DON'T ASK, DO TELL: THE IMPLICATIONS OF 2008 CIRCUIT COURT DECISIONS FOR THE STANDARD OF CONSTITUTIONAL REVIEW APPLICABLE TO THE MILITARY HOMOSEXUAL CONDUCT POLICY

MAJOR BAILEY W. BROWN, III*

The laws involved . . . here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.[1]

I. Introduction

Gay and lesbian servicemembers have reason for cautious optimism.[2] Two recent federal circuit court decisions have confronted, with different results, significant questions surrounding the military's homosexual conduct policy, codified at 10 U.S.C. § 654[3] and "colloquially known as 'Don't Ask, Don't Tell'" (DADT).[4] As written, DADT requires

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* Judge Advocate, U.S. Army. Presently assigned as the Deputy Staff Judge Advocate, U.S. Army Garrison, Fort McPherson, Ga. LL.M., 2009, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.; J.D., 2000, University of Georgia; B.A., 1997, The University of the South at Sewanee, Tenn. Previous assignments include Brigade Judge Advocate, 501st Sustainment Brigade, Daegu, Korea, 2006–2008; Brigade Judge Advocate, 18th Engineer Brigade (Theater Army), Bagram Afghanistan, 2005–2006; Chief, Personnel Claims, Europe, U.S. Army Europe and 7th Army, Mannheim, F.R.G., 2003–2005; Legal Assistance Attorney, U.S. Army Southern European Task Force (SETAF) (Airborne), Vicenza, Italy, 2001–2003. Member of the Georgia Bar. This article was submitted in partial completion of the Master of Laws requirements of the 57th Judge Advocate Officer Graduate Course.

[1] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[2] Optimism is warranted because, along with a changing national political climate, recent judicial scrutiny of the military policy against homosexual conduct casts doubt on its constitutionality. Caution is warranted because some scholars regard the political leanings of the Supreme Court bench as the critical factor for any judicially motivated change, with those on the left likely to strike the policy and those on the right more likely to support it; and those on the right have more votes in the end." E-mail from Shaun Martin, Law Professor, University of San Diego School of Law (Oct. 9, 2008, 14:098:31 EST) (on file with author).

[3] 10 U.S.C. § 654 (2006) (concerning homosexuality in the armed forces).

[4] Thomasson v. Perry, 80 F.3d 915, 920 (4th Cir. 1996).

separation of all military members who engage in homosexual acts.[5] In *Witt v. Department of the Air Force* (*Witt*),[6] plaintiff Major Margaret Witt was suspended from reserve duties as an Air Force nurse pending separation proceedings under DADT.[7] She had served eighteen years, was highly decorated[8] and generally regarded as an outstanding officer, and was featured in Air Force promotional and recruiting materials for more than ten years, starting in 1993.[9] From 1997 to 2003, Major Witt was involved in a committed same-sex relationship in which she and her partner lived together in a home 250 miles from the military base where she performed her reserve duties.[10] In 2004, the Air Force commenced the investigation which led to the separation action.[11]

She brought action in federal court to enjoin the Air Force from separating her.[12] In May 2008, the Ninth Circuit Court of Appeals determined that the Supreme Court decision in *Lawrence v. Texas* (*Lawrence*)[13] requires the military to demonstrate that each specific servicemember's acts adversely impact the concerned military unit prior to separating the servicemember under DADT.[14] *Witt* required consideration of each case on its own facts, precluding blanket application of the policy.[15] To that end, the circuit court remanded the case to the district level, where the Air Force will have an opportunity to present evidence in satisfaction of this new requirement.[16] As crushing a defeat as this decision was for DADT, the dissent demanded an even more stringent review, suggesting that the policy should be measured

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[5] 10 U.S.C. § 654(b)(1).
[6] 527 F.3d 806 (2008).
[7] *Id.* at 809.
[8] *See id.* Major Witt's awards include "the Meritorious Service Medal, the Air Medal, the Aerial Achievement Medal, the Air Force Commendation Medal, and numerous others." *Id.*
[9] *Id.*
[10] *Id.* ("Major Witt's partner was never a member nor a civilian employee of any branch of the armed forces, and Major Witt states that she never had sexual relations while on duty or while on the grounds of any Air Force base.").
[11] *Id.* at 810.
[12] *Id.*
[13] 539 U.S. 558, 567 (2003).
[14] *Witt*, 527 F.3d at 819.
[15] *Id.*
[16] *Id.* at 821.

against the strictest constitutional standard.[17] The policy would not likely survive the dissent's proposed constitutional review.[18]

In June 2008, the First Circuit Court of Appeals in *Cook v. Gates* (*Cook*)[19] confronted the identical issue. In this case, twelve former military members[20] who had been separated under DADT brought an action claiming that DADT is unconstitutional based upon due process, equal protection, and free speech grounds.[21] The First Circuit agreed with *Witt* that the Supreme Court in *Lawrence* imposed "a standard of review that lies between strict scrutiny and rational basis,"[22] but stated that, "[i]n Witt, the 9th Circuit resolved an as-applied, post-*Lawrence* substantive due process challenge to [DADT] differently then we do here."[23] In contrast to the *Witt* analysis, the First Circuit determined that DADT survived this higher level of constitutional scrutiny, even on a case-by-case basis, due to judicial deference to the legislature concerning military affairs.[24]

As a result of these conflicting circuit court decisions, the Supreme Court of the United States may consider the military's ban on homosexual servicemembers ripe for constitutional review. Both these cases read *Lawrence* to require a heightened level of constitutional

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[17] *Id.* at 822 (Canby, J., dissenting) (arguing that DADT should be subject to strict scrutiny).

[18] *Id.* at 817 (majority opinion) ("Few laws survive such scrutiny, and DADT most likely would not."); *see also* Pamela Lundquist, *Essential to the National Security: An Executive Ban on Don't Ask, Don't Tell*, 16 AM. U.J. GENDER SOC. POL'Y & L. 115, 124 (2007) (stating that courts applying strict scrutiny to DADT have found it unconstitutional, but that "those cases have been overturned on appeal," (citing Watkins v. U.S. Army, 837 F.2d 1428, 1451 (9th Cir. 1988) ("[T]he Army's regulations violate the constitutional guarantee of equal protection of the laws because they discriminate against persons of homosexual orientation, a suspect class, and because the regulations are not necessary to promote a legitimate compelling governmental interest."), *vacated,* 875 F.2d 699, 731 (9th Cir. 1989) (en banc), *and* Able v. United States, 968 F. Supp. 850, 864 (E.D.N.Y. 1997) (stating that "the Act discriminates against homosexuals in order to cater to the prejudices of heterosexuals"), *rev'd on appeal*, 155 F.3d 628, 635 (2d Cir. 1998))).

[19] 528 F.3d 42 (2008).

[20] Details of each plaintiff can be found at the Service Member's Legal Defense Network website, http://www.sldn.org/pages/plaintiffs-in-cook-v-gates (last visited May 19, 2009).

[21] *Cook*, 528 F.3d at 47.

[22] *Id.* at 56.

[23] *Id.* at 48 n.10 (citing *Witt*, 527 F.3d. 806).

[24] *Id.* at 60.

scrutiny for DADT—a scrutiny it may not survive.[25] The differences in the analysis presented by the two circuits, as well as the disparate results in the two cases, invite an attempt by the highest Court to resolve this matter of contentious public and legal debate. This article predicts the result of such an attempt by examining the law surrounding DADT and the historical developments leading to the present debate. It closely examines the language and intent of the *Lawrence* decision and reviews the recent cases that have caused a split in the circuits about the standard of review established in *Lawrence*. It compares their treatment of the due process and equal protection arguments, and addresses the First Amendment arguments posed in *Cook*.

This article argues that the Supreme Court will do as the *Witt* and *Cook* courts have done and subject DADT to a higher than rational basis standard of review. The Court will not likely invalidate the policy under a strict scrutiny analysis. Instead, the policy will most likely survive in a weakened form requiring specific evidence of unit impact. From a practical standpoint, military judge advocates involved in the implementation of DADT should prepare to review files for evidence of adverse unit impact prior to separating personnel under DADT.

II. Background

A. Due Process

The Fourteenth Amendment states that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[26] The Fifth Amendment states that no person "shall be deprived of life, liberty, or property without due process of law."[27] While the due process analysis most often appears in the context of examining state statutes under the Fourteenth Amendment, courts apply the same analysis to

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[25] *See Witt*, 527 F.3d at 827 (Canby, J., concurring in part and dissenting in part) (acknowledging that, under strict scrutiny analysis, "requiring the Air Force to make the requisite showing as a threshold matter may end the case").

[26] U.S. CONST. amend. XIV § 1. The Supreme Court has long read the Fourteenth Amendment to incorporate the principles of the Bill of Rights and apply them to the states. *See* Gitlow v. New York, 268 U.S. 652 (1925) ("[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

[27] U.S. CONST. amend. V.

legislation arising from the U.S. Congress under the Fifth Amendment.[28] The Supreme Court has read the due process language of these amendments to limit the ability of states or the Federal Government to intrude upon fundamental liberties without a proper basis,[29] "regardless of the procedures provided."[30] Due process includes respect not only for liberties specifically enumerated in the Constitution, but also those "necessary in making the express guarantees fully meaningful."[31] Historically, the term liberty in the Fourteenth Amendment

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his

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[28] See Troxel v. Granville, 530 U.S. 57, 65 (2000), stating that:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the [Fourteenth] Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."

[29] *See generally* Schware v. Bd. of Bar Examiners of N.M., 353 U.S. 232 (1957) (holding that due process requires the state to consider the individual circumstances of persons adversely affected by the application of a law).

[30] Brief of Appellee-Respondent at 33, Witt v. Dep't of the Air Force, No. 06-35644 (9th Cir. Jan. 3, 2007).

[31] Griswold v. Connecticut, 381 U.S. 479, 484 (1965). In THE FEDERALIST, NO. 84 (Alexander Hamilton), Hamilton argued that the naming of specific liberties should be unnecessary under the Constitution because the document itself limits the Government to its enumerated powers—none other should be available to it. He cautioned that "bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince," *id.* at 578–79, and argued against enumerated liberties lest they become

> exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.

> own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men . . . . [t]his liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.[32]

In the specific context of DADT, "the due process claim . . . is premised on the constitutional protection afforded all citizens to engage in certain sexual conduct,"[33] and challenges whether DADT intrudes upon "a realm of personal liberty which the government may not enter."[34]

B. Equal Protection

The Fourteenth Amendment also guarantees all citizens equal protection under the law.[35] Although the "inherent content of equal protection continues to be a subject of intense debate,"[36] the Supreme Court has interpreted this provision to mean that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[37] Courts ordinarily find legislation compliant with equal protection principles so long as it "neither burdens a fundamental right, nor targets a suspect class . . . [and] bears a rational relation to some legitimate end."[38]

Id.

[32] Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923).

[33] Cook v. Gates, 528 F.3d 42, 60 (2008).

[34] Lawrence v. Texas, 539 U.S. 558, 579 (2003).

[35] U.S. CONST. amend. XIV. The Supreme "Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiessenfeld, 420 U.S. 636, 638 n.2 (1975).

[36] GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 628 (13th ed. 1997) ("[T]he strongest consensus about the meaning of equal protection is drawn from its historical origins: at the very least it was directed at governmental racial discrimination against blacks.").

[37] Romer v. Evans, 517 U.S. 620, 633 (1996) (quoting Sweatt v. Painter, 339 U.S. 629, 635 (1950)).

[38] *Id.* at 631.

Neither the states nor the Federal Government[39] may indulge in "indiscriminate imposition of inequalities,"[40] and "certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis."[41] In the specific context of DADT, "the equal protection claim is based on [DADT]'s differential treatment of homosexual military members versus heterosexual military members,"[42] and challenges whether "homosexuals [are] a suspect class for equal protection purposes."[43]

C. Standards of Review in Constitutional Analysis

The Supreme Court has the power to strike down laws that violate constitutional principles pursuant to its power of judicial review.[44] Key to the fate of DADT is the standard of constitutional scrutiny the Supreme Court would apply in a potential judicial review of the statute.[45] There are three primary standards by which the Supreme Court examines a statute.[46] The rational basis test and the strict scrutiny test are considered the traditional standards,[47] having evolved over "a series of Supreme Court cases that have interpreted the Due Process and Equal Protection Clauses of the Fourteenth Amendment."[48] Rational basis review examines "whether governmental action is so arbitrary that a rational basis for the action cannot even be conceived *post hoc*."[49]

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[39] The process of incorporating the Fourteenth Amendment into the Fifth Amendment began with *Bolling v. Sharpe*; the Court explained that where the Fourteenth Amendment prevented states from segregating schools, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." 347 U.S. 497, 500 (1954).

