Overseas and Under Siege

Why Congress Needs to Amend 10 U.S.C. § 1093 and Provide Overseas Servicewomen with the Same Reproductive Rights that Civilian Women Enjoy

Emily Brailey

Abortion: Law in Context

Professor Sanger, Fall 2012
Introduction

On December 4, 2012, the Shaheen Amendment, named after its sponsor, Senator Jeane Shaheen, passed unanimously through the United States Senate.\(^1\) The Amendment seeks to extend federal funding under the National Defense Authorization Act, for the fiscal year 2013, to abortion services sought in military treatment facilities overseas in cases of rape or incest.\(^2\) The House version of the National Defense Authorization Act for 2013 purposefully excludes this funding extension to victims of rape or incest.\(^3\) In order for the Amendment to succeed, Congress will need to reconcile the funding extension language between the House and Senate bills.\(^4\) Senator Shaheen's proposed amendment is not novel, and, historically, amendments such as this have been invariably unsuccessful.\(^5\)

The Shaheen Amendment is not radical. It merely equalizes servicewomen's rights with those of civilians. But, due to overseas obstacles, military women lack the necessary access to abortion services that their civilian counterparts enjoy. In effect, military women have been denied the very rights that they serve to protect. Thus, since 1995, Congress members have unsuccessfully proposed yearly amendments to restore military women's right to pre-paid abortions in military facilities overseas.\(^6\)

\(^2\) Id.
\(^3\) H.R. 4310, 112\(^{th}\) Cong. (2012).
\(^4\) See Leigh Munsil, Jeanne Shaheen: Expand Military Abortion Rights, POLITICO (July 18, 2012, 10:55 PM), http://www.politico.com/news/stories/0712/78683.html (“But the House-passed bill doesn't include a similar provision, setting up the contentious abortion issue as a potential sticking point when the two measures reach a joint House-Senate conference committee for reconciliation.”).
\(^6\) See annual amendments proposed since 1997 by various Congress members, such as Representative Harman, Representative Sanchez, Representative Davis, Senator Lautenberg, and Representative Andrews.
Although amendments such as Senator Shaheen’s and those that restore women’s access to overseas pre-paid abortions have been wholly unsuccessful, Congress is in a peculiarly positive place to finally pass these amendments. This is because the combination of Congress’s 2011 repeal of Don’t Ask, Don’t Tell, the powerful pro-choice response in the 2012 reelection of President Obama, the role of federal courts in deciding an issue regarding a fundamental right, and the military’s acknowledgement of its sordid rape culture creates an environment in which restoring reproductive rights is possible. Therefore, Congress needs to take advantage of this environment – now – to pass the Shaheen Amendment as well as Amendments to 10 U.S.C. 1093(b) that will allow military women to access pre-paid abortion care in overseas military facilities.

**Background**

In 1966, when abortion was illegal for civilians, military hospitals were unofficially authorized to provide abortion services to servicewomen.\(^7\) However, physicians could refuse to perform abortions based on their opinions regarding the morality of abortion.\(^8\) Additionally, “commanders of various medical facilities may have had some effect [based on their own moral leanings] on how and under what circumstances abortion services may have been provided.”\(^9\) In 1970, the Department of Defense officially authorized abortions when it was “medically necessary or when the mental health of the mother” was threatened as long as two physicians, not necessarily military personnel, approved the

---


\(^8\) DAVID BURRELLI, CONG. RESEARCH SERV., 7-5700, ABORTION SERVICES AND MILITARY MEDICAL FACILITIES 3 (2012).

\(^9\) *Id.*
procedure. In 1971, President Nixon, considering abortion to be “an unacceptable form of population control,” struck down the 1970 directives in favor of a “good neighbor policy.”

This policy forced military bases to conform to the abortion laws of the states in which they reside, thus, because this was before the Supreme Court’s Roe v. Wade decision, some military hospitals were prohibited from performing abortions.

Nixon’s “good neighbor policy” forced some branches of the military to revise their policies toward pregnant women. For example, Air Force regulations required the immediate discharge of a female servicemember found to be pregnant, unless she terminated the pregnancy. Because women could no longer depend on abortion services, the Air Force waived this policy. Additionally, in 1976, the Second Circuit ruled that the Marine Corp’s mandatory discharge policy for pregnant women was an unconstitutional intrusion into both women’s right to equal protection and due process under the Fifth Amendment, even if pregnancy, as a temporary disability, was a “valid military concern.”

