

Protecting Our Defenders: The Need to Ensure Due Process for Women in the Military Before Amending the Selective Service Act

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Introduction

Sergeant Rebekah Havrilla defused bombs as the only woman in her unit in Afghanistan.¹ The Taliban should have been her greatest threat, but it was a comrade from within her unit that caused her the most harm.²

During my tour, one of my team leaders continuously sexually harassed me and was sexually abusive towards me. This behavior caused me so much anxiety that I ended up self-referring to mental health and on medication to manage not just the stress of my deployment, but also the stress of having to live with an abusive leader and coworker.

One week before my unit was scheduled to return back to the United States, I was raped by another servicemember that had worked with our team. Initially I chose not to do a report of any kind because I had no faith in my chain of command as my first sergeant previously had sexual harassment accusations against him and the unit climate was extremely sexist and hostile in nature towards women.

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1. Alexandra Frean, *Rapist Drove Bomb Expert Rebekah Havrilla Out of US Army*, THE WEEKEND AUSTRALIAN (Mar. 14, 2013), <http://www.theaustralian.com.au/news/world/rapist-drove-bomb-expert-rebekah-havrilla-out-of-us-army/newsstory/e751e1f751d92bd716fab95cc07a0e60>.

2. *Id.*

Approximately a year after separating from Active Duty, I was on orders for job training, and during that time I ran into my rapist in a post store. He recognized me and told me that he was stationed on the same installation. I was so retraumatized from the unexpectedness of seeing him that I removed myself from training and immediately sought out the assistance from an Army chaplain who told me, among other things, that the rape was God's will and that God was trying to get my attention so that I would go back to church.³

The above testimony describes the experience of a woman soldier in today's United States military. Servicewomen are more likely to be raped by fellow servicemen than to be killed by adversaries in combat.⁴ Apart from the trauma inflicted on victims, sexual assault within the military costs U.S. taxpayers at least \$3.6 billion annually.⁵ As is, the U.S. military is a flawed and complex organization.

While the Constitution grants the President command of the military as the Commander in Chief, it is Congress that has sweeping authority to "raise and support" the military services and to call up the forces as needed and therefore the authority to determine who shall register for potential military service.⁶ From the Civil War to the conflict in Vietnam, the U.S. military has accessed civilians into the military forces through the draft.⁷ During World War I and II, over half of all troops were draftees.⁸ Throughout the period of the draft, America never required women's service in uniform—women's participation in the U.S. military has always been strictly voluntary.⁹

3. *Sexual Assault in the Military: Hearing Before the Subcomm. on Pers. of the S. Comm. On Armed Servs.*, 113th Cong. (2013) (statement of Rebekah Havrilla, Former Sergeant, U.S. Army).

4. Jane Harman, *Rapists in the Ranks*, L.A. TIMES (Mar. 31, 2008), <http://www.latimes.com/news/la-oe-harman31mar31-story.html>. See also Kate Hendricks Thomas, *I was a Marine. I Can't be Silent About the Sexual Harassment I Faced Anymore*, VOX (Mar. 9, 2017), <https://www.vox.com/first-person/2017/3/9/14861796/marines-sexual-harassment-sexism> ("I still remember carrying a knife into the showers with me, and being told I should never walk around the forward operating base in Iraq alone for fear of sexual assault.")

5. Coreen Farris et al., *Enemy Within, Military Sexual Assault Inflicts Physical, Psychological, Financial Pain*, RAND REVIEW (July 11, 2013), <https://www.rand.org/pubs/periodicals/rand-review/issues/2013/summer/enemy-within.html>.

6. U.S. CONST. art. II, § 2; U.S. CONST. art. I, § 8.

7. KRISTY N. KAMARCK, CONG. RESEARCH SERV., R44452, THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION: ISSUES FOR CONGRESS 1 (2016).

8. *Id.* at 11. During the world wars, 59.4% and 62.7% of the force was comprised of draft inductees. By the conflict in Vietnam, draftees comprised only 21.3% of the force.

9. *Id.* at 15.

The Military Selective Service Act provides the guidelines for today's draft system.¹⁰ The Act authorizes the President to register men within thirty days of their eighteenth birthday and to keep the men registered on the national list until age twenty-six.¹¹ This task is carried out by the Selective Service System, a small independent executive branch agency.¹² In the event that a draft is necessary to meet personnel requirements of the armed forces, the federal government would induct civilians from this list.¹³ These civilians would likely be used to replace and replenish frontline troops—those most likely to perish during an armed conflict. Thus far, Congress had resisted requiring women to register with Selective Service, because they had not been allowed to serve in frontline positions.¹⁴ However, since January 2016, servicewomen have been permitted to apply for all military occupations, including those on the frontlines and among special forces, which raises the question of whether women should now be drafted.¹⁵

In April 2016, Representative Duncan Hunter (R-CA 50th) introduced a measure to require women to register for the draft.¹⁶ Hunter, a former Marine Corps reservist and critic of women in the military, was hoping to force a national policy discussion on the dangers of women in combat.¹⁷ Instead, the House Armed Services Committee adopted the proposal in a 32-

10. Military Selective Service Act, 50 U.S.C. § 3802 (2017).

11. The current Act requires registration from all U.S. citizen men, including veterans who separated before age 26, permanent resident immigrants, dual nationals, refugees, and transgender women. *Who Must Register – Chart*, SELECTIVE SERVICE SYSTEM, <https://www.sss.gov/registration/who-must-register/chart>.

12. 50 U.S.C. § 3801(f).

13. 50 U.S.C. § 3801(d).

14. President Bill Clinton put in place the last policy that prevented women from serving in frontline occupations “below the brigade level.” DEPARTMENT OF DEFENSE, DIRECT GROUND COMBAT DEFINITION AND ASSIGNMENT RULE (1994) [hereinafter *Combat Exclusion Policy*]. The Women’s Armed Services Integration Act of 1948 is credited with being the origin of the combat exclusion for women. Women’s Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356, 356-375 (1948).

15. Cheryl Pellerin, *Carter Opens All Military Occupations, Positions to Women*, DOD NEWS (Dec. 3, 2015), <https://www.defense.gov/News/Article/Article/632536/carter-opens-all-military-occupations-positions-to-women>. See e.g., Merrit Kennedy, *Army, Marine Corps Generals Say Women Should Have to Register for the Draft*, NPR (Feb. 3, 2016), <http://www.npr.org/sections/thetwo-way/2016/02/03/465404486/army-marine-corps-generals-say-women-should-have-to-register-for-the-draft>; see also Justin Worland, *Women May Have to Register for Draft Eventually*, *Army Secretary Says*, TIME (Oct. 14, 2015), <http://time.com/4072929/women-draft-army-secretary/>.

16. Draft America’s Daughters Act of 2016, H.R. 4478, 114th Cong. (2016).

17. Nicholas Clairmont, *The Unseemly Death of an Amendment to Draft Women*, ATLANTIC (May 20, 2016), <https://www.theatlantic.com/politics/archive/2016/05/the-unlikely-birth-and-unseemly-death-of-an-amendment-to-draft-americas-women/483599/> (“Hunter, a vocal opponent of women serving in combat, offered the amendment as a dare, confident that progressives on gender equality in the service were all talk. He voted against his own proposal.”).

30 vote.¹⁸ The Senate also voted on a similar measure, though neither Hunter's measure nor the Senate measure were enacted.¹⁹

In his last days in the White House, President Obama announced his support for a change in policy which would require that women register for Selective Service.²⁰ Although the statement was purely symbolic, it will likely spur further considerations by lawmakers in the 115th Congress and beyond. In fact, the final defense bill for fiscal year ("FY") 2017 included a provision whereby the Pentagon is to report on the current and future need for the Selective Service and address expanding registration to include women.²¹

Despite women's achievements across the military, the idea of including women in the Selective Service is very controversial in America today and evokes many different views. Many supporters have posited that for women to enjoy equal rights in society, they should be subject to equal responsibilities, such as registering for the draft.²² Some scholars have argued that excluding women from the draft harms women by promoting male domination.²³ Feminists in earlier decades rejected calls to register women as it would require women to "sacrifice their lives abroad when [they] are denied economic equality and refused political power at home."²⁴ Others take the view that Congress should not be forcing America's

18. Karoun Demirjian, *Are women headed for the draft? Support for the idea grows in Congress*, WASH. POST (Apr. 28, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/04/28/women-could-be-headed-for-the-draft-after-house-committee-vote>.

19. Leo Shane III, *Congress drops plans to make women register for the draft*, MILITARY TIMES (Nov. 29, 2016), <http://www.militarytimes.com/articles/ndaa-final-draft-pay-end-strength>.

20. Gregory Korte & Tom Vanden Brook, *White House: Obama Supports Registering Women for Military Draft*, USA TODAY (Dec. 1, 2016), <http://www.usatoday.com/story/news/politics/2016/12/01/obama-supports-registering-women-military-draft/90449708/>.

21. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 552 (2016).

22. Due to the epidemic of childhood obesity, the number of eligible men for military service is declining. Opening up registration to women would increase the eligibility pool from which to draw.

23. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 189-190 (1982).

24. CATHARINE A. MACKINNON, SEX EQUALITY 270 (1st ed. 2001).

daughters into combat service.²⁵ Yet others suggest eliminating the draft system altogether.²⁶

Requiring women to register for the Selective Service forces a more serious discussion of war into every American household because it would mean that both sons *and* daughters would be at risk should a draft be called.²⁷ But before women are susceptible to be drafted, the United States needs to have a broader discussion on whether it is appropriate *at this time* to mandate women's service given the military's documented unwillingness and inability to provide them with a standard of safety and basic constitutional protections. The culture within the military and the environment that has been retained for decades creates a dangerous situation for servicewomen.

Since the opening of all military occupations to servicewomen in 2016, many have wrongfully concluded that men and women in the military are now equal and therefore women should be required to register with Selective Service. This flawed analysis stemmed from the idea that equal access to jobs is all that is required for equality between men and women.²⁸ While women are slowly integrating into the newly opened military professions, they continue to be deprived of several other rights.

When examining the dilemma of whether women should now be mandated to register, the Supreme Court is likely to revisit *Rostker v. Goldberg*²⁹ and may find that the current policy of exclusively requiring men to register does constitute *de jure* discrimination. This Note does not argue against or refute this narrow legal conclusion.

25. After the statements by Army and Marine Corps chiefs in support of women's registration, the Southern Baptist Conference released a resolution, stating that women in combat "rejects gender-based distinctions established by God in the order of creation" and "subordinates the combat readiness of American troops . . . to the unbiblical social agenda of feminism." David Roach, *Female Military Conscription 'Absurd' but Likely*, BAPTIST PRESS (Feb. 3, 2016), <http://www.bpnews.net/46257/female-military-conscription-absurd-but-likely>; see also Jennifer Marshall et al., *Don't Force America's Daughters Into Combat*, THE NATIONAL INTEREST (May 11, 2016), <http://nationalinterest.org/blog/the-buzz/dont-force-americas-daughters-combat-16148>.

26. Editorial, *Draft Registry For Women? How About For No One?*, L.A. TIMES (Feb. 16, 2016), <http://www.latimes.com/opinion/editorials/la-ed-draft-women-20160216-story.html>. In 2016, several members of the U.S. House of Representatives proposed an unsuccessful bill to repeal the Military Selective Service Act in total. To Repeal the Military Selective Service Act, H.R. 4523, 114th Cong. (2016).

27. Political scientists theorize that when every American family is affected by a policy, they have "skin in the game," and thus are more likely to participate in democratic fora, such as contacting elected representatives, when Congress is contemplating the authorization of war.

28. See Gabrielle Fromer, *With Equal Opportunity Comes Equal Responsibility: The Unconstitutionality of a Male-Only Draft*, 18 GEO. J. GENDER & L. 173 (2017).

29. *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that the practice of requiring only men to register for the draft was constitutional).

This Note seeks to assert that as a normative matter, requiring women to register for Selective Service would be unconstitutional unless other policies and laws are also amended. This Note seeks to present the case that *as-applied* to women, an amended Selective Service Act *requiring*³⁰ all 18-year-olds to register will be unconstitutional at this time. This Note does not intend to convey that women should never be included in a system for mandatory service—quite the contrary. Women should be required to equally shoulder the responsibilities of citizenship, but not at the expense of their due process rights.

Part I of this Note provides background on the history of women's gradual inclusion and service in the military. Part II highlights some of the unique structural barriers and conditions present in the military which affect how women are able to serve. This Note analyzes these structural characteristics as they relate to sexual violence occurring within the military. Sexual violence by no means affects every woman in the military, but it is the phenomenon that has received heightened attention in recent years and best demonstrates the paucity of due process rights experienced by servicewomen.³¹ Part III provides analysis on how women in the military are inequitably deprived of these due process rights in several ways. First, several aspects of the military justice system, including the powers exercised by the Convening Authority and how juries are selected, amount to a lack of procedural due process for women who seek justice after an assault by a fellow servicemember. Second, women are unable to access abortion care through the military healthcare system for unintended pregnancies—a real specter considering the potentiality of rape in the military—and in many instances, the military places significant obstacles in their path to access the

30. It could be argued that women in the military today are serving voluntarily and thus by signing enlistment contracts are agreeing to give up certain rights. However, the mandatory registration of women into the selective service system, potentially leading to a draft, will force non-volunteer women to give up rights that places them far from equal to male draftees. No matter the current likelihood of a draft being instituted, Congress shall only amend the Act when it could pass constitutional muster on an *as-applied* challenge.

