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Homosexuality and Military Service: Legislation, Implementation, and Litigation

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HOMOSEXUALITY AND MILITARY SERVICE: LEGISLATION, IMPLEMENTATION, AND LITIGATION

William A. Woodruff

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I. INTRODUCTION

When President Clinton announced his intention to lift the military’s long-standing rule against service by homosexuals, he set off a fire storm of controversy. Less than two weeks after his inauguration as the “its the economy, stupid”

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candidate, he had become the social agenda president. Telephone calls from the American people jammed White House and Capitol Hill switchboards. "Gays and the military" became the topic of conversation on television and radio news and talk shows. The print media ran article after article on the issue. Everyone had strong opinions. To some, President Clinton was striking a blow for equality and justice that was long overdue. To others, he was sacrificing the best military force in the world to repay special interest groups for their support during the campaign.

The President’s decision to lift the ban placed the senior military leadership in the awkward position of publicly opposing the Commander-in-Chief. The split in Congress was equally dramatic with influential members of the President’s own party objecting to the President’s unilateral approach to lift the ban. Lost in all of the controversy, however, was an understanding of the Department of Defense policy itself. In his January 29, 1993 press conference, the President characterized the then-existing policy as excluding people from service based “solely on the basis of their status.” The President added, “I believe that American citizens who want to serve their country should be able to do so unless their conduct disqualifies them from doing so.” On the other hand, the Chairman of the Joint Chiefs of Staff, General Colin Powell, in defending the homosexual exclusion policy in a letter to a member of Congress, noted that “[s]exual orientation is perhaps the most profound of human behavioral characteristics.” Were the President and the General talking about the same policy? Did the policy discriminate based upon a benign non-behavioral characteristic, or was the policy based upon conduct and reasonable inferences about conduct? In other words, in the context of military personnel management policies, is sexual “orientation” or “status” unrelated to sexual behavior?

Because the old regulatory policy has been replaced now with a statutory policy, it would seem these are moot questions. Nothing, however, could be further

4. Some reports claim President Clinton received up to ninety percent of the gay vote and gay-rights political action committees contributed almost three million dollars to his campaign. John Barry & Daniel Glick, Crossing the Gay Minefield, NEWSWEEK, Nov. 23, 1992, at 26.
8. Id.
from the truth. The answers to these questions provide the philosophical compass that sets the course for the interpretation and implementation of the statutory policy passed by Congress in 1993.10

This Article examines the old regulatory policy (hereinafter "1981 homosexual exclusion policy"), its application, and judicial interpretation to establish a benchmark from which to compare the post-January 1993 policy developments. The Article then examines the administrative policy announced by President Clinton on July 19, 1993, and compares it to the 1981 homosexual exclusion policy. The Article also analyzes the statutory policy enacted in late 1993 and its constitutionality to see how Congress approached the issues, as well as the Department of Defense’s implementation of the statutory policy to determine whether the implementing directives have followed the policy determined by Congress. Finally, this Article concludes that significant differences exist between the statute passed by Congress and the subsequent implementing regulations.

II. THE 1981 DEPARTMENT OF DEFENSE REGULATORY POLICY

A. Institutional and Philosophical Context

1. The Role of the Armed Forces in American Society

To understand and appreciate the issues that produced this intense national debate, one must consider the context in which the Department of Defense homosexual exclusion policy operates: the American Armed Forces. The American Armed Forces are unique. In a government based upon the consent of the governed, the military is autocratic. In a society that treasures individual freedom, the soldier must conform and sacrifice individual freedom for mission accomplishment. In a country where the right to speak one’s mind is paramount, the soldier is called upon to defend that right while not enjoying its full extent. To some, it is paradoxical that the defenders of freedom must forfeit their own freedom. Consider the mission of the military, however, and the paradox vanishes. The mission of the United States Armed Forces is to fight and win our nation’s wars. It takes an army to do that, not a debating society. The Supreme Court has long-recognized "the differences between the military and civilian communities result from the fact that ‘it is the primary business of armies and navies to fight or be ready to fight wars . . . .’"11

To accomplish this unique, important, difficult, and dangerous business of fighting wars, the military forces have many requirements that have no parallel in civilian society. Soldiers are not free to “call in sick” if they do not feel like working. Soldiers are not permitted to vote on whether to take the objective by a

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11. Parker v. Levy, 417 U.S. 733, 743 (1974) (quoting Toth v. Quarles, 350 U.S. 11, 17 (1955)). See also In re Grimley, 137 U.S. 147, 153 (1890) ("An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."). For a discussion of the needs and purposes of a military in a democratic society and the resulting impact on servicemen’s claims of constitutional rights violations, see James M. Hirschhorn, The Separate Community: Military Uniqueness & Servicemen’s Constitutional Rights, 62 N.C. L. REV. 177 (1984).
frontal assault or a flanking movement. They are not given the option of wearing button-down collars or the latest fashion trend. Theirs is the duty of obedience to the lawful orders of their superiors. Wars are won not by individuals, but by units functioning together under extremely difficult circumstances. In short, military service requires the soldier to subordinate individual desires to the needs of the group; to eschew personal prerogatives for the sake of unit success; to place accomplishment of the mission before attainment of private goals. This overarching principle of conformity and unit cohesion undergirds the discipline and the teamwork necessary to train, maintain, and employ an effective fighting force. As the Supreme Court noted in Goldman v. Weinberger,¹² “[t]he essence of military service ‘is the subordination of the desires and interests of the individual to the needs of the service.’”¹³

In the final analysis, all military rules, regulations, policies, traditions, and customs are related to, and in some manner support, the ultimate goal of combat effectiveness. The 1981 homosexual exclusion policy, like other personnel policies, was a component of the force management equation that sought to build a military force that was trained, disciplined, ready, and able to defend the nation’s interests whenever and wherever called.

2. Individual Rights v. Military Readiness

While the impact of homosexuality on these important concerns has been, and still is, the subject of considerable debate, the perspective from which one approaches the debate is as important as resolving the underlying issues themselves. Specifically, is the debate one of policy centered on individual rights, or is it a debate about how best to raise and support an effective and efficient armed forces? Answering this question establishes the perspective from which the various arguments must be viewed and is a fundamental prerequisite to properly analyzing the arguments of both sides. Ultimately, this is a philosophical or ideological question. While we may look to our constitutional history and the allocation of power among the various branches of government for guidance, the answer to this question is really a philosophical or ideological position rather than a legal one.

Proponents of eliminating the 1981 homosexual exclusion policy have argued the policy denies homosexuals the “right” to serve their country.¹⁴ Phrasing the debate in terms of individual rights allows opponents of the policy to cloak their position in the garb of the civil rights movement. Viewing the issue from the individual rights perspective places the burden on the military to justify the exclusion policy. Because the military has not conducted controlled experiments to

¹³. Id. at 507 (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).
generate empirical data in support of the 1981 homosexual exclusion policy, critics claim the policy does not have a rational basis and must fall in the face of an individual rights attack.\textsuperscript{15} This perspective permits critics of the policy to rely upon some celebrated cases of homosexuals who served successfully as refuting the military's justification for the policy. Because the military has not produced any empirical data to the contrary, critics are then able to assume their own argument and dismiss "professional military judgment" as a euphemism for prejudice.\textsuperscript{16}

Viewed from the perspective of the needs of the military, on the other hand, the debate indeed takes a different approach. The burden of proof shifts. Opponents of the policy must demonstrate that eliminating the exclusion of homosexuals will enhance the military's ability to perform its mission of fighting and winning wars. From this perspective, "professional military judgment" is significant. The question then turns on whether the Chiefs of Staff of the services, and military leaders such as General Norman Schwartzkopf are better qualified to develop personnel policies that promote combat readiness and efficiency than are the leaders of the National Gay and Lesbian Task Force and other gay rights organizations. This perspective is significant considering the fact that gay rights activists have yet to make a case for improving, or at least not hindering, combat effectiveness by eliminating the 1981 policy.\textsuperscript{17}

The "individual rights" perspective is illustrated by the Gay, Lesbian, and Bisexual Military Freedom Project, a coalition of organizations interested in furthering the gay rights movement. The Military Freedom Project presented the Clinton-Gore transition team with a comprehensive agenda for integrating homosexuals and bisexuals into the military.\textsuperscript{18} The agenda called for an executive order "ending discrimination on the basis of homosexual or bisexual orientation or conduct in the armed forces."\textsuperscript{19} It also demanded establishment of an advisory committee to advise the President and the Secretary of Defense on "all matters relating to homosexuals and bisexuals in the armed forces."\textsuperscript{20} The agenda urges "prompt reform" of the Uniform Code of Military Justice\textsuperscript{21} to remove the possibility of criminal sanctions for consensual homosexual sodomy.\textsuperscript{22} In addition, the

\begin{itemize}
  \item 15. See, e.g., Hermansen, supra note 14.
  \item 16. See id. at 195-209.
  \item 17. In testimony before the Senate Armed Services Committee, Dr. Lawrence Korb, a former Assistant Secretary of Defense, who now favors lifting the exclusion policy, acknowledged the experimental nature of eliminating the policy: "All my research and experience tells me that the question of whether the presence of openly gay men and women in the armed services would undermine fighting effectiveness cannot be answered definitively until the policy is actually changed." Prepared Statement of Lawrence J. Korb on Homosexuals in the Military and Unit Cohesion before the Senate Armed Services Committee, March 31, 1993, at 1, [hereinafter Korb Statement], \textit{reprinted in Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Armed Services Committee}, 103rd Cong., 1st Sess. 255-56 (1993) [hereinafter S. Hrgs.].
  \item 19. Gay, Lesbian, and Bisexual Military Freedom Project Recommendations for Accepting Homosexuals and Bisexuals into the U.S. Armed Forces, ¶ (1)(A) [hereinafter Project Recommendations].
  \item 20. Id. ¶ (I)(B).
  \item 22. See Project Recommendations, supra note 19, ¶ (2)(A).
\end{itemize}
document urged reparations for all those discharged for homosexuality under previous policies and a comprehensive training program to teach commanders, chaplains, doctors, military policemen, and ordinary soldiers that homosexual conduct is acceptable.23

Significantly, the document did not mention national defense. It did not concern itself with whether this ambitious agenda for social engineering will have any adverse impact, in either the short or long term, on combat effectiveness. The agenda omitted any reference to the possible impact on unit cohesion, trust, and confidence that might occur when soldiers are required to live under conditions of minimal or no privacy with individuals of the same gender who may find them sexually attractive. The Military Freedom Project agenda did not concern itself with what might happen when sexual tensions in a combat unit disrupt the unit’s ability to fight as a team. It did not even acknowledge the mission and role of the Armed Forces in American society. The agenda’s sole purpose was to further the interests of homosexuals as individuals and as a group. It did not even attempt to address legitimate concerns of military readiness and combat effectiveness.

Other proponents of change have also confused national priorities. Dr. Lawrence Korb, a former Assistant Secretary of Defense who now favors lifting the 1981 homosexual exclusion policy, testified before the Senate Armed Services Committee on this issue. His position typifies the up-side-down logic of proponents of individual rights over military necessity:

Regardless of their position on this issue, no responsible person, particularly someone who has served on active duty with the military, would desire to take any step which he or she knew would permanently undermine the unit cohesion or fighting effectiveness of our armed forces. However, the burden of scientific proof must be on those who wish to exclude gays from the military. We cannot infringe on the rights of any American to serve his or her country unless we can convincingly demonstrate that the presence of that person in a unit would prevent the development of cohesion even with the most competent and highly motivated leadership.24

Carefully consider what Dr. Korb said. First, he pays homage to unit cohesion and fighting effectiveness and warns against knowingly taking some action that would permanently hinder combat effectiveness. Apparently, Dr. Korb finds it acceptable to take action that could temporarily hinder our ability to defend national interests; we need only hope that some crisis requiring combat force does not present itself during that time of temporary ineffectiveness. He also implies it is acceptable to take action that would permanently hinder effectiveness as long as we did not know that it would have such consequences. According to Dr. Korb, as long as we do not have the mens rea to hinder national defense, experimentation with our national defense forces is perfectly acceptable. In short, Dr. Korb would have the entire country bear the risk of failure instead of denying a particular individual his or her “right” to serve in the military.

23. Id. ¶¶ (3)(C), (3)(D), & (4).
24. Korb Statement, supra note 17, at 1.
Second, Dr. Korb not only elevates individual rights over the needs of the military, but he gives us an interesting insight into the quantum of evidence required to sustain the policy. Note that he requires "scientific" proof to justify the policy. Instead of allowing military leaders with combat experience to tell us what it takes to fight and win wars, Dr. Korb defers to "science" as if this issue was capable of scientific certainty or resolution. Furthermore, he believes the "scientific" evidence must "convincingly demonstrate" the wisdom of the policy. In other words, doubts should be resolved in favor of the individual and against military readiness concerns.

Finally, Dr. Korb proposes that "any American" should be able to serve unless we can "convincingly demonstrate that the presence of that person" would disrupt unit cohesion even with the best leadership available. Carried to its logical conclusion, Dr. Korb proposes a new and radical qualification standard that is so focused on individual desires that the needs of the military do not even appear in the equation. "Any American" would include the physically handicapped, the mentally retarded, the elderly, the young, the felon, the drug addict, the emotionally immature, and a host of others who fit in categories that are not considered generally appropriate for military service. Furthermore, Dr. Korb seriously proposes that any and all of these should be permitted to serve. Only after they are in the military and "convincingly demonstrate" that their presence detracts from the unit’s ability to perform its mission would discharge be appropriate. Such egalitarian notions may be appropriate for social clubs and civic groups, but they are hardly conducive to building combat forces.

Perhaps the most sobering aspect of Dr. Korb's proposal is his forthright admission that "the question of whether the presence of openly gay men and women in the armed services would undermine fighting effectiveness cannot be answered definitively until the policy is actually changed." In spite of this, however, he and the gay rights groups advocate implementing their social experiment with no consideration of a risk-benefit analysis to national defense and society in general. In their view, individual rights are paramount and the impact upon societal interests and norms are simply irrelevant until someone "convincingly demonstrates" the experiment is a failure.

If the purpose of the military is to provide equal employment opportunity to all who wish to serve, then individual rights should take precedence over other concerns. If the military is to perform a national defense role and be ready to project combat power whenever and wherever necessary, then combat readiness concerns must dictate personnel policies. To ask this question is to answer it. The only reason to maintain an army is to be ready to fight and win wars. Ultimately, military readiness and combat effectiveness must be the criteria by which the arguments on either side of the issue are judged.

This fundamental philosophical choice explains why the judiciary gives such deference to the military. In this regard, it is important to repeat what the Supreme Court observed in Goldman: "The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" To elevate individual rights above the needs of the service and the military’s ability to wage war is the antithesis of military service. When individual free speech rights

25. Id.

conflict with the need for discipline, free speech must yield. When an individual’s free exercise of religious rights conflicts with the military’s requirement for uniformity, the need for uniformity prevails. When the military’s interest in good order is inconsistent with the procedural protections afforded civilian criminal defendants, good order is paramount. When an individual’s claims of racial discrimination threaten a commander’s authority to discipline his subordinates, equal protection remedies available in civilian society give way to the need for military discipline. When personal political views of a soldier are inconsistent with mission orders, the mission takes precedence. By the same token, when special interest groups seek to use the military to enhance their own social and political agenda, any doubts about the impact of their proposal on military efficiency and combat readiness must be resolved in favor of the professional military judgment of those charged with leading our military in combat. To do otherwise sacrifices matters of national importance on the altar of self-interest and pays homage to individual rights at the expense of combat readiness. Emphasizing and accommodating individual rights at all costs is a poor substitute for establishing sound national policy.

B. The Historical Context

The military’s policy, like the Uniform Code of Military Justice and the laws of the states that criminalize sodomy, derives from a long history of general condemnation of homosexual conduct. Sodomy was punished by the ecclesiastic courts of the early and medieval church and was made a secular offense under a statute of Henry VIII. Sodomy was held in such opprobrium that Blackstone referred to the mere mention of sodomy as a “disgrace to human nature.” Because sodomy was an offense over which the civilian courts had jurisdiction, it was not specifically included in the military codes until the 18th century when it became punishable under the Laws Relating to the Government of His Majesty’s Ships, Vessels, and Forces by Sea. Similarly, sodomy was not included in the early

28. See Goldman, 475 U.S. at 503.
32. “Our rights-laden public discourse easily accommodates the economic, the immediate, and the personal dimensions of a problem, while it regularly neglects the moral, the long-term, and the social implications.” Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 171 (1991).
34. 25 Hen. 8, ch. 6 (1533) (Eng.).
35. 3 William Blackstone, Commentaries *215-16.
36. 22 Geo. 2, art. 29 (1749) (Eng.).
American military codes because it was punishable by the civilian courts under the common law adopted from England. During World War I, however, the Army prosecuted sodomy under the Manual For Courts-Martial, 1917. Congress included sodomy as a separate offense under the Articles of War in 1920.

