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Alice W.W. Parham

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THE QUIET REVOLUTION: REPEAL OF THE
EXCLUSIONARY STATUTES IN COMBAT AVIATION —
WHAT WE HAVE LEARNED FROM A DECADE OF
INTEGRATION

CAPTAIN ALICE W.W. PARHAM*

There is therefore no pursuit connected with city management which belongs to woman because she is a woman, or to a man because he is a man, but various natures are scattered in the same way among both kinds of persons. . . . Shall we then assign them all to men, and none to a woman? — How can we? . . . One may be athletic or warlike, while another is not warlike and has no love of athletics. . . . So one woman may have a guardian nature, the other not. Was it not a nature with these qualities which we selected among men for our male guardians too? . . . Such women must then be chosen along with such men to live with them and share their guardianship, since they are qualified and akin to them by nature.¹

INTRODUCTION

The embers of the smoldering public debate about the role of women in combat have been rekindled by recent events.² Struggling

* Alice W.W. "Tally" Parham is an attorney with Venable, LLP in Baltimore, Maryland. She is also an F-16 pilot with the South Carolina Air National Guard and has served three combat tours in Iraq. The opinions expressed in this article are those of the author and are in no way meant to represent the opinions of the South Carolina Air National Guard or the United States Air Force. The author wishes to thank Maj. Robert D. Kosciusko for his tireless assistance and thoughtful contributions.

1. PLATO, THE REPUBLIC 117-18 (G.M.A. Grube trans., Hackett Publishing 1974) (360 B.C.E.).

2. See, e.g., Rowan Scarborough, *Iraq War Muddles Role of Women*, WASH. TIMES, Oct. 17, 2005, at A4 ("The Iraq war has highlighted confusion over the proper roles of women in the military, and policy-makers are often ignorant of what women want to achieve while wearing the uniform."); Jodi Wilgoren, *A Nation at War: Women in the Military: A New War Brings New Role for Women*, N.Y. TIMES, Mar. 28, 2003, at B1 (debating women's versus men's ability and tolerance of certain aspects of war and discussing the risk women face for sexual torture).

to meet recruiting goals,³ the Army toyed with the idea of "collocating" women with its infantry and armor land combat battalions.⁴ In response, a House bill⁵ proposed a requirement that the Pentagon ask Congress for permission each time it wanted to open new battlefield support jobs to women.⁶ Soon thereafter, four women were killed and eleven were injured in a single attack in Iraq, reminding the public that the casualties of war do not discriminate.⁷ Responding to the news, one columnist postulated:

Do we really want to put our women at this level of risk if it's not necessary? The rules against placing women in combat still stand, but the slope is looking a bit slippery When we decide to willingly put our nation's mothers — whether future or of the moment — in harm's way, we may already have lost the war.⁸

Adopting a familiar refrain, the commentator ignored the fact that such "mothers" have already spent years operating in harm's way, willingly, and returning fire. The federal statute banning women from combat aircraft was repealed over a decade ago,⁹ and on April 28, 1993, Secretary of Defense Les Aspin lifted the Department of Defense (DOD) policy ban on the assignment of women as combat aircrew.¹⁰ Ever since, women have served as fighter pilots in the Air Force, Navy, and Marines. In addition, the past decade has seen the integration of numerous military occupations that were previously closed to women.¹¹ The debate about women in combat frequently glosses over the fact that women are

3. Tom Bowman, *Army Is at Risk of Missing Recruiting Goals*, N.Y. SUN, July 1, 2005, at 5 ("The Army's top general told Congress yesterday that the Army is at 'serious risk' of not making its recruiting goals for the year . . .").

4. See, e.g., Rowan Scarborough, *Army Affirms Its Ban on Women in Combat*, WASH. TIMES, Jan. 19, 2005, at A1.

5. H.R. 1815, 109th Cong. (2005). See also H. COMM. ON ARMED SERVICES, REPORT ON H.R. 1815, 508-524 (2005), available at <http://armedservices.house.gov/billsandreports/109thcongress/HR1815report.pdf>.

6. See Thom Shanker, *House Bill Would Preserve, and Limit, the Role of Women in Combat*, N.Y. TIMES, May 19, 2005, at A20.

7. *Convoy Attack Killed at Least 4 Female GIs*, CHI. TRIB., June 26, 2005, at C6.

8. Kathleen Parker, *They Shoot Women, Don't They?*, ORLANDO SENTINEL, June 29, 2005, at A13.

9. Act of Aug. 10, 1956, ch. 1041, 70A Stat. 528, repealed by Pub. L. No. 102-190, div. A, title V, § 531(a)(1) (1991).

10. See ROY A. GROSSNICK, UNITED STATES NAVAL AVIATION 1910-1995, 386 (4th ed. 1997). See also *Women in Combat: How Other Nations Rank*, N.Y. TIMES, May 2, 1993, § 4, at 4.

11. See MARGARET C. HARRELL ET AL., THE STATUS OF GENDER INTEGRATION IN THE MILITARY: ANALYSIS OF SELECTED OCCUPATIONS 2-3 (2002).

fully engaged in combat as fighter pilots, on combat naval ships, and in other occupations.¹² Those who would oppose further integration use justifications for their arguments that, only a little more than a decade ago, were used to keep women out of the combat positions that they have now successfully occupied for years.

The rhetoric against the general idea of women in combat tends to be very emotional and rarely accompanied by empirical evidence.¹³ To the extent that this debate is going to continue, participants should be informed by the very real developments in the composition of the current fighting force and the realities of the modern battlefield. When one considers the events that have unfolded since the repeal of the combat exclusion statutes in the early 1990s, the arguments that continue to be recycled in favor of maintaining combat restrictions seem unrealistic and overbroad.¹⁴ If the remaining exclusionary policies were to change, combat aviation would be a successful model to emulate. The maintenance of high and equal standards for each pilot,¹⁵ regardless of gender, has helped alleviate concerns about the effect on military readiness and unit cohesiveness. A similar approach in other military specialties, such as the establishment of gender-neutral physical strength and endurance standards, would ensure the maintenance of military effectiveness while providing flexibility for military leaders to populate the military's ranks with the best and brightest volunteers, perhaps holding off the need to lower standards in pursuit of new recruits.¹⁶

The purpose of this article is to consider the somewhat low-key integration of combat aviation and its relevance to the ongoing

12. See, e.g., *id.* at 96 ("The number of female F-16 pilots has been steadily increasing since the restriction of combat aircraft was lifted.").

13. See, e.g., Marilyn A. Gordon & Mary Jo Ludvigson, *The Combat Exclusion for Women Aviators: A Constitutional Analysis*, 1 USAFA J. LEG. STUD. 51, 77 (1990) ("[T]he case against women in combat is fear that women will fail to develop a team spirit or 'bond' with men in combat. . . . A final argument used to justify the exclusion of women from combat aviation has to do with the fear that the public is not yet ready for women in combat.").

14. See, e.g., HARRELL ET AL., *supra* note 11, at 121 (considering women's integration into selected combat occupations and concluding that these integrations have been successful and have helped to dispel the generalizations that women are unsuitable for combat).

15. See, e.g., *id.* at 89-98 (describing the gender-blind training process for Marine F-18 and Air Force F-16 pilots and the resulting gender integration).

16. See, e.g., Eric Schmitt, *Army Recruiting More High School Drop Outs to Meet Goals*, N.Y. TIMES, June 11, 2005, at A11 ("The Army is having to turn to more high school dropouts and lower-achieving applicants to fill its ranks, accepting hundreds of recruits in recent months who would have been rejected a year ago, according to Army statistics.").

debate about women's participation in combat. Part I offers historical examples of women's participation in combat in order to provide the necessary and often ignored context for the debate. Part II revisits the events of the early 1990s that engendered the statutory repeal and policy change. Part III observes how the integration was achieved in aviation, without modification of standards or qualifications. Part IV considers the usefulness of the remaining exclusionary policies. Part V examines the very recent return to the issue of women in combat and the extent to which experience has changed the nature of the debate.