31. Sexual assault and harassment affect nearly one in four servicewomen. The 2014 RAND Military Workplace Study estimated that 26% of active-duty women across the military experienced sexual harassment or gender discrimination, while approximately 5% of women were sexually assaulted. When data was disaggregated by Service, men and women in the Air Force experienced substantially lower rates of sexual assault than those in the Army, Navy, and Marine Corps. SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY, VOLUME 2, ESTIMATES FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY xviii–xx (Andrew R. Morral et al. eds., 2016) [hereinafter RAND STUDY].

The disproportionate assault on women in the military and the construct of the military justice system has been repeatedly highlighted in popular television programs. See *House of Cards: Chapter 18* (Netflix broadcast Feb. 14, 2014) and *Alpha House: Bugged* (Amazon Studios broadcast Oct. 24, 2014).

necessary medical procedures in the private sector. Lastly, current Department of Veterans Affairs policies require that women meet a higher burden of proof to access benefits for injuries resulting from sexual violence, resulting in many women veterans being completely denied the benefits. This Note concludes with a call to action to Congress before considering any amendment to the Selective Service Act. The due process violations highlighted in this Note illustrate that given current conditions, laws, and policies, if women were to be drafted from the Selective Service list, there is a high likelihood that the military would deprive them of their constitutional due process rights in several significant and life-changing ways.³²

I. Background on Women's Service in the Military, the Selective Service Act, and Current Jurisprudence

In every military conflict in American history, women have valiantly served this nation. Women disguised themselves as men in order to serve on the frontlines during the Revolutionary and Civil Wars because cultural norms dictated that combat was not suitable for women.³³ During World War II, President Franklin D. Roosevelt proposed drafting women in order to address a shortage of nurses.³⁴ The need was later met by a surge of volunteers and the bill never passed Congress.³⁵ Without a formal role in the military, women primarily served in auxiliary capacities.³⁶ In an effort to free men for combat duty, women primarily served as nurses, clerks, and secretaries.³⁷

On May 14, 1942, President Roosevelt established the Women's Army Corps, making women's status nominally equal to their male counterparts in the military.³⁸ However, due to the combat exclusion, women's

32. A deprivation of rights will not only affect women in the military—it could lead to an immense loss of public confidence in the U.S. military as an institution of our democracy. Maintaining civilian confidence in the military is absolutely necessary for mission effectiveness, especially during wartime—the precise time when the Selective Service and a draft would be most important.

33. The most celebrated of such women is Deborah Sampson Gannett, who donned men's clothing and enlisted in the 4th Massachusetts Regiment in 1782. She was later wounded in her left leg, and her true identity was discovered by her attending doctor, who agreed to keep her secret. See *Deborah Sampson (1760-1827)*, NATIONAL WOMEN'S HISTORY MUSEUM, <https://www.nwhm.org/education-resources/biography/biographies/deborah-sampson/>.

34. *Backgrounder: Women and the Draft*, SELECTIVE SERVICE SYSTEM (Jan. 10, 2017), <https://www.sss.gov/Registration/Women-And-Draft>.

35. *Id.*

36. *World War I & World War II*, THE WOMEN'S MEMORIAL (Apr. 10, 2017), <https://www.womensmemorial.org/history/detail/?s=world-war-i-world-war-ii>.

37. *Id.*

38. Pub. L. No. 78-554, § 1 (1942).

advancement and occupational opportunities would remain limited throughout the decades until the last year of the Obama administration when the exclusion was repealed.³⁹

While the federal government's use of the draft ended in 1973, the Selective Service System was maintained in a standby status and men were still required to register.⁴⁰ A month before the end of the conflict in Vietnam, President Ford terminated the registration requirement for men.⁴¹ However, after the Soviet invasion of Afghanistan in 1979, Washington leaders began to contemplate the need for a rapid expansion of the number of US military personnel.⁴²

In response to the situation in Afghanistan, President Jimmy Carter decided to place the Selective Service back on standby mode.⁴³ Driven by a reporting requirement in the 1980 National Defense Authorization Act,⁴⁴ Carter considered the implications of having women register. In February 1980, President Carter requested registration of men in the Selective Service System and asked Congress for presidential authority to register, classify, and examine women for service.⁴⁵ In announcing his plans, Carter stated,

My decision to register women is a recognition of the reality that both women and men are working members of our society. It confirms what is already obvious throughout our society—that women are now providing all types of skills in every profession. The military should be no exception.

There is no distinction possible, on the basis of ability or performance that would allow me to exclude women from an obligation to register.⁴⁶

39. In January 2013, Secretary of Defense Leon Panetta repealed the Combat Exclusion Policy, which prevented women from assignments below the brigade level, i.e., military units with the primary mission to engage in direct combat. "By opening up more opportunities for people to serve in uniform, we are making our military stronger and we are making America stronger." Leon E. Panetta, U.S. Sec'y of Def., Statement on Women in Service (Jan. 24, 2013).

40. KRISTY N. KAMARCH, CONG. RESEARCH SERV., R44452, THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION: ISSUES FOR CONGRESS (2016).

41. *Id.*

42. *Id.*

43. *Id.*

44. National Defense Authorization Act for Fiscal Year 1980, Pub. L. No. 96-107, § 811 (1979). The National Defense Authorization Act is the annual federal law wherein Congress specifies the budget and expenditures of the Department of Defense.

45. See *Backgrounder: Women and the Draft*, *supra* note 34.

46. EXEC. OFFICE OF THE PRESIDENT, ANNOUNCEMENT REGISTRATION OF WOMEN FOR SELECTIVE SERVICE (1980).

Congress ultimately rejected President Carter's request to expand registration to women.⁴⁷ The conference report for the 1981 defense authorization stated that the Pentagon's policy of excluding women from combat was the primary factor in the result.⁴⁸ Testimony from civilian and military leadership found no "military need" to draft women.⁴⁹

Internal White House memos reveal that President Carter had considered the draft's connection with passage of the Equal Rights Amendment ("ERA"), which he supported.⁵⁰ An assessment at that time revealed that if the ERA was fully ratified, this would force women to register and be inducted with the men.⁵¹ The Carter White House Considered the fact that some women's groups held pacifist beliefs and thus opposed registration in general, but a majority favored a women's requirement to mirror the men's registration.⁵²

James McIntyre, Director of the Office of Management and Budget, advised President Carter that,

A decision to apply an obligation to register equally on men and women would be consistent with Administration support for ERA and other sexual equality issues. . . . At the same time, we could restate our policy to exclude women from combat, while continuing to seek legislative changes to permit increased opportunity and flexibility for women in the military. It would recognize the important role women now play in the military, and reduce the possibility of a successful court challenge to the system.⁵³

47. See *Backgrounder: Women and the Draft*, *supra* note 34.

48. See *Backgrounder: Women and the Draft*, *supra* note 34.

49. See *Backgrounder: Women and the Draft*, *supra* note 34. See also *Department of Defense Authorization for Appropriations for Fiscal Year 1981 Before the S. Subcomm. on Manpower and Personnel*, 96th Cong. 1665 (1980) (statement of Richard Danzig, Principal Deputy Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics) ("Our Department of Defense view is that women would be useful in a mobilization scenario. If women were not available, I do not think the republic would crumble. Men could be used instead.").

50. EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE PRESIDENT, REGISTRATION OF WOMEN FOR SELECTIVE SERVICE (1980). The Equal Rights Amendment was a proposed amendment to the U.S. Constitution designed to guarantee equal rights to all citizens regardless of sex.

51. *Id.*

52. *Id.*

53. EXEC. OFFICE OF THE PRESIDENT, ANNOUNCEMENT REGISTRATION OF WOMEN FOR SELECTIVE SERVICE (1980).

After Congress rejected the President's request to amend the registration system, several men filed a gender discrimination case, *Rostker v. Goldberg*, in federal court.⁵⁴ The men claimed that the Military Selective Service Act constituted gender-discrimination in that it violated their right to due process under the Fifth Amendment.⁵⁵ In the *Rostker* case, the Court upheld the constitutionality of the Act's exclusion of women.⁵⁶ The Court primarily based its decision on the Pentagon's policy which excluded women from combat.⁵⁷ The Court reasoned that as long as job opportunities were determined by sex, it was constitutionally permissible for draft registration requirements to differ by sex.⁵⁸ The opinion also reiterated the Court's preference for deferring to Congress, since the policy fell squarely in the legislature's constitutional authority under Article I, Section 8.⁵⁹

In 1994, President Bill Clinton tasked his Secretary of Defense to update mobilization requirements for Selective Service and to reassess the arguments for and against excluding women from mobilization requirements.⁶⁰ The Pentagon maintained that because of the Combat Exclusion Policy and the *Rostker* decision, the exclusion was justified.⁶¹ The Pentagon, however, highlighted that women comprised sixteen percent of recruits and that "the success of the military will increasingly depend upon the participation of women."⁶²

In January 2013, Secretary of Defense Leon Panetta announced his decision to repeal the Combat Exclusion Policy, the main impetus for the *Rostker* decision.⁶³ In February 2013, Representative Charles Rangel (D-NY 13th District) introduced legislation to require women to register for the draft.⁶⁴ The resolution was referred to the Subcommittee on Military Personnel, but never received a floor vote.⁶⁵

54. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

55. *Rostker*, 453 U.S. at 59.

56. *Id.* at 83.

57. *Id.* at 77 ("The existence of combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration.").

58. *Id.*

59. *Id.* at 65 ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.") (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1980)).

60. *Backgrounder: Women and the Draft*, *supra* note 34.

61. *Backgrounder: Women and the Draft*, *supra* note 34.

62. *Backgrounder: Women and the Draft*, *supra* note 34.

63. Leon E. Panetta, U.S. Sec'y of Def., Statement on Women in Service (Jan. 24, 2013).

64. H.R. 747, 113th Cong., 1st Sess. (2013).

65. *Id.*

After Secretary Panetta's announcement of the repeal, a group of men filed a lawsuit alleging sex discrimination under the Selective Service policy.⁶⁶ The District Court ruled that the plaintiffs did not yet have a ripe complaint, as the Pentagon was just beginning a multiyear process of formally integrating women.⁶⁷ On Appeal, the Ninth Circuit declined to rule on the merits, as women were just beginning to gain access to combat job training, but did recognize that the claims were "definite and concrete, not hypothetical or abstract," indicating the court's inclination to hear a claim that may potentially overturn *Rostker's* holding.⁶⁸

Today, all combat positions are open to women. At least three women Army officers have graduated from Ranger School, one woman has graduated the Marine Corps Infantry Officer Course, and at least one woman has attempted the SEAL selection process.⁶⁹ Despite these advancements, women are still a minority within each military service.⁷⁰ Overall, women comprise approximately 15% of all active duty troops.⁷¹ In the Air Force, Army, and Navy, women's participation numbers are in the double digits, however women have never comprised more than 7% of the Marine Corps.⁷² Servicewomen have never accounted for more than 20% of any of the military services—the number generally recognized as the point when women have critical mass or agency within a system.⁷³ While the thought of a potential draft of women may be appealing to increase the number of women in the military, the federal government must first remove a number of other barriers, before women should be required to serve. Part II of this Note analyzes a number of these barriers to justice.

66. National Coal. for Men v. Selective Serv. Sys., 640 F. App'x 664 (2016).

67. *Id.* at 665.

68. *Id.* at 666. In addition to affecting the possibility of having to enter the military, the registration requirement directly affects the ability to access federal student loans and the ability for noncitizen men to become U.S. permanent residents.

A second case is currently being challenged by a young woman plaintiff seeking to register. *Kyle v. Selective Service System*, No. 15-cv-05193 (D.N.J. filed July 3, 2015).

69. The Army's Ranger School is a combat leadership course orientated toward small-unit tactics. The Navy's SEAL (Sea, Air, Land) program includes multiple stages of training before recruits are designated as special warfare operators. Both training programs are considered elite and traditionally have had a low percentage of recruits graduate the programs.

70. DEPARTMENT OF DEFENSE, POPULATION REPRESENTATION IN THE MILITARY SERVICES: FISCAL YEAR 2014 SUMMARY REPORT (2015).

71. *Id.*

72. *Id.*

73. JAY NEWTON-SMALL, BROAD INFLUENCE, HOW WOMEN ARE CHANGING THE WAY AMERICA WORKS 6 (2016) ("[I]f numbers of women were lower than 20 percent, women's voices weren't heard: either they didn't speak up or men didn't listen.").

