Don't Mess with "Don't Ask, Don't Tell"

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DON'T MESS WITH "DON'T ASK, DON'T TELL"

I. INTRODUCTION

Over the last two decades, the Gay-Rights Movement in America has slowly, but steadily, gained political strength and prominence. Pushing for outright acceptance of their lifestyle, homosexuals have naturally attempted to use their political and economic resources to attack those institutions that they feel have historically discriminated against them the most. One of those institutions is a branch of the United States Government: the Department of Defense. The "discrimination" being combated is the long-standing ban on gays serving in the Armed Forces.

This steady assault on the ban reached its zenith during the 1992 presidential election. Presidential candidate Bill Clinton made lifting of the ban a plank in his political platform. Clinton met with stiff resistance when he attempted to remove the ban in the early days of his Presidency. The most notable resistance came from Congress, the Secretary of Defense, and the several branches of the Armed Forces. After protracted negotiations, a compromise was finally reached.

The result of those negotiations was a policy that is now commonly referred to as "Don't Ask, Don't Tell, Don't Pursue." Under this policy, the ban is not completely lifted. Indeed, open homosexuality or homosexual conduct is still a service-disqualifying condition. Still, the new policy has radically altered the military's approach to homosexuality. The policy has three prongs. Under the first prong, "Don't Ask," those involved in recruiting or retention of service members are forbidden to question individuals about their sexual orientation. The "Don't Tell" prong compels homosexual service members to refrain from openly discussing their sexual orientation. The "Don't Pursue" prong prohibits commanders from conducting "witch hunts" to root out possible homosexuals.

1. This Comment uses the term "homosexual" to refer to both gays and lesbians. It is used solely for convenience and is not intended to offend any member of the gay or lesbian community.
2. All references in this Comment to "Armed Forces" or "military" refer to the United States Army, Air Force, Navy, Marine Corps, and Coast Guard.
5. Policy Guidelines on Homosexual Conduct in the Armed Forces, in Memorandum from Les Aspin, Secretary of Defense, to the Secretaries of the Army, Navy, Air Force, and
The new policy is a disappointment to both members of the military establishment, who are convinced it went too far, and gay-rights advocates, who feel it did not go far enough. Because of the new policy's similarities to the prior ban, it is possible that it may not survive a constitutional challenge. What both of these groups fail to realize is that, at the present time, the new policy is a perfect solution.

Not only does the policy take into consideration, as it must, the mission requirements of a military force undergoing unprecedented change, both nationally and internationally, it also offers greater protection and opportunities for patriotic homosexuals who wish to serve their country. Also, this policy can easily withstand as strict a constitutional analysis as the one used to uphold the original ban. Most importantly, if carried out properly, the “Don’t Ask, Don’t Tell” policy could finally answer the question of whether homosexuality is truly incompatible with military service.

Part II of this Comment examines the separate place the military holds in our society, as well as the origins of the outright ban and “Don’t Ask, Don’t Tell.” It will also analyze the issue that should be the sole focus of any discussion on the lifting of the ban: the possible effect overturning the new policy and lifting the ban would have on our Armed Forces' ability to effectively carry out their stated mission of winning wars. Part III examines the results of constitutional attacks on the prior outright ban, and the likely constitutionality of the new “Don’t Ask, Don’t Tell” policy. Finally, it will argue that “Don’t Ask, Don’t Tell” could be extremely effective in altering the military's and society's present attitudes toward homosexuality without jeopardizing the high standards of readiness and morale required of our Armed Forces.


The ban on homosexuals serving in the military is a long-standing one. While the ban was originally based on unsound assumptions about the abilities of homosexuals, valid concerns about the effects of open homosexuality on military readiness still exist. This section will examine the nature of military service, give a brief account of the ban's history, and

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examine some of the reasons for upholding a ban on open homosexuality. It will also briefly outline the "Don't Ask, Don't Tell" policy itself.

A. The Military's Separate Place in Our Society

The Armed Forces of the United States exist for one purpose and one purpose only: winning wars. Because of this unique mission, the military has had to evolve as a separate society, with a lifestyle and rules all its own. The Supreme Court recognized this distinction in *Schlesinger v. Councilman*, when it stated that "the military must insist upon a respect for duty and a discipline without counterpart in civilian life." It is vital to grasp this distinction if one is to adequately understand what is truly at issue in the current debate over the military's prohibition on the service of homosexuals.

The military's unrelenting call for respect of duty, and utter need for discipline, shape the day-to-day life of soldiers, sailors, airmen, and marines. At any time, vast numbers of service members reside in open-bay barracks or in cramped living areas on board ships or submarines. Privacy, something treasured by most people, is simply inconsistent with the exigencies of military duty, a fact recognized by anyone who has ever served. Additionally, service members have little or no choice in their duty station, and indeed, may be transferred anywhere, anytime the mission requires it. Of course, these sacrifices pale when compared to the ultimate sacrifice that these individuals may be called on to make: surrendering their lives in combat, or even in peacetime.

It should be noted that those who choose to enter the service willingly surrender some of the protections offered by the Bill of Rights. The extent to which the military is permitted to curtail these rights would most likely be viewed as unacceptable to the average civilian.

For example, while service members do enjoy Fourth Amendment protection against unreasonable searches and seizures, they are nevertheless constantly subject to "inspections" completely unsupported by

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7. *See, e.g.*, United States *ex rel.* Toth *v.* Quarles, 350 U.S. 11, 17 (1955) (stating that the primary business of armies and navies is to fight wars).
9. *Id.* at 757.
10. The peacetime sacrifices regularly made by members of our Armed Forces were illustrated recently when four Army soldiers died from hypothermia after wading through chilly, chest-deep swamps at Eglin Air Force Base, Florida, while undergoing Ranger training. The Rangers, an elite branch of the Army, are an all volunteer force. *Four Army Rangers Die in Training*, ATLANTA J. & CONST., Feb. 16, 1995, at A1.
probable cause.\textsuperscript{11} During inspections, a commander may fully examine the barrack room and personal belongings of an individual service member. It seems unlikely that the average citizens would grant their superiors full access to their homes, or give them license to search their closets and drawers for contraband.

