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## Coming Out to Fight for Our Country: Achieving Equality for Gay Service Members in a Post-"Don't Ask, Don't Tell" Military

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## COMING OUT TO FIGHT FOR OUR COUNTRY: ACHIEVING EQUALITY FOR GAY SERVICE MEMBERS IN A POST-“DON’T ASK, DON’T TELL” MILITARY

### I. INTRODUCTION

Until September 20, 2011,<sup>1</sup> uniformed members of the United States Armed Forces constituted the only labor force in the country that could be fired on the basis of sexual orientation.<sup>2</sup> In fact, these men and women serving their country not only *could* be separated from the military on this basis, but their removal was actually *required* by federal law.<sup>3</sup> No other federal, state, or local policy authorized employment discrimination based on sexual orientation as did the policy established in 1993 known as “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (“DADT”).<sup>4</sup>

Approximately 14,500 service members were discharged under DADT.<sup>5</sup> These men and women ranged in rank from private to general and held military occupations such as linguists, translators, and national security experts, all of whom possessed valuable, specialized skills critical to the defense of our nation.<sup>6</sup> After seventeen years and

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1. See Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES, July 22, 2011, [http://www.nytimes.com/2011/07/23/us/23military.html?\\_r=1&scp=2&sq=don%20ask%20dont%20tell%20repeal%20certification&st=cse](http://www.nytimes.com/2011/07/23/us/23military.html?_r=1&scp=2&sq=don%20ask%20dont%20tell%20repeal%20certification&st=cse). President Obama certified the repeal of “Don’t Ask, Don’t Tell” on July 22, 2011, but the repeal required a sixty-day waiting period, thereby pushing its official enactment to September 20, 2011. *Id.*

2. James A. Garland, Symposium, *Introduction*, 21 HOFSTRA LAB. & EMP. L.J. 325, 328 (2004).

3. *Id.*

4. 10 U.S.C. § 654 (2006), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; see SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE NINTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 9 (2003), available at [http://sldn.3cdn.net/d7e44bb7ad24887854\\_w6m6b4y13.pdf](http://sldn.3cdn.net/d7e44bb7ad24887854_w6m6b4y13.pdf).

5. About “Don’t Ask, Don’t Tell,” SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/pages/about-dadt> (last visited Dec. 18, 2011).

6. See, e.g., Alastair Gamble, Symposium, *How Do You Say Gay in Arabic? Being Essential Under “Don’t Ask, Don’t Tell,”* 21 HOFSTRA LAB. & EMP. L.J. 437, 437-39 (2004) (recounting the author’s discharge from his position as an Arabic linguist in the Navy after his commanding

countless failed challenges to DADT, the policy was finally declared unconstitutional in the first successful lawsuit against DADT, *Log Cabin Republicans v. United States*.<sup>7</sup> This ruling was the catalyst for Congress's historic repeal of DADT on December 18, 2010.<sup>8</sup>

The controversy surrounding the repeal of DADT in the aftermath of *Log Cabin Republicans* necessitates a discussion of the implementation of the new, non-discriminatory policy addressing homosexuality in the military and the shortcomings of that policy that require additional legislation in order to fully achieve the goals sought by DADT repeal. Part II of this Note details the history of the ban on homosexuality in the military prior to DADT and the eventual codification of the policy during former president Bill Clinton's tenure in 1993. Part III outlines the failed constitutional challenges to DADT prior to *Log Cabin Republicans*. Part III also considers additional setbacks to gay rights in the military, including sodomy laws and the policy requiring higher education institutions to permit on-campus military recruiting despite the military's discriminatory policy on sexual orientation. Part IV discusses the rationale of the *Log Cabin Republicans* decision. Part V analyzes the aftermath of the *Log Cabin Republicans* ruling and its influence on the passage of congressional bills that sought to end employment discrimination on the basis of sexual orientation in the military. Part VI concludes that there are major shortcomings of the new, non-discriminatory policy replacing DADT and proposes remedies through the repeal of statutes that bar certain benefits to gay<sup>9</sup> service members as well as the addition of sexual orientation as a protected class against unlawful discrimination within military policies. Part VII offers concluding thoughts.

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sergeants discovered pictures and holiday cards evidencing his relationship with another male soldier).

7. No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612, at \*121 (C.D. Cal. Sept. 9, 2010).

8. See 156 CONG. REC. S10668-84 (2010).

9. The term "gay" is used throughout this Note to refer to lesbian, gay, and bisexual service members. Any mention of "transgender" individuals is noticeably absent from the language of DADT. See 10 U.S.C. §§ 654(b), (f) (2006). However, the policy has still been applied to transgender service members that self-identify as gay or are misperceived as being gay. See Sharon E. Debbage Alexander, Symposium, *A Ban by Any Other Name: Ten Years of "Don't Ask, Don't Tell,"* 21 HOFSTRA LAB. & EMP. L.J. 403, 404 (2004).

## II. A HISTORY OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN THE MILITARY AND THE SUPPOSED COMPROMISE OF “DON’T ASK, DON’T TELL”

Discrimination against homosexuals in the military can be traced back to World War I.<sup>10</sup> For nearly eighty years, status as a homosexual was enough to disqualify a service member from duty.<sup>11</sup> In 1993, DADT was established to relax the ban on homosexuals by prohibiting the military from questioning service members and recruits about their sexual orientation (“don’t ask”), yet retaining the ability to discharge personnel discovered to be homosexual.<sup>12</sup> Homosexuality itself was no longer considered the trigger for discharge; rather, homosexuality-related words or conduct served as grounds for separation.<sup>13</sup> Thus, homosexual individuals were permitted to serve in the armed forces as long as they did not “tell” anyone of their true sexual identity.<sup>14</sup>

### *A. Pre-DADT Policies and Rationales*

Prior to World War I, there was no military policy regulating homosexuality among members of the armed forces.<sup>15</sup> A service member could only be discharged under civilian sodomy laws until the military adopted its own policy outlawing sodomy under the Articles of War of 1916.<sup>16</sup> However, these civilian and military bans on sodomy were criminal prohibitions.<sup>17</sup> It was not until World War II that the first administrative prohibition against homosexuality was implemented in the military.<sup>18</sup> Under this policy, homosexuality served as sufficient grounds for discipline or discharge of active duty service members as well as a means of “screening out” recruits that identified as homosexual.<sup>19</sup> This was the first time employment discrimination based

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10. See Alexander, *supra* note 9, at 404.

11. See *id.* at 406.

12. See *id.* at 410-12.

13. *Id.* at 410.

14. See *id.* at 413. Though this policy covers affirmative statements made by service members confirming their sexual orientation, spoken words are not the only means of “telling” their sexual identity to the military. See *id.* at 413-14. Inadvertent forms of “telling” have resulted in discharge from duty, including diary entries, photographs, and private communications to family and friends, such as email messages and holiday cards. *Id.* at 414.

15. *Id.* at 405.

16. *Id.*

17. *Id.*

18. *Id.* at 405-06.

19. *Id.* at 406.

on sexual orientation was explicitly permitted in the military.<sup>20</sup>

The ban on gays in the military came at the beginning of the Cold War as well as at the height of Sigmund Freud's popularity in the psychology field.<sup>21</sup> These historical events provided the backdrop for two different yet equally prominent rationales behind the ban on homosexuality in the armed forces. During the start of the Cold War in the years following World War II, the United States strived for global recognition as a dominant power in the Western world.<sup>22</sup> At that time, the public perceived homosexuals as weak and perverted.<sup>23</sup> Allowing homosexuals to serve in the military was believed to reflect a similar negative view on the United States as a weak nation at a time when it was crucial to project a strong, masculine image of our country into the post-World War II state of military tension.<sup>24</sup>

Additionally, Freud's teachings served as the foundation for the belief that homosexuality was incompatible with military service.<sup>25</sup> Relying on Freud's theories, psychiatrists suggested that gay men and women lacked an aptitude for combat and were untrustworthy.<sup>26</sup> These characteristics threatened to undermine military discipline and unit cohesion.<sup>27</sup> The military viewed homosexuality as a form of mental illness rendering homosexuals unfit for duty.<sup>28</sup> In fact, the American Psychiatric Association ("APA") listed homosexuality as a sociopathic personality disturbance in its Diagnostic and Statistical Manual.<sup>29</sup> These psychological interpretations of homosexuality, combined with the United States's need to emit a strong, powerful image into the post-World War II world, contributed to the development of the outright ban

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20. See *id.* at 405-06.

21. See *id.* at 406; Jay Hatheway, Symposium, *Guilty as Charged*, 21 HOFSTRA LAB. & EMP. L.J. 443, 453 (2004).

22. See generally Henry J. Sage, *America and the Cold War: The Truman, Eisenhower, and Kennedy Years*, ACAD. AM. HIST., <http://www.academicamerican.com/postww2/coldwar.html> (last updated Jan. 5, 2012) (discussing the struggle for power between the United States and the Soviet Union specifically, and the Eastern and Western powers generally, including the nuclear arms race).

23. Hatheway, *supra* note 21, at 453.

24. See *id.*

25. Alexander, *supra* note 9, at 406.

26. See *id.*

27. See Hatheway, *supra* note 21, at 445.

28. See *id.*

29. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38-39 (1952), available at <http://www.psychiatryonline.com/DSMPDF/dsm-i.pdf>. Homosexuality was listed under "Sexual deviation" within the broader category of personality disorders and was defined as "deviant sexuality . . . [that] includes most of the cases formerly classed as 'psychopathic personality with pathologic sexuality.' The diagnosis will specify the type of pathologic behavior, such as homosexuality." *Id.*

on gay service members from the military.

The prohibition of gays in the military was further codified in the Uniform Code of Military Justice ("UCMJ").<sup>30</sup> This Code was used to extend the ban on gays in the military through the enactment of sodomy laws. Article 125 of the UCMJ states: "Any person . . . who engages in unnatural carnal copulation with another person of the same or opposite sex . . . is guilty of sodomy."<sup>31</sup> The consequence for such a violation is "punish[ment] as a court-martial may direct,"<sup>32</sup> which often includes dishonorable discharge.<sup>33</sup> For four decades following World War II, the administrative prohibition against gays and the UCMJ sodomy laws purported to keep homosexuals out of the military by seeking out these individuals and removing them from service or preventing them from enlisting altogether.<sup>34</sup> Such proactive policing of homosexuality in the armed forces would theoretically come to a halt with the enactment of DADT in 1993.

### *B. The Establishment and Rationales of DADT*

During Bill Clinton's 1992 presidential campaign, the democratic candidate promised, if elected, to bring an end to the military's ban on homosexuals.<sup>35</sup> Much had changed in public opinion since the initial prohibition of gays from the armed forces was instituted in the post-World War II era. The 1960s and 1970s produced great changes in the political atmosphere through the rise of feminist, civil rights, and anti-war movements.<sup>36</sup> These marginalized groups began to speak out against oppression, and following the police riots at Stonewall Inn in Greenwich Village in 1969,<sup>37</sup> American homosexuals added their voices

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30. The UCMJ is the codification of military laws in the United States. Congress enacted these laws in 1951 pursuant to its authority granted by the United States Constitution, which states that Congress shall have the power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14. The UCMJ sets forth military policies, including the establishment of the military court-martial and its jurisdiction, trial procedures, sentencing guidelines, and appellate court procedures. See 10 U.S.C. §§ 801-946 (2006).

31. 10 U.S.C. § 925(a).

32. *Id.* § 925(b).

33. See, e.g., Hatheway, *supra* note 21, at 452 (describing service member Lt. Hatheway's dishonorable discharge after a jury unanimously found him guilty of violating Article 125).

34. See Alexander, *supra* note 9, at 406.

35. *Id.* at 408.