Early enlistment and discharge regulations did not mention homosexuality or sodomy. Indeed, they were all very general and offered enlistment to "[n]one but men of good character, sound in body and mind, of good appearance, and well formed and fit, in every particular. . ." After World War I, Army regulations provided for the discharge of soldiers who evidenced "habits or traits of character which serve to render retention in service undesirable," or who were "disqualified for service, physically or in character, through [their] own misconduct."

During World War II, the Army discharged homosexuals administratively. In January 1944, the War Department issued Circular No. 3, which specifically provided for the disposition of homosexuals. It reminded commanders that homosexual conduct was punishable under the Articles of War, but that administrative separation often served the military's best interests. The circular distinguished between "true or confirmed" homosexuals who were not "reclaimable" and "first offenders" whose conduct may have been influenced by drugs, alcohol, immaturity, curiosity, or undue pressure by a superior. If the "confirmed" homosexual's conduct was not aggravated by independent offenses, the circular recommended administrative discharge as the appropriate measure, otherwise, court-martial was appropriate. "First offenders" were subject to medical evaluation and treatment and, depending upon the success of the treatment regimen, were either retained on active duty, administratively separated, or, if otherwise justified, court-martialed for sodomy.

40. Dep’t of Army Reg. No. 615-360, § 49 (Mar. 1, 1926).
41. Administrative separations are not criminal prosecutions. Only a court-martial can issue a dishonorable discharge, a bad conduct discharge, or in the case of an officer, a dismissal. Current regulations characterize administrative discharges as honorable, general, or other than honorable depending upon the nature of the individual's service. While the procedural protections available to a soldier facing administrative elimination are not the same as those available in a criminal prosecution, the administrative separation is not a punitive action, it cannot impose a period of confinement or other "sentence," and is not a criminal or quasi-criminal conviction. The administrative separation is the military equivalent to a civilian employer firing an employee. See generally Francis A. Gilligan & Frederic I. Lederer, Court-Martial Procedure § 3-22.00 (1991). For an account of the conversion from a criminal approach to homosexuality to an administrative approach, see Allan Berube, Coming Out Under Fire: The History of Gay Men and Women in World War Two 128-48 (1990).
42. War Dep’t Circ. No. 3, Homosexuals (Jan. 3, 1944).
43. Id. § 2b.
44. Id. § 2a.
45. Id. § 2b.
By 1950, Army regulations provided for separation of “[t]rue, confirmed, or habitual homosexual personnel, irrespective of sex . . . .”46 The regulation separated homosexual cases into three different categories. A “Class I” case involved homosexual acts accompanied by some aggravating factor such as assault, coercion, or involvement of children.47 Cases involving “true or confirmed homosexual personnel” who committed homosexual acts without the aggravating factors were placed in “Class II.”48 “Class III” cases were limited to “those rare cases wherein personnel only exhibit, profess, or admit homosexual tendencies and wherein there are no specific, provable acts . . . .”49

As might be expected, the disposition of the case depended upon the class in which it fell. Class I cases were tried by general court-martial.50 Enlisted personnel in a Class II category could either accept an undesirable discharge (officers could resign) or face general court-martial.51 Class III cases involving enlisted personnel were subject to involuntary administrative separation if the soldier declined a discharge, which could be either general or honorable depending upon the circumstances.52

Over the next two decades, personnel policies generally required separation of homosexuals, but continued to classify those whom the regulations considered “reclaimable” and permitted them to serve. In 1970, Army regulations abandoned the “confirmed” and “reclaimable” classifications and were amended to separate for “unfitness” soldiers who committed homosexual acts. Soldiers who merely had homosexual “tendencies” were separated for “unsuitability.”53

Problems with the policies of all three services were highlighted in a series of federal court decisions in the late 1970s. Under the Air Force and Navy policies, it appeared that commanders had authority to retain homosexuals on active duty under “unusual circumstances.” Neither service, however, defined what circumstances were sufficiently unusual to justify retention. The United States Court of Appeals for the District of Columbia Circuit overturned the discharges of two homosexual servicemen because they were not given an opportunity to demonstrate they qualified for the exception.54

The Army policy fared no better. A District Court in Wisconsin enjoined the discharge of an admitted lesbian because the Army policy prohibiting service by individuals with homosexual “tendencies” was potentially so broad that it violated First Amendment and privacy rights.55

46. DEP’T OF ARMY REG. NO. 600-443, PERSONNEL—SEPARATION OF HOMOSEXUALS ¶ 2 (Jan. 12, 1950).
47. Id. ¶ 3a.
48. Id. ¶ 3b.
49. Id. ¶ 3c.
50. Id. ¶ 6.
51. DEP’T OF ARMY REG. NO. 600-443, PERSONNEL—SEPARATION OF HOMOSEXUALS ¶ 7a, b (Jan. 12, 1950).
52. Id. ¶ 8.
55. See benShalom v. Secretary of the Army, 489 F. Supp. 964, 975-77 (E.D. Wis. 1980).
In response to these challenges and demonstrated deficiencies, the Department of Defense assembled representatives of the services to review and revise the policy to satisfy constitutional standards and to provide for a uniform policy throughout the Department. The result of this effort was Department of Defense Directive 1332.14, pertaining to the administrative separation of enlisted members, and Department of Defense Directive 1332.30, which governs the separation of officers. The new policy, which was promulgated in the waning days of the Carter


a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impair the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain public acceptability of military service; and to prevent breaches of security.

b. As used in this section:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts;

(2) Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts; and

(3) A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

c. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member’s usual and customary behavior;

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

(d) Under the particular circumstances of the case, the member’s continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the
administration, addressed the deficiencies of the earlier policies by eliminating the “unsuitability” discharge for “homosexual tendencies” found objectionable by the court in *benShalom v. Secretary of the Army*.\(^5\) To insure consistent application among the services, the policy clarified that separation was mandatory for individuals who were homosexuals within the meaning of the Directive. This clarification eliminated the undefined “unusual circumstances” which the courts relied upon in overturning the discharges in *Matlovich v. Secretary of the Air Force*\(^5\) and *Berg v. Claytor*.\(^9\) To add clarity, the policy defined “homosexual” as one who “engages in, intends to engage in, or desires to engage in homosexual acts,” and defined “homosexual acts” as “bodily conduct, actively undertaken or passively permitted, between persons of the same sex for the purpose of satisfying sexual desires.”\(^6\)

### C. Operational Context

An agency’s written regulation can best be understood and appreciated by examining the agency’s own interpretation of its regulation.\(^6\) The 1981 homosexual exclusion policy is no exception. The consistent agency interpretation and application of the policy reveals the policy was an exclusion policy premised upon the policy determination that “[h]omosexuality is incompatible with military service.” As an exclusion policy, it had two basic components, (1) an accession mechanism designed to screen out homosexuals prior to their entering military service, and (2) a discharge mechanism to separate those who entered the military in spite of the accession screening mechanism. The policy was premised on the judgment of military professionals that homosexual conduct in the unique setting of the military was inimicable to good order, discipline, unit cohesion, and combat effectiveness.\(^6\)

The policy operated on the logical conclusion that as a class, homosexuals engaged in or were likely to engage in homosexual activity. In order to reduce, if not eliminate, the instances of homosexual activity in military units, the policy...
excluded from service the category most closely associated with homosexual activity: homosexuals.

At accession, recruits were asked if they "intended to engage in . . . homosexual acts . . ." Enlistment forms also asked, "Are you a homosexual or bisexual? ('Homosexual' is defined as: sexual desire or behavior directed at (a) person(s) of one's own sex. 'Bisexual' is defined as: a person sexually responsive to both sexes.)" An affirmative answer precluded enlistment.

For those who entered military service or continued in military service in violation of the policy by either lying in response to the questions at enlistment or for those who answered truthfully but subsequently realized they were homosexual, the policy required discharge when one or more of the following criteria were met: (1) the individual engaged in, attempted to engage in, or solicited another to engage in homosexual acts; (2) the individual admitted he or she is a homosexual; (3) the individual married or attempted to marry a person known to be of the same sex. When presented with probable cause that any of the above conditions existed, commanders were required to initiate separation proceedings. Service regulations provided the soldier with certain due process rights in the proceedings, including the right to notice of the proceedings, the right to legal counsel, the right to cross-examine witnesses, the right to present evidence and witnesses, and the right to either remain silent or testify in his or her own behalf. Separation was required if the Board determined the individual was a homosexual within the meaning of the Department of Defense Directive.

If the basis for the separation proceeding was that the soldier engaged in, attempted to engage in, or solicited another to engage in homosexual acts, the separation board could recommend retention only by finding: the conduct in question was a departure from the soldier's usual behavior, the conduct was unlikely to recur, it was not accompanied by force or coercion, that under the circumstances retention of the soldier would be consistent with good order, morale, and discipline, and the soldier does not desire or intend to engage in homosexual acts in the future. In other words, if these additional factors were present, the soldier did not fall within the definition of the excluded class and discharge for homosexuality was not required. Similarly, where the basis of separation was marriage or attempted


64. Id.

65. Similar questions were asked of officers upon appointment and of those entering pre-commissioning programs such as Reserve Officers Training Corps. See, e.g., DEP'T OF ARMY FORM 597-3, ARMY SENIOR ROTC SCHOLARSHIP CADET CONTRACT, Part I(2)(f) (July 1992).


67. Id. ¶ (H)(1)(c)(2).

68. Id. ¶ (H)(1)(c)(3).

69. Id. ¶ (H)(3)(a).

70. Id. at Part 3, ¶ (C).


72. Id. This aspect of the regulation seems to be the modern equivalent of the "reclaimable" homosexual addressed in earlier versions of the policy. Here, however, the regulation does not purport to "cure" or provide "treatment" for homosexuality, it merely recognizes a person may engage in a homosexual act and not, in fact, be a homosexual. While administrative discharge for homosexuality is not appropriate in those circumstances, the military is free to apply the criminal provisions of the
marriage to a person of the same sex, the regulation permitted retention if the Board
determined the individual was not a homosexual within the meaning of the
Department of Defense Directive.\textsuperscript{73}

The Department of Defense policy also required separation of those who
disclosed their homosexuality by their own statements, unless the separation board
found they were not homosexuals within the meaning of the Department of Defense
Directive. The admission of homosexuality placed the soldier in an excluded class;
a class defined by conduct or the propensity to engage in conduct the military
determined was inimicable to good order, morale, unit cohesion, and ultimately,
combat effectiveness. Because the definition of homosexual was tied to sexual
conduct rather than to amorphous concepts of sexual tendencies, preferences, or
orientation, the policy presumed that one who claimed to be a homosexual has, will,
or was likely to engage in the conduct that defines the class.\textsuperscript{74} To overcome the
effect of the presumption, the soldier had the burden of proving that he or she was
not a member of the excluded class, i.e., he or she was not a homosexual. The
administrative elimination process, with its panoply of rights and procedural
protections, including the right to cross-examine witnesses, to call witnesses, and to
introduce evidence, provided the servicemember with the opportunity to rebut the
presumption that he or she was, in fact, a member of the excluded class. If the
servicemember failed to rebut the presumption that he or she engages in, intends to
engage in, or desires to engage in homosexual acts, i.e., he or she was a homosexual,
the soldier's voluntary claim to be a member of a class that is defined by its sexual
conduct or propensity to engage in such conduct was sufficient to warrant discharge.

Discharging soldiers based solely upon their self-identification as a
homosexual without additional evidence of homosexual conduct avoided the
necessity for intrusive investigations and inquiries into the soldiers' sexual practices.
Furthermore, because it is reasonable to believe homosexuals will engage in the
conduct that defines the class, discharging those who claim to be homosexuals
served the goal of preventing the disruption and adverse impact upon unit readiness,
morale, and discipline that homosexual conduct within the military environment
causes.

Uniform Code of Military Justice to the conduct in question or to apply its other administrative
measures, including discharge. See, e.g., DEP'T OF THE ARMY REG. NO. 635-200, PERSONNEL

Retention would only be appropriate if the separation authority determined that the servicemember
was not a homosexual or bisexual and the marriage was not entered into in an attempt to avoid service.
While the "Corporal Klinger" exception avoided discharge for homosexuality, it did not preclude
application of other administrative or disciplinary sanctions. See id. ¶ (H)(3)(g).

74. Presumptions are procedural rules to allocate the burden of production of evidence or the
burden of persuasion, or both, in trials. See generally 2 JOHN W. STRONG ET. AL., MCCORMICK ON
EVIDENCE, §§ 342-345 (4th ed. 1992). For example, a letter properly addressed, with the proper
postage affixed, and deposited in the mail is presumed to have been delivered to the addressee. If the
party against whom the presumption operates is to avoid the effect of the presumption, that party bears
the burden of producing evidence to show that the letter was in fact not delivered. Id. § 343.
Similarly, the law presumes that a child born to a woman during her marriage is the legitimate child
of her husband. The party challenging paternity bears the burden of producing evidence to overcome
the presumption of paternity. Id.
D. Judicial Review of the 1981 Homosexual Exclusion Policy

Judicial challenges to the 1981 regulatory policy evolved over the years from attacks based upon the process used to separate homosexuals, to claims that the policy infringed constitutionally protected privacy interests and First Amendment free speech rights, to arguments that it violated the equal protection component of the Fifth Amendment Due Process Clause. With few exceptions, these judicial challenges have been uniformly unsuccessful.

The long line of judicial authority upholding the 1981 homosexual exclusion policy is due in large part to the traditional deference the courts give the military in managing internal military affairs. This deference is grounded in the recognition that the Constitution gives the Executive and Legislative branches authority over military affairs and the judiciary lacks the expertise required to make the professional judgments needed to manage the operations of the Armed Forces.

1. Procedural Due Process

Most of the early challenges to the military's homosexual policy attacked the procedures employed to separate the individual from the service. In the constitutional sense, procedural due process is triggered by the government's infringement of some protected property or liberty interest. When protected interests are implicated, the individual is entitled to notice and an opportunity to be heard. Determining the timing, scope, and formality of the notice and hearing, i.e., the process that is due, requires balancing competing private and governmental interests.

Complicating the procedural due process theory of plaintiffs challenging expulsion from the military is the fact that courts have been virtually unanimous in holding there is no property or liberty interest in continued service in the military. Thus, discharge from the military does not, in and of itself, implicate constitutional guarantees of procedural due process. Only if the discharge falsely stigmatizes the individual will notions of constitutional procedural due process come into play.


77. See Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

78. In determining the precise contours of the process that is due in particular circumstances, the Supreme Court has applied a balancing of interests approach that considers first, the private interests at stake; second, the degree to which the procedures employed safeguard the protected interests from erroneous deprivation; and third, the government's interest in fiscal and administrative efficiency and what burden additional protections would impose. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).


80. As the Guerra court noted, a soldier may, in the abstract, have a liberty interest in his good name or reputation and if the military falsely stigmatizes the soldier with a less than honorable discharge, the Due Process Clause is implicated. Guerra, 942 F.2d at 278 (citing Wisconsin v.
Obviously, when a soldier voluntarily proclaims that he or she is a homosexual and is discharged according to the established policy, it simply cannot be said that the military has falsely stigmatized the individual.\(^8\) Accordingly, it is now well settled that the 1981 homosexual exclusion policy does not violate the procedural due process component of the Fifth Amendment.\(^8\)

Though it does not usually rise to constitutional levels, the process employed to effect a discharge is, however, important and may confer on the servicemember procedural rights and protections that a court will enforce. To a large extent, the process to which a servicemember is due in the administrative separation context is determined by the service regulations themselves. In other words, the regulations providing for discharge also establish the procedural protections due the service member.

