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## WOMEN IN COMBAT: CHANGING THE RULES

*Professor Michael F. Noone, Jr.\**

### I. INTRODUCTION

During the 1970's, a number of offices in the Air Force displayed a plaque which read: "Our job is to fly and fight—and don't you forget it." The original was in the Air Force Chief of Staff's office in the Pentagon and was intended to remind the reader of the ultimate purpose of the military. If fighting is the mission of the armed forces, proponents of legal changes which would permit women to serve in combat must argue that women can fight as well as men and should be permitted to do so. That view is represented by Mady Wechsler Segal.<sup>1</sup> Opponents of change represented by Brian Mitchell<sup>2</sup> argue that women's fighting abilities are unknown at best and, at worst, their presence in combat would adversely affect unit efficiency. Representative Patricia Schroeder has introduced legislation which would require the Army to open certain combat units to qualified women volunteers and to carry out a four-year test intended to resolve the debate. Representative Beverly B. Byron, chair of the House subcommittee reviewing the bill, has already announced her opposition. Most observers doubt that the legislation will pass; therefore, the questions posed by the title of this article remain unanswered.

This article offers an approach, not an answer. It concludes that any of the three branches of government could permit women to serve in combat units. Women have been formally barred from serving in combat ships or aircraft by a 1948 law—the Women's Armed Services Integration Act. Because the sponsors of that legislation concluded that it was impossible to distinguish combat and noncombat roles in the Army, the Secretary

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1. See, e.g., *The Argument for Female Combatants*, in *Female Soldiers—Combatants or Noncombatants* 267-90 (Goldman ed. 1982); *Women's Roles in the U.S. Armed Forces: An Evaluation of Evidence and Arguments for Policy Decisions*, in *Conscripts and Volunteers: Military Requirements, Social Justice, and the All Volunteer Force* 200-14 (R.K. Fullinwider ed. 1983).
2. Weak Link: *The Feminization of the American Military* (1989).

of that service was given discretion to designate combat units which would be filled only by men. Congress could change the law. The judiciary could decide that the law, or the Army's exercise of discretion, was unconstitutionally discriminatory. The President could issue an executive order ameliorating the law's application. The nature of the inquiry into whether there should be a change, and the criteria applied, will differ depending on the branch of government involved. While that proposition is unremarkable, the distinction seems to have escaped the attention of most proponents and opponents of the combat exclusion laws.<sup>3</sup> Although the considerations that should apply can only be outlined, the debate is more complex than is commonly suggested.

## II. SHOULD CONGRESS CHANGE THE COMBAT EXCLUSION LEGISLATION?

The Women's Armed Services Integration Act, in which the combat exclusions first appeared, was the product of a political compromise to overcome the objections of some members of the Navy and their allies on Capitol Hill while meeting the Army's desperate military manning needs as the draft law expired.<sup>4</sup> Women have been integrated in the armed forces for over forty years, and the original participants to the compromise have left the political scene. Although Representative Schroeder's public statements do not indicate an awareness of the history of the legislation, her proposal is obviously intended to develop empirical evidence which would serve as a basis for further changing the 1948 law.<sup>5</sup> Consequently, Congress must ask whether integration of women into the combat units of the armed forces would enhance or maintain combat efficiency.

To answer that question, Congress will have to focus on quality rather than quantity. As the size of the U.S. forces declines as a result of the reduction of the threat posed by the Warsaw Pact, demographic arguments that the decreasing number of eligible males will require increased utilization of women lose their effect.<sup>6</sup> If foreseeable military manpower needs for

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3. See, e.g., Lieberman, *Woman in Combat*, 37 Fed. Bar. N. & J. 215 (May 1990), where the author's equal protection (i.e. judicial) analysis is weakened by references to considerations (e.g., that female soldiers may be less likely to violate the laws of war) which should have weight only in a legislative or executive context.
  4. Women's Armed Services Integration Act, 10 U.S.C. § 8549 (1948, 1956); Sherman, *They either need women or they do not: Margaret Chase Smith and the Fight for Regular Status for Women in the Military*, 54 The J. of Mil. Hist. 47 at 70-71 (1990). Surprisingly, the topic is not discussed in the comprehensive study of the modern Navy's relations with Congress. Vincent Davis, *The Admirals Lobby* (1967).
  5. The law was substantially changed in 1967 to permit women to hold permanent grades through O-6 (colonel/captain), to be appointed to general/flag officer grade, to equalize retirement provisions, and to eliminate a two percent limitation on enlisted strength. The changes have been attributed to "changing social mores and military expediency." M. Binkin & S. Bach, *Women and the Military* 12 (1977).
  6. In the 1980's, projections indicated that the services would, before the end of the century, exhaust the pool of eligibles with a propensity to enlist (assuming that

combat-qualified individuals can be met without expanding the pool of eligibles, congressional attention must be on the quality of the eligibles. In that regard, "quality" will have to be defined more carefully than has been the case in the past. Formal definitions of quality have relied on Armed Forces Qualification Test Scores,<sup>7</sup> and women recruits have consistently scored higher than men.

