Challenging the Constitutionality of President Clinton's Compromise: A Practical Alternative to the Military's Don't Ask, Don't Tell Policy, 28 J. Marshall L. Rev. 179 (1994)

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NOTES

CHALLENGING THE CONSTITUTIONALITY OF
PRESIDENT CLINTON'S COMPROMISE: A
PRACTICAL ALTERNATIVE TO THE MILITARY'S
"DON'T ASK, DON'T TELL" POLICY

INTRODUCTION

During the 1992 Presidential campaign, Democratic candidate Bill Clinton pledged to lift the ban on homosexuals in the military, a policy which had been in place for fifty years. After six months of fierce opposition from the military and conservatives in Congress, President Clinton modified his stance and announced a compromise policy dubbed “Don’t Ask, Don’t Tell.” Subsequently, Congress enacted a modified version of the “Don’t Ask, Don’t Tell” policy, which went into effect on October 1, 1993. The “Don’t Ask, Don’t Tell” policy prohibits the military from asking new recruits whether they are gay (Don’t Ask). However, the military will discharge service members who voluntarily announce that they are gay (Don’t Tell), even if they have not engaged in homosexual conduct.

Military discharges based solely on homosexual orientation violate the Equal Protection Clause of the U.S. Constitution because the discharges are not rationally related to any legitimate military interest. Studies show that the presence of gay service

1. This Note uses the term “homosexual” to indicate a person who is gay or lesbian since that term is used in the military's regulations. The term is used merely for convenience and is not meant to offend members of the gay and lesbian community.
5. Id. at 1369-73.
8. Id. This provision existed under the former military regulations. See infra note 61 and accompanying text for a discussion of the similarities between the former military policy on homosexuals in the military and the “Don’t Ask, Don’t Tell” policy.
9. See infra notes 97-141 and accompanying text for a discussion of the consti-
members do not simply by their virtue of being gay, adversely affect the functioning of the military. Furthermore, the military's retention of gay service members during wartime refutes the contention that heterosexual and homosexual soldiers cannot serve together. Rather, the "Don't Ask, Don't Tell" policy is based on the prejudice of heterosexual service members.

This Note challenges the constitutionality of the "Don't Ask, Don't Tell" policy on equal protection grounds. This Note further proposes that the military should base discharges on sexual misconduct rather than on sexual orientation. Hence, Part I of this Note presents a history of the military's ban on homosexuality, including the "Don't Ask, Don't Tell" policy. Next, Part II analyzes the split in the courts over whether discharging service members solely for stating that they are gay violates the Equal Protection Clause. Part II further argues that the "Don't Ask, Don't Tell" policy violates the Equal Protection Clause because it mandates the discharge of gay service members based solely on their sexual orientation.

Relying on Part II's finding that the "Don't Ask, Don't Tell" policy violates the Equal Protection Clause, Part III proposes that the military eliminate homosexual orientation as a grounds for discharge. It argues that the military should indiscriminately base discharges on homosexual conduct and sexual harassment. Part III also discusses how foreign militaries have successfully integrated heterosexual and homosexual troops by indiscriminately prohibiting homosexual conduct and sexual harassment.

10. See infra notes 113-41 and accompanying text for a discussion of the rationales for the military's ban on homosexuals.
11. See infra notes 32, 36-41 and accompanying text for a discussion of the military's reduction in military discharges based on homosexuality during wartime.
12. See infra notes 20-48 and accompanying text for a historical overview of the military's policy regarding homosexuals.
13. See infra notes 49-67 and accompanying text for a discussion of the "Don't Ask, Don't Tell" policy.
14. See infra notes 68-141 and accompanying text for a discussion of the courts' holdings regarding the constitutionality of military discharges of gay service members.
15. See infra notes 108-41 and accompanying text for a discussion of the constitutionality of the "Don't Ask, Don't Tell" policy.
16. See infra notes 136-55 and accompanying text for a discussion of this Note's proposal that military discharges should be based on sexual misconduct, not sexual orientation.
17. See infra notes 142-68 and accompanying text for a discussion of this Note's proposal that the military should expand its sexual harassment policy to include sexual harassment of heterosexual service members by gay service members.
18. See infra notes 161-66 and accompanying text for a discussion of foreign military policies regarding homosexuals.
nally, Part IV presents various hypothetical situations to demonstrate how the military could integrate heterosexual and homosexual troops without sacrificing the military's need to maintain unit discipline and morale.19

I. THE HISTORY OF THE MILITARY'S BAN ON HOMOSEXUALS

The following historical overview describes the events which created the political climate surrounding President Clinton's compromise on the "Don't Ask, Don't Tell" policy. Section A discusses the military's policy from World War I to 1992.20 Then, Section B discusses the evolution of the "Don't Ask, Don't Tell" policy since 1992.21


The military promulgated its first regulations proscribing homosexual conduct during World War I.22 Under the Articles of War of 1916, the military classified "assault with the intent to commit sodomy" as a felony offense.23 By 1920, the military classified sodomy as a separate felony offense.24 Throughout the 1920's and 1930's, the military court-martialed and imprisoned homosexual service members who engaged in sodomy.25

19. See infra notes 167-85 and accompanying text for a number of hypothetical situations demonstrating how the military could apply this Note's proposed modifications to the "Don't Ask, Don't Tell" policy.


21. See infra notes 49-62 and accompanying text for a discussion of the compromises reached by President Clinton with the military and conservatives in Congress.


23. SHILTS, supra note 22, at 15. The Manuals for Court-Martial, 1917, defined sodomy as anal penetration of a man or woman by a man. RAND CORP., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: POLICY OPTIONS AND ASSESSMENT- STUDY OVERVIEW, reprinted in 139 CONG. REC. S11,181, S11,188 (daily ed. Sept. 9, 1993) (citing Jeffrey S. Davis, Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives, 131 MIL. L. REV. 55, 73 (1991)). However, penetration of the mouth did not constitute sodomy. Id. When sodomy became a separate offense in 1920, Congress revised the Manuals for Court-Martial to include oral penetration. Id.

24. SHILTS, supra note 22, at 15. This broadened the scope of the offense to include both consensual and nonconsensual sodomy. Id.

25. Id. In the years leading to World War II, the military allowed homosexual soldiers who did not engage in sodomy to serve but restricted these soldiers to non-
The breakout of World War II increased the military's need for manpower. The military responded to this need by changing the status of homosexuality from criminal behavior to mental illness. The military relied on early psychiatric theories that homosexuality was a mental illness that should be treated. As a result, military psychiatrists tried to treat known homosexuals. The military discharged homosexuals who could not be treated, classifying them as "unsuitable for military service." In addition, the military denied entrance to individuals who had engaged in prior overt homosexual behavior. By the end of World War II, the military changed its focus from discharge for sodomy to discharge for homosexuality, even where there was no corresponding sexual conduct.

In the wake of McCarthyism during the 1950's, the United States government purged homosexuals from federal civilian positions. The rationale was that homosexuals were "sexual per-
verts" whose "weakened moral fibre" made them more prone to espionage and blackmail. The military followed suit and modified its regulations to classify homosexual behavior as "sexual perversion," and grounds for discharge.

By the 1960's, the military liberalized its policy toward homosexuals in response to the Vietnam War. The military needed soldiers to fight in Vietnam. As a result, all branches of the military discreetly began allowing openly gay men to enlist.

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Furthermore, in 1965, the Department of Defense (DoD) revised Directive 1332.1449 to allow homosexual service members facing less-than-dishonorable discharges to present their cases before an administrative discharge board.40 The board would then decide whether to raise the discharge to "honorable," based on past performance in the military.41

The liberalized policy of the 1960's and 1970's caused more problems than solutions.42 Administrative discharge boards inconsistently applied their standards and procedures, resulting in the discharge of some homosexuals and the retention of others.43 As a result, in 1981, the DoD again revised Directive 1332.14.44 The revised directive mandated the discharge of all known homosexuals in the military, regardless of the service member's personal merit.45 In the directive, the military also stated for the first time that homosexuality was "incompatible with military service."46 The military rationalized its exclusion of homosexuals by stating that homosexuals adversely affected the "discipline, good order, and morale" of the military.47 Under the revised directive, however, administrative discharge boards could award honorable discharges to gay service members who had not engaged in homosexual conduct.48

chiatrist. Id. at 63. Watkins further admitted to having had oral and anal sex with men. Id. Nevertheless, the psychiatrist wrote on Watkin's form: "This 19 year old inductee has had homosexual tendencies in the past. . . . Patient can go into Military service—qualified for induction." Id.

