legal challenge.⁴³¹

Instead of codifying the legally questionable “Don’t Ask, Don’t Tell” concept, Congress chose to adopt unambiguous statements that were understandable, enforceable, consistent with the unique requirements of the military, and devoid of the First Amendment conundrums that were obvious in President Clinton’s July 19 proposal.

The only concession made during this process in 1993 was omission of “the question” about homosexuality, which President Clinton had eliminated with his January 29, 1993 “interim policy.”⁴³² Congress nevertheless authorized restoration of routine inquiries about homosexuality by a future Secretary of Defense,⁴³³ who can (and should) restore “the question” without additional legislation. This concession did not nullify the language of the law itself, but it allowed the Congress, which was controlled by the Democrats at the time, to give political cover to President Clinton by calling the plan a “compromise” and referring to it as “Don’t Ask, Don’t Tell.” The politically expedient strategy has caused problems ever since.

Widespread misunderstandings about the rationale and meaning of the law have continued for four major reasons. First, in 1993, major media inaccurately reported that Congress had passed Clinton’s “compromise” plan to accommodate homosexuals in the military, known as “Don’t Ask, Don’t Tell.” Reports did not note that the statute actually said something quite different: “The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.”⁴³⁴ Second, President Clinton had an

431. H.R.REP. NO. 103-200, at 288 (1993).

432. See Memorandum from President Clinton to the Secretary of Defense, *supra* note 405.

433. See *supra* note 425 and accompanying text.

434. 10 U.S.C. § 654(a)(13) (1993); see *supra* note 425. *The New York Times* and *The Washington Post* stayed uncharacteristically silent on the historic House vote that occurred on September 28, 1993. A thorough search of contemporaneous news accounts reveals only two reports on the House vote for Senate-passed legislation codifying long-standing Defense Department regulations banning homosexuals from the military. See Michael Ross, *House Backs Modified Ban on Gays in Armed Forces*, L.A. TIMES, Sept. 29, 1993, at A11; Rowan

interest in *appearing* to deliver on his campaign promise to lift the ban on gays in the military, even though he had not done so. Disregarding the legal mandate to provide documents and briefings that “set forth” the provisions of the law, in December 1993, Clinton issued enforcement regulations that implement his original proposal, “Don’t Ask, Don’t Tell”—even though Congress had rejected that concept as unworkable.⁴³⁵ Third, the law passed by Congress is widely misunderstood because no one gave it a distinctive and appropriate name. Absent a name of its own, the law that Congress passed was frequently misidentified with the catchphrase “Don’t Ask, Don’t Tell,” which is easier to remember than the utilitarian “Public Law 103-160” or “Title 10, United States Code, Section 654.” And fourth, there was no individual author or descriptive “short title” for the legislation because the statutory language came directly from Defense Department regulations, which were promulgated in 1981.⁴³⁶

To clarify the difference between the law regarding homosexual conduct and President Clinton’s “Don’t Ask, Don’t Tell” enforcement policy, this Article hereinafter will refer to P.L. 103-160, Section 654, Title 10 as the 1993 law regarding homosexual conduct in the military, or “The Military Personnel Eligibility Act of 1993.”

d. The Purpose of the “Military Personnel Eligibility Act of 1993.”

Referring to 10 U.S.C. § 654 as the “Military Personnel Eligibility Act of 1993” is appropriate because the language of the law that Congress actually passed makes it clear that homosexuals are *not eligible* for service in the armed forces. It restates the rationale of the 1981 DoD Directives almost word for word,⁴³⁷ and sets forth fifteen points in support of the principle that homosexuality is incompatible with military service.⁴³⁸

Scarborough, *Gay-Ban Deal Nearer to Becoming Law*, WASH. TIMES, Sept. 29, 1993, at A4. Neither of these reports quoted key legislative language making it clear that the statute does not authorize accommodation of homosexuals in accordance with Clinton’s controversial “Don’t Ask, Don’t Tell” proposal. The only “compromise” involved was administrative, not substantive, since the law authorizes a reinstatement of the induction form “question” regarding homosexuality at any time.

435. See *supra* note 429.

436. See 10 U.S.C. § 654 (1993); S. REP. NO. 103-112, at 263–97 (1993); H.R. REP. NO. 103-200, at 287–90 (1993).

437. See *supra* note 404 and accompanying text.

438. Woodruff, *supra* note 400, at 135-42.

Prof. Woodruff explained the rationale behind the 1981 DoD Directives, which was carried over into the statute passed by Congress in 1993:

The [1981] policy was an exclusion policy premised upon the policy determination that “homosexuality is incompatible with military service.” . . . The policy operated on the logical conclusion that as a class, homosexuals engaged in or were likely to engage in homosexual activity. In order to reduce, if not eliminate, the instances of homosexual activity in military units, the policy excluded from service the category most closely associated with homosexual activity: homosexuals.⁴³⁹

The law states, “there is no constitutional right to serve in the armed forces,” and affirms that military life is fundamentally different from civilian life.⁴⁴⁰ Military society “is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior that would not be acceptable in civilian society.”⁴⁴¹ Military standards of conduct “apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.”⁴⁴²

The law also distinguishes itself from the July 19 “Don’t Ask, Don’t Tell” policy by affirming “[t]he prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.”⁴⁴³

The 1981 policy required separation of persons found to be engaging in homosexual acts, but also those who disclosed by their own statements that they were homosexuals within the meaning of the DoD Directives.⁴⁴⁴ The statute does the same.⁴⁴⁵ Prof. Woodruff explained:

The admission of homosexuality placed the soldier in an excluded class; a class defined by conduct or the propensity to engage in conduct the military determined was inimical to good order, morale, unit cohesion, and ultimately, combat effectiveness. Because the definition of homosexual was tied to sexual conduct rather than to amorphous concepts of sexual

439. *Id.* at 132-33 (citation omitted).

440. 10 U.S.C. § 654(a)(2), (a)(8) (reprinted *infra* Appendix A).

441. *Id.* § 654(a)(8)(B) (reprinted *infra* Appendix A).

442. *Id.* § 654(a)(10) (reprinted *infra* Appendix A).

443. *Id.* § 654(a)(13) (reprinted *infra* Appendix A).

444. *See supra* note 404 and accompanying text.

445. *See* 10 U.S.C. § 654(b)(2) (reprinted *infra* Appendix A).

tendencies, preferences, or orientation, the policy presumed that one who claimed to be a homosexual has, will, or was likely to engage in the conduct that defines the class.⁴⁴⁶

As was the case with the 1981 Directives, the 1993 homosexual conduct law allows a military person to “rebut the presumption” of homosexual conduct, but only under narrow circumstances—i.e., a service member says or does something entirely out of character while intoxicated, or to escape military service. In general, however:

Discharging soldiers based solely upon their self-identification as a homosexual without additional evidence of homosexual conduct avoided the necessity for intrusive investigations and inquiries into the soldiers’ sexual practices. Furthermore, because it is reasonable to believe homosexuals will engage in the conduct that defines the class, discharging those who claim to be homosexuals served the goal of preventing the disruption and adverse impact upon unit readiness, morale, and discipline that homosexual conduct within the military environment causes.⁴⁴⁷

The “Military Personnel Eligibility Act” recognized the need for military people to be always ready for possible deployment worldwide to a combat environment. The statute also respects the power of sexuality and the desire of human beings for sexual modesty, even when they must accept living conditions offering little or no privacy.

In gender-neutral terms, the law states that *persons* living in conditions of “forced intimacy” should not have to expose themselves to *persons* who might be sexually attracted to them.⁴⁴⁸ To the greatest extent possible, the same principle applies to the housing of men and women in the military.

Prof. Woodruff noted that the statute’s findings reveal several important principles that remain unchanged and support the statute’s legitimacy:

First, Congress was acting pursuant to a clear grant of constitutional power to establish the qualifications and conditions of service in the military. Second, American society demands unique rules that may not be the same as those found in other countries or in civilian society. Third, Congress made clear the statutory policy was aimed at creating and preserving

446. Woodruff, *supra* note 400, at 134.

447. 10 U.S.C. § 654(b)(1)(A)–(D).

448. *Id.* § 654(a)(11), (12).

military effectiveness and cohesion. Noticeably absent from the findings section is any indication that military readiness was being balanced against the individual interests of homosexuals who wished to serve. In other words, combat effectiveness, not accommodation of homosexuals, either individually or as a class, was the purpose of the statute. Fourth, Congress set out the factual predicate for the long-standing professional military judgment that homosexuality is incompatible with military service and carried that principle forward into the new law. Both the House and Senate reports specifically note that the statute recognizes and adopts the principle that homosexuality is incompatible with military service.⁴⁴⁹

The “Military Personnel Eligibility Act” defines homosexual conduct but avoids using the vague phrase “sexual orientation.” As explained by Professor Woodruff:

Significantly, Congress did not say that “sexual orientation” was a private matter or that it was a benign, non-disqualifying factor. The law did not define “sexual orientation” or try to artificially separate homosexual orientation from homosexual conduct. . . . Equally as important, Congress made no mention of passing a law to accommodate homosexuals or creating a situation where they could serve under color of law like the July 19, [1993] policy contemplated.⁴⁵⁰

It is unfortunate that constant, inaccurate references to the law as “Don’t Ask, Don’t Tell” have perpetuated confusion about its meaning. As a result of this mislabeling, many young people who are homosexual are being misled about their eligibility to serve.

2. Enforcement Regulations Inconsistent with the Law

a. The “Don’t Ask, Don’t Tell” Policy/Enforcement Regulations

President Clinton signed the “Military Personnel Eligibility Act” on November 30, 1993, as part of the National Defense Authorization Act for Fiscal Year 1994.⁴⁵¹ Two months later, he released enforcement regulations, known as the “Don’t Ask, Don’t Tell” policy, which are inconsistent with

449. Woodruff, *supra* note 400, at 153 (citations omitted).

450. *Id.* at 154-55 (citations omitted).

451. Pub. L. 103-160, § 571, 107 Stat. 1670 (1993) (codified at 10 U.S.C. § 654 (2000) (reprinted *infra* Appendix A)).

the law.⁴⁵² It is significant to note that the DoD news release announcing regulations to enforce 10 U.S.C. § 654 made reference to the “Don’t Ask, Don’t Tell” policy announced by President Clinton on July 19, 1993. The release and accompanying documents claimed that the enforcement regulations were “consistent” with the law, but they were actually written to implement Clinton’s “Don’t Ask, Don’t Tell” proposal, which was not “consistent” with the law at all.⁴⁵³ Few members of the media noticed (or chose to write about) the glaring discrepancy, which has been the source of confusion and controversy ever since.⁴⁵⁴

Prof. Charles Moskos, the respected military sociologist who proposed the “Don’t Ask, Don’t Tell” idea in 1993, noted in a *Wall Street Journal* article that “[t]he Pentagon policies are, in fact, somewhat more lenient than the language of the statute.”⁴⁵⁵ Indeed, the key passage in the Clinton Administration’s inconsistent interpretation of the law, as stated in this regulatory language, was an attempt to redefine its meaning to fit Clinton’s July 19, 1993, proposal: “Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.”⁴⁵⁶

The December 22, 1993, news release, an overview, and a memorandum from Defense Secretary Les Aspin to the Service Secretaries directing them to implement the new policy, which referred to “the policy as announced by President Clinton on July 19, 1993,”⁴⁵⁷ simply overlooked the fact that Congress had foreseen problems with that concept and rejected it. The plain language of the statute is not based on the vague phrase “sexual orientation.” It is based on conduct.⁴⁵⁸

In effect, the DoD attempted to help Clinton deliver on his campaign promise to gay activists by simply redefining the law and calling it “Don’t Ask, Don’t Tell.” The Pentagon also failed to comply with the legal

452. See *supra* note 417 and accompanying text.

453. See DoD News Release No. 605-93, *supra* note 417 (announcing regulations to “implement the policy that was announced by President Clinton in July”; claiming that the new directives were “fully consistent with the National Defense Authorization Act for Fiscal Year 1994”).

454. Rowan Scarborough, *Joint Chiefs Were Muzzled on Gay Policy*, WASH. TIMES, Jan. 3, 1994, at A1.

455. Charles Moskos, *Don’t Knock “Don’t Ask, Don’t Tell,”* WALL ST. J., Dec. 16, 1999, at A22.

456. See Dep’t of Defense Directive No. 1332.14, *supra* note 417, at encl. 3 ¶ E3.A1.1.8.1.1.

457. See DoD News Release No. 605-93, *supra* note 417.

458. Woodruff, *supra* note 400, at 168 n.255.

requirement that entering servicemembers should be informed of the law, 10 U.S.C. § 654, which excludes homosexuals from the military. A subsequent amendment to the DoD Directives changed the wording of the quoted sentence slightly but still used the phrase “sexual orientation,” which Congress pointedly had not used in the statutory language because it was so vague. The Clinton administration’s regulatory interpretation reads: “A person’s sexual orientation is considered a personal and private matter, and is not a bar to service entry or continued service unless manifested by homosexual conduct in the manner described in paragraph B.8.b., below.”⁴⁵⁹ Current briefing materials and training manuals still do not include the actual text of the law, or accurate summaries of its meaning. Instead, instructional materials keep repeating the “Don’t Ask, Don’t Tell” mantra: “Sexual orientation is considered a personal matter and is not a bar to military service unless manifested by homosexual conduct.”⁴⁶⁰

b. The United States Court of Appeals for the Fourth Circuit

In 1996, the United States Court of Appeals for the Fourth Circuit looked beyond the “Don’t Ask, Don’t Tell” catch-phrase and recognized the difference between Clinton’s policy and the law.⁴⁶¹ In a nine-to-four decision that denied the appeal of Navy Lt. Paul G. Thomasson, a professed homosexual who wanted to stay in the Navy, U.S. Circuit Judge Michael Luttig wrote about the exclusion law: “Like the pre-1993 [policy] it codifies, [the statute] unambiguously prohibits all known homosexuals from serving in the military”⁴⁶² Judge Luttig added that the Clinton Administration “fully understands” that the law and DoD enforcement regulations are inconsistent and has engaged in “repeated mischaracterization of the statute itself”⁴⁶³

459. See Dep’t of Defense Directive No. 1332.14, *supra* note 417, at encl. 3 ¶ E3.A1.1.8.1.1.

460. See, e.g., Center for Military Readiness, Army Comic Book Misrepresents Law on Gays in the Military (Jan. 14, 2002), <http://www.cmrlink.org/Hmilitary.asp?docID=112> (describing an Army comic book titled “Dignity and Respect: A Training Guide on Homosexual Conduct Policy”); Joel P. Engardio, *The Adventures of Capt. GayMan*, S.F. NEWS WEEKLY, Aug. 22, 2001, available at <http://www.sfweekly.com/2001-08-22/news/the-adventures-of-capt-gayman/print>; Office of the Chief of Public Affairs, U.S. Army, *Questions and Answers About Army’s Policy on Homosexual Conduct*, HOT TOPICS, Winter 2000, at 6, available at <http://www.army.mil/soldiers/HotTopics/winter00.pdf>.

461. Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).

462. *Id.* at 937 (Luttig, J., concurring).

463. *Id.* at 939.

Actually overruling the DoD enforcement regulations was not within the purview of the Court. Still, the Fourth Circuit's decision in *Thomasson*, affirming the constitutionality of the law, should have prodded the Administration to correct inconsistencies in its administrative policy. But this was the Clinton Administration, which was fully committed to accommodating homosexuals in the military, one way or another.

c. Confusion Caused by "Don't Ask, Don't Tell"

The difference between what should be called the "Military Personnel Eligibility Act" and the Clinton enforcement policy explains why factions on both sides of the issue are critical of "Don't Ask, Don't Tell." Even though Congress rejected, with good reason, the "Don't Ask, Don't Tell" concept in 1993, the Clinton Administration inscribed it in enforcement regulations that remain in effect today.

Activists keep complaining that "Don't Ask, Don't Tell" does not work. The most relevant question is, "Work to do what?" If the goal is to allow homosexuals to serve, Clinton's permissive "Don't Ask, Don't Tell" regulations do not go far enough. But if the goal is to preserve military morale, discipline, and readiness for combat (and it is), then the Clinton policy goes too far—in the wrong direction.

