

**The Military Abortion Ban: How 10 U.S.C. Section 1093 Violates  
International Standards of Reproductive Healthcare**

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## Abstract

Under 10 U.S.C. Section 1093, women in the military cannot obtain abortion services in military hospitals even if they use their own funds. Women who are stationed abroad are forced to search for services elsewhere in the foreign country in which they are stationed, facing cultural barriers, language barriers, difficult travel arrangements and high costs. In the last ten years, clear standards of reproductive health emerged at an international level, with women's health being the center of the International Conference on Population and Development, and the Fourth World Conference on Women, among others. The United States is simultaneously encouraging developing countries to address women's health, specifically access to safe abortion, while at the same time jeopardizing the health of American women in the military with its unsound abortion policy.

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## **I. Introduction**

"[T]he experience had been both mortifying and painful...no pain killer of any sort was administered for the procedure; the modesty of this soldier and the other women at the clinic had been violated...It was a searing experience for all of us—that in a very vulnerable time, this American who was serving her country overseas could not count on the Army to give her the care she needed."<sup>1</sup>

In 1973, the Supreme Court recognized the Constitutional right of American women to choose to terminate a pregnancy through abortion.<sup>2</sup> Despite over thirty years of political, social and judicial attacks, it is still a recognized and protected

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<sup>1</sup> See Letter from Lieutenant General Claudia J. Kennedy to U.S. Senators Snowe and Murray Senate (June 10, 2002), [www.crlp.org/hill\\_ltr\\_0602mil.html](http://www.crlp.org/hill_ltr_0602mil.html) (describing a non-commissioned officer's experience obtaining an abortion while stationed abroad).

<sup>2</sup> See Roe v. Wade, 410 U.S. 113, 154, 163-67 (1973) (establishing a right to terminate a pregnancy found within the right of privacy). The Supreme Court found that in the first trimester of pregnancy a woman had an unqualified right to choose; in the second trimester a state could regulate in regards to women's health; and in the third trimester, a state could limit a woman's right to choose in regard to protecting potential human life. Id.

right—at least for some American women.<sup>3</sup> A military law, codified at 10 U.S.C. Section 1093, however, denies the right to choose to American women serving in the military.<sup>4</sup> 10 U.S.C. Section 1093 prohibits the use of military facilities, in America or abroad, for abortion services, even if a woman in the military uses her own funds.<sup>5</sup> Because of this law, American service women stationed abroad must attempt to find safe abortion services in the country in which they are stationed, if they are able to

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<sup>3</sup> See Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992) (reaffirming the central holding of Roe); see also Stenberg v. Carhart, 530 U.S. 914, 948 (2000) (finding that under Casey restrictions on abortion procedures must have a health exception). See generally Laurence Tribe, **Abortion: the Clash of Absolutes**, 150 (W.W. Norton & Company 1990) (1992) (recognizing the anti-choice movement as a small but powerful political force, “chipping away” at abortion rights one law at a time).

<sup>4</sup> Armed Forces, General Military Law, Performance of Abortions: Restrictions, 10 U.S.C. § 1093, pts. a-b [hereinafter 10 U.S.C. § 1093].

<sup>5</sup> See id. (restricting the use of government funds and facilities for abortion services).

find them at all.<sup>6</sup> Besides the practical difficulties in this task, some countries do not allow abortions unless the woman's life is endangered; in these cases, American women must attempt to go back to the United States if they wish to have the abortion performed—an option which, because of the restrictions of military service many service women do not always have.<sup>7</sup>

Despite being part of multiple international treaties establishing reproductive rights as human rights, the United States continues to ignore the international standards for providing American military women stationed abroad with

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<sup>6</sup> See Amy Crawford, Under Siege: Freedom of Choice and the Statutory Ban on Abortions in the Military, 71 **U. Chi. L. Rev.** 1549, 1570-71 (2004) (pointing out the difficulties in trying to obtain abortion services in foreign countries, including lower medical standards, hostility to Americans, cultural differences, and finding transportation to hospitals).

<sup>7</sup> See Marshall Wilde, Air Force Women's Access to Abortion Services and the Erosion of 10 U.S.C. § 1093, 9 **Wm. & Mary J. Women & L.** 351, 392-93 (2003) (noting that the military grants leave at the discretion of commanders, so women might not be able to travel to the United States for an abortion if the country in which they are stationed does not allow them).

comprehensive reproductive health care.<sup>8</sup> Because 10 U.S.C. Section 1093 denies American women stationed abroad access to comprehensive reproductive health care, including access to safe abortion services, it is in violation of international standards of reproductive health care, and Congress should repeal it.<sup>9</sup>

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<sup>8</sup> See e.g., International Conference on Population and Development, Cairo, U.N. Doc. A/Conf.171/13/Rev.1 (September 5-13, 1994) (establishing reproductive rights as part of a broader notion of human rights); Fourth World Conference on Women, Beijing, U.N. Doc. A/Conf.177/20 (September 4-15, 1995); Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979).

<sup>9</sup> Center for Reproductive Rights, "Penalized for Serving Their Country: the Ban on Abortion for Women in the Military," (2003), [www.crlp.org/pub\\_fac\\_military.html](http://www.crlp.org/pub_fac_military.html) [hereinafter "Penalized for Serving Their Country"] (arguing that because the United States committed itself to multiple international treaties, it should uphold the standards of health set forth in the documents).

Part II of this Comment discusses the history of 10 U.S.C. Section 1093<sup>10</sup>, and the international treaties under which it is analyzed.<sup>11</sup> Part III examines the ways 10 U.S.C. violates international standards of reproductive health, and contravenes the human rights of American military women.<sup>12</sup> Finally, part IV

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<sup>10</sup> See generally Symposium, The Legacy of Roe: the Constitution, Reproductive Rights, and Feminism: the Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic, 6 **U. Pa. J. Const. L.** 752, 768 (2004) [hereinafter The Legacy of Roe] (tracing the enactment of 10 U.S.C. Section 1093, noting that this law's "harshest effects" often are on lower-ranked women, who must gain permission from their superiors, and who are likely less able to afford to pay for travel expenses to obtain an abortion).

<sup>11</sup> See generally Nadine Taub, Population and Development: Cairo: Its Achievements and Challenges, 1995 **St. Louis-Warsaw Trans'l** 51, 54 (1995) (emphasizing that the International Convention on Population and Development showed "impressive" recognition of the essential nature of reproductive health for women world wide).

<sup>12</sup> See World Health Organization, "Safe Abortion: Technical and Policy Guidance for Health Systems," 11 (2003),

recommends strategies for ways the international conferences could be enforced against participating countries, and possible ways 10 U.S.C. Section 1093 could be challenged.<sup>13</sup>

## **II. Background**

Congress enacted 10 U.S.C. Section 1093 during the early 1980's, in a political climate particularly hostile to reproductive rights.<sup>14</sup> The law changed slightly through the

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[http://www.who.int/reproductive-health/publications/safe\\_abortion/safe\\_abortion.pdf](http://www.who.int/reproductive-health/publications/safe_abortion/safe_abortion.pdf) (estimating that about 20 million unsafe abortions occur each year, and that "safe abortion services, as provided by law, therefore need to be available").

<sup>13</sup> See generally Meredith Marshall, Comment, Recent Development: United Nations Conference on Population and Development: The Road to a New Reality for Reproductive Health, 10 **Emory Int'l L. Rev.** 441, 492 (1996) (arguing that while the ICPD does not have a mechanism by which to bind countries, it is still considered an influential and commanding document to which governments should refer regarding international standards of health).

<sup>14</sup> See Tanya Melich, **The Republican War Against Women**, 178-79, 183, 202-03 (Bantam Books 1996) (1998) (documenting the anti-choice policies of the Reagan Administration); see also Tribe, supra note 3, at 143 (analyzing the anti-choice reaction to Roe

1990's during the Clinton Administration, but currently all of its restrictions are enforced.<sup>15</sup> The United States enforces this law in contravention of multiple international treaties, and in violation of the international standard of reproductive rights.<sup>16</sup>

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v. Wade in the 1970's, as a "two-tiered attack"). The anti-choice forces worked to overturn Roe entirely, but also worked to make the right inaccessible by creating barriers to abortion services, which served as a practical ban for low-income women. Id.

<sup>15</sup> See David Burrelli, Report for Congress, Congressional Research Service, "Abortion Services and Military Medical Facilities," 4, 8, 16 (2002) (speculating that even though the first Clinton Administration allowed pre-paid abortions in military hospitals, access to abortion services did not necessarily increase due in part to the general unwillingness of military doctors to perform the procedure).

<sup>16</sup> See "Penalized for Serving Their Country," supra note 9 (asserting that the United States has a duty to its citizens to uphold the standard of reproductive health care recognized in the ICPD, to which it is committed).

