

LEGAL IMPEDIMENTS TO SERVICE: WOMEN IN THE MILITARY AND THE RULE OF LAW

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PREAMBLE

Since our nation's birth, women have been engaged in the national defense in various ways. This article will examine the legal impediments to service by women in the United States military. This brings to light an interesting assessment of the meaning of the term "Rule of Law," as the legal exclusions barring women from service, establishing barriers to equality and creating a type of legal glass ceiling to preclude promotion, all fell within the then-existing Rule of Law in the United States. Finally, this article looks at the remaining barriers to women in the military and reasons to open all fields and all opportunities to women in today's military.

I. THE CONCEPT OF THE RULE OF LAW

Albert Venn Dicey, in "Law of the Constitution," identified three principles which establish the Rule of Law: (1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and (3) the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts.¹

This concept of the Rule of Law has existed since the beginning of the nation, most famously reflected in the writings of John Adams in drafting the

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1. HALSBURY'S LAWS OF ENGLAND, CONSTITUTIONAL LAW AND HUMAN RIGHTS 14 (Lord Hailsham ed., 4th ed. 1996) (citing ALBERT VENN DICEY, LAW OF THE CONSTITUTION 187 (10th ed. 1959)).

constitution for the Commonwealth of Massachusetts. In that document, Adams wrote:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.²

II. WOMEN IN THE MILITARY—THE LAW

It is hard to believe that, as recently as the early 1970s, women in the United States who wanted the opportunity to serve in their nation's armed forces were involuntarily separated from the military when they became pregnant. In fact, it took until the case of *Crawford v. Cushman*³ before the courts concluded that the longstanding policy of the U.S. military of discharging a military woman as soon as pregnancy was discovered constituted a violation of the Fifth Amendment's due process clause.

Pregnancy and parenthood were two of many extremely challenging issues that faced the U.S. military throughout its transition to an all volunteer force. However, these issues were part of a long legacy of legislative and policy barriers established to keep the U.S. armed forces a predominantly male institution.

III. EARLY BARRIERS TO SERVICE

The military tradition, beginning with the Continental Army, did not include women, calling by Army regulation for service only by male enlistees.⁴ However, it would be incorrect to say that women did not serve. From the earliest days of our nation women accompanied the U.S. armed forces, serving in a variety of supporting roles. Women were not included as an authorized component of the military until 1901 when Congress established the Nurse Corps as an auxiliary of the Army.⁵

Prior to that date, the women who participated in support of the U.S. military did so in various ways that are recounted largely in folklore or legend. Some of those who served did so by disguising themselves as men.⁶ A number of women had served as spies, as was the case of Rose O'Neal Greenhow, who was arrested and imprisoned for supplying the Confederate Army with information, and Pauline Cushman, who was sentenced to be executed as a Union spy during the War Between the States.⁷

The first woman to receive the Congressional Medal of Honor, Dr. Mary Walker, provided her services as a doctor free of charge to Union forces in

2. MASS. CONST. art. XXX (1780).

3. 531 F.2d 1114 (2d Cir. 1976).

4. JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 4-5 (1993).

5. 31 Stat. 753 (1901).

6. HOLM, *supra* note 4, at 6.

7. *Id.* at 6-8.

LEGAL IMPEDIMENTS TO SERVICE 1063

Virginia and Tennessee.⁸ She had asked the Union Army to hire her as a doctor, but it refused.⁹ Despite its refusal to hire her, Dr. Walker continued to provide medical services to Union soldiers.¹⁰ Eventually, she was captured by Confederate soldiers.¹¹

After her release from Confederate prison as part of a prisoner exchange, she was given an official position of "Acting Assistant Surgeon," the first woman to be given such a title.¹² Dr. Walker received the Congressional Medal of Honor after the war.¹³ In 1917, however, the U.S. Congress attempted to remove the honor from her, stating that only those who fought in combat were entitled to the award.¹⁴

When the Congress decided that the Medal had been awarded in error, Walker refused to return the medal.¹⁵ Even after her death, Dr Walker's family continued to battle to resolve her status as a Medal of Honor recipient. Finally, in the 1970s, and almost sixty years after her death, Congress decided not to refuse the medal to this pioneer.¹⁶

Women, therefore, were not permitted to serve in any significant role as members of the military service. Women who served disguised as males were separated from the military when their gender was discovered and they received no benefits or pension. Those who accompanied their husbands while they served were not recognized as members of the military, despite performing roles that were necessary to support the combat arms profession. These roles included traditional quarter master functions, such as mess, laundry, and uniform repair and alteration to ensure the uniforms were in serviceable condition.¹⁷

These early restrictions on women serving in the armed forces are not surprising considering the general legal status of women in the United States during these same early periods in U.S. history. For example, women were not afforded the right to vote in any state in any election before achieving the right to vote in school board elections in Kentucky in 1838.¹⁸ Passage of the Nineteenth Amendment in 1920 gave women the right to vote in national elections across the country.¹⁹ Similarly, women were not entitled to administer estates, own property, or enter into contract in their personal capacity.²⁰ Although there was

8. AMY NATHAN, *COUNT ON US: AMERICAN WOMEN IN THE MILITARY* 18 (2004).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. HOLM, *supra* note 4, at 4.

18. ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES* 168 (1996).

19. *Id.* at 317.

20. In 1971, for the first time, the United States Supreme Court ruled in favor of a woman who complained that her State had denied her equal protection of its laws when, in *Reed v. Reed*, 404 U.S.

never a specific blanket prohibition excluding women from all forms of combat, until nearly 1990, the belief was widely held that any combat service by women was precluded by law.²¹

IV. INTEGRATION INTO THE REGULAR FORCE

As noted above, the earliest inclusion of women into the military service of the nation came through the recognition of their existing role as nurses. Women had served as nurses and, as in the case of Dr. Mary Walker, physicians from the earliest conflicts engaged in by the United States as a nation. However, it was the action by the U.S. Congress in 1901 to formally acknowledge an Army Nurse Corps Auxiliary that set the stage for future developments in integrating women into the military.

In March 1917, the U.S. Navy Department authorized the enrollment of women in the Naval Reserve to perform clerical duties. It was a move born of necessity, as war loomed on the horizon and the U.S. Navy found itself unprepared to meet its demand for clerical personnel.²² The role of women in the Army Nurse Corps had been formally acknowledged, and women were being authorized to serve in an enlisted status in the Navy. Within the next year, women were also authorized to enlist in the Marine Corps.²³

During World War I, women in the Navy held more than just clerical positions. They were assigned to such diverse duties as draftsmen, translators, and recruiters. Assigned the title of "yeoman," these first enlisted women posed a special challenge to the Navy, as yeomen were supposed to be assigned to ships. However, Navy regulations prohibited the assignment of women to positions at sea. The Navy's solution to this challenge was to assign these women to stationary tugs which rested on the bottom of the Potomac River.²⁴

The Marines began recruiting women for enlistment in August 1918, two months before the cessation of hostilities. Like the Navy, the U.S. Marines began their recruitment of women out of necessity. The heavy overseas casualties experienced during the war effort led to the recruitment of women. Again, these women, who were called "Marinettes," were recruited to fill clerical posts.²⁵

Following the signing of the Armistice on November 11, 1918, the role of women in the military reverted principally to the traditional role of women in the military; that is, it was restricted to service in the Nurse Corps. The minor gains achieved during the time of necessity, which allowed women to serve in the Navy and Marines as clerks, draftsmen, translators and recruiters, were undone as the nation returned to a peace time footing. In 1925, the Naval Reserve Act was modified to allow the enlistment of "male citizens," restricting

71, 73 (1971), it ruled that Idaho's preference for males over females in matters related to estate administration was unconstitutional.

21. HOLM, *supra* note 4, at 399.

22. *Id.* at 10.

23. *Id.* Despite the door now being opened for enlisted service by the Department of the Navy, the Army did not authorize women to enlist during World War I. Instead the Army included women in its Nurse Corps. *Id.*

24. *Id.* at 12.

25. *Id.*

LEGAL IMPEDIMENTS TO SERVICE 1065

the broader language contained in the 1916 Act, which had opened the door to enlist women during World War I.²⁶

With war once again looming on the horizon, however, in May 1941, Congresswoman Edith Nourse Rogers (R-Mass.) introduced H.R. 4906, which established the Women's Army Auxiliary Corps (WAAC).²⁷ A year later, the bill passed, establishing as law a separate set of rules for women who would serve with the Army.²⁸ Among those unique characteristics established by this legislation, women who were in the Auxiliary Corps were required to be of high moral character and technical competence—a standard not required of men who, at this time, were being inducted into the armed forces by means of a compulsory draft.²⁹

Women who were able to join the Army under this new legislation lived under a different set of rules and regulations than did their male counterparts. Women were not extended the same legal protections if they went overseas, and they were not entitled to receive the same benefits if injured during service.³⁰ They were not entitled to draw the same pay, received no entitlements for their dependents, and were restricted in terms of their military rank and overall promotion opportunities. Although part of the Auxiliary, women were clearly not considered a part of the U.S. Army in its most important characteristics.³¹

Interestingly, the issue of women potentially serving as general officers surfaced as early as the hearings on the 1941 WAAC bill.³² The issue would be raised again in 1947 and 1948 in hearings on the Women's Armed Services Integration Act.³³

Opposition to women in flag officer positions³⁴ was not only expressed within the system generally, but by some of the very women who were engaged in the struggle for integration into the armed forces. Women who spoke publicly on the issue of integration were concerned that asking for too much too soon would disserve the eventual inclusion of women in the military.³⁵

In July 1942, the Navy followed the Army with legislation creating the Women Accepted for Volunteer Emergency Service (WAVES).³⁶ Once again, the congressional action occurred as the result of a critical need for support for the war effort.³⁷ As with their Army counterparts, the WAVES did not draw equal

26. *Id.* at 18; Naval Reserve Act of 1925, Pub. L. No. 68-512, 43 Stat. 1080 (1925).

27. HOLM, *supra* note 4, at 21.

28. Women's Army Auxiliary Corps (W.A.A.C.) Act, Pub. L. No. 77-554, 56 Stat. 278 (1942).

29. Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885 (1940) (codified as amended at 50 U.S.C. app. 301-309a (2000)) (creating the Selective Service to administer the first peacetime draft).

30. HOLM, *supra* note 4, at 24.

31. *Id.*

32. *Id.* at 195.

33. *Id.*

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

35. *Id.*

36. *Id.* at 27.

37. Pub. L. No. 77-689 (1942).

pay or entitlements, and they were administered under different regulations pertaining specifically to women serving the Navy.³⁸

At the end of World War II, massive demobilization of the military took with it most of the women who had been recruited into the WAAC and the WAVES. One author reports that the Department of the Army, which had consistently resisted the recruitment of women, even into clerical posts, held this view at the end of the war:

[I]t is believed no longer desirable that arrangements be made to form military organizations composed of women. A continuation of the war would have required the United States . . . to make a much more extended use of women . . . to replace men sent overseas or men shifted to heavy work which men alone can do.³⁹

Efforts to create a Women's Army Corps (WAC) and roles for women in the Navy and in the Regular and Reserve divisions of the peacetime Army failed in 1946 and 1947.⁴⁰

Efforts to establish a permanent nursing corps in the Navy and Army, however, did achieve success, as The Army-Navy Nurse Act⁴¹ established the Nurse Corps as a permanent staff corps. This act provided for the integration of female nurses into the officer ranks of the Regular Army and Navy up to the rank of lieutenant colonel or commander.⁴²

Under continuing pressure to integrate women, in June 1948, Congress passed the Women's Armed Services Integration Act of 1948, creating the legal foundation for women's participation in the regular military.⁴³ The law established the Women's Army Corps (WAC) in the Regular Army and authorized the enlistment and appointment of women in the Air Force, Navy and Marine Corps.

This 1948 law served as the foundation—the “Rule of Law”—to impose and perpetuate a set of legalized institutional discriminatory standards, the remnants of which still inhibit full integration of women into combat roles in the military service.

