

**COMBAT IN AN AGE OF TERROR:
THE MILITARY NECESSITY OF WOMEN IN COMBAT ROLES IN IRAQ AND AFGHANISTAN
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INTRODUCTION

Women have served the United States military since the birth of the nation.¹ Although relegated officially to mostly clerical and nursing positions until the mid twentieth century, women have historically answered the call of duty in times of war and manpower shortage. When World War II called for more male fighter pilots at the Front, women stepped in and filled their aviation transport positions at home. When the troops needed skilled nurses to tend to wounded troops in the World Wars, women volunteered in droves for both the Red Cross and the Nursing Corps. And when the War efforts needed educated and skilled clerical assistance to take over for the men who had been transferred to combat duty, women filled the role splendidly.

Recently, women's positions in the military have shifted; women have gone from performing mostly clerical and nursing duties to employment in fully militarized support positions in all branches of the military. Women, however, while not restricted by legislation, are restricted by Department of Defense policy excluding them from ground combat and direct combat support positions. This paper will examine the reasons for this exclusion and the necessity of its repeal based both on equal protection and national security standards. *Part I* will lay out the current regulations governing women in combat. *Part II* will analyze the three largest justifications for a generalized combat ban – physical strength and physical differences, unit cohesion, and sexual assault and risk of capture – and analyze each under an intermediate

¹ A thorough review of women's military history in the United States will not be undertaken in this paper. For a complete history, see JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* (Presidio Press rev. ed. 1993).

scrutiny standard of equal protection, concluding that none of the three can withstand the scrutiny. *Part III* will touch on the overall impact of the combat exclusion on women, and *Part IV* will examine the current nature of combat in an age of terrorism and its effects on the roles women play in the military. *Part V* will analyze women in combat roles as a necessity to fulfill the U.S.'s current foreign policy goals, in the context of cultural sensitivity and respect, and as a requirement of military efficacy and security. *Part V* will also lay out the framework for the effective integration of women into ground combat roles. Finally, *Part VI* will look at the possibilities for change with the new Administration.

It is apparent that women are involved in increasing numbers and importance in the military; it is therefore paramount that women be evaluated on the basis of individual merit and competence and not under outdated blanket assumptions applied to the gender as a whole. Such generalizations cannot withstand an “exceedingly persuasive justification” analysis, and historically have not withstood the steely glare of women’s actual performances in the war and combat arena.

I. CURRENT REGULATIONS AND THE COMBAT EXCEPTION

No direct legislation bars women from combat. Rather, women are restricted purely by military policy. Under current Department of Defense protocol, the combat exclusion reads, “service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground. . . .”² The policy defines 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

² 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/CMRNotes/LesAspin%20DGC%20DefAssign%20Rule%20011394.pdf>.

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.³

The combat exclusion enumerates further the following 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;⁴
- 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.⁵

The combat exception does not ban women from flying combat aircraft in combat or from serving on naval ships exposed to combat.⁶ Additionally, pursuant to an act of Congress, the Department of Defense must notify Congress of any opening or closing of positions or units under the combat exclusion to women.⁷

II. EQUAL PROTECTION AND THE COMBAT EXCEPTION: A CLEAR VIOLATION

Classifications based on gender are currently subject to an intermediate scrutiny standard of review. Gender, however, was not always subject to such heightened scrutiny. In *Reed v. Reed*, the Supreme Court applied a rational basis review whereby gender classifications were evaluated based on the functional relevance between the object to be attained and the criteria applied to attain it.⁸ At issue in the case was an Idaho law that gave preference to males over females in the administration of estates for reasons of administrative efficiency.⁹ The Court invalidated the law, stating that “a mandatory preference to members of either sex over members

³ *Id.*

⁴ This is the *collocation rule*. It bars women from serving in non-combat units that provide direct support and are attached to ground combat units.

⁵ *Id.*

⁶ Blythe Leszkay, *Feminism on the Front Lines*, 14 HASTINGS WOMEN'S L.J. 133, 137 (2003).

⁷ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 336 (2006).

⁸ *Reed v. Reed*, 404 U.S. 71, 76 (1971).

⁹ *Id.* at 75.

of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.”¹⁰ The Court recognized no functional relevance between overgeneralizations of gender and the goal – administrative efficiency - to be achieved by the statute, and effectively decried the practice of using gender as a proxy.

The Court raised this standard three years later in *Frontiero v. Richardson*, holding that “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”¹¹ Because sex is an immutable characteristic, classifications based on it are automatically suspect and subject to a heightened standard.¹² Justice Brennan, writing for the Court, analogized women as a group to a discrete and insular minority warranting special judicial solicitude based on their entrenched political powerlessness.¹³ Although he advocated a strict scrutiny standard for gender classifications (as in the quote above), Brennan failed to persuade the majority Court, which ultimately applied an intermediate scrutiny standard.¹⁴ The result of this heightened scrutiny for gender classifications was the invalidation of a law that afforded male military members an automatic dependency allowance for their wives but required female service members to prove the dependence of their husbands before any benefits would be assigned.¹⁵ The Court ruled that the law violated the Fifth Amendment’s Equal Protection Clause.¹⁶

¹⁰ *Id.* at 76.

¹¹ *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

¹² *Id.* at 686.

¹³ *Id.* at 685. Brennan based his analysis on footnote four of *United States v. Carolene Products Co.*, famous for justifying special protections for “discrete and insular minorities” that do not receive adequate representation in the political process. 304 U.S. 144, 152 n.4 (1938).

¹⁴ *Id.* at 688.

¹⁵ *Id.* at 690–91.

¹⁶ *Id.*

The Court further restricted the legality of gender classifications in *Craig v. Boren*.¹⁷ The Court – in analyzing a law restricting the sale of non-alcoholic beer to young males but not to young females – held that a statute based on gender classifications may only stand when such distinction *substantially serves to achieve an important state objective*.¹⁸ Six years later, in *Mississippi State University for Women v. Hogan*, the Court sustained the challenge of a male applicant who was denied admission to the all-female School of Nursing based on his sex.¹⁹ In its analysis, the Court refused to distinguish between classifications favoring women and classifications favoring men. That a man had brought suit to obtain entrance to an all-female college was irrelevant; any party seeking to uphold a challenged gendered classification “must carry the burden of showing an exceedingly persuasive justification for the classification” that is substantially and directly related to the goals of the statute.²⁰

In sum, classifications based on sex are inherently suspect and are currently subjected to an “exceedingly persuasive justification” analysis - a division of intermediate scrutiny. In order to withstand an equal protection analysis, a classification based on gender must substantially serve to achieve an important state objective, and those defending a gender-classifying law must prove an exceedingly persuasive justification for the distinction.

A. Standing

Standing to bring suit is shown by proving injury or potential imminent harm to the party bringing the suit, plus proof that the defendant committed the harm, such that a favorable court decision will remedy the harm done. There are several theoretical formulations for standing in a challenge to the combat exception. Women soldiers desirous of fighting in combat roles are the

¹⁷ *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁸ *Id.* at 197.

¹⁹ 458 U.S. 718, 722–23 (1982).

²⁰ *Id.* at 724.

most obvious party with standing; by denying women the opportunity to fill combat positions, the United States and military are denying that woman's right to free contract in choice of career and also to receive unique and valuable training provided to male combat soldiers. The injury – a denial of desired training – may affect future career prospects and military promotion schedule.

Similarly, male combat soldiers may be able to bring suit for a slightly different reason; when the military does not apply equal standards for male and female physical performance,²¹ the military necessarily includes some weaker and smaller males into combat while denying some larger and stronger females from fulfilling the same role.²² The injury is a weakened overall fighting force, which could result in imminent physical harm to the male combat soldier.

B. Reasons for Excluding Women from Combat

“Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”²³ In 1873, the Court denied that Myra Bradwell, as a woman, had a right to practice law in Illinois.²⁴ Noting the "difference in the respective spheres and destinies of man and woman,"²⁵ the Court used a blanket generalization of the nature of women as a group to bar each individual woman – no matter how qualified – from choosing a career traditionally reserved for men. This ban has no credence today. Such a blanket generalization about the nature of women cannot withstand an equal protection analysis in our current political or social world. Nor can the traditional reasons for excluding women from combat withstand such an analysis. We turn to these reasons next.

1. Physical Strength and Physical Differences

²¹ See *infra* Part I.1.

²² *Id.*

²³ *Bradwell v. State*, 83 U.S. 130, 141 (1873).

²⁴ *Id.* at 142.

²⁵ *Id.* at 141.

Physical strength unequal to that of men has been used throughout American women's military history as an excuse to ban all women from certain posts. However, recent history and a critical analysis of this purported interest show that, increasingly, the physical strength excuse is employed to deny women entry to posts for which they are qualified. The history of women military aviators is a telling example.

During World War II, the U.S. Army Air Force (the AAF)²⁶ implemented a flying program for women in which they ferried military aircraft to bases across the country, thereby freeing up male transport pilots for combat overseas and decreasing the "Air Forces' total demands for the cream of the manpower pool."²⁷ This Women AirForce Service Pilot program (or WASP, for short), suffered initially from qualms over women's perceived lack of physicality. Military combat and transport planes, designed and built for men, were considered too heavy and too forceful for women to fly. The Commanding General of the AAF, General H.H. Arnold, opined; "frankly, I didn't know in 1941 whether a slip of a young girl could fight the controls of a B-17 in the heavy weather they would naturally encounter in operational flying."²⁸ "It was the opinion of civilian flying instructors and Army check pilots that a woman, if too slight in stature, usually had difficulty operating aircraft, because of difficulties with foot and manual controls."²⁹

²⁶ The Air Force as we today know it was not a separate branch of the military during World War II; it was incorporated into the "Army Air Force." The term AirForce, although the unofficial spelling, was written as one word in regard to the WASP program.

