NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

RESTRICTIONS ON ASSIGNMENTS OF MILITARY WOMEN: A BRIEF HISTORY

The general trend since the end of the Second World War has been expanding roles for women in the Armed Forces. This paper provides background information on the history and status of policy governing assignment of military women.

History: Pre-1994

- The Women's Armed Services Integration Act of 1948[1] gave women a permanent place in the regular military services but contained provisions restricting their assignments. All the military Secretaries were given authority to prescribe the kind of military duty to which women could be assigned, provided that Navy women were not to be assigned to duty on Navy ships (except hospital ships and transports) and that Navy and Air Force women were not to be assigned to duty on aircraft engaged in combat missions.[2] There were no other specific statutory restrictions on assignments of women in the Armed Forces, but the legislative history of the Act showed that Congress intended to limit assignments of women to noncombat jobs, and each of the Services continued to do so.[3]

- In 1978, the law permitting Navy women to be assigned only to Navy hospital and transport ships was amended; the new limitation read that "women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions."[4]

- In 1988, a Department of Defense (DoD) Task Force on Women in the Military found that there was inconsistency in the breadth of the Services' definitions of "combat mission," especially in their use of the risk of exposure to hostile fire or capture to close noncombat positions or units to women.[5] It recommended that the Secretary of Defense provide guidance to the Services "about how combat missions should be defined and to specify the way in which risk can be considered in assessing noncombat units and positions for closure to women."[6] The Task Force said its evaluation of the Services' policies was based in part on 1985

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[1] Pub. L. No. 80-625, 62 Stat. 356-75 (June 12, 1948).
[2] *Id.* §§ 104(g), 210, 307. *See, e.g.*, U.S. GENERAL ACCOUNTING OFFICE, GENDER ISSUES—INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION, GAO/NSIAD-99-7, 1-3 (October 1998); J. HOLM, WOMEN IN THE MILITARY, AN UNFINISHED REVOLUTION 119-20 (rev. ed. 1992).
[3] *See* DEPARTMENT OF DEFENSE, REPORT: TASK FORCE ON WOMEN IN THE MILITARY 9 (1988) [hereinafter 1988 DoD TASK FORCE ON WOMEN IN THE MILITARY]; M. BINKIN AND S. BACH, THE BROOKINGS INSTITUTION, WOMEN IN THE MILITARY 26-27 (1977).
[4] Pub. L. No. 95-485 § 808, 92 Stat. 1611 (1978). The law restricting assignment of Navy women to hospital and transport ships had earlier that year been ruled unconstitutional. *Owens v. Brown*, 455 F. Supp. 291, 308 (D.D.C. 1978).
[5] 1988 DoD TASK FORCE ON WOMEN IN THE MILITARY, *supra* note 3, at 9-10.
[6] *Id.* at 10.

Secretary of Defense guidance stating that "the combat exclusion rule should be interpreted to allow as many as [sic] possible career opportunities for women to be kept open."[7] With respect to the risk issue, the Task Force proposed a rule[8] that shortly thereafter was promulgated as DoD policy. This "Risk Rule" set a Department-wide standard for evaluating noncombat positions and units from which the military services could exclude women. The Risk Rule stated:

> Risks of direct combat, exposure to hostile fire, or capture are proper criteria for closing non-combat positions or units to women, when the type, degree, and duration of such risks are equal to or greater than the combat units with which they are normally associated within a given theater of operations. If the risk of non-combat units or positions is less than comparable land, air or sea combat units with which they are associated, then they should be open to women.[9]

Each Service used its own mission requirements and the Risk Rule to evaluate whether a noncombat position should be open or closed to women.

- The National Defense Authorization Act for Fiscal Years 1992 and 1993 removed the specific statutory prohibitions on the assignment of Navy and Air Force women to aircraft engaged in combat missions and provided that the Secretaries of Army, Navy and Air Force could prescribe the conditions under which female members could be assigned to such combat aircraft.[10] None of the Service Secretaries acted to assign women to combat aircraft, however.

- The National Defense Authorization Act for Fiscal Years 1992 and 1993 also established a Commission on the Assignment of Women in the Armed Forces, with 15 members appointed by the President.[11] The Commission issued its report to the President in November 1992, including among its recommendations that women should be excluded from direct land combat units and positions and that prohibitions against women flying combat aircraft should be reenacted, but that women should be permitted to serve on combatant vessels except submarines and amphibious vessels.[12]

- In April 1993, Secretary of Defense Les Aspin directed the Services to open more specialties and assignments to women, including those in combat aircraft (noting that Congress had repealed the prohibition two years earlier), and on as many ships as possible under the existing law that prohibited assignment of Navy women to Navy ships engaged in combat missions.[13]

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[7] *Id.* at 9 (quoting the guidance without citation).
[8] *Id.* at 10.
[9] Memorandum on Women in the Military from the Secretary of Defense to the Secretaries of the Military Departments (Feb. 3, 1988).
[10] Pub. L. No. 102-190 § 531, 105 Stat 1290, 1365 (Dec. 5, 1991).
[11] *Id.* § 541.
[12] PRESIDENTIAL COMMISSION ON ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT 24-33 (Nov. 15, 1992).
[13] Memorandum on Policy on the Assignment of Women in the Armed Forces from the Secretary of Defense to the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chairman, Joint Chiefs of Staff, Assistant Secretary of Defense (Force Management and Personnel), and Assistant Secretary of Defense (Reserve Affairs)

At the same time, Secretary Aspin directed the Navy to prepare a legislative proposal to repeal this law.[14] He also expressly directed the Army and Marine Corps to study the possibility of opening more assignments to women, including, but not limited to, field artillery and air defense artillery.[15] The directive categorically excepted from the general policy of opening assignments to women "units engaged in direct combat on the ground, assignments where physical requirements are prohibitive and assignments where the costs of appropriate berthing and privacy arrangements are prohibitive."[16] Secretary Aspin established a committee to implement his directive, with representatives from the Office of the Secretary of Defense, the military services, and the Joint Chiefs of Staff; the committee was also charged with reviewing the continued appropriateness of the Risk Rule.[17]

- In November 1993, as part of the National Defense Authorization Act for FY 1994, Congress repealed the prohibition on assigning Navy women to Navy ships engaged in combat missions.[18] The same Act required the Secretary of Defense to give Congress 90 days' notice prior to "closing to female members of the Armed Forces any category of unit or position that at that time is open to service by such members" or "open[ing] to service by such members any category of unit or position that at that time is closed to service by such members."[19]

<u>The 1994 DoD Assignment Policy</u>

- In January 1994, Secretary Aspin, in response to advice from the implementation committee he established in 1993, rescinded the Risk Rule.[20] In his view, the rule was no longer appropriate based on experiences during Operation Desert Storm, where everyone in the theater of operations was at risk.[21] Secretary Aspin established a new rule stating: "Service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignments to units below the brigade level whose primary mission is direct combat on the ground."[22] Direct ground combat was defined as "engaging an enemy on the ground with individual or crew-served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect."[23]

- The 1994 DoD assignment policy also permitted (but did not require) the Services to include restrictions on the assignment of women in four instances: (1) "where the Service Secretary

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(Apr. 28, 1993).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Pub. L. No. 103-160 § 541, 107 Stat. 1547, 1659 (Nov. 30, 1993).
[19] *Id.* § 542(b)(2).
[20] Memorandum on Direct Ground Combat Definition and Assignment Rule from the Secretary of Defense to the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chairman, Joint Chiefs of Staff, Assistant Secretary of Defense (Personnel and Readiness), and Assistant Secretary of Defense (Reserve Affairs) (Jan. 13, 1994).
[21] *Id.*
[22] *Id.*
[23] *Id.*

attests that the cost of providing appropriate berthing and privacy arrangements are prohibitive"; (2) "where units and positions are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women"; (3) "where units are engaged in long range reconnaissance operations and Special Operations Forces missions"; and (4) "where job related physical requirements would necessarily exclude the vast majority of women Service members."[24] The Secretary stated that the Services "will use this guidance to expand opportunities for women. No units or positions previously open to women will be closed under these instructions."[25]

- Following this directive, thousands of jobs were opened to women, including 32,700 Army positions and 48,000 Marine positions.[26]

- Section 573 of the National Defense Authorization Act for FY 2001 required the Secretary of Defense to give Congress 30 days' written notice prior to changing Navy policy limiting service on submarines to males and before expending funds to reconfigure any submarine to accommodate female crew members.[27]

- In 2005, the Army's transformation to modular units and the differences between the military mission in Iraq and linear battlefields of the past raised concerns among some members of Congress and other interested parties as to whether the roles of Army women in Iraq were consistent with existing assignment policies for women.[28]

- The Army assignment policy,[29] promulgated in 1992 and still in effect in 2005, differed from the 1994 DoD policy in certain important respects, all of which are more restrictive. The Army policy stated that:

> The Army's assignment policy for female soldiers allows women to serve in any officer or enlisted specialty or position except in those specialties, positions, or units (battalion size or smaller) which are assigned a routine mission to engage in direct combat, or which collocate routinely with units assigned a direct combat mission.[30]

First, the Army policy prohibited assignment of women to units that have a "routine mission" of direct ground combat, while the DoD policy's prohibition applies only to units whose "primary mission" is direct ground combat. Second, both Army and DoD policies generally define direct ground combat as engaging an enemy with individual or crew-served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel. However, the DoD policy adds that direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them

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[24] *Id*.
[25] *Id*.
[26] WOMEN'S RESEARCH & EDUC. INST., WOMEN IN THE MILITARY 8 (6th ed. 2008).
[27] Pub. L. No. 106-398, 114 Stat. 1654A-136 (Oct. 30, 2000), codified at 10 U.S.C. § 6035.
[28] *See, e.g.*, Thom Shankar, *House Bill Would Preserve, and Limit, the Role of Women in Combat Zones*, N.Y. TIMES, May 20, 2005, *available at* http://www.nytimes.com/2005/05/20/politics/20military.html?_r=1.
[29] Army Policy for the Assignment of Female Soldiers, Army Reg. 600-13 (Mar. 27, 1992).
[30] *Id*. § III, 1-12.

by fire, maneuver, or shock effect. The Army definition instead included this statement: "Direct combat takes place while closing with the enemy by fire, maneuver, and shock effect in order to destroy or capture the enemy, or *while repelling the enemy's assault* by fire, close combat or counterattack" (emphasis added).[31] This inclusion of "repelling the enemy's assault" could have the effect of restricting women from assignments that require self defense.[32] Finally, the Army policy prohibited assignment to units that "routinely collocate" with direct combat units, while the DoD policy permits such assignment and allows exclusion of women only in units "doctrinally required to physically collocate and remain" with direct ground combat units. The Army did not change its 1992 policy to comport with the 1994 DoD policy.

- On May 10, 2005, Representative John McHugh, then Chairman of the Military Personnel Subcommittee of the House Armed Services Committee (HASC), introduced (at the request of HASC Chairman Duncan Hunter) an amendment to the FY 2006 National Defense Authorization bill that would have banned Army women from service in "forward support companies."[33] The proposed amendment stated in part: "Prohibition—Female members of the Army may not be assigned to duty in positions in forward support companies."[34] "Forward support company" was defined to include any unit of company size that provides combat support or combat service support to a direct combat battalion.[35] A May 11, 2005, press release by Chairman Hunter stated:

> The Forward Support Companies under the new Army modularization will be called upon to move into battle to support combat forces. Rocket-propelled grenades, machine gun fire and all the other deadly aspects of war will make no distinction between men and women on the front lines. The nation should not put women into the front lines of combat.[36]

- The amendment passed on May 11, 2005, on a party-line vote in the Personnel Subcommittee. On May 17, 27 Democratic members of the HASC wrote to Chairman Hunter to express "in strongest possible terms" their opposition to the amendment, noting that "Army leadership is strongly opposed"; that it "ties the hands of military commanders in a time of war"; that it "imposes unwarranted and unanticipated obstacles on the career advancement opportunities of women serving in the Army"; that it "undercuts our ability to recruit the best and brightest young people for military service"; and that it "undermines the cohesiveness and morale of units by drawing unsupported gender distinctions on deployment of trained personnel."[37] They also noted that the amendment was offered "literally in the middle of the night" with no

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[31] *Id.* Glossary, § II.
[32] *See* RAND NATIONAL DEFENSE RESEARCH INSTITUTE, ASSESSING THE ASSIGNMENT POLICY FOR ARMY WOMEN xvi (2007) (hereinafter 2007 RAND REPORT).
[33] National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, 109th Cong. (proposed amendment offered by Mr. McHugh, May 10, 2005).
[34] *Id.* § 3640(a).
[35] *Id.* § 3640(b).
[36] Press Release, House Armed Services Committee Chairman Duncan Hunter (May 11, 2005).
[37] Letter from 27 members of Congress to Duncan Hunter, U.S. House of Representatives (May 17, 2005).

meaningful opportunity for discussion or consultation.[38] They asked that the amendment be struck from the bill.[39]

- According to press reports, the Army had recorded its strong opposition to this amendment and wrote that if enacted, the result would be the loss of 21,925 jobs that were currently open to women.[40]

- During full Committee markup, Representative McHugh presented a substitute for the original amendment that would have barred women from Army forward support companies. The substitute, applicable to all Services, would have codified the ground combat exclusion and the four permissible categories of exclusion of the 1994 DoD assignment policy.[41] Importantly, the provision would have also required the continued closure of any military occupational specialties (MOSs) closed at the time—so that no MOSs could be opened to women after May 2005 without a change in the law.[42] This provision was a direct reversal of the statement in the 1994 DoD policy that its intent was to expand opportunities for women. The provision also contained a 30-day notice requirement to the HASC and SASC if the Secretary of Defense or any Service Secretary proposed to "make available to female members of the armed forces assignment to any of the following that, as of the date of the proposed change, is closed to such assignment … (A) [a]ny type of existing or new unit, position, or other assignment; (B) [a]ny class of combat vessel; (C) [a]ny type of combat platform."[43] The HASC passed this version on May 18, again on a party-line vote.[44]

- In the HASC report on the bill, 24 Democratic members and one Republican member (writing separately) filed additional views objecting to the provision on assignments for military women.[45] The Democrats called the provision inadvisable in that a purported codification of the 1994 DoD assignment policy without further study and deliberation would limit the flexibility of military commanders in time of war, noting that the Army was undergoing major force structure realignment.[46] They stated that there were key differences between the 1994 DoD policy and the provision in the bill, observing that "the eleven year old Aspin policy was obviously meant to be a starting point for the role of women in the military" and that the statement in the 1994 policy that it was to be used to expand opportunities for women was an apparent conscious omission on the part of the drafters.[47] "What was once intended to be the base line from which advances were expected is now the limit beyond which no advance can be made without a further change in the law."[48] They said this provision was nothing more

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[38] *Id*.
[39] *Id*.
[40] *See* Ann Scott Tyson, *More Objections to Women-in-Combat Ban*, WASH. POST, May 18, 2006, at A5.
[41] National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, 109th Cong. § 652(a), (b) (proposed amendment offered by Mr. McHugh, May 16, 2005).
[42] *Id*. § 652(c)(1).
[43] *Id*. § 652(d).
[44] REPORT OF THE COMMITTEE ON ARMED SERVICES, HOUSE OF REPRESENTATIVES ON H.R. 1815 TOGETHER WITH ADDITIONAL AND DISSENTING VIEWS, H.R. DOC. NO. 109-89, at 509 (2006).
[45] *Id*. at 508-10, 518.
[46] *Id*. at 509.
[47] *Id*. at 509-10.
[48] *Id*. at 510.

than an attempt to roll back the current role of women in our military.[49] The Republican member echoed many of the same concerns, stating his view that banning women from critical support roles "sends the wrong message at the wrong time."[50] The history of the provision is set forth in the additional views appended to the Committee Report on the bill.[51]

- The provision codifying the preexisting exclusions did not survive into the legislation ultimately passed by Congress. The final legislation contained only a notice requirement, under which the Secretary of Defense must report to Congress any change in the ground combat exclusion policy or specified changes in assignments of women.[52] Such changes then cannot be implemented until "30 days of continuous session of Congress (excluding any day on which either House of Congress is not in session) following the day the report is received."[53] This notice is to include "a detailed description of, and justification for, the proposed change" and "a detailed analysis of legal implication of the proposed change with respect to the constitutionality of the application of the Military Selective Service Act … to males only."[54] The assignment changes covered by the notice requirement are changes to open or close to women any existing category of unit or position, or to open or close to assignment of women any military career designator (defined as MOSs and other qualification identifiers for enlisted personnel and as occupational specialties and other special qualification identifiers for officers).[55] The Act also contained a charge to the Secretary of Defense to review and report to Congress on the "current and future implementation" of the 1994 DoD policy on the assignment of women, and in so doing to "closely examine Army unit modularization efforts, and associated personnel assignment policies, to ensure their compliance with the [1994 DoD policy]."[56]

- In response to the requirement to study the 1994 DoD assignment policy, the Under Secretary of Defense for Personnel and Readiness commissioned research by RAND National Defense Research Institute.[57] In a 2007 report entitled, "Assessing the Assignment Policy for Army Women," RAND found that the Army policy differed in several important respects from DoD policy (as described above);[58] that "neither the Army nor DoD assignment policies for military women are clearly understandable";[59] that the meaning of the term "collocation" is ambiguous;[60] that in Iraq, the Army is complying with the 1994 DoD assignment policy but may not be complying with the 1992 Army policy on assignments;[61] that certain

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[49] *Id.*
[50] *Id.* at 518.
[51] *Id.* at 504.
[52] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 541(a)(1), 119 Stat. 3136, 3251-52 (2006) (amending 10 U.S.C. § 652(a)).
[53] *Id.*
[54] *Id.* (amending 10 U.S.C. § 652(a)(3)).
[55] This notice provision (30 days measured by days in a continuous session of Congress) differs from and replaced the one enacted in 1993, which required 90 days' notice.
[56] Pub. L. No. 109-163 § 541, 119 Stat. 3136, 3251-53 (Jan. 6, 2006).
[57] *See* 2007 RAND REPORT, *supra* note 32, at iii.
[58] *Id.* at xiii.
[59] *Id.* at xiv.
[60] *Id.* at xvi-xvii.
[61] *Id.* at xv.

interpretations of the Army policy could close to women many, if not all, support units;[62] and that military personnel expressed concern that a strict interpretation of Army assignment policy could prevent women from participating in Army operations in Iraq, which would preclude the Army from completing its mission.[63] RAND observed: "In many ways, the language and concepts in the current policy for assigning women do not seem well suited to the type of operations taking place in Iraq. The focus on a defined enemy and the linear battlefield … is inappropriate to Iraq."[64] RAND recommended that DoD consider as a "critical first issue" whether "there should even be an assignment policy for military women."[65] RAND further recommended (among other things) that if there is to be an assignment policy for women, it should be recrafted "to make it conform—and clarify how it conforms—to the nature of warfare today and in the future, and [there should be a] plan to review the policy periodically."[66]

- In a July 2007 response to the congressional directive to closely examine Army unit modularization efforts and associated personnel assignment policies to ensure compliance with the 1994 DoD assignment policy, Secretary of Defense Robert Gates wrote to the chairmen of the congressional defense committees. He stated, "Following careful review, including analysis by [RAND], it has been determined that Army modularization efforts and associated assignment policies, and assignment policies of the Department of Navy and Air Force comply with the 1994 DoD policy."[67]

- In February 2010, Secretary Gates gave notice to Congress of the determination by the Department of the Navy "to implement policy changes to support a phased approach to the assignment of women to submarines."[68] In June 2010, Secretary Gates gave notice to Congress of the intent "to expand the role of women in the Marine Corps" by opening the MOSs of Counter Intelligence and Human Source Intelligence Operations Officer and Specialist.[69]

- On March 17, 2010, the Military Personnel Subcommittee of the House Armed Services Committee held a hearing to receive testimony on military personnel legislative priorities.[70] Witnesses included the top military personnel officials of DoD and each of the Services. LTG Thomas P. Bostick, Deputy Chief of Staff for Personnel, represented the Army. In response to a question from Chairwoman Susan Davis regarding the role of women in the military, LTG Bostick stated the Army Chief of Staff had directed a review of assignments for women to be

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[62] *Id*. at xvi.
[63] *Id*. at xviii.
[64] *Id*. at xix.
[65] *Id*. at xx.
[66] *Id*. at xx-xxi.
[67] *See, e.g*., Letter from Robert Gates, Secretary of Defense, to the Honorable Carl Levin, Chairman of the Committee on Armed Services, United States Senate (July 30, 2007).
[68] *See, e.g*., Letter from Robert Gates, Secretary of Defense, to the Honorable Carl Levin, Chairman of the Committee on Armed Services, United States Senate (Feb. 19, 2010).
[69] *See, e.g*., Letter from Robert Gates, Secretary of Defense, to the Honorable Carl Levin, Chairman of the Committee on Armed Services, United States Senate (June 16, 2010).
[70] *Military Personnel Legis. Priorities: Hearing Before the Military Personnel Subcomm. of the Comm. on Armed Services, H.R.*, 111th Cong. 19-20 (2010).

undertaken and completed that year.[71] He said that the review would include the views of commanders and added that, in his experience, most would like to see the opening of additional assignments for women.[72]

- In December 2010, the Military Leadership Diversity Commission, established by Congress to conduct a comprehensive evaluation of diversity in military leadership,[73] approved the following recommendation:

> DoD and the Services should eliminate the "combat exclusion policies" for women, including the removal of barriers and inconsistencies, to create a level playing field for all qualified servicemembers. The Commission recommends a time-phased approach:
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> - Women in career fields/specialties currently open to them should be immediately able to be assigned to any unit that requires that career field/specialty, consistent with the current operational environment.
> - DoD and the Services should take deliberate steps in a phased approach to open additional career fields and units involved in "direct ground combat" to qualified women.
> - DoD and the Services should report to Congress the process and timeline for removing barriers that inhibit women from achieving senior leadership positions.[74]

- Also in December 2010, the Defense Advisory Committee on Women in the Services, a civilian advisory committee established in 1951 to advise the Secretary of Defense on matters pertaining to women in the military, approved the following recommendations:

> DoD should eliminate the 1994 combat exclusion policy and direct the services to eliminate their respective assignment rules, thereby ending gender-based restrictions on military assignments. Concurrently, DoD and the services should open all related career fields/specialties, schooling and training opportunities that have been closed to women as a result of the DoD combat exclusion policy and service assignment policies.[75]

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[71] *Id.* at 19. "[O]ur chief and our Secretary have directed that we take a look at women in the military and their positions and what could be opened up. We are looking at our three-year cyclic review. That is going to start in April. And we think that could take anywhere from 90 to 120 days. And we will come back to the Secretary and the Chief with recommendations on what could change."

[72] *Id.* at 19-20.

[73] National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 596(a), (d), 122 Stat. 4356, 4476-78 (2008).

[74] *See* MILITARY LEADERSHIP DIVERSITY COMMISSION FINAL REPORT, FROM REPRESENTATION TO INCLUSION—DIVERSITY LEADERSHIP FOR THE 21st-CENTURY MILITARY, 71-74 (March 15, 2011).

[75] DEFENSE ADVISORY COMMITTEE ON WOMEN IN THE SERVICES (DACOWITS), 2010 Report, *available at* http://dacowits.defense.gov. *See also* DACOWITS 2011 and 2012 Reports, repeating the same recommendation.

- In Section 535 of the National Defense Authorization Act for FY 2011, Congress required the Secretary of Defense to conduct, in coordination with the Secretaries of the military departments, "a review of laws, policies, and regulations, including the collocation policy, that may restrict the service of female members of the Armed Forces to determine whether changes in such laws, policies, and regulations are needed to ensure that female members have an equitable opportunity to compete and excel in the Armed Forces," and "not later than April 15, 2011, [to] submit to the congressional defense committees a report containing results of the review."[76]

- The Department of Defense released the required report in February 2012.[77] In the report, DoD announced its intention to make two changes to the 1994 DoD assignment policy:[78]

    - First, DoD decided to eliminate the collocation exclusion permitting the Services to prohibit the assignment of women to units and positions doctrinally required to physically collocate and remain with direct ground combat units that are closed to women.[79] This decision was based on the recognition that "the dynamics of the modern-day battlefield are non-linear, meaning there are no clearly defined front line and safer rear area" and therefore no reason to exclude women from units or positions that physically collocate with direct ground combat units.[80] According to the report, the elimination of the exclusion resulted in opening 13,139 positions to women in the Army.[81]

    - Second, DoD decided to make an exception to the general policy excluding women from assignment to units below the brigade level with a primary direct ground combat mission.[82] Under this exception, the Army, Navy and Marine Corps were allowed to assign women in occupational specialties open to women to select units and positions at the battalion level whose primary mission is direct ground combat.[83] According to the report, this exception resulted in opening 1,186 positions to women.[84]

  In addition, the report stated that the Services supported the establishment of gender-neutral occupational standards, but that they required "sufficient time to complete a thorough analysis of job-related physical requirements as they pertain to the capabilities expected of Service

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[76] Pub. L. 111-383, 124 Stat. 4217-18 (Jan. 7, 2011).
[77] *See* REPORT TO CONGRESS ON THE REVIEW OF LAWS, POLICIES AND REGULATIONS RESTRICTING THE SERVICE OF FEMALE MEMBERS IN THE U.S. ARMED FORCES (Feb. 2012) [hereinafter FEB. 2012 REPORT TO CONGRESS], *available at* http://www.hsdl.org/?view&did=700868.
[78] As part of the report, DoD gave the required notice to Congress of its proposed changes. *Id*. at 14-16.
[79] *Id*. at 3, 4.
[80] *Id*. at 3.
[81] *Id*. at 4. Although previous DoD reports listed assignments in other Services closed because of collocation, *see, e.g.*, ANNUAL REPORT ON STATUS OF FEMALE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES, FY2002-06 (prepared for the United States Congress by the Department of Defense Office of Personnel and Readiness, Military Personnel Policy), *available at* http://dtic.mil/dacowits/docs/feb2008/Status_of_Women_FY0206.pdf, this report states that the elimination of the collocation exclusion affects only the Army, FEB. 2012 REPORT TO CONGRESS, *supra* note 77, at 4.
[82] *Id*. at 3, 4-5.
[83] *Id*.
[84] *Id*. at 5.

members."[85] These standards were, in turn, to be used to determine whether to open additional positions to women.[86] Finally, the report concluded, based on a RAND study and DoD's own review of information from the Services, there was "[no] indication of females having less than equitable opportunities to compete and excel under current assignment policy."[87]

In announcing the changes, Secretary of Defense Leon Panetta said that the Services "will continue to review positions and requirements to determine what additional positions may be opened, ensuring the mission is met with the best qualified and most capable regardless of gender."[88] He directed the Services to update him in six months on implementation of these policy changes and on progress in developing gender-neutral physical standards.[89]

- Also in 2012, military women plaintiffs went into federal courts to challenge the constitutionality of the exclusionary 1994 DoD assignment policy. The complaint in *Baldwin v. Panetta* was filed in the District Court for the District of Columbia on May 23, 2012.[90] The complaint in *Hegar v. Panetta* was filed in the District Court for the Northern District of California on November 27, 2012.[91] In both cases, officers and enlisted Service women charged, among other harms, that they had been denied ground combat assignment opportunities solely because they are women, in violation of their rights to equal protection of the law under the Fifth Amendment of the United States Constitution.

<u>Rescission of the 1994 DoD Assignment Policy</u>

- By memorandum dated January 24, 2013, Secretary of Defense Leon Panetta and Chairman of the Joint Chiefs of Staff Martin Dempsey rescinded, effective immediately, the 1994 DoD assignment policy for military women.[92] Secretary Panetta and Chairman Dempsey directed that closed units and positions be opened by each relevant Service, consistent with certain guiding principles, set forth in an attached memorandum of Chairman Dempsey to the Secretary of Defense dated January 9, 2013,[93] and "after the development and implementation of validated, gender-neutral occupational standards and the required notifications to Congress."[94] They also directed that:

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[85] *Id*.
[86] *Id*.
[87] *Id*. at 3-4. It is unclear from the report the comparison that DoD is making here. According to the report, a RAND study found "no statistical differences in the career progression of female officers in open occupations with closed positions as compared to women in fully open occupations," *id*., but DoD seems to be making a broader comparison of females to males in their ability "to compete and excel" under current assignment policy.
[88] U.S. Department of Defense News Release, No. 092-12 (Feb. 9, 2012).
[89] *Id*.
[90] *Baldwin v. Panetta*, No. 1:12-cv-00832-RMC (D.D.C. filed May 23, 2012). The *Baldwin* case was voluntarily dismissed without prejudice on November 4, 2013.
[91] *Hegar v. Panetta*, No. 3:12-cv-06005-EMC (N.D. Cal. filed Nov. 27, 2012). The *Hegar* case is pending as of the date of this paper.
[92] Memorandum on Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule from the Secretary of Defense and Chairman of the Joint Chiefs of Staff for the Secretaries of the Military Departments, Acting Under Secretary of Defense for Personnel and Readiness, and Chiefs of the Military Services (Jan. 24, 2013) (hereinafter Panetta/Dempsey January 2013 Directive).
[93] *See* Info Memo on Women in the Service Implementation Plan for Secretary of Defense from General Martin E. Dempsey, CJCS (Jan. 9, 2013) (hereinafter Dempsey January 2013 Guiding Principles).
[94] Panetta/Dempsey January 2013 Directive.

- Detailed plans for implementation be submitted by the Military Departments to the Secretary of Defense by May 15, 2013.[95]

- Integration of women into newly opened positions and units occur as expeditiously as possible, but be completed no later than January 1, 2016.[96]

- Any recommendation for continued closure of an occupational specialty or unit be personally approved first by the Chairman of the Joint Chiefs of Staff and then by the Secretary of Defense, and that exceptions "be narrowly tailored, and based on a rigorous analysis of factual data regarding the knowledge, skills and abilities needed for the position."[97]

- Chairman Dempsey's January 9, 2013, memorandum stated that it was the unanimous view of the Joint Chiefs of Staff to "move forward with the full intent to integrate women into occupational fields to the maximum extent possible."[98] This effort, he said, should be driven by the following guiding principles:

  - "Ensuring the success of our Nation's warfighting forces by preserving unit readiness, cohesion, and morale.

  - "Ensuring all Service men and women are given the opportunity to succeed and are set up for success with viable career paths.

  - "Retaining the trust and confidence of the American people to defend this Nation by promoting policies that maintain the best quality and most qualified people.

  - "Validating occupational performance standards, both physical and mental, for all military occupational specialties (MOSs), specifically those that remain closed to women. Eligibility for training and development within designated occupational fields should consist of qualitative and quantifiable standards reflecting the knowledge, skills, and abilities necessary for each occupation. For occupational specialties open to women, the occupational performance standards must be gender-neutral as required by Public Law 103-160, Section 542 (1993).

  - "Ensuring that a sufficient cadre of midgrade/senior women enlisted and officers are assigned to commands at the point of introduction to ensure success in the long run. This may require an adjustment to our recruiting efforts, assignment processes, and personnel policies. Assimilation of women into heretofore 'closed units' will be informed by continual in-stride assessments and pilot efforts."[99]

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[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Dempsey January 2013 Guiding Principles.
[99] *Id.*

Chairman Dempsey also provided the following goals and milestones in support of "the elimination of unnecessary gender-based barriers to service:"[100]

- "Services will expand the number of units and number of women assigned to hose units—based on ETP [Exception to 1994 assignment policy announced by DoD in February 2012, allowing women in occupational specialties open to women to be assigned to select units and positions at the battalion level whose primary mission is direct ground combat]—and provide periodic updates on progress each quarter beginning in 3rd quarter, FY 2013.

- "The Navy will continue to assign women to afloat units as (1) technical changes and modifications for reasonable female privacy and appropriate female berthing arrangements are completed; (2) female officer and enlisted leadership assignments can be implemented; and (3) ships' schedules permit. Integration will be expeditiously implemented considering good order and judicious use of fiscal resources.

- "Services will continue to develop, review, and validate individual occupational standards. Validated gender-neutral occupational standards will be used to assess and assign Service members not later than September 2015.

- "The Services and U.S. Special Operations Command (USSOCOM) will proceed in a deliberate, measured and responsible way to assign women to currently closed MOSs as physical standards and operational assessments are completed and as it becomes possible to introduce cadres as described above. The Services and USSOCOM must complete all studies by 1st quarter, FY 2016, and provide periodic updates each quarter beginning in 3rd quarter, FY 2013.

- "If we find that the assignment of women to a specific position or occupational specialty is in conflict with our stated principles, we will request an exception to policy."[101]

- In accordance with the Panetta/Dempsey January 2013 Directive, each of the Services and USSOCOM submitted plans to implement the directive to Secretary of Defense Chuck Hagel, which he released on May 21, 2013.[102]

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[100] *Id.*
[101] *Id.*
[102] *See* Memorandum on Proposed Implementation Plans in Response to January 24, 2013, Secretary of Defense Memorandum Regarding the Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule from the Secretary of Defense for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Acting Under Secretary of Defense for Personnel and Readiness, Chiefs of the Military Services, Commander United States Special Operations Command, and Chief of the National Guard Bureau (May 21, 2013). The Marine Corps substantially revised its plan early in 2014. *See* Marine Corps Force Integration Plan, Information Brief for DACOWITS, (March 13, 2014), *available at* http://dacowits.defense.gov/ReportsMeetings/2014Documents.aspx (DACOWITS Briefings March Meeting).

- Since the Panetta/Dempsey January 2013 Directive, as of April 2015, the Department of Defense has given notice to Congress of its intention to open 91,747 previously closed positions, and 92 previously closed MOSs and enlisted classifications. Approximately 240,000 Active and Reserve Component positions (11 percent) and 53 MOSs (4 percent) remain closed to women.[103]

[103] Decl. of Juliet M. Beyler, Dir., Officer & Enlisted Personnel Management, Office of the Deputy Assistant Secretary of Defense for Military Personnel Policy, at attach. ¶ 9, *Hegar v. Carter*, No. 12-CV-06005 EMC (N.D. Cal. Apr. 23, 2015), EMC No. 47.