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Gail Brooke Goldman

THE MILITARY'S EXCLUSION OF HOMOSEXUALS: AN *INDEFENSIBLE* POLICY*

*Gail Brooke Goldman & Berylin Tancer***

Not long ago, military concerns of patriotism and loyalty kept African-Americans from serving with their fellow Americans in the armed forces. The United States Navy set forth its justification for banning African-Americans from service in a 1941 Department Memo which stated in part:

> The close and intimate conditions of life [in the armed forces], the necessity for the highest possible degree of unity and esprit-de-corps; the requirement of morale - all these demand that nothing be done which may, adversely affect the situation. Past experience has shown irrefutably that the enlistment of Negroes other than for mess attendants leads to disruptive and undermining conditions. It should be pointed out in this connection that one of the principle objectives by subversive agents in this country attempting to break down the existing efficient organization is by demanding participation for minorities in all aspects of defense, [because] such participation tends to disrupt present smooth working organizations . . . The loyalty and patriotism should be such that there be no desire on their part to weaken or disrupt the present organization.[1]

In keeping with the political temper of the time that claimed unity through segregation, racial discrimination was rigidly enforced throughout most of the military. The policy was finally terminated on July 26, 1948 when President Truman issued his bold executive

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** BLS Class of 1994.

[1] Memorandum G.B. #240 Serial #201, Chairman of the General Board to Secretary of the Navy, *Enlistment of Men of Colored Race in Other Than Messmen Branch* (1941) *reprinted in* MORRIS MACGREGOR, INTEGRATION OF THE ARMED FORCES 1940-1965 (1981).

order establishing equality of treatment and opportunity for all racial groups in the armed forces.[2] The collapse in morale and disruption of order in the armed services feared by the segregationists never occurred, nor did the public rise up in arms. On the contrary, the military overcame its prejudice, as Truman had anticipated. Today, African-Americans have obtained high-ranking positions of leadership within the armed services.[3] Admittedly, the road was not always smooth, nor have individual prejudices fully disappeared.[4] However, with the passage of time, African-American military personnel have been evaluated according to individual achievement and not skin color.

On January 30, 1993, President Clinton had the opportunity to step into Mr. Truman's shoes and end the military's present policy barring homosexuals from serving in the armed forces.[5] In contrast to the bold initiative taken by his predecessor, President Clinton offered tentative answers and a murky message as he put the discrimination issue on hold.[6] Confronted with strong opposition to his initial efforts by top military officials,[7] President Clinton implemented a six month waiting period during which the current policy will be reexamined by members of Congress and the

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[2] Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948) ("by virtue of the authority vested in me as . . . Commander in Chief of the armed services, it is hereby ordered . . . that there shall be equality of treatment and opportunity for all persons in that armed services without regard to race, color, religion or national origin.").

[3] This assertion is evidenced by the appointment of General Colin Powell who is the first African-American to chair the Joint Chiefs of Staff.

[4] *See* Stinson v. Hornsby, 821 F.2d 1537, 1540 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988) (member of National Guard claimed he had been discriminated against based on his race).

[5] Gwen Ifill, *Clinton Accepts Delay in Lifting Military Gay Ban*, N.Y. TIMES, Jan. 30, 1993 at 1.

[6] *Id.*

[7] *See* John H. Cushman, Jr., *Top Military Officers Object to Lifting Homosexual Ban*, N.Y. TIMES, Nov. 14, 1992, at 9.

Executive branch.[8] While the Pentagon and the Legislature attempt to reach a permanent solution, two interim changes have been implemented: the military will be enjoined from inquiring about the sexual preference of new recruits; and, avowed homosexuals will not be formally discharged, but rather will be placed in the unpaid standby reserves.[9]

During this hiatus, the political branches of the government will debate the validity of the Department of Defense Directive[10] that purports to explain and justify the military's stance regarding homosexuals. The Directive reads in pertinent part as follows:

> 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 impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Armed Forces to...foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; to facilitate...service of members who frequently must live and work under conditions affording minimal privacy; to recruit and retain members of the armed forces; to maintain the public acceptability of military service. Homosexual acts are crimes under the Uniform Code of Military Justice.[11]

The military's ban against homosexuals resembles past discriminatory regulations against African-Americans since it deems a certain class of persons unsuitable for military service. The Military's interest in maintaining discipline, good order and

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[8] *Id.*

[9] Gwen Ifill, *supra* note 5.

