GAZE IN THE MILITARY:
A RESPONSE TO PROFESSOR WOODRUFF

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William A. Woodruff’s article, *Homosexuality and Military Service*, is a significant document because of its author’s credentials. As Chief of the Litigation Division, Office of the Judge Advocate General, Professor Woodruff was at the center of the legal battle over the military’s exclusion of gays. He has reviewed all the arguments that the military has been able to generate for its policy, and has had ample opportunity to separate the wheat from the chaff. He has thought about these issues for a long time. What’s more, here he is speaking in his own voice, and he is an enthusiastic proponent of the exclusion. Unlike the legal papers he drafted before his retirement from active duty, this piece has not needed the approval of any committee or bureaucracy. Here, if anywhere, we can expect to find the strongest case that can be made for the exclusion policy. Professor Woodruff’s impressive background is a two-edged sword, however. For what are we to think if the task of persuasively defending the policy turns out to be beyond his capacities?

I. DEFERENCE

Professor Woodruff’s central claim is that the civilian branches of government ought to defer to the military about military matters.¹ He puts the point in exceedingly strong terms:

> when special interest groups seek to use the military to enhance their own social and political agenda any doubts about the impact of their proposal on military efficiency and combat readiness must be resolved in favor of the professional military judgment of those charged with leading our military in combat.²

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* Assistant Professor of Politics, Princeton University. Thanks to Robert Pushaw and William Woodruff for helpful comments on an earlier draft. Professor Woodruff’s response to this essay was originally a bit longer than it is now, since I responded to some of his criticisms by deleting errors he had caught. This essay is dedicated to Dr. Melvin Gilbert, a cheerful and courageous warrior.

1. Professor Woodruff claims I have misunderstood him. William A. Woodruff, *A Reply to Professor Koppelman*, 64 UMKC L. Rev. 195 (1995). I don’t think so. He states that the judiciary has a constitutional obligation to defer to the military. He emphasizes that the courts did not change the racial segregation policy, implying that it would have been wrong for them to do so. Congress and the Executive, on the other hand, are constitutionally free to disregard the military’s advice, but he clearly thinks such disregard would be foolish and dangerous.

2. William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation and Litigation*, 64 UMKC L. Rev. 121, 128 (1995) (emphasis added). It is far from clear, incidentally, that professional military judgment points as clearly in favor of the policy as Woodruff indicates. For example, Woodruff invokes the judgment of “military leaders such as General Norman Schwartzkopf,” *id.* at 125, but Schwartzkopf has privately stated that he won’t mind the policy’s termination, since he has known many fine gay soldiers. *See Randy Shilts, Conduct Unbecoming: Lesbians and Gays in the U.S. Military, Vietnam to the Persian Gulf* 6, 426-27 (1993).
Moreover, he emphasizes that the consequences for combat readiness of any proposed innovation in the armed forces can never be known for certain in advance.\(^3\) This implies that there will always be "doubts about the impact" of any proposal. Taken together, these arguments indicate that the military ought to be the final arbiter of any issue about which it makes claims on the basis of "military efficiency and combat readiness."

Woodruff argues that these are attractive principles that emerge from the case law and the history of civilian-military relations. In that case law and that history, there are, however, two major cases that he does not consider or even mention. When we add these to the sample, a very different picture emerges.

His most conspicuous omission is the Supreme Court’s decision in *Korematsu v. United States*,\(^4\) affirming the constitutionality of the forced relocation, without charge or trial, of American citizens of Japanese ancestry into concentration camps during World War II. *Korematsu* relied on precisely the same considerations of military necessity that Woodruff invokes, and used language that strongly supports his claims.\(^5\) Woodruff claims that the exclusion of gays from the military is not motivated by hostility toward them, but rather by the legitimate needs of the military. Similar claims were made in *Korematsu*, and the Court readily accepted them.\(^6\)

If *Korematsu* were still good law, it would be the most powerful authority he could cite in support of his position. Indeed, Woodruff’s argument inescapably implies that *Korematsu* was rightly decided. To have decided the case the other way, the Court would have had to substitute its judgment for that of the military, which Woodruff says it must never do. It is, however, understandable that Woodruff maintains a delicate silence about that case. Congress has lately declared, and the Court has since agreed, that “a grave injustice was done” by the forced relocation and internment, which “were carried out without adequate security reasons . . . and were motivated largely by racial

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5. See, e.g., *id.* at 219-20:
[W]e are not unmindful of the hardships imposed by [the relocation] upon a large group of American citizens . . . . But hardships are a part of war, and war is an aggregation of hardships. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.
6. See *id.* at 223:
To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence at this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.

