

**BREAKING THE GROUND BARRIER: EQUAL PROTECTION
ANALYSIS OF THE U.S. MILITARY'S DIRECT GROUND
COMBAT EXCLUSION OF WOMEN**

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The distinction between combat and noncombat is purely descriptive and never definitive. The only reason it is made at all is to say where women may serve or where they may not serve. The line between the two is always drawn arbitrarily.¹

I. Introduction

Heavy machine gun fire and a deadly barrage of rocket-propelled grenades rain down on your vehicle. It is March 20, 2005, near noon in Iraq, and you are a team leader in a military police squad, patrolling and providing security to a sustainment convoy. The fifty enemy fighters are ambushing your convoy using irrigation ditches and an orchard for their well-planned complex attack. They intend to destroy your convoy, inflict numerous casualties, and kidnap sustainment convoy drivers or U.S. soldiers. While flames engulf the lead vehicle trapping the convoy, your squad maneuvers around the trapped vehicles and you direct your gunner to fire into the orchard and trench line. Even though enemy fighters outnumber your squad five to one, you leave the safety of your vehicle to engage them with small arms fire. While still outside the protection of the vehicle, you use your M203 grenade launcher to further suppress the

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¹ BRIAN MITCHELL, *WOMEN IN THE MILITARY: FLIRTING WITH DISASTER* 347 (1997) (quoting his own testimony to the 1992 Presidential Commission on the Assignment of Women in the Armed Forces). Mr. Mitchell advocates complete exclusion of women from the armed forces. *Id.* at 343–44.

heavy attack. You and your squad leader then throw fragmentation grenades into the trench before going over the berm and into the trench. There you begin clearing the trench with your M4 carbine. In the dangerously confining space of the trench, you personally kill three enemy fighters at close range. You and your squad leader then clear the trench and secure the ambush site.²

Your name is Sergeant (SGT) Leigh Ann Hester, and you are the first woman to earn the Silver Star Medal in Iraq for “exceptionally valorous achievement during combat operations.”³ More recently, Specialist (SPC) Monica Brown earned the Silver Star Medal while serving as a Combat Medic on a combat patrol in Afghanistan in April 2007, by pulling wounded soldiers out of a burning tracked vehicle, treating them amid intense enemy fire, and shielding the casualties from the enemy fire with her body.⁴

Sergeant Hester and SPC Brown earned the Silver Star Medal for their heroism despite the policy on the assignment of women in the military, titled the Direct Ground Combat Definition and Assignment Rule (referred to by the author as the “exclusion policy”).⁵ The 1994 exclusion policy prohibits (1) assigning women to units that collocate with direct ground combat units,⁶ (2) assigning women to direct ground combat units below the brigade level, and (3) assigning women to a

² Compiled from Sergeant Leigh Ann Hester’s Silver Star Award Narrative. *See* HomeOfHeroes.com, U.S. Army Citations for Awards of the Silver Star in the Global War on Terrorism, http://www.homeofheroes.com/valor/08_WOT/ss_GWOT/citations_USA-G.html (last visited Feb. 25, 2010) [hereinafter Hester Citation] (publishing citation and award narrative for Hester, Leigh Ann).

³ *See id.*

⁴ *See* HomeOfHeroes.com, U.S. Army Citations for Awards of the Silver Star in the Global War on Terrorism, http://www.homeofheroes.com/valor/08_WOT/ss_GWOT/citations_USA.html (last visited Feb. 25, 2010) [hereinafter Brown Citation] (publishing citation for Brown, Monica).

⁵ *See* Memorandum from Sec’y of Def. Les Aspin, to the Sec’ys of the Army, Navy, and Air Force et al., subject: Direct Ground Combat Definition and Assignment Rule (13 Jan. 1994) [hereinafter Aspin Memo 1994].

⁶ The exclusion policy permits, but does not require, the services to exclude women based on collocation, and both the Army and the Department of the Navy, which includes the Marine Corps, specifically prohibit women from assignment to collocating units. *See* U.S. DEP’T OF ARMY, REG. 600-13, ARMY POLICY FOR THE ASSIGNMENT OF FEMALE SOLDIERS para. 1-12 (Feb. 2008) [hereinafter AR 600-13]; *see* U.S. DEP’T OF NAVY, SEC’Y OF THE NAVY INSTR. 1300.12C, CHANGE TRANSMITTAL 1, ASSIGNMENT OF WOMEN IN THE DEPARTMENT OF THE NAVY para. 6e (14 May 2009) [hereinafter SECNAVINST 1300.12C CH-1].

combat arms military occupational specialty (MOS).⁷ Since the exclusion policy's implementation, the direct ground combat experiences of thousands of women in Afghanistan and Iraq, along with changes to doctrine and personnel policies, have undermined the justifications for exclusion.

Along with the contradiction inherent in the service of SGT Hester and SPC Brown, the exclusion policy erodes the military effectiveness of U.S. ground forces. Because they are women, the top two graduates of the U.S. Military Academy (USMA) class of 2010, Second Lieutenants Liz Betterbed and Alex Rosenberg,⁸ cannot be commissioned as infantry officers, or as military intelligence officers assigned to an armor battalion. Despite their demonstrated military, physical, leadership, and academic skills, the exclusion policy deprives direct ground combat units the leadership capabilities of not only these two newly commissioned officers, but also every other qualified female Soldier.

In addition, the status-based exclusion policy, centered on the assumption that women generally lack the capability for direct ground combat, undermines the military as a merit-based organization. The exclusion policy sends the message that women in the military are subordinate to men due to their gender. Further, while the Army has transformed its force to meet the needs of the current conflicts in Iraq and Afghanistan,⁹ the strains of an Army at war push commanders who do not completely understand the exclusion policy to test the limits of a policy written for a different conflict.

On the other hand, advocates of exclusion justify the policy based on concerns about a woman's individual ability, how her presence undermines unit cohesion, and the negative social implications of sending women to combat.¹⁰ While other nations like Canada and Denmark have opened all ground combat positions to women, the United

⁷ Aspin Memo 1994, *supra* note 5.

⁸ See *Obama Praises West Point Cadets, Lays Out Challenges*, CNN.COM, May 22, 2010, available at <http://www.cnn.com/2010/POLITICS/05/22/obama.west.point/index.html>. From West Point's class of 2010, the Number 1 overall cadet, Liz Betterbed, and the valedictorian, Alex Rosenberg, are women. *Id.*

⁹ MARGARET C. HARRELL ET AL., RAND NAT'L DEF. RESEARCH INST., ASSESSING THE ASSIGNMENT POLICY FOR ARMY WOMEN 9–10 (2007) [hereinafter HARRELL, 2007 RAND STUDY].

¹⁰ See *infra* Part III.B–G.

Kingdom also continues to exclude women.¹¹ The British Ministry of Defence recently released its study of women in combat and concluded that while women are physically capable to perform ground combat, the presence of women in combat units may harm unit cohesion.¹² Whatever the social, political, or popular reason for the U.S. policy, it must comply with the Equal Protection clause of the U.S. Constitution.

In 1996, when the Supreme Court held in *United States v. Virginia*¹³ that Virginia's exclusion of women from the Virginia Military Institute (VMI) was unconstitutional, it ruled that Equal Protection requires that any policy that excludes willing and capable women must be based on an exceedingly persuasive justification.¹⁴ The justifications for the exclusion policy rely on predicting how women will perform in direct ground combat and how their presence will affect the units in which they are assigned. However, new data since 2001 demonstrates that women have actually performed in direct ground combat and how their presence actually affected their units.¹⁵ In over nine years of conflict, women have fought, died, been captured, and earned combat distinction.¹⁶ The unconventional nature of combat on the nonlinear battlefields of Afghanistan and Iraq has produced performance data of women who found themselves in direct ground combat.¹⁷ Additionally, changes in combat doctrine,¹⁸ the increase in the maximum age of enlistment,¹⁹ the

¹¹ See *infra* Part III.G.2.(4).

¹² See U.K. MINISTRY OF DEFENCE, REPORT ON THE REVIEW OF THE EXCLUSION OF WOMEN FROM GROUND CLOSE-COMBAT ROLES (Nov. 2010) [hereinafter UK 2010 REPORT].

¹³ 518 U.S. 515 (1996).

¹⁴ *Id.* at 534.

¹⁵ See *infra* Part III.G.

¹⁶ Lizette Alvarez, *G.I. Jane Stealthily Breaks the Combat Barrier*, N.Y. TIMES, Aug. 16, 2009, at A1.

¹⁷ As all male and female troops are exposed to attack, many more women have performed in direct ground combat than ever before. Compare Colonel Christopher R. Farley, *The US Army Assignment Policy for Women: Relevancy in 21st Century Warfare* 8 (2009) (Master's Thesis prepared for the Sch. of Advanced Military Studies, U.S. Army Command and Gen. Staff Coll., Fort Leavenworth, Kan.) (noting that over 40,000 women served in the Gulf War), with Colonel Robert J. Botters, *How the Army Can Meet the Intent of Policy and Statute on Ground Combat Exclusion for Women*, in WOMEN IN COMBAT COMPENDIUM 72 (Colonel Michele M. Putko & Douglas V. Johnson II eds., 2008) (noting that over 60,000 women have served in Iraq where direct ground combat may occur anywhere in Iraq).

¹⁸ Botters, *supra* note 17, at 72.

¹⁹ Congress increased the maximum age of enlistment to forty-two years old in 2006, effectively lowering the minimum physical requirements for performance in all military occupational specialty (MOS). Lisa Burgess, *Army Raises Maximum Enlistment Age*,

end of the Navy's ban on women serving on submarines,²⁰ and the Don't Ask, Don't Tell Repeal Act of 2010 (DADT) and its related reports²¹ provide a new perspective from which to evaluate the exclusion justifications.

Using the framework of *Virginia*, and considering the new data and changes since 2001, the exclusion policy violates the Equal Protection clause of the Constitution.²² The services, the Department of Defense (DoD), and Congress if necessary, must act to update the assignment policy because military commanders need a clear rule that comprehends modern combat and continues to account for the physical demands of direct ground combat. Despite some political opposition, a majority of the American public supports a policy that would allow women to break the ground combat barrier in order to have the opportunity to serve in ground combat units and engage in direct ground combat.²³

This article evaluates the current exclusion policy based on the *Virginia* Equal Protection analysis, applying the modern factors. As the U.S. Army comprises the majority of U.S. ground forces,²⁴ this article

STARS & STRIPES, June 23, 2006, available at <http://www.military.com/features/0,15240,102539,00.html>.

²⁰ Phil Stewart & Susan Cornwell, *Pentagon OKs Lifting Ban on Women in Submarines*, REUTERS, Feb. 23, 2010, <http://www.reuters.com/article/idUSTRE61M6LW20100224>.

²¹ Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) [hereinafter DADT Repeal Act]; U.S. DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" (Nov. 30, 2010) [hereinafter CRWG REPORT]; U.S. DEP'T OF DEF., SUPPORT PLAN FOR IMPLEMENTATION (Nov. 30, 2010) [hereinafter CRWG SUPPORT PLAN]. The DADT was effectively repealed on September 20, 2011. Memorandum from Clifford Stanley, Under Sec'y of Def. for Personnel and Readiness, to the Sec'ys of the Army, Navy, and Air Force et al., subject: Repeal of "Don't Ask, Don't Tell" (20 Sept. 2011) [hereinafter Certification Memo].

²² The Fifth Amendment of the U.S. Constitution provides "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. The Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV, § 1. The Supreme Court has held that the Fifth Amendment imposes an equal protection duty on the federal government, similar to the Fourteenth Amendment equal protection guarantee. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

²³ Alvarez, *supra* note 16, at A1; *see also* Mady Wechsler Segal & Chris Bourg, *Professional Leadership and Diversity in the Army*, in *THE FUTURE OF THE ARMY PROFESSION* 705, 706 (Lloyd J. Matthews ed., 2d ed. 2005).

²⁴ *See, e.g., The Future of U.S. Ground Forces Before the U.S. Senate Armed Services Committee, Airland Subcommittee: The Future of U.S. Ground Forces* (Mar. 26, 2009),

will focus primarily on Army doctrine and implementation. The scope is limited to ground combat, but includes how the exclusion policy applies to all U.S. ground forces, including Army and Marine Corps²⁵ troops. This article will use “combat arms MOS” and “direct ground combat unit” to describe the MOSs and units currently closed to women. This article will use “combat support MOS” and “combat support unit”²⁶ to describe the MOSs and units open to women. Part II of this article introduces a history of the gradual integration of women into the armed forces. Part III evaluates the modern factors in the context of the *Virginia* decision to determine the validity of the exclusion policy foundation. Part IV recommends courses of action for the services and DoD to systematically and deliberately end the exclusion policy and implement a sustainable and progressive policy on women in combat.

II. A History of Gender Integration

A. The Doctrine of Military Deference

The exclusion policy’s historical foundation and the Doctrine of Military Deference²⁷ provide a basis with which to evaluate the policy. The U.S. military is a specialized society where military success in

available at <http://www.csbaonline.org/wp-content/uploads/2011/02/2009.03.26-The-Future-of-US-Ground-Forces.pdf> (testimony of Andrew F. Krepinevich, President, Ctr. for Strategic and Budgetary Assessments) (“My testimony is focused primarily on the Army, given the dominant position it holds in providing ground forces for our country.”); see also David S. Cloud, *Defense Chief Gates Orders Review of Marines’ Role*, L.A. TIMES ONLINE, August 12, 2010 (ordering a review of the Marine Corps mission because the Marines have become a “second land army”).

²⁵ The Marine Corps is a component of the Department of the Navy. 10 U.S.C. § 5063 (2006).

²⁶ Although the Army commonly breaks support units into combat support and combat service support, this article will refer to both as combat support. A revision to Army doctrine in 2008 ended the use of the terms combat arms, combat support, and combat service support. U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 2-7 (Feb. 2008) [hereinafter FM 3-0]. However, the rules for an Army Ranger assignment distinguish between combat support and combat service support soldiers. See U.S. DEP’T OF ARMY, REG. 614-200, ENLISTED ASSIGNMENTS AND UTILIZATION MANAGEMENT paras. 5-4i, j. (26 Feb. 2009) [hereinafter AR 614-200].

²⁷ See generally Jeffrey S. Dietz, *Getting Beyond Sodomy: Lawrence and Don’t Ask, Don’t Tell*, 2 STAN. J. C. R. & C. L. 63, 70–74 (2005) (discussing the doctrine of military deference as the heightened level of deference the courts give to Congress and the military when reviewing military regulations).

combat requires unit cohesion, discipline, morale, and integrity.²⁸ Military regulations and policies create the framework to effect necessary discipline, and to help commanders build the required unit cohesion for success on the battlefield.²⁹ Similarly, the regulations and policies currently in place limit the exercise of constitutional rights by requiring a level of discipline that civilian society would find unacceptable.³⁰

Because constitutional power over the military lies with Congress and the President, and not the Judiciary, the courts often exercise the Doctrine of Military Deference, generally deferring on military personnel decisions.³¹ However this deference does not lead to “a blanket presumption of constitutionality.”³² Instead, while deference is high in the case of First Amendment analysis, the courts exercise much less deference in Equal Protection and Due Process claims.³³ An additional hurdle for those attempting to challenge military regulations is the *Feres* Doctrine, which prohibits members of the armed forces from seeking “damages in a suit against the government for constitutional violations.”³⁴ Although the courts do not assume to know better than the military, Congress, or the President, what constitute important military objectives, the courts assess the logical connections between the regulations and the asserted objective of the regulations.³⁵

²⁸ See *Parker v. Levy*, 417 U.S. 733, 743 (1974) (“specialized society”); *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953)) (“specialized community”); see *Dietz*, *supra* note 27, at 70.

²⁹ See *Dietz*, *supra* note 27, at 73.

³⁰ See *Chappell v. Wallace*, 462 U.S. 296, 300–01 (1983) (“[N]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.”); see *Dietz*, *supra* note 27, at 70.

³¹ U.S. CONST. art. I, § 8, cl. 12–14; *id.* art. II, § 2, cl. 1.; see also *Dietz*, *supra* note 27, at 71.

³² *Dietz*, *supra* note 27, at 72.

³³ *Id.*; see also *Tomasson v. Perry*, 80 F.3d 915, 933 (1996) (indicating that First Amendment challenges to Don’t Ask, Don’t Tell require higher deference than Due Process and Equal Protection claims). *But see* *Log Cabin Republicans v. United States*, Case No. CV 04-08425-VAP (Ex) (C.D. Cal. 2010) (finding “Don’t Ask, Don’t Tell” violates First Amendment).

³⁴ *Dietz*, *supra* note 27, at 72; see *Feres v. United States*, 340 U.S. 135 (1950) (holding no liability for the Government under the Federal Tort Claims Act for military service injury); see *Chappell*, 462 U.S. at 304–05 (extending *Feres* by barring redress in civilian courts for members of the armed forces claiming constitutional wrongs suffered in the course of military duty).

³⁵ *Dietz*, *supra* note 27, at 73.

Courts have not shied away from assessing the constitutionality of military regulations or congressionally mandated rules. In 1973, the Supreme Court reversed a statutory scheme that treated female military personnel with dependents differently from male personnel with dependents.³⁶ Later, courts invalidated regulations mandating discharge for pregnant Marines, and overturned a statute prohibiting the Navy from permanently assigning women only to Navy hospital ships or transport vessels.³⁷ Even in deference, there is no presumption of constitutionality.³⁸ Most recently, a federal district court held that the statute and regulations underlying the military's homosexual conduct policy unconstitutional on Fifth Amendment Substantive Due Process grounds and First Amendment Free Speech grounds.³⁹ Change to the policy of excluding women from direct ground combat units is most likely going to come from outside the courts.⁴⁰

B. Expanding Military Roles For Women

While Congress and the President have gradually integrated women into the military since the end of World War II, the military still maintains various levels of gender-based exclusion. Although women have always played a role in the success of U.S. combat forces,⁴¹ Congress did not establish permanent positions for women until 1901 with the creation of the Army Nurse Corps.⁴² In World War II, Congress created the Women's Army Auxiliary Corps (WAAC) and then the Women's Army Corps (WAC), but made these positions temporary.⁴³

³⁶ *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (holding on Due Process grounds).

³⁷ *Crawford v. Cushman*, 531 F.2d 1114, 1125-26 (2d Cir. 1976) (finding the Marine Corps regulations violated Due Process guarantees); *Owens v. Brown*, 455 F. Supp. 291, 309-10 (D.D.C. 1978).

³⁸ Dietz, *supra* note 27, at 74.

³⁹ *Log Cabin Republicans v. United States*, Case No. CV 04-08425-VAP (Ex) (C.D. Cal. 2010).

⁴⁰ See Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 159 (2008) ("Extrajudicial actors, rather than courts, may answer the many questions that women's military status raises from the perspective of the constitutional law of sex equality.")

⁴¹ See Farley, *supra* note 17, at 3-5.

⁴² *Id.* at 4.

⁴³ *Id.* at 5-6. The WAAC created a "small group of women *attached to rather than in the Army.*" *Id.* The WAC "gave full military status to women" but kept set the duration of the WAC as "duration of the war plus six months." *Id.* at 6.

The first major integration of women into the military, with broad limitations, came after the end of World War II with the Women's Armed Services Integration Act of 1948 ("Integration Act").⁴⁴ The act ended the traditional male monopoly on soldiership by authorizing female service in the Women's Army Corps, Navy, and Marine Corps.⁴⁵ On the other hand, the act, coupled with service regulations, clearly excluded women from combat, including from combat aircraft and naval vessels.⁴⁶ The Integration Act also infringed on women's ability to provide for their families, achieve promotion, and assume command.⁴⁷ It capped the percentage of women in the armed forces at two percent of the overall force and capped the highest rank for women at colonel.⁴⁸ The Integration Act also required women to be three years older than men in order to enlist without parental permission.⁴⁹ It limited women's ability to claim husbands and children as dependents and prohibited women from having command authority over men.⁵⁰

In 1951, the President and the services overtly made a woman's role in the home superior to her role in the armed forces by automatically discharging any pregnant woman or mother who stayed at home with a minor child at least thirty days a year.⁵¹ In 1967, Congress provided some relief by lifting the two percent cap and opening general officer rank to women.⁵² In 1971, the Air Force instituted more change by allowing waivers to otherwise automatic pregnancy discharges and opening enlistment to women with dependent children.⁵³ As previously

⁴⁴ Women's Armed Service Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356.

