

# The Military's Abortion Crisis in the Aftermath of *Dobbs v. Jackson Women's Health Organization*

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*Women in the military have not had access to abortion care since 1978, when Congress introduced an amendment to a Department of Defense (DoD) appropriations bill, later codified under 10 U.S.C. § 1093, that prohibited the use of DoD funds for abortions. While women have endured this second-class health care for over four decades, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* has created new problems for servicewomen and the military writ large. Now military women must travel off-base and, in some instances, out-of-state or out-of-country, to seek an abortion. While women in and out of uniform share this burden, servicewomen must comply with military constraints that exacerbate their situation, including following orders that require them to be stationed in states that criminalize abortion, reporting their pregnancy up their chain of command, following leave protocols that require their commander's approval when traveling for abortion care, and managing unpredictable assignments, including deployments, while seeking reproductive care. These unique circumstances create an unwelcoming and terrifying environment for military women at a time when the military is desperately trying to diversify the armed forces.*

*The DoD responded to the *Dobbs* decision by instituting an abortion travel policy, now rescinded, that allowed service members to be reimbursed for abortion-related travel, such as lodging, mileage, and per diem. While such policies are laudable, they are subject to change, and they do not diminish the legal and professional challenges that service members face after *Dobbs*. This Article analyzes the legal authorities that shape reproductive health policies in the military. It argues that the swirling political winds that influence abortion policies undermine the stability that military health care is meant to provide. Despite the hardships that service members face after *Dobbs*, renewed challenges to 10 U.S.C. § 1093 are likely to fail. However, Congress's statutory ban should not prohibit the DoD from exploring alternative means of providing support to service members. The Article argues for increased confidentiality for pregnant servicewomen and argues that the Department of Veterans Affairs (VA) should be utilized to provide abortion services to servicewomen. The DoD must encourage formal and informal support networks and must leverage private organizations as*

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*gap-fillers where military health care falls short. The Article concludes that the military's crippled reproductive health services are unacceptable in the age of Dobbs and that their detrimental impact on service members and national security is a national crisis. Unless reproductive services are expanded, the abortion issue will continue to impact national security and will hamstring the military's efforts to modernize.*

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#### INTRODUCTION<sup>1</sup>

Almost half a century ago, Congress passed the Hyde Amendment, a law that banned abortion in major health care programs including Medicaid, Medicare, and others funded through an annual appropriations act for the Departments of Labor, Health and Human Services, and Education (L-HHS-Ed).<sup>2</sup> Passed as a response to *Roe v. Wade*, the law severely restricts access to abortions for millions of low-income women and their families who rely on Medicaid and other federal health programs.<sup>3</sup> Since 1976, Congress has included some version of the Hyde Amendment in every L-HHS-Ed appropriation.<sup>4</sup> In addition to the Hyde Amendment, Congress has used its role as a public insurer, employer, and provider of health care to enact Hyde-like laws that restrict full reproductive care for women who receive health care through

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1. The author acknowledges and respects that service members capable of pregnancy do not always identify as women. However, the author wishes to highlight the impact of the *Dobbs* decision on servicewomen, who make up 17 percent of the military, and has intentionally used the term "servicewomen" to promote the acceptance and normalization of women in the military, including pregnant servicewomen. The author also recognizes that abortion restrictions affect all service members, not just servicewomen, and therefore uses the terms servicewomen and service members throughout the Article.

2. EDWARD LIU & WEN SHEN, CONG. RSCH. SERV., IF12167, THE HYDE AMENDMENT: AN OVERVIEW (2022).

3. Megan K. Donovan, *In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact*, GUTTMACHER POL'Y REV., Jan. 5, 2017, at 1.

4. LIU & SHEN, *supra* note 2, at 1.

the federal government.<sup>5</sup> These laws impose abortion restrictions on a wide swath of women, including federal employees, military personnel, military veterans, Peace Corps volunteers, American Indians and Alaska Natives, and people incarcerated in federal prisons or detention centers.<sup>6</sup>

In 1984, Congress passed a Hyde-like statute banning the military from providing abortions to women in uniform and their dependents.<sup>7</sup> While the ban negatively affected all service members, it had an outsized impact on service members stationed overseas in countries that do not have liberalized abortion laws.<sup>8</sup> These service members were burdened with finding and obtaining safe medical treatment for abortions in foreign countries, or traveling home to seek treatment in the United States.<sup>9</sup> For service members stationed stateside, the ban meant finding care at a nearby private clinic, at their own expense.<sup>10</sup>

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* was a seismic shift for all service members and their families.<sup>11</sup> In *Dobbs*, the Supreme Court held that there is no constitutional right to an abortion.<sup>12</sup> Overruling *Roe v. Wade*, the Court decided that states have the authority to prohibit a woman from terminating her pregnancy.<sup>13</sup> Shortly after the *Dobbs* decision, former Secretary of Defense Lloyd Austin sent a memo to senior Pentagon officials warning them that the *Dobbs* decision had "impacted access to reproductive health care with readiness, recruiting, and retention implications for the Force."<sup>14</sup> He described the complexity and uncertainty that servicewomen would face in accessing reproductive care and its implications for national security:

The practical effects of recent changes are that significant numbers of Service members and their families may be forced to travel greater distances, take more time off from work, and pay more out of pocket expenses to receive reproductive health care. In my judgment, such effects qualify as unusual, extraordinary, hardship, or emergency circumstances for Service members and their dependents and will interfere with our ability to recruit, retain, and maintain the readiness of a highly qualified force.<sup>15</sup>

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5. *Id.*

6. *Id.*

7. Performance of Abortion: Restrictions, 10 U.S.C. § 1093 (1984).

8. Kate Grindlay, Susan Yanow, Kinga Jelinska, Rebecca Gomperts & Daniel Grossman, *Abortion Restrictions in the U.S. Military: Voices from Women Deployed Overseas*, 21 WOMEN'S HEALTH ISSUES 259, 261 (2011).

9. For a list of countries and their abortion status, see *The World's Abortion Laws*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/worlds-abortion-laws/> [perma.cc/X34R-VNAA] (last visited Oct. 27, 2025).

10. Service members obtain military health care under TRICARE, a health program for service members and their families. See *TRICARE 101*, TRICARE, <https://www.tricare.mil/Plans/New> [web.archive.org/web/20251008040705/https://tricare.mil/Plans/New] (last visited Oct. 27, 2025).

11. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 262 (2022).

12. *Id.* at 292.

13. *Id.*

14. Memorandum from the Sec'y of Def. on Ensuring Access to Reproductive Health Care (Oct. 20, 2022), <https://media.defense.gov/2022/Oct/20/2003099747/-1/-1/1/MEMORANDUM-ENSURING-ACCESS-TO-REPRODUCTIVE-HEALTH-CARE.PDF> [perma.cc/E7UR-DA45].

15. *Id.* at 2.

Secretary Austin's memo outlined policy directives that attempted to lessen the blow to servicewomen, including extending the time that servicewomen have to notify commanders of their pregnancy, allowing for administrative leave, and reimbursing travel expenses for women seeking outside reproductive care.<sup>16</sup> The memo also called for a program to support DoD health care providers who could be subject to civil or criminal penalties related to their official duties in some states.<sup>17</sup>

This Article responds to the current abortion crisis facing the DoD and its service members in the aftermath of the *Dobbs* decision. It analyzes the constitutionality of the military abortion ban after *Dobbs* and the role of the legislative and executive branches in making health care policy for the military. Regardless of the power levers that govern military health care, the Article questions Congress's prudence in denying full reproductive rights to servicewomen and argues that, in a post-*Dobbs* United States, servicewomen must have access to full reproductive rights as a matter of national security. Part I of the Article examines the abortion ban and its impact on military women, unveiling the unique difficulties that the ban imposes on pregnant servicewomen. It also discusses the national security implications of the ban in the post-*Dobbs* environment. Part II examines the constitutional rights of servicewomen and the separation of powers issues raised by the military abortion ban and the *Dobbs* decision. The Section ultimately concludes that Congress's power of the purse is a permissible means to regulate abortion in the military but explores the possibility of using the VA's formerly-liberalized abortion policy to provide reproductive health care to service members. Part III offers recommendations for providing more robust reproductive health care to servicewomen within the limits of the abortion ban. The Article applauds supportive efforts such as the military's now-rescinded abortion travel policy but argues that DoD policies must go further to protect the confidentiality of servicewomen. The Article argues for using other federal entities to provide abortion services, such as VA hospitals, and analyzes the use of leasing agreements with private organizations to provide abortion services. Part IV concludes that while 10 U.S.C. § 1093 is on firm constitutional footing, it does not foreclose other means of providing reproductive services to servicewomen. The *Dobbs* decision has created a national security crisis that requires immediate attention. Without safe and accessible reproductive health care, women will be chilled from joining the military and the status quo will continue to adversely impact the military's diversity goals and ultimately weaken the armed forces.

#### I. THE IMPACT OF *DOBBS* ON MILITARY WOMEN AND NATIONAL SECURITY

The harmful impact of *Dobbs* on servicewomen and the nation is undeniable.<sup>18</sup> While the military's abortion ban has been in effect for more than four decades, the *Dobbs* decision raised the ban's detrimental impact to new heights. This Section analyzes the problems associated with the ban and discusses its potential to disrupt national security in the post-*Dobbs* environment.

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16. *Id.*

17. *Id.*

18. KYLEANNE M. HUNTER, SARAH O. MEADOWS, REBECCA L. COLLINS & ISABELLE GONZÁLEZ, HOW THE *DOBBS* DECISION COULD AFFECT U.S. NATIONAL SECURITY, RAND (2022), <https://www.rand.org/pubs/perspectives/PEA2227-1.html> [perma.cc/LQA9-9ESW].

*A. Risks for Military Women Accessing Reproductive Health Care and Using the DoD's Abortion Travel Policy*

The history of military medicine in the United States dates to the American Revolution.<sup>19</sup> Since that time, the Military Health System (MHS) has grown to be one of the largest health systems in the nation.<sup>20</sup> The importance of the MHS to national security is codified in 10 U.S.C. § 1073(d), a statute that requires the Secretary of Defense to maintain medical treatment facilities to support the medical readiness of the armed forces.<sup>21</sup> The MHS directly supports the National Defense Strategy, DoD's strategic plan, by providing for a medically ready force that cares for uniformed personnel, their families, and retirees in wartime and peacetime.<sup>22</sup> Under the MHS, ease of access to medical care is paramount.<sup>23</sup> Military personnel and their dependents can seek treatment at a military treatment facility (MTF), often a hospital or clinic located on their installation, or through off-installation providers, including private providers, if treatment is not available through an MTF.<sup>24</sup> The medical benefit is extremely valuable to service members and their families, especially junior enlisted, because it provides them with free comprehensive health care and insulates them from rising health care costs and complicated claims processes.<sup>25</sup>

The MHS provides services through a managed care program called TRICARE, the military's health benefits program.<sup>26</sup> TRICARE manages care for military members and their dependents through MTFs and civilian health care facilities that participate in the TRICARE program.<sup>27</sup> Congress broadly determines the scope of medical and dental care for the military while day-to-day operations are administered by the Assistant Secretary of Defense for Health Affairs, the Defense Health Agency, and the military service branch health agencies.<sup>28</sup>

19. Christopher Hurd, *Army Medical Corps Provides Continuity of Care for 248 Years*, ARMY NEWS SERV. (July 27, 2023), [https://www.army.mil/article/268631/army\\_medical\\_corps\\_provides\\_continuity\\_of\\_care\\_for\\_248\\_years](https://www.army.mil/article/268631/army_medical_corps_provides_continuity_of_care_for_248_years) [web.archive.org/web/20250907084432/https://www.army.mil/article/268631/army\_medical\_corps\_provides\_continuity\_of\_care\_for\_248\_years].

20. BRYCE H.P. MENDEZ, CONG. RSCH. SERV., R45399, MILITARY MEDICAL CARE: FREQUENTLY ASKED QUESTIONS (2021).

21. 10 U.S.C. § 1073(d); *see also* 10 U.S.C. § 1071 (describing the MHS mission as “to create and maintain high morale in the uniform services by providing an improved and uniform program of medical and dental care”).

22. MIL. HEALTH SYS., MILITARY HEALTH SYSTEM STRATEGY (2024–2029), [https://www.health.mil/Reference-Center/Publications/2023/12/15/MHS\\_Strategic\\_Plan\\_FY24\\_29](https://www.health.mil/Reference-Center/Publications/2023/12/15/MHS_Strategic_Plan_FY24_29) [web.archive.org/web/20250908115835/https://www.health.mil/Reference-Center/Publications/2023/12/15/MHS\_Strategic\_Plan\_FY24\_29].

23. *Id.* at 6.

24. MENDEZ, *supra* note 20.

25. Daniel Kopp, *How Much Is Your Military Pay Really Worth?*, MIL. WALLET (Mar. 15, 2024), <https://themilitarywallet.com/much-military-pay-worth/> [web.archive.org/web/20250619005509/https://themilitarywallet.com/much-military-pay-worth/].

26. *Id.* Previously called the Civilian Health and Medical Program, or CHAMPUS.

27. *Id.*; *see* various sections of Medical and Dental Care, 10 U.S.C. §§ 1071–110b; *see also* Exclusions, TRICARE, <https://www.tricare.mil/CoveredServices/IsItCovered/Exclusions> [web.archive.org/web/20250915103000/https://www.tricare.mil/CoveredServices/IsItCovered/Exclusions] (last visited Oct. 18, 2024).

28. MENDEZ, *supra* note 20.

The DoD classifies abortion health care as “covered” or “non-covered.”<sup>29</sup> Covered abortions are those that meet the statutory exceptions, including cases in which the life of a woman would be endangered, or if the pregnancy is the result of rape or incest.<sup>30</sup> Between 2016 and 2021, military hospitals performed ninety-one abortions, or about fifteen a year.<sup>31</sup> Researchers estimate that servicewomen have between 2,500 and 4,100 abortions annually, meaning that non-covered abortions performed at non-DoD facilities account for the vast majority of abortions.<sup>32</sup> This is not surprising, given that the exceptions under the statutory ban are narrow. To qualify for the rape or incest exceptions, service members must have a physician’s note indicating that it is the physician’s “good faith” belief that the pregnancy resulted from rape or incest.<sup>33</sup> It is not clear how service members meet this burden of proof, especially in cases where service members opt for “restricted reporting,” a process that does not trigger an investigation and allows service members to confidentiality receive medical treatment.<sup>34</sup> Many incidents of sexual assault and rape are not reported.<sup>35</sup> According to one study, only 30 percent of women and 17 percent of men report sexual assault.<sup>36</sup> Even if a service member provides satisfactory information to establish the physician’s good faith belief, many military

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29. Memorandum from Under Sec’y of Def. on Ensuring Access to Essential Women’s Health Care and Services for Service Members, Dependents, Beneficiaries, and Dep’t of Def. Civilian Employees (June 28, 2022) (on file with author).

30. Performance of Abortions: Restrictions, 10 U.S.C. § 1093.

31. Haley Britzky, *Fact Check: Sen. Tommy Tuberville Overestimates Number of Abortions Military Women Would Seek Out Under New DoD Policies, Researchers Say*, CNN (July 12, 2023), <https://www.cnn.com/2023/07/12/politics/tommy-tuberville-abortion-military-fact-check> [perma.cc/XT4W-25XE].

32. Sonner Kehrt, *More Than 40% of Troops Face Limited or No Access to Abortion Care, Study Shows*, WAR HORSE (Sept. 13, 2022), <https://thewarhorse.org/roe-reversal-limits-abortion-access-for-military-women-wives/> [perma.cc/GU5G-W85M].

33. Kamani Cook-Christian, *Current DoD Policy on Women’s Health Care Options and Servs.*, U.S. ARMY (Aug. 18, 2023), <https://home.army.mil/bliss/about/news/current-dod-policy-womens-health-care-options-and-services> [web.archive.org/web/20250615002743/https://home.army.mil/bliss/about/news/current-dod-policy-womens-health-care-options-and-services]; NAVAL HOSP. GUAM, QUESTIONS FROM THE FORCE ON ESSENTIAL WOMEN’S HEALTH CARE SERVICES, [https://guam.tricare.mil/Portals/117/WOMENS%20HEALTH\\_Dobbs\\_QandA\\_080622\\_final\\_508\\_v2%20%28002%29.pdf](https://guam.tricare.mil/Portals/117/WOMENS%20HEALTH_Dobbs_QandA_080622_final_508_v2%20%28002%29.pdf) [web.archive.org/web/20250307223055/https://guam.tricare.mil/Portals/117/WOMENS%20HEALTH\_Dobbs\_QandA\_080622\_final\_508\_v2%20%28002%29.pdf].

34. *Victim Assistance*, SEXUAL ASSAULT PREVENTION & RESPONSE, <https://www.sapr.mil/reporting-options> [web.archive.org/web/20250917184743/https://www.sapr.mil/reporting-options] (discussing how restricted reporting allows service members to receive legal advice, medical treatment, and advocacy services); NAVY MED., WOMEN’S HEALTH: A GUIDE FOR NAVY AND MARINE CORPS LEADERSHIP, [https://www.med.navy.mil/Portals/62/Documents/NMFA/NMCPHC/root/Health%20Promotion%20and%20Wellness/Women's%20Health/Documents/Resources\\_for\\_Leadership/Womens\\_Health\\_Leadership\\_Guide\\_MAR2025.pdf?ver=f\\_uAE7XvlaVD06\\_8ZbWguA%3D%3D](https://www.med.navy.mil/Portals/62/Documents/NMFA/NMCPHC/root/Health%20Promotion%20and%20Wellness/Women's%20Health/Documents/Resources_for_Leadership/Womens_Health_Leadership_Guide_MAR2025.pdf?ver=f_uAE7XvlaVD06_8ZbWguA%3D%3D) [web.archive.org/web/20250821053603/https://www.med.navy.mil/Portals/62/Documents/NMFA/NMCPHC/root/Health%20Promotion%20and%20Wellness/Women's%20Health/Documents/Resources\_for\_Leadership/Womens\_Health\_Leadership\_Guide\_MAR2025.pdf?ver=f\_uAE7XvlaVD06\_8ZbWguA%3D%3D].

35. *Prevalence of Sexual Assault in the Military: Risk and Protective Factors, Data Sources, and Data Users*, RAND, <https://www.rand.org/pubs/tools/TLA746-2/handbook/resources/data-on-sexual-assault-in-the-military.html> [perma.cc/K9ET-EK53]; *Facts on United States Military Sexual Violence*, PROTECT OUR DEFENSES, [www.protectourdefenders.com/wp-content/uploads/2021/05/MSA-Fact-Sheet-2021.pdf](http://www.protectourdefenders.com/wp-content/uploads/2021/05/MSA-Fact-Sheet-2021.pdf) [perma.cc/RGA4-HHVP] (last updated May 2021).

36. *Id.*

physicians refuse to perform abortions.<sup>37</sup> Their refusal may be based on ethical or legal grounds, as physicians could face adverse action in cases with scant corroborating evidence.<sup>38</sup> Given these limitations, in addition to the well-studied phenomenon of secondary victimization of service members who report sexual assault and rape in the military,<sup>39</sup> the exceptions to the ban have been rendered practically meaningless.<sup>40</sup>

In the aftermath of the *Dobbs* decision, then-Secretary Austin called for the MHS to provide more assistance to service members who may experience difficulty accessing abortion care.<sup>41</sup> The DoD issued guidance on reproductive health care that attempted to balance servicewomen's privacy with the needs of the military.<sup>42</sup> For the most part, the policies make minor tweaks to reproductive policies that are already in place.<sup>43</sup> Women who intend to carry their pregnancy to term are encouraged to confirm their pregnancy with a DoD provider and notify their commander within twelve weeks of gestation.<sup>44</sup> Women who are considering an abortion and want to delay notification must report their pregnancy to their command within twenty weeks of gestation, with limited exceptions.<sup>45</sup> If a pregnant woman consults a DoD provider about pregnancy termination, the provider will place the service member in a medical temporary non-deployable status, without reference to her pregnancy status.<sup>46</sup> After twenty weeks' gestation, the member's medical status changes to a temporary non-deployable status specifying limitations due to pregnancy.<sup>47</sup>

Despite the DoD's best intentions, its regulations are confusing, fail to provide adequate privacy for servicewomen, and are dependent on the whims of the current

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37. DAVID F. BURRELLI, CONG. RSCH. SERV., 95-387, ABORTION SERVS. AND MILITARY MEDICINE FACILITIES 8 (2013).

38. *Id.*

39. Rachel Kimerling, *No Mission Too Difficult: Responding to Military Sexual Assault*, 107 AM. J. PUB. HEALTH 642, 643 (2017); Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences With Military and Civilian Social Systems*, 29 PSYCH. WOMEN Q. 97, 99-100 (2005); Elyse, *Don't Tell: Why Soldiers Are Not Reporting Rape*, BERKELEY POL. REV. (Apr. 28, 2016), <https://bpr.studentorg.berkeley.edu/2016/04/28/dont-tell-why-soldiers-are-not-reporting-rape/> [perma.cc/W6VE-GN3B].

40. Meghann Myers, *Service Members, Military Doctors Detail Obstacles to Abortion Access After Supreme Court Ruling*, MIL. TIMES (July 29, 2022), <https://www.militarytimes.com/news/pentagon-congress/2022/07/29/service-members-military-doctors-detail-obstacles-to-abortion-access-after-supreme-court-ruling/> [perma.cc/C8S7-MMH8]; Lauren Mascarenhas, *Experts Explain How Abortion Ban Exceptions for Rape and Incest Are Inaccessible in Practice*, CNN (Oct. 19, 2024), <https://www.cnn.com/2024/10/19/us/abortion-ban-states-rape-exception/index.html> [perma.cc/275C-Y8CR].

41. Memorandum from the Sec'y of Def., *supra* note 14.

42. *Id.*

43. Memorandum from Under Sec'y of Def., *supra* note 29 ("The Supreme Court's decision also does not affect the Department's leave policies. Existing Department policy authorizes active-duty Service members to travel for a covered abortion, or at the Service member's own expense on regular leave for all other cases. Access to emergency or convalescent leave remains unchanged for all Service members.")

44. Memorandum from Under Sec'y of Def. on Changes to Command Notification of Pregnancy Policy (Feb. 16, 2023) (on file with author).

45. *Id.* Special circumstances may trigger earlier notification, including special military duties, occupational health hazards, and medical conditions that warrant placing the military member on a medical temporary non-deployable status that would require notice to the commander.

46. Memorandum from Under Sec'y of Def., *supra* note 44.

47. *Id.*; see also U.S. DEP'T OF DEF., INSTRUCTION 6025.19, INDIVIDUAL MEDICAL READINESS PROGRAM (2022).

administration. For example, the DoD guidance does not state how a service member finds a provider for a non-covered abortion in a state that bans abortion.<sup>48</sup> If a service member consults with their DoD provider, they risk being placed in a non-deployable status, which would trigger a notification of non-deployability to their commander and could negatively impact their career.<sup>49</sup> Once a service member finds a provider, they must request leave, especially if the provider is located out-of-state.<sup>50</sup> Service members may take regular leave or request an administrative absence for a period of up to twenty-one days, designating “non-covered reproductive health care” as the purpose for the leave.<sup>51</sup> The administrative option provides service members with additional time for medical care without depleting their regular leave, but offers little privacy, as service members must identify that their request is for “non-covered reproductive health care.”<sup>52</sup> The regular leave option offers more privacy, but without knowing the reason for the leave, commanders may deny the request.<sup>53</sup> To avoid a denial of their request, servicewomen are instructed to specify that their regular leave is for a reproductive health procedure.<sup>54</sup> But doing so compromises confidentiality and causes commanders to make assumptions about women’s health care. Furthermore, DoD policy states that DoD medical providers will, “after consultation with the service member,” place service members on temporary non-deployable status and limited duty or light duty status.<sup>55</sup> It is not clear whether service members can decline this status change. Commanders are keenly aware of their troops’ deployment status, and non-deployability can impact a service member’s promotion eligibility, career progression, retention, and perception among peers and military leadership.<sup>56</sup> If convalescent leave is required after the procedure, service members must again request approval from their commander and must provide a note from a health care professional.<sup>57</sup> These procedures apply to military members accompanying service members seeking abortions who may be needed to drive the member home after

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48. *Id.* Servicewomen are directed to contact Military OneSource or to speak to a military chaplain.

49. *Id.*

50. Cook-Christian, *supra* note 33.

51. Memorandum from Under Sec’y of Def., *supra* note 44; *see also* Memorandum from Dep’t of the Air Force to Total Force Airmen and Guardians (Aug. 17, 2022) (on file with author); Rebecca Kheel, *Troops Don’t Have to Disclose They’re Getting An Abortion to Use New Leave, Pentagon Says*, MIL. TIMES (Feb. 24, 2023), <https://www.military.com/daily-news/2023/02/24/troops-dont-have-disclose-theyre-getting-abortion-use-new-leave-pentagon-says.html#:~:text=Service%20members%20who%20want%20to,to%20Military.com%20on%20Friday> [perma.cc/WEJ5-TR2T].

52. Memorandum from Dep’t of the Air Force to Total Force Airmen and Guardians, *supra* note 51, at 2; *see also* Memorandum from Under Sec’y of Def. on Administrative Absence for Non-Covered Reproductive Health Care 1 (Feb. 16, 2023) (on file with author).

53. Memorandum from Dep’t of the Air Force, *supra* note 51, at 2.

54. *Id.*

55. Memorandum from Under Sec’y of Def., *supra* note 44, at 2.

56. Lisa Ferdinando, *Pentagon Releases New Policy on Nondeployable Members*, U.S. DEP’T OF DEF. (Feb. 16, 2018), <https://www.defense.gov/News/NewsStories/Article/Article/1443092/#:~:text=Focus%20on%20Readiness%2C%20Lethality%20Service%20members%20could,for%20more%20than%2012%20months%2C%20Mulcahy%20said> [perma.cc/FK6C-WQ5L] (stating that non-deployable troops are a disruption to the overall readiness of the military and to the immediate readiness of individual military units, and that commanders must pay careful attention to the non-deployable status of their troops).

57. Memorandum from Dep’t of the Air Force, *supra* note 51.

the procedure.<sup>58</sup> While the regulations are well-intended, they do not adequately protect the privacy concerns of servicewomen.

Research shows that servicewomen are wary of involving their chain of command when it comes to their reproductive health.<sup>59</sup> Dr. Kyleanne Hunter, a RAND researcher who studies the impact of the *Dobbs* decision on national security, noted that “servicewomen are often very uncomfortable even telling commanders about pregnancies that are wanted . . . there’s a lot of stigma around just reporting pregnancies—a planned, wanted pregnancy.”<sup>60</sup> Although DoD policies attempt to make non-covered abortions less of a financial strain, Dr. Hunter notes that having to go through the process of filing a travel claim, on top of the procedures for requesting leave from a commander, is an additional barrier to reproductive care.<sup>61</sup>

Given the stress of requesting leave and the stigma surrounding terminating a pregnancy, servicewomen may decide to forgo leave requests and have an abortion during regular “off duty” hours.<sup>62</sup> Between June and December 2023, service members used the abortion travel policy only twelve times, suggesting that many servicewomen are having abortions without notifying the military. Doing so involves some risk. Service members traveling out-of-state on a “regular pass” (e.g., over the weekend or after a duty shift) are subject to recall, have limited time, and are subject to the availability of medical providers during those hours.<sup>63</sup> Accompanying service members face the same risks. Follow-up care extends the risks. Faced with these dilemmas, some service members elect illegal abortions or self-abortion, though both options carry tremendous physical and legal risks.<sup>64</sup>

In addition to health, privacy and stigma concerns, reproductive care is expensive. On January 24, 2025, the Trump administration rescinded provisions of the DoD policy that allowed reimbursement for travel related to abortions.<sup>65</sup> Previously, under the Biden administration, reimbursement of travel, including mileage, lodging, and per diem, was available for service members and dependents, as well as attendants or escorts who accompanied a member receiving care outside

58. Memorandum from Sec’y of Defense to Senior Pentagon Leadership Commanders of the Combatant Commands Defense Agency and DOD Field Activity (Oct. 20, 2022), <https://www.health.mil/Reference-Center/Policies/2022/10/20/Ensuring-Access-to-Reproductive-Health-Care>; *see also* *What Can I Expect After Having an In-Clinic Abortion?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/what-can-i-expect-after-having-an-in-clinic-abortion> [perma.cc/4G52-GGBV] (last visited Oct. 18, 2024) (describing how providers restrict patients who have been administered anesthesia during the procedure from driving home).

59. Britzky, *supra* note 31.

60. *Id.*

61. *Id.*

62. Service members are never “off duty.” Rather, non-working hours, such as weekends, are considered “regular passes,” and have some restrictions. *See, e.g.*, ASSISTANT SEC’Y OF THE AIR FORCE, AFI 36-300, MIL. LEAVE PROGRAM (2024), [https://static.e-publishing.af.mil/production/1/af\\_a1/publication/dafi36-3003/dafi36-3003.pdf](https://static.e-publishing.af.mil/production/1/af_a1/publication/dafi36-3003/dafi36-3003.pdf) [web.archive.org/web/20250916193855/https://static.e-publishing.af.mil/production/1/af\_a1/publication/dafi36-3003/dafi36-3003.pdf].

63. *See, e.g.*, HEADQUARTERS DEP’T OF THE ARMY, AR 600-8-10, LEAVES AND PASSES 39 (2011), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/ARN30018-AR\\_600-8-10-000-WEB-1.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN30018-AR_600-8-10-000-WEB-1.pdf) [web.archive.org/web/20250204031438/https://armypubs.army.mil/epubs/DR\_pubs/DR\_a/ARN30018-AR\_600-8-10-000-WEB-1.pdf].

64. HUNTER ET AL., *supra* note 18.

65. Exec. Order No. 14182, 90 Fed. Reg. 8751 (Jan. 24, 2025) (establishing United States policy to end the “forced use of Federal taxpayer dollars to fund or promote elective abortion”).

the local area.<sup>66</sup> The reimbursement was critical to junior enlisted service members in the E-1 to E-3 ranks. For example, a woman assigned to Fort Cavazos, a large military installation in central Texas, would have to travel more than 500 miles to receive care at the nearest abortion clinic in Wichita, Kansas.<sup>67</sup> The estimated cost of the trip, which would require overnight stays because of Kansas's waiting period requirements, would total about \$1,100.<sup>68</sup> Junior enlisted service members make about \$1,800 to \$2,200 a month before taxes, meaning the medical expenses would be about half of a junior enlisted member's paycheck.<sup>69</sup> The rescinded travel policy re-exposed junior enlisted members to health and financial risks as well as gender discrimination in reproductive care.

The reality is that while DoD policies attempt to support women seeking abortions, the military has not built a culture that supports women, especially pregnant women.<sup>70</sup> Women with dependents often face discrimination related to family planning.<sup>71</sup> For example, service members are required to have caregiver plans that account for their day-to-day duties and unpredictable work hours.<sup>72</sup> If servicewomen are unable to provide a caregiver plan that names someone who will accept custody of their children if they deploy, they are forced to leave the military.<sup>73</sup> In short, the stigma associated with women in service, especially pregnant women and mothers, has survived the policies that once banned these groups from serving in the military.<sup>74</sup> To a large extent, the reproductive policies that are in place today reflect the cultural norms of the past. If the military truly wants to support women in service, it must do more than reimburse them for travel expenses. It must create an environment that is conducive for all service members, including pregnant servicewomen and mothers.

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66. Memorandum from Sec'y of Defense, *supra* note 58.

67. Carrie N. Baker, *Dobbs' Effect on Military Women: 'Our Fighting Force Is Hindered and Our Security Is at Risk'*, MS. (Dec. 19, 2022), <https://msmagazine.com/2022/12/19/dobbs-military-women-abortion/> [perma.cc/7G83-JHQC].

68. *Id.*

69. *Id.*

70. Lt. Col. Jessica Rutenber, Testimony at the Defense Advisory Committee on Women in the Services (DACOWITS) Public Comment Period (Mar. 3, 2020), <https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/March2020/Lt%20Col%20Rutenber.pdf?ver=2020-03-02-093455-923>.

71. Jessica Rutenber, *How the Military is Losing Its Top Talent Because of Pregnancy Discrimination and What We Can Do About It*, HIDDEN BARRIERS (June 20, 2022), <https://hidden-barriers.org/2020/06/20/how-the-military-is-losing-its-top-talent-because-of-pregnancy-discrimination-and-what-we-can-do-about/> [perma.cc/GC5P-NV9M].

72. Ben Kesling, *The Military Recruiting Crisis: Even Veterans Don't Want Their Families to Join*, WALL ST. J. (June 30, 2023), [https://www.wsj.com/politics/military-recruiting-crisis-veterans-dont-want-their-children-to-join-510e1a25?gaa\\_at=eafs&gaa\\_n=AWETSqczirTSQJCzu3W6fMA8fcTVyXwK3tice0CUDq8TfCSFFupWjYep6vnDUeWg8xE%3D&gaa\\_ts=6904fce8&gaa\\_sig=72fC0aNt50BzS0NV-31CVUzBF7u2RZEoLsQAZP4V1ThFgpiZdObstNSPEYu2E\\_UNsd9W\\_7tmld6xmjuTmwttrQ%3D%3D](https://www.wsj.com/politics/military-recruiting-crisis-veterans-dont-want-their-children-to-join-510e1a25?gaa_at=eafs&gaa_n=AWETSqczirTSQJCzu3W6fMA8fcTVyXwK3tice0CUDq8TfCSFFupWjYep6vnDUeWg8xE%3D&gaa_ts=6904fce8&gaa_sig=72fC0aNt50BzS0NV-31CVUzBF7u2RZEoLsQAZP4V1ThFgpiZdObstNSPEYu2E_UNsd9W_7tmld6xmjuTmwttrQ%3D%3D) [perma.cc/8VDM-QU62].

73. *Id.*

74. Women were not officially permitted to serve in the regular military until 1948. Pregnant women were prohibited from serving until 1976. See Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 773 (2010).

*B. The Evolving Legal Landscape for Military Women Accessing Reproductive Health Care and Their Providers*

In addition to the complications involved in obtaining travel approval for reproductive care, servicewomen, their families, and their health care providers face vigilante enforcement and other punitive action from anti-abortion states.<sup>75</sup> Since *Dobbs*, anti-abortion activists and state legislatures have been testing new legal strategies that target women who cross state lines to obtain abortions.<sup>76</sup> Some legal experts, including Supreme Court Justice Brett Kavanaugh, have indicated that travel bans would fail judicial scrutiny based on the constitutional right to interstate travel.<sup>77</sup> The right to travel is not explicitly mentioned in the Constitution, though such a right has been recognized by the Supreme Court since 1867.<sup>78</sup> Two years after *Roe*, in *Bigelow v. Virginia*, the Supreme Court held that the editor of a newspaper in Virginia who published an ad for abortions in New York could not be convicted under a Virginia statute that criminalized the encouragement of abortions through circulars.<sup>79</sup> The Court decided the case on First Amendment grounds, but noted that “[t]he Virginia Legislature could not have proscribed the activity in that state. Neither could Virginia prevent its residents from travelling to New York to obtain those services or, as the State conceded, prosecute them for going there.”<sup>80</sup> Still, no prior precedent resolves the current issues, and anti-abortion advocates continue to experiment with new strategies to criminalize interstate travel for abortion.<sup>81</sup>

After *Dobbs*, health care providers may be liable for performing or assisting with abortions and related services. In Texas, a man filed a state court petition asking for an investigation into his ex-partner’s abortion in Colorado.<sup>82</sup> The man

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75. HUNTER ET AL., *supra* note 18; *see also Behind the Scenes of Abortion Travel Bans*, AM. OVERSIGHT (June 5, 2024), <https://americanoversight.org/behind-the-scenes-of-abortion-travel-bans-2/> [perma.cc/K8MH-JKZM] (detailing the litigation strategy of anti-abortion activists Mark Lee Dickson and former Texas Solicitor General Jonathan Mitchell).

76. Glenn Cohen, Eli Adashi & Mary Ziegler, *The New Threat to Medical Travel for Abortion*, 137 AM. J. MED. 298, 298 (2024).

77. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 346 (2022) (describing the question as “not especially difficult as a constitutional matter”).

78. *Crandall v. State of Nevada*, 73 U.S. 35 (1867). For interstate travel cases since *Crandall*, *see United States v. Guest*, 383 U.S. 745, 757–59 (1966); *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969); *Doe v. Bolton*, 410 U.S. 179, 200 (1973).

79. *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975).

80. *Id.* at 822–24.

81. Naomi Cahn & Sonia Suter, *Crossing State Lines to Get an Abortion Is a New Legal Minefield, With Courts to Decide if There’s a Right to Travel*, CONVERSATION (Sept. 6, 2024), <https://theconversation.com/crossing-state-lines-to-get-an-abortion-is-a-new-legal-minefield-with-courts-to-decide-if-theres-a-right-to-travel-238167> [perma.cc/36WU-LNGH].

82. Caroline Kitchener, *Texas Man Files Legal Action to Probe Ex-Partner’s Out-of-State Abortion*, WASH. POST (May 3, 2024), <https://www.washingtonpost.com/investigations/2024/05/03/texas-abortion-investigations/> [perma.cc/2VCB-L6HB]; *see also* Tierney Sneed & Alessandra Freitas, *Texas Man Wants Court Order to Investigate Woman’s Out-Of-State Abortion*, CNN (May 5, 2024), <https://www.cnn.com/2024/05/05/us/texas-abortion-collin-davis-colorado/index.html> [perma.cc/KQ3Z-44ZN]. The Texas Heartbeat Act authorizes a civil cause of action for private citizens to sue individuals who perform or induce an abortion or aid and abet the performance or inducement of an abortion. TEX. HEALTH & SAFETY CODE § 171.208 (2021). In a separate but related lawsuit filed in U.S. District Court for the Western District of Texas, Judge Robert Pitman blocked prosecutors in eight Texas counties from pursuing charges beyond state lines under Texas’s anti-abortion laws. *See also* Eleanor Klibanoff, *Texans Who Perform Abortions Now Face Up to Life in Prison, \$100,000 Fine*, TEX.

claimed that multiple individuals were liable for “wrongful death claims” under Texas’s aiding and abetting statute since they had helped his ex-partner travel from Texas to Colorado to have an abortion.<sup>83</sup> Under a similar theory, Alabama’s Attorney General has threatened to file conspiracy charges against health care workers who help patients arrange out-of-state abortions.<sup>84</sup> In Idaho, legislatures passed an “abortion trafficking” law that makes it a crime to procure an abortion or obtain abortion medication for a minor by recruiting, harboring, or transporting a pregnant minor within the state.<sup>85</sup> Two Texas counties have passed ordinances mirroring Idaho’s trafficking law but makes the law applicable to anyone who knowingly transports any pregnant person for the purpose of abortion care or provides funds for travel costs.<sup>86</sup> Many experts discredit the constitutionality of such laws, but after *Dobbs* it is not clear how courts will answer questions involving extraterritorial application of state criminal or civil law, the aiding of another to obtain an out-of-state abortion, conspiracy to obtain an abortion, wrongful death suits, or the criminalization of disseminating abortion information.<sup>87</sup>

Another evolving area is the legality of medication abortions, also called abortion pills.<sup>88</sup> Since *Dobbs*, seventeen states have banned medication abortions, with another ten limiting their use to certain conditions.<sup>89</sup> Laws that impose required waiting periods before accessing abortion drugs and that require in-person clinic visits to obtain the drugs have made medical abortions particularly difficult for women in rural areas, including servicewomen, who have limited access to abortion clinics.<sup>90</sup> Medication abortions are critical to servicewomen because they offer a safe and effective means of terminating a pregnancy without the need for interstate travel.<sup>91</sup> In addition to banning medical abortions, some states have challenged the legality of the drugs.<sup>92</sup> So far, the Supreme Court has rejected these challenges.<sup>93</sup> In *FDA v. Alliance for Hippocratic Medicine*, the Supreme Court considered whether the Food and Drug Administration’s (FDA) approval and regulation of the drug

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TRIB. (Aug. 5, 2022), <https://www.texastribune.org/2022/08/25/texas-trigger-law-abortion/> [perma.cc/565J-9YDX]; Eleanor Klibanoff, *Texas Abortion Funds Likely Safe From Prosecution, Federal Judge Rules*, TEX. TRIB. (Feb. 24, 2023), <https://www.texastribune.org/2023/02/24/texas-abortion-fund-s-ruling/> [perma.cc/76AP-97PP]; Eleanor Klibanoff, *Some Texas Groups Resume Funding Out-of-State Abortions After Court Ruling*, TEX. TRIB. (Mar. 24, 2023), <https://www.texastribune.org/2023/03/24/texas-court-abortion-funds/> [perma.cc/KQ3Z-44ZN].

83. Cohen et al., *supra* note 76.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *The Abortion Pill*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill> [perma.cc/5HV2-MFD9] (last visited Oct. 27, 2025).

89. N. Kirkpatrick & Szu Yu Chen, *Are Abortion Pills Legal in My State? Here’s What You Need to Know*, WASH. POST (Mar. 17, 2025), <https://www.washingtonpost.com/nation/interactive/2024/abortion-pills-legal-states/> [perma.cc/T5W4-77AM].

90. *Id.*

91. Louis Caldera, Ray Mabus & Deborah James, *Retired Military Officials: Protecting Abortion Care Keeps America Safe*, WASH. POST (Feb. 1, 2024), <https://www.washingtonpost.com/opinions/2024/02/01/supreme-court-abortion-pill-mifepristone/> [perma.cc/798G-TZ7C].

92. Ann E. Marimow & David Ovalle, *Supreme Court Upholds Broad Access to Key Abortion Pill Mifepristone*, WASH. POST (June 13, 2024), <https://www.washingtonpost.com/politics/2024/06/13/supreme-court-abortion-pill-ruling-mifepristone/> [perma.cc/ZN22-G4JD].

93. *Id.*

mifepristone, used for terminating pregnancies, violated the Administrative Procedure Act.<sup>94</sup> The Court did not reach that issue, holding that plaintiffs, four pro-life medical associations and several individuals doctors who do not use or prescribe mifepristone, lacked Article III standing to challenge the FDA's regulation of mifepristone.<sup>95</sup> The ruling left in place new regulations that went into effect in 2021 that allow the use of mifepristone through ten weeks of gestation and permit telehealth visits and mail distribution of the drug.<sup>96</sup> However, the ruling does not preclude future plaintiffs from litigating the issue in the lower courts, and Missouri, Idaho, and Kansas have already signaled their intention to do so.<sup>97</sup>

These lingering legal questions sow confusion and fear and create additional risk for military members, who are subject to their own legal code.<sup>98</sup> Military members are governed by the Uniform Code of Military Justice (UCMJ) and the criminal and civil codes of the states in which they reside.<sup>99</sup> A military member could be charged under Article 134 of the UCMJ for violating local civil law if the member's commander determined that a state law violation constituted a "disorder[] . . . [or] neglect[] to the prejudice of good order and discipline in the armed forces."<sup>100</sup> Even worse, an investigation by local authorities of an alleged criminal or civil law offense could serve as the basis for discharge from service, regardless of the outcome of the investigation.<sup>101</sup> Former Secretary Austin had directed commanders to display objectivity and discretion when addressing reproductive health care matters, but a different secretary of defense could do the opposite, directing commanders to pursue criminal charges or take administrative action against service members for violations of state anti-abortion laws.<sup>102</sup> The confusion and complexity of overlapping criminal, civil, and administrative law makes the abortion landscape a legal minefield for service members.

The evolving legal landscape takes a huge emotional toll on servicewomen and their providers.<sup>103</sup> When servicewomen are denied reproductive care, they can feel

94. FDA v. All. for Hippocratic Med., 602 U.S. 367, 373 (2024).

95. *Id.* at 374.

96. Marimow & Ovalle, *supra* note 92.

97. Carter Sherman, *Despite the Supreme Court Ruling for the Abortion Pill, the Battle is Far from Over*, GUARDIAN (Jun. 13, 2024), <https://www.theguardian.com/world/article/2024/jun/13/supreme-court-abortion-pill-mifepristone> [perma.cc/MLX8-PNS9]. The Supreme Court's standing decision does not preclude these states, other states, or any other plaintiffs from bringing the same claims in lower courts.

98. Olivia Aldridge, *Interstate Travel Becomes a Target for the Anti-Abortion Movement with Texas Filing*, NPR (May 17, 2024), <https://www.npr.org/2024/05/17/1252218618/interstate-travel-becomes-a-target-for-the-anti-abortion-movement-with-texas-fil> [perma.cc/257P-Y2QH].

99. JENNIFER K. ELSEA & JONATHAN M. GAFFNEY, CONG. RSCH. SERV., R46503, MILITARY COURTS-MARTIAL UNDER THE MILITARY JUSTICE ACT OF 2016 4, <https://crsreports.congress.gov/product/pdf/R/R46503> [web.archive.org/web/20250303160925/https://crsreports.congress.gov/product/pdf/R/R46503].

100. 10 U.S.C. § 834. Article 134 is often charged when a military member is engaged in civil or criminal activity outside the military, such as in their state of residence. Commanders have tremendous discretion in determining charges or taking administrative action based on non-military civil or criminal activity.

101. Hugh McClean, *Discharged and Discarded: The Collateral Consequences of a Less-Than-Honorable Military Discharge*, 121 COLUM. L. REV. 2203, 2214 (2021).

102. Memorandum from the Sec'y of Def., *supra* note 14.

103. Brief of Former Mil. Off., Civilian Nat'l Sec. Leaders, and Vet Voice Found. as Amici Curiae in Support of Petitioners, *U.S. Food and Drug Admin. v. All. for Hippocratic Med.*, 602 U.S.

abandoned.<sup>104</sup> As one servicewoman said, “I’d experienced loss in combat, but this was worse because I was alone. We have a support system in place for combat loss. There was no one there for me. . . . I was completely alone.”<sup>105</sup> Other service members expressed similar sentiments at a congressional hearing on reproductive health and readiness after the *Dobbs* decision.<sup>106</sup> Each shared their experiences and expressed their frustration with the emotional, legal, medical, and administrative burdens imposed on women seeking reproductive care.<sup>107</sup> When it comes to reproductive health care, changes in DoD leadership have resulted in vastly different reproductive policies, suggesting that there is no guarantee that future administrations will provide any continuity or relief to servicewomen seeking comprehensive reproductive care.<sup>108</sup>

### C. National Security Implications After the *Dobbs* Decision

In addition to the impact on service members, the abortion ban and the *Dobbs* decision have raised serious national security questions concerning the readiness of the armed forces. Even though long-term repercussions of the *Dobbs* decision are unclear, several current and former senior military officials have warned that the decision directly impacts national security because it negatively affects military recruiting and retention for the armed forces.<sup>109</sup> Almost immediately after the *Dobbs* decision, military members and their families voiced their concerns to senior officials.<sup>110</sup> Within two months, the DoD implemented policies that attempted to soften the blow.<sup>111</sup> As then-National Security Council spokesperson John Kirby cautioned, “[I]f you don’t think there’s going to be a retention and morale issue, think again, because it’s already having that effect.”<sup>112</sup>

Military readiness is “the United States’ ability to produce, deploy, and sustain military forces that will perform successfully in combat.”<sup>113</sup> Readiness is dependent on many factors, including the availability, retention, and recruitment of qualified service members.<sup>114</sup> Trained personnel are the heart of readiness, and reductions in readiness make the military less prepared and increase the risk of conflict.<sup>115</sup> There is renewed interest in readiness as the military is experiencing the worst recruiting

367 (2024) (No. 23-235, 23-236), 2024 WL 456958 [hereinafter Brief of Former Mil. Off., Civilian Nat’l Sec. Leaders, and Vet Voice Found.].

104. *Id.*

105. *Id.*

106. *Military Personnel on Reproductive Health and Readiness Before the House Armed Services Committee Readiness Subcommittee*, 117th Cong. 49–75 (2022) (statement of witnesses).

107. Brief of Former Mil. Off., Civilian Nat’l Sec. Leaders, and Vet Voice Found., *supra* note 103, at 24.

108. Memorandum from the Sec’y of Def., *supra* note 14.

109. Caldera et al., *supra* note 91.

110. Memorandum from the Sec’y of Def., *supra* note 14; see also Trevor Hunnicutt, *Restrictive Abortion Laws Hurting US Military, White House Says*, REUTERS (July 17, 2023), <https://www.reuters.com/world/us/restrictive-abortion-laws-hurting-morale-retention-us-military-w-house-2023-07-17/> [perma.cc/M5TQ-UEFE].

111. Memorandum from the Sec’y of Def., *supra* note 14.

112. Hunnicutt, *supra* note 110.

113. G. James Herrera, CONG. RSCH. SERV., R46559, THE FUNDAMENTALS OF MILITARY READINESS 1 (2020).

114. *Id.* at 14–15.

115. Brief of Former Mil. Off., Civilian Nat’l Sec. Leaders, and Vet Voice Found., *supra* note 103, at 24.

shortage since the inception of an all-volunteer force.<sup>116</sup> The reason for the shortage is multifold. The number of youths who qualify for service has declined, the COVID-19 pandemic slowed recruiter contact with the public, unemployment has remained low, and fewer young people have parents or caregivers who served in the military and who might influence their decision to serve.<sup>117</sup> Despite these challenges, the DoD has specifically targeted women to counteract its recruiting challenges, bringing its recruitment and retention strategies in line with its diversity goals.<sup>118</sup> The DoD has recognized that women bring diversity to the force; are needed to more accurately reflect the nation's population;<sup>119</sup> ensure strong military leadership;<sup>120</sup> “represent a higher percentage of the recruitable population than their male counterparts”;<sup>121</sup> and are needed to fill combat and other operational roles across the spectrum of conflict.<sup>122</sup>

The *Dobbs* decision could not come at a worse time for military recruiting. The DoD has struggled with recruitment and retention of women in the military for nearly two decades. Between 2004 and 2024, the overall percentage of active-duty women rose only 2.4 percent, from 15.1 percent to 17.5 percent.<sup>123</sup> The military has also struggled with retention. Female enlisted and commissioned officers have higher attrition rates than males, with women being 28 percent more likely to leave service than men.<sup>124</sup> Not surprisingly, studies show that having children in the military is particularly hard on women.<sup>125</sup> A recent United States Government Accountability Office (GAO) study found that married and unmarried female active-duty service members with dependents are more likely to leave service compared to those without dependents.<sup>126</sup> Servicewomen reported that

116. See Jim Garamone, *Chiefs Discuss Military Recruiting Challenges at Committee Hearing*, U.S. DEP'T OF DEF. (Dec. 7, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3610846/chiefs-discuss-military-recruiting-challenges-at-committee-hearing/> [web.archive.org/web/20250908074924/https://www.war.gov/News/News-Stories/Article/Article/3610846/chiefs-discuss-military-recruiting-challenges-at-committee-hearing/].

117. *Id.* (noting only 12 percent of American youths today have a parent who served in the military, compared to 40 percent in 1995).

118. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-61, FEMALE-ACTIVE DUTY PERSONNEL: GUIDANCE AND PLANS NEEDED FOR RECRUITMENT AND RETENTION EFFORTS (2020), <https://www.gao.gov/assets/gao-20-61.pdf> [perma.cc/5P2N-SFTK] [hereinafter GAO Report: Female-Active Duty].

119. *Id.* at 1–2.

120. *Id.* at 2.

121. HUNTER ET AL., *supra* note 18.

122. Jim Garamone, *DoD Unveils Women, Peace, Security Strategy*, U.S. DEP'T OF DEF., (June 11, 2020), <https://www.defense.gov/News/News-Stories/Article/Article/2217438/dod-unveils-women-peace-security-strategy/> [perma.cc/3E3D-KQXH]; see also Brief of Former Mil. Off., Civilian Nat'l Sec. Leaders, and Vet Voice Found., *supra* note 103, at 13 (noting that women in combat roles started in 2013 when Panetta rescinded the 1994 ban). *But see* Missy Ryan & Alex Horton, *Hegseth, Under Senate Scrutiny, Mutes Critique of Women in Combat*, WASH. POST (Jan. 14, 2025), <https://www.washingtonpost.com/national-security/2025/01/14/pete-hegseth-women-combat/> [perma.cc/86N5-MNYV].

123. GAO Report: Female-Active Duty, *supra* note 118; see also *Defense Department Shows Decline in Armed Forces Population While Percentage of Military Women Rises Slightly*, U.S. DEP'T. OF DEF. (Nov. 6, 2023), <https://www.defense.gov/News/Releases/Release/article/3580676/defense-department-report-shows-decline-in-armed-forces-population-while-percen/> [perma.cc/T6YF-FVDT].

124. GAO Report: Female-Active Duty, *supra* note 118, at 18.

125. *Id.* at 19–20.

126. *Id.*

unpredictable and demanding work schedules required them to sacrifice family time for their careers.<sup>127</sup> They also reported that difficulty aligning pregnancies with rigid career timelines, missed opportunities while pregnant, and an “old boys” culture that pervades certain career fields contributed to their decision to separate from service.<sup>128</sup>

In addition to the hardships that women face because of pregnancy, the GAO found that the military’s failure to properly handle instances of sexual harassment and sexual assault has contributed to women separating from service.<sup>129</sup> The DoD’s congressionally mandated report on sexual assault in the military noted that the prevalence of unwanted sexual contact declined in 2023, decreasing from 8.4 percent of active duty women in 2021 to 6.8 percent in 2023.<sup>130</sup> However, prior to 2021, the DoD reported a 25 percent increase in sexual assault between the years 2018 and 2021.<sup>131</sup> Whether incidents of sexual assault are increasing or decreasing, the perception remains that the DoD has a sexual assault problem.<sup>132</sup> In a 2021 memo to senior leadership, then-Secretary Austin proposed myriad initiatives to combat sexual assault and improve the readiness of the armed forces, noting that people and readiness are inextricably linked.<sup>133</sup> One initiative stripped commanders of their prosecutorial authority in sexual assault cases and bestowed that authority on a group of general and flag officers who report directly to the secretaries of the military departments.<sup>134</sup> The purpose of the move was to “prevent [sexual assault] crimes and work to restore the trust and confidence of our service members.”<sup>135</sup> The abdication of command authority was instrumental in restoring faith in the military criminal system, though it is not yet clear whether it will reduce instances of sexual assault in the military.<sup>136</sup>

After *Dobbs*, military leaders expressed concern that the case would exacerbate an already hostile climate for women and would further inhibit recruitment and

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127. *Id.* at 28.

128. *Id.* at 29.

129. *Id.*

130. U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2023 (May 14, 2024), [https://www.sapr.mil/Portals/156/FY23\\_Consolidated\\_Annual\\_Report.pdf](https://www.sapr.mil/Portals/156/FY23_Consolidated_Annual_Report.pdf) [web.archive.org/web/20250918225156/https://www.sapr.mil/Portals/156/FY23\_Consolidated\_Annual\_Report.pdf].

131. Zara Abrams, *U.S. Military is Hiring Thousands of Psychologists to Help Reduce Sexual Assault*, AM. PSYCH. ASSOC. (Mar. 1, 2024), <https://www.apa.org/monitor/2024/03/military-sexual-assault-prevention-efforts> [perma.cc/TEH3-7C79].

132. Memorandum from the Sec’y of Def. on Immediate Actions to Counter Sexual Assault and Harassment and the Establishment of a 90-Day Independent Review Commission on Sexual Assault in the Military (Feb. 26, 2021) (on file with author).

133. *Id.* at 3.

134. *Sexual Assault Now Tried Outside Military Chain of Command*, U.S. DEP’T. OF DEF. (Dec. 28, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3627107/sexual-assault-now-tried-outside-military-chain-of-command/> [perma.cc/KG7Z-7S2P] (noting the creation of the Offices of Special Trial Counsel) (general and flag officers, or GFO’s, refers to senior ranking officers in pay grades O-7 through O-10).

135. *Id.*

136. Nicole Shearin, *‘I Feel Like Because of the Fear That There Is, That Shouldn’t Keep Our Future Generation from Serving’: Women Are More Reluctant to Join the Army*, KCENTV.COM (June 15, 2023), <https://www.kcentv.com/article/news/national/military-news/women-more-reluctant-join-army/500-5f1af8dc-7fc6-4e5e-9d78-0b9529e987e9> [perma.cc/P2ZG-DG9C].

retention.<sup>137</sup> In a 2022 congressional hearing held just weeks after the decision, then-Undersecretary for Personnel and Readiness, Gilbert Cisneros, noted that potential recruits may not want to live in locations with reproductive restrictions, and that women in the service who are assigned to those locations may be more inclined to separate.<sup>138</sup> Among the estimated 1.16 million active-duty military members, approximately 201,000 are women stationed in the continental United States.<sup>139</sup> About 95 percent of the women are of reproductive age.<sup>140</sup> Roughly 80,000 of them live in states that restrict abortion,<sup>141</sup> meaning that over 40 percent of servicewomen and their families are restricted from accessing abortion services, in full or in part.<sup>142</sup> Although there are no centralized statistics on the number of military women that have abortions, researchers estimate that between 2,573 and 4,136 active-duty women have an abortion annually.<sup>143</sup> Given these figures, between 1,029 and 1,654 military women cannot get abortion care where they live.<sup>144</sup> Service members cannot choose their assignment locations, making healthcare a gamble that depends on their installation location.<sup>145</sup> Recognizing this risk, congressional leaders contemplated but dismissed the idea of allowing service members to choose assignments, fearing that such a scheme would politicize the military.<sup>146</sup>

Recruiting and retention are not the only national security issues impacted by the *Dobbs* decision. Loss of productivity and the availability of DoD resources for service members with families also impact national security.<sup>147</sup> Under the current scheme, members must take extended sick leave for out-of-state medical care, thereby reducing the readiness of their military units. The primary reason that the military provides health care is to ensure its members are healthy and available for duty.<sup>148</sup> Delays in accessing abortion care increase health risks, which in turn lead to lengthy absences and staffing problems for military units.<sup>149</sup> A recent study found that in states with abortion bans, the average travel time to the nearest abortion

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137. Alex Horton & Rachel Roubein, *Abortion Ruling Will Worsen Military Personnel Crisis, Pentagon Says*, WASH. POST (July 29, 2022), <https://www.washingtonpost.com/national-security/2022/07/29/military-abortion-recruiting/> [perma.cc/3K98-KTFJ].

138. *Id.*

139. HUNTER ET AL., *supra* note 18, at 3.

140. *Id.* at 3. Reproductive age means under the age of 45.

141. States that have restricted abortion since the *Dobbs* decision have a large military presence, and include Texas, Georgia, Florida, Oklahoma, South Carolina, Arizona, and North Carolina. See *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST. (Jan. 24, 2024), <https://states.guttmacher.org/policies/> [perma.cc/8W56-7HPZ].

142. *Id.* States restricting abortion do so through (1) total or partial bans, (2) “trigger” laws that go into effect after a set period of time or are pending a legislative vote, (3) bans that have been stayed pending judicial review, and (4) gestational limits on abortion up to eighteen weeks.

143. HUNTER ET AL., *supra* note 18, at 4 (relying on data collected from a DoD Women’s Reproductive Health Survey).

144. *See id.*

145. *See id.* at 6.

146. Horton & Roubein, *supra* note 137.

147. See Osaid Alser, Mads Gilbert & Tarek Loubani, *Travel Time and Costs for Abortion for Military Service Members After the Dobbs Decision*, 331 J. AM. MED. ASSOC. 75, 76 (2024).

148. *The Official Website of the Military Health System*, HEALTH.MIL, <https://health.mil/About-MHS> [web.archive.org/web/20250920001515/https://health.mil/About-MHS] (last visited Dec. 26, 2024).

149. Brief of Former Mil. Off., Civilian Nat’l Sec. Leaders, and Vet Voice Found., *supra* note 103, at 24.

facility was 228 minutes.<sup>150</sup> In Louisiana, North Dakota, and Texas, travel times are over 400 minutes.<sup>151</sup> Depending on when and by what method abortion care is provided, service members may require tests, counseling, multi-day procedures, recovery time, and follow-up visits.<sup>152</sup> During a congressional hearing on the topic, one servicewoman reported that she drove three and a half hours from Alabama to Georgia for abortion care.<sup>153</sup> When she arrived, she was told that Georgia had a three-day waiting period and that the clinic could only confirm her pregnancy during that visit.<sup>154</sup> The member ultimately sought care in another state.<sup>155</sup> While new reproductive policies create an administrative pathway for members to obtain abortion care, the extra time needed to obtain out-of-state care reduces the overall productivity and readiness of military units and hampers national security.

A related national security problem is the DoD's burgeoning budget. Congress's decision not to provide abortion care comes at a cost. A recent study found that the abortion ban increases costs to the military and is associated with more maternal deaths, severe maternal morbidities, stillbirths, neonatal deaths, neonatal intensive care admissions, and higher disability-adjusted life years.<sup>156</sup> One of the intended consequence of the abortion ban is that more servicewomen carry their pregnancies to term.<sup>157</sup> Several military institutions will be impacted if that happens, including MTFs, the DoD Child Care program, and DoD schools.<sup>158</sup> The DoD already has a shortage of obstetricians, gynecologists, and pediatric specialists, and an increase in pregnancy care could increase health care costs.<sup>159</sup> The DoD Child Care program, which provides child care to military members, has faced pressure to enroll more children and to provide care during irregular work hours.<sup>160</sup> The DoD school system provides pre-kindergarten through grade twelve education to military members and DoD civilians living on an installation with a DoD school.<sup>161</sup> The cost for the DoD to own and operate the schools is \$670 million, in addition to another \$1.2 billion for overseas schools.<sup>162</sup> These costs are likely to increase if more pregnancies are carried to term, as the DoD is already struggling to meet the current demand.

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150. See Alser, Gilbert & Loubani, *supra* note 147.

151. *Id.*

152. *Abortion in Clinic: What to Expect*, NAT'L ABORTION FED'N, <https://prochoice.org/patients/abortion-what-to-expect/> [perma.cc/RG6N-LVQF] (last visited Dec. 26, 2024).

153. *Military Personnel on Reproductive Health and Readiness Befort the House Armed Services Committee Readiness Subcommittee*, 117th Cong. 49–75 (2022) (statement of Sharon Arana, active-duty service member).

154. *Id.* The service member could not return to Georgia for the procedure because of her training schedule and ultimately obtained abortion care in New York.

155. *Id.*

156. Elizabeth Gill, Wu Zeng, Jacqueline S. Lamme, Tetsuya Kawakita, Monica A. Lutgenford, Patrick Richard & Jill E. Brown, *Decision and Economic Evaluation of Abortion Availability in the United States Military*, 232 AM. J. OBSTETRICS & GYNECOLOGY 301.e1, 301.e1 (2025).

157. *Id.*

158. See *id.*

159. *Id.*

160. KRISTY KAMARCK, CONG. RSCH. SERV., IN12202, FY2024 NDAA: MILITARY CHILD CARE PROGRAMS (2024).

161. KRISTY KAMARCK, CONG. RSCH. SERV., IF10335, DEFENSE PRIMER: DOD DOMESTIC SCHOOL SYSTEM (2023).

162. *Id.*

One last national security problem that *Dobbs* created was demonstrated by Senator Tommy Tuberville when he blocked several hundred senior military nominations to protest the military's abortion travel policy.<sup>163</sup> Beginning in February 2023, after the military had authorized travel reimbursements for abortion care, Senator Tuberville refused to allow the senate to confirm hundreds of nominations for senior military positions, including four-star generals nominated to lead the combatant commands.<sup>164</sup> The secretaries of the Army, Navy, and Air Force defended the travel policy in an op-ed, arguing that the policies were critical to supporting troops and ensuring national security, and urged Senator Tuberville to drop his objection.<sup>165</sup> Senator Tuberville relented after eleven months, but not without considerable damage to productivity, military families, and troop morale.<sup>166</sup>

This was not the first time that Congress used the military to push its abortion agenda.<sup>167</sup> In the 1970s, the military fell victim to political disagreements over abortion that ultimately led to the passage of 10 U.S.C. § 1093.<sup>168</sup> Through a series of congressional authorizations, Congress removed the authority of military doctors to make medical determinations concerning abortion, and instead implemented the abortion funding ban that is in place today.<sup>169</sup> The military often has the final say in matters of national security, but Congress has successfully carved out an exception when it comes to women's reproductive rights.<sup>170</sup>

The integration of women in the military has been a tumultuous process. Women have faced bias, sexual harassment, and sexual assault.<sup>171</sup> The *Dobbs* decision is the latest obstacle in the path to equality. Military policies offering administrative support for pregnant service members are well intended, but are not likely to reduce the stress and hardship placed on servicewomen. Recruitment and retention will continue to suffer for as long as women have limited access to

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163. Connor O'Brien, *Senate Confirms Top Military Nominees, Ending Tuberville's Hold Over Promotions*, POLITICO (Dec. 19, 2023), <https://www.politico.com/news/2023/12/19/senate-confirms-top-military-nominees-ending-tubervilles-hold-over-promotions-00132588> [web.archive.org/web/20251004185818/https://www.politico.com/web/20251004185818/https://www.politico.com/news/2023/12/19/senate-confirms-top-military-nominees-ending-tubervilles-hold-over-promotions-00132588]. In the Senate, a single senator can hold up nominations or legislation. However, a majority of senators can move a blocked measure forward by bringing it to a floor vote. In this case, there were hundreds of nominations that would each require a floor vote to move them forward. Therefore, Senator Tuberville was able to effectively block the promotions.

164. *Id.* Combatant commands provide command and control of military forces for geographic or functional units. They include Africa Command, Central Command, Indo-Pacific Command, Northern Command, Southern Command, Space Command, Cyber Command, Special Operations Command, and Strategic Command.

165. Carlos Del Toro, Frank Kendall & Christine Wormuth, *Three Service Secretaries to Tuberville: Stop This Dangerous Hold on Senior Officers*, WASH. POST (Sep. 4, 2023), <https://www.washingtonpost.com/opinions/2023/09/04/army-navy-air-force-secretaries-tuberville-military-hold/> [perma.cc/RG5T-RAAW].

166. Anastasia Obis, *Impacts of Tuberville's Military Holds Will Be Felt for Years*, FED. NEWS NETWORK (Mar. 4, 2024), <https://federalnewsnetwork.com/federal-report/2024/03/impacts-of-tubervilles-military-holds-will-be-felt-for-years/> [perma.cc/4N7P-NJPM].

167. BURRELLI, *supra* note 37.

168. *Id.* at 7.

169. *Id.*

170. *Id.* at 1.

171. C. Todd Lopez, *In 75 Years Since Women's Armed Services Integration Act, Female Service Members Have Excelled*, J. AEROSPACE, DEF. INDUS. & VETERANS NEWS, Feb. 2024, at 1, <https://www.aerotechnews.com/wp-content/PDFs/022324DLNAZDIG.pdf> [perma.cc/4L7G-LFHH].

reproductive care and face legal uncertainty. The weaponization of abortion in the military will lead to lost productivity, a scarcity of DoD resources, and will negatively impact national security. In short, the military cannot maintain a ready force while asking service members to manage and shoulder the cost of out-of-state reproductive care. Such a scheme creates a harrowing experience for women and will result in recruiting, retention, and low morale problems that reduce the overall effectiveness of the military.<sup>172</sup>

## II. CONSTITUTIONAL RIGHTS AND SEPARATION OF POWERS: THE SCOPE OF LEGISLATIVE AND EXECUTIVE AUTHORITY AND THE POWER TO REGULATE REPRODUCTIVE RIGHTS IN THE MILITARY

The DoD's reversal of its policy allowing reimbursement for travel expenses related to abortion demonstrates that, at any time, Congress or the DoD can change its position on reproductive care for service members and veterans.<sup>173</sup> This precarious regulatory landscape puts service members' health at risk and threatens national security. This Section examines the tension between the legislative and executive branches on the issue of military abortion care. It analyzes service members' constitutional rights to reproductive care and the scope of congressional rulemaking when regulating military matters that impact national security. The Section concludes that Congress wields broad constitutional authority over the military and has discretion to make rules that regulate the military, including health care policy.<sup>174</sup> Therefore, while there should be a constitutional right to abortion in the military, courts are not likely to recognize such a right. However, the military can avoid running afoul of the abortion funding ban while supporting military members through ancillary policies. These policies may not be popular with a socially conservative Congress or DoD, but the impact of *Dobbs* on military recruiting, retention, and readiness may force Congress and the DoD to compromise on these issues.

### *A. Constitutional Challenges Involving the Hyde Amendment and the Military Abortion Ban*

The Hyde Amendment and the military's abortion funding ban apply abortion restrictions to federal employees and military personnel, respectively. Although the two laws apply to different groups of federal employees, they operate similarly. As such, judicial decisions involving the Hyde Amendment and the military's abortion funding ban are relevant to this discussion. This Section addresses the constitutionality of the Hyde Amendment and the military abortion funding ban, noting the importance of particular deference rules that shape the analysis in the military context.

With respect to the Hyde Amendment, Congress's abortion funding prohibitions have been challenged on statutory and constitutional grounds, albeit

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172. Brief of Former Mil. Off., Civilian Nat'l Sec. Leaders, and Vet Voice Found., *supra* note 103.

173. Leo Shane III, *Could Trump Drop the VA and DoD Abortion Access Policies Right Away?*, MIL. TIMES (Nov. 13, 2024), <https://www.militarytimes.com/news/pentagon-congress/2024/11/14/could-trump-drop-the-va-and-dod-abortion-access-policies-right-away/> [perma.cc/LJ2P-XSUC].

174. U.S. CONST., art. II, § 8, cl. 14.

unsuccessfully. In *Harris v. McRae*, plaintiffs, including Cora McRae, a Medicaid recipient in the first trimester of a pregnancy that she wished to terminate, filed a lawsuit in the Eastern District of New York, alleging that she was entitled to abortion care under the state's Medicaid program.<sup>175</sup> After several preliminary rulings, the District Court ruled in favor of McRae.<sup>176</sup> On direct appeal, the U.S. Supreme Court reversed.<sup>177</sup> The issue for the Court was whether the Hyde Amendment violates the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment or the Religion Clauses of the First Amendment.<sup>178</sup> To reach the constitutional questions, the Court first considered whether Title XIX required states participating in the Medicaid program to fund medically necessary abortions for which federal reimbursement was unavailable under the Hyde Amendment.<sup>179</sup> The Court held that Congress did not intend for states to unilaterally fund abortions in lieu of federal funding.<sup>180</sup> As the Court explained, states are not obligated to pay for medically necessary abortions as a condition of federal support for other health services.<sup>181</sup>

Having resolved the statutory question, the Court addressed whether the Hyde Amendment violates the constitutional rights of a woman to terminate her pregnancy.<sup>182</sup> Relying on the Due Process Clause and the "liberty" right articulated in *Roe v. Wade*, the Court recognized a woman's right to terminate her pregnancy but distinguished between a criminal prohibition and a funding prohibition.<sup>183</sup> Citing a factually similar case decided three years earlier, *Maher v. Roe*, the Court said that the guiding principle in *Maher* was whether the government places obstacles in the pregnant woman's path.<sup>184</sup> As the Court explained, "a value judgment favoring childbirth over abortion, and [implementing] that judgment by the allocation of public funds" does not impose unconstitutional obstacles or restrictions on women seeking abortions.<sup>185</sup> The government simply used unequal subsidization of abortion and other medical services to encourage alternatives to abortion.<sup>186</sup> Because the constitutional protections of abortion do not include entitlements to the financial resources to obtain an abortion, and because the government had not

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175. *Harris v. McRae*, 448 U.S. 297, 303 (1980).

176. *Id.* at 306.

177. *Id.* at 318.

178. *Id.* at 300.

179. *Id.*

180. *Id.* at 310–11.

181. *Id.* at 309.

182. *Id.* at 311.

183. *Id.* at 313.

184. *Id.* at 314. In *Maher*, a Connecticut regulation limited state Medicaid benefits for first trimester abortion to those that are "medically necessary." Connecticut defined "medically necessary" to include psychiatric necessity, as determined by a physician. Two indigent women who were unable to obtain a physician's certificate of medical necessity filed a lawsuit challenging the Connecticut regulation as inconsistent with Title XIX and as violative of their constitutional rights. The Supreme Court held that Title XIX does not require states to fund nontherapeutic abortions to participate in the Medicaid program and held that the regulation satisfied rationale basis review. *Maher v. Roe*, 432 U.S. 464, 466–67 (1977).

185. *Harris*, 448 U.S. at 314. The Court recognized indigency as an obstacle but stated that indigency was not created by the government regulation at issue.

186. *Id.* at 315.

created the appellee's indigency, the Court concluded that the government did not obstruct the right to an abortion.<sup>187</sup>

Courts have reached the same conclusion in the military context. In 2004 and 2005, appellate courts considered a pair of cases brought by military dependents challenging 10 U.S.C. § 1093, the military abortion funding ban. In *Britell v. United States*, a military spouse and her husband, a captain in the Air National Guard, discovered at twenty weeks that their fetus suffered from a rare and allegedly fatal condition called anencephaly.<sup>188</sup> The private medical center that performed Britell's abortion sought reimbursement from CHAMPUS, the military's medical insurer.<sup>189</sup> Citing 10 U.S.C. § 1093 and the implementing regulation that specifically denied reimbursement for abortions due to anencephaly, the insurer denied the claim.<sup>190</sup> The medical provider obtained a state court judgment against Britell, and Britell filed a lawsuit in the United States District Court for the District of Massachusetts alleging an as-applied equal protection challenge to 10 U.S.C. § 1093.<sup>191</sup> The District Court granted summary judgment for Britell, finding that Britell's case was distinguishable from *McRae* because the government's interest in potential human life was not legitimate in cases of anencephaly.<sup>192</sup> On appeal, the Federal Circuit reversed. The court found that, like in *McRae*, the funding statute imposed no obstacles on the constitutional protected freedom of choice recognized in *Roe v. Wade* because every woman has the same range of reproductive choices despite the funding prohibition.<sup>193</sup> Finding that the statute impinged on no fundamental right and deserved no suspect classification, the question was whether the statute was rationally related to a legitimate government interest.<sup>194</sup> The court answered that question affirmatively, holding that any other result would require courts to make medical determinations about which fetal abnormalities or birth defects are so severe as to remove the state's interest in potential human life.<sup>195</sup>

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187. *Id.* at 317. Nor did the Court find that selective subsidization violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment. Holding that an indigent woman seeking an abortion does not come within a suspect class, the Court applied rationale basis review and found that the Hyde Amendment is rationally related to the legitimate government objective of protecting potential life. The Court dispensed with the Free Exercise Clause challenge because appellees lacked standing. Regarding the Establishment Clause challenge, the Court said that a legislative enactment does not violate the Constitution if it has a secular purpose. Even though the Hyde Amendment coincides with religious tenets, that alone does not contravene the Establishment Clause.

188. *Britell v. United States*, 372 F.3d 1370, 1373 (Fed. Cir. 2004). Anencephaly is a condition in which the fetus develops without a forebrain, cerebellum, or cranium, and the fetus dies during pregnancy, birth, or within a few months of birth.

189. *Id.* TRICARE replaced CHAMPUS in 1993.

190. *Id.*; see also 32 C.F.R. § 199.4(e)(2) ("Abortions performed for suspected or confirmed fetal abnormality (e.g., anencephalic) or for mental health reasons (e.g., threatened suicide) do not fall within the exceptions permitted within the language of the statute and are not authorized for payment under CHAMPUS.").

191. *Britell*, 372 F.3d at 1373–75. The government argued that 10 U.S.C. § 1093 was facially constitutional under *Harris v. McRae* and therefore Britell could not bring an as-applied challenge. The District Court disagreed, finding that the Supreme Court has recognized as-applied challenges since 1985, when the Court decided *City of Cleburne v. Cleburne Living Ctr.* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that the denial of a special use permit to an organization housing people with mental illness was premised on irrational prejudice).

192. *Britell*, 372 F.3d at 1375.

193. *Id.* at 1380.

194. *Id.*

195. *Id.* at 1383.

A year after *Britell*, the Ninth Circuit decided *Doe v. United States*, a case with almost identical facts as those in *Britell*. A military spouse and her Navy enlisted husband were denied reimbursement after having an abortion because of an anencephalic fetus.<sup>196</sup> The District Court for the Western District of Washington ruled in favor of the couple, but the Ninth Circuit reversed.<sup>197</sup> Relying on *McRae* and *Britell*, the Ninth Circuit found that the statute did not impinge on a fundamental right and did not trigger a suspect classification.<sup>198</sup> The court held that the statute was rationally related to the government's interest in protecting life, and that the couple's personal circumstances did not undermine the reasonableness of the statute.<sup>199</sup>

These cases hold that Congress's funding prohibition is uniquely different from previous cases involving constitutional rights of military members. For example, in *Witt v. Department of the Air Force*, the Ninth Circuit ruled that the military must prove, on a case-by-case basis, that discharging a service member under the "Don't Ask Don't Tell" policy is necessary to further an important government interest.<sup>200</sup> Relying on the Supreme Court's decision in *Texas v. Lawrence*, the court said that the personal and private lives of homosexuals deserved heightened scrutiny, holding that the government "must advance an important government interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest."<sup>201</sup> Likewise, in litigation over the military's transgender ban, lower courts have applied intermediate scrutiny, finding that transgender individuals satisfy the criteria "of at least a quasi-suspect classification."<sup>202</sup>

After *Dobbs*, there is no heightened scrutiny for women seeking an abortion. Further, as the above cases make clear, courts are not going to apply heightened scrutiny to abortion funding restrictions.<sup>203</sup> Without a fundamental right to abortion, courts only have to decide whether the funding ban is rationally related to a legitimate government interest. Protecting potential life has repeatedly been upheld as a legitimate state interest in abortion cases, and nothing in *Dobbs* changes that longstanding principle.<sup>204</sup> Further, 10 U.S.C. § 1093 is a funding prohibition, not an abortion prohibition, and therefore does not interfere with a service member's freedom to terminate a pregnancy.<sup>205</sup> Thus, substantive due process

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196. *Doe v. United States*, 419 F.3d 1058, 1060–61 (9th Cir. 2005).

197. *Id.* at 1061.

198. *Id.* at 1062–63.

199. *Id.* The court briefly considered whether TRICARE's exclusion of coverage in cases of anencephaly is arbitrary and capricious and violative of section 706 of the APA. The court applied the same reasoning as it did for its equal protection analysis and found that the challenge was without merit.

200. *Witt v. Dep't of Air Force*, 527 F.3d 806, 822–26 (9th Cir. 2008).

201. *Id.* at 819.

202. *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208 (D.D.C. 2017); *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019). *But see Doe 2 v. Shanahan*, 917 F.3d 694, 720 (D.C. Cir. 2019) (refusing to apply heightened scrutiny to transgender service members); *Schilling v. Trump*, No. 25-2039 (9th Cir. Apr. 18, 2025) (challenging the DoD's current transgender ban).

203. *See, e.g., Britell v. United States*, 372 F.3d 1370, 1373 (Fed. Cir. 2004).

204. *See Harris*, 448 U.S. at 313 (finding that the government's interest in protecting the potential life of a fetus justifies a criminal prohibition against abortions).

205. *Id.* at 316.

challenges to 10 U.S.C. § 1093 after *Dobbs* face insurmountable hurdles and are unlikely to succeed under rational basis review.<sup>206</sup>

Equal protection challenges have been similarly ineffective in challenging the statute. Equal protection under the Fifth Amendment guarantees the right to be free from invidious discrimination in statutory classifications and other government activity.<sup>207</sup> Legislation that operates to the disadvantage of a suspect class or impinges upon a fundamental right receives strict judicial scrutiny.<sup>208</sup> As discussed above, 10 U.S.C. § 1093 does not infringe upon a fundamental right,<sup>209</sup> and military or veteran status has never been recognized as a suspect or quasi-suspect class.<sup>210</sup> Thus, the statute receives rational basis review.<sup>211</sup> Some service members obtain in-state abortions at reduced costs with reduced administrative burdens. Others require out-of-state abortions at increased costs with increased burdens. The statute does not treat service members unequally. Rather, it prohibits funding for all service

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206. Notably, the Supreme Court relied on a history of state abortion restrictions to justify its holding in *Dobbs*. However, the history of abortion in the military is quite different than that of the states. Historically, the military did not have an official abortion policy for much of its existence. Service members had access to abortion care until about the 1970s, when Congress instituted the federal funding ban in response to *Roe v. Wade*. Prior to 1970, there was no formal service policy on abortion. Pregnant women were banned from serving in the military, meaning that service members obtained abortions through the military or privately to avoid being discharged from the military. See Brief for Petitioner, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840, at 22. Abortion services at MTFs varied by service, location, physician, and “command milieu.” Some service branches were more liberal in allowing abortions than others, as were the physicians who performed them. The DoD formalized its abortion policy in a 1970 memorandum issued to the surgeon generals of the military departments. The policy stated that physicians were not required to perform abortions, but that abortions could be performed “when medically indicated or for reasons involving mental health and subject to the availability of space and facilities and the capabilities of the medical staff.” In 1971, then-President Nixon issued an executive order changing the policy “to correspond with the laws of the states where those bases are located,” a policy coined “the good neighbor” policy. Nixon’s policy remained in effect until 1975, when the DoD directed MTFs to comply with the mandates in *Roe*, making abortion accessible in MTFs across the country. See BURRELLI, *supra* note 37, at 4. It is difficult to determine how many abortions were performed in MTFs before Congress passed 10 U.S.C. § 1093. The DoD has not made abortion data for this time period public, nor does it publish abortion statistics from individual hospitals. However, it is estimated that between 1976 and 1977, about 26,000 service members and dependents obtained abortions in MTFs or through the CHAMPUS program. See Heather D. Boonstra, *Off Base: The U.S. Military’s Ban on Privately Funded Abortions*, GUTTMACHER POL’Y REV., 2010, at 2. If the Supreme Court were to consider a right to abortion for servicewomen, it would have to consider the unique history of abortion in the military. Nonetheless, courts are not likely to find that abortion is “deeply rooted” in the nation’s history for several reasons. First, courts are unlikely to find that a small segment of society with a history of less restrictive abortion policies establishes that service members have a deeply rooted fundamental right to abortion. Women were not permitted to serve in the regular armed forces until 1948, making the military’s history of performing abortions relatively short compared to the states. Second, courts are unlikely to find that service members gain a fundamental right that they did not have as civilians, by virtue of joining the military. That said, the military’s liberal abortion policies in the pre-*Roe* era are remarkable in light of more restrictive state laws that dotted the national landscape at that time.

207. *Harris*, 448 U.S. at 322.

208. *Maher v. Roe*, 432 U.S. 464, 470 (1977).

209. *Doe v. United States*, 419 F.3d 1058, 1062–63 (2005).

210. *Rostker v. Goldberg*, 453 U.S. 57, 69–70 (1981); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975); *Cohen v. California*, 403 U.S. 15 (1971); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274–75 (1979). *But see* Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 (2012) (recognizing military status as a protected class for employment purposes).

211. *Doe*, 419 F.3d at 1062; *Britell v. United States*, 372 F.3d 1370, 1379 (Fed. Cir. 2004).

members, regardless of their individual circumstances.<sup>212</sup> Because the protection of human life has been recognized as a legitimate state interest,<sup>213</sup> and because Congress has broad constitutional discretion in military funding, 10 U.S.C. § 1093 does not violate the equal protection clause.<sup>214</sup>

Aside from precedent supporting Congress's right to withhold funding in the face of substantive due process and equal protection challenges, courts have long deferred to Congress in cases involving military preparedness and personnel policy.<sup>215</sup> The Supreme Court has stated that deference is owed because the Constitution vests clear authority in Congress and the Executive in military matters.<sup>216</sup> Further, military policies are accountable to the electorate while judicial rulings are not, and the judiciary generally has less expertise in military affairs than Congress and the Executive.<sup>217</sup> Further, the Supreme Court has been reluctant to apply a "one-size-fits-all" level of scrutiny to cases involving military affairs and constitutional rights, whether that be rationale basis review, heightened scrutiny, or strict scrutiny.<sup>218</sup> Instead, the Court attempts to balance, albeit with deference to the government, explicit constitutional grants of authority with service members' individual rights.<sup>219</sup> For example, In *Schlesinger v. Ballard*, a male naval officer was discharged due to failure to promote.<sup>220</sup> A similarly situated female officer would not have been discharged because of a separate statute allowing women more time to promote.<sup>221</sup> Affirming the male officer's discharge, the Court found that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress . . . and with the President."<sup>222</sup> The Court's recent pronouncement that abortion is not a fundamental right, Congress's explicit constitutional authority to make rules governing military personnel, and Congress's authority to fund or not fund military programs all result in significant deference to Congress and the Executive in determining whether servicewomen are entitled to abortions through DoD health care. Though the abortion funding ban endangers servicewomen and threatens national security, the ban unfortunately rests on firm legal ground.

*B. Separation of Powers and the Battle Over DoD Policies that Provide Support to Servicewomen Seeking Abortions*

Despite the longstanding abortion funding restrictions under 10 U.S.C. § 1093, the DoD and Congress have often clashed over how broadly to interpret the

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212. *Doe*, 419 F.3d at 1063.

213. *Britell*, 372 F.3d at 1381.

214. *Maher v. Roe*, 432 U.S. 464, 479 (1977).

215. *Rostker*, 453 U.S. at 64–65; *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

216. *Doe 2 v. Shanahan*, 917 F.3d 694, 702 (D.C. Cir. 2019).

217. *Id.*

218. *Rostker*, 453 U.S. at 70.

219. *Id.*

220. *Schlesinger v. Ballard*, 419 U.S. 498, 499 (1975). Under 10 U.S.C. § 6382(a), officers must promote within a specific period or be discharged from service.

221. *Id.* at 500.

222. *Id.* at 510.

funding ban.<sup>223</sup> Over the years, the DoD has made attempts to provide ancillary support to servicewomen seeking abortions without violating the statute, while Congress has argued that such policies violate the spirit of the law.<sup>224</sup> This Section analyzes the legal tug-of-war between Congress and the Executive branch over ancillary DoD abortion policies and argues that the instability of such policies is detrimental to servicewomen and national security.

The prohibition on public funding for abortion in the military has been in place for almost fifty years, though Congress has tinkered with exceptions to the ban.<sup>225</sup> Statutory exceptions have focused on rape and incest, and reporting requirements for each, in addition to exceptions for when the “life of the mother would be endangered if the fetus were carried to term.”<sup>226</sup> In 1984, after several years of amendments to the funding ban in subsequent defense bills, Congress codified the ban with a single exception for protecting the life of the mother, but later added exceptions for rape and incest.<sup>227</sup>

After the initial funding ban went into effect, DoD informally permitted service members stationed overseas to pay out-of-pocket for abortions at military treatment facilities.<sup>228</sup> The practice was a safe and convenient way to provide health care to service members who could not obtain an abortion because of restrictions in host nations and neighboring countries.<sup>229</sup> However, in 1988, then-Assistant Secretary of Defense, Dr. William Mayer, issued a memorandum barring the practice because of its “insensitivity to the spirit” of the law.<sup>230</sup> In 1993, then-President Clinton reversed the DoD’s policy and ordered that military facilities continue to permit abortions if paid entirely with non-DoD funds.<sup>231</sup> In 1996, Congress responded to President Clinton’s order by amending 10 U.S.C. § 1093 to include a second provision that explicitly prohibited abortions in any DoD facility, thus closing the loophole for privately funded abortions.<sup>232</sup> The statute read:

§ 1093. Performance of abortions: restrictions.

(A) RESTRICTIONS OF USE OF FUNDS.—Funds available to the Department of Defense may not be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest.

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223. BURRELLI, *supra* note 37, at 4–6.

224. *Id.*

225. Britell v. United States, 372 F.3d 1370, 1381 (Fed. Cir. 2004); Doe v. United States, 419 F.3d 1058, 1063 (9th Cir. 2005).

226. BURRELLI, *supra* note 37, at 4–6.

227. *Id.* at 5–6. Amendments to the ban were included in successive versions of the National Defense Authorization Act from 1979 to 1983.

228. Amy E. Crawford, *Under Siege: Freedom of Choice and the Statutory Ban on Abortions on Military Bases*, 71 U. CHI. L. REV. 1549, 1553 (2004).

229. Grindlay et al., *supra* note 8.

230. *Abortion Is Restricted at Military Hospitals*, N.Y. TIMES, July 19, 1988, at A11.

231. President William J. Clinton, Memorandum to the Sec’y of Def. on Abortions in Military Hospitals (Jan. 22, 1993), <https://www.govinfo.gov/content/pkg/WCPD-1993-01-25/pdf/WCPD-1993-01-25-Pg88-2.pdf> [perma.cc/9VJK-R2BH].

232. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 384 (1996).

(B) 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.<sup>233</sup>

The amendment provided the final word on using funds or facilities for performing abortions and closed the door on one of the safest and most equitable solutions to balancing the interests of Congress with the needs of service members.<sup>234</sup>

In 2022, the *Dobbs* decision and the DoD's subsequent abortion travel policy reignited the abortion debate. The travel policy has become the latest flashpoint for separation of power skirmishes, once again pitting Congress's abortion funding prohibition against DoD policies that attempt to ease the burden on service members. Members of Congress have attacked the travel policy and claimed that the DoD is acting as an "abortion travel agency."<sup>235</sup> Under the Biden administration, the DoD defended its travel policy on several grounds, including drafting a memorandum for the Department of Justice that justified its legal position.<sup>236</sup> First, the DoD argued that 10 U.S.C. § 1093 applies only to funds used to "perform abortions" and not to related expenditures.<sup>237</sup> When Congress has wanted to prohibit related expenditures, it has done so through plain language.<sup>238</sup> The DoD cited multiple examples when Congress has amended abortion-related funding restrictions under the Hyde Amendment that go beyond prohibiting just the performance of abortions.<sup>239</sup> Second, the DoD cited three statutes, expressly granting the Secretary of Defense broad authority to reimburse travel expenses that the DoD argued could be used to reimburse travel related to the performance of abortions.<sup>240</sup> Third, DoD argued that the necessary expense doctrine permitted the DoD to use its operation and maintenance (O&M) appropriation to support the travel policy.<sup>241</sup>

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233. *Id.*

234. Boonstra, *supra* note 206, at 2–3.

235. *Heritage Explains: Standing Up to the DoD's "Abortion Travel Agency,"* HERITAGE FOUND., <https://www.heritage.org/defense/heritage-explains/standing-the-dods-abortion-travel-agency> [perma.cc/R8SS-7UNK] (last visited Aug. 5, 2025).

236. Authority of the Department of Defense to Use Appropriations for Travel by Service Members and Dependents to Obtain Abortions, 46 Op. O.L.C. \_\_ (Oct. 3, 2022), <https://www.justice.gov/d9/2022-11/2022-10-03-dod-abortion-transportation.pdf> [perma.cc/FGK4-U38Q].

237. *Id.* at 1–2.

238. *Id.* at 2 (citing a Department of Justice prohibition on the use of funds "to require any person to perform, or facilitate in any way the performance of, any abortion").

239. *Id.* at 3–4.

240. *Id.* at 5–6. The DoD relied on 37 U.S.C. § 452(a) (authority for the Secretary to provide "actual and necessary expenses of travel and transportation, for, or in connection with," any "travel as authorized or ordered by the administering Secretary"); 37 U.S.C. § 452(b)(11) (authority under § 452(a) "includes travel under or in connection with[] . . . [u]nusual, extraordinary, hardship, or emergency circumstances"); and 37 U.S.C. 453(d) (authorized travelers "may be provided travel and transportation allowances under this section for unusual, extraordinary, hardship, or emergency circumstances, including circumstances warranting evacuation from a permanent duty assignment location").

241. *Id.* at 8. According to the DoD, the doctrine allows an agency to use general appropriations for an expenditure that "bears a logical relationship to the objectives of the general appropriation and will make a direct contribution to the agency's mission." The DoD argued that the readiness of its force

Accepting the legality of the DoD's travel policy, Congress has refocused its efforts on repealing the policy. In the two years since the DoD announced its policy, the House has twice voted to overturn it by amending 10 U.S.C. § 1093 to prohibit reimbursement for abortion related travel expenses.<sup>242</sup> The Senate introduced a similar bill that did not receive a vote.<sup>243</sup> In 2025, under the Trump administration, the DoD repealed provisions of the travel policy that reimbursed service members for expenses related to abortion care but left in place other provisions, such as the leave protocols.<sup>244</sup> If Congress is successful in getting legislation passed, which requires a simple majority in the House and Senate, the president could sign the bill and Congress could end the policy permanently.

The revolving abortion policy is due in part to separation of powers principles. Pursuant to the U.S. Constitution, Congress and the President share control of the military, though their powers are allocated separately. Article II, § 2, designates the President as Commander-in-Chief (C in C).<sup>245</sup> Under this authority, the President has the power to make decisions regarding strategic and tactical military operations;<sup>246</sup> deploy forces;<sup>247</sup> appoint civilian and military leadership;<sup>248</sup> order the use of nuclear weapons; negotiate treaties; propose budgets; and exercise certain emergency powers.<sup>249</sup> As C in C, the President may reverse or amend DoD policy with almost unfettered discretion.<sup>250</sup> President Clinton did exactly that in his skirmish with the DoD over privately funded abortions in the 1990s.<sup>251</sup> Future

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was clearly impacted by the health of its members, and that general appropriations approved by senior officials would contribute to its mission.

242. Connor O'Brien, *House Votes to Overturn Pentagon Abortion Policy Pushing Defense Bill Hard-Right*, POLITICO (June 13, 2024), <https://www.politico.com/news/2024/06/13/house-votes-to-overturn-pentagon-abortion-policy-pushing-defense-bill-hard-right-00163323> [web.archive.org/web/20250918075848/https://www.politico.com/web/20250918075848/https://www.politico.com/news/2024/06/13/house-votes-to-overturn-pentagon-abortion-policy-pushing-defense-bill-hard-right-00163323].

243. S. 822, 118th Cong. (2023-2024), <https://www.congress.gov/bill/118th-congress/senate-bill/822/text> [perma.cc/M5UD-KBY5]; see also Rebecca Kheel, *Pentagon Defends Abortion Policy Ahead of Senate Fight Over Defense Bill*, MILITARY.COM (July 19, 2023), <https://www.military.com/daily-news/2023/07/19/pentagon-defends-abortion-policy-ahead-of-senate-fight-over-defense-bill.html> [perma.cc/D6GV-KSSE].

244. BRYCE H.P. MENDEZ, CONG. RSCH. SERV., IN12512, DOD POLICY CHANGES: REPRODUCTIVE HEALTH BENEFITS (2025).

245. U.S. CONST. art. II, § 2, cl. 1. The phrase "Army and Navy" as used in the Constitution means all the armed forces. Memorandum for the Special Couns. to the President from Harold Baynton, *Presidential Authority as Commander in Chief of the Air Force* (Aug. 26, 1947), <https://www.justice.gov/file/147516-0/dl> [perma.cc/9HK8-TP4M].

246. JENNIFER K. ELSEA, CONG. RSCH. SERV., IFI0534, DEFENSE PRIMER: PRESIDENT'S CONSTITUTIONAL AUTHORITY WITH REGARD TO THE ARMED FORCES (2024); see also Fleming v. Page, 50 U.S. 603, 615 (1850) (noting that the President's powers are purely military).

247. ELSEA, *supra* note 246.

248. Zachary S. Price, *Constitutional Law: Congress's Power Over Military Offices*, in 6 THE JUDGES' BOOK 23 (2022), <https://repository.uchastings.edu/judgesbook/vol6/iss1/6> [perma.cc/M845-45R2].

249. ELSEA, *supra* note 246.

250. WILLIAM YEATMAN, REIGNING IN THE UNREASONABLE EXECUTIVE, CATO INST. POL'Y ANALYSIS NO. 935 1 (Nov. 1, 2022).

251. O'Brien, *supra* note 242.

Presidents could similarly reverse the current travel policy, with or without the support of the DoD.<sup>252</sup>

If Congress were to act, it would have the final say over the abortion travel policy. Though Congress and the Executive share control of the military, the U.S. Constitution draws a distinction between these branches of government and military control. When Congress restricts funding for abortion in the military, it is acting pursuant to its broad constitutional authority to fund and regulate the armed forces.<sup>253</sup> Article I, § 8 of the U.S. Constitution grants Congress the power to declare war;<sup>254</sup> raise and support armies;<sup>255</sup> provide and maintain a navy;<sup>256</sup> make rules for the government and regulation of the armed forces;<sup>257</sup> organize, arm, and discipline the militia;<sup>258</sup> deploy militias to enforce laws, suppress insurrections, and repel invasions;<sup>259</sup> control the defense budget and military spending;<sup>260</sup> and regulate military installations.<sup>261</sup> Congress has explicit constitutional authority to make rules governing the military, and has done so in the context of military health care for many decades.<sup>262</sup>

As discussed in Section II.A, by restricting funding and facilities used for abortions, rather than directly regulating service members' activity, Congress reduces its risk of violating constitutional rights.<sup>263</sup> Congress has often used its spending power to end activities it does not support.<sup>264</sup> For example, in 1969, when Congress opposed further escalation of the Vietnam War, it passed an amendment to the defense spending bill that prevented funding for military operations in Laos or Thailand.<sup>265</sup> In 1996, when Congress opposed research on stem cells and in vitro fertilization because the research involved the creation or destruction of human embryos, Congress passed the Dickey Amendment, a rider in the L-HHS-Ed appropriations act that prohibited using federal funds for embryonic research.<sup>266</sup>

252. Leo Shane III, *Could Trump Drop the VA and DoD Abortion Access Policies Right Away?*, MIL. TIMES (Nov. 13, 2024), <https://www.militarytimes.com/news/pentagon-congress/2024/11/14/could-trump-drop-the-va-and-dod-abortion-access-policies-right-away/> [perma.cc/3S4M-QZGD].

253. U.S. CONST., art I, § 8.

254. *Id.* cl. 11.

255. *Id.* cl. 12.

256. *Id.* cl. 13.

257. *Id.* cl. 14.

258. *Id.* cl. 16.

259. *Id.* cl. 15.

260. *Id.* cl. 12.

261. *Id.* cl. 14.

262. MICHELLE DOLFINI-REED & JENNIFER JEBO, *THE EVOLUTION OF THE MILITARY HEALTH CARE SYSTEM: CHANGES IN PUBLIC LAW AND DOD REGULATIONS*, CENTER FOR NAVAL ANALYSES 3 (July 2000).

263. *Maier v. Roe*, 432 U.S. 464, 475 (1977) (“Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State’s power to encourage actions deemed to be in the public interest is necessarily far broader.”).

264. *Id.*

265. Julian E. Zelizer, *How Congress Got Us Out of Vietnam*, AM. PROSPECT (Feb. 19, 2007), <https://prospect.org/features/congress-got-us-vietnam/> [perma.cc/FX9A-XX7W] (describing how President Nixon signed the bill, under his policy of “Vietnamization” that called for a gradual withdraw of forces from Vietnam).

266. JUDITH A. JOHNSON & EDWARD C. LIU, CONG. RSCH. SERV., RL33540, *STEM CELL RESEARCH: SCIENCE, FEDERAL RESEARCH FUNDING, AND REGULATORY OVERSIGHT* (2013) (noting that the Dickey Amendment halted the development of National Institute of Health guidelines on human embryo research).

These laws did not directly prohibit the activities that Congress deemed undesirable but rather withheld the funding that eventually halted those activities.<sup>267</sup> In both instances, Congress acted within its authority without violating the Constitution to achieve its desired result.<sup>268</sup>

Congress is on especially hallowed ground when making health care policy. Congress provides health care coverage for about a third of Americans through Medicare, Medicaid, the Children's Health Insurance Program (CHIP), the Veterans Health Administration, the Indian Health Service, the Affordable Care Act, and the military.<sup>269</sup> Both the House and Senate have an Armed Services Committee that makes health care policy for active-duty and retired military members.<sup>270</sup> In addition to Congress's extensive history of regulating health care, the Supreme Court has recognized Congress's authority to regulate the military and has deferred to legislative judgments about military affairs, noting that "perhaps in no other area has the Court accorded Congress greater deference."<sup>271</sup> Thus, if Congress amends 10 U.S.C. § 1093 to prohibit funding for the DoD's travel policy, then the DoD and the President would have little recourse.

After *Dobbs*, military abortion policies are more important and more unpredictable than ever before. There is tremendous potential for conflict between the president, DoD, and Congress, with outcomes dependent on political battles within the government branches. If Congress wants to permanently repeal the travel policy, it must have a majority of members that negotiate with the President to pass a bill into law. If the President wants to repeal the travel policy, they could do so unilaterally, but such an order could be overridden by congressional action. The unpredictability and shifting health policies for servicewomen under the Biden and Trump administrations could not come at a worse time for the DoD, as service branches open combat roles to women and look to increase gender diversity in the higher echelons of the Pentagon.<sup>272</sup>

### *C. Circumventing the Abortion Ban: Using the VA Health Care System to Provide Reproductive Services to Servicewomen*

Unless Congress changes course on the abortion funding ban, an unlikely scenario given Congress's penchant to narrow rather than expand abortion access for federal employees, servicewomen are not likely to have access to full

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267. *Id.* at 7.

268. *Sherley v. Sebelius*, 689 F.3d 776, 780–83 (D.C. Cir. 2012).

269. Julie Rovner, *Congress and the Executive Branch and Health Policy*, KFF (Jan. 14, 2025), <https://www.kff.org/health-policy/101-congress-and-the-executive-branch-and-health-policy/?entry=table-of-contents-introduction> [perma.cc/7TRK-ESX8].

270. *Id.*

271. *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981). *But see Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972). While Congress's authority to regulate the military is broad, it is not without limits. In *Struck*, then-Professor Ruth Bader Ginsburg defended an Air Force nurse facing discharge for becoming pregnant, then prohibited, while serving in Vietnam. After losing at the district court and at the Court of Appeals for the Ninth Circuit, Captain Struck appealed to the Supreme Court. For reasons not entirely clear, then-Solicitor General Erwin Griswold convinced the Air Force to waive Captain Struck's discharge and abandon their discharge policy.

272. Doug Irving, *Insights on 'Women, Peace, and Security'*, RAND (Jan. 9, 2024), <https://www.rand.org/pubs/articles/2024/how-gender-diversity-improves-defense-operations.html> [perma.cc/ZL M8-H7XH].

reproductive services through the military any time soon. However, there are alternatives that could offer servicewomen some relief.

One possible alternative is for servicewomen to obtain abortion services through the VA. In 2022, the VA promulgated an interim rule that amended its medical regulations “to remove the exclusion on abortion counseling and establish exceptions to the exclusion on abortions in the medical benefits package. . . .”<sup>273</sup> In its federal register notice, the VA explained that the change was necessary because the *Dobbs* decision “created urgent risks to the lives and health of pregnant veterans” in the states that outlaw abortion.<sup>274</sup> The VA cited several alarming trends to support the regulation change, including that the maternal mortality rate in the United States had gone from 8.8 deaths per 100,000 live births between 1998 and 2005, to 17.9 deaths per 100,000 live births between 2007 and 2015.<sup>275</sup> The VA also listed several pregnancy-related complications that often warrant an abortion, including hemorrhage, placenta accreta septum, and peripartum hysterectomy.<sup>276</sup> The VA cited studies linking the rising mortality rate and pregnancy-related complications to reduced access to family planning, abortion clinic closures, and legislation restricting abortions based on gestational age.<sup>277</sup> On March 4, 2024, the VA finalized its interim rule without any changes or amendments.<sup>278</sup>

Unfortunately, the VA rescinded the 2022 regulation during the second Trump administration. On August 4, 2025, the VA promulgated a proposed rule, now final, that reverted to pre-2022 exclusions that prohibit abortion counseling and abortions in almost every instance, including for the health of the pregnant veteran, rape, and incest, and only allowed abortions to save the life of a pregnant person.<sup>279</sup> The rescission is a major setback for veterans and their families as it removes abortion rights for a vast group of people nationwide.<sup>280</sup> Nonetheless, the VA’s 2022 rule is worthy of examination because it offers a blueprint of how the federal government could expand abortion services in the federal workplace, including for military members, under a willing administration.

Although the VA’s 2025 rule reverts to an older, more restrictive policy, there is statutory authority for a more expansive abortion policy. As the VA explained in its promulgation of the 2022 rule, under 38 U.S.C. § 1710(a)(1)–(3), the agency has the authority to determine the medical needs of veterans.<sup>281</sup> In defending the 2022 rule, the VA (under the Biden administration) determined that access to abortions was “needed” when the life *or health* of a pregnant veteran would be endangered if

273. Reproductive Health Services, 87 Fed. Reg. 55287 (Sep. 9, 2022); *see also* Rachel N. Morrison, *Department of Veterans Affairs Rule Doubles Down on Abortion*, FEDERALIST SOC’Y (Mar. 13, 2024), <https://fedsoc.org/commentary/fedsoc-blog/department-of-veterans-affairs-rule-doubles-down-on-abortion> [perma.cc/SFF3-H8HU].

274. Reproductive Health Services, *supra* note 273, at 55288.

275. *Id.* at 55291.

276. *Id.*

277. *Id.*

278. Morrison, *supra* note 273.

279. Reproductive Health Services, 90 Fed. Reg. 36415 (Aug. 4, 2025). Notably, the VA’s rule is more restrictive than DoD policy, which allows abortions for active duty members in the case of rape or incest. 10 U.S.C. § 1093(b).

280. Press Release, Ctr. for Reprod. Rts., *Trump Administration Announces Plans to Ban Abortions for Veterans—Even After Rape or When Health is in Danger* (Aug. 1, 2025), <https://reproductiverights.org/trump-plans-ban-abortions-veterans/> [perma.cc/RGB6-MS47].

281. Reproductive Health Services, *supra* note 273, at 55291.

the pregnancy was carried to term.<sup>282</sup> Under the pre-2022 rule, only a pregnancy endangering the life of the mother would warrant an abortion.<sup>283</sup> Notably, in the 2022 rule, the VA included “mental health” among the risks associated with pregnancy, suggesting it would qualify as an exception to the abortion funding ban under certain circumstances. The interim rule notice stated:

Veterans of reproductive age, in particular, have high rates of chronic medical and mental health conditions that may increase the risks associated with pregnancy. Such conditions include chronic post-traumatic stress disorder, severe hypertension, and chronic renal disease. When a health care professional determines that these conditions (potentially in combination with other factors) render an abortion needed to preserve the health of a veteran, access to an abortion is essential health care.<sup>284</sup>

The 2022 policy effectively adopted the policy that the DoD had in place in the years between the integration of women in the military in 1948 and *Roe v. Wade*.<sup>285</sup> That policy allowed for an abortion when the decision to abort a pregnancy was made by the pregnant service member and her physician, and when the physician determined that an abortion could be medically justified under conditions that endangered the life *or health* of the member.<sup>286</sup>

The 2022 VA policy presents a blueprint for servicewomen to receive reproductive health care in federal facilities. Generally, the DoD and VA manage separate health care systems.<sup>287</sup> Active-duty, reserve and national guard members use DoD facilities managed by TRICARE, while veterans use VA facilities managed by CHAMPVA.<sup>288</sup> However, the DoD may refer service members to VA health facilities in certain instances. The VA’s status as a “TRICARE Network Provider” allows each VA health care facility to serve as a primary care manager or to provide specialty care to TRICARE (military) beneficiaries.<sup>289</sup> Service members must have a referral or authorization from TRICARE to obtain treatment, and the VA will only provide care on a space available basis.<sup>290</sup> Service members may receive treatment at VA facilities without prior approval if the VA facility has a VA/DoD sharing agreement that allows the VA to provide care without referrals.<sup>291</sup>

282. *Id.*

283. *Id.*

284. *Id.*

285. BURRELLI, *supra* note 37.

286. *Id.*

287. Andrew LaPelusa & Julie Bohlen, *Medicare, Medicaid, and Military and VA Healthcare Programs*, in STATPEARLS (July 16, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK594241/> [perma.cc/3D7V-REGC].

288. SIDATH VIRANGA PANANGALA & JARED S. SUSSMAN, CONG. RSCH. SERV., IF10555 INTRODUCTION TO VETERANS HEALTH CARE (2023).

289. *VA/DoD Health Affairs*, U.S. DEP’T OF VETERANS AFFS. (June 27, 2022), <https://www.va.gov/VADODHEALTH/TRICARE.asp#:~:text=VA%20can%20provide%20care%20for,are%20used%20for%20specialty%20care> [perma.cc/99KH-7GPU].

290. *Active-duty Service Members and VA Health Care*, U.S. DEP’T OF VETERANS AFFS. (Nov. 16, 2022), <https://www.va.gov/health-care/eligibility/active-duty/> [perma.cc/W3R7-YTHQ].

291. *Id.*; see also *VA & TRICARE Information*, U.S. DEP’T OF VETERANS AFFS. (June 27, 2022), <https://www.va.gov/VADODHEALTH/TRICARE.asp#:~:text=VA%20can%20provide%20care%20for,are%20used%20for%20specialty%20care> [perma.cc/EE4H-A9PE] (noting that VA is a network provider for TRICARE beneficiaries).

There are several barriers to establishing a VA/DoD sharing agreement. First, abortions are not currently permitted under TRICARE, except in instances that meet the statutory exceptions under 10 U.S.C. § 1093.<sup>292</sup> Although the VA is a TRICARE Network Provider, the VA can only provide medical care to servicewomen that is authorized under TRICARE. The DoD could amend its TRICARE policies to allow servicewomen to receive abortions at VA facilities under the VA's more liberal abortion standards. Even with an amendment, the DoD would be prohibited from directly reimbursing the VA for abortion care under 10 U.S.C. § 1093(a). There are several workarounds for this. The DoD could ask servicewomen to pay out-of-pocket for their VA abortion care, much like the DoD did before Congress barred the use of DoD facilities to perform abortions.<sup>293</sup> Or, the VA could pay for abortions from its general operational and maintenance fund without seeking direct reimbursement from the DoD. Out-of-pocket payment would put the financial onus on servicewomen, which is something that the DoD wants to avoid. And paying for DoD abortions with VA operational and maintenance funds could raise separation of powers concerns with Congress. There is no question that the fiscal issues are significant, but given the overlap of the DoD's and VA's health missions, leveraging the VA's abortion policy is a smart strategy that the DoD should pursue for its service members.

Since *Dobbs*, the VA's abortion policy has been a target for political and legal challenges and remains a hot button issue regardless of who is in the White House.<sup>294</sup> Opponents allege that the 2022 Biden policy violates VA employees' religious beliefs, that VA providers are violating state law, and that the policy violates the Veterans Health Care Act (VHCA) of 1992, a statute that anti-abortionists say explicitly prohibits the VA from providing abortions.<sup>295</sup> Opponents' claims alleging that the VA policy is ultra vires are based on section 106 of the VHCA.<sup>296</sup> Congress enacted the VHCA primarily to expand access to health care services for women veterans.<sup>297</sup> The VHCA authorized services such as pap smears, breast exams, and general reproductive health care, and authorized care for

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292. *Abortions*, TRICARE (May 22, 2025), <https://www.tricare.mil/CoveredServices/IsItCovered/Abortions#:~:text=TRICARE%20covers%20abortions%20only%20when,Individual%20providers> [web.archive.org/web/20250807084206/https://www.tricare.mil/CoveredServices/IsItCovered/Abortions#:~:text=TRICARE%20covers%20abortions%20only%20when,Individual%20providers].

293. 10 U.S.C. § 1093(b).

294. Leo Shane III, *VA Stands by Abortion Policy After Legal Threats from State Leaders*, MILITARY TIMES (Nov. 22, 2022), <https://www.militarytimes.com/veterans/2022/11/22/va-stands-by-abortion-policy-after-legal-threats-from-state-leaders/> [perma.cc/M5CX-9VF8]; Morrison, *supra* note 273. In one such case, a VA nurse practitioner filed a lawsuit in federal court in Waco, Texas, alleging that the policy violated her First Amendment rights and asked the court for an injunction. The VA has since clarified that its policy allows all VA employees a reasonable accommodation for a religious exemption. At least one lawsuit was dismissed after the VA's clarification. See Jorge Gomez, *Texas Nurse Practitioner Wins Religious Accommodation Process for All VA Employees*, FIRST LIBERTY INST. (July 28, 2023), <https://firstliberty.org/news/nurse-practitioner-wins-religious-accommodation/> [perma.cc/HJ78-BYS6].

295. Devan Cole, *Department of Veterans Affairs Sued Over Decision to Offer Abortion Counseling and Certain Abortions to Veterans*, CNN (Dec. 14, 2022), <https://www.cnn.com/2022/12/14/politics/veterans-affairs-abortion-lawsuit-texas-facility> [perma.cc/J4VJ-T7VS].

296. Pub. L. No. 102-585, 160 Stat. 4943 (1992).

297. *Id.*

Post-Traumatic Stress Disorder (PTSD) resulting from military sexual trauma.<sup>298</sup> Section 106 of the VHCA states that the VA may provide limited reproductive care, “but not including *under this section* infertility services, abortions, or pregnancy care (including prenatal and delivery care), except for such care relating to pregnancy that is complicated or in which the risks of complication are increased by a service-connected condition.”<sup>299</sup> The VA argues its authority for the abortion policy is not derived from section 106, but rather is based on other benefit-granting statutory authority.<sup>300</sup> The VA primarily relies on 38 U.S.C. § 1710 as the authority for its abortion policy, a statute that grants the VA Secretary broad authority to provide medical services “which the Secretary determines to be needed” to care for veterans.<sup>301</sup> The VA argues that it has provided reproductive services under the statute for decades, including services prohibited under section 106 of the VHCA such as infertility and pregnancy-related services.<sup>302</sup> The VA also relies on 38 U.S.C. § 1781, which authorizes the VA Secretary “to provide for medical care in the same or similar manner and subject to the same or similar limitations as medical care is furnished to certain dependents and survivors of active-duty and retired members of the Armed Forces under chapter 55 of title 10. . . .”<sup>303</sup> To the extent that the VA’s policy includes an exception for the “health of the pregnant veteran” that is not available to service members under 10 U.S.C. § 1093, the VA contends that “similar” does not require an identical policy, and that the VA has a longstanding history of providing more benefits than TRICARE offers.<sup>304</sup> Further, the VA contends that the “health” exception does not provide for “unrestricted abortions” and argues that the VA limits abortions to those determined to be “medically necessary and appropriate for the treatment of a condition.”<sup>305</sup>

Under the Biden administration, the Department of Justice (DoJ) vowed to defend the VA and insisted that the VA’s policy is not *ultra vires*.<sup>306</sup> The Trump administration has taken the opposite view and has been successful at implementing more restrictive abortion policies during both Trump terms.<sup>307</sup> On December 18, 2025, DoJ reversed its Biden-era posturing and issued a legal opinion concluding that the VA does not have statutory authority to provide abortion or abortion

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298. Veterans Health Care Act of 1992, Pub. L. No. 102-585, 160 Stat. 4947 (1992); *see also Women Veterans Issues: A Historical Perspective*, U.S. DEPT. OF VETERANS AFFS., <https://www.va.gov/womenvet/docs/20yearshistoricalperspective.pdf> [perma.cc/W2PH-JGDA] (last visited Dec. 27, 2024).

299. Defendant’s Opposition to Plaintiff’s Motion for a Preliminary Injunction, *Carter v. McDonough*, No. 6:22-cv-1275-A, at 35 (W.D. Tex. Jan. 17, 2023) [hereinafter Defendant’s Opposition to Plaintiff’s Motion].

300. *Id.*

301. 38 U.S.C. § 1710 (2024).

302. Defendant’s Opposition to Plaintiff’s Motion, *supra* note 299.

303. 38 U.S.C. § 1781(b).

304. Defendant’s Opposition to Plaintiff’s Motion, *supra* note 299.

305. 38 C.F.R. § 17.272(a)–(b).

306. Perry Stein, *Justice Dept. Says It Would Defend Veterans Affairs Medical Workers in Abortion Cases*, WASH. POST (Sep. 22, 2022), <https://www.washingtonpost.com/national-security/2022/09/22/veterans-affairs-abortion-prosecution/> [perma.cc/UV4B-ELSC].

307. John Wilkerson, *Abortion Opponents Expect Reversal of Biden Policy Allowing the Procedure at VA Facilities*, STAT (Apr. 7, 2025), <https://www.statnews.com/2025/04/07/abortion-at-veterans-affairs-medical-facilities-trump-rule-biden-policy/> [perma.cc/T2AL-8QG4].

counseling under 38 U.S.C. 1710.<sup>308</sup> Trump's reprisal of restrictive abortion policies and DoJ's reinterpretation of VA medical statutes paved the way for VA Secretary Doug Collins to adopt as final, without changes, the VA's 2025 proposed rule banning abortion in nearly every instance.<sup>309</sup> For now, nothing prohibits future White House administrations from returning to Biden-era policies. Those policies offer one of the most workable solutions for federal workers who need abortions, including service members. A statutory remedy is long overdue. However, Congress is unlikely to pass legislation changing the DoD's abortion funding and facility prohibitions under 10 U.S.C. § 1093, and service members are not likely to prevail in their constitutional challenges to the statute. The now-former VA policy that permitted abortions for the health of the mother offered a commonsense approach that returned abortion decisions to pregnant persons and their physicians. Under a supportive administration, and if the fiscal issues could be resolved, VA treatment could be a viable option for servicewomen seeking abortion care in the future.

### III. THE PATHWAY FORWARD: BALANCING GOVERNMENT INTERESTS WITH SERVICEWOMEN'S REPRODUCTIVE RIGHTS

The military abortion conundrum is ripe for compromise. Current policies put individual service members at risk and threaten the military's goals of recruiting a diverse fighting force and providing for national security.<sup>310</sup> While the DoD's abortion leave policies attempt to support service members, members are not likely to utilize policies that infringe on their health privacy and jeopardize their careers.<sup>311</sup> Given the various legal considerations discussed above, this Section argues that the best solution is to offer a variety of options to suit servicewomen's reproductive needs and preferences. The following Section analyzes the benefits and challenges of several options and argues for the implementation of each.

#### *A. Make the DoD's Abortion Leave Policy Strictly Confidential*

The DoD abortion leave policy is promising, but for service members to utilize the program, it must be made completely confidential. Servicewomen have a long history of facing sexual harassment and gender discrimination in the military.<sup>312</sup> Given the military's tumultuous history with servicewomen, women are less likely to feel comfortable discussing their reproductive health with their superiors.<sup>313</sup>

308. U.S. Dep't of Justice, Office of Legal Counsel, Reconsidering the Authority of the Department of Veterans Affairs to Provide Abortion Services, 49 Op. O.L.C. \_\_ (Dec. 18, 2025), <http://www.justice.gov/olc/media/1421726/dl?inline> [perma.cc/2ETN-7BFA].

309. Reproductive Health Services, 90 Fed. Reg. 61328 (Dec. 31, 2025).

310. Memorandum from the Sec'y of Def., *supra* note 14.

311. Britzky, *supra* note 31.

312. See Brief for Petitioner, *supra* note 206 (noting that as recently as 1975, pregnant women were prohibited from serving in the military). In 2023, Congress and the DoD stripped commanders of their discretion to prosecute sex crimes because of numerous investigations in which there was sufficient evidence for cases to proceed to courts-martial but commanders declined to move forward. See Kyra Ziesk-Socolov, *Two-Front War: The Struggle for Legitimacy in Military Sexual Assault Adjudications*, 44 HARV. J.L. & GENDER 101, 107 (2021); see also Kelsey E.B. Knoer, *The Catch-22 of Females Reporting Sexual Assault in the Military: A Cause for Holistic International Intervention*, 95 NEB. L. REV. 1160, 1162, (2016).

313. HUNTER ET AL., *supra* note 18, at 10.

Under the DoD's previous reimbursement policy, only about twelve women sought reimbursement for abortion related travel expenses annually.<sup>314</sup> That number would have been higher if the DoD had educated service members about the program and if it had taken additional measures to protect service members' health privacy.<sup>315</sup>

The DoD abortion leave policy leans toward confidentiality, but there are several reasons why it should go even further to protect health privacy. First, service members should not have to request leave from their commanders to obtain abortion services. Although the travel policy promises confidentiality, that is only true if the service member requests regular leave without providing a reason for the request.<sup>316</sup> Second, service members should be able to decline a change in their deployment status if they are not actively preparing for deployment and are otherwise able and willing to perform their duties. Service members may not want commanders second-guessing the reason for their non-deployability, and they may not want to risk the potential consequences of changing their deployment status. Third, there is a fear that leave documentation could be used by local law enforcement or district attorneys to prosecute servicewomen seeking abortions.<sup>317</sup> A few states have passed "bounty-hunter laws" that target abortion "aiders and abettors."<sup>318</sup> Abortion rights advocates worry that leave and travel documents could be used to support civil or criminal suits against servicewomen in states with these bounty-hunter laws.<sup>319</sup>

The military's checkered history of mishandling sensitive gender issues and the threat of litigation against aiders and abettors demands that the leave policy provide great confidentiality for servicewomen seeking reproductive care. One possible solution is for military doctors to approve reproductive-related leave instead of commanders.<sup>320</sup> Advocates who work with servicewomen say that the troops who need help are the newer recruits who are still in training or living in military dorms.<sup>321</sup> Those newer troops are less likely to involve the military in their reproductive health if they think their commanders or peers might learn of their circumstances.<sup>322</sup> If there was a provider who could serve as a point-of-contact for abortion leave requests and counseling services, then service members would be more inclined to involve the military in their reproductive health.<sup>323</sup> There is precedent for the military using special advocates to support vulnerable service

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314. C. Todd Lopez, *DoD Releases Usage Numbers for Reproductive Health Care Travel*, U.S. DEP'T OF DEF. (Mar. 26, 2024), <https://www.defense.gov/News/News-Stories/Article/Article/3719375/dod-releases-usage-numbers-for-reproductive-health-care-travel/#:~:text=Between%20June%20and%20December%202023,was%20used%20by%2012%20individuals> [web.archive.org/web/20250907085914/https://www.war.gov/News/News-Stories/Article/Article/3719375/dod-releases-usage-numbers-for-reproductive-health-care-travel/].

315. Steve Walsh, *Faced with Obstacles to Abortion, Military Women Have Built Their Own Support System*, NPR (Oct. 30, 2024), <https://www.npr.org/2024/10/29/nx-s1-5162443/women-in-the-military-abortion-roe-v-wade> [perma.cc/CSU8-BWL9].

316. Memorandum from Under Sec'y of Def. on Changes to Command Notification of Pregnancy Policy (Feb. 16, 2023) (on file with author); *see also* Kheel, *supra* note 51.

317. Kheel, *supra* note 51.

318. *Id.*

319. *Id.*

320. Walsh, *supra* note 315.

321. *Id.*

322. *Id.*

323. *Id.*

members, such as in cases involving survivors of rape or sexual assault.<sup>324</sup> Special advocates can provide confidentiality and act as liaisons for service members and their commanders. Implementing a special advocate program or allowing medical providers to approve leave would protect the confidentiality, health, and wellness of pregnant service members without compromising mission requirements.

*B. Take Advantage of Federal Territories that are not Encumbered by State Abortion Bans*

While the VA offers a promising opportunity for accommodating service members seeking abortions, there may be other opportunities to utilize federal land for this purpose. The DoD's real estate portfolio is sprawling, comprising millions of acres of land throughout the United States and abroad.<sup>325</sup> These federal enclaves are not restricted by state abortion bans.<sup>326</sup> For the past several years, in part due to congressional interest, the DoD has explored opportunities to enhance its underutilized land by contracting with non-DoD entities to use DoD space.<sup>327</sup> Federal agencies, including the DoD and VA, have been doing this for decades.<sup>328</sup> In the 1990s, Congress specifically authorized the DoD to use public-private partnerships to construct and renovate military family housing.<sup>329</sup> The DoD outsourced all of the work to private sector developers and property management companies through loans, leases, rental guarantees, and conveyances of property.<sup>330</sup> On a smaller scale, the VA leased property in west Los Angeles to private entities for construction of a baseball stadium, athletic complex, and other commercial facilities.<sup>331</sup>

Public-private partnerships are complex and the real estate instruments available to the DoD are vast and sophisticated. 10 U.S.C. § 2667 authorizes the DoD to lease available, non-excess real property to non-federal entities.<sup>332</sup> Enhanced-Use Leases (EULs), as they are known, are used by several federal agencies, including the DoD and VA.<sup>333</sup> The DoD has used EULs to authorize the

324. *Id.*

325. *Real Property Accountability (RPA)*, OFF. OF THE ASSISTANT SEC'Y OF DEF. FOR ENERGY, INSTALLATIONS, & ENV'T, <https://www.acq.osd.mil/eie/imr/rpid/rp/index.html> [web.archive.org/web/20250423115949/https://www.acq.osd.mil/eie/imr/rpid/rp/index.html] (last visited Aug. 4, 2025).

326. Cook-Christian, *supra* note 33; NAVAL HOSP. GUAM, *supra* note 33.

327. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-346, UNDERUTILIZED FACILITIES: DOD AND GSA INFORMATION SHARING MAY ENHANCE OPPORTUNITIES TO USE SPACE AT MILITARY INSTALLATIONS (2015), <https://www.gao.gov/assets/gao-15-346.pdf> [perma.cc/8CRA-5TQB].

328. CAROL HARDY VINCENT & LAURA A. HANSON, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (2020), <https://crsreports.congress.gov/product/pdf/r/r42346> [web.archive.org/web/20251006182359/https://crsreports.congress.gov/web/20251006182359/https://crsreports.congress.gov/product/pdf/r/r42346]; Antoinette Naddour, *Veterans Win Back the West LA VA Campus*, DAILY J. (Oct. 23, 2024), <https://www.dailyjournal.com/article/381503-veterans-win-back-the-west-la-va-campus> [perma.cc/YRS6-78NU].

329. ANDREW TILGHMAN, CONG. RSCH. SERV., R48137, PRIVATIZED MILITARY HOUSING: COSTS AND BUDGETARY ISSUES FOR CONGRESS (2024).

330. *Id.* at 2.

331. Naddour, *supra* note 328.

332. 10 U.S.C. § 2667 (2024).

333. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-283R, FEDERAL REAL PROPERTY: AUTHORITIES AND ACTIONS REGARDING ENHANCED USE LEASES AND SALE AND UNNEEDED REAL PROPERTY (2009), <https://www.gao.gov/assets/a95974.html> [perma.cc/V336-QJ5V].

construction of wind farms,<sup>334</sup> shopping centers,<sup>335</sup> recreational facilities,<sup>336</sup> and research parks.<sup>337</sup> Installation commanders have considerable discretion in selecting lessees, though there are limitations.<sup>338</sup> In deciding whether to lease DoD property, commanders consider the availability and suitability of space, competing interests of lessees, future DoD needs, security, infrastructure, mission-relatedness of lessees' activities, and benefits to service members and the public, among other considerations.<sup>339</sup>

Of course, given the controversial nature of abortion, there are difficulties with leasing space to abortion providers. First, leasing agreements have faced scrutiny from civilians who believe government property is being misused. The west Los Angeles VA's commercial leases drew considerable backlash from veterans who believed that the property should be used to house homeless veterans.<sup>340</sup> In a lawsuit filed against the VA, a federal judge found that the leases were illegal and ordered the VA to move forward with construction of 1,800 housing units.<sup>341</sup> It is likely that leases with abortion providers would draw similar ire. The DoD could face lawsuits from anti-abortion groups, and leases could be subject to the politics of changing administrations and congresses.<sup>342</sup> However, health service leases are more closely aligned with the DoD's mission than commercial leases. Further, there are national security interests at stake, and if Congress and the DoD believed that access to abortion was affecting military readiness, they could pilot a small test program that utilizes limited DoD property for reproductive care.

Second, opponents may argue that leases with abortion providers violate 10 U.S.C. § 1093. That statute prohibits "funds" or a "medical treatment facility or other facility of the Department of Defense" to be used to perform abortions.<sup>343</sup> The term "facility" is not defined in the abortion statute, but under military construction statutes the term is defined as "a building, structure, or other improvement to real property."<sup>344</sup> If DoD leased land to abortion providers but did not allocate funds or facilities, medical providers could construct their own facilities or acquire government facilities under various real estate instruments.<sup>345</sup> Such an agreement would not violate the statutory prohibitions because leases would not

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334. Alison Ferris, *BOEM and DoD Sign Agreement to Bolster Interagency Collaboration on Offshore Wind Development*, BOEM (Oct. 29, 2024), <https://www.boem.gov/newsroom/press-release/s/boem-and-dod-sign-agreement-bolster-interagency-collaboration-offshore-wind> [perma.cc/F66B-Z6NN].

335. JAMES HERRERA, CONG. RSCH. SERV., IF11309, DEPARTMENT OF DEFENSE OUTLEASING AND ENHANCED USE LEASES (2019).

336. Naddour, *supra* note 328.

337. HERRERA, *supra* note 335.

338. 10 U.S.C. § 2667 (2024); U.S. DEP'T OF DEFENSE, INSTRUCTION 4165.70, REAL PROPERTY MANAGEMENT 4-6 (Aug. 31, 2018).

339. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-346, *supra* note 327.

340. Naddour, *supra* note 328; Richard Sisk, *VA Must Start Building 750 Temporary Units for Homeless Vets on Los Angeles Land, Judge Says*, MILITARY.COM (Oct. 22, 2024), <https://www.military.com/daily-news/2024/10/21/judge-orders-va-start-building-hundreds-of-units-homeless-vets-lo-s-angeles-medical-center.html> [perma.cc/CCZ7-VJ4A].

341. Naddour, *supra* note 328.

342. Under 10 U.S.C. § 2662, the DoD must report certain real property transactions to Congress prior to entering into lease agreements.

343. 10 U.S.C. § 1093 (2024).

344. 10 U.S.C. § 2801(c)(2) (2024).

345. *Id.*

obligate DoD funds or facilities for abortions. However, even if these leases do not violate 10 U.S.C. § 1093, Congress would have to approve them, and their operation would have to comply with a web of DoD medical regulations.<sup>346</sup> These limiting factors are likely to prevent leases from resolving the abortion problem in the current political climate. However, with the requisite political will, leases could offer a blend of federal and private resources that would provide access to abortion without relying exclusively on federal or state resources.

*C. Encourage Ad-Hoc Peer Support Networks and Develop Privately Funded Foundations to Support Service Members*

Without consensus and adequate support from Congress and the DoD, service members have begun helping each other through what has been described as the “underground railroad” of military reproductive care.<sup>347</sup> In cities with fewer abortion restrictions and large military populations, such as Virginia Beach, servicewomen have created networks to help each other find safe and accessible abortion services outside the DoD health care system.<sup>348</sup> Abortion providers are seeing an influx of military patients in those cities.<sup>349</sup> This ad-hoc military support network is based on relationships and referrals. A service member stationed along the eastern seaboard, say in Florida, may know a service member or veteran in Virginia Beach and feel safe to seek abortion services there.<sup>350</sup> Some service members have become confidants for other members, offering advice, referrals, and a place to stay.<sup>351</sup> For service members who are hesitant to share their reproductive health information with the DoD because of restrictive policies or fear of discrimination, an informal support network is invaluable. At a time when Congress and the DoD provide limited reproductive health services to service members, informal networks should be encouraged and even funded. The military ethos, “leave no one behind,” is apropos for service members contemplating difficult choices about reproductive care, and for the support networks that fellow service members have formed to assist them.<sup>352</sup>

In addition to informal networks, formal networks, including non-profit foundations and organizations, should be developed to provide access to reproductive care. There are thousands of organizations that support the military in a multitude of capacities.<sup>353</sup> Each service branch has several foundations that

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346. See, e.g., U.S. DEP’T OF DEFENSE, INSTRUCTION 6025.13, MEDICAL QUALITY ASSURANCE AND CLINICAL QUALITY MANAGEMENT IN THE MILITARY HEALTH SYSTEM (July 26, 2023) (establishing policy and procedures for quality assurance and clinical quality management); U.S. DEP’T OF DEFENSE, INSPECTOR GENERAL, DoDIG 2018-111, ACCESS TO CARE AT SELECTED MILITARY TREATMENT FACILITIES (May 1, 2018) (establishing access to care metrics for military treatment facilities); U.S. DEP’T OF DEFENSE, INSTRUCTION 6000.14, PATIENT BILL OF RIGHTS AND RESPONSIBILITIES IN THE MILITARY HEALTH SYSTEM (MHS) (Sept. 26, 2011) (establishing a patient bill of rights).

347. Walsh, *supra* note 315.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. George Galdorisi, *Why We Leave No Man Behind*, CNN (June 9, 2014), <https://www.cnn.com/2014/06/09/opinion/galdorisi-leave-no-man-behind/index.html> [perma.cc/X9H8-476E].

353. See, e.g., *Military Support Organizations*, U.S. DEP’T OF DEF., <https://www.defense.gov/Resources/Military-Support-Organizations/> [perma.cc/TU7Y-HELIC] (last visited Dec. 27, 2024).

provide thousands of dollars in ancillary support to military members and their families. The Air & Space Forces Association, a non-profit organization operating under section 501(c)(3) of the Internal Revenue Code, provides financial support to seriously wounded, ill, and injured Airmen and to their families and caregivers.<sup>354</sup> The Semper Fi & America's Fund has a similar mission, providing disaster relief, adaptive equipment, transportation, housing, and other services to injured service members.<sup>355</sup> These organizations operate on donations and unrestricted funds, collecting contributions through matching gifts, retirement plans, life insurance, and the Combined Federal Campaign, that enable them to support beneficiaries in a way that the DoD cannot, filling gaps for troops who need support beyond what the DoD or VA provides.<sup>356</sup>

In some cases, military commands work directly with private organizations to bring about institutional changes. For example, in 2020, Air Combat Command, an Air Force command that provides combat airpower to the armed forces, held a leadership symposium focusing on female- and family-centric issues that impact readiness.<sup>357</sup> That symposium, known as Sword Athena, helped create partnerships between government and non-profits, encouraged the DoD to develop new female hair regulations<sup>358</sup> and maternity uniform sizes,<sup>359</sup> removed barriers for nursing mothers,<sup>360</sup> and helped establish the DoD's abortion travel policy.<sup>361</sup> There are several organizations that help women find abortion providers and provide financial assistance, though none of them cater to the needs of *military* women.<sup>362</sup> Military commands, like Air Combat Command, should partner with private organizations to provide access to abortion care and should advocate for greater reproductive rights in the military.

In sum, the expansion of reproductive rights for service members requires a multi-pronged approach. It demands simultaneous efforts, by multiple constituents,

354. *Wounded Airmen & Guardians Program*, AIR & SPACE FORCES ASS'N, <https://www.afa.org/wounded-airmen-guardians-program/> [perma.cc/5APZ-K3UL] (last visited Dec. 27, 2024).

355. *The Fund Info Sheet*, SEMPER FI & AM'S FUND, [https://thefund.org/wp-content/uploads/2024/05/InfoSheet\\_2024-1.pdf](https://thefund.org/wp-content/uploads/2024/05/InfoSheet_2024-1.pdf) [perma.cc/GF5T-NMH2] (last visited Dec. 27, 2024).

356. *Give to AFA*, AIR & SPACE FORCES ASS'N, <https://www.afa.org/give-to-afa/> [perma.cc/MR9T-T5UT] (last visited Dec. 27, 2024).

357. Nick Wilson, *ACC Builds Leaders Armed for Action*, AIR MOBILITY COMMAND (Aug. 20, 2020), <https://www.amc.af.mil/News/Article-Display/Article/2319248/acc-builds-leaders-armed-for-action/> [web.archive.org/web/20200823143311/https://www.amc.af.mil/News/Article-Display/Article/2319248/acc-builds-leaders-armed-for-action/].

358. *Id.*

359. Laura Hayden, *Sword Athena Drives Change in Maternity Uniform Accessibility*, AIR FORCE MED. SERV. (Dec. 10, 2021), <https://www.airforcemedicine.af.mil/News/Display/Article/2869185/sword-athena-drives-change-in-maternity-uniform-accessibility/> [web.archive.org/web/20250621105535/https://www.airforcemedicine.af.mil/News/Display/Article/2869185/sword-athena-drives-change-in-maternity-uniform-accessibility/].

360. Brian W. Everstine, *ACC to Allow New Mothers to Use Breast Pumps in Secure Facilities*, AIR & SPACE FORCES MAG. (Aug. 2, 2021), <https://www.airandspaceforces.com/acc-to-allow-new-mothers-to-use-breast-pumps-in-secure-facilities/> [perma.cc/Z5BC-NKTP].

361. Steve Walsh, *In States with Fewer Abortion Restrictions, Providers Are Seeing a Growing Number of Service Members*, AM. HOMEFRONT PROJECT (Oct. 28, 2024), <https://americanhomefront.wunc.org/news/2024-10-28/in-states-with-fewer-abortion-restrictions-providers-are-seeing-a-growing-number-of-service-members> [perma.cc/288S-E729].

362. See, e.g., NAT'L NETWORK OF ABORTION FUNDS, <https://abortionfunds.org/> [perma.cc/W3JQ-JEM9] (last visited Dec. 27, 2024); WOMEN'S REPROD. RIGHTS ASSISTANCE PROJECT, <https://wrrap.org/> [perma.cc/G42M-2QQF] (last visited Dec. 27, 2024).

through diverse means, to give service members options and alternatives that make them feel safe and supported. The DoD must educate service members on reproductive health care and make confidentiality a cornerstone of the abortion leave policy. The DoD should coordinate with federal partners, including the VA, to provide reproductive health care for service members, and should explore ways to make use of federal land for ancillary medical services, especially in states that restrict access to abortion. Finally, the military must encourage formal and informal support networks and should partner with private organizations to provide access to services and other support for those seeking abortions.

#### CONCLUSION

The post-*Dobbs* reproductive health care landscape has created unprecedented challenges for service members. While all women must endure the consequences of the *Dobbs* decision, military members face unique challenges by virtue of their military service. Service members must work in states with abortion bans, receive permission to travel for reproductive care, and share personal health information with superiors. Service members must contend with the military's sexual assault, rape, and sexual harassment epidemic while navigating a health care system that requires them to prove that they were raped before receiving abortion care. Finally, service members and their military health care providers face criminal liability in states criminalizing abortion and are subject to prosecution under the UCMJ for violating state law. These challenges threaten national security and create an exceptionally difficult environment for service members. Legal challenges to 10 U.S.C. § 1093 are especially problematic after the *Dobbs* decision and the Supreme Court's repeal of a fundamental right to abortion. Service members cannot rely on military secretaries to establish and maintain supportive policies, such as the abortion travel reimbursement policy, as those policies change from one administration to the next. Further, Congress has not offered support to servicewomen since the first military abortion funding ban went into effect almost fifty years ago.<sup>363</sup> Given the statutory and regularity restrictions on abortion, service members must look elsewhere for relief. With the right administration, the VA could expand abortion services nationwide for a wide swath of people. Leasing space to medical providers offers another option. Lastly, without any support from Congress, the DoD could encourage the development of formal and informal networks of military members and non-profit organizations that provide support services to servicewomen facing difficult reproductive decisions. No single solution will negate the chilling effect of 10 U.S.C. § 1093 on recruitment. However, a multi-pronged approach to advancing military reproductive health care will attract the attention of women and will help protect national security interests now and into the future.

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363. BURRELLI, *supra* note 37.