Also, the Armed Forces have been found justified in restraining service members’ First Amendment rights to free speech,\textsuperscript{12} free association,\textsuperscript{13} and freedom of religion.\textsuperscript{14} All of these permissible restrictions are based on the Court’s acknowledgment of the military’s absolute need for discipline and maintenance of morale and readiness. Restrictions on the enjoyment of those rights are allowed when unlimited enjoyment of those rights would unduly interfere with the military mission.\textsuperscript{15}

In order to ensure that the military is well equipped to deal with threats to its ability to carry out its mission, Congress created a separate body of law: the Uniform Code of Military Justice. Military law is specifically tailored to reflect the needs and realities of military life.\textsuperscript{16} All members of the Armed Forces are subject to this law twenty-four hours a day, seven days a week.\textsuperscript{17} Through the Uniform Code of Military Justice, service members are subject to administrative discharge proceedings,\textsuperscript{18} court-martial,\textsuperscript{19} or even non-judicial punishment.\textsuperscript{20} Many of the crimes for

\begin{itemize}
  \item Inspections are conducted to “determine and ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle.” MIL. R. EVID. 313(b).
  \item See, e.g., Parker v. Levy, 417 U.S. 733, 759 (1974) (noting that speech of service members will be restricted if that speech “undermines the effectiveness of response to command”).
  \item Schleuter, \textit{supra} note 13, at 406-07.
  \item See, e.g., \textit{MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984} at I-1 (1984) (stating that the “purpose of military law is to . . . promote efficiency and effectiveness in the military establishment . . . ”).
  \item Aspin, July Memorandum, \textit{supra} note 5, at 2; \textit{MELISSA WELLS-PETRY, EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE} 85 (1993).
  \item See, e.g., U.S. Army Regulation 635-200 (authorizing discharge for unsuitability or misconduct).
  \item \textit{Id.} § 815. Commonly referred to as Article 15, non-judicial punishment allows commanders to punish service members for minor offenses not warranting court-martial. \textit{Id.}
which service members may be punished have no counterpart in the civilian criminal justice system.\(^{21}\)

Because of the military's overriding need for unquestioned obedience established through discipline, and because of the great sacrifices voluntarily made by its members, it is vital that any action which could adversely affect the ability of the military to complete its mission, or the willingness of its members to serve, be closely scrutinized.

B. The History of the Ban

Some form of prohibition on homosexuality or homosexual acts has always existed in our Armed Forces. As early as 1778, an officer of the Continental Army was drummed out of the service for committing homosexual sodomy and perjury.\(^{22}\) Still, the crime of sodomy was not codified into American military law until 1917 through the Articles of War of 1916 which deemed "assault with intent to commit sodomy" a felony.\(^{23}\) Sodomy was originally defined as anal copulation between men or between a man and a woman.\(^{24}\)

When the Articles of War were revised in 1920, sodomy itself was made a punishable offense.\(^{25}\) Additionally, the definition of sodomy was broadened to proscribe oral copulation between men or between a man and a woman.\(^{26}\) With the criminalization of sodomy, the expulsion and exclusion of homosexuals from the service was a natural consequence. Some of the original bases given for excluding homosexuals from military service included the questionable findings of early psychiatrists that

\(^{21}\) See, e.g., id. \(\S\) 888 (contempt toward officials); id. \(\S\) 889 (disrespect toward superior commissioned officer); id. \(\S\) 892 (failure to obey lawful order or regulation).


\(^{23}\) Id. at 15. The offense was embodied in Article 93 of the Articles of War of 1916. RAND CORP., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: RAND CORP. OPTIONS AND ASSESSMENT 3-4 (1993).

\(^{24}\) RAND CORP., supra note 23, at 4 (citing Jeffrey S. Davis, Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives, 131 MIL. L. REV. 55, 73 (1991)).

\(^{25}\) Davis, supra note 24, at 73.

\(^{26}\) RAND CORP., supra note 23, at 4 n.3 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES \(\S\) 443 (1921)). The offense of sodomy is currently embodied in the Uniform Code of Military Justice, 10 U.S.C. \(\S\) 925 (1988). That article states:

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense. (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Id.
indicated that a homosexual was "dangerous, . . . [and] an ineffective fighter." 27

Between World Wars I and II, the military more clearly formed its attitudes and practices in regard to homosexuality. 28 On the basis of biological criteria formulated specifically to identify homosexuals, individuals possessing certain suspect characteristics were denied enlistment. 29 During this period, many soldiers found to be homosexuals were given administrative discharges. 30 Others were court-martialed for their acts. 31

The advent of World War II had a profound impact on the status of homosexuals in the Armed Forces. For the military to successfully conscript an unprecedented number of troops, it was deemed necessary to formulate a functional policy to exclude "sodomists," individuals who were deemed unsuitable for military service. 32 Additionally, military officials were disturbed by the uneven application of the policy towards homosexuals among the individual branches. 33 The formulation of this policy continued throughout the war, resulting in a total of twenty-four revisions between 1941 and 1945. 34 Two of the major changes that resulted were the shift of focus from the "sodomist" to the homosexual, and a determination that homosexuals, if discovered, should be denied induction into the service or summarily discharged. 35

It was not until October 11, 1949, that a formal, unified policy regarding homosexuality in the military was announced. 36 The Department of Defense memorandum setting out the policy stated the following: "Homosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Services in any capacity, and prompt separation of known homosexuals from the Armed Forces [should] be made mandatory." 37

This unified policy was first revised in 1959, when Department of Defense Directive 1332.14 stated that individuals could be administratively

27. SHILTS, supra note 22, at 15.
29. Id.
30. Id. These discharges were normally less-than-honorable. Id.
31. Id.
32. Id. at 5.
33. Id.
34. Id.
35. Id.
36. Id. at 6.
37. Id. (citations omitted).
discharged if deemed to be "unfit" for service. This determination of unfitness could be based on "sexual perversion," which included sodomy and other homosexual acts. In 1965, precise rules for the process of separating these individuals were outlined. Service members in danger of receiving a less-than-honorable discharge were given the opportunity to present their case to a review board and to be represented by counsel.