⁴⁵ Women's Research & Education Institute, *Chronology of Significant Legal & Policy Changes Affecting Women in the Military: 1947-2003*, available at [http://www.wrei.org/Women in the Military/Women in the Military Chronology of Legal Policy.pdf](http://www.wrei.org/Women%20in%20the%20Military/Women%20in%20the%20Military%20Chronology%20of%20Legal%20Policy.pdf) [hereinafter *Chronology*]; see generally Captain Stephanie L. Stephens, *Combat Exclusion: An Equal Protection Analysis* 11-13 (1997) (LL.M. Thesis, Judge Advocate General's School).

⁴⁶ *Chronology*, *supra* note 45; see Stephens, *supra* note 45, at 11-13. However, the Department of Defense (DoD) did not provide a unified definition of combat until 1978. See *Chronology*, *supra* note 45.

⁴⁷ See § 107, 62 Stat. at 361; see also *Chronology*, *supra* note 45; see also JUDITH HICKS STIEHM, *ARMS AND THE ENLISTED WOMAN* 109 (1989); see *Chronology*, *supra* note 45.

⁴⁸ See § 107, 62 Stat. at 357-58.

⁴⁹ See *id.* § 107, 62 Stat. at 360.

⁵⁰ See § 107, 62 Stat. at 361; see also *Chronology*, *supra* note 45; see also STIEHM, *supra* note 47, at 109.

⁵¹ Exec. Order No. 10,240, 16 Fed. Reg. 3689 (Apr. 27, 1951) (permitting discharge for natural and adoptive mothers and stepmothers); see also *Chronology*, *supra* note 45.

⁵² See *Chronology*, *supra* note 45; see also STIEHM, *supra* note 47, at 110.

⁵³ *Chronology*, *supra* note 45.

mentioned, in the 1970s, the courts ended the practice of superior dependent benefits for male troops, invalidated rules on mandatory pregnancy discharges, and quashed statutory exclusion of women from permanent assignment to various Navy vessels.⁵⁴

C. Assignment Policies: All-Volunteer Force to the Persian Gulf War

In addition to the change ushered in by the courts and the Air Force, the 1970s also brought the All-Volunteer Force (AVF) and cultural change.⁵⁵ The end of the draft in 1973 forced the services to find new ways to fill the AVF.⁵⁶ While the Chief of Naval Operations opened new positions to Navy women, the service chiefs and several high-ranking officers balked at admitting women to the federal service academies.⁵⁷ Even the former head of the Women Airforce Service Pilots during World War II, Jacqueline Cochran, asserted that “a woman’s primary function in life is to get married, maintain a home and raise a family,” and not to fight in combat.⁵⁸ Although by 1972, women could enter the Air Force, Army, and Navy Reserve Officer Training Corps (ROTC), critics equated allowing women to attend the U.S. Military Academy at West Point (“West Point”) as parallel to allowing women to fight in ground combat.⁵⁹ Despite the objections, Congress opened the academy doors to women in 1976, allowing women to prove their mettle and achieve success.⁶⁰ By 1977, women qualified for noncombat aviation.⁶¹

⁵⁴ *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973); *Crawford v. Cushman*, 531 F.2d 1114, 1126 (2d Cir. 1976); *Owens v. Brown*, 455 F. Supp. 291, 309–10 (D.D.C. 1978).

⁵⁵ See Farley, *supra* note 17, at 8; see Lance Janda, ‘A Simple Matter of Equality’: *The Admission of Women to West Point*, in *A SOLDIER AND A WOMAN: SEXUAL INTEGRATION IN THE MILITARY* 305, 306, 318 (Gerard J. DeGroot & Corinna Peniston-Bird eds., 2000).

⁵⁶ See Farley, *supra* note 17, at 8; see Janda, *supra* note 55, at 305, 318 (arguing that the creation of the AVF forced recruiter to recognize the heavy need for female troops).

⁵⁷ Chronology, *supra* note 45; Janda, *supra* note 55, at 307.

⁵⁸ Janda, *supra* note 55, at 307 (quoting Jacqueline Cochran from her Hearings Before Subcommittee No. 2 of the House Committee on Armed Services, 93d Congress, 2d Session (1974)).

⁵⁹ Chronology, *supra* note 45; Janda, *supra* note 55, at 305, 313.

⁶⁰ Department of Defense Appropriation Authorization Act, Pub. L. No. 94-106, tit. VIII, sec. 814(a), (b), 89 Stat. 531 (1975); see also Janda, *supra* note 55, at 319. The Coast Guard Academy allowed women to enroll in 1975. Chronology, *supra* note 45. For additional discussion on the integration of the Service Academies, see Janda, *supra* note 55, at 305. See generally DONNA M. MCALEER, *PORCELAIN ON STEEL: WOMEN OF WEST POINT’S LONG GRAY LINE* (2010) (describing the hardships and successes of women graduates of USMA).

In the next two years, Congress dissolved the WAC and allowed permanent assignment of women to noncombat ships, and the Navy opened more shipboard jobs to women, including diving and salvage positions.⁶²

Prior to the end of the draft, in 1972, Congress passed the Equal Rights Amendment (ERA).⁶³ Once ratified by the states, the ERA would have given women a constitutional guarantee of equal rights under the law.⁶⁴ However, debate highlighted widespread concern that the ERA would take wives from husbands and force mothers into combat.⁶⁵ Prior to the 1979 deadline, President Jimmy Carter urged ratification and assured critics that women would not serve in combat positions.⁶⁶ Although President Carter pushed a gender-neutral draft registration, Congress passed the male-only requirements of the Military Selective Service Act (MSSA) in 1980.⁶⁷ This eventually led to the Supreme Court's decision in *Rostker v. Goldberg*⁶⁸ upholding the male-only registration while presuming, without discussion, that the exclusion of women from combat roles was constitutional.⁶⁹

In the following years, women in 1989 led units in combat into Panama, commanded a Navy ship in 1990, and then entered combat zones in the largest military operation since the inception of the AVF.⁷⁰ Over 40,000 women also served in Operation Desert Shield and Operation Desert Storm.⁷¹ Women and the nation paid the price of the increased numbers of women in the conflict, with thirteen women killed

⁶¹ Chronology, *supra* note 45 (noting the Navy in 1973, the Army in 1974, and the Air Force in 1977).

⁶² Tit. VII, secs. 803, 820, 92 Stat. 1611; Chronology, *supra* note 45; MARGARET C. HARRELL & LAURA L. MILLER, RAND NAT'L DEF. RESEARCH INST., NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS UPON READINESS, COHESION, AND MORALE 2 (1997) [hereinafter HARRELL & MILLER, 1997 RAND STUDY].

⁶³ Hasday, *supra* note 40, at 113.

⁶⁴ Proposed Amendment to the Constitution of the United States, H.R.J. Res. 208, 92d Cong., § 1, 86 Stat. 1523, 1523 (1972).

⁶⁵ Hasday, *supra* note 40, at 110.

⁶⁶ *Id.* at 113–14.

⁶⁷ Military Selective Service Act, 50 U.S.C. App. § 451–473 (2000); see Hasday, *supra* note 40, at 115; see Major Scott E. Dunn, *The Military Selective Service Act's Exemption of Women: It is Time to End It*, 2009 ARMY LAW., Apr. 2009, at 9–10.

⁶⁸ 453 U.S. 57 (1981).

⁶⁹ *Id.* at 81–83.

⁷⁰ See HARRELL & MILLER, 1997 RAND STUDY, *supra* note 62, at 2.

⁷¹ Chronology, *supra* note 45.

and two taken as prisoners of war.⁷² However, even though America's fear of having its daughters captured by the enemy came true, the Gulf War also provided a new perspective for those who doubted a woman's capability in combat. When Major (MAJ) Rhonda Cornum and SGT Troy Dunlap recounted their experiences as prisoners of war (POW) together, SGT Dunlap declared, "She can go to combat with me anytime," even though he clearly considered MAJ Cornum the exception.⁷³

The gradual integration of women into the armed forces since 1948 contributed to the increased numbers of women who, although broadly excluded from combat and combat roles, experienced the tragedies of combat. Their experiences changed the way the American society viewed military women and their role in combat. However, the view that women should not see direct combat remained steadfast with respect to women's roles in direct ground combat.

D. Assignment Policies Following the Gulf War

Following the 1992 Presidential Commission on the Assignment of Women in the Military (1992 Presidential Commission), in 1993, Congress abolished separate personnel systems for men and women servicemembers, repealed the combat aircraft ban, and lifted the combat ship exclusion, although submarines and some smaller combat ships still remained closed to women.⁷⁴ Then in 1994, Secretary of Defense Les Aspin issued his Direct Ground Combat and Assignment Rule memorandum (Aspin Memo), which opened all combat aviation to women, ended the "Risk Rule," and directed the Army and Marine Corps to study opening more assignments to women.⁷⁵

⁷² *Id.*

⁷³ MELISSA S. HERBERT, CAMOUFLAGE ISN'T ONLY FOR COMBAT: GENDER, SEXUALITY, AND WOMEN IN THE MILITARY 121 (1998) (quoting Sergeant Dunlap's statements in an interview to *Dateline NBC* in 1992). Major Cornum deployed in Operation Desert Storm as a flight surgeon in the 101st Airborne Division. RHONDA CORNUM AS TOLD TO PETER COPELAND, SHE WENT TO WAR: THE RHONDA CORNUM STORY 3, 5 (1992).

⁷⁴ Chronology, *supra* note 45.

⁷⁵ Aspin Memo 1994, *supra* note 5; *see also* Memorandum from Sec'y of Def. Les Aspin, to the Sec'ys of the Army, Navy, and Air Force et al., Policy on the Assignment of Women in the Armed Forces (Apr. 28, 1993).

Prior to 1994, the Risk Rule excluded women from units or positions “if their risks of exposure to direct combat, hostile fire, or capture are equal to or greater than the risks for land, air, or sea combat units with which they are associated in a theater of operations.”⁷⁶ In 1988, the Risk Rule actually opened approximately 30,000 new positions to women by setting one clear standard for exclusion.⁷⁷ By ending the Risk Rule in 1994, the Aspin Memo opened yet another 32,700 Army positions and 48,000 Marine Corps positions to women.⁷⁸

1. The Aspin Memo and the Service Policy

The Aspin Memo, Secretary of the Navy Instruction (SECNAVINST) 13001.12C CH-1,⁷⁹ and Army Regulation (AR) 600-13⁸⁰ comprise the current exclusion policy. The Aspin Memo excludes women “from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground.”⁸¹ It also permits the services to exclude women from units and positions that “are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women,” units “engaged in long range reconnaissance operations and Special Operations Forces missions,” and units and positions “where job related physical requirements would necessarily exclude the vast majority of women Service members.”⁸² The Aspin Memo defines direct ground combat as

engaging the enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.⁸³

⁷⁶ ROBERT T. HERRES ET AL., THE PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT 36 (1992).

⁷⁷ Chronology, *supra* note 45.

⁷⁸ *Id.*; see Aspin Memo 1994, *supra* note 5.

⁷⁹ SECNAVINST 1300.12C CH-1, *supra* note 6.

⁸⁰ AR 600-13, *supra* note 6.

⁸¹ Aspin Memo 1994, *supra* note 5.

⁸² *Id.*

⁸³ *Id.*

Navy policy, reflected in SECNAVINST 1300.12C CH-1, mirrors the Aspin Memo on direct ground combat and collocation, and excludes women in the Department of the Navy, including the Marine Corps, from assignment to billets as members of the following types of units:

infantry regiments and below; artillery battalions and below; any armored units (tanks, amphibious assault vehicles, and light armored reconnaissance); units and positions which are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women; or units engaged in long-range reconnaissance operations or Special Operations Forces missions, when such billets are inherently likely to result in being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel.⁸⁴

Additionally, the Instruction specifies that “[w]omen may be assigned in combat service support roles for deployed Naval Special Warfare forces,” and details several Special Operations billets that are exclusive to men.⁸⁵

Due to a broad 1992 Army definition of direct ground combat⁸⁶ the resulting policy is even more exclusive than the Aspin Memo and the Navy Instruction.

Engaging an enemy with individual or crew served weapons while being exposed to direct enemy fire, a high probability of direct physical contact with the enemy's personnel and a substantial risk of capture. Direct combat takes place while closing with the enemy by fire, maneuver, and shock effect in order to destroy or capture the enemy, or while repelling the enemy's assault by fire, close combat, or counterattack.⁸⁷

⁸⁴ SECNAVINST 1300.12C CH-1, *supra* note 6, para. 6e.

⁸⁵ *Id.*

⁸⁶ Army Regulation 600-13 uses direct combat while the DoD policy uses direct ground combat. *Compare* AR 600-13, *supra* note 6, at pt. II, with Aspin Memo 1994, *supra* note 5. This article will use the term direct ground combat to refer to the same concept in both policies.

⁸⁷ AR 600-13, *supra* note 6, at pt. II.

The Army adds defensive language to the definition by including “repelling the enemy’s assault.” While the Aspin Memo and Navy Instruction prohibit assignment to units below the brigade level with a “primary mission” to engage in direct ground combat, the Army prohibits assignment to units below the brigade level with a “routine mission” to engage in direct ground combat.⁸⁸ Additionally, although the Aspin Memo merely allows, but does not require, the services to exclude women based on collocation, the Army, like the Navy, adopts collocation as an exclusion basis. Rather than look to whether a unit is “doctrinally required” to collocate, as the Aspin Memo and Navy Instruction do, the Army regulation requires exclusion from units and positions that “collocate routinely.”⁸⁹

However, the RAND National Defense Research Institute published its study in 2007, *Assessing the Assignment Policy for Army Women* (2007 RAND Study)⁹⁰ and found no common definition of collocation.⁹¹ The Army collocation seems to mean placing “two or more units in close proximity so as to share common facilities.”⁹² On the other hand, the Aspin Memo collocation seems to refer to “a high level of interaction and interdependency between the units, rather than just physical proximity.”⁹³

In the end, the exclusion policy restricts assignment, but not employment; commanders may employ properly assigned soldiers in the way they deem most effective, regardless of gender.⁹⁴ The Army codes each position as open or closed to women according to the position’s duties, the MOS’s area of concentration, the unit’s mission, and collocation.⁹⁵ An MOS such as medic may be open to women except when the position is in a direct ground combat unit below the brigade

⁸⁸ Aspin Memo 1994, *supra* note 5; SECNAVINST 1300.12C CH-1, *supra* note 6, at para. 5a; AR 600-13, *supra* note 6, para. 1-12.

⁸⁹ Aspin Memo 1994, *supra* note 5; SECNAVINST 1300.12C CH-1, *supra* note 6, at para. 6e; AR 600-13, *supra* note 6, para. 1-12.

⁹⁰ HARRELL, 2007 RAND STUDY, *supra* note 9, at 6–9.

⁹¹ *Id.* at 18.

⁹² *Id.* While the Aspin Memorandum does not define collocation, AR 600-13 does: “Collocation occurs when the position or unit routinely physically locates and remains with a military unit assigned a doctrinal mission to routinely engage in direct combat.” Compare AR 600-13, *supra* note 6, pt. II, with Aspin Memo 1994, *supra* note 5.

⁹³ HARRELL, 2007 RAND STUDY, *supra* note 9, at 18.

⁹⁴ AR 600-13, *supra* note 6, para. 1-12; HARRELL, 2007 RAND STUDY, *supra* note 9, at 4; Farley, *supra* note 17, at 13.

⁹⁵ AR 600-13, *supra* note 6, para. 2-1; HARRELL, 2007 RAND STUDY, *supra* note 9, at 4.

level or is in a combat support unit that routinely collocates with a direct ground combat unit.

A combat arms MOS like armor crewman or infantryman is closed to women.⁹⁶ Women are excluded from serving as an officer in armor, infantry, and special forces.⁹⁷ In addition to all armor, infantry, and special forces MOSs, enlisted women are excluded from all but three MOSs in field artillery,⁹⁸ from the Bradley linebacker crew member MOS of air defense artillery,⁹⁹ from the combat engineer MOS; from tank, Bradley, and artillery mechanics of mechanical maintenance; and from the ground surveillance system operator MOS of military intelligence.¹⁰⁰

The exclusion policy attempts to both exclude women from exposure to the enemy and to exclude women from roles where their mission is to locate and engage the enemy. In doing so, the exclusion policy has three prongs of exclusion: (1) exclusion from assignment to a unit that collocates with a direct ground combat unit (collocation prong); (2) exclusion from assignment to a direct ground combat unit below the brigade level (below brigade prong); and (3) exclusion from assignment to specific combat arms MOS (combat arms MOS prong). The combat arms MOS prong can further be divided into an exclusion of women from assignment to conventional combat arms MOSs and an exclusion of women from assignment to the special forces MOSs. Although the exclusion policy has no statutory foundation, Congress now requires notification when the DoD proposes to change the status quo of the exclusion policy.¹⁰¹

⁹⁶ See HARRELL, 2007 RAND STUDY, *supra* note 9, at 79-101 (providing a complete list of positions closed to women); see also SECNAVINST 1300.12C CH-1, *supra* note 6.

⁹⁷ HARRELL, 2007 RAND STUDY, *supra* note 9, at 95-96. Warrant officer women are only excluded from Special Forces; there are no Armor or Infantry Warrant Officer positions for men or women. *Id.* at 91-95. See also SECNAVINST 1300.12C CH-1, *supra* note 6.

⁹⁸ Surveyor, meteorological crewmember, and senior sergeant MOS in Field Artillery remain open to women. HARRELL, 2007 RAND STUDY, *supra* note 9, at 81.

⁹⁹ A Bradley linebacker is a modified Bradley Fighting Vehicle, an armored and tracked personnel carrier and fighting vehicle, with a Stinger anti-aircraft missile launch system. Bradley Linebacker Short Range Air Defense Vehicle, USA, ARMY-TECHNOLOGY.COM (last visited Sept. 2, 2011), at <http://www.army-technology.com/projects/linebacker>.

¹⁰⁰ *Id.* at 79-101.

¹⁰¹ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 541, 119 Stat. 3136. Not less than thirty days before implementing a change to military assignment policies of women, the Secretary of Defense shall submit notice, in writing, of the proposed change to the Congress. *Id.* Changes that require notice are changes that

Accordingly, women may not serve in the infantry, armor, special forces, and some other specified MOSs. While women may serve in a military intelligence MOS, they may not serve as a military intelligence officer on a battalion staff. Women may serve in forward support companies (FSCs) as a gender-neutral mechanic, but the exclusion policy prohibits assignment to a forward support company that collocates with its supported direct ground combat battalion.

2. Army Force Transformation

When the Army and DoD created the exclusion policy after the Gulf War, the main military configuration upon which it focused was the Division.¹⁰² The focus was linear major combat operations (MCO) that included “large and heavily armed conventional forces fight[ing] for military supremacy.”¹⁰³ The irregular and unconventional conflicts of insurgency in Afghanistan and Iraq forced the Army to adapt to the non-contiguous nature of combat in those theaters.¹⁰⁴ Now, all units are subject to attack and may engage in direct ground combat.¹⁰⁵ Collocation was designed to give geographical separation between mixed-gender combat support units and the enemy, but the non-linear aspect of combat erases the distinction between rear areas and forward areas.¹⁰⁶ The Army responded to the changing environment by developing the modular brigade combat team (BCT).¹⁰⁷

The BCT was designed for organizational flexibility, so the BCT commanders can internally task organize its personnel and assets to fight in full spectrum operations that include both MCO and counterinsurgency operations (COIN).¹⁰⁸ In February 2008, the Army modified its operations doctrine with Field Manual (FM) 3-0, elevating the importance of stability operations to the same level as offensive or

open or close a unit or position to women, or open or close any military career designator to women. *Id.* Notice must include an analysis of the effect the proposed change may have on the constitutionality of the Military Selective Service Act. *Id.* The Navy most recently exercised the notification process when it modified its rules excluding women from submarine service. Stewart & Cornwell, *supra* note 20.