Describing the law as "Don't Ask, Don't Tell" effectively slanders the statute. The result is widespread confusion and inconsistent enforcement. Whether intended or not, the unnecessary confusion gives an advantage to activists who want to repeal both the policy and law, in order to achieve the goal of open homosexuality in the military.

When President George W. Bush took his oath of office in 2001, he assumed the obligation to enforce all laws, including the 1993 law regarding homosexual conduct. President Bush is not obligated to retain the enforcement regulations of his predecessor. Because the "Don't Ask, Don't Tell" regulations are inconsistent with the law, President Bush should have directed the Secretary of Defense, early in his administration, to eliminate and replace them with enforcement regulations that include the language and truly reflect the intent of the statute.

The Department of Justice has successfully defended the constitutionality of the law in several cases, but the Bush Administration has done little to improve understanding and enforcement of the law. Unnecessary confusion has continued since December 1994, even though the "Military Personnel Eligibility Act of 1993" mandates "Entry Standards

and Documents” and “Required Briefings” that accurately describe the language and meaning of the statute.⁴⁶⁴

That mandate could be fulfilled by simply providing to potential enlistees and military personnel the actual text of the law and its legislative history, as set forth concisely in the House and Senate Reports issued in support of the 1993 legislation. This would help to clear up widespread confusion about potential enlistees’ eligibility to serve, and be a significant improvement over the convoluted instructional materials prepared by the Department of Defense to explain Bill Clinton’s inexplicable “Don’t Ask, Don’t Tell” policy. Activist groups and the Department of Defense should stop misleading young people about their eligibility to serve in the military. Practicing homosexuals are among many groups of people who may serve their country in many ways but who remain ineligible to serve in uniform.⁴⁶⁵

3. Campaign To Repeal the Law

a. Legal Efforts Post-*Lawrence v. Texas*

On June 26, 2003, in the controversial *Lawrence v. Texas* decision,⁴⁶⁶ the Supreme Court overturned *Bowers v. Hardwick*⁴⁶⁷ and invalidated a Texas law regarding private, consensual sodomy.⁴⁶⁸ The decision excited homosexual activist groups because several members of the Court quoted foreign court rulings that had been cited in an *amicus* brief filed by the United Nations’ High Commissioner for Human Rights, Mary Robinson.⁴⁶⁹

The Robinson *amicus* brief cited one such ruling, handed down by the European Court of Human Rights in Strasbourg, France, which upheld gay rights in Ireland. In 1996, the same European Court quoted by Justice Kennedy in the *Lawrence* decision ordered Britain to repeal all restrictions

464. See 10 U.S.C. § 654 (c)–(d) (2000) (reprinted *infra* Appendix A).

465. Henry Levins, *Military Bans Go Far Beyond Gays*, ST. LOUIS POST-DISPATCH, Feb. 8, 1993.

466. *Lawrence v. Texas*, 539 U.S. 558 (2003).

467. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

468. *Lawrence*, 539 U.S. at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

469. See *id.* at 573; Brief of Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interights, the Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights as Amici Curiae Supporting Petitioners at 10, *Lawrence v. Texas*, 539 U.S. 558 (2004) (No. 02-102), 2003 WL 164151.

on homosexuals in the military.⁴⁷⁰ In a January 2003 treatise posted on the website of Human Rights Watch,⁴⁷¹ the \$14 million international activist group signaled its intent to use both European Court decisions and international law as battering rams to bring down all restrictions on open homosexual service in the military.⁴⁷²

The Bush Administration vigorously and successfully defended the law, resulting in three legal victories in 2006. *Cook v. Rumsfeld*, filed by the Servicemembers Legal Defense Network on behalf of twelve former servicemembers, was dismissed by U.S. District Judge George A. O'Toole, Jr., on April 24, 2006.⁴⁷³ Also, in April 2006, U.S. District Judge George Schiavelli dismissed a lawsuit brought by the Log Cabin Republicans on behalf of anonymous past and present servicemembers, due to a lack of names in the complaint.⁴⁷⁴ And on July 26, 2006, U.S. District Judge

470. See *Lustig-Prean & Beckett v. United Kingdom*, 29 Euro. Ct. H.R. 548, 587 (1999) (finding that plaintiffs were wrongly discharged "on the grounds of their homosexuality"); *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493, 523 (1999) (finding that the applicants were denied "respect for their private lives" when dismissed from military service on the grounds of their homosexuality).

471. *Human Rights Watch: Defending Human Rights Worldwide*, <http://www.hrw.org>; see also *Lawrence v. Texas: Constitutional Right to Privacy of Gays and Lesbians in the United States*, July 2, 2003, available at <http://www.hrw.org/press/2003/07/hrw-amicusbrief.htm>.

472. See Human Rights Watch, Human Rights News, U.S. Military's "Don't Ask, Don't Tell" Policy Panders to Prejudice (Jan. 23, 2003) [hereinafter Human Rights Watch News Release], available at <http://www.hrw.org/press/2003/01/us012303.htm>; HUMAN RIGHTS WATCH, UNIFORM DISCRIMINATION: THE "DON'T ASK, DON'T TELL" POLICY OF THE U.S. MILITARY 38-45 (Jan. 2003) [hereinafter HUMAN RIGHTS WATCH: UNIFORM DISCRIMINATION], available at <http://www.hrw.org/reports/2003/usa0103/USA0103.pdf>.

473. See *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (D. Mass. 2006) (granting government's motion to dismiss), *reh'g denied*, 2006 WL 2559766, No. 04-12546-GAO, slip op. at *1 (D. Mass. Sept. 5, 2006), *appeal argued sub nom.*, *Cook v. Gates*, No. 06-2313 (1st Cir. argued Mar. 7, 2007); see also Denise LaVoie, *Judge Tosses "Don't Ask, Don't Tell" Suit*, ASSOCIATED PRESS, Apr. 12, 2006, available at <http://abcnews.go.com/US/print?id=1885164>; Shelly Murphy, *"Don't Ask, Don't Tell" Suit Dismissed*, BOSTON GLOBE, Apr. 25, 2006, at B1; Associated Press, *Gay Veterans Challenge "Don't Ask,"* AIR FORCE TIMES, Nov. 14, 2006, available at <http://www.airforcetimes.com/print.php?f=1-292925-2356305.php>.

474. *Log Cabin Republicans v. United States*, No. 04-08425 (C.D. Cal. Mar. 2006) (dismissing complaint for lack of standing), *refiled sub nom.*, *Nicholson v. United States*, No. 04-08425 (C.D. Cal. May 2, 2006); see also Bob Egelko, *Suit Challenging "Don't Ask" Dismissed for Lack of Names*, S.F. CHRON., Apr. 5, 2006, at B2.

Ronald B. Leighton dismissed a challenge filed in Washington by an Air Force Reserve nurse and lesbian, Maj. Margaret Witt.⁴⁷⁵

All courts are unpredictable, but the 1993 homosexual conduct law should continue to withstand constitutional challenge for four basic reasons: (1) the federal courts have historically ruled with “deference to the military” in such matters; (2) unlike the circumstances of *Lawrence*, there is no such thing as “privacy” in the military; (3) the validity of the statute regarding homosexual conduct does not hinge on the overturned *Bowers* precedent; and (4) the 1993 exclusion law and the Uniform Code of Military Justice (UCMJ) ban on sodomy applies to men and women in precisely the same way, so “equal protection” is not a valid issue.

Opening the military to professed homosexuals remains a key goal of a determined activist movement, which has worked relentlessly to repeal the homosexual conduct law since 1993. For purposes of clarity in future cases, it would help to administratively repeal the “Don’t Ask, Don’t Tell” regulations, while faithfully enforcing the 1993 homosexual conduct law.⁴⁷⁶

b. Legislative Strategy

Rep. Marty Meehan (D-Mass.), whose amendment to strike the law regarding homosexual conduct was defeated overwhelmingly in 1993,⁴⁷⁷ introduced legislation to repeal the statute in March 2005⁴⁷⁸ and again in March 2007.⁴⁷⁹ When first introduced, the bill gained a total of 122 co-

475. Witt v. U.S. Air Force, 444 F. Supp. 2d 1138 (W.D. Wash. 2006), *appeal docketed*, No. 06-35644 (9th Cir.); *see also* Gene Johnson, Associated Press, *ACLU Plans To Appeal Ruling on 19-Year AF Veteran*, SEATTLE POST-INTELLIGENCER (online ed.), July 27, 2006, http://seattlepi.nwsource.com/local/278980_suit27.html.

476. In *Able v. United States*, U.S. District Judge Eugene H. Nickerson struck down both the law and the “Don’t Ask, Don’t Tell” policy because Justice Department lawyers failed to justify numerous anomalies in the policy/enforcement regulations. *See Able v. United States*, 968 F. Supp. 850, 858-61 (E.D.N.Y. 1997), *rev’d*, 155 F.3d 628 (2d Cir. 1998). For example, the lawyers could not explain why the military could say that a certain characteristic (homosexuality) is unacceptable, but persons may join or stay in the military as long as they do not *say* they are homosexual. *See* 968 F. Supp. at 858-61. The Second Circuit Court of Appeals later upheld the law, *see* 155 F.3d at 628, but such an outcome is by no means assured in the future. To reduce that risk, the Clinton Administration’s “Don’t Ask, Don’t Tell” regulations, announced on December 22, 1993, should be administratively dropped.

477. H. amend. 316 to H.R. 2401, 103d Cong. (1993) (voting record available at <http://clerk.house.gov/evs/1993/roll460.xml>).

478. *See* H.R. 1059, 109th Cong., 1st Sess. (Mar. 2, 2005); *see also* Deborah Funk, *Lawmaker Pitches Bill To Let Gays Openly Serve*, AIR FORCE TIMES, Mar. 21, 2005.

479. H.R. 1246, 110th Cong., 1st Sess. (Feb. 28, 2007); *see also* Ted McKenna, “Don’t Ask Don’t Tell” Repeal Faces Long Odds, PR WEEK USA, Mar. 2, 2007, at 2.

sponsors, but did not make it past the House Armed Services Committee.⁴⁸⁰ Meehan is now Chairman of the House Armed Services Oversight and Investigations Subcommittee. The number of co-sponsors has increased on Meehan's bill, but many of the members signing on seem primarily critical of "Don't Ask, Don't Tell," the Clinton administration's policy and regulations that are inconsistent with the 1993 law.⁴⁸¹

There is no need for legislation to repeal the problematic enforcement regulations known by the catch-phrase "Don't Ask, Don't Tell." President Bush or the Secretary of Defense can eliminate that Clinton-era policy with a stroke of the pen. The statute is another matter, requiring an act of Congress to change the "Military Personnel Eligibility Act" that a Democratic Congress passed in 1993 with a veto-proof majority. Nothing has changed that would justify the turmoil that would occur in and outside of Congress if Meehan's legislation were seriously considered or passed.

c. Public Relations Campaign

The only thing that has changed since 1993 is an illusion of momentum for repeal of the law created by a skilled and persistent public relations campaign that began in 2003, the tenth anniversary of passage of the law. The campaign was energized by the Supreme Court's decision in *Lawrence v. Texas*,⁴⁸² which the Servicemembers Legal Defense Network predicted would help them to win the *Cook* case.⁴⁸³

Every four to six weeks, homosexual activist groups have generated some sort of "news" event, which usually gets national coverage when it appears (almost always) in the Associated Press and major papers such as the *New York Times* and the *Washington Post*. These stories, which rarely describe the law accurately, usually focus on "celebrity" (military) endorsers or human-interest stories, such as homosexuals who used to be in the military or gay students trying to enlist in the military.⁴⁸⁴ Other student

480. H.R. 1059, 109th Cong., 1st Sess. (Mar. 2, 2005) (co-sponsors and status available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.01059>).

481. See McKenna, *supra* note 479.

482. *Lawrence v. Texas*, 539 U.S. 558 (2003).

483. See Human Rights Watch News Release, *supra* note 471.

484. See, e.g., Joseph A. Slobodzian, *Walk-In Test Confirms Military's Gay Ban*, PHILA. INQUIRER, Aug. 2, 2006, available at http://calbears.findarticles.com/p/articles/mi_kmtpi/is_200608/ai_n16603720. The "Right to Serve" campaign of Soulforce, located in Lynchburg, Virginia, has organized visits to recruiting stations by homosexual men or women who say they want to enlist. See Soulforce, Right to Serve, <http://www.soulforce.org/righttoserve> (last visited Apr. 14, 2007). Camera crews and reporters are invited to witness the contrived events, which consume the time of recruiters and usually portray them in a negative light.

groups have protested the homosexual conduct law by trying to keep recruiters or ROTC units off of high school and college campuses—sometimes with anti-military demonstrations.⁴⁸⁵

Activist groups also have visited the military service academies⁴⁸⁶ and publicized an award given by the U.S. Military Academy's Department of English to a cadet writing a paper advocating the inclusion of gays in the military.⁴⁸⁷ In 2004 and 2005, a San Francisco-based group of Naval Academy graduates calling itself "USNA Out" (later changed to the "Castro Chapter") unsuccessfully demanded official recognition for a group of homosexual alumni.⁴⁸⁸

The public relations campaign has been advanced most often by periodic releases of various "studies," reports, or polls produced, sponsored, or influenced by the University of California, Berkeley-based Center for the Study of Sexual Minorities in the Military (CSSMM), now called the

485. See Joe Chenelly, *Frontline, Recruiters Stay Away: Protest Prompts Office Closing*, ARMY TIMES, May 30, 2005, at 3; Campus Antiwar Network, Open Letter from the Antiwar Movement to SFSU President Corrigan (Apr. 19, 2006), http://www.traprockpeace.org/campus_antiwar_network/index.php/2006/04 ("On Friday, April 14, [2006,] ten SFSU students protested military recruitment at the university's career fair. . . . You should be proud of students who will not condone hate against their peers by a homophobic and sexist military.").

486. See *Gay Riders To Challenge "Don't Ask, Don't Tell" at West Point*, ASSOCIATED PRESS, Apr. 26, 2006; Kristen Wyatt, *Protesters Object to Naval Academy Policy on Gays*, ASSOCIATED PRESS, Oct. 21, 2005.

487. Center for the Study of Sexual Minorities in the Military, West Pointer Wins First-Ever Military Award for Challenging Gay Ban (Aug. 9, 2006), http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2006_0808.htm; *Thesis Challenges Gay Policy*, ASSOCIATED PRESS, Aug. 9, 2006; Roger Brigham, *West Point Grad Takes Aim at DADT*, BAY AREA REPORTER (S.F.) (online ed.), Aug. 24, 2006, <http://ebar.com/news/article.php?sec=news&article=1108>. The Center for Military Readiness raised questions about the suitability of this award. Then-Cadet Raggio had every right to express his opinions, but the paper was thinly sourced and did not even cite or accurately describe the text of the 1993 law. See CMR Issues Analysis (Oct. 2006), available at <http://cmrlink.org/cmrnotes/analysisraggiothesis.pdf>.

488. See Gretchen Parker, *Gay Academy Alums To Apply Again for Official Recognition*, ASSOCIATED PRESS, Nov. 12, 2004; Molly Knight, *OK for Gay Group Sought: Naval Academy Alumni Resume Efforts for Chapter*, BALTIMORE SUN, Nov. 12, 2004, at 1B; Jamie Stiehm, *Gay Academy Alumni Seek Anti-Bias Policy: Graduate Association Board Insists No Such Action Is Needed*, BALTIMORE SUN, Nov. 29, 2005, at 5B; see also Gretchen Parker, *Naval Academy Alumni Association Rejects Gay Group*, ASSOCIATED PRESS, Dec. 2, 2004. Recognition was not granted because affiliate groups are organized geographically, not by affiliations of gender, race, service community, or other factors. An affiliated chapter for alumni who live in recreational vehicles is the exception that proves the rule.