This policy remained essentially intact through the Vietnam War and most of the 1970s. Still, continuing inconsistency in the standards and procedures related to the discharge of homosexuals, and numerous cases pointing to the uneven application of separation proceedings and discharges, prompted the Carter Administration to review the policy. In 1981, the new version of Department of Defense Directive 1332.14 flatly stated that anyone who had "engaged in, [had] attempted to engage in, or [had] solicited another to engage in a homosexual act" must be mandatorily discharged. It also issued a statement that "homosexuality is incompatible with military service." The reasoning behind this conclusion was stated succinctly in that directive:

The presence of such members adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers [sic]; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers [sic] who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the armed forces; to maintain the public acceptability of military service; and to prevent breaches of security.

This new directive also changed the military's policy regarding the discharge of homosexuals. In the absence of other circumstances, including violent acts, misconduct discharges were not required to be given. Service members discharged under the new policy amounted to a relatively small group. For example, from 1980 to 1991, a total of 16,919 service members were administratively discharged for homosexuality. While

38. Id. at 7.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id. at 8.
45. Id.
46. RAND CORP., supra note 23, at 8.
47. Id.
that number may seem high, discharges for homosexuality amounted to only 1.7 percent of all involuntary discharges for that period.\footnote{48} This policy remained substantially in effect until July 19, 1993.\footnote{49}

C. "Don’t Ask, Don’t Tell"

In January of 1993, President Bill Clinton directed then Secretary of Defense Les Aspin to submit a draft Executive Order that would end "discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces. . . ."\footnote{50} Secretary Aspin was told to carry out this directive in a realistic and practical manner "consistent with the high standards of combat effectiveness and unit cohesion . . ."\footnote{51} required of our military. On the basis of reports prepared by Rand’s National Defense Research Institute\footnote{52} and an Office of the Secretary of Defense Working Group,\footnote{53} the Department of Defense formulated the "Don’t Ask, Don’t Tell" policy. The new policy came under immediate attack from individuals on both sides of the debate.

The new policy first mandates that recruits will no longer be questioned regarding their sexual orientation.\footnote{54} Similarly, individuals applying for security clearances will not be subjected to this type of questioning.\footnote{55} All service members, however, are to be informed of the military’s separation policy that mandates discharge for homosexual conduct.\footnote{56} Commanders will no longer be allowed to initiate investigations solely to determine a service member’s sexual orientation,\footnote{57} but will be allowed to do so if the investigation is based on “credible information that a basis for discharge or disciplinary action exists.”\footnote{58}

The new policy also clearly defines what type of actions will be viewed as “homosexual conduct.” In addition to sexual contact between members

\begin{footnotes}
\item[48] Id. at 8-9.
\item[49] On that day, Secretary of Defense Les Aspin announced the military's new "Don't Ask, Don't Tell, Don't Pursue" policy. Aspin, July Memorandum, supra note 5.
\item[50] President's Memorandum for the Secretary of Defense on Ending Discrimination on the Basis of Sexual Orientation in the Armed Forces, 29 WEEKLY COMP. PRES. DOC. 112 (Jan 29, 1993).
\item[51] Id.
\item[52] RAND CORP., supra note 23.
\item[53] Summary Report of the Military Working Group, contained in Memorandum for the Secretary of Defense (1 July 1993).
\item[54] Aspin, July Memorandum, supra note 5, at 1.
\item[55] Id. at 3.
\item[56] Id. at 1.
\item[57] Id.
\item[58] Id.
\end{footnotes}
of the same sex, these actions include statements of one’s sexual orientation, public displays of affection between members of the same sex, or marriage or attempted marriage to a member of the same sex. Still, even a statement regarding one’s homosexuality will only raise a presumption that the individual desires, or intends to engage in, homosexual conduct, a presumption which is rebuttable.

D. The Theory of the Ban—Possible Risks and Consequences of Open Homosexuality in the Armed Forces

In an effort to counter the claim that homosexuality is incompatible with military service, many plaintiffs challenging their discharge for homosexuality have gone to great lengths to make their individual service records an important aspect of the litigation. Essentially, the argument goes: “If homosexuality is incompatible with military service, how could I have been so successful while I served?” This argument, which focuses on the individual, is seductive, but utterly misses the point. It is homosexuality as a lifestyle that is considered incompatible with military service. As the Supreme Court stated in Turner v. Safley, “[w]hen accommodation of an asserted right will have a significant ‘ripple effect’ on fellow . . . [service members], courts should be particularly deferential to the informed discretion of [military] officials.” This section will examine the ripple effect that overturning all forms of prohibition on homosexuality would have on the military community and its ability to carry out its mission. It should be noted that the concerns expressed in this section stem solely from the possible effects that an outright lifting of the ban would have on the Armed Forces.

