1994

Gays and Lesbians in the Military: A Rationally Based Solution to a Legal Rubik's Cube

David A. Schlueter
St. Mary's University School of Law, dschlueter@stmarytx.edu

GAYS AND LESBIANS IN THE MILITARY: A RATIONALLY BASED SOLUTION TO A LEGAL RUBIK'S CUBE

*David A. Schlueter**

Professor Schlueter writes about the policy of limited accommodation adopted by Congress in response to the issue of military service of homosexuals. He begins by delineating various options open to Congress, from the extremes of a total ban to full accommodation, and then explains the compromise solution of limited accommodation. Next, the role of military law is considered in terms of its constitutional basis, with a particular focus on military administrative law and criminal law issues. After this discussion, the application of several provisions of the Bill of Rights to servicemembers is highlighted. With this background established, Professor Schlueter raises many potential constitutional, administrative, and criminal law issues Congress faced in dealing with homosexuals in the military and concludes that, on balance, Congress' solution marks a sensible compromise among several competing interests.

INTRODUCTION

Few constitutional issues have sparked as much debate recently as has the question of extending civil rights to gay men and lesbians. The debate has been particularly sharp in the context of the military's "gay ban" which limits the ability of homosexuals to serve in the armed forces. The proponents of a ban on the service of homosexuals generally rest their arguments on the assumption that those having a propensity to engage in homosexual acts pose an unacceptable risk to military discipline and performance.[1] Those opposing a ban argue that, as a recognized minority, homosexuals are entitled to a full measure of civil rights, including the privilege of serving in the armed forces without any limitation.[2]

---

* Professor of Law, St. Mary's University School of Law. J.D. 1971, Baylor University School of Law, LL.M. 1981, University of Virginia School of Law. This article is a revised and expanded version of the author's testimony before the Senate Armed Services Committee, as noted in S. REP. No. 112, 103d Cong., 1st Sess. 269 (1993), and the House Subcommittee on Military Forces and Personnel, *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the Comm. on Armed Services*, 103d Cong., 1st Sess. 224 (1993).

1. This "propensity" argument was advanced by the Secretary of Defense, and specifically rejected by the court in Steffan v. Aspin, 8 F.3d 57, 63 (D.C. Cir. 1993), *vacated, and reh'g granted*, 8 F.3d 70 (D.C. Cir. 1994). *Steffan* is discussed *infra* notes 24-28 and accompanying text.

2. The status of homosexuals as a "recognized minority" is unsettled. The *Steffan*

The current debate is well-documented. On January 29, 1993, President Clinton fulfilled a campaign promise and directed a review of the Department of Defense's long-standing policies[3] concerning the service of homosexuals in the armed forces.[4] The Senate Armed Services Committee responded by holding extensive hearings on the issue[5] and, on July 19, 1993, received the Department of Defense's recommended changes in the policy.[6] Following additional hearings before both the Senate and House Armed Services Committees, Congress adopted a statutory policy for homosexuals serving in the military.[7] The statute, which is included as an Appendix to this article, in conjunction with Department of Defense implementing regulations,[8] has been dubbed the "Don't Ask, Don't Tell, Don't Pursue" policy.[9] In December 1993, the Department of Defense released its implementing directives,[10] effective February 5, 1994, and in March 1994 issued amendments to those directives.[11]

During congressional consideration of the issue in 1993, it became apparent that, if the ban were completely lifted, a host of legal and administrative issues would arise. For example, could a homosexual servicemember claim a homosexual companion as a dependent?[12] Could the military limit or restrict a homosexual servicemember's access to a partic-

---

court declined to reach the issue of whether homosexuals constitute a suspect or quasi-suspect class, instead holding that the then existing ban was based on status and failed the rational basis constitutional analysis. *Id.* at 63.

3. A concise history of the military positions on homosexuality is included in S. REP. No. 112, 103d Cong., 1st Sess. 265-67 (1993).

4. President's Memorandum for the Secretary of Defense on Ending Discrimination on the Basis of Sexual Orientation in the Armed Forces, 29 WEEKLY COMP. PRES. DOC. 112 (Jan. 29, 1993).

5. *See* S. REP. No. 112, 103d Cong., 1st Sess. 268-70 (1993).

6. Memorandum from Les Aspin, Secretary of Defense, to the Secretaries of the Army, Navy and Air Force and the Chairman, Joint Chiefs of Staff (July 19, 1993) (on file with the author).

7. 10 U.S.C.A. § 654 (West Supp. 1994).

8. For a discussion of Department of Defense Directives relating to homosexual service in the armed forces are discussed, see *infra* notes 20-22 and accompanying text.

9. The statute includes a "don't tell" provision which prohibits servicemembers from serving who have admitted that they are homosexuals or bisexuals. 10 U.S.C.A. § 654(b)(2) (West Supp. 1994). The "don't ask" and "don't pursue" components are found in the applicable Department of Defense regulations. The first component restricts the ability of military authorities to ask a recruit, or servicemember, to reveal his or her sexual orientation or whether they have engaged in homosexual conduct. Department of Defense Directive 1304.26, para. B-8(a), at 2-5 (1994) (Qualification Standards for Enlistment, Appointment, and Induction), *in* Memorandum from Les Aspin, Secretary of Defense, to Secretaries of the Military Departments et al. (Dec. 21, 1993) (on file with author) [hereinafter Memorandum from Les Aspin]. For a discussion of the second component, limiting the ability of the military to investigate alleged homosexual conduct, see *infra* notes 236-45 and accompanying text.

10. Memorandum from Les Aspin, *supra* note 9.

11. Memorandum from Jamie S. Gorelick, General Counsel of Department of Defense, to Director of Administration and Management (Feb. 28, 1994) (on file with the author).

12. For a more detailed discussion of this issue, see *infra* note 189 and accompanying text.

ular assignment or location, or the ability to form support groups or clubs on military installations? The legal and moral issues surrounding the debate presented what amounted to a "legal Rubik's Cube."[13] While many of the hypothetical issues have been mooted by Congressional action spelling out what amounts to a policy of limited accommodation, the debate is certain to move into the federal courts for legal challenges. As this article goes to press, several groups have filed suit challenging the constitutionality of the new policy in the federal courts.[14]

In order to determine the constitutionality of the new statute, federal courts will have to decide, generally, whether Congress has the authority to enact legislation concerning homosexual service and, if so, particularly, whether this statute survives judicial scrutiny. In the process, those who advocate a complete lifting of the ban will argue that doing so would not pose any real threat to military discipline.

The following topics are discussed in this article with respect to the new policy of limited accommodation for homosexuals: the role of law in the military setting, taking into account the special needs of the military; military administrative law and military criminal law; the application of the Bill of Rights to servicemembers; and an assessment of the legal issues likely to be created by the statutory and regulatory changes to the military's position on the service of homosexuals in the armed forces.[15]

II. THE ROUTE OF LIMITED ACCOMMODATION: PROHIBITING CONDUCT BUT NOT STATUS

A. *In General: Congressional Options*

In considering the issue of gays in the military, Congress ultimately faced the task of line-drawing and choosing from a number of legislative options. In determining whether the current policy is reasonable, the federal courts should take note of those options.

> First, Congress could have continued the policy extant prior to the President's actions in January 1993, through legislative enactment. That policy precluded homosexuals from serving.
>
> Second, the interim policy, as announced by President Clinton on July 19, 1993, could have been codified by congressional action. That is,

---

13. *See The Historical and Legal Background of the Ban on Homosexuals in the Military: Hearings on S.919 Before the Senate Armed Services Comm.*, 103d Cong., 1st Sess. (1993), *reprinted in* THE FEDERAL NEWS SERVICE, March 29, 1993, at 2 (statement of David A. Schlueter, Professor of Law, St. Mary's University School of Law). The author used the term "legal Rubik's Cube" to describe "a complicated set of interlocking constitutional and military law issues and competing interests." *Id.*

14. *See Don't Ask, Don't Tell Policy is Challenged*, N.Y. TIMES, March 8, 1994, at A18.

15. *See also* the author's testimony before the Senate Armed Services Committee, as noted in S. REP. No. 112, 103d Cong., 1st Sess. 269 (1993), and the House Subcommittee on Military Forces and Personnel, *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the Comm. on Armed Services*, 103d Cong., 1st Sess. 224 (1993).

no questions would be asked about a person's sexual preference before entry into the armed forces, but homosexual conduct would remain a punishable offense or service disqualifying.

Third, the policy (or statute) could have provided that homosexuals be admitted without being asked to state their sexual preference, but they would be prohibited from engaging in homosexual conduct which is "service connected." An example of service-connected conduct would be conduct occurring on a military installation or property, or conduct between servicemembers at an off-post location.[16]

Fourth, Congress could have decided to treat homosexuals as a protected class and admitted them into the armed forces on equal footing with all other heterosexual servicemembers without regard to sexual conduct. In this scenario, homosexual conduct would not be punished.

While this list of options is not exhaustive, it provides a frame of reference for understanding that, in the difficult task of line-drawing, Congress understood that there would be inevitable legal issues associated with each option. Of the options listed above, the first and the last options seem to be the easiest to apply because they are bright-line rules: either homosexuals would not be admitted at all, or they would be admitted as a protected class which would entitle them to all of the rights and benefits available to heterosexual servicemembers. Inevitably, if one of the bright-lines were to be adopted, those supporting the opposing bright-line position would mount a legal challenge.

B. Congressional Action: Adopting the Route of Compromise

The President's January 1993 interim policy took a middle ground by permitting homosexuals to serve in the armed forces with the proviso that they refrain from homosexual conduct.[17] Ultimately, that was the option selected by Congress.[18] While Congress' solution offers more protections for homosexuals than many would have wanted, it falls far short of the goals advocated by those who oppose the ban. In effect, it amounts to a limited accommodation. Although the congressional reform signals a continuation of a long-standing position that homosexual conduct is incompatible with military service, it recognizes that homosexuals who do not manifest their status may serve. It also reflects a sensible balance between the government's interest in an effective military and the rights of all persons, including homosexuals.[19]

---

16. For a more detailed discussion of this issue, see *infra* notes 225-28 and accompanying text.

17. In a news conference on the day he issued his memorandum to the Secretary of Defense, President Clinton said that the question was "[s]hould someone be able to serve their [sic] country in uniform if they say they are homosexuals, but they do nothing which violates the code of conduct or undermines unit cohesion or morale, apart from that statement?" *The President's News Conference on Gays in the Military*, 29 WEEKLY COMP. PRES. Doc. 109 (Jan. 29, 1993).

18. *See* 10 U.S.C.A. § 654(b) (West Supp. 1994).

19. *See* S. REP. No. 112, 103d Cong., 1st Sess. 274 (1993) (noting consideration of needs of military and rights of all persons).

The new policy makes a clear distinction between homosexual status (*orientation*) and homosexual *conduct*.[20] Sexual orientation, which is more abstract,[21] is not grounds for exclusion from the armed forces; rather, conduct is grounds for exclusion.[22] While that distinction is sure to be challenged, it is a defensible position, amply supported by the legislative history accompanying the statute.[23] The challenge to that distinction was foreshadowed in *Steffan v. Aspin*.[24] In that case, a Naval Academy midshipman challenged the Department of Defense's former policy of excluding homosexuals from the armed forces.[25] The court concluded that the policy could not survive constitutional scrutiny, even under a rational basis review.[26] A key element in the court's decision rested on the view that the military had no basis for concluding that homosexual orientation demonstrated a propensity for homosexual conduct. The court stated: "[a]ccordingly, we find that the Secretary's "propensity" argument, which presumes that "desire" will lead to misconduct, is illegitimate as a matter of law. It cannot provide a rational basis for the DOD Directives."[27] While the court's opinion in *Steffan* has been vacated and is currently being considered by the court en banc, it would be reasonable to assume that challenges to the new statutory provision will take a similar tack: Any stated basis for excluding homosexuals for engaging in

---

20. *See* Department of Defense Directive 1304.26, para. B-8(a), at 2-5 (1994) ("Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct."), *in* Memorandum from Les Aspin, *supra* note 9.

21. *See, e.g.*, Department of Defense Directive 1332.30, para. C, at 1-2 (1994) (Separation of Regular Commissioned Officers for Cause), *in* Memorandum from Les Aspin, *supra* note 9, which defines "sexual orientation" as an "abstract preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts." *Id.* at 1-1. The directive also indicates that the term "propensity" means "more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts." *Cf.* S. REP. No. 112, 103d Cong., 1st Sess. 282-83 (1993) (pointing out that gay rights advocates have "expressly linked sexual orientation to conduct.").