The courts have, of course, required the military to follow its own regulations in conducting administrative separations. In fact, two of the cases that scuttled the predecessor to the 1981 homosexual exclusion policy dealt with claims that the services failed to follow their own regulations and denied the plaintiffs the procedural protections of the regulations. Both *Berg v. Claytor*\(^8\) and *Matlovich v. Secretary of the Air Force*\(^8\) involved allegations that the plaintiffs were discharged for homosexual activity without being told why their cases did not come within the "unusual circumstances" exception to discharge contained in Navy and Air Force regulations. The D.C. Circuit found the regulations "provided that in cases of this type a reasoned explanation should be made for any detrimental action ordered; [t]he whole system of regulations is infused with this concept."\(^8\)5 The failure to provide the "reasoned explanation" required by the regulations denied the plaintiffs knowledge of the grounds for the decisions and precluded the court from exercising its proper function of judicial review of agency actions.\(^8\)6 The discharges were overturned and the cases were returned to the services for action in conformity with the regulations.\(^8\)7

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*Constantineau*, 400 U.S. 433, 437 (1971)). The key to invoking a protected liberty interest is the falsity of the government's asserted basis for the discharge. If the underlying basis for discharge is true, whether it involves drug use as in *Guerra* or homosexuality as in *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984), the discharge action does not falsely stigmatize the individual and protected liberty interests are not infringed.

81. *See Rich*, 735 F.2d at 1228.
82. *See id.* at 1220; *Beller v. Middendorf*, 632 F.2d 788, 806 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *see also Holroyd*, *supra* note 14, at 432-34.
83. 591 F.2d 849 (D.C. Cir. 1978).
84. 591 F.2d 852 (D.C. Cir. 1978).
85. *Id.* at 859.
86. *Id.* at 857. The difficulty of relying upon the agency-provided benefits and protections is the agency is free to change them. After the *Berg* and *Matlovich* decisions the Department of Defense revised the policy and removed the "unusual circumstances" language thereby precluding future challenges to discharges on those grounds. *See supra* notes 55-60 and accompanying text.
87. Prompted by the *Matlovich* court's decision, the Department of Defense revised the policy to eliminate the procedural vagaries that allowed the plaintiffs to avoid discharge. Curiously, the court itself invited the Defense Department to solve the problem by revising the policy. The court noted the services could follow one of two approaches to the problem: either change the policy under its rule-making authority to provide a "generalized approach to a general problem . . ." or continue to handle
A more recent application of this “administrative” or “regulatory” due process, though not specifically denominated as such by the court, is Meinhold v. Department of Defense. Keith Meinhold was a twelve-year Navy veteran who in 1992 declared on a national television news program that he was, “in fact, gay.” The Navy did what the Department of Defense policy required in such situations and instituted separation proceedings to provide Meinhold the opportunity to establish that he was not a homosexual within the meaning of the policy. Because the policy presumed one who claims to be a homosexual will engage in the conduct that defines the class and because Meinhold did not challenge the logical presumption of homosexuality that his statement raised, as he had the right and opportunity to do, the administrative proceedings concluded Meinhold was in fact a homosexual (i.e., one who “engages in, desires to engage, or intends to engage in homosexual acts”) and discharged him from the Navy. After his discharge, Meinhold sued to overturn his discharge and obtained a preliminary injunction reinstating him to duty while the case was pending. On cross motions for summary judgment, the court found the policy violated Meinhold’s right to equal protection, made the preliminary injunction reinstating him permanent, and enjoined the Department of Defense from “discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the Armed Forces.”

On appeal, the Ninth Circuit noted that the regulations as applied by the Navy raised serious constitutional claims. Instead of deciding if the policy actually violated Meinhold’s constitutional rights, however, the court opted to re-interpret the policy to avoid the constitutional issue altogether. The court found the policy called for discharge based upon a statement of homosexuality only if the statement reflected a “fixed or expressed desire to commit homosexual acts despite their being prohibited.” Finding Meinhold’s statement did not contain such a fixed or expressed desire, the court reasoned the Navy misapplied its regulation to Meinhold and affirmed the district court’s order reinstating him. Thus, the court determined the policy, as the court interpreted it, was constitutional. The policy, however, was applied improperly to Meinhold. It was the Navy’s misapplication of its

88. 34 F.3d 1469 (9th Cir. 1994).
91. Meinhold, 808 F. Supp. at 1458. The Supreme Court stayed application of the injunction pending appeal in so far as it purported to grant relief to anyone other than Meinhold. Department of Defense v. Meinhold, 114 S. Ct. 374 (1993).
92. Meinhold v. Department of Defense, 34 F.3d 1469, 1478 (9th Cir. 1994).
93. Id. at 1477.
94. Id. at 1479.
95. Id. at 1479-80.
constitutional policy that caused Meinhold harm, not a “correct” application of an unconstitutional policy.\textsuperscript{96}

\section*{2. Substantive Due Process}

Attacks on the policy based on substantive due process grounds have fared no better than those alleging procedural due process violations. Substantive due process requires the governmental policy, rule, regulation, or action bear a rational relationship to a legitimate government purpose.\textsuperscript{97} If the basis of the due process challenge is that the government action infringes upon constitutionally protected rights or privileges, whether enumerated or found in penumbras, the government must show a compelling interest rather than just a rational basis to survive constitutional scrutiny.\textsuperscript{98} Whether challenged as violating a fundamental right, denying homosexuals’ privacy rights, or infringing upon free speech guarantees, with few exceptions, courts have had no trouble determining the 1981 homosexual exclusion policy did not infringe protected rights and that it bore a rational relationship to a legitimate governmental purpose.\textsuperscript{99} One court even subjected the policy to heightened scrutiny and found that it passed constitutional muster.\textsuperscript{100}

The notable exception was the district court in\textit{benShalom v. Secretary of the Army},\textsuperscript{101} a case challenging an earlier version of the policy. Miriam benShalom was a member of the Army Reserve who admitted her lesbianism. The Army had no evidence of homosexual conduct, other than her profession of lesbianism, and

\begin{enumerate}
\item In reinterpreting the policy to avoid the constitutional issues, the \textit{Meinhold} court relied upon the principle that it must “construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” \textit{Meinhold}, 34 F.3d at 1476 (quoting DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). The policy at issue in \textit{Meinhold} was a regulatory policy as opposed to a statute, however, application of the \textit{DeBartolo} principle would seem to require the court to reach the constitutional question because the court’s construction of the policy was “plainly contrary” to the long-standing interpretation of the policy by both the agency and the courts. Furthermore, the \textit{Meinhold} court’s reinterpretation of the policy to avoid the constitutional questions does not mean that the Navy’s original interpretation of the policy was, in fact, unconstitutional. Other courts have upheld the policy as interpreted and applied by the Navy. See Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc); \textit{benShalom} v. Marsh, 881 F.2d 454 (7th Cir. 1989), \textit{cert denied}, 494 U.S. 1004 (1990). In fact, the \textit{Meinhold} court itself acknowledged the Navy’s interpretation was at least “arguably . . . [rational] in the abstract.” \textit{Meinhold}, 34 F.3d at 1479. Under a rational basis equal protection review such a finding is all that is required to pass constitutional muster: “[a] classification ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification; . . . courts are compelled under rational basis review to accept . . . generalizations even when there is an imperfect fit between means and ends . . . .’” \textit{Heller} v. Doe, 113 S. Ct. 2637, 2642-43 (1993).
\item \textit{See}, e.g., 3 ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 15.1-15.7 (1992).
\item \textit{Id.} § 15.4.
\item \textit{See}, e.g., \textit{Marsh}, 881 F.2d at 454; \textit{Woodward} v. United States, 871 F.2d 1068 (Fed. Cir. 1989), \textit{cert. denied}, 494 U.S. 1003 (1990); \textit{Rich} v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).
\item \textit{See} \textit{Beller} v. \textit{Middendorf}, 632 F.2d 788 (9th Cir. 1980), \textit{cert. denied}, 452 U.S. 905 (1981).
\item \textit{Id.} 489 F. Supp. 964 (E.D. Wis. 1980).
\end{enumerate}
discharged her for "homosexual tendencies" under the earlier policy. The court found the policy unconstitutionally infringed benShalom's right to privacy in her personality, was overbroad in violation of the First Amendment, and was arbitrary and capricious because the Army could not establish a nexus between her admission of homosexuality and her demonstrated performance of duty. The Army did not appeal and benShalom was reinstated.\textsuperscript{102}

In light of the change in the policy in 1981 to eliminate the vague "tendencies" language and the recent decision by the Seventh Circuit upholding the 1981 homosexual exclusion policy in a subsequent suit brought by benShalom,\textsuperscript{103} it is safe to say there is little or nothing left of the district court's substantive due process/fundamental rights analysis.

3. Free Speech

Because the most controversial aspect of the military's policy has been the discharge of those who state they are homosexual and about whom the military has no extrinsic evidence of homosexual conduct, some have claimed the policy violates Free Speech rights protected by the First Amendment.\textsuperscript{104} While discharging a person for uttering the words "I am a homosexual" certainly involves "speech" in a generic sense, the courts have been unanimous in concluding the 1981 homosexual exclusion policy did not infringe First Amendment free speech rights.\textsuperscript{105}

The First Amendment does not protect every word that comes out of a citizen's mouth. To qualify for First Amendment protection in a public employment context, the speech must first be about a "matter of legitimate public concern" as opposed to a "matter of personal concern." BenShalom v. Marsh, 881 F.2d 454, 461 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

102. The litigation, however, was far from over. As previously noted, the District of Columbia Circuit ruled against the military in Berg and Matlovich. See supra notes 55-60 and accompanying text. Those two decisions and the district court decision in benShalom prompted the Department of Defense to revise the policy. The new policy was promulgated in January 1981 and benShalom was denied reenlistment under the revised policy. She again sued and the district court again found the policy unconstitutional. See benShalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989). This time, however, an appeal was taken and the constitutionality of the policy was before the appellate court. The Seventh Circuit, noting the difference between civilian and military life, found that constitutional guarantees that may apply in a civilian setting are not applicable in the unique setting of the military's need for obedience, discipline, loyalty, and team work. The court also found the matter was more appropriately addressed by the political branches of government rather than by judges who "are not selected on the basis of military knowledge." BenShalom v. Marsh, 881 F.2d 454, 461 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). Accordingly, the court held the policy did not violate the plaintiff's constitutional rights and reversed the district court's order requiring the Army to reenlist BenShalom. Id. at 466.

103. Marsh, 881 F.2d at 454.


105. See Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992); Marsh, 881 F.2d at 454; see also WELLS-PETRY, supra note 33, ch. 2.

to a mere revelation of "matters only of personal interest."\textsuperscript{107} Concluding that speech is a matter of public concern does not end the inquiry. Rather, it merely triggers the application of a test to balance the individual's interest in making the statement against the governmental interests furthered by the policy "restriction" on the speech.

The weakness in plaintiffs' attempts to invoke Free Speech rights has not been an inability to convince courts to tip the scales in their favor upon balancing the relative interests. The impediment to the Free Speech theory has been the refusal by courts to consider the statement "I am a homosexual" to merit constitutional protection in the first instance. Making a statement in public does not necessarily mean the statement reaches a matter of public concern. Rather than being a statement of public concern, a revelation of one's homosexuality in the military personnel context is merely acknowledgment of membership in a class that is excluded from service. Thus, the statement was a statement of identity; evidence that the servicemember was a member of a class that was not eligible for service. Accordingly, the threshold requirements for First Amendment protection were not satisfied and, therefore, Free Speech rights were not implicated.\textsuperscript{108}

4. Equal Protection

It is well settled that the Due Process Clause of the Fifth Amendment has an equal protection component which applies to the federal government the same standards the Equal Protection Clause of the Fourteenth Amendment applies to the states.\textsuperscript{109} Equal protection analyses test the propriety of dispensing governmental benefits or burdens, or both, based upon class groupings or distinctions. When government action impacts similarly situated classes differently, equal protection review evaluates whether the class distinctions are appropriate means to further the government goals. Class distinctions drawn along lines of race or national origin, or which burden the exercise of fundamental rights, are subject to strict scrutiny.\textsuperscript{110} To withstand this level of review, the classification scheme must be necessary to further a compelling governmental interest.\textsuperscript{111} Classification schemes that do not implicate fundamental rights and are not based on race or national origin need only pass a rational basis review.\textsuperscript{112} Under this deferential standard of review, the courts will uphold the challenged classification unless it is clear the classification bears no rational relationship to any legitimate governmental interest.\textsuperscript{113} An intermediate

\textsuperscript{107} Id. at 147.

\textsuperscript{108} See benShalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (stating identity makes the service member ineligible for military service, not the speaking of it aloud); Pruitt, 943 F.2d at 992 (stating the discharge resulted not from the content of the speech, but from being a homosexual).


\textsuperscript{111} ROTUNDA, supra note 97, § 18.8.

\textsuperscript{112} Id.

\textsuperscript{113} See, e.g., Pennell v. City of San Jose, 485 U.S. 1 (1988).
level of review, sometimes referred to as "heightened scrutiny," is usually applied to gender and illegitimacy classification schemes. Intermediate or heightened scrutiny asks whether the "quasi-suspect" classification scheme is substantially related to a legitimate government interest.

Equal protection challenges to the military homosexual policy initially argued that homosexuality shared the same characteristics as race or national origin and should be considered a suspect class. While gathering some support from commentators and individual judges, the final decisions of the courts addressing the issue have unanimously concluded that homosexuality is not a suspect class and strict scrutiny of the military policy is not warranted. Furthermore, while at least one court has applied and upheld the policy under heightened scrutiny, no court has ever held that homosexuals are a "quasi-suspect" class. Thus, equal protection challenges to the policy must proceed under the rational basis level of review.

Like other constitutional challenges, the equal protection claim has been embraced by commentators and some lower courts, but rejected by the courts of appeals. The most recent, and probably one of the last cases arising under the 1981 homosexual exclusion policy that will ever reach the court of appeals, is Steffan v. Perry, the celebrated case of midshipman Joseph Steffan who was disenrolled from the Naval Academy shortly before graduation when he disclosed his homosexuality. Steffan resigned from the academy rather than insisting on taking his case through the complete elimination process. Some eighteen months later, however, he had second thoughts and wrote the Secretary of the Navy asking that he be allowed to complete his studies. The Secretary refused and Steffan sued.

On cross motions for summary judgment, the district court rejected Steffan's argument that homosexuals are a "suspect class" for equal protection analysis and


120. See Steffan, 41 F.3d at 677; Pruitt v. Cheney, 943 F.2d 989 (9th Cir. 1991); Marsh, 881 F.2d at 454; Woodward, 871 F.2d at 1068; Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich, 735 F.2d at 1220; Beller, 632 F.2d at 788.

121. But see Cammermeyer, 850 F. Supp. at 910.

122. 41 F.3d 677 (D.C. Cir. 1994).
upheld the regulations under rational basis review. Steffan appealed and a panel of the D.C. Circuit found the policy violated the Equal Protection component of the Fifth Amendment Due Process Clause. The court reversed the district court and ordered the Secretary to "grant Mr. Steffan his diploma from the United States Naval Academy, reinstate him to military service, and commission him as an officer."  

Upon rehearing en banc the full court found there was no dispute over the authority of the military to discharge one who engages in homosexual conduct, whether on or off duty. It was also conceded that the Constitution permits discharge of those who have an "intention" to engage in homosexual conduct. Thus, the court was faced with "whether banning those who admit to being homosexual rationally furthers the end of banning those who are engaging in homosexual conduct or are likely to do so."  

The court found the policy presumed that when a servicemember claimed to be a homosexual, "that member means that he [or she] either engages or is likely to engage in homosexual conduct." In rejecting Steffan's equal protection claim, the court found "the class of self-described homosexuals is sufficiently close to the class of those who engage or intend to engage in homosexual conduct for the military's policy to survive rational basis review."  

In the final analysis, the overwhelming weight of judicial authority clearly supports the constitutionality of the 1981 homosexual exclusion policy. While individual district court judges may have disliked the policy and ruled it unconstitutional, every circuit court of appeals to directly address the constitutionality of the policy has held the policy was constitutional.

125. Steffan, 41 F.3d at 684.  
126. Id. at 685.  
127. Id. at 685 (emphasis in original).  
128. Id. at 686.  
129. Id. at 686-87. While no final decision of an appellate court has ever held the 1981 homosexual exclusion policy violated equal protection analysis, the Ninth Circuit has ruled it was error for a district court to dismiss a complaint for failure to state a claim without considering whether the complaint could be construed to present an equal protection claim. See Pruitt v. Cheney, 943 F.2d 989 (9th Cir. 1991). Several district courts have ruled the presumption of homosexual conduct the policy raised upon a revelation of homosexuality is illogical and thus failed rational basis review. See Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994); Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319 (E.D. Cal. 1993). The Steffan court characterized these decisions as "undisciplined rebellion against the governing constitutional doctrine." Steffan, 41 F.3d at 689.  
130. See, e.g., 41 F.3d at 677; High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990), reh'g denied, 909 F.2d 375 (9th Cir. 1990); benShalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).
III. THE POST-JANUARY 1993 POLICIES

A. Background

If the 1981 homosexual exclusion policy seemed impervious to constitutional attacks, why then was it necessary to address the issue in the form of either a new executive policy or positive legislation? The time-worn rule “if it ain’t broke, don’t fix it” would seem to apply. The answer can be found, not in court decisions, law review articles, legal briefs, or even footnotes to Supreme Court opinions. The firestorm of controversy that engulfed this issue in late 1992 and 1993 was produced by an ideological and political shift, not a jurisprudential movement.

