Abortion & The Military: Limitations on Access for Servicewomen

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NOTES

ABORTION & THE MILITARY: LIMITATIONS ON ACCESS FOR SERVICEWOMEN

INTRODUCTION

Jessica Kenyon joined the U.S. Army in 2005.1 She was raped by a fellow soldier while stationed in Korea and became pregnant as a result.2 Jessica received her health insurance through the army.3 Notwithstanding the trauma of being raped by a fellow soldier, Jessica had to deal with the fact that her military health insurance at the time allowed abortion coverage only in situations where the mother’s life was endangered and not in cases of rape.4 Unable to have a safe abortion off-base, Jessica ended up being discharged from the army, and emotionally scarred as a result of the trauma from the rape, flew back to the U.S. where she eventually miscarried.5 At the time of the rape, Jessica was applying to become an officer in the army and wanted to continue her career serving her country.6 She may have had the chance to do so if she had health insurance that covered the same reproductive health services as the civilians she was serving and protecting are afforded. In fact, if Jessica had been an employee in almost any other department of the federal government, she would have had the option of having an abortion that is covered under the federal health insurance plan.7

2. See id.
3. See id.
5. Kenyon, supra note 1.
6. Id.

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The above facts illustrate the consequences of a discriminatory Department of Defense ("DOD") policy, which, until January 2, 2013, denied U.S. military servicewomen abortion coverage when they had been the victims of rape or incest. Prior to 2013, 10 U.S.C. § 1093 prohibited the use of funds available to the DOD for the performance of abortions, allowing for only one exception, in cases "where the life of the mother would be endangered if the fetus were carried to term." The purported reason for this law was to keep federal funds from being used to pay for abortions. However, the restrictions on the use of all other federal funds for abortions governed by the Hyde Amendment already permitted exceptions in two additional cases: for rape and incest. Consequently, some of the U.S. citizens most vulnerable to being raped were denied healthcare coverage for abortions if they became pregnant as a result, while those statistically less likely to be the victims of rape remained covered by their federal healthcare plan.

With the approval of the National Defense Authorization Act for Fiscal Year 2013, the Shaheen Amendment was signed into law, reinstating abortion coverage for victims of rape and incest within the U.S. Armed Forces. Although the inclusion of this amendment helps to make right the unthinkable inequity of denying a servicewoman healthcare coverage for the performance of an abortion after she has suffered through the trauma of a rape or incident of incest, it is simply not enough.

U.S. servicewomen are still denied the right to choose to have an abortion at a military hospital or healthcare facility, even if they pay for it out of their own pockets. This additional barrier to abortion access is

exceptions and providing no similar restrictions on funding as those found in 10 U.S.C. § 1093(a).
9. See 10 USC §1093(a).
15. See Letter from Elizabeth King, Assistant Sec'y of Def., to Carl Levin, Chairman, Comm.
particularly dangerous for women serving in the military overseas because federal law prohibits military treatment facilities from providing abortion services to women even when patients pre-pay the entire cost of the procedure with their own private funds. This additional ban, which now includes the narrow exception for life endangerment, rape, and incest, imposes grave health risks and leaves servicewomen and their families still far worse off in terms of their healthcare options than civilian women. For example, a servicewoman or family member who is prohibited from accessing abortion services on a military base may have to resort to local facilities in foreign countries that are substandard or unsafe if she chooses to have an abortion, or is forced to travel either back to the U.S. or to a country where she can get an abortion legally. This ban places an often insurmountable obstacle in the paths of women serving the U.S. military that does not exist for their civilian counterparts. The DOD itself has spoken out against the private funding ban as early as 1999, stating in a letter “it is unfair for female service members, particularly those members assigned to overseas locations, to be denied their constitutional right to the full range of reproductive health care.” Despite such strong support from within the DOD, servicewomen are still unable to choose to have an abortion at a military healthcare facility.

This Note will examine the current DOD abortion policy, explain the recent changes made as a result of the adoption of the Shaheen Amendment and compare the DOD policy to the greater federal abortion policy in this country. Specifically, this Note will explain why the DOD’s abortion policy continues to unfairly treat American servicewomen despite the recent passage of the Shaheen Amendment. Additionally, this Note will explain the need for further action to create a DOD abortion policy that fairly treats America’s servicewomen and does not deny them the same rights to reproductive care available to all.

See 10 U.S.C.A. § 1093(b) (West 2010 & Supp. 2013) (providing no exception to the restriction on the use of DOD facilities for privately funded abortions).


146 CONG. REC. S5412 (2000) (statement of Sen. Dick Durbin) (quoting Letter from Dr. Sue Bailey, Assistant Secretary of Defense for Health Affairs to the Honorable Loretta Sanchez (May 7, 1999)).

10 U.S.C.A § 1093(b) (West 2010 & Supp. 2013)

other American women.

To begin with, Part I will discuss how military health insurance is structured and how members of the armed forces receive their healthcare as well as the comparable health insurance for other federal employees who are not employed by the DOD.

Next, Part II will discuss the extensive problem of rape in all branches of the U.S. military and examine the reporting methods available to victims of sexual assaults, as well as the problem of underreporting, which has skewed the statistics on the overall number of sexual assaults.

Part III will discuss current federal law regarding abortion for civilians, focusing specifically on the Hyde Amendment and the restrictions it places on federal funding of abortions.

Next, Part IV will discuss pregnancy in the U.S. military, both intended and unintended, as well as the realities of access to abortion care for servicewomen and military dependents should she choose to terminate her pregnancy.

Part V will discuss the history of the DOD’s inconsistent abortion policy, which governs U.S. military servicewomen, as well as the current policies and potential changes and implications thereof that may occur as the result of recently adopted legislation.

Finally, Part VI will discuss the costs, monetary and otherwise, of providing or refusing to make available abortion funding for women serving in the military, the voices behind both sides of the debate, pro-choice and pro-life, and further steps necessary for the DOD to create a truly fair abortion policy for American servicewomen.

I. MILITARY STRUCTURE & HEALTHCARE COVERAGE

The U.S. Department of Defense is the world’s largest employer, with more than 3.2 million employees worldwide.21 There are currently 1.4 million active-duty members in all five branches of the U.S. armed forces; over 200,000 of them are women.22

As an employer, the U.S. military provides health insurance for uniformed service members, retirees and their families through the DOD’s health care program, TRICARE.23 TRICARE is a constituent
TRICARE healthcare coverage is available to "eligible beneficiaries from any of the seven uniformed services[:] the U.S. Army, U.S. Navy, U.S. Air Force, U.S. Marine Corps., U.S. Coast Guard, Commissioned Corps of the U.S. Public Health Service, and the National Oceanic and Atmospheric Administration." TRICARE was established within the MHS to provide healthcare plans with choices for military personnel, their families, and veterans and to coordinate the healthcare resources of the uniformed services and supplement them with the appropriate networks of civilian healthcare providers. TRICARE offers twelve different health plan options for beneficiaries to choose from. DOD funding for health insurance, as governed by section 1093(a), does not prohibit funding for contraceptive methods and other reproductive health services universally. While every woman who gets health insurance through the federal government faces a ban on coverage for abortion, the abortion funding ban for servicewomen in cases of rape and incest was particularly inconsistent with the rest of federal policy, since such exceptions have historically been included for non-military abortion funding.

Conversely, civilian federal employees receive their health insurance through the Federal Employees Health Benefits Program ("FEHBP"). In order to be eligible for FEHBP healthcare coverage individuals must be either a "permanent federal employee with a regularly scheduled tour of duty[,] a temporary employee with an appointment for longer than one year[,] or a temporary employee with an appointment limited to one year or less, and [has] completed one year of current continuous employment. . . ." Additionally, certain cooperative

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Mar. 20, 2013).

24 See id.


26 About Tricare, supra note 23 ("[t]he TRICARE health program combines the health care resources at military hospitals and clinics (or direct care) with networks of civilian health care professionals, institutions, pharmacies and suppliers to provide access to high-quality health care services while maintaining the capability to support military operations.").