22. Department of Defense Directive 1304.26, para. B-8(b), at 2-5 (1994) (homosexual conduct "is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage"), *in* Memorandum from Les Aspin, *supra* note 9. *See also* 10 U.S.C.A. § 654(f) (West Supp. 1994) (definitions).

23. *See* S. REP. No. 112, 103d Cong., 1st Sess. 265-67 (1993).

24. Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), *vacated*, and *reh'g granted*, 8 F.3d 70 (D.C. Cir. 1994). *See also* Meinhold v. Department of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993) (no rational basis for DOD's policy excluding gays and lesbians). Steffan is discussed in more detail in this dedicated issue: *see* Spiro P. Fotopoulos, Note, *Steffan v. Aspin: The Beginning of the End for the Military's Traditional Policy Toward Homosexuals*, 28 WAKE FOREST L. REV. _ (1994).

25. *Steffan*, 8 F.3d at 62.

26. *Id.* at 63.

27. *Id.* at 67. That conclusion seemingly contradicts arguments made by gay rights groups that link sexual orientation to conduct. S. REP. No. 112, 103d Cong., 1st Sess. 283 (1993) (quoting argument in brief filed by Lambda Legal Defense and Education fund in Bowers v. Hardwick, 478 U.S. 186 (1986)).

specified behavior is not rational.

That argument should ultimately be rejected.[28] It is important to note that the Department of Defense directives at issue in *Steffan* were not supported with legislative findings, following extensive hearings on the issue. The new statute's proscription of service of those demonstrating a propensity to engage in homosexual conduct is amply supported by such findings and is consistent with federal caselaw. For example, in *Ben Shalom v. Marsh*,[29] the court recognized that the military does not have to take the risk that an avowed homosexual will not engage in such conduct that will interfere with the unit's assigned mission.[30]

In addressing the challenges to the new statute and the implementing regulations, it will be important for the courts to keep in mind the uniqueness of the military society and its needs. That topic is addressed next.

III. Military Law: A Unique Legal System for a Separate Society

A. *The Military: A Separate Society*

The military legal system has been recognized by the Supreme Court as legitimately unique.[31] This uniqueness is an inevitable outgrowth of the distinctive requirements of the military establishment itself. For instance, service in the military is not the equivalent of civilian "employment." The military does not "hire" servicemembers. Those wishing to don the uniform of the armed forces either enlist or receive commissions in accordance with detailed statutory and regulatory guidelines.[32]

---

28. This article is not a critique of *Steffan* or of the numerous other federal decisions which run counter to the court's conclusion in *Steffan*. The case is instructive, however, in anticipating challenges to the new statute which is clearly based on the premise that certain mental or physical characteristics present risks of undermining the military's mission. The underlying premise for exclusion of persons with such characteristics is the same as that for excluding persons whose conduct indicates a propensity to engage in sexual misconduct. Congress has concluded that such characteristics present a likelihood or possibility that the military's mission will be impaired. The new statute is apparently not based on moral or religious arguments as implied by Senator Kennedy's comment which suggests that the debate centers on the religious and moral objections of the public. S. Rep. No. 112, 103d Cong., 1st Sess. 305 (1993).

29. 881 F.2d 454, 464 (7th Cir. 1989), *cert denied sub nom.* Ben-Shalom v. Stone, 494 U.S. 1004 (1990).

30. *Ben-Shalom*, 881 F.2d at 460-61, *cited in* S. Rep. No. 112, 103d Cong, 1st Sess. 285 (1993). *See also id.* at 285. That Report makes clear that the Senate Armed Services Committee agreed with the Department of Defense that when a person indicates that he or she has the propensity to engage in homosexual acts, the military is not required to wait until the person acts before excluding him or her.

31. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 300 (1983); Middendorf v. Henry, 425 U.S. 25, 43 (1976). In Schlesinger v. Councilman, 420 U.S. 738, 757 (1975), the Court indicated that the military "must insist upon a respect for duty and a discipline without counterpart in civilian life."

32. *See, e.g.*, Department of Defense Directive 1304.26 (1994) (stating eligibility criteria), *in* Memorandum from Les Aspin, *supra* note 9. The directive also includes a provision

Unlike civilian employment, which may be extensively controlled by civil rights legislation, the statutes and regulations governing entry into the armed services routinely discriminate. Factors such as height, weight, age, physical condition, education, and mental capacity may disqualify people from service, without regard to their motivation or patriotism.[33] Physical and mental characteristics, both within and beyond the control of the applicant, are treated identically.[34] Those not qualified for service are simply not permitted to enter the armed forces.[35]

There is no right to serve in the armed forces.[36] Furthermore, while entry may be voluntary, there is no assurance that actual service will be permeated with voluntariness. To the contrary, once a person has changed his or her status from civilian to servicemember, that person's duties, privacy, assignments, apparel, length of hair, living conditions, associates, and freedom of movement are dictated by policymakers or commanders.[37] Once on active duty, the servicemember has no absolute right to continued service. Failure to conform to governing statutes or regulations may result in a dismissal, an administrative discharge, or a punitive discharge imposed by a court-martial.

While prudent commanders will almost always seek the advice of their staffs, the military is not a democratic enterprise.[38] A commander's

---

for "homosexual conduct." *Id.* at 2-5.

33. For a discussion of legal authority rejecting the notion that there is a right to serve in the military, see *infra* note 36 and accompanying text.

34. The argument might be made that having a sexual preference for members of the same gender is an immutable, genetic, characteristic, much like a benign racial characteristic. For a recent critique on the question of immutability as a tool for sucessful pro-gay litigation however, see generally Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument From Immutability*, 46 STAN. L. REV. 503 (1994). As the author noted in his testimony to the Senate Armed Services Committee, that argument is probably irrelevant. For example, if someone is overweight, it is irrelevant for purpose of entry into the armed forces, whether or not the weight problem is genetic. By the same token if a servicemember has a propensity to engage in homosexual acts, it should not matter whether or not that propensity is inherited.

35. *See generally* David A. Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV. 1, 6 (1977) (noting view that physical and mental qualifications are for benefit of government).

36. *See, e.g.*, Nieszner v. Mark, 684 F.2d 562, 564-65 (8th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983) (denied service due to age); Lindenau v. Alexander, 663 F.2d 68, 72 (10th Cir. 1981) ("well established that there is no right to enlist in this country's armed services"); West v. Brown, 558 F.2d 757, 760 (5th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) (divorcee with two children denied service). *See also* S. REP. No. 112, 103d Cong., 1st Sess. 272 (1993) (no constitutional right to serve in military). *Cf.* Statements of Senator Edward Kennedy noting that author's "unamplified" testimony before the Senate Armed Services Committee that there is no constitutional right to entry into the armed forces became "Finding #2 of the [Senate Bill 1298]." S. REP. No. 112, 103d Cong., 1st Sess. 304 (1993).

37. "[T]he very essence of compulsory service is the subordination of the desires and interests of the individual to the needs of the service." Orloff v. Willoughby, 345 U.S. 83, 92 (1953).

38. "In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel 'without counterpart in civilian life.'" Chappell v. Wallace, 462 U.S. 296, 300 (1983) (quoting Schlesinger v.

decision to place individuals in harm's way is not subject to debate and a vote by those under his or her command. The reason for this rests in the oft-cited language from the Supreme Court's decision in *Ex rel Toth v. Quarles*: "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[39] A core element in the military's ability to carry out its assigned "primary business" can be summarized in one word: *discipline*. The military society is a paradigm of "law and order."[40] Obedience to the leader and teamwork amongst servicemembers are indispensable ingredients. Servicemembers who question the authority of a superior run the risk of criminal sanctions.[41] Accordingly, a constant and legitimate concern of commanders is whether they will be able to maintain discipline in carrying out their mission—whether in times of peace or combat. Events, conditions, or actions which impede or disrupt discipline potentially threaten the ability of the military to accomplish its primary purposes.

B. *The Role of "Military Law"*

To insure that the armed forces are ready to fulfill the primary purpose for their existence, Congress and the Executive, under the watchful eye of the judiciary, have promulgated detailed laws, regulations, and directives designed to insure that discipline is maintained. One component for carrying out that mission is "military law," a generic term for several aspects of delivery of legal services to the military community. The Preamble to the 1984 *Manual for Courts-Martial* defines "military law" as follows:

> Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to . . . promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.[42]

Councilman, 420 U.S. 738, 757 (1975)).

39. 350 U.S. 11, 17 (1955).

40. "The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." Chappell v. Wallace, 462 U.S. 296, 300 (1983).

41. *See, e.g.*, Uniform Code of Military Justice, 10 U.S.C. § 888 (1988) (contempt toward officials); *id.* § 889 (disrespect toward superior commissioned officer); *id.* § 890 (1988) (disobedience of superior commissioned officer); *id.* § 892 (1988) (failure to obey order or regulation). The disobedience offenses are discussed in DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE §§ 2-4 (3d ed. 1992) [hereinafter MILITARY CRIMINAL JUSTICE].

42. *Manual for Courts-Martial, United States, 1984*, at I-1 (1984) [hereinafter

In other words, military law is designed to promote good order and discipline so that the primary mission of the military, to fight wars and be prepared to do so, can be fulfilled. Military law also ensures that servicemembers' actions are performed in accordance with the rules established by Congress and the President. And finally, military law assures that those subject to the military system will be treated fairly in criminal and administrative proceedings.

This discussion focuses on two aspects of military law: military administrative law and military criminal law. Before turning to those elements, it is important to note briefly the constitutional basis for the military legal system.

1. The constitutional basis of military law and the role of Congress

Congress is explicitly empowered under Article I, Section 8, Clause 14, of the Constitution to "make Rules for the Government and Regulation of the land and naval Forces."[43] Most of the legislation promulgated under this authority rests in Title 10 of the United States Code. That Title includes specific guidance on personnel matters, covering who is qualified to serve in the armed forces,[44] length of service,[45] and the number of officers who may serve.[46]

Title 10 also includes the "Uniform Code of Military Justice" (hereinafter U.C.M.J.).[47] That Code includes a blend of both procedural rules and substantive crimes.[48] Of particular interest is Article 36,[49] which specifically authorizes the President to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial."[50] An exercise of that authority is found in the *Manual for Courts-Martial*.[51] The *Manual* provides detailed guidance on military criminal procedures which is lacking in the more general outline of the Uniform Code of Military Justice.

MANUAL].

43. Although Article 1, § 8, Clause 14 is most frequently cited as authority for congressional actions, other provisions in § 8 provide for declaring war, raising and supporting armies and a Navy, and calling and regulating the Militia.

44. 10 U.S.C. §§ 501-505 (1988).

45. *See, e.g., id.* §§ 505-507 (enlistments).

46. 10 U.S.C. §§ 521-26 (1988).

47. Uniform Code of Military Justice, 10 U.S.C.A. §§ 801-946 (West 1983 & Supp. 1994).

48. Articles 77 through 134 are labeled the "Punitive Articles." *Id.* §§ 877-934.

49. Uniform Code of Military Justice, 10 U.S.C. § 836 (1988).

50. *Id.* § 836(a).

51. MANUAL, *supra* note 42. The most recent version is dated 1984 and was prescribed by Exec. Order No. 12,473, 49 Fed. Reg. 17,512 (1984). Earlier editions were prescribed in 1951 and 1968. The most recent edition was an attempt to more closely align military criminal procedure with federal criminal practice.

C. *Military Administrative Law*

Military administrative law consists of those statutes and regulations which govern the full range of military operations and other military activities, including military personnel law. Personnel law, in turn, governs recruiting, promotions, retention, and separation from the armed forces.

As noted in the preceding discussion, the statutory outline for military personnel law is set out in Title 10 of the United States Code. Further, the President and the Services have promulgated directives and a maze of regulations implementing the statutory provisions.[52] For example, while 10 U.S.C. § 505 provides general guidance on eligibility to enlist, Service Regulations, in turn, establish more detailed procedures and requirements for enlistment.[53] The same model holds true for regulations concerning discharges.

