Under Siege: Freedom of Choice and the Statutory Ban on Abortions on Military Bases

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Under current federal law, a woman may not obtain an abortion on a military base even when she is willing to pay for it.1 Exceptions are made for situations in which the woman's life is endangered or the pregnancy results from rape or incest. Servicewomen or female dependents of servicepersons stationed in foreign countries must leave the American base in order to obtain either nontherapeutic abortions or even medically necessary abortions in which the woman's life is not endangered.3

Although a number of commentators and legislators have argued that the military abortion ban is bad policy and abridges the constitutional rights of servicewomen or dependents,4 few, if any, have ex-


1 See 10 USC § 1093(b) (2000). The statute provides, in pertinent part:

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

2 A nontherapeutic, or "voluntary," abortion is one that is not procured for reasons concerning the health or safety of the mother.

3 Of course, in some cases, it may be difficult to know when a medically necessary abortion crosses the threshold of "life endangering." See, for example, National Defense Authorization Act for Fiscal Year 2004, S 1050, 108th Cong, 1st Sess (May 13, 2003), in 149 Cong Rec S 6892, 6910-11 (May 22, 2003) (statement of Senator Feinstein). Senator Feinstein discussed a letter she had received from Holly Webb, the wife of an Air Force staff sergeant stationed at Misawa, Japan. Webb had detailed in her letter the refusal of military doctors to perform an abortion after her water broke at twenty weeks. Though the doctors had told her that she faced a risk of infection and that her baby would suffer serious health complications if it were able to survive, they refused to dilate her cervix or induce labor because such procedures would be considered an abortion. When she went to a private Japanese hospital off base, doctors there told her that she "would very likely die" if she did not immediately take intravenous antibiotics. The Japanese doctors dilated her cervix and she delivered a stillborn baby. The military hospital later told her that this was an elected abortion and not a stillborn birth. See id.


In today's military... birth control of every kind is freely and easily available for men, women, and even for minors; obstetric, gynecological, and pediatric care are available and encouraged; and even vasectomies are free and commonplace. Nobody contemplating the rights they might forgo in the service of their country could reasonably look at the reality of the military health care system and believe they will be expected to sacrifice their constitutional rights to reproductive choice. And certainly nobody would reasonably expect wives, daughters, and other civilians to sacrifice their rights.

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explored whether the ban is actually constitutional. The ban implicates two seemingly conflicting lines of Supreme Court jurisprudence: that of abortion on the one hand and deference to the military on the other. The Supreme Court's abortion doctrine confirms that women have a constitutional right to an abortion.\(^5\) However, the government is not constitutionally required to guarantee access to an abortion.\(^6\) Abortion laws are subject to the "undue burden" standard; that is, if a regulation imposes an undue burden on a woman's right to an abortion, it is unconstitutional.\(^7\) The military deference doctrine complicates the constitutional analysis of the military abortion ban because constitutional rights may be less stringently examined in "recognition that within the military individual rights must of necessity be curtailed lest the military's mission be impaired."\(^8\) When assessing the constitutionality of military regulations, courts typically apply an extremely deferential form of "rational basis" review.\(^9\) Under this standard, a military regulation need only be rationally related to a legitimate military interest in order to be constitutional, even if that regulation infringes on constitutional rights.


Surprisingly, as the women of our military fight for our freedoms overseas, they are actually denied some of those freedoms during their service. Here at home, women have the right to choose. They have constitutionally protected access to safe and legal reproductive health services. But that is not the case for military women serving overseas.

\(^5\) See Roe v Wade, 410 US 113, 163-64 (1973) (concluding that a state may not regulate the performance of abortions prior to viability); Planned Parenthood of Southeastern Pennsylvania v Casey, 505 US 833, 846 (1992) (reaffirming the central holding of Roe v Wade that a woman has a right to choose abortion before viability).

\(^6\) See Harris v McRae, 448 US 297, 300-01, 326-27 (1980) (upholding the Hyde Amendment's prohibition on the use of Medicaid funds for abortions except when the mother is the victim of rape or incest or her life is endangered); Maher v Roe, 432 US 464, 473-74 (1977) (upholding a regulation limiting state Medicaid benefits to those abortions that are medically necessary).

\(^7\) Casey, 505 US at 874 (plurality) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

\(^8\) Able v United States, 155 F3d 628, 633-34 (2d Cir 1998) (upholding homosexual conduct as grounds for military discharge).

\(^9\) Courts do not always apply rational basis review to the military. For example, in the equal protection context, courts tend to apply heightened scrutiny according to the same framework that exists in cases not involving the military. See, for example, Frontiero v Richardson, 411 US 677, 690-91 (1973) (plurality) (holding that the statutory difference in the treatment of male and female military personnel for the purpose of determining "dependent" benefits violated the Due Process Clause of the Fifth Amendment). The plurality opinion in Frontiero was one of the first opinions to adopt heightened scrutiny for sex-based classifications. See also Berkley v United States, 287 F3d 1076, 1091 (Fed Cir 2002) (reversing the trial court on the ground that strict scrutiny, not rational basis, was the appropriate standard to be applied to an Air Force policy that treated women and minority officers differently from other officers with regard to involuntary termination).
In this Comment, I attempt to reconcile the abortion and military doctrines in the context of the military ban on privately funded abortions. I maintain that, because both the undue burden standard and rational basis review forbid government regulation based on an illegitimate purpose, the military abortion ban is unconstitutional under either standard. First, abortion jurisprudence suggests that restrictions fashioned with the purpose of placing obstacles before a woman’s right to choose impose burdens that are per se undue. I argue that the ban has the impermissible purpose and effect of placing obstacles in the path of a woman seeking an abortion; thus, the burden imposed is per se undue.

Second, the Due Process Clauses of the Fifth and Fourteenth Amendments demand that a legislative classification be rationally related to a legitimate government purpose. Thus, rational basis review simply verifies that a regulation offers rational means to achieve legitimate ends. In the case of the military abortion ban, the military context is the only reason to deviate from the undue burden standard that would normally apply. Therefore, the ban must be rationally related to a legitimate military purpose in order to trigger (and withstand) the more deferential standard of review. However, the ban lacks a genuine military justification; thus, it fails rational basis review. This argument is difficult because courts conducting rational basis review rarely look beyond a government’s asserted justification to determine whether it is pretextual. However, a court will cast a skeptical eye toward justifications that it perceives as pretextual. This skepticism will inform both the choice of a standard of review (which is why a court would likely use the undue burden standard) and a decision on the merits (which is why a court would strike down the ban under either standard).

I argue that an outright ban on abortions on military bases is unconstitutional as applied to women on foreign bases with hospital facilities that routinely perform operations of similar complexity.

10 See, for example, United States Department of Agriculture v Moreno, 413 US 528, 532-33 (1973) (holding that a provision denying food stamps to all unrelated individuals living in a household violated the Due Process Clause of the Fifth Amendment, because the provision did not rationally further any legitimate government interests).

11 See, for example, Williamson v Lee Optical of Oklahoma, Inc, 348 US 483, 487-88 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

12 Challenges to the constitutionality of statutes and regulations are generally brought as “facial” challenges or as “as-applied” challenges. If a court holds that a statute is unconstitutional as applied to a particular case, the statute may be enforced in different circumstances. See Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan L Rev 235, 236 (1994). Normally, a facial challenge “must establish that no set of circumstances exists under which the Act would be valid.” United States v Salerno, 481 US 739, 745 (1987). However, the Casey plurality “explained that a statute imposes an ‘undue burden’ if it operates as a substantial obstacle to
Moreover, both the undue burden and rational basis standards leave ample leeway for discretionary denials of abortions on foreign bases for any number of reasons. Where real military necessity imposes constraints on the hospital facilities available or the type of medical services offered, a woman may be refused an abortion at her particular location without offending the Constitution. Though I discuss some of the factors that might be relevant to individual determinations, it is beyond the scope of this Comment to analyze the precise conditions under which an abortion may or may not be prohibited. Instead, I focus on the more interesting doctrinal questions posed by the collision of these two distinct contexts. But at bottom, this Comment is not advocating a constitutional right to an abortion in the foxhole; it merely suggests that, where facilities are available, servicewomen and female dependents on foreign bases have the same constitutional right to access self-financed abortions as their stateside counterparts.

Part I of this Comment discusses the history and possible rationales for the ban. Part II explores the background law on abortion and on the deference given to decisions made by Congress on behalf of the military. Part III argues that the ban fails the undue burden standard because it has the purpose and effect of blocking access to abortion, and that it fails rational basis review because it is not rationally related to legitimate military goals (and may even work against such goals). I conclude that, while national security demands deferential review for those regulations that promote the effectiveness of the military, courts should take a skeptical view of legislation that hinders both private rights and military efficiency in favor of achieving unrelated political goals.

I. THE BAN ON PRIVATELY FUNDED ABORTIONS ON MILITARY BASES

An examination of the history of the military abortion ban indicates that it may have been instituted (and opposed) primarily for political, rather than military, reasons. It is difficult to justify the ban based on concerns about federal funding for abortions, because it pro-

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a woman's choice to have an abortion in a 'large fraction' of the cases in which the statute is relevant.” Rachel D. King, Comment, A Back Door Solution: Stenberg v. Carhart and the Answer to the Casey/Salerno Dilemma for Facial Challenges to Abortion Statutes, 50 Emory L J 873, 882–83 (2001). Almost all Supreme Court cases involving abortion restrictions have involved facial challenges, often brought by abortion providers. This is in large part because there is little incentive for a pregnant woman to mount a challenge to an abortion restriction because her case will probably not be resolved during the period in which she can procure an abortion. However, in the military context, it is not clear who, other than a pregnant woman, would have standing to sue. Moreover, a challenge is unlikely to be undertaken by a servicewoman; the military tends to be a close-knit, conservative community marked by strict adherence to the chain of command, and the reputational consequences of an abortion challenge may make such an action unlikely.
hibits even those abortions that women pay for out of pocket. The history of the ban shows that general opposition to abortion, and particularly revulsion to abortions being performed on federal territory, has driven its support.

A. History of the Ban

In 1978, Congress included language in the 1979 defense appropriations bill prohibiting the use of federal funds to perform abortions on military bases except in cases of rape, incest, severe health consequences, or endangerment of the life of the mother. However, women could still informally obtain self-financed, or “pre-paid,” abortions on bases overseas. In 1988, under the Reagan administration, the Department of Defense articulated a policy proscribing pre-paid abortions in military treatment facilities. The policy states, in part:

The informal practice of performing so called “pre-paid” abortions in very limited circumstances outside the United States does not violate the legal prohibition [on defense funds used to perform abortions except where the life of the mother is endangered]. However, it might suggest insensitivity to the spirit of the Congressionally-enacted policy of withholding government involvement in the provision of abortions. It therefore appears appropriate to establish formally a uniform Department of Defense policy in this regard. The policy is that the performance of pre-paid abortions in military treatment facilities is not authorized.

During his first days in office, President Clinton reversed the ban along with a host of other abortion regulations. His subsequent policy memorandum stated that women on overseas bases “should have access to abortion services comparable to that of women in the United States.” The policy allowed military health care providers to refrain from participating in abortion procedures if they objected on moral or ethical grounds. Further, the policy reaffirmed that, as under the for-

15 See id.
16 Id.
17 See Privately Funded Abortions at Military Hospitals, Memorandum for the Secretary of Defense, 58 Fed Reg 6439 (1993) (President Clinton stating that he deemed the ban unwarranted).
mer policy, host nation laws concerning abortion would be respected. That is, an abortion could not be performed on a base located in a host country where abortion was illegal. However, where an abortion could not feasibly be performed in a certain military facility, the policy required the Military Health Services System to develop other means to assure access to abortions for military personnel and dependents. Such accommodations could include “supplementing facility staff with local contract personnel, referrals to another military facility or to qualified local civilian providers, consideration of travel to nearby locations, and other appropriate steps.”

The new abortion policy did not last long. Congress managed to reinstate the ban in its 1996 defense authorization package. President Clinton vetoed the package once, but ultimately signed it because it contained a number of other provisions that he considered vital for national defense and troop morale, including a pay raise. The statute provides:

No medical treatment facility or other facility of the Department of Defense may be used to perform an abortion except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest.

In subsequent years, Senators Patty Murray and Olympia Snowe led unsuccessful efforts to repeal the ban in order to give service-women and female dependents the same access to abortion as their stateside counterparts. During debates on the 2003 defense appropriations bill, a majority of the Senate voted to repeal the ban, but the House voted to keep it in place. By the 2004 bill, the move to repeal had lost some momentum, perhaps in part as a result of shifting priorities surrounding the war in Iraq. Thus, the ban remains in effect.

B. Possible Rationales for the Ban and Their Shortcomings

Congress set forth a number of different justifications for the military abortion ban. The legislative history indicates two possible rationales: (1) a congressional policy of withholding government assis-

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19 Id.
21 See Philip Shenon, Reluctantly, Clinton Signs Defense Bill, NY Times A33 (Feb 11, 1996) (reporting that the “President felt that he had no choice . . . because it contained a variety of other provisions . . . including a 2.4 percent military pay raise”).
22 10 USC § 1093(b).
24 See National Defense Authorization Act for Fiscal Year 2004, 149 Cong Rec at S6911 (cited in note 3) (recording that the vote on an amendment to repeal the ban lost 48–51).
tance from women seeking to obtain an abortion in order to avoid "a Federal endorsement of the practice that is opposed by tens of millions of Americans"; and (2) proposals to permit on-base abortions did not include informational or administrative requirements common to state abortion laws. Others have argued that repeal of the ban is simply unnecessary because women may still obtain abortions by leaving the base. Military justifications for the ban include respect for the abortion laws and customs of the country in which the base is located, and concerns that military morale might be harmed by the incidence of on-base abortions.

The 1988 Department of Defense memorandum issuing the first iteration of the policy did not mention military reasons for the law. In fact, the only reason cited for the policy change was that allowing such abortions might conflict with the established congressional policy of eliminating any form of government involvement in the provision of abortions. The policy was entirely in line with other moves by the Reagan Administration to limit access to abortion more generally.

Congressional debates on the issue reveal that opposition to abortion in general, and especially to the possibility of federal funds being used to subsidize abortions, has driven support for the ban. Supporters of the ban worry that if abortions were allowed to be per-

26 See Authorizing Appropriations for Fiscal Year 1993 for Military Activities of the Department of Defense, S Rep No 102-352, 102d Cong, 2d Sess 411 (July 31, 1992) (statement of Senator Coats) (“Let it be perfectly clear that members of Congress who support this language are in fact supporting an unrestricted entitlement to abortion on demand for any or for no reason.”).
27 See National Defense Authorization Act for Fiscal Year 2001, 146 Cong Rec at S 5407 (cited in note 25) (statement of Senator Hutchinson) (noting that the military will provide “transportation either to the United States or to another country where abortion is legal for only $10”).
28 See text accompanying notes 35–42 for a discussion of these rationales.
29 Mayer, DoD Policy (cited in note 14).
30 President Reagan advocated a “Human Life Amendment,” which would have made all abortions illegal except when the life of the mother was in danger. See Ronald Reagan, 1988 Legislative and Administrative Message: A Union of Individuals, in 1 Public Papers of the Presidents of the United States: Ronald Reagan 1988 91, 120 (GPO 1990) (“I am committed to reducing the number of abortions in this country and reaffirming life’s sacred position in our Nation.”).
31 See, for example, National Defense Authorization Act for Fiscal Year 2004, 149 Cong Rec at S 6906 (cited in note 3) (statement of Senator Sessions) (citing poll data showing that Americans generally support stricter limitations on abortion).

Let's pretend we are not subsidizing abortions. We know they are in military hospitals performed by military doctors paid by American taxpayers .... We know the equipment used is bought and paid for by American taxpayers. But we are not really subsidizing it. That is a legal myth and it simply does not measure up.
formed on military bases, it would be impossible to ensure that, in accordance with the Hyde Amendment, no federal funds would be used to perform the abortions. Although there is a military justification for efficient military spending, the concern here is not how much money is being spent, but rather on what it is being spent. Supporters on this ground would, in principle, be opposed to spending a single dollar of taxpayer money on an abortion. This may be a legitimate political rationale, but it does not directly relate to military readiness or efficiency. The same is true for the argument that permitting on-base abortions would constitute a federal endorsement of the practice.

One military-related justification is the argument that the military should not conduct practices on its bases that host countries oppose. However, when military abortions were permitted under the Clinton administration, they could only be performed on bases in countries that permitted abortion. In countries where abortion was prohibited, women were to be referred to other military facilities or transported to locations where abortion was legal.

Therefore, respect for host country laws and customs does not appear to demand that abortions be prohibited on every military base. It is also true that the military does not require conformity to all foreign laws and practices;

33 Act of Sept 30, 1976 § 209, Pub L No 94-439, 90 Stat 1418, 1434 (forbidding the use of Medicaid funds to reimburse the cost of an abortion except in cases where the mother's life is threatened). Later versions of the Hyde Amendment added exceptions for abortions in cases of rape or incest. See Act of Nov 20, 1979 § 109, Pub L No 96-123, 93 Stat 923, 926 (noting that the rape or incest had to be reported promptly).


Every person who has ever been in a hospital for any type of procedure knows full well that the hospital and the physician is able to account for every charge, the cost of every minute, every physician, every nurse, each aspirin, the supplies, the materials, the overhead, the insurance, anything that is part of the procedure. Under this amendment [to reverse the ban], every expense is included in the cost that is paid by private funds.

Senator Snowe's argument would also apply if a lack of willing military physicians necessitated the hiring of contract physicians from the U.S., the host country, or neighboring countries. In any event, it could be argued that the military "subsidizes" abortions under current policy in the same way that it would if it allowed on-base abortions, because a servicewoman or military dependent seeking an abortion receives free transportation (as do all members of the military) to her destination.


for example, it is doubtful that it would observe a host country’s policy of racial or religious discrimination.\footnote{See, for example, \textit{Military Eases Policy; But Muslim-Dress Flap Continues for U.S. Women}, Newsday A32 (Jan 24, 2002) (reporting that the military no longer required service-women who traveled off base in Islamic countries to wear traditional abayas, or head-to-toe robes).}

The most frequently offered military justification for the abortion ban is that permitting abortions could hurt the morale of the armed forces. Senator Jeff Sessions has stated that allowing abortions on military bases “is not good for military morale. It is not going to improve the self-image of the patriots who defend us every day.”\footnote{National Defense Authorization Act for Fiscal Year 2001, 146 Cong Rec at S 5416 (cited in note 25) (statement of Senator Sessions) (noting that a majority of physicians in the military were against abortion).} Senator Michael Enzi added that providing abortions on bases “runs contrary to the mission of our armed services,” which is to preserve human life.\footnote{Id at 5413 (statement of Senator Enzi) (noting that the legislation against the ban would call on military personnel to take innocent lives, not protect them).} On this theory, military personnel in general might be harmed by the awareness that abortions are being performed on the base, or a particular individual might be adversely affected, such as a serviceman who objects to his wife’s decision to have an abortion.

While the goal of promoting morale is a legitimate one, it is difficult to prove that the means fit this end. The result is that morale can often be used to justify either side of an argument, and can be offered as a pretext for some underlying rationale. For example, until President Truman’s 1948 executive order, segregation of African-Americans within the military was justified by morale arguments.\footnote{See \textit{Watkins v United States Army}, 875 F2d 699, 729 (9th Cir 1989) (en banc) (Norris concurring) (“As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale.”).} For this reason, some courts have bypassed the military’s morale arguments where the actual effect on morale could not be proved.\footnote{See id at 709 (concluding that re-enlisting an openly gay serviceman does not cause any harm to the public interest or the Army). See also \textit{Holmes v California Army National Guard}, 920 F Supp 1510, 1531–34 (ND Cal 1996) (holding that the ban on homosexuals in the military failed to rationally further a military purpose), revd, 124 F3d 1126 (9th Cir 1997).}

Supporters of the ban could also argue that easy access to an abortion might encourage sexual relations among soldiers, which causes undesirable sexual tension. A similar defense was made (and upheld) in the face of challenges to the ban on homosexuals in the military.\footnote{See, for example, \textit{Holmes}, 124 F3d at 1133 (recognizing that the government has a legitimate interest in excluding from military service those who engage in homosexual conduct).} The legislative history of the military abortion ban does not indicate that any such arguments have yet been made, and indeed, any link between abortion access and sexual tension seems tenuous at
best; sexual tension is no doubt inevitable at some level, and is unlikely to be affected by enhanced or reduced abortion access.

Thus, even though the history of the ban suggests that the primary reason for the ban was to limit federal involvement in abortion, at least two military rationales have been offered, and others may exist. As I argue in Part III, the lack of strong military reasons weighs in favor of casting a more critical eye toward the ban, whether through the undue burden standard or rational basis review.

II. BACKGROUND LAW

The military abortion ban intertwines two very different areas of the law: the due process right to an abortion and Congress's wide latitude to prescribe military policy. While courts have invalidated on constitutional grounds legislation that restricts access to an abortion, they have generally been loath to strike down laws regulating the military. In this Part, I lay out the standards of review applied to restrictions on the constitutional rights of military personnel (rational basis review) and to restrictions on abortion (the undue burden standard). Rational basis review requires a rational connection to a legitimate governmental purpose. Abortion law considers restrictions to be illegitimate if their purpose is to put substantial obstacles in the path of a woman exercising her right to an abortion. Thus, I conclude that abortion restrictions that serve only this impermissible purpose would fail both the undue burden standard and rational basis review.

A. Review of Military Regulations

This Part considers the tradition of deferential judicial review of both congressional legislation regarding the military and individual military decisions that have the effect of curtailing the constitutional rights of military personnel. Cases that uphold individual rights over military decisionmaking indicate that courts balance actual (as opposed to articulated) military interests with individual rights before granting deference in any particular case.

1. Why deference?

The Supreme Court has held that "judicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." Deferential "rational basis review" has been extended to military policy and regulations ranging from capital

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punishment" to the male-only draft. Even in Korematsu v United States, which established the strict scrutiny standard for statutory distinctions on the basis of race or national origin, the Court was so concerned with giving Congress flexibility in matters of military crisis that it applied a level of review that more closely resembled rational basis review. However, as a result of decisions like Korematsu, one of the most reviled opinions in Supreme Court history, courts may be more wary of infringing upon constitutional rights without a valid military justification.

Courts give deference to military authority based on principles that apply to the other branches of government more generally, and for reasons that apply specifically to the military. First, because the Constitution vests Congress and the Executive with supremacy over the military, courts owe the military the same kind of deference that administrative agencies receive. This principle justifies the generally deferential nature of rational basis review on grounds such as the separation of powers doctrine, administrative expertise, and limited judicial competence. But courts are especially deferential to the military as a separate community with the purpose of maintaining national security. When its policies are challenged, the military typically defends them on grounds that relate to national security. Among the goals most often cited are cohesion, loyalty, good order, discipline, and

44 See Loving v United States, 517 US 748, 768–69 (1996) (upholding Congress's delegation to the president of the authority to define factors for the death penalty in military capital cases).
45 See Rostker, 453 US at 83 (refusing to make an "independent evaluation of the evidence" and relying on congressional justifications instead).
46 323 US 214 (1944).
47 Id at 223 (upholding as constitutional the internment of Japanese Americans during World War II).
48 See, for example, Hirabayashi v United States, 828 F2d 591, 593–94 (9th Cir 1997) (noting that the military decision at issue in Korematsu was in reality based on racial stereotypes and that there was no emergency calling for internment).
49 US Const Art I, § 8, cl 12–16 (vesting in Congress the right to establish, maintain, and regulate the armed forces); Art II, § 2, cl 1 (establishing the president as commander-in-chief of the armed forces).
50 See Kelly E. Henriksen, Comment, Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise, 9 Admin L J Am U 1273, 1277–78 (1996) (noting that courts have stated that the separation of powers doctrine requires such deference).

The most obvious reason [for the Supreme Court's "hands off" attitude] is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.

In the context of restricting homosexual conduct in the military, reduction of sexual tension and increased privacy have also been upheld as rational military goals. Some regulations are more tailored toward military interests than others. For example, proscription of active opposition to military policy by a member of the armed forces prevents dissension that could "undermine the effectiveness of response to command." Thus, the circumscription of free speech in this context is fairly construed as being rationally related to legitimate (indeed, important) military interests. But courts have sometimes been extremely deferential even when regulations infringe upon otherwise near-sacred rights to achieve results that seem only minimally related to military efficiency and readiness. For example, in Goldman v Weinberger, the Supreme Court upheld a regulation prohibiting indoor use of headgear as applied to an Orthodox Jewish psychologist wearing a yarmulke on an Air Force base. Although Goldman's military duties were "performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission," the Court held that "the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations." However, as Justice O'Connor objected in her dissent:

The Court rejects Captain Goldman's claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force . . . . No test for free exercise claims in the military context is even articulated, much less applied. It is entirely sufficient for the Court if the military perceives a need for uniformity.

53 See id (noting "the critical importance of obedience and subordination").
54 See Able v United States, 155 F3d 628, 634 (2d Cir 1998) (noting that concerns for unit cohesion, reduced sexual tension, and the promotion of personal privacy "distinguish the military from civilian life and go directly to the military's need[s]").
56 475 US 503 (1986).
57 Id at 504 (noting that the Air Force's "strong interest in discipline justified the strict enforcement of its uniform dress requirements").
58 Id at 511 (Stevens concurring) (noting that the Court should consider the regulation as applied to all personnel of all religions, and not simply as applied to this individual).
59 Id at 509-10 (majority) (noting that it was acceptable for the Air Force to draw the line between religious apparel that is visible and that which is not).
60 Id at 528-29 (O'Connor dissenting) (noting that the Court should articulate "an appropriate standard for a free exercise claim in the military context").
Similarly, Justice Blackmun complained that the majority deferred to the military without demanding a reasonable justification for its decision:

Reasoned military judgments, of course, are entitled to respect, but the military has failed to show that this particular judgment with respect to Captain Goldman is a reasoned one. If, in the future, the Air Force is besieged with requests for religious exemptions from the dress code, and those requests cannot be distinguished on functional grounds from Goldman's, the service may be able to argue credibly that circumstances warrant a flat rule against any visible religious apparel. That, however, would be a case different from the one at hand.  

The Court's lack of concern with the burden on a litigant's constitutional rights and its unwillingness to review the military's judgment is fairly typical of jurisprudence involving the military. In short, courts will often bend over backward to uphold decisions made by, and with regard to, the military.

2. Dispensing with deference: demanding a real military reason.

Deference to the military notwithstanding, courts do occasionally uphold the individual rights of servicepersons and their dependents against military restrictions. Courts tend to cast a more critical eye upon those restrictions that seem to be least related to military purposes. In *Reid v Covert*, the Supreme Court set forth a pair of important propositions concerning the constitutional rights of military personnel and their civilian dependents. First, when the United States acts against its citizens abroad, it cannot do so free of constitutional safeguards on individual rights. Second, the power of Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces" does not extend to civilians, although they may be dependents living with servicemen on a military base. Yet although courts

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61 Id at 527-28 (Blackmun dissenting) (noting that it was an empirical question whether many individuals would come forward seeking religious exemptions, and that the Air Force had provided no such showing).
64 See id at 5-6 ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away.").
65 US Const Art I, § 8, cl 14.
66 See Reid, 354 US at 19-20 ("The wives of servicemen are no more members of the 'land and naval Forces' when living at a military post in England or Japan than when living at a base in this country."). This obviously has implications for dependents on foreign military bases who
frequently recite the principle that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes," those rights have not always been upheld against the exercise of military authority.

However, the case law shows that, generally speaking, courts will not use deferential review for those military decisions that least benefit military preparedness at the expense of fundamental constitutional rights. For example, courts over the past thirty years have routinely struck down military regulations relating to women and minorities as violating the Due Process and Equal Protection Clauses. Remarkably, the only Supreme Court decision ever to apply strict scrutiny to a sex-based classification was a case involving the military. In *Frontiero v Richardson*, which dealt with the statutory difference in treatment of male and female military personnel in terms of their "dependent" benefits, the Court treated the military like any other government employer. Moreover, in *Berkley v United States*, the Federal Circuit recently held that the policy of giving deference to the military does not permit a trial court to review a military policy under the rational basis standard when it contains a classification that would normally be subject to strict scrutiny. Instead of building deference into the standard of review, the court suggested that the requisite deference should be layered into the judicial application of strict scrutiny.

Perhaps most importantly, there is precedent applying strict scrutiny not only in military cases involving suspect classifications, but also in cases involving military restrictions upon those rights protected by the Due Process Clause as being most "fundamental." In *O’Neill v

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67 Warren, 37 NYU L Rev at 188 (cited in note 51) (noting that since the military has such a huge impact on the lives of millions of citizens, judicial deference might be unwarranted).

68 See, for example, *Dash v Commanding General*, 429 F2d 427, 428 (4th Cir 1970) (per curiam) (affirming the constitutionality of a regulation restricting First Amendment expressive activities).

69 See *Frontiero v Richardson*, 411 US 677, 688 (1973) (plurality) (holding unconstitutional a statute that required only female servicemembers to prove a spouse’s dependence); *Crawford v Cushman*, 531 F2d 1114, 1116 (2d Cir 1976) (striking down a Marine Corps regulation providing for automatic discharge of any pregnant woman). Although the *Crawford* court did not discuss a heightened standard, the court commented that the discharge rule was "simply not constitutionally tailored to promote" the military's legitimate interest in insuring the mobility and readiness of its personnel. Id at 1122.

70 411 US 677 (1973) (plurality).

71 Id at 688.

72 287 F3d 1076 (Fed Cir 2002).

73 Id at 1091 (reversing the trial court on the ground that strict scrutiny, not rational basis, was the appropriate standard to be applied to an Air Force policy that treated women and minority officers differently from other officers with regard to involuntary termination).

74 See id ("[W]e do not reach the question of what effect, if any, deference to the military would have on the judicial application of strict scrutiny.").
Dent, the Eastern District of New York struck down the United States Merchant Marine Academy's prohibition on marriages for all cadets prior to graduation. The court acknowledged the longstanding tradition of deference to the military, yet it puzzled over whether to exercise strict scrutiny or the intermediate "substantial relation" standard, under both of which the prohibition would fail, or whether to exercise rational basis scrutiny, under which the ban would survive. With a fundamental right at issue, the court chose strict scrutiny, holding that "[f]or the government to invoke this possibility of justification it must show the clearest kind of imperative, and lack of alternative."

Thus, although the overwhelming number of military regulations are upheld under rational basis scrutiny, there are instances where the constitutional right at stake trumps the military rationale. These instances most often involve a pairing of those rights deemed most fundamental with those restrictions most tangentially related to military preparedness.

B. Abortion Law: The Undue Burden Standard

In 1973, the Supreme Court in Roe v Wade held that the right to an elective abortion was protected by the Fourteenth Amendment's

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76 The Merchant Marine Academy operates under the Department of Commerce, but the court recognized that it served military purposes and therefore considered the military deference issue. See id at 571-72, 576.
77 Id at 570.
78 Id at 577-78. With regard to the "substantial relation" test, the court noted: [T]he Supreme Court has moved away from a rigid dichotomy between the "compelling state interest" test and the "minimal scrutiny" test, adopting, at least in some cases, "a more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it. Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is in fact substantially related to the object of the statute."
79 O'Neill, 364 F Supp at 579, quoting Anderson v Laird, 466 F2d 283, 302 (DC Cir 1972) (Leventhal concurring).
80 The Fifth Circuit has proposed a test for reviewability of military claims that makes explicit this balancing of private and military interests. See Minde v Sea Man, 453 F2d 197, 201-02 (5th Cir 1971). The court proposed a four-factor test that considers (1) "[t]he nature and strength of the plaintiff's challenge to the military determination," (2) "[t]he potential injury to the plaintiff if review is refused," (3) "[t]he type and degree of anticipated interference with the military function" posed by review, and (4) "[t]he extent to which the exercise of military expertise or discretion is involved." Id. The court concluded that "[c]ourts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions." Id. Although this test has been used primarily to determine justicability of claims, it also lends itself to the determination of the appropriate standard of review and the outcome on the merits.
81 410 US 113 (1973).
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implicit guarantee of privacy. The Court found that governmental regulation of abortion must withstand strict scrutiny, meaning that the regulation must serve a compelling state interest and must be narrowly tailored to protect only the state interests at stake. The Court recognized state interests in both the health of the mother and the life of the fetus. These state interests increased with each trimester of pregnancy.

Nearly two decades later, after a number of cases that left the appropriate standard of review in some doubt, the Court explicitly rejected Roe's trimester framework in Planned Parenthood of Southeastern Pennsylvania v Casey. The plurality opinion of Justices O'Connor, Kennedy, and Souter reaffirmed the central holding of Roe, upholding both a woman's right to an abortion during the pre-viability term without undue interference from the state and the state's right to restrict abortion after viability, provided that the law contains an exception for both the life and health of the mother. But the Casey plurality also adopted a new standard—that of the "undue burden." According to Casey, "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."

The "undue burden" standard was intended, in part, to give adequate weight to the state's interest; whether a burden is "undue" depends on the degree of infringement upon the abortion right relative to the importance of the state interest served. Casey holds that the

82 Id at 152–53 (noting that the right of privacy may be justified by the Ninth Amendment's reservation of rights to the people as well).
83 Id at 163–64 (noting that the "compelling" point with regard to the protection of potential life was at the viability of the fetus).
84 Id at 155 (citing several illustrative cases).
85 Id at 159 (noting that the woman's right to privacy must be weighed against the interests of the potential human life).
86 The Court decided that the state-proffered interests in the life of the fetus were "compelling" only after the first trimester of pregnancy; thus, first-trimester abortions could not be regulated by the state. After the first trimester, the state's interest in the health of the mother became compelling; therefore, reasonable health regulations were permissible during the stage after the first trimester. The state interest in the potential life of the fetus became compelling at the point of viability, after which the state could regulate or even proscribe abortion for the protection of the fetus, except when the life or health of the mother was threatened. See id at 164–65.
87 For example, in Webster v Reproductive Health Services, 492 US 490, 518–19 (1989), the Court criticized the trimester framework as somewhat arbitrary, but did not explicitly overrule it until Planned Parenthood of Southeastern Pennsylvania v Casey, 505 US 833, 873 (1992) (plurality). Justice Blackmun, writing in dissent in Webster, considered the plurality's test "nothing more than a dressed-up version of rational basis review." 492 US at 555.
89 See id at 846 (majority) ("[T]he essential holding of Roe v. Wade should be retained and once again reaffirmed.").
90 Id at 874 (plurality) (citing cases).
The Statutory Ban on Abortions on Military Bases

state can never promote its interest in fetal life in a way that trumps a mother's pre-viability privacy right to an abortion: "[W]e answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State’s interest in fetal life which imposes an undue burden on the woman’s decision before fetal viability could be constitutional. . . . The answer is no."

Subsequent case law suggests that laws that only promote the state’s interest in fetal life tend to place greater burdens on a woman’s right to choose than laws that also promote the state’s interest in the mother’s health or in other administrative concerns. For example, in Stenberg v Carhart, in which the Supreme Court struck down Nebraska’s ban on partial birth abortions, the Court gave greater weight to the health of the mother than to the state’s interest in fetal life. As long as a given procedure is preferred by some physicians for health reasons, it is likely to be upheld even if it is one which, “in the State’s reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus.” As discussed at greater length in Part II.C, this suggests that laws with the sole purpose of restricting or prohibiting pre-viability abortions for the sake of the state’s interest in fetal life are per se illegitimate. That is to say, although the state’s interest in promoting fetal life is a legitimate one, that interest cannot be legitimately furthered by a law whose purpose is illegitimate: not to promote fetal life by educating, informing, or persuading, but to do so simply by making an abortion more difficult to access. Thus, a restriction whose sole purpose is illegitimate imposes a burden that is per se undue; no further factual inquiry is required.

C. Restricting Abortion for Illegitimate Purposes: Merging the Standards

Courts have used both the undue burden standard and rational basis review to strike down anti-abortion laws that have improper purposes. Under both standards, courts balance the importance of the abortion right against the worthiness of the state’s purpose in restricting abortion access. Although I argue in Part III that both the purpose and the effect of the military abortion ban is to impose undue burdens on abortion access, I focus first on the “purpose” part of the Casey in-

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91 Id at 877 (allowing regulations so long as they are not an obstacle to the “woman’s right to make the ultimate decision”).
93 See id at 930–31.
94 Id at 961 (Kennedy dissenting).
quiry to show that an abortion restriction with an impermissible purpose not only is unduly burdensome, but also lacks a rational basis.

*Casey* held that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Further, "[a] statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." Courts have subsequently read *Casey* to hold that the state may not restrict abortion for the illegitimate purpose of making it harder to access; thus, the burden inflicted by a restriction enacted for that purpose is per se undue. Read this way, an abortion restriction may be struck down either on the basis of its illegitimate purpose or for its overly burdensome effect.

This alone, however, does not answer the question of what purposes are legitimate. *Casey* recognized that promoting both the health of the mother and the life of the fetus are legitimate state interests, but established that the latter purpose could not be legitimately served by laws whose purpose is simply to set up roadblocks to abortion. As the Seventh Circuit put it:

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95 505 US at 877 (plurality).

96 Id (emphasis added) (noting that protecting fetal life was a permissible goal, but that putting an obstacle in front of a woman's right to choose was an impermissible means).

97 See *Okpalobi v Foster*, 190 F3d 337, 354 (5th Cir 1999) (reading *Casey* as requiring lower courts "to determine whether a regulation has the 'purpose' of imposing an undue burden on a woman's right to seek an abortion"), revd on other grounds, 244 F3d 405, 409 (5th Cir 2001) (en banc). See also *Jane L. v Bangerter*, 102 F3d 1112, 1117 (10th Cir 1996) (concluding that a statute fixing viability at twenty weeks "was enacted with the specific purpose of placing an insurmountable obstacle in the path of a woman seeking the nontherapeutic abortion of a nonviable fetus after twenty weeks, and it therefore imposes an unconstitutional undue burden on her right to choose under *Casey*.")

98 It remains an open question whether a law can be unduly burdensome because its purpose is impermissible even if its effects are permissible. See *Mazurek v Armstrong*, 520 US 968, 972 (1997) (per curiam) (finding no improper legislative purpose in that case "even assuming . . . that a legislative purpose to interfere with the constitutionally protected right to abortion without the effect of interfering with that right . . . could render the Montana law invalid"). See also *Carhart*, 530 US at 1008 n 19 (Thomas dissenting) ("Justice Ginsburg [concurring] seems to suggest that even if the Nebraska statute does not impose an undue burden on women seeking abortions, the statute is unconstitutional because it has the purpose of imposing an undue burden."). However, the resolution of this question is not necessary to the outcome of a challenge to the military abortion ban, because the ban's effect as well as its purpose is impermissible. To say that an abortion law has an impermissible purpose but permissible effects must mean, first, that the law fails to fully effectuate its impermissible purpose of substantially burdening the abortion right, and second, that the law serves some other, legitimate purpose. In this case, I argue that the military abortion ban accomplishes the illegitimate purpose of burdening the abortion right and lacks any other legitimate purpose, such that it fails both undue burden and rational basis analyses.
[A] state may advance its legitimate interest in potential life by enacting measures designed to ensure that a woman’s choice is informed and mature as long as the purpose of such measures is to persuade the woman to choose childbirth over abortion rather than to prevent the woman from exercising her right to choose.\(^9\)

Several courts have struck down abortion restrictions on grounds that they prevented choice rather than persuaded its exercise. In holding unconstitutionally vague a statute making Louisiana abortion providers liable in tort for all damages occasioned by an abortion, the Fifth Circuit in *Okpalobi v Foster*\(^{10}\) noted that it must not “accept the government’s proffered purpose if it is a mere ‘sham.’”\(^{11}\) The statute at issue, which the court described as “dishonest,” provided no indication as to how physicians could avoid liability, other than to stop performing abortions.\(^{12}\) Likewise, in *Jane L. v Bangerter*\(^{13}\), the Tenth Circuit invalidated Utah’s attempt to fix viability at twenty weeks as having an impermissible purpose.\(^{14}\) The Court noted that “the Utah legislature’s intent in passing the abortion provisions was to provide a vehicle by which to challenge *Roe v. Wade,* as demonstrated by the legislature’s establishment of an abortion litigation trust account.”\(^{15}\) Thus, a statute designed merely to reduce the overall number of abortions by making abortion harder to access has an impermissible purpose. But when reasonable minds may differ about the purpose of a statute, a court will uphold it.\(^{16}\)

My point in discussing the “purpose” part of the *Casey* inquiry is to establish that the Supreme Court has held that imposing obstacles to abortion is an illegitimate governmental goal. Though I argue in Part III.B.1 that the undue burden standard is the appropriate framework within which to review the military abortion ban, there is always a chance that a court could choose the more deferential rational basis

\(^{9}\) *Karlin v Foust*, 188 F3d 446, 493 (7th Cir 1999) (upholding abortion regulations relying on the legislature’s stated permissible purposes in enacting them and the plaintiff’s inability to bring forward any evidence of impermissible purposes).

\(^{10}\) 190 F3d 337 (5th Cir 1999).

\(^{11}\) Id at 354 (looking for guidance from other constitutional areas in which the legislative purpose has to be discerned, including voting rights and Establishment Clause cases).

\(^{12}\) See id at 356–57 (noting that the statute would drive abortion providers out of business).

\(^{13}\) 102 F3d 1112 (10th Cir 1996).

\(^{14}\) Id at 1117.

\(^{15}\) Id at 1116 (noting that purpose was to be found “from the structure of the legislation and from examination of the process that led to its enactment”).

\(^{16}\) See, for example, *A Woman’s Choice—East Side Women’s Clinic v Newman*, 305 F3d 684, 693 (7th Cir 2002) (upholding a twenty-four-hour informed consent provision that required a woman to receive information “in the presence” of her doctor, necessitating two visits to the clinic or hospital). Judge Wood, dissenting, noted that there was no evidence showing that the “in the presence” requirement actually furthered the state’s legitimate interests in maternal health or in protecting potential life.” Id at 716.
review. To say that a law passes rational basis review simply means that it satisfies the minimal due process requirement that it be rationally related to a legitimate state interest. If the purpose of a law is illegitimate under the undue burden standard, it should be equally illegitimate under the rational basis standard.

Though courts normally do not have occasion to review abortion restrictions under the rational basis standard, two cases suggest that rational basis review of abortion restrictions involves more than a simple nod to legitimate state interests. In fact, these courts exercised rational basis review to strike down abortion restrictions as applied to fetuses with "lethal anomalies" on grounds that the restrictions were not rationally related to the statutory purpose of promoting the life of the fetus where the fetus will not live to term. Britell v United States is of particular interest because it involved the denial of coverage for an abortion of an anencephalic fetus by the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), the military's health insurer. The insurer denied coverage because federal law prohibits the use of Defense Department funds "to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." Although the Supreme Court has upheld such restrictions on funds, the Britell court held that the purpose of protecting fetal life is not served when applied to fetuses with no hope of survival after birth. Importantly, the court also found that, despite the deference normally accorded legislative funding decisions, deference was not appropriate because the costs associated with carrying

107 See, for example, Lawrence v Texas, 539 US 558, 579 (2003) (O'Connor concurring) ("Under our rational basis standard of review, 'legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'"), citing City of Cleburne v Cleburne Living Center, Inc, 473 US 432, 440 (1985).

108 See Karlin, 188 F3d at 489 n 16; Britell v United States, 204 F Supp 2d 182, 185 (D Mass 2002). Karlin held:

[T]he mandatory provision of information relating to a father's child support obligations and the availability of state childrearing assistance serves no legitimate state interest and makes little sense under the circumstances. We fail to see how the provision of this largely irrelevant information helps a woman "facilitate the wise exercise of [her abortion] right."


110 An anencephalic fetus is one that develops without a forebrain or cerebrum. If an anencephalic infant is not stillborn, he or she will usually die within a few days after birth. See Anencephaly Information, online at http://www.anencephaly.net/anencephaly.html (visited July 1, 2004) (noting that “[t]he infant is usually blind, deaf, unconscious, and unable to feel pain”).

111 Britell, 204 F Supp 2d at 183 (noting that anencephaly was explicitly mentioned in the federal regulations denying medical coverage for fetal abnormalities).

112 10 USC § 1093(a).

113 Britell, 204 F Supp 2d at 194–95 (distinguishing the constitutionality of bans on assisted suicides for terminally ill individuals).
the child to term (which would have been covered by CHAMPUS) far exceeded the cost of Britell's abortion.\footnote{114}

Although the regulation was applied to Britell, the dependent of a military officer, and concerned the expenditure of defense funds, the court did not discuss military deference. However, the court specifically rejected post hoc, morality-based justifications for the denial of coverage: “If the only rationale offered for a statute is a general, morality-based concern, evidenced nowhere in the record, and not hashed out in the legislative process, any statute could pass muster.”\footnote{115} Although the two anencephalic fetus cases do not speak in terms of “illegitimate purpose,” they illustrate that even abortion restrictions driven by legitimate state interests will not always be upheld under even the most deferential standard of review.\footnote{116}

In summary, the undue burden standard has been fleshed out to mean that laws that more clearly appear to protect a mother’s health are usually valid, whereas laws that aim to protect fetal life by impairing a woman's pre-viability access to an abortion are often invalidated. Some of the more severe limitations on abortion access have been invalidated as having an illegitimate purpose. Those regulations that have an illegitimate purpose can also be seen as lacking a rational (read: permissible) basis. Abortion cases applying rational basis review show that courts will look closely at the fit between a restriction’s means and ends.

\textbf{III. ILLEGITIMATE PURPOSE OF RESTRICTING ABORTION: WHY THE MILITARY ABORTION BAN’S BURDENS ARE PER SE UNDUE}

An analysis of the military abortion ban reveals that (1) it heavily burdens the ability of women on foreign bases to obtain an abortion; and (2) military justifications are largely pretextual, and to the extent that they are legitimate, the ban is overbroad. A reviewing court will likely take into account the strengths of these competing military and

\footnote{114} See id at 195–96 (noting that because the costs of determining which fetuses have anencephaly are low, it would not increase costs to allow abortions only for anencephalic fetuses).
\footnote{115} Id at 194. In the context of military regulations, the same could be said for \textit{morale-based} justifications like those advanced by members of Congress in support of the military abortion ban. See Part I.B.
\footnote{116} This suggests that these courts applied a more rigorous rational basis scrutiny typical of cases involving a “bare desire to harm” a politically unpopular group, see, for example, \textit{Romer v Evans}, 517 US 620, 634 (1996) (striking down a state constitutional provision prohibiting any law designed to protect homosexual persons); \textit{Cleburne}, 473 US at 446–47 (striking down an ordinance that prevented an organization from operating a facility for the mentally disabled), rather than the extremely deferential traditional rational basis review, see \textit{Williamson v Lee Optical of Oklahoma, Inc}, 348 US 483, 487–88 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).
private interests in both selecting a standard of review and deciding the merits of the case. In this Part, I explain that the attenuated relationship between the ban and military interests leads to the conclusion that the undue burden framework provides the appropriate standard of review. Given that the purpose of restricting access to abortion is illegitimate, and military justifications are pretextual, I conclude that the ban is unduly burdensome. However, if a court chooses rational basis review, the same illegitimate purpose and pretextual military justifications that make the ban unduly burdensome should lead that court to conclude that the ban also lacks a rational basis.

A. Analyzing Burdens and Justifications

1. Burdens.

The practical reality is that the ban seriously infringes upon a woman’s right to procure an abortion. Currently, a woman on a foreign military base who wishes to obtain an abortion must either return to the United States or seek an abortion within the host country or a nearby country. This creates risks that include denial of leave by a commanding officer, invasion of privacy, delay, inability to communicate with the operating physician, and substandard medical facilities or treatment.

A woman who seeks an off-base abortion will likely have to obtain leave from her commanding officer, which may well require revealing the circumstances of her request. Her superior may then choose to postpone or deny her request. Even if leave is granted, access to timely transportation is not guaranteed. While military personnel and their dependents may travel on military transport at no charge on a space-available basis, a woman seeking an abortion may not have the same access to transportation as those with other medical needs. Nor does a woman receive medical leave for an abortion, so

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117 See Englin, Surrendering Rights, New Republic Online (cited in note 4) (“Since it is ultimately a woman’s superiors who determine if she can take leave, when, and for how long . . . [the ban on abortions on military bases] effectively shifts the right and the burden of reproductive choice to those commanders and supervisors.”).

118 See Karen Weil, Adventure Is Just a “Hop” Away: How to Take a Space A Flight, Fort Huachuca Scout B3 (Jan 15, 2004), online at http://www.tradoc.army.mil/pao/Web_specials/H_and_PWB/012504.htm (visited Aug 2, 2004). Although one employee boasts, “We go places that don’t even have terminals,” another officer warns, “You have to be flexible in the amount of time you’re willing to spend (in another city or country), because a flight may not leave from (that place) for days, or even weeks.” Id.

119 See Technical Corrections and Corrections to Enrollment of Certain Appropriations Acts, H J Res 157, 102d Cong, 1st Sess (Feb 28, 1991), in 137 Cong Rec S 17540, 17588–90 (Nov 22, 1991) (statement of Senator Lautenberg). Senator Lautenberg had the entire text of a letter from Dr. Jeffrey T. Jensen added to the record. Dr. Jensen noted:

[A]ir transport for military on leave is on a “space available” basis only, and flights do not
any extra time away from base that is necessitated by travel will presumably be counted in vacation days or time for which she is not paid. In addition, health risks and legal complications increase with any substantial delay. On the other hand, denial of leave would certainly impose an undue burden upon a servicewoman because it would force her to choose between getting an abortion and going absent without leave.

If travel to the United States is not feasible, a woman must look for an abortion provider in the host country, provided that abortion is legal there. Health care standards and practices differ from nation to nation; a woman who leaves base may be subjected to much lower standards of medical expertise, safety, and cleanliness than would exist at the military facility. One military officer reports that a woman from her battalion who obtained an off-base abortion in Germany received no painkiller for the procedure and could barely understand instructions given in the provider's broken English. One can imagine worse scenarios, particularly in host countries where abortion is illegal or where medical facilities are substandard.

2. Justifications.

Justifications for the military abortion ban can be divided into reasons that have to do with the military context ("military justifications"), and generic reasons for restricting abortion ("civil justifications"). I separate these justifications because, in Part III.B, I argue that civil justifications alone are insufficient either to withstand an undue burden analysis or to justify the exercise of a deferential rational basis review. Only genuine military necessity can justify the burdens on a woman's choice or provide a legitimate, rational basis

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Id at 17589. Because women are not given medical leave to procure an abortion, a woman seeking an abortion must wait for her supervisor's permission before even signing up for a flight.


121 Although abortion is technically prohibited in Germany, women who choose to obtain abortions during the first trimester will not be prosecuted as long as they first receive counseling designed to convince them not to terminate their pregnancy. See Questions & Answers about Germany: Health Care, Health Issues and Social Welfare, online at http://www.germanyinfo.org/relaunch/info/facts/facts/questions_en/health/healthissues3.html (visited July 1, 2004).

122 See Letter from Lieutenant General Claudia J. Kennedy (retired) to Senate on Abortion Ban for Women in the Military, online at http://www.crlp.org/hill_ltr_0602mil.html (visited July 1, 2004) (noting also that the modesty of the soldier had been violated due to different cultural norms about nudity).
for the ban. In this Part, I suggest that genuine military justifications are lacking.

a) Civil justifications. There are several overlapping civil justifications for the military ban, including the desire to restrict abortion, the desire not to entangle taxpayer funds in the provision of abortion, and the desire not to perform abortions in federal facilities. As explained in Part II.C, policies that only serve the purpose of restricting abortion impose a burden that is per se undue. Although the purpose of withholding taxpayer funding for abortions has been upheld as legitimate, the military ban extends to privately funded abortions. While some lawmakers have questioned the government's ability to pass on all costs related to an abortion, it hardly seems impossible given that private insurance companies routinely undertake such billing inquiries. In any event, where serious measures have been taken to ensure that public funds will not be used to subsidize abortion, the denial of the fundamental right to an abortion cannot be legitimately justified by billing concerns.

Finally, the ban does serve the purpose of retracting government participation, apart from funding, in the performance of abortions. Opponents of legal abortion may abhor the thought of government employees performing abortions in government facilities, even when those employees participate voluntarily and the government pays nothing. The purpose of forbidding government involvement in the performance of abortions is closely analogous to the permissible purpose of restricting government funding of abortions.

However, the Supreme Court has distinguished between the denial of government funding of abortions, which is seen as the refusal to act affirmatively, and its imposition of obstacles to abortion. Moreover, where women are, in a sense, held captive by the government, the refusal to act affirmatively and the imposition of insuperable obstacles to an abortion may be one and the same.

The case of prison abortions makes this more concrete. In the prison setting, female inmates are captive, closely controlled by the

123 See Harris v McRae, 448 US 297, 326-37 (1980) (upholding the Hyde Amendment's prohibition on the use of Medicaid funds for abortions except when the mother is the victim of rape or incest or her life is endangered); Maher v Roe, 432 US 464, 473-74 (1977) (upholding a regulation limiting state Medicaid benefits to those abortions that are medically necessary).

124 See National Defense Authorization Act for Fiscal Year 2003, 148 Cong Rec at S 5827 (cited in note 4) (statement of Senator Murray) (“Opponents have argued that there is no way to determine the costs of these services, despite the fact that private hospitals must determine per-unit costs of per-procedure costs, every single day.”).

125 See Maher, 432 US at 474 (“The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman’s path to an abortion. . . . The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there.”).
The state, of course, has a legitimate interest in promoting fetal life. However, if the state does not act affirmatively to provide female prisoners access to abortions, they will have no choice but to carry their fetuses to term. Because state inaction eviscerates the right, some courts have held that prisons have a constitutional obligation to facilitate prisoner access to abortions.\[126\]

In the peculiar context of foreign military bases, the government’s refusal to allow on-base abortions will be functionally equivalent, in many cases, to a denial of the right altogether. In this setting, the purpose of refraining from involvement is the same as the forbidden purpose of restricting abortions; thus, both purposes, in this particular case, are illegitimate.\[127\] The military’s quasi-custodial role with respect to military personnel and dependents, like that of the prison context, gives rise to an affirmative duty to provide access to abortions, even though the government has no such duty with respect to the general public.

b) Military justifications. As I argue in Part III.B, the military abortion ban requires military justifications. Only military necessity could justify the burdens upon a woman under the higher undue burden standard, and likewise, only military necessity can justify ratcheting down the level of scrutiny from undue burden to rational basis review. Thus, it is necessary to review military reasons for the ban. I argue that no military priorities justify the ban. The fact that military efficiency is actually better served by allowing on-base abortions rebuts the suggestion that the ban is anything but a political attempt to curtail abortion access.

The most oft-repeated military justification for the ban is that performing abortions on military bases hurts military morale. Abortion is a divisive issue, the argument goes, and the awareness of the performance of the procedure in close proximity will make members of the military less capable of discharging their duties. Raising morale is a legitimate military goal. However, each side of the congressional debate has argued that its side better serves morale. If Congress could

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126 See Monmouth County Correctional Institutional Inmates v Lanzaro, 834 F2d 326, 334, 337–38 (3d Cir 1987) (holding unconstitutional a requirement that prisoners obtain court orders for release upon their own recognizance in order to obtain abortions; such a requirement would completely deprive maximum security inmates of their right to an abortion, and would cause other inmates to endure unconstitutional delay); Roe v Leis, 2001 US Dist LEXIS 4348, *9 (SD Ohio) (following Monmouth County).

127 Again, the purpose of this Comment is to discuss the constitutional issues raised by the ban, not to determine the exact circumstances under which it could be made constitutional. However, it would seem that the closest case would be presented by a policy that flies a servicewoman home and back immediately. Although this might reduce the burdens associated with health and safety risks of getting an abortion in a foreign country, the high costs of employing such a policy only support the notion that the ban’s sole purpose is the illegitimate one of restricting access to abortion.
simply appeal to an undefined concept of "morale," it could enact virtually any regulation upon the military; such assertions must be supported by some type of evidence. Only the barest anecdotal evidence has been offered to support either side of the congressional debate about morale: supporters of the ban have stated that doctors oppose performing abortions, which affects their morale;\textsuperscript{128} opponents of the ban have cited a doctor's letter and a servicewoman's letter indicating a loss of morale from an inability to obtain abortions.\textsuperscript{129}

Other possible military justifications are equally unfounded. As explained earlier, the argument for respect for host country laws and customs can be blunted by the fact that the Clinton policy provided transportation to a facility in a country where abortion was legal. The goal of decreasing sexual tension was upheld as a legitimate rationale for the ban on gays in the military, but the link between abortion and sexual tension is too attenuated for that rationale to have traction in this debate. Abortion is no more likely to promote sexual activity than birth control or the presence of women in the military.

Moreover, assertions that the ban serves military interests can be rebutted by showing that military goals of readiness and efficiency are actually better served by providing access to abortion. The ban on abortion costs more lost days from work and creates a higher risk of serious injury to women if they must seek abortions off base. Further, children cost the military a great deal in terms of the loss in productivity of parents and the costs of dependent benefits. Of course, this argument should not be misread to suggest that, on military bases, abortion is preferable to childbirth; it simply illustrates that efficiency justifications are inadequate to support the ban.

\textsuperscript{128} Some members of Congress have referenced conversations with military doctors who oppose performing abortions on bases. See, for example, National Defense Authorization Act for Fiscal Year 2000, HR 1401, 106th Cong, 1st Sess (Apr 14, 1999), in 145 Cong Rec H 3964, 3994 (June 9, 1999) (statement of Representative Weldon) ("Everybody that I spoke to, the doctors and nurses, were very pleased that they were going to take that very, very controversial issue and move it out of the military hospitals."). But allowing on-base abortions does not mean that military doctors would be forced to perform them; the Clinton policy explicitly provided that doctors could opt out on the basis of conscience or moral principle. See text accompanying notes 18–19.

\textsuperscript{129} See Technical Corrections and Corrections to Enrollment of Certain Appropriations Acts, 137 Cong Rec at S 17590 (cited in note 119) (statement of Senator Lautenberg) (introducing a letter from Dr. Jeffrey T. Jensen that noted: "The preparedness of the military would be improved not only by reducing lost work days, but also by enhancing \textit{morale through this expression of empathy for women's issues}") (emphasis added); National Defense Authorization Act for Fiscal Year 2004, HR 1588, 108th Cong, 1st Sess (Apr 3, 2003), in 149 Cong Rec H 4402, 4500 (May 21, 2003) (statement of Representative Davis):

One woman wrote to me the following after being turned away at her base: "The military expects nothing less than the best from its soldiers, and I expect the best medical care in return. If this is how I will continue to be treated as a military servicemember by my country and its leaders, however, I want no part of it."
First, some pregnant women will choose to have an abortion no matter what the circumstances. That means that where a safe, legal abortion is inaccessible, some servicewomen or military dependents will choose to procure unsafe or illegal abortions in the host country. Such abortions could result in injury or death to the mother. In addition to the cost that such effects will have on morale and readiness, the military will have to absorb the medical costs of treating such injuries.

The alternative to abortion is childbirth. In most cases, women who carry their fetuses to term will keep their babies rather than give them up for adoption. The cost to the military of an abortion is zero, since the woman is obligated to finance it herself. Childbirth, on the other hand, incurs not only medical costs, but also maternity leave and more sick days. In some cases, pregnancy may call vital personnel away from their duties at times of crisis.

Also, attrition rates will likely be very high for new mothers in the military relative to their nonpregnant peers. Considering that many working women who become mothers get pregnant relatively early in the span of working years, the military will get a much lower return on investment in terms of the resources spent training young military women. Considering that the military work and the military lifestyle are generally more demanding than other occupations, attrition is likely to be significantly higher among new mothers employed by the military than among the larger working pool of new mothers. Those who remain in the military while raising children will require more leave than women without children. This extra leave will naturally also hold true for servicemen who father children.

In addition, the military assumes a higher degree of responsibility for youth raised on military bases than other employers. For example, federal law authorizes the Secretary of Defense to subsidize child care for servicepersons on active duty, and requires every military installation to have a “youth sponsorship program to facilitate the integration of dependent children . . . into new surroundings” when a parent

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130 The World Health Organization estimates that twenty million unsafe abortions occur each year, resulting in about eighty thousand maternal deaths and hundreds of thousands of disabilities. The vast majority of these injuries occur in developing countries. See World Health Organization, Address Unsafe Abortion, online at http://www.who.int/archives/whday/en/pages1998/whd98_10.html (visited July 1, 2004).


133 10 USC § 1788(a) (2000).
has relocated. Of course, the military cannot ignore the costs of childbirth to military readiness, for, in the not-so-distant past, it actually promoted policies of mandatory discharge of pregnant women in acknowledgement of these very costs. Further, before the strong anti-abortion movement of the 1980s, the military permitted abortions on bases; it should be significant that, before politicians got involved, the military itself allowed them.

In sum, it is uncontroversial that military readiness and efficiency are better served when military personnel are available, healthy, and physically capable of doing their jobs. Moreover, it follows that servicewomen are better able to serve on active military duty when they are not pregnant. Therefore, if a servicewoman or a dependent wants to procure an abortion, it would seem to be in the military's interest to facilitate that choice by providing the speediest access to the safest possible abortion.

B. Choosing and Applying a Standard

Having discussed the military and ordinary governmental justifications for the military abortion ban and the burdens that it places on a woman's right to access an abortion, it remains only to discuss what standard a court would apply in a challenge to the ban, and what the outcome of such a challenge would be. First, because a clearly established framework exists for reviewing the constitutionality of restraints on abortion, and because the military context of this ban provides little in the way of reasons to vary from this framework, I argue that the undue burden standard provides the proper standard of review. Second, the ban is unduly burdensome. Finally, I go one step further to argue that, even if a court (incorrectly) reviewed the ban under a rational basis standard, it should still be held unconstitutional.

134 10 USC § 1785(a) (2000). For a criticism of the rate of defense spending devoted to family support programs, see Luddy, Government's Biggest Welfare Program, American Enterprise (cited in note 131) (arguing that the military's coverage of dependents of unwed servicewomen means that "[t]here is now no better place in America to be an unwed mother than in the armed forces"). Luddy further argues:

Consider an unmarried female Petty Officer Third Class. If she becomes pregnant, she may immediately request special permission to move out of barracks or off ship and live off base at government expense. After her twentieth week of pregnancy, commanders are required to grant such a request. Nine months' housing allowance amounts to approximately $2,400. After the woman's child is born, she receives 45 days of paid maternity leave, worth an additional $1,800. Throughout her pregnancy, our sailor is entitled to free obstetrical care, and free delivery. Her infant immediately becomes eligible for years of day care, medical and dental care, recreational and educational subsidies, and other benefits. Financial costs in just this first year run to many thousands of dollars.

Id. 135 See Crawford v Cushman, 531 F2d 1114, 1124-26 (2d Cir 1976) (holding unconstitutional the military's practice of discharging pregnant women).
1. The undue burden framework provides the correct standard of review.

The military cases show that there is no clear doctrinal dividing line between when to apply a higher standard of review and when to apply a deferential rational basis review. The choice of a standard of review depends on a consideration of the competing military interests and constitutional claims.\footnote{In practice, courts weigh private interests, as well as the potential for improper or politically based motives, against possible military justifications. This balancing affects both the selection of a standard and the outcome on the merits. This argument echoes criticisms as to the artificiality of the Court's multilayered analytical framework in the equal protection context. See Craig v Boren, 429 US 190, 212 (1976) (Stevens concurring): I am inclined to believe that what has become known as the [ ]tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. See also note 80.} Courts are left to determine on a case-by-case basis whether the articulated military justifications for a particular decision are weighty enough to defer to the military's judgment. The case law indicates that, where a higher standard of review normally applies, and where the facts of the case do not implicate the policies behind deferring to the military, the higher standard will be applied.\footnote{See Frontiero, 411 US at 690-91 (plurality) (holding that the statutory difference in the treatment of male and female military personnel for the purpose of determining "dependent" benefits violated the Due Process Clause of the Fourteenth Amendment); Berkley, 287 F3d at 1091 (reversing the trial court on the grounds that strict scrutiny, not rational basis, was the appropriate standard to be applied to an Air Force policy that treated women and minority officers differently from other officers with regard to involuntary termination); O'Neill, 364 F Supp at 579 (applying strict scrutiny to the prohibition on marriage at the Merchant Marine Academy).} This is a sensible approach, because the purpose of deferential review in the military context is to allow leaders significant authority and flexibility to deal with issues of national security and military readiness;\footnote{Although deference to the military can also be justified on the same grounds as deference to any agency (expertise, institutional competency, democratic legitimacy, etc.), see text accompanying notes 50-51, such "civil" deference does not permit agencies to trump individual constitutional rights; only the special purpose of national security allows that.} where such issues are not really at stake, individual rights should receive greater protection.

A challenge to the military abortion ban could be distinguished from military cases where courts exercised judicial restraint because it is basically unrelated to issues of military efficiency and national security.\footnote{See Part III.A.2(b).} Given the widespread federal activity to halt even the most indirect government participation in abortion, such as in the contexts of domestic and international public health funding and Medicaid, a reviewing court should consider the risk that military justifications are pretextual. If we assume that military justifications are pretextual, this
still does not answer the question of how the civil justifications stack up against the ban’s burdens, but it does answer the question of which standard to use. The only reason to vary from the undue burden standard is the military context at issue here. Moreover, even when rational military interests are at stake, a right may be so much more important by comparison that it must be reviewed under its accompanying constitutional standard.¹⁴⁰

If a court were concerned that the higher standard of review does not give enough deference and flexibility to the military to make appropriate policies, it should consider that deference can be built into either the choice of a standard or the application of the standard.¹⁴¹

The undue burden standard explicitly allows for a weighing of state and private interests; whether a burden is undue depends on the countervailing government justifications. Although the purpose of burdening abortion access, when it exists in isolation from other legitimate purposes, creates burdens that are per se undue, an important and legitimate military justification could mean that a restriction’s burdens are not at all undue. Thus, the higher standard adequately accounts for legitimate military interests.

2. The burdens imposed by the military abortion ban are per se undue.

Again, the military abortion ban cannot be justified on the basis of military justifications; the fact that the goals of military efficiency and readiness are actually better served by allowing on-base access to abortion rebuts the premise that the ban serves genuine military justifications.¹⁴² After possible military justifications for the ban are stripped away, only civil justifications remain.

¹⁴⁰ See, for example, O’Neill, 364 F Supp at 579 (striking down the Merchant Marine Academy’s prohibition on marriage for all cadets). It is worth considering whether courts are informally engaging in an “imminence” or “absoluteness” inquiry in an examination of how fundamental rights are either granted or denied in the military context. Some rights can be curtailed for military reasons without a wholesale deprivation. For example, although Goldman upheld the Air Force’s prohibition on wearing headgear (including yarmulkes) indoors, the decision did not require the wholesale prohibition of an Orthodox Jew’s religious exercise. See generally 475 US 503. In contrast, some rights are either upheld or denied completely, such as restraints on marriage. The right to an abortion on a military base falls into the latter category; for many service-women and dependents, regardless of accommodative military policies, delay or expense may mean that a woman who is denied the right to an abortion on a base will be incapable of exercising the right at all.

¹⁴¹ See Berkley, 287 F3d at 1091 (“[W]e do not reach the question of what effect, if any, deference to the military would have on the judicial application of strict scrutiny.”).

¹⁴² See Part III.A.2(b). Regarding the analytically parallel setting of prisons, see also Monmouth County, 834 F2d at 341–42 & n 22 (holding that the restriction on women inmates’ ability to access abortion was not related to the legitimate penological interest of conserving the prison’s limited resources where “the presence of pregnant inmates in the prison population . . . places a greater burden on jail resources and administrative concerns than would a woman who
Although a state's legitimate interest in fetal life makes legitimate the purpose of discouraging abortion, it is illegitimate to do so by making an abortion exceedingly difficult to obtain. The purpose of discouraging abortion can only be upheld via provisions that "inform the woman's free choice, not hinder it." The case law indicates that the ban is more like those provisions that have been struck down as hindering choice than those upheld as informing choice. For example, spousal notification provisions have been struck down as a substantial obstacle likely to deter some women from procuring abortions. Although the military ban does not formally require notification, it may result in a de facto employer notification requirement. While other employment settings permit a woman to take vacation time without informing her boss of her intentions, the military is different. Conversely, twenty-four-hour waiting periods have been upheld, but these serve the government goal of providing pregnant women with the opportunity to weigh costs and risks associated with both abortion and childbirth; delays in the context of the military ban (which are likely to extend much longer than twenty-four hours) are not motivated by similar intentions.

The case most on point here is Roe itself. Roe involved a Texas law proscribing abortion in all cases except when the life of the mother was endangered. Unlike subsequent laws that involved administrative or informational regulations, or the refusal of federal or

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143 Casey, 505 US at 877 (plurality) (noting that regulations that "express a profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose").

144 See id at 893–94 (majority). It is relevant to note that the spousal notification provision struck down in Casey merely required a woman to sign a statement that she had notified her spouse of her decision to procure an abortion; a statement from her husband affirming notification was not required. Further, the notification requirement could be waived under a number of circumstances, including affirmation by the woman that her spouse was not the person who impregnated her, or that physical abuse would result from notification. See id at 887.

145 It may be the case that an on-base abortion also provides de facto employer notification, depending on medical circumstances and the type of job performed. Compare Planned Parenthood's website at http://www.plannedparenthood.org/abortion/what-to-expect.htm (visited July 1, 2004) ("After an abortion up to the 25th week, you will rest in a medically supervised recovery room for as long as necessary, usually about an hour. ... Usually you can return to work or your normal activities the day after early abortion—depending on how strenuous your normal activities are."), with the Boulder Valley Women's Health Center's website at http://www.bvwhc.org/abortion.html (visited May 14, 2004) ("You should plan on three weeks of healing. During this time, you need to get plenty of rest, eat nutritious foods and avoid strenuous activity.").

146 See, for example, Casey, 505 US at 881–87 (plurality) (upholding a twenty-four-hour waiting period between the provision of information about the procedure and the actual performance of the procedure); Casey reversed City of Akron v Akron Center for Reproductive Health, 462 US 416, 449–51 (1983), which had held a similar provision unconstitutional.

147 See Roe, 410 US at 117–18 (noting that a majority of the states had statutes similar to the Texas statute).

148 See note 146.
state government to affirmatively guarantee access to abortions, the Texas statute in Roe was a statewide ban. A military base can be analogized to a state; although there would be no constitutional problem if no abortion providers chose to operate within a certain state, it is obviously impermissible for a government to outlaw the practice entirely. To outlaw abortion in the federal “jurisdiction” of foreign military bases is the equivalent of a statewide abortion ban.

An awkwardness arises out of the fact that, in this case, the entire “jurisdiction” is government-owned. If the purpose of eliminating government funding of abortions is legitimate, why is it illegitimate to eliminate government participation altogether? The answer is that, in certain narrow contexts, the normally legitimate purpose of disentangling government from support of abortion is equivalent to the illegitimate purpose of denying the right altogether. Though the lack of government funding for abortions may make it practically impossible for indigent women to access abortion, the government is not actually forbidding abortion. Outlawing abortion on military bases is more like outlawing abortion in an entire state (necessitating travel that may, in fact, be more difficult than simple interstate travel), which Roe held unlawful, than it is like funding one activity to the exclusion of another. Where women are held captive by the government, either legally (as in prisons) or practically (as on foreign military bases), the government does have an affirmative obligation to provide access to safe and legal abortions without undue delay.

3. The military abortion ban cannot withstand rational basis review.

Some skeptics might doubt whether a court would really select the undue burden standard, given the judiciary’s historical hands-off approach to reviewing military infringements of constitutional rights. Having outlined the reasons that a court should review the ban under the undue burden standard, and why the ban fails that higher standard, I also maintain that the ban could not withstand even rational basis scrutiny.

Though the rational basis standard is designed with built-in deference to a government entity’s authority to choose among rational policy alternatives, the actual exercise of that standard varies dramatically depending on the means and ends at issue. This variation is as

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149 See note 123.
150 See notes 126–27 and accompanying text.
151 See United States Railroad Retirement Board v Fritz, 449 US 166, 176–77 n 10 (1980) (citing eleven of the Court’s rational basis holdings, stating that “[t]he most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles”).
true in the context of military regulations as in any other context. When military regulations have little to do with the military context, and simply relate to the government’s role of employer more generally, rational basis review will be less deferential. Examples include the ban on pregnant women in the military that was struck down in Crawford v Cushman, and the denial of coverage for the abortion of an anencephalic fetus that was reversed in Britell. Crawford noted that the plaintiff’s claims “must be evaluated in relation to the specific military justifications alleged here—the demands of readiness, mobility and administrative convenience—without unjustified presumptions of validity for either competing interest given in our inquiry on the merits.”

The only reason for switching to the lower standard of rational basis review is concern for broad legitimate military purposes. Thus, for rational basis review to apply, the military abortion ban must have rational military justifications. However, the ban has no rational relationship to furthering the legitimate goals of raising morale or reducing sexual tension. Assuming that a reviewing court begins its analysis “without unjustified presumptions of validity for either competing interest,” any assertion that military goals are served by the ban would have to be supported by evidence. Moreover, even though the ban must have legitimate military justifications, the ban is not even justified by legitimate civil purposes. That is, because the ban lacks any rationale but to burden access to abortion, it lacks a rational relationship to a legitimate government interest. Thus, the same illegitimate purpose that makes the ban per se undue also makes it irrational.

CONCLUSION

The military abortion ban restricts the abortion rights of service-women in ways that no other American woman’s rights could be restricted. Considering the financial and efficiency costs to the military
of childbirth and child-rearing, and the lack of support for a legitimate morale argument, it does not follow that Congress has banned abortions on bases for military reasons. A legal realist analysis of existing case law suggests that, regardless of whether a court applied the undue burden standard or a rational basis standard, the ban would be found unconstitutional.

I concede that a challenge to the ban is unlikely, given the costs and reputational risks of bringing such a challenge. I also readily admit that any number of circumstances on the ground might make an abortion on a foreign military base impractical or infeasible. Under such circumstances, placing a heavier burden on a woman's access to abortion is neither undue nor irrational. However, a military-wide ban suggests an indifference to military circumstances that underscores the legislative history indicating that the ban is politically, not militarily, motivated. At a time when the need for military efficiency is high, and when greater numbers of women serve in the armed forces than ever before, the military's focus should be on guaranteeing the best access to medical care possible—including access to abortions.