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Recent Developments

The legal status of traditionally disadvantaged women is in constant flux. This year’s elections demonstrated how quickly the political climate can change, threatening rights we once considered clearly established. Scholars and advocates must keep ahead of legal, political, and societal changes that may affect traditionally disadvantaged women. We hope this Recent Developments section will provide news and updates on current events implicating the legal rights of women of color, poor women, lesbians, and women with disabilities. We also hope to inspire more in-depth and scholarly analysis of these topics.

The section’s writers have focused on the following issues: welfare reform, domestic violence, medical research and treatment, lesbians in the military, and Fourth Amendment rights of women with mental disabilities.

“Don’t Ask, Don’t Tell”: Lesbians Challenge the New Military Policy

Holly Baldwin†

Lesbians are in the forefront of the current challenges to the military’s anti-homosexual policy. Three women, Margarethe Cammermeyer, Zoe Dunning, and Pam Mindt have recently won their struggles to stay in the military after announcing their sexual orientation. These struggles have not been easy, because federal law concerning the military policy on homosexuals is in flux. Lesbians in the military have several hopes for remaining in the armed services. Two different federal courts of appeals have recently issued conflicting decisions, and a few district courts, such as the Wash-
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ington court which heard Cammermeyer’s case, are seizing upon an “active” rational basis standard of review to reinstate lesbian and gay service members. There may also be hope for reform from within the armed services, as Dunning and Mindt were both spared discharge by the military. The Navy panel at Dunning’s discharge hearing, in an unprecedented move, recommended her retention. Eighteen months after a board recommended Mindt’s discharge from the National Guard, the Pentagon returned her file, choosing not to take action on her case.

I. MILITARY POLICY ON HOMOSEXUALS AND THE STATUS OF LESBIANS IN UNIFORM

Gays and lesbians have traditionally been excluded from joining the U.S. military, and have been discharged when discovered within its ranks. When President Clinton took office, he suspended the military’s existing ban and announced a new policy on July 19, 1993. Under the new policy, dubbed “Don’t Ask, Don’t Tell, Don’t Pursue,” the military may no longer ask applicants about their sexual orientation or investigate current service members solely to determine sexual orientation. However, any admission of a non-heterosexual orientation, regardless of its context, creates a “rebuttable presumption” of actual homosexual conduct or the propensity to engage in such conduct. If the service member does not disprove this presumption, she may be discharged. Thus, this military policy allows lesbians, gays, and bisexuals to serve openly, but only if they can prove their celibacy or at least their abstinence from any same-sex relations.

“Don’t Ask, Don’t Tell, Don’t Pursue” can be seen as a small step forward in principle for lesbian, gay, and bisexual civil rights. However, since the policy’s application is left to the unregulated discretion of individual commanding officers, it results in widely varying treatment of gay personnel. Some commanders abide by the policy’s guidelines, but many do not, continuing to investigate and discharge gay subordinates. In fact, some advocates, such as Michelle Benecke of the Servicemembers Legal

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4 Ison, supra note 3, at IA.
5 Since 1980, almost 20,000 service members have been discharged for homosexuality, costing the military $584 million in replacement costs alone. Millions more are spent annually on investigations and the legal costs of discharging homosexuals and bisexuals. Chris Black, Military is Still Hounding Us, Gays Say, S.F. EXAMINER, Feb. 5, 1995, at C7.
7 While the overall number of gay discharges has dropped from 949 in 1991 to 597 in 1994 (including seven months under the new policy), the rate of discharges has remained about the same since the active military has decreased from 1.9 million to 1.5 million in the same time period. Black, supra note 5, at C7; Ison, supra note 3, at IA.
Defense Network, say there has been a recent backlash against homosexuals in uniform.\(^8\)

The long-standing resistance to and sexual harassment of women in the military\(^9\) creates an even more precarious situation for lesbians. Lesbians are especially vulnerable to sexual harassment, because although women's sexual harassment complaints are rarely pursued, charges of homosexuality often made by spurned men are almost always investigated.\(^10\) In addition, due to both the intense scrutiny of all female personnel and the stereotype\(^11\) of military women as lesbian, lesbians are more likely to be investigated and discharged than gay men.\(^12\)

II. **Cammermeyer's Challenge and "Active" Rational Basis Review**

Before the new "Don't Ask, Don't Tell, Don't Pursue" policy was announced, a number of cases had challenged the military ban, claiming that it violated the right to equal protection by discriminating against gays and lesbians.\(^13\) Among these is the case of Margarethe Cammermeyer, a colonel in the Washington State National Guard, the highest-ranking military officer ever discharged for being a homosexual.\(^14\) Cammermeyer had served proudly and with distinction for almost thirty years, first in the Army and then the National Guard,\(^15\) when she applied for admission to the Army War College in 1989. During the required top-secret security clearance interview, she was asked about her sexual orientation and she stated that she

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\(^8\) Black, *supra* note 5, at C7.


\(^10\) RANDY SILS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY 495-97* (1993). In the wake of the Tailhook scandal, the Department of Defense issued an expanded definition of sexual harassment and made it easier to file complaints. However, many women still fear retaliation if they report. Packer, *supra* note 9, at 5.

\(^11\) The lesbian image of military women became a self-fulfilling prophecy in the late 1970s and early 1980s, as more young lesbians joined the military seeking a peer group. Id. at 318. Military lesbians estimate that during the early 1980s, lesbians comprised between 20-35% of military women, but as the military began to attract a broader range of female applicants, the proportion dropped to 25% by the late 1980s. Id. at 415, 561.

\(^12\) In 1987 and 1988, women made up 10% of the armed forces, but 26% of the homosexual discharges. In 1989, the Marine Corps discharged as homosexual ten times as many women as men. Id. at 595.

\(^13\) The Equal Protection Clause of the Fourteenth Amendment is applicable against the government under the Due Process Clause of the Fifth Amendment. Claims have also been made that both old and new policies violate the rights to free speech, due process (by punishing service members on the basis of status, not conduct), and privacy, but I focus here on the equal protection claims as I believe they present the most viable current challenge.

\(^14\) Cammermeyer, 850 F. Supp. at 913 n.6 (W.D. Wash. 1994).

\(^15\) Cammermeyer earned a Bronze Star during the Vietnam War, and she served as an Army nurse from 1961 until 1986, with the exception of a four-year hiatus. According to then-current regulations, Cammermeyer was forced to quit active duty when she became pregnant, but rejoined when the rule was changed. She transferred to the National Guard in 1986, where she served until her discharge in 1992. Id. at 912.
was a lesbian. Six months later, the Army initiated discharge proceedings against Cammermeyer on the basis of that statement. Cammermeyer continued to serve for over three years after her admission of homosexuality, until her honorable discharge on June 11, 1992.\(^{16}\)

Cammermeyer filed a suit in federal district court, claiming that the policy violated her equal protection rights.\(^{17}\) If a government policy discriminates against a protected "suspect class," such as ethnic minorities or women, courts must employ a heightened level of scrutiny when evaluating equal protection claims.\(^{18}\) Traditionally, however, courts have declined to grant suspect status on the basis of sexual orientation,\(^{19}\) and challenges to the military ban on homosexuals have generally been evaluated under the "rational basis" standard of review.\(^{20}\) While this standard requires the government to prove a "rational relationship" between its policy and a legitimate goal or objective, the degree of deference accorded to the military generally means that rational basis review equals no review at all.

However, in June 1994, the court in Cammermeyer's case followed three recent decisions employing an "active" rational basis test and examining the government's arguments more closely, and found that the military policy banning homosexuals does not bear a rational relation to permissible governmental objectives.\(^{21}\) The first of these was in January 1993, when a California district court ordered the reinstatement of gay sailor Keith Meinhold, holding that the government's "justifications [for the policy] are baseless and very similar to the reasons offered to keep the military racially segregated in the 1940's."\(^{22}\) Similarly, in November 1993 the District of

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16 Id. at 912-13.
17 Cammermeyer claimed that the policy violated her rights to equal protection, privacy, due process, and freedom of speech. Id. at 912.
18 See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (applying strict scrutiny to military relocation of Japanese Americans to detention camps during World War II and finding relocations justified by military emergency).
19 See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). But see Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988), modified en banc, 875 F.2d 699 (9th Cir. 1989) (finding that sexual orientation can serve as a basis for heightened scrutiny) (finding that sexual orientation can serve as a basis for heightened scrutiny). In addition to the difficulty of attaining a heightened level of scrutiny based on sexual orientation alone, lesbians are also disadvantaged by the lack of categories which would acknowledge the reality of layered intersectional discrimination. An African-American lesbian, for example, may be the target of discrimination and harassment, but not be able to tell if this is due to her race, gender, or sexual orientation, and indeed, such hatred often crosses the artificial boundaries separating varieties of difference.
20 Williams, supra note 6, at 937.
21 The Cammermeyer court relied on Dahl v. Sec'y of the United States Navy, 830 F. Supp. 1319, 1325 (E.D. Cal. 1993), which cites an earlier case, Pruitt v. Cheney, 963 F.2d 1160, 1166 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), saying, "a court must actively review the record "to see whether the government has established on the record a rational basis for the challenged discrimination." Cammermeyer, 850 F. Supp. at 917.
22 Meinhold v. Dep't of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993), modified, 34 F.3d 1469 (9th Cir. 1994). Meinhold revealed on television that he is gay, and the Navy discharged him solely on his admissions of homosexuality, absent any charges of homosexual conduct. However, Meinhold's precedential value has been diluted by the Ninth Circuit's 1994 modification, which, while upholding Meinhold's reinstatement, reversed as overbroad the district court's injunction
Columbia Court of Appeals ordered the reinstatement of Joseph Steffan. The court found the military policy unconstitutional, saying "equal protection forbids the government to disadvantage a class based solely upon irrational prejudice, whatever the standard of review." In August 1993, another California district court used an "active" rational basis review to grant sailor Mel Dahl summary judgment on his equal protection claim, holding that the policy was based on "... illegitimate prejudice and that it is therefore irrational as a matter of law."*

The Cammermeyer court cited Dahl in its analysis of Cammermeyer’s equal protection claim,* and using an active rational basis review found "that there is no rational basis for the Government’s underlying contention that homosexual orientation equals ‘desire or propensity to engage’ in homosexual conduct." The court rejected the government’s proffered justifications for the policy and granted Cammermeyer summary judgment on her equal protection and due process claims, stating:

Colonel Cammermeyer was discharged from the National Guard pursuant to a governmental policy that is based solely on prejudice. Prejudice, whether founded on unsubstantiated fears, cultural myths, stereotypes or erroneous assumptions, cannot be the basis for a discriminatory classification. As the Supreme Court stated in *Palmore,* “private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”

In addition to ordering Cammermeyer’s reinstatement into the National Guard, the court awarded her attorney’s fees.*

### III. CHANGE FROM WITHIN?

While the uneven enforcement of “Don’t Ask, Don’t Tell, Don’t Pursue” has allowed many commanding officers to continue harassing and investigating homosexual and bisexual service members, some officers seem to have taken the new policy to heart. Zoe Dunning, an honors graduate of the Naval Academy, was serving with the Navy reserves in Alameda, California when, encouraged by Clinton’s promise to lift the gay ban, she

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*prohibiting the military from discharging any other service members solely on the basis of homosexual status.

23 Steffan v. Aspin, 8 F.3d 57, 70 (D.C. Cir. 1993), vacated for reh’g en banc 62 U.S.L.W. 2309 (D.C. Cir. Jan. 7, 1994), rev’d sub nom. Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994), relying on City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-50 (1985). Steffan, a midshipman at the Naval Academy, was expelled six weeks short of graduation for admitting his homosexual orientation. A three-judge panel made the decision to reinstate Steffan. However, upon subsequently rehearing the case en banc, the court found the military policy constitutional and upheld Steffan’s expulsion. Steffan, 41 F.3d 677.

24 Dahl, 830 F. Supp. at 1337. Dahl admitted during an official interview that he is gay, but denied engaging in any homosexual conduct since enlisting; he was subsequently discharged from the Navy. The government is currently appealing the Dahl court’s decision.


26 Id. at 920.

27 Id. at 929 (citations omitted).

28 Id.
came out at a rally at Moffett Air Force Base four days before the Presidential Inauguration in January 1993. The Navy immediately sought her dismissal, and at her initial discharge hearing, the panel recommended termination. However, Dunning won a rehearing pursuant to the new military policy. In the first time such a body has supported an openly homosexual service member, the Navy hearing board issued a decision on December 1, 1994, recommending her retention and distinguishing sexual orientation from conduct. The board seemed to follow the Meinhold ruling, stating that Dunning’s announcement of her lesbianism absent any evidence of homosexual conduct was not sufficient proof of “conduct unbecoming” a member of the armed forces.29

Pam Mindt, an Army National Guard Captain from Minnesota, has also recently escaped discharge. Mindt has logged eighteen years of service, during many of which she provided mental health counseling to troops. The attempt to discharge her began in August 1992, and she was the first soldier in Minnesota to face termination for being homosexual. While the discharge attempt began under the old military policy, it was discontinued after the new policy’s implementation. Eighteen months after a hearing board recommended her discharge, the Pentagon returned Mindt’s file to the Minnesota Guard in November 1994, choosing not to take action on her case. The “flag” on her file has been lifted, and she is now eligible for promotion to major. However, if Mindt continues to speak out concerning her sexual orientation, she could be vulnerable to discharge proceedings again.30

IV. THE FUTURE OF LESBIAN AND GAY CHALLENGES — WHERE NEXT?

Still pending is Able v. United States, the first legal challenge to the new “Don’t Ask, Don’t Tell, Don’t Pursue” policy.31 This class-action lawsuit in New York district court was filed in July 1993 by counsel for the American Civil Liberties Union and the Lambda Legal Defense and Education Fund.32 The six plaintiffs, service members who had not previously

29 Holding, supra note 3, at A6; Ison, supra note 3, at 1A; Mills, supra note 3, at 6A. The panel’s recommendation to retain Dunning was sent to the Naval Bureau of Personnel, which will make a recommendation to Navy Secretary John Dalton. While Dalton has the final say on Dunning’s discharge, chances seem good that Dunning will ultimately remain in the reserves.

30 Ison, supra note 3, at 1A.

31 Please note that as this piece went to press, U.S. District Court Judge Eugene Nickerson found that the military’s policy regarding homosexuals violated both the First and Fifth Amendment rights of six plaintiff service members. The court enjoined the military from enforcing the “Don’t Ask, Don’t Tell” policy against the plaintiffs, five men and one woman. Able v. United States, No. 94 CV 0974, 1995 U.S. Dist. LEXIS 3928 (E.D.N.Y. March 30, 1995). See infra notes 32-33 and accompanying text. Attorneys for the military plan to appeal the decision. Frances A. McMorris, Judge Rejects Military’s Policy on Gays, WALL ST. J., Mar. 31, 1995, at B6.

disclosed their sexual orientation to their superior officers, charge that the new policy violates their rights to equal protection and free speech. They won a preliminary injunction restraining the military from discharging them while their suit is pending, and after victory at the district court, await an appeal to the Second Circuit Court of Appeals. Chai Feldblum, a Georgetown University Law Center professor and former legal director of the Campaign for Military Service, expects to see the case on the Supreme Court docket in about two years.

The Servicemembers Legal Defense Network, a year-old Washington-based group, has been helping lesbians and gays in uniform challenge the new military policy. The group’s three full-time employees work with a national network of 200 lawyers, and the Network has advised over 400 service members. Michelle Benecke and C. Dixon Osborn, the organization’s co-directors, both formerly of the Campaign for Military Justice, have raised $200,000 in this first year, and have appointed a board of directors that includes Margarethe Cammermeyer. The Network also tracks discharges sent back for rehearings under the new policy, and they find that while cases like Dunning’s and Mindt’s are promising, by no means are they the rule. In most cases, the military again recommends discharge under the new policy. However, the Network also states that seventeen gays and lesbians are serving openly despite previous discharge attempts.

The future of lesbians and gays in the military is unclear. The new policy is not functionally very different from the old, especially given the wide disparity in its enforcement. While some lesbians may be granted temporary clemency by commanding officers, they remain at the mercy of command changes and are continually exposed to the threat of harassment, investigation, and discharge should they dare to come out, even off base. “Don’t Ask, Don’t Tell, Don’t Pursue” is fundamentally unfair to non-heterosexuals, who are expected to remain closeted and celibate, unlike their heterosexual peers, simply to avoid stirring up military prejudice. Lesbians in uniform must face this discrimination in addition to the long-standing military tradition of sexual harassment. The issue of gays in uniform seems certain to reach the U.S. Supreme Court soon, but the result remains

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34 Holding, supra note 3, at A6.

35 Mills, supra note 3, at 6A.

36 Id. at 6A.

37 Ison, supra note 3, at 1A.

38 Mills, supra note 3, at 6A.

39 Race also intersects with the gender and sexual orientation discrimination suffered by military women. For example, in the 1980 investigation into the presence of lesbians on the U.S.S. Norton Sound, out of the ship’s sixty-one women, twenty-three initially came under suspicion on the basis of hearsay and uninformed speculation. Out of the ship’s nine African-American female crew members, all but one were accused of being lesbian. Shilts, supra note 10, at 336-37.
unpredictable, and the conservative tenor of the Supreme Court will not aid opponents of the military policy. However, the more stringent recent applications of the rational basis test seen in cases like Cammermeyer's offer some hope that this irrational and prejudicial policy may yet be struck down.