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A Few Straight Men: Homosexuals In The Military And Equal Protection

by

Alafair S.R. Burke

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Until relatively recently, the military's policy of actively discovering and discharging homosexual servicemembers solely on the basis of their sexual orientation had escaped mainstream public criticism. But with the Clinton Administration came a realization that the military would have to modify, if not revoke, its

discriminatory policy of banning all gays and lesbians from service solely on the basis of their sexual orientation. As discussions among the military, the Executive, and members of Congress progressed, the policy of "don't ask, don't tell" emerged as the most likely compromise. The "don't ask" prong of this policy requires the military to cease its prior practice of asking new recruits about their sexual orientation and provides that sexual orientation as a status no longer constitutes grounds for discharge. On the other hand, the "don't tell" prong of the policy generally prohibits gay

servicemembers from being open about their sexual orientation.

Although "don't ask, don't tell" is less restrictive than a complete ban on gay and lesbian servicemembers, gay rights advocates were less than enthusiastic about the compromise. During the 1992 presidential campaign, then-candidate Bill Clinton prom-

ised to revoke the ban on homosexuals in the military once he was elected. But when Clinton failed to discard the ban in a swift order during his first months as Commander in Chief, opponents of the military's policy feared that Clinton was retreating from his promise to remove the ban completely in favor of a more politically-palatable compromise. In November 1993, the fears of those who opposed the ban became a reality when Congress adopted and President Clinton signed a version of "don't ask, don't tell" as part of the 1993 military budget.¹ The adopted version of "don't ask, don't tell" prohibits the military from discriminating against servicemembers solely on the basis of homosexual orientation and purports to move the military's focus onto a servicemember's sexual conduct, rather than his status. In

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other words, although a servicemember may be discharged if he engages in "homosexual acts,"² in theory his sexual orientation alone no longer constitutes grounds for dismissal. The practical effect of the rule, however, is to permit closeted homosexuals to remain in the military while forcing out open gays. Under the new rules, a servicemember's acknowledgement that he is homosexual constitutes a sufficient basis to oust him from the military unless he can demonstrate that he "is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."³ In other words, the policy creates a presumption that an acknowledged homosexual engages in homosexual acts, forcing the servicemember to have the burden of proving that he has not and will not engage in such acts.⁴

Its punishment of acknowledged homosexual servicemembers is not the only respect in which the "don't ask, don't tell" policy falls short of its promise to focus solely on sexual conduct rather than on sexual orientation. Although the policy ended the military's prior practice of questioning new servicemembers about their sexual orientation, the rules allow the Secretary of Defense to reinstate the practice at his discretion. Similarly, the compromise allows the military to investigate suspected homosexuals as it deems necessary. Finally, Congress failed to include a requirement that the military maintain even-handed enforcement of its Code of Conduct, which prohibits both heterosexual and homosexual sodomy, thereby inviting the pre-compromise practice of enforcing the sodomy restriction only against homosexuals.⁵

The adoption of Congress' version of "don't ask, don't tell" followed a months-long debate between the Legislature and Executive regarding what, as a matter of public policy and national defense, would be the best approach to resolving the perceived tensions among civil rights, "traditional" values, homogeneity in the ranks, and national security. An issue almost wholly ignored by the media and the government, however, is whether the "don't ask, don't tell" compromise is constitutional. The debate surrounding the issue of gays and the military seems to assume that the military, Legislature, and Executive may enact and enforce any policy they collectively decide is wise. Meanwhile, the Judiciary has engaged in its own debate, one that turns more on abstract legal doctrine than on heated rhetoric.

This article explores the validity of the "don't ask, don't tell" compromise under the Equal Protection Clause of the Fifth Amendment. Regardless of the fact that any version of the policy is less restrictive than the military's former complete ban, the "don't ask, don't tell" compromise actu-

ally opens the door to constitutional challenges that were largely unsuccessful in the past. Consequently, the tremendous effort spent to reach a politically-palatable compromise may in fact destroy the deference that the military traditionally has enjoyed from the courts. The current effort simply to loosen the ban may lead, therefore, to its complete invalidation.

DEFERENCE TO THE MILITARY

Although the principle of military deference is sufficiently broad to warrant an entire article, no examina-

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tion of the relationship between the military and the courts would be complete without a basic understanding of the deference that the judiciary generally applies to claims brought against the military or claims that touch on issues of national security. The Supreme Court has stated that because "the military is, by necessity, a specialized society separate from civilian society,"⁶ the Court's judicial review of military regulations "is far more deferential than constitutional review of similar laws or regulations designed for civilian society."⁷

In establishing this principle, the Court has offered remarkably broad language that, if interpreted without qualification, could open the door to the complete subordination of all individual rights to the needs of the military. The Court has written, for example, that "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the Fifth Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."⁸ In fact, according to the Court, "the essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'"⁹ In addition, the Court has tended to see itself as "ill-equipped"¹⁰ to second guess the judgments of the military, because "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the

military.”¹¹

In the past, courts have followed the disturbing lead created by such broad language to hold that homosexuals may not challenge the military's decision to discriminate on the basis of sexual orientation. In *Woodward v. United States*, for example, the Federal Circuit rejected such a challenge, stating that “[s]pecial deference must be given by a 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.”¹²

This deferential theme is echoed in *Ben-Shalom v. Marsh*, where the Seventh Circuit wrote about the military's ban on homosexuals: “It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the judicial branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.”¹³

The Court has not, however, completely abjured its responsibility to review the decisions of the military. The Court has explicitly stated that “aspects of military life do not, of course, render entirely nugatory in the military context the guarantees” of the Constitution.¹⁴ Thus, “simply labeling the legislative decision ‘military’ . . . does not automatically guide a court to the correct constitutional result.”¹⁵ In particular, courts are still obligated under Article III to decide whether or not an individual's right to equal protection has been violated, even if it so happens that the alleged violator is the United States military.¹⁶ As Justice Ginsburg stated recently, “men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.”¹⁷

AN ARGUMENT FOR HEIGHTENED SCRUTINY?

Claims brought under the Equal Protection component of the Fifth Amendment have been the most common challenge to the use of sexual orientation as a basis for discharge from the military. The likelihood of success of an equal protection challenge turns in part on the level of scrutiny that the court applies to the military's practice of treating heterosexual and homosexual servicemembers differently. Three standards of review exist under equal protection analysis: strict scrutiny, heightened scrutiny, and rational basis review. Strict scrutiny applies to classifications

that either “operate to the disadvantage of some suspect class or impinge upon a fundamental right explicitly or implicitly protected by the Constitution.”¹⁸ Heightened scrutiny is proper when the classification disadvantages a “quasi-suspect” class such as gender, alienage, or illegitimacy.¹⁹ In all other cases, the rational basis test is applied.²⁰

Under the most stringent test, strict scrutiny, a classification violates the Equal Protection Clause unless it is “precisely tailored to serve a compelling governmental interest.”²¹ Because the test is “strict in theory, but fatal in fact,”²² the military's policy of differentiating between heterosexual and homosexual servicemembers would almost certainly fail this stringent review. Strict scrutiny, however, is applied only to classifications that either burden a suspect class or infringe on the exercise of a fundamental right. It is unlikely that a court will define homosexuals as a suspect class, as this category traditionally has been limited to race, national origin, and, occasionally, alienage.

A lower level of scrutiny is available if homosexuals constitute a quasi-suspect class, similar to gender or illegitimacy. Under the intermediate scrutiny applicable to discrimination against such classes, the military's policy would fail unless it was “substantially related to a legitimate state interest.”²³ To qualify as a quasi-suspect class, a group must: 1) suffer a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) be politically powerless.²⁴

Application of the Three-Prong Test to Homosexuals

Although federal courts have yet to consider homosexuals a quasi-suspect class,²⁵ there are good arguments that they should. First, gays and lesbians have suffered a clear history of purposeful discrimination. Discrimination against homosexuals has been pervasive in both the public and private sectors. Legislative bodies have excluded homosexuals from certain jobs and schools, and have prevented homosexual marriage. In the private sphere, homosexuals continue to face discrimination in jobs, housing, and churches. Moreover, reports of violence against homosexuals have become commonplace in our society. In sum, the discrimination faced by homosexuals is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin.²⁶

Furthermore, gays and lesbians are the victims of some of society's most vicious stereotypes. Many members of society continue to view homosexuals as promiscuous, mentally ill, or sexually deviate. The history of discrimination against gays and lesbians is clear, and even courts that have rejected the argument that homosexuals comprise a

protected class have conceded that they fulfill at least the initial criterion for intermediate scrutiny.²⁷

The second prong of the heightened scrutiny test requires that the group seeking heightened protection display an obvious, immutable, or distinguishing characteristic. Because there is no consensus among the public, legal scholars, gay activists, or scientists whether homosexuality represents a voluntary choice or a genetically determined trait,²⁸ the immutability requirement is the most difficult hurdle to establishing sexual orientation as a quasi-suspect classification. But regardless of the outcome of this "nature versus nurture" debate, it is becoming increasingly clear that one's sexual orientation (either by environmental influences or by genetic fate) is fixed early in life and is unlikely to change.²⁹ Gone are the days in which psychologists attempted to "diagnose" and "cure" homosexuals.

The Ninth Circuit in *High Tech Gays v. Defense Industrial Clearance Office*³⁰ refused to apply heightened scrutiny to the military's discrimination against homosexuality. The court reasoned that homosexuality is a "behavioral" trait and therefore not an immutable characteristic for purposes of the Equal Protection Clause.³¹ However, alienage, which the Supreme Court has held to be a fully suspect classification, is also in some sense behavioral. It is not an inborn trait: one "chooses" her alienage status when she leaves her native country. Nor is it an unchangeable status: one can gain citizenship.

Furthermore, the formulation of this requirement for heightened scrutiny is that the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group," not that the group share some trait that is literally unchangeable. What distinguishes sexual orientation (and alienage) from some other "behavioral" trait, such as a hobby or a vice, is that it is a defining aspect of a person's identity. A person is as gay while playing bridge as he is while having sex.³² Moreover, sexual orientation, like an immutable characteristic, is so unrelated to personal ability that a classification based on it is more likely to be a resort to prejudice than to actual differences.³³

In a changing political landscape, application of the third prong of the heightened scrutiny test to gays and lesbians has become increasingly controversial. This prong requires that the group seeking heightened protection lack the political power necessary to obtain redress from the political branches of government.³⁴ Gays and lesbians represent a minority of the population³⁵ and are far fewer in number than women, who enjoy the protection of heightened scrutiny under the Equal Protection Clause. Furthermore, circumstances unique to gays and lesbians prevent them from organizing politically. Pressures to conceal one's

homosexuality deter gays and lesbians from "coming out of the closet" and working with others to obtain equal treatment.³⁶ And even when the gay community does participate openly in politics, animus towards homosexuals often prevents elected officials from associating with their causes.³⁷

Nevertheless, the perception of gays and lesbians as a highly organized, powerful lobbying group is increasingly widespread. A recent national poll revealed that 70% of the public believes that federal law prohibits discrimination on the basis of sexual orientation.³⁸ Despite this common perception, none of the federal civil rights acts proscribes discrimination based on sexual orientation. Although Senator Edward Kennedy has proposed legislation that would prohibit employment discrimination against gays and lesbians, it is not likely to pass this year.³⁹ In contrast, women and racial minorities are protected by several federal statutes and by legislation in almost every state.

Despite the lack of federal civil rights protection for gays and lesbians, the perception that homosexuals as an already protected class persists. The court in *High Tech Gays*, for example, argued that homosexuals are not politically powerless and "have the ability to and do 'attract the attention of the lawmakers.'"⁴⁰ In support of this claim, the court cited three state anti-discrimination statutes protecting homosexuals,⁴¹ only one of which was a comprehensive statute barring employment discrimination on the basis of sexual orientation.⁴² The other two statutes cited by the court offer only minimal protection to gays and lesbians, and indicate how vulnerable homosexuals are to a hostile majority. One barred violence based on sexual orientation,⁴³ and the other prohibited the denial of care in health facilities on the basis of sexual orientation.⁴⁴ If anything, the court's short list of support illustrates the *sparsity* of gay rights legislation at the state and local levels.