40. RAND CORP., supra note 23, at S11.182.
41. Id.
42. Id.
43. Id.
44. SHILTS, supra note 22, at 377. The inconsistent application of the military's regulations banning homosexuals led gay service members to challenge the constitutionality of the policy in the late 1970's. Id. See, e.g., Matlovich v. Secretary of the Air Force, 591 F.2d 852, 854-55 (D.C. Cir. 1978) (concerning the discharge of a decorated Vietnam War veteran). In 1981, Deputy of Defense Graham Clayton (appointed by President Carter) revised DoD Directive 1332.14 by removing the military's discretion in deciding whether to retain an open homosexual. SHILTS, supra note 22, at 377. Instead, discharges for homosexuality became mandatory. Id. This allowed the military to defend the policy in courts without having to explain inconsistently applied exceptions. Id.
46. Id.
47. Id. See infra notes 113-35 and accompanying text for a discussion of the military's rationale for excluding homosexuals from the military.
48. SHILTS, supra note 22, at 377. Revised DoD Directive 1332.14 reflected Deputy of Defense Clayton's belief that "the mere fact of homosexuality" should not be grounds for less than an honorable discharge. Id. Only if the service member had engaged in actual homosexual conduct should a discharge be less than honorable. Id. Between 1980 and 1991, the military discharged nearly 17,000 homosexu-
B. 1992 to Present—President Clinton’s Compromise and the
“Don’t Ask, Don’t Tell” Policy

During the 1992 Presidential campaign, Democratic candidate Bill Clinton promised to end the homosexual exclusion policy by lifting the military’s ban. Upon entering office, President Bill Clinton modified his stance in reaction to pressures from the military and conservatives in Congress who favored the military’s ban. On January 29, 1993, President Clinton announced an interim policy in which the Joint Chiefs of Staff agreed that the military would stop asking recruits whether they were gay. In return, the President issued a compromised directive stating that all other aspects of the military’s policy would remain intact for six months while the military studied a new policy to lift the ban on homosexuals. Several members of Congress feared that the President would ignore the results of the military’s study and would unilaterally order an absolute lifting of the ban. Senator Dole and other Senators sought to codify the military’s ban on ho-

als, an average of 1,400 per year. RAND CORP., supra note 23, at S11182.
49. Towell, Roots, supra note 2, at 1971.
50. Clinton, Remarks on Gay Policy, supra note 4, at 1370 (stating that "those who want the ban to be completely lifted completely on both status and conduct must understand that such action would have faced certain and decisive reversal by the Congress... ").
52. President’s Memorandum on Ending Discrimination in the Armed Forces, 29 WEEKLY COMP. PRES. DOC. 112, 112 (Jan. 29, 1993) [hereinafter Clinton, Ending Discrimination]. President Clinton issued the following memorandum to the Secretary of Defense:
Memorandum for the Secretary of Defense
Subject: Ending Discrimination on the Basis of Sexual Orientation in the
Armed Forces.

I hereby direct you to submit to me prior to July 15, 1993, a draft of an
Executive order ending discrimination on the basis of sexual orientation in
determining who may serve in the Armed Forces of the United States. The
draft of the Executive order should be accompanied by the results of a study
to be conducted over the next six months on how this revision in policy
would be carried out in a manner that is practical, realistic, and consistent
with the high standards of combat effectiveness and unit cohesion our
Armed Forces must maintain.

In preparing the draft, I direct you to consult fully with the Joint Chiefs
of Staff and the military services, with other Departments affected by the
order, with the Congress, and with concerned individuals and organizations
outside the executive branch.

Id.
will continue down this road, regardless of the evidence.”).
mososexuals in order to prevent any immediate changes in the policy.54

Sensing considerable opposition in Congress to a total abolition of the military's ban,55 President Clinton announced a compromise policy on July 19, 1993,56 dubbed "Don't Ask, Don't Tell."57 Under the "Don't Ask, Don't Tell" policy, the military no longer asks recruits whether they are gay (Don't Ask).58 In addition, gay service members no longer have to disclose that they are gay,59 but the military will discharge gay service members who

54. During the February, 1993 debates, the Senate considered two amendments to President Clinton's policy. See generally 139 Cong. Rec. S1262-S1339 (daily ed. Feb. 4, 1993) (reprinting Senate debates on lifting the ban on gays in the military). The first amendment, sponsored by Majority Leader Mitchell, supported President Clinton's policy to conduct studies for six months in order to determine the impact of lifting the ban on homosexuals. Id. at S1266. Senators on both sides of the issue supported the Mitchell amendment because they believed that the six-month study would prove the merits of their position. Senators opposed to lifting the ban believed that the study would conclusively prove that lifting the ban would destroy unit cohesion and combat readiness. Id. at S1280 (reprinting statement of Sen. Nickles, Okla.). Senators who favored lifting the ban believed that the study would prove that the ban was based on irrational prejudices. See, e.g., id. at S1273-74 (reprinting statement of Sen. Moseley-Braun, Ill.); id. at S1275 (reprinting statement of Sen. Feinstein, Cal.); id. at S1277 (reprinting statement of Sen. Boxer, Cal.); id. at S1284 (reprinting statement of Sen. Wellstone, Minn.); id. at S1289-S1290 (reprinting statement of Sen. Chafee, R.I.); id. at S1326 (reprinting statement of Sen. Murray, Wash.); id. at S1328-S1329 (reprinting statement of Sen. Kennedy, Mass.); id. at S1329-30 (reprinting statement of Sen. Robb, Va.); id. at S1330 (reprinting statement of Sen. Jeffords); id. (reprinting statement of Sen. Levin); id. at S1330-31 (reprinting statement of Sen. Campbell); id. at S1331 (reprinting statement of Sen. Dodd); id. at S1332-33 (reprinting statement of Sen. Dorgan).

The second amendment, sponsored by Minority Leader Dole, proposed that Congress codify the ban as it existed before President Clinton changed it. Id. at S1264-65. This amendment provided that Congress alone should make any changes in the policy after hearings. Id. Senators who supported the Dole amendment believed that the impact of lifting the military's ban could only be determined through Congressional debates and hearings. See, e.g., id. at S1266 (reprinting statement of Sen. Smith, N.H.); id. at S1268-S1269 (reprinting statement of Sen. Cohen); id. at S1275 (reprinting statement of Sen. Lott, Miss.).

The Mitchell amendment passed 62-37. Id. at S1338-S1339.

55. Clinton, Remarks on Gay Policy, supra note 4, at 1370 (stating that "those who want the ban to be completely lifted on both status and conduct must understand that such action would have faced certain and decisive reversal by the Congress. . . .").

56. Id. at 1369-73.


59. See infra note 62 for the text of the National Defense Authorization Act for Fiscal Year 1994, which codifies the "Don't Ask, Don't Tell" policy.
voluntarily announce that they are gay (Don't Tell). In all other respects, the "Don't Ask, Don't Tell" policy mirrors the former military policy. In October, 1993, Congress enacted the National Defense Authorization Act for Fiscal Year 1994, which codi-

60. See infra note 62 for the text of the National Defense Authorization Act for Fiscal Year 1994, which codifies the "Don't Ask, Don't Tell" policy.

61. The "Don't Ask, Don't Tell" policy mandates the discharge of service members "who engage in homosexual conduct, which is defined as a homosexual act, a statement that the member is a homosexual or a bisexual, or a marriage or attempted marriage to someone of the same gender." See infra note 62 for the text of the National Defense Authorization Act for Fiscal Year 1994, which codifies the "Don't Ask, Don't Tell" policy. These were the same three grounds for discharge under the former military policy. Enlisted Administrative Separations, 32 C.F.R. § 41, app. A, pt. 1, § H.1.a (1992).

Furthermore, the "Don't Ask, Don't Tell" policy's definition of what constitutes a homosexual act is similar to the former military policy. Under the "Don't Ask, Don't Tell" policy, a homosexual act is "[b]odily contact between service members of the same sex that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts (e.g., handholding or kissing in most circumstances). . . ." Defense Guidelines, supra note 58, at 1977. See infra note 62 for the text of the National Defense Authorization Act for Fiscal Year 1994, which codifies the "Don't Ask, Don't Tell" policy. Under the former military policy, "[a] homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." 32 C.F.R. § 41, app. A, pt. 1, § H.1.a. See also infra note 62 for the text of National Defense Authorization Act for Fiscal Year 1994.

Finally, the definitions of homosexual and bisexual have been carried over into the "Don't Ask, Don't Tell" policy. "Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." Id. at § H.1.b.1. "Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual or heterosexual acts." Id. at § H.1.b.2.

As the military is only concerned about homosexual, and not heterosexual, behavior, this Note does not discuss bisexuals in the military. Under this Note's proposal, bisexuals could openly announce their bisexuality. Furthermore, since the military is only concerned with homosexual conduct, the proposed regulations in this Note adequately deal with homosexual conduct by bisexuals. See infra notes 146-191 and accompanying text for a discussion of this Note's proposed modifications to the "Don't Ask, Don't Tell" policy.


§ 654. Policy concerning homosexuality in the armed forces
   (a) Findings.—Congress makes the following findings:

   (2) There is no constitutional right to serve in the armed forces.

   (3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

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

   (8) Military life is fundamentally different from civilian life in that—

      (A) the extraordinary responsibilities of the armed forces, the
fied the “Don’t Ask, Don’t Tell” policy.

As the foregoing has shown, the military has historically forbidden homosexuals from joining the military.63 Secretly the military has always needed and admitted homosexuals into the military during wartime.64 As a result, the military enacts regulations which give the military the best of both worlds. Military policies mandate the discharge of homosexuals, but provide excep-

unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

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

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

(b) Policy.—A member of the armed forces shall be separated from the armed forces . . . if one or more of the following findings is made . . . :

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act . . . .

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect . . . .

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

(f) Definitions.—In this section:

(1) The term “homosexual” means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian”.