Note the Court’s talismanic repetition of the word “military,” a rhetorical device that also appears frequently in Woodruff’s article.
prejudice, wartime hysteria, and a failure of political leadership.” Reparations have been paid, and official apologies made, to the survivors of the internment.8

A second case that Woodruff does not mention is the racial segregation of the military, which ended only with President Truman’s executive order in 1948. This segregation was never challenged in the courts, probably because any such challenge was obviously doomed.9 The arguments that were made then against desegregation, often by the generals who had led the armed forces to victory in World War II, are precisely those made now against the homosexual exclusion, yet here, too, Woodruff declines to rely on these distinguished authorities for support. “The Army is not out to make any social reforms,” said the Army chief of staff, Omar Bradley, “[i]t will change that policy when the Nation as a whole changes it.”10 A few months before the executive order, General Dwight Eisenhower told the Senate Armed Services Committee, “I do believe that if we attempt merely by passing a lot of laws to force someone to like someone else, we are just going to get into trouble.”11 Eisenhower thought racism was an “incontrovertible fact,” and warned that “when you put in the same organization and make live together under the most intimate circumstances men of different races, we sometimes have trouble.”12 Representative Overton Brooks of Louisiana warned that “it is a serious mistake to bring politics into the armed services,”13 and military analyst Hanson Baldwin wrote in the New York Times that “it is extremely dangerous nonsense to try to make the Army other than one thing—a fighting machine.”14 Since 1948, as it happens, the armed forces have not only integrated successfully, but have gone farther in achieving racial equality than the rest of American society.15 Yet segregation was once a military regulation, and Woodruff


8. It has also has become clear that military authorities deliberately misled the court about facts material to the disposition of the case. For this reason, the conviction upheld by the Court in Korematsu has since been vacated. The decision in which this was done describes in detail the government’s misconduct in the earlier litigation. See Korematsu v. United States, 384 F. Supp. 1406 (N.D. Cal. 1984). On the aftermath of the decision, see generally WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 98-101 (2d ed. 1995).

9. Kenneth Karst has written a brief draft of an imaginary 1940 Supreme Court opinion rejecting a constitutional challenge to the Marine’s total exclusion of blacks and the Army’s segregation of blacks. It is largely modeled on, and some of it is taken word for word from, the arguments of recent cases rejecting challenges to the exclusion of gays. Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 U.C.L.A. L. Rev. 499, 572-73 (1991).


11. Id.

12. Id.

13. Id.

14. Id. Bass provides exact parallels for each quotation from the present debate over the gay ban. For other quotations from the 1948 debate to the same effect, see C. Dixon Osburn, A Policy in Desperate Search of a Rationale: The Military’s Policy on Lesbians, Gays, and Bisexuals, 64 UMKC L. Rev. 199, nn.210-17 and accompanying text (1995).

15. See Karst, supra note 9, at 521-22. Woodruff also cites Goldman v. Weinberger, 475 U.S. 503 (1986), several times but neglects to note that, after the Supreme Court refused to invalidate military regulations that prohibited Orthodox Jewish soldiers from wearing the yarmulke, Congress granted relief. See 10 U.S.C.A. § 774 (West Supp. 1995). There is no evidence that the fighting capability of the armed
claims that "all military rules, regulations, policies, traditions, and customs are related to, and in some manner support, the ultimate goal of combat effectiveness." 16

These cases embarrass Woodruff's plea for blind deference to the military's judgment. They suggest that, where invidious discrimination is alleged, the military's judgment may merely reflect and reinforce 17 the prejudices of the society from which its personnel is drawn. If that's so, then courts and Congress need to examine the substantive arguments for the policies in question, and decide for themselves whether there is an adequate basis for the military's judgment. In doing so, they should, to be sure, give some degree of deference to that judgment. For present purposes, it is unnecessary to work out what degree of deference is appropriate under what circumstances. 18 It suffices to say that it is not appropriate to give military judgments infinite weight—for infinite weight is what Woodruff is really asking that society give to the military's judgments.

Why does Woodruff make such an extreme claim? Woodruff's position relies heavily on, 19 and largely mirrors, the Seventh Circuit's decision in benShalom v. Marsh 20 upholding the gay exclusion, which, as Kenneth Karst observes, "all but said there is a 'military exception' to the Constitution." 21 As I have said, Woodruff is an experienced and probably a very capable attorney. Lawyers don't like to make silly arguments, but they will do it if it seems to be the only way they can say anything at all on behalf of their clients. Woodruff must advocate blind deference to the military, because the exclusion can't stand being looked at.

II. THE EVIDENCE

As Justice Murphy observed in his dissent in Korematsu, the military's judgments sometimes extend to matters outside its expertise. The justification for the exclusion rested "mainly upon questionable racial and sociological grounds not

forces has been compromised by this overruling of military judgment.

16. Woodruff, supra note 2, at 124 (emphasis added).

17. In each of these cases, the damaging effect of the challenged policy on society as a whole is as much of a concern as the possibility that societal prejudice has distorted the military's judgment. The wartime internment gave official endorsement to the idea that Japanese-Americans were not loyal citizens. The racial segregation of the military indoctrinated millions of Northerners into the ideology and practices of Jim Crow. Randy Shilts observes that the military's indoctrination lectures concerning homosexuality, which labeled gays as child molesters, rapists, and murderers,

went far beyond the confines of the military, ensuring that millions of young people received a grossly intolerant introduction to the issues of nonconforming sexual orientation. The young men who listened to the prescribed indoctrination of the Korean War era became America's military leaders and corporate executives of the 1970s. The men who saw sissies taunted and tormented during the days of the Vietnam War became the leaders of the 1980s and 1990s.

SHILTS, supra note 2, at 135.

18. For one attempt to respond systematically to claims of deference, see Karst, supra note 9, at 571-72.

19. See, e.g., Woodruff, supra note 2. Woodruff cites the benShalom decision more than a dozen times.


ordinarily within the realm of expert military judgment, supplemented by certain semi-
military conclusions drawn from an unwarranted use of circumstantial evidence."^{22} Woodruff's claims about the damaging effects of the presence of known homosexuals on unit cohesion appear to be predicated on just the same kind of sociological judgment. A military judgment based on such grounds, Murphy wrote, "is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations."^{23}

What evidence do we have about the likely consequences of ending the homosexual exclusion? We have the experience of foreign militaries, of domestic paramilitary institutions such as police and fire departments, and the history of the integration of African-Americans in the American military.^{24} We have the military's own studies, which it attempted to suppress when the results were not to its liking.^{25} We have the judgment of the American military itself in periods of wartime, when the need for unit cohesion is obviously at a premium, but when the expulsion of gays has slowed to a trickle.^{26} Finally, we have the increasing trend in the 1980s toward acceptance of gay soldiers and sailors by large numbers of military field commands, who often successfully shield their own troops from investigators.^{27} All point to the same conclusion: the exclusion has nothing to do with promoting military effectiveness. The armed forces themselves evidently regard the homosexual exclusion as a luxury rather than a necessity, which they cannot afford during those periods when they need to operate at peak efficiency.

Woodruff claims that "[o]pponents of the policy must demonstrate that eliminating the exclusion of homosexuals will enhance the military's ability to perform its mission of fighting and winning wars."^{28} This is nonsense. If eliminating the exclusion would have no effect on the military's capabilities, and there are independent

22. The arguments relied upon by the military in Korematsu, as enumerated below by Justice Murphy, are just the kind of anecdotal and speculative considerations upon which Woodruff rests his entire argument:

Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." They are claimed to be given to "emperor worshipping ceremonies" and to "dual citizenship." Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with facts as to certain persons being educated and residing at length in Japan. It is intimated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them "to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so."


23. Id. (footnotes omitted).

24. See Osburn, supra note 14, at nn.184-218 and accompanying text.

25. See GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS (Kate Dyer ed. 1990).


27. See SHILTS, supra note 2, at 531-39. This trend has occurred without any institutional efforts to ameliorate homophobia, though efforts of that kind have played a crucial part in the military's success in achieving racial equality. Education against homophobia would certainly promote unit cohesion, yet such efforts are unimaginable so long as the present policy is in place.

28. Woodruff, supra note 2, at 125 (emphasis added).
reasons for thinking the exclusion is wrong, then it should be eliminated.\textsuperscript{29} Nonetheless, the burden of proof Woodruff proposes can probably be met, for the simple reason that \textit{any} arbitrary exclusion of some applicants from an organization is likely to harm its efficiency. The point is a familiar one to students of the economics of discrimination.\textsuperscript{30} Arbitrary exclusion of applicants tends to degrade the quality of the pool of personnel that is selected, because it eliminates at least some of the highest quality applicants. For example, when the army excluded blacks from its officer corps, it kept out some who would have become very capable generals and admirals. Instead, it promoted less capable whites to those positions. Military command is extraordinarily demanding, like any other highly competitive task whose primary goal is to outsmart someone else (in this case, the enemy commander), and the costs of having marginally less capable individuals in such positions can be quite high. There is no way to prove counterfactuals, but it seems reasonable to speculate that, before 1948, at least some white commanders could have been replaced by more competent blacks, and that because they were not, battles were unnecessarily lost and troops unnecessarily died. In all likelihood, deference to the military’s judgments on this issue \textit{impaired} its ability to carry out its mission. The same analysis applies to the exclusion of gays. President Clinton was right: we can’t afford to be without the best talent we can get.

III. THE 1981 POLICY

Woodruff claims that the exclusion, at least until President Clinton’s revision of the policy, was always consistent, and was always focused on homosexual conduct rather than homosexual status. He thus implicitly concedes that there is something fishy about discrimination based solely on a status, but argues that this fishy something cannot be found in the 1981 policy.\textsuperscript{31}

Consider, however, the U.S. Army regulation, on the books from 1981 to 1993, requiring exclusion of any “homosexual,” defined as “a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.”\textsuperscript{32} It is awfully hard to describe this rule as conduct-based, even if desire is taken to be relevant only as a predictor of conduct, because it also contains what has been dubbed the “Queen for a Day” proviso,\textsuperscript{33} which states that “[p]ersons who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity,

\textsuperscript{29} Moreover, even some effect on those capabilities may be justified by other considerations. The transition to a racially desegregated military was not costless—racial tensions were particularly high during the Vietnam war—but the costs were worth bearing.


\textsuperscript{31} Given Woodruff’s skeletal account of the policy before 1981, I won’t take that period up here, except to note that the incoherences I identify in the 1981 policy were also present in its predecessors. The policy has not always rested on the arguments about unit cohesion on which Woodruff relies. Rather, it was based on stereotypes, which Woodruff does not and could not defend, of gays as rapists and traitors. See Shilts, \textit{supra} note 2, at 134-35.

\textsuperscript{32} AR 635-200, § 15-2(a), \textit{quoted in} Watkins v. United States Army, 847 F.2d 1329, 1336 n.11 (9th Cir.), vacated, 847 F.2d 1362 (9th Cir. 1988), aff’d on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990). “A homosexual act” is defined as “bodily contact, actively undertaken or passively permitted, between soldiers of the same sex for sexual satisfaction.” \textit{Id.}

\textsuperscript{33} See Shilts, \textit{supra} note 2, at 199.
curiosity [sic], or intoxication, and in the absence of other evidence that the person is a homosexual, normally will not be excluded from reenlistment.\textsuperscript{34} The definition of the homosexual immediately becomes obscure: what could a homosexual be if it is possible for a person voluntarily to engage in homosexual acts—the regulation uses the plural—without being one? The regulation says that separation from the service is required if “[t]he soldier has stated that he or she is a homosexual or bisexual, unless there is a further finding that the soldier is not a homosexual or bisexual.”\textsuperscript{35} What could be the basis for such a finding?

The epistemological difficulties that such an inquiry raises are illustrated by the case of James Miller, who, faced with a Navy regulation mandating expulsion for homosexual acts, admitted to committing such acts but also “at various times denied being homosexual and expressed regret or repugnance at his acts.”\textsuperscript{36} Janet Halley observes that the interaction in which Miller, threatened with compulsory punishment, made his disavowals, “create[s] for him a new public identity.”\textsuperscript{37} But the identity thus created is the product of a coerced confession. It is not a reliable indicator of anything. “[T]he utterances of the confessor and the categories imposed by the inquisitor have lost all referential power. In the case of plaintiff James Miller, the possibility of discovering any ‘true’ sexual orientation, if it ever existed, has now been destroyed.”\textsuperscript{38}

Perhaps this weird ritual can be understood as part of a policing of speech, in which heretical declarations of a gender identity inconsistent with the military’s desired self-conception are to be suppressed. Or perhaps it can be understood as a hunt for forbidden thoughts, in which the prohibited conduct is taken as an indicator of the desires that soldiers must not feel. But it’s quite a stretch to describe the army’s regulation as concerned exclusively with homosexual conduct when it is sometimes ready to forgive such conduct when it occurs, and when its primary effect is to produce avowals of heterosexual identity. A finding of homosexual conduct won’t invariably lead to separation from the services, but a finding of homosexual desire invariably

\textsuperscript{34} AR 601-280, § 2-21, quoted in Watkins, 847 F.2d at 1336. This is consistent with the Department of Defense policy, quoted in Woodruff, supra note 2, at 131 n.56, which provides that a homosexual act or acts will not be cause for separation if

(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 by the member during a period of military service;

(d) Under the particular circumstances of the case, the member’s continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

Section (c) is particularly fascinating, implying as it does that homosexual rape will not necessarily be a cause for separation as long as the member did not commit it “during a period of military service.”

\textsuperscript{35} AR 635-200, § 15-3(b), quoted in Watkins, 847 F.2d at 1337 n.11.


\textsuperscript{37} Halley, supra note 36, at 953.

\textsuperscript{38} \textit{Id.} at 954.
Woodruff thinks that the policy's First Amendment difficulties are a product of recent innovations by President Clinton, but in fact they are far older.

The Reagan-era policy had to be revisited precisely because the unfairness of penalizing people for their desires became clear. The policy was rendered problematic for the same reason that all discrimination against gays became problematic: the idea that all gays are mentally ill was scientifically refuted, and it became clear that for many gays, their sexual orientation is an unchosen and harmless condition. Given these facts, discrimination on the basis of desire alone increasingly seemed arbitrary and unfair. That sense of unfairness has been exacerbated by the increasing number of stories of dedicated, hardworking soldiers who have been thrown out of the service, often over the protests of their own commanders.

Woodruff claims that there was no problem with the old policy, because the courts upheld it. This obviously confuses constitutionality with wisdom—some of the courts were careful to point out that a policy can be both constitutional and stupid—but it also downplays the constitutional difficulties with the old policy. That policy was upheld in almost every case that challenged it, but the judicial logic by which this was done was remarkably tortured.

39. Although the military's sodomy law applies equally to heterosexual sexual activity, the latter is rarely, if ever, prosecuted absent aggravating circumstances such as rape, and even then is punished less harshly than homosexual sodomy that is private and consensual and which takes place off base. William B. Rubenstein, Challenging the Military's Antilebian and Antigay Policy, 1 L. & SEXUALITY 239, 242-43 (1991).


41. The practices by which the military carries out the policy have also reached the nostrils of the public. There are by now many well-documented cases in which rumors of homosexuality, often false ones, triggered illegal wiretaps and searches, days-long interrogations, denial of access to counsel, groundless threats of severe penalties for noncooperation, incessant demands for names of other gays, coerced or forged confessions, intimidation of witnesses, rigged juries, kangaroo courts, and dishonorable discharges or lengthy prison sentences. See generally Marcosson, supra note 26. Randy Shilts observes that these abuses are inseparable from the policy:

   The practices are so routine as to appear to be official policy, even though such a policy is officially forbidden. As a practical matter, one can understand why coercion is necessary. Consider the dilemma for investigators. They can only rarely find evidence of homosexuality in a soldier's service record. Rarely do aggrieved "victims" volunteer as witnesses. Nor are investigators likely to find direct proof that homosexual deeds actually took place. Given this, illegal coercive interrogations are not an unfortunate side effect of antigay regulations; they are virtually the only way to execute the work that the regulations demand.

SHILTS, supra note 2, at 124.

Woodruff is obviously familiar with this history, which is recounted in sources he cites. However, he only addresses it in a single footnote, in which he declares in tones of wounded innocence that no one has ever provided a definition of "witch hunt." Woodruff, supra note 2, at 148-49 n.161.

42. Woodruff, supra note 2, at 149-50. Professor Woodruff is correct that existing case law is on his side on this issue, see William A. Woodruff, A Reply to Professor Koppelman, UMKC L. Rev. 195, 195-96 (1995), but if that were all he hoped to say, he could have written a much shorter article. He also argues, at far greater length, that the homosexual exclusion is wise and appropriate. This essay is primarily a response to that claim. The case law, however, rests on such shaky logic that it should not go unchallenged.
A key issue in every case was whether sexual orientation should be a suspect classification calling for heightened scrutiny under the Fourteenth Amendment. The factors that trigger such scrutiny would appear to be amply satisfied in the case of lesbians and gays: a history of purposeful discrimination; the gross unfairness of that discrimination, as evidenced by the irrelevance of the basis for discrimination, the difficulty of changing the trait in question, or widespread prejudice and stereotyping of the group; and the group's lack of political power necessary to obtain redress from the political branches of government. Nonetheless, almost all of the federal courts that have considered the question have rejected the suspect classification claim.

Woodruff trumpets these cases' results, but refrains from commenting on, or even indicating, their reasoning. The rationale invariably proffered by the courts is that the equal protection claim is foreclosed by Bowers v. Hardwick, which held that the Due Process Clause does not protect the right to engage in homosexual sodomy. Thus, for example, the United States Court of Appeals for the District of Columbia declared: "It would be quite anomalous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."

Because the Supreme Court held in Hardwick that a law disadvantaging gays did not violate the Due Process Clause, the Court of Appeals infers that such a statute cannot be challenged on equal protection grounds, even though the Hardwick Court expressly declared that it was not deciding that issue. The implicit premise of this reasoning is that, unless a statute violates every provision of the Constitution, it cannot violate any of them. That premise is bizarre. Suppose, before Brown v. Board of Education, that some misguided attorney had unsuccessfully asserted the rather silly claim that school segregation violated the Third Amendment’s prohibition on

43. The best statement of the argument for recognizing sexual orientation as a suspect classification is the majority opinion in Watkins v. United States Army, 847 F.2d 1329, 1345-49 (9th Cir. 1988), vacated, 847 F.2d 1362 (9th Cir. 1988), aff'd on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990). The cases rejecting this argument typically argue that gays are not absolutely unable to obtain political redress, and point to the fact that gays are protected by antidiscrimination law in some jurisdictions. This reading of the requirements for judicial protection, however, "at least arguably fails to cover the one group everyone seems to agree should be extended special protection under the Fourteenth Amendment, namely blacks." John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 152 (1980). Blacks are quite effective at pooling their interests with those of other groups, and were protected by anti-discrimination laws in some states, such as New York, years before Brown v. Board of Education. See Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy 19-22 (1990).

44. 478 U.S. 186 (1986).
45. Id. at 190-96.
46. Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987); see also High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571-74 (9th Cir. 1990), reh'g denied, 909 F.2d 375 (9th Cir. 1990); benShalom v. Marsh, 881 F.2d 454, 464-66 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). This reasoning was rejected in Watkins, 847 F.2d at 1345-49 (with one judge dissenting), aff'd on other grounds, 875 F.2d at 705-11 (applying principle of equitable estoppel against the military); Janiz v. Muci, 759 F. Supp. 1543, 1546-47 (D. Kan. 1991), rev'd on other grounds, 976 F.2d 623 (10th Cir. 1992); and implicitly in Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993) (rejecting a privacy challenge to a statute disallowing same-sex marriages while sustaining an equal protection challenge to that same statute).
47. See Bowers, 478 U.S. at 196 n.8.
quartering troops in citizens' homes. Could one conclude from this precedent that Brown must be decided in the state's favor simply because the earlier third amendment case had already determined that segregated schools were constitutional? 48

It is hard to find shabbier reasoning in federal decisions than that involving the status of gays. Because this reasoning was so vulnerable, it was a frail reed on which to rest the policy. Woodruff is too sanguine about the capacity of the 1981 policy to withstand judicial challenge over the long haul.

IV. THE 1993 POLICY

Appropriately or not, the policy was changed. I can hardly take issue with Woodruff's claim that the July, 1993 Department of Defense regulations are incoherent and unconstitutional; I have said so myself in another place. 49 It is far from clear, however, that the statute Congress enacted later that year, which Woodruff admires, does any better.

Obviously worried about the constitutionality of a policy that punishes forbidden desires, the new policy purports to focus exclusively on conduct. 50 But how, exactly, is homosexual conduct supposed to impair the ability of the military to carry out its mission? 51 Although Woodruff repeatedly claims that homosexual conduct is harmful to good order and discipline, he never explains how private conduct engaged in while

48. The example may sound farfetched, but the reasoning of Plessy v. Ferguson, 163 U.S. 537 (1896), the case that upheld racial segregation against an equal protection challenge, ran precisely along these lines. The Court cited, in support of its conclusion, eleven state and lower federal cases that had rejected challenges to segregation. "Unfortunately, not one of the eleven cases reached the constitutional issue presented to the Court in Plessy." Richard Kluger, Simple Justice 78 (1975). Some of the cited cases antedated the Fourteenth Amendment, and in none of them was the Equal Protection Clause the basis of the challenge. Id.


50. Woodruff quotes with approval the Senate Committee's claim that it "views... [the substitution of the phrase 'propensity or intent' for the phrase 'desire or intent'] as a useful clarification that will not effect [sic] the practical effect of the policy." Woodruff, supra note 2, at 153 n.178, quoting S. REP. No. 112, 103d Cong., 1st Sess. 290 (1993). Woodruff is careful, however, not to acknowledge that there was any ambiguity to be clarified. Thus he leaves unclear why the language was changed at all. Given the retention of the "Queen for a Day" proviso, see 10 U.S.C.A. § 654(b) (West Supp. 1995), it is dubious whether the new policy is any more clearly focused on conduct than the old. Rather, it appears that homosexual conduct is only a basis for separation when it is committed by "a homosexual." See generally Janet E. Halley, Straight Procedure: The Conduct/Status Distinction in the 1993 Revisions to Military Anti-Gay Policy (unpublished manuscript on file with the author); Janet E. Halley, Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993).

51. Woodruff, and the Congress, seem to assume that there can be no objection to a law that governs conduct rather than thought, but the question remains whether there is any adequate warrant for restricting the conduct in question. The problems with the assumption that conduct can always be restricted are illustrated by the reply that Oliver Cromwell made to a besieged Catholic community in Ireland, which offered to surrender if it were permitted freedom of conscience: "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted." Quoted in Sidney Hook, The Paradoxes of Freedom 23 (1962).
off duty can have this effect. Soldiers are not supposed to engage in sexual intercourse of any kind, homosexual or heterosexual, when they are on duty. Sexual acts committed in the middle of the mess hall during dinner are no less disruptive if heterosexual than if homosexual. Woodruff, however, quotes Congress’ findings that the military’s standards of conduct “regulate a member’s life for 24 hours each day,” and “whether the member is on duty or off duty,” because “members of the armed forces must be ready at all times for worldwide deployment to a combat environment.” These findings are indisputably accurate, but their relevance is mysterious. Certain off-duty activities can affect military readiness—a soldier who becomes blind drunk during her liberty will be ill-prepared to respond to an unexpected mobilization—but sexual conduct doesn’t fall within that category. (It’s hard to imagine what Congress had in mind when it invoked the soldiers’ need to be ready for immediate deployment. It’s a fact, but not a distinction between heterosexual and homosexual intercourse, that a person in the middle of an orgasm might not answer the phone on the first ring.)

Woodruff does a bit better when he points to the potentially divisive effect of troops forming sexual liaisons with each other. There is anecdotal evidence of such tensions. The conduct at issue here is, however, considerably narrower than the kind of “conduct” that the policy purports to prohibit. It may be reasonable to presume that most service members, whatever their sexual orientation, will find a way to have sex with somebody. It is far less reasonable to presume that they will seek out partners in their own chain of command. As the recent Tailhook scandal shows, sexuality can endanger military discipline whether it is homosexual or heterosexual. Homosexual tensions have rarely been a problem. Heterosexual harassment, on the other hand, has been massive and ubiquitous since women were integrated into the armed forces, and is arguably the most serious personnel problem the military faces today. By putting pressure on women to prove their heterosexuality, the gay ban certainly makes this problem worse. If the rules of military life cannot persuade soldiers to refrain from

52. In one section heading, Woodruff casually refers to “the Harm to Good Order, Discipline, Morale, and Unit Cohesion That All Agree Homosexual Conduct Causes,” thus implying that there is consensus with respect to the precise question that is disputed in this symposium. Woodruff, supra note 2, at 158 (emphasis added). This transparently disingenuous claim is unworthy of response.


54. The same kind of logical gap appears in the statute’s observation that “[t]here is no constitutional right to serve in the armed forces.” 10 U.S.C. § 654(a)(2). This is true, but it does not follow that exclusion of any group, however arbitrary, is therefore justified. One need only think once more of racial segregation. The same disposes of the claim that “it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.” Id.

55. Woodruff, supra note 2, at 165-66.

56. The way women can prove themselves to be nonlesbians is to have sex with men. Thus antigay regulations have encouraged sexual harassment of women. Those who will not acquiesce to a colleague’s advances are routinely accused of being lesbian and are subject to discharge. Some women have allowed themselves to be raped by male officers, afraid that the alternative would be a charge of lesbianism. Those who do complain of sexual harassment often find themselves accused: Their commands are far more intrigued with investigating homosexuals than with investigating sexual harassment. Several investigations of suspected lesbians in the 1980s pressured waves of pregnancies on various installations, as women became pregnant in order to avoid suspicion that they were gay.
inappropriate sexual advances, the gay ban is pretty small beer; the only solution is wholesale castration.

Woodruff’s account of the policy as focusing on conduct, then, is incoherent. The only intelligible argument he makes has to do with soldiers’ privacy:

The presumption underlying gender segregation is that people are sexually attracted to the opposite sex. Thus, most people view being forced to sleep, shower, and use toilet facilities with members of the opposite sex as an infringement of their privacy. When the underlying presumption is not valid, e.g., when individuals find members of the same gender sexually attractive, the invasion of privacy occurs even in gender segregated facilities. This, in turn, disrupts the bonding and cohesion vital to military effectiveness.57

For this reason, Woodruff concludes, “[h]eterosexual soldiers who are stripped of the little privacy military living provides and are required to share cramped living space with those who are sexually attracted to the same gender do not fear a loss of privacy, they have already experienced it.”58 In short, the policy must be shielded from the judicial gaze so that troops can be shielded from the sexual gaze. There is, it seems, plenty of embarrassment to go around.

Unlike Woodruff’s other arguments, this one is comprehensible. But it doesn’t work. The exposure to the sexual gaze that he describes is not peculiar to the military. Civilians experience it all the time in public restrooms and changing rooms at the beach or in the gym. There are, as he notes, sacrifices of privacy that civilians don’t ordinarily experience, but which members of the military have to endure. This isn’t one of them.

Moreover, as Richard Mohr has pointed out, in every other context, the military is extraordinarily cavalier about its members’ privacy.59 And, as Samuel Marcossen


57. Woodruff, supra note 2, at 160-61.

58. Id. This argument, like all the others that are made for the gay exclusion, has its analogue in the 1940s debate over racial segregation:

The close and intimate conditions of life aboard ship, the necessity for the highest degree of unity and esprit-de-corps; the requirement of morale—all these demand that nothing be done which may adversely affect the situation. Past experience has shown irrefutably that the enlistment of Negroes (other than for mess attendants) leads to disruptive and undermining conditions. It should be pointed out in this connection that one of the principal objectives of subversive agents in this country in attempting to break down existing efficient organization is by demanding participation for “minorities” in all aspects of defense, especially when such participation tends to disrupt present smooth working organizations . . . . It is considered also that the loyalty and patriotism of the minority should be such that there be no desire on their part to weaken or disrupt the present organization.

United States Navy Department Memorandum from the Committee (organized to investigate admitting blacks to the Navy) to the Secretary of the Navy (Dec. 24, 1941), quoted in Rubenstein, supra note 39, at 241-42.

59. [I]n all other circumstances except when it is trying to justify discrimination against gays, the military claims that in the armed forces there is no right to privacy whatsoever. The military whenever challenged has successfully advanced this claim in the courts. It argues
has shown in this symposium, this disregard for privacy reaches its maximum when sexual orientation is at issue. A wondrous paradox: in the world according to Woodruff, the sole but crucially reassuring signal the military gives its troops of its solicitude for their privacy is when, policing its ranks for homosexuals, it extracts their confidential communications from psychiatrists and clergy, taps their telephones, breaks into their homes, reads their diaries and their mail, and interrogates their parents and their children.

Lastly, this "privacy" rationale is flatly inconsistent with Woodruff's claim that the exclusion is about conduct and only conduct. Exactly what conduct concerns him—what gays do with their genitals, or what they do with their eyes? A "homosexual act" is defined by the statute as "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires," but it turns out that no contact at all is necessary in order for the thing that Woodruff fears to happen.

It is by now beyond dispute that the exclusion policy is, and has always been, a failure. Gays, including sexually active ones, have always served in the military in huge numbers, sometimes at the highest levels, and their sexual orientation has often been well known to their fellow troops. The notion that homosexuality is incompatible with military service is falsified by all of American military history. The total exclusion of gays, which Woodruff portrays as indispensable to an effective military, has never existed. It probably never can.

both that by voluntarily joining the armed forces, one has simply waived one's usual privacy rights and that in any case, the special circumstances of the armed forces entail that the normal privacies of life are simply unaffordable in a military setting. Indeed, many of the ways in which gays are "uncovered" for dismissal from the armed forces provide examples of such privacies disregarded: a snooping sergeant reads a private's diary in which lesbian desire is expressed; a chaplain reports to military officers the homosexual confessions of an enlisted man; a navy doctor or psychiatrist reports a sailor's anxieties over his sexual orientation or his fears that nongay soldiers will kill him.


60. See Marcosson, supra note 26.
61. Cf. Mohr, supra note 59, at 5-6:
The gay soldier's presence does not prevent the nongay soldier from performing any action, does not violate his liberty in any way. Rather, what the nongay soldiers lose by the gay soldier's presence is the absolute authority to control the interpretation and presentation of the meaning of their lives . . . . That this is the nature of the fear is made clear by the military's own admission that completely closeted gays are okay in the military. The desire of a completely closeted gay man is (at least) whatever physical threat the desire of a noncloseted one is. But the completely closeted gay man and his completely unacknowledged desire do not press the nongay man to reflect on his identity and place in the cosmos. The nongay soldier's worry is not that his body will be raped but that his conception of himself will be raped, disrupted, destroyed. The penis penetrates the body, but the gaze penetrates the soul.

62. See generally Shilts, supra note 2; Allan Berube, Coming Out Under Fire: The History of Gay Men and Women in World War Two (1990). The military has responded to these facts with profound denial. For example, when a gay group attempted one Veteran's Day to lay a wreath at the Tomb of the Unknown Soldier in memory of lesbian and gay troops who had given their lives for their country, the Army resisted fiercely, asserting that there were no gay veterans to honor. Shilts, supra note 2, at 332-34.
Whether the problem is imagined to be homosexual activity or the homosexual gaze, excluding self-professed gays is no solution. As Richard Posner has lately reminded us, a person’s willingness to regard other persons of the same sex as potential sexual objects is not a fixed quantity: “the prevalence of homosexual behavior is an inverse function of the sexual availability of women to men.”63 The idea that the universe of human beings can be neatly divided into “homosexuals” and “heterosexuals” is fantasy. Almost all human beings have a propensity to homosexual conduct that will manifest itself in certain conditions, and a soldier’s life often produces such conditions. In military situations where there are no women around for prolonged periods, sooner or later men will begin to stare at each other in the shower.64 In short, the enterprise of keeping the gaze out of the military is forlorn. If military readiness depends on this, then it’s hard to explain how the United States could ever have won any wars.

As many critics of the ban have observed, the dark heart of the policy is the aspiration to a perfect masculinity, an ideal which is inherently unattainable and which therefore is a prescription for chronic anxiety. Men typically deal with this anxiety with group rituals that reaffirm their manhood by expressing domination over other groups, which are characterized in those rituals by their failure to measure up to the masculine ideal. Thus the hated, inadequately manly aspect of the self is exorcised by being projected onto a despised other.65 This kind of reassurance about one’s masculinity is one of the principal attractions of military life: many join the military not so much to win wars as to establish their manhood. And military training builds upon and reinforces male anxiety, typically using as its severest sanction the threat of being labeled female or homosexual or both.

The trouble with this aspiration is that the valorization of what Mohr calls “the impenetrable penetrator”66 may itself be in tension with the military’s mission. For instance, Madeline Morris has shown how the hypermasculine culture of the military has sometimes promoted conduct that is flatly inconsistent with its mission, notably the rape of civilians, a war crime which violates international law. (It also didn’t help to win the hearts and minds of the Vietnamese.)67 The gay ban is another example of the same tension. It degrades the quality of personnel by periodically throwing out highly trained gays who have sometimes been doing outstanding jobs, replacing them with less competent heterosexuals. It hurts morale in two ways: it makes gay personnel fear and distrust their commanders, and it encourages the sexual harassment of women. It costs hundreds of millions of dollars, both in the costs of extensive investigations and in the

64. For thousands of gay soldiers in Vietnam, overtures from heterosexual colleagues were the most confusing experiences of their service careers. Though there were indeed some brazenly gay troops who were not reluctant to put the make on anybody, it was also true that the most sexually aggressive soldiers in the field tended to be heterosexual, usually married, and clearly intent on resuming their heterosexual proclivities once they returned to the United States.
65. See, e.g., Kast, supra note 9, at 502-10; Koppelman, supra note 49, at 234-51.
lost expense of training the expelled members. Finally, and most insidiously, the gay ban institutionalizes cruel, deceitful, lawless, and contemptible behavior in an institution on whose integrity, discipline, and honor our liberties depend. The military, it appears, has two goals: maximizing its ability to win wars, and maintaining its image of itself as a bastion of masculinity. Sometimes, when the two goals come into conflict, the second finds a higher place among the military’s priorities. Why on earth should the rest of us defer to that?