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ARTICLES

LET THE SMALL CHANGES BEGIN: PRESIDENT OBAMA, EXECUTIVE POWER, AND “DON’T ASK DON’T TELL”

JACKIE GARDINA*

I. INTRODUCTION

This Article advocates that President Obama should use his statutory authority to alter how the Department of Defense (DoD) implements Don’t Ask Don’t Tell.¹ This position is controversial and is not generally supported even by those seeking to repeal the law.² Given President Clinton’s experience attempting to lift the ban on gays and lesbians openly serving in the armed forces, proponents of repeal are hesitant to suggest that President Obama act without first building consensus within the military and Congress.³ A wide perception exists that President Clinton’s efforts to initiate change backfired, slowing his legislative agenda and leading to the codification of the DoD’s discriminatory policy.⁴ Conventional wisdom suggests that to avoid the mistakes of the Clinton Administration, President Obama must not push Congress or the military too quickly.⁵

* The author is an Associate Professor of Law at Vermont Law School. I want to thank Pam Stephens, Bruce Duthu, and Ellen Swain Veen for their insights. I also want to thank Dustin Brucher for his hard work and his willingness to travel down every rabbit hole. And a special thanks to the gay men and lesbians who willingly sacrifice their identities and personal stories so that they can make the ultimate sacrifice for our country.

¹ National Defense Authorization Act of 1994, Pub. L. 103-160, § 571, 107 Stat. 1547, (codified at 10 U.S.C. § 654 (1993)).

² Aubrey Sarvis, *Don’t Ask Don’t Tell: Getting Repeal Right This Time*, HUFFINGTON POST, Nov. 23, 2008, http://www.huffingtonpost.com/aubrey-sarvis/dadt-getting-repeal-right_b_145874.html.

³ Aubrey Sarvis, *Under Obama “Don’t Ask Don’t Tell” Will Pass Away*, HUFFINGTON POST, Dec. 3, 2008, http://www.huffingtonpost.com/aubrey-sarvis/under-obama-dont-ask-dont_b_147553.html.

⁴ See Jennifer Bendery & Steven T. Dennis, *Congressional Democrats to Wait on ‘Don’t Ask Don’t Tell,’* ROLL CALL, Dec. 24, 2008, http://www.rollcall.com/news/30978-1.html?type=printer_friendly; see also Mark Thompson, *Don’t Ask Don’t Tell Turns 15*, TIME Jan. 28, 2008, available at <http://www.time.com/time/nation/article/0,8599,1707545,00.html>.

⁵ Bendery & Dennis, *supra* note 4.

Contrary to common belief,⁶ President Obama need not wait for Congress to act. To be sure, Congress provides the best avenue to open service—only Congress can create permanent change.⁷ And President Obama should work to build support for passage of the Military Readiness Enhancement Act (MREA),⁸ a bill that would repeal Don't Ask Don't Tell and replace it with a non-discrimination provision that allows gay, lesbian, and bisexual individuals to serve openly.⁹ But Democratic leaders have suggested that it could be several years before Congress addresses repeal of Don't Ask Don't Tell.¹⁰ With a severe economic crisis and a war being fought on two fronts, passage of MREA is not at the top of the legislative agenda.¹¹ Unfortunately, President Obama appears satisfied to limit his reform efforts to the legislative process.¹²

President Obama can and should do more pending congressional action. He has the authority to provide interim relief to those currently serving under the shadow of Don't Ask Don't Tell.¹³ Despite the historical narrative that has emerged from the Clinton era, President Clinton successfully used his executive authority to alter the military's approach to service by gay and lesbian individuals, changes that remain in effect today.¹⁴ President Clinton, not Congress, declared that "homosexual orientation [was] not a bar to service entry or continued service,"¹⁵ altering the military's longstanding position that "homosexuality [was] incompatible with military service."¹⁶ President Clinton, not Congress, prohibited the military from "asking" about an applicant's sexual orientation.¹⁷ While the statute is called "Don't Ask Don't Tell," the statute

⁶ *Id.*

⁷ Don't Ask Don't Tell is law, and thus only Congress can repeal it. To ensure a permanent change, congressional action is necessary. See Pamela Lundquist, *Essential to National Security: An Executive Ban on Don't Ask Don't Tell*, 16 AM. U. J. GENDER SOC. POL'Y & L. 115,142 (2007).

⁸ Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (1st Sess. 2009).

⁹ *Id.*

¹⁰ See Bendery & Dennis, *supra* note 4.

¹¹ Mary Louise Kelly, *Congress in No Rush To Lift 'Don't Ask Don't Tell'*, Feb. 24, 2009. (Comments of Representative Joe Wilson) <http://www.npr.org/templates/story/story.php?storyId=101071006>.

¹² John Cloud, *Revisiting 'Don't Ask Don't Tell'*, TIME, July 23, 2008, <http://www.time.com/time/nation/article/0,8599,1825801,00.html>; *Obama aide: Ending 'don't ask, don't tell' must wait*, CNN.com, Jan. 15, 2009, <http://www.cnn.com/2009/POLITICS/01/14/obama.gays.military/index.html>.

¹³ See *infra* § IV.

¹⁴ See *infra* notes 56-58 and accompanying text.

¹⁵ Memorandum from Les Aspin, The Secretary of Defense, to the Secretaries of the Army, Navy, and Air Force and the Chairman, Joint Chiefs of Staff (July 19, 1993) [hereinafter *Aspin Memorandum*].

¹⁶ *Id.*

¹⁷ See *id.* ("Applicants for military service will not be asked or required to reveal their sexual orientation.")

only prohibits a service member from telling; President Clinton forbade the military from asking.¹⁸

Like President Clinton, President Obama can immediately improve the lives of the estimated 65,000 gay and lesbian members of the armed forces.¹⁹ This Article does not advocate that President Obama issue an Executive Order allowing for open service. While he arguably has the power to do so,²⁰ President Obama has already indicated a desire to achieve repeal through consensus. He is unlikely to risk a political and constitutional fight so early in his presidency, especially when there is growing support for repeal in Congress.²¹ Instead, President Obama should use his statutory authority to authorize small but critical changes to the current DoD Directives that neither contradict the congressional mandate, nor undermine the stated policy objective of the statute. Both on the campaign trail and since taking office, President Obama has expressed his gratitude and support for the men and women serving in the armed forces.²² He can now put his words into substantive action.

To make the case for executive action, I first discuss the historical context of Don't Ask Don't Tell, specifically focusing on the lessons of the Clinton era and President Clinton's successful use of executive power to affect gay and

¹⁸ Compare 10 U.S.C. § 654(b) (mandating discharge when a member makes a statement about his or her sexual orientation) with Aspin Memorandum, *supra* note 15 (disallowing the military from asking an applicant about sexual orientation)

¹⁹ *Don't Ask Don't Tell Review: Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 109th Cong. 2 (2008) (statement of Gary J. Gates, The Williams Institute, UCLA School of Law) (estimating that there are 65,000 gays and lesbians currently serving in the military), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=11110&context=uclalaw/williams>.

²⁰ See *infra* notes 170–175 and accompanying text.

²¹ See Daphne Benoit, *Obama cautious on gay rule in US military*, YAHOO NEWS, (Mar. 18, 2009) http://news.yahoo.com/s/afp/20090319/lf_afp/usgaysmilitaryrights_20090319031757.

²² See, e.g., President Barack Obama, Inaugural Address (Jan. 20, 2009):

As we consider the road that unfolds before us, we remember with humble gratitude those brave Americans who, at this very hour, patrol far-off deserts and distant mountains. They have something to tell us, just as the fallen heroes who lie in Arlington whisper through the ages. We honor them not only because they are guardians of our liberty, but because they embody the spirit of service; a willingness to find meaning in something greater than themselves. And yet, at this moment—a moment that will define a generation—it is precisely this spirit that must inhabit us all.

(transcript available at <http://obamaspeeches.com/P-Obama-Inaugural-Speech-Inauguration.htm>); Senator Barack Obama, Candidate for President, Acceptance Speech at the Democratic National Convention: The American Promise (Aug. 28, 2008) (“As Commander-in-Chief, I will never hesitate to defend this nation, but I will only send our troops into harm’s way with a clear mission and a sacred commitment to give them the equipment they need in battle and the care and benefits they deserve when they come home.”) (transcript available at <http://obamaspeeches.com/E10-Barack-Obama-The-American-Promise-Acceptance-Speech-at-the-Democratic-Convention-Mile-High-Stadium—Denver-Colorado-August-28-2008.htm>).

lesbian service members. In Part III, I explain why President Obama must act pending congressional action, describe the status of repeal efforts in Congress, and explore potential barriers to quick success. I also discuss the recent circuit court decisions regarding Don't Ask Don't Tell which, interestingly, have set the stage for President Obama's first executive decision on the issue: opposing the petition for *certiorari* in *Pietrangelo v. Gates*,²³ and refusing to seek *certiorari* in *Witt v. Air Force*.²⁴ Finally, Part IV provides examples of five amendments to the directives, ranging from improving the confidentiality of communications to health care providers, to altering the burden of proof. Part IV also addresses the potential substantive due process concerns raised by the Ninth Circuit's decision in *Witt*. Each advocated change can be made within the president's statutory authority, and implemented without upsetting the military's daily operations.

II. THE PAST AS PROLOGUE: 1993 TO THE PRESENT

History teaches us two lessons on this subject: first, it will be difficult to repeal the current law if the military actively opposes it.²⁵ The military's vociferous opposition to open service led to the current statute.²⁶ President Obama must work to build consensus within the Pentagon before seeking to repeal the current statute and codify open service. Second, contrary to the narrative that has emerged from the Clinton experience,²⁷ the Executive Branch can and should act unilaterally to improve the lives of gays and lesbians currently serving in the military pending the repeal of the statute.²⁸ Through one memorandum, President Clinton altered the Pentagon's approach to gays in the military.²⁹ President Obama can do the same.

Before 1993, a DoD policy declared homosexuality incompatible with military service, and any service member perceived to be lesbian or gay was discharged.³⁰ But during the 1992 presidential campaign, then-candidate Clinton

²³ No. 08-824. James E. Pietrangelo, a plaintiff in *Cook v. Gates* 528 F.3d 42 (1st Cir. 2008), sought *certiorari* Docket. The government's response is due on May 6, 2009. <http://origin.www.supremecourtus.gov/docket/08-824.htm>.

²⁴ See Letter from Eric Holder, Attorney General of the United States, to Morgan Frankel, Senate Legal Counsel (April 24, 2009)(hereinafter Holder Letter). The Obama administration decided not to seek *certiorari* in *Witt v. Air Force*, 527 F.3d 806 (9th Cir. 2008) *r'hg en banc* denied by 548 F.3d 1264 (9th Cir. 2009).

²⁵ JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 19-26 (1999).