36. Hatheway, *supra* note 21, at 444.

37. Stonewall Inn was a popular gay bar run by the Mafia and frequently raided by police. *Stonewall Rebellion*, N.Y. TIMES (Apr. 10, 2009), [http://topics.nytimes.com/top/reference/timestopics/subjects/s/stonewall\\_rebellion/index.html?scp=1-spot&sq=stonewall%20rebellion&st=cse](http://topics.nytimes.com/top/reference/timestopics/subjects/s/stonewall_rebellion/index.html?scp=1-spot&sq=stonewall%20rebellion&st=cse). On June 28, 1969, a police raid erupted into violence

to the outcry against discrimination.<sup>38</sup> The gay rights movement in the United States was born.<sup>39</sup>

Over the next twenty years, gay rights activism spread across the United States as well as around the world.<sup>40</sup> However, prejudice and discrimination remained, especially in the military, where homosexuals were still banned from joining the service. In response to the shift in public opinion toward acceptance of homosexuality and motivated by the outrage following the widely-publicized murder of Petty Officer Allen Schindler at the hands of his fellow comrades in an anti-gay hate crime,<sup>41</sup> Bill Clinton declared that the ban on homosexuals from the military would end with his presidency.<sup>42</sup> Unfortunately, President Clinton's ultimate legislation, at best, resulted in a compromise for homosexuals desiring to fight for their country, and, at worst, merely perpetuated the ban on gays in the military.

In 1994, after holding hearings before the Senate Committee on Armed Services to determine if a change in the military's homosexuality policy was necessary, Congress enacted the first statutory ban on homosexuality in the military in what became known as the "Don't Ask, Don't Tell" policy.<sup>43</sup> Rather than regulating homosexual status, this policy purported to regulate homosexual conduct and behavior by

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as bar customers fought back against police harassment. Dayo Adiatu, *Stonewall Riots: The Beginning of the LGBT Movement*, THE LEADERSHIP CONFERENCE (June 22, 2009), <http://www.civilrights.org/archives/2009/06/449-stonewall.html>. Over one thousand protestors held demonstrations in the days following the initial riot, and the event sparked discussions of gay rights throughout New York City. *Id.* The first gay pride parades were held in Chicago, San Francisco, Los Angeles, and New York one year later to mark the anniversary of the raids on Stonewall. *Id.* These parades have expanded to many major cities throughout the U.S. and continue to be held in June to commemorate the Stonewall riots. *See id.*

38. *See* Hatheway, *supra* note 21, at 444.

39. *See* Adiatu, *supra* note 37.

40. *See* A.J. Mahari, *Gay Pride Grows Stronger with Time*, RECORD, June 15, 2000, at A11.

41. *See* Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 411 (1994). Petty Officer Schindler had recently come out to his commanding officer, and word of his homosexuality quickly spread throughout the ship's crew. *Id.* Two of Schindler's shipmates followed him into the bathroom and brutally beat him to death such that his body was only identifiable through tattoos on his arms. *Id.* at 411-12. Schindler was savagely punched and stomped, resulting in fatal injuries to his skull, neck, lungs, liver, face, penis, and ribs. *Id.*

42. Alexander, *supra* note 9, at 408.

43. 10 U.S.C. § 654(b) (2006). *See generally* Policy Concerning Homosexuality in the Armed Forces: Hearing on S. 1298 Before the S. Comm. on Armed Servs., 103d Cong. 103-845 (1993) [hereinafter *Hearing on S. 1298*] (the nine hearings the Committee conducted were compiled and published in this single volume which consists of testimony from members of the military, Department of Defense, and experts in topics including law, sociology, and military affairs).

prohibiting homosexual acts,<sup>44</sup> statements made by a service member indicating homosexuality or bisexuality,<sup>45</sup> and marriage between a service member and a person of the same biological sex.<sup>46</sup> Violations of this policy required separation from the armed forces.<sup>47</sup> This policy was intended as a compromise that would lift the ban on gays in the military by allowing homosexual Americans to join the armed forces as long as they did not reveal their sexual orientation to anyone.<sup>48</sup> In return for their silence as to their true sexual identity, gay service members and recruits could no longer be asked directly about their sexual orientation, except under special circumstances.<sup>49</sup>

The DADT policy was rooted in Congress's fifteen "findings" culminating from the testimony during the hearings before the Senate Committee on Armed Services.<sup>50</sup> Notably, Congress found that there is no constitutional right to serve in the military,<sup>51</sup> and that military life is fundamentally different from civilian life.<sup>52</sup> This view upholds the military's longstanding belief in the uniqueness of the armed forces, and therefore ignores any societal changes in public opinion that would urge for a change in the military's policy on homosexuality.<sup>53</sup> Any argument relying on employment discrimination laws protecting sexual orientation in the workplace in any other labor force is fruitless as these laws are

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44. *See id.* § 654(b)(1). This section also contained an escape clause under which an individual found to have engaged in a homosexual act could avoid discharge and remain with the military if he or she could overcome the presumption of homosexuality through a showing of five elements: that the act was uncustomary behavior, the act was unlikely to recur, the act was not accomplished by force, the member's presence in the military was consistent with discipline, order, and morale, and the member did not have a propensity to engage in homosexual acts. *See id.*

45. *Id.* § 654(b)(2). This section contained an exception in which a service member could avoid violating the statute if the individual could demonstrate that he or she did not engage in, or have a propensity to engage in, homosexual acts. *See id.*

46. *Id.* § 654(b)(3).

47. *Id.* § 654(b).

48. *See Alexander, supra* note 9, at 413. This was the "Don't Tell" aspect of the legislation. *Id.*

49. *See id.* at 412-13. This was the "Don't Ask" portion of the law. *Id.* An example of a special circumstance in which commanders or investigators could ask about a service member's sexual orientation was an inquiry to affirm credible information about specific incidents of homosexual conduct. *See id.*

50. *See* § 654(a)(1)-(15).

51. *Id.* § 654(a)(2).

52. *Id.* § 654(a)(8) (stating that the "extraordinary responsibilities" and "unique conditions" of military service require the armed forces to exist as a "specialized society" regulated by its "own laws, rules, customs, and traditions . . . that would not be acceptable in civilian society").

53. *See* S. REP. NO. 103-112, at 272-74, 286-87 (1993). Military service has been described as "a unique calling in which the rights of individuals are subordinated to the needs of national defense." *Id.* at 272.



inapplicable to the military.<sup>54</sup>

Military service is considered “more than a job” and is distinguished from “an everyday job in an ordinary workplace” because service members not only work with homosexual individuals but are forced to live with them as well.<sup>55</sup> A typical worker in a nine-to-five job might have a “casual encounter” with homosexual coworkers, but a member of the military must share confined living spaces with a homosexual comrade, including sleeping quarters, bathrooms, and shower facilities.<sup>56</sup> These concerns over privacy served as the foundation for the government’s argument that known homosexuality threatens unit cohesion, or the “bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the . . . individual unit members.”<sup>57</sup> Though the unit cohesion rationale differed from the previous reasoning behind the ban on gays in the military, the underlying assumption that fellow comrades would react negatively to the presence of homosexuals in their units permeated both arguments.

Because service members could not seek recourse under employment discrimination laws and an attempt to convince Congress to repeal the statute would be an uphill battle, service members discharged under DADT turned to the courts in hope of finding an alternative avenue of relief. However, for years, constitutional arguments challenging the policy proved equally unsuccessful at instigating change.

### III. FAILED CHALLENGES TO DADT AND ADDITIONAL SETBACKS TO GAY RIGHTS IN THE MILITARY

The various constitutional challenges to the military’s policies banning openly gay service members from the armed forces have alleged violations of due process, free speech, establishment of religion, and equal protection. Additional arguments have been made against the sodomy laws listed in Article 125 of the UCMJ and the Solomon Amendment implemented under section 983 of the United States Code.<sup>58</sup>

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54. See *id.* at 286-87. As of 2009, twenty-four states have policies banning employment discrimination based on sexual orientation. Matthew Barker, Note, *Employment Law – Antidiscrimination – Heading Toward Federal Protection for Sexual Orientation Discrimination*, 32 U. ARK. LITTLE ROCK L. REV. 111, 113 n.13 (2009).

55. See S. REP. NO. 103-112, at 272-73.

56. See *Hearing on S. 1298*, *supra* note 43, at 762.

57. See § 654(a)(7).

58. See 10 U.S.C. § 983. In response to the American Association of Law Schools (“AALS”) directive barring accredited schools from hosting on-campus recruitment by employers that

Only the First Amendment's Free Speech Clause and the Fifth Amendment's Due Process Clause have resulted in successful lawsuits against the military's DADT policy.<sup>59</sup>

#### A. Early Constitutional Challenges to the Ban on Gays in the Military

The first major decision upholding the constitutionality of the military's outright ban on gay service members came in *Beller v. Middendorf*.<sup>60</sup> After being discharged under the Navy's regulations barring homosexuals from active duty,<sup>61</sup> three former service members brought suit in federal court challenging the policy on grounds that it violated procedural and substantive due process under the Fifth and Fourteenth Amendments and equal protection under the Fourteenth Amendment.<sup>62</sup>

The test for a procedural due process violation is whether the service member was deprived of an interest in property or liberty.<sup>63</sup> The court found there was not a deprivation of a property interest in this case because the service members had no reasonable expectation of continued employment once it was determined that they were gay.<sup>64</sup> The Navy's regulations clearly required the dismissal of gay service members, and

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discriminate based on race, religion, sex, or sexual orientation, Congress enacted section 983 (known as the Solomon Amendment) to ensure that military recruiters could seek students for its Judge Advocates General Corps, the military's law firm, and ROTC programs. See Gamble, *supra* note 6, at 441. The statute authorizes the Secretary of Defense to withhold federal funds (including funds from the Department of Defense and Department of Education) to any higher education institution denying military recruitment on campus. 10 U.S.C. § 983(a)-(b).

59. See Log Cabin Republicans v. United States, No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612, at \*120 (C.D. Cal. Sept. 9, 2010).

60. 632 F.2d 788 (9th Cir. 1980). This case remained good law and was cited in countless decisions as the basis for the constitutionality of the military's ban on gays until being overruled by *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). In *Witt*, the Ninth Circuit found that DADT advanced an important government interest in military readiness, but remanded to the district court on the issue of whether the intrusion into the individual's rights significantly furthered that interest. See *Witt*, 527 F.3d at 821-22. On remand, the district court held that the plaintiff's discharge did not significantly further the government's interest in military readiness and ordered the plaintiff reinstated to her position in the Air Force. *Witt v. Dep't of the Air Force*, 739 F. Supp. 2d 1308, 1317 (W.D. Wash. 2010).

61. *Beller*, 632 F.2d at 792. The Navy's policy stated: "Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization . . . [and] are security and reliability risks who discredit themselves and the naval service. . . . Their prompt separation is essential." *Id.* at 803. The policy also defined a homosexual act as "bodily contact with a person of the same sex with the intent of obtaining or giving sexual gratification." *Id.* at 802 n.9.

62. See *id.* at 801 & n.8.

63. *Id.* at 805 (citing Bd. of Regents v. Roth, 408 U.S. 564 (1972)).

64. See *Beller*, 632 F.2d at 805.

the Navy did not consider any additional factors in its decision to institute discharges on this basis.<sup>65</sup> The court also ruled that the service members were not deprived of their liberty interests because they not only admitted to being gay, but also had an opportunity to present evidence to the Secretary of Defense in a hearing to determine if the Secretary would exercise discretion to retain them despite their homosexuality.<sup>66</sup> The court further stated the “mere fact of discharge from a government position does not deprive a person of a liberty interest.”<sup>67</sup>

When considering a substantive due process claim, the court utilizes a case-by-case balancing approach in which it weighs the nature and degree of the individual interest infringed, the government interest, and the availability of alternatives by which the government entity can achieve its goals.<sup>68</sup> The court may also evaluate whether the regulation bears a “rational relation to a legitimate government interest.”<sup>69</sup> In this case, the court determined that the regulation banning homosexuals from the military furthered an important government interest in maintaining order and discipline in the military and that no alternative means of achieving these goals were available.<sup>70</sup>

The court in *Beller* relied on the nature of the Navy as an employer, noting concerns about tension between homosexuals and heterosexuals while working together in close quarters, as well as possible hindrances to recruiting, should potential service members disrespect or distrust their superiors by questioning their sexuality.<sup>71</sup> Notably, the court explained that although an individual “does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces.”<sup>72</sup> The court

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65. *Id.*

66. *See id.* at 806 (relying on the rationale of *Codd v. Velger*, 429 U.S. 624 (1977)). The court also hinted that it might have found a deprivation of a liberty interest had the service members been *falsely* determined to be homosexual. *See Beller*, 632 F.2d at 806.

67. *Beller*, 632 F.2d at 806.

68. *See id.* at 807.

69. *Id.* at 808.

70. *See id.* at 812.

71. *Id.* at 811 & n.22.