[10] THEODORE R. SARBIN & KENNETH E. KAROLS, DEFENSE PERSONNEL SECURITY RESEARCH AND EDUCATION CENTER, NONCONFORMING SEXUAL ORIENTATIONS AND MILITARY SUITABILITY A9 (Dec. 1988) (*citing* Department of Defense Directive 1332.14 § h.1) (on file with *The Journal of Contemporary Health Law and Policy*).

[11] *Id.*

morale, the justification for the current ban, are as unfounded as theories which were applied to exclude African-Americans before 1948. At least two recent scientific studies commissioned by the Department of Defense refute the notion that gays pose a security or morale threat.[12] A 1989 survey commissioned by the military maintains that: "homosexuals more closely resemble those who successfully adjust to military life than those who are discharged for unsuitability." [13] In light of evidence which disproves any theory of incompatibility, the current directive can be understood as a regulation which keeps company with racism by excluding men and women solely because of an immutable characteristic: their sexual orientation.

And yet, due to the personal nature of one's sexual preference, the current directive bodes an even more ominous eclipse to constitutional interests of free speech, due process and privacy than past regulations which discriminated among service members according to race. The directive defines a homosexual as any person who takes part in homosexual activity or anyone who is not homosexually active, but who, through acts and statements, manifests a propensity to engage in homosexual conduct.[14] The wide scope of this definition justifies military disqualification procedures that are deliberately invasive of a person's thoughts, actions and speech, and leave homosexual service members defenseless against otherwise unconstitutional violations. Despite such grave infringements, few if any legal remedies are available to these members. Courts have continually enforced the directive in deference to overriding military interests, regardless of whether the ban was challenged on principles of First Amendment rights,

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[12] United States v. Meinhold, 1993 WL 15899 (C.D. Cal. 1993) (*citing* Theodore R. Sarbin & Kenneth E. Karols, *supra* note 10, at 33 and MICHAEL A. MCDANIEL, PRE SERVICE ADJUSTMENT OF HOMOSEXUAL AND HETEROSEXUAL MILITARY ACCESSIONS 19 (1989).

[13] MICHAEL A. MCDANIEL, *supra* note 12, at 19.

[14] *See* THEODORE R. SARBIN & KENNETH E. KAROLS, *supra* note 10, at A-9.

procedural and substantive due process or equal protection.[15]

Meinhold v. United States Department of Defense[16] represents a new attempt by the courts to end the military ban using the Equal Protection Clause. In *Meinhold*, the United States District Court for the Central District of California rescinded the plaintiff's discharge and enjoined the military from discharging or denying enlistment to any person based on sexual orientation.[17] The court found that the Department of Defense did not establish, by setting forth a factual basis, that its policy is rationally related to its purported goals.[18] However, although the district court in *Meinhold* refused to defer to the military's justifications for the policy, an en banc panel of the Ninth Circuit was unwilling to invalidate the ban on Equal Protection grounds.[19] While the *Meinhold* decision gives hope to homosexual service members, in reality, the strength of its impact is questionable at best given the Supreme Court's traditional deference to military interests.[20] The absence of a more permanent solution highlights the need for courts to apply a more heightened level of scrutiny to the military's exclusion of homosexuals.

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[15] *See* Troy Holroyd, *Commentary, Homosexuals and the Military: Integration or Discriminatory*, 8 J. CONTEMP. HEALTH L. & POL'Y 429, 430 (1992).

[16] 1993 WL 15899 (C.D. Cal. Jan. 29, 1993).

[17] *Id.*

[18] *Id.* at 1.

[19] *See*, Watkins v. United States Army, 875 F.2d. 699 (9th Cir. 1989) (en banc) (Holding that the Army had effectively waived its right to deny Watkins reenlistment on grounds that he was a homosexual. The majority declined however, to reach the constitutional issue of whether to apply strict, intermediate or rational level scrutiny to the military regulation), *Id.* at 705; *compare* Watkins v. United States Army, 847 F.2d. 1329 (9th Cir. 1988) *vacated*, 875 F.2d 699 (Army's regulations violate the Equal Protection Clause by discriminating against homosexuals, a suspect class).

[20] *See* Goldman v. Weinberger, 475 U.S. 503 (1986); Chappell v. Wallace, 462 U.S. 296 (1983).

This article seeks to illustrate the directive's textual and subtextual discriminatory policies and to explore the judiciary's power to effectuate change in the absence of decisive executive or congressional action. Part one examines the ban's underlying infirmities and illustrates that the procedures by which the military implements the directive not only legitimate prejudice but also violate a homosexual service member's constitutional interests. Part two suggests that the tradition of judicial deference to military interests results in an absence of meaningful constitutional analysis by courts on the issue leaving homosexual soldiers with virtually no legal redress. Finally, this article concludes that the lack of sufficient legal protection justifies a court's future decision to categorize homosexuals as a suspect class under the Equal Protection Clause. By recognizing that homosexuals, similar to African-Americans, have long been discriminated against and lack the political power to remedy violative discriminatory regulations, courts should strictly scrutinize and invalidate the military's current directive.