²⁶ *Id.*

²⁷ Sarvis, *supra* note 2.

²⁸ See *infra* § IV for discussion of executive power.

²⁹ See Aspin, *supra* note 16 (stating that sexual orientation is not a bar to military service and prohibiting the military services from asking or requiring to be revealed an applicants sexual orientation).

³⁰ Dep't of Defense, Directive No. 1332.14, Enlisted Administrative Separations, encl. 3

vowed to "lift the ban" on sexual minorities serving in the military.³¹ Because the ban was merely a DoD policy, the Executive had the authority to change it without congressional approval.³² President Clinton's plan was not unprecedented; President Truman used an Executive Order to racially integrate the military in 1948 and, although it met with opposition both within and outside of the military, the change was ultimately accepted.³³ When President Clinton took office, he instructed Les Aspin, his Secretary of Defense, to review the DoD's policy and draft an order ending discrimination on the basis of sexual orientation in the armed forces.³⁴

But President Clinton's directive to Secretary Aspin created significant and vocal opposition among the Joint Chiefs of Staff and certain members of Congress.³⁵ Senator Nunn, then-Chair of the Senate Armed Services Committee, and other opponents to open service immediately mobilized to block President Clinton's efforts.³⁶ Senator Nunn's Committee heard over nine days of testimony in which a parade of military personnel came forward to testify that open service would interfere with the proper functioning of the military.³⁷ Both the Chairman of the Joint Chiefs of Staff, General Colin Powell, and the Vice Chairman, Admiral David Jeremiah, testified that they opposed President Clinton's proposal.³⁸ The House Armed Services Committee heard similar testimony, including statements from one retired Marine officer who referred to homosexuals as "walking depositories of disease,"³⁹ and insisted that open service would "virtually destroy the Marine Corps."⁴⁰

Congress eventually blocked President Clinton's efforts to allow for open

§ H (Jan. 28, 1982); Dep't of Defense, Directive No. 1332.30, Separation of Regular Commissioned Officers, encl. 2 (Jan. 15, 1981).

³¹ David Burelli, *An Overview of the Debate on Homosexuals in the U.S. Military*, GAYS AND LESBIANS IN THE MILITARY 17, 20 (Wilbur J. Scott & Sandra Carson Stanley eds., 1994).

³² See *infra* notes 168 -183 and accompanying text (discussion on Executive power to regulate the military).

³³ Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948); Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 520-21 (1991).

³⁴ Aspin, *supra* note 15 ("On January 29, 1993, the President directed me to review DoD policy on homosexuals in the military.").

³⁵ Halley, *supra* note 25.

³⁶ *Id.*

³⁷ See *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Services*, 103rd Cong. 1-1075 (1993) [hereinafter *Senate Hearings on Homosexuality in the Armed Forces*].

³⁸ See *id.* at 707-67 (statements of General Powell and Admiral Jeremiah).

³⁹ *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the H. Comm. on Armed Services*, 103rd Cong. 92 (statement of Col. John Ripley, USMC, Retired).

⁴⁰ *Id.* at 92.

service in the 1994 National Defense Authorization Act.⁴¹ The statute closely tracks (if not outright copies) the military's previous policy.⁴² The congressional findings set forth in the statute mirror statements contained in DoD directives.⁴³ The statutory definitions of homosexuality and homosexual acts replicate the definitions originally adopted by the DoD.⁴⁴ The conduct identified as mandating discharge in the statute mimics the basis of discharge under the previous policy, including available defenses.⁴⁵ Congress essentially codified the military policy with no substantive changes.

Relying heavily on the testimony of military officials, Congress declared that the presence of openly gay and lesbian individuals would interfere with unit cohesion, something deemed essential to a properly functioning military.⁴⁶ No military official or civilian witness testified that gay and lesbian members were incapable of performing their duties.⁴⁷ To the contrary, witnesses recognized that gay and lesbian individuals had served capably and with distinction.⁴⁸ Instead, Congress relied on statements that the presence of openly gay and lesbian individuals would make heterosexual members of the unit uncomfortable.⁴⁹

Based on this discomfort, Congress mandated that a member of the armed forces be separated from service if the member "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; if the member "stated that he or she is a homosexual or bisexual, or words to that effect"; or if "the member has married or attempted to marry a person known to be of the same biological sex."⁵⁰ Congress went on to define "homosexual" as a person who exhibits even a "propensity" to engage in a homosexual act.⁵¹ "Homosexual act" was defined as including "any bodily contact . . . between members of the same sex . . . which a reasonable person would understand to demonstrate a propensity or intent" to "satisfy[] sexual desires."⁵² A member need not have actually engaged in a homosexual act to be subject to discharge; he or she

⁴¹ Pub. L. 103-160, 107 Stat. 1547, § 571 (codified at 10 U.S.C. § 654 (1993)).

⁴² Compare Dep't of Defense Directive No. 1332.14 & (2) Enlisted Administrative Separations (Jan 28, 1982), with 10 U.S.C. § 654 (2006).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 10 U.S.C. § 654(a)(15) (2006).

⁴⁷ See Senate Hearings on Homosexuality in the Armed Forces, *supra* note 37; House Hearings on Homosexuality in the Armed Forces, *supra* note 39.

⁴⁸ See Senate Hearings on Homosexuality in the Armed Forces *supra* note 37, at 556 (statement of Lt. Burnham, recognizing that "homosexuals have served with distinction").

⁴⁹ See *id.* at 523-26, 544-58 (statements of Petty Officer Second Class Al Portes, U.S. Navy; Master Chief Harry Schafer, U.S. Navy; and Captain Gordon Holder, U.S. Navy), available at <http://dont.stanford.edu/hearings/Hearings5-10-93.pdf>.

⁵⁰ 10 U.S.C. § 654(b) (2006).

⁵¹ *Id.* at § 654(f).

⁵² *Id.*

needed only to exhibit a “propensity” to engage in such conduct.⁵³ And despite its unofficial title—Don’t Ask Don’t Tell—Congress did not prohibit the military from asking a service member about his or her sexual orientation, it only prohibited a service member from “telling” about it.⁵⁴ But Congress did not flesh out the details, instead providing the Secretary of Defense with the authority to develop the procedures and to delineate the necessary findings for investigations and discharge.⁵⁵

President Clinton, however, did alter the Pentagon’s conduct in relation to gays and lesbians serving in the military. While Congress was conducting hearings, Secretary Aspin declared that sexual orientation was not a bar to service entry or continued service and that applicants for military service could not be asked or required to reveal their sexual orientation.⁵⁶ President Clinton put the “don’t ask” in the Don’t Ask Don’t Tell statute. But Secretary Aspin’s memorandum does not represent the only change in the DoD’s position on gays and lesbians serving in the military. President Clinton also issued an executive order prohibiting the military from denying security clearances to members of the armed forces because of their sexual orientation.⁵⁷ The Deputy Secretary of Defense then issued a memorandum stating that any information about “homosexual orientation or conduct” discovered during a security clearance investigation could not be used by the military departments in discharge proceedings.⁵⁸

President Obama can do the same and in a vastly different social and political landscape. For example, a recent CNN poll found that 81 percent of Americans are in favor of allowing gays and lesbians to serve openly, compared to only 44 percent in 1993.⁵⁹ Polls also show that almost half of junior enlisted personnel support lifting the ban, and that three quarters are personally comfortable with gays and lesbians.⁶⁰ More than 100 retired generals and admirals

⁵³ *Id.*

⁵⁴ *See id.* at (b)(2).

⁵⁵ *Id.* at (b).

⁵⁶ *See Aspin, supra* note 15.

⁵⁷ Exec. Order No. 12,968, 3 C.F.R. 391 (Aug. 2, 1995).

⁵⁸ Memorandum from Deputy Sec’y of Def. to Sec. of the Military Dep’ts, Assistant Sec’y of Def. for Command, Control, Comm’cns and Intelligence (Dec. 1995) (Implementation of “Policy on Homosexual Conduct in the Armed Forces” in Personnel Security Investigation and Adjudication).

⁵⁹ *Obama aide: Ending ‘don’t ask, don’t tell must wait,’* CNN.com, Jan. 15, 2009, <http://www.cnn.com/2009/POLITICS/01/14/obama.gays.military/index.html>; Kyle Dropp and Jon Cohen, *Acceptance of Gay People in Military Grows Dramatically*, Washington Post, at A03 (July 19, 2008) <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/18/AR2008071802561.html>

⁶⁰ ZOGBY INTERNATIONAL, OPINIONS OF MILITARY PERSONNEL ON SEXUAL MINORITIES IN THE MILITARY 5–6 (2006), available at <http://www.palmcenter.org/files/active/1/ZogbyReport.pdf>.

signed a letter advocating for open service,⁶¹ while a bill in Congress seeking to overturn the ban has accumulated over 140 co-sponsors in the House.⁶² Even Sam Nunn and General Powell, originally vocal opponents to open service, have suggested it may be appropriate to “take another look” at the law.⁶³ At the 2008 Democratic National Convention, the Democratic Party included repeal of Don’t Ask Don’t Tell in its platform for the first time.⁶⁴ There is also growing anecdotal evidence that the ban actually interferes with, rather than promotes, unit cohesion.⁶⁵ Moreover, we now know the costs of Don’t Ask Don’t Tell. The law has undermined both national security and conservative fiscal values by discharging over 12,500 service members,⁶⁶ some in areas of critical need such as Arabic linguists and medical professionals,⁶⁷ and costing taxpayers nearly half a billion dollars.⁶⁸

While President Obama has the constitutional authority to lift the ban in the absence of the Pentagon’s acquiescence,⁶⁹ he is unlikely to do so. In contrast to President Clinton, President Obama has explicitly stated that he would seek consensus before taking any action. In a September 2008 interview, President Obama declared, “I want to make sure when we reverse ‘Don’t Ask, Don’t Tell,’ its gone through a process and we’ve built consensus . . . so that it works.”⁷⁰ After Representative Ellen Tauscher introduced MREA on March 2,

⁶¹ Palm Center, 104 Admirals and Generals: Gay Ban Must End, (Nov. 17, 2008) <http://www.palmcenter.org/press/dadt/releases/104Generals%2526Admirals-GayBanMustEnd>.

⁶² Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (2009).

⁶³ Jim Galloway, *Says Nunn: It might be time to take another look at ‘don’t ask, don’t tell’*, ATLANTA J.-CONST., June 3, 2008, http://www.ajc.com/metro/content/shared-blogs/ajc/politicalinsider/entries/2008/06/03/says_nunn_it_might_be_time_to.html; Fareed Zakaria GPS: Colin Powell Interview (CNN television broadcast Dec. 14, 2008) available at <http://www.cnn.com/video/#/video/us/2008/12/11/gps.powell.on.dont.ask.tell.cnn?iref=videosearch>.