From a military personnel management viewpoint, the 1981 homosexual exclusion policy was easily applied at the unit level and the policy had been upheld repeatedly by the courts. From 1981 to 1992, however, the battle over gay rights, at least insofar as the military policy was concerned, had moved from the courtroom to the political arena. Most gay activists had come to accept the fact that the appellate courts and the Supreme Court were not going to second guess the military. Rather than placing its hopes in the courts, the gay-rights movement began to place more emphasis on securing change through the political branches. The election of Bill Clinton and his campaign pledge to lift the ban gave the movement a new burst of energy. The presidential election changed not the policy, but the policy maker. The issue of gays in the military would now be viewed from a different ideological and philosophical perspective.

As early as September 1992, the Senate Armed Services Committee was committed to examining the 1981 homosexual exclusion policy. After President Clinton’s inauguration, news reports indicated the President was going to make good his promise to lift the ban. On January 29, 1993, the President directed the Secretary of Defense to conduct a review of the 1981 homosexual exclusion policy and prepare an executive order “ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces.” He also announced an interim policy that would suspend asking recruits about any homosexual conduct and would place in the inactive reserves, pending the Secretary’s development of a new policy, servicemembers who were processed for discharge upon admissions of homosexuality. The Secretary was given until July 15, 1993, to formulate the new policy.

On February 4, 1993, two amendments were proposed to the Family and Medical Leave Act that dealt with the homosexual issue. One would have frozen all military personnel policies concerning homosexuals as they existed on January 1, 1993. The other expressed the sense of the Congress that the Secretary of

131. See SHILTS, supra note 33, at 284-85, 388-90.
Defense should conduct a comprehensive study of the issue and report his findings to the President and to Congress by July 15, 1993. It also called for the Senate Armed Services Committee to conduct "comprehensive hearings on the current military policy with respect to the service of homosexuals" and "oversight hearings on the Secretary’s recommendations . . . ." 136

While the Military Working Group, appointed by the Secretary to develop the Presidential Executive Order, was formulating recommendations for the Secretary and the President, Congress began its own consideration of the issue. Both the House Armed Services Committee and the Senate Armed Services Committee held hearings and received a wide range of testimony from interested individuals and organizations. 137 The Senate Armed Services Committee even visited military installations and naval vessels to gain insight into the actual conditions of military living and to gauge the impact of any policy change on the troops. 138

B. The July 19th Policy

On July 19, 1993, the Secretary delivered and the President announced the long-awaited results of the Administration’s policy review. According to the President, his new policy would have these essential elements:

One, service men and women will be judged based on their conduct, not their sexual orientation. Two, therefore the practice, now 6 months old, of not asking about sexual orientation in the enlistment procedure will continue. Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption; in other words, to demonstrate that he or she intends to live by the rules . . . . And four, all provisions of the Uniform Code of Military Justice will be enforced in an even-handed manner . . . . And thanks to the policy provisions agreed to by the Joint Chiefs, there will be a decent regard to the legitimate privacy and associational rights of all service members. 139

The July 19th "policy" was actually a memorandum from the Secretary of Defense directing the service secretaries to develop regulations implementing the President’s essential elements. 140 Thus, detailed service regulations and Department

136. Id.
137. The Senate Armed Services Committee conducted hearings on the policy generally on March 29, 31; April 29; May 7, 10, and 11. Oversight hearings on the Administration’s July 19th policy were held on July 20, 21, and 22, 1993. S. Hrgs., supra note 17. Oversight hearings in the House were held July 21, 22, and 23, 1993. Assessment of the Plan to lift the Ban on Homosexuality in the Military: Hearings before the Military Forces and Personnel Subcommittee of the Committee on Armed Services, 103d Cong., 1st Sess. (1993) [hereinafter H. Hrgs.].
of Defense directives implementing the new policy had not been drafted when the
President made his announcement. The policy guidelines issued with the
Secretary’s July 19th memorandum identified three areas where the new policy
would operate: (1) accessions; (2) discharges; and (3) investigations.

The accessions policy stated that “[a]pplicants for military service will no
longer be asked or required to reveal if they are homosexual or bisexual, but
applicants will be informed of the conduct that is proscribed for members of the
armed forces, including homosexual conduct.” 141 This concept was essentially
the same as the interim policy established in January 1993 when the military suspended
asking applicants to disclose whether they were homosexual or if they engaged in
or intended to engage in homosexual conduct. This aspect of the policy obviously
gave rise to the “don’t ask” label.

The discharge guidance noted that:

Sexual orientation will not be a bar to service unless manifested by homosexual
conduct. The military will discharge members who engage in homosexual
conduct, which is defined as a homosexual act, a statement that the member is
homosexual or bisexual, or a marriage or attempted marriage to someone of the
same gender. 142

The third aspect of the July 19th policy dealt with guidelines concerning
investigations and inquiries into allegations of homosexuality. Detailed guidelines
and procedures had not been developed when the policy was announced. Rather,
the July 19th memorandum noted merely that investigations and inquiries would not
be used “solely to determine a servicemember’s sexual orientation.” 143 It also
directed commanders to initiate investigations or inquiries only “when there is
credible information that a basis for discharge or disciplinary action exists.” 144 The
policy guidelines also provided that something more than a mere allegation by
another that a servicemember was homosexual was required before initiating either
a commander’s inquiry or a criminal investigation. 145

As written, the policy guidance was a rather marked departure from the
previous 1981 homosexual exclusion policy, and from military personnel policies
generally. As a rule, military personnel policies are designed and developed to
further military interests in unit cohesion, combat readiness, and military
effectiveness. The July 19th guidance introduced a new purpose: providing “greater
protection to those who happen to be homosexual and want to serve their country
...” 146 The policy guidance reiterated the President’s determination not to base
military service determinations on sexual orientation and specifically declared that
“sexual orientation is considered a personal and private matter, and homosexual

141. Id.
142. Id. As a broad policy guideline, the July 19th discharge policy is similar to the 1981
homosexual exclusion policy. As will be more fully developed below, however, the July 19th policy
actually departs dramatically from the theory and structure of the 1981 homosexual exclusion policy
where discharge for an admission of homosexuality is concerned.
143. Id.
144. Id.
146. Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 WEEKLY
COMP. PRES. DOC. 1369 (July 19, 1993).
orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.\textsuperscript{147}

The memorandum introduced "sexual orientation" into the military lexicon and defined it as "a sexual attraction to individuals of a particular sex."\textsuperscript{148} Conversely, the policy removed from the military lexicon the defined class "homosexual" that the 1981 homosexual exclusion policy excluded from military service.\textsuperscript{149} Thus, the President's July 19th policy eliminated the class that the previous policy excluded from service and created a new defined class of "sexual orientation" that was specifically authorized to serve.

The policy also continued the interim practice of not asking recruits if they engaged in homosexual acts or if they desired or intended to engage in homosexual acts.

The policy guidance did, however, purport to incorporate the same discharge criteria that existed under the 1981 homosexual exclusion policy. In other words, under the July 19th policy soldiers would be discharged if they engaged in or attempted to engage in homosexual acts, married or attempted to marry another person of the same biological sex, or revealed their homosexuality through a statement.\textsuperscript{150} While the acts and marriage discharge criteria were precisely the same as the 1981 homosexual exclusion policy, the statements provisions rested on a very different theory.

Under the 1981 homosexual exclusion policy, a statement of homosexuality was viewed as an act of identification; it placed the individual in a class excluded from service. The July 19th policy, however, eliminated the previously excluded class and created a new class or category that was not excluded from service: homosexual orientation. This class of "orienteers" was not part of the regulatory scheme prior to July 19th. Under the previous policy, the only defined class to which a statement of homosexuality could possibly refer was to the class "homosexual," a class the directives defined by conduct and the propensity to engage in certain conduct. The statement was an act of identification that placed the individual in the excluded class. Under the July 19th policy, however, a statement of homosexuality could not identify the individual as a member of an excluded class because the only class defined by the July 19th policy was the included class of orientation. Thus, the theory supporting discharge for a statement of homosexuality under the July 19th policy was not that the statement was an act of identification, but that the statement revealed specific misconduct on the part of the service member.\textsuperscript{151}

\textsuperscript{147} Sec. Def. Dec. 22nd News Release, \textit{supra} note 140.

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id. See also S. Hrgs., \textit{supra} note 17, at 771 ("We simply took out the middle part, the reference to homosexual . . ."); id. at 804 ("Also . . . we have eliminated the terms 'homosexuality' and 'homosexual' as unnecessary to the analysis.") (testimony of Jamie Gorelick, General Counsel, Department of Defense).}

\textsuperscript{150} \textit{See supra} notes 140-142 and accompanying text.

\textsuperscript{151} \textit{S. Hrgs., \textit{supra} note 17, at 805. Ms. Gorelick continued: We used to say, in the . . . [1981 homosexual exclusion] policy, "If you say you are a homosexual, we will presumptively conclude that you are." What is a homosexual under our policy? Someone who engages in acts or has a propensity or intent to do so. So we say now, "If you say you are a homosexual, we presumptively conclude that you engage}
The policy raised a presumption of misconduct even though the member may have only been referring to his or her orientation, a characteristic the policy itself declared to be unrelated to conduct and, thus, non-disqualifying. To avoid this obvious illogic of discharging someone for merely revealing what the military declared to be a non-disqualifying characteristic, the policy defined the statement of homosexuality as "homosexual conduct." Because uttering the words "I am gay" was now defined as conduct, the July 19th policy could claim the policy was based upon "conduct" and not "status."

The Attorney General reviewed the July 19th policy and informed the President that the new policy contained three aspects that improved the ability of the Justice Department to defend the policy against court challenges. First, the Attorney General noted that separating sexual orientation from homosexual conduct as a matter of policy would require the military "to judge an individual's suitability for service on the basis of conduct, and homosexual conduct (but not an unmanifested orientation) would be grounds for separation from service." Second, according to the Attorney General, the status-conduct distinction embodied in the July 19th policy "suggests a meaningful opportunity to rebut the presumption flowing from statements of homosexuality; [and,] [a]s a consequence, the Department of Justice will be better able to argue that the policy is not directed at speech or expression . . . ." Finally, the Attorney General opined that the July

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152. See Sec. Def. Dec. 22nd News Release, supra note 140.

153. In the rhetoric surrounding this issue, discrimination based upon "status" has been the demon the Clinton Administration most wanted to slay. Critics of the 1981 homosexual exclusion policy repeatedly claim a policy that denies individuals the privilege of serving in the Armed Forces solely because of their "status" as homosexuals violates common sense, basic fairness, and a host of other virtues. What is overlooked in this claim is the characteristics of the "status" at issue. "Status" is not a self-defining term. Unlike racial "status," which is a benign, non-behavioral characteristic, unrelated to any particular conduct or pattern of conduct, homosexual "status" is only accorded to those who engage in, intend to engage in, or have a propensity to engage in a certain type of behavior or conduct. See Padula v. Webster, 822 F.2d 97, 101 (D.C. Cir. 1987) (stating "homosexual status is accorded to people who engage in homosexual conduct, and people who engage in homosexual conduct are accorded homosexual status"). Thus, the "status" at issue in the homosexual policy is a status that is defined by and inextricably linked to conduct. In addition to the clear distinction between a benign "status," like race, and a behavioral "status" like homosexuality, military personnel policies routinely "discriminate" on the basis of categories or status. For example, those who fall within the "status" of being a single parent are denied enlistment. Individuals with the "status" of a non-high school graduate are not qualified to serve. Those whose "status" is measured by age, either too young or too old, are similarly not qualified for enlistment. Thus, the underlying issue is not whether the homosexual policy discriminates upon "status." The real issue is the characteristics of the "status" and what impact those characteristics have upon unit cohesion and combat effectiveness. As previously noted, the "status" of homosexual is inextricably linked to homosexual conduct and no court has ever questioned the authority of military to eliminate homosexual conduct from within the ranks. See Steffan v. Perry, 41 F.3d 677, 684-86 (D.C. Cir. 1994).

154. Memorandum for the President from the Attorney General, Defensibility of the New Policy on Homosexual Conduct in the Armed Forces (July 19, 1993) [hereinafter Atty Gen'l Memo.].

155. Id. at 1.

156. Id. at 2. In this Author's opinion this statement is rather incredible when one stops to
19th policy was an improvement over the 1981 homosexual exclusion policy because the policy decision to not question service members "about their sexual orientation or behavior" and to allow commanders to "initiate investigations only where there is credible evidence of 'homosexual conduct'... will make decisions made under the [July 19th] policy appear fairer, more even-handed, and conduct-based, and therefore easier to defend."157

The Attorney General’s memo is remarkable in that it reflects a poor understanding of both the operation of the 1981 homosexual exclusion policy and the long line of judicial authority upholding that policy against constitutional challenges. The memo hails the creation of the status-conduct distinction as an important element in improving the ability of the Department of Justice to defend the policy in court. The judicial opinions upholding the 1981 homosexual exclusion policy, on the other hand, pointed to the absence of such a distinction as an important aspect in the policy’s ability to pass constitutional muster.158 Furthermore, contrary to the Attorney General’s statement that separating conduct and status would strengthen the defense against a First Amendment challenge, the 1981 homosexual exclusion policy’s equating conduct with status was the element that precluded plaintiffs from being able to even state a claim under the First Amendment.159 Handing an opponent in litigation a legal theory or claim with which to attack you, even if you think you can ultimately prevail, hardly seems like a stronger approach than denying the opponent the claim in the first instance.

Finally, the Attorney General’s view that a policy precluding questioning service members about their “sexual orientation or behavior” would end the practice of conducting investigations “for the sole purpose of determining an individual’s sexual orientation” misperceives the basis of the 1981 homosexual exclusion policy. As noted,160 “sexual orientation” was not a defined term, characteristic, or class under the 1981 policy. Discharges were not issued on the basis of “sexual orientation.” The 1981 homosexual exclusion policy did not attempt to adopt or conform to the language of the gay rights movement. Nor did it venture any further into the realm of human sexuality than was necessary to safeguard legitimate military interests in preserving unit cohesion and combat effectiveness. The defined class that was excluded from service was “homosexual,” and the class definition was based upon conduct and the propensity to engage in conduct. In reality, the Attorney General was saying the July 19th policy was easier to defend than the straw-man policy to which she was comparing it.

consider that every appellate court to consider the issue, including the Ninth Circuit whose judges seemed most hostile to the policy, held that plaintiffs challenging the 1981 homosexual exclusion policy could not even state a claim under the First Amendment. It is difficult to imagine, therefore, how the July 19th policy could improve upon the unanimous line of authority holding the 1981 policy impervious to First Amendment attacks.

157. Id.


159. See Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Pruitt v. Cheney, 943 F.2d 989 (9th Cir. 1991); Marsh, 881 F.2d 454.

The congressional oversight hearings began the day after the President announced the Administration's new policy. From July 20th to the 23rd, 1993, the Secretary of Defense, the Department of Defense (DoD) General Counsel, the Chairman of the Joint Chiefs of Staff, the Chief of Staff of each of the services, and key members of the Military Working Group appeared before the Senate Armed Services Committee and the Personnel Subcommittee of the House Armed Services Committee to explain the policy guidance to members of Congress.