[40] *Romer*, 517 U.S. at 633.

[41] Plyer v. Doe, 457 U.S. 202, 233 (1982) (Blackman, J., concurring).

[42] Cook v. Gates, 528 F.3d 42, 60 (2008).

[43] *Id.* at 51.

[44] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[45] *See generally* Lochner v. New York, 198 U.S. 45 (1905). Justice Oliver Wendell Holmes' informative dissent provides a general discussion of judicial review standards. *Id.* at 74.

[46] *See* Pamela Glazner, *Constitutional Law Doctrine Meets Reality: Don't Ask, Don't Tell in Light of* Lawrence v. Texas, 46 SANTA CLARA L. REV. 635, 639 (2003) (pithily explaining that "strict scrutiny sits atop intermediate scrutiny, which sits atop rational basis review").

[47] Witt v. Dep't of the Air Force, 527 F.3d 806, 818 (2008) ("Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases."); *see also* Glazner, *supra* note 46, at 640.

[48] Glazner, *supra* note 46, at 640.

[49] *Witt*, 527 F.3d at 817.

Critically, this standard of review "does not permit consideration of the strength of the individual's interest or the extent of the intrusion on that interest caused by the law; the focus is entirely on the rationality of the state's reason for enacting the law."[50] A law will survive the rational basis test so long as the law in question is rationally related to a legitimate government interest, and its objectives are not "themselves invalid."[51]

The second traditional standard, strict scrutiny, is often the death knell of the subject legislation.[52] Legislation "infringing on fundamental rights receives strict scrutiny, which requires the government to establish that the means the law employs 'are suitably [or "narrowly"[53]] tailored to serve a compelling [governmental] interest.'"[54] Strict scrutiny reverses the burden of persuasion, requiring the government to defend its law.[55] Traditionally, "[s]ubstantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases."[56]

In some cases, the Court applies neither of the traditional tests, but instead uses an intermediate standard of scrutiny,[57] sometimes called a "searching rational basis test."[58] Under this standard, legislation must serve "important governmental objectives and must be substantially related to achievement of those objectives."[59] Such cases represent neither a strict scrutiny standard, nor a mere rational basis test, but a more "searching constitutional inquiry"[60] tailored to the specific issue at

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[50] Cook v. Gates, 528 F.3d 42, 55 (2008).
[51] *See id.* at 55 (citing Nordlinger v. Hahn, 505 U.S. 1, 11–12 (1992); Heller v. Doe, 509 U.S. 312, 324 (1993)).
[52] *See* GUNTHER & SULLIVAN, *supra* note 36, at 467.
[53] *Witt*, 527 F.3d at 817.
[54] Glazner, *supra* note 46, at 641 (citing Watson v. Perry, 918 F. Supp. 1403, 1416 (W.D. Wash. 1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).
[55] JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 72 (2001).
[56] *Witt*, 527 F.3d at 817.
[57] Intermediate scrutiny rose to prominence during the 1970s in the context of equal rights challenges to gender discrimination. GUNTHER & SULLIVAN, *supra* note 36, at 683. For examples of intermediate scrutiny, see generally *Craig v. Boren*, 429 U.S. 190 (1976) and *Sell v. United States*, 539 U.S. 166 (2003).
[58] Robert I. Correales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 441 (Spring 2008) (citing United States v. Marcum, 60 M.J. 198, 201 (C.A.A.F. 2004)).
[59] *Craig*, 429 U.S. at 197.
[60] *Marcum*, 60 M.J. at 205.

hand.[61] These cases "shift away from the rigid two-tiered standard of review to a more flexible sliding-scale approach."[62]

D. History of DADT

1. Pre-Statutory Practice

Congress stated in the DADT policy that "[t]he prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary."[63] This language references the military practice, prior to DADT, of "total exclusion of homosexuals from the armed forces."[64] Wholesale exclusion "was based upon notions that '[h]omosexuality is incompatible with military service' and that the presence of homosexuals in the armed forces 'seriously impairs the accomplishment of the military mission.'"[65] Exclusion was not statutory until World War I, when the military "pronounced that homosexuals were not only dangerous, but also ineffective fighters."[66] Prohibition on homosexuals *per se* continued until 1993.[67]

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[61] *See generally Sell*, 539 U.S. 166. In *Sell*, the *Cook* court found "instructive in the sense that it illustrates the Supreme Court's application of an intermediate level of scrutiny." Cook v. Gates, 528 F.3d 42, 60 (2008).

[62] Anna Stolley Persky, *Don't Ask, Don't Tell, Don't Work?*, ABA L.J. (Oct. 2008) (quoting Courtney Joslin, Law Professor, Univ. Cal. at Davis, referring to potential interpretations of *Lawrence*).

[63] 10 U.S.C. § 654(a)(13) (2006).

[64] Aaron A. Seamon, *The Flawed Compromise of 10 U.S.C. 654: An Assessment of the Military's "Don't Ask, Don't Tell" Policy*, 24 DAYTON L. REV. 319, 324 (Winter 1999).

[65] *Id*. at 323–24 (citing 32 C.F.R. pt. 41, app. A, pt. 1, H (1992)).

[66] JILL NORGEN & SERENA NANDA, AMERICAN CULTURAL PLURALISM AND LAW 187 (2d ed. 1996).

[67] Seamon, *supra* note 64, at 323. Enforcement was not uniform, with some boards "recommending the retention of enlisted personnel who, but for their homosexuality, were exemplary soldiers. Headquarters, Department of the Army, concluding that this practice was at variance with the new policy, issued a release saying that the intent of the new policy was to permit retention only of nonhomosexual soldiers." Watkins v. U.S. Army, 721 F.2d 687, 689 (9th Cir. 1983) (citing Message, 161400Z Jun 82, Headquarters, U.S. Dep't of Army, paras. 4-5).

2. The Statute: 10 U.S.C. § 654[68]

President Clinton signed the current DADT policy in 1993, pursuant to the National Defense Authorization Act for 1994,[69] after his efforts to abolish the prohibition on homosexuals in the military proved unpopular with Congress and the military.[70] The DADT policy does not explicitly require separation based upon homosexual status, but instead requires separation based upon findings that "the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts."[71] The Department of Defense (DoD) interpreted this to mean that "[a] person's sexual orientation is considered a personal and private matter and is not a bar to entry or continued service unless manifested by homosexual conduct[.]"[72] Homosexual conduct, according to the statute, includes "engag[ing] in, attempt[ing] to engage in, or solicit[ing] another to engage in a homosexual act or acts,"[73] marrying or attempting to marry a person of the same sex,[74] or making a statement that one is "homosexual or bisexual, or words to that effect."[75] A finding that any of these acts occurred requires separation unless it is further found that "the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."[76] The burden of that showing rests with the member.[77]

The DADT policy is based upon the congressional finding that "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"[78] of military

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[68] See app. A for the full text of 10 U.S.C. § 654 (2006).
[69] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547 (1993).
[70] *See* Correales, *supra* note 58, at 416–18; Thomasson v. Perry, 80 F.3d 915, 921 (4th Cir. 1996) (providing a detailed account of "the legislative process that led to the enactment of § 654," Cook v. Gates, 429 F.2d 385, 387 (2006)).
[71] 10 U.S.C. § 654(b)(1).
[72] U.S. DEP'T OF DEFENSE, INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS encl. 3, pt. 8a(1) (28 Aug. 2008).
[73] 10 U.S.C. § 654(b)(1).
[74] *Id.* § 654(b)(3).
[75] *Id.* § 654(b)(2).
[76] *Id.*; *see also* Thomasson v. Perry, 80 F.3d 915, 920 (4th Cir. 1996).
[77] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-19d(5)(f) (Mar. 18, 2008) [hereinafter AR 600-20].
[78] 10 U.S.C. § 654(a)(15).

units. This broad finding and its statutory implementation do not "contemplate weighing the perceived deleterious effects of the presence of openly homosexual service members on morale, good order and discipline . . . against the individual merit or value of the service of any particular openly homosexual service member."[79] Congress considers a person who engages in any act indicating homosexual tendencies a *per se* danger to military effectiveness,[80] no "matter how exemplary a service member's performance has been."[81]

3. Bowers—*The Old Regime*

The Supreme Court in *Bowers v. Hardwick* (*Bowers*)[82] effectively foreclosed successful legal challenges to DADT.[83] There the Court, dealing with a Georgia sodomy law[84] criminalizing homosexual practices,[85] found no "fundamental right [for] homosexuals to engage in acts of consensual sodomy."[86] The Court explicitly applied a rational basis test to the Georgia law and found that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was an adequate basis for the law.[87] Applied to DADT, this rationale provided a judicially solid foundation for holding

> that the military ban on homosexual acts intruded upon no constitutionally protected right and was "rationally related" to legitimate military needs for "unit cohesion"

[79] Cook v. Gates, 429 F.2d 385, 390 (2006).
[80] 10 U.S.C. § 654(a)(15).
[81] *Cook*, 429 F.2d at 391.
[82] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).
[83] Glazner, *supra* note 46, at 636.
[84] GA. CODE ANN. § 16-6-2 (2006) ("A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."). *Id*. para. (a)(1).
[85] *Bowers*, 478 U.S. at 188. Although the statute was drafted more broadly than acts specific to same sex couples, the Court narrowed its analysis to "Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." *Id*.
[86] *Id.* at 192.
[87] *Id.* at 196. *See* Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (May 1988) (discussing the role political bias among jurists may have played in *Bowers* and stating that, "competing political philosophies, classical conservatism and classical liberalism, respectively, underlie the Supreme Court majority and dissenting opinions"). Goldstein, *supra*, at 1091.

> and discipline. Moreover, by equating the admission of homosexuality by individual service members—unless demonstrated otherwise—with "propensity" for illegal conduct, the "don't ask, don't tell" policy successfully avoided equal protection and first amendment challenge as well.[88]

4. Lawrence—*The New Regime*

The Supreme Court in *Lawrence* overruled *Bowers*[89] and, with it, the foundation for prior judicial rulings concerning DADT.[90] The *Lawrence* Court considered the constitutionality of a Texas statute[91] purporting to make it a crime for "two persons of the same sex to engage in certain intimate sexual conduct."[92] Relying upon the principles of personal freedom and individual liberty protected by the Fifth and Fourteenth Amendments, the Court found that Americans

> are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. [93]

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[88] DAVID F. BURRELLI & JODY FEDER, CONG. RESEARCH SERV., HOMOSEXUALS AND THE U.S. MILITARY: CURRENT ISSUES, RL 30113, at 14 (2008).
[89] Lawrence v. Texas, 539 U.S. 558, 578 (2003).
[90] *See* United States v. Marcum, 60 M.J. 198, 206–07 (C.A.A.F. 2004).
[91] TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2007). Unlike the Georgia statute upheld in *Bowers*, the Texas law specifically criminalized homosexual conduct, stating that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." *Id.*
[92] *Lawrence*, 539 U.S. at 562.
[93] *Id.* at 578 (citations omitted) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

The Court explained in detail its decision to overrule *Bowers*,[94] noting that "criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects."[95] In a powerful rejection of its prior rationale, the Court opined that *Bowers*' "continuance as precedent demeans the lives of homosexual persons"[96] and that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled."[97] This dramatic holding cast new doubts upon the constitutionality of Congress's broad prohibition of homosexuality in the military.[98] In the wake of the Court's discussion of "gay and lesbian sexual conduct in grand terms of liberty,"[99] the "bulwark of *Bowers* has crumbled, arming opponents of [Uniform Code of Military Justice] Article 125,[100] and 'don't ask, don't tell,' with an argument that current military policies abridge the due process right to privacy of homosexual service members."[101]

Efforts to interpret the Supreme Court's language in *Lawrence*[102] dominate the present debate concerning the legal status of DADT.[103] There is much confusion on this point[104] because, despite its grand language, *Lawrence* did not specify a constitutional standard of review.[105] The "precise standard of judicial review, in the wake of *Lawrence* . . . has yet to be firmly established."[106]

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[94] *Id.*
[95] *Id.* at 575 (noting that even the "courts of five different States have declined to follow [Bowers] in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment."). *Id.*
[96] *Id.*
[97] *Id.* at 578.
[98] Glazner, *supra* note 46, at 644–48.
[99] *Id.*
[100] The military's criminal statute prohibiting sodomy, located at MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 51 (2008) [hereinafter MCM].
[101] BURRELLI & FEDER, *supra* note 88, at 14.
[102] *See* Cook v. Rumsfeld, 429 F. Supp. 2d 385, 395 (D. Mass. 2006); United States v. Marcum, 60 M.J. 198, 204 (C.A.A.F. 2004) (providing examples of linguistic hairsplitting of *Lawrence*); Brief of Appellant-Petitioner at 49-51, Witt v. Dep't of the Air Force, No. 06-35644 (9th Cir. Oct. 16, 2006).
[103] *See, e.g.*, Witt v. Dep't of the Air Force, 527 F.3d 806 (2008); Cook v. Gates, 528 F.3d 42 (2008); *Marcum*, 60 M.J. at 206–07; Glazner, *supra* note 46, at 635.
[104] *See generally* Persky, *supra* note 62.
[105] *See Witt*, 527 F.3d at 814; *Cook*, 528 F.3d at 49.
[106] BURRELLI & FEDER, *supra* note 88, at 14.