In addition, since *High Tech Gays* was decided, the nation has witnessed a notable backlash against the minimal political collaboration that does exist among gays and lesbians.⁴⁵ The fuel for this backlash was a successful 1992 Colorado ballot measure prohibiting the state from enacting anti-discrimination legislation for gays and lesbians.⁴⁶ Although the Colorado Supreme Court eventually held that the measure violated the Colorado Constitution,⁴⁷ the sparks from the Colorado amendment ignited intense anti-gay campaigns across the nation. This year, anti-gay coalitions attempted to place similar measures on the ballot in ten states, succeeding in Oregon and Idaho.⁴⁸ The debate over whether gays and lesbians deserve basic civil rights exists at the local level as well: in 1993, nineteen local initiatives excluding homosexuals from the protection of anti-discrimination laws made it onto the ballot, and every one was

successful.⁴⁹

Attempts to target gays and lesbians exist even at the national level. In its last session, Congress voted overwhelmingly to include a provision in the Improving America's Schools Act that would cut federal funding to any school "encouraging or supporting homosexuality as a positive lifestyle alternative," including any school that counsels students regarding their homosexuality or even refers students to "an organization that affirms a homosexual lifestyle."⁵⁰ This provision was approved by a vote of 63-36 in the Senate and 301-120 in the House in total disregard of the fact that thirty percent of youth suicides occur among gays and lesbians.⁵¹ Given the frequency and intensity of anti-gay efforts in the current political climate, the fact that a handful of states and cities have chosen to protect gays and lesbians from some forms of discrimination should not

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prevent courts from treating homosexuality as a quasi-suspect classification.

The Hardwick Hurdle

Despite these persuasive arguments, several courts have held that the Supreme Court's decision in *Bowers v. Hardwick*⁵² precludes a holding that gays and lesbians are a quasi-suspect class entitled to intermediate scrutiny under the Equal Protection Clause.⁵³ In *Hardwick*, the Court held that a state law criminalizing sodomy does not violate the Due Process Clause of the Fourteenth Amendment. Typical of several courts addressing the issue, the Ninth Circuit in *High Tech Gays* reasoned that, "by the *Hardwick* majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes."⁵⁴

This reasoning distorts the *Hardwick* decision. The Supreme Court has never held that a state may criminalize

homosexual sodomy but permit heterosexual sodomy. *Hardwick* simply held that there was no fundamental right to engage in sodomy, and, therefore, that a facially-neutral law criminalizing sodomy did not violate principles of substantive due process. Although the state conceded in *Hardwick* that it could not constitutionally enforce the sodomy restriction against a married couple,⁵⁵ this was because of the Court's traditional protection of marital privacy,⁵⁶ not because the state or the Court afforded special protection of heterosexual sodomy over homosexual sodomy.⁵⁷ In this regard, *Hardwick* resembles *Employment Div., Dept. of Human Resources of Oregon v. Smith*,⁵⁸ in which the Supreme Court held that a facially-neutral law proscribing the use of the drug peyote was constitutional, despite the fact that its impact fell more harshly on a particular religion.

The analytical flaw in *High Tech Gays* lies in the assumption that it is "homosexual conduct" that defines one's identity as a gay or lesbian. A celibate homosexual is just as homosexual as one who engages in "homosexual conduct."⁵⁹ The Supreme Court has a history of rejecting classifications based on "status" rather than conduct. For example, in *Robinson v. California*,⁶⁰ the Court held that, although states could prohibit actual drug use, they could not criminalize a person's status as a drug addict. Similarly, in *Powell v. Texas*,⁶¹ the Court held that a state could prohibit public alcohol consumption, but could not arrest someone based solely on his status as a chronic alcoholic. This well-established distinction between status and conduct indicates the irrelevance of the Court's holding in *Hardwick* to the debate over the military's policy toward homosexuals. Unlike the sodomy law at issue in *Hardwick*, the military's traditional treatment of homosexuals has never turned on sexual conduct; it has always turned on *status*. Thus, those who engaged in behavior that could be criminalized under *Hardwick* were targeted only if they are homosexual, and homosexuals were targeted regardless of their sexual activities — as Ninth Circuit Judge Canby put it, "that is the key" to understanding these issues.⁶²

NEW APPLICATION OF THE OLD RATIONAL BASIS TEST

Because courts have been unwilling to treat homosexuals as a semi-suspect class, the military's policy of discrimination against homosexuals has been subject only to rational basis review. This is the lowest level of scrutiny: a classification will be upheld so long as it is "rationally related to a legitimate state interest."⁶³ Traditionally, courts applying this standard of review have upheld almost every challenged classification. In light of this tradition and the courts' general deference to matters within the areas of the

military and national defense, it is not surprising that equal protection claims of servicemembers who were discharged from the military based on their sexual orientation have been largely unsuccessful.

The bite of the old rational basis test, however, is becoming increasingly sharp. In *Pruitt v. Cheney*,⁶⁴ for example, a former Army Reserve Officer challenged Army regulations requiring her discharge because of her homosexuality. The Ninth Circuit held that, when reviewing classification based on sexual orientation, it will engage in "active rational basis review"⁶⁵ as exemplified by the Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.*⁶⁶ and *Palmore v. Sidoti*.⁶⁷ Under this level of scrutiny, the court will "review to see whether the government ha[s] established on the record a rational basis for the challenged discrimination."⁶⁸ Furthermore, the court will not permit the government to give effect to "private biases."⁶⁹ However, even "active" rational basis review requires only a "rational" basis between a challenged classification and a legitimate governmental interest; it does not require a showing of a "precisely tailored" or "substantial" relationship between the two.

Pruitt makes clear that the military will no longer be allowed to simply rely on older, more deferential standards of review to justify a policy distinguishing among servicemembers according to sexual orientation, but will have to introduce evidence into the record that provides a rational justification for its policies. The remainder of this section explores the possible justifications for "don't ask, don't tell" and concludes that, as the military moves away from its total ban toward "don't ask, don't tell," it simultaneously is destroying its ability to uphold in the courts its policy regarding homosexuals.

The Traditional Security Rationale

The traditional rationale for the military's ban on homosexuals is that homosexual servicemembers are higher security risks than their heterosexual counterparts.⁷⁰ For example, the military has justified its policy by stating that "[p]articipation in deviant sexual activities may tend to cast doubt on the individual's morality, emotional or mental stability and may raise questions as to his or her susceptibility to coercion or blackmail."⁷¹ The military's definition of "deviant sexual activities" includes homosexuality along with bestiality, sadism, necrophilia, and pedophilia.

The evidence supporting the claim that homosexuals pose a security risk has always been shaky. The Crittendon report,⁷² a study commissioned by the Department of Defense (DOD) itself, states that the security rationale appears to have originated in the report of the Hoey Committee, but

that this committee based its recommendation "on the opinions of those best qualified to know, namely, the intelligence agencies of the Government."⁷³ The Crittendon report notes, however, that no intelligence agency, as far as can be ascertained, adduced any factual data before the Committee with which to support these opinions.⁷⁴ Moreover, the military, recently forced under active rational basis review to come forward with evidence supporting its security rationale, has yet to produce anything but anecdotal evidence regarding a handful of homosexual soldiers.⁷⁵

The public debate surrounding "don't ask, don't tell" makes clear that the public's central concern is with the reactions of heterosexual soldiers to homosexuals, *not* with the abilities of homosexuals.

Opponents of the ban on homosexuals in the military have argued for years that the ban bears no rational relationship to the military's interest in national security. After all, the risk that a homosexual servicemember will yield to blackmail attempts because of his sexual orientation is only *increased* when the soldier knows he will surely be discharged if his secret is disclosed by the extortionist. However, even if the military did not discharge homosexuals, it is plausible (and therefore rational to believe) that, because of other societal prejudices, homosexual servicemembers would remain prone to blackmail on the basis of their sexual orientation.⁷⁶ Furthermore, the rational basis test does not require that the relationship between the policy and its rationale be a tight one, simply a rational one. The courts are even more likely to defer to such judgments when they are made by the military.⁷⁷ As a result, the military has been able to exclude *all* discovered homosexuals from the ranks by arguing that those homosexuals who prefer to remain in the closet present higher security risks.

Judicial deference to the military, however, can only go so far. Although courts might have been willing to accept a classification that tended to overgeneralize within a group, the courts are not likely to defer to a classification that, on its face, is the exact *opposite* classification one would expect from its stated rationale. In other words, by moving away from a total ban and toward the "don't ask, don't tell" compromise, the military has ruined its credibility

with the courts with regard to the security rationale.

The compromise involved in "don't ask, don't tell" is that homosexual servicemembers who hide their sexuality may remain in the military. However, homosexuals who are open to their families, friends, and their fellow servicemembers will be subjected to an investigation in which they shoulder the burden of proving that they do not engage in acts prohibited by the Code of Conduct. This policy is the opposite of the only one that could conform to the military's longstanding security rationale for its ban on homosexuals in the military. Homosexuals who do not conceal their sexual orientation cannot be subjected to blackmail on the issue. On the other hand, closeted homosexuals, who are allowed to remain in the military under "don't ask, don't tell," will be more likely to succumb to blackmail attempts in order to keep their secret safe.

In the past, the military has enjoyed a surprising degree of judicial deference to its unsupported claim that homosexuals are likely to succumb to blackmail attempts in order to conceal their sexual orientation. Now, however, by compromising in the direction of "don't ask, don't tell," the military has adopted a policy that flies in the face of this claim. In doing so, the military has destroyed any hope that it can justify its new policy with the formerly successful security rationale.

Other Rationales of the Past

The military has also defended its prior ban on homosexuals by arguing that, because homosexual conduct may constitute a criminal violation, such behavior calls into question a servicemember's willingness to uphold the law.⁷⁸ Counterarguments to this claim have always existed. First, although it is true that sodomy is a criminalizable offense, sodomy is illegal in only about half the states.⁷⁹ Therefore, not every person who engages in "homosexual conduct" is violating state law. Moreover, of the states that do maintain anti-sodomy laws, a clear majority of those laws proscribe both homosexual and heterosexual sodomy, as does the Military's Code of Conduct. Therefore, if "homosexual conduct" displays a willingness to violate the law, heterosexual sodomy displays a similar tendency and every servicemember, regardless of sexual orientation, should be questioned regarding his private sexual conduct.

President Clinton's earlier version of "don't ask, don't tell" at least attempted to accommodate these criticisms by focusing on conduct rather than sexual orientation. His version called for even-handed enforcement of the Code of Conduct's prohibition on sodomy. In contrast, Congress' enacted version of the compromise makes no mention of equal enforcement. Moreover, a homosexual

servicemember's open acknowledgement of his sexual orientation is grounds to investigate the soldier for violations of the Code of Conduct, whereas an openly-heterosexual servicemember does not suffer similar consequences. Although the government's interest in keeping the military free from lawless soldiers might justify enforcing the Code of Conduct's prohibition on sodomy, especially if the Code were enforced regardless of sexual orientation, it does not justify a policy that allows homosexuals to remain in the military only if they simultaneously remain in the closet.

Similarly, "don't ask, don't tell" does not conform to another justification given for the military's prior all-out ban: that homosexuals are more likely to have emotional problems. The Department of Defense argued to the district court in *High Tech Gays*, for example, that "a homosexual may face emotional tension, instability or other difficulties since society has not recognized his sexual practice as mainstream."⁸⁰ It would be difficult enough for the military to make such an argument when courts increasingly are recognizing the psychiatric and medical communities' consensus that homosexuality is not a mental disorder.⁸¹ However, courts will be especially reluctant to defer to the military when it allows homosexuals to remain in the military so long as they keep secret their sexual orientation, since there is no rational basis for believing that gays and lesbians have emotional problems only once they publicly reveal their homosexuality.

Tension Among the Troops

The downfall of "don't ask, don't tell" in the courts should be hastened as it becomes increasingly clear to the public, and therefore to the courts, that the only rationale supporting the policy is that openly homosexual soldiers will disrupt the "morale" of the troops. Maintaining morale is the only possible rationale for a policy that allows homosexuals to remain in the military only if they hide their sexual orientation. Furthermore, the public debate surrounding "don't ask, don't tell" makes clear that the public's central concern is with the reactions of heterosexual soldiers to homosexuals, *not* with the abilities of homosexuals.

Forexample, Vice Admiral Ronald Joseph Zlatoper, Chief of Naval Personnel and Deputy Chief of Naval Operations, stated at hearings before the Senate Committee on Armed Services that the presence of homosexuals in the Navy has a direct adverse impact on the ability of military leaders to sustain relationships, instill camaraderie, and maintain the cohesion necessary for a unit to remain a highly effective fighting force. The presence in units of individuals who engage in, desire to engage in, or intend to engage in homosexual acts polarizes units and undermines the ability

of a commanding officer to foster good morale and maintain an effective chain of command.

