Thinking Outside the Five-Sided Box: An Analysis of the Department of Defense's Parental Accommodations

By
Michelle Downey Marty
B.S., May 2002, United States Air Force Academy
J.D., May 2009, Southern Illinois University School of Law

A Thesis submitted to

The Faculty of
The George Washington University Law School
in partial satisfaction of the requirements
for the degree of Master of Laws
May 15, 2016

Thesis directed by
Charles B. Craver
Freda H. Alverson Professor of Law

Acknowledgements

The author wishes to thank Professor Charles Craver for his help is selecting this thesis topic and for his continued advice. To Professor Karen Thornton, thank you for your invaluable guidance and reassurance. To my parents, I am forever grateful for your endless support throughout this, and every, endeavor. I owe all of my successes to you. Finally, to my husband, Lt Col Gregory Marty, I can't express how thankful I am for your unyielding patience during our first year of marriage. Your love and encouragement enabled me to persevere.

Disclaimer

Major Marty serves in the U.S. Air Force Judge Advocate General's Corps. This paper was submitted in partial satisfaction of the requirements for the degree of Master of Laws in Labor and Employment Law at The George Washington University Law School. The views expressed in this paper are solely those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense or U.S. Government.

Abstract

Thinking Outside the Five-Sided Box: An Analysis of the Department of Defense's Parental Accommodations

On January 28, 2016, the Secretary of Defense announced a series of family-friendly initiatives aimed to improve the recruitment and retention of women in the Armed Forces. Included in the initiatives was the standardization of maternity leave across the Military Services, providing for twelve weeks of leave postpartum for all service women. The Secretary also announced that he would seek authorization from Congress to increase paternity leave for service men from ten to fourteen days. This series of initiatives left untouched the Department of Defense's (DoD's) standing policy providing biological mothers with a minimum of four months deferral of deployments and certain assignments, which the Military Services had expanded over recent years to up to twelve months.

This thesis examines and critiques the overall parental accommodations scheme created by the DoD's current parental leave policies and deferral rules, as implemented by the Military Services. It proposes that the current parental accommodations scheme is based on outdated notions of gender roles. While well intentioned, the DoD's paternalistic view of military mothers has the likelihood of harming their career advancement, disenfranchising male service members, and ultimately undermining the DoD's recruiting and retention efforts. This thesis explores the necessity of the Pentagon developing a strategic plan for parental accommodations that is significantly more gender balanced, and outlines workplace flexibility tools it can utilize in developing such a plan.

Table of Contents

Acknowledgements ii
Disclaimer iii
Abstract iv
Table of Contents v
List of Tables vii
I. Introduction 1
II. Background 8
A. The Department of Defense Reforms 8
1. Maternity Leave 13
2. Paternity Leave 15
3. Adoption Leave 15
4. Additional Comprehensive Family Benefit Reforms 16
B. The Statutory Difference between Maternity Leave and Paternity and Adoption Leaves 20
C. An Additional DoD Parental Accommodation: Deferrals 23
D. United States Federal Parental Leave Policies 27
1. The Pregnancy Discrimination Act 27
2. The Family and Medical Leave Act 29
III. Analysis 38
A. The DoD's Extended Maternity Leave Policy is a Step in the Right Direction 38
1. Improved Duty Performance 39
2. Reliable Attendance 41
B. The DoD Parental Accommodations Scheme May Prove to Be a Pyrrhic Victory for Military Mothers 44
1. Military Service-Specific Parental Accommodation Policies 45
a. Parental Accommodations in the Navy 45
b. Parental Accommodations in the Marine Corps 52
c. Parental Accommodations in the Army 56
d. Parental Accommodations in the Air Force 60
2. Deployment Deferrals Epitomize the Problem of Differential Treatment between the Genders 63
3. The DoD's Directive that Women Shall Not Be Disadvantaged because of Maternity Leave Is Insufficient 70

C. Thinking Outside the Five-Sided Box 74
1. The Pentagon Must Develop a Fair and Flexible Strategic Plan for Parental Accommodations 78
2. An Existing but Underutilized Parental Accommodations Equalizer: The Career Intermission Pilot Program 86
a. What is the CIPP? 86
i. CIPP Implementation in the Navy 90
ii. CIPP Implementation in the Marine Corps 91
iii. CIPP Implementation in the Army 93
iv. CIPP Implementation in the Air Force 94
b. How the CIPP Can Help Equalize Parental Accommodations: Possibilities and Challenges 96
IV. Conclusion 100

List of Tables

Summary of Parental Accommodations ii
Total Number of CIPP Participants Approved by Each Military Service as of July 2015..... 88

I. Introduction

The Pentagon has been making tremendous waves recently by uprooting long-standing policies pertaining to women in the Armed Forces. Within a span of two months, the Pentagon removed all remaining bans on women serving in direct ground combat units[1] and directed a series of family-friendly reforms, which included doubling the length of the Department of Defense's (DoD's) maternity leave benefit.[2] These changes were made, in part, to help rectify a significant imbalance between the number of men and women serving in the Armed Forces.[3]

These drastic changes to an institution steeped in tradition have left many heads spinning, particularly among older veterans and political commentators. Critics are concerned that the President and Congress are forcing the military to engage in "social engineering" that will make the military weaker and less effective at accomplishing its assigned missions.[4] Indeed, research has shown that social diversity (meaning diversity of gender, race, ethnicity, and sexual orientation) can cause "discomfort, rougher interactions, a lack of trust, greater perceived interpersonal conflict, lower

---

[1] Ashton Carter, Secretary, Dept. of Def., Remarks in the Pentagon Press Briefing Room: The Women-in-Service Review (Dec. 3, 2015), http://www.defense.gov/News/Speeches/Speech-View/Article/632495/remarks-on-the-women-in-service-review (last visited Feb. 9, 2016) [hereinafter Carter, Women-in-Service Review].

[2] Ashton Carter, Secretary, Dept. of Def., Briefing in the Pentagon Press Briefing Room: Force of the Future Reforms (Jan. 28, 2016), http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/645952/department-of-defense-press-briefing-by-secretary-carter-on-force-of-the-future (last visited Jan. 30, 2016) [hereinafter Carter, Force of the Future].

[3] Peter Rugg, *Defense Department Doubles Maternity Leave to 12 Weeks*, INVERSE, Jan. 28, 2016, https://www.inverse.com/article/10750-defense-department-doubles-maternity-leave-to-12-weeks (last visited Mar. 31, 2016).

[4] *See* Carl Asszony, *Military Social Engineering Unproductive*, DAILY RECORD, Feb. 11, 2016, http://www.dailyrecord.com/story/opinion/2016/02/11/military-social-engineering-unproductive/80187806/ (last visited Mar. 31, 2016) (stating that "the military is being weakened because of the political agenda put forth by those in Washington who never served a single day in the military). *See also* Ray Starmann, *The Great Social Experiment Takes the Field – In the War of 2020*, U.S. DEF. WATCH, Feb. 7, 2016, http://usdefensewatch.com/2016/02/the-great-social-experiment-takes-the-field-in-the-war-of-2020/ (last visited Mar. 31, 2016) (depicting a fictitious story about the inevitable failure of US military due to "vast social engineering").

communication, less cohesion, more concern about disrespect, and other problems."[5] In effect, critics believe that for the military to become more diverse, it will have to sacrifice quality for quotas.[6]

Given such critiques, why does the military persist in striving to recruit and maintain more women? First, contrary to the belief of some critics, the military is not resorting to quotas to achieve diversity.[7] Consequently, the military does not have to choose between diversity and quality personnel.[8] As a basic principle, by broadening a pool of applicants so that a greater number of people apply, the number of high-quality applicants should also increase.[9] For the military, women represent a large pool of potential recruits, but they consider joining the military at much lower rates than men.[10] By more effectively tapping into that potential pool of recruits, the military would have more applicants to choose from, could be more selective, and therefore, its personnel quality would invariably increase.[11]

Second, those critics that express concern about the military becoming a weaker force, less able to effectively accomplish its mission, are likely clinging to vestiges of an "oversimplified image" of the "strongest alpha male" making the best warrior.[12] For the

---

[5] Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM., Oct. 1, 2014, http://www.scientificamerican.com/article/how-diversity-makes-us-smarter/ (last visited Mar. 29, 2016).
[6] Carl Forsling, *Why the Military Needs Diversity*, TASK & PURPOSE, Apr. 28, 2015, http://taskandpurpose.com/why-the-military-needs-diversity/ (last visited Mar. 29, 2016).
[7] *See* Tom Philpott, *Military Update: Pledges, Doubts Shared Over Women in Ground Combat Jobs*, STARS & STRIPES, Feb. 4, 2016, http://www.stripes.com/military-update-pledges-doubts-shared-over-women-in-ground-combat-jobs-1.392178 (last visited Mar. 31, 2016) (*quoting* Gen. Mark A. Milley, Army Chief of Staff, informing the Senate Armed Services Committee that the Army will "apply no quotas and no pressure" to integrate women into direct ground combat units).
[8] Forsling, *supra* note 6.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Kelsey L. Campbell, *Diversity & Inclusion: Imperative for the U.S. Military's Future Success*, WOMEN IN INT'L SEC., Feb. 3, 2014, http://wiisglobal.org/2014/02/03/diversity-and-inclusion-imperative-for-the-u-s-militarys-future-success/ (last visited Mar. 29, 2016).

modern military, however, most warfighting takes place on a "technologically centered battlefield,"[13] and its service members are called upon to engage in an expansive range of operations other than war, including, for example, humanitarian assistance, counter-drug operations, and peacekeeping operations.[14] Additionally, today's military is challenged by having to function with fewer service members and on a shrinking budget; a trend which is likely to continue.[15] As such, the U.S. Armed Forces of the "twenty-first century requires a range of leaders and fighters," who can enable the military to innovate and adapt to changing times.[16]

Decades of research conducted in countless fields of study have come to the same conclusion: "socially diverse groups . . . are more innovative than homogeneous groups."[17] Thus, to build a team that excels at innovation, there must be diversity. Diversity has been shown to enhance creativity because "[p]eople who are different from one another in . . . gender and other dimensions bring unique information and experiences to bear on the task at hand."[18] The phenomenon of increasing innovation does not occur solely because of the people with diverse backgrounds bringing new information and experiences; research also shows that "simply interacting with individuals who are different forces group members" to think differently.[19] Members in homogeneous groups tend to "rest somewhat assured that they will agree with one another; that they will

---

[13] *Id*.
[14] Dept. of Def. J. Publ'n 3-07, *Joint Doctrine for Military Operations Other Than War* (June 16, 1995) at III-1, Fig. III-1.
[15] David Alexander, *Budget Cuts to Slash U.S. Army to Smallest Since before World War Two*, REUTERS, Feb. 24, 2014, http://www.reuters.com/article/us-usa-defense-budget-idUSBREA1N1IO20140224 (last visited Mar. 31, 2016).
[16] Campbell, *supra* note 12.
[17] Phillips, *supra* note 5.
[18] *Id*.
[19] *Id*.

understand one another's perspectives and beliefs; [and] that they will be able to easily come to a consensus."[20] However, when social diversity exists in the group, the members' preconceptions change so that they "anticipate differences of opinion and perspective . . . [and] [t]hey assume they will need to work harder to come to a consensus."[21] Further, when a person hears a dissenting opinion or idea from someone that is socially different than them, "it provokes more thought" than when it comes from someone who is homogenous with the listener.[22]

Additionally, research has also shown that gender diversity has a measurable, positive impact on the success of an organization. For example, one study found that "female representation in top management leads to an [average] increase of $42 million in firm value."[23] The study also found that organizations had greater financial gains resulting from innovation when "women were part of the top leadership ranks."[24]

By generating more ideas and subliminally "encouraging individuals to up their game," teams with women, and other diversities, tend to innovate better and perform better.[25] Innovation, in turn, is imperative to the military's ability to operate in new situations and in a variety of cultures, and to adapt more easily to the next challenges it encounters.[26] Having a socially diverse force that includes ample women, therefore "increases the chances for mission effectiveness by bringing a wider variety of tools to

[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] Forsling, *supra* note 6.
[26] Campbell, *supra* note 12.

the fight."[27] These imperatives are what is driving the Department of Defense to strive to recruit and retain more women.

The U.S. Armed Forces, nonetheless, are strikingly homogeneous. As of 2014, males constituted eighty-five percent of the military.[28] Thus, unlike today's civilian workforce in which women outnumber men, men in the military still outnumber women by five-and-a-half to one.[29] Additionally, nearly sixty-nine percent of all service members identify themselves as white, just over fifty-five percent are married, and forty-two percent have children.[30] In fact, the demographics of today's military resemble the civilian workforce of over fifty years ago.[31]

In the past, women who joined the workforce, especially those joining the military, "were expected to adapt to male norms and values."[32] The notion of the ideal American worker developed in the likeness of traditional male employees who were "'autonomous, unencumbered . . . , shorn of their external attachments and relationships' . . . [and who] expressed commitment to their careers through maximum face time" at the workplace.[33] Consequently, because the military also embraced the "ideal worker" expectation, it was slow to make accommodations for parents to balance their work and family responsibilities. As a result, because women were traditionally (and still are)

---

[27] *Id*.
[28] DEPT. OF DEF., 2014 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY, 2014, at vii, http://download.militaryonesource.mil/12038/MOS/Reports/2014-Demographics-Report.pdf (last visited Apr. 13, 2016) [hereinafter DEPT. OF DEF., 2014 DEMOGRAPHICS PROFILE].
[29] Marcy L. Karin & Katie Onachila, *The Military's Workplace Flexibility Framework*, 3 Am. U. Lab. & Emp. L.F. 153, 159 (2013).
[30] DEPT. OF DEF., 2014 DEMOGRAPHICS PROFILE, *supra* note 28.
[31] Karin & Onachila, *supra* note 29.
[32] *Id*. at 183.
[33] Margaret F. Tighe, *Family and Medical Leave Act*, 16 GEO. J. GENDER & L. 141, 143 (2015) (*quoting* Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 95-96 (2000) & *citing* Judy O. Berry & Julie Meyer Rao, *Balancing Employment & Fatherhood: A System Perspective*, 18 J. FAM. ISSUES 386, 395 (1997).

more likely than men to shoulder the bulk of childrearing responsibilities, the persistence of the "ideal worker" expectation has disadvantaged mothers more than it has fathers.[34]

The upcoming generation of service women, however, is not accepting this outdated expectation and are seeking greater flexibility during their service.[35] In recognition that the Military Services are recruiting and retaining women at much lower rates than men during their prime years to start families, the Pentagon instituted a series of expanded parental accommodation policies as part of its "Force of the Future" reforms, including doubling the length of maternity leave from six to twelve weeks.[36]

This thesis argues that the new DoD maternity leave policy is a step in the right direction for recruiting and retaining more service women; however, set in the context of the whole scheme of DoD parental accommodations, it could prove to be a Pyrrhic victory for military mothers. Although the DoD offers an array of parental accommodations that are highly competitive with federal and corporate maternity policies, the DoD's policies were developed piecemeal and have resulted in an overall scheme that is substantially gender imbalanced. This thesis will discuss the motivations for and potential adverse impacts of the DoD's imbalanced parental accommodations, and recommend that the Pentagon strategically reengineer its parental accommodations scheme into a more gender-balanced and flexible plan.

It is beyond the scope of this thesis, however, to propose the specific details of such a plan, as that will entail exhaustive manpower and operational assessments on the part of the Pentagon and the Military Services. It is also beyond the scope of this thesis

[34] *Id*. at 144.
[35] Karin & Onachila, *supra* note 29.
[36] Carter, Force of the Future, *supra* note 2.

to discuss, in-depth, the advantages and disadvantages of ancillary family benefits recently announced by the DoD, such as mandates for breastfeeding rooms, extended child care hours, and fertility services. Rather, this thesis focuses on the parental accommodation policies that affect the duration of new parents' absences from the workplace and that temporarily waive parents' responsibilities to serve worldwide. Additionally, this thesis focuses exclusively on parental accommodations as they apply to the active duty component of the Armed Forces, and not to the Guard or Reserves.

Part II of this thesis sets forth the Pentagon's Force of the Future reforms, including its comprehensive family benefits. It then takes a brief interlude to explain the procedural reasons why the Pentagon cannot effectuate changes to paternal and adoption leaves in the same way it can maternity leave. It then moves on to provide information on an additional, preexisting DoD parental accommodation policy that was unaltered by the Force of the Future reforms. This part also provides information on federal parental leave policies, which, although inapplicable to the Armed Forces, provide insight into the national parental-leave landscape within which the Pentagon developed its policies.

Part III opens with a discussion of the advantages of the DoD's new twelve-week maternity leave policy for new mothers and for the Armed Forces. It then goes on to discuss implementation of parental accommodations by the Navy, Marine Corp, Army, and Air Force, and illustrates how the Armed Forces have approached parental accommodations with a mindset that male service members are indispensable sailors, Marines, soldiers, and airmen, whereas service women are less vital service members who are expected to be the primary caregivers in their households. This part further explains the growing importance of work-life balance and workplace flexibility to the

upcoming generation of service men and women, and how the Pentagon needs to incorporate those values into a new, comprehensive parental accommodations plan in order to effectively continue to recruit and retain top talent. It closes with a discussion of an additional benefit that Congress made available to the Armed Forces in 2009, but has remained underutilized and relatively undeveloped as a parental accommodations tool. Finally, Part IV concludes this thesis with a brief highlight of the arguments presented herein.

II. Background

A. The Department of Defense Reforms

President Barak H. Obama nominated Ashton B. Carter to be the 25th Secretary of Defense, in part, because of his reputation for being "an innovator and a reformer."[37] Secretary Carter has lived up to that reputation. Since taking office as the Secretary of Defense, on February 17, 2015, Secretary Carter has pursued his vision of reforming the DoD into the Force of the Future by effecting sweeping personnel and social changes.[38]

At his ceremonial swearing in, Secretary Carter hinted at the changes to come in the DoD's personnel policies. He explained that the "9/11 generation" is coming to the end of its time in the military and that new recruits are coming from generations that have no personal memory of the Cold War and only vaguely remember the 9/11 terrorist attacks, if at all.[39] Consequently, it will take different approaches than in the past to attract the finest of the upcoming generations and to recruit them away from the private

[37] Cheryl Pellerin, *Carter Takes Office Today as 25th Defense Secretary*, DOD NEWS, Feb. 17, 2015, http://www.defense.gov/News-Article-View/Article/604124 (last visited Feb. 12, 2016).
[38] *Id*.
[39] Ashton Carter, Secretary, Dept. of Def., Speech at the Pentagon Auditorium: Ceremonial Swearing-In (Mar. 6, 2015), http://www.defense.gov/News/Speeches/Speech-View/Article/606651/ceremonial-swearing-in (last visited Feb. 12, 2016) [hereinafter Carter, Ceremonial Swearing-In].

sector.[40] During a subsequent speech at his former high school, Secretary Carter elaborated that if the Armed Forces are not able to "continue to attract, inspire, and excite talented young Americans," then "having the best technology, . . . planes, ships, and tanks . . . will [not] matter."[41]

Following this speech, Secretary Carter directed a comprehensive review of the DoD's personnel systems, focused on ways to increase personnel retention and to recruit high-quality individuals.[42] The review, which spanned five months, was conducted by over 150 subject matter experts and scholars representing each of the branches of the Armed Forces.[43] The team reviewed more than 100 studies and reports regarding personnel management, talent management, and human resources practices of the private sector.[44] Ultimately, in August 2015, the team recommended over 100 reform proposals and initiatives for Secretary Carter's consideration.[45]

Upon receiving these initial recommendations, Secretary Carter formed a second working group to evaluate all of the proposals "against the backdrop of force readiness and maintaining an all-volunteer Joint Force."[46] The working group recommended

---

[40] *Id*.
[41] *Id*.
[42] DEPT. OF DEF., FACT SHEET: BUILDING THE FIRST LINK TO THE FORCE OF THE FUTURE, http://www.defense.gov/Portals/1/features/2015/0315_force-of-the-future/documents/FotF_Fact_Sheet_-_FINAL_11.18.pdf (last visited Feb. 9, 2016) [hereinafter DEPT. OF DEF., FACT SHEET: BUILDING THE FIRST LINK].
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*. "Joint Force" is "[a] general term applied to a force composed of significant elements, assigned or attached, of two or more Military Departments [(i.e., one of the departments within the Department of Defense created by the National Security Act of 1947, which are the Department of the Army, the Department of the Navy, and the Department of the Air Force)] operating under a single joint force commander." Dept. of Def. J. Publ'n 1-02, *Department of Defense Dictionary of Military and Associated Terms* (Nov. 8, 2010, as amended through Jan. 15, 2016) at 125, 152, *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (last visited Feb. 13, 2016). The Marine Corps falls under the Department of the Navy. Official site of the United States Marine Corps, http://www.marines.mil/Leaders.aspx (last visited Feb. 14, 2016).

twenty reforms and initiatives, eighteen of which Secretary Carter approved and unveiled during his speech on November 18, 2015 at The George Washington University.[47] This initial round of initiatives primarily dealt with internship and fellowship programs, retirement pension restructuring, and the establishment of various new personnel offices and task forces.[48]

In addition to these Force of the Future initiatives, Secretary Carter also ordered two highly publicized social changes during his first year in office. First, on July 13, 2015, he directed the DoD to create a working group to study the implications of lifting the ban on military service by transgender individuals.[49] He further directed that the working group would have six months to complete its study and that the group would start with the presumption that "transgender persons can serve openly without adverse impact on military effectiveness and readiness."[50] A subsequent memo, obtained by *USA*

[47] DEPT. OF DEF., FACT SHEET: BUILDING THE FIRST LINK, *supra* note 42; Ashton Carter, Secretary, Dept. of Def., Remarks at The George Washington University: Building the First Link to the Force of the Future (Nov. 18, 2015), http://www.defense.gov/News/Speeches/Speech-View/Article/630415/remarks-on-building-the-first-link-to-the-force-of-the-future-george-washington (last visited Feb. 9, 2016). Secretary Carter announced that the DOD would work to implement the following initiatives: (1) improve and enhance college internship programs, (2) launch an entrepreneur-in-residence program, (3) designate a chief recruiting officer in the Office of the Under Secretary of Defense for Personnel and Readiness, (4) expand the Secretary of Defense Corporate Fellows Program, (5) update and modernize the retirement system, (6) implement a web-based talent management system, (7) establish an Office of People Analytics, (8) implement exit surveys, (9) examine ways to improve recruiting, (10) institute diversity briefings for senior leaders, (11) establish Talent Management Centers of Excellence, (12) align civilian skills with mission requirements in the Reserve component, (13) conduct a compensation study, (14) establish a doctoral-level program in strategy, (15) establish a Center for Talent Development, (16) establish a Civilian Human Capital Innovation Laboratory, (17) establish a DOD-wide Defense Innovation Network, (18) establish a task force to review Active and Reserve component permeability. The author was unable to find any description of the two initiatives Secretary Carter apparently either disapproved or deferred for later approval. *Id*.

[48] DEPT. OF DEF., FACT SHEET: BUILDING THE FIRST LINK, *supra* note 42.

[49] Press Release, Dept. of Def. Statement by Secretary of Defense Ash Carter on DOD Transgender Policy (July 13, 2015), http://www.defense.gov/News/News-Releases/News-Release-View/Article/612778 (last visited Feb. 13, 2016).

[50] *Id*.

Today, purported to establish a timeline for lifting the ban on transgender troops on May 27, 2016.[51]

The second highly publicized social change occurred on December 3, 2015, when Secretary Carter announced his decision to not grant any exceptions to opening all remaining occupations in the Armed Forces to women.[52] That decision marked the final chapter in then-Secretary of Defense, Leon E. Panetta's revocation of the Direct Ground Combat Definition and Assignment Rule, in January 2013.[53] At that time, then-Secretary Panetta granted each of the Military Departments three years to request any exceptions to continue to exclude qualified women from assignment to units whose primary mission is to engage in direct ground combat.[54] The Army, Navy, and Air Force did not request any exemptions, but the Marine Corps requested a limited exception for certain positions including those of infantry, machine gunner, fire support, and reconnaissance.[55] Secretary Carter denied the Marine Corps' request and opened the remaining 220,000 military positions to any woman who could meet the often rigorous physical standards required for those jobs.[56]

Several military and national leaders have opposed these social changes. Among the opposition included General Joseph F. Dunford, Chairman of the Joint Chiefs of Staff, who, as a Marine, supported the Marine Corps' request and sought to keep women out of infantry units; and Congressman Duncan D. Hunter, a member of the Armed

---

[51] Tom Brook, *Military Transgender Ban Set to End Next May*, USA TODAY (Aug. 25, 2015), http://www.usatoday.com/story/news/nation/2015/08/25/military-transgender-ban-set-end-next-may/32345385/# (last visited Feb. 9, 2016).
[52] Carter, Women-in-Service Review, *supra* note 1.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

Services Committee, who criticized opening all combat roles to women and ending the bar to service by transsexuals as "the politicization of the U.S. military."[57] Congressman Hunter averred that the Pentagon and the White House were unconcerned with the combat effectiveness of the Armed Forces, claiming that the changes would cause "small infantry units [to] become less effective, and less able to kill."[58] Other critics have expressed concern that such dramatic social changes over such a short period of time is overwhelming to service members.[59]

Nonetheless, Secretary Carter remained undeterred by such criticism, and on January 28, 2016, announced the next wave of Force of the Future reforms: comprehensive family benefits, which are the focus of this thesis.[60] The family benefit initiatives were among the reforms recommended to Secretary Carter, in August 2015, following the comprehensive five-month review of the Department's personnel systems.[61]

Prior to unveiling the reforms, Secretary Carter drew attention to the fact that fifty-two percent of enlisted military members and seventy percent of officers are married.[62] Further, across the Military Departments, there are 84,000 military-to-military (or "dual-military") marriages, meaning that both spouses in the marriage are members of the Armed Forces.[63] Ultimately the stress of trying to balance family and service is one

---

[57] Tom Brook, *Defense Secretary Ash Carter's History Personnel Changes Irk Generals*, USA TODAY (Dec. 27, 2015), http://www.usatoday.com/story/news/2015/12/23/defense-secretary-ash-carter-transgender-troops-women-in-combat-gen-joe-dunford/77825314/# (last visited Feb. 12, 2016).
[58] *Id*.
[59] Nancy Youssef, *Pentagon's Progressive Revolution Adds More Maternity Leave*, THE DAILY BEAST (Jan. 28, 2016), http://www.thedailybeast.com/articles/2016/01/28/pentagon-s-progressive-revolution-adds-more-maternity-leave.html (last visited Feb. 13, 2016).
[60] Carter, Force of the Future, *supra* note 2.
[61] *Id*.
[62] *Id*.
[63] *Id*.

of the primary reasons service members report for leaving the military.[64] Therefore, Secretary Carter sees it as imperative that the DoD address this challenge in order to build the Force of the Future, particularly because upcoming generations place an even higher priority on work-life balance than did prior generations.[65]

1. Maternity Leave

The first initiative Secretary Carter announced was to standardize maternity leave across the Joint Force.[66] Prior to this announcement, each Military Department had established its own policy concerning maternity leave.[67] Consequently, maternity leave varied from six weeks to eighteen weeks across the Departments. Secretary Carter standardized maternity leave by setting it at twelve weeks for all female serve members DoD-wide.[68] This maternity leave will be fully paid, meaning the Armed Forces member taking leave will continue to receive 100 percent of her base pay, benefits, and allowances.[69]

Secretary Carter also decreed that the maternity leave must be taken continuously, starting immediately following a "birth event" or release from hospitalization after a "birth event," whichever occurs later.[70] The Pentagon defined a "birth event" as "[a]ny birth of a child(ren) to a female Service member wherein the child(ren) is retained by the mother. . . . multiple children resulting from a single pregnancy (e.g., twins or triplets) will be treated as a single event so long as the multiple births occur within the same 72-

---

[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] Dept. of Def. Directive-Type Memorandum 16-002, *DoD-Wide Changes to Maternity Leave* (Feb. 5, 2016) at 2, *available at* http://www.dtic.mil/whs/directives/corres/pdf/DTM-16-002.pdf (last visited Feb. 11, 2016) [hereinafter DTM 16-002].

hour period."[71] For military-to-military couples, maternity leave may not be transferred to the spouse who did not experience the birth event in order to create a shared benefit between the service members.[72]

Additionally, the new mother's commander, or the commander's designee, is not permitted to disapprove her request for maternity leave. Further, commanders or medical providers may continue to grant additional convalescent leave in excess of the twelve weeks maternity leave when a medical provider deems it is warranted due to the service member's fitness for duty.[73]

The new maternity leave benefits are offered to all women serving in the active duty military or to Reserve members who are serving in a full-time status or on an active duty recall or mobilization orders lasting longer than twelve months.[74] This currently numbers over 200,000 women (14.8 percent of enlisted personnel and 17.4 percent of officers).[75]

Stating that he had reviewed numerous studies, reports, and inputs from the Military Services, Secretary Carter concluded that a standardized twelve weeks of maternity leave across joint force "establishes the right balance between offering a highly

---

[71] *Id*.
[72] *Id*.
[73] *Id*. Convalescent leave is leave which a commander may grant to a patient who is not fit for duty. Such leave ordinarily may not exceed 30 days per hospitalization and is to be granted for the shortest duration essential. Dept. of Def. Instruction 1327.06, *Leave and Liberty Policy and Procedures* (June 16, 2009, incorporating Change 2, effective Aug. 13, 2013) at Enclosure 1, para. 1.k.(1), *available at* http://dtic.mil/whs/directives/corres/pdf/132706p.pdf (last visited Feb. 14, 2016) [hereinafter DoDI 1327.06].
[74] DEPT. OF DEF., FACT SHEET: BUILDING THE SECOND LINK TO THE FORCE OF THE FUTURE STRENGTHENING COMPREHENSIVE FAMILY BENEFITS, http://www.defense.gov/Portals/1/Documents/pubs/Fact_Sheet_Tranche_2_FOTF_FINAL.pdf (last visited Jan. 30, 2016) [hereinafter DEPT. OF DEF., FACT SHEET: BUILDING THE SECOND LINK].
[75] *Id*.

competitive leave policy while also maintaining the readiness of our total force."[76] He also boasted that the new maternity leave policy "puts the DoD in the top tier of institutions nationwide."[77]

Finally, the Pentagon attempted to resolve any discrimination issues that could result from the new maternity leave policy by stating that "[n]o member shall be disadvantaged in her career, including without limitation in her assignments, performance appraisals or selection for professional military education, because she has taken Maternity Leave."[78]

2. Paternity Leave

Secretary Carter also voiced recognition over the changing roles of mothers and fathers in modern society, stating "[r]aising a family or caring for an infant . . . is not just a mother's responsibility."[79] In recognition of fathers' growing role in childcare, Secretary Carter announced his intention to seek authorization from Congress to nominally increase paid paternity leave for military fathers from ten days to fourteen days.[80] Unlike maternity leave, this sought-after legislation would not require new fathers to take paternity leave continuously.

3. Adoption Leave

---

[76] Carter, Force of the Future, *supra* note 2. The author submitted a Freedom of Information Act (FOIA) request to the DoD on January 30, 2016, requesting the reports, surveys, and studies Secretary Carter referenced during his announcement. On February 9, 2016, an employee from the FOIA Division notified the author that the Department would be unable to respond to the request within the FOIA's twenty-day statutory period because of a backlog of 1,631 open requests. As of the date of submission of this paper, the author had not received a substantive response to her request.
[77] *Id*.
[78] DTM 16-002, *supra* note 70.
[79] *Id*.
[80] *Id*.

Current legislation authorizes members of the Armed Forces who adopt a child to take three weeks of adoption leave.[81] This benefit is only extended to one parent in military-to-military couples.[82] Secretary Carter also promised to seek authorization from Congress to provide two weeks of adoption leave to the second parent in such dual-military relationships.[83]

4. Additional Comprehensive Family Benefit Reforms

Secretary Carter announced a number of other family-friendly initiatives to help military families strike an acceptable work-life balance. First, through the multitude of surveys and reports gathered by his reforms task force, Secretary Carter discovered that nearly half of all military families have to use additional child care providers beyond the DoD-subsidized providers made available on most military installations.[84] In part, this was because the standard hours of those on-base child care facilities did not cover the normal duty hours of many service men and women.[85] The DoD also discovered a link between dissatisfaction with finding adequate child care and retention of military parents.[86] Therefore, Secretary Carter directed that all child care facilities on military installations will expand their hours to provide access to child care for fourteen hours per day.[87] Additionally, each child will be entitled to up to twelve hours of subsidized care per day.[88]

---

[81] *Id.*; 10 U.S.C. § 701(i)(l) (2013).
[82] *Id.*
[83] Carter, Force of the Future, *supra* note 2.
[84] *Id.*
[85] *Id.*; DEPT. OF DEF., FACT SHEET: BUILDING THE SECOND LINK, *supra* note 74.
[86] Carter, Force of the Future, *supra* note 2.
[87] *Id.*
[88] BUILDING THE SECOND LINK, *supra* note 74.

Further, Secretary Carter directed additional assessments to develop more options to improve access to childcare. The Military Departments were directed to submit reports, no later than June 1, 2016, regarding plans to address the following issues: (1) how to extend child care capacity in locations where wait times for on-base child care enrollment exceeds ninety days; (2) enabling service members to place their children on on-base childcare wait lists as soon as the service member receives orders to move to a new duty station, rather than having to wait until arrival at that duty station; (3) proposals for creation of a universal application for all on-base childcare programs, (4) ideas for connecting military parents to additional childcare resources in their area; and (5) creation of mentorship networks, forums for home-based childcare, and parent advisory boards.

Next, Secretary Carter directed that every building in which fifty or more women are regularly assigned, on every military installation, must designate a mother's room.[89] The purpose of the room is to accommodate women who need to pump breast milk during the duty day in order to continue breastfeeding, if they choose to do so.[90] The rooms must be private; not be restrooms; be equipped with electrical outlets, chairs, and tables; be located as close to possible to a source of water; and ensure access to designated refrigeration for breast milk.[91] This initiative will result in the modification or creation of approximately 3,600 mother's rooms DoD-wide.

Furthermore, Secretary Carter pledged to seek an amendment to Title 10 that would allow service members to postpone an assignment to a new duty station in

[89] Carter, Force of the Future, *supra* note 2.
[90] *Id*.
[91] DEPT. OF DEF., FACT SHEET: BUILDING THE SECOND LINK, *supra* note 74.

situations that are in the best interest of their families.[92] This initiative contemplates situations such as a child being able to finish their senior year of high school at his or her current school, a spouse finishing a graduate degree at a local college, or a service member with an ailing family member who requires treatment near their current duty station.[93] In exchange for being able to remain at his or her current duty station, the service member would have to agree to an additional active duty service obligation.[94] However, the DoD has not specified how many years of additional service would be required.

Finally, Secretary Carter highlighted that, through a pilot program, the DoD will cover the cost for active duty service members to freeze their eggs or sperm.[95] This initiative is designed to help service members protect their future ability to have children despite injuries that may occur from being placed in harm's way when duty calls, and to provide service members flexibility to start families later in life.[96] The DoD will also look into reducing costs to service members to obtain fertility assistance through advanced reproductive technologies.[97]

Secretary Carter stated that these comprehensive family benefit reforms are being implemented to "strengthen the support we provide to military families to improve their quality of life" and to "modernize our workplace and workforce, to retain and attract the top talent we need, so that our force can remain the best for future generations."[98] Through these reforms, Secretary Carter wants to demonstrate that the DoD is a "family-

---

[92] *Id*.
[93] *Id*.; Carter, Force of the Future, *supra* note 2.
[94] DEPT. OF DEF., FACT SHEET: BUILDING THE SECOND LINK, *supra* note 74.
[95] Carter, Force of the Future, *supra* note 2.
[96] *Id*.
[97] DEPT. OF DEF., FACT SHEET: BUILDING THE SECOND LINK, *supra* note 74.
[98] Carter, Force of the Future, *supra* note 2.

friendly force."[99] Consequently, Secretary Carter expects the reforms to impact recruiting, retention, and career and talent management.[100] He anticipates that, through these reforms, the DoD will be able to attract top-quality recruits from upcoming generations, while simultaneously helping the military to retain promising service members for continued service.[101] Secretary Carter believes these reforms will ultimately enhance mission effectiveness.[102]

On February 9, 2016, President Obama sent Congress his proposed discretionary spending budget for the Department of Defense in Fiscal Year 2017.[103] Within the $582.7 billion request, President Obama sought funding for Force of the Future initiatives, including increasing paternity leave to fourteen days, increasing the availability of on-base childcare services, and providing egg and sperm freezing assistance to help military families preserve their ability to start a family.

In contrast to the support the reforms received from the White House, they have met staunch resistance in Congress. Most notably, Senator John S. McCain III, attacked the Force of the Future initiatives saying that he found it "deeply disturbing that [the DoD is] proposing to add expensive fringe benefits," and that the initiatives are an "outrageous waste of official time and resources . . . that illustrate[] the worst aspects of a bloated and inefficient defense organization."[104] Despite the harsh criticism, Pentagon officials

---

[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] Press Release, Dept. of Def., Department. of Defense (DoD) Releases Fiscal Year 2017 President's Budget Proposal (Feb. 9, 2016), http://www.defense.gov/News/News-Releases/News-Release-View/Article/652687/department-of-defense-dod-releases-fiscal-year-2017-presidents-budget-proposal (last visited Feb. 20, 2016) [hereinafter Press Release, Fiscal Year 2017 President's Budget Proposal].
[104] Leo Shane III, *The Pentagon's "Force of the Future" Plan Just Got Trashed in Congress*, MILITARYTIMES (Feb. 25, 2015), http://www.militarytimes.com/story/military/2016/02/25/senators-blast-personnel-reforms-nominee/80924888/ (last visited Apr. 21, 2016).

remain optimistic about the future of the reforms because most of the Senate's venom, rather than being aimed at any particular initiative, was aimed at the nominee for the undersecretary of defense for personnel and readiness position, who was the architect behind the reforms and would have led their implementation if he was confirmed.[105] Secretary Carter remains confident that the reforms will go forward and plans to continue to fight for them at future testimonies before Congress.[106]

B. The Statutory Difference between Maternity Leave and Paternity and Adoption Leaves

Before proceeding further, it is important for the reader to understand the limitations placed on not only the individual Military Services, but also on the Pentagon, with regards to establishing paternity versus maternity leave policies, as well as adoption leave policies. Maternity leave and paternity leave for members of the Armed Forces are drastically different from one another; not just in duration, but also in the authorities that govern them.

The duration of paternity leave for members of the Armed Forces, unlike maternity leave, is set by federal law. On October 14, 2008, President George W. Bush signed the National Defense Authorization Act (NDAA) for Fiscal Year 2009, which amended Title 10 to establish paternity leave for married service members who were on active duty status in the Armed Forces.[107] The NDAA provides for ten days of paternity

---

[105] Tom Philpott, *"Force of the Future" Might Survive Attack on Its Architect*, MILITARY.COM (Mar. 4, 2016), http://militaryadvantage.military.com/2016/03/force-of-the-future-might-survive-attack-on-its-architect/ (last visited Apr. 21, 2016).
[106] Richard Sisk, *DoD to Expand "Force of the Future" Personnel Plan Despite Setback*, MILITARY.COM (Mar. 15, 2016), http://www.military.com/daily-news/2016/03/15/dod--expand-force-of-the-future-personnel-plan-despite-setback.html (last visited Apr. 21, 2016).
[107] Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008) [hereinafter NDAA 2009]; 10 U.S.C. § 701(j).

leave for service members whose wives give birth to a child.[108] Thus, the NDAA does not provide for paternity leave for unmarried service members who conceive a child out of wedlock.[109] The NDAA merely states that the leave is "to be used in connection with the birth of the child," but it does not specify when the leave must start or whether the ten days of leave must be taken continuously.[110] Department of Defense Instruction (DoDI) 1327.06, *Leave and Liberty Policy and Procedures*, however, prescribes that paternity leave "should be taken consecutively and within a reasonable amount of time following the birth."[111] As part of his Force of the Future reforms, detailed in Part II.A., *infra*, Secretary Carter has requested Congress to authorize an additional four days of paternity leave.[112] That request did not include a proposed change to extend paternity leave to unmarried service members.[113]

The duration of maternity leave, on the other hand, is not dictated by federal law. Rather, Title 10 authorizes the Secretary of Defense to prescribe procedures for the accumulation and use of paid leave for the Department of Defense, which includes convalescent leave.[114] Convalescent leave is paid leave granted by a military member's commanding officer or a hospital commander to allow the service member to recover from serious illness, injury, or more recently, childbirth, which makes him or her not "fit

---

[108] *Id*.
[109] *See id*.
[110] NDAA 2009; 10 U.S.C. § 701(j).
[111] DoDI 1327.06, *supra* note 73, para. 1.k.(5). After the repeal of Don't Ask Don't Tell, in 2013, the DoD amended the heading of para. 1.k.(5) from "Paternity Leave" to "Parental Leave." The DoD did not need to wait for a corresponding amendment to be made to the controlling section of Title 10 before so amending the DoDI because the provision in Title 10 was originally written in gender-neutral terms.
[112] Carter, Force of the Future, *supra* note 2; Press Release, Fiscal Year 2017 President's Budget Proposal, *supra* note 103.
[113] *See Id*.
[114] 10 U.S.C. § 704.

for duty."[115] Maternity leave, therefore, is considered a form of convalescent leave.[116] Thus, the Secretary of Defense has "broad discretion" to determine convalescence leave and maternity leave standards for the military.[117] The Secretary can set the duration of maternity leave at whatever he considers to be appropriate to allow military mothers "to recover from the trauma of giving birth, and [to] allow them to resume their rigorous responsibilities" in their military jobs, without the need for any legislative action.[118] Prior to January 2016, the Secretary of Defense had capped maternity leave at six weeks following childbirth, but entrusted the Secretaries of the respective Military Departments to establish their own procedures for other convalescent leave.[119] Particularly, the Secretary of Defense delegated to the Military Departments the authority to establish service-wide policies regulating convalescent leave in excess of thirty days.[120] This arrangement allowed the Military Departments to prolong the non-chargeable leave a mother could take following the birth of a child by establishing a blanket policy entitling mothers to take a designated period of convalescent leave immediately following the expiration of maternity leave.[121] Secretary Carter partially rescinded that delegation of authority, however, when he expressly superseded the Military Departments' policies on maternity-plus-convalescent leave and established one, uniform policy for all members of the Armed Forces.[122]

---

[115] DoDI 1327.06, *supra* note 73, para. 1.k.(1).
[116] Kellie Lunney, *Military's Paid Maternity Leave Now 12 Weeks; Feds Still at Zero*, GOV'T EXECUTIVE (Feb. 18, 2016), http://www.govexec.com/pay-benefits/2016/02/militarys-paid-maternity-leave-now-12-weeks-feds-are-still-zero/126044/ (last visited Mar. 3, 2016); DoDI 1327.06, *supra* note 73, para. 1.k.(2).
[117] Lunney, *Military's Paid Maternity Leave Now 12 Weeks*, *supra* note 116.
[118] *Id*.
[119] DoDI 1327.06, *supra* note 73, para 1.k.(1)-(2).
[120] *Id*. at para. 1.k.(1).
[121] *See id*. at paras. 1.k.(1)-(2).
[122] DTM 16-002, *supra* note 70.

Finally, like paternity leave, adoption leave is covered by Title 10.[123] Thus, in order for Secretary Carter's vision regarding adoption leave to become reality, that is, to provide two weeks of adoption leave to the second parent in dual-military marriages, legislative action is required.[124] The current legislation does not prescribe whether or not the parent taking the adoption leave must take all twenty-one days consecutively.[125] However, in contrast to the DoD's guidance regarding paternity leave, in the area of adoption leave, the DoD does not express a preference that service members should take all twenty-one days of leave consecutively.[126] This may be in recognition of the reality that most adopting parents would use adoption leave immediately upon placement of a child in their home, and use the leave consecutively, in order to meet a requirement imposed by the majority of adoption agencies that a parent be present in the home for a period of time after a child is placed in the home.[127]

C. An Additional DoD Parental Accommodation: Deferrals

Maternity, paternity, and adoption leave are not the only aspects of DoD policy that have a significant effect on military members' work-life balance. An additional policy that substantially affects new military parents is the DoD's pre-reforms policy permitting deployment, assignment, and "temporary duty" [128] deferrals.

---

[123] 10 U.S.C. § 701(i).
[124] DEPT. OF DEF., FACT SHEET: BUILDING THE SECOND LINK, *supra* note 74.
[125] *See* 10 U.S.C. § 701(i).
[126] *See* DoDI 1327.06, *supra* note 73, para. 1.k.(4).
[127] *See* S. Rep. No. 103-3, at 15 (1993).
[128] Temporary duty (TDY) is "[d]uty at one or more locations, other than the permanent duty station, at which a member performs duty under orders." Commissioned Corps Personnel Manual Pamphlet No. 51, *Uniformed Services Personnel Travel and Transportation*, 12 (1999), *available at* https://dcp.psc.gov/eccis/documents/PAM51.pdf (last visited Feb. 21, 2016). Ordinarily, upon completion of a TDY, the service member returns to his or her permanent duty station. TDYs can last anywhere from a single day to many months.

The DoD maintains a stance that military parents, whether single or married, are "expected to fulfill their military obligations on the same basis" as all other members of the Armed Forces.[129] To that end, military parents remain eligible for duty worldwide, including assignments to dangerous areas.[130] However, the DoD provides an exception to this rule for a period of time following the birth of a child or placement of an adopted child with the military member's family.[131] DoDI 1315.18, *Procedures for Military Personnel Assignments*, sets forth the Department's policy regarding these accommodations for military parents.[132]

Following the birth of a child, a "military mother" will be deferred, for a minimum of four months, from any assignment that would take her away from her home (or "permanent") duty station including (1) an overseas assignment that does not permit dependents (e.g., civilian spouses or children) to accompany the service member; (2) an overseas assignment in which dependents could be permitted to accompany the military member, but concurrent travel is denied; (3) deployments (e.g., a limited-duration duty in locations such as Iraq or Afghanistan in support of an on-going conflict); or (4) temporary duty (see *infra* note 128).[133] DoDI 1315.18 expressly permits the Military Services to authorize deferments in excess of the DoD four-month standard.[134] Military mothers have the exclusive authority to waive deferments related to the birth of their

[129] Dept. of Def. Instruction 1315.18, *Procedures for Military Personnel Assignments* (Oct. 28, 2015) at para. 9.a. [hereinafter DoDI 1315.18].
[130] *Id*.
[131] *Id*. at paras. 9.c-d.
[132] *Id*. at para. 9.
[133] *Id*. at 9.d.
[134] *Id*.

children.[135] Significantly, there is no reciprocal deferment, of any duration, for military fathers following the birth of a child.[136]

DoDI 1315.18 does, however, provide equal assignment, temporary duty, and deployment deferrals to military mothers or fathers following the placement of an adopted child in his or her home. Single service members, regardless of gender, are deferred for four months from the same assignment types enumerated above, and are the exclusive waiver authority for deferrals.[137] For dual-military couples who adopt a child, only one spouse in the relationship may have their assignment, temporary duty, or deployment deferred for the four month period.[138] The other is subject to orders that will take him or her away from the couple's home station.[139] The policy states no preference for whether the mother or father should be granted the deferral.[140] Thus, because exclusive waiver authority for the deferment lies with the military couple, it is the couple that has the power to choose which parent will be deferred from any potential assignments.[141] Once again, the Pentagon authorized the Military Services to sanction deferments longer than four months.[142]

The Pentagon's deferment policies for postpartum military mothers, single military members who adopt a child, and one member of a military couple who adopt a child are reiterated, without elaboration, in DoDI 1342.19, *Family Care Plans*.[143] Both

---

[135] *Id*. The "Military Services" refers collectively to the Army, Navy, Air Force, and Marine Corps. *Id*. at 66.
[136] *See generally*, DoDI 1315.18 *supra* note 129.
[137] DoDI 1315.18, *supra* note 129, at para. 9.c.
[138] *Id*.
[139] *Id*.
[140] *See generally*, DoDI 1315.18, *supra* note 129.
[141] *Id*.
[142] DoDI 1315.18, *supra* note 129, at para. 9.c.
[143] Dept. of Def. Instruction 1342.19, *Family Care Plans* (May 7, 2010) at paras. 4.g.(1)-(2) [hereinafter DoDI 1342.19].

DoDI 1315.18 and DoDI 1342.19 fail to specifically address whether or not there is a deferment policy for military members who are married to civilians.[144] In the absence of a specific grant of a deferment accommodation to military members married to civilians, deferment authorization cannot be presumed to exist. Additionally, neither DoDI 1315.18 nor DoDI 1342.19 articulate the Department's reasons either for granting deferrals to military mothers following the birth of a child, or for the absence of deferrals for military fathers in such instances.[145]

While the deployment deferral policy has attracted some sporadic attention from Congress, that attention has been limited to a call for the Pentagon to equalize the duration of mothers' deployment deferrals across the Military Services, with no consideration of extending deployment deferrals to biological fathers.[146] As will be discussed in Part III.B.1, the Military Services have exercised the DoD's grant of authority to establish their own Service-specific deferment policies, resulting in vastly different deferment durations for mothers in the various Services. Thus, in 2008, *The Washington Post* highlighted that the Army offered the shortest deployment deferral period, while the length of soldiers' deployments averaged longer than any other Service.[147] In response, Senator Claire C. McCaskill called for then-Secretary of Defense Robert M. Gates to establish a "single, equitable policy" for the entire DoD that makes "medical, including psychological, considerations of the mother and newborn the first

---

[144] *See generally*, DoDI 1315.18, *supra* note 129, and DoDI 1342.19, *supra* note 143.
[145] *Id*.
[146] *See, e.g.*, Brian Mann, *Military Moms Face Tough Choices*, NAT'L PUB. RADIO (May 26, 2008), http://www.npr.org/templates/story/story.php?storyId=88501564 (last visited Feb. 29, 2016) ("[Sen. Brian Nelson (D-NE)] questioned [Army Secretary Preston M.] Geren about the Army's policy of deploying female soldiers to Iraq just six weeks after they give birth.").
[147] Ann Tyson, *Short Maternity Leaves, Long Deployments*, THE WASHINGTON POST (Feb. 18, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021702324.html (last visited Feb. 29, 2016).

priority of the policy."[148] No mention, however, was made of extending deployment deferrals to military fathers.[149] Further, Secretary Carter has neither updated the deferral policy as part of his Force of the Future reforms nor publically alluded to any plans to change the policy.

D. United States Federal Parental Leave Policies

In order to analyze the strengths and weaknesses of the Defense Department's parental leave policies, it is helpful to understand the landscape of rules governing such leave in the U.S. civilian workforce. These rules undoubtedly influenced the Pentagon's decisions regarding its parental leave policies, particularly in ensuring that it was developing a policy that would make it competitive in recruiting new personnel. The remainder of this part is devoted to explaining the foundations of parental leave policies in the U.S.

1. The Pregnancy Discrimination Act

Due to the traditional roles of men and women in American society, wherein males are considered to be the primary breadwinners and females are considered to be the primary caregivers, parental leave did not become a significant, wide-spread issue until women became more predominant in the workforce. When women began entering the workforce in greater numbers during the 1940s, there were few laws pertaining to pregnant employees.[150] Typically, those States that did have such laws required women to take leave from their jobs for a specified period of time before and after childbirth.[151]

---

[148] Press Release, Sen. Claire McCaskill, McCaskill Urges Sec. Gates to Adopt Uniform, Fair Maternity Leave Policy (Feb. 21, 2008), http://www.mccaskill.senate.gov/media-center/news-releases/mccaskill-urges-sec-gates-to-adopt-uniform-fair-maternity-leave-policy (last visited Feb. 29, 2016).
[149] *See, Id.*
[150] Tighe, *supra* note 33, at 144.
[151] *Id*.

These laws were paternalistic in nature and were intended to protect the health of the mother; however, because the laws did not provide for employment protection, they often had the effect of "protect[ing] pregnant women right out of their jobs."[152]

Responding to Supreme Court decisions upholding such employer policies that discriminated against pregnant women in job retention, Congress passed the Pregnancy Discrimination Act (PDA) in 1978.[153] The PDA prohibits discriminatory hiring practices or firing of women on the basis of pregnancy.[154] While the PDA was an important step toward curbing discrimination toward women in the workplace, its limited scope left families with minimal, if any, job security when faced with postpartum medical needs or family members with serious health conditions. Also, the growing role of men in the care of their children was unaddressed, as the PDA contained no provisions providing for paternity leave.[155]

Nine years after its enactment, the Supreme Court upheld the PDA and declared that it guaranteed "women the basic right to participate fully and equally in the workforce, without denying them the full participation in family life."[156] The Supreme Court's declaration, however, failed to recognize not only the job security issue mentioned above, but also the pervasive, albeit more covert discrimination that resulted

---

[152] Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 82 (2000) (quoting Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 334 (1984)).
[153] Tighe, *supra* note 33, at 144.
[154] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555 (1978), incorporated in 42 U.S.C. S2000e(k) (1981 & Supp. 1992).
[155] *See*, Pregnancy Discrimination Act *supra* note 154.
[156] Cal. Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987).

in mothers being seen as less suitable for advancement and promotion because they did not conform to the "unencumbered employee" expectation of American employers.[157]

Some states attempted to remedy this resulting imbalance of employment and advancement opportunities between men and women through legislation. By 1989, however, only thirty-seven percent of employees were covered by some such form of family-leave legislation.[158] The need for federal legislation was apparent, although not universally welcome.[159]

2. The Family and Medical Leave Act

Cutting through the diverse array of family leave legislation enacted throughout the States, the Family and Medical Leave Act[160] (FMLA) emerged as the federal standard for family leave, including parental leave, in the United States.

On February 5, 1993, President William J. Clinton signed the FMLA into law, declaring it guarantees Americans "will no longer need to choose between the job they

---

[157] Tighe, *supra* note 33 (quoting Bornstein, *supra* note 152, at 95-96.
[158] Tighe, *supra* note 33, at 145; Kathryn Branch, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119, 139-140 (1994) (citing U.S. Bureau of the Census, Statistical Abstract of the United States: 1993 (113th ed.) 431, Table No. 679). *See* discussion, *infra*, Part I.
[159] "Opponents of the FMLA argued that the Act would interfere with employer flexibility and create massive costs to businesses. Critics were also concerned that creating leave requirements directed toward women would provide employers with a further disincentive to hire women." Tighe, *supra* note 33, at 145.
[160] Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq*. (1993).

need and the family they love."[161] Passage of the FMLA signaled the first time the federal government endorsed "work-family policy" through legislation.[162]

In the final version of the bill, Congress made specific findings which demonstrated the driving need for legislation including:

> (1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly; (2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing . . .; (3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting; (4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods; (5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and (6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.[163]

In order to accommodate or remedy the issues identified in these findings, Congress stated that the purposes of the FMLA were

> (1) to balance the needs of the workplace and families . . .; (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child . . . who has a serious health condition; (3) to accomplish the purposes [of the Act] in a manner that

---

[161] William Clinton, President, U.S., Remarks at the University of Virginia: Signing of the Family Medical Leave Act (Feb. 5, 1993), http://millercenter.org/president/speeches/speech-4562 (last visited Jan. 26, 2016). The first draft of the FMLA was drafted by the Women's Legal Defense Fund in 1984. A version of the FMLA was introduced in Congress every year from 1984 through 1993, but was repeatedly blocked by opponents. Congress passed the legislation in 1991 and again in 1992, but President George H.W. Bush vetoed it each time. Finally, nine years after the first introduction of the FMLA, Congress passed the bill again in 1993 and President Bill Clinton made it the first legislation he signed after taking office. National Partnership for Women and Families, *History of the FMLA*, http://www.nationalpartnership.org/issues/work-family/history-of-the-fmla.html, (last visited Feb. 1, 2016).

[162] Paul Richter & Gebe Martinez, *Clinton Signs Family Leave Bill into Law*, TRANSPORTATION PROJECTS (Feb. 5, 1993), http://articles.latimes.com/1993-02-06/news/mn-1088_1_family-leave (last visited Jan. 23, 2016). Notably, Congress passed the Pregnancy Discrimination Act (PDA) in 1978. While the PDA prohibited discriminatory hiring or firing of women due to pregnancy, it was criticized for its focus on pregnancy and mothers' physical disability following childbirth while not making provisions for leave to care for children, or other family members, with serious medical conditions. Tighe, *supra* note 33, at 144-145.

[163] 29 U.S.C. § 2601(a)(1)-(3), (5)-(6).

> accommodates the legitimate interests of employers; (4) to accomplish the purposes [of the Act] in a manner that . . . minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender-neutral basis; and (5) to promote the goal of equal employment opportunity for women and men . . . .[164]

The FMLA provides unpaid leave to eligible employees who work for an employer that maintains fifty or more employees per working day for twenty or more workweeks in the current or previous calendar year.[165] Notably, FMLA benefits apply equally to both male and female employees. Thus, an eligible male or female employee may take up to twelve workweeks of leave during any twelve-month period for the birth or adoption of a child.[166] The FMLA default is that the twelve workweeks of family leave will be taken consecutively.[167] However, upon agreement between the employer and employee, the employee may take the leave intermittently, when medically necessary.[168] If leave is taken intermittently, the employee is still entitled to an aggregate of twelve workweeks of leave.[169]

Furthermore, the FMLA provides that employers must continue the employee's health care coverage while he or she is on family leave.[170] Upon return to work, the employer must reinstate the employee to the same position he or she occupied prior to taking leave or to a position with equivalent "benefits, pay, and other terms and conditions of employment."[171]

---

[164] *Id*. § 2601(b)(1)-(5).
[165] *Id*. §§ 2612(c); 2611(2)(B)(ii); 2611(4)(A)(i). The fifty employees must be within a seventy-five-mile radius. *Id*. at § 2611(2)(B)(ii).
[166] *Id*. § 2612(a)(1).
[167] *Id*. § 2612(b)(1).
[168] *Id*. § 2612(b)(1).
[169] *Id*. § 2612(b)(1).
[170] *Id*. § 2614(c)(1).
[171] *Id*. § 2614(a)(1)(A)-(B).

To be eligible for FMLA benefits, the employee must have been employed by the employer from whom he or she is requesting leave for at least twelve months and must have completed at least 1,250 hours of work for that employer within the previous twelve months.[172] Additionally, an employer may elect to not restore "highly compensated employees" to their pre-leave position or an equivalent position.[173] The phrase "highly compensated employees" is defined by the Act as "employee[s] who [are] among the highest paid ten percent of the employees employed by the employer."[174] Also, the FMLA does not cover certain Federal officers or employees or uniformed members of the Armed Forces.[175]

As a result of these requirements limiting eligibility for both employers and employees, only an estimated fifty-nine percent[176] of employees were eligible for FMLA benefits in 2012, which is a decline from an estimated sixty-six percent[177] of employees who were eligible for FMLA benefits in 2003. Furthermore, the FMLA has been heavily criticized because many employees who are otherwise eligible for FMLA coverage decline to take family leave because they cannot afford the lost income.[178]

The FMLA also provides flexibility to employers in an effort to "accommodate [their] legitimate interests."[179] For instance, although employers must continue an

---

[172] *Id*. § 2611(2)(A)(i)-(ii).
[173] *Id*. § 2614(b).
[174] *Id*. § 2614(b)(2).
[175] *Id*. § 2611(2)(B)(i). The FMLA amended 5 U.S.C. § 6301 (2006) to cover civil service employees, but it did not amend 10 U.S.C. § 701 to cover uniformed members of the Armed Forces.
[176] Abt Associates Inc., *Family and Medical Leave in 2012: Technical Report, Prepared for U.S. Department of Labor*, Contract #GS10F0086K, (Sept. 7, 2012, revised Apr. 18, 2014), at 2, http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf (last visited Jan. 25, 2016).
[177] Kenneth G. Dau-Schmidt & Carmen Brun, *Protecting Families in a Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 165, 200 (2006).
[178] *See, e.g.*, Erin Gielow, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529, 1546 (2002); Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. POL'Y 65, 67 (2004).
[179] 29 U.S.C. § 2601(b)(3).

employee's health care coverage during FMLA leave, if the employee fails to return to work following the allotted leave period, for reasons beyond the employees' control, the employer may recover the premiums it paid for the employee's medical coverage.[180] Also, as stated above, employers are not required to cover "highly compensated employees" or employees whom they have employed for less than twelve months or who have not performed at least 1,250 hours of work for the employer in the current or previous year.[181] Further, an employer generally may substitute an employee's accrued paid leave for any portion of the twelve-week FMLA period.[182] Employers may also require employees to provide thirty calendar days' notice for foreseeable use of FMLA leave and, in cases of authorized intermittent leave, to temporarily transfer the employee to an equivalent position better suited to accommodate the employees' absences.[183] Finally, to discourage abuse, employers may require a doctor's certification stating that the employee is unable to return to work due to the employee's own health condition or because the employee is needed to care for his or her child due to the child's serious health condition.[184]

In January 1993, prior to Congress passing the FMLA, the Labor and Human Resources Committee submitted a report to the Senate in which it recommended the Senate pass the Act. In the report, the committee presented substantial findings supporting the need for the legislation. At the outset, the committee noted that "[p]rivate sector practices and government policies have failed to adequately respond to recent

[180] *Id*. § 2614(c)(1)-(2).
[181] *Id*. §§ 2614(b), 2611(2)(A)(i)-(ii).
[182] *Id*. § 2612(d)(2)(A).
[183] *Id*. § 2612(e), (b)(2).
[184] *Id*. § 2614(c)(3).

economic and social changes that have intensified the tension between work and family" and that the failure "impose[s] a heavy burden on families, employees, and employers and the broader society."[185] Referencing a report created by the Government Accountability Office (GAO), the committee noted that each year for the past forty years, the number of females in the work force has increased by approximately one million new workers.[186] Further, the work force saw more than a 200 percent increase in the number of female employees between the years 1950 and 1990.[187] Additionally, the Bureau of Labor Statistics (BLS) predicted that 66.1 percent of women nationwide would be participating in the workforce by 2005.[188]

The committee defended the legislation as being in line with other employment legislation establishing minimum standards that had become accepted as common place, including laws regarding child labor, minimum wage, workplace health and safety, pension safeguards, and minimum standards for leave.[189] Like the FMLA, the legislation creating each of those standards arose from changing societal interests and from problems with broad ramifications.[190] Also, like the FMLA, Federal standards were needed because "voluntary corrective actions on the part of employers had proven inadequate."[191] By providing the uniform standards, the FMLA would require businesses to maintain minimum protections for their employees "without jeopardizing or decreasing

---

[185] S. Rep. No. 103-3, at 4.
[186] S. Rep. No. 103-3, at 5.
[187] *Id*.
[188] *Id*. According to the Department of Labor, Women's Bureau, women's participation in the labor force did not increase quite a much as the Bureau of Labor Statics predicted. As of 2005, women's work force participation had risen to 59.3 percent, rather than the predicted 66.1 percent. BUREAU OF LABOR STATISTICS, EMPLOYMENT STATUS OF WOMEN AND MEN IN 2005, http://www.dol.gov/wb/factsheets/qf-eswm05.htm (last visited on Feb. 6, 2016).
[189] S. Rep. No. 103-3, at 4.
[190] *Id*.
[191] *Id*.

competitiveness" that employers feared could result by implementing such pro-employee measures *sua sponte* while other employers do not.[192]

The committee went on to explain the inadequacy of existing family leave policies in the U.S. Relying on another study conducted by the BLS, the committee observed that approximately thirty-three to thirty-seven percent of "full-time employees working in private business with more than 100 workers" were covered by unpaid maternity leave and only sixteen to eighteen percent were covered by unpaid paternity leave.[193] Additionally, a report conducted by Buck Consultants found that out of 253 U.S. corporations surveyed, seventy-three percent had no form of parental leave program whatsoever and that sixty-two percent of those corporations stated they "would offer such a program only if required to do so by State or Federal Governments."[194] The committee also remarked on the difficulties faced by adoptive parents who are not covered by a reasonable family leave policy, resulting from a requirement by most adoption agencies that a parent be present in the home immediately following placement of a child with the family. Some agencies require a parent's presence for as long as four months to "allow [the parent and child] adequate time for proper bonding."[195]

To bolster its recommendation of passing the FMLA legislation, the committee also illustrated the inferiority of America's support for its working families, pointing out that "[w]ith the exception of the United States, virtually every industrialized country, as well as many Third World countries, have national policies that require employers to

---

[192] *Id*. at 18.
[193] *Id*. at 14-15.
[194] *Id*. at 15. Despite this finding, the committee concluded elsewhere in its report that "[e]ven without minimum standards, most employers would . . . offer their employees decent benefits." *Id*. at 4.
[195] *Id*. at 5.

provide some form of maternity or paternity leave."[196] Specifically, 135 countries already provided maternity benefits, at a minimum, with 127 of those countries also providing wage replacement.[197] The committee urged the Senate to pass the FMLA bill in order to help narrow the gap in work-family balance between the United States and other countries.[198] The committee also briefly reviewed family leave legislation adopted by the States. At that time, twenty-eight States, the District of Columbia, and Puerto Rico had passed some form of family or medical leave legislation.[199]

Further strengthening its support for passing of the bill, the committee explained that the FMLA would prove to be cost effective. Specifically, it praised the legislation for its potential to reduce costs associated with hiring, training, turnover, and absenteeism.[200] The committee relied on a 1992 Families and Work Institute study, based on a survey of 331 supervisors, which concluded that "providing parental leave is more cost-effective for employers than permanently replacing employees who need leave."[201] The study also asserted that ninety-four percent of employees who take

---

[196] *Id*. at 19. The committee specifically exemplified the following countries: Japan, for providing twelve weeks of partially paid pregnancy disability leave; Canada, for providing maternity leave for up to forty-one weeks while receiving sixty percent of the mother's salary for the first fifteen weeks; France, Great Britain, and Italy, for providing maternity benefits as part of paid sick leave (all of which had similar laws in place since before World War I); and Sweden, for providing eighteen months of family leave at about ninety percent of the parent's gross pay. The committee also noted that the European Community Commission issued a directive in September 1992 requiring all member countries to provide a minimum of fourteen weeks paid maternity leave. *Id*.

[197] *Id*.

[198] *Id*.

[199] *Id*. at 20. The twenty-eight States with family or medical leave laws as of January 1993 were Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Washington, West Virginia, and Wisconsin. *Id*. at 20-21.

[200] *Id*. at 12-13.

[201] *Id*. at 17.

parental leave return to work for their employer and that seventy-five percent of supervisors believe parental leave had a positive effect on the company's business.[202]

Finally, the committee touted the fact that the FMLA would cover all qualified employees, both male and female.[203] The committee cautioned that protective laws that apply only to women, or any immutable group, not only risk causing discriminatory treatment toward the protected group, but could also be inequitable under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution.[204]

Secretary Carter likely had the FMLA in mind when he remarked that the DoD's new twelve-week maternity leave policy "puts DoD in the top tier of institutions nationwide."[205] In some ways, particularly in that the DoD's policy provides for one hundred percent paid leave, it is superior to the FMLA. Just as the FMLA has been criticized because lower-wage employees are unable to take full advantage of the authorized family leave because they could not afford to be without a paycheck for twelve weeks, lower-ranking enlisted military members would have faced the same dilemma if the DoD's policy had provided only for unpaid leave. By authorizing paid leave, the DoD's policy will ensure that all ranks are able to benefit. The DoD's policy, however, falls far short of the FMLA in terms of paternal leave. It thereby sets up the

---

[202] *Id*. at 17.
[203] *Id*. at 16.
[204] *Id*. In pertinent part, the Fourteenth Amendment states, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. For an interesting argument regarding how one-sided maternity leave can cause gender discrimination toward women, *see* Theresa Bresnahan-Coleman, *The Tension Between Short-Term Benefits for Caregivers and Long-Term Effects of Gender Discrimination in the United States, Canada, and France*, 15 NEW ENG. J. INT'L & COMP. L. 151 (2009).
[205] Carter, Force of the Future, *supra* note 2.

different protective standards that could cause discriminatory treatment toward the protected group that the Labor and Human Resources Committee understood and warned the Senate about over twenty years ago.

III. Analysis

A. The DoD's Extended Maternity Leave Policy is a Step in the Right Direction

Guaranteeing twelve weeks of maternity leave across all the Military Services was a smart way for the DoD to make itself appear to be a more attractive employer to potential female recruits. The decision also has a direct, tangible impact that will help service women attain greater work-life balance. The extended maternity leave will invariably lead to better post-leave performance by new mothers, but could also lead to more loyal service and, at least in the short term, increased retention rates.

The Defense Department Advisory Committee on Women in the Service reported that a leading reason women voluntarily separate from the military is to concentrate on starting or raising a family.[206] Service women are more likely than their male counterparts to leave military service to become a full-time parent or to pursue civilian employment that is more conducive to raising their children.[207] A 2010 study by the Military Leadership Diversity Commission found that, for officers, women voluntarily separated from the military at a rate up to twenty percent higher than men between their fourth and twelfth year of service.[208] Four to twelve years of service corresponds to

---

[206] Steven Smith, *Committee Examines Issues of Women Separating from Military*, DOD NEWS (Aug. 28, 2006), http://archive.defense.gov/news/newsarticle.aspx?id=612 (last visited Apr. 1, 2016).
[207] Sara Root, *Capitalizing "F" Is Not Enough: The Army Should Revise Its Postpartum Leave Policies to Better Support the Army Family*, 201 MIL. L. REV. 132, 169 (2009).
[208] MILITARY LEADERSHIP DIVERSITY COMM'N, OFFICER RETENTION RATES ACROSS THE SERVICES BY GENDER AND RACE/ETHNICITY (2010) at 2-3, https://www.hsdl.org/?view&did=716147 (last visited Mar. 30, 2016).

approximately twenty-six to thirty-four years of age, which are prime childbearing years. The Commission also found that, for enlisted service members, the greatest gap between reenlistment rates for men and women occurred between six and ten years of service.[209] More recently, Secretary Carter stated that the retention difference between men and women during their prime years for starting a family had swelled to thirty percent.[210] Clearly something had to be done if the military wanted to retain more of its service women. And so, it was in recognition that the conflict between work and family was a primary reason for women leaving the Service that Secretary Carter instituted the DoD-wide twelve-week maternity leave policy.[211]

The military will reap additional benefits from this policy beyond recruiting and improved mid-career retention of its female service members. Most notably, it will gain improved duty performance and productivity and more reliable attendance of its new mothers because, as studies have shown, longer periods of maternity leave are linked to better physical and psychological health of both the new mother and the child.

1. Improved Duty Performance

Following a mother's return from maternity leave, the Military Services are likely to see improved attendance from its service women compared to their attendance rates following the previous six-week maternity leave policy. By classifying maternity leave as a form of convalescent leave, the military is clearly in tune with the fact that the physical trauma of childbirth makes a new mother unfit for duty for an extended period of time. What the Pentagon may not have realized until recently though, is that research

[209] MILITARY LEADERSHIP DIVERSITY COMM'N, REENLISTMENT RATES ACROSS THE SERVICES BY GENDER AND RACE/ETHNICITY (2010) at 2-3, https://www.hsdl.org/?view&did=716162 (last visited Mar. 30, 2016).
[210] Carter, Force of the Future, *supra* note 2.
[211] *Id*.

shows that postpartum fatigue "is the same, or higher" six weeks after delivery as it is at the time of delivery.[212] In fact, postpartum fatigue is considered progressive and continues beyond what the DoD previously considered the postpartum period.[213] However, when a new mother is able to take eight to twelve weeks of maternity leave, she experiences "[a] decrease in maternal depressive symptoms . . . [and] better vitality."[214] Other studies have found that six to eight weeks of maternity leave only accounts for time for the mother to recover exclusively from the trauma of childbirth.[215] As such, six-week maternity leave periods do not provide new mothers the necessary time to "adjust mentally and emotionally to parenthood while simultaneously battling fatigue and" preparing to return to full time employment.[216] Consequently, by doubling the length of maternity leave, the DoD helped ensure that new mothers will return to service less fatigued and better equipped to balance parenthood with their military duties.

Additionally, shorter maternity leaves have been proven to have a detrimental effect on the long-term relationship between a mother and her child.[217] Dr. Berry Brazelton, one of the world's leading child development experts, testified before a congressional subcommittee for the FMLA that "parents who have to leave their baby too soon guard themselves against attaching to the baby."[218] Rather than focusing on

---

[212] Nancy Troy, *A Comparison of Fatigue and Energy Levels at 6 Weeks and 14 to 19 Months Postpartum*, 8 CLINICAL NURSING RES. NO. 2, at 135, 135 (1999).
[213] Root, *supra* note 207, at 162 (citing *id*.).
[214] *Id*. (quoting Katharina Staehelin et al., *Length of Maternity Leave and Health of Mother and Child--A Review*, 52 INT. J. PUB. HEALTH 202, 207-08 (2007)).
[215] *Id*. at 163 (citing Parental and Disability Leave: Joint Hearing on H.R. 2020 Before the Subcommittee. on Civil Service and the Subcommittee. on Compensation & Employee Benefits of the Comm. on Post Office & Civil Service, and the Subcommittee. on Labor Mgmt. Relations & the Subcommittee. on Labor Standards of the Comm. on Educ. & Labor, 99th Cong. (1985), at 21 [hereinafter PDL Subcommittee Hearing]).
[216] *Id*.
[217] *Id*.
[218] *Id*. at 164 (citing PDL Subcommittee Hearing, *supra* note 215, at 49).

bonding with the baby, they are focused on time constraints and preparing for substitute childcare.[219] Thus, by allowing new mothers additional time to bond with their infants, the DoD is helping to prevent parent-child relationship problems that could follow service women throughout their careers, continually causing distractions from optimal duty performance and productivity.

2. Reliable Attendance

Military childcare centers have strict policies preventing children who are exhibiting signs of illness from remaining at the centers.[220] As a result, when a child is ill, a parent often has to be absent from work to remain home to care for the child. Therefore, having a healthy child promotes more reliable attendance by the parent.

Research shows that maternity leave lasting for eight to twelve weeks leads to measurably improved health of the children. One such study found that for each additional week of paid maternity leave, the infant mortality rate decreased by two to three percent.[221] On the other hand, infants who attend daycare are at an increased risk for developing infections.[222] Additionally, children under one year of age are sixty-nine

---

[219] *Id*. (citing PDL Subcommittee Hearing, *supra* note 215, at 54).

[220] For example, a parent handbook for an Air Force childcare center states that in accordance with Air Force policy, caregivers will do a health inspection when the child arrives at the center. If the child exhibits any symptoms of illness he or she will not be permitted to stay. Further, if a child develops any signs of illness, such as a fever in excess of 101 degrees, an upset stomach, or "any sign of eye, ear, or nose infections," the center will notify a parent to pick up the child. Subsequently, the child will not be permitted to return to day care until he or she has been symptom free for 24 hours. FINLEY AND DM CHILD DEVELOPMENT CENTER PARENT HANDBOOK (2005) at 4, www.dmforcesupport.com/CDC/Docs/cdcparenthandbook.doc (last visited Apr. 1, 2016). Similarly, a parent handbook for an Army childcare center states that children will be denied admission or sent home if they exhibit signs of illness including temperatures above 100.5 degrees Fahrenheit, severe diarrhea or vomiting, or a persistent cough. Upon notification, a parent or guardian must pick up the child within two hours. Again, the child will be denied readmission until he or she has been symptom free for 24 hours. U.S. ARMY CHILD, YOUTH & SCHOOL SERVICES, FORT BENNING INSTALLATION PARENT HANDBOOK (2014) at 20-21, http://www.benningmwr.com/documents/cyss/FB%20Handbook%20Central.pdf (last visited Apr. 1, 2016).

[221] Root, *supra* note 207, at 155 (citing Christopher J. Ruhm, *Parental Leave and Child Health*, 19 J. OF HEALTH ECON. 931, 932 (2000)).

[222] *Id*. at 156.

percent more likely to require hospitalization for an acute respiratory infection during their first six months at a day care facility than those children who were cared for at home.[223] Thus, the longer an infant is able to stay at home, rather than at a childcare facility, the healthier he or she will be.

In addition to delaying care at a childcare facility, another factor that makes a significant difference in the health of the child is breastfeeding. Not surprisingly, longer maternity leave is directly linked to mothers continuing to breastfeed for longer periods of time after childbirth.[224] According to the American Academy of Pediatrics, breastfeeding leads to numerous health benefits for the infant including decreased incidences of diarrhea, respiratory tract infection, otitis media (ear infection), and urinary tract infection.[225] Additionally, older children who were breastfed as infants are less likely to develop lymphoma, leukemia, obesity, and asthma.[226] One study quantified these health benefits by comparing infants that were predominantly breastfed to infants who were exclusively fed formula.[227] That study found that of all the infants that did not have any illnesses over the course of the study, eighty-six percent were from the breastfed group.[228] Mothers also personally experience health benefits from

---

[223] *Id*. at 157 (referencing Mads Kamper-Jorgensen et al., *Population-Based Study of the Impact of Childcare Attendance on Hospitalizations for Acute Respiratory Infections*, 110 PEDIATRICS NO. 4, at 1439 (2006)).
[224] *Id*. (citing Michael Baker et al., *Maternal Employment, Breastfeeding, and Health: Evidence from Maternity Leave Mandates*, 27 J. OF HEALTH ECON. 871, 872 (2008)).
[225] American Academy of Pediatrics, *Breastfeeding and the Use of Human Milk*, PEDIATRICS, Vol 115/Issue 2 (2005), *available at* http://pediatrics.aappublications.org/content/115/2/496 (last visited Apr. 2, 2016).
[226] *Id*.
[227] Root, *supra* note 207, at 160 (citing generally Rona Cohen et al., *Comparison of Maternal Absenteeism and Infant Illness Rates Among Breast-Feeding and Formula-Feeding Women in Two Corporations*, 10 AM. J. OF HEALTH PROMOTION NO. 2, 148 (1995)).
[228] *Id*.

breastfeeding. These benefits include an earlier return to pre-pregnancy weight, decreased postpartum bleeding, and decreased risk for breast cancer.[229]

Despite these benefits, rates of breastfeeding still remain relatively low. As of 2001, seventy percent of all women in the U.S. initiated breastfeeding, but only thirty-three percent were still breastfeeding after six months, and only eighteen percent after a year.[230] Mothers report their return to work as the primary reason why they stop breastfeeding.[231] Similarly, the leading reason mothers report not initiating breastfeeding is because of limited time before they have to return to work.[232] In particular, researchers have found that women who have to return to work within six weeks of giving birth are far less likely to initiate breastfeeding.[233] One such study found that for every additional week of maternity leave a mother is able to take, her breastfeeding duration increases by three to four days and there is "an accompanying growth in the frequency" of mothers who initiate breastfeeding.[234] Thus, the longer a woman's maternity leave, the more likely it is that she will initiate and continue breastfeeding her child and, therefore, have a healthier child.

Overall, the DoD's new twelve-week maternity leave policy will benefit both service women who have children and the Armed Forces. Although each military unit will be without their new military mothers for an additional six weeks under the new DoD policy, when the service woman returns to duty, her performance will be better due

---

[229] American Academy of Pediatrics, *supra* note 225.
[230] *Id*. at Table 1.
[231] Root, *supra* note 207, at 158 (citing Baker, *supra* note 224, at 827.)
[232] *Id*.
[233] *Id*. at 158-59 (citing Gerald Calnen, *Paid Maternity Leave and Its Impact on Breastfeeding in the United States: An Historic, Economic, Political, and Social Perspective*, 2 BREASTFEEDING MED. NO. 1, 34 (2007)).
[234] *Id*. at 161 (citing Ruhm, *Parental Leave and Child Health*, *supra* note 221, at 952).

to her improved physical and mental health, and her attendance will be more reliable because her child stands a better chance of being healthy too. The new policy is also a dramatic message that the Armed Forces are a viable option for women seeking employment that offers work-life balance. Therefore, the Pentagon's new policy was a step in the right direction to immediately improve the DoD's ability to recruit and retain women.

B. The DoD Parental Accommodations Scheme May Prove to Be a Pyrrhic Victory for Military Mothers

"A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment."[235] The Labor and Human Resources Committee provided this warning to the Senate during hearings on the FMLA bill.[236] The Senate understood this important concept, which underscored its decision to make the FMLA a gender-neutral benefit. Both Congress and the DoD, however, seem to have discarded this principle in creating its various parental accommodation policies for the military.

The ideal of equal treatment is fundamental to our political and legal system: those who are similarly situated should be treated alike.[237] Modern notions of gender equality in employment promote the parity of men and women to be able to work successfully in spheres traditionally monopolized by the opposite gender. In biological terms, however, men and women are not similarly situated.[238] Only women are capable of becoming pregnant, giving birth, and breastfeeding. These unique experiences can

---

[235] S. Rep. No. 103-3, at 16.
[236] See discussion, *infra*, Part II.D.2.
[237] Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1142 (1986).
[238] *Id*.

drive different medical needs and work-life balance expectations for women. Consequently, perfect equality between the parental accommodations designed for military mothers and military fathers may not be possible due to the unique environment of the military, wherein policymakers must balance the needs for diversity, recruiting, and retention with operational readiness.[239]

Nonetheless, the Pentagon needs to heed the warning about the dangers of providing special protection to a defined group. By bestowing potentially unnecessarily generous special treatment upon women, without reciprocating significant parental accommodations on men, the Pentagon has established a scheme that runs the risk of ultimately disadvantaging military mothers and undermining its own retention efforts. A discussion of the potential disadvantageous outcomes of the DoD's inequitable parental accommodations scheme follows.

1. Military Service-Specific Parental Accommodation Policies

Each of the Military Services has tailored the DoD-authorized parental accommodation programs to comport with their service-specific needs and institutional values. While Secretary Carter's January 2016 reforms superseded any individualized maternity leave policies established by the Military Services, looking at those policies, along with the rest of the parental accommodations, provides insight into the value each Service placed on matters such as accomplishment of the mission, increasing diversification, and advancement of women's issues, including normalization of gender roles, career advancement, and work-life balance.

a. Parental Accommodations in the Navy

[239] Overly generous parental accommodations and the resulting unavailability of military parents could affect the combat readiness of the Armed Forces.

The Department of the Navy has been a leader amongst the Military Departments in striving to recognize the parental needs of its service members and enabling them to achieve greater work-life balance. In 2005, the Navy published its *Policy on Parenthood and Pregnancy*, in which it vowed to "accommodate the career and welfare needs of service members who are parents to the greatest extent possible."[240] The policy also expresses the Navy's commitment "to ensure equality of opportunity while maintaining operational readiness and supporting a higher-performing workforce."[241]

Consequently, it is not surprising that the Department of the Navy was the first of the Military Departments to provide its female service members with effectively longer maternity leave than the pre-reform DoD policy.[242] Raymond E. Mabus, Secretary of the Navy, first publically floated the idea of extending maternity leave in May 2015, at which time he was considering proposing legislation to override the DoD's then-six-week maternity leave policy with an amendment to Title 10 that would have authorized twelve weeks of maternity leave.[243]

Secretary Mabus quickly changed course, however, and on July 2, 2015, announced a new Department of the Navy-wide policy authorizing commanders to grant service women who give birth to a child up to eighty-four days of convalescent leave beyond the six weeks of maternity leave.[244] Secretary Mabus' announcement provided

---

[240] Sec'y of the Navy Instruction 1000.10A, *Department of the Navy (DON) Policy on Parenthood and Pregnancy* (Sept. 9, 2005) at para. 7.a.(1) [hereinafter SECNAVINST 1000.10A].
[241] *Id*. at para. 1.
[242] Cortney O'Brien, *U.S. Navy Triples Maternity Leave, Air Force Looks to Follow Suit*, TOWNHALL (July 11, 2015), *available at* http://townhall.com/tipsheet/cortneyobrien/2015/07/11/us-navy-extends-maternity-leave-n2023450 (last visited Dec. 15, 2015); DoDI 1327.06, *supra* note 73, at para. 1.k.(2).
[243] Meghann Myers, *Mabus Triples Maternity Leave from Six to 18 Weeks*, NAVYTIMES (July 2, 2015), http://www.navytimes.com/story/military/2015/07/02/navy-secretary-ray-mabus-maternity-leave-18-weeks/29625963/ (last visited Dec. 13, 2015); DoDI 1327.06, *supra* note 73, at para. 1.k.(2).
[244] Press Release, Department of the Navy, SECNAV Announces New Maternity Leave Policy (July 2, 2015), http://www.navy.mil/submit/display.asp?story_id=87987 (last visited Mar. 8, 2016).

Department of the Navy women with up to eighteen aggregate weeks of maternity-plus-convalescent leave, which is three times as long as the previous standard that relied solely on the six-weeks of maternity leave granted by the DoD.[245]

Under the Department of the Navy's additional maternity leave plan, commanders retained the ability to balance the needs of their mission with the needs of new mothers under their command. While it remained mandatory for commanders to grant the initial six weeks of maternity leave, commanders had the flexibility to grant "up to" eighty-four days of convalescent leave.[246] This arrangement provided commanders significantly more flexibility than previously allowed under the Navy's convalescent leave policy, which ordinarily required the recommendation of an attending physician before the commander could authorize additional leave and capped grants of convalescent leave to periods of up to thirty days.[247] Further, while the initial six weeks of maternity leave were required to be taken immediately following the mother's release from the hospital, per DoD policy, the additional eighty-four days of convalescent leave could have been used anytime within one year of the child's birth and did not need to be taken continuously.[248] Finally, the additional convalescent leave was only available to mothers who retained custody of their newborns, indicating that the additional leave was for reasons other than the physical health of the mother.[249]

When Secretary Mabus announced the Department of the Navy's new maternity leave policy, he recognized the difficult choice service women are asked to make

---

[245] *Id*.; DoDI 1327.06, *supra* note 73, at para. 1.k.(2).
[246] Naval Administration No. 182-15, *Maternity and Convalescent Leave Policy* (Feb. 25, 2015) at paras. 3, 4.b [hereinafter NAVADMIN 182-15]; All Navy No. 053/15, *Department of the Navy Maternity and Convalescent Leave Policy* (July 2, 2015) at para. 5 [hereinafter ALNAV 053/15].
[247] *See* Dept. of the Navy Military Personnel Manual No. 1050-180, *Convalescent Leave* (Aug. 22, 2002).
[248] NAVADMIN 182-15, *supra* note 246, at para. 3.
[249] *Id*. at para. 5.

between continuing to answer the call to service and being away from their children for prolonged periods of times.[250] He also expressed his desire to "demonstrate . . . commitment . . . to the women who are committed to serve," by providing "[m]eaningful maternity leave when it matters most."[251] Additionally, when Secretary Mabus provided written guidance to his military forces, he emphasized that "[e]xtended time for a mother with her newborn has tremendous health and psychological benefits for both the mother and child, and helps to ensure that the mother is fully prepared to return to her duties without having to sacrifice crucial time with her child."[252] He also specifically stated that the additional maternity leave would not only provide mothers with time to recover, but would also give them time to bond with their child.[253] Secretary Mabus anticipated these changes would help to recruit more women into the service.[254] Finally, noting that when Google increased its maternity leave policy from twelve to eighteen weeks in 2007, the attrition rate for its female employees dropped by fifty percent, Secretary Mabus likewise expected his new maternity leave policy to help the Department of the Navy retain its skilled, experienced service women.[255]

Despite Secretary Mabus' pioneering efforts, his eighteen-week maternity leave initiative was superseded by Secretary Carter's twelve-week DoD-wide maternity leave

---

[250] Myers, supra note 243.
[251] *Id.*
[252] ALNAV 053/15, *supra* note 246, at para. 4. On December 31, 2015, the author filed a Freedom of Information Act request with the Department of the Navy requesting a copy of all "reports, studies, memoranda, letters, etc." the Navy used to determine its new maternity leave policy. On March 1, 2016, the Navy responded with a single document that described the Navy's authority to set the policy as it did, but did not provide any documents that were actually responsive to the request.
[253] *Id*. at para. 3.
[254] *Id*.; Bryce Covert, *The Navy Wants to Double Its Paid Maternity Leave to Attract More Women*, THINK PROGRESS (May 14, 2015), http://thinkprogress.org/economy/2015/05/14/3659147/navy-paid-maternity-leave/ (last visited Dec. 15, 2015).
[255] *Id*.

mandate less than seven months after its inception.[256] Nonetheless, the Department of the Navy has made its mark on additional parental accommodations that have survived the DoD's reforms.

Next, although the Military Services have considerably less ability to manipulate paternity leave due to its legislative underpinnings, the Navy has implemented a policy that maximizes the flexibility of paternity leave for both the Navy and new fathers. Despite the DoD's guidance that paternity leave "should be taken consecutively,"[257] the Navy has directed that "[t]he full 10 days of paternity leave need not be taken in a single block . . . ."[258] However, Navy guidance advises that paternity leave "should commence once the child is born in order to assist the parent(s) in adapting to the demands of parenthood, formalizing legal requirements, establishing a child care program, and other tasks as required."[259] The Navy has also maximized flexibility for commanding officers by allowing them to grant paternity leave on a case-by-case basis, taking into consideration the "unit's mission, specific operational circumstances, and [the] service member's [particular job]" meaning commanders can deny requests for paternity leave or grant less than ten days.[260]

---

[256] When he directed the new DoD-wide maternity leave policy, Secretary Carter smoothed the waters with new Department of the Navy mothers and mothers-to-be by providing a grandfather clause, which entitled them to up to eighteen weeks of maternity leave if they became pregnant or gave birth on or before March 3, 2016. DTM 16-002, *supra* note 70, at 2.
[257] DoDI 1327.06, *supra* note 73, para. 1.k.(5).
[258] Dept. of the Navy Military Personnel Manual 1050-430, *Paternity Leave* (Dec. 2, 2008) at para. 1.d. [hereinafter MILPERSMAN 1050-430].
[259] Chief of Naval Operations Instruction 6000.1C, *Navy Guidelines Concerning Pregnancy and Parenthood* (June 14, 2007) at Enclosure 1,para. 201.a.(1) [hereinafter OPNAVINST 6000.1C].
[260] MILPERSMAN 1050-430, *supra* note 258, at para. 1.b.

The Navy did not make any significant changes to the DoD's policy regarding adoption leave.[261] It did, however, reiterate that commanding officers "may" authorize an adopting parent "up to" twenty-one days of adoption leave, thereby preserving some flexibility for commanding officers to balance the needs of their mission against the needs of their personnel.[262]

Finally, the Navy's approach to the parental accommodation policy regarding assignment, temporary duty, and deployment deferrals is particularly important due to the unique nature of the Navy's mission, which necessitates having sailors at sea for significant periods of time.[263] Participation in sea duty, as opposed to shore duty, is also critical to upward progression for most sailors.[264] The Navy will allow a pregnant service woman to remain onboard a ship until her 20th week of pregnancy, so long as a medical treatment facility capable of handling obstetrical emergencies is located within six hours of the ship.[265] Similarly, with an appropriate waiver, pregnant service members may retain their flight status until their twenty-eighth week of pregnancy, subject to limitations on certain aircraft.[266]

With regard to service members who adopt a child, the Navy follows the DoD's policy by authorizing a four-month deferral for one service member per family.[267] However, since 2007, the Navy's policy regarding birth mothers has been far more

---

[261] *See* Dept. of the Navy Military Personnel Manual 1050-420, *Adoption Leave* (Dec. 6, 2006) [hereinafter MILPERSMAN 1050-420].
[262] *Id*. at para. 1.
[263] *See* SECNAVINST 1000.10A, *supra* note 240, para. 3.c.
[264] Sandra Jontz, *Navy Transfers Expectant Mothers from Ship to Shore to Finish Tour*, STARS & STRIPES (July 11, 2009), http://www.stripes.com/news/navy-transfers-expectant-mothers-from-ship-to-shore-to-finish-tour-1.93246 (last visited Apr. 3, 2016).
[265] OPNAVINST 6000.1C, *supra* note 259, at para. 104.e.(2).
[266] *Id*. at para. 104.e.(3)(a)1.
[267] *Id*. at para. 202.b.(2).

generous than the four-month-minimum deferment allowed by the DoD.[268] Under Navy policy, service women's assignments, including deployments onboard ships, are deferred for twelve months following the birth of a child.[269] A commanding officer does not have the authority to shorten the duration of the deferment; only the service woman may request a waiver.[270] The stated purpose of the Navy's deferral period is to "allow the servicewoman time to regain her physical strength and stamina in order to perform the duties commensurate with her rate/rank."[271] This stated purpose, however, contradicts the Navy's policy regarding fitness assessments. After returning to duty following child birth, sailors must take a fitness assessment within six months and "conform to the acceptable height/weight standards."[272] Thus, on the one hand, the Navy is saying that it expects it to take twelve months for a woman to "regain her physical strength," but on the other hand it expects it to take six months or less for a woman to become physically fit again. Additionally, if a sailor puts her infant up for adoption, she becomes available for reassignment as soon as she has completed all adoption requirements.[273] The physical trauma of giving birth is identical regardless of whether or not the mother retains the child. Given these inconsistencies, it appears that the Navy's actual purpose for authorizing the twelve-month deferment is paternalistic and based on traditional gender roles to allow the new mother time to care for and bond with her infant.

---

[268] DoDI 1315.18, *supra* note 129, at para. 9.d; *New Instruction Underscores Navy's Commitment to Family Issues*, CAPTAIN'S CALL (June 20, 2007), http://www.navy.mil/cck/NNS070620-04.pdf (last visited Apr. 3, 2016).
[269] OPNAVINST 6000.1C, *supra* note 259, at para. 104.a, c.2.
[270] *Id*. at para. 104.a.
[271] *Id*.
[272] *Id*. at paras. 201.d.(1), 205.b.
[273] *Id*. at para. 202.a.

Thus, it is evident that the Navy has put a great deal of consideration into balancing its mission with other considerations including the maternal desires of its female sailors and the work-life balance of all its service members. Nonetheless, as will be discussed in detail in Parts III.B.2.-3., *infra*, aspects of the Navy's parental accommodations scheme, like the DoD's, is ultimately damaging to females' career advancement and likely driven, albeit inadvertently, by outdated gender stereotypes.

b. Parental Accommodations in the Marine Corps

The Marine Corps operates as an independent Military Service, but is organized as part of the Department of the Navy.[274] As such, the Marine Corps is subject to the directions of the Secretary of the Navy.[275] The Secretary of the Navy extended his policy regarding maternity leave to both the Navy and the Marine Corps. Consequently, the discussion regarding that policy in Part III.B.1.a., *infra*, is also applicable to the Marine Corps.[276] However, the Secretary of the Navy did not extend his policies regarding paternity leave; adoption leave; or establishment of assignment, temporary duty, and deployment deferrals in excess of the DoD-minimum standard to the Marine Corps,

[274] See Dept. of the Navy, *Marine Corps Manual* (1980, incorporating through Change 2, dated Jan. 11, 1984) at para. 1000.1. The Marine Corps has been a part of the Department of the Navy since 1834. The head of the Marine Corps, known as the Commandant of the Marine Corps, must report to the Secretary of the Navy, the civilian head of the Department of the Navy. The Commandant of the Marine Corps, however, is not subordinate to any military members of the Department of the Navy. *See id*.

[275] *Id*.

[276] See NAVADMIN 182-15, *supra* note 246; ALNAV 053/15, *supra* note 246. Following Secretary Mabus' announcement of the eighteen-week maternity leave policy for the Department of the Navy, the Marine Corps issued implementing instructions which predominantly reiterated ALNAV 053/15. *See* Marine Administrative Message 421/15, *Marine Corps Maternity and Convalescent Leave Policy* (Aug. 26, 2015) [hereinafter MARADMIN 421/15]. In the MARADMIN, the Marine Corp made clear that use of the additional 84 days of maternity leave "will not alter the requirements . . . for returning to Marine Corps standards and completing a Marine Corps Physical Fitness Test or Combat Fitness Test." *Id*. at para. 2.D. These standards include taking the physical fitness test "no later than six months after being returned to full duty" by a health care professional. Marine Corps Order 5000.12E, *Marine Corps Policy Concerning Pregnancy and Parenthood* (Dec. 8, 2004) at para. 4.a.(6) [hereinafter MCO 5000.12E].

thereby allowing the Marine Corps to tailor those programs to meet its mission needs and institutional values.

With regard to the paternity leave, while the Marine Corps mandates that commander's "shall authorize 10 consecutive days" of paternity leave,[277] its policy is clearly tilted in favor of commanders' prerogatives and minimizing mission impact over familial responsibilities. For example, when paternity leave may be taken it "will be granted at the commander's discretion depending on the unit's mission and specific operational circumstances."[278] Commanders are to ensure that paternity leave is completed within twenty-five days after the birth of the child, but even then, only "absent any immediate or future operational requirements."[279] Additionally, the policy makes it clear that when a Marine is scheduled to deploy "immediately following the birth, commanders will have the discretion to postpone [paternity leave]."[280]

Another interesting aspect of the Marine Corps' paternity leave policy is its departure from the gender-neutral language employed by Title 10 and the DoD's policy.[281] The Marine's policy unambiguously states four times in less than half a page that paternity leave applies to "male Marines," signaling that female Marines whose wives give birth will not be granted paternity leave by the Marine Corps.[282] While this policy predates Congress' repeal of its ban on lesbians serving openly in the Armed Forces,[283] the Marine Corp has maintained the gender-specific language for the ensuing

---

[277] Marine Corps Order 1050.3J, *Regulations for Leave, Liberty, and Administrative Absence*, Enclosure 1, Ch. 5, para. 1.c.(9)(a) (May 19, 2009) [hereinafter MCO 1050.3J].
[278] *Id*. at para. 1.c.(9)(b).
[279] *Id*.
[280] *Id*. at para. 1.c.(9)(c).
[281] *See* 10 U.S.C. § 701(j); DoDI 1327.06, *supra* note 73, para. 1.k.(5).
[282] *See* MCO 1050.3J, *supra* note 277, at paras. 1.c.(9)(a), (d).
[283] Don't Ask, Don't Tell Repeal Act of 2010, 10 U.S.C. § 654 (Dec. 22, 2010).

4.5 years. If the continuation of its gender-specific policy is intentional, it indicates that the Marine Corps may not be concerned with the work-life balance of certain female Marines, or that its institutional values may remain tied to traditional family structures and gender roles.

With regard to adoption leave, the Marine Corps more evenly balances its mission with its service members' familial needs. Most notably, whereas the DoD merely states that commanders shall grant "up to" twenty-one days of adoption leave, the Marine Corps also established that commanders shall grant "no less than 10 days" leave, thereby affording adopting parents a safeguard not provided for by the DoD.[284] Further, recognizing the "complex and rigorous process of adopting a child," the Marine Corps instructs commanders that they "should allow Marines the greatest latitude possible, while also taking into consideration associated risks related to mission accomplishment."[285] Additionally, the Marine Corps expressly authorizes its service members to take adoption leave intermittently, "due to the arduous process involved when adopting."[286]

While on the surface the Marine Corps' approach to adoption leave applies equally to male and female Marines, as required, and seems to embrace fathers' growing role in their families, that may not be the case. It cannot be ignored that only 7.6 percent of Marines are female, which is the lowest of any of the Military Services.[287] As such,

---

[284] MCO 1050.3J, *supra* note 277, at para. 1.c.(10)(b).
[285] *Id*.
[286] *Id*. at 1.c.(10)(d).
[287] U.S. MARINE CORPS, THE MARINE CORPS DEMOGRAPHICS UPDATE, (Dec. 2014) at 17, http://www.usmc-mccs.org/mccs/assets/File/Demographics%20Booklet%20Dec%202014.pdf (last visited Mar. 26, 2016). According to *The Marine Corps Demographics Update*, as of December 2014, the percentage of female members in each of the Military Services was as follows: Marine Corps – 7.6%, Army – 13.9%, Navy – 17.9%, and Air Force 18.9%. *Id*.

the policy was likely, and appears to have been, written predominantly with Marine fathers in mind. Namely, the Marine Corps' latitude with regard to adoption leave is for the purpose of "assist[ing] the parent(s) in relocating the adoptive child, formalizing legal requirements, establishing the child care program, and other tasks as required" after "the child is ready for placement" with the family.[288] Notably, none of the purposes for the Marine Corps embracing adoption leave pertain to bonding or personally caring for the child, which are traditionally seen as a mother's role. Rather, the reasons expressed for allowing adoption leave are to handle complicated administrative and logistical matters, which are traditionally seen as a father's role. As a result, the Marine Corps' adoption leave policy may provide further insight into the service's gender values.

Finally, with regard to assignment, temporary duty, and deployment deferrals, the Marine Corps exempts female Marines from such duties for six months from the date of delivery of her child.[289] This six-month deferment policy represents a reduction in time from the Marine Corps' previous policy. Prior to June 2007, female Marines were afforded a twelve-month post-delivery deferment.[290] When the Marine Corps announced this change, a representative from the Military Policy Analyst, Manpower and Affairs explained that "Marine Corps policies are constantly reviewed to ensure their application to the force. During the review and staffing process it was felt a six-month deferment provides the best balance between ensuring the health of the mother and child and the requirements of a naval career."[291] If a health care provider deems it necessary for the

[288] *Id*. at 1.c.(10)(b), (c).
[289] MCO 5000.12E, *supra* note 276, at para. 8.d.
[290] Marine Administrative Message 358/07, *Change 2 to Marine Corps Policy Concerning Pregnancy and Parenthood* (June 12, 2007) at paras. 2-3.
[291] A. L. Blanchard, *Marine Moms Back into the Fight Sooner*, MARINE CORPS NEWS (June 26, 2007), http://www.lejeune.marines.mil/News/tabid/1099/Article/512080/ (last visited Mar. 26, 2016).

health of either the mother or the child, commanders may extend the deferral period beyond six months.[292]

Consequently, it is evident that the Marine Corps places greater value on limiting disruption to its mission than on the work-life balance and family needs of its service members. The potential impact of the Marine Corps' approach to long-term retention of women in the Armed Forces will be discussed in greater detail in Parts III.B.2-3., *infra*.

c. Parental Accommodations in the Army

The Army has been arguably the slowest of the Military Services to embrace making institutional changes to promote the recruiting and retention of women. As not only the largest of the Military Services,[293] but also the Service with the greatest number of females,[294] it is not surprising that the Army also received the most Congressional attention for its policies, or lack thereof.[295]

Nevertheless, shortly after the Navy implemented its now-superseded eighteen-week maternity leave policy, the Army announced, in August 2015, that it was reviewing

---

[292] *Id*.; MCO 5000.12E, para. 8.d.

[293] In January 2016, the Military Services had the following numbers of active duty personnel: Army – 478,450; Navy – 324,230; Air Force – 307,597; Marine Corps – 184,418. DEF. MANPOWER DATA CTR, DEPARTMENT OF DEFENSE ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (Jan. 31, 2016), https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (last visited Mar. 26, 2016) [hereinafter DMDC, DOD ACTIVE DUTY MILITARY PERSONNEL].

[294] In January 2016, the Military Services had the following numbers of female active duty personnel: Army – 68,746; Navy – 59,706; Air Force – 58,944; Marine Corps – 14,323. DEFENSE MANPOWER DATA CENTER, TABLE OF ACTIVE DUTY FEMALES BY RANK/GRADE (Jan. 2016), https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (last visited Mar. 26, 2016).

[295] In 2008, *The Washington Post* exposed that the Army had the shortest postpartum deployment deferment of any of the services, sparking the attention of Senator Clare McCaskill. Tyson, *supra* note 147; Press Release, Sen. Claire McCaskill, *supra* note 148. More recently, in July 2015, Representative Niki Tsongas published an op-ed article in the ArmyTimes reproaching the Army for being the only Military Service without a breastfeeding policy. Niki Tsongas, *Commentary: An Environment Where Equality Is Not Yet Reality*, ARMYTIMES (July 1, 2015), http://www.armytimes.com/story/opinion/2015/07/01/army-breastfeeding-policy-commentary-niki-tsongas/29125997/ (last visited Mar. 26, 2016).

its maternity leave policy.[296] At the time, the Army, like the other Services, was utilizing the six-week maternity leave standard.[297] The Army did little to expound on the DoD's policy and even provided an opportunity for commanders to provide its service women with less than forty-two days of postpartum maternity leave. Namely, commanders were directed that prior to approving maternity leave, they were to "[v]erify what, if any, convalescent leave [the] Soldier has taken while assigned or attached to [a] hospital, only that portion is authorized which, when added to hospital-approved leave, will not exceed . . . 42 days if the reason is pregnancy and childbirth."[298] In other words, in certain circumstances, the Army directed commanders to deduct from the forty-two days of maternity leave those day(s) in which the mother was in the hospital giving birth, in clear contravention of the DoD's mandate that maternity leave commences following birth.

Nonetheless, the Army made no further statements about any planned changes to its policy prior to Secretary Carter announcing his DoD-wide eighteen-week maternity leave policy, in January 2016. Following the DoD's new direction, the Army issued implementing instructions in which it properly stated that the "twelve-week period of maternity leave will start immediately following a birth event or the mother's release from hospitalization following a birth event, whichever is later."[299] Additionally, the guidance explained that it "does not limit convalescent leave to twelve weeks when a health care professional or medical authority has deemed that [additional convalescent

[296] Michelle Tan, *Army Reviewing Rules for Maternity, Paternity Leave*, ARMYTIMES (Aug. 7, 2015), http://www.armytimes.com/story/military/careers/army/2015/08/07/army-reviewing-rules-maternity-paternity-leave/31285283/ (last visited Mar. 26, 2016).
[297] *See* DoDI 1327.06, *supra* note 73, at para 1.k.(2).
[298] Army Regulation 600-8-10, *Leave and Passes* (Aug. 4, 2011) at para. 5-7.b.(2) [hereinafter AR 600-8-10].
[299] Army Directive 2016-09, *Maternity Leave Policy* (Mar. 1, 2016) at para. 4.

leave] is warranted."[300] Consequently, since implementing the DoD's new maternity leave policy, the Army is affording greater credence to the postpartum health needs of its female soldiers.

With regard to paternity leave, the Army also announced, in August 2015, that it was reviewing its paternity leave policy.[301] The Army promulgated its paternity leave policy following the enactment of the Duncan Hunter NDAA for Fiscal Year 2009.[302] In its policy, the Army mandated that paternity leave "be taken consecutively and within 45 days after the birth of the child."[303] Also, soldiers who are deployed when their wives give birth "have 60 days after returning from deployment to utilize the 10 days of paternity leave."[304] The Army maintained the gender-neutral language of Title 10 and the DoD's guidance.[305] However, since promulgating its paternity leave policy over seven years ago, the Army has failed to incorporate it into its *Leave and Pass* regulation, which is the document most soldiers reference to ascertain what leave entitlements they do or do not have, despite having revised the regulation in 2011. As such, when soldiers consult what should be the governing regulation, they read that they are limited to ordinary, chargeable leave or to emergency leave, if their commander is provided documentation evidencing that childbirth has placed the soldier's spouse in "a severe life threatening situation."[306] While it is unclear whether the Army's seven-year omission of paternity leave in its governing regulation is the result of negligence or a conscious effort to hide

---

[300] *Id*. at para. 7.
[301] Tan, *supra* note 296.
[302] All Army Activities 062/2009, *Army Guidance for Paternity Leave Auth by Duncan Hunter Natl Def Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)* (Mar. 10, 2009) [hereinafter ALARACT 062/2009].
[303] *Id*. at para. 5.
[304] *Id*.
[305] *See generally*, *id*.
[306] AR 600-8-10, *supra* note 298, para. 6-1.f.(1).

paternity leave benefits from its soldiers, it does indicate that the Army places a low priority on its soldiers' needs to care for their newborn children and spouses who just endured the physical trauma of child birth.

Finally, with regard to assignment, temporary duty, and deployment deferrals, the Army acted promptly, in 2008, when *The Washington Post* and Senator McCaskill criticized it for having the longest deployments of any of the Military Services while maintaining a postpartum deployment deferral that tied for the shortest among the Services.[307] At the time, Army deployments typically lasted fifteen months and postpartum deployment deferrals were only for four months after the mother-soldier gave birth.[308] Within five months, the Army decreased the standard duration of deployments to twelve months for all soldiers and extended deployment and overseas assignment deferrals to six months for new biological mothers and one adopting parent per family.[309] Additionally, commanders were given the flexibility to extend a new mother's deployment deferment past six months when they deemed it to be "operationally feasible."[310] When the Army announced these changes, it explained that it "is all part of emphasizing the importance of family, rebalancing the force, . . . [and increasing] stability for Soldiers and Families."[311] The Army representative also explained that the extended deferment period shows that the Army "recognize[s] that the period of time

[307] *See* Tyson, *supra* note 147; Press Release, Sen. Claire McCaskill, *supra* note 148.
[308] *Id*.
[309] *New Army Parents to Get More Time at Home*, ARMY NEWS SERVICE (July 3, 2008), http://www.army.mil/article/10969/new-army-parents-to-get-more-time-at-home/ (last visited Mar. 27, 2016); Army Regulation 614-30, *Overseas Service* (Mar. 30, 2010) at Table 3-1, para. 3-8.a.(5); All Army Activities 171/2008, *Notification of Pending Postpartum and Adoption Deferment Policy Change* (July 15, 2008) at para. 1 [hereinafter ALARACT 171/2008].
[310] ALARACT 171/2008, *supra* note 309, para. 3-8.a.(5).
[311] *New Army Parents to Get More Time at Home*, *supra* note 309.

after birth is important for the bonding of the mother and child."[312] Thus, the representative's comments demonstrate that the Army's thinking, like that of the other Services, is in terms of traditional gender roles: that bonding with an infant is only an important factor for mothers.

Although the Army has made significant strides in recent years in accommodating work-life balance and the parental needs of its soldiers, its approach remains grounded in values that embrace not only traditional gender roles, but also Industrial Age notions of the ideal worker, unencumbered by family considerations. The potential impact of the Army's parental accommodation policies on the long-term retention of women will be discussed further in Parts III.B.2-3., *infra*.

d. Parental Accommodations in the Air Force

The Air Force began seriously reevaluating and prioritizing its approach to diversity and airmen's work-life balance when Deborah Lee James took office as its second female Secretary of the Air Force, in December 2013.[313] From the start of her tenure, Secretary James made clear that "recruiting, retaining and reshaping" the Air Force was one of her top priorities.[314] Her vision included "getting more diversity of thought . . . [from people] from diverse backgrounds" and "achieving a work-life balance."[315]

---

[312] *Id*.
[313] *See* Rich Lamance, *SecAF Outlines Top Priorities during 'State of AF' Address*, Air Force News Service (Feb. 24, 2014), http://www.af.mil/News/ArticleDisplay/tabid/223/Article/473409/secaf-outlines-top-priorities-during-state-of-af-address.aspx (last visited Mar. 28, 2016); Jon Harper, *Deborah Lee James Confirmed as Next Air Force Secretary*, STARS & STRIPES (Dec. 13, 2013), http://www.stripes.com/news/deborah-lee-james-confirmed-as-next-air-force-secretary-1.257331 (last visited Mar. 28, 2016).
[314] Lamance, *supra* note 313.
[315] *Id*.

Nevertheless, Secretary Mabus outmaneuvered her by announcing his Department of the Navy-wide maternity leave reform, in July 2015.[316] Within a week of Secretary Mabus' announcement, the Air Force stated that it was also looking into extending paid maternity leave for its airmen.[317] Subsequently, in December 2015, Secretary James guaranteed that "one way or another, the Air Force will triple its paid maternity leave benefit to eighteen weeks."[318] She stated that she "believe[d] in what the Navy did" and that "it was the right thing to do," so the Air Force will "do the same thing."[319] Secretary James believed the Pentagon would extend maternity leave to eighteen weeks for all members of the Armed Forces as part of its Force of the Future initiatives.[320] If the Pentagon did not extend maternity leave, however, Secretary James pledged to do it herself.[321] As Secretary James predicted, the Pentagon did institute a DoD-wide maternity leave policy, only it was for twelve weeks rather than the eighteen weeks she expected, foreclosing her promise of eighteen weeks of maternity leave for the Air Force.[322]

With regard to paternity leave, the Air Force promulgated its implementing instructions within two months of the President signing the Hunter Douglas NDAA for

---

[316] Meghann Myers, *Air Force Considering Longer Maternity Leave*, AIRFORCETIMES (July 8, 2015), http://www.airforcetimes.com/story/military/2015/07/08/air-force-considering-longer-maternity-leave/29869643/ (last visited Mar. 28, 2016).
[317] *Id*.
[318] Stephen Losey, *Air Force Secretary Pledges to Triple Maternity Leave for Airmen*, AIRFORCETIMES (Dec. 10, 2015), http://www.airforcetimes.com/story/military/pentagon/2015/12/09/james-pledges-to-triple-maternity-leave-for-airmen/77045926/ (last visited Mar. 28, 2016).
[319] *Id*.
[320] *Id*.
[321] *Id*.
[322] Secretary of the Air Force, Memorandum for All Airmen, *Extending Maternity Leave* (Feb. 9, 2016), *available at* http://www.misawa.af.mil/shared/media/document/AFD-160209-066.pdf (last visited Mar. 28, 2016).

Fiscal Year 2009.[323] Additionally, when the Air Force announced the new policy, a representative from the Air Force Personnel Center advised that "[t]his is going to have a positive impact on our Air Force families. By giving our new dads more time to bond with mom and baby, we're building a stronger Air Force family."[324] Despite the representative's reference to "dads," the Air Force has maintained the policy in gender-neutral terms, consistent with Title 10 and the DoD's guidance.[325] Finally, within a year, the Air Force updated its *Military Leave Program* instruction to include the paternity leave policy.[326] The Air Force requires that paternity leave be taken consecutively and "no later than one year following the birth" of the child.[327]

Finally, with regard to assignment, temporary duty, and deployment deferrals, the Air Force has been steadily increasing the deferral period for the past seven years. First, in 2009, it announced its "commitment to taking care of its people" by increasing the deferment policy from four months to six months for both new birth mothers and adoptive parents.[328] Prior to that change, the Air Force was the only remaining Military Service that provided a deferment period of less than six months.[329] More recently, in 2015, the Air Force again extended its post-childbirth deferral from six months to twelve

---

[323] Personnel Services Delivery Memorandum 08-63, *Paternity Leave for Service Members (Force Management and Customer Service Elements; Functional Category: Leave)* (Dec. 12, 2008), http://robinsfss.com/wp-content/uploads/2015/06/paternityleaveforservicemembers1.pdf (last visited Mar. 28, 2016) [hereinafter PSDM 08-63].
[324] Air Force Personnel Center, *Congress Authorizes Paternity Leave* (Dec. 15, 2008), http://www.afpc.af.mil/news/story.asp?id=123128001 (last visited Mar. 28, 2016).
[325] *See* Air Force Instruction 36-3003, *Military Leave Program* (Oct. 26, 2009) at Table 7, Rule 48 [hereinafter AFI 36-3003].
[326] *Id*. at 2.
[327] *Id*. at Table 7, Rule 48.
[328] Air Force Personnel Center Public Affairs, *Assignment Deferment Extended for Births, Adoptions* (Sept. 25, 2009), http://www.afpc.af.mil/news/story.asp?id=123169602 (last visited Mar. 28, 2016).
[329] *Id*.

months.[330] The increase in the deferment period ties the Air Force's policy with the Navy's for the longest deferment.[331] In announcing the change, an Air Force official concluded that "the overall impact on manning and deployment levels . . . resulting from the increased deferment time will be negligible. . . . This should allow minimal disruption to mission planning/training for deployments and/or assignments and allow units to more seamlessly execute [their missions]."[332] The policy change did not include service members who adopt a child; therefore, the adoption deferment period remains at six months.[333]

In short, although the Air Force has lagged behind the Navy in implementing new diversity and other work-life balance policies, when it does implement them, it generally does it with success. Nonetheless, as with the Navy's policies, the sum total of the Air Force's parental accommodations schemes may prove to be a Pyrrhic victory for women in the Armed Forces.

2. Deployment Deferrals Epitomize the Problem of Differential Treatment between the Genders

As discussed in Part II.C., *infra*, postpartum deployment deferrals do not apply equally to male and female service members; they are a benefit provided exclusively to women.[334] Service women are exempt from deploying for at least six to twelve months after the birth of their children, depending in which Military Service they are assigned.

---

[330] Air Force Instruction 36-2110, *Assignments* (July 16, 2015, Incorporating Air Force Guidance Memorandum 2015-03) at Table 2.2, Line 1 [hereinafter AFI 36-2110]; Stephen Losey, *New Air Force Rules Give New Moms Longer Breaks from Deployments*, AIRFORCETIMES (July 8, 2015), http://www.airforcetimes.com/story/military/2015/07/08/new-moms-can-delay-deployment-after-giving-birth/29861997/ (last visited Mar. 28, 2016).
[331] Losey, *supra* note 330.
[332] *Id*.
[333] AFI 36-2110, *supra* note 330, at Line 16.
[334] *See generally*, DoDI 1315.18, *supra* note 129; DoDI 1342.19, *supra* note 143.

When the deferral period is added to the nine months of pregnancy when service women are deemed non-deployable,[335] they ultimately do not deploy for at least one-and-a-half to nearly two years. All the while, male service members continue to deploy as needed.

Neither of the DoD regulations that provide for deployment deferrals articulate the Department's reasons either for granting postpartum deferrals to military mothers, or for the absence of any deferral benefit for military fathers after the birth of their children.[336] Neither regulation indicates that the postpartum deferral period is based on considerations for the mother's health.[337] In fact, given that waiver authority is exclusively in the hands of the mother, and not her physician, the regulations would permit a new mother to waive the deferment at the expense of her own health.[338] Because the deployment deferral policy does not hinge on the actual postpartum health of the mother, its purpose appears to be paternalistic in nature and/or intended to allow those whom the DoD sees as primary caregivers, i.e., mothers, time to care for their infants.

Some may argue that deployment deferrals are only necessary for mothers because only mothers are capable of breastfeeding. This argument is flawed, however, as breastfeeding is only one component of parental caregiving. And, although it is medically preferable, it is not necessary. It is illogical to assume that the Pentagon would maintain a policy aimed at not interrupting breastfeeding by exempting *all* new mothers

---

[335] The author does not disagree with pregnant service members being deemed non-deployable. Apart from the debatable moral implications of deploying pregnant women, the physical demands of deployment may not be possible for many pregnant women to accomplish. Further, it would not be fiscally feasible to make obstetricians available to deployed pregnant service women.

[336] *See generally* DoDI 1315.18, *supra* note 129; DoDI 1342.19, *supra* note 143. Additionally, the flaws inherent in the rational voiced by the Military Services regarding their service-specific deferment policies was discussed in Part III.B.1, *infra*.

[337] Malcolm Wilkerson, *Missing the Men: Defining Female Servicemembers as Primary Caregivers in Deployment Deferral Policy*, 34 U. HAW. L. REV. 161, 163 (2012).

[338] *Id*. at 164.

from deployment, even though nearly one-third never begin breastfeeding and within six months two-thirds are not breastfeeding.[339] Rather, if this were the aim, the Pentagon would only defer deployment for those mothers who are breastfeeding, and only for so long as the mother continues breastfeeding.[340]

The unfortunate truth is that the DoD's and Military Services' policies pertaining to deferrals perpetuate the stereotype that mothers are supposed to be the primary caregivers in a family.[341] The DoD has historically demonstrated this belief. Until 1974, the military maintained a policy that authorized the involuntary discharge of any service woman who became pregnant or assumed custody of child.[342] The Pentagon continued to demonstrate its belief in this stereotype during the Gulf War in the early 1990s, which was prior to its current deployment deferral policy.[343] During the war, the DoD offered service women who had a child the option to not deploy.[344] This option was made available to all military mothers regardless of whether or not they were married.[345] By contrast, not one service man was extended the same offer, including single fathers.[346]

The current deployment deferral policy is little more than a modest improvement of the Gulf War program. Indeed, the stark difference in the current policy's treatment of service men and service women could still be construed to indicate the DoD's belief that

---

[339] See discussion infra Part III.A.
[340] In the military, it is a crime, punishable by up to five years confinement and a dishonorable discharge, for any service member to knowingly make a false official statement. Consequently, it would be easy for commanders to ascertain whether a new mother is still breastfeeding: all they would have to do is ask. *See* Uniform Code of Military Conduct § 31(a), (e), *Article 107—False Official Statements* (2012).
[341] Wilkerson, *supra* note 337, at 178.
[342] Root, *supra* note 207, at 145 (citing BETTIE J. MORDEN, THE WOMEN'S ARMY CORPS 1945-1978 305 (1990)).
[343] Wilkerson, *supra* note 337, at 179.
[344] *Id*.
[345] *Id*.
[346] *Id*.

men are its indispensable warfighters whose role as fathers must give way to their job as airmen, sailors, soldiers, or Marines; whereas women's military responsibilities can readily take a back seat to her responsibilities as a care giver.[347] At a minimum, the policy suggests that women are temporarily expendable from deployments, whereas men are not.[348]

Scrutiny of the deployment deferral policy as it plays out between the sexes based on marital status also reveals the Pentagon's belief that women are to serve as the primary caregiver in any context.[349] First, regardless of their marital status, all military mothers always receive the postpartum deployment deferral.[350] For military fathers, the opposite is true; regardless of their marital status, fathers are denied any deployment deferral following the birth of their child.[351] Thus, if the father is in a dual-military marriage, the DoD expects the mother to stay at her home station with the newborn while the father deploys.[352] Regardless of whether the father may be better able to care for the infant, whether the military mother has a more mission-crucial job, or whether the dual-military couple prefers that the mother deploy (similar to the choice made available to dual-military couples who adopt a child), the DoD makes the military mother available for childcare while forcing the military father to focus on his military duties.[353] Likewise, if the father is married to a civilian spouse, the Pentagon presumes that she will be available to care for their child.[354] Finally, if the father is a single father with sole

---

[347] *Id*.
[348] *Id*.
[349] *Id*.
[350] *Id*.
[351] *Id*.
[352] *Id*. at 179-80.
[353] *Id*. at 164.
[354] *Id*. at 179.

custody of his child, the father is expected to execute his family care plan, which details his plan for alternative long-term, full-time care for his child, and deploy.[355] Undeniably, the DoD's deferral policy demonstrates its lingering belief in traditional gender roles.

Furthermore, our country has a history of enacting paternalistic policies aimed to protect women in the workforce that ultimately impair their career prospects. Prime examples of this are state labor laws that were pervasive from the 1940's through the 1970's, which required pregnant women to take leave from their jobs after childbirth. While these laws were paternalistically designed to protect the health of women, it had the effect of forcing women out of employment because the laws did not require employers to retain pregnant employees or to rehire them upon the expiration of the mandated leave period.[356] In another feat of misguided paternalism, the U.S. Congress attempted to rectify this problem by passing the PDA. While the PDA prohibited employers from firing women on the basis of pregnancy, it nonetheless provided a loophole for employers to terminate a mother's employment if she had to take any time off from work to care for her children. Thus, in attempting to provide paternalistic protection for working mothers, the PDA failed to see the larger picture and consequently failed to provide women job security in the long run.[357] In the same vein, the DoD's deployment deferral policy aims to protect women from having to choose between their military service and their children in the short term, but it missed the broader implications that such a substantially imbalanced policy can have on the career progression of service women.

---

[355] *Id*. at 180.
[356] *See* discussion infra Part II.D.1.
[357] *See* discussion infra Part II.D.1.

The disparity in treatment between gender classes in deployment deferral policies has the potential to negatively impact the promotion rates of military mothers. A 2003 study into the effect of deployments on promotion to E-5 confirmed that participation in a deployment reduced the expected time to promotion.[358] The Army recently quantified the importance of deployment to promotion for its enlisted troops by awarding up to 60 points toward promotion for individuals who had spent time in a combat zone.[359] Similarly, the Navy requires its sailors to alternate between sea tours and shore tours.[360] The more tours a sailor serves at sea, the more his or her chances of promotion improve.[361] Thus, deployments and sea duty are important factors in the promotion of most military members, yet military mothers alone are missing opportunities to deploy because of parenthood.

Some may argue that any detrimental career impacts caused by a deployment deferral are accepted by the military mother because she chooses to not waive the deferment. That argument, however, is not realistic. For one, military members generally assume that when the military provides a benefit, it will not then penalize a member for utilizing that benefit. Accordingly, many service women may not realize that by not taking the extraordinary, affirmative step of waiving their deferral, they could be harming their career progression. Furthermore, when offered a means to attain some

---

[358] RAND, *Empirical Results from the Promotion/Reenlistment Model*, 66 (2003), https://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1594/MR1594.ch5.pdf (last visited Apr. 3, 2016).
[359] Jim Tice, *New Rules for Enlisted Promotions*, ARMYTIMES (Feb. 23, 2015), http://www.armytimes.com/story/military/careers/army/enlisted/2015/02/23/army-promotion-regulation-updated/23492405/ (last visited Apr. 3, 2016). The enlisted promotion system is based on accumulating point. The more points a troop accumulates, the higher the likelihood that he or she will fall above the quota-cut-off line for the number of troops that can be promoted to a particular rank in a particular year.
[360] Jontz, *supra* note 264.
[361] *Id*.

degree of work-life balance, particularly at such a crucial family juncture, few mothers would choose a long-duration separation from their infant.

The author is not proposing to eliminate deployments as a positive factor toward promotions. Deployments are quintessential to military service. Further, completion of a deployment provides insight into a service member's military character and potential to serve effectively in a rank that requires greater responsibility.[362] Nor is the author proposing to eliminate deployment deferrals for military mothers. Such action would undoubtedly have a disastrous effect on mid-career retention of women in the military. Rather, the author is proposing a balanced solution: the DoD's and Military Services' deployment deferral policies should reflect the relative equality of men's and women's abilities to parent infants and to contribute, in person, to deployed missions. In creating a new deferment policy for biological parents, the DoD should cast aside its outmoded notions of gender roles and focus on the actual needs and best interests of both its missions and its military families.[363] If mission needs so require, the DoD could also consider a shared or shifting deferment benefit similar to the flexibility provided to dual-military couples who adopt a child.

By establishing a more gender-balanced deferment policy, military mothers will not be alone in missing deployment opportunities because of parenthood; that potential disadvantage to promotion selection will be shared by military fathers too. As a result, the records of military mothers will be more on par with those of their male counterparts,

---

[362] *See, e.g., Secretary of the Air Force Memorandum of Instructions for CY15 Air Force Reserve (AFR) Line and NonLine Lieutenant Colonel Boards*; and *CY15 AFR Major Selective Continuation Board* (undated) (providing instructions to promotion board members on consideration of deployment information in the records of officers competing for promotion).
[363] Wilkerson, *supra* note 337, at 180.

and they will not be unilaterally disadvantaged. If the DoD fails to implement a more gender-neutral postpartum assignment policy, it will likely continue to be ineffective at retaining women long term because they will unsatisfactorily progress in rank. Consequently, it's in the best interest of the Force of the Future to restructure the current deferment policy.

3. The DoD's Directive that Women Shall Not Be Disadvantaged because of Maternity Leave Is Insufficient

When the Pentagon provided its written directive to the Military Services regarding its new DoD-wide twelve-week maternity leave policy, it included a provision intended to protect military mothers from negative career impacts that could result from taking maternity leave.[364] The directive, however, will prove to be insufficient to shield military mothers from potential negative career impacts. The provision states, in its entirety:

> No member shall be disadvantaged in her career, including limitations in her assignments (except in the case where she voluntarily agrees to accept an assignment limitation), performance appraisals, or selection for professional military education or training, *solely* because she has taken maternity leave (emphasis added).[365]

When the Secretaries of the Military Departments implemented the DoD's directive, they each issued written guidance to their Services, containing a protective provision that varied in the level it mirrored the original directive. The Secretary of the Navy re-promulgated the protective provision verbatim for the Navy and Marine Corps.[366] The Secretary of the Army changed "No member shall" to "No Soldier will,"

---

[364] DTM 16-002, *supra* note 70, at 2, 4.
[365] *Id*. at 4.
[366] Naval Administration No. 046/16, *Maternity and Convalescent Leave Policy Update* (Feb. 25, 2016) at para. 10 [hereinafter NAVADMIN 046/16] (stating "No member shall be disadvantaged in her career, including limitations in her assignments (except in the case where she voluntarily agrees to accept an

but otherwise re-promulgated the provision verbatim.[367] The Secretary of the Air Force made the most substantial changes to the provision, stating, "Furthermore, no Airman shall be disadvantaged in her career, including limitations to assignments, evaluations, or selection for [professional military education] because she has taken Maternity Leave."[368]

A significant problem with the DoD's provision, and the provisions of all of the Military Services except the Air Force, is the use of the word "solely." By using the word "solely," they are sanctioning decisions to disadvantage a military mother for taking maternity leave, so long as the decision maker can articulate an additional factor for the decision to disadvantage her. Under this wording, it would be permissible, for example, for a commander to downgrade a military mother on her performance appraisal or not select her to attend training because she took maternity leave and did not have her boot laces properly tucked in on one occasion. Although this is an extreme example, it illustrates the wide latitude the current verbiage permits. By allowing maternity leave to be *a* factor, just not the *sole* factor, for disadvantaging a military mother's career, the provision essentially provides no protection against such invidious decisions.

The Air Force's version corrects this verbiage problem, but nonetheless, it is unlikely that it will meaningfully protect military mothers from career disadvantages resulting from taking maternity leave. A seasoned military officer with more than 20 years of service and three separate experiences as a commanding officer explained the problem at the micro level:

---

assignment limitation), performance appraisals, or selection for professional military education or training, solely because she has taken maternity leave.").

[367] Army Directive 2016-09, *Maternity Leave Policy* (Mar. 1, 2016) at para. 9 (stating "No Soldier will be disadvantaged in her career, including limitations in her assignments (unless she voluntarily agrees to accept an assignment limitation), performance appraisals, or selection for professional military education or training, solely because she has taken maternity leave.".

[368] Deborah Lee James, *Memorandum for All Airmen: Extending Maternity Leave* (2016) at 1.

> While I would never consciously downgrade a female in my unit for taking maternity leave, I can't say that her absence wouldn't have an impact on some decisions. If I was having to decide between two star performers, which one I was going to stratify[369] as my number one troop that year on his or her [performance appraisal], it may be difficult to say that the person that was not contributing to the unit's success for twelve-plus weeks ultimately out-performed the one that was there all the time. I mean, if they really were equal performers when they were both on the job, how do I just ignore the extra three months of work that the one who didn't take maternity leave contributed to my unit?[370]

Every year, commanders, or their designated subordinates, must prepare performance appraisals on all of the service members under their command. Those appraisals, in turn, are an important criterion used to determine whether a service member should be competitively selected for promotion to the next higher rank. For officers, the process is substantially similar across the Military Departments: the officers' records, including their appraisals, are brought before a board, and that board selects a predetermined number of officers to be promoted, based on the quality of their records.[371] Therefore, the more and better stratifications an officer has on his or her performance appraisals, the more likely it is that he or she will be selected for promotion.

For enlisted personnel, the promotion system varies from Service to Service, but is generally based on accumulating points through duty performance and testing; the

---

[369] A stratification is a "[q]uantitative comparison of an individual standing among peers within a definable group and within a specific evaluators scope of authority (i.e., direct rating chain)." Air Force Instruction 36-2406, *Officer and Enlisted Evaluation Systems* (Nov. 30, 2015) at 340 [hereinafter AFI 36-2406]. All of the Military Departments use stratifications, to varying degrees, in their officer and enlisted performance evaluations. *Id*. at para. 1.12.1.4.1.5, 1.12.1.6.1 (explaining stratification procedures for officers and enlisted evaluations, respectively); Bureau of Naval Personnel Instruction 1610.10C, Navy Performance Evaluation System (Apr. 20, 2011) at para. 10 (authorizing "[n]umerical ranking among peers"); Army Regulation 623-3, *Evaluation Reporting System* (Nov. 4, 2015) at para. 3-7.4.f.(d), 3-9.2.a. (explaining stratification procedures for enlisted and officer evaluations, respectively); Army Regulation Dept. of the Army Pamphlet 623-3, *Evaluation Reporting System* (Nov. 10, 2015) at 104, 116 (stating that raters may assess service members' overall performance compared to others of the same rank).

[370] Interview with Anonymous, Commander, Dept. of Def. (Mar. 22, 2016).

[371] *See generally*, Rod Powers, *Military Commissioned Officer Promotions*, ABOUT.COM (2006), http://usmilitary.about.com/od/promotions/l/blofficerprom.htm (last visited Apr. 8, 2016).

more points an enlisted member accumulates, the better his or her chances of being selected for promotion. The quality of the service member's performance appraisals are an important factor in accumulating points.[372] Thus, like for officers, the more often an enlisted service member is stratified, and the higher those stratifications are, the more likely it is that he or she will be selected for promotion.

Consequently, if a military mother is not stratified or receives a lower stratification, not blatantly because she took maternity leave, but for the benign reason that she missed out on participating in major projects or events, or did not contribute to her unit's success in general for a quarter of a year, while all of her peers continued to contribute, it could have a very real impact on her chances to be selected for promotion. If, however, some of her male peers are taking paternity leave of similar duration during the same year, the potential disadvantage would be diluted. This disadvantage to military mothers would become even more diluted at promotion time if military fathers Service-wide are also taking longer-duration paternity leave. For the upcoming generation of women in the military, career progression is a high priority.[373] If these upcoming service women are dissatisfied with their career progression, or if they believe they will be passed over for promotion because of the quality of their appraisals, they will be more willing than their predecessors to leave the military to seek more rewarding employment elsewhere.[374]

---

[372] *See generally*, Stephen Losey, *New EPR System: Leaders Answer Your Questions*, AIRFORCETIMES (Jan. 12, 2015), http://www.airforcetimes.com/story/military/careers/air-force/2015/01/12/new-epr-system/21460541/ (last visited Apr. 8, 2016); Tice, *supra* note 359;
[373] Pricewaterhouse Coopers, *Millennials at Work: Reshaping the Workforce*, 4 (2011), https://www.pwc.com/gx/en/managing-tomorrows-people/future-of-work/assets/reshaping-the-workplace.pdf (last visited Mar. 29, 2016).
[374] *Id*.

The DoD's attempt to prevent career disadvantages resulting from maternity leave by instituting a one-sentence directive to that effect is woefully insufficient. If the Pentagon actually wants women, as a class, to not be disadvantaged by maternity leave, it needs to even the playing field between maternity and paternity leave, including by pushing Congress to allow military fathers to take substantially more paternity leave, not merely the fourteen days it is currently requesting. Only when military fathers are also absent from the workplace for durations significantly closer to those of military mothers, will military mothers not be alone in potentially suffering career disadvantages for taking parental leave. When military mothers are not unique in this disadvantage, it will not only help them at the micro level by leveling the comparisons unit commanders make between the contributions of individual members to their units, but it will also help at the macro level by making the records of military mothers more on par with those of military fathers.

C. Thinking Outside the Five-Sided Box

Structuring a new parental accommodations plan that transcends the traditional notions of gender roles and paternalism to which the U.S. military has clung will undoubtedly be challenging, but it is imperative. Secretary Carter was correct when he recognized that upcoming generations have different priorities and motivations than those of the generation currently leading the DoD.[375] He was also on point when he acknowledged the need for the military to "strengthen the support [it] provide[s] to military families to improve their quality of life" and to "modernize [its] workplace and

[375] *See* Carter, Ceremonial Swearing-In, *supra* note 39 (stating that "every generation is different" and that the DoD must find a way to "attract the finest among them").

workforce, to retain and attract the top talent."[376] Moreover, Secretary Carter understood that the DoD needs to "think outside this five-sided box and be open to . . . best practices, ideas, and technologies."[377] Nonetheless, in attempting to modernize and strengthen its support to military families, the Pentagon did so within a framework of gender stereotypes that do not comport with the ideals of the upcoming generation.

Every person currently in the Armed Forces who is under thirty-four years of age is part of the Millennial generation.[378] That means Millennials already constitute nearly 80 percent of the active duty military.[379] The Millennial generation characteristically places greater emphasis on their personal needs than on those of their employer.[380] Work-life balance is a significant priority for both males and females of this generation.[381] Millennial fathers, like their female counterparts, are increasingly expecting to have flexibility in their employment that allows them to play a key role in raising their children.[382] Consequently, improving workplace flexibility is a meaningful way to boost recruiting and improve retention of Millennials.[383]

---

[376] Carter, Force of the Future, *supra* note 2.
[377] Carter, Ceremonial Swearing-In, *supra* note 39. The "five-sided box" refers to the Pentagon.
[378] There is not a universally accepted delineation for what birth years constitute the Millennial generation. A commonly cited delineation, however, is for those individuals born between 1982 and 2003. *See*, *e.g.*, Sarah Keeling, *Advising the Millennial Generation*, NACADA J., 30, 31 (2003) (citing William Strauss & Neil Howe, *Generations: The History of America's Future, 1584 to 2069*, New York: Quill/William/Morrow (1991)).
[379] DEPT. OF DEF., 2014 DEMOGRAPHICS PROFILE, *supra* note 28, at 35.
[380] Pricewaterhouse Coopers, *Millennials at Work*, *supra* note 373, at 3.
[381] *Id*. at 8. Karin & Onachila, *The Military's Workplace Flexibility Framework*, *supra* note 29, at 183 (citing Ken Barrett, *Human Capital Management for Defense*, at 10-12 (presented Feb. 15, 2011), http://www.public.navy.mil/bupersnpc/support/tflw/Documents/Life%20Work% 20Integration.ppt.).
[382] Dana Wilkie, *Millennial Dads Demand Flexible Hours, Robust Benefits to Help Raise Kids*, SOC'Y FOR HUMAN RES. MGMT. (July 10, 2015), https://www.shrm.org/hrdisciplines/diversity/articles/pages/millennial-parents.aspx (last visited Apr. 10, 2016).
[383] *Id*. (*citing* Marcie Pitt-Catsouphes, *et al.*, *Workplace Flexibility: Findings from the Age & Generations Study* (2009), http://www.bc.edu/content/dam/files/research_sites/agingandwork/pdf/publications/IB19_WorkFlex.pdf; The Lattice Group, http://thelatticegroup.org/about-5/about-the-lattice-group (non-profit that "conducts research and sparks dialogue about work-life issues from a Gen Y perspective").).

Since at least 2002, the Pentagon has been aware that the "lifestyle values of American workers from which the [D]epartment draws are changing," including a desire to spend more time with their families.[384] In light of these changing values, the GAO recommended to the DoD that offering extended time off to new military parents, both mothers and fathers, would help the Department retain personnel.[385] Despite this recommendation, the DoD opted to focus exclusively on extending benefits to new mothers.[386] However, the DoD needs to be concerned with retaining all its top talent, not just its top female talent.

The military is unique in its hierarchy; it is a closed system. The military has no option to "lateral in" personnel from the civilian sector mid-career to fill its higher ranks.[387] Virtually every member joins the military as a low-ranking officer or enlisted member.[388] This means that the person who will be the Chairman of the Joint Chiefs of Staff in 2036 is already serving in the military.[389] Thus, the quality of the upper ranks of the military is entirely dependent upon the quality of individuals it is able to recruit and retain. If top performers choose to separate from military service, there is no other choice than to promote more mediocre performers to fill vacancies in the higher ranks.

---

[384] GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE SUBCOMMITTEE ON PERSONNEL, COMMITTEE ON ARMED SERVICES, U.S. SENATE: ACTIVE DUTY BENEFITS REFLECT CHANGING DEMOGRAPHICS, BUT OPPORTUNITIES EXIST TO IMPROVE, Sept. 2002, at 2, 10 [hereinafter GAO, BENEFITS] (referencing Office of the Deputy Assistant Sec'y of Def. for Military & Fam. Pol'y, *A New Social Compact: A Reciprocal Partnership Between the Department of Defense, Service Members and Families* (May 2002). In response to a Presidential directive that the Secretary of Defense review quality-of-life issues for military personnel and provide recommendations for improvements, the DoD published its *New Social Compact*, which was a "strategic human capital plan addressing quality-of-life issues and benefits." *Id*. at 2.

[385] *Id*. at 10.

[386] *Id*. at 18.

[387] Campbell, *supra* note 12.

[388] *Id*.

[389] Shelly M. Wadsworth & Kenona Southwell, *Military Families: Extreme Work and Extreme "Work-Family"*, 638 ANNALS AM. ACAD. POL. & SOC. SCI. 163, 169 (2011). The Chairman of the Joint Chiefs of Staff is the highest-ranking officer across all the Military Services.

Consequently, it is imperative that the Pentagon infuse its thinking with new, innovative, and flexible approaches that appeal to Millennials, including its approach to parental accommodations, or it risks losing its top-tier mothers and fathers from that generation.

Two of the most frequently cited factors that service members consider when deciding whether to stay in the military are their spouses' support of their continued military careers and the service members' own perception of their work-life balance.[390] The disharmony that results from tension between work and family responsibilities causes many top performers, both men and women, to choose to leave the military.[391] These factors do not just affect the retention of military mothers, as the Pentagon seems to think. Rather, these factors also influence the retention decisions of the fifty-seven percent of male active duty service members who have families. This career-impacting influences of family satisfaction and work-life balance will continue to increase as more Millennials enter the military and start families.[392] Implementing a more balanced parental accommodations scheme is, therefore, essential to the military retaining its top talent across gender lines.

The United States military has been an all-volunteer force for over 40 years.[393] During that time, the military has had to change its mindset, and adopt new policies and

---

[390] Karin & Onachila, *supra* note 29, at 190 (citing Shelley MacDermid Wadsworth, *Workplace Flexibility 2010 Briefing: Supporting our Nation's Military Families: The Role of Workplace Flexibility* (Dec. 18, 2008), http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=690).
[391] *Id*. (citing Stephen Miller, *Thought Leaders Call Flexible Workplaces "Strategic Imperative*,' SOC'Y FOR HUMAN RES. MGMT. (Feb. 14, 2011), http://www.weknownext.com/workplace/thought-leaders-call-flexible-workplaces-strategic-imperative). *See also* Derek Stewart, Government Accountability Office, Testimony before the Subcommittee on Personnel, Armed Services Committee, U.S. Senate: Active Duty Benefits Reflect Changing Demographics, but Continued Focus Is Needed (Apr. 11, 2002) at 5 (stating that "[a] significant body of research by the military services shows that family satisfaction with military life can significantly influence a servicemember's decision to stay in the military or leave.").
[392] DEPT. OF DEF., 2014 DEMOGRAPHICS PROFILE, *supra* note 28, at 45.
[393] RAND Corporation, *The Evolution of the All-Volunteer Force*, 2 (2006).

programs, in order to successfully compete against private-sector employers to recruit and retain high-quality personnel.[394] The military has already demonstrated its ability to adapt to enlightened social changes such as racial desegregation and women in combat.[395] Now it must adapt to changing gender roles and the expectations of greater work-life balance of the upcoming generations.

1. The Pentagon Must Develop a Fair and Flexible Strategic Plan for Parental Accommodations

The DoD offers an array of parental accommodations in its current benefits scheme. However, these accommodations were developed piecemeal, creating an end result that heaps accommodations on military mothers, while scarcely acknowledging male service members' responsibilities as fathers.[396] The Pentagon needs to strategically reevaluate the entire scheme of parental accommodations into a gender-balanced and flexible plan, otherwise it risks ultimately disadvantaging military mothers and disenfranchising military fathers.[397]

The following table summarizes the previously-discussed parental accommodations that are currently available to military personnel:[398]

---

[394] Wadsworth & Southwell, *supra* note 389, at 169. The Armed Forces already suffers a mounting recruiting disadvantage in that, as of 2016, only approximately twenty-five percent of America's seventeen- to twenty-four-year olds are even eligible to join the military: obesity being one of the main disqualifying factors. Robert Longley, *Up to 75 Percent of US Youth Ineligible for Military Service*, ABOUT NEWS (Feb. 17, 2016), http://usgovinfo.about.com/od/usmilitary/a/unabletoserve.htm (last visited Apr. 10, 2016).
[395] *See, e.g.*, *Desegregation of the Armed Forces*, Harry S. Truman Library & Museum, http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/index.php?action=bg; Carter, Women-in-Service Review, *supra* note 1.
[396] *See* Stewart, *supra* note 391, at 14 (broadly discussing DoD benefits).
[397] *See id*.
[398] *See* discussion *infra* Parts II.A.1-3, II.B, and III.B.1.a.

Service Member	Parental Leave	Deferral
Biological Mother, married or unmarried	12 weeks	Minimum 4 months (authorized 6-12 months per Service policies)
Biological Father, married	10 days (DoD has requested an increase to 2 weeks)	------
Biological Father, unmarried	------	------
Adoptive Mother/Father dual-military or unmarried	3 weeks (available to only one parent in a dual-military couple; DoD has requested 2 weeks for the second parent)	4 months (available to only one parent in a dual-military couple)
Adoptive Mother/Father married to a civilian	3 weeks	------

The inequality and inconsistences of the current parental accommodations scheme are readily apparent when it is viewed en masse. The DoD has repeatedly verbalized its recognition of the value of supporting military families, yet its parental accommodations scheme indicates that its concept of "family" is significantly behind the times.[399] The DoD needs to consolidate its parental accommodations into a strategic plan that reflects the relative equality of men and women to shoulder parental responsibilities.

While the DoD's decision to extend maternity leave from six to twelve weeks was, standing on its own, a step in the right direction to improve the recruiting and retention of women, when viewed in concert with the deferral policy, it stands to significantly disadvantage women in their career progression. The current parental accommodations scheme is also likely to disenfranchise male service members who want

[399] Wilkerson, *supra* note 337, at 166.

to participate in the care of their newborns. Congress recognized in its findings for the FMLA that "it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing."[400] Nonetheless, Congress, with the apparent endorsement of the Pentagon, has made military parenting a woman's prerogative. The Pentagon needs to embrace the modern social construct that parenting is a gender-neutral commitment, and push Congress to extend to military fathers its prior recognition of the equally important role of fathers in childrearing.

The DoD has in its own power the ability to correct the stark imbalance in deferral policies between military fathers and mothers. The Pentagon has given no explanation as to why military mothers are entitled to deferrals, but biological fathers are not. Similarly, the Pentagon has given no explanation as to why military mothers are entitled to a deferral, but biological fathers are not. The only insight comes from the Military Services. The Navy claims that deferrals are granted to women to allow them "time to regain [their] physical strength" following childbirth.[401] This assertion, however is disproved by the Navy's policy requiring new mothers to pass a physical fitness test six months before the expiration of the deferral period, and by the lack of a deferment for mothers who decide not to retain custody of their children.[402] The Army, on the other hand, clearly expressed that the unequal deferral policy is based on traditional gender roles when it announced that the policy "recognize[s] that the period of time after birth is important for the bonding of the mother and child."[403] No mention was made regarding the importance of bonding between father and child, despite the finding of numerous

[400] 29 U.S.C. § 2601(a)(2).
[401] OPNAVIST 6000.1C, *supra* note 259, at para. 104.a.
[402] *See* discussion *infra* Part III.B.1.a.
[403] *New Army Parents to Get More Time at Home*, *supra* note 309.

studies that "at every state of child development from infancy through adolescence, fathers' involvement has significant positive effects on their children."[404]

As the Military Services are deferring military mothers' deployment eligibility for six to twelve months postpartum, it may not be feasible to simply offer an identical deferral to military fathers. Consequently, to rectify the imbalance, the DoD may need to completely reengineer its deferral policy. The manpower studies and operational requirements analysis that will be necessary to construct a more gender-neutral deferral policy are beyond the scope of this thesis. Nonetheless, the author suggests that the Pentagon may need to cap the authorized duration of deferrals for service women, at a length less than what some of the services are currently granting, in order to accommodate deferrals for biological fathers. Further, if the Pentagon is concerned with the promotion of breastfeeding, discussed *infra* Part III.A, it could structure its policy to grant continuing deferment for mothers, so long as breastfeeding is the primary source of nutrition for their infant. Regardless of the precise substance of the final deferral policy, the crux of the solution is in lessening the current inequity. By providing a substantially similar deferral period for both men and women, the Pentagon will rectify the potential career disadvantages military mothers face under the current policy, and enhance the Department's ability to recruit and retain its top performers.[405]

Unlike deferrals, alleviating the gender imbalance of the parental leave policies is not entirely within the control of the DoD.[406] While the DoD has the power to adjust maternity leave, it must seek Congressional authorization for any extension of the

---

[404] *See generally, id.* Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 28 (1998).
[405] *See* discussion *infra* Part III.B.2.
[406] *See* discussion *infra* Part II.B.

parental leave policy.[407] Despite the more onerous process, if the Pentagon is serious about the career advancement of women and the recruiting and retention of top-talent Millennials, it must make a concerted effort to make the policies more equitable. Again, the manpower and operational studies necessary to craft a strategically viable parental leave policy for the DoD is beyond the scope of this thesis. Nonetheless, the author offers some thoughts for consideration in deliberating a new parental accommodations plan.

The Pentagon has expressed reluctance to comparing the DoD to civilian corporations such as Google and Apple whose employee flexibility benefits, including parental leave, have made them among the best U.S companies at recruiting and retaining top-talented Millennials.[408] However, the Pentagon could look to other sources for successful models of parental accommodations plans. For example, the U.S. Coast Guard, which falls under the Department of Transportation in peacetime but is subject to the authority of the Navy during wartime, has offered extended time off for its new mothers and fathers since the early 1990s.[409] Under the Coast Guard's program, service men and women can separate from the service for up to two years to care for their newborn children.[410] During that time, the service members do not receive any active duty pay or benefits, but they may transition to the Coast Guard Reserve and receive all the pay and benefits associated with that part-time service.[411] Subsequently, upon completion of the separation period, the service members are guaranteed reinstatement to

---

[407] *Id*.
[408] Carter, Force of the Future, *supra* note 2; Pricewaterhouse Coopers, *supra* note 373, at 3.
[409] GAO BENEFITS, *supra* note 384, at 11.
[410] *Id*.
[411] *Id*.

the same rank they held before they left.[412] Of the service members who have taken part in the program, fifty-five percent have been women and forty-five percent men.[413]

The Pentagon could also look outside the United States for successful examples of military parental leave programs. In the Canadian Armed Forces, for example, both service men and women are authorized extended leave to care for their new children. Service women initially receive maternity leave for up to eight week prior to birth and eighteen weeks postpartum.[414] Additionally, both men and women are authorized up to thirty-seven weeks of parental leave for the birth or adoption of a child.[415] During these leave periods, the service members receive approximately seventy-five percent of their monthly pay.[416] The Canadian Armed Forces expressly states that its policies are intended to support "gender equality by encouraging both parents to share in family responsibilities" and "employment equity by encouraging the recruitment and retention of women."[417]

These two examples illustrate that similarly situated entities are able to accommodate extended parental leave programs that are considerably more balanced than the DoD's current maternity and paternity leave policies. They also illustrate how flexibility in other conditions of employment, such as pay or active versus reserve status,

---

[412] *Id*.
[413] *Id*.
[414] Queen's Regulations and Orders, Vol. I, Ch. 16, *Leave* (2006) at para. 16.26(4), http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-01/ch-16.page#cha-016-26 (last visited Apr. 15, 2016).
[415] *Id*. at para. 16.27(3), (4).
[416] Compensation and Benefits Instruction, Chapter 205, *Allowances for Officers and Non-Commissioned Members* (2015) at para. 205.461(6), http://www.forces.gc.ca/en/about-policies-standards-benefits/toc-ch-205-officer-ncm-allowance-rates.page (last visited Apr. 15, 2016); Gov't of Canada, *Maternity and Parental Benefits: How Much Could You Receive*, http://www.esdc.gc.ca/en/ei/maternity_parental/benefit_amount.page.
[417] Def. Admin. Orders and Directives 5001-2, *Maternity and Parental Benefits* (2000) at para. 2.3, http://www.forces.gc.ca/en/about-policies-standards-defence-admin-orders-directives-5000/5001-2.page#int (last visited Apr. 15, 2016).

can expand the DoD's options when constructing a cohesive parental leave plan. In addition to these examples, there are numerous workplace flexibility tools that the DoD could utilize to create a parental leave plan that both satisfies the needs of parents for work-life balance, and the needs of the Armed Forces to maintain operational readiness.

The U.S. Navy has been experimenting with and implementing workplace flexibility tools for its active duty members, outside the context of parental leave, since 2007.[418] Understanding that most manual-labor jobs also include administrative responsibilities, the Navy first instituted teleworking opportunities for its sailors while they are serving ashore.[419] The Navy has also authorized flex hours for its Judge Advocate General's Corps, which sets core duty hours during which personnel must be at work, but otherwise allows service members to adjust the start and end times of their work day while maintaining a minimum of 40 hours per week.[420]

Although neither the Navy nor the DoD at large have explored using flexible work arrangements as part of a comprehensive parental accommodations plan, such an undertaking could prove to be the key to drafting a viable and equitable plan. The DoD has already published guidance pertaining to teleworking, which encourages supervisors and commanders to "allow maximum flexibility for . . . Service members to telework to

---

[418] *See* Laura Stegherr, *Navy to Receive National Award for Work-Life Balance Programs* (May 19, 2010), http://www.norfolknavyflagship.com/news/top_stories/navy-to-receive-national-award-for-work-life-balance-programs/article_f6aa3546-fafc-5d63-b632-7f7c2bb5bb9c.html (last visited Apr. 15, 2016) (describing the Navy's Task Force Life-Work program).

[419] *Navy Dives Deep into Telework*, THE MOBILE WORKER, http://www.mobileworkexchange.com/mobileworker/view/4063 (last visited Apr. 15, 2016). Telework is defined as "[a] voluntary work arrangement where an employee or Service member performs assigned official duties and other authorized activities during any part of regular, paid hours at an approved alternative worksite (e.g., home, telework center) on a regular and recurring or a situational basis." Dept. of Def. Instruction 1035.01, *Telework Policy* (Apr. 4, 2012) at 25 [hereinafter DoDI 1035.01].

[420] Judge Advocate Gen./Commander Navy Legal Serv. Command Instruction 12620, *Flex Hour Program* (Dec. 2, 2010) [hereinafter JAG/COMNAVLEGSVCCOM Instruction 12620].

the extent that mission readiness or accomplishment is not compromised."[421] Thus, the authority is already in place to apply teleworking to parental accommodations. Likewise, the Pentagon could explore the possibility of incorporating flex time or medically-related shortened duty days into its parental leave plan for new mothers.

As an example, the DoD could explore curtailing maternity leave to nine weeks and then providing new mothers with three weeks of teleworking or half duty days. Such an arrangement would allow military mothers undisturbed time at home to physically recuperate, breastfeed, and bond with their newborns, but also allows them to resume contributing to their unit sooner. It would also allow for an easier adjustment back to the work environment. Similarly, to help bridge the gap between the length of maternity and paternity leave policies, the DoD could explore teleworking options for military fathers or Congressional authorization for a period of half duty days. The point being, the military can use workplace flexibility tools to expand its options for accomplishing a more balanced parental accommodations plan that meets the needs of its service members and while supporting military operations.[422]

Structuring a new parental accommodations plan will be challenging. In engineering a new plan, it will be crucial that the Pentagon change its thought process to embrace workplace flexibility and greater equality between military mothers and fathers. A balanced parental accommodations plan that neither disadvantages women's career advancement nor disenfranchises male service members will likely prove essential to the DoD's future recruiting and retention success.

[421] DoDI 1035.01, *supra* note 419, at para. 2.e.
[422] Karin & Onachila, *supra* note 29, at 155.

2. An Existing but Underutilized Parental Accommodations Equalizer: The Career Intermission Pilot Program

For the past seven years, the Pentagon has had at its disposal a program that could be utilized to help level the parental accommodations gap between male and female service members. The Career Intermission Pilot Program (CIPP) provides flexibility for military members, as well as for leaders working to ensure mission success. The program also resolves the disadvantages women are subject to under the lopsided parental leave and deferral policies. This part will explore the development of the CIPP and how the DoD can better utilize the program as part of its overall parental accommodations scheme.

a. What is the CIPP?

With the goal of recruiting and retaining more women in the Military Services,[423] in March 2008, the Department of Defense requested both the Senate and the House of Representatives to include in the NDAA for Fiscal Year 2009, authorization for a pilot program to allow a limited number of military personnel to take sabbaticals from active duty service.[424] The DoD anticipated the program would "encourage retention by providing an opportunity for Service members to focus on personal and professional goals and responsibilities for a temporary period followed by a return to full operational readiness."[425]

---

[423] Telephone interview with Lt Col Tiaa E. Henderson, Assistant Director, Force Management Policy & Research Studies, Office of the Secretary of Defense (Mar. 17, 2016) [hereinafter Henderson, Telephone Interview]; Hope Seck, *Few Taker in First Year of Marine Career Sabbatical Program*, MILITARY TIMES (July 24, 2014), http://www.militarytimes.com/story/news/2014/07/23/few-takers-in-first-year-of-marine-career-sabbatical-program/13036617/ (last visited Mar. 26, 2016).
[424] *See*, Letter from Daniel J. Dell'Orto, Acting General Counsel of the Dept. of Def. to Congress (Mar. 14, 2008), 1-2, 25-30, http://www.dod.mil/dodgc/olc/docs/14March2008Package.pdf (last visited Mar. 16, 2016).
[425] *Id*. at 29.

Congress acquiesced to the request and included in the NDAA authorization for the DoD to launch the Career Intermission Pilot Program (CIPP) for a three-year trial period.[426] Under the CIPP, twenty officers and twenty enlisted service members per Military Service (i.e., 160 members DoD-wide) per year may leave active duty service "to meet personal or professional needs" for a period of up to three years.[427] Although the Pentagon originally conceptualized the program as a tool to recruit and retain more women in the Armed Forces, neither the legislation nor the DoD's implementing instruction constrains the reasons for which a service member may participate in the CIPP.[428] Thus, male or female service members may apply to take CIPP sabbaticals for any number of reasons such as to pursue educational goals, spend time with terminally ill parents, simply to take a break from military service, or, as is pertinent to this thesis, to care for their young children.

While on sabbatical, service members may be required to complete any correspondence training necessary for them to retain their proficiency in military skills, professional qualifications, and physical readiness.[429] Additionally, during sabbatical, service members receive two-thirtieths of their basic pay, which equates to two days pay per month. Service members and their dependents also retain medical and dental coverage while participating in the CIPP.[430] For each month a service member spends on

---

[426] NDAA 2009 § 533.
[427] *Id*. at §§ 533(a)(1), 533(c).
[428] Henderson, Telephone Interview, *supra* note 423; Seck, *supra* note 423. *See also* NDAA 2009; Memorandum from Under Secretary of Defense (Personnel & Readiness) on Pilot Programs on Career Flexibility to Enhance Retention on Service Members (Feb. 4, 2009). *See also* GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES: DOD SHOULD DEVELOP A PLAN TO EVALUATE THE EFFECTIVENESS OF ITS CAREER INTERMISSION PILOT PROGRAM (Oct. 2015), http://gao.gov/assets/680/673360.pdf (last visited Mar. 16, 2016) [hereinafter GAO, CIPP].
[429] NDAA 2009 at § 533(e)(2).
[430] *Id*. at § 533(j).

sabbatical, he or she is obligated to serve two months upon return to active duty.[431] Finally, at any time, the Secretary of the Military Service to which a member belongs, may terminate the member's participation in the CIPP and recall him or her to active duty service.[432]

Although only the Navy participated in the CIPP during its inaugural period from 2009 through 2012, Congress authorized a continuation of the program through 2015 in the NDAA for Fiscal Year 2012, and subsequently through 2019 in the NDAA for Fiscal Year 2015.[433] However, in 2014, due to a continued lack or participation by the Army and Air Force, the Senate directed the GAO to compile a report addressing the implementation efforts and impacts of the CIPP.[434] By the time the GAO had completed its report in late 2015, all four Military Services were participating in the program.[435] The following table depicts the amount of participation in the CIPP within each Military Service through July 2015:[436]

Total Number of CIPP Participants Approved by Each Military Service as of July 2015					
Military Service	Number of Applicants	Applicants Approved	Actual Participants (Male)	Actual Participants (Female)	Total Actual Participants
Navy	130	111	38	55	93
Air Force	46	35	15	15	30
Army	10	9	2	4	6
Marine Corps	7	6	3	1	4
TOTALS	193	161	58	75	133

[431] *Id*. at § 533(e)(3).
[432] *Id*. at § 533(g).
[433] GAO, CIPP, *supra* note 428; National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, § 531(a)(1) (Dec. 31, 2011); Carl Levin & Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291,§ 522(a)(2) (Dec. 19, 2014).
[434] S. Rep. 113-211 at 19 (July 17, 2014).
[435] GAO, CIPP, *supra* note 428. The Marine Corps instituted the CIPP in 2013, and the Army and Air Force began participation in 2014. *Id*. at 8.
[436] *Id*. at App. I.

The GAO observed that even with all of the Military Services participating in the CIPP, the number of participating service members remained significantly below the statutorily authorized limit of 160 service members per year, where maximum participation was reached in 2014 with a mere seventy-six participants DoD-wide.[437] Military Service officials believed several factors may have adversely affected participation in the program by service members.[438] First, the authorizing statute did not permit service members to apply for CIPP during their initial term of service, which typically covers a service member's first two to five years in the Armed Forces.[439] Officials also believed many otherwise interested service members may have been hesitant to apply to the program due to the low caps the statute sets for the number of participants allowed per Military Service each year.[440] Second, a perception exists among service members, including those in leadership positions, that participation in the CIPP could have a negative effect on career advancement.[441] Third, officials recognize that many service members may not be able to participate in the program due to financial constraints.[442]

Congress responded to some of these concerns in the NDAA for Fiscal Year 2016 by repealing both the eligibility limitation for service members in their initial term of service and the cap on the number of participants the Military Services can approve each

[437] *Id*. at 7, Fig. 1.
[438] *Id*. at 8.
[439] *Id*. at 8-9.
[440] *Id*. at 9.
[441] *Id*. at 10.
[442] *Id*. at 11. Service officials also reported that the selection processes implemented by the Military Services, as well as service-specific rules prohibiting breaks in service for certain career fields may also limit the number of applicants. *Id*. at 9-10.

year.[443] As a result of these changes, the CIPP has the potential to become a powerful parental accommodation tool for the Military Services to help meet the needs of its military parents while balancing the needs of their missions.

i. CIPP Implementation in the Navy

As mentioned above, the Navy was the first of the Military Services to implement the CIPP.[444] Navy applicants are required to submit a personal statement to the selection board that explains the "purpose for which the applicant intends to use the CIPP" and an endorsement from their commanding officer "that addresses the motivation and potential of the applicant within the applicant's community and provide[s] a specific approval or disapproval recommendation."[445] From implementation of the program in 2009 through July 2015, 130 sailors had applied to participate in the CIPP. During this period, the Navy was statutorily authorized to approve up to 280 sailors for the CIPP.[446] It is notable that the Navy received less than half that number in applications. At any rate, of those 130 applicants, 111 were approved.[447] Participating sailors used the sabbatical period for a wide range of reasons including pursuing educational goals, staggering career milestone timelines for dual-military couples, and caring for ailing parents or young children.[448]

As of July 2015, thirty-seven sailors had completed their sabbaticals.[449] As of October 2015, one of those thirty-seven sailors had separated from the Navy before completing his or her CIPP-incurred service obligation, and sufficient time had passed for

---

[443] National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, § 523(b) (Nov. 25, 2015).
[444] GAO, CIPP, *supra* note 428, at 8.
[445] Office of the Chief of Naval Operations Instr. 1330.2B, *Navy Career Intermission Pilot Program Guidelines* (Feb. 14, 2013) at para. c.(9)-(10).
[446] See NDAA 2009 at § 533(c), *supra* note 107.
[447] *Id*. at 19. Of the 130 applications, eleven were disapproved, six were withdrawn by the service member, and two were pending as of the publication of the GAO's report. *Id*.
[448] *Id*.
[449] *Id*.

only five sailors to have completed their CIPP-incurred service obligation.[450] Of those five sailors, one separated from the Navy after his or her service obligation and one transitioned to the Navy Reserves.[451]

Neither the DoD nor the Navy have accomplished any studies or interviews of participants yet to determine whether participation in the program influenced them to elect to stay in the Navy longer than they would have if they had not taken part in the CIPP.[452] Further, insufficient time has elapsed to determine if participation in the CIPP adversely affects promotion and, as a consequence, long term retention.[453] Nonetheless, the DoD considers the CIPP to have succeeded as a retention tool any time a participant completes the two-for-one service obligation incurred by the program because the Military Service retained that member for longer than it would have been guaranteed without the CIPP's additional service obligation.[454]

ii. CIPP Implementation in the Marine Corps

The Marine Corps was the second of the Military Services to begin participating in the CIPP, commencing the program in August 2013. Marines that have participated in the program have taken sabbaticals for a variety of reasons including to reside with a spouse, attend graduate school, attend seminary, and to care for children and focus on family.[455] Marines' participation in the CIPP is lagging far behind that of members of the other services.[456] During the first three years of its participation in the CIPP, the Marine

---

[450] *Id*.
[451] *Id*.
[452] Henderson, Telephone Interview, *supra* note 423. The DoD plans to conduct such interviews for its CIPP report due to Congress in 2017. *Id*.
[453] *Id*.
[454] *Id*.
[455] GAO, CIPP, *supra* note 428, at 20.
[456] See Table, infra, Part III.C.2.a. *See also* Seck, *supra* note 423.

Corps only received a total of seven applications and approved six for participation in the program.[457] By contrast, the Navy approved twenty-eight sailors during the first three years of its participation.[458] While it could be expected that the Marine Corps would have lower participation numbers than the Navy due to the smaller size of the Marine Corps (in January 2016, there were 324,230 active duty sailors and 184,418 active duty Marines),[459] even proportionally the Marine Corps is lagging behind. To have kept pace with the Navy, the Marine Corps would have needed to accept fifteen applicants for participation in the CIPP during its first three years.

The Marine Corps' disproportionately low participation in the CIPP may be due, in part, to culture, but the highly restrictive eligibility requirements established by the Marine Corps is also likely having an adverse effect on participation. The implementing guidance for the Marine Corps enumerates fourteen separate criteria that render its personnel ineligible for participation in the CIPP.[460] Most significantly, the Marine Corp limits eligibility for enlisted personnel to those in the paygrades of E-6 and E-7 (with less than 15 years of service).[461] This criterion alone makes more than eighty-six percent of enlisted Marines ineligible for participation in the CIPP.[462]

---

[457] GAO, CIPP, *supra* note 428, at 20. Additionally, two applicants approved by the Marine Corps withdrew their applications, so from 2013 through 2015, only four Marines ultimately participated in the CIPP. *Id*.
[458] *Id*. at 19.
[459] *See* DMDC, DOD ACTIVE DUTY MILITARY PERSONNEL, *supra* note 293. To calculate these figures, the author added the "Total Officer" and "Total Enlisted" figures rather than using the "Grant Total" because the "Grand Total" figure included cadets and midshipmen who are not eligible for participation in the CIPP.
[460] Marine Administrative Message 418/13, *Career Intermission Pilot Program* (Aug. 23, 2013) at paras. 3.A.(7)(A)-(N) [hereinafter MARADMIN 418/13].
[461] *Id*. at para. 3.A.(7)(H).
[462] *See* DMDC, DOD ACTIVE DUTY MILITARY PERSONNEL, *supra* note 293. To calculate these figures, the author added the total number of E-6 and E-7 active duty Marines (15,151 + 8,319) and subtracted that sum from the total number of enlisted Marines (163,768).

Additionally, on average, it takes a Marine 10.4 years in service to attain the grade of E-6.[463] Thus, a Marine who enlists at the age of eighteen years, would ordinarily be about twenty-eight years old before he or she becomes eligible for the CIPP. Also, on average, a Marine attains the grade of E-7 at 14.8 years in service.[464] Thus, the average E-7 only remains eligible for the CIPP for the first two to three months after he or she promotes to E-7. Meanwhile, the average age of a Marine when his or her first child is born is 24.3 years.[465] Consequently, most Marines will have started their families nearly four years before they become eligible for the CIPP, making the CIPP a less valuable parental accommodation resource for new Marine parents.

iii. CIPP Implementation in the Army

The Army instituted the CIPP, in 2014, five years after Congress authorized it.[466] In its first year, ten soldiers applied for the program and nine were accepted.[467] Of those nine soldiers, three ultimately opted not to take a sabbatical.[468] The remaining six soldiers began their sabbaticals in the summer of 2015 and are using them to pursue higher education, travel, align the participant's assignment cycle with that of an active-duty spouse, and to "address family and medical issues."[469]

The Army's policy enumerates fifteen separate criteria that can render a soldier ineligible for participation in the CIPP.[470] Under these criteria, "[s]oldiers assigned to the

---

[463] Rod Powers, *Marine Corps Enlisted Promotion System*, (Oct. 23, 2015) at 5, http://usmilitary.about.com/cs/marinepromotions/a/marineprom.htm (last visited Mar. 26, 2016).
[464] *Id*.
[465] U.S. MARINE CORPS, THE MARINE CORPS DEMOGRAPHICS UPDATE, *supra* note 287, at 3.
[466] Army Directive 2014-07, *Army Career Intermission Pilot Program* (May 9, 2014).
[467] GAO, CIPP, *supra* note 428, at 20. The one soldier that was not accepted into the CIPP was "determined to be ineligible due to remaining service obligation. *Id*.
[468] *Id*.
[469] *Id*.
[470] Army Directive 2014-07, *supra* note 466, at paras. 5.a.-o.

Medical Corps, Dental Corps, Veterinary Corps, Medical Service Corps, Army Nurse Corps, Army Medical Specialist Corps, Judge Advocate General's Corps and Chaplains Corps," are ineligible to participate in the CIPP.[471] Those excluded career fields traditionally contain a disproportionately high number of females compared to other career fields throughout the Armed Forces. Thus, many female soldiers do not have the option of taking CIPP sabbaticals to care for their children because of the Army's career field exclusions. The Army may also have stunted applications through how its representatives present the program. For example, an Army CIPP program manager explained that when soldiers use the CIPP for family-related purposes, most of them use it when "unexpected life events occur," such as spending time with parents in very poor health at the end of their lives, caring for a child with disabilities that requires frequent medical appointments, or undergoing fertility treatments.[472] Such representations by Army officials may dissuade both male and female soldiers from attempting to use the CIPP to improve their work-family balance.

iv. CIPP Implementation in the Air Force

The Air Force also began participating in the CIPP in mid-2014. The Air Force expressly reserves participation in the program for "[t]op performers with a bright future" who the Air Force does not want to lose to "premature separation" due to "competing priorities."[473] To select applicants, the Air Force "assess[es] all factors in the Airman's record that bear on his or her potential to serve in the Air Force in the future, including

---

[471] *Id*. at para. 5.n.
[472] *Army Career Intermission Pilot Program*, NCOSUPPORT.COM (June 12, 2015) http://www.ncosupport.com/education/army-career-intermission-program.html (last visited Mar. 27, 2016).
[473] *AF Implements Career Intermission Pilot Program*, AIR FORCE NEWS SERVICE (July 30, 2014), http://www.af.mil/News/ArticleDisplay/tabid/223/Article/486908/af-implements-career-intermission-pilot-program.aspx (last visited Mar. 28, 2016).

job performance, professional qualities, leadership, depth and breadth of experience, job responsibility, academic and developmental education, and special achievements."[474] Airmen applying for the program must submit a memorandum explaining the "[i]ntended use of [the] CIPP and expected benefits to the Air Force upon return to active duty."[475] The Air Force's policy sets forth 13 criteria that renders an airman ineligible to participate in the program, but none of them, other than the DoD-mandated preclusion of service members in their first term of service, appear to be of a nature to disproportionately affect women or airmen, in general, looking to use the CIPP as a means to dedicate time to starting and raising a family.[476]

When the Air Force announced the CIPP, the Air Force's top civilian, Secretary James; its top officer, Air Force Chief of Staff General Mark A. Welsh III; and its top enlisted personnel, Chief Master Sergeant of the Air Force James A. Cody, all vocalized their support of the program.[477] As a result, in the Air Force's first year of offering the CIPP to its service members, it had more participants than any of the other Military Services in any year they have offered the program.[478] In 2014, forty-six airmen applied to participate in the CIPP and thirty-five were approved for participation.[479] Of those thirty-five airmen, one was subsequently disqualified for "quality reasons arising after

---

[474] Air Force Guidance Memorandum 2014-36-01, *Air Force Guidance Memorandum for Career Intermission Pilot Program (CIPP)* (Feb. 26, 2014) at Attachment 1, para. 4.1.2.1., http://static.e-publishing.af.mil/production/1/af_a1/publication/afgm2014-36-01/afgm2014-36-01.pdf (last visited Mar. 28, 2016).
[475] *Id*. at para. 6.1.4.
[476] *Id*. at paras. 4.2.1.-4.2.13.
[477] *AF Implements Career Intermission Pilot Program*, *supra* note 473.
[478] GAO, CIPP, *supra* note 428, at 8. Thirty-five airman were approved for participation in the CIPP in 2014, the first year the Air Force offered the program. The next highest number of approved applicants reach by one of the other Services was thirty applicants, which the Navy also attained in 2014. *Id.*
[479] *Id*. at 19. "The Air Force disapproved 11 applicants because they did not meet basic eligibility requirements or, according to Air Force officials, did not have competitive performance ratings." *Id*. at 19-20.

selection," and four decided not to take a sabbatical.[480] The thirty remaining participants are using the CIPP to pursue higher education, realign their assignment cycle or promotion window with an active-duty spouse to facilitate being stationed together in the future, and to "care for a family member or start a family."[481]

b. How the CIPP Can Help Equalize Parental Accommodations: Possibilities and Challenges

Now that Congress has eliminated the ban on participation for personnel in their first term of service and the cap of forty participants per Military Service, the CIPP stands to serve as a key parental accommodation for both military mothers and fathers. The Pentagon does not plan to place its own caps on the number of participants each Service may support; it plans to leave that determination to the Secretaries of each of the Military Services.[482] Thus, the Military Services will be able to weigh the needs of their current mission requirements against their needs for future retention of personnel as well as the familial needs of their service men and women. By expanding the CIPP program, the Armed Forces will be able to allow more military parents to use sabbaticals as a substitute for parental leave and/or deployment deferrals.

One of the main benefits of using a CIPP sabbatical in place of other parental accommodations is that it pauses a participant's active duty service.[483] This means that a service member will not receive a performance appraisal while he or she is participating in the CIPP, or for a sufficient amount of time after the service member returns to active

---

[480] *Id*. at 19.
[481] *Id*. at 20.
[482] Henderson, Telephone Interview, *supra* note 423.
[483] Luke W. Nowakowski, *Career Intermission Program Available to Eligible Airmen*, BUCKLEY AIR FORCE BASE NEWS (Aug. 12, 2015), http://www.buckley.af.mil/news/story.asp?id=123455725 (last visited Apr. 12, 2016).

duty for him or her to accumulate the minimum number of days required before a performance appraisal can be accomplished. Thus, the potential disadvantage military mothers may experience by competing against their peers after taking twelve weeks of maternity leave and being non-deployable due to pregnancy and the deferral policies could disappear for CIPP participants if they coincide their CIPP sabbaticals with the time when those accommodations would ordinarily occur.

Another significant benefit for service members that use CIPP sabbaticals in place of other parental accommodations is that it "resets their year group."[484] For officers, the term "year group" refers to a group of officers who received their commissions within the same timeframe.[485] Or, put more simply (although not entirely accurately),[486] a group of officers who all started serving as officers in the same year.[487] For most officers, when they become eligible for promotion depends upon their year group, with each year group progressing toward pre-determined promotion eligibility zones based on the number of years of service since commissioning.[488] For enlisted personnel, the term "year group" is rarely used, but would generally refer to a group of individuals who have held the same rank for the same timeframe, such as all those individuals who promoted to E-5 in the same year.[489] Enlisted personnel have to hold a particular rank for a set amount of time before they are eligible to promote to the next higher rank.[490] To illustrate, individuals

[484] *Id*.
[485] Telephone interview with Lt Col Gregory Marty, Chief of Promotion Board Operations, Air Force Reserve Personnel Center (Apr. 12, 2016) [hereinafter Marty, Telephone Interview].
[486] An in-depth explanation or understanding of the officer promotion system is unnecessary for this discussion and beyond the scope of this thesis. For more information on officer promotions, see 10 U.S.C. Chapter 1405, *Promotions*, Pub. L. No. 114-38.
[487] Marty, Telephone Interview, *supra* note 485.
[488] *Id*.
[489] *Id*.
[490] *Id*.

who would have been eligible for promotion in 2016, would instead become eligible in 2017 if they take a one-year sabbatical, 2018 if they take a two year sabbatical, and so on.

The advantage of resetting the year group is that it ensures those who take a CIPP sabbatical compete for promotion against individuals who have the same number of years of experience as themselves. Individuals who participate in the CIPP remain competitive for promotion because they will not be competing against individuals who have accumulated one, two, or three more years of experience than themselves.[491] Thus, in conjunction with avoiding lackluster performance appraisals due to using other parental accommodations, the year-group reset could negate any potential career disadvantages resulting from maternity leave and deployment deferrals.

The CIPP also provides needed flexibility for the Military Services. As discussed above, if mission requirements so necessitate, a commander can disapprove a service member's request to participate in the program or, via the Service Secretary, recall individuals from sabbatical. Additionally, if the Military Services expand the CIPP to allow for greater use as a parental accommodation for both mothers and fathers, there is nothing in the NDAA precluding the Military Services from capping the length of sabbaticals, if such a measure is deemed necessary for the good of the Service.[492] Finally, service members who are on sabbatical do not count against their unit's or their Service's "end strength," meaning that they are not accounted for in the precise number of people the unit or the Military Service is allowed to have at any given time.[493] As

[491] Navy Personnel Command, *CIP Frequently Asked Questions*, http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/tflw/Pages/FrequentlyAskedQuestions.aspx (last visited Apr. 13, 2016).
[492] *See generally*, NDAA 2009, *supra* note 107.
[493] Henderson, Telephone Interview, *supra*, note 423. *See also* 10 U.S.C.A. § 115(a) (explaining Congress' authority to control the number of service members in the Armed Forces.)

such, when a service member takes sabbatical, the position in which he or she was serving is free to be filled by transferring another service member into that position. This is not an option that exists for parental leave, because in parental leave situations, the member is still assigned to his or her unit and, therefore, counts against its end strength. Consequently, in many ways, the CIPP offers more flexibility to commanders than parental leave and deployment deferrals.

However, there are challenges to the CIPP becoming a key parental accommodation tool. The main challenge the Services will have to overcome is culture.[494] In varying degrees throughout the Armed Forces, there is a cultural ideal that if a service member prioritizes anything over their military service, including their families, they lack loyalty and are less suitable for advancement.[495] Officials from the Military Services attribute the low applications rates in the CIPP, in part, to this culture.[496] Consequently, even if the Military Services significantly raise the cap on annual participants, the program will continue to be underutilized if the Services do not also address the cultural issue. To address the negative stigma of taking a sabbatical, leadership needs to embrace it. The Navy, Army and Marine Corps could learn from the example set by the Air Force in this regard. By having all of its top leadership publicly show support for the program, and by publicizing stories of ordinary parents with typically healthy children benefitting from the program, the Air Force, in its inaugural year of the CIPP, was able to surpass the participation levels any of the other services had

[494] *See* GAO, CIPP, *supra* note 428, at 10 (stating that Service officials identified military culture may adversely influence participate in the CIPP).
[495] See *id*. (conveying a CIPP participant's report that his chain of command told him that people would assume that he did not want to be competitive for advancement because he prioritized his family over his career).
[496] *Id*.

attained over the life of the program.[497] This kind of top-down down support for the CIPP will be necessary in order for it to become a viable parental accommodation for both military mothers and fathers.

As part of a unified parental accommodations scheme, the CIPP has the potential to equally provide service members with the ability to prioritize their families, at a time when it is most crucial to do so, without adversely affecting their careers. The CIPP heeds the wisdom behind the FLMA of bestowing benefits equally between the genders. Consequently, the CIPP can provide military fathers with a meaningful work-life balance tool and can eliminate the potential disadvantages to military mothers caused by significantly one-sided parental leave and deployment deferral accommodations. These benefits cannot become reality, however, without greater support by the Pentagon and Military Service leaders.

IV. Conclusion

The DoD's new twelve-week maternity leave policy is a step in the right direction, but could prove to be a Pyrrhic victory for military mothers as part of the military's significantly gender-imbalanced parental accommodations scheme. The stresses of trying to balance family and military service have disproportionately affected the retention of women more than men. [498] The Pentagon understands that diversity, including gender diversity, makes an organization more innovative and increases performance; qualities the Armed Forces will need in order to continue to successfully

---

[497] *AF Implements Career Intermission Pilot Program*, *supra* note 473; GAO, CIPP, *supra* note 428, at 8. *See*, *e.g.*, Omari Bernard, *Balancing Career, Family through Career Intermission Program*, 18TH WING PUBLIC AFFAIRS (June 26, 2015), http://www.af.mil/News/ArticleDisplay/tabid/223/Article/601844/balancing-career-family-through-career-intermission-program.aspx (last visited Mar. 16, 2016).

[498] Carter, Force of the Future, *supra* note 2.

adapt to the world's increasingly dynamic operational environment.[499] These considerations ultimately compelled Secretary Carter to double the length of maternity leave, in an effort to attract and retain more women in the Armed Forces.[500]

Publicly announcing one of the most generous maternity leave policies in the United States was an impactful way for the DoD to cast itself as a more family-friendly employment option to female recruits. The new maternity leave policy will invariably improve the work-life balance of service women who start families by giving them an additional six undisturbed weeks at home with their infants. This improved work-life balance may increase the retention of service women. Additionally, despite new mother's longer absence from work, the military also serves to benefit from the longer maternity leave in the form of better attendance and productivity from its new mothers. From these perspectives, the DoD's new policy was a step in the right direction.

However, the Pentagon missed the broader implications that are likely to result from its increasingly imbalanced parental accommodations scheme. The disparity between the parental leave and deferral accommodations provided to male and female service members has the potential of negatively impacting the promotion rates of military mothers. Contributing to unit success and participation in deployments are important factors in both performance appraisals and promotions. Career progression is a high priority for Millennial women.[501] As such, if they are dissatisfied with their career progression, or what they perceive will be their career progression, they will be more likely than past generations of women to leave their current employment to find more

[499] *See generally*, Forsling, *supra* note 6; Campbell, *supra* note 12.
[500] Carter, Force of the Future, *supra* note 2.
[501] Pricewaterhouse Coopers, *supra* note 373, at 4.

satisfying work elsewhere.[502] Consequently, the disadvantages to service women's careers that are likely to result from such an imbalanced parental accommodations system, could ultimately undermine the Pentagon's retention efforts. Only by leveling the playing field between the parental accommodations for mothers and fathers can the Pentagon avoid this result.

Due to its unique mission and operational requirements, it would not be feasible for the DoD to simply provide fathers with benefits equal to those that new mothers currently enjoy. Nonetheless, the DoD must come to accept that its traditional way of thinking—that males are indispensable warfighters and women are primarily caregivers—is no longer a viable way of approaching personnel issues. To secure the Force of the Future as a strong, diverse force, the Pentagon will need to think outside its five-sided box and structure a new, cohesive, and strategic parental accommodations plan that is grounded in greater equality and flexibility.

[502] *Id*.