II. Harms from Within: Women's Experiences While in Uniform

Should women be drafted into the military, they would be exposed to dangers at a rate far exceeding what male draftees would have to endure. While most of America worries about the dangers of combat, the reality in the military is that women often have to watch for dangers from within their own unit. Even when women complete their enlistment without experiencing assault, they likely worried about the potential for assault and had to console friends who experienced such traumas. Many servicewomen who experience harassment and assault find little relief in the military justice system, and often face retaliation for reporting their experiences. The Pentagon has repelled Congressional attempts at procedural reform and the civilian courts have largely refused to question Pentagon doctrine on personnel matters.

A. Sexual Harassment and Sexual Assault are Ongoing Problems Affecting Women in the Military

The incidence of sexual assault against servicewomen has been estimated to be sixteen times the rate of sexual assault among eighteen-year-old to thirty-four-year-old women in the general American population.⁷⁴ As mandated by Congress, the Pentagon's Sexual Assault Prevention and Response Office ("SAPRO") produces an annual report on the crime of sexual assault within the military.⁷⁵ The current epidemic of sexual assault exploded into the national dialogue with the release of the FY2012 Workplace and Gender Relations Survey of Active Duty Members in the spring of 2013.⁷⁶ The survey estimated that 26,000 active duty servicemembers were victims of unwanted sexual contact and of those, 89%

74. Michael Planty et al., *FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010* (Bureau of Justice Statistics, rev. May 31, 2016). The civilian rate of incidence of sexual assault between 2006-2010 was estimated to be 0.37%. In 2012, the Department of Defense noted that 6.1% of active duty women *reported* unwanted sexual contact. Most (67%) of experiences of unwanted sexual contact occurred on military installations during the work day. The large majority of offenders (94%) are male. Survivors reported harassment after the unwanted touching (30%) and stalking by the offender (8%). See U.S. DEPARTMENT OF DEFENSE, *2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS* (2013).

75. The Ike Skelton National Defense Authorization Act for Fiscal Year 2011 requires that the Department of Defense provide Congress with an annual report on sexual assaults involving members of the Armed Forces. Pub. L. No. 111-383, §1631 (2010).

76. U.S. DEP'T OF DEFENSE, *2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS* (2013) [hereinafter *WORKPLACE AND GENDER RELATIONS SURVEY*]. The total sample for the survey consisted of 108,478 individuals in all four military services who had at least six months of service and were below flag rank; 22,792 servicemembers responded to the survey.

chose not to file a report.⁷⁷ Congress initially questioned the validity of the study, but then learned of the pervasive nature of the crime from numerous survivors testifying on Capitol Hill that year—the first of such hearings in nearly a decade.⁷⁸

Despite the high level of attention in 2013, sexual violence in the military remains pervasive within each military service and at the service academies—the U.S. government’s elite training grounds for tomorrow’s officers.⁷⁹ In several incidents over the years, the public has come to learn that drill instructors have assaulted trainees in basic training just as they enter the military.⁸⁰ After the shock and backlash from the FY2012 survey, the Department of Defense selected the RAND Corporation to provide an independent evaluation of sexual assault, sexual harassment, and gender discrimination within the military.⁸¹ The RAND Military Workplace Study found that between 18,200 and 22,400 active duty servicemembers

77. WORKPLACE AND GENDER RELATIONS SURVEY, *supra* note 76. Some have questioned whether the same size and composition of survey takers is sufficient to make an adequate extrapolation for the entire Department of Defense. While the validity of the sampling technique is not the subject of this paper, the statistics have been widely reported and are relied on by many U.S. government bodies. Cf. Lindsay Rodman, *Fostering Constructive Dialogue on Military Sexual Assault*, 69 JOINT FORCES QUARTERLY, 2nd Quarter, 2013, at 25, 26 (“The sample was clearly weighted toward female responses, and the definition of *unwanted sexual contact* did not align at all with the colloquial understanding or any statutory or legal definition of sexual assault.”).

78. Jennifer Steinhauer, *Veterans Testify on Rapes and Scant Hope of Justice*, N.Y. TIMES (Mar. 13, 2013), <http://www.nytimes.com/2013/03/14/us/politics/veterans-testify-on-rapes-and-scant-hope-of-justice.html>.

79. For current information on the incidence rates at the service academies, see U.S. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES FOR ACADEMIC PROGRAM YEAR 2015-2016 (2017) (“Survey responses indicate that 48 percent of female cadets and midshipmen and 12 percent of male cadets and midshipmen experienced sexual harassment in the past year Fewer cadets and midshipmen chose to make sexual harassment complaints this year than last year.”).

80. See Dan Lamothe, *Army Suspends Drill Sergeants at Fort Benning Amid Allegation of Sexual Assault*, WASH. POST (Aug. 23, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/08/23/army-suspends-drill-sergeants-at-fort-benning-amid-allegations-of-sexual-assault-against-trainees>.

81. See RAND STUDY, *supra* note 31.

The RAND Corporation is a federally funded research and development center (“FFRDC”) contracted by the Department of Defense (“DoD”) to conduct research and analysis on a number of topics. For this study, DoD asked RAND to conduct an independent assessment of sexual assault, sexual harassment, and gender discrimination in the military. The study focused on collecting data on crimes under the Uniform Code of Military Justice and violations of equal opportunity laws and regulations. The study used criteria to measure violations drawn directly from Article 80 and 120 crimes of the UCMJ and from DoD Directive 1350.2. The sample size for the 2014 survey was 560,000 active duty servicemembers.

experienced a sexual assault in 2014—1% of men and 4.9% of women.⁸² Most survivors experienced more than two instances of assault during the study year.⁸³ For both men and women, junior enlisted members (E1-E4) experience the highest rate of assault; 1.4% for junior enlisted men and 7.3% for junior enlisted women.⁸⁴ The vast majority of offenders (85%) are serving in the military, and of those military offenders, over half are of a higher rank than the survivor.⁸⁵ Approximately 90% percent of all sexual assaults occurred in a military setting or were committed by other military members.⁸⁶ Should women be drafted into the military, they will more likely than not enter the service as junior enlisted members—the group statistically most at risk for experiencing assault.

The RAND study found that only 21% of women indicated that they filed an official report about the sexual assault, and for those who reported it, over half experienced social or professional retaliation.⁸⁷ Over one third of assault survivors stated that the event made them want to end their military career.⁸⁸

Servicewomen who first experience harassment are sixteen times more likely to experience an assault.⁸⁹ Twenty-six percent of women reported experiencing sexual harassment or gender discrimination in the workplace—nearly five times the rate as experienced by men—making the military an especially hostile work environment for women.⁹⁰ Gender discrimination affected approximately one in eight servicewomen, while only affecting one in sixty servicemen.⁹¹ Overall, those who experienced sexual harassment or gender discrimination indicated that their supervisor or unit leader was amongst those who engaged in the violation.⁹² Those who reported the issue were often advised to drop the report or the superiors who were alerted took no action.⁹³ Within the military, the presence of sexual harassment in the

82. RAND STUDY, *supra* note 31, at 9-10. One million three-hundred thousand servicemembers served on active duty in 2014, resulting in an estimate that 1.5% of the overall active duty force experienced sexual assault.

83. RAND STUDY, *supra* note 31, at xviii.

84. RAND STUDY, *supra* note 31, at xix.

85. RAND STUDY, *supra* note 31, at 22.

86. RAND STUDY, *supra* note 31, at 22.

87. RAND STUDY, *supra* note 31, at 27.

88. RAND STUDY, *supra* note 31, at 25.

89. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2016 (2017).

90. RAND STUDY, *supra* note 31, at xx.

91. RAND STUDY, *supra* note 31, at 33.

92. RAND STUDY, *supra* note 31, at 48.

93. RAND STUDY, *supra* note 31, at 50.

workforce has been normalized and is seen as “very common.”⁹⁴ Similarly, discrimination against women is viewed as “very common.”⁹⁵ The presence of systemic harassment against women affects retention rates—at least a quarter of servicewomen who have endured harassment are “very unlikely” to stay in the military beyond their enlistment term.⁹⁶

With the proliferation of social media, servicewomen have also become targets of online harassment from their fellow servicemembers. In March 2017, the Center for Investigative Reporting uncovered a secret Facebook group, entitled “Marines United,” which was used to solicit and share salacious photos of servicewomen among its 30,000 members.⁹⁷ In the online posts, members identified the women in the photos with their full name, rank, and military duty station.⁹⁸ Some members posted direct threats of rape, and others began stalking women in order to obtain more photos.⁹⁹ Marine Corps leadership was alerted to this particular instance of online harassment in January 2017, but was slow to react.¹⁰⁰ Several years prior, the Corps’ leadership was apprised of online harassment against women, but refused to act;¹⁰¹ in some instances, leadership labeled the behavior “an IT [information technology] issue.”¹⁰² In the instances, where the Marine Corps failed to take action, thousands of men and women succeeded in persuading Facebook to take down the pages promoting sexual violence.¹⁰³ For some servicewomen, the online harassment has upended their career plans. “Even

94. RAND STUDY, *supra* note 31, at 57.

95. RAND STUDY, *supra* note 31, at 56.

96. RAND STUDY, *supra* note 31, at 49.

97. Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL (Mar. 4, 2017), <https://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/>.

98. *Id.*

99. *Id.*

100. *Id.*

101. Brian Adam Jones, *The Sexist Facebook Movement the Marine Corps Can’t Stop*, TASK AND PURPOSE (Aug. 20, 2014), <http://taskandpurpose.com/sexist-facebook-movement-marine-corps-cant-stop/> (describing content posted online by servicemembers, such as a meme which read “Roses are red, violets are blue, be my fucking Valentine, or I’ll rape you.”).

102. Joanna Rothkopf, *Rep. Jackie Speier On One Change That Would Truly Help Combat Sexual Assault in the Military*, JEZEBEL (Apr. 28, 2017), <http://theslot.jezebel.com/rep-jackie-speier-on-one-change-that-would-truly-help-1794742877>.

103. Shelly Burgoyne, *Why Haven’t the Marines Shown Stronger Support for Women?*, N.Y. TIMES (June 3, 2013), <https://atwar.blogs.nytimes.com/2013/06/03/why-hasnt-the-marines-show-ed-stronger-support-for-women/> (“Those men and women managed to do in two weeks what the Marine Corps could not, or did not have any interest in doing, for three years.”).

if I could, I'm never reenlisting. Being sexually harassed online ruined the Marine Corps for me, and the experience.”¹⁰⁴

B. The Military Justice System Provides Too Few Remedies, Rarely Results in Just Outcomes for Survivors of Assault, and is Prone to Abuse

We would never expect somebody who is getting medical treatment to ask your commander what kind of treatment they should get, or give commanders the authority to tell them what kind of medical treatment they get, because it's just ludicrous. Yet when it comes to our area of expertise, the justice system, we defer to commanders in making these decisions. It makes no sense.¹⁰⁵

Unlike the civilian judiciary, the military justice system derives its authority from Congress and is administered by the executive branch.¹⁰⁶ The military justice system is a “distinct body of law and procedure that co-exists with Article III courts.”¹⁰⁷ The Uniform Code of Military Justice (“UCMJ”), a corpus of law separate from state and federal laws, governs all members of the military.¹⁰⁸ The military court-martial has a dual role of administering justice and maintaining discipline.¹⁰⁹ In maintaining discipline, courts-martial seek to preserve the rank structure and system of authority within the military.¹¹⁰ However, this dual role has long been criticized by some of the

104. Thomas Gibbons-Neff, *I'm never reenlisting': Marine Corps rocked by nude-photo scandal*, WASH. POST (Mar. 5, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/03/05/im-never-reenlisting-marine-corps-rocked-by-nude-photo-scandal>.

105. Zoe Carpenter, *Military Stifling Supporter for Sexual Assault Reforms, High-Ranking Officer Says*, THE NATION (Nov. 15, 2013), <https://www.thenation.com/article/military-stifling-support-sexual-assault-reforms-high-ranking-officer-says/> (reporting that a judge advocate general commenting on how commanders' lack of legal knowledge often leaves both victims and the accused vulnerable).

106. U.S. CONST. art. I, § 8. Military courts derive their authority from Article I, from which Congress has the power “to make rules for the government and regulation of the land and naval forces.”

107. Elizabeth L. Hillman, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 888 (1999).

108. Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801 (2016). The UCMJ is accompanied by the Rules for Courts-Martial (analogous to the Federal Rules of Criminal Procedure) and the Military Rules of Evidence (analogous to the Federal Rules of Evidence).

109. Peter L. Colt, *“Military Due Process” and the Selection of Court-Martial Panels: An Illogical Gap in Fundamental Protection*, 2 HASTINGS CONST. L.Q. 547, 551 n.22 (1975).