¹⁰² See Farley, *supra* note 17, at 17.

¹⁰³ FM 3-0, *supra* note 26, para. 2-7.

¹⁰⁴ See Farley, *supra* note 17, at 16.

¹⁰⁵ See *id.* at 23.

¹⁰⁶ *Id.* at 29.

¹⁰⁷ *Id.* at 18.

¹⁰⁸ *Id.*

defensive operations.¹⁰⁹ The new doctrine forces commanders to recognize that “each situation requires a different mix of violence and restraint,” and that they must use “lethal and nonlethal actions together [to] complement each other and create dilemmas for opponents.”¹¹⁰ The COIN challenges soldiers to be disciplined, versatile professionals, capable of violence and restraint.¹¹¹

The modular structure also altered the doctrine of support. The latest Army doctrine uses FSCs to support the direct ground combat battalions of the BCT.¹¹² The doctrine gives battalions operational control over their supporting FSC.¹¹³ The FSCs are mixed-gender combat support units assigned to the BCT’s brigade support battalion, but Army doctrine and practice involves collocation of the FSCs and the FSCs’ subordinate mixed-gender field maintenance teams with their supported direct ground combat battalions and companies.¹¹⁴ As commanders have more discretion in employment of properly assigned women, doctrine and practice also advocate the use of women in direct ground combat units to pat-down and search civilians and detainees in culturally sensitive situations.¹¹⁵ The 2007 RAND Study assessed the Army’s use of women

¹⁰⁹ FM 3-0, *supra* note 26, paras. 3-2 to -3. “Army forces combine offensive, defensive, and stability or civil support operations simultaneously as part of an interdependent joint force to seize, retain, and exploit the initiative, accepting prudent risk to create opportunities to achieve decisive results.” *Id.* para. 3-2. “Offensive and defensive operations place a premium on employing the lethal effects of combat power against the enemy.” *Id.* para. 3-18. “Stability and civil support operations emphasize nonlethal, construction actions by Soldiers working among noncombatants.” *Id.* para. 3-26. Within the United States, the third element is civil support, while overseas the third element is stability. *Id.* para. 3-3.

¹¹⁰ *Id.* para. 3-17.

¹¹¹ Farley, *supra* note 17, at 16 (citing the Army’s 2006 Game Plan, describing future leaders as “multi-skilled pentathletes”).

¹¹² See, e.g., U.S. DEP’T OF ARMY, FIELD MANUAL 3-90.5, THE COMBINED ARMS BATTALION para. 2-1 (Apr. 2008) [hereinafter FM 3-90.5]; see also Farley, *supra* note 17, at 18.

¹¹³ See, e.g., FM 3-90.5, *supra* note 112, para. 2-1; see also Farley, *supra* note 17, at 18.

¹¹⁴ Author’s personal observation and experience while serving as the Brigade Judge Advocate of the 2nd Heavy Brigade Combat Team, 1st Infantry Division in Baghdad, Iraq 2008–2009. See also Farley, *supra* note 17, at 18–20, 39.

¹¹⁵ See U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. A-35 (Dec. 2006) [hereinafter FM 3-24]; see FM 3-90.5, *supra* note 112, para. 8-72; see Farley, *supra* note 17, at 23; Alvarez, *supra* note 16, at A1 (discussing the Marine’s use of female searchers).

in FSCs, and, as searchers, found the Army in compliance with the exclusion policy.¹¹⁶

All soldiers develop the Warrior Ethos and train on warrior tasks, such as proficiency on personal and crew served weapons, room clearing, and hand-to-hand combatives.¹¹⁷ All Marines take an annual combat fitness test that includes maneuver under fire, throwing a dummy grenade, and dragging, lifting, and carrying a casualty.¹¹⁸ This training is essential as women continue to serve in direct ground combat. As of August 2006, the Army has awarded the combat action badge to over 1,800 women.¹¹⁹ The combat action badge recognizes “Soldiers who personally engage the enemy, or are engaged by the enemy during combat operations,” except soldiers eligible for the combat infantry badge or the combat medic badge.¹²⁰ Since 1994, with the conflicts in Iraq and Afghanistan, soldiers in the Army develop the Warrior Ethos; Marines take the combat fitness test; combat arms and combat support troops are exposed to direct ground combat; and actual ground combat has tested the mettle of more women than ever before.

III. Equal Protection Analysis

*Women are in combat now. We're not inferior, or less capable or emotionally weak. I think it's funny that we even need a study to say that.*¹²¹

¹¹⁶ HARRELL, 2007 RAND STUDY, *supra* note 9, at 32–40. The study suggested that the Army may have violated its own policy, but that it was in compliance with the Aspin Memo. *Id.*

¹¹⁷ See Farley, *supra* note 17, at 25; see also U.S. DEP'T OF ARMY, FIELD MANUAL 3-21.75, THE WARRIOR ETHOS AND SOLDIER COMBAT SKILLS (Jan. 2008) [hereinafter FM 3-21.75].

¹¹⁸ Rod Powers, *Marine Corps Combat Fitness Test*, ABOUT.COM, Nov. 9, 2008, <http://usmilitary.about.com/od/marines/a/cft.htm>.

¹¹⁹ HARRELL, 2007 RAND STUDY, *supra* note 9, at 143–46.

¹²⁰ Farley, *supra* note 17, at 26.

¹²¹ Catherine Pearson, *Women Handle Combat Stress As Well As Men, Study Shows*, HUFFPOST.COM (June 8, 2011), available at http://www.huffingtonpost.com/2011/06/08/women-combat-stress_n_873381.html (quoting Michelle Wilmont, who served on the first female team attached to Marine infantry units to perform combat operations in Iraq from 2004 to 2005, referring to a study concluding that women are as resilient as men to the effects of combat stress).

A. The *Virginia* Standard

In 1996, the Supreme Court decided *United States v. Virginia*, holding that the state of Virginia violated the Equal Protection clause when it excluded women from Virginia Military Institute (VMI).¹²² The Equal Protection clause of the U.S. Constitution prohibits the government from discriminating on the basis of gender, except when the gender classification serves important governmental objectives.¹²³ In applying this heightened scrutiny, the “discriminatory means employed” must be “substantially related to the achievement of those objectives.”¹²⁴ In *Virginia*, the state failed to demonstrate an “exceedingly persuasive justification” for excluding willing and capable women.¹²⁵

The state of Virginia argued that gender integration would destroy VMI’s stature as a physically and mentally challenging educational institution that produces citizen-soldiers.¹²⁶ Specifically, the state argued that the admission of women would alter physical training programs as women are generally not as strong as men, would require alterations of living facilities, and would destroy VMI’s unique adversative system.¹²⁷ However, the Court found that physical differences may justify discrimination, but the justification “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹²⁸ Because “some women can meet the physical standards,” and more specifically that “some women are capable of all of the individual activities required of VMI cadets,” the Court found the state’s justification of physical strength unpersuasive.¹²⁹ Instead, the Court required a “‘hard look’ at generalizations or ‘tendencies.’”¹³⁰ The Court looked to the successful integration of women into the federal military academies as evidence that the state’s “fears for the future of VMI may not be solidly grounded.”¹³¹ The Court ultimately found that

¹²² *United States v. Virginia*, 518 U.S. 515, 534 (1996).

¹²³ *Id.* at 533.

¹²⁴ *Id.*

¹²⁵ *Id.* at 535–36.

¹²⁶ *Id.* at 521–22, 542.

¹²⁷ *Id.* at 540.

¹²⁸ *Virginia*, 518 U.S. at 533.

¹²⁹ *See id.* at 523, 541.

¹³⁰ *Id.* at 541.

¹³¹ *Id.* at 544–45.

Virginia could not constitutionally exclude willing and capable women from VMI.¹³²

As a result, any justification for the exclusion of willing and capable women from direct ground combat must be exceedingly persuasive. Generalizations, tendencies, and fixed notions of gender roles shall not constitute exceedingly persuasive justifications.¹³³ Additionally, each prong of exclusion must substantially relate to an exceedingly persuasive justification. The successful integration of the federal military academies demonstrated VMI's justifications for exclusion were unfounded. Similarly, successful integration of combat support units and other comparable fields like firefighters, emergency medical technicians, and police undermine direct ground combat exclusion justifications, absent a unique characteristic of direct ground combat.¹³⁴ If a justification is not unique to direct ground combat, and if mixed-gender combat support units successfully overcome the stated justification, then that justification fails to substantially relate to the exclusion policy.

In the 1981 case of *Rostker v. Goldberg*, the Supreme Court assumed the constitutionality of excluding women from combat when it upheld the MSSA.¹³⁵ More recently, a three-judge panel of the U.S. Court of Appeals for the First Circuit dismissed a case brought by male former federal employees who failed to register for Selective Service and who

¹³² *Id.* at 542 (noting that the issue was “whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords”).

¹³³ *Id.* at 534 (Noting that “classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women”); *id.* at 541 (noting that the state “may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females’” (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982))).

¹³⁴ See Colonel Katherine M. Cook, *Integration and Role of Soldiers Who are Women*, in WOMEN IN COMBAT COMPENDIUM 63 (describing the success of the combat support unit in combat); see, e.g., Riverside County Fire Department, n.d., at <http://www.rvcfire.org/opencms/facilities/Camps/> (last visited Sept. 2, 2011) (noting that “[f]ire crews are the infantry of any fire department. . . . [and] [w]omen fire crew firefighters have proven their effectiveness in working equally well with male crews.”); see, e.g., Daniel Hipp & Jenny Rizo, *Females in Policing: Strides and Future Challenges in a Male-Dominated Profession*, April 30, 2010, available at <http://aurora.edu/documents/academics/special-programs/honors/Jenny%20Rizo%20-%20Women%20In%20Policing.pdf> (noting that “women in policing have proven time and time again that they can be just as effective, if not more, than males at their jobs”).

¹³⁵ *Rostker v. Goldberg*, 453 U.S. 57, 81–83 (1981).

argued that the MSSA violated equal protection guarantees.¹³⁶ While the majority dismissed the case without reaching the Equal Protection question, the concurring opinion addressed whether the *Rostker* holding is still good law considering changes in the military, the increased service of women in combat, and *Virginia*'s impact on the equal protection standard.¹³⁷ While acknowledging that "the current reality of the armed forces represents a marked shift from 1981, when *Rostker* was decided," the concurrence found that "[n]o part of *Rostker* has been overruled."¹³⁸

Nevertheless, this MSSA analysis is distinct from analysis under *Virginia*. Analysis regarding the all-male draft evaluates whether combat roles are open to women and whether the government would be able to force women as well as men into direct ground combat roles, regardless of whether they are willing. This article, using the *Virginia* analysis, evaluates whether the government may constitutionally exclude capable women who willingly choose direct ground combat assignments.¹³⁹

For all arguments in support of the exclusion policy, including collocation, the below brigade analysis, and the combat arms MOS justification, the overarching and most important objective is military effectiveness. In the DADT Repeal Act of 2010, Congress required that the military policies drafted to implement the repeal of DADT be "consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces."¹⁴⁰ In the same way, military policy on the assignment of women should be consistent with these standards. The life of the individuals involved and the security of the nation depend on the military effectiveness of the armed forces.

¹³⁶ *Elgin v. U.S. Dept. of the Treasury*, 2011 WL 1332171 (C.A.1 Mass. Apr. 8, 2011). While the district court initially found the draft's purpose is to fill combat positions and so it dismissed the Equal Protection challenge to the all-male draft of the Military Selective Service Act (MSSA). *Elgin v. United States*, 594 F. Supp. 2d 133, 147 (D. Mass. 2009).

¹³⁷ *Elgin*, 2011 WL 1332171, at *16–17.

¹³⁸ *Id.* Judge Stahl also noted that "it would not be for this court to determine what, if any, impact these developments had on the continued vitality of *Rostker*, a task left solely to the Supreme Court. *Id.*

¹³⁹ See *Virginia*, 518 U.S. at 542 ("The issue, however, is not whether "women—or men—should be forced to attend VMI; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.").

¹⁴⁰ DADT Repeal Act, *supra* note 21.

Exclusionists argue six justifications based on concerns about individual performance ability, unit cohesion, and social implications: (1) women are not psychologically suited to kill¹⁴¹ (psychological justification); (2) women are not suitable combat leaders¹⁴² (combat leaders); (3) U.S. society will not accept women as killers, targets, or captives¹⁴³ (social perceptions); (4) Women menstruate and get pregnant¹⁴⁴ (pregnancy); (5) the military is unable to provide the necessary personal privacy to reduce sexual tension¹⁴⁵ (personal privacy and sexual tension); and (6) women are not physically capable of direct ground combat¹⁴⁶ (physical strength).

The questions are whether these proposed justifications are exceedingly persuasive, and whether they uniquely apply to direct ground combat. Arguments that would also justify excluding women from all units deploying to combat, including combat support units, are overly broad. Women serving in combat support units have served with distinction.¹⁴⁷ The mixed-gender units have overcome these perceived hurdles.¹⁴⁸ Absent a justification that is unique or specific to either direct ground combat units or combat arms MOSs, the justification is unpersuasive.

¹⁴¹ See e.g., KINGSLEY BROWNE, CO-ED COMBAT: THE NEW EVIDENCE THAT WOMEN SHOULDN'T FIGHT THE NATION'S WARS 28 (2007).

¹⁴² See, e.g., *id.* at 154; see also HERRES ET AL., *supra* note 76 at 25.

¹⁴³ See, e.g., Tom Bowman, *Military, Congress Ponder How to Deploy Female Troops in Iraq, Rule to Keep Them out of Combat Doesn't*, BALT. SUN, June 12, 2005, at 1A (quoting Representative Duncan Hunter, "The American people have never wanted to have women in combat and this reaffirms that policy."); see also HERRES ET AL., *supra* note 76, at 25.

¹⁴⁴ See, e.g., Mitchell, *supra* note 1, at 148-49; see also HERRES ET AL., *supra* note 76, at 25.

¹⁴⁵ See e.g., S. REP. NO. 103-112, at 195-96 (1993) (statement of General (GEN) Powell) ("One of the factors in dictating the pace of increasing the opportunities for women in the armed forces has been the need to accommodate sexual privacy with respect to living, rest room, and bathing facilities for deployed troops."); see also HERRES ET AL., *supra* note 76, at 25.

¹⁴⁶ See, e.g., Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 815, 835 (2007); see also HERRES ET AL., *supra* note 76, at 25.

¹⁴⁷ See *infra* note 161 (discussing praise for women in their combat support roles and as leaders).

¹⁴⁸ Cook, *supra* note 134, at 63 ("Gender made no difference in any of the situations we encountered. Americans can be rightly proud of this Army.").

B. Psychological Justification

Exclusionists like Kingsley Browne, professor of law at Wayne State University Law School, argue that women do not possess the necessary psychological traits for success in combat.¹⁴⁹ The justification is unfounded, fails to qualify as exceedingly persuasive, and is contradicted by the actual performance of women in direct ground combat.

Professor Browne argues that women are more fearful than men and less likely than men to take risks.¹⁵⁰ He asserts that while men are more physically aggressive and dominant than women, women are more nurturing and empathetic than men.¹⁵¹ However, as Browne concedes, the data demonstrates trends and “is not by itself sufficient to warrant women’s exclusion.”¹⁵² The *Virginia* Court emphasized that “overbroad generalizations” of “talents, capacities, or preferences” are unpersuasive justifications.¹⁵³ Browne and others have merely demonstrated that studies support the existence of stereotypes and that, on average, men generally possess traits often popularly associated with warfare. Browne focuses on the willingness to kill,¹⁵⁴ but soldiers are by definition not killing machines. Members of the armed forces are disciplined fighters who must equally understand and restrain the urge to kill as well as they quickly employ lethal force, especially in today’s counterinsurgency

¹⁴⁹ See BROWNE, *supra* note 141, at 28; see also MITCHELL, *supra* note 1, at 170–72. Browne also argues that women are cognitively inferior to men regarding combat ability. BROWNE, *supra* note 141, at 36. Though he concedes that women have superior verbal abilities, he believes that verbal abilities are not useful in combat. *Id.* at 37. However, a key component of success in counterinsurgency operations is communication FM 3-24, *supra* note 115, paras. 3-52 to 54.

¹⁵⁰ BROWNE, *supra* note 141, at 29–31.

¹⁵¹ *Id.* at 32–33.

¹⁵² *Id.* at 34–35 (emphasis of underestimate removed).

¹⁵³ *United States v. Virginia*, 518 U.S. 533 (1996).

¹⁵⁴ See BROWNE, *supra* note 141, at 33 (asserting that empathy and nurturance inhibit the willingness to kill).

operations.¹⁵⁵ The trait of empathy may actually be more beneficial to modern military leaders than aggressiveness and dominance.¹⁵⁶

Retired Lieutenant Colonel Dave Grossman, author of *On Killing* and *On Combat*, is an expert on the psychology of killing and combat.¹⁵⁷ He travels the world “training military units, such as Green Berets, Rangers, Marines . . . and law enforcement officers” on the subjects.¹⁵⁸ His work demonstrates the trainability of the traits for combat success, including killing the enemy.¹⁵⁹ He advocates that women are just as able to kill in combat as men, and recognizes that women deserve “the dubious honors of war.”¹⁶⁰

When it comes to the effects of combat stress, men are no more resilient than women, according to a recent study published in the *Journal of Abnormal Psychology*.¹⁶¹ Despite the researchers’ initial hypothesis that they would find combat stress to have a more negative impact on women than men, the data led them to a different conclusion.¹⁶² The research even accounted for the exclusion policy, noting that “[t]he difference between men’s and women’s exposure to combat in Iraq and Afghanistan is actually relatively small among veterans returning from Iraq and Afghanistan. . . . [because] [e]xposure to combat is not just restricted to people in ground combat roles.”¹⁶³

¹⁵⁵ See FM 3-24, *supra* note 115, para. 1-150 (discussing the paradox that in counterinsurgency operations that more lethal force may be less effective); see also DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* 226 (1st ed. 1995) (recognizing that returning veterans are “less likely to use their deadly skills than non-veterans of the same age and the same sex,” because “[d]iscipline is the safeguard in a warrior’s life.”). *Id.*

¹⁵⁶ See U.S. DEP’T OF ARMY, FIELD MANUAL 6-22, *ARMY LEADERSHIP* para. 2-15 (Oct. 2006) [hereinafter FM 6-22] (“Three major factors determine a leader’s character: values, empathy, and the Warrior Ethos.”).

¹⁵⁷ See GROSSMAN, *supra* note 155, at xvi; see DAVE GROSSMAN, *ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND IN PEACE*, at xi (1st ed. 2004).

¹⁵⁸ GROSSMAN, *supra* note 157, at xvi.

¹⁵⁹ See *id.* at 141 (“Warriors like these do not just happen: They are built; they are crafted; they are nurtured every day.”).

¹⁶⁰ See *id.* at xiv (quoting Gwynne Dyer).

¹⁶¹ Catherine Pearson, *Women Handle Combat Stress As Well As Men, Study Shows*, HUFFPOST.COM (June 8, 2011), available at http://www.huffingtonpost.com/2011/06/08/women-combat-stress_n_873381.html.

¹⁶² *Id.*

¹⁶³ *Id.*

Professor Browne also asserts that men are significantly braver than women, but bases his claims on bravery awards that exclude police, emergency responders, and servicemembers.¹⁶⁴ His evidence conveniently excludes the pool of women most likely to demonstrate bravery. The heroism of women like SGT Leigh Ann Hester, SPC Monica Brown, and the more than 1,800 women who earned the Combat Action Badge in Iraq and Afghanistan¹⁶⁵ disprove his point. The psychological differences between men and women amount to generalizations and fail to constitute an exceedingly persuasive justification for any prong of exclusion.

C. Combat Leaders and Cohesion Justification

Exclusionists argue that women are not suitable leaders and that men will not accept women as leaders in combat. The justification is unfounded, fails to qualify as exceedingly persuasive, and is contradicted by evidence of gender integration in combat support units.

Professor Browne asserts that women do not evoke followership behavior to the same extent that men do.¹⁶⁶ He says that “[m]en are more likely to adopt an autocratic or directive style and women a more democratic or participatory style.”¹⁶⁷ However, Army doctrine recognizes that leadership for team building and unit cohesion requires “persuasion, empowerment, motivation, negotiation, conflict resolution, bargaining, advocacy, and diplomacy.”¹⁶⁸ A direct style may be appropriate in some combat situations, but “persuasion and openness” are keys to teambuilding and unit cohesion.¹⁶⁹

Additionally, women have proven themselves as capable leaders in combat. As Secretary of Defense Robert M. Gates asserted in November 2007, “there are few areas of our military where women have not established themselves as skilled and dedicated leaders.”¹⁷⁰ Women serve

¹⁶⁴ BROWNE, *supra* note 141, at 35.

¹⁶⁵ HARRELL, 2007 RAND Study, *supra* note 9, at 143-46.

¹⁶⁶ BROWNE, *supra* note 141, at 154.

¹⁶⁷ *Id.* at 155.

¹⁶⁸ FM 6-22, *supra* note 156, para. 11-7.

¹⁶⁹ *Id.* para. 11-22 (noting that the “[w]ell-developed skills of persuasion and openness to working through controversy in a positive way”).

¹⁷⁰ Robert M. Gates, *10th Anniversary Message*, STARS & STRIPES, http://www.stripes.com/shop_pages/pages/WM/10thAnniversaryMessage.html (last

in and lead Army military police (MP) companies that conduct “route security, cordon and search operations, [and] raids,” which are many of the same direct ground combat tasks executed by infantry and armor units.¹⁷¹ An engineer battalion commander from Operation Iraqi Freedom who was part of the initial invasion indicated, “What I also saw were the desired leader attributes in female leaders that were indistinguishable from those of their male counterparts – their patriotism, technical and tactical expertise, leadership, and professionalism.”¹⁷²

Professor Browne also asserts that the most powerful reason that men fight is male bonding.¹⁷³ He suggests gender integration will cause men in the unit to compete for the attention of the women and breed situations where men would be overprotective of women to the detriment of the unit.¹⁷⁴ Additionally, in November 2010, the United Kingdom decided to continue its exclusion policy, not based on the physical

visited Mar. 1, 2010); see also John J. Kruzal, *Gates Honors Military Women During Memorial Celebration*, AM. FORCES PRESS SERV., Nov. 3, 2007, <http://www.defense.gov/news/newsarticle.aspx?id=48035>. Other leaders have noted the contributions of female soldier leaders. See Colonel Paul L. Grosskruger, *Women Leaders in Combat: One Commander's Perspective*, in WOMEN IN COMBAT COMPENDIUM, *supra* note 17, at 43, 47.

While other female leaders supported combat formations on the attack, First Lieutenant Sarah Sinclair, a quiet, hands-dirty kind of leader and expert equipment operator in her own right, planned and executed the battalion's lifeline—the supply convoys running back and forth from forward units to Camp Virginia in Kuwait. She single-handedly led her support platoon through hundreds of kilometers of dangerous terrain and ensured that the critical classes of supply got through. In the final attack on Baghdad in early April, the 3d ID directed the 94th to link up with one of its forward elements, 1st Brigade Combat Team, to support it in the seizure and clearance of Baghdad International Airport. On April 5, 2003, after the roller coaster ride supporting 3d ID during their attack north, the 94th Engineer Battalion arrived at Baghdad International Airport (BIAP).

Id.

¹⁷¹ See Lieutenant Colonel Randall E. Twitchell, *The 95th Military Police Battalion Deployment to Iraq—Operation IRAQI FREEDOM II*, in WOMEN IN COMBAT COMPENDIUM, *supra* note 17, at 69, 69; Colonel Michele M. Putko, *The Combat Exclusion Policy in the Modern Security Environment*, in WOMEN IN COMBAT COMPENDIUM, *supra* note 17, at 27, 32.

¹⁷² Grosskruger, *supra* note 170, at 49.

¹⁷³ BROWNE, *supra* note 141, at 7.

¹⁷⁴ See *id.* at 7–8 (asking rhetorical questions about the impact of women on unit cohesion).

abilities of women, but based “on the potential risks associated with maintaining cohesion in small mixed-gender tactical teams engaged in highly-dangerous close-combat operations.”¹⁷⁵

Alternatively, the 1997 RAND National Defense Research Institute study, *New Opportunities for Military Women* (1997 RAND Study), found that gender integration in U.S. units had a minimal effect on morale, cohesion, or readiness.¹⁷⁶ The study found that rank was as likely as gender to divide a group, and that in some cases rank was even more detrimental to unit cohesion than gender.¹⁷⁷ Instead of undermining morale, the study found that gender integration in U.S. units had a positive effect on a unit’s morale.¹⁷⁸ Concerns that men will be overprotective of women are likely a common but emotional conclusion, based on a person’s instinct and assumption that military men are chivalrous and that chivalry would require them to defend women first. Such conclusions ignore the experience of U.S. mixed-gender units and the evidence in the 1997 RAND Study. Additionally, former POW MAJ Rhonda Cornum insists that unit bonding occurs regardless of gender, and that she felt as protective of her male POW comrades as they did of her.¹⁷⁹

As women “have earned the confidence and respect of male colleagues. . . . Iraq has advanced the cause of full integration for women in the Army.”¹⁸⁰ Assertions that women do not possess the leadership capability or that they will destroy unit cohesion are overbroad generalizations, and are disproved by the actual successful combat performance of mixed-gender combat support units. Additionally, the United Kingdom report and conclusion, when compared with the 1997 RAND Study, is more persuasive of cultural differences between the two nations than of the appropriateness of exclusion. Accordingly, a justification based on women’s leadership capabilities and effect on unit cohesion is not exceedingly persuasive.

¹⁷⁵ UK 2010 REPORT, *supra* note 12, para. 13.

¹⁷⁶ See HARRELL & MILLER, 1997 RAND STUDY, *supra* note 62, at 99.

¹⁷⁷ See *id.* at xviii (“Any divisions caused by gender were minimal or invisible in units with high cohesion. Gender appeared as an issue only in units with conflicting groups, and then it took a back seat to divisions along work group or rank lines.”); *id.* at 85, 97.

¹⁷⁸ See *id.* at 100.

¹⁷⁹ CORNUM, *supra* note 73, at 198–99.

¹⁸⁰ Alvarez, *supra* note 16, at A1 (quoting COL Peter R. Mansoor, former executive officer to GEN David H. Petraeus while GEN Petraeus was the American commander in Iraq).

D. Social Perceptions Justification

Exclusionists argue that U.S. society is not prepared to accept women as killers, targets, or captives. Popular opinion and the reaction of the American public contradict this assertion, making it an invalid justification for exclusion.

Republican Congressman Duncan L. Hunter introduced legislation to increase exclusion in May 2005 and boldly asserted, “The American people have never wanted to have women in combat and this reaffirms that policy.”¹⁸¹ Yet over eighty percent of those polled in a December 2003 Gallup poll “think women should either be required to serve in the same combat assignments as men, or should at least have the opportunity to do so.”¹⁸² The most support came from Americans eighteen to twenty-nine years old, the recruiting pool for the armed forces, and “the nation’s future civilian leaders, policy-makers, and voters.”¹⁸³ A July 2009 *New York Times/CBS News* poll found similar results with fifty-three percent of respondents favoring women “join[ing] combat units, where they would be directly involved in the ground fighting.”¹⁸⁴

Elaine Donnelly, president of the Center for Military Readiness and a long-time advocate of excluding women from combat and other parts of the armed forces, argues that deploying “single mothers and moms with large families” to combat creates “emotional scars in military families.”¹⁸⁵ However, deploying fathers in similar situations may be equally harmful to a military family. In 2009, Congress and the DoD recognized the importance of fathers in a family with the paternity leave policy, demonstrating a shift in the cultural view of men’s and women’s roles.¹⁸⁶ Even with the direct ground combat exclusion, record numbers

¹⁸¹ Bowman, *supra* note 143, at 1A; *see also* Farley, *supra* note 17, at 14–15. Army leaders opposed the amendment, including then Vice Chief of Staff of the Army, GEN Richard Cody, who said, “The proposed amendment will cause confusion in the ranks, and will send the wrong signal to the brave young men and women fighting the Global War on Terrorism.” Ann Scott Tyson, *Panel Votes to Ban Women From Combat*, WASH. POST, May 12, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/11/AR2005051101867.html>.

¹⁸² Segal & Bourg, *supra* note 23, at 706.

¹⁸³ *Id.*

¹⁸⁴ Alvarez, *supra* note 16, at A1.

¹⁸⁵ Donnelly, *supra* note 146, at 936.

¹⁸⁶ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 532, 122 Stat. 4356 (2008); U.S. DEP’T OF DEF., INSTR. 1327.06, LEAVE AND LIBERTY POLICY AND PROCEDURES encl. 2, para. 1.k(5) (16 June 2009).

of women, many of them mothers, have deployed to combat zones away from their families. Deployments of fathers may be just as destructive as deployments of mothers, and exclusion of women from direct ground combat fails to prevent either.

Exclusionists assert that “[e]ngaging the enemy in this uncivilized thing we call war is a job for men, not women,”¹⁸⁷ that “there is a deeply rooted belief that women should be protected rather than protectors,”¹⁸⁸ and that the “prevailing view” is that “female soldiers should not be needlessly exposed to the risk of capture by serving in close proximity to close combat units.”¹⁸⁹ As the poll results demonstrate, these views do not represent the prevailing belief of the American public. Even so, the Constitution prohibits exclusionists from using seemingly fixed notions about a mother’s role in her family or a woman’s role in society to perpetuate the legal and social inferiority of women.¹⁹⁰

Representative Hunter asserts that the “deadly aspects of war will make no distinction between women and men on the front lines.”¹⁹¹ Ms. Donnelly claims that the capture of women by the enemy “was a surprise to many Americans, including the parents of female soldiers.”¹⁹² However, the fighting, dying, and capture of women on the battlefield have not caused any significant public outcry.¹⁹³ The public understands the risks, and they continue to support and celebrate women’s continued service in risk-adverse roles. In Iraq and Afghanistan, all units are subject to direct attack,¹⁹⁴ and therefore the exclusion policy does not substantially relate to preventing the enemy from targeting or capturing

¹⁸⁷ See HARRELL, 2007 RAND Study, *supra* note 9, at 20 (quoting Kate O’Bierne, Washington editor of the *National Review*, quoted in Sharon Cohen, *Women Take on Major Battlefield Roles*, A.P., Dec. 3, 2006).

¹⁸⁸ See *id.* at 20 (quoting David Moniz, *Female Amputees Make Clear That All Troops Are on the Front Lines*, USA TODAY, April 28, 2005).

¹⁸⁹ See *id.* (quoting the CTR. FOR MILITARY READINESS, WOMEN IN LAND COMBAT REP. No. 16 (Apr. 2003)).

¹⁹⁰ See *United States v. Virginia*, 518 U.S. 515, 534 (1996).

¹⁹¹ See Farley, *supra* note 17, at 14.

¹⁹² Donnelly, *supra* note 146, at 830–31.

¹⁹³ Colonel Jimmie O. Keenan, *The DoD Combat Exclusion Policy: Time for a Change?*, in *WOMEN IN COMBAT COMPENDIUM*, *supra* note 17, at 21, 24 (“It does not appear that women are being excluded from combat, but instead are being recognized and honored for their valor in combat.”); Colonel Mark R. Lindon, *Impact of Revising the Army’s Female Assignment Policy*, in *WOMEN IN COMBAT COMPENDIUM*, *supra* note 17, at 37, 40.

¹⁹⁴ Farley, *supra* note 17, at 23.

women. Accordingly, social concerns are unpersuasive justifications for exclusion.

E. Applying *Virginia* to the Pregnancy Justification

Exclusionists argue that pregnancy removes women from the fight.¹⁹⁵ Reasoning that because a woman has a uterus, menstruates, and may become pregnant, she is therefore a liability to her unit, and a possible drain on the unit's resources.¹⁹⁶ However, mixed-gender combat support units already mitigate concerns about a soldier's womanhood through leadership, training, and discipline. Although the possibility of pregnancy is an issue for military leaders, it would affect direct ground combat units no differently than combat support units, and therefore fails to substantially relate to the Exclusion Policy.

Exclusionists also assert that menstruation is incompatible with a combat environment.¹⁹⁷ Shortly after becoming Speaker of the House, Newt Gingrich suggested that a woman's menstrual cycle causes her health problems and prevents combat service.¹⁹⁸ While exclusionists like Professor Browne point to a 2001 article from the Journal of the American Academy of Nurse Practitioners in support of Mr. Gingrich's position,¹⁹⁹ the article merely concludes that military field time makes personal hygiene management difficult and time consuming, and that difficulty cleaning may contribute to "embarrassment, odor, moodiness, [and] insecurity."²⁰⁰ The evidence supports a position that women have additional challenges, but not that the menstrual cycle creates a dangerous health problem for women deployed in remote locations or somehow prevents effective combat service.²⁰¹

¹⁹⁵ See, e.g., BROWNE, *supra* note 141, at 247–48.

¹⁹⁶ *Id.* at 246–53.

¹⁹⁷ See, e.g., *id.* at 257.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.* at 258.

²⁰⁰ *Id.* at 259.

²⁰¹ See also HERRES ET AL., *supra* note 76, at 90–92 (Dissent on Ground Combat) (noting that women already train and fight under conditions where cleanliness and fresh clothing are merely inconveniences in prolonged combat); *but see* Lynch v. Freeman, 817 F.2d 380, 388 (6th Cir. 1987) (finding disparate impact by company providing unclean portable toilets which caused female worker to hold her urine and develop a bladder infection).

A soldier's pregnancy does require her evacuation from a combat zone for appropriate medical care.²⁰² An undetected pregnancy could delay critical treatment for ectopic pregnancy or other pregnancy complications, jeopardizing the soldier's life and the life of her baby.²⁰³ Combatant commanders find their female soldiers "absolutely invaluable," and perceive a pregnant soldier as a loss of combat power.²⁰⁴

As part of Operation Desert Spring and later Operation Iraqi Freedom, COL Katherine M. Cook commanded the 203d Forward Support Battalion, 3d Brigade Combat Team, 3d Infantry Division, a mixed-gender combat support unit.²⁰⁵ Colonel Cook considered deployment readiness due to pregnancy an important issue, but one of personnel management.²⁰⁶ She effectively minimized the issue through pregnancy testing, frank discussions on sex and unit cohesion, sex education, and chaplain sensing sessions.²⁰⁷ At the conclusion of her deployment, she assessed, "Gender made no difference in any of the situations we encountered. Americans can be rightly proud of this Army."²⁰⁸

Major General (MG) Tony Cucolo, commander of 3d Infantry Division, Task Force Marne, in Iraq, considered the female soldiers assigned to his unit to be a valuable part of his combat power.²⁰⁹ To address combat readiness, he issued a general order on November 4, 2009, that prohibited soldiers from "becoming pregnant, or impregnating a soldier, while assigned to the Task Force Marne [Area of Responsibility], resulting in the redeployment of the pregnant Soldier."²¹⁰ Major General Cucolo considered the male soldier to be just as responsible for taking a soldier out of the fight and reducing the unit's combat power as the pregnant female soldier who must leave the combat

²⁰² See Cook, *supra* note 148, at 56.

²⁰³ See *id.*

²⁰⁴ See *Defense Department Conference Call with Major General Tony Cucolo, U.S. Army, Commander, 3rd Infantry Division via Teleconference from Iraq: Pregnancy Provision in His Recent General Order*, FEDERAL NEWS SERV., Dec. 22, 2009, [hereinafter *Conference Call with MG Cucolo*].

²⁰⁵ Cook, *supra* note 148, at 53.

²⁰⁶ See *id.* at 54.

²⁰⁷ *Id.* at 59–60.

²⁰⁸ *Id.* at 63.

²⁰⁹ *Conference Call with MG Cucolo, supra* note 204.

²¹⁰ Major General Anthony A. Cucolo III, Gen. Order No. 1 para. 3.s (4 Nov. 2009), available at <http://documents.nytimes.com/general-order-no-1-prohibited-activities-for-soldiers>.

zone, and intended to get soldiers thinking about the impact of their decisions.²¹¹ His order was controversial, and subsequently rescinded by General (GEN) Raymond Odierno, then-commander of U.S. Forces, Iraq.²¹²

While sex is a voluntary act that may deplete a unit of combat power, so is playing organized sports or conducting physical fitness.²¹³ Sports injuries may also deplete a unit of combat power, and recreational sports activities are voluntary and dangerous on the sandy or rocky grassless sports fields of Iraq.²¹⁴ A fertile uterus does not hurt military effectiveness; ineffective leadership and careless behavior does.

Exclusionists may argue that the exclusion policy is necessary because the closer a woman is to the enemy, the more difficult it will be to evacuate her. However, whether or not women are either collocated with male troops, or assigned to a direct ground combat unit, all units “are subject to attack and even direct combat.”²¹⁵ Army leaders accept the pregnancy risk by operationally employing mixed-gender units as collocated combat support for direct ground combat units.²¹⁶ When it comes to evacuation, the task is no more difficult and likely requires less urgency for pregnant women than for any other serious medical condition. There is no reason that direct ground combat units cannot deal with pregnant soldiers as effectively as combat support units have in ground combat. Pregnancy presents no greater challenge than any other medical condition that depletes combat power. Menstruation and pregnancy fail to constitute exceedingly persuasive justifications for any prong of exclusion.

²¹¹ Conference Call with MG Cucolo, *supra* note 204.

²¹² Sarah Netter & Luis Martinez, *Pregnant Soldiers in War Zone Won't Be Punished*, ABC NEWS, Dec. 25 2009 <http://abcnews.go.com/print?id=9422998>.

²¹³ E-mail from female Army captain serving in Iraq, to author (Dec. 23, 2009) (on file with author) (“Pregnancy and broken legs take you out of the fight so treat them the same! Playing football in Iraq is just as much a choice as having sex.”).

²¹⁴ *But see* BROWNE, *supra* note 141, at 246–47 (arguing that sports injuries are less detrimental than pregnancy to readiness).

²¹⁵ Farley, *supra* note 17, at 23.

²¹⁶ Author’s personal observation and experience while serving as the Brigade Judge Advocate of the 2nd Heavy Brigade Combat Team, 1st Infantry Division in Baghdad, Iraq 2008–2009. Additionally, “the most recent BCT doctrine states that ‘FSC’s are assigned to the BSB, but usually are OPCON to their supported battalions.’” HARRELL, 2007 RAND STUDY, *supra* note 9, at 30–31. Also consider the assertions of COL Farley that Army doctrine contemplates collocating mixed-gender Field Maintenance Teams with direct ground combat companies. Farley, *supra* note 17, at 18–20, 39.

F. Privacy and Sexual Tension Justification

Leaders of direct ground combat units are capable of providing personal privacy and reducing sexual tension, even with women in their units. Exclusionists argue that the introduction of women into and around direct ground combat units will destroy unit cohesion by leading to sexual tension, inappropriate relationships, and sexual misconduct. Simultaneously, they argue that the military will be unable to provide the personal privacy necessary for basic dignity.²¹⁷

General Colin Powell testified in hearings focused on the military's homosexual conduct policy that "[o]ne of the factors in dictating the pace of increasing the opportunities for women in the armed forces has been the need to accommodate sexual privacy with respect to living, restroom, and bathing facilities for deployed troops."²¹⁸ Providing personal privacy reduces sexual tension, improves a commander's ability to enforce good order and discipline, and reduces inappropriate relationships.²¹⁹ Personal privacy also contributes to increasing a soldier's feeling of safety while decreasing incidences of sexual assault and sexual harassment.²²⁰ This is not the same privacy as the right to be secure from unreasonable search and seizure, and is instead the privacy and modesty that preserves individual dignity.²²¹

The justification for exclusion is not that gender segregation for personal privacy is impossible in either a garrison environment or on an established forward operating base (FOB). Exclusionists like Professor Kingsley Browne imply that integration will lead to co-ed open bay showers,²²² where naked male and female soldiers bathe together like in

²¹⁷ See *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from views of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."); see also John Dwight Ingram, *Prison Guards and Inmates of Opposite Genders: Equal Employment Opportunity versus Right of Privacy*, 7 DUKE J. GENDER L. & POL'Y 3, 21 (2000).

²¹⁸ See S. REP. NO. 103-112, at 196 (1993) (statement of GEN Powell).

²¹⁹ See *id.* ("The separation of men and women is based upon the military necessity to minimize conditions that would disrupt unit cohesion, such as the potential for increased sexual tension that could result from mixed living quarters.").

²²⁰ See U.S. Army Sexual Assault Prevention and Response Program, As an Army Leader, What Can I Do to Help Prevent Sexual Assault in My Unit, http://www.sexualassault.army.mil/leader_prevent.cfm (last visited Mar. 3, 2010) (indicating measures to prevent sexual assault that include securing living areas).

²²¹ See Ingram, *supra* note 217, at 21.

²²² See BROWNE, *supra* note 141, at 3.

the shower scene from the movie *Starship Troopers*.²²³ However, integration of combat support units has not led to such a degree of shared facilities in garrison or in the field.²²⁴ Instead, the privacy justification is based on the difficulty of providing adequate personal privacy in a deployed environment during military combat operations, with the enemy. In such a case, the government cannot reasonably provide a garrison environment without interfering with the unit's ability to effectively fight the enemy.

Recently, a survey of 236 U.S. Army War College students from the Class of 2006 revealed that fifty-nine percent believe that "a lack of coed life support facilities" should not be a bar to assigning women to combat units.²²⁵ Mixed-gender units have successfully overcome issues of sexual tension, inappropriate relationships, and sexual misconduct through leadership, discipline, and by providing personal privacy.²²⁶ Direct ground combat commanders are capable of the same dynamic leadership using the same disciplinary tools as combat support commanders; the mission to locate and destroy the enemy does not somehow prevent a leader from enforcing the standard. In order to demonstrate that privacy is an exceedingly persuasive justification to exclude women from direct ground combat, exclusionists must identify the difference between mixed-gender combat support units and direct ground combat units that makes mixed-gender operations successful for the former, but detrimental for the latter.

1. *Baseline Personal Privacy*

The first step in evaluating the capacity to provide personal privacy is identifying the baseline necessary to maintain human dignity and unit cohesion while reducing sexual tension. Baseline personal privacy demands a means to prevent observation while changing clothes, while eliminating waste, and while bathing, and the means to provide at least a

²²³ See *STARSHIP TROOPERS* (Tristar Pictures 1997).

²²⁴ See e.g., Cook, *supra* note 148, at 59.

²²⁵ Colonel Christopher Putko, *USAWC Women in Combat Survey Interpretation, in WOMEN IN COMBAT COMPENDIUM*, *supra* note 17, at 1, 10. Of the class of 300, 236 took the survey. *Id.* at 1. The Army made up seventy-six percent of the volunteers, eight percent Air Force, six percent Marine Corps, five percent Navy, three percent Department of the Army Civilian, one percent Coast Guard, and one percent Department of State. *Id.* The volunteers were eighty-nine percent male and eleven percent female. *Id.*

²²⁶ See Cook, *supra* note 148, at 63.

slight degree of physical separation while sleeping.²²⁷ Even under extreme conditions, soldiers use standard issue items like ponchos and sleeping bags to achieve that privacy.

While deployed as part of Operation Desert Spring and later Operation Iraqi Freedom, COL Cook shared a tent with her male command sergeant major, “as usual in such arrangements,” and used “a partition between our areas for privacy.”²²⁸ Her forward support battalion “had mixed gender tents with privacy screens fashioned from poncho liners or similar make-shift screens in the company areas.”²²⁹ Not only did the unit normally train and live in this manner, she found that keeping the mixed-gender sections intact was better for cohesion and reduced discipline problems.²³⁰ Men and women “shared and took [] turns in the showers and latrines; there was no need for separately designated shower stalls as the construction of most showers were individual compartments.”²³¹ She described how soldiers met the challenge of having vehicles with mixed-gender crews during the invasion of Iraq:

Travel conditions were Spartan. Some modesty was going to be lost as we moved through Iraq; soldiers of both genders were in vehicles that often did not stop for several hours. Emergency bodily relief during movement was usually remedied by cutting off the top off a water bottle and throwing on a poncho or poncho liner over the head, and throwing the waste out the window.²³²

In contrast, courts have found work conditions for plant and construction sites with similarly austere provisions unacceptable and as

²²⁷ See *Forts v. Ward*, 621 F.2d 1210, 1216-17 (2d Cir. 1980); see Cook, *supra* note 148, at 59.

²²⁸ Cook, *supra* note 148, at 59. Colonel Cook’s experience is not unique. See e-mail Responses to Survey of 58th Graduate Course Students, The Judge Advocate Gen.s Legal Ctr. & Sch. (Feb. 11-22, 2010) [hereinafter Grad Course Survey] (on file with author). The informal survey asked 111 officers from the Army, Navy, Air Force, Marines, and Coast Guard about their experiences with mixed-gender living conditions. *Id.* Over thirty officers responded with various personal experiences, including several that mirror COL Cook’s. *Id.*

²²⁹ Cook, *supra* note 148, at 59.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 64.

having a disparate impact on women.²³³ In one case, the court rejected a practice of requiring workers, including women, “to urinate off the side of a crane in lieu of bathroom breaks.”²³⁴ Although the court considered “the obvious anatomical and biological differences between men and women and the unique hygienic needs of women, including those during menstrual cycles,”²³⁵ the court suggested that it would have come to a different conclusion if the practice and conditions of the workplace were business necessities.²³⁶ In the same way that employers may articulate a business necessity to excuse austere conditions in Title VII²³⁷ cases, “[o]nce an individual has changed his or her status from civilian to military, that person’s duties, assignments, living conditions, privacy, and grooming standards, are all governed by military necessity, not personal choice.”²³⁸

More instructive to determine the baseline level of personal privacy are Title VII prison cases. Just as soldiers face reduced privacy expectations in a deployed environment or a combat zone,²³⁹ courts found inmates have reduced privacy expectations due to security concerns and guards’ Title VII equal employment rights. Courts have recognized a prison’s obligation to provide female inmates the opportunity to briefly cover cell windows while changing clothes or using the toilet, and to provide translucent shower screens.²⁴⁰ One court articulated the standard privacy the prison must provide as the ability to

²³³ See *Johnson v. AK Steel Corp.*, No. 1:07-cv-291, 2008 WL 2184230, at *8 (S.D. Ohio May 23, 2008) (finding disparate impact by not providing bathroom breaks to crane operators); see *Lynch v. Freeman*, 817 F.2d 380, 388 (6th Cir. 1987) (finding disparate impact by company providing unclean portable toilets which caused female worker to hold her urine and develop a bladder infection).

²³⁴ *Johnson*, 2008 WL 2184230, at *8.

²³⁵ See *id.*

²³⁶ See *Lynch v. Freeman*, 817 F.2d 380, 389 (6th Cir. 1987) (“TVA made no attempt to prove business necessity”); see *Johnson*, 2008 WL 2184230, at *8 (“defendants have not demonstrated a business necessity for the practice in question”).

²³⁷ Civil Rights Act of 1964 § VII, 42 U.S.C. § 2000e-2(a) (2006) (prohibiting gender discrimination in employment) [hereinafter Title VII]. Title VII does not apply to members of the armed forces for national security reasons. See *id.* § 2000e-2(g).

²³⁸ See S. REP. NO. 103-112, at 191 (1993) (statement of GEN Gordon Sullivan, Chief of Staff of the Army) (summarizing the difference between military and civilian life in testimony on the military’s homosexual policy).

²³⁹ *Id.* (statement of GEN Powell) (“[T]he potential for involvement in actual combat frequently require[s] . . . living conditions [that] are spartan and primitive, characterized by forced intimacy and little or no privacy.”).

²⁴⁰ *Forts v. Ward*, 621 F.2d 1210, 1216–17 (2d Cir. 1980).

“be free from the unrestricted observation of their genitals and bodily functions” by those of the opposite gender.²⁴¹

Military necessity requires a lower level of privacy considerations than would be acceptable for civilians or even for soldiers in a garrison or established forward operating base (FOB) environment. Even so, combat support units have a successful record of providing personal privacy while maintaining unit cohesion. The tools of personal privacy are as simple as ponchos, make-shift screens, make-shift bedpans, and sleeping bags.²⁴² Soldiers in mixed-gender units already share sleeping and living space in confined vehicles and spaces, and professional privacy considerations for each other. They do so while performing their mission, even while in as close proximity to the enemy as soldiers in direct ground combat units.

2. Personal Privacy and Sexual Tension

Mixed-gender combat support units have the same tactics, techniques, and procedures of privacy and the logistical tools to do so, even when they physically locate with direct ground combat units. The act of collocation does not change or inhibit their ability to continue to provide personal privacy for male and female soldiers. Mixed-gender units already physically locate with direct ground combat units.²⁴³ Whether or not it is a violation of the current policy, military commanders view mixed-gender units as both necessary and beneficial to unit cohesion and mission accomplishment.²⁴⁴

The function and structure of a battalion staff are conducive to personal privacy provisions. The exclusion policy authorizes a mixed-

²⁴¹ See *Bowling v. Enomoto*, 514 F. Supp. 201, 203–04 (N.D. Cal. 1981) (noting that “people do not undress, bathe, or defecate in the presence of strangers of the opposite sex”).

²⁴² See Cook, *supra* note 148, at 64; see Catherine Ross, *Home Fires: Women’s Work*, N.Y. TIMES, Feb. 15, 2010, <http://opinionator.blogs.nytimes.com/2010/02/15/womens-work/?hp> (describing how she and her fellow soldiers “perfected the art of getting dressed while completely encased in one’s sleeping bag”); see Grad Course Survey, *supra* note 228.

²⁴³ Author’s personal observation and experience while serving as the BJA of the 2d Heavy Brigade Combat Team, 1st Infantry Division in Baghdad, Iraq 2008–2009. See also Farley, *supra* note 17, at 18–20, 39 (noting that some Army doctrine collocates mixed-gender Field Maintenance Teams with direct ground combat companies).

²⁴⁴ See, e.g., Cook, *supra* note 148, at 59.

gender BCT staff, but not a mixed-gender subordinate direct ground combat staff. The relevant difference between the two may be the amount of equipment and the number of soldiers on the staff,²⁴⁵ but not the ability to provide privacy. Both staffs establish command posts using tents, vehicles, and other equipment.²⁴⁶ Just as a combat support unit is able to use the equipment to meet the privacy needs of soldiers, so may a direct ground combat battalion staff.

Army doctrine has contemplated collocating mixed-gender field maintenance teams in the company trains of the direct ground combat company they support.²⁴⁷ Doctrinally, the Army accepts and promotes women living and operating at the company level of direct ground combat units. The military leadership recognizes the valuable contributions of women²⁴⁸ and finds the privacy capabilities at the company level adequate for unit cohesion and morale. Whether collocated with the company trains of a direct ground combat unit, or assigned to a direct ground combat company, the Army recognizes that direct ground combat units are capable of overcoming personal privacy concerns and issues of sexual tension.

Although more equipment for privacy is available at the company level than in a subordinate platoon, combat arms MOS soldiers are also capable of maintaining the baseline level of privacy. Infantry operations are not an obstacle to personal privacy. Men and women train side-by-side on infantry tasks and in infantry missions during the grueling Sapper Leader Course.²⁴⁹ The Army trains mixed-gender ROTC cadets and Basic Officer Leader Course officers on infantry operations and in field conditions.²⁵⁰ Soldiers recount successful and professional pairing into

²⁴⁵ Compare U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM paras. 2-7 to -9 (Aug. 2006) [hereinafter FM 3-90.6] (describing the BCT staff organization), with FM 3-90.5, *supra* note 112, ch. 2 (describing the CAB staff organization).

²⁴⁶ See FM 3-90.6, *supra* note 245, ch. 3, sec. II (describing the makeup of the BCT command posts); see FM 3-90.5, *supra* note 112, para. 3-8 (describing the CAB command post organization).

²⁴⁷ See Farley, *supra* note 17, at 39.

²⁴⁸ See Conference Call with MG Cucolo, *supra* note 204 (noting that female soldiers are "absolutely invaluable.").

²⁴⁹ SAPPER LEADER COURSE, SAPPER LEADER COURSE PAMPHLET 7 (Feb. 2011) [hereinafter SAPPER LEADER COURSE PAM.], available at [http://www.wood.army.mil/sapper/document_frames/Sapper Pamphlet 2011.pdf](http://www.wood.army.mil/sapper/document_frames/Sapper%20Pamphlet%202011.pdf).

²⁵⁰ See U.S. Army Maneuver Ctr. of Excellence, *Basic Officer Leader Course II*, <https://www.benning.army.mil/BOLC/index.htm> (last visited Mar. 3, 2010) (describing

opposite gender battle buddy teams, sharing living and sleeping space in tents and vehicles, sharing space in fighting positions, and sharing use of latrines and bathing facilities.²⁵¹ Soldiers routinely string up ponchos, take turns in vehicles changing, change clothes in sleeping bags, use make-shift barriers, and generally find ways to maintain a baseline of personal privacy.²⁵²

Similarly, armored vehicle operations are not an obstacle to personal privacy. Just as COL Cooke's mixed-gender vehicles eliminated waste, the crew of a tank or a Bradley Fighting Vehicle (BFV) has the same capabilities for elimination and privacy. Just as the crew of a mixed-gender vehicle has the opportunity to sleep in and around the vehicle in sleeping bags that provide physical separation, the crew of a tank or BFV sleeps in and around the tank or BFV in individual sleeping bags. Just as combat support soldiers have "perfected the art of getting dressed while completely encased in one's sleeping bag,"²⁵³ armor and mechanized soldiers can maintain privacy and dignity.

Military leaders though do not unanimously accept these living arrangements. One Armor battalion commander resisted COL Cook's recommended living accommodations with his attached maintenance support team (MST).²⁵⁴ Instead of keeping the MST together, the Armor battalion commander crammed all men into a mixed MOS male tent, and put the female team leader with one other woman in a tent the same size as the men's.²⁵⁵ Although mixed-gender tents increase cohesion and decrease discipline issues, the Armor battalion commander severed a team and forced cramped living conditions on the unit. In the end though, the Armor commander found a way to address the presence of women in his unit.

Ms. Donnelly argues that one of the reasons for excluding women from service on submarines is that the cramped living conditions do not allow for it.²⁵⁶ In 2000, the Navy identified that living space was already

the mixed-gender course, including a field training exercise, and advising candidates to read the manual for the infantry rifle platoon and squad); see Grad Course Survey, *supra* note 228.

²⁵¹ See Grad Course Survey, *supra* note 228.

²⁵² *Id.*; Ross, *supra* note 242.

²⁵³ Ross, *supra* note 242.

²⁵⁴ Cook, *supra* note 148, at 59.

²⁵⁵ *Id.*

²⁵⁶ Donnelly, *supra* note 146, at 859-60.

cramped on submarines and that accommodating mixed-gender crews would reduce the standards below an acceptable level.²⁵⁷ However, on February 23, 2010, the Navy and the DoD notified Congress of its intent to open submarine service to women.²⁵⁸ The Navy and DoD have now identified that it is possible to maintain unit cohesion and provide a baseline personal privacy even in the cramped living conditions of a submarine. The Navy's new position on female service on submarines undermines the exclusionist arguments that armor and infantry living conditions are unsuitable for mixed-gender units.

In 1993 testimony on the military's homosexual policy, then-Chairman of the Joint Chiefs of Staff, GEN Colin Powell, argued that allowing homosexuals to serve openly created sexual tension, violated personal privacy, and hurt unit cohesion because of the necessarily intimate living conditions.²⁵⁹ In doing so, he equated homosexual integration with mixed-gender integration.²⁶⁰ More recently, Retired GEN Powell said that "attitudes and circumstances have changed" in support of repealing the "Don't Ask, Don't Tell policy."²⁶¹ On November 30, 2010, the DoD's Comprehensive Review Working Group (CRWG) published its report and implementation plan.²⁶² Subsequently, Congress passed and President Barack Obama signed into law the "Don't Ask, Don't Tell Repeal Act of 2010."²⁶³ The President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certified on July 22, 2011 that the armed forces are prepared for the implementation of the repeal of DADT.²⁶⁴ Accordingly, DADT was effectively repealed on September 20, 2011.²⁶⁵ If living conditions no longer create unmanageable personal privacy or sexual tension issues for direct ground combat units with openly gay, lesbian, or bisexual troops, then the living conditions should also no longer present an obstacle for mixed-gender direct ground combat units.

²⁵⁷ *Id.*

²⁵⁸ Stewart & Cornwell, *supra* note 20.

²⁵⁹ See S. REP. NO. 103-112, at 196 (1993) (statement of GEN Powell) ("The separation of men and women is based upon the military necessity to minimize conditions that would disrupt unit cohesion, such as the potential for increased sexual tension that could result from mixed living quarters.").

²⁶⁰ See *id.* (statement of GEN Powell).

²⁶¹ Martina Stewart, *Powell in Favor of Repealing 'Don't Ask, Don't Tell'*, CNN, Feb. 3, 2010, <http://www.cnn.com/2010/POLITICS/02/03/powell.gays.military/index.html>.

²⁶² CRWG REPORT, *supra* note 21.

²⁶³ Repeal Memo, *supra* note 21.

²⁶⁴ Certification Memo, *supra* note 21.

²⁶⁵ *Id.*

Similar to commanders of mixed-gender combat support units and Navy submarines, direct ground combat unit commanders are capable of the leadership and of providing the baseline personal privacy to maintain unit cohesion, reduce sexual tension, and reduce sexual misconduct. Accordingly, personal privacy and sexual tension are not exceedingly persuasive justifications for any of the prongs of exclusion.

G. Physical Requirements Justification

The Aspin Memo permits the services to restrict the assignment of women “where job related physical requirements would necessarily exclude the vast majority of women service members.”²⁶⁶ Accordingly, advocates of exclusion argue that women are physically inferior to men, and that women’s lack of physical strength and stamina makes them unsuited for ground combat.²⁶⁷ However, the Supreme Court in *Virginia* found that while physical differences may justify discrimination, the justification “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”²⁶⁸ Additionally, the Court found the state’s justification of physical strength unpersuasive because “some women can meet the physical standards,” and more specifically that “some women are capable of all of the individual activities required of VMI cadets.”²⁶⁹

When assessing whether the physical capabilities of women as compared with the physical requirements of direct ground combat constitute an exceedingly persuasive justification, it is important to distinguish between evidence of actual performance and predictive evidence. Where “some women” have actually performed in “all of the individual activities required of”²⁷⁰ soldiers in direct ground combat, as have women in combat support units in Afghanistan and Iraq, a court would likely apply *Virginia* to find the physical strength justification unpersuasive as it applies to that prong of direct ground combat.

²⁶⁶ Aspin Memo 1994, *supra* note 5.

²⁶⁷ See BROWNE, *supra* note 141, at 21–22.

²⁶⁸ United States v. Virginia, 518 U.S. 515, 533 (1996).

²⁶⁹ See *id.* at 523, 541.

²⁷⁰ HARRELL, 2007 RAND STUDY, *supra* note 9, at 143–46 (noting that as of August 2006, the Army has awarded the combat action badge to over 1,800 women); United States v. Virginia, 518 U.S. 515, 541 (1996) (finding the state’s justification of physical strength unpersuasive because “some women can meet the physical standards,” and more specifically that “some women are capable of all of the individual activities required of VMI cadets”)

Alternatively, when using evidence that predicts how women will perform as a basis for exclusion, a court may apply the Doctrine of Deference and use the Aspin Memo's "vast majority" standard to evaluate the Government's physical requirements justification. The failure, though, of the Aspin Memo and other DoD publications to define "vast majority"²⁷¹ highlights the arbitrariness of the standard and its application. Courts that look to the way other jurists have used the phrase are likely to settle on eighty percent or more as the "vast majority" standard.²⁷² Accordingly, this article will consider predictive evidence exceedingly persuasive when it demonstrates that eighty percent or more of willing and capable women fail to meet the direct ground combat physical requirements.

In addition to the "vast majority" standard, courts will also likely consider how closely the test measures job performance and whether such a test could be part of the battery of other entrance exams to which military applicants are subject. Along those lines, excluding all women based on predictive evidence is likely unpersuasive when the services individually screen and test all applicants for a particular job, as is the case with Special Forces MOS and certain Special Operations Forces assignments.

Direct ground combat certainly requires physical strength, and the government is justified in excluding people who lack the required physical strength for direct ground combat. The greater issue, and the appropriate standard, is whether willing and otherwise capable women possess the required level of physical strength for a MOS or overall job

²⁷¹ Aspin Memo 1994, *supra* note 5. A search by the author for "vast majority" in current Department of Defense publications results in five documents with the phrase, but none with a definition or clear meaning of the intended percentage. *See, e.g.*, U.S. DEP'T OF DEFENSE, INSTR. 1015.11, LODGING POLICY, at E2.10 (6 Oct. 2006).

²⁷² *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 892-94 (1992) (rejecting Respondent's conclusion and selected controlling class, but accepting Respondent's assertion that the statute "imposes almost no burden at all for the vast majority of women seeking abortions," because the effects of the statute "are felt by only one percent of the women who obtain abortions."); *Callery v. New York Dep't of Parks and Recreation*, 326 N.Y.2d 640, 641 (N.Y. App. Div 1971) (noting that lifeguard height and weight standards excluded a "vast majority of women" of over 90%, considering that 90% did not meet minimum height and 60% did not meet minimum weight); *Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works*, 947 F.2d 292, 303 (7th Cir. 1991) ("the vast majority were women (over 80%)"); *The People v. Randy Eugene Garcia*, 2011 WL 3715535 (25 August 2011) ("Most telling, however, is that the vast majority of the final jury was female, to wit, 10 of 12, or 83 percent.").

performance, and not whether women, as a general proposition, are equally as strong as men.

1. Below Brigade and Collocation

The most persuasive data regarding whether the physical requirements of direct ground combat justify the below brigade prong or the collocation prong is the evidence of actual performance. All women soldiers and Marines already train for and perform basic warrior tasks, more than 1,800 women have earned the combat action badge, and “some women” have actually performed in “all of the individual activities required of” combat support soldiers in direct ground combat.²⁷³ Exclusionists instead continue to argue that women lack the physical capabilities to perform the tasks necessary to repel the enemy’s assault.²⁷⁴ They argue that the below brigade prong and the collocation prong are important and necessary to reduce women’s exposure to direct ground combat because women’s physical limitations would lead to disastrous results.²⁷⁵

Professor Kingsley Browne points to the devastating enemy attack on the 507th Maintenance Company that led to the capture of six U.S. soldiers, including Private First Class Jessica Lynch and SPC Shoshana Johnson, as support for excluding women from combat support units that face exposure to direct ground combat.²⁷⁶ Browne correctly observes that units besides Infantry and Armor must be prepared to fight.²⁷⁷ After the incident with the 507th, the Army increased training and qualification requirements for personal and crew-served weapons for all soldiers, and established the Warrior Tasks on which all soldiers would train.²⁷⁸

Women already train on and perform direct ground combat tasks. The Warrior Tasks train all soldiers on weapons qualification, “reacting to indirect fire, reacting to direct fire, man-to-man contact (combatives),

²⁷³ HARRELL, 2007 RAND STUDY, *supra* note 9, at 143-46; United States v. Virginia, 518 U.S. 515, 541 (1996).

²⁷⁴ See BROWNE, *supra* note 141, at 63-70.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 64 (suggesting the failure proved that training had been dumbed down by the introduction of women); see Farley, *supra* note 17, at 25 (describing the attack on the 507th Maintenance Company).

²⁷⁷ See BROWNE, *supra* note 141, at 63.

²⁷⁸ See *id.* at 25.

engaging targets during an urban operation, and entering a building during an urban operation.”²⁷⁹ The Marine Corps Combat Fitness Test includes an 880 yard run, a thirty pound ammo can lift, and a 300 yard maneuver under fire event that incorporates scurrying, high crawling, dragging a casualty, lifting and carrying a casualty, carrying two thirty pound ammo cans, accurately tossing a dummy grenade, and push-ups.²⁸⁰

Notwithstanding, Anna Simons, a professor at the Naval Postgraduate School, argues that women endanger soldiers’ lives because they lack the strength and ability to carry their wounded male comrades to safety.²⁸¹ Krystyna Cloutier, a former Marine who has advocated for the creation of all-female platoons of combat troops, described her experience as a Marine in Iraq. Her own ninety pounds of combat gear was enough to “cause [her] hips to become numb, [her] lower back to ache, and blisters to form on [her] feet.”²⁸² Elaine Donnelly also asserts that most women do not have the ability to “physically lift and evacuate a wounded infantryman or Marine who has been injured and might die without immediate medical help.”²⁸³

Instead, the actual combat experiences of soldiers like SPC Monica Brown contradict such fears. SPC Brown earned her Silver Star while serving as a combat medic with a patrol of the 4th Squadron, 73d Cavalry Regiment, a direct ground combat battalion.²⁸⁴ After the trail vehicle of the patrol hit an improvised explosive device (IED) and was engulfed in flames, and as the enemy began to fire small arms and mortars at the patrol, SPC Brown immediately moved to the burning vehicle under intense enemy fire.²⁸⁵ At the vehicle, she treated two casualties, and as the enemy fire continued, she “used her body to shield the casualties from enemy fire, as well as the explosions of ammunition.”²⁸⁶ She assisted in moving the casualties to a more protected position, where she continued to use her body to shield the

²⁷⁹ See Putko, *supra* note 171, at 31 (noting that the training is incorporated into basic training).

²⁸⁰ Powers, *supra* note 118.

²⁸¹ See HARRELL, 2007 RAND Study, *supra* note 9, at 21.

²⁸² Krystyna M. Cloutier, Note: *Marching Toward War: Reconnoitering the Use of All Female Platoons*, 40 CONN. L. REV. 1531, 1561 (2008).

²⁸³ Donnelly, *supra* note 146, at 835.

²⁸⁴ See Brown Citation, *supra* note 4.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

wounded soldiers from the heavy fire.²⁸⁷ On September 14, 2003, MAJ Kellie McCoy demonstrated her courage and strength in direct ground combat.²⁸⁸ She was then an engineer platoon leader in Iraq, and she ran through enemy fire to save a wounded soldier, and then returned to the enemy's kill zone to rescue remaining wounded soldiers.²⁸⁹ Actual performance of women in direct ground combat is more persuasive than and overcomes the asserted fears of exclusionists.

Women have also demonstrated the physical ability to save the life of another. All soldiers and Marines train on casualty evacuation, including the techniques to lift, carry, or drag a casualty.²⁹⁰ In 1991, the Firefighter Combat Challenge began as a competition based on a job-related, physical-performance examination for firefighters developed by the University of Maryland with a 1975 grant from the U.S. Fire Administration.²⁹¹ In the individual competition, firefighters "climb[] a five-story tower, hoist[] and chop[] an item, drag[] hoses and rescue[] a life-sized 175-pound 'victim,' all while wearing their full bunker gear, including an air-breathing apparatus."²⁹² At the 2009 Scott Firefighter Combat Challenge, Air Force Staff Sergeant Jessica Packard, a woman and a firefighter from Goodfellow Air Force Base, Texas, scored the fastest course time among both genders, ranking her first in the Air Force and third in the world.²⁹³

Other women have demonstrated the strength and heroism to repel the enemy. One woman, given the alias of Private First Class (PFC) Silverina, was assigned as a driver in an Infantry battalion's maneuver platoon and effectively responded to an enemy attack in Afghanistan, as reported in February 2009.²⁹⁴ The company executive officer's sanitized report details how PFC Silverina maneuvered her vehicle to establish fire

²⁸⁷ *Id.*; see Farley, *supra* note 17, at 26 ("Specialist Brown assisted moving the injured soldiers to a safer location and provided medical treatment while exposed to heavy fire.").

²⁸⁸ Alvarez, *supra* note 16, at A1.

²⁸⁹ *Id.*

²⁹⁰ Putko, *supra* note 171, at 31; Powers, *supra* note 118.

²⁹¹ Jared Council, *Firefighters Compete in Firefighter Combat Challenge*, COURIER PRESS.COM, 18 October 2010, <http://www.courierpress.com/news/2010/oct/18/heated-rivalry/> [hereinafter Jared Council].

²⁹² Technical Sergeant Matthew McGovern, *Air Force Firefighters Demonstrate Skills at 2009 Scott Firefighter Combat Challenge*, U.S. AIR FORCE, 20 November 2009, <http://www.af.mil/news/story.asp?id=123178858>.

²⁹³ *Id.*

²⁹⁴ Farley, *supra* note 17, at 41.

superiority, “cross leveled ammunition throughout the platoon,” and personally “fired one AT-4 killing two [enemy fighters] from 600 meters away and returned fire with her M4 throughout the engagement.”²⁹⁵

These heroic examples, in addition to the 1,800 other women who earned the combat action badge, constitute exceedingly persuasive evidence that women actually do possess the physical capacity to serve in and around direct ground combat units, and effectively undermine the physical requirements justification for the below brigade and collocation prongs.

2. Conventional Combat Arms MOS

Soldiers in the conventional combat arms MOS fill the direct ground combat battalions with the mission to close with and destroy the enemy.²⁹⁶ Mission accomplishment requires high upper body strength to lift tank rounds into the breach of a tank, change thrown tank track, lift a soldier’s own body encumbered by a combat load off the ground, or kick in a door during a raid.²⁹⁷ It also requires a high degree of physical stamina to load multiple rounds into a tank or to conduct a forced march to find, fix, and fight the enemy.²⁹⁸

²⁹⁵ *Id.*

²⁹⁶ *See id.* at 21 (citing to the Modified Tables of Organization and Equipment for Infantry, Combined Arms Battalion, Reconnaissance Surveillance and Target Acquisition, and Fires Battalions). The Infantry and Armor Battalions have identical missions: “To close with and destroy enemy forces using fire, maneuver, and shock effect, or to repel his assault by fire and counterattack.” *Id.* This definition closely mirrors the definition of direct ground combat. Additionally, women are excluded from the combat engineers MOS and assignment to combat engineer Sapper Companies due to the combat engineer direct ground combat mission. SAPPER LEADER COURSE PAM., *supra* note 249, at 5 (indicating that the engineer missions of a Sapper Company include specialized engineer and infantry tasks).

²⁹⁷ *See* HERRES ET AL., *supra* note 76, at C-10 (describing Marine Corps infantry requirements); *see* U.S. DEP’T OF ARMY, SOLDIER’S MANUAL, MOS 19K M1/M1A1/M1A2 ABRAMS ARMOR CREWMAN: SKILL LEVEL 1, at 2-288, 2-505 (30 July 2004) [hereinafter STP 17-19K1-SM] (describing tasks for armor crewmen, including loading tank rounds and changing thrown tank track); *see* U.S. DEP’T OF ARMY, FIELD MANUAL 3-21.8, THE INFANTRY RIFLE PLATOON & SQUAD para. 7-137 (Mar. 2007) [hereinafter FM 3-21.8] (instructing on a tactical raid).

²⁹⁸ *See* STP 17-19K1-SM, *supra* note 297, at 2-505 (describing loading tank rounds); *see* FM 3-21.8, *supra* note 296, at para. D-58 (describing dismounted forced marches).

While the unconventional battlefields of Afghanistan and Iraq have created the environment for actual evidence of women in combat support MOSs engaging in direct ground combat, the exclusion policy has ensured that there is no evidence of women performing in the U.S. combat arms MOS. Accordingly, advocates of exclusion must use predictive evidence from various tests and studies. While women in the United States have not been assigned to combat arms MOSs, other nations have opened their combat arms positions to women. Additionally, U.S. women in the combat support MOS of engineers and military police (MP) not only have many of the same physical tasks for job performance as Infantry or Armor, they have actually performed those tasks in combat.

a. Actual Evidence

Women in Army MP units conduct some of the same direct ground combat tasks as men in combat arms MOS, including route security, cordon and search, and raid.²⁹⁹ Despite SGT Hester's petite size, she and her MP squad used individual and crew served weapons to locate and close with the attacking enemy, and defeated the enemy with fire and maneuver.³⁰⁰ In 2004 in Iraq, First Lieutenant Brittany Meeks, a female platoon leader of the 230th MP Company, 95th MP Battalion, led a quick reaction force, suppressed the enemy with fires, evacuated the wounded, called close air support, secured a downed Apache helicopter, and conducted cordon and search operations that resulted in the discovery of several weapons.³⁰¹ She and other female soldiers of the 95th MP Battalion "were extremely competent and able to successfully engage and defeat the enemy," while they "took charge, organized patrols, escorted convoys, manned checkpoints, defended base camps, and worked with the Iraqi Highway Patrol or police."³⁰²

²⁹⁹ Putko, *supra* note 171, at 32.

³⁰⁰ *See id.* at 33 (referring to SGT Hester as a "petite MP woman"); *see* Hester Citation, *supra* note 2; *see* Aspin Memo 1994, *supra* note 5 (defining Direct Ground Combat).

³⁰¹ Twitchell, *supra* note 171, at 70.

³⁰² *Id.*

Women attend and graduate from the Army's Sapper Leader Course. The Sapper Leader Course is "a demanding 28-day course" that is the premier leadership course for Army combat engineers. Half of the training missions are infantry missions and half are engineer missions. The course includes basic combat patrolling techniques and battle drills, "urban operations, breaching, patrol organization and movement, and reconnaissance, raid and ambush tactics." Additionally, "[a]ll personnel must arrive in excellent physical condition," because a typical physical training session includes both upper and lower body exercises done to muscle failure, a "[d]istance run of 3 – 7 miles, at a 7.0 minute per mile pace" in formation, a requirement that all students complete "6 chin-ups, complete a 12-foot horizontal ladder, and climb a 30-foot rope before each meal and after each [physical training] session," and a requirement that all students "complete a 12-mile foot march, with weapon, [load bearing equipment] and 35 pound pack within 3 hours." In the end, Sapper Leader Course students complete the course as "hardened combat engineers [who] are better prepared to fight on today's modern battlefield with increased leadership skills."³⁰³

b. Predictive Evidence

In spite of persuasive actual evidence that some women are capable of many of the same individual physical job performance activities required of combat arms MOS soldiers, exclusionists continue to use predictive evidence to justify the combat arms MOS prong. Since even before the 1994 Aspin Memo, exclusionists have based their physical requirements argument on a study of Army Physical Fitness Test (APFT) data, the Army's previous use of the Military Entrance Physical Capacity Test (MEPSCAT), data from an Air Force lift study, and data from studies conducted by foreign militaries.

Title VII physical test cases provide a framework for evaluating minimum physical requirements tests and studies. Although Title VII does not apply to the armed forces,³⁰⁴ the cases are instructive in determining what constitutes a fair evaluation of a person's ability to perform a job. When evaluating data against a minimum physical job requirement, "a discriminatory cutoff score must be shown to measure the minimum qualifications necessary to perform successfully the job in

³⁰³ SAPPER LEADER COURSE PAM., *supra* note 249, at 7-11.

³⁰⁴ 42 U.S.C. § 2000e-2(g) (2006).

question,” and the test itself must be “a reasonable measure of job performance.”³⁰⁵ When evaluating predictive data used to justify the combat arms MOS prong, the relevance of the evidence depends on how well it compares the strength or stamina required for actual job performance with the minimum qualification necessary for successful job performance.

(1) APFT

While some have called the APFT “the worst test for physical capabilities that you can imagine,”³⁰⁶ it is the only established physical standard available in the military that also allows for a comparison between male and female results.³⁰⁷ Soldiers who fail to meet the APFT minimum standards may face administrative action, including separation from the service.³⁰⁸ The APFT uses push-ups to evaluate upper-body strength, sit-ups to evaluate core strength, and a two-mile run to evaluate

³⁰⁵ See *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 493 (3d Cir. 1999) (preventing employers with physical requirements from using unnecessarily high cutoff scores “to exclude virtually all women by justifying this facially neutral yet discriminatory practice on the theory that more is better”); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 432, 436 (1971) (establishing the burden in disparate impact cases for the employer to show its practice is “related to job performance”; “bear[s] a demonstrable relationship to successful performance of the jobs for which it was used”; has “a manifest relationship to the employment in question”; and is “demonstrably a reasonable measure of job performance”).

³⁰⁶ Joe Gould, *Soldiers Want More Combat-Relevant PT Test*, ARMYTIMES.COM, July 20, 2010, http://www.armytimes.com/news/2010/07/army_pt_test_071810w/ (quoting Lieutenant General Mark Hertling, commander of the Army’s Initial Military Training). Additionally, Command Sergeant Major John Troxell, the Army’s I Corps Command Sergeant Major, developed Physically Mentally Emotionally Hard Gauntlet training because the APFT was not “designed for the rigors of combat.” Lindsey Kibler, *I Corps CSM Builds Physically, Emotionally Strong ‘Tactical Athlete’*, DVIDSHUB.NET, April 29, 2011, at <http://www.dvidshub.net/news/69602/corps-csm-builds-physically-emotionally-strong-tactical-athletes>.

³⁰⁷ In contrast, the U.S. Marine Corps uses a different upper-body event for men than for women. U.S. MARINE CORPS, ORDER P6100.12, MARINE CORPS PHYSICAL FITNESS TEST AND BODY COMPOSITION PROGRAM MANUAL 2-9 (10 May 2002) [hereinafter U.S. MARINE CORPS, ORDER P6100.12]. Male Marines are tested on pull-ups, but female Marines are tested on the arm-hang. *Id.*

³⁰⁸ U.S. DEP’T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 1-24c(2) (18 Dec. 2009) [hereinafter AR 350-1] (“Soldiers must meet the physical fitness standards (as measured during the Army Physical Fitness Test (APFT)) set forth in FM 21–20 and this regulation. Soldiers who are unable to meet these standards or the mission-related physical fitness standards required of their duty assignment may be subject to administrative action.”).

strength and stamina.³⁰⁹ Soldiers must score a minimum of sixty points on each of the tested events.³¹⁰ The required minimum number of push-ups to be performed in two minutes and sit-ups in two minutes varies by age of the soldier, as does the speed at which the soldier must run two miles.³¹¹ The minimum number of required push-ups is greater for men than for women, and the minimum required time to complete the two-mile run is faster for men than for women, but the number of sit-ups is the same for both genders.³¹² Thus, a male soldier and a female soldier of the same age will achieve the same score for the same number of sit-ups, but the female does not have to perform as many push-ups or run as fast as the male to achieve the same score. The minimum number of push-ups and sit-ups and the minimum time required for the run decrease as a soldier gets older and moves to different age brackets.³¹³

The 1992 Presidential Commission considered the report of Lieutenant Colonel (LTC) W.J. Gregor, who evaluated published studies and data on Army ROTC cadets.³¹⁴ He concluded that cadet women, who were physically superior to Army women in general, could not achieve the basic male physical standard on the APFT.³¹⁵ He found only three percent of the cadet women could achieve the male mean, and sixty-eight percent of the cadet women failed under the same-age male standards altogether.³¹⁶

First, this APFT data fails to demonstrate that a “vast majority” of women were incapable of meeting the minimum physical standard for job performance. The test data demonstrated that only sixty-eight percent of the cadet women failed to meet the minimum standard required of the men their same age.³¹⁷ A court applying the “vast majority” standard of eighty percent is not likely to find a failure of sixty-eight percent exceedingly persuasive.

³⁰⁹ U.S. DEP'T OF ARMY, FIELD MANUAL 21-20, PHYSICAL FITNESS TRAINING para. 14-1 (1 Oct. 1998) [hereinafter FM 21-20].

³¹⁰ *Id.* at 1-15. Soldiers in basic training need only score fifty points per event. *Id.*

³¹¹ See DA Form 705, *infra* note 322.

³¹² See *id.*

³¹³ See *id.*

³¹⁴ HERRES ET AL., *supra* note 76, at C-14.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

Second, this APFT data compared the performance of cadet women against the minimum standard required of men the same age, rather than the minimum standard required of men presumed physically capable of combat arms service. Because the military presumes that all men are qualified for service in the combat arms MOS,³¹⁸ a male who passes the basic physical fitness test is presumed physically qualified to serve in the conventional combat arms MOS.³¹⁹ Following congressional authorization, the Army in 2006 increased the maximum enlistment age for new recruits to forty-two years old.³²⁰ Accordingly, soldiers like Jeffery Williamson enlisted in the infantry at age forty-one. Williamson, who is now forty-five, serves as an infantry sergeant in a scout platoon in the 101st Airborne Division.³²¹ In raising the age limit, the Army set the physical standard and minimum qualification necessary for the combat arms MOS as at least that required of a male age forty-two: thirty push-ups in two minutes, thirty-two sit-ups in two minutes, and a two-mile run time of eighteen minutes and forty-two seconds.³²² If the Army considers a forty-two-year-old man capable of service in the combat arms, then the minimum physical standard to which he is held on the APFT should also be the minimum physical standard to which a female soldier is held.

Third, evidence that the women held to one standard failed to meet an unknown higher standard is an unpersuasive justification for exclusion. The cadet women took their test knowing the number of

³¹⁸ Neither the Army nor the Marine Corps have a specific physical test for assignment to a conventional combat arms MOS. *See id.* at C-16 (indicating no Marine Corps MOS specific test); *see* U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS chs. 2, 3 (14 Dec. 2007) (describing the physical standards for Enlistment and for Retention, none of which include MOS specific testing); *see generally* U.S. DEP'T OF DEF., INSTR. 6130.4, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE ARMED FORCES (18 Jan. 2005) (describing standards for all the services).

³¹⁹ *See, e.g.,* Stew Smith, *Army Basic Training PFT*, MILITARY.COM, <http://www.military.com/military-fitness/army-fitness-requirements/army-basic-training-pft> (last visited Mar. 3, 2010) (describing the physical requirements to attend infantry training); *see* AR 350-1, *supra* note 308, app. G, para. G-9a(13)(a) ("Fitness testing ensures the maintenance of a base level of physical fitness essential for every Soldier in the Army, regardless of MOS or duty assignment."); *see* FM 21-20, *supra* note 309, ch. 14 (describing the Army Physical Fitness Test); *see* U.S. MARINE CORPS, ORDER P6100.12, *supra* note 307, at 2-3 (describing the Marine Corps physical fitness standards).

³²⁰ Burgess, *supra* note 19. While Congress increased the age from thirty-five to forty-two, the Army initially raised the age to forty, and then later to forty-two. *Id.*

³²¹ Saeed Shah, *Age No Limit for Infantryman*, CHI. TRIB., Sept. 26, 2010, at 40.

³²² *See* U.S. Dep't of Army, Form 705, Army Physical Fitness Test Scorecard (June 1999) [hereinafter DA Form 705] (establishing the required repetitions and time for different scores for different age groups and genders).

repetitions and the speed they needed to run based on their scale. Later pointing out that the women did not meet a higher standard is like moving the football goal posts after the ball has been kicked and calling it a miss. The data might be persuasive if it demonstrated that women failed to meet a known standard.

Alternatively, data demonstrating that women passed the male standard, even when not held to that standard, persuasively demonstrates that the physical requirements justification lacks basis. Recent cadet APFT data demonstrate that a vast majority of willing and capable women met or exceeded the minimum physical standard for direct ground combat assignment. Of the 206 women in their first year at West Point who took the APFT in the fall of 2011, more than ninety-one percent passed the test at the forty-two-year-old standard for men, with more than ninety-eight percent passing the run, and more than ninety-two percent passing the push-up event.³²³ In comparing the 138 cadet women in their third year who tested in the spring of 2010 to the forty-two-year-old standard for men, over ninety-six percent passed, with more than ninety-eight percent passing the run, and over ninety-seven percent passing the push-up event.³²⁴

Even comparing the women's data against the higher seventeen-year-old male standard³²⁵ fails to support exclusion. At the seventeen-year-old male standard, a fifty-four percent simple majority of the first-year cadet women did not meet this standard, but over fifty-two percent of the third-year cadet women passed at the same standard.³²⁶ Additionally, at this higher male standard, over sixty-four percent of the first-year women passed the run and over sixty-six percent passed the push-up event, while over fifty-seven percent of the third-year women passed the run and over eighty-four percent passed the push-up event.³²⁷ Rather than provide an exceedingly persuasive justification for the combat arms MOS prong, the APFT data, especially using recent results, demonstrates how the physical requirements justification is merely a manufactured and contrived excuse for exclusion.

³²³ See 2010–2011 U.S. Military Academy APFT Data (on file with author).

³²⁴ See *id.*

³²⁵ The minimum standard for men ages seventeen to twenty-one is forty-two push-ups in two minutes, fifty-three sit-ups in two minutes, and a two-mile run time of fifteen minutes and fifty-four seconds. See DA Form 705, *supra* note 322.

³²⁶ See *id.*

³²⁷ See *id.*

(2) *MEPSCAT*

Exclusionists also point to the Army's previous use of the MEPSCAT.³²⁸ The Army developed the MEPSCAT after 1977, using Department of Labor lifting standards to evaluate an enlistee's physical capability to perform specific MOS strength tasks.³²⁹ However, the Army eliminated the MEPSCAT after disagreements over whether it should "reflect peacetime or wartime requirements."³³⁰ Brian Mitchell, an author who advocates for full exclusion of women from the armed forces, points to early MEPSCAT results at Fort Jackson, South Carolina.³³¹ He asserts that the data showed only eight percent of women were able to perform work rated heavy, and only three percent of women were able to perform work rated very heavy.³³² He points out that of those women working in the heavy or very heavy MOS, forty-nine percent did not complete their enlistment and suggests that those who did merely performed duties unrelated to their MOS.³³³

However, he does not produce the evidence to support his conclusion that women did not perform their MOS duties. If only forty-nine percent of women failed to complete their enlistment, as opposed to eight percent, then the MEPSCAT did not likely correlate well with the actual job requirements. Instead, the data demonstrates that more than half of the women in heavy and very heavy MOS remained in their MOS, and a failure of forty-nine percent is not even a majority, let alone a "vast majority." Rather than evaluate an applicant's capability to perform in combat, the test was designed to improve a recruiter's ability to assign the right person with the right MOS in peacetime.³³⁴ In addition, the MEPSCAT used Department of Labor lifting standards, rather than standards developed by the Department of Defense, without evidence that they represented a "reasonable measure of job performance." Instead, the MEPSCAT was eliminated because it did not fully or accurately test job requirements. Finally, if the MEPSCAT was an accurate predictor of performance, then it should be easily reinstated.³³⁵

³²⁸ See HERRES ET AL., *supra* note 76, at C-13.

³²⁹ *Id.*

³³⁰ *Id.* at 7.

³³¹ MITCHELL, *supra* note 1, at 109–10.

³³² *Id.* at 110.

³³³ *Id.*

³³⁴ See HERRES ET AL., *supra* note 76, at C-13.

³³⁵ As previously mentioned, the MEPSCAT was eliminated, not because of the cost or difficulty in implementing it, but because the test did not reflect the right standard.

Accordingly, the MEPSCAT data is an unpersuasive justification for exclusion.

(3) *Air Force Lift Study*

The 1992 Presidential Commission considered the results of an Air Force lift study that tested lifting capacity. The study found that all men but only about thirty percent of women could lift seventy pounds; over ninety percent of men but less than ten percent of women could lift ninety pounds; and only sixty-eight percent of men but less than one percent of women could lift the maximum amount of one hundred and ten pounds.³³⁶ While the study demonstrates that more men than women can lift different weights, it fails to demonstrate that women lack the physical strength required of a conventional combat arms MOS. Considering that all men are presumed capable of the physical requirements of direct ground combat, the relevant data pertains to the failure of women to lift the amount all men can lift. Accordingly, the study merely demonstrates a failure of seventy percent of the women tested, less than the eighty percent required to constitute a “vast majority.” Even though an Air Force study does not clearly correlate with conventional combat arms MOS job requirements, if it were an accurate representation, then implementation of the simple lift test as part of the other entrance exams for applicants would obviate any requirement to exclude all women. Accordingly, the Air Force lift study is likely not an exceedingly persuasive basis to justify exclusion.

(4) *Foreign Military*

To further support exclusion, Professor Browne points to a report of an Israeli armored brigade commander who allowed two female tank instructors to join the male crewmen in advanced tank crew training.³³⁷ The commander related that the women were physically exhausted after loading a few tank shells, and therefore quit from exhaustion.³³⁸ However, the failure of two women thrown into the middle of a training program amounts to an interesting anecdote, but is not evidence to justify exclusion. Professor Browne also cites to a 2003 Israeli study that

³³⁶ HERRES ET AL., *supra* note 76, at C-15 to 16.

³³⁷ BROWNE, *supra* note 141, at 66.

³³⁸ *Id.*

“recommended that women continue to be excluded from infantry, armor, and artillery units because of their weakness.”³³⁹ Although the study found that women could not safely carry as much a percentage of their bodyweight or walk as far as men, the Israel Defense Forces (IDF) decided to increase the number of women in specialized combat infantry units.³⁴⁰ More recently, a 2007 study, commissioned by the head of the IDF personnel department, recommended that women be allowed to serve in all army units.³⁴¹ A court is not likely to find the overly broad and generalized 2003 study exceedingly persuasive, especially when it was partly ignored and subsequently contradicted.

Notwithstanding the Israeli reports, the trials of other nations are instructive. Professor Browne points to the British 2002 evaluation of women’s ability to serve in ground combat positions.³⁴² While the British Army’s director of infantry suggested the trials had been watered down to allow more women to pass, the Ministry of Defence countered that “the tests were not intended to recreate actual battle conditions as this would have put the women, who are not trained for infantry warfare, at an unfair advantage.”³⁴³ Most relevant is that the British ultimately concluded that “evidence of women’s lower physical capacity should not, in itself, be a reason to maintain” their policy of excluding women from ground close-combat roles. Instead, they kept their exclusion policy, after evaluations in 2002 and 2010, based on concerns about unit cohesion.³⁴⁴

³³⁹ *Id.* at 68.

³⁴⁰ Abraham Rabinovich, *Israeli Women Won’t See Combat*, WASH. TIMES, Oct. 20, 2003, at A01 (reporting that “the medical study has determined [women] are, after all, the weaker sex”); Margot Dudkevitch, *IDF to Increase Women in Combat Roles*, JERUSALEM POST, Oct. 20, 2003, available at <http://www.thehighroad.org/archive/index.php/t-45751.html>. The specialized combat unit, known as a Caracal or Wildcat unit, “is a highly operational combat force which combines both male and female soldiers, tasked with guarding the borders of Israel with Egypt and Jordan. The unit undergoes training like any combat infantry....” See Dudkevitch, *supra*; Women in the IDF, Israel Defense Forces, <http://idfspokesperson.com/2011/03/07/women-in-the-idf/> (posted Mar. 7, 2011).

³⁴¹ *IDF Commission to Recommend Women Soldiers Serve in All Units*, HAARETZ SERVICE, Sept. 17, 2007, <http://www.haaretz.com/news/idf-commission-to-recommend-women-soldiers-serve-in-all-units-1.229482>.

³⁴² *Id.* at 65.

³⁴³ *Row Over Frontline Women Troops*, BBC NEWS, Mar. 26, 2001, http://news.bbc.co.uk/2/hi/uk_news/1243288.stm.

³⁴⁴ UK 2010 REPORT, *supra* note 12; see Part III.C.

In 1987, Canada evaluated women in infantry training, and graduated one out of 103, but “none of the women were prescreened or required to meet any minimum standard before being assigned to a unit.”³⁴⁵ Though the results indicate a vast majority of over ninety-nine percent failed, the small sample size was made up of willing but not otherwise fit women. More importantly, the tests led to Canada opening all combat roles to women in 1989, and women have actually served in ground combat roles in Afghanistan.³⁴⁶

In the 1980s, Denmark tested integration of women into ground combat roles, but thirty-nine of the seventy women tested, amounting to fifty-six percent, left early due to the physical difficulties of the training program.³⁴⁷ This again was a small sample size, but only a mere majority, not a vast majority, failed the Danish tests. Denmark subsequently altered its physical standards and admitted women into combat roles.³⁴⁸

The collective evidence demonstrates that women are physically capable of entering the combat arms MOS. The successful performance of women actually executing combat arms MOS tasks in direct ground combat, the data demonstrating that over ninety percent of West Point cadet women exceeded the minimum physical standard for the combat arms MOS, and the results of trials and implementation in the United Kingdom, Canada, and Denmark outweigh contrary anecdotes and inconclusive or unrelated tests. The evidence in total supports the conclusion that any physical limitation of women is not an exceedingly persuasive justification for exclusion. Instead, an arbiter could conclude that willing and fit women are physically capable of serving in the conventional combat arms MOS.

³⁴⁵ HERRES ET AL., *supra* note 76, at C-23.

³⁴⁶ See *Women in the Canadian Military*, CBC NEWS, May 30, 2006, <http://www.cbc.ca/news/background/cdnmilitary/women-cdnmilitary.html> (noting that Canada opened all positions, including submarines, in 2000). In 1989, Canada added Private Heather R. Erxleben as the first female Regular Force infantry soldier. *Id.* In 1991 the first female officers in the combat arms graduated from artillery training. *Id.* About fifteen percent of the Canadian military are women and two percent of Canadian combat troops are women. *Id.*

³⁴⁷ HERRES ET AL., *supra* note 76, at C-24.

³⁴⁸ *Id.* at C-23.

3. *Special Forces and Special Operations*

As opposed to the conventional combat arms MOS, the Special Forces MOS does have a specific entrance physical standard and qualification course.³⁴⁹ Similarly, assignment to a Special Operations unit, like an Army Ranger battalion, requires a special qualification earned at an Army school, and the units include soldiers with conventional combat arms MOS and combat support MOS.³⁵⁰ Whether it is assignment to a Ranger battalion or the Special Forces MOS, permanent assignment requires a physical screening and completion of a physical qualification course. Because the Army already individually tests a soldier to ensure that soldier meets the “qualifications necessary to perform successfully the job in question,” predictive evidence is unnecessary and unpersuasive to justify excluding an entire class of soldiers from Special Forces MOS and Special Operations unit assignment.

Soldiers assigned to the Special Forces MOS include “highly specialized elements to accomplish specially directed strategic missions in times of peace, conflict, and war, in support of national interests and/or security Training for, and participation in, these missions is arduous, somewhat hazardous, and often sensitive in nature.”³⁵¹ Many of the physical requirements of the Special Forces MOS likely exceed the capability of a vast majority of men and women. Professor Browne argues that the relevant physical differences between men and women include muscular strength, size, speed, and endurance.³⁵² He argues that men are physically superior to women, as evidenced by the performance of elite athletes.³⁵³ Just as the sports that require size, strength, and speed separate male athletes from female athletes, so should the armed forces.³⁵⁴ As described in Sean Naylor’s *Not A Good Day To Die*, Special Forces operators in elite units are expected to perform at extremely high physical standards in combat situations, climbing up and down mountains over two kilometers high, carrying “eighty-pound rucksacks

³⁴⁹ AR 614-200, *supra* note 26, para. 5-5c(7).

³⁵⁰ *See id.* paras. 5-3 to -4; *see* U.S. SPECIAL OPERATIONS COMMAND, FACT BOOK 4, 7, 11–13 (n.d.) (last visited Mar. 3, 2010) [hereinafter FACT BOOK], *available at* <http://www.socom.mil/SOCOMHome/newspub/pubs/Documents/FactBook.pdf> (describing the mission and organization of Special Operations Forces).

³⁵¹ AR 614-200, *supra* note 26, para. 5-2c.

³⁵² BROWNE, *supra* note 141, at 22.

³⁵³ *Id.* at 19, 25, 26.

³⁵⁴ *Id.* at 19; FACT BOOK, *supra* note 348 (describing the various missions).

uphill through thick snow at high altitude,” while trying to avoid detection by the enemy.³⁵⁵ Special Forces conduct the most “physically demanding operations undertaken by the military.”³⁵⁶

For assignment in the Special Forces MOS, a soldier must meet screening requirements, pass the Army’s Special Forces Assessment and Selection (SFAS) course, and then complete the Special Forces Qualification Course (SFQC).³⁵⁷ All phases include some evaluation of an applicant’s physical capabilities in order to determine whether the applicant meets the “qualifications necessary to perform successfully” in the Special Forces MOS.³⁵⁸ The SFAS Program requires soldiers to climb obstacles (by use of a rope) 20 to 30 feet high, swim while in uniform, and travel great distances cross-country while carrying a rucksack with a minimum of 50 pounds.³⁵⁹

The Army excludes women from assignment to Ranger units, even though combat support MOS and combat arms MOS soldiers fill Ranger assignments. Not all soldiers must be Ranger qualified for assignment, but must complete the physically rigorous Ranger School training for permanent assignment.³⁶⁰ Even before attending Ranger School, applicants must meet screening requirements to be “ranger-qualified.”³⁶¹ Additionally, Ranger School is open to all combat support MOS and combat arms MOS male soldiers for service in all types of units, because the school now serves as a leader-training course for the entire Army as

³⁵⁵ SEAN NAYLOR, NOT A GOOD DAY TO DIE: THE UNTOLD STORY OF OPERATION ANACONDA 5, 109–17 (2005) (referring to the Delta Special Operators as “athlete-warriors”).

³⁵⁶ HERRES ET AL., *supra* note 76, at 34 (mentioning Special Operations Forces).

³⁵⁷ AR 614-200, *supra* note 26, para. 5-5.

³⁵⁸ *Id.*

³⁵⁹ U.S. ARMY RECRUITING COMMAND, PAM. 601-25, IN-SERVICE SPECIAL FORCES RECRUITING PROGRAM (OFFICER AND ENLISTED) para. 4-2 (14 Nov. 2006).

³⁶⁰ AR 614-200, *supra* note 26, para. 5-4. All combat arms MOS soldiers and the traditional combat support MOS soldiers in the grade of E-5 and above must attend Ranger training prior to assignment to a Ranger unit. Soldiers E-4 and below and traditional combat service support MOS soldiers are assigned to a Ranger unit, and then attend Ranger training once they meet the Ranger School requirements. *Id.* para. 5-4i, j. The physical requirements of Ranger School are rigorous. Stew Smith, *Preparing for Army Ranger School*, MILITARY.COM, <http://www.military.com/military-fitness/army-special-operations/army-ranger-school-prep> (last visited Mar. 1, 2010) (describing the minimum requirements for Army Ranger School and the recommended physical standard for achieving success).