Michael D. Palmer Center, and like-minded groups.⁴⁸⁹ A closer look at materials produced by the activist groups usually reveals questionable methodology and unsupported conclusions.

d. Surveys and Polls

In January 2007, retired Army Gen. John M. Shalikashvili, Chairman of the Joint Chiefs of Staff from 1993 to 1997, became a “celebrity endorser” for the gays-in-the-military cause by writing an op-ed for publication in *The New York Times*, a newspaper that has been in the forefront of efforts to repeal the 1993 homosexual conduct law.⁴⁹⁰ The General’s article drew attention to a December 2006 poll of 545 service members conducted by Zogby International, indicating that seventy-three percent of the respondents said they were “comfortable interacting with gay people.”⁴⁹¹

The only surprising thing about this innocuous question was that the favorable percentage was not closer to one hundred percent. The Zogby poll asked another, more important question that was not even mentioned in the news release announcing the poll’s results: “Do you agree or disagree with allowing gays and lesbians to serve openly in the military?” On that question, twenty-six percent of those surveyed “Agreed,” but thirty-seven percent “Disagreed.” The Zogby poll also found that thirty-two percent of respondents were “Neutral” and only five percent were “Not sure.”⁴⁹²

489. See *infra* notes 510-12 and accompanying text.

490. John M. Shalikashvili, Op-Ed, *Second Thoughts on Gays in the Military*, N.Y. TIMES, Jan. 2, 2007, at 17.

491. ZOGBY INTERNATIONAL, OPINIONS OF MILITARY PERSONNEL ON GAYS IN THE MILITARY, DEC. 2006, SUBMITTED TO AARON BELKIN, DIRECTOR, MICHAEL D. PALM CENTER [hereinafter ZOGBY POLL], available at <http://www.zogby.com/news/ReadNews.dbm?ID=1222>.

492. See *id.* at 14-15. Responses to this question revealed additional findings that received little notice:

Within military subgroups, the highest agreement rates [supporting gays in the military] were found among Veterans (thirty-five percent) and those having served less than four years (thirty-seven percent). The lowest acceptance rates were among Active Duty Personnel (twenty-three percent), officers (twenty-three percent), those serving between ten and fourteen years (twenty-two percent) and those serving more than twenty (nineteen percent). Active Duty Personnel were also among those with the highest disapproval rates (thirty-nine percent), as were those serving between fifteen and nineteen years (forty percent), those serving more than twenty (forty-nine percent), and officers (forty-seven percent).

Id. at 6.

If this poll were considered representative of military personnel, the twenty-six percent of respondents who wanted the law repealed could not compete with the combined sixty-nine percent of people who were opposed to or neutral on repeal. This minority opinion was hardly a mandate for radical change.

Polling organizations recognize that respondents who believe a policy is already in place are more likely to favor that policy, while those who know otherwise are less likely.⁴⁹³ Incorrect assertions that “homosexuals can serve in the military provided that they do not say they are gay” are probably skewing polls of civilians, who mistakenly believe that homosexuals are already eligible to serve, due to the “Don’t Ask, Don’t Tell” policy.

People in the military, however, are more likely to understand what the law is.⁴⁹⁴ In the most recent poll announced by the *Military Times* newspapers, in response to the question “Do you think openly homosexual people should be allowed to serve in the military?” thirty percent answered “Yes,” but fifty-nine percent answered “No,” and ten percent answered “No Opinion.”⁴⁹⁵ The same percentage—fifty-nine percent in opposition—was reported by the *Military Times* survey in the previous year.⁴⁹⁶

A closer look at the Zogby poll reveals more interesting details that should have been recognized by news media people reporting on it.⁴⁹⁷ First, the Zogby poll news release clearly states that it was designed in conjunction with Aaron Belkin, Director of the Michael D. Palm Center, formerly the Center for Sexual Minorities in the Military.⁴⁹⁸ This is an

493. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-135 (Commissioner Generated Finding 14) (citing ROPER ORGANIZATION, INC., ATTITUDES REGARDING THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES: THE PUBLIC PERSPECTIVE (Sept. 1992)).

494. See Robert Hoderne, *We Asked What You Think. You Told Us*, NAVY TIMES, Jan. 3, 2005, at 14-15 (citing the section on Race, Gender, Gay, Question 6), available at http://www.militarycity.com/polls/2004_chart3.php. Annual *Military Times* surveys are done by mailing questionnaires randomly to subscribers to the affiliated newspapers *Air Force Times*, *Army Times*, *Navy Times*, and *Marine Corps Times*. The polls tabulate only responses from active-duty personnel. Results are published in all four affiliated newspapers.

495. See Robert Hoderne, *Down on the War*, ARMY TIMES, Dec. 29, 2006, at 12-14. The *Military Times* survey was done by mailing questionnaires randomly to subscribers of affiliated newspapers, but the poll only tabulated responses (954) from active-duty personnel. Results were published in all four affiliated newspapers.

496. See *id.* (presenting bar graphs of polling results).

497. See ZOGBY POLL, *supra* note 491.

498. See *id.* The cover page and news release were titled “Zogby Poll: ‘Don’t Ask, Don’t Tell’ Not Working.”

activist group promoting homosexuals in the military.⁴⁹⁹ Second, the poll claims to be of 545 people “who have served in Iraq and Afghanistan (or in combat support roles directly supporting those operations), from a purchased list of U.S. Military Personnel.”⁵⁰⁰ However, the U.S. military does not sell or provide access to personnel lists. Due to security rules that were tightened in the aftermath of 9/11, personal details and even general information about the location of individual personnel is highly restricted.⁵⁰¹ Third, the apparent absence of random access undermines the credibility of the poll, which inflates the claim that, “The panel used for this survey is composed of over 1 million members and correlates closely with the U.S. population on all key profiles.”⁵⁰² Fourth, activists frequently claim that the greater comfort of younger people with homosexuals is evidence enough to justify changing the law; however, if that were the case, all referenda banning same-sex marriage would have been soundly defeated. On the contrary, the voters of several states have approved twenty-six of twenty-seven such referenda, often with comfortable majorities.⁵⁰³

499. See The Michael D. Palm Center, About Us, <http://www.palmcenter.org/about> (last visited May 10, 2007).

500. See ZOGBY POLL, *supra* note 491, at 2.

501. Memorandum from Deputy Secretary of Defense Paul Wolfowitz to Secretaries of the Military Departments et al. (Oct. 18, 2001) (addressing “Operations Security Throughout the Department of Defense”) (on file with author); Memorandum from Office of the Secretary of Defense, Administration and Management Director D.O. Cooke to DoD FOIA Offices (Nov. 9, 2001) (addressing “Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA)”) (on file with author). Zogby International did not respond to a telephone request from this author for more information on its selection of survey participants.

502. See ZOGBY POLL, *supra* note 491, at 2. Zogby’s polling sample is somewhat questionable, but “internal” data in the poll reveals interesting insights on the question of whether opinions among younger people might make it more acceptable to accommodate gays in the military. The Zogby poll seems to indicate that opinions on this issue have more to do with military occupation than they do with age. Active duty people in the younger and older ranks are more favorable to the idea, but the ones in the middle age and experience group, who are more likely to be involved in close combat situations, are more strongly opposed. It is possible that an objective poll of identified military personnel—similar to the official survey done by the Roper Organization for the 1992 Presidential Commission on the Assignment of Women in the Armed Forces—would show similar results. See ZOGBY POLL, *supra* note 491, at 14-15; see also *supra* note 492.

503. See Human Rights Campaign, State Prohibitions on Marriage for Same Sex Couples 1 (Nov. 2006), <http://www.hrc.org/TemplateRedirect.cfm?Template=/ContentManagement/ContentDisplay.cfm&ContentID=28225> (listing twenty-six states that have a voter-approved constitutional amendment prohibiting same-sex marriage and nineteen states that have a law prohibiting same-sex marriage). To date, Arizona is the only state in which voters have repudiated an attempt to amend a state constitution to ban same-sex civil marriage. See

e. The National Security Argument: Too Many Discharges of Homosexuals

Supporters of legislation to repeal the 1993 homosexual conduct law have tried to reframe their argument in terms of military necessity, rather than equal opportunity. The “national security” argument for gays in the military usually centers on the number of discharges of homosexual servicemen and women that have occurred and suggests that recruiting problems and shortages could be solved if only the military were open to professed homosexuals.⁵⁰⁴

A report done by the Government Accountability Office (GAO) early in 2005 provided statistical data on the number of “unprogrammed separations.”⁵⁰⁵ The GAO report essentially estimated the “replacement costs” of discharging and replacing homosexual service members from FY 1994 through FY 2003 to be approximately \$190.5 million.⁵⁰⁶

Dr. David Chu, Under Secretary of Defense for Personnel and Readiness, responded to the GAO report with a two-page memorandum.⁵⁰⁷ Figures cited by Dr. Chu indicated that discharges due to the homosexual exclusion policy between 1994 and 2003 amounted to only 0.37% of discharges for all reasons (about five percent of unplanned separations) during that period.⁵⁰⁸ There were, for example, 26,446 discharges for pregnancy; 36,513 for violations of weight standards; 38,178 for “serious offenses”; 20,527 for parenthood; 59,098 for “drug offenses/use”; and 9501 for homosexuality.⁵⁰⁹

CNN.com, America Votes 2006, Key Ballot Measures, <http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/> (reporting on the failure of Arizona Proposition 107 on November 7, 2006).

504. John Henren, *Ban on Gays in Military Assailed*, L.A. TIMES, Feb. 25, 2005, at A24; Josh White, *“Don’t Ask” Costs More Than Expected*, WASH. POST, Feb. 14, 2006, at A04; John Files, *Military’s Discharges for Being Gay Rose in ‘05*, N.Y. TIMES, Aug. 15, 2006, at A17.

505. See generally GOV’T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD’S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED (Feb. 2005) [hereinafter GAO, FINANCIAL COSTS CANNOT BE ESTIMATED], available at <http://www.gao.gov/new.items/d05299.pdf>.

506. *Id.* at 3.

507. Memorandum from Dr. David Chu, Under Secretary of Defense for Personnel & Readiness, to Derek Stewart, Director of Defense Capabilities and Management at the GAO (Feb. 7, 2005), reprinted in GAO, FINANCIAL COSTS CANNOT BE ESTIMATED, *supra* note 505, at 42-43.

508. Memorandum from Dr. David Chu, *supra* note 507.

509. GAO, FINANCIAL COSTS CANNOT BE ESTIMATED, *supra* note 505, at 42.

The Berkeley-based Center for the Study of Sexual Minorities in the Military (CSSMM) was not satisfied with the \$190 million dollar estimate. CSSMM Executive Director Aaron Belkin organized a “Blue Ribbon Commission,” which he chairs.⁵¹⁰ This non-governmental “Blue Ribbon Commission” claimed in a February 2006 report that the GAO estimate of “replacement costs” was too low.⁵¹¹ The CSSMM argued that a more accurate estimate of the costs of discharges for homosexuality would be \$363 million—approximately \$173.3 million, or ninety-one percent higher, than the GAO estimate.⁵¹²

The Comptroller General responded by addressing a letter to Sen. Edward Kennedy (D-Mass.) on July 13, 2006, which “stood by” the original GAO estimate.⁵¹³ The entire debate about numbers generated publicity, but it missed the point. The cost of personnel losses related to the homosexual conduct law, whatever it is, could be reduced to near-zero if all potential recruits were fully and accurately notified that the 1993 law means that homosexuals are not eligible to serve. It is bad policy to enforce a regulatory policy such as “Don’t Ask, Don’t Tell,” which misinforms potential recruits about the conditions of eligibility and encourages people to be less than honest about their homosexuality—only to be subject to discharge later.

The GAO document provided useful information, but you do not get the right answers if you do not ask the right questions. The issue is not “replacement cost.” It is the cost of recruiting and training individuals who are not eligible to serve in the military because they are homosexual.

f. Contradiction: Too Few Discharges Due to the War

Many of the same people who claim that the military is losing too many homosexual personnel simultaneously make a contradictory claim:

510. FRANK J. BARRETT ET AL., THE PALM CENTER, FINANCIAL ANALYSIS OF “DON’T ASK, DON’T TELL”: HOW MUCH DOES THE GAY BAN COST?, at 1, 3 (Feb. 2006), *available at* <http://www.palmcenter.org/files/active/0/2006-FebBlueRibbonFinalRpt.pdf>. In addition to Prof. Belkin, this non-governmentally authorized, private group includes Lawrence Korb, Adm. John D. Hutson, USN (Ret.), and other activists supporting repeal of the law regarding homosexual conduct in the military. The report also acknowledges receiving help from the offices of Rep. Marty Meehan (D-Mass.) and Sen. Frank Lautenberg (D-N.J.), sponsors of legislation to repeal the 1993 law.

511. *Id.* at 2.

512. *Id.* at 3.

513. Letter from David M. Walker, Comptroller General of the United States, to Sen. Edward Kennedy (July 13, 2006), *available at* <http://www.gao.gov/htext/d06909r.html>.

Dismissals have declined because gays are needed to fight in the war.⁵¹⁴ A Congressional Research Service Report to Congress discussed this argument:

Some have claimed that discharges decline during time of war, suggesting that the military ignores homosexuality when soldiers are most needed, only to “kick them out” once the crisis has passed. It is notable that during wartime, the military services can, and have, instituted actions “to suspend certain laws relating to . . . separation” that can limit administrative discharges. These actions, know [sic] as “stop-loss,” allow the services to minimize the disruptive effects of personnel turnover during a crisis. However, administrative discharges for homosexual conduct are *not* affected by stop-loss. It can be speculated that a claim of homosexuality during a crisis may be viewed skeptically and under the policy would require an investigation. . . . [But if] such a claim were found to be in violation of the law on homosexual conduct, the services could not use “stop-loss” to delay an administrative discharge.⁵¹⁵

Two news releases from the Center for the Study of Sexual Minorities in the Military in September 2005 claimed to have evidence that homosexual service members were being retained to serve the needs of war, despite the homosexual conduct law.⁵¹⁶ But a spokesman at the Forces Command Army base at Fort McPherson, Georgia, where this evidence allegedly was found, has countered that argument with a clarification. According to the spokesman, if a soldier declares himself to be homosexual just prior to a deployment, an investigation ensues, lasting eight to ten weeks, which may not be completed prior to deployment. If the investigation does find that a

514. Associated Press, “*Don’t Ask*” Dismissals Drop in Wartime, WASH. POST, Mar. 24, 2004, at A22; Evelyn Nieves & Ann Scott Tyson, *Fewer Gays Being Discharged Since 9/11*, WASH. POST, Feb. 12, 2005, at A01.

515. CONGRESSIONAL RESEARCH SERVICE, HOMOSEXUALS AND U.S. MILITARY POLICY: CURRENT ISSUES 9-10 (May 27, 2005) (citations omitted), available at <http://www.fas.org/sgp/crs/natsec/RL30113.pdf>.

516. The Michael D. Palm Center, Researchers Locate Army Document Ordering Commanders Not To Fire Gays (Sept. 13, 2005), available at http://www.palmcenter.org/press/dadt/releases/researchers_locate_army_document_ordering_commanders_not_to_fire_gays; The Michael D. Palm Center, Pentagon Acknowledges Sending Openly Gay Service Members to War (Sept. 23, 2005), available at http://www.palmcenter.org/press/dadt/releases/pentagon_acknowledges_sending_openly_gay_service_members_to_war_acknowledgement_follows_discovery_of_regulat.

person is homosexual and therefore not eligible to serve, an honorable discharge is ordered, even if the person is deployed.⁵¹⁷

Anecdotes about homosexuals being allowed to remain in the military demonstrate the need for accurate information on what the “Military Personnel Eligibility Act” actually says. Commanders who do not understand or enforce the law should be given accurate information and support when taking steps to comply with it. Officials who choose to disregard this law should be held accountable in the same way that they would be for other failures to comply with duly enacted law.

g. Linguists and the Defense Language Institute

The “Don’t Ask, Don’t Tell” policy/regulations have caused widespread confusion and costly errors, such as the admittance of twelve homosexual language trainees to the Army’s Defense Language Institute (DLI) in Monterey, California. Two of the students were found in bed together, and the others voluntarily admitted their homosexuality.⁵¹⁸

All were honorably discharged.⁵¹⁹ Gay activist groups decried the dismissals as a loss for national security. The true loss occurred, however, when twelve students who were not eligible to serve occupied the spaces of other language trainees who could be participating in the current war. This wasted time and money was a direct result of President Clinton’s calculated

517. E-mail correspondence from Major Nate Flegler, Chief, Media Division, FORSCOM Public Affairs, to author (Nov. 15, 2005) (on file with author).