110. John Michael Haggerty, *Judicial Review of Military Administrative Decisions*, 3 HASTINGS CONST. L.Q. 171, 188 (1976).

military's most well-known leaders.¹¹¹ For the majority of victims and survivors of sexual assault in the military, this system of justice and discipline has not delivered adequate remedies.¹¹²

Military survivors of sexual assault have the option of filing a restricted, confidential report with either the Sexual Assault Response Coordinator ("SARC") for their command, a victim advocate, or with their healthcare provider.¹¹³ Filing a restricted report ensures the survivor has access to healthcare, advocacy services, and legal advice without notifying their command or law enforcement officials.¹¹⁴ A restricted report will not lead to an investigation of the assailant, nor can a protective order be issued; likely, the survivor will remain in their same unit and have contact with the assailant.¹¹⁵

Alternatively, sexual assault survivors may file an unrestricted report with the military, which alerts the survivor's military command and the military criminal investigative organization ("MCIO").¹¹⁶ While the MCIO collects evidence during the investigation, it is the commander who has greatest control over the disposition of the criminal case in their role as the Convening Authority.¹¹⁷ As convening authorities, commanders are

111. See William Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 8 (1971) ("A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.").

112. Molly O'Toole, *Military Sexual Assault Epidemic Continues to Claim Victims As Defense Department Fails Females*, THE WORLD POST (May 20, 2013), http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html.

113. *Restricted Reporting*, DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, (Apr. 5, 2017), <http://sapr.mil/index.php/restricted-reporting>.

114. *Id.* However, the Commander is notified that an incident occurred, with no victim details, ostensibly so he or she can better understand their command climate.

115. *Id.* However, if a victim confides in a friend about assault, "that friend is obligated under military order to disclose the communication to the command," and therefore the report would convert to an unrestricted report. Rodman, *supra* note 77, at 29.

116. Rodman, *supra* note 77, at 29. This would be the Naval Criminal Investigative Service, Army Criminal Investigation Command, or Air Force Office of Special Investigations.

117. DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 1-8 (Matthew Bender & Co., 9th ed. 2016).

The Convening Authority also has the power to select the jurors, known as court-members. See 10 U.S.C. § 825 (The UCMJ provides a list of qualifications for applicable court-members, namely that they not be junior in rank or grade to the accused and the default is that the members are commissioned officers, unless the accused has requested that enlisted members be appointed). See also *United States v. Smith*, 27 M.J. 242, 248 (1988) ("When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.").

empowered with complete prosecutorial discretion.¹¹⁸ Commanders may refer a case to a court-martial, take nonpunitive measures and enact nonjudicial punishment, or take no action at all.¹¹⁹ After a case proceeds through a court-martial and a verdict is delivered, the Convening Authority has the broad power to “suspend all or a portion of the adjudged sentence, a power not possessed by either the Court of Criminal Appeals or the Court of Appeals for the Armed Forces.”¹²⁰ This level of power has been abused in the past, affecting both the ability of victims to gain a sense of justice and the willingness of other victims to come forward.

In one of the more infamous instances, in February 2013, the commander of the Third Air Force, Lieutenant General Craig Franklin, set aside the sexual assault conviction for Lieutenant Colonel James Wilkerson, a fighter pilot stationed in Italy.¹²¹ The perceived bias was very clear to any onlooker—both men were fighter pilots and both had served in the 31st Fighter Wing.¹²² Wilkerson was released on clemency after Franklin’s decision, and soon thereafter promoted to colonel and returned to “full-duty status.”¹²³ In response to public outcry after the Wilkerson case, Congress amended the UCMJ to restrict the convening authority’s power to set aside findings of guilt.¹²⁴

118. SCHLUETER, *supra* note 117. The California National Guard recently removed prosecutorial discretion from commanders. Tony Kovaleski, *CA Military Sexual Assault Bill Becomes Law*, NBC BAY AREA (Aug. 21, 2014), <http://www.nbcbayarea.com/investigations/CA-Military-Sexual-Assault-Bill-Becomes-Law-272241931.html>. See also S.B. 1422, 2013-2014 Leg., Reg. Sess. (Ca. 2014).

119. SCHLUETER, *supra* note 117. Nonpunitive punishment can take the form of written reprimands, transfer in assignment, administrative reduction in rank, administrative discharge, or extra training. Nonjudicial punishment, commonly known as NJP, is outlined in Article 15 of the Uniform Code of Military Justice. See 10 U.S.C. § 815.

Before 2014, the Manual for Courts-Martial did not provide mandatory minimum sentencing for sex crimes. Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 648 (2014).

120. DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 17-9 (Matthew Bender & Co., 9th ed. 2016).

121. Nancy Montgomery, *Case dismissed against Aviano IG convicted of sexual assault*, STARS AND STRIPES (Feb. 27, 2013), <https://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797>.

122. *Id.* “Franklin’s disposition of the case came after a uniquely military post-trial review process in which convicted servicemembers petition the convening authority for clemency. Those petitions contain any mitigating factors and letters from supporters. Wilkerson’s 20-year career had provided him with many supporters, especially within the fighter pilot community.”

123. Montgomery, *supra* note 121. Wilkerson’s accuser was stunned by the dismissal. “She said she thought that the reversal would have a negative impact on people’s willingness to report assaults and that it “smacks of cronyism, a good old boys network among the elite of the Air Force.”

124. National Defense Authorization Act for 2014, PUB. L. NO. 133-66, § 1702(b)(revising of Article 60, U.C.M.J.).

In several instances, commanders have abused their prosecutorial authority, typically to benefit the alleged perpetrator of the crime. For example, in 2014 the former general in charge of U.S. Army forces in Japan was removed from his post for failing to take action on a credible claim of sexual assault.¹²⁵ The general received the report of allegations against a subordinate colonel, whom he had known for two decades.¹²⁶ Disbelieving the allegations, the general waited months to pass the report onto criminal investigators.¹²⁷ Rather than provide a formal reprimand to the general for this obstruction of justice, Army leadership removed him from his command and reassigned him as a director of policy analysis and evaluation for the Army Deputy Chief of Staff in the Pentagon.¹²⁸ The Army only took action on the general's mishandling of the assault report when the victim herself reported it to the Army inspector general and to a Japan-based military reporter.¹²⁹

To further erode trust in the system, several high-profile incidents involving Sexual Assault Response Coordinators have occurred—the very organization which is supposed to be a refuge for assault survivors. In 2013, the colonel who led the Air Force's Sexual Assault Prevention and Response Office in the Pentagon was arrested and charged with sexual battery in northern Virginia.¹³⁰ Late one night, the colonel, who was drunk at the time, allegedly approached a woman in a parking lot and “grabbed her breasts and buttocks.”¹³¹ The incident made national headlines.

On at least one occasion, the Pentagon's leadership has misled Congress on its ability to prosecute offenders within the military. During a hearing in front of the Senate Armed Services Committee in July 2013, then-Vice Chairman of the Joint Chiefs of Staff Admiral James Winnefeld testified that

125. Craig Whitlock, *Army general disciplined over mishandling of sexual-assault case in Japan*, WASH. POST (Apr. 22, 2014), https://www.washingtonpost.com/world/nationalsecurity/army-general-disciplined-over-mishandling-of-sexual-assault-case-in-japan/2014/04/22/6339f268-ca2b-11e3-a75e-463587891b57_story.html (“Army generals who have gotten in trouble for misconduct or inappropriate behavior toward women have often remained in the ranks for a long time.”).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Luis Martinez, *Air Force's Sexual Assault Prevention Officer Charged with Sexual Battery*, ABC NEWS (May 6, 2013), <http://abcnews.go.com/Politics/air-forces-sexual-assault-prevention-officer-charged-sexual/story?id=19120383> (“If these allegations are true, this is one more example on a long list of how fundamentally broken the military justice system and culture are. The idea that the head of the Air Force's Sexual Assault Prevention and Response Office (SAPRO) could be arrested for sexual assault indicates the depth of the problem. It's outrageous.”).

131. *Id.*

the military was more effective in prosecuting offenders than civilian prosecutors.¹³²

The Army has looked back over the last 2 years and has found 35 cases where a civilian district attorney refused to take a sexual assault case. The chain of command in the military insisted that the case be taken inside the military chain of command. Of the 35 complete, 25 resulted in a court martial conviction. That is a 71 percent conviction rate. The civilian rate is around 18 to 22 percent.

If the Army had not taken those 49 cases and the 35 where we have achieved a conviction, those people would be walking the street right now. I worry that if we turn this over to somebody else, whether it is a civilian DA or a non-entity in the military, that they are going to make the same kind of decisions that those civilian prosecutors made. I worry that we are going to have fewer prosecutions if we take it outside the chain of command.¹³³

Admiral Winnefeld made the above assertion¹³⁴ at the same time that Congress was considering Senator Kirsten Gillibrand's (D-NY) Military Justice Improvement Act ("MJIA").¹³⁵ Gillibrand's bill would require that qualified, independent military prosecutors determine whether to proceed with a court martial, rather than be determined by the accused member's commanding officer, who in most cases, has a personal and working relationship with the accused.¹³⁶ Gillibrand's impetus for the bill was based on victims' dissatisfaction with how the chain of command handled allegations, and their fear of retaliation for seeking justice.¹³⁷ Admiral

132. *Nominations Before the Senate Armed Services Committee*, 113th Cong. 793 (2013) (statement of Admiral James Winnefeld).

133. *Nominations Before the Senate Armed Services Committee*, *supra* note 132.

134. Several members of Congress relied on and repeated Admiral Winnefeld's claim that military commanders were tougher on sexual assault than civilian or military prosecutors. Senators Claire McCaskill (D-MO), Kelly Ayotte (R-NH), Carl Levin (D-MI), Jim Inhofe (R-OK), and Congresswoman Loretta Sanchez (D-CA, 46th) all quoted Winnefeld's statements in public comments. *See, e.g.*, DEBUNKED: FACT-CHECKING THE PENTAGON'S CLAIMS REGARDING MILITARY JUSTICE A6-A9 (Protect Our Defenders, 2016).

135. Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013) (enacting legislation to reform procedures for determinations to proceed to trial by court-martial for certain offenses under the UCMJ).

136. *Id.*

137. THE INVISIBLE WAR (Chain Camera Pictures 2012). Gillibrand said the bill was part inspired by the award-winning documentary film "The Invisible War." The film featured interviews with veterans of all military services recounting the events surrounding their assaults,

Winnefeld's comments seem to have been intended to dissuade the Senate committee from fully considering MJIA.¹³⁸

In 2016, the veterans service organization Protect Our Defenders released a report that cast doubt upon Admiral Winnefeld's assertions to the Senate committee just three years earlier.¹³⁹ From documents obtained through Freedom of Information Act requests, Protect Our Defenders, along with the Associated Press, was able to determine that the Pentagon relied on faulty case summaries and therefore the statistics presented to Congress were not only exaggerated, but also false.¹⁴⁰ There was not a single instance when a military commander requested legal jurisdiction, while civil prosecutors and/or military attorneys refused to take the case.¹⁴¹ Pentagon documentation often recorded that civilian prosecutors declined a case, when in actuality, the case was transferred to the military based on jurisdictional issues, such as the accused being deployed to Iraq.¹⁴² Ultimately, Admiral Winnefeld grossly exaggerated the conviction rates within the military; he claimed that the Marine Corps and Army achieved successful convictions 57% and 81% respectively, when in reality the rates were closer to 33% and 52%.¹⁴³ The investigation also found that sentencing decisions were often arbitrary and unpredictable, likely reducing the deterrent effect on would-be offenders.¹⁴⁴ Protect Our Defenders also uncovered that the Pentagon fails to track criminal cases involving servicemembers in the civilian justice system, allowing potential criminals to serve in the military undetected.¹⁴⁵

The proliferation of false statistics concerning the Pentagon's track record of prosecution likely paved the way for the defeat of MJIA. In June 2013, Senator Carl Levin, Chairman of the Armed Services Committee, led

the lack of recourse to an impartial justice system, reprisals against survivors, the lack of emotional and physical care, and the unhindered advance of perpetrators' careers.

138. Richard Lardner, *Pentagon misled lawmakers on military sexual assault cases*, ASSOCIATED PRESS, Apr. 18, 2016, <http://bigstory.ap.org/article/23aed8a571f64a9d9c81271f0c6ae2fa/pentagon-misled-lawmakers-military-sexual-assault-cases>.

139. *Id.*

140. *Id.*

141. PROTECT OUR DEFENDERS, *DEBUNKED: FACT-CHECKING THE PENTAGON'S CLAIMS REGARDING MILITARY JUSTICE 3* (2016).

142. *Id.*

143. *Id.*

144. *Id.* at 4 ("Nearly 25% convicted offenders received a year or less of jail time. If sexual predators know that even a rape conviction does not guarantee substantial punishment, the justice system will fail to deter such criminal conduct.").