³⁶¹ AR 614-200, *supra* note 26, at para. 5-4e(3).

much as it is a qualification course for assignment to a Ranger unit.³⁶² A soldier need only be male to apply for and undergo screening. Accordingly, women are denied the ability to attend Ranger School, even though they are allowed to attend the physically rigorous Sapper Leader Course that includes infantry missions, and even though one of the purposes of Ranger School is to produce leaders for the entire Army in all MOSs. The individual physical screening process required to attend Ranger School and the rigorous physical test of Ranger School undermine the physical requirements justification to exclude women from Ranger School attendance and Ranger unit assignments.

Soldiers must individually pass physically demanding screening, testing, and training in order to earn an assignment to either a Special Forces MOS or a Special Operations unit. It is therefore irrelevant whether a vast majority of women servicemembers are capable of the job-related physical requirements for those assignments. It is only relevant whether an individual woman passes the tests at the set standards. Accordingly, the physical requirements of the Special Forces MOS and Special Operations units are unpersuasive justifications for all prongs of exclusion.

4. The Wounded Warrior Contradiction

While exclusionists argue that the weakness of women endangers their fellow soldiers in combat, the Army assigns wounded warriors to direct ground combat units below the brigade level and deploys them to combat. MAJ David Rozelle, then a captain, lost his leg below the knee in Iraq in June 2003 when an IED destroyed his vehicle.³⁶³ In June 2004, MAJ Rozelle demonstrated the courage and strength to return to combat in Iraq as a direct ground combat company level commander in the 3rd Armored Cavalry Regiment.³⁶⁴ “Other amputees who have returned to

³⁶² See Message, R091738Z Feb 05, Dep’t of the Army Washington, DC, subject: ALARACT 028/2005, Selection and Scheduling of Soldiers for United States Army Ranger School para. 1 [hereinafter Ranger School Guidance] (indicating that soldiers may attend Ranger School even if they are not assigned against a Ranger assignment); See Ranger Training Brigade, Ranger School Brief slide 5, https://www.benning.army.mil/rtb/ranger_website_brief.ppt (last visited Mar. 4, 2010) (describing the Ranger Training Brigade mission as “Produce as many Ranger and RSLC leaders as possible within standards.”).

³⁶³ CAPTAIN DAVID ROZELLE, BACK IN ACTION: AN AMERICAN SOLDIER’S STORY OF COURAGE, FAITH, AND FORTITUDE 1–7 (2005).

³⁶⁴ *Id.* at 227.

combat, ranging from infantry grunts to special forces soldiers, have conducted door-to-door searches, convoy operations and other missions in [Iraq and Afghanistan].”³⁶⁵ Some estimate approximately twelve amputees have returned to duty in the combat zones of Iraq and Afghanistan.³⁶⁶

If an amputee has the physical capacity for assignment to a direct ground combat battalion or to perform direct ground combat tasks in a combat arms MOS, then a physically fit woman surely has the physical capacity. If the Army has the capability to individually determine whether a wounded warrior is physically capable of returning to duty in a combat arms MOS, then the Army has the capability to individually determine whether a woman is physically capable of serving in that combat arms MOS in a way that exclusion of an entire class is unnecessary. The amazing heroism of the wounded warriors who return to combat is beyond praiseworthy; however, this wounded warrior contradiction demonstrates the fallacy inherent in arguing that direct ground combat physical requirements justify female exclusion. Generalizations and stereotypes of female physical strength limitations only serve to perpetuate perceptions of inferiority, and fail to persuasively justify exclusion under all prongs of exclusion.

IV. Ending Exclusion

*We’re going to integrate the entire force.*³⁶⁷

While the exclusion policy violates the Equal Protection clause of the U.S. Constitution, there are also several policy reasons to open the doors to women. Ending exclusion restores the integrity of the merit-based nature of the armed forces, improves leadership diversity and career advancement opportunities, and removes the confusion associated with an arbitrary definition of combat and who participates in combat. In consideration of fairness and military readiness benefits, the Secretary of the Navy in April 2011 announced his opposition to any gender-based

³⁶⁵ Michelle Roberts, *Amputee Soldiers Return to Active Duty*, HUFFINGTON POST, May 30, 2007, <http://www.huffingtonpost.com/huff-wires/20070530/amputee-soldiers/>.

³⁶⁶ David Zucchino, *A Long Walk Back: A Year after Losing His Leg in Iraq, A Marine Is Again in a Combat Zone*, L.A. TIMES, Aug. 6, 2008, at 1.

³⁶⁷ Sam Fellman, *SECNAV: All Communities Should Be Open to Women*, NAVY TIMES, Apr. 14, 2011, at 24 (quoting Sec’y of the Navy Ray Mabus).

ban in the Navy.³⁶⁸ He asserted that “women ought to have whatever opportunities men do.”³⁶⁹ He further explained that the Navy planned to evaluate how its integration of female officers on submarines goes in order to determine the course for further integration of women and opening more assignment opportunities to women.³⁷⁰ In doing so, he suggested that the Department of the Navy, including the Marine Corps and the SEALs, may consider opening direct ground combat doors to women.³⁷¹

According to Dr. Lawrence Korb, a senior fellow at the Center for American Progress “with an extraordinary background in military preparedness and national security issues,” whom the court in *Log Cabin Republicans v. United States* found to be “an extraordinarily well-credentialed and powerfully credible witness,” the merit-based nature of the military contributes to military preparedness.³⁷² He asserted that “in order for the military to perform its mission successfully, it must mold persons from vastly different backgrounds who join it into a united and task-oriented organization.”³⁷³ He testified that 10 U.S.C. § 654, commonly known as Don’t Ask, Don’t Tell, “detracts from the merit-based nature of the [military] organization, because discharges under [10 U.S.C. § 654] are not based on the servicemember’s failure to perform his or her duties properly, or on the effect of the soldier’s presence on the unit’s morale or cohesion.”³⁷⁴ In the same way, the exclusion policy undermines the military meritocracy because exclusion is not based on the willing and capable soldier’s failure to perform her duties properly, or on the effect of her presence on the unit’s morale or cohesion. She is not excluded simply because she is a woman, but because she is presumed incapable. Accordingly, ending the exclusion policy increases military readiness and effectiveness by restoring confidence in the merit-based nature of the military.

In March 2011, the Military Leadership Diversity Commission (MLDC) concluded that eliminating the exclusion policy would enhance military performance by eliminating barriers to career advancement for

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Log Cabin Republicans v. United States*, Case No. CV 04-08425-VAP (Ex), 46 n. 26 (C.D. Cal. 2010).

³⁷³ *Id.* at 49.

³⁷⁴ *Id.*

women, and increase the gender diversity of senior leadership.³⁷⁵ The MLDC further recommended that DoD and the services eliminate the exclusion policy in a time-phased approach, by first eliminating the collocation and below brigade rationales, and then taking “deliberate steps in a phased approach to open additional career fields and units involved in ‘direct ground combat’ to qualified women.”³⁷⁶ The phased approach would allow the services the opportunity to think through all potential issues, “including how to best implement new policies.”³⁷⁷ Because the exclusion policy effectively bars women from entering the career fields and units associated with advancing to general officer grades, “women [are] at a disadvantage compared with men in terms of career advancement potential.”³⁷⁸ While not an absolute bar to advancement, the exclusion policy is “a structural barrier whose removal could help improve both the career advancement potential of qualified women and, ultimately, the demographic diversity of senior leaders.”³⁷⁹

Additionally, confusion regarding the exclusion policy undermines readiness and hurts veterans. As reported by the RAND Study, many commanders are confused about the policy and its application.³⁸⁰ Additional confusion regarding whether women actually engage in ground combat has contributed to the Veteran’s Administration inconsistently providing benefits to men compared with women combat veterans.³⁸¹ Eliminating the prongs of exclusion would provide clarity for military commanders and ensure women veterans are treated with the respect that they earned in direct ground combat.

³⁷⁵ MILITARY LEADERSHIP DIVERSITY COMMISSION, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY, EXECUTIVE SUMMARY 7, 13, 19–20 (Mar. 15, 2011) [hereinafter MLDC FINAL REPORT] (on file with author).

³⁷⁶ *Id.* at 19–20. Military Leadership Diversity Commission advocated not lowering standards with the elimination of the Exclusion Policy. *Id.* at 71.

³⁷⁷ *Id.* at 73. While a majority of MLDC Commissioners advocated a phased approach, a small number of Commissioners “favored further study,” and another small number “would have preferred a more forceful recommendation to immediately eliminate the policies.” *Id.*

³⁷⁸ *Id.* at 74.

³⁷⁹ *Id.*

³⁸⁰ HARRELL, 2007 RAND STUDY, *supra* note 9, at 19.

³⁸¹ Meg McLagan & Daria Sommers, *The Combat Ban and How It Negatively Affects Women Veterans*, Mar. 22, 2010, at <http://www.pbs.org/povregardingwar/conversations/women-and-war/the-combat-ban-and-how-it-negatively-affects-women-veterans.php>; Zinie Chen Sampson, *Report: Women Missing Out on Post-War Benefits*, Jan. 10, 2011, at <http://carenetwv.org/?content=activity-new&articlenumber=52>.

These policy reasons make it even more appropriate that the executive or legislative branches end the exclusion policy, rather than wait for a proper plaintiff and a court ruling. Accordingly, the services, the DoD, and Congress all have roles to play in ending a policy that degrades military capability. While the Army and the Navy may take immediate action, the DoD should begin by establishing a gender integration oversight panel³⁸² to ensure effective integration of women while maintaining the high military standards of the U.S. ground forces. The oversight panel could function in a similar way to the DoD Comprehensive Review Working Group (CRWG), established by Secretary of Defense Robert Gates to develop an implementation plan for new policy following the repeal of DADT.³⁸³ In the same way, the DoD gender integration oversight panel should develop a department-wide implementation plan for the repeal of each prong of the exclusion policy and the opening of direct ground combat roles to women.³⁸⁴ Because the exclusion policy is instantly unconstitutional, some may advocate immediate implementation of gender-neutral assignment policies.³⁸⁵ On the other hand, opening ground combat roles to women represents a cultural change in the armed forces, and eliminating the policy while simultaneously implementing an orderly, sequenced, and deliberate change is likely a constitutional solution that accounts for the important governmental objectives of ensuring that “all potential issues, including how to best implement the new policies, can be thought through.”³⁸⁶

A. Ending Collocation and Opening Ranger School

The collocation argument’s destiny is in the hands of the Army and the Navy, as long as they notify Congress through the Secretary of Defense that they intend to change their assignment policies. In addition to the Secretary of the Navy and the MLDC, several senior Army

³⁸² Cf. Keenan, *supra* note 193, at 24 (recommending a “DoD-congressional commission [to] examine the roles of women in the 21st century military”).

³⁸³ See Memorandum from Sec’y of Def. Robert Gates, to the Gen. Counsel and Commander, U.S. Army Europe, subject: Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. § 654 (2 Mar. 2010) [hereinafter CRWG Terms of Reference].

³⁸⁴ The purpose of the oversight panel would not be to determine whether integration should happen, but how to best implement integration. See *id.* (indicating that the CRWG’s purpose is not to determine whether repeal should happen, but to assess implications of repeal and develop an implementation plan for any new statutory mandate).

³⁸⁵ See MLDC FINAL REPORT, *supra* note 375, at 73.

³⁸⁶ See *id.*

leaders, including 165 students of the 2006 graduating class of the U.S. Army War College, already advocate changing or ending the collocation justification for gender exclusion.³⁸⁷ Additionally, collocation is the most clearly unconstitutional justification for exclusion. All units are subject to attack and there are no rear areas. Therefore, the collocation justification accomplishes no important objective.³⁸⁸ Instead, it inhibits military effectiveness and confounds military leaders.

The Army should also immediately open Ranger School to all genders, just as it has opened the course to all male MOSs, and just as the Sapper Leader Course is open to all genders. While ending collocation would require congressional notification, opening Ranger School to both genders would not.³⁸⁹ If the Army is serious about having women leaders, then it should put willing and capable women to the test in one of the Army's most challenging leadership courses. However, once any of the physical standards of Ranger School change, critics will likely argue either that the standards have been artificially raised to exclude women, or that the standards have been lowered to allow weaker women to pass. Both results are detrimental to the important training that Ranger School provides. In opening Ranger School, the Army must set deliberate controls to maintain the rigorous nature of Ranger School without appearing to compromise for female inclusion. Title VII physical test cases provide a way to incorporate women into Ranger School and maintain high standards without compromising the integrity of the course.³⁹⁰

The proposed DoD gender integration oversight panel would evaluate physical testing for Ranger School, combat arms MOS physical evaluation, or SFAS to ensure that high standards continued to be applied

³⁸⁷ Farley, *supra* note 17, at 31–32 (advocating an end to the Collocation Prong, but advocating no change to the below brigade prong); Putko, *supra* note 225, at 2 (indicating that seventy percent of the survey respondents believed the rule against collocation should be changed); Putko, *supra* note 171, at 34 (advocating a total change to the Exclusion Policy); Lindon, *supra* note 193, at 40 (ending Collocation Prong and opening more positions to women); Grosskruger, *supra* note 170, at 51 (ending Collocation Prong); Cook, *supra* note 148, 67–68 (ending Collocation Prong); Botters, *supra* note 17, at 72–73 (ending Collocation Prong).

³⁸⁸ Botters, *supra* note 17, at 72–73.

³⁸⁹ Congressional notification is only required when the change opens or closes a unit or position to women, or opens or closes any military career designator to women. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 541, 119 Stat. 3136.

³⁹⁰ See discussion Part III.B.6.

and enforced to both genders. In the same way that the Title VII disparate impact analysis evaluates whether physical standards are excessively high, the panel would evaluate the standards to ensure they are appropriately linked to the mission objectives of Ranger School. The government may not constitutionally exclude women from attending Ranger School, but the Army must ensure that integration of Ranger School does not undermine the important place it holds in leader development for the Army.

If one or either service fails to act, DoD should take the lead to ensure that direct ground combat units, regardless of the branch of service, are no longer constrained by an unconstitutional and ineffective policy. Concurrent with ending the collocation rationale, the Army should open Ranger School to women in order to increase the quality of all leaders across the Army.

B. Ending the Below Brigade Justification for Gender Exclusion

Immediately following the end of the collocation argument, the DoD should end the below brigade rationale, with notification to Congress. Effective integration³⁹¹ of women below the brigade level requires a clear plan for ensuring baseline personal privacy. Although Army doctrine already conceives of integration below the brigade level in direct ground combat units, service leaders owe subordinate commanders integration guidance. The guidance may be as simple as sharing the tactics, techniques, and procedures already employed by mixed-gender combat support units. Direct ground combat commanders have not had the same experiences as COL Cook or other combat support commanders, and will need direction in order to implement effective integration. Through the DoD gender integration oversight panel, service leaders must arm direct ground combat commanders with the guidance and tools to effectively ensure baseline personal privacy for all soldiers. Integration will then ensure that direct ground combat battalions and companies have access

³⁹¹ Integration of women in combat support MOS below the brigade level is different from opening the combat arms MOS to women. While integration indicates that assignment or denial of assignment of combat support MOS soldiers to units below the brigade level is gender-neutral, opening the combat arms MOS to women does not result until willing and capable women choose to enlist or commission into the combat arms MOS.

to “some of [the] most brilliant and creative intelligence analysts,”³⁹² and other talented female combat support soldiers.

C. Ending Exclusion From Combat Arms MOSs

Once positions in direct ground combat units below brigade level are opened for gender-neutral assignment of combat support MOS soldiers, then DoD, with notification to Congress, should end the unconstitutional exclusion of women from the combat arms MOS. As with ending the below brigade prong, direct ground combat commanders deserve clear guidance to ensure baseline personal privacy protection. While the physical requirements of the combat arms MOS is an unpersuasive justification for exclusion, the best way to guarantee physically qualified soldiers serve in the combat arms MOS is to institute gender-neutral MOS-specific physical standards.³⁹³ Although the screening and testing standards already exist for special forces assignments, the gender integration oversight panel would ensure the relevance of any conventional combat arms tests and the minimum standard to actual performance of the conventional combat arms MOS tasks.

In 1997, as an Army Judge Advocate officer, Captain (CPT) Stephanie Stephens advocated gender-neutral testing of troops during initial entry training.³⁹⁴ Subsequently, only those men and women who met the minimum physical standards would be eligible for advanced training in their combat arms MOS.³⁹⁵ Captain Stephens further recommended additional regular testing after initial assignment to ensure fitness for the combat arms specialty.³⁹⁶ In the alternative, testing could be accomplished at the military entrance processing stations (MEPS) before the soldiers enlist in the combat arms MOS. While MEPS testing would ensure a soldier does not enlist for an MOS without being physically qualified, testing during initial entry training would more fairly test the applicants after they all had some baseline training in strength and endurance techniques.

³⁹² Conference Call with MG Cucolo, *supra* note 204.

³⁹³ HERRES ET AL., *supra* note 76, at 7 (recommending the services adopt specific gender-neutral standards for specialties that require muscular strength, endurance, and cardiovascular capacity).

³⁹⁴ Stephens, *supra* note 45, at A-1.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

Although critics may argue that developing a standard or conducting additional testing for conventional combat arms MOS assignments will be too burdensome for the military, the Army already evaluates soldiers' ability to perform in their MOS. Through the MOS/Medical Retention Board process, physicians evaluate wounded soldiers to continue service in their specialty.³⁹⁷ The various soldier's manuals already identify MOS specific requirements.³⁹⁸ As the standards and process already exist, the military need only now ensure fair implementation while upholding the standards that guarantee a superior fighting force. Just as a 1975 grant to the University of Maryland from the U.S. Fire Administration led to the development of the Firefighter Combat Challenge course,³⁹⁹ a similar initiative could lead to a relevant and effective testing procedure to determine strength eligibility for the conventional combat arms MOS.

All of these gradual and sequenced steps could also be implemented through legislation. However, Congress is not likely to act without DoD leadership in reform and implementation. Action to end the exclusion policy is consistent with the standards of military readiness, military effectiveness, and unit cohesion. A failure to act is unconstitutional.

V. Conclusion

*No longer is a soldier's value measured by how close he or she is to the front line—there are no front lines on today's battlefield. Every soldier is a warrior; every soldier has to embody not only the Army Values every day but take to heart the soldier's Creed and, most specifically right now, the Warrior Ethos that will be around that soldier's neck and lived by soldiers every day.*⁴⁰⁰

Breaking the ground barrier for women is not about social engineering, political correctness, mandating integration, or quotas.

³⁹⁷ See U.S. DEP'T OF ARMY, REG. 600-60, PHYSICAL PERFORMANCE EVALUATION SYSTEM para. 2-1.a (28 Feb. 2008) (requiring the board to base its recommendations on a Soldier's "physical ability to reasonably perform the duties of his or her primary military occupational specialty").

³⁹⁸ See, e.g., STP 17-19K1-SM, *supra* note 297 (describing the MOS requirements for an armor crewman).

³⁹⁹ Jared Council, *supra* note 291.

⁴⁰⁰ General Peter J. Schoomaker, Army Chief of Staff, Address at the Association of the U.S. Army Convention (Oct. 6, 2003).

Instead, ending the direct ground combat exclusion policy is a way to open the door so that willing and capable women can demonstrate their ability to fully serve their nation. It is also a way to ensure that the military operates as a merit based organization and that soldiers in all military units benefit from the assignment of the best and brightest to those units, regardless of gender. Ending the direct ground combat exclusion is consistent with the Equal Protection clause of the U.S. Constitution, increases military effectiveness, and ensures that the United States military will have the most effective and talented ground forces to fight and win the nation's wars.