(3) The term “homosexual act” means—

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

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

(d) Sense of Congress.—It is the sense of Congress that—

(1) the suspension of questioning concerning homosexuality . . . should be continued, but the Secretary of Defense may reinstate that questioning . . . if the Secretary determines that it is necessary.

Id.

63. See supra notes 20-48 and accompanying text for a historical overview of the military’s policy regarding homosexuals.

64. See supra notes 32, 36-41 and accompanying text for a discussion of the military’s practice of admitting homosexuals during wartime.
tions in order to allow the military to retain gay service members who are indispensable to their units.65

Since the military has allowed gay service members to serve during wartime, the rationale that homosexuals are incompatible with military service is clearly flawed. If gay service members truly destroyed unit cohesion, the military would not allow them to serve during wartime since that is when strong unit cohesion is most important. The military's actions imply that a mere statement by a service member that he or she is gay does not adversely affect unit cohesion. Only when a gay service member engages in homosexual conduct could other service members or unit cohesion be threatened. Thus, the provision in the “Don't Ask, Don't Tell” policy mandating the discharge of service members who announce that they are gay is not rationally related to any legitimate military interest. As Part II discusses, the discharge provision is unconstitutional as a violation of the Equal Protection Clause.67

II. AN EQUAL PROTECTION ANALYSIS OF THE “DON'T ASK, DON'T TELL” POLICY

Courts have split over whether the military violates the Equal Protection Clause when it discharges service members who state that they are gay, but who have not engaged in homosexual conduct.68 Courts upholding the discharges have held that the military could rationally fear that openly gay service members will engage in homosexual conduct.69 On the other hand, courts invalidating the discharges have held that discharges based solely on a service member's sexual orientation are not rationally related to any legitimate military interest.70 These courts point to the military's own findings that sexual orientation has no bearing on an individual's ability to perform military work.71 These courts

65. See infra notes 136-38 and accompanying text for a discussion of the exceptions to the military's policy of discharging service members for engaging in homosexual conduct.
66. See infra notes 113-35 and accompanying text for an analysis of the military's rationales for excluding homosexuals from military service based on homosexual orientation.
67. See infra notes 89-135 and accompanying text for a discussion of the constitutionality of military discharges based on a service member's statement that he or she is gay.
68. Id.
69. See infra notes 95-98 and accompanying text for a discussion of those courts holding that the military discharges based on sexual orientation alone are constitutional.
70. Id.
further point out that openly gay service members can and do serve without adversely affecting the unit cohesion or combat readiness of their units.\textsuperscript{72}

This Part analyzes the constitutionality of the "Don't Ask, Don't Tell" policy under an equal protection analysis and concludes that the policy violates the Equal Protection Clause. Section A first discusses the three tests used to determine whether a regulation violates the Equal Protection Clause.\textsuperscript{73} Next, Section B analyzes equal protection claims against the military.\textsuperscript{74} Finally, Section C argues that the "Don't Ask, Don't Tell" policy violates the Equal Protection Clause because mandatory discharges based on the service member's sexual orientation are not rationally related to any legitimate military interest.\textsuperscript{75}

\section{A. Rational Basis Review and Equal Protection Claims Brought by Homosexuals}

Depending on the class of people affected, courts apply one of three tests to determine whether a regulation violates the Equal Protection Clause:\textsuperscript{76} the strict scrutiny test,\textsuperscript{77} the intermediate

\textsuperscript{72} Steffan v. Aspin, 8 F.3d at 70; Dahl v. Secretary of the Navy, 830 F. Supp. at 1335-36 (citing numerous military studies concluding that homosexual orientation does not affect a service member's ability to do his or her job); Meinhold, 808 F. Supp. at 1458.

\textsuperscript{73} See infra notes 76-88 and accompanying text for a discussion of the three tests used to determine whether a regulation violates the Equal Protection Clause.

\textsuperscript{74} See infra notes 89-107 and accompanying text for a discussion of equal protection claims as applied to the military.

\textsuperscript{75} See infra notes 108-41 and accompanying text for a discussion of the constitutionality of the "Don't Ask, Don't Tell" policy.

\textsuperscript{76} U.S. CONST. amend. XIV, § 1 (stating that "[n]o State shall.., deny to any person... the equal protection of the laws."). The Equal Protection Clause applies to the federal government through the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).


"These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." \textit{Cleburne}, 473 U.S. at 440-41. Courts will only uphold such legislation if it is "suitably tailored to serve a compelling state interest." \textit{Id.} at 440; see, e.g., Shaw v. Reno, 113 S.Ct. 2816, 2828 (1993) (holding that under strict scrutiny analysis, gerrymandering based on race violated Equal Protection Clause); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 507-08 (1989) (holding that under strict scrutiny analysis, municipal quota which set aside 30% of city construction dollars to minority subcontractors violated Equal Protection Clause); United States
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Don't Ask, Don't Tell scrutiny, or the rational relation test. Courts will apply either the intermediate or strict scrutiny tests when the plaintiff is a member of a "suspect class." A "suspect class" is one where the group (1) has suffered a history of discrimination; (2) exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) is a minority or politically powerless. Although courts concede that homosexuals have historically been subjected to discrimination, they do not consider homosexuals a suspect class entitled to intermediate or strict scrutiny. These courts give two reasons for this. First, homosexuals are characterized based on their behavior, which is mutable. Second, courts have found that homosexuals are not

v. Paradise, 480 U.S. 149, 168-70 (1987) (holding that under strict scrutiny analysis, state department policy which promoted one black state trooper for every white state trooper did not violate Equal Protection Clause where state troopers selected from qualified pool of candidates); Bernal, 467 U.S. at 227-28 (holding that under strict scrutiny analysis, state law barring resident aliens from becoming notary publics violated Equal Protection Clause).

78. Cleburne, 473 U.S. at 440-41. Courts apply the intermediate scrutiny test when legislation discriminates on the basis of gender or illegitimacy. Id. See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988) (holding that intermediate scrutiny analysis applies where discriminatory legislation based on illegitimacy); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (holding that intermediate scrutiny analysis applies where discriminatory legislation based on gender). A person's gender or legitimacy generally has no impact on the ability to perform a job. Cleburne, 473 U.S. at 440-41. Therefore, the legislation must be "substantially related to a sufficiently important governmental interest." Id. at 441. See, e.g., Jeter, 486 U.S. at 463-64 (holding that under intermediate scrutiny analysis, state statute which limited paternity actions for illegitimate children to six years after the birth of the child violated Equal Protection Clause); Hogan, 458 U.S. at 729-31 (holding that under intermediate scrutiny analysis, state-supported university which limited enrollment to women violated Equal Protection Clause).

79. See infra notes 86-88 and accompanying text for a discussion of the rational relation test.


82. High Tech Gays, 895 F.2d at 573.


84. Dahl, 830 F. Supp. at 1323 (citing High Tech Gays, 895 F.2d at 573). Writers have challenged the notion that homosexuals are not a quasi-suspect class entitled to heightened scrutiny under the Equal Protection Clause, arguing that homosexuality is an immutable trait because the person is born gay. See, e.g., Denise Dunnigan, Note, Constitutional Law: A New Suspect Class: A Final Reprieve for Homosexuals in the Military?, 42 OKLA. L. REV. 273, 289-90 (1989); Marion Halliday Lewis, Note, Unacceptable Risk or Unacceptable Rhetoric?: An Argument
politically powerless since they have successfully lobbied to pass legislation favorable to the gay community. As a result, courts apply the rational relation test to regulations which allegedly discriminate against homosexuals. Under this standard, the legislation is presumed valid as long as it is "rationally related to a legitimate state interest." Therefore, a regulation which discriminates against homosexuals violates the Equal Protection Clause if the homosexual can show that discrimination based on his or her status as a homosexual is not rationally related to a legitimate state interest.


This Note does not adopt the proposition that homosexuals are a suspect class. Unlike other suspect classes, homosexuals can alter their defining characteristic—their behavior. Dahl, 830 F. Supp. at 1323 (citing High Tech Gays, 895 F.2d at 573). Other than behavior, homosexuals have no other defining characteristics. Id. In contrast, members of groups classified as suspect cannot alter their defining characteristic. Id. For example, African-Americans cannot change their skin color; women cannot change their gender; illegitimate children cannot make themselves legitimate; and foreigners cannot change their national origin. Id.

This Note, however, argues that even under rational basis review, the "Don't Ask, Don't Tell" policy violates the Equal Protection Clause. See infra notes 108-41 and accompanying text for a discussion of the constitutionality of the "Don't Ask, Don't Tell" policy. Therefore, applying a stricter standard of review only strengthens this argument.


86. High Tech Gays, 895 F.2d at 571 (citing Ben-Shalom v. Marsh, 881 F.2d at 464; Woodward v. United States, 871 F.2d at 1076; Padula v. Webster, 822 F.2d at 103).


[Where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Id. at 441-42. See, e.g., Heller v. Doe by Doe, 113 S.Ct. 2637, 2643-44 (1993) (holding that under rational relation test, state statute which provided for the involuntary confinement of persons who were a danger to themselves and others did not violate Equal Protection Clause, even though the burden of proof needed for confinement of mentally retarded persons was “clear and convincing” and for mentally ill persons was “beyond a reasonable doubt”); Gregory v. Ashcroft, 111 S.Ct. 2395, 2406-08 (1991) (holding that under rational relation test, state mandatory retirement age for judges did not violate Equal Protection Clause); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 461-62 (1988) (holding that under rational relation test, a school busing fee did not violate the equal protection rights of poor school children).