When a Guard or Reserve unit is mobilized to active duty, Forces Command Regulation 500-3-3 . . . identifies 35 different criteria that may prevent a Soldier from deploying with his or her unit. Examples include being overweight, facing criminal prosecution, or medical problems. . . . Should a Soldier declare him or herself homosexual, a process defined not by FORMDEPS but by other regulations is begun to determine the veracity of the assertion and whether the assertion constitutes grounds to discharge the Soldier from military service. This process can last eight to ten weeks. . . . While our spokesman may have been accurately quoted as saying, “they still have to go to war and the homosexual issue is postponed until they return to the U.S. and the unit is demobilized,” we wish to clarify that the Soldier’s case is not postponed until the unit returns. The review process continues while the unit is deployed and there is no delay in resolving the matter or discharging the Soldier if that is the resolution.

Id.

518. See Nathaniel Frank, “Don’t Ask, Don’t Tell” v. the War on Terrorism, NEW REPUBLIC, Nov. 18, 2002, at 18; Op-Ed, Alistair Gamble, *A Military at War Needs Its Gay Soldiers*, N.Y. TIMES, Nov. 29, 2002.

519. See Frank, *supra* note 518.

action to accommodate homosexuals in the military, despite prohibitions in the law.

Military specialty schools such as the DLI should not be misusing scarce resources to train linguists who are not eligible to serve in the military. The problem here is not the 1993 homosexual conduct law, but “Don’t Ask, Don’t Tell,” a set of inconsistent enforcement regulations that ought to be administratively eliminated.⁵²⁰

h. Alleged Shortages in Critical Specialties

In July 1994, the Center for the Study of Sexual Minorities in the Military (CSSMM) claimed the military was discharging valuable personnel in important military specialties. These included, for example, “49 nuclear, biological, and chemical warfare specialists; 212 medical-care workers; 90 nuclear power engineers; 52 missile guidance and control operators; 10 rocket, missile and other artillery specialists; 340 infantrymen; 88 linguists; and 163 law-enforcement specialists.”⁵²¹ The story was based on data that the CSSMM obtained from the Defense Manpower Data Center (DMDC) by means of a Freedom of Information Request.⁵²²

A closer look at the same data, obtained from the DMDC, reveals several disparities with those quoted in the “study” released by the CSSMM. For example, according to the official who provided the same DMDC data to this author, the category of persons in the “nuclear power” field does not necessarily mean that all the people in question were “nuclear power

520. On December 11, 2002, the Center for Military Readiness filed a formal Request for Assistance with the Army Inspector General, asking for an investigation of this waste of educational resources by authorities at DLI. No response was received. A subsequent Freedom of Information (FOIA) request, which did not ask for individual information, was addressed in a letter to the DoD Inspector General on November 17, 2003. The FOIA request was initially denied and later “answered” with largely blank pages marked with FOIA exemption code “(b)(7)(c).” That code is used when government officials refuse to confirm or deny that disciplinary proceedings have taken place.

521. Vince Crawley, *Hundreds of Discharged Gays Served in Critical Specialties*, AIR FORCE TIMES, June 12, 2004, available at http://docs.newsbank.com/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:AFNB:AFTB&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=103F530765572C3E&svc_dat=InfoWeb:aggregated4&req_dat=0F56A02D68496F45; see also Kim Curtis, *Report: Number of Gay Linguists Discharged Higher Than Thought*, ASSOCIATED PRESS, Jan. 13, 2005.

522. Defense Manpower Data Center, tables titled “Separations Due to Homosexual Conduct, FY 1998–2003,” and “Duty Base Facility Identifier, (FY 1998–2003)” (on file with author).

engineers.”⁵²³ As for the eighty-eight discharged linguists, the list of “Primary DoD Occupation Code” titles includes, at number 241, “Language interrogation,” an occupation from which a total of fifteen persons were separated due to homosexuality. But that is seventy-three persons short of the number of discharged “linguists” cited. How to account for the discrepancy? A Duty Base Facility Identifier Table, also provided by the DMDC, indicates that a total of seventy-three persons were separated from the Presidio of Monterey, where the Defense Language Institute is located.⁵²⁴ It is not clear how the CSSMM came up with the claim that “eighty-eight linguists” were discharged due to the “Don’t Ask, Don’t Tell” policy. Fifteen plus seventy-three, coincidentally, equals eighty-eight. There is no “linguist” category listed among the DMDC categories of occupations.⁵²⁵

Another round of news reports and hand-wringing commentaries centered on the loss of “fifty-four Arabic linguists” trained for military service.⁵²⁶ This number is in a column of personnel losses noted by the General Accountability Office (GAO) in 2005.⁵²⁷ The referenced number is broken down, however, by type and level of proficiency of the language trainees, which varied considerably. Again, the number of language trainees lost after any time in training could be reduced to near zero if the “Military Personnel Eligibility Act” were accurately explained and enforced by the Department of Defense.

i. The Urban Institute

In September 2004, the Urban Institute, a nonpartisan social policy and research organization, issued a report estimating that approximately 65,000 gay personnel are now serving in the U.S. military, and another one million gays and lesbians are veterans.⁵²⁸ Activists frequently cite this report when

523. *See id.*

524. *See id.*

525. *Id.*

526. *See, e.g.,* Mackubin Thomas Owens, *Ask, Tell, Whatever?: Gays-in-the-Military Comes Up Again*, NAT’L REV., Apr. 16, 2007; Debra Saunders, *Don’t Ask, Don’t Tell for the Devout*, WASH. TIMES, Mar. 17, 2007, at A13.

527. GAO, FINANCIAL COSTS CANNOT BE ESTIMATED, *supra* note 505, at 21.

528. GARY J. GATES, THE URBAN INSTITUTE, GAY MEN AND LESBIANS IN THE U.S. MILITARY: ESTIMATES FROM CENSUS 2000, at iii (2004), *available at* http://www.urban.org/UploadedPDF/411069_GayLesbianMilitary.pdf.

advocating repeal of the 1993 homosexual conduct law⁵²⁹—sometimes touting the data as if it is brand new and “solid.”⁵³⁰

The document, however, reveals questionable methodology, based on presumptions about the percentage of homosexuals in the general population and about the sexuality of persons interviewed by the census.⁵³¹ The speculative claim that three percent of women and four percent of men are homosexual was applied to 2000 census data on the number of persons of the same sex living in the same household—one of whom is a “veteran.”⁵³² Citing mathematical computations, the study speculated that household-mates of the same sex are homosexual.⁵³³ Next came the leaping conclusion that sixty-five thousand gay men and lesbians are serving or used to be in the military. This number is frequently trumpeted by gay activists and like-minded journalists, who overlook or fail to mention the fact that the census does not ask questions about sexual orientation or behavior. All estimates are based on sheer speculation, dressed up with a public relations spin.

The Urban Institute report, which was prepared in consultation with the activist Center for the Study of Sexual Minorities in the Military and the Servicemembers Legal Defense Network, is more like an urban legend than a serious piece of scholarship.

j. Harassment of Homosexuals

Contrary to exaggerated claims by activist groups, more than eighty percent of homosexual service members discharged since the law was enacted left the service not because of witch hunts rooting them out but because of voluntary statements admitting homosexuality. According to a

529. See Joanne Kimberlin, *Study Finds 65,000 Gay Men, Women in the Military*, VIRGINIAN-PILOT, Oct. 21, 2004, at A10; Denise M. Bonilla, *Don't Ask, Don't Tell: A Policy Under Fire*, NEWSDAY, Aug. 6, 2006, at G05.

530. See Deb Price, *UCLA Researcher Mines Data To Make Gays Visible*, DETROIT NEWS, Apr. 2, 2007, at 13A. In this article, self-identified gay columnist Deb Price praises Gary J. Gates, now affiliated with the progressive Williams Institute at the University of California at Los Angeles, for producing “solid numbers” that will help persuade Congress to lift the ban on homosexuals in the military. The public relations strategy at work here may be a reflection of what is known about surveys of public opinion. People are more likely to favor a policy if they think it is already in place. See *supra* note 493.

531. GAO, FINANCIAL COSTS CANNOT BE ESTIMATED, *supra* note 505, at 1-4. The report, which includes many caveats, concedes that “the census does not ask any questions about sexual orientation, sexual behavior, or sexual attraction (three common ways used to identify gay men and lesbians in surveys).” *Id.* at 1.

532. *Id.* at 3.

533. *Id.* at 1-4.

1998 DoD Task Force report, there were only four cases of anti-homosexual harassment reported since 1994.⁵³⁴ Two of those cases involved anonymous letters that could not be traced.⁵³⁵

In 1999, homosexual activists crafted a polemic campaign that focused on the brutal murder of Army Pfc. Barry Winchell, an alleged homosexual, at Fort Campbell, Kentucky, in July of that year.⁵³⁶ The savage killing of Pfc. Barry Winchell has been cited as evidence that more must be done to end “hate crimes” and harassment of homosexuals.⁵³⁷

The confessed killer, Pvt. Calvin Glover, assaulted Winchell in the barracks with a baseball bat on July 4, 1999, several hours after Winchell had beaten him in a drunken brawl.⁵³⁸ Evidence of Glover’s hostile attitude toward Winchell, who was involved with a transgender male nightclub entertainer who appeared to be a woman, was a factor in his trial and sentencing to life in prison.⁵³⁹ An Army Inspector General investigation cleared Fort Campbell commanders, but noted poor morale and a tolerance of underage drinking and anti-gay language by the senior sergeant in the

534. OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS, REPORT TO THE SECRETARY OF DEFENSE, REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT’S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY 6 (Apr. 1998) [hereinafter DO D TASK FORCE REPORT 1998], available at http://dont.stanford.edu/casestudy/appendixG_short.pdf; Dep’t of Defense News Release, No. 158-98 (Apr. 7, 1998).

535. DO D TASK FORCE REPORT 1998, *supra* note 534.

536. Jane McHugh, *Murder in the Barracks*, ARMY TIMES, Aug. 23, 1999, at 12; Jane McHugh, *Second Soldier Implicated in Possible Hate Crime*, ARMY TIMES, Aug. 2, 1999, at 8.

537. See Dep’t of Defense News Release No. 432-00, Department of Defense Issues Anti-Harassment Guidelines (July 21, 2000); Tom Ricks, *Pentagon Vows To Enforce “Don’t Ask, Don’t Tell,”* WASH. POST, July 22, 2000, at 1A (quoting Carol Battiste, head of a Pentagon panel set up to review the seven-year-old “Don’t Ask, Don’t Tell” policy in 2000). Battiste said that military leaders face a “dilemma” when they try to counter discrimination against homosexuals, who cannot identify themselves. *Id.* Ricks added, “One reason the military establishment continues to be uncomfortable with ‘Don’t Ask, Don’t Tell’ is that it is a policy that is purposely ambiguous, while military culture tends to value clarity.” *Id.* Actually, a policy that encourages deception is not workable in any institution. This is one of the reasons why members of Congress did not vote for the proposal known as “Don’t Ask, Don’t Tell.” Instead of wringing their hands about “ambiguity” and “dilemmas,” Pentagon officials should scrap the “Don’t Ask, Don’t Tell” regulations and issue informational materials that reflect the clarity of the law.

538. *Id.*

539. See David France, *An Inconvenient Woman*, N.Y. TIMES MAG., May 28, 2000, available at <http://www1.nytimes.com/library/magazine/home/index.html>; Brian Dunn, *Private Confessed to “Gay Bash” Slaying, Inmate Says*, ARMY TIMES, Sept. 13, 1999, at 16.

battalion. The report also noted the reluctance of battalion commanders to ask questions about matters involving alleged homosexuality.⁵⁴⁰ Military discipline requires constant awareness of what is happening in military units, throughout the chain of command. A policy such as “Don’t Ask, Don’t Tell” that discourages the asking of legitimate questions interferes with sound leadership. In this tragic case, a failure to ask questions apparently was a factor in the creation of a volatile situation that exploded with violence. Perpetrators of this crime have been rightly punished, but there is no need for additional legislation to stop harassment or murderous assaults—of anyone—in the barracks.

Some recent cases of harassment involving persons of the same sex deserve closer scrutiny and objective analysis of whether the “Don’t Ask, Don’t Tell” policy created conditions conducive to abuse. For example, the Associated Press reported that a drill sergeant at Fort Eustis, Virginia, faced molestation charges for forcing a trainee to dress as Superman and submit to sexual acts. A Fort Eustis spokeswoman, Karla Gonzalez, confirmed that Army Staff Sgt. Edmundo F. Estrada, thirty-five-years-old, was accused of indecent assault, having an inappropriate relationship with a trainee, and cruelty and maltreatment of subordinates.⁵⁴¹

Air Force Captain Devery L. Taylor was convicted and sentenced to twenty-eight to fifty years in prison for raping four men, allegedly with date-rape drugs. According to a report in *Air Force Times*, an investigator interrogating Taylor, now a convicted serial rapist, said that he would not

540. Jane McHugh, *1st Sgt. Faulted in Report on Gay Beating Death*, ARMY TIMES, July 31, 2000, at 8. This article reported on the Army Inspector General’s Investigation of the July 1999 beating death of Army Pfc. Barry Winchell. The report found that the command environment at Fort Campbell, Kentucky was generally positive, but the unit in which the killing occurred suffered from poor morale and a tolerance for underage drinking—a major factor in the case. According to *The Army Times*, the report also found that commanders were frustrated and confused by the “Don’t Ask, Don’t Tell” policy. *Id.*

[Some were] afraid to violate military law by retaining soldiers who admit homosexuality. But they are also afraid that some of these soldiers might be saying they are gay just to get out of the Army. Either way, commanders are reluctant to investigate. They fear that looking into the matter would only hurt unit and soldier morale.

Id.

541. *Fort Eustis Drill Sergeant Faces Charges of Molesting Trainees*, ASSOCIATED PRESS, Mar. 4, 2007. Sgt. Estrada pleaded guilty to the charges at his court-martial on April 23, 2007, to three counts of mistreating soldiers, as well as to violating regulations not to develop relationships with subordinates. Associated Press, *Sgt. Pleads Guilty to Sexually Harassing Trainees*, ARMY TIMES, May 7, 2007, at 45. He faces six months in prison, a bad-conduct discharge and reduction in rank. *Id.*

ask any questions about the man's sexual practices because such questions are not allowed. This statement demonstrated how misunderstandings about the 1993 homosexual conduct law help to create volatile conditions that undermine good order and discipline.⁵⁴² Sexual assault of any kind is wrong and especially demoralizing in a military setting, where people live in conditions of "forced intimacy" and are not free to change jobs if someone threatens them. Such misconduct should not be considered "off limits" to questioning just because it happens to occur between persons of the same sex.

k. Foreign Militaries

The Center for the Study of Sexual Minorities in the Military and other activist groups frequently point to the experiences of other countries, such as Great Britain, Canada, Australia, the Netherlands, and Israel, which have no restrictions on professed homosexuals in their militaries.⁵⁴³

The United Kingdom was ordered by the European Court of Human Rights to open its ranks to homosexuals in September 1999.⁵⁴⁴ There was some controversy in the Parliament, but instead of appealing or challenging the ruling, ultimately the nation complied—something the United States would be unlikely to do. Contrary to the notion that all has gone well, European newspapers have reported recruiting and disciplinary problems in the British military.⁵⁴⁵

542. See *Captain Sentenced to 50 Years for Raping 4 Men*, AIR FORCE TIMES, Mar. 12, 2007, at 15; *Officer Accused of Rape Says He Rejected Alleged Victim*, AIR FORCE TIMES, Mar. 5, 2007, available at <http://buzztracker.org/2005/01/19/cache/441692.html>. The March 5 article, reported from Eglin Air Force Base, Florida, reported that in a video of an interview with Taylor, shown during his February 22 court-martial, an Air Force Office of Special Investigations investigator told Taylor, "[It] doesn't concern me if it (the sexual encounter) was consensual . . . I'm not allowed to talk about your preferences. That has nothing to do with your military career as far as the people who do my job are concerned." *Id.* This was an astonishing statement for the investigator to have made, particularly in view of Capt. Taylor's convictions for raping four men.