Secretary Aspin told the Senate Armed Services Committee that "[t]he policy does important things; [a] service member who may be homosexual can serve under this policy without lying and without fear of 'witch hunts.'" General Powell told Congress the July 19th policy "permits gay and lesbian Americans to serve if they are willing to keep their orientation a private matter." Despite the wording of the July 19th memorandum, the President's speech, Secretary Aspin's statement that under the July 19th policy "[a] homosexual can serve," and General Powell's explanation that the policy "permits gay and lesbian Americans to serve," all of which were marked departures from the prior exclusion policy, the detailed testimony from the DoD officials who developed the policy was that the July 19th policy guidance was not a departure from the prior policy. The Service Chiefs, the DoD General Counsel, and members of the Military Working Group all assured Congress the July 19th policy carried forward the substance of the old policy. In describing the concept of the July 19th policy guidance, DoD General Counsel, Jamie Gorelick, assured Congress that "we kept the legal structure [of the old policy]." Upon close questioning by members of the Senate Armed Services Committee, Ms. Gorelick noted the July 19th policy differed from the previous policy in only three, relatively minor areas: (1) service members would not be asked about their sexual orientation, (2) that administrative inquiries into allegations of homosexuality required service members to divulge their sexual orientation was one of the major misunderstandings of this entire matter. The enlistment form completed at accession asked if the recruit engaged in or desired to engage in homosexual acts. It also asked the recruit if he or she was a homosexual with reference to homosexual conduct or the intent or desire to engage in homosexual conduct. See supra notes 63-65 and accompanying text. Thus, even under the July 19th policy's definitions, the prior
homosexuality would not be initiated unless the commander had credible
information that a basis for discharge existed; and (3) criminal investigative
resources would not be used absent reason to believe a crime had been committed.\footnote{166}

The obvious discrepancy between the written policy, the explanation of the
policy given by the President, Secretary Aspin, and General Powell, on the one
hand, and the testimony of other DoD and military leaders on the other, raised
serious questions in the minds of key Congressional leaders as to the wisdom of the
July 19th policy. Senator Coats expressed concern that the courts would “find
inconsistencies in the policies as written” and interpret them in a way that would
hinder the goal of maintaining military effectiveness and unit cohesion.\footnote{167} Senator
Nunn noted that he shared Senator Coats’ “apprehension along the same line.”\footnote{168}

In the House, Representative Talent commented,

when I listened to the Chiefs and the Secretary yesterday, what I basically heard
them saying was that they had resolved this debate in favor of essentially
keeping the old policy, \ldots [but] \ldots when I read the policy as a totality, \ldots [it]
doesn’t seem to be consistent with what I understood the Secretary and the
Chiefs have been saying about the policy.\footnote{169}

\section{C. The 1993 Statutory Policy}

These unsettling differences between the July 19th policy as written and the
explanation of the policy given by the DoD General Counsel and the members of the
Military Working Group and the constitutional authority of Congress to “make the
rules for the government and regulation of the land and naval
forces,”\footnote{170} led the Senate Armed Services Committee to draft a statutory policy and include it as part
of the National Defense Authorization Act of 1994.\footnote{171}

\begin{quote}
\footnotesize
policy did not question recruits about their sexual orientation.

166. \textit{S. Hrgs., supra} note 17, at 790.
167. \textit{Id.} at 798.
168. \textit{Id.}
Supp. 1995)). The statute provides:

\textbf{\textit{\S} 654. Policy concerning homosexuality in the armed forces}

\begin{enumerate}[label=(\alph*)]
\item Findings.-Congress makes the following findings:
\begin{enumerate}[label=(\arabic*)]
\item Section 8 of article I of the Constitution of the United States commits
exclusively to the Congress the powers to raise and support armies,
provide and maintain a Navy, and make rules for the government and
regulation of the land and naval forces.
\item There is no constitutional right to serve in the armed forces.
\item Pursuant to the powers conferred by section 8 of article I of the
Constitution of the United States, it lies within the discretion of the
Congress to establish qualifications for and conditions of service in the
armed forces.
\item The primary purpose of the armed forces is to prepare for and to prevail
in combat should the need arise.
\end{enumerate}
\end{enumerate}
\end{quote}
(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that—
   (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and
   (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) Policy.-A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in
such regulations, that the member has demonstrated that—
(A) such conduct is a departure from the member’s usual and customary behavior;
(B) such conduct, under all the circumstances, is unlikely to recur;
(C) such conduct was not accomplished by use of force, coercion, or intimidation;
(D) under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents.—
(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).
(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required briefings.—The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of construction.—Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—
(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and
(2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions.—In this section:
(1) The term “homosexual” means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian”.
(2) The term “bisexual” means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.
(3) The term “homosexual act” means—
(A) any bodily contact, actively undertaken or passively permitted,
Analysis of the statutory language and the legislative history reveals the statute was a codification of the 1981 policy in all material respects. First, the statute appears in Chapter 37, United States Code, General Service Requirements, rather than in Chapter 59, Separations. Thus, the statute is not merely a discharge or separation policy, but is a limitation or qualification on the ability to serve in the first instance. The statute begins with a findings section that sets out the basis of the congressional action on this controversial issue. The findings reveal several important principles that should govern both the DoD implementation and the perspective from which courts reviewing the policy should approach it.

First, Congress was acting pursuant to a clear grant of constitutional power to establish the qualifications and conditions of service in the military. Second, Congress made clear that the unique role and mission of the armed forces in American society demands unique rules that may not be the same as those found in other countries or in civilian society. Third, Congress made clear the statutory policy was aimed at creating and preserving military effectiveness and cohesion.

Noticeably absent from the findings section is any indication that military readiness was being balanced against the individual interests of homosexuals who wished to serve. In other words, combat effectiveness, not accommodation of homosexuals, either individually or as a class, was the purpose of the statute. Fourth, Congress set out the factual predicate for the long-standing professional military judgment that homosexuality is incompatible with military service.

The structure, function, and legal theory underlying the statutory separation policy is identical to the 1981 policy. The differences between the exact wording in the 1981 policy and the statute are minor and the Senate Report noted they were merely clarifications and were not changes in policy. Equally as important, the Senate Report specifically adopted the judicial interpretation that had been developed under the 1981 policy and clearly expressed the intent that the statute be

between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

173. See id. § 654(a)(1)-(3).
174. See id. § 654(a)(4)-(12).
175. See id. § 654(a)(13)-(14).
176. See id. § 654(a)(15).
177. See S. REP., supra note 132, at 293 ("The findings reflect long standing Department of Defense policy, as set forth in DoD Directive 1332.14, that 'homosexuality is incompatible with military service ...'); H.R. 103-200, 103d Cong., 1st Sess., at 287 (1993) [hereinafter H. REP.] ("[T]he committee carried forward the fundamental tenets upon which the DOD policy regarding homosexuals has long been based. In short, the committee concludes that homosexuality is incompatible with military service.").
178. See, e.g., S. REP., supra note 132, at 290 ("The committee views ... [the substitution of the phrase 'propensity or intent' for the phrase 'desire or intent'] as a useful clarification that will not affect the practical effect of the policy.").
interpreted consistent with those cases. Like the 1981 policy, the statute defines "homosexual" in terms of conduct or the propensity to engage in conduct and then excludes the class from service. Like the 1981 policy, the statutory policy permits servicemembers who are facing discharge for making a statement that identifies them as a homosexual to rebut the presumption that they are, in fact, a member of the excluded class.

Significantly, Congress did not say that "sexual orientation" was a private matter or that it was a benign, non-disqualifying factor. The law did not define "sexual orientation" or try to artificially separate homosexual orientation from homosexual conduct. Instead, Congress specifically noted that when a person revealed he or she had a "homosexual orientation," the statute presumed the individual was a homosexual, i.e., one who engages in, intends to engage in, or has a propensity to engage in homosexual acts. In this respect, the statute mirrored the 1981 policy and differed markedly from the July 19th policy. Thus, under the statute, a statement of homosexuality logically and legitimately raises a presumption that the individual is referring to the only class defined under the statute: homosexual. And that class, of course, is a class defined by conduct or the propensity to engage in conduct.

Consistent with the July 19th policy, the statute required recruits to be briefed on the policy and the policy itself be set out in the various enlistment or accession documents. Rather than codify the July 19th policy of not asking recruits if they engaged in or intended to engage in homosexual acts, the statute expressed the sense of Congress that the Secretary of Defense should retain the discretion to "reinstate accession questions if the Secretary determines that it is necessary to effectuate the restrictions on homosexuality." Congress, however, chose not to legislate any specific investigative guidance such as that contemplated by the July 19th policy. Instead, Congress left investigations where they had been under the 1981 policy, as a matter of Secretarial discretion with the caveat that any published guidelines would not place "unusual restrictions on the authority of commanders to initiate investigations...[and that commanders] should have great discretion as to what constitutes sufficient information to begin an inquiry...about behavior or actions that could have an impact on unit cohesion, morale, welfare and discipline." The statutory policy mirrored the 1981 policy in all material respects, was consistent with the July 19th policy where that policy was consistent with the 1981 policy.

179. See id. at 285, 294 (favorably citing cases upholding 1981 policy and specifically rejecting the contrary holding of the district court in Meinhold v. United States, 808 F. Supp. 1455 (C.D. Cal. 1993)).
180. See id. at 294.
183. S. REP., supra note 132, at 291.
184. H. REP., supra note 177, at 289.
policy, but omitted certain aspects of the July 19th policy that seemed to cause the most confusion and concern during committee hearings.

Equally as important, Congress made no mention of passing a law to accommodate homosexuals or creating a situation where they could serve under color of law like the July 19th policy contemplated. By adopting the principle underlying the 1981 policy that homosexuality is incompatible with military service, it would have been illogical and inconsistent to say that homosexuality in some circumstances is compatible with military service. Congress legislated on a class-based presumption that homosexuals, as a class, have a propensity to engage in homosexual acts. The statute excludes the class from service to prevent the disruption that homosexual activity within the military environment will cause. The rebuttable presumption under the statute is the same as under the 1981 policy: the individual can rebut whether they are a member of the class; they cannot rebut the class definition or claim that while they are, in fact, members of the class they will not act in accordance with their admitted propensity. Neither the 1981 policy nor the statutory policy placed the risk on the military that a given homosexual would not be able to live up to his or her claim to be an exception to the class definition. Thus, like the 1981 policy, the statutory policy is a class-based exclusion policy premised upon the principle that homosexuality is defined by and inextricably linked to homosexual conduct and is, therefore, incompatible with military service.

An analysis of the statutory policy in light of the existing standard of review reveals that the statute should easily pass rational basis review.

1. Rational Basis Review

In Heller v. Doe the Supreme Court reviewed the principles applicable to rational basis review of legislative classifications challenged under equal protection principles. In summarizing the law, the Court reviewed a long line of cases and distilled the following principles:

[R]ational-basis review in equal protection analysis “is not a license . . . to judge the wisdom, fairness, or logic of legislative choices.” Nor does it authorize “the judiciary to sit as a superlegislature to judge the wisdom or desirability of . . . policy determinations . . . that neither affect fundamental rights nor proceed


187. See H. REP., supra note 177, at 288 ("[T]he committee concluded that any effort to create as a matter of policy a sanctuary in the military where homosexuals could serve discreetly and still be subject to separation for proscribed conduct would be a policy inimical to unit cohesion, morale, welfare, and discipline, unenforceable in the field, and open to legal challenge.").

188. S. REP., supra note 132, at 284.

189. Id. ("It would be irrational, however, to develop military personnel policies on the basis that all gays and lesbians will remain celibate . . . [I]t is appropriate to take into consideration that when a person indicates that he or she . . . [is a homosexual] the armed forces are not required to wait until the person engages in . . . [a homosexual] act before taking personnel action . . . The government is not required to prove in each individual case that a service member will not remain celibate or to otherwise prove adverse impact on a specific unit.").

190. 113 S. Ct. 2637 (1993).
along suspect lines." For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity . . . . Further, a legislature that creates these . . . classifications need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

Moreover, [a state] has no obligation to produce evidence to sustain the rationality of a statutory classification. "A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." . . . [C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "is not made with mathematical nicety or because in practice it results in some inequality." "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."191

The Court also made clear that a "statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."192 Thus, the law imposes an extremely heavy burden on those seeking to overturn the statutory scheme.

2. Congress Can Forbid Homosexual Activity in the Military Environment

In Dronenburg v. Zech,193 the U.S. Court of Appeals for the District of Columbia Circuit specifically held that the Navy policy requiring discharge of those who engage in homosexual conduct serves legitimate state interests which include the maintenance of "discipline, good order and morale[,] . . . mutual trust and confidence among service members, . . . insur[ing] the integrity of the system of rank and command, . . . recruit[ing] and retain[ing] members of the naval service . . . and . . . prevent[ing] breaches of security."194

After conducting extensive hearings on the impact of homosexuality on military effectiveness, Congress found the interests protected by the policy in

191. Id. at 2642-43 (citations omitted).
192. Id. at 2643 (citations omitted).
194. Id. at 1398. Accord benShalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981), cert. denied, 454 U.S. 864 (1981); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); see also Padula v. Webster, 822 F.2d 97, 104 (D.C. Cir. 1987) ("It is not irrational . . . to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality exposes many homosexuals, even 'open' homosexuals, to the risk of possible blackmail to protect their partners, if not themselves.").
Dronenburg were still valid: "The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service." 195

This aspect of the homosexual policy has never been subject to serious challenge. Neither litigants nor courts have seriously questioned the military's right to exclude individuals who engage in homosexual acts. 196

3. It is Reasonable to Conclude that Homosexuals Will Engage in Homosexual Conduct

Given that homosexual conduct adversely effects legitimate military interests and such conduct can be forbidden constitutionally, the question becomes: May Congress avoid the damage to legitimate military interests by excluding from military service the class most likely to engage in the prohibited conduct? Every appellate court to finally decide the issue under the 1981 policy has clearly answered this question in the affirmative. 197 Congress agreed and concluded that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 198 The statute is based upon a simple, logical, and reasonable thesis: the more homosexuals there are in the military, the more homosexual conduct will occur, and the more problems associated with homosexual conduct will occur. Because there is no practical way to prevent homosexuals from engaging in homosexual conduct—nor does the military wish to take on that task—the best, most efficient way—and the way that is fairest to both the individual and the military—to minimize homosexual conduct within the military is to exclude homosexuals, rather than subject them and the armed forces to unrealistic expectations and unnecessary administrative burdens. 199

In enacting the statutory policy, Congress rejected the notion that homosexual "status" is unrelated to homosexual conduct and accepted the common sense proposition that homosexual status and homosexual activity are inextricably related. 200 Congress, the branch responsible for establishing the rules and

196. Steffan v. Aspin, 8 F.3d 57, 64 (D.C. Cir. 1993) ("[H]omosexual acts' are forbidden to military service members, and there is no dispute that laws forbidding such conduct are constitutional."), vacated sub nom. Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc). See also Bowers v. Hardwick, 478 U.S. 186 (1986) (holding states may criminalize homosexual sodomy).
197. See, e.g., Steffan, 41 F.3d at 677; Marsh, 881 F.2d at 454; Woodward, 871 F.2d at 1068; Rich, 735 F.2d at 1220. See also High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir.), reh'g denied, 909 F.2d 375 (9th Cir. 1990).
199. "[T]he fact that . . . persons of 'homosexual orientation' engage in or seek to engage in homosexual conduct is as unremarkable as the fact that . . . persons of 'heterosexual orientation' engage in or seek to engage in heterosexual conduct. To pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd." Watkins v. United States Army, 847 F.2d 1329, 1361 n.19 (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990).
200. The policy "does not classify [a] plaintiff based merely upon her status as a lesbian, but upon
regulations governing the land and naval forces, rejected the politics of pretending that homosexuals, as a group, do not present a risk of homosexual conduct in the military.

4. The Military May Avoid the Harm to Good Order, Discipline, Morale, and Unit Cohesion That All Agree Homosexual Conduct Causes by Excluding the Class Most Likely to Engage in the Prohibited Conduct

a. The Policy is Grounded Upon Factors Properly Cognizable in Determining Qualifications for Military Service

There can be no doubt that maintaining a combat-ready military force is a legitimate government interest. In fact, no responsible critic or commentator has ever suggested otherwise. Instead of negating every conceivable basis for the policy, critics generally claim that because homosexual conduct is subject to societal disapproval, the policy is based solely upon irrational fears and must fall under the equal protection standards of City of Cleburne v. Cleburne Living Center. A review of Cleburne and the factors that are properly cognizable in determining qualifications for military service, however, refutes this argument.

Cleburne involved a challenge to a zoning regulation that required a special use permit for a group home for the mentally retarded but did not require a permit for other types of group homes. The Supreme Court recognized there was a difference between a group home for the mentally retarded and other types of group homes that were freely permitted, but noted “this difference is largely irrelevant unless . . . [the home for the mentally retarded] . . . would threaten legitimate interests of the city in a way that other permitted uses . . . would not.” The city argued a special permit was required, (1) to control the size of the home and number of occupants in order to limit population density in the surrounding area; (2) because of doubts about legal responsibility for actions of the residents of the home; (3) because the home would be located in a flood plain; (4) because of fear that students in a nearby school would harass the residents; and (5) because of negative attitudes of property owners within 200 feet of the proposed home as well as fears from elderly residents of the neighborhood. The Court noted that proffered justifications one, two, and three would apply to all group homes and provided no explanation for different treatment of the home for the mentally retarded.

reasonable inferences about her probable conduct in the past and in the future.” Marsh, 881 F.2d at 464. See also S. Rep., supra note 132, at 266, 285, 294.

