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## Queer Eye for the Military Guy: Will "Don't Ask, Don't Tell" Survive in the Wake of Lawrence v. Texas?

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## NOTES

# QUEER EYE FOR THE MILITARY GUY: WILL “DON’T ASK, DON’T TELL” SURVIVE IN THE WAKE OF *LAWRENCE V. TEXAS*?

GAVIN W. SCOTTI, JR.<sup>†</sup>

“*Bowers v. Hardwick* [is] a decision . . . similar in its bias and prejudice to *Plessy v. Ferguson*. I remain confident that someday a Supreme Court with a sense of fairness and an adequate vision of the Constitution will repudiate *Bowers* in the same way that a wise and fair-minded Court once repudiated *Plessy*.”<sup>1</sup>

### INTRODUCTION

With its landmark decision *Lawrence v. Texas*,<sup>2</sup> the Supreme Court overruled *Bowers v. Hardwick* and held that homosexuals enjoy a constitutionally protected right to engage in private intimate conduct.<sup>3</sup> The holding has cast doubt upon the constitutionality of the controversial military policy excluding open ho-

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<sup>1</sup> *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1137 (9th Cir. 1997) (Reinhardt, J., dissenting) (citations omitted). *Bowers v. Hardwick* was a 1986 case where the Court initially found there was no fundamental right to engage in homosexual sodomy. 478 U.S. 186, 191 (1986), overruled by *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (holding homosexuals possess a constitutionally protected liberty to engage in consensual sexual conduct). Similarly, in *Plessy v. Ferguson*, the Court initially upheld segregation under the “separate but equal” doctrine before later overruling the decision in 1954. 163 U.S. 537, 550–52 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>2</sup> 123 S. Ct. 2472 (2003).

<sup>3</sup> See *id.* at 2478, 2484 (holding that “[t]he liberty protected by the Constitution allows homosexual persons the right to make [the] choice” to engage in intimate conduct within the confines of their own homes, thus overruling *Bowers*).

mosexuals.<sup>4</sup> This Clinton-era compromise, embodied in the 1994 National Defense Authorization Act, is commonly referred to as "Don't Ask, Don't Tell" (DADT).<sup>5</sup> Under the policy, neither an

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<sup>4</sup> See Press Release, Center for the Study of Sexual Minorities in the Military, Legal Scholars Question Whether Sodomy Ruling Will Affect Military Gay Ban (June 26, 2003), [http://www.gaymilitary.ucsb.edu/PressCenter/press\\_rel\\_2003\\_0626P.htm](http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2003_0626P.htm). ("[L]egal experts on sexuality in the military said today that the Pentagon's ban on openly gay soldiers could come under increasing legal scrutiny. . . . [P]rominent legal scholars suggested that [*Lawrence v. Texas*] may erode the rationale for continuing to ban both sodomy and openly gay soldiers, while others disagreed.").

<sup>5</sup> Aaron Belkin, *Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?*, PARAMETERS, Summer 2003, at 108, available at <http://carlisle-www.army.mil/usawc/parameters/03summer/belkin.pdf>. Professor Belkin is director of the University of California at Santa Barbara's Center for the Study of Sexual Minorities in the Military. *Id.* at 109; see also Elizabeth Crawford, *U.S. Army Journal Publishes Professor's Critique of 'Don't Ask, Don't Tell' Policy on Gay Soldiers*, CHRON. HIGHER EDUC., (June 27, 2003), available at <http://chronicle.com/prm/weekly/v49/i42/42a01301.htm> (describing Professor Belkin's article and expressing surprise that it was published in a U.S. Army quarterly read by senior military officers).

Upon his election to the Presidency, Bill Clinton attempted to fulfill his campaign promise to lift the military ban on homosexuals. He was opposed, however, by the Joint Chiefs of Staff and prominent members of Congress. He persevered, and on January 29, 1993, he abolished the former outright military ban on homosexuals. After six months of hearings, Congress formulated the current policy. Belkin, *supra* note 5, at 108; see also Thomasson v. Perry, 80 F.3d 915, 921-23 (4th Cir. 1996). The directive implementing the National Defense Authorization Act provides that a servicemember's statement that he is a homosexual "creates a rebuttable presumption that he engages in homosexual acts or has a propensity or intent to do so." *Id.* at 920 (citations omitted).

The [servicemember] is informed of this presumption and afforded an opportunity to rebut it by presenting appropriate evidence. Whether the presumption has been rebutted is determined by a variety of factors: whether the [servicemember] has engaged in homosexual acts; the [servicemember's] credibility; testimony from others about the [servicemember's] past conduct; the nature and circumstances of the [servicemember's] statement; and any other evidence relevant to whether the [servicemember] has a propensity or intent to engage in homosexual acts.

*Id.* (citing DoD Dir. 1332.40, Encl. 2, ¶ E2.3.1.2 to E2.3.1.5, at 10 (Sept. 16, 1997)). The Act has been codified in 10 U.S.C. § 654 (1994):

§ 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

applicant for military service, nor a person currently serving, may be asked about his sexual orientation, unless there is reason to suspect he may be gay.<sup>6</sup> Once a servicemember discloses that

service in the armed forces.

....

(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.

....

(12) ... [L]iving... and working conditions... are often... 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... exclude persons whose presence... would create an unacceptable risk to the... morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence... of [homosexuals]... would create an unacceptable risk to the [armed forces'] high standards of morale, good order and discipline, and unit cohesion....

(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... a homosexual act... unless... the member has demonstrated that—

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

(B) such conduct, under all 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, ... unless there is a further finding, ... 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.

*Id.*

<sup>6</sup> Belkin, *supra* note 5, at 109.

he is gay or is caught engaging in homosexual conduct, he is subject to discharge—with limited exceptions.<sup>7</sup>

DADT has been challenged several times on constitutional grounds.<sup>8</sup> The circuit courts, however, have upheld the policy, usually relying on the Supreme Court's holding in *Bowers*.<sup>9</sup> The Supreme Court, meanwhile, has refused to rule on DADT's constitutionality five times since its implementation in 1993.<sup>10</sup>

The world has changed during the ten years since DADT took effect. The surprising overnight success of the television show *Queer Eye for the Straight Guy* demonstrates the ever-increasing level of mainstream acceptance of homosexuality.<sup>11</sup> This Note examines the issue of whether, in the wake of *Lawrence*, the military's policy of excluding open homosexuals will continue to pass constitutional muster. In order to answer this question, this Note addresses two sub-issues: (1) what are the limits of judicial deference to the executive and legislative branches with regard to military regulations, and (2) is it possible today to continue to justify DADT?

## I. BACKGROUND: *LAWRENCE V. TEXAS*

On June 23, 2003, the United States Supreme Court handed down its decision in *Lawrence v. Texas*,<sup>12</sup> which invalidated a Texas statute that outlawed homosexual sodomy<sup>13</sup> and overruled

<sup>7</sup> *Id.*; see also 10 U.S.C. § 654.

<sup>8</sup> See *infra* notes 83–101 and accompanying text.

<sup>9</sup> 478 U.S. 186, 191 (1986).

<sup>10</sup> See *Thorne v. Dep't of Def.*, 139 F.3d 893 (4th Cir. 1998), *cert. denied*, 525 U.S. 947 (1998); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Selland v. Perry*, 100 F.3d 950 (4th Cir. 1996), *cert. denied*, 520 U.S. 1210 (1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996).

<sup>11</sup> See Michael Giltz, *Queer Eye Confidential*, *ADVOCATE*, Sept. 2, 2003, available at [http://www.advocate.com/html/stories/897/897\\_queereye\\_mag.asp](http://www.advocate.com/html/stories/897/897_queereye_mag.asp); Andrew Wallerstein, 'Queer Eye' Guys, *NBC Do Contract Make Over* (Oct. 31, 2003), at [http://story.news.yahoo.com/news?tmpl=story&u=nm/20031031/en\\_nm/television\\_queer\\_dc\\_4](http://story.news.yahoo.com/news?tmpl=story&u=nm/20031031/en_nm/television_queer_dc_4).

<sup>12</sup> 123 S. Ct. 2472 (2003).

<sup>13</sup> See TEX. PENAL CODE ANN. § 21.06 (Vernon 2003), *repealed by Lawrence v. Texas*, 123 S. Ct. 2472 (2003).  
Homosexual Conduct.

(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.

(b) An offense under this section is a Class C misdemeanor.

*Id.*; see also *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 310–11 (5th Cir.

its 1986 decision in *Bowers v. Hardwick*.<sup>14</sup> The Court thus severely limited the permissible scope of morals-based legislation.<sup>15</sup> The holding was surprising both in its wholesale rejection of *Bowers* and its far-reaching implications.<sup>16</sup> Because states may no longer prohibit private, consensual sodomy, military policies that exclude open homosexuals may now be unconstitutional.<sup>17</sup> The effects of *Lawrence* are already apparent, for example in the realm of family law. In November 2003, Massachusetts' highest court, in a decision predicted to have ramifications throughout the country, held that same-sex couples are entitled to marry under the state's constitution.<sup>18</sup> It stands to reason that *Lawrence* will influence many other areas of the law, including military regulations. This section will briefly examine the holding in

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1997) (holding it is slander per se to call a person gay, a faggot, queer, or anything else indicating that the person is a homosexual, because it imputes the crime of sodomy to that person).

<sup>14</sup> 478 U.S. 186 (1986).

<sup>15</sup> See *Lawrence*, 123 S. Ct. at 2490 (Scalia, J., dissenting). State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices. . . . "The law," it is said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id.* (quoting *Bowers*, 478 U.S. at 196). It is interesting (and telling) that Justice Scalia declined to attempt to distinguish between homosexual sex and incest or bestiality.

<sup>16</sup> See David G. Savage, *In Rulings, Echoes of 1992: The High Court Stuns Conservatives—Just as It Did More Than a Decade Ago*, A.B.A. J., Aug. 2003, at 21, 22.

[I]t soon became clear [that Justice] Kennedy was not citing *Bowers* to follow as precedent, but rather to admit that the court had erred—and badly so.

In *Bowers*, the Court had ridiculed the gay rights claim, saying it was "at best facetious" to say the Constitution confers on homosexuals a "right to engage in sodomy." This focus on a "particular sex act . . . demeans" the basic claim to liberty and privacy at issue, Kennedy said.

Gays and lesbians are entitled to "respect" and "dignity" in their personal lives, he said, and the Constitution does not permit laws that amount to "state-sponsored condemnation" of homosexuals.

*Id.* at 22.

<sup>17</sup> See Press Release, *supra* note 4 (noting that prominent legal scholars believe the recent Supreme Court ruling may chip away at the constitutional rationale for upholding DADT, although admittedly there is disagreement on this point).