As a group, gays and lesbians have never been allowed to serve as openly homosexual soldiers, sailors, airmen or marines. Although there are

59. Id.
60. Id.
61. Id.
62. Aspin, July Memorandum, supra note 5.
63. See, e.g., Watkins v. United States Army, 847 F.2d 1329, 1331 (9th Cir. 1988), withdrawn, 875 F.2d 699 (9th Cir. 1989) (describing the discharged soldier as “one of [unit’s] most respected and trusted soldiers”); Steffan v. Cheney, 780 F. Supp. 1, 5 (D.D.C. 1991) aff’d sub nom. Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (noting that the discharged Naval Academy midshipman was “academically . . . in the top ten percent of his class [and] . . . slated for one of the most prestigious assignments after graduation”).
64. 482 U.S. 78, 90 (1987). Turner dealt with the Court’s balancing of two interests: the constitutional rights of prison inmates and the complex task of running a state penal system. Id. at 84-85. Similar interests are involved here: the balancing of soldiers’ constitutional rights and the complex task of running the United States Armed Forces.
individual cases of homosexuals who were open about their sexual orientation and still managed to avoid discharge, these are the exception, not the rule.\textsuperscript{65} Also, while the ability of homosexuals to serve as outstanding service members is unquestioned, the actual effects that dropping the prohibition would have on the military's combat readiness is simply unknown. Several areas of concern are pressing and must be either answered comprehensively, or at least explored more fully, before courts jump headlong into the fray and overturn the new policy. The areas that this section will examine include the privacy interests of heterosexual service members, the exceptional medical needs of homosexual service members, and the threat that open homosexuality poses to the recruiting and retention of service members. These concerns are more practical and more easily expressed than the concerns that many military officials raise involving unit cohesion and combat effectiveness, vague terms that define a unit's ability to wage war. While those concerns are certainly vital, this Comment will not discuss the effect open homosexuality would have on that aspect of the military's ability to fulfill its mission.

1. Privacy Interests of Heterosexual Soldiers

At the end of a work day, service members do not leave the installation and re-enter civilian life. Many of them go to barracks rooms, large open-bay barracks, or even sleeping berths on board ships. While service members do enjoy the right of privacy, that right is necessarily diminished in light of the exigencies of the military mission. The diminishment of that right has not, however, extended to the removal of gender segregation in the Armed Forces.\textsuperscript{66} On military bases worldwide, separate living quarters must be provided for male and female service members. Even in the field, separate tents must be erected to accommodate men and women.

Gender segregation also extends to the military's prohibition on members of the opposite sex occupying the same barrack room or using the same bathroom facilities. It cannot be disputed that quartering men and women together would constitute a violation of both sexes' right of privacy.\textsuperscript{67} If males and females desired to share a barrack room, such a

\begin{itemize}
  \item \textsuperscript{65} SHILTS, supra note 22, passim.
  \item \textsuperscript{66} The common sense reasoning behind gender segregation was discussed during Senate debate on the new policy. 139 CONG. REC. S11,157-04, S11,190 (daily ed. Sept. 9, 1993) (statement of Sen. Coats).
  \item \textsuperscript{67} See, e.g., Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1988) (during urinalysis, observer of individual providing sample should be of same sex); Rider v. Pennsylvania, 850 F.2d 982 (3d Cir. 1988) cert. denied, 488 U.S. 993 (1988) (because hiring female guards to oversee female prisoners was often necessary, hiring process did not
living arrangement, even if purely platonic, would surely be viewed as contrary to good morale and discipline. Military barracks are a natural extension of a service member’s daily life, and as such, must be maintained in a professional manner. They are not college dormitories.

This prohibition takes on a strange twist when one attempts to apply it to open homosexuality in a military context. Realistically, the military would be forced to make a determination of whether to extend that prohibition to forbid same-sex couples from occupying the same barrack room. Additionally, the military would have to decide if they should give any credence to the unwillingness of heterosexuals to be assigned to share quarters with a service member sexually attracted to members of the same sex. If forcing men and women to share a shower or a room is violative of either sex’s right of privacy, how can it seriously be argued that forcing, for example, a heterosexual woman and a lesbian to shower together is not equally violative of that same right?

Even an attempt to set up heterosexually and homosexually segregated barracks would likely be insufficient to resolve concerns with the military’s standing prohibition on sodomy. In accommodating the concerns of all service members, heterosexual and homosexual, the military would be forced to accept assurances from homosexual service members that no sexual relationship with their barrack mate would occur, a promise that could possibly be broken. Moreover, even if the military was forced to drop its prohibition on sodomy, the same concerns that arise in a heterosexual male-heterosexual female barrack pairing would be valid if raised in a homosexual male-homosexual male barrack pairing; morale and discipline would likely be affected.

Assuming that the military could somehow come up with a scheme that protected the privacy interests of all parties concerned, the scope of such an undertaking would undoubtedly be extremely cost prohibitive. With the intense ongoing debate over the funding of our Armed Forces, and the budget cutting that the military has endured in the last several years, it seems unlikely that any workable scheme that offers adequate protection to all service members could be formulated.

2. Exceptional Medical Needs of Homosexual Soldiers

Many homosexuals have served in the military. Still, the previous ban likely had the effect of discouraging many who wished to serve from discriminate against male guards).

68. SHILTS, supra note 22, passim.
entering the Armed Forces. For those who did enter, it is also likely that
the strict policy against homosexual conduct inhibited many of those
individuals from engaging in homosexual behavior. If the ban on
homosexuals serving in the military was lifted entirely, it is rational to
assume that more homosexuals would enter the service. Although it is
likely that a large percentage of homosexuals engage in a lifestyle quite
similar to that of the average heterosexual, it must also be recognized that
many homosexuals adopt lifestyles and engage in sexual practices that are
relatively uncommon in straight society.\footnote{69}

For example, research indicates that homosexual men engage in
significantly more sexual relationships than the average heterosexual
male.\footnote{70} The results of one study involving 93 male homosexuals showed
the mean number of lifetime sexual partners for the subjects to be 1,422.\footnote{71}
The range for this particular group was from 15 to 7,000 partners.\footnote{72} It is
this behavior that frequently places homosexual men in a high risk group
for AIDS.\footnote{73} Even awareness of the threat of AIDS has not conclusively
been shown to be effective in reducing the disease's spread. One report
stated that a large percentage of "homosexual men appear to be reverting
back to risky sexual behavior, threatening to undo gains made in halting
the spread of AIDS . . . ."\footnote{74}

In addition to the threat of AIDS, the promiscuity of a significant
percentage of homosexual men places them in greater danger of contract-
ing other sexually transmitted diseases, and sustaining injuries unique to
their sexual practices.\footnote{75} The increased demand for treatment that could
result from a large influx of members of a high risk group would wreak
havoc on the military community, a community that is dedicated to
providing complete medical treatment to its members.