72. *Id.* at 810. The court took time to explain its limited role in determining the constitutionality of a military regulation. The court’s inquiry was restricted to the narrow question of whether the Navy’s adoption of the policy was constitutionally permissible, rather than an evaluation of the policy on its merits. *Id.* at 792. Any determination that the policy was unwise or should be replaced was the responsibility of the political branches, not the court. *Id.* In fact, the court highlighted the distinction between a declaration that the policy was constitutional, and a

further assumed service members at that time had negative attitudes towards gays, “[d]espite the evidence that attitudes towards homosexual conduct have changed among some groups in society.”<sup>73</sup>

The *Beller* decision in 1980 came during the expansion of the gay rights movement in the United States.<sup>74</sup> Gay service members discharged under the existing ban on gays in the military began to seek support from the civilian movement.<sup>75</sup> The American Civil Liberties Union (“ACLU”), on behalf of a soldier discharged under the policy, led the first constitutional challenge to the military’s sodomy law.<sup>76</sup> The ACLU sought to overturn the statute on the ground that it was unconstitutional as applied to gay service members.<sup>77</sup> The ACLU’s two essential arguments were that the statute selectively prosecuted homosexual sodomy compared to heterosexual sodomy and that the statute violated the First Amendment’s Establishment Clause.<sup>78</sup>

The court dismissed the ACLU’s selective prosecution argument<sup>79</sup> after agreeing with the Secretary of the Army’s argument that the military is a “special community with the right to regulate the behavior of its members.”<sup>80</sup> The ACLU then argued that Article 125 failed to meet the following three-prong test used to evaluate laws challenged under the Establishment Clause: (1) the law must reflect a clearly legislative secular purpose; (2) the primary effect of the law cannot be to advance or inhibit religion; and (3) the law must avoid excessive government entanglement with religion.<sup>81</sup> The ACLU focused on the third prong and argued that the lack of evidence required to find a service member guilty of sodomy demonstrated that the statute was based more on religious practice than an actual injury to an important

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statement that the policy was a wise one: “The latter judgment is neither implicit in our decision nor within our province to make. . . . [W]e cannot under the guise of due process give our opinion on the fairness of every application of the military regulation.” *Id.* at 812. Furthermore, the Supreme Court has stated that “judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies . . . is challenged.” *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

73. *Beller*, 632 F.2d at 811.

74. See Mahari, *supra* note 40, at A11.

75. See Hatheway, *supra* note 21, at 445.

76. *Id.* at 443 (discussing *Hatheway v. Sec’y of the Army*, 641 F.2d 1376 (9th Cir. 1981)). Lt. Jay Hatheway filed a lawsuit against the military after he was fired for violating the sodomy laws of Article 125. See Hatheway, *supra* note 21, at 445.

77. Hatheway, *supra* note 21, at 445.

78. *Id.* at 445-46.

79. *Sec’y of the Army*, 641 F.2d at 1381-82.

80. See Hatheway, *supra* note 21, at 446.

81. *Id.* at 447 (citing *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973)).

government interest, therefore unconstitutionally entangling government and religion.<sup>82</sup> However, the court disagreed and deemed the military's sodomy statute constitutional after finding the statute reflected a secular purpose of maintaining the government's interest in a strong military force through the prevention of disruptive conduct.<sup>83</sup> The first constitutional challenge to Article 125 had failed.<sup>84</sup>

Considering that all prior constitutional challenges to the military's regulatory bans on gay service members and its sodomy statutes failed, it is not surprising that a constitutional attack on the Solomon Amendment was equally unsuccessful. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,<sup>85</sup> the Court found United States Code § 983 constitutional.<sup>86</sup> The plaintiff, an association of law schools and law faculties, argued that the statute authorized the loss of federal funds from schools denying military access to on-campus recruitment activities in violation of the schools' First Amendment rights of free speech and association.<sup>87</sup> From the plaintiff's perspective, it was forced to choose between exercising these First Amendment rights and receiving funding for school programs.<sup>88</sup>

However, the Court disagreed and ruled that the schools were neither limited in what they could say nor were they required to say anything under the statute.<sup>89</sup> In the Court's view, the statute regulated conduct, not speech.<sup>90</sup> The Court disagreed with the Third Circuit and found that the statute: (1) did not compel schools to speak a government message; (2) did not require schools to host or accommodate military speech; and (3) did not infringe on schools' rights to engage in

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82. See Hatheway, *supra* note 21, at 447. The prohibitions against sodomy originated in Judeo-Christian practices and were advocated solely by religious groups. *Id.*

83. *Sec'y of the Army*, 641 F.2d at 1384.

84. See Hatheway, *supra* note 21, at 452. A jury voted unanimously to find Lt. Hatheway guilty of sodomy in violation of Article 125 of the UCMJ. *Id.* Hatheway was sentenced to "dismissal under condition less than honorable for the good of the service." *Id.* He appealed his conviction in federal district court, which granted summary judgment to the Secretary of the Army. *Sec'y of the Army*, 641 F.2d at 1379. The 9th Circuit affirmed. *Id.* at 1384.

85. 547 U.S. 47 (2004).

86. See *id.* at 70. The Solomon Amendment requires higher education institutions to offer military recruiters the same access to students on campus as it does non-military employers in order to receive federal funding. See *id.* at 53. The statute explicitly carves out an exception to the AALS directive barring employers that engage in discrimination from recruiting on campus. See discussion *supra* note 58.

87. *Rumsfeld*, 547 U.S. at 53.

88. *Id.*

89. *Id.* at 60.

90. *Id.*

expressive conduct.<sup>91</sup> As a result, the Solomon Amendment remains yet another means of discrimination against gay service members.

*B. New Policy, Same Challenges, Same Results – The Constitutionality of DADT*

Many of the constitutional challenges to DADT were based on the same arguments as the attacks on the military's original ban on gay service members, the military's sodomy statute, and the Solomon Amendment.<sup>92</sup> The courts repeatedly rejected all arguments against DADT grounded in free speech, due process, and equal protection. For nearly twenty years, service members challenging the statute were faced with the same defeat as those that came before them. Time and again, the courts upheld the constitutionality of DADT on these various bases.

In *Cook v. Gates*,<sup>93</sup> the First Circuit rejected substantive due process challenges to DADT both facially and as applied, and ruled that the policy did not violate equal protection or free speech.<sup>94</sup> This case was only the second challenge to DADT to come before a federal circuit court of appeals following the Supreme Court's landmark decision *Lawrence v. Texas*,<sup>95</sup> in which the Court declared the criminalization of sodomy unconstitutional.<sup>96</sup> In order to reach its decision in *Cook*, the First Circuit analyzed *Lawrence* and its implications on due process considerations.<sup>97</sup>

In *Lawrence*, the Court broadly framed the right at issue as the right of adults to engage in private, consensual sexual intimacy rather than the

91. See *id.* at 60-68.

92. Compare *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (rejecting plaintiff's arguments that DADT violated substantive due process, equal protection, and free speech), with *Rumsfeld*, 547 U.S. at 54 (rejecting plaintiff's argument that the Solomon Amendment restricted free speech), and *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (rejecting plaintiff's arguments that the military's ban on gay service members violated due process and equal protection).

93. 528 F.3d 42 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009) (the Supreme Court never heard a case challenging DADT's constitutionality).

94. *Cook*, 528 F.3d at 60, 62, 65.

95. 539 U.S. 558 (2003). The statute at issue in *Lawrence* prohibited deviate sexual intercourse between individuals of the same sex. *Id.* at 563 (citing TEX. PENAL CODE ANN. § 21.06(a) (West 2003)). Deviate sexual intercourse was defined as "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object." *Lawrence*, 539 U.S. at 563.

96. See *id.* at 579. The first post-*Lawrence* challenge to DADT came in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). See discussion *supra* note 60.

97. See *Cook*, 528 F.3d at 48 (stating that "interpreting *Lawrence* is the critical first step in evaluating the plaintiffs' substantive due process claim").

more narrow “right . . . [of] homosexuals to engage in sodomy.”<sup>98</sup> This expansive framework allowed the Court to address the ban on sodomy as one affecting “private human conduct . . . in the most private of places, the home.”<sup>99</sup> Statutes prohibiting similar private conduct, such as the use of contraception and the choice to have an abortion, were also invalidated because those activities were “liberty interests,” and as such, were “specially protected” by the Due Process Clause.<sup>100</sup>

Though the First Circuit in *Cook* found the right to engage in consensual sexual intimacy in the home to be a protected liberty interest, it nevertheless held the homosexual conduct and statements at issue under DADT to be beyond the scope of the Court’s holding in *Lawrence*, thus undeserving of due process protection.<sup>101</sup> The court dismissed the plaintiffs’ facial challenge to DADT after narrowly interpreting *Lawrence* as only recognizing a protected liberty interest in consensual sexual activities conducted privately *in the home*.<sup>102</sup> The court found that DADT prohibited a different type of sexual activities: those coerced or conducted *in public*.<sup>103</sup> Because the sexual activities outlawed under DADT were implicitly excluded from the liberty interests protected under *Lawrence*, the statute was ruled constitutional on its face.<sup>104</sup>

Additionally, the *Cook* court declared DADT constitutional as applied to these plaintiffs.<sup>105</sup> In making its determination, the court looked to legislative records revealing Congress’s reasons for passing DADT.<sup>106</sup> The most important of these was the need to preserve the military’s effectiveness as a fighting force and therefore ensure national security.<sup>107</sup> The court found this to be “an exceedingly weighty” government interest that surpassed the government interest in outlawing

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98. *Lawrence*, 539 U.S. at 566-67.

99. *Id.* at 567.

100. *Cook*, 528 F.3d at 49 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

101. *See Cook*, 528 F.3d at 55-56.

102. *Id.* at 56.

103. *Id.*

104. *See id.* In order to demonstrate that a statute is facially unconstitutional under substantive due process, a plaintiff must establish that there is “no set of circumstances” in which the statute would be valid. *See id.* (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Because the sexual acts described in DADT fell outside the narrow protections of *Lawrence*, the plaintiff could not show that there was “no set of circumstances” in which the statute would be valid. *Cook*, 528 F.3d at 56.

105. *See Cook*, 528 F.3d at 60.

106. *Id.*

107. *See id.*

sodomy in *Lawrence*.<sup>108</sup> Because the need for military effectiveness superseded the personal interests of all members of the armed services, the court found DADT constitutional as applied to these plaintiffs.<sup>109</sup>

The court in *Cook* also rejected the plaintiffs' claims that their discharges under DADT violated their equal protection rights.<sup>110</sup> The court first distinguished equal protection rights from those of due process in that an equal protection argument is based specifically on the statute's disparate treatment of gay service members as compared to heterosexual service members, whereas due process addresses all citizens engaging in homosexual activities.<sup>111</sup> Because of this distinction, the court had to consider whether gay service members constituted a "suspect class" requiring heightened judicial scrutiny under equal protection analysis.<sup>112</sup> In making its determination, the court analyzed *Romer v. Evans*,<sup>113</sup> which invalidated a Colorado statute prohibiting the enactment of laws protecting individuals based on sexual orientation.<sup>114</sup> Though the Court in *Romer* found the state statute unconstitutional, the First Circuit refused to read *Romer* as establishing a new suspect class for homosexuals.<sup>115</sup>

Categorizing homosexuals as a non-suspect class, the court evaluated the plaintiffs' challenge to DADT using rational basis review.<sup>116</sup> Under this standard, a statute will be upheld as long as the "classification drawn by the statute is rationally related to a legitimate state interest."<sup>117</sup> On this point, the *Cook* court merely stated that Congress had a "non-animus" explanation for passing DADT, which the statute rationally served.<sup>118</sup> The court also cited the importance of judicial deference to the legislature in light of Congress's power to raise

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108. *Id.*

109. *See id.*

110. *Id.* at 62.

111. *Id.* at 60.

112. *See id.* at 61. The test for determining an equal protection violation varies depending on whether the plaintiff challenging the statute is a member of a "suspect class." *See id.* If so, the court must apply a heightened judicial scrutiny standard. *Id.* If the statute targets a non-suspect class, the statute is subject only to the lesser standard of rational basis review. *Id.*

113. 517 U.S. 620 (1996).

114. *Cook*, 528 F.3d at 61.

115. *Id.* The court cited the lack of Supreme Court guidance on the issue of homosexuals as a suspect class and followed the lead of other federal circuit courts of appeals. *See generally* Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250 (6th Cir. 2006); Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006); Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004) (rejecting arguments that *Romer* established homosexuals as a suspect class under equal protection analysis).

