TITLE VII: THE NEXT WEAPON FOR FEMALE SOLDIERS

INTRODUCTION

Two decades ago, the Supreme Court held that Virginia was required to admit female students to the Virginia Military Institute (VMI), a public college, because it failed to provide any “exceedingly persuasive justification” for excluding women from VMI’s citizen-soldier program, violating the Equal Protection Clause of the Fourteenth Amendment.¹ Justice Ruth Bader Ginsburg was adamant that “[sex] classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”²

Some of the same rejected rationales from the VMI case come up today³ in the fight to bar women from certain military roles or from combat altogether. For example, opponents cried that integration of women into the student body at VMI would “destroy” VMI’s program.⁴ They insisted women could not succeed in physically demanding, adversarial environments.⁵ The Court rejected these claims and ordered VMI to accept women after Virginia failed to offer an alternative, equally prestigious and challenging opportunity to women.⁶ VMI was the last holdout of American public military institutions to block women from admittance; the federal military academies had accepted women three decades earlier to great success; the military itself had female soldiers since the Revolutionary War, albeit not officially.⁷

² Id.
⁴ 518 U.S. at 540.
⁵ Id. at 541.
⁶ Id. at 557.
⁷ Id. at 544.
As of 2014, women comprise 15.1 percent of active duty soldiers (including all branches), and women’s numbers have steadily increased since 2000. In the reserves, women comprise 18.8 percent of the force. This Paper will discuss the lack of legal remedies for discrimination against female soldiers and urge Title VII’s application to the military. Even Title VII applied to the military, it would still have three ways to preserve its autonomy: (1) the requirement of exhaustion of intra-service administrative remedies, (2) the bona fide occupational qualification defense to discrimination, and (3) the national security exception to Title VII.

Because the BFOQ defense would likely be the most common safeguard of military autonomy, the Paper also argues that two common reasons to discriminate against military women must fail due to technological advances: (1) women’s physical weakness and (2) pregnancy. It will cover the long delay in allowing women into official combat positions and how technological advances in warfare will enable the integration of women into combat; and how advances in reproductive health care have the potential to support women’s careers in the military, especially during deployment. Because technology is making it possible for women to serve successfully in all military roles, the law should reflect that evolution and provide them a remedy when discrimination occurs.

**Title VII’s Applicability to the Armed Forces**

Title VII of the Civil Rights Act of 1964 creates a presumption that sex differences should not be considered in the workplace, and makes it unlawful for employers to discriminate based on sex in hiring, firing, and promotion or other employment decisions. Specifically, it is unlawful for an employer “to limit, segregate, or classify his employees or applicants for

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9 Id. at v.
employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” based on an employee’s sex.\(^\text{10}\) The discrimination prohibition applies to employers, employment agencies, unions, and training programs alike.\(^\text{11}\) Only a select few organizations or employment areas are exempt: most notably, religious entities and employers subject to national security requirements.\(^\text{12}\)

However, those in the military will have a hard time finding a way to combat discrimination experienced in service. In 1976, the Supreme Court held that sovereign immunity precluded discrimination claims against the federal government brought under 42 U.S.C. § 1981 or 42 U.S.C. § 1985(3).\(^\text{13}\) Later, the Supreme Court blocked military personnel from using the Equal Protection Clause of the Fifth Amendment to remedy alleged discrimination, because “the unique disciplinary structure of the Military Establishment and Congress’[s] activity in the field constitute ‘special factors’ which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.”\(^\text{14}\) Finally, although the Supreme Court has not determined Title VII’s applicability to the military, the circuit courts have consistently barred military personnel from Title VII remedies.\(^\text{15}\) Courts reliably defer to military decision-making rather than apply Title VII to military personnel.\(^\text{16}\)

\(^{10}\) 42 U.S.C. § 2000(a)(2).
\(^{14}\) Chappell v. Wallace, 462 U.S. 296, 304 (1983). However, the Supreme Court has found in favor of a female soldier in a sex discrimination suit based on the Due Process Clause of the Fifth Amendment. Frontiero v. Richardson, 411 U.S. 677, 690 (1973).
\(^{15}\) Gabryluk v. U.S. Army, 347 F. App’x 696, 697 (2d Cir. 2009); Gonzalez v. Dep’n of the Army, 718 F.2d 926 (9th Cir. 1983); Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978). This discussion will be confined to only Title VII’s applicability to the military.
\(^{16}\) Roper v. Dep’t of the Army, 832 F.2d 247, 248 (2d Cir. 1987) (“We refuse to extend a judicial remedy for alleged discrimination in civilian employment to the dissimilar employment context of the military, especially given the need for deference to the military in matters involving hierarchy and structure of command.”); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (finding deference to hierarchical military structure precludes claim of race discrimination in work assignments where Congress has provided no such cause of action).
Military deference is a common excuse used by courts to stay hands off of military operations. Judges claim to respect the chain of command and the unique hierarchy of the military, or to be too uninformed about military operations to interfere with them. As the Supreme Court has explained:

The military is ‘a specialized society separate from civilian society’ with ‘laws and traditions of its own [developed] during its long history.’ . . . To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.

Further, “to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.” As long as a military decision or regulation is made “reasonably and evenhandedly,” military leaders are “under no constitutional mandate to abandon [their] considered professional judgment.” The military itself depends on “the subordination of the desires and interests of the individual to the needs of the service.”

