TENNESSEE LAWYERS' ASSOCIATION FOR WOMEN

Empowerment Conference 2017: Women Who Win!

TLAW

Tennessee Lawyers' Association for Women

EMPOWERING WOMEN SINCE 1989.

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Linda Strite Murnane, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 Duke J. of Gender L. & Pol'y 1061 (2007).

The American Bar Association Commission on Women in the Profession, *A Current Glance at Women in the Law* (2017).

The Honorable Cheryl Ann Krause, *From the Bench: Moving Beyond Gender; Effective Deployment of Legal Arsenal*, 43 Litigation 6 (2017).

Liane Jackson, *Changing Times: Panelists look for ways to remove barriers to advancement for women at large firms*, 103 ABA J. 66 (January 2017).

Empowerment Conference 2017: *Women Who Win!*
Conference Schedule

MORNING SESSION

8:00 am to 9:00 am	**Networking Coffee & Continental Breakfast**
9:00 am to 9:05 am	**Welcome** *Ramona P. DeSalvo, TLAW President (Nashville)*
9:05 am to 9:15 am	**Introduction to Conference and The Hon. J. Gibbons** *The Honorable Cornelia Clark, Tennessee Supreme Court*
9:15 am to 10:15 am	**Morning Keynote Address: "Pathways to Leadership"** *The Honorable Julia Smith Gibbons, Sixth Circuit Court of Appeals*
10:15 am to 10:30 am	**Break**
10:30 am to 12:00 pm	**Elected & Appointed Panel: Preparing Oneself for Elected & Appointed Positions**
Panelists	*Andrée Blumstein, Solicitor General, State of Tennessee* *Dawn Deaner, Metropolitan Public Defender, Nashville-Davidson County* *The Honorable Kim McMillan, Mayor, Clarksville, Tennessee* *The Honorable Brandon Gibson, Tennessee Court of Appeals*
Moderator	*Kim Harvey Looney, Partner, Waller Lansden Dortch & Davis, LLP (Nashville)*
12:00 pm to 12:10 pm	**Break**
12:10 pm to 1:10 pm	**Luncheon Keynote Address: "There is No Such Thing as Can't"** *Linda Strite Murnane, Colonel, USAF, Ret.* *Chair, Judicial Division, American Bar Association* *Chief, Court Management Services Section for the Special Tribunal for Lebanon* *(Leidschendam, The Netherlands)*
1:10 pm to 1:20 pm	**Break**

Empowerment Conference 2017: *Women Who Win!*
Conference Schedule

AFTERNOON SESSION

1:20 pm to 1:50 pm	**"Where Women Stand: Pipeline, Retention, and Promotion"** *Heather Hubbard, Life Coach & Business Strategist, The Language of Joy (Nashville)*
1:50 pm to 2:50 pm	**General Counsel Panel: Leading from the Top**
Panelists	*Kristi Bennett, Legal Counsel, Eastman Chemical Company (Kingsport)* *Susan Gritton, Senior Vice President and General Counsel, Ascend Federal Credit Union (Tullahoma)* *Donna Pierce, Vice President and General Counsel, University of the South (Sewanee)* *Wanda Wilson, Chief Operating Officer and General Counsel, Tennessee Lottery (Nashville)* *Jane Young, General Counsel, Tennessee Department of Health (Nashville)*
Moderator	*Kyonzte Hughes-Toombs, TLAW Empowerment Conference Co-Chair & Deputy General Counsel, Tennessee Department of Health (Nashville)*
2:50 pm to 3:00 pm	**Break**
3:00 pm to 4:00 pm	**Law Firm Partners Panel: The Partnership Track**
Panelists	*Molly Glover, Senior Attorney, Burch Porter & Johnson (Memphis)* *Lela Hollabaugh, Managing Partner, Bradley Arant Boult Cummings (Nashville)* *Jennifer Keller, President and COO, Baker Donelson (Johnson City)* *Andrea Perry, Member, Bone McAllester Norton PLLC (Nashville)*
Moderator	*Patty Wise, Counsel on Call (Brentwood)*
4:00 pm to 4:15 pm	**Closing Remarks** *Justice Holly Kirby, Tennessee Supreme Court*
4:15 pm	**Thank You & Adjournment**

Conference Welcome

RAMONA P. DESALVO

TLAW President & Founding Member, DeSalvo Law Firm PLLC
(Nashville, TN)

Ramona P. DeSalvo concentrates her practice in copyright, trademark, and entertainment law at DeSalvo Law Firm PLLC, in Nashville, Tennessee. She also lectures at Nashville School of Law, teaching intellectual property and entertainment law. Previously, DeSalvo was an assistant professor in Middle Tennessee State University's Recording Industry Department, where she taught copyright and legal issues in the recording industry. She earned her bachelor's degree from University of California, Berkeley and her J.D. degree from University of Cincinnati College of Law. DeSalvo is admitted to practice in Tennessee, Ohio, and California. She also is admitted in the Sixth Circuit Court of Appeals, Middle and Eastern Districts of Tennessee, and the Southern District of Ohio. After practicing for years on Music Row, she joined a Nashville firm handling complex copyright litigation (In Re Napster, Bridgeport Music Litigation and Eight Mile Style/F.B.T. Productions). In 2011, she returned to private practice full time.

DeSalvo is a member of the National Academy of Recording Arts and Sciences (NARAS), Copyright Society of the South, American Bar Association, Tennessee Bar Association, Nashville Bar Association, Tennessee Lawyers' Association of Women (President), the State Bar of California, Music Row Administrators Group. She is a 2017 Fellow of the Nashville Bar Foundation and a 2017 Fellow of the American Bar Association.

Introduction of the Morning Keynote Speaker by

THE HONORABLE CORNELIA A. CLARK

Justice, Tennessee Supreme Court

Cornelia (Connie) A. Clark was appointed to the Tennessee Supreme Court in September 2005 and retained in 2006 and 2014. She served as Chief Justice September 1, 2010, to August 31, 2012. From May 1999 to September 2005, she was Director of the Administrative Office of the Tennessee Courts, where she served as chief administrative officer of the state court system. From 1989 to 1999 she served as Circuit Judge for the 21st Judicial District, where she heard both civil and criminal cases. From 1979 to 1989, she practiced law in Nashville and Franklin with the Nashville firm of Farris, Warfield & Kanaday (now Stites & Harbison), where she was a partner. She also taught high school history and government for four years prior to attending law school.

Justice Clark received a B.A. degree from Vanderbilt University, her M.A.T. degree from Harvard University, and a J.D. Degree from Vanderbilt University School of Law, where she was a member of the Law Review Editorial Board.

Justice Clark is a member of the Williamson County, Nashville (Second Vice President), Tennessee, and American Bar Associations, Tennessee Lawyers' Association for Women (founding member), Lawyers' Association for Women, Marion Griffin Chapter (board member), National Association of Women Judges, the Nashville, Tennessee, and American Bar Foundations, and the John Marshall Tennessee American Inn of Court. She was the first woman to serve as chair of the Tennessee Bar Foundation.

She has also been named Appellate Judge of the Year by the Southeastern Chapter of the American Board of Trial Advocates, received special recognition by the Tennessee Council of Juvenile and Family Court Judges, and been inducted into the Nashville YWCA Academy for Women of Achievement. She has received the Liberty Bell Award given by the Williamson County Bar Association, the Patrons Award given by the Heritage Foundation of Franklin and Williamson County, a certificate of merit from the Tennessee Historical Commission.

Morning Keynote Speaker

THE HONORABLE JULIA SMITH GIBBONS

Judge, United States Court of Appeals for the Sixth Circuit

Judge Julia Smith Gibbons has achieved professional excellence in her field. At age 30, she was appointed to the State of Tennessee 15th Circuit Court, Memphis, Tennessee by Governor Lamar Alexander for whom Judge Gibbons had served as legal advisor. Two years later, she was appointed to the United States District Court for the Western District of Tennessee by President Ronald Reagan, where she served as Chief Judge from 1994 to 2000. Also, she was appointed to the Judicial Panel for Multi-District Litigation in 2000 for a five-year term.

In 2002, Judge Gibbons was elevated to the Sixth Circuit Court of Appeals upon her appointment by President George W. Bush. Judge Gibbons has been a member and is now chair of the Committee on the Budget for the Judicial Conference of the United States, having been appointed by U.S. Supreme Court Chief Justice William Rehnquist in 2004. She served on the Judicial Resources Committee for the federal Judicial Conference, as a member from 1990 to 1999, and then as Chair from 1994 to 1999. Judge Gibbons was the leader of the Judicial Officer Resources Working Group from 1998 to 1999. In the Sixth Circuit, she served on the Council Executive Committee of the Judicial Council, and she chaired the Committee to Review Recall Requests. Judge Gibbons served as a judicial clerk upon her law school graduation working with the late Honorable William Miller, Sixth Circuit Court of Appeals in Nashville.

Judge Gibbons served the legal community in the American Inn of Court, as a Fellow with the American, Tennessee, Memphis and Shelby County Bar Foundations, and leading women as President of Tennessee Lawyers' Association for Women and as President of the Association for Women Attorneys. In recognition of her leadership, Judge Gibbons received the Outstanding Judge of the Year Award from Memphis attorneys in 1985, was selected by the Memphis Bar Association to receive the Heroine for Women in the Law Award, and received the Marion Griffin-Frances Loring Award from the Association for Women Attorneys.

Panel Moderator,
Preparing Oneself for Elected & Appointed Positions

KIM HARVEY LOONEY

Partner, Waller Lansden Dortch & Davis, LLP
(Nashville, TN)

Kim Harvey Looney is a partner with Waller Lansden Dortch & Davis, LLP in the firm's Nashville office. Looney advises health care providers on day-to-day operational issues, such as recruitment and employment, and regulatory issues, such as maintaining ongoing compliance with Stark and federal and state anti-kickback regulations. Looney has extensive experience with the development of integrated delivery systems such as IPAs, PHOs, and ACOs and contracting issues related to professional service, recruiting and employment agreements. Her transactional experience includes the analysis of fraud and abuse and other regulatory issues in structuring joint ventures, mergers and acquisitions and other alignments between health care providers.

Looney currently serves on the Board of Directors of the American Heath Lawyers Association. She previously served as the vice chair of the AHLA's Physician Organizations Practice Group. Looney is the former chair of the health law sections of both the Tennessee Bar Association and the Nashville Bar Association. She frequently speaks at state and national teleconferences and seminars on a wide range of healthcare topics. She is recognized by *Best Lawyers* as a leading attorney in the category of Healthcare Law. Looney earned her J.D. from Vanderbilt University Law School and her B.S. in Business Administration from the University of Tennessee.

Panelist,
Preparing Oneself for Elected & Appointed Positions

ANDRÉE BLUMSTEIN

Solicitor General, State of Tennessee

Blumstein earned her J.D. in 1981 from Vanderbilt Law School, where she was elected to membership in the Order of the Coif and was research editor of the *Vanderbilt Law Review*. While at Vanderbilt, she was recognized as an outstanding oralist in appellate advocacy. She also holds a Ph.D. in Germanic languages and literature from Yale University. She earned her undergraduate degree *magna cum laude* and was elected to Phi Beta Kappa at Vassar College. Blumstein worked in private practice at Trabue, Sturdivant & DeWitt from 1981-1993 and later at Sherrard & Roe, PLC (now Sherrard, Roe, Voight, Harbison, PLC) from 1993-2014, where she concentrated on appellate litigation, health law, taxation and antitrust law.

In 2014, Blumstein was tapped to serve on a special state Supreme Court that heard a challenge to the state's method of selecting appeals judges and holding retention elections. She served as Chief Justice and wrote the opinion in March 2014 that upheld the system as constitutional. Later that year, Blumstein was appointed by Tennessee Attorney General Herbert Slatery as Solicitor General. In that role, Blumstein oversees appellate litigation in state and federal courts, review written opinions, and advise the attorney general.

Blumstein has been recognized by her community and has served her community in a number of ways. She has been named repeatedly by Woodward/White in the publication *The Best Lawyers in America*, and she received the Justice Joseph W. Henry Award for Outstanding Legal Writing in 2012. Furthermore, Blumstein has served as Chair of the Editorial Board of the *Tennessee Bar Journal* since 2003, she has been a Counselor for the American Inns of Court, Harry Phillips Chapter since 2003, she served on the Nashville Pro Bono Program Board of Directors from 2006-2011, she served as Co-chair for Large Firm and Leadership Cabinet Fundraising for the Legal Aid Society of Middle Tennessee's 2012 Campaign for Equal Justice, and she is a graduate of the 1993 class of Leadership Nashville.

Panelist,
Preparing Oneself for Elected & Appointed Positions

Dawn Deaner

Metropolitan Public Defender, Nashville-Davidson County

Dawn Deaner is the Metropolitan Public Defender for Nashville-Davidson County, a position she has held since 2008. Before becoming the Public Defender, Deaner spent 11 years as an Assistant Public Defender in Nashville, and a year at the Metropolitan Department of Law. In addition to membership in several legal organizations, Deaner serves on the Family Reconciliation Center Board, the Mayor's Criminal Justice Steering Committee, and on the Executive and Steering Committees of the National Association for Public Defense. She is a member of the 2015 Leadership Nashville Class, the 2009 Tennessee Bar Association Leadership Law Class, and the Harry Phillips American Inn of Court. In 2011, the TBA honored Deaner with its Ashley T. Wiltshire Public Service Attorney of the Year award, and in 2012, Gideon's Promise recognized Deaner's work to improve indigent defense in the South with its Stephen B. Bright Award.

Deaner earned a B.A. in English from Columbia College in 1993, and her J.D. from George Washington University Law School in 1996.

Panelist,
Preparing Oneself for Elected & Appointed Positions

THE HONORABLE KIM MCMILLAN

Mayor, Clarksville, Tennessee

Kim McMillan was sworn in as Mayor of Clarksville in January 2011, the first woman to serve as Mayor of any Tennessee city with a population over 100,000. She was re-elected in 2014 to a second term. As Mayor, her priorities are transparency in government, public safety, good roads, strong economic development, and improving Clarksville's exceptional quality of life. Mayor McMillan opened the budget hearing process to the public and has ensured that all citizens have access to City Council meetings through television and the internet.

Mayor McMillan has advocated better health for all Clarksvillians, and her Mayor's Fitness Council led to the City being designed a Healthier Tennessee Community by the Governors Health Foundation. She continuously encourages the City's Parks and Recreation Department to offer healthy programs and fitness activities for residents of all ages.

Prior to becoming Mayor, McMillan served in the Tennessee House of Representatives for 12 years and was elected twice by her colleagues as House Majority Leader, becoming the first woman in Tennessee to serve in this position in either chamber of the General Assembly. In 2007, at the request of Gov. Phil Bredesen, she became the Senior Policy Adviser to the Governor. She later served in administration and on the faculty of Austin Peay State University.

McMillan graduated as valedictorian from South-Young High School in Knoxville and then received her bachelor's degree and law degree, both with honors, from the University of Tennessee. As Mayor, she has ensured that Clarksville plays a growing role in Middle Tennessee leadership. She serves as chair of the Regional Transit Authority; vice-chair of the Greater Nashville Regional Council; and co-vice chair of the Middle Tennessee Mayors Caucus. She also has been elected to the Advisory Committee of the U.S. Conference of Mayors.

She is a graduate of a number of leadership academies, including The U.S. Army War College, 2013; Leadership Tennessee, inaugural Class of 2014; Leadership Middle Tennessee, inaugural Class of 2001; and Leadership Clarksville, Class of 1996. She serves on the board of Cumberland Bank & Trust, a community bank in Clarksville. She has been married to native Clarksvillian Larry McMillan for more than 25 years. They have two grown children, Katie and Ryan, who attended the University of Tennessee.

Panelist,
Preparing Oneself for Elected & Appointed Positions

THE HONORABLE BRANDON O. GIBSON

Judge, Tennessee Court of Appeals

Judge Brandon O. Gibson is one of twelve members of the Tennessee Court of Appeals. She is a sixth generation Tennessean and was raised as the fourth generation to plow and plant a family farm in Dyer County.

Judge Gibson graduated from Mississippi State University with a Bachelor of Science degree and Master's degree in Agribusiness Management. She graduated from Southern Methodist University School of Law in 2000, practiced law in Texas for a year, and felt the pull back to West Tennessee, where she began practicing law in Jackson.

Judge Gibson practiced at Pentecost & Glenn, PLLC in Jackson for many years until she was appointed to the Tennessee Court of Appeals on December 26, 2013. Brandon was sworn in on September 1, 2014, and continues to be confused when people call her Judge instead of Brandon. She lives on a small farm in Crockett County, Tennessee (one of few counties in the state with no red lights).

Lunch Keynote Speaker

Linda Strite Murnane, Colonel, USAF, Ret.

Chair, Judicial Division, American Bar Association
Chief, Court Management Services Section for the Special Tribunal for Lebanon
(Leidschendam, The Netherlands)

Linda Strite Murnane currently serves as the Chief, Court Management Services Section for the Special Tribunal for Lebanon in Leidschendam, The Netherlands.

Murnane served as the Judicial Bailiff for The Honorable Anne Taylor, Franklin County Municipal Court, Columbus, Ohio from January 2013 until undertaking her present duties in August 2014. She also previously served as the Chief, Court Management and Support Services for the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague, Netherlands from 2009 to December 2012. In that position, she led teams totaling about 40 staff involved in the daily operation of the courtrooms in which the trials of alleged war criminals are being tried under the mandate of the United Nations Security Council. She also was responsible for leading a team responsible for implementing three components of the European Union-funded War Crimes Justice Project, providing training to court professionals and others in the Balkans, transcribing verbatim local language transcripts and providing translation of the ICTY's Appeals Chamber Case Law Research Tool in Balkan languages.

In 2011, she also spent three months as the Acting Head of Chambers for the Tribunal and in 2011 –2012 she spent four and one half months as the Acting Deputy Registrar for the Tribunal. Murnane had previously spent two years as one of the four Senior Legal Officers assigned to Trial Chambers in the ICTY. While a Senior Legal Officer, she was responsible for preparation of orders, decisions, judgments and support for the international judiciary. Murnane specifically had responsibility for the cases of Milutinovic, et al. (six accused charged with war crimes and crimes

against humanity in Kosovo), Prlic, et al. (six accused charged with war crimes and crimes against humanity involving the Herceg-Bosna leadership), Vojislav Seselj, and Vlastimir Djordjevic. She was also responsible in the pre-trial phase for the cases of Rasim Delic, Stanisic and Simatovic, Momcilo Perisic, Lukic and Lukic, and Radovan Karadzic.

Murnane served as the Senior International Attorney for the Defense Institute of International Legal Studies from November 2008 until her return to the ICTY in August 2009. Based in Newport, Rhode Island, the Institute is the U.S. Department of Defense's lead agency providing seminars and programs to military personnel and civilian government officials throughout the world dealing with the legal complications of the strategic, operational, and tactical decisions faced by military personnel and civilian professionals as they work to accomplish their missions. She served as the Executive Director for the Kentucky Commission on Human Rights in the United States, a gubernatorial executive cabinet commission, from February 2005 until July 2007.

Prior to that, she served for nearly 30 years on active duty with the United States Air Force, entering the Air Force as an Airman Basic and retiring in the grade of Colonel. In her Air Force career, Colonel Murnane served in a variety of positions, including ten years as a chief circuit military judge, or military judge. She was the Chief Circuit Judge for Europe and the Eastern Judicial Circuit, Bolling AFB, Washington, D.C. She presided at the first criminal trials for the U.S. Air Force during Operations Iraqi and Enduring Freedom in the war zone, deploying five times in support of those operations between 2001 and 2003. Among her military assignments, Murnane served as the Chief, International, Operations and Civil Law while assigned at U.S. Forces Japan/Fifth Air Force from 1988 – 1991. She was the Deputy Staff Judge Advocate at Ramstein Air Base, Germany, from 1991 – 1993, and the Staff Judge Advocate at Bitburg Air Base, Germany from 1993 –1994. In each of these positions, she served as an advisor to commanders making decisions employing Rules of Engagement, in the European and Pacific Theaters for U.S. and Joint Forces. Murnane has participated in training programs as an adjunct faculty member for the Defense Institute of International Legal Studies, training judges, lawyers and civilian leaders in Liberia, Rwanda, Zambia, Argentina, Latvia, and Papua New Guinea, on a wide range of legal topics. Murnane's military decorations include the Legion of Merit, and the Meritorious Service Medal with bronze and silver oak leaf cluster.

She currently serves as the Chair of the Judicial Division of the American Bar Association (ABA). She is a past Chair of the National Conference of Specialized Jurisdiction Court Judges for the ABA Judicial Division. She is a past Chair and former member of the ABA's Standing Committee on Armed Forces Law, and a Senior Advisor and past Co-Chair of the ABA Section of International Law's (SIL) U.S. Lawyers Practicing Abroad Committee. She served as a Vice Chair of the ABA SIL's Women's Interest Network and currently serves as a Vice Chair of the SIL's International Courts Committee and International Criminal Law Committee. She is a member of the ABA's GP Solo and

Small Firm Division, Government and Public Sector Lawyers Division, Criminal Law Section, and State and Local Government Section. She is a senior advisor to the Uniform Laws Commission project on modernization of the model notarial act. She is also a member of the American Judges Association, the National Association of Women Judges, the International Association of Women Judges, and the Federal Bar Association. She is a member of the steering committee of the Ohio State Bar Association's Women in the Profession Committee and served two years as Co-Chair of the Ohio State Bar Association's Military and Veterans Affairs Committee and a member of the Columbus Bar Association and Women Lawyers of Franklin County (Ohio). She is admitted to the practice of law before the U.S. Supreme Court, the Ohio and Kentucky Supreme Courts, the Federal Circuit Court of Appeals, the U.S. Court of International Trade, the U.S. Court of Appeals for the Armed Forces, and the Army and Air Force Courts of Criminal Appeals. In August 2008, she received the Margaret Brent Women of Achievement Award, one of the most prestigious awards presented by the American Bar Association. She attended Loyola University New Orleans Night Law Program, and transferred to the regular law study program when she was selected for the United States Air Force's Funded Legal Education Program in 1977. She was awarded the American Jurisprudence Award for Academic Excellence in Constitution Law while at Loyola. She transferred to the University of Cincinnati College of Law in the summer of 1978, and was awarded her J.D. degree from the University of Cincinnati, completing her law studies in December 1980. She was one of the first six Fellows selected to the Urban Morgan International Human Rights Fellowship program while at the University of Cincinnati.

Murnane is married to Lt. Col. (ret.) Kevin Murnane. She has two daughters, a foster daughter, three grandchildren, and a foster grandchild.

Where Women Stand: Pipeline, Retention, and Promotion

HEATHER JOY HUBBARD

Life Coach & Business Strategist, The Language of Joy
(Nashville, TN)

Heather Joy Hubbard is a speaker, attorney, coach, and changemaker. She is the creator of the Life & Law in Balance semi-annual retreat at Miraval Resort & Spa in Tucson, Arizona, and hosts a weekly podcast, Hustle & Flow with Heather Hubbard, available on iTunes and Stitcher. Attorneys turn to Heather when they need a clear and effective strategy for achieving more success and satisfaction in their careers. In addition to retreats, Hubbard works with individuals in her Life & Law Mastermind and VIP Strategy Days. Law firms also engage Heather to lead internal Masterminds for female and minority senior associates and partners to promote retention and development efforts.

Prior to establishing her own coaching and consulting company, Hubbard was a partner and practice group leader at Waller. During that time, Hubbard was recognized by Best Lawyers in America (Copyright, Trademark, Intellectual Property Litigation, and Patent Litigation), MidSouth SuperLawyers, Benchmark Litigation, and Managing IP Stars. She also received the American Bar Association and National Academy of Recording Arts & Sciences Entertainment Law Initiative Award and was named one of Nashville's Top 40 under 40 by the Nashville Business Journal.

Hubbard graduated *summa cum laude* from the University of Louisville and received her juris doctorate from Vanderbilt University Law School.

Panel Moderator,
General Counsel Panel: Leading from the Top

KYONZTÉ HUGHES-TOOMBS

TLAW Empowerment Conference Co-Chair &
Deputy General Counsel, Tennessee Department of Health

Kyonzté Hughes-Toombs is one of the co-chairs of TLAW's 2017 Women Empowerment Conference. She currently serves as Deputy General Counsel with the Tennessee Department of Health. She has practiced healthcare and administrative law with the Department for seven years, and her primary responsibility is supervising a team of attorneys who advise the Board of Pharmacy, the Emergency Medical Services Board, the Board of Veterinary Examiners, the Board for Licensing Health Care Facilities, and the Board of Examiners for Nursing Home Administrators. Hughes-Toombs also serves as advisory counsel for the Medical Laboratory Board as well as the Council of Certified Professional Midwifery.

Prior to working for the Department, Hughes-Toombs owned her own solo firm practicing family and criminal law. She has also worked for Howell & Fisher, PLLC in Nashville practicing medical malpractice and general civil litigation as well as the Department of Children's Services practicing primarily employment law. Hughes-Toombs is very active in the community. Among other things, she currently serves as the Secretary of the Nashville Bar Association, Co-Chair of the Lawyers' Association for Women (LAW) Diversity Committee as well as LAW's representative to the TLAW Board of Directors. She's also the Immediate Past President of the Napier-Looby Bar Association. Hughes-Toombs obtained both her undergraduate and law degree from Vanderbilt University in 2001 and 2004, respectively.

Panelist,
General Counsel Panel: Leading from the Top

KRISTI BENNETT

Legal Counsel, Eastman Chemical Company
(Kingsport, TN)

Kristi Bennett is a Senior Attorney with Fortune 500 company and three-time winner of Glass Ceiling's "Best Places to Work" award, Eastman Chemical Company in Kingsport, Tennessee where she provides legal counsel to Eastman's Direct Procurement, Information Technology Procurement, Logistics, Alternative Methods of Supply and Capital Projects groups. In addition, Bennett works in litigation and mergers and acquisitions.

Prior to joining Eastman in 2015, Bennett was the Director of Legal and Contracts Management for ALSTOM Power's Environmental Controls/Carbon Capture Systems Division. As Director and, prior to that, as Legal Counsel, she was responsible for the negotiation and management of many 8-figure construction contracts, as well as all other contracts for the business unit. She managed litigation and dispute resolution and provided regular training to personnel on a variety of topics. She also provided advice to the local management team as well as the sector management team regarding risk and mitigation tactics.

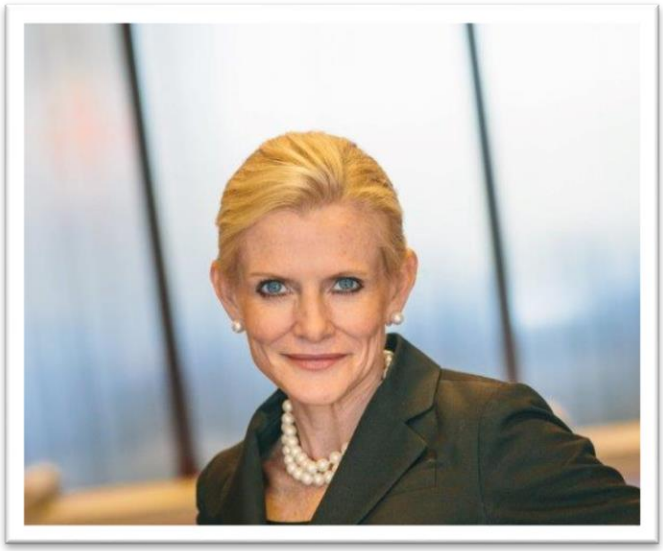
After brief stints with two small firms, Kristi worked as an associate at Lewis, King, Krieg & Waldrop in the Construction Practice Group. During her years there, she became knowledgeable regarding all aspects of construction law, including design professional liability. Bennett is a graduate of the University of Tennessee College of Law, where she a recipient of the Kolwyck Fellowship .

She is a member of the Kingsport, Tennessee and American Bar Associations. She is admitted to practice in all Tennessee courts, in the United States District Court for the Eastern District of Tennessee, and the United States Court of Appeals for the Sixth Circuit. She serves on the Board of the United Way of Greater Kingsport, and is a regional support officer for her sorority's housing arm. She served as a member and Director of the National Association of Women in Construction, Knoxville Chapter; a member of the Hamilton Burnett Inn of Court; and was a founding member of the Tennessee Association of Construction Counsel. Bennett has presented seminars on construction and design professional liability issues to many organizations, including the National Association of Women in Construction and the Tennessee and North Carolina Utility Contractors Associations.

Panelist,
General Counsel Panel: Leading from the Top

SUSAN GRITTON

Senior Vice President and General Counsel,
Ascend Federal Credit Union
(Tullahoma, TN)



Gritton joined Ascend Federal Creidt Union in 2015. She provides strategic and tactical legal support to executives, the board of directors and various business units in connection with the operations of the largest federally chartered credit union in Middle Tennessee with over $2 billion in assets and 172,000 members. Gritton also serves as Chief Compliance Officer, oversees internal security operations, mergers and acquisitions, real estate transactions and complex contract negotiations.

Prior to joining Ascend, Gritton worked at Correct Care Solutions, LLC, Sarah Cannon Research Institute, and Ingram Entertainment, where she provided advice on regulatory compliance and employment issues.

Gritton graduated from the Uiversity of Gerogia with a Bachelors of Art in Art History and she later attended and graduated from the University of South Carolina School of Law in 1996. She practiced in South Carolina for several years, as an Assistant District Attorney for the Second Judicial Circuit for the State of South Carolina and then as General Counsel for the South Carolina Secretary of State. She relocated to Tennessee in 1999 and served as corporate counsel for J.C. Bradford & Company, which was acquired by UBS/Paine-Webber.

Panelist,
General Counsel Panel: Leading from the Top

DONNA PIERCE

Vice President and General Counsel, University of the South (Sewanee, TN)

Donna L. Pierce is Vice President and General Counsel at The University of the South. She is responsible for providing, managing, and coordinating legal services for the University, advising University officials on legal matters related to the performance of their duties, including compliance with university policies and laws applicable to the University, and identifying and minimizing the University's legal risks. In addition to her duties as General Counsel, she served as the University's Director of Human Resources from 2007 to 2011 and Director of Community Services from 2000 to 2001.

Pierce is admitted to practice in Tennessee and South Carolina and before the United States Supreme Court, the U.S. Courts of Appeal for the Fourth, Fifth, Sixth and Eleventh Circuits, and the U.S. District Court for Eastern District of Tennessee.

She received her Juris Doctor degree from the University of South Carolina School of Law, where she was a member of Order of the Coif and the national moot court team and served as a legal writing instructor. She received her undergraduate degree from the University of South Carolina (Upstate) where she was named the political science student of the year.

Pierce is a member of the National Association of College and University Attorneys, the Tennessee Bar Association Board of Governors, and the Brock-Cooper Inn of Court. She is also a Fellow of the American, Tennessee, and Chattanooga Bar Foundations, a past president of the Chattanooga Bar Association, and a Leadership Chattanooga graduate. She has been named a mid-South Super Lawyer in employment law and received her AV rating from Martindale-Hubbell in 1993.

Ms. Pierce previously practiced law in the Tennessee Valley Authority's Office of General Counsel and with the Chattanooga law firm of Chambliss, Bahner and Stophel, P.C.

Panelist,
General Counsel Panel: Leading from the Top

WANDA YOUNG WILSON

Chief Operating Officer and General Counsel, Tennessee Lottery
(Nashville, TN)

Wanda Young Wilson is an accomplished attorney with extensive marketing and business development experience. She has over twenty years of executive management experience in the public gaming industry. She began her career in the lottery business in 1993 with the inception of the Georgia Lottery Corporation, where she served as the Senior Vice President and General Counsel for ten years.

In 2003, Wilson's experience in public gaming and expertise in developing internal systems and controls brought her to Tennessee, where she accepted the position of Executive Vice President and General Counsel to the Tennessee Education Lottery Corporation. The Tennessee Lottery has since received high acclaim as one of most successful lotteries in the United States. In addition to her role as General Counsel, in 2014 Wanda was named the Tennessee Lottery's Chief Operating Officer.

Wilson has received several awards for her contributions to the legal profession and the public gaming industry, including the Lifetime Achievement Award from the Public Gaming Research Institute and the Individual Star Diversity Award of Excellence from Corporate Counsel Women of Color. She was also named one of the 50 most powerful African Americans in Tennessee by Business Tennessee. Wilson is also very active in professional and civic organizations. She served on the Board of Directors of Purpose Preparatory Charter School in Nashville and is a mentor with Big Brothers/Big Sisters of Middle Tennessee. She is a life member of Alpha Kappa Alpha Sorority, Inc. and a member of the Music City Chapter of The Links, Inc. She has also served on the Board of Directors of the Atlanta Chapter of the Association of Corporate Counsel and is a founding member of the Georgia Association of Black Women Attorneys.

Wilson earned her bachelor's degree in advertising from the University of Illinois at Urbana-Champaign and a Juris Doctorate from the University of Minnesota. She has been licensed to practice law in the states of Tennessee, Georgia, and Minnesota.

Panelist,
General Counsel Panel: Leading from the Top

JANE YOUNG

General Counsel, Tennessee Department of Health

Jane Young is general counsel for the Tennessee Department of Health. As general counsel, she is responsible for oversight of all legal matters for the Department. This includes supervision of a large staff that provides legal work for more than 30 boards and numerous state public health programs. She also serves as ethics compliance officer for the Department of Health.

Young has served as a staff attorney for the Tennessee Supreme Court and as senior counsel with the Tennessee Attorney General's Office, where she represented the State of Tennessee in state and federal courts in matters related to criminal appeals, employment, prison civil rights and education. She has also served as a staff attorney with the United States Department of Health and Human Services. In addition, she has also worked as an administrative law judge, and as a law clerk to a Court of Appeals judge.

Young is a graduate of the University of Tennessee College of Law and received her Bachelor of Arts degree from Samford University.

Panel Moderator,
Law Firm Partners Panel: The Partnership Track

PATTY WISE

Executive Director, Counsel on Call
(Brentwood, TN)

As the Executive Director, Patty Wise designs, implements and manages legal solutions for Counsel On Call clients across the country. She also oversees the facilitation of client assignments with Counsel On Call's attorneys and paralegals. She is based in Counsel On Call's Nashville office.

Prior to joining Counsel On Call, Wise was a litigation attorney with Kennedy Covington in Charlotte, NC, and Troutman Sanders in Atlanta, GA.

She attended Vanderbilt University School of Law (J.D.) in Nashville, where she received the Junius L. Allison Award, given for the most significant contribution to the Legal Aid Society. Wise received her B.A. from Emory University in Atlanta, where she was a member of Pi Sigma Alpha (national English honor society) and Sigma Tau Delta (national political science honor society).

Panelist,
Law Firm Partners Panel: The Partnership Track

MOLLY GLOVER

Senior Attorney, Burch, Porter & Johnson, PLLC
(Memphis, TN)

Molly Glover joined Burch Porter & Johnson in 2013. She is an experienced trial lawyer, representing individual and corporate clients in complex and contentious matters. She has defended attorneys, physicians, nursing home personnel, dentists, pharmacists, and insurance professionals in matters involving allegations of professional negligence. In addition she has served as lead trial counsel in complex matters involving products liability, premises liability, sexual harassment, and breach of contract. Glover's trial experience also includes representing policyholders and insurers in insurance coverage and bad faith litigation.

She tries cases in state and federal courts and has appeared before the Tennessee Court of Appeals, Tennessee Supreme Court, and Sixth Circuit Court of Appeals and is admitted to practice before the United States Supreme Court. Glover was first selected by her peers as a Mid-South Super Lawyer in 2013 and is an active member of the Leo Bearman, Sr. Chapter of the American Inn of Court.

Panelist,
Law Firm Partners Panel: The Partnership Track

LELA HOLLABAUGH

Managing Partner, Bradley Arant Boult Cummings
(Nashville, TN)

Lela Hollabaugh has served as the lead trial lawyer in more than a dozen jury trials, as well as more than two dozen bench trials, arbitrations and administrative hearings. She advises leading natural gas pipeline companies on issues involving location, land acquisition, construction and operations. Hollabaugh is currently advising on several large scale pipeline projects in the southeast. She also represents leading pharmaceutical, medical device and other manufacturers in matters ranging from individual lawsuits to mass tort cases. Hollabaugh is actively involved in several mass tort matters around the country.

Hollabaugh has served in several leadership positions in legal, industry, and government organizations. She currently heads the firm's business litigation group and is the managing partner of the Firm's Nashville office. She is general counsel to the Nashville Bar Association and a trustee of the Nashville Bar Foundation. Lela is a past-president of the Nashville Bar Association and is a past member of the International Association of Defense Counsel's Board of Directors. She is a past Chair of the Tennessee Board of Professional Responsibility. Lela is also listed on the American Arbitration Association's (AAA) Roster of Neutrals for Commercial Litigation. She holds a J.D. and B.S. (with honors) from the University of Tennessee.

Panelist,
Law Firm Partners Panel: The Partnership Track

JENNIFER KELLER

President and COO, Baker Donelson
(Johnson City, TN)

Jennifer P. Keller was elected President and Chief Operating Officer of Baker Donelson effective April 1, 2015. Keller has been with Baker Donelson for over 20 years. Prior to her election as President, she was a shareholder in the firm's Tri-Cities office, a member of the firm's Board of Directors, and the Chair of the firm's nationally ranked Labor & Employment Department. She is the firm's first female President and Chief Operating Officer and she is one of a handful of women in the "C-Suite" of "Big Law."

Keller is originally from Knoxville, Tennessee and is a graduate of the University of Tennessee College of Law. She has been recognized by The Best Lawyers in America® as a leading attorney in the practice areas of workers' compensation and labor and employment, by Mid-South Super Lawyers in the area of labor and employment, and by Chambers USA: America's Leading Lawyers for Business as a leading labor and employment lawyer.

She is dedicated to her family, including husband Jeff and daughter Peyton, her faith, and her community. She serves in various roles on the boards of directors for Southern Appalachian Ronald McDonald House Charities and Coalition for Kids. She is also a member of the board of directors and executive committee of the Johnson City/Jonesborough/Washington County Chamber of Commerce.

Panelist,
Law Firm Partners Panel: The Partnership Track

ANDREA PERRY

Member, Bone McAllester Norton PLLC
(Nashville, TN)

Andrea P. Perry concentrates her practice in the areas of real estate, commercial lending, general corporate, entertainment and tax-exempt organizations.

Perry is very involved in the community and currently serves on the Board of Directors of Middle Tennessee Council–Boy Scouts of America, the Nashville Children's Theatre, Rocketown, the Napier-Looby Bar Foundation and the Industrial Development Board. She is also a member of the Rotary Club of Nashville.

Over the years, Perry has received a number of awards including Mid South's Super Lawyers (2015), Nashville Business Journal's Women of Influence (2014), Nashville Business Journal's 40 Under 40 (2013), Athena Young Professional Award (2012), and Nashville Business Journal's Best of the Bar in 2009, 2013 and 2015. She is also a 2017 Fellow of the Nashville Bar Foundation.

Perry graduated magna cum laude from the University of Memphis with a Bachelor of Arts. She attained her Juris Doctor from Vanderbilt University Law School, where she served as Co-Founder and Associate Editor for the Vanderbilt Journal of Entertainment Law and Practice. She was blessed to marry her best friend, and they have two amazing sons, Isaiah (10) and Caleb (7).

Closing Remarks

THE HONORABLE HOLLY KIRBY

Justice, Tennessee Supreme Court

Justice Holly Kirby is the newest justice on the Tennessee Supreme Court. Prior to her appointment to the Supreme Court, Justice Kirby served for over 18 years on the Tennessee Court of Appeals, and was the first woman ever to sit on that Court.

Justice Kirby graduated from the University of Memphis with a degree in mechanical engineering, and graduated from the University of Memphis School of Law in 1982 with high honors. Upon graduation, she served as judicial law clerk on the 6th Circuit Court of Appeals. After her clerkship, Justice Kirby joined the Memphis law firm of Burch, Porter & Johnson, where she became the firm's first female partner. While in private practice, she served as Chair of the Tennessee Appellate Court Nominating Commission.

During her tenure with the Court of Appeals, Justice Kirby served both the Court of the Judiciary and the Board of Judicial Conduct. She was chosen as Outstanding Young Alumna for the University of Memphis and as Outstanding Alumna for the University of Memphis College of Engineering, and received the Marion Griffin-Frances Loring Award from the Memphis Association for Women Attorneys. Justice Kirby is a member of the Tennessee Three Branches Institute, and last year was named Community Mother of the Year by the Tennessee Justice Center.

Thank you to the members of the Planning Committee for TLAW's Empowerment Conference 2017: Women Who Win!

Karen Crutchfield, Co-Chair
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Connie Chadwick
Loretta Cravens
Crista Cuccaro
Ramona P. DeSalvo
Linda Knight
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Kathy Rowell

As always, TLAW is grateful for the assistance of its Executive Director, Karol Lahrman.

How to Get Involved in the Tennessee Lawyers' Association for Women

Feeling inspired by the Empowerment Conference and want to get more involved in TLAW? We don't blame you! Here is some information on how you can serve TLAW and women attorneys across the State of Tennessee.

TLAW's Background and Purpose

Founded in 1989, TLAW was formed for the purposes of achieving the full participation of women lawyers in the rights, privileges and benefits of the legal profession, increasing the number of women serving on the bench, providing opportunities for mutual support and fellowship, supporting the status and progress of women, and providing a source for continuing legal education.

TLAW's members span the state and benefit from the unique opportunities that TLAW provides for networking, career development, and experience and training for leadership positions that are useful in "rising to the top" on the fast track in other professional organizations. TLAW provides CLE and other programs of special interest to women lawyers.

Run for the Board of Directors

TLAW is guided by a Board of Directors in developing a vision for women attorneys in the State of Tennessee. TLAW members elect the organization's Officers and At Large Directors annually. The Board of Directors serve a one-year term starting July 1 and through June 30 of the following year, except that Board members nominated from local women's bar organizations serve two year terms. Serving on TLAW's Board of Directors provides invaluable professional development experience and connects the Directors with attorneys across the state and across practice areas. Directors are expected to participate in monthly conference calls and fulfill the duties of the Director role.

Join a Committee

In addition to Director positions, TLAW has a number of Standing and Ad Hoc Committees, which assume various roles and responsibilities for the organization. Examples of Committees include Annual Meeting; Community Relations; Continuing Legal Education; Elected & Appointed Positions; Legislation; Membership & Local Organization Development; Publications; and Technology. Although Committee Chairs do not vote on Board actions, Committees are essential to the operation and success of TLAW.

Attend TLAW's Annual Meeting on June 17

The elections for TLAW's Board of Directors will be held at TLAW's Annual Meeting, scheduled for June 17, 2017 in Kingston, TN. Regardless of whether you want to throw your name in the hat for a position, we hope to see you at the Annual Meeting. If you have any questions about how to get involved, we encourage you to contact the TLAW Directors and Committee Members listed on the next page. You can also find a wealth of information on TLAW's website at www.tlaw.org.

TLAW Board of Directors 2016-2017

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If you have questions about TLAW, the Empowerment Conference, or otherwise, you can also contact TLAW's Executive Director, Karol Lahrman, at karol.lahrman@tlaw.org or (615) 385-5300.

Pinnacle Financial Partners is proud to support the TLAW Empowerment Conference.

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As a proud supporter of Tennessee Lawyers' Association for Women, Ortale Kelley Law Firm is committed to supporting women in the legal profession. We are honored to sponsor this year's TLAW Empowerment Conference: Women Who Win!

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ETLAW is a professional legal organization devoted to advancing issues of concern to women within the legal profession and society as a whole. Our membership is comprised of judges, attorneys and law students. ETLAW offers its members eight (8) free CLE programs annually in addition to professional development and networking opportunities. Find out more at www.etlawtn.org.

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LEGAL IMPEDIMENTS TO SERVICE: WOMEN IN THE MILITARY AND THE RULE OF LAW

LINDA STRITE MURNANE*

PREAMBLE

Since our nation's birth, women have been engaged in the national defense in various ways. This article will examine the legal impediments to service by women in the United States military. This brings to light an interesting assessment of the meaning of the term "Rule of Law," as the legal exclusions barring women from service, establishing barriers to equality and creating a type of legal glass ceiling to preclude promotion, all fell within the then-existing Rule of Law in the United States. Finally, this article looks at the remaining barriers to women in the military and reasons to open all fields and all opportunities to women in today's military.

I. THE CONCEPT OF THE RULE OF LAW

Albert Venn Dicey, in "Law of the Constitution," identified three principles which establish the Rule of Law: (1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and (3) the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts.[1]

This concept of the Rule of Law has existed since the beginning of the nation, most famously reflected in the writings of John Adams in drafting the

* Colonel, USAF, Ret. The author acknowledges with gratitude the research assistance of Vega Iodice, intern at the International Criminal Tribunal for the Former Yugoslavia and lawyer apprentice at the Iodice Law Firm in Naples, Italy, in the preparation of this article. Also the author appreciates the editorial review of the article by Col. Terrie Gent, USAF, Ret., Col. Carol Hattrup, USAF, Ret. (both former judges on the Air Force Court of Criminal Appeals), Col. Robert G. Gibson, USAF, Ret., (former Air Force trial judge and chief circuit military judge), and Col. Denise Vowell, USA, Ret. (the first woman to serve as the Chief Trial Judge of the United States Army).

The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

The views expressed are those of the author personally and are not intended to represent the views of the Department of Defense, the Department of the Air Force, the Kentucky Commission on Human Rights, or the Commonwealth of Kentucky. This article was written in its entirety following Col. Murnane's permanent retirement from the Air Force, and no portion of this article was prepared during any time she served on active duty.

1. HALSBURY'S LAWS OF ENGLAND, CONSTITUTIONAL LAW AND HUMAN RIGHTS 14 (Lord Hailsham ed., 4th ed. 1996) (citing ALBERT VENN DICEY, LAW OF THE CONSTITUTION 187 (10th ed. 1959)).

constitution for the Commonwealth of Massachusetts. In that document, Adams wrote:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[2]

II. WOMEN IN THE MILITARY—THE LAW

It is hard to believe that, as recently as the early 1970s, women in the United States who wanted the opportunity to serve in their nation's armed forces were involuntarily separated from the military when they became pregnant. In fact, it took until the case of *Crawford v. Cushman*[3] before the courts concluded that the longstanding policy of the U.S. military of discharging a military woman as soon as pregnancy was discovered constituted a violation of the Fifth Amendment's due process clause.

Pregnancy and parenthood were two of many extremely challenging issues that faced the U.S. military throughout its transition to an all volunteer force. However, these issues were part of a long legacy of legislative and policy barriers established to keep the U.S. armed forces a predominantly male institution.

III. EARLY BARRIERS TO SERVICE

The military tradition, beginning with the Continental Army, did not include women, calling by Army regulation for service only by male enlistees.[4] However, it would be incorrect to say that women did not serve. From the earliest days of our nation women accompanied the U.S. armed forces, serving in a variety of supporting roles. Women were not included as an authorized component of the military until 1901 when Congress established the Nurse Corps as an auxiliary of the Army.[5]

Prior to that date, the women who participated in support of the U.S. military did so in various ways that are recounted largely in folklore or legend. Some of those who served did so by disguising themselves as men.[6] A number of women had served as spies, as was the case of Rose O'Neal Greenhow, who was arrested and imprisoned for supplying the Confederate Army with information, and Pauline Cushman, who was sentenced to be executed as a Union spy during the War Between the States.[7]

The first woman to receive the Congressional Medal of Honor, Dr. Mary Walker, provided her services as a doctor free of charge to Union forces in

2. MASS. CONST. art. XXX (1780).
3. 531 F.2d 1114 (2d Cir. 1976).
4. JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 4–5 (1993).
5. 31 Stat. 753 (1901).
6. HOLM, *supra* note 4, at 6.
7. *Id.* at 6–8.

Virginia and Tennessee.[8] She had asked the Union Army to hire her as a doctor, but it refused.[9] Despite its refusal to hire her, Dr. Walker continued to provide medical services to Union soldiers.[10] Eventually, she was captured by Confederate soldiers.[11]

After her release from Confederate prison as part of a prisoner exchange, she was given an official position of "Acting Assistant Surgeon," the first woman to be given such a title.[12] Dr. Walker received the Congressional Medal of Honor after the war.[13] In 1917, however, the U.S. Congress attempted to remove the honor from her, stating that only those who fought in combat were entitled to the award.[14]

When the Congress decided that the Medal had been awarded in error, Walker refused to return the medal.[15] Even after her death, Dr Walker's family continued to battle to resolve her status as a Medal of Honor recipient. Finally, in the 1970s, and almost sixty years after her death, Congress decided not to refuse the medal to this pioneer.[16]

Women, therefore, were not permitted to serve in any significant role as members of the military service. Women who served disguised as males were separated from the military when their gender was discovered and they received no benefits or pension. Those who accompanied their husbands while they served were not recognized as members of the military, despite performing roles that were necessary to support the combat arms profession. These roles included traditional quarter master functions, such as mess, laundry, and uniform repair and alteration to ensure the uniforms were in serviceable condition.[17]

These early restrictions on women serving in the armed forces are not surprising considering the general legal status of women in the United States during these same early periods in U.S. history. For example, women were not afforded the right to vote in any state in any election before achieving the right to vote in school board elections in Kentucky in 1838.[18] Passage of the Nineteenth Amendment in 1920 gave women the right to vote in national elections across the country.[19] Similarly, women were not entitled to administer estates, own property, or enter into contract in their personal capacity.[20] Although there was

8. AMY NATHAN, COUNT ON US: AMERICAN WOMEN IN THE MILITARY 18 (2004).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. HOLM, *supra* note 4, at 4.

18. ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES 168 (1996).

19. *Id.* at 317.

20. In 1971, for the first time, the United States Supreme Court ruled in favor of a woman who complained that her State had denied her equal protection of its laws when, in *Reed v. Reed*, 404 U.S.

never a specific blanket prohibition excluding women from all forms of combat, until nearly 1990, the belief was widely held that any combat service by women was precluded by law.[21]

IV. INTEGRATION INTO THE REGULAR FORCE

As noted above, the earliest inclusion of women into the military service of the nation came through the recognition of their existing role as nurses. Women had served as nurses and, as in the case of Dr. Mary Walker, physicians from the earliest conflicts engaged in by the United States as a nation. However, it was the action by the U.S. Congress in 1901 to formally acknowledge an Army Nurse Corps Auxiliary that set the stage for future developments in integrating women into the military.

In March 1917, the U.S. Navy Department authorized the enrollment of women in the Naval Reserve to perform clerical duties. It was a move born of necessity, as war loomed on the horizon and the U.S. Navy found itself unprepared to meet its demand for clerical personnel.[22] The role of women in the Army Nurse Corps had been formally acknowledged, and women were being authorized to serve in an enlisted status in the Navy. Within the next year, women were also authorized to enlist in the Marine Corps.[23]

During World War I, women in the Navy held more than just clerical positions. They were assigned to such diverse duties as draftsmen, translators, and recruiters. Assigned the title of "yeoman," these first enlisted women posed a special challenge to the Navy, as yeomen were supposed to be assigned to ships. However, Navy regulations prohibited the assignment of women to positions at sea. The Navy's solution to this challenge was to assign these women to stationary tugs which rested on the bottom of the Potomac River.[24]

The Marines began recruiting women for enlistment in August 1918, two months before the cessation of hostilities. Like the Navy, the U.S. Marines began their recruitment of women out of necessity. The heavy overseas casualties experienced during the war effort led to the recruitment of women. Again, these women, who were called "Marinettes," were recruited to fill clerical posts.[25]

Following the signing of the Armistice on November 11, 1918, the role of women in the military reverted principally to the traditional role of women in the military; that is, it was restricted to service in the Nurse Corps. The minor gains achieved during the time of necessity, which allowed women to serve in the Navy and Marines as clerks, draftsmen, translators and recruiters, were undone as the nation returned to a peace time footing. In 1925, the Naval Reserve Act was modified to allow the enlistment of "male citizens," restricting

71, 73 (1971), it ruled that Idaho's preference for males over females in matters related to estate administration was unconstitutional.

21. HOLM, *supra* note 4, at 399.

22. *Id.* at 10.

23. *Id.* Despite the door now being opened for enlisted service by the Department of the Navy, the Army did not authorize women to enlist during World War I. Instead the Army included women in its Nurse Corps. *Id.*

24. *Id.* at 12.

25. *Id.*

the broader language contained in the 1916 Act, which had opened to door to enlist women during World War I.[26]

With war once again looming on the horizon, however, in May 1941, Congresswoman Edith Nourse Rogers (R-Mass.) introduced H.R. 4906, which established the Women's Army Auxiliary Corps (WAAC).[27] A year later, the bill passed, establishing as law a separate set of rules for women who would serve with the Army.[28] Among those unique characteristics established by this legislation, women who were in the Auxiliary Corps were required to be of high moral character and technical competence—a standard not required of men who, at this time, were being inducted into the armed forces by means of a compulsory draft.[29]

Women who were able to join the Army under this new legislation lived under a different set of rules and regulations than did their male counterparts. Women were not extended the same legal protections if they went overseas, and they were not entitled to receive the same benefits if injured during service.[30] They were not entitled to draw the same pay, received no entitlements for their dependents, and were restricted in terms of their military rank and overall promotion opportunities. Although part of the Auxiliary, women were clearly not considered a part of the U.S. Army in its most important characteristics.[31]

Interestingly, the issue of women potentially serving as general officers surfaced as early as the hearings on the 1941 WAAC bill.[32] The issue would be raised again in 1947 and 1948 in hearings on the Women's Armed Services Integration Act.[33]

Opposition to women in flag officer positions[34] was not only expressed within the system generally, but by some of the very women who were engaged in the struggle for integration into the armed forces. Women who spoke publicly on the issue of integration were concerned that asking for too much too soon would disserve the eventual inclusion of women in the military.[35]

In July 1942, the Navy followed the Army with legislation creating the Women Accepted for Volunteer Emergency Service (WAVES).[36] Once again, the congressional action occurred as the result of a critical need for support for the war effort.[37] As with their Army counterparts, the WAVES did not draw equal

26. *Id.* at 18; Naval Reserve Act of 1925, Pub. L. No. 68-512, 43 Stat. 1080 (1925).

27. HOLM, *supra* note 4, at 21.

28. Women's Army Auxiliary Corps (W.A.A.C.) Act, Pub. L. No. 77-554, 56 Stat. 278 (1942).

29. Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885 (1940) (codified as amended at 50 U.S.C. app. 301–309a (2000)) (creating the Selective Service to administer the first peacetime draft).

30. HOLM, *supra* note 4, at 24.

31. *Id.*

32. *Id.* at 195.

33. *Id.*

34. Officers holding any grade of admiral or general are referred to as "flag officers" because they are entitled to have a flag designating their rank displayed at their place of duty.

35. *Id.*

36. *Id.* at 27.

37. Pub. L. No. 77-689 (1942).

pay or entitlements, and they were administered under different regulations pertaining specifically to women serving the Navy.[38]

At the end of World War II, massive demobilization of the military took with it most of the women who had been recruited into the WAAC and the WAVES. One author reports that the Department of the Army, which had consistently resisted the recruitment of women, even into clerical posts, held this view at the end of the war:

> [I]t is believed no longer desirable that arrangements be made to form military organizations composed of women. A continuation of the war would have required the United States . . . to make a much more extended use of women . . . to replace men sent overseas or men shifted to heavy work which men alone can do.[39]

Efforts to create a Women's Army Corps (WAC) and roles for women in the Navy and in the Regular and Reserve divisions of the peacetime Army failed in 1946 and 1947.[40]

Efforts to establish a permanent nursing corps in the Navy and Army, however, did achieve success, as The Army-Navy Nurse Act[41] established the Nurse Corps as a permanent staff corps. This act provided for the integration of female nurses into the officer ranks of the Regular Army and Navy up to the rank of lieutenant colonel or commander.[42]

Under continuing pressure to integrate women, in June 1948, Congress passed the Women's Armed Services Integration Act of 1948, creating the legal foundation for women's participation in the regular military.[43] The law established the Women's Army Corps (WAC) in the Regular Army and authorized the enlistment and appointment of women in the Air Force, Navy and Marine Corps.

This 1948 law served as the foundation—the "Rule of Law"—to impose and perpetuate a set of legalized institutional discriminatory standards, the remnants of which still inhibit full integration of women into combat roles in the military service.

This legislation also established a statutory restriction that limited women to no more than two percent of total force strength.[44] Women under the age of twenty-one were required to have parental permission to join the armed forces, but their male counterparts required permission only if they were under the age of eighteen.[45] While enlisted women were permitted to achieve any rank then authorized, women officers were not permitted to hold a rank higher than the grade of colonel.[46]

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38. HOLM, *supra* note 4, at 24, 26–27.

39. *Id.* at 14 (citing MATTIE B. TREADWELL, U.S. ARMY IN WORLD WAR II: SPECIAL STUDIES—THE WOMEN'S ARMY CORPS 10 (1954)) (alteration added).

40. HOLM, *supra* note 4, at 99–109 (citing H.R. 5919 (1946)).

41. Pub. L. No. 36-80C, 61 Stat. 101 (1947).

42. HOLM, *supra* note 4, at 108.

43. Pub. L. No. 80-625, 62 Stat. 368 (1948).

44. *Id.*

45. *Id.*

46. JUDITH HICKS STIEHM, ARMS AND THE ENLISTED WOMAN 109–10 (1989).

This legislation codified the legal distinction that, for the purposes of pay and entitlements, women officers and enlistees could only claim their husbands or children as "dependents" if they could establish that these family members were in fact dependent upon the *women* for "their chief support."[47] By contrast, wives and children of male members were automatically treated as dependents, and men serving in the armed forces were entitled to draw separate pay and entitlements for these dependents.[48]

This same legislation also contained the provisions which would serve for years as the legal authority used to prohibit women from participating in combat, and the law served for more than four decades as the source of a solid "glass ceiling" in terms of women's ability to achieve equality in rank in the military.

These barriers are rooted in the provisions included in the Women's Armed Services Integration Act of 1948 which authorized the Secretaries of the various military services to prescribe *by regulation* the kind of military duties that women may be assigned to perform.[49] Additionally, Congress specifically restricted women from service in the Navy and Air Force on aircraft engaged in combat operations or on Navy vessels, except for hospital ships or naval transports.[50] The long-term effects of this policy continue to be felt even today, particularly as the issue of women in combat has arisen again in the current War Against Terror.[51]

The Women's Armed Services Integration Act of 1948 also authorized the service secretaries to terminate the service of a female member, enlisted or commissioned, under regulations established by the President.[52] It was this provision that, supplemented by Executive Order 10240, provided the legal authority to separate women from the Armed Forces due to pregnancy.[53]

The Executive Order signed by President Harry Truman stated:

> The commission of any one woman serving in the Regular Army, the Commission or warrant of any woman serving in the Regular Navy or the Regular Marine Corps, and the commission, warrant, or enlistment of any woman serving in the Regular Air Force, under either of the above mentioned acts [referring to the Army-Navy Nurses Act of 1947[54] and the Women's Armed Services Integration Act of 1948[55] may be terminated, regardless of rank, grade, or length of service, by or at the direction of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, respectively, (1) under the same circumstances, procedures, and conditions, and for the same reasons under which a male member of the same armed force and of the same grade,

47. Pub. L. No. 80-625, 62 Stat. 356 (1948).

48. *See* HOLM, *supra* note 4, at 120; 37 U.S.C. §§ 401, 403 (West Supp. 2006); 10 U.S.C. § 1072 (West Supp. 2006).

49. HOLM, *supra* note 4, at 119.

50. *Id.*

51. Center for Military Readiness, Women in or Near Land Combat, Issues Paper, June 16, 2006, http://www.cmrlink.org/WomenInCombat.asp?docID=272 (last visited Mar. 20, 2007).

52. HOLM, *supra* note 4, at 124.

53. *Id.* at 125.

54. 61 Stat. 41 (1947).

55. 62 Stat. 356 (1948).

> rating or rank, and length of service may be totally separated from the service by administrative action, whether by termination of commission, discharge or otherwise, or (2) whenever it is established under appropriate regulations of the Secretary of the department concerned that the woman (a) is the parent, by birth or adoption, of a child under such minimum age as the Secretary concerned shall determine, (b) has personal custody of a child under such minimum age, (c) is the stepparent of a child under such minimum age and the child is within the household of the woman for a period of more than thirty days a year, (d) is pregnant, or (e) has, while serving under such commission, warrant or enlistment, given birth to a living child; and such woman may be totally separated from the service by administrative action by termination of commission, termination of appointment, revocation of commission, discharge or otherwise.[56]

It was this Executive Order, along with the regulatory authority given to the service secretaries to establish policies, which precluded full integration of women into the military and limited their status in the armed forces. It also set the stage for the battles that women in the military began to fight through the Courts in the 1960s and beyond.

V. THE IMPACT OF THE CIVIL RIGHTS ACT AND SUPREME COURT DECISIONS

On July 2, 1964, Congress passed the Civil Rights Act.[57] This legislation established protections in the areas of employment, housing, and public accommodations, and it was designed to secure the civil rights of all people in the United States.[58] However, by the time of this enactment, the 1948 Integration Act had become "the base of a system of institutional segregation and unequal treatment that would shock modern-day civil libertarians."[59] Thus, despite Congress's noble intentions in 1964, it was not until November 1967 that substantial progress was made to advance the opportunities for women in the armed forces.

On November 8, 1967, President Lyndon Johnson signed into law the most significant legislative change in two decades for women in military service. The enactment of Public Law 90-130, which amended Titles 10, 32, and 37 of the United States Code, combined with subsequent victories in the courts, worked to reduce some barriers for women in the military.[60]

As with each increment of progress in years past, the changes came about and gained acceptance as the result of political pressures facing a military then

56. HOLM, *supra* note 4, at 511, *quoting* Exec. Order No. 10,240, Apr. 27, 1951 (alteration in original; citations omitted).

57. Pub. L. 88-352, 78 Stat. 241 (1964). The principal impact of this legislation would not be realized in the U.S. military until nearly thirty years later when sexual harassment and assault cases at the military service academies resulted in careful examination of this legislation in an effort to add offenses specifically barring sexual harassment to the Uniform Code of Military Justice. *See* Richard Chema, *Arresting 'Tailhook': The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 3 (1993).

58. 42 U.S.C. § 1971 (2000).

59. HOLM, *supra* note 4, at 178.

60. Pub. L. No. 90-130 (1967).

engaged in an unpopular war—this time in Vietnam, accompanied by an increasing pressure to end the equally unpopular draft.

Among the restrictions lifted by Public Law 90-130 was the cap limiting the number of women in the services to two percent of the force.[61] Also of great significance in this legislation was the lifting of the restrictions on promotions for commissioned women, who were finally permitted to achieve the grade of colonel and the flag ranks (admiral and general).[62]

However, the law did not address many of the legally discriminatory provisions that continued to serve as barriers to equal service in the military until the intervention of the courts. These included: (1) the segregation of women into separate corps (i.e., WAC, Women's Air Force (WAF), and WAVE); (2) the authority maintained by service secretaries to discharge women for reasons of pregnancy and custody or housing of minor children; (3) unequal pay based upon dependency status; (4) exclusion from a taxpayer-funded education at the service academies; and (5) specific restrictions from service aboard Naval ships and aircraft engaged in combat missions.[63] Additionally, there were restrictions remaining in many career fields. These restrictions were driven by the authority extended to limit women's service by regulation and did not, necessarily, involve any statutory restrictions.

The remaining discriminatory provisions discussed above were next brought for review before the U.S. courts. Progress came slowly, however. Nearly a decade after the Equal Pay Act,[64] in the landmark decision of *Frontiero v. Richardson*,[65] Sharron Frontiero, an Air Force lieutenant married to a military veteran, challenged the provisions that denied women the same entitlements for dependents as their male counterparts. Frontiero's spouse was not automatically considered her dependent.[66] Additionally, she was not eligible for on-base housing, and her husband was not eligible for the medical care routinely provided to wives of military members.[67] To become eligible for these same benefits, the Frontieros were required to submit proof that Lieutenant Frontiero's husband was dependent upon her for more than one-half of his support.[68]

The suit was submitted on both the basis of due process and equal protection grounds.[69] The federal district court for the Middle District of Alabama held against the Frontieros, indicating that there would be a "considerable saving of administrative expense and manpower," by allowing

61. *Id.*

62. *Id.*

63. HOLM, *supra* note 4, 201–02.

64. 29 U.S.C. § 206 (2000).

65. Frontiero v. Richardson, 411 U.S. 677 (1973).

66. *Id.* at 680.

67. *Id.*

68. *Id.*

69. Frontiero v. Laird, 341 F. Supp. 201, 203 (M.D. Ala. 1972), *rev'd sub nom.*, Frontiero v. Richardson, 411 U.S. 677 (1973).

the distinction, because military wives were generally dependent upon their spouses.[70]

The U.S. Supreme Court, in an eight to one decision (Justice Rehnquist, dissenting) reversed the District Court.[71] In the plurality opinion, four Justices (Brennan, Douglas, White, and Marshall) held that the distinction created by this statute warranted a "strict judicial scrutiny" review consistent with the equal protection cases being decided by the Court at that time.[72]

Justices Brennan, Douglas, White, and Marshall stated in their opinion:

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ."[73]

They continued in their analysis by pointing out the changes which had occurred in legislation dealing with sex-based classifications, and by noting the changes to Title VII of the Civil Rights Act of 1964[74] and to the Equal Pay Act of 1963.[75]

Brennan, Douglas, White, and Marshall went on to indicate that, with all of the legal developments in mind:

> [W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must, therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.[76]

Justices Powell, Blackmun, and Burger declined to apply the "strict scrutiny" standard, and instead resolved the issue under due process standards.[77] In the opinion authored by Justice Powell, these three justices held "it is unnecessary for the Court in this case to characterize sex as a suspect classification with all of the far-reaching implications of such a holding."[78] It appears that the reason for avoiding the strict scrutiny argument arose from a belief that the Equal Rights Amendment, which had been passed by Congress and was submitted for ratification by the States, would moot the need for such analysis.[79]

70. *Id.* at 207.
71. Frontiero v. Richardson, 411 U.S. at 677.
72. *Id.* at 688.
73. *Id.* at 686 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972)).
74. 42 U.S.C. § 1971 (2000).
75. 29 U.S.C. § 206 (2000).
76. *Frontiero*, 411 U.S. at 688 (alteration added).
77. *Id.* at 691.
78. *Id.* at 691 (citing Reed v. Reed, 404 U.S. 71 (1971)).
79. *Id.*

Justice Potter Stewart also concurred in finding the legislation unconstitutional, but he made no reference to the "strict scrutiny" standard necessary to establish an equal protection ground for the decision.[80]

Following *Frontiero*, the legal battles came in earnest on many fronts, and through various fact patterns. Among them was a challenge to the policy of discharging women who had minor children either residing or visiting in their homes.[81] Tommie Sue Smith, a judge advocate, joined the U.S. Air Force in 1966 with a four-year-old son.[82] She had surrendered legal custody of her son in order to join the military.[83] However, after serving in the Air Force for a time, she also learned that she could not have her son in her home for more than thirty days each year, or she would face discharge.[84]

Smith had requested a waiver to allow her child to live in her home for more than thirty days a year, which would enable her to maintain physical custody while vesting legal custody in another person.[85] Her request for a waiver was denied. Smith therefore sent her son to a military school in Virginia, which was within weekend commuting distance of Smith's Washington, D.C. base assignment.[86]

In 1969, Smith received an assignment to the Philippines.[87] She was told she could not take her son with her on the assignment because of the thirty-day rule.[88] She was given the option either to go on the assignment without her son or to separate from the Air Force.[89]

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80. *Id.*

It is important to note here that *Frontiero* was a plurality opinion, and a majority of the court did not endorse the application of strict scrutiny to gender classifications. Indeed, in the years immediately following *Frontiero*, the standard of review for gender classifications remained uncertain, and the Court decided several such cases without articulating a level of scrutiny. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 725 (2d ed. 2002) (discussing some of these post-*Frontiero* cases). Finally, in 1976, the Court seemed to settle on an ill-defined "elevated or 'intermediate' level" of scrutiny for gender classifications in *Craig v. Boren*. *See* 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting). In 1996, however, the Court articulated yet another "heightened scrutiny" standard in *United States v. Virginia*. *See* 518 U.S. 515, 550 (1996) ("[A]ll gender-based classifications today warrant heightened scrutiny." (alteration added; quotations omitted)). Under this standard, "[p]arties who seek to defend gender-based government action must demonstrate an *exceedingly persuasive justification* for that action." *Id.* at 531, 533 (emphasis and alteration added). While Justice Ginsburg, writing for the Court, was careful to say that "[s]trict scrutiny . . . is reserved for state classifications based on race or national origin and classifications affecting fundamental rights," *id.* at 567–68 (alteration added; quotations omitted), a compelling argument can be made—and it is the view of this author—that the majority adopted a standard that "amounts to (at least) strict scrutiny." *Id.* at 579 (Scalia, J., dissenting). Whatever the Court chooses to call the standard of review in the next gender classification case, it is clear that the standard will be more searching than rational basis review.

81. STIEHM, *supra* note 46, at 115–17.

82. *Id.* at 116.

83. *Id.*

84. *Id.* at 115–17.

85. HOLM, *supra* note 4, at 296.

86. *Id.* at 296.

87. STIEHM, *supra* note 46, at 116.

88. *Id.*

89. HOLM, *supra* note 4, at 296.

This occurred even though the Air Force Deputy Chief of Staff, then Lt. Gen. Robert Dixon, had ordered his staff to rescind the minor children discharge policy in August 1969.[90] The policy was not finalized until September 29, 1969, the day after Smith's lawsuit was filed seeking to overturn the policy.[91]

Smith, who was admitted to practice before the U.S. Supreme Court and a member of the Tennessee bar, filed suit in U.S. District Court on September 28, 1969.[92] The next day, the Air Force implemented its change in policy and Smith was permitted to go to the Philippines with her son.[93]

Additional battles loomed to allow natural mothers to remain on active duty. In 1970, Seaman Anna Flores became pregnant.[94] Flores was unmarried at the time. Before she and her fiancé, a Navy enlisted man, could be married (as they had already planned), she miscarried.[95] Although she was no longer pregnant, her commanding officer nevertheless took actions to have Flores discharged as called for by Navy regulations.[96]

Flores filed suit before the U.S. District Court in Pensacola, Florida, to block the Navy from discharging her, arguing that the Navy was unconstitutionally discriminating against women by discharging them for becoming pregnant while not discharging the male sailors who impregnated them.[97] The suit was brought by the American Civil Liberties Union and was eventually granted class-action status.[98] The complaint argued that all women in the military were being deprived of due process and equal protection of the law.[99]

In ruling in favor of the Department of Defense, the District Court for the Northern District of Florida relied solely upon the remedial actions that had been taken by the Department of the Navy after Seaman Flores brought her suit to avoid finding a violation of the equal protection component of the due process clause of the Fifth Amendment.[100]

Flores' commander had initially recommended:

> In spite of FLORES [sic] excellent professional performance and her strong desire to remain in the Navy, retention is not recommended. To do otherwise would imply that unwed pregnancy is condoned and would eventually result in a dilution of the moral standards set for women in the Navy.[101]

Flores had contended in her lawsuit that discharging unmarried women because of a concern related to moral standards—while not applying the same moral

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 295–96.
94. *Id.* at 298.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. Seaman Anna Flores v. Sec'y of Defense, 355 F. Supp. 93 (N.D. Fla. 1973).
100. *Id.* at 96.
101. *Id.* at 94.

standards to men—violated the equal protection component of the due process clause.[102]

At the time of the institution of the law suit, the then-Deputy Chief of Naval Personnel, Adm. Plate, had testified in deposition that he did not accept the rationale that men and women should be held to a single standard of morality.[103] He argued that to do so would enable those men seeking to find a way to avoid their obligation under the Selective Service Act to find women willing to assist them in achieving violations of the morality standard to which military women were already being held.[104]

By the time the Florida District Court rendered its decision, however, the Navy had abandoned its policy of discharging pregnant women who were unmarried.[105] The District Court also relied upon the fact that the Navy now had a new Deputy Chief of Naval Personnel, and that Adm. Baldwin, who succeeded Adm. Plate, had testified that "whatever prior Navy policy may have been, there is not now applied or considered a double moral standard for men and women in determining retention in service of pregnant women."[106] The Court went on to state:

> His testimony is unequivocal that the issue in determining retention is service of pregnant women is the person's ability to do her job and cope with her physical condition, that moral character is not a factor, and that the same basic criteria are applied to both single and married pregnant women requesting retention in the Navy.[107]

This single moral standard issue would resurface, however, in cases involving disciplinary actions taken for sexual misconduct some twenty years later.[108]

At the same time as Flores' case was winding through the courts, Capt. Susan R. Struck, a pregnant nurse at McChord Air Force Base, Washington, also challenged the policy regarding pregnancy discharge for military women.[109] Struck was single and a Roman Catholic, according to Justice Ruth Bader Ginsburg, who—prior to her appointment to the federal bench—had represented Struck as a lawyer working for the American Civil Liberties Union.[110] Struck had agreed to surrender the child after birth for adoption. Despite having informed her superiors about her decision, they pursued her separation from the Air Force in accordance with the then-existing policies.[111]

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102. *Id.*

103. *Id.* at 95.

104. *Id.*

105. *Id.*

106. *Id.* at 96.

107. *Id.* at 95.

108. These sexual misconduct cases will be discussed later in this paper and include cases arising from Tailhook and concerning Lt. Kelly Flinn, Lt. Christa Davis, Col. Jan Cisler, Lt. Col. Dave Shober, Maj. Gen. Thomas Fiscus, and Maj. Gen. David Hale, among others.

109. HOLM, *supra* note 4, at 299; STIEHM, *supra* note 46, at 117.

110. Justice Ruth Bader Ginsburg, Speech at the Women in Military Service Memorial for America (Sept. 9, 2005) (notes on file with author).

111. *Id.*

Struck took her case to District Court and lost.[112] The case was appealed, and the Solicitor General concluded that the Air Force position would be weak.[113] Therefore, Struck was granted a waiver, rendering further action before the U.S. Supreme Court moot.[114] Similar lawsuits resulted in additional waivers being granted to Lt. Mary S. Gutierrez[115] and Airman Gloria D. Robinson.[116]

The lawsuits confronting these issues continued and eventually, facing the inevitability of change, the Department of Defense directed the service secretaries on June 1, 1974, to develop new policies making separations for pregnancy voluntary. The new policies were to be effective by May 1975.[117]

Meanwhile, the Marine Corps was confronted with these same issues as the Air Force when Stephanie Crawford challenged the Corps's policy. The Marines rule was to discharge any pregnant military woman, even if she had surrendered all rights to custody or control of the child.[118] They also notified the female marine's parents if she became pregnant of the reasons for the pregnant woman's discharge.[119]

Crawford had become pregnant out of wedlock.[120] She had been discharged from the Marines in 1970 due to the pregnancy.[121] She applied for reenlistment, and her request was denied because she had a child.[122] Crawford filed a lawsuit seeking reinstatement, but the trial court held in favor of the Marines.[123] Finally, in *Crawford v. Cushman*, the United States Court of Appeals for the Second Circuit held that the Marine Corps' regulation requiring the discharge of a pregnant marine as soon as pregnancy is discovered violated the Fifth Amendment of the United States Constitution.[124] Reversing the decision of the United States District Court for the District of Vermont, the Second Circuit held that the regulation violated the due process clause because it established an irrebuttable presumption that any pregnant marine (or service member) is permanently unfit for duty.[125]

The issue of military members as parents continues to be a source of challenge for the U.S. military. In 1981, in *Lindenau v. Alexander*,[126] the military prevailed in its position to deny enlistment to single parents who have custody of their children. Because the policy banned male and female single parents

112. Struck v. Sec'y of Defense, 460 F.2d 1372 (9th Cir. 1971).

113. HOLM, *supra* note 4, at 299.

114. *Id.*

115. Gutierrez v. Sec'y of Defense Melvin Laird, 346 F. Supp. 289 (D.D.C. 1972).

116. Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972); *see also* STIEHM, *supra* note 46, at 116–17.

117. STIEHM, *supra* note 46, at 117; HOLM, *supra* note 4, at 300.

118. STIEHM, *supra* note 46, at 117.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. 378 F. Supp. 717 (D.C. Vt. 1974).

124. 531 F.2d 1114 (2d Cir. 1976).

125. *Id.*

126. Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981). *See also* Mack v. Rumsfeld, 609 F. Supp. 1561 (W.D.N.Y. 1985), *aff'd*, 784 F.2d 438 (2d Cir. 1986), *cert. denied sub nom.*, Mack v. Weinberger, 479 U.S. 815 (1986).

alike, the due process arguments used to strike down the previous barriers to women's service could not be used to modify these enlistment barrier provisions.

VI. THE MILITARY ACADEMY DILEMMA

Perhaps the most publicized dilemma to the U.S. Department of Defense posed by the integration of women into its services is the inclusion and integration of women into the service academies.

Since the founding of the U.S. Military Academy in 1802, the military service academies were long considered to be extraordinarily elite educational institutions for men destined for positions of leadership in the U.S. armed forces.[127] The branches of the services were, as in most issues pertaining to integration of women into their ranks, split on opening the doors of the service academies to women.[128] The arguments from those opposed to inclusion of women focused principally upon the existing policies, which precluded women from being assigned to serve aboard ships or to hold combat-support or combat-leadership positions.[129] During this discussion, the service academies maintained that "the primary mission of the service academies is to train men for assignment to the combat arms or combat support arms. Since women could not be assigned to such a role, it is not necessary nor logical to grant them admission."[130]

Ultimately, it was the process of nomination available to members of Congress that brought this issue to the fore. In 1972, Sen. Jacob Javits (R-N.Y.) nominated a woman for appointment as a cadet at the United States Naval Academy.[131] Because women were ineligible to enroll at the institution, the Academy refused to consider her nomination.[132] In the same year, in response to the Academy's refusal to consider the nomination, Javits and Rep. Jack H. McDonald (R-Mich.) introduced a concurrent resolution proposing that a woman, duly nominated to a military service academy, should not be denied admission solely on the basis of sex.[133] The resolution passed in the Senate with little debate, but it never passed out of the House Armed Services Committee.[134]

In September 1973, women who wanted to enter the academies brought lawsuits against the Air Force and the Navy.[135] They were joined in this effort by

127. The United States Military Academy (Army) was established in 1802 and is the oldest military academy in the United States. It was followed by establishment of the U.S. Naval Academy in 1845, the U.S. Coast Guard Academy in 1876, the U.S. Merchant Marine Academy in 1942, and the U.S. Air Force Academy in 1954.

128. HOLM, *supra* note 4, at 305–06.

129. *Id*.

130. *See* Harry C. Beans, *Sex Discrimination*, 67 ARMY L. REV. 19, 63 (1975) (citing *Hearings Before the Special Subcomm. on the Utilization of Manpower in the Military of the House Commission on Armed Services*, 92d Cong., 2d Sess. 12443 (1972) (statement of General Bailey))

131. HOLM, *supra* note 4, at 305–06.

132. *Id*. at 305.

133. *Id*. at 306.

134. *Id*.

135. *Id*.

four members of Congress who objected to being required to discriminate on the basis of sex in making nominations for the service academies.[136]

On December 20, 1973, the Senate once again voted by voice vote to approve an amendment to allow women to enter the service academies.[137] The House once again struck the amendment from the bill.[138] However, the compromise struck this time was that hearings would be held, under the authority of the House Armed Services Committee Chair, Rep. F. Edward Hebert (D-La.).[139]

The argument against allowing women to compete for a fully-paid college education at the U.S. military academies focused principally on the myth that the service academies were exclusively designed as a leadership laboratory for America's combat leadership.[140] It was this misplaced reliance that led, once again, to the reluctant change in the discriminatory application of the rule of law.

On April 16, 1975, Rep. Samuel S. Stratton (D-N.Y.) issued a press release, citing a Government Accounting Office (GAO) study that reported, of the 8880 graduates of the Air Force Academy serving on active duty as of October 1974, twenty-nine percent had never held a career combat assignment.[141] The GAO study went on to state that 3777 of the 30,576 graduates of the nation's top three service academies had never had a combat assignment.[142]

With lawsuits wending their way through the Courts, and with the GAO study defeating the myth that the "combat exclusion" supported continued exclusion of women, the Department of Defense Appropriations Bill was the vehicle used to change the exclusion of women from service academies. Without further discussion of the exclusion of women in combat, Public Law 94-106, signed into law on October 7, 1975, opened the doors of the U.S. military service academies to women for the first time.[143]

The decision to admit women to the U.S. military academies was followed by similarly wrenching and unsettling challenges to other military colleges. Legislation was enacted in 1978 that authorized the Secretary of Defense to require that any college or university designated as a military college permit women to participate in their programs as a condition of maintaining its designation as a military college.[144] That law, however, was quickly repealed.[145] The next year, the law resurfaced, again allowing the Secretary of Defense to establish the condition that military colleges allow "qualified female undergraduate students" enrolled in military colleges and universities to

136. *Id*.
137. *Id*.
138. *Id*.
139. *Id*. at 306–07.
140. *Id*. at 305–08.
141. *Id*. at 310.
142. *Id*.
143. Pub. L. No. 94-106, 89 Stat. 531 (1975).
144. Pub. L. No. 95-485, 92 Stat. 1623 (1978).
145. Pub. L. No. 98-525, 98 Stat. 2621 (1984).

participate in military training, but it added that the regulations may not require women enrolled in the college or university to participate in military training.[146]

The battle fought to allow women to enter traditionally all-male military institutions continued at military colleges throughout the U.S. In 1990, the United States sued the Commonwealth of Virginia and the Virginia Military Institute for violating the Equal Protection Clause of the Fourteenth Amendment, challenging the policy that Virginia had followed to deny women admission to the Virginia Military Institute (VMI), a publicly funded university.[147] In the two years preceding the lawsuit, VMI had received inquiries from 347 women, but it had not responded to any of them.[148]

The District Court ruled in favor of VMI and rejected the equal protection challenge pressed by the United States, relying upon the arguments presented by VMI and the Commonwealth of Virginia to the effect that physical training, the absence of privacy, and the "adversative approach" used at VMI would be materially affected by making the program co-educational.[149] The Fourth Circuit Court of Appeals disagreed with the District Court, holding that the Commonwealth of Virginia had not "advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women."[150] The Court of Appeals held, "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."[151]

Virginia's response to the Fourth Circuit's ruling was to propose a parallel program for women, the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, a private liberal arts school for women.[152] This remedial plan was approved by the District Court, despite clear inequities in the educational environment and military training opportunities set out in the VWIL program.[153] A divided Court of Appeals affirmed the District Court's approval of the remedial plan.[154]

On appeal, the United States Supreme Court held that Virginia had failed to demonstrate an "exceedingly persuasive justification" for excluding all women from the citizen-soldier training provided at VMI.[155] The Supreme Court further held that the Mary Baldwin VWIL program did not provide an equal opportunity, and it reversed the Fourth Circuit's decision approving the remedial plan.[156]

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146. 10 U.S.C. § 2009 (2000).

147. United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *remanded to* 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *reh'g en banc denied*, 52 F.3d 90 (4th Cir. 1995), *aff'd*, 518 U.S. 515 (1996), *remanded to* 96 F.3d 114 (4th Cir. 1996).

148. *Virginia*, 518 U.S. at 523.

149. *Id.* at 525–26.

150. *Virginia*, 976 F.2d at 892.

151. *Id*.

152. *Virginia*, 518 U.S. at 526.

153. *Virginia*, 852 F. Supp. 484–86.

154. *Virginia*, 44 F.3d at 1229–51.

155. *Virginia*, 518 U.S. at 534.

156. *Id.* at 534.

In this important Supreme Court decision, the Court specifically addressed the argument that had been advanced that "admission of women would downgrade VMI's stature, destroy the adversative system, and with it, even the school."[157] The Supreme Court noted that this same argument had been made regarding admitting women to the federal military academies, citing specifically the testimony of Lt. Gen. A.P. Clark, Superintendent of the U.S. Air Force Academy, "It is my considered judgment that the introduction of female cadets will inevitably erode this vital atmosphere," and the statement of the Hon. H.H. Callaway, Secretary of the Army, "Admitting women to West Point would irrevocably change the Academy. . . . The Spartan atmosphere—which is so important to producing the final product—would surely be diluted, and would in all probability disappear."[158]

The VMI case was unfolding as Shannon Faulkner waged a similar battle to be able to enroll at The Citadel, a state-funded military college in South Carolina.[159] Faulkner had applied to and been selected for admission to The Citadel in early 1993, while the school remained a male-only military college.[160] The Citadel indicated that it was unaware of Faulkner's gender when it mistakenly admitted her.[161] When it realized she was a female, The Citadel revoked her admission and Faulkner filed suit.[162]

In August 1993, a preliminary injunction ordered that Shannon Faulkner be allowed to attend day classes at The Citadel, but the court did not require that she be permitted to join the Corps of Cadets.[163] In 1994, after a hearing on the merits of Faulkner's case, the District Court held that The Citadel's male-only admissions policy violated the Equal Protection Clause, and it ordered The Citadel to admit Faulkner to the Corps of Cadets.[164] Following Virginia's lead, the State of South Carolina proposed to create a parallel program at Converse College called the South Carolina Institute of Leadership for Women (SCIL).[165] The District Court had ordered The Citadel to admit Faulkner to the Corps of Cadets not later than August 12, 1995.[166]

Although The Citadel sought a stay of the action, to enable them to propose the Converse College plan as an alternative, the discovery battle that ensued prevented the parties from having the order reviewed before the August 12, 1995, date. And so it was that on August 12, 1995, Shannon Faulkner became the first woman admitted to the Corps of Cadets at The Citadel.[167]

157. *Id.* at 543.

158. *Id.* at 544 n.11.

159. Faulkner v. Jones, 858 F. Supp. 552 (D.S.C. 1994), *aff'd*, 51 F.3d 440 (4th Cir. 1995).

160. *Faulkner*, 858 F. Supp. at 554.

161. *Id.*

162. *Id.*

163. Faulkner v. Jones, 10 F.3d 226, 229 (4th Cir. 1993), *motion to stay mandate denied*, 14 F.3d 3 (4th Cir. 1994).

164. *Faulkner*, 858 F. Supp. at 569.

165. United States v. Jones, 136 F.3d 342, 344 (1998).

166. *Faulkner*, 858 F. Supp. at 569.

167. CNN.com, The Citadel Graduates First Woman in its History (May 8, 1999), http://www.cnn.com/US/9905/08/citadel.women/ (last visited Feb. 23, 2007).

After less than a week, Cadet Faulkner left The Citadel, "to the jubilation of the male student,"[168] due to "illness."[169] She was followed by others, including Nancy Mellette, who continued the litigation until the doors of The Citadel were legally opened to women.[170] It was not, however, until May 8, 1999, when Cadet Nancy Mace (the daughter of the Commandant of Cadets at The Citadel) became the first woman to graduate from The Citadel, that the doors were fully opened to women. Mace graduated *cum laude* with a degree in business administration.[171]

VII. SEXUAL MISCONDUCT, THE UNIFORM CODE OF MILITARY JUSTICE, AND THE RULE OF LAW

As more women were integrated into the services, the number of cases in which sexual misconduct was charged began to grab headlines throughout the United States. A 1997 report noted that, through 1988, the Air Force had brought no adultery charges against Air Force women, and in 1987, it brought only sixteen cases against men.[172] However, by 1996, there were sixty-seven cases in which adultery was included as at least one charge against both men and women in the military.[173]

From cases involving recruiter misconduct[174] to cases involving women in the service posing nude for magazines such as *Playboy* or *Penthouse*,[175] the challenges of fully integrating women into the armed forces began to clearly identify sexuality as a challenge to the military as an institution.

In April 1980, the publishers of *Playboy* magazine photographed seven military women in various states of uniform (un)dress.[176] The photos included three women from the U.S, Navy, and one each from the Army, Marines, Coast Guard, and Air Force.[177] The uniform response from all the Armed Forces was to involuntarily discharge the women.[178] The unexpected consequence of the *Playboy* discharges was the discovery that male service members also had posed

168. *Id.*

169. Mellette v. Jones, 136 F.3d 342, 345 (4th Cir. 1998).

170. *Id.*

171. Mace was one of three women admitted the year after Faulkner left The Citadel. The other two women left the school, citing harassment by the male cadets. Mace's father, Brig. Gen. Emory Mace, was the Commandant of Cadets at the time of his daughter's graduation. CNN.com, The Citadel Graduates First Woman in its History, (May 8, 1999), http://www.cnn.com/US/9905/08/citadel.women/ (last visited Feb, 23, 2007).

172. Via *Associated Press*, as reported in *The Bismarck Tribune*, May 17, 1997.

173. *Id*.

174. *See generally* United States v. Machado, No. ACM 35908, 2006 WL 1512106 (A.F. Ct. Crim. App. May 31, 2006), *review denied*, 64 M.J. 231 (C.A.A.F. 2006); United States v. Pope, 63 M.J. 68 (C.A.A.F 2006).

175. STIEHM, *supra* note 46, at 124–26.

176. *Id.* at 126.

177. *Id.* at 124–26.

178. *Id.*

nude for *Playgirl* magazine.[179] This discovery resulted in a male Marine major receiving a letter of reprimand,[180] although he was not discharged.[181]

In sharp contrast to the military's decision to discharge the women who posed for these magazines, the United States Court of Military Appeals in November 1986 affirmed the decision of the Air Force Court of Military Review that an Air Force lieutenant colonel charged with taking nude photographs of a female employee was entitled to have the offense dismissed because the charge was too vague to constitute conduct unbecoming an officer and a gentleman.[182] Lt. Col. David A. Shober had been the manager of the Officers' Open Mess at Wright-Patterson Air Force Base, Ohio, when he was charged with having sexual intercourse with a subordinate female bartender, and with taking nude photographs of her.[183] The same court also ruled that neither Lt. Col. Shober's sexual misconduct—some of which occurred in his office—nor his taking nude photographs of his civilian subordinate were criminal acts warranting his dismissal from the Air Force.[184] Although a military judge, sitting in a bench trial at the accused's request, found Lt. Col. Shober guilty of both offenses and sentenced him to dismissal and forfeiture of all pay and allowances, the Air Force Court of Military Review nevertheless held that the taking of nude photographs of a subordinate did not constitute conduct unbecoming an officer and modified the sentence by setting aside Shober's dismissal. Instead, it imposed a reprimand and forfeiture of $1500 pay per month for twelve months.[185] The Court of Military Appeals affirmed that decision and ordered Shober—who had been on leave status while awaiting a final decision on his appeal—returned to active duty.

The Air Force Court of Military Review opinion held:

> Not every deviation from the high standard of conduct expected of an officer constitutes conduct unbecoming an officer. The nude photographs were taken with the consent of the subject and were given to her upon her request. There is no indication that while the appellant had the photographs he used them for an illicit purpose. . . . Under the language of this allegation, any officer who has an interest in photography had best limit the subject matter to still-life, landscapes and fully-clothed models.[186]

179. *Id.*

180. *Id.* at 126.

181. More recently, in January 2007, the United States Air Force took action to demote Staff Sgt. Michelle Manhart for posing nude in the January 2007 edition of *Playboy*. Associated Press, *Playboy-Posing Sergeant Relieved of Duty*, CBS NEWS (online ed.), Jan. 12, 2007, http://www.cbsnews.com/stories/2007/01/12/print/main2354876.shtml (last visited Mar. 22, 2007).

182. United States v. Shober, 22 M.J. 253 (C.M.A. 1986).

183. United States v. Shober, 26 M.J. 502 (A.F.C.M.R. 1986).

184. *Id.* at 503.

185. *Id.*

186. *Id.* (citations omitted). The charge against Lt. Col. Shober stated:

> In that LIEUTENANT COLONEL DAVID A. SHOBER, United States Air Force, . . . did, at Wright-Patterson Air Force Base, Ohio, on or about December 1984, wrongfully take nude photographs of C.S., a subordinate civilian employee, not the wife of the said Lieutenant Colonel David A. Shober, at the Officer's Open Mess, which conduct was unbecoming an officer and a gentleman.

In December 1989, at Yokota Air Base, Japan, the Air Force brought court-martial charges against one of the most highly decorated fighter pilots from the Vietnam War, when they charged the Fifth Air Force Chief of Staff with violating the lawful order of his superior commanding officer on two occasions and committing adultery.[187] Col. Cisler was charged with and convicted of having engaged in a sexual liaison with an enlisted female air traffic controller. A panel of senior officers—composed of colonels and generals senior in grade to Cisler—sentenced him to serve two years in prison, to forfeit $2000 pay per month for twenty-four months, and to pay a fine of $10,000.[188] Cisler had been ordered on three occasions not to see the female airman any more, but after having received that order, he had continued his adulterous affair with the airman.

In August 1991, an Air Force captain—deployed in support of Operations Desert Shield and Desert Storm—was charged with conduct unbecoming an officer and a gentleman, adultery, and committing an indecent act with another[189] for having engaged in consensual sexual activity with two enlisted women. In one of the offenses, Capt. Hebert, the accused, acknowledged that he had engaged in the sexual activity in the presence of his paramour's roommate.[190] On appeal, Capt. Hebert argued that he had been the victim of selective prosecution, as his two enlisted paramours had only been given reprimands for their part in this activity.[191] Hebert's more novel argument, however, was that "conduct such as his was the norm in a deployment environment, and there was tacit acceptance of it as indicated by other instances of adulterous conduct known by him which went unpunished."[192] Hebert's appeal was unsuccessful and his sentence to dismissal and confinement for three months was affirmed.

In September 1991, the challenges posed by fully integrating women into the military and dealing with the attendant sexuality issues came to a boiling point with the disclosure of dishonorable conduct engaged in by naval aviators against women at the Tailhook Convention at the Las Vegas Hilton Hotel.

The Tailhook Association is a private organization composed of active duty, retired, and reserve Navy and Marine Corps aviators. It also includes defense contractors and others associated with naval aviation.[193] At the 1991

Id.

187. United States v. Cisler, 33 M.J. 503 (A.F.C.M.R. 1991). Adultery in this case was charged as conduct unbecoming an officer and a gentleman under the Uniform Code of Military Justice as a violation of 10 U.S.C. § 933 (2000). Failure to obey the lawful order of a superior commanding officer is charged as a violation of 10 U.S.C. § 891 (2000), but in some cases this may be charged as a violation of 10 U.S.C. § 892 (2000).

188. *Id.*

189. These offenses are charged under 10 U.S.C §§ 933–934 (2000).

190. Public performance of sexual activity may serve as the basis for an "indecent act" specification in military jurisprudence, which is a violation of 10 U.S.C. § 934 (2000).

191. United States v. Hebert, No. ACM 29622, 1993 WL 430214, at *1–10 (A.F.C.M.R. Sept. 14, 1993), *review granted*, 41 M.J. 105 (C.A.A.F. 1994), *aff'd*, 41 M.J. 376 (C.A.A.F. 1994), *cert. denied sub nom.*, McElroy v. United States, 513 U.S. 1192 (1995).

192. *Hebert*, 1993 WL 430214 at *3.

193. Lt. Cdr. J. Richard Chema, *Arresting 'Tailhook': The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV.1, 16 (1993).

convention, more than five thousand members attended, including several senior leaders of the Navy. The Secretary of the Navy and Chief of Naval Operations were present, as well as twenty-nine other active duty admirals, two active duty Marine Corps generals, three Navy Reserve admirals, and many other retired flag officers.[194]

Navy Lt. Paula Coughlin attended the convention, and she complained that she had been physically and sexually assaulted by a group of drunken aviators in a "gauntlet" formed in the hotel corridor.[195] What followed included investigations—and investigations of the investigations—that concluded that the Armed Forces had overlooked the need to establish a clear criminal consequence for engaging in sexual harassment under the Uniform Code of Military Justice.[196] In the end, no one was criminally charged for misconduct in the Tailhook events.[197]

In July 1993, a male military training instructor faced charges of forcible sodomy, indecent assault, communicating a threat, dereliction of duty and violating a command regulation for his conduct involving female trainees assigned to his military training unit.[198] In upholding his conviction and subsequent sentence of dishonorable discharge, three years' confinement, and reduction from the grade of E-4 to the grade of E-1, the Air Force Court of Criminal Appeals explained that the unique power a military training instructor held over the lives of enlisted trainees constitutes a constructive force that is sufficient to establish that the sodomy was forcible.[199]

In March 1998, Army Sgt. Maj. Gene McKinney was reduced to the grade of master sergeant following his conviction on the charge of obstructing justice.[200] McKinney, who had served in the Army for twenty-nine years and was the highest-ranked enlisted member of the Army at the time, was charged with pressuring six women for sex. Although, at his court-martial, McKinney was acquitted of the charges alleging that he had maltreated subordinates, communicated threats, committed adultery, and committed indecent assault involving female subordinates,[201] one of the individuals who had accused him of

194. *Id.* (citing DEP'T OF DEFENSE, OFFICE OF INSPECTOR GENERAL, TAILHOOK 91, PART 1—REVIEW OF THE NAVY INVESTIGATIONS 1–2 (Sept. 1992), *available at* http://www.mith2.umd.edu/WomensStudies/GenderIssues/SexualHarassment/tailhook-91 (last visited Mar. 25, 2007)).

195. Chema, *supra* note 193, at 17.

196. 10 U.S.C. §§ 801–946 (West Supp. 2007).

197. Chema, *supra* note 193, at 18. Chema notes that his information was current as of two years after the date of the events at Tailhook.

198. These offenses were charged in violation of 10 U.S.C. §§ 925, 934, 934, 892, 892 (2000), respectively.

199. United States v. McCreary, No. ACM 30753, 1995 WL 77637 (A.F. Ct. Crim. App. Feb. 15, 1995), *review denied*, 43 M.J. 157 (C.A.A.F. 1995).

200. McKinney v. White, 291 F.3d 851 (D.C. Cir. 2002); McKinney v United States, 51 M.J. 270 (C.A.A.F. 1998); McKinney v Caldera, 141 F. Supp. 2d 25 (D.D.C. 2001).

201. A court-martial is a criminal proceeding held in accordance with the Uniform Code of Military Justice. The trial in Sergeant Major McKinney's case was presided over by a military judge, properly appointed for duty in that role in accordance with 10 U.S.C. § 826 (2000). In McKinney's trial, he elected to be tried by a panel, which is generally like a jury, but which is composed exclusively of members of the military senior in grade to the accused. McKinney's panel included six men and two women. *McKinney sentenced to reduction in rank and reprimand*, CNN (online ed.), Mar.

pressuring her for sex tape-recorded McKinney instructing her to tell investigators that she had only spoken with McKinney about career development. It was for this conduct that McKinney was sentenced to be reduced to the grade of E-8. Shortly after his trial, he was permitted to retire.

Further scandals surfaced in January 2003. A female cadet sent an e-mail describing sexual assaults at the U.S. Air Force Academy to officials in the command structure.[202] The doors of the Air Force Academy were opened to investigate what became a wave of complaints alleging sexual assault and sexual harassment coming from female cadets. Investigators looked into as many as fifty-seven alleged sexual assaults at the Academy over a ten-year period beginning in 1993.[203]

A review by *The Denver Post* found that reports of sexual assaults and misconduct were not new, and that the Board of Visitors responsible for matters related to morale and discipline had not pursued previous reports of sexual assault.[204]

In 1995, the United States Air Force relieved the commander of the 12th Air Force, Lt. Gen. Thomas R. Griffith, of duty when evidence came to light that Lt. Gen. Griffith had engaged in a consensual affair with a civilian.[205] Although the military could have charged Griffith with an offense under the Uniform Code of Military Justice, he was subjected to a "grade determination" board upon his retirement shortly after he was relieved of his duties. The board concluded that Griffith, who had served in the military for twenty-eight years, should be retired as a major general, in essence suffering a one grade demotion for his allegedly criminal conduct.[206]

The next year, the Air Force brought court-martial charges against Lt. Col. Shelley "Scotty" Rogers, alleging that he had engaged in an unprofessional relationship with a female officer while he was the commander of an F-15 fighter squadron.[207] Rogers, who at the time was the commander of the 90th Fighter Squadron, was deployed with his unit from Elmendorf Air Force Base, Alaska to Aviano Air Base, Italy. He was charged with conduct unbecoming an officer by developing an unprofessional relationship with a subordinate member of his command, and with disorderly conduct on multiple occasions.[208]

16, 1998, http://www.cnn.com/US/9803/16/mckinney.sentence (last visited Mar. 22, 2007). "The sentence came from the same jury of six men and two women that last week convicted him of that count and acquitted him of 18 other charges in a high-profile court-martial involving allegations of sexual misconduct." *Id.*

202. *Hearing on Sexual Misconduct Allegations at the Air Force Academy Before the S. Armed Servs. Comm.*, 108th Cong. (2003) (statement of Air Force Secretary James G. Roche).

203. *Academy Board Heard of Abuse 20 Years Ago, But Did Little*, N.Y. TIMES, June 16, 2003, at A12.

204. *Id.*

205. Adultery was then, and is now, an offense under the Uniform Code of Military Justice, chargeable under 10 U.S.C. § 934 (2000), and punishable by one year of confinement and a dismissal from the service (in the case of an officer).

206. *General Loses Command*, N.Y. TIMES, June 27, 1995, at A14.

207. United States v. Rogers, 50 M.J. 805 (A.F. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 244 (C.A.A.F. 2000).

208. These offenses are chargeable under 10 U.S.C. §§ 933, 934 (2000), respectively.

In concluding that Lt. Col. Rogers' relationship with a female subordinate officer in his command amounted to criminal conduct, the Air Force Court of Criminal Appeals explained:

> Professional relationships are essential to the effective operation of the Air Force, but unprofessional relationships create the appearance that personal friendships and preferences are more important than individual performance and contribution to the mission. Because they erode morale, discipline and the unit's ability to perform its mission, they become matters of official concern.[209]

Rogers, who was selected for promotion to the grade of colonel while he was serving on this deployment, was convicted, sentenced to forfeit $2789 pay per month for four months, and reprimanded.[210]

The United States Air Force was not alone in attempting to bring the behavior of its personnel, male or female, into compliance with the established legal bounds of military service. In October 1995, the Navy removed three officers who had been nominated for promotion to admiral, all three removals based upon charges alleging sexual impropriety. One of the three, Capt. Everett L. Greene, was once the Navy's top equal opportunity officer, and had been in charge of the Navy's efforts to combat sexual harassment after the 1991 Tailhook Convention. Capt. Greene was tried by court-martial for sexually harassing two female aides.[211] The other two Navy captains removed from the list for promotion to flag officer received administrative sanctions for their conduct. Capt. Mark Rogers, who had been serving in the White House military office, was removed from the list after an investigation by the Navy Inspector General concluded that Rogers had persistently used coarse and degrading sexual language on the job, despite repeated objections by his co-workers.[212] Capt. Thomas J. Flanagan, once the commander of a submarine, was removed from the list after acknowledging to his superiors that he had engaged in a consensual sexual affair with a female lieutenant.[213]

In September 1996, the Army was rocked by scandal when female trainees at the Aberdeen Proving Ground training facility in Maryland alleged that they had been subjected to sexual assaults, forcible sodomy, and rape at the hands of their male training instructors and one of their company commanders. These allegations led to the criminal convictions of Staff Sgt. Delmar G. Simpson[214] and others. Additionally, the Army was coping with similar charges of misconduct by noncommissioned officers charged with training responsibilities of female military members at Fort Lee, Virginia, where Staff Sgt. Jeffrey L. Ayers, Sr. was convicted of indecent assault, violation of a lawful general regulation, adultery,

209. *Rogers*, 50 M.J. at 809 (citing Air Force Instruction (AFI) 36-2909, *Fraternization and Professional Relationships* (Feb. 20, 1995)). The 1995 version of AFI 36-2909 was superseded by subsequent revised versions of the Instruction. The current version, from May 1, 1999, is available at http://www.e-publishing.af.mil/pubfiles/af/36/afi36-2909/afi36-2909.pdf.

210. *Rogers*, 50 M.J. at 806.

211. Eric Schmitt, *Navy Kills Promotion of Two to Admiral*, N.Y. TIMES, Oct. 13, 1995, at A25.

212. *Id.*

213. *Id.*

214. United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003).

and similar offenses.[215] Convictions followed at many other training installations, including Fort Leonard Wood, Missouri, where Army and Marine military police were trained.

The cases involving training instructor misconduct were not limited to misbehavior by men, however. In 2001, the Air Force convicted Staff Sgt. Andrea L. Reeves of engaging in consensual sexual relationships with four trainees while she served as a military training instructor. Reeves was convicted of disobeying a general regulation and obstruction of justice in that she advised the trainee to get a lawyer and not to speak to investigators.[216] A panel of officer and enlisted members sentenced the female training instructor to a dishonorable discharge, confinement for six years, total forfeiture of all pay and allowances, and a reduction in grade from E-5 to E-1. The sentence to confinement was reduced to three years at the time of its execution.[217]

Predictably, perhaps, the response of the armed forces was to suggest that the clock should be turned back, and military officials as well as some members of Congress recommended a return to separate training programs for women in the armed services.[218] However, in 1997, Vice Adm. Patricia Tracey, the Navy's chief of education and training, testified at a Senate hearing against proposals for a return to segregated military training, stating, "Men and women who suspect they have been trained to different standards cannot have confidence in one another to boldly go into harm's way."[219]

In 1997, the Air Force was once again in the spotlight when it charged the first female to qualify as a B-52 bomber pilot with adultery, false official statements, and failure to obey the lawful orders of her superior commander.[220] First Lt. Kelly Flinn raised the public's awareness of how cases of sexual misconduct had been treated in the past, renewing public debate about whether women in the military were being subjected to the same or different standards when it came to cases of alleged sexual misconduct.

Lt. Flinn had broken the pilot barrier that previously kept women in the Air Force from flying in any aircraft qualified as a combat aircraft. By 1997, women were in the cockpits of cargo aircraft, but Lt. Flinn, an Air Force Academy graduate, had been selected as the first female to pilot the B-52 bomber aircraft.

But this success came to a crashing halt when allegations arose that Flinn had engaged in a consensual sexual relationship with Marc Zigo, who was married to a female airman in Flinn's squadron. Flinn's commander ordered her to stop seeing Zigo and to require him to move out of her home, where he had

215. United States v. Ayers, 54 M.J. 85 (C.A.A.F. 2000).

216. The offenses alleging disobeying a lawful general regulation were charged as violations of 10 U.S.C § 892 (2000). Reeves was charged with five specifications of violating orders. The offense alleging obstruction of justice was charged as a violation of 10 U.S.C. § 934 (2000).

217. United States v. Reeves, 61 M.J. 108 (C.A.A.F. 2005).

218. Philip Shenon, *Military Morality: The Overview; Cohen Criticized for His Support of A Top General*, N.Y. TIMES, June 6, 1997, at A1.

219. *Id.*

220. These are offenses chargeable under 10 U.S.C. §§ 934, 907, 891 (2000), respectively.

taken up residence. Flinn did not do so, resulting in the court-martial charges that grabbed headlines and sparked debate throughout the nation.[221]

Once Lt. Flinn's commander preferred the charges against her, there ensued a debate that brought out the positions of members of Congress, and which detailed the lack of consistency in treatment of cases in which adultery had been at least one charge included in a court-martial. Members of Congress urged the military to resolve Lt. Flinn's case with an administrative separation, and in the end, the Secretary of the Air Force, the first woman to serve in that post, Sheila Widnall, approved a general discharge for Flinn, who thereby avoided a criminal conviction for her conduct.[222]

Also, in 1997, the Navy relieved Rear Adm. R.M. Mitchell, Jr. of his duties as commander of the Navy Supply Systems Command at Mechanicsburg, Pennsylvania, as they investigated allegations that he had made unwanted sexual advances toward a subordinate military member.[223] That same week, the Army relieved Brig. Gen. Stephen Xenakis, head of medical operations in the Southeast United States, following allegations that Xenakis had engaged in an improper relationship with a civilian nurse who was caring for the General's wife, who was ill.[224]

Lt. Christa Davis, also a graduate of the Air Force Academy, was charged with a variety of offenses stemming from her adulterous affair with a married officer who had been one of her instructors at the Academy.[225] Davis' charges, which initially included adultery, were modified following the high-profile discussion of sexual misconduct in the Flinn case, resulting in charges of dereliction of duty, failure to report to duty, making a false official statement, and conduct unbecoming an officer.[226] Davis' case was ultimately resolved through non-judicial punishment. She paid a fine of $2000 and received a reprimand. She was also separated from the Air Force and was required to repay the $13,000 cost of her education at the Air Force Academy.[227]

As these cases drew higher levels of attention, additional allegations of sexual misconduct of senior officers in the military began to garner attention. In

221. Editorial, *Embarrassed Air Force Ready for Court-Martial*, S. F. CHRON., May 16, 1997, at A18; *Flinn Rejoins Civilian Life; Discharge Goes Into Effect*, ORLANDO SENTINEL, May 30, 1997, at A16; Jube Shriver, Jr., *Female Ex-Bomber Pilot Will Appeal Air Force Discharge, Attorney Says*, L.A. TIMES, May 26, 1997, at A16.

222. Among the legislators publicly voicing their support for Flinn's administrative separation in lieu of a court-martial action were then-Senate Majority Leader Sen. Trent Lott (R-Miss.) and Sen. Olympia Snowe (R-Me.), then the only woman on the Senate Armed Services Committee. *Female Ex-Bomber Pilot Will Appeal Air Force Discharge, Attorney Says*, L.A. TIMES, May 26, 1997, at A16.

223. Eun-Kyung Kim, *Sexual Harassment Alleged Against Admiral, Top Army Official*, ASSOCIATED PRESS, May 31, 1997; Dana Priest & Jackie Spinner, *Army Misconduct Probe Digs Deeper; Aberdeen Commander's Departure May Become Issue in Courts-Martial*, WASH. POST, June 4, 1997, at A03.

224. Dana Priest & Jackie Spinner, *Army Misconduct Probe Digs Deeper; Aberdeen Commander's Departure May Become Issue in Courts-Martial*, WASH. POST, June 4, 1997, at A03.

225. Arthur Brice, *Air Force Drops 9 Charges Against Female Officer*, ROCKY MTN. NEWS, May 31, 1997, at 44A.

226. These are offenses charged under 10 U.S.C. §§ 892, 886, 907, 933 (2000), respectively. Davis faced a maximum sentence of ten years and a dismissal from the Air Force for her misconduct.

227. *News in Brief*, CHARLESTON DAILY MAIL, Aug. 5, 1997, at P3A; Gary Janousek, Letter to the Editor, *Cruel, Unjust Punishment*, AUSTIN AM.-STATESMAN, Nov. 19, 1997, at A14.

June 1997, Maj. Gen. John Longhouser, then the commander of the Army's Aberdeen Proving Ground in Aberdeen, Maryland, was permitted to retire when an anonymous complaint led to discovery that he had engaged in an affair prior to 1992.[228] Longhouser's conduct came to light following allegations by women recruits attending basic training at the Aberdeen Proving Grounds alleging that they had been raped by their drill sergeants. A hot line established to handle calls related to the alleged sexual misconduct by male drill sergeants resulted in the retirement of the highly decorated Longhouser, who was a 1965 graduate of the United States Military Academy at West Point. Like the Air Force's 12th Air Force Commander, Gen. Griffith, Longhouser was permitted to retire. A grade determination board determined that he last served honorably as a brigadier general, and he was retired with a demotion to that grade.[229]

Public criticism of what appeared to be an unequal application of military standards crescendoed when, in June 1997, Gen. Joseph Ralston, then the Vice Chief of Staff for the Office of the Joint Chiefs of Staff, was being considered for the position of Chief of Staff. Ralston's adulterous affair, which had occurred while he was in the military some thirteen years earlier, surfaced as an obstacle to his appointment to the position for which he had been the front runner. Despite the revelation of the affair, Ralston was permitted to stay in the military, and in August 1999, even given the position as Supreme Commander of NATO Forces in Europe.[230] When withdrawing his name from candidacy for the position of Chairman of the Joint Chiefs of Staff in 1997, Ralston noted his regret that the nation saw the cases of Flinn and Ralston as comparable. In a written statement, he said: "My regret is that the public discussion surrounding my potential nomination blurred the facts in a number of cases and gave the appearance of a double standard regarding military justice."[231] In an ironic side note, military critics questioned whether Ralston should be allowed to continue his military service, despite his long and distinguished career, when just two years earlier Ralston, then-Lt. Gen. Griffith's immediate superior commander, had forced Griffith to retire when Griffith's adulterous affair with a civilian had been disclosed.[232]

Shortly before Ralston was named to the top NATO post, the Army court-martialed retired Maj. Gen. David Hale (another NATO commander) for having adulterous affairs with the wives of four subordinates, including the wife of his aide-de-camp. Hale was convicted in March of 1999 after pleading guilty to seven counts of 'conduct unbecoming an officer' and one count of 'making false

228. *Aberdeen General to Retire After Admitting Adultery*, SAN ANTONIO EXPRESS-NEWS, June 3, 1997, at A1.

229. *Id*.

230. Elizabeth Becker & Melinda Hennenberger, *Disgraced General, Now Redeemed, Resurrected, Rewarded*, PITT. POST-GAZETTE, Aug. 5, 1999, at A-7; Paul Richter, *General Ralston Drops Joint Chiefs Bid After Adultery Flap*, L.A.TIMES, June 10, 1997, at A1.

231. Paul Richter, *General Ralston Drops Joint Chiefs Bid After Adultery Flap*, L.A. TIMES, June 10, 1997, at A1.

232. Philip Shenon, *Military Morality: The Overview; Cohen Criticized for His Support of A Top General*, N.Y. TIMES, June 6, 1997, at A1.

official statements'.[233] Hale was sentenced to pay a $10,000 fine and to forfeit $12,000 of his retirement pay during the next twelve months. He had faced a sentence that included eleven years in prison.[234]

In April 1999, a married male Air Force pilot and father of five children, pled guilty in his court-martial to obstruction of justice, fraternization, and conspiracy charges.[235] Capt. Joseph Belli was a tanker pilot when he began a consensual sexual affair with Airman Susan Redo in 1997. The offenses with which Belli was charged carried a maximum sentence of twenty-two years in prison and a dismissal. Belli was sentenced to be dismissed from the Air Force and to serve fifteen days in jail.[236]

In 2005, the Air Force's top lawyer, Maj. Gen. Thomas J. Fiscus, then the Judge Advocate General of the United States Air Force, was approved to retire in the permanent grade of colonel, following punishment under the military's nonjudicial or administrative punishment system[237] for conduct unbecoming an officer,[238] fraternization,[239] engaging in unprofessional relationships,[240] and obstruction of justice.[241] Fiscus graduated from the Air Force Academy in 1972.

The report on Fiscus' involvement with enlisted members, civilians, and officers—all while he was serving as the Air Force's highest ranking legal officer in uniform—detailed inappropriate relationships with thirteen women, including six active-duty judge advocates, two paralegals (usually enlisted members of the Air Force), one civilian Department of Defense employee, and four other civilians.[242] In his non-judicial punishment action, Fiscus was ordered to forfeit one-half of his pay per month for two months and was reprimanded for misconduct which had occurred over a ten-year period, according to the report. The Secretary of the Air Force also took action to approve Gen. Fiscus' retirement in the grade of colonel, which meant that the former two-star general would retire in a grade two steps below that in which he was serving at the time

233. These offenses are charged under 10 U.S.C. §§ 933, 907 (2000), respectively. Nine other charges against Hale were withdrawn as a condition of his plea bargain with the Army. Laurence M. Cruz, *Retired General Fined, Reprimanded for Affairs*, ASSOCIATED PRESS, Mar. 18, 1999.

234. Laurence M. Cruz, *Retired General Fined, Reprimanded for Affairs*, ASSOCIATED PRESS, Mar. 18, 1999.

235. These offenses are chargeable under 10 U.S.C. § 934 (2000) (obstruction of justice and fraternization) and § 889 (2000) (conspiracy).

236. John Howard, *Pilot Dismissed from Air Force: Childhood Dreams End in Court-Martial*, ASSOCIATED PRESS, April 29, 1999.

237. 10 U.S.C. § 815 (2000).

238. Conduct unbecoming an officer is a criminal offense, chargeable under Article 133 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 933 (2000).

239. Fraternization is a criminal offense, chargeable under Article 134 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 934 (2000).

240. Engaging in an unprofessional relationship may be charged as a violation of Article 92 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 892 (2000), or it may also be charged as the offense of conduct unbecoming an officer, in violation of Article 133 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 933 (2000).

241. Obstruction of justice is a criminal offense, chargeable under Article 134 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 934 (2000).

242. Press Release, United States Air Force, Air Force's Top Military Lawyer to Retire in Reduced Rank (Jan. 10 2005), http://www.af.mil/pressreleases/release.asp?storyID=123009553 (last visited Feb. 23, 2007).

his misconduct was discovered. The case marked the first time in the history of the military where a Judge Advocate General, the most senior uniformed lawyer in a service branch, was relieved of his duty for unprofessional conduct.[243]

The obvious difficulty posed by these high-profile cases is to explain to the general public how the rule of law was being applied fairly and impartially, not only considering gender as in the cases of Lts. Flinn and Davis, but also as it pertained to grade of the offender. Cases involving very senior commissioned officers resulted, almost exclusively, in nonjudicial punishment actions or administrative sanctions, with the final outcome being that each was permitted to retire and to draw their military pension, albeit at a lower grade. Because the legal impediments to women in the service precluded women from achieving the grade or rank of their male counterparts charged with these sexual offenses in the years between 1988 and 2005, there was a *de facto* inability to draw adequate comparisons. In each high-profile case involving accused women, the member was very junior. In each case involving general officers engaged in serious misconduct, the rationale routinely applied was the length of their service and their distinguished military careers. Critics of these actions argued that the existence of a history of systemic discrimination which precluded women from advancement should not be further rewarded by the application of a double standard which resulted in women being judged more harshly than their male superiors who were being permitted to retire with honorable discharges.

However, the more perplexing dilemma posed in the tortured history surrounding the application of the Uniform Code of Military Justice in the last thirty years is to explain to the outside observer how women could believe that they were equally protected under the Code when it was a dischargeable offense to pose for a magazine that was sold on news stands to service members, but was not criminal at all for a male supervisor to take nude photos of a subordinate woman employee, provided he gave them back to her if she asked for them. How could the services explain that it could take more than two years to decide that being drunk at a hotel at a convention gave male military members license to form a gauntlet where women in the military would pass by and be groped by their co-workers and strangers alike, and face no risk of having action taken against them?

It had to be difficult even for male members of the military to understand how their superiors—superiors involved in consensual relationships with other women outside of their marriages—could exert pressure on junior members in their command to force them to retire before they had planned to leave the military (as in the case of Gen. Griffith), only to later see that same supervisor supported for higher levels of command and responsibility by the civilian leadership of the armed forces.

As with much of the history of women in the military, there was little about the rule of law that seemed applicable to the military services. Certainly, considering that the cases detailed above all arose after the Equal Rights Act of 1964 and the Equal Pay Act of 1963, one had to wonder how the exercise of

243. Thomas E. Ricks, *Top Air Force Lawyer Steps Aside, Investigators Examine Alleged Sexual Conduct with Subordinate*, WASH. POST, Sept. 30, 2004, at A02.

discretion left to commanders under the military system of justice, and whether the past hostility detailed in the legislative proscriptions to women's service, were now being applied in the way the rule of law was going to be enforced.

VIII. THE WAY AHEAD

The glass ceiling created by the Integration Act of 1948 and the social opposition to opening combat opportunities to qualified women continue to play a significant role in inhibiting the advancement of women in the military in the United States. Though much progress has been made, it has been slow, and has come in fits and starts.

According to the Women in Military Service Memorial for America, women serving in the U.S. military are still restricted from serving in a variety of positions. These include:

> (1) Army: Infantry, armor, special forces, combat engineering companies, ground surveillance radar platoons and air defense artillery batteries.
>
> (2) Air Force: Pararescue, combat controllers, and "those units and positions that routinely collocate with direct ground combat units."
>
> (3) Navy: Submarines, coastal patrol boats, mine warfare ships, SEAL (special forces) units, joint communications units that collocate with SEALS, and support positions (such as medical, chaplain, etc.) collocated with Marine Corps Units.
>
> (4) Marine Corps: Infantry regiments and below, artillery battalions and below, all armored units, combat engineer battalions, reconnaissance units, riverine assault craft units, low altitude defense units, and fleet anti-terrorism security teams.[244]

Women remain barred from "combat" positions, though hearings in the 1970s eventually (but begrudgingly) led to the opening of some career fields previously closed to women. The hearings on admission to women in the service academies, and the progress made through court decisions involving the state-sponsored military academies like VMI and The Citadel, led to further hearings regarding the role women might play in the armed forces. Beginning on March 6, 1972, Rep. Otis Pike (D-N.Y.) chaired hearings on the role of women in the military.[245] One recommendation made during those hearings was that women should be permitted to serve as pilots.[246] Women had long before then established their ability to serve as pilots, having performed duties as Women Airforce Service Pilots (WASPS) during World War II.[247] More than 1100 female pilots had flown for the Army Air Forces during World War II as civilians. But since they were civilians, these women did not receive pensions or other benefits after the war.[248]

244. Women in Military Service for America Memorial Foundation, Inc., History and Collections, http://www.womensmemorial.org/H&C/History/history.html (last visited Feb. 12, 2007) [hereinafter WIMS, History and Collections].

245. HOLM, *supra* note 4, at 250–51.

246. *Id.* at 317.

247. NATHAN, *supra* note 8, at 38–39.

248. *Id.* at 43.

It was the Navy and then the Army, and finally (but reluctantly) the Air Force, who put women in the cockpits after the 1972 Pike hearings. The Navy, in August 1972, under Adm. Elmo Zumwalt, moved closer toward permitting women to serve aboard ships and toward allowing women into its pilot program; in 1973, six Navy women became the first to win pilot wings and to be designated naval aviators.[249] The Army followed suit, when Lt. Sally Murphy became its first female helicopter pilot in June 1974.[250]

Unlike its Navy and Army counterparts, the Air Force did not start its "test program" for women pilots and navigators to be used in non-combat flying until 1975[251] and did not graduate its first women from pilot training until 1977.

The barriers faced by women in the Air Force interested in flying in fighter and bomber aircraft is demonstrated by the slow progress made despite their successes in the pilot training programs in which they were permitted to participate. Some fifteen years after women were permitted to fly in non-combat aircraft, in his testimony in 1992 before the Senate Armed Services Committee, Gen. Merrill A. McPeak, then the Air Force Chief of Staff, testified before the Senate and admitted that women were capable of flying combat aircraft. He added, however, that he personally would choose a male pilot over a more qualified woman. McPeak stated, "I have a very traditional attitude about wives and mothers and daughters being ordered to kill people."[252]

In 1977, Secretary of Defense Harold Brown directed that the services examine additional ways to increase the use of women in the military. Secretary of the Air Force John C. Stetson opened up the Titan II missile field to women, and by mid-1979 thirteen women had graduated from the Titan missile training program: four were assigned as combat crew commanders and nine were assigned as deputy commanders.[253]

Despite these advances, women remained barred from duties which were essential to promotions to senior enlisted and officer grades. It was November 1978 before women were able to report to duty aboard Navy ships,[254] but they were still excluded from serving aboard combat ships.

Generally, the exclusion of women from combat roles is defined in 10 U.S.C. §§ 6015 and 8549, which were part of the "glass ceiling" created by the 1948 Women's Armed Services Integration Act. Those provisions specifically prohibited putting women aboard Navy ships or on Navy and Air Force aircraft engaged in combat missions. In regulations promulgated by the services, these laws were interpreted to exclude women in ground combat specialties as well. But the law did not specifically address these missions.

Despite the absence of specific prohibitions other than those imposed upon the Navy and the Air Force by statute, the services have continued to maintain that women cannot and should not serve in direct combat roles. However,

249. *Id.* at 317.

250. *Id.* at 319.

251. *Id.* 320–21.

252. Nancy Duff Campbell & Shirley Sagawa, Women in Combat (Oct. 30, 1992) (unpublished issue paper, National Women's Law Center), *available at* http://www.nwlc.org/pdf/Combat.pdf.

253. HOLM, *supra* note 4, at 325.

254. *Id.* at 327.

beginning in Operation Urgent Fury, in October 1983 in Grenada, women were deployed in support of the operation, serving as military police officers. They provided checkpoint and roadblock support, and they also served as interrogators for individuals who were held as prisoners of war. Women also served with the Army as helicopter pilots, crew chiefs and maintenance personnel in Grenada.[255]

The actions in Grenada inched women closer to breaking through the policy-imposed barriers to women serving in combat roles. In December 1989, during Operation Just Cause in Panama, Capt. Linda Bray and the 988th Military Police Company engaged in what was described as an infantry-style firefight, shattering the myth that women did not and could not serve in combat.[256] Women also served in roles as helicopter pilots in Panama, and at least two of the women who did so came under heavy enemy fire. A female pilot on a helicopter supply mission was also fired upon.[257]

Although the public was now aware of women and their performance in combat, the military as a whole continued to resist the full integration of women into those roles traditionally assigned as combat roles. In 1990, Lt. Gen. Thomas Hickey, then the Director of Personnel for the Air Force, testified before the Senate Armed Services Committee in March that there was probably not a combat job in the Air Force that women could not do. Hickey, however, relied upon the existence of a legislative bar to combat as justification for keeping these career fields and opportunities closed for women in the Air Force.[258]

However, only five months later, when Operations Desert Shield and Desert Storm began, women were finally put to the test as the United States found itself engaged in the defense of Kuwait against Saddam Hussein. Among all Army personnel deployed in support of the 1991 Gulf War, 9.7% were women.[259] All services deployed some women, and the total of all services was approximately 7.2% of the forces deployed in support of the operations.[260]

Women were among the casualties and captives in Desert Shield and Desert Storm during the brief hostilities.[261] Thirteen women were killed in combat-related missions, and two women, Maj. Rhonda Cornum and Spec. Melissa Rathbun-Nealy, were detained as prisoners of war.[262]

This, of course, was not the first time that women in the U.S. military had lost their lives in support of military operations, nor was it the first time that women in the U.S. military had been taken as prisoners of war. More than four hundred nurses and fifty-seven Navy Yeomen (female) died during World War I, mostly from the deadly outbreak of Spanish flu that appeared near the end of

255. *Id.* at 404.

256. *Id.* at 435.

257. *Id.* at 435.

258. *Id.* at 432.

259. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF CONFLICT: AN INTERIM REPORT TO CONGRESS, at 10-1, 10-2 (1991).

260. *Id.*

261. Gen. Holm details the stories of many of these women in her book. HOLM, *supra* note 4, at 450–61.

262. *Id.*, at 456–58.

the war.[263] In World War II, despite a concerted effort to keep service women from playing combat roles, many came under attack. In late 1942, a ship carrying some of the first U.S. Army women deployed overseas was attacked by a German submarine. Five women officers were rescued by a British warship, and the officers were taken to North Africa to begin working there.[264] Six Army nurses died in early 1944 when a bomb hit hospital tents during a battle on Anzio beach in Italy.[265] Overall, more than four hundred U.S. servicewomen and nurses died serving in World War II.[266]

In Spring 1942, eighty-one women serving with the military, including sixty-six Army nurses, eleven Navy nurses, and three Army dietitians, were captured when U.S. forces were defeated in the Philippines.[267] They were held for 2.5 to three years as prisoners of war. Although many U.S. service members died in the POW camps, all of these women survived. Five more Navy nurses were taken prisoner by Japan during fighting in Guam, and one Army flight nurse was captured by the Germans when the plane she was aboard as a flight nurse was shot down.[268] Women also served in nursing and related duties in Vietnam, and many are memorialized alongside their male counterparts at the Vietnam Memorial.[269]

Although women had clearly been placed in positions that resulted in their death or capture, it was clear that they were not being assigned to combat roles as generally defined until the conflicts in Grenada, Panama, and finally Desert Shield and Desert Storm. Just five months before the deployments that sent women into Desert Shield and Desert Storm, Gen. Hickey had given his testimony indicating that change would have to come from Congress. And yet it had not. In fact, the laws upon which the military had relied to deny women the opportunities that their male counterparts had experienced had not changed. But, as with changes arising in the past, the realities of war and the necessity to meet the mission of the military resulted in *de facto* deployments that placed women in the position of performing combat roles.

What is significant about these combat opportunities, in addition to the experience they provide and the respect they garner among the contemporaries and peers of military servicewomen, is the impact that they have on opportunities for promotion and other career enhancements. For example, among enlisted members, a portion of the promotion calculation has included scores assigned to military awards and decorations. Those awards and decorations earned in support of combat operations can carry significant points toward military promotion. Women who have been deployed in support of combat operations have fitness evaluations or performance reports that allow

263. NATHAN, *supra* note 8, at 32.

264. *Id.* at 41.

265. *Id*.

266. *Id*.

267. *Id.* at 45.

268. *Id*.

269. Gen. Holm discusses several of those who died, including Capt. Mary T. Klinker, an Air Force nurse who died on April 4, 1975 in the crash of a C-5A Galaxy aircraft that was carrying Vietnamese orphans out of the country, and 1st Lt. Sharon Lane, who died of shrapnel wounds during an enemy rocket attack on an evacuation hospital. HOLM, *supra* note 4, at 241–42.

them to compete on a more balanced playing field; they too can now be recognized for air support for combat operations or for strategic and tactical successes under extreme conditions.

One of the final legislative barriers to women serving in combat roles came to an end in December 1991. After heated debate, the passage of the 1992 Defense Authorization Act, signed on December 5, 1991, resulted in the repeal of laws banning women from flying on combat missions in the Air Force and Navy. That legislation also established the Commission on the Assignment of Women in the Armed Forces, and it authorized the Secretary of Defense to waive the remaining combat exclusion law to conduct test assignments of female service personnel in combat positions. Though the Commission's work was to be completed one year later, the controversy remains, as women continue to be excluded from direct combat roles in many fields.[270]

In December 2004, The Washington Post reported that an Army internal document had advocated changing the collocation policy, removing the restrictions on women in combat, and allowing equal treatment for military service members without regard to gender.[271]

It was against this backdrop that Congress passed the National Defense Authorization Act for Fiscal Year 2006, taking yet another stab at refining the role of women in the military. In that legislation, Congress added § 652 to Title 10 of the United States Code. This section requires, among other things, that Congress be notified if the Secretary of Defense (1) proposes to make any change to the ground combat exclusion policy or (2) opens or closes any military career designator to women in the service. The Secretary of Defense's proposed change can only take place after the end of a period of sixty days of continuous session of Congress following the date on which such report is received.[272]

The legislation specifically details that the "ground combat exclusion" has been implemented not by law, but by military personnel policies of the Department of Defense and the military departments, since at least October 1, 1994.[273]

In 10 U.S.C. § 652(a)(6), the Secretary of Defense must notify Congress in advance of making assignments available to women for service aboard any class of combat vessel, on any type of combat platform, or with any ground combat unit.

As with the many controversies that have embattled progress for women at every step in their integration into the Armed Services, the issue of women in combat evokes a strong emotional response whenever it is raised. In this May 2007 symposium issue and in a June 2006 article, Elaine Donnelly of the Center for Military Readiness argued that women should no longer be permitted to

270. *See* WIMS, History and Collections, *supra* note 244.

271. Rowan Scarborough, *Report Leans Toward Women in Combat*, WASH. TIMES, Dec. 13, 2004, at A01.

272. 10 U.S.C. § 652 (West Supp. 2007).

273. 10 U.S.C. § 652(a)(4) (West Supp. 2007).

serve in the roles in which they are currently serving in Iraq.[274] Donnelly has strongly opposed an increased role for women in the military and has specifically opposed any use of women in combat roles.

The current debate is one that is best viewed within the overall historical context of women in the military and the concept of the rule of law. Perhaps it is unsurprising that, more than forty years after the Civil Rights Act of 1964, members of the legislative branch, as well as those in positions to engender policy for and within the U.S. military, continue to limit opportunities for women in fields in which they have a proven competence. According to figures released by the Pentagon, more than thirty-nine women have died in Iraq since the 2003 invasion, most of them killed by hostile fire.[275] Despite so many women having made the ultimate sacrifice, women's service in combat is still discouraged.

As Sagawa and Campbell concluded in 1992, "[W]hen women who serve in the Gulf come up for promotions, they may be passed over because current policies deny women the experience that provides a route to higher-level jobs. . . . Until qualified women are given access to assignments that are central to the military's mission, they will be marginalized."[276]

The policies remaining that bar the full integration of women into the military are a reflection of military culture and tradition. Gen. Jeanne Holm, as long ago as 1977, told the Senate Joint Economic Committee, "Increased utilization of military women has always been a difficult concept for the military to accept. They [military decision makers] have traditionally thought of military women as the resource of last resort, after substandard males, . . . and civilians."[277]

Those responsible for making the decisions regarding implementation of women in combat roles would be well-served by a review of the constitutional commitment in the United States to the rule of law and to the tortured treatment of women within the military despite domestic legal requirements to treat each citizen equally, regardless of race, gender, religion, and similar protected characteristics.

IX. SUMMARY

This article has offered a brief review of the historical legal barriers which have limited the enlistment or entry of women into commissioned service in the defense of the United States of America. It has also reviewed the

274. Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 813 (2007); Elaine Donnelly, *Rumsfeld Dithers on Women in Combat*, CTR. MIL. READINESS (online ed.), June 16, 2006, http://www.cmrlink.org/WomenInCombat.asp?docID=273 (last visited Feb. 23, 2007).

275. Bryan Bender, *Combat Support Ban Weighed for Women: Pentagon Opposes GOP Proposal*, BOSTON GLOBE, May 18, 2005, at A1.

276. Capt. Judith M. Galloway, *Women in Combat: The Need for Cultural Reconditioning*, AIR UNIV. REV. (online ed.), Nov.–Dec. 1978, http://www.airpower.maxwell.af.mil/airchronicles/aureview/1978/nov-dec/galloway.html (last visited Feb. 12, 2007).

277. *Id.* (citing *The Role of Women in the Military: Hearing Before the Sen. Subcomm. On Priorities and Economy in Gov. of the S. Joint Econ. Comm.*, 95th Cong. 95 (1977) (statement of Maj. Gen. Jeanne Holm)).

implementation and enforcement of the legislative enactments, executive orders, and policy and regulatory actions which raise questions as to the rule of law and its application to women in the service.

There has been slow and steady progress made toward ensuring that our nation enjoys the services of its best qualified military members without regard to their gender. Underpinning this progress is the rule of law and the basic concept that each person is entitled to equal protection under the law. It has taken more than two hundred years to achieve an understanding of what this means in terms of the role of women in the service of their nation. It is clear now that only the services' personnel policies bar women from entering military specialties currently closed to them. The weight of both history and the law suggests that these barriers will also fall because they cannot survive strict scrutiny.

A Current Glance at Women in the Law

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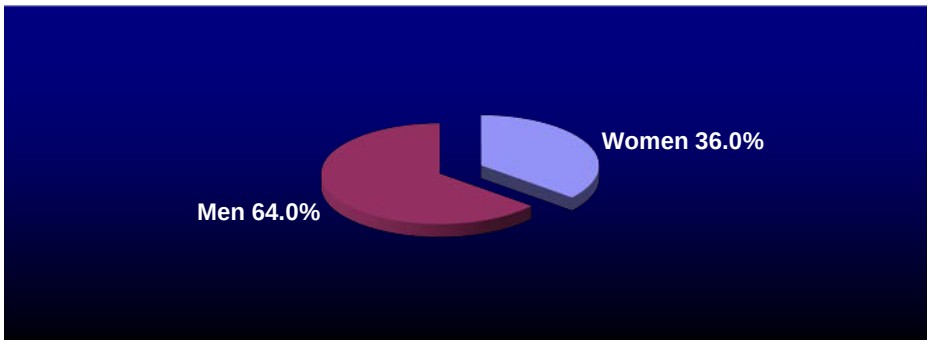
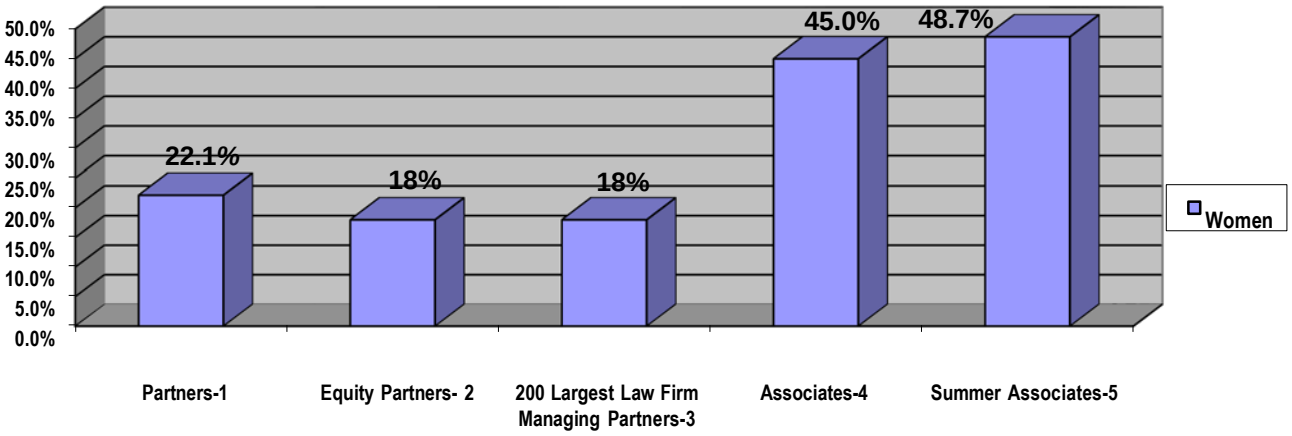


American Bar Association Market Research Department, April, 2016.

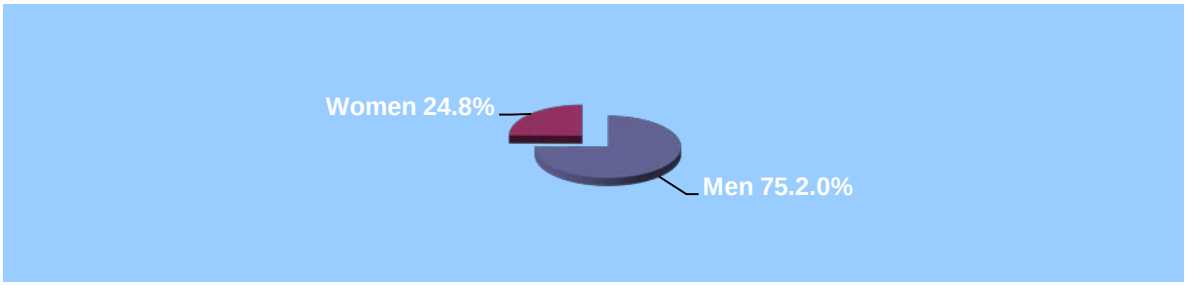
Women in Private Practice



[1] *2016 Report on Diversity in U.S. Law Firms*. National Association for Law Placement, January, 2017. www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf
[2] *Report of the Ninth Annual National Survey on Retention and Promotion of Women in Law Firms*. National Association of Women Lawyers and NAWL Foundation, October 2015. www.nawl.org/p/cm/ld/fid=82#surveys
[3] *Report of the Ninth Annual National Survey on Retention and Promotion of Women in Law Firms*. National Association of Women Lawyers and NAWL Foundation, October 2015. This figure represents the 25 firms that reported having a single managing partner. www.nawl.org/p/cm/ld/fid=82#surveys
[4] *2016 Report on Diversity in U.S. Law Firms*. National Association for Law Placement, January, 2017. www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf
[5] *2016 Report on Diversity in U.S. Law Firms*. National Association for Law Placement, January, 2017. www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf

Women in Corporations

Fortune 500 General Counsel



MCCA's 17th Annual General Counsel Survey: Breaking Barriers, One Person at a Time. Minority Corporate Counsel Association, November/ December 2016. www.diversityandthebardigital.com/datb/november_december_2016?pg=21#pg22

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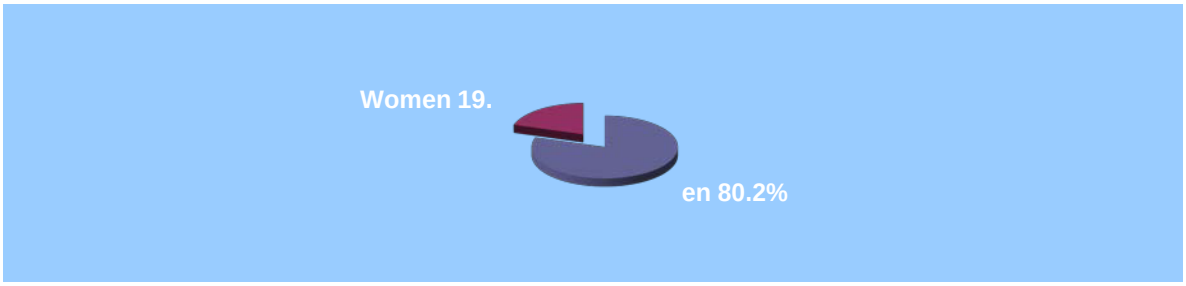

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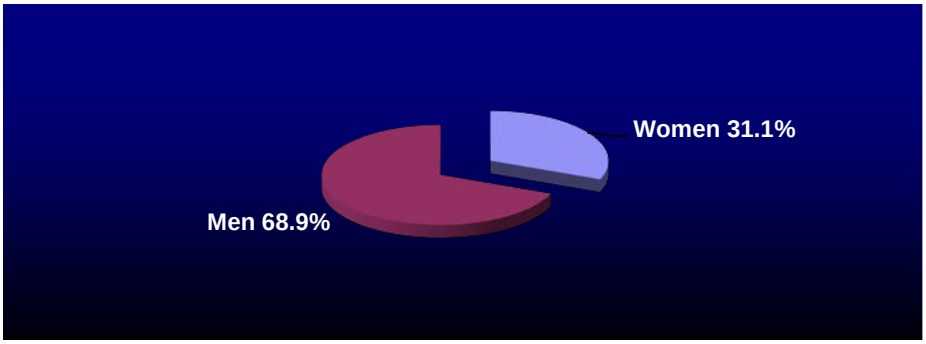
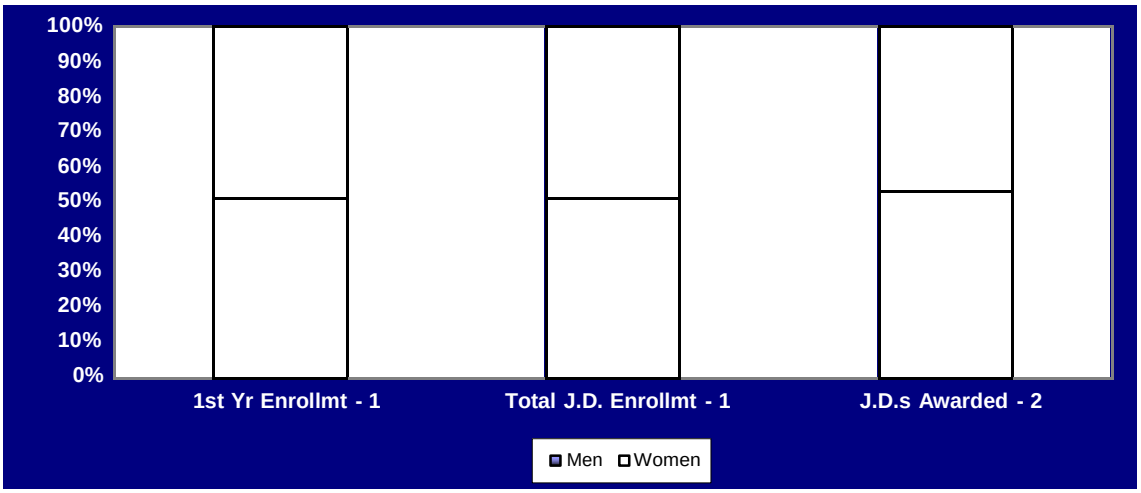
Law School Administration - Deans



Association of American Law Schools (January 13, 2016). This represents 183 deans at AALS member schools, three of which have two co-deans each, and includes permanent and interim deans.

Women in Law Schools



[1]*Enrollment and Degrees Awarded,* 2014-2015 Academic Year. American Bar Association Section of Legal Education and Admissions to the Bar.
[2]*J.D. and LL.B. Degrees Awarded,* 2010-2011 Academic Year. American Bar Association Section of Legal Education and Admissions to the Bar.
www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_llb_degrees_awarded.pdf

Women on Law Reviews[1]

Survey	Leadership Positions	Editors-in-Chief
Top 50 schools ranked by *U.S. News & World Report*	46%	38%
New York Law School Law Review (NYLS) – all law schools not ranked in Top 50	56%	51%
Combined sample (Top 50 & NYLS)	54%	49%

[1] 2012-2013 *Law Review Diversity Report. New York Law School Law Review* and Ms. JD, December 2013.
www.nylslawreview.com/wp-content/uploads/sites/16/2013/12/Law-Review-Diversity-Report-2013.pdf

Women in the Judiciary

Representation of United States Federal Court Women Judges

Type of Court	Total # of Seats	Women	% of Women
United States Supreme Court	8	3	37.5%
Circuit Court of Appeals (Active)[1]	167 active	60	35.9%
Federal District Court Judges (Active) in the U.S.			33%[2]

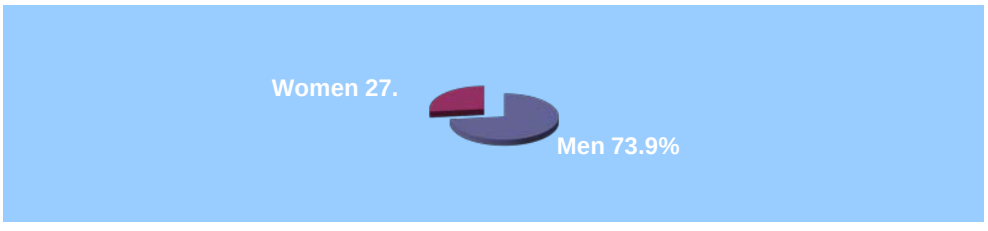
[1] *Women in the Federal Judiciary: Still a Long Way to Go*. National Women's Law Center, October, 2016. http://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf
[2] *Women in the Federal Judiciary: Still a Long Way to Go*. National Women's Law Center, October, 2016. http://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf

2016 Representation of United States State Court Women Judges

Type of Court	Total # of Seats	Women	% of Women
State Final Appellate Jurisdiction Courts	353	122	34.6%
State Intermediate Appellate Jurisdiction Courts	991	344	34.7%
State General Jurisdiction Courts	11,778	3,502	29.7%
State Limited and Special Jurisdiction Courts	4,884	1,628	33.3%
All State Court Judges in the U.S.	18,006	5,596	31.1%

National Association of Women Judges. www.nawj.org/statistics/2016-us-state-court-women-judges

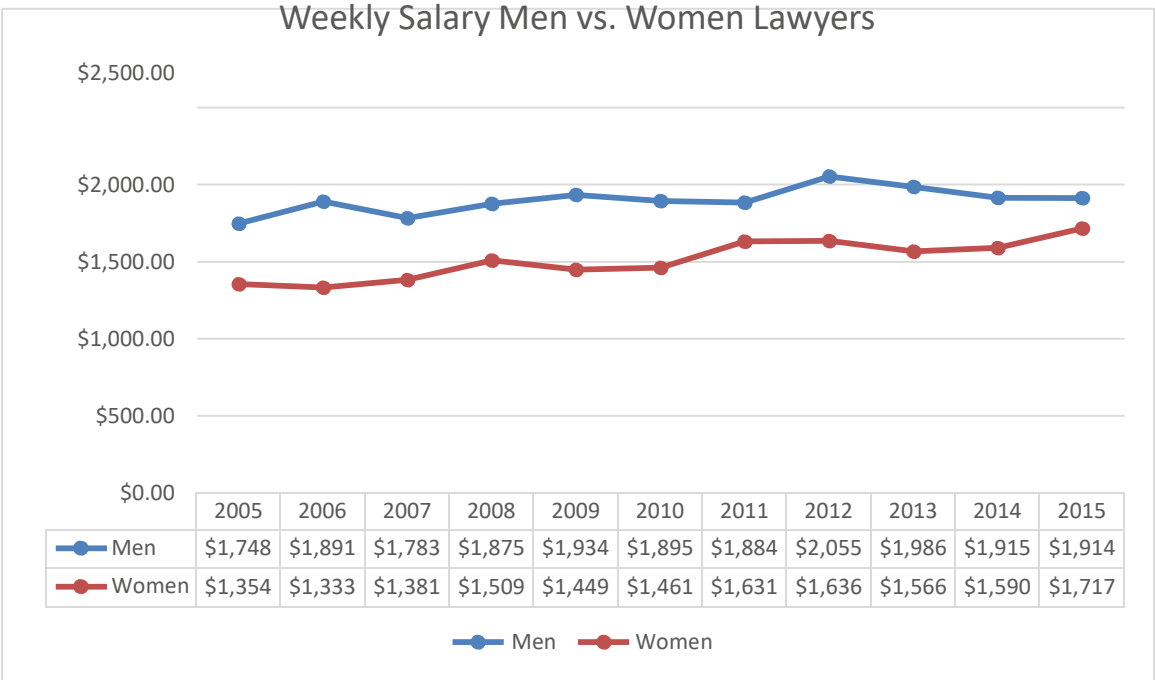
Total Representation of Women - Federal & State Judgeships



Women in Federal and State-Level Judgeships: A Report of the Center for Women in Government & Civil Society, Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York. Summer 2012. www.albany.edu/womeningov/publications/summer2012_judgeships.pdf

Compensation

Weekly Salary Men vs. Women Lawyers



	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Men	$1,748	$1,891	$1,783	$1,875	$1,934	$1,895	$1,884	$2,055	$1,986	$1,915	$1,914
Women	$1,354	$1,333	$1,381	$1,509	$1,449	$1,461	$1,631	$1,636	$1,566	$1,590	$1,717

Women lawyers' weekly salary as a percentage of male lawyers' salary:

2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
77.5%	70.5%	77.5%	80.5%	74.9%	77.1%	86.6%	79.6%	78.9%	83.0%	89.7%

2015 Bureau of Labor Statistics, *Median weekly earnings of full-time wage and salary workers by detailed occupation and sex*. www.bls.gov/cps/cpsaat39.htm

Women Equity Partners Compensation

At the median, the typical female equity partner in the 200 largest firms earns 80% of the compensation earned by the typical male partner.

This figure represents the 30 firms that provided this data. *Report of the Ninth Annual National Survey on Retention and Promotion of Women in Law Firms. National Association of Women Lawyers and NAWL Foundation, October 2015.* www.nawl.org/p/cm/ld/fid=82#surveys

Women in the ABA

ABA Lawyer Members	292,037	101,062	34.6%
Board of Governors	44	19	43.2%
Section/Division Chairs, 2016-2017 Bar Year	28	12	42.9%
Total Presidential Appointments, 2016-2017	775	397	51.2%
Committee Chair Appointments, 2016-2017	93	37	39.8%

	Total	Women	% Women

ABA Commission on Women in the Profession, December 31, 2016.

Women Presidents of the ABA:

- Linda A. Klein (2016-2017)
- Paulette Brown (2015-2016)
- Laurel Bellows (2012-2013)
- Carolyn B. Lamm (2009-2010)
- Karen J. Mathis (2006-2007)
- Martha W. Barnett (2000-2001)
- Roberta Cooper Ramo (1995-1996)

Women Chairs of the House of Delegates:

- Deborah Enix- Ross (2016-)
- Patricia Lee Refo (2014-2016)
- Linda A. Klein (2010-2012)
- Laurel G. Bellows (2006-2008)
- Karen J. Mathis (2000-2002)
- Martha W. Barnett (1994-1996)

Secretaries

- Mary T. Torres (2014-2017)
- Cara Lee T. Neville (2011-2014)
- Bernice B. Donald (2008-2011)
- Ellen F. Rosenblum (2002-2005)
- Donna C. Willard-Jones (1996-1999)

Treasurer

- Alice E. Richmond (2008-2011)

First Women Members of the ABA:

- Mary B. Grossman; Cleveland, OH (1918)
- Mary Florence Lathrop; Denver, CO (1918)

For more information on women's advancement into leadership positions in the ABA, see the ABA Commission on Women's *Goal III Report* at www.ambar.org/goal3women.

American Bar Association - Commission on Women in the Profession
321 N. Clark Street, Chicago, IL 60654
Phone: 312-988-5715 • Email: abacwp1@americanbar.org • Website: www.americanbar.org/women

From the Bench

MOVING BEYOND GENDER: EFFECTIVE DEPLOYMENT OF THE LEGAL ARSENAL

HON. CHERYL ANN KRAUSE

The author is a judge on the U.S. Court of Appeals for the Third Circuit.

After spending most of my career as a litigator, I have realized there is good reason litigation is often likened to battle. Most obviously, the practice of the law carries with it enormous stakes, and the consequences of a single case matter deeply to the parties and can reverberate through countless lives. But there is a link, too, between law and combat when it comes to how we attain a successful outcome—one that is instructive for the training we provide our cadets in the law and for breaking down barriers to success as they progress through the ranks. Whether standing before a jury in a courtroom or sitting at the deal table in a boardroom, we must master the strategies that make us effective in face-to-face showdowns with opponents, as well as those that let us make effective use of the deterrent force of might.

In drawing an analogy between law and combat, I deliberately choose an aggressive metaphor, for my point is that aggressiveness—by which I mean initiative and decisiveness about which tools in the legal arsenal to use, and the confidence and leadership to actually use them when needed—is precisely what success in the law requires. Yes, empathy and effective interpersonal skills are also important legal tools, and without a doubt, there is value in endeavoring to bring parties together where appropriate. But just as diplomacy often benefits from the credible threat of force, lawyers' efficacy as negotiators often turns on whether they are perceived as having the confidence, skill, and resolve to follow through—for example, to break off negotiations, to file that complaint or motion, or to go to trial and command that courtroom.

The particular aggressiveness that I describe as vital to success in the legal profession has no gender. For there is nothing inherently male or female about strategy and focus, confidence and initiative, decisiveness and intelligent follow-through. Unfortunately, however, recent studies tell us that this aggressiveness is neither equally encouraged nor equally respected in men and women.

The problem cuts across professions. Researchers at the Clayman Institute for Gender Research at Stanford University recently analyzed hundreds of performance reviews of female and male employees and found that women were almost twice as likely as their male colleagues to be described as "supportive" or "collaborative" or "helpful," and more than twice as likely to be praised by reference to team achievements rather than their individual accomplishments. Meanwhile, men's reviews contained twice the number of references to technical expertise and were more likely to contain praise of exceptional abilities or talents. Forming a backdrop to these findings was this one: The concrete feedback women did receive often related to their communication styles, and women were criticized for being "too aggressive" at about three times the rate of men. In short, the study suggests that women who behave assertively are criticized and penalized in ways that men generally are not.

I understand that encouraging women to be more "aggressive" in professional arenas might come across as somewhat dated. It's the kind of plea that has been replaced with nuanced calls for professional women to "lean in" or for changes in our culture and workplace infrastructure so we can finally "have it all." I invoke the term, however, because I believe that aggressiveness plays a special role in the practice of law. And if aggressiveness is treated as an asset for our sons but a liability for our daughters—if even the terminology with which we celebrate the strengths and talents of women is coded language—little wonder, then, that women in the law sometimes feel uncomfortable handling conflict or stepping outside support roles, and those aspiring to be generals may find themselves navigating a more complex course than their male counterparts.

Indeed, despite making up roughly half of new law school graduates and a third of all lawyers, women account for only about one out of five law firm partners and one out of four general counsels of Fortune 500 companies. Likewise, the

National Women's Law Center reports that only about a third of all active federal district and appellate court judges are women, and six federal district courts have never seated a woman judge.

These numbers are all the more sobering when we consider how much society stands to benefit from women generals on every front. We benefit from women like Ann Dunwoody, the first woman four-star general in American history, and Kristen Griest, Shaye Haver, and Lisa Jaster, the first-ever female graduates of the army's legendary Ranger School. We also benefit from women generals in the law, and many of the leadership qualities we associate with top brass should be actively encouraged and cultivated in both our female and our male lawyers.

So if law is in some ways like combat, how can we ensure that, on and off the battlefield, there are fair opportunities for both men and women who seek to build meaningful careers? The military offers some useful points of instruction.

First, in both war and law, how we accord recognition is no small matter. Our armed forces use badges and awards to recognize the qualifications, accomplishments, and, most importantly, service, of every soldier, sailor, airman, and marine. The legal profession too has its own epaulets, but ours are predicated on an exceedingly narrow definition of success. We need to expand it.

We too often measure "success" on a single axis, like billable hours, discounting the critical long-term investment that women and men make every year in the development of the legal profession, community service, and the next generation of citizens and leaders, that is, our children. We too rarely express admiration and appreciation to those lawyers, male and female, who choose to undertake the challenges of childrearing and working simultaneously, and we too often disapprove instead of supporting those who sequence their professional and personal lives, perhaps leaving an exciting practice to devote time to family or other important causes, and returning years later to continue their professional ambitions. Indeed, how we frame success in the law is itself a reflection of what kind of work we think matters. If we are truly to build an inclusive profession, we must expand our conception of what success looks like.

Another relevant point of comparison between the law and the military is the essential role of our partner, and here I mean life partner. The wingman, shipmate, or battle buddy gives his colleague support, covers his back, and provides real-time feedback and perspective. My husband, who is a fighter pilot and colonel in the air force, often serves as the wingman, not only at work, but also on the home front. For devoted parents who also aspire to successful careers, the close support of a good partnership is mission-critical, and with it, dare I say, the sky's the limit.

There is wisdom here that crosses generations. I spoke recently with Judge Dolores Sloviter, whose active seat I had the privilege of assuming. Judge Sloviter joined the U.S. Court of Appeals for the Third Circuit in 1979 as its first woman. She was only the fourth on any federal court of appeals and remains the only woman to have served as chief judge of our circuit—at least so far. When I asked her about her achievements, she said the best thing she ever did was marry her husband and adopt her daughter, and none of the rest of it would have been possible otherwise.

Thanks to pioneers like Judge Sloviter, the course young lawyers and parents must navigate today is far easier than it was in decades past. Many firms have paternity leave policies, and many young fathers are using them and coordinating work schedules with their working spouses so that, if they choose to, both can continue in their careers and participate in the sometimes overwhelming responsibilities of parenthood. That's not to say there aren't times when you're called to arms in the law—trials or closings, for example—when the commitment to get the job done needs to be full-time. But with a supportive and flexible partner with whom you can chart out your joint strategy for the challenges of a dual career, your capacity can be more than doubled. In short, our choice of life partner is not only a matter of the heart; it is also the bedrock of our professional lives.

No doubt there are many more points of comparison between the legal profession and the military, but I'd like to touch on just one more, and that is their exceptionally hierarchical organization. We are constantly told, mostly by our friends in the tech world, that flatter is better, and that eliminating top-down management encourages creativity and collaboration. But I'm not convinced that a vertical structure per se is the problem. Indeed, it may be part of the solution. In the military, for example, hierarchy not only enables the unit to function in an effective, efficient, and versatile way; it also presents opportunities for the members of that unit to learn specific skills from others expertly trained, to appreciate the integral roles of other units, to observe effective leadership, and to distinguish themselves as they work their way up the ranks. So, too, in the law. Whether in the context of law practice, academia, or judicial clerkships, good mentoring and apprentice-type relationships offer similar opportunities to young lawyers.

Our military and legal professions are united in their commitment to preserve and protect our laws and Constitution and in their love of country. But whether we battle with the sword or the pen, our rising young professionals, to be successful, must be able to engage others with confidence, to take initiative, to strategize, and to act decisively—in short, to be aggressive when it is needed. And we, in the senior ranks, can support those skills and enable the next generation of leaders to reach their potential so long as we take seriously our obligation to be good role models and mentors. Law may be combat, but at least part of the battle lies within each of us. ▪

Changing Times

Panelists look for ways to remove barriers to advancement for women at large law firms

By Liane Jackson

On a late October day in New York City, partners, law firm associates and in-house counsel gathered at the offices of Mayer Brown to confront issues of gender inequity in BigLaw and brainstorm ways to move the needle.

The discussion happened at a time when the state of diversity in the legal profession is sobering at best and dismal at worst, according to members of the panel brought together to address the issue.

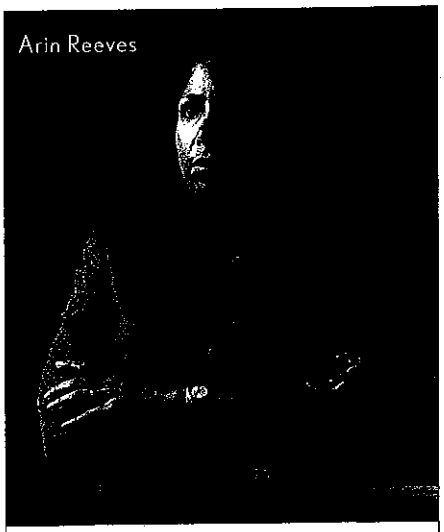
Survey findings released by the New York City Bar Association, for example, indicated that, while women have made some gains at the 75 law firms that responded to the survey, the percentage of female first-year associates at the firms in 2015 was 45.2 percent, a decrease of five percentage points since 2004. The finding "raises concerns about erosion of the associate pipeline," the report stated.

The survey further found that 35 percent of all lawyers at the firms in 2015 were women, "despite representing almost half of graduating law school classes for nearly two decades." The survey found that 18.4 percent of women and 20.8 percent of minorities left the surveyed firms in 2015, compared to an attrition rate of 12.9 percent for white men, who accounted for 77 percent of equity partners.

Another recent study by Major, Lindsey & Africa, a legal recruiting firm headquartered in Chicago, found that male partners make 44 percent more on average than female partners make.

The title of the event at Mayer Brown—"Visible Difference: Reversing the Trend of Women Leaving Law Practice"—succinctly stated the dilemma. The program focused on best practices—what's working and what isn't—against a backdrop of recent class action lawsuits filed by female partners and recent reports of pay disparities and lack of diversity in large law firms. The *ABA Journal* partnered with Mayer Brown to produce the event, which included collaborative panel discussions in Chicago and New York.

"If we had an equal number of women in leadership roles at the firm, we wouldn't have this problem," said Mayer Brown partner Lisa M. Ferri, one of the panelists at the program in New York. "When women are on compensation committees, there is less disparity in pay." The biggest challenge is attrition, she said. "Because of that, we don't have a pipeline" that leads to partnership.


Arin Reeves

Ferri suggested that attorneys should get credit for the collaborative ways they serve the firm's clients and not just for billable hours. She said firms also should find ways to share origination credit.

"There has to be an actual change in the firm or things that stand in the way of succeeding," she said.

OLD SOLUTIONS AREN'T WORKING

The next level of change is going to require structural change, said Arin N. Reeves, founder and president of Nextions, a research and consulting firm in Chicago. "How can we mentor women better? How can we sponsor women better?" said Reeves, who moderated the New York and Chicago programs. She said her recent research demonstrates that "we don't need to do anything 'more' for women. We need to get out of their way" by removing barriers and challenges.

Gabrielle Lyse Brown, director of diversity and inclusion at the New York City Bar Association, presented data from its new report that showed that one in four New York firms has no women on its management committee, and one in eight has no female practice group leaders. The report also revealed that, of female partners at responding law firms, 85.2 percent were white, 7 percent were Asian or Pacific Islander, 3.6 percent were black, and 2.5 percent were Hispanic.

"Women aren't monolithic," Reeves said, noting that women of color face additional hurdles in their advancement. "There are different issues and challenges we face."

Nate Saint-Victor, an executive director in the legal and compliance division of Morgan Stanley in New York City, noted that racial and gender bias is "still widespread" in corporate legal departments. Saint-Victor said mentoring women of color has been an effective tool. But every attorney in the position to do so has an "obligation to pursue a meritocratic environment within your organization," he said.

"You can't be who you can't see," said Saint-Victor, explaining that promoting female partners who "aren't just tokens" can be an inspiration to associates who hope to move up through a firm. Diversity should be a goal in promoting other attorneys, as well, he said.

Adrienne D. Gonzalez of the Black Organization for Leadership and Development's people and business resource group at Bristol-Myers Squibb said her company partners with law firms to groom diverse lawyers. Bristol-Myers Squibb also has adapted a business model to reflect the country's changing landscape and promote inclusiveness internally as well as with its outside counsel, she said.

"What we know is that by 2050, this country will be more than 50 percent African-American, Asian-American and Hispanic," Gonzalez said. "We have to be responsive to the fact that the country is changing. We can't keep using the same formula; we need to evolve." ■

PHOTOGRAPH BY WAYNE SLEZAK

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Thank you!

TLAW

Tennessee Lawyers' Association for Women

Stay in touch by visiting TLAW online at www.tlaw.org. You can also find us on Facebook & Twitter.