145. *Id.* See also *id.* at 16. The investigation found a case of an Air Force Chief Master Sergeant who received a civilian conviction related to domestic violence. While the Department of Defense failed to maintain a full tracking of civilian criminal action against servicemembers, the Department expected the Chief to reveal his conviction at every new duty station.

the defeat of Gillibrand's bill, but added provisions to the National Defense Authorization Act for FY 2014 which made retaliation by military leaders a crime and required review by the civilian service chief¹⁴⁶ if a commander declined to prosecute a recommended case.¹⁴⁷ The *New York Times* published an editorial shortly thereafter chastising Senator Levin.¹⁴⁸

C. When Servicewomen File a Complaint, They Endure Social and Professional Retaliation

Why should I be discharged because I was raped? I did what I was supposed to do. Had I never come forward I truly believe I would still be in the Air Force.¹⁴⁹

All too often, survivors of assault and harassment in the military are demeaned, demoted, disciplined, and discharged after coming forward with allegations. Only one in four victims report their assault in the military, due to an often cited fear of retaliation from the perpetrator, the perpetrator's friends, or professional retaliation.¹⁵⁰ In certain instances, victims who came forward to report their assault were cited for "collateral misconduct," such as underage drinking or adultery; fear of punishment for these infractions deters victims from reporting.¹⁵¹ In years past, seeing a mental health provider after an assault was noted in personnel files, and had a negative impact on renewals of security clearances.¹⁵² A servicewoman who was

146. The civilian service chiefs are the Secretary of the Navy, Secretary of the Army, and Secretary of the Air Force.

147. Editorial, *A Failure on Military Sexual Assaults*, N.Y. TIMES (June 12, 2013), <http://www.nytimes.com/2013/06/13/opinion/a-failure-on-military-sexual-assaults.html>.

("Cracking down on retaliation, though necessary, does not address the low prosecution rate or the sense among many victims that their claims, especially against someone higher in rank, will not be believed. It is distressing that two decades of scandals could not persuade Mr. Levin to budge from his decision to support the military brass.")

148. *Id.*

149. Statement by Airman First Class Juliet Simmons in November 2002. HUMAN RIGHTS WATCH, *BOOTED: LACK OF RECOURSE FOR WRONGFULLY DISCHARGED US MILITARY RAPE SURVIVORS 1* (2016) [hereinafter *BOOTED*].

150. HUMAN RIGHTS WATCH, *EMBATTLED: RETALIATION AGAINST SEXUAL ASSAULT SURVIVORS IN THE US MILITARY 3* (2015) [hereinafter *EMBATTLED*].

151. *Id.* at 5.

152. Larry Abramson, *Can Counseling Complicate Your Security Clearance?*, NPR (Sept. 11, 2012), <http://www.npr.org/2012/09/11/160898774/question-21-a-matter-of-national-security>. In 2013, the Office of Personnel Management made changes to Question 21 on Standard Form 86 (used for security clearance applications) to ensure that sexual assault victims were not unfairly deprived of the ability to obtain national security positions. OFF. OF PERS. MGMT., REVISED INSTRUCTIONS FOR COMPLETING QUESTION 21, STANDARD FORM 86, "QUESTIONNAIRE FOR

assaulted while deployed to Djibouti in 2003-2004 reported that, “some things in the military records are career enders It doesn’t matter what it’s for, they see that you’ve been in there for mental health and they’ll re-evaluate you—are you really stable enough to be a soldier?”¹⁵³ Assault survivors have reported that their military commands denied them professional opportunities, such as training, deployments, and promotions, after reporting their assault.¹⁵⁴

Women survivors of assault are at an increased risk of developing post-traumatic stress disorder (“PTSD”). Over forty-five percent of women victims of sexual assault experience PTSD—exceeding the thirty-eight percent of men who experience PTSD following combat exposure.¹⁵⁵ In many cases, women experiencing PTSD symptoms¹⁵⁶ after their attack were misdiagnosed with a personality disorder, kicked out of the military, and discharged with no benefits.¹⁵⁷

Upgrading wrongful discharges can be a new battle in and of itself, which induces the victims to relive their trauma every day. Military sexual trauma survivors who receive ‘bad paper’ discharges have no access to benefits such as education assistance, pension, vocational rehabilitation, and

NATIONAL SECURITY POSITIONS,” (Apr. 19, 2013); *see also* Pam Zubeck, *Sexual Assault Victims Say Air Force Academy Uses Mental Health Counseling to Get Rid of Them*, COLORADO SPRINGS INDEPENDENT (July 19, 2017), <https://www.csindy.com/coloradosprings/sexual-assault-victims-say-air-force-academy-uses-mental-health-counseling-to-get-rid-of-them/Content?oid=6402040>.

153. Bridget Burns et al., *Military Sexual Trauma Among US Servicewomen During Deployment: A Qualitative Study*, 104 AM. J. OF PUB. HEALTH 345, 347 (2014).

154. EMBATTLED, *supra* note 150, at 6.

155. *Military Sexual Trauma: Issues in Caring for Veterans*, U.S. DEP. OF VETERANS AFF. (Mar. 30, 2017), <https://www.ptsd.va.gov/professional/trauma/war/military-sexual-trauma.asp>.

156. EMBATTLED, *supra* note 150, at 7 (stating that symptoms may manifest as “an inability to control reflexive behavior, irritability, or attraction to high risk behavior.”).

157. EMBATTLED, *supra* note 150, at 6. *See also* Mark Thompson, *Military Sexual Assault Victims Discharged After Filing Complaints*, TIME (May 18, 2016), <http://time.com/4340321/sexual-assault-military-discharge-women/> (“The Army used her acknowledgement that she should have been more careful in detailing what happened to generate a letter of reprimand, which it used to boot her out with a general discharge for “unacceptable conduct,” after her unit returned to its Texas base in 2010.”).

Veterans discharged with “bad paper” (any discharge that is less than honorable) are at risk for higher rates of suicide, homelessness, and imprisonment. *See* BOOTED, *supra* note 149, at 4; *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-260, ACTIONS NEEDED TO ENSURE POST-TRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY ARE CONSIDERED IN MISCONDUCT SEPARATIONS (2017) (“GAO’s analysis of Department of Defense (DOD) data show that 62%, or 57,141 of the 91,764 servicemembers separated for misconduct from fiscal years 2011 through 2015 had been diagnosed within the 2 years prior to separation with post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), or certain other conditions that could be associated with misconduct.”).

home loans.¹⁵⁸ Many civilian employers ask about a veteran's discharge status, potentially complicating an assault survivor's ability to find employment and reintegrate into the civilian world if they received a less than honorable discharge.¹⁵⁹ Veterans' only relief is to seek an adjustment in their discharge through an appeal to the military services' Discharge Review Board or the Board for Correction of Military Records.¹⁶⁰ However, in the past, the Boards have rejected over ninety percent of those applying for discharge upgrades.¹⁶¹ Veterans often submit hundreds of supporting documents for review, which are often overlooked in the few scant minutes that the reviewing officials spend on each application.¹⁶² There are rarely hearings on the cases and there is no oversight from an administrative law judge.¹⁶³

D. The Judiciary Refuses to Provide Oversight of the Military Justice System

Outside of criminal proceedings, survivors of military sexual trauma have no civil remedy available to them. In 1950, the Supreme Court established the *Feres* Doctrine, which prevents servicemembers from suing the government under the Federal Tort Claims Act¹⁶⁴ based on injuries that "arise out of or are in the course of activity incident to [military] service."¹⁶⁵ Courts have stretched the meaning of the doctrine to prevent victims of military sexual violence from seeking damages from the federal government.¹⁶⁶ Judges have even cited *Feres* to block claims under Title VII of the Civil Rights Act—the primary mechanism to hold employers accountable for discrimination based on race, color, religion, sex, and national origin.¹⁶⁷

Servicewomen have unsuccessfully tried to establish causes of action against the Secretary of Defense for official acts and omissions contributing

158. *BOOTED*, *supra* note 149, at 5.

159. *Hiring Veterans*, U.S. DEPARTMENT OF LABOR (Apr. 7, 2017), <https://www.dol.gov/vets/ahaw/recruit.htm> (only federal agencies *should* ask questions related to military discharge).

160. *BOOTED*, *supra* note 149, at 9.

161. *BOOTED*, *supra* note 149, at 9.

162. *BOOTED*, *supra* note 149, at 10.

163. *BOOTED*, *supra* note 149, at 10.

164. 28 U.S.C. §2671–2680.

165. *Feres v. United States*, 340 U.S. 135, 146 (1950). The holding in *Feres* is often referred to by the "incident to service" rule.

166. Rebecca Huval, *Feres Doctrine and the Obstacles to Justice for Military Rape Victims*, PBS (May 9, 2013), <http://www.pbs.org/independentlens/blog/feres-doctrine-and-the-obstacles-to-justice-for-military-rape-victims/>.

167. *Id.*

to the military culture of tolerance for sexual crimes.¹⁶⁸ In *Cioca v. Rumsfeld*, a class of survivors attempted to use the holding in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*¹⁶⁹ to establish an implied cause of action against the Pentagon's leadership for violation of their Fifth Amendment rights to due process and equal protection, First Amendment rights to free speech, and their Seventh Amendment rights to trial by jury.¹⁷⁰ Citing a prior *Bivens* challenge in a military case, the court held that the "Supreme Court has long counselled restraint in implying new remedies at law."¹⁷¹ Courts are especially hesitant to recognize causes of action for money damages against the military as the "special nature of military life . . . would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command."¹⁷² The Court also cautioned against the "disruption" that would occur if a soldier were able to "hale his superiors into court."¹⁷³

Recently, a former West Point cadet tried to use the holding in *Bivens* when she brought a suit, alleging that generals at the academy created a sexually oppressive culture that marginalized women cadets.¹⁷⁴ The Second Circuit Court of Appeals denied the woman relief, finding that "civilian courts are ill-equipped to second-guess military decisions regarding discipline, supervision, and control" of military members.¹⁷⁵ In a dissenting opinion, Judge Denny Chin noted his disagreement on the application of *Feres* in the case, as her rape was not incident to combat service, but was due to the purported failures of school administrators to create a safe learning environment for students.¹⁷⁶ Cadets at all of the military academies are

168. *Klay v. Panetta*, 924 F.2d 8 (D.D.C. 2013); *Cioca v. Rumsfeld*, 720 F.3d 505, 506 (4th Cir. 2013).

169. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that an implied cause of action existed for an individual whose Fourth Amendment freedom from unreasonable search and seizures had been violated by the Federal Bureau of Narcotics).

170. *Cioca*, 720 F.3d at 507.

171. *Id.* at 509 (citing *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012)).

172. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). The Court goes on to state that "[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. But the special relationships that define military life have "supported the military establishment's broad power to deal with its own personnel." *Id.*

173. *Id.*

174. *Doe v. Hagenbeck*, No. 15-1890-cv, 2017 U.S. App. Lexis 16604, at *4 (2d Cir. Aug. 3, 2017) (2-1 decision).

175. *Id.* at *28.

176. *Id.* at *32 (Chin, J., dissenting).

unable to bring Title IX complaints as the academies are exempted from the provisions of the legislation.¹⁷⁷

Courts have consistently found that, as a function of the separation of powers, the Constitution contemplates no role for the judiciary in the oversight of the military.¹⁷⁸ In *Parker v. Levy*, Justice Rehnquist articulated the military as a separate society, thereby requiring that the judiciary provide an uncritical deference to the Commander in Chief in all military personnel matters.¹⁷⁹ The Court's undeserved caution toward Pentagon policies may in fact be eroding the adversarial process.¹⁸⁰ Some scholars suggest that the doctrine of military deference is the standard because critiques of the institution have been viewed as criticism toward those who serve—a third rail in U.S. politics.¹⁸¹ With the current jurisprudence, the judiciary's hands-off approach fails servicewomen and would likewise fail women draftees.¹⁸²

E. Congressional Attempts at Reform have been Modest and have Failed to Transform the System

Select members of the House and Senate Armed Services Committees have taken notice of the lack of justice for servicewomen and have attempted to instill reform through legislation. However, the most transformational proposals have met strong opposition from Pentagon leadership and senior

177. 20 U.S.C. § 1681(a)(4).

178. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

179. *Parker v. Levy*, 417 U.S. 733, 743 (1974) (“This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.”). Prior to *Parker*, the Court held that for an off-post crime to be cognizable in a court-martial, it must affect military status or discipline, i.e., be military-related. The Court required proof that a court-martial was the proper venue, otherwise the default would be an Article III court. *O’Callahan v. Parker*, 395 U.S. 258, 261–262 (1969) (“If the case does not arise “*in the land or naval forces*,” then the accused gets *first*, the benefit of an indictment by a grand jury and *second*, a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, § 2, of the Constitution.”).

While Chief Justice, Earl Warren advocated for the hands off approach to military affairs. “The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.” Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962).

180. See Eugene Fidell, *Justice John Paul Stevens and Judicial Deference in Military Matters*, 43 U.C. DAVIS L. REV. 999, 1018–19 (2010) (suggesting that having more veterans on the Court could “add to the robustness of both discussion on and scrutiny of government claims that might otherwise be embraced uncritically”).

181. Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 785 (2013).

182. See Kristin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1 (1992) (“[T]he judiciary increasingly fails to engage in any analysis or balancing of military needs against individual constitutional claims and is moving towards creation of a doctrine that military matters are non-judiciable.”).

members of the Congressional committees, often citing the claim that military commanders are best positioned to root out the scourge.¹⁸³

The Pentagon has taken extraordinary measures to resist any changes that take prosecutorial discretion for sexual assault cases from military commanders. Senator Gillibrand introduced her bill for the MJIA in 2013, 2014, and 2015, but has been unable to attain a filibuster-proof majority.¹⁸⁴ Gillibrand remains determined to reform the system, especially in light of the government's own statistics which show that sixty-two percent of servicewomen who reported being sexually assaulted experienced retaliation in some form.¹⁸⁵ Though, servicemembers who have expressed support for Gillibrand's reform efforts have been scalded by the military.¹⁸⁶ One Judge Advocate was warned by a superior not to support Gillibrand's efforts: "It would kill my chances of ever having a good job again I would be ostracized It would be the end of my career."¹⁸⁷ It appears that top military brass fear that if Congress is able to change one aspect of military policy, "they'll be willing to change a lot more."¹⁸⁸

183. Jennifer Herb, *Military Brass Oppose Removing Sexual Assault Cases from Chain of Command*, THE HILL (June 4, 2013), <http://thehill.com/policy/defense/303275-military-brass-oppose-removing-cases-from-chain-of-command>.

184. See Military Justice Improvement Act of 2013, S. 967 & S. 1752, 113th Cong. (2013); Military Justice Improvement Act of 2014, S. 2970 & S. 2992, 113th Cong. (2014); and National Defense Authorization Act for Fiscal Year 2016, S.Amdt.1578, 114th Cong. (2015). Military Justice Improvement Act of 2013, H.R. 2016, 113th Cong. (2013) was also introduced by Representative Dan Benishek (R-MI, 1st) in the House of Representatives.

185. *Comprehensive Resource Center for the Military Justice Improvement Act*, THE OFFICE OF KIRSTEN GILLIBRAND (Apr. 10, 2017), <https://www.gillibrand.senate.gov/mjia>.

186. Craig Whitlock, *Air Force Captain Dissents from Military Sex Assault Policy, and Commanders Take Notice*, WASH. POST (Dec. 30, 2014), https://www.washingtonpost.com/world/national-security/air-force-captain-dissents-from-military-sex-assault-policy-and-commanders-take-notice/2014/12/30/9e95fa72-9051-11e4-a412-4b735edc7175_story.html (stating how Captain Maribel Jarzabek, a lawyer and former victim advocate in the Air Force, expressed her frustration with the system on Gillibrand's Facebook page and was later reprimanded by her Air Force command for supporting a "partisan political cause").

Legal scholars, many of whom are veterans, have publicly expressed their support for Gillibrand's bill. *Law Professors' Statement on Reform of Military Justice*, THE OFFICE OF KIRSTEN GILLIBRAND (June 7, 2013), <https://www.gillibrand.senate.gov/imo/media/doc/MJIA-%20Law%20Professors.pdf> ("... unless structural changes are made, we are concerned that our military personnel will not be receiving the kind of justice they deserve. Public confidence will also not be served. That is particularly disturbing given the Nation's reliance on an All-Volunteer Force.").

187. Erika Eichelberger, *The Fight Over How to Stop Military Sexual Assault, Explained*, MOTHER JONES (Nov. 20, 2013), <http://www.motherjones.com/politics/2013/11/mccaskill-gillibrand-military-sexual-assault>.

188. Zoe Carpenter, *Military Stifling Supporter for Sexual Assault Reforms, High-Ranking Officer Says*, THE NATION (Nov. 15, 2013), <https://www.thenation.com/article/military-stifling-support-sexual-assault-reforms-high-ranking-officer-says/>.

Members of Congress have attempted to offer more modest proposals of reform and likewise have encountered resistance. Representative Jackie Speier (D-CA, 14th) proposed the Sexual Assault Training Oversight and Prevent (STOP) Act in 2011, which gained 159 cosponsors, and again in 2013, both times to no success.¹⁸⁹ With the measure, Speier sought to create a new, independent office to which victims could report their assaults without fear of retaliation from commanders.¹⁹⁰ The bill also sought to end the commander's reliance on non-judicial punishment—a unique form of military punishment that shields perpetrators from criminal convictions or having to register as a sex offender once discharged from the military.¹⁹¹

For many years, servicemembers accused of crimes were able to present evidence of their “good military character” during the guilt phase of courts-martial.¹⁹² The ability to present this character evidence meant that accusers with high rank and long service were essentially insulated from conviction.¹⁹³ The ‘Good Soldier Defense’ operated on the untested notion that servicemembers with a decorated past did not have the propensity to commit the alleged crime.¹⁹⁴ In cases of sexual assault, where a battle over the credibility of the accuser and accused often ensues, the good soldier defense can be extremely problematic for the accuser, who is more likely than not junior in rank and service time.¹⁹⁵ In 2014, Senator Claire McCaskill introduced a bill to amend the Military Rules of Evidence to remove the ability for individuals in courts-martial to submit a good soldier defense.¹⁹⁶ McCaskill's measure received unanimous support in the Senate and was included in the Fiscal Year 2015 Defense Authorization Act.¹⁹⁷

Sexual assault in the military is not a uniquely American problem—the Australians and Canadians have experienced their own scandals in recent

189. Sexual Assault Training Oversight and Prevention Act, H.R.1593, 113th Cong. (2013).

190. *Id.*

191. *Id.* See e.g., Craig Whitlock, *How the Military Handles Sexual Assault Cases Behind Closed Doors*, WASH. POST (Sept. 30, 2017), https://www.washingtonpost.com/investigations/how-the-military-handles-sexual-assault-cases-behind-closeddoors/2017/09/30/a9df0682-672a-11e7-a1d7-9a32c91c6f40_story.html (describing the decision by Air Force Lt. Gen. John Thompson to serve nonjudicial punishment to a colonel despite the incontrovertible evidence of abusive sexual contact toward a subordinate uncovered by the Air Force Office of Special Investigations).

192. Hillman, *supra* note 107, at 880.

193. Hillman, *supra* note 107, at 881.

194. Hillman, *supra* note 107, at 883.

195. Hillman, *supra* note 107, at 904.

196. Victims Protection Act of 2014, S. 1917, 113th Cong. § 3 (2014).

197. Nancy Montgomery, *Military Lawyers Lose the ‘Good Soldier’ Defense*, STARS AND STRIPES (Feb. 9, 2015), <https://www.stripes.com/news/military-lawyers-lose-the-good-soldier-defense-1.328128#.WOWUJVKZNBw>.

years. However, their approaches to reform have been markedly different, as both countries have relied on independent bodies to perform an evaluation and devise recommendations. In April 2011, the Australian Government appointed Elizabeth Broderick, the Sex Discrimination Commissioner, to lead a review on the treatment of women in the Australian Defense Force (“ADF”).¹⁹⁸ What resulted was an independent review of the effectiveness of cultural change strategies within the ADF and recommendations to Parliament.¹⁹⁹ Acting on one such recommendation, the ADF established a new office, where victims can report their incidents outside of the chain of command.²⁰⁰

Likewise, in 2014 the Canadians instituted an External Review Authority, led by Justice Marie Deschamps, to lead a fact-finding mission across several military bases.²⁰¹ The review found that while policy change was critical, cultural change was key and that strong leadership would drive reform.²⁰² “Without broad-scale cultural reform, policy change is unlikely to be effective.”²⁰³

III. Unintended Consequences: An Immediate Change to the Selective Service Act Will Likely Result in Depriving Women of Due Process Once in the Military

Just last night, a woman came to me and said her daughter wanted to join the military and could I give my unqualified support for her doing so. I could not. I cannot overstate my disgust and disappointment over continued reports of sexual misconduct in our military. We’ve been talking about this issue for years and talk is insufficient.²⁰⁴

198. *Sex Discrimination Commissioner Elizabeth Broderick*, AUSTRALIAN HUMAN RIGHTS COMMISSION (Apr. 10, 2017), <https://www.humanrights.gov.au/about/commissioners/sex-discrimination-commissioner-elizabeth-broderick>.

199. AUSTL. HUM. RTS COMM’N, REVIEW INTO THE TREATMENT OF WOMEN IN THE AUSTRALIAN DEFENSE FORCE (2012).

200. Lexi Metherell, *Australian Defence Force Sets Up New Office to Help Victims of Abuse Report Incidents Confidentially*, ABC NEWS (July 22, 2013), <http://www.abc.net.au/news/2013-07-23/defence-sets-up-new-office-to-help-victims-of-abuse/4837794>.

201. Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, NATIONAL DEFENCE AND THE CANADIAN ARMED FORCE (Mar. 27, 2015), <http://www.forces.gc.ca/en/caf-community-support-services/external-review-sexual-mh-2015/summary.page>.

202. *Id.*

203. *Id.*

204. Bill Briggs, *McCain: Cannot Give ‘Unqualified Support’ for Women Joining the Military Until Crisis Resolves*, NBC NEWS (June 4, 2013), https://usnews.newsvine.com/_news/2013/06/04/18729878-mccain-cannot-give-unqualified-support-for-women-joining-the-military-until-crisis-resolved.

As the last section illustrated, women are currently disproportionately victimized in the U.S. military. If the registration requirement is extended to include women, and a draft is ever reinstated, women will be compelled to be in an environment in which the government does not uphold its obligation to provide due process of the law for all. Unless several legal and policy changes occur, women will not be fully protected by the Constitution that they would be drafted to protect.

The Due Process Clause of the U.S. Constitution prohibits the government from “depriving a person of life, liberty, or property without due process of law.”²⁰⁵ The Supreme Court has held that “due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances . . . [but rather] is flexible and calls for such procedural protections as the particular situation demands.”²⁰⁶ The Court of Military Appeals has held that the protections of the Bill of Rights extend to members of the armed forces.²⁰⁷ Currently, servicewomen, and potential future women draftees, are deprived of their liberty rights, property rights, and procedural due process.²⁰⁸

A. The Deprivation of Procedural Due Process Rights

Procedural due process is a constitutional principle which holds that when the state or federal government acts in such a way that denies a person of life, liberty, or a property interest, the person must be given notice and the

205. U.S. CONST. amend. V.

206. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

207. *United States v. Jacoby*, 29 C.M.R. 244, 246–47 (C.M.A. 1960) (“[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.”).

208. After the release of the 2012 sexual assault study, the U.S. Commission on Civil Rights became concerned with the situation for women within the military. The Commission held hearings on the topic—the first time they had examined civil rights in the military for fifty years—and released a report. U.S. COMM’N. ON CIVIL RTS., *SEXUAL ASSAULT IN THE MILITARY*, 2013 STATUTORY ENFORCEMENT REPORT (Sept. 2013).

In October 2014, Cornell Law School, along with several prominent civil society organizations, submitted two shadow reports on the issue of sexual violence in the U.S. military to the United Nations Human Rights Council and the United Nations Committee Against Torture. The submission to the Committee Against Torture alleged that the alarming rate of sexual violence and rape in the military violates servicemembers’ “right to be free of torture and cruel, inhuman, and degrading treatment.” See Cornell Law School, *Shadow Reports for the UN Human Rights Council and UN Committee Against Torture on Sexual Violence in the U.S. Military* (Mar. 15, 2017), <http://www.lawschool.cornell.edu/Clinical-Programs/global-gender-justice/Shadow-Report-s-for-the-UN-Human-Rights-Council-and-UN-Committee-against-Torture-on-Sexual-Violence-in-the-US-Military.cfm>.

opportunity to be heard.²⁰⁹ Procedural due process ensures fundamental fairness by requiring a fair process for a government determination.²¹⁰

The Pentagon currently deprives servicewomen who experience sexual assault of their procedural due process rights to an impartial decision maker, have decisions based only on the evidence presented, and judicial review.²¹¹

An impartial decision maker is required in every case where a hearing is required.²¹² The further the tribunal is from the agency involved, the more the presumption of bias can be removed.²¹³ The key challenge with the current military justice system is that nonlegal professionals, the convening authority, hold the power to determine whether an allegation is referred to a court-martial. The convening authority is the commander or a superior officer in the chain of command of the defendant, and thus potentially has a relationship with the defendant. Legal scholars have been raising issues about command influence for decades. “Since the commander has the responsibility for the discipline and morale of his command, he will have a personal interest in the outcome of any court-martial of one of his men.”²¹⁴

In addition to determining whether a case goes to court-martial, the convening authority is also responsible for approving the list of potential jury members.²¹⁵ This raises the issue of whether a commander whose professional record as a leader might be affected by successful criminal prosecutions in their unit will approve neutral and objective jurors.²¹⁶

209. ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICES 604 (5th ed. 2015).

210. *Id.*

211. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279–1295 (1975).