88. Steffan v. Aspin, 8 F.3d 57, 63 (D.C. Cir. 1993), reh’g en banc granted, 8 F.3d 70 (1994); Dahl v. Secretary of the Navy, 830 F. Supp. at 1323-24 (quoting
B. Equal Protection Challenges to Military Regulations

Courts have generally given greater deference to the military when reviewing military regulations.\(^9\) Courts give greater deference because military life is so different in character than civilian life and requires greater restrictions to maintain unit cohesion and combat readiness.\(^9\) As a result, the military may proscribe speech or conduct that it finds detrimental to military discipline and morale.\(^9\) However, the military may only prohibit that

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This Note does not adopt the active rational basis review proposed in Kurt D. Hermansen, Note, Analyzing the Military's Justifications for its Exclusionary Policy: Fifty Years Without a Rational Basis, 26 LOY. L.A. L. REV. 151, 193-95 (1992). In Heller, 113 S.Ct. at 2642-43, the Supreme Court rejected active rational basis review and held that a challenged classification:

must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional . . . and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.

Id. at 2642-43 (citations omitted).

This Note, however, argues that there is no rational basis at all for the military's regulations banning homosexuals. See infra notes 113-35 and accompanying text for a challenge to the rationales postulated in support of the military's ban.

89. Parker v. Levy, 417 U.S. 733, 758 (1974) (holding that "the different character of the military community and of the military mission requires a different application of [First Amendment] protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); Woodward v. United States, 871 F.2d at 1077 (holding that "[s]pecial deference must be given by the court to the military when adjudicating matters involving their decisions on discipline, morale, composition and the like, and a court should not substitute its views for the 'considered professional judgment' of the military.") (quoting Goldman v. Weinberger, 475 U.S. 503, 508 (1986)).

90. Parker, 417 U.S. at 758.

91. Courts have generally held that military discharges based on statements by the service member that he or she is a homosexual do not violate the First Amendment right to free speech. Pruitt v. Cheney, 963 F.2d 1160, 1163 (9th Cir. 1991); Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984). The military does not violate the First Amendment because the military does not prohibit the service member from discussing his or her views on homosexuality or his or her views on the military's policy regarding homosexuals. Id. What the service member cannot do is be gay. Id.

Some writers have argued that the military’s policy implicates the First
speech or conduct if doing so is rationally related to its mission. Furthermore, when the military enacts a regulation which discriminates between similarly situated groups, the regulation must be rationally related to a legitimate military interest. If the discrimination is not rationally related to a legitimate military interest, it is unconstitutional as a violation of the Equal Protection Clause.

Relying on the Supreme Court’s holding in Bowers v. Hardwick that there is no fundamental right to engage in consensual homosexual sodomy, courts have uniformly held that the military may constitutionally discharge a service member for overt homosexual behavior. However, courts have split on the issue of whether a discharge based solely on a statement that a service member is gay violates the Equal Protection Clause. Those courts which have upheld such discharges have equated homosexual orientation with homosexual conduct. They have held that the

Amendment. See generally Phyllis E. Mann, Note, If the Right to Privacy Means Anything: Exclusion from the United States Military on the Basis of Sexual Orientation, 46 SMU L. Rev. 85 (1992) (arguing that the military discharges based on a service member’s statement that he or she is gay violates the First Amendment right to free speech).

This Note does not challenge the rulings of those courts that have upheld the military’s ban on First Amendment grounds. Instead, this Note limits its challenge to the ban on equal protection grounds. See infra notes 108-41 and accompanying text for a discussion of the constitutionality of the “Don’t Ask, Don’t Tell” policy.

92. Pruitt, 963 F.2d at 1166; Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1076; Dronenburg, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984); Rich, 735 F.2d at 1229.

93. Pruitt, 963 F.2d at 1166; Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1076; Dronenburg, 741 F.2d at 1397-98; Rich, 735 F.2d at 1229.

94. Pruitt, 963 F.2d at 1166; Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1076; Dronenburg, 741 F.2d at 1397-98; Rich, 735 F.2d at 1229.

95. Bowers v. Hardwick, 478 U.S. 186 (1986). In Hardwick, the Court held that consensual homosexual activity is not a fundamental right protected by substantive due process. Id. at 194-96. Fundamental rights are “those liberties that are deeply rooted in this Nation’s history and tradition.” Id. at 192. The Court held that while the right of privacy is a fundamental right, the right of privacy is limited to family relationships, marriage, and procreation; it does not extend to consensual homosexual activity. Id. at 190-91. See also High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (1990) (citing Hardwick for the proposition that there is no fundamental right to engage in consensual homosexual activity under the equal protection component of the Fourteenth Amendment).

96. Falk v. Secretary of the Army, 870 F.2d 941, 947 (2nd Cir. 1989) (holding that Army discharge based on homosexual conduct does not violate equal protection); Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382-84 (9th Cir. 1981) (holding that Army’s discharge of serviceman for committing sodomy does not violate due process or equal protection); Beller v. Middendorf, 632 F.2d 788, 811-12 (9th Cir. 1980) (holding that Navy’s discharge of enlistees who engaged in homosexual activities does not violate due process); Dronenburg, 741 F.2d at 1395-98 (holding that Navy’s discharge of serviceman who admitted to engaging in homosexual acts does not violate constitutional rights to privacy or equal protection).

97. Ben-Shalom v. Marsh, 881 F.2d at 464. In Ben-Shalom, the court held that
military need not wait until a homosexual acts on his or her sexual desires.\(^8\)

On the other hand, courts have struck down military discharges based solely on homosexual orientation as unconstitutional. These courts find that the military's policy is not rationally related to its declared objectives of "discipline, good order, and morale."\(^9\) In three recent federal cases, *Steffan v. Aspin*,\(^9\)

an Army discharge based solely on the plaintiff's admission that she was a lesbian did not violate the Equal Protection Clause. *Id.* The court reasoned that the Army had a legitimate interest in preventing conduct which would interfere with the military's interest in maintaining unit discipline and morale. *Id.* The court further stated that the military could reasonably assume that a service member who had homosexual desires would act on those desires. *Id.* The Army did not have to wait until the service member actually acted on his or her sexual desires. *Id.*

The *Ben-Shalom* court, however, failed to address the issue that the military regulations are based on the prejudices of heterosexual service members rather than on a legitimate threat to unit cohesion and combat readiness. *Dahl* v. Secretary of the Navy, 830 F. Supp. 1319, 1336-37 (E.D. Cal. 1993) (rejecting *Ben-Shalom*'s holding that discharging gay service members on the basis of homosexual orientation alone is rationally related to the military's mission); accord *Steffan v. Aspin*, 8 F.3d 57, 65-67 (D.C. Cir. 1993), *reh'g en banc granted*, 8 F.3d 70 (1994). In addition, the military discharges fewer gay service members during wartime. See *supra* notes 32, 36-41 and accompanying text for a discussion of the military's admission of homosexuals during wartime. Presumably, if homosexuality adversely affected combat readiness and unit cohesion, the military would tighten its ban against homosexuals of the restrictions, not relax it.


99. *Steffan*, 8 F.3d at 70; *Dahl*, 830 F. Supp. at 1335; *Meinhold v. Department of Defense*, 808 F. Supp. 1453 (C.D. Cal. 1992), *decided on merits in*, 808 F.Supp. 1455, 1458 (C.D. Cal. 1993). *See also* *Falk*, 870 F.2d at 947 (stating in dictum that a military discharge based solely on homosexual orientation would violate the Equal Protection Clause); *Watkins v. United States Army*, 875 F.2d 699, 709-10 (9th Cir. 1989) (ordering reenlistment of a 14-year veteran on equitable estoppel grounds because the Army knew he was gay but took no action for 14 years).

100. *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *reh'g en banc granted*, 8 F.3d 70 (1994). In *Steffan*, the Navy denied the plaintiff his commission six weeks before graduating from the United States Naval Academy ("Academy") after he admitted that he was gay. *Id.* at 60. The plaintiff had not engaged in homosexual conduct. *Id.* Up to the time of his discharge from the Academy, the plaintiff was considered one of the most promising students at the Academy. *Id.* at 59. He consistently received high marks. *Id.* "By his sophomore year, his instructors considered him 'gifted,' an 'outstanding performer' who had 'exhibited excellent leadership.'" *Id.* "In his junior year, [he] was selected as the Regimental Commander of half his class." *Id.* "In his senior year, [he] was selected as Battalion Commander, one of the ten highest ranking midshipmen at the Academy." *Id.* "In this capacity, [he] had direct command over one-sixth of the Academy's 4,500 midshipmen." *Id.* The district court upheld the discharge on equal protection grounds. *Id.* at 60. A panel of the United States Circuit Court for the D.C. Circuit reversed, holding that the Navy's policy of discharging homosexuals solely for stating that they are gay violated the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at 70. The court held that the policy was not rationally related to any legitimate military objective, but instead, was based on the irrational prejudice of the other service members. *Id.* The panel ordered the plaintiff's reinstatement. *Id.*
Dahl v. Secretary of the Navy, and Meinhold v. Department of Defense, the courts rejected the military's rationale that a mere statement by a service member that he or she is gay destroys the discipline, morale, and good order of the unit. These courts held that Navy regulations mandating the discharge of service members who announce that they are gay, even where the service members have not engaged in homosexual conduct, are unconstitutional as a violation of the Equal Protection Clause. The courts held that the Navy's rationale that homosexuals are incompatible with military service was irrational because the plaintiffs' open homosexuality had no effect on morale within their units. In fact, the plaintiffs earned the respect of their peers despite their sexual orientation. Furthermore, the courts point-

On January 7, 1994, a majority of the court voted to rehear the entire case en banc and vacated the judgment ordering reinstatement. Id. at 70. As a result, it remains to be seen whether the panel's decision will be affirmed. 101. Dahl v. Secretary of the Navy, 830 F. Supp. 1319 (E.D. Cal. 1993). In Dahl, the Navy discharged the plaintiff after he admitted that he was gay after his superiors questioned him. Id. at 1321. The plaintiff, however, qualified his answer by stating that he had not engaged in homosexual activity subsequent to enlistment. Id. The plaintiff had an excellent service record and received affidavits from superiors and shipmates alike that he should remain in the Navy. Id. The court held that the Navy's policy of excluding homosexuals solely on the basis their status as a homosexual was unconstitutional as a violation of the Equal Protection Clause. Id. at 1337. In particular, the court cited numerous studies conducted by the Navy which concluded that homosexual orientation alone had no impact on the homosexual's ability to serve. Id. at 1336. Rather, the Navy's exclusionary policy was based on the prejudice of heterosexual service members. Id. at 1337.

102. Meinhold v. Department of Defense, 808 F. Supp. 1453 (C.D. Cal. 1992), decided on merits in, 808 F.Supp. 1455 (C.D. Cal. 1993). In Meinhold, the Navy discharged the plaintiff when he announced that he was gay on a national television program. Id. at 1454. Prior to that time, the plaintiff had told both his superiors and subordinates that he was gay but that he had never engaged in homosexual activity. Id. The Navy considered the plaintiff to be one of its top instructors. Id. Furthermore, the members of the plaintiff's unit respected him. Id. Neither unit discipline or morale nor plaintiff's ability to lead suffered as a result of the plaintiff's openness about his homosexuality. Id. at 1458. The court held that the Navy's policy of discharging the plaintiff solely for his homosexual orientation was unconstitutional as a violation of plaintiff's equal protection rights. Id. The court held that the Navy had failed to demonstrate how plaintiff's discharge was rationally related to the Navy's objectives of maintaining discipline, good order, and morale, when plaintiff's known homosexuality did not adversely affect any of these goals. Id. Furthermore, the court held that the Navy could not justify its rationale when the Navy's own studies showed that homosexual orientation alone did not affect the military's interest in maintaining unit cohesion. Id. at 1457-58.

103. Steffan, 8 F.3d at 67-69; Dahl, 830 F. Supp. at 1332-37; Meinhold, 808 F. Supp. at 1458.

104. Steffan, 8 F.3d at 67-69; Dahl, 830 F. Supp. at 1332-37; Meinhold, 808 F. Supp. at 1458.

105. Steffan, 8 F.3d at 59; Dahl, 830 F. Supp. at 1321; Meinhold, 808 F. Supp. at 1458.

106. Steffan, 8 F.3d at 59; Dahl, 830 F. Supp. at 1321; Meinhold, 808 F. Supp. at
ed out that the Navy's own studies showed that gay service members performed their duties as competently as heterosexual service members.\textsuperscript{107}

C. The "Don't Ask, Don't Tell" Policy and the Violation of the Equal Protection Rights of Gay Service Members

Like the Navy regulations at issue in \textit{Steffan}, \textsuperscript{108} \textit{Dahl},\textsuperscript{109} and \textit{Meinhold},\textsuperscript{110} the "Don't Ask, Don't Tell" policy violates the Equal Protection Clause because it treats service members differently depending on the service member's sexual orientation, even though the discrimination is not rationally related to any legitimate military interest. Under the "Don't Ask, Don't Tell" policy, the military will discharge service members who state that they are gay, even if those service members have not engaged in homosexual conduct.\textsuperscript{111} However, the military does not discharge heterosexual service members who state their sexual preferences. Rather, the military will only discharge heterosexual service members after they have engaged in prohibited sexual conduct.\textsuperscript{112}

The military has traditionally rationalized the policy by arguing that homosexuals are military liabilities that destroy unit cohesion.\textsuperscript{113} The "Don't Ask, Don't Tell" policy retains this ratio-

\footnotesize{1458.}
\footnotesize{108. \textit{Steffan}, 8 F.3d 57. See supra note 100 and accompanying text for a discussion of \textit{Steffan}.}
\footnotesize{112. For example, a service member is subject to discharge for engaging in sodomy. U.C.M.J. art. 125, 10 U.S.C. § 925 (1993) (stating that "[a]ny [service member] who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Any person found guilty of sodomy shall be punished as a court-martial may direct."). A heterosexual service member could say that he enjoyed anal sex with women, yet that would not subject him to discharge from the military. Only after he had engaged in anal sex could he be discharged from the military. \textit{Id.} However, when homosexual service members state that they are homosexuals (implying they prefer sexual relations with other persons of the same sex), the military discharges them, even if they never planned to have homosexual sex. See 10 U.S.C. § 654. See supra note 62 for the text of the National Defense Authorization Act for Fiscal Year 1994, which codifies the "Don't Ask, Don't Tell" policy.}
\footnotesize{113. The military rationalizes its ban on homosexuals as follows: Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who,
The military argues that homosexuals destroy unit cohe-

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 Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.


The Air Force Regulations are: 36-2 (Officer Personnel: Administrative Discharge Procedures—Substandard Performance, Misconduct, Moral or Professional Dereliction, or In the Interest of National Security); 36-12 (Officer Personnel: Administrative Separation of Commissioned Officers); 39-10 (Administrative Separation of Airmen). Id.

The Navy Regulations are: SECNAVINST 1900.9C (Policy for Members of Naval Service Involved in Homosexual Conduct); SECNAVINST 1920.4A (Enlisted Administrative Separations, Active and Reserve); SECNAVINST 1920.6A (Administrative Separations of Officers, Active and Reserve); NAVMILPERSCOMINS 1910.1C (Personnel Instructions); MILPERSMAN 3630400 (Separation by Reason of Homosexuality). Id.

The Marine Corps Regulations include the Navy Regulations above plus: Marine Corps Separation and Retirement Manual 1900-16C, 6207 (Officers and Enlisted). Id.

The Coast Guard Regulations are: Personnel Manual art. 12-B-16 (Discharge for Unsuitability); Personnel Manual art. 12-B-18 (Discharge for Homosexuality); Personnel Manual art. 12-B-33 (Discharge Processing). Id.

114. 10 U.S.C. § 654 (a). This statute states:

(13) The prohibition against homosexual conduct [which includes a statement that a service member is a homosexual] is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

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

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

In addition to the "unit cohesion" argument, the military and its supporters defend the military's ban on gays on three other grounds. (1) Allowing homosexuals to join the military destroys public confidence in the military. 32 C.F.R. § 41, app. A, pt. 1, § H.1.a. (2) Homosexuals are security risks. Id. (3) Allowing homosexuals to join the military threatens the military's blood supply during wartime because of the threat of AIDS. BURRELLI, supra note 22, at S1315. None of these reasons is a rationale basis for excluding homosexuals from the military.

The military's goal in maintaining public confidence in the military is not rationally related to the exclusion of homosexuals because it is not grounded in reality. Id. at S1314. For example, a 1991 Gallup poll found that 81% of Americans believed that homosexuals should not be discharged from the military based solely on their orientation. Id. However, even if a majority of Americans disliked homosexuals, this would not be an appropriate ground to ban homosexuals from the military. The Equal Protection Clause forbids the government from giving legal effect to the prejudices of others. Steffan v. Aspin, 8 F.3d 57, 68 (D.C. Cir. 1993), reh'g en banc granted, 8 F.3d 70 (1994) (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

The rationale that homosexuals are greater security risks than heterosexuals is also not grounded in reality. HUNTER ET AL., supra note 113, at 43. "As early as 1957, the Navy's Crittenden Report acknowledged that the notion that homosexual individuals pose a security risk was 'without sound basis in fact ... [N]o intelligence agency, as far as can be learned, adduced any factual data ... to support these opinions.'" Id. (quoting REPORT OF THE BOARD APPOINTED TO PREPARE AND SUBMIT RECOMMENDATIONS TO THE SECRETARY OF THE NAVY FOR THE REVISION OF POLICIES, PROCEDURES, AND DIRECTIVES DEALING WITH HOMOSEXUALS 5-7 (1957)). "Recent Department of Defense studies have concluded that '[i]n the 30 years since the Crittenden report was submitted, no new data have been presented that would refute its conclusion that homosexuals are not a greater security risk than heterosexuals.'" HUNTER ET AL., supra note 113, at 43-44 (quoting T. SARBIN AND K. KAROLS, NONCONFORMING SEXUAL ORIENTATION AND MILITARY SUITABILITY APP. B B-4 (Defense Personnel Security Research Education Center, 1988) and citing M. MC DANIEL, PRESERVICE ADJUSTMENT OF HOMOSEXUAL AND HETEROSEXUAL MILITARY ACCESSIONS: IMPLICATIONS FOR SECURITY CLEARANCE SUITABILITY 21 (Defense Personnel Security Research and Education Center, 1989)).

Finally, the argument that homosexuals should be barred from the military because of health risks related to AIDS is also misplaced. BURRELLI, supra note 22, at S1315. The military's ban on homosexuals is based on the impact a gay service member will have on unit discipline and morale, not on general health concerns. Id. The military screens individuals to ensure that they are physically fit for combat. Id. The military then bars from service individuals who have health problems, or a history of health problems. Id. Thus, the military would bar an individual who tested positive for HIV-1 from service. Id. However, the military will not bar an individual from service because he or she belongs to a group with a higher probability of contracting a certain disease or illness. Id. Therefore, the military would not bar a gay individual from service merely because gay men have a higher probability of contracting AIDS. Id. Furthermore, the AIDS argument breaks down when one considers that lesbians have less of a chance of contracting HIV-1 than either male homosexuals or heterosexuals. Id. If the military wanted to limit the spread of AIDS, the military should enlist more lesbians. Id.

In addition, the military's own actions tend to discount AIDS as a rational threat to the military blood supply. During wartime, the military suspends the ban on homosexuals and allows homosexuals to fight. If AIDS were a threat to the military's blood supply, the military would discharge more gay service members
privileges to other service members to whom they are sexually attracted;\textsuperscript{116} (2) homosexual service members cannot earn the respect of their unit members;\textsuperscript{117} and (3) homosexual service members could not tolerate the sexual tension that would result from being placed in close quarters with service members of the same sex.\textsuperscript{118}

The first rationale, that gay service members will give privileges to those service members to whom they are sexually attracted, ignores the fact that heterosexual service members can just as readily promote their friends in the unit as homosexuals can.\textsuperscript{119} There is no evidence that homosexuals are more prone to patronage than heterosexuals.

The second rationale, that homosexuals cannot gain the respect of their unit members, also is not supported in reality. The military has conducted several studies concluding that homosexuality has no effect on a person's ability to do a military job.\textsuperscript{120} Furthermore, as cases like Steffan v. Aspin,\textsuperscript{121} Dahl v. Secretary of the Navy,\textsuperscript{122} and Meinhold v. Department of Defense\textsuperscript{123} demonstrate, homosexual service members can earn the respect of both superiors and subordinates alike, even when unit members know that the person is gay.\textsuperscript{124} In addition, the military has successfully combatted prejudice in the past, when it opened its ranks to both African-Americans\textsuperscript{125} and women.\textsuperscript{126}

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\textsuperscript{117} Id. § 654(a)(7) (stating that “[o]ne of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members.”).

\textsuperscript{118} Id. § 654(a)(12) (stating that “the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions . . . characterized by forced intimacy with little or no privacy.”).

\textsuperscript{119} Dahl, 830 F. Supp. 1319, 1335 n.17 (E.D. Cal. 1993). The court analogized this reasoning to a facially prejudicial argument that minorities are more likely to steal. Id.

\textsuperscript{120} Id. at 1336 (citing numerous military studies concluding that homosexual orientation does not affect a service member's ability to do his or her job).

\textsuperscript{121} Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), reheg in banc granted, 8 F.3d 70 (1994).

\textsuperscript{122} Dahl, 830 F. Supp. 1319 (E.D. Cal. 1993).


\textsuperscript{124} Steffan, 8 F.3d at 59; Dahl, 830 F. Supp. at 1321; Meinhold, 808 F. Supp. at 1458.


\textsuperscript{126} On June 2, 1948, Congress passed the Women's Armed Services Act of 1948 (P.L. 80-625), which integrated women into the military. JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 113 (1982).
Finally, the third rationale, that placing homosexuals in close quarters with service members of the same sex creates intolerable sexual tension for heterosexuals, is also irrational. First, homosexual service members who have joined the military presumably want to remain in the military. Therefore, they will not act on their sexual desires because that would lead to their discharge. Second, most homosexuals who serve in the military remain silent about their homosexuality, yet it is common knowledge that homosexuals have served and do serve in the military. The military claims that gay service members do not threaten the privacy of heterosexual service members as long as they keep their gay status a secret. This is because heterosexual service members cannot fear what they do not know. However, the military fails to demonstrate how the same heterosexual service members are threatened by knowing that their fellow service members are gay, when the gay service members respect the heterosexual service members’ privacy. The only logical conclusion is that the policy is based on the prejudiced perceptions of the heterosexual service members, rather than the actual propensity to sexual conduct of the gay service members. The military must secretly believe that homosexuals and heterosexuals can serve side-by-side during wartime since the military discharges fewer homosexuals during wartime than during peacetime.

127. Steffan, 8 F.3d at 69; Dahl, 830 F. Supp. at 1334.
129. Hunter et al., supra note 113, at 42-43. Military studies reveal that approximately 10 percent of military service members are exclusively or predominantly homosexual. Id. (citing Sarbin & Karols, supra note 115, at 8, 24; A. Kinsey et al., Sexual Behavior in the Human Female 474 (1953)). These studies further conclude that as many as 46 percent of servicemen and more than 28 percent of servicewomen have engaged in “homosexual conduct” as defined by the military discharge regulations. Id.
Most service members who are discharged for homosexuality are not detected until they have served for over a year. Id. at 43. Between 1974 and 1983, the average tenure of a service member who was discharged for homosexuality was three years. Id. at 59, n. 40 (citing Comptroller-General Decision, Cost of Department of Defense Homosexual Exclusion Policy (General Accounting Office 1984)). Between 1981 and 1987, of all service members discharged from the Army and the Air Force for homosexuality, 72 percent served at least two years, almost 32 percent served more than three years, and 17 percent served five years or more. Id. at 43 (citing Sarbin & Karols, supra note 115, at 22).
130. Clinton, Remarks on Gay Policy, supra note 4, at 1370.
131. Steffan, 8 F.3d at 69; Dahl, 830 F. Supp. at 1332-33.
132. Steffan, 8 F.3d at 69; Dahl, 830 F. Supp. at 1332-33.
133. Steffan, 8 F.3d at 69; Dahl, 830 F. Supp. at 1332-33.
134. In fact, military studies have shown that homosexuals are no more prone to sexual conduct than heterosexuals. Dahl, 830 F. Supp. at 1332-33.
135. See supra notes 32, 36-41 and accompanying text for a discussion of the military’s reduction in homosexual discharges during wartime.
If homosexuals truly posed a threat to heterosexual service members, the military would adopt the opposite policy.

In addition, the “Don’t Ask, Don’t Tell” policy contradicts itself. In one section, the policy states that homosexuality is incompatible with military service.136 Yet, in another section, the policy lists exceptions where homosexuality is not incompatible with military service, such as where a heterosexual has a one-time homosexual encounter.137 If the military is interested in prohibiting homosexual conduct, it should apply its policy indiscriminately, regardless of the sexual orientation of the service member. Failure to apply the policy indiscriminately will lead to the same inconsistent application of the military’s “gay regulations” that occurred during the 1960’s and 1970’s, where some homosexual activity led to a discharge and some did not.138 This would undermine the military’s goal of preventing homosexual conduct.

The “Don’t Ask, Don’t Tell” policy fails to address the military’s interest in maintaining discipline, good order, and morale.139 The policy also contains exceptions which undermine the military’s objectives.140 As a result, the military needs to revise its regulations.141

III. INTEGRATING HETEROSEXUAL AND HOMOSEXUAL TROOPS: MAINTAINING UNIT COHESION THROUGH MANDATORY DISCHARGES BASED ON HOMOSEXUAL CONDUCT AND SEXUAL HARASSMENT

As the foregoing demonstrates, the “Don’t Ask, Don’t Tell” policy violates the Equal Protection Clause because the military cannot demonstrate142 how discharging homosexuals merely for

136. 10 U.S.C. § 654(a)(15) (1993) (stating that “[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability”).

137. Id. § 654(b)(1)(e) (stating that “[a] member of the armed forces shall be separated from the armed forces... if... the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act... unless... the member does not have a propensity or intent to engage in homosexual acts”).

138. See supra notes 36-43 and accompanying text for a discussion of the inconsistent application of the military's policy regarding homosexuals during the 1960's and 1970's.

139. See supra notes 108-38 and accompanying text for a discussion of constitutionality of the "Don't Ask, Don't Tell" policy.

140. See supra notes 136-38 and accompanying text for a discussion of the exceptions in the "Don't Ask, Don't Tell" policy.

141. See infra notes 142-89 and accompanying text for a discussion of this Note's proposed modifications to the "Don't Ask, Don't Tell" policy.

142. The service member challenging the regulation, not the military, has the burden of showing that a discriminatory military regulation is not rationally related to a legitimate military interest. See supra note 88 and accompanying text for a
stating that they are gay is rationally related to the military's objectives of discipline, good order, and morale. Furthermore, the exceptions to the policy will result in inconsistent application of the regulations to homosexuals, thereby undermining the purpose of the regulations themselves. As a result, the policy should be modified in three ways. First, the military should not discharge service members who announce that they are gay if the service members have not engaged in homosexual conduct. Second, the military should discharge, without exception, any service member who engages in homosexual conduct. Third, the military should expand its sexual harassment policy to protect heterosexual service members who are sexually harassed by gay service members. Under this proposal, the military could control unwanted homosexual behavior without violating the constitutional rights of gay service members. The military would base discharges on homosexual conduct rather than on homosexual orientation. Furthermore, by eliminating the exceptions to the policy, the military would apply its regulations forbidding homosexual conduct indiscriminately to all service members. Finally, by expanding sexual harassment to include harassment by homosexuals, the military could prevent gay service members from harassing other service members. This proposal is a practical alternative to the “Don't Ask, Don't Tell” policy. Foreign militaries have successfully integrated heterosexual and homosexual service members by enacting similar regulations.

Section A proposes that the military adopt the above three modifications to its current policy on homosexuality. Next, Section B discusses how foreign militaries have successfully integrated heterosexual and homosexual service members by enacting regulations similar to those proposed in this Note.

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143. See supra notes 108-41 and accompanying text for an equal protection analysis of the “Don’t Ask, Don’t Tell” policy.
144. See supra notes 136-38 and accompanying text for a discussion of the possible inconsistent application of the “Don’t Ask, Don’t Tell” policy.
145. See infra notes 142-89 and accompanying text for a discussion of this Note’s proposed modifications to the “Don’t Ask, Don’t Tell” policy.
146. See infra notes 148-60 and accompanying text for a discussion of this Note’s proposal to eliminate discharges based solely on a service member’s statement that he or she is gay.
147. See infra notes 161-66 and accompanying text for a discussion of the successful integration of heterosexual and homosexual troops in foreign militaries.
A. A Proposal to Modify the Military's Discharge Policy: Mandating Discharges for Homosexual Conduct and Sexual Harassment Rather Than for Homosexual Orientation

In addition to indiscriminately prohibiting homosexual conduct, the military must also ensure that gay service members do not sexually harass service members of the same sex. Expanding the military's sexual harassment policy to include homosexuals would solve this problem. The Department of Defense Military Equal Opportunity Act (Military EO Act), the military's sexual harassment policy, is based on Title VII of the Civil Rights Act of 1964 (Title VII) and the Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex (EEOC Guidelines). Under the Military EO Act, the military will dis-
charge service members who sexually harass service members of the opposite sex.\textsuperscript{151} Sexual harassment can take one of two forms. The first form is where the service member's statements or conduct create a "hostile" work environment.\textsuperscript{152} Under this form of sexual harassment, the statements or conduct prevent the harassed individual from performing his or her job.\textsuperscript{153} The second form, "quid pro quo" sexual harassment, occurs when a superior conditions a subordinate's work assignment on sexual favors with the superior.\textsuperscript{154}

Currently, the Military EO Act contemplates sexual harassment between men and women.\textsuperscript{155} However, the military could easily expand the policy to include homosexual harassment of service members of the same sex. Courts have held that Title VII does not protect homosexuals who are harassed by heterosexuals because Title VII's definition of "sex" means "gender" and not "sexual orientation."\textsuperscript{156} However, courts have held that Title VII protects persons who have been sexually harassed by homosexuals of the same gender.\textsuperscript{157} The different treatment occurs because implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

\begin{itemize}
\item \textbf{g} Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.
\end{itemize}

29 C.F.R. § 1604.11.
151. 32 C.F.R. § 51.4.
152. Id. § 51.3(c). Cf. 29 C.F.R. § 1604.11(c) (containing similar language). In Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982), the court held that a "hostile work environment" is one in which sexual harassment is "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." Id. The court further held that "whether sexual harassment . . . is sufficiently severe and persistent to affect seriously the psychological well-being of employees is a question to be determined with regard to the circumstances." Id. See also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (citing Henson with approval); Moylan v. Maries County, 792 F.2d 746, 749-50 (8th Cir. 1986) (quoting Henson's definition of "hostile work environment" with approval).
153. 29 C.F.R. § 1604.11(a)(3).
154. 32 C.F.R. § 51.3(a)-(b). Cf. 29 C.F.R. § 1604.11(a)(1)-(2) (containing similar language).
155. 32 C.F.R. § 51.3(a)-(c). The military has limited sexual harassment to relations between heterosexual men and women by stating that sexual harassment is "[a] form of sex discrimination." Id.
156. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979).
courts have interpreted sexual harassment to mean harassment that is sexually motivated (i.e., based on sexual attraction). Therefore, Title VII does not protect homosexuals who are harassed by heterosexuals because the harassment is not sexually motivated; heterosexuals are not sexually attracted to persons of the same gender. However, Title VII protects individuals who are sexually harassed by homosexuals of the same gender because homosexuals are attracted to persons of the same gender. Since the Military EO Act contains similar language to the EEOC Guidelines, the military could apply its sexual harassment policy to homosexuals who sexually harass service members of the same sex.

Prohibitions on homosexual harassment in conjunction with prohibitions on homosexual conduct serve the military's interest in maintaining discipline, good order, and morale. By discharging service members who engage in either activity, the military assures heterosexual service members that the military will protect them from unwanted sexual advances by homosexual service members. On the other hand, by limiting discharges to homosexual conduct instead of to homosexual orientation, the military protects the equal protection rights of gay service members.

B. The Application of Sexual Harassment Standards to Homosexuals in Other Countries

Foreign militaries that have lifted their bans on homosexuals have successfully integrated heterosexual and homosexual troops by applying regulations similar to those proposed in this Note. This demonstrates that the United States military could integrate heterosexuals and homosexuals without destroying unit cohesion. Over half of the members of the North Atlantic Treaty Organization (NATO) allow homosexuals to serve in the military. An overwhelming majority prohibit overt homosexual behavior. In

158. Id.
159. Id.
160. Id.
161. 139 CONG. REC. S1262-02, S1287-89 (daily ed. Feb. 4, 1993) (reprinting NATO Acceptance of Gays Runs Full Spectrum, ARMY TIMES, Jan. 11, 1993, at 11) [hereinafter NATO Acceptance]. Twelve out of 21 members of NATO allow homosexuals to serve in the military. Id. These countries include: Australia, Belgium, Canada, Denmark, France, Germany, Luxembourg, Japan, The Netherlands, Norway, and Spain. Id. The NATO members that ban homosexuals from the military are: Great Britain, Greece, Italy, Korea, New Zealand, Portugal, Saudi Arabia, Turkey, and the United States. Id. The reader should note that even in Japan, where the social stigma against homosexuality is great, the military will not discharge a homosexual service member solely for announcing his sexual orientation. Id. at S1289.
162. Id. at S1287-89. Among the NATO countries allowing homosexuals to serve
addition, even in countries which allow service members to engage
in consensual homosexual sex, sexual harassment policies provide
for the discharge of service members who behave inappropriately,
regardless of sexual preference. Although some countries sub-
ject homosexuals to psychiatric examinations, homosexuals may
serve if their homosexuality will not interfere with the military’s
effectiveness. Beyond restrictions on conduct, however, most
NATO countries do not restrict military advancement or as-
signments of homosexuals.

While countries which have al-
lowed homosexuals to serve in the military continue to experience
prejudice by heterosexuals against homosexuals, homosexuality
rarely destroys unit cohesion. Just as foreign countries have
successfully integrated homosexuals into their militaries, so can
the United States successfully integrate homosexuals into its
military.

IV. TESTING THE PROPOSED MODIFICATIONS TO THE MILITARY’S
POLICY REGARDING HOMOSEXUALS

The following hypotheticals will demonstrate how the pro-
posed regulations will allow the military to accept homosexuals
openly into its ranks without compromising the unit cohesion of
the troops. This Part first presents a general set-up and then
applies the proposed regulations to specific scenarios which follow.

John is a homosexual who wants to join the Navy. He goes to
his local recruiter. The recruiter asks him questions about his
health and fitness for being a sailor, but he does not ask John
whether he is gay. John, being an open and honest fellow, vol-
unteers that he is gay.

When asked whether he believes this will affect his perfor-
ance as a sailor, John says that it will not. The recruiter tells
John that overt homosexual conduct is prohibited at all times and
places as is sexual harassment of other sailors. The recruiter
further tells John that the military will discharge him if he vio-
lates these regulations. There will be no exceptions. John says
that he is willing to live by the military's regulations and will not

in the military, only four allow service members to engage in consensual homosex-
ual sex: Denmark, Luxembourg, The Netherlands, and Norway. Id. at S1288-89.
163. Id.
164. Id. Belgium, France, Germany, and Israel subject homosexual service mem-
ers to psychiatric examinations. Id.
165. Id. All NATO countries allow homosexuals to serve in combat, except Israel.
Id. Belgium allows homosexuals to serve in combat but excludes them from certain
tasks and units. Id. Only Germany and Israel forbid homosexuals from serving as
officers, on grounds that they cannot earn the respect of other soldiers. Id. Bel-
gium, France, Germany, and Israel limit or exclude access by homosexuals to high
security positions. Id.
166. NATO Acceptance, supra note 161, at S1287-89.
violate them. At this point, the recruiter takes John at his word. Barring any mental or physical problems, John successfully enlists in the Navy. The following scenarios occur after John enlists.

SCENARIO #1: John never engages in homosexual conduct. He never makes a homosexual advance against another sailor. Overall, he is a fine sailor.

In this scenario, John may serve as long as he wants. Homosexual service members may serve as long as they do not engage in homosexual conduct or sexually harass other service members of the same sex. Since John has done neither, he will not be discharged.

SCENARIO #2: John innocently and nonprovokingly tells Tom that he (John) is gay.

Like Scenario #1, nothing will happen to John. The military will not discharge a service member who merely states that he or she is gay. A nonprovoking statement about sexual orientation does not threaten discipline or morale because it does not flaunt the fact in such a way as to prevent other service members from performing their work.

SCENARIO #3: This scenario is the same as Scenario #2, except that John repeatedly tells Tom that he is gay in such a way as to flaunt his homosexuality. Tom feels uncomfortable.

In this scenario, the Navy will discharge John. Conduct which "interferes with an individual's performance or creates an intimidating, hostile, or offensive environment" violates the sexual harassment provisions of the proposed policy and results in the offender's immediate discharge. Unlike Scenario #2, here, John flaunts his homosexuality. Tom cannot properly perform his work because John deliberately makes Tom uncomfortable with his remarks. Furthermore, John's harassment breaks down Tom's trust of John which is essential to unit cohesion.

SCENARIO #4: While they are working together one day, John tells Tom that he is good-looking, implying that he is sexually attracted to Tom. Tom, who is heterosexual, feels uncomfort-
able by the statement. The Navy will discharge John for the same reasons listed in Scenario #3. In the civilian setting, mere flirtation does not create a “hostile environment” and thus would not be considered sexual harassment.\textsuperscript{174} In the military, however, where individuals are forced into close living quarters, flirtation could create a “hostile environment” because the victim would not be able to escape the offensive comments.

SCENARIO #5: John asks if he can kiss Tom, a sailor in his unit. Tom is heterosexual and is repulsed by the offer. John makes no other advances. The Navy will immediately discharge John for the same reasons listed in Scenarios #4. A request for a kiss could create a “hostile environment” when the individuals are confined to close living quarters.

SCENARIO #6: John is sexually attracted to Paul. One night, while sitting in the barracks, John reaches over and holds Paul’s hand.\textsuperscript{175} Paul, who is secretly gay, reciprocates.

In this scenario, the Navy will discharge both John and Paul. The proposed regulations prohibit homosexual acts.\textsuperscript{176} Homosexual acts encompass both those that are actively undertaken and passively received for the purpose of satisfying sexual desires.\textsuperscript{177} Here, John intimately touched Paul because he was sexually attracted to Paul. Paul, on the other hand, passively accepted John’s intimate touch. Therefore, the Navy will discharge both John and Paul.

SCENARIO #7: John has homosexual sex with a consenting adult male while he is on leave. In this scenario, the Navy will discharge John. The regulations prohibit homosexual conduct not only on the base or ship,\textsuperscript{178} but also on leave.\textsuperscript{179}

\textsuperscript{175} Id.
\textsuperscript{176} See infra notes 190-91 and accompanying Appendix for the language of 10 U.S.C. § 654(b)(1).
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
SCENARIO #8: Tom and Will are both heterosexual sailors and best friends. One night while out on leave, they both get drunk. They then proceed over to the local beach and have sex together. Neither has ever engaged in homosexual sex before. The next day, both state that the behavior was a deviation from their normal behavior, caused by their drunkenness. Both emphatically state that they are heterosexual.

Under this scenario, the Navy will discharge both Tom and Will. Both engaged in homosexual conduct, which is prohibited. That they were both heterosexual is irrelevant since the exceptions have been eliminated. Furthermore, that they were on leave is also irrelevant. The exceptions have been eliminated to maintain the strictest order in the military and to keep discharges consistent. By indiscriminately discharging service members who engage in homosexual conduct, the military can maintain order and discipline without differentiating between the actual sexual orientation of the individual.

SCENARIO #9: John is the commanding officer of his unit. Secretly, he is sexually attracted to Scott, a member of his unit. John promotes Scott over Tom, even though Tom is better qualified for the position.

Under this scenario, the Navy will discharge John, but it will not discharge Scott. The proposed regulations state that a supervisor who implicitly uses sexual behavior to affect the career, pay, or job of a military member is engaging in sexual harassment. Since John promoted Scott over a more qualified service member because he was sexually attracted to Scott, he has engaged in sexual harassment and will be immediately discharged. The strict enforcement of this provision ensures compliance by supervisors and commanders. However, since Scott was an unwitting party to the harassment, the Navy will not discharge him.

SCENARIO #10: John is the commanding officer of his unit. He is attracted to Scott. John offers Scott a promotion in exchange for sex. Scott consents.

Under this scenario, the Navy will discharge both John and Scott. John violated the sexual harassment regulations because he made sex a condition of Scott's promotion. Scott will be discharged because he condoned John's behavior by complying.

180. Id.
182. Id.
183. See infra notes 192-93 and accompanying Appendix for the language of the Department of Defense Military Equal Opportunity Act, 32 C.F.R. § 51.3(c).
184. Id.
185. Id.
The strict enforcement of these regulations against both parties is to protect other service members from promotions based on sexual attraction, rather than merit. Furthermore, an added protection results because the regulation gives subordinates an incentive to “blow the whistle” on improper sexual propositions by their superiors.

SCENARIO #11: John is the commanding officer of his unit. He is attracted to Scott. John tells Scott that unless Scott has sex with him, Scott will never get promoted. Scott refuses.

Under this scenario, the Navy will discharge John for the reasons listed in Scenario #10. However, the Navy will not discharge Scott because he did not consent to John’s proposition.

The preceding eleven scenarios demonstrate how the military could effectively control sexual conduct which undermines unit cohesion and morale while allowing homosexuals to serve openly in the military. By indiscriminately providing for the immediate discharge of all service members who engage in sexual misconduct, the military protects heterosexual service members from unwanted sexual advances by homosexuals, protects its interest in proscribing homosexual conduct, and protects the equal protection rights of homosexual service members.

CONCLUSION

The “Don’t Ask, Don’t Tell” policy violates the Equal Protection Clause because it provides for the discharge of service members who announce that they are gay, even if those service members have not engaged in homosexual conduct. Discrimination of homosexuals based on their sexual orientation violates the Equal Protection Clause because such discrimination is not rationally related to the military’s interests in maintaining discipline, good order, and morale.

The military should revise its regulations to focus on sexual misconduct rather than on sexual orientation, since impermissible conduct is what actually undermines discipline and morale in the military. This could be achieved in three ways: (1) by eliminating the provision providing for discharge based solely on homosexual orientation; (2) by eliminating the exceptions to the discharge policy; and (3) by expanding the military’s sexual harassment policy to include homosexual harassment of heterosexual service members. Several foreign militaries have successfully inte-

187. See supra notes 108-41 and accompanying text for a discussion of the constitutionality of the “Don’t Ask, Don’t Tell” policy.
188. See supra notes 142-89 and accompanying text for a discussion of this Note’s proposed modifications to the “Don’t Ask, Don’t Tell” policy.
grated heterosexual and homosexual troops by basing discharges on homosexual conduct and sexual harassment.189 Similarly, the United States military could successfully integrate heterosexual and homosexual troops. The military could maintain strong unit cohesion and combat readiness while also protecting the constitutional rights of its members by allowing gay service members to openly serve while indiscriminately prohibiting sexual conduct and sexual harassment.

APPENDIX: REGULATIONS REGARDING HOMOSEXUALITY IN THE ARMED FORCES

The National Defense Authorization Act for Fiscal Year 1994190 should be amended as follows. Proposed deletions have been crossed through. Added provisions are in italics.

§ 654. Policy concerning homosexuality in the armed forces
(a) Findings.—Congress makes the following findings:
(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.
(2) There is no constitutional right to serve in the armed forces.
(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

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

(8) Military life is fundamentally different from civilian life in that—

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at

189. See supra notes 161-66 and accompanying text for a discussion of the integration of heterosexual and homosexual troops in foreign militaries.
the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

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

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

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

(b) Policy.—A member of the armed forces shall be separated from the armed forces if one or more of the following findings is made . . .:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

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

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

(C) Such conduct was not accomplished by use of force, coercion, or intimidation;

(D) Under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) The member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect . . .

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

(f) Definitions.—In this section:

(1) The term homosexual means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian”.

(2) The term “bisexual” means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.
(3) The term "homosexual act" means—

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

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

(d) Sense of Congress.—It is the sense of Congress that—

(1) the suspension of questioning concerning homosexuality... should be continued, but the Secretary of Defense may reinstate that questioning... if the Secretary determines that it is necessary... 191

The Department of Defense Military Equal Opportunity Act 192 should be amended as follows. Proposed deletions have been crossed through. Proposed additions are in italics.

Sexual Harassment. A form of sex discrimination that involves Sexual harassment consists of unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(a) Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career, or

(b) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or

(c) Such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military member or civilian employee who makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment. Sexual harassment occurs in any situation detailed above where sex is involved, regardless of the genders of the persons involved. It may occur between members of the opposite sex or members of the same sex. 193

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191. Id.
193. Id.