Regarding the eligibility of a particular class of individuals to serve in the armed forces, Congress possesses full authority to determine the terms and conditions of service. As the courts have recognized, "[t]he composition and qualifications of members of the armed forces is a matter for Congress and the military."[54] While an argument could be made that Congress and the President share the authority to determine who is qualified,[55] Congress has the clear power to declare, by statute, classes of individuals who are eligible, or ineligible, for service.[56] As it has done in the past, Congress may continue to draw only broad guidelines and leave the specific implementation to the President. The implementation of statutory guidance is generally a function of military administrative law.[57]

D. *Military Criminal Law*

1. *The purpose of military criminal law*

The criminal law, or military justice, component of military law is relied upon to enforce the military establishment's norms through punitive measures. The norms consist of statutes, directives, and regulations.[58]

---

52. *See generally* 32 C.F.R. §§ 1-399 (1993).

53. *See, e.g.*, 32 C.F.R. §§ 571-575 (1993) (outlining enlistment requirements for the United States Army).

54. Rich v. Secretary of the Army, 735 F.2d 1220, 1224 n.1 (10th Cir. 1984); *see also* Lindenau v. Alexander, 663 F.2d. 68, 73 (10th Cir. 1981).

55. The argument might be made that the President, as Commander-in-Chief, under Article II of the Constitution has power to determine the fitness of a particular person or persons to serve in the military. However, historically, the primary responsibility for determining fitness to serve has rested with Congress. President Clinton's signing of the statute regarding gays in the military probably moots that particular argument and avoids a constitutional debate in the courts over whether the President could have ordered full-fledged assimilation of gays into the military over Congressional objection. *See* S. REP. No. 112, 103d Cong., 1st Sess. 270-71 (1993) ("The President may supplement, but not supersede, the rules established by Congress for the government and regulation of the armed forces.").

56. S. REP. No. 112, 103d Cong., 1st Sess. 270-71 (1993) (citing Constitution and cases).

57. Those implementing directives are normally the function of the Department of Defense and the branches of the armed forces.

58. *See* Uniform Code of Military Justice, 10 U.S.C.A. §§ 801-946 (West 1983 & Supp.

The criminal law component of military law is the one most familiar to the general public and the one which is likely to receive the most attention in connection with regulation of the sexual conduct of homosexuals in the armed forces.

To many, the military justice system seems foreign and, at times, inherently unfair.[59] The public's attention is generally directed at military justice issues only when a noteworthy case or issue arises, such as national security trials, allegations of sexual harassment, and whether homosexual conduct should continue to be treated as a punishable offense.

The public's concerns about the military justice system in such matters can be attributed to several factors. First, the terminology used in military justice matters is arcane to most citizens who have had little or no prior contact with the military.[60] Second, servicemembers may be tried by court-martial and sentenced to confinement for a wide range of misconduct which has no clear civilian criminal analogy.[61] Critics of military criminal law seem particularly sensitive to the differences in military criminal law when a servicemember is prosecuted for an act normally not subject to criminal prosecution in the civilian community.[62]

2. *How the military criminal system works: A brief overview*

Distinguishing *status* from *conduct* has been a prevalent issue in the debate about homosexual service in the armed forces.[63] Because the current statute and regulations continue to prohibit homosexual conduct,[64] but not status, and with the possibility of investigation and discharge of homosexuals in the armed forces, it is important to discuss both military criminal law issues and how the military criminal justice system operates.

When an offense is reported, the unit commander is required to conduct a thorough and impartial inquiry.[65] If it appears that an offense has

---

1994); *see also* Army, Air Force, Coast Guard, Navy, and Marine Corps regulations as cited in MILITARY CRIMINAL JUSTICE, *supra* note 41, §§ 3-5(B) to -5(E)(4), at 192.

59. *See* David A. Schlueter, *Military Justice in the 1990's: A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 5-8 (1991) [hereinafter *Military Justice in the 1990's*]. The article notes factors which may contribute to criticisms of military justice.

60. *See generally* Uniform Code of Military Justice, 10 U.S.C. § 801 (1988) (giving definitions of military terminology).

61. *See generally* MILITARY CRIMINAL JUSTICE, *supra* note 41, §§ 2-2 to -9 (listing military crimes, many of which have no civilian parallel).

62. *See Military Justice in the 1990's*, *supra* note 59, at 12.

63. *See* Steffan v. Aspin, 8 F.3d 57, 65 (D.C. Cir. 1993), *vacated, and reh'g granted*, 8 F.3d 70 (D.C. Cir. 1994).

64. Pursuant to the Uniform Code of Military Justice, 10 U.S.C. § 890 (1988), the military may issue orders prohibiting certain sexual conduct. MILITARY CRIMINAL JUSTICE, *supra* note 41, § 2-9(B). These "safe-sex" orders have been upheld by military courts. *See* United States v. Womack, 29 M.J. 88, 91 (C.M.A. 1989) (holding "safe-sex" order proscribing HIV infected appellant from engaging in sodomy or homosexual acts to be constitutional).

65. MILITARY CRIMINAL JUSTICE, *supra* note 41, § 5-2 (commander's investigation, pretrial restraints, and confinement).

been committed by the accused,[66] the commander may: (1) begin nonjudicial punishment proceedings under Article 15, U.C.M.J.;[67] (2) begin administrative discharge procedures under the appropriate Service regulations;[68] (3) or *prefer* court-martial charges.[69] In making a decision, the commander may consider the nature of the offense, the prior record of the servicemember, and the available evidence.[70] The unit commander has broad discretion.[71] In some instances, a superior commander may indicate that certain offenses should be forwarded to higher command levels for processing.[72] Usually, though, any attempts to tell a subordinate commander how to handle a particular case would be considered unlawful command influence.[73]

If charges are preferred, a *convening authority* may ultimately *refer* the charges to a particular court-martial, a temporary tribunal, for trial.[74] There are three types of courts-martial: summary, special, and general.[75] More serious charges are referred to general courts-martial,[76] after a pretrial, *Article 32 hearing* is held on the question of whether the charges appear to be supported by the evidence.[77]

---

66. For a discussion of options after an offense has been committed, see MILITARY CRIMINAL JUSTICE, *supra* note 41, § 5-2.

67. Uniform Code of Military Justice, 10 U.S.C. § 815 (1988). The U.C.M.J. sets out the statutory guidelines for imposing punishments on servicemembers for minor offenses. *Id.* The individual Services have promulgated additional regulatory guidance concerning these procedures which are set out in MILITARY CRIMINAL JUSTICE, *supra* note 41, §§ 3-5(B) to -5(E)(4).

68. Each of the Services has promulgated regulations concerning discharge of servicemembers for a variety of reasons, including misconduct. *See* Army Regulation 635-200, which allows administrative discharge for misconduct or unsuitability. If the administrative discharge route is chosen, the accused is entitled to some procedural due process: written notice, the opportunity to consult with counsel, and, in some instances, a hearing before a board of officers who will hear evidence and make a recommendation to higher authorities on disposition of the servicemember. *See* MANUAL, *supra* note 42, at V-2 to -4. *See also* MILITARY CRIMINAL JUSTICE, *supra* note 41, § 3-5.

69. Uniform Code of Military Justice, 10 U.S.C. § 830 (1988).

70. MILITARY CRIMINAL JUSTICE, *supra* note 41, § 3-3(c); *see also* MANUAL, *supra* note 42, at V-1.

71. MILITARY CRIMINAL JUSTICE, *supra* note 41, § 6-1 n.15.

72. *Id.* § 6-4(C).

73. *Id.* § 6-4(B).

74. Uniform Code of Military Justice, 10 U.S.C. §§ 822-824 (1988). A "convening authority" is an officer, authorized by the U.C.M.J. to order the formation of a court-martial, *i.e.*, convene it, and then refer court-martial charges to it for trial. *Id.* § 822.

75. *See* R.C.M. §§ 201(f)(1)-(3), *reprinted in* MANUAL, *supra* note 42, at II-9 to -11; *see also* Uniform Code of Military Justice, 10 U.S.C. § 816 (1988). The discussion here focuses on the general and special court-martial. Summary courts-martial are not used very often; a servicemember tried by a summary court-martial is generally not entitled to the same level of rights as a servicemember being tried before a general or special court-martial. *See, e.g.*, Middendorf v. Henry, 425 U.S. 25, 32 (1976); United States v. Kendig, 36 M.J. 291, 295 (C.M.A. 1993); United States v. Ezell, 6 M.J. 307, 313 (C.M.A. 1979).

76. *See* MILITARY CRIMINAL JUSTICE, *supra* note 41, § 4-3(A) to -3(C) (showing that general courts-martial have more jurisdiction and can hand out stiffer penalties than other types of courts-martial).

77. Uniform Code of Military Justice, 10 U.S.C. § 832 (1988).

Throughout the process, the servicemember is entitled to free legal representation from a uniformed lawyer,[78] called a "JAG" (an officer in the Judge Advocate General's Corps). Also, similar to civilian criminal trials, broad discovery rights[79] and other due process and constitutional protections are available.[80] The presiding officer at a general or special court-martial is a military judge—an armed forces lawyer with many years of experience.[81] The accused has the option of requesting trial by judge alone (a bench trial) or with "members" (the equivalent of a jury trial).[82] If the latter option is exercised, the convening authority selects the court members who will decide the case.[83]

At trial, the Military Rules of Evidence apply.[84] Those rules, which closely parallel the Federal Rules of Evidence, were promulgated in 1980 as part of an attempt to adopt, wherever possible, federal criminal law practice and procedure.[85] The Military Rules of Evidence also include a set of rules creating privileges for certain confidential communications. For example, statements made to lawyers,[86] clergy,[87] or spouses[88] are normally not admissible.

If the accused is convicted, he or she may appeal to a Court of Military Review consisting of panels of senior uniformed lawyers.[89] Again, the accused is entitled to free legal representation.[90] Appeals from the Courts of Review, go to the United States Court of Military Appeals,[91] consisting of five civilian judges appointed by the President and confirmed by the Senate.[92] This step in the appellate process, often referred to as "The Supreme Court of the Military" insures that there will be civilian review of courts-martial convictions. In 1983, Congress provided that an accused servicemember could seek further discretionary review by the Supreme Court of the United States.[93]

In discussing the issue of gays in the military, it is important to remember the purpose of military criminal law: to insure that the norms for

---

78. *Id.* § 838(b)(1), (3).

79. *See generally* MILITARY CRIMINAL JUSTICE, *supra* note 41, § 10-1 (noting the broad discovery granted under military law).

80. *Id.* § 1-7.

81. Uniform Code of Military Justice, 10 U.S.C. § 826 (1988). *See generally* Weiss v. United States, 114 S. Ct. 752 (1994) (discussion of role of military judges).

82. MILITARY CRIMINAL JUSTICE, *supra* note 41, § 12-3.

83. Uniform Code of Military Justice, 10 U.S.C. § 825(d)(2) (1988).

84. *See* STEPHAN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, *Military Rules of Evidence Manual* 6 (3d ed. 1991) (discussion of applicability of rules of evidence) [hereinafter MILITARY RULES OF EVIDENCE MANUAL].

85. *Id.* at ix to xii (recounting background of Military Rules of Evidence).

86. MIL. R. EVID. 502 (lawyer-client privilege).

87. MIL. R. EVID. 503 (communications to clergy).

88. MIL. R. EVID. 504 (husband-wife privilege).

89. Uniform Code of Military Justice, 10 U.S.C. § 866 (1988). *See generally* MILITARY CRIMINAL JUSTICE, *supra* note 41, § 17-15 (discussing the composition of the court).

90. MILITARY CRIMINAL JUSTICE, *supra* note 41, § 17-14.

91. *Id.* §§ 17-15(c), 17-16.

92. Uniform Code of Military Justice, 10 U.S.C. § 942 (Supp. IV 1992).

93. Uniform Code of Military Justice, 10 U.S.C. § 1259 (1988).

a servicemember's conduct established by Congress and the President are met. And while discipline is a by-product of the system, those involved in military law must insure that "justice" is accomplished. That point was made in the 1960 Powell Report:

> Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable.
>
> . . . .
>
> Once a case is before a court-martial it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.[94]

Without regard to whether one views the military criminal law as a means of enforcing justice, discipline, or both, it is important to remember that the primary purpose of the military establishment is to fight wars and to be prepared to fight wars; in other words, to protect national security. As the Supreme Court has recognized, the "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of the armies is not served."[95] Thus, it is not in the best interests of a commander to conduct "witch hunts," or to prosecute every single act of misfeasance or malfeasance. Instead, the goal of commanders is to instill enough pride and discipline in their units to avoid the need for disciplinary action.