The Supreme Court’s seminal 1973 decision in Roe v. Wade legalized abortion nationwide. Despite Roe, the 1970 military guidelines regarding abortion services remained in effect, and abortions continued to be federally funded only if military policies were not in conflict with those of the host state. Therefore, servicewomen’s access to abortion was subject to an unreliable patchwork system of rights. In 1975, in order to abide

---

10 Id.; see also Ponder, supra note 7, at 390.
13 Id.
14 Crawford v. Cushman, 531 F.2d 1114, 1121 (2nd Cir. 1976).
15 Burrelli, supra note 8, at 4.
by the decision in *Roe*, the Department of Defense ordered military facilities to perform abortions in States that had not yet legalized abortions, thereby overturning the “good neighbor policy” wherever the ‘neighbor’ violated *Roe*.\(^{16}\) In 1978, Congress passed a defense authorization bill for the fiscal year of 1979 that authorized the use of federal funds to cover abortions in military facilities as long as the abortion was necessary to save the life of the mother, to prevent “severe and long-lasting” physical health damage to the mother as determined by two physicians, and to aid victims of rape or incest when the rape or incest was “reported promptly to a law enforcement agency or public health service.”\(^{17}\) The funds also covered contraception and medical procedures necessary to terminate ectopic pregnancies.\(^{18}\) Republican congressmen, however, disfavored this policy and subsequently removed the provision to allow federally funded abortions in military hospitals where a woman would suffer “severe and long-lasting” physical damage should she carry the fetus to term.\(^{19}\) To protect a servicewoman serving in a country where no adequate civilian facilities were available, the restrictions on federal funds did not prevent her from accessing overseas military facilities to receive abortion services as long as she paid for the service privately (so-called “pre-paid” abortions).\(^{20}\) In 1980, Congress repealed the reporting requirement for incest, but legislated a 72-hour reporting requirement for rape victims seeking an abortion.\(^{21}\) In 1981, the conservative Congress restricted abortions in military facilities to only those that were needed to save the life of the mother.\(^{22}\)

\(^{16}\) *Id.*

\(^{17}\) *Id.*

\(^{18}\) *Id.*

\(^{19}\) *Id.*

\(^{20}\) *Id.* at 4-5.

\(^{21}\) *Id.* at 5.

\(^{22}\) *Id.*
However, the legislation still did not prevent women from obtaining pre-paid abortions in overseas military facilities. Until 1984, the restrictions on federal funding for abortions were bundled into the defense appropriations bills. This meant that the restrictions, if not included in the following year's bill, would expire at the end of the fiscal year. But, in 1984, Congress codified these restrictions, therefore preserving them in legislative perpetuity, within Title 10 of the United States Code.23

In 1988, Assistant Secretary of Defense, Dr. William Mayer, issued a memorandum that reversed the pre-paid policy. According to the memorandum, obtaining abortions in military facilities abroad, even if not federally funded, violated the “spirit” of the law set forth in 10 U.S.C. § 1093.24 In response, President Clinton approved a memorandum in 1993 reinstating the pre-1988 policy that allowed women to obtain pre-paid abortions in overseas military facilities.25 Even with a liberalized abortion policy, military women still faced insurmountable challenges when trying to obtain pre-paid abortions, because no overseas doctors in military facilities were willing to perform the abortions.26 The refusal stemmed from multiple factors:

First, fewer medical schools require or provide training in these techniques than was the case . . . immediately following . . . Roe. Second, . . . the military in general, and military physicians in particular, tend[ ] to be more conservative on social issues than many population cohorts. Even if training were made available it is unlikely that many

---

23 10 U.S.C. § 1983
24 Memorandum from the Assistant Sec'y of Def. to the Sec'y's of the Military Dep'ts (June 21, 1988) (on file with author).
25 Memorandum to the Sec'y of Def., 29 WEEKLY COMP. PRES. DOC. 85 (Jan. 22, 1993); see also Memorandum from the Assistant Sec'y of Def. to the Sec'y's of the Military Dep'ts (May 9, 1994) (on file with author) for a list of policies aimed at unifying Department of Defense rules and procedures regarding overseas pre-paid abortions.
26 See Burrelli, supra note 8, at 7 (explaining that all but one doctor adamantly opposed performing the procedure, and eventually the hold-out physician also refused to perform abortions).
would volunteer. Third, the social order on military posts tends to be very close-knit and hierarchical. . . [T]he social norms established by superiors in the military environment are likely to translate into action or inaction by subordinates. This conventional wisdom gains credibility given the enormous amount of leverage superiors in the military have over the careers of subordinates. Fourth, the medical team must consist of volunteers. Fifth, since military physicians are paid a salary . . . there is no economic incentive to provide abortions. Finally, rules exist requiring the services to respect the prevailing laws in each country. Thus, the restrictions of a particular country may limit the access to pre-paid abortions at military facilities. 

Republicans regained control of Congress in 1995 and immediately sought to reverse Clinton’s 1993 pre-paid abortion policy. The 104th Congress amended the Act to restrict federally funded abortions in military facilities, except to save the life of the mother or in cases of rape or incest. No other abortion services could be provided, even if privately funded, in these military facilities. In 1996, the Act was further amended in order to clarify the restrictions placed on the use of military facilities for abortions other than the three exceptions (rape, incest, life of the mother).