I. THE ERRORS OF THE DIRECTIVE

The policy barring homosexuals from service allows the military to exclude potential service members based on their sexual orientation. The fact that sexual preference, unlike skin pigmentation, is a discrete trait creates the potential for more invasive regulations against homosexuals who are enlisted, or who wish to enlist in the service, than former military policies which excluded African-Americans. By adhering to a policy which punishes those who are caught engaging in homosexual activity, as well as those who are inclined to participate in homosexual conduct,[21] the military uses a "before-the-fact" threat of discharge to dictate the acceptable behavior of all service members.[22] This

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[21] THEODORE R. SARBIN & KENNETH E. KAROLS *supra* note 10 at A-9.

[22] *See* Judith Hicks Stiehm, *Managing The Military's Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685, 701 (1992) (". . . the military wants something more than simply to root out homosexuals. It also wants to root out effeminate males from the ranks even if they are not homosexual").

type of "thought policing" policy creates an environment in which private thoughts and personal attitudes are subject to covert military censorship.[23] It encourages fellow service members to betray confidences and expose a colleague's proscribed thoughts, the contents of which could likely result in disqualification from military service.[24]

Unlike the policies which excluded African-Americans, detecting homosexuality often requires the discovery of personal information about a service member's lifestyle. Therefore, the manner in which gay service members are uncovered is apt to be highly intrusive and violative of one's privacy.[25] For example, investigators have violated privacy interests of service members alleged to be homosexual, or thought to have "gay tendencies," by following them off base, opening letters from secured mailboxes and leaking news of the investigation to colleagues.[26] Service members have even been coerced into providing the military with names of other allegedly homosexual troops,[27] resulting in procedures analogous to silent "witch hunts" where large groups of personnel are investigated and discharged.[28]

Homosexuals are induced by threats of discharge to conceal

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[23] *Id. at* 695.

[24] *See* Judith Hicks Stiehm *supra* note 22 *referring to* MARY A. HUMPHREY, MY COUNTRY, MY RIGHT TO SERVE 45-46 (1988) (detailing discharge of a Naval officer).

[25] Michelle Benecke & Kirsten Dodge, *Military Women in Non-Traditional Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215, 220-21 (1990).

[26] *Id.*

[27] *Id.*

[28] "The most well known witch hunts are the Navy's investigations of the U.S.S. Norton Sound in 1980 and the U.S.S. Yellowstone in 1988, and the Marine's Parris Island investigation between 1986 and 1988." Judith Hicks Stiehm, *supra* note 22, at 697.

their sexual orientation, and in effect, their identities.[29] Unlike African-American soldiers who were openly chastised, gays are "outed" [30] and subsequently weeded from the military in a manner shielded from public scrutiny.[31] In fact, many homosexual service members have been honorably discharged from the service in the interest of avoiding the critical eye of the press and the public.[32] As will be discussed below, under the guise of respectful dismissals, such honorable discharges allow the military to avoid granting hearings which set forth reasons for the discharge. By protecting such information, offensive military procedures of investigation and disqualification are kept hidden from judicial scrutiny when discharged plaintiffs seek constitutional protection in court.

II. THE ABSENCE OF AVAILABLE REMEDIES

Courts have traditionally given the military a high degree of deference when reviewing military regulations.[33] The Supreme Court has recognized that "[w]ithin the military community there is simply not the same [individual] autonomy as there is in the

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[29] *See* Judith Hicks Stiehm, *supra* note 22, at 701.

[30] Being "outed" is the practice of exposing to the public that someone is homosexual after that person has chosen to keep his or her sexual orientation private. David H. Pollack, *Sexual Orientation and the Legal Dilemmas in "Outing"*, 46 U. MIAMI L. REV. 711 (1992).

[31] ALLAN BERUBE, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 19 (1990).

[32] Honorable discharges do not give reasons for the action. So in effect a person may be discharged from the military for being homosexual without the record ever setting forth that conclusion.