²⁷ Address by General H.H. Arnold, Commanding General, Army Air Forces, before WASP Ceremony (Dec. 7, 1944) (hereinafter known as Address by General H.H. Arnold). Jacqueline Cochran, one of the founders of the WASP program, summed up the need for women pilots in terms of sheer manpower; "If a woman could effectively handle a trainer plane," Cochran reported, "it was a waste of manpower to have it handled by a pilot fully trained for higher duty." Press Release, War Department, Report on Women Pilot Program by Jacqueline Cochran (Dec. 14, 1944) (hereinafter known as Report on Women Pilot Program), available at http://www.westtexas.tstc.edu/wasp/DOCUMENTS/final_report.htm.

²⁸ Address by General H.H. Arnold, *supra* note 27.

²⁹ Report on Women Pilot Program, *supra* note 27.

Additionally, Army officials were concerned about women's menstrual cycles inhibiting the ability to fly, a concern later proven to be unfounded by the WASP's performance.³⁰

However, the WASP, whose duties included ferrying aircraft, towing targets for anti-aircraft gunner training, glider towing, radar calibration flights, test flights of bombers, copiloting bombers, training male pilots, and transporting officers and troops, proved themselves to be more than capable as military aircraft pilots and quickly dispelled the brass's fears. By the end of the program's tenure, General Arnold firmly backed the skills of the women who had proven themselves to be a worthy match for heavy aircraft. While addressing the WASP at their disbandment ceremony, General Arnold praised their military accomplishments:

[T]he entire operation has been a success. It is on the record that women can fly as well as men. In training, in safety, in operations, your showing is comparable to the over-all record of the AAF flying within the continental United States. . . . If the need had developed for women to fly our aircraft overseas, I feel certain that the WASP would have performed that job equally well. . . . Certainly we haven't been able to build an airplane you can't handle. From AT-6's to B-29's, you have flown them around like veterans. . . . We will know that they [women in the time of future emergency] can handle our fastest fighters, our heaviest bombers; we will know that they are capable of ferrying, target towing, flying training, test flying, and the countless other activities which you have proved you can do.³¹

The WASP were not the only women pilots who proved themselves physically capable during the First and Second World Wars. Russia routinely used women at unprecedented rates in all military positions during the Wars, with great success. In World War I, Russian women were organized into all-female units, both for purposes of using every resource against the enemy, and as a manner of shaming Russian men into fighting.³² The surrender of German troops to the 1st Russian Women's Battalion of Death impressed their superiors in 1917, and women continued to

³⁰ JACQUELINE COCHRAN & MARYANN BUCKNAM BRINLEY, *JACKIE COCHRAN: AN AUTOBIOGRAPHY* 210 (Bantam Books 1987) ("We had to prove points as basic as the fact that women could fly during any time of the month. Menstrual cycles didn't upset anyone else's cycle.").

³¹ Address by General H.H. Arnold, *supra* note 27.

³² Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL'Y 1011, 1057 (Appendix B).

fight effectively in the Second World War both in the air and in ground combat.³³ The 588th Night Bombers, an all female flying squadron, were so effective at hitting their German targets that the enemy nicknamed them “the night witches.”³⁴ They flew more than thirty thousand combat sorties combined and produced a record number of Hero medals from the Russian government.³⁵

Although British women were similarly banned from combat in World War Two, they were utilized in mixed-gender anti-aircraft batteries³⁶ and as military pilots much like the WASP. Germany similarly used women in combat support roles. While they were not allowed to actually fire anti-aircraft guns, they were used in anti-aircraft and searchlight support positions.³⁷ The United States, Germany, Russia and Britain all found their women to be physically capable of doing the jobs assigned to them, often with distinction.³⁸

After World War II, women were given permanent status in the military for the first time,³⁹ but were limited to non-combat support roles and were banned from flying combat missions. This flight restriction, however, was lifted in 1992 based on women’s continued performance and achievement after the Gulf War, and the realization that some women could

³³ *Id.* at 1057–58.

³⁴ *Id.* at 1058.

³⁵ *Id.*

³⁶ *Id.* American women, unlike the British, did not serve in as wide a range of support roles in World War Two. While the WASP existed domestically, women were limited to foreign work in medical and clerical positions. They were not utilized in the European theater in anti-aircraft batteries.

³⁷ *Id.*

³⁸ The idea of women’s full military participation, including combat, is not unique to established State armies; terrorist organizations and guerilla groups also employ the military equality of the sexes doctrine. For example, the Kurdistan Workers’ Party, a Kurdish militant group currently operating in the mountains of northern Iraq, espouses equality of the sexes, even while being labeled a terrorist group by the United States, Iraq, Turkey, and NATO. Arwa Damon, *Female Fighters: We Won’t Stand for Male Dominance*, CNN, <http://www.cnn.com/2008/WORLD/meast/10/06/iraq.pkk/index.html>. Within the co-ed group, deemed a “women’s party” by its male leader, women have their own command structure and carry out their own assaults on neighboring Turkish forces, with the end goal of establishing a Kurdish state in Iraq. *Id.* The equality doctrine has attracted a large number of Kurdish women who are interested in fighting for both a Kurdish state and women’s rights. *Id.* “Citizenship” for these women combatants is intricately tied to force employed for a common goal.

³⁹ Women’s Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356 (1948) (establishing women as permanent military members).

physically control heavy aircraft.⁴⁰ Fighter pilots require strength and endurance to sustain high G-forces for seven to nine hour combat flights on a daily basis.⁴¹ With this demand of physicality, forty-nine women by 2007 had completed fighter pilot training in the Air Force, with most having flown combat missions for Operations Southern Watch, Northern Watch, Desert Fox, Allied Force, Enduring Freedom, and Iraqi Freedom.⁴² Women fighter pilots, like their transport aviation sisters, have proven to be competent and well-qualified additions to the fighting force, despite the contentions of some that their gender effectively bars them from overly physical military functions.

In an equal protection analysis, as stated above, a classification based on gender must substantially serve to achieve an important state objective, and those defending a gender-classifying law must prove an exceedingly persuasive justification for the distinction. The Department of Defense's objective in banning women from ground combat is ensure an effective, ready military force capable of winning engagements and protecting the nation. Those who advocate for the combat restriction point to women's relative physical weakness as compared to men as the justification for excluding them from combat and direct combat support roles. However, this justification fails the intermediate scrutiny test for two important reasons; it is both overly broad in its classification of women's strength, to the detriment of the armed forces as a whole, and inexcusable in that it makes no distinction between *similarly situated* military men and women. Because this regulation excepts women as a *whole*, when some

⁴⁰ The 1992 Defense Authorization Act, Pub. L. No. 102-190, 105 Stat. 1290 (1991) included a provision repealing the law that prohibited women from flying combat aircraft, and instead left this determination to the discretion of the Department of Defense. The Air Force no longer restricts women from flying combat missions.

⁴¹ McSally, *supra* note 32, at 1031.

⁴² *Id.* at 1031.

women will necessarily meet all the requirements for physical strength and some men will not, physicality is not an exceedingly persuasive justification for the ban.

Conventional wisdom as well as sample studies dictate that most women are not as strong as most men.⁴³ The 1992 Presidential Commission on the Assignment of Women in Combat recognized that “most women are shorter in stature, have less muscle mass, and weigh less than men. These physiological differences place women at a distinct disadvantage when performing tasks requiring a high level of muscular strength and aerobic capacity. . . .”⁴⁴ However, as the Commission recognized, *some* women are capable of matching a normal man’s physical strength, while some *men* are not.⁴⁵ Distinctions based on gender generalizations ignore this idea and necessarily both *exclude* some highly capable women and *include* some under-achieving men.

This policy is also underinclusive, and therefore can offer no exceedingly persuasive justification. Currently, the Army⁴⁶ does not impose specific physical strength examinations on male recruits before assigning them to a specific combat duty.⁴⁷ Instead, a man’s physical strength is tested only in that he must be able to complete the training necessary for a specific combat job.⁴⁸ Women, meanwhile, are peremptorily excluded from entering into such combat training based on perceptions of physical strength that apply to their entire gender, not to their individual physical capacities. Therefore, similarly situated men and women – that is, men and

⁴³ This is supported by protocol distinguishing physical fitness norms for men and women in law enforcement. Generally, women are expected to perform at slightly lower levels than men. For example, a woman between the ages of twenty and twenty-nine and at the 99th percentile of fitness is expected to run a 400 meter track in 54.0 seconds. Men between the same ages and at the same percentile are expected to run the 400 meter track in 42.6 seconds (conversely, running the same track in 54.0 seconds are at the 60th percentile). THE COOPER INSTITUTE, PHYSICAL FITNESS ASSESSMENTS AND NORMS FOR ADULTS AND LAW ENFORCEMENT, PHYSICAL FITNESS ASSESSMENTS AND NORMS BOOKLET.

⁴⁴ Presidential Commission on the Assignment of Women in the Armed Forces, Report to the President: Women in Combat (1992), at 24.

⁴⁵ *Id.*

⁴⁶ This assertion is singular to the Army and excludes conclusions about the Air Force, Navy and Marines.

⁴⁷ McSally, *supra* note 32, at 1029; Leszkay, *supra* note 6, at 161.

⁴⁸ McSally, *supra* note 32, at 1029-30.

women who have similar or identical physical capabilities – are not treated equally by the combat exclusion. Men will advance to combat training and will be weeded out later if they are unable to pass the physical requirements; women are excluded from the training at the outset regardless of strength.

Furthermore, there are certain combat positions – such as tanker – for which a lighter and smaller soldier may be better suited.⁴⁹ Women have no access to these positions under current policy, although their physique may theoretically qualify them for the position.