This legislation also established a statutory restriction that limited women to no more than two percent of total force strength.⁴⁴ Women under the age of twenty-one were required to have parental permission to join the armed forces, but their male counterparts required permission only if they were under the age of eighteen.⁴⁵ While enlisted women were permitted to achieve any rank then authorized, women officers were not permitted to hold a rank higher than the grade of colonel.⁴⁶

38. HOLM, *supra* note 4, at 24, 26–27.

39. *Id.* at 14 (citing MATTIE B. TREADWELL, U.S. ARMY IN WORLD WAR II: SPECIAL STUDIES—THE WOMEN'S ARMY CORPS 10 (1954)) (alteration added).

40. HOLM, *supra* note 4, at 99–109 (citing H.R. 5919 (1946)).

41. Pub. L. No. 36-80C, 61 Stat. 101 (1947).

42. HOLM, *supra* note 4, at 108.

43. Pub. L. No. 80-625, 62 Stat. 368 (1948).

44. *Id.*

45. *Id.*

46. JUDITH HICKS STIEHM, ARMS AND THE ENLISTED WOMAN 109–10 (1989).

LEGAL IMPEDIMENTS TO SERVICE 1067

This legislation codified the legal distinction that, for the purposes of pay and entitlements, women officers and enlistees could only claim their husbands or children as “dependents” if they could establish that these family members were in fact dependent upon the *women* for “their chief support.”⁴⁷ By contrast, wives and children of male members were automatically treated as dependents, and men serving in the armed forces were entitled to draw separate pay and entitlements for these dependents.⁴⁸

This same legislation also contained the provisions which would serve for years as the legal authority used to prohibit women from participating in combat, and the law served for more than four decades as the source of a solid “glass ceiling” in terms of women’s ability to achieve equality in rank in the military.

These barriers are rooted in the provisions included in the Women’s Armed Services Integration Act of 1948 which authorized the Secretaries of the various military services to prescribe *by regulation* the kind of military duties that women may be assigned to perform.⁴⁹ Additionally, Congress specifically restricted women from service in the Navy and Air Force on aircraft engaged in combat operations or on Navy vessels, except for hospital ships or naval transports.⁵⁰ The long-term effects of this policy continue to be felt even today, particularly as the issue of women in combat has arisen again in the current War Against Terror.⁵¹

The Women’s Armed Services Integration Act of 1948 also authorized the service secretaries to terminate the service of a female member, enlisted or commissioned, under regulations established by the President.⁵² It was this provision that, supplemented by Executive Order 10240, provided the legal authority to separate women from the Armed Forces due to pregnancy.⁵³

The Executive Order signed by President Harry Truman stated:

The commission of any one woman serving in the Regular Army, the Commission or warrant of any woman serving in the Regular Navy or the Regular Marine Corps, and the commission, warrant, or enlistment of any woman serving in the Regular Air Force, under either of the above mentioned acts [referring to the Army-Navy Nurses Act of 1947⁵⁴ and the Women’s Armed Services Integration Act of 1948⁵⁵] may be terminated, regardless of rank, grade, or length of service, by or at the direction of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, respectively, (1) under the same circumstances, procedures, and conditions, and for the same reasons under which a male member of the same armed force and of the same grade,

47. Pub. L. No. 80-625, 62 Stat. 356 (1948).

48. See HOLM, *supra* note 4, at 120; 37 U.S.C. §§ 401, 403 (West Supp. 2006); 10 U.S.C. § 1072 (West Supp. 2006).

49. HOLM, *supra* note 4, at 119.

50. *Id.*

51. Center for Military Readiness, Women in or Near Land Combat, Issues Paper, June 16, 2006, <http://www.cmrlink.org/WomenInCombat.asp?docID=272> (last visited Mar. 20, 2007).

52. HOLM, *supra* note 4, at 124.

53. *Id.* at 125.

54. 61 Stat. 41 (1947).

55. 62 Stat. 356 (1948).

rating or rank, and length of service may be totally separated from the service by administrative action, whether by termination of commission, discharge or otherwise, or (2) whenever it is established under appropriate regulations of the Secretary of the department concerned that the woman (a) is the parent, by birth or adoption, of a child under such minimum age as the Secretary concerned shall determine, (b) has personal custody of a child under such minimum age, (c) is the stepparent of a child under such minimum age and the child is within the household of the woman for a period of more than thirty days a year, (d) is pregnant, or (e) has, while serving under such commission, warrant or enlistment, given birth to a living child; and such woman may be totally separated from the service by administrative action by termination of commission, termination of appointment, revocation of commission, discharge or otherwise.⁵⁶

It was this Executive Order, along with the regulatory authority given to the service secretaries to establish policies, which precluded full integration of women into the military and limited their status in the armed forces. It also set the stage for the battles that women in the military began to fight through the Courts in the 1960s and beyond.

V. THE IMPACT OF THE CIVIL RIGHTS ACT AND SUPREME COURT DECISIONS

On July 2, 1964, Congress passed the Civil Rights Act.⁵⁷ This legislation established protections in the areas of employment, housing, and public accommodations, and it was designed to secure the civil rights of all people in the United States.⁵⁸ However, by the time of this enactment, the 1948 Integration Act had become “the base of a system of institutional segregation and unequal treatment that would shock modern-day civil libertarians.”⁵⁹ Thus, despite Congress’s noble intentions in 1964, it was not until November 1967 that substantial progress was made to advance the opportunities for women in the armed forces.

On November 8, 1967, President Lyndon Johnson signed into law the most significant legislative change in two decades for women in military service. The enactment of Public Law 90-130, which amended Titles 10, 32, and 37 of the United States Code, combined with subsequent victories in the courts, worked to reduce some barriers for women in the military.⁶⁰

As with each increment of progress in years past, the changes came about and gained acceptance as the result of political pressures facing a military then

56. HOLM, *supra* note 4, at 511, *quoting* Exec. Order No. 10,240, Apr. 27, 1951 (alteration in original; citations omitted).

57. Pub. L. 88-352, 78 Stat. 241 (1964). The principal impact of this legislation would not be realized in the U.S. military until nearly thirty years later when sexual harassment and assault cases at the military service academies resulted in careful examination of this legislation in an effort to add offenses specifically barring sexual harassment to the Uniform Code of Military Justice. See Richard Chema, *Arresting ‘Tailhook’: The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 3 (1993).

58. 42 U.S.C. § 1971 (2000).

59. HOLM, *supra* note 4, at 178.

60. Pub. L. No. 90-130 (1967).

LEGAL IMPEDIMENTS TO SERVICE 1069

engaged in an unpopular war—this time in Vietnam, accompanied by an increasing pressure to end the equally unpopular draft.

Among the restrictions lifted by Public Law 90-130 was the cap limiting the number of women in the services to two percent of the force.⁶¹ Also of great significance in this legislation was the lifting of the restrictions on promotions for commissioned women, who were finally permitted to achieve the grade of colonel and the flag ranks (admiral and general).⁶²

However, the law did not address many of the legally discriminatory provisions that continued to serve as barriers to equal service in the military until the intervention of the courts. These included: (1) the segregation of women into separate corps (i.e., WAC, Women's Air Force (WAF), and WAVE); (2) the authority maintained by service secretaries to discharge women for reasons of pregnancy and custody or housing of minor children; (3) unequal pay based upon dependency status; (4) exclusion from a taxpayer-funded education at the service academies; and (5) specific restrictions from service aboard Naval ships and aircraft engaged in combat missions.⁶³ Additionally, there were restrictions remaining in many career fields. These restrictions were driven by the authority extended to limit women's service by regulation and did not, necessarily, involve any statutory restrictions.

The remaining discriminatory provisions discussed above were next brought for review before the U.S. courts. Progress came slowly, however. Nearly a decade after the Equal Pay Act,⁶⁴ in the landmark decision of *Frontiero v. Richardson*,⁶⁵ Sharron Frontiero, an Air Force lieutenant married to a military veteran, challenged the provisions that denied women the same entitlements for dependents as their male counterparts. Frontiero's spouse was not automatically considered her dependent.⁶⁶ Additionally, she was not eligible for on-base housing, and her husband was not eligible for the medical care routinely provided to wives of military members.⁶⁷ To become eligible for these same benefits, the Frontieros were required to submit proof that Lieutenant Frontiero's husband was dependent upon her for more than one-half of his support.⁶⁸

The suit was submitted on both the basis of due process and equal protection grounds.⁶⁹ The federal district court for the Middle District of Alabama held against the Frontieros, indicating that there would be a "considerable saving of administrative expense and manpower," by allowing

61. *Id.*

62. *Id.*

63. HOLM, *supra* note 4, 201-02.

64. 29 U.S.C. § 206 (2000).

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

66. *Id.* at 680.

67. *Id.*

68. *Id.*

69. *Frontiero v. Laird*, 341 F. Supp. 201, 203 (M.D. Ala. 1972), *rev'd sub nom.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973).

the distinction, because military wives were generally dependent upon their spouses.⁷⁰

The U.S. Supreme Court, in an eight to one decision (Justice Rehnquist, dissenting) reversed the District Court.⁷¹ In the plurality opinion, four Justices (Brennan, Douglas, White, and Marshall) held that the distinction created by this statute warranted a “strict judicial scrutiny” review consistent with the equal protection cases being decided by the Court at that time.⁷²

Justices Brennan, Douglas, White, and Marshall stated in their opinion:

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .”⁷³

They continued in their analysis by pointing out the changes which had occurred in legislation dealing with sex-based classifications, and by noting the changes to Title VII of the Civil Rights Act of 1964⁷⁴ and to the Equal Pay Act of 1963.⁷⁵

Brennan, Douglas, White, and Marshall went on to indicate that, with all of the legal developments in mind:

[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must, therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.⁷⁶

Justices Powell, Blackmun, and Burger declined to apply the “strict scrutiny” standard, and instead resolved the issue under due process standards.⁷⁷ In the opinion authored by Justice Powell, these three justices held “it is unnecessary for the Court in this case to characterize sex as a suspect classification with all of the far-reaching implications of such a holding.”⁷⁸ It appears that the reason for avoiding the strict scrutiny argument arose from a belief that the Equal Rights Amendment, which had been passed by Congress and was submitted for ratification by the States, would moot the need for such analysis.⁷⁹

70. *Id.* at 207.

71. *Frontiero v. Richardson*, 411 U.S. at 677.

72. *Id.* at 688.

73. *Id.* at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972)).

74. 42 U.S.C. § 1971 (2000).

75. 29 U.S.C. § 206 (2000).

76. *Frontiero*, 411 U.S. at 688 (alteration added).

77. *Id.* at 691.

78. *Id.* at 691 (citing *Reed v. Reed*, 404 U.S. 71 (1971)).