[33] *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (review of First Amendment challenge to military regulations requires greater deference than in a civilian context); Chappell v. Wallace, 462 U.S. 296 (1983) (enlisted military personnel barred from bringing suits against superiors even where such actions involve alleged constitutional violations).

larger civilian community," [34] and therefore, "when the Court is confronted with questions relating to military discipline and military operations, [it] properly defers to the judgment of those who must lead our armed forces in battle." [35]

Because of this longstanding deference, remedies in equity available to all military personnel are limited.[36] An example of the limitations on judicial interference of military practices is civil tort actions brought against the military by service members.[37] In 1950, the Supreme Court held in *Feres v. United States*[38] that the government is not liable under the Federal Tort Claims Act for injuries to service members which arise in the course of military duty.[39] Subsequent to *Feres*, the Court concluded that tort claims against the military are barred because these are the "type[s] of claims that would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." [40] Moreover, the Court broadened its interpretation of *Feres* to hold that military personnel are precluded from maintaining any kind of damages claim, even where the claim is based on an alleged constitutional violation.[41] Rather than grounding its limitation on

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[34] *Goldman*, 475 U.S. at 507.

[35] North Dakota v. United States, 495 U.S. 423, 443 (1990).

[36] United States v. Johnson, 481 U.S. 681 (1987); Feres v. United States 340 U.S. 135 (1950).

[37] *Johnson*, 481 U.S. 681 (widow of coast guard helicopter pilot brought wrongful death action against United States alleging that air traffic controller's negligence caused helicopter crash that killed her husband).

[38] *Id.*

[39] *Id.*

[40] United States v. Shearer, 473 U.S. 52, 59 (1985) (mother of army private was barred from bringing wrongful death action for Army's negligence for failure to warn her son that the service man who kidnapped and killed him had been previously convicted of murder and manslaughter).

[41] *See Chappell*, 462 U.S. 296.

tort claims in legal principles, the Court bases its continued adherence to the *Feres* doctrine solely upon the unique nature of the military:

> The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.[42]

The military discipline rationale requires courts to balance the military institution's need to insulate itself from judicial interference against the importance of the plaintiff's rights at issue. In favor of an exclusive system of military justice, that scale is always tipped in favor of the military, while courts merely grant a cursory glance to individual grievances.

The courts' reluctance to interfere with regulations mandated by the military when the action is brought under the United States Constitution further intensifies the inadequacy of legal protection afforded homosexuals. Courts have held that the Constitution provides no remedy for gay soldiers who are barred from serving in the armed forces.[43] Consequently, challenges to the ban by homosexuals based upon First Amendment[44] or Due Process[45] grounds have had little success because "in reality the courts disregard the commands of our Constitution, and bow instead to the purported requirements of a different master, military

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[42] *Id.* at 300.

[43] Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied.*, 494 U.S. 1004 (1990).

[44] *Id.*

[45] Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).

discipline." [46] In addressing First Amendment claims, the Supreme Court has continued its longstanding tradition of deference to the mission of the military. The result is that concerns of military security curtail any individual protection usually afforded by the First Amendment.

A. The First Amendment

In response to First Amendment challenges, the Supreme Court has long made the distinction between the need for protection under the First Amendment in civilian and military life:

> Speech that is protected in the civil population may . . . undermine the effectiveness of response to command. Thus, while members of the military services are entitled to the protection of the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The rights of military men must yield somewhat to meet certain overriding demands of discipline and duty . . . Speech likely to interfere with these vital prerequisites for military effectiveness therefore can be excluded from a military base.[47]

Due to the special need to restrict First Amendment rights of members in the military, the path for homosexuals in challenging the military's regulation is not smoothly paved.

In *Ben-Shalom v. Marsh*,[48] Miriam Ben-Shalom, an Army Reserve sergeant, alleged that her discharge from the Army based on her admission that she was a lesbian violated her First

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[46] United States v. Stanley, 483 U.S. 669, 686 (1987) (Brennan, J., dissenting).

[47] Brown v. Glines, 444 U.S. 348, 354 (1980) (quoting United States v. Priest, 21 C.M.A. 564 (1972)).

[48] 881 F.2d 454 (7th Cir. 1989).

Amendment right of free speech. She argued that the regulation discharging homosexuals from the military had the chilling effect of restricting her freedom to make statements regarding her sexual orientation that would otherwise be constitutionally protected under civil law.[49] The lower court found Ben-Shalom's proclamation of lesbianism to be protected speech, and that the military's regulation was broader than necessary to protect its legitimate interest of good order, morale and discipline.[50] On appeal, the Seventh Circuit reversed the district court's findings and held that "policies that might not pass constitutional muster if imposed upon a civilian population will be upheld in the military setting." [51] Aside from its acceptance of the principle that military interests can override conventional First Amendment protections, the court refused to recognize that Ben-Shalom's discharge violated the First Amendment at all since "it is not speech per se that the regulation against homosexuality prohibits." [52] The court concluded that the plaintiff was still free to talk about homosexuality, discuss the regulation banning homosexuals and even associate with homosexuals.[53] Specifically, the court recognized that the conduct at issue which makes one ineligible for military service is not the act of speaking of homosexuality aloud, but rather of identifying oneself as a homosexual. And, as the court reasoned, although the regulation might affect speech in some sense, it merely does so incidentally in the course of achieving overriding military goals of morale and good order.[54]

Ben-Shalom suggests that courts will uncritically accept military justifications for curbing First Amendment rights of

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[49] *Id.* at 457.