Moreover, the military mission requires that its members not only
remain in an extremely high state of physical readiness, but also a high
state of mental readiness. Military life, by its very nature, is likely to
induce stress in any service member. Studies have shown, however, that

\footnote{69} WELLS-PETRY, supra note 17, at 93, 97, 101.
\footnote{70} Id. at 93.
\footnote{71} Id. at 94 (citing J. W. Gold, Unexplained Persistent Lymphadenopathy in
Homosexual Men and the Acquired Immune Deficiency Syndrome, 64 MED. 203 (1985)).
\footnote{72} Id.
\footnote{73} WELLS-PETRY, supra note 17, at 94-95.
\footnote{74} Rebecca Kolberg, Safe Sex Relapse Poses AIDS Threat, UPI (June 22, 1990).
\footnote{75} Roger A. Roffman et. al., Continuing Unsafe Sex: Assessing the Need for AIDS
Prevention Counseling, 105 PUB. HEALTH REP. 202-208 (1990) (high risk behavior included
unprotected oral sex, unprotected anal intercourse, fisting, (anal-fist contact) rimming, (anal-
oral contact) and shared sex toys).
homosexuals are additionally subject to unique mental health concerns stemming from the "emotional toll of secrecy, disapproval and, often, internalized shame. . ." These concerns may be the reason behind studies indicating higher rates of substance abuse among the homosexual population, as well as higher rates of suicide contemplation.

If the military is to function effectively, it must be allowed the latitude to "assure the enlistment of personnel free of medical conditions which would cause excessive lost time from duty, medically adaptable to global geographic areas and capable of performing duties without aggravation of existing physical or medical conditions." If the studies regarding the sexual practices of homosexuals and the medical and psychological consequences of those practices are even partially accurate, they raise serious concerns over the wisdom of removing the restrictions on open homosexuality in the military.

3. Recruiting and Retention

The peacetime military is solely a volunteer force. Absent conscription, it is vital that the military be able to recruit the best and brightest young men and women to serve. Still, it is common knowledge that entering the military means subjugating the needs and desires of the individual to the needs of the group. Also, the level of expertise required of service members if our military is to succeed in wartime demands unquestioned obedience and rigid discipline. Convincing those talented individuals to surrender so many of the freedoms enjoyed by the average American is obviously a difficult task.

To attract these individuals, it is necessary that the Armed Forces guarantee an environment that is morally acceptable to them. If unable to guarantee that environment, consequences could be disastrous. If talented individuals are unwilling to join because they fear, rightly or wrongly, that the lifestyle they are entering will be offensive to their moral or religious beliefs, military readiness suffers in two distinct ways. First, the number of those willing to serve dwindles. Second, to make up for the loss of

77. Jay P. Paul et al., Gay and Alcoholic: Epidemiologic and Clinical Issues, 15 ALCOHOL HEALTH AND RES. WORLD 151 (1991) (study showed that 30% of gay and lesbian subjects were problem drinkers).
78. Raymond, supra note 76 (noting that a study of 1917 lesbians found that over 50% of the group had contemplated suicide. Twenty percent of those individuals had attempted suicide at least once).
talented individuals, the military is forced to lower its entrance standards to maintain adequate force levels.

Opinion polls conducted nationally and among members of the Armed Forces clearly show a negative attitude towards homosexuality in general, and towards homosexuals in the military in particular. While many would view society’s negative perception of homosexuality as an outdated notion based solely on stereotypes, an all-volunteer fighting force does not have the luxury of ignoring public opinion. Indeed, it is likely that many would see allowance of open homosexuality in the military as tacit governmental approval of that lifestyle, a view that could do nothing but damage the military’s efforts to maintain its high recruiting standards. The military’s ability to retain skilled, senior service members could be similarly affected. The loss of a large number of experienced leaders would have a profound impact on the ability of the military to adequately train and supervise its members.

III. The Constitutionality of The Ban and The Likely Constitutionality of “Don’t Ask, Don’t Tell”

Service members dismissed because of their homosexuality have often attempted to have the military’s ban declared unconstitutional. In their quest to do so, they have employed several different theories including substantive due process, violation of equal protection, and the deprivation of their First Amendment rights. This section will first examine the status-conduct dichotomy that has shaped many of the cases that have reached the trial stage. It will then briefly explain the individual theories, and why courts have generally been unwilling to apply any of them to the military’s ban. Finally, it will discuss the likely constitutionality of “Don’t Ask, Don’t Tell.”

A. Homosexual Status v. Homosexual Conduct

The military’s pre-“Don’t ask, Don’t tell” policy on homosexuality made discharge mandatory for individuals who had “engaged in, ha[d] attempted to engage in, or ha[d] solicited another to engage in a homosexual act.” On its face, the policy did not seem to conflict with the

80. RAND CORP., supra note 23, at 438-50 (in polls conducted by different organizations, percentage of those approving of homosexual lifestyle never exceeded 50%).
81. Id. at 451-62 (the percentage of male service members opposed to homosexuality as a lifestyle or lifting the ban on homosexuals was consistently higher than the percentage of females).
82. Directive, supra note 44.
holding of *Robinson v. California*, a case in which the Supreme Court declared it unconstitutional to penalize an individual based solely on her "status."  

Status has been defined as an attribute of a person that remains even after that person has ceased to engage in any specific category of conduct. Nevertheless, it is often difficult to determine where conduct ends and status begins. It has been argued that status itself is proof that the individual has engaged in homosexual conduct in the past, or is likely to do so in the future. Still, an individual can claim to be a homosexual although they have never and may never engage in homosexual conduct. Indeed, in many cases involving discharge for homosexuality, the "status" of the individual alone seemed to be the primary basis for that individual's discharge. The practical application of the ban forced courts to struggle with this dichotomy.

