

# Case Notes

## Saving FACE:

### Clinic Access Under a New Commerce Clause

United States v. Wilson, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 1996 WL 137910, 64 U.S.L.W. 3669 (U.S. Oct. 7, 1996) (No. 95-1523).

In May 1994, President Clinton signed into law the Freedom of Access to Clinic Entrances Act (FACE),<sup>1</sup> which proscribes blockades and violence directed at facilities providing reproductive health services. Congress authorized FACE under the Commerce Clause<sup>2</sup> and under Section 5 of the Fourteenth Amendment.<sup>3</sup> Just months after the law went into effect, Michael Skott, an anti-abortion protester arrested and convicted under FACE for blockading the Wisconsin Women's Health Care Center,<sup>4</sup> challenged Congress's authority to enact the law.<sup>5</sup> He contended that the statute unconstitutionally exceeded Congress's Commerce Clause power on the grounds that reproductive health services do not constitute interstate commerce.<sup>6</sup> Until recently, such a challenge would have had little hope of success. For over fifty years, the Supreme Court extended great deference to Congress by declining to "set aside [any act based on the Commerce Clause]

---

1. 18 U.S.C.A. § 248 (West Supp. 1996); *see infra* text accompanying notes 16–20

2. U.S. CONST. art. I, § 8, cl. 3.

3. U.S. CONST. amend. XIV, § 5.

4. Skott, George Wilson, and others blockaded the Center by cramming automobiles into the entrances and welding themselves into interlocking steel apparatuses welded to the cars. "One defendant was located in the driver's seat, restrained by a welded steel device confining his head in a steel harness. [Another defendant's] head was restrained in a locked harness secured around his throat." United States v. Wilson, 73 F.3d 675, 677 (7th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3669 (U.S. Oct. 7, 1996) (No. 95-1523). While firefighters used blowtorches, saws, and pry bars to extricate the defendants, the blockade prevented 12 women from receiving scheduled health services. *See id.*

5. *See id.* Although Wilson was the named plaintiff below, Skott appealed to the Supreme Court.

6. *See Wilson*, 73 F.3d 675, *petition for cert. filed sub nom. Skott v. United States*, 64 U.S.L.W. 3731 (U.S. Mar. 20, 1996) (No. 95-1523) (certifying question whether FACE, "which operates directly upon intrastate, non-commercial activities such as physical obstruction of facilities providing reproductive health services, [is a] lawful exercise of Congress' authority under [the Commerce Clause] as interpreted and applied in *U.S. v. Lopez* [115 S. Ct. 1624 (1995)]?").

as without rational basis."<sup>7</sup> In April 1995, however, the Court decided *United States v. Lopez*,<sup>8</sup> which recharacterized and narrowed the Commerce Clause's scope by holding that Congress overstepped its bounds in enacting the Gun-Free School Zones Act.<sup>9</sup> Skott's request that the Court use its new Commerce Clause analysis to invalidate FACE was ultimately denied. Even if review had been granted, however, it seems likely that *Lopez* would pose no threat to the new clinic access law.<sup>10</sup>

In the twenty-three years since *Roe v. Wade*<sup>11</sup> was decided, abortion opponents have won increasing restrictions on reproductive rights,<sup>12</sup> but have failed to convince the Court to overturn *Roe* outright.<sup>13</sup> In response, opponents have launched a campaign of violence against reproductive health clinics and providers that has included blockades, bombings, death threats, arsons, chemical attacks, stalkings, assaults, and murders.<sup>14</sup> The attacks

7. *United States v. Lopez*, 2 F.3d 1342, 1363 n.43 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

8. 115 S. Ct. 1624 (1995).

9. See *id.* at 1626.

10. Prior to *Lopez*, the Fourth Circuit upheld FACE in *American Life League, Inc. v. Reno*, 47 F.3d 642, 645 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 55 (1995), but has on appeal *Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996), in which the district court stated that *Lopez* "represents new law which must inform the proper resolution of this case. . . . *American Life League* . . . [is not] viable after *Lopez*." *Id.* at 806 n.5. Lower courts have generally upheld the constitutionality of FACE. See *United States v. Dinwiddie*, 885 F. Supp. 1286, 1297-98 (W.D. Mo. 1995), *aff'd*, 76 F.3d 913 (8th Cir. 1996); *United States v. Hill*, 893 F. Supp. 1034, 1036-37 (N.D. Fla. 1994); *Riely v. Reno*, 860 F. Supp. 693, 707-08 (D. Ariz. 1994); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1431 (S.D. Cal. 1994). *But see* *United States v. Wilson*, 880 F. Supp. 621, 624-33 (E.D. Wis. 1995). Since *Lopez*, six additional lower courts have upheld the Act. See *United States v. Soderna*, 82 F.3d 1370, 1373-74 (7th Cir. 1996), *petition for cert. filed sub nom. Hatch v. United States*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); *United States v. Dinwiddie*, 76 F.3d 913, 919 (8th Cir. 1996); *Cheffer v. Reno*, 55 F.3d 1517, 1519-21 (11th Cir. 1995); *United States v. Scott*, 919 F. Supp. 76, 77 (D. Conn. 1996); *United States v. Lucero*, 895 F. Supp. 1421, 1423-24 (D. Kan. 1995); *United States v. White*, 893 F. Supp. 1423, 1432-34 (C.D. Cal. 1995).

11. 410 U.S. 113 (1973).

12. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding restriction on minors' access to abortion and 24 hour waiting period for adults seeking abortion); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding "gag rule" ban on federally funded clinics from engaging in abortion-related activities); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding ban on Medicaid funding for abortion).

13. See *Casey*, 505 U.S. at 846 ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

14. See S. REP. NO. 103-117, at 3 (1993) (reporting 131 death threats, 2 kidnappings, 327 clinic invasions); *id.* at 6 (reporting 71 acid and chemical attacks); NATIONAL ABORTION FED'N, INCIDENTS OF VIOLENCE AND DISRUPTION AGAINST ABORTION PROVIDERS, 1996 (reporting over 9000 clinic disruptions and 33,739 arrests at clinic blockades); NATIONAL ABORTION & REPRODUCTIVE RIGHTS ACTION LEAGUE, CLINIC VIOLENCE, INTIMIDATION AND TERRORISM 1 (1996) [hereinafter NARAL REP.] (reporting 1900 acts of violence against abortion providers from 1977-1992); *Abortion Doctor Shot by Woman During Protest at Kansas Clinic*, WASH. POST, Aug. 20, 1993, at A17 (reporting shooting of Dr. George Tiller by pro-life protester outside Wichita clinic); *Abortion Doctor is Slain Confronting Man Burglarizing His Car in Alabama*, WASH. POST, Aug. 23, 1993, at A4 (reporting murder of Dr. George Wayne Patterson during walk to his car, but not confirming whether murder was abortion-related); Christopher B. Daly, *Salvi is Convicted of Murder in Abortion Clinic Shootings*, WASH. POST, Mar. 19, 1996, at A1 (reporting murder of two clinic workers by John Salvi in Brookline, Massachusetts on December 30, 1994); Laurie Goodstein & Pierre Thomas, *Clinic Killings Follow Years of Antiabortion Violence*, WASH. POST, Jan. 17, 1995, at A1 (reporting 37 bombings, 123 arsons, and 1500 cases of stalking, assault, sabotage, and burglary for 1983-1995); Mireya Navarro, *Abortion Foe is Guilty of Murder in Deaths of 2 at a Florida Clinic*, N.Y. TIMES, Nov. 3, 1994, at A1 (reporting murder of Dr. John Britton and bodyguard, James Barrett, by Paul Hill outside Pensacola Ladies Center on July 29, 1994); Larry Rohter, *Man Guilty of Murder in Death of*

explicitly seek to eliminate abortion: As one Operation Rescue field director explained, "We may not get laws changed . . . [b]ut if there is no one willing to conduct abortions, there are no abortions."<sup>15</sup>

Thirteen days after a pro-life activist murdered Dr. David Gunn, Senator Edward Kennedy introduced FACE.<sup>16</sup> Before FACE, existing federal, state, and local laws failed both to protect patients and providers and to keep clinics open.<sup>17</sup> The Act's purpose is to prevent blockades, violence, and threats against medical facilities and personnel who provide abortion services, and to provide criminal penalties and civil remedies when such acts do occur.<sup>18</sup> To that end, it prohibits force or the threat of force or physical obstruction to intentionally injure, intimidate, or interfere with anyone obtaining or providing reproductive health-related services.<sup>19</sup> The Senate determined that authorizing FACE under the Commerce Clause was "clear[ly] constitutional."<sup>20</sup>

In *United States v. Wilson*,<sup>21</sup> the defendants persuaded the district court that protecting reproductive health services under the Commerce Clause exceeded Congress's authority.<sup>22</sup> The Seventh Circuit reversed,<sup>23</sup> holding that obstruction of reproductive health facilities substantially affected the national reproductive health services market.<sup>24</sup> Skott's appeal asserted that reproductive health services do not have a sufficient nexus to interstate commerce to be subject to congressional regulation under the higher level of scrutiny established by *Lopez*.<sup>25</sup>

*Abortion Doctor*, N.Y. TIMES, Mar. 7, 1994, at A15 (reporting murder of Dr. David Gunn by Michael Griffin during protest outside Pensacola Women's Medical Services clinic on March 10, 1993)

15. Sandra G. Boodman, *The Death of Abortion Doctors*, WASH. POST, Apr. 20, 1993, at 27

16. See 139 CONG. REC. S3523 (daily ed. Mar. 23, 1993).

17. Federal courts had accepted clinics' invocation of civil rights law 42 U.S.C. § 1985(3) (1995) to challenge abortion-related violence, finding that blockades constituted conspiracies to interfere with patients' rights to unobstructed interstate travel to obtain abortions. See, e.g., *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993). In 1993, however, the Supreme Court held that the law could not provide a federal cause of action against clinic blockaders. See *id.*

18. See S. REP. NO. 103-117, at 2 (1993).

19. See 18 U.S.C.A. § 248(a)(1) (West Supp. 1996).

20. S. REP. NO. 103-117, at 31 (1993). The report found that patients travel across state lines for reproductive health services, that doctors travel interstate to provide such services, that clinics purchase medical supplies in other states, and that blockades and sabotage have closed clinics, resulting in diminished provision of reproductive health services and less interstate movement of people and goods. See *id.*

21. 880 F. Supp. 621 (E.D. Wis. 1995), *rev'd*, 73 F.3d 675 (7th Cir. 1995)

22. See *id.* at 624-33.

23. *United States v. Wilson*, 73 F.3d 675, 680 (7th Cir. 1995)

24. See *id.* at 688.

25. *Lopez* requires that an activity not simply "affect" but "substantially affect" interstate commerce, to be subject to congressional regulation. *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995). The Gun-Free School Zones Act failed this test because the Court found that it "neither regulates a commercial activity nor contains a requirement that the possession [of a gun] be connected in any way to interstate commerce." *Id.* at 1626. Before *Lopez*, courts had almost always deferred to Congress's exercise of the commerce power, even when used to regulate ostensibly local activities. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding regulations on intrastate coal mining), *Perez v. United States*, 402 U.S. 146 (1971) (upholding regulation of intrastate extortionate credit transactions), *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding regulations on production and consumption of home-

Perhaps key to the Court's decision to deny the FACE challenge was the fact that the reproductive health services market is connected to interstate commerce in ways that the Gun-Free School Zones Act in *Lopez* was not. First, provision and attainment of reproductive health services are inherently interstate commercial activities. Substantial numbers of women travel across state lines to obtain reproductive health services.<sup>26</sup> Clinic obstructions contribute substantially to the unique scarcity of reproductive health services: Fewer than seventeen percent of counties contain facilities and physicians that provide abortion services.<sup>27</sup> Clinic blockades are nationally organized, and often involve hundreds of protesters moving across state lines to specifically targeted cities such as Wichita and Pensacola.<sup>28</sup> In addition, clinics purchase supplies in interstate channels<sup>29</sup> and employ physicians from out of state. The number of physicians performing abortions decreased in nearly every state between 1982 and 1992,<sup>30</sup> and over five hundred hospitals and clinics stopped providing abortions entirely since the early 1980s,<sup>31</sup> largely because of clinic violence.<sup>32</sup> Consequently, eighty-three percent of U.S. counties lack a single abortion provider,<sup>33</sup> causing many physicians who do perform abortions to "ride circuit" to provide reproductive health services in several states.<sup>34</sup>

---

grown wheat). Some judges postulated that Congress could justify almost any action under the Commerce Clause. *See, e.g.*, *United States v. Ornelas*, 841 F. Supp. 1087, 1092 (D. Colo. 1994), *rev'd*, 56 F.3d 78 (10th Cir. 1995) ("Indeed, very few activities exist regarding which Congress could not reasonably find an interstate commerce nexus. . . . Perhaps unfortunately, Congress's legislative power under the Commerce Clause has become a virtual blank check . . ."); *United States v. Morrow*, 834 F. Supp. 364, 365 (N.D. Ala. 1993) ("[H]as not everyone been conditioned to believe that there is nothing which moves or has ever moved which does not support an invocation of the Commerce Clause . . .").

26. *See, e.g.*, National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1489 (E.D. Va. 1989) (finding that nearly one-third of patients at one Virginia clinic were from D.C., Florida, Maryland, New Jersey, New York, Pennsylvania, Texas, and West Virginia, and majority of patients at one Maryland clinic were from out of state).

27. *See* NARAL REP., *supra* note 14, at 4.

28. *See* S. REP. NO. 103-117, at 13 (1993) ("[M]uch of the activity has been orchestrated by groups functioning on a nationwide scale, including . . . Operation Rescue . . .") (quoting testimony of Attorney General Janet Reno); *see also* *United States v. Cooley*, 787 F. Supp. 977, 980 (D. Kan. 1992) (noting that "hundreds and perhaps thousands of persons came to Wichita from across the nation to [blockade clinics] by acts of trespass and obstruction"); Larry Rohter, *Doctor is Slain During Protest Over Abortions*, N.Y. TIMES, Mar. 11, 1993, at A15 (describing "long history of anti-abortion violence" in Pensacola).

29. *See* S. REP. NO. 103-117, at 31 (1993). The Supreme Court has sustained use of Commerce Clause authority under the Hobbs Act, 18 U.S.C. § 1951 (1988), to prohibit extortion or robbery that affects businesses purchasing supplies out of state or serving out-of-state customers, *see* *Stirone v. United States*, 361 U.S. 212, 213-15 (1960), or otherwise acting interstate, *see* *United States v. Green*, 350 U.S. 415, 420 (1956).

30. *See* NARAL REP., *supra* note 14, at 4.

31. *See* Amy Goldstein, *U.S. Abortion Services Drop; Fewer Doctors Performing Procedure*, *Study Says*, WASH. POST, Jan. 22, 1995, at A1.

32. *See* FEMINIST MAJORITY FOUND., CLINIC VIOLENCE SURVEY REPORT 2, 7 (1995) (reporting that clinics experiencing substantial violence most commonly lose staff, and majority of clinics losing staff in 1995 report direct link to Brookline murders). Further, fewer new doctors are learning to perform abortions—while 93% of obstetrics and gynecology residency programs offered abortion training in 1975, in 1992 one-third provided no training and only 12% require it. *See* Goldstein, *supra* note 31.

33. *See* *Abortion: Where Are the Doctors?*, N.Y. TIMES, Oct. 13, 1994, at A26.

34. *See* Goldstein, *supra* note 31 (reporting that shortage is most pronounced in "much of the South and parts of the Midwest, where the few available doctors often are circuit-riders, spreading their services

Ironically, anti-abortion activists' success in reducing the number of clinics that provide abortion has driven women and physicians to travel across state lines, strengthening the interstate nature of the reproductive health services market and the resulting Commerce Clause justification for FACE.<sup>35</sup>

A second justification for congressional regulation of clinic violence under the Commerce Clause stems from the need for federal law enforcement to contain the violence. Many blockades involve vast numbers of protesters who travel from other states and overwhelm state and local law enforcement.<sup>36</sup> In other cases, law enforcement officers are openly unwilling to restrict or to prosecute blockaders—Sheriff James T. Hickey of Nueces County, Texas testified that because of his personal anti-abortion beliefs, if confronted with illegal anti-abortion activities in his jurisdiction, "I will not [enforce the law]."<sup>37</sup> In contrast, the absence of need for federal authority to control firearms trafficking in school zones was a critical factor in the Court's finding that the Gun-Free School Zones Act trespassed on an inherently local problem.<sup>38</sup> Moreover, law enforcement officers' refusal to protect health clinics and providers from violence because of the services they provide may constitute sex discrimination,<sup>39</sup> thereby implicating the Fourteenth Amendment principles on which FACE rests.<sup>40</sup>

In enacting FACE, Congress made specific findings that the reproductive health services market is national in scope and that clinic violence is organized on a national scale, and used these findings to justify its Commerce Clause authorization. In contrast, when considering the legislation declared

---

among several cities or states"). Dr. Gunn had performed abortions in Florida, Georgia, and Alabama. See Larry Rohter, *Doctor is Slain During Protest Over Abortions*, N.Y. TIMES, Mar. 11, 1993, at A1.

35. Regulation of other interstate services has been sustained as an appropriate use of the Commerce Clause. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (allowing regulation of hotels under Commerce Clause on grounds that travellers seeking hotel accommodations often travel interstate), see also *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995) (citing *Heart of Atlanta Motel* with approval).

36. In West Hartford, Connecticut, approximately 40 law enforcement officers encountered over 200 blockaders. *Town of W. Hartford v. Operation Rescue*, 726 F. Supp. 371, 374 (D. Conn. 1989).

37. S. REP. NO. 103-117, at 19 (1993); see also Sandra G. Boodman, *Abortion Foes Strike at Doctors' Home Lives*, WASH. POST, Apr. 8, 1993, at A1 ("[Often] local law enforcement is unwilling to do their job to protect physicians and their families.") (quoting Rep. Nita Lowey). In Buffalo, New York, Mayor James Griffin invited Operation Rescue to his city, stating that police would treat protesters "with compassion. . . . If they can close down one abortion mill, then I think they'll have done their job." David Treadwell, *Buffalo Bracing for Abortion Protests*, L.A. TIMES, Apr. 21, 1992, at A15.

38. See *Lopez*, 115 S. Ct. at 1632-34.

39. Denial of abortion access through clinic violence may deny a federal constitutional right to a protected class. The Fourth Circuit had found that clinics providing abortion services and women seeking abortion constitute a "subset of a gender-based class" in the context of a 42 U.S.C. § 1985(3) (1995) claim, see *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1492 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), but was reversed, see *Bray v. Alexandra Women's Health Clinic*, 506 U.S. 263 (1993) (declaring that "opposition to abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women").

40. The *Wilson* court did not reach the Fourteenth Amendment authorization. See *United States v. Wilson*, 73 F.3d 675, 679 (7th Cir. 1995) ("Because we conclude that Congress had authority under the Commerce Clause, we express no opinion regarding the district court's Fourteenth Amendment discussion.").

unconstitutional in *Lopez*, the *Wilson* court noted that Congress made no such findings about the effects on interstate commerce of gun possession in local school zones,<sup>41</sup> and has made no such findings about other activities which individuals occasionally cross state lines to perform, such as “golfing, bowling, camping, or shopping.”<sup>42</sup> While the Court acknowledged that Congress was not required to provide formal findings of fact to justify its legislation, it suggested that such findings would aid its understanding of congressional judgment.<sup>43</sup>

Finally, the extent to which FACE was modeled on past civil rights statutes, such as the Civil Rights Acts of 1964<sup>44</sup> and 1968,<sup>45</sup> reflects its validity. In considering the Civil Rights Act of 1968, the 90th Congress found that there was “no question of the constitutional power of Congress to punish private interference with voting in Federal elections, interstate travel or interstate commerce” under the Commerce Clause,<sup>46</sup> and further found that “[i]n dealing with violent interference with the right to be free from racial discrimination in interstate activities it is reasonable to conclude that effective regulation requires reaching related local activities also.”<sup>47</sup> Soon after the enactment of the Civil Rights Act of 1964, local business owners who wished to evade the antidiscrimination law challenged its connection to interstate commerce, but were unsuccessful because many of their customers were from out of state.<sup>48</sup>

*Skott v. United States* would have presented a promising opportunity for the Court to validate the constitutionality of FACE and affirm Congress’s power to enact laws protecting women from gender-based attacks that impair their access to interstate services.<sup>49</sup> For now, however, FACE stands intact, safeguarding reproductive health clinics,<sup>50</sup> providers, and women who depend on them.

—Amy H. Nemko

---

41. *See id.* at 683.

42. *Id.* at 681 (quoting *United States v. Wilson*, 880 F. Supp. 621, 631 (E.D. Wis. 1995)).

43. *See Lopez*, 115 S. Ct. at 1631–32.

44. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

45. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18, 25, 28, 42 U.S.C.).

46. S. REP. NO. 90-721 (1968), reprinted in 1968 U.S.C.C.A.N. 1837, 1842 (citations omitted).

47. *Id.*

48. *See Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1966) (denying challenge by restaurant owners); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 253 (1964) (denying challenge by hotel owners).

49. *Cf. Doe v. Doe*, 929 F. Supp. 608, 615 (D. Conn. 1996) (upholding Commerce Clause authorization of Violence Against Women Act (“VAWA”) on grounds that gender-motivated violence restricts women’s participation in national economy). *But cf. Brzonkala v. Virginia Polytechnic*, No. CIV.A.95-1358-R, 1996 WL 431097, at \*15 (W.D. Va. July 26, 1996) (holding that Congress exceeded commerce power in enacting VAWA).

50. Since the enactment of FACE, abortion-related violence has “decreased sharply,” and clinic access has opened “significant[ly].” Robert Pear, *Protests at Abortion Clinics Have Fallen, and New Law is Credited*, N.Y. TIMES, Sept. 24, 1996, at A18 (citing statistics from National Abortion Federation).

## Upholding “Don’t Ask, Don’t Tell”

Thomasson v. Perry, 80 F.3d 915 (4th Cir.), *cert. denied*, 1996 WL 396112 (U.S. Oct. 21, 1996) (No. 96-1).

In 1993, President Clinton sparked a political firestorm by renewing his campaign pledge to lift the military’s ban on homosexual service members. Over the following months, the President, the Congress, and the public engaged in a sometimes fierce debate that included extensive congressional hearings and deliberations.<sup>1</sup> Ultimately, President Clinton acceded to a “compromise” policy known as “Don’t Ask, Don’t Tell” (DADT) written by conservatives in Congress.<sup>2</sup> The new policy ended the military’s former practice of inquiring into service applicants’ sexual orientation without specific cause, but declared that “[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”<sup>3</sup> This Case Note argues that constitutional challenges to the DADT policy have little chance of success under the current standard of review.

Last spring, in *Thomasson v. Perry*,<sup>4</sup> the Fourth Circuit became the first federal court of appeals to rule on the constitutionality of the new policy.<sup>5</sup>

---

1. See, e.g., *Policy Concerning Homosexuality in the Armed Forces. Hearings Before the Senate Comm. on Armed Services*, 103d Cong. (1993) [hereinafter *SASC Hearing*]; *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong. (1993) [hereinafter *HASC Hearing*]; *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Subcomm. on Military Forces and Personnel of the House Comm. on Armed Services*, 103d Cong. (1993) [hereinafter *MFPS Hearing*]; S. REP. NO. 103-112, at 270 (1993) (explaining and justifying DADT policy); H.R. REP. NO. 103-200, at 286 (1993) (same); 139 CONG. REC. H7080-89 (daily ed. Sept. 28, 1993); 139 CONG. REC. S11,168-228 (daily ed. Sept. 9, 1993)

2. See National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654 (1996), 32 C.F.R. pt. 41, app. A (1995) (implementing regulation).

3. 10 U.S.C. § 654(a)(15). The statute requires a discharge if a member: (1) attempts to engage in homosexual acts (unless the member demonstrates, inter alia, that such acts are unlikely to recur), (2) states that he is a homosexual or bisexual (unless the member demonstrates that he has no propensity to engage in homosexual acts); or (3) attempts to marry someone of the same sex. See *id.* § 654(b)

4. 80 F.3d 915 (4th Cir. 1996), *aff’g* *Thomasson v. Perry*, 895 F. Supp. 820 (E.D. Va. 1995), *petition for cert. filed*, 65 U.S.L.W. 3033 (U.S. July 1, 1996) (No. 96-1).

5. Shortly after *Thomasson*, the Second Circuit tentatively upheld the DADT policy in *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996). The Eighth Circuit also recently upheld the policy in a brief opinion that heavily cites *Thomasson*. See *Richenberg v. Perry*, No. 95-4181, 1996 WL 560208 (8th Cir. Oct. 3, 1996); see also *Watson v. Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996); *Selland v. Perry*, 905 F. Supp. 260 (D. Md. 1995); *Philips v. Perry*, 883 F. Supp. 539 (W.D. Wash. 1995). But see *Holmes v. California Army Nat’l Guard*, 920 F. Supp. 1510, 1526-28, 1534-36 (N.D. Cal. 1996) (finding that DADT violates equal protection and free speech); *Thorne v. United States Dep’t of Defense*, 916 F. Supp. 1358, 1358 (E.D. Va. 1996) (finding that DADT violates free speech); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 926, 928

Shortly after the Navy began implementing the DADT policy, Lieutenant Thomasson declared that he was homosexual, prompting the Navy to convene a Board of Inquiry.<sup>6</sup> At the Inquiry, Thomasson provided evidence of his impressive service record but refused to address the DADT policy's "rebuttable presumption" that a member's "statement that he . . . is a homosexual" indicates that he "engages in or is likely to engage in homosexual acts."<sup>7</sup> After the Board voted for Thomasson's honorable discharge, Thomasson filed suit, claiming that the DADT policy violated his Fifth Amendment right to equal protection and his First Amendment right to free speech.

According to current equal protection precedent, military regulation of homosexual conduct is subject merely to "rational basis" review.<sup>8</sup> Under this standard, the question is "simply whether the legislative classification is rationally related to a legitimate governmental interest."<sup>9</sup> As the *Thomasson* court pointed out, this means that the DADT statute deserves a "strong presumption of validity";<sup>10</sup> the policy survives facial attack if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification."<sup>11</sup> This inquiry does not require the government to provide a court with "evidence or empirical data,"<sup>12</sup> nor does it give a court license "to judge the wisdom, fairness, or logic of legislative choices."<sup>13</sup>

---

(W.D. Wash. 1994) (finding that DADT violates equal protection and substantive due process but not free speech).

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

7. *Id.* at 822. Under the DADT policy, a member's statement that he is a homosexual establishes a rebuttable presumption that he has a propensity to engage in prohibited homosexual conduct. Under the former, status-based policy, such a member faced a "mandatory" discharge if he could not prove that he was "not a homosexual." Compare 32 C.F.R. pt. 41, app. A (1995), with 46 Fed. Reg. 9571 (1981) (originally codified at 32 C.F.R. pt. 41 (1981)).

8. Current precedent in every circuit that has examined an equal protection challenge to the DADT policy or its predecessor holds that military regulation of homosexual conduct is subject to rational basis review. See, e.g., *Thomasson*, 80 F.3d at 927-28 (refusing to recognize homosexuals as "suspect class"); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (same); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570-74 (9th Cir. 1990) (same); *Ben-Shalom v. Marsh*, 881 F.2d 454, 463-66 (7th Cir. 1989) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (same). The government need only satisfy a minimal standard of "rationality" in order to disfavor homosexual activity because such discrimination does not burden any "fundamental" constitutional right. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986) (allowing criminalization of homosexual conduct). In its recent decision striking down Colorado's antihomosexual rights amendment, the Court continued to apply a "rational basis" standard. See *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996), although the Court's result may presage a shift to a higher standard in the future.

9. *Thomasson*, 80 F.3d at 928 (emphasis omitted) (citing *Heller v. Doe*, 509 U.S. 312, 318-19 (1993)).

10. *Id.*; see also *Heller*, 509 U.S. at 320 (explaining presumption of constitutionality); *FCC v. Beach Communications*, 508 U.S. 307, 314-15 (1993) (same); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462 (1988) (same).

11. *Thomasson*, 80 F.3d at 928 (quoting *Heller*, 509 U.S. at 320); see also *Beach Communications*, 508 U.S. at 313; *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (finding any "plausible policy reason" sufficient).

12. *Beach Communications*, 508 U.S. at 315, cited with approval in *Thomasson*, 80 F.3d at 928; see also *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (finding no need for "convincing statistics").

13. *Thomasson*, 80 F.3d at 928 (quoting *Beach Communications*, 508 U.S. at 313); see also *Heller*, 509 U.S. at 324.



In addition, the Supreme Court has insisted that the judiciary treat congressional and executive decisions on military policy with special respect. While the Constitution gives explicit control over military regulation to Congress<sup>14</sup> and to the Commander-in-Chief,<sup>15</sup> “the lack of competence on the part of the courts [concerning military affairs] is marked.”<sup>16</sup> As a result, “judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies . . . is challenged.”<sup>17</sup> Such deference has, for example, extended to Congress’s decision to register only males for a military draft,<sup>18</sup> Congress’s regulation of military conduct under the Uniform Code of Military Justice,<sup>19</sup> and the President’s discretion regarding military commissions.<sup>20</sup>

As long as the federal courts continue to hold that military regulation of homosexual conduct is subject to a highly deferential, rational basis review, gay rights advocates have little chance of overturning the DADT policy,<sup>21</sup> because the policy’s discrimination against homosexual conduct rests on a broad foundation of congressional testimony, deliberation, and reasoning. Although opponents of the DADT policy may think it unwise or offensive, the policy is “rationally” predicated on congressional findings that “[s]uccess in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion”<sup>22</sup> and that “[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to” necessary morale, order, and cohesion.<sup>23</sup> In reaching these conclusions, Congress relied on extensive hearings that included testimony from the nation’s highest military officers, independent defense experts, gay rights advocates, and front-line military personnel.<sup>24</sup> After receiving evidence on both sides of the issue,<sup>25</sup> moreover,

14. See U.S. CONST. art. I, § 8.

15. See U.S. CONST. art. II, § 2.

16. *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981); see also *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953).

17. *Rostker*, 453 U.S. at 70.

18. See *Rostker*, 453 U.S. 57.

19. See *Parker v. Levy*, 417 U.S. 733 (1974).

20. See *Orloff*, 345 U.S. 83.

21. Note that every federal circuit that considered the military’s pre-1993 homosexual policy found that the armed services could constitutionally prohibit homosexual conduct. See *supra* note 8.

22. National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654(a)(6) (1996).

23. *Id.* § 654(a)(15).

24. See *SASC Hearing*, *supra* note 1; *HASC Hearing*, *supra* note 1; *MFPS Hearing*, *supra* note 1.

25. See, e.g., *HASC Hearing*, *supra* note 1, at 270–79, 290 (testimony of military sociologist opposing ban on open homosexuality). A study commissioned by the Secretary of Defense also supported lifting the ban. See RAND CORP. NAT’L DEFENSE RESEARCH INST., *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT* (1993). Although opponents of the DADT policy might cite such evidence to argue that the policy is unwise, the fact that Congress chose one side of a policy dispute does not demonstrate that the policy is unconstitutionally “irrational,” especially because the government need not provide more than a “rational speculation” or “conceivable basis” to support its reasoning. See *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) (holding that no empirical data is required for rational basis). Of course, if the applicable equal protection standard became more rigorous,

both Houses produced detailed reports explaining their conclusions.<sup>26</sup> In sum, Congress went well beyond the establishment of a “conceivable state of facts” required for rational basis review.<sup>27</sup> Whether or not the result of Congress’s long deliberative process was ultimately “correct,” Congress was not “irrational” to have believed testimony from military leaders and other defense experts that homosexual activity was “incompatible” with military service.

In an attempt to move beyond the rational basis standard, Thomasson also argued that the DADT policy violated his First Amendment right of free speech.<sup>28</sup> Because the only evidence introduced against Thomasson before the Board of Inquiry was his statement that he was gay,<sup>29</sup> Thomasson argued that the government had impermissibly penalized the content of his speech. Because the statute was not, in his view, “content-neutral,” Thomasson maintained that the policy could only survive judicial review if it was narrowly tailored to serve a compelling state interest.<sup>30</sup>

Thomasson’s argument, however, confuses the “content-neutral” use of his statements as evidence with the “content-regulating” punishment of his personal beliefs. As the Fourth Circuit explained: “The statute does not target speech declaring homosexuality; rather, it targets homosexual acts and the propensity or intent to engage in homosexual acts, and permissibly uses the speech as evidence.”<sup>31</sup> The DADT policy does not treat “speech” itself as impermissible conduct.<sup>32</sup> Instead, it uses speech declaring homosexual orientation as evidence that a service member has a “propensity” to engage in prohibited homosexual conduct.

In much the same way, prosecutors and plaintiffs routinely introduce defendants’ confessions and other statements to establish material facts, such as motive or intent, without violating defendants’ First Amendment rights.<sup>33</sup> The Supreme Court has consistently upheld such evidentiary use of speech, because such evidentiary practices are aimed not at punishing particular

then such empirical evidence could become more significant. *But see* David M. Bessho, *The Military Ban on Homosexuals: Suspect, Constitutional, or Both?*, 12 GA. ST. U. L. REV. 845 (1996).

26. *See* S. REP. NO. 103-112, at 270 (1993); H.R. REP. NO. 103-200, at 286 (1993).

27. Thus, the DADT policy “embodies the exhaustive effort of the democratically accountable branches of American government and . . . reflects month upon month of political negotiation and deliberation. Such products of the democratic process are seldom completely tidy or universally satisfactory, but it is precisely on that account that they deserve judicial respect.” *Thomasson v. Perry*, 80 F.3d 915, 923 (4th Cir. 1996).

28. *See id.* at 931. This has been a common tactic in DADT cases. *See* cases cited *supra* note 5; *see also* Daniel S. Alter, *Confronting the Queer and Present Danger: How to Use the First Amendment When Dealing with Issues of Sexual Orientation and Military Service*, HUM. RTS., Summer 1995, at 22 (1995) (encouraging First Amendment claims against DADT policy).

29. *See Thomasson v. Perry*, 895 F. Supp. 820, 823 (E.D. Va. 1995).

30. *See Thomasson*, 80 F.3d at 931.

31. *Id.* (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)).

32. Under the policy, statements of homosexual orientation do not themselves constitute prohibited conduct, but rather serve as evidence of propensity for conduct. *See supra* note 7.

33. *See, e.g., Mitchell*, 508 U.S. at 489-90 (citing *Haupt v. United States*, 330 U.S. 631, 642 (1947) (statements of sympathy with enemy can be used as evidence of motive in treason trial)).

“content” but rather at proving the elements of legitimate causes of action. Thus, as the Fourth Circuit observed, the Court has recognized the “content-neutral” use of defendants’ words to provide evidence of motive in Title VII challenges to discriminatory acts.<sup>34</sup> Similarly, the Court has approved the “content-neutral” introduction of defendants’ racial slurs to prove aggravating circumstances in criminal sentencing.<sup>35</sup> By the same token, “[n]o First Amendment concern would arise . . . from the discharge of service members for declaring that they would refuse to follow orders, or that they were addicted to controlled substances. Such remarks provide evidence of activity that the military validly may proscribe.”<sup>36</sup> Simply put, there is no constitutional reason why the military cannot use a service member’s speech as relevant evidence to establish facts that might form the basis for that service member’s discharge. If the underlying discrimination against homosexual conduct is constitutional, then so too is the use of evidence indicating that a service member is likely to engage in such conduct.<sup>37</sup>

Because the DADT policy is aimed at conduct,<sup>38</sup> the question becomes whether it is “rational” for the government to establish a “rebuttable presumption” that a statement of homosexual orientation indicates a likelihood of homosexual activity.<sup>39</sup> It is hard to dispute the Fourth Circuit’s common sense conclusion that a service member’s statement that he is homosexual “has substantial evidentiary value regarding whether he has a propensity to engage in homosexual acts—‘the military may reasonably assume that when a member states that he is a homosexual, that member means that he either engages or is likely to engage in homosexual conduct.’”<sup>40</sup> The DADT policy does not presume that homosexuals are somehow more prone to sexual behavior than heterosexuals. Rather, the policy makes the practical assumption that homosexuals and heterosexuals alike will engage in sexual activity. The

---

34. See *Thomasson*, 80 F.3d at 931 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992), *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251–52 (1989) (plurality opinion)), see also *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

35. See *Thomasson*, 80 F.3d at 933 (citing *Mitchell*, 508 U.S. at 487), see also *Barclay v. Florida*, 463 U.S. 939 (1983) (plurality opinion) (allowing speech as evidence of racial animus in death sentencing)

36. *Thomasson*, 80 F.3d at 931.

37. See *id.*; *Able v. United States*, 88 F.3d 1280, 1296–300 (2d Cir. 1996) (accepting use of statements showing propensity for homosexual conduct, but remanding for examination of constitutionality of prohibiting such conduct).

38. As further evidence that the policy is aimed only at conduct, the *Thomasson* district court found that it allows members “to affiliate with a group that opposes the policy, to make statements criticizing the policy, to attend demonstrations in favor of homosexual rights, to read homosexual newspapers, or [to] engage in other such expressive activities.” *Thomasson v. Perry*, 895 F. Supp. 820, 825 (E.D. Va. 1995).

39. Congress may codify evidentiary presumptions if there is a “rational connection between the fact proved and the ultimate fact presumed” that is not “so unreasonable as to be a purely arbitrary mandate.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (quoting *J.K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910)); see also *Watson v. Perry*, 918 F. Supp. 1403, 1416 n.6 (1996) (citing *Usery*, 428 U.S. at 28). Note that under the pre-1993 policy, a statement of homosexual orientation resulted in a “mandatory” discharge, rather than an evidentiary presumption. See *supra* note 7. A claim that the presumption itself discriminates against homosexuals would also be subject to rational basis review. See *supra* note 8.

40. *Thomasson*, 80 F.3d at 932 (quoting *Steffan v. Perry*, 41 F.3d 677, 686 (D.C. Cir. 1994)).

difference is that the military absolutely forbids homosexual conduct. As the Senate has observed: “[I]t would be irrational . . . to develop military personnel policies on the basis that all gays and lesbians will remain celibate . . . .”<sup>41</sup>

Even if such use of statements as evidence was not “rational” and “viewpoint-neutral,” Thomasson’s claim would still probably founder on the “special First Amendment considerations [that] surround the military environment.”<sup>42</sup> Because “[s]peech that is protected in the civil population may . . . undermine the effectiveness of response to command,”<sup>43</sup> the Supreme Court has insisted that “review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”<sup>44</sup> Thus, the Court has upheld a ban on the wearing of yarmulkes,<sup>45</sup> the discipline of doctors who urge insubordination,<sup>46</sup> the prohibition of disruptive campaign literature and speeches on military bases,<sup>47</sup> and the prior restraint of petitions circulated to base residents.<sup>48</sup> Given such a history of deference,<sup>49</sup> the *Thomasson* Court was understandably hesitant to overturn a policy that “Congress expressly found . . . was justified on grounds relating to performance of the military function, perhaps the most important of all governmental responsibilities.”<sup>50</sup>

Ultimately, challenges like Thomasson’s to the constitutionality of the DADT policy have little chance of success under current precedent. As long as the *Bowers* rational basis standard continues to legitimate criminalization of homosexual conduct, gay rights advocates have little prospect of reversing the months of careful political deliberation that produced the military’s exclusion policy. With the Supreme Court’s history of deference to military judgments, moreover, the DADT policy presents the worst possible vehicle for a challenge to *Bowers*. Unless defeats such as *Thomasson* provide substantial symbolic or political value for the gay rights movement, advocates should consider foregoing further suits against the DADT policy until the Court holds discrimination against homosexuals to a higher standard.

—Warren L. Ratliff

---

41. S. REP. No. 103-112, at 284 (1993).

42. *Thomasson*, 80 F.3d at 933 (citing *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Brown v. Glines*, 444 U.S. 348, 354 (1980); *Parker v. Levy*, 417 U.S. 733, 758 (1974)).

43. *Brown*, 444 U.S. at 354 (citations omitted).

44. *Goldman*, 475 U.S. at 507. The government may even restrict its civilian employees’ speech in some contexts to improve its effectiveness. See, e.g., *Waters v. Churchill*, 511 U.S. 661 (1994).

45. See *Goldman*, 475 U.S. at 507.

46. See *Parker*, 417 U.S. at 760.

47. See *Greer v. Spock*, 424 U.S. 828, 838–40 (1976).

48. See *Brown*, 444 U.S. at 354–58.

49. For a discussion of the judicial “incompetence” in military affairs that underlies this deference, see *supra* notes 14–21 and accompanying text.

50. *Thomasson v. Perry*, 80 F.3d 915, 933 (4th Cir. 1996).