79. *Id.*

LEGAL IMPEDIMENTS TO SERVICE 1071

Justice Potter Stewart also concurred in finding the legislation unconstitutional, but he made no reference to the “strict scrutiny” standard necessary to establish an equal protection ground for the decision.⁸⁰

Following *Frontiero*, the legal battles came in earnest on many fronts, and through various fact patterns. Among them was a challenge to the policy of discharging women who had minor children either residing or visiting in their homes.⁸¹ Tommie Sue Smith, a judge advocate, joined the U.S. Air Force in 1966 with a four-year-old son.⁸² She had surrendered legal custody of her son in order to join the military.⁸³ However, after serving in the Air Force for a time, she also learned that she could not have her son in her home for more than thirty days each year, or she would face discharge.⁸⁴

Smith had requested a waiver to allow her child to live in her home for more than thirty days a year, which would enable her to maintain physical custody while vesting legal custody in another person.⁸⁵ Her request for a waiver was denied. Smith therefore sent her son to a military school in Virginia, which was within weekend commuting distance of Smith’s Washington, D.C. base assignment.⁸⁶

In 1969, Smith received an assignment to the Philippines.⁸⁷ She was told she could not take her son with her on the assignment because of the thirty-day rule.⁸⁸ She was given the option either to go on the assignment without her son or to separate from the Air Force.⁸⁹

80. *Id.*

It is important to note here that *Frontiero* was a plurality opinion, and a majority of the court did not endorse the application of strict scrutiny to gender classifications. Indeed, in the years immediately following *Frontiero*, the standard of review for gender classifications remained uncertain, and the Court decided several such cases without articulating a level of scrutiny. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 725 (2d ed. 2002) (discussing some of these post-*Frontiero* cases). Finally, in 1976, the Court seemed to settle on an ill-defined “elevated or ‘intermediate’ level” of scrutiny for gender classifications in *Craig v. Boren*. See 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting). In 1996, however, the Court articulated yet another “heightened scrutiny” standard in *United States v. Virginia*. See 518 U.S. 515, 550 (1996) (“[A]ll gender-based classifications today warrant heightened scrutiny.” (alteration added; quotations omitted)). Under this standard, “[p]arties who seek to defend gender-based government action must demonstrate an *exceedingly persuasive justification* for that action.” *Id.* at 531, 533 (emphasis and alteration added). While Justice Ginsburg, writing for the Court, was careful to say that “[s]trict scrutiny . . . is reserved for state classifications based on race or national origin and classifications affecting fundamental rights,” *id.* at 567–68 (alteration added; quotations omitted), a compelling argument can be made—and it is the view of this author—that the majority adopted a standard that “amounts to (at least) strict scrutiny.” *Id.* at 579 (Scalia, J., dissenting). Whatever the Court chooses to call the standard of review in the next gender classification case, it is clear that the standard will be more searching than rational basis review.

81. STIEHM, *supra* note 46, at 115–17.

82. *Id.* at 116.

83. *Id.*

84. *Id.* at 115–17.

85. HOLM, *supra* note 4, at 296.

86. *Id.* at 296.

87. STIEHM, *supra* note 46, at 116.

88. *Id.*

89. HOLM, *supra* note 4, at 296.

This occurred even though the Air Force Deputy Chief of Staff, then Lt. Gen. Robert Dixon, had ordered his staff to rescind the minor children discharge policy in August 1969.⁹⁰ The policy was not finalized until September 29, 1969, the day after Smith's lawsuit was filed seeking to overturn the policy.⁹¹

Smith, who was admitted to practice before the U.S. Supreme Court and a member of the Tennessee bar, filed suit in U.S. District Court on September 28, 1969.⁹² The next day, the Air Force implemented its change in policy and Smith was permitted to go to the Philippines with her son.⁹³

Additional battles loomed to allow natural mothers to remain on active duty. In 1970, Seaman Anna Flores became pregnant.⁹⁴ Flores was unmarried at the time. Before she and her fiancé, a Navy enlisted man, could be married (as they had already planned), she miscarried.⁹⁵ Although she was no longer pregnant, her commanding officer nevertheless took actions to have Flores discharged as called for by Navy regulations.⁹⁶

Flores filed suit before the U.S. District Court in Pensacola, Florida, to block the Navy from discharging her, arguing that the Navy was unconstitutionally discriminating against women by discharging them for becoming pregnant while not discharging the male sailors who impregnated them.⁹⁷ The suit was brought by the American Civil Liberties Union and was eventually granted class-action status.⁹⁸ The complaint argued that all women in the military were being deprived of due process and equal protection of the law.⁹⁹

In ruling in favor of the Department of Defense, the District Court for the Northern District of Florida relied solely upon the remedial actions that had been taken by the Department of the Navy after Seaman Flores brought her suit to avoid finding a violation of the equal protection component of the due process clause of the Fifth Amendment.¹⁰⁰

Flores' commander had initially recommended:

In spite of FLORES [sic] excellent professional performance and her strong desire to remain in the Navy, retention is not recommended. To do otherwise would imply that unwed pregnancy is condoned and would eventually result in a dilution of the moral standards set for women in the Navy.¹⁰¹

Flores had contended in her lawsuit that discharging unmarried women because of a concern related to moral standards—while not applying the same moral

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 295–96.

94. *Id.* at 298.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Seaman Anna Flores v. Sec'y of Defense*, 355 F. Supp. 93 (N.D. Fla. 1973).

100. *Id.* at 96.

101. *Id.* at 94.

LEGAL IMPEDIMENTS TO SERVICE 1073

standards to men—violated the equal protection component of the due process clause.¹⁰²

At the time of the institution of the law suit, the then-Deputy Chief of Naval Personnel, Adm. Plate, had testified in deposition that he did not accept the rationale that men and women should be held to a single standard of morality.¹⁰³ He argued that to do so would enable those men seeking to find a way to avoid their obligation under the Selective Service Act to find women willing to assist them in achieving violations of the morality standard to which military women were already being held.¹⁰⁴

By the time the Florida District Court rendered its decision, however, the Navy had abandoned its policy of discharging pregnant women who were unmarried.¹⁰⁵ The District Court also relied upon the fact that the Navy now had a new Deputy Chief of Naval Personnel, and that Adm. Baldwin, who succeeded Adm. Plate, had testified that “whatever prior Navy policy may have been, there is not now applied or considered a double moral standard for men and women in determining retention in service of pregnant women.”¹⁰⁶ The Court went on to state:

His testimony is unequivocal that the issue in determining retention is service of pregnant women is the person’s ability to do her job and cope with her physical condition, that moral character is not a factor, and that the same basic criteria are applied to both single and married pregnant women requesting retention in the Navy.¹⁰⁷

This single moral standard issue would resurface, however, in cases involving disciplinary actions taken for sexual misconduct some twenty years later.¹⁰⁸

At the same time as Flores’ case was winding through the courts, Capt. Susan R. Struck, a pregnant nurse at McChord Air Force Base, Washington, also challenged the policy regarding pregnancy discharge for military women.¹⁰⁹ Struck was single and a Roman Catholic, according to Justice Ruth Bader Ginsburg, who—prior to her appointment to the federal bench—had represented Struck as a lawyer working for the American Civil Liberties Union.¹¹⁰ Struck had agreed to surrender the child after birth for adoption. Despite having informed her superiors about her decision, they pursued her separation from the Air Force in accordance with the then-existing policies.¹¹¹

102. *Id.*

103. *Id.* at 95.

104. *Id.*

105. *Id.*

106. *Id.* at 96.

107. *Id.* at 95.

108. These sexual misconduct cases will be discussed later in this paper and include cases arising from Tailhook and concerning Lt. Kelly Flinn, Lt. Christa Davis, Col. Jan Cislser, Lt. Col. Dave Shoher, Maj. Gen. Thomas Fiscus, and Maj. Gen. David Hale, among others.

109. HOLM, *supra* note 4, at 299; STIEHM, *supra* note 46, at 117.

110. Justice Ruth Bader Ginsburg, Speech at the Women in Military Service Memorial for America (Sept. 9, 2005) (notes on file with author).

111. *Id.*

Struck took her case to District Court and lost.¹¹² The case was appealed, and the Solicitor General concluded that the Air Force position would be weak.¹¹³ Therefore, Struck was granted a waiver, rendering further action before the U.S. Supreme Court moot.¹¹⁴ Similar lawsuits resulted in additional waivers being granted to Lt. Mary S. Gutierrez¹¹⁵ and Airman Gloria D. Robinson.¹¹⁶

The lawsuits confronting these issues continued and eventually, facing the inevitability of change, the Department of Defense directed the service secretaries on June 1, 1974, to develop new policies making separations for pregnancy voluntary. The new policies were to be effective by May 1975.¹¹⁷

Meanwhile, the Marine Corps was confronted with these same issues as the Air Force when Stephanie Crawford challenged the Corps's policy. The Marines rule was to discharge any pregnant military woman, even if she had surrendered all rights to custody or control of the child.¹¹⁸ They also notified the female marine's parents if she became pregnant of the reasons for the pregnant woman's discharge.¹¹⁹

Crawford had become pregnant out of wedlock.¹²⁰ She had been discharged from the Marines in 1970 due to the pregnancy.¹²¹ She applied for reenlistment, and her request was denied because she had a child.¹²² Crawford filed a lawsuit seeking reinstatement, but the trial court held in favor of the Marines.¹²³ Finally, in *Crawford v. Cushman*, the United States Court of Appeals for the Second Circuit held that the Marine Corps' regulation requiring the discharge of a pregnant marine as soon as pregnancy is discovered violated the Fifth Amendment of the United States Constitution.¹²⁴ Reversing the decision of the United States District Court for the District of Vermont, the Second Circuit held that the regulation violated the due process clause because it established an irrebuttable presumption that any pregnant marine (or service member) is permanently unfit for duty.¹²⁵

The issue of military members as parents continues to be a source of challenge for the U.S. military. In 1981, in *Lindenau v. Alexander*,¹²⁶ the military prevailed in its position to deny enlistment to single parents who have custody of their children. Because the policy banned male and female single parents

112. *Struck v. Sec'y of Defense*, 460 F.2d 1372 (9th Cir. 1971).

113. HOLM, *supra* note 4, at 299.

114. *Id.*

115. *Gutierrez v. Sec'y of Defense Melvin Laird*, 346 F. Supp. 289 (D.D.C. 1972).

116. *Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972); *see also* STIEHM, *supra* note 46, at 116–17.

117. STIEHM, *supra* note 46, at 117; HOLM, *supra* note 4, at 300.

118. STIEHM, *supra* note 46, at 117.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. 378 F. Supp. 717 (D.C. Vt. 1974).

124. 531 F.2d 1114 (2d Cir. 1976).

125. *Id.*

126. *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981). *See also* *Mack v. Rumsfeld*, 609 F. Supp. 1561 (W.D.N.Y. 1985), *aff'd*, 784 F.2d 438 (2d Cir. 1986), *cert. denied sub nom.*, *Mack v. Weinberger*, 479 U.S. 815 (1986).

LEGAL IMPEDIMENTS TO SERVICE 1075

alike, the due process arguments used to strike down the previous barriers to women's service could not be used to modify these enlistment barrier provisions.

VI. THE MILITARY ACADEMY DILEMMA

Perhaps the most publicized dilemma to the U.S. Department of Defense posed by the integration of women into its services is the inclusion and integration of women into the service academies.

Since the founding of the U.S. Military Academy in 1802, the military service academies were long considered to be extraordinarily elite educational institutions for men destined for positions of leadership in the U.S. armed forces.¹²⁷ The branches of the services were, as in most issues pertaining to integration of women into their ranks, split on opening the doors of the service academies to women.¹²⁸ The arguments from those opposed to inclusion of women focused principally upon the existing policies, which precluded women from being assigned to serve aboard ships or to hold combat-support or combat-leadership positions.¹²⁹ During this discussion, the service academies maintained that "the primary mission of the service academies is to train men for assignment to the combat arms or combat support arms. Since women could not be assigned to such a role, it is not necessary nor logical to grant them admission."¹³⁰

Ultimately, it was the process of nomination available to members of Congress that brought this issue to the fore. In 1972, Sen. Jacob Javits (R-N.Y.) nominated a woman for appointment as a cadet at the United States Naval Academy.¹³¹ Because women were ineligible to enroll at the institution, the Academy refused to consider her nomination.¹³² In the same year, in response to the Academy's refusal to consider the nomination, Javits and Rep. Jack H. McDonald (R-Mich.) introduced a concurrent resolution proposing that a woman, duly nominated to a military service academy, should not be denied admission solely on the basis of sex.¹³³ The resolution passed in the Senate with little debate, but it never passed out of the House Armed Services Committee.¹³⁴

In September 1973, women who wanted to enter the academies brought lawsuits against the Air Force and the Navy.¹³⁵ They were joined in this effort by

127. The United States Military Academy (Army) was established in 1802 and is the oldest military academy in the United States. It was followed by establishment of the U.S. Naval Academy in 1845, the U.S. Coast Guard Academy in 1876, the U.S. Merchant Marine Academy in 1942, and the U.S. Air Force Academy in 1954.

128. HOLM, *supra* note 4, at 305-06.

129. *Id.*

130. See Harry C. Beans, *Sex Discrimination*, 67 ARMY L. REV. 19, 63 (1975) (citing *Hearings Before the Special Subcomm. on the Utilization of Manpower in the Military of the House Commission on Armed Services*, 92d Cong., 2d Sess. 12443 (1972) (statement of General Bailey))

131. HOLM, *supra* note 4, at 305-06.

132. *Id.* at 305.

133. *Id.* at 306.

134. *Id.*

135. *Id.*

four members of Congress who objected to being required to discriminate on the basis of sex in making nominations for the service academies.¹³⁶

On December 20, 1973, the Senate once again voted by voice vote to approve an amendment to allow women to enter the service academies.¹³⁷ The House once again struck the amendment from the bill.¹³⁸ However, the compromise struck this time was that hearings would be held, under the authority of the House Armed Services Committee Chair, Rep. F. Edward Hebert (D-La.).¹³⁹

The argument against allowing women to compete for a fully-paid college education at the U.S. military academies focused principally on the myth that the service academies were exclusively designed as a leadership laboratory for America's combat leadership.¹⁴⁰ It was this misplaced reliance that led, once again, to the reluctant change in the discriminatory application of the rule of law.

On April 16, 1975, Rep. Samuel S. Stratton (D-N.Y.) issued a press release, citing a Government Accounting Office (GAO) study that reported, of the 8880 graduates of the Air Force Academy serving on active duty as of October 1974, twenty-nine percent had never held a career combat assignment.¹⁴¹ The GAO study went on to state that 3777 of the 30,576 graduates of the nation's top three service academies had never had a combat assignment.¹⁴²

With lawsuits wending their way through the Courts, and with the GAO study defeating the myth that the "combat exclusion" supported continued exclusion of women, the Department of Defense Appropriations Bill was the vehicle used to change the exclusion of women from service academies. Without further discussion of the exclusion of women in combat, Public Law 94-106, signed into law on October 7, 1975, opened the doors of the U.S. military service academies to women for the first time.¹⁴³

The decision to admit women to the U.S. military academies was followed by similarly wrenching and unsettling challenges to other military colleges. Legislation was enacted in 1978 that authorized the Secretary of Defense to require that any college or university designated as a military college permit women to participate in their programs as a condition of maintaining its designation as a military college.¹⁴⁴ That law, however, was quickly repealed.¹⁴⁵ The next year, the law resurfaced, again allowing the Secretary of Defense to establish the condition that military colleges allow "qualified female undergraduate students" enrolled in military colleges and universities to

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 306-07.

140. *Id.* at 305-08.

141. *Id.* at 310.

142. *Id.*

143. Pub. L. No. 94-106, 89 Stat. 531 (1975).

144. Pub. L. No. 95-485, 92 Stat. 1623 (1978).

145. Pub. L. No. 98-525, 98 Stat. 2621 (1984).

LEGAL IMPEDIMENTS TO SERVICE 1077

participate in military training, but it added that the regulations may not require women enrolled in the college or university to participate in military training.¹⁴⁶

The battle fought to allow women to enter traditionally all-male military institutions continued at military colleges throughout the U.S. In 1990, the United States sued the Commonwealth of Virginia and the Virginia Military Institute for violating the Equal Protection Clause of the Fourteenth Amendment, challenging the policy that Virginia had followed to deny women admission to the Virginia Military Institute (VMI), a publicly funded university.¹⁴⁷ In the two years preceding the lawsuit, VMI had received inquiries from 347 women, but it had not responded to any of them.¹⁴⁸

The District Court ruled in favor of VMI and rejected the equal protection challenge pressed by the United States, relying upon the arguments presented by VMI and the Commonwealth of Virginia to the effect that physical training, the absence of privacy, and the “adversative approach” used at VMI would be materially affected by making the program co-educational.¹⁴⁹ The Fourth Circuit Court of Appeals disagreed with the District Court, holding that the Commonwealth of Virginia had not “advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI’s unique type of program to men and not to women.”¹⁵⁰ The Court of Appeals held, “[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender.”¹⁵¹

Virginia’s response to the Fourth Circuit’s ruling was to propose a parallel program for women, the Virginia Women’s Institute for Leadership (VWIL) at Mary Baldwin College, a private liberal arts school for women.¹⁵² This remedial plan was approved by the District Court, despite clear inequities in the educational environment and military training opportunities set out in the VWIL program.¹⁵³ A divided Court of Appeals affirmed the District Court’s approval of the remedial plan.¹⁵⁴

On appeal, the United States Supreme Court held that Virginia had failed to demonstrate an “exceedingly persuasive justification” for excluding all women from the citizen-soldier training provided at VMI.¹⁵⁵ The Supreme Court further held that the Mary Baldwin VWIL program did not provide an equal opportunity, and it reversed the Fourth Circuit’s decision approving the remedial plan.¹⁵⁶

146. 10 U.S.C. § 2009 (2000).

147. *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *remanded to* 852 F. Supp. 471 (W.D. Va. 1994), *aff’d*, 44 F.3d 1229 (4th Cir. 1995), *reh’g en banc denied*, 52 F.3d 90 (4th Cir. 1995), *aff’d*, 518 U.S. 515 (1996), *remanded to* 96 F.3d 114 (4th Cir. 1996).

148. *Virginia*, 518 U.S. at 523.

149. *Id.* at 525–26.

150. *Virginia*, 976 F.2d at 892.

151. *Id.*

152. *Virginia*, 518 U.S. at 526.

153. *Virginia*, 852 F. Supp. 484–86.

154. *Virginia*, 44 F.3d at 1229–51.

155. *Virginia*, 518 U.S. at 534.

156. *Id.* at 534.

In this important Supreme Court decision, the Court specifically addressed the argument that had been advanced that “admission of women would downgrade VMI’s stature, destroy the adversative system, and with it, even the school.”¹⁵⁷ The Supreme Court noted that this same argument had been made regarding admitting women to the federal military academies, citing specifically the testimony of Lt. Gen. A.P. Clark, Superintendent of the U.S. Air Force Academy, “It is my considered judgment that the introduction of female cadets will inevitably erode this vital atmosphere,” and the statement of the Hon. H.H. Callaway, Secretary of the Army, “Admitting women to West Point would irrevocably change the Academy. . . . The Spartan atmosphere—which is so important to producing the final product—would surely be diluted, and would in all probability disappear.”¹⁵⁸

The VMI case was unfolding as Shannon Faulkner waged a similar battle to be able to enroll at The Citadel, a state-funded military college in South Carolina.¹⁵⁹ Faulkner had applied to and been selected for admission to The Citadel in early 1993, while the school remained a male-only military college.¹⁶⁰ The Citadel indicated that it was unaware of Faulkner’s gender when it mistakenly admitted her.¹⁶¹ When it realized she was a female, The Citadel revoked her admission and Faulkner filed suit.¹⁶²

In August 1993, a preliminary injunction ordered that Shannon Faulkner be allowed to attend day classes at The Citadel, but the court did not require that she be permitted to join the Corps of Cadets.¹⁶³ In 1994, after a hearing on the merits of Faulkner’s case, the District Court held that The Citadel’s male-only admissions policy violated the Equal Protection Clause, and it ordered The Citadel to admit Faulkner to the Corps of Cadets.¹⁶⁴ Following Virginia’s lead, the State of South Carolina proposed to create a parallel program at Converse College called the South Carolina Institute of Leadership for Women (SCIL).¹⁶⁵ The District Court had ordered The Citadel to admit Faulkner to the Corps of Cadets not later than August 12, 1995.¹⁶⁶

Although The Citadel sought a stay of the action, to enable them to propose the Converse College plan as an alternative, the discovery battle that ensued prevented the parties from having the order reviewed before the August 12, 1995, date. And so it was that on August 12, 1995, Shannon Faulkner became the first woman admitted to the Corps of Cadets at The Citadel.¹⁶⁷

157. *Id.* at 543.

158. *Id.* at 544 n.11.

159. *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994), *aff’d*, 51 F.3d 440 (4th Cir. 1995).

160. *Faulkner*, 858 F. Supp. at 554.

161. *Id.*

162. *Id.*

163. *Faulkner v. Jones*, 10 F.3d 226, 229 (4th Cir. 1993), *motion to stay mandate denied*, 14 F.3d 3 (4th Cir. 1994).

164. *Faulkner*, 858 F. Supp. at 569.

165. *United States v. Jones*, 136 F.3d 342, 344 (1998).

166. *Faulkner*, 858 F. Supp. at 569.

167. CNN.com, *The Citadel Graduates First Woman in its History* (May 8, 1999), <http://www.cnn.com/US/9905/08/citadel.women/> (last visited Feb. 23, 2007).

LEGAL IMPEDIMENTS TO SERVICE 1079

After less than a week, Cadet Faulkner left The Citadel, “to the jubilation of the male student,”¹⁶⁸ due to “illness.”¹⁶⁹ She was followed by others, including Nancy Mellette, who continued the litigation until the doors of The Citadel were legally opened to women.¹⁷⁰ It was not, however, until May 8, 1999, when Cadet Nancy Mace (the daughter of the Commandant of Cadets at The Citadel) became the first woman to graduate from The Citadel, that the doors were fully opened to women. Mace graduated *cum laude* with a degree in business administration.¹⁷¹

VII. SEXUAL MISCONDUCT, THE UNIFORM
CODE OF MILITARY JUSTICE, AND THE RULE OF LAW

As more women were integrated into the services, the number of cases in which sexual misconduct was charged began to grab headlines throughout the United States. A 1997 report noted that, through 1988, the Air Force had brought no adultery charges against Air Force women, and in 1987, it brought only sixteen cases against men.¹⁷² However, by 1996, there were sixty-seven cases in which adultery was included as at least one charge against both men and women in the military.¹⁷³

From cases involving recruiter misconduct¹⁷⁴ to cases involving women in the service posing nude for magazines such as *Playboy* or *Penthouse*,¹⁷⁵ the challenges of fully integrating women into the armed forces began to clearly identify sexuality as a challenge to the military as an institution.

In April 1980, the publishers of *Playboy* magazine photographed seven military women in various states of uniform (un)dress.¹⁷⁶ The photos included three women from the U.S. Navy, and one each from the Army, Marines, Coast Guard, and Air Force.¹⁷⁷ The uniform response from all the Armed Forces was to involuntarily discharge the women.¹⁷⁸ The unexpected consequence of the *Playboy* discharges was the discovery that male service members also had posed

168. *Id.*

169. *Mellette v. Jones*, 136 F.3d 342, 345 (4th Cir. 1998).

170. *Id.*

171. Mace was one of three women admitted the year after Faulkner left The Citadel. The other two women left the school, citing harassment by the male cadets. Mace’s father, Brig. Gen. Emory Mace, was the Commandant of Cadets at the time of his daughter’s graduation. CNN.com, *The Citadel Graduates First Woman in its History*, (May 8, 1999), <http://www.cnn.com/US/9905/08/citadel.women/> (last visited Feb. 23, 2007).

172. Via *Associated Press*, as reported in *The Bismarck Tribune*, May 17, 1997.

173. *Id.*

174. See generally *United States v. Machado*, No. ACM 35908, 2006 WL 1512106 (A.F. Ct. Crim. App. May 31, 2006), *review denied*, 64 M.J. 231 (C.A.A.F. 2006); *United States v. Pope*, 63 M.J. 68 (C.A.A.F. 2006).

175. STIEHM, *supra* note 46, at 124–26.

176. *Id.* at 126.

177. *Id.* at 124–26.

178. *Id.*

nude for *Playgirl* magazine.¹⁷⁹ This discovery resulted in a male Marine major receiving a letter of reprimand,¹⁸⁰ although he was not discharged.¹⁸¹

In sharp contrast to the military's decision to discharge the women who posed for these magazines, the United States Court of Military Appeals in November 1986 affirmed the decision of the Air Force Court of Military Review that an Air Force lieutenant colonel charged with taking nude photographs of a female employee was entitled to have the offense dismissed because the charge was too vague to constitute conduct unbecoming an officer and a gentleman.¹⁸² Lt. Col. David A. Shober had been the manager of the Officers' Open Mess at Wright-Patterson Air Force Base, Ohio, when he was charged with having sexual intercourse with a subordinate female bartender, and with taking nude photographs of her.¹⁸³ The same court also ruled that neither Lt. Col. Shober's sexual misconduct—some of which occurred in his office—nor his taking nude photographs of his civilian subordinate were criminal acts warranting his dismissal from the Air Force.¹⁸⁴ Although a military judge, sitting in a bench trial at the accused's request, found Lt. Col. Shober guilty of both offenses and sentenced him to dismissal and forfeiture of all pay and allowances, the Air Force Court of Military Review nevertheless held that the taking of nude photographs of a subordinate did not constitute conduct unbecoming an officer and modified the sentence by setting aside Shober's dismissal. Instead, it imposed a reprimand and forfeiture of \$1500 pay per month for twelve months.¹⁸⁵ The Court of Military Appeals affirmed that decision and ordered Shober—who had been on leave status while awaiting a final decision on his appeal—returned to active duty.

The Air Force Court of Military Review opinion held:

Not every deviation from the high standard of conduct expected of an officer constitutes conduct unbecoming an officer. The nude photographs were taken with the consent of the subject and were given to her upon her request. There is no indication that while the appellant had the photographs he used them for an illicit purpose. . . . Under the language of this allegation, any officer who has an interest in photography had best limit the subject matter to still-life, landscapes and fully-clothed models.¹⁸⁶

179. *Id.*

180. *Id.* at 126.

181. More recently, in January 2007, the United States Air Force took action to demote Staff Sgt. Michelle Manhart for posing nude in the January 2007 edition of *Playboy*. Associated Press, *Playboy-Posing Sergeant Relieved of Duty*, CBS NEWS (online ed.), Jan. 12, 2007, <http://www.cbsnews.com/stories/2007/01/12/print/main2354876.shtml> (last visited Mar. 22, 2007).

182. *United States v. Shober*, 22 M.J. 253 (C.M.A. 1986).

183. *United States v. Shober*, 26 M.J. 502 (A.F.C.M.R. 1986).

184. *Id.* at 503.

185. *Id.*

186. *Id.* (citations omitted). The charge against Lt. Col. Shober stated:

In that LIEUTENANT COLONEL DAVID A. SHOBER, United States Air Force, . . . did, at Wright-Patterson Air Force Base, Ohio, on or about December 1984, wrongfully take nude photographs of C.S., a subordinate civilian employee, not the wife of the said Lieutenant Colonel David A. Shober, at the Officer's Open Mess, which conduct was unbecoming an officer and a gentleman.

LEGAL IMPEDIMENTS TO SERVICE 1081

In December 1989, at Yokota Air Base, Japan, the Air Force brought court-martial charges against one of the most highly decorated fighter pilots from the Vietnam War, when they charged the Fifth Air Force Chief of Staff with violating the lawful order of his superior commanding officer on two occasions and committing adultery.¹⁸⁷ Col. Cisler was charged with and convicted of having engaged in a sexual liaison with an enlisted female air traffic controller. A panel of senior officers—composed of colonels and generals senior in grade to Cisler—sentenced him to serve two years in prison, to forfeit \$2000 pay per month for twenty-four months, and to pay a fine of \$10,000.¹⁸⁸ Cisler had been ordered on three occasions not to see the female airman any more, but after having received that order, he had continued his adulterous affair with the airman.

In August 1991, an Air Force captain—deployed in support of Operations Desert Shield and Desert Storm—was charged with conduct unbecoming an officer and a gentleman, adultery, and committing an indecent act with another¹⁸⁹ for having engaged in consensual sexual activity with two enlisted women. In one of the offenses, Capt. Hebert, the accused, acknowledged that he had engaged in the sexual activity in the presence of his paramour's roommate.¹⁹⁰ On appeal, Capt. Hebert argued that he had been the victim of selective prosecution, as his two enlisted paramours had only been given reprimands for their part in this activity.¹⁹¹ Hebert's more novel argument, however, was that "conduct such as his was the norm in a deployment environment, and there was tacit acceptance of it as indicated by other instances of adulterous conduct known by him which went unpunished."¹⁹² Hebert's appeal was unsuccessful and his sentence to dismissal and confinement for three months was affirmed.

In September 1991, the challenges posed by fully integrating women into the military and dealing with the attendant sexuality issues came to a boiling point with the disclosure of dishonorable conduct engaged in by naval aviators against women at the Tailhook Convention at the Las Vegas Hilton Hotel.

The Tailhook Association is a private organization composed of active duty, retired, and reserve Navy and Marine Corps aviators. It also includes defense contractors and others associated with naval aviation.¹⁹³ At the 1991

Id.

187. *United States v. Cisler*, 33 M.J. 503 (A.F.C.M.R. 1991). Adultery in this case was charged as conduct unbecoming an officer and a gentleman under the Uniform Code of Military Justice as a violation of 10 U.S.C. § 933 (2000). Failure to obey the lawful order of a superior commanding officer is charged as a violation of 10 U.S.C. § 891 (2000), but in some cases this may be charged as a violation of 10 U.S.C. § 892 (2000).

188. *Id.*

189. These offenses are charged under 10 U.S.C §§ 933–934 (2000).

190. Public performance of sexual activity may serve as the basis for an "indecent act" specification in military jurisprudence, which is a violation of 10 U.S.C. § 934 (2000).

191. *United States v. Hebert*, No. ACM 29622, 1993 WL 430214, at *1–10 (A.F.C.M.R. Sept. 14, 1993), *review granted*, 41 M.J. 105 (C.A.A.F. 1994), *aff'd*, 41 M.J. 376 (C.A.A.F. 1994), *cert. denied sub nom.*, *McElroy v. United States*, 513 U.S. 1192 (1995).

192. *Hebert*, 1993 WL 430214 at *3.

193. Lt. Cdr. J. Richard Chema, *Arresting 'Tailhook': The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV.1, 16 (1993).

convention, more than five thousand members attended, including several senior leaders of the Navy. The Secretary of the Navy and Chief of Naval Operations were present, as well as twenty-nine other active duty admirals, two active duty Marine Corps generals, three Navy Reserve admirals, and many other retired flag officers.¹⁹⁴

Navy Lt. Paula Coughlin attended the convention, and she complained that she had been physically and sexually assaulted by a group of drunken aviators in a “gauntlet” formed in the hotel corridor.¹⁹⁵ What followed included investigations—and investigations of the investigations—that concluded that the Armed Forces had overlooked the need to establish a clear criminal consequence for engaging in sexual harassment under the Uniform Code of Military Justice.¹⁹⁶ In the end, no one was criminally charged for misconduct in the Tailhook events.¹⁹⁷

In July 1993, a male military training instructor faced charges of forcible sodomy, indecent assault, communicating a threat, dereliction of duty and violating a command regulation for his conduct involving female trainees assigned to his military training unit.¹⁹⁸ In upholding his conviction and subsequent sentence of dishonorable discharge, three years’ confinement, and reduction from the grade of E-4 to the grade of E-1, the Air Force Court of Criminal Appeals explained that the unique power a military training instructor held over the lives of enlisted trainees constitutes a constructive force that is sufficient to establish that the sodomy was forcible.¹⁹⁹

In March 1998, Army Sgt. Maj. Gene McKinney was reduced to the grade of master sergeant following his conviction on the charge of obstructing justice.²⁰⁰ McKinney, who had served in the Army for twenty-nine years and was the highest-ranked enlisted member of the Army at the time, was charged with pressuring six women for sex. Although, at his court-martial, McKinney was acquitted of the charges alleging that he had maltreated subordinates, communicated threats, committed adultery, and committed indecent assault involving female subordinates,²⁰¹ one of the individuals who had accused him of

194. *Id.* (citing DEP’T OF DEFENSE, OFFICE OF INSPECTOR GENERAL, TAILHOOK 91, PART 1—REVIEW OF THE NAVY INVESTIGATIONS 1–2 (Sept. 1992), available at <http://www.mith2.umd.edu/WomensStudies/GenderIssues/SexualHarassment/tailhook-91> (last visited Mar. 25, 2007)).

195. Chema, *supra* note 193, at 17.

196. 10 U.S.C. §§ 801–946 (West Supp. 2007).

197. Chema, *supra* note 193, at 18. Chema notes that his information was current as of two years after the date of the events at Tailhook.

198. These offenses were charged in violation of 10 U.S.C. §§ 925, 934, 934, 892, 892 (2000), respectively.

199. *United States v. McCreary*, No. ACM 30753, 1995 WL 77637 (A.F. Ct. Crim. App. Feb. 15, 1995), *review denied*, 43 M.J. 157 (C.A.A.F. 1995).

200. *McKinney v. White*, 291 F.3d 851 (D.C. Cir. 2002); *McKinney v. United States*, 51 M.J. 270 (C.A.A.F. 1998); *McKinney v. Caldera*, 141 F. Supp. 2d 25 (D.D.C. 2001).

201. A court-martial is a criminal proceeding held in accordance with the Uniform Code of Military Justice. The trial in Sergeant Major McKinney’s case was presided over by a military judge, properly appointed for duty in that role in accordance with 10 U.S.C. § 826 (2000). In McKinney’s trial, he elected to be tried by a panel, which is generally like a jury, but which is composed exclusively of members of the military senior in grade to the accused. McKinney’s panel included six men and two women. *McKinney sentenced to reduction in rank and reprimand*, CNN (online ed.), Mar.

LEGAL IMPEDIMENTS TO SERVICE 1083

pressuring her for sex tape-recorded McKinney instructing her to tell investigators that she had only spoken with McKinney about career development. It was for this conduct that McKinney was sentenced to be reduced to the grade of E-8. Shortly after his trial, he was permitted to retire.

Further scandals surfaced in January 2003. A female cadet sent an e-mail describing sexual assaults at the U.S. Air Force Academy to officials in the command structure.²⁰² The doors of the Air Force Academy were opened to investigate what became a wave of complaints alleging sexual assault and sexual harassment coming from female cadets. Investigators looked into as many as fifty-seven alleged sexual assaults at the Academy over a ten-year period beginning in 1993.²⁰³

A review by *The Denver Post* found that reports of sexual assaults and misconduct were not new, and that the Board of Visitors responsible for matters related to morale and discipline had not pursued previous reports of sexual assault.²⁰⁴

In 1995, the United States Air Force relieved the commander of the 12th Air Force, Lt. Gen. Thomas R. Griffith, of duty when evidence came to light that Lt. Gen. Griffith had engaged in a consensual affair with a civilian.²⁰⁵ Although the military could have charged Griffith with an offense under the Uniform Code of Military Justice, he was subjected to a "grade determination" board upon his retirement shortly after he was relieved of his duties. The board concluded that Griffith, who had served in the military for twenty-eight years, should be retired as a major general, in essence suffering a one grade demotion for his allegedly criminal conduct.²⁰⁶

The next year, the Air Force brought court-martial charges against Lt. Col. Shelley "Scotty" Rogers, alleging that he had engaged in an unprofessional relationship with a female officer while he was the commander of an F-15 fighter squadron.²⁰⁷ Rogers, who at the time was the commander of the 90th Fighter Squadron, was deployed with his unit from Elmendorf Air Force Base, Alaska to Aviano Air Base, Italy. He was charged with conduct unbecoming an officer by developing an unprofessional relationship with a subordinate member of his command, and with disorderly conduct on multiple occasions.²⁰⁸

16, 1998, <http://www.cnn.com/US/9803/16/mckinney.sentence> (last visited Mar. 22, 2007). "The sentence came from the same jury of six men and two women that last week convicted him of that count and acquitted him of 18 other charges in a high-profile court-martial involving allegations of sexual misconduct." *Id.*

202. *Hearing on Sexual Misconduct Allegations at the Air Force Academy Before the S. Armed Servs. Comm.*, 108th Cong. (2003) (statement of Air Force Secretary James G. Roche).

203. *Academy Board Heard of Abuse 20 Years Ago, But Did Little*, N.Y. TIMES, June 16, 2003, at A12.

204. *Id.*

205. Adultery was then, and is now, an offense under the Uniform Code of Military Justice, chargeable under 10 U.S.C. § 934 (2000), and punishable by one year of confinement and a dismissal from the service (in the case of an officer).

206. *General Loses Command*, N.Y. TIMES, June 27, 1995, at A14.

207. *United States v. Rogers*, 50 M.J. 805 (A.F. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 244 (C.A.A.F. 2000).

208. These offenses are chargeable under 10 U.S.C. §§ 933, 934 (2000), respectively.

In concluding that Lt. Col. Rogers' relationship with a female subordinate officer in his command amounted to criminal conduct, the Air Force Court of Criminal Appeals explained:

Professional relationships are essential to the effective operation of the Air Force, but unprofessional relationships create the appearance that personal friendships and preferences are more important than individual performance and contribution to the mission. Because they erode morale, discipline and the unit's ability to perform its mission, they become matters of official concern.²⁰⁹

Rogers, who was selected for promotion to the grade of colonel while he was serving on this deployment, was convicted, sentenced to forfeit \$2789 pay per month for four months, and reprimanded.²¹⁰

The United States Air Force was not alone in attempting to bring the behavior of its personnel, male or female, into compliance with the established legal bounds of military service. In October 1995, the Navy removed three officers who had been nominated for promotion to admiral, all three removals based upon charges alleging sexual impropriety. One of the three, Capt. Everett L. Greene, was once the Navy's top equal opportunity officer, and had been in charge of the Navy's efforts to combat sexual harassment after the 1991 Tailhook Convention. Capt. Greene was tried by court-martial for sexually harassing two female aides.²¹¹ The other two Navy captains removed from the list for promotion to flag officer received administrative sanctions for their conduct. Capt. Mark Rogers, who had been serving in the White House military office, was removed from the list after an investigation by the Navy Inspector General concluded that Rogers had persistently used coarse and degrading sexual language on the job, despite repeated objections by his co-workers.²¹² Capt. Thomas J. Flanagan, once the commander of a submarine, was removed from the list after acknowledging to his superiors that he had engaged in a consensual sexual affair with a female lieutenant.²¹³

In September 1996, the Army was rocked by scandal when female trainees at the Aberdeen Proving Ground training facility in Maryland alleged that they had been subjected to sexual assaults, forcible sodomy, and rape at the hands of their male training instructors and one of their company commanders. These allegations led to the criminal convictions of Staff Sgt. Delmar G. Simpson²¹⁴ and others. Additionally, the Army was coping with similar charges of misconduct by noncommissioned officers charged with training responsibilities of female military members at Fort Lee, Virginia, where Staff Sgt. Jeffrey L. Ayers, Sr. was convicted of indecent assault, violation of a lawful general regulation, adultery,

209. *Rogers*, 50 M.J. at 809 (citing Air Force Instruction (AFI) 36-2909, *Fraternization and Professional Relationships* (Feb. 20, 1995)). The 1995 version of AFI 36-2909 was superseded by subsequent revised versions of the Instruction. The current version, from May 1, 1999, is available at <http://www.e-publishing.af.mil/pubfiles/af/36/afi36-2909/afi36-2909.pdf>.

210. *Rogers*, 50 M.J. at 806.

211. Eric Schmitt, *Navy Kills Promotion of Two to Admiral*, N.Y. TIMES, Oct. 13, 1995, at A25.

212. *Id.*

213. *Id.*

214. *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003).

LEGAL IMPEDIMENTS TO SERVICE 1085

and similar offenses.²¹⁵ Convictions followed at many other training installations, including Fort Leonard Wood, Missouri, where Army and Marine military police were trained.

The cases involving training instructor misconduct were not limited to misbehavior by men, however. In 2001, the Air Force convicted Staff Sgt. Andrea L. Reeves of engaging in consensual sexual relationships with four trainees while she served as a military training instructor. Reeves was convicted of disobeying a general regulation and obstruction of justice in that she advised the trainee to get a lawyer and not to speak to investigators.²¹⁶ A panel of officer and enlisted members sentenced the female training instructor to a dishonorable discharge, confinement for six years, total forfeiture of all pay and allowances, and a reduction in grade from E-5 to E-1. The sentence to confinement was reduced to three years at the time of its execution.²¹⁷

Predictably, perhaps, the response of the armed forces was to suggest that the clock should be turned back, and military officials as well as some members of Congress recommended a return to separate training programs for women in the armed services.²¹⁸ However, in 1997, Vice Adm. Patricia Tracey, the Navy's chief of education and training, testified at a Senate hearing against proposals for a return to segregated military training, stating, "Men and women who suspect they have been trained to different standards cannot have confidence in one another to boldly go into harm's way."²¹⁹

In 1997, the Air Force was once again in the spotlight when it charged the first female to qualify as a B-52 bomber pilot with adultery, false official statements, and failure to obey the lawful orders of her superior commander.²²⁰ First Lt. Kelly Flinn raised the public's awareness of how cases of sexual misconduct had been treated in the past, renewing public debate about whether women in the military were being subjected to the same or different standards when it came to cases of alleged sexual misconduct.

Lt. Flinn had broken the pilot barrier that previously kept women in the Air Force from flying in any aircraft qualified as a combat aircraft. By 1997, women were in the cockpits of cargo aircraft, but Lt. Flinn, an Air Force Academy graduate, had been selected as the first female to pilot the B-52 bomber aircraft.

But this success came to a crashing halt when allegations arose that Flinn had engaged in a consensual sexual relationship with Marc Zigo, who was married to a female airman in Flinn's squadron. Flinn's commander ordered her to stop seeing Zigo and to require him to move out of her home, where he had

215. United States v. Ayers, 54 M.J. 85 (C.A.A.F. 2000).

216. The offenses alleging disobeying a lawful general regulation were charged as violations of 10 U.S.C § 892 (2000). Reeves was charged with five specifications of violating orders. The offense alleging obstruction of justice was charged as a violation of 10 U.S.C. § 934 (2000).

217. United States v. Reeves, 61 M.J. 108 (C.A.A.F. 2005).

218. Philip Shenon, *Military Morality: The Overview; Cohen Criticized for His Support of A Top General*, N.Y. TIMES, June 6, 1997, at A1.

219. *Id.*

220. These are offenses chargeable under 10 U.S.C. §§ 934, 907, 891 (2000), respectively.

taken up residence. Flinn did not do so, resulting in the court-martial charges that grabbed headlines and sparked debate throughout the nation.²²¹

Once Lt. Flinn's commander preferred the charges against her, there ensued a debate that brought out the positions of members of Congress, and which detailed the lack of consistency in treatment of cases in which adultery had been at least one charge included in a court-martial. Members of Congress urged the military to resolve Lt. Flinn's case with an administrative separation, and in the end, the Secretary of the Air Force, the first woman to serve in that post, Sheila Widnall, approved a general discharge for Flinn, who thereby avoided a criminal conviction for her conduct.²²²

Also, in 1997, the Navy relieved Rear Adm. R.M. Mitchell, Jr. of his duties as commander of the Navy Supply Systems Command at Mechanicsburg, Pennsylvania, as they investigated allegations that he had made unwanted sexual advances toward a subordinate military member.²²³ That same week, the Army relieved Brig. Gen. Stephen Xenakis, head of medical operations in the Southeast United States, following allegations that Xenakis had engaged in an improper relationship with a civilian nurse who was caring for the General's wife, who was ill.²²⁴

Lt. Christa Davis, also a graduate of the Air Force Academy, was charged with a variety of offenses stemming from her adulterous affair with a married officer who had been one of her instructors at the Academy.²²⁵ Davis' charges, which initially included adultery, were modified following the high-profile discussion of sexual misconduct in the Flinn case, resulting in charges of dereliction of duty, failure to report to duty, making a false official statement, and conduct unbecoming an officer.²²⁶ Davis' case was ultimately resolved through non-judicial punishment. She paid a fine of \$2000 and received a reprimand. She was also separated from the Air Force and was required to repay the \$13,000 cost of her education at the Air Force Academy.²²⁷

As these cases drew higher levels of attention, additional allegations of sexual misconduct of senior officers in the military began to garner attention. In

221. Editorial, *Embarrassed Air Force Ready for Court-Martial*, S. F. CHRON., May 16, 1997, at A18; *Flinn Rejoins Civilian Life; Discharge Goes Into Effect*, ORLANDO SENTINEL, May 30, 1997, at A16; Jube Shriver, Jr., *Female Ex-Bomber Pilot Will Appeal Air Force Discharge, Attorney Says*, L.A. TIMES, May 26, 1997, at A16.

222. Among the legislators publicly voicing their support for Flinn's administrative separation in lieu of a court-martial action were then-Senate Majority Leader Sen. Trent Lott (R-Miss.) and Sen. Olympia Snowe (R-Me.), then the only woman on the Senate Armed Services Committee. *Female Ex-Bomber Pilot Will Appeal Air Force Discharge, Attorney Says*, L.A. TIMES, May 26, 1997, at A16.

223. Eun-Kyung Kim, *Sexual Harassment Alleged Against Admiral, Top Army Official*, ASSOCIATED PRESS, May 31, 1997; Dana Priest & Jackie Spinner, *Army Misconduct Probe Digs Deeper; Aberdeen Commander's Departure May Become Issue in Courts-Martial*, WASH. POST, June 4, 1997, at A03.

224. Dana Priest & Jackie Spinner, *Army Misconduct Probe Digs Deeper; Aberdeen Commander's Departure May Become Issue in Courts-Martial*, WASH. POST, June 4, 1997, at A03.

225. Arthur Brice, *Air Force Drops 9 Charges Against Female Officer*, ROCKY MTN. NEWS, May 31, 1997, at 44A.

226. These are offenses charged under 10 U.S.C. §§ 892, 886, 907, 933 (2000), respectively. Davis faced a maximum sentence of ten years and a dismissal from the Air Force for her misconduct.

227. *News in Brief*, CHARLESTON DAILY MAIL, Aug. 5, 1997, at P3A; Gary Janousek, Letter to the Editor, *Cruel, Unjust Punishment*, AUSTIN AM.-STATESMAN, Nov. 19, 1997, at A14.

LEGAL IMPEDIMENTS TO SERVICE 1087

June 1997, Maj. Gen. John Longhouser, then the commander of the Army's Aberdeen Proving Ground in Aberdeen, Maryland, was permitted to retire when an anonymous complaint led to discovery that he had engaged in an affair prior to 1992.²²⁸ Longhouser's conduct came to light following allegations by women recruits attending basic training at the Aberdeen Proving Grounds alleging that they had been raped by their drill sergeants. A hot line established to handle calls related to the alleged sexual misconduct by male drill sergeants resulted in the retirement of the highly decorated Longhouser, who was a 1965 graduate of the United States Military Academy at West Point. Like the Air Force's 12th Air Force Commander, Gen. Griffith, Longhouser was permitted to retire. A grade determination board determined that he last served honorably as a brigadier general, and he was retired with a demotion to that grade.²²⁹

Public criticism of what appeared to be an unequal application of military standards crescendoed when, in June 1997, Gen. Joseph Ralston, then the Vice Chief of Staff for the Office of the Joint Chiefs of Staff, was being considered for the position of Chief of Staff. Ralston's adulterous affair, which had occurred while he was in the military some thirteen years earlier, surfaced as an obstacle to his appointment to the position for which he had been the front runner. Despite the revelation of the affair, Ralston was permitted to stay in the military, and in August 1999, even given the position as Supreme Commander of NATO Forces in Europe.²³⁰ When withdrawing his name from candidacy for the position of Chairman of the Joint Chiefs of Staff in 1997, Ralston noted his regret that the nation saw the cases of Flinn and Ralston as comparable. In a written statement, he said: "My regret is that the public discussion surrounding my potential nomination blurred the facts in a number of cases and gave the appearance of a double standard regarding military justice."²³¹ In an ironic side note, military critics questioned whether Ralston should be allowed to continue his military service, despite his long and distinguished career, when just two years earlier Ralston, then-Lt. Gen. Griffith's immediate superior commander, had forced Griffith to retire when Griffith's adulterous affair with a civilian had been disclosed.²³²

Shortly before Ralston was named to the top NATO post, the Army court-martialed retired Maj. Gen. David Hale (another NATO commander) for having adulterous affairs with the wives of four subordinates, including the wife of his aide-de-camp. Hale was convicted in March of 1999 after pleading guilty to seven counts of 'conduct unbecoming an officer' and one count of 'making false

228. *Aberdeen General to Retire After Admitting Adultery*, SAN ANTONIO EXPRESS-NEWS, June 3, 1997, at A1.

229. *Id.*

230. Elizabeth Becker & Melinda Hennenberger, *Disgraced General, Now Redeemed, Resurrected, Rewarded*, PITT. POST-GAZETTE, Aug. 5, 1999, at A-7; Paul Richter, *General Ralston Drops Joint Chiefs Bid After Adultery Flap*, L.A. TIMES, June 10, 1997, at A1.

231. Paul Richter, *General Ralston Drops Joint Chiefs Bid After Adultery Flap*, L.A. TIMES, June 10, 1997, at A1.

232. Philip Shenon, *Military Morality: The Overview; Cohen Criticized for His Support of A Top General*, N.Y. TIMES, June 6, 1997, at A1.

official statements'.²³³ Hale was sentenced to pay a \$10,000 fine and to forfeit \$12,000 of his retirement pay during the next twelve months. He had faced a sentence that included eleven years in prison.²³⁴

In April 1999, a married male Air Force pilot and father of five children, pled guilty in his court-martial to obstruction of justice, fraternization, and conspiracy charges.²³⁵ Capt. Joseph Belli was a tanker pilot when he began a consensual sexual affair with Airman Susan Redo in 1997. The offenses with which Belli was charged carried a maximum sentence of twenty-two years in prison and a dismissal. Belli was sentenced to be dismissed from the Air Force and to serve fifteen days in jail.²³⁶

In 2005, the Air Force's top lawyer, Maj. Gen. Thomas J. Fiscus, then the Judge Advocate General of the United States Air Force, was approved to retire in the permanent grade of colonel, following punishment under the military's nonjudicial or administrative punishment system²³⁷ for conduct unbecoming an officer,²³⁸ fraternization,²³⁹ engaging in unprofessional relationships,²⁴⁰ and obstruction of justice.²⁴¹ Fiscus graduated from the Air Force Academy in 1972.

The report on Fiscus' involvement with enlisted members, civilians, and officers—all while he was serving as the Air Force's highest ranking legal officer in uniform—detailed inappropriate relationships with thirteen women, including six active-duty judge advocates, two paralegals (usually enlisted members of the Air Force), one civilian Department of Defense employee, and four other civilians.²⁴² In his non-judicial punishment action, Fiscus was ordered to forfeit one-half of his pay per month for two months and was reprimanded for misconduct which had occurred over a ten-year period, according to the report. The Secretary of the Air Force also took action to approve Gen. Fiscus' retirement in the grade of colonel, which meant that the former two-star general would retire in a grade two steps below that in which he was serving at the time

233. These offenses are charged under 10 U.S.C. §§ 933, 907 (2000), respectively. Nine other charges against Hale were withdrawn as a condition of his plea bargain with the Army. Laurence M. Cruz, *Retired General Fined, Reprimanded for Affairs*, ASSOCIATED PRESS, Mar. 18, 1999.

234. Laurence M. Cruz, *Retired General Fined, Reprimanded for Affairs*, ASSOCIATED PRESS, Mar. 18, 1999.

235. These offenses are chargeable under 10 U.S.C. § 934 (2000) (obstruction of justice and fraternization) and § 889 (2000) (conspiracy).

236. John Howard, *Pilot Dismissed from Air Force: Childhood Dreams End in Court-Martial*, ASSOCIATED PRESS, April 29, 1999.

237. 10 U.S.C. § 815 (2000).

238. Conduct unbecoming an officer is a criminal offense, chargeable under Article 133 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 933 (2000).

239. Fraternization is a criminal offense, chargeable under Article 134 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 934 (2000).

240. Engaging in an unprofessional relationship may be charged as a violation of Article 92 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 892 (2000), or it may also be charged as the offense of conduct unbecoming an officer, in violation of Article 133 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 933 (2000).

241. Obstruction of justice is a criminal offense, chargeable under Article 134 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 934 (2000).

242. Press Release, United States Air Force, Air Force's Top Military Lawyer to Retire in Reduced Rank (Jan. 10 2005), <http://www.af.mil/pressreleases/release.asp?storyID=123009553> (last visited Feb. 23, 2007).

LEGAL IMPEDIMENTS TO SERVICE 1089

his misconduct was discovered. The case marked the first time in the history of the military where a Judge Advocate General, the most senior uniformed lawyer in a service branch, was relieved of his duty for unprofessional conduct.²⁴³

The obvious difficulty posed by these high-profile cases is to explain to the general public how the rule of law was being applied fairly and impartially, not only considering gender as in the cases of Lts. Flinn and Davis, but also as it pertained to grade of the offender. Cases involving very senior commissioned officers resulted, almost exclusively, in nonjudicial punishment actions or administrative sanctions, with the final outcome being that each was permitted to retire and to draw their military pension, albeit at a lower grade. Because the legal impediments to women in the service precluded women from achieving the grade or rank of their male counterparts charged with these sexual offenses in the years between 1988 and 2005, there was a *de facto* inability to draw adequate comparisons. In each high-profile case involving accused women, the member was very junior. In each case involving general officers engaged in serious misconduct, the rationale routinely applied was the length of their service and their distinguished military careers. Critics of these actions argued that the existence of a history of systemic discrimination which precluded women from advancement should not be further rewarded by the application of a double standard which resulted in women being judged more harshly than their male superiors who were being permitted to retire with honorable discharges.

However, the more perplexing dilemma posed in the tortured history surrounding the application of the Uniform Code of Military Justice in the last thirty years is to explain to the outside observer how women could believe that they were equally protected under the Code when it was a dischargeable offense to pose for a magazine that was sold on news stands to service members, but was not criminal at all for a male supervisor to take nude photos of a subordinate woman employee, provided he gave them back to her if she asked for them. How could the services explain that it could take more than two years to decide that being drunk at a hotel at a convention gave male military members license to form a gauntlet where women in the military would pass by and be groped by their co-workers and strangers alike, and face no risk of having action taken against them?

It had to be difficult even for male members of the military to understand how their superiors—superiors involved in consensual relationships with other women outside of their marriages—could exert pressure on junior members in their command to force them to retire before they had planned to leave the military (as in the case of Gen. Griffith), only to later see that same supervisor supported for higher levels of command and responsibility by the civilian leadership of the armed forces.

As with much of the history of women in the military, there was little about the rule of law that seemed applicable to the military services. Certainly, considering that the cases detailed above all arose after the Equal Rights Act of 1964 and the Equal Pay Act of 1963, one had to wonder how the exercise of

243. Thomas E. Ricks, *Top Air Force Lawyer Steps Aside, Investigators Examine Alleged Sexual Conduct with Subordinate*, WASH. POST, Sept. 30, 2004, at A02.

discretion left to commanders under the military system of justice, and whether the past hostility detailed in the legislative proscriptions to women's service, were now being applied in the way the rule of law was going to be enforced.

VIII. THE WAY AHEAD

The glass ceiling created by the Integration Act of 1948 and the social opposition to opening combat opportunities to qualified women continue to play a significant role in inhibiting the advancement of women in the military in the United States. Though much progress has been made, it has been slow, and has come in fits and starts.

According to the Women in Military Service Memorial for America, women serving in the U.S. military are still restricted from serving in a variety of positions. These include:

- (1) Army: Infantry, armor, special forces, combat engineering companies, ground surveillance radar platoons and air defense artillery batteries.
- (2) Air Force: Pararescue, combat controllers, and "those units and positions that routinely collocate with direct ground combat units."
- (3) Navy: Submarines, coastal patrol boats, mine warfare ships, SEAL (special forces) units, joint communications units that collocate with SEALs, and support positions (such as medical, chaplain, etc.) collocated with Marine Corps Units.
- (4) Marine Corps: Infantry regiments and below, artillery battalions and below, all armored units, combat engineer battalions, reconnaissance units, riverine assault craft units, low altitude defense units, and fleet anti-terrorism security teams.²⁴⁴

Women remain barred from "combat" positions, though hearings in the 1970s eventually (but begrudgingly) led to the opening of some career fields previously closed to women. The hearings on admission to women in the service academies, and the progress made through court decisions involving the state-sponsored military academies like VMI and The Citadel, led to further hearings regarding the role women might play in the armed forces. Beginning on March 6, 1972, Rep. Otis Pike (D-N.Y.) chaired hearings on the role of women in the military.²⁴⁵ One recommendation made during those hearings was that women should be permitted to serve as pilots.²⁴⁶ Women had long before then established their ability to serve as pilots, having performed duties as Women Airforce Service Pilots (WASPs) during World War II.²⁴⁷ More than 1100 female pilots had flown for the Army Air Forces during World War II as civilians. But since they were civilians, these women did not receive pensions or other benefits after the war.²⁴⁸

244. Women in Military Service for America Memorial Foundation, Inc., History and Collections, <http://www.womensmemorial.org/H&C/History/history.html> (last visited Feb. 12, 2007) [hereinafter WIMS, History and Collections].

245. HOLM, *supra* note 4, at 250–51.

246. *Id.* at 317.

247. NATHAN, *supra* note 8, at 38–39.

248. *Id.* at 43.

LEGAL IMPEDIMENTS TO SERVICE 1091

It was the Navy and then the Army, and finally (but reluctantly) the Air Force, who put women in the cockpits after the 1972 Pike hearings. The Navy, in August 1972, under Adm. Elmo Zumwalt, moved closer toward permitting women to serve aboard ships and toward allowing women into its pilot program; in 1973, six Navy women became the first to win pilot wings and to be designated naval aviators.²⁴⁹ The Army followed suit, when Lt. Sally Murphy became its first female helicopter pilot in June 1974.²⁵⁰

Unlike its Navy and Army counterparts, the Air Force did not start its “test program” for women pilots and navigators to be used in non-combat flying until 1975²⁵¹ and did not graduate its first women from pilot training until 1977.

The barriers faced by women in the Air Force interested in flying in fighter and bomber aircraft is demonstrated by the slow progress made despite their successes in the pilot training programs in which they were permitted to participate. Some fifteen years after women were permitted to fly in non-combat aircraft, in his testimony in 1992 before the Senate Armed Services Committee, Gen. Merrill A. McPeak, then the Air Force Chief of Staff, testified before the Senate and admitted that women were capable of flying combat aircraft. He added, however, that he personally would choose a male pilot over a more qualified woman. McPeak stated, “I have a very traditional attitude about wives and mothers and daughters being ordered to kill people.”²⁵²

In 1977, Secretary of Defense Harold Brown directed that the services examine additional ways to increase the use of women in the military. Secretary of the Air Force John C. Stetson opened up the Titan II missile field to women, and by mid-1979 thirteen women had graduated from the Titan missile training program: four were assigned as combat crew commanders and nine were assigned as deputy commanders.²⁵³

Despite these advances, women remained barred from duties which were essential to promotions to senior enlisted and officer grades. It was November 1978 before women were able to report to duty aboard Navy ships,²⁵⁴ but they were still excluded from serving aboard combat ships.

Generally, the exclusion of women from combat roles is defined in 10 U.S.C. §§ 6015 and 8549, which were part of the “glass ceiling” created by the 1948 Women’s Armed Services Integration Act. Those provisions specifically prohibited putting women aboard Navy ships or on Navy and Air Force aircraft engaged in combat missions. In regulations promulgated by the services, these laws were interpreted to exclude women in ground combat specialties as well. But the law did not specifically address these missions.

Despite the absence of specific prohibitions other than those imposed upon the Navy and the Air Force by statute, the services have continued to maintain that women cannot and should not serve in direct combat roles. However,

249. *Id.* at 317.

250. *Id.* at 319.

251. *Id.* 320–21.

252. Nancy Duff Campbell & Shirley Sagawa, Women in Combat (Oct. 30, 1992) (unpublished issue paper, National Women’s Law Center), available at <http://www.nwlc.org/pdf/Combat.pdf>.

253. HOLM, *supra* note 4, at 325.

254. *Id.* at 327.

beginning in Operation Urgent Fury, in October 1983 in Grenada, women were deployed in support of the operation, serving as military police officers. They provided checkpoint and roadblock support, and they also served as interrogators for individuals who were held as prisoners of war. Women also served with the Army as helicopter pilots, crew chiefs and maintenance personnel in Grenada.²⁵⁵

The actions in Grenada inched women closer to breaking through the policy-imposed barriers to women serving in combat roles. In December 1989, during Operation Just Cause in Panama, Capt. Linda Bray and the 988th Military Police Company engaged in what was described as an infantry-style firefight, shattering the myth that women did not and could not serve in combat.²⁵⁶ Women also served in roles as helicopter pilots in Panama, and at least two of the women who did so came under heavy enemy fire. A female pilot on a helicopter supply mission was also fired upon.²⁵⁷

Although the public was now aware of women and their performance in combat, the military as a whole continued to resist the full integration of women into those roles traditionally assigned as combat roles. In 1990, Lt. Gen. Thomas Hickey, then the Director of Personnel for the Air Force, testified before the Senate Armed Services Committee in March that there was probably not a combat job in the Air Force that women could not do. Hickey, however, relied upon the existence of a legislative bar to combat as justification for keeping these career fields and opportunities closed for women in the Air Force.²⁵⁸

However, only five months later, when Operations Desert Shield and Desert Storm began, women were finally put to the test as the United States found itself engaged in the defense of Kuwait against Saddam Hussein. Among all Army personnel deployed in support of the 1991 Gulf War, 9.7% were women.²⁵⁹ All services deployed some women, and the total of all services was approximately 7.2% of the forces deployed in support of the operations.²⁶⁰

Women were among the casualties and captives in Desert Shield and Desert Storm during the brief hostilities.²⁶¹ Thirteen women were killed in combat-related missions, and two women, Maj. Rhonda Cornum and Spec. Melissa Rathbun-Nealy, were detained as prisoners of war.²⁶²

This, of course, was not the first time that women in the U.S. military had lost their lives in support of military operations, nor was it the first time that women in the U.S. military had been taken as prisoners of war. More than four hundred nurses and fifty-seven Navy Yeomen (female) died during World War I, mostly from the deadly outbreak of Spanish flu that appeared near the end of

255. *Id.* at 404.

256. *Id.* at 435.

257. *Id.* at 435.

258. *Id.* at 432.

259. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF CONFLICT: AN INTERIM REPORT TO CONGRESS, at 10-1, 10-2 (1991).

260. *Id.*

261. Gen. Holm details the stories of many of these women in her book. HOLM, *supra* note 4, at 450-61.

262. *Id.*, at 456-58.

LEGAL IMPEDIMENTS TO SERVICE 1093

the war.²⁶³ In World War II, despite a concerted effort to keep service women from playing combat roles, many came under attack. In late 1942, a ship carrying some of the first U.S. Army women deployed overseas was attacked by a German submarine. Five women officers were rescued by a British warship, and the officers were taken to North Africa to begin working there.²⁶⁴ Six Army nurses died in early 1944 when a bomb hit hospital tents during a battle on Anzio beach in Italy.²⁶⁵ Overall, more than four hundred U.S. servicewomen and nurses died serving in World War II.²⁶⁶

In Spring 1942, eighty-one women serving with the military, including sixty-six Army nurses, eleven Navy nurses, and three Army dietitians, were captured when U.S. forces were defeated in the Philippines.²⁶⁷ They were held for 2.5 to three years as prisoners of war. Although many U.S. service members died in the POW camps, all of these women survived. Five more Navy nurses were taken prisoner by Japan during fighting in Guam, and one Army flight nurse was captured by the Germans when the plane she was aboard as a flight nurse was shot down.²⁶⁸ Women also served in nursing and related duties in Vietnam, and many are memorialized alongside their male counterparts at the Vietnam Memorial.²⁶⁹

Although women had clearly been placed in positions that resulted in their death or capture, it was clear that they were not being assigned to combat roles as generally defined until the conflicts in Grenada, Panama, and finally Desert Shield and Desert Storm. Just five months before the deployments that sent women into Desert Shield and Desert Storm, Gen. Hickey had given his testimony indicating that change would have to come from Congress. And yet it had not. In fact, the laws upon which the military had relied to deny women the opportunities that their male counterparts had experienced had not changed. But, as with changes arising in the past, the realities of war and the necessity to meet the mission of the military resulted in *de facto* deployments that placed women in the position of performing combat roles.

What is significant about these combat opportunities, in addition to the experience they provide and the respect they garner among the contemporaries and peers of military servicewomen, is the impact that they have on opportunities for promotion and other career enhancements. For example, among enlisted members, a portion of the promotion calculation has included scores assigned to military awards and decorations. Those awards and decorations earned in support of combat operations can carry significant points toward military promotion. Women who have been deployed in support of combat operations have fitness evaluations or performance reports that allow

263. NATHAN, *supra* note 8, at 32.

264. *Id.* at 41.

265. *Id.*

266. *Id.*

267. *Id.* at 45.

268. *Id.*

269. Gen. Holm discusses several of those who died, including Capt. Mary T. Klinker, an Air Force nurse who died on April 4, 1975 in the crash of a C-5A Galaxy aircraft that was carrying Vietnamese orphans out of the country, and 1st Lt. Sharon Lane, who died of shrapnel wounds during an enemy rocket attack on an evacuation hospital. HOLM, *supra* note 4, at 241-42.

them to compete on a more balanced playing field; they too can now be recognized for air support for combat operations or for strategic and tactical successes under extreme conditions.

One of the final legislative barriers to women serving in combat roles came to an end in December 1991. After heated debate, the passage of the 1992 Defense Authorization Act, signed on December 5, 1991, resulted in the repeal of laws banning women from flying on combat missions in the Air Force and Navy. That legislation also established the Commission on the Assignment of Women in the Armed Forces, and it authorized the Secretary of Defense to waive the remaining combat exclusion law to conduct test assignments of female service personnel in combat positions. Though the Commission's work was to be completed one year later, the controversy remains, as women continue to be excluded from direct combat roles in many fields.²⁷⁰

In December 2004, The Washington Post reported that an Army internal document had advocated changing the collocation policy, removing the restrictions on women in combat, and allowing equal treatment for military service members without regard to gender.²⁷¹

It was against this backdrop that Congress passed the National Defense Authorization Act for Fiscal Year 2006, taking yet another stab at refining the role of women in the military. In that legislation, Congress added § 652 to Title 10 of the United States Code. This section requires, among other things, that Congress be notified if the Secretary of Defense (1) proposes to make any change to the ground combat exclusion policy or (2) opens or closes any military career designator to women in the service. The Secretary of Defense's proposed change can only take place after the end of a period of sixty days of continuous session of Congress following the date on which such report is received.²⁷²

The legislation specifically details that the "ground combat exclusion" has been implemented not by law, but by military personnel policies of the Department of Defense and the military departments, since at least October 1, 1994.²⁷³

In 10 U.S.C. § 652(a)(6), the Secretary of Defense must notify Congress in advance of making assignments available to women for service aboard any class of combat vessel, on any type of combat platform, or with any ground combat unit.

As with the many controversies that have embattled progress for women at every step in their integration into the Armed Services, the issue of women in combat evokes a strong emotional response whenever it is raised. In this May 2007 symposium issue and in a June 2006 article, Elaine Donnelly of the Center for Military Readiness argued that women should no longer be permitted to

270. See WIMS, History and Collections, *supra* note 244.

271. Rowan Scarborough, *Report Leans Toward Women in Combat*, WASH. TIMES, Dec. 13, 2004, at A01.

272. 10 U.S.C. § 652 (West Supp. 2007).

273. 10 U.S.C. § 652(a)(4) (West Supp. 2007).

LEGAL IMPEDIMENTS TO SERVICE 1095

serve in the roles in which they are currently serving in Iraq.²⁷⁴ Donnelly has strongly opposed an increased role for women in the military and has specifically opposed any use of women in combat roles.

The current debate is one that is best viewed within the overall historical context of women in the military and the concept of the rule of law. Perhaps it is unsurprising that, more than forty years after the Civil Rights Act of 1964, members of the legislative branch, as well as those in positions to engender policy for and within the U.S. military, continue to limit opportunities for women in fields in which they have a proven competence. According to figures released by the Pentagon, more than thirty-nine women have died in Iraq since the 2003 invasion, most of them killed by hostile fire.²⁷⁵ Despite so many women having made the ultimate sacrifice, women's service in combat is still discouraged.

As Sagawa and Campbell concluded in 1992, "[W]hen women who serve in the Gulf come up for promotions, they may be passed over because current policies deny women the experience that provides a route to higher-level jobs. . . . Until qualified women are given access to assignments that are central to the military's mission, they will be marginalized."²⁷⁶

The policies remaining that bar the full integration of women into the military are a reflection of military culture and tradition. Gen. Jeanne Holm, as long ago as 1977, told the Senate Joint Economic Committee, "Increased utilization of military women has always been a difficult concept for the military to accept. They [military decision makers] have traditionally thought of military women as the resource of last resort, after substandard males, . . . and civilians."²⁷⁷

Those responsible for making the decisions regarding implementation of women in combat roles would be well-served by a review of the constitutional commitment in the United States to the rule of law and to the tortured treatment of women within the military despite domestic legal requirements to treat each citizen equally, regardless of race, gender, religion, and similar protected characteristics.

IX. SUMMARY

This article has offered a brief review of the historical legal barriers which have limited the enlistment or entry of women into commissioned service in the defense of the United States of America. It has also reviewed the

274. Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 813 (2007); Elaine Donnelly, *Rumsfeld Dithers on Women in Combat*, CTR. MIL. READINESS (online ed.), June 16, 2006, <http://www.cmrlink.org/WomenInCombat.asp?docID=273> (last visited Feb. 23, 2007).

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

276. Capt. Judith M. Galloway, *Women in Combat: The Need for Cultural Reconditioning*, AIR UNIV. REV. (online ed.), Nov.-Dec. 1978, <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1978/nov-dec/galloway.html> (last visited Feb. 12, 2007).

277. *Id.* (citing *The Role of Women in the Military: Hearing Before the Sen. Subcomm. On Priorities and Economy in Gov. of the S. Joint Econ. Comm.*, 95th Cong. 95 (1977) (statement of Maj. Gen. Jeanne Holm)).

implementation and enforcement of the legislative enactments, executive orders, and policy and regulatory actions which raise questions as to the rule of law and its application to women in the service.

There has been slow and steady progress made toward ensuring that our nation enjoys the services of its best qualified military members without regard to their gender. Underpinning this progress is the rule of law and the basic concept that each person is entitled to equal protection under the law. It has taken more than two hundred years to achieve an understanding of what this means in terms of the role of women in the service of their nation. It is clear now that only the services' personnel policies bar women from entering military specialties currently closed to them. The weight of both history and the law suggests that these barriers will also fall because they cannot survive strict scrutiny.