116. *See Cook*, 528 F.3d at 61-62.

117. *Id.* at 61 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).

118. *See Cook*, 528 F.3d at 62.



and support armies under the Constitution.<sup>119</sup>

In addition to the due process and equal protection challenges, the court in *Cook* also upheld DADT on free speech grounds.<sup>120</sup> The plaintiffs argued that the statute restricted the content of their speech because any statements indicating homosexuality could be used to discharge them under the policy.<sup>121</sup> Though the court agreed that a service member's statement regarding sexual orientation constituted speech and that First Amendment protections do apply to the military to some extent, it still found the statute constitutional because of the military's "compelling need to foster instinctive obedience, unity, [and] commitment," which often trumps individual interests.<sup>122</sup> The court again exercised deference to the legislature and recognized a difference in judiciary constitutional analysis when considering military regulations rather than civilian regulations.<sup>123</sup>

In upholding DADT on First Amendment grounds, the court reasoned that the purpose of the statute was to eliminate homosexual *conduct*, not speech.<sup>124</sup> In fact, the court explained the statute included speech as a basis for discharge only because statements of homosexuality highly correlated with homosexual *acts*.<sup>125</sup> The court also relied on Supreme Court precedent holding that speech could be used as evidence to establish elements of a claim or prove motive or intent without violating the First Amendment.<sup>126</sup> Because statements of homosexuality were used as *evidence* of propensity to engage in homosexual acts, no violation of the First Amendment occurred.<sup>127</sup> This was true despite any chilling effect on speech the statute may have had.<sup>128</sup>

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119. *Id.* at 57.

120. *Id.* at 63.

121. *See id.* at 62. The statute plaintiffs were referring to states that a member of the armed services shall be separated from the military if it is found that a "member has stated that he or she is a homosexual or bisexual, or words to that effect." 10 U.S.C. § 654(b)(2) (2006).

122. *Cook*, 528 F.3d at 62.

123. *Id.*

124. *Id.* at 63.

125. *Id.*

126. *See id.* (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)); *see also* *Thomasson v. Perry*, 80 F.3d 915, 931 (4th Cir. 1996) (specifically holding that the type of speech prohibited under DADT may be used as evidence to establish a basis for discharge from the military under the statute).

127. *Cook*, 528 F.3d at 64.

128. *See id.* at 65. A statute will be upheld against a First Amendment challenge as long as the speech prohibited under the statute is content-neutral, or "justified without reference to the content" of the speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Because DADT was justified on the basis of military effectiveness, the speech prohibited by the statute was not content-

The *Cook* decision has been cited by federal circuit courts of appeals as the foundation for the constitutionality of DADT. However, a recent case decided by the United States District Court for the Central District of California threatened the future of *Cook* and similar holdings of other federal circuit courts.<sup>129</sup> Without controlling precedent in its jurisdiction on the issue, the district court in *Log Cabin Republicans v. United States*<sup>130</sup> upheld challenges to the constitutionality of DADT for the first time.<sup>131</sup> The relevance of *Cook* and its sister courts' decisions and the future of gay service members in the military hung in the balance of the outcome of an appeal of the case to the Ninth Circuit.

#### IV. THE FIRST SUCCESSFUL CHALLENGE TO DADT – *LOG CABIN REPUBLICANS V. UNITED STATES*

After countless failed attempts to overturn DADT on constitutional grounds, a non-profit organization advocating for gay and lesbian rights against federal government policies that discriminate on the basis of sexual orientation became the first successful plaintiff in a suit challenging DADT.<sup>132</sup> Although the court dismissed the plaintiff's cause of action alleging a violation of the Equal Protection Clause of the Fourteenth Amendment, the court declared DADT unconstitutional on the grounds that it violated due process rights guaranteed under the Fifth Amendment as well as rights to freedom of speech under the First Amendment.<sup>133</sup>

##### A. *Same Constitutional Challenges, But Different Results – The Unconstitutionality of DADT*

Despite the repeated failures of constitutional challenges to DADT, the plaintiff in *Log Cabin Republicans* advanced arguments grounded in due process and free speech to challenge the statute on its face.<sup>134</sup>

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based, even if it had an effect on some speakers but not others. See *Cook*, 528 F.3d at 65.

129. See, e.g., *Able v. United States*, 155 F.3d 628, 631-36 (2d Cir. 1998) (holding DADT did not violate the Equal Protection Clause of the Fifth Amendment); *Richenberg v. Perry*, 97 F.3d 256, 260-62 (8th Cir. 1996) (upholding DADT on First Amendment grounds as well as equal protection grounds under the Fifth Amendment); *Thomasson*, 80 F.3d at 927-31 (holding DADT did not violate any constitutional provision).

130. No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612 (C.D. Cal. Sept. 9, 2010).

131. See *id.* at \*120.

132. See *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010).

133. See *id.*

134. *Id.* at 888.

However, rather than suffering the defeat common to DADT challengers, this plaintiff was the first to emerge victorious. Because of the decision's departure from years of precedent in other jurisdictions weighing in favor of constitutionality, a careful analysis of the court's reasoning is necessary to determine how these constitutional arguments came out differently than those argued in the past.

The plaintiff's first constitutional challenge to DADT was grounded in substantive due process, based on the privacy rights defined by the Court in *Lawrence* as "autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>135</sup> Looking back to *Cook v. Gates*, the First Circuit refused to measure that plaintiff's substantive due process claim against the heightened scrutiny standard required for statutes targeting members of a suspect class.<sup>136</sup> However, in *Witt v. Department of the Air Force*,<sup>137</sup> the Ninth Circuit found that DADT implicated the privacy rights identified in *Lawrence* and therefore had to be judged using the standard of heightened scrutiny, rather than rational basis review.<sup>138</sup> Because *Witt* was controlling law in the District Court for the Central District of California, the court in *Log Cabin Republicans* presumed the statute intruded on fundamental rights and applied the heightened scrutiny standard to the due process inquiry.<sup>139</sup> In order for DADT to survive a facial challenge under this test, it was the government's burden to show: (1) the statute advanced an important government interest; (2) the intrusion on individual rights significantly furthered that interest; and (3) the intrusion was necessary to further that interest.<sup>140</sup>

The court disposed of the first prong fairly easily. In *Witt*, the Ninth Circuit found that DADT advanced an important government interest because it involved management of the military, and the courts must exercise deference to the legislature in military affairs.<sup>141</sup> The court in *Log Cabin Republicans* accepted this finding<sup>142</sup> and moved on to

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135. See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Log Cabin Republicans*, 716 F. Supp. 2d at 911.

136. See *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (refusing to recognize homosexuals as a suspect class).

137. 527 F.3d 806 (9th Cir. 2008).

138. *Id.* at 813.

139. See *Log Cabin Republicans*, 716 F. Supp. 2d at 911. The court was not bound by the First Circuit's decision in *Cook* and found the court's logic in that case unpersuasive. See *id.* at 895.

140. See *Log Cabin Republicans v. United States*, No. CV 04-08425-VAP, 2010 U.S. Dist. 93612, at \*69 (C.D. Cal. Sept. 9, 2010).

141. See *Witt*, 527 F.3d at 821.

142. See *Log Cabin Republicans*, 2010 U.S. Dist. LEXIS 93612, at \*69.

determine the more difficult questions of whether the second and third elements of the test were satisfied.

On the second prong, the court found that the intrusion on individual rights under DADT did not significantly further the governmental interest in managing military effectiveness.<sup>143</sup> In making this determination, the court evaluated the defense's evidence, including the statute itself and its legislative history.<sup>144</sup> The defense presented various reports and testimony from individuals such as doctors and General Colin Powell.<sup>145</sup> However, the government merely cited these documents generally in support of its position against the due process challenge to DADT without pointing out its reliance on any specific text in the material.<sup>146</sup> The court found that these documents did not satisfy the government's burden of demonstrating that the statute's intrusion on service members' rights furthered the government's interest in managing military effectiveness.<sup>147</sup>

Although the burden was on the government to demonstrate the statute's constitutionality, the plaintiff presented extensive evidence to show that the statute's intrusion on service members' rights did not further the government's interest in military effectiveness and unit cohesion.<sup>148</sup> The plaintiff offered testimony from military sociologists, social psychologists, military historians, and experts in national security policy, in addition to the testimony of service members discharged under the statute.<sup>149</sup> This testimony was bolstered by statistics showing increases in discharges under the policy despite personnel shortages as

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143. *Id.* at \*70.

144. *See id.* at \*69-79.

145. *See id.* at \*71-79. The defense relied on the Crittenden Report prepared by the Navy in 1957, which detailed discipline procedures for homosexuals in the military. *See id.* at \*71-72. It also offered the PERSEREC Report, which surveyed legal trends in 1988, including views toward, and social treatment of, homosexuals. *Id.* at \*72-73. The government also presented the RAND Report of 1993, which discussed what was known about unit cohesion and military performance at that time. *Id.* at \*73-74.

146. *Id.* at \*69-71.

147. *Id.* at \*70. The court found that the Crittenden Report was silent on the governmental interests of military effectiveness and unit cohesion, therefore failing to support the defense's argument that the intrusion on individual rights furthered those governmental interests. *Id.* at \*72. The PERSEREC Report, though calling for empirical research on the issue of homosexuality and unit cohesion, contained no data on the subject. *Id.* at \*73. In fact, the report suggested that the military transition toward acceptance of homosexuals in the armed forces. *Id.* The RAND Report also failed to contain empirical evidence of the effect of homosexuals on unit cohesion and stated that the presence of homosexuals in the military might actually *decrease* negative feelings toward these individuals based on the theory that "familiarity breeds tolerance." *See id.* at \*74-75.

148. *Id.* at \*79-80.

149. *Id.* at \*80.

well as an inverse relationship of discharges during times of war.<sup>150</sup> The plaintiff also presented government data revealing discharges of service members with specialized skills critical to the defense of the nation.<sup>151</sup> Furthermore, the plaintiff offered evidence of the policy's harm to military recruitment through both its discouragement of qualified citizens from enlisting in the armed forces and the refusal of colleges to host Reserve Officer Training Corps (ROTC) programs under schools' employment nondiscrimination policies.<sup>152</sup> In light of this evidence, and the government's failure to overcome its burden of demonstrating that the statute's intrusion on service members' rights significantly furthered the government's interest in military effectiveness, the court found that DADT failed the second prong of the heightened scrutiny test.<sup>153</sup>

The court went a step further and found that the government also failed to overcome its burden of demonstrating that the intrusion on the rights of service members was *necessary* to further the government's interest in military effectiveness.<sup>154</sup> The government relied on General Colin Powell's testimony before the Senate Committee on Armed Services in 1993 to support its position that DADT was constitutional.<sup>155</sup> During that hearing, General Powell had stated his concern regarding the presence of homosexuals in the military based on the unique circumstances of military life.<sup>156</sup> He explained there is no escape from the military environment for long periods at a time, and service members are forced into constant close proximity through the sharing of bathroom and sleeping quarters.<sup>157</sup> However, the court discredited this argument

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150. *See id.* at \*80-82. According to a Government Accountability Office Report, over 13,000 service members had been discharged under DADT from 1993 through 2009. *Id.* at \*80-81. The report showed a steady increase in the number of service members discharged under the policy per year, with over 1,200 discharges in 2001, or nearly double the number of discharges in 1994 (about 600). *Id.* at \*81. The report also illustrated a sharp decline in discharges following the start of the war in Afghanistan (in 2002, the number of discharges dropped dramatically to 885). *Id.* at \*81-82. A witness for the plaintiff testified that these statistics demonstrated the military failed to enforce DADT during wartime because of the need for troops. *Id.* at \*82.

151. *Id.* at \*83 (stating that these skills included fluency in foreign languages, counterterrorism training, military intelligence, and medical training). The resulting lack of Arabic interpreters and doctors available for care of wounded soldiers had already impacted the wars in the Middle East. *See id.* at \*83-84.

152. *Id.* at \*86. Testimony from a witness for the plaintiff added that millions of dollars were spent recruiting and training new service members to replace those discharged under DADT. *Id.* at \*87.

153. *See id.* at \*92.

154. *See id.*

155. *Id.* at \*94.

156. *Id.* (citing *Hearing on S. 1298*, *supra* note 43, at 709).