I. THE PIONEERS

"The 35,000 women who served in the Persian Gulf War — not to mention female cops, firefighters and astronauts — have shown that competence has nothing to do with gender. But all too often, reason flees and emotion takes over when there's talk of women in combat."¹⁷ The debate in the early nineties tended to employ gender stereotyping and outdated assumptions to the exclusion of historical evidence.¹⁸ Nevertheless, even before the advent of women fighter pilots and naval combat ship commanders, significant examples that challenged those stereotypes and assumptions existed.

During the Revolutionary War, some women dressed themselves as men to take part in the fighting.¹⁹ Deborah Samson's disguise was so convincing that no one knew she was a woman (she signed up as Robert Shurtlieff), and she fought alongside the men in her battalion for more than a year.²⁰ When she was wounded, she never let anyone examine her too carefully.²¹ After she finally became so sick with a high fever that a doctor reached inside her jacket to check for a heartbeat, Samson's secret was revealed.²² Fighting for the Union during the Civil War, Jennie Hodgers called herself Albert Cashier and served with an Illinois regiment for three years.²³ Also fighting for the Union, Sarah Rosetta Wakeman, age nineteen, joined a New York regiment as Lyons Wakeman and

17. Editorial, *Women and War*, N.Y. TIMES, April 12, 1993, at A16.

18. See Gordon & Ludvigson, *supra* note 13, at 76-77.

19. See, e.g., AMY NATHAN, COUNT ON US: AMERICAN WOMEN IN THE MILITARY 9 (2004).

20. Andrew Curry et al., *Hoaxes of the Ages*, U.S. NEWS & WORLD REP., July 24, 2000, at 4.

21. NATHAN, *supra* note 19, at 9.

22. *Id.*

23. *Id.* at 20.

fought for two years until she died during a march through Louisiana.²⁴

In World War II, Russian fighter aces Lilya Litvak (1921-1943) and Katya Budanova (1917-1943) scored a combined tally of twenty-two aerial victories before being killed in action.²⁵ Three Russian regiments of female pilots were organized in 1941, and other women pilots flew with male squadrons.²⁶ The Germans dubbed the 254 women of the 588th Night Bomber Regiment the "Night Witches" for their aggressive spirit under adverse conditions and often against superior odds.²⁷ The 588th completed 24,000 sorties and dropped 23,000 tons of bombs during the war.²⁸ Five-foot Lilya Litvak destroyed twelve German planes in less than one year, and on many occasions, ground monitors heard enemy pilots warning each other: "Achtung, Litvak!"²⁹ Her tenth kill was a Luftwaffe ace, achieved after fifteen minutes of dueling.³⁰ On another occasion, when her airplane caught fire during a dogfight, Litvak swung the plane upside down to throw herself from the cockpit and parachute to safety.³¹

In the United States, more than 400 American women died serving in World War II.³² The Women Airforce Service Pilots ("WASPs") disproved the notion that women were not willing, skilled, or courageous enough to fly military aircraft.³³ Formed in 1943, "[m]ore than 25,000 women applied to fly with the WASPs, but only 1,830 were accepted and 1,074 earned their pilot wings."³⁴ The WASPs served in a number of capacities, from "work[ing] as test pilots, tow[ing] targets for gunners, pull[ing] weather reconnaissance missions, fl[y]ing student navigators and bombardiers, and instruct[ing] male pilots."³⁵ Flying sorties as long and as

24. *Id.* at 21. See generally LAUREN COOK BURGESS, AN UNCOMMON SOLDIER: THE CIVIL WAR LETTERS OF SARAH ROSETTA WAKEMAN, ALIAS, PVT. LYONS WAKEMAN, 153RD REGIMENT, NEW YORK STATE VOLUNTEERS, 1862-1864 (1996).

25. Michael D. Hull, *Red Air Force Female Fighter Pilot Lilya Litvak Became an Ace and a Hero of the Soviet Union Fighting the Germans*, WWII HIST., Jan. 2005, at 14.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 19, 21.

30. *Id.* at 20.

31. *Id.*

32. NATHAN, *supra* note 19, at 41.

33. Gordon & Ludvigson, *supra* note 13, at 53.

34. Rudi Williams, *DoD Hosts Women's History Month Observance at Women's Memorial*, AM. FORCES INFO. SERVICE, Mar. 21, 2003, http://www.defenselink.mil/news/Mar2003/n03212003_200303218.html.

35. Bruce D. Callander, *The WASPs*, 84 AIR FORCE MAGAZINE 68, 69 (2001), available at <http://www.afa.org/magazine/April2001/0401wasps.pdf>.

regularly as the male pilots, the WASPs showed no physical, mental, or psychological differences.³⁶ Thirty-eight of the WASPs lost their lives in airplane crashes, though their accident rate was about the same as the men's.³⁷ In late 1944, the Army suddenly disbanded the WASPs, but it was not until 1977 that any of the women pilots were granted military veteran status.³⁸ Although not directly involved in combat, the WASPs' performance should have put to rest doubts about women's abilities as pilots and brought about greater opportunities.³⁹ Instead, women would not be permitted into the cockpit of a military aircraft for almost three decades.⁴⁰

In 1948, not only were the WASPs still grounded, but that same year produced the Women's Armed Services Integration Act.⁴¹ Although the Act provided a permanent place for women in the services,⁴² it also created the statutory bans prohibiting women from flying combat aircraft⁴³ or serving on combat Naval ships.⁴⁴ The Act also limited women's numbers in the Armed Forces to two percent of the total military.⁴⁵ When Congress was writing these exclusions, however, it never consulted available evidence or made an effort to learn how women had performed their combat roles in Britain, Germany, Japan, China, or the Soviet Union.⁴⁶ For example, Congress was never informed of an experiment that Army Chief of Staff George C. Marshall had conducted, using women in mixed battery anti-aircraft artillery units.⁴⁷ Marshall had heard reports from General Eisenhower that British women performed quite well in anti-aircraft combat duty against the Luftwaffe.⁴⁸ Marshall's experiment "stunned the General Staff" by showing that

36. MAJ. GEN. JEANNE HOLM, USAF (RET.), *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 315 (1992).

37. *Id.*

38. *Id.* at 64 n.3.

39. Callander, *supra* note 35, at 71-72.

40. *Id.* at 72 ("[The WASPs'] actions in wartime demonstrated courage and determination, paving the way for women to be admitted to military flying training again, but it had been more than 30 years before they finally completed their journey.").

41. Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356 (1948) (repealed 1967).

42. HOLM, *supra* note 36, at 119.

43. See 10 U.S.C. § 8549 (repealed 1991).

44. See 10 U.S.C. § 6015 (repealed 1993).

45. Pub. L. No. 90-130, 81 Stat. 374 (1967) (removing the two percent cap on women in the military).

46. D'Ann Campbell, *Women in Combat: The World War II Experience in the United States, Great Britain, Germany, and the Soviet Union*, 57 J. MIL. HIST. 301, 322 (1993).

47. *Id.* at 302, 305.

48. *Id.* at 303.

the units mixed with women and men in equal proportion performed better than all-male units and had a high unit cohesion.⁴⁹ The experiment was shut down, however, by powerful Southern congressmen who threatened to abolish the Women's Army Corps (WAC) if the Army used any women in combat.⁵⁰ Chief of Staff Marshall needed the WAC too much to risk its abolition and was willing to accept an inferior military solution to the Luftwaffe threat as the consensus among the Army staff was that the public was not ready for American women in combat.⁵¹

A recurring theme in women's military history is that opportunities frequently opened to women not by force of social change or demands for equal treatment, but rather from military necessity.⁵² In World War II, that need was for pilots.⁵³ The United States was able to squeak by using thousands of civilian men who had been disqualified for military service and by relying on the WASPs to ferry aircraft and perform other non-combat flying.⁵⁴ Decades later, after the draft ended, the military was struggling to meet male recruiting goals. To do so, the services accepted large numbers of minimally qualified male recruits.⁵⁵ Over half of the Army's males were high school dropouts in the lowest acceptable mental category, while most of its women were high school graduates scoring in the top mental categories.⁵⁶

Ironically, in the 1980s the USAF trained female pilots of other NATO nations to fly its combat aircraft.⁵⁷ Canada, Denmark, Luxembourg, Norway, and Portugal did not have combat exclusion laws,⁵⁸ and by 1987 Canada had opened all of its aircrew positions to women.⁵⁹

49. *Id.* at 302.

50. *Id.* at 304.

51. *Id.* at 305.

52. See, e.g., Callander, *supra* note 35, at 70 (noting that Maj. Gen. Arnold (the Chief of the Army Air Forces) had initially rejected Jackie Cochran's (the director of women pilots) plan to use women pilots in noncombat roles but "[b]y the summer of 1942, the US was in the war and hurting for pilots[, and] Arnold called Cochran . . . to set up a program to teach women to fly for the Army").

53. Gordon & Ludvigson, *supra* note 13, at 54 ("When World War II erupted, the United States found itself short of manpower and women were once again called upon to join the services in order to free men in combat.").

54. HOLM, *supra* note 36, at 316.

55. *Id.* at 384.

56. *Id.*

57. *Id.* at 429.

58. *Id.* at 500.

59. *Id.* at 429.

In 1989, Operation Just Cause began in Panama, and 800 military women took part in the invasion.⁶⁰ One woman led a platoon that "exchanged fire with snipers and shot and killed three men who had refused to halt at a roadblock."⁶¹ Another woman "ran out under sniper fire to rescue a civilian . . . and was caught in the street that was subject to hostile fire."⁶² A third woman "spent a night under a bus at her roadblock, firing at a Panamanian Defense Force (PDF) vehicle which came within inches of striking the bus under which she lay."⁶³ Still another led several platoons in an assault on a suspected stronghold, endured a firefight, and successfully infiltrated the compound.⁶⁴

Operation Desert Storm demonstrated that the classification of a job as a 'non-combat position' does not guarantee safety. Sixteen women were killed in the Operation.⁶⁵ As one female Army Sergeant explained, "[w]hen the shells start coming downwind, I will be counting on my flak jacket for protection, not my [job title]."⁶⁶ Far from the battlefield, three Army women were killed by "a scud missile that landed on a military barracks in Dhahran [Saudi Arabia], one woman died in an antipersonnel mine explosion, and another died when the aircraft she was in was shot down."⁶⁷ "Army helicopter pilot Major Marie Rossi died one day after the cease-fire when her helicopter hit an unlit microwave tower."⁶⁸ Two women were taken prisoner of war.⁶⁹ One, a truck driver, was held for thirty-three days.⁷⁰ The other, Major Rhonda Cornum, was an Army flight surgeon on a search and rescue mission when her helicopter was shot down.⁷¹ She was sexually molested by the Iraqis, but downplayed the incident by explaining, "a lot of people make a big

60. Lydia Zaidman, Book Note, 20 WOMENS RTS. L. REP. 33 (1998) (reviewing LINDA BIRD FRANCKE, *GROUND ZERO: THE GENDER WAR IN THE MILITARY* (1997)).

61. *Id.*

62. *Id.* at 34.

63. *Id.*

64. *Id.*

65. Women in Military Service, Questions and Answers, <http://www.womensmemorial.org/historyandcollections/history/learnmoreques.htm> (follow "Do You Have Casualty Figures for Military Women" hyperlink) (last visited Jan. 25, 2006).

66. Women in Military Service, Eras: 1990s, <http://www.womensmemorial.org/historyandcollections/history/lrnmre1990s.html> (last visited Jan. 25, 2006).

67. Women in Military Service, Questions and Answers, <http://www.womensmemorial.org/historyandcollections/history/learnmoreques.htm> (follow "Do You Have Casualty Figures for Military Women" hyperlink) (last visited Jan. 25, 2006).

68. *Id.*

69. *Id.* (follow "Do You Have Prisoner of War Figures for Military Women" hyperlink).

70. *Id.*

71. *Id.* See also Joellen Perry, *Rhonda Cornum*, U.S. NEWS & WORLD REP., Aug. 20, 2001, at 30.

deal about getting molested . . . [b]ut in the hierarchy of things that were going wrong, that was pretty low on my list.”⁷² She also noted, “[c]ombat exclusion isn’t preventing women from getting captured; it’s just keeping them from the kinds of jobs they might want.”⁷³ A member of the Defense Advisory Committee on Women in the Services (DACOWITS)⁷⁴ observed, “the perception that Americans will not tolerate women being killed or held POWs did not prove to be accurate during Desert Storm and is unlikely to be the case in future conflicts.”⁷⁵

The Pentagon’s final report to Congress on the Persian Gulf War concluded that “women played a vital role in the theater of operations,” and “[t]hey performed professionally and without friction or special consideration.”⁷⁶ Their performance was the catalyst for the events of the following months, during which time a heated debate ensued on whether to remove the outdated legal barriers that banned women from positions for which they had proven themselves qualified.⁷⁷ By December 1991, the first of those statutes was gone.⁷⁸

II. OPENING THE DOOR

The only statutes that have barred women from combat of any kind were created by the Women’s Armed Services Integration Act

72. Frontline, *The Gulf War: War Story: Rhonda Cornum*, PBS ONLINE, <http://www.pbs.org/wgbh/pages/frontline/gulf/war/5.html> (last visited Jan. 25, 2006).

73. 138 CONG. REC. E238-03 (daily ed. Aug. 5, 1992) (statement of Rep. Schroeder quoting Maj. Rhonda Cornum).

74. Def. Dep’t Advisory Comm. on Women in the Servs., About DACOWITS, http://www.dtic.mil/dacowits/tableabout_subpage.html (last visited Jan. 25, 2006). DACOWITS was established in 1951 by Secretary of Defense Marshall. *Id.* “The Committee is composed of civilian women and men who are appointed by the Secretary of Defense to provide advice and recommendations on matters and policies relating to the recruitment and retention, treatment, employment, integration, and well-being of highly qualified professional women in the Armed Forces.” *Id.*

75. D’Ann Campbell, *Combating the Gender Gulf*, 2 TEMP. POL. & CIV. RTS. L. REV. 65, 84 (1992).

76. DEPT OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 740 (1992) [hereinafter GULF WAR REPORT TO CONGRESS] (“Women served in almost all of the hundreds of occupations open to them; as a matter of law and policy, women were excluded from certain specific combat military occupational specialties.”).

77. See Jon Nordheimer, *Women’s Role in Combat: The War Resumes*, N.Y. TIMES, May 26, 1991, § 1, at 1.

78. Nat’l Def. Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1317 (Dec. 5, 1991) [hereinafter Nat’l Def. Authorization Act FY 1992 and 1993]. The Act repealed the statutory limitations on the assignments of women to aircraft flying combat missions. See GULF WAR REPORT TO CONGRESS, *supra* note 76, at 740.

of 1948.⁷⁹ Passed after World War II, the Act gave women permanent status in the Regular and Reserve forces of the Army, Navy, Marine Corps, and the newly created Air Force, but, as noted, capped their numbers at two percent of the total force.⁸⁰ Women were specifically excluded from "serving on navy ships (except hospital ships and transports) and aircraft engaged in combat missions."⁸¹ The two exclusionary statutes were codified in 10 U.S.C. § 8549,⁸² prohibiting assignment of female members to duty in aircraft engaged in combat, and 10 U.S.C. § 6015,⁸³ prohibiting women from assignment to duty on vessels engaged in, or likely to be engaged in, combat missions.

As the realities of the Persian Gulf War demolished the myths about women's roles, these statutes were reconsidered in 1991.⁸⁴ The first direct challenge came on May 8, 1991, when the House Armed Services Committee adopted an amendment to the 1992 defense authorization bill introduced by Representative Patricia Schroeder (D-Colo.) by a voice vote.⁸⁵ The Schroeder amendment sought to repeal the prohibition barring women from Air Force aircraft engaged in combat missions.⁸⁶ Representative Beverly B. Byron (D-Md.) proposed expanding the amendment to include repeal of the Navy and Marine Corps bans as well.⁸⁷ The defense authorization bill (with the Schroeder-Byron amendments) cleared the full House on May 22, 1991 and moved on to the Senate.⁸⁸ Perhaps sensing a change in the political winds, Secretary of Defense Dick Cheney publicly endorsed the proposal.⁸⁹

79. Women's Armed Services Integration Act of 1948, ch. 449, Pub. L. No. 80-625, 62 Stat. 356 (repealed in 1967).

80. HOLM, *supra* note 36, at 120.

81. *Id.* See also U.S. GEN. ACCOUNTING OFFICE, GENDER ISSUES: INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION 1 (1998), available at <http://www.gao.gov/archive/1999/ns99007.pdf> [hereinafter GAO/NSIAD-99-7] ("Because the Marine Corps is a naval oriented air and ground combat force, the exclusion of women from Navy ships essentially barred them from combat positions in the Marine Corps as well. The Women's Army Corps already excluded women from combat positions, eliminating the need for a separate statute for Army servicewomen.").

82. 10 U.S.C. § 8549, *repealed by* Pub. L. No. 102-190, div. A, title V, § 531(a)(1), 105 Stat. 1365 (1991).

83. 10 U.S.C. § 6015, *repealed by* Pub. L. No. 103-160, div. A, title V, § 541(a), 107 Stat. 1659 (1993).

84. HOLM, *supra* note 36, at 461-62.

85. H.R. 2100, 102d Cong. (1991). See also HOLM, *supra* note 36, at 475.

86. Robert H. Knight, *Women in Combat: Why Rush to Judgment?*, (Heritage Found., Background No. 836, 1991), <http://www.heritage.org/Research/NationalSecurity/BG836.cfm>.

87. HOLM, *supra* note 36, at 476.

88. *Id.*

89. *Id.*; Sharen Shaw Johnson, *Senate Duo Pushes for Female Combat Pilots*, USA TODAY, July 30, 1991, at 5A.

The Senate Armed Services Committee scheduled hearings for June 18, 1991, before the Manpower and Personnel Subcommittee, chaired by Senator John Glenn (D-Ohio).⁹⁰ Rather than addressing whether to go along with the House proposal, a debate ensued over the entire range of issues relating to women in combat.⁹¹ In the intense lobbying by the traditional and conservative interests opposed to repealing the exclusions, the frequently employed argument was the "slippery-slope."⁹² That is, "[r]epeal of the combat flying exclusions would lead inexorably to opening *all* combat roles to women"⁹³ During the hearings, the testimony of the service chiefs was against change.⁹⁴ They felt that there had been enough experimentation with women in the military and the exclusionary laws were necessary to maintain an effective fighting force.⁹⁵ The Army Chief of Staff, General Carl Vuono, and the Marine Commandant, General Alfred M. Gray, Jr., declared that removing the ban would harm combat effectiveness and distract male soldiers.⁹⁶ The Commandant also told the committee that, "[w]e don't find that our women want change."⁹⁷

The debate intensified when General Merrill A. McPeak, the Air Force Chief of Staff, testified that although women were superior to men when it came to taking G-forces,⁹⁸ he would choose a less qualified male pilot to fly with him in combat over a highly qualified female pilot, even if it sacrificed national security.⁹⁹ A

90. See *Hearing on Dep't of Def. Authorization for Appropriations for Fiscal Years 1992 and 1993, Before the Comm. on Manpower and Pers., Comm. on Armed Servs.*, 102d Cong. (1991) [hereinafter *Manpower and Pers. Hearing*].

91. HOLM, *supra* note 36, at 478.

92. *Id.*

93. *Id.* at 480 (emphasis in original).

94. *Id.* at 481.

95. *Id.*

96. *Id.* at 481-482; *Manpower and Pers. Hearing, supra* note 90, at 823-25, 828-30 (statements of Gen. Carl Vuono and Gen. Alfred M. Gray, Jr.). Downplaying the role women had played in expelling Iraq from Kuwait, General Gray noted, "Operations Desert Shield and Desert Storm . . . was [sic] not the ultimate test in terms of sustained combat" *Id.* at 828 (statement of Gen. Alfred M. Gray, Jr.).

97. *Id.* at 828 (statement of Gen. Alfred M. Gray, Jr.).

98. See *infra* notes 121 and 136. As General McPeak explained, "the ability to pull Gs relates to height rather than sex" and women tend to be shorter than men. *Manpower and Pers. Hearing, supra* note 90, at 839-40 (statement of Gen. Merrill A. McPeak).

99. *Manpower and Pers. Hearing, supra* note 90, at 840. See also Eric Schmitt, *Women Ready to Fly for Navy, or Flee It*, N.Y. TIMES, Apr. 23, 1993, at A14 (noting that shortly after the hearing, Gen. McPeak commented to a meeting of the Defense Advisory Committee on Women in the Services, "I think it's a mistake to open up bombers and fighters to women I have a culturally based hang-up: I can't get over this image of old men ordering young women into combat.").

former Marine Commandant testified in a prepared statement that "WOMEN CAN'T DO IT! . . . I think the very nature of women disqualifies them from doing it. Women give life. Sustain life. Nurture life. They don't TAKE it."¹⁰⁰ Two lower grade officers testified that women are incapable of performing combat jobs and their presence would disrupt crucial male bonding.¹⁰¹ No senior military women were asked to participate in the hearing.¹⁰² Two female pilots gave the only significant testimony related to combat flying other than General McPeak's.¹⁰³ They explained that although they had undergone the same training as the men, they were denied opportunities because of their gender rather than their skills.¹⁰⁴

A month after the hearings, Senator William V. Roth (R-Del.) introduced a bill in the Senate similar to the House-passed measure.¹⁰⁵ The full Senate convened to debate the bill on July 31, 1991.¹⁰⁶ After rehashing the objections already heard, Senator Nancy Kassenbaum (R-Kan.) brought the debate back on track with the reminder that the only real question at issue was whether or not to repeal the statute that barred women from air combat in the Air Force and Navy.¹⁰⁷ The Senate then approved the Roth amendment ninety-five to three on a voice vote.¹⁰⁸

The new law, signed on December 5, 1991, repealed 10 U.S.C. § 8549, the combat aviation ban.¹⁰⁹ The law also established a Commission on the Assignment of Women in the Armed Forces to examine the entire issue of women's roles in combat.¹¹⁰ Even though the statutory ban was gone, the Pentagon decided to put any actual policy change on hold until the Commission made its report.¹¹¹ In November of 1992, the Commission issued its findings.¹¹² Considering the composition of the Commission, its recommendations were not surprising. One of the members of the commission was Elaine Donnelly, president of the Center for Military Readiness (CMR).

100. HOLM, *supra* note 36, at 483.

101. *Id.* at 484.

102. *Id.*

103. *Id.*

104. *Id.*

105. S.1076, 102d Cong. (1991). *See also* HOLM, *supra* note 36, at 486.

106. HOLM, *supra* note 36, at 494.

107. *Id.* at 499-501.

108. *Id.* at 502.

109. *See* Nat'l Def. Authorization Act for Fiscal Years 1992 and 1992, Pub. L. No. 102-190, div. A, title V, § 531(a)(1), 105 Stat. 1365 (1991).

110. *Id.* § 541.

111. Campbell, *supra* note 75, at 88.

112. *Id.* *See generally* PRESIDENTIAL COMM'N ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT: WOMEN IN COMBAT (1992).

The April 2003 CMR Report elucidates Ms. Donnelly's stance on the issue: "We do have a choice about sending young women, including single mothers, to fight our wars. In a nation and culture that respects women, close combat on an equal basis with men is not a step forward for women, it is a step backward for civilization."¹¹³ The commissioners voted, eight to seven, to close combat aviation to women.¹¹⁴ In addition, the Commission recommended that the air and land combat roles be banned by law, a recommendation that would have been an affirmative step backward as Congress had just repealed the legal ban on air combat the year before.¹¹⁵

The fate of the Commission's report, however, changed in November 1992 with the election of a new commander-in-chief. President Clinton disregarded the report and on April 28, 1993, his Secretary of Defense, Les Aspin, announced that he was ordering the military services to open assignments in combat aviation to women as a first step toward allowing them into virtually every combat position, short of those in front-line ground combat units.¹¹⁶ Aspin added that he would also ask Congress to repeal the law banning women from serving on Navy warships at sea.¹¹⁷ Congress later repealed 10 U.S.C. § 6015, the only other exclusion statute on the books.¹¹⁸

III. BREAKING MORE THAN THE SOUND BARRIER

The first woman to become an Air Force fighter pilot "brought the issue of women in combat roles to a head, after she graduated first in her undergraduate pilot training class in 1992."¹¹⁹ As pilots select assignments based upon their class ranking, she earned the right to choose her weapons system first and selected the F-15E Strike Eagle. In a volte-face from his incendiary testimony to the

113. REPORT OF THE CENTER FOR MILITARY READINESS, 16 CMR REPORT 6 (2003), available at <http://www.cmrlink.org/CMRNotes/M38V8CCMRRT16.pdf> [hereinafter CMR REPORT].

114. Campbell, *supra* note 75, at 89.

115. *Id.*

116. ROSEMARIE SKAINE, WOMEN AT WAR: GENDER ISSUES OF AMERICANS IN COMBAT 104 (1999).

117. HOLM, *supra* note 36, at xiii. See also CMR REPORT, *supra* note 113, at 3.

118. Pub. L. 103-160, div. A, title V, § 541(a), 107 Stat. 1659 (1993).

119. Sarah L. Schipman, *Women Command Airspace in Combat Pilot Positions*, AIR FORCE LINK, Mar. 8, 2005, <http://www.af.mil/news/story.asp?storyID=123009983> (discussing how Jeannie Flynn's stellar qualifications prompted the Secretary of Defense to eventually lift the policy ban against women combat pilots in 1993).

Senate Armed Services Committee in 1991, General McPeak introduced Flynn "to the press as the Air Force's first mission-qualified female fighter pilot" in laudatory terms.¹²⁰

Nonetheless, not everyone favored the repeal of the combat exclusion laws. Describing the physical prowess necessary to handle nine times the force of gravity in an F-16,¹²¹ one male pilot, now a brigadier general, commented, "I don't think a woman can hack the program."¹²² A number of women have proven him wrong. By 2004, sixty women flew fighters¹²³ in the Active Duty Air Force and "there are more female fighter pilots every year."¹²⁴ As the numbers indicate, being a combat pilot is not for everyone. One woman explained, "[i]f you're ultra sensitive, you're in the wrong profession. Women fighter pilots are tough You have to be willing to kill people and be ready to die."¹²⁵

Responding to the recent public discussions about women's combat roles, the commander of the 20th Fighter Wing at Shaw Air Force Base pointed out that many people may not realize that the Air Force confidently assigns women to combat aircraft positions.¹²⁶ "Our women fighter pilots in the Air Force are fully qualified and continue to fly in combat alongside their male counterparts They do so with lethal and effective force against our adversaries."¹²⁷ Considering that a single F-16 costs over \$14 million and that it costs over \$5 million to train one pilot to fly it, that confidence is no

120. Rebecca Grant, *The Quiet Pioneers*, 85 AIR FORCE MAGAZINE 34, 35 (Dec. 2002), available at <http://www.afa.org/magazine/dec2002/1202pioneer.pdf> (quoting Gen. McPeak) ("She didn't ask for anything from anybody Nobody gave her anything, and she went right through that course just like everybody else. Everybody in the squadron had very high respect for her.").

121. See, e.g., *FactSheets: F-16 Fighting Falcon*, AIR FORCE LINK, <http://www.af.mil/factsheets/factsheet.asp?fsID=103> (last visited Jan. 25, 2006) ("With a full load of internal fuel, the F-16 can withstand up to nine G's — nine times the force of gravity — which exceeds the capability of other current fighter aircraft.").

122. Dave Moniz, *Women Rejoicing at Chance to Prove Themselves in Combat*, STATE-RECORD (COLUMBIA), Apr. 30, 1993, at 1A.

123. Fighter aircraft include the F-16 Fighting Falcon, F-15 Eagle, F-15E Strike Eagle, A-10 Thunderbolt, and F-117 Nighthawk stealth fighter. See generally U.S. AIR FORCE, 109TH CONG., AIR FORCE HANDBOOK, 67, 91, 92, 95 (2005), available at <http://www.af.mil/library/posture/2005handbook.pdf>.

124. Madelyn Waychoff, *Women Play Important Role in Military*, AIR FORCE LINK, Mar. 23, 2004, <http://www.af.mil/news/story.asp?storyID=123007277>.

125. Elaine Aviles, DEFEND AMERICA, U.S. DEPT OF DEF. NEWS ABOUT THE WAR ON TERRORISM, *Female Fighter Pilots Take on Challenges*, Apr. 2003, <http://www.defendamerica.mil/articles/apr2003/a041403e.html>.

126. Susan Penning, *Female Fighters Display "Lethal, Effective Force,"* AIR FORCE PRINT NEWS, June 27, 2005, available at <http://www.af.mil/news/story.asp?storyID=123010885> (quoting Col. Philip Ruhlman).

127. *Id.*

sham.¹²⁸ Another Air Force commander, commenting on women's participation in Iraq, stated, "[w]omen are an integral part of our air and space team I have witnessed their excellence in combat and their (effect) on our total force We were asked to put our best foot forward in support of (Operation Iraqi Freedom), and we did that" ¹²⁹

Women combat pilots have become a fact of life, and gender differences have subsided from the collective consciousness of the occupation. The fact that "[t]he Air Force deputy chief of staff for personnel no longer assigns an action officer to track 'female pilot' issues, as was done in the early 1990s,"¹³⁰ is testament to the progress that has been made. Certainly, contributing significantly to the integration has been the fighter community's maintenance of the same high standards of performance for each pilot, regardless of gender.

Air Force pilots must successfully complete a merit-based, objectively-measured training program, in which one's progress and choice of aircraft are strictly determined by performance.¹³¹ At the conclusion of Undergraduate Pilot Training, where student pilots learn the basic flight skills common to all military pilots, students elect their advanced training tracks based on class standing.¹³² Those whose class standing allows them to choose a fighter or bomber track learn to fly the T-38 Talon, a supersonic jet trainer.¹³³ Graduate pilots who have chosen a fighter aircraft must then pass an Introduction to Fighter Fundamentals course before moving on to a major weapons system such as the F-16, F-15, F-15E, or A-10.¹³⁴

In order to meet the physical requirements necessary to fly fighters, early on in training each pilot must successfully complete

128. See, e.g., *Factsheets: F-16 Fighting Falcon*, *supra* note 121 (approximating the unit cost of an F-16 at between \$14.6 million and \$18.8 million in FY 1998 constant dollars); Richard Halloran, *Air Force and Navy Try Steps to Keep Jet Pilots*, N.Y. TIMES, May 31, 1988, at B6 ("Training a pilot in the F-16 costs . . . \$5.3 million.").

129. Penning, *supra* note 126 (quoting Maj. Anthony Roberson, 20th Operation Support Squadron, Operations Director).

130. Grant, *supra* note 120, at 38.

131. See AIR EDUC. AND TRAINING COMMAND, SPECIALIZED UNDERGRADUATE PILOT TRAINING, <http://www.baseops.net/militarypilot> (last visited Jan. 25, 2006) ("Students pick [their weapon system] based on their performance/ranking in phase 2.").

132. *Id.*; *Factsheets: Air Education and Training Command*, AIR FORCE LINK, <http://www.af.mil/factsheets/factsheet.asp?fsID=138> (last visited Jan. 25, 2006).

133. *Factsheets: Air Education and Training Command*, *supra* note 132.

134. *Id.*

the Fighter Aircrew Conditioning Test (FACT).¹³⁵ The test measures a person's muscle fitness as it applies to operating high-G¹³⁶ aircraft, recognizing that "[a]naerobic fitness . . . is essential to performing effective anti-G straining maneuvers without fatigue," and "[a]erobic fitness . . . increases blood supply . . . [to reduce] recovery time between engagements and sorties."¹³⁷ The FACT is part of a conditioning program designed to "improve the G-tolerance, G-endurance, and cockpit strength of fighter aircrews . . ." ¹³⁸ All Air Force flight training students must successfully complete the FACT before graduating to high-G aircraft.¹³⁹ The only persons exempt from the program are senior officers (colonel and above).¹⁴⁰

Another mandatory physical qualification for fighter aircrew is successful completion of centrifuge training.¹⁴¹ The centrifuge is a gondola-like capsule, resembling a cockpit attached to the end of a long arm, which rotates at increasing speeds to imitate the positive inertial forces experienced during high-G maneuvering.¹⁴² "The high-G aircraft operated by today's aircrew are easily capable of causing G-induced loss of consciousness (G-LOC)."¹⁴³ The training is designed to teach an anti-G-straining maneuver (AGSM), "the aircrew's most significant weapon against the potentially incapacitating effects of G . . ." ¹⁴⁴ To qualify, pilots are strapped into a

135. See AIR EDUC. AND TRAINING COMMAND, *supra* note 131.

136. "G" forces refer to the gravitational pull exerted on a pilot during maneuvering, the intensity of which is a function of airspeed and turn radius. See U.S. AIR FORCE, AIR FORCE PAMPHLET 11-419, G-AWARENESS FOR AIRCREWS 12 (1999) (defining "G" as "[a]ny force that produces an acceleration of 32.2 [feet per second] . . . which is equivalent to the acceleration produced by earth's gravity"). Modern fighters can create a force equivalent to a maximum of nine Gs, or nine times the force of gravity. See *supra* note 121. This inertial force not only makes it difficult for a pilot to move about in the cockpit (turning an eight pound head to "check six," for example, means turning a seventy-two pound head under nine Gs), but also draws blood away from the brain, pooling it in the lower extremities. See, e.g., Gail Kaufman, *Real G-Forces — On the Ground; Simulator Company Helps Fighter Pilots Acclimate*, DEFENSE NEWS, Mar. 1, 2004, at 54. Without counteracting this force, the lack of blood and oxygen causes the brain to shut down, creating an effect known as G-induced loss of consciousness (G-LOC). See, e.g., AIR EDUC. AND TRAINING COMMAND, AETC INSTRUCTION 11-406, FIGHTER AIRCREW CONDITIONING PROGRAM (FACP) 1 (2000) [hereinafter AETC INSTRUCTION 11-406].

137. AETC INSTRUCTION 11-406, *supra* note 136, at 3. One need only witness a civilian after a half-hour ride in an F-16 to understand this concept. In the author's experience, most individuals will vomit several times and sleep for several hours to recover, even from the most benign of orientation flight profiles.

138. *Id.* at 1.

139. *Id.* at 2.

140. *Id.*

141. See U.S. AIR FORCE, AIR FORCE INSTRUCTION 11-403, AEROSPACE PHYSIOLOGICAL TRAINING PROGRAM G-AWARENESS FOR AIRCREWS 30-31 (2001).

142. *Id.*

143. U.S. AIR FORCE, AIR FORCE INSTRUCTION 11-404, CENTRIFUGE TRAINING FOR HIGH-G AIRCREW 4 (1999).

144. *Id.* at 10.

centrifuge training device and put through a series of five profiles, including a "rapid onset" run of 9, 8.5, or 7.5 Gs, depending on the pilot's follow-on aircraft assignment.¹⁴⁵ In addition to the initial qualification, any pilot who experiences an in-flight G-LOC is grounded until successfully completing the required profile again.¹⁴⁶ Normally, a pilot gets two chances — if a G-LOC occurs on the second try, that individual no longer flies a fighter.¹⁴⁷

In addition to flying-related training, Air Force pilots undergo both water survival and combat survival training.¹⁴⁸ By learning how to evade capture and resist interrogation, pilots learn skills necessary in the event they are shot down over enemy territory. It takes nearly three years of training before a newly-minted fighter pilot becomes mission-ready and able to deploy to combat.¹⁴⁹ Training and evaluation, however, do not end at that point. Compulsory annual mission-related check rides, instrument check rides, and emergency procedure evaluations — all of which are evaluated by objective, standardized criteria — are mandatory throughout a pilot's flying career.¹⁵⁰ Regulations establish a senior officer who is in charge of an Aircrew Standardization/Evaluation Program for each flying unit.¹⁵¹ Only the most highly qualified and experienced instructor pilots are assigned as flight examiners.¹⁵² Thus, at every stage, the Air Force has established criteria to objectively measure and evaluate performance. This serves not only to ensure the maintenance of a highly skilled force, but also to promote confidence among pilots in one another's capabilities.

IV. MAKING SENSE OF THE REMAINING EXCLUSIONARY POLICIES

Although no statute prohibiting women from serving in any military capacity has been on the books since 1993, DOD policies of exclusion continue to control the assignment of women.¹⁵³ The

145. *Id.*

146. *Id.* at 11.

147. *Id.* at 12-13.

148. See generally U.S. AIR FORCE, AIR FORCE POLICY DIRECTIVE 16-13, SURVIVAL, EVASION, RESISTANCE, AND ESCAPE (SERE) (2000).

149. See WILLIAM W. TAYLOR ET AL., RAND CORP., ABSORBING AIR FORCE FIGHTER PILOTS: PARAMETERS, PROBLEMS, AND POLICY OPTIONS 24 (2002).

150. See U.S. AIR FORCE, 2 AIR FORCE INSTRUCTION 11-202, AIRCREW STANDARDIZATION/EVALUATION PROGRAM 15-25 (2002).

151. See *id.* at 16-18.

152. *Id.* at 16.

153. See, e.g., *Women in Combat: Lawmakers Draw New Line*, MSNBC.COM, May 19, 2005, <http://www.msnbc.msn.com/id/7909442/from/RL.3> ("Army policy keeps women from some support jobs such as repairing tanks or artillery in a fighting situation.").

current DOD policy banning women from ground combat states that "servicemembers are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignments to units below the brigade level whose primary mission is to engage in direct combat on the ground."¹⁵⁴ Additionally, each of the four services may "close positions to women" under four circumstances:

- (1) the units and positions are required to physically collocate¹⁵⁵ and remain with direct combat units; (2) the service secretary attests that the cost of providing the appropriate living arrangements is prohibitive; (3) the units are engaged in special operations forces' missions, including those involving long-range reconnaissance; or (4) job-related physical requirements would exclude the vast amount of women.¹⁵⁶

In 1998, a General Accounting Office (GAO) report estimated that "221,000 positions, or about 15 percent of the approximately 1.4 million positions in [the] DOD, were closed to servicewomen."¹⁵⁷

The Department of Defense defines direct ground combat 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.'"¹⁵⁸ Additionally, "direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them

154. U.S. GEN. ACCOUNTING OFFICE, GENDER ISSUES: INFORMATION TO ASSESS SERVICEMEMBERS' PERCEPTIONS OF GENDER INEQUITIES IS INCOMPLETE 18-19 (1998), available at <http://www.gao.gov/archive/1999/ns99027.pdf> [hereinafter GAO/NSIAD-99-27] ("The impact of DOD's ground combat exclusion policy is greatest in the Army and the Marine Corps and has very little impact in the Air Force and the Navy.").

155. See GAO/NSIAD-99-7, *supra* note 81, at 7 ("Units that collocate with direct ground combat units operate within and as part of those units during combat operations. For example, Army ground surveillance radar units, while not considered direct ground combat units, routinely operate with infantry and armor units on the battlefield.").

156. *Id.* at 19 ("The local policies and practices of military commanders can also affect assignments. Military commanders have considerable discretion to assign personnel under their command.").

157. *Id.* at 7. See also *id.* at 19. Approximately "101,700 [forty-six percent] of these positions are closed based on DOD's policy of not assigning women to occupations that require engagement in direct ground combat." *Id.* Forty-one percent "of the positions closed to women are attributed to the collocation exclusion policy." *Id.* at 5. Another twelve percent of positions are closed to women due to gender-neutral modifications considered to be "cost prohibitive." *Id.* at 6. "The special operations forces and long-range reconnaissance missions policy accounts for almost [two percent] of all positions closed to women." *Id.* The GAO found no positions closed to women "based on physical requirements." *Id.*

158. *Id.* at 7.

by fire, maneuver, or shock effect.”¹⁵⁹ To be considered a direct ground combat unit, the primary mission of that unit must include all of the criteria in the above definition.¹⁶⁰

A 1998 report by the GAO made the following conclusion regarding this definition:

DOD’s definition of direct ground combat includes a statement that ground combat forces are “well forward on the battlefield.” This statement, however, does not reflect the less predictable nature of emerging post-Cold War military operations that may not have a well-defined forward area on the battlefield. If this trend continues, DOD’s definition of direct ground combat may become increasingly less descriptive of actual battlefield conditions.¹⁶¹

The trend heralded by the 1998 report has certainly continued, as American forces are involved in both a war on terror and an unconventional war in Iraq, both of which defy the traditional notions of ground combat.

Further complicating the matter are federal statutes defining certain rights based upon whether individuals are engaged in combat. These statutes afford disparate treatment to seemingly similarly situated individuals, with “combat” as the justification. The Internal Revenue Code, for example, defines a “combat zone,” for purposes of the combat zone exclusion for taxes, as “any area which the President of the United States by Executive Order designates, for purposes of this section or corresponding provisions of prior income tax laws, as an area in which Armed Forces of the United States are or have (after June 24, 1950) engaged in combat.”¹⁶² Federal statute 26 U.S.C. § 112 exempts from gross income the compensation received by members of the Armed Forces who “served in a combat zone” or were “hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone.”¹⁶³ Executive Order No. 13,239, for example, designated Afghanistan as a combat zone.¹⁶⁴ Men and women who have served in Afghanistan have been in an area “in which Armed Forces are and have been engaged in combat” for purposes of § 112.¹⁶⁵ There

159. *Id.*

160. *Id.*

161. *Id.* at 4.

162. 26 U.S.C. § 112 (c)(2) (2005).

163. *Id.* § 112 (a) & (b).

164. Exec. Order No. 13,239, 66 Fed. Reg. 64,905 (Dec. 19, 2001).

165. *Id.*

appears to be one definition of combat when considering tax exemptions and another when considering job classification. All servicewomen in Afghanistan, therefore, are in an area where Armed Forces are engaged in combat, but they are not, apparently, engaging in combat themselves. Thus, while similarly situated under the tax laws, the women and men in Afghanistan are treated differently by DOD policy, and that is arguably unfair to the men.

Another illustration of inconsistency is the Federal Tort Claims Act, which waives the United States' immunity from liability in certain situations.¹⁶⁶ The Act includes an exemption for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."¹⁶⁷ The Ninth Circuit has interpreted "combatant activities" to "include not only physical violence, but activities both necessary to and in direct connection with actual hostilities."¹⁶⁸ The phrase does not necessarily include "all varied activities having an incidental relation to some activity directly connected with previously ended fighting on active war fronts"¹⁶⁹ In light of the policies excluding women from engaging in actual hostilities, it is unclear how the provisions of the Tort Claims Act apply to such women. Perhaps the waiver of liability would apply differently to a woman than to a man who suffered the same injury, under the assumption that the woman was not engaged in combatant activities.

The practical application of the combat exclusion policies further demonstrates their confusion and unworkability. Part of the difficulty in the application is the lack of a clearly articulated purpose behind the policies. If the purpose is to protect women from the dangers of combat, the preceding sections have demonstrated that job assignment does not necessarily offer protection. It is contradictory to try to protect women from combat on the ground, while at the same time exposing other women to all the dangers inherent in combat from the air. This paradox would be more apparent in a conflict in which the United States did not have air superiority, or in which the air-to-surface threats produced greater risk of being shot down and captured.

If the purpose of the exclusion policies is preservation of military effectiveness, under the assumption that women are not as capable as men in some areas, it depends on stereotypes and

166. 79 Pub. L. No. 601, 60 Stat. 812 (codified as amended in scattered sections of 2 U.S.C. and 28 U.S.C.).

167. 28 U.S.C. § 2680(j) (2005).

168. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).

169. *Id.*

ignores the many examples in which women have proven their combat capabilities.¹⁷⁰ Military effectiveness is controlled by training and the maintenance of high standards. Certain combat-related assignments require specific physical qualifications and skill, and these standards should not be changed. There may be few women capable of meeting such standards, but because the main objective is production of the most effective force possible, exclusion from combat-related assignments should be based strictly on qualifications and not on gender.

The evaporation of the linear battlefield¹⁷¹ and the flexibility necessary to pursue today's insurgent conflicts have made exclusions based on 'front line' assignments impractical. As retired Brigadier General Stephen M. Koper, president of the National Guard Association, has explained, "[t]oday combat may occur in the desert or on Main Street."¹⁷² In the recent conflict in Iraq, for example, on June 16, 2005, a twenty-three-year-old Army Sergeant was awarded the Silver Star medal (the first such award to a woman since World War II) for exceptional valor in close combat.¹⁷³ On March 20, 2005, she "led her team through a 'kill zone' and into a flanking position, where she assaulted a trench line with grenades and M203 grenade-launcher rounds . . . kill[ing] at least three insurgents . . ."¹⁷⁴ She was one of two women and eight men from a military police squad that killed twenty-seven insurgents and wounded six in an orchard south of Baghdad.¹⁷⁵ Considering that "direct ground combat" is 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,'"¹⁷⁶ it appears as though this woman's brave performance fits that definition precisely. In the

170. A 1997 Rand study sponsored by the Undersecretary of Defense for Personnel and Readiness concluded that gender integration has had a negligible impact on readiness, cohesion, and morale. See HARRELL ET AL., *supra* note 11, at xiii (citing MARGARET C. HARRELL & LAURA L. MILLER, *NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS ON READINESS, COHESION, AND MORALE* (1997)).

171. See, e.g., Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1051 (1998) ("In the past, battlefields were generally linear — fielded forces faced each other across a geographically distinct line.").

172. Ann Scott Tyson, *More Objections to Women-in-Combat Ban*, WASH. POST, May 18, 2005, at A5 (quoting Brig. Gen. Stephen M. Koper).

173. 151 CONG. REC. E1492 (daily ed. July 14, 2005) (statement of Rep. Cooper honoring Sgt. Leigh Ann Hester).

174. *Id.*

175. Steve Fainaru, *Silver Stars Affirm One Unit's Mettle; Women Play Key Roles in Combat Near Baghdad*, WASH. POST, June 26, 2005, at A1.

176. GAO/NSIAD-99-7, *supra* note 81, at 7.

face of this kind of evidence, it is difficult to understand what possible legitimate purpose the exclusionary policies are intended to promote.

With regard to the policy prohibiting mixed-sex support units from collocation with combat units, Army officers interviewed in Iraq consistently agreed that it had become meaningless.¹⁷⁷ As the Army struggles to maintain its requisite numbers while honoring its exclusionary rules, the changing nature of the battlefield, the guerrilla-style nature of the war against terrorism, and the high level of threat now associated with 'non-combat' roles make practical adherence to the exclusionary policies nearly impossible. It might be easier to change the policy than the reality.

V. THE DEBATE REVISITED

The current round of fighting over the role of women in combat was resuscitated in late 2004 when the Army's shortage of skilled male soldiers in Iraq led some Army officials to recommend elimination of the DOD policy restricting women from assignment to units that collocate with ground combat troops.¹⁷⁸ On January 13, 2005, "Army Secretary Francis Harvey reported that after a 'systematic review' he ha[d] concluded that current policies keeping women out of combat will stand. In the process, he declined to adopt [the] recommendation . . . to abolish . . . [the] rule that prohibits women from 'collocating' with combat troops."¹⁷⁹ Despite the Army's official stance supporting exclusionary policies, reorganization of the Third Infantry Division's (3ID) mixed-gender forward support companies (FSCs) in Iraq suggested otherwise.¹⁸⁰ Specifically, thirty women in thirteen FSCs of 3ID's deployed forces had been placed under the command of maneuver battalions, which include infantry, armor, and other combat troops — in effect putting women on the front lines.¹⁸¹ Army spokesmen argue that the modification

177. See, e.g., Ann Scott Tyson, *For Female GIs, Combat Is a Fact; Many Duties in Iraq Put Women at Risk Despite Restrictive Policy*, WASH. POST, May 13, 2005, at A1 (quoting Lt. Col. Cheri Provancha, commander of a Stryker Brigade in Mosul) ("The Army has to understand the regulation that says women can't be placed in direct fire situations is archaic and not attainable. . . . This war has proven that we need to revisit the policy, because they are out there doing it . . .").

178. Bryan Bender, *Army Secretary Rejects Change in Policy on Women in Combat*, BOSTON GLOBE, Jan. 29, 2005, at A11.

179. *Id.*

180. Forward support companies provide logistical support (e.g., food, gas, ammunition) to combat arms units engaging the enemy.

181. The FSCs had previously been under the command of support battalions. See, e.g., Melissa Charbonneau, *The Reality of Women in Combat*, <http://www.cbn.com/cbnnews/news/050223a.asp> (last visited Jan. 25, 2006).

continues to comply with the law because even though the female soldiers “do drive trucks [and] deliver fuel and munitions to the front-line soldiers [they] do not remain round-the-clock with combat forces”¹⁸² Others have contended that the Army is clearly violating the law.¹⁸³

Seeking to keep women out of ground combat, as well as counteracting what must have been perceived as the Army’s attempt to circumvent its policies, the House Armed Services Committee entered the fray in 2005 by offering an amendment during debate of the 2006 Defense Authorization Bill.¹⁸⁴ Section 574 of H.R. 1815 would have prohibited women from serving in certain support units — a measure that would have statutorily excluded women from over 20,000 positions in which they were already serving.¹⁸⁵ Though its supporters claimed that the proposal merely codified existing policy,¹⁸⁶ the creation of an exclusionary statute where none previously existed would have been a significant step backwards.¹⁸⁷ Army leaders strongly criticized the measure, reiterating that they were in compliance with DOD policy and asserting that the proposed legislation would cause confusion and send the wrong signal to the troops.

Sounding remarkably out of touch with reports from Iraq, the Republican supporters of the amendment argued that women’s presence close to the front lines reduced the military’s overall effectiveness.¹⁸⁸ Additionally, they argued that women were not as well-suited for combat roles as men and that female integration into fighting units introduced distractions and danger.¹⁸⁹ Representative Hunter, the amendment’s sponsor, offered, “[t]he nation should not put women into the front lines of combat Forward support companies go forward into battle. That is why they are labeled ‘forward’ support companies. The American people have

182. *Id.*

183. *See, e.g., id.* (quoting Elaine Donnelly, president of the Center for Military Readiness (CMR), who argues that the policy “violates DOD policy on co-location [sic]” and claims that the Army is “circumventing policy and misleading Congress”).

184. *See* H.R. 1815, 109th Cong. (2005).

185. *See* 151 CONG. REC. E1150 (daily ed. May 25, 2005) (statement of Rep. Maloney).

186. *See* 151 CONG. REC. H3912 (daily ed. May 25, 2005) (statement of Rep. Hunter) (“We had a provision in the bill that would statutorily take the Army policy, the present policy, and Xerox it, exactly the same policy, but would make it law.”).

187. *See, e.g.,* Nat’l Org. for Women, Support Military Women; Urge House Vote for Bipartisan Amendment (May 24, 2005), <http://www.now.org/lists/now-action-list/msg00187.html>.

188. Bryan Bender, *Combat Support Ban Weighed for Women, Pentagon GOP Proposal*, BOSTON GLOBE, May 18, 2005, at A1.

189. *Id.*

never wanted to have women in combat, and this [amendment] reaffirms that policy.”¹⁹⁰ The recurring use of the words “forward” and “front lines” indicates either a failure or an unwillingness to recognize that the nature of the battlefield has long since lost its linear composition.¹⁹¹

The measure was eventually amended and a compromise that “gave a partial victory to both sides” was reached.¹⁹² Under the compromise, women would be allowed to continue to serve in the 22,000 positions open to them under the FSCs, but the Pentagon would require Congressional approval before opening any additional positions to women.¹⁹³ On January 6, 2006, the amendment became law as part of the National Defense Authorization Act for Fiscal Year 2006.¹⁹⁴

In this past round of congressional debate on women in combat, the first since the early nineties, the justifications offered by proponents seeking to keep or increase the restrictions on women can be summed up as follows: (1) Americans do not want women in direct ground combat,¹⁹⁵ (2) military or prospective military women do not want to be in direct ground combat,¹⁹⁶ (3) women distract the men,¹⁹⁷ and (4) women’s presence weakens military effectiveness.¹⁹⁸ None of these arguments are new and, once again, they reflect emotional appeal unsupported by empirical evidence. Thankfully, they were not convincing this time. In spite of the effort of some congressional leaders to impose greater restrictions on women in the military, the prevailing parties appear to have learned the lessons of history and experience. In a role reversal from the 1991

190. *Id.* (remarks of Rep. Hunter) (modification in original).

191. *See, e.g.,* Charbonneau, *supra* note 181 (quoting Ret. Army Col. Bill Taylor) (“There are no such things as fixed battle lines in the kind of war we’re fighting now, in war against terrorism, against insurgents. Insurgents attack 360 degrees day and night, and they can hit forward support companies with women as easily as they can hit infantry combat units.”). *See also* GAO/NSIAD-99-7, *supra* note 81, at 10 (“Ground combat experts in the Army and the Marine Corps note that, in the post-Cold War era, the nonlinear battlefield is becoming more common.”).

192. Shanker, *supra* note 6.

193. *Id.*

194. Pub. L. No. 109-163, 119 Stat. 3576 (2006).

195. *See supra* note 99 and accompanying text.

196. 151 CONG. REC. H3912, (daily ed. May 25, 2005) (quoting Rep. Hunter) (“The facts are that 90 percent of the women polled who are in the Army do not want to go in direct ground combat.”).

Assuming that the two preceding suggestions were in fact true, a more probing analysis is whether military decisions should be based upon the consensus public opinion.

197. *See, e.g.,* Bender, *supra* note 188 (quoting Elaine Donnelly as explaining that “gender integration ‘distracts from the combat mission’”).

198. *Id.*

debates, military leaders sought freedom from the exclusionary policies' restrictions, while a cadre of congressmen sought greater control over the Pentagon's policies. Perhaps Representative Rosa L. DeLauro had it right when she noted, "Congress ought to charge the military with the responsibility to move people into jobs and positions based on merit."¹⁹⁹

CONCLUSION

Once again, women's increased participation in combat has been engendered by military necessity, not the pursuit of equal opportunity. The exclusionary policies are unworkable from a practical standpoint, without considering an equal protection analysis. Indeed, some commentators have postulated that the combat exclusions would not survive an equal protection challenge.²⁰⁰ Others have concluded that even the existing level of participation by women in combat should bring an end to the all-male selective service act.²⁰¹ Certainly the ever-increasing body of evidence and experience will contribute significantly to the consideration of such issues.

During this time of recruiting shortages and the changing nature of the battlefield, maximum flexibility will be required for the United States' Armed Forces to maintain superiority and achieve future successes. The existing gender-based policy restrictions on commanders' ability to make merit-based assignments does not enhance flexibility. Experience has demonstrated that integration and military readiness are not mutually exclusive, even in the most traditionally hyper-masculine and androcentric professions. To the extent that a woman can meet the demanding qualifications associated with combat-related assignments, we can not afford to exclude her from the team.

199. 151 CONG. REC. E1133 (daily ed. May 26, 2005) (statement of Rep. DeLauro).

200. See generally Karen L. Kupetz, Note, *Equal Benefits, Equal Burdens: "Skeptical Scrutiny" for Gender Classification After United States v. Virginia*, 30 LOY. L.A. L. REV. 1333 (1997).

201. See generally Capt. Dale A. Riedel, *By Way of the Dodo: The Unconstitutionality of the Selective Service Act Male-Only Registration Requirement Under Modern Gender-Based Equal Protection*, 29 U. DAYTON L. REV. 135 (2003).