543. See Aaron Belkin, *Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?*, PARAMETERS (U.S. Army War Coll. Q.), Summer 2003, at 108-19.

544. See *Lustig-Prean & Beckett v. United Kingdom*, 29 Euro. Ct. H.R. 548, 587 (1999); HUMAN RIGHTS WATCH: UNIFORM DISCRIMINATION, *supra* note 472, at 38; *Delight and Despair at Gay Ban Ruling*, BBC NEWS, Sept. 27, 1999, http://news.bbc.co.uk/2/hi/uk_news/458842.stm (reporting that the ruling of the European Court of Human Rights was "not binding on the UK Government").

545. See, e.g., BBC News, *Deepcut Army Sex Attacker Jailed*, Oct. 22, 2004, http://news.bbc.co.uk/1/hi/england/southern_counties/3634474.stm; Nicholas Hellen, *Navy Signals for Help To Recruit Gay Sailors*, TIMESONLINE (London), Feb. 20, 2005, <http://www.timesonline.co.uk/tol/news/uk/article516647.ece>; Tony Czuczka, Associated

Canada, Australia, and the Netherlands have cultures quite different from the United States⁵⁴⁶ and live under the protection of the American military. Prof. Charles Moskos has noted that nations without official restrictions on gays in the military are also very restrictive in actual practice. Germany, for example, dropped criminal sanctions against homosexual activities in 1969, but also imposed many restrictions on open homosexual behavior and imposed career penalties such as denial of promotions and access to classified information.⁵⁴⁷ Israel's situation differs from the United States because all able-bodied citizens, including women, are compelled to serve in the military. Israeli soldiers usually do not reveal their homosexuality and are barred from elite combat positions if they do.⁵⁴⁸

The CSSMM frequently claims that no problems have been experienced in all of the countries listed above and is critical of those who support the ban, demanding that opponents provide "empirical" evidence to support their case. The irony is that the CSSMM and other activist groups base most of their arguments on anecdotal information and opinion, largely gathered from like-minded sources.

In a letter to *Parameters* responding to a Summer 2003 article by Aaron Belkin, Maj. Joseph A. Craft, USMC, pointed out that the CSSMM Executive Director had based his case on interviews with only 104 "experts" in four countries—all of whom were advocates of gays in the military.⁵⁴⁹ Wrote Craft,

One of Belkin's key arguments is that Don't Ask, Don't Tell (DADT) is based on anecdotes and misleading surveys instead of

Press, *British Soldier Admits to Assault on Captive*, WASH. TIMES, Jan. 19, 2005, available at <http://www.buzztracker.org/2005/01/19/cache/441692.html>; Michael Evans, *War Blamed As 6,000 Quit Territorial Army*, TIMES (London), Oct. 30, 2005, at 2; Michael Evans, *Iraq Factor Takes Toll on the TA*, TIMES (London), Oct. 31, 2005, at 8. The reported abuse of male Iraqi soldiers with a forklift involved forced sexual acts, but details are not known because of court-ordered gag orders.

546. See, e.g., Kate Monaghan, *Dutch Political Party Wants To Normalize Pedophilia*, CNSNEWS.COM, July 26, 2006, <http://www.cnsnews.com/ViewSpecialReports.asp?Page=/SpecialReports/archive/200607/SPE20060726a.html>.

547. See, e.g., Otto Kreisher, *Few Armies Accept Homosexuals*, SACRAMENTO UNION, June 7, 1993, at A5.

548. See Tom Philpott, *In Israel: The Hard Reality—Gays Are Allowed To Serve in the Military but They Are Not Fully Accepted*, ARMY TIMES, Jan. 11, 1993, at 11; Tom Philpott, *Gay Israelis Avoid Ridicule, Get Ahead by Staying in Closet*, ARMY TIMES, Jan. 11, 1993, at 13; Charles Moskos, *Services Will Suffer If Used for Social Experiments*, RICHMOND-TIMES DISPATCH, Feb. 28, 1993, at F1.

549. Joseph A. Craft, Letter to the Editor, *Legitimate Debate or Gay Propaganda?*, PARAMETERS (U.S. Army War Coll. Q.), June 22, 2004, at 132.

quantitative evidence. . . . Yet Belkin's article is entirely anecdotal. It is nothing more than selected quotes from supposed experts who claim that homosexual integration has had no impact on unit cohesion or military readiness. A quick review of the author's endnotes, cross-checked with an internet search, reveals the questionable credentials and political leanings of most of these experts. At one point, Belkin refers to a 1995 Canadian government report, which supposedly indicates that lifting the ban on gays in the military had "no effect." However, his endnote does not cite the report but a "personal communication with Karol Wenek."⁵⁵⁰

The issue of homosexuals in the military is a major political question that has been dealt with through the political system, as established by the U.S. Constitution. Major decisions such as this should not be decided by international courts, federal courts in the United States, or by politicians who are misinformed about the nature of the 1993 law and the rationale behind it.

1. Religious Bias

Finally, advocates of gays in the military have attempted to fire up their cause by criticizing Marine Gen. Peter Pace, Chairman of the Joint Chiefs of Staff, who expressed his personal views regarding gays in the military and personal morality during an interview on March 11, 2007.⁵⁵¹ A wave of name calling and demands for an apology ensued, but Gen. Pace had no reason to apologize for a law duly enacted by Congress. The statute reflects the views of people who see the issue in moral terms, but it uses secular language emphasizing military discipline. Duly enacted laws—including prohibitions against lying, stealing, and murder—should not be repealed just because they coincide with religious principles and moral codes such as the Ten Commandments.

550. *Id.*

551. See, e.g., Aamer Madhani, *Top General Calls Homosexuality "Immoral,"* CHI. TRIB., Mar. 12, 2007, at 1; *Group Wants Gen. Pace Apology for Calling Gays "Immoral,"* ASSOCIATED PRESS, Mar. 13, 2007; Editorial, *Old Prejudice Dishonors New Military Generation,* USA TODAY, Mar. 14, 2007, at 10A; Elaine Donnelly, *Gen. Pace vs. PC Police,* WASH. TIMES, Mar. 18, 2007, at B3.

IV. CONCLUSION

A. The Military/Civilian Connection

Today's military is not a conservative institution. It is on the cutting edge of liberal cultural change. Many times in our history the military has advanced positive social change, especially in the area of civil rights. The armed forces were very much ahead of the civilian world in overcoming prejudice against minorities and promoting women to leadership positions at rates equal to or faster than men.⁵⁵²

Since 9/11, cultural change in the all-volunteer force has accelerated. We are accustomed to seeing female soldiers in fatigues, boots, and helmets, piloting aircraft, navigating ships, carrying weapons, and driving humvees in support of combat operations. We always knew that women were courageous, but never in our history have we seen so much evidence of bravery among servicewomen who are choosing to live—and in unprecedented numbers, die—in a man's very dangerous world. Women are in our military to stay, and no one is seriously suggesting otherwise.

Given the prominence of gender issues in today's military, it is wise to consider the cultural implications of the current course. Pentagon officials, feminist activists, politicians, media, and bureaucratic forces are uniting to push for elimination of all of women's exemptions from direct ground combat. Many of the same people expect officially mandated acceptance of professed homosexuals in the armed forces, with career penalties for anyone who dares to object or show resistance.

Some advocates attempt to wrap their agenda in the flag of military necessity, but the two social movements share the same hierarchy of values. Both movements assign higher priority to "equal opportunity" considerations than they do to the needs of the military. The advocates of these movements are asking the armed forces to pay any price, and carry any burden, in order to advance acceptance of their viewpoints and the career opportunities of a few.

If this paramount standard of review is adopted and applied consistently, the consequences inevitably will be felt not only in the military, but in the civilian world as well. In the matter of gays in the military, that is the

552. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-131 (Finding 4.24); Army, Navy, Marine Corps, and Air Force Responses to DACOWITS (Spring 2001) (on file with author); *see also* Defense Data Manpower Center and Service's Human Resource Staffs and Commands, Annual Report on Status of Female Members of the Armed Forces of the United States, FY 2002–2005, *available at* http://www.dtic.mil/dacowits/docs/feb2006/statusofwomenfinal_05.doc (last visited Apr. 21, 2007).

underlying objective. It is reasonable to ask, where is this powerful and respected institution taking us now?

1. What Our Military Says About Cultural Values

- a. Respect for Women

One of the biggest human interest news stories in recent years was the mysterious disappearance of eighteen-year-old Natalie Holloway, in 2005, during a high school graduation trip to Aruba. After months of controversy, in March 2006, Fox News correspondent Greta van Susteren—who “owned” the story—interviewed the prime suspect, eighteen-year-old Joran van der Sloot.⁵⁵³ Experts who watched the three-part interview thought that the young man came across as surprisingly credible and that he probably did not kill Natalie. Yet no one analyzed the broader implications and message conveyed by the young man’s defense. Joran van der Sloot claimed he was innocent because he left the intoxicated Natalie Holloway alone, late at night, on a beach in Aruba. His indifference and self-centered neglect that night did not violate any law. But it did say something about respect for women and the eroding values of Western Civilization. The parents of Joran, apparently, did not teach him a fundamental lesson: Good men protect and defend women. It is a concept that we purge from our culture at great risk.

In the summer of 1995, near downtown Detroit, Michigan, a 260-pound man, Martell Welch, brutally assaulted a 115-pound woman, Deletha Word, on the Belle Isle Bridge. Approximately forty people reportedly watched but did not intervene when Welch chased Word with a tire iron. The desperate woman fled and leaped off the bridge to her death.⁵⁵⁴ At the conclusion of Welch’s trial in April 1996, foreman William Brown announced the jury’s maximum verdict: second degree murder. Brown also made front-page news by reaffirming civilized cultural values. Repeating a simple maxim that he had learned at his mother’s knee, Brown conveyed a message that the jury intended to be heard by the young men of the city of Detroit: “Never hit a woman. You can’t go around battering young ladies. The people aren’t going to take it anymore.”⁵⁵⁵ With that unequivocal statement, the thirty-two-year-old security guard demonstrated civilized cultural values. If mothers everywhere taught the same lesson to their sons, violent crime rates would drop significantly.

553. *On the Record* (Fox News Broadcast Mar. 1–3, 2006).

554. Melinda Wilson, *Belle Isle Bridge Death Was Murder, Jury Says*, DETROIT NEWS, Apr. 30, 1996, at 1A.

555. *Id.*

In contrast to the two stories above, the campaign to force young women into or near the violence of close combat depends on psychological acceptance of the idea that men can and should place women in physical or mortal danger.⁵⁵⁶ Even in some forms of military training, men have to learn to “hit” female trainees and not think twice about it.⁵⁵⁷ Kate O’Beirne, as a member of the Presidential Commission and now an author, forcefully defended Western cultural values and civilization on the issue of violence against women. Feminist advocates had difficulty answering Commissioner O’Beirne’s compelling argument, which she restated in 2006:

Good men protect and defend women in the face of a physical threat. If men in uniform are going to be expected to be sex blind when it comes to protecting their comrades, American mothers will have to get to work instructing their sons that it’s okay to hit girls. Women have no “right” to serve in combat if their presence puts the men they serve with in jeopardy because these decent men are determined to protect the weaker sex. Instructors at the military’s [Survival, Evasion, Resistance & Escape (SERE)] school for pilots saw that male students reacted more negatively to the simulated torture of female trainees and concluded that the men would have to be trained to inure themselves to the plight of women in pain.⁵⁵⁸

Feminists recognize the vulnerability of women when they are concerned with the plight of women who are victims of domestic abuse. . . . Their position on integrating combat ranks puts them in the position of saying that violence against women is a terrible

556. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-127 (Finding 4.13). The commission established that different assignment policies—allowing women the option of volunteering for close combat but not the burden of being involuntarily assigned—would have a deleterious effect on morale.

557. Pamela Martineau & Steve Weigand, *A Dad Soldiers On*, SACRAMENTO BEE, Mar. 9, 2005, available at http://dwb.sacbee.com/content/news/projects/women_at_war/story/12533035p-13388315c.html. An accompanying photo by Renee C. Byer shows 2nd Lt. Emily Morris in training at Fort Lewis, Washington. Lt. Morris is trying to break away from her instructor, Sgt. Keith Chessner, who has her pinned to a mat with his large hand throttling her neck. *Id.*

558. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-45–46 (Findings 1.48–1.50) (referencing SERE trainers’ testimony before the Commission on June 8, 1992).

thing unless it is at the hands of the enemy, in which case it's a welcome tribute to women's equality.⁵⁵⁹

b. Cultural Amnesia and the "New Chivalry"

Do we as a nation still believe that good men protect and defend women? The answer is unclear. In the military, traditional chivalry has been replaced with a peculiar form of "new chivalry."⁵⁶⁰ The new concept promotes professional paternalism, as defined and provided by "victim advocates" who get paid to help women who encounter problems in the brave, new, gender-free world.⁵⁶¹

The military service academies have become a prime market for professionally paternalistic Department of Women's Studies graduates who are seeking to become a growth service industry in the DoD and military bases everywhere.⁵⁶² Many officials in Congress, the Pentagon, and the

559. KATE O'BEIRNE, WOMEN WHO MAKE THE WORLD WORSE AND HOW THEIR RADICAL FEMINIST ASSAULT IS RUINING OUR SCHOOLS, FAMILIES, MILITARY, AND SPORTS 119-20 (2006). Mrs. O'Beirne is the Washington Editor of *National Review*.

560. Duke Selwyn, *The New Chivalry*, AMERICAN THINKER.COM, Jan. 5, 2006, http://www.americanthinker.com/2006/01/the_new_chivalry.html.

So, the great white knight of chivalry is supposed to be dead, slain by the feminist dragon of androgyny. . . . You see, while [the] old chivalry's habitat has been denuded, relegating it to a few pristine bastions of traditionalism, it has not left a void. It has been replaced. Replaced by a new chivalry Like the old chivalry, the new version involves social codes and social pressure to enforce them, but also much, much more. The new chivalry has also been written into law; it is embodied by affirmative-action and set aside programs that favor women, and by legislation such as the Violence Against Women Act (VAWA), which now serves as a vehicle through which to empower and fund feminist groups.

Id.

561. While misogyny or women hating is politically incorrect, misandry or men hating is socially acceptable. American Enterprise Institute scholar Christina Hoff Sommers notes that "gender feminists" relentlessly portray women as "victims" by frequently concocting evidence that cannot stand up to scrutiny. See CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? 11-25 (1994).

562. See DEFENSE TASK FORCE REPORT, *supra* note 10, at 11-19, 27. The Task Force Report recited a long list of officials and institutions that are available for the support of (alleged) victims of sexual harassment or assault. At all three military service academies, these include chaplains, psycho-therapists, medical staff and family support counselors, military and civilian "victim advocates," volunteer crisis support organizations and offices with various names, judge advocates who provide counsel and prosecutors on campus, associated civilian hospitals and law enforcement agencies, academy boards of visitors and

service academies are eager to establish ubiquitous “victim advocate” offices, staffed by professionals who vow to protect military women from the slightest form of harassment, real or imagined.

The same officials simultaneously promote the deliberate exposure of military women to extreme abuse and violence in close, lethal combat, where females do not have an equal opportunity to survive or to help fellow soldiers survive. Some observers think this is acceptable because the women volunteered for military service and knew what they were getting into. Indications are, however, that many female recruits are not being informed, prior to enlistment, that regulations no longer exempt women from assignments known to involve a “substantial risk of capture.”⁵⁶³ Nor are the female recruits being told that their “job description” might involve involuntary placement in ground-combat-located units, despite regulations requiring those units to be coded for men only.⁵⁶⁴ Army officials have been misleading members of Congress and female recruits about the possibility of involuntary placement in ground-combat-located units since 2004, primarily by playing word games in order to justify the

superintendents, plus numerous Defense Department officials charged to enforce DoD directives guaranteeing numerous rights to persons deciding to pursue legal remedies.

563. See Thomas, *supra* note 58; Kris Axtman, *Guard Recruiters Try Realism and Succeed*, CHRISTIAN SCI. MONITOR, Apr. 12, 2006, at 1 (reporting on a seventeen-year-old girl who tells a recruiter: “I don’t want to do the military thing. I don’t want to be trained or none of that.” . . . “I just want to go to college.” When the recruiter assured her that she “won’t be on the front lines because women are not allowed in combat positions,” the girl said, “OK, I want to go. I’m ready.”).

564. See also E-mail and telephone correspondence from Pfc. Stephanie Filus and her father to author (Jan. 2005–June 2006) (on file with author). Spec. Filus had served as an Army light wheeled vehicle mechanic for twelve years, but she had no desire to be placed in or near direct ground combat. Recruiters had assured her that that would never happen. But in December 2004, officers of the 101st Airborne at Fort Campbell, Kentucky, told Filus and several other female soldiers that their next deployment would involve placement in a forward support company (FSC), with an infantry company headed to Iraq. The local officers assured the female soldiers that they would be “assigned” to a support unit at the brigade level, so nothing would change. Filus was aware, however, that the FSC would be physically attached and collocated with an infantry maneuver battalion, despite the collocation rule. Her attempts to obtain a discharge prior to that deployment were denied, and she was sent to Fort Polk, Louisiana, for pre-deployment training. Filus finally obtained her discharge from the Army in May 2005, but only after she took the desperate and dangerous step of attempting suicide with pills in front of the commanding officer at Fort Polk.

illicit “employment” of women in certain support units that collocate, or embed, with all-male infantry battalions.⁵⁶⁵

The general public is confused and conflicted. Allegations of sexual abuse in the military inspire outrage, but news stories about unprecedented numbers of women killed and injured in the war are met with stoic and resigned acceptance. This reaction was presaged in 1992 by prisoner of war survival (SERE) instructors, who favored repeal of all exemption rules. The SERE trainers told the Presidential Commission that the culture would have to change before great numbers of women could be sent into combat.⁵⁶⁶ A type of “de-sensitization,” similar to coping mechanisms that are taught to men in training scenarios simulating abuse of female captives, would have to occur in the nation.⁵⁶⁷

565. See Cathy Booth Thomas, *Taken by Surprise: This Single Mom Joined the Army To Be a Cook. How Did She Become a POW?*, TIME, Apr. 7, 2003, at 64; Axtman, *supra* note 563.

566. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-45 (Finding 1.50 (referencing June 8, 1992 testimony of SERE trainers regarding heightened sensitivity of men when women are subjected to simulated abuse)); *id.* at C-46 (Finding 1.51 (also referencing testimony of SERE trainers, who said that there was no sexual abuse of male U.S. POWs substantiated from the Vietnam conflict forward)).

567. *Id.* at C-45–C-46 (Findings 1.50–1.51); *id.* at 103 (Trip Report Summary of Commissioner Elaine Donnelly). During her two-day trip to Fairchild AFB, Washington, August 9–11, 1992, Donnelly talked to instructors about their realistic “rape scenario,” in which male trainees are taught to manage more intense feelings when a female colleague is threatened with sexual assault or worse, so that enemy captors cannot exploit those emotions. Donnelly described parts of the SERE training that she saw at Fairchild Air Force Base during her visit:

Without knowing what to expect, I found myself locked in a cramped black box that was both physically and psychologically uncomfortable. I also participated in and witnessed interrogation exercises designed to suggest but not duplicate the physical and emotional stress of being a POW. As the night wore on, a sense of cultural dissonance began to overcome the camp’s logic of equality in the simulation of brutality.

A woman I watched being interrogated was very capable, but she was totally in the power of a man much stronger than she. What I saw was an unmistakable element of inequality that—in the opinion of many Commission witnesses—cannot be overcome by peacetime training programs or psychological techniques. As the interrogation continued, it was easy to visualize the possibility of sexual abuse as well as physical harm at the hands of a menacing enemy. For reasons of survival, the SERE training for aircrew members makes sense. . . . However, the politically-correct unisex nature of the resistance training is very seductive; it is easy to become “desensitized,” meaning accustomed, to the idea that men and women are interchangeable equals in a world of torture and abuse. The SERE trainers asserted that the entire nation

Are we already there? An insightful *New Yorker* cartoon, showing a group of bureaucrats discussing disturbing news while seated around a conference table, may be close to the truth. In the caption one of the men says to the others, "Let's just sit tight till the cultural amnesia sets in."⁵⁶⁸

There are several reasons, including cultural amnesia, that explain why the public reaction to the numbers of women killed in the current war has been somewhat muted. One is that people understand the power of international media and the Internet. We are reluctant to react in a way that encourages murderous anarchists in Iraq to deliberately target more of our women for capture, brutality, and death.⁵⁶⁹ Another reason is that many Americans find it hard to believe that a Republican administration would ignore or contradict the president's stated position that women should not be in land combat. And we respect the sacrifices of our female soldiers. No one wants to say anything that might add to the grief of the families. Reaction is also diffuse because news stories about the deaths and injuries being suffered by our women usually appear only in the soldiers' hometown newspapers, with little information provided. Rarely do we hear heartbreaking details, such as circumstances surrounding the death of Staff Sgt. Kimberley Voelz, who lost her life during a courageous attempt to defuse a bomb in Iraq.⁵⁷⁰

must prepare itself for this very real possibility if women are assigned to combat positions.

Id.; see also *id.* at C-46 (Finding 1.51 (finding that there was no sexual abuse substantiated of male U.S. POWs from the Vietnam conflict to the time of the panel's inquiry)).

568. P.C. Vey, *Let's just sit tight till the cultural amnesia sets in.*, NEW YORKER, Oct. 14, 2002 (cartoon), available at http://www.cartoonbank.com/product_details.asp?sitetype=1&sid=52827.

569. In the aftermath of Abu Ghraib, there were reports that Iraqi insurgents, enraged by photos from Abu Ghraib, wanted to kidnap and kill an American woman for purposes of revenge. Rowan Scarborough, *Zarqawi Targets Female Soldiers*, WASH. TIMES, July 1, 2004, at A01.

570. Chris A. Courogen, *She "Died in His Arms,"* PATRIOT NEWS (Harrisburg, Penn.), Dec. 16, 2003, at A01; David Zucchino, *Equal Right To Fight*, L.A. TIMES, Apr. 10, 2004, at A1. On December 13, 2003, a male soldier escorted Staff Sgt. Voelz, an explosive ordnance disposal expert, to disarm a device taped to an electrical tower. When the bomb exploded, shrapnel ripped her body, nearly severing her left arm and lower leg. Her husband, a soldier also on duty nearby in Iraq, rushed to her side, and she died in his arms. As of May 2007, more than seventy-five American military women have been killed in Afghanistan, Iraq, and Kuwait. See Center for Military Readiness, *Grim Toll of Military Women Lost in War* (Feb. 27, 2007), <http://www.cmrlink.org/printfriendly.asp?docID=288>.

A news report from Britain reflects a kind of concern about combat violence against women that has been muted in the United States.⁵⁷¹ Two women, a nurse and an interpreter, were among four soldiers killed in a bomb attack near the southern Iraq city of Basra.⁵⁷² Col. Bob Stewart, who was the first British commander of UN forces in Bosnia, said that he was against women being close to combat as their deaths or injuries had a debilitating effect on male soldiers.⁵⁷³ “It’s disquieting for a lot of people in this country when women are put into the front line because when they are wounded or killed, the men around them find it very difficult to operate.”⁵⁷⁴ Col. Stewart added that he had twice been present when women soldiers died.⁵⁷⁵ “One was in my arms after a bomb in Northern Ireland and I was inconsolable afterwards. I could not operate. If you put women in the front line because they are equal then you have to expect that there will be operational casualties.”⁵⁷⁶

In the New Gender Order, we are not supposed to care about female soldiers any more than we do about male soldiers, who die in far greater numbers. Some men who resent feminists take it a step further, expressing eagerness to see more female soldiers injured and killed in combat. “You wanted equal rights,” they argue. “Why shouldn’t you be expected to lose limbs, bleed, and die in combat along with the men?” This attitude represents a small but significant cohort of men, which was detected in a survey of Army men and women done for the Presidential Commission by one of its members, noted sociologist Charles C. Moskos, Ph.D.⁵⁷⁷ Prof. Moskos and his Northwestern University colleague, doctoral candidate Laura Miller, identified a group of survey respondents that they called

571. Thomas Harding, *Outrage As Two Female Soldiers Die in Basra*, TELEGRAPH (London), Apr. 6, 2007, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/04/06/wireaq 06.xml>.

572. *Id.*

573. *Id.*

574. *Id.*

575. *Id.*

576. *Id.*

577. Charles C. Moskos & Laura Miller, *1992 Survey on Gender in the Military*, Aug. 28, 1992, presented to the Presidential Commission by Moskos and Miller on Sept. 10, 1992 (transcript on file with author); see also Kathleen Parker, *Separate the Genders During War?*, JEWISH WORLD REV., Mar. 28, 2007, available at http://www.jewishworldreview.com/kathleen/parker032807.php3?printer_friendly (describing the simmering resentment of women among some men in the military, which results when they are forced to pretend that women are or should be “equals” in combat); cf. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-114 (Findings 3.31, 3.32).

“egalitarian sexists” or “hostile proponents.”⁵⁷⁸ These were men who advocated forced combat for women for vindictive reasons.⁵⁷⁹

A West Point graduate challenged that attitude: “Ninety years ago, the *Titanic* men gave their lives for the women and children ‘because it was the civilized thing to do;’ now women are masculinized to serve in wars for American males [who are] relaxing at golf and tennis clubs declaring it ‘progress.’”⁵⁸⁰

Syndicated columnist Kathleen Parker has expressed similar concerns:

[O]ur military is gradually weaning men of their intuitive inclination to protect women—which, by extrapolation, means ignoring the screams of women being assaulted. At the point when our men can stand by unfazed while American servicewomen are raped and tortured, then we will have no cause to fight any war. We will have already lost.⁵⁸¹

c. Untold Consequences of Family Separation

This “progress” has affected not only women, but thousands of young children left behind while their sole parent, one parent, or both are deployed to the war zone—sometimes for a year or more. The military does regular assessments of the impact of military operations on wild animals, birds, and

578. See Moskos & Miller, *supra* note 577.

579. *Id.* Ms. (now Dr.) Miller commented that some men said, “Well, yeah, I’m for women in combat. Let them fall on their faces.” *Id.* When asked to explain further she added,

[The egalitarian sexists] said those comments directly. Let them go out there and see how hard it is and then they won’t want to be in combat; that it’s just a principle, they are just complaining on the principle. They don’t really want to do it, so if you just open it up then we won’t have to deal with the issue. They’ll get themselves killed and we won’t have to hear from those women anymore. . . . It’s also a sort of treatment of like a third gender of Army women. I mean, they say, “Oh, those aren’t real women,” and they talk about them in different terms, so it’s not like they’re really sacrificing women in that case. They still have, you know, this sense of traditional women elsewhere and that those are women to be gotten rid of.

Id. Prof. Moskos estimated, subjectively, that about one-third to one-half of male respondents favoring women in combat shared this view. *Id.*

580. Letter from W. Edward Chynoweth to author (July 14, 2005) (on file with author). Mr. Chynoweth graduated from the United States Military Academy at West Point in 1946 and earned graduate degrees from the University of California at Berkeley and Stanford University.

581. Kathleen Parker, *The Mother of All Blunders*, WASH. POST, April 7, 2007, at A13.

whales.⁵⁸² In contrast, thousands of children are being conscripted for an unprecedented social experiment, but there have been few studies done or revealed that have examined the psychological effects of prolonged wartime separation on children and their parents.⁵⁸³

The last time the subject was officially researched at all was in 1992, when several experts in the fields of child psychology, psychiatry, and human development presented testimony to the Presidential Commission.⁵⁸⁴ Some witnesses focused on the impact of long-term wartime separation on children. Others described the coping mechanisms of deployed mothers—including deliberately setting aside their maternal feelings while abroad—

582. See Kenneth R. Weiss, *Navy Gets 2-Year Exemption to Sonar Limits*, L.A. TIMES, Jan. 24, 2007, at A21; Editorial, *Degrading Our Military*, FORBES, Sept. 15, 2003, at 25; Marc Kaufman, *Sonar Used Before Whales Hit Shore*, WASH. POST, Aug. 31, 2004; Marc Kaufman, *Whale Stranding in N.C. Followed Navy Sonar Use*, WASH. POST, Jan. 28, 2005, at A03.

583. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-117 (Finding 3.39). The smaller Defense Advisory Committee on Women in the Services (DACOWITS), established with a new charter in 2002, has produced several reports that deal with family issues, but has not followed up on research available. In its 2004 Report, for example, DACOWITS made reference to “studies [that] have found a significant negative relationship between deployment-related parental absence and one or more aspects of children’s well-being.” See REPORT OF THE DACOWITS 32-33 (2004) [hereinafter DACOWITS 2004 REPORT] (referencing Michelle L. Kelly, *The Effects of Deployment on Traditional and Nontraditional Military Families: Navy Mothers and Their Children*, in MILITARY BRATS AND OTHER GLOBAL NOMADS: GROWING UP IN ORGANIZATIONAL FAMILIES (M.G. Ender ed., 2002) (finding that “[a]bout 12 percent of children of deployed mothers exhibited internalizing behavior scores in the clinical range, compared to 1 percent of children of non-deployed mothers”). The DACOWITS made several recommendations for reducing the impact of long-term separation on children, but the committee apparently has not pursued those proposals. See DACOWITS 2004 REPORT, *supra*, at 76-77.

584. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-118 (Finding 3.43).

Child development experts agree that the psychological and emotional effects of parental separation on young children is [sic] greatly increased when there is a risk of death in war. Their research demonstrated that separation from the primary caregiver (mother or father, mother in particular) greatly reduces a child’s feelings of security. An infant/toddler who does not have a secure attachment is less likely to explore his/her surroundings and relate to others. The mother is most often cited by experts as the preferred and most critical parent for childcare. After prolonged and/or repeated separations, attachment theory research showed that children tended to be more depressed and anxious, and less willing to re-attach to the parent upon reunion.

Id.

and the difficulty of reestablishing those feelings upon their return, especially when the child emotionally withdraws.⁵⁸⁵

There have been many recent reports of emotional scars in military families, indicating that this subject ought to be studied in more depth.⁵⁸⁶ Instead, the DoD continues to subsidize and encourage the recruitment and deployment of single mothers and moms with large families, buying into the politically correct notion that it makes no difference who does the soldiering and who does the mothering.

2. Rumpelstiltskin Recruiting

In addition to personal patriotism, fathers and mothers join or stay in the military for the same reasons they work in any occupation. But in the military, generous education, housing, and medical benefits serve as an almost irresistible magnet for single parents with custody, the greater proportion of which are mothers.⁵⁸⁷ Gender-based recruiting quotas increase numbers of deployable mothers even more, especially in the National

585. Testimony of Dr. Jay Belsky, Penn State University, Before the Presidential Commission (June 9, 1992) (on file with author) (“[W]e have this new emergency language of child development. All we hear about is their resilience. Lost is a language of vulnerability. And I contend to you, every time you hear resilience spoken, you will hear simultaneously, really, a driving motivation, which is an adult’s career development.”); see also PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at 55-56 (Issue H: Parental and Family Policies, Alternative Views).

586. See, e.g., Donna St. George, *Yearning To Be Whole Again*, WASH. POST, Nov. 24, 2006, at A01 (describing the effects of war on a single mother soldier and her family); Pamela Martineau & Steve Wiegand, *Scarred Survivors*, SACRAMENTO BEE, Mar. 8, 2005, available at http://www.truthout.org/docs_docs_2006/112406X.shtml; Pamela Martineau & Steve Weigand, *A Dad Soldiers On*, SACRAMENTO BEE, Mar. 9, 2005 (describing what happened when Lt. Emily Morris’s soldier husband was called up for duty at the same time that she was—their six-year-old son, Julian, threw all of his toys out of his bedroom, and hung a sign on the door reading “No dog, no toys, no aunt, no mom, no dad.”), available at http://www.sacbee.com/content/news/pprojectrs/women_at_war/v-print/story/12528269p-13383679c.html; Shia Kapos, *Internal Wars: Family Separation Adds Another Layer of Stress for Women Serving in the Military*, CHI. TRIB., May 26, 2004, at C1.

587. Quarterly Data Collection on Non-Deployables, DAPE-MPE (Dec. 15, 2002) (on file with author) (quoting Dr. Betty D. Maxfield, Chief, Army Demographics Office, G-1, Q.6) (“In FY 02, 36,531 Soldiers are single with children. Of that number, 26,495 are male (or 72.5% of total) and 10,036 are female (or 27.5% of total). The latter figure is disproportionate to the number of women in the Army.”); see also Sandy Davis, *Single Mom Has Right Stuff for U.S. Army*, ARK. DEMOCRAT GAZETTE, June 23, 2001, at 1A; PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-116 (Finding 3.35).

Guard, which allows single parents with custody to sign up for deployable positions.⁵⁸⁸

In this and many other situations involving single- or dual-service parents, family subsidies that are needed to support stable families have had the unintended effect of creating more *unstable* families. As in the civilian world, when you subsidize something you get more of it.

Due to pressures from feminists inside and outside of the Pentagon, the military seems incapable of striking a more reasonable balance between the needs of three parties at interest: (1) the mother, who wants a good job and career advancement; (2) field commanders, who rely upon the readiness of deployable personnel; and (3) the children, whose needs for mother-care have not changed to conform with feminist theories.

The military's answer to this monumental problem is to throw money at it. Millions of defense dollars are spent on expensive, heavily subsidized childcare—the largest system in the nation. Family support is a necessity in the all-volunteer force, sixty percent of which is composed of married people.⁵⁸⁹ Funds spent to sustain stable families have also attracted thousands of young custodial single parents. Many of these young families live beneath the poverty line, and depend on food stamps as well as financial support and benefits from the DoD.⁵⁹⁰

The job of recruiters is tough enough, without having to spend more time and money recruiting female trainees, who drop out at higher rates.⁵⁹¹ Pressures from the Pentagon, however, have forced recruiters to become like the fairy tale character Rumpelstiltskin—offering help to young women

588. National Guard units used to serve primarily within the borders of individual states, but in the early 1990s, Guard missions were expanded to include overseas deployments in combat zones. The Army's liberal policy of inducting single parents drew national attention in 2003, when Spec. Simone Holcomb, an Army National Guard medic and mother of seven children in a "blended" family, was called to duty in Iraq at the same time as her Army husband. See, e.g., Associated Press, *Army Medic, Mom Faces Punishment: Carson Soldier Refuses To Leave 7 Kids*, COLO. SPRINGS GAZETTE, Nov. 6, 2003, at 1. The problem actually began years earlier when the Guard recruited Holcomb as a single mother of three or possibly five children—the exact number is not known due to military privacy rules. For the same reason, the ages of the children could not be revealed.

589. Allan Carlson, The Howard Center for Family, Religion & Society, *Families and War: Two Cautionary Tales*, 16 FAMILY AM. 2 (Oct. 2002).

590. *Id.* at 3. According to Dr. Carlson, direct and indirect military expenditures for child care tripled in the decade prior to 2002. *Id.* He added, "Although military people are more likely to be married than others in their age group, young service couples are 64% more likely to be divorced by age 24 than comparable civilian couples." *Id.*

591. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-96 (Finding 2.6.3C).

in need, with painful separations from their children being the ultimate tradeoff later on.⁵⁹²

This does not mean that mothers should not serve in the military, but some situations are less workable and acceptable than others, especially where the needs of the child are concerned.⁵⁹³

Pentagon leaders need to acknowledge this reality. It is not sound policy to perpetuate false assurances and illusions about the psychological resiliency of children, while assigning lower priority to the most important needs of the military.

B. Constructing a Stronger Military

1. Recommendations for the Secretary of Defense

When former Defense Secretary Donald Rumsfeld gave his farewell address at the Pentagon in December 2006, he said that the single worst day of his time in office occurred when he learned of the Abu Ghraib prisoner scandal in Iraq.⁵⁹⁴ This was not a military defeat, but it put the American forces on the defensive and diverted untold thousands of man-hours for intense damage control.

An internationally scandalous breakdown in discipline as serious as Abu Ghraib is likely to happen again. One way to guarantee that result is to allow social engineers to continue volatile social experiments with servicemen and women, conducted without accountability or objective evaluation. Unlike the mechanical engineers of NASA, social engineers do

592. For a summary of the tale of Rumpelstiltskin, see <http://en.wikipedia.org/wiki/Rumpelstiltskin> (last visited Apr. 21, 2007).

593. During the first Persian Gulf War, many dependent care plans fell apart, forcing many soldiers to leave their children behind in makeshift care arrangements. Sen. John Heinz (D-Penn.) and other members of Congress sponsored "Gulf Orphan" bills, which would have allowed one parent in military couples and single parents to exempt themselves from combat voluntarily. *See, e.g.*, S. 325, 102d Cong. (1991). The Senate voted against the bill and instead passed a non-binding resolution sponsored by Sen. John Glenn (D-Ohio) calling for the Pentagon to develop consistent regulations regarding military couples, single parents and newborn children. S. amend. 7 to S. 320, 102d Cong. (1991); *see also* Helen Dewar, *Senate, Yielding to Pentagon, Rejects Parent Exemption Plan*, WASH. POST, Feb. 21, 1991, at A27. The Presidential Commission recognized, however, that changes in family policies should be implemented long before a major war begins. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-134–C-135 (Findings 10-13); *id.* at 15-18 (Issue H: Parental and Family Policies, Recommendations); *id.* at 54-56 (Issue H: Parental and Family Policies, Alternative Views).

594. Robert Burns, *Rumsfeld Bids Farewell to Pentagon*, ASSOCIATED PRESS, Dec. 8, 2006.

not even try to learn from their mistakes. And when something bad happens, they blame men (not women) who “don’t get it,” instead of accepting responsibility for their own policies.

The social engineering blueprint for an ungendered military incorporates elitist assumptions, Amazon myths, double standards, social fiction, high-level dissembling, and arrogance held together with a fragile web of carefully spun public relations. It is a shaky structure, not stable enough for what must be the strongest military in the world.

To reinforce the social infrastructure of our military, the Secretary of Defense should:

- Be vigilant.
- Take these issues seriously.
- Set forth sound priorities, putting the needs of the military first.
- Mandate complete candor about the consequences of cultural change in the military, forbidding retribution or career penalties for anyone expressing inconvenient truth.

a. End Illusions in Military Basic and Advanced Training

In a 1997 article published by *The Weekly Standard*, former Secretary of the Navy James Webb, now the junior Senator from Virginia, wrote about the importance of getting candid, firsthand information from military commanders who have to deal with the consequences of sexual misconduct in the military:

Consider the commander who knows that the culprit in such situations is not one or a half-dozen individuals, but a system that throws healthy young men and women together inside a volatile, isolated crucible of emotions—a ship at sea or basic training, to take two notable examples. Whom does this commander tell if he believes that the experiment itself has not worked, that the compressed and emotional environment in which these young men and women have been thrust together by unknowing or uncaring policymakers actually encourages disruptive sexual activity?

. . . .

Present-day generals and admirals, constantly under political pressure, sometimes unsure of where to draw the line between

military and civilian control, often constrained by legal edicts, and wishing to be fair to those females who do perform well, have issued unenforceable orders rather than confront the politicians who dreamed them up. They have muddled about for years from incident to incident while many junior leaders have been forced to deal directly with impossible, ethically compromising positions.⁵⁹⁵

In 1981, President Ronald Reagan summarily ended a five-year experiment with co-ed basic training in the Army. Women were suffering too many injuries, and men were not being challenged enough.⁵⁹⁶ The Marines retained separate-gender training, which continues to be superior for teaching discipline to both men and women during and after basic training.

In 1993, Army officials reinstated co-ed basic training and introduced various types of gender-norming techniques to disguise physical differences. An editorial cartoonist illustrated the illogic of this by portraying ten beribboned Army generals sitting around a conference table: “It’s agreed then,” says the presiding general. “We will reduce the physical requirements of warfare so that women may participate.”⁵⁹⁷

A Marine officer serving in Fallujah addressed that illusion directly:

Please think about this: when things really go wrong, that is not the time to remember why the military has upper body strength requirements. When there are casualties, no soldier or Marine should die because his buddy couldn’t get him to safety because she wasn’t strong enough.⁵⁹⁸

The Secretary of Defense should:

595. James Webb, *The War on Military Culture*, WEEKLY STANDARD, Jan. 20, 1997, at 17.

596. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at C-71, C-78 (Findings 2.1.5, 2.4.1A).

597. Peter Steiner, *It’s agreed then. We will reduce the physical requirements of warfare so that women may participate.*, WASH. TIMES, Sept. 25, 1996. During the 2000 presidential campaign, the *American Legion* magazine asked then-Texas Gov. George W. Bush about his views on co-ed basic training. Candidate Bush replied, “The experts tell me, such as Condoleezza Rice [formerly a member of the Kassebaum-Baker Commission], that we ought to have separate basic training facilities.” Bill Gertz & Rowan Scarborough, *Inside the Ring*, WASH. TIMES, Jan. 31, 2003, at A7.

598. E-mail from senior Marine officer serving in Iraq to author (July 20, 2005) (on file with author).

- Take this matter out of the hands of social engineers and restore separate-gender basic training without apology or further delay. Mixed-gender training occurs at advanced levels, but new recruits need to concentrate on learning the basics first.
- Require the various services to maintain height, weight, and physical capability standards that are commensurate with occupational demands in time of war and are not obscured by evaluations of entire groups in training. The National Defense Authorization Act for Fiscal Year 1994 mandated “Gender-Neutral Occupational Performance Standards,” but none have yet been established.⁵⁹⁹
- Direct all military officials responsible for physical training that, if it is necessary to have different, gender-normed grading systems for men and women in order to avoid disproportionate injuries among female trainees, they must avoid describing the standards as “the same” or “identical,” because “equal effort” is not the same as “equal results.”
- Instruct advanced training commands that special concessions and double standards involving women (DSIW) are not acceptable, particularly in aviation and other forms of training for hazardous positions on land, sea, and in the air.

b. Restore Compliance with Policy and Law

The issue of women in combat should not be treated as a “women’s issue.” It is condescending, if not sexist, to treat these issues as less important than other matters of Defense policy. DoD regulations regarding women in combat were set forth in 1994, and the services are obligated to comply. Army officials do not have the right to rewrite, redefine, bend, break, or contrive rules on their own. Nor should Pentagon bureaucrats expect junior officers to resolve contradictions and confusion caused by high level officials who are trying to shift their own responsibilities elsewhere.

599. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No 103-160, § 543(a)(1),(3), 107 Stat. 1547, 1660 (1993).

“Fem fear”⁶⁰⁰ is an emotion that grips the hearts of men who are terrified that feminists—including women on the Armed Services Committees—might get angry at them. The Defense Secretary has to be prepared to take some heat, but ultimately it is much easier to defend coherent policies that are based on sound principles than it is to satisfy implacable ideologies. Solid information can be produced to support constructive directives, but only if the Secretary asks the right questions and insists on complete, candid answers.

“Fatherly favoritism” is another emotion that seems to be influencing some policies in the military. A number of Pentagon policymakers have daughters in uniform—some of them graduates of the military academies who want to follow their dads’ footsteps into flag rank.⁶⁰¹ Paternal feelings are understandable, but they are the last reason why a policymaker should take a position either for or against women in ground combat.

Even if direct combat experience were required for promotions (it is not), fatherly favoritism is not a good enough reason to send other women into combat. Nor should these policies be influenced primarily by the opinions of wives or female officers seeking promotions.

Absent intervention by the Office of the Secretary of Defense, the Army’s assignment system has become needlessly confused and chaotic. Field commanders are expected to accommodate female soldiers in formerly all-male units, coping with personnel losses that are common in gender-mixed support units.⁶⁰² At the same time, junior female officers are

600. This term was first used by Marine Staff Sgt. Charlotte Crouch. See Charlotte Crouch, “Fem Fear” *Widening the Corps’ Gender Gap*, NAVY TIMES, Sept. 30, 1996, at 29.

601. Confidential personal conversations between individuals at the Pentagon and author (Summer 2004).

602. E-mail from ground-combat soldier to author (Dec. 11, 2006) (on file with author). The soldier wrote that a forward support company (FSC) associated with his former unit was “totally [gender-]integrated,” resulting in two pregnancies for the first time in the history of the battalion. *Id.*; see also E-mail from ground combat soldier to author (Dec. 9, 2006) (on file with author).

On another note, the line between the FSC and our battalion has completely broken down. Females from the FSC’s are being attached to all male infantry and armor companies with no regard whatsoever. Interestingly, this same FSC is now having its [rank omitted] and one of its senior NCO’s fired over sexual misconduct. This is a pretty tremendous shock for a company and it will definitely shake, if not ruin, the confidence in the company’s chain of command for the foreseeable future. . . . Those of us who are combat arms officers are not envious of the FSC commander’s job who has to hold his company together after his [rank omitted] has been taken down.

Id.

being allowed to assign female soldiers almost anywhere they please.⁶⁰³ Male officers rarely are asked what they think about all this, but if they are, their answers appear to be influenced by career considerations.⁶⁰⁴

It is a demoralizing situation, unguided by policy or law, and another example of DSIW. If (when) another explosive international incident involving our military occurs, people will wonder why the Pentagon officials did not see the “perfect storm” coming.⁶⁰⁵

Some observers insist that regulations do not matter anymore because there is no “front line” in the current war. But in the last major mobilization of American ground forces, the Persian Gulf War, there was a violent “front line” attack to liberate Kuwait. It is impossible to predict what the requirements of the next war will be, but even in the current war the missions of direct ground combat troops, such as the infantry, Special Operations Forces, and Marine infantry, have not changed. “Tip of the

603. Jontz & Dougherty, *supra* note 143; Tyson, *For Female GIs, Combat Is a Fact*, *supra* note 122 (describing the actions of Lt. Col. Cheri Provancha, who decided to “bend” (actually break) Army rules by allowing a female soldier, Spec. Jennifer Guay, to serve as a medic for an infantry company of the 82nd Airborne).

604. E-mail from combat-experienced officer in Iraq to author (Oct. 26, 2006) (on file with author) (explaining that some male officers enhance their careers by enthusiastically embracing feminism in the military).

I guess something I have not really mentioned is the NCO responsibility for implementing bad policy. Senior officers come up with bad ideas and as much as the good NCO’s know it will not work, they feel professionally obligated to implement it because that is what they do. They are just as, or even more reluctant to fight bad policies for the sake of their careers and many feel that at a certain time, it is not worth fighting the system.

Id.

605. E-mail from deployed infantryman in Iraq to the author (Dec. 11, 2006) (on file with author) (explaining the risks of gender integrating Military Training Teams).

The Iraqis, as you know, are not prepared to deal with women in a professional capacity. They have no EO or sensitivity training. Women to them are almost cattle and they will see no problem in making aggressive sexual advances, particularly since American women are seen as petite and exotic. The tough girl attitude loses its charm when a 300 man battalion of Iraqis have no problem groping, leering and raping a gung ho female American. The CA [Civil Affairs] team . . . replaced a team with a female captain. What happened to the previous team illustrates the very worst that could happen to an integrated MTT team. The female CA captain was sleeping with all of the powerful local Iraqi contacts. She compromised her mission and her team. She was removed and her disgraced team replaced. Who knows how much classified information she could have given away. At the very least, her team was unable to do its job.

Id.

spear” ground-combat troops should not be managed as if they are the “tip of the spoon.”