[DoD] issued a conduct-based policy; . . . [u]nder current DoD policy, a servicemember’s admission . . . [of homosexuality] provides a basis for discharge because the admission establishes a rebuttable presumption that the individual is a person who engages in, desires to engage in, or intends to engage in homosexual acts . . . . The policy setting forth the grounds for discharge is conduct-based.

Id.

203. Id. at 448-49.
Regarding justification four, the Court observed that about thirty mentally retarded youths actually attended the school and that fears of harassment were vague and undifferentiated. The fifth justification, the negative attitudes of the nearby property owners and the fears of elderly residents, were similarly unexplained and, importantly, were unrelated to any factor otherwise properly cognizable in the legitimate exercise of land use zoning. The Court concluded that requiring a special use permit “appears to us to rest on an irrational prejudice against the mentally retarded.”

In striking down the zoning ordinance, the Court held that “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.”

Reading Cleburne simply to say “negative attitudes” or “fears” can never support a classification scheme challenged under the Equal Protection Clause is wrong. Moreover, applying such an argument to the statutory homosexual exclusion law is overly simplistic, misapplies the Supreme Court’s rational basis review standards, misperceives the basis of the statutory policy, improperly equates society’s long-held opprobrium of homosexual practices with irrational prejudice, and assumes the purpose of the policy is to stigmatize or punish homosexuals rather than to contribute to combat effectiveness.

Assuming an element of “fear” or “negative attitudes” toward homosexuality are present to some degree in society generally and in the military in particular, a proper application of Cleburne requires an analysis to determine whether the “negative attitudes” or “fears” are “unsubstantiated by factors which are properly cognizable” in the policy area under review. In the context of the homosexual policy, the question is whether society’s disapproval of homosexual conduct is substantiated by factors which are properly cognizable in developing military service qualifications designed to maintain unit cohesion and enhance combat effectiveness.

Cleburne does not require Congress and the military to risk a reduction in combat effectiveness. Cleburne holds that government may not impose a policy solely for the purpose of disadvantaged a particular group or class. In its review of the policy, Congress carefully considered the purpose of the military, the unique nature of military service, the key elements that must be present to successfully accomplish a military mission, the function of personnel policies in building a force capable of successfully accomplishing the mission, and finally, the need for a policy excluding homosexuals in order to raise and maintain a force capable of success on the battlefield. These factors are properly cognizable in developing military personnel policies. A review of these factors underscores the legitimacy of the

204. Id. at 450.
205. Id. at 448.
206. See ROTUNDA, supra note 97, § 15.4. The authors state: [T]he [Cleburne] Court invalidated the legislation under the equal protection rationality standard because the state could assert no interest to support the legislation other than a desire to discriminate against the disfavored group. Such laws violate equal protection because the desire to discriminate cannot in itself supply a justification for the discriminatory classifications.
governmental goals and supports the rational basis of the policy choice made to achieve those goals.

(1) The Purpose of the Military

"The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise."207 This straightforward statement of the need for a modern armed force is not open to debate. Furthermore, since this fundamental statement of purpose was made by the branch of government specifically entrusted with raising and supporting armies, there can be no doubt that the purpose is a legitimate one.208 Certainly the purpose of the armed forces is a properly cognizable factor in establishing qualifications for service.

(2) The Unique Nature of Military Service

Military life is fundamentally different from civilian life in that—(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.209

This principle is also beyond debate.210 In explaining the unique nature of military service to Congress, General Gordon Sullivan, Chief of Staff of the Army, pointed out the essential difference between military and civilian life:

What separates us from civilian society is the ultimate sacrifice, the sacrifice of our lives for our country. We have to sublimate everything that we do to selfless service to our Nation. Duty, honor, country . . . . It is, in fact, that mission, the protection of the Nation, which must govern everything that we do.211

Not only does the military differ from civilian life in the degree of sacrifice it requires soldiers to be prepared to make, it differs on the day-to-day living basis as well. General Colin Powell, Chairman of the Joint Chiefs of Staff, explained:

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208. See also Toth v. Quarles, 350 U.S. 11, 17 (1955) ("[I]t is the primary business of armies and navies to fight and be ready to fight should the occasion arise.").
211. S. REP., supra note 132, at 273.
The majority of our... [soldiers] are required to live in communal settings that force intimacy and provide little privacy. It may be hard to contemplate spending 60 continuous days in the close confines of a submarine; sleeping in a foxhole with half a dozen other people; 125 people all living and sleeping in the same 40 by 50 foot, open berthing area, but this is exactly what we ask our young people to do.\textsuperscript{212}

To provide a modicum of privacy in these situations, the military has traditionally segregated bathing and sleeping facilities by gender. The presumption underlying gender segregation is that people are sexually attracted to the opposite sex. Thus, most people view being forced to sleep, shower, and use toilet facilities with members of the opposite sex as an infringement of their privacy. When the underlying presumption is not valid, e.g., when individuals find members of the same gender sexually attractive, the invasion of privacy occurs even in gender segregated facilities. This, in turn, disrupts the bonding and cohesion vital to military effectiveness.\textsuperscript{213}

Dismissing such concerns as only a “fear” that homosexuals will invade privacy interests and claiming that such a fear rests upon “irrational stereotypes” misses the point. Heterosexual soldiers who are stripped of the little privacy military living provides and are required to share cramped living space with those who are sexually attracted to the same gender do not fear a loss of privacy, they have already experienced it. For example, a homosexual former soldier described a preinduction physical as “pretty spectacular, I mean, ‘cause you’ve got three hundred naked men in one room . . . ”\textsuperscript{214} A lesbian discharged from the Air Force wrote of her impression of barracks living at basic training:

I entered the military knowing that I was a lesbian, but also knowing that I wanted to do what was right by military standards and stay there! But, by God, when I got into basic, I thought I had been transferred to hog heaven! No damn kidding! Lordy!\textsuperscript{215}

The issue is not whether a homosexual will physically assault a heterosexual. The issue is the actual loss of privacy and discretion the soldier has come to expect and society has heretofore provided in deciding when and to whom to expose one’s body. Recasting the privacy interests of heterosexuals into an irrational worry over whether one would be assaulted in the shower, trivializes the legitimate interests of soldiers and elevates the individual self-interests of homosexuals over the norms that our society has heretofore maintained and protected.

As with the purpose of the military, the unique nature of military life is clearly a factor that is properly cognizable by Congress in determining qualifications for service.

\begin{footnotes}
\item[212.] Id. at 277.
\item[213.] Id. at 277-78.
\item[214.] MARY ANN HUMPHREY, MY COUNTRY, MY RIGHT TO SERVE 61 (1990).
\item[215.] Id. at 11.
\end{footnotes}
(3) Essential Elements of Military Capability

"[H]igh standards of morale, good order and discipline, and unit cohesion... are the essence of military capability."216

During the recent Senate hearings several senior combat leaders testified to the critical role of cohesion and discipline in winning wars. General Schwarzkopf told the Congress, "In my 40 years of Army service in three different wars, I have become convinced that... [unit cohesion] is the single most important factor in a unit's ability to succeed on the battlefield."217 General Powell told Congress that a unit must bond [together] as a fighting force before it is sent to the battlefield;... [m]utual trust, common core values, self confidence, and realization of shared goals help to form the cohesive military team; [c]ohesion requires the sacrifice of personal needs for the needs of the unit, subjugating individual rights to the benefit of the team.218

Building cohesion is not something that is done overnight. "It does not suddenly happen the moment the bullets come. If it was not there to begin with, it is going to take a long time and some dead and mangled bodies before you get it."219

Homosexuality adversely effects the development of unit cohesion because it injects sexuality into a situation that should be sexually neutral. General Schwarzkopf observed that "the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war..."220

Even among homosexuals, the sexual tension created by living in close quarters causes polarization and reduces cohesion:

People in each [homosexual] clique had their own rules and customs. Women often paired up into butch/girlfriend couples or remained unattached, although some lesbian cliques were made up only of butches. Adhering to their own sexual folkways and taboos, butches rarely dated each other and had to be careful about dating other butches' girlfriends in the same crowd. Rusty Brown, who was a Navy mechanic during the war, 'automatically went to the table with the butches' so that she could 'find out who was going with who - I didn't want to get my head knocked off.' Couple relationships stabilized a lesbian clique but breakups, rivalry, and jealousy caused fights and tensions that sometimes tore a group apart.221

217. S. REP., supra note 132, at 275.
218. Id.
219. Id. at 276 (quoting testimony of Dr. David Marlowe, Chief of the Department of Military Psychiatry, Walter Reed Army Medical Center).
220. Id. at 280.
221. BERUBE, supra note 41 at 103-04.
A military leader, whether an officer or a noncommissioned officer, is unable to effectively command or lead his troops if he loses the respect and trust of his subordinates. This adversely affects morale, discipline, and cohesion. For the homosexual leader, the loss of respect follows from engaging in conduct that may be the natural expression of his sexuality.\(^2\)

If, as senior military leaders believe and Congress found, unit cohesion, good order and discipline, and morale are indispensable to success on the battlefield, there can be no question that it is a factor properly cognizable in establishing qualifications for service.

(4) The Function of Personnel Policies in Force Composition

The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.\(^2\)

In light of the purpose of the military, the unique nature of military service, and the critical role of cohesion, no one can seriously challenge the proposition that personnel policies must exclude those categories that military judgment and experience has found do not enhance cohesion and combat capability. Applying this self-evident principle, military policies are based upon professional military judgment as to what categories or classes do not contribute to overall combat effectiveness. This class-based approach reflects the fact that members of the

\(^2\) The personal account of two former officers provides an example:

When I went out on a cruise with the USS Constellation, there was nobody in the squadron I knew who was gay, but I did, within a couple days, recognize a seaman I had seen at a bar, and made contact with him. . . . That's how I was introduced to the "Connie girls," a group of gay guys . . . [who] for the most part . . . were really flamboyant queen types, relatively young, mostly first tour. I was the only officer that associated with them at all.

One night, I was dancing with this sailor and limboed down toward my back, and he shimmied down on my face. All of these other guys who were not gay were sitting around going, "Oh, oh, oh," and "Gross." I just loved it, loved the heck out of it.

HUMPHREY, supra note 214, at 163 (interview of Jim Woodward).

I . . . started seeking out the 'tearoom' [anonymous sexual encounters in public toilets] scene. The train stations were real good sources for that kind of stuff. I'd always known it was against the rules.

A lot of people attending the trial were my troops, people who wanted to see me get what they felt was my just deserts. You see, I was a hard-core squadron commander. I believed everyone was there to work and we all had the same mission to accomplish, and if you didn't play by the rules . . . I told them what the rules were . . . I had very simple rules—tough but simple. I was known as a kick-ass commander, and so the troops that I had given reprimands to were there to watch me suffer . . . .

Id. at 228, 230 (interview of Paul Starr).

military are not “hired” for a particular job at a particular location for a particular period of time. Rather, it recognizes the individual must become subordinate to the unit and the mission. Wars are not won by individuals; they are fought and won by cohesive teams of warriors who are ready to sacrifice their own lives for that of their buddy.\footnote{224}

Class-based personnel policies, or managing by categories, allows the military to expend its time, effort, and resources in those areas that professional military judgment has found are most conducive to creating the cohesive units required for victory in battle.\footnote{225} Congress has imposed a number of restrictions on entry that disqualify personnel irrespective of their individual suitability.\footnote{226}

Congress has also delegated authority to the Secretary of Defense to establish “physical, mental, moral, professional, and age qualifications . . .”\footnote{227} Pursuant to this authority, the services routinely exclude single parents, those with physical disabilities or limitations, those not meeting prescribed educational and mental aptitude standards, and those with a record of ingrained delinquency behavior patterns.\footnote{228} Within each of these broad categories there may be individuals who could perform well in certain positions in the military. Enlistment qualifications, however, exclude them on a class-wide basis.

Given the purpose of the military, it is not only reasonable, but imperative that personnel policies exclude those whose presence will detract from the ability to accomplish the mission. Managing by categories is a logical and efficient way to select those potential soldiers that military judgment and experience has shown stand the best chance of enhancing combat effectiveness. And enhancing combat effectiveness is clearly a factor properly cognizable in developing qualifications for service.

\textbf{(5) Homosexuals Create an Unacceptable Risk to Unit Cohesion}

The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.\footnote{229}

With this legislative finding, Congress wrote into law the long-standing principle that “homosexuality is incompatible with military service . . . [because the] presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in

\begin{footnotesize}
\begin{footnote}{224. S. REP., supra note 132, at 275.}
\begin{footnote}{225. See WELLS-PETRY, supra note 33, at 66-73.}
\begin{footnote}{226. See, e.g., 10 U.S.C.A. § 504 (1983) (excluding the insane, intoxicated, deserters, and convicted felons); id. § 505 (precluding enlistment by those under 17 years old and over 35 years old); id. § 3253 (restricting enlistments to those who are citizens or permanent residents of the U.S.).}
\begin{footnote}{227. Id. § 12102 (1994).}
\begin{footnote}{228. See WELLS-PETRY, supra note 33, at 5 (listing exclusion categories).}
\begin{footnote}{229. 10 U.S.C.A. § 654(a)(15) (West Supp. 1995).}
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homosexual conduct, seriously impairs the accomplishment of the military mission.'

In reaching this conclusion Congress did not rely upon private prejudice, bigotry, stereotypes, or mere negative attitudes and fears. Rather, it focused on military effectiveness, unit cohesion, the unique nature of military life, and the impact homosexual conduct in the military would have, ultimately, on success on the battlefield. It simply cannot be argued that these factors are not properly cognizable in determining qualifications for service.

The findings contained in the statute itself, as well as the legislative history, clearly establish the purpose behind the statute is not to disadvantage homosexuals, but to promote an efficient and effective military capable of winning our nation's wars. As the branch specifically vested by the Constitution with the power to "raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces," Congress found the "primary purpose of the armed forces is to prepare for and to prevail in combat," and that personnel policies must "exclude persons whose presence in the armed forces would create an unacceptable risk to the . . . high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." Clearly, the purpose of the policy is to maintain an effective military, not to disadvantage gay men and women. The statute is not "anti-gay;" it is "pro-combat effectiveness."

Critics still argue that despite the "laudable goals" the policy seeks to achieve, it is based ultimately upon private prejudice. This view fails to appreciate that the disruptive nature of homosexual conduct in the military is not the result of some bigoted attitude toward a benign, non-behavioral characteristic. Rather, the adverse impact on unit cohesion and combat effectiveness caused by homosexual conduct is a result of forcing soldiers to share close living conditions that afford

230. S. REP., supra note 132, at 293 (quoting DEP'T OF DEFENSE DIR. NO. 1332.14, supra note 56). See also H. REP., supra note 177, at 287 ("The committee concludes that . . . homosexuality is incompatible with military service.").

231. S. REP., supra note 132, at 268-69, 278-79, 281-283. See also WELLS-PETRY, supra note 32, at 89-131.


234. Id. § 654(a)(14).

235. "[T]he Senate Armed Services Committee's primary focus and concern has been the implications of any change in the current policy on the effectiveness of our armed forces to carry out their mission to defend our nation." S. REP., supra note 132, at 268-69.

236. That the policy excludes those who are most likely to engage in homosexual conduct does not mean it improperly caters to private bias or irrational prejudice. Assuming homosexuals engage in homosexual acts is the result of simple logic, not bigotry. Even some critics of the current policy have acknowledged the reasonableness of this presumption. See, e.g., Jeffery Davis, Military Policy Toward Homosexuals: Scientific, Historical, & Legal Perspectives, 131 MIL. L. REV. 55, 106 (1991) ("It is logical to assume that most [homosexuals] are going to act in accordance with their preference."). Claiming discrimination on the basis of "homosexual status" merely avoids confronting the real issue: the effect of homosexual conduct on unit cohesion and combat effectiveness. In upholding Georgia's power to criminalize homosexual sodomy, the Supreme Court recognized the so-called "private bias" against such conduct was actually a legitimate ground upon which to base public policy. Bowers v. Hardwick, 478 U.S. 186 (1986).
minimal privacy with those who may find them sexually attractive. It injects an element of sexual tension and potential eroticism into a situation that must remain sexually neutral to insure maximum combat effectiveness. It places an imprimatur of the government on conduct the vast majority of Americans consider “always wrong.”