A prime example of this irrational policy in action is that of Martha McSally, one of the first women in the U.S. to become a fighter pilot after the aviation combat restriction was lifted in 1992. In 2005, McSally went on to become the first woman to command a combat aviation squadron into combat in Afghanistan.⁵⁰ At the time the aviation combat ban was lifted in 1992, McSally was training to represent the Air Force at an Ironman Triathlon Championship, an event to which each branch of the service sends its best athletes.⁵¹ She won the women's division, and beat most of the male competitors as well,⁵² illustrating the glaring double standard employed against women in terms of physical prowess in the military.

If the recruitment of the best combat forces possible is the goal of the military in executing this combat exception, the current blanket combat exception is not a realistic or persuasive way to attain that goal. Under current policy, it is possible that some of the physically least qualified men will be placed in combat positions, while physically stronger women will be relegated to non-combat support roles.

⁴⁹ Leszkay, *supra* note 6, at 161.

⁵⁰ McSally, *supra* note 32, at 1013.

⁵¹ McSally, *supra* note 32, at n.124.

⁵² *Id.*

Two influential equal protection cases explicitly address the lack of individuality in blanket exceptions as seen above; both are relevant for this analysis. In *Frontiero v. Richardson*, the Court explicitly stated that “the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our legal system that legal burdens should bear some relationship to individual responsibility.”⁵³ The Court continued, “the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”⁵⁴

The Court in *United States v. Virginia* reiterated this rule in its application of the exceedingly persuasive justification standard invalidating Virginia’s rule that only men could attend the Virginia Military Institute.⁵⁵ The Court declared:

Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.⁵⁶

The burden to prove that a classification is exceedingly persuasive rests entirely on the State, and requires a demanding showing that the challenged classification serves important governmental objectives and is substantially related to the achievement of those objectives.⁵⁷ Such a classification may not rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”⁵⁸ In formulating this opinion, the Court explicitly

⁵³ *Frontiero*, 411 U.S. at 686.

⁵⁴ *Id.* at 686–87.

⁵⁵ See *United States v. Virginia*, 518 U.S. 515.

⁵⁶ *Id.* at 532.

⁵⁷ *Id.* at 533 (internal quotations omitted).

⁵⁸ *Id.*

recognized the findings of the District Court that some women would want to attend VMI and, in fact, could meet the physical standards the school imposed on men.⁵⁹ Furthermore, “state actors controlling gates to opportunity. . . . may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females.”⁶⁰

The current combat exclusion takes into account neither individual responsibility nor actual capabilities of individuals in the excluded group. As discussed prior, women as a gender are excepted from combat regardless of their individual strengths and ability to contribute to the goal of a ready, efficient and effective military. *Frontiero* made suspect any classifications based solely on the sex of the individuals involved and declined to let the classification stand where similarly situated males were not subject to the same treatment.⁶¹ *United States v. Virginia* reiterated the point and focused on the capabilities of individuals as the basis for viewing gendered generalizations with skepticism. Like military colleges and universities, the military itself provides numerous unique educational opportunities that members may translate to the non-military world upon their discharge. Dissimilar treatment for men and women who are similarly situated cannot withstand an intermediate scrutiny equal protection analysis. Therefore, military men and women with equal physical strength must be subjected to the same restrictions. The combat exclusion ignores this rule and allows the State to exclude capable individuals based on fixed notions of gendered traits.

2. Unit Cohesion

Like gendered physical characteristics, a second major reason put forth to uphold the combat exclusion is a detrimental impact on unit cohesion. But like overgeneralizations of physical strength, this classification cannot withstand intermediate scrutiny. Unit cohesion

⁵⁹ *Id.* at 540–41.

⁶⁰ *Id.* at 541 (internal quotations omitted).

⁶¹ *Frontiero*, 518 U.S. at 688.

refers, plainly, to bonding among soldiers that, in times of combat, fosters loyalty, heroism, and self-sacrifice.⁶² It necessarily involves the quality of relations between individuals who make up a whole.⁶³ The argument is that if women were to be introduced into combat or combat support units, the intrusion would impede bonding and the unit would be less cohesive during combat.

However, there is little evidence to support this notion. The 1992 Presidential Commission, in assessing whether to lift the combat exclusion, stated that there were “not authoritative military studies of mixed-gender ground combat cohesion, since available cohesion research has been conducted among male-only ground combat units.”⁶⁴ Such studies have since been accomplished in mixed-gender non-combat units. One General Accounting Office report on perceptions of unit readiness among units opened to women after 1993 concluded that “both men and women had a positive view of their own readiness. Furthermore, most men and women agreed that women either affected readiness no differently from men or affected readiness positively or very positively.”⁶⁵ In fact, military research has shown that men in co-ed training units actually physically outperform their counterparts in all-male units, demonstrating heightened unit cohesion.⁶⁶

Studies have also shown that a shared commitment to a common group goal, known as task cohesion, is definitive in overall unit cohesion and essential for accomplishing tasks.⁶⁷ Social cohesion, on the other hand, referring to group members who like each other, is less important.⁶⁸ One Army study of co-ed training and field exercises found that “it is the

⁶² Leszkay, *supra* note 6, at 167. See also McSally, *supra* note 32, at 1034.

⁶³ McSally, *supra* note 32, at 1034.

⁶⁴ Presidential Commission on the Assignment of Women in the Armed Forces, *supra* note 44, at 25.

⁶⁵ U.S. GEN. ACCOUNTING OFFICE, GENDER ISSUES: PERCEPTIONS OF READINESS IN SELECTED UNITS 5 (1999), available at <http://www.gao.gov/archive/1999/ns99120.pdf>.

⁶⁶ Leszkay, *supra* note 6, at 161.

⁶⁷ McSally, *supra* note 32, at 1035.

⁶⁸ Valerie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 336 (2005).

commonality of experience of the soldiers involved, rather than their gender, that produces cohesion.”⁶⁹ A 1997 RAND study found that gender alone did not result in reduced unit cohesiveness or effectiveness,⁷⁰ and that any divisions caused by gender were nonexistent or minimal in units with high cohesion.⁷¹

A perfect example is the continuing use of women as combat fighter pilots. McSally, after gaining respect for her flying competence, observed that “performance is the ultimate, impersonal, gender-neutral standard” that transcended views of cohesion based on gender.⁷² Once her male comrades were confident in her abilities as a pilot, she experienced no cohesion problems.⁷³ Competency in necessary skills, according to McSally’s experience, was paramount in unit cohesion. When she later took over command of the same squadron of co-ed pilots in which she had served, she claims cohesion was high and became more so after the unit’s deployment to Iraq for five months (an example of task cohesion), allowing the unit to win the prestigious Air Force Association David C. Shilling Award for the best aerospace contribution to national defense.⁷⁴ It is this focus on a common task and respect for display of competency that fosters unit cohesion; gender makes little difference to cohesion when competency is clearly demonstrated.

McSally’s sentiments have been echoed in several forums since World War II. The WASP, while not actively employed in units containing men, worked with military men on a regular basis. One WASP, reflecting on male attitudes towards the women with whom she worked often, remembered:

⁶⁹ *Id.*

⁷⁰ MARGARET C. HARRELL & LAURA L. MILLER, *NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS UPON READINESS, COHESION AND MORALE* 54–5 (1997); *see also* Vojdik, *supra* note 68, at 336.

⁷¹ Harrell & Miller, *supra* note 70, at 66–7; *see also* McSally, *supra* note 32, at 1036.

⁷² McSally, *supra* note 32, at 1040.

⁷³ *Id.*

⁷⁴ *Id.*

Because the planes were stacking up because the men did not want to fly them ...Because of the hazards with some of them. So, they [airmen] were refusing to fly them. And along came the WASP, and we would fly whatever needed to be flown. So they were very grateful, the people that were in the operation, you know...And the pilots - - I never felt any, you know, resentment or anything. If you could fly the plane, fine.⁷⁵

Competence is an argument often used to rebut the idea that men, if forced into combat with women, will feel the overarching need to protect the females in combat situations, to the detriment of the whole in terms of efficiency and goal-reaching. Military women today who have served in Iraq and Afghanistan have stated exactly such a telling argument; their competence won out over gendered ideas of propriety, with no detrimental effect on unit cohesion. Specialist Shannon Morgan, a Track Vehicle Mechanic and S.A.W. gunner with the 1st Engineer Battalion who served in Iraq in 2003, responded to an interviewer's question about whether she experienced male 'chivalry' on the battlefield:

Absolutely not I mean, don't get me wrong, we take care of each other but I think, you know, the men, they play their part and they seen [sic] that we were competent enough, and especially a female S.A.W.⁷⁶ gunner which that's what I was, a 249 gunner, was very rare.⁷⁷ You didn't hardly see that and I really had to stand out and above and, uh, really prove to them that I could do this. And once they realized that I could do it, and I, I was competent, then it was smooth sailing from there.⁷⁸

⁷⁵ Interview by Dawn Letson with Margaret M. Weiss, former WASP, as part of Women Airforce Service Pilots Oral History Project, in Denton, TX (Dec. 4, 1997), at 35.

⁷⁶ S.A.W. stands for Squad Automatic Weapon, a light machine gun.

⁷⁷ Under current regulations, women are allowed to be S.A.W. gunners in the Army. The position is not listed as one denied to women under the ground combat exclusion or the collocation rule. See McSally, *supra* note 32, at Appendix A. Although not a primary job function in the Army, each unit has a S.A.W. gunner; Shannon Morgan's duty as a gunner was secondary to her function as a Track Vehicle Mechanic. For the Army's take on female S.A.W. gunners, see Army Accessions Command, *Transportation Soldier Takes on New Challenge*, Boots on the Ground, August 8, 2008, available at <http://www.armyreserve.army.mil/ARWEB/NEWS/BOOTS/ARTICLES/20080808.htm> (discussing PFC Stephanie Patterson, a truck driver and S.A.W. gunner in the Army Reserves deployed to Iraq).

⁷⁸ Woman's Hour: Interview with Meg McLagan, director of Lioness, and Shannon Morgan, 1st Engineer Battalion and member of Team Lioness (BBC News broadcast March 19, 2008), available at http://www.bbc.co.uk/radio4/womanshour/03/2008_12_wed.shtmlhttp://www.bbc.co.uk/radio4/womanshour/03/2008_12_wed.shtml.

These sentiments are similarly echoed by the experience of African Americans during World War II. In World War I, Black soldiers were relegated to segregated units under ineffective command domestically and foreign (French) command in Europe.⁷⁹ World War II brought reluctant desegregation of the troops. General George Marshall, U.S. Army Chief of Staff, posited a viewpoint of Black integration similar to the argument against integration of females into combat units; “the level of intelligence and occupational skill of the Negro population is considerably below that of the white. . . . “Experiments within the Army in the solution of social problems are fraught with danger to efficiency, discipline, and morale.”⁸⁰ Marshall assumed that white soldiers would see black soldiers as incompetent, and therefore lack confidence in them, decimating any chance for unit cohesion.⁸¹

However, the effect of African American integration into the armed forces did not have the detrimental effect on unit cohesion that General Marshall predicted. At World War II’s end, the Army surveyed white soldiers who had served in combat alongside black platoons. The men admitted resentment at first, but seventy-five percent reported that at the end of their tours they had an improved view of African American soldiers.⁸² The competence displayed by African American soldiers led to improved perception of unit cohesion by white soldiers.

Because women’s inclusion in units has not proved to erode unit cohesion, the combat exclusion cannot substantially serve the state objective of maintaining cohesive combat units. There is no exceedingly persuasive justification in terms of cohesion for the combat distinction between men and women. Essentially, the argument that women will impede male bonding and unit cohesion is the same argument that was rejected by the Court in *United States v. Virginia*

⁷⁹ Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 517 (1991).

⁸⁰ *Id.* at 519–20.

⁸¹ *See id.* at 520.

⁸² *Id.*

(VMI). Virginia argued (to no avail) that VMI’s adversarial method of “character development and leadership training” would need to be modified if VMI were to admit women,⁸³ and such accommodations would be so radical and drastic as to destroy VMI’s program.⁸⁴ Essentially, the admission of women to VMI would so corrode the bonds between cadets formed by the common experience of the adversarial approach that neither men nor women would receive a true VMI education. The Court – wisely – rejected this argument as unrealistic. It concluded that the adversarial method famous at VMI could be used to educate women who might prefer it to the methodology of a women’s college.⁸⁵ Nothing about VMI’s method “is inherently unsuitable to women,” and State actors may not exclude qualified applicants based on fixed notions of gender roles and abilities.⁸⁶

The VMI Court rejected entrenched gender notions in declining to recognize a possible declination in the quality of VMI’s instruction and bonding experience. Analogous to this case is the idea of unit cohesion as a justification for the combat exclusion; women cannot be allowed to integrate with men in combat because they, as females, will erode the quality of bonding among males by virtue of *being female*. *U.S. v. Virginia* tells us that this formulation cannot withstand intermediate scrutiny in part because of “women’s successful entry into the federal military academies, and their participation in the Nation’s military forces.”⁸⁷ The Court has declared that Virginia’s “justification for excluding all women from ‘citizen-soldier’ training for which some are qualified. . . cannot rank as ‘exceedingly persuasive.’⁸⁸ Nor can a vague and unsupported notion of a decline in unit cohesion justify the exclusion of all women from combat roles for

⁸³ *United States v. Virginia*, 518 U.S. 515, 535 (1996).

⁸⁴ *Id.* at 540.

⁸⁵ *Id.*

⁸⁶ *Id.* at 541.

⁸⁷ *Id.* at 544.

⁸⁸ *Id.* at 545.

which some are qualified; this is not an exceedingly persuasive justification for upholding the ban.

3. Sexual Misconduct and the Risk of Capture

The third major reason for the exclusion of women from ground combat is paternalism about rape and sexual assault and the risk of capture. Americans, it has been argued, are not ready to see their women on television as prisoners of war and potential victims of foreign sexual abuse. However, every soldier who enters the force must weigh and accept the risks of being a POW before enlisting; the current nature of war is such that even supply forces are at risk of capture.⁸⁹ Allowing men to weigh the risk of capture when choosing a combat position but not allowing women to do the same ignores the individual capacity argument put forth in *Frontiero* and solidified in *VMI*. Such a paternalistic construction may also do more harm to women than good; “when women are told that they are unfit for combat, that they are incapable of fighting, that they need protection, they are more readily the victims of violence.”⁹⁰ In addition, rape is a violation of the Geneva Convention, and the risk of sexual assault among servicemen is, arguably, the same as the risk for servicewomen. Any exception that treats one gender differently than the other in terms of POW status and risk of sexual assault sets a de facto standard that one gender is worth more than the other. This violates our intermediate scrutiny analysis.

Fears about the effects of sexual commiseration and sexual assault on unit cohesion may have some basis in fact,⁹¹ but do not meet the equal protection standard of analysis to justify the combat ban. In fact, sex may be more of a problem among members of non-combat support

⁸⁹ McSally, *supra* note 32, at 1043.

⁹⁰ Leszkay, *supra* note 6, at 164–65.

⁹¹ McSally, *supra* note 32, at 1037.

units than among those serving on the front lines.⁹² Soldiers at the front are concerned with accomplishing their mission and preserving their lives. Focus is key; sex, as a distraction, would necessarily detract from the goal of self-preservation.⁹³ Sexual relations will necessarily be more prevalent in units with more time off and less physically demanding training.⁹⁴

Each branch of the military has prohibitions against adultery, fraternization, and sexual misconduct,⁹⁵ which are punishable by courts-martial. The adoption and enforcement of these regulations serves to foster respect among servicemen and women and to maintain order in the ranks. Any sexual assault that occurs within the service between two service members has the potential to be dealt with swiftly and efficiently through these regulations. In recent years, however, male sexual assault of both servicewomen and civilians has come to light,⁹⁶ and it has been suggested that these problems are not attributable to discord because of female integration in the ranks, but rather to lack of leadership.⁹⁷

Such serviceman behavior is not attributable to the victim (in the case of inter-rank sexual assault, the victim is the female servicewoman) but rather to the assaulter. Punishing the entire female gender through exclusion for the ills of select male service members who choose to commit criminal acts is a misplacement of justification for the combat exception. Such exclusion does not meet the necessary exceedingly persuasive justification. Women have not attained the prestige of men in the military due largely to their exclusion from certain

⁹² Leszkay, *supra* note 6, at 166.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See, e.g.*, Air Force Instruction 36-2909, Professional and Unprofessional Relationships (proscribing limits on dating, courtship, and close friendships between men and women, and also addressing fraternization, adultery, and “unprofessional relationships”) (cited in McSally, *supra* note 32, at 1037–38).

⁹⁶ McSally, *supra* note 32, at 1038. *See also* Vojdik, *supra* note 68, at 347 (discussing the Tailhook and Aberdeen scandals and widespread sexual harassment in the branches); Linda Strite Murnane, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 DUKE J. GENDER L. & POL’Y 1061, 1079–1089 (2007) (discussing widespread sexual misconduct and unequal application of military law to servicemen and women).

⁹⁷ McSally, *supra* note 32, at 1039.

occupations; their exclusion from combat reinforces the stereotype that women are unable to fight back in situations of rape and sexual assault, which in turn helps to maintain the combat exclusion status quo.⁹⁸

III. OVERALL CAREER IMPACT OF THE COMBAT EXCLUSION ON WOMEN

In addition to fueling stereotypes of women as weak, non-physical, sexualized, and divisive to male units, the combat exclusion serves as a career glass ceiling for military women. The military – a behemoth employer on the national scale – offers career training that the private sector does not. Women, because they are excluded from certain career paths, are prohibited from receiving just such training. For example, women may not serve as Infantry Officers, Armor or Cavalry Officers, Rangers, Cannon Crewmembers, Radar Operators, Combat Engineers, Tank Turret Mechanics, Pararescue Officers or Helpers, Weather Officers (Air Force), Navy SEALs, Amphibious Reconnaissance members, or in any Special Forces (including Army Special Forces medical or communications positions), Control and Recovery (Air Force), or Submarine (Navy) position.⁹⁹ In the Army alone, 32.8% of jobs were not available to women in 2003.¹⁰⁰ Nearly 200,000 positions are prohibited to women in the Forces overall.¹⁰¹

This denial of educational benefits makes true equality in the military – and a truly effective and efficient fighting force - impossible to achieve, as advancement in the ranks often depends on a combination of higher or specialized training and experience.¹⁰² Advanced training is a large determinant of achieving a higher rank; training at certain military schools (such as Ranger school, from which women are excluded), puts a military member in a preferred position

⁹⁸ See, e.g., Leszkay, *supra* note 6, at 144 (discussing women soldiers as not full soldiers and the idea's effects).

⁹⁹ McSally, *supra* note 32, at Appendix A.

¹⁰⁰ Leszkay, *supra* note 6, at 140.

¹⁰¹ McSally, *supra* note 32, at 1012.

¹⁰² Leszkay, *supra* note 6, at 140.

for promotion.¹⁰³ Promotion and rank, in turn, help to determine pay.¹⁰⁴ Because women are peremptorily excluded from significant advanced training opportunities, fewer women will achieve higher ranks, in turn leading to lower salaries for women in the military than for men. As a potent exempt, the Army recently named its very first female Four-Star General.¹⁰⁵ Ann Dunwoody, age 55, achieved the rank thirty-three years after beginning her career with the Army as a Second Lieutenant.¹⁰⁶ She serves as Commander of the Army Materiel Command, responsible for uniforms, food, vehicles and arms for all soldiers.¹⁰⁷ There have been twenty-four four-star general appointments since 2001, and 201 in the history of the Army.¹⁰⁸ All the rest have been male.

Fewer job opportunities mean lesser participation in the military community for women members. Active participation in the community, though, is a proxy for power and influence in the military as a whole.¹⁰⁹ The exclusion serves to reinforce the idea that women have no authority in combat currently, and so cannot become authorities on the subject.¹¹⁰ This reinforces gender subordination in the military and stigmatizes women as presumptively incapable, while painting men and women as fundamentally different.¹¹¹

One traditional argument about the effects of the combat exclusion on women as a whole is that women are not full citizens because they cannot fight and die to defend their country.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Associated Press, *Army Gets First Female Four-Star General*, MSNBC, November 14, 2008, available at <http://www.msnbc.msn.com/id/27718059/>.

¹⁰⁶ *Id.*

¹⁰⁷ U.S. Army Materiel Command Publications Office, *First Female Four-Star General Promoted Friday*, ArmyMil.News, November 12, 2008, available at <http://www.army.mil/-news/2008/11/12/14101-first-female-four-star-general-promoted-friday/>.

¹⁰⁸ This is a difficult statistic to track down. For a very good graphical representation of past and current four-star Army generals, see http://en.wikipedia.org/wiki/List_of_United_States_Army_four-star_generals#1941.E2.80.93present.

¹⁰⁹ Leszkay, *supra* note 6, at 141.

¹¹⁰ *Id.*

¹¹¹ Vojdik, *supra* note 68, at 324, 341.

There is a historical connection between citizenship and soldiering; the noblest sacrifice one can make is to die for one's country. If a woman is barred from making such a sacrifice, then full citizenship is closed to her.¹¹² This notion of soldiering as citizenship has early roots. To bolster the argument after the Civil War that the Thirteenth Amendment made former slaves United States citizens, Congress heard testimony of the great service Black men had rendered unto the country by fighting for the north:

Two hundred thousand strong arms seized the musket, and two hundred thousand dusky heroes grappled with the foe. Nobly have they performed their part, and largely have they contributed to our victory. . . . [Members of] this Chamber began to think that a black man had, after all, some rights which a white man was bound to respect. . . . Then we were in peril, and felt grateful to the negro, who stood between us and our enemies.¹¹³

Rights and citizenship and soldiering were bedfellows after the Civil War, and some argue are still; full citizenship comes with full integration into the entity that defends that citizenship from harm: the military.

IV. THE CURRENT NATURE OF COMBAT

Regardless of the combat exception on the books, the nature of modern warfare has turned the definition of 'combat' on its head. The modern military and the intermediate scrutiny equal protection analysis agree: the combat exception is outdated and increasingly irrelevant, and the nature of warfare in an age of terrorism means that women are engaging in defensive combat in Iraq and Afghanistan.

Between September, 2001 and February, 2007, seventy-five women had died in Iraq and Afghanistan,¹¹⁴ due largely in part to the fact that there is no "front" or "rear" in the current war on terror and no time to separate the men from the women in order to determine who is allowed

¹¹² Leszkay, *supra* note 6, at 145.

¹¹³ Cong. Globe, 39th Cong., 1st Sess. 1159 (1866) (remarks of Representative Windom).

¹¹⁴ McSally, *supra* note 32, at 1043.

to engage in combat.¹¹⁵ Today's war occurs in a complete sphere around each troop assigned to hostile territory, and often terrorist insurgents choose to target their enemy's supplies – managed by units in which women are prevalent.¹¹⁶ “It's the highway or the road now that's now the combat zone because that is where those who want to attack wait to shoot their missiles or throw off their grenades or set off their IEDs.”¹¹⁷ Women working on bases that support forward combat troops are also not immune to hostile enemy attacks, even if they do not engage in offensive combat:

Even if you're living on a forward operating base, like this one that we're at right now, you have the possibility of getting mortared. So though we may not be in direct combat shooting at somebody, we are still in the line of the enemy's capability of getting to us. So this is preparing all of us, whether we're male or female, for those kind of realities.¹¹⁸

Although all military members are now trained in basic combat skills, women still may not fight in units assigned to direct ground combat or be involved with units assigned to directly support combat units.

The definition of “combat,” however, as stated above, has grown to encompass almost every unit in which women take part. Women currently serve as gunners on truck convoys, as security forces or military police patrolling city streets, as Apache helicopter pilots (although they may not pilot special-operations helicopters), as attachments to infantry units conducting insurgent searches at checkpoints and in Iraqi homes, and in hundreds of other capacities.

Women may also serve in Forward Support Companies (FSCs)¹¹⁹ – units intended to operate

¹¹⁵ *Id.* at 1015; Leszkay, *supra* note 6, at 166; Bryan Bender, *Combat Support Ban Weighed for Women*, Boston Globe, May 18, 2005, at A1.

¹¹⁶ *Id.*

¹¹⁷ Betty Ann Bowser, *Women in Combat*, PBS ONLINE NEWSHOUR, Aug. 3, 2005, available at http://www.pbs.org/newshour/bb/middle_east/july-dec05/women_8-03.html (comment of Lori Manning, director of the Women in the Military Project) (hereinafter PBS Newshour).

¹¹⁸ *Id.* (comment of Captain Amanda Bielski).

¹¹⁹ Rowan Scarborough, *Report Leans Toward Women in Combat*, The Washington Times, Dec. 13, 2004, at A1.

close to combat units in order to make them more self sufficient¹²⁰ - but, in theory, must stay behind if the forward combat unit to which they are attached goes into battle in order to comply with the combat restriction and the collocation ban.¹²¹

None of these jobs is safe from enemy hostility in the current climate, and women have met this challenge head on. Army Sergeant Leigh Ann Hester, who led her team of supply guard soldiers in a counterattack after being ambushed by fifty insurgents, became the first woman since the Second World War to be awarded the Silver Star for valor in combat.¹²² Lance Corporal Chrissy DeCaprio - a Marine .50-cal gunner on scout detail – routinely protected her unit from hostile insurgent AK-47 fire in Iraq and scouted for improvised explosive devices (IEDs) on supply routes.¹²³ What is clear is that military women serving in support positions are increasingly forced to engage the enemy – whether in scouting missions or returning enemy fire on supply routes – regardless of whether the combat regulation purports to ban such engagement. In fact, in the first Gulf War, of the thirteen servicewomen killed, four died from enemy fire, and three of those from an Iraqi Scud missile attack.¹²⁴ Additionally, two were taken prisoners of war, and twenty-one were wounded in action.¹²⁵ Captain Amanda Bielski summed up the current situation in Iraq and Afghanistan:

There's no longer this idea that you can put somebody in someplace where they're going to be safe, because there is no place safe anymore. So we really have to change the way we think of how war works and really accept the fact that

¹²⁰ Bender, *supra* note 98, at A1.

¹²¹ *Id.*

¹²² KIRSTEN HOLMSTEDT, *BAND OF SISTERS: AMERICAN WOMEN AT WAR IN IRAQ* 309 (Stackpole Books 2007); PBS Newshour, *supra* note 117. Hester killed three of those insurgents. The irony here is glaring; a woman who is barred by regulation from being recognized as a combat fighter wins a medal of honor based on bravery in combat.

¹²³ *Id.* at 140–14.

¹²⁴ Leela Jacinto, *Women Join the Boys in Combat, But Not Without a Fight*, ABC NEWS, Jan. 14, 2003, available at http://www.realnews247.com/girl_power.htm.

¹²⁵ *Id.*

everyone is going to be in some kind of danger, and to prepare everyone for that as a possibility.¹²⁶

Furthermore, some positions open to women would seemingly fall under the category of combat positions, which makes the military policy arbitrary and confusing. Women are expressly allowed to be S.A.W. gunners – a position assigned to at least one member per unit. The S.A.W. gun is a light machine gun that requires extra training to operate.¹²⁷ While each member of a unit carries a standard issue M16A4 rifle, the SAW gunner carries an M249 Squad Automatic Weapon (S.A.W.) – a rapid-fire machine gun – for extra unit protection.¹²⁸ SAW gunners defend their units in attacks, and are readily prepared to operate turret guns on HUMVEES, as the training readily translates to knowledge of the main gun on the HUMVEE.¹²⁹ Women are increasingly performing both of these functions, even though conventional wisdom and reality dictate that these positions will be instrumental in defending against enemy attack.

The ramifications of pulling women out of the roles they currently occupy in Iraq and Afghanistan would be huge. Currently, 200,000 women are serving in active military duty, making up roughly fourteen percent of the total force.¹³⁰ The Army revealed in a 2004 briefing that if it were to pull all women out of the Forward Support Companies in which they serve, it would not have enough servicemen to fill their places and make the units men-only; the pool of male recruits is simply “too small to sustain force.”¹³¹ A Pentagon briefing later in the year advocated eradicating the collocation rule altogether, thereby allowing women to serve in support units attached to male-only combat units (although this briefing was not adopted

¹²⁶ PBS Newshour, *supra* note 117 (comment of Captain Amanda Bielski).

¹²⁷ See Randall A. Clinton, *Bringing the Brawn: Young Marine Steps Up as SAW Gunner*, MARINES ONLINE NEWS, Aug. 29, 2007, available at <http://www.marines.mil/units/marforcom/iimef/24thmeu/Pages/2007/ContentAUG14.aspx>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Woman’s Hour, *supra* note 76.

¹³¹ Scarborough, *supra* note 100, at A1.

officially).¹³² Pulling women out of every position that could find itself in combat would weaken the strength of the entire fighting force, damage readiness and efficiency, and be a slap in the face of the women who competently performed these military tasks.

V. U.S. FOREIGN POLICY, MILITARY EFFICIENCY, AND SECURITY NECESSITATE THE USE OF WOMEN IN CERTAIN GROUND COMBAT POSITIONS IN IRAQ AND AFGHANISTAN

Iraq and Afghanistan, both Muslim majority nations,¹³³ practice a brand of cultural conservatism that is largely unfound in the United States and which we as a fighting force must acknowledge in order to gain lasting strides in either country. Women occupy spheres in both countries that are largely different than those in the United States, and America's armed forces must deal with women in ways that we are unaccustomed to in the U.S. Confounding the cultural sensitivity issues our troops encounter in both countries, women suicide bombers are becoming more prevalent in both nations, heightening the need for effective, efficient, tough and compassionate women soldiers to search, communicate, and sometimes disarm women in these spheres. The use of our military women is essential in achieving a balance that augments our forces' security, effectiveness, and overall foreign policy goals. The United States should therefore embrace women in expanded military positions, including combat positions, as an extension of our military efficacy and in pursuit of success in the two foreign nations that currently house more of our troops than any other.

During the 1990s and early 2000s, the Iraqi economy declined sharply and an increasing number of people became unemployed, driving many families into poverty.¹³⁴ Due in large part to international economic sanctions under Saddam Hussein's reign, the economic and social

¹³² *Id.*

¹³³ According to the CIA World Factbook, Afghanistan is 99 per cent Muslim and has a female literacy rate of 12.6, as compared to a male literacy rate of 43.1 per cent. Iraq's population is 97 per cent Muslim, and boasts a female literacy rate of 64.2 per cent (the male literacy rate is 84.1 per cent). The CIA World Factbook may be accessed at <https://www.cia.gov/library/publications/the-world-factbook/>.

¹³⁴ ALI A. ALLAWI, *THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE* 128 (Yale University Press, 2007).

outlook in Iraq was bleak, and some scholars argue that “the fabric of Iraq’s society seriously began to unravel during the 1990s.”¹³⁵ By 2000, financial necessity had forced almost one quarter of the school-age population to drop out of school, while near to half the adult population was illiterate.¹³⁶ An Iraqi “brain drain” took place during the nineties as a mass exodus of professional Iraqis fled to the west or to other friendly Arab countries.¹³⁷ Domestic agriculture production had declined precipitously, leaving the majority of Iraq to depend heavily on imported foodstuffs.¹³⁸ Food rationing, begun in the 1990s, was a way of life by the time the U.S. invaded the country.¹³⁹ In the 1980s, Iraq’s healthcare system was considered by the World Health Organization to be one of the best in the Middle East. By the 1990s and 2000s, infrastructure degradation, poor water and sewage treatment programs, underfunding of the healthcare system, and the abandonment of Iraq’s prior free-welfare system and state-sponsored universal free health care all contributed to a huge decline in the quality of the health care system.¹⁴⁰

This deterioration, it has been argued, affected the middle class more than any other.¹⁴¹ “The middle classes were fragile, and their precarious hold on prosperity [during the 1970s oil boom] was seriously challenged in the 1990s. Sanctions and hyperinflation effectively destroyed them.”¹⁴² Women, especially, felt these changes. Never a bastion of feminism, the 1990s saw an increase in Iraqi conservatism in both social and religious realms, which quickly became the

¹³⁵ *Id.* at 127.

¹³⁶ *Id.* at 128.

¹³⁷ *Id.* at 129.

¹³⁸ *Id.* at 128. In 2003, domestic production of wheat was 300,000 tons, while imports totaled almost 3.3 million tons. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 129.

¹⁴¹ *Id.* at 127.

¹⁴² *Id.*

state-sponsored norm.¹⁴³ High unemployment levels relegated women to the home as available men scooped up any open jobs, while leaving many women as heads of household due to abandonment, male exile, or male death or disability in wars fought by Iraq's then leader, Saddam Hussein.¹⁴⁴ American troops entered an Iraq in 2003 that was socially and economically unstable – a “physical and psychological ghetto”¹⁴⁵ - and wary of outside intervention. Ali A. Allawi, Iraq's first post-war civilian Minister of Defence, a member of the Transitional National Assembly, and Minister of Finance, described the situation at the first point of American involvement in 2003:

The occupation of Iraq overturned a laboriously constructed system of rule and authority that had become grotesquely distorted during the last decade of the Ba'ath [Saddam Hussein's ruling party]. the system appeared to be monolithic and pervious to change; in the final analysis, it was held together by the threat and use of extreme force and brutality. Saddam had succeeded, to an extent that would only later become apparent, in instilling fear and anxiety as the governing, all-dominant, parameters in Iraqi society and politics. The raw and naked fissures inside Iraqi society became wider and deeper in the decades of Ba'athist rule, and with the removal of the heavy hand of dictatorship they emerged into the light of day.¹⁴⁶

In such a fractured climate, cultural sensitivity and empathy is paramount in achieving even a small modicum of success. Cultural respect, after years of dictatorship and hardship, is a key to making strides in a nation that considers Americans to be invaders at least as often as it considers Americans to be liberators.

Currently, because of such deep-seated cultural sensitivity and fear, there are certain crucial jobs that only servicewomen may perform. Because many Muslim women shun contact with men unrelated to them, the military needs women soldiers to conduct searches of Muslim women who may be hiding weapons, and routinely uses servicewomen to reassure and calm

¹⁴³ *Id.* at 129.

¹⁴⁴ *Id.* at 129–30.

¹⁴⁵ *Id.* at 131.

¹⁴⁶ *Id.* at 133.

Iraqi women who have been detained or whose homes are searched for contraband.¹⁴⁷

Cooperation from Iraqi women is often essential to everyday military operations; one American servicewoman, a member of a supply convoy, explained one such situation: “[w]e were trying to clear out an area for our convoy to get through, and [the Iraqi women] wouldn’t move. They wouldn’t talk to the men. So they brought me over, and with an interpreter, a female interpreter, [the women] actually cooperated with me.”¹⁴⁸ In a war very much fought against supply lines (in which women serve in large numbers) and slow-moving convoys, speedy cooperation is essential to troop welfare and may mean the difference between life and death, the difference between successful delivery of supplies and enemy attack.¹⁴⁹

The need for effective U.S. servicewomen on the front lines is similarly underscored by the increased use of women suicide bombers and militants in both Iraq and Afghanistan. Since the U.S. began its occupancy of the countries, several women militants have been killed by American forces, and scores have blown themselves up in suicide missions.¹⁵⁰ Thirty-two attacks were attempted or carried out by Iraqi female suicide bombers in 2008; eight occurred or were attempted in 2007.¹⁵¹ And in late January, 2009, Samira Ahmed Jassim - code name: “The

¹⁴⁷ PBS NewsHour, *supra* note 117; Woman’s Hour, *supra* note 76.

¹⁴⁸ PBS NewsHour, *supra* note 117 (comment of Specialist Keena Ray).

¹⁴⁹ “In Iraq, insurgents strike almost every day. There are no clear combat lines, and convoys are a main target where a higher percentage of women serve in combat support roles.” PBS NewsHour, *supra* note 117 (comment of Betty Ann Bowser).

¹⁵⁰ Since September, 2008: Associated Press, *Bomber Attacks Afghan Anti-Drug Unit, Killing 5*, MSNBC.COM, April 9, 2009, available at <http://www.msnbc.msn.com/id/30129008/> (U.S. forces killed two alleged female militants in Afghanistan); Associated Press, *Arrest Unveils Iraqi Women Suicide Bombers*, MSNBC.COM, Feb. 4, 2009, available at <http://www.msnbc.msn.com/id/29000504/> (a female suicide bomber killed 36 people at a Shiite religious gathering); Associated Press, *Attacks on Christians in Iraq City Raise Concern*, MSNBC.COM, Oct. 8, 2008, available at <http://www.msnbc.msn.com/id/27089296/> (a female suicide bomber killed eleven Iraqi civilians near government offices); Associated Press, *General Odierno Warns Gains in Iraq Reversible*, MSNBC.COM, Sept. 16, 2008, available at <http://www.msnbc.msn.com/id/26733319/> (a female bomber killed twenty-two people at a dinner for police in Diyala province, Iraq); Associated Press, *Suicide Bomber Kills 6 at Market in Iraq*, MSNBC.COM, Sept. 6, 2008, (“Kurdish security forces raided a house in Irbil province, killed a suspected member of an al-Qaida front group and captured a 17-year-old girl wearing an explosives vest”).

¹⁵¹ Associated Press, *Arrest Unveils Iraqi Women Suicide Bombers*, MSNBC.COM, Feb. 4, 2009, available at <http://www.msnbc.msn.com/id/29000504/>.

Mother of Believers” - was arrested for recruiting more than eighty Iraqi women to become suicide bombers and for masterminding twenty-eight such bombings.¹⁵² The widespread use of suicide bombers represents a shift in insurgent tactics in Iraq; insurgents exploit the cultural standards that do not allow male security forces to search, or even sometimes speak with, women, in order to gain access to targets and to hide bombs under women’s long, flowing robes undetected.¹⁵³ Iraqi security forces have recruited more women to handle this flux, recently allowing women forces to search Iraqi women voters at polling areas.¹⁵⁴ American servicewomen routinely perform searches of Iraqi women for potential threats. In the summer of 2005, three servicewomen were killed by a suicide bomber (male) in their vehicle outside of Fallujah after having searched Iraqi women going in and out of the city for hidden weapons.¹⁵⁵ Although a sometimes fatal job, American women, as discussed *infra*, are better equipped to conduct searches of Iraqi women for hidden weapons and are uniquely equipped to gain access to areas in which the presence of men is taboo. This ability makes servicewomen a valuable commodity; servicewomen who search and communicate with Iraq’s female population are better able to preserve a modicum of respect for Iraqi culture, which in turn may foster goodwill among the Iraqi people, while at the same time weeding out those whose goal is to fight against American forces. Such goodwill could be the key whatever lasting success we might achieve for Iraq. In a booklet published for and distributed to American forces stationed in Iraq during World War II, the U.S. government had this sage advice to give: “American success or failure in Iraq may well depend on whether the Iraqis (as the people are called) like American soldiers or

¹⁵² *Id.*

¹⁵³ *See, e.g., id.* (discussing this change in tactics).

¹⁵⁴ *Id.*

¹⁵⁵ PBS NewsHour, *supra* note 117.

not. It may not be quite that simple. But then again it could.”¹⁵⁶ Sage advice, and still applicable sixty years hence.

A. Advocating Servicewomen in Ground Combat on the ‘Team Lioness’ Model

It is clear that some servicewomen perform roles that fall explicitly within the realm of combat or direct combat support and are vital to national security. Team Lioness, an ad-hoc Army construct made up of women soldiers recruited from support units to assist infantry and artillery units in raids for Iraqi insurgents, directly supported combat soldiers and often came under enemy attack. Team Lioness operated on the ground in enemy territory from August, 2003 to September, 2004, one of the most dangerous positions in which a soldier may find herself, and routinely engaged the enemy during operations.¹⁵⁷ Team Lioness, assembled out of military and cultural necessity to assist male combat troops in raids and searches, is the baseline program on which the United States should base further programs incorporating women in ground combat missions. As a mission based entirely on military needs assessed at the scene, Team Lioness breaks stereotypes in several ways that are helpful in arguing against the combat exception: top Army brass requested the assistance of the servicewomen in order to meet their immediate military needs, in contravention of traditional stereotypes of women as subservient to men in a military realm, and the Lioness served effectively in situations including ground combat, disproving the myth that women are incapable of holding their own in physically demanding situations in the current War on Terror.

Team Lioness was born of military and cultural necessity on the ground. Lioness women, none of the twenty-five trained explicitly for ground combat, were recruited by Army brass desperate for some way to calm and search the women and children routinely encountered

¹⁵⁶ Stephen Farrell, *How to Wage War in Iraq – Against Hitler*, NY TIMES, April 12, 2009.

¹⁵⁷ LIONESS (Room 11 Productions 2008).

by infantry and artillerymen during nighttime raids and searches of homes.¹⁵⁸ Lieutenant Colonel Richard Cabry, Commander of the 1/5 Field Artillery Unit stationed in Ramadi in 2003, specifically asked for a servicewoman to help his Army combat troops carry out insurgent raids. He had not anticipated the need for women in ground troops previously, but found them necessary to counter cultural differences that, if ignored, could erode the efficacy of a mission: “I didn’t foresee the need, I didn’t foresee the circumstances that set itself up such that we would utilize the female soldiers in the role we did. The goal is to ensure that nobody is smuggling anything. But, we knew culturally male soldiers could not search women with our hands.”¹⁵⁹ LTC Cabry asked for one woman to assist; in response, Lieutenant Colonel William Brinkley, Commander of the 1st Engineer Battalion in Ramadi, gave him two in recognition of the command’s growing need.¹⁶⁰ Specialist Rebecca Nava was one of the team members:

We did not only our jobs at the base camp that we were taught by the Army to do . . . but we also did the Lioness missions. You needed females to go out with them on a mission to help calm the women and children . . . so that in the beginning, the Army didn’t look so bad to them.¹⁶¹

These raids and searches, based on intelligence that Iraqis were hiding weapons, mostly took place during the middle of the night, and often involved physical violence or firefights. Specialist and Team Lioness member Shannon Morgan was involved in several front-line combat situations where she discharged her weapon many times.¹⁶² Despite the physical danger she faced in these missions, she describes the military’s need for women to take part in these raids:

¹⁵⁸ LIONESS (Room 11 Productions 2008).

¹⁵⁹ *Id.* (remark of LTC Richard Cabry).

¹⁶⁰ *Id.* (“As we started playin’ around with it I said hey you know this is sort of a special type situation . . . and so initially we came up with the thought of Lionesses.”)

¹⁶¹ *Id.* (remark of Specialist Rebecca Nava).

¹⁶² Woman’s Hour, *supra* note 76.

Once you corralled the [Iraqi] women up it made ‘em more at ease when they realized another woman was the person that was gonna be puttin’ their hands on ‘em and searchin’ them because the insurgents learned that if they gave the detonators to their wives that they wouldn’t be searched because they knew the U.S. men could not touch the women so therefore there was a need for the females to accompany them along.¹⁶³

Occupations like Morgan’s are hard to justify under the combat exclusion policy and the collocation ban, but easy to justify in terms of national security and aid to combat soldiers.

Not only did the Lioness women face intermittent firefighting, they also were engaged in full-scale ground hostility in Ramadi in April, 2004, while working directly with the 2nd Battalion, 4th Marines, and proved themselves to be vastly capable soldiers.¹⁶⁴ Ramadi, the capital of Al Anbar Province, the largest province in Iraq and a significant population center, saw extreme hostility in the spring of 2004. Direct fire engagements, mortar attacks, and improvised explosive device detonations were routine, and the sentiment among the American command was that if the military could control Al Anbar Province, it could control Iraq as a whole.¹⁶⁵ The Lionesses in Ramadi were the first women “to engage in offensive ground combat operations in this country’s history.”¹⁶⁶ Attached directly to the Marine units stationed in Ramadi whose job it was to draw out insurgents, their mission was to arrest suspected insurgent leaders.¹⁶⁷ During one mission to counteract a suspected three-day jihad, Lioness members assisted in storming four different homes, searching the women inside, and arresting two high-value insurgent targets.¹⁶⁸ On the way back to base camp, they and the marines were caught in a firefight with insurgents:

The last raid I went on was truly dangerous. I remember after we set up and stayed at the checkpoint until dawn, the prayers had ended sometime ago. Then suddenly a man came over the loudspeaker again saying something. The last part I

¹⁶³ *Id.*

¹⁶⁴ LIONESS (Room 11 Productions 2008).

¹⁶⁵ *Id.* (remark of LTC Richard Cabry).

¹⁶⁶ *Id.* (remark of Captain Lory Manning, U.S. Navy (retired), Women’s Research and Education Institute).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

caught allah jihad something jihad something. Then all hell broke loose. About a hundred meters from us. I remember I was about to ask the marines I was with if they thought they heard the same jihad too. There was no time for that. We hopped into the truck and started zipping around the outskirts of the battle trying to block the enemy from escaping or reinforcing. I was dismounted and took a position. Stray bullets flew around but I didn't see where they were coming from. The area was too saturated with marines to just fire blindly. It was good four hours of straight fighting. I saw my first dead boy that day. Three Iraqis actually (Diary of Captain Anastasia Breslow).¹⁶⁹

The Lionesses, along with the Marines, returned fire and engaged the enemy for more than four hours. Specialist and Lioness Shannon Morgan, who enlisted as a Track Vehicle Mechanic “really not expecting to ever have to fire [her] weapon,” killed an Iraqi insurgent who had been firing at the Marines during the fight.¹⁷⁰ None of the Lionesses was killed in the battle, and the Team was commended by the military command for its conduct during the hostilities.¹⁷¹

Forcing women to resign from these roles searching insurgent homes and questioning women may likely have caused a cultural rift between U.S. forces and Iraqi women, who may not speak with foreign men. This, in turn, may encourage Iraqi insurgents to use women in a more extensive manner against U.S. forces either as suicide bombers or as hidiers of weapons and explosives. Carl von Clausewitz, the famous Prussian soldier and strategic theorist, related war to a “continuation of policy by other means,” recognizing that every military engagement has deeper political roots and that political aims dictate military requirements and strategy.¹⁷²

[W]ar is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means. All beyond this which is strictly peculiar to war relates merely to the peculiar nature of the means which it uses. That the tendencies and views of policy shall not be incompatible with these means, the art of war in general and the

¹⁶⁹ Diary of Captain Anastasia Breslow, Team Lioness, April, 2004, *available at* http://www.pbs.org/independentlens/lioness/breslow_diary.html.

¹⁷⁰ LIONESS (Room 11 Productions 2008) (remark of Specialist Shannon Morgan).

¹⁷¹ *Id.*

¹⁷² Carl von Clausewitz was born in Prussia in 1780, served as a general in the Prussian army, and gained posthumous fame for his treatise on military strategy, *On War*. For a brief biography of von Clausewitz, see ENCYCLOPEDIA BRITANNICA, *Carl von Clausewitz*, *available at* <http://www.britannica.com/EBchecked/topic/120545/Carl-von-Clausewitz>.

commander in each particular case may demand, and this claim is truly not a trifling one. But however powerfully this may react on political views in particular cases, still it must always be regarded as only a modification of them; for the political view is the object, war is the means, and the mean must always include the object in our conception.¹⁷³

The War on Terror necessitates the use of women in ways in which traditional wars have not. To most effectively carry out the political objectives that underlie the current hostilities, women in ground combat troops is necessary to mitigate cultural taboos that prevent servicemen from performing certain functions. In order to uphold our political goals with any integrity, the United States must rethink its ban on women in ground combat positions; only then will the political and the military goals of the War on Terror coincide.

The success that Team Lioness had in the thirteen months of their operation flies in the face of traditional gender stereotypes about the suitability of women for combat. The program should be used as a model for larger-scale integration of women into ground combat units, based on military necessity. Although the original Lionesses had no prior training in ground combat, their experiences show that further training is necessary for all women attached to ground combat troops under possibility of enemy attack or offensive missions engaging the enemy. The Lionesses have proven effective at handling weapons, searching Iraqi women, keeping up with male ground combat troops, and maintaining their cool under fire. For the immediate future, however, rather than integrating women directly into Army or Marine ground combat units, suitable servicewomen should be recruited into Lioness units and trained in both Army and Marine tactics and protocol, as well as in special functions reserved for women service members in the context of Iraqi cultural codes. Fully trained Lioness women should then be dispatched to Marine and Army units requesting their presence singly or in teams, as was the norm with the Lioness program, and allowed to perform the combat roles they have proven to be capable of.