Similarly, President Clinton has stated that "The American people are deeply divided on this issue, with most military people opposed to lifting the ban because of the feared impact on unit cohesion, rooted in disapproval of homosexual lifestyles, and a fear of invasion of privacy of

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heterosexual soldiers. Those who oppose lifting the ban are clearly focused not on the conduct of individual gay service members but on how non-gay service members feel about gays in general and, in particular, those in military service."⁸²

In designing "don't ask, don't tell" to accommodate the negative attitudes of heterosexual servicemembers toward gays and lesbians, the President, Congress, and military appear to have disregarded constitutional requirements established a decade ago by the Supreme Court. The Court has made clear that, however deferential it may be to the government's judgments regarding a classification and a state interest, it will not allow the government to give effect to "private biases."⁸³ The Supreme Court first established this principle in *Palmore v. Sidoti*, where it held that a mother could not be denied custody of her child because of social disapproval of her interracial marriage. In the Court's view, "the Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."⁸⁴

In *City of Cleburne v. Cleburne Living Center*,⁸⁵ the Court once again made clear its unwillingness to permit the government to invoke private prejudices as a justification for discriminatory legislation. In *Cleburne*, the Court held that

group homes for the mentally retarded could not be subjected to special zoning requirements simply to protect the non-retarded from a minority that they feared or despised. The Court's holding in *Cleburne* indicated that the *Palmore* rationale was not limited to classifications based on race or that infringed on a fundamental right such as the relationship between a parent and child; it also applied to classifications requiring only the rational basis standard of review. In other words, even though the government need only establish a rational connection between its chosen classification and the alleged governmental interest, the government interest still must be a *legitimate* one, and the *Palmore/Cleburne* principle establishes that the government has no legitimate interest in giving effect to private prejudices.

Courts are increasingly relying on *Palmore* and *Cleburne* to hold that, even under the rational basis test, the military may not justify its policy regarding homosexuals by claiming that open homosexuality offends the values of heterosexual servicemembers.⁸⁶ For example, in 1980, prior to the Supreme Court's decisions in *Palmore* and *Cleburne*, the Ninth Circuit in *Beller v. Middendorf* held that "the tension between known homosexuals and other members who despise/detest homosexuality" could justify the military's ban on homosexuals.⁸⁷ In 1991, however, the court made clear in *Pruitt* that, because of the Supreme Court's holding in *Palmore*, the justification accepted in *Beller* "should not be given unexamined effect today as a matter of law."⁸⁸

Following the Ninth Circuit's lead in *Pruitt*, a three-judge panel of the D.C. Circuit held in *Steffan v. Aspin* that the military's former ban on homosexuals cannot be justified on the basis that "forcing [heterosexuals] to serve with homosexuals will lower their morale, impair their discipline, and discourage them from enlisting."⁸⁹ The *Steffan* court reached its holding by relying not only on the *Palmore/Cleburne* principle, but also on the First Amendment doctrine of the "heckler's veto." That doctrine forbids the government from silencing controversial speech based on the reaction of a hostile audience, thereby preventing the majority or a vocal minority from suppressing disfavored viewpoints.⁹⁰

Both the *Palmore/Cleburne* principle and its First Amendment analogue, the heckler's veto, establish that a policy that discriminates against homosexual servicemembers can be justified neither by heterosexual dislike nor by fear of homosexuals. As a recent district court opinion stated: "Even assuming that homosexuals threaten 'unit cohesion', the integrity of the system of rank and command, recruiting of Navy servicemembers, protection of heterosexuals' privacy rights and 'public acceptability' of Navy service, such

threats can only conceivably arise from: (1) heterosexual dislike of homosexuals for moral or other reasons; (2) heterosexuals' apparent fear that they will be victimized, threatened or harassed by homosexuals, and/or (3) the notion that homosexuals are uniquely incapable of controlling their sexual desires. These rationales are directly analogous to the state court's concern with social disapproval of interracial marriages in *Palmore* and the city's concern with the negative attitudes of property owners towards the mentally retarded in *Cleburne*, both of which were invalidated as based on illegitimate prejudice."⁹¹

The extension of *Palmore* and *Cleburne* to discrimination against homosexuals should render it impossible for the military to defend the "don't ask, don't tell" policy in the courts. One district court has already granted a preliminary injunction barring the policy's enforcement against the plaintiffs in that case.⁹² In doing so, the court noted that the policy "is really concerned not so much with 'conduct' but with the attitudes of others when they learn of statements of homosexual orientation. The message to those with such an orientation appears to be not to avoid private homosexual acts but to stay in the closet and to hide their orientation."⁹³

THE CONTINUED DEBATE

Palmore and *Cleburne* clearly establish that the government has no legitimate interest in accommodating the prejudices of a hostile majority. Both the Ninth Circuit's decision in *Pruitt* and the D.C. Circuit's opinion in *Steffan* recognized that the *Palmore/Cleburne* logic applies in the military context. Senior military officials have acknowledged openly that the basis for "don't ask, don't tell" is to avoid the discomfort that heterosexual servicemembers might experience if forced to serve with homosexual soldiers. Thus, although both *Pruitt* and *Steffan* addressed the military's former policy and not "don't ask, don't tell," one might nevertheless assume that the decisions would doom the new policy in the courts.

Recent events in the D.C. and Ninth Circuits, however, suggest a retreat from *Steffan* and *Pruitt* to the degree that the decisions have erected insurmountable obstacles for the "don't ask, don't tell" compromise. When the three-judge panel of the D.C. Circuit announced its decision in *Steffan*, the Administration sought full-court review of only a narrow part of the case. Instead, the full court vacated the panel's opinion in its entirety and upheld military regulations employing a servicemember's admission of his homosexual orientation as a proxy for determining that he had engaged in homosexual conduct.⁹⁴ The court's opinion reflects a markedly narrow view of the judicial role. Rather

than requiring the military to articulate a justification for discharging openly homosexual servicemembers and then asking whether that interest is both legitimate and rationally furthered by the military regulations, the court asked only whether the policy of banning those who admit that they are homosexual rationally furthers the end of banning those who engage in homosexual conduct. In other words, the court did not require a neutral justification independent from the military's desire to exclude homosexuals from service. With such a narrow inquiry, the court determined that the regulations served a rational basis. In doing so, the court cited the Supreme Court's decisions in *Robinson* and *Powell* which establish that status alone cannot justify punishment, but limited this principle to the criminal context.

Even the Ninth Circuit appears to be departing from prior caselaw that suggested the ultimate demise of "don't ask, don't tell." In its most recent discussion of the military's former policy, in *Meinhold v. United States Dept. of Defense*,⁹⁵ the court held that the Navy could not discharge Petty Officer Keith Meinhold simply because he stated on ABC World News Tonight, "Yes, I am in fact gay."

In *Meinhold*, the Ninth Circuit recognized that it must "accommodate" both the principle of military deference and its duty to enforce the Constitution. The court stated that, to do so, it must "start with the [military's] professional judgment . . . that 'homosexuality is incompatible with military service [because] [t]he presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.'"⁹⁶

The court held that the military undoubtedly could proscribe homosexual conduct, but recognized that the policy also targeted servicemembers whose mere statements indicated that they may engage in such conduct. The court then addressed the military's definition of homosexuality, asking whether it could be interpreted in a manner that did not raise serious constitutional concerns while remaining consistent with the military's purpose. The court held that "[c]onstruing the regulation to apply to the 'classification of being homosexual' clearly implicates equal protection," because at least a serious question existed regarding whether it would ever be rational to assume that one class of persons, defined solely by their sexual preference, would violate conduct-based regulations while another class would not. Relying on the Supreme Court's decisions in *Powell* and *Robinson*, the court recognized that "equating status or propensity with conduct or acts that are prohibited is problematic as well."

Due to these serious constitutional concerns, the constitutionality of the military's policy was a "close ques-

tion" only because of the "greater license" that courts give the military. Rather than interpret the military's definition of homosexuality in a manner that raised those concerns, however, the court interpreted the regulation as extending only to "statements that show a concrete, fixed, or expressed desire to commit homosexual acts despite their being prohibited." Thus, the military went beyond its own objectives when it presumed that Petty Officer Meinhold desired or

The military's acceptance of "don't ask, don't tell" establishes that many of its former justifications for the complete ban were smoke and mirrors masking a formal policy accommodating the heterosexual majority's all too common fear or hatred of gays and lesbians.

intended to engage in prohibited conduct simply on the basis of his public statement.

The immediate impact of the *Meinhold* decision is Petty Officer Meinhold's reinstatement—a clear victory for him. Commentators have opined that the decision is a victory for gay rights advocates generally. For example, Stanford constitutional law professor Kathleen Sullivan said the decision was "stunning" and "brought into serious question" the "'don't tell' part of [don't ask, don't tell]."⁹⁷ However, the grounds for the *Meinhold* decision were more narrow and may be more favorable to "don't ask, don't tell" than the Ninth Circuit's logic in *Pruitt*.

To its credit, the court in *Meinhold*, unlike the D.C. Circuit's en banc decision in *Steffan*, made a clear distinction between homosexual status and homosexual conduct, and recognized that, even though the latter may be prohibited, a person may not be targeted solely on the basis of the former. Although the court explicitly stated that its opinion concerned the military's former policy and not "don't ask, don't tell," its logic certainly suggests that the Ninth Circuit would interpret the "don't tell" prong of the new policy narrowly: A general statement that the servicemember is gay or lesbian would not itself justify exclusion.

However, *Meinhold* marks a departure from *Pruitt* to the extent that it assumed without scrutiny that the military had a legitimate purpose for including a servicemember's statements in its policy concerning homosexual

servicemembers. Certain narrowly-circumscribed statements may indeed evidence an intent or propensity to engage in legitimately prohibited conduct and may therefore constitute legitimate grounds for separation. The court in *Meinhold*, however, did not force the military to prove that it included a servicemember's statements as relevant in order to identify those who engage or intend to engage in homosexual conduct. Instead, the court held that it was "obliged" to conduct its analysis in light of the military's own determination that the presence of those who fit the military's definition of homosexual "seriously impairs the accomplishment of the military mission." Absent from *Meinhold* is any discussion of *Pruitt* and its holding that the military may not promulgate regulations solely for the purpose of comforting heterosexual servicemembers. Nowhere in the opinion does the court indicate that certain objectives are illegitimate, even if forwarded by the military. Consequently, the decision may support a narrow reading of "don't ask, don't tell," but it does not suggest its complete invalidation.

CONCLUSION

It appears that the political branches have assumed that, because the courts allowed them in the past to enforce a complete ban on homosexuals in the military, it will allow them to enforce any less restrictive policy, whatever its constitutional implications. In reaching the "don't ask, don't tell" compromise, Congress, the military, and the Administration apparently focused more on political considerations involved in an issue as closely watched and emotional as gays in the military rather than on whether the compromise was constitutional. Thus, the primary goal of the debate appears to have been to carve out a compromise that would please the President, the Pentagon, the troops, and, perhaps most importantly, the public. The effort appears to have succeeded: a Gallup poll taken after Clinton proposed the "don't ask, don't tell" policy indicated that, although 51% of the public still preferred a complete ban on gays in the military, 58% of the public favored the policy while only 37% disfavored it.⁹⁸

However, popularity alone cannot save a policy that violates the Constitution, and recent court decisions have made it increasingly clear that the judiciary has no intention of simply rubberstamping "don't ask, don't tell." Although reluctance to apply heightened scrutiny to classifications based on sexual orientation and the judiciary's traditional deference to military judgments have enabled the military to enforce a complete ban on homosexuals in the past, the courts should not defer so reverently to "don't ask, don't tell." Although the courts are not equipped to make decisions affecting military strategy or procedure, their

function is to enforce the Constitution, and deference to the military can only go so far. Public statements from the military, the President, and the Legislature establish that the central concern of policy makers is the reaction of heterosexual soldiers, not the abilities of homosexual servicemembers. No military expertise is required to scrutinize the legality of this intent; rather, it is within the traditional role of the courts to state whether a governmental purpose is constitutionally permissible. Members of the judiciary should not add another round to the game of "don't ask, don't tell" by closing their eyes and ears and pretending not to know that the policy has nothing to do with national security and everything to do with appeasing a vocal contingent that either fears or hates gays and lesbians.

If "don't ask, don't tell" is ultimately struck down as unconstitutional, the military may have difficulty moving back to a complete ban. The military's acceptance of "don't ask, don't tell" establishes that many of its former justifications for the complete ban were smoke and mirrors masking a formal policy accommodating the heterosexual majority's all too common fear or hatred of gays and lesbians. Thus, in the end, it is possible that the "don't ask, don't tell" compromise, which has been criticized by gay-rights advocates as being too restrictive, will lead eventually to a complete eradication of government-sanctioned discrimination against homosexuals in the military.

This is not to say that the military will suddenly become an environment in which heterosexuals must run in fear from insatiable gays and lesbians. As an initial matter, the Administration, Congress, and the Pentagon almost certainly underestimate the tolerance of heterosexual servicemembers and potential enlistees. Although many of them might prefer an entirely heterosexual military community, it is far from certain that heterosexuals will leave the military or refuse to join simply because homosexuals also are permitted to enlist. Moreover, a Supreme Court decision stating that the military may not discriminate on the basis of sexual orientation would not forbid the military from assuring heterosexual servicemembers that they will not be harassed by homosexuals. The military could adopt and strictly enforce severe penalties for sexual harassment and non-consensual sexual conduct, whether heterosexual or homosexual. These penalties would not only protect concerned heterosexual servicemembers, but would also provide a safe working and living environment for every man and woman serving in our nation's military.

Members of our military have stood against some of history's most ruthless dictators and have proven to be the strongest and most effective military force in the world. They will not run in fear simply because the military con-

cedes that a servicemember's abilities are not determined by his or her sexual orientation. "Don't ask, don't tell" is premised on a prejudice against gays and lesbians, but it just as much reflects an unfair stereotype of heterosexual servicemembers. It also assumes a judiciary willing to look the other way. However, recent court opinions suggest that the judiciary will scrutinize the policy at least to a limited extent. What is still unclear is whether the courts will simply interpret "don't ask, don't tell" narrowly, leaving intact its general premise, or whether it will gut the policy entirely. In any event, the days of "see no evil, hear no evil" are over.

NOTES

¹ 10 U.S.C. § 654; see *Pentagon Budget is Passed With Clinton's Gay Policy*, N.Y. TIMES, Nov. 17, 1993, at B18.

² 10 U.S.C. § 654(b)(1).

³ 10 U.S.C. § 654(b)(2).

⁴ *Id.*

⁵ See Eric Schmitt, *President's Policy on Gay Troops is Backed in Vote of Senate Panel*, N.Y. TIMES, July 24, 1993, at 7; *A Retreat on Gay Soldiers*, N.Y. TIMES, Sept. 19, 1993, at 4.

⁶ *Goldman v. Weinberger*, 475 U.S. 503, 506 (1986) (rejecting claim that Army regulation forbidding the wearing of headgear while indoors violated the First Amendment by interfering with servicemember's ability to wear his yarmulke).

⁷ *Id.* at 507; *Parker v. Levy*, 417 U.S. 733, 743 (1974).

⁸ *Goldman*, 475 U.S. at 507.

⁹ *Id.* (quoting *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953)).

¹⁰ See, e.g., *Chappel v. Wallace*, 462 U.S. 296, 305 (1983) (noting that courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have").

¹¹ *Weiss v. United States*, ___ U.S. ___, 114 S. Ct. 752, 761 (1994) (quoting *Solorio v. United States*, 483 U.S. 435, 447-48 (1987)).

¹² 871 F.2d 1068, 1077 (Fed. Cir. 1989); see also *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (denial of rehearing en banc).

¹³ 881 F.2d at 466 (quoting *Gilligan v. Morgan*, 13 U.S. 1, 10 (1973)).

¹⁴ *Goldman*, 475 U.S. at 507.

¹⁵ *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

¹⁶ *See Dubbs v. Central Intelligence Agency*, 769 F. Supp. 1113, 1116 n.3 (N.D. Cal. 1990).

¹⁷ *Weiss*, 114 S. Ct. at 769 (Ginsburg, J., concurring).

¹⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 27 (1973).

¹⁹ *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (gender); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (illegitimacy).

²⁰ *See, e.g., Johnson v. Robison*, 415 U.S. 361 (1974).

²¹ *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

²² Gerald Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

²³ *Pichett v. Brown*, 462 U.S. 1, 8 (1983); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

²⁴ *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

²⁵ *See, e.g., High Tech Gays v. Defense Industrial Clearance Office*, 895 F.2d 563 (9th Cir. 1990), *reh'g denied, en banc*, 909 F.2d 375 (9th Cir. 1990); *Ben-Shalom v. Secretary of the Army*, 881 F.2d 454, 461 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1296 (1990).

²⁶ *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (hereinafter *Watkins III*) (Norris, J., concurring).

²⁷ *High Tech Gays*, 895 F.2d 563; *see also High Tech Gays*, 668 F. Supp. at 1369 (district court stating that "lesbians and gays have been the object of some of the deepest prejudice and hatred in American society"); *Ben-Shalom*, 881 F.2d at 461.

²⁸ *See, e.g., Simon LeVay, A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 Sci. 1034, 1035 (1991).

²⁹ *See generally* Marion Halliday Lewis, *Unacceptable Risk or Unacceptable Rhetoric? An Argument for a Quasi-Suspect Classification for Gays Based on Current Government Security Clearance Procedures*, 7 J. L. & POL. 133, 166 (1990).

³⁰ 895 F.2d 563.

³¹ *Id.* at 573.

³² *See High Tech Gays*, 909 F.2d at 380 (Canby, J., dissenting from denial of rehearing en banc).

³³ *See Frontiero v. Richardson*, 93 S. Ct. 1764, 1770 (1973) (plurality) (noting that gender frequently bears no relation to ability to perform or contribute to society); *Plyler v. Doe*, 457 U.S. at 217 n.14 (1982) (considering whether a classification is likely "to reflect deep-seated prejudice rather than . . . rationality").

³⁴ This factor is probably the most important consideration under a process-based view of the Equal Protection Clause. From this view, the judiciary avoids making value choices better left to elected officials, and instead concerns itself with leveling the playing field of politics by scrutinizing classifications that disadvantage a "discrete" and "insular" minority. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); *Carolene Products Co. v. United States*, 304 U.S. 144, 153 n.4 (1938).

³⁵ Even the most optimistic estimate, currently under attack, places the gay population at 10%. *See* A. Kinsey et al., *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

³⁶ *See Watkins III*, 875 F.2d 699, 727 (Norris, J., concurring) ("Ironically, by 'coming out of the closet' to protest against discriminatory legislation and practices, homosexuals expose themselves to the very discrimination they seek to eliminate"); *Rowland v. Mad River Local School District*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena").

³⁷ *See Watkins III*, 875 F.2d at 727 (Norris, J., concurring) ("[E]lected officials sensitive to public prejudice and ignorance, and insensitive to the needs of the homosexual constituency, may refuse to even consider legislation that even appears to be pro-homosexual").

³⁸ *Lazarus Mellman, Lake Inc. poll* (Feb. 1994).

³⁹ The Employment Non-Discrimination Act of 1994 would prohibit employment discrimination based on sexual orientation. *See* 103 S. 2238; 103 H.R. 4636.

⁴⁰ 895 F.2d at 574 (quoting *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3257 (1985)).

⁴¹ The court also cited a handful of executive orders and local ordinances. *See* 895 F.2d at 574 n.10.

⁴² WIS. STAT. ANN. §§ 111.31-395 (West 1988).

⁴³ CAL. CIV. CODE § 51.7 (West 1984).

⁴⁴ MICH. COMP. LAWS ANN. § 333.20201(2)(a) (West 1984).

⁴⁵ One author reports that a rise in anti-gay hate crimes has been linked to the increased visibility of gays as a result

of gay political organizing efforts. *See* Lewis, *supra* note 29, at 171 & n.231.

⁴⁶ *See* Colorado's "Amendment 2," passed on November 3, 1992, which adopted a new Section 30 of the state constitution.

⁴⁷ *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994).

⁴⁸ *Groups Sponsoring Anti-Gay Measures Fall Short of Goals*, L.A. TIMES, July 12, 1994, at A12.

⁴⁹ Stephen Chapman, *The Real Agenda in the Campaign Against Gay Rights*, CHI. TRIB., Feb. 3, 1994, at 21.

⁵⁰ 103 S. 1513; CONG. REC. S. 10208; 103 H.R. 6; CONG. REC. H. 2020.

⁵¹ David Gelman, et al., *Tune In, Come Out*, NEWSWK., Nov. 8, 1993.

⁵² *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (holding that, under substantive due process, there is no fundamental right to commit sodomy).

⁵³ *High Tech Gays*, 895 F.2d at 571-73; *see also* Ben-Shalom, 881 F.2d at 464-65 ("The Constitution, in light of *Hardwick*, cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result."); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990) ("After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."); *Padula v. Webster*, 822 F.2d 97, 103 ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. After all, there can hardly be more palpable discrimination against a class than making conduct that defines the class criminal."); *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992).

⁵⁴ 895 F.2d at 571.

⁵⁵ 106 S. Ct. at 2858 n.10 (Stevens, J., dissenting).

⁵⁶ *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵⁷ Subsequent lower court and state court decisions interpreting *Hardwick* emphasize the neutrality of the Georgia statute upheld by the Court. *See, e.g., Watkins III*, 875 F.2d at 717 (Norris, J., concurring); *Commonwealth v. Wasson*, 842 S.W.2d 487, 491 (Ky. 1992); *Scochet v. State*, 541 A.2d 183, 197 (Md. 1988).

⁵⁸ 110 S. Ct. 1595 (1990).

⁵⁹ *See supra* note 32, and accompanying text.

⁶⁰ 370 U.S. 660 (1962).

⁶¹ 392 U.S. 514 (1968).

⁶² *High Tech Gays*, 909 F.2d at 380 (Canby, J., joined by Norris, J., dissenting from denial of rehearing en banc).

⁶³ *Cleburne*, 105 S. Ct. at 3254.

⁶⁴ 963 F.2d 1160 (9th Cir. 1992).

⁶⁵ *Pruitt*, 963 F.2d at 1165-66; *see also* *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993); *Buttino v. FBI*, 801 F. Supp. 298 (N.D. Cal. 1992); *Dubbs v. CIA*, 769 F. Supp. 1113 (N.D. Cal. 1990) ("*Dubbs II*," decided after *High Tech Gays*); *Meinhold v. U.S. Dept. of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993).

⁶⁶ 105 S. Ct. 3249.

⁶⁷ 466 U.S. 429 (1984).

⁶⁸ *Pruitt*, 963 F.2d at 1166 (emphasis in original).

⁶⁹ *Id.* at 1165; *Palmore*, 104 S. Ct. at 1882.

⁷⁰ *See, e.g., Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *McKeand v. Laird*, 490 F.2d 1262 (9th Cir. 1973); *see also Webster v. Doe*, 108 S. Ct. 2047 (1988).

⁷¹ *See High Tech Gays*, 895 F.2d at 568 (quoting The DIS Manual for Personnel Security Investigations at para. 4-5, 4-6).

⁷² *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*, 21 December, 1956-15 March, 1957.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See, e.g., High Tech Gays*, 895 F.2d at 570.

⁷⁶ *See Padula*, 822 F.2d at 104 ("[C]riminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality, [subjects] even 'open' homosexuals, to the risk of possible blackmail to protect their partners, if not themselves").

⁷⁷ *See supra* notes 7-17 and accompanying text.

⁷⁸ The Department of Defense made this argument at the district court level in *High Tech Gays*, 668 F. Supp. at 1373.

⁷⁹ *See Hardwick*, 106 S. Ct. at 2841.

⁸⁰ 668 F. Supp. at 1374.

⁸¹ *See, e.g., Hill v. United States I.N.S.*, 714 F.2d 1470,

1472 and n.3 (9th Cir. 1983) (basing its decision on the professional expertise of the American Psychiatric Association, the American Psychological Association, the American Public Health Association, the American Nurses' Association, and the Counsel of Advanced Practitioners in Psychiatric and Mental Health Nursing of the American Nurses' Association).

⁸² *Clinton: Policy on Gays in Military 'Sensible Balance,'* WASH. POST, July 20, 1993.

⁸³ *Palmore*, 104 S. Ct. 1879, 1882; *Cleburne*, 105 S. Ct. at 3254.

⁸⁴ 466 U.S. at 433.

⁸⁵ 473 U.S. 432.

⁸⁶ *See, e.g., Pruitt*, 963 F.2d 1160; *Cammermeyer v. Aspin*, 850 F. Supp. 910, 924-26 (W.D. Wash. 1994); *Dahl*, 830 F. Supp. 1319.

⁸⁷ *See Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 1010 S. Ct. 3030 (1981) (appearing to accept as a justification the prejudice of others against homosexuals).

⁸⁸ *Pruitt*, 963 F.2d at 1165.

⁸⁹ *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993). The *Steffan* court reached this holding even though it applied the traditional rational basis test and not the Ninth Circuit's active rational basis test, in which the government must present evidence showing a relationship between a legitimate state interest and the challenged classification.

⁹⁰ *Id.*

⁹¹ *Dahl*, 830 F. Supp. at 1332.

⁹² *Able v. United States*, 847 F. Supp. 1038, 1041 (E.D.N.Y. 1994).

⁹³ *Id.*

⁹⁴ *Steffan v. Perry*, ___ F.3d ___, No. 91-5409, 1994 U.S. App. LEXIS 33045 (D.C. Cir. Nov. 22, 1994) (en banc).

⁹⁵ ___ F.3d ___, No. 93-55242, 1994 U.S. App. LEXIS 23705 (9th Cir. Aug. 31, 1994).

⁹⁶ *Id.* at *19 (quoting former DOD Directive 1332.14(H)(1)(b)(1)).

⁹⁷ *Betina Boxall and Sebastian Rotella, Court Upholds Reinstatement of Gay Sailor*, L.A. TIMES, Sept. 1, 1994, at A3.

⁹⁸ *Debbie Howlett, 58% Favor Clinton Gay Policy*, USA TODAY, July 22, 1993, at 1A.