⁶⁴ THE DEMOCRATIC NAT’L CONVENTION COMM., THE 2008 DEMOCRATIC NATIONAL PLATFORM: RENEWING AMERICA’S PROMISE 36 (2008) available at <http://www.democrats.org/a/party/platform.html>.

⁶⁵ BRIGADIER GENERAL HUGH AITKEN ET AL., REPORT OF THE GENERAL/FLAG OFFICERS’ STUDY GROUP 10 (2008) (“Stories such as this suggest to us that service members may be more disturbed about serving with dishonest peers than about serving alongside gays and lesbians.”).

⁶⁶ Service Members Legal Defense Network: About “Don’t Ask, Don’t Tell” <http://www.sldn.org/pages/about-dadt> (last visited Feb. 28, 2009).

⁶⁷ Ann Scott Tyson, *Sharp Drop in Gays Discharged from Military Tied to War Need*, WASH. POST, at A3, Mar. 14, 2007 (“The dismissed have included Arabic speakers and other linguists, intelligence experts and medical personnel—all of whom are in short supply.”).

⁶⁸ Josh White, *‘Don’t Ask’ Costs More Than Expected*, WASH. POST, at A4, Feb. 14, 2006. The figure includes the value of the lost service member and the costs associated with recruiting and training replacements.

⁶⁹ See *infra* notes 162-183 and accompanying text (discussing Executive power)

⁷⁰ Mark Segal, *Obama Talks, McCain Balks*, PHILA. GAY NEWS, Sept. 2008, available at

2009, the White House stated that “The President supports changing Don’t Ask Don’t Tell,” and further that “[a]s part of a long standing pledge, he has also begun consulting closely with Secretary Gates and Chairman Mullen so that this change is done in a sensible way that strengthens our armed forces and our national security.”⁷¹

President Obama does not need to lift the ban to improve the lives of those serving in the shadow of the statute. As will be discussed more fully below, he can amend current DoD policies and practices to provide some relief to gay and lesbian service members without contradicting the current congressional mandate or undermining the stated policy objective of protecting unit cohesion.⁷² The amendments require no dramatic changes to the military’s operations,⁷³ and because he is acting within congressionally mandated parameters, President Obama will avoid the constitutional controversy that marred President Clinton’s first months in office.

III. SURVEYING THE PLAYING FIELD: WAITING FOR CONGRESS AND THE COURTS

For over fifteen years, opponents of Don’t Ask Don’t Tell have actively sought its repeal through Congress and the courts. Congress has been slow to respond to these efforts. It wasn’t until 2005, twelve years after Congress passed Don’t Ask Don’t Tell, that Representative Marty Meehan introduced the first bill to repeal it.⁷⁴ Congressional action provides the best way to ensure the end of Don’t Ask Don’t Tell.⁷⁵ But it is neither certain that Congress will act quickly, nor that when it does act that open service is the inevitable result.⁷⁶ The judiciary also does not provide a ready solution to ending Don’t Ask Don’t Tell. Generally, the courts have not been receptive to constitutional challenges to the statute.⁷⁷ While a recent Ninth Circuit decision in *Witt v. Air Force* is a positive step, most courts remain resistant to second-guessing the military’s personnel decisions.⁷⁸

http://www.epgn.com/pages/full_story?page_label=results_content&id=1048356-Obama-talks-McCain-balks&article=Obama-talks-McCain-balks%20=&widget=push&open=&

⁷¹ Posted by Brian Montopli, *White House: “We’re in ‘Don’t Ask Don’t Tell’ Consultations”*, (March 3, 2009), <http://www.cbsnews.com/blogs/2009/03/03/politics/politicalhot-sheet/entry4841552.shtml>

⁷² See *infra* § IV (executive power)

⁷³ The military will continue to investigate and discharge members who engage in homosexual conduct, the suggested amendments simply alter what evidence can be used in these proceedings, the necessary findings, and burden of proof.

⁷⁴ See Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (2009).

⁷⁵ See *supra* note 7

⁷⁶ See *infra* notes 79-110 and accompanying text.

⁷⁷ See *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008); *Witt v. Air Force*, 527 F.3d 806 (9th Cir. 2008).

⁷⁸ *Witt*, 527 F.3d at 819. See also *Able v. United States*, 155 F.3d 628, 636 (2d Cir.

The following discussion surveys the current status of efforts in Congress and the courts, and illustrates why Executive action pending repeal by Congress is warranted.

A. Congress

In 2005, Rep. Marty Meehan introduced the Military Readiness Enhancement Act (MREA), a bill that would repeal Don't Ask Don't Tell and replace it with a nondiscrimination provision.⁷⁹ While the bill remains in committee, it has garnered 140 co-sponsors in the House.⁸⁰ Three years after its introduction, the House Armed Services Subcommittee on Military Personnel held the first hearings on Don't Ask Don't Tell since its inception in 1993.⁸¹ For advocates of MREA, the hearings provided a welcome indicator that a growing number in Congress are willing to seriously consider the possibility of open service.⁸²

But proponents of the bill face a number of hurdles. First, sponsors of MREA have given mixed signals on how quickly, if at all, they are willing to act on the bill during the 111th Congress. Representative Ellen Tauscher, who was the lead sponsor of the bill at the time of its introduction, suggested that it could be passed in 2009,⁸³ while Representative Barney Frank, another sponsor, indicated that it is unlikely the bill will be considered until 2010.⁸⁴ Other Democrats have offered a less sanguine timetable, opining it could be another two years before Congress attempts to overturn the statute.⁸⁵ Moreover, outside

1998); *Holmes v. California Nat'l Guard*, 124 F.3d 1126, 1127 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256, 263 (8th Cir. 1996); *Thorne v. Dept. of Defense*, 945 F. Supp. 924, 929 (E.D.Va. 1996); *Watson v. Perry*, 918 F. Supp. 1403, 1416 (W.D.Wash. 1996).

⁷⁹ Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (1st Sess. 2009).

⁸⁰ *Id.*

⁸¹ *Don't Ask Don't Tell Review: Hearing Before the Military Personnel Subcomm. of the H. Comm. on Armed Servs.*, 110th Cong. (2008) [hereinafter Military Personnel Subcommittee Hearing]. As of this writing, only an audio version of the entire hearing is available <http://hascaudio.house.gov/MP072308.wma>

⁸² Jamie Reno, 'Beginning the Conversation': Fifteen Years After Don't Ask Don't Tell was enacted for the U.S. Military, Congress prepping to review the law, *NEWSWEEK* (July 21, 2008), available at <http://www.newsweek.com/id/147961>

⁸³ Jamie McIntyre, *Lawmaker: 'Don't ask-don't tell' can be repealed in year*, CNN, Nov. 18, 2008 ("The key here is to get bills that pass the House and the Senate, that we can get to President-elect Obama to sign, and I think that we can do that, certainly, the first year of the administration," Tauscher told CNN.), available at <http://edition.cnn.com/2008/POLITICS/11/18/dont.ask.dont.tell/index.html>

⁸⁴ Lou Chibbaro Jr., 'Change has come to America,' *WASH. BLADE*, Nov. 7, 2008 ("In a four-year term, we can get many of our issues passed," Frank said. "I feel once Iraq is over, we can get rid of "Don't Ask, Don't Tell.""), available at http://www.washingtonblade.com/print.cfm?content_id=13543; Jennifer Benderey, Frank: Democrats Punting on Don't Ask Don't Tell until 2010, *Roll Call*, April 23, 2009 <http://www.rollcall.com/news/34244-1.html>.

⁸⁵ See Bendery & Dennis, *supra* note 4.

advocates have taken a cautionary approach, anxious not to repeat the mistakes of the Clinton administration.⁸⁶

Second, unlike the current economic crisis, MREA arguably does not require immediate attention.⁸⁷ While salient reasons have been offered for its passage, no one has forecast the potential collapse of the military if Congress fails to act swiftly. After appearing at the recent congressional hearing, Elaine Donnelly, President of the Center for Military Readiness (an organization that opposes MREA), opined that not one proponent of repeal stated why it was necessary to alter the current statute and replace it with open service.⁸⁸ Ms. Donnelly isn't entirely correct. Proponents of open service have argued that Don't Ask Don't Tell undermines national security.⁸⁹ The press has reported on the military's struggle to recruit and retain qualified individuals.⁹⁰ The Pentagon recently authorized the military departments to recruit foreigners living in the United States whose language or medical skills are "vital to the national interests."⁹¹ Ms. Donnelly is correct, however, that the Pentagon itself has not indicated that its obligation to enforce the statute is interfering with its ability to protect the United States.

Third, Congress is sensitive to the desires of the military in this arena.⁹²

⁸⁶ Sarvis, *supra* note 2.

⁸⁷ See Kelly, *supra* note 11.

⁸⁸ Memorandum from Elaine Donnelly, President, Center for Military Readiness, to Interested Parties (July 29, 2008) ("Throughout the hearing, none of the opposing witnesses or members gave a single reason why repeal of this law would improve military readiness, morale, and discipline."), available at http://armedservices.house.gov/pdfs/MilPers072308/Donnelly_Testimony072308.pdf

Another hearing witness, Brian Jones, a former Army Ranger, suggested that given the military's current responsibilities and resources now was not the time to introduce such a dramatic change. Military Personnel Subcommittee Hearing, *supra* note 81 (statement of Mr. Brian Jones:

On their behalf, I would respectfully like to say that in this time of war, I find it surprising that we are here today to talk about this issue of repealing the 1993 law. Our Soldiers are over-tasked with deploying, fighting, redeploying, refitting, and deploying again. These brave men and women have achieved what many Americans thought impossible. With all of the important issues that require attention, it is difficult to understand why a minority faction is demanding that their concerns be given priority over more important issues.

⁸⁹ NATHANIEL FRANK, *UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA*, 167 (St. Martin Press 2009).

⁹⁰ Tom Vanden Brook, *Army Pays \$1B to Recruit, Retain Soldiers*, USA TODAY, Apr. 11, 2007, available at http://www.usatoday.com/news/washington/2007-04-11-army-recruitment-retention_N.htm; Ann Scott Tyson, *Army Offers Incentives to Try to Retain Officers*, WASH. POST, Feb. 12, 2006, at A12.

⁹¹ Pauline Jelinek, *Pentagon to Recruit Aliens On Visas*, HUFFINGTON POST, Dec. 5, 2008 available at http://www.huffingtonpost.com/2008/12/05/pentagon-to-recruit-alien_n_148808.html.