### **A. History of 10 U.S.C. Section 1093**

Congress first included language restricting abortion services to female military personnel in a 1978 amendment to the Department of Defense ("DoD") appropriations bill.<sup>17</sup> In 1984, Congress enacted 10 U.S.C. Section 1093 incorporating language similar to that used in the 1978 amendment.<sup>18</sup> As the language of the statute could be interpreted, women could still obtain abortions in military facilities, so long as they used their own funds to pay for the abortion (known as "pre-paid" abortions).<sup>19</sup> The law allowed the use of federal funds if the woman's health

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<sup>17</sup> See Burrelli, supra note 15, at 4 (stating the portion of the amendment that forbade any funds appropriated for the military to be used for abortion services, with exceptions for life of the mother, rape, and incest).

<sup>18</sup> See 10 U.S.C. § 1093 supra note 4 (restricting the use of DoD funds for abortions, but still allowing the use of military facilities for privately funded abortions).

<sup>19</sup> See Crawford, supra note 6, at 1552-53 (commenting that once pre-paid abortions were no longer allowed, the ban could no longer be justified by an interest for preventing federal funds' use for abortions, since women had been using their own money for pre-paid abortions).

or life was at risk, or if the pregnancy resulted from rape or incest.<sup>20</sup>

The policy of this law changed however in 1988, as part of the Reagan Administration's broader plan to limit reproductive rights (in a political environment generally hostile to reproductive rights).<sup>21</sup> The Assistant Secretary of Defense

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<sup>20</sup> 10 U.S.C. § 1093, supra note 4, pt. b.

<sup>21</sup> See Melich, supra note 14, at 178-79, 182-83 (pointing out the Reagan Administration's systematic dismantling of civil rights, its encouragement of the anti-choice religious right, and the anti-choice Republican platform of 1984). This platform included support for a "Human Life Amendment" and support for laws stating "the Fourteenth Amendment's protections apply to unborn children." Id. at 182-83. See also International Conference on Population, Second Conference August 13-16, 1984, Mexico City, Mexico, 4 (prohibiting the use of U.S. funds to non-governmental organizations providing information, education, or counseling on abortion, or abortion services). See generally Webster v. Reproductive Health Services, 492 U.S. 490, 520 (1989) (upholding a Missouri law that prohibited the use of public funds, government employees, or public facilities for the performance of abortions); Harris v. McRae, 448 U.S. 297, 306-11 (1980) (authorizing the Hyde Amendment, which prohibited the use

produced a memorandum, forbidding the use of military facilities for the performance of abortions even if a woman used private funds.<sup>22</sup> Though military regulations require military medical personnel to refer women to a local hospital to obtain an abortion, as mandated by a military regulation, no referral

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of Medicaid funds for abortions, even in circumstances where the abortion was considered medically-necessary); Maier v. Roe, 432 U.S. 464, 478-80 (1977) (finding that states were not required to provide abortion services to low-income women through state Medicaid programs, unless the abortion was considered medically necessary).

<sup>22</sup> See William Mayer, Memorandum, Department of Defense Policy Regarding Providing Non-Funded Abortions in Outside the Continental United States Military Medical Treatment Facilities, June 21, 1988,

<http://www.tricare.osd.mil/policy/memos/abortion.html>

(indicating that allowing women to obtain abortions with their own funds at military facilities could imply "insensitivity to the spirit of the Congressionally-enacted policy" of government noninvolvement with abortion services, and thus prepaid abortions would no longer be approved).

guidelines exist, and women are often left with little or no guidance regarding where to go for services.<sup>23</sup>

Congress enacted this law as part of a larger anti-choice movement that took place throughout the 1980's<sup>24</sup>, as evidenced by Supreme Court cases upholding funding restrictions for abortions, policies restricting access to abortion<sup>25</sup>, and foreign

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<sup>23</sup> See Wilde, supra note 7, at 351-52 (noting that along with the lack of referral guidelines, another problem is that military commanders have almost total discretion regarding medical leave, and in certain geographic areas, they therefore have "an effective veto over abortion" if they decide to not grant medical leave to a woman seeking an abortion).

<sup>24</sup> See Melich, supra note 14, at 214 (stating that the second Reagan Administration fully adopted the stance of the religious right toward reproductive health, which believed that abortion should be completely illegal).

<sup>25</sup> See Tribe, supra note 3, at 206 (speculating that the debate over public funding is really just a way to deny low-income women the right to choose). "Insofar as abortion itself remains legal, denying public funds for abortion is simply a collective decision that abortion be available only to the rich . . . [t]he denial to some women of the right to choose . . . while others can exercise that right freely, is really no compromise at all

policies restricting funding for reproductive health.<sup>26</sup> Early in his time as president, Bill Clinton directed the DoD to bring the standard back to the pre-1988 ban on the use of facilities; women could use facilities again, but had to use their own funds.<sup>27</sup> In 1996 though, Congress again reinstated the ban on

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and seems particularly immoral when the line between the two groups is based on something as unrelated to the situation of pregnancy . . . as personal wealth.” Id. See also Casey, at 854-56 (reaffirming the right to choose established in Roe). Though the Court in Casey upheld certain restrictions on abortion, the Court held that the government could not, under the “undue burden” standard, enact regulations that served as “substantial obstacles” to women who sought abortion services. Id. at 869-77.

<sup>26</sup> See Melich, supra note 14, at 214 (pointing out the effect of the Republican policies on reproductive health at a global level, including cutting funding for contraceptive distribution and family-planning in foreign countries where abortion was legal).

<sup>27</sup> Memorandum of the President of the United States, William J. Clinton, Memorandum for the Secretary of Defense, Jan. 22, 1993, 58 F.R. 6439, available at <http://frwebgate5.access.gpo.gov> (directing the Secretary of Defense to repeal the ban on the use

pre-paid abortions, and women in the military could no longer obtain abortions at military facilities in the United States or abroad, except in cases of rape or life endangerment.<sup>28</sup>

### **B. International Conferences Promoting Women's Reproductive Rights**

There are a number of international conferences addressing the development of reproductive rights.<sup>29</sup> The International Conference on Population and Development ("ICPD") was one of the first major conferences to identify access to safe abortion as

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of U.S. military facilities for abortions, and allowing their use for prepaid abortions).

<sup>28</sup> See Stephen C. Joseph, "Statutory Revision to DoD Policy Regarding Prepaid Abortions in Military Hospitals," February 13, 1996, <http://www.tricare.osd.mil/policy/fy96/abplcy96.html> (stating that "Prepaid abortions are no longer allowed, except in cases in which the pregnancy is the result of an act of rape or incest").

<sup>29</sup> See "Safe Abortion: Technical and Policy Guidance for Health Systems," supra note 12, at 12 (recognizing that while international conferences emphasize the importance of safe abortion, they also address a dedication to reducing the need for abortion services through increased family planning).

part of a broader notion of reproductive health.<sup>30</sup> Similarly, the Fourth World Conference on Women ("FWCW") recognized a broad idea of human rights which included a right to reproductive healthcare.<sup>31</sup> The International Covenant on Civil and Political Rights ("ICCPR") speaks to more general liberty interests, but also includes many of the "core" political and social rights recognized by the Universal Declaration of Human Rights.<sup>32</sup> The Conference on the Elimination of all Forms of Discrimination against Women ("CEDAW") also recognized reproductive rights as

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<sup>30</sup> See Key Actions For Further Implementation of the Programme of Action of the International Conference on Population and Development, ch. IV, pt. c, ¶ 63, § iii (1999) [hereinafter Key Actions].

<sup>31</sup> See Fourth World Conference on Women, supra note 8, ch. 1, § 95.

<sup>32</sup> See UNFPA State of World Population 1997, "The Right to Choose: Reproductive Rights and Reproductive Health," ch. 1, at 3 (1997) <http://www.unfpa.org/swp/1997/chapter1.htm> (pointing out that the ICCPR, in addition to embracing many of the rights of the Universal Declaration, also specifically articulated women's right to live without discrimination).

being part of a larger human rights framework.<sup>33</sup> Though neither the ICPD nor FWCW are binding, and though the United States never ratified CEDAW, each document serves as an important part of developing an international standard of reproductive health.<sup>34</sup> The ICPD and FWCW lack the devices necessary to make governments “legally accountable,” for failure to enforce the goals of the

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<sup>33</sup> See Symposium, Fourth Annual Woman and the Law Conference, Resisting Equality: Why the U.S. Refuses to Ratify the Women’s Convention, 27 **T. Jefferson L. Rev.** 15, 20 (2004) [hereinafter Resisting Equality] (emphasizing that part of CEDAW’s importance is that it mandates that governments take affirmative steps in ensuring women have equality in social and political contexts).

<sup>34</sup> See Rebecca J. Cook and Mahmoud F. Fathalla, “Advancing Reproductive Rights Beyond Cairo and Beijing,” International Family Planning Perspectives, vol. 22, no. 3 (September 1996), 115 (explaining how the ICPD and FWCW contribute “specific detail” to international standards of reproductive health, as well as encourage the development of other government programs designed to address reproductive healthcare issues). CEDAW also contributes to the international standard of reproductive health, by providing an agreed-upon, documented standard of reproductive health to which governments can pledge to uphold.

Id.

conferences, but both the ICPD and FWCW serve important functions in defining acceptable standards of reproductive health care at an international level.<sup>35</sup> The wide acceptance in an international context of the idea that reproductive rights are part of a larger framework of human rights is evidenced by the ICPD, FWCW, ICCPR, and CEDAW.<sup>36</sup>

**i. The International Conference on Population and Development**

Despite the lack of political support for reproductive rights in the United States during the 1980's, most of the 1990's, and now during the current Bush administration<sup>37</sup>, the

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<sup>35</sup> See id. (articulating how the ICPD and FWCW give support to reproductive rights and other programs designed to advance such rights, despite the lack of an enforcement mechanism).

<sup>36</sup> See UNFPA State of World Population 1997, supra note 32, ch. 1, at 1-2 (commenting that reproductive rights are part of a widely accepted framework of international human rights, and that such a right is understood to be implicit in the "rights to life and survival, liberty and personal security, to equal treatment, to education, to development, and to the highest attainable standard of health. . .")

<sup>37</sup> See, e.g., Memorandum of President of the United States, George W. Bush, Memorandum for the Administrator of the United

notion that reproductive rights are human rights advanced at an international level during the 1980's and 1990's.<sup>38</sup> The ICPD firmly established reproductive rights as human rights, and promoted the idea that a full range of reproductive health services and choices help ensure women's equal rights.<sup>39</sup> Chapter

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States Agency for International Development, Restoration of the Mexico City Policy, January 22, 2001, [www.whitehouse.gov/news/releases/20010123-5.html](http://www.whitehouse.gov/news/releases/20010123-5.html), (reinstating all of the requirements of the Mexico City Policy restricting funds to Non Governmental Organizations receiving money from the United States, and prohibiting them from speaking of abortion as part of their reproductive health advocacy).

<sup>38</sup> See, e.g., Fourth World Conference on Women, supra note 8; International Conference on Population and Development, supra note 8; Convention on the Elimination of all Forms of Discrimination Against Women, supra note 8.

<sup>39</sup> See International Conference on Population and Development, Summary of the Programme of Action, ch. VII, "Reproductive Rights and Reproductive Health," <http://www.un.org/ecosocdev/geninfo/populatin/icpd.htm> (stating that "[r]eproductive health is a state of complete physical, mental, and social well-being in all matters relating to the reproductive system and to its functions and processes. It

VIII, paragraph 8.25, and Chapter VII, paragraph 7.6 of the ICPD, adopt the view that a broad notion of healthcare includes safe abortion.<sup>40</sup>

The ICPD serves an important function in the context of international human rights, by acknowledging the interconnectedness of growth and development of countries with the "economic status and empowerment of women."<sup>41</sup> In recognizing that women's health is part of a broader human rights context, the ICPD made reproductive health care a priority on an

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implies that people have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this is the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice. . .").

<sup>40</sup> International Conference on Population and Development, supra note 8, ch. VII, ¶ 7.6; ch. VIII, ¶ 8.25.

<sup>41</sup> See United Nations, Report of the International Conference on Population and Development, ch. 1, ¶ 1.5, Preamble, U.N. Doc. A/Conf.171/13/Rev.1 (1995) (mandating that the ICPD recognize that the environment, population, and poverty cannot be considered as isolated elements, and must be reviewed as interrelated issues).

international level.<sup>42</sup> As a participating country, the United States committed itself to the goals and programs for the advancement of women established at this conference.<sup>43</sup> The United States played an important role in the ICPD, recognizing the importance of reproductive rights in an international context, and acknowledging the importance of safe access to abortion services in particular.<sup>44</sup>

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<sup>42</sup> See Cook and Fathalla, supra note 34, at 115 (interpreting the ICPD as promoting women's rights and protecting reproductive rights as human rights, through a broad definition of health that includes a wide range of reproductive health matters; this includes access to family planning, and the freedom to decide when and if to have children); see also Marshall, supra note 13, at 441, 444 (stressing that even though the ICPD is not binding on participating countries, it nevertheless indicates an "international consensus" regarding reproductive health).

<sup>43</sup> See United Nations General Assembly, Statements in Explanation of Position and Reservations to the ICPD Programme of Action, 47, UN Doc A/S-21/PV.9 (1995) (restating the United States commitment to the ICPD and support of programs designed to serve the goals of the ICPD).

<sup>44</sup> See Key Actions for the Further Implementation of the Programme of Action of the International Conference on

## ii. The Fourth World Conference on Women

The Fourth World Conference on Women, held in 1995 in Beijing, China supports the ideas of equality and reproductive health set-forth in the ICPD.<sup>45</sup> In the FWCW's overall mission of "advanc[ing] the goals of equality, development and peace for all women everywhere in the interest of all humanity," it

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Population and Development, New York, June 30-July 2, 1999, 48, [www.unfpa.org](http://www.unfpa.org) (announcing at the five year review of the ICPD, the importance of government commitment to the ICPD, and that "Governments participating in this five-year review have overwhelmingly agreed to stay true and steady to the course Cairo [ICPD] set us on. Cairo is working"). "Our collective efforts here this week worked. And we all go back home renewed and rededicated to continue our work for women and their families everywhere in the world." Id.

<sup>45</sup> See Report of the Fourth World Conference on Women, ch. 1, ¶ 94, U.N. Doc A/Conf.177/20 (September 4-15, 1995) (defining reproductive health as "a state of complete physical, mental and social well-being . . . in all matters relating to the reproductive system and to its functions and processes"); see also Cook and Fathalla, supra note 34, at 115 (pointing out that the FWCW "reaffirm[s]" the ICPD's broad definition of reproductive health as part of a larger right to health care).

includes a broad definition of reproductive health, and the expected standard of health care access for women worldwide.<sup>46</sup> The FWCW reinforced much of what the ICPD set forth in 1994.<sup>47</sup>

### **iii. International Covenant on Civil and Political Rights**

The United States ratified the ICCPR on June 8, 1992.<sup>48</sup> Though the ICCPR does not contain language specific to reproductive rights, much of its language and many of its articles apply to women's health.<sup>49</sup> The Human Rights Committee

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<sup>46</sup> See id., ch. 1, ¶ 92 (stating that "[w]omen's right to the enjoyment of the highest standard of health must be secured throughout the whole life cycle in equality with men").

<sup>47</sup> See Cook and Fathalla, supra note 34, at 118 (pointing out that the ICPD and FWCW, together, set forth a broad understanding of reproductive healthcare, and the importance of access to reproductive healthcare).

<sup>48</sup> See Office of the High Commissioner for Human Rights, Ratifications and Reservations of the International Covenant on Civil and Political Rights, <http://www.ohchr.org/english/countries/ratification/4.htm> (listing that the United States ratified the ICCPR on June 8, 1992).

<sup>49</sup> See International Covenant on Civil and Political Rights, G.A. Res. 2200, pt. II, art. 3; pt. III, arts. 7,9, U.N. GAOR, 21st

monitors compliance with the ICCPR by collecting reports from governments regarding implementation of rights included in the ICCPR.<sup>50</sup>

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Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966)

(announcing that men and women have equal political and civil rights, the impermissibility of degrading treatment, and the right to liberty and security of person); see also UNFPA State of World Population 1997, supra note 32, at 3 (interpreting the ICCPR as a human rights document which encompasses a broad range of women's rights, including freedom from all forms of discrimination, and rights to privacy regarding family decisions).

<sup>50</sup> Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, "Monitoring Civil and Political Rights," [www.ohchr.org/english/bodies/hrc/index.htm](http://www.ohchr.org/english/bodies/hrc/index.htm) (enforcing a regular reporting requirement for all parties that have ratified the ICCPR, as a way to track governments' progress in recognizing the rights enumerated in the ICCPR).

#### **iv. The Convention on the Elimination of All Forms of Discrimination Against Women**

CEDAW is another international treaty promoting and protecting the rights of women worldwide.<sup>51</sup> Notably, the United States is the only democratic nation that has not ratified CEDAW due to domestic political reasons.<sup>52</sup> CEDAW outlines important

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<sup>51</sup> See Convention on the Elimination of All Forms of Discrimination against Women, supra note 8 (outlining the importance of women's social and political rights on a global level).

<sup>52</sup> See Resisting Equality, supra note 33, at 16-17 (observing that many politicians in the United States fear ratification of CEDAW because of concern with its possible effect on domestic policies involving family planning and issues of gender equality). This also notes that the United State's refusal to ratify "reflects the ideological agenda and considerable clout of the religious right and the corporate establishment." Id. See also The Legacy of Roe, supra note 10, at 752, 785 (pointing out that anti-choice politics are part of the reason the United States' has failed to ratify CEDAW; even though the treaty says nothing of the sort, anti-choice politicians argue the treaty promotes "abortion on demand"). See generally Stefanie Grant, "The United States And the International Human Rights Treaty System: For Export Only?" 317, **The Future of UN Human Rights**

issues of equality, including the idea that governments should take steps to ensure women are treated equally in a political, economic and social context, and more specifically that women should have equal "access to health care services."<sup>53</sup> Though the United States has not ratified this treaty, it remains an important document establishing the need for women's equality worldwide.<sup>54</sup>

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**Treaty Monitoring**, (Eds. Philip Alston and James Crawford, Cambridge University Press, 2000) (considering the "slow and contradictory" process of treaty ratification in the United States).

<sup>53</sup> See Convention on the Elimination of all Forms of Discrimination Against Women, supra note 8, pt. I, art. 3; pt. 3, art. 7 (establishing that in all fields, including political, social, and economic and cultural, the government should take steps to ensure women's full and equal participation, and also that the government should ensure women have equal access to health care services).

<sup>54</sup> See Resisting Equality, supra note 33 at 16 (suggesting that CEDAW is likely "the most significant treaty guaranteeing gender equality").

### **III. Analysis**

The international standard of reproductive health care includes access to safe abortion services.<sup>55</sup> As a participating country in the ICPD and FWCW, and as a country bound to the ICCPR, the United States has an obligation under international law to ensure American women have access to a broad range of healthcare services.<sup>56</sup> By denying American women this right with 10 U.S.C. Section 1093, the United States violates the human

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<sup>55</sup> See International Covenant on Civil and Political Rights, supra note 49, pt. III, arts. 6, 9 (asserting that all people have the right to life, and the right to liberty); see also Fourth World Conference on Women, supra note 8, ch. 1, § 106, pt. j (stating that governments must “[r]ecognize and deal with the impact of unsafe abortion as a major public health concern. . .”); International Conference on Population and Development, supra note 8 at ch. IIIIV, pt. C, § 25 (mandating that countries “deal with the impact of unsafe abortion as a major public health concern. . .”).

<sup>56</sup> See “Penalized for Serving Their Country,” supra note 9 (speculating that the United States’ commitment to the ICPD should compel it to comply with the mandates of the ICPD; including ensuring American women have access to safe abortions).

rights of American women in the military.<sup>57</sup> The United States fails to ensure American women in the military stationed abroad have access to comprehensive reproductive health services, which contravenes international standards of women's rights and healthcare.<sup>58</sup>

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<sup>57</sup> See Key Actions, supra note 30, ch. III, pt. a, ¶¶ 39-40 (stating that governments should take steps to "ensure that the human rights of women and girls are respected, protected and promoted. . ." which can be accomplished by enacting reproductive health policies); see also The Legacy of Roe, supra note 10, at 752, 795 (proposing that the Bush Administration's reproductive health policies are part of a "coordinated plan to dismantle the protections afforded women by the U.S. Constitution and human rights instruments. . .")

<sup>58</sup> See The Legacy of Roe, supra note 10, at 793-95 (arguing that the military ban is just part of a larger anti-choice political agenda of the Bush administration, whose primary goal is to limit the reproductive rights of women). The Alan Guttmacher Institute published a press release that noted the alliance of the United States with Iran, Iraq, Libya and Sudan, countries "not known for their support of women's rights." Id. at 793-94. The president of the International Women's Health Coalition stated in the press release that the "alliance shows the depths

**A. The United States Government Violates International Standards of Reproductive Health Care by Enforcing 10 U.S.C. Section 1093**

10 U.S.C. Section 1093 violates the international standard of reproductive health care, by denying women safe access to abortion.<sup>59</sup> The United States government has an obligation under the ICCPR, ICPD and FWCW to ensure women in the military have access to comprehensive reproductive health care that includes abortion.<sup>60</sup> The United States also has a duty to provide women in the military with abortion services, because 10 U.S.C.

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of perversity of the [United States'] position. On the one hand we're presumably blaming these countries for unspeakable acts of terrorism, and at the same time we are allying ourselves with them in the oppression of women." Id. at 793-94.

<sup>59</sup> See International Conference on Population and Development, supra note 8, ch. VII, ¶ 7.6; ch. VIII, ¶ 8.25.

<sup>60</sup> See Key Actions, supra note 30, ch. III, pt. a, ¶ 40 (stressing that the United Nations and governments should work to incorporate and protect reproductive health as a human right, and that governments should ensure access to reproductive health care for all women).

Section 1093 denies the right to choose to women by virtue of them being in the military.<sup>61</sup>

**1. 10 U.S.C. Section 1093 Violates the Standards Of Reproductive Healthcare Established by the ICPD and the FWCW**

In many circumstances in which American women in the military are stationed abroad, 10 U.S.C. Section 1093 serves as a practical all-out ban on abortion.<sup>62</sup> As the ICPD states, "reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive

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<sup>61</sup> See Leah Ginsberg, Comment, Do Prisoners Get a Better Deal? Comparing the Abortion Rights and Access of Military Women Stationed abroad to Those of Women in Prison, 11 **Cardozo Women's L.J.** 385, 401-02 (2005) (describing how the military can deny women in the military the right to choose by stationing them in countries where abortion services are not available, and then by being denied leave by their commander to seek legal abortion services in another country).

<sup>62</sup> See Wilde, supra note 7, at 392-95 (arguing that certain obstacles for women seeking abortions abroad, including higher cost, language barriers, ability to travel, and commanders' power to deny leave for women seeking abortions, serve to prohibit abortion all together).

health problems.”<sup>63</sup> Similarly, the FWCW states that “reproductive rights embrace certain human rights that are already recognized in . . . international human rights documents and other consensus documents.”<sup>64</sup> While supporting this proposition in theory, as a participating country in these conferences, the United States simultaneously denies American women stationed abroad rights to reproductive health.<sup>65</sup>

At the five-year review of the ICPD, participating countries specifically identified unsafe abortion as a “major public-health concern” and stated that “where abortion is not against the law, such abortion should be safe.”<sup>66</sup> Rather than ensure

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<sup>63</sup> See International Conference on Population and Development, supra note 8, ch. VII, ¶ 7.2.

<sup>64</sup> See Fourth World Conference on Women, supra note 8, ch. 1, § 95.

<sup>65</sup> See International Conference on Population and Development, supra note 8, ch. II, Notes, ¶ 119 (listing the United States as a participating country). See generally “Penalized for Serving Their Country,” supra at note 9 (pointing out the many ways this ban compromises women’s health, including the fact that women stationed abroad might not be able to find a safe facility in which to obtain an abortion).

<sup>66</sup> See Key Actions, supra note 30, ch. IV, pt. c, ¶ 63, § iii.

American women's access to safe abortions, 10 U.S.C. Section 1093 puts women's health at risk by forcing them to seek abortions in foreign countries where the medical standards may be lower than those at a U.S. military hospital.<sup>67</sup> In addition to lower medical standards, women might also be in a country that completely prohibits abortion, forcing them to travel to another country to seek legal abortion services.<sup>68</sup> Women might also face

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<sup>67</sup> See Crawford, supra note 6, at 1571 (acknowledging the different standards of health care that exist depending on the country; along with lower standards of care, safety and cleanliness are also issues with which women must contend); see also Kennedy, supra note 1 (recounting a "mortifying and painful" experience of a female officer in the military in trying to obtain an abortion in Germany; the officer did not speak German, the workers at the German clinic violated her notions of privacy [a result of cultural differences], and the clinic workers performed the procedure without any form of pain killer); Cook and Fathalla, supra note 34, at 117 (supporting the contention that unsafe abortion is a major public health concern, as about 200,000 women per year die as a result of unsafe abortion).

<sup>68</sup> See Wilde, supra note 7, at 392-93 (pointing out that in some instances, women will be forced to travel back to the United

language barriers, and higher costs than they would if they were in the United States.<sup>69</sup> When women must travel to countries other than where they are based to seek legal abortion services it is difficult and can be expensive, which for low-ranking women might cause dangerous delay.<sup>70</sup>

Chapter VIII, paragraph 8.25 of the ICPD explicitly states that “where abortion is not against the law, such abortion should be safe” and paragraph 7.6 of Chapter VII adopts this

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States for abortion services, if they are stationed abroad in countries that forbid abortion entirely).

<sup>69</sup> See id. (emphasizing that high costs add an additional burden to women overseas, as abortions abroad tend to cost in the thousands of dollars, while in the United States, an early term abortion typically starts at \$200).

<sup>70</sup> See American Association of University Women, “Federal Employee and Military Coverage Bans,” (2006), [www.aauw.org/issue\\_advocacy/actionpages/positionpapers/repro\\_military.cfm](http://www.aauw.org/issue_advocacy/actionpages/positionpapers/repro_military.cfm) (evaluating the difficulties in travel for women stationed abroad, noting that people in the military fly standby on military planes, or use their own money to fly commercially which many cannot afford); see also Kennedy, supra note 1 (emphasizing the cost-prohibitive function of being forced to travel off-base for abortion services).

view of abortion into a standard of reproductive health care, making it part of a broader notion of primary health care.<sup>71</sup> Paragraph 7.6 of the ICPD also states that “[a]ll countries should strive to make accessible through the primary health care system, reproductive health to all individuals of appropriate ages as soon as possible. . . .”<sup>72</sup> 10 U.S.C. Section 1093 does just the opposite of this, by removing access to safe abortion from the framework of healthcare provided by the military.<sup>73</sup> The United States not only fails to make abortion services “accessible through the primary health care system,” but it

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<sup>71</sup> International Conference on Population and Development, supra note 8, ch. VII, ¶ 7.6; ch. VIII, ¶ 8.25.

<sup>72</sup> Id., ch. VII, ¶ 7.6.

<sup>73</sup> See Wilde, supra note 7, at 396 (raising the fact that “military commanders do not understand women’s health issues,” and as such, women in the military would be hesitant to bring up women’s health issues such as abortion with military doctors); see also Kennedy, supra note 1 (explaining the difficulty for women in the military to approach military doctors who are “officers” and outrank enlisted soldiers because of a “climate of intimidation” and because some doctors display outwardly their disapproval of abortion, making it a difficult subject to discuss).

denies women this basic function of health care by failing to provide them with alternative means of obtaining abortion services.<sup>74</sup>

**2. 10 U.S.C. Section 1093 Contravenes Article 9  
of the ICCPR**

In the context of the military where women are as a practical matter, "held captive by the government," the failure of the government to allow the use of military hospitals for abortion, removes this right all together for women in the military.<sup>75</sup> By placing these women outside of the United States,

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<sup>74</sup> See International Conference on Population and Development, supra note 8, ch. VII, ¶ 7.6; see also Ginsberg, supra note 61 at 400-02 (arguing that the many barriers women abroad will face in trying to obtain an abortion off the military base because of 10 U.S.C. Section 1093, including transportation problems, and problems getting leave from their superiors, effectively deny women in the military abortion services all together); Crawford, supra note 6 at 1574 (noting that under the Clinton Administration's policy on 10 U.S.C. Section 1093, at one time, the military did have a responsibility to provide women with transportation to facilities where abortions would be performed).

<sup>75</sup> See id. at 1580 (arguing that the failure of the military to provide abortion services is akin to an all-out ban on abortion,

where they would otherwise have the ability to obtain abortion services, the United States government has a duty to provide alternative services for safe abortion.<sup>76</sup> The right to choose

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which is not legitimate, and not lawful under Roe v. Wade); see generally Kennedy, supra note 1 (asserting that a major difference between civilian American women, and women in the military, is that women in the military “belong” to the United States army in a sense). In a sense, women become “subjected” to the military: “[s]he is subject to the orders of the officers appointed over her. Every hour of her day belongs to the U.S. army, and she must have her seniors’ permission to leave her place of duty.” Id. See generally Wilde, supra note 7, at 392 (expanding on the practical difficulties for women in the military, given that the military has higher rates of domestic violence than the rest of the United States). Along with the higher rates of domestic violence, pregnant women are generally more likely to suffer from domestic violence [especially women with unintended pregnancies], and military doctors tend to recognize and treat domestic violence less effectively than all other health care providers. Id.

<sup>76</sup> See Crawford, supra note 6, at 1580 (advocating that the “military’s quasi-custodial role” creates an “affirmative duty” of the military to ensure women have access to abortion

abortion is a legally protected liberty interest in the United States, and the government cannot deny this right to military women merely because they are part of the military.<sup>77</sup>

Article 9 of the ICCPR states that every person has "the right to liberty and security of person," which for American women includes a right to safe reproductive healthcare.<sup>78</sup> This

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services, even if such a duty does not apply to women in America); see also Wilde, supra note 7, at 410 (claiming that "[i]n removing women from an environment in which they could readily obtain an abortion, the military has arguably affirmatively denied them a constitutional right and must therefore provide an affirmative remedy").

<sup>77</sup> See Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992) (holding that Roe v. Wade could be seen as a "rule . . . of personal autonomy and bodily integrity," which recognizes constraints on government power to regulate medical processes, and that whatever the government interests are in limiting the right to abortion, they do not justify an absolute priority over the individual liberty interest at stake).

<sup>78</sup> See International Covenant on Civil and Political Rights, supra note 49, art. 9; see also Audrey Chapman, The Right to Health: Monitoring Women's Right to Health Under the International Covenant on Economic, Social and Cultural Rights,

law contravenes Article 9, by denying the liberty interest of women in the military to choose abortion as a medical procedure, and putting them at risk in ways not permissible for their civilian counter-parts living in the United States.<sup>79</sup> By treating Women's legal rights differently based on whether a woman is in the military, the government discriminates against women in the military.<sup>80</sup> The healthcare providing function of military

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44 **Am. U. L. Rev.** 1157, 1171 (1995) (arguing that the right to health recognized in the International Covenant on Economic, Social and Cultural Rights is similar and interrelated with the right to life acknowledged in Article 6 of the ICCPR, and that this right to life, as the general comment of the ICCPR notes, should have a broad interpretation).

<sup>79</sup> See generally Crawford, supra note 6, at 1581 (reasoning that the dearth of legitimate justifications for this law supports the contention that it would be found unconstitutional under American jurisprudence); see also "Penalized for Serving Their Country," supra note 9 (noting that 10 U.S.C. Section 1093 prohibits women stationed abroad from exercising their constitutional right to abortion that would otherwise be available to them if they were in the United States).

<sup>80</sup> "Federal Employee and Military Coverage Bans," supra note 70 (recognizing the injustice of 10 U.S.C. Section 1093 as it

hospitals serves an even more vital purpose in countries where local medical standards and facilities may not be adequate, yet the military denies women the right to use the hospitals for a medical procedure that uniquely affects them.<sup>81</sup>

**B. 10 U.S.C. Section 1093 Violates the Human Rights of American Women in the Military Stationed Abroad**

American women stationed abroad have a right to accessible healthcare services, and 10 U.S.C. Section 1093 directly infringes on this right.<sup>82</sup> Even if the United States had

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prevents women in the military from exercising their legal right to abortion, simply by virtue of voluntarily serving in the military).

<sup>81</sup> Id. (explaining that the purpose of military hospitals is to provide adequate healthcare for people serving in the military, and their families).

<sup>82</sup> See generally Center for Reproductive Rights, "Safe and Legal Abortion is a Woman's Human Right," 2004, [www.crlp.org/pdf\\_bp\\_safeandlegal.pdf](http://www.crlp.org/pdf_bp_safeandlegal.pdf) (observing that women's right to life is protected by multiple human rights documents, and that because a major cause of maternal deaths are caused by unsafe abortion services, laws that constrain a woman's right to safe abortion procedures contravenes this widely recognized right to life); "Federal Employee and Military Coverage Bans," supra note 70 (discussing the fact that abortion is a legally

compelling reasons for enacting this law, they would not outweigh the reproductive rights of American women such that the military could deny absolutely the right to choose.<sup>83</sup> In the absence of any compelling reason for this law, the hardships imposed on women in the military are even more unnecessary.<sup>84</sup>

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protected right, and women in the military are denied this right, merely by virtue of being in the military).

<sup>83</sup> See Crawford, supra note 6, at 1573 (arguing that no military reasons for this law, justify it); see also Webster, 492 U.S. 490 at 510, n.8 (stating that if the state took action to effectively enact an all out ban on abortion, by denying the use of any facilities for abortions, there would be a constitutional problem).

<sup>84</sup> See Crawford, supra note 6, at 1558 (explaining that if the purpose of a law is solely to substantially block a woman's access to abortion, than abortion law jurisprudence generally considers such laws "illegitimate").

**1. 10 U.S.C. Section 1093 Denies the Right to Safe Abortion Services, Despite the United States' Recognition of This Right**

The ICPD, FWCW, and ICCPR indicate that reproductive health is part of a larger notion of human rights for women.<sup>85</sup>

Paradoxically, the United States has played a major role in shaping reproductive rights at an international level, both by promoting them, and also by denying them.<sup>86</sup> 10 U.S.C. severely

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<sup>85</sup> See International Conference on Population and Development, supra note 8, ch. VII, ¶ 7.3 (declaring that the ICPD definition of reproductive rights, "embraces" human rights that have already been recognized in international and national laws, recognizing a right "to attain the highest standard of sexual and reproductive health"); see also Fourth World Conference on Women, supra note 8, ch. 1, ¶ 96 (maintaining that "the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence"). See generally Taub, supra note 11, at 54 (discussing the fact that the ICPD properly recognizes reproductive rights as part of a larger human rights framework).

<sup>86</sup> See The Legacy of Roe supra note 10, at 756-65, 788, 792 (pointing out that the United States contributed significantly

restricts American women's access to reproductive healthcare, in violation of the widely recognized human right to reproductive healthcare.<sup>87</sup>

With the establishment of abortion rights in the right of privacy found in the United States Constitution, the United States was one of the first countries to recognize reproductive rights as a constitutional right.<sup>88</sup> Other industrialized

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to the trend recognizing reproductive rights at a global level, but in recent years has also contributed to a growing "countertrend bent on dismantling these rights").

<sup>87</sup> See "Safe Abortion: Technical and Policy Guidance for Health Systems," supra note 12, at 16 (asserting that governments have an obligation to respect women's right to health, and that governments should aim to create policies that support women's reproductive health); see also Chapman, supra note 78, at 1772 (saying that laws that block women's access to reproductive healthcare comprise "a fundamental violation of women's right to health," as established in part by the ICCPR).

<sup>88</sup> See The Legacy of Roe, supra note 10, at 760 (emphasizing the effect United States jurisprudence had on other developed countries, such as Canada which recognized abortion as a protected right in a 1988 Canadian Supreme Court case, R. v. Morgentaler).

countries followed suit, recognizing reproductive rights in national constitutions; the Constitutional Courts of Austria, France, Italy and the Netherlands have all found that "liberal abortion laws are consistent with women's right to liberty."<sup>89</sup> While the United States was one of the leaders in promoting reproductive health at one time, in the last ten years the United States has been among countries that restrict access to safe abortions services, as exemplified by laws such as 10 U.S.C. Section 1093.<sup>90</sup>

While conferences, such as the ICPD and FWCW, are not binding on the United States, nor are the constitutions of other countries, such documents are "declarations of political commitment" to notions of human rights that include the rights

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<sup>89</sup> See Cook and Fathalla, supra note 34, at 118 (articulating how the FWCW helps guide governments liberalize abortion laws to protect women's liberty and "reproductive self-determination").

<sup>90</sup> See Center for Reproductive Rights, "As World Eases Restrictions on Abortion, U.S. becomes More Restrictive, Study Finds," (2005) [http://www.crlp.org/pr\\_05\\_0304abortion.html](http://www.crlp.org/pr_05_0304abortion.html) (citing the 2003 so-called "Partial Birth Abortion Ban" as one of the United States' restrictions on abortion passed in the last fifteen years).

to health, bodily integrity, and self-determination.<sup>91</sup> As such, reproductive rights are part of the larger human rights framework, to which the United States is privy and has a responsibility to uphold.<sup>92</sup>

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<sup>91</sup> See The Legacy of Roe supra note 10, at 763 (evaluating the influence of Roe v. Wade on other governments, and noting that while its influence is noticeable in the liberalization of many abortion laws, this liberalization is slowing and meeting a conservative backlash in many countries); see also "Safe Abortion: Technical and Policy Guidance for Health Systems," supra note 12, at 84 (drawing attention to the fact that even in countries where abortion is not legal, most participating governments at the FWCW agreed that such countries should review laws that punish women for obtaining illegal abortions).

<sup>92</sup> See The Legacy of Roe supra note 10, at 765 (pointing out that the conservative influence of countries such as the United States, forces progressive governments across the world to fight the trend of increasingly restrictive laws).

The FWCW specifically outlines steps governments should take to promote and defend reproductive rights.<sup>93</sup> This framework advances the idea that governments should implement laws to actively support accessible and comprehensive reproductive healthcare to women, including health services that “address the needs of women throughout their lives and take into account their multiple roles and responsibilities.”<sup>94</sup> This section also explicitly encourages governments to contend with the “health impact of unsafe abortion as a major public health concern”—something the United States is not doing.<sup>95</sup> For example, 10

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<sup>93</sup> See Fourth World Conference on Women, supra note 8, ch. 1, § 106, pts. a-c (outlining steps governments can take to ensure they meet the goals of the FWCW, such as reviewing existing laws and policies, and designing gender-sensitive health programs).

<sup>94</sup> See id., ch. 1, § 106, pts. a-j (encouraging participating countries to “support and implement the commitments” of the ICPD Programme of Action, as well as encouraging governments to “ensure that all health services and workers conform to human rights. . .”).

<sup>95</sup> See id., pt. j; see also Rebecca J. Cook, International Protection of Women’s Reproductive Rights, 24 **N.Y.U. J. Int’l L. & Pol.** 645, 651 (contending that laws and policies that constrain women’s access to reproductive healthcare service, are

percent of United States military personnel in Afghanistan and Iraq are women; abortion is only legal in life-threatening situations for the women in Afghanistan, and the shortage of capable doctors knowledgeable about women's health adds an additional barrier to reproductive healthcare.<sup>96</sup> This creates a situation that is inherently dangerous to women's health—they must either find abortion services in another country (of which they may not know the language), which requires extensive traveling, or are forced to delay the abortion which increases health complications.<sup>97</sup>

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challengeable because they are in violation of women's human rights).

<sup>96</sup> See Ginsberg, supra note 61, at 405-06 (stressing that only 52 of 193 countries surveyed by the United Nations allowed therapeutic abortions; 83 allow abortion only in cases of rape or incest; and 4 countries had an all-out ban on abortion, even if the woman's life was in danger).

<sup>97</sup> See Crawford, supra note 6, at 1571 (raising the fact that denial of leave for a military woman seeking abortion could result in more health risks, as the procedure is delayed); see also "Federal Employee and Military Coverage Bans," supra note 70 (emphasizing that the longer a woman is forced to wait to receive an abortion, the riskier the procedure becomes).

10 U.S.C. Section 1093 directly contravenes accepted human rights concepts of reproductive health, and does not allow for American women in the military to enjoy reproductive health as a "state of complete physical, mental and social well-being."<sup>98</sup> By denying women access to abortion services in military hospitals, the United States unjustly disadvantages women in the military, as they must attempt to obtain medical leave, or have a child.<sup>99</sup>

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<sup>98</sup> See International Conference on Population and Development, supra note 8, ch. VII, ¶ 7.2; see also National Abortion Federation, "Service Women Overseas Deserve Better Access to Safe and Legal Health Care,"

[www.prochoice.org/policy/national/women\\_military.html](http://www.prochoice.org/policy/national/women_military.html)

(explaining that not only does the military ban present barriers to many women in the military seeking abortions, but it also forces women to use their own money for abortions resulting from rape or incest—a policy inconsistent with the current Medicaid law which allows the use of federal funds in those limited circumstances).

<sup>99</sup> See Crawford, supra note 6, at 1575 (rebutting the "efficiency" argument for this law, as the costs of women obtaining abortions in a military hospital are essentially nothing because they must pay for the procedure, but the costs of childbirth are substantial for the military); see also Wilde,

The United States also fails completely to consider the affects of unsafe abortion as a "major public health concern" as 10 U.S.C. Section 1093 puts American military women in the types of unsafe situations, such as not having access to abortion at all (which might force them to seek unsafe or illegal procedures), the ICPD and FWCW directly encourage governments to prevent.<sup>100</sup>

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supra note 7, at 371 (refuting the "neutrality" of the military's policy regarding abortion, and arguing that "in practice the policy obstructs access to abortion").

<sup>100</sup> See International Conference on Population and Development, supra note 8, ch. VII, ¶ 7.2; see also Fourth World Conference on Women, ch. 1, § 106, pt. j; Ginsberg, supra note 61, at 400-02 (arguing that the many barriers women abroad will face in trying to obtain an abortion off the military base because of 10 U.S.C. Section 1093, including transportation problems, and problems getting leave from their superiors, effectively deny women in the military abortion services all together); Crawford, supra note 6, at 1575 (suggesting that in instances where safe, legal abortion services are unavailable for women stationed abroad, they may resort to unsafe abortions in the country in which they are stationed, which could result in serious injury or death); "Penalized for Serving Their Country," supra note 9 (pointing out the inaccessibility of safe medical facilities

## **2. The Government's Reasons for 10 U.S.C. Section 1093, Do not Outweigh the Health Interests of Women in the Military**

As noted before, Congress enacted 10 U.S.C. Section 1093 during a time when the political climate was particularly hostile to reproductive rights in America.<sup>101</sup> The government offered justifications for this law, such as promoting morale on bases, a general government interest in withholding federal funds from abortion procedures, and respect for the host country's laws, but they are generally pretext for the underlying anti-choice political motivations of this law.<sup>102</sup> 10 U.S.C. Section 1093 should not trump the reproductive rights of

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abroad in which to obtain abortions due to lower medical standards). See generally "Safe Abortion: Technical and Policy Guidance for Health Systems," supra note 12, at 12 (estimating that about 20 million women have unsafe abortions every year).

<sup>101</sup> See generally Melich, supra note 14, at 196 (discussing the movement of the Republican party in the 1980's to methodically dismantle women's rights).

<sup>102</sup> See Crawford, supra note 6, at 1582 (concluding that the legislative history of this law shows that the ban is motivated by politics, not by military needs).

American women, especially when the government lacks a compelling reason for the law.<sup>103</sup>

**i. Following the Laws of the Host Country**

Some proponents of the law argue that the United States must follow the laws of the host country in regard to the legality of abortion.<sup>104</sup> This is a policy choice, not a legal

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<sup>103</sup> See id. (making the argument that the all-out military ban on abortion is not supported by legitimate government justifications); see also Ginsberg, supra note 61, at 411 (contending that it is unjust, and probably unconstitutional for the government to deny women in the military rights that would otherwise be protected at home in America). The situation for women in the military is fundamentally unfair and unjust: "Their work [military women] is patriotic, yet these women are denied the rights of the very Constitution they fight to protect . . . The fact that courts have found the right to choose an abortion too fundamental, important, and necessary to allow its denial only emphasizes the ridiculousness of the federal government's willingness to choke off that . . . right of women defending our freedom." Id.

<sup>104</sup> See Stephen C. Joseph, "Implementation of Policy Regarding Pre-Paid Abortions in Military Treatment Facilities," Memorandum for the Secretaries of the Military Departments, DoD (1994)

choice, as international law does not mandate that the United States military adhere to the laws of a host country.<sup>105</sup> Even if another country could bind the United States to its laws, 10 U.S.C. Section 1093 would not be justified because access to abortion is part of the comprehensive health care the United States has a duty to provide.<sup>106</sup> The United States could provide

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[www.tricare.osd.mil/policy/fy96/abort30.html](http://www.tricare.osd.mil/policy/fy96/abort30.html) (stating that when it is not viable to “provide pre-paid abortion services in a particular military facility, the Military Health Services System shall develop other means to assure access for U.s. personnel and dependents, such as . . . referrals to another military facility or to qualified local civilian providers, consideration of travel to nearby locations, and other appropriate steps”).

<sup>105</sup> See Wilde, supra note 7, at 384 (recognizing the vastly diverging abortion laws in host countries, which can greatly inhibit women’s access to abortion services, depending on the restrictiveness of the host country’s laws).

<sup>106</sup> See Webster v. Reproductive Health Services, 492 U.S. 490 at 510, n.8 (1989) (acknowledging that the Missouri law at issue did not prohibit a woman’s right to choose, but that a “different analysis might apply” if a state did not provide alternative ways of obtaining abortion services). See generally

alternatives, such as providing assistance to women traveling to countries with legal abortion to ensure women's access to abortion; so even if the United States did adhere to a host country's laws, it does not justify 10 U.S.C. Section 1093.<sup>107</sup>

### **ii. The Moral Argument**

Congress enacted 10 U.S.C. Section 1093, during a time in the early 1980's when many laws were passed severely restricting abortion on "moral" grounds, rather than legal, and at a time

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"Safe Abortion: Technical and Policy Guidance for Health Systems," supra note 12, at 13 (proving the need for abortion services, the World Health Organization estimates that there would still be about 6 million unwanted pregnancies each year, even if contraceptive users used contraception perfectly one hundred percent of the time). The World Health Organization also states that for a number of reasons, even when abortion services should be available to women, they are not. Id. at 16. These reasons include lack of knowledge of the legality of abortion, lack of trained providers, complex regulations, and use of unsafe methods. Id.

<sup>107</sup> See Crawford, supra note 6, at 1574 (observing that under the Clinton Administration's policy on 10 U.S.C. Section 1093, the military provided transportation to a country where a woman could legally obtain abortion services).

when the abortion issue developed into a blatantly political issue.<sup>108</sup> While some proponents offered these sorts of moral arguments in defense of 10 U.S.C. Section 1093, some politicians went so far as to argue that the mere knowledge that abortions could be performed in a military facility might adversely affect the morale of troops abroad.<sup>109</sup> These sorts of moral arguments have been accepted by the Supreme Court, but never in the context of the government entirely prohibiting access to abortion, as 10 U.S.C. Section 1093 does.<sup>110</sup>

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<sup>108</sup> See Webster, 492 U.S. at 509 (holding that the government had a legitimate interest in promoting human life, and encouraging women to choose childbirth over abortion); see also Burrelli, supra note 15, at 2 (observing the leadership shift in Congress in the early 1990's from Democrats to Republicans, which also resulted in an increase in restrictive abortion laws).

<sup>109</sup> See Crawford, supra note 6, at 1558 (commenting that under this rationale, almost any sort of military regulation could be justified without evidence). A 1988 DoD memorandum regarding this law did not give military justification; its only justification was to eliminate all government involvement with abortion. Id.

<sup>110</sup> See Stenberg v. Carhart, 530 U.S. 914, 938 (2000) (reaffirming Casey's health exception requirement—if a state

There is no evidence that knowledge that abortions were available would in any way adversely affect the morale of troops.<sup>111</sup> Some military doctors argue that providing women with abortion services could actually help morale, by showing

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limits abortion procedures, it must always allow a health exception where a doctor deems an abortion medically necessary); see also Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (upholding the central findings in Roe: that the right to choose abortion is a liberty interest protected by the Fourteenth Amendment, and before viability women have a right to abortion services without interference from the state); "Penalized for Serving Their Country," supra note 9 (noting that this ban goes beyond the Supreme Court cases by actively putting up a barrier to women's access).

<sup>111</sup> See Crawford, supra note 6, at 1574-75 (pointing out there is not any sort of evidence supporting this claim); see also "Safe Abortion: Technical and Policy Guidance for Health Systems," supra note 12, at 16 (arguing that "[h]ealth professionals at all levels have ethical and legal obligations to respect women's rights").

"empathy for women's issues."<sup>112</sup> The United States has a legal obligation to ensure that women in the military have access to abortion, and a duty under international health standards.<sup>113</sup> A policy choice regarding "morale" cannot be sustained as justification for compromising the legal rights of women.<sup>114</sup>

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<sup>112</sup> See Crawford, supra note 6, at 1574 n.129 (quoting a statement by Dr. Jeffrey Jensen in a letter to Senator Lautenberg).

<sup>113</sup> See Webster v. Reproductive Health Services, 492 U.S. 490, 510, n.8 (1989); see also International Conference on Population and Development, supra note 8, ch. VII, § 7.4 (highlighting that governments should follow the ICPD's broad definition of reproductive health in implementing the standards of the ICPD).

<sup>114</sup> See Crawford, supra note 6, at 1558 (saying that while the "morale" argument does not provide adequate justification for this law, the courts give extreme deference to Congress' role in establishing laws regulating the military).

#### **IV. Recommendations**

The ICPD set a framework for how participating governments should approach reproductive rights as a health care issue.<sup>115</sup> The FWCW also anchored reproductive health in a broad notion of human rights, creating a framework within which countries should work to provide women with safe abortion services.<sup>116</sup> The ICCPR binds the United States to uphold a certain standard of civil and political rights.<sup>117</sup> The United States should follow these

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<sup>115</sup> See Marshall, supra note 13, at 491-92 (interpreting the ICPD as a framework, and "authoritative charter" within which governments can work to apply the tenets of the ICPD).

<sup>116</sup> See Fourth World Conference on Women, supra note 8, ch. 1, ¶ 96 (encouraging governments to "[r]eaffirm the right to the enjoyment of the highest attainable standards of physical and mental health, protect and promote the attainment of this right . . . and incorporate it in national legislation").

<sup>117</sup> See Symposium: the Ratification of the International Covenant on Civil and Political Rights: Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights, 42 DePaul L.Rev. 1233, 1235-36 (1993) (arguing that the United States' ratification of the ICCPR not only obligates it to the international community, but also submits its actions to "international scrutiny," and, as a

frameworks, and provide comprehensive reproductive health care to American women in the military.<sup>118</sup>

**A. The ICPD and FWCW Should Enact Reporting Mechanisms to Compel Compliance**

While the ICPD and FWCW are not binding on participating countries, and there is not currently a mechanism by which to compel governments to comply with the standards in the ICPD and FWCW, the United States should still be held accountable for its violations of women's health.<sup>119</sup> Besides the deference that U.S.

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world power, "legitimizes" the monitoring process of human rights instruments generally).

<sup>118</sup> See Center for Reproductive Rights, "Safe and Legal Abortion is a Woman's Human Right," 2 (2004), [www.crlp.org/pdf/pub\\_bp\\_safeandlegal.pdf](http://www.crlp.org/pdf/pub_bp_safeandlegal.pdf) (saying that the right to health in regards to abortion requires governments to make sure women have access to safe abortion services, and to "take appropriate measures" to prevent women from risking their health because of unsafe abortions).

<sup>119</sup> See The Legacy of Roe, supra note 10, at 794-95 (pointing out the enormous influence on other countries the United States has regarding reproductive health, and that U.S. politicians must acknowledge that the actions they take will likely affect women world-wide); see also Cook and Fathalla, supra note 34, at 15 (emphasizing that even though the ICPD and FWCW lack binding

courts give to the military, there are few arguments for why this law even exists.<sup>120</sup> Even if there were legitimate reasons for this law, it is implausible any of them would justify putting women's health at severe risk, as 10 U.S.C. Section 1093 does.<sup>121</sup>

In an international context, 10 U.S.C. Section 1093 is particularly troubling.<sup>122</sup> As a country active at the ICPD, and at the five-year follow-up, the United States actively promoted

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mechanisms, they still serve an important function in setting a standard of international health).

<sup>120</sup> See generally Crawford, supra note 6, at 1550 (observing the tension in Supreme Court jurisprudence between constitutionally-protected abortion rights and the usual deference the Court gives to the military).

<sup>121</sup> See id. at 1582 (arguing that this law not only lacks a military purpose, but it also lacks any legitimate civil rationale; its only purpose is to "burden access to abortion").

<sup>122</sup> See generally "As World Eases Restrictions on Abortion, U.S. Becomes More Restrictive, Study Finds," supra note 89 (pointing out that since 1995 the United States implemented laws limiting women's access to abortion services, while fifteen countries enacted legislation increasing women's access to abortion).

women's health, and encouraged access to safe abortions.<sup>123</sup> The United States also took an active role at the FWCW, which sets guidelines for governments to provide comprehensive reproductive health care to women, and again the United States ignores these standards with 10 U.S.C. Section 1093.<sup>124</sup>

The ICPD and FWCW should enact a reporting mechanism to track the progress countries are making in the field of women's health.<sup>125</sup> If a reporting mechanism existed, the United States

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<sup>123</sup> See Key Actions, supra note 30, ch. IV, pt. c, ¶63, § iii, (stating that where "abortion is not against the law" then abortion should be "safe and accessible").

<sup>124</sup> See Fourth World Conference on Women, supra note 8, ch. I, § 106; see also Center for Reproductive Rights, "Abortion and the Law: Ten Years of Reform," 1 (2005)

[http://www.crlp.org/pdf/pub\\_bp\\_abortionlaws10.pdf](http://www.crlp.org/pdf/pub_bp_abortionlaws10.pdf)

(characterizing the FWCW as a platform demanding that governments worldwide consider liberalizing "restrictive abortion laws that punish women").

<sup>125</sup> See generally Cook and Fathalla, supra note 34, at 115 (pointing out that CEDAW has a reporting function so that the Committee established at the Convention can evaluate what programs participating countries have enacted to meet the goals set forth at the Convention).

would then have to report that with 10 U.S.C. Section 1093 it is actually putting its own citizens' health at risk, rather than following the recommendations of the ICPD and FWCW.<sup>126</sup> A regular reporting instrument would give the ICPD and FWCW more oversight than just the five and ten-year reviews have.<sup>127</sup> If the ICPD and FWCW had an oversight committee like the ICCPR does, then parties to the conventions would report progress to the committee which could assess progress and encourage compliance where governments are lacking.<sup>128</sup>

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<sup>126</sup> See "Penalized for Serving Their Country," supra note 9 (pointing out that the United States endorsed the ICPD and pledged itself to the fulfillment of reproductive rights, including access to safe abortion services).

<sup>127</sup> See Cook and Fathalla, supra note 34, at 115 (conceding that the ICPD and FWCW lack the means by which to hold governments accountable, but noting that other human rights instruments have such devices and can also be used to promote reproductive health).

<sup>128</sup> See e.g., International Covenant on Civil and Political Rights, "Consolidated Guidelines for State Reports under the ICCPR," U.N. Doc. CCPR/C/66/GUI/Rev.2 (Feb. 26, 2001) (outlining the reporting mechanisms by which parties are bound, such as presenting periodic updates to the committee).

Such a process will involve the cooperation of participating governments, as well as the commitment of non-governmental organizations.<sup>129</sup> The monitoring committee of the ICCPR could also take issue with this law, and scrutinize the extent to which the United States complies with rights specified by the ICCPR; even if the United States received only a threat of sanctions, it might influence a change in this law.<sup>130</sup>

**B. Countries Participating in the ICPD, FWCW and ICCPR Should Put Pressure on the United States to Comply**

The participating countries in the ICPD, FWCW, and ICCPR should put pressure on the United States to comply with its own standards it set for other countries.<sup>131</sup> Participating

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<sup>129</sup> See Taub, supra note 11, at 59-62 (suggesting that implementation of the ICPD goals are beginning to take shape through United Nations measures, as well as through actions of governments and non-governmental organizations).

<sup>130</sup> See generally Cook, supra note 94, at 671 (noting that countries that were not working to meet the goal of reducing maternal deaths could be forced to explain their failure to protect women's health).

<sup>131</sup> See generally "Safe Abortion: Technical and Policy Guidance for Health Systems," supra note 12, at 17 (saying that since abortion is legal under at least narrow circumstances in most

governments should hold the United States accountable since it committed itself to the protection of women's health at an international level; this commitment includes ensuring American women serving in the military have access to health care.<sup>132</sup>

Because the ICPD and FWCW lack a binding mechanism, it will probably take the public condemnation of this law by other industrialized countries involved with the ICPD and FWCW to even raise awareness of the health violations caused by Section 1093.<sup>133</sup> Countries, especially a super-power such as the United

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countries, there is "considerable scope . . . to apply the guidance put forth" in the World Health Organization document, recognizing women's reproductive rights).

<sup>132</sup> See Fourth World Conference on Women, supra note 8, ch. I, § 106, pt. b (directing participating governments to "review existing legislation . . . including health legislation . . . to reflect a commitment to women's health and to ensure that they meet the changing roles and responsibilities of women wherever they reside").

<sup>133</sup> See generally "Safe Abortion: Technical and Policy Guidance for Health Systems," supra note 12, at 16 (contending that all governments have an obligation to respect women's right to health, and that "ministries of health" should work together to

States, must take steps to actually implement the goals set forth in the ICPD, FWCW and ICCPR, or they will remain "mere aspiration."<sup>134</sup>

### **C. Legal Challenges to 10 U.S.C. Section 1093**

Americans should also put pressure on the government to change this law.<sup>135</sup> Despite some support for overturning the ban on prepaid abortions, there have not been any strong challenges to the law as a whole.<sup>136</sup> While legal challenges would be

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create and support laws and policies that support women's reproductive health).

<sup>134</sup> See Marshall, supra note 13, at 473, 491 (emphasizing that the ICPD gives countries the guidelines to implement the goals of the document, but all members of society must help to ensure that governments meet these goals).

<sup>135</sup> See generally, Center for Reproductive Rights, "Letter to Members of the House of Representatives," (2002) [www.crlp.org/hill\\_ltr\\_0502mil.html](http://www.crlp.org/hill_ltr_0502mil.html) (urging representatives to support an amendment that would repeal 10 U.S.C. section 1093).

<sup>136</sup> See "Penalized for Serving Their Country," supra note 9 (observing that since 1996, Congress people continually attempted to repeal this law, but so far, have been unsuccessful); see also Ginsberg, supra note 61, at 410 (acknowledging that if there is a conservative majority in

difficult to win due to courts' deference to the military, legal challenges might be successful in striking down parts of 10 U.S.C. Section 1093, and at least return to the Clinton era policy when the military allowed prepaid abortions.<sup>137</sup>

## **V. Conclusion**

10 U.S.C. Section 1093 is a politically-motivated law that puts the health American women in the military at risk.<sup>138</sup> This law contravenes internationally accepted standards of reproductive health care, with no legitimate governmental

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Congress, a successful repeal or amendment to this law is unlikely).

<sup>137</sup> See Britell v. United States, 204 F. Supp. 2d 182, 184-85 (2002), rev'd 372 F.3d 1370 (2004) (finding that when women carry an anencephalic pregnancy, it is not legitimate and not rational for the military to deny coverage of an abortion). An anencephalic pregnancy involves a fetal anomaly, occurring when the brain fails to develop. In such instances, there is essentially no hope for survival upon birth. Id. at 184-85.

<sup>138</sup> See generally Tribe, supra note 3, at 156 (evaluating the late 1970's debate over public funding for Medicaid abortions, as a time when the anti-choice Right could "flex political muscle" by refusing to allow a health exception for low-income women).

justification for the law.<sup>139</sup> The United States' commitment to international conventions such as the ICCPR, the ICPD and the FWCW, should compel the United States to provide an acceptable standard of reproductive healthcare for its own citizens.<sup>140</sup>

Because of 10 U.S.C. Section 1093, the health of American women in the military is unnecessarily put at risk, and therefore the law should be repealed.<sup>141</sup> As long as the United States continues to ignore the hardships caused by 10 U.S.C. Section 1093, women in the military will have to tolerate needless injustices, merely because they serve in the military.<sup>142</sup>

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<sup>139</sup> See Crawford, supra note 6, at 1582 (reasoning that under any level of scrutiny, 10 U.S.C. Section 1093 should be found unconstitutional for lack of legitimate government reasons).

<sup>140</sup> See "Safe Abortion: Technical and Policy Guidance for Health Systems," supra note 12, at 16 (arguing that governments have an obligation to respect and promote women's right to reproductive health).

<sup>141</sup> See generally Kennedy, supra note 1 (describing the incredible difficulty with which women stationed abroad had to seek abortions in countries where it was legal and available).

<sup>142</sup> Cook, supra note 94, at 648 (stressing that women "bear the exclusive burden of unwanted pregnancy," and laws that

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criminalize or limit medical services, such as abortion, are particularly unjust).