Courts struggled because not all of the ways that a service member's homosexuality comes to light necessarily involve prohibited homosexual "conduct." Indeed, there are several ways a homosexual serving in the armed forces can come out or be forced out of the closet. For example, a service member could be discovered committing sodomy with a person of the same sex. In that instance, the individual not only committed the crime of sodomy, an offense punishable under the Uniform Code of Military Justice, the individual also engaged in a homosexual act, an act warranting mandatory discharge. Here, it is the conduct of the individual that is prohibited and which serves as the basis for discharge. Discharges involving such proved conduct were rarely challenged.

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84. *Id.* at 666. *Robinson* dealt with a California statute that made it unlawful to be addicted to narcotics. The defendant was arrested and charged not because of possession or use of drugs, but because he had needle marks on his arms. At his criminal trial, the jury was allowed to convict Robinson without specifying if he had been punished for unlawful conduct as evidenced by the needle marks, or merely for his status as an addict. *Id.* at 663.
87. See, e.g., Ben-Shalom v. Sec'y of the Army, 489 F. Supp. 964 (E.D. Wis. 1980) ("Ben Shalom I") (challenging discharge of a lesbian drill sergeant who announced her sexual orientation); Pruitt v. Weinberger, 659 F. Supp. 625 (C.D. Cal. 1987), modified, 943 F.2d 989 (9th Cir. 1991) (challenging discharge of a lesbian chaplain who had acknowledged her sexual orientation); Steffan v. Cheney, 733 F. Supp. 121 (D.D.C. 1989), rev'd, 920 F.2d 74 (D.C. Cir 1990) (challenging discharge of Naval Academy midshipman who admitted he was gay after being questioned by Academy officials).
Also, an individual might be seen engaging in a public display of affection with a member of the same sex. Such displays of affection between members of the same sex, including hand holding or kissing, can obviously raise questions as to a service member's sexual orientation. Although these types of displays are not forbidden by the Uniform Code of Military Justice, they can still be viewed as types of "homosexual acts." Although not criminal, these actions are nevertheless "conduct," and therefore constitute stronger proof of an individual's homosexuality.

In both of the previous examples, some form of conduct was viewed as proof of the sexual orientation of the service member. That conduct normally fit neatly within the wording of the ban. Unfortunately, in most of the cases brought by discharged homosexual service members, this conduct did not occur. Rather, they identified themselves as homosexuals through their responses to questions regarding their sexual orientation, or through their on-duty or off-duty statements that they were indeed homosexuals. Absent any proof of the service member having engaged in prohibited conduct, it would seem intellectually dishonest to state that their status was not at issue.

Nevertheless, most courts have been unwilling to find that a discharge based even solely on an individual's statement that she is homosexual is violative of the Supreme Court's edict in Robinson v. California. For example, in Ben-Shalom v. Marsh91 (Ben-Shalom II), Miriam Ben-Shalom was denied reenlistment into the Army Reserve, not on the basis of alleged or proven conduct, but on the basis of her verbal acknowledgment of her homosexuality.92

Upholding the Army's action, the Seventh Circuit Court of Appeals found that the admission of homosexuality alone was "compelling evidence that [Ben-Shalom had] in the past and [was] likely to again engage in such conduct."93 That court also stated that the Army did not have to close its eyes to the practical realities of what Ben-Shalom's statement indicated,

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89. See, e.g., Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990) (noting fact that the discharging commanding officer's suspicion had been aroused when a naval officer was seen in company of known homosexual sailor. This resulted in questioning as to the officer's sexual orientation).
90. Indeed, the "Don't Ask, Don't Tell" policy specifically prohibits any "[b]odily contact [between service members] which a reasonable person would understand to demonstrate a propensity or intent to engage in [homosexual acts]." 10 U.S.C.A. § 654(f)-(3)(B) (West Supp. 1995).
92. Id. at 464.
93. Id.
even in the absence of any proof of prohibited conduct. By allowing evidence of status to substitute for evidence of conduct, the holding of Ben-Shalom II indicates just how far courts were willing to go in their quest to uphold the ban. While the status-conduct distinction seemed to be a promising weapon against the ban, in many cases, courts managed to avoid the prohibition on status-based penalties with regard to homosexuality.

B. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment essentially prohibits the government's unequal treatment of persons who are similarly situated. Traditionally, courts have been reluctant to strike down legislation on equal protection grounds in deference to the complex and difficult political process. In its efforts to limit the judiciary's second guessing of legislative motives, the Court has fashioned various levels of review under which classifications claimed to violate equal protection are scrutinized.

The highest level, strict scrutiny, involves classifications that deal specifically with "suspect classes." Such classifications, usually involving race or alienage, are seen as inherently suspect. Because these classifications are generally regarded as relying on stereotypes, disadvantaging those who are politically powerless, or attacking an individual based on some immutable characteristic, they warrant the protection of strict scrutiny.

If legislation is based on such a classification, or if it impinges on a fundamental interest, the lawmaking body must show that the governmental interest involved is "compelling." Moreover, it must prove that the legislation is narrowly tailored to satisfy that interest. Only then will the legislation be found constitutional. As a practical matter, an announcement by a court that it is employing strict scrutiny essentially sounds a death knell for the statute.

94. Id.
96. Id. § 14.3, at 576. Strict scrutiny can also be triggered if the classification impinges on a "fundamental interest." Id. § 11.4, at 378-379.
97. Id. § 14.3, at 576.
99. Id.
100. Not since Korematsu v. United States, 323 U.S. 214 (1944), has a statute subjected to strict scrutiny survived. In Korematsu, Japanese-Americans were contesting a military order excluding all persons of Japanese ancestry from the West Coast. The order was upheld because of the exigent circumstances of World War II. Id. at 217-19.
The next level of review, intermediate or mid-level scrutiny, is applied in cases where the classification affects members of a quasi-suspect class. This class typically includes such distinctions as gender or illegitimacy. If subjected to this standard of review, the classification must address an "important governmental objective," a lower standard than the compelling objective requirement of a strict scrutiny analysis. Additionally, the legislation is only required to be substantially related to the important objective. The constitutionality of legislation subjected to this level of review is by no means a foregone conclusion.

The last level, "mere rationality," is applied to classification schemes that affect neither suspect nor quasi-suspect classes. This level is the most deferential to legislatures because it only requires that some rational relation exist between the classification and the purpose to be achieved. Even absent some articulated rationale, courts will often supply one to justify upholding the legislation. The application of this level of review generally assures the legislation's constitutionality.

If a "suspect" or "quasi-suspect" equal protection attack on the military's ban on homosexuality was to succeed, homosexuals would first need to be deemed a suspect or quasi-suspect class. Homosexuality seems to meet several of the requirements. Arguably, homosexuals are subjected to stereotypes, and the ban on homosexuals could be said to be based on the stereotype of homosexuals as ineffective fighters. Additionally, many gay and lesbian rights advocates and members of the scientific community have claimed that homosexuality is a genetic characteristic, and

103. Clark, 486 U.S. at 461.
104. Id.
105. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (holding that where individuals possess characteristics relevant to interests the state has the authority to limit or advance, state need only show a rational means intended to reach a legitimate end); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 581 (9th Cir. 1990) (finding that homosexuality is not an immutable characteristic, and discounting claims that homosexuals were politically powerless).
106. See Railway Express Agency Inc. v. New York, 336 U.S. 106, 110 (1949) (In upholding regulation, Court conjectured at possible reasons state would pass a law forbidding truck owners from selling space on the side of their vehicles for advertising, while still allowing them to advertise their own business on their vehicles).
107. SHILTS, supra note 22, at 15.
therefore immutable.\textsuperscript{103} As a minority, homosexuals may also have a justifiable claim that they are politically powerless. In spite of homosexuality's seeming applicability to a suspect or quasi-suspect class qualification, courts have traditionally declined to extend the application of that status to homosexuals, disputing claims that homosexuals are politically powerless,\textsuperscript{109} or that their sexuality is something beyond their own choice.\textsuperscript{110}

Absent a suspect or quasi-suspect class qualification, courts reviewing the constitutionality of the military's exclusion policy consistently subjected it to a mere rationality analysis, the most deferential standard of review. Indeed, courts passing on the ban invariably found it to be constitutional.

C. Substantive Due Process

Rulings involving substantive due process have generally settled the notion that the Fourteenth Amendment protects certain aspects of life and liberty from governmental interference.\textsuperscript{111} In order to warrant this protection, the aspect of life or liberty that is sought to be protected must be recognized as a "fundamental interest."\textsuperscript{112} One of these fundamental interests is the right of privacy, a penumbral right that, while not specifically mentioned in the Constitution, has received limited recognition by the Supreme Court.\textsuperscript{113}

Attempts by homosexuals to have this right construed to protect same-sex relations were effectively quelled by the Court in \textit{Bowers v. Hardwick},\textsuperscript{114} a case involving a male homosexual's challenge to Georgia's sodomy law. In reaching its finding that the right of privacy did not extend to homosexual sodomy,\textsuperscript{115} the Court held that the privacy interest protects only behavior that results from a marital relationship, or at least between members of the opposite sex.\textsuperscript{116} Because state marriage laws

\begin{itemize}
\item \textsuperscript{109} See, e.g., \textit{High Tech Gays}, 895 F.2d at 574 n.10 (asserting that evidence of state and local ordinances prohibiting discrimination against sexual minorities belied claim that homosexuals were politically powerless).
\item \textsuperscript{110} \textit{Id.} at 573 (stating that homosexuality is strictly behavioral, and "fundamentally different from . . . race, gender, or alienage").
\item \textsuperscript{111} \textit{NOWAK & ROTUNDA, supra note 95, § 11.5-11.7, at 380-94.}
\item \textsuperscript{112} \textit{See id.} § 11.4, at 378-79.
\item \textsuperscript{113} Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (stating that the "First Amendment has a penumbra where privacy is protected from governmental intrusion").
\item \textsuperscript{114} 478 U.S. 186 (1986).
\item \textsuperscript{115} \textit{Id.} at 191.
\item \textsuperscript{116} \textit{Id.} at 190-91.
\end{itemize}
typically prohibit members of the same sex from being married, it is effectively impossible for participants in a homosexual relationship to enjoy the protection reserved for legally recognized families.

Admittedly, heterosexuals, homosexuals, and bisexuals are all capable of committing sodomy as it is typically defined. Unfortunately, the Court never answered the more direct question of whether only homosexuals may be penalized for committing sodomy, or if any person engaging in the prohibited act may be charged, regardless of their sexuality or sex partner.

Had the right of privacy been found broad enough to protect the rights of same-sex couples as it has traditionally protected cross-sex couples, it would have been a powerful weapon against a military ban premised on sexual conduct the military regards as criminal. Still, by finding that there was no fundamental interest to engage in homosexual sex, the holding of *Bowers v. Hardwick* effectively stifled the use of substantive due process as a means of overturning the military's ban on homosexuality.

**D. First Amendment**

In addition to equal protection and substantive due process attacks, opponents of the ban have suggested using the protections of the First Amendment as a basis for overturning the prohibition. This theory rests on two prongs. First, the First Amendment prevents the government from inhibiting free expression based on the content of the expression, \(^{117}\) whether the expression is verbal (pure speech) or expressive conduct (symbolic speech). \(^{118}\) Second, the First Amendment inhibits government action that intrudes on a person's right to associate with others for religiously or politically expressive activities. Individuals discharged not for homosexual conduct, but for admitting they were homosexual, have claimed that the statement, "I am a homosexual," constitutes protected speech, and cannot therefore be a basis for punitive action. \(^{119}\) Courts passing on this claim have generally held that because being homosexual

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117. See Nowak & Rotunda, supra note 95, §§ 16.5-16.7, at 937-38.
119. Ben-Shalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989), rev'd, 881 F.2d 454 (7th Cir. 1989) ("Ben-Shalom II") (district court accepted argument that plaintiff's First Amendment freedoms of expression and association were violated by Army Regulation mandating discharge for individuals who verbally expressed their homosexuality. Because a mere statement regarding one's sexual orientation could never be dispositive evidence of their having engaged in homosexual conduct, that statement could not be a basis for punitive action).
is grounds for discharge from the Armed Forces, such speech constitutes an admission, and is not protected speech.\footnote{120}

The associational prong could be implicated if individuals were forbidden from forming support groups or clubs with homosexuality as their focus. Still, courts have also recognized the military's power to limit the associational rights of service members. For example, commanders may declare areas or establishments off limits for service members.

\subsection*{E. The Likely Constitutionality of "Don't Ask, Don't Tell"}

As the foregoing discussion has shown, courts have gone to great lengths to defer to the military's decision to deny homosexuals access to serve in the Armed Forces. Recently, however, several courts have accepted some of the constitutional arguments previously raised by plaintiffs attacking the military's ban on homosexuality. For example, in \textit{Cammermeyer v. Aspin},\footnote{121} a federal district court in Washington found for Cammermeyer on the grounds that the policy violated both equal protection and substantive due process.\footnote{122} While this holding did not extend suspect class status to the plaintiff, it held that the regulation was based solely on prejudice, and therefore failed even a rational basis review.\footnote{123}

Also, in \textit{Meinhold v. Department of Defense},\footnote{124} the Ninth Circuit Court of Appeals upheld an injunction barring the Navy from discharging Meinhold on the basis of his statement "I am gay."\footnote{125} The court, however, limited its decision to the particular facts before it, refusing to uphold the lower court's nationwide injunction on discharging homosexuals under the new policy or to pass on the constitutionality of the new policy.\footnote{126}

Based on the Supreme Court's tradition of deferring to Congress and the Executive's control of the military, and the care taken by those branches in formulating the new policy, as evidenced by the extensive legislative history generated by the debate on the ban, "Don't Ask, Don't Tell" will likely survive the "rational basis" analysis that has traditionally

\begin{itemize}
\item \footnote{120} Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) ("Ben-Shalom II"), \textit{cert. denied}, 494 U.S. 1004 (1990).
\item \footnote{121} 850 F. Supp. 910 (W.D. Wash. 1994).
\item \footnote{122} \textit{Id.} at 929.
\item \footnote{123} \textit{Id.}
\item \footnote{124} 34 F.3d 1469 (9th Cir. 1994).
\item \footnote{125} \textit{Id.} at 1480.
\item \footnote{126} \textit{Id.} at 1479-80.
\end{itemize}
been applied to the military's ban on homosexuals. Indeed, at least one federal district court has declared the military's new policy constitutional.

IV. THE LIKELY EFFECTS OF “DON'T ASK, DON'T TELL”

Serving as a member of the Armed Forces of the United States is not a right; it is a privilege. With the advent of “Don’t Ask, Don’t Tell,” homosexuals have now been given an unprecedented opportunity to serve as members of the Armed Forces without the stigma of having to lie about their sexuality during their military career, a barrier which prevented many homosexuals from even entering the military and cost many of them their careers upon reenlistment or application for a security clearance.

While homosexual conduct is still forbidden, the new policy does discourage commanders from actively seeking out homosexuals absent outrageous behavior that raises the concerns and suspicions of fellow service members. Moreover, even a statement by an individual that she is homosexual only raises a rebuttable presumption that she desires or intends to engage in homosexual conduct, a presumption that the service member is given the opportunity to rebut. By employing a modicum of self-restraint and discretion, homosexual service members will now be able to serve proudly in all branches of the Armed Forces.

Had the ban been lifted entirely, the military would likely have suffered immediate consequences involving the drain of a significant number of skilled soldiers, an increased unwillingness of civilians to volunteer for military service, and a breakdown in society's view of its Armed Forces. By implementing a policy that is sensitive to both the desire of homosexuals to serve as members of the Armed Forces, and the very real concerns of service members and military commanders, the Clinton Administration has struck an excellent balance.

127. Schleuter, supra note 13, at 430.
128. Thomasson v. Perry, No. 95-252-A, 1995 U.S. Dist. LEXIS 11420 (E.D. Va. Jun. 8, 1995). Thomasson, a Lieutenant in the Navy, had openly announced his homosexuality. At his administrative discharge hearing, he declined to produce any evidence that might rebut the presumption that he had a propensity to engage in homosexual conduct. Id. at *9. After dismissing the plaintiff's equal protection, substantive due process and First Amendment challenges to the new policy, the judge refuted Thomasson's claim that the presumption raised by his statement was irrebuttable by noting that three individuals had already been successful in avoiding administrative discharge by producing evidence sufficient to rebut the presumption. Id. at *35-*37.
129. E.g., Reeves v. Ainsworth, 219 U.S. 296 (1911); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976); Pauls v. Sec'y of Air Force, 457 F.2d 294 (1st Cir. 1972).
If the policy is implemented properly, it could have a profound impact on society's perception of homosexuality and homosexuals in the military. As more and more homosexuals enter the Armed Forces, the validity of the concerns raised by military commanders will be put to the test. While it might seem unfair to force homosexual service members to refrain from engaging in their chosen lifestyle, they should recognize the possible negative impact that their lifestyle could have on the ability of the military to fulfill its mission. The military should never be used as a tool for social experimentation or change.

V. CONCLUSION

With the advent of "Don't Ask, Don't Tell," the military has finally taken a long, reasoned look at its policy on homosexuals in the Armed Forces. Unable to ignore the outstanding service records of thousands of gay and lesbian service members, it has formulated a new plan that will allow homosexuals thinking about entering the Armed Forces, and those who are currently in uniform, to serve proudly. Due to the possible effects that open homosexuality could have on the ability of the military to complete its assigned missions, homosexual service members have been asked to trade their civilian lifestyle for one that is wholly military until they leave the service. This sacrifice, like all other sacrifices made by soldiers, sailors, airmen, and marines, is for the good of the United States Armed Forces, and it should be made willingly.

Daniel R. Plane