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SLAMMING THE CLOSET DOOR SHUT: ABLE, THOMASSON AND THE REALITY OF "DON'T ASK, DON'T TELL"

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SLAMMING THE CLOSET DOOR SHUT: *ABLE, THOMASSON* AND THE REALITY OF "DON'T ASK, DON'T TELL"

I. INTRODUCTION

During the 1992 Presidential campaign, Bill Clinton sought the gay vote by promising to remove the military's longstanding ban against homosexual and lesbian service members.[1] The ultimate product of his promise was 10 U.S.C. § 654, the military's "Don't Ask, Don't Tell" policy.[2] Under this policy, incoming service members are not forced to reveal their sexual orientation,[3] and such orientation, by itself, is no longer considered to be a bar to service.[4]

The new policy was intended to be a compromise between lifting the total ban and reducing the incidents of military witch hunts designed to eliminate the homosexual presence in the military.[5] Unlike the former ban, the new policy focuses on homosexual conduct, not homosexual orientation, as the impetus for discharging a soldier.[6] The policy also gives an accused service member the opportunity to exonerate him or herself by rebutting the presumption that he or she is likely to engage in homosexual conduct.[7]

While the "Don't Ask, Don't Tell" policy is on its face a compromise, its practical effect is to continue to reduce the homosexual presence in the military.[8] The "Don't Ask, Don't Tell" policy has done little to reduce either the frequency of these witch hunts or the number of soldiers removed for violating the policy.[9] Yet, because the "Don't Ask,

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1. *See* Jeanne M. VanderHeide, *Is "Don't Ask, Don't Tell" Constitutional? Legislative and Judicial Reform of the Military's Ban on Gay Men and Lesbians*, 40 WAYNE L. REV. 1273, 1273 (1994).

2. *See* Kenneth S. McLaughlin, Jr., *Challenging The Constitutionality of President Clinton's Compromise: A Practical Alternative to the Military's "Don't Ask, Don't Tell" Policy*, 28 J. MARSHALL L. REV. 179, 179 (1994).

3. *See id.*

4. *See Judge Blocks Ouster of Homosexual Sailor*, N.Y. TIMES, Apr. 28, 1995, at A23.

5. *See He Should Have Lifted the Ban*, HARTFORD COURANT, July 20, 1993, at B12.

6. *See* Paul Quinn-Judge, *Military Policy on Gays Detailed; Conduct is Target, Not One's Orientation*, BOSTON GLOBE, Dec. 23, 1993, at 3.

7. *See* 10 U.S.C. § 654(b)(1)(E) (1993).

8. *See Lift the Ban*, THE NEW REPUBLIC, Mar. 27, 1995, at 7.

9. *See id.*

Don't Tell" policy seeks to proscribe conduct,[10] and does not remove soldiers on the basis of their sexual status alone,[11] the policy should withstand the legal attacks initiated by discharged soldiers who claim the act is unconstitutional.

Two such attacks have created a circuit split in the federal courts of New York and Virginia.[12] The two cases, *Able v. United States*,[13] and *Thomasson v. Perry*,[14] are in the appeals process and the final resolution of the issues involved will likely be determined by the United States Supreme Court.[15] This note will explain why the "Don't Ask, Don't Tell" policy will likely be held constitutional by reviewing the federal courts' treatment of litigation surrounding the prior policy on homosexuals in the military, by examining 10 U.S.C. § 654 and its effect, and by focusing specifically on the *Able* and *Thomasson* opinions. Part II discusses the motivation behind the "Don't Ask, Don't Tell" policy. Part III examines the policy itself. Part IV discusses the practical effects the policy has had since its implementation. Part V analyzes *Able v. United States*. Part VI scrutinizes *Thomasson v. Perry*. Part VII discusses the future of the "Don't Ask, Don't Tell" policy and Part VIII concludes by reiterating why the policy should be upheld.

II. A NEW POLICY IS NECESSARY

Following sixty years of negative treatment toward its gay members,[16] the official policy of the military toward homosexual service members was revised in 1981[17] to command the discharge of all known homosexuals in the military regardless of the service member's personal merit.[18] This directive declared that homosexuality was "incompatible with military service"[19] and that the presence of homosexuals adversely

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10. *See* Quinn-Judge, *supra* note 6, at 3.

11. *See Judge Blocks Ouster of Homosexual Sailor, supra* note 4, at A23.

12. *See "Don't Ask, Don't Tell" is Upheld in Va. Case*, USA TODAY, June 15, 1995, at 2A.

13. 880 F. Supp. 968 (E.D.N.Y. 1995).

14. 895 F. Supp. 820 (E.D. Va. 1995).

15. *See Policy on Gays in Military Goes to Appeals Court This Week*, S.F. CHRON., Sept. 11, 1995, at A4 [hereinafter *Policy on Gays*].

16. *See generally* McLaughlin, *supra* note 2, at 181-84.

17. *See id.* at 184.

18. *See id.*

19. *Id.*

affected the morale of the military.[20] Clearly, this ban focused on the status of a member's sexual orientation, and used that status as the criterion for discharge.[21] While President Clinton's pre-election promise was one source of inspiration for changing the former policy,[22] concurrent litigation attacking the ban's constitutionality also threatened its future and suggested the formulation of an alternative.[23] Numerous litigants challenged the old policy claiming, inter alia, that discharging service members based on their homosexual status violated the Equal Protection Clause of the Fifth Amendment of the Constitution.[24]

In one such case, *Meinhold v. United States Department of Defense*,[25] the Navy sought to remove Keith Meinhold, a distinguished officer who had admitted his gay orientation.[26] Meinhold filed suit against the Navy, claiming that the military's policy of discharging members on the basis of sexual orientation violated his Equal Protection rights under the Fifth Amendment.[27] The United States District Court for the Central District of California agreed.[28] While the final outcome of Meinhold's case on appeal did not find the policy unconstitutional,[29] the district court's decision at the time further illustrated the need for a new policy.[30]

The "Don't Ask, Don't Tell" policy was announced by President Clinton on July 19, 1993, following extensive political debate, newspaper editorials, and United States senatorial hearings on the gay ban.[31] Under the new policy, the military no longer seeks to remove servicemen and women solely on the basis of their homosexual status.[32] On June 1, 1994, a federal district court in Washington, D.C., held that the

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20. *See id.*

21. *See* Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 55 (1991).

22. *See* Kenneth Williams, *Gays in the Military: The Legal Issues*, 28 U.S.F. L. REV. 919, 924 (1994).

23. *See id.* at 924.

24. *See id.* at 922.

25. 34 F.3d 1469 (9th Cir. 1994).

26. *See* Williams, *supra* note 22, at 924.

27. *See id.*

28. *See* Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993).

29. *See Meinhold*, 34 F.3d at 1479.

30. *See* Williams, *supra* note 22, at 924.

31. *See id.* at 921-22.

32. *See Sense on Gays in the Military*, SACRAMENTO BEE, Apr. 3, 1995, at B6.

"[government's] regulation mandating separation from service by reason of homosexual status or on account of statements of homosexual orientation is unconstitutional."[33] The new policy's arrival had been timely, indeed.

III. THE POLICY, 10 U.S.C. § 654[34]

The "Don't Ask, Don't Tell" policy, codified at 10 U.S.C. § 654, begins by stating fifteen congressional findings that describe the motivation behind its construction.[35] First, Congress reiterated its authority to regulate the armed forces through the enumerated grant of power in Section 8 of Article I of the United States Constitution.[36] The Act then declares that there is no basic, constitutional right to serve in the armed forces.[37]

Among its findings, Congress determined that the most critical element in determining military success is unit cohesion or, "the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members."[38] Congress found that military life differs significantly from civilian life because military society is characterized by restrictions on individual behavior and liberties that would not be acceptable in civilian society.[39]

The thirteenth congressional finding of the policy declares that the prohibition against homosexual conduct continues to be a necessary component of military life.[40] The fifteenth finding states the policy's basis, by declaring that the presence of those in the armed forces who either demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale and unit cohesion that are the keystones of military capability.[41]

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33. Cammermeyer v. Aspin, 850 F. Supp. 910, 929 (W.D. Wash. 1994).

34. 10 U.S.C. § 654 (1993).

35. *See id.* § 654(a).

36. *See id.* § 654(a)(1).

37. *See id.* § 654(a)(2).

38. *Id.* § 654(a)(7).

39. *See id.* § 654(a)(8)(B); *see also* Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that the military could, to further the interest of military cohesion, prohibit a soldier from wearing religious headgear without violating the First Amendment).

40. *See* 10 U.S.C. § 654(a)(13) (1993).

41. *See id.* § 654(a)(15).

In making its findings, Congress elicited extensive testimony from both current and retired military officers, doctors, and professors of law.[42] On the subject of military personnel policies, General Norman Schwarzkopf stated that, "[i]n every case—[n]ot most cases—in every case where homosexuality became known in the unit, it resulted in a breakdown in morale, cohesion, effectiveness—[w]ith resulting dissent, resentment, and even violence."[43] Additionally, Congress was informed by witnesses that "[t]he . . . ability of Government to restrict . . . liberties is linked with the primary purpose of the military establishment to protect national security. . . . [W]here the military's need for morale is threatened, a service member's constitutional rights may be restricted lawfully by commanders."[44] Thus, the congressional determinations contained in the "Don't Ask, Don't Tell" policy are likely influenced by these individuals and their testimony concerning, inter alia, the negative impact that homosexual service members may have on military cohesion.[45]

The "Don't Ask, Don't Tell" policy states three instances in which a service member may be removed from the military for violation of the policy:[46]

1. When the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts.[47] A positive determination here will result in separation unless there are further findings that the member has demonstrated that:

> (A) such conduct is a departure from the member's usual and customary behavior;
> (B) such conduct, under all the circumstances, is unlikely to recur;
> (C) such conduct was not accomplished by use of force, coercion, or intimidation;
> (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

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42. *See* 139 CONG. REC. S7603 (1993) (statement of Sen. Coats).

43. *Id.* at S7604.

44. *Id.* at S7605.

45. *See id.*

46. *See* 10 U.S.C. § 654(b).

47. *See id.* § 654(b)(1).

(E) the member does not have a propensity or intent to engage in homosexual acts.[48]

2. When the member has stated that he or she is a homosexual or bisexual, or words to that effect.[49] Again, the member may produce evidence to show that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.[50]

3. When the member has married or attempted to marry a person of the same biological sex.[51]

For the purposes of the Act, homosexual activity is defined as both "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires"[52] and "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in the acts described [above]."[53]

On its face, the "Don't Ask, Don't Tell" policy was designed to accomplish the following goals: to no longer ban individuals merely on the basis of their status as homosexuals;[54] to prevent homosexual conduct, which Congress has determined to be detrimental to the military's goals;[55] and to reduce the incidents of military witch hunts designed to flush out those thought to be homosexual.[56] The new policy has sought to achieve these goals in several ways.

First, under the "Don't Ask, Don't Tell" policy, new applicants will not be asked questions designed to reveal their sexual orientation.[57] Further, even when a service member has been found to have committed homosexual acts or uttered a statement in violation of section 654(b)(2) of the policy (a statement that he is a homosexual or words of similar

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48. *Id.* § 654(b)(1)(A)-(E).

49. *See id.* § 654(b)(2).

50. *See id.*

51. *See id.* § 654(b)(3).

52. *Id.* § 654(f)(3)(A).

53. *Id.* § 654(f)(3)(B).

54. *See Lift the Ban*, *supra* note 8, at 7.

55. *See id.*

56. *See id.*; *see also* Philip Shenon, *When 'Don't Ask, Don't Tell' Means Do Ask and Do Tell All*, N.Y. TIMES, Mar. 3, 1996, § 4, at 1 (suggesting that contrary to the policy's intent, witch hunts continue to occur aboard Naval vessels).

57. *See* Williams, *supra* note 22, at 925.

import),[58] he still cannot be automatically separated.[59] The policy gives a service member the opportunity to present evidence to rebut the presumption that he or she is likely to engage in homosexual acts and that the particular instance in question was an aberration from his or her usual conduct.[60] The policy specifies neither the quantity nor quality of evidence that a service member would have to provide in order to successfully rebut this presumption.[61]

The "Don't Ask, Don't Tell" policy is designed so that military commanders in the armed forces are not permitted to initiate investigations into an individual's background unless there is credible information that a basis for discharge or disciplinary action exists.[62] For example, an allegation made by another service member that a soldier is homosexual, by itself, is not grounds for the commencement of an inquiry.[63] Thus, on its face, the policy in its design comports with President Clinton's promise to curtail a status-based ban,[64] while still maintaining Congress's continued desire to exclude those whose conduct would deem them unfit for military service.[65]

IV. THE POLICY'S PRACTICAL EFFECTS

Through its practical effects, the "Don't Ask, Don't Tell" policy has thus far done little to distinguish itself from the former total ban[66] in its ability to reduce the homosexual presence in the military.[67] Evidence shows that the number of discharges related to homosexual conduct has dropped from 949 in 1991 to 597 in 1994.[68] However, these numbers are deceiving because the total number of active military personnel has also declined, from 1.9 million to 1.5 million, during this time period.[69]

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58. *See* 10 U.S.C. § 654(b)(2).

59. *See id.*

60. *See* Williams, *supra* note 22, at 925.

61. *See* Walter John Krygowski, *Homosexuality and the Military Mission: The Failure of the "Don't Ask, Don't Tell" Policy*, 20 U. DAYTON L. REV. 875, 922 (1995).

62. *See* Williams, *supra* note 22, at 927.

63. *See id.*

64. *See Lift the Ban*, *supra* note 8, at 7.

65. *See* 10 U.S.C. § 654(a)(13) (1993).

66. *See And the Ban Stays On*, S.F. CHRON., May 10, 1994, at A18.

67. *See Orwell and 'Don't Tell,'* ST. PETERSBURG TIMES, Apr. 7, 1995, at 18A.

68. *See* Chris Black, *Gays in Military Find Backlash*, BOSTON GLOBE, Feb. 5, 1995, at 1.

69. *See id.*

Thus, the new policy has had the effect of keeping consistent the number of individuals removed for their homosexuality at 0.04% of the total military personnel.[70] In fact, in some military branches, the rate of discharge has even increased: in 1994, the Air Force removed 180 airmen from service for violating the policy, compared to 111 in 1992.[71] In 1995, the Army, Navy, and Marines discharged a combined total of 488 service members for violating the policy--a seventeen percent increase from the previous year.[72]

Second, although the "Don't Ask, Don't Tell" policy was designed to create an environment more accepting of homosexuals,[73] evidence suggests a backlash by those who are responsible for enforcing the policy.[74] Enforcement of the "Don't Ask, Don't Tell" policy rests within the discretion of individual commanders.[75] Surveys indicate that military commanders remain staunchly opposed to a homosexual presence in the military.[76] As a result, one of the policy's key prongs, refusing to ask new applicants about their sexual orientation, often is not enforced.[77] Specific examples include one recruit who was asked about her sexuality more than four times, both orally and on an outdated written form.[78] Further, commanders are allowed and even openly encouraged to flout the policy by creating open-ended investigations of suspected personnel.[79]

Commanders have initiated investigations based on weak allegations without credible support,[80] seized and examined personal property including letters, photographs, and diaries,[81] and interrogated parents, roommates, and friends about individuals' sexual propensities.[82] Soldiers have even been ordered to "out" any fellow soldier and report anyone

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70. *See* Jonathan S. Landay, *New Policy on Gays In Military Draws Fire One Year Later*, CHRISTIAN SCI. MONITOR, Mar. 17, 1995, at 3.

71. *See Lift the Ban*, *supra* note 8, at 7.

72. *See A Bad Policy Made Worse*, SACRAMENTO BEE, Mar. 15, 1996, at B6.

73. *See Lift the Ban*, *supra* note 8, at 7.

74. *See* Black, *supra* note 68, at 1.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See Lift the Ban*, *supra* note 8, at 7.

79. *See id.*

80. *See* Black, *supra* note 68, at 1.

81. *See id.*

82. *See id.*

suspected of being a homosexual; both violations of the policy's intent.[83] There are few reports of commanders being disciplined for these violations of the policy,[84] even though the Servicemembers Legal Defense Network cited 180 instances in 1994 in which commanders from the combined four branches of the armed forces violated the new policy.[85] Included in this report was a classic military witch hunt conducted at a Marine base in Okinawa, Japan, in which twenty-one Marines were interrogated about their sexual orientation.[86] In 1995, the Servicemembers Legal Defense Network cited 363 cases in which military officials violated the policy by either questioning service members as to their sexual orientation or by harassing soldiers suspected of being homosexuals.[87]

The discretion given to military commanders to enforce the "Don't Ask, Don't Tell" policy has not resulted in completely negative ramifications for homosexuals.[88] Some military commanders have used their discretion to protect homosexuals.[89] In certain instances, an individual will be deemed too valuable to lose and no action will be taken,[90] even though the service member admits to violating the policy.[91] Other instances point to lax enforcement by commanders, even those openly confronted with homosexual conduct by service members.[92] As of early 1995, fifteen individuals who violated the "Don't Ask, Don't Tell" policy continue to openly serve in the military.[93] In most instances, these individuals have received support from their fellow soldiers.[94] The same can be said for Keith Meinhold, who had

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83. *See id.*

84. *See id.*

85. *See* Eric Schmitt, *The New Rules on Gay Soldiers: A Year Later, No Clear Results*, N.Y. TIMES, Mar. 13, 1995, at A1.

86. *See id.*

87. *See* Dana Priest, *Military, Despite Policy Shift, Discharged More Gays in '95; Perry Promises Inquiry but Sees No 'Significant Change,'* WASH. POST, Feb. 28, 1996, at A2.

88. *See* Schmitt, *supra* note 85, at A16.

89. *See id.*

90. *See id.*

91. *See id.*

92. *See* Art Pine, *Few Benefit From New Military Policy On Gays*, L.A. TIMES, Feb. 6, 1995, at A1.

93. *See* Schmitt, *supra* note 85, at A1.

94. *See id.* at A16.

successfully challenged the former ban[95] and who was reinstated under the new policy,[96] on the condition that he not repeat his statement of homosexuality.[97] Meinhold has, for the most part, been tolerated and even embraced by his colleagues.[98]

While Keith Meinhold's situation may have ended positively, the new policy's detrimental effects on homosexuals seem to outweigh any potential benefits. The flexibility and discretion allotted to commanders gives them the ability to pick and choose whom to prosecute and whom to leave alone.[99] Further, such discretion grants commanders the ability to plea-bargain with violators, offering them immunity against prosecution in exchange for their testimony against other service members.[100]

The discretionary, arbitrary enforcement of the "Don't Ask, Don't Tell" policy has served to perpetuate a tense atmosphere,[101] wherein suspected homosexuals are aggressively singled out.[102] Particularly revealing is the statistic that, as of early 1995, only four service members were able to successfully rebut the presumption that they were likely to engage in homosexual acts, thus saving their military careers.[103]

The apparent intent of the "Don't Ask, Don't Tell" policy was to make the military more accessible to homosexuals.[104] However, in reality, Congress created a policy that has continued to produce the same effect of deterring homosexuals from careers in the military.[105] Unlike the former ban, the new policy focuses on homosexual conduct, rather than status, as the means by which unwanted members can be removed from the armed forces.[106] The next question is whether the new policy will survive the forthcoming constitutional attacks.

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95. *See* Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1479 (9th Cir. 1994).

96. *See* Lynn Rosellini, *One True Gay Life in the Navy: When the "Faggot" Met the "Bigot from Hell" and His Pals, Strange Things Soon Happened*, U.S. NEWS & WORLD REP., Feb. 6, 1995, at 60.

97. *See id.*

98. *See id.*

99. *See, e.g.*, Pine, *supra* note 92, at A1.

100. *See* Williams, *supra* note 22, at 926.

101. *See* Pine, *supra* note 92, at A1.

102. *See id.*

103. *See id.*

104. See *Lift the Ban*, *supra* note 8, at 7.

105. *See id.*

106. *See* Quinn-Judge, *supra* note 6, at 3.

V. *ABLE V. UNITED STATES*[107]

On March 30, 1995, Judge Eugene Nickerson of the Eastern District of New York held that the section of the "Don't Ask, Don't Tell" policy creating a presumption of homosexual conduct based on statements made by a service member was unconstitutional under both the First Amendment and the Equal Protection Clause of the Fifth Amendment of the United States Constitution.[108] In their complaint, six lesbian and gay members of the armed forces filed suit in federal court attacking the constitutionality of the "Don't Ask, Don't Tell" policy on both First Amendment and Equal Protection grounds, naming the United States and the Secretary of Defense as defendants.[109]

The plaintiffs won the initial battle when the federal district court granted a preliminary injunction, allowing the six members to remain in the military during the course of the litigation.[110] A second victory came when the court denied the government's motion to vacate the injunction.[111] In the next phase of the litigation, the government's motion to dismiss the complaint was granted in part and denied in part.[112] The relevant portions of that decision held that the plaintiffs had indeed stated causes of action for violation of the Equal Protection Clause of the Fifth Amendment and for violation of freedom of expression under the First Amendment.[113] The plaintiffs' claims, that the Act and Regulations violated their right to intimate association and that the Act and Regulations were overbroad and vague, were dismissed.[114]

The government appealed the initial injunction to the United States Court of Appeals for the Second Circuit.[115] In a per curiam opinion, the court upheld the preliminary injunction but remanded the case to the district court, whereupon a full trial on the merits of the plaintiffs' claims would take place.[116] Yet, before the district court addressed the merits of the case, it held that, based on the pleadings, the plaintiffs lacked

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107. 880 F. Supp. 968 (E.D.N.Y. 1995).

108. *See id.* at 979-80.

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

110. *See* Krygowski, *supra* note 61, at 914.

111. *See* Able v. United States, No. 94-0974, 1994 WL 792657, at *1 (E.D.N.Y. May 10, 1994).

112. *See* Able v. United States, 863 F. Supp. 112 (E.D.N.Y. 1994).

113. *See id.* at 114.

114. *See id.* at 115-16.

115. *See* Able v. United States, 44 F.3d 128 (2nd Cir. 1995).

116. *See id.* at 131-32.

standing to bring three of their claims.[117] Therefore, the only issue before the trial court was whether section 654(b)(2)[118] of the "Don't Ask, Don't Tell" policy violated the plaintiffs' First Amendment and Equal Protection rights guaranteed by the Fifth Amendment.[119] Section 654(b)(2) of the policy addresses removal of a service member based on statements made by the member that would create a presumption that he or she would engage in homosexual acts.[120] Because the plaintiffs in their complaint stated that they were homosexuals (as opposed to actually engaging in homosexual acts), the court only examined the validity of that section.[121] Thus, the first question under the court's consideration was whether the government could, without violating the First Amendment, prohibit a member of the armed forces from stating that he is a homosexual.[122]

The essence of the plaintiffs' First Amendment argument was that the policy inhibited their right to free speech because of the inference (of engaging in future homosexual conduct) that could be made against them by statements such as, "I am a homosexual."[123] In response, the government asserted that 10 U.S.C. § 654(b)(2) does not violate the First Amendment because this subsection is directed at acts, not speech, and also because members who face removal can rebut the presumption that they will engage in homosexual acts.[124]

Similar to the *Able* plaintiffs, opponents of the "Don't Ask, Don't Tell" policy claim that the policy "chills" service members' First Amendment rights to state their sexual orientation.[125] The policy's rebuttable presumption arises only with service members whose statements reveal a homosexual or bisexual orientation.[126] Conversely, a service member's statement of heterosexual orientation has no consequences.[127] Therefore, it may be argued that the policy seeks to engage in content-

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117. *See* Able v. United States, No. 94-0974, 1995 WL 116322, at *5 (E.D.N.Y. Mar. 14, 1995).

118. 10 U.S.C. § 654(b)(2) (1993).

119. *See* Krygowski, *supra* note 61, at 917.

120. *See* 10 U.S.C. § 654(b)(2 (1993).

121. *See* Able v. United States, 880 F. Supp. 968, 972 (E.D.N.Y. 1995).

122. *See id.* at 973.

123. *See id.*

124. *See id.*

125. *See, e.g.*, Krygowski, *supra* note 61, at 927.

126. *See* Williams, *supra* note 22, at 929.

127. *See id.*

based restriction of homosexual service members' statements.[128] Such restriction would undoubtedly fail under strict scrutiny,[129] and opponents would argue, therefore, that the policy should be found unconstitutional.[130]

In its analysis of the First Amendment issue, the *Able* court acknowledged that the speech uttered by the plaintiffs (an admission of their homosexuality) had significant value and, therefore, fell within a category of speech protected by the First Amendment.[131] Thus, the government could regulate the content of plaintiffs' speech only after showing that such regulation was narrowly tailored to further a compelling interest.[132] At this point though, it seems the district court had blurred the issue.

The "Don't Ask, Don't Tell" policy, it can be argued, is not aimed at regulating "homosexual" speech. The policy merely uses speech as a way of identifying certain service members whose future conduct could be detrimental to the military.[133] The court refused to accept this use of speech as a predictor of future acts, stating that "the government elected to allow them to join and remain in the Services only on the condition that they remain silent regarding their status."[134]

In attempting to provide a basis for its decision, the court found that there was no true distinction between the government's definition of homosexual "orientation" and homosexual "propensity," going so far as to call the treatment of these terms "Orwellian."[135] The court declared that a service member's chances of rebutting the presumption of conduct was at best "hypothetical."[136] The court further stated that the government is still seeking to remove service members on the basis of their status as homosexuals, whose presence is not welcome by the majority of heterosexual members of the military.[137] The court concluded that, under the First Amendment, removal proceedings cannot

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128. *See id.*

129. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (holding that content-based governmental restrictions on free speech will be subject to strict scrutiny).

130. *See* Williams, *supra* note 22, at 929-30.

131. *See* Able v. United States, 880 F. Supp. 968, 973 (E.D.N.Y. 1995).

132. *See id.*

133. *See* Thomasson v. Perry, 895 F. Supp. 820, 824 (E.D. Va. 1995).

134. *Able*, 880 F. Supp. at 974.

135. *Id.* at 975

136. *Id.*

137. *See id.* at 979.

be commenced solely on the basis of statements of homosexual orientation.[138] The court therefore held that section 654(b)(2) of the Act is unconstitutional under the First Amendment.[139]

In addressing plaintiffs' Equal Protection claim, the court made a determination that the policy has provided heterosexuals, on the basis of sexual status, the right to exercise free speech while denying that right to homosexual service members.[140] The court declared that, in order for the policy to stand, the government had to show that the policy is "tailored to serve a substantial governmental interest."[141] Without deciding whether the government's purpose was to prevent homosexual acts from occurring, or whether it was merely a pretext for the military's possible heterosexual prejudices, the court declared that the government had not met its burden.[142] Therefore, the court held that section 654(b)(2) of the Act is also invalid under the Equal Protection component of the Fifth Amendment.[143] The court did not provide any other support or explanation for its holding.[144] The government appealed the district court's ruling.[145]

The district court's analysis of the action taken by Congress in creating the new policy is accurate. Yet the reasoning used to strike down the "Don't Ask, Don't Tell" policy as applied to these six plaintiffs is without support,[146] and the decision should therefore be reversed on appeal. The court was on-target when it stated that the impetus behind the new policy was that "[d]efendants recognized that a policy mandating discharge of homosexuals merely because they have a homosexual orientation or status could not withstand judicial scrutiny"[147] and that "[d]efendants therefore designed a policy that purportedly directs discharge based on 'conduct' . . . ."[148] Yet the court stretched logical reasoning when it stated that an admission or acknowledgment of status is "transmogrified into an admission of misconduct, and misconduct that the

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138. *See id.* at 976.

139. *See id.* at 980.

140. *See id.* at 980.

141. *Id.* (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972)).

142. *See id.*

143. *See id.*

144. *See id.*

145. *See "Don't Ask, Don't Tell"? Don't Count On It,* ATLANTA CONST., Apr. 3, 1995, at A6.

146. *See* 141 CONG. REC. S5171 (1995) (statement of Sen. Nunn).

147. *Able*, 880 F. Supp. at 975.

148. *Id.*

speaker has the practically insurmountable burden of disproving."[149] Without supporting its contention, the court declared that the policy treats an admission of homosexual orientation as (irrebuttable) proof that the individual will commit homosexual acts.[150] Yet at trial, the government produced evidence of three separate instances wherein members of the Navy were able to rebut the presumption of their tendency to commit homosexual acts, after they had stated that they were homosexuals.[151] Such proof was offered in an attempt to show that there was a legitimate chance of avoiding removal under the new policy.[152] Without explaining its reasoning, the court dismissed this evidence as "three atypical results that are obviously aberrations that cannot be taken to show that the Act holds out any realistic opportunity to rebut the presumption."[153]

Further, the court's analysis of the plaintiffs' Equal Protection claim is flawed.[154] First, the court utilizes, but does not provide any explanation for applying, an intermediate standard of review.[155] The employment of this standard places a greater burden on the government, one that was not deemed necessary in five previous federal appeals cases[156] involving the challenging of a military policy on the basis of sexual orientation.[157] When an Equal Protection claim arises related to an issue of sexual orientation, the appropriate standard remains rational review, not intermediate scrutiny.[158] As a class, homosexuals have yet to be recognized as a discrete, insular minority, marginalized by society and therefore worthy of heightened scrutiny.[159]

Second, the court provided no justification for determining that the government failed to meet its required showing.[160] The "Don't Ask, Don't Tell" policy as codified relies not upon random prejudices but upon

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149. *Id.*

150. *See id.* at 976.

151. *See id.*

152. *See id.*

153. *Id.*

154. *See* 141 CONG. REC. S5171 (1995) (statement of Sen. Nunn).

155. *See Able*, 880 F. Supp. at 980.

156. *See* Walmer v. United States Dep't of Defense, 52 F.3d 851 (10th Cir. 1995); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc); Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989).

157. *See, e.g.*, Thomasson v. Perry, 895 F. Supp. 820 (E.D. Va. 1995).

158. *See id.* at 827.

159. *See id.*

160. *See Able*, 880 F. Supp. at 980.

Congress's opinion that unit cohesion is put at risk by the presence of homosexual conduct in the armed forces.[161] Instead of addressing the policy as it stands, the court relied on the testimony provided by those in favor of a complete ban, made during the Senate hearings before the "Don't Ask, Don't Tell" policy was effectuated.[162]

While the government did discuss possible prejudices against homosexuals as an alternative argument, the court admitted that within fifteen findings supporting the "Don't Ask, Don't Tell" policy, there is no mention of heterosexual animosity toward homosexuals.[163] Nor is there discussion of what effect the reactions of heterosexuals towards a homosexual presence would have on unit cohesion.[164] The court's determination that the policy violates the plaintiffs' right to Equal Protection is unsubstantiated, without rational support, and has been criticized on the floor of the United States Senate.[165] Senator Nunn stated:

> [T]he *Able* decision was not correctly decided . . . particularly in view of the unusual approach taken by the district judge in which he, in effect, drafted his own statute, manufactured his own legislative purposes, and reviewed the policy without regard to the standards articulated over a long period of years by the Supreme Court of the United States.[166]

Able v. United States is a poorly written opinion: one that provides more emotion than logic and supportive precedent.[167] For the reasons heretofore discussed, *Able v. United States* should be reversed on appeal.[168]

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161. *See* 10 U.S.C. § 654(a)(14) (1993).

162. *See Able*, 880 F. Supp. at 976.

163. *See id.*

164. *See id.*

165. *See* 141 CONG. REC. S5171-75 (1995) (statement of Sen. Nunn).

166. *Id.* at S5173.

167. *See id.*

168. *See* Deborah Pines, *Military Policy On Gays Debated In Circuit Court*, N.Y.L.J., Jan. 17, 1996, at 1.

VI. *THOMASSON V. PERRY*[169]

The "Don't Ask, Don't Tell" policy went into effect on February 28, 1994.[170] On March 2, 1994, Naval Lieutenant Paul Thomasson wrote a letter to his superior officer declaring, "I am gay."[171] Immediately, the Navy began removal proceedings against the ten year soldier who had a stellar record[172] and the support of his commanding officer.[173] Thomasson's hearing lasted two days before a Naval Board of Inquiry[174] and included testimony, argument, and the introduction into evidence of Thomasson's service record and documents concerning the Navy's stance on homosexuality.[175] The Navy acknowledged both Thomasson's superior service record[176] and the lack of evidence indicating that he had engaged in any homosexual acts.[177] However, Thomasson refused to introduce into evidence any rebuttal of the presumption, based on his prior statement, that he has a propensity to engage in homosexual acts.[178] The Board of Inquiry thus unanimously determined that Thomasson had not rebutted the presumption raised by his statements and recommended that Thomasson be honorably discharged.[179]

A Naval Board of Review unanimously affirmed the Board of Inquiry's decision to remove Thomasson.[180] The district court of Virginia granted a preliminary injunction preventing the Navy from removing Thomasson pending the resolution of his lawsuit.[181] Thus began *Thomasson v. Perry*,[182] a second challenge to the "Don't Ask, Don't Tell" policy that is headed toward a federal court of appeals[183]

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169. 895 F. Supp. 820 (E.D. Va. 1995).

170. See Schmitt, *supra* note 85, at A16.

171. *See Policy on Gays*, *supra* note 15, at A4.

172. *See* Kim I. Mills, *Clinton's 'Don't Ask' Policy Faces 2 Telling Court Fights*, CHI. SUN-TIMES, Sept. 11, 1995, at 38.

173. *See id.*

174. *See Thomasson*, 895 F. Supp. at 823.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *Id.*

183. *See "Don't Ask, Don't Tell" is Upheld in Va. Case*, *supra* note 12, at 2A.

and perhaps ultimately to the United States Supreme Court for its final disposition.[184]

However, unlike the plaintiffs in *Able v. United States*,[185] Thomasson was removed from the Navy after the United States District Court for the Eastern District of Virginia denied Thomasson's motion for summary judgment.[186] The court granted the government's motion for summary judgment,[187] holding that the "Don't Ask, Don't Tell" policy is constitutional and does not violate Thomasson's First Amendment or Fifth Amendment Equal Protection guarantees.[188]

Thomasson brought an action before the district court, seeking permanent injunctive relief to prevent the government from removing him on the basis of his statement.[189] Thomasson challenged the "Don't Ask, Don't Tell" policy alleging violations of the First Amendment, the Equal Protection Clause of the Fifth Amendment, the Due Process Clause of the Fifth Amendment, and the Administrative Procedure Act.[190]

Thomasson first argued that the "Don't Ask, Don't Tell" policy infringes upon his First Amendment rights because the policy suppresses certain statements, such as a declaration of homosexuality, by making those statements in and of themselves grounds for dismissal.[191] The court, however, pointed out that the "Don't Ask, Don't Tell" policy does not mandate removal on the basis of statements.[192] Rather, "the policy uses the speech as evidence, via rebuttable presumption, that the service member's declaration of his homosexuality will lead to homosexual conduct."[193] The court discussed how evidence of speech to prove motive or intent has been held not to violate the First Amendment in a criminal context.[194] The same can be said for a civil context, wherein the litigant has even fewer constitutional protections as compared to a

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184. *See Judge: Rights Not Violated By Military Policy On Gays*, ORLANDO SENTINEL, June 15, 1995, at A12.

185. 880 F. Supp. 968 (E.D.N.Y. 1995).

186. *See Thomasson*, 895 F. Supp. at 831.

187. *See id.*

188. *See id.*

189. *See id.* at 821.

190. *See id.*

191. *See id.* at 824.

192. *See id.*

193. *Id.*

194. *See id.*; *see also* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (holding that the evidentiary use of speech to prove intent or motive is consistent with the First Amendment).

criminal defendant.[195] Further, if Thomasson's speech were to be considered an admission, such an admission could be used as evidence of facts admitted.[196]

Thomasson further argued that the policy penalized an individual's truthful statements about his own identity and his affiliation with particular groups.[197] The court dismissed this aspect of Thomasson's argument by citing precedents holding that "a service member's expressive rights must often yield to the necessities of military life."[198] Here, the court's reasoning parallels several of the congressional findings made in the "Don't Ask, Don't Tell" policy that indicate that military life is different because individuals may be restricted in ways that would be unacceptable in civilian life.[199] The court dismissed Thomasson's First Amendment claim by recognizing that the policy seeks to remove service members based on their engaging in proscribed homosexual conduct, not solely on the basis of their speech.[200] For these reasons, the court held that the "Don't Ask, Don't Tell" policy does not violate Thomasson's rights under the First Amendment.[201]

Unlike the threadbare discussion of the plaintiffs' First Amendment claim in *Able*,[202] the *Thomasson* court provides an organized and detailed analysis as to why the policy is constitutional under the Fifth Amendment's Equal Protection Clause.[203] Thomasson had argued an Equal Protection violation on three grounds: the policy discriminated against homosexuals on the basis of their status as homosexuals; it discriminated against acknowledged or "open" homosexuals on the basis of their status; and it irrationally presumed that "open" homosexuals will violate military codes of conduct.[204]

The court began its discussion by first determining that the proper standard of review is rational review,[205] unlike the standard of

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195. *See Thomasson*, 895 F. Supp. at 824.

196. *See id.*; High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

197. *See Thomasson*, 895 F. Supp. at 825.

198. *Id.*

199. *See* sources cited *supra* note 39 and accompanying text.

200. *See Thomasson*, 895 F. Supp. at 825.

201. *See id.* at 825, 831.

202. Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995).

203. *See Thomasson*, 895 F. Supp. at 826-27.

204. *See id.* at 826.

205. *See id.* at 826-27.

intermediate scrutiny utilized in *Able*.[206] In support of its determination, the district court pointed to prior Equal Protection challenges made by homosexuals against the former policy.[207] In each instance, five federal courts of appeal held that rational review was the proper standard, whether the basis of the challenge was homosexual conduct or statements.[208] The court refused to grant Thomasson's request for heightened scrutiny, citing the Supreme Court's "great 'reluctan[ce]' to expand the number of classifications afforded heightened scrutiny."[209]

In evaluating the policy under rational review, the court sought to determine whether the policy was rationally related toward achieving a legitimate governmental purpose.[210] Further burdening Thomasson's chances of success on his Equal Protection claim was the precedent that, in any proceeding challenging the validity of a military action, courts must always accord great deference to the judgment of political branches.[211] Specifically, the Supreme Court has noted the lack of competence courts maintain in questioning decisions made by Congress in a military context.[212]

The district court held that in creating the "Don't Ask, Don't Tell" policy, the government had a legitimate purpose in regulating the military, and that the policy, as created, rationally furthered that end.[213] First, the court recognized that the constitutional powers given to Congress to regulate the military and "make all laws necessary and proper to that end"[214] are broad and sweeping.[215] Second, the court gave credence to several congressional findings explicitly stated in the policy.[216]

Among the findings respected by the court are that unit cohesion remains "the single most important factor in maintaining an effective militia."[217] The court accepted the government's argument that allowing individuals who are likely to commit homosexual acts to remain in the military would, by their presence, introduce sexual tension into the units,

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206. *See Able*, 880 F. Supp. at 980.

207. *See Thomasson*, 895 F. Supp. at 826.

208. *See id.*

209. *Id.* at 827; *see* Cleburne v. Cleburne, 473 U.S. 432 (1985).

210. *See Thomasson*, 895 F. Supp. at 827.

211. *See id.* at 827-28.

212. *See id.*; Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

213. *See Thomasson*, 895 F. Supp. at 830.

214. *Id.* at 827; *see* United States v. O'Brien, 391 U.S. 367, 377 (1968).

215. *See Thomasson*, 895 F. Supp. at 827.

216. *See id.* at 828-29.

217. *Id.* at 828.

which would in turn undermine unit cohesion and jeopardize military preparedness.[218] The court supported this statement by declaring that, "[t]he military is entitled to deference for its professional determination that these legitimate concerns would adversely impact our nation's military readiness."[219]

The district court also found the "Don't Ask, Don't Tell" policy's rebuttable presumption to be a rational means of prohibiting individuals who are likely to engage in homosexual conduct from serving in the military.[220] The court cited precedent for the proposition that using statements as a means to indicate a propensity to engage in sexual conduct is a rational and reliable indicator of an individual's direction and drive.[221] The court concluded its analysis by restating its refusal to second guess the rationale or motivations of the government.[222] Rather, the court noted that it must simply determine whether the government's purpose in creating the "Don't Ask, Don't Tell" policy was legitimate.[223] If so, the court needed to determine whether the means stated by the policy were rationally related to achieving the policy's ends.[224] Because the court determined that the government had made that showing,[225] the court held that the policy did not violate the Fifth Amendment's Equal Protection clause.[226]

The court then turned its attention to Thomasson's remaining claims.[227] Thomasson stated that the policy violated the Due Process Clause of the Fifth Amendment by: "(1) creating and applying a legal classification that is unconstitutionally overbroad; (2) applying a presumption that is in fact irrebuttable; and (3) imposing an irrebuttable presumption grounded on a class-based expectation."[228] Thomasson argued that the statute was overbroad insofar as it provided for removal

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218. *See id.* at 828-29.

219. *Id.* at 829.

220. *See id.* at 830.

221. *See id.* at 829-30; Steffan v. Perry, 41 F.3d 677, 690 (D.C. Cir. 1994) (en banc).

222. *See Thomasson*, 895 F. Supp. at 830.

223. *See id.*

224. *See id.*

225. *See supra* notes 42-45 and accompanying text (discussing congressional record that supports the findings contained within the "Don't Ask, Don't Tell" policy and therefore supports the *Thomasson* court's determination that the policy passes rational review).

226. *See Thomasson*, 895 F. Supp. at 831.

227. *See id.* at 830.

228. *See id.*

of those who may be homosexual, but who may not actively engage in the prohibited conduct.[229]

In dismissing Thomasson's first argument, the court held that the statute dictates removal for those members who have raised, but cannot rebut, the presumption of their intended conduct.[230] The fact that there may be individuals who declare a homosexual orientation, but in fact intend on remaining celibate, was not at issue.[231] Both types of individuals are placed under the same burden of rebutting the presumption or facing removal, and through this same treatment, the policy cannot be deemed overbroad.[232]

The court dismissed Thomasson's second argument by pointing to empirical data showing that three members have in fact been able to rebut the presumption after making statements regarding their homosexuality.[233] Therefore the policy is not irrebuttable.[234] Thomasson's third Due Process argument focused on the constitutionality of creating an irrebuttable presumption based on a class-based expectation, when the issue of violating the policy calls for an individual assessment.[235] The court dismissed this argument by pointing to the policy's procedure of allowing the service member the opportunity to rebut the presumption and, as was the case with Thomasson, to have a full hearing on the merits of his charged violation.[236] Finally, on the basis that the policy provides for, and the fact that the Navy had given Thomasson a full trial on the merits of his case, the court held that his removal by the Navy was neither arbitrary nor unsupported by substantial evidence and, therefore, not in violation of the Administrative Procedure Act.[237] Therefore, because the "Don't Ask, Don't Tell" policy does not violate Thomasson's rights under the First Amendment,[238] the Equal Protection[239] or Due Process[240] Clauses of the Fifth Amendment, or the

229. *See id.* at 831.
230. *See id.*
231. *See id.*
232. *See id.*
233. *See id.*
234. *See id.*
235. *See id.*
236. *See id.*
237. *See id.*
238. *See id.*
239. *See id.*
240. *See id.*

Administrative Procedure Act,[241] the court granted the government's cross-motion for summary judgment.[242]

The *Thomasson* decision is clearly at odds with Judge Nickerson's opinion in *Able v. United States*.[243] In upholding the "Don't Ask, Don't Tell" policy, Judge Claude M. Hilton used a systematic approach in analyzing and dismissing Thomasson's numerous claims. The opinion is written concisely and is supported throughout by precedent established by both federal courts of appeals as well as the Supreme Court.[244] In this respect, *Thomasson* differs from the *Able* opinion written by Judge Nickerson, whose rhetoric has lead that opinion to be referred to as a "question-begging pronouncement disguised as jurisprudence"[245] whose passages "sound more like an editorial from the New Republic than a sober judgment by a real jurist."[246]

Thomasson appealed his decision and his case was heard before the United States Court of Appeals for the Fourth Circuit, *en banc*, on December 5, 1995.[247] On April 5, 1996, in a 9-4 decision, the Fourth Circuit affirmed Judge Hilton's decision,[248] thus delivering supporters of the "Don't Ask, Don't Tell" policy a major victory.[249] In refusing to accede to Thomasson's arguments that the policy is unconstitutional,[250] the court emphasized its reluctance to overturn congressional laws governing military life stating:

> Congress has enacted and the President has signed legislation providing that a propensity or intent to engage in homosexual acts is incompatible with the distinctive requirements of military service. This considered judgment on the part of the coordinate

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241. *See id.*

242. *See id.*

243. 880 F. Supp. 968 (E.D.N.Y. 1995); *see Military Policy on Gays*, PITT. POST-GAZETTE, June 15, 1995, at A13.

244. *See Thomasson*, 895 F. Supp. at 820.

245. Samuel Francis, *The Politics of Immorality*, WASH. TIMES, Apr. 7, 1995, at A21.

246. *Id.*

247. *See* Randolph Goode, *Gay Policy Prompts Court Quiz; Judges Not Expected To Rule Till Early 1996*, RICHMOND TIMES-DISPATCH, Dec. 6, 1995, at B1.

248. *See* Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).

249. *See* Don Van Natta, Jr., *Rethink Ruling on Gay Ban, Appeals Panel Tells Judge*, N.Y. TIMES, July 2, 1996, at A8.

250. *See Thomasson*, 80 F.3d at 919.

> branches of our government is one that the third branch has a solemn duty to respect.[251]

In doing so, the court continued a tradition of judicial deference toward congressional laws aimed at regulating military policy.[252]

Able v. United States[253] had also been appealed,[254] and the three-judge panel of the United States Court of Appeals for the Second Circuit heard the government's appeal on January 16, 1996.[255] On July 1, 1996, the Second Circuit vacated Judge Nickerson's decision and remanded the case back to the district court.[256] At the district court level, Judge Nickerson had denied the plaintiffs standing to challenge section 654(b)(1)--the section of the "Don't Ask, Don't Tell" policy that proscribes homosexual conduct.[257] Therefore, the trial court only examined the constitutionality of section 654(b)(2)--the section of the policy addressing removal of a service member based on statements made by the member that would create a presumption that he would engage in homosexual acts.[258] On appeal, the court held that Judge Nickerson had erred in granting the plaintiffs' standing to challenge only one section of the "Don't Ask, Don't Tell" policy stating:

> [t]he subsections rise or fall together: if Congress is permitted to require that service members be discharged if they engage in homosexual acts, then both subsections are constitutional, but if the Constitution prohibits such a requirement, then the statements presumption of [section 654](b)(2) must fall as well.[259]

Thus, the court vacated Judge Nickerson's decision and remanded the matter back to the district court, whereupon the merits of both sections of the policy could be adjudicated.[260]

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251. *Id.* at 923.

252. *See* Neil A. Lewis, *Court Upholds Clinton Policy On Gay Troops*, N.Y. TIMES, Apr. 6, 1996, at A1.

253. 880 F. Supp. 968 (E.D.N.Y. 1995).

254. *See Policy on Gays in Military Goes to Appeals Court This Week*, S.F. CHRON., Sept. 11, 1995, at A4.

255. *See* Pines, *supra* note 168, at 1.

256. *See* Able v. United States, 88 F.3d 1280 (2d Cir. 1996).

257. *See* Able v. United States, No. 94-0974, 1995 WL 116322, at *5 (E.D.N.Y. Mar. 14, 1995); *see also supra* pp. 319-20.

258. *See id.*

259. *Able*, 88 F.3d at 1292.

260. *See id.* at 1300.

Although the Second Circuit neither affirmed nor reversed the district court, the court is considered to be more liberal than the Fourth Circuit[261] and, therefore, more likely to declare the policy unconstitutional.[262] However, the language employed in the court's opinion suggests that, had it decided the merits of the case, it may have reached an unexpected outcome.

In examining section 654(b)(2) of the "Don't Ask, Don't Tell" policy, the court acknowledged that governmental restrictions on individuals' liberties, which would be abhorrent in civilian society, can be permissible in a military context.[263] Further, in addition to stating that the government had an important interest in preventing homosexual conduct,[264] the court found the government's use of speech to create a rebuttable presumption of future homosexual conduct to be sensible:[265] "This evidentiary use substantially furthers the government's interest because it is plain to us that there is a correlation between those who state they are homosexual and those who engage in homosexual acts."[266] The court thus declared, "if the acts prohibition of [section 654](b)(1) is constitutional (the issue to be decided on remand), we believe that the statements presumption of [section 654](b)(2) does not violate the First Amendment."[267]

Therefore, Congress has thus far succeeded in creating a policy that, in effect, continues the former ban against homosexuals while at the same time passes at least one of the constitutional attacks promulgated against it.[268] However, on July 1, 1996, Paul Thomasson petitioned the Supreme Court of the United States to review his case,[269] thus making *Thomasson v. Perry*[270] the first challenge to the "Don't Ask, Don't Tell" policy to reach the nations's highest court.[271]

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261. *See* Van Natta, *supra* note 249, at A8.

262. *See id.*

263. *See Able*, 88 F.3d at 1293.

264. *See id.* at 1296.

265. *See id.*

266. *Id.* at 1296-97.

267. *Id.* at 1296.

268. *See* Thomasson v. Perry, 895 F. Supp. 820 (E.D. Va. 1995).

269. *See* Deb Price, *Discharged Officer Takes Heart in Recent Court Decisions as He Challenges Gay Ban*, DET. NEWS, July 5, 1996, at D9.

270. Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).

271. *See 'Don't Ask' Ruling Sent Back*, NAT'L L.J., July 15, 1996, at A8.

VII. THE FUTURE SUCCESS OF "DON'T ASK, DON'T TELL"

While the "Don't Ask, Don't Tell" policy's practical effects make it indistinguishable from the former ban,[272] the policy is likely to be upheld by future courts for several reasons. First, courts are not quick to overrule Congress's discretion and judgment when regulating the military.[273] Second, the policy does not automatically ban those who have admitted their homosexuality.[274] The policy permits those who have made an admission of homosexual orientation to nonetheless prove that they will not engage in homosexual acts, although the nature and quantity of evidence required to rebut the presumption has yet to be firmly established.[275] While Judge Nickerson may deride the success rate,[276] the fact remains that as of January 16, 1996, seven individual service members have rebutted the presumption and have thus remained in the military.[277]

Further, Congress has the right to proscribe behavior deemed detrimental to military success.[278] In proscribing homosexual conduct in the military, Congress has made an arguably rational conclusion that those who identify themselves as homosexuals through statements do so because they either have engaged in homosexual activity or may have the inclination to do so in the future.[279] Therefore, from the government's and the *Thomasson*[280] court's point of view, the rebuttable presumption is a valid instrument in focusing attention upon those individuals who are likely to violate the policy by engaging in homosexual conduct.[281]

By granting a soldier the opportunity to avoid removal by rebutting the presumption and by characterizing the "Don't Ask, Don't Tell" policy as a proscription on conduct, as opposed to mere status, Congress has created a policy that will likely survive the First Amendment and Equal Protection attacks that the former ban would not have withstood.[282]

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272. *See* Mills, *supra* note 172, at 38.

273. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981).

274. *See* Bruce Fein, *Judge Turned Advocate*, WASH. TIMES, Apr. 3, 1995, at A18.

275. *See id.*

276. *See id.*

277. *See* Pines, *supra* note 168, at 1.

278. *See, e.g.*, U.S. CONST. art. I, § 8; *see Rostker*, 453 U.S. at 57; United States v. O'Brien, 391 U.S. 367, 381 (1968).

279. *See* Fein, *supra* note 274, at A18.

280. Thomasson v. Perry, 895 F. Supp. 820 (E.D. Va. 1995).

281. *See* Fein, *supra* note 274, at A18.

282. *See, e.g.*, Cammermeyer v. Aspin, 850 F. Supp. 910, 926 (U.S.D.C. 1994).

The First Amendment attacks should fall because the "Don't Ask, Don't Tell" policy is not about censoring service members' right to free speech, but merely uses their speech as an indicator of future conduct.[283] The First Amendment's protective net, which allows citizens to say essentially what they please, is not cast as widely in the military.[284] For example, in civilian society, a female may utter a seemingly harmless term of affection to a male, and her statement will likely be protected as free speech.[285] The same statement uttered in a military context could result in disciplinary action for sexual harassment.[286] To create the most effective military, the government must be free to regulate its armed forces without overbearing judicial restraints.[287]

In terms of an Equal Protection argument, homosexuals have never been recognized as a class warranting any greater protection than that of rational review.[288] Further, the courts have traditionally given greater latitude to the government to create rules for the military.[289] For these reasons, an Equal Protection attack should also fall.

When comparing the two district court opinions, *Thomasson* provided strong, precedentially supported explanations for the lack of an Equal Protection violation, while Judge Nickerson in *Able*[290] did not apply the correct standard of review[291] and was, in essence, criticized by the Second Circuit for his procedural handling of the case.[292] In the meantime, the *Thomasson* opinion has apparently been holding greater precedential weight than its conflicting brother, *Able*.[293] In a recent decision, a district court upheld the Navy's removal of Lieutenant Richard Selling for violating the military's policy against homosexual conduct.[294] In doing so, the judge held that the military's 'Don't Ask, Don't Tell'

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283. *See Thomasson*, 895 F. Supp. at 824.

284. *See Dubious Decision On 'Don't Ask,'* CHI. TRIB., Apr. 2, 1995, at 2.

285. *See id.*

286. *See id.*

287. *See Who Runs the Armed Services?*, DET. NEWS, Apr. 4, 1995, at A8.

288. *See* Bruce B. Auster, *Next: A Federal Courtroom*, U.S. NEWS & WORLD REP., July 5, 1993, at 47.

289. *See id.*

290. Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995).

291. *See id.* at 980.

292. *See* Bill Alden, *Ban Upset on Military Policy on Gays: New Life Given Fed'l "Don't Ask, Don't Tell" Policy*, N.Y.L.J., July 2, 1996, at 1.

293. *See* Michael James, *Judge's Ruling Allows Navy to Discharge Gay Md. Officer: No Violation is Found of His Freedom of Speech*, BALTIMORE SUN, Nov. 2, 1995, at 3A.

294. *See id.*

policy "is designed to prevent homosexual acts and any incidental burden on speech resulting from its application does not violate the First Amendment."[295]

VIII. CONCLUSION

In enacting the "Don't Ask, Don't Tell" policy, Congress has essentially continued the former ban's effect of minimizing, though not totally eliminating, the homosexual presence in the military.[296] However, by focusing on homosexual conduct and not homosexual status, Congress has created a policy that will likely continue to withstand constitutional attacks.[297] Eventually, the final outcome of the "Don't Ask, Don't Tell" policy will be decided by the Supreme Court.[298] On its face, the "Don't Ask, Don't Tell" policy presents itself as a compromise between the former ban and an encompassing embrace of homosexuality.[299] Therefore, the Supreme Court may decide to uphold the policy for the very reason that it presents itself as a compromise.[300] While the policy does not allow homosexuals to "openly" serve, the "Don't Ask, Don't Tell" policy still grants them greater freedom to serve in the military than they have ever before enjoyed.

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295. *Id.*

296. *See And the Ban Stays On*, *supra* note 66, at A18.

297. *But see* Williams, *supra* note 22; Krygowski, *supra* note 61 (discussing the unconstitutionality of the "Don't Ask, Don't Tell" policy).

298. *See* Carol Ness, *'Don't Ask' Ruling Has Gay Advocates Beaming; Judge Calls Military Policy "Orwellian," Puts it on Path to Supreme Court*, S.F. EXAMINER, Mar. 31, 1995, at A1.

299. *See* Larry Neumeister, *Appeals Court Hears First Challenge to "Don't Ask, Don't Tell,"* ASSOC. PRESS, Jan. 16, 1996.

300. *See id.*