[50] *Id.* at 459.

[51] *Id.* at 461 (stating that the military is different in that it must protect and defend the United States).

[52] *Id.* at 462.

[53] *Id.*

[54] *Id.*

homosexual service members. In justifying its decision, the Seventh Circuit echoed the directive's rationale and found that the plaintiff's forthright admission of homosexuality implied a propensity to engage in the proscribed conduct.[55] Essentially, the Seventh Circuit upheld a service member's discharge based solely on the Military's fear of the effect that the presence of admittedly homosexual service members might have on the ranks. By refusing to reevaluate military doctrine and require the military to "assume the risk" that an avowed homosexual will not damage morale and detract from the camaraderie of the military unit,[56] the Seventh Circuit's decision leaves homosexual service members without First Amendment protection for an admission of homosexuality.

B. Procedural Due Process

Homosexuals have also tried to challenge regulations barring them from service on the grounds that the military ban violates their right to procedural due process.[57] The Fifth Amendment to the United States Constitution states: "nor [shall any person] be deprived of life, liberty, or property without due process of law." [58] When the government, state or federal, tries to deprive an individual of life, liberty or property, procedural due process requires that the individual be granted procedural fairness of notice and the right to a fair hearing.[59] In order to successfully attack the mandatory discharge of homosexuals from the military on grounds of procedural due process, courts must first be convinced that there exists a property or liberty interest at stake.[60] In

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[55] *Id.* at 460.

[56] *Id.* at 461.

[57] *Beller*, 632 F.2d 788 (9th Cir. 1980); *Rich*, 735 F.2d 1220 (10th Cir. 1984).

[58] U.S. CONST. amend. V.

[59] Matthews v. Eldridge, 424 U.S. 319, 332 (1976).

[60] *See* Troy Holroyd, *supra* note 15, at 430.

narrowly interpreting the Due Process Clause, courts have been extremely reluctant to find that homosexuals are deprived of such interests when discharged from the military.

Honorably discharging gay service members in an attempt to silence accusations of discrimination enables the military to exclude those members without a hearing.[61] *Rich v. Secretary of the Army*[62] and *Beller v. Middendorf*,[63] are two cases which held that honorable discharges of homosexual service members do not deprive these members of either property or liberty interests, even in the absence of a hearing ordinarily required by the Due Process Clause.

In *Rich*, the plaintiff was honorably discharged from the military upon his admission of homosexuality.[64] The Tenth Circuit addressed the plaintiff's procedural due process claim by first determining whether there was a property or liberty claim involved.[65] The court held that the plaintiff did not have a property right to continue military service since, by identifying himself as homosexual, he no longer comported with military regulations.[66] Therefore, the military's discharge did not offend due process of law even though the plaintiff had not been granted a hearing.[67] The court recognized that even in the absence of a property right, a liberty interest may nevertheless require that the plaintiff be provided a due process hearing.[68] However, the Tenth Circuit concluded that the plaintiff's liberty interest had not even

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[61] *Rich*, 735 F.2d at 1226.

[62] 735 F.2d 1220 (10th Cir. 1984).

[63] 632 F.2d 788 (9th Cir. 1980).

[64] *Rich*, 735 F.2d at 1226.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

been violated when the Army released records to the public which mentioned the plaintiff's homosexuality.[69] In proving the deprivation of a liberty interest, a plaintiff must show that the "protection of one's good name, reputation, honor and integrity" has not been deprived as well as "one's freedom to take advantage of other employment opportunities." [70] Because the plaintiff consented to the release of the information and personally publicized the reasons for his discharge, the court concluded that no liberty interest was impinged upon.[71]

In *Beller*, the court used the same rationale to decide that the plaintiff, who had been discharged from the Navy for admitting that he engaged in homosexual acts, could not be afforded procedural due process protection. The court recognized that the Navy subjects anyone who engages in homosexual acts to immediate termination and stated that once the plaintiff admitted to having done so, he could no longer expect that his employment would continue.[72] After concluding that the plaintiff had no property interest in continued military service, the court rejected a liberty interest when it considered whether "the Navy's action 'might seriously damage [the person's] standing and associations in his community' and would impose a 'stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities'".[73] In acknowledging that an honorable discharge does not convey reasons for the service termination, the court held that such a dismissal would neither stigmatize the plaintiff nor impair his opportunity to obtain employment elsewhere.[74]

The military practice of honorable discharge precludes homosexual service members from finding adequate political and

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[69] *Id.* at 1227.