212. *Id.* at 1279. See also Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475 (1986) (“It is our position that the participation of an independent adjudicator is such an essential safeguard, and may be the only one.”); *id.* at 483 (“Of all the values informing the due process guarantee, the perception-of-fairness value most clearly dictates use of a truly independent adjudicator.”).

213. Friendly, *supra* note 211, at 1279.

214. Colt, *supra* note 109, at 553.

215. UCMJ Art. 25. By statute, an enlisted accused military member has the ability to make a request on the composition of the jury panel, in that they may request trial by judge alone, by a jury panel composed of one-third enlisted members, or the default, a jury panel composed of all commissioned or warrant officers. If the accused is an officer, the panel will consist of all officers. The rank of the victim does not affect jury selection.

216. See Colt, *supra* note 109, at 554 (“Although the extent of actual command influence and active interference with the court-martial process is small, it is well established that the mere appearance of impropriety or unfairness may undermine confidence in the judicial system.”).

Although the Court later changed its view, it is instructive to see the Court’s early thinking on the system of military justice: “The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility

Because jurors have to be higher ranked than the accused, general and flag officers are hardly court-martialed due to the difficulty of assembling a jury of the appropriate rank.²¹⁷ When servicemembers see that the most senior brass in the military are not held accountable for their crimes, it negatively impacts morale within the military.²¹⁸ While most literature focuses on whether the accused is receiving a fair hearing, this Note urges readers to consider whether, under the current construct, military prosecutors are able to present the case of a lower enlisted woman victim to a potentially all-male, all-officer jury.

Rape and assault are not ‘military crimes’ in the same sense that an unauthorized military absence or a negligent discharge of an issued weapon are military crimes.²¹⁹ The necessity of an all-military jury panel is less persuasive for crimes that civilian juries also see.²²⁰ In fact, there is a strong historical record concerning the overreach of court-martial jurisdiction.²²¹ Given the long-held negative attitudes toward women in the military, one should wonder whether a military jury panel would consider the testimony and facts of such cases in the same way a panel composed of civilian peers from the local community would. A sizeable number of troops today consider women either “sluts, bitches, or dykes”²²²—is it even possible for

of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.” *O’Callahan v. Parker*, 395 U.S. 258, 264 (1969).

217. *Episode 025: Protect Our Defenders*, MILITARY JUSTICE (Aug. 22, 2017) (downloaded using iTunes).

218. *Id.*

219. *Colt*, *supra* note 109, at 560.

220. *Colt*, *supra* note 109, at 560 (“Constitutional due process should require a panel free from any possible command influence under article 25.”) *See also id.* at 561 (“The jury selection process is one area in which court-martial procedure does not provide the safeguards of a civilian court.”).

221. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *413 (“For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king’s courts are open for all persons to receive justice according to the laws of the land.”). *See also Reid v. Covert*, 354 U.S. 1, 23–24 (1957) (“The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds.”).

222. *See* Mariette Kalinowski, “*Slut, Bitch, Dyke*”—*Joan of Arc and the Modern Military Woman*, THE DAILY BEAST (Aug. 21, 2013), <http://www.thedailybeast.com/slut-bitch-dykejoan-of-arc-and-the-modern-military-woman>; *see also* Alexander McCoy, *Rethinking Gender Segregation in the Marines*, TEDxMILEHIGH (Aug. 22, 2017) (describing how Marines have ‘slut walls’ within the barracks and encourage each other to post raunchy photos of their girlfriends); Margo Mahan, *Sluts, Dykes, & Bitches in the U.S. Army*, MARGO M. MAHAN BLOG (Apr. 21, 2016), <http://www.margomahan.com/blog/-sluts-dykes-bitches-in-the-us-army> (“The identities that get mapped on women in the military are determined

women victims of assault to have a fair hearing? This Note does not suggest an easy fix for this issue—rather it seeks to raise the fact that legal analysts and commenters have long critiqued the provision of due process rights in military justice proceedings.²²³ Until servicewomen are guaranteed a neutral tribunal, they will be deprived of their right to due process.

Procedural due process requires that decisions are based solely on the evidence presented.²²⁴ The military has made some recent steps to realize this requirement,²²⁵ but several deficiencies still persist. Defendants attend all court-martial proceedings in uniform. This provides them the opportunity to visibly display their various unit and professional insignia and awards, and potentially gain unwarranted sympathy from jurors based on a natural emotional attachment for those with shared military experiences.²²⁶

Lastly, judicial review is a crucial element of procedural due process.²²⁷ Judicial review of cases does not solely focus on fair procedure—it also protects the right to “obtain review for lack of substantial evidence or even for arbitrariness or capriciousness.”²²⁸ As described earlier in this Note, the U.S. Supreme Court has historically provided unwavering deference to the military on policies and judicial proceedings. The military, and the Court, should be required to provide the American people evidence that judicial intervention would cause *more harm* than the sexual violence that continues to pervade the system.²²⁹ While deferring to military leaders on unique military matters—such as operations and training—makes sense, it is less

(not surprisingly) through the male gaze. Put differently, the category from which a female soldier must negotiate her reputation is based on her sexual desirability to men. To that end, three dominant categories emerge: sluts, dykes, and bitches.”)

223. Some scholars see multiple benefits that would come from trying non-military related crimes in civilian courts. See Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 *POLITICS AND SOCIETY* 101, 119 (2009) (“Treating soldiers who rape just like civilians who rape would allow military criminal law to focus on peculiarly military crimes. It would also undermine the acceptance of violent sexual aggression as part of the identity and behavior of the American soldier.”).

224. Friendly, *supra* note 211, at 1282.

225. Most notably the removal of the “Good Soldier Defense.” See Hillman, *supra* note 107, at 880.

226. Social identity is strong in the military, and particularly strong toward those of the same career field. Pilots may give fellow pilots the benefit of the doubt in the proceedings; infantryman may feel more swayed by the testimony of a fellow infantryman.

227. Friendly, *supra* note 211, at 1294.

228. Friendly, *supra* note 211, at 1295.

229. Banner, *supra* note 181, at 785. In instances when courts have been viewed as activist, they invariably have acted to protect the fundamental rights of servicemembers. See *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011) (finding that the policy of Don’t Ask, Don’t Tell violated due process and the First Amendment rights of servicemembers and that the policy did not further the government’s interests of military readiness and unit cohesion).

convincing in the realm of sexual assault or rape—crimes which Article III courts have vast experience and thoroughly established doctrine.²³⁰ While the civilian judiciary fails to provide oversight, civil society is also prevented from accessing and checking the system. Over ninety percent of sexual assault incidents in the military are “investigated and adjudicated behind closed doors,” leaving the public with no way to measure how well the system is functioning and protecting those serving in uniform.²³¹

Prior to the Court’s shift on military deference in *Parker v. Levy*, Justice Douglas clearly recognized the dangers of having the military justice system preside over nonmilitary issues:

A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved. That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and *history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty*. This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere, but in examining the reach of their jurisdiction, it has recognized that “There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. *Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service . . .*”²³²

B. The Deprivation of Liberty Rights in the Form of Reproductive Healthcare

The liberty rights protected within due process include protection for reproductive autonomy. However, due to the strict application of the Hyde

230. See John Michael Haggerty, *Judicial Review of Military Administrative Decisions*, 3 HASTINGS CONST. L.Q. 171, 188 (1976) (“[T]he closer the decision is to actual combat, the greater the propriety of deference.”).

231. Whitlock, *supra* note 191. Of the 6,172 report sexual assaults in 2016, only 389 cases went to trial and produced public records of the incidents. When journalists have properly requested records of the investigation and punishment through the Freedom of Information Act, they have been rejected by the military, citing the privacy rights of the perpetrator.

232. *O’Callahan v. Parker*, 395 U.S. 258, 265 (1969) (emphasis added) (quoting *Toth v. Quarles*, 350 U. S. 11, 22 (1955)).

Amendment,²³³ the military health care system denies servicewomen access to safe abortion options. This is alarming given the high specter of rape in the military, and the increased chance of unwanted pregnancies.

Under *Roe v. Wade*, women have the right to terminate a pregnancy prior to viability.²³⁴ The Hyde Amendment was challenged in 1980, and the Court found that the amendment did not in itself violate women's rights.²³⁵ The Court held that, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."²³⁶ *Planned Parenthood v. Casey* established that the government can regulate abortions prior to viability so long as it does not place an *undue burden* on access to abortions.²³⁷ An undue burden is created when a government regulation imposes a substantial obstacle in a woman's path to obtaining access to reproductive healthcare.²³⁸ Servicewomen today experience several undue burdens and obstacles from the federal government in accessing reproductive health services.²³⁹

233. 10 U.S.C. § 1093 (1985). The Hyde Amendment is a legislative provision barring the use of federal funds to pay for abortion. It is implemented as an appropriations rider on funding for federally provided medical care. The Hyde Amendment applies to the military health system even more narrowly than other federal programs, as it prohibits payment or use of a treatment facility for abortions with one single exception—where the life of the mother would be endangered if the fetus were carried to term.

A few members of Congress have attempted to pass measures to ease the prohibitions that particularly affect military women stationed overseas. In 2011, Senator Jeanne Shaheen (D-NH) sponsored an amendment to allow abortions in the military for cases of rape or incest, but ultimately was unsuccessful. National Defense Authorization Act for Fiscal Year 2012, S.Amdt.1120 to S.1867, 112th Cong. (2011).

234. *Roe v. Wade*, 410 U.S. 113 (1973). Originally when *Roe* passed, the Pentagon required that the military services provide abortion services in accordance with the law. While the military no longer provided taxpayer-funded abortions in military hospitals by 1979, servicewomen were still able to access the services if they paid for the procedure on their own. See generally Hillary Hansen, *Fundamental Rights for Women: Applying Log Cabin Republicans to the Military Abortion Ban*, 23 HASTINGS WOMEN'S L.J. 127, 129–131 (2012).

235. *Harris v. McRae*, 448 U.S. 297 (1980).

236. *Id.* at 316.

237. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

238. *Id.* at 877.

239. See Leslie Nemo, *The Challenge of Accessing Birth Control in the Military*, ATLANTIC (Feb. 23, 2017), <https://www.theatlantic.com/health/archive/2017/02/military-women-birth-control/517452/> (The unintended pregnancy rate in the active duty forces is fifty percent higher than that of the general U.S. population; military medical facilities do not keep a sufficient stock of all FDA-approved contraceptives and do not always provide enough of a supply to last an entire deployment.).

Accessing a sufficient supply of contraceptives prior to deployment and refills during deployment is also a real impediment for servicewomen. Kate Grindlay & Daniel Grossman, *Contraception access and use among US servicewomen during deployment*, 87 CONTRACEPTION 162, 165–166 (2013).

Due to Hyde, servicewomen must seek access to reproductive health procedures in the local economy. While this may be feasible and convenient in duty stations such as England, women deployed in a combat zone, posted in Kuwait, the island of Diego Garcia, or even Kwajalein Atoll face great difficulty accessing adequate care for their health needs.²⁴⁰ If no adequate option is available in the host country, a servicewoman is left to ask her command for permissive leave to travel to the U.S. or a country in which she can access the care she desires. Approval of the time off is left to the commanding officer's discretion. This presents a significant barrier to women's access to care. In many cases where servicewomen approach their command leadership about their health status, they are met with disapproval, judgment, and even interference from commanding officers with strong anti-abortion sentiments.²⁴¹ To add a further undue burden, women who are able to obtain an abortion on their own are not permitted to receive pre- or post-procedure services with their primary military doctor.²⁴² For a woman who must travel back to the U.S. for an abortion or to another country where there might be a language barrier, this government-placed barrier to reproductive care results in the woman being deprived of the full continuum of care they need.

The federal government is not permitted to interfere with the exercise of certain fundamental rights unless the government policy can pass strict scrutiny.²⁴³ To overcome strict scrutiny, the policy must serve a compelling government interest and the policy must be narrowly tailored to achieve that interest.²⁴⁴

The military's current policy of placing several undue burdens in the path of servicewomen who seek to exercise their liberty right of control over

240. While military members sometimes can request duty locations, where they are posted is based on the needs of the military at large. This distinction is key to understanding the challenges of access for military women as compared to civilian women. See also Kate Grindlay, et al., *Abortion Restrictions in the U.S. Military: Voices from Women Deployed Overseas*, 21-4 WOMEN'S HEALTH ISSUES 259, 260 (2011) ("Even if a woman is able to pay for services herself, abortion is legally restricted in many countries where troops are deployed.").

241. See Kathryn Joyce, *Military Abortion Ban: Female Soldiers Not Protected By Constitution They Defend*, USC ANNENBERG RELIGION DISPATCHES (Dec. 17, 2009), <http://religiondispatches.org/military-abortion-ban-female-soldiers-not-protected-by-constitution-they-defend/>; Claudia J. Kennedy, *Letter from Lieutenant General Claudia J. Kennedy to Senate*, CENTER FOR REPRODUCTIVE RIGHTS (June 10, 2002), <https://www.reproductiverights.org/document/letter-from-lieutenant-general-claudia-j-kennedy-to-senate>.