DoD regulations are clear, but Army officials keep arrogating to themselves the power to order young female soldiers into units that are required to be all-male. Because responsible decisions on this issue are long overdue—and are too important to be decided without accountability—the Secretary of Defense should:

- Direct Army officials to comply with current DoD regulations regarding female soldiers, including the collocation rule.
- Ensure compliance in new units requiring close combat experience and readiness, such as small combat Military Transition Teams (MTTs), which train male Iraqi troops in combat skills.
- Order a reevaluation of some positions, such as the military police, to determine areas that resemble direct ground combat. To ensure compliance with regulations, it may be necessary to divide the occupational title to reflect current realities.
- Direct female search team (FST) leaders to begin the process of training Iraqi women to assist their own forces in doing searches of female Iraqi civilians.
- Instruct Army officials that if they want to change or repeal the 1994 Aspin regulations, including the collocation rule, they first must obtain the written approval of the Secretary of Defense. (This responsibility is too important to be delegated to a subordinate.)
- Provide formal notice of proposed regulation changes to Congress well in advance, as mandated by law, together with the legally required analysis of the consequences for Selective Service obligations.
- Provide long-overdue information to Congress on how many female soldiers have been physically placed in ground-combat-located units—and explain why this has been permitted.
- Dismiss or demote civilian and military officials who are responsible for any shortages of male soldiers for the combat

arms, and those who have ordered the placement of female soldiers in units that are required to be all male.

- If the Army is allowed to continue status-quo placements of women in or near formerly all-male units, the Secretary should issue a formal news release announcing that female soldiers can and will be assigned involuntarily in or near direct-ground-combat units, such as the infantry. This information should be posted in all recruiting offices.
- Officials who are reluctant to provide this information publicly should honestly assess *why* they are reluctant.

c. Recruit To Meet Requirements

If there is a greater need of men for the combat arms, the President should speak directly to young men and ask them to consider serving in uniform. In the years since 9/11, the President has yet to issue such a call, but it is likely that sufficient numbers of young men would respond affirmatively if he were to do so.

The various branches of the services are required to recruit people to fill anticipated needs. The military service academies have the responsibility to tailor the makeup of each incoming class, and the service departments make assignments of graduates to meet current and future requirements. The Secretary of Defense should:

- Instruct leaders of the various services to adjust recruiting goals and drop gender-based quotas, in order to provide the proper “inventory” of soldiers for commanders in Iraq and Afghanistan, including those responsible for combat training Military Transition Teams (MTTs).⁶⁰⁶
- Protect the volunteer force by defending, without apology, the right of access for recruiters and ROTC units at high schools and colleges.⁶⁰⁷

606. The National Defense Authorization Act for Fiscal Year 1994 mandated an end to gender quotas, goals, and ceilings. *See* Pub. L. No. 103-160, § 543(a)(2), 107 Stat. 1547, 1660 (1993).

607. The “Solomon Amendment,” legislation passed in 1996 to protect access for recruiters, was upheld by the Supreme Court on March 6, 2006. *See* *Forum for Academic & Institutional Rights, Inc. (FAIR) v. Rumsfeld*, 126 S. Ct. 1297 (2006); *see also* Guy Taylor, *Colleges’ Military Bans Rejected*, WASH. TIMES, Mar. 7, 2006, at A1.

- Instruct all military service academy superintendents to increase the number of cadets and midshipmen who are eligible for the combat communities that are needed most: Combined infantry/armor battalions, Special Operations Forces, Marine Infantry, Navy SEALs, and submarines.
- Instruct all recruiters that they should provide accurate information about the risks involved in military service—i.e., that there are no laws exempting women from “combat” and regulations regarding women do not exempt them from being “In Harm’s Way.”
- Encourage recruiters to spend primary time and effort with the cohort of people who are most likely to sign up and finish basic training—i.e., young men, who are also needed in greater numbers for the combat arms.

d. Encourage Discipline, Not Indiscipline

Both civilian and military policy makers have the responsibility to set conditions so that troops in the field can succeed. Given the many social disruptions that have occurred in recent years, Pentagon policy makers have a responsibility to deter similar incidents in the future. A senior Marine officer wrote,

As for [sic] the unit cohesion argument is concerned, you cite studies. I can tell you, first hand, that females and males in forward deployed units do not mix well. Flirtations and relationships on ships and remotely deployed units do have an adverse effect on morale and unit cohesiveness. We deal with it every day here in Iraq.⁶⁰⁸

Behavioral perfection is beyond the human condition; personnel policies should encourage discipline rather than indiscipline. The Indiana National Guard has provided a small but significant demonstration of how sound policies can work to reduce incidents of misconduct.

In 2005, the Indiana National Guard was dealing with serious allegations of rape and sexual misconduct between military recruiters and teenagers. The GAO reported 629 confirmed cases of sexual misconduct in FYs 2004 and 2005. The Associated Press reported that the highly inappropriate

608. E-mail from senior Marine officer in Fallujah, Iraq, to author (July 20, 2005) (on file with author).

incidents involved trusting girls—and some boys—who were offered alcohol and sexual attention in the recruiting stations after hours.⁶⁰⁹

The GAO also reported that only ten percent of the allegations of sexual misconduct were substantiated or corroborated (629 of 6602).⁶¹⁰ Even if the remaining ninety percent of cases were discounted by half, a large portion of the recruiters were being falsely accused.

Instead of panicking and sacking any recruiter accused of misconduct, the Indiana Guard adopted a policy, called “No One Alone,” which addressed both problems: sexual misconduct and false allegations of the same. This policy simply states that adult recruiters may not be alone with teenage prospects in offices, cars, or anywhere else. If they are, or if they fail to report another recruiter’s misconduct, they risk immediate disciplinary action. Wallet-sized “Guard Cards” advise parents and students of the rules and a telephone number to call if they experience anything improper.

As a result of this sensible program, which deters inappropriate conduct and discourages false accusations, morale is more secure, community trust is up, and misconduct reports are down.⁶¹¹ The Congress included language in the report accompanying the 2007 Defense Authorization Act, encouraging the Defense Department to adopt the Indiana National Guard’s “No One Alone” policy as a DoD standard.⁶¹²

Policies to deter sexual misconduct between adults are more complicated but have a better chance of succeeding if they acknowledge human failings, instead of operating on the assumption that men and women are interchangeable beings who can be perfected with a few “sensitivity training” sessions run by “victim advocate” professionals. The Secretary of Defense, the service chiefs, academy superintendents, and all military installations should:

609. Martha Mendoza, *Preying on Recruits*, NAVY TIMES, Sept. 4, 2006, at 14-16; James Gillaspay & Dan McFeely, *Military Recruiter Accused of Sex Assaults*, INDIANAPOLIS STAR, Mar. 1, 2005, available at <http://www.notinourname.net/youth/recruiter-sex-assault-1mar05.htm>.

610. GOV’T ACCOUNTING OFFICE, *MILITARY RECRUITING, DOD AND SERVICES NEED BETTER DATA TO ENHANCE VISIBILITY OVER RECRUITER IRREGULARITIES* 19 (Aug. 2006), available at <http://www.gao.gov/new.items/d06846.pdf>.

611. See Elaine Donnelly, *Remedies for Recruiter Abuse*, WASH. TIMES, Oct. 1, 2006, at B3.

612. Rick Maze, *Lawmakers Want Tougher Recruiting Rules*, AIR FORCE TIMES, Oct. 4, 2006, available at <http://www.airforcetimes.com/story.php?f=1-292925-2150102.php>; H.R. REP. NO. 109-702 (2006) (Conf. Rep.); see also Bryan Bender, *Pentagon Acts To Crack Down on Recruiter Misconduct*, BOSTON GLOBE, Mar. 19, 2007, at A1.

- Adopt social policies that are rooted in reality, not social fiction.
- Enforce “No One Alone” policies for all recruiters who work with teenagers and potential recruits for all the services.
- End or discourage gender-mixed housing arrangements and other situations that encourage unprofessional relationships, including the use of alcohol.
- Decline requests for funding of an “office of victim advocate” in the Pentagon, and avoid mandates to needlessly increase such services, which are readily available at the local installations.
- Investigate all reports of sexual misconduct or abuse, having respect for the privacy of a person alleging abuse prior to the filing of a complaint, but also providing full protection for the rights of the accused after a complaint is filed.

e. Respect for Family and Cultural Values

At times in history our leaders have had no choice but to send young men to fight. We do have a choice, however, about sending women and single mothers. America is a large and patriotic country; there is no demographic or military reason why we must send so many young women and mothers to fight our wars.

Since the September 11, 2001 attacks on America, some individuals, including single and dual-service parents, have been rotated in and out of the war zone several times, on deployments lengthened by several months. It is long past time for policymakers to implement policies that alleviate the psychological damage done to emotionally vulnerable children. There are several things that the Secretary of Defense should do to address these problems:

- Review and revise all family policies that do not provide a reasonable balance between the interests of the parent, field commanders, and vulnerable children.⁶¹³
- Order appropriate DoD offices to consider or act upon the various recommendations regarding family issues that were

613. Single parents who want to join the active duty force frequently surrender custody of their children to others in order to sign up.

made by the Presidential Commission in 1992, but not implemented.⁶¹⁴

- Order the National Guard and Reserves to revise recruitment policies and benefit subsidies, which have the effect of increasing the number of single parents with custody, and the number of dependent children separated from their parents during lengthy deployments.
- Issue guidelines for disciplining military personnel who fail to make secure arrangements for the care of their children.
- Conduct and release studies of military post-traumatic stress disorder, which monitor and report on gender differences, plus additional studies providing information on the impact of long separations on military parents and children.

f. Enforce the 1993 Homosexual Conduct Law

Activists who want to repeal the law banning homosexuals from the military are determined to impose their agenda on the military. This would include the full range of benefits and “sensitivity training” programs designed to promote acceptance of the homosexual lifestyle and conduct.⁶¹⁵ For the sake of civilian institutions as well as the military, they should not be allowed to succeed.⁶¹⁶

614. PRESIDENTIAL COMMISSION REPORT, *supra* note 5, at 54 (Issue H: Parental and Family Policies, Alternative Views).

In order to reduce the number of children subjected to prolonged separation or the risk of becoming orphans during deployment, long-term DoD policies regarding the recruitment, deployment and retention of single and dual-service parents should be revised on a phased-in basis. Such policies should allow for voluntary or involuntary discharges at the discretion of local commanders, or reasonable incentives for separation. They may also include waivers by local commanders in certain circumstances.

Id.

615. *See supra* note 411.

616. Closing scenes in the 1947 film *Miracle on 34th Street* suggest a strategy for the movement to gain legitimacy. The classic Christmas film ends happily when a kindly gentleman named Kris Kringle is recognized as Santa Claus by the U.S. Postal Service, which forwards thousands of children’s letters to him. If another respected government agency, the U.S. military, bestows legitimacy on the campaign for homosexual rights, recognition would soon be extended to other federal, state, and local agencies, and even private institutions that receive public support.

President George W. Bush is obligated by the U.S. Constitution to enforce all laws, but he is not required to retain administrative regulations written by his predecessor, including the policy known by the catch phrase “Don’t Ask, Don’t Tell.” Whether intended or not, inconsistencies between Clinton’s policy and the 1993 homosexual conduct law create an advantage for activists who want to repeal both.

In doing this, the Department of Defense should not apologize or be intimidated by civil rights analogies and pejorative accusations. Gen. Colin Powell, who was Chairman of the Joint Chiefs of Staff early in the Clinton Administration, wrote a classic letter addressing the subject to then-Rep. Patricia Schroeder (D-Colo.) in 1993. Dismissing Schroeder’s argument that his position reminded her of arguments used in the 1950s against desegregating the military, Gen. Powell replied:

I know you are a history major but I can assure you I need no reminders concerning the history of African-Americans in the defense of their nation and the tribulations they faced. I am part of that history. . . . Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.⁶¹⁷

Columnist Charles Krauthammer agreed:

Powell’s case does not just rest on tradition or fear. It rests on the distinction between behavioral and non-behavioral characteristics. Skin color is a non-behavioral trait. Homosexuality is not.

Consider the behavioral implications of gender differences: Men and women are sexually attracted to each other and sexual attraction engenders feelings not just of desire but shame and a wish for privacy. . . .

That is why if a white person refuses association with blacks, the military tells him that the refusal is irrational and will not be respected. But the military does respect the difference between men and women. Because the cramped and intimate quarters of the military afford no privacy, the military sensibly and non-

617. Elmo R. Zumwalt & J.G. Zumwalt, *Schroeder Ignores Wise Advice from Powell*, HUM. EVENTS, June 1, 1992.

controversially does not force men and women to share barracks.⁶¹⁸

In recent years, advocates of gays in the military have been promoting the idea that sexual modesty does not matter, since modern military facilities provide more privacy than older ones. Even if people are exposed to others in the field, they say, younger people are used to it, and this is not a big deal.⁶¹⁹ This is an elitist argument, which is contradicted in numerous ways that usually escape notice.

A midwestern family-oriented recreation center, for example, has separate locker rooms for men and women, next to the community pool. Inside the entrance of the women's locker room is a sign clearly stating that boys of any age are not permitted. A similar sign, regarding girls, is posted in the men's locker room. The signs are there not as an affront to young boys (or girls). They are there because the community respects the desire for sexual modesty in conditions of forced intimacy. This is the case even though people who use the recreation center do not live and sleep there for months at a time.

Servicemen and women in the military deserve the same consideration, and much more. As columnist Thomas Sowell wrote, "Military morale is an intangible, but it is one of those intangibles without which the tangibles do not work."⁶²⁰ Military people depend on policymakers to remember basic realities and to guard their best interests. Considerations such as this strengthen vertical cohesion—the indispensable bond of trust between military leaders and the troops they lead.

To ensure that the intent of Congress is carried out with regard to homosexuals in the military, the Secretary of Defense should:

- Improve understanding and enforcement of the law by eliminating the Clinton Administration's enforcement regulations, known as "Don't Ask, Don't Tell," which are inconsistent with the 1993 law that Congress actually passed, and (better yet) restore "the question" about homosexuality that used to be on induction forms prior to January 1993.

618. Charles Krauthammer, Op-Ed, *Powell Needs No Lectures*, WASH. POST, Jan. 29, 1993, at A23.

619. Aaron Belkin & Melissa Sheridan Embser-Herbert, *A Modest Proposal*, 27 INT'L SEC. 178 (Fall 2002).

620. Thomas Sowell, *The Anointed and Those Who Aren't*, WASH. TIMES, Feb. 8, 1993, at E3.

- Oppose any legislative attempt to repeal the 1993 homosexual conduct law in Congress.
- Ensure that the 1993 statute is vigorously defended every time it is challenged in the federal courts.
- Prepare and distribute accurate instructional materials for potential recruits, recruiters, and all military personnel that include the text and legislative history of the 1993 law.
- Remind the media that everyone can serve his or her country in some way, but not everyone is eligible to be in the military.

2. The Only Military We Have

Many institutions in civilian life have been affected negatively by unsuccessful social experimentation. The baby boomer and “Gen-X” generations, for example, have been subjected to “look-say” reading, “new math,” and “civics” courses that fail to teach students fundamentals about history and the U.S. Constitution. In matters of urban policy, whole cities have been threatened by unrestrained crime, ruinous taxes, and crumbling neighborhoods.

Parents who are dissatisfied with the public schools can choose private ones or teach their children at home. If residents do not like the way their city is being managed, they can run for local office or move to another city. Some states gain population while others lose. Consumers constantly choose favored products over less desirable ones. This is a free country, and limitless choices are always available.

When it comes to national defense, however, there are no options from which to choose. Today’s volunteer force is the only military we have. All of our freedoms are guaranteed by a strong national defense, which cannot be taken for granted in a dangerous world.

Our national security depends on the men and women of the military. For our own sake as well as theirs, the co-ed military must be constructed on foundations that are sound. We have to get this right; it is the only military we have. Ours is the strongest military in the world, and we have an obligation to keep it that way.

APPENDIX A

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1994, PUB. L. NO. 103-160, § 571, 107 STAT. 1547, 1670 (1993) (CODIFIED AT 10 U.S.C. § 654 (2000))

(a) Codification.—(1) Chapter 37 of title 10, United States Code, is amended by adding at the end the following new section:

§ 654. Policy concerning homosexuality in the armed forces

(a) Findings.—Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that—

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would

create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) Policy.—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to

engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents.—

(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required briefings.—The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title [10 U.S.C. § 937] (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of construction.—Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions.—In this section:

(1) The term “homosexual” means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian.”

(2) The term “bisexual” means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term “homosexual act” means—

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

(b) Regulations.—Not later than 90 days after the date of enactment of this Act [Nov. 30, 1993], the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a).

(c) Savings Provision.—Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654.

(d) Sense of Congress.—It is the sense of Congress that—

(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice).