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FEMINIST-IN-CHIEF? EXAMINING PRESIDENT OBAMA’S EXECUTIVE ORDERS ON WOMEN’S RIGHTS ISSUES

MARY PAT TREUTHART

I. INTRODUCTION

I didn’t run for President so that the dreams of our daughters could be deferred or denied. I didn’t run for President to see inequality and injustice persist in our time. I ran for President to put the same rights, the same opportunities, [and] the same dreams within the reach for our daughters and our sons alike. I ran for President to put the American Dream within the reach of all of our people, no matter what their gender, or race, or faith, or station.2

The 2008 Democratic primary election presented a dilemma for feminist voters.3 Who should be the party’s nominee for president: Senator Hillary Rodham Clinton or Senator Barack Obama? Would feminists succumb to the media portrayal that the final decision could be reduced to a question of race versus gender, replicating past struggles between the civil rights and women’s rights movements?4 How could carefully-constructed coalitions between groups

1. Mary Pat Treuthart is a Professor of Law at Gonzaga University School of Law in Spokane, Washington. I am pleased with the opportunity to participate in this symposium issue of the Chicago-Kent Law Review. I acknowledge the importance of the support for faculty research projects provided by Gonzaga University School of Law and the beneficial input from my colleagues, especially Ann Murphy, at a winter 2014 faculty workshop presentation and thereafter. Much appreciation goes to Ashley Sundin, research librarian, and to Ruth Ptak, student research assistant, who facilitated my work by making their contributions in a timely, efficient, and cheerful manner. Finally, thank you to the Chicago-Kent Law Review staff for the help provided during the editing process.


3. See generally Lakshmi Chaudhry, What Women See When They See Hillary, NATION (June 14, 2007), http://www.thenation.com/article/what-women-see-when-they-see-hillary (explaining that women who previously supported Hillary are torn when it comes to supporting her bid for the presidency).

4. See Gloria Steinem, Right Candidates, Wrong Question, N.Y. TIMES (Feb. 7, 2007), http://www.nytimes.com/2007/02/07/opinion/07steinem.html (suggesting that progressives should refuse to be drawn into an irrelevant debate about Clinton versus Obama because it is destructive); see also Mark Leibovich, Rights vs. Rights: An Improbable Collision Course, N.Y. TIMES (Jan. 13, 2008), http://www.nytimes.com/2008/01/13/weekinreview/13leibovich.html (referencing the division between Elizabeth Cady Stanton and Frederick Douglass about which group should be granted the right to vote first).
traditionally disadvantaged in the political process successfully over-
come stereotyped thinking and binary divisions and come together
to defeat the Republican candidate in the general election?6

Several high-profile feminists weighed in publicly, voicing their
preferences for one candidate over the other.6 There were gener-
tional divisions between “second wave” ’70s era feminists, and their
“third wave” real and metaphorical daughters.7 The doves and the
hawks squared off, with the former concerned about Clinton’s sup-
port for the Iraq War.8 Discussions and debates about race, gender,
and class proliferated.9 Clinton offered experience; Obama promised
change.10 And, in the end, Barack Obama became the 2008 Demo-
cratic presidential nominee.11

Political theorist and activist Zillah Eisenstein observed that
“one of the most significant things about the 2008 election is that it

5. See Patricia Williams, I’m a Black Woman. This Is My Dream, GUARDIAN (Jan. 13,
2008), http://www.theguardian.com/commentisfree/2008/jan/13/uselections2008.world (dis-
cussing the extraordinary moment in history where there are serious “black and female presi-
dential candidates” who are, “indeed, twice as good as their nearest contenders”).
6. See WHO SHOULD BE FIRST? FEMINISTS SPEAK OUT ON THE 2008 PRESIDENTIAL
CAMPAIGN (Beverly Guy-Sheftall & Johnnetta Betsch Cole eds., 2010) for much of the con-
temporaneous written commentary by feminists preserved for review in this aptly titled book.
7. See, e.g., Maureen Dowd, Duel of Historical Guilt, in WHO SHOULD BE FIRST, supra
note 6, at 25. For a brief primer on the different “waves of feminism,” see JENNIFER
BAUMGARDNER, Is There a Fourth Wave? Does it Matter?, in F’EM! GOO GOGA AND SOME
THOUGHTS ON BALLS 243, 245 (2011) (explaining that the waves of feminism description can
be “useful shorthand in describing the broad strokes of feminist history”).
8. Jon Wiener, Feminist Leaders Oppose Hillary, Endorse Obama, HUFFINGTON POST
(Mar. 28, 2008), http://www.huffingtonpost.com/jon-wiener/feminist-leaders-oppose-_h_b_84715.html (indicating that Clinton’s support for the Iraq War was the main reason she
lost the support of the group calling itself “New York Feminists for Peace and Barack
Obama!”). Hillary Clinton has since acknowledged that her vote for the Iraq war was “a mis-
take, plain and simple.” Adam B. Lerner, Hillary Clinton Says Her Iraq War Vote Was a Mis-
take,’ POLITICO (May 19, 2015), http://www.politico.com/story/2015/05/hillary-clinton-iraq-war-
vote-mistake-iowa-118109.html.
9. Dianne M. Pinderhughes, Intersectionality, in WHO SHOULD GO FIRST, supra
note 6, at 171, 181 (concluding in 2008 that “[r]ace, gender, and class, the ‘holy trinity’ of intersec-
tional analysis, are central factors in the electoral outcomes in [that] year’s primaries to date”).
10. STEPHEN SKOWRONK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE
AND REAPPRAISAL 168 (2d ed. 2011).
11. Obama Makes History as Democratic Nominee, CNN (Aug. 28, 2008),
Convention, Clinton made a motion for the delegates to support Obama unanimously without
finishing the roll call vote, presumably to demonstrate party unity for his candidacy. Id. For one
perspective on how Obama captured the presidency in 2008, see Barack Obama: How He Did
It, NEWSWEEK (Nov. 4, 2008), http://www.newsweek.com/barack-obama-how-he-did-it-85083.
For an in-depth look at the struggles of the Clinton 2008 primary campaign, see Joshua
Green, The Front-Runner’s Fall, ATLANTIC (Sept. 2008),
Sheehy, Hillaryland at War, VANITY FAIR (Aug. 2008),
brought the complexity of feminism to the fore of mainstream politics."12 Indeed, Obama's campaign literature emphasized his commitment to women's rights issues in the areas of promoting pay equity, investing in women-owned businesses, supporting reproductive autonomy, combatting violence against women, advancing women's educational opportunities, and protecting women's health.13 But even after he won the 2008 general election with the support of a majority of women voters, Obama's feminist bona fides still appeared to be open for debate.14 A few weeks before he took office, feminist commentator Katha Pollitt, writing a column in The Nation, observed that "[f]or some women who care about women's equality, the jury is still out on Obama. They voted for him, but they don't trust him to do the right thing for women."15 Pollitt urged him to become "a truly feminist President," and, in summary, to move beyond platitudes and to "make gender equality a keystone of his administration."16

The editors at Ms. Magazine took a different tack. Although future First Lady Michelle Obama declined to characterize herself as a feminist in a 2007 interview with the Washington Post, her husband was not reluctant to embrace the label of feminist when speaking with Eleanor Smeal, the publisher of Ms. Magazine.17 Subsequently,

13. See Barack Obama on Women's Rights: Barack Obama is Dedicated to Improving the Lives of Women, OBAMA FOR AM., http://obama.3cdn.net/4ad874d9b8e8a9ff7d_71m6btei7.pdf (last visited Nov. 7, 2015). Women's rights issues can be defined as "that set of policies that concern women as women." CHRISTINA WOLBRECHT, THE POLITICS OF WOMEN'S RIGHTS: PARTIES, POSITIONS, AND CHANGE 19 (2000) (citing SUSAN CARROLL, WOMEN AS CANDIDATES IN AMERICAN POLITICS 15 (1985) (characterizing women's rights issues as those "where policy consequences are likely to have a more immediate and direct impact on significantly larger numbers of women than men").
16. Id. In a subsequent column, Pollitt, an Obama supporter during the primary campaign, summed up his gender politics in office during the first three months by concluding "he's been terrific on women's rights and reproductive rights, here and abroad . . . ." Katha Pollitt, Obama's 100-Day Hope Check, NATION (Apr. 20, 2009), http://www.thenation.com/blog/obamas-100-day-hope-check.
the figure of a newly-elected President Obama was splashed across the front of the 2009 Ms. Magazine special inaugural issue striking a Superman-like pose and ripping open his suit jacket to reveal a T-shirt with a logo proclaiming, “This is what a feminist looks like.” In explaining the Ms. Presidential cover page featuring Obama, Smeal said, “we wanted to tell the world that he self-identifies as a feminist and that he’s run on the strongest platform of any major party for women’s rights. And we also wanted to capture both the national mood and the feminist mood of high expectations and hope for his presidency.”

Indeed, Ms. returned with a report card of sorts on President Obama’s first 100 days in office, which concluded “[t]he Obama Administration has taken giant strides for women in terms of employment, reproductive health[,] and elevation of women’s rights domestically and globally.” Particular early achievements noted by the editors included (1) overturning the global gag rule; (2) appointing seven women to cabinet-level positions; (3) creating the position of ambassador-at-large for women’s global issues; (4) establishing the White House Council on Women and Girls (CWG); and (5) re-starting the contributions by the United States to the United Nations Population Fund (UNFPA). All of this seemed like a propitious start, but the question posed by some observers was: Would the momentum continue?

A year later, the reaction from prominent women leaders to President Obama’s progress on gender equality was decidedly more
mixed. Terry O'Neil, president of the National Organization for Women (NOW) opined that "[t]he administration is not taking enough of an initiative to change the reality for women."23 Her priorities included securing leadership from the White House to ratify the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) and adopt the Equal Rights Amendment (ERA).24 Lisa Maatz, the director of public policy and government relations for the American Association of University Women, gave “an A for outreach” to Obama’s efforts on women’s issues and described the setbacks as not “entirely the fault of the administration.”25 In contrast, Amy Siskind, founder of The New Agenda, a progressive women’s leadership organization, expressed her disappointment with the work of the CWG in particular, characterizing its creation as “form over substance” and lamenting the fact “[i]t hasn’t done anything.”26 But President Obama had three more years in office—and possibly more—to demonstrate the breadth and depth of his commitment to women’s rights.

This begs the question: What are women’s rights issues? Certain topics may be more readily associated with the concept of women’s rights in the policy arena, but there is no single unassailable definition of the term “women’s rights issues.” A common description is a “set of policies that concern women as women.”27 Another approach is to characterize women’s rights issues as those “where policy consequences are likely to have a more immediate and direct impact on significantly larger numbers of women than of men.”28 At least one scholar proposes that a degree of intentionality is a prerequisite and that women should be the “intended beneficiary, constituency, or object” of a particular action.29 Mere heightened interest by women in a specific topic would not necessarily categorize it as a women’s rights concern; rather, the promotion of greater equality and opportunity for women while recognizing their differences from men is an essential part of the equation.30 Here,
being mindful of the aforementioned explanation, this examination will concentrate primarily on executive orders that involve the empowerment of women, gender-based violence, reproductive rights, and employment.

II. OVERVIEW OF DIRECT EXECUTIVE ACTION

Various forms of presidential directives comprise the presidential administrative toolkit including executive orders, proclamations, and memoranda. Executive orders are the most familiar type of presidential directives because they are publicly issued, targeted to officials and agencies within the executive branch, and they “combine the highest level of substance, discretion, and direct presidential involvement.” Implied constitutional and statutory authority provides the basis for the execution as well as the implementation of these orders. Despite the lack of specific constitutional parameters in terms of definition or issuance, executive orders have generally been acknowledged as a legitimate exercise of presidential power from the beginning.

Much of the law review scholarship has centered on the constitutional and separation of powers aspects of presidential directives. In contrast, scholars of the American Presidency from other
disciplines such as political science are “more concerned with developing and/or testing explanations of presidential behavior.” As a result, greater emphasis is placed on ways that executive orders can be used for different purposes.

Reviewing President Obama’s presidential directives regarding women’s rights issues reveals those subjects he has chosen to highlight when unfettered by partisan politics and congressional gridlock. As one expert has observed, focusing on a specific constituent group such as women and the issues of concern to them allows “insight into the nature of White House decision-making processes and perhaps insight into presidential involvement itself in the process.” Ultimately, examining these executive actions and their context facilitates an analysis of the extent to which Obama has effectively promoted gender equality during his presidency.

III. EXECUTIVE ORDERS THAT PROMOTE WOMEN’S RIGHTS

Executive Order 13,506

Less than two months after taking office, President Obama signed Executive Order 13,506, which established the White House Council on Women and Girls (CWG). It is designed to create a “coordinated Federal response” in addressing issues that have a primary effect on women and girls. The heads of every federal agency and major White House office comprise the CWG’s membership. This comports with the view previously expressed by former Secretary of State Madeleine Albright that “in our government,
‘responsibility for the advancement of women is not the job of any one agency, it’s the job of all of them.’”42

According to its presidential author, the purpose of the new entity created by Executive Order 13,506 “is to ensure that American women and girls are treated fairly in all matters of public policy.”43 Obama further suggested that progress in the areas of economic security, a balance between work and family, violence against women, and women’s health represents “an important measure of whether we are truly fulfilling the promise of our democracy for all our people.”44

Barack Obama was not the first executive to bring a specialized office dealing with women’s issues in-house. Presidents Ford and Carter had created similar programs during their administrations.45 Thereafter, immediately prior to the United Nations Fourth World Conference on Women in Beijing, President Clinton set up the President’s Interagency Council on Women in August 1995 with the goal to implement ideas from the conference.46 A few months earlier, the president had formed the White House Office for Women’s Initiatives and Outreach (OWIO).47

The OWIO resulted from consultations between the Chiefs-of-Staff from the Offices of the President and the First Lady with the ad hoc D.C.-based feminist group Washington Women’s Advocates.48 The OWIO staff scrutinized legislation and other proposals to assess the effect on women and maintained relationships with women’s groups to share information and obtain input.49 Betsy Myers, the first

44. Id.
45. MARTIN, supra note 38, at 256.
47. MARTIN, supra note 38, at 256.
48. Noelle Norton & Barbara Morris, Feminist Organizational Structure in the White House: The Office of Women’s Initiatives and Outreach, 56 Pol. Res. Q. 477, 481–82 (2003) (discussing how the advocates group had expressed concern about the dearth of women appointees to government positions and “the inattention to women’s issues”).
Director of the OWIO, indicated that the office “became a place of refuge for women appointees throughout Washington.” In 1997, the OWIO then became a part of the Executive Office of the President (EOP) within the confines of the White House proper; this geographic proximity arguably allowed for greater access, but the resulting trade-off was the OWIO’s being subsumed within an existing EOP culture that was more structured, competitive, and rule-bound, which are “characteristics identified as masculine by organizational theorists.”

A later case study of the OWIO concluded that it operated more effectively in its initial years when it was physically located outside the White House and was run in an autonomous, yet collaborative, non-hierarchical manner more indicative of a feminist organizational structure. As Myers explained with respect to the original office site, “[o]ur location may have been ‘outside the gates’ of perceived power, but it actually became the source of our true power, which was the power to connect—with our constituents, with our mission, and with each other.” Despite uncertainties about its real impact on the powerbrokers inside the Beltway, the OWIO “was considered symbolically and strategically important among the many women’s groups that had urged Clinton to open it.”

During the early days of the presidency of George W. Bush, the gender-focused executive offices were abolished, which appeared to be more in keeping with the priorities of his voter base. Newly-elected President Obama received a letter from the leaders of fifty women’s groups pressing him to not only resuscitate the OWIO, but to expand it by establishing a new cabinet-level office on women. Interestingly, many years earlier, in 1977, delegates to the National Women’s Conference that was organized and convened pursuant to President Carter’s Executive Order 11,979 had rejected a proposal...
for a cabinet-level department of women. According to one media representative who attended the conference, “[s]ome feminists thought it would isolate women or co-opt them into the political establishment, and the conservatives opposed it as more hated bureaucracy.”

Other advocates urged Obama to form a blue-ribbon Presidential Commission on Women. There was some precedent for this particular course of action. President John F. Kennedy had issued Executive Order 10,980 on December 14, 1961, which established the President’s Commission on the Status of Women (PCSW). Eleanor Roosevelt agreed to serve as the PCSW’s “Chairman.” Its assignment was quite broad: The PCSW was expected to “review progress and make recommendations as needed for constructive action” on a myriad of topics such as labor and employment policies and practices, social insurance and tax laws, differential legal treatment in the areas of political and civil rights, special services for women in their roles as wives, mothers and workers including education, counseling and childcare. Pursuant to its mandate, the PCSW issued its report on October 11, 1963, which would have been Eleanor Roosevelt’s seventy-ninth birthday.


58. Komisar, supra note 57, at 625.


Despite the various voices clamoring for President Obama to create a different structure to stress the importance of women’s issues, he chose instead to launch the CWG in March 2009, appointing Senior Adviser and Assistant to the President for Intergovernmental Affairs and Public Engagement Valerie Jarrett as the Chair and Tina Tchen as the Executive Director. While some activists questioned the selection of Jarrett to lead this effort due to her lack of direct experience in advancing women’s rights, others seemed willing—at least at first—to give her a chance to prove herself.

Resistance to the CWG’s formation also surfaced from those who took exception to its pointed gender focus, which appeared to omit men and boys who could share an interest in—or be affected by—the work of the CWG. For example, author and educator Dr. Warren Farrell gathered support from thirty-four prominent representatives from the academic, business, and health sectors who urged President Obama to set up a comparable White House Council on Men and Boys. This type of counter-advocacy may have provided part of the impetus for the establishment of the White House’s My Brother’s Keeper initiative in 2014, which was devised “to address persistent opportunity gaps faced by boys and young men of color.” Perhaps predictably, My Brother’s Keeper was then derided for its solely-male focus, as well as for its targeted outreach to private foundations for subsidies.
Since its inception, the CWG has promoted collaboration and served as a clearinghouse for a number of projects. To support the CWG’s work, a report titled *Women in America: Indicators of Economic and Social Well-Being* was assembled from materials collated by a myriad of federal statistical agencies.\(^70\) Collectively, this information provided a baseline on “how women are faring in the United States today and how these trends have changed over time.”\(^71\) The CWG also worked together with the Office of Science and Technology Policy to get women and girls more directly involved in science, technology, engineering, and mathematics (STEM).\(^72\) Recognizing the intersectionality between race, ethnicity, and gender, the CWG released a report in November 2014 about the barriers and obstacles that exist for women and girls of color; the report concluded by announcing the formation of a working group to explore disparities in sectors such as economic security, education, and health.\(^73\)

Possibly the CWG’s most high profile endeavor, the White House Task Force to Protect Students from Sexual Assault, was established pursuant to a presidential directive in January 2014 and placed jointly under the auspices of the CWG and the Office of the Vice President.\(^74\) The first Task Force report was issued three
months later. Various aspects of the report generated immediate controversy. Conservative commentators questioned the accuracy of the report’s statistic that one in five college women is subjected to sexual assault and characterized this high number as “fraudulent” and “ridiculous.” Civil libertarians expressed concern about the lack of due process protections for those accused of sexual assault. Grassroots activists had consistently lobbied for greater transparency regarding the disclosure of the names of colleges and universities that had violated Title IX standards with specifics about non-compliance; they were disappointed that this heightened degree of revelation was not mandated by the report.

There is general agreement among various stakeholders about the fact that oftentimes there is a divergence of interests between institutions of higher learning and sexual assault survivors. Eradicating sexual assault on college campuses, albeit by using different strategies and tactics, remains the common goal. But the ongoing

80. Kingkade, supra note 79.
81. Johnston, supra note 76.
efforts of the White House, including the CWG, to address sexual assault—although well-intentioned—quickly became somewhat diffuse. The initial Task Force report was titled Not Alone, which suggested the emphasis was on support for those subjected to abuse and the necessity for the use of a collaborative approach to address the matter effectively. Simultaneously with the April release of the Task Force report, the vice president’s office issued a public service announcement that used the tagline “1 is 2 Many,” stressed bystander intervention, and featured commentary by male celebrities. Finally, in September 2014, the White House launched the It’s On Us campaign with the release of a brief video providing close-up shots of identifiable actors and actresses that asks its audience members to sign a pledge to get personally involved to stop sexual assault on college campuses. While focusing on different aspects of the problem, the multiple White House-linked campaigns have the potential to cause confusion not only about sponsorship but overall intent.

To showcase all of its endeavors, the CWG maintains an active website that is updated regularly with links to its projects and other news. However, a quick review of the programs, photos, and information highlighted on the CWG’s website reveals that the content is not exclusively female-focused. Notably, the first item on the CWG Resources page is First Lady Michelle Obama’s Let’s Move! initiative, which is geared toward reducing childhood obesity by promoting better health, good nutrition, and enhanced physical activ-

82. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, supra note 75, at 2.
83. I Is 2 Many, WHITE HOUSE, https://www.whitehouse.gov/1is2many (last visited Aug. 27, 2015).
86. See About the Council on Women and Girls, supra note 42.
ity for girls and boys. This serves to reinforce the notion that it is sometimes difficult to define issues and concerns as gender specific.

In sum, establishing the CWG via an executive order allowed President Obama to demonstrate a clear cut and immediate commitment to women and girls, a gesture that was arguably both substantive and symbolic. On women’s issues, he evidenced a clear divide with his Republican predecessor George W. Bush who had dismantled the OWIO set up by Bill Clinton. Throughout his presidency, he has demonstrated his intent for the CWG to serve as a repository for broader policy initiatives such as the Sexual Assault Task Force. The effectiveness of the CWG to promote women’s rights, however, remains an open question.

**Executive Order 13,595**

Pursuant to President Obama’s Executive Order 13,595 issued in December 2011, the White House released the *United States National Action Plan on Women, Peace, and Security (NAP)*. The NAP sets forth the approach the U.S. government plans to follow “to accelerate, institutionalize, and better coordinate our efforts to advance women’s inclusion in peace negotiations, peacebuilding activities, and conflict prevention; to protect women from sexual and gender-based violence; and to ensure equal access to relief and recovery assistance, in areas of conflict and insecurity.”

Along with several other countries, the U.S. had been dilatory in responding to the international community’s request to formulate the type of NAP ultimately set forth in Executive Order 13,595. More than a decade earlier, the U.N. Security Council adopted Resolution 1325, which required states to adopt an NAP, to increase women’s participation in peacebuilding and political institutions, and to take

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89. NAP, supra note 88, at 1.

special measures to protect women and girls from sexual and other forms of gender-based violence in situations of armed conflict.\textsuperscript{91} In the subsequent decade, the U.N. Security Council adopted four additional resolutions linked to women, peace, and security concerns.\textsuperscript{92}

In the United States, various non-profit groups had been working to memorialize a 1325 NAP.\textsuperscript{93} In addition, congressional action called on the U.S. to meet its obligations under Security Council Resolution 1325. For example, in 2007, Representative Eddie Bernice Johnson (D-TX-30) introduced House Resolution 146, which stated:

expressing the sense of the House of Representatives that the United States should take action to meet its obligations, and to ensure that all other member states of the United Nations meet their obligations, to women as agreed to in United Nations Security Council Resolution 1325 relating to women, peace, and security, and the United States should fully assume the implementation of international law relating to human rights that protects the rights of women and girls during and after conflicts, and for other purposes.\textsuperscript{94}


93. See, e.g., U.S. INST. OF PEACE, supra note 91; WOMEN’S INT’L LEAGUE FOR PEACE & FREEDOM, supra note 91; WAND EDUC. FUND, supra note 91; but see Corinne L. Mason, Global Violence Against Women as a National Security “Emergency”, FEMINIST FORMATIONS 25, 55 (2013) (demonstrating the possible negative implications of linking the eradication of violence against women to national security concerns).

During 2008 congressional hearings on this subject, testimony was provided from differing perspectives with most participants underscoring the importance of including women in all phases of the peace and security process. However, Representative Dana Rohrabacher (R-CA-46) expressed opposition to fulfilling the requirements of 1325 based on the concern that compliance “could turn over U.S. domestic policy to an unelected group of so called international experts.” Rohrabacher’s statement highlights the perceived infringement on national sovereignty if the U.S. were to throw in its lot with other U.N. member nations. It is also indicative of a prevalent anti-U.N. sentiment among a majority of Americans during this time period, which would have likely been reflected in pushback by congressional lawmakers on any proposed initiative originating with the U.N.

The favorable treatment of international instruments dealing with women’s rights had been rather dismal in the U.S. Congress. Most notably, CEDAW was never ratified by the Senate after the Carter administration signed the document in 1980. Only a few countries, including the United States, Iran, Somalia, Sudan, Palau, and Tonga, have failed to ratify CEDAW, which is sometimes referred to as the “Women’s Convention.” Although Obama has consistently registered support for the ratification of CEDAW, there is a sense that his administration has been hesitant to push the issue, perhaps due to an unwillingness to risk defeat in Senate.

A similar problem had arisen over the years involving international organizations that provide services in areas that affect women

96. Id. at 4.
99. Id.
and girls. For example, debates about the allocation of funds to support the U.N. Population Fund (UNFPA) were continually contentious, even though the organization does not focus on women exclusively. In 1985, Congress passed the Kemp-Kasten Amendment requiring taxpayer funding to be withheld from any entity operating overseas that the president determines to be supporting or participating in "the management of a program of coercive abortion or involuntary sterilization." Even though UNFPA funding was not used for prohibited activities, every Republican administration thereafter refused to financially subsidize UNFPA, which led to a grassroots movement in 2002 to replace $34 million of escrowed taxpayer funding with private donations.

Some commentators suggested that GOP legislators had declared a "war on women" in the domestic realm as well. Senator Barbara Boxer accused her Republican counterparts of repeatedly opposing bills concerning women’s healthcare, pay equity, gender discrimination, and domestic violence. The combined effect of GOP antagonism to U.N. initiatives—regardless of the subject matter—and to women’s rights proposals, both internationally and domestically, suggested a negative fate for NAP if it were forced to navigate a congressional path.

Given these realities, adoption of the NAP through the presidential directive route suggests Obama’s willingness to respond to the international community without forcing a legislative showdown. A few feminists have publicly questioned the potential negative conse-

quences of connecting women’s human rights issues to global security concerns. As a result, it is somewhat difficult to categorize this particular executive order as an unequivocal advancement of women’s rights. The sense is that most advocates have perceived it as a positive step.

Executive Order 13,623

A mere eight months after signing Executive Order 13,595, President Obama again ventured into the area of international women’s rights by issuing Executive Order 13,623 titled Preventing and Responding to Violence Against Women and Girls Globally. Several provisions in Executive Order 13,623 had been floating around Congress for more than five years in the form of the proposed International Violence Against Women Act (I-VAWA). This order also specifically references the United States Strategy to Prevent and Respond to Gender-Based Violence Globally (“U.S. Strategy”) that was included in an appropriations bill from the previous year.

Several years earlier, women’s rights advocates in the U.S. made a conscious decision to tackle the global problem of violence against women. In 2005, staff at the non-profit organization Women Thrive Worldwide engaged in a global interviewing process with representatives from grassroots organizations, survivors of abuse, and experts to obtain input on what initiatives actually work in reducing violence against women and what role should be played by the U.S. in these anti-violence efforts. A clear consensus emerged that the United States could—and should—exercise leadership on this issue.

Although the U.S. government had sponsored and funded international projects to combat violence against women, its efforts were scattered and difficult to track. Women Thrive Worldwide part-

107. Mason, supra note 93, at 55.
111. RITU SHARMA, TEACH A WOMAN TO FISH: OVERCOMING POVERTY AROUND THE GLOBE 162 (2014).
112. Id.
113. Id.
nered with other organizations including Amnesty International and Futures Without Violence to convince U.S. lawmakers to commit to a longer-term, concrete strategy to end violence against women internationally by enacting legislation. The result was the International Violence Against Women Act (I-VAWA), which proposed to fund anti-violence programs in selected countries across borders and to create a women’s global leadership position under the auspices of the U.S. Department of State.

Joe Biden, the Democratic Senator from Delaware who was subsequently tapped to be Barack Obama’s running mate as vice president, co-sponsored I-VAWA when it was introduced in 2007. He had been the primary sponsor of the 1994 Violence Against Women Act (VAWA) that provided financial support: (1) to enhance law enforcement response in cases of rape and domestic violence; (2) to expand essential services to those subjected to abuse; and (3) to establish a repository for data-tracking and statistics-gathering. Biden has characterized the passage of VAWA as “my proudest legislative accomplishment.” Unfortunately, I-VAWA was not as well-received in either the House or the Senate during its initial foray into the legislative arena during the 110th Congress.

After attracting significant bipartisan support, I-VAWA was better positioned for success during its second go-around in the 111th...
Congress in 2009 and 2010. Members of the public also were positively inclined toward the goals of I-VAWA as evidenced by the results of a 2009 public opinion survey. A number of other factors coalesced and made I-VAWA's passage seem possible, such as a Democratic majority in Congress, an increased number of women lawmakers at the national level, greater awareness of the connection between foreign policy and human rights, and the recognized success of—and support for—VAWA on the domestic front.

Hillary Clinton’s appointment as secretary of state also boded well for I-VAWA. She is credited with coining the catchphrase “women’s rights are human rights” in a keynote address on gender inequality and gender-based violence at the 1995 Fourth World Conference on Women in Beijing. Soon after Clinton’s confirmation, the Office of Global Women’s Issues was created, which was a centerpiece of the I-VAWA bill, and Melanne Verveer was placed in charge of its operations as the Ambassador-at-Large. In the meantime, I-VAWA became bogged down in “abortion politics,” which splintered the fragile coalition of legislators committed to its
passage. After Republicans secured a majority in the House of Representatives in the 2010 midterm elections, the momentum on I-VAWA was stalled, despite a favorable eleventh-hour vote in the Senate Foreign Relations Committee.

Although the push for enacting I-VAWA continued, its proponents pivoted to the executive for action, resulting in the issuance of Executive Orders 13,595 and 13,623, which served to implement critical pieces of the bill that had been suspended in legislative limbo. Despite the lack of forward movement on I-VAWA, effective lobbying had resulted in the inclusion of a provision in the aforementioned 2011 spending bill that mandated the president to develop a strategy designed to prevent and respond to violence against women and girls across borders. This imprimatur from Congress helped bolster the appeal to the executive for more aggressive action on gender-based violence globally, which could then be viewed as a joint legislative/executive effort rather than a unilateral presidential move.

Addressing violence against women worldwide was a high priority for two key members of the Obama administration—namely, Vice-President Joe Biden who was an original sponsor of I-VAWA in the Senate, and Secretary of State Hillary Clinton who had been a champion of the rights of women and girls for more than three decades. Women’s rights activists were gratified that Obama seemingly took this executive action in an election year without any fear of political fallout. Finally, issuance of this executive order sent a strong symbolic message that the U.S. could assume a leadership role on

126. SHARMA, supra note 111, at 171–72.


128. I-VAWA has been introduced in subsequent sessions of Congress without success to date. See, e.g., International Violence Against Women Act of 2013, H.R. 3571, 113th Cong. (2013); International Violence Against Women Act of 2012, H.R. 5905, 112th Cong. (2012). Presidential scholars have asserted that the executive has greater opportunity, if not authority, to act unilaterally in the foreign affairs sphere as compared to the domestic realm. See generally Marshall & Pacelle, supra note 36.

the issue of gender-based violence, even in the absence of CEDAW ratification.

**Executive Order 13,665**

Signed by Obama on April 8, 2014, Executive Order 13,665 “encourages greater pay transparency by prohibiting federal contractors and subcontractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing or inquiring about compensation.” Executive Order 13,665 amends a previous presidential directive concerning nondiscriminatory employment and other practices for federal contractors that was issued by Lyndon Johnson in 1965. President Obama specifically mentioned the negative gender implications of wage secrecy in his accompanying remarks at the signing ceremony.

In issuing Executive Order 13,665, the president was following through on a promise he made during his 2014 State of the Union Address. Of course, Executive Order 13,665 was not without criticism. See, e.g., Laura Bassett, *Conservatives Push Back Against Equal Pay Efforts*, HUFFINGTON POST (Apr. 8, 2010), http://www.huffingtonpost.com/2014/04/07/republicans-equal-pay_n_5106329.html (disputing, inter alia, the “77 cents per dollar” amount often cited in this issue); Aamer Madhani, *Obama, GOP Trade Sharp Rhetoric in Equal Pay Debate*, USA TODAY (Apr. 8, 2014), http://www.usatoday.com/story/news/politics/2014/04/08/obama-equal-pay-executive-orders/7461035 (discussing how Republicans claimed the order was unnecessary, with discrimination already being illegal, and explaining how the GOP pointed to wage disparities within the Obama administration itself).

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address to work collaboratively and “give every woman the opportunity she deserves” in the employment context. He also made a reference to a popular long-running television series by proclaiming, “It’s time to do away with workplace policies that belong in a ‘Mad Men’ episode.”

At the same time President Obama was signing Executive Order 13,665, Democrats were attempting to bring the Paycheck Fairness Act to the Senate floor for debate. The House had passed an earlier version of this bill in 2008. The impetus behind the Paycheck Fairness Act was to decrease the so-called gender gap in wages through various means including the prohibition of retaliation against workers who disclose wage information. But, as NPR commentator Scott Horsley presciently observed about its 2014 iteration,

[that bill is unlikely to become law, but it does have the potential to put Republicans on the spot. No one wants to be in the position of defending unequal pay. Instead, GOP critics of the law warn of government interference in the free market, and the prospect of runaway lawsuits.]

The concept of “equal pay for equal work” was enshrined in federal law beginning with the passage of the appropriately titled Equal Pay Act of 1963. Also prompted by concerns about differential...
ences in pay between men and women, the provisions of the Act require the same rates of pay for jobs that depend on “equal skill, effort, and responsibility, and which are performed under similar working conditions.” The following year, Title VII of the Civil Rights Act of 1964 prohibited discrimination in employment based on race, color, religion, sex, or national origin, which expanded the bases for bringing differential pay claims for members of the protected classes.

A major problem with Title VII was its relatively short 180-day filing period from the date of occurrence for asserting a wage discrimination claim. Potential plaintiffs were often disadvantaged because they were unaware of a pay disparity until after the filing deadline had passed. In the 2007 case Ledbetter v. Goodyear Tire & Rubber Co., the U.S. Supreme Court rejected Ledbetter’s paycheck accrual argument that each new paycheck re-started the EEOC charging period and instead upheld a narrow interpretation of the statutory filing period. Due to the lack of salary transparency in her workplace, Ms. Ledbetter did not learn about the pay discrepancy until it was too late. One of President Obama’s first actions after taking office was to sign the Lilly Ledbetter Fair Pay Act of 2009, which permits claimants to file Title VII actions within 180 days after receiving the last discriminatory paycheck.

Despite this welcome change in the law, its underlying assumption continues to be that a worker knows the amount of compensation paid to others. In January 2014, the first survey of its kind to ask...
directly about workplace policies on secrecy surrounding pay was conducted by the Institute for Women’s Policy Research. 147 About half of the surveyed male (47%) and female (51%) workers answered that “the discussion of wage and salary information is either discouraged or prohibited and/or could lead to punishment.” 148 Results from a Robert Morris University poll released in March 2014 indicated that over two-thirds (68.4%) of respondents agreed with the statement, “Most employers hide salaries to avoid comparisons of equal pay for equal jobs among men and women.” 149 This information is essential to combat pay discrimination and, as one scholarly commentator notes, “[h]ence there is a need for wage disclosure laws.” 150

Through direct presidential action under Executive Order 13,665, President Obama was able to protect only federal contract workers from being disadvantaged for discussing, disclosing, or inquiring about salary information. 151 But it represented forward movement on the overall wage transparency issue, which is noteworthy because the Paycheck Fairness Act of 2014 was ultimately stalled due to a Senate filibuster by Republicans. 152 The president’s inclination to take unilateral action on this economic issue resonated with working women and starkly revealed the gap between the two major political parties. 153 His position on wage equity and equal em-
ployment represents the clearest example of promoting women's rights.

IV. AN EXECUTIVE ORDER THAT UNDERMINED WOMEN'S RIGHTS
(AT LEAST IN THE SHORT RUN)

Executive Order 13,535

Although controversy has swirled around some aspects of the aforementioned gender-focused Executive Orders in terms of the efficacy of a particular strategy or tactic, it is reasonable to conclude that their primary aim was the advancement of women's rights. But President Obama has also issued at least one executive order that negatively affects women's rights in the area of reproductive autonomy.

Things began on a positive note from the vantage point of advocates for reproductive justice when, immediately upon taking office in January 2009, the president signed a Presidential Memorandum revoking the so-called “Global Gag Rule” that had been put in place by his executive predecessor.154 This rule, also known as the “Mexico City Policy,” prohibits the award of federal funds to any entity overseas that provides information, advice, referral, services for legal abortion, or support for the legalization of abortion, even if other money subsidizes those activities.155 Ronald Reagan initiated this policy during his administration and it was continued during the George H.W. Bush's tenure; Bill Clinton reversed the rule, only to have George W. Bush reinstate it.156

In an accompanying statement to the Memorandum, President Obama lamented the fact that family planning assistance had been used as a “political wedge issue” and signaled that he wished to end the debate.157 The president's timing seemed to suggest his good intentions.


faith in this regard; the announcement of the policy reversal occurred late on a Friday afternoon with minimal fanfare.\textsuperscript{158} Moreover, he pointedly did not take the opportunity to lift the ban the day before, which was the 36th anniversary of the contentious \textit{Roe v. Wade} Supreme Court ruling on abortion.\textsuperscript{159}

As a Senator, Barack Obama’s record on reproductive autonomy issues was assessed as consistently “pro-choice.”\textsuperscript{160} In a 2007 speech to the Planned Parenthood Action Fund about health care reform, presidential aspirant Obama stated, “In my mind, reproductive care is essential care. It is basic care, so it is at the center and at the heart of the plan that I propose.”\textsuperscript{161}

Despite his repeated support for reproductive justice, Obama was compelled to adjust his perspective when it appeared that passage of the Patient Protection and Affordable Care Act (ACA), his signature health care legislation, might be jeopardized by uncertainty about subsidized coverage for abortion procedures.\textsuperscript{162} Executive Order 13,535 with its unwieldy title \textit{Patient Protection and Affordable Care Act’s Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion} pledged enforcement to ensure that federal funds would not be used “for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered).”\textsuperscript{163}

Obama’s presidential directive was perceived as necessary to secure the votes of right-to-life Democrats, such as Rep. Bart Stupak (D-MI), for the ACA without risking an amendment to the bill it-
According to William Galston of the Brookings Institution, “[t]he executive order found a sweet spot, which I’m surprised existed . . . Something that didn’t send the base of the party into a tizzy but seems to have satisfied a very important minority within the party. It was the model of win-win pragmatism.”

Unsurprisingly, conservatives in Congress condemned the issuance of Executive Order 13,535 in lieu of Congress’ holding out for substantive change on abortion coverage in the ACA. Both House Minority Leader John Boehner (R-OH) and Rep. Paul Ryan (R-WI) publicly recognized the impermanence of a presidential directive. Ryan, appearing on a Fox News Sunday segment, described the Executive Order as “the rule of man” and “not the rule of law.”

But pro-choice proponents also immediately denounced Executive Order 13,535. A National Organization of Women (NOW) statement declared “Obama’s willingness to sign the order demonstrated that ‘it is acceptable to negotiate health care on the backs of women.’”

164. See Choice, Life Groups Slam Obama Order on Abortion Funding, FOX NEWS (Mar. 21, 2010), http://www.foxnews.com/politics/2010/03/21/stupak-says-health-care-deal-looming-abortion-funding (also noting that Stupak was the primary mover behind an amendment to the ACA limiting the provision of abortion services).
167. See 3 C.F.R. § 201.
170. Shear, supra note 165.
forced to sign an Executive Order that further codifies the proposed anti-choice language in the health care reform bill.” 171

While the ACA’s contraceptive coverage spawned litigation that ultimately reached the U.S. Supreme Court, the apprehension expressed by advocates at the time of the signing of Executive Order 13,535 about the potential to limit coverage for reproductive health was not realized. 172 Ironically, insurers under the ACA seemingly have provided more—not less—coverage. 173 A 2014 Government Accounting Office (GAO) investigation revealed that fifteen of eighteen insurers were selling plans that did not segregate funds for abortion coverage, which is required under the ACA. 174

By issuing this order, Barack Obama accomplished multiple objectives. He managed to disarm his congressional opponents, pacify equivocal legislators, and ensure the salvation of the ACA. But his executive action on this issue cannot be characterized as pro-feminist, despite the overall end result.

V. AN EXECUTIVE ORDER THAT REPRESENTS A MISSED OPPORTUNITY TO ADVANCE WOMEN’S RIGHTS

Executive Order 13,696

An Executive Order amending the Military’s Manual for Courts-Martial was signed by President Obama in June 2015. 175 The terms of Executive Order 13,696 incorporated 2013 legislative changes to the Uniform Code of Military Justice; these included several modifications and additions designed to address sexual assault issues in the military more effectively. 176 Unlike many other executive directives, this order results from the president’s role as the Commander-in-Chief of the armed forces in combination with a specific congres-
sional delegation of power.\(^{177}\) In view of the extensive documenta-
tion of continued instances of sexual violence in the military, Barack
Obama’s overall leadership on the subject has been viewed by
some as insufficient.\(^{178}\) But when he had taken the opportunity to
speak out forcefully by stating that uniformed perpetrators of sexual
assault should be “prosecuted, stripped of their positions, court-
martialed, fired, dishonorably discharged,” President Obama was
accused of “undue command influence” by military defense lawyers
and judges with active cases pending.\(^{179}\)

The problem of sexual assault in the military was brought out in-
to the open after incidents of sexual assault and harassment were
reported at the 1991 naval aviator Tailhook Convention in Las Ve-
gas.\(^{180}\) Groups were formed such as Protect Our Defenders and the
Service Women’s Action Network to safeguard and promote the
rights of individuals with a special mission to aid those who had
been subjected to sexual assault while in uniform.\(^{181}\) Incremental
changes had occurred; however, more than two decades later, a
number of obstacles remained for survivors of sexual violence in the
military: (1) reporting difficulties; (2) inadequate victims’ services; (3)
chain of command issues; and (4) retaliation.

Numerous instances in each area were highlighted in the media
as well as featured in a 2012 documentary film, The Invisible War,

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\(^{177}\) Uniform Code of Military Justice, 10 U.S.C. § 836 (2006). See also Robinson O. Ev-


erett, Some Comments on the Role of Discretion in Military Justice, 37 LAW & CONTEMP.
PROBS. 173, 173–74 (1972) (contending that the broad congressional delegation of authority
to the president renders it unnecessary to determine the scope of executive constitutional au-
thority); William F. Fratcher, Presidential Power to Regulate Military Justice: A Critical Study of
Decisions of the Court of Military Appeals, 34 N.Y.U. L. REV. 861, 862–63 (1959) (supporting
an expansive view of executive constitutional authority in the area of military justice).

\(^{178}\) Anu Bhagwati, The Invisible President: How Obama’s Ignored Military Sexual As-
sault, JEZEBEL (Dec. 8, 2014) http://jezebel.com/the-invisible-president-how-obamas-ignored-
military-s-1668212408.

\(^{179}\) Darlene Iskra, Is This Really “Unlawful Command Influence”? TIME (June 21, 2013),
http://nation.time.com/2013/06/21/is-this-really-unlawful-command-influence. “Illegal command
influence is an attempt to coerce, or by any unauthorized means, influence the action of a
court martial in reaching the findings or sentence in any case or the action of any convening,
approving, or reviewing authority with respect to such authority’s judicial acts.” Jonathan P.
Tomes & Michael I. Spak, Practical Problems with Modifying the Military Justice System to
Better Handle Sexual Assault Cases, 29 WISC. J.L. GENDER & SOCY 377, 385 (2014) (citing
10 U.S.C. § 837 (2012)).

\(^{180}\) Michael Winerip, Revisiting the Military’s Tailhook Scandal, N.Y. TIMES (May 13,
2013), http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-
video.html.

\(^{181}\) See PROTECT OUR DEFENDERS, http://www.protectourdefenders.com (last visited
Aug. 27, 2015); SERVICE WOMEN’S ACTION NETWORK, http://servicewomen.org (last visited
Aug. 27, 2015).
which was nominated for an Academy Award.\textsuperscript{182} For example, over
the course of several years, sixty-two trainees at San Antonio’s
Lackland Air Force Base had been sexually assaulted or subjected
to inappropriate conduct at the hands of thirty-two different instruc-
tors, but were too fearful to report what had occurred.\textsuperscript{183} Despite the
supposed services for victims, an Iraqi war veteran who had been
sexually assaulted while in basic training revealed that of her friends
who attempted to report sexual violence, “none of them were sent a
victim’s advocate, a counselor or a chaplain.”\textsuperscript{184} Lt. Col. James
Wilkerson was found guilty of aggravated sexual assault, court-
martialed, and sentenced to one year in prison, only to have the de-
cision reversed by Lt. Gen. Craig Franklin, Commander of the Third
Air Force.\textsuperscript{185} In 2015, after an eighteen-month investigation, the
international NGO Human Rights Watch released a 113-page report
documenting the varied forms of commonplace retaliation against
U.S. military sexual assault survivors, which included name-calling,
ostracism, bullying, and punishment for collateral misconduct such
as underage drinking, negative performance evaluations, and pro-
motion denials.\textsuperscript{186}

With the president somewhat hamstrung, at least temporarily,
after being accused of a “conflict of interest” as a result of his role as
Commander-in-Chief, it was left to Congress to take the lead on
shaping public policy on combatting military sexual assault. There
was public disagreement about the best way to proceed, which ulti-
mately “pitted two women of the Senate, both Democrats, both law-
yers, against each other.”\textsuperscript{187} Senator Kirsten Gillibrand (D-NY)
introduced the Military Justice Improvement Act (MJIA) that would,
among other things, take away the authority of commanders to de-

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183. James Risen, Attacked At 19 by an Air Force Trainer, and Speaking Out, N.Y. TIMES
about-rape-by-her-sergeant-at-lackland.html.
185. Juana Summers, Kimberly Hanks Takes on Air Force, POLITICO (Sept. 9, 2013),
186. Embattled: Retaliation Against Sexual Assault Survivors in the US Military, HUMAN
RIGHTS WATCH (May 18, 2015), https://www.hrw.org/report/2015/05/18/embattled/retaliation-
against-sexual-assault-survivors-us-military.
187. Alisa Chang, Gillibrand, McCaskill Square Off over Military Assault Prosecutions,
NPR (Mar. 7, 2014), http://www.npr.org/2014/03/07/287117360/gillibrand-mccaskill-square-off-
over-military-assault-prosecutions.
\end{flushleft}
cide whether to convene a court martial for certain types of offenses, including sexual assault. The reform legislation proposed by Senator Claire McCaskill (D-MO) did not remove chain-of-command decision making, but did allow survivors opportunity for input into the way their cases were handled. Although Gillibrand lined up support from fifty-five of her Senate colleagues, she did not have the necessary sixty votes to defeat a threatened filibuster by McCaskill.

Gillibrand vowed to continue fighting to overhaul the military justice system. In May 2015, her office issued a report she had commissioned concerning sexual assault report filing at the four largest U.S. military bases. The findings contained in the report show that survivors continued to face difficulties in the areas of sexual assault reporting and case handling, which seem to strengthen Gillibrand’s resolve to bring about structural and systemic changes.

When overtures to the legislative and executive branches failed to alter the chain-of-command problem, some survivors turned to the courts. Although the litigation approach has not been successful to date, a 2015 action was filed in the U.S. District Court for the Eastern District of Virginia requesting an injunction to stop commanders from being placed in charge of sexual assault cases that occur within their units. The lawsuit contends that the close contact and fa-

189. Id.
194. See Complaint, Baldwin v. Dep’t of Defense, No. 1:15-cv-424 (E.D. Va. Mar. 31, 2015). The attorney for the victims in this case, Susan Burke, has filed at least two other cases in which plaintiffs sued the U.S. military for creating a culture that is viewed as tolerating sexual assault and discouraging victims from reporting rape. The first case was dismissed be-
miliarity of commanders with victims and alleged perpetrators who were line reports prevents the necessary impartiality for responsible decision making.195

Although First Lady Michelle Obama has no official government position, she, along with the vice president’s wife, Dr. Jill Biden, unveiled the Joining Forces initiative under the auspices of her White House Office in 2011.196 Designed to help meet the needs of military members and their families, the initiative has stressed “wellness access” as one of its key pillars.197 Despite appeals for Michelle Obama to address the trauma of those sexually assaulted while in uniform, she has declined to do so.198 A 2014 magazine cover story featuring the First Lady and the challenges faced by five female veterans did not discuss the issue of sexual violence in the military.199 In a 2015 interview, Michelle Obama again deftly side-stepped questions presented about military sexual assault.200 With her high-impact profile, the First Lady’s reluctance to speak out on this issue represents another lost chance for the Obama White House as a whole to take a forceful public stance on sexual violence in the military.201

cause “[i]n the more than twenty-five years since the Supreme Court pronounced in Stanley that service members will not have an implied cause of action against the government for injuries arising out of or incident to their military service under Bivens, Congress has never created an express cause of action as a remedy for the type of claim that Plaintiffs allege here. And it is Congress, not the courts, that the Constitution has charged with that responsibility.” Cioca v. Rumsfeld, 720 F.3d 505, 517 (4th Cir. 2013). The second case was dismissed for two reasons: the plaintiffs were not entitled to a remedy under Bivens when their injuries were incidental to their military service, and second, the facts alleged were not sufficient to overcome the qualified immunity of the defendants. See Klay v. Panetta, 924 F. Supp. 2d 8 (D.D.C. 2013).

197. Id.
201. Michelle Obama was listed at number ten on the Forbes 2015 list of The World’s 100 Most Powerful Women. The World’s 100 Most Powerful Women, FORBES, http://www.forbes.com/profile/michelle-obama (last visited Sept. 13, 2015). Although Michelle Obama’s favorability rating is consistently between sixty and seventy percent, there is a perception among some “that she has not used her platform to its full advantage.” Peter Baker,
President Obama seems disinclined to take a more definitive position on the chain-of-command question. This is not surprising in view of the fact that prominent members of his own party are divided on this issue. But he must find alternative ways to assert his commitment to ending sexual violence in the military such as increasing victims’ services and promoting a “zero tolerance” policy to deal with retaliation. Barack Obama’s current reticence on this particular sexual assault issue stands in contrast to his administration’s posture on ending global violence against women under Executive Order 13,623 and stopping rape on college campuses under the auspices of the CWG and its Task Force. While not necessarily flawless from a feminist perspective, those policies are decidedly more robust.

VI. CONCLUSION

An examination of President Obama’s use of executive orders on women’s rights issues does not result in a simple “thumbs up or thumbs down” appraisal. Establishing the CWG under Executive Order 13,506 supports women’s empowerment, although its achievements to date in terms of quality and quantity have not necessarily demonstrated a strong leadership role on women’s rights in the public policy arena. Executive Orders 13,595 and 13,623 lived up to feminist expectations on addressing global gender-based violence and creating a women’s rights oriented agenda in the realm of foreign affairs. The president’s issuance of Executive Order 13,665 belongs in the plus column for its promotion of women’s equality, generally—and for wage equity, specifically—in the employment sector. The political compromise that resulted in Obama’s signing of Executive Order 13,535 caused a furor among reproductive justice advocates at the time, but may have saved the ACA, which could be more beneficial to women in the long run. Finally, Barack Obama has yet to take convincing action on the issue of sexual assault in the military, which seems ripe for a presidential directive geared toward reformation of existing policies under the Department of De-


fense and in all branches of the military, as well as those governing the national service academies.

During his final press conference in December 2014, Obama made a point of fielding questions from women reporters only. Many characterized this action as a bold, history making move. A few weeks later, senior administration officials suggested that the White House intended to “pivot away from President Barack Obama’s reliance on executive actions in the coming year and invest more in a legislative strategy aimed at trying to advance key policy goals.” This was not welcomed news for women’s rights activists who knew it was unlikely that a Republican-controlled Congress would have a pro-feminist legislative agenda. However, Barack Obama’s 2015 State of the Union address was surprisingly focused on gender equality concerns. While difficult to reconcile these mixed signals, the president seems ready to advance women’s rights more overtly, albeit more gradually than anticipated when he was first showcased on a magazine cover as “what a feminist looks like” upon taking office in 2009. Assigning him the moniker of feminist-in-chief might be premature, but by presidential directive or otherwise, Barack Obama can still solidify his legacy on women’s rights—not only symbolically, but substantively—if he seizes the opportunity.