To the extent these concerns reflect traditional notions of morality and societal values, there is nothing in the law that disables Congress from considering such factors in developing law and policy. The Supreme Court has held “[t]he law . . . is constantly based on notions of morality.” The Court has recognized a “substantial government interest in protecting order and morality.” Furthermore, the Court has acknowledged that “a legislature could legitimately . . . protect ‘the social interest in order and morality.’” If a legislature can rely directly upon notions of morality in enacting laws applicable to the public generally, Congress certainly can consider notions of morality in developing policies to preserve combat effectiveness. This is true especially here where the need for cohesion, trust, confidence, loyalty, and shared values is so important to success in battle. The impact of the invasion of privacy that occurs when heterosexuals are forced to share close living conditions with homosexuals, the introduction of a sexual component into what should be a sexually neutral situation, and the reduction in trust and cohesion produced by forced subjugation of widely held moral principles are all factors that are properly cognizable in developing personnel policies to promote combat effectiveness because they all affect the essential element of unit cohesion. Precluding consideration of such factors results in elevating the personal interests of homosexuals over what professional military judgment and Congressional findings hold to be critical elements in winning on the battlefield.

_City of Cleburne v. Cleburne Living Center_ does not reject the principle that policies may be based upon traditional notions of morality. _Bowers v. Hardwick_ and _Barnes v. Glen Theatre, Inc._, which specifically approved basing laws on moral precepts, were both decided after _Cleburne_. In fact, the distinction between _Cleburne_, on one hand, and _Bowers_ and _Glen Theatre_ on the other, was the presence of traditional notions of morality and decency that supported the legislation in the latter two cases. The Court specifically recognized the power of the state to “provide for the public health, safety, and morals . . . .” The law upheld in _Bowers_ was based upon a “millennia of moral teaching.” This legitimate moral

237. _The American Enterprise, Views About Homosexuality_ 82 (Mar./Apr. 1993) (quoting National Opinion Research Center 1991 survey that revealed 71% of those polled said sexual relations between two adults of the same sex was “always wrong”).
238. _Bowers_, 478 U.S. at 196.
241. As stated by the court in _benShalom v. Marsh_, 881 F.2d 454, 461 (7th Cir. 1989), _cert. denied_, 494 U.S. 1004 (1990), the military “should not be required by this court to assume the risk, a risk it would be assuming for all our citizens, that accepting admitted homosexuals into the armed forces might imperil morale, discipline, and the effectiveness of our fighting forces.”
242. 478 U.S. at 186.
243. 111 S. Ct. at 2456.
244. _Id._ at 2462.
245. _Bowers_, 478 U.S. at 197 (Burger, J., concurring).
basis was noticeably lacking in the City's justification of discrimination against the mentally retarded in Cleburne. 246

While it may not be appropriate for the military leadership to assume the position of the final arbiter of moral choices, 247 Congress certainly is not disabled from recognizing and considering the prevailing moral values of the American people in developing personnel policies applicable to the American people's armed forces. Indeed, Congress has directed the Secretary of Defense to establish "moral . . . qualifications for . . . enlistment . . . " 248 If "majority sentiments about the morality of homosexuality" 249 can support criminal provisions, the consideration of those same sentiments and the impact homosexuals would have on unit cohesion is even more appropriate. 250

In the final analysis, Congress, professional military judgment, and common sense all recognize that homosexuality is inextricably linked to homosexual conduct. To pretend otherwise is absurd. It is also beyond dispute that the military may prohibit homosexual conduct because it destroys unit cohesion and reduces combat effectiveness. It follows that excluding the class most likely to engage in homosexual conduct is a logical and reasonable way to minimize homosexual conduct in the military. Those constitutionally responsible for our national defense made the policy choice to exclude homosexuals rather than risk the damage to cohesion that homosexual conduct causes.

The specific consideration of this controversial issue by the Congress under its armies' powers, the logical, reasonable, and rational connection between homosexuality and homosexual conduct, the application of rational basis review, coupled with an unbroken line of Supreme Court decisions counseling deference in judicially reviewing military policies, 251 combine to make it highly unlikely, if not

246. Palmore v. Sidoti, 466 U.S. 429 (1984), is also relied upon by opponents of the policy for the proposition that a classification scheme that treats homosexuals differently than heterosexuals violates equal protection principles. Palmore involved discrimination based upon non-behavioral characteristics (race) in determining parental fitness and was reviewed under strict scrutiny. Obviously, there is no legitimate moral basis to support determining the fitness of a parent along racial lines. A classification scheme based upon a non-behavioral characteristic and the application of strict scrutiny distinguish Palmore and preclude its applicability to the homosexual issue.

247. General Powell testified before Congress that the military leadership should not "use our official position to make moral or religious judgments on this issue." S. REP., supra note 132, at 279.


250. For a discussion of the appropriateness of using majoritarian notions of morality to support the homosexual policy, see Arthur A. Murphy, et al., Gays in the Military: What About Morality, Ethics, Character, & Honor?, 99 DICK. L. REV. 331 (1995).

251. See, e.g., Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) ("[J]udges are not given the task of running the Army . . . ; the judiciary [must] be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); Rostker v. Goldberg, 453 U.S. 57, 68 (1981) ("[W]e must be particularly careful not to substitute our judgment . . . for that of Congress, or our own evaluation of evidence for a reasonable evaluation by [Congress] . . ."); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence."); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("Our review of military regulations . . . is far more deferential than constitutional review of similar laws or regulations designed for civilian society.").
impossible, that the Supreme Court would find the statute unconstitutional. Thus, the actions of Congress in legislatively addressing this issue would seem to put the matter to rest, at least as far as the courts are concerned.

IV. DOD IMPLEMENTATION

Like most statutes that apply to the military, DoD was authorized to promulgate regulations to implement the law. In view of the similarity between the statute and the 1981 policy, the extensive congressional record supporting the statutory findings and policy structure, as well as the long history of appellate decisions upholding the 1981 policy, implementation of the new statute should have been relatively easy. Little more than republishing the regulations applicable to the 1981 policy would seem to be required. Analysis of DoD’s implementing regulations, however, proves the old adage that “there’s a right way, a wrong way, and a military way” of doing things.

The DoD directives and service regulations reveal a rather remarkable departure from the letter and intent of the statute. It appears that DoD implemented the July 19th policy rather than the statute passed by Congress and signed into law by the President. The following points demonstrate the inconsistencies and contradictions between the statute and the directives.

1. The news release announcing the revised DoD policy stated the regulations “implement the policy that was announced by President Clinton in July.” The “overview” of the new directives that was included with the news release explained that “[o]n July 19, 1993, the President and Secretary of Defense announced a new DoD policy on homosexual conduct in the Armed Forces. DoD today is issuing new directives implementing that policy.” Neither the news release, the overview, nor the memorandum from Secretary Aspin to the Service Secretaries directing them to implement the new policy stated that the new directives were implementing the statute. The news release and the overview merely noted the new directives were “fully consistent” with the statute. The Aspin memorandum did not mention the statute at all.

2. The new directives implemented the principle first introduced in the July 19th policy that “sexual orientation is a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct” even though the law codifies the settled legal principle that a claim to have a “homosexual orientation” raises a presumption that the person engages in, intends to engage in, or has the propensity to engage in homosexual acts. A subsequent amendment to the implementing directives changed the

254. Id.
256. DEP’T OF DEFENSE DIRECTIVE No. 1304.26, encl 2, ¶ (B)(8)(a) (Feb. 28, 1994).
257. S. REP., supra note 132, at 294.
wording of the quoted sentence slightly, but not its meaning, and has not altered the manner in which the DoD has implemented its policy. 258

3. The new DoD directives defined "sexual orientation" as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts" 259 and, consistent with the July 19th policy, officially separated status (orientation) and conduct. Congress, on the other hand, declined to legislate based upon amorphous concepts of "sexual orientation" or "sexual preference" and specifically noted that "advocates of gay rights have expressly linked sexual orientation to conduct." 260 Furthermore, Congress rejected the idea that homosexuality could be "merely an abstract sense of identity" and recognized that "[homosexuality] is intimately connected with conduct." 261

4. To further create the distinction between orientation and conduct that was introduced in the July 19th policy but absent from the 1981 policy and the statute, the new directives defined "propensity" to engage in homosexual acts as "more than . . . [a] desire to engage in homosexual acts . . . " 262 even though Congress specifically noted that using "propensity" in the statute instead of "desire" as in the 1981 policy was not a substantive change and would "not affect the practical effect of the policy." 263

5. The DoD directives do not include the principle that "homosexuality is incompatible with military service" as a basis for the policy even though Congress said the statute carried that principle forward in the law 264. Furthermore, the directives do not include either a reference to the law or its detailed findings in setting out the basis of the policy promulgated by the directives. 265

6. The new DoD directives permit retention of an admitted homosexual if the person promises to refrain from engaging in homosexual acts while in the military 266 even though Congress said that an admission of homosexuality raises a rebuttable presumption of engaging in homosexual acts and that "a member cannot rebut the presumption simply through a promise to adhere to military standards of conduct in the future." 267 Training scenarios published by DoD contain the hypothetical of a service member who admits to being a homosexual and at the administrative discharge hearing the individual does not dispute that he claimed to be a homosexual. The individual "promises, however, that he will not engage in any

258. The new sentence reads: "A person's sexual orientation is considered a personal and private matter, and is not a bar to service entry or continued service unless manifested by homosexual conduct in the manner described in paragraph B.B.b., below." DEP’T OF DEFENSE DIRECTIVE NO. 1304.26, encl. 2, ¶ (B)(8)(a) (Feb. 28, 1994).

259. DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 2, ¶ (O) (Feb. 28, 1994).

260. S. REP., supra note 132, at 283.

261. Id. at 282.

262. DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 2, ¶ (J) (Feb. 28, 1994).

263. S. REP., supra note 132, at 290.

264. Id. at 293; H. REP., supra note 177, at 287.


266. See Memorandum from Assistant Secretary of Defense for the Assistant Secretaries of the Army, Navy, and Air Force to Assistant Secretary of Defense, Subject: Training Guidance for DoD Policy on Homosexual Conduct in the Armed Forces; Teaching Scenarios 12, 13 [hereinafter Teaching Scenarios].

267. S. REP., supra note 132, at 294.
homosexual acts during the remainder of his term of enlistment . . . [and] . . . presents no other evidence.”

In discussing whether the servicemember's evidence is sufficient to rebut the presumption that he is, in fact, homosexual, the teaching scenario allows the members of the administrative board to “determine whether that promise . . . was sufficient to demonstrate that he does not engage in homosexual acts and is not likely to do so.” Thus, the DoD regulations permit an admitted homosexual to serve if the separation authority accepts a promise to adhere to military standards of conduct in the future. In testimony before the Senate Armed Services Committee, the DoD General Counsel explained that such a result was indeed possible, even though unlikely:

The service member bears the burden of persuasion by a preponderance of the evidence. The decisionmaking authority remains the same as it is under current [1981] policy. It is hypothetically possible that such a decisionmaking authority could take that assertion to be sufficient. For example, if that assertion is essentially, I was misunderstood, I did not mean it, it was a joke. I mean it could hypothetically suffice.

In the real instance that I believe you are trying to get at, Senator [Nunn], in which someone made the statement knowingly and was not drunk, or had not lost his or her mind, it seems to me it is very very unlikely that the mere assertion that I am not engaged in acts, I do not have such a propensity or intent, would be sufficient to carry that burden. The burden is placed on the service member throughout. And I would reiterate what the Secretary said yesterday, which is that is a very high burden and no one has ever done it.

Apparently not satisfied with the General Counsel’s prediction as to the likelihood of a particular separation authority accepting a promise of celibacy as sufficient to rebut the fact that the servicemember was a homosexual, the Senate Armed Services Committee specifically noted that “a member cannot rebut the presumption simply through a promise to adhere to military standards of conduct in the future; nor can the member rebut the presumption by a statement to the effect that he or she has a propensity towards homosexuality but has not acted upon it.” The Senate viewed the claim of homosexuality to be just that and the servicemember had the burden to prove that the original statement was “made in jest” in order to avoid discharge.

In spite of clear language and direction to the contrary, the DoD directives have carried forward the July 19th policy choice that does permit admitted homosexuals to serve merely upon a promise that they will not act upon their natural propensity. In application, the “promise” of celibacy sufficient to warrant retention under the DoD regulations need not be under oath or subject to cross-examination at the administrative board hearing.

268. Teaching Scenarios, supra note 266, no. 12.
269. Id.
270. S. Hrgs., supra note 17, at 772.
271. S. REP., supra note 132, at 294.
272. Id.
273. See Letter from Commander, Naval Base, San Francisco to Chief of Naval Personnel, Subject: Report of Board of Inquiry in the Case of Lt. Maria Z. Dunning (Apr. 21, 1995) (an unworn
7. The DoD regulations create the status-conduct dichotomy that first appeared in the July 19th policy, but which is noticeably absent from the statute. The directives define "sexual orientation" as an "abstract preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts."\textsuperscript{274} The directives also state that "sexual orientation is a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct . . . .\textsuperscript{275} The directives create a class composed of all those who have an "abstract preference for persons of a particular sex" and declare that members of this class can serve in the military unless they engage in certain prohibited conduct. Thus, the directives create a status-conduct dichotomy and declare status as a benign and non-disqualifying factor. Conduct, on the other hand, is not so benign and will disqualify one from service. One example of "conduct" that will disqualify an "orienteer" from service is revealing that his or her "abstract preference" is for those of the same sex. According to the DoD directives, the revelation of "an abstract preference" for persons of the same sex "indicates a likelihood that the member engages in or will engage in homosexual acts."\textsuperscript{276} We are not told, however, how the mere revelation of a characteristic that the directives clearly define as non-conduct related can logically or reasonably indicate a likelihood of engaging in certain conduct. This bit of illogic in the DoD directives departs significantly from the 1981 policy structure and from the policy structure of the statute. As a result, it seriously weakens the defensibility of the policy in court by introducing a free speech issue that was not present under the former policy.\textsuperscript{277}

The legal and factual fiction that sexual orientation and sexual conduct are unrelated was a central component of the July 19th policy. The status-conduct dichotomy as a policy construct allowed the President to claim his new policy "end[ed] discrimination on the basis of sexual orientation." The fact this dichotomy produced the illogical, irrational, and absurd rule that the mere revelation of a non-disqualifying characteristic was disqualifying seemed lost on the proponents of the July 19th policy and did not dissuade them from making the status-conduct dichotomy the center piece of the DoD directives.

Congress, on the other hand, rejected the notion that sexual orientation and sexual conduct are unrelated. The Senate Report noted "[h]omosexuality is not merely an abstract sense of identity; [i]t is intimately connected with conduct."\textsuperscript{278} The Senate Report also noted that advocates of gay rights themselves "have expressly linked sexual orientation to conduct."\textsuperscript{279} In crafting the statutory policy, Congress rejected the fiction of a status-conduct dichotomy and specifically adopted statement, and thus not subject to cross-examination, of no intent to or desire to engage in homosexual acts sufficient to warrant retention).

\textsuperscript{274} DEP'T OF DEFENSE DIRECTIVE NO. 1332.14,\textsuperscript{7} (O), app. (Feb. 28, 1994).
\textsuperscript{275} Id. \textsuperscript{7} (H)(1).
\textsuperscript{276} Id.
\textsuperscript{277} See, e.g., Pruitt v. Cheney, 963 F.2d 1160, 1163 (9th Cir. 1991), \textit{cert. denied}, 113 S. Ct. 655 (1992); benShalom v. Marsh, 881 F.2d 454, 460 (7th Cir. 1989), \textit{cert. denied}, 494 U.S. 1004 (1990); \textit{see also} Williams, \textit{supra} note 118, at 927-34.
\textsuperscript{278} S. REP., \textit{supra} note 132, at 282.
\textsuperscript{279} Id. at 283.
the structure of the 1981 policy which recognized the logical and rational connection between sexual orientation and sexual behavior.\(^{280}\)

8. The investigatory guidelines included in the new DoD directives reinforce the notion that the policy administered by DoD is an accommodation policy that permits homosexuals to serve under limited circumstances rather than a policy that "exclude[s] persons whose presence in the armed forces would create an unacceptable risk to . . . morale, good order and discipline, and unit cohesion. . . ."\(^{281}\)

The 1981 policy had no specific or published investigatory restrictions, limitations, or guidelines. As a result, critics claimed that some commanders and criminal investigation agencies abused their authority in trying to uncover closeted homosexuals and discharge them from the service. The July 19th policy addressed this allegation by limiting the sort of information that would support initiation of an investigation into allegations of homosexuality and restricting the ability of criminal investigators to initiate an investigation absent evidence of a criminal offense.\(^{282}\) Congress, on the other hand, was concerned that restrictions or limitations on a commander's ability to take action to protect unit cohesion would be counter-productive.\(^{283}\) Congress seemed more concerned with the ability of the commander to protect the combat capability of the unit than with allegations that in some situations in the past some commanders and criminal investigators may have abused their discretion, used poor judgment, or even violated existing laws or policies. In any of these situations, the military already possessed adequate means to remedy any abuse of command or authority. Instead of including detailed guidance on investigations in the statute, Congress left the Secretary with the discretion to promulgate administrative guidance, if necessary, provided the guidelines did not establish "unusual restrictions on the authority of the commanders to initiate investigations."\(^{284}\)

The security investigation guidelines treat homosexual activity, the amount of income tax a person pays, and membership in a trade union exactly the same for the purposes of determining whether an individual is a security risk\(^{285}\) even though Congress made homosexual activity a criminal offense and such activity could subject the individual to blackmail or coercion.\(^{286}\) The guidelines forbid security investigators from asking, "Have you ever engaged in sexual activity with a person of the same sex?"\(^{287}\) Even under the July 19th policy definitions, this particular question deals solely with conduct and has nothing to do with "sexual orientation." This limitation on inquiring into actual homosexual conduct seems to run counter to even the July 19th policy's claim that "DoD judges the suitability of persons to serve in the Armed Forces on the basis of conduct."\(^{288}\) And it obviously runs

\(^{280}\) See id. at 282-5; see also Marsh, 881 F.2d at 454.
\(^{282}\) See supra notes 146-166 and accompanying text.
\(^{284}\) S. Rep., supra note 132, at 291.
\(^{285}\) DEP'T OF DEFENSE INVESTIGATIVE SERV., MANUAL FOR PERSONNEL SEC. INVESTIGATIONS., DIS-20-1-M, encl. 18, ¶ (C) (Jan. 1993) [hereinafter SEC. INVESTIGATIONS MANUAL].
\(^{286}\) UCMJ, arts. 125, 133, 134.
\(^{287}\) SEC. INVESTIGATIONS MANUAL, supra note 285, ¶ (C)(10).
\(^{288}\) Sec. Def. Dec. 22nd News Release, supra note 140.
counter to the specific finding of Congress that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion, that are the essence of military capability."\(^{289}\)

When viewed as a whole, the DoD directives and regulations contradict the expressed views of Congress in several important areas, are inconsistent with the statutory scheme in other respects, and weaken the overall basis of the statute by creating irrational and illogical presumptions. The 1981 policy and the statute operate on the simple proposition that homosexual activity is inappropriate in the military; homosexuals, as a class, engage in or are at least likely to engage in homosexual activity; and that excluding homosexuals from service will reduce the amount of homosexual activity that occurs in the military. While the logic of this proposition may not be perfect and it may not hold true in every single situation, there is a sufficient rationality to it to easily satisfy rational basis constitutional standards.\(^{290}\)

The new DoD directives, on the other hand, rely upon executive fiat that declares speech to be conduct and imposes a presumption of misconduct on the mere revelation of a characteristic that the directives themselves define as non-conduct related. The illogic is staggering and raises serious constitutional questions.\(^{291}\)

**V. JUDICIAL REVIEW OF THE DOD POLICY**

Two recent district court cases have reached opposite results as to the constitutionality of the DoD policy. In *Able v. United States*,\(^{292}\) the court examined the policy as implemented by the DoD directives and concluded it violated both equal protection and free speech rights of the plaintiffs. Central to the court's holding was the illogic and irrationality of discharging one for merely revealing what the directives define as a non-disqualifying characteristic. The other case, *Thomasson v. Perry*,\(^{293}\) on the other hand, focused primarily upon the statutory scheme and ignored the inconsistent and contradictory DoD regulations in finding that discharging one for admitting to being a homosexual did not offend constitutional rights and protections.

*Able* was the first challenge to the new policy. Shortly after the implementing regulations went into effect, six members of the armed forces filed suit in the U.S. District Court for the Eastern District of New York challenging the policy on free speech and equal protection grounds.\(^{294}\) Plaintiffs sought and were granted a preliminary injunction preventing the military from taking any adverse administrative action or initiating any investigation against them on the basis of statements made and claims asserted during the litigation.\(^{295}\) Subsequently, the court

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292. Id.
dismissed for lack of standing plaintiffs' challenges to those portions of the policy that required discharge for engaging in homosexual acts or for entering into a homosexual marriage.\textsuperscript{296} Thus, the narrow issue before the court was whether the DoD policy requiring discharge because "the member has stated that he or she is a homosexual\textsuperscript{297} violated plaintiffs' First and Fifth Amendment rights.\textsuperscript{298}

In analyzing the policy under First Amendment principles, the court noted that "Defendants . . . designed a policy that purportedly directs discharge based on 'conduct,' and craftily sought to avoid the First Amendment by defining 'conduct' to include statements revealing one's homosexual status."\textsuperscript{299} The court also pointed out that "the Directives purport to distinguish between homosexual 'orientation' and homosexual 'propensity,' defining the former as . . . an 'abstract preference for members of the same sex' and the latter as . . . indicat[ing] a 'likelihood' . . . [the individual will act upon his or her sexual preference].\textsuperscript{300} Finding the definition and treatment of these terms nothing short of "Orwellian,"\textsuperscript{301} the court held the First Amendment would not permit discharge for a mere statement of homosexual orientation.\textsuperscript{302}

After finding the policy wanting under the First Amendment, the court held that because the statements provision of the policy allowed heterosexuals to exercise the fundamental right of free speech with regard to disclosing their sexual orientation but denied homosexuals the same right, the policy violated the Equal Protection component of the Fifth Amendment as well.\textsuperscript{303}

In addition to finding the policy constitutionally infirm, the court criticized the policy as based upon pretense rather than truth and noted that, even if the Constitution permitted it, there was no congressional finding to support a policy that encourages deception:

To invite someone with a homosexual orientation to join the Services, then to throw that person out solely because that orientation is revealed from something he or she said, and finally to pretend that the discharge was not because of the person's orientation, might appear to all members, heterosexual and homosexual, less than honorable, with incalculable effect on "high morale, good order and discipline, and unit cohesion."\textsuperscript{304}

Not surprisingly, the aspects of the policy seized upon by the court in finding constitutional violations all stem from the inconsistencies between the statute and the DoD directives. For example, the court noted the "Orwellian" attempt of the directive to distinguish between "propensity" and "orientation."\textsuperscript{305} Neither term was defined in the statute or in the 1981 policy because neither the statute nor the 1981

\textsuperscript{298} Able, 880 F. Supp. at 972.
\textsuperscript{299} Id. at 975.
\textsuperscript{300} Id.
\textsuperscript{301} Id.
\textsuperscript{302} Id. at 976, 980.
\textsuperscript{303} Able, 880 F. Supp. at 980.
\textsuperscript{304} Id. at 979.
\textsuperscript{305} Id. at 975.
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policy relied upon a distinction between orientation and propensity. The orientation-propensity distinction was first introduced in the July 19th policy. The plain language of the statute and the legislative history reveals that Congress rejected such a distinction as a basis for the statutory policy. 306

The same may be said for the court's troubling comment concerning a policy that "invite[s] someone with a homosexual orientation to join the Services, then . . . throw[s] that person out solely because that orientation is revealed from something he or she said . . ." 307 Neither the 1981 policy nor the statute "invites" homosexuals to join. In fact, both specifically exclude homosexuals as a class. Both were premised upon the judgment that homosexuality is incompatible with military service. 308 The July 19th policy, however, first created the idea that homosexuals could serve under color of law but still provided for their discharge when they acted in conformity with their sexual preferences. Despite Congress' rejection of such a policy premise, DoD grafted the flawed logic of the July 19th policy onto the statute through the implementing directives. The court specifically noted "[t]he Directives do not explain how an 'orientation' means an 'abstract preference' if not revealed but if admitted becomes evidence of a 'likelihood' to commit acts . . ." 309 This approach to implementation lifts to prophetic proportions Congress' concern that "any effort to create—as a matter of policy—a sanctuary in the military where homosexuals could serve discreetly and still be subject to separation for proscribed conduct would be a policy inimical to unit cohesion, morale, welfare, and discipline, unenforceable in the field, and open to legal challenge." 310

The First Amendment violation found by the Able court and its application to the Fifth Amendment was produced directly by the Department of Defense's creation of an "Orwellian" distinction between homosexual orientation and homosexual conduct. The 1981 policy did not rely upon such a legal or factual fiction and, hence, did not implicate First Amendment concerns. 311 Congress followed the structure of the 1981 policy in legislating in this area. 312 The Department of Defense's implementation of the July 19th policy instead of the statute passed by Congress necessitated the efforts to "craftily . . . avoid the First

306. See supra notes 171-189 and accompanying text.


308. "The findings reflect long standing Department of Defense policy, as set forth in DoD Directive 1332.14, that '[h]omosexuality is incompatible with military service' . . ." S. REP., supra note 132, at 293. "The committee carried forward the fundamental tenets upon which the DoD policy regarding homosexuals has long been based. In short, the committee concludes that homosexuality is incompatible with military service." H. REP., supra note 177, at 287.


310. H. REP., supra note 177, at 289.


312. S. REP., supra note 132, at 282-83.

Homosexuality is not merely an abstract sense of identity. It is intimately connected with conduct . . . While some individuals may view themselves as homosexual, gay, or lesbian based upon thoughts that never ripen into a propensity or intent to engage in homosexual acts, advocates of gay rights have expressly linked sexual orientation to conduct . . . It is reasonable for the armed forces to take into account the potential behavior of persons who define themselves as homosexual, gay, or lesbian.

Id.
Amendment by defining ‘conduct’ to include statements revealing one’s homosexual status.313

Significantly, the court neither discussed, distinguished, or even cited any of the cases decided under the 1981 policy. Apparently, in the court’s view, the DoD policy under review was not similar enough to the former policy to warrant even mentioning the unanimous line of appellate decisions sustaining the policy under identical constitutional challenges.

The second case to consider the new law was Thomasson v. Perry.314 Shortly after the Navy implemented the DoD Directives, Lieutenant Paul G. Thomasson notified his superiors in writing that he was a homosexual. At the subsequent discharge proceeding, Lieutenant Thomasson refused to offer any evidence to rebut the presumption that he engaged in, intended to engage in, or had the propensity to engage in homosexual acts. Instead, Thomasson said, “I will not go further in degrading myself by disproving a charge about sexual conduct that no one has made.”315 The Navy discharge board found that Lieutenant Thomasson had not met the burden of proof the policy placed on him and ordered him discharged from the Navy.

Prior to the delivery of the discharge certificate, Thomasson filed suit. He sought and was granted a preliminary injunction enjoining the Navy from discharging him until resolution of the case on the merits. He claimed the discharge for revealing his homosexuality violated the First Amendment, Equal Protection under the Fifth Amendment, and the Administrative Procedure Act.316

In evaluating both lines of constitutional attack, the court relied heavily upon the cases sustaining the 1981 policy and found that the policy did not infringe Lieutenant Thomasson’s constitutional rights.317 In so doing, the court ignored the regulatory inconsistencies and contradictions the Able court found significant. Rather than evaluating a policy that “invite(s) someone with a homosexual orientation to join the Services, then throw[s] that person out solely because that orientation is revealed . . .,”318 as the Able court did, the Thomasson court noted military personnel policies are often based upon “categories”319 and agreed with the Steffan court’s view that homosexuality and homosexual conduct are inexorably intertwined.320

The Thomasson court did not even address, much less resolve, how a statement of orientation, which the directives define as unrelated to conduct, could logically or reasonably give rise to a presumption of conduct. Rather, the court accepted the common sense notion that one who claims to be a homosexual is likely to engage in or have a propensity to engage in homosexual acts. After accepting this premise,
the court logically and legally concluded that the military may discharge a homosexual before the admitted “orientation” gives rise to actual conduct and the disruption that such conduct causes.\textsuperscript{321}

In one respect, the \textit{Thomasson} and \textit{Able} decisions are consistent: both courts ignored evidence and information that contradicted their respective views of the policy. \textit{Able} failed to consider the legislative history indicating Congress adopted the class-based structure of the 1981 policy and rejected the July 19th policy’s orientation-conduct dichotomy. \textit{Thomasson}, on the other hand, did not attempt to resolve the logical flaws in the policy created by the DoD Directives and applied the precedent developed under the 1981 policy. In essence, \textit{Able} reviewed the July 19th policy and found it unconstitutional. \textit{Thomasson}, on the other hand, reviewed the 1981 policy as codified by 10 United States Code, Section 654 and found that it passed constitutional muster.

Ordinarily, courts called upon to review military policies apply the traditional standards of review to the established policy. Here, however, both the \textit{Able} and \textit{Thomasson} courts had to determine what the policy was before they could perform their judicial review functions. They reached different conclusions because they essentially reviewed different policies.

When two courts rule opposite one another on important issues the natural tendency in our system is to let the appellate courts resolve the debate. Ultimately, the Supreme Court could settle any conflicting rulings among the appellate courts. This particular situation, however, is most unsuited for traditional judicial resolution. Because, the \textit{Able} court and the \textit{Thomasson} court reviewed two different policies, resolving the constitutional issues raised by these two decisions first requires one to determine what the policy is before measuring it against constitutional standards.

Answering this question is not a function of the courts. The political branches have the constitutional authority to establish and define the policy, the courts merely review the policy under a deferential standard.\textsuperscript{322} The significant differences noted in this Article between the statutory policy and the regulatory policy produced the seemingly contradictory court opinions. Arguably, both courts correctly decided their respective cases based upon the policy as they found it. The ultimate question, however, is still unanswered: What is the policy?

The significant discrepancies between the statutory policy and the regulatory policy, if left uncorrected, will create a climate where the ultimate policy will be decided by individual litigants who can persuade individual judges to adopt their views. Thus, the judiciary, whose only role in setting military policy is to conduct a very deferential review, and individuals seeking to vindicate their own interests as opposed to the national interests of the roles and missions of the armed forces, will have acquired by default the authority the Constitution vests in Congress.

If the Executive has not executed or implemented faithfully the law passed by Congress it is Congress’ responsibility to correct the Executive. It is an abdication of Constitutional responsibility and authority for Congress to let the matter be decided by the courts. Congress is charged with making the rules, the Executive is charged with executing the rules, and the courts are charged with reviewing the

\textsuperscript{321} \textit{Id.} at *23-25.

\textsuperscript{322} \textit{See} Nunn, \textit{supra} note 75, at 557.
rules. By failing to take action to correct an erroneous implementation of the statute, Congress turns its constitutional responsibility over to the courts and the Executive.

Congress, as a body, may not think the new DoD directives are inconsistent with the statute. The failure to take any corrective action would certainly indicate that may be the case. Indeed, litigants attacking the policy could urge the courts to "defer to the military" in interpreting the statute and then highlight the internal inconsistencies in the military's directives to illustrate the irrationality of the policy.323

The better and more responsible course for Congress, assuming the statute was intended to be a codification of the 1981 policy, as its language and legislative history indicates, would be to require the Executive to faithfully implement the letter and spirit of the law. This may be accomplished through "political persuasion" or through additional legislation. In any case, Congress has the means and responsibility to require the Executive to implement the law as passed, not the law the Executive hoped would pass.

VI. CONCLUSION

After an extensive national debate over whether homosexuals should be permitted to serve in the military, Congress concluded the long-standing professional military judgment that "homosexuality is incompatible with military service" was correct. It then passed a statute that in all material respects adopted the form, structure, and function of the 1981 regulatory policy that had been upheld repeatedly by the courts. DoD, however, implemented a regulatory policy designed, in some degree, to deliver on a campaign promise to lift the ban on service by homosexuals. The statutory policy and the current DoD regulatory policy are at odds on several material points. These contradictions and inconsistencies provide fertile ground for individual litigants and the judiciary to influence national military policy in a way our Constitution never imagined. Congress, not the courts, has the responsibility to resolve the discrepancies between the statute and the regulations. Its failure to do so is an abdication of its constitutional responsibility.

323. In performing their task of statutory construction, courts should, of course, look to the language of the statute and its legislative history rather than agency regulations that are contrary to the intent of Congress. See, e.g, Sullivan v. Zelby, 110 S. Ct. 885 (1990). Because the Department of Justice, as part of the Executive Branch, defends the United States in these cases, it is not likely Department of Justice attorneys will urge courts to reject as contrary to congressional intent the very regulations the Executive Branch has promulgated. This is especially true here, where the author of the implementing regulations, the DoD General Counsel Jamie Gorelick, is now the Deputy U.S. Attorney General. Thus, plaintiffs will be able to exploit the illogical and irrational regulatory provisions with impunity.