The idea behind prohibiting any pre-paid abortions is that, even if the procedures are privately funded, taxpayer dollars will inevitably flow through to the elective procedures. This is because the federal funds would still provide the foundation for the actual facilities, equipment, and any other underlying infrastructure.

---

27 Id. at 7-8.
29 Burrelli, supra note 8, at 2.
30 Id.
31 Bumiller, supra note 12.
Unintended Pregnancy and the Obstacles to Obtaining Elective Abortions

Currently, 10 U.S.C. § 1093(a), (b) authorizes federal funding for abortions that will save the life of the mother,\textsuperscript{32} and authorizes military facilities to perform abortions to save the life of the mother as well as in cases of rape or incest (though the latter must be paid out-of-pocket).\textsuperscript{33} This means that U.S. military women may sometimes serve in countries that afford their citizens more reproductive rights than the U.S. affords its own soldiers. For example, although Iraq does not allow abortions for rape or incest victims, it does allow abortions in cases of fetal impairment.\textsuperscript{34} The U.S. military, however, neither allows federal funding in this situation, nor allows women to obtain abortions in its facilities for this reason. In \textit{Britell v. U.S.}, the wife of an Air National Guard Captain was twenty weeks pregnant with her second child when doctors diagnosed the fetus with anencephaly.\textsuperscript{35} Anencephaly is a fatal condition in which the fetus is missing part of its skull and brain. After consulting family, doctors, counselors, psychiatrists, and a priest, the Britells decided to abort the fetus.\textsuperscript{36} Their military insurance, however, denied coverage. The court, citing the judgment from \textit{Harris v. McRae}, which approved the constitutionality of the Hyde Amendment, found that the government had a legitimate interest in denying coverage for anencephaly.\textsuperscript{37}

\textsuperscript{32} See Hilary Hanson, \textit{Fundamental Rights for Women: Applying Log Cabin Republicans to the Military Abortion Ban}, 23 \textit{HASTINGS WOMEN’S L.J.} 127, 135 (explaining that Tricare, the insurance policy to which military women subscribe, not only excludes coverage for abortions in the cases of rape or incest, but also denies coverage for “counseling, referral, preparation, and follow-up services related to a non-covered abortion.”).

\textsuperscript{33} 10 U.S.C. § 1093(a), (b).

\textsuperscript{34} Ginsberg, \textit{supra} note 28, at 406.

\textsuperscript{35} Britell \textit{v. US}, 372 F.3d 1370, 1373 (Fed. Cir. 2004)

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} \textit{Id.} at 1383.
To obtain an elective abortion, a female service member must seek leave from her base and must depend on whatever local clinics, and therefore local procedures, exist in the country where she is serving.\textsuperscript{38} She is not provided medical leave and free transportation that is afforded to servicemembers seeking other kinds of medical treatments.\textsuperscript{39} Furthermore, overseas servicewomen face the following problems when utilizing an overseas clinic:

[Many overseas facilities] are inadequate, unsafe, below the standards of U.S. medical facilities, or lack trained medical personnel; U.S. military bases may be located in remote areas without access to local medical facilities; U.S. military personnel may be serving in countries where animosity toward the United States runs high, jeopardizing the safety of U.S. service personnel if they were to use local health facilities; and U.S. military personnel may be serving in an area under active hostilities, imposing a significant threat to the safety of personnel who leave the U.S. military base.\textsuperscript{40}

In some instances, the female servicemember’s request for medical leave may be denied altogether.\textsuperscript{41} For example, an Air Force Commander stationed in a remote base overseas may deny a pregnant woman’s release until week twenty-four of her pregnancy.\textsuperscript{42}

\textsuperscript{38} Ponder, \textit{supra} note 7, at 390.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} Ginsberg, \textit{supra} note 28, at 406-07.
\textsuperscript{41} See Marshall L. Wilde, \textit{Air Force Women’s Access to Abortion Services and the Erosion of 10 U.S.C. § 1093}, 9 \textit{WM. & MARY J. WOMEN} \& L. 351, 352 (“Should an active duty military woman choose to have an abortion, she must request leave, which her commander has no obligation to grant.”)
\textsuperscript{42} Ginsberg, \textit{supra} note 28, at 401; \textit{see also} Wilde, \textit{supra} note 41, at 351 (“Air Force commanders have tremendous discretion in determining when to allow … medical leave, giving them an effective veto over abortion in some locations.”), Hanson, \textit{supra} note 32, at 136 (“The ACLU has received reports about commanding officer that hold such strong anti-abortion sentiments that they actively attempt to interfere with women taking leave in order to obtain the procedure.”).
This may effectively work to prevent the woman from obtaining an abortion at all – thereby forcing her to carry the fetus to term.\textsuperscript{43}

Moreover, a female servicemember seeking leave to procure an elective abortion is not afforded an anonymous option, therefore violating the servicemember’s interest in privacy.\textsuperscript{44} However, the servicemember’s hesitation in asking permission for medical leave is far more complex than a mere fear that her fundamental right to privacy will be violated. A female servicemember may be reluctant to discuss an unintended pregnancy with her superior because of an underlying military culture opposed to unintended pregnancy, thus delaying the abortion and causing the woman to potentially face increased medical complications, especially in countries with substandard abortion procedures.\textsuperscript{45}

Additionally, military regulations require that women serving in countries that prohibit elective abortions, such as Afghanistan,\textsuperscript{46} be flown home within two weeks of discovering the pregnancy.\textsuperscript{47} However, especially for unmarried women, an unintended pregnancy permanently stigmatizes the women such that future career advancements are no longer possible.\textsuperscript{48} In one case, a Marine, finding herself pregnant while serving in Iraq, attempted to self-abort.\textsuperscript{49} The attempt was unsuccessful and, after spending time in an Iraqi hospital,

\begin{flushright}
\textsuperscript{43}Ginsberg, \textit{supra} note 28, at 402; \textit{see also} Wilde, \textit{supra} note 41, at 351 (explaining that because a military woman may find hostility when searching for an abortion in a host nation, she may suffer wide disparities in their access to abortion when compared with their civilian counterparts.

\textsuperscript{44}Ponder, \textit{supra} note 7, at 390.

\textsuperscript{45}\textit{Id.}


\textsuperscript{47}Bumiller, \textit{supra} note 12.

\textsuperscript{48}\textit{Id.}

\textsuperscript{49}\textit{Id.}
\end{flushright}
she was subsequently discharged from the Marines.\textsuperscript{50} In another case, a young army soldier was accused of becoming pregnant “on purpose to get out of going to war,” and when she miscarried, her unit commander accused her of “trying a new way of malingering by claiming she’d had a miscarriage.”\textsuperscript{51} The soldier did return to war, only to be harassed and distrusted due to rumors that she became pregnant to avoid deployment.\textsuperscript{52}

Therefore, access to abortion for American servicewomen is, at times, unduly burdened, which, according to \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, presents a constitutional issue for civilians. It does not, however, necessarily present such an issue for women abroad. This is because the military is unique and may violate individual rights “if [it is] deemed necessary to support the military’s mission. The military could therefore constitutionally ban abortions on military bases, if it were proven that abortions interfere with military missions.”\textsuperscript{53} This is compounded by the deferential policy courts usually exhibit towards the military when adjudicating cases focusing on the deprivation of individual rights.\textsuperscript{54} Logically, though, it would seem that allowing abortions for unintended pregnancies would always benefit a military mission by preventing attrition.

\textsuperscript{50} Id.
\textsuperscript{51} HELEN BENEDICT, THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ 163 (2009); see also Ponder, supra note 7, at 386 (explaining that “pregnant servicewomen are considered non-deployable and are usually not assigned to overseas commands.”).
\textsuperscript{52} See also Hanson, supra note 32, at 136, 146 (“[K]nowledge that a servicewoman is pregnant could also generate or result in bias or prejudice against the woman as irresponsible or neglectful of her duty. This could substantially diminish the servicewoman’s credibility in the eyes of her commanding officer, affecting career-determinative factors such as letters of recommendation and evaluations.”).
\textsuperscript{54} Hanson, supra note 32, at 128.
due to pregnancy and by saving time and money that would be expended on reassignment and evacuation.55

Like military servicemembers upon enlistment, federal prisoners also check their individual rights at the jailhouse gates.56 But, whereas military women are, figuratively, thrown to the wolves when trying to obtain certain abortion procedures, prisoners, on the other hand, are surprisingly cared for.

In 1987, the Third Circuit ruled in *Monmouth County Correctional Institutional Inmates v. Lanzaro* that “denial of abortion-related services constitutes deliberate indifference to a serious medical need . . . the County [must] *provide* abortion services to all inmates requesting such service”57 or risk violating prisoners’ Eighth Amendment rights. Furthermore, the Third Circuit decided that the inmates, themselves, are responsible for the cost of the abortion *unless* “alternative means of funding are nonexistent,” at which point the County “must assume the full cost of all inmate abortions.”58 The Supreme Court has not taken up this issue, but subsequent circuit courts faced with the issue generally follow the Third Circuit’s decision,59 recognizing that “ours is a government of laws, not of men.”60 Beyond providing the prisoner with access and means to an abortion the prison also “arrang[es] and facilitate[es] transportation to and from the off-site facility where the

55 Ponder, *supra* note 7, at 390; see also Hanson, *supra* note 32, at 146 (“Thus, by not allowing women the choice to terminate their pregnancies on the military base . . . the military leaves these women with no choice but to return to the United States and abandon their responsibilities to their battalions.”).
56 See Ginsberg, *supra* note 28, at 396 (explaining that prison regulation that impinges on inmate’s constitutional rights is valid “if it is reasonably related to legitimate penological interests.”).
58 *Id.* at 351.
59 Ginsberg, *supra* note 28, at 398; see also Ptaschnik v. Luzerne Cnty. Prison Bd. (declaring that any request for an elective abortion is *per se* medically necessary).
abortion will be performed."\textsuperscript{61} Therefore, federal prisoners, generally, have more access to abortions and funding than American military women.

There are, however, significant elements of the military that are unique from any other system, and these elements may inform the military's decision to prohibit elective abortions. First, unlike those in the prison system, women's involvement in the military is part of an All-Volunteer force. Prisoners are vulnerable and completely dependent on the prison system for their health, daily care, food, clothing, and other amenities. Civilians, regardless of political leanings, are entitled to certain unalienable rights and government benefits. Soldiers, on the other hand, are trained to survive harsh conditions, are not expected to ask much of the military system while on duty, and are especially discouraged from complaining or seeking help for medical conditions.\textsuperscript{62} Moreover, women's involvement in the military is professional, and therefore women are expected to consciously plan their families around their service. Additionally, the military takes precautions by prophylactically vaccinating female servicemembers with the Depo-Provera birth control injection, which may serve as a symbolic statement to the women to avoid pregnancy. Conversely, the prison system may not have expectations of its prisoners to avidly avoid pregnancy, and prisoners may not have reliable access to contraception. Thus, while federal prisons are responsible for the care of those in its custody, the military is arguably not the guardian of its volunteer servicemembers. Therefore the military may justify its prohibition of certain abortion services by referencing the voluntariness of

\textsuperscript{61} Ginsberg, \textit{supra} note 28, at 402.
\textsuperscript{62} See Benedict, \textit{supra} note 51, at 7 ("[M]ilitary culture demands that all soldiers keep their pain and distress to themselves ... ")
women to enlist in the military rather than remain in civilian society; in this way, enlistment becomes a kind-of informed consent.

But, for many servicemembers, joining the military and serving overseas is all but voluntary. As enlistment numbers waned following 9/11, recruiters became desperate and employed inappropriate tactics to lure in new recruits. For example, some young enlisters agreed to join the National Guard, hoping to work within the United States. Recruiters never informed these recruits that not only could the National Guard send them overseas, but that the recruits most likely would be sent overseas to fight in various wars, the parameters of which these soldiers-to-be did not comprehend. Recruiters even told enlisters that the “war ended a long time ago.” Additionally, recruiters target high schools where students are more likely to be from poor families and face bleak futures. The recruiters promise large enlisting bonuses, great adventures, valuable job training, and scholarships for post-deployment education, but then these same recruiters renege on their promises after gaining the students’ signatures. Moreover, most of the current female recruits have a history of sexual abuse and sometimes use enlistment to escape such abuse; these recruits are considerably more vulnerable when they enter the army.

Second, the policies and culture of the military are distinctively different from both those of civilians and prisoners. This may stem from the isolated structure the military

63 Id. at 16.
64 See generally id., especially at 18.
65 Id. at 16.
66 Id.
67 Id. at 16-17 (“Recruiters can [break these promises] because the enlistment contract that every recruit must sign states that none of these promises have to be kept . . . .”).
68 Id. at 24, 210 (“[T]here are women soldiers in Iraq who have been abused as children, who are abused again by their fellow soldiers, who are harassed by their comrades, who are serving with the men who attacked them, and who are enduring mortar and fire attacks, seeing the wounded and the dead, fighting in combat, and living in constant fear for their lives.”).
employs: “it has its own code of conduct, legal system, police, courts, education, and research facilities, and medical system.” Additionally, the military is profoundly conservative, especially in its anti-abortion sentiments. The military is also historically hostile to pregnant enlisted women, seeing pregnancy as “the greatest impediment to women’s assimilation in the U.S. Armed Forces.” These ideas have yet to falter, and the military perpetuates this hostility by issuing Depo-Provera injections to women in order to prevent pregnancies, yet withholds condoms to discourage sexual activity. Hostility towards pregnant women is also illustrated, as shown above, by treating pregnant women as traitors and liars.

This deep-seated disrespect is not contained to pregnant women in the military, but extends to female recruits generally. The military has always been a “good-old-boys’ club,” and the entrance of women, though necessary and proven beneficial, is still barely acknowledged or, worse still, is met with resentment. Women have had a presence in the military since 1901, but are still excluded from ground combat positions. Even if women’s positions are not officially characterized as “ground combat,” the women are still engaging

70 Thank you to Professor Helen Benedict for conversing with me on Monday, December 17, 2012; see also Burrelli, supra note 8, at 3 (explaining that some branches, such as the Army and Navy, are more conservative than others, like the Air Force).
71 Ginsberg, supra note 28, at 407.
72 Benedict, supra note 51, at 143 (though it’s effectiveness may be challenged. As one soldier remarked, “The result of my Depo shot is running around my living room right now.”).
73 Id. at 143.
74 Id. at 67.
75 DACOWITS History, Def. Advisory Comm. on Women in the Servs., History and Accomplishments, http://dacowits.defense.gov/History/ (last visited Dec. 19, 2012) (Women first joined the Armed Forces as members of the Nurse Corps); see also Linda S. Murnane, Legal Impediments to Service: Women in the Military and The Rule of Law, 14 DUKE J. GENDER L & POL’Y 1061, 1062 (2007) for a historical recounting of women’s involvement and recognition (or lack thereof) in the Armed Forces.
in “ground combat” duties. For example, in Iraq, women were banned from ground combat, but were still responsible for standing “on top of . . . dump truck[s] with a semiautomatic gun, guarding soldiers as they worked on a highway or checkpoint. This was the same work the infantry was doing.”76 Women assigned to be military police specialists “also worked jobs indistinguishable from those of an all-male combat unit.”77 Instead of recognizing that women are fulfilling combat duties, and therefore suffering and dying along side male combat soldiers, the Department of Defense merely recognizes these women as being “exposed to combat danger.”78 This is reminiscent of the time period between Vietnam and the Panama crisis in which the Pentagon reclassified job titles.79 Under the new scheme, women provided “combat support,” therefore entering battle without the Government acknowledging their presence on the battlefield.80

Women have continually proven themselves not only capable of maintaining positions in the Armed Forces, but are also extremely successful in military missions. The old adage that women are inferior – both in intellect and strength – is defunct. Instead, women test higher than men on entrance exams and bring new perspectives to the battlefield.81 However, instead of embracing the necessity of female servicemembers, men are resentful of women’s usurpation of ‘the masculine role of the warrior.’82 Because women who are subject to male resentment and aggression usually occupy inferior

76 Benedict, supra note 51, at 135.
77 Id.
78 Id. at 227.
79 Id. at 4.
80 Id.
81 LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 279 (1998).
82 Benedict, supra note 51, at 5.
positions,\textsuperscript{83} and are therefore weary of their superiors’ power of promotion, there is no large contingency of active-duty women willing to step forward to create waves of change against the menacing, misogynistic military culture.

\textbf{Why now?}

Although the Shaheen Amendment follows in the footsteps of many failed amendments before it, this 2012 Amendment is finally ripe for approval. This is because the Don’t Ask, Don’t Tell policy (DADT) has been both deemed unconstitutional and repealed, the recent reelection of President Obama signals a major shift in public opinion away from anti-abortion sentiments, courts may be more comfortable playing a role in this area and therefore striking down abortion bans in overseas military bases, and the military has finally acknowledged the prevalent culture of rape and sexual assault perpetrated by its own soldiers.

In 2010, the non-profit organization Log Cabin Republicans argued in federal district court that DADT violated its members’ Fifth Amendment and First Amendment rights.\textsuperscript{84} Because the Plaintiffs asserted constitutional violations, the District Court employed a less deferential heightened scrutiny standard toward the Government.\textsuperscript{85} Therefore, the Government could only succeed in dismissing the suit if DADT “advance[d] an important government interest, the intrusion [on fundamental rights] must significantly further that interest, and the intrusion must be necessary to further that interest.”\textsuperscript{86} The Court ultimately found that the Government did not meet its burden under this standard.

\textsuperscript{83} \textit{Id.} at 6 (explaining that nearly 90\% of rape victims are junior ranking women).

\textsuperscript{84} Log Cabin Republicans v. U.S., 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010), \textit{vacated}, 658 F.3d 1162 (9th Cir. 2011).

\textsuperscript{85} \textit{Id.} at 911.

\textsuperscript{86} \textit{Id.}
and ruled DADT unconstitutional. The Court also found in favor of Plaintiffs’ First Amendment claims, and enjoined the Government from further enforcing DADT. While appeal before the Ninth Circuit Court of Appeals was pending, Congress repealed DADT, thus mooting the case.

A woman’s right to choose an abortion over childbirth is a fundamental right. Therefore, in order to maintain 10 U.S.C. § 1093’s constitutionality, the military must meet its burden under a standard of heightened scrutiny. Here, the military faces the same obstacles it faced in Log Cabin Republicans, and therefore cannot meet this burden. For example, due to the severe drop in recruitment after 9/11, the Armed Forces lowered its recruiting requirements. Out of desperation, the military has applied “moral waivers” in order to raise recruitment numbers by enlisting people with criminal records, including those with records of aggravated assault, robbery, domestic abuse, sexual violence, and other convicted felonies. Furthermore, “those who are allowed to enlist under a ‘moral waiver’ are more likely to leave the service because of misconduct and more likely to leave without fulfilling their service commitment than others who joined the Armed Forces.” At the same time, recruiting women to fill ranks and raise standards has been vital to the

---

87 Id. at 923.
88 Id. at 929.
89 Log Cabin Republicans v. U.S., 658 F. 3d 1162 (9th Cir. 2011).
90 See Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). Although the “undue burden” standard is arguably below that of strict scrutiny, the Court has not denied that the right-to-choose falls within the zone of fundamental rights.
91 Log Cabin Republicans, 716 F. Supp. 2d at 911.
92 Benedict, supra note 51, at 88.
93 Log Cabin Republicans, 716 F. Supp. 2d at 918.
Thus, a paramount concern to the military is recruiting enough bodies to allow it to function properly and effectively.

Because women are already facing a dangerous rape culture, and because applying “moral waivers” can only potentially add to this sordid attitude, restricting abortion, especially to victims of rape, is inapposite to the military’s mission. Not only does the military face attrition due to criminal behavior, but it risks losing female recruits because of its anti-abortion policies and lack of respect for women’s safety. This is especially true where women are becoming more aware of this rape culture through documentaries, non-fiction accounts, incredible media attention, and even the military’s acknowledgement.

DADT was repealed in 2011, but, nonetheless, Senator Shaheen’s proposed Amendment that year, similar to the 2012 version, could not pass through both houses of Congress. However, with both DADT under its belt and the strong showing of pro-choice voters in the recent election, the Obama Administration is poised to pressure Congress to amend 10 U.S.C. § 1093.

The 2012 reelection of President Obama showed a remarkable change in public opinion regarding abortion, which was a major-ticket issue in the campaign. Not only were the major-ticket anti-abortion candidates defeated – Mitt Romney and Paul Ryan – but so were the outspoken anti-abortion Congressional candidates – Richard Mourdock (who

---

94 Id. at 224 (explaining that the Pentagon “opened 30,000 more positions to [women] just since 1991”).
95 See, e.g., THE INVISIBLE WAR (Chain Camera Pictures, 2012)
96 See, e.g., Benedict, supra note 51.
claimed rape is “something God intended to happen”) and Todd Akin (who claimed women “don’t get pregnant from ‘legitimate rape’). 98 Additionally, anti-abortion candidates were defeated in otherwise conservative states. Notably, President Obama won reelection with a wide margin, thereby showing widespread support for his social policies, including his pro-choice stance. Because of the momentum gathered during the recent election, and because DADT was successfully repealed, it would seem that now is the time for the Shaheen Amendment to pass successfully through Congress with the most support. As public opinion shifts regarding abortion policies, Congressmembers will have a harder time upholding the strict, arguably “undue,” burdens facing military women abroad who are in need of abortion services.

The federal courts usually employ a policy of strong deference toward Congress when it “exercise[s] [its] authority . . . to raise and support armies and make rules and regulations for their governance . . .”99 Even so, “deference does not mean abdication.”100 Moreover, “Congress . . . is subject to the requirements of the Due Process Clause when legislating in the area of military affairs . . .”101 Furthermore, courts are historically less deferential to the Government when dealing with unpopular practices. For example, by 1971, the popular opinion regarding the US mission in Vietnam was rather low. That year, the Supreme Court found in favor of the New York Times and Washington Post, ruling that the Government, though threatened with the publication of classified material regarding

---

100 Id.
101 Will v. Dept. of Air Force, 527 F. 3d 806, 821 (9th Cir. 2008).
the War, had not met its burden to restrain publication.\textsuperscript{102} In 1972, when public sentiment was even lower regarding the effort to eradicate Communism in Vietnam, the Supreme Court daringly adjudicated a case within the realm of national security, issuing a ruling that was not deferential toward the Government.\textsuperscript{103} Today, after an on-going eleven year War on Terrorism, public opinion is similarly waning, and social justice, rather than absolute military deference, is in society’s purview.

Additionally, courts are less deferential toward military policies that arbitrarily enact an absolute bar to a protected activity that seems unrelated to a military purpose.\textsuperscript{104} Courts have a strong tradition of striking down “military regulations relating to women . . . as violating the Due Process and Equal Protection Clauses.”\textsuperscript{105} For example, in \textit{Crawford v. Cushman}, the Second Circuit held that the automatic discharge of a pregnant Marine, as a policy, violated women’s equal protection and due process rights.\textsuperscript{106} The Court made its decision based upon a rational basis standard, refusing to acknowledge either gender or pregnancy as belonging within a suspect classification.\textsuperscript{107} This is telling, because a rational basis standard is a very deferential standard toward the government, and in \textit{Crawford}, the government could not even surmount this light burden. The court deemed the Marines’ policy “irrational,” stating that it was “patently overinclusive” and was a regulation in “the class of those archaic and overbroad premises which have been rejected as

\textsuperscript{105} \textit{Id.} at 1562 (remarking that the only Supreme Court decision applying strict-scrutiny to a sex-based case involved the military).
\textsuperscript{106} \textit{Crawford v. Cushman}, 531 F.2d 1114, 1121 (1976).
\textsuperscript{107} \textit{Id.} at 1122.
unconstitutional in a host of recent decisions.”

“Pregnancy,” the court held, “is no longer . . . a dirty word.”

The court in Crawford did not find issue with the Marines’ discharging women, because “one does not have a constitutional right to remain in the armed services,” but found issue that the Marine Corp employed a general rule “that seriously affects the ability of women Marines who are physically able to be mobile and ready” yet decide to have a child.

Thus, it seems that the court would have accepted a discharge policy that was initiated on an individual, case-by-case basis.

Similarly, following on the bootstraps of Log Cabin Republicans, a federal court would probably be willing to adjudicate the constitutionality of 10 U.S.C. § 1093. Additionally, a federal court would probably have the confidence to decide the case without deferring absolutely to an anti-abortion military policy. Moreover, a court is likely to decide, in line with Crawford, that § 1093 enacts an absolute bar for some military women to receive adequate abortion services while serving their country abroad. As the court in Crawford remarked, today, “[abortion] is no longer a dirty word.”

Finally, the prevalence of rape and sexual assault against women in the military is no longer a hidden phenomenon. As stated above, not only has the mainstream media and entertainment industry reported on these claims, but the military, itself, has also acknowledged the validity of the enormous amount of rapes in the Armed Forces. Defense Secretary Leon Panetta, recognizing that the majority of rapes are not reported, estimates that maybe 19,000 sexual assaults occur per year.

With the military’s recent use of “moral waivers,” this number can only increase over time. Moreover, it is widely

---

108 Id. at 1123-24.
109 Id. at 1124.
110 Id. at 1125.
111 Munsil, supra note 4.
recognized that war elicits an unusually increased response of sexual violence from male soldiers who are disproportionately prone to seeing women as “sexual prey rather than as responsible adults.” Moreover, the military's attempts at educating male soldiers on sexual assault and violence are laughable, whereas its enforcement of misogyny and disrespect for women is ever growing. Not only does the military fail to prevent sexual assault, it fails to effectively and fairly prosecute the perpetrators, but succeeds in sharpening its skills at victim-blaming. Therefore, although military reform in this area is much needed as a long-term solution, affording overseas servicewomen access to abortion services is a desperate, and finally acknowledged, necessity right now.

Conclusion

An Amendment to extend federal funding to military abortions in response to rape and incest inevitably uncovers the widespread issues of assault on female servicemembers by their male counterparts. Furthermore, it reveals a deep-seated disrespect or resentment by men towards women serving in the military. The consistent disapproval of federal funding for military abortions in cases of rape or incest, especially when such procedures are funded for both civilians and federal prisoners, exposes gender discrepancies that do not just exist by way of a passive military culture, but also exist by way of a seemingly

---

112 Benedict, supra note 51, at 4-5.
113 Id. at 51, 90.
114 Id. at 82-83.
115 See Patricia Kime, DACOWITS Supports Bill to Cover Some Abortions, ARMY TIMES (Dec. 11, 2012 4:48 PM) http://www.armytimes.com/news/2012/12/military-dacowits-endorses-bill-to-cover-some-abortions-121112w/ (Explaining that Medicare, Medicaid, the Federal Employee Health Benefits Program, and the federal penitentiary system provide abortion coverage for rape victims); see also Heather D. Boonstra, The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States, 10 GUTTMACHER POL’Y REV. 1, 13 (2007) (explaining that as of 1997, the Hyde Amendment “allows federal funding for abortion in cases of rape and incest, as well as life endangerment . . .”).
deliberate, and maybe desperate, attempt to hold fast to the status quo. Thus, civilians are able to enjoy their civil rights more so than the women who fight to uphold them.

The recently proposed Shaheen Amendment authorizes federal funding for abortions in military facilities in the case of rape or incest, thus providing servicemembers the same rights already supplied to their civilian counterparts. But, for women serving abroad, this does not eliminate the insurmountable obstacles these women face when trying to obtain certain abortion procedures. However, the political and moral climate toward abortion is changing, which has presented Congress with a window of time in which adoption of the necessary amendments, unlike in previous years, may finally be successful.