¹⁷³ CARL VON CLAUSEWITZ, ON WAR 22 (Wordsworth Editions Limited, 1997).

VI. A NEW ADMINISTRATION: A NEW OUTLOOK?

From the first moment a woman dared to speak that hope -- dared to believe that the American Dream was meant for her too -- ordinary women have taken on extraordinary odds to give their daughters the chance for something else; for a life more equal, more free, and filled with more opportunity than they ever had. In so many ways we have succeeded, but in so many areas we have much work left to do.¹⁷⁴

Then-Senator Barack Obama's words ring true still today, but what are the real chances for change in the policies governing women in combat in the hundred-day-old Obama administration? That remains to be seen. President Obama is at once a man committed to equality among the sexes, a man who has not shied away from making difficult military decisions, and yet a man who failed to address the combat exception issue during the campaign months and has not mentioned so far in his presidency. Regardless, the possibility of a reanalysis of the combat exception to fit today's concept of war is more likely under President Obama than it has been in the past eight years.

President Obama has so far not shied away from matters of military concern. In March 2009, he announced his plan to withdraw most American troops from Iraq by the end of August, 2010.¹⁷⁵ Of the 142,000 troops currently stationed in Iraq, 35,000 to 50,000 will remain after that time.¹⁷⁶ Obama has also ordered the deployment of an additional 17,000 troops to fight the Taliban in southern and eastern Afghanistan, citing the situation as demanding "urgent attention," and 4,000 more troops to train our Afghan allies.¹⁷⁷ The New York Times has labeled Obama's strategy in Afghanistan and Pakistan, which focuses on a larger combat force and more

¹⁷⁴ Senator Barack Obama, Speech in Washington, D.C. (Nov. 10, 2005), *available at* http://change.gov/agenda/women_agenda/.

¹⁷⁵ Deirdre Walsh, *Obama Wants Another \$83 Billion for Iraq, Afghanistan*, CNN, April 9, 2009, *available at* <http://www.cnn.com/2009/POLITICS/04/09/obama.war.funding/index.html>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

training, “ambitious but risky.”¹⁷⁸ Obama is “unveiling his approach at a time when the conflict is worsening, the lives of the people are not visibly improving, and the intervention by American-led powers is increasingly resented.”¹⁷⁹ Obama’s adherence to his own plan demonstrates a persistence of purpose that may bode well for discussions about lifting the combat ban.

Another aspect of Obama’s campaign, and now his presidency, which may point to a more inclusive view of combat is Obama’s view on the selective service. While he does not support a military draft, Obama does support selective service registration by both men and women (John McCain, in contrast, has opposed any registration by women).¹⁸⁰ Because of the restriction on fighting in combat, women are excused from draft registration. In a presidential debate broadcasted on YouTube, Obama compared women’s exemption from the draft to the experience of African Americans in the military:

There was a time when African Americans weren’t allowed to serve in combat. And yet, when they did, not only did they perform brilliantly, but what also happened is they helped to change America, and they helped to underscore that we’re equal. . . . [I]f women are registered for service – not necessarily in combat roles I think it will help to send a message to my two daughters that they’ve got obligations to this great country as well as boys do.¹⁸¹

Despite Obama’s inconclusive remark about women in combat roles couched in the above quotation, Obama’s reference to the experience of African American soldiers is a potent one; implementation of equal standards is often the tool by which greatness is discovered. African Americans proved themselves to be as competent and effective on the battlefield as Caucasians; opening these ranks to women could be the impetus to improving our fighting forces by filling

¹⁷⁸ David Stout, *Obama Sounds Cautious Note as He Sets Out Afghan Plan*, NY TIMES, Mar. 27, 2009.

¹⁷⁹ *Id.*

¹⁸⁰ Jerome L. Sherman, *Candidates Differ on Female Draft*, PITTSBURGH POST-GAZETTE, Oct. 13, 2008, available at <http://www.post-gazette.com/pg/08287/919582-470.stm?cmpid=elections.xml>; *Obama Believes Women Should Register for Draft*, WORLDNETDAILY, Oct. 13, 2008, available at <http://www.worldnetdaily.com/index.php?fa=PAGE.view&pageId=77875>.

¹⁸¹ Sherman, *supra* note 180.

the ranks with talent heretofore left untapped. Obama's staff has underscored his view of equality of opportunity as well. Wendy Norigi, Obama's national security spokesman on the campaign trail, told the press that he would consider opening combat roles to women.¹⁸²

"Women are already serving in combat [in Iraq and Afghanistan] and the current policy should be updated to reflect realities on the ground. . . . Barack Obama would consult with military commanders to review the constraints that remain."¹⁸³

Whether President Obama will make these changes to reflect reality remains to be seen. So far, military commanders have been pleased with the attention to military matters the President has shown, and with his willingness to listen to their recommendations. General Ray Odierno, the top U.S. military commander in Iraq, has said of Obama, "[h]e listens. He's incredibly intelligent. He talks through the issues. He makes a decision and then we execute those decisions, and that's all you can expect out of your commander-in-chief. And I've been very pleased with the interaction that I've been able to have with him."¹⁸⁴ As President and Commander in Chief, Obama has the power to gather the relevant information from soldiers on the ground in order to analyze the combat exclusion in terms of military necessity and overall policy, and would follow in a long line of Presidents if he chooses to exercise his power to change the current regulations. Although the current combat exclusion is based on military policy, Obama has the option of dispensing with the combat exception through the issuance of an Executive Order. This method has been used in military matters for decades; it was Executive Order 9981, issued by former President Harry Truman, that ended racial segregation in the armed

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Martina Stewart, *General: U.S. Should Be Out of Iraq By Late 2011*, CNN, April 12, 2009, available at <http://www.cnn.com/2009/WORLD/meast/04/12/iraq.us.troops/index.html>.

services post World War II.¹⁸⁵ More recently, President Clinton in 1995 issued Executive Order 12947, which authorized the generation of a list of “Specially Designated Terrorists” targeted at entities (including individuals) who threatened the Middle East Peace Process.¹⁸⁶ Similarly, on September 23, 2001, in light of the September 11th attacks on the Pentagon and the World Trade Center, President George W. Bush declared a national emergency by way of Executive Order 13244 to deal with the “continuing and immediate threat of further attacks on United States nationals or the United States.”¹⁸⁷ E.O. 13244 also created a terrorist list and effectively blocked “all property and interests in property” of those listed and those accused of materially supporting them.¹⁸⁸ President Obama has the resources and powers of authority necessary to call for revocation of the combat exception; to do so would, in effect, extend to women Harry Truman’s call for Equality and Treatment of Opportunity in the armed forces.

CONCLUSION

*“Most of our brothers don’t look at us any differently. It’s just the gunny, first sergeant, CO. It’s time everyone looked at us this same way.”*¹⁸⁹

The Department of Defense combat exclusion policy prohibits women from serving in roughly 200,000 military positions.¹⁹⁰ The restriction does not consider individual characteristics of individual women, nor does it take into account the skills that fifteen percent of its total force can bring to combat. The combat exception, applied as a blanket classification to

¹⁸⁵ President Harry Truman, Executive Order 9981: Establishing the President's Committee on Equality of Treatment and Opportunity In the Armed Forces, July 26, 1948, *available at* <http://www.trumanlibrary.org/9981a.htm>.

¹⁸⁶ President William J. Clinton, Executive Order 12947: Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process, Jan. 25, 1995, *available at* <http://www.treas.gov/offices/enforcement/ofac/legal/eo/12947.pdf>.

¹⁸⁷ President George W. Bush, Executive Order 13224: Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism, Sept. 23, 2001.

¹⁸⁸ *Id.*

¹⁸⁹ Holmstedt, *supra* note 103, at 312.

¹⁹⁰ McSally, *supra* note 32, at 1013.

the entire female gender, is a violation of equal protection that cannot be justified on the basis of any important State need. Neither lack of physical strength, decreased unit cohesion, nor risk of capture are exceedingly persuasive justifications for the combat ban, and each can be debunked by history, statistical studies, and analysis. Public sentiment concurs; in a 1997 TIME Magazine survey, sixty-seven percent of those polled supported the idea of women in combat roles,¹⁹¹ a number sure to be low considering the poll was conducted before the recent displays of competence and bravery by military women in Iraq and Afghanistan.

The combat exclusion is an anomaly in the War on Terror, which boasts no front lines and exposes every soldier, regardless of position, to the potential for combat. Women are serving in support roles and in combat roles, all of which may be confronted with hostile enemy action at any given time, and women are serving well. The Brass recognize this; Army spokesman Colonel Joseph Curtin proclaimed in 2005 that “women soldiers have made incredible contributions in the war on terrorism through service and their demonstrated bravery.”¹⁹² It is time for military regulations to catch up with reality. The combat exception must be lifted to allow every man and woman the opportunity to demonstrate his or her skill as an individual. Lifting the exception will not cause an influx of women combat soldiers; entrance to combat positions should be dictated by ability to pass gender-neutral standards of physical strength necessary for the specific military position for which one is training. This, in the end, will ensure the most effective, ready, and efficient fighting force by imposing the same standards on similarly situated men and women. America’s current fighting force can, and should, be augmented by highly-trained servicewomen who can navigate ground combat and cultural norms that pervade Iraqi and Afghani society. While this change may not see the light of day within

¹⁹¹ *Id.* at 1042.

¹⁹² Bender, *supra* note 98, at A1.

America's tenure in Iraq, our troops will not manage effective foreign policy or national security as effectively as possible until this change is implemented. Only when the military consents to choose from the best in a pool made up of both men and women will it be capable of assembling the most skilled and effective fighting forces it possibly can.