27 TRICARE Choices: At a Glance Brochure, supra note 25.


employees are eligible for FEHBP coverage such as those employees who are "appointed by a Federal agency for service in cooperation with a non-Federal agency," and those who "are paid in whole or in part from non-Federal funds."32 In total, over eight million civilian federal employees, retirees and dependents receive their health insurance through FEHBP.33

The law governing the FEHBP is 5 U.S.C. §§ 8901-8914.34 Currently, Congress has authorized abortion coverage under FEHBP in cases where the woman’s life is endangered, or where the pregnancy is the result of rape or incest.35 Despite the recent addition of the Shaheen Amendment to the 2013 Defense Authorization Act, the FEHBP remains less restrictive than its DOD counterpart since civilian federal employees always have the option of receiving reproductive healthcare services from nonmilitary healthcare facilities.36 Unfortunately, that is not always an option for U.S. servicewomen as the result of being stationed on a remote military base or overseas.36

II. THE PROBLEM OF SEXUAL ASSAULT AND RAPE IN THE U.S. MILITARY

Despite the purported "no-tolerance policy toward sexual assault[,]"37 statistics reveal that it remains a significant and challenging issue for the military.38 Sexual assaults significance in the armed forces

forms/pamphlets/ri75-13.pdf.
33. Id.
34. Id.
35. DEP'T OF THE TREASURY, THE BUDGET FOR FISCAL YEAR 2011, at 1060, §§ [613][611]-[614][612] (2011) ("No funds appropriated by this Act shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefits program which provides any benefits or coverage for abortions ... The provision of section [613] 611 shall not apply where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest.").
36. See BOONSTRA, supra note 28 (noting that President Clinton's lifting of the ban on privately funded abortions gave servicewomen stationed overseas similar access to abortions as women in the United States).
37. Memorandum from the Sec'y of Def. to Sec'ys of the Military Dep'ts et al. (Apr. 13, 2009), available at http://www.sapr.mil/contents/SAAM/OSD 03306-09.pdf ("The Department of Defense has a no-tolerance policy toward sexual assault.").
only further intensifies the U.S. military’s need for comprehensive reproductive healthcare coverage for its servicewomen that provides women with the real financial, emotional and psychological support they deserve.

The DOD describes sexual assault within its ranks as “an affront to the basic American values we defend, and may degrade military readiness, subvert strategic goodwill, and forever change the lives of victims and their families.”39 While women are not always the victims in cases of sexual assault in the military, the majority of the time they are, while male victims comprise a small percentage of the overall statistics.40 In fact, women who enlist in the U.S. military actually increase their risk of being raped, and according to some reports, military sexual assault rates are twice as high as civilian sexual assault rates, a finding that may not come as much of a surprise considering that women are outnumbered by men seven to one.41 Additionally, a study from the American Journal of Industrial Medicine found that thirty-seven percent of victims in the military experience more than one rape and, outrageously fourteen percent experience gang rape.42 According to The Huffington Post, an American servicewoman was almost 180 times more likely to have become a victim of sexual assault in 2012 than she was to have been killed “while deployed during the last [eleven] years of combat in both Iraq and Afghanistan.”43 The fact that certain reproductive healthcare benefits would be less available to these

40. Elisabeth Bumiller, Sex Assault Reports Rise in Military, N.Y. TIMES (Mar. 16, 2010), http://www.nytimes.com/2010/03/17/us/17assault.html?_r-0 (noting that Kaye Whitley, the director of the Pentagon’s Sexual Assault Prevention and Response Office said that “[o]f all the assaults ... a vast majority, 87 percent, were male on female, while 7 percent were male on male” based on the DOD’s 2009 report).
41. Sexual Assault in the Military Part Three: Context and Causes: Hearing Before the Subcomm. on Nat’l Sec. & Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform, 111th Cong. 1-2 (2009) [hereinafter Sexual Assault in the Military Part Three] (statement of Helen Benedict, Professor of Journalism, Columbia University) (noting that “one in six women is raped or sexually assaulted in her lifetime, according to the National Institute of Justice”); Boonstra, supra note 28, at 5.
42. Am. Civ. Liberties Union, supra note 38.
servicewomen is inimical to military readiness and unequivocally unfair.

The effects on military readiness will only be further exacerbated by the recent decision of Defense Secretary Leon Panetta to lift the military’s ban on women in combat roles, opening up hundreds of thousands of “front-line jobs” available only to men for the past two decades. This decision comes on the heels of a federal lawsuit filed by the American Civil Liberties Union on behalf of four servicewomen who served in Afghanistan or Iraq and the Service Women’s Action Network (“SWAN”). SWAN is “a nonpartisan, nonprofit organization that supports, defends, and empowers service women and women veterans through advocacy initiatives and community programs.” SWAN’s “mission includes transforming military culture by securing equal opportunity and freedom to serve without discrimination, harassment, or assault.” The complaint argued that the military’s policy barring women from roles focused on combat solely because of their gender was unconstitutional. In the U.S. armed forces, “serving in combat positions like the infantry remains crucial to career advancement. Women have long said that by not recognizing their real service, the military has unfairly held them back.” In its complaint the ACLU described how one of the plaintiffs, Major Mary Jennings Hegar, an Air National Guard helicopter pilot, was “shot down by enemy fire [while flying] over Afghanistan, as she and her crew were evacuating three injured soldiers. . . . [S]he returned fire and successfully completed the rescue mission under fire[,]” but could not pursue combat leadership positions because her service was not officially recognized as combat. Major Hegar’s story is just one of many that describe the difficulties and unfair barriers facing American servicewomen, which may not come as much of a surprise to most considering the U.S. military’s history of rigid gender distinctions. Sociologist Mady Wechsler Segal has described the military by saying that it is “a masculine institution; it may be the most prototypically masculine of all social institutions.”


**45.** *Id.; see* Complaint at 1, Hegar v. Panetta, No. C-12-6005 (N.D. Cal. filed Nov. 27, 2012) 2012 WL 5925302.

**46.** Complaint, *supra* note 45, at 9.

**47.** *Id.

**48.** *Id. at* 17.


**50.** Complaint, *supra* note 45, at 4.

**51.** Mady Wechsler Segal, *Women’s Military Roles Cross-Nationally: Past, Present, and
result of being such a "masculine institution," domestic violence abuse, sexual assaults, rape and overall gender inequality continue to pervade the U.S. military.

While it will take years for the DOD to implement Defense Secretary Panetta's proposed changes, the availability of hundreds of thousands of front-line jobs to women in the military serves to highlight the further harm to military readiness that the current abortion policy will create.\(^\text{52}\) As servicewomen are finally granted the opportunities to advance along career paths that have been denied them and to assume greater responsibilities and power within the military, the need for an abortion policy that allows them to perform their duties uninterrupted will become more and more apparent.

The crimes of rape and sexual assault in the military are unique because the U.S. military has its own criminal law, which is separate from the rest of U.S. civilian law.\(^\text{53}\) The Uniform Code of Military Justice ("UCMJ") is the law that governs the U.S. military and is codified in Title 10 of the U.S. Code.\(^\text{54}\) Historically, the military has defined rape using a common law definition.\(^\text{55}\) However, addressing growing concerns about the inadequacy of the military's rape laws, the National Defense Authorization Act for Fiscal Year 2006 replaced the military's rape code, UCMJ Article 120, with language similar to the Model Penal Code.\(^\text{56}\)

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\(^{52}\) Bumiller & Shanker, supra note 44, at 2.


\(^{54}\) Id. §§ 801-940.

\(^{55}\) Compare BLACK'S LAW DICTIONARY 1232 (9th ed. 2009). ("At common law, unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will. The common-law crime of rape required at least a slight penetration of the penis into the vagina. Also at common law, a husband could not be convicted of raping his wife."). with 10 U.S.C. § 920 (providing that rape requires "an act of sexual intercourse, by force and without consent" and "[p]enetration, however slight, is sufficient" for rape).

\(^{56}\) Compare 10 U.S.C. § 920 ("Rape.—Any person subject to this chapter who commits a sexual act upon another person by—(1) using unlawful force against that other person; (2) using force causing or likely to cause death or grievous bodily harm to any person; (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; (4) first rendering that other person unconscious; or (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct."). with MODEL PENAL CODE § 213.1 (1980) ("Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing
In response to a growing number of sexual assault scandals within all branches of the Armed Forces, a task force assembled by former Secretary of Defense Donald Rumsfeld in 2004 to "review the DOD process for treatment and care of victims of sexual assault in the Military Services." A year later, in October 2005, "the overarching elements of sexual assault prevention and response policy became permanent with the approval of DOD Directive 6495.01, Sexual Assault Prevention and Response Policy...." As part of that directive, the DOD has been required to submit to Congress an annual sexual assault report. According to the DOD, "[t]he report ensures transparency on sexual assault reports, investigations, and case dispositions of those accused of the crime. It also provides department and Congressional leadership with information to evaluate and help address the problem." 