<sup>18</sup> Pam Belluck, *Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES, Nov. 19, 2003, at A1. Despite the protestations of Justices Kennedy and O'Connor that *Lawrence* has not opened the door for the legalization of gay marriage, the decision may prove to have just that effect. Linda Greenhouse, *Supreme Court Paved Way for Marriage Ruling With Sodomy Law Decision*, N.Y. TIMES, Nov. 19, 2003, at A24.

*Lawrence* as a means of taking a first step toward anticipating the implications of the decision for the continued viability of DADT.

Two main cases form the background against which the Supreme Court decided *Lawrence: Bowers v. Hardwick*<sup>19</sup> and *Romer v. Evans*.<sup>20</sup> In *Bowers*, the Court upheld a Georgia anti-sodomy statute that outlawed all sodomy, not just homosexual sodomy.<sup>21</sup> The Court, however, addressed the case as if the main issue dealt with the rights—or lack thereof—of homosexuals.<sup>22</sup> Professor William N. Eskridge, Jr. offered an in-depth critique of *Bowers*.<sup>23</sup> He argued that the 5–4 decision “rested upon an anachronistic treatment of sodomy regulation at the time of the Fifth (1791) or Fourteenth (1868) Amendments.”<sup>24</sup> Central to the Court’s analysis was its belief that the due process right of privacy could only be applied to protect those fundamental liberties “deeply rooted in this Nation’s history and tradition.”<sup>25</sup> The slim

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<sup>19</sup> 478 U.S. 186 (1996).

<sup>20</sup> 517 U.S. 620 (1996).

<sup>21</sup> See *Bowers*, 478 U.S. at 188 n.1 (noting that at the time the “Georgia Code Ann. § 16-6-2 (1984) provide[d], in pertinent part, as follows: (a) A person commits . . . sodomy when he performs . . . any sexual act involving the sex organs of one person and the mouth or anus of another. . . . (b) A person convicted of . . . sodomy shall be punished by imprisonment for not less than one nor more than 20 years.”).

<sup>22</sup> *Id.* at 188 (“The only claim properly before the Court . . . is 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.”).

<sup>23</sup> See William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 631 n.\*. Professor Eskridge is the John A. Garver Professor of Jurisprudence at Yale Law School. He received his B.A. from Davidson College in 1973, his M.A. from Harvard University in 1974 and his J.D. from Yale Law School in 1978. *Id.* at n.\*.

<sup>24</sup> *Id.* at 631 (emphasis omitted). Specifically, he asserted that the framers of those amendments could not have understood sodomy laws as regulating oral intercourse (Hardwick’s crime) or as focusing on “homosexual sodomy” (the Court’s focus). Before this century, Sodomy regulation sought to ensure that sexual intimacy only occurred within the context of procreative marriage. Today, this represents an unconstitutional basis for criminal law under the Court’s privacy jurisprudence. *Id.*; see, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that a Connecticut law criminalizing the use of contraceptives unconstitutionally intruded upon the right of marital privacy).

<sup>25</sup> Eskridge, *supra* note 23, at 632 (quoting *Bowers*, 478 U.S. at 192). Because homosexual sodomy had long been criminal in Anglo-American law, the Court held that there was no “deeply rooted” liberty Hardwick could claim and, indeed, that Hardwick’s fundamental rights claim was “at best, facetious.” *Id.* (citing *Bowers*, 478 U.S. at 194). The Court was not “inclined to take a more expansive view of [its]

majority, however, did not easily come to this conclusion. The critical fifth vote, Justice Lewis Powell, came after he reportedly switched sides as a result of powerful lobbying from the Chief Justice.<sup>26</sup> Powell later admitted that he came to regret his decision.<sup>27</sup> Judge Richard Posner of the Seventh Circuit has also criticized *Bowers*,<sup>28</sup> suggesting in 1992 that anti-sodomy laws would be subject to attack on equal protection grounds.<sup>29</sup>

In *Romer v. Evans*,<sup>30</sup> the Court struck down a Colorado constitutional amendment that prohibited legislative, executive, or judicial action designed to protect homosexuals from discrimination.<sup>31</sup> *Evans* was decided on equal protection grounds<sup>32</sup> and,

authority to discover new fundamental rights imbedded in the Due Process Clause." The majority stated that the "Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.* *Bowers*, 478 U.S. at 194.

<sup>26</sup> See Eskridge, *supra* note 23, at 633.

<sup>27</sup> *Id.* Justice Powell, while ultimately agreeing with the majority that there was no substantive right under the Due Process Clause to engage in homosexual sodomy, went on to assert:

This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case . . . authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue.

*Bowers*, 478 U.S. at 197 (Powell, J. concurring).

<sup>28</sup> See RICHARD A. POSNER, *SEX AND REASON* 346 (1992).

Perhaps the strongest argument for Michael Hardwick was that statutes which criminalize homosexual behavior express an irrational fear and loathing of a group that has been subjected to discrimination . . . . The position of the homosexual is difficult at best, even in a tolerant society, which our society is not quite; and it is made worse . . . by statutes that condemn the homosexual's characteristic methods of sexual expression as vile crimes (the Georgia statute carried a maximum punishment of twenty years in prison).

*Id.*

<sup>29</sup> *Id.* at 348. Posner suggested that "there is no rational basis for treating homosexuals and heterosexuals differently" and that discrimination based upon a person's sexual preference, as opposed to his conduct (as the military used to do in the days prior to DADT), is "suspect because sexual preference is a largely immutable characteristic and therefore analogous to sex and race, which under the jurisprudence of equal protection are—race especially—highly disfavored grounds for discrimination." *Id.*

<sup>30</sup> 517 U.S. 620 (1996).

<sup>31</sup> *Id.* at 623–24 (explaining a law must be neutral when a person's rights are involved). "We must conclude that [the statute] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do." *Id.* at 635.



therefore, did not overrule *Bowers*, which was decided on due process grounds.<sup>33</sup> *Evans* focused on status rather than conduct. Nonetheless, the two decisions did "not rest easily together in the same logic set."<sup>34</sup> Justice Antonin Scalia recognized this apparent inconsistency in his *Evans* dissent.<sup>35</sup>

In *Lawrence v. Texas*,<sup>36</sup> the Supreme Court held that the Texas law, which criminalized private, adult, consensual sodomy, was an unconstitutional violation of the Fourteenth Amendment liberty right protected by the Due Process Clause.<sup>37</sup> The Court had previously held that the Fourteenth Amendment protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."<sup>38</sup> With *Lawrence*, the Court has extended that protection

<sup>32</sup> *Id.* at 623, 635.

<sup>33</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 194–95 (1986) (expressing reluctance to strike down the law on due process grounds because it would be illegitimate to allow "judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

<sup>34</sup> Eskridge, *supra* note 23, at 634–35 (noting that although the two cases focused on separate grounds their conclusions had a profound affect on homosexuals).

<sup>35</sup> *Evans*, 517 U.S. at 641 (Scalia, J., dissenting) ("If it is constitutionally permissible for a State to make homosexual conduct criminal [like in *Hardwick*], surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct . . . [or] merely prohibiting all levels of state government from bestowing *special protections* upon homosexual conduct."); Eskridge, *supra* note 23, at 634. "The six-justice *Evans* majority failed to deny, much less refute, this assertion." *Id.* at 635; see also *Evans*, 517 U.S. at 623–36.

<sup>36</sup> 123 S. Ct. 2472 (2003).

<sup>37</sup> See *id.* at 2484 ("[The petitioners'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

<sup>38</sup> *Id.* at 2481 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)). The Ninth Amendment also has been invoked to support the proposition that we have an inherent right to liberty, although it is not commonly used in this manner. It states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.; see also *Griswold v. Connecticut*, 381 U.S. 479, 486–99 (1965) (Goldberg, J., concurring). The Court more commonly invokes the Fourteenth Amendment in its protection of liberty rights. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153, 168 (1973) (holding that a woman's right to have an abortion is protected as an exercise of liberty under the Fourteenth Amendment's Due Process Clause); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (extending the holding in *Griswold* beyond the marital relationship by stating that a Massachusetts law, which allowed the distribution of contraceptives to married persons but not to unmarried persons, was violative of the Fourteenth Amendment Equal Protection Clause); *Griswold*, 381 U.S. at 484–85 (holding that the Connecticut law prohibiting the use of contraceptives, as applied to married persons, was unconstitutional because it violated the "zone of privacy created by several fundamental constitutional guarantees," including the First,

to intimate homosexual relationships.<sup>39</sup> The Court observed that infrequent and inconsistent enforcement of anti-sodomy laws undermined their legitimacy.<sup>40</sup> It intentionally declined to overturn the Texas law solely on equal protection grounds because it wanted to make clear that private, intimate conduct between consenting adults was now beyond the reach of state regulation.<sup>41</sup> The Court drew upon the “broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases.”<sup>42</sup> It did not explicitly state that the *Bowers* Court erred in holding that there was no fundamental constitutional right to engage in homosexual sodomy; rather, it couched its conclusion

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Third, Fourth, Fifth, Ninth, and Fourteenth Amendments); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 533–36 (1925) (holding that a state act compelling students to attend public schools was unconstitutional because it violated the liberty interest protected by the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding that a Nebraska law banning the teaching of foreign languages to students below eighth grade was unconstitutional).

[T]he liberty . . . [protected by the Fourteenth Amendment extends beyond the] freedom from bodily restraint [and includes] 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 own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.* at 399.

<sup>39</sup> *Lawrence*, 123 S. Ct. at 2481–82.

<sup>40</sup> *Id.* at 2480–81. The Court cited the American Law Institute:

In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for “criminal penalties for consensual sexual relations conducted in private.” It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and 3) the laws were arbitrarily enforced and thus invited the danger of blackmail.

*Id.* at 2480 (citing MODEL PENAL CODE § 213.2 cmt. 2, at 372 (1980) and MODEL PENAL CODE § 207.5, at 277–80 (Tentative Draft No. 4, 1955)). Furthermore, despite the fact that all fifty states had outlawed sodomy prior to 1961, the prohibitions were widely ignored. *Id.* at 2481.

<sup>41</sup> *Id.* at 2482. “Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.” *Id.* Thus, Justice Kennedy recognized the distinction between *Bowers* and *Lawrence*. Justice O’Connor, however, disagreed with the majority and asserted that *Bowers* should have been upheld, while the Texas statute should have been struck down as a violation of equal protection. *Id.* at 2484 (O’Connor, J., concurring).

<sup>42</sup> *Id.* at 2476; see *supra* note 38 for a brief description of five such cases.

in terms of liberty.<sup>43</sup> Justice Scalia noted this omission in his dissent, where he criticized the majority for both failing to state explicitly that such a right existed and failing to provide constitutional support for the assertion.<sup>44</sup>

The impact of *Lawrence* became apparent on July 7, 2003 when former Army Lieutenant Colonel Loren S. Loomis, who was discharged for homosexual conduct, filed suit in the Washington D.C. federal district court challenging the constitutionality of DADT.<sup>45</sup>

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<sup>43</sup> See *Lawrence*, 123 S. Ct. at 2478.

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and 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. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

*Id.* The Court went on to state that *Bowers* had "misapprehended the claim of liberty" presented to it and that it was incorrect to state the claim in that case as one of "whether there is a fundamental right to engage in consensual sodomy." *Id.*

<sup>44</sup> *Id.* at 2488 (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause."). This is literally true, however, the Court seemed to implicitly say that there is such a right when it stated the following:

The State cannot demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime. . . . "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.

*Id.* at 2484 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)). Justice Scalia went on to assert that the overturning of *Bowers* represented "a massive disruption of the current social order." *Id.* at 2491 (Scalia, J., dissenting).

<sup>45</sup> See *Gay Man, Citing Supreme Court Ruling, Fights '97 Army Discharge*, N.Y. TIMES, July 9, 2003, at A14 (noting that according to Jon Davidson, senior counsel at Lambda Legal Defense and Education Fund (a gay rights group), this is the first lawsuit filed using the landmark ruling in *Lawrence* as precedent); Phillip Carter, *Judicial Deference to the Military: How It Will Affect Court Cases Involving Gay Rights, and War on Terrorism Policies*, FINDLAW LEGAL COMMENT (July 15, 2003), at [http://writ.news.findlaw.com/commentary/20030715\\_carter.html](http://writ.news.findlaw.com/commentary/20030715_carter.html).

## II. JUDICIAL DEFERENCE TO THE MILITARY IS WARRANTED WHERE THE INFRINGEMENT OF CONSTITUTIONAL RIGHTS IS NECESSARY TO MAINTAIN THE EFFECTIVENESS OF THE ARMED FORCES.

When a law is challenged on due process or equal protection grounds it is presumed to be valid and is subject only to rational basis review, which requires merely that the law be rationally related to a legitimate government purpose.<sup>46</sup> However, where a challenged law draws suspect or quasi-suspect classifications based on certain immutable factors, such as race, or infringes upon fundamental constitutional rights, courts subject the law to strict scrutiny and require that it be “narrowly tailored to serve a compelling state interest.”<sup>47</sup> The circuit courts have applied rational basis review to laws affecting homosexuals. This is because homosexuality was not a suspect classification; there was no fundamental right to engage in homosexual acts.<sup>48</sup> Because *Lawrence* has identified a right to liberty that protects homosexual acts, DADT infringes upon the constitutionally protected

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<sup>46</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312, 319–20 (1993). The presumption of validity places the burden on the party challenging the law to prove that there is no rational basis to support it. *Id.* at 320 (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

<sup>47</sup> See, e.g., *Reno v. Flores*, 507 U.S. 292, 301–02 (1993); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); see also *Watkins v. United States Army*, 875 F.2d 699, 724–28 (9th Cir. 1989) (Norris, J., concurring). Judge Norris listed the factors used by the Supreme Court to determine whether a classification is “suspect” so as to warrant strict scrutiny analysis. The first factor is whether the group has suffered a history of discrimination. He asserted that the Army itself conceded that this is the case with regard to homosexuals. The second factor is whether the discrimination embodies a gross unfairness that is so contrary to the concept of equal protection that it qualifies as “invidious.” This requirement is necessary because “discrimination exists against some groups because the animus is warranted—no one could seriously argue that burglars form a suspect class.” *Id.* at 724. Judge Norris implied that discrimination against gays is invidious because empirical evidence proves that sexual orientation does not bear on one’s ability to perform in the military. *Id.* at 725. The third factor is “whether the group burdened by official discrimination lacks the political power necessary to obtain redress from the political branches of government.” *Id.* at 726. Judge Norris asserted that homosexuals have historically been “victimized by political bodies.” *Id.* at 727. He therefore concluded that homosexuality is a suspect classification. *Id.* at 728. However, the Circuit Courts have not agreed with this conclusion. See *infra* note 83 and accompanying text.

<sup>48</sup> See *infra* note 83 and accompanying text.

rights of homosexuals and will likely be subjected to strict scrutiny in the future.

A. *How Courts Historically Have Dealt With the Issue of Deference to the Military*

The Supreme Court lacks the constitutional authority that is shared by the President and Congress with regard to the military; therefore, it has generally deferred to the other two branches, or to the military itself, in cases involving the infringement of constitutional rights in the military context.<sup>49</sup> In *Korematsu v. United States*,<sup>50</sup> the Court upheld a military order providing for the internment of Japanese-Americans in relocation centers.<sup>51</sup> While recognizing that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," the Court pointed out that not all such restrictions are unconstitutional.<sup>52</sup> Such restrictions, according to the Court, are subject to rigid scrutiny,<sup>53</sup> but the Court neglected to perform this strict scrutiny analysis that it claimed was necessary. Instead, it deferred to the judgment of military authorities, who determined that Japanese-Americans posed a significant security threat.<sup>54</sup>

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<sup>49</sup> Carter, *supra* note 45; see also U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2; U.S. CONST. art. III.

<sup>50</sup> 323 U.S. 214 (1944).

<sup>51</sup> *Id.* at 223–24; see also Richard Nunan, *Gays in the Military and Constitutional Deference*, NEWSLETTER ON PHIL. & LAW (American Philosophical Association, University of Delaware), Fall 1997, available at <http://www.apa.udel.edu/apa/archive/newsletters/v97n1/lawmilitary.asp>.

<sup>52</sup> *Korematsu*, 323 U.S. at 216.

<sup>53</sup> *Id.* The Court went on to state that "[p]ressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." *Id.*

<sup>54</sup> *Id.* at 217–18. "Here . . . we cannot reject as unfounded the judgment of the military authorities and of Congress." *Id.* at 218 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)); see also *id.* at 225 (Frankfurter, J., concurring) ("If a military order . . . does not transcend the means appropriate for conducting war, such action by the military is as constitutional."). The dissent pointed out that, in ruling upon the constitutionality of the executive order, the Court did not first attempt to determine whether the internment of Japanese-Americans was actually necessary in order to further national security. See *id.* at 233–35 (Murphy, J., dissenting).

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal in-

In *Rostker v. Goldberg*,<sup>55</sup> the Court held that the Military Selective Service Act,<sup>56</sup> which excluded women from the draft, was constitutional because “[t]he exemption of women from registration [was] not only sufficiently, but [was] also closely, related to Congress’ purpose in authorizing registration.”<sup>57</sup> In justifying its deference to the military, the Court noted that “in the context of Congress’ authority over national defense and military affairs, . . . the Court [must] accord[] Congress greater deference [than in perhaps all other areas].”<sup>58</sup>

The Court held in *Goldman v. Weinberger*<sup>59</sup> that an Air Force regulation prohibiting the wearing of a yarmulke while in uniform did not violate the First Amendment right to freedom of religious expression because it was justified by the disciplinary interest of the Air Force.<sup>60</sup> Once again, the Court recognized the importance of judicial deference to the military.<sup>61</sup> At first, it appeared that the Court made some attempt to examine the challenged regulation.<sup>62</sup> As the dissent pointed out, however, “[t]he

telligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion . . . Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support . . . “What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”

*Id.* at 233–34 (quoting *Sterling v. Constantin*, 287 U.S. 378, 401 (1932)).

<sup>55</sup> 453 U.S. 57 (1981).

<sup>56</sup> 50 U.S.C. app. §§ 451–73 (2000).

<sup>57</sup> *Rostker*, 453 U.S. at 79.

<sup>58</sup> *Id.* at 64–65 (“Not only is the scope of Congress’ constitutional power in this area broad, but the lack of competence on the part of the courts is marked.”).

<sup>59</sup> 475 U.S. 503 (1986).

<sup>60</sup> *Id.* at 509–10.

<sup>61</sup> *Id.* at 507.

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. . . . [W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.

*Id.* (citations omitted).

<sup>62</sup> *See id.* at 508.

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the

Court simply restate[d] [the Air Force's] assertions without offering any explanation how the exception Dr. Goldman requests reasonably could interfere with the Air Force's interests. Had the Court given actual consideration to Goldman's claim, it would have been compelled to decide in his favor."<sup>63</sup>

*Korematsu* and *Goldman* involved military directives that were not the subject of extensive congressional debate.<sup>64</sup> The two cases thus differed from those challenging DADT, which was born of executive and legislative action involving lengthy debate and examination.<sup>65</sup> Because the Court regularly reviews executive and legislative actions,<sup>66</sup> DADT is perhaps due less deference than the challenged rules in *Korematsu* and *Goldman*, which were purely military directives.<sup>67</sup> However, several cases indicate that the circuit courts often defer to the executive and legislative branches in military matters.<sup>68</sup> It remains to be seen whether the Supreme Court will afford the same deference to DADT as it has to past military policies.<sup>69</sup>

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subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.

*Id.*

<sup>63</sup> *Id.* at 516 (Brennan, J., dissenting).

<sup>64</sup> *See id.* at 508 (challenging Air Force regulation: AFR 35-10); *Korematsu v. United States*, 323 U.S. 214, 216-17 (1944) (challenging military directive, Exclusion Order No. 34, based on Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942)).

<sup>65</sup> *See infra* notes 91-101 and accompanying text; *see also* Press Release, Center for the Study of Sexual Minorities in the Military, Senior Admiral Says Lifting Gay Ban Would Strengthen Military (Aug. 21, 2003), at [http://www.gaymilitary.ucsb.edu/PressCenter/press\\_rel\\_2003\\_0821P.htm](http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2003_0821P.htm). "Since Congress made the gay ban a federal statute, the Pentagon cannot overturn the policy without Congressional action." *Id.* Rear Admiral John D. Hutson, retired, Judge Advocate General for the Navy, asserted that Congress would not oppose the lifting of the ban if the Department of Defense declared that the policy should be abandoned. *Id.*

<sup>66</sup> *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (re-viewing the President's Executive Order to seize and operate steel mills).

<sup>67</sup> Even purely military directives, however, ought not receive unquestioning deference. *See, e.g.*, *Philips v. Perry*, 106 F.3d 1420, 1439-40 (1997) (Fletcher, J., dissenting) (quoting *Parisi v. Davidson*, 405 U.S. 34, 55 (1971)) ("When the military steps over [the] bounds [of civil liberties], it leaves the area of its expertise and forsakes its domain. The matter then becomes one for civilian courts to resolve, consistent with the statutes and with the Constitution.") (alterations in original).

<sup>68</sup> *See infra* notes 91-101 and accompanying text.

<sup>69</sup> *See supra* note 10 and accompanying text.

In the late 1980s and early 1990s, before DADT, courts showed a willingness to limit the scope of judicial deference to the military regarding the exclusion of homosexuals. For example, in *Dahl v. Secretary of the United States Navy*,<sup>70</sup> the Eastern District of California refused to defer to the military's judgment.<sup>71</sup> In that case, the plaintiff serviceman was discharged from the Navy in 1982 for stating in an official interview that he was gay.<sup>72</sup> The court refused simply to accept the validity of the military's "homosexual exclusion policy"<sup>73</sup> based solely on the judgment of the coequal branches of government and the military, without first examining it to determine its underlying basis.<sup>74</sup> Nonetheless, the court accorded the military decision a high degree of deference.<sup>75</sup> The court rejected the reasoning used by the government in support of its exclusion policy, observing that "[the government] concede[s] that . . . homosexuals may serve in the Navy provided that they do not reveal their sexual orientation to others. Apparently, as long as heterosexual service-members . . . do not know exactly who is homosexual, they do not object to working, showering and living with homosexuals."<sup>76</sup> Accordingly, the court ordered the Navy to reinstate Dahl, identifying a violation of Fifth Amendment equal protection and

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<sup>70</sup> 830 F. Supp. 1319 (E.D. Cal. 1993).

<sup>71</sup> See *id.* at 1327–28.

<sup>72</sup> *Id.* at 1321. Plaintiff did, however, deny that he had ever engaged in homosexual conduct after entering the Navy. *Id.*

<sup>73</sup> *Id.* at 321 n.1.

<sup>74</sup> *Id.* at 1327. The court pointed out that "there is no support for [the government's] argument that the court must accept without question [its] proffered bases for the homosexual exclusion policy without analyzing the relevant evidence and determining whether the policy is motivated by prejudice against homosexuals." *Id.*

<sup>75</sup> *Id.* at 1328 ("[J]udicial review of military regulations 'is far more deferential than constitutional review of similar laws or regulations designed for civilian society.' However, . . . although individual autonomy is not as great within the military community as it is within the larger civilian community, the essence of individual constitutional rights nevertheless remain intact.") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

<sup>76</sup> *Id.* at 1332.

The only inference to be drawn from the [policy's] failure to reach undeclared homosexuals is that the threats to military effectiveness posed by homosexuals, assuming such threats actually exist, arise solely from heterosexuals' adverse reactions to [their] presence . . . . Given this, the court cannot conceive how the policy *cannot* be motivated by prejudice.

*Id.* at 1332–33.



citing a lack of evidence that he had actually engaged in prohibited homosexual conduct.<sup>77</sup>

In *Watkins v. United States Army*,<sup>78</sup> the Ninth Circuit invoked equitable estoppel and ordered the Army to reenlist Sergeant Watkins, who was discharged due to his homosexuality.<sup>79</sup> The court held that after repeatedly allowing Watkins to reenlist despite his acknowledged homosexuality, it was fundamentally unfair to discharge him.<sup>80</sup> The court thus avoided the constitutional equal protection and due process issues raised by the case.

Since the advent of DADT, courts have upheld the law against constitutional challenges.<sup>81</sup> The most common approach has been to rely on *Bowers v. Hardwick*<sup>82</sup> in rejecting due process and equal protection challenges, applying the rational basis standard of review because there was no fundamental right to engage in homosexual acts and homosexuality was not a "suspect classification."<sup>83</sup> Applying rational basis, courts have sustained

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<sup>77</sup> *Id.* at 1337–38. The court distinguished the case from *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), cited by the government, because that case presented a substantive due process challenge, not an equal protection challenge, and because the servicepersons in *Beller* were found to have engaged in homosexual conduct, while the plaintiff in this case had simply declared his homosexual status. *Dahl*, 830 F. Supp. at 1336.

<sup>78</sup> 875 F.2d 699 (9th Cir. 1989).

<sup>79</sup> *Id.* at 711. In 1967, Watkins was drafted into the Army and indicated on his pre-introduction medical form that he had homosexual tendencies. The Army nonetheless admitted him. A year later, pursuant to an investigation into Watkins' sexual conduct, he signed an affidavit stating that he was gay and that he had engaged in sodomy with two other servicemen. *Id.* at 701. Still, the Army did nothing, citing lack of evidence. Later, after his enlistment period had expired, he was allowed to reenlist. In subsequent years, Watkins obtained various security clearances that were occasionally revoked due to his homosexuality, only to be reinstated pursuant to the recommendations of his commanding officers. The Army repeatedly found that his homosexuality did not create a problem. Furthermore, Watkins consistently received outstanding evaluations, often receiving perfect scores, and had undeniably earned the respect of those who served with him. After the promulgation of Army Regulation 635-200 chpt. 15, in 1981, which mandated the discharge of all homosexuals, an Army board of review recommended that Watkins be discharged for stating he was gay. *Id.* at 701–03. Subsequently, the General in charge of the board directed that Watkins be discharged, but a district judge intervened and enjoined the Army from doing so. *Id.* at 703. The Army appealed to the Ninth Circuit, where a panel reversed. The full court then granted review to address the issues raised. *Id.* at 704.

<sup>80</sup> *Id.* at 711.

<sup>81</sup> See *infra* notes 83–101 and accompanying text.

<sup>82</sup> 478 U.S. 186 (1986).

<sup>83</sup> See, e.g., *Selland v. Perry*, 905 F. Supp. 260 (D. Md. 1995). *Selland* pointed out that strict scrutiny applies only "when a law infringes a 'fundamental right' or

DADT, holding that the exclusion of open homosexuals was rationally related to the military's legitimate interest in maintaining unit cohesion, high morale, and discipline.<sup>84</sup> In upholding DADT in *Philips v. Perry*, the Ninth Circuit Court of Appeals noted that only homosexual *conduct* is prohibited, not *orientation*; homosexuals are allowed to serve, the court stated, as long as they refrain from engaging in prohibited conduct.<sup>85</sup> Accordingly, the court sustained the policy on both equal protection and due process grounds.<sup>86</sup>

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creates a 'suspect classification.'" *Id.* at 265. (citing *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). The court went on to assert that "there is no infringement of a 'fundamental right' in this case." *Id.* at 265 (citing generally *Bowers*, 478 U.S. 186). Other circuits have followed a similar approach. See *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998) (stating that "[t]he suspect or quasi-suspect classes that are entitled to heightened scrutiny have been limited to groups generally defined by their status, such as race, national ancestry or ethnic origin, alienage, gender and illegitimacy, and not by the conduct in which they engage"); *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1997) (holding that DADT is subject to rational basis standard of review because homosexuals are not part of a suspect classification and there is no fundamental constitutional right to engage in homosexual acts); *Richenberg v. Perry*, 97 F.3d 256, 260 n.5 (8th Cir. 1996) (noting that in *Bowers*, the Supreme Court used a rational basis standard of review); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996).

<sup>84</sup> See, e.g., *Able*, 155 F.3d at 636; *Thomasson*, 80 F.3d at 928-29; see also *Philips*, 106 F.3d at 1425-26 (holding that the exclusion policy was rationally related to the "compelling government purpose" of "maintaining effective armed forces"). Furthermore, the *Philips* court observed that even under "strict scrutiny," the standard used in *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), and *Hatheway v. Sec'y of the Army*, 641 F.2d 1376 (9th Cir. 1981), before it was deemed inappropriate, the court still held that the importance of the government's interest outweighed any privacy rights (*Beller*) or equal protection rights (*Hatheway*) that the discharged members may have had. *Philips*, 106 F.3d at 1426.

<sup>85</sup> *Philips*, 106 F.3d at 1426-27 (citing its earlier decision in *Meinhold v. United States*, 34 F.3d 1469, 1479-80 (9th Cir. 1994), which reversed the servicemember's discharge because it was based solely on his statement that he was homosexual and there was no evidence that he ever acted or intended to act in a prohibited manner). Interestingly, the *Philips* court cited *Meinhold* despite the fact that the case involved events that took place prior to the 1993 implementation of DADT. In a footnote, the court glossed over the Fourth Circuit's decision in *Thomasson* which upheld the "statements" prong of the DADT against an equal protection challenge, seemingly in contradiction of its own conclusion. *Id.* at 1427 n.12. The court did not address this apparent inconsistency.

<sup>86</sup> See *id.* at 1427. The court found that "substantive due process and equal protection doctrine are intertwined for purposes of equal protection analyses of federal action." *Id.* (quoting *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 n.9 (9th Cir. 1990)); see also *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1135-36 (9th Cir. 1997) (upholding the portion of DADT providing that an admission of homosexuality creates a rebuttable presumption that the servicemember will engage in homosexual conduct under equal protection); *Schowengerdt v. United States*, 944 F.2d. 483, 490 (9th Cir. 1991) (noting that the

The second approach used by courts upholding DADT has been to cite a lack of constitutional authority to review military policies put in place by the executive and legislative branches of government.<sup>87</sup> The Constitution gives Congress authority to raise and support armies, provide for a navy and make rules to regulate the armed forces,<sup>88</sup> while the President is the Commander-in-Chief of the armed forces.<sup>89</sup> The Constitution, however, says nothing about the authority of the courts vis-à-vis the military.<sup>90</sup>

The third approach is to defer to the judgment of the executive and legislative branches because of the extensive debate and lengthy expert testimony that preceded implementation of DADT.<sup>91</sup> For example, in *Selland v. Perry*,<sup>92</sup> the Maryland District Court noted that in formulating the policy, Congress heard extensive testimony from interested parties, both military and non-military, and carefully considered the importance of maintaining an effective military defense capability.<sup>93</sup> The Court of Appeals for the Fourth Circuit, in *Thomasson v. Perry*,<sup>94</sup> likewise proved hesitant to second-guess the judgment of the military authorities in carrying out rules established by the executive and legislative branches,<sup>95</sup> noting that both branches engaged in an extensive review of the policy.<sup>96</sup> Before enacting DADT, the

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United States, 944 F.2d. 483, 490 (9th Cir. 1991) (noting that the court had previously rejected substantive due process claims, holding them to be foreclosed by *Bowers*).

<sup>87</sup> Carter, *supra* note 45; see also *Philips*, 106 F.3d at 1430–31 (Noonan, J., concurring) (observing that the courts are not responsible for supervising military discipline because that is the job of the executive and legislative branches of government).

<sup>88</sup> U.S. CONST. art. I, § 8, cls. 12–14.

<sup>89</sup> *Id.* art. II, § 2.

<sup>90</sup> See *id.* art. III.

<sup>91</sup> See *infra* notes 92–101 and accompanying text.

<sup>92</sup> 905 F. Supp. 260 (D. Md. 1995).

<sup>93</sup> *Id.* at 264–65.

<sup>94</sup> 80 F.3d 915 (4th Cir. 1996).

<sup>95</sup> See *id.* at 921 (“Thomasson seeks to upset . . . a carefully crafted national political compromise, . . . the product of sustained and delicate negotiations involving both the Executive and Legislative branches of our government.”).

<sup>96</sup> *Id.* at 922.

The Senate Armed Services Committee held no less than nine days of hearings, including a field hearing at the Norfolk Naval Complex, taking testimony from nearly fifty witnesses. The House Armed Services Committee held five days of hearings. Witnesses who appeared at these hearings represented a broad range of views and backgrounds. They included: the Sec-

House and Senate conducted a thorough debate and both houses pondered amendments.<sup>97</sup> The Eighth Circuit in *Richenberg v. Perry*<sup>98</sup> observed that deference to the considered professional judgment of military authorities was warranted because of the court's lack of competence in the military realm.<sup>99</sup> In *Philips v. Perry*,<sup>100</sup> the Ninth Circuit justified its deference by pointing out that Congress made fifteen findings of fact before enacting 10 U.S.C. § 654, the official codification of DADT.<sup>101</sup>

*B. Predictions of How Courts Will Address the Issue of Judicial Deference to the Military in the Wake of Lawrence v. Texas*

Legal commentators have disagreed about the effect *Lawrence* will have on the degree of judicial deference afforded to DADT; some have suggested that the policy's days are numbered,<sup>102</sup> while others disagreed and predicted that the decision

retary of Defense and the Chairman of the Joint Chiefs of Staff; military and legal experts; enlisted personnel, officers and senior military leaders; and activists supporting and opposing the military's policy.

At the same time, the Department of Defense conducted its own exhaustive review. It convened a military working group composed of senior members of each service, commissioned a study by the Rand Corporation, initiated regular consultations with the Joint Chiefs of Staff and leaders of each service, studied the history of the military's response to social change, and consulted legal experts.

*Id.* (citations omitted).

<sup>97</sup> *Id.* at 923. "What Thomasson challenges, therefore, is a statute that embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiation and deliberation. . . . The courts were not created to award by judicial decree what was not achievable by political consensus." *Id.*

<sup>98</sup> 97 F.3d 256 (8th Cir. 1997).

<sup>99</sup> *Id.* at 261.

<sup>100</sup> 106 F.3d 1420 (9th Cir. 1997).

<sup>101</sup> *Id.* at 1422-23; see also *Able v. United States*, 155 F.3d 628, 635 (2d Cir. 1998) (stating that the court "cannot say that the reliance by Congress on the professional judgment and testimony of military experts and personnel that those who engage in homosexual acts would compromise the effectiveness of the military was irrational").

<sup>102</sup> See Paul Schindler, *Does Lawrence Trump Don't Ask, Don't Tell?*, GAY CITYNEWS, July 11-17, 2003, at <http://www.gaycitynews.com/gcn228/doeslawrence.html>. Kathi Wescott, a staff attorney with the Servicemembers Legal Defense Network (SLDN), a Washington-based support group for homosexual soldiers, commented that "[c]ourts were viewing *Bowers* . . . as controlling vis-à-vis the federal [military] sodomy statute," and asserted that *Lawrence* provides an opportunity to challenge the military sodomy ban, and that without that ban, the prohibition on openly homosexual soldiers under DADT will be harder to sustain. *Id.*

will have little, if any, effect on future rulings.<sup>103</sup> In the wake of *Lawrence*, it appears that DADT burdens a fundamental right and therefore is subject to "strict scrutiny."<sup>104</sup> If this is so, courts will have to agree that DADT is "narrowly tailored to achieve" the compelling governmental interest of optimal military effectiveness.<sup>105</sup> Although it may appear difficult to argue that DADT is "narrowly tailored" or that the exclusion of open homosexuals is related to military effectiveness, in the context of military questions, courts normally defer to the judgment of the legislative and executive branches, which in turn defer to the judgment of the military.<sup>106</sup> Many commentators, therefore, believe that DADT will survive due to the unwillingness of courts to upset the carefully brokered 1993 compromise between Congress and the President.<sup>107</sup>

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<sup>103</sup> See Belkin, *supra* note 5 (discussing the current debate among scholars and experts on lifting the ban on homosexual personnel); Carter, *supra* note 45. Professor Belkin has expressed pessimism about the demise of DADT, despite the positive sign that a military journal published an article he wrote criticizing the policy. See Crawford, *supra* note 5, for a discussion of Belkin's article. An editor at the Department of Defense-affiliated quarterly PARAMETERS explained that the journal published Belkin's article "because, even though [he] is a gay-rights advocate, he presented his argument in an unbiased manner, with facts backing up his statements." *Id.* While this is seen as encouraging, Belkin remained pessimistic, predicting that the gay ban will continue for at least five, and possibly as long as twenty, years. *Id.*

<sup>104</sup> Carter, *supra* note 45. *But see* Press Release, *supra* note 4. Not all legal experts agree that laws affecting homosexuals are now subject to strict scrutiny. For example, George Fisher, Professor of Law at Stanford University Law School, noted that the Court in *Lawrence* did not apply strict scrutiny. Therefore, Fisher posited that the Court would likely subject DADT to rational basis review rather than strict scrutiny. *Id.* Professors James Garland of Hofstra University School of Law and Chai Feldblum of Georgetown University Law Center agreed, finding it unlikely that *Lawrence* will affect DADT. *Id.* Nonetheless, other experts, like Tobias Wolff, Visiting Professor of Law at Stanford Law School, and Diane Muzur, Professor of Law at the University of Florida, expressed hope that DADT will now be examined more closely; they suggested that continued judicial deference to the military's judgment with regard to DADT should no longer be taken for granted. However, neither explicitly stated that the policy is now subject to the strict scrutiny level of review. *Id.*

<sup>105</sup> Carter, *supra* note 45; *see also supra* notes 46–47 and accompanying text (describing rational basis and strict scrutiny standards of review).

<sup>106</sup> *Id.*; *see also* Press Release, *supra* note 65 (describing Congress' deference to the Department of Defense's influence regarding the reversal of the policy).

<sup>107</sup> *See supra* notes 91–101 and accompanying text.

### III. IT IS NO LONGER POSSIBLE TO JUSTIFY THE CONTINUATION OF DADT AFTER *LAWRENCE V. TEXAS*

#### A. *Pre-Lawrence Justifications for Military Policies Excluding Homosexuals*

Proponents of DADT predict disastrous consequences if homosexuals are allowed to serve openly in the military.<sup>108</sup> They argue that the effectiveness of the armed forces would be severely compromised because heterosexual servicemembers would be unwilling to live and serve alongside homosexuals.<sup>109</sup> It is also said that the judiciary should defer to the judgment of the elected branches of government on this matter because DADT has been widely debated and is the culmination of many years of study and consideration;<sup>110</sup> furthermore, the executive and legislative branches have a constitutional mandate to regulate the armed forces, while the judicial branch does not.<sup>111</sup>

Judge Posner of the Seventh Circuit has said that historically there are four principal arguments against allowing homosexuals in the military: (1) homosexuals are likely to be blackmailed into revealing military secrets;<sup>112</sup> (2) homosexuals tend to be less stable than heterosexuals;<sup>113</sup> (3) homosexual superior offi-

<sup>108</sup> See Belkin, *supra* note 5, at 110.

<sup>109</sup> See NAT'L DEF. RESEARCH INST., RAND CORP., *Sexual Orientation and U.S. Military Personnel Policy: Policy Options and Assessment*, 24–25 (1993), <http://www.rand.org/publications/MR/MR323/mr323.chl.pdf>.

<sup>110</sup> See *supra* notes 101–07 and accompanying text.

<sup>111</sup> See Carter, *supra* note 45; see also U.S. CONST. art. I, § 8; U.S. CONST. art II, § 2; U.S. CONST. art. III.

<sup>112</sup> POSNER, *supra* note 28, at 314–15. Posner called this argument weak and not applicable to open homosexuals since they presumably do not have to hide the fact that they are gay. *Id.* However, Posner's dismissal of this argument failed to consider the situation of a "closeted" homosexual who does not want his fellow servicemembers to know his secret.

<sup>113</sup> *Id.* at 315. Posner conceded that although this may be true, it would nonetheless be irrelevant since stereotypical effeminate gays are unlikely to join the military. Also, if gay men are less suited to military service, the flip side of the argument is that gay women are more suited to the military than heterosexual women. In any event, the military screens applicants for suitability, so gays that are unfit for service can be screened out due to mental instability and there would be no need to exclude all known homosexuals. See *id.* "The Crittenden Report contains the flat statement, apparently by the chief of naval personnel, that there is no correlation between homosexuality and either ability or attainments." *Id.* at 316. (citing the Crittenden Report, *Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuals* (Dec. 21, 1956 to Mar. 15, 1957)).

cers might force subordinates into performing sexual favors;<sup>114</sup> (4) the inclusion of homosexuals will adversely affect the morale of heterosexual service members and reduce the effectiveness of the armed forces.<sup>115</sup>

At first glance, these justifications may have seemed compelling, or at least reasonable. A growing body of evidence, however, has slowly eroded the foundations of such arguments. The following section examines this evidence.

## B. *Pre-Lawrence Arguments Against Military Policies Excluding Homosexuals*

### 1. Such Policies are Unnecessary and Possibly Detrimental to the Military

Many open homosexuals serve in the military without issue so long as they are discreet about their orientation.<sup>116</sup> Empirical

<sup>114</sup> *Id.* at 316. Posner dismissed this argument. "[T]his bridge was crossed when the armed forces admitted women over the same objection. . . . This is not to deny that [homosexuals in the armed forces can be a problem]. . . . It just is not ordinarily thought a sufficiently serious problem to warrant the blanket exclusion of a whole class of [persons]." *Id.*

<sup>115</sup> *Id.*

[W]hy do I say that the argument . . . is a good argument for exclusion? . . . Because the question of morale is separable from the question of the merits of the exclusion. Suppose American Soldiers harbored the irrational but unshakable belief that to attack on Friday the thirteenth would bring disaster. . . . If it was very important to attack on Friday the thirteenth, [their commander] might try to educate the soldiers out of their superstition; but if it was not very important . . . he might think it best to yield. It is the same with the homosexual question.

*Id.* at 318.

<sup>116</sup> *Id.* at 317.

There is no reason to believe that homosexuals who . . . pass all the physical, mental, and psychological tests that the armed forces administer . . . are militarily less effective than heterosexuals, or cause trouble, or otherwise degrade military performance. Many homosexuals are known to have served in . . . the Second World War, the Korean War, and the Vietnam War, and studies of their military records show that they did as well on average as the heterosexuals.

*Id.* Interestingly, during World War II many German gays sought refuge from Nazi persecution by joining the army "because the military command was too busy to worry about trying to root out homosexuals; evidently they were not considered a threat to effective military performance." *Id.* at 317. "[F]or the most part they are accepted, generally without fuss, unless they get arrested or otherwise misbehave in ways that would land heterosexuals in trouble for corresponding forms of sexual misconduct." *Id.* at 320. However, not everyone cares to hear about how well homosexuals can function in the military. For instance, during Congressional debates on

evidence disproving the justifications for banning homosexuals began to accumulate in 1957 with the Crittenden Report commissioned by the Navy to evaluate the alleged negative effects of homosexual servicemembers on morale and unit cohesion.<sup>117</sup> “The Navy considered the Crittenden report sufficiently damaging that it chose to suppress it for the next two decades.”<sup>118</sup> At least two other studies commissioned by the Department of Defense similarly called into question the judgment of excluding homosexuals. One is a report written for the Department of Defense’s Personnel Security Research and Education Center (PERSEREC) in 1988 by Berkeley psychologist Theodore Sarbin and Navy Captain Kenneth Karols, and the other is the RAND report commissioned at the request of President Clinton.<sup>119</sup> The PERSEREC report concluded that there was no evidence that the inclusion of homosexuals in the military would have an adverse effect on morale or security, and accordingly recommended the elimination of the ban.<sup>120</sup> The General Accounting Office (GAO) released its own analysis regarding the exclusion of homosexuals in June of 1992 and confirmed the PERSEREC findings.<sup>121</sup> The RAND report similarly concluded that it was possible to lift the ban on homosexuals without damaging unit cohesion.<sup>122</sup>

The dissent in *Thomasson v. Perry* pointed out that even though the military insists that “tolerating [prejudice against homosexuals] is essential to ‘unit cohesion[,]’ . . . there is no evidence that the discharge of [homosexuals] will rationally further that purpose.”<sup>123</sup> Ironically, exclusionary policies like DADT can

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DADT, testimony including accounts of homosexuals serving gallantly was suppressed by supporters of the ban. See Belkin, *supra* note 5, at 117 (“When [Senate Armed Services Committee Chairman] Nunn learned that the testimony of retired Army Colonel Lucian K. Truscott III would include accounts of open gay soldiers who had served with distinction, Nunn deleted Truscott from the witness list.”).

<sup>117</sup> See Nunan, *supra* note 51 (citing generally RANDY SHILTS, CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY (1993)).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*; see also U.S. GEN. ACCOUNTING OFFICE, GAO REPORT ON GAYS IN THE MILITARY (1992), [http://www.fordam.edu/halsall/pwh/gao\\_report.html](http://www.fordam.edu/halsall/pwh/gao_report.html).

<sup>122</sup> Nunan, *supra* note 51; see also NAT’L DEF. RESEARCH INST, *supra* note 109, at 14–15 (discussing the effectiveness of integration of homosexuals into the military in foreign nations).

<sup>123</sup> *Thomason v. Perry*, 80 F.3d 915, 951 (4th Cir. 1996) (Hall, J., dissenting).

There are at least three . . . major problems with the ‘unit cohesion’ argu-



actually harm morale and unit cohesion by encouraging lying on the part of homosexual servicemembers who are required to keep their sexual orientation a secret.<sup>124</sup> Because no one knows who is homosexual and who is not, servicemembers may have reason to be wary of the leering eyes of closet homosexuals.<sup>125</sup> DADT proved harmful to military morale in 2002, when the public widely criticized the policy upon learning that almost two-dozen Army linguists, many of whom spoke Arabic, were discharged under the policy.<sup>126</sup>

## 2. The Experiences of Foreign Militaries Prove that Homosexuals Can Serve

Homosexuals have long served in foreign militaries without the dire consequences predicted by proponents of their exclusion. This was verified by the independent research center RAND, which, at the request of then-President Clinton, began a study in April 1993 to determine the viability of his plan to lift the ban on homosexuals in the military.<sup>127</sup>

RAND sent staff members to seven foreign countries to observe their militaries and to interview their members.<sup>128</sup> Both the Netherlands and Norway followed a policy of nondiscrimination with regard to homosexuals in the military.<sup>129</sup> In 1992, Canada dropped its military ban on homosexuals altogether.<sup>130</sup>

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ment. First, it represents a severe and somewhat defeatist underestimation of the ability of today's servicemembers to keep their focus on professional military concerns. . . . Second, kowtowing to the prejudices of some by excluding others has never been an acceptable policy rationale . . . . [T]hird, in the several units where acknowledged homosexuals are serving today (usually, by court order), there are no signs of unit disintegration or bad morale.

*Id.* at 951–52 (quoting Dr. Lawrence J. Korb, Assistant Secretary of Defense under President Reagan).

<sup>124</sup> *Id.* at 953; *see also* *Philips v. Perry*, 106 F.3d 1420, 1437–38 (9th Cir. 1997) (Fletcher, J., dissenting).

<sup>125</sup> *Philips*, 106 F.3d at 1438 (Fletcher, J., dissenting).

<sup>126</sup> Press Release, *supra* note 65; *see also* Carter, *supra* note 45 (discussing the government's alleged compelling interest in enacting the DADT statute which "promote[s] unit cohesion, morale and discipline . . . ultimately relat[ing] directly to our national security").

<sup>127</sup> NAT'L DEF. RESEARCH INST, *supra* note 109, at 2.

<sup>128</sup> *Id.* at 11. RAND researchers visited the Netherlands, the United Kingdom, Canada, France, Germany, Israel, and Norway. *Id.* "In all of the countries visited, sodomy ha[d] been decriminalized in the civil law." *Id.* at 13.

<sup>129</sup> *Id.* at 12.

<sup>130</sup> *Id.* at 13.

The French did not have an official policy, but “[i]n general, the French approach [was that] private sexual conduct [was] not relevant to performance of military duties.”<sup>131</sup> The Israeli policy was that everyone who was physically capable should be available to defend the country.<sup>132</sup> “Israeli officials directly refuted the . . . assertion that homosexual men [were] not permitted to serve in combat units, or were treated like women and given clerical jobs . . . stating that all such decisions [were] made on a case-by-case basis.”<sup>133</sup> Even Germany, which excluded open homosexuals from service, had a flexible policy for homosexuals who were already serving.<sup>134</sup> Overall, no serious problems were reported concerning the presence of homosexuals in the Netherlands, Norway, Canada or Israel, all of which had policies of total nondiscrimination.<sup>135</sup> Furthermore, none of the militaries RAND studied for the report indicated that their performance had been hampered by the presence of homosexuals.<sup>136</sup>

A decade after the RAND study, Professor Aaron Belkin also undertook an examination of the experiences of foreign militaries and concluded that the ban on homosexuals is based on prejudice rather than necessity.<sup>137</sup> He noted that the Center for the Study of Sexual Minorities in the Military (“CSSMM”) conducted its own study, similar to, but more recent than RAND’s, concentrating on only four countries: Australia, Canada, Israel, and Britain.<sup>138</sup> CSSMM interviewed every pro-gay and anti-gay

<sup>131</sup> *Id.* at 12.

<sup>132</sup> *See id.* On June 11, 1993, Israel “reaffirmed its policy of nondiscrimination, removed the requirement that homosexuals undergo a mental examination, and no longer automatically prohibit[ed] them from holding top-level security clearances.” *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 13. Basically, if a known homosexual were performing satisfactorily, he would not be discharged. *Id.* at 13–14.

<sup>135</sup> *Id.* at 14.

<sup>136</sup> *Id.* at 15. There were some reports of “ridicule or violence,” although they were so rare that it was not deemed necessary to take special precautionary measures to address them. *Id.*

<sup>137</sup> *See Belkin, supra* note 5, at 109 (“[L]ifting bans on homosexual personnel does not threaten unit cohesion or undermine military effectiveness.”).

<sup>138</sup> *Id.* Furthermore, the report noted:

[These countries were chosen] because all four lifted their gay bans despite opposition from the military services; because the United States, Australia, Canada, and Britain share important cultural traditions; because the Israel Defense Forces are among the most combat-tested militaries in the world; and because prior to lifting its ban, Britain’s policy was often cited as support for those opposed to allowing homosexual personnel to serve

expert it could locate.<sup>139</sup> The study revealed that each country had different motivations for abolishing its military ban on homosexuals.<sup>140</sup> The 104 experts interviewed unanimously concluded that removing the ban on homosexuals had not “undermined military performance, readiness, or cohesion, led to increased difficulties in recruiting or retention, or increased the rate of HIV infection among the troops.”<sup>141</sup> This result occurred because the military leaders in each country issued regulations holding heterosexual and homosexual soldiers to the same standards of conduct and insisted that soldiers abstain from abuse or harassment.<sup>142</sup> The study also revealed, unsurprisingly, that the majority of homosexual soldiers in the four countries did not immediately reveal their orientation once it became permissible to do so.<sup>143</sup> Despite all of this encouraging evidence, “[e]xperts

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openly in the United States.

*Id.*

<sup>139</sup> *Id.* The experts included “officers and enlisted personnel, ministry representatives, academics, veterans, politicians, and nongovernmental observers.” *Id.* Overall, a total of 104 experts were interviewed and 622 documents and articles were examined. *Id.* at 110.

<sup>140</sup> *Id.* at 110. In Canada, the ban was lifted pursuant to a court order in October 1992, holding that the ban violated Canada’s Charter of Rights and Freedoms. *Id.* In Australia, it was lifted in November 1992 by the liberal government of Prime Minister Paul Keating at a time when “the country was integrating a number of international human rights conventions into its domestic laws and codes.” *Id.* In Israel, the “public outcry against” the ban that followed “dramatic Knesset hearings” lead the military to lift the ban in June of 1993. *Id.* Finally, Britain lifted its ban in January 2000, four months after “the European Court of Human Rights ruled that [the ban] violated the right to privacy guaranteed in the European Convention on Human Rights.” *Id.*

<sup>141</sup> *Id.* Furthermore, the “dire predictions” that preceded the lifting of the bans in Canada and Britain did not come to pass. *Id.* In Australia, Commodore R.W. Gates, who holds a rank equivalent to that of a one-star admiral, “remarked that the lifting of the ban was ‘an absolute non-event.’” *Id.* Significantly, even those who most vehemently opposed the inclusion of homosexuals in the military conceded that the removal of the ban did not have an adverse effect on the armed forces. *Id.* at 111.

<sup>142</sup> *Id.* at 111–12. This “emphasis on conduct and equal standards seem[ed] to work,” with few if any cases of harassment of homosexuals. *Id.* at 112.

<sup>143</sup> *Id.* at 112. Even prior to the lifting of the ban on homosexuals, many gay servicemembers were known among their peers. *Id.* This is similar to the current situation in the United States. See POSNER, *supra* note 28, at 319–20. Once the ban on gays was lifted in those countries, small numbers of gay soldiers, gradually, over time, disclosed their sexual orientation. See Belkin, *supra* note 5, at 112. One Canadian lesbian soldier commented that gay soldiers were never interested in being “really, really out,” instead, they just wanted to be secure in their jobs, knowing that they would not be fired solely on the basis of their sexual orientation. *Id.* at 113. In Britain, experts have noted that most homosexuals in the military have not

who support the exclusion of homosexual soldiers from the [United States] armed forces often claim that foreign military experiences are not applicable to the American case."<sup>144</sup> Professor Belkin conceded that homosexuals sometimes receive special treatment in foreign militaries, but typically only inasmuch as such treatment was an attempt to "resolve problems flexibly."<sup>145</sup> Significantly, there is nothing to indicate that such minor differential treatment adversely affected "performance, cohesion, readiness, or morale."<sup>146</sup> Although different countries have different cultures, the United States, Canada, Britain, and Australia "share many cultural traditions," and these countries, along with Israel, possess cultures that are largely homophobic.<sup>147</sup>

### 3. Experiences of American Police and Fire Departments Support the Assertion that Homosexuals Can Serve in the Military

The experiences of American police and fire departments in integrating homosexuals demonstrate that homosexuals can

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revealed their orientation to their peers, "reflecting their keen awareness of appropriate behavior in the military." *Id.* In Israel, "[a]s more gay Israelis have grown comfortable about expressing their orientation in recent years . . . greater openness has been found in the military." *Id.* at 113. A University of Chicago study found that there are only seven gays serving openly in the Chicago police department and only about one hundred in the New York Police Department. Belkin, *supra* note 5, at 116. Police departments are "quasi-military," and thus offer a fitting analogy to admission of homosexuals into the military. POSNER, *supra* note 28, at 319. It stands to reason then that there would not be a mass coming out among gay servicemembers if the United States were to lift its ban. "Dr. Laura Miller, previously on the faculty of the UCLA Sociology Department and now with the RAND Corporation, argues that . . . most homosexual American soldiers will not disclose their sexual orientation if the United States changes its policy unless and until it is safe to do so." Belkin, *supra* note 5, at 116.

<sup>144</sup> Belkin, *supra* note 5, at 113. Such persons further claim that gays in foreign militaries receive "special treatment," that the United States is culturally different than foreign countries, and that there are no known gay soldiers serving in foreign combat units. *Id.*

<sup>145</sup> *Id.* at 114.

For example, some *heterosexual* soldiers in Israel are allowed to live off base or to change units if they are having trouble with their group, and some commanders allow heterosexual soldiers to shower privately. In other cases, unequal treatment consists of minor privileges accorded to heterosexuals, not special rights for gay and lesbian soldiers. Homosexual soldiers in the Australian and British militaries, for example, are not entitled to the same domestic partner benefits that heterosexuals receive.

*Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 115.

serve in the military, because police and fire departments "share a number of characteristics with the . . . military that make them the closest domestic analog."<sup>148</sup> RAND researchers visited police and fire departments in six American cities that include open homosexuals.<sup>149</sup> They focused on the behavioral responses of both homosexuals and heterosexuals to the inclusion of homosexuals and the "organizational strategies and policies put into place to implement the nondiscrimination policies."<sup>150</sup> The researchers found that nearly all homosexuals who join police and fire departments "conform to the norms and customs of the organization they are joining."<sup>151</sup> Given the high degree of anti-homosexual sentiment, most homosexuals were slow to reveal their orientation to their co-workers.<sup>152</sup> Homosexuals proved eager to conform and "prove [their] worth," so they were unlikely to engage in behavior that would undermine these goals.<sup>153</sup> The integration of homosexuals was by no means free from difficulty. For instance, there was widespread fear among heterosexuals that homosexuals would receive special treatment or that attempts would be made to "educate" heterosexuals to modify their attitudes.<sup>154</sup> The leadership of the departments effectively addressed these fears and minimized any resulting problems.<sup>155</sup> None of the departments visited reported diminished effectiveness as a result of the presence of homosexuals.<sup>156</sup>

#### 4. The Number of Discharges for Homosexuality Diminishes During Wartime

Past actions of military leaders demonstrate that they do not actually believe that the inclusion of homosexuals adversely affects military performance. The military's enforcement of exclu-

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<sup>148</sup> NAT'L DEF. RESEARCH INST, *supra* note 109, at 15.

<sup>149</sup> *Id.* at 16. The six cities visited were Chicago, Houston, Los Angeles, New York, San Diego and Seattle. *Id.* Posner suggested that the comparison of domestic police departments to the military is appropriate because "[p]olice forces are quasi-military." POSNER, *supra* note 28, at 319.

<sup>150</sup> NAT'L DEF. RESEARCH INST, *supra* note 109, at 16.

<sup>151</sup> *Id.* "[T]hose who join police departments, for example, [wanted] to be 'cops,' not 'homosexual cops.'" *Id.*

<sup>152</sup> *Id.* at 17.

<sup>153</sup> *Id.* at 18.

<sup>154</sup> *Id.* at 19.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 19-20; *see also* POSNER, *supra* note 28, at 319 ("[A] large number of homosexuals already serve without significant difficulties.").

sionary policies drops off markedly during periods of war.<sup>157</sup> Journalist Randy Shilts compiled evidence demonstrating that the military never had an aversion to enlisting homosexuals while the country was in the midst of armed conflict, and that the number of discharges for homosexuality only rose when the country experienced periods of relative peace.<sup>158</sup>

##### 5. Arguments for Excluding Homosexuals Mirror Those Once Used to Support Racial Segregation of the Armed Forces

Although it is not possible to directly compare racial desegregation with the inclusion of homosexuals in the military, there are a number of valuable insights to be gained from drawing analogies.<sup>159</sup> The main argument of those opposed to racial integration was that white servicemembers did not want to live or serve alongside blacks. The rhetoric used was remarkably similar to that used today with regard to DADT.<sup>160</sup> Although a majority of Americans opposed the racial integration of the military in the late 1940s, public opinion changed over time.<sup>161</sup> By the

<sup>157</sup> See Nunan, *supra* note 51.

<sup>158</sup> *Id.* Moreover:

Shilts offers statistical evidence for his thesis, but he also discusses concrete examples to illustrate how this came to be. *Watkins v. United States Army*, 879 F.2d 699 (9th Circuit, 1989) is the best of these. After openly admitting to "homosexual tendencies" on his draft physical form in 1967, Perry Watkins was drafted in 1968. During the height of the Vietnam War, military authorities needed able-bodied soldiers, and since sexual orientation could be used as a shield to avoid the draft, authorities were reluctant to enforce that policy, especially when the inductees were black, like Watkins. It was only in 1980, long after Watkins had decided to make a career in the Army, that the machinery to discharge him finally began to creak into action. The en banc 7-4 Ninth Circuit decision reinstating Watkins, upheld after the Supreme Court denied certiorari in 1990, (110 S. Ct. 196), was based on the fairness issue created by the Army's decision to first enlist an acknowledged homosexual and then discharge him on that ground [i.e., equitable estoppel]. In doing so, the court backed away from its 1988 2-1 panel decision supporting Watkins on constitutional equal protection grounds (847 F.2d 1329).

*Id.* at n.21; see generally RANDY SHILTS, *CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY* (1993) (discussing the Army's historical responses to homosexuals in the military).

<sup>159</sup> NAT'L DEF. RESEARCH INST., *supra* note 109, at 20. The integration of black and white service members was "said to be inconsistent with prevailing societal norms and likely to create tensions and disruptions in military units and to impair combat effectiveness." *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See *id.* at 20-22.

time of the RAND study in 1993, public opinion was more favorable towards allowing homosexuals to serve in the military than it was to racial integration back in the 1940s.<sup>162</sup> The experience of racial integration suggests that civilian and military leadership can successfully overcome any initial resistance to change and can reduce the fears of opponents about the harmful effects on unit performance.<sup>163</sup>

It has been argued that the racial analogy is inappropriate because the courts did not play a part in the integration of the armed services.<sup>164</sup> Nevertheless, courts today surely would not allow a re-instituted policy of racial segregation, regardless of whether it had popular support.<sup>165</sup>

## 6. Policies Excluding Homosexuals from the Military no Longer Reflect Public Attitudes

The retired Judge Advocate General of the Navy, Rear Admiral John D. Hutson, has declared that he now believes DADT should be abandoned.<sup>166</sup> While admitting that he initially had supported the policy, he conceded that much has changed since 1993.<sup>167</sup> Given today's political and social climate, Admiral

<sup>162</sup> *Id.* at 22.

<sup>163</sup> *Id.*

<sup>164</sup> *Philips v. Perry*, 106 F.3d 1420, 1432 (9th Cir. 1997). Rather, this was done upon the executive order of President Truman, exercising his proper Constitutional authority. *See id.*; Exec. Order No. 9980, 13 Fed. Reg. 4311 (July 28, 1948).

<sup>165</sup> *See Philips*, 106 F.3d at 1439 (Fletcher, J., dissenting).

[T]here is no doubt . . . the courts would easily reject the military's assertions of "unit cohesion," "morale," and "discipline" and strike down the policy as violative of equal protection. While racial classifications are subject to a stricter level of scrutiny, these asserted interests, which are based on animosity towards the disfavored class, are no more acceptable when used to support the exclusion of gay[s] from the military.

*Id.*; *see also* Nunan, *supra* note 51.

If it were argued today that black skin was incompatible with military service because of the adverse affect it would have on the unit cohesion of white racists, the Court would not tolerate it. Unfortunately . . . [w]hile discrimination against people of color is no longer socially fashionable in our society, the same cannot be said about discrimination against homosexuals.

*Id.*

<sup>166</sup> Press Release, *supra* note 65.

<sup>167</sup> *Id.* The Admiral has said that, given the previous decade's worth of experience with DADT and "with what he called a 'somewhat more enlightened population, particularly among younger people,' he now believes it's time to end the ban." *Id.*

Hutson believes that lifting the ban could serve to strengthen the military by increasing public support for the institution.<sup>168</sup>

Public support for allowing homosexuals to serve in the military is also increasing.<sup>169</sup> It has been said, however, that favorable polls “are not necessary for maintaining cohesion, readiness, morale, and performance after the integration of a minority group into the military,” since the military is fully capable of achieving these goals—with or without public support.<sup>170</sup>

#### 7. The Cost of Enforcing Exclusionary Policies is Prohibitive

Millions of dollars are spent each year to identify, discharge, and then replace homosexual servicemembers.<sup>171</sup> Because the Department of Defense does not keep records of the specific costs of administering the exclusionary policy, the General Accounting Office (GAO) had to estimate its expense. Using the available figures, it found that during the 1990 fiscal year, “recruiting and initial training costs associated with the replacement of personnel discharged for homosexuality were estimated to be \$28,226 for each enlisted troop and \$120,772 for each officer.”<sup>172</sup> Furthermore, the GAO found that, from 1980 to 1990, about 17,000 servicemembers were discharged for being homosexual.<sup>173</sup>

#### C. *DADT Cannot Survive in the Wake of Lawrence v. Texas.*

Assuming *Lawrence v. Texas* requires courts to strictly scrutinize laws affecting homosexuals, the seven arguments above illustrate that DADT is not narrowly tailored to meet a compelling government interest. A law excluding an entire class of persons, based solely on conduct that effectively defines such persons, from serving in the military is arguably not narrowly

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<sup>168</sup> *Id.*

<sup>169</sup> A 1989 Gallop poll found that 60% of respondents favored allowing gays to serve in the military. POSNER, *supra* note 28, at 319. More recent Gallup polls indicate that 72% of Americans support allowing homosexuals to serve in the military and 56% believe that open gays should be allowed to serve. Belkin, *supra* note 5, at 115 (citing Frank Newport, Gallup Poll News Service, In-Depth Analyses: Homosexuality (Sept. 2002), at <http://www.gallup.com/poll/analysis/ia020911v.asp>).

<sup>170</sup> Belkin, *supra* note 5, at 115. For example, 63 % of Americans opposed the racial integration of the military at the time President Truman forced the issue by ordering the military to end racial segregation. *Id.*

<sup>171</sup> See U.S. GEN. ACCOUNTING OFFICE, *supra* note 121.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*



tailored.<sup>174</sup> Furthermore, even if DADT were narrowly tailored, the weight of empirical evidence proves that the inclusion of open homosexuals does not diminish military effectiveness.<sup>175</sup>

In the alternative, if courts were to continue to apply rational basis review to DADT, *Lawrence* makes it more difficult to hold that the exclusion of homosexuals is rationally related to the legitimate government purpose of maintaining a highly effective military. *Lawrence*, by confirming the rights of homosexuals to live their lives without undue government interference, has changed the way courts will consider laws relating to homosexuals. This is already apparent with regard to gay marriage.<sup>176</sup> Given this new paradigm, it is likely that courts, even using rational basis review, will begin to doubt that DADT is rationally related to its intended purpose.

It is time for the courts to overcome their traditional reticence to challenge the judgment of the executive and legislative branches with regard to military policy and step in to overturn DADT. Judicial deference is not warranted absent evidence justifying challenged policies, as illustrated by *Korematsu*.<sup>177</sup> Like the internment order, "the 1994 decision to codify the ban on gays in the military contravened available empirical evidence, and was based instead exclusively on political considerations buttressed by the testimony of generals."<sup>178</sup>

<sup>174</sup> See Carter, *supra* note 45.

<sup>175</sup> See *supra* notes 116–173 and accompanying text.

<sup>176</sup> See Belluck, *supra* note 18; see also Greenhouse, *supra* note 18.

<sup>177</sup> See Nunan, *supra* note 51.

In the internment case, in addition to the evidence of racist motivations which fueled [Justice] Murphy's *Korematsu* dissent, the historical record reveals that army intelligence analysts reported to Chief of Staff George Marshall that mass evacuation of Japanese Americans was unnecessary. This report was issued the very day Roosevelt signed his executive order permitting the internment. Brigadier General Mark Clark, to whom Marshall had assigned the task of evaluating the military threat posed by Japanese on the West Coast, had come to the same conclusion a week earlier. The decision to proceed with internment plans was a political one, not a military one, based on pressure from the public, from politicians, and from civilian personnel in Roosevelt's cabinet. The pretext for a military justification was based on the testimony of generals who stood to enlarge their own spheres of responsibility as a result of the enactment of the internment policy.

*Id.* (citing generally Peter Irons, *Justice at War: The Story of The Japanese American Internment Cases* (1983)).

<sup>178</sup> *Id.* (citing generally Shilts, *supra* note 158).

In the wake of *Lawrence v. Texas*, the arguments favoring judicial intervention to overturn DADT stand on much firmer ground. Even prior to *Lawrence*, many circuit court judges, in their dissents, argued that DADT was unconstitutional. For example, Judge Hall observed in his *Thomasson* dissent that “[alt]hough the delicacy of the situation stems from the respect we owe the legislature and executive, the gravity inheres in our duty to defend the Constitution against the trespasses of those branches, no matter how carefully or pedantically they be constructed, and notwithstanding their popularity.”<sup>179</sup> Judge Hall further argued that Lt. Thomasson was not discharged as a result of engaging in prohibited conduct, but rather solely because he was gay.<sup>180</sup> Hall observed that “the desire to disadvantage a politically unpopular group is never a legitimate governmental interest,”<sup>181</sup> and suggested that “[t]here is a great deal of evidence that the statute was motivated by a desire to accommodate prejudice against homosexuals.”<sup>182</sup> Furthermore, Hall contended that the policy operates in an unconstitutional manner: “Its bedrock is a presumption that *everyone* will fail to comply with rules of conduct—a declared homosexual is bound to misbehave, and the members of his unit will doubtless allow private prejudice to override discipline.”<sup>183</sup>

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<sup>179</sup> *Thomasson v. Perry*, 80 F.3d 915, 949 (4th Cir. 1996) (Hall, J., dissenting). Judge Hall criticized the overgeneralization of homosexuals as a group:

It is critical in this case to resist falling into discussion of generalities, as if each homosexual were a clone of some preening archetype. . . . Even without the challenged policy, some homosexuals would be unfit for military service, and some among them whose sexual misconduct were the root of their unfitness. The same, of course, can be said for heterosexuals.

*Id.* at 950.

<sup>180</sup> *Id.* at 950. Judge Hall pointed out that Thomasson’s service record was “sparkling.” Admiral Konetzni (who ironically was in charge of implementing DADT) recommended Thomasson for immediate promotion to Lieutenant Commander on the very day of his discharge. Hall further noted that the Navy had no proof that Thomasson engaged in sodomy or broken any other rule of conduct. Hall thus concluded that Thomasson was discharged solely because he stated that he was homosexual. *Id.*

<sup>181</sup> *Id.* at 951.

<sup>182</sup> *Id.* The President stated that “those who oppose lifting the ban are clearly focused not on the conduct of individual gay service members, but on how non-gay service members feel about gays in general and, in particular, those in the military service.” *Id.*

<sup>183</sup> *Id.* at 953. Judge Hall argued that a presumption of misconduct from a person’s status, or even from his private prejudices, does not comport with due process. Lieutenant Thomasson offered a good analogy at oral argument. He pointed out that

The *Philips* dissent similarly asserted that there is no rational basis for the continued existence of DADT.<sup>184</sup> Because the majorities in both *Thomasson* and *Philips* relied on the *Bowers* proposition that there is no fundamental right to engage in homosexual sodomy and that homosexuals do not make up a suspect classification,<sup>185</sup> it is likely that these dissenting arguments will prevail now that *Lawrence* has overruled *Bowers*.

### CONCLUSION

With *Lawrence v. Texas*, the Supreme Court identified a constitutional right to liberty and explicitly stated that it is unlawful for states to pass laws prohibiting both homosexual and heterosexual sodomy.<sup>186</sup> Following this development, a strong argument can be made that DADT will now be subject to the "strict scrutiny" level of constitutional review, rather than the "rational basis" standard previously employed.<sup>187</sup> While there is some precedent of courts upholding DADT even after a strict scrutiny analysis,<sup>188</sup> it is unlikely that this would happen today, given the current societal and governmental trends away from discrimination against homosexuals. Six of the nine justices on the Supreme Court have clearly indicated that they will no longer tolerate discrimination against homosexuals in the absence of a very compelling reason.<sup>189</sup> In light of the large and growing body of evidence confirming that the inclusion of homosexuals in the military does not have adverse affects, it is becoming increasingly difficult to argue that DADT bears any relation

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in *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Supreme Court upheld the military policy forbidding the wearing of yarmulkes. Supposing a serviceman were to write a letter to his superior stating that he is an Orthodox Jew, could it be said that he violated the regulation? Should he be dismissed because he has a "propensity" to wear a yarmulke? *Thomasson*, 80 F.3d at 953. Would his discharge be justified "because his status and accompanying presumed propensity are presumed to stir up anti-Semitism among the majority gentiles?" *Id.* *Thomasson* pointed out how silly this was, concluding with the observation that "[i]f persons do not obey rules with which they disagree, or are presumed to act upon every urge or desire whatever the legal consequences, then rules are a vain exercise indeed." *Id.*

<sup>184</sup> See *Philips v. Perry*, 106 F.3d 1420, 1435 (9th Cir. 1997) (Fletcher, J., dissenting).

<sup>185</sup> See *supra* note 83.

<sup>186</sup> 123 S. Ct. 2472, 2478 (2003).

<sup>187</sup> See *Carter*, *supra* note 45.

<sup>188</sup> See *generally* *Hatheway v. Sec'y of the Army*, 641 F.2d 1376 (9th Cir. 1981); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980).

<sup>189</sup> See *Lawrence*, 123 S. Ct. at 2484, 2488.

to military necessity.<sup>190</sup> It is clear that the current policy is based on outdated prejudices.

Now that *Bowers v. Hardwick* is no longer good law, it is likely that at least one of the circuit courts will conclude for the first time that DADT violates the due process right to liberty. An appeal to such a holding would result in a circuit split that would virtually compel the Supreme Court to address the issue. Considering the language used in *Lawrence*, it is likely that the current Court would prove willing to examine very critically—i.e., strictly scrutinize—any arguments made in defense of DADT. Given the utter lack of empirical evidence supporting the argument that the inclusion of open homosexuals would seriously undermine our military capabilities, and the mounting evidence in support of the opposite conclusion,<sup>191</sup> it is increasingly likely that the Supreme Court will one day strike down DADT as unconstitutional.

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<sup>190</sup> See, e.g., Belkin, *supra* note 5, at 118.

<sup>191</sup> See *supra* notes 116–73 and accompanying text.