IV. Application of the Bill of Rights to Servicemembers in the Armed Forces

A. *Differing Standards in Application of the Bill of Rights*

It is now well settled in civilian and military jurisprudence that, with few exceptions,[96] the constitutional protections within the Bill of Rights

---

94. Report to Honorable Wilber M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army [Powell Report] 11, 12 (1960).

95. United States v. *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

96. The rights not available are the right to indictment by grand jury, U.S. Const. amend. V; the right to bail, Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976); and the right to jury trial, Reid v. Covert, 354 U.S. 1, 37 n.68 (1957).

are generally available to servicemembers, but not to the same extent as to their civilian counterparts.[97] The differences are grounded on the special needs of the military establishment to maintain discipline. It may be that the key to federal litigation on the issue of gays in the military rests in large part on whether the courts hearing the challenges to the new policy will be willing to recognize the special and unique needs of the military. The following discussion briefly notes those distinctions, where they exist.

B. First Amendment Protections: Freedom of Speech, Religion, Right to Associate

1. An overview

The First Amendment freedoms are considered among the most prized liberty interests: the right to free speech,[98] the right to freely practice one's religion,[99] the right to be free from establishment of an official religion,[100] and the right to associate with others.[101] But as the courts have recognized, these rights are not absolute and may be subject to government regulation where the government can establish a sufficiently compelling reason for doing so.[102] Indeed, some forms of speech are not protected at all, for example pornography.[103] Other forms, such as commercial speech, receive only moderate protection.[104]

2. Free speech in the military context

In the military context, the Supreme Court has recognized that servicemembers do not enjoy the same degree of First Amendment protection available to their civilian counterparts.[105] The Court has stated that a servicemember is not protected under the First Amendment if the speech "undermines the effectiveness of response to command."[106] In enforcing that rule, commanders are given a wide berth, as long as they are not irrational or arbitrary.

---

97. HOMER E. MOYER, JUSTICE AND THE MILITARY §§ 2-103 to -106 (1972).

98. U.S. CONST. amend. I.

99. *Id.*

100. *Id.*

101. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

102. *See* S. REP. No. 112, 103d Cong., 1st Sess. 278 (1993). In this case the reasons would include morale, discipline, and unit cohesion.

103. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 53 (1973).

104. Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748, 770-72 (1976).

105. MILITARY CRIMINAL JUSTICE, *supra* note 41, § 13-3(N)(3).

106. Parker v. Levy, 417 U.S. 733, 759 (1974). The commander's restrictions on expression might also extend to citizens attempting to use the military forum for expressing their views. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 361 (1980) (upholding regulation restricting circulation of petitions on Air Force bases); Greer v. Spock, 424 U.S. 828, 840 (1976) (upholding regulation banning speeches and demonstrations of partisan political nature on military reservations).

3. Freedom of religion

In the area of freedom of religion, the Supreme Court has recognized the government's authority to regulate some forms of religious practices within the military. For example in *Goldman v. Weinberger*,[107] the Court upheld the government's decision to ban wearing of religious apparel. Congress later modified the effect of that decision by accommodating the religious beliefs of servicemembers through legislation which now permits them to wear religious apparel which does not interfere with their performance and is "neat and conservative."[108] It is important to note that, in the process of accommodating the religious beliefs of the servicemembers, Congress delegated to the military (the "Secretary concerned") the authority to decide whether the religious apparel in question was permissible.[109]

4. Freedom to associate

With regard to the freedom to associate, the Supreme Court has recognized certain penumbral First Amendment rights, such as the right to associate with others for the purposes of political, religious, or expressive activities.[110] The military may also regulate this form of speech, however, if it can show a compelling or important reason for doing so. A typical example of this would be a military regulation declaring certain civilian establishments or organizations off-limits.[111] If the "association" is intimate in nature, such as a family, the right to associate is protected, not by the First Amendment, but by a penumbra privacy right, discussed below.[112]

C. Fourth Amendment: Right to Be Free From Unreasonable Searches and Seizures

A servicemember has some protection under the Fourth Amendment against unreasonable searches and seizures.[113] But the right is not absolute, in view of special military interests which may outweigh the servicemember's privacy interests.[114] The burden for showing that a

107. 475 U.S. 503, 510 (1986). "The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Id.* at 509.

108. 10 U.S.C. § 774 (1988) (some religious apparel permitted).

109. *Id.*

110. *See* Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

111. *See, e.g.*, Blameuser v. Andrews, 630 F.2d 538, 543-44 (7th Cir. 1980) (association of white officer with white supremacist group).

112. *See* Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984).

113. *See, e.g.*, United States v. Ezell, 6 M.J. 307, 315 (C.M.A. 1979).

114. United States v. Fagan, 28 M.J. 64, 69 (C.M.A.), *cert. denied*, 493 U.S. 823 (1989) (court noted that servicemembers recognize and accept limits on their liberty and privacy, and that it would be unrealistic to incorporate civilian standards wholesale into military setting).

different rule should apply in the military rests upon the government.[115]

Although the Uniform Code of Military Justice provides no specific guidance in this area, the Military Rules of Evidence provide specific rules for how, and when, a commander may search a servicemember's property.[116] These rules of evidence, when adopted, were intended to reflect the then existing state of constitutional law on searches and seizures.[117] Further, the military courts rely heavily on federal court decisions interpreting the Fourth Amendment.[118] Thus, military search and seizure law, with few exceptions, parallels civilian precedent.

The differences in the two systems generally center on the servicemember's reduced reasonable expectation of privacy, either because of overriding and important government interests or because of the lack of physical privacy caused by special living conditions.[119] One of the most notable differences is the military law concerning "inspections." A commander may conduct an inspection, without probable cause, to "determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle."[120] An inspection would typically consist of a complete examination of every element of a servicemember's living area and personal belongings in a manner considered unacceptable in a civilian setting, without a showing of probable cause or even reasonable suspicion.[121]

If a court determines that a servicemember's Fourth Amendment rights have been violated, any evidence obtained as a result of that violation, and any derivative evidence, will be excluded.[122]

D. Fifth Amendment: The Constitutional and Statutory Right Against Self-Incrimination

A servicemember's right against self-incrimination generally parallels the prevailing civilian law on the same subject.[123] But in the inherently coercive environment of military life, the right against self-incrimination takes on added importance for servicemembers. Servicemembers enjoy not only the Fifth Amendment right to remain silent, but also the protections afforded in Article 31 of the Uniform Code of Military Justice,[124] which provides in part that "[n]o person subject to [the U.C.M.J.] may compel any person to incriminate himself or to answer any question the

---

115. Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976).

116. *See* MILITARY RULES OF EVIDENCE MANUAL, *supra* note 84, at 243-399.

117. United States v. Postle, 20 M.J. 632, 643 (N.M.C.M.R. 1985).

118. *Id.* at 645.

119. *See, e.g.*, S. REP. No. 112, 103d Cong., 1st Sess. 277 (1993) (testimony of General Colin Powell describing living conditions of servicemembers which provide only minimal privacy).

120. MIL. R. EVID. 313(b).

121. *See id.* (no requirement for probable cause is contained in the rule).

122. MIL. R. EVID. 311(a).

123. *See* MILITARY RULES OF EVIDENCE MANUAL, *supra* note 84, at 100-03.

124. United States v. Ray, 15 M.J. 808, 810 (N.M.C.M.R. 1983).

answer to which may tend to incriminate him."[125]

Additionally, Article 31(b) of the Uniform Code of Military Justice provides that servicemembers suspected of an offense must first be warned of their right to remain silent.[126] A similar provision exists in Military Rule of Evidence 301.[127] If the government desires potentially incriminating testimony from a servicemember, it may obtain that testimony by granting either testimonial or transactional immunity to the servicemember.[128] Contrary to popular belief, the government may not override a servicemember's legitimate right against self-incrimination by simply ordering the individual to provide the information.[129] Without immunity, an order to do so would clearly violate the servicemember's right to remain silent.

E. Sixth Amendment Rights: Counsel; Confrontation; Compulsory Process; and Trial by Jury

With the exception of the right to trial by jury, which is not applicable in military cases, a servicemember being tried by a general or special court-martial is entitled to all of the Sixth Amendment rights available in a civilian trial. That is, a military accused is entitled to representation by civilian counsel (provided for at no expense to the government), individual military counsel upon request, or assigned military counsel.[130] Military defense counsel are provided to the accused without cost.[131]

A military accused is also entitled to the full range of rights emanating from the Sixth Amendment right to compulsory process, that is, the right to request defense witnesses to appear.[132] Depending on the nature and importance of the expected testimony, the court may direct that the prosecution obtain the presence of the defense witness at government expense, or risk abatement of the proceedings.[133] Civilian counsel practicing before courts-martial are often surprised, and pleased, to learn of the very liberal discovery policies in effect.

The accused is also generally entitled to the same confrontation rights available to a civilian defendant. That is, an accused is entitled to cross-examine adverse witnesses[134] and block otherwise inadmissible hear-

---

125. Uniform Code of Military Justice, 10 U.S.C. § 831(a) (1988).

126. *Id.* § 831(b). These rights warnings preceded the Supreme Court's mandate in Miranda v. Arizona, 384 U.S. 436 (1966), that suspects be advised of the right to remain silent and the right to the presence of counsel. *See* Miranda, 384 U.S. at 489 (citing Article 31(b)).

127. MIL. R. EVID. 301(a).

128. United States v. Newman, 14 M.J. 474, 481 (C.M.A. 1988).

129. *See* United States v. Lee, 25 M.J. 457, 460 (C.M.A. 1988).

130. MIL. R. EVID. 313(d)(2).

131. *Id.*

132. *See* Uniform Code of Military Justice, 10 U.S.C. § 846 (1988) (production of witnesses).

133. United States v. Allen, 31 M.J. 572, 611 (N.M.C.M.R. 1990).

134. United States v. Lonetree, 31 M.J. 849, 858 (N.M.C.M.R. 1990), *cert. denied*, 113 S. Ct. 1813 (1993).

say evidence.[135] However, the one Sixth Amendment right not available to servicemembers is the right to trial by jury.[136] Thus, the Supreme Court's rulings concerning the size and composition of juries are not applicable to the military.

F. The Fundamental Right to Privacy; Liberty Interests

While many of the foregoing Bill of Rights protections may not necessarily impact directly on the issue of permitting homosexuals to serve in the armed services, there is one right that is directly implicated: the fundamental right to privacy. The Supreme Court has recognized that citizens have a penumbral, fundamental right to privacy which includes the right to marry,[137] to procreate,[138] or to obtain an abortion.[139] If a court agrees that the military is nonetheless infringing on the right to privacy, the government must be prepared to show that it has a compelling interest in doing so and that the means chosen for advancing that interest are necessary.[140]

To date, the Supreme Court has resisted attempts to broaden the right to privacy into other activities. For example, in *Bowers v. Hardwick*,[141] in a closely divided decision, the Court held that there is no fundamental right to engage in homosexual acts.[142]

An activity not protected by the right to privacy may nonetheless be considered a liberty interest, also subject to a substantive due process analysis—which tests whether the governmental action is reasonably related to a legitimate government purpose.[143] Under that approach, the courts have generally given the military wide latitude in regulating matters such as grooming, dress, hygiene, financial matters, use of alcohol, and association with others. The Court of Military Appeals has stated:

> All activities which are reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command

---

135. United States v. Duncan, 30 M.J. 1284, 1287-88 (N.M.C.M.R. 1990).

136. *See, e.g.*, Callahan v. Parker, 395 U.S. 258, 261 (1969), *overruled on other grounds by* Solorio v. United States, 107 S. Ct. 2924 (1987); Reid v. Covert, 354 U.S. 1, 37 n.68 (1957). United States v. Gray, 37 M.J. 751, 755 (A.C.M.R. 1993), stands for the proposition that servicemembers do not enjoy the right to trial by jury.

137. Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

138. Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

139. Roe v. Wade, 410 U.S. 113, 153 (1973).

140. *Id.* at 155.

141. 478 U.S. 186 (1986).

142. *Id.* at 191-92. *But see* S. REP. No. 112, 103d Cong., 1st Sess. 286 (1993) (noting that, in addition to civilian cases, federal law, specifically Title VII, does not prevent discrimination based on homosexuality).

143. Youngberg v. Romeo, 457 U.S. 307, 320 (1982). *But see* S. REP. No. 112, 103d Cong., 1st Sess. 285 (1993) (citing cases supporting view that homosexual conduct is neither a fundamental right nor a liberty interest).

> and are directly connected with the maintenance of good order in the services are subject to the control of the officers upon whom the responsibility of the command rests.[144]

In the context of admitting homosexuals into the military, even though there might not be a fundamental right to engage in homosexual sodomy, there might still be constitutional issues concerning the ability of the commander to "control" sexual activities which he or she believed would impact on the morale, discipline, or usefulness of the members in the unit.

G. *Summary*

This brief review of constitutional protections for servicemembers demonstrates several key points. First, with few exceptions, servicemembers are entitled to the same constitutional liberties available to civilians. Second, those liberties may not always apply to the same extent as in the civilian setting. Third, the justification for governmental restrictions on constitutional liberties available in the civilian setting is linked with the primary purpose of the military establishment — to protect national security. Where the military's need for discipline or morale is threatened, the servicemember's constitutional rights may be restricted by the commander. Fourth, the Supreme Court has indicated repeatedly that it will defer to Congress and the President in overseeing the military establishment, even where individual rights of servicemembers are implicated.[145]

V. Legal Issues Posed by Removing or Modifying the Ban Against Homosexuals

A. *In General*

Legal challenges to the new statutory policy and Department of Defense directives are inevitable. Some challenges will directly implicate constitutional law issues; others will raise questions about possible statutory amendments to the Uniform Code of Military Justice. Many possible challenges are, for now, only hypothetical. For example, an issue such as possible military benefits derived from homosexual marriages probably would have arisen had Congress decided to fully assimilate homosexuals into the military community. Nonetheless, it is important to note that Congress did consider such issues in deciding not to treat homosexuals as a protected class.

---

144. United States v. Martin, 5 C.M.R. 102, 104 (C.M.A. 1952).

145. *See, e.g.*, Solorio v. United States, 483 U.S. 435, 447 (1987) (affirming Court of Military Appeals decision that servicemember could be court-martialled for off-base sex offenses).

B. Potential Constitutional Law Issues

Whatever the nature of the administrative or criminal law decisions affecting servicemembers,[146] potential constitutional challenges to those decisions exist, many of which can only be imagined at this point. Past litigation in the federal courts indicates that the potential constitutional challenges are not fanciful.

Virtually any military personnel decision is subject to the argument that it unfairly discriminates, violates fundamental privacy interests, or infringes on First Amendment freedoms. As noted in the discussion of the application of the Bill of Rights to servicemembers,[147] courts generally defer to the decisions of Congress and of military leadership in deciding which policies best advance the management of the military.[148] Although the courts typically defer to Congress in assessing the constitutionality of a law governing military matters, that deference is partly based on the belief that, in adopting a particular rule, Congress has carefully considered potential issues, balanced the interests involved, and drawn the line in a manner it believed to be the most appropriate.[149] Given the critical role of legal precedent in court decisions, it seems safe to assume that, absent a major shift in the current philosophy of the federal courts, judicial deference will continue with regard to any decisions affecting service of homosexuals in the armed services.

The following discussion briefly addresses several potential constitutional law issues. This discussion is not an attempt to address or answer all possible issues; rather, it is an attempt to demonstrate the reasonableness of Congress' position on the issue of gays in the military and to identify what might be expected from challenges to that position. Also, it is important to note that, even if a particular constitutional law challenge is not made, there may still exist a feeling of discontent among servicemembers, either heterosexual or homosexual, which could impact on discipline.

---

146. For a discussion of administrative law issues, see *infra* notes 185-89 and accompanying text. For a discussion of criminal law issues, see *infra* notes 190-248 and accompanying text.

147. For a discussion of the application of the Bill of Rights to servicemembers, see *supra* notes 96-145 and accompanying text.

148. For a discussion of judicial and legislative deference to military leadership, see *supra* note 145 and accompanying text.

149. *See* Weiss v. United States, 114 S. Ct. 752, 760 (1994) (stating that Constitution contemplates that Congress has plenary power in governance of military); Rostker v. Goldberg, 453 U.S. 57 (1981) (stating that the Court's deference is "at its apogee" when reviewing congressional decisions regarding military).

1. First Amendment issues; challenges to the "don't tell" component

As discussed earlier,[150] generally the courts recognize that the military may regulate speech within the military context.[151] To so regulate, the military must be prepared to demonstrate an overriding military necessity.

In the context of homosexuals in the military, most courts have held that a servicemember does not have a First Amendment right to declare that he or she is a homosexual.[152] The rationale is that, while a servicemember may have a right to advocate a particular viewpoint, it is an entirely different matter to admit being homosexual, which is service disqualifying. That is, so long as it is disqualifying to admit homosexuality while on active duty, a servicemember's statement that he or she is gay will be considered an admission not protected by the First Amendment.[153] Thus, any effect on speech would be considered incidental to the military goals of excluding homosexuals.

A further issue arises when considering whether the government may proscribe servicemembers' statements concerning either homosexual or heterosexual lifestyles.[154] Given the emotionally charged positions taken on both sides of this issue, it is not difficult to imagine that servicemembers would eventually join the debate and that, in order to maintain discipline, a commander would simply order that no particular viewpoint could be advocated. The order could take the form of banning not only verbal speech but also display of posters, notices, and other forms of expression. Those actions would clearly raise First Amendment issues.[155]

Similarly, it is not unusual for servicemembers to form clubs on military installations to further their mutual interests in sports, hobbies, religious beliefs, or cultural heritage. If a group of servicemembers desired to form such a club or support group for homosexual rights, could the military ban such activity or membership? It would be difficult to do so, particularly if the military tolerated other organizations based upon

---

150. For a discussion of the military's ability to regulate speech, see *supra* notes 105-06 and accompanying text.

151. Parker v. Levy, 417 U.S. 733 (1974). *See also* Brown v. Glines, 444 U.S. 349 (1980).

152. *See* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub nom.* Ben-Shalom v. Stone, 494 U.S. 1004 (1990).

153. *See, e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub nom.* Ben-Shalom v. Stone, 494 U.S 1004 (1990). *But see* Matthews v. Marsh, No. 82-0216P (D. Me. filed April 3, 1984) (ROTC cadet had First Amendment right), *vacated on other grounds*, 755 F.2d 182 (1st. Cir. 1985).

154. *See* Pruitt v. Cheney, 963 F.2d 1160, 1163 (9th Cir. 1991) (finding that servicemember may talk about homosexuality and remain in the army, as long as not identifying herself as being homosexual); *see also* Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989), *cert. denied sub nom.* Ben-Shalom v. Stone, 494 U.S. 1004 (1990).

155. For a discussion on free speech issues in the military context, see generally MILITARY CRIMINAL JUSTICE, *supra* note 41, § 13-3(N)(3).

expressive activities.[156]

While almost all of the public's attention has been focused on the free speech rights of gay men and lesbians, there is the related problem of potentially chilling the First Amendment liberties of those who oppose assimilation of homosexuals into the military. Whether the restriction of their speech would be through "sensitivity training," adoption of a code of sexual conduct, or amendments to the Uniform Code of Military Justice, heterosexual servicemembers could argue that their First Amendment freedoms are being infringed, either because they are required to listen to speech they would rather not hear,[157] or because they might not be free to register their concerns about homosexual servicemembers. Additionally, heterosexual servicemembers might argue that, by requiring them to listen to "sensitivity" lectures about homosexuals' status, or tolerance of homosexual acts, their religious beliefs are being violated.

The same issues would arise from enforcement of so-called "hate speech" statutes, regulations or directives which would bar servicemembers from using derogatory terms to describe homosexuals.[158] Department of Defense directives specifically prohibit such harassment.[159] What the law makes clear is that no matter how well-intentioned such laws or directives might be, they potentially implicate First Amendment concerns.

Opponents of the revised statute and regulations are sure to argue that they infringe upon, or chill, their First Amendment rights. For example, the "policy" provision in the statute clearly indicates that prohibited homosexual conduct includes any statement by a servicemember that "he or she is a homosexual or bisexual, or words to that effect."[160] That provision could prohibit a wide range of statements other than those which advocate a homosexual lifestyle. However, the military could defend the stated policy by arguing that a statement indicating a propensity or intent to commit homosexual acts would be inconsistent with the good order and discipline required in the military environment. As noted above, generally the courts defer to the military in regulating servicemembers' speech if there is reason to believe that the speech would interfere with the military mission.[161]

---

156. Although the military clearly has the authority to limit certain forms of speech, any attempt to limit expressive behavior based on the content of the speech would raise First Amendment claims. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980) (finding that a picketing ordinance impermissibly discriminated).

157. *See generally* Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 NW. U. L. REV. 153 (1972).

158. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992) (finding that an ordinance prohibiting speech which insults, or provokes violence, on basis of race, color, creed, religion, or gender is facially overbroad).

159. *See* Applicant Briefing Item on Separation Policy ("[t]he Armed Forces do not tolerate harassment or violence against any servicemember for any reason"), *in* Department of Defense Directive 1304.26 (1994), *in* Memorandum From Les Aspin, *supra* note 9.

160. Uniform Code of Military Justice, 10 U.S.C.A. § 654(b)(2) (West Supp. 1994).

161. For a discussion of judicial deference to the military regarding speech regulationd, see *supra* notes 105-06, 145, and 149 and accompanying text.

Furthermore, the Department of Defense guidelines briefly address rights of association. The guidelines indicate that mere servicemember association with known homosexuals is not, in itself, sufficient information to justify an investigation, or serve as the basis for discharge.[162] Nonetheless, as a practical matter, a servicemember's close and continual association with known homosexuals could certainly be a factor considered in deciding whether to initiate an investigation and, to that extent, might cast a chill on such association. Again, federal and military courts have determined that the military may properly restrict the associational rights of servicemembers upon a rational basis showing for such regulation.[163]

2. Equal protection issues: treating homosexual servicemembers differently

Perhaps one of the most difficult, overarching, legal issues Congress has faced, and the courts will face, is to what extent the military will be required to provide equal protection for homosexuals. The right to equal protection under the law means that similarly situated individuals will be treated similarly by the government.[164] The potential legal question before the courts is whether homosexuals should be treated as being similarly situated with all other servicemembers.[165] Most of the attention has focused on the denial of access to full-fledged protection in the armed forces. Ironically, as noted below, the DOD Policy arguably creates some procedural protections for servicemembers suspected of sexual misconduct which are not otherwise available to other servicemembers suspected of improper conduct.[166]

The principle of the equal protection component of the Fifth Amendment's Due Process Clause is that regulations which treat one class differently from another must be reasonable to be constitutionally sound.[167] If

---

162. *See, e.g.*, Department of Defense Directive 1332.30 (1994) (Separation of Regular Commissioned Officers), *in* Memorandum from Jamie S. Gorelick, *supra* note 11, which provides that credible information for an investigation does not exist if "[t]he only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct." *Id.* at 8-2.

163. *See, e.g.*, United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981) (prohibiting association between trainees and training staff).

164. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.2, at 570 (4th ed. 1991) [hereinafter NOWAK & ROTUNDA].

165. Similar attention has focused on equal protection challenges to regulations which treated female servicemembers differently. Frontiero v. Richardson, 411 U.S. 677 (1973) (treating female servicemember differently regarding dependency status). Currently, the military establishment continues to treat female servicemembers differently than male servicemembers, for example, in terms of living arrangements, certain assignments, and physical requirements.

166. For a discussion of the impact of this policy on investigatory decisionmaking, see *infra* notes 210-21 and accompanying text.

167. *See* NOWAK & ROTUNDA, *supra* note 164, § 14.1 (discussing application of equal

the class receiving less beneficial treatment is a suspect class,[168] or if the activity at issue implicates a fundamental right, courts will apply a *strict scrutiny* analysis, which means that the government must show a compelling need for the different treatment and that the means chosen are necessary.[169] Further, governmental actions that discriminate on the basis of gender are subject to an *intermediate*, or mid-level, scrutiny.[170] Otherwise, the test is usually a *rational basis* test which requires a legitimate governmental purpose and means chosen which are rationally related to that purpose.[171]

To date, the courts have generally declined to treat homosexuals as a suspect class, or even as a quasi-suspect class, which might entitle them to something more than a mere rational basis test.[172] Nonetheless, opponents of the ban have argued, and will no doubt continue to argue, that the ban is based upon the same types of prejudices which at one time precluded blacks from full integration into the armed forces.[173] Congress apparently rejected that linkage, however. In hearings before the Senate Armed Services Committee, General Colin Powell, an African-American, testified that:

> I am well aware of the attempts to draw parallels [to] the positions used years ago to deny opportunities to African-Americans . . . . I need no reminders concerning the history of African-Americans in the defense of their Nation and the tribulations they faced. I am a part of that history.
>
> Skin color is a benign, non-behavioral, characteristic. Sexual orientation is perhaps the most profound of human characteristics. Comparison of the two is a convenient but invalid argument. I believe the privacy rights of all Americans in uniform have to be considered, especially since those rights are often infringed upon by the conditions of military service.[174]

---

protection analysis to federal acts); *see also id.* § 14.2 (discussing the concept of equal protection).

168. The term "suspect class" is used by the courts to define a group of individuals who, by their nature, have been subject to discrimination in the past and, traditionally, have been politically powerless. Generally, courts have restricted the term to racial minorities, national origin, and alienage. *Id.* § 14.3, at 576.

169. *See id.* § 14.3, at 575-76 (describing strict scrutiny test).

170. *See* Craig v. Boren, 429 U.S. 190 (1976) (defining intermediate level scrutiny for gender discrimination cases).

171. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446 (1985). *See also* NOWAK & ROTUNDA, *supra* note 164, § 14.3, at 574-75 (description of rational relationship test).

172. Steffan v. Aspin, 8 F.3d 57, 62-63 (D.C. Cir. 1993), *vacated, and reh'g granted*, 8 F.3d 70 (D.C. Cir. 1994).

173. *See, e.g.*, Lynne Duke, *Drawing Parallels: Gays and Blacks Linking Military Ban to Integration Fight Stirs Outrage, Sympathy*, WASH. POST, Feb. 13, 1993, at A1.

174. S. REP. No. 112, 103d Cong., 1st Sess. 282 (1993). That report also makes clear that the Senate Armed Services Committee was aware of the existence of prejudice in society against gays and lesbians, but that "its position on the service of gays and lesbians is not based upon stereotypes, but upon the impact in the military setting of the conduct that is an integral element of homosexuality." *Id.* The Report also indicates the nexus between

Some commentators have suggested that, if Congress had permitted homosexuals to serve openly in the military, then Congress would have had to consider assigning them only to noncombat units,[175] lest the risk of HIV infection render them ineffective for such things as "battlefield blood transfusions." Still others have suggested assigning homosexuals to units where it is not likely that they will be placed in close, intimate contact with heterosexuals.[176]

Other commentators have suggested that the military should adopt a sort of "separate but equal" approach to admitting homosexuals into the armed services.[177] For example, homosexuals could be segregated into particular units, tasks, or locations. Even assuming that suggestion had merit, it would raise additional issues for resolution to the extent that the creation of "havens" would discriminate against homosexuals.[178] And it would place additional burdens on heterosexual servicemembers to fill assignments not open to homosexuals, which would be particularly problematic in the case of combat duty.[179]

Whatever the merit of these suggestions, the fact remains that any different treatment of homosexual servicemembers than heterosexual members would inevitably raise equal protection concerns.

---

sexual orientation and conduct. *Id.*

175. *See, e.g.*, RICHARD D. MOHR, GAYS/JUSTICE 196 (1988); Gisela Caldwell, Note, *The Seventh Circuit in Ben-Shalom v. Marsh: Equating Speech with Conduct*, 24 LOY. L.A. L. REV. n.216 (1991) (stating that Israel allows homosexuals to serve in noncombat positions).

176. *See* Eric Schmitt, *The Gay Troop Issue*, N.Y. TIMES, Jan. 31, 1993, § 1, at 1.

177. The idea of separating homosexuals from other servicemembers was discussed during the Senate debates, drawing an analogy to women in the military:

> But I think it would be irrational to develop military personnel policies on the basis that all gays and all lesbians will remain celibate or that they will not be attracted to others. Because when dealing with issues involving different genders, we have to assume that in most instances declaration of status, of sexual orientation, is going to result in conduct or at least sexual attraction. And when that happens, according to thousands of pages of testimony from hundreds if not thousands of individuals, that tends to seriously undermine and break down unit cohesion and unit morale.
>
> The courts have consistently held that there is a rational basis for coming to this conclusion. That is the reason why we separate men and women. If we simply operated on a conduct status in the military, then there is no justification to separate men and women. There is no justification for having separate barracks. Women could charge that under equal protection of the law they deserved to not be segregated into separate barracks. No one would advocate having men and women live together on a 24-hour-a-day basis in the same living conditions without the issue of sexual attraction playing a very major role in the morale, in the discipline, in the good order and unit cohesion of the unit.

139 CONG. REC. S11157-04, S11190 (daily ed. Sept. 9, 1993) (statement of Sen. Coats); *cf.* Robert D. Stone, Comment, *The American Military: We're Looking for a Few Good [Straight] Men*, 29 GONZ. L. REV. 133, 161-62 (1993).

178. *See, e.g.*, Peter S. Pritchard, *Justice Demands End to Ban on Gays in the Military*, U.S.A. TODAY, March 31, 1993, at 10A.

179. *See* S. REP. No. 112, 103d Cong., 1st Sess. 274-76 (1993) (discussing combat capability).

3. The inevitable clash of competing privacy interests

Much of the public's attention has been focused on the privacy rights of homosexuals: the right to choose and practice a particular lifestyle. But it is also necessary to analyze the potential impact on the privacy interests of heterosexual servicemembers.[180]

Although the recent change in policy accommodates the desires of homosexuals to serve in the military, heterosexuals who believe that their privacy interests will be jeopardized might raise legal challenges. The right to privacy includes an autonomy feature—the right to make personal choices in life.[181] It also includes a personal security feature which focuses on the right to be left alone.[182] In the arena of human sexuality, these two rights take on greater importance. To admit homosexuals into the military arguably advances their privacy interest. At the same time, however, it raises concerns about the ability of heterosexual servicemembers to be free from unwanted sexual advances or attention coming from homosexuals.

Congress had, and the courts now have, a good model from which to consider this issue: service of women in the military. In order to accommodate what might be viewed as competing privacy interests, servicemembers are segregated by gender in most living conditions. Similarly, it can be argued that the legal issue of protecting competing privacy interests among homosexual and heterosexual servicemembers will require the same approach.[183]

This issue is of critical importance. Unlike most civilian jobs, at the end of the work day, servicemembers typically do not leave the installation and return to civilian life. The servicemember's home is often a small two-person tent, a cramped berth in a submarine, or an open-bay barracks where a large number of individuals share, not only a common sleeping area, but common shower and restroom facilities. In such conditions, what little physical privacy exists is highly treasured.[184]

C. *Military Administrative Law Issues: What Might Have Been*

Since the new policy prohibits only homosexual conduct, it is possible that servicemembers with a known homosexual orientation will be permitted to serve, assuming that they refrain from such conduct. However, the policy is silent on the possible implications on administrative law issues, because if a servicemember admits to being a homosexual, or commits homosexual acts, he or she is not qualified for military service.

In reviewing the constitutionality of the current policy, courts should

---

180. *Id.* at 277-78 (discussing privacy in the military).

181. NOWAK & ROTUNDA, *supra* note 164, § 14.26, at 157-58.

182. *Id.*

183. *See, e.g.*, Judith Hicks Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685, 692-93 (1992).

184. *See* S. REP. No. 112, 103d Cong., 1st Sess. 279 (1993) (citing testimony from General Colin Powell concerning military "way of life.")

realize that, had Congress decided to permit homosexuals to serve openly in the military, several important issues would have arisen. Those issues fall into the category of military administrative law. As noted above, that branch of military law is concerned with, among other things, personnel policies and regulations.[185] Inevitably, there will be arguments that Congress did not go far enough with its current policy, raising several potential issues. Many of these issues will be briefly addressed.

1. Assignments, promotions, and retention

As a normal incident of making personnel assignments, a servicemember's qualifications, work performance, and prior assignments may be routinely relied upon by those responsible for allocating military resources.[186] Although a servicemember's interests or preferences for a particular assignment may be considered, it is also well known that they are really secondary to the needs of the service.[187] Sometimes the formula for assignments may be skewed slightly because of other factors; for example, married servicemembers are normally not assigned to the same unit. If Congress had permitted homosexuals to serve openly, personnel policies on assignments might have been skewed because of a person's known sexual preference. From a legal standpoint, if a servicemember believed that he or she was receiving less favorable assignments because of known sexual preference,[188] it is likely that either administrative or judicial challenges would be made to the administrator's decision.

Similarly, promotion and retention decisions would be challenged. These decisions are typically made by boards of high ranking officers or enlisted personnel. Each board receives instructions on the relevant criteria to be applied. For example, if Congress had allowed homosexuals to serve openly, the question would have arisen whether a board could have been advised that it could not give any consideration to a person's sexual preference, status, or orientation. If so, how would those terms be defined? On the other hand, could a board be advised to consider, in order to create diversity, that sexual preference is a positive factor in deciding whether to promote or retain an individual?

2. Military benefits

Married servicemembers, and members with dependents, receive a number of benefits not otherwise available for single members. Perhaps

185. For a discussion of military administrative law as it relates to the composition and qualifications of servicemembers, see *supra* notes 54-57 and accompanying text.

186. *See* Army Regulation 614-100, ch.1, 1-6 (1990) (discussing officer personnel assignment system).

187. *Id.* "The primary factors influencing an officer's assignment are Army requirements and the Officer Distribution Plan (ODP). Development of the ODP is based on numerous factors including documented and resourced authorizations, DA [Department of the Army] priorities, professional development needs and disposition of the force." *Id.* at 1-6a.

188. For a discussion of issues relating to the application of Bill of Rights provisions to servicemembers, see *supra* notes 96-145 and accompanying text.

the most common examples are housing allowances, medical benefits, and commissary privileges. However, under the current statute, prohibited homosexual conduct includes when a "member has married or attempted to marry a person known to be of the same biological sex."[189] Thus, a homosexual servicemember is clearly not entitled to any military benefits hinged on a "marriage." The question remains, however, whether military benefits not contingent on marriage might be available for partners of homosexual servicemembers. For example, could a homosexual servicemember be entitled to military benefits, such as commissary privileges, for another homosexual "dependent?"

D. Military Criminal Law Issues

1. Prohibiting conduct, not status: defining conduct

In addition to the administrative law issues discussed above, there are also a number of criminal law issues which must be addressed. Congress and the Department of Defense have taken the position that homosexual status and conduct are distinguishable and that only the latter is prohibited.[190] With this policy in mind, the following discussion reviews the current state of military criminal law regarding prosecution of homosexual conduct.

Defining prohibited "conduct" presents drafting problems. Assuming that homosexual conduct is prohibited, could the military be permitted to proscribe *any* physical contact between servicemembers? The statute indicates that "homosexual act" includes "(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)."[191]

At this point, public behavior such as kissing, embracing, and dancing between heterosexual servicemembers is not prohibited except in narrowly defined circumstances.[192] Should equal protection concerns prohibit this conduct from all servicemembers? As the cases illustrate, whenever a commander regulates the personal conduct of servicemembers, he or she must be prepared to show that the regulation is tailored to meet a particular military mission or military duty.[193] In a regulatory scheme that flatly prohibits public displays of affection, even well intentioned attempts to regulate such conduct might be considered overbroad and unlawful.[194] Moreover, assuming that public displays of affection could be

---

189. 10 U.S.C.A. § 654(b)(3) (West Supp. 1994).

190. *Id.* § 654.

191. *Id.* § 654(f)(3).

192. *See, e.g.*, MANUAL, *supra* note 42, para. 90, at IV-131 (indecent acts with another).

193. *See, e.g.*, United States v. Green, 22 M.J. 711, 715 (A.C.M.R. 1986). "[A] commander may lawfully regulate all activities which are reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and are directly connected with the maintenance of good order in the service." *Id.* at 714.

194. For example, a regulation punishing servicemembers for having alcohol in their

evenly and lawfully regulated, from a practical standpoint, these regulations would be difficult to enforce.

Unanswered questions remain as to whether the armed forces could lawfully and effectively regulate conduct occurring off-post and after duty hours. To what extent should the military be able to control the private conduct of any servicemember? Should different rules be established for investigating homosexual servicemembers in order to avoid heterosexual members from being offended?

2. Prohibiting sexual conduct: the future of Article 125

The reported cases indicate that it is rare that a servicemember is prosecuted solely for consensual homosexual acts.[195] Instead, it is more likely that the servicemember will be administratively discharged.[196] If there is evidence of other criminal conduct, such as drug use or assault, the homosexual acts may be charged along with the other acts.[197]

The Uniform Code of Military Justice includes several provisions which might be relied upon to prosecute sexual misconduct. For example, Article 120 proscribes rape and carnal knowledge[198] and Article 93, proscribing cruelty and maltreatment, may be relied upon to prosecute those who sexually harass other servicemembers.[199] Additionally, Articles 133[200] and 134,[201] sometimes referred to as the "general articles,"[202] may be relied upon to prosecute offenses not otherwise specifically listed in the punitive articles. For example, those articles are relied upon to prosecute indecent acts and adultery.[203]

One provision that will undoubtedly continue to draw attention is

---

system and on their breath during duty hours was considered void as being arbitrary, unreasonable, and standardless. United States v. Green, 22 M.J. 711 (A.C.M.R. 1986).

195. *See generally* COLIN J. WILLIAMS, HOMOSEXUALS AND THE MILITARY 33, 38-53 (1971).

196. *Id.*

197. Jefrey S. Davis, *Military Policy Towards Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 74 (1991).

198. Uniform Code of Military Justice, 10 U.S.C. § 920 (1988).

199. *Id.* § 893.

200. Article 133 provides: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." *Id.* § 933.

201. Article 134 provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Id. § 934.

202. Richard J. Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1, 27 (1993); Kenneth L. Kurst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 556 (1991).

203. *See generally* MILITARY CRIMINAL JUSTICE, *supra* note 41, §§ 2-5, -6.

Article 125, which proscribes sodomy.[204] On its face, Article 125 is not limited to homosexual acts.[205] In fact, the Court of Military Appeals has held that Article 125 is constitutional as applied to consensual heterosexual acts.[206] However, Congress could amend Article 125 to accommodate homosexuals in the armed forces.[207] Indeed, forceful arguments will be made that it is an archaic law which does not reflect recent social and legal trends.

On the other hand, proponents of the Article 125 proscription against sodomy would probably offer at least two justifications of the statute as currently enacted. First, given current medical data indicating that homosexual acts present a high risk of transmitting the HIV virus,[208] it would be reasonable for the military to prohibit that conduct in order to reduce the risk of transmission and to maintain the health and fitness of its servicemembers. Second, for many Americans, the prohibition against homosexual acts reflects a moral judgment that such conduct should not be condoned.[209] Apparently, by leaving Article 125 intact, Congress recognizes that viewpoint.

3. The need to maintain prosecutorial discretion: limiting the decision to investigate

Notwithstanding any future changes in, or challenges to, substantive military criminal law, it is important that commanders retain prosecutorial discretion, since they are in the best position to understand

---

204. Uniform Code of Military Justice, 10 U.S.C. § 925 (1988).

205. Article 125 provides:

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

Id.

The maximum punishment for nonconsensual sodomy and for sodomy with a person under the age of 16 years is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years. MANUAL, *supra* note 42, at IV-90. In other cases the maximum punishment is dishonorable discharge, forfeiture of all pay and allowances and five years confinement. MANUAL, *supra* note 42, at IV-91.

206. United States v. Henderson, 34 M.J. 174 (C.M.A. 1992) (applying Article 125 to consensual, heterosexual fellatio with ROTC cadet); United States v. Fagg, 34 M.J. 179 (C.M.A. 1992) (applying Article 125 to consensual, private sodomy with civilian junior high school student).

207. Defining the substantive military law is a matter peculiarly within the prerogative of Congress. U.S. CONST. art. I, § 8, cl. 14.

208. Warren Winkelstein Jr. et al., *Sexual Practices and Risk of Infection by Human Immunodeficiency Virus: The San Francisco Men's Health Study*, 237 JAMA 321 (1987); JEFFREY A. KELLY & JANET S. ST. LAWRENCE, THE AIDS HEALTH CRISIS: PSYCHOLOGICAL AND SOCIAL INTERVENTIONS 21-22 (1988).

209. Bowers v. Hardwick, 478 U.S. 186, 192-97 (1986) (discussing that majoritarian sentiments that homosexuality is immoral provides states with adequate constitutional basis to criminalize sodomy).

the impact of a particular criminal offense on the unit.[210] Courts have typically recognized the broad authority of the commander to investigate and decide what charges should be preferred against a servicemember.[211] Those decisions are not above review, however, and some well-defined guidelines for bringing charges against a servicemember have developed over the years.[212] Although there may be concern that admitting homosexuals into the military will result in higher incidences of prosecution, or "witch hunts," the solution to this conflict need not focus on abrogating punitive articles in the Uniform Code of Military Justice. Instead, attention should be directed towards the common sense decisionmaking of those responsible for maintaining discipline in the military establishment.

A key element in the Department of Defense's new policy is that it limits investigations of suspected sexual misconduct in a way not found in other investigations. The Department of Defense guidelines indicate that: (1) neither investigations nor inquiries will be conducted solely to determine a servicemember's sexual orientation; (2) commanders may initiate an investigation where there is "credible information" of sexual misconduct; and (3) generally only commanders, not investigators, may determine whether sufficient credible information exists to justify the dedication of investigative resources.[213] According to the Department of Defense policy, "credible information" is "[i]nformation, considered in light of its source and all attendant circumstances, that supports a reasonable belief that a Service member has engaged in sexual misconduct. Credible information consists of articulable facts, not just a belief or suspicion."[214]

In the aggregate, this policy creates a special category of procedural protections for servicemembers suspected of sexual misconduct which are not applicable to other persons or conduct. It does so in several key respects. First, it generally limits those who may initiate the investigation. Second, through the "reasonable belief" component of "credible information," it imposes what appears to be a "probable cause" requirement before an investigation may be commenced.[215] In all other cases, a reasonable suspicion, tip, and even an investigator's instincts will justify an in-

---

210. *See* S. REP. No. 112, 103d Cong., 1st Sess. 292 (1993) (Senate Armed Services Committee received assurances from Department of Defense that the policy's guidelines for investigations would be "implemented in a manner that would provide commanders with the discretion they need to maintain good order and discipline.").

211. *See* MILITARY CRIMINAL JUSTICE, *supra* note 41, § 6-1, at 237 n.15.

212. *See id.* § 6-1 (discussing process for preferring charges).

213. *See* Department of Defense Instruction 5505.8 (1994), *in* Memorandum from Les Aspin, *supra* note 9 (Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and other DOD Law Enforcement Organizations).

214. *Id.* at 1-1. *See also id.* at para. A (allegations of sexual misconduct normally should be referred to commander; investigative organizations may initiate investigation if credible information exists that an offense has been committed and it is determined that expenditure of resources is appropriate).

215. *Cf.* S. REP. No. 112, 103d Cong., 1st Sess. 291 (noting that General Counsel for Department of Defense had informed Committee that references to "credible information" and "reasonable belief" did not "involve a legal standard, such as probable cause.").

vestigation.[216] Further, reasonable suspicion and probable cause are requirements normally encountered in determining whether governmental intrusions satisfy Fourth Amendment requirements.[217] Rarely are they applied in determining whether a military investigation should be commenced.

In theory, the Department of Defense approach reflects an even-handed approach to allegations of sexual misconduct, without regard to the sexual orientation of the accused servicemember. Apparently, in formulating the investigation guidelines, the Department of Defense did not intend to create any substantive or procedural rights for the accused.[218] Nonetheless, to the extent that the application of these rules offers heightened protections for homosexuals, heterosexual servicemembers can argue that they are entitled to the same protections.[219] That is, a criminal investigation into allegations of nonsexual misconduct may not be initiated by anyone other than a commander, and only if there was reasonable belief to conclude that a crime had been committed.

One additional concern should be noted. The question arises whether any commander in the chain of command, including the President, could direct that homosexual conduct *not* be prosecuted, for example, under Article 125. The military cases on the issue of command influence might be helpful on this point. While a commander may withdraw court-martial jurisdiction over a particular category of offenses, senior commanders are not permitted to instruct junior commanders how to proceed on a particular case.[220] If senior commanders instruct junior commanders to prefer court-martial charges, they become the "accusers" and under the U.C.M.J. are thereafter disqualified from acting on the case.[221]

---

216. *See* MILITARY CRIMINAL JUSTICE, *supra* note 41, § 5-2, et. seq. (discussing commander's investigation).

217. *See* U.S. CONST. amend. IV (probable cause requirement for searches and seizures conducted with warrant). *See also* Terry v. Ohio, 392 U.S. 1 (1968) (applying reasonable suspicion standard to warrantless stop and frisk cases under Fourth Amendment).

218. S. REP. No. 112, 103d Cong., 1st Sess. 291 (1993) (quoting testimony of General Counsel for Department of Defense that application of investigation guidelines was "not intended to create any substantive or procedural rights to encumber the necessary flexibility that the military must have in approaching the management of such a large group of personnel.").

219. It appears that the Department of Defense may have avoided equal protection complaints from heterosexual servicemembers by dictating an across-the-board limitation on sexual misconduct. In effect, heterosexual servicemembers benefitted from concerns about witch hunts being conducted if homosexuals were openly admitted into the military.

220. *See e.g.*, United States v. Shelton, 26 M.J. 787, 792 (A.F.C.M.R. 1988) (general officer directing subordinate to prefer court-martial charges against the accused was the "accuser" and thus barred from referring the case to trial); United States v. Corcoran, 17 M.J. 137, 138 (C.M.A. 1984) (senior commander became "accuser" when instructed junior officer to "write up" defendant, thereby precluding the senior commander from acting as convening authority in the case and proceeding to trial).

221. *See* Uniform Code of Military Justice, 10 U.S.C. § 822(b) (1988). If a commanding officer is the accuser, a court-martial "shall" be convened by a superior competent authority. *Id.*

4. Jurisdiction issues: regulating off-post conduct

An issue related to regulating homosexual conduct and prosecutorial discretion is whether, and to what extent, the military should be able to prosecute servicemembers for conduct occurring off-post. For example, should the military be able to prosecute a homosexual servicemember for committing private, consensual sodomy in an off-post location?

The new statute clearly states that the standards of conduct for servicemembers applies twenty-four hours each day,[222] whether the member is on base or off base, and whether the member is on duty or off duty.[223] It is likely that this policy will not settle the debate, especially if those who oppose any restrictions on homosexual service argue that the military should allow servicemembers greater zones of privacy.[224]

In addressing the issue of prosecution of off-duty or off-base conduct, it is important to note that, from 1969 until 1987, only those offenses which were service-connected could be prosecuted in military courts. The genesis for the rule rested in the Supreme Court's opinion in *O'Callahan v. Parker*.[225] Throughout these years there evolved an elaborate, sometimes confusing, formula for determining whether an offense was service-connected.[226] Finally, in 1987, the Supreme Court concluded in *Solorio v. United States*[227] that court-martial jurisdiction depends entirely on the status of the defendant as a member of the armed forces. The Court noted that the Constitution grants Congress plenary authority to determine the extent of military jurisdiction.[228]

The reported military cases since 1987 do not reflect a significant increase in the number of off-post cases tried in military courts. In most instances the military installations have reached formal or informal agreements with local prosecutors as to who will assume jurisdiction over a particular case.[229]

Undoubtedly, some will argue that removing the ban against homosexuals serving in the armed forces would be a hollow step unless they are assured that what they do in their private lives, off-post, is beyond government control. Those same arguments were made and rejected in a variety of other off-post conduct cases, as well as in the announced policy in the new statute.[230] While it is true that what takes place off-post may not *appear* on its face to be of any concern to the military, nevertheless service in the armed forces is an around-the-clock proposition. What ser-

---

222. 10 U.S.C.A. § 654(a)(9) (West Supp. 1994).

223. *Id.* § 654(a)(10).

224. *See generally* Davis, *supra* note 197, at 87.

225. 395 U.S. 258, 272 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

226. *See* MILITARY CRIMINAL JUSTICE, *supra* note 41, § 4-11.

227. 483 U.S. 435, 451 (1987).

228. *Id.* at 446.

229. *See* MILITARY CRIMINAL JUSTICE, *supra* note 41, §§ 4-11 to -12. The Double Jeopardy clause does not apply to different sovereigns; in theory a servicemember could be charged in both a military and civilian court for the same offense although that is rare.

230. 10 U.S.C.A. § 624(a)(9)-(10) (West Supp. 1994).

vicemembers do in their free time, off-post, is still subject to the legitimate needs and the interests of the military.[231] For example, the military has an obvious interest to insure that its members do not use drugs, either on-post or off-post. At a minimum, what a servicemember does off-post may be a reflection, positive or negative, on the military itself.

As noted in the earlier discussion, Congress could provide additional accommodation to homosexuals by codifying some version of the earlier "service-connection" requirement adopted in *O'Callahan*.[232] Such a requirement would mean that court-martial jurisdiction would exist for conduct occurring in specifically defined circumstances. Examples include limiting court-martial jurisdiction to conduct while in uniform, between servicemembers while in duty status, or while on a military installation.

As past experience has demonstrated, service-connection requirements raise perhaps more questions than solutions.[233] While a service-connection requirement might provide some protection for homosexual activity occurring off-post, there are major concerns about defining appropriate limits for any rule which creates immunity from military prosecution. For example, would the service-connection requirement be extended only to off-post homosexual acts? Or would it extend to a wider range of personal contact between homosexuals which do not amount to sexual acts? In view of potential equal protection issues, would these limits apply to all private, consensual, off-post sexual conduct of servicemembers? If a service-connection were to be adopted, what steps could be taken to avoid the tangled legal questions which the courts struggled with when the requirement was dictated by judicial opinions?[234] Although this discussion will not attempt to answer these important questions, in addressing these concerns policymakers should remain cognizant of the Supreme Court's conclusions in *Solorio*.[235]

5. *Lessons learned from fraternization cases*

In the past few years the military has dealt with many fraternization offenses which may assist the courts in measuring the constitutionality of Congress' actions. The offense of fraternization is historically based on the assumption that undue familiarity between officers and enlisted personnel is potentially fatal to discipline in the unit.[236] Thus, over the years,

---

231. *See, e.g.*, Refre v. United States, 11 Cl. Ct. 81, 84-85 (1986), *aff'd by* 883 F.2d 1022 (1987), *cert. denied*, 486 U.S. 1011 (1988) (refusing to hear complaint about order preventing off-duty work); United States v. Reitz, 12 M.J. 784, 785-86 (1982) (holding the sergeant can be convicted of negligent homicide for off-duty conduct because of special needs of military).

232. For a discussion of *O'Callahan*, see *supra* notes 225-26 and accompanying text.

233. For a discussion of the service-connection requirement from 1969 to 1987, see *supra* notes 225-28 and accompanying text.

234. For a discussion of the service-connection requirement from 1969 to 1987, see *supra* notes 225-28 and accompanying text.

235. Solorio v. United States, 483 U.S. 435 (1987).

236. *See generally* MILITARY CRIMINAL JUSTICE, *supra* note 41, § 2-8 (offense of fraternization).

military regulations have proscribed such conduct. Typically, the offense is charged under one of the general articles.[237]

With the assimilation of women into the military, the incidences of improper fraternization have increased.[238] Formerly, the offense of fraternization would arise when officers gambled with enlisted personnel, or entered into loan agreements with them.[239] Presently, the offense often arises from intimate sexual relationships between officers and enlisted personnel, between officers of different ranks, and enlisted personnel of different ranks.[240]

While the underlying sexual acts may not normally be prosecuted, the offense of fraternization is still relied upon where the two servicemembers are different in rank, especially where one is in a position of authority over the other.[241] Defining and prosecuting the offense are now delicate tasks given the view that private, consensual, sexual relationships implicate liberty interests.[242] Those who criticize the military justice system may be quick to condemn the military for prosecuting what can be viewed as purely private conduct between two individuals who have a strong attraction for one another.[243] Although a number of constitutional challenges have been made to fraternization prosecutions, to date the courts have rejected arguments that such prosecutions violate free speech, equal protection, and privacy rights.[244]

The rules governing fraternization will certainly arise where there is assimilation of homosexuals into the same environment, if one servicemember is sexually attracted to another servicemember. Unlike the civilian workplace where individuals work together for a limited portion of the day, servicemembers' relationships are not necessarily limited to work-related environments. That is, they do not simply work together. They work, sleep, eat, and socialize with each other.

The issue of appropriate levels of socialization implicates additional legal inquiries. For instance, to what extent could the military regulate social activities such as touching, dancing, and embracing? Assuming the military accommodates such behavior between heterosexual servicemembers, could it legitimately prohibit such conduct by homosexuals without violating equal protection challenges? It is important to note that

---

237. The general articles are Article 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 933-34 (1988). For a discussion of the general articles, see *supra* notes 200-03 and accompanying text.

238. Kevin W. Carter, *Fraternization*, 113 MIL. L. REV. 61, 81 (1986).

239. *Id.* at 77. The author noted that "[c]harged officer misconduct with enlisted personnel unrelated to alcohol included gambling; borrowing money; [and] engaging in homosexual or heterosexual activities." *Id.* at 78-79 (citations omitted).

240. *Id.* at 81.

241. MILITARY CRIMINAL JUSTICE, *supra* note 41, § 2-8(A).

242. For a discussion of these liberty interests, see *supra* notes 137-44 and accompanying text.

243. For a discussion of fraternization issues in terms of private conduct, see David S. Jonas, *Fraternization: Time for a Rational Department of Defense Standard*, 135 MIL. L. REV. 37, 37-38 (1992).

244. *See* MILITARY CRIMINAL JUSTICE, *supra* note 41, § 2-8(D).

the legal implications of regulating intimate associations not only between heterosexual, but also homosexual, servicemembers were issues Congress faced in deciding whether to admit homosexuals into the military.[245]

6. Punishing those who discriminate or harass

While most of the debate has focused on placing limits on homosexual members' sexual activities, there are other military criminal law implications. For example, military criminal law must sanction those who harass homosexuals or refuse to treat them fairly. Department of Defense Policy indicates that hostile treatment or violence against a servicemember, for any reason, will not be tolerated.[246] Article 93 of the Uniform Code of Military Justice currently prohibits those who are in a position of command from mistreating and harassing their subordinates.[247] Prosecuting a servicemember, not in a position of authority, for harassing a homosexual would not be possible under Article 93 as it is currently written.

Perhaps a special code of conduct should be drafted which would apply to both homosexuals and heterosexuals for sexual behavior in the armed forces. If that approach has merit, it would only be effective if it were enforceable through either administrative or criminal sanctions. And as noted above, to the extent it controlled servicemembers' speech, it might raise First Amendment issues.[248]

CONCLUSIONS

The issue of homosexuals in the armed forces presented Congress with a significant challenge to the exercise of its constitutionally-based powers to regulate the military. Congress had to draw lines and make distinctions among a wide range of options. At one end, Congress could have maintained a strict ban against homosexuals serving in the armed forces. In the other extreme, Congress could have treated homosexuals as a protected class, with all of the rights, benefits, and responsibilities available to heterosexual servicemembers. Between these two positions, rested a variety of other options, including a policy of limited accommodation — a compromise which does not discriminate on the basis of a person's status as a homosexual.

In addressing the issue of whether Congress had a rational basis for its decision to adopt a policy of limited accommodation, the following points should be considered:

---

245. Carter, *supra* note 238, at 74-81 (discussing that both homosexual and heterosexual associations between servicemembers occurred during the period before deliberations about admitting homosexuals into the military).

246. For a discussion of DOD policy against harassment, see *supra* note 159 and accompanying text.

247. Uniform Code of Military Justice, 10 U.S.C. § 893 (1988).

248. For a discussion of these First Amendment issues, see *supra* notes 105-06, 150-63 and accompanying text.

(1) The military establishment is a unique organization, constituted and regulated by Congress. The authority of Congress to determine who will serve in the armed forces rests in the Constitution.

(2) The purpose of the military establishment is to protect national security. Any other purpose, or use, is secondary.

(3) "Discipline" is an indispensable ingredient in the military establishment and activities or issues which divert the commander's or servicemembers' attention threaten the unit's ability to fulfill its primary purpose. The persons best able to assess the risks to discipline are the individuals who must deal with that issue on a daily basis.

(4) Constitutional protections are available to servicemembers, but in some cases apply in a different or limited fashion. The system of military law is designed to insure that standards are imposed and, where necessary, enforced through punitive measures. Throughout the system, however, there are also protections designed to insure fair treatment.

(5) In deciding which course to take in addressing the issue of homosexuals in the armed forces, Congress was faced with potential constitutional, military administrative law, and military criminal law issues.

(6) Many of the statutes, rules, and regulations governing the military demonstrate a sensitive balance between individual rights and liberties and governmental interests. The issue of homosexuals serving in the armed forces presented an opportunity for Congress to decide how to strike that delicate balance.

(7) Even the middle ground chosen by Congress creates additional issues of constitutional and military law which must be addressed.

(8) Legal commentators and courts have recognized that, in many instances, the law is based on deeply rooted and firmly held moral values.[249] While there may be debate about whether particular sexual acts are moral or immoral,[250] the issue of homosexuality, apart from the myriad legal issues, implicates potential moral challenges and dilemmas to those holding such values.[251] Thus, a key question before Congress was whether

---

249. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (condemnation of homosexual acts firmly rooted in Judeo-Christian moral and ethical standards). *See also* McCleskey v. Kemp, 481 U.S. 279, 342-43 (1987), in which Justice Brennan, dissenting, quoted a passage from ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH:

> It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law.

ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 24 (1962)

250. *Bowers* 478 U.S. at 212 (Blackmun, J., dissenting).

251. *Cf.* S. REP. No. 112, 103d Cong., 1st Sess. 305 (1993). Senator Kennedy criticized the author for noting moral and religious foundations for laws without citing Palmore v. Sidoti, 466 U.S. 429 (1984), or City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), which in his view "provide direct guidance on what the government is expected to do when faced with significant rejection of a particular class of people by the public, including situations in which that rejection is based on moral and religious beliefs." *Id.* What the Senator failed to note is that neither of those cases dealt with the public's views on homo-

the military, as a paradigm of a "law and order" society, should be required to accommodate a status or behavior which many servicemembers, civilians, and potential servicemen would find unacceptable on moral or religious grounds.[252] This is particularly important in light of the military environment and the competing privacy interests that affect members of the armed forces.

The route chosen by Congress, a policy of limited accommodation, is clearly defensible. The statute represents a carefully considered and articulated solution to a compelling issue and highly charged arguments. The extensive Senate Report accompanying the initial Senate version of the statute is an excellent legislative history of the issues Congress confronted and amply demonstrates that Congress had a rational basis for its decision. While the "legal Rubik's cube"—the issue of homosexuals in the military—is not yet fully solved, Congress' careful consideration and action has provided a sound basis for concluding that it properly exercised its Constitutional powers.

APPENDIX

SUBTITLE G — OTHER MATTERS

SEC. 571. POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES.

(a) CODIFICATION.—(1) Chapter 37 of title 10, United States Code, is amended by adding at the end of the following new section:

"§ 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.

"(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

"(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

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

---

sexual acts. Perhaps more significantly, it does not appear that 10 U.S.C.A. § 654 (West Supp. 1994) is intended to further any particular moral or religious belief; instead, it is based on the sound view that people who manifest an intent or propensity to engage in homosexual acts present a risk to the military mission.

252. *See, e.g.*, John P. Elwood, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747, 765 (1992) (homosexuality is strongly condemned and penalized in our society).

cohesion.

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

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

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

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

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

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

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

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

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

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

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

"(b) POLICY.—A member of the armed forces shall be separated

from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

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

"(A) such conduct is a departure from the member's usual and customary behavior;

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

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

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

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

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

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

"(c) ENTRY STANDARDS AND DOCUMENTS—(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

"(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

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

"(e) RULE OF CONSTRUCTION.—Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—

"(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

"(2) separation of the member would not be in the best inter-

est of the armed forces.

"(f) DEFINITIONS.—In this section:

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

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

"(3) The term 'homosexual act' means—

"(A) any bodily contact, actively undertaken or passively permitted, 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)."

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following:

"654. POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES".

(b) REGULATIONS.—Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a).

(c) SAVINGS PROVISION.—Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654.

(d) SENSE OF CONGRESS.—It is the sense of Congress that—

(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 20, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice).