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"If the Right of Privacy Means Anything": Exclusion from the United States Military on the Basis of Sexual Orientation

Phyllis E. Mann

When I was in the military they gave me a medal for killing two men, and a discharge for loving one.¹

I. Introduction

Throughout the history of the United States military, homosexuals² have been excluded from service.³ Prior to 1982, each branch of the military adopted and enforced its own regulations for exclusion and discharge of homosexuals.⁴ In 1982, all branches of the service adopted

¹ Epitaph on the tombstone of Leonard Matlovich in the Congressional Cemetery in Washington, D.C. (quoted in Mary Ann Humphrey, My Country, My Right to Serve 154 (1990)).

² Throughout this Comment, the terms homosexual and heterosexual are used solely for purposes of clarity. This should in no way be taken to endorse the belief that individuals fit neatly into one of these two categories. Scientific studies of sexual orientation from 1948 to the present suggest that sexual orientation is best explained as a continuum ranging from an exclusive heterosexual identity to an exclusive homosexual identity with variations of degree in activity. See, e.g., A. Kinsey et al., Sexual Behavior in the Human Male (1948) [hereinafter Kinsey Study]; The Wolfenden Report, Report of the Committee on Homosexual Affairs and Prostitution (1963); A.P. MacDonald, Bisexuality: Some Comments on Research and Theory, 6 J. Homosexuality 21 (1982); Theodore R. Sarbin & Kenneth E. Karols, Nonconforming Sexual Orientations and Military Suitability C-5 (Dec. 1988) (unpublished draft report PERS-TR-89-002 of the Defense Personnel Security Research and Education Center [hereinafter PERSEREC Report]), quoted in full in Gays in Uniform; The Pentagon's Secret Reports 3-97 (Kate Dyer ed., 1990) [hereinafter Gays in Uniform]. The Kinsey Study, considered to be the most authoritative, found that forty-six percent of all white men had had some homosexual experience during their adult life and could thus be considered bisexual. Kinsey Study, supra at 656; PERSEREC Report, supra at D-1 to D-2. Additionally, current definitions of nontraditional sexuality include transsexuals, who could be classified as homosexual during one segment of their lives and heterosexual during the remainder, and transvestites, who could be classified as either heterosexual, bisexual, or homosexual depending on their sexual activity. U.S. Defense Department policy makes none of these distinctions. See Department of Defense Directive 1332.14, 32 C.F.R. pt. 41, app. A, pt. I.H.1.a. (1991) [hereinafter DOD Directive 1332.14]. Rather, at least for investigative purposes, the Defense Department considers even a single desire for sexual gratification with the same sex to qualify one as homosexual. Id.

³ Gays in Uniform, supra note 1, at xiii.

⁴ The Army regulation provided for the separation of individuals evidencing homosexual "tendencies, desires, or interests", but retention was discretionary. Army Reg. 635-200, Personnel Separations, Enlisted Personnel, paras. 13-14 (Jul. 15, 1966) (C39, Nov. 23, 1972). The Navy regulation provided for discharge of homosexuals with no explicit exception. Secre-
Department of Defense Directive 1332.14. This directive requires disclosure of sexual orientation prior to induction into the service. Homosexuals are excluded if they commit any act of sodomy. They are excluded, based on their status as homosexuals, even if they have not committed "homosexual acts."

Both prior to and since the adoption of the 1982 policy, the exclusion of homosexuals has been challenged as unconstitutional. Courts have consistently found, however, that the policy of exclusion is permissible because: (1) there is no constitutional right to commit homosexual sodomy; (2) the military regulations excluding homosexuals are rationally related to a legitimate governmental interest; and (3) the courts must defer to the military and allow it to determine its own policies and regulations. (2) whether the right of privacy protects an individual from discrimination based on status as a homosexual; and (3) whether the right of privacy protects an individual from discrimination based on private consensual sexual behavior between adults.

This comment first discusses the development of the right of privacy in sexual activity under the Constitution. It then presents the basis for adoption of the 1982 military policy toward homosexuals and a discussion of judicial decisions regarding exclusion of homosexuals on the basis of disclosure, status, and conduct. Finally, it suggests that the failure of courts to distinguish between status as a homosexual and the conduct of criminal sodomy has resulted in the application of an erroneous constitutional standard. In conclusion, this Comment asserts that the right of privacy should protect homosexuals against exclusion from the military on the basis of status and
from the requirement of disclosure, and further that there is no contemporary factual basis for excluding homosexuals from the military.

II. THE RIGHT OF PRIVACY

A. Historical Origins

The phrase "right of privacy" or "the right to be let alone" is said to have originated from a law review article written by Samuel Warren and Louis Brandeis in 1890. Adopting the idea promoted in that article, some state courts began to protect privacy as a common law right. The Supreme Court from 1890 until 1965 spoke of privacy only as a necessary element in affording other rights enumerated by the Constitution. Until 1965 the Court did not acknowledge privacy as a constitutionally protected right.

14. The concept of privacy is a broad philosophical area that this Comment does not attempt to define or address. The right of privacy in American jurisprudence is likewise broad and not the subject of this Comment. See Restatement (Second) of Torts § 652A cmts. a, b, c (1991). This analysis centers on the right of privacy in the area of private sexual behavior.


17. The Georgia Supreme Court was the first to give credence to this view. See Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905). But cf. De May v. Roberts, 9 N.W. 146 (Mich. 1881) (awarding damages to woman for invasion of her privacy during childbirth, but not recognized by later courts as contributing to privacy rights). This is somewhat ironic in view of the laws infringing on the right of privacy which have originated from the State of Georgia since that time. See infra notes 33-35, 46-56 and accompanying text. Another state which quickly recognized a right of privacy was Michigan. See Atkinson v. John E. Doherty & Co., 80 N.W. 285 (Mich. 1899). But see Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895) (refusing to find that common law privacy protected a woman against unauthorized use of her photograph).

18. See Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964) (protecting the right to travel as a liberty interest under the Fifth Amendment); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958) (finding distribution of group membership lists would violate privacy in association); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (protecting the fundamental and basic liberty of procreation); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (protecting the private decision of where to educate children); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923) (protecting the private decision of what to learn as inherent in the First Amendment).

19. In 1928, Justice Brandeis rendered his famous dissent in Olmstead v. United States, 277 U.S. 438 (1928). The case presented the issue of whether private telephone conversations, recorded with a federal wire tap, could be used as evidence in a criminal trial. Id. at 564. In finding that the Fourth and Fifth Amendments were violated, Brandeis stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. Id. at 478 (Brandeis, J., dissenting). With great foresight, he also noted that "[w]ays may some day be developed by which the Government ... will be enabled to expose to a jury the most intimate occurrences of the home. ... Can it be that the Constitution affords no protection against such invasions of individual security?" Id. at 474.
The framework of the right of privacy in the area of sexual behavior developed on a case-by-case basis.

B. The Constitutional Right of Privacy

The Supreme Court recognized a constitutional right of privacy for the first time in *Griswold v. Connecticut*. The Court, with three Justices dissenting, found a peripheral right of privacy in the "penumbra" of the First Amendment. The Court also found that a zone of privacy was necessary to support other guarantees of the Bill of Rights, including the First Amendment right of association, the Third Amendment prohibition against quartering of soldiers, the Fourth Amendment prohibition against unreasonable search and seizure, the Fifth Amendment self-incrimination clause, and the Ninth Amendment generally. On appeal from the Connecticut Supreme Court of Errors, Estelle Griswold challenged the constitutionality of a state statute which criminalized the use of contraceptives for purposes of birth control. The Court held that the statute was unconstitutional because it invaded the protected freedom of privacy in the marriage relationship.

The Court extended the *Griswold* holding to unmarried persons in *Eisenstadt v. Baird*. In *Eisenstadt*, the Supreme Court found that a Massachusetts statute prohibiting distribution of contraceptives to unmarried persons was not rationally related to a valid public purpose. The Court concluded that married and unmarried persons have the same rights with regard to receiving contraceptives. The Court found, therefore, that the statute vio-

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20. 381 U.S. 479 (1965).
21. *Id.* at 482-84. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484.
22. *Id.* at 484. *Contra id.* at 508-10 (Black & Stewart, JJ., dissenting). The dissent noted: The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not . . . . I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.
23. *Id.* at 479. It was legal to use contraceptives for disease control. See *id.* at 498 (Goldberg & Brennan, JJ., concurring).
24. *Id.* at 485-86. The Court recited the legal principle that "a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' " *Id.* at 485 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1963)). It may be inferred from this principle that any regulation which infringed on protected freedoms or fundamental rights would be declared overbroad and in violation of the Constitution. This has not held to be true. The principle has been restated to say that, with regard to the military and other particular areas, regulations may restrict protected freedoms "no more than is reasonably necessary to protect the substantial governmental interest." *Brown v. Glines*, 444 U.S. 348, 355 (1980).
26. *Id.* at 443.
27. *Id.* at 453.
lated the Equal Protection Clause of the Fourteenth Amendment. Consequently, the Court did not reach the question of whether the fundamental right of privacy was violated. In *dicta*, however, the Court stated:

"[I]n *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."29

The freedom from unjustified governmental intervention in childbearing decisions was reaffirmed by the Court in *Roe v. Wade*30 and *Carey v. Population Services International*31.

In *Stanley v. Georgia*,32 the Supreme Court heard the appeal of a Georgia citizen convicted of possessing of obscene material. Federal and state agents had found pornographic films in the appellant's home while searching for evidence of bookmaking activities. The Court held that mere possession of obscene materials could not be considered a crime in light of the First and Fourteenth Amendments.33 Although not all of the Justices reached the First Amendment issues in this case,34 there was no dissent from the holding that individuals are free to read or view what they choose in the privacy of their homes. These decisions led to questions about precisely what behavior, particularly when occurring in the home, would receive constitutional protection under the right of privacy.

C. The Extent of Constitutional Privacy in Sexual Behavior

In the 1970s courts began to explore the degree to which the right of privacy would protect adult consensual sexual behavior.35 Because there was

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28. *Id.* at 447 n.7.
29. *Id.* at 453.
33. *Id.* at 568. Although noting that the regulation of obscenity was a valid governmental concern, Justice Marshall stated that a prosecution for possession of obscene materials in the privacy of one's home "takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id.* at 564. He further stated:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

*Id.* at 565.
34. *Id.* at 569.
35. See *Carey*, 431 U.S. at 684 ("[t]he right of personal privacy includes 'the interest in independence in making certain kinds of important decisions', yet] the outer limits of this aspect of privacy have not been marked by the Court" (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977))); *Carey*, 431 U.S. at 694 n.17 ("the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults").
no clear Supreme Court ruling on the limits of the constitutional protection of privacy in sexual relations, lower courts rendered disparate rulings on this issue. A three-judge district court, with one judge dissenting, upheld as constitutional a Virginia statute criminalizing sodomy as applied to homosexual relations. The appellants contended that the statute was invalid as applied to private consensual adult homosexual behavior under the First and Ninth Amendment guarantees of privacy and various other provisions of the Bill of Rights. The majority based its holding primarily on the limiting language in Justice Goldberg's concurring opinion in Griswold. Justice Goldberg's concurrence had quoted Justice Harlan's dissent in Poe v. Ullman, which had indicated that Griswold did not limit the government's right to regulate behavior outside of heterosexual marriage. As Judge Merhige pointed out in his dissent in Doe v. Commonwealth's Attorney, reliance on Justice

36. See Lovisi v. Slayton, 539 F.2d 349 (4th Cir.), cert. denied, 429 U.S. 977 (1976). In the Fourth Circuit, the right of privacy apparently extended only to private consensual heterosexual behavior between two adults. Aldo and Margaret Lovisi, a married couple, were convicted and imprisoned under a Virginia sodomy statute for engaging in oral sex in the bedroom of their home. Id. at 350. Unfortunately for the Lovisis, they had invited a third person to join them on this occasion. The court acknowledged that "the marital intimacies shared by the Lovisis when alone and in their own bedroom are within their protected right of privacy . . . [and are] beyond the power of the state to scrutinize." Id. at 351. The right of privacy was waived, however, when a third person was allowed as an onlooker because "the married couple has welcomed a stranger to the marital bedchamber, and what they do is no longer in the privacy of their marriage." Id. See also Fugate v. Phoenix Civil Serv. Bd., 791 F.2d 736-41 (9th Cir. 1986) (discharge of police officers for sexual activity with prostitutes while on duty not violative of right of privacy); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986) (sodomy statute criminalizing homosexual activity not violative of privacy or equal protection); Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 446 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985) (no violation of rights where school teacher dismissed after stating she was bisexual); Shawgo v. Spradlin, 701 F.2d 470, 472 (5th Cir.), cert. denied sub nom., Whisenhut v. Spradlin, 464 U.S. 965 (1983) (no violation of privacy rights where police officers disciplined for off-duty sexual relationship in violation of department regulations). But see City of North Muskegon v. Briggs, 563 F. Supp. 585, 591 (D. Mich. 1983), aff'd, 746 F.2d 1475 (6th Cir. 1984), cert. denied, 473 U.S. 909 (1985) (right of sexual privacy infringed where police officer suspended for engaging in adulterous relationship); Thorne v. City of El Segundo, 726 F.2d 459, 471 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984) (private, off-duty sexual activities of city employee protected by rights of privacy and free association); New York v. Onofre, 415 N.E.2d 936, 937-38 (N.Y. 1980), cert. denied, 451 U.S. 987 (1981) (sodomy statute criminalizing activity between nonmarried persons violated right of privacy and equal protection).


39. Id. at 1201 (citing Griswold, 381 U.S. at 499 (Goldberg, J., concurring)).


41. Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) ("Adultery, homosexuality and the like are sexual intimacies which the State forbids . . ."). The Doe v. Commonwealth's Attorney opinion also independently relied on Justice Harlan's view that "adultery, homosexuality, fornication and incest are [not] immune from criminal enquiry [sic], however privately practiced." Commonwealth's Attorney, 403 F. Supp. at 1201-02 (quoting Poe v. Ullman, 347 U.S. at 552-53 (Harlan, J., dissenting)).
Harlan’s dissent was questionable. By the time of the Poe v. Ullman ruling, the Eisenstadt case had extended the right of privacy beyond the marital relationship. Presumably, this had limited the power of the state to legislate against heterosexual, and possibly homosexual, fornication. The Supreme Court summarily affirmed the holding of Doe v. Commonwealth's Attorney with three Justices indicating they would note probable jurisdiction.

In 1986 the Court determined that the right of privacy does not extend to private consensual homosexual conduct between adults. In Bowers v. Hardwick, a majority of five held that they were unwilling to find “a fundamental right to engage in homosexual sodomy.” The majority specifically limited its ruling to homosexual sodomy, although the Georgia statute before the Court criminalized any act of oral or anal sex, whether committed by persons of the same or opposite sex. Both the majority and the dissent noted that this decision did not address the Eighth or Ninth Amendments or the Equal Protection Clause. Writing for the majority, Justice White reviewed the constitutional privacy cases and proclaimed that homosexual sodomy was not in any way related to the protected areas of child rearing and education, family relationships, procreation, marriage, contraception, or abortion. In a lengthy discussion, the Court proscribed a right to engage in homosexual sodomy by finding that this activity did not meet the standards established for recognition as a fundamental right.

42. Commonwealth’s Attorney, 403 F. Supp. at 1203-04 (Merhige, J., dissenting).
43. Id. at 1204 (Merhige, J., dissenting) (citing Eisenstadt, 405 U.S. at 453).
44. Commonwealth’s Attorney, 425 U.S. at 901.
46. Id. at 191.
47. Id. at 188 n.2.
48. Id. at 200. (Blackmun, J., dissenting) (“[T]he Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens.”); cf. Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring):
   
   The framers of the Constitution knew and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure the laws will be just than to require that laws be equal in operation.

49. Hardwick, 478 U.S. at 196 n.8, 201.
50. Id. at 190-91.
51. Id. at 191-92. The Court determined that homosexual acts were “neither ‘implicit in the concept of ordered liberty,’ such that neither liberty nor justice would exist if [they] were sacrificed” nor “deeply rooted in this Nation’s history and tradition.” Id. (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937) and Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (alterations in original). In elucidating the “ancient roots” of sodomy laws, the opinion fully enumerates the state penal statutes prohibiting sodomy in effect in 1791 and in 1868. Id. at 192-94. In a concurring opinion, Justice Powell cites to the twenty-four state sodomy laws in effect in 1986 as support for his view that the Eighth Amendment may well provide protection against the Georgia
The dissent in *Hardwick* characterized the case as an issue of the fundamental right of privacy and freedom in intimate association. Because the dissent found that a fundamental right had been violated, they would have required the State of Georgia to demonstrate a compelling interest in regulating the proscribed behavior. The majority had declared that homosexual sodomy bore no resemblance to the activities protected under previous privacy cases. The dissent responded that protection was afforded to such activities because of the importance they held in the lives of each individual and not because of their societal value.

D. Limitations on Privacy and the Reach of *Bowers v. Hardwick*.

The right of privacy is not absolute. The protection of the right of privacy statute’s penalty of up to twenty years imprisonment. *Id.* at 197-98 (Powell, J., concurring). Although relying heavily on historical and current state laws for support, the majority did not acknowledge that almost all of those statutes criminalized both heterosexual and homosexual activity. *Id.* at 214-16 (Stevens, J., dissenting). For a discussion of *Hardwick* which considers sodomy laws in an historical sense, see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *Yale L.J.* 1073 (1988).

52. *Id.* at 206 (Blackmun, J., dissenting) (“what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.”); *see id.* at 199 (Blackmun, J., dissenting) (“This case is [not] about ‘a fundamental right to engage in homosexual sodomy,’ as the Court purports to declare . . . . [T]his case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’ ” (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

53. *Id.* at 208, 208 n.3 (Blackmun, J., dissenting). The dissent stated:

If [the right of privacy] means anything, it means that, before [a state] can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an “abominable crime not fit to be named among Christians.”

*Id.* at 199-200 (Blackmun, J., dissenting) (quoting Herring v. State, 46 S.E. 876, 882 (Ga. 1904)). In attacking the historical ground upon which the majority based its decision, Justice Blackmun wrote:

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court’s scrutiny . . . . It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

*Id.* at 210-11 (Blackmun, J., dissenting); *cf.* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”); O’Connor v. Donaldson, 422 U.S. 563, 575 (1975) (“Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.”)


55. *Id.* at 204 (Blackmun, J., dissenting). The dissent explained:

We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life. . . . The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. . . . [A] necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.

*Id.* at 204-06 (Blackmun, J., dissenting).
is most frequently sought through due process or equal protection challenges. In both types of challenges, if the challenged regulation does not infringe on the right of privacy, then it will be upheld if it is rationally related to a legitimate state interest. If the right of privacy is infringed, the legislation limiting that right must serve a compelling governmental interest and must do so in the narrowest way possible. If the law "sweeps too broadly," it will be invalidated. If the legislation is found to serve a compelling interest and to limit the right of privacy in the narrowest possible manner, then it will be upheld as constitutional.

A substantive due process challenge alleges that a law deprives an individual of the right to act in an otherwise legal way. The test in these cases is whether the regulated conduct is so "deeply rooted in this Nation's history and tradition" as to merit due process protection. In other words, due process protects acts which the majority has traditionally felt entitled to engage in. If the conduct is found to be protected, then the courts will balance the nature of the individual interest against the importance of the governmental interest furthered by the law. The courts also consider the degree to which the individual interest is infringed and the ability of the government to achieve a less infringing method of furthering its interest.

Both Griswold and Hardwick addressed substantive due process challenges to the law. The outcome of these two cases was predetermined by the Court's framing of the issue. In Griswold, the Court focused on the area of life in which a particular behavior occurs. The Griswold Court questioned whether the government could interfere in the marital decision of whether to bear children yet did not question whether there was a constitutional right to take birth control pills or wear a condom. The Court found that the right of

56. Equal protection is applied to federal law under the Fifth Amendment Due Process Clause. Bolling v. Sharpe, 347 U.S. 497 (1954). In Bolling, the Court said:

The Fifth Amendment ... does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Id. at 499.


59. City of Cleburne, 473 U.S. at 440.

60. Id. But cf. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting):

Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Id.

61. For a general discussion of the application of substantive due process to the right of privacy, see Jeffrey S. Koehlinger, Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases, 65 IND. L.J. 723 (1990).
privacy in the marriage relationship may not be invaded by legislation.\footnote{Griswold, 381 U.S. at 585-86. See Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973).} Thus, the fundamental right of privacy was protected. In \textit{Hardwick}, however, the Court focused on the particular activity regulated by the legislation. The \textit{Hardwick} Court did not ask whether the government could interfere in the private and highly personal decision of who one's sexual partner should be; rather, the Court focused on whether there was a constitutional right to engage in homosexual sodomy.\footnote{\textit{Id.}} The Court then found that this behavior was not a fundamental right protected by the Constitution.\footnote{\textit{Id.}} Accordingly, where a due process challenge is raised, activities protected under the right of privacy can only be distinguished from those that are not on a case-by-case basis.

Because the ruling of \textit{Hardwick} focused on the narrow behavior of homosexual sodomy, it is not determinative of whether the right of privacy protects an individual's status of being homosexual. It also did not determine whether the right of privacy protects an individual from being forced to disclose his or her sexual orientation. This is significant in the military context because homosexuals are excluded from the military on the basis of their status as homosexuals and not because of the commission of sodomy. Thus, the standard to be met by the military's exclusionary policy is not established by the \textit{Hardwick} ruling.

Equal protection ensures the rights of minorities against majoritarian rule. There are two branches of equal protection analysis. In the first branch, it is alleged that a law discriminates in the exercise of a fundamental right.\footnote{Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brandeis, J., dissenting).} If a fundamental right is infringed in a discriminatory way, then the law which discriminates must do so in order to serve a compelling governmental interest and must infringe no more than necessary on the fundamental right. Again, \textit{Hardwick} has determined that there is no fundamental right to engage in homosexual sodomy. Thus, any statute that discriminates on this basis does not implicate a fundamental right. The military policy, however, discriminates on the basis of status rather than conduct. If the right of privacy protects an individual's right to be homosexual or to refuse to divulge his or her sexuality, then discrimination on this basis could be found to violate the Equal Protection Clause.\footnote{See Jeffrey S. Davis, \textit{Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives}, 131 MIL. L. REV. 55 (1991); John Charles Hayes, \textit{The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick}, 31 B.C. L. REV. 375 (1990). But see Craig W. Stedman, \textit{The Constitution, the Military, and Homosexuals: Should the Military's Policies Concerning Homosexuals be Modified?}, 95 DICK. L. REV. 321 (1991).}
The second branch of equal protection analysis is applied to legislation discriminating against a particular class of individuals. The Supreme Court has not ruled on whether homosexuality is a suspect classification.

III. MILITARY POLICY TOWARD HOMOSEXUALS

The military has great latitude in enacting and enforcing regulations regarding its servicemembers. While the courts will consider constitutional challenges to military action, they do so with great deference. Further, the degree of protection afforded to servicemembers under the Bill of Rights has traditionally been less than the protection given the civilian population. The combination of a lower standard of protection and a higher standard of deference has created a formidable hurdle to successful challenges to the constitutionality of military regulations.

A. Advent of the Current Regulations

Official United States military policy states that "homosexuality is incompatible with military service." The Defense Department asserts that homosexuals in the military will create security problems, lessen public ac-
ceptance of the military and the ability to recruit members, complicate assignment and deployment of personnel, and deter discipline, trust, confidence, and the integrity of the rank and command system.\textsuperscript{73} Prior to 1982, each branch of the military had separate regulations for the exclusion and discharge of homosexuals.\textsuperscript{74} Responding to a successful challenge to the Army’s discharge regulation, in 1982 the Department of Defense issued directives that standardized military policy on homosexual personnel.\textsuperscript{75}

Previously, Army regulations had required the discharge of any soldier who evidenced “homosexual tendencies, desire, or interest.”\textsuperscript{76} Miriam Ben-Shalom was discharged from the United States Army Reserves on December 1, 1976 because she was homosexual. After exhausting administrative remedies, Ben-Shalom brought a mandamus action in the Eastern District of Wisconsin seeking reinstatement in the Reserves. She alleged that the discharge violated her constitutional rights under the First, Fifth, and Ninth Amendments.

The district court held that there was no violation of procedural due process under the Fifth Amendment because Ben-Shalom could not establish a protectable property or liberty interest.\textsuperscript{77} Ben-Shalom’s First Amendment challenge was upheld. The court held that the regulation was overbroad because it substantially “impinge[d] the first amendment rights of every soldier to free association, expression, and speech.”\textsuperscript{78} Furthermore, the court held that Ben-Shalom’s right to personal privacy was infringed.\textsuperscript{79} As a re-

\textsuperscript{73} Id. The policy states:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system to rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

\textsuperscript{74} See supra note 3.

\textsuperscript{75} DOD Directive 1332.14, supra note 1. The branch regulations currently in effect are U.S. Army Regulation 635-200, SEC/NAV Instruction 1900.9C, and Air Force Manual 39-10, Chapter 5, Section 6. These regulations provide for mandatory discharge of any person who has committed a homosexual act, claimed to be homosexual, or married or attempted to marry someone of the same sex. The only exception is for a person who is not homosexual. Id.

\textsuperscript{76} U.S. Army Regulation 135-178, § 7-5b(6).

\textsuperscript{77} Ben-Shalom v. Secretary of Army, 489 F. Supp. 964, 971 (E.D. Wis. 1980) [Ben-Shalom I].

\textsuperscript{78} Id. at 974. The court found that the regulations, as worded, would prohibit reading or learning about homosexuality or meeting with homosexuals or even talking about homosexuality for fear that any of these things could be taken as having an interest in homosexuality. The opinion noted that the regulation was a “tool for intimidation and harassment” which threatened protected activities. Id.

\textsuperscript{79} Id. at 975. Judge Evans drew a clear distinction between status as a homosexual and the commission of homosexual conduct. He indicated that personality and its lawful manifestations were areas into which the government could not intrude. Because Ben-Shalom was discharged solely because of her identity as a homosexual, the court found that this violated
sult, the Army was ordered to reinstate Ben-Shalom as a reservist.80 The Secretary of the Army initially appealed the district court’s order, but later withdrew its appeal.81

In response to the district court’s ruling in Ben-Shalom,82 the Department of Defense promulgated an altered definition of homosexual. This definition purportedly eliminated the language that the district court had found to be overbroad: “homosexual tendencies, desire, or interest.” The new directives defined a homosexual as “a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.”83

B. Challenges to the Policy on Homosexuality

1. Disclosure of Sexual Orientation

When enlisting for service in the United States armed forces, a recruit must complete DD Form 1966/2.84 This form asks if the recruit is a homosexual or a bisexual and whether the recruit “intend[s] to engage in homosexual acts.”85 An affirmative response to either question constitutes a nonwaivable bar to enlistment.86 The failure to honestly answer these questions provides a basis for discharge.87 The Supreme Court has not ruled on the constitutionality of this disclosure requirement.88

In 1977, Roger Rich was involuntarily discharged from the Army. The Army asserted that Rich lied when he denied on his enlistment papers that he was homosexual.89 Rich appealed his discharge and it was upheld as valid.90 On appeal, the Tenth Circuit found that the Army had “a compel-

her right of privacy in her self-image, her personality and its manifestations, and her very identity, all of which were protected. Id. 80. Id. at 977. 81. Ben-Shalom v. Secretary of the Army, 807 F.2d 982, 983 (Fed. Cir. 1986). 82. Id. at 983 n.1; 46 Fed. Reg. 9571 (1981). 83. DOD Directive 1332.14, supra note 1. A homosexual act is “bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.” Id. at 32 C.F.R. pt. 41, app. A, pt. 1.H.1.b.(3). 84. DEPARTMENT OF DEFENSE, DD FORM 1966/2, S/N 0102-LF-006-2100 (Jan. 1989). 85. Id. at 2. 86. DOD Directive 1332.14, 32 C.F.R. pt. 41, app. A, pt. 1.H.1.c.(2) (1991). 87. See DOD Directive 1332.14, 32 C.F.R. pt. 41, app. A, pt. 1.E.4.a. (1991) which states: A member may be separated ... on the basis of procurement of a fraudulent enlistment, induction, or period of military service through any deliberate material misrepresentation, omission, or concealment which, if known at the time of enlistment, induction, or entry onto a period of military service, might have resulted in rejection. Id. 88. Cf. Griswold, 381 U.S. at 484 (in dicta) (“The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.”) 89. Rich claimed that he was unsure of his sexual orientation at the time of his enlistment. Rich v. Secretary of the Army, 735 F.2d 1220, 1223 (10th Cir. 1984). 90. Id. at 1224. The court below had found the requirement of disclosure justified because “sexual perversion is a non-waivable moral and administrative disqualification” to service in the Army. Rich v. Secretary of Army, 516 F. Supp. 621, 626 (D. Colo. 1981), aff’ed, 735 F.2d 1220 (10th Cir. 1984). The trial court also found the Army to be justified in concluding that Rich was, at the time of enlistment, “a homosexual who had committed homosexual acts.” Id. at 628. Even if no homosexual conduct had occurred, the district court reasoned that status as
ling interest in maintaining a strong military force.” The court concluded that “if the Army were unable to exclude homosexuals it would ‘severely compromise the government’s ability to maintain such a force.’” The court held that any incidental imposition on fundamental rights was permissible because of the “special needs of the military.” Finally, it found that the Army had demonstrated a compelling interest “in maintaining the discipline and morale of the armed forces.” The Tenth Circuit did not distinguish between the requirement of disclosure, discharge for status as a homosexual, or homosexual conduct. Instead, the court based its conclusions solely on homosexual conduct.

One rationale for requiring disclosure of sexuality on the enlistment form is that the military has a legitimate interest in ensuring that its members do not break the law. Since sodomy is illegal under the Uniform Code of Military Justice (UCMJ), an admission that a recruit intended to commit sodomy would be evidence of intent to commit a crime. Under the UCMJ heterosexual sodomy is also a crime, yet no enlistment form asks whether the recruit intends to commit an illegal heterosexual act.

In 1982 a Washington district court found that the Army was equitably estopped from refusing to reenlist Perry Watkins because it had previously reenlisted him with full knowledge that he was homosexual. On the day the order was rendered the Army conducted a new hearing regarding Watkins’ reenlistment and questioned him about his sexual practices. In re-

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91. Rich, 735 F.2d at 1228 (quoting Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382 (9th Cir.), cert. denied, 454 U.S. 864 (1981)).
92. Id.
93. Id. at 1229. The court did not reach the question of whether a privacy interest was implicated and determined that no “First Amendment rights were directly curtailed.” Id. at 1228-29.
94. Id. The court did not explain, and thus one can presume did not feel the need to find, how any of these “compelling interests” were served by requiring servicemembers to disclose their sexual orientation or by discharging them for failure to do so.
95. This is particularly noteworthy because the Army did see a need to make this distinction. Id. at 1223. Rich was discharged for fraudulently misrepresenting that he was not homosexual. Id. (citing Army Reg. 635-200 ch. 14 (1973)). The Army had initially recommended his discharge due to unsuitability for service because of homosexuality. Id. (citing Army Reg. 635-200 ch. 13 (1973)).
96. Id. at 1228 (“Therefore, we hold that even if privacy interests were implicated in this case, they are outweighed by the Government’s interest in preventing armed service members from engaging in homosexual conduct.”); id. at 1229 (“[P]laintiff was not discharged for advocating homosexuality or merely associating with homosexuals. Rather the Army discharged him because during enlistment he falsely denied having engaged in homosexual activity.”); id. at 1227 (denying substantive due process claim in reliance on Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 903 (1981) and cert. denied, 454 U.S. 855 (1981), which related to homosexual conduct).
97. 10 U.S.C. § 925 (1991). Sodomy is defined as “unnatural carnal copulation with another person of the same or opposite sex or with an animal . . . .” Id.
98. Id.
sponse to Watkins' refusal to answer these questions, the Army filed a
renewed motion for summary judgment alleging that his refusal to discuss
his sexual activities was ground for the Army to refuse to reenlist him. The
Army asserted that it had a legitimate interest in the likelihood that Watkins
would commit criminal acts of sodomy. The court noted that sodomy had
been criminal throughout Watkin's term of service and that the Army had
been aware of his homosexual relations with other servicemen since 1968.100
With reference to its previous finding of equitable estoppel, the court stated
that "[s]ince defendants are estopped from considering plaintiff's homosexu-
ality as a bar to his reenlistment, they cannot use his refusal to answer ques-
tions concerning his homosexuality as a bar."101 Thus, Perry Watkins could
not be barred from reenlistment in the Army on the basis of refusal to dis-
close facts about his sexual orientation. This holding was limited, however,
to Watkins and did not extend to all homosexuals in the military.102 Addi-
tionally, the court's order would not prevent Watkins' discharge if he com-
mitted sodomy in the future.103

Few military cases addressing the requirement of disclosure of sexual ori-
entation have reached the courts. Presumably this is because those persons
who disclose their orientation are denied enlistment and have no vested in-
terest, such as years of service, to protect through litigation. Those individu-
als who are homosexual and are admitted to the military did not answer yes
to the questions regarding sexual orientation. Anyone who disputed the
right of the Defense Department to inquire would immediately be suspect.

2. Status as a Homosexual

Mere status as a homosexual is sufficient for discharge under the military's
homosexuality policy. Thus, servicemembers who admit to being homo-
sexual or bisexual may be discharged solely as a result of their status and re-
gardless of their conduct.104 Furthermore, there is no exception under
which members may be retained in the service after truthfully stating that
they are homosexual or bisexual.105

One soldier's battle with the military policy on homosexuality spanned ten
years.106 Sergeant Miriam Ben-Shalom prevailed in her first attempt to pre-

100. Id. at 224.
101. Id. at 225.
102. Id. ("the court [has not] stated that the Army cannot use homosexuality as a bar to
the reenlistment of soldiers other than Sergeant Watkins.")
103. Id. ("The court has never said and is not now saying that plaintiff has a right to
commit acts that Congress has declared illegal. Nor has the court attempted to limit the
Army's lawful authority to investigate and prosecute offenses occurring under its
jurisdiction.")
104. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004
(1990) ("[Homosexual] acknowledgement, if not an admission of its practice, at least can ra-
tionally and reasonably be viewed as reliable evidence of a desire and propensity to engage in
homosexual conduct.")
106. Miriam Ben-Shalom challenged first the pre-1982 regulations and then the current
regulations. The judicial opinions addressed her freedom to claim to be lesbian as well as her
constitutional right to be a lesbian and serve in the military, both before and after the Supreme
vent the Army from discharging her because she was homosexual. After a ruling in her favor, the Department of Defense issued new guidelines in an attempt to bring military regulations within the bounds of the Constitution. Ben-Shalom also challenged the new regulations but ultimately did not succeed.

Sergeant Ben-Shalom was scheduled to end her enlistment in the Army Reserves on August 11, 1988. She wanted to reenlist but was barred by the new Army regulations that made admission of homosexuality a nonwaivable disqualification to service in the military. On August 3, 1988, the Army was ordered to consider Ben-Shalom's application for reenlistment without considering her sexual orientation. Despite the court order and a determination that Ben-Shalom met the reenlistment requirements, the Army refused to reenlist Ben-Shalom. After contempt proceedings, Ben-Shalom was finally reenlisted until further determination by the court. On January 10, 1989, Judge Gordon granted a summary judgment in favor of Ben-Shalom. The court held that the new regulation was void on its face for violation of the First and Fifth Amendments.

In granting summary judgment, the court first relied on Ben-Shalom I to find that Sergeant Ben-Shalom's statements regarding her sexuality were protected speech under the First Amendment. The district court then found that the Army was seeking to protect substantial government interests. Finally, the court found that the regulations were broader than necessary to protect these interests. The court observed that the new regulations, like the old regulations, required the discharge of any soldier...

Court's decision in Bowers v. Hardwick. These opinions cumulatively address virtually every issue which has been raised in the ongoing legal dispute over the constitutionality of the U.S. military's policy excluding homosexuals. See supra notes 77-82 and accompanying text.

107. This was the reenlistment pursuant to the order of the Eastern District of Wisconsin following Ben-Shalom's challenge to her initial discharge based on homosexuality. See supra note 81 and accompanying text.

108. Army Reserve Regulations, AR 140-111.


111. Id.

112. Id. at 1375. Ben-Shalom argued that the Army regulations chilled her First Amendment freedom of speech; if she exercised her legal right to say she was lesbian, she would lose the privilege of serving in the military. In response, the Army argued that Ben-Shalom's statements were not protected speech but were, instead, admissions of intent to commit sodomy. The court did not address the protected speech versus admissions dichotomy, other than to state that "Ben-Shalom [sic] I held that Sergeant BenShalom's statements were protected speech, and the Secretary may not be heard now to assert the contrary." Id. at 1376.

Other courts have considered this distinction. Numerous opinions have held that, while saying one is homosexual is protected speech, a discharge arising out of a statement that one is homosexual does not violate the First Amendment. These jurists considered the statement to be an admission of status as a homosexual. Pruitt v. Cheney, No. 87-5914, 1992 WL 92128, at *3-4 (9th Cir. May 8, 1992); Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

113. Ben-Shalom, 703 F. Supp. at 1376. The Army asserted the seven interests itemized in the DOD policy statement and adopted in Army regulations, AR 135-178, p. 10-2. Id.

114. Id. at 1377.
who had a "desire" for homosexual conduct. The court found there was no evidence showing that desires of any sort affected the claimed military interests. Thus, the district court held that the regulations excluding individuals who, by their protected speech, indicated a desire for homosexual conduct chilled the protections of the First Amendment.

With regard to Ben-Shalom's Fifth Amendment claim, the district judge held that "homosexuals, as defined by the status of having a particular sexual orientation, constitute a suspect class . . . ." Under an equal protection analysis, it would have then been appropriate for the court to require that the Army regulations be shown to be necessary to further a compelling governmental interest. The district court, however, found that there was no evidence demonstrating that the regulations were rationally related in any way to the legitimate military interests asserted. Therefore, even if homosexuals did not constitute a suspect class, the regulations would still fail to provide equal protection. Because the regulations violated the First and Fifth Amendments, the court granted a permanent injunction against the Army. Consequently, Ben-Shalom continued as an enlisted soldier in the Army Reserves.

On May 18, 1989, more than fifteen years after Ben-Shalom's initial discharge for homosexuality, the Army was authorized to void her reenlistment in accordance with its regulations. The Army had appealed to the Seventh Circuit which found that the regulations were constitutional.

115. Id.
116. Id.
117. Id.
118. Id. at 1380. The court first distinguished Bowers v. Hardwick and Padula v. Webster as establishing only that homosexuals, when defined as a group practicing criminal sodomy, would not be a suspect class. Id. at 1377. The court then was free to consider whether homosexuality, when defined solely as sexual orientation, could be considered a suspect classification. The court noted that the Ninth Circuit had held, in a case addressing army regulations barring enlistment of homosexuals, that homosexuals when defined by status constitute a suspect class. Id. at 1379 (citing Watkins v. U.S. Army, 847 F.2d 1329, 1349 (9th Cir. 1988), withdrawn on reh'g en banc, 875 F.2d 699 (9th Cir. 1989), cert. denied, 111 S.Ct. 384 (1990)). The court found that purposeful discrimination was imposed on homosexuals as a group. Id. The military's characterization of homosexuals as being persons who desired to commit criminal acts of sodomy and the hostility of the pleadings before the court, which compared homosexuals to criminals, evidenced this type of discrimination. Id. Next, the court found that a person's sexual orientation was a trait which had no bearing on the ability to contribute to society. Id. Finally, Judge Gordon found that, because only eight to fifteen percent of the population is estimated to be homosexual, this was a discrete group which was subject to the prejudicial power of the majority. Id. at 1380. The court did not address whether sexual orientation was an immutable characteristic.

119. Ben-Shalom, 703 F. Supp. at 1380. The court stated: "[t]he elimination of all soldiers with homosexual orientations from the ranks of the Army is not rationally related to the advancement of any compelling government interest." Id. In dicta, the court suggested that a regulation which excluded individuals who had committed criminal sodomy would be permissible because the regulation of criminal conduct advanced the military's asserted interests. The court refused to presume, however, that any individual who claimed to be homosexual necessarily would commit criminal sodomy. Id.

120. Id. at 1381.
122. Id.
court found that there was no First Amendment violation, but explained at length that, even if there had been, the rule of deference to the military would require that the regulations be upheld. The court of appeals observed that courts were obligated to refrain from impairing the authority of military commanders because this authority is necessary to achieve the military's purpose of protecting and defending the country. The Seventh Circuit recognized that military leaders had determined that the presence of admitted homosexuals in the military would impair the achievement of the military mission. The court, therefore, found that the judiciary could not question the validity of the Defense Department's decision to exclude homosexuals and must uphold the regulations.

The appeals court considered more thoroughly the Fifth Amendment claim. The court first addressed the suspect class issue. The three-judge panel found that homosexuals do not constitute a suspect class because the conduct defining the class may be criminalized. The Seventh Circuit refused to accept a dichotomy between homosexuality as a status of sexual orientation and homosexuality as a term connoting persons who engage in criminal acts. The appeals court panel then applied the deferential stan-

123. Id. at 464. This finding precluded the need to consider whether the regulations infringed on fundamental rights only to the degree necessary to achieve the military's purpose. If the court had found a violation of the First Amendment, it would have still upheld the regulation, since under the military's reasoning it was necessary to infringe on the right of a person who claimed to be homosexual in order to preclude these individuals from being enlisted. This is made clear by the court's statement that:

Even if we assume that the present regulation does have a chilling effect on protected speech by discouraging proclamations of homosexuality among the military personnel, we cannot say that that infringement rises to the level of being unconstitutional. As we have noted, the branches of the military have great leeway in determining what policies will foster the military mission, and courts will rarely second-guess those decisions.

124. Id. at 459-60. The court of appeals considered that it was bound by the majority opinion in Brown v. Glines, which established that military regulations protecting a substantial governmental interest unrelated to the suppression of fundamental rights and restricting those rights no more than reasonably necessary to promote that interest would be upheld. Id. at 458-59 (citing Brown v. Glines, 444 U.S. 348 (1980)).

125. Id. at 460. But see Brown v. Glines, 444 U.S. at 370 (Brennan, J., dissenting) ("This Court abdicates its responsibility to safeguard [freedoms] when it reflexively bows before the shibboleth of military necessity.").

126. Ben-Shalom, 881 F.2d at 462 ("The Army has determined that the presence of homosexual individuals within its ranks may compromise one or more of its military interests in its mission of protecting this country."). But see Brown v. Glines, 444 U.S. at 367 (Brennan, J., dissenting) ("where constitutional rights are at stake, important ends do not sustain mismatched means."); Goldman, 475 U.S. at 516 (Brennan, J., dissenting) ("When a military service burdens the . . . rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a credible explanation of how the contested practice is likely to interfere with the proffered military interest.").

127. Ben-Shalom, 881 F.2d at 461. The court stated that the military should not "assume the risk that the presence of homosexuals within the service" would "imperil morale, discipline, and the effectiveness of our fighting forces." Id. at 460, 461.

128. Id. at 464 (relying on Bowers v. Hardwick). Judge Wood noted that to find otherwise would create "an unjustified and indefensible inconsistency" in applying the Constitution. Id. at 464-65.

129. Id. at 463-64. The court noted that Ben-Shalom's admission was not just that she had
There was no question that the interests asserted by the military were legitimate. Since the military considered the regulations necessary to achieve these purposes, the Seventh Circuit held that the regulations satisfied the deferential standard of review. In the final appeal of Ben-Shalom's challenge to the Army regulations, the court found the regulations constitutional. The military was not required to demonstrate how discharging an exemplary reservist who had served without incident for fifteen years would promote the military mission.

The Navy was also successful in excluding servicemembers without evidence of any homosexual conduct. James Woodward admitted his homosexual orientation in 1974 after serving two years in the Naval Reserves. Woodward's commanding officer recommended discharge on the basis of homosexuality but this recommendation was never processed. Following this admission, however, Woodward was removed from active duty and served the remainder of his six year term in inactive reserve status without pay.

On appeal to the Federal Circuit, Woodward argued that his constitutional rights of privacy and equal protection were violated by the release from active duty. The court relied on Bowers v. Hardwick in holding that homosexuality was not protected by a constitutional right of privacy. The court refused to consider a distinction between status and conduct despite the lack of evidence of any homosexual activity. Also in reliance on homosexual tendencies or an interest in homosexuality but rather was that she was a lesbian. Id. at 464. The court then found that:

Plaintiff's lesbian acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct ... [and] it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. To this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future. The Army need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts ...

Id. 130. Id. 131. See Ben-Shalom, 881 F.2d at 465 (summarily stating that "[t]he new regulation, we find, clearly promotes a legitimate government interest ... "); id. at 459 (itemizing the government interests asserted).

132. Id. at 465.
133. Id. at 466.
135. Id. at 1071. As a predicate to consideration of the constitutional issue, the court determined that Woodward would not have been under consideration for release from active duty absent his admission of homosexuality. Thus, the Navy could not assert that he would have been released even without evidence of homosexual tendencies. Id. at 1073-74.
136. Id. at 1074-75.
137. Id. at 1074 n.6. Judge Archer relegated the entire discussion of this argument to a footnote. Further, the court implied that Woodward would have born the burden of proving he had not committed homosexual acts stating:

There is no claim by Woodward that he is celibate. Nevertheless, Woodward's counsel, in his briefs, attempted to characterize Woodward as having only ho-
Hardwick, the court held there was no violation of equal protection.\textsuperscript{138} First, since it saw no distinction between status and conduct, there was no need to consider equal protection of a fundamental right.\textsuperscript{139} Second, the court found that homosexuals did not constitute a suspect or quasi-suspect class.\textsuperscript{140}

Since no fundamental right was infringed and no suspect class was involved, the court proceeded to consider whether the Navy's policy was rationally related to a permissible governmental interest.\textsuperscript{141} The opinion summarily concluded that the policy of discharging homosexuals served the interests itemized by the Defense Department in its policy on homosexuals.\textsuperscript{142} The sole basis given for this conclusion was that "the unique needs of the military... justify the Navy's determination that homosexual conduct impairs its capacity to carry out its mission."\textsuperscript{143} To bolster this finding, the court stated that it must give special deference to the professional judgment of the military regarding composition of its forces.\textsuperscript{144}

Frequently, the military will allow homosexuals to voluntarily resign and thereby avoid the stigma of discharge papers bearing indications that the servicemember is homosexual. On May 6, 1988, the Navy accepted the resignation of Midshipman Joseph C. Steffan, which Steffan had submitted to avoid an involuntary discharge for homosexuality. When Steffan later sought to withdraw his resignation the Navy refused. Steffan then brought suit alleging that he was involuntarily separated from the Navy because he was homosexual and that this violated his constitutional rights. The Navy initially challenged Steffan's standing to sue, claiming that his resignation was voluntary.\textsuperscript{145} The district court denied the Navy's motion to dismiss for lack of standing and discovery began.\textsuperscript{146}

During depositions, Steffan refused to answer questions regarding participation in homosexual conduct. The Navy moved for dismissal for failure to comply with discovery. After repeated refusals by Steffan, the court dis-
missed Steffan's action. The district court ruled that Steffan had been discharged based on his statement that he was homosexual and not because of any homosexual conduct. The court, however, also held that questions regarding Steffan's homosexual activities were relevant because the Navy could refuse reinstatement on the basis of homosexual conduct.

On appeal from the dismissal, the D.C. Circuit Court of Appeals reversed. The appeals court held that, since conduct was not the basis of the separation, homosexual activities were not put into issue by Steffan's challenge to his separation. Steffan's action against the Navy was reinstated.

After reinstatement, Steffan's action was defeated on a summary judgment motion. Senior District Judge Gasch ruled that, as a matter of law, the regulations excluding homosexuals do not violate the Fifth Amendment Equal Protection Clause. The court held that homosexuals do not constitute a suspect class. In so holding, the court found that no fundamental right was implicated with regard to conduct, citing Bowers v. Hardwick. Judge Gasch also noted that Steffan had not claimed a fundamental right under the Constitution to have a homosexual orientation. Accordingly, there was no need to address this issue. The court then applied rational basis review to the Navy's exclusionary regulations. Although Steffan was not charged with the commission of any homosexual activity, the court relied on Dronenburg, a case where conduct had been alleged, and found that case controlling. Judge Gasch determined that the reasons stated by the Dronenburg court as to why there was a rational basis for the Navy's policy were equally applicable to Steffan's "non-conduct case."

In a footnote, the court saw fit to acknowledge Steffan's argument that the term "homosexual orientation" should apply when discussing status as a homosexual, while the term "homosexual conduct" should apply when discussing "bodily contact between members of the same gender designed to elicit a sexual response ...." Id. at 2 n.1. Considering this distinction raised by Steffan, the lack of evidence of any sexual conduct on the part of Steffan, and the claim of a violation of the Equal Protection clause, it is difficult to understand why the court felt that the fundamental right to be homosexual had not been raised.

In an explanation of why a conduct case was controlling in Steffan's status case, the court stated:

[I]t has not been shown in this case that lifelong, or even career-long celibacy among those with a homosexual orientation is the rule rather than the exception.... The plaintiff has stated his sexual preference for people of the same gender as himself and has thereby demonstrated a propensity to engage in conduct which both parties agree is clearly regulable under Dronenburg. Unless it can be shown that the plaintiff has some commitment to celibate living, the pre-
the court noted concerns for a standard of morality and protection of privacy as legitimate purposes of the exclusionary regulation. Finally, the court took judicial notice of a matter not alleged or briefed by the parties. Judge Gasch wrote three pages in a sixteen page opinion to address the military's concern for protecting the health of the armed forces against the HIV epidemic.

The Ninth Circuit rendered the least deferential ruling by the judiciary in recent years regarding the constitutionality of discharge because of status as a homosexual. The Army discovered that Captain Dusty Pruitt was homosexual when the Los Angeles Times published an article discussing the struggle invoked by religion, the military, and homosexuality. When the interview with Pruitt was published, she had served in the Army and the Army Reserve for a total of twelve years and was to be promoted to Major just nine days later. After an investigation beginning in January 1983, the Army determined that Pruitt was a homosexual and issued an honorable discharge on July 9, 1986. At the time of her discharge, Captain Pruitt had served in the United States military for over fifteen years.

Pruitt filed suit in district court alleging that her discharge was based solely on an admission of homosexuality and therefore violated the First Amendment. The district court found that it was required to grant substantial deference to the military's determination that homosexuality was not compatible with military service. Accordingly, it held that the regulations were constitutional.

On appeal, the Ninth Circuit agreed that there was no infringement of First Amendment speech. The appeals court found that Pruitt was discharged for being a homosexual and not because of the content of her speech. The opinion then explained that the Army was discharging servicemembers because of their status as homosexuals and determined that the

sumption must be, and it is rational for the Navy to believe, that plaintiff could one day have acted on his preferences in violation of regulations prohibiting such conduct.

Id. at 12-13.
161. Id. at 13.
162. Id. at 13-16.
166. Id.
168. Id. Judge Canby noted the similarity of the facts in this case to that of Miriam Ben-Shalom. He quoted the Seventh Circuit's opinion in the Ben-Shalom case which said:

[Appellant] is free under the regulation to say anything she pleases about homosexuality and about the Army's policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes. What [appellant] cannot do, and remain in the Army, is to declare herself to be a homosexual. Although that is, in some sense speech, it is also an act of identification. And it is the identity that makes her ineligible for military service, not the speaking of it aloud.

Id. (quoting Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990)).
correct issue was whether the Army was entitled to do so.\footnote{169} Applying equal protection review standards, the appeals court first found that there was no legal support for the Army's claim that its regulations had a rational basis\footnote{170} as a matter of law.\footnote{171} The court noted that Pruitt should have the opportunity to contest the rationality of the Army's basis for its regulation.\footnote{172} Regarding deference to the military, the Ninth Circuit stated that, without a trial court record demonstrating the basis for the Army's regulation, any ruling on the constitutionality of the regulation would effectively deny judicial review of Pruitt's discharge.\footnote{173} Accordingly, the court of appeals remanded Pruitt's case to the district court for a determination of whether the Army's discriminatory regulations were rationally related to a permissible governmental purpose.\footnote{174}

\footnote{169}Id. The appeals court panel found that Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981) and cert. denied, 454 U.S. 855 (1981), was distinguishable because it had considered a discharge for conduct. Additionally, the Beller court had considered evidence of the basis for the military regulations being challenged, where the Pruitt trial court had dismissed on a motion without an evidentiary hearing. Finally, the appeals court described Beller as a substantive due process case which had not considered the equal protection claim of discrimination presented to the Pruitt court. More significant than the distinctions between these cases, however, is Judge Canby's observance that the Beller opinion had considered prejudice against homosexuals as a permissible basis for upholding the military policy. He then noted that societal prejudices could no longer serve as justification for discriminatory regulations. Pruitt, 1992 WL 92128, at *5 (citing Palmore v. Sidoti, 466 U.S. 429 (1984) and City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).

\footnote{170}The court noted that it had relied in part on Bowers v. Hardwick in determining that it would not require a higher standard of equal protection review. It distinguished both Hardwick and High Tech Gays, 895 F.2d 563 (9th Cir. 1990), from the case at hand because those cases had addressed conduct rather than status as a homosexual. Because this case raised discrimination on the basis of status, the court found that there was no stare decisis barrier to active rational basis review. Pruitt, 1992 WL 92128, at *6 & n.5.

\footnote{171}Pruitt, 1992 WL 92128, at *7. The court discussed its prior ruling in High Tech Gays in which it required the Department of Defense to demonstrate a rational basis for its discriminatory practice of subjecting homosexuals to expanded investigations prior to granting security clearances. The Pruitt court explained that the presentation of evidence to support a claim of a rational basis was necessary and followed the "active rational basis review" that the Supreme Court had applied in City of Cleburne v. Cleburne Living Center. Id.

\footnote{172}Id.

\footnote{173}Id.

\footnote{174}Id. At the time of this writing, the Pruitt case was on remand to the U.S. District Court for the Central District of California. It is clear from the Ninth Circuit opinion in this case that the military will have to do more than simply rely on its stated policy as evidence of a rational basis for its regulations which discriminate against homosexuals. Historically, courts have accepted the Defense Department's conclusory statement that homosexuals are incompatible with military service without requiring any objective proof of why this should be true. The hard data demonstrates that many persons of a homosexual orientation have served extended terms in the military and continue to be quite compatible with military service. Perserec Report, supra note 1, at 21-24, B-1. The cases addressed in this Comment each primarily involve servicemembers with significant military service terms. The majority of these individuals had excelled in their military careers until they were discovered to be homosexual. There is no evidence of blackmail against homosexuals or that homosexuals have had difficulty in commanding the respect of their subordinates. It is equally clear that the Ninth Circuit Court of Appeals will not accept prejudice within or outside of the military as a basis for discriminatory regulations.
3. Homosexual Conduct

If a soldier commits an overt act of homosexual behavior, that soldier is subject to discharge. Additionally, the servicemember may be subject to court martial for violation of the military sodomy statute. Notably, it is irrelevant under military policy whether the activity occurs in public or in private, with another enlisted person or with a civilian, on or off base, or during working hours or while on leave. The most interesting enigma of the military policy is that a heterosexual may commit a "homosexual act", even a criminal act, and remain in the military; however, for a homosexual who neither commits a homosexual act nor intends to, discharge is mandatory.

In 1975 Leonard Matlovich told his commanding officers that he was homosexual. At the time of this admission he had served in the Air Force for twelve years and was considered an excellent airman. Technical Sergeant Matlovich requested a waiver of the Air Force regulation requiring discharge of homosexuals. During the ensuing investigation, Matlovich discussed his sexual activities while in the service, stating that all such activity had occurred with consenting adult men in private while off-base and off-duty. Matlovich received an involuntary administrative honorable discharge seven months after disclosing his sexual orientation to his superiors.

When Matlovich's case reached the appeals court, the primary issue was whether the military could exclude individuals for private consensual homo-

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175. See DOD Directive 1332.14, 32 C.F.R. pt. 41, app. A, pt. 1.H.1.c.(1) ("A member shall be separated under this section if . . . [t]he member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . . .")


177. See id. §§ 802, 805 (providing that all persons who are "members of a regular component of the armed forces", whether on active duty or retired, are subject to the Uniform Code of Military Justice, which is applicable "in all places").

178. See DOD Directive 1332.14, supra note 1. This was pointed out by Judge Gordon in his grant of summary judgment in Ben-Shalom II, see supra notes 111-121 and accompanying text, where he stated:

If a person, such a Sergeant BenShalom [sic], has the status of having a homosexual orientation and that person engages in speech which discloses or otherwise acknowledges that status, then that person is subject to an automatic, nonwaivable disqualification to reenlistment, regardless whether that person has engaged in or intends to engage in actual homosexual conduct. . . . If a person with a heterosexual orientation engages in homosexual conduct, that person can avoid the consequences of [the regulations] upon proof of his or her heterosexual orientation. In other words, status based on heterosexual orientation may be a defense to the commission of homosexual acts, and a person with a heterosexual orientation may engage in conduct which is prohibited on the part of a person with a homosexual orientation.

Ben-Shalom, 703 F. Supp. at 1374-75.

179. Under the regulations then in effect, an exception to the discharge requirement could be made when "the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised." Air Force Manual 39-12 (Change 4), para. 2-103, Oct. 21, 1970. This exception is no longer available. Current directives allow retention only for a limited time in the interest of national security. DOD Directive 1332.14, supra note 1, at para. H.3.g.(2).
sexual activity.\textsuperscript{180} The court did not reach the constitutional question.\textsuperscript{181} Instead, it remanded the case to the Air Force with instructions to articulate the unusual circumstances under which a homosexual servicemember may be retained.\textsuperscript{182} In its rationale for requiring this explanation, the court indicated that a standard such as whether a servicemember had publicized his sexual orientation might be considered arbitrary and capricious.\textsuperscript{183}

In 1980 the Ninth Circuit Court of Appeals ruled on the constitutionality of Naval discharges of three servicemembers who had been separated from the service because of admission of homosexual conduct.\textsuperscript{184} Mary Saal, James Miller, and Dennis Beller each admitted during the course of investigation to having engaged in homosexual activity while in the Navy.

Saal was recommended for discharge but, following suit for injunctive relief, the Navy was enjoined from discharging her pending resolution on the merits. Her term of enlistment expired prior to rendition of a final order and she was honorably discharged. The Navy then designated her as ineligible for reenlistment and Saal amended her complaint to claim a violation of her constitutional right to due process. Her request to extend her enlistment also was denied. The district court held that Saal’s application for reenlistment must be considered without regard to regulations requiring exclusion of homosexuals.\textsuperscript{185}

Miller was to receive a general discharge for misconduct based on having committed homosexual acts while in the service. Like Saal, his discharge was stayed until final resolution of his case. The district court granted summary judgment for the Navy and the circuit court continued the stay of Miller’s discharge pending outcome of the appeal.\textsuperscript{186} Similarly, Miller attempted to reenlist following completion of his tour of duty and his application was also denied. Beller received an honorable discharge for unfitness following the district court’s judgment in favor of the Navy. He did not attempt to reenlist.

\textsuperscript{180} Matlovich v. Secretary of the Air Force, 591 F.2d 852, 855 (D.C. Cir. 1978). The military relied on the Supreme Court’s summary affirmation of Doe v. Commonwealth’s Attorney. Matlovich argued that Carey demonstrated the issue had not been decided.

\textsuperscript{181} Id.

\textsuperscript{182} Id. at 856. The record demonstrated that the Air Force had at times retained homosexuals under the unusual circumstances exception, however no information was presented as to how those cases differed from that of Matlovich. Id. at 855. Additionally, the Air Force Board for the Correction of Military Records had stated that even the presence of unusual circumstances would not require that Matlovich be retained, but would merely permit his retention at the discretion of Air Force. Id. at 856.

\textsuperscript{183} Id. at 856-57. The opinion of the district court on remand is unpublished and contains no findings. No. Civ. A. 75-1750, 1980 WL 237 (D. D.C. Sept. 10, 1980). The court ordered that the 1975 discharge of Matlovich be declared void and that Matlovich be reinstated with full active duty pay and time served as if he had not been discharged. Id. Matlovich settled for the awarded back pay and promotion with an honorable discharge.


\textsuperscript{186} Beller, 632 F.2d at 794.
On appeal, the Ninth Circuit first analyzed the policy of the Navy relating to separation of homosexuals.\textsuperscript{187} It found that discharge of homosexuals was mandatory and that any retention exception was unrelated to the individual's fitness to serve in the Navy.\textsuperscript{188} The court then determined that there was no violation of procedural due process because the plaintiffs were not deprived of a property or liberty interest.\textsuperscript{189}

Judge Kennedy, now Supreme Court Justice Kennedy, wrote for the three-judge panel which held that the regulations did not violate any constitutional right of substantive due process.\textsuperscript{190} After determining the appropriate standard of review,\textsuperscript{191} the appeals court found several plausible grounds

\textsuperscript{187} Id. at 801. The Navy policy then in effect stated:

Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. In developing and documenting cases involving homosexual conduct, commanding officers should be keenly aware that members involved in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct. Their prompt separation is essential.

Secretary of the Navy Instruction 1900.9A (July 31, 1972). The regulations under which these plaintiffs were discharged stated:

\begin{itemize}
\item e. Homosexual acts. Processing for discharge is mandatory. (See SECNAVINST 1900.9 series for controlling policy and additional action required in cases involving homosexuality.) . . .
\end{itemize}

\textsuperscript{188} Bell, 632 F.2d at 802. The appeals court noted that a person who had committed homosexual acts could be retained by the Navy in the discretion of the Secretary of the Navy "if the individual is of extraordinary value to the Navy." Id. at 804. The court noted, however, that "an individual with an otherwise fine service record will not be retained unless the Secretary concludes his record marks him as being highly unusual or especially valuable to the Navy. This kind of consideration does not contemplate evaluating the fitness of an individual to continue military service." Id. at 805.

\textsuperscript{189} Id. at 805-07. The court found that under the Navy regulations there could be no continuing expectation of employment in the military once a servicemember admitted homosexual activity. The discharges did not, therefore, deprive the plaintiffs of any constitutional property interest without due process. Id. at 805. Additionally, the court found that the plaintiffs had admitted to committing homosexual acts and that the evidence did not indicate any stigma attached to the service papers issued by the Navy in connection with the discharges under honorable conditions. Id. at 807. Accordingly, the plaintiffs were not deprived of a liberty interest. Id.

\textsuperscript{190} Id. at 807, 810. The court concluded:

\[\text{The importance of the government interests furthered, and to some extent the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct.}\]

Id. at 810. In dicta, the court advised that a finding that the regulations were constitutional was not meant to imply that they were wise, and noted that "the constitutionality of the regulations stems from the needs of the military, the Navy in particular, and from the unique accommodation between military demands and what might be constitutionally protected activity in some other contexts." Id. at 812.

\textsuperscript{191} The opinion contains a lengthy discussion of the similarities and differences between substantive due process analysis and equal protection analysis with regard to fundamental rights. The court stated:

When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds
for the Navy's assertion that the regulations discharging homosexuals were necessary for the achievement of the military mission.\textsuperscript{192} The Ninth Circuit recognized, for example, that prejudice provided a factual basis for the Navy's claim that homosexuals would be unable to command the respect of other personnel and that their presence would create tensions and hostilities.\textsuperscript{193} The court also concluded that, although every concern asserted by the Navy might not apply in each of the cases on appeal, each was a legitimate concern and together they substantiated the relationship of the regulations to the achievement of the Navy's goals.\textsuperscript{194} While noting that these goals could perhaps be achieved through a regulation which did not stretch so broadly, the court found that the regulations were a reasonable attempt to achieve governmental objectives while considering the individual interests involved.\textsuperscript{195}

In 1981 the Ninth Circuit considered an equal protection challenge to the Navy's criminal prosecution of Lieutenant Joseph G. Hatheway for commission of homosexual sodomy in violation of the UCMJ, Article 125.\textsuperscript{196} Hatheway claimed that the Navy was selectively prosecuting only homosexuals under the sodomy laws even though heterosexual sodomy was also prohibited. First, the court found, without explanation, that the exercise of the fundamental right of privacy was implicated by the criminalization of homosexual sodomy.\textsuperscript{197} Then, asserting that the interests affected in the case in much the same way as analysis under the lowest tier of equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. At the other extreme, where the Government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis. The case before us lies somewhere between these two standards.

\textit{Id.} at 808-09 (citations omitted). With regard to the application of substantive due process to the cases on appeal, the court further stated:

\begin{quote}
The due process clause does not require the Government to show with particularity that the reasons for the general policy of discharging homosexuals from the Navy exist in a particular case before discharge is permitted. \ldots Under the analysis described in our opinion, individual treatment in some circumstances might be required by substantive due process, depending on the outcome of the balancing test. This case, however, involves neither middle-tier equal protection analysis nor a situation where the only alternative means available to satisfy the Government's goals consistent with due process is an individual showing of unfitness. \ldots While the substantive due process test we describe in the text does proceed on a case-by-case basis, it does not necessarily require the Government in each case involving changing norms to show that the reasons for the regulation apply in the particular case. \ldots Discharge of the particular plaintiffs before us would be rational, under minimal scrutiny, not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals is rational.
\end{quote}

\textit{Id.} at 808 n.20.

\textsuperscript{192.} \textit{Id.} at 811.

\textsuperscript{193.} \textit{Id.} at 811-12. The Navy had presented evidence claiming that "the great majority of naval personnel \ldots despise/detest homosexuality" and would have difficulty trusting, respecting, and living in close quarters with homosexuals. \textit{Id.} at 811.

\textsuperscript{194.} \textit{Id.} at 812.

\textsuperscript{195.} \textit{Id.}


\textsuperscript{197.} Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382 & n.6 (9th Cir.), \textit{cert. de-
before it were similar to the interests affected in *Beller v. Middendorf*,\(^1\) the court decided without further explanation to apply an intermediate level equal protection review.\(^1\) Again in reliance on the findings of *Beller*, the Ninth Circuit panel concluded that "[t]he government has a compelling interest in maintaining a strong military force" and "those who engage in homosexual acts severely compromise the government's ability to maintain such a force."\(^2\) The Navy could, therefore, elect to prosecute those "violations of the UCMJ which are most likely to undermine discipline and order in the military,"\(^3\) namely, homosexual sodomy.

Lieutenant Hatheway also raised a direct constitutional challenge to Article 125, claiming that it violated his right to personal autonomy. Once again, the panel relied on *Beller* in finding that the military's asserted interests outweighed any protection of private consensual homosexual acts.\(^2\)

In 1984, after adoption of the current DOD policy on homosexuality and before the Supreme Court's ruling in *Bowers v. Hardwick*,\(^3\) the D.C. Circuit Court of Appeals\(^4\) considered the claim of naval Petty Officer James L. Dronenburg.\(^5\) Dronenburg asserted that the Navy policy requiring discharge of homosexuals violated his constitutional rights of privacy and equal protection. The Navy had discharged Dronenburg on April 21, 1981, after he admitted during an investigation that he had committed homosexual acts.\(^6\) The appeals court relied on the Supreme Court's summary affirma-

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\(^{1}\) *Beller v. Middendorf*, 1988. 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981) and cert. denied, 454 U.S. 855 (1981). In *Beller*, the court specifically refrained from deciding whether there was a fundamental right to participate in consensual private homosexual conduct. *Id.* at 807. In determining that intermediate level review was appropriate, the *Beller* panel had acknowledged the split among the circuits over whether homosexual conduct was entitled to constitutional protection, and concluded that "the reasons which led the [Supreme] Court to protect certain private decisions intimately linked with one's personality suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge." *Id.* at 809-10 (citations omitted).

\(^{2}\) *Hatheway*, 641 F.2d at 1382. Intermediate level review requires that a discriminatory regulation would be upheld as constitutional only if it is shown that the classification bears a substantial relationship to an important governmental interest. *Id.*

\(^{3}\) *Id.*

\(^{4}\) *Id.* at 1384 (quoting *Beller*, 632 F.2d at 810). Additionally, the court noted that Hatheway's acts had not actually been committed in private since they were within the view of a third party and, thus, Hatheway's right of personal autonomy carried less weight. *Id.*

\(^{5}\) *See supra* notes 46-56 and accompanying text. Justice White's majority opinion in *Hardwick* tracks the logic expressed in *Dronenburg*.

\(^{6}\) Both Justice Scalia and Supreme Court appointee Bork sat on this three-judge panel. Circuit Judge Bork wrote the decision of the Court.

\(^{1}\) *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

\(^{2}\) At the time of his discharge, Dronenburg had served nine years in the Navy. The discharge was based on Secretary of the Navy Instruction 1900.9C (Jan. 20, 1978) that pro-
tion of Doe v. Commonwealth's Attorney to find that the right of privacy did not protect homosexual activity. Additionally, the court considered the line of cases addressing constitutional privacy rights and found that these cases did not provide any criteria by which lower federal courts could determine what activities were within the protection of the right of privacy. Further, the appeals court found that the areas listed by the Supreme Court as protected under the right of privacy were unrelated to the right to homosexual conduct asserted by Dronenburg. Additionally, the D.C. Circuit found that the right to homosexual conduct was not among those rights that are 'fundamental' or 'implicit in the concept of ordered liberty.' Finding no precedent for constitutional protection of the right to engage in homosexual activity, the circuit court declined to create what it termed a new constitutional right. The court then concluded that, as "legislation may implement morality, ... this regulation bears a rational relationship to a permissible end." Finally, the court stated that, because homosexual conduct would affect morale and discipline, the Navy had justifiably determined that such conduct would hinder its ability to carry out the military mission. The discharge of homosexuals therefore promoted the legitimate interests asserted by the Navy. Accordingly, the D.C. Circuit upheld the

provided: "Any member [of the Navy] who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale." Dronenburg, 741 F.2d at 1389. The only exception to mandatory discharge was when the homosexual act was committed on "a single occasion" by someone who "does not profess or demonstrate proclivity to repeat such an act" and where the act committed "is not likely to present any adverse impact either upon the member's continued performance of military duties or upon the readiness, efficiency, or morale of the unit to which the member is assigned ...." Secretary of the Navy Instruction 1900.9C at 6b (Jan. 20, 1978).

207. Dronenburg, 741 F.2d at 1391-92.
209. Dronenburg, 741 F.2d at 1392. Citing Griswold, the panel stated: "[Griswold] did not indicate what other activities [aside from the right of a husband and wife to use contraceptives] might be protected by the new right of privacy and did not provide any guidance for reasoning about future claims laid under that right." Id. With regard to Eisenstadt, the panel asserted that the opinion did not provide the criteria by which a court could make the necessary determinations of "whether the challenged governmental regulation was 'unwarranted' and whether the regulation was of a matter 'so fundamentally affecting a person as the decision whether to bear or beget a child.' " Id. at 1393 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)). Finally, the panel stated "the Court provided no explanatory principle that informs a lower court how to reason about what is and what is not encompassed by the right of privacy." Id. at 1395.
211. Dronenburg, 741 F.2d at 1395-96.
212. Id. at 1396.
213. Id. at 1397.
214. Id. at 1398.
215. Id.
Navy’s discharge regulations as constitutional and rationally related to legitimate interests.216

IV. WHAT IS THE FUTURE OF THE RIGHT OF PRIVACY FOR HOMOSEXUALS IN THE MILITARY?

Distinctions between disclosure, status, and conduct have been generally disregarded by the courts when considering right of privacy challenges to military exclusion cases. This failure to distinguish merits close scrutiny. Most courts have applied a conduct standard to the cases presenting only evidence of status. Under military regulations, status is determined by the belief of the recruit or servicemember and not by conduct.

Bowers v. Hardwick held that homosexual sodomy is not an activity protected by the fundamental right of privacy.217 The Georgia statute before the Court in Hardwick prohibited “any sexual act involving the sex organs of one person and the mouth or anus of another.”218 Hardwick’s holding is limited, therefore, to this one particular form of homosexual conduct.219 The Uniform Code of Military Justice defines sodomy as engaging in “unnatural carnal copulation with another person of the same or opposite sex or with any animal . . . .”220 Presumably, although the military sodomy statute

216. Id. In a dissent to the denial of rehearing en banc, 746 F.2d 1579 (D.C. Cir. 1984), four judges of the eleven-judge D.C. Circuit joined in a scathing attack on the Dronenburg opinion. Chief Judge Robinson wrote:

[W]e are deeply troubled by the use of the panel’s decision to air a revisionist view of constitutional jurisprudence.

The panel’s extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case before the court. The ratio decidendi of the panel decision is fairly well stated in the last paragraph of the opinion. Jurists are free to state their personal views in a variety of forums, but the opinions of this court are not proper occasions to throw down gauntlets to the Supreme Court.

We find particularly inappropriate the panel’s attempt to wipe away selected Supreme Court decisions in the name of judicial restraint. Regardless whether it is the proper role of lower federal courts to “create new constitutional rights,” surely it is not their function to conduct a general spring cleaning of constitutional law. Judicial restraint begins at home.

Dronenburg v. Zech, 746 F.2d 1579, 1580 (D.C. Cir.) (en banc) (Robinson, C.J., dissenting) denying reh’g to 741 F.2d 1388, 1396 (D.C. Cir. 1984). The dissent further stated:

We intimate no view as to whether the constitutional right of privacy encompasses a right to engage in homosexual conduct, whether military regulations warrant a relaxed standard of review, or whether the Navy policy challenged in this case is ultimately sustainable. What we do maintain is that the panel failed to resolve any of these compelling issues in a satisfactory manner. Because we believe that the panel substituted its own doctrinal preferences for the constitutional principles established by the Supreme Court, we would vacate the decision of the panel and hear the case anew.

Id. at 1581.

219. Hardwick, 478 U.S. at 188 n.2.
220. UCMJ, 10 U.S.C. § 925, art. 125(a). The Manual for Courts Martial defines “unnatural carnal copulation” as “taking[ing] into the person’s mouth or anus the sexual organ of another person or of an animal; or [placing] that person’s organ in the mouth or anus of another person or an animal; or [having] carnal copulation in any opening of the body, except the sexual parts,
defines sodomy differently than the Georgia statute, it would withstand constitutional review on the same basis as the Georgia statute. Accordingly, the military could constitutionally prohibit the commission of homosexual sodomy by its members. This does not resolve the question of whether the military may constitutionally exclude members, through discharge or refusal to enlist, on the basis of homosexual status alone.

The Defense Department is not excluding homosexuals because they have committed sodomy. The military prohibits membership in the armed services by anyone who has the status of being homosexual.221 This status is generally determined by the servicemember's own belief that he or she is homosexual.222 Evidence of homosexual acts by a servicemember will not necessarily result in exclusion.223 It is the belief that is determinative, not the conduct. Therefore, the issue becomes whether the military may constitutionally exclude persons from service on the basis of their belief about their own sexuality.

Personal beliefs are traditionally considered to be protected under the Bill of Rights. It is an unusual situation where a person may be compelled to disclose their personal beliefs and then, on the basis of those beliefs, face denial of benefits or even prosecution. Yet the military requires all recruits to disclose this highly personal information before they may join the service and, on the basis of the belief disclosed, individuals are excluded from service.

In a case involving the enlistment of a soldier who has committed homosexual sodomy, no fundamental right is involved. It is therefore only necessary for the military to demonstrate that the regulation excluding this soldier from service is rationally related to a legitimate military interest. The military, like the State, has a duty to protect the interests of its members from crime. Homosexual sodomy is a crime under the UCMJ. Consequently, the exclusion of a person who has committed homosexual sodomy is rationally related to the prevention of crime.224 While Hardwick is the law in this country, the right of privacy will not prevent the exclusion of this soldier. This is not determinative in the case of a person who has not committed homosexual sodomy, but has the status of being homosexual.

Most courts have proceeded from the holding of Hardwick to conclude that the right of privacy is not implicated in any case involving homosexuality. The courts have applied the conduct standard of Hardwick, or the earlier holding of Doe v. Commonwealth's Attorney, to cases where there was no


See supra note 51 regarding state sodomy laws; see also Hardwick, 478 U.S. at 198 n.1 (Powell, J. concurring) (listing state sodomy statutes in effect); PERSEREC Report, supra note 1, at A-20 (describing status of non-military sodomy laws).

221. See supra notes 104-105 and accompanying text.

222. See supra notes 84-88 and accompanying text.

223. See supra note 178 and accompanying text.

224. Remaining unexplained by the military is why it has no similar interest in preventing heterosexual sodomy, which is similarly illegal under the UCMJ. See supra notes 97-98 and accompanying text.
evidence of conduct. In other words, because a person has no fundamental right to commit sodomy, many judges have concluded there is also no fundamental right to be homosexual. This conclusion logically must rest on the assumption that all homosexuals commit sodomy if the rational relationship between the regulation and the military’s interest is to be found. Yet no court has required the military to demonstrate the truth of this assumption. Even if this could be demonstrated, still another step is required. It must also be shown that all people who believe themselves to be homosexual are in fact homosexual and therefore commit sodomy.

Hardwick did not hold that there is no fundamental right to believe that one is homosexual. Personal beliefs appear to be at the heart of the constitutional right of privacy cases. The holdings of those cases protected the freedom from unwarranted governmental intrusion into matters fundamentally affecting people. The Court has acknowledged the constitutional right of privacy in the marital relationship, in decisions on childbearing, and in the home. Prior to finding a constitutional right of privacy, the Court recognized that other Bill of Rights guarantees necessarily protected privacy in association, procreation, and education of children. In each of these cases, the Court not only protected the right to hold certain beliefs, but also prohibited the States from punishing citizens for acting on those beliefs. At a minimum, the right of privacy has been held to protect against unwarranted governmental intrusion into beliefs. Unless we are to diverge significantly from Supreme Court precedent, the military regulation requiring exclusion of anyone who believes him or herself to be homosexual must be found to infringe the fundamental right of privacy.

Where a fundamental right is infringed, the military must show that it has a compelling interest. The regulation imposed must serve this compelling interest. Additionally, the regulation must infringe on that fundamental right as little as possible. The military should then be required to demonstrate that a compelling interest is served by its exclusion of persons who hold the belief that they are homosexual.

Courts have had no trouble in finding that the interests asserted by the

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226. Recent medical findings lend support to the notion that homosexuality is a biological condition and therefore immutable. See McNeil/Lehrer News Hour (television broadcast, Aug. 30, 1991); Natalie Angier, Ideas & Trends, The Biology of What it Means to be Gay, NEW YORK TIMES, Sept. 1, 1991, at 4-1. Such a finding would greatly increase the likelihood of homosexuals being held to constitute a suspect class under equal protection analysis. The compelling interest standard would then be applied to the military’s regulation, despite the lack of implicating a fundamental right. See supra note 69 and accompanying text.


229. Stanley v. Georgia, 394 U.S. 557 (1969); see supra notes 32-34 and accompanying text.

230. See supra note 19 and accompanying text.
military (morale, discipline, national security, public acceptance, etc.) are compelling. Until Pruitt, however, the military has not been required to demonstrate how any of these interests are served by a regulation excluding homosexuals. Other courts have simply deferred to the military's determination that its exclusionary policy served its interest. This determination has been undermined in recent years. Colin Powell, Chairman of the Joint Chiefs of Staff, recently stated that homosexuals no longer pose a security risk. The national security concern is also undercut by the presence of homosexuals in high-level security clearance positions outside of the military. Internal discipline and morale concerns are hard to believe given the military's own estimates that as many as ten percent of its members are homosexual. Finally, while the public may express concern about the presence of homosexuals, the concern is lessening as evidenced by the repeal of sodomy laws in a majority of states, the enactment of civil laws prohibiting discrimination against homosexuals, and the election of homosexuals to Congress and state legislatures. Secretary of Defense Dick Cheney acknowledged the difficulty in explaining the continuing exclusion of homosexuals from the military when he said it was a policy he inherited and "a bit of an old chestnut." Surely courts are not required to continue to defer to an outdated determination by military leaders which has no basis in the present.

Finally, Hardwick did not address the chilling effect that a regulation excluding one from the military on the basis of personal belief would have on the right to hold that belief. The right of privacy is not only a positive right, but also a negative right. The government may not infringe on the right of privacy by either limiting its expression or by requiring its expression. The military excludes persons on the basis of their sexuality and, in order to make the determination whether a person is homosexual, requires recruits to declare their belief about their own sexuality. It is hard to imagine a more private interest. Unfortunately, there appear to be no cases directly challenging this disclosure requirement.

The courts appear to draw a clearer line between disclosure and conduct than between status and conduct. Although the military policy excludes on the basis of status, the military has occasionally focused on conduct in attempting to require disclosure. In Watkins, the military was ordered to consider reenlistment of the servicemember without regard to his status as a homosexual. The Army then attempted to ask Watkins about his sexual conduct on the ground that it has an interest in the commission of crime.

232. See DOD Directive 5200.2.R., supra note 1. The military's own reports have repeatedly stated that there is no evidence that homosexuals pose a greater security risk than heterosexuals. See Gibson, Report of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuals (1978); PERSEREC Report, supra note 1, at 29.
233. PERSEREC Report, supra note 1, at 24.
234. See supra note 52. See also Hardwick, 478 U.S. at 197-98 (Powell, J., concurring).
236. Cheney Won't Fight Ban on Homosexuals, USA TODAY (Final ed.), Aug. 1, 1991, News 4-A.
237. See supra notes 99-103 and accompanying text.
The court refused to require disclosure of past conduct. In *Steffan*, the Navy discharged Steffan because of status as a homosexual. In depositions pursuant to Steffan's appeal, the Navy asked about his sexual conduct. Here too, the court refused to require this disclosure, finding that conduct was not in issue since it was not the basis for the discharge.

Distinguishing between disclosure and conduct is a step in the right direction for the courts. It does not provide much protection for most individuals, however, because a recruit or servicemember who willingly admits their homosexuality will be denied the right to serve. In the cases challenging the exclusion of servicemembers because of their statements that they were homosexual, the courts have applied the conduct standard and held that the servicemember was being discharged for being homosexual rather than for saying he or she was homosexual. The absence of a line between status and conduct creates a Catch-22 for anyone who happens to be homosexual and desires to serve their country in the military.

The fiscal cost to the public in enforcing this regulation is high. The General Accounting Office reported in 1984 that 14,311 members were discharged on the basis of homosexuality during the preceding ten years. For each discharged soldier, the public had invested $12,299 in getting that soldier to their first duty station, basically induction and basic training costs. The average soldier discharged on the basis of homosexuality had spent three years in the service. The GAO could not estimate the cost of prosecuting these discharges or of defending them on appeal. The social cost may also be high. For years, the military fought the racial integration of its members for many of the same reasons asserted here. The military declined to enlist women, again for many of the same reasons. History has shown that the military's concerns were groundless. The future will likely show that the military's concerns about homosexuals are likewise without foundation.

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238. See supra notes 145-162 and accompanying text.
239. GENERAL ACCOUNTING OFFICE, B-216657 at 4 (Oct. 12, 1984).
240. Id. at 6.
241. Id. at 7.
242. Id. at 8.
243. Watkins v. United States, 847 F.2d 1329, 1350-51 (9th Cir. 1988); PERSEREC Report, supra note 1, at 29.