242. *Abortions*, TriCARE, https://tricare.mil/CoveredServices/IsItCovered/Abortions.aspx?sc_database=web (Apr. 29, 2017).

243. See *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

244. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

their reproduction necessitates that these policies undergo strict scrutiny. For almost all military personnel policies, the Pentagon asserts that the compelling government interest is military readiness and unit cohesion.²⁴⁵ It is hard to rationalize that forcing women to overcome so many barriers to access adequate health care increases readiness or cohesion. Servicewomen in many instances are forced to lie to their command in order to get time off to obtain medical care off base. This hinders open communication and creates obvious barriers to unit cohesion.²⁴⁶ When women are unable to obtain proper services for their unintended pregnancies, what results is their unit losing a vital member if deployed, a loss of return in the investment on the training they received, and a substantial cost to the government for reassignment of the woman to a non-combat military post. The loss of a team member during a deployment, when a unit has prepared for the overseas mission together for years ahead of time, creates undercurrents of tension and erodes unit cohesion.²⁴⁷ Considering the low number of women in each of the services, a loss of just a few women leaders can mean that other young servicewomen have no one to confide in. Obstructing access to abortion, and contraceptives overall, does not aid the military's mission—it greatly hinders it.

Some have argued that incarcerated women in U.S. prisons have more access to their liberty rights than women serving in the military.²⁴⁸ In *Estelle v. Gamble*, the Supreme Court held that inmates have a right to adequate

245. *Log Cabin Republicans v. United States*, 716 F.Supp. 2d 884, 923 (C.D. Cal. 2010).

246. As a corollary, when “Don’t Ask, Don’t Tell” was in force, gay and lesbian servicemembers were barred from exercising their right to speak about their loved ones while serving in uniform, resulting in withdrawal and overall reduced unit cohesion.

247. Women who become pregnant within contingency zones have been punished, viewed as selfishly abandoning the mission and their unit. Adam Levine, *Pregnant soldiers Won’t be Court-Martialed, Commander Says*, CNN (Dec. 23, 2009), <http://www.cnn.com/2009/US/12/22/iraq.us.soldiers.pregnancy/> (“The policy—which would punish soldiers who get pregnant or impregnate another soldier—was included in Maj. Gen. Anthony Cucolo’s orders to troops regarding conduct while deployed under his command in northern Iraq.”). For decades, the military had a policy of discharging pregnant women. Kathryn Joyce, *Military Abortion Ban: Female Soldiers Not Protected By Constitution They Defend*, USC ANNENBERG RELIGION DISPATCHES (Dec. 17, 2009), <http://religiondispatches.org/military-abortion-ban-female-soldiers-not-protected-by-constitution-they-defend/>. This policy of discharging women due to pregnancy was struck down. *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976). Although this policy is no longer in force, servicewomen who have children while serving are still negatively perceived within the military today. Bethany Saros, *My shameful military pregnancy*, SALON (Nov. 13, 2011), http://www.salon.com/2011/11/13/my_shameful_military_pregnancy/ (“No one ever said to my face that they were disappointed in me, but I could see it in the eyes of my commander, my first sergeant and my boss. They all congratulated me but I sensed I had let them down in some way.”).

248. Leah Ginsberg, *Do Prisoners Get a Better Deal? Comparing the Abortion Rights and Access of Military Women Stationed Abroad to Those of Women in Prison*, 11 CARDOZO WOMEN’S L.J. 385, 387 (2005).

medical care, as it is not something they can provide for themselves.²⁴⁹ The “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.”²⁵⁰ In 1998, the Third Circuit found that denying inmates access to full reproductive care had no rational relationship to prison interests, and therefore was not permissible.²⁵¹ Although military women are not prisoners and thus the Eighth Amendment is not a factor, their circumstances are comparable in that they are required to live in confined locations with limited options for outside medical treatment. Because of this similar situation regarding medical access, *Estelle* should be serve as a precedent for servicewomen’s right to access full medical care from military facilities.

C. The Deprivation of Property Rights in the Form of Veterans Benefits

The Due Process Clause requires that the right to property cannot be deprived except pursuant to a constitutionally adequate procedure.²⁵² The legislature cannot deprive such a property interest without the appropriate procedural safeguards.²⁵³ Today, many servicewomen survivors of military sexual assault are deprived of their property interest in veterans benefits.

In *Cushman v. Shinseki*, the Federal Circuit Court held that veterans benefits are “nondiscretionary [and] statutorily mandated.”²⁵⁴ Applicants for veterans’ disability benefits possess a constitutionally protected property interest in these benefits.²⁵⁵ When servicewomen are deprived of their ability to access the benefits, which is often the case with survivors of sexual assault, they are deprived of fundamental property rights.

The Department of Veterans Affairs (“VA”) has created substantial barriers for women veterans to access benefits arising from injuries caused by military sexual assault. Current regulations require that survivors of military sexual assault provide credible evidence that the sexual assault occurred during their military service.²⁵⁶ In the analysis of an application for benefits, the VA can choose to disregard the conclusions of “a veteran’s

249. *Estelle v. Gamble*, 429 U.S. 97, 103 (1981).

250. *Id.*

251. *Monmouth Cty. Correctional Instit. Inmates v. Lanzaro*, 834 F.2d 326, 338 (3d Cir. 1987) (“[T]here must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it. . . . Moreover, the governmental objective must be a legitimate and neutral one.”).

252. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 541 (1985).

253. *Id.*

254. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009).

255. *Id.*

256. 38 C.F.R. § 3.304(f)(5) (2010) (omitting lay evidence provision from section applicable to Post-Traumatic Stress Disorder caused by sexual assault).

long-time physician in favor of an opinion based on a single visit and record review by a VA physician.”²⁵⁷ Those reviewing the benefit applications also have the ability to deny claims if they conclude that the PTSD is attributable to childhood abuse.²⁵⁸ Conversely, for those claiming physical injuries arising out of combat service, the lay testimony of the servicemember is sufficient.²⁵⁹ Presenting a combat medal is enough for a combat veteran, but a survivor of sexual assault has to conclusively prove that their PTSD cannot be traced back to an assault prior to their service with evidence other than the veteran’s military records.²⁶⁰ According to VA statistics, as of 2008, 22,283 women were not able to meet the heightened burden of proof for their PTSD claim based on their assault, and therefore were denied benefits.²⁶¹ This burden is particularly onerous to meet for young, lower enlisted servicewomen—the majority of assault survivors—who have experienced a military culture that is dismissive and unsympathetic to women’s claims. Given the lack of women clinicians on many bases, survivors often have no one to turn to, and thus lack professionals to rely on for statements for any later claims. Despite the evidence of the burden this places on survivors of military sexual assault, the Federal Circuit has upheld the regulation.²⁶²

257. Ben Kappelman, *When Rape Isn’t Like Combat: The Disparity Between Benefits for Post-Traumatic Stress Disorder for Combat Veterans and Benefits for Victims of Military Sexual Assault*, 44 SUFFOLK U. L. REV. 545, 562–63 (2011). *Accord* Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10330 (Mar. 7, 2002).

258. Kappelman, *supra* note 257, at 562.

259. 38 U.S.C. § 1154(b) (2006) (mandating acceptance of lay testimony absent clear and convincing evidence to contrary).

260. Kappelman, *supra* note 257, at 550–53.

261. *Eliminating the Gaps: Examining Women Veterans’ Issues*, Hearing Before the Subcomm. on Disability Assistance and Mem’l Affairs and the Subcomm. on Health of the House Comm. on Veterans’ Affairs, 111th Cong. 102–03 (2009) (statement of Bradley G. Mayes, Director, Compensation and Pension Service, Veterans Benefits Administration).

262. *National Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 330 F.3d 1345, 1350–51 (Fed. Cir. 2003).

Conclusion

Essentially, the situation for a female in the military is, ‘I have signed up to defend my country and yet my country doesn’t give me the same rights as every other American woman.’²⁶³

The expansion of employment opportunities for women in the military has not been matched with structural or cultural reform.²⁶⁴ Women contemplating joining the military today consider the probability of experiencing assault while in uniform.²⁶⁵ Within the military, women still endure groping and assault, in addition to new forms of harassment such as revenge porn and cyber stalking. Despite the increased awareness of these crimes, perpetrators continue to receive scant punishment, if any at all.²⁶⁶

Some completely disregard the need to address the rate of sexual violence before requiring women to register with Selective Service.²⁶⁷ Others believe that increasing the percentage of women in the military should come first and thereafter long-term issues with sexual harassment and assault will work themselves out.²⁶⁸ Requiring the registration of women will not reverse or

263. Joan Ryan, *She Defends Freedoms She Can’t Exercise*, S.F. CHRON. (Dec. 18, 2001), <http://www.sfgate.com/opinion/article/She-defends-freedoms-she-can-t-exercise-2839152.php>.

264. See Kyleanne Hunter, *A Female Marine Speaks Out About the Nude Photo Scandal*, TEEN VOGUE (Apr. 5, 2017), <http://www.teenvogue.com/story/calling-military-nude-photo-scandal-victim-blaming> (“[M]isogyny and female objectification have historically not only been passively accepted but actively encouraged. Even more recently, from the pinup girls of World War II to *Plaboy*’s “salute” to the troops, military men have been taught that one of their rewards for bravery and service is the right to gaze upon and objectify the female form.”).

265. RECRUITING POLICIES AND PRACTICES FOR WOMEN IN THE MILITARY (Yeung et al. eds., 2017) (“My sisters were concerned. When I told her I was joining, the first thing she said was about the sexual harassment. But I told them it could happen anywhere, inside or outside the military.”).

266. See, e.g., Rob Johnson, *3 Blue Angels named in porn probe still flying*, USA TODAY (Aug. 5, 2014), <https://www.usatoday.com/story/news/nation/2014/08/05/navy-blue-angels-pilots-probe/13646979/> (“A retired Navy attorney . . . said the Navy had little choice but to limit career-ending punishment The reason is that punishing the other pilots might have required at least a partial cancellation of the current air show season because replacing them with other qualified flight demonstration pilots on short notice would be almost impossible.”).

267. “The military’s inability to remedy its longstanding sexual assault problem should not preclude women’s total integration into every aspect of the military.” Gabrielle Fromer, *With Equal Opportunity Comes Equal Responsibility: The Unconstitutionality of a Male-Only Draft*, 18 GEO. J. GENDER & L. 173, 202 (2017). Cf. Rodman, *supra* note 76, at 32 (“The military is being asked to be better than society at large, which the military should strive to be. However, the expectation associated with such a request must be reasonable and achievable.”).

268. Hanna Kozłowska, *There is only one way to undo decades of ingrained institutional sexism in the US military*, QUARTZ (Mar. 20, 2017), <https://qz.com/935983/recruiting-more-women-is-the-best-way-to-solve-one-of-the-us-militarys-worst-problems/> (“[W]hile there are a number of critical steps to take toward true integration, the military needs, first and foremost, more women.”).

correct decades of policies and attitudes that subordinate women. As a normative matter, requiring women to join the military on the speculative theory that women after them will be less likely to be assaulted is unconstitutional.

It is likely that the courts will revisit *Rostker v. Goldberg* in the coming years in order to determine whether civilian men and women are now “similarly situated”²⁶⁹ with regard to their ability to register for Selective Service. In preparation for this, it is essential that Congress consider the multitude of policies and structures that affect women’s ability to serve in our armed forces. Although women may have the same ability to request the same military assignments as men, women are nowhere near equal footing to men in the military. The construct of the military justice system, restricted access to reproductive rights, and the veterans’ benefits systems create extraordinary hurdles for women in the military. Women and men should both serve our country and should equally share in that burden. However, it must be equal in all senses—women should not be nominally equal, while enduring numerous violations of their due process rights in the shadows.

Congress, especially the Armed Services Committees, is ill situated to evaluate the military system that has denied women their due rights process. Historically, these Committees have either failed to provide proper oversight over the military or passed legislation that strengthened the systems of oppression that servicewomen experience. Asking the Committees to examine their own legislation and critique their own methodology would invite an imbalanced outcome. Instead, Congress should create an independent evaluation body, following the example of our allied partners—free from interference, coercion, and political pressure—to make recommendations to address the system that fails to deter sexual violence towards servicewomen, the lack of adequate medical options for women in the military, and the imbalance in access to veterans benefits once women leave military service. A neutral and independent authority would be able to critically look at historical systems without the risk of embarrassment for admitting fault for their own past work. Only after these systems are corrected and after women are able to experience true equality of protection as their male counterparts, should Congress undertake the monumental task of drafting legislation that would require women to register for the draft.

Before rushing to amend the Selective Service Act in order to say men and women are nominally equal in the military, the legislature should take a deep look at the flaws in the military. The system will not cure itself. Future generations of American women should wear the American flag patch next to their brothers in arms, but not at the expense of their constitutional rights.

269. *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981).