III. Discussion

A. Split in the Circuits

In two recent cases, the Ninth Circuit Court of Appeals and the First Circuit Court of Appeals confronted the question of the post-*Lawrence* standard of review,[107] something the federal appellate courts had yet to address.[108] Both cases involved challenges to DADT by servicemembers, and both cases were dismissed[109] for failure to state a claim.[110] Though both courts applied intermediate standards of review,[111] they differed in their interpretations of *Lawrence* and its impact on DADT.[112] Ultimately, the Ninth Circuit remanded[113] the matter back to the district court, while the First Circuit issued a ruling in the case.[114] This article examines each in turn, starting with *Witt*.

1. The Ninth Circuit's Due Process Analysis

The Ninth Circuit noted that "[b]ecause *Lawrence* is, perhaps intentionally so, silent as to the level of scrutiny that it applied, both parties draw upon language from *Lawrence* that supports their views."[115] Observing that in *United States v. Marcum*[116] the U.S. Court of Appeals for the Armed Forces' (CAAF)[117] became frustrated with a semantic

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[107] *See generally Witt*, 527 F.3d 806; *Cook*, 528 F.3d at 55 n.1; Persky, *supra* note 62.
[108] *Witt*, 527 F.3d at 815 ("[T]he Eleventh Circuit upheld a law that forbade homosexuals from adopting children, explicitly holding that *Lawrence* did not apply strict scrutiny. Otherwise, our sister circuits are silent.").
[109] *Id.* at 809; *Cook*, 528 F.3d at 45 n.1.
[110] FED. R. CIV. P. 12(b)(6) allows a court, upon pre-trial motion, to dismiss a case for "failure to state a claim upon which relief can be granted."
[111] *Witt*, 527 F.3d at 819; *Cook*, 528 F.3d at 56.
[112] *Cook* 528 F.3d at 45 n.1 (acknowledging the decision in Witt and stating that, "we resolve differently the as applied substantive due process claim brought in this case."); BURRELLI & FEDER, *supra* note 88, at 20–22.
[113] *Witt*, 527 F.3d at 822.
[114] *Cook*, 528 F.3d at 65.
[115] *Witt*, 527 F.3d at 814 (2008) (emphasis added).
[116] 60 M.J. 198 (C.A.A.F. 2004).
[117] The CAAF is an appellate court comprised of five civilian judges with jurisdiction over personnel subject to the Uniform Code of Military Justice (UCMJ). Its decisions are generally appeallable to the U.S. Supreme Court. *See* U.S. Court of Appeals for the Armed Forces, http://www.armfor.uscourts.gov (last visited Feb. 15, 2009).

approach to interpreting *Lawrence*,[118] the Ninth Circuit elected to analyze *Lawrence* "by considering what the Court actually *did*, rather than by dissecting isolated pieces of text."[119] In doing so, the court observed that the Supreme Court in *Lawrence* overturned *Bowers*, the critical case rejecting the idea of a protected interest in "adult persons in deciding how to conduct their private lives in matters pertaining to sex,"[120] and in particular homosexual intimacy,[121] not because it lacked a rational basis, but "because of the 'Court's own failure to appreciate the extent of the liberty at stake.'"[122] The *Lawrence* Court's consideration of the liberty interest affected by the subject legislation was "inconsistent with rational basis review,"[123] in the opinion of the Ninth Circuit, because only "the basis for the law"[124] typically merits consideration in a rational basis analysis.[125] The Ninth Circuit also took note of the public policy rationale provided in *Lawrence*, stating that "the Court overturned *Bowers* because '[i]ts continuance as precedent demeans the lives of homosexual persons.'"[126]

To address the specific question of homosexual conduct in the military, the Ninth Circuit looked to the military court's application of *Lawrence* in *Marcum*, which involved homosexual sodomy.[127] It cited the CAAF analysis in *Marcum* for the proposition that, even in the military, the implications of *Lawrence* must be considered in the context of each specific case, not through a broad challenge to the DADT policy.[128] The Ninth Circuit found especially instructive that the *Marcum* court undertook a detailed, fact-specific analysis based upon its

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[118] *Witt*, 527 F.3d at 816 ("[A]s the Court of Appeals for the Armed Forces stated in *Marcum*, '[a]lthough particular sentences within the Supreme Court's opinion may be culled in support of the Government's argument, other sentences may be extracted to support Appellant's argument.'") (quoting United States v. Marcum, 60 M.J. 198, 204 (C.A.A.F. 2004) (citation omitted)).
[119] *Id.*
[120] Lawrence v. Texas, 539 U.S. 558, 572 (2003).
[121] Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (announcing the refusal of the Court to create "a fundamental right to engage in homosexual sodomy.").
[122] *Witt*, 527 F.3d at 817 (quoting *Lawrence*, 539 U.S. at 567).
[123] *Id.*
[124] *Id.*
[125] *Id.*; *see also* Part II.C, *infra*.
[126] *Witt*, 527 F.3d at 817 (quoting *Lawrence*, 539 U.S. at 575).
[127] *Id.* at 816.
[128] *Id.* (quoting United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004)).

interpretation of *Lawrence*.[129] In view of the fact-specific analysis in *Marcum*, the Ninth Circuit concluded that CAAF applied more than a rational basis review to the sodomy rule as it applied to homosexuality. The court stated that by "considering whether the policy applied properly to a particular litigant, rather than whether there was a permissible application of the statute, the court necessarily required more than hypothetical justification for the policy—all that is required for rational basis review."[130]

Having found that both CAAF and the *Lawrence* Court "applied something more than traditional rational basis review"[131] to laws addressing homosexual conduct, the Ninth Circuit rejected the other traditional standard, strict scrutiny. The court noted that the language normally found in strict scrutiny cases, such as "narrow tailoring or a compelling state interest,"[132] was noticeably absent from the *Lawrence* opinion.[133] The Ninth Circuit declined to read the highest constitutional standard into a decision that did not explicitly require it.[134] Despite this apparent deference, Justice Canby's dissenting assertion that "the right to engage in homosexual relationships and related private sexual conduct is a personal right of a high constitutional order, and that the 'Don't Ask, Don't Tell' statute so penalizes that relationship and conduct that it must be subjected to strict scrutiny,"[135] and the majority's observation that "DADT most likely would not" survive strict scrutiny,[136] imply that the Ninth Circuit takes a dim view of the policy.

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[129] *Marcum* dealt with a challenge to the UCMJ provision criminalizing sodomy. The *Witt* court took note of the following test:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. (quoting *Marcum*, 60 M.J. at 206-07).
[130] *Id.*
[131] *Id.* at 817.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* at 823.
[136] *Id.* at 817.

Stopping short of radical measures, the Ninth Circuit instead turned to the Supreme Court's careful balancing of state interests against individual liberties in *Sell v. United States* (*Sell*)[137] for guidance in formulating an intermediate standard of review.[138] Although *Sell* dealt with "forcibly administering medication, the scrutiny employed by the Court . . . is instructive,"[139] as it "resembles and expands upon the analysis performed in *Lawrence*."[140] The Ninth Circuit observed that the Court in *Sell*

> recognized a "significant" liberty interest—the interest "in avoiding the unwanted administration of antipsychotic drugs"—and balanced that liberty interest against the "legitimate" and "important" state interest "in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others."[141]

Noting the consistency of this approach with Supreme Court precedent along intermediate scrutiny lines,[142] the Ninth Circuit described how, in order "[t]o balance those two interests, the [*Sell*] Court required the state to justify its intrusion into an individual's recognized liberty interest against forcible medication—just as *Lawrence* determined that the state had failed to 'justify its intrusion into the personal and private life of the individual.'"[143]

In *Sell* the Supreme Court noted that "'[a] compelled surgical intrusion into an individual's body . . . implicates expectations of privacy and security' of great magnitude."[144] The Court stated that "the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if"[145] four criteria are satisfied. First, the court must find that

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[137] 539 U.S. 166 (2003).
[138] *Witt*, 527 F.3d at 818.
[139] *Id.*
[140] *Id.*
[141] *Id.* (quoting *Sell*, 539 U.S. at 178).
[142] *Id.* at 818 n.7 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)).
[143] *Id.* at 818 (discussing *Sell*, 539 U.S. 166) (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).
[144] *Sell*, 539 U.S. at 176 (quoting Winston v. Lee, 470 U.S. 753, 759 (1985)).
[145] *Id.* at 179.

"*important* governmental interests are at stake."[146] Second, if such an interest is identified, the court must find "that involuntary medication will *significantly further* those concomitant state interests."[147] Third, the court must find that the use of medication is "*necessary* to further those interests."[148] Finally, "the court must conclude that administration of the drugs is *medically appropriate*."[149] Following its restatement of the *Sell* criteria, the Ninth Circuit performed an analysis particularized to the facts of the *Witt* case.[150]

The Ninth Circuit adapted the *Sell* factors to weigh the rights of the individual against the military's concerns as addressed in DADT.[151] Dismissing the fourth factor as "specific to the medical context of *Sell*,"[152] the court said that "the first three factors apply equally"[153] to a challenge to DADT. The court extracted the underlying principles from their original, medical context and stated them more broadly, holding

> that when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.[154]

The court further held that "this heightened scrutiny analysis is as-applied rather than facial."[155] This holding is based upon *Sell's* requirement that courts "consider the facts of the individual case in evaluating the Government's interest"[156] as well as the principle that as-applied analysis "is the preferred course of adjudication since it enables

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[146] *Id.* at 180 (emphasis added).
[147] *Id.* at 181 (emphasis added).
[148] *Id.* (emphasis added).
[149] *Id.* (emphasis added).
[150] *Id.* at 176–81.
[151] Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (2008).
[152] *Id.* (emphasis added).
[153] *Id.*
[154] *Id.* (emphasis added).
[155] *Id.*
[156] *Id.* (quoting Sell v. United States, 539 U.S. 166, 180 (2003)).

courts to avoid making unnecessarily broad constitutional judgments."[157] The court claimed to take "direction from the Supreme Court"[158] in reaching this conclusion. It did so by reasoning itself "bound by the theory or reasoning underlying a Supreme Court case, not just by its holding."[159] The Ninth Circuit cited itself for this versatile proposition.[160]

Applying the *Sell* factors to the facts in *Witt*, the Ninth Circuit held that "the government advances an important governmental interest . . . the management of the military."[161] This judicial finding satisfied the first prong of the court's application of "heightened scrutiny to DADT in light of current Supreme Court precedents."[162] However, the court ended its analysis with the first prong because the record lacked evidence particular to Major Witt's case. The court could not answer "whether the application of DADT specifically to Major Witt significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest."[163] Based upon this lack of particularized evidence,[164] the Ninth Circuit remanded the case to "the district court to develop the record."[165] In a footnote to its instruction, the court noted that the Air Force would not likely produce such evidence, given that "Major Witt was a model officer whose sexual activities hundreds of miles away from base did not affect her unit until the military initiated discharge proceedings under DADT and, even then, it was her suspension pursuant to DADT, not her homosexuality, that damaged unit cohesion."[166]

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[157] *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447 (1985)).
[158] *Id.*
[159] *Id.* (quoting Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003)).
[160] *Id.* at 818.
[161] *Id.* at 821; *see also* Brief of Appellee-Respondent at 13–14, Witt v. Dep't of the Air Force, No. 06-35644 (9th Cir. Jan. 3, 2007).
[162] *Witt*, 527 F.3d at 821.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* at 821 n.11. The *Witt* court was a three–member panel reviewing the district court's decision to dismiss Major Witt's complaint under Federal Rule 12(b)(6). By holding in this way, the panel appears to have predetermined the outcome of any further proceedings at the district level. As of this writing, the Air Force had undertaken no further action on this case. *See* Telephone Interview with James E. Lobsenz, Shareholder, Carney Badley Spellman, P.S., and Adjunct Professor, Seattle University School of Law, in Seattle, Wash. (Dec. 20, 2008) [hereinafter Lobsenz Telephone Interview].

2. The Ninth Circuit's Equal Protection Analysis

The Ninth Circuit did not confront the implications of *Lawrence* for its equal protection precedent with respect to DADT,[167] nor did it address the equal protection arguments raised in Major Witt's appellate brief.[168] Instead, it disposed of Major Witt's equal protection argument summarily,[169] relying entirely on its 1997 holding in *Phillips v. Perry* (*Phillips*)[170] for the proposition that "DADT does not violate equal protection under rational basis review, and that holding was not disturbed by *Lawrence*."[171]

A closer reading of *Phillips* reveals some irony in the court's logic. As explained in the dissenting opinion by Judge Canby,[172] the *Phillips* court relied entirely upon its 1990 opinion in *High Tech Gays v. Defense Industrial Security Clearance Office* (*High Tech Gays*)[173] for the proposition that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment."[174] *High Tech Gays*, in turn, relied entirely upon the Supreme Court's statement in *Bowers* "that homosexual activity is not a fundamental right protected by substantive due process and that the proper standard of review under the Fifth Amendment is rational basis review."[175] The Ninth Circuit heightened the irony of its apparently inadvertent reliance on *Bowers* when it reasoned that *Lawrence* did not disturb its holding in *Phillips* precisely because the Supreme Court was

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[167] The court merely recited Major Witt's argument in summary, stating "[s]he argues that DADT violates equal protection because the Air Force has a mandatory rule discharging those who engage in homosexual activities but not those 'whose presence may also cause discomfort among other service members,' such as child molesters." *Witt*, 527 F.3d at 821.

[168] *See generally* Brief of Appellant-Petitioner, Witt v. Dep't of the Air Force, No. 06-35644 (9th Cir. Oct. 16, 2006).

[169] In its twelve–page opinion, the majority devotes a single paragraph, 116 words, to Major Witt's equal protection claim.

[170] 106 F.3d 1420 (1997). *Phillips* involved a military member who, like Major Witt, claimed "that his sexual encounters never involved other military members or occurred on board ship or on a military installation; that the acts were consensual; that he had experienced no problems at work because of his homosexuality." *Id.* at 1422.

[171] *Witt*, 527 F.3d at 821 (internal citations omitted).

[172] *Id.* at 822–27 (2008).

[173] 895 F.2d 563 (1990).

[174] *Phillips*, 106 F.3d at 1425 (quoting *High Tech Gays*, 895 F.2d at 574).

[175] *High Tech Gays*, 895 F.2d at 571 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

focused on "whether *Bowers* itself ha[d] continuing validity."[176] As Judge Canby explained, "[b]ecause Lawrence unequivocally overruled Bowers, it 'undercut the theory [and] reasoning underlying' *High Tech Gays* and *Philips* 'in such a way that the cases are clearly irreconcilable.'"[177]

The circuit court's equal protection analysis closely resembled the almost equally cursory[178] treatment by the district court.[179] The district court cited *Philips* as an example of the law before *Lawrence*[180] and did not explicitly rely upon it as authority for its dismissal of the equal protection complaint.[181] It cited instead to another pre-*Lawrence* decision, *Holmes v. California Army Nat'l Guard* (*Holmes*),[182] which closely resembled the reasoning of *Philips* in the Ninth Circuit.[183] In *Holmes* the Ninth Circuit said it was "guided in [the equal protection] inquiry by our recent decision in *Philips v. Perry,* in which we upheld the acts prong of § 654(b)(1) against an equal protection challenge."[184] The court in *Holmes* then recited substantially the same language as *Philips*, resulting in the same indirect reliance on discredited precedent.[185] The *Holmes* court's substantive due process analysis further demonstrated its inappropriateness in a post-*Lawrence* discussion of DADT by stating in its entirety,

> We have previously rejected claims similar to Watson's substantive due process claim. See *Schowengerdt v. United States,* 944 F.2d 483, 490 (9th Cir. 1991) (stating that substantive due process claim with respect to the old policy was foreclosed by *Bowers v. Hardwick,* 478 U.S.

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[176] *Witt*, 527 F.3d at 821 (quoting Lawrence v. Texas, 539 U.S. 558, 574–75 (2003)). Major Witt asserts in her brief to the Ninth Circuit that Phillips was wrongly decided. Brief of Appellant-Petitioner at 49, Witt v. Dep't of the Air Force (9th Cir. Oct. 16, 2006) (No. 06-35644).

[177] *Witt*, 527 F.3d at 824 (Canby, J., dissenting) (quoting Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003)) (emphasis added).

[178] One hundred forty-five words, divided into two paragraphs.

[179] Witt v. Dep't of the Air Force, 444 F. Supp. 2d 1138, 1145 (W.D. Wash. 2006).

[180] *Id.* at 1144.

[181] *See id.* at 1145.

[182] 124 F.3d 1126 (1997).

[183] *Philips* was filed on 18 April 1997. *Holmes* was filed 5 September 1997.

[184] *Holmes*, 124 F.3d at 1132 (internal citation omitted).

[185] *Id.*

> 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986), Beller, and High Tech Gays).[186]

Relying on pre-*Lawrence* precedent, which was based entirely on the discredited opinion in *Bowers*, both the district and circuit courts in *Witt* failed to address the *Lawrence* Court's impact on the equal protection analysis.

Major Witt raised a novel equal protection argument to illustrate the inappropriateness of DADT as it is currently applied. She observed in her brief that while separation for homosexual conduct is mandatory, the military "does not have a mandatory rule discharging other people whose presence may also cause discomfort among other service members: namely, persons who commit a variety of crimes society condemns as loathsome."[187] She cited as an example an Air Force regulation which authorizes, but does not require, separation of servicemembers who molest children.[188] The Ninth Circuit majority did not compare or address the merits of this challenge[189] in regard to the statutory rationale of DADT but instead merely disregarded it under *Phillips*.[190]

Judge Canby, in his dissent, offered a more nuanced equal protection analysis. He offered that strict scrutiny should be applied to DADT on two grounds: classification of homosexuals as a suspect class under equal protection principles and the fundamental right to enjoy private intimacy under due process.[191] In support of the qualification of homosexual persons as a suspect class, Judge Canby observed

> that homosexuals have "experienced a history of purposeful unequal treatment [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." They also "exhibit obvious, immutable, or distinguishing

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[186] *Id.* at 1136.
[187] Brief of Appellee-Respondent at 50, Witt v. Dep't of the Air Force, No. 06-35644 (9th Cir. Jan. 3, 2007).
[188] *Id.*
[189] Major Witt's attorney described his decision not to raise a broad equal protection argument as a tactical one, explaining that "if I cannot win this on substantive due process in front of a panel, I certainly will not win on equal protection." Lobsenz Telephone Interview, *supra* note 166.
[190] Witt v. Dep't of the Air Force, 527 F.3d 806, 821 (2008).
[191] *Id.* at 824 (Canby, J., dissenting).

> characteristics that define them as a discrete group; and they are [ ] a minority." In short, they are a group deserving of protection against the prejudices and power of an often-antagonistic majority.[192]

Judge Canby argued that the right to engage in homosexual relationships falls squarely under an equal protection analysis, noting the *Lawrence* Court's concession "that a decision recognizing a liberty interest in certain conduct advanced the cause of equality as well as due process."[193] He observed that the Supreme Court sought other grounds specifically because it "would not sufficiently establish the right to intimate homosexual relations if only equal protection were invoked, because a state might frustrate the right by denying heterosexuals as well as homosexuals the right to non-marital sexual relations."[194]

Judge Canby argued that "[t]he reason for including an equal protection analysis is that there is a very clear element of discrimination in the whole 'Don't Ask, Don't Tell' apparatus."[195] The equal protection analysis goes directly to the question, "what compelling interest of the Air Force is narrowly served by discharging homosexuals but not others who engage in sexual relations privately off duty, off base, and with persons unconnected to the military?"[196] While Judge Canby's arguments did not convince the Ninth Circuit, his analysis demonstrates how DADT would fare under strict scrutiny.[197]

3. The First Circuit's Due Process Analysis

This article now addresses the First Circuit's decision in *Cook*. The First Circuit, like the Ninth, determined that "interpreting *Lawrence* is the critical first step in evaluating the plaintiffs' substantive due process claim."[198] The First Circuit also agreed with the Ninth that *Lawrence*

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[192] *Id.* (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) and Lyng v. Castillo, 477 U.S. 635, 638 (1986)) (citations omitted).
[193] *Id.* at 825 (citing Lawrence v. Texas, 539 U.S. 558, 575 (2003)).
[194] *Id.* (citing *Lawrence*, 539 U.S. at 575).
[195] *Id.* at 826.
[196] *Id.*
[197] *Id.* at 827 ("[T]he Air Force must demonstrate that the 'Don't Ask, Don't Tell' statute meets the requirements of strict scrutiny—that it is necessary to serve a compelling governmental interest and that it sweeps no more broadly than necessary.").
[198] Cook v. Gates, 528 F.3d 42, 49 (2008) (emphasis added).

requires "a standard of review that lies between strict scrutiny and rational basis."[199] From there, however, the opinions diverge. The First Circuit noted that, "[i]n *Witt*, the 9th Circuit resolved an as-applied, post-*Lawrence* substantive due process challenge to [DADT] differently than we do here."[200]

The circuit court began its analysis with a review of the district court opinion.[201] The district court determined that the rational basis standard of review continued to apply to legislation affecting private sexual conduct,[202] though it confessed that "the matter is not free from doubt because of the ambiguity of the *Lawrence* opinion."[203] Prior to engaging in a linguistic analysis of the terms used in the *Lawrence* decision, the district court explained that

> the *Lawrence* majority did not expressly—that is, in so many words—recognize a fundamental liberty interest in "consensual intimacy and relationships between adults of the same sex." One might stop right there. After all, for a proposition to be considered a holding, one might reasonably expect it to have been stated. This is particularly so when the proposition would state a new—that is, not previously announced—principle of constitutional law.[204]

The First Circuit did not agree, stating that "at least four reasons [support] reading *Lawrence* as recognizing a protected liberty interest. First, *Lawrence* relies on the following due process cases for doctrinal support: *Griswold*, *Eisentstadt*, *Roe*, *Carey*, and *Casey*."[205] Each of these, the court explained, "resulted in the Supreme Court recognizing a due process right to make personal decisions related to sexual conduct that mandated the application of heightened judicial scrutiny."[206]

Second, the court relied upon the language of the *Lawrence* opinion, reciting the Court's concern with matters such as "freedom of thought,

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[199] *Id.* at 56.
[200] *Id.* at 60 n.10 (citing *Witt*, 527 F.3d 806) (emphasis added).
[201] *Id.* at 47.
[202] Cook v. Rumsfeld, 429 F. Supp. 2d 385, 396 (D. Mass. 2006).
[203] *Id.* at 395 (emphasis added).
[204] *Id.* at 394 (emphasis added).
[205] *Cook*, 528 F.3d at 52 (citations omitted) (emphasis added).
[206] *Id.*

belief, and expression"[207] and the statement that "'[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'"[208] The court found *Lawrence's* use of these broad terms of liberty "strongly suggest[ive] that *Lawrence* identified a protected liberty interest."[209]

Third, the circuit court pointed out *Lawrence's* reliance on the *Bowers* dissent as the controlling law.[210] The First Circuit specifically recalled Justice Stevens's argument, also quoted in *Lawrence*,[211] that "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of liberty protected by the Due Process Clause . . . . Moreover, this protection extends to intimate choices by unmarried as well as married persons."[212] Justice Stevens's description of this liberty as fundamental[213] persuaded the First Circuit that it could not "read *Lawrence* as declining to recognize a protected liberty interest without ignoring the Court's statement that Justice Stevens' *Bowers* dissent was controlling."[214]

Finally, the First Circuit observed that the *Lawrence* Court overturned the convictions of those prosecuted under the Texas law,[215] noting that "prohibiting immoral conduct was the only state interest that Texas offered to justify the statute."[216] Since the Court had acknowledged morality as a rational basis in the past,[217] the *Lawrence* case must have dealt with a liberty interest too important to give way before a mere rational basis.[218]

For these reasons the First Circuit overruled the district court's interpretation of *Lawrence* as applying a rational basis analysis to laws governing private, consensual sexual conduct,[219] holding that "*Lawrence*

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[207] *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 563 (2003)).
[208] *Id.* (quoting *Lawrence*, 539 U.S. at 578).
[209] *Id.* (emphasis added).
[210] *Id.* (citing *Lawrence*, 539 U.S. at 578).
[211] *Lawrence*, 539 U.S. at 578.
[212] *Cook*, 528 F.3d at 52 (quoting *Lawrence*, 539 U.S. at 578).
[213] Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).
[214] *Cook*, 528 F.3d at 52 (emphasis added).
[215] *Id.* at 52.
[216] *Id.*
[217] *Id.* (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569, (1991)).
[218] *Id.* at 53.
[219] *Id.*

did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label."[220]

The *Cook* court nods to *Sell* only to distinguish the review in *Lawrence* from strict scrutiny, stating that

> in *Sell v. United States*, the Court recognized a "constitutionally protected liberty interest [for a criminal defendant] in avoiding the unwanted administration of antipsychotic drugs" and then applied a standard of review less demanding than strict scrutiny by asking whether administering the drugs was "necessary significantly to further important governmental trial-related interests."[221]

Unlike *Witt*, the First Circuit does not rely upon *Sell* for additional guidance in applying intermediate scrutiny, explaining that "[a]lthough we find *Sell* instructive in the sense that it illustrates the Supreme Court's application of an intermediate level of scrutiny, we do not find *Sell* especially helpful in analyzing this statute regulating military affairs."[222]

The First Circuit distinguished *Cook* from *Witt* by characterizing its case as a facial challenge to DADT.[223] According to the court, the plaintiffs' in *Cook* claimed the military policy unconstitutionally punishes acts protected by the liberty interest identified in *Lawrence*, namely "consensual sexual intimacy in the confines of one's home and one's own private life."[224] The court distinguished this argument from the matter before the Ninth Circuit in *Witt*, quoting the district court's conclusion that

> none of the plaintiffs claim that the policy, if valid in general, was misapplied in his or her particular case to result in separation when a proper application of the policy would have allowed him or her to remain in

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[220] *Id.* at 52 (emphasis added).
[221] *Id.* at 55 (citing Sell v. United States, 539 U.S. 166, 179 (2003)) (emphasis added).
[222] *Id.* at 60 (emphasis added).
[223] *Id.* at 56.
[224] *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 567 (2003)).

> service. Rather, their objections . . . are that the policy was applied, not how it was applied.[225]

The First Circuit observed that DADT "provides for the separation of a service person who engages in a public homosexual act or who coerces another person to engage in a homosexual act. Both of these forms of conduct are expressly excluded from the liberty interest recognized by *Lawrence*."[226] The First Circuit recited settled law to show why such a broad facial challenge to DADT must fail, stating that "[t]he fact that [an act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid" in all circumstances.[227]

Since this First Circuit analysis treated the due process claim as "a facial challenge to the statute"[228] and not as a challenge to its specific application to the plaintiffs' facts, this aspect of the First Circuit's opinion would not necessarily contradict the "as-applied" analysis in *Witt*.[229] Jurists could simply read *Witt's* facts as an example of an unconstitutional application of a potentially lawful policy.[230] The Ninth Circuit focused narrowly on the particulars of its case.[231] It performed a fact-specific balancing test to the application of DADT, not to its destruction.[232] Neither case indicates that DADT itself fails a facial due process challenge.[233]

Disposing of the facial challenge, the First Circuit attempted an as-applied analysis of the statute's application to its particular plaintiffs.[234]

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[225] *Id.* at 48 (citing the district court opinion at Cook v. Rumsfeld, 429 F. Supp. 2d 385 (D. Mass. 2006)).
[226] *Id.* at 56 (citing *Lawrence*, 539 U.S. at 578) (emphasis added).
[227] *Id.* (quoting United States v. Salerno, 481 U.S. 739, 745, (1987)).
[228] *Id.* at 48 (citing the district court opinion at Cook v. Rumsfeld, 429 F. Supp. 2d 385 (D. Mass. 2006)).
[229] Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (2008).
[230] *Id.* (holding that the *Sell* factors are to be applied to each particular application of DADT).
[231] *Id.* at 810–13 (undertaking a detailed analysis of Major Witt's procedural posture, the eligibility of the facts alleged to proceed as pleaded, and remanding her procedural due process claim to the district court).
[232] *Id.* at 819.
[233] *See generally Witt*, 527 F.3d 806; *Cook*, 528 F.3d 42 (2008).
[234] The district court declined such an undertaking because

> none of the plaintiffs claims that the policy, if valid in general, was misapplied in his or her particular case to result in separation when a

The court reasoned that "the military's effectiveness as a fighting force . . . is an exceedingly weighty interest and one that unquestionably surpasses the government interest that was at stake in *Lawrence*."[235] The court further reasoned that "[e]very as-applied challenge brought by a member of the armed forces against [DADT], at its core, implicates this interest."[236] As a result, all as-applied challenges must fail.[237] The court relied upon the congressional record[238] and the statutory language[239] to determine that deference is warranted concerning the DADT policy. At the same time, the court conducted a balancing test on a broad social scale reminiscent of *Lawrence*, opining boldly that "where Congress has articulated a substantial government interest for a law, and where the challenges in question implicate that interest, judicial intrusion is simply not warranted."[240]

The First Circuit's dismissive treatment of all possible as-applied challenges to DADT is unpersuasive because Congress has made no findings with regard to any particular plaintiffs.[241] Thus, "deference to congressional findings does not make sense. There is nothing to defer to" with respect to any particular plaintiff.[242] Instead, the court's attempt to conduct an as-applied analysis amounts to a judicial determination that no analysis should be conducted when Congress has recited a substantial interest as the basis for legislation.[243]

> proper application of the policy would have allowed him or her to remain a service member. Rather, their objections, as articulated in the legal arguments in opposition to the motion to dismiss, are *that* the policy was applied, not *how* it was applied. This is classically a facial challenge to the statute, and their arguments will be evaluated with that understanding.

Cook v. Rumsfeld, 429 F. Supp. 2d 385, 390 (D. Mass. 2006) (emphasis in original).
[235] Cook v. Gates. 528 F.3d. 42, 61 (2008) (emphasis added).
[236] *Id.* at 60.
[237] *Id.*
[238] *Id.*
[239] *Id.* (citing 10 U.S.C § 654(a)(12), (15) (2006)).
[240] *Id.* (citing Rostker v. Goldberg, 453 U.S. 57, 68 (1982)).
[241] 10 U.S.C § 654(a) (2006).
[242] Lobsenz Telephone Interview, *supra* note 166.
[243] *Cook*, 528 F.3d. at 56–60. Bizarrely, the First Circuit then claimed that "deference to Congressional judgment in this area does not mean abdication." *Id*. at 60.

4. The First Circuit's Equal Protection Analysis

The First Circuit devoted substantially more attention to the question of equal protection than did the Ninth.[244] The First Circuit distinguished the equal protection claim from the due process one, explaining that "[u]nlike the due process claim, which is premised on the constitutional protection afforded all citizens to engage in certain sexual conduct, the equal protection claim is based on the [DADT]'s differential treatment of homosexual military members versus heterosexual military members."[245] This distinction is critical because "*Lawrence* was a substantive due process decision that recognized a right in all adults, regardless of sexual orientation, to engage in certain intimate conduct."[246] Under equal protection, the relevant issues are the classification of persons and the basis for that classification.[247] Where legislation targets a suspect class,[248] heightened judicial scrutiny applies.[249] Classifications aimed at "non-suspect classes are subject only to rational basis review."[250]

The question for the equal protection claim before the First Circuit was whether homosexuals constitute a suspect class. The plaintiff's equal protection claim was "that the district court erred by applying rational basis review because the Supreme Court's decisions in *Romer v. Evans*, [citation omitted] and *Lawrence* mandate a more demanding standard."[251] The court noted first that *Romer v. Evans* (*Romer*)[252]

> invalidated, on equal protection grounds, a Colorado constitutional amendment which prohibited the enactment of any measure designed to protect individuals due to their sexual orientation. The Court analyzed the constitutionality of the amendment through the prism of rational basis, asking whether the classification bore "a rational relation to some legitimate

[244] Seven hundred seventy three words, compared to the Ninth Circuit's 116.
[245] *Cook*, 528 F.3d. at 60.
[246] *Id.* at 61 (citing *Lawrence*, 539 U.S. 558, 574–75 (2003)) (emphasis added).
[247] Romer v. Evans, 517 U.S. 620, 633 (1996).
[248] This has become a term of art in equal protection jurisprudence, originating with *Korematsu v. United States*, where the Court said "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." 323 U.S. 214, 215 (1944).
[249] *Cook*, 528 F.3d. at 61.
[250] *Id.*
[251] *Id.* (emphasis added).
[252] 517 U.S. 620, 633 (1996).

> end." Applying this standard, the Court concluded that the amendment was unconstitutional because the only possible justification for the amendment was "animosity toward the class of persons affected," which does not constitute even "a legitimate governmental interest."[253]

The First Circuit found nothing in *Romer* to indicate treatment of homosexual persons as a suspect class and found instructive its explicit use of a rational basis standard.[254] The court also noted extensive case law from other circuits reaching the same conclusion.[255]

The First Circuit turned next to the question of whether *Lawrence* impacted the equal protection framework surrounding homosexual persons.[256] Recognizing that "the *Lawrence* Court explicitly declined to base its ruling on equal protection principles, even though that issue was presented,"[257] the First Circuit found no evidence that *Lawrence* conferred suspect classification status upon homosexual persons for purposes of equal protection.[258] Absent specific language establishing such a classification, the First Circuit agreed with the district court[259] that rational basis remains the applicable equal protection standard for legislation classifying persons on the basis of sexual orientation.[260]

Despite the plaintiffs' argument that DADT should fail even the rational basis test,[261] the First Circuit closed its equal protection inquiry with the statement that, "Congress has put forward a non-animus based explanation for its decision to pass [DADT]. Given the substantial deference owed Congress' assessment of the need for the legislation, [DADT] survives rational basis review."[262]

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[253] *Cook*, 528 F.3d. at 61 (citation omitted) (quoting Romer v. Evans, 517 U.S. 631–35 (1996)).
[254] *Id.*
[255] *Id.* The court offered the following string citation referencing its sister circuits: "Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006); Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006); Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004); Lofton, 358 F.3d at 818; Veney v. Wyche, 293 F.3d 726, 731-32 (4th Cir. 2002); Holmes, 124 F.3d at 1132."
[256] *Id.*
[257] *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 574–75 (2003)) (emphasis added).
[258] *Id.*
[259] Cook v. Rumsfeld, 429 F. Supp. 2d 385, 405 (D. Mass. 2006).
[260] *Cook*, 528 F.3d. at 61.
[261] *Id.*
[262] *Id.* at 62.

5. The First Circuit's First Amendment Analysis

Unlike the Ninth Circuit, the First Circuit addressed a First Amendment claim that DADT impinges on free speech.[263] Under DADT, servicemembers' statements to the effect that they are homosexual or bisexual give rise to a rebuttable presumption that they will engage in prohibited conduct.[264] This presumption, if unrebutted, is a basis for separation.[265] The *Cook* plaintiffs attacked the rebuttable presumption with two arguments.[266] First, they alleged that the presumption cannot be rebutted by persons whose sexual orientation is homosexual or bisexual, so that the effect of DADT is to punish the statement.[267] Second, the plaintiffs alleged that even if a homosexual person could rebut the presumption, its existence forces "gay and lesbian service members to live in an environment that severely restricts and chills constitutionally protected speech."[268]

The *Cook* court rejected the first of these arguments on the grounds that "a person may say he or she is homosexual even though the person does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts."[269] The court cited examples where servicemembers who had announced a homosexual orientation remained in the service because they indicated they would not engage in prohibited conduct.[270] The plaintiffs' claim that the existence of the presumption chills protected speech failed because "the member's speech continues to have only evidentiary significance in making this conduct-focused determination."[271] The court acknowledged that DADT "does

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[263] *Id.* Major Witt did not raise, and the Ninth Circuit did not discuss, a free speech claim under the First Amendment. *See generally* Witt v. Dep't of the Air Force, 527 F.3d 806, (2008) and Brief of Appellant-Petitioner, Witt v. Dep't of the Air Force, No. 06-35644 (9th Cir. Oct. 16, 2006) (discussing the First Amendment only in historical context on the matter of freedom of association).

[264] 10 U.S.C. § 654(b)(2) (2006).

[265] *Id.*

[266] *Cook*, 528 F.3d. at 64.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.* ("One female Naval officer admitted to her homosexuality but submitted a statement, in which she stated, *inter alia,* that she understands the rules against homosexual conduct and intended to obey those rules. Another female Naval officer stated that she was a lesbian but that the statement 'in no way, was meant to imply [] any propensity or intent or desire to engage in prohibited conduct.'") (citing Holmes v. Cal. Army Nat'l Guard 124 F.3d 1126, 1136 (1997)).

[271] *Id.* at 62.

affect the right of military members to express their sexual orientation by establishing the possibility of adverse consequences" for declaring a homosexual orientation,[272] but noted that any time the law "prohibits certain acts, it necessarily chills speech that constitutes evidence of the acts. A regulation directed at acts thus inevitably restricts a certain type of speech; this policy is no exception. But effects of this variety do not establish a content-based restriction of speech."[273]

In his expositive dissent, Judge Saris concluded that the "plaintiffs have made sufficient allegations that the burden that the statement presumption places on speech is greater than is essential, particularly in nonmilitary settings off-base and off-duty."[274] He reached this conclusion because DADT's "statement presumption chills individual service members from discussing homosexuality both privately and publicly even when they have no intent to engage in prohibited homosexual conduct."[275] Although the military enjoys the widest latitude in controlling speech,[276] Judge Saris concluded that the rebuttable presumption provision, which "applies '24 hours [a] day,' and applies even to speech made 'off base' and/or 'off duty,'"[277] and in the most private contexts, "such as confiding in a friend or words within a letter from a friend or family member,"[278] is more expansive than necessary to advance the stated governmental interest.[279]

B. The Crystal Ball

This section attempts to predict the outcome of a potential judicial review of DADT by the Supreme Court. It is noteworthy that both circuit courts offer a tempting common ground concerning DADT under post-*Lawrence* due process—both courts subjected DADT to an intermediate level of scrutiny. In the event the Supreme Court were to review either or both of the circuit cases, it is likely to agree with the two

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[272] *Id.* at 63.
[273] *Id.* (quoting Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996)).
[274] *Id.* at 74.
[275] *Id.*
[276] *Id.* at 73 ("See e.g., Goldman, 475 U.S. at 507-10 (affording deference to regulation that prevented soldiers from wearing yarmulkes while on duty and in uniform); Brown v. Glines, 444 U.S. 348, 354–55 (1980) (affording deference to regulation that prevented soldiers from circulating petitions on air force bases).").
[277] *Id.* at 74 (quoting 10 U.S.C. § 654(a)(9)–(11) (2006)).
[278] *Id.*
[279] *Id. See generally* Wayte v. United States, 470 U.S. 598, 611 (1985).

circuits that the liberty interest in private, adult, consensual sexual intimacy is protected under due process as interpreted by the circuits and consistent with *Lawrence*, and that the protection afforded this liberty interest subjects statutory efforts to infringe upon it to a higher than rational basis review. Like the circuit courts, the Supreme Court would likely agree that the protection of the liberty interest does not require application of strict scrutiny.[280] Such findings would offer the Court flexibility in addressing the constitutionality of DADT, while avoiding less developed areas of equal protection and First Amendment law as they apply to homosexuality in the military.

Equal protection arguments are unlikely to form the basis of a Supreme Court ruling on DADT. The circuit court decisions do not undermine the rational basis standard for classification of homosexual persons as a group under equal protection, and this standard of review appears unlikely to change as a result. Although the equal protection analyses presented by the circuit courts are unsatisfying, their contrast with careful and detailed due process discussions illustrates the comparatively little weight equal protection carries in the arena of homosexuality as a classification in our society. The DADT policy affects primarily the military—a small slice of the larger American society, and one which is widely considered jurisprudentially distinct.[281] A successful challenge to the equal protection status of homosexual persons would more likely arise from circumstances more broadly applicable than gays in the military.[282] Finally, DADT may not be an ideal vehicle to challenge the equal protection status quo with regard to sexual orientation because DADT explicitly addresses acts, not status.[283]

The Court would likely find no protection for speech of evidentiary character under the First Amendment, though such an approach can be conceived and may contribute to judicial intervention. After *Lawrence*

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[280] E-mail from Shaun Martin, Law Professor, University of San Diego School of Law (Oct. 9, 2008, 14:09:31 EST) (on file with author) (noting that the Supreme Court would "be hesitant to employ straightforward strict scrutiny, even after Lawrence and Romer").
[281] *See* Parker v. Levy, 417 U.S. 733, 755 (1974) ("Congress is permitted to legislate both with greater breadth and with greater flexibility when the statute governs military society."); Burns v. Wilson, 346 U.S. 137, 140 (1953) ("Military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."). *See generally* Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 197 (1962) ("[T]he Court has viewed the separation and subordination of the military establishment as a compelling principle.").
[282] *See* Lobsenz Telephone Interview, *supra* note 166.
[283] 10 U.S.C. § 654(b)(1) (2006).

and *Marcum*, DADT "operates as an evidentiary mechanism for the military to target conduct that, according to the military's own courts, can no longer be criminalized."[284] It can be argued that the real reason for the policy is that "the military leadership believes its rank and file could not stomach" the idea of homosexuality among military members—a paradigm of prohibited viewpoint discrimination[285] under the First Amendment.[286] These concerns, coupled with the issues raised by Judge Saris in his dissent,[287] raise significant questions about the constitutionality of DADT as it is currently administered. Even if the Court were to agree that the rebuttable presumption based upon a statement of homosexuality violates the First Amendment, it is not necessary to scrap the entire policy on First Amendment grounds. A *Witt*-style requirement that the Government show case-specific evidence of military harm from the specific homosexual acts alleged would undermine the application of the presumption as an independent basis for separation. Where the Court can avoid a constitutional issue, it will do so as a matter of policy.[288]

A due process analysis presents the greatest threat to DADT. Remaining within the common ground of the circuit courts' treatment of due process would provide a principled foundation for the Court to address the application of DADT without overturning it. This approach would also provide the Court leeway to determine the degree of its deference to Congress on military matters—it could insist on a case-by-case application of congressional intent a la *Witt*, or it could follow *Cook* and abdicate. Finally, the Court could use the circuit courts' consensus that higher than rational basis is required after *Lawrence* as a springboard to overturn DADT on due process grounds. Each possibility is examined in turn.

1. Option 1—The policy will survive constitutional muster under a heightened scrutiny standard requiring the Government to show a

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[284] Shannon Gilreath, *Sexually Speaking: "Don't Ask, Don't Tell" and the First Amendment after* Lawrence v. Texas, 14 DUKE J. GENDER L. & POL'Y 953, 958 (May, 2007).

[285] Viewpoint discrimination is Government action stifling "speech on account of its message, or that requires the utterance of a particular message favored by the Government." Turner Broad. v. FCC, 512 U.S. 622 (1994).

[286] Gilreath, *supra* note 284, at 958.

[287] Cook v. Gates, 528 F.3d 42, 65 (2008) (Saris, J., dissenting).

[288] GUNTHER & SULLIVAN, *supra* note 36, at 29.

specific unit impact in the particular case of the Soldier to be separated, effectively creating a regime where homosexual acts resulting in actual disruption can form a basis for separation. This is likely.

Although the Court could create an altogether new framework of analysis, or defer entirely to Congress as in *Cook*, it is likely the Court will adopt the *Sell* factors as applied in *Witt*. This outcome is likely because the *Sell* factors offer a persuasive and convenient framework grounded in Supreme Court precedent. The Court in *Sell* created a balancing test specifically tailored to weigh private liberty interests against the needs of the Government. Rejection of that test in the context of private sexual activity would require the court to address why sexual activity, and in particular homosexual activity, should be treated differently. The Court is unlikely to invite criticism by attempting to carve out special legal rules for homosexuals when more facially neutral means are available. Perhaps most importantly, the *Sell* factors will not commit the Court to a specific course of action regarding the facial validity of DADT. By invoking the *Sell* factors the Court can address the constitutional difficulties of DADT without striking the statute.

The *Sell* factors would limit, but not preclude, the military's application of DADT. In cases where the private sexual practices of a military member do not adversely impact the "high standards of morale, good order and discipline, and unit cohesion,"[289] commanders generally have little incentive to pursue separation under DADT. In cases where the conduct causes disruption, commanders would need only to document the effects in consultation with their assigned legal advisors. Documenting adverse unit impact is a routine part of administrative separations under other provisions[290] and is unlikely to present a significant administrative burden. Commanders could also allow reassignment to another unit in appropriate cases. Thus, application of the *Sell* test will have a *de minimis* impact on the military in cases where Congress's concerns of military effectiveness are implicated.

2. Option 2—The Supreme Court, while upholding the Witt and Cook determinations concerning the Lawrence liberty interest, will

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[289] 10 U.S.C. § 654(a)(15) (2006).

[290] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED SEPARATIONS paras. 13 (unsatisfactory performance), 14-12b (pattern of misconduct) (6 June 2005).

follow Cook and show deference to the point of abdication to Congress's findings. This is less likely.

If the Supreme Court were to adopt the First Circuit's approach, the military would carry on with business as usual. This outcome is unlikely because, as even the *Cook* Court admitted,[291] "deference to [c]ongressional judgment in this area does not mean abdication."[292]

The First Circuit found significant depth of concern reflected in the congressional record, as explained in *Cook*, over matters of privacy, liberty, and morality concerning private sexual conduct, and the application of social values in the military context specifically.[293] As the First Circuit explained, "[t]he circumstances surrounding [DADT]'s passage lead to the firm conclusion that Congress and the Executive studied the issues intensely and from many angles, including by considering the constitutional rights of gay and lesbian service members."[294] Deference to congressional determinations is rooted in the Constitution, which grants Congress the power to "raise and support armies . . . and [t]o make all Laws which shall be necessary and proper" for that purpose.[295] The Supreme "Court has described this power as 'broad and sweeping'"[296] and professed inability to intelligently address military matters, claiming that

> [i]t is difficult to conceive of an area of governmental activity in which courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.[297]

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[291] This admission was made while announcing a policy of blanket abdication. *Cook*, 528 F.3d at 60.
[292] *Id.*
[293] *Id.* at 58–60.
[294] *Id.* at 59.
[295] U.S. CONST. art. I, § 8, cls. 12–14.
[296] *Cook*, 528 F.3d at 59 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).
[297] *Id.* (quoting *O'Brien*, 391 U.S. at 377).

This facially strong argument for blanket deference fails for three primary reasons.[298] First, taken to its logical end, *Cook*'s reasoning would unfetter military affairs from constitutional restraints. This is not the law, for the Supreme Court has explained that deference does not free Congress "to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause."[299]

Second, DADT undermines the legislative process because it prohibits the class of persons directly affected by the policy, homosexual military personnel, from open participation in the public discussion.[300] Legislative representatives are unlikely to hear from constituent military members affected by DADT, while constituents on the other side of the debate may speak freely. As Professor Shannon Gilreath[301] observed,

> the only soldiers who may speak in favor of the ability of gays and lesbians to live authentic lives while serving their country are straight soldiers, or gays who are secreting their authentic selves. It is a curious debate indeed when the only people prohibited from debating are the victims of the policy the debate addresses.[302]

This silent constituency may be significant, with claims that up to "65,000 gay men and lesbians now serve in the American armed forces and that there are more than one million gay veterans."[303] Where they are not meaningfully represented in the legislative debate, the federal courts may be uniquely qualified to intervene because the courts hear directly from active duty military personnel when they contest their separations through litigation.

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[298] The fact that Congress remained substantially divided on DADT at the time of this writing does not undermine deference, since the issue is deference to the findings recited in the Act and not deference to a subjective perception of the mood of Congress at a particular moment.

[299] Rostker v. Goldberg, 453 U.S. 57, 67 (1981); *see also* Warren, *supra* note 281, at 188 ("[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.").

[300] Gilreath, *supra* note 284, at 961.

[301] Assistant Director for the International Graduate Program and Adjunct Professor of Law at Wake Forest University.

[302] Gilreath, *supra* note 284, at 962.

[303] Thom Shanker & Patrick Healya, *A New Push to Roll Back 'Don't Ask, Don't Tell,'* N.Y. TIMES, Nov. 30, 2007, *available at* http://www.nytimes.com/2007/11/30/us/30 military.html.

Third, the nexus between military effectiveness and the conduct proscribed under DADT is problematic. In order to rest on naked deference regarding DADT, the Court would have to explain why separation of servicemembers based upon private sexual conduct is a military matter rather than a legal one. This would require a connection between private sexual activity and military effectiveness—a connection which, if manifested in form of sexual assault or harassment, would likely violate a number of uncontroversial criminal statutes addressing sexual misconduct.[304] Where the law already addresses sexual misconduct in wide and gender-neutral terms, to include most conceivable sexual activity in the military workplace,[305] it is difficult to conceive of facts where sexual orientation could disrupt the military environment without triggering existing criminal enforcement mechanisms.

Congress attempted to bridge this logical gap with the finding that "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."[306] This conclusory statement fails to show a causal relationship between the private sexual conduct and military effectiveness,[307] instead relying implicitly on the assumption that personal bias within the military ranks will create friction where homosexual, rather than heterosexual, conduct becomes known. Since "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect,"[308] the Court would likely demand a more explicit connection between private sexual conduct and military effectiveness.

3. Option 3—DADT will fail judicial review. This is unlikely.

Opposite abdication on the scale of judicial activism is wholesale destruction of legislation by the judiciary. The Court exercises its power

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[304] *See, e.g.*, MCM, *supra* note 100, pt. IV, ¶¶ 45, 51.
[305] *Id.*; AR 600-20, *supra* note 77, ch. 7 (Prevention of Sexual Harassment).
[306] 10 U.S.C. § 654(a)(15) (2006).
[307] Gilreath, *supra* note 284, at 972 ("The easiest way to see that irrationality is to replace the argument's reference to 'gays' with reference to 'blacks.' This requires no great feat of imagination, because it was precisely the argument made in resistance to racial integration of the military in the 1940s.").
[308] Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

of judicial review with great care, applying a policy of strict necessity,[309] and "has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress."[310] This reluctance to leap to constitutional activism means that, even when legislation is constitutionally problematic, the Supreme Court will seek a way to interpret the statute in a way that does not violate the Constitution.[311]

Although the circuit courts did not agree on their application of heightened scrutiny to DADT, they both focus substantially on its application rather than its facial validity. *Witt*, in particular, focused explicitly on the application of Congress's legislation to the particular plaintiff. Its instructions on remand are essentially procedural steps for compliance with the act.[312] This approach would offer the Supreme Court a method of analysis that stops short of striking the statute. Where such an alternative exists and especially, as here, where lower courts have laid a foundation, the Supreme Court is unlikely to apply judicial review more broadly.

It is unlikely that the Court will apply strict scrutiny to DADT. While equal protection,[313] the First Amendment,[314] and due process all

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[309] GUNTHER & SULLIVAN, *supra* note 36, at 29.
[310] Ashwander v. TVA, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).
[311] *Id.* at 348.
[312] Witt v. Dep't of the Air Force, 527 F.3d 806, 821 (2008).

> The Air Force attempts to justify the policy by relying on congressional findings regarding "unit cohesion" and the like, but that does not go to whether the application of DADT specifically to Major Witt significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest. Remand therefore is required for the district court to develop the record on Major Witt's substantive due process claim. Only then can DADT be measured against the appropriate constitutional standard.

Id.
[313] *Id.* at 824 (2008) (Canby, J., dissenting) (arguing that DADT is subject to strict scrutiny under equal protection because homosexuals are a suspect class and the *Lawrence* liberty interest is a matter of the equality of homosexual persons).
[314] *E.g.*, Gilreath, *supra* note 284, at 967–68.

> [S]trict scrutiny emerges as the appropriate evaluative standard for the government's regulations of expression via "Don't Ask, Don't Tell." Governmental regulation of expressive conduct warrants strict

suggest that institutional discrimination against homosexual persons, or private sexual relationships, should be subject to strict scrutiny, the Court had the opportunity to set that standard in *Lawrence*. It did not.[315] Where the lower courts have articulated an intermediate scrutiny consistent with *Lawrence*, the Court will not likely risk "the respect accorded to the judgments of the Court and to the stability of the law"[316] by undermining them.

Application of strict scrutiny, while unlikely, is not impossible. Since *Lawrence* was silent on the standard of review,[317] it left open the possibility of clarifying the appropriate standard in light of future developments in law and society. The Court expressed its concern that "*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding."[318] *Lawrence* has likewise caused confusion.[319] The Court could determine that the circuit court decisions have made ripe the question of the standard of review required under *Lawrence*, and that the standard is strict scrutiny. If the Court applies strict scrutiny to DADT, it will almost certainly overturn it.[320]

Should it do so, the military will remain well-positioned to address acts of sexual conduct, homosexual or heterosexual, that adversely impact military effectiveness. Sexual tension in the workplace is a form of hostile work environment prohibited by military regulations. [321] Contributing to such an environment is punishable under the Uniform Code of Military Justice.[322] Military commanders' remedies for non-criminal sexual speech or behavior in the workplace would no longer vary with the sexual orientation character of the underlying acts but

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> scrutiny when (1) the regulation of speech or conduct targets the message that the speech or conduct communicates to others and (2) similar expression is regulated differently based on the communicated viewpoint of the speaker.

Id.

[315] *Lawrence*, 539 U.S. 558 (2003); *Witt*, 527 F.3d at 818; *Cook*, 528 F.3d at 54.

[316] *Lawrence*, 539 U.S. at 577.

[317] *Witt*, 527 F.3d at 814.

[318] *Lawrence*, 539 U.S. at 577.

[319] *See generally e.g.*, *Witt*, 527 F.3d 806; *Cook*, 528 F.3d 42; United States v. Marcum, 60 M.J. 198, 206–07 (C.A.A.F. 2004); *supra* Part II.D.

[320] *See generally e.g.*, *Cook*, 528 F.3d at 65; *Witt*, 527 F.3d at 822 (Canby, J., dissenting); *supra* note 197.

[321] *See, e.g.*, AR 600-20, *supra* note 77, ch. 7 (Prevention of Sexual Harassment), MCM, *supra* note 100, pt. IV, ¶ 16 (criminalizing violation of certain regulations, including AR 600-20).

[322] MCM, *supra* note 100, pt. IV, ¶¶ 16, 17.

would instead rely upon existing gender-neutral enforcement mechanisms. Aggressive implementation of military equal opportunity programs would enable military leaders to prevent discomfort with homosexuality from impacting unit effectiveness.[323] In addition, the military disciplinary structure is uniquely suited to suppressing discriminatory attitudes among servicemembers, as illustrated by its spectacular, albeit initially difficult, success with racial integration in 1948.[324]

IV. Conclusion

Although "[l]awyers and courts alike puzzle over the different interpretations"[325] of *Lawrence* for DADT, the *Witt* court's analysis presents the most attractive, persuasive and convenient resolution of the current tension between DADT and society's evolving expectations of due process. Should the Supreme Court review the matter, it would probably subject DADT to a higher than rational basis standard of review, but stop short of strict scrutiny. As a result, the policy would likely survive in a weakened form, where the Government must bring case specific evidence of adverse unit impact resulting from the homosexual acts in question. From a practical standpoint, military commanders and attorneys involved in the implementation of DADT should prepare to consider each case in terms of adverse unit impact and be prepared to document any such impact prior to separating personnel under DADT.

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[323] *See, e.g.*, AR 600-20, *supra* note 77, ch. 6 (The Equal Opportunity Program in the Army).

> The Equal Opportunity (EO) Program formulates, directs, and sustains a comprehensive effort to maximize human potential and to ensure fair treatment for all persons based solely on merit, fitness, and capability in support of readiness. EO philosophy is based on fairness, justice, and equity. Commanders are responsible for sustaining a positive EO climate within their units.

Id. para 6-1.

[324] *See generally* MORRIS J. MACGREGOR, JR., INTEGRATION OF THE ARMED FORCES 1940–1965 (1985).

[325] Persky, *supra* note 62.

Appendix

DADT Full Text

*** CURRENT THROUGH PL 110-353, APPROVED 10/7/2008 ***
*** WITH GAPS OF 110-343, 110-344, 110-346 and 110-351 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 37. GENERAL SERVICE REQUIREMENTS

10 USCS § 654

§ 654. Policy concerning homosexuality in the armed forces

(a) Findings. Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members

that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that--

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The 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.

(b) Policy. A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if

one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that--

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

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

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents.

(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required briefings. The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title [10 USCS § 937] (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of construction. Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that--

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions. In this section:

(1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

(2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term "homosexual act" means--

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

History:

(Added Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(a)(1), 107 Stat. 1670.)

History; Ancillary Laws and Directives:

Other provisions

Regulations. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(b), 107 Stat. 1673, provides: "Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a).".

Savings provision. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(c), 107 Stat. 1673, provides: "Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654.".

Sense of Congress. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(d), 107 Stat. 1673, provides: "It is the sense of Congress that--

"(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

"(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice).".

Notes:

Am Jur:

16B Am Jur 2d, Constitutional Law § 850.

Labor and Employment:

10 Larson on Employment Discrimination, ch 168, Discrimination Based on Sexual Orientation § 168.07.

4 Labor and Employment Law (Matthew Bender), ch 127, Discrimination Based on Sexual Orientation § 127.07.

Annotations:

Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct. 96 ALR5th 391.

Interpretive Notes and Decisions:

1. Generally
2. Constitutionality
3. Standing
4. Injunction
5. Application

1. Generally

In deciding to issue preliminary injunctions in case brought by six gay or lesbian members of armed forces challenging constitutionality of law embodying "don't ask, don't tell" policy, district court should have required plaintiffs to prove likelihood of success on merits rather than only "serious questions going to merits," since governmental policies implemented through legislation or regulations developed through presumptively democratic processes are entitled to higher degree of deference and should not be enjoined lightly. Able v United States (1995, CA2 NY) 44 F3d 128, 67 BNA FEP Cas 1095, 65 CCH EPD P 43399.

Claim of members of United States Armed Services, alleging that they are homosexuals and that Services' policy and regulations as to homosexuals violated their right to equal protection, is not dismissed, because although government is entitled to deference where constitutional rights of service members are implicated, plaintiffs are entitled to attempt to prove that findings underlying statute are based solely on prejudice or fear of prejudice, or otherwise that there is no rational relationship between statute's classifications of gay and lesbian service members and legitimate government purpose. Able v United States (1994, ED NY) 863 F Supp 112, app den (1994, ED NY) 870 F Supp 468, 67 BNA FEP Cas 1092, remanded (1995, CA2 NY) 44 F3d 128, 67 BNA FEP Cas 1095, 65 CCH EPD P 43399.

2. Constitutionality

In action by 6 self-identified homosexual members of Armed Services, court declares 10 USCS § 654 constitutional, where statute prohibits statement "I am homosexual or have homosexual propensities," because § 654(b)(2) advances a substantial governmental interest and restricts

speech no more than is reasonably necessary. Able v United States (1996, CA2 NY) 88 F3d 1280, 71 BNA FEP Cas 419, 68 CCH EPD P 44233, on remand, injunction gr (1997, ED NY) 968 F Supp 850, 71 CCH EPD P 44999, revd on other grounds (1998, CA2 NY) 155 F3d 628, 74 CCH EPD P 45501.

Discharge of servicemember who stated that he was homosexual and had engaged in and intended to continue to engage in homosexual acts did not violate servicemember's right to equal protection since his discharge under "acts" prong of statute is constitutionally permissible because relationship between Navy's mission and its policy on homosexual acts renders distinction between acts and status rational; nor did his discharge violate his First Amendment right to free speech since his statements were used as evidence, not as reason for discharge. Philips v Perry (1997, CA9 Wash) 106 F3d 1420, 97 CDOS 1038, 97 Daily Journal DAR 1551, 70 CCH EPD P 44721, amd (1997, CA9 Wash) 97 CDOS 2848, 97 Daily Journal DAR 5031.

Statute setting forth policy on homosexuals in military, and its implementing regulations, are constitutionally valid; both circuit precedent and that from other circuits establishes that military has legitimate interest in discharging service members on account of homosexual conduct in order to maintain effective armed forces. Holmes v California Army Nat'l Guard (1997, CA9 Cal) 124 F3d 1126, 97 CDOS 7165, 97 Daily Journal DAR 11571, 71 CCH EPD P 45000, reh, en banc, den (1998, CA9) 155 F3d 1049, 98 CDOS 7548, 98 Daily Journal DAR 10518, 74 CCH EPD P 45513 and cert den (1999) 525 US 1067, 119 S Ct 794, 142 L Ed 2d 657.

Statute mandating termination of service of member of armed forces for engaging in homosexual conduct does not violate equal protection clause of Fifth Amendment; government justifications rationally related prohibition to goals of promoting unit cohesion, enhancing privacy and reducing sexual tension. Able v United States (1998, CA2 NY) 155 F3d 628, 74 CCH EPD P 45501.

10 USCS § 654 does not constitute unconstitutional bill of attainder, where statute creates rebuttable presumption that military officer who states he or she is homosexual has propensity to engage in homosexual acts, but policy expressed by statute does not fall within historical meaning of legislative punishment, since under policy homosexuals are not barred from military simply because they are homosexuals, and

statute leaves open possibility of qualifying for continued military service when homosexual overcomes presumption that he or she does engage in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. Richenberg v Perry (1995, DC Neb) 909 F Supp 1303, 68 CCH EPD P 44121, injunction den (1995, CA8 Neb) 73 F3d 172, 69 BNA FEP Cas 883 and affd (1996, CA8 Neb) 97 F3d 256, 68 CCH EPD P 44259, reh, en banc, den (1997, CA8) 1997 US App LEXIS 1040 and cert den (1997) 522 US 807, 118 S Ct 45, 139 L Ed 2d 12.

Military's "Don't Ask, Don't Tell" policy, implemented under 10 USCS § 654, which discharges homosexuals from military service who admit to being homosexuals, did not substantially further government's interest in preventing unit polarization as required under heightened scrutiny standard of First Amendment, where silent homosexuals were allowed to serve, even though they still could read gay literature, frequent gay bars, march in gay rights parades, and vociferously advocate right of gays to serve, thus causing same degree of debate, unrest, and polarization as that caused by person who admitted homosexuality. Thorne v United States DOD (1996, ED Va) 916 F Supp 1358, 71 BNA FEP Cas 565, summary judgment gr, dismd (1996, ED Va) 945 F Supp 924 and affd without op (1998, CA4 Va) 139 F3d 893, reported in full (1998, CA4 Va) 1998 US App LEXIS 6904 and cert den (1998) 525 US 947, 142 L Ed 2d 307, 119 S Ct 371.

Challenge by 12 former service members to constitutionality of 10 USCS § 654, "Don't Ask/Don't Tell" policy on homosexuality in armed services, was dismissed for failure to state claim upon which relief could be granted because rational basis standard of review applied where right advanced by service members was neither fundamental nor involved suspect class, and Congress' goal of maintaining high standards of morale, good order, and discipline in military was rational in sense necessary to withstand constitutional challenge and sufficient to end substantive due process review and to foreclose most of equal protection challenges. Cook v Rumsfeld (2006, DC Mass) 429 F Supp 2d 385.

Service member's challenge to constitutionality of Don't Ask Don't Tell policy as regulation upon individual conduct failed; service member was unable to demonstrate that her interest in liberty was affected by government's effort to separate her from military service; because there had been no violation of her procedural due process rights, service

member could not state cause upon which relief could be granted. Witt v United States Dep't of Air Force (2006, WD Wash) 444 F Supp 2d 1138.

3. Standing

Plaintiffs had standing to challenge § 654(b)(1) since they all stated that they were homosexuals and thus member of allegedly disadvantaged group, statute imposes government-imposed barrier to homosexual conduct in providing for separation of servicemembers who engage, attempt to engage, or solicit homosexual acts, and Act treats homosexuals and heterosexuals differently even though they have engaged in similar acts within broad range of sexual conduct. Able v United States (1996, CA2 NY) 88 F3d 1280, 71 BNA FEP Cas 419, 68 CCH EPD P 44233, on remand, injunction gr (1997, ED NY) 968 F Supp 850, 71 CCH EPD P 44999, revd on other grounds (1998, CA2 NY) 155 F3d 628, 74 CCH EPD P 45501.

4. Injunction

Air Force Captain who admitted to his commanding officer that he was homosexual was not entitled to injunction preventing his discharge pending appeal since he did not have substantial likelihood of success on merits of appeal challenging constitutionality of statute, nor had he shown irreparable injury since if he prevailed on appeal he would be entitled to reinstatement with full back pay and benefits or other comparable monetary relief. Richenberg v Perry (1995, CA8 Neb) 73 F3d 172, 69 BNA FEP Cas 883.

Preliminary injunction will issue, in action by lesbian and gay members of United States Armed Services challenging constitutionality of new policy and regulations as to homosexuals in armed forces, enjoining United States and Secretary of Defense from investigating, discharging, or taking other adverse action against plaintiffs because they have identified themselves as homosexuals, because: (1) showing of possible violation of constitutional rights constitutes irreparable harm justifying preliminary injunction; (2) exhaustion of administrative remedies is not required when plaintiffs raise constitutional questions and when irreparable injury will occur without preliminary injunctive relief; (3) plaintiffs have established serious questions going to merits of dispute; and (4) hardship to 6 plaintiffs is evident and immediate and their free

speech rights to pursue this case will be chilled without injunctive relief, so balance of hardships tips decidedly in favor of plaintiffs. Able v United States (1994, ED NY) 847 F Supp 1038, 64 BNA FEP Cas 692, 64 CCH EPD P 42966.

5. Application

Servicemember who informed his commanding officer that he was homosexual failed to rebut presumption that he had propensity or intent to engage in homosexual acts, despite his testimony that he did not intend to engage in such acts, since on cross-examination he admitted to being sexually attracted to men. Richenberg v Perry (1996, CA8 Neb) 97 F3d 256, 68 CCH EPD P 44259, reh, en banc, den (1997, CA8) 1997 US App LEXIS 1040 and cert den (1997) 522 US 807, 118 S Ct 45, 139 L Ed 2d 12.

District court did not err in granting summary judgment with respect to military doctor's claim under Administrative Procedures Act, 5 USCS § 701 et seq., because while doctor made clear statement of intent to serve on active duty, Air Force undertook extensive investigation, conducted interview, made credibility determination, and prepared report with written findings, and concluded that doctor had informed Air Force of doctor's sexual orientation for purpose of separating. Hensala v Dep't of the Air Force (2003, CA9 Cal) 343 F3d 951, 2003 CDOS 8317, 2003 Daily Journal DAR 10444, 93 BNA FEP Cas 1177.

Navy servicemember's discharge from U.S. Navy on grounds that he engaged in homosexual acts must be upheld, where discharged servicemember stated to superior that he was homosexual but had never engaged in homosexual acts with other servicemen although he did frequent gay bars while off duty, which led to consensual sexual encounters, because while service members cannot be discharged solely because they are homosexuals, under Uniform Code of Military Justice (10 USCS § 654(a), (b), (f), service members may be discharged because of homosexual acts. Philips v Perry (1995, WD Wash) 883 F Supp 539, 66 CCH EPD P 43469, affd (1997, CA9 Wash) 106 F3d 1420, 97 CDOS 1038, 97 Daily Journal DAR 1551, 70 CCH EPD P 44721, amd on other grounds (1997, CA9 Wash) 97 CDOS 2848, 97 Daily Journal DAR 5031.

Individual, who, pursuant to military's "old policy," had been denied benefits of voluntary separation incentive and special separation benefit program (10 USCS §§ 1174a and 1175) solely on ground that individual admitted that he was homosexual, was entitled to have his eligibility reviewed under military's new policy, as codified at 10 USCS § 654; such denial of benefits raised serious equal protection questions. Elzie v Aspin (1995, DC Dist Col) 897 F Supp 1, 68 BNA FEP Cas 1674.

Admittedly homosexual sergeant's case is remanded with instructions that his status in Marine Corps and his eligibility for voluntary retirement program be reviewed under military's current "Don't Ask, Don't Tell" policy as codified at 10 USCS § 654, where sergeant had met all eligibility requirements for enrollment in program based on very distinguished service since 1982, but was discharged after stating publicly that he was homosexual, because new policy was enacted since discharge, and it is difficult to conceive how military's stated rationale--military morale and discipline--for discharging professed homosexuals applies to prevent homosexuals from receiving retirement benefits already earned. Elzie v Aspin (1995, DC Dist Col) 897 F Supp 1, 68 BNA FEP Cas 1674.

Challenge of homosexual serviceman to his separation from service under 10 USCS § 654 "Don't Ask, Don't Tell" policy is unsuccessful, where he was assigned to serve as supply officer on fast-attack nuclear submarine preparing for top secret mission, because deference towards congressional and presidential judgment in military context is great, and serviceman could not show that application of policy to his situation clearly violated his First, Fifth, or Eighth Amendment rights. Selland v Perry (1995, DC Md) 905 F Supp 260, 67 CCH EPD P 43897, affd without op (1996, CA4 Md) 100 F3d 950, reported in full (1996, CA4 Md) 1996 US App LEXIS 29054 and cert den (1997) 520 US 1210, 117 S Ct 1691, 137 L Ed 2d 819.

Department of Defense's "Don't Ask, Don't Tell" policy regarding homosexuals in military was constitutionally applied to servicemember, where he denied to Board of Review having engaged in any homosexual conduct with any military student or servicemember and denied engaging in homosexual conduct during performance of military duty or while on military installation, because such statements were sufficient to create presumption that he has engaged in, or has intent to engage in, homosexual conduct with nonservicemembers while off base and off duty, and such conduct may be constitutionally prohibited and provides

sufficient grounds for separation. Watson v Perry (1996, WD Wash) 918 F Supp 1403, affd, request den (1997, CA9 Cal) 124 F3d 1126, 97 CDOS 7165, 97 Daily Journal DAR 11571, 71 CCH EPD P 45000, reh, en banc, den (1998, CA9) 155 F3d 1049, 98 CDOS 7548, 98 Daily Journal DAR 10518, 74 CCH EPD P 45513 and cert den (1999) 525 US 1067, 119 S Ct 794, 142 L Ed 2d 657.

Servicemember's homosexual activities warranted his elimination from Army without violating any fundamental right triggering Fifth Amendment strict scrutiny on review under 10 USCS § 654; he was, however, entitled to suspension of elimination proceeding while his request for retirement was processed under Army Regulations. Loomis v United States (2005) 68 Fed Cl 503.