No objective criteria have been developed, however, to determine whether women could perform satisfactorily in combat units. At this point, differences between the services arise. The Navy implements the statutory bar primarily by designating certain vessels and types of aircraft as closed to women and also proscribes women's assignment to certain occupational specialties. The Air Force also relies primarily on weapons system designation, while the Army and Marine Corps bar women from combat by closing occupational specialties. Since the Air Force and the Navy also rely on occupational codes to bar women from vessels and aircraft (e.g., no woman can be classified as a fighter pilot), the formulation of these codes is crucial to the debate over any changes to present assignment policies. At the enlisted end of the spectrum, recruits and noncommissioned officers are now assigned to combat units if they have satisfied the requisite skill and occupational code requirements. Officer assignments to units or particular jobs predesignated as involving the risk of direct combat are similarly based on the officer's grade, occupational code, and skill. Present and potential combat leadership characteristics also play a role in the selection of officers and senior noncommissioned officers for assignment to combat units.

Thus, because of the gender bar, assignments to combat units have been based primarily on skill qualifications.<sup>8</sup> Supporters of the combat bar are either compelled to admit that present occupational specialty criteria, while adequate to identify qualified males, are intrinsically gender-biased and could not be used to identify qualified females, or to argue that, while the assignment criteria are satisfactory, the additional costs associated with the assignment of women do not warrant their inclusion in combat units, ships, or aircraft. By contrast, proponents for change must either assume that present assignment criteria are not gender biased (i.e., that they work equally well for both sexes), or that it would be easy to make them

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numbers, gender, and test scores remained constant). See generally Horne, *Modeling Army Enlistment Supply for the All-Volunteer Force*, Monthly Lab. Rev. 35 (Aug. 1985). Thus, General Jeanne Holm could appropriately write in 1982 that "the ability of the President to keep his commitment to build the nation's defenses without conscription may very well turn on the question of women." *Women and the Military* 392 (1982).

7. See Rimland & Larson, *The Manpower Quality Decline, An Ecological Perspective*, 8 *Armed Forces & Soc.* 21, 67 n.8 (1981).
8. In this regard, the Army's efforts to develop and apply a direct combat probability code by military occupational specialty (MOS) caused it to conclude that 53 percent of all enlisted positions had the highest (P-1) expectation of exposure to combat. Women had either to be excluded from the combat-related MOS or to be given preferential treatment in assignments within the MOS. The Army elected to exclude them. M. Marsden, *The Continuing Debate. Women Soldiers in the U.S. Army*, 58 *Life in the Rank & File* 73-74 (D. Segal & H. Sinaiko eds. 1986).

gender-neutral, and that once qualified women were identified (by occupational code specialty and, in the case of officers, leadership potential), that the benefits associated with assigning women would outweigh the costs. Therefore, any congressional debate over the effect of change on the quality of manning must address a series of discrete issues.

A. Are Occupational and Skill Level Criteria Used to Assign Male Personnel to Combat Units Gender Neutral?

If assignment is based on objective test scores (as is the case for recruits and lower-ranking NCO's), the question can be answered by validating the test. While this would not be easy, because tests for advanced skill levels assume both prior experience in the (combat-related) field and certain physiological characteristics, it should be possible to achieve a neutral test for skill and knowledge. However, there are two intangibles which would be difficult to validate: combat leadership potential and the capability of mixed-gender units to maintain efficiency during sustained contact with hostile forces. The Department of Defense has never been obliged to take an official position on either issue. Certainly, the Services' views on both issues should be solicited. In this regard, consideration should be given to the variety of combat roles assigned to each of the Services and to the nature of the leadership expected to be exercised.<sup>9</sup>

B. Assuming That Selection Criteria for Assignment to a Combat Unit Are, Or Could Be Made, Gender Neutral, How Should the Costs and Benefits of Any Change From Present Policies Be Measured?

Empirical studies have focused on combat readiness rather than effectiveness (i.e. once a unit achieves an established level of manning and equipment, it is assumed to be "combat ready"), but no serious efforts have been made to test, within that category, which units are more (or less) effective over time.<sup>10</sup> If enhanced or equivalent combat effectiveness should be the primary criterion for deciding whether women should be integrated into currently segregated units, Congress must require the military to establish an analytic technique for measuring combat effectiveness. This may prove to be rather easy for the Air Force and the Navy which could, for example, measure and compare the ability to acquire and destroy targets while under stress. It may prove to be impossible for the Army and Marine Corps which operate in a far less structured environment.<sup>11</sup> Both the Army and the Navy have conducted tests where women were assigned to combat units. The outcomes seem to suggest that assignment of women to combat

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9. Compare F. Margiotta's discussion of service differences in *The Changing World of the American Military 463-73 (1978)* with J. Holme's *Women and the Military*, *supra* note 6, which assumes that the four services are homogeneous.

10. A good, if somewhat dated, criticism of the current analytic system can be found in L. Sorley, *Prevailing Criteria: A Critique*, in *Combat Effectiveness 59-66* (S. Sarkesian ed. 1980).

11. McQuie, *Military History and Mathematical Analysis*, *Mil. Rev.* 9-17 (May 1970).

units would lower efficiency, but the tests' methodology and the conclusions drawn from them have been criticized on analytic grounds.<sup>12</sup>

Therefore, before there can be any valid tests of the consequences of assigning women to direct combat units, the services will have to define combat effectiveness in measurable terms and ensure that gender bias (physiological or psychological) in occupational codes is either eliminated or clearly justified. Congress could then determine the costs, if any, of maintaining or enhancing combat effectiveness in integrated units, and the debate could proceed along rational lines.

Of course, Congress has an alternative. It may simply assume that the costs outweigh the benefits (as Representative Byron contends) or, in the alternative, favor Representative Schroeder's view that costs would be negligible in light of the goal to be achieved. Recent history suggests that so-called "equity arguments" will not sway Congress to change the law. The Carter Administration recommended that the combat exclusion rules be eliminated but the testimony offered by administration witnesses was so unpersuasive<sup>13</sup> that, when the Reagan Administration announced that it was withdrawing the initiative, a Democratic Congress did not object. Therefore, while Congress could change the law, history suggests that it will not do so unless it is satisfied (as it was in 1948) that combat effectiveness would be maintained, if not enhanced, within reasonable cost.

### III. SHOULD THE JUDICIARY REJECT COMBAT EXCLUSION LAWS AS UNCONSTITUTIONAL?

The fourteenth amendment to the Constitution guarantees equal protection of the laws. A state law which contains a classification based on gender is subject to scrutiny under the Equal Protection Clause.<sup>14</sup> To withstand that scrutiny, gender classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives."<sup>15</sup> This intermediate standard of scrutiny requires a court to determine whether the purpose of the discriminatory scheme is:

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12. J. McNally, *Women in the United States Military: A Contemporary Perspective*, 37-41 (Naval War C. 1985) (unpublished).
  13. See, e.g., the congressional testimony of Richard Danzig, Principal Deputy Assistant Secretary of Defense (Manpower, Reserve Affairs, and Construction) cited in J. Tuten, *The Argument Against Female Combatants*, *Female Soldiers: Combatants or Noncombatants* 260 (N. Goldman ed. 1982). Danzig admitted that "equitable treatment" was the only reason he could offer for admitting women into combat units. The Carter Administration's initiative, and the military's response, is summarized in Witherspoon, *Female Soldiers in Combat: A Policy Adrift*, 6 *Minerva* 18-22 (May 1988). Female officers suspect that promotion possibilities for higher (i.e., general and flag) grade are limited because they can not serve in, or command, war fighting units. Sherman, *supra* note 4, at 50 n.9, p. 78, n.93. While that may well be the case, a statutory change in the law intended to benefit a few senior officers could not be expected to garner widespread congressional support.
  14. *Reed v. Reed*, 404 U.S. 71 (1971).
  15. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

permissible; important; and the least restrictive classification which would serve that end without substantial loss to the government. While the Federal Government is not bound by the fourteenth amendment, the Supreme Court has applied the same kind of equal protection analysis under the fifth amendment which does apply.

Thus, a judicial test exists for determining whether the congressional statutory scheme discriminating against women in combat is constitutional. If women have a constitutional right not to be discriminated against by Congress, the costs (with which Congress should be properly concerned) should have no effect on the judiciary's analysis. Certainly, a number of Supreme Court fourteenth amendment decisions hold that "old notions" about the respective roles of the sexes cannot justify discriminatory schemes.<sup>16</sup> At first blush, the initial Supreme Court decision to consider discriminatory treatment of women in the armed forces, *Frontiero v. Richardson*,<sup>17</sup> seems to stand as precedent for an attack on the combat exclusion statute. That analysis, however, should be rejected.

*Frontiero* involved a congressional classification scheme relating to entitlements. Women in the armed forces had to establish the dependency of their spouses to be eligible for an additional allowance, while spouses of males were presumed to be dependent. The plurality decision rejected the classification. Four Justices (Brennan, Douglas, White, and Marshall) subjected the classification to strict scrutiny; three (Powell, Blackmun, and Burger) concluded that the statute failed the traditional rational-basis test; Justice Stewart held that the statute was void under traditional scrutiny; and Justice Rehnquist dissented. Subsequent decisions<sup>18</sup> involving civilian classifications elaborated and extended the analysis. In *Schlesinger v. Ballard*, however, the Court rejected the argument of a male officer who, relying on *Frontiero*, argued that a gender-based statutory classification scheme which made it easier to release males from active duty was discriminatory.<sup>19</sup> Similarly, an equal protection attack on a statute which required that only males register for possible future conscription failed in *Rostker v. Goldberg*.<sup>20</sup>

*Frontiero* never achieved the precedential value that supporters of equal rights of females in the armed forces had hoped. There are two reasons for its failure, reasons which justify the prediction that the Supreme Court will not extend *Frontiero's* ruling to other types of discriminatory statutory schemes in the armed forces within the next decade.

The first is based on the membership of the Court. *Frontiero* can be seen as the last gasp of the Warren majority. Five of the *Frontiero* Justices

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16. See, e.g., *Orr v. Orr*, 40 U.S. 268, 279-80 (1979); *Parham v. Hughes*, 441 U.S. 347, 355 (1979); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

17. 411 U.S. 677 (1973).

18. *Stanton v. Stanton*, 421 U.S. 7 (1975) and those cited in *supra* note 16.

19. 419 U.S. 498 (1975).

20. 453 U.S. 57 (1981).

participated in *O'Callahan v. Parker*<sup>21</sup> which struck down provisions of the Uniform Code of Military Justice permitting trial by courts-martial of servicemen who committed nonservice-connected crimes off-post and off-duty. *O'Callahan* could be described as the apogee of the Warren Court's efforts to ensure that the military remained subject to civilian judicial control. *O'Callahan* was reversed nineteen years later in *Solorio v. United States*<sup>22</sup> by a Court which retained only two Warren Court Justices (Brennan and Marshall).

The second reason for doubting that *Frontiero* will be extended to other classes of discrimination is based on the Rehnquist Court's return to what might be described as the traditional judicial recognition of the military as a separate community and a concomitant deference to Congress' right "to legislate with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed than when it is prescribing rules for [civilian society]."<sup>23</sup> It was to this tradition that the Court returned in the *Rostker* and *Schlesinger* decisions. This deference, which extends to internal regulations of the armed services, was pushed to the limit in *Goldman v. Secretary of Defense*<sup>24</sup> in which the Court narrowly sustained a regulation which prohibited members of the Air Force from wearing symbols of their religious belief while in uniform.<sup>25</sup> If the Supreme Court defers to Congress on matters military, and Congress shows no inclination to act, then the executive branch is the only recourse for supporters of the concept of women in combat.

#### IV. SHOULD THE EXECUTIVE BRANCH PERMIT WOMEN TO SERVE IN COMBAT?

While it is true that the statutes prohibit service in combat ships and aircraft, the Navy and Air Force decide what ships and aircraft fall within the proscription, and the Secretary of Defense decides what constitutes combat. The Army could eliminate its regulatory restrictions without concern for the statutes. But, would the executive do so, either by requesting that the statutes be eliminated or by Executive order? There is an obvious precedent.

On July 26, 1948, President Truman issued Executive Order 9981 which guaranteed "equality of treatment and opportunity to members of the armed forces." The Executive order's language was consistent with the

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21. 395 U.S. 258 (1969).

22. 107 S. Ct. 2924 (1987).

23. *Parker v. Levy*, 417 U.S. 733, 752 (1974). See also *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1954); *Schlesinger v. Councilman*, 420 U.S. 738, 746-48 (1975); *Greer v. Spock*, 424 U.S. 828, 837-38 (1976); *Middendorf v. Henry*, 425 U.S. 25, 45-46 (1976); *Brown v. Glines*, 444 U.S. 348, 353-58 (1980).

24. 106 S. Ct. 1310 (1986).

25. Congress responded to the decision by passing a law which permitted deviations from the regulation. The Defense Authorization Act of 1985, Pub. L. No. 98-525, § 554(a), 98 Stat. 2532.

“separate but equal doctrine” enunciated by the *Plessy v. Ferguson* Court’s interpretation of the fourteenth amendment’s equal protection provisions,<sup>26</sup> but it was applied so that institutional racial discrimination in the armed forces was eliminated. The Air Force, Navy, and Marine Corps had already begun the process of integration before the Executive order was drafted.<sup>27</sup> While the parallel is not a perfect one—since *Plessy* permitted discrimination while the combat exclusion statutes require it—the Executive order reminds us of the power of the President, particularly when acting as commander-in-chief of the armed forces, to interpret restrictive laws.

There is another parallel as well. Women might not be able to meet objective criteria for service in combat. Similar concerns had been expressed in the 1940’s over the intellectual abilities of blacks serving or seeking to serve in the armed forces.<sup>28</sup> The concern led to an imposition of quotas to limit the number that could be enlisted.<sup>29</sup> The Truman Administration acknowledged that the concerns might be valid (in light of the substandard education received by many southern blacks), but concluded that appropriate tests would keep out the unqualified.<sup>30</sup> Presumably, a similar testing process could keep unqualified women out of combat assignments.

Although there is precedent for Executive action, circumstances have changed radically. In 1948, with the elimination of the draft, the Department of Defense could not maintain force levels unless they either lowered their entry requirements, raised the level of compensation, or expanded the pool of applicants by admitting women and desegregating military units. They chose the latter alternative. In 1990, there is no shortage of qualified applicants to the combat arms and, therefore, there is no military incentive to change present practices. Moreover, President Truman had a political incentive to take the apparently radical step of desegregating the armed forces. He was expected to lose his Presidential campaign against Thomas Dewey unless he could rally the Democratic liberals who would otherwise support the Progressive candidate, Henry A. Wallace. His political advisor, Clark Clifford, suggested that racial desegregation of the armed forces would establish the President’s liberal credentials and dis-

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26. 163 U.S. 537 (1896).

27. See M. Blinkin et al., *Blacks and the Military* 27 (1982). The best history of Exec. Order No. 981 is found in M. MacGregor, *Integration of the Armed Forces 1940-1965*, at 309-14 (1981).

28. W. Young, *Minorities in the Military* 210-12 (1982), discusses the use of Army intelligence Armed Forces Qualification Test (AFQT) scores to justify racial discrimination.

29. S. Stouffer et al., *The American Soldier* 524 (1949); R. Dalfume, *Desegregation of the U.S. Armed Forces: Fighting on Two Fronts*, 1939-53, 202-3, 207, 215 (1969).

30. See memorandum to the President from David K. Niles, February 7, 1950, in M. MacGregor & B. Nalty, *Blacks in the Military*, *Essential Documents* 263 (1981).

31. B. Nalty, *Strength for the Fight* 241-42 (1986); M. MacGregor, *Integration of the Armed Forces* 309-11 (1982).

courage defections.<sup>31</sup> The Executive order was issued three months before the election and, contrary to predictions, the President won. The political scene today offers no parallel.

## V. CONCLUSION

There are three possible conditions that would cause the combat exclusion laws to be changed. The least probable of these is that the Supreme Court will change its views regarding the permissible ways that Congress and the Executive may regulate the internal affairs of the armed forces. Nor does it seem probable that enlistment rates will decline so precipitously that the Executive and Congress will be compelled, as they were in 1948, to change military manpower policies in order to meet enlistment goals. Finally, while domestic political considerations could serve as an engine for change, the absence of valid test data and structural differences between the services suggest that any proposal to eliminate the combat exclusion bar will face formidable obstacles.

This analysis serves to emphasize two facts which much of the policy debate has obscured: The national security establishment have been properly cautious about undertaking changes which could affect the combat readiness of the armed forces, no matter how salutary the social goal; and, as the size of the force declines, combat efficiency rather than combat readiness may well become the criterion for evaluating change. The debate will continue—but over means, not ends.