In light of courts’ aversion to disturbing military affairs, some courts have established a framework for “determining whether particular actions of military authorities are properly reviewable by civilian courts.” Under this framework, a military plaintiff must (1) make “an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations” and (2) exhaust all available intra-service administrative remedies before filing suit in federal court. A plaintiff’s failure to meet

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20 Id. at 509-10.
22 Williams v. Wilson, 762 F.2d 357, 359 (4th Cir. 1985) (adopting the widely accepted approach articulated in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971)).
23 Williams, 762 F.2d at 359.
these requirements renders any federal court claim “a nonjusticiable military controversy,” that
the district court must dismiss “without prejudice as premature.”24 In cases where the plaintiff
meets the two threshold requirements, courts weigh four policy considerations to determine
whether the plaintiff’s claims are justiciable:

(1) the nature and strength of the plaintiff’s challenge to the military
determination; (2) the potential injury to the plaintiff if review is refused; (3) the
type and degree of anticipated interference with the military function; (4) the
extent to which the exercise of military expertise or discretion is involved.25

Although deference to the military is an important aspect of American
jurisprudence, the military should not be permitted to use that deference to discriminate
against women when research shows its rationales are flawed, or worse, false.26 Title VII
must apply to the armed forces, and should have decades ago. In fact, the language of
Title VII explicitly identifies employees in the “the military departments” – defined as
the Departments of the Army, the Navy, and the Air Force27 – as included in its
protections.28 Despite the plain language of Title VII and no support for it in the
legislative history, the Second Circuit has read “the military departments” to refer to only
civilian employees of those departments.29 The Ninth Circuit has explained this
interpretation by comparing the definition of “the military departments” 5 U.S.C. § 102 to
the definitions of “the military departments” and “armed forces” in 10 U.S.C. § 101(7).30
Section 101 of Title 10 (which covers the armed forces) defines “the military
departments” very similarly to Title 5, but also includes a definition of “armed forces” –

24 Id.
25 Id.
29 Roper v. Dep’t of Army, 832 F.2d 247, 248 (2d Cir. 1987).
30 Gonzalez v. Dep’t of the Army, 718 F.2d 926, 928 (1983).
“the Army, Navy, Air Force, Marine Corps, and Coast Guard.” The Ninth Circuit understood the differing definitions of “the military departments” and “armed forces” to distinguish between civilian employees and uniformed personnel. Therefore, because Title VII applies expressly to “the military departments” and not “armed forces,” it only applies to civilian personnel. The circuits’ strained interpretation of “the military departments” demonstrates courts’ immense distaste for checking military matters, even to the point of straining themselves to stay away.

Applying Title VII to the servicemembers would not undermine the military mission or the chain of command, because three safeguards are available to preserve military autonomy. First, federal courts could still require exhaustion of intra-service administrative remedies before hearing a military plaintiff’s Title VII claim. Second, the bona fide occupational qualification defense in Title VII would be particularly relevant to the military, where very specific qualifications are required for positions across the services. Third, the national security exemption in Title VII would protect the military’s performance of national security functions where discrimination may be inevitable.

**A. Exhaustion of Intra-Service Administrative Remedies**

Prior to taking a Title VII claim to federal district court, the military could require servicemembers to exhaust all intra-service administrative remedies. The services already require this in a myriad of other cases. In response to “several class action promotion lawsuits,” the military bureaucracy convinced Congress in 2001 to require exhaustion of administrative remedies before challenging an adverse decision made by a selection

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32 *Gonzalez*, 718 F.2d at 928.
33 *Id.*
Selection boards make determinations concerning “appointment, enlistment, reenlistment, assignment, promotion, retention, separation or retirement” of military personnel, and are made up of higher-ranking officers or enlisted soldiers than the soldier being evaluated. Several statutes provide that courts do not have jurisdiction to hear these cases unless the servicemember plaintiff first is heard by a “special board” convened specifically to hear his challenge to the initial board’s decision. The services have implemented the exhaustion requirement variably across different cases.

For sex discrimination cases, exhaustion of intra-service remedies would take the form of first filing a formal complaint with your supervisor. Next, a servicemember may be required to participate in an investigation, pending action by a supervisor. If promotion is involved, the victim of discrimination would follow the normal exhaustion protocols for promotion challengers – convention of a “special board.” Administrative remedies are usually more than just hoops to jump through; typically, when a court reviews a military decision, the judge makes her decision using only the administrative record before her. It would be in the soldier’s best interest to exhaust all intra-service remedies before going to court, so the administrative record is sufficiently built. Additionally, because of courts’ aversion to interfering with military decision-making, it is likely a court would dismiss a soldier’s discrimination claim for non-justiciability unless an agency (such as the Department of the Army) had already denied the soldier’s claim. Courts are more likely to respond to claims with prior denials from agencies

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35 Id.
36 Id.
37 Id.
38 Id.
39 Id.
“that established tests and standards against which the court can measure the military conduct.”\textsuperscript{40} Exhaustion of administrative remedies would allow the servicemember to eventually be heard by a court, while also ensuring the military branches have the first opportunity to address, act on, or remedy the alleged discrimination.

**B. BONA FIDE OCCUPATIONAL QUALIFICATION**

The primary defense to a sex discrimination claim is that the discrimination arises from a “bona fide occupational qualification” (BFOQ). Section 703(e) of Title VII provides:

\ldots it shall not be an unlawful employment practice for an employer to hire and employ employees\ldots on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business…\textsuperscript{41}

To prove that discrimination arises from a BFOQ and not simply discriminatory platitudes about women’s physical weakness, the military must show, for example, that a *specific position* requires a physicality level that a woman cannot reach. All combat positions are not the same and many labeled “combat” do not involve direct engagement with the enemy.\textsuperscript{42} Some combat positions involve work in a fighter jet, on an aircraft carrier, or in submarines – locales unlikely to demand intense physical strength for use in hand-to-hand combat.

Consider the case of Joan Hill.\textsuperscript{43} In 1982, Hill enlisted in the Army Reserve in New York.\textsuperscript{44} She was accepted and assigned to serve as a nuclear biological and chemical specialist (NBC specialist), based on a written exam and her academic background.\textsuperscript{45} NBC specialists

\textsuperscript{40} Id.
\textsuperscript{41} 42 U.S.C. § 2000(e).
\textsuperscript{44} Id. at 1231.
\textsuperscript{45} Id.
“examine[d] contaminated areas after nuclear, biological or chemical attack.”

Hill quit her job, signed her enlistment contract, and agreed to complete the necessary training at Fort Jackson, South Carolina, and Fort McClellan, Alabama. Hill’s training was set to commence in November 1982, but in the meantime and unbeknownst to Hill, the Army had closed the NBC specialist position to women. The Army “reclassified” the position as a combat support role, and thus, women were ineligible to serve in it. In December 1982, with no position to fill in the Army Reserve, Hill was discharged. She returned to her old job in February 1983.

The Army revoked women’s eligibility for the NBC specialist position “on the recommendation of the Women in the Army Policy Review Group, an organization created...to study various issues concerning women in the Army.” The Group found that if “more than a few women” occupied the NBC specialist position, “combat readiness would be endangered.” In response to negative feedback, the Group again assessed the NBC specialist position in April 1983. It then found that “positions at the combat-likelihood level of NBC Specialist could accommodate more women without a threat to combat readiness.” In October 1983, the Army reclassified the NBC specialist position – the job Hill “chose, qualified for, and could not enter” was non-combat. Unfortunately, Hill had no Title VII remedy available to her in 1983, and still today, she would be out of luck.

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46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id. at 1231-32.
52 Id. at 1232.
53 Id.
54 Id.
55 Id.
56 Id.
If Title VII provided a cause of action to servicemembers, the military would still have the opportunity to defend itself against claims using the BFOQ. In Hill’s case, the Army would have argued Hill was unqualified to be an NBC specialist because she was a woman. That is unlikely to be successful, so the BFOQ exception would have the effect of making it harder for the military to reject women from roles for blatantly pretextual reasons. The BFOQ exception would be a valid and important exception for the armed forces, but also protect women from being barred from positions solely because they are women. Instead, the military would be required to articulate a clear reason a woman is unqualified, or, if it actually is because she is a woman, why being a woman is a disqualifying factor in and of itself. Two of the most common things militating against women’s success in the military are (1) women’s physical weakness and (2) pregnancy. These would be failed bases for BFOQ, however, because technological advances make them largely moot.

1. ARGUMENT ONE: WOMEN ARE TOO PHYSICALLY WEAK TO BE IN COMBAT

“Despite her delicate features and voice, Disney expects us to believe that Mulan’s ingenuity and courage were enough to carry her to military success on an equal basis with her cloddy cohorts. Obviously, this is Walt Disney’s attempt to add childhood expectation to the cultural debate over the role of women in the military. I suspect that some mischievous liberal at Disney assumes that Mulan’s story will cause a quiet change in the next generation’s attitude about women in combat and they just might be right.”

Beginning in January 2016, U.S. Department of Defense Secretary Ash Carter opened combat positions in all the armed forces to women, despite some pushback from the Marine Corps. But women have served in the military since the American Revolution. During World

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War II, women won official status in the military in the form of “women’s auxiliary services,” due to a shortage of men. After WWII, women were able to secure permanent positions in the military, albeit outside of combat. Later, Congress partially repealed the ban on women in combat after women proved invaluable during the first Gulf War, “allowing women to fly combat aircraft and serve on naval ships exposed to combat.” However, the ban on women in combat was reinstated by the 1994 DOD Direct Ground Combat Definition and Assignment Rule, which provided, “…women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground.” Former Secretary of Defense Leon Panetta rescinded the rule in 2013. The services were instructed to integrate women into appropriate positions as they saw fit, until Secretary Carter opened all opportunities in all services to women in 2016.

Creating and enforcing a policy to block women from certain positions – those labeled “combat” positions – is discrimination on its face. In no other arena are employers permitted to tell women that they cannot fill a certain role in the workplace. In 2016, employers cannot ban women from being partners at law firms; mechanics; astronauts; football referees; scientists; racecar drivers; or other professionals in male-dominated fields. However, the military did it with Congress’s blessing until 2016, when the DOD made its own decision to end the ban. The military is set apart from other employers because of its unique mission to defend the nation


60 Id.
61 Id.
62 Id.
65 Pellerin, supra note 58.
66 Id.
from threats at home and abroad. Even so, the military – the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard – is an employer and falls generally under the blanket of employment law by passing its own regulations. However, claims of discrimination fail when brought against the armed forces, because the military almost always gets deference from Congress and the courts. Equality is something the military has had to come to on its own terms and in its own time – without much judicial or legislative involvement.\textsuperscript{67}

The main argument of exclusionists (those who want to exclude women from combat) is that women are smaller and weaker than men, and therefore physically incapable of effectively serving in combat positions.\textsuperscript{68} They are, supposedly, “psychologically unfit,” and lack the aggressiveness that combat requires.\textsuperscript{69} Tradition forces us to keep women out.\textsuperscript{70} On a deeper level, exclusionists claim women disrupt the bonds of men in a military unit and are incapable of the same bonding men exhibit.\textsuperscript{71} Women “destroy[] the possibility of bonding for the men and leads to psychic emasculation, stifling of masculinity, and even sterilization of the whole process of combat leadership.”\textsuperscript{72} This is very damning, but also untrue. Mixed-gender police teams are able to bond; foreign armies that are gender-integrated have bonded units; and racially integrated units in the Vietnam War bonded when faced with the realities of war.\textsuperscript{73}

Although on average women do tend to be smaller and weaker than men, technology has helped undermine the arguments of those in support of gender lines and gender roles for soldiers.


\textsuperscript{69} Id.

\textsuperscript{70} Id. See also United States v. St. Clair, 291 F. Supp. 122 (S.D.N.Y. 1968) (“In providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning.”).

\textsuperscript{71} Roush, supra note 68, at 166.

\textsuperscript{72} Id.

\textsuperscript{73} Id. at 166-67. The “bond disruption” claim against women will not be explored in this Paper.
Technological advancement has the potential to enable gender equality and increase women’s access to military arenas historically left to men. Much of today’s war is not fought in hand-to-hand combat with battle spears, physical might determining the winner. Warfare’s constant evolution has led us to the new frontier of combat: drones, missiles, cyber attacks, and artificial intelligence.\textsuperscript{74}

In the Army, the ultimate combat position is that of infantry officer – the pure warfighter.\textsuperscript{75} As of Secretary Carter’s January 2016 directive, a woman can be an infantry officer as long as she can pass the physical requirements of the position. It is unclear how women will perform after official integration, because they are not expected to enter units until early 2017.\textsuperscript{76} Regardless, women have already been serving in combat roles, although unnoticed by the general public.\textsuperscript{77} Women entering the infantry are perhaps up against the most pushback – as previously covered, they are too weak or they ruin the bonds between men.\textsuperscript{78} But technology is aiding their integration.

In response to the disparity between men and women’s upper body strength, the Army has started testing on mechanical equipment to augment women’s strength. Exoskeletons would


\textsuperscript{75} Combat Careers, Go ARMY, http://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/combat.html. This Paper will discuss only the infantry officer, as there are too many combat positions in the Army to sufficiently discuss.

\textsuperscript{76} Michelle Tan, \textit{Army's 1st Female Grunts, Tankers Should Arrive At Their Units in 2017}, ARMY TIMES (Mar. 10, 2016), https://www.armytimes.com/story/military/careers/army/2016/03/10/armys-1st-female-grunts-tankers-should-arrive-their-units-2017/81608514/.

\textsuperscript{77} Gayle Tzemach Lemmon, \textit{Women in Combat? They've Already Been Serving on the Front Lines, with Heroism}, L.A. TIMES (Dec. 4, 2015), http://www.latimes.com/opinion/op-ed/la-oe-1204-lemmon-women-combat-20151204-story.html (“An estimated 300,000 women in uniform have served in the wars in Iraq and Afghanistan. Female service members have earned more than 10,000 combat action badges and Bronze Stars... Women have served in intelligence gathering, as combat pilots, field artillery officers, special operations civil affairs officers and even in the ultra-secretive Delta Force. One hundred and sixty women have given their lives to their country.”)).

be used to “increase[e] dismounted soldiers' native endurance and strength” when they perform physically demanding activities.\textsuperscript{79} DARPA-developed robotic vehicles and autonomous vehicles are being developed to reduce loads on soldiers who currently have to carry up to 80 pounds of gear in rugged terrain.\textsuperscript{80} Body armor design is evolving, too. Body armor used to be too long or too loose for women; now, the military is finally developing sizes designed for women’s bodies.\textsuperscript{81} The Army alone has introduced eight new sizes of military gear for women, in addition to lighter weapons.\textsuperscript{82}

The Air Force has dramatically increased its use of remotely piloted aircraft, or drones, in the last decade and its fleet continues to grow.\textsuperscript{83} Drone operators – enlisted soldiers and officers in the Air Force – use drones to track targets in Afghanistan, Pakistan, and Iraq.\textsuperscript{84} Sometimes these operators track a target from the air for months – they learn where he goes to mosque, where his children go to school, and even when he beats his wife or travels out of town.\textsuperscript{85} When it is time, they strike the target with a plan accurate to the second.\textsuperscript{86} They observe the aftermath of the drone strike, ensure the target is dead, and monitor the funeral from the air to search for more potential targets.\textsuperscript{87} Drone operators work from the physical safety of military bases and do

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  \item \textsuperscript{80} Id.
  \item \textsuperscript{81} Id.
  \item \textsuperscript{85} Kevin Maurer, \textit{She Kills People From 7,850 Miles Away}, DAILY BEAST (Oct. 18, 2015), http://www.thedailybeast.com/articles/2015/10/18/she-kills-people-from-7-850-miles-away.html.
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id.
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not see physical combat; indeed, until April 2016, “drone operator” was a combat support role. Today, they are classified as true combat positions, even though drone squadrons are based domestically at Holloman Air Force Base, New Mexico; Whiteman AFB, Missouri; and Creech AFB, Nevada. Men and women in these combat positions “provide real-time intelligence, surveillance and reconnaissance to commanders, close air support to ground troops, and post-operation battle damage assessment to senior leaders.”

Finally, for all branches, military threats and responses to those threats have evolved dramatically with cyber advances. Since the Gulf War, “the use of advanced sensor technology, information warfare and increased reliance on air power [has] shifted the military’s previous reliance on armor and mechanized operations.” Today, the battlefield consists of “exploitation of the electromagnetic spectrum, cyber warfare and virtual battlefields, drone technology and the push for automated weapon systems.” Recently, the Army has started embedding soldiers trained in cyber warfare in combat brigades. Although these men and women are not infantry soldiers per se, they are trained for combat and placed in these units as specialists in technology and communications – like a medic would specialize in medicine while also being trained and equipped for combat. These cyber embeds come from the 780th Military Intelligence Brigade, the Army’s offensive cyber unit. At the Army’s Combat Training Center, cyber soldiers train

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89 Id.
90 Id.
92 Id.
94 Id.
95 Id.
with infantry and Ranger units.\textsuperscript{96} In the field, these soldiers use extensive equipment like laptops, radios, and independent servers to interfere, intercept, and block enemy communications.\textsuperscript{97} Additionally, these soldiers could be vital in the future to protect their unit from attack by defending the unit’s communications and electronic weapon systems that may be vulnerable to attacks.\textsuperscript{98}

Future drones will be autonomous and trained to respond to different stimuli – friendly and unfriendly targets, counterattacks, and more.\textsuperscript{99} The Department of Defense has kicked off research and testing of unmanned fighters and bombers.\textsuperscript{100} In the Air Force, where physical combat is rare, women and men are equally capable of piloting fighters.\textsuperscript{101} In fact, women tend to have a lower centers of gravity, and are therefore “better able to ‘pull G’s’ [in aircraft] than men.”\textsuperscript{102} Women are fully capable of controlling drones flying over Afghanistan from a computer screen thousands of miles away.\textsuperscript{103} For ground troops in the Army and Marine Corps, advances in weapons, gear, and training, coupled with the changing landscape of the war zone, are making up for disparities in strength between men and women.\textsuperscript{104} The longstanding critique of women’s physical prowess crumbles bit by bit when faced with the reality of a changing military, changing wars, and a changing enemy.

\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Roush, supra note 68, at 164.
\textsuperscript{103} Kevin Maurer, \textit{She Kills People From 7,850 Miles Away}, DAILY BEAST (Oct. 18, 2015), http://www.thedailybeast.com/articles/2015/10/18/she-kills-people-from-7-850-miles-away.html.
2. Argument Two: Pregnancy Is An Inevitable Liability of Military Women

Advances in medical care increase women’s ability to serve in combat and in the military, which makes a potential BFOQ argument that “women’s risk of pregnancy disqualifies them from positions” a weak one. Exclusionists often cite pregnancy as a major obstacle to women maintaining reliability in the military; it is a common accusation among soldiers that women get pregnant to avoid deployment.\(^{105}\) In the Army, pregnant women cannot be deployed during pregnancy and until six months after the birth of a child, unless they volunteer to do so earlier.\(^{106}\) In the Navy, pregnant sailors can remain onboard a naval vessel up to the twentieth week of pregnancy.\(^{107}\) Typically, they can be assigned to overseas locations up to their twenty-eighth week of pregnancy, subject to some exceptions: pregnant women in the Navy cannot be deployed between the twentieth week of pregnancy and one year after the birth of her child; they cannot be assigned to overseas locations without adequate OB/GYN facilities; and they cannot be assigned to overseas locations without adequate housing facilities.\(^{108}\) Air Force servicewomen cannot be assigned to “isolated or remote” areas after the twenty-fourth week of pregnancy.\(^{109}\) They are not required to deploy until one year after their child’s birth, although they can volunteer earlier.\(^{110}\)

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\(^{108}\) *Id.* at 1-9, 1-10.


Many pregnancies of servicewomen are planned, but many others are not. Unplanned pregnancy among soldiers has become a military crisis – the average rate of unintended pregnancy among servicewomen is 50 percent higher than the rate among the general population.\textsuperscript{111} Unplanned pregnancy can have a direct impact on female soldiers’ promotion potential and employment long-term. Pregnancy will, in all the services, interfere with deployment, a key rite of passage connected to promotion and further success.\textsuperscript{112} Inability to complete deployments creates a burden on the remaining members of a military unit and breeds resentment in the unit.\textsuperscript{113} All of the services have a strict no fraternization rule, punishable by court martial proceedings under the Uniform Code of Military Justice.\textsuperscript{114} Fraternization refers to inappropriate relationships between two soldiers of different ranks or between an officer and an enlisted soldier.\textsuperscript{115} Fraternization undermines the chain of command by fostering an improper sexual, business, or gambling relationship between two soldiers of unequal rank and authority.\textsuperscript{116} In addition to the rule against fraternization, there is a strict “no sex” rule on deployments.\textsuperscript{117} Women who become pregnant on deployments are shipped back home and face professional consequences for having sex on deployment and possibly, criminal charges for fraternization.\textsuperscript{118} At the very least, it is likely they will receive a poor rating from their senior

\textsuperscript{111} Jacque Wilson, \textit{Unplanned pregnancies may be on rise in military}, CNN (Jan. 24, 2013), http://www.cnn.com/2013/01/23/health/unplanned-pregnancies-military/.
\textsuperscript{112} Army Regulation 614-30, \textit{supra} note 106; Op Nav Instruction 6000.1C, \textit{supra} note 107; AFPD 44-1, \textit{supra} note 109.
\textsuperscript{114} For the Army example, see Army Regulation 600-20, 4-14, \textit{available at} http://www.apd.army.mil/Search/ePubsSearch/ePubsSearchDownloadPage.aspx?docID=0902c851800103cd. \textit{See also} \textit{UNIFORM CODE OF MILITARY JUSTICE}, ART. 92.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} Russell-Kraft, \textit{supra} note 113.
\textsuperscript{118} \textit{Id.}
Anecdotal evidence suggests men who have sex on deployment, however, stay in the field and do not face the same discipline women do.\textsuperscript{120} Remarkably, 11 percent of female soldiers slated for deployment in 2013 “were not able to [deploy] in the previous year because of a pregnancy.”\textsuperscript{121} An evacuation from military theater due to pregnancy down range costs an estimated $10,000.\textsuperscript{122} In a study of an Army Brigade Combat Team over 15 months during Operation Iraqi Freedom, it was discovered that 10.8 percent of the women in the unit were evacuated for pregnancy reasons.\textsuperscript{123}

These statistics have negative effects on the armed forces, the mission, and the women who become pregnant. The military foots the bill for medical evacuations, loss of personnel, and administrative strain on resources and replacement personnel. The women suffer from stigma, reduced opportunities and promotion potential, and even job loss. The takeaway issue, though, is the underutilization of massive opportunities for avoidance of unplanned pregnancies in the military, and thus, cost-saving, job security, and mission success for everyone involved.

\textbf{a. Contraception in the Military}

Active duty soldiers have access to several forms of birth control provided under the military’s robust health insurance program.\textsuperscript{124} However, the structure of the military and the

\begin{thebibliography}{99}
\bibitem{119} Id.
\bibitem{120} Id.
\bibitem{123} Id. A brigade comprises roughly 3,000 to 5,000 personnel. \textit{Operational Unit Diagrams}, U.S. ARMY, available at https://www.army.mil/info/organization/unitsandcommands/oud/.
\end{thebibliography}
nature of the job often pose barriers to that access.\textsuperscript{125} Especially on deployments, which can last more than a year, it can be difficult to take advantage of the birth control access to which women are entitled.\textsuperscript{126} “Some 60 percent of women who had been deployed did not speak with a military provider about their contraceptive options before leaving, and 41 percent who had a prescription requiring refills said those refills were difficult to get.”\textsuperscript{127} The military should be taking a proactive, positive approach to birth control. Advancements in reproductive health make issues with prescription refills, contraception access, and contraception effectiveness largely moot.

By far the most effective and medically advanced form of birth control today is the intrauterine device (IUD). The IUD has been proven more than 99 percent effective in pregnancy prevention, and it is reversible at any time.\textsuperscript{128} It is a tiny device inserted into the uterus that works “by changing the way sperm move so they can't get to an egg.”\textsuperscript{129} Currently, the FDA approves of four different brands of IUDs: ParaGard, Liletta, Mirena, and Skyla.\textsuperscript{130} ParaGuard is a copper IUD and the rest of hormonal. ParaGuard prevents pregnancy for up to 12 years.\textsuperscript{131} Liletta, Mirena, and Skyla use progestin to prevent pregnancy and work for six, three, and three years, respectively.\textsuperscript{132} Getting an IUD requires a doctor’s visit – a doctor or nurse must insert the device.\textsuperscript{133} Finally, the IUD is the most expensive form of birth control for most people; the bill can reach $1,000.\textsuperscript{134} For active duty servicewomen, though, there is no out-of-pocket cost, and

\textsuperscript{125} Russell-Kraft, supra note 113.
\textsuperscript{126} Pearson, supra note 121.
\textsuperscript{127} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} How can I get an IUD?, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/birth-control/iud/how-can-i-get-an-iud.
\textsuperscript{134} Id.
preventing pregnancy is incredibly cost-effective human maintenance the military should embrace.

IUDs are growing in popularity.\textsuperscript{135} From 2009 to 2015, the Colorado Department of Public Health and Environment gave IUDs and other long-acting forms of birth control to teens and low-income women as part of study tracking women’s utilization of free birth control.\textsuperscript{136} Unsurprisingly, the young women of Colorado took advantage of the offering, and unplanned pregnancies – and abortions – among teens dropped 40 percent.\textsuperscript{137} The wildly successful program was discontinued in 2015 when the Colorado legislature ended funding for it.\textsuperscript{138} Between 2011 and 2013, the Centers for Disease Control reported 6.4 percent of women using birth control chose an IUD, double the percentage between 2006 and 2010.\textsuperscript{139} In 2012, a study found IUDs 20 times more effective at stopping pregnancy than other methods of birth control like the pill.\textsuperscript{140}

Servicewomen have access, on paper, to IUDs. All of the services require routine birth control consultations for female soldiers, but this is apparently not always put into practice.\textsuperscript{141} In 2010, one third of servicewomen surveyed “reported that they were unable to access a [birth control] method they might want for deployment, and 59 [percent] did not speak with a military


\textsuperscript{136} Sabrina Tavernise, \textit{Colorado’s Effort Against Teenage Pregnancies Is a Startling Success}, N.Y. TIMES (July 5, 2015), http://www.nytimes.com/2015/07/06/science/colorados-push-against-teenage-pregnancies-is-a-startling-success.html?_r=0. I would submit this headline is misleading – the results of Colorado’s project were not “startling” at all.

\textsuperscript{137} Id.


\textsuperscript{141} Russell-Kraft, \textit{supra} note 113.
provider about contraceptive options prior to deployment.” Some servicewomen are denied IUDs because their doctors believe women who have never given birth are ineligible for one, which is false. In 2013, the FDA approved the Skyla IUD, specifically designed for women who have not had a child. The Skyla IUD is physically smaller than all other IUDs. Although Mirena and other IUDs have been safe for years for women without kids, rumors persist – even among the medical community – that they are not. The armed services should take advantage of Skyla’s introduction on the market to recommend them to the vast numbers of single young women in the military, enlisted and officers alike.

In addition to the information gap between the facts of modern IUDs and the medical community, military culture presents obstacles to women gaining the reproductive services they need. Ideally, servicewomen must be educated on pregnancy prevention, and military officials and medical professionals should present birth control options as a responsible, normal way to prevent pregnancy at home and on deployment. However, regulations in every service “make sexual relationships a chargeable offence in a number of circumstances, including fraternization, adultery, and wrongful cohabitation.” Fear of reprimand and negative professional consequences may drive servicewomen to avoid discussing sex and birth control with their doctors, who are also officers permitted to give them orders, or to believe they will not need birth control at all on deployment.

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143 Russell-Kraft, supra note 113.
145 Id.
146 Id.
147 The Impact of Unintended Pregnancy on Servicewomen and the Military, supra note 122, at 5. See UNIFORM CODE OF MILITARY JUSTICE, ART. 134.
148 The Impact of Unintended Pregnancy on Servicewomen and the Military, supra note 122, at 5.
b. Abortion Services in the Military

Women in the military are also a special situation when it comes to abortion services. Because Tricare, the military health insurer, is a federal insurance program, it does not fund abortion services. Women must pay for abortion services out of pocket. Servicewomen can get an abortion at a military treatment facility only if the pregnancy threatens the mother’s life or the pregnancy is the result of rape or incest. Military women simply do not have the same options as civilian women might. Early in pregnancies discovered on deployment, sometimes in countries where abortion is illegal or criminal, women should be able to take advantage of nonsurgical oral abortion methods if they so choose. These involve taking oral pills – mifepristone or methotrexate, taken with misoprostol – to induce a miscarriage, terminating the pregnancy. A few days of bed rest is normally recommended for most women because painful cramping can occur. Such an opportunity would allow female soldiers to continue the mission with little effect on their employment or long-term job success. One group, Ibis Reproductive Health, has suggested introducing abortion telemedicine to women deployed in remote areas who choose not to continue their pregnancies.

Telemedicine is “the use of technology and electronic communications, such as video conferencing, to provide medical care and advice at a distance.” Medication abortion does not

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152 Id.
153 Id. The Potential of Telemedicine to Improve Abortion Access, *supra* note 150. The potential attitudes of commanders toward abortion in the field – such as pressuring female soldiers to get an abortion to complete the mission, or punishing those who do choose to get an abortion – is beyond the scope of this Paper.
154 Id. at 2.
involve surgery and can take place up to 63 days into a pregnancy. Because of its relative ease and high level of safety, “medication abortion can be offered by a wide range of providers, including certified nurse midwives, physician assistants, and nurse practitioners.” The military has used telemedicine resources in several contexts, including 16 different clinical disciplines, from emergency medicine to dermatology. Ibis Reproductive Health found that telemedicine has already been used in the U.S. to provide abortion services to women in remote locations.

In rural Iowa, Planned Parenthood of the Heartland clinics in Ames, Bettendorf, Burlington, Cedar Falls, Council Bluffs, Dubuque, and Sioux City offer abortions through telemedicine. In 2008, Iowa became the first state to allow telemedicine abortions, and it was soon followed by Minnesota and Maine. Doctors remotely supervise medical professionals via a webcam give patients the “abortion pill.” This teleconferencing has served more than 7,000 women in Iowa in a very modern way. Abortion providers first consult with the patient, who is accompanied by a nurse who has already provided the patient with an ultrasound and lab work. Once prepared, the doctor “clicks a button on a computer screen to open a remote-controlled drawer in the patient’s exam room that contains the medicine and watches the patient swallow it.” In Iowa, women who are up to 10 weeks pregnant can access abortion by

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155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.* at 3.
159 Brock Borgeson, *Telemedicine Has Increased Abortion Access In Iowa But Abortion Numbers Are Down*, IOWA WATCH (July 5, 2016), http://iowawatch.org/2016/07/05/telemedicine-has-increased-abortion-access-in-iowa-but-abortion-numbers-are-down/.
160 *Id.*
161 *Id.*
163 *Id.*
164 *Id.*
telemedicine. The practice faced initial opposition from the Iowa Board of Medicine, until the Iowa Supreme Court stepped in and allowed it to continue. An American Journal of Public Health study supported Planned Parenthood’s innovative approach to abortion access, finding “[t]elemedicine could improve access to medical abortion, especially for women living in remote areas, and reduce second-trimester abortion.”

Because of the ban on federal funding of abortion, military women would still likely have to pay out of pocket for their telemedicine abortions on deployments. However, such a resource would enable women to make an important reproductive choice on the job with little interruption in their military duties or the mission. Telemedicine is already common in war zones for administering mental health treatment. “Psychiatrists provide[] an initial evaluation and ongoing treatment, including medication management and psychotherapy, to remote military personnel via videoconferencing.” Telemedicine is a highly cost-effective method of mental health treatment for sufferers of post-traumatic health disorder. The military has a long history of technological innovation, and it has the resources to provide telemedicine abortion to its deployed servicewomen. Providing medical abortions is demonstrably cheaper than losing a member of a unit and sending her home for $10,000. Telemedicine is an opportunity for the branches to combat barriers to their soldiers’ abortion access, such as “long distances from

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165 Borgeson, supra note 159.
166 Brendan Pierson, Iowa Supreme Court allows telemedicine abortion program to go on, REUTERS (June 19, 2015), http://www.reuters.com/article/us-iowa-telemedicine-abortion-idUSKBN0OZ1PW20150619. An analysis of the Iowa Supreme Court’s decision in that case is beyond the scope of this Paper.
168 It is beyond the scope of this Paper to discuss the legality of abortions in certain foreign countries where soldiers are deployed.
169 Id.
170 Id.
171 Id.
172 The Impact of Unintended Pregnancy on Servicewomen and the Military, supra note 122, at 3.
providers, limited number of staff trained to provide abortion, and challenges to maintaining patient confidentiality in the event of obtaining medical leave and/or evacuation.173

The armed forces are in a unique position to take care of soldiers’ health, reproductive or not. No other employer in the nation has such control over so many aspects of its employees’ lives – where they live, their fitness, whether they are home for birthdays or Thanksgivings, what they wear, and how their spouses and children live. A soldier is human capital – an investment by the country. It is in the company’s – the United States – best interest to protect and to maintain its investments – its armed forces. With several contraception options and telemedical abortion available to female soldiers, “risk of pregnancy” is a weak BFOQ argument and one that would inappropriately and entirely discriminate against women.

C. NATIONAL SECURITY EXEMPTION

Finally, many military decisions could fall under the national security exemption of Title VII. The national security exemption provides:

[I]t shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and (2) such individual has not fulfilled or has ceased to fulfill that requirement.174

In other words, the national security exemption makes it lawful for an employer – for example, the Department of Defense – to refuse to put a person in a certain position if that position is subject to any national security requirements. For example, someone

173 The Potential of Telemedicine to Improve Abortion Access, supra note 150, at 4.
cannot be placed in certain roles if they cannot pass a Top Secret security clearance investigation.\(^{175}\) In *Egan*, a Navy civilian employee was denied security clearance and he subsequently lost his position.\(^{176}\) The Supreme Court held he was not entitled to Title VII protections or judicial review of his security clearance denial because “clearance may be granted only when ‘clearly consistent with the interests of the national security.’”\(^{177}\) Further, authority to safeguard national security falls on the president, as the head of the executive branch and commander-in-chief of the armed forces.\(^{178}\) Courts may not review grants or denials of access to sensitive information by the executive.\(^{179}\) This idea is derived from the Constitution itself, which gives the president the “authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information.”\(^{180}\)

Similarly, the Fifth Circuit recently held that a civilian FBI contractor was not entitled to Title VII protection in a suit in which she claimed gender discrimination had led to revocation of her access to secure premises.\(^{181}\) In that case, the government successfully invoked the national security exemption to Title VII using Executive Order 12829, which established the National Industrial Security Program (NISP).\(^{182}\) NISP created guidelines for national security involving contractors and it clearly applied to the FBI contractor in *Toy*.\(^{183}\) In the same vein, it is plausible that women cannot be placed in

\(^{175}\) Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988).
\(^{176}\) Id. at 521-22.
\(^{177}\) Id. at 528.
\(^{178}\) Id. at 527.
\(^{179}\) Id. at 529.
\(^{180}\) Id. at 527.
\(^{181}\) Toy v. Holder, 714 F.3d 881, 887 (5th Cir. 2013).
\(^{182}\) Id. at 886.
\(^{183}\) Id.
certain – very limited – military roles because their status as women makes them unfit for
the role and placement in that position would undermine American national security. The
national security exemption grants employers in the national security sphere much
deference in their hiring and firing, and removes Title VII from soldiers’ remedies.

For example, the national security exemptions could be applied to high-risk
operations like those of the Special Forces, where no women have successfully passed
training. The Special Forces, the Green Berets, and the Navy SEALs are elite forces
tasked with some of the most secretive and demanding international missions in the U.S.
military. I would posit the executive would enjoy the national security exemption when
granting security clearances to certain soldiers or accepting only a select few to be in the
Special Forces or Navy SEALs. Like the CIA, the U.S. military would likely be
deserving of much deference when specific national security interests are at risk.

CONCLUSION

Today’s soldiers are more like traditional employees than ever. Without the draft,
the armed forces rely 100 percent on volunteers. Servicemembers receive a robust
benefits package: health care, housing, child care, retirement, and more. Enlisted
soldiers have the opportunity to take advantage of job training in preparation for

184 Dan Lamothe, Women Will Attempt Army Special Forces Training Soon — but They’re Not the First, WASH.
special-forces-training-soon-but-theyre-not-the-first/.
185 Julie Barzilay, Extreme Sleep Deprivation: How Navy SEALs Handle No Sleep, ABC NEWS (Nov. 18, 2015),
http://abnews.go.com/Health/extreme-sleep-deprivation-navy-seals-handle-sleep/story?id=35286158; Helene
Cooper, Obama Announces Killing of Osama bin Laden, N.Y. TIMES (May 1, 2011),
http://thelede.blogs.nytimes.com/2011/05/01/bin-laden-dead-u-s-official-says/?_r=0; Christian Lowe, 4 Key
Differences between the Green Berets and Delta Force, BUS. INSIDER (Nov. 14, 2016),
reentering the civilian sector. Officers can apply for and receive funding for higher education. Total benefits rank even with civilian jobs.

Although the military may still be a separate society of Americans, they are due the same rights in the workplace as civilians. Women in the military, past and present, face discrimination every day with no legal recourse available to them. Military women should have Title VII remedies in their arsenal to fight discrimination in their workplace – the armed forces. Opponents to such an expansion of Title VII’s reach cite the important ideal of military autonomy, but providing Title VII to servicemembers as a tool to combat discrimination would not harm military leaders and the military mission. Even with Title VII protections, the armed forces could still require exhaustion of intra-service administrative remedies, they would still have the BFOQ exception, and they could still use the national security exemption for exceptionally sensitive matters. The law should reflect the military’s evolution and women’s advancement in the services, and provide soldiers a remedy when discrimination occurs. Title VII is no magic bullet against military autonomy; instead, it is a necessary and strong step toward workplace equality for men and women in the military.

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187 Id.
188 Id.
189 Id.