[70] *Id.*

[71] *Id.*

[72] *Beller*, 632 F.2d at 805.

[73] *Id.* at 806 (quoting Board of Regents v. Roth, 408 U.S. 564 (1972)).

[74] *Id.* at 807.

legal protection against discrimination because it excuses the military from granting a hearing that would expose unfair policies and practices to the courts, the press and public. Moreover, as *Beller* illustrates, an honorable discharge prevents a court from finding a liberty interest necessary to constitutionally invalidate a service member's dismissal. By adopting an extremely narrow interpretation of what constitutes both liberty and property interests, both cases fail to determine whether any procedural safeguards will satisfy the due process guarantees of the Constitution. Courts justify this "hands-off" approach by deeming the question of honorable discharge one that is germane to the function of the military and not within the province of the court.

C. Substantive Due Process

Substantive due process, as well as procedural due process is guaranteed by the Fifth and Fourteenth Amendments when an individual's fundamental liberty is stake.[75] The Supreme Court has generally limited judicial review of substantive due process to whether the law at issue is rationally related to a legitimate governmental interest. Only where legislation restricts "fundamental rights" will the Court apply a strict scrutiny analysis to the challenged regulation.[76] Fundamental rights include rights pertaining to the First Amendment, marriage, procreation, and family relationships.[77]

Plaintiffs who have challenged regulations barring homosexuals from the military argued that the fundamental right to

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[75] Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (finding that the right to privacy extends beyond the marital relationship); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that there is a fundamental right to privacy in a marital relationship); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (finding a fundamental right of parents to educate their children as they chose).

[76] *Eisenstadt*, 405 U.S. at 454-55; *Griswold*, 381 U.S. at 485-86; *Meyer*, 262 U.S. at 399-400.

[77] Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1, 12 (1967); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

privacy should extend to protect homosexual conduct.[78] In *Dronenburg v. Zech*,[79] plaintiff was discharged from the Navy when he admitted that he was a homosexual. Plaintiff challenged the regulation which mandated his discharge on the grounds that it violated his fundamental right to be free from governmental interference with respect to personal autonomy.[80] Plaintiff argued that this right to personal autonomy was firmly established in the Supreme Court cases of *Griswold v. Connecticut*[81] and *Roe v. Wade*.[82] However, the court was not persuaded by plaintiff's argument and limited fundamental rights to include only those activities which relate to "marriage, procreation, contraception, family relationships, and child rearing and education." [83] By marking the parameters of fundamental rights according to traditional family values, the court concluded: "it need hardly be said that none of these covers a right to homosexual conduct." [84]

The Supreme Court confirmed its position on fundamental rights in *Bowers v. Hardwick*,[85] where a 5-4 majority upheld a Georgia state law criminalizing sodomy. The court followed *Dronenberg* in recognizing that the right to privacy is limited to

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[78] *See* Dronenburg v. Zech, 741 F.2d 1388, 1391 (D.C. Cir.1984) (rejecting contention that regulations barring homosexuals from military violates fundamental right to privacy under due process clause); *Beller*, 632 F.2d 788 (rejecting argument that regulations barring homosexuals from service violates plaintiff's substantive due process rights).

[79] 741 F.2d 1388, 1389 (D.C. Cir. 1984).

[80] *Id.* at 1391.

[81] 381 U.S. 479 (1965).

[82] 410 U.S. 113 (1973).

[83] *Dronenberg*, 741 F.2d at 1395-96.

[84] *Id.*

[85] 478 U.S. 186 (1986).

those activities pertaining to marriage, procreation and family.[86] However, the Court took an even firmer stand against homosexual rights by directing the focus away from the constitutional issue of governmental interference on sexual preferences.[87] Instead, the Supreme Court held that a right to homosexual activity could not be extrapolated from an understanding of fundamental rights that exclusively encompasses traditional family activities.[88]

In *Woodward v. United States*,[89] the Federal Circuit relied on *Bowers* to reject a Navy officer's argument that sexual orientation was a privacy interest. Woodward was an officer who had acknowledged homosexual tendencies at the time of his enlistment.[90] After he had been seen associating with a homosexual man who was about to be discharged for his sexual orientation, Woodward was recommended for discharge.[91] In its decision, the Federal Circuit affirmed the United States Claims Court's denial of reinstatement, and used *Bowers v. Hardwick* to reject the principle that his homosexuality is protected under the Constitution as a fundamental right.[92]

Areas protected by substantive due process directly rely on the kinds of activities a court is willing to characterize as fundamental rights. It appears that until justices are willing to frame the issue of sexual orientation as a right to privacy which

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[86] *Id.* at 190-191.