157. *Log Cabin Republicans*, 2010 U.S. Dist. LEXIS 93612, at \*94 (citing *Hearing on S. 1298*,

by accepting the plaintiff's uncontroverted evidence that General Powell's opinions of DADT had shifted since his testimony in 1993.<sup>158</sup>

Additionally, the plaintiff presented plentiful evidence that the intrusion of DADT was unnecessary to further the government's interest in military effectiveness and unit cohesion. The court looked to the testimony of various service members discharged under the policy, which recounted experiences in dormitory-like living situations while deployed abroad, and found that none of these gay service members encountered any problems with fellow comrades sharing the same living spaces.<sup>159</sup>

Furthermore, the statistics illustrating the sharp decline in discharges after the start of the war in Afghanistan and the delays in discharging gay service members confirmed the court's decision that DADT was not necessary to further the government's interest in military effectiveness and unit cohesion.<sup>160</sup> The court reasoned that if military effectiveness was actually the government's purpose, discharges would not only be higher in times of war, but also prompt upon discovery of a service member's homosexuality.<sup>161</sup> The failure to discharge homosexuals at all and the delays in processing discharges demonstrated to the court that DADT was unnecessary to further the government's interest in military effectiveness, and therefore failed the third prong of the heightened scrutiny test.<sup>162</sup> Although the court had agreed that DADT satisfied the first prong by advancing an important government interest, the statute's failure to meet the second and third prongs rendered it unconstitutional on grounds of substantive due process.<sup>163</sup>

The plaintiff's second challenge to DADT was based on the Free Speech Clause of the First Amendment.<sup>164</sup> Constitutional challenges based on free speech rights ordinarily face strict scrutiny given the amendment's goal of promoting the free flow of ideas and beliefs such that individuals may decide for themselves which of these to accept and follow.<sup>165</sup> A statute will only be struck down as stifling these rights to

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*supra* note 43, at 762).

158. *Log Cabin Republicans*, 2010 U.S. Dist. LEXIS 93612, at \*94-95. In 2010, General Powell admitted that the policy must be reviewed. *Id.*

159. *See id.* at \*95-97 (testimony of discharged service members Michael Almy, John Nicholson, and Stephen Vossler).

160. *See id.* at \*101-02.

161. *Id.*

162. *See id.* at \*102.

163. *Id.* at \*104-05.

164. *Id.* at \*105.

165. *See id.* at \*105-06 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994)).

free speech if it results in governmental control over the content of a message conveyed by a private party.<sup>166</sup> In order to be judged content-based and therefore unconstitutional, a plaintiff must demonstrate that the statute “distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed.”<sup>167</sup> However, this strict scrutiny test is not used to evaluate regulations of speech in the military context.<sup>168</sup> Courts adopt a deferential view toward First Amendment challenges to speech in the military, and a statute will be upheld as long as its restriction on speech is “no more than is reasonably necessary to protect the substantial government interest.”<sup>169</sup>

The court determined DADT failed to meet this lesser standard applied to alleged violations of free speech rights in the military context.<sup>170</sup> The court found the statute’s reach “sweeping” because it encompassed a vast range of speech, making it broader than necessary to accomplish military effectiveness and unit cohesion.<sup>171</sup> Under DADT, service members had been discharged based on incriminating private e-mails, greeting cards, and letters, in addition to outright statements regarding homosexuality.<sup>172</sup>

The court went a step further and found the statute was not only unnecessary to protect the government’s interest in unit cohesion, but it actually undermined the very goals it proposed to protect.<sup>173</sup> The testimony of discharged service members demonstrated that the statute’s restrictions on speech regarding homosexuality limited discussions of the members’ personal lives with their comrades.<sup>174</sup> This inability to communicate personal information in social situations created a “distance” between these members and the rest of their units and even bred distrust among them.<sup>175</sup> Further undermining unit cohesion was the chilling effect the statute had on speech by service members who refused to come forward with information regarding violations of the military code of conduct out of fear of investigation into their own sexual

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166. *Turner Broad. Sys.*, 512 U.S. at 641-42.

167. *Id.* at 643.

168. *See* *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). The military is not required to tolerate speech to the extent that speech would be tolerated in civilian society because of the military’s need for unity, obedience, and commitment. *Id.*

169. *Log Cabin Republicans*, 2010 U.S. Dist. LEXIS 93612, at \*114 (citing *Brown v. Glines*, 444 U.S. 348, 348, 355 (1980)).

170. *Log Cabin Republicans*, 2010 U.S. Dist. LEXIS 93612, at \*115-16.

171. *Id.* at \*115.

172. *Id.* at \*118-19.

173. *Id.* at \*117.

174. *Id.* at \*116.

175. *Id.*

orientation.<sup>176</sup> The court held that these effects of the statute demonstrated it restricted speech more than reasonably necessary to protect the government's interest in military effectiveness, rendering the statute unconstitutional on First Amendment grounds.<sup>177</sup>

Although the court needed only evaluate DADT under the lesser standard for speech in the military, it nevertheless measured the statute using strict scrutiny as well.<sup>178</sup> The court determined the statute was content-based because subsection (b)(2) of the statute did not prohibit *all* conversations regarding sexual orientation; rather, it permitted heterosexual service members to discuss their sexuality while homosexuals could not.<sup>179</sup> DADT was therefore facially discriminatory in the content of the speech it regulated and thus unconstitutional under the strict scrutiny standard.<sup>180</sup>

The district court's ruling that DADT was unconstitutional because it violated both substantive due process and free speech rights was undoubtedly controversial as this was the first time DADT had been successfully challenged in any court.<sup>181</sup> Further contributing to the controversy, the court also issued a permanent injunction to halt implementation of the policy in light of its decision.<sup>182</sup> Such an injunction required immediate changes to military operations. The government appealed both the ruling of the statute's unconstitutionality and the issuance of the permanent injunction to the Court of Appeals for the Ninth Circuit.<sup>183</sup>

### *B. Subsequent Judicial Proceedings Following the District Court's Decision in Log Cabin Republicans*

After finding DADT unconstitutional, District Court Judge Virginia

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176. *Id.* at \*117-18. Service members that experienced harassment, hazing, taunts, or homophobic slurs often did not report such abuse because their sexual orientation could have been revealed as a result of an investigation into the situation. *Id.*

177. *See id.* at \*119-120.

178. *See id.* at \*112-13.

179. *Id.* at \*112. Section 654(b)(2) required discharge of service members that "stated that he or she is a homosexual or bisexual, or words to that effect." 10 U.S.C. § 654(b)(2) (2006).

180. *Log Cabin Republicans*, 2010 U.S. Dist. LEXIS 93612, at \*112.

181. *See Log Cabin Republicans v. United States*, No. 10-56634, 2010 U.S. App. LEXIS 22655, at \*4-5 (9th Cir. Nov. 1, 2010) (discussing failed constitutional challenges to DADT in the First, Second, Fourth, and Eighth Circuit Courts of Appeal).

182. *See Log Cabin Republicans*, 2010 U.S. Dist. LEXIS 93612, at \*120.

183. *See Brief of Defendant-Appellant at 6, Log Cabin Republicans v. United States*, No. 10-56634 (9th Cir. Oct. 20, 2010), 2010 U.S. 9th Cir. Motions LEXIS 32 at \*11 [hereinafter *Brief of Defendant-Appellant*].



Phillips issued a permanent injunction barring the statute's enforcement.<sup>184</sup> The injunction required immediate worldwide effect and mandated that the military halt all implementation of the policy.<sup>185</sup> The potential consequences of such an abrupt change to a policy of this magnitude were evident. The government quickly filed an emergency motion for administrative stay of the district court's order.<sup>186</sup> On October 20, 2010, the Ninth Circuit granted a temporary stay to provide itself time to fully consider the issues presented in the case.<sup>187</sup> Twelve days later, the Ninth Circuit granted the government's motion to stay the injunction pending its resolution of the case on the merits.<sup>188</sup>

The Ninth Circuit agreed with the government's argument that an immediate change to the implementation of DADT would seriously disrupt the Administration's<sup>189</sup> ongoing efforts to repeal the policy in an orderly fashion.<sup>190</sup> The government argued that this disruption would result in "immediate harm" and "irreparable injury" to the military.<sup>191</sup> Rather than enforce an instantaneous ban on the implementation of DADT, the government urged the court to recognize that new military policies, training, and guidance would be needed to properly effectuate any changes to the DADT policy.<sup>192</sup> An injunction would not provide a sufficient time frame in which to accomplish these goals appropriately.<sup>193</sup>

In granting the government's motion to stay pending appeal, the Ninth Circuit recognized that this case raised "serious legal questions."<sup>194</sup> The court also stated three reasons persuading it to

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184. *Log Cabin Republicans*, 2010 U.S. Dist. LEXIS 93612, at \*120.

185. *Log Cabin Republicans*, 2010 U.S. App. LEXIS 22655, at \*2.

186. Brief of Defendant-Appellant, *supra* note 183, at \*2 (arguing the injunction "preclude[d] the administration of an Act of Congress" and interfered with the military's efforts to implement repeal in an orderly manner).

187. *Log Cabin Republicans v. United States*, No. 10-56634, 2010 U.S. App. LEXIS 21651, at \*1 (9th Cir. Oct. 20, 2010).

188. *Log Cabin Republicans*, 2010 U.S. App. LEXIS 22655, at \*1.

189. The Administration included President Barack Obama, former Secretary of Defense Robert Gates, and former Chairman of the Joint Chiefs of Staff Mike Mullen. *See id.*

190. *See id.* at \*6. The government's motion to stay the district court's order pending appeal placed it in a unique position in which it both supported repeal of DADT and argued for the policy's continued enforcement. *See id.* at \*1-2; *see also Appeals Court Delays Injunction Against 'Don't Ask, Don't Tell,' CNN U.S.* (Oct. 21, 2010, 6:31 PM), <http://www.cnn.com/2010/US/10/20/dont.ask.dont.tell/index.html?hpt=T2> (explaining that the government's motion placed it in a "very bizarre position . . . of [its] own making").

191. *Log Cabin Republicans*, 2010 U.S. App. LEXIS 22655, at \*2.

192. *Id.*

193. *Id.*

194. *Id.* at \*3 (quoting *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d

maintain the status quo during the appeals process. The court first found that Acts of Congress are presumptively constitutional, a finding weighing heavily in favor of the government when balancing hardships in consideration of a stay request.<sup>195</sup> Second, the Ninth Circuit reiterated the court's deference to Congress when faced with legislation enacted pursuant to Congress's authority to raise and support armies.<sup>196</sup> Finally, the court expressed concern that the rationale and outcome of *Log Cabin Republicans* directly conflicted with the rulings of the First, Second, Fourth, and Eighth Circuit Courts of Appeal on the issue of DADT's constitutionality.<sup>197</sup> Taking these considerations into account, as well as the public interest in an orderly transition to a new, non-discriminatory policy, the Ninth Circuit granted a stay of the district court's injunction.<sup>198</sup>

The plaintiff appealed the stay to the Supreme Court in a motion to vacate the Ninth Circuit's order.<sup>199</sup> Ruling only on the narrow enforcement issue regarding the injunction, the Supreme Court denied the plaintiff's motion, thereby lifting the injunction for the duration of the appeals process.<sup>200</sup> The military was therefore permitted to continue enforcing DADT until a final resolution was issued on the case.<sup>201</sup>

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1112, 1115 (9th Cir. 2008)).

195. *Log Cabin Republicans*, 2010 U.S. App. LEXIS 22655, at \*3.

196. *Id.* at \*3-4 (citing *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 58 (2006)).

197. *Log Cabin Republicans*, 2010 U.S. App. LEXIS 22655, at \*4-5 (citing *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008); *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996)). For a discussion of these cases, see *supra* note 129.

198. *Log Cabin Republicans*, 2010 U.S. App. LEXIS 22655, at \*6. Circuit Judge Fletcher dissented and would have granted a partial stay of the injunction in which the government would not have been required to change its personnel policies or recruiting practices but would be enjoined from discharging current service members under DADT. *Id.* at \*7-8 (Fletcher, J., dissenting).

199. See *Log Cabin Republicans v. United States*, 131 S. Ct. 589 (2010).

200. See *id.* Once the Ninth Circuit rendered a decision on the merits, the losing party could then have appealed to the Supreme Court, which would have discretion to hear the constitutional issues presented by the case.

201. See *Don't Ask, Don't Tell*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/d/dont\\_ask\\_dont\\_tell/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/d/dont_ask_dont_tell/index.html) (last updated Sept. 20, 2011) [hereinafter '*Don't Ask, Don't Tell*']. As pointed out in the plaintiff's argument against the stay of the district court's injunction, the military faced the practical problem of enforcing DADT prior to the injunction, being banned from enforcing DADT once the injunction was issued, then again enforcing DADT upon the grant of the stay of the injunction. See Brief of Plaintiff-Appellee at 2-3, *Log Cabin Republicans v. United States*, No. 10-56634 (9th Cir. Nov. 1, 2010), 2010 U.S. 9th Cir. Motions LEXIS 33 at \*4. In the weeks between the issuance of the injunction and the grant of the stay, the Pentagon had advised military recruiters that openly gay applicants could be accepted as candidates. See Adam Levine, *Military Recruiters Told They Can Accept Openly Gay Applicants*, CNN U.S. (Oct. 20, 2010, 9:55 AM),

However, in response to the growing legal uncertainty surrounding DADT, former Secretary of Defense Robert Gates raised the standards under which gay service members could be discharged based on the policy.<sup>202</sup> According to those standards, a service member could only be discharged under DADT after the appropriate Secretary of the Army, Navy, or Air Force consulted with the Pentagon's legal counsel and undersecretary for personnel, and a group decision was then reached on the proper course of action for that service member.<sup>203</sup> Since that change was made on October 21, 2010, no service members were discharged under the policy, despite former Secretary Gates's denial that the shift in policy amounted to a moratorium on DADT.<sup>204</sup>

As the case awaited resolution in the courts, the fate of DADT was also debated in Congress. A bill to repeal the statute had passed in the House of Representatives, but was struck down in the Senate just two weeks after the district court's decision in *Log Cabin Republicans*.<sup>205</sup> However, the fear that the judiciary would declare the statute unconstitutional was enough to prompt Congress to reconsider the repeal bill in a last-ditch effort to keep the decision out of the courts' hands.

#### V. LOG CABIN REPUBLICANS AS A CATALYST FOR CONGRESSIONAL REPEAL OF DADT

In May 2010, the House of Representatives passed a bill to repeal DADT by a vote of 234-194.<sup>206</sup> However, the bill never made it through the Senate, where it was struck down by a vote of 56-43 in a Republican-led filibuster on September 21, 2010.<sup>207</sup> Though still hopeful, opponents of DADT faced the reality that legislative change

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<http://www.cnn.com/2010/US/10/19/pentagon.gays.recruiting/index.html?hpt=T2>. In upholding the stay, the Supreme Court was viewed as merely maintaining the status quo during the pending appeal, but exactly what the status quo was at that time is unclear. See *id.* (describing the "interim period of uncertainty" as the appeals were pending). The undesirable practical implications of judicial decisions on military operations became the catalyst for Congress's eventual repeal of DADT.

202. See Elisabeth Bumiller, *Gates 'Don't Ask' Memo Limits Discharge Policy*, N.Y. TIMES, Oct. 21, 2010, [http://www.nytimes.com/2010/10/22/us/22military.html?\\_r=1](http://www.nytimes.com/2010/10/22/us/22military.html?_r=1).

203. *Id.*

204. See *id.*; Bill Mears, *Supreme Court Keeps Gays in the Military Policy in Place During Appeal*, CNN U.S. (Nov. 12, 2010, 7:06 PM), <http://www.cnn.com/2010/US/11/12/scotus.gays.military/index.html?hpt=Sbin>.

205. See 156 CONG. REC. S7246 (daily ed. Sept. 21, 2010).

206. 156 CONG. REC. H4062-63 (daily ed. May 27, 2010).

207. 156 CONG. REC. S7246 (daily ed. Sept. 21, 2010) ("On this vote, the yeas are 56, the nays are 43. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected").

might still be some time away. Fortunately, legislative action is not the only means by which a federal statute may be overturned.<sup>208</sup> While waiting for Congress to repeal DADT, opponents of the policy turned to the courts in the wake of *Log Cabin Republicans*, where the appeals in the case were taking place contemporaneously with the debates in Congress.<sup>209</sup> Many hoped the courts would declare the policy unconstitutional and finally put an end to employment discrimination based on sexual orientation in the military. However, the courts never had to make a final determination of DADT's constitutionality because Congress ultimately repealed the statute on December 18, 2010,<sup>210</sup> rendering all proceedings in *Log Cabin Republicans* moot.<sup>211</sup>

Although the appeals in *Log Cabin Republicans* did not take place, the significance of this case is far from negligible. When the bill to repeal DADT failed to clear the Senate in September 2010, the likelihood that Congress would overturn the statute in the near future seemed grim. However, just three months later, the Senate again considered the proposed repeal and this time passed it by a vote of 65-31.<sup>212</sup> The arguments put forth in these debates paralleled those repeatedly made on the congressional floor on previous occasions in which repeal of DADT was addressed and rejected.<sup>213</sup> During this debate though, a new issue was raised on which both supporters and opponents of the repeal agreed. In the time between the Senate's two recent votes on DADT, the judicial proceedings in *Log Cabin Republicans* threatened the future of the policy.<sup>214</sup> The risk that the courts might effectively take the decision out of Congress's hands was enough to push the legislature into action after years of refusal to repeal the law.

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208. See generally *Marbury v. Madison*, 5 U.S. 137, 178-80 (1803) (establishing the Supreme Court's power to void a federal statute on the grounds that it is unconstitutional).

209. See Mears, *supra* note 204.

210. See 156 CONG. REC. S10684 (daily ed. Dec. 18, 2010).

211. See *Log Cabin Republicans v. United States*, Nos. 10-56634, 10-56813, 2011 U.S. App. LEXIS 16134, at \*3-5 (9th Cir. July 6, 2011) (lifting the stay of the injunction barring the government from discharging service members under DADT, noting a change in circumstances); *Log Cabin Republicans v. United States*, Nos. 10-56634, 10-56813, 2011 U.S. App. LEXIS 16310, at \*3-5 (9th Cir. July 22, 2011) (upholding its July 6, 2011 order upon the government's emergency motion for reconsideration in so far as it enjoined the government from enforcing DADT).

212. See 156 CONG. REC. S10684 (daily ed. Dec. 18, 2010).

213. Compare 156 CONG. REC. S10661 (daily ed. Dec. 18, 2010) (statement of Sen. John McCain) (explaining that interfering with unit cohesion will cause great damage and result in harm to battle effectiveness), with *Hearing on S. 1298*, *supra* note 43, at 710 (statement of Gen. Carl Mundy) (arguing the importance of unit cohesion).

214. See 'Don't Ask, Don't Tell,' *supra* note 201.

In fact, just weeks before the Senate's historic vote in December 2010, former Secretary Gates issued a warning to the members of Congress to repeal DADT or face changes to the policy imposed by "judicial fiat."<sup>215</sup> In his professional opinion, the immediate changes a court ruling would impose on the policy would be "far more disruptive and hazardous to battlefield readiness" than congressional repeal.<sup>216</sup> A legislative decision to overturn the statute would bide the military time to adjust its policies, personnel manuals, and recruitment practices and appropriately transition to a new policy of non-discrimination.<sup>217</sup> His recommendation followed the release of a Pentagon report<sup>218</sup> that determined repeal posed little risk to military readiness, effectiveness, and unit cohesion,<sup>219</sup> a finding that former Chairman of the Joint Chiefs of Staff Admiral Mike Mullen fully endorsed.<sup>220</sup> Backed by support from former Secretary Gates and former Admiral Mullen, as well as President Barack Obama, the stage was set for repeal of this controversial policy.<sup>221</sup>

In previous debates, the repeal was a provision in the annual National Defense Authorization Act, which set the budget for the Department of Defense in the upcoming fiscal year.<sup>222</sup> This Act, which traditionally passed with bipartisan support, failed to pass for the first time in forty-eight years.<sup>223</sup> The DADT repeal provision was blamed for this unusual failure.<sup>224</sup> When the bill to repeal DADT was raised before Congress in a lame duck session in December 2010, it was stripped from

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215. Liz Halloran, *Gates to Senate: End 'Don't Ask' Before Courts Do*, NPR (Nov. 30, 2010), <http://www.npr.org/2010/11/30/131697322/pentagon-study-dismisses-risk-of-openly-gay-troops>.

216. *Id.*

217. See Crosby Burns, *Don't Delay Don't Ask, Don't Tell Repeal*, CENTER FOR AM. PROGRESS (June 8, 2011), [http://www.americanprogress.org/issues/2011/06/don't\\_delay\\_dadt.html](http://www.americanprogress.org/issues/2011/06/don't_delay_dadt.html).

218. See DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" I (2010), *available at* <http://www.npr.org/documents/2010/nov/dadt.pdf> [hereinafter DOD REPORT]. The Report was conducted using surveys of over 115,000 troops and 44,000 military spouses, as well as face-to-face interviews with service members stationed around the world. *Id.* at 1-2.

219. See Halloran, *supra* note 215. The report noted that any interruption of unit cohesion or retention would not be widespread or long-lasting. See Charley Keyes et al., *Pentagon: Letting Openly Gay Troops Serve Won't Hurt Military*, CNN POLITICS (Nov. 30, 2010, 5:34 PM), <http://www.cnn.com/2010/POLITICS/11/30/military.gay.policy/index.html?hpt=T2>.

220. See Halloran, *supra* note 215.

221. See *id.*

222. See 156 CONG. REC. S7243-44 (daily ed. Sept. 21, 2010); David Herszenhorn, *Move to End 'Don't Ask, Don't Tell' Stalls in Senate*, N.Y. TIMES, Sept. 21, 2010, <http://www.nytimes.com/2010/09/22/us/politics/22cong.html>.

223. See 156 CONG. REC. H8399 (daily ed. Dec. 15, 2010) (statement of Rep. Todd Akin).

224. See *id.*

the larger Act and considered as a stand-alone measure.<sup>225</sup> Opponents of the repeal criticized the priority given to the provision and argued it took attention away from broader national security measures.<sup>226</sup> The fact that the bill was of such importance demonstrates Congress's urgency in pushing the legislation through prior to the end of the congressional term.<sup>227</sup> With a newly elected and more conservative Congress entering in January 2011, repeal proponents recognized the need to overturn the policy before the next term began.

As the threat of a judicial decree loomed overhead, the Senate fiercely contested the merits of a repeal of DADT.<sup>228</sup> Arguments on both sides of the issue focused on the military's involvement in two wars as well as the statistics garnered from service members' responses to the surveys used in the DOD Report.<sup>229</sup> Repeal proponents argued it was unwise to discharge so many qualified service members with specialized skills in a time when troops were desperately needed to fight in Iraq and Afghanistan.<sup>230</sup> Opponents of repeal countered that such a drastic change to a personnel policy was unwise for a military engaged in a war on two fronts.<sup>231</sup>

The DOD Report helped to resolve these conflicting positions by examining the racial integration of the military in the 1940s and 1950s.<sup>232</sup> The military's willingness to integrate different racial groups in the wake of World War II, during the Korean War, and at the beginning of the Cold War suggested that the military was fully capable of integrating gay service members despite the ongoing war efforts in the Middle East.<sup>233</sup>

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225. See *id.* at H8397 (statement of Rep. Howard P. McKeon).

226. See *id.*

227. See *House Democrats Push 'Don't Ask, Don't Tell' Repeal*, CNN POLITICS (Dec. 14, 2010), [http://articles.cnn.com/2010-12-14/politics/gays.military\\_1\\_repeal-don-t-senate-votes-gop-support?s=PM:POLITICS](http://articles.cnn.com/2010-12-14/politics/gays.military_1_repeal-don-t-senate-votes-gop-support?s=PM:POLITICS).

228. See David S. Cloud, *Gates Urges Congress to Act on 'Don't Ask, Don't Tell'*, L.A. TIMES, Dec. 10, 2010, <http://articles.latimes.com/2010/dec/10/world/la-fgw-gates-dont-ask-20101211>.

229. See generally 156 CONG. REC. S10651-53 (daily ed. Dec. 18, 2010) (illustrating the types of arguments put forth by senators for and against DADT repeal).