⁹² David Welna, *Will Obama Press for End of "Don't Ask Don't Tell"?* (NPR radio

Congress wants an affirmative statement that the Pentagon is both willing and able to absorb the change.⁹³ Until recently, the Pentagon had not publicly taken a stand on repeal.⁹⁴ When directly asked about efforts to repeal the statute, however, Secretary Gates made two telling statements about the Administration's willingness to push for repeal. In a televised interview, Secretary Gates stated that any decision to repeal Don't Ask Don't Tell would be pushed "down the road a little bit."⁹⁵ During a visit to the Army War College, Secretary Gates responded to a question about open service by suggesting that "if we go down that road at all," the Administration would need to act cautiously.⁹⁶ Some members of Congress have noted the military's reticence to change, offering it as a reason to maintain the status quo.⁹⁷

While retired military officers have spoken, their messages have been mixed.⁹⁸ Some officers, like General Peter Pace and General Merrill McPeak, maintain that the statute is "working."⁹⁹ Recently, more than 1,000 retired military officers, including several who were top commanders, urged President Obama and Congress to maintain the law that bars gays from serving openly in

broadcast Dec. 11, 2008), available at <http://www.sldn.org/news/archives/will-obama-press-for-end-to-dont-ask-dont-tell/>.

⁹³ Kelly, *supra* note 11.

⁹⁴ See Bendery & Dennis, *supra* note 4; see also DoD News Briefing with Geoff Morrell from the Pentagon (July 23, 2008) <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4265>; ("I would say only that "don't ask, don't tell" remains the law of the land. And to my knowledge, the department is not advocating a change in policy.") Secretary of Defense Robert Gates and Chairman Joint Chiefs of Staff Adm. Michael Mullen (Jan. 22, 2009)(Sec. Gates stated "Don't ask, don't tell is law. It is a political decision. And if the law chains—changes, we will comply with the law.") <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4343>

⁹⁵ See Bill Sammon, *Administration Delays Change to Military's Don't Ask Don't Tell Policy*, FOX News, Mar. 29, 2009, <http://www.foxnews.com/politics/first100days/2009/03/29/administration-delays-change-militarys-dont-ask-dont-tell-policy/>

⁹⁶ See Elisabeth Bumiller, *Gates Cautious on Repeal of Ban on Gays in the Military*, New York Times Blog "The Caucus," April 16, 2009 <http://thecaucus.blogs.nytimes.com/2009/04/16/gates-cautious-on-repeal-of-ban-on-gays-in-military/?apage=3>

⁹⁷ See Bendery & Dennis, *supra* note 4. (As Alabama Senator Jeff Sessions stated: "I think the policy is working well. I haven't sensed that the military is calling for a change.")

⁹⁸ Mark Thompson, *Reexamining "Don't Ask Don't Tell,"* TIME.COM, Mar. 13, 2007, available at <http://www.time.com/time/nation/article/0,8599,1598653,00.html>; Nathaniel Frank, *Ending "Don't Ask, Don't Tell,"* THE NEW REPUBLIC, Nov. 25, 2008, available at <http://www.cbsnews.com/stories/2008/11/25/opinion/main4632720.shtml>

⁹⁹ Thompson, *supra* note 98 (quoting then Chairman of the Joint Chiefs of Staff "I believe homosexual acts between two individuals are immoral and that we should not condone immoral acts."); see also Frank, *supra* note 98 (noting that in October 2008, "retired Air Force General Merrill McPeak, one of Barack Obama's highest-ranking military supporters during the campaign, reiterated his opposition to openly gay service.").

the armed forces.¹⁰⁰ General Colin Powell, while calling for the ban to be revisited, cautioned against repealing the law “until it can be fully reviewed by the Joint Chiefs, military commanders and the Defense Secretary.”¹⁰¹ But a growing number of retired officers support open service, signing a statement declaring that “our service members are professionals who are able to work together effectively despite differences in race, gender, religion, and sexuality. Such collaboration reflects the strength and the best traditions of our democracy.”¹⁰²

A third group of retired officers presented an alternative to congressionally mandated open service; this alternative, however, offers the greatest threat to passage of the bill in its current form.¹⁰³ A nonpartisan national study group comprised of retired General/Flag Officers issued a public report on Don’t Ask Don’t Tell.¹⁰⁴ While the report advocated for the repeal of the current statute, it did not support a law that would allow for open service.¹⁰⁵ Instead the officers recommended that Congress “return authority for personnel policy under this law to the Department of Defense.”¹⁰⁶ The group opined that the DoD was in the best position to alter policy to reflect changing circumstances.¹⁰⁷

The group’s recommendation provides Congress with a compromise position.¹⁰⁸ Congress could repeal the current statute and provide the military with the power to manage its internal affairs.¹⁰⁹ Senators and Representatives reluctant to interfere with DoD personnel matters, especially when the country is at war and the military is stressed, may find an amendment encompassing the report’s recommendation more palatable than a congressional mandate requiring open service.¹¹⁰

With all that in mind, the question is not *when* the bill will pass, but *if* it will pass, and additionally if so, *in what form*. With wars in Iraq and Afghanistan, and the economic crisis, Congress may be unable, even if willing, to give repeal high priority.¹¹¹ Further, and arguably more important to note, there is no guarantee that MREA as currently conceived will pass. As will be discussed more fully in § IV, President Obama can fill this void and provide interim relief while Congress debates the issue.

¹⁰⁰ David Cray, *Former Officers Back Don’t Ask Don’t Tell*, WASHINGTON TIMES, Apr. 2, 2009 <http://www.washingtontimes.com/news/2009/apr/02/retired-officers-keep-dont-ask-dont-tell-policy-on/>

¹⁰¹ Bendery & Dennis, *supra* note 4.

¹⁰² Palm Center, *supra* note 61.

¹⁰³ REPORT OF THE GENERAL/FLAG OFFICERS’ STUDY GROUP, *supra* note 65.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 6.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ *See id.*

¹¹⁰ Kelly, *supra* note 11

¹¹¹ *Id.*

B. Courts

As a general matter, courts have not been receptive to cases challenging the validity of Don't Ask Don't Tell, and have routinely rejected service members' constitutional claims.¹¹² The courts have avoided potential constitutional problems by relying on a combination of the low standard of review and the military deference doctrine.¹¹³ Because most courts refuse to recognize sexual orientation as a protected class, the government need only establish a rational basis for laws that discriminate based on sexual orientation.¹¹⁴ Additionally, the courts have traditionally deferred to congressional decisions in the military arena, acknowledging that the courts lack institutional competence in this area.¹¹⁵

But the Supreme Court breathed new life into attempts to overturn Don't Ask Don't Tell when it issued its decision in *Lawrence v. Texas*, invalidating a Texas statute that criminalized consensual homosexual sodomy.¹¹⁶ In *Lawrence*, the Court seemed to suggest that government action regulating sexual conduct should be subject to increased scrutiny.¹¹⁷ Unfortunately, the Court was less than clear in its pronouncement and the lower courts have struggled to determine whether the Court intended to subject government intervention into sexual conduct to a level of scrutiny different from rational basis, and if so, what that level of scrutiny should be.¹¹⁸

The lower courts are just starting to address Don't Ask Don't Tell in a post-

¹¹² See, e.g., *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998); *Holmes v. California Nat'l Guard*, 124 F.3d 1126, 1127 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256, 263 (8th Cir. 1996); *Thorne v. Dept. of Defense*, 945 F. Supp. 924, 929 (E.D.Va. 1996); *Watson v. Perry*, 918 F. Supp. 1403, 1416 (W.D.Wash. 1996).

¹¹³ See, e.g., *Able*, 155 F.3d at 632; *Holmes*, 124 F.3d at 1132–33; *Richenberg*, 97 F.3d at 263; *Thorne*, 945 F. Supp. at 929; *Watson*, 918 F. Supp. at 1410.

¹¹⁴ *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (recognizing the Supreme Court's decision in *Lawrence* declined to address the Equal Protection test thus leaving undisturbed the application of the rational basis test); see also Melissa Sheriden Embser-Herbert & Elvira Embser-Herbert, *Changes in Latitude, Changes in Attitude: Is There a Role for Canadian Jurisprudence in Ending Discrimination in the U.S. Military?*, 32 WM. MITCHELL L. REV. 599, 612 (2005–06).

¹¹⁵ *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981); Heather S. Ingram Gipson, "The Fight for the Right to Fight": *Equal Protection and the United States Military*, 74 UMKC L. REV. 383, 388–392 (2005–06).

¹¹⁶ 539 U.S. 558, 578 (2003).

¹¹⁷ *Id.*

¹¹⁸ *Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008) (concluding that *Lawrence* adopted an intermediate level of scrutiny); *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (concluding that the Court adopted rational basis review); *Fields v. Palmdale Sch. Dist.* 271 F. Supp. 2d 1217, 1221 (C.D.Cal. 2003) (concluding that *Lawrence* established fundamental right). See also Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103 (2003–2004) (recognizing that level of scrutiny is difficult to determine).

Lawrence environment.¹¹⁹ In the first of such cases to reach the circuit courts, both the First and Ninth Circuits decided that *Lawrence* requires an increased level of scrutiny.¹²⁰ Neither court, however, was willing to subject Don't Ask Don't Tell to the strict scrutiny standard applied to race, settling instead on an intermediate level of scrutiny.¹²¹ Although the two courts agreed on the level of scrutiny, they came to quite different conclusions when applying that standard to the statute.¹²²

In the Ninth Circuit case of *Witt v. Air Force*, the plaintiff was, quite literally, an Air Force “poster child” who was featured in Air Force recruitment materials.¹²³ According to the record, Major Witt was an excellent officer who was repeatedly recognized for her service.¹²⁴ In 2004, Major Witt was suspended from duty after her relationship with a civilian woman came to the attention of her command.¹²⁵ Major Witt brought an action in district court seeking to challenge her suspension and eventual discharge, claiming that as applied to her Don't Ask Don't Tell violated procedural and substantive due process, as well as the Equal Protection clause.¹²⁶ The Ninth Circuit rejected her Equal Protection claim and determined that her procedural due process claim was not yet ripe.¹²⁷ The court did address her substantive due process claim, however, tackling the potential implications of the Supreme Court's decision in *Lawrence*.¹²⁸ As noted, the *Witt* court held that *Lawrence* required an intermediate level of scrutiny.¹²⁹ Under intermediate scrutiny, the Ninth Circuit applied a three factor test, requiring the government to “advance an important governmental interest,” show that “the intrusion . . . significantly further[s] that interest, and [that] the intrusion . . . [is] necessary to further that interest.”¹³⁰

In an as-applied challenge, the court clarified that it “must determine not whether DADT has some hypothetical, post-hoc rationalization in general, but

¹¹⁹ Currently there are only three cases that have directly addressed the issue, *Cook*, 528 F.3d at 42; *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008); *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004).

¹²⁰ *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) *petition for cert. filed* No.08-824 (Dec. 23, 2008) ; *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008) *reh'g en banc* denied by 548 F.3d 1264 (9th Cir. 2008).

¹²¹ *Cook*, 528 F.3d at 56; *Witt*, 527 F.3d at 817.

¹²² *Cook*, 528 F.3d at 60 (dismissing the plaintiffs' substantive due process claims); *Witt*, 527 F.3d at 821–822 (remanding to determine if discharge violated plaintiff's substantive due process rights).

¹²³ *Witt*, 527 F. 3d at 809.

¹²⁴ *Id.*

¹²⁵ *Id.* at 810.

¹²⁶ *Id.* at 811.

¹²⁷ *Id.* at 813, 821.

¹²⁸ *Id.* at 813; *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹²⁹ *Witt*, 527 F.3d at 817.

¹³⁰ *Id.* at 819.

whether a justification exists for the application of the policy as applied to Major Witt."¹³¹ Notably, the court gave only a passing nod to the deference usually afforded congressional decisions in military affairs.¹³² While the court acknowledged that "'judicial deference . . . is at its apogee'" when Congress is exercising its authority to raise and support armies, the court went on to declare that "'deference does not mean abdication,'" and "'Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs.'"¹³³

Applying the standard as articulated, the court noted that the government's interest in promoting unit cohesion, good order and morale was indeed important.¹³⁴ But the court was not convinced that the second and third factors were met.¹³⁵ Significantly, the court rejected the Air Force's attempts to rely on congressional findings that presence of homosexuals in the military automatically interferes with unit cohesion, good order, and morale.¹³⁶ Instead, the court placed the burden on the Air Force to prove that Major Witt's discharge was necessary to further the government's identified interest, and that there wasn't a less intrusive means to achieve the same result.¹³⁷

The First Circuit took a different approach. In *Cook v. Gates*, the court addressed the claims of twelve service members who were dismissed from service under Don't Ask Don't Tell.¹³⁸ The plaintiffs challenged the statute as violating their substantive due process rights, the Equal Protection Clause, and to the extent the statute allowed for discharge to be based on statements, their First Amendment rights.¹³⁹ Like the Ninth Circuit, the First Circuit rejected the plaintiffs' equal protection and First Amendment arguments. The court did, however, address the plaintiffs' substantive due process claims, confronting the question of how *Lawrence* had changed the legal landscape.¹⁴⁰

While the First Circuit agreed with the Ninth Circuit that *Lawrence* required an intermediate level of scrutiny,¹⁴¹ the court disagreed regarding the test to be applied, as well as the level of deference to be given to congressional decisions in military affairs.¹⁴² The First Circuit adopted a balancing test, one that weighed "the strength of the state's asserted interest in prohibiting immoral

¹³¹ *Id.*

¹³² *Id.* at 168.

¹³³ *Id.* at 821 (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) and *Weiss v. United States*, 510 U.S. 163, 176 (1994)).

¹³⁴ *Id.*

¹³⁵ *Id.* at 821.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ 528 F.3d 42, 47 (1st Cir. 2008).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 49, 62, 65.

¹⁴¹ See *id.* at 56.

¹⁴² See *id.* at 57.

conduct against the degree of intrusion into the petitioners' private sexual life caused by the statute."¹⁴³ But, before the court applied its test to the facts of the case, it acknowledged that the test weighed heavily in favor of the government.¹⁴⁴ "It is unquestionable that judicial deference to congressional decision-making in the area of military affairs heavily influences the analysis and resolution of constitutional challenges that arise in this context."¹⁴⁵ After reviewing the legislative history surrounding the passage of the statute in 1993, the First Circuit surmised that it had "no choice but to dismiss the plaintiffs' as-applied challenge."¹⁴⁶

Both the Ninth and First Circuits declined to review their decisions *en banc*, setting up a split in the circuits and a potential Supreme Court showdown. The proponents of repeal could be confident of a significant alteration in the status quo only if the Supreme Court were to accept the Ninth Circuit's position.¹⁴⁷ Currently, the government need only establish that a member has engaged in homosexual conduct as defined in the statute.¹⁴⁸ The burden is exceedingly light, given that a member can be discharged for exhibiting even a "propensity to engage in . . . homosexual acts."¹⁴⁹ Once the government establishes its case, the burden then shifts to the member to establish a negative—that he or she is not an individual who engages in or has a propensity to engage in homosexual conduct, a burden nearly impossible to meet.¹⁵⁰

While the First Circuit's decision maintained the status quo, the Ninth Circuit placed an additional evidentiary burden on the government. Under the Ninth Circuit's formulation the government would need to establish not only that the member engaged in or had a propensity to engage in homosexual conduct, but that such conduct interfered with unit cohesion, and that discharge of the member was the least intrusive means to reestablish cohesion.¹⁵¹ The government would need to establish this in *every* discharge proceeding.¹⁵² Given that there is anecdotal evidence that many members serve openly within their units without incident, and that a growing number of service members believe that gays, lesbians, and bisexuals should be able to openly serve in the armed forces, it may prove to be a daunting burden.¹⁵³

¹⁴³ *Id.* at 56.

¹⁴⁴ *See id.* at 57.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 60.

¹⁴⁷ *See infra* notes 151-153 and accompanying text

¹⁴⁸ 10 U.S.C. § 654(b), (f) (2006).

¹⁴⁹ *See id.*

¹⁵⁰ *Id.* at (b)(1)(E), (b)(2).

¹⁵¹ *See Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).

¹⁵² *See id.*

¹⁵³ *See ZOGBY INTERNATIONAL*, *supra* note 60 at 5-6; *see also* Military Personnel Subcommittee Hearing, *supra* note 81 (statement of Marine Staff Sergeant Eric Alva); *Military Soft on Don't Ask Don't Tell?* (CBS 60 Minutes television broadcast, Dec. 16, 2007) sum-

President Obama has already made a decision that influences the implementation of Don't Ask Don't Tell. James Petrienglo, one of the original plaintiffs in *Cook v. Gates*, filed a petition for *certiorari*, seeking Supreme Court review of the decision. As expected, the Obama Administration is against granting *certiorari*.¹⁵⁴ The government's position was upheld in the *Cook* case, and it has little incentive to have the Supreme Court review the decision. But the Administration is also not seeking review of the *Witt* decision, a case that was decided against the Air Force.¹⁵⁵ The administration's decision was largely based on the procedural posture of the case. The Ninth Circuit did not decide that the statute was unconstitutional, nor did it hold that the application of the statute was unconstitutional as applied to Major Witt.¹⁵⁶ Instead, the court remanded the case back to the trial court for a trial applying the new evidentiary burden.¹⁵⁷ In making its determination, the Department of Justice noted that the Supreme Court rarely grants review of non-final, interlocutory decisions, and further that any future review would be aided by the development of a factual record at trial.¹⁵⁸

The administration's reasons to not seek *certiorari* in *Witt* are unconvincing for several reasons. First, the Supreme Court rules explicitly identify a split in the circuits as a defining criterion for granting a petition for *certiorari*.¹⁵⁹ Second, parties have sought, and the Supreme Court has granted, *certiorari* in cases with a similar procedural posture.¹⁶⁰ Third, the Supreme Court's review of the legal question will not be benefited by the development of a factual record at trial; it rests primarily on whether the First and Ninth Circuits properly interpreted the Supreme Court's decision in *Lawrence* and subsequently identified the proper constitutional standard. Indeed, the issue is whether a trial is even necessary.

Nonetheless, the decision is helpful politically and it sends a positive message to opponents of Don't Ask Don't Tell. It keeps the case out of the Supreme Court, preserving the First and Ninth Circuit's favorable readings of *Lawrence* and saving the Ninth Circuit's decision from being reviewed through

mary available at <http://www.cbsnews.com/stories/2007/12/13/60minutes/main3615278.shtml>.

¹⁵⁴ Holder Letter, *supra* note 24.

¹⁵⁵ *See id.*

¹⁵⁶ *See Witt v. Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).

¹⁵⁷ *See id.* at 822.

¹⁵⁸ *See Holder Letter supra* note 24.

¹⁵⁹ SUP. CT. R. 10(a). There is also no doubt the Supreme Court has jurisdiction in this case. 28 U.S.C. § 1254(1).

¹⁶⁰ *See, e.g., Bell Atlantic v. Twombly*, 550 U.S. 544, 552-53 (2007)(accepting *certiorari* after the district court grants a motion to dismiss, the appellate court reverses and remands).

the Supreme Court's military deference jurisprudential lens.¹⁶¹ The decision not to seek *certiorari* also allows the Ninth Circuit's decision to stand pending the outcome of the trial and subsequent appeals. It may be years before the question reaches the Supreme Court and by that time Congress could have acted, mooted any subsequent challenges. Perhaps most importantly, the government's primary reason for mandating the discharge of all lesbian and gay service members – unit cohesion – will be put on trial. It is a high stakes gamble. If the government fails to establish that Major Witt's "homosexual conduct" interfered with unit cohesion, then it calls into question the assumptions on which the entire statutory framework rests. Even if they succeed, under the Ninth Circuit's framework, the government must also establish that Major Witt's discharge, rather than a less intrusive measure, is necessary to reestablish cohesion.

IV. WHILE WE WAIT: EXECUTIVE ACTION PENDING PASSAGE OF MREA

Because he can act quickly and unilaterally, President Obama is in the best position to provide interim relief to gay and lesbian service members pending congressional action. He has both the constitutional and statutory authority¹⁶² to act, as well as growing political support for a review of the current statute and implementing regulations.¹⁶³ In addition to his decision to oppose *certiorari* in *Cook v. Gates* and *Witt v. Air Force*, he can take a number of other actions that will have an even broader impact and significantly improve the lives of those serving under the ban.

As a constitutional matter, President Obama has the authority to alter the implementation of Don't Ask Don't Tell. Article II, § 2 of the Constitution identifies the President as the "Commander in Chief of the Army and Navy of the United States."¹⁶⁴ The Supreme Court has stated unequivocally that the President has the prerogative to establish rules and regulations for the armed forces.¹⁶⁵ President Lincoln relied upon this authority when he issued General Order 100, a code establishing formal guidelines for the Union Army's treatment of Confederate soldiers,¹⁶⁶ as did President Truman when he issued the

¹⁶¹ This is of course assuming the Supreme Court does not accept *certiorari* in *Cook*. At this writing the Supreme Court had not yet decided.

¹⁶² See *infra* notes 164-183 and accompanying text.

¹⁶³ See *supra* notes 59-65 and accompanying text.

¹⁶⁴ U.S. CONST. art. II, § 2, cl. 1.

¹⁶⁵ *United States v. Eliason*, 41 U.S. 291, 301 (1842) ("The power of the executive to establish rules and regulations for the government of the army, is undoubted.").

¹⁶⁶ See FRED C. AINSWORTH & JOSEPH W. KIRKLEY, *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, 148-164 (series III, volume III, Government Printing Office 1899); see also RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR 1-2* (Transaction Publishers 1983).

Executive Order integrating the military.¹⁶⁷

But President Obama need not rely on constitutional authority alone to effect change. The Executive may also exercise whatever authority Congress provides within a specific statute.¹⁶⁸ Congress also has the constitutional authority to establish rules regulating the military,¹⁶⁹ and it can delegate that authority to the Executive.¹⁷⁰ The Supreme Court has recognized Congress' ability to share its power to regulate the armed forces, and has additionally noted that "it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority" in this area.¹⁷¹ Presidents have often relied on a combination of constitutional and statutory authority to justify their conduct in military affairs.¹⁷²

Congress has delegated to the Secretary of Defense the authority to develop the regulations necessary to implement Don't Ask Don't Tell.¹⁷³ The Pentagon, and by implication the Executive, has significant statutory authority to determine how best to approach the application of the law in the military setting.¹⁷⁴ Using this authority, the DoD has issued directives to the military departments that prescribe the initiation of an investigation, the discharge hearing process, and further define certain terms left ambiguous in the statute.¹⁷⁵

¹⁶⁷ See Exec. Order No. 9,981, 13 Fed. Reg. 4313 (July 26, 1948).

¹⁶⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

¹⁶⁹ U.S. CONST. art. I, § 8, cl. 14.

¹⁷⁰ See *Loving v. United States*, 517 U.S. 748, 768 (1996).

¹⁷¹ *Id.*

¹⁷² See, e.g., Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002), *reprinted in* 10 U.S.C. § 801 (Supp. I 2001) (establishing military tribunals, claiming authority "as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution and sections 821 and 836 of title 10, United States Code" (citation omitted)); Exec. Order No. 12,294, 3 C.F.R. 139 (1982), *reprinted in* 50 U.S.C. § 1701 (2000) (suspending legal claims against Iran under authority of "the Constitution and statutes of the United States, including [specified sections of several Acts]").

¹⁷³ 10 U.S.C. § 654(b), (e) (2006).

¹⁷⁴ There is an academic debate regarding whether the President can exercise discretionary authority delegated to a named official within the Executive Branch. See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 274 (2006) (discussing the various theories). It is beyond the scope of this article to discuss the various theories; however, I subscribe to Dean Elena Kagan's approach, which finds that a congressional delegation of authority to a named executive official does not preclude presidential directives in exercise of that authority. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2326-31 (2001).

¹⁷⁵ See Dep't of Defense Directive No. 1332.14, Enlisted Administrative Separations E.3. A4; (Dec. 21, 2003); Dep't of Defense Instruction No. 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers (Sept. 16, 1997).

This statutory authority, however, does not include the ability to allow gays and lesbians to serve openly.¹⁷⁶ To lift the ban unilaterally, President Obama would need to rely solely on his Commander in Chief power.¹⁷⁷ Such a move would not be unprecedented.¹⁷⁸ Both Presidents Truman and Clinton issued Executive Orders that addressed discriminatory practices in the military without explicit statutory authority to do so.¹⁷⁹ Neither order, however, directly contradicted an express congressional mandate.¹⁸⁰ As Justice Jackson explained in his oft-cited *Youngstown* concurrence, the Executive's power is at its "lowest ebb" when he is acting contrary to a congressional directive.¹⁸¹ While President Obama certainly could make an argument that national security requires a suspension of all discharges—especially in critical need areas such as linguists or medical professionals—it is doubtful that he would take such an extraordinary step.¹⁸² Moreover, the action would be temporary, lasting only as long as national security required.¹⁸³

But President Obama can make significant change by simply amending the current DoD directives. The five changes outlined below are small adjustments that neither contradict the congressional mandate nor undermine the stated policy objective of protecting unit cohesion. The President would be acting well within his statutory authority if he were to direct the Secretary to institute these suggestions, thereby sidestepping a constitutional fight with Congress early in his presidency.

A. Confidentiality and Privacy

President Obama should direct the Secretary of Defense to amend the directives to prevent service members from being discharged based on statements made to doctors, psychologists, other allied health professionals, and chaplains. As a general matter, service members have no guaranteed right to confidentiali-

¹⁷⁶ 10 U.S.C. § 654(b) (2006) (mandating separation of members of the armed services under specified conditions).

¹⁷⁷ See *Youngstown*, 343 U.S. at 585, 587.

¹⁷⁸ See Exec. Order No. 9,981, 13 Fed. Reg. 4,313, 4,313 (July 26, 1948); Exec. Order No. 12,968, 3 C.F.R. 391 (Aug. 2, 1995).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Youngstown*, 343 U.S. at 637 (Jackson, J. concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

¹⁸² See *supra* notes 66-68 and accompanying text. Additionally, it would be unsettling to create such a "carve out." It would result in a caste system within the gay and lesbian community. Gays and lesbians with particular skills would be allowed to serve openly while other service members would face discharge.

¹⁸³ See Pamela Lundquist, *Essential to National Security: An Executive Ban on Don't Ask Don't Tell*, 16 AM. U. J. GENDER SOC. POL'Y & L. 115,142 (2007)

ty regarding their physical or mental health.¹⁸⁴ In theory there is a limited privilege afforded members speaking to chaplains.¹⁸⁵ While no member is assured of privacy, lesbian and gay service members face the added dilemma that disclosures to health care providers or chaplains could result in discharge under Don't Ask Don't Tell.¹⁸⁶ Under the statute, when a member discloses his or her sexual orientation or makes any statement that suggests a "propensity" to engage in homosexual conduct, such disclosure is considered a "statement," and therefore a basis for the initiation of an investigation and discharge.¹⁸⁷

The military neither requires nor prohibits a chaplain, physician or other service provider to disclose statements made in the course of treatment.¹⁸⁸ Nonetheless, treatment providers have revealed service members' statements, leading to their discharge.¹⁸⁹ The Marine Corps discharged one Marine—who had served two tours of duty in Iraq—after the physician assistant revealed a statement he made during treatment. Kevin Blaesing, a Marine infantryman, sought treatment from a naval psychologist. After Blaesing asked the psychologist questions about homosexuality, the psychologist reported him to his command, telling Blaesing it was in his best interest to leave the military.¹⁹⁰ Blaesing was discharged under Don't Ask Don't Tell.¹⁹¹ Unfortunately, Blaesing's experi-

¹⁸⁴ Congress added a very limited psychotherapist-patient privilege to the UCMJ in 1999. However, this privilege only applies in the criminal context. See Manual for Court Martial 2000, part III, R. 513; see also Maj. Dru Brenner-Beck, "'Shrinking' the Right to Everyman's Evidence": Jaffee in the Military, 45 A.F. L. REV. 201, 244 (1998); Judith Hicks Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685, 697 (1991-1992).

¹⁸⁵ MIL. R. EVID. 503(a) ("A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.").

¹⁸⁶ 10 U.S.C. § 654(b)(2) (2006) (mandating discharge when a member "has stated that he or she is a homosexual or bisexual, or words to that effect").

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g. Dep't of Defense Directive No. 1332.14, Enlisted Administrative Separations, § E3.A4.1 (allowing a commander to initiate an investigation when he or she receives "credible information that there is a basis for discharge"); § E3.A4.3.1 (determining that "[c]redible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge."); § E3A4.3.4.2 (stating that credible information exists when a "reliable person states that he or she observed or heard or discovered a member make a spoken or written statement . . .").

¹⁸⁹ SERVICE MEMBERS LEGAL DEFENSE NETWORK, THE SURVIVAL GUIDE: A COMPREHENSIVE GUIDE TO "DON'T ASK, DON'T TELL" AND RELATED MILITARY POLICIES 29 (5th ed. 2007) [hereinafter *Survival Guide*].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

ence is not an isolated incident.¹⁹²

President Obama could amend the current directives to include a paragraph which provides:

Statements revealing sexual orientation or homosexual conduct made by a member to a chaplain, chaplain assistant, physician, psychiatrist, psychologist or other allied health professional shall not be disclosed, and if disclosed shall not be used as a basis for an investigation nor used as evidence in a separation proceeding.

The recommended amendment clarifies what information a commander could use to initiate a fact-finding inquiry involving homosexual conduct, and what evidence is available to make the required findings authorizing discharge.¹⁹³ Such an addition is entirely consistent with the current directives which limit the source and strength of evidence necessary to initiate investigations.¹⁹⁴ The maintenance of confidentiality also aids the stated objective of the statute: unit cohesion.¹⁹⁵ In theory, unit cohesion is undermined when its members know that an individual is gay or lesbian.¹⁹⁶ The provider's disclosure to the unit's command—not the member's initial statement during the course of treatment—interferes with unit cohesion.

The current practice under Don't Ask Don't Tell creates a barrier to treatment. Gay and lesbian members may avoid seeking medical or psychological treatment and spiritual guidance for fear that the information they have confided during the course of treatment will be disclosed and used as a basis of discharge. By inhibiting access to religious, medical, and psychological services, the current practice unnecessarily undermines the well-being of gay and lesbian service members. At a time when members of the armed forces are under extreme stress, facing multiple and extended deployments with the attendant difficulties that arise,¹⁹⁷ all members, regardless of sexual orientation, should be free to seek the appropriate help without fear of reprisal.

¹⁹² See Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 I.A. L. REV. 1633, 1648 (2003–2004).

¹⁹³ Dep't of Defense Directive No. 1332.14, § E3.A4.3.1 (defining "credible information"); § E3.A1.1.8.4.2.1 (authorizing separation if the circumstances mandating separation is "supported by the evidence").

¹⁹⁴ *Id.* at § E3.A4.3.1.

¹⁹⁵ 10 U.S.C. § 654(a)(15).

¹⁹⁶ See *supra* notes 37 & 46 and accompanying text. As discussed earlier, the statute does not preclude gays and lesbians from serving in the military; it simply prohibits them from stating they are homosexual or engaging in "homosexual acts." Congress predicated the need for silence on the belief that if other unit members were aware that someone was gay or lesbian, this would interfere with the bonding so necessary in combat situations. Implicit in the statute is the premise "what the unit doesn't know doesn't hurt them."

¹⁹⁷ See Julian E. Barnes, *20% of Iraq, Afghanistan veterans have depression or PTSD, study finds*, LA TIMES, Apr. 18, 2008 available at <http://articles.latimes.com/2008/apr/18/nation/na-stress18>.

B. *Credible Information*

A similar amendment to the directives could be made regarding the strength of the evidence a commander needs to begin an investigation.¹⁹⁸ Currently a commander may initiate an investigation only if there is "credible information" from a "reliable person."¹⁹⁹ As written and interpreted, the directive raises several issues. First, the description of when credible information exists is ambiguous.²⁰⁰ Second, the reliable person standard is vague and allows a person not involved in the military or un-affected by the member's alleged conduct to cause an investigation or discharge proceedings to be initiated.²⁰¹ Third, the directive allows an investigation or discharge proceeding to be based on "non-verbal statements by a member."²⁰²

Such ambiguity leads to unfortunate results. In practice, service members have been discharged based on anonymous e-mails to command "outing" members,²⁰³ and evidence obtained from civilian sources unconnected to the unit.²⁰⁴ Army Sergeant Bleu Copas, an Arabic linguist, was ousted by an anonymous e-mail. The investigating officer admitted that the source never identified him or herself, and thus the credibility of the report could not be established.²⁰⁵ He nonetheless recommended discharging Copas.²⁰⁶ Lieutenant Commander Karen Soria's ten-year naval career ended after a civilian friend's civilian husband accused her of having an affair with his wife.²⁰⁷

To address the ambiguity in the current directives, the Pentagon should more clearly define "credible information" and "reliable source." First, credible information should only exist when a service member, not a civilian, has direct knowledge of a basis for discharge. Because the statute's stated objective is to maintain unit cohesion,²⁰⁸ the discharge should be based only on a member's

¹⁹⁸ Dep't of Defense Directive No.1332.14, § E3.A4.3.1 (defining "credible information").

¹⁹⁹ *Id.* at § E3.A4.3.4.1-3.

²⁰⁰ *See id.* at § E3.A4.3.1.

²⁰¹ *See id.* at § E3.A4.3.4.1-3.

²⁰² *Id.* at § E3.A4.3.4.3. (stating that credible information includes information that a reliable person observed behavior that amounts to a "non-verbal statement by a member that he or she is a homosexual").

²⁰³ *See* Earl Neikirk, *Army dismisses gay Arabic linguist*, MSNBC, July 5, 2006, available at <http://www.msnbc.msn.com/id/14052513/>.

²⁰⁴ *Survival Guide*, *supra* note 189 at 32 (5th ed.) (describing a soldier's husband reporting to her command that she was a lesbian and a gay man contacting civilian police to report domestic violence).

²⁰⁵ Neikirk, *supra* note 203.

²⁰⁶ *Id.*; *see also* Memorandum from Servicemembers Legal Defense Network to Presidential Candidates Barack Obama and John McCain (Sept. 2008) (on file with author).

²⁰⁷ Memorandum from Servicemembers Legal Defense Network to Presidential Candidates Barack Obama and John McCain (Sept. 2008) (on file with author).

²⁰⁸ *See* 10 U.S.C. § 654(a)(15).

conduct that is heard or observed by another member. A civilian's alleged knowledge of a member's statements or behavior does not affect unit cohesion. Yet the directives and current practice allow investigations to be initiated and discharges to occur based on information obtained from sources unconnected to the unit or the military as a whole.²⁰⁹

Second, the DoD should amend the directives to require that service members making allegations identify themselves by name and rank, and submit sworn affidavits that they witnessed the conduct or heard the statement alleged. This change would prevent commanders from initiating investigations based on anonymous sources, and ensure that the investigations and discharge proceedings are based on "credible information" as required by the directives.²¹⁰ It would also discourage the potential that Don't Ask Don't Tell will be used as a weapon to avenge perceived slights or as a basis for blackmail.

Finally, a command should not be able to subject a member to discharge based upon a so-called "non-verbal statement."²¹¹ The statute simply does not include a "non-verbal statement" as a basis for discharge. It defines the specific acts ("bodily contact" or "marriage or attempted marriage")²¹² and the words ("homosexual or bisexual, or words to that effect")²¹³ that may result in discharge. But the current directives define "statement" much more broadly:

A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity to engage in homosexual acts.²¹⁴

Under the current directives, a service member could wear a rainbow flag or a pink triangle and be accused of making a "non-verbal statement" that indicates a propensity to engage in homosexual conduct. To make the directives consistent with the statute, the directives should be amended to limit the definition of statement to written or spoken words. Congress did not cast the net so broadly and neither should the Secretary.

C. *Timing of Conduct*

President Obama should order the DoD to amend the directives to allow the military to investigate and discharge members for conduct that occurred only

²⁰⁹ See *supra* note 207 and accompanying text.

²¹⁰ Dep't of Defense Directive No.1332.14 § E3.A4.3.1.

²¹¹ Dep't of Defense Directive No.1332.14 § E3.A4.3.4.3 (defining statement to include "language or behavior"); see also *id.* at § E3.A4.3.4.3 (defining credible information as "observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual. . .").

²¹² 10 U.S.C. § 654(f)(3) (2006).

²¹³ *Id.* at (b)(2).

²¹⁴ Dep't of Defense Directive No.1332.14 § E3.A4.3.4.3

after they entered the military. Although neither the statute nor the directives explicitly require that pre-service conduct be considered, they are ambiguous enough to cover this earlier time frame.²¹⁵ The interpretation allows an individual to be discharged based on conduct that occurred before he or she was subject to the statutes and regulations that govern the armed forces.²¹⁶ This interpretation may be a holdover from the policy in place before 1993, which explicitly stated that a member could be discharged based on conduct and statements made before they entered the military.²¹⁷ That language, however, is neither in the statute nor in the current DoD directives.²¹⁸

To correct this deficiency, the DoD should amend the directives to explicitly include only homosexual acts or statements that occurred "after entering military service."²¹⁹ A member's pre-service conduct should neither be the basis for initiating an investigation nor used as evidence in a discharge proceeding. This proposed amendment is consistent with the military's policy not to inquire into pre-service homosexual conduct at the time of enlistment or induction.²²⁰

D. *Rebuttable Presumption*

President Obama should also retract a 1995 memorandum by Judith Miller, then General Counsel for the DoD, that creates a nearly insurmountable eviden-

²¹⁵ See 10 U.S.C. § 654(b) (2006) (defining the basis of discharge as a finding that the member "has engaged in, or solicited another to engage in a homosexual act"; that the member "stated he or she is a homosexual" or that a member "married or attempted to marry a person known to be of the same biological sex"); Dep't of Defense Directive No. 1332.14 § E3.A1.1.8.1.2 (describing necessary findings for separation); Dep't of Defense Directive No. 1332.40 § E2.3.1 (same).

²¹⁶ Dep't of Defense Directive No. 1332.14 § E3.A4.3.2.1 (stating that a basis for discharge exists if the member "has engaged in a homosexual act" but places not time limitations on when the act occurred).

²¹⁷ Dep't of Defense Directive No.1332.30 (Feb. 12, 1986) ("The basis for separation may include pre-service, prior service, or current service conduct or statements"); Dep't of Defense Directive No.1332.14 Part I § H(1)(c) (Jan. 28, 1982) ("The basis for separation may include pre-service, prior service, or current service conduct or statements.").

²¹⁸ 10 U.S.C. § 654(b) (2006); Dep't of Defense Directive No.1332.14 § E3.A1.1.8.1.2.1.

²¹⁹ For example, Dep't of Defense Directive No.1332.14 § E3.A1.1.8.1.2.1 should be amended to state: "*After entering military service*, the member has engaged in, attempted to engage in, or solicited another to engage in homosexual acts" and likewise § E3.A1.1.8.1.2.2 should be amended to state: "*After entering military service* the member has made a statement that he or she is a homosexual or bisexual or words to that effect . . ." and similarly § E3A4.3.2.1. should be amended to state the member "has engaged in a homosexual act *after entering military service*."

²²⁰ Dep't of Defense Directive No.1304.26 Qualification Standards for Enlistment, Appointment and Induction, Encl.2, Attachment Application Briefing Item on Separation Policy (1994) ("Although we have not and will not ask you about your sexual orientation, you should be aware that homosexual conduct is grounds for discharge from the Armed Forces.").

tiary burden for a service member contesting discharge.²²¹ The statute provides that a member shall be discharged if she makes a statement that she is a homosexual or bisexual, unless the member demonstrates that 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.”²²² Congress did not address what evidence a member must produce to meet this standard, nor did Congress identify which party had the ultimate burden of proof.

The ambiguity in the statute came to light during discharge proceedings involving then-Navy Lieutenant Commander Zoe Dunning. In 1993, Dunning stated that she was a lesbian and the Navy initiated discharge proceedings.²²³ During her administrative hearing, Dunning declared that when she “made the statement that I am a lesbian that statement was to indicate my sexual orientation. It, in no way, was meant to imply any propensity or intent or desire to engage in prohibited conduct.”²²⁴ In a surprising outcome, the Board found that Dunning’s statement did not prove she would engage in homosexual acts and therefore did not violate the conduct component of the new policy.²²⁵ As a result, Dunning was retained and continued to serve openly until her retirement in 2007.²²⁶

Dunning’s success came as a result of an internal inconsistency in the statute and DoD’s implementing policy.²²⁷ To avoid judicial scrutiny, the DoD insisted that a member’s discharge would be based on homosexual conduct, not his or her sexual orientation.²²⁸ To make this distinction clear, the DoD policy explicitly states that “sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service

²²¹ Memorandum from Judith A. Miller, General Counsel for the Department of Defense, to the General Counsels of the Military Departments, the Judge Advocate Generals of the Army and Navy and Judge Advocate of the Air Force, and Staff Judge Advocate to the Commandant of the Marine Corps, Policy on Homosexual Conduct in the Armed Forces (Aug. 18, 1995)[hereinafter Miller Memorandum].

²²² 10 U.S.C. § 654(b)(2) (2006).

²²³ Jon Sawyer, *Homosexuals in the Military Protest Ban So That Others Can ‘Stop Living Lie’*, ST LOUIS POST-DISPATCH, Apr. 27, 1993, at 7A; *Discharged lesbian plans to challenge gay policy*, ARIZ. REPUBLIC, June 11, 1993, at A4.

²²⁴ Melissa Wells-Petry, *Sneaking A Wink At Homosexuals? Three Case Studies on Policies Concerning Homosexuality in the United States Armed Forces*, 64 UMKC L. REV. 3, 57 App. (Fall 1995).

²²⁵ *Navy Board Backs Lesbian*, WASH. POST, Dec. 2, 1994, at A14.

²²⁶ Cynthia Laird, *Out Navy Commander Retires*, BAY AREA REPORTER, June 7, 2007.

²²⁷ See *Able v. United States*, 880 F. Supp. 968, 975 (E.D.N.Y. 1995) *vacated by* 88 F.3d 1280 (2d Cir. 1996) (quoting Jamie Gorelick, General Counsel to Department of Defense: “The reason we do not discharge people because we believe them to have a homosexual orientation is because in 1981 it was recognized that it we did have a status-based as opposed to conduct-based rule, that it would be vulnerable to the courts.”).

²²⁸ *Id.*

unless manifested by homosexual conduct.”²²⁹ DoD directives further define “sexual orientation” as “an abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.”²³⁰ In the statute, Congress defined a “homosexual” as a “person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts”²³¹ The statute requires that anyone who engages in homosexual conduct be discharged from the service. A statement by a Service member that “. . . he or she is a homosexual or bisexual or words to that effect” is sufficient to constitute “homosexual conduct.”²³² Therein lies the rub. A member’s statement that he or she is a “homosexual” is by definition an admission that he or she has the propensity to engage in homosexual acts, thus mandating discharge. Yet, in theory, the military cannot discharge a member based on his or her sexual orientation.²³³

Congress attempted to address this inconsistency by allowing a statement that a member is “a homosexual or bisexual or words to that effect” to create a rebuttable presumption that the service member could overcome by demonstrating 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.”²³⁴ Dunning relied on her testimony to rebut the presumption and effectively shift the burden to the government to present evidence to the contrary.²³⁵ The government obviously failed to do so.

In response to Dunning’s success, Ms. Miller clarified the member’s evidentiary burden and the basis for a finding:

A member may not avoid the burden of rebutting the presumption merely by asserting that his or her statement of homosexuality was intended to convey only a message about sexual orientation, as defined in the Directives, and not to convey any message about propensity or intent to engage in homosexual acts. To the contrary, by virtue of the statement, the member bears the burden of proof that he or she does not engage in, and does not attempt, have a propensity, or intend to engage in homosexual acts. If the member in rebuttal offers evidence that he or she does not engage in homosexual acts or have a propensity or intent to do so, the offering of the evidence does not shift the burden of proof to the government[.] Rather,

²²⁹ Aspin, *supra* note 15; see also Dep’t of Defense Directive No. 1332.14, § E3.A1.1.8.1

²³⁰ Dep’t of Defense Directive No. 1332.14, § E2.1.15.

²³¹ 10 U.S.C. § 654(f)(1) (2006).

²³² *Id.* at (b)(2).

²³³ Dep’t of Defense Directive 1332.14 § E3.A1.1.8.1.1 (“A member’s sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section”)

²³⁴ 10 U.S.C. § 654(b)(2).

²³⁵ See *Arizona Republic*, *supra* note 223.

the burden of proof remains on the member throughout the proceeding.²³⁶

Not surprisingly, since the memorandum was issued, only one service member has successfully rebutted the presumption.²³⁷ Ms. Miller's memorandum essentially created an irrebuttable presumption.²³⁸ It is entirely unclear how a member would meet the imposed burden; it is nearly impossible to prove a negative. Several courts have recognized that a service member who makes a statement that he or she is gay is, in essence, acknowledging that he or she has a propensity to engage in homosexual acts.²³⁹ As a result, the distinction between status and conduct has been lost (if it ever existed). Despite assertions to the contrary, service members are discharged based on their sexual orientation without any evidence that they intend to engage in conduct deemed detrimental to unit cohesion.

President Obama should replace the Miller memorandum with a fairer and traditional burden-shifting regime. In most civil proceedings, the party against whom the presumption is directed has the burden of presenting evidence to rebut the presumption; however, the burden of proof does not shift to that party.²⁴⁰ Under this paradigm, once the government establishes that the service member made a statement of homosexuality, a presumption arises that the member has at least a propensity to engage in homosexual acts.²⁴¹ The service member would then need to produce some evidence that he or she does not have a propensity or intent to engage in homosexual acts. Like Lt. Dunning, the service member could meet this initial burden of production through his or her own testimony. If the member presents some evidence then the presumption is neutralized. Moreover, throughout the proceeding, the government

²³⁶ See Miller Memorandum, *supra* note 221, at 2.

²³⁷ See *Thorne v. Dept. of Defense*, 945 F. Supp. 924, 929 (E.D.Va. 1996). But it should be noted that Thorne's administrative appeal occurred just a few months after the Miller memorandum was issued; See also *Cook v. Gates*, 528 F.3d 42, 71 (1st Cir. 2008) (Saris, J. concurring and dissenting) (noting that the government's examples of members successfully rebutting the presumption were "well over twelve years old").

²³⁸ See *supra* note 212; see also *Weinberger v. Safi*, 422 U.S. 749, 768 (1975) (discussing the constitutionality of irrebuttable presumptions).

²³⁹ See, e.g., *Thomasson v. Perry*, 80 F.3d 915, 941–42 n. 8 (4th Cir. 1996) (Luttig, J. concurring) ("I do not know what homosexual orientation is, if it is not the propensity to commit homosexual acts; indeed I do not understand how one even knows that he has a homosexual orientation except by realizing that he has a propensity toward the commission of homosexual acts."); *Able*, 880 F. Supp. at 975 *vacated by* 88 F.3d at 1280 (calling the distinction between orientation and propensity as "nothing less than Orwellian"); see also *Cook* 528 F.3d at 70–71 (Saris, J. dissenting) (questioning the reality that the presumption is rebuttable).

²⁴⁰ FED. R. EVID. 301; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) (describing burden shifting model in Title VII case).

²⁴¹ 10 U.S.C. § 654(b)(2) (2006).

would have the ultimate burden of persuasion.²⁴²

The proposed change is consistent with the statutory mandate. Congress allowed the service member to rebut the presumption that arose once he or she made a statement "in accordance with procedures set forth in the regulations."²⁴³ The DoD can develop whatever burden-shifting regime it wants. The recommended change is also consistent with the DoD's internal policy. The DoD has stated explicitly that sexual orientation is not a bar to continued service unless accompanied by a homosexual act.²⁴⁴ Perhaps most importantly, the change reduces the constitutional concerns that erupt when it appears the government is discharging individuals based on their sexual orientation and not their conduct.²⁴⁵

While retracting the Miller memorandum doesn't cure the DoD's (nearly) invisible line separating status and conduct, it does shift the burden of proof back to the DoD in statement cases. Given that nearly 85% of discharges under Don't Ask Don't Tell are "statement" cases, this small change could have an enormous impact.²⁴⁶ Members seeking to continue their military service would at least have a fighting chance.

E. *Substantive Due Process*

Another possible amendment reflects the substantive due process concerns raised in *Witt*.²⁴⁷ Although the stated purpose of the statute is to protect "morale, good order and discipline, and unit cohesion," members are discharged without any finding that their conduct interfered with the identified concerns.²⁴⁸ There is ample evidence that members are serving openly without adverse consequences to the unit, yet members are routinely discharged without evidence that their "homosexual conduct"—often just a statement regarding their sexual orientation—has interfered with the proper functioning of their unit.²⁴⁹

²⁴² See Hicks, 509 U.S. at 507

²⁴³ 10 U.S.C. § 654(b)(2).

²⁴⁴ Dep't of Defense Directive No. 1332.14, § E3.A1.1.8.1.

²⁴⁵ See, e.g., *Hansela v. Dept. of Air Force*, 343 F.3d 951, 958 (9th Cir. 2003) ("If it is demonstrated that the armed forces is discriminating based on status, *Hansela's* equal protection and first amendment claims present genuine issues that need to be resolved at trial."); *Meinhold v. Dept. of Defense*, 34 F.3d 1469, 1477 (9th Cir. 1994) ("Construing the regulation to apply to the 'classification of being homosexual' clearly implicates equal protection.").

²⁴⁶ See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-05-299, *MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DoD'S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED* 11 (2005).

²⁴⁷ See *Witt v. Air Force*, 527 F.3d 806 (9th Cir. 2008).

²⁴⁸ 10 U.S.C. § 654(a)(15); *Witt*, 527 F.3d at 821 (discussing the government's reliance on unit cohesion as a basis for discharge in the absence of a finding that unit cohesion was affected).

²⁴⁹ Navy Commander Zoe Dunning openly served from 1993, when she first stated she

To correct this anomaly, and address the substantive due process concerns raised in *Witt*, the directives should be amended to require an additional finding. Currently, the directive only requires the government to establish that the member engaged in homosexual conduct.²⁵⁰ Under the suggested amendment, the government would also need to produce evidence that the member's homosexual conduct "substantially interfered with unit cohesion" and that the member's discharge is the least intrusive means to remedy the perceived problem. Thus members who are openly and ably serving without an adverse effect on their unit could complete their service obligation.

The proposed change would have several benefits. First, it would cure any difficulties resulting from the different outcomes in *Witt* and *Cook*. The government's decision not to seek *certiorari* in *Witt* ensures that military installations located in the Ninth Circuit will be subject to the more stringent standard developed by that court. With a slight alteration in the directives, all military installations, regardless of location, would be required to make the same findings. Second, it would avoid the time and cost of defending substantive due process claims in the circuits that have yet to rule on the issue. Certainly service members facing discharge in other circuits will seek to test the split between the First and the Ninth Circuits' holdings. Finally, it would aid the military's accession goals as well as reduce the financial costs associated with discharge. As the Pentagon has recognized "[s]eparation prior to the completion of an obligated period of service is wasteful because it results in a loss of [the military's] investment and generates a requirement for increased accessions."²⁵¹

V. CONCLUSION

Throughout out his campaign, President Obama pledged to support the men and women serving in uniform. He can make good on that promise by amending the directives affecting the estimated 65,000 gay and lesbian service members. While he builds the needed consensus for open service, he can provide stop-gap relief for those currently serving. Congress provided the Executive Branch significant discretionary authority to implement Don't Ask Don't Tell,²⁵² and President Obama can and should take full advantage of it. The

was a lesbian, to 2007 when she retired from the Navy. See *supra* notes 215-218. Marine Staff Sergeant Eric Alva testified that he was "out" to his unit while he served in the Iraq War. See *Don't Ask Don't Tell Review: Hearing Before the H. Comm. on Armed Services*, 109th Cong. (2008) (statement of Staff Sgt. Eric Alva), available at http://armedservices.house.gov/pdfs/MilPers072308/Alva_Testimony072308.pdf; Army Sergeant Darren Manzel-la reported on *60 Minutes* that he openly served in his unit while deployed in Iraq. *CBS News: Military Soft on Don't Ask, Don't Tell?* (CBS television Broadcast July 9, 2008), available at <http://www.cbsnews.com/stories/2007/12/13/60minutes/main3615278.shtml>

²⁵⁰ Dep't of Defense Directive No. 1332.14, § E3.A1.1.8.1

²⁵¹ Dep't of Defense Directive No. 1332.14, § 4.2.3.

²⁵² See *supra* notes 173-175 and accompanying text.

recommended changes, while not allowing gay and lesbian members to serve openly, will relieve some of the daily tension under which these men and women work. President Obama will begin to fulfill his promise that "change has come to America."²⁵³

²⁵³ See Election Night Victory Speech, Grant Park, Ill. (Nov. 4, 2008) ("It's been a long time coming, but tonight, because of what we did on this day, in this election, at this defining moment, change has come to America.") <http://obamaspeeches.com/E11BarackObamaElectionNightVictorySpeechGrantParkIllinoisNovember42008.htm>