[87] ANTHONY RANIERI-BERGER, AN EXAMINATION OF HOMOSEXUAL RIGHTS CASES IN THE UNITED STATES, CANADA AND EUROPE 10 (1992) (unpublished manuscript, on file with the authors); *see also* Troy Holroyd, *supra* note 15, at 429; Tracy Rich, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 GA. L. REV. 773, 793 (1988).

[88] *Bowers*, 478 U.S. at 191.

[89] 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

[90] *Id.* at 1069.

[91] *Id.*

[92] *Id.* at 1074-75.

deserves freedom from governmental interference, rather than an activity that must comport with traditional social customs, homosexuals will be unable to secure constitutional protection against military encroachments.

D. Equal Protection

By bowing to military interests, courts have declined to secure constitutional rights of free speech and due process for homosexual service members.[93] Such unquestioning reverence indicates that courts seek to avoid critical discussion on the subject of military practices altogether. As a result, the survival of the directive against homosexuals relies on the kind of constitutional escape which traditional military deference creates. From a legal perspective, however, a court's talismanic invocation of military doctrine results in a body of case law which provides little thoughtful criticism as to whether and how military regulations comport with constitutional principles. Ironically, for homosexual service members, the absence of constitutional legal protection is a mixed blessing. While the Supreme Court finds nothing within the First, Fifth or Fourteenth Amendments to remedy individual grievances, the absence of constitutional redress may create an equal protection defense for homosexuals as a group under the status of a suspect class.

Ordinarily, when a class of persons is subjected to discriminatory treatment, the court, under an Equal Protection analysis, requires that the challenged regulation be rationally related to a legitimate state goal in order for the law to be constitutionally valid.[94] It has been noted that "[i]n virtually every case in which rationality review is the standard, the Court upholds the challenged

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[93] *Ben-Shalom*, 881 F.2d 454.

[94] City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)("legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest"); McGinnis v. Royster, 410 U.S. 263, 270 (1973).

law." [95] Currently, the level of scrutiny applied to classifications based on homosexual conduct or status is the minimal rational basis test.[96] For homosexual service members who contest the validity of the directive, this standard is highly ineffective once combined with traditional military deference.[97] Therefore, it is essential for homosexuals to be recognized as a suspect class because such a classification requires courts to apply a heightened level of scrutiny to the military's regulation. Under strict scrutiny, the military must justify its present policy by demonstrating that the challenged regulation is closely tailored to serve a compelling governmental interest.[98] As a result, the military would be hard pressed to argue that a sufficiently compelling interest justifies such unequal treatment of service members.

In order for homosexual service members to receive a heightened level of judicial review, they must establish that, as a group, they deserve suspect class status. Characteristics typical of a suspect class include a history of discrimination which is caused by an immutable trait and a lack of political and legal power to redress the discrimination. Aside from the inadequate protection which courts have granted under First Amendment and Due Process principles, homosexuals as a group possess three additional characteristics traditionally used in designating persons that constitute a suspect class. First, as Justice Brennan observed, "it is indisputable that homosexuals have historically been the object

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[95] Harris N. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S.CAL. L. REV. 797, 808 (1984).

[96] *See e.g.*, Jantz v. Muci, 976 F.2d 623, 626-29 (10th Cir. 1992) (discussing the equal protection argument in light of decisions after Bowers v. Hardwick, 478 U.S. 186 (1986)).

[97] *See generally* Troy Holroyd, *supra* note 15, at 429; *see also* Tracy Rich, *supra* note 87, at 773.

[98] Plyler v. Doe, 457 U.S. 202, 217 (1982).

of pernicious and sustained hostility." [99] Homosexuals have been fired from jobs, excluded from schools, churches and even housing.[100] Second, it has been argued that homosexuality is an immutable characteristic.[101] Courts have construed an immutable characteristic to be "so central to one's personality that it would be abhorrent for government to penalize a person for refusing to change it, regardless of how easy that change might be physically." [102] Current research which demonstrates the biological nature of sexual orientation confirms that homosexuality is an immutable characteristic. A study in 1991 found that genes which men inherit from their parents may account for up to 70% of the probability that a man will be homosexual.[103]

Finally, in determining whether homosexuals lack the political power to seek redress for their grievances, the Supreme Court has focused on whether the class is a "discrete and insular minority." [104] In general, homosexuals as a class are faced with social, economic and political pressure to conceal their sexual preference. This results in their inability to make effective use of

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[99] Watkins v. United States Army, 837 F.2d 1428 (1988), 1444, *cert. denied*, __ U.S. __, 111 S.Ct. 384 (1989) (quoting Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J. dissenting from denial of *cert.*).

[100] *Watkins*, 837 F.2d at 1444.

[101] *Id.; see generally* Natalie Angier, *Study Suggests Genes Sway Lesbians' Sexual Orientation*, N.Y. TIMES, Mar. 12, 1993, at A21 ("The public is now getting the idea that there is a mountain of evidence being built to support the idea that homosexuality is biological . . ."); *see also* Curt Suplee, *Brain May Determine Sexuality*, WASH. POST, Aug. 30, 1991, at A1 (scientists found that genes men inherit from their parents may account for up to 70% of the probability that a man will be homosexual); Malcolm Gladwell, *Genes Tied to Sexual Orientation*, WASH. POST, Dec. 15, 1991, at A1.

[102] *Watkins*, 837 F.2d at 1444.

[103] Troy Holroyd, *supra* note 15, at 459 n. 144, (citing 57 S. CAL. L. REV. 817, 817-21).

[104] *Cleburne*, 473 U.S. at 441; *Plyler*, 457 U.S. at 216, n.14.

the political process." [105] Within the confines of the military, this situation is further exacerbated by the military procedures used to detect and discharge gay service members. "Thought policing"[106] policies and silent "witch hunts" [107] instill fear in homosexual service members that eliminates any choice of openly admitting their sexual orientation. Thus, they are forced to conceal their true identities and live in fear of discovery. This way of life forecloses any opportunity of their being heard within the hierarchy of the military and ultimately leads homosexuals to avoid coming forward and securing their rights. In addition, the military practice of honorable discharge ironically works to the detriment of gay rights by eliminating the requirement of a hearing. Without proper hearings, the public and the courts are left unaware of these service members' grievances and the danger of public ignorance intensifies homosexuals' inability to make effective use of the political process.[108]

Since homosexuals possess the characteristics the Supreme Court requires when defining a group of persons as a "suspect class," the military's regulations discriminating against these service members must be subject to strict scrutiny and therefore must be narrowly tailored to serve a compelling governmental interest.[109] The military's regulation banning homosexuals from service will not withstand strict scrutiny because the ban relies on ambiguous arguments to support its regulations. The prime motivation for the directive is fear that homosexuals will disrupt good order, morale and discipline in the armed forces.[110] However, the Supreme Court has made clear that prejudice and fear

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[105] *Watkins*, 837 F.2d at 1446.

[106] See *supra* note 20 and accompanying text.

[107] *See supra* note 25 and accompanying text.

[108] *Watkins*, 837 F.2d at 1446.

[109] *Plyler*, 457 U.S. at 217.

[110] *Ben-Shalom*, 881 F.2d at 461; *see also* Defense Directive *supra* note 10 and accompanying text.

are not adequate reasons for creating laws and regulations.[111] Therefore, the regulation cannot withstand a strict scrutiny analysis.

CONCLUSION

In contrast to constitutional arguments under the First Amendment and Due Process Clause, the Equal Protection Clause would provide homosexual service members with legal redress against invasive military regulations if courts granted these members the suspect class status they deserve. A strict scrutiny review would allow courts to review the directive and require that military regulations be narrowly tailored to achieve compelling governmental goals. This kind of review prevents courts from uncritically adopting vague justifications for military discrimination. Future court decisions should turn to the Equal Protection Clause in order to furnish long term solutions instead of temporary panaceas. Essentially, equal protection would give homosexual service members constitutional harbor from practices which they endure as a cost of defending these laws. As Justice O'Connor recognized in *United States v. Stanley*: "Soldiers ought not be asked to defend a Constitution indifferent to their essential human dignity." [112]

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[111] *See generally* Chad Johnson, *A Judicial Blow to the Military's Anti-Gay Policies: Pruitt v. Cheney*, HARV. C.R.-C.L. REV. 244 (1992); Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that racial prejudice cannot justify removing a child from the custody of its natural mother); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

[112] United States v. Stanley, 483 U.S. 669, 708 (1987) (O'Connor, J., dissenting).