The DOD employs the term "sexual assault" when describing any "including rape, aggravated sexual assault, wrongful sexual contact, non-consensual sodomy, abusive sexual contact, aggravated sexual contact, and indecent assault." In 2005, the DOD created the Sexual Assault Prevention and Response Office ("SAPRO"), which describes itself as:

[T]he organization responsible for the oversight of Department of Defense (DOD) sexual assault policy. The Department of Defense is committed to the prevention of sexual assault. The Department has implemented a comprehensive policy to ensure the safety, dignity and well being of all members of the Armed
Forces. Our men and women serving throughout the world deserve nothing less, and their leaders—both Military and civilian—are committed to maintaining a workplace environment that rejects sexual assault and reinforces a culture of prevention, response and accountability.64

A. Reporting Sexual Assault and Rape in the U.S. Military

In 2011, the DOD reported that there were 3192 reported cases of sexual assault in the U.S. Armed Forces.65 However, a large percentage of incidents of sexual assaults and rapes go unreported each year.66 According to the DOD’s own statistics, only about fourteen percent of incidents of unwanted sexual contact were reported to a military authority.67 In a Pentagon press conference in January 2012, the then U.S. Defense Secretary Leon Panetta suggested, “because so few victims come forward . . . the real number is closer to 19,000 assaults.”68

Retired Chief Master Sergeant Cindy McNally, who served in the U.S. Air Force described her experience reporting sexual assault during her career:

I was sexually traumatized in the military. Early in my career, while I was in tech school, two instructors tried to assault me. When I reported the incident to my commander, I had to stand outside of his office with both of my assailters while he considered the situation. They both outranked me. I knew then that I would never again report an assault as a member of the military, no matter what happened. A year later, I was sexually assaulted and never reported it.69

Although the DOD aims to increase the reporting of such incidents “by . . . improv[ing] the confidence Service members have in the reporting process, engendering a positive command climate, enhancing

64. Id.
65. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, supra note 39, at 2.
67. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, supra note 38, at 7.
68. MSNBC.com Staff & News Servs., supra note 66.
education about reporting options, and reducing stigma and other barriers that deter reporting," encouraging victims to come forward remains an uphill battle that will not likely improve without some significant policy changes on the part of the DOD. 70

There are a number of reasons why an individual service member would be less than inclined to report an incident of sexual assault by a fellow soldier to their chain of command. One of the main reasons that cases of sexual assault and rape in the military are so underreported may be because the victims are often of a lower rank than their assailant. 71 According to Senator Jeanne Shaheen, "[m]ost of the women affected here are enlisted women who are making about $18,000 a year. They’re young, they don’t have access to a lot of resources. Many of them are overseas," 72 and within the military, such incidents often involve continued victim-assailant contact, which decreases the likelihood that a victim will want to report an incident. 73 Additionally, a survey of women in the Army reported "fewer than half of women... had confidence their leaders would take seriously their sexual harassment and abuse allegations." 74 Military insiders have described the, "unique relationship between a military leader and his or her subordinate [a]s at once both powerful and fragile; strong enough to compel the subordinate to put life and liberty on the line, yet fragile enough that it cannot thrive in anything short of an environment of complete trust." 75

Discussing a sexual assault can be not only intimidating for servicewomen but also humiliating. It is often their word against the word of their attacker, often a higher ranking enlisted male.

So, in 2004, Secretary of Defense Donald Rumsfeld directed the formation of a task force "to undertake a 90-day review of all sexual assault policies and programs among the Services and [Department of Defense], and recommend changes necessary to increase prevention, promote reporting, enhance the quality and support provided to victims,

70. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, supra note 38, at 2.
73. HANSEN, supra note 71.
especially within combat theaters, and improve accountability for offender actions." 76

The Task Force conducted focus groups at military sites in the U.S. and overseas, having personal contact with more than 1300 individuals. 77 The report revealed that one of the most substantial impediments to reporting by victims was thought by many to be the "perceived lack of privacy and confidentiality within the Department of Defense." 78 The task force report further states that barriers preventing victims from reporting an alleged sexual assault soon after the incident or at all include: "[c]oncerns that they will not be believed[,] [f]eelings of embarrassment and stigma[,] [a]mbiguity about what constitutes sexual assault[,] [c]oncerns that the criminal justice system is largely ineffective at responding to or preventing such incidents[,] and [f]ear of reprisal from the offender." 79 All of these reported barriers to reporting by sexual assault victims only serve to place a woman who becomes pregnant as a result of such an assault in an even more perilous position.

Currently, victims of sexual assault within the military have two options for reporting the incident. 80 "Unrestricted reports result in notification to the victim’s command, the initiation of a law enforcement investigation, and the provision of care and services to the victim." 81 A restricted report is "made to specific parties within the department (e.g., a sexual assault response coordinator, victim advocate, or medical personnel) and allows the victim to receive care and services; however, at the victim’s request, these reports are not investigated because of the victim’s desire for confidentiality." 82 According to the DOD, the restricted reporting option “is intended to give a victim additional time and increased control over the release and management of his/her personal information, and to empower him/her to seek relevant information and support to make more informed decisions about participating in a criminal investigation.” 83

However, there are many, both within and outside the military, who

77. Id. at vii-viii.
78. Id. at ix.
79. Id. at 28.
80. DOD Directive 6495.01, supra note 59, at 13.
81. Facts on Sexual Assault, supra note 61.
82. Id.
believe that not enough is being done to address the real issue and to bring the perpetrators of sexual assaults to justice.\textsuperscript{84} Much of the DOD’s response to the issue of sexual assault and rape within its ranks to date has been aimed at prevention, rather than revisiting Department policies to make sure that victims are properly advocated for and that perpetrators are punished.\textsuperscript{85}

Since all branches of the military are governed by the UCMJ, the procedures for handling an alleged sexual assault are different from those procedures in the civilian criminal justice system.\textsuperscript{86} Currently, the military’s chain of command deals directly with reports of sexual assault.\textsuperscript{87} In 2011, close to seventy percent of “actionable” sexual assault cases did not go to trial because of discretion at low command levels.\textsuperscript{88} In fact, the sole discretion as to whether a reported sexual assault is investigated and to what extent lay in the hands of a commander who often know both the victim and the perpetrator personally.\textsuperscript{89}

However, what appears to be a significant change has been announced by Secretary of Defense Leon Panetta.\textsuperscript{90} Acknowledging “the fact that under the current policy, assault claims frequently are swept under the rug,” Panetta revealed plans “to issue a directive requiring local commanders to immediately hand over investigations to an outside, higher-ranking colonel.”\textsuperscript{91} The new policies purportedly will also establish,


\textsuperscript{88} SERV. WOMEN’S ACTION NETWORK, supra note 85 (“Actionable cases are sexual assault allegations that have been investigated by the service’s criminal investigations office and found to be both substantiated and within the jurisdiction of the military’s criminal justice system.”).

\textsuperscript{89} Id.

\textsuperscript{90} Ellison, supra note 87.

\textsuperscript{91} Id.
a “special victims’ unit” within each service composed of specially trained experts in evidence collection, interviewing and working with victims; [r]equiring that sexual assault policies be explained to all service members within [fourteen] days of their entry into active duty; [a]llowing National Guard and Reserve personnel who have been sexually assaulted to remain on active duty status to obtain the treatment and support afforded to active-duty members; [r]equiring a record of the outcome of disciplinary and administrative proceedings related to sexual assault and retaining the records centrally; [r]equiring commanders to conduct annual organizational climate assessments to measure whether they are meeting the department’s goal of a culture of professionalism and zero tolerance of sexual assault; [e]nhancing training programs for sexual assault prevention, including training for new military commanders in handling sexual assault matters; and [m]andating wider public dissemination of available sexual assault resources, such as DOD’s “Safe Helpline,” a 24/7 helpline via Web, phone or text message operated by the nonprofit Rape, Abuse, and Incest National Network.92

These new policies appear to address a majority of the major issues that the military’s current sexual assault policy fails to address; however, it remains to be seen how effective the military’s highest ranking officials will be in implementing any kind of significant change for servicewomen.

III. ABORTION LAW IN THE U.S.

Abortion has been constitutional in the U.S., with some limitations, since the Supreme Court’s decision in Roe v. Wade in 1973.93 Roe “and its Supreme Court progeny protect a woman’s right to terminate a pregnancy with very few restrictions in the first trimester, with increasing potential for restrictions as the pregnancy progresses.”94 These decisions of our nation’s highest court protect military women and

94. Id. at 370.
their family members and dependents just as much as they do civilians.\textsuperscript{95} However, women in the military and their family members continue to face significant restrictions to abortion access both in the U.S. and overseas. Despite what personal opinions and beliefs individuals may have with regard to abortion and a woman’s right to choose, providing military servicewomen and their families with the same access to abortion coverage as is available to the civilians they serve to protect should not even be a question.

In 1976, an amendment was introduced in Congress to limit the use of federal funds for abortions.\textsuperscript{96} The Hyde Amendment, named for its sponsor, Republican Representative Henry Hyde, “is a rider to the annual Labor/Health and Human Services (HHS)/Education appropriations bill which prevents Medicaid and any other programs under these departments from funding abortions, except in limited cases.”\textsuperscript{97} After a series of challenges, in 1980 the Supreme Court affirmed the constitutionality of the Hyde Amendment in \textit{Harris v. McRae}.\textsuperscript{98} In that case, the Supreme Court stated that “[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realized all the advantages of that freedom.”\textsuperscript{99} However, since the Amendment was passed, Congress has debated about the narrow circumstances under which federal funding for abortion should be permitted.\textsuperscript{100}

Initially, exceptions to the Hyde Amendment for rape and incest were included, but a strong pro-life contingent that entered the Senate after the 1980 election successfully removed the exceptions for rape and incest.\textsuperscript{101} Consequently, from 1981 to 1993, the Hyde Amendment

\textsuperscript{95} Id.

\textsuperscript{96} Crawford, supra note 11, at 1555-56.


\textsuperscript{98} Harris v. McRae, 448 U.S. 297 (1980) (holding that States that participated in Medicaid were not required to fund medically necessary abortions for which federal reimbursement was unavailable as a result of the Hyde Amendment, which restricted the use of federal funds for abortion. The Court also held that the funding restrictions of the Hyde Amendment did not violate either the Fifth Amendment or the Establishment Clause of the First Amendment).

\textsuperscript{99} Id. at 317-18.


\textsuperscript{101} Nat’l Comm. for a Human Life Amendment, supra note 29.
allowed federal funding of abortion only in cases “where the life of the mother would be endangered if the fetus were carried to term.” In 1993, federal funding was reinstated for abortions in cases of rape and incest. Currently, the exceptions for rape and incest continue to be included.

The Hyde Amendment’s restriction on federal funding of abortion has mainly affected low-income women who receive healthcare coverage under the joint federal-state program known as Medicaid. However, this restriction is also affecting another population of women who become pregnant unintentionally while serving the U.S. Armed Forces as well as military family members and dependents who receive their healthcare coverage through the Department of Defense and Tricare.

IV. UNPLANNED PREGNANCY IN THE MILITARY THE REALITY OF ACCESS TO ABORTION WHILE IN THE MILITARY

Unplanned pregnancy among servicewomen continues to occur even though the MHS provides a wide variety of contraceptive options to servicewomen at no extra cost. However, according to one study of female soldiers at a single hospital, 51% of births occurring among active duty servicewomen are “unintended.” The study also found that only thirty-five percent of births were “intended,” with the remaining fourteen percent of the women surveyed choosing neither “intended” or “unintended,” but rather “ambivalent” to describe their situation. The researchers went on to say that, “[i]f ambivalent pregnancies i.e. pregnancies where the surveyed mother answered that she could not say if they were mistimed, unwanted or wanted, are combined with unintended pregnancies our study found that sixty-five percent of active-duty army births were not intended.”

102. Id.
103. Id.
108. Id.
109. Id. at 198.
With such a high percentage of pregnancies among U.S. servicewomen unplanned, the ability of a servicewoman to choose how to proceed with her pregnancy is vital. Preventing access to abortion services constructively denies a servicewoman her fundamental right to choose as set out in *Roe v. Wade*.  

If a servicewoman decides that "the time is not appropriate for childbearing, she will have a hard time exercising her right to a procedure that is both legal and safe in the nation she defends." Servicewomen "unduly bear the consequences of sexual activity and they should not have to sacrifice their careers" if they become pregnant.

Abortion is an incredibly time sensitive procedure. Despite being regarded as relatively safe, "the risk of death increases exponentially with increased gestational length, from a rate of 0.1 deaths per 100,000 legally induced abortions at or before eight weeks’ gestation to 8.9 deaths after 20 weeks." An active duty servicewoman serving overseas who makes the decision to have an abortion must first ask permission from her commanding officer to take leave from her military duty in order to return to the U.S. or a country where abortion is legal, since overseas abortion laws vary widely. Many of the countries that host the largest contingents of U.S. service members at this time, namely Iraq and Afghanistan, are the most restrictive. "According to a 2002 Government Accountability Office (GAO) report on health care benefits for women in the military, ‘[f]or active duty women, explaining their specific ailment to their commanding officer (usually male) or appearing like they need special treatment may make them reluctant to seek the care they need.’" The GAO also reports that

in some cases, commanders have not been adequately trained on the importance of women’s health care and may be reluctant to allow active duty members time away from duty. Indeed, commanders are not required to grant any particular

110. See Wilde, *supra* note 93, at 411-12 (arguing that current rules and regulations in the military provide “significant obstacles” to “exercising [a] right to abortion services”).
112. *id.*
113. *See* Boonstra, *supra* note 28, at 6 (noting that the risk of death during abortion increases with the length of the pregnancy).
114. *id.*
115. *id.*
116. *id.*
117. *id.*
leave request and, in war zones, leave may not be available. 118

Furthermore, these constraints affect women in "the most junior of enlisted ranks, who are also the most likely to have an unintended pregnancy." 119 Supposing such servicewomen are even able to make it back to the U.S., "the cost of an abortion can be substantial and only increases with gestational age." 120 It is estimated that "[j]unior enlisted personnel with three years' experience earn no more than $23,000 per year." 121 According to the National Abortion Federation, "[t]he exact cost of an abortion depends on many factors, such as how far along the pregnancy is, the kind of procedure and anesthetic that are used, and the kind of facility (clinic, physician's office, or hospital)." 122 On average, a woman who is "between six and ten weeks' gestation can expect to pay about $350 at an abortion clinic and $500 at a physician's office[,]" but after twenty weeks, she can expect to pay at least $1,000. 123 Consequently, the longer it takes for servicewomen to get an abortion, the harder it becomes for them to afford the procedure, which comes in addition to the increased dangers of aborting a pregnancy as gestation increases. 124

Tragically, as a result of this policy, some servicewomen seek alternative means by which they can abort their pregnancies. Amy, a twenty-four-year-old active Marine sergeant who was stationed in Fallujah, Iraq saw her unplanned pregnancy as a "career-ending situation."

She describes how she obtained information on the Internet about how to cause a miscarriage by taking high doses of over-the-counter herbs and supplements. After weeks with no success, [she] resorted to attempting to manually dislodge the fetus by inserting objects into [her] cervix. There were no coat hangers to be found in Iraq, but the idea was the same. 126

Dr. Morris Wortman, a Rochester, New York physician, recounted

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118. Id.
119. Id.
120. Id.
121. Id.
122. Economics of Abortion, supra note 105.
123. Id.
126. Id.
the situation of one his Patients:

[m]y patient Erica was stationed in the Middle East and working as an Arabic translator when she was raped by her commanding officer. She became pregnant as a result and wanted an abortion. Erica couldn’t end her pregnancy at her base’s medical facility unless she reported the rape, which she refused to do. She feared that her rapist would physically assault her if she turned him in. She also worried that he would go out of his way to hurt her career. Erica had no choice but to fly home to have an abortion.

Erica knew she was pregnant at four weeks, but she had to wait another ten weeks before she could go home. In addition to increasing the medical risk of her abortion, this ten-week delay complicated Erica’s emotional recovery from the rape. Her pregnancy was a constant reminder of the attack.127

Yet, it is not solely women who have made the decision “that the time is not appropriate for childbearing,” being affected by this restrictive DOD policy.128 There is another group of servicewomen and Tricare beneficiaries who are facing the consequences of not being able to have an abortion at military facilities, namely, women who have been given the devastating news that the fetus they are carrying has a fetal anomaly “incompatible with postnatal life.”129 For example, in 2002 a young Navy wife found out that the baby she carried was anencephalic - it had no forebrain or cerebellum. It would most likely live only minutes after she gave birth. At 4 months into her pregnancy, the most sensible and least painful thing for her to do would be terminate the pregnancy.

129. Priscilla J. Smith, Responsibility for Life: How Abortion Serves Women’s Interests in Motherhood, 17 J.L. & POL’Y 97, 115-16 (2008) ("There are hundreds of fetal anomalies that are either lethal or would result in a child with significant morbidity. Among these conditions are Trisomy 13 and 18, which are often fatal chromosomal anomalies; neural-tube defects, including anencephaly, a lethal disorder characterized by the absence of the cranium and open spina bifida, in which parts of the neural system are outside of the body ... Structural fetal anomalies, such as renal agenesis, anencephaly, and skeletal dysplasia ... ")
But Tricare, the insurance company covering military families, would not allow that. Its policy is written in such a way that ONLY in cases where the mother’s life is at risk should abortion be paid for. This young family faced a $3000 medical bill, or the pain of going through another four months carrying a baby that would die.

They had the abortion, when a court ordered Tricare to pay the bill. But in 2005, a federal court reversed that decision, requiring the sailor and his wife to repay Tricare the whole cost of the bill. 130

Nevertheless, this couple was extremely fortunate to even have access to a civilian healthcare facility at which to have the abortion performed. 131 Had they been stationed somewhere overseas, depending on the country and its laws regarding abortion, it may not have been legal, or access to a facility willing to perform an abortion may not have even been possible. 132

Although the inclusion of the rape and incest abortion funding exceptions to the DOD’s 2013 budget has been a positive step toward protecting American servicewomen from an inequitable and discriminatory healthcare coverage policy, more needs to be done. 133 The additional barrier to abortion access with the prohibition of privately funded procedures at military healthcare facilities endangers the lives of our servicewomen and constructively denies them their right to choose whether or not to have an abortion as well as having the impact of forcing servicewomen to have children at times in their lives and careers when they may choose not to. The current epidemic of sexual assault and rape in the military makes the necessity of equal abortion access for servicewomen undeniable, especially with the well known reluctance of servicewomen to reporting such incidents. 134

131. See Jacobson, supra note 107, at 256 (discussing how women stationed overseas lack access to abortion services).
132. Id. at 255.
134. Sexual Assault in the Military Part Three, supra note 41, at 5-6.
V. Abortion Policy for Women in the Military: Past, Present & Future

A. Military Policy Towards the Availability of Abortion benefits for Servicewomen has Changed Repeatedly in the Past Forty Years Directly Affecting Access to Abortions and the Number of Abortions Performed from Year to Year

Prior to 1970 there was no formal policy on abortions in the military. The availability of abortion services at that time varied depending on what branch of the armed forces the servicewoman was in (as each branch had a different approach), where she was stationed, the individual physicians treating her, and even the commanders in charge of the various medical facilities may have impacted a servicewoman’s access to an abortion. During this time period, relatively few abortions were performed by physicians at military medical facilities.

In 1971, President Nixon gave directions that military policy about abortions should mirror that of the state or nation where the military base is located in what “came to be known as ‘the good neighbor policy.’” This had the effect of decreasing the access to abortions that servicewomen had just one year prior as many states had a more restrictive policy than the military had in 1970, which was to allow abortions in military medical facilities where it was deemed medically necessary or where the mental health of the mother was at stake.

Just two years after the “good neighbor policy” went into effect, the Department of Defense, in response to the Supreme Court’s ruling in Roe v. Wade, broadened their policy to allow abortions “for any women eligible for DOD health care.” The limitations on this right included the requirement that two physicians agree that the abortion was “medically indicated” or that it was necessary for the mental health of the mother, and that it was allowed in the state where the abortion was to

136. Id.
137. Id.
138. Id. at 4.
139. See id.
141. BURRELLI, supra note 135, at 4.
take place.142 As this resulted in disparities between treatment of women stationed in various regions, in 1975 military medical personal were directed to follow the decision in Roe, even though state statutes that differed from the decision had not been successfully challenged.143

However, in 1978, an amendment to the DOD defense bill prohibited abortions using DOD funding unless the life of the mother was in danger, in cases where pregnancy was a result of rape or incest, or where there would be physical health damage as determined by two doctors.144 Funding could also be used for ectopic pregnancies and drugs and devices that prevent implantation of a fertilized ovum.145 In 1979, the provision allowing for abortions for the physical health of the mother was removed.146 The following year, an amendment to the act added a provision requiring that “victims of rape were required to report the incident within [seventy-two] hours” in order to qualify for an abortion at the military medical facility with DOD funding.147 Between 1981 and 1983, the language of the amendment was considerably shortened as many exceptions to the funding restrictions were removed, stating simply: “None of the funds provided by this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.”148

In 1984, the language was finally codified at 10 U.S.C. § 1093.149 Currently, the language of 10 U.S.C. § 1093 states the following:

(a) Restrictions on Use of Funds.—Funds available to the Department of Defense may not be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

(b) Restrictions on Use of Facilities.—No medical treatment facility or other facility of the Department of Defense may be used to perform an abortion except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an

142. Id.
143. Id.
144. Id.
145. Id. at 4-5.
146. Id. at 5.
147. Id.
149. BURRELLI, supra note 135, at 6.
act of rape or incest.\textsuperscript{150}

In 1988, there were modifications made to the rules to require a doctor's statement to satisfy the requirement that funds were used only for life threatening conditions including cancer, kidney and heart failure, severe heart disease and uncontrollable diabetes.\textsuperscript{151} Then in June of 1988, the Assistant Secretary of Defense at the time sent out a memorandum “barring abortions in military medical.”\textsuperscript{152} The Assistant Secretary of Defense was aware that “privately paid abortions did not violate the letter of the law, [but] he issued the memorandum to avoid the appearance of ‘insensitivity to the spirit’ of the law.”\textsuperscript{153} The following year attempts to get rid of this restriction failed, as well as proposals in the House and Senate to allow abortions overseas at military medical facilities.\textsuperscript{154} Similar attempts to pass amendments to return the regulations to what they were prior to the issuance of the memorandum failed to become law in 1991.\textsuperscript{155} In anticipation of a presidential veto by George H. W. Bush of “any defense legislation that reinstated the former policy,” the language was again dropped in 1992.\textsuperscript{156}

In 1993, President Clinton issued a memorandum that directed a “change in policy so that abortions could be performed at military medical facilities provided that the procedure was ‘privately funded.’”\textsuperscript{157} As a result, the Secretary of Defense directed that the pre-1988 policy concerning availability of overseas abortions be reinstated in an attempt to “unify and make consistent DOD policy.”\textsuperscript{158} The Secretary of Defense issued a five part policy that did the following:

1. provided access to abortion services for service women and eligible depends overseas,

2. required the valid consent of a parent or other designated person in the case of a minor who was ‘not mature enough and well enough informed to give valid consent,’”

\begin{thebibliography}{158}
\bibitem{151}  BURRELLI, supra note 135, at 6.
\bibitem{152}  id.
\bibitem{153}  id.
\bibitem{154}  id.
\bibitem{155}  id.
\bibitem{156}  id. at 7.
\bibitem{157}  id. at 1.
\bibitem{158}  id. at 7.
\end{thebibliography}
(3) relieved those medical practitioners directly involved from performing abortions if they objected,

(4) respected host nation laws regarding abortion, and

(5) directed the Military Health Services System to provide other means of access if providing pre-paid abortion services at a facility was not feasible.\textsuperscript{159}

This did not necessarily have the intended effect of making abortion access for servicewomen as readily available as the President had expected.\textsuperscript{160} It seems that "[a]lthough abortion access had been liberalized in terms of overall policy, liberalization had not necessarily occurred in terms of actual access."\textsuperscript{161}

Several reasons were proposed for this unexpected outcome, but the unwillingness of military doctors to perform abortions was in large part due to the structure of the military hierarchy and the conservative tilt of the military itself, as well as the fact that the medical team had to consist of volunteers, with the added caveat that the abortion must be allowed in the host nation.\textsuperscript{162}

In 1976-1977, the number of abortions performed at military facilities was reported to be approximately 26,000 worldwide; in 1979 that figure dropped to 1,300 abortions.\textsuperscript{163} Approximately fifteen years later, during the two-year span from 1993-1994, only a reported thirty-seven abortions were performed worldwide.\textsuperscript{164} Additionally, all of the abortions that were performed in 1994 (a reported total of ten), were performed because there was danger to the life of the mother.\textsuperscript{165} Over the fifteen-year span that followed, a reported average of 3.79 therapeutic abortions had been performed per year.\textsuperscript{166}

As the law concerning the availability of abortion benefits and access for military servicewomen stood, codified in Title 10 of the United States Code, no abortions were allowed to be performed with Department of Defense funding except if the life of the mother is

\textsuperscript{159} Id.
\textsuperscript{160} Id. at 8.
\textsuperscript{161} Id.
\textsuperscript{162} See id.
\textsuperscript{163} Id. at 4-5.
\textsuperscript{164} Id. at 8.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 9.
danger. As far as the use of military hospitals is concerned, military facilities may only be used for the performance of an abortion in instances where the life of the mother is in danger, or in cases of rape and incest. In those cases of rape and incest, however, Department of Defense funding may not be used, and abortion must be privately funded. A servicewoman who has been the victim of rape or incest has to pay out-of-pocket for her abortion care.

B. There is Current Legislation Pending on the Floor of Congress that Addresses the Issue of Abortion Benefits for Military Servicewomen Intended to Broaden the Current Law Making Abortions More Accessible

While federal health insurance programs are prohibited from using federal funding for providing abortion care to women, they acknowledge an exception for cases where the pregnancy was the result of an act of rape or incest. This is contrary to military policy which does not acknowledge this exception and requires that women serving in the military, who want an abortion after having been raped or having been the victims of incest, must pay for that abortion themselves.

However, there were two major pieces of legislation pending in Congress that addressed the issue of abortion services for women in the military, the MARCH Act and the Shaheen Amendment. Both pieces of legislation were aimed at broadening the care available to women who are serving in the United States military, making it easier for them to obtain an abortion while serving the country.

1. MARCH Act

The MARCH for Military Women Act (Military Access to Reproductive Care and Health for Military Women Act) was introduced separately to the House (as H.R. 2085) and Senate (S. 1925) in 2011.
What the bill proposes to do is address the issue of abortion in the military in two ways:

(1) allow federal health insurance coverage for abortion to service women and military wives and daughters who become pregnant as a result of rape or incest; and

(2) allow servicewomen and dependants of people to use their own money to obtain an abortion on a military facility in circumstances other than rape, incest, life endangerment (e.g., where her health is endangered by the pregnancy).

2. Shaheen Amendment

The Shaheen Amendment, sponsored by the New Hampshire Democrat Sen. Jeanne Shaheen, is an amendment that would allow the DOD to pay for abortions in cases where the life of mother is in danger, as well as in cases of rape or incest. The amendment gained bipartisan support from Republican members of Congress including Sens. John McCain, Susan M. Collins, and Scott P. Brown (all members of the Armed Services Committee). This is notable because “[d]emocrats have tried in the past to overturn the 16-year-old ban on military funding for abortion except when the mother’s life is at stake,” but this is the first time it’s gained the bipartisan support it needs to pass. Also, the Department of Defense itself has “announced that it supported the bill, saying it would make the military rules more consistent with other major abortion-funding restrictions in federal law.”

There is still significant ground to tread for these bills, however, as they have yet to be heard by the full Senate as part of the final defense bill, and even if this does occur, “anything could happen when lawmakers meet to hammer out differences between the House and Senate versions.” Additionally there will be definite resistance from

176. See id.
178. See id.
179. Id.
180. Id.
181. Id.
House Republicans who are “backed up by leading pro-life groups such as National Right to Life, Americans United for Life, Concerned Women for America and SBA List,” and who want the language to stay the same.  

Those against the amendment offer several reasons for their opposition, including expressing their view that the proper approach to handling situations where military servicewomen are being raped or are victims of incest is prevention. Many pro-life advocates hold this view that the solution is:

"Preventing assault in the first place. ‘One of the things the Democrats use is the high number of assaults in the military,’ said Shari Rendall, director of legislation for Concerned Women for America. ‘Why not focus that attention on preventing the rape and assault instead of a killing a baby, which is a result of the unlawful assault on a woman?’"

C. The Costs, Monetary and Otherwise, of Providing or Refusing to Make Available Abortion Funding for Women Serving in the Military

There was a time in the United States history, where abortions were illegal. During that time period, it was common that women would pay exorbitant fees to get an abortion from an unqualified doctor in abysmal conditions. It was not uncommon that these same women would have to face serious medical complications that were a direct result of their illegally obtained abortion. These complications not only resulted in “lengthy hospital stays, increased financial and health costs,” but were also a burden on maternity resources at hospitals, and were one of the main causes of maternal death in the United States.

Though abortions in the United States are no longer illegal, in situations where women are denied access to abortion funding they face similar obstacles. In situations where women are not covered by their insurance or Medicaid plans (as is the case with military servicewomen),

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182. Id.
183. See id.
184. Id.
185. See Economics of Abortion, supra note 105.
186. Id.
187. See id.
188. Id.
189. See id.
there are "both real and hidden costs that they, their families, and other taxpayers must bear."\textsuperscript{90}

Typically, women who are unable to obtain funding for their abortion attempt to pay for it themselves.\textsuperscript{91} This leads to situations where a woman attempting to save enough money to afford an abortion ultimately delays the abortion, making it not only a more medically dangerous situation for the woman, but also ends up resulting in a more expensive procedure.\textsuperscript{92} Additionally, there are the multitudes of women who cannot save up enough money for their abortion and attempt to take matters into their own hands, and try to give themselves an abortion.\textsuperscript{93} This is obviously a very dangerous choice that could ultimately lead to serious medical complications or could just as easily result in the woman's death.\textsuperscript{94}

Anti-abortion activists who oppose public funding for abortion cite "the unfair burden on taxpayers."\textsuperscript{95} However, it is the case that the "funding restrictions on abortions cost taxpayers millions of dollars every year, due to the much higher cost of prenatal care and childbirth, and the secondary costs of unplanned births."\textsuperscript{96}

These statistics are especially worrisome for servicewomen who not only have to pay for their own abortion under "normal" circumstances, but have to pay for their own abortion even after they have been raped, a situation that even federal inmates are not subject to after experiencing a rape.\textsuperscript{97} This remains the case even though "[s]tudies have long shown that a woman doubles her risk of sexual assault just by joining the military."\textsuperscript{98}

The reports of sexual assault in the military continue to rise.\textsuperscript{99} The DOD has reported that in 2011, there were approximately 3,192 reports of sexual assault.\textsuperscript{200} This is only a single percentage increase since 2010, but that statistic does not take into account the vast number of unreported incidences of sexual assault that occur every year in the

\textsuperscript{90} Id.
\textsuperscript{91} See id.
\textsuperscript{92} See id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{200} Id.
United States military. Additionally, reports from agencies at the Department of Defense indicate that "the vast majority of sexual assault victims are under the age of twenty-five and from the junior enlisted ranks." 

The Department of Defense estimates that over three-quarters of sexual assaults are not reported, so a conservative estimate of the number of sexual assaults in the military hover closer to 19,000. The reasons for the unreported assaults vary, but there are instances of interfering superior officers who discourage such reports, even punishing servicewomen who come forward to report an assault. 

In light of these disturbing statistics, it is still the case that a woman who has been raped in the military has to find a way to get enough money together to pay for an abortion, should a pregnancy result. And in cases of the junior enlisted (those under the age of twenty-five who represent the majority of the statistic regarding assaults in the military), servicewomen who earn less, are "less likely to be able to pay for additional medical expenses, often causing them to delay medical care in order find necessary funds."

Those who oppose giving servicewomen benefits that include abortion coverage in cases of rape, state that "it would threaten 'military readiness' and morale." There are also concerns that approving abortion funding would "discourage young doctors who don’t want to perform abortions from enlisting—although precedent has long shown that military doctors who oppose abortions wouldn’t be forced to perform them." Detractors also claim that the existing restriction on military funding to abortion for servicewomen "reflects the ‘moral and fiscal values’ of Americans," though polling indicates that as many as 77% of the population are not opposed to abortions.

Despite this, the Legislature has stated a "number of different justifications for the military abortion ban. . . [including] a congressional policy of withholding government assistance from women

201. Id.
203. See Dietrich, supra note 197.
204. See id.
205. See id.
207. Dietrich, supra note 197.
208. Id.
209. Id.
seeking to obtain an abortion in order to avoid ‘a Federal endorsement of the practice that is opposed by tens of millions of Americans.’" 210 However, these justifications as military reasons for not allowing abortions carry little water. It seems that

[a]lthough there is a military justification for efficient military spending, the concern here is not how much money is being spent, but rather on what it is being spent. Supporters on this ground would, in principle, be opposed to spending a single dollar of taxpayer money on abortion. This may be a legitimate political rationale, but it does not directly relate to military readiness or efficiency 211

The same can be said of arguments pertaining to the effect of military morale, and comments by those in Congress that claim the mission of the armed services is to preserve human life and not end it (which is a purpose defeated by funding abortions in the military). 212 But this argument can also be said to go the other way, 213 and it could be said that making access to abortion care equal to that of other federal employees in the United States could raise morale.

Congressmen and women who desire to lift the current ban on funding for abortions for rape victims in the military, state that refusing to provide abortion services to a military woman sends a demoralizing message throughout the ranks. 214 There are legislators who argue that refusing to provide abortion services and funding to these military women in effect lowers overall morale because the women in the military will feel like if ‘they become pregnant due to a sexual assault, they are on their own.’ 215

These same legislators point to individual stories hoping to change minds about the effect of denying this coverage, recounting stories such as this:

During the debate on my amendment, a story surfaces about a 22-year-old U.S. Army private who was raped at a military base in Afghanistan. She became pregnant and wanted an abortion.

211. Id. at 1556.
212. See id. at 1557.
213. Id.
215. Id.
Since a pregnancy from rape is not covered she had no choice but to come home for the procedure, interrupting her service and her career. She faced “red-tape” delays in coming home plus the difficulty of raising the money for her procedure. Her sole source of financial support was her mother who was living on a fixed, low income.\textsuperscript{216}

D. The Voices Behind Both Sides of the Debate, Pro-Choice and Pro-Life, Cite Various Reasons for Why the Bill Should or Should Not be Included in the Defense Bill

Many people have come forth with reasons for either allowing abortions in the military to preventing them from being performed in this arena. Though oftentimes the split is largely along political lines,\textsuperscript{217} the reasons cited by both sides involve protecting the life and career of the mother, or that of the infant.\textsuperscript{218}

Pro-life advocates have come forth in great numbers on this debate in order to influence the outcome. Marie Hilliard of the National Catholic Bioethics Center came out to urge that advocates remember that there are two victims or potential victims when there is a pregnancy resulting from rape or incest—the woman and the child. . . . It is a tragedy when a woman is sexually assaulted, but the unborn child should not be treated as a perpetrator. The child is innocent and should not become a victim too.\textsuperscript{219}

The pro-life advocates include even former “victims” themselves. Ryan Bomberger of the Radiance Foundation, who himself could have been considered a “victim of rape” in that he was conceived out of a rape, asserts that abortion rights are not about protecting women but rather diverting the focus away from the real solution.\textsuperscript{220} He states, “[w]hy not include some sort of provision including harsher punishments for the attacker? Why not go after the men who commit

\begin{itemize}
\item \textsuperscript{216} Id.
\item \textsuperscript{217} See Dave Bohon, Abortion Coverage Expanded for Women in Military, THE NEW AM. (Dec. 30, 2012, 15:00), http://www.thenewamerican.com/usnews/item/14057-abortion-coverage-expanded-for-women-in-military (providing an example where the Republican-controlled House failed to include the abortion amendment proposed by Democrats).
\item \textsuperscript{218} See id. (discussing the desire of pro-choice views to protect the life of the woman and her career, and the desire of pro-life views to protect the life of the infant).
\item \textsuperscript{219} Id.
\item \textsuperscript{220} See id.
\end{itemize}
these horrible crimes...? [A]bortion is not care. Care doesn’t end in death.”

The inclusion of the “pro-abortion amendment” in the defense funding bill was followed closely by many pro-life advocates including the Family Research Council. The head of the Family Research Council, Tony Perkins, commented on the situation by coming forward to say that it would play a large part in the social policy goals of many conservatives. He said, “[i]t’s not the deal most Americans are waiting for, but Congress is days away from agreeing on a final Defense Authorization bill. That could be particularly significant for social conservatives, who have a big stake in the finished product.”

He goes on to highlight the policy changes that had been on its way with the proposed legislation, point out that, “[f]or the past 16 years, the military has had the most life-honoring laws of any federal government department. Despite FRC’s efforts, that could all change this week if conferees agree to new exceptions on the DOD’s abortion law.” He continues saying, “[s]ince the Clinton administration, the Defense Department’s rule has been to finance abortions—only to save the mother’s life.” Perkins focuses on the monetary impact that the policy will have, stating that the legislature is “considering a major break with military policy and weighing whether or not to funnel taxpayer dollars to abortions in the cases of rape and incest... Although victims of sexual assault are free to pursue an abortion privately, taxpayers have never been forced to fund them.”

Perkins goes on to explain their vigilance regarding the bill by stating that they are attempting to protect the rights of the unborn child:

While the issue is a sensitive one, we believe abortion is never a loving solution for the mother or the child. The circumstances surrounding a pregnancy from rape or incest are extremely difficult, but one brutal act of violence against a woman doesn’t justify the government encouraging a second act of violence against an unborn child. Everyone has a right to life—even

221. Id.
223. Id.
224. Id.
225. Id.
226. Id.
227. Id.
those whose lives begin in horrible situations like these.\textsuperscript{228}

Because of all of the intense scrutiny regarding the amendment, many predicted that it would not pass, and would not eventually remain in the defense funding bill.\textsuperscript{229} Horace Cooper, a member of the National Center for Public Policy, when speaking about the amendment said that proponents are trying to make it seem that this is a major crisis that needs immediate attention and he asserts that this is not the case, "[w]e don’t minimize [sexual] assaults when they happen, and in particular when they happen to people who are enlisted or wear the uniform, but at the same time it’s just unfair to argue that this is the crisis du jour. . . ."\textsuperscript{230} He cites the fervor of those in favor of the amendment as an attempt to push pro-choice policies, explaining that, "[t]his is part of expanding pushing abortion and trying as much as possible to find circumstances to use taxpayer dollars to do it."\textsuperscript{231}

The Susan B. Anthony List President Marjorie Dannenfelser commented on the vote before Congress regarding the abortion amendment claiming that the vote ignored the voice and sentiment of the voters, stating that, "the Senate’s pro-abortion leadership ignored the will of the American people and tried to advance a bill that would allow taxpayer-subsidized abortion on over 400 U.S. military bases, both at home and abroad. On November 2, voters sent Congress clear marching orders to end taxpayer funding of abortion."\textsuperscript{232}

Dannenfelser went on to express the fears of the pro-life movement, claim that the "Defense Authorization Bill containing the [provision] would turn over 400 domestic and international military bases into abortion clinics, using personnel and equipment subsidized by taxpayers. Medical facilities are meant to preserve life, not destroy it."\textsuperscript{233} She goes on to state that even when abortions were performed in the military, there was resistance from members of the military, stating that, "[m]ilitary physicians understand this better than anyone which is why they refused to participate when the practice was permitted during the Clinton Administration, forcing the Administration to recruit civilian abortionists."\textsuperscript{234}

Adding to those comments, the Christian Medical Association Vice

\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
President Gene Rudd, MD, pointed to lowered morale as a key reason for resisting the amendment stating that, "requiring military physicians to perform abortions threatens military readiness. Morale will suffer among those already serving. Morale is a key component of military effectiveness."

He also fears that there will be fewer young doctors who want to join the military because of the abortion provision, stating that, "just as we have seen a marked decrease in young doctors entering OB/Gyn training for fear of being forced to do abortion, this requirement will discourage young doctors from joining the military."

Based on the foregoing comments from the pro-life camp, the majority of reasons for continuing the policy of no abortion coverage as part of the medical benefits of servicewomen seems to hinge on protecting the life of the unborn child and preserving taxpayer money. The opposition also cites resistance to the policy within the military itself and the general fear that allowing abortion in the military would open the floodgates to taxpayer covered abortions everywhere and fewer doctors willing to join the military as a result. Obviously, supporters of the bill find these assertions to be without merit.

In fact, an equal, if not greater, number of pro-choice advocates have come forward to voice their support for the bill. Army General Colin Powell, former chairman of the joint chiefs during George W. Bush's administration, joined over forty retired military officers in signing a letter sent to committee leaders stating that:

At the very least, our military women deserve the same access to care as civilian women who rely on the federal government for their health care. Our servicewomen commit their lives to defending our freedoms; Congress should respect their service and sacrifice and provide them with the same level of health

235. Id.
236. Id.
237. See id.; See Bohon, supra note 217.
238. See Ertelt, supra note 222; Economics of Abortion, supra note 105.
239. Economics of Abortion, supra note 105 ("In fact, funding restrictions on abortions cost taxpayers millions of dollars each year, due to the much higher cost of prenatal care and childbirth, and the secondary costs of unplanned births.").
care coverage it provides civilians.\textsuperscript{241}

Retired Army Major General Gale Pollock, a member of the advisory committee pointed to political reasons as the main reason for the delay in incorporating an amendment allowing abortions in the military, saying that, "[m]ilitary women in uniform and military women beneficiaries are not political pawns, and it is totally inappropriate to make this a political game. They are defending our nation and they deserve equity in health care when compared to other federal beneficiaries."\textsuperscript{242}

Pollock points out that coverage is available for abortions in instances of rape and incest under Medicare, Medicaid, the Federal Employee Health Benefits Program and even the federal penile system (and only Tricare, the military medical coverage insurer, failed to cover abortions in such instances).\textsuperscript{243} Pollock indicates the inequity between "[m]ilitary women and beneficiaries," saying that they are "treated differently than any other federal beneficiaries who survive rape and incest."\textsuperscript{244} Pollock asserts that now is an extremely important time to include such a provision protecting military servicewomen and military beneficiaries who survive rape and incest, "[a]t a time when the number of rapes in the military is raising widespread alarm . . . it’s inconceivable to me that service women who are raped do not receive this important coverage."\textsuperscript{245}

Perhaps the most important voices to come out on this issue are those of the military rape survivors, who have lent their voices to both sides of the debate and have come forward in larger numbers to advocate for the inclusion of abortion coverage in military medical benefits for servicewomen and Tricare beneficiaries.\textsuperscript{246} One such advocate is Ayana Harrell, a 34-year-old army veteran, who was drugged and gang-raped in 2001 by fellow soldiers at the Redstone Arsenal base in Alabama.\textsuperscript{247} She delayed reporting the rape, waiting three weeks before coming forward because she "had been trained to believe that soldiers are not
allowed to feel or behave like victims."²⁴⁸

When Harrell finally came forward to her senior drill sergeant and told him about what happened, she found out that she was already pregnant as a result of the rape.²⁴⁹ In her interview, Harrell said that the sergeant’s only counsel to her upon hearing about what happened to her at the hand of fellow soldiers while on base was the following: “This is your thing. I don’t want to hear about it. You need to deal with it however you’re gonna deal with it. Go off post and get an abortion.”²⁵⁰

Harrell then attempted to follow his “advice” and go get an abortion at a local Alabama abortion clinic, “but ended up backing out of the procedure in part because she couldn’t afford the ‘$200-something’ fee.”²⁵¹ Harrell advocated for the inclusion of abortion coverage for military rape victims, saying that, “[i]t shouldn’t be that a woman joins the military and she loses her rights to make choices about her body... or that she has to make the choice to foot the bill out of her pocket for something that wasn’t her choice in the first place.”²⁵²

If Harrell had been a civilian federal employee, on Medicaid or Medicare, a federal inmate, that abortion would have been covered, and she would not have had a $200 bill to take care of a pregnancy that resulted from having been gang raped by fellow soldiers.²⁵³ While $200 may not seem like a huge sum of money, it is coming out of the pockets of servicewomen who often start out making $18,000 a year, and put into that perspective it is much easier to see how paying for an abortion out-of-pocket can be a huge impediment to being able to obtain an abortion if a woman really wanted to have one.²⁵⁴

E. Women in the Military Today – New Roles, New Issues, A New Understanding of the Place of Women in the Military

The role of women in the military is changing drastically. Among the changes that have taken place in the military recently with regard to women is expanding abortion coverage to servicewomen and female dependents in cases of rape and incest.²⁵⁵ The latest authorization law

²⁴⁸. Id.
²⁴⁹. Id.
²⁵⁰. Id.
²⁵¹. Id.
²⁵². Id.
²⁵³. Id.
²⁵⁴. See id.
²⁵⁵. See Impact of New Abortion Coverage for Servicewomen Will Depend on Forthcoming Rules, NAT'L PARTNERSHIP FOR WOMEN & FAMS.,
from the Department of Defense includes a provision that has extended abortion coverage in those specific circumstances where the pregnancy was the result of rape or an act of incest. The impact this expansion has, however, depends largely on how it is implemented.

There are still numerous questions to be answered despite the most recent victory of servicewomen and supporters who rallied behind this expansion. There are still important questions of how these incidences will be reported (as coverage is only provided for cases of rape and incest, the reporting process will play a huge role in how accessible coverage will be for servicewomen and TRICARE dependents). Currently it is not clear how reporting will take place, and whether it will require an official police report and criminal investigations to trigger coverage, or whether the victim will have to identify the person who assaulted her. It may be the case that the trend of unreported rapes continues due partly to the "lack of privacy that accompanies notifying higher-ranked officials . . . ."

Additionally, questions as to where covered abortions will be performed remain. There are considerations regarding availability of abortion providers and local laws that may prohibit such a procedure that need to be weighed, and have yet to be addressed fully. The question of whether these women will be transported to a facility off base or if on site military doctors would be trained to offer the procedure also lingers with no definitive answers currently offered.

The treatment of women in the military often hinge on views regarding their place in society as a whole. Often anti-abortion sentiment centers on "traditionalist ideas about gender roles . . . that [a woman’s] primary identity should be maternal rather than professional." While pro-life advocates opposed to the availability of abortions in the military often claim that it was due to protection of

http://www.nationalpartnership.org/site/News2?page=NewsArticle&id=38263&news_i...
potential life, many criticized this stating that underneath this claim the fight was largely about the underlying role of women in today’s society. The abortion issue thus plays a huge role in the career trajectories of women and opportunities for advancement.

These changes to the abortion policy within the military come at a critical point as the role of women in the military is currently changing as well. Thousands of front-line positions that were previously closed are now for the first time officially being opened to women. It was announced in January 2013 that the Pentagon is lifting the ban on servicewomen in combat, a move recommended by the Joint Chiefs of Staff that overturns a 1994 rule that prohibited women from being assigned to smaller ground combat battalions. The new order expands the DOD’s earlier move that had already opened up over 14,000 combat positions to women. This new move will provide women in the military job openings of approximately 230,000 positions that were previously unavailable.

As the question of abortions in the military faced intense scrutiny, so did this new position of the Pentagon to allow women to serve in front-line combat roles. Questions of whether women would have the necessary “strength and stamina for certain jobs, or whether their presence might hurt unit cohesion,” coupled with “suggestions that the American public would not tolerate large numbers of women being killed in war.” Detractors such as Kingsley Browne, a professor at Wayne State University Law School, state that because women are physically different than men, these new policies may lead to lower overall standards. Browne additionally cites fears that it will “creat[e]
conditions of sexual competition and sexual harassment."

But the new changes to policy seem to be largely a reflection of what has already been happening on the ground. Gen. Martin Dempsey, chairman of the Joint Chiefs of Staff, stated that it was in 2003 while in Baghdad that he first realized the situation of women in the military was changing when he approached a turret gunner in charge of his Humvee and realized that she was a female and he acknowledged that something had definitely changed where a female turret gunner was assigned to protect a division commander. Similarly, Defense Secretary Leon Panetta arrived at the same conclusion as he spent 18 months traveling and speaking with servicewomen, past and present. Both the General and the Defense Secretary stated that the new policy was essentially affirming "what they had seen was already occurring on the battlefield, where women have frequently found themselves in combat over the past decade of war . . . although not officially recognized for it, and therefore held back in military in which combat experience is crucial to advancement."

As far as the new positions that will soon be available to women in the military, officials have repeatedly stated that "they would not lower the physical standards for women in rigorous combat jobs . . . but they would review requirements for all of the military specialties . . . and potentially change them to keep up with, for example, advances in equipment and weaponry." The tests could range from anything from "lifting and loading a heavy shell" for a woman who wanted to join a tank unit, hiking long distances with heavy equipment for a woman who wanted to join the infantry, or other more "gender-neutral" physical evaluations than may currently be in place. While not every position will be made available to women, Sec. Panetta has put in place a clear timeline wherein feedback regarding progress and any specific exemptions for positions that potentially should not be open to women are to be filed.
While the role of women in the military is clearly changing, the Chairman of the Joint Chiefs admitted that "resources for women were lagging behind those for men and that 'the military system does not yet understand the unique challenges of women in uniform.'"283 With the ever increasing number of women involved in the military, with the potential for even greater numbers with changing laws, there are serious concerns about the "lack of women's health equipment in field hospitals, a lack of privacy in military and VA medical centers and the need for more expertise in women's care among health care providers" in the military.284 A 2007 DOD report found that many women expressed that there were a lack of facilities specific to the health care needs of women, with women coming forward stating that they just did not feel their care was given as much importance as their male counterparts.285 The same report found that there was limited access to gynecological care, procedures, lab testing, and limited "birth-control options in field pharmacies."286 Women reported feeling a lack of privacy and that they felt like they were labeled or "seen as whiners for seeking care."287 In fact, in the event that a woman needs "high-level" care, she is likely to be transferred to a civilian doctor instead of being treated at the medical centers on U.S. bases because of the lack of necessary equipment or training required for the procedure.288 While there are efforts being made recently to attempt to improve upon these situations for servicewomen, it is clear that they are not happening at a rate to match the growth of women in the military.289

While large numbers of women are potentially being added to the ranks of current female enlistees, it is clear to many that there are intrinsic concerns about integration of women into these previously prohibited areas of the military.290 It is clear that the obvious solution to

representatives of the service would have to make a case to the defense secretary by January 2016.

285. See id.
286. See id.
287. See id.
288. See id.
289. See id.
As the military considers sweeping changes for women, a senior Air Force leader told a House panel examining a sexual-abuse scandal at a Texas base on Wednesday that his branch of the military needs to improve its culture to root out problems, such as binge drinking and vulgar images, that can be conducive to sexual harassment. Obscene images songs and stories “will not be accepted as part of our culture,” Gen. Mark Welsh III, the Air Force chief of staff, told the House Armed Services Committee, which is investigating allegations of widespread sexual misconduct at the Air Force’s facility for basic military training in San Antonio, where enlisted members begin their service. 291

It is under these conditions that the Shaheen amendment will be doing its part to “end[] the longstanding . . . discrimination against women who serve in America’s military.” 292 And while it does not mean the solution to all of the problems faced by women in the military, it is one step towards alleviating unnecessary hardships to allowing women to serve and offer them the same opportunities for advancement.

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