230. See *id.* at S10651 (statement of Sen. Mark Udall).

231. See *id.* at S10653 (statement of Sen. Saxby Chambliss).

232. See DOD REPORT, *supra* note 218, at 81-85.

233. *Id.* at 84-85. The Report acknowledged some differences between race and sexual orientation in regard to integration in the military in so far as race is a readily observable characteristic while homosexuality is not, and sexual orientation involves religious implications while race does not. *Id.* at 84. The Report nonetheless concluded that these issues raised similar concerns among military leaders, and with the successful integration of different racial groups in the military in a time of war, there was no reason to believe the same could not be done for members with different sexual orientations. *Id.* at 85.

Similarly, senators on both sides of the issue cited the statistics presented in the DOD Report to bolster their arguments. Proponents of repeal focused on the finding that 70% of troops believed repeal would have a positive, mixed, or no effect on military effectiveness and unit cohesion.<sup>234</sup> On the other hand, opponents of repeal contended that the troops listed in the “mixed” or “no effect” categories should not be counted toward the number of troops *in favor of* a policy change.<sup>235</sup> Without the inclusion of these two categories, only 17% of service members reported that a repeal would result in a positive change to military effectiveness and unit cohesion.<sup>236</sup>

Again, the DOD Report’s explanation of racial integration clarified this issue. When talks of racial integration began in 1946, 80% of service members opposed the change in policy.<sup>237</sup> Opposition remained well over 60% in 1949 when President Truman issued an executive order declaring equal treatment and opportunity for members of the armed services without regard to race.<sup>238</sup> This monumental policy change was implemented in spite of heavy service member opposition. Therefore, in the case of DADT, there was little reason to believe that opposition from members of the armed forces would prevent a policy change, especially when most members reported that repeal would have almost no impact on military effectiveness.

Despite the contentions on both sides of these issues, the deciding factor was ultimately the pressure of the judiciary’s potential intervention in overturning this discriminatory policy. The United States had reason for concern given that the United Kingdom, Canada, Australia, Germany, and Israel were forced to change their military policies on open service by gays in response to court decisions or legal challenges to their policies.<sup>239</sup> Most notably, Canada and the United Kingdom were required to implement rapid changes after losing court battles that challenged their policies on gay military service.<sup>240</sup>

Aware that the United States could face a similar fate as a result of the *Log Cabin Republicans* appeal, Congress acted first to repeal the statute and afford the military time to properly implement major policy

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234. 156 CONG. REC. S10650 (daily ed. Dec. 18, 2010) (statement of Sen. Carl Levin); DOD REPORT, *supra* note 218, at 66.

235. See 156 CONG. REC. H8399 (daily ed. Dec. 15, 2010) (statement of Rep. Roscoe Bartlett).

236. See DOD REPORT, *supra* note 218, at 66.

237. *Id.* at 85.

238. *Id.* at 81, 83.

239. See *id.* at 90.

240. *Id.*

modifications without disrupting military operations.<sup>241</sup> Without the weight of judicial action bearing on its decision, perhaps Congress would not have reached this result as soon as it did. However, once repeal was mandated, the energy and focus of the military shifted from defending DADT to implementing a new, non-discriminatory policy permitting gays to openly serve in the armed forces.<sup>242</sup> Unfortunately, the problems associated with repeal implementation and the shortcomings of this new policy reveal that there is need for additional legislative action if equality for gays in the military is to be achieved.

#### VI. THE SHORTCOMINGS OF THE NON-DISCRIMINATORY POLICY REPLACING DADT AND PROPOSED SOLUTIONS TO ACHIEVE EQUALITY FOR GAY SERVICE MEMBERS

Although Congress was in a hurry to repeal DADT before the courts issued a final decision on the policy's constitutionality, implementation of the new, non-discriminatory policy was slow to develop. One of the driving forces behind the repeal was Congress's need to give the military time to adjust its policies rather than face the consequences of rapid changes that would follow a court ruling.<sup>243</sup> For this reason, DADT remained in effect until September 20, 2011.<sup>244</sup> Before repeal was effective, President Barack Obama, former Secretary of Defense Robert Gates, and former Chairman of the Joint Chiefs of Staff Admiral Mike Mullen each had to certify that repeal would not harm military effectiveness, readiness, or unit cohesion.<sup>245</sup> Once that certification was issued, a sixty-day waiting period was required before the repeal was officially enacted.<sup>246</sup> Therefore, DADT could continue to be enforced despite the repeal, leaving gay service members with the warning that it was still too early to reveal their sexual orientation

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241. See Cloud, *supra* note 228 (discussing the unpredictability of the courts and the importance of congressional action to ensure the "Defense Department had time to train its personnel in how to implement the change").

242. See 'Don't Ask, Don't Tell,' *supra* note 201.

243. See *id.*; Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(a)(2)(C), 124 Stat. 3515, 3515-16.

244. See Don't Ask, Don't Tell Repeal Act of 2010 § 2(c); Bumiller, *supra* note 1.

245. Don't Ask, Don't Tell Repeal Act of 2010 § 2(b)(2).

246. *Id.* Former Secretary Gates had made it clear that he would not certify the repeal prior to leaving office at the end of June 2011, further delaying implementation of the repeal and leaving the fate of DADT in the hands of his successor, Leon Panetta. See Joseph White, *Gates: New Pentagon Chief Will Certify Repeal of 'Don't Ask, Don't Tell,'* LGBTQ NATION (June 26, 2011), <http://www.lgbtqnation.com/2011/06/gates-new-pentagon-chief-will-certify-repeal-of-dont-ask-dont-tell/>.



without facing adverse consequences.<sup>247</sup>

Even with the repeal now fully enacted, gay service members are still not on equal footing with their heterosexual comrades. In a number of circumstances, gay service members are denied benefits and privileges solely because of their sexual orientation. Amendments to existing statutes and repeal of certain laws are necessary if equality is to be achieved among all members of the military without regard to sexual orientation. These changes include repeal of the Defense of Marriage Act, repealing and amending sodomy laws codified in the UCMJ, adding sexual orientation to the Military Equal Opportunity program as a protected class, and redefining “dependent” under the United States Code to include same-sex partners for purposes of housing and healthcare benefits for military families.

*A. Additional Repeals Necessary to Achieve Equality for Gay Members of the Armed Forces*

The gay rights movement in the United States has achieved notable success in bringing about legislative changes to promote equality for gays in America since the days of the Stonewall Riots in 1969.<sup>248</sup> The repeal of anti-sodomy laws and enactment of anti-discrimination laws in housing and employment reflect some of these triumphs.<sup>249</sup> However, there is one statute that not only prevents gays from attaining a legal status that is fundamental to the American way of life, but also further denies gays the benefits associated with that legal status. The Defense of Marriage Act (DOMA) prevents legal recognition of same-sex relationships at the federal level by defining “marriage” as “only a legal union between one man and one woman as husband and wife” and “spouse” as “only . . . a person of the opposite sex.”<sup>250</sup> Despite this federal statute, same-sex marriages are permitted at the state level in

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247. Barbara Starr, *Gates Tells Troops 'Don't Ask, Don't Tell' is Still in Effect*, CNN POLS. (Dec. 23, 2010), [http://articles.cnn.com/2010-12-23/politics/gates.dadt\\_1\\_service-members-defense-secretary-robert-gates-civilian-service-secretaries?\\_s=PM:POLITICS](http://articles.cnn.com/2010-12-23/politics/gates.dadt_1_service-members-defense-secretary-robert-gates-civilian-service-secretaries?_s=PM:POLITICS).

248. See *Stonewall Rebellion*, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/subjects/s/stonewall\\_rebellion/index.html](http://topics.nytimes.com/topics/reference/timestopics/subjects/s/stonewall_rebellion/index.html) (last updated Apr. 10, 2009).

249. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring anti-sodomy laws unconstitutional); Barker, *supra* note 54, at 113 n.13 (stating that twenty-four states have enacted policies barring employment discrimination based on sexual orientation). There is also a bill pending in Congress that, if passed, would prohibit federal employers from discriminating based on sexual orientation. See Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. § 2.

250. See 1 U.S.C. § 7 (2006).

Connecticut, Iowa, Vermont, Massachusetts, New Hampshire, Washington, D.C., and most recently, New York.<sup>251</sup> However, with DOMA still in place, gay service members and their same-sex partners lawfully married in any of these states do not receive important benefits from their military service that their heterosexual counterparts and their spouses enjoy whose relationships conform to the definition of marriage under DOMA. In order for gay service members and their families to receive these same benefits and privileges, DOMA must be repealed and replaced with a policy that defines marriage in gender-neutral terms.

Two significant areas in which gay service members are denied equal access to benefits are military housing and health care. The Basic Allowance for Housing statute provides funding for housing of service members living off base.<sup>252</sup> The statute allots more funding to service members "with dependents."<sup>253</sup> Eligibility for this classification is limited to the service member's "spouse," dependent parents, and certain unmarried children.<sup>254</sup> Because DOMA limits the definition of "spouse" to opposite-sex partners, gay service members with same-sex partners do not qualify for these housing funds. Similarly, the military's health care benefits plan defines "dependents" as including a "spouse," thereby denying gay service members in same-sex relationships the ability to receive this type of assistance because of their sexual orientation.<sup>255</sup>

With DOMA still in place, the military is incapable of offering housing and health care benefits to service members in same-sex relationships, regardless of the DADT repeal.<sup>256</sup> This result is inconsistent with the goal of attaining equality for all service members regardless of sexual orientation. Unfortunately, the military itself is not in the position to change this law and must abide by it until either the

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251. *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16430> (last updated July 14, 2011). Additionally, as of July 2011, two states recognize same-sex marriages performed in other states, and five states permit civil unions in which spousal rights are afforded to same-sex unions. *Id.* In the seven states that allow domestic partnerships, not all spousal rights granted to married couples are afforded to individuals in same-sex partnerships. *Id.* In June 2011, New York became the sixth state to legalize same-sex marriage. See Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 24, 2011, <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?scp=1&sq=ny%20passes%20gay%20marriage&st=cse>.

252. See 37 U.S.C. § 403 (2010).

253. See *id.* § 403(a)(2); DOD REPORT, *supra* note 218, at 143.

254. DOD REPORT, *supra* note 218, at 143.

255. See 10 U.S.C. § 1072(2)(A) (2010).

256. See Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(d), 124 Stat. 3515, 3516 ("Nothing in [the repeal statute] shall be construed to require the furnishing of benefits in violation of [DOMA]").

Supreme Court declares the statute unconstitutional or Congress repeals the law.

In light of the DADT repeal, legislative action is not out of the question as the gay rights movement gains momentum. However, despite the significance of the DADT repeal, a repeal of DOMA still faces an uphill battle because it goes to the heart of society's views of homosexuality. Though most Americans supported the rights of gays to serve openly in the military, the issue of gays' legal right to marry has been less favorable among the American public.<sup>257</sup> Not only does the lack of public support fail to place pressure on Congress to repeal DOMA, but also there is little concern, as there was when Congress voted to repeal DADT, of rapid implementation of a new policy in the event of a court ruling. The need to afford an organization time to modify a major personnel policy is not present if the Supreme Court decides DOMA is unconstitutional.<sup>258</sup> Considering these differences from the circumstances surrounding DADT repeal and the Republican majority replacing the House that overturned DADT,<sup>259</sup> it is unlikely that legislative action will be taken in the near future to invalidate DOMA. Therefore, a decision to overturn this statute is more likely to occur in the courts.

Much like the circumstances surrounding DADT repeal, the courts could potentially play a vital role in abolishing DOMA. Several lower

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257. See Jeffrey M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, GALLUP (May 24, 2010), <http://www.gallup.com/poll/128291/americans-opposition-gay-marriage-eases-slightly.aspx>. A Gallup poll conducted in May 2010 showed 53% of Americans opposed gay marriage while 44% supported it. *Id.* Although there has been a slow increase in support for gay marriage since DOMA was enacted in 1996, the percentage of those in favor of gay marriage still lags far behind those that supported DADT repeal. Lymari Morales, *In U.S., Broad, Steady Support for Openly Gay Service Members*, GALLUP (May 10, 2010), <http://www.gallup.com/poll/127904/broad-steady-support-openly-gay-service-members.aspx>. In this same Gallup poll, 70% of Americans reported being in favor of open military service. *Id.* This disparity demonstrates that overturning DOMA will be even harder than repealing DADT.

258. This is not to say that legislative changes would be insubstantial. As of December 2011, thirty-seven states had Defense of Marriage Act constitutional bans or equivalents against same-sex marriage that would need to be amended. See Maria Godoy, *State by State: The Legal Battle Over Gay Marriage*, NPR (Dec. 15, 2009), <http://www.npr.org/templates/story/story.php?storyId=112448663>. However, such changes do not implicate concerns of instituting a new policy that effects individuals in life or death situations in which careful consideration must be given as to how to properly adjust to the policy change.

259. See *House History: Party Divisions of the House of Representatives (1789 to Present)*, OFF. OF THE CLERK - U.S. HOUSE OF REPRESENTATIVES, [http://artandhistory.house.gov/house\\_history/partyDiv.aspx](http://artandhistory.house.gov/house_history/partyDiv.aspx) (last visited Jan. 22, 2012). Republicans hold a majority of House members in the 112th Congress by 242-193. *Id.* When DADT was repealed, Democrats led the 111th Congress 257-178. See *id.*

federal courts have declared DOMA unconstitutional.<sup>260</sup> As of March 2011, two particular lower federal court cases awaiting appeal suggest that the end of DOMA may be near. Both *Pedersen v. Office of Personnel Management*<sup>261</sup> and *Windsor v. United States*<sup>262</sup> challenged DOMA's constitutionality. The appeals in these cases are pending in the Second Circuit Court of Appeals in which there is no established precedent on the standard under which laws discriminating on the basis of sexual orientation must be measured.<sup>263</sup>

President Obama announced his finding that sexual orientation must be measured using the heightened scrutiny standard,<sup>264</sup> which he claims DOMA fails because it does not substantially relate to an important government function.<sup>265</sup> Because of his conclusion that DOMA is unconstitutional as applied to lawfully married same-sex couples, President Obama declared that the government would no longer defend these cases.<sup>266</sup> Although DOMA will remain in effect while these cases are appealed,<sup>267</sup> this recent determination suggests that DOMA will likely be overturned in the federal courts. If DOMA is

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260. See *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, U.S. DEP'T OF JUSTICE – OFF. OF PUB. AFFAIRS (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> [hereinafter *Statement of the Attorney General*]. See, e.g., *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010) (holding DOMA unconstitutional after finding that Congress's intent was to "disadvantage a group of which it disapproves," which cannot constitute a legitimate government interest under rational basis review).

261. *Frequently Asked Questions: Pedersen et al. v. Office of Personnel Management et al.*, GLAD (Nov. 9, 2010), <http://www.glad.org/doma/faq-pedersen/>.

262. *Windsor v. United States – Frequently Asked Questions (FAQ)*, ACLU, <http://www.aclu.org/lgbt-rights/windsor-v-united-states-frequently-asked-questions-faq> (last visited Jan. 22, 2012).

263. See Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter Letter from Eric H. Holder, Jr.].

264. *Id.* This standard is warranted when a discriminatory law meets four criteria: (1) the group at issue has experienced a history of discrimination; (2) individuals among the group exhibit "immutable . . . characteristics that define them as a discrete group;" (3) the group is politically powerless or a numerical minority; and (4) the characteristics that distinguish the group have little relation to legitimate policy objectives. See *id.* (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985)). President Obama determined that sexual orientation meets all four of these classifications and therefore heightened scrutiny must apply to laws that discriminate on this basis. See Letter from Eric H. Holder, Jr., *supra* note 263.

265. See Letter from Eric H. Holder, Jr., *supra* note 263. The President found DOMA unconstitutionally violates gay citizens' equal protection rights guaranteed by the Fifth Amendment. *Id.*

266. *Statement of the Attorney General*, *supra* note 260.

267. *Id.*

invalidated either by a court judgment or legislative repeal, the bar denying housing and health care benefits to gay service members and their families will be lifted and another step taken toward equality for members of the armed forces without regard to sexual orientation.

In addition to overturning the controversial DOMA statute, there are further legislative changes that must be made before gays in the military can enjoy equal rights. These changes include repealing and amending the military's anti-sodomy statutes in the Uniform Code of Military Justice.<sup>268</sup> Article 125 of the UCMJ prohibits all acts of sodomy, regardless of the alleged perpetrator's sexuality and in spite of consent.<sup>269</sup> Under *Lawrence v. Texas*, it is unconstitutional to criminalize private consensual sodomy between any adults.<sup>270</sup> The Court of Appeals for the Armed Forces extended *Lawrence* to apply to service members' conduct in *United States v. Marcum*.<sup>271</sup> In response to these cases, the DOD Joint Service Committee on Military Justice proposed congressional repeal of Article 125 in its entirety as well as an amendment to Article 120 of the UCMJ to add prohibitions of forcible sodomy and sodomy against children.<sup>272</sup> Removing and amending these provisions will help to ensure equal application of the laws to all members of the armed forces.

### *B. Special vs. Equal Treatment for Gays in the Military*

While repeal of DOMA and the military's anti-sodomy statutes would lift bars that prevent gay service members from being treated equally, removing these discriminatory provisions is not enough. Changes must be made to existing statutes and policies to affirmatively grant gay service members the right to be free from discrimination. These changes consist of adding sexual orientation to the Military Equal Opportunity program as a suspect class and adding same-sex partners to the list of "dependents" eligible for housing and health care benefits. These additions, when combined with repeal of DOMA and anti-sodomy statutes, will help achieve equality for all members of the armed forces regardless of sexual orientation.

The Military Equal Opportunity program encourages "an

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268. See 10 U.S.C. § 925(a) (2006).

269. See *id.*

270. 539 U.S. 558, 578 (2003).

271. 60 M.J. 198, 206 (C.A.A.F. 2004).

272. DOD REPORT, *supra* note 218, at 139. Article 120 outlines the provisions addressing rape and sexual assault in the military. 10 U.S.C. § 920 (2006).

environment free from personal, social, or institutional barriers that prevent [s]ervice members from rising to the highest level of responsibility possible.”<sup>273</sup> Under this program, all personnel decisions must be made based only on a service member’s capability, fitness, and individual merit.<sup>274</sup> The policy also specifically protects against discrimination in five categories: race, color, religion, sex, and national origin.<sup>275</sup> In the DOD Report, the Pentagon recommended *against* adding sexual orientation to the list of protected classes under the program.<sup>276</sup> If this recommendation is followed, gay service members will not be eligible for diversity programs, tracking initiatives, or a complaint resolution process for unlawful discrimination or sexual harassment.<sup>277</sup> This outcome is not consistent with the goal of equality for gays in the military. Instead, sexual orientation must be added as a sixth protected class under the Military Equal Opportunity program in order to ensure the protection of gay service members’ rights against unlawful treatment.

One of the concerns service members expressed in their responses to the Pentagon’s survey was that permitting gays to serve openly in the military would elevate them to a protected class receiving special treatment.<sup>278</sup> The Pentagon sought to quell this fear by emphasizing that the new policy in place of DADT would merely permit gay service members equal footing and would not warrant any specialized treatment.<sup>279</sup> This approach is claimed to be consistent with the military’s policy of treating all service members equally without any special action taken on behalf of any particular groups.<sup>280</sup> However, the fact that the Military Equal Opportunity program specifically defines classes of service members worthy of protection against unlawful discrimination demonstrates that the military actually does give

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273. DOD REPORT, *supra* note 218, at 136 (quoting DEP’T OF DEF., DIRECTIVE: DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM 2 (1995), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/135002p.pdf>).

274. DOD REPORT, *supra* note 218, at 136.

275. *Id.* at 137.

276. *Id.*

277. *See id.* The only course of action for gay service members experiencing unlawful discrimination is to rely on “the chain of command, the Inspector General, and other means as may be determined by the Services.” *Id.* at 138. Such vague guidelines are clearly insufficient to protect gay service members from discriminatory treatment.

278. *See id.* at 137.

279. *Id.* The Pentagon concluded that the key to gay service members’ acceptance by other members of the armed forces was perceived equal treatment and that gay service members themselves did not seek any specialized treatment. *Id.*

280. *See id.* at 137-38.

preferential treatment to some service members over others.<sup>281</sup> Given these categories, there is no reason to exclude sexual orientation from the list of classes of individuals receiving certain protections against unlawful discrimination.<sup>282</sup>

Although sexual orientation should be added to the list of classes of service members deserving protection against unlawful discrimination, this so-called special treatment does not have to go as far as requiring implementation of an affirmative action plan for homosexuals in the military.<sup>283</sup> Specifically recruiting gay applicants to join the armed forces would mean that these applicants would have to disclose their sexual orientation to recruiters in order to satisfy the plan's requirements. However, the fact that gays may now serve openly in the military does not necessarily imply that all are going to do so. In fact, only fifteen percent of service members reported that they would come out to other members of the military if DADT were repealed.<sup>284</sup> Gay citizens wishing to serve their country without revealing their sexual orientation would fail to be included under an affirmative action plan. Because the need to protect gay service members against unlawful discrimination is greater than the need to seek out gay applicants to fill positions in the military, special treatment in the form of an affirmative action plan is unnecessary to achieve equality for gay members of the armed forces.

Just as the Military Equal Opportunity program must add sexual orientation to its list of protected classes, so too must the definition of "dependents" used to determine housing and health care benefits add same-sex partners to its list of eligible recipients. This change is already underway in federal agencies employing gay civilians.<sup>285</sup> The approach these agencies have taken is to specifically permit same-sex partners to receive benefits upon a showing that the partners are involved in a committed relationship.<sup>286</sup> An alternative method is to redefine the

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281. *See id.* at 137.

282. Twenty-four states have employment anti-discrimination statutes that specifically include sexual orientation in the list of protected classes. *See Barker, supra* note 54, at 113 n.13. Furthermore, President Obama's declaration that sexual orientation deserves heightened constitutional scrutiny in the courts suggests that homosexuals are a special class worthy of protection against unlawful discrimination. *See Letter from Eric H. Holder, Jr., supra* note 263.

283. The Pentagon recommended against an affirmative action policy recruiting gay applicants. *See DOD REPORT, supra* note 218, at 137-38.

284. *Id.* at 5. This contradicted the fear that repeal of DADT would result in widespread disclosure of gay service members' sexual orientation, which it was argued would lead to disruptions in military operations. *See id.*

285. *Id.* at 144.

286. *Id.* This showing could be made through a demonstration that the partners share

terms of the statute to permit service members to designate “family members” as beneficiaries.<sup>287</sup> However, there is concern that these methods create an opportunity for abuse by individuals seeking benefits for those with whom they are not actually in a committed relationship.<sup>288</sup> The potential repeal of DOMA would remedy this problem, as same-sex partners would be included in the definition of marriage under a new, gender-neutral statute. Until DOMA is overturned, reliance will have to be placed on the honesty of service members seeking benefits for their same-sex partners. With this addition to the definition of “dependents” as well as the addition of sexual orientation to the Military Equal Opportunity program, gay service members will finally be able to receive the benefits and protections they deserve.

## VII. CONCLUSION

The further backward you look, the further forward you can see.

-Winston Churchill<sup>289</sup>

The history of discrimination based on sexual orientation in the military can be traced back through time to reveal an outright ban on gays from serving their country. Over the years, this policy shifted to a compromise under which gay service members were permitted to serve in silence and neither they nor the military could disclose the sexual orientation of these members. Now, yet another policy proposes to allow open service for gay members of the armed forces. The likelihood of successful implementation of a non-discriminatory policy is best understood by looking back to the rationales underlying the old policies as well as the integration of similar minority groups in the past.

The rationales for the discriminatory policies have disappeared over time, and the success of racial integration demonstrates that openly gay service members can serve in the armed forces without significantly hindering military operations. While it is recognized that the military is a “specialized society” that is “more than a job” and in which service members do not receive all of the constitutional protections afforded to civilians, there is no relation between sexual orientation and a service

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responsibility for significant financial obligations as well as share a residence. *See id.* at 144 n.382.

287. *See id.* at 144.

288. *See id.* at 15.

289. RICHARD LANGWORTH, CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 576 (2011).



member's ability to successfully perform the job at hand. Therefore, a non-discriminatory policy regarding sexual orientation in the military is a major victory for gay rights in the United States. However, achieving true equality for gay service members is dependent upon repeal of other statutes barring certain benefits to same-sex partners as well as the inclusion of sexual orientation in statutes providing protection against unlawful discrimination. Congressional or judicial action will be necessary to carry out these proposed solutions. Given the circumstances that eventually resulted in the repeal of DADT, it is not only reasonable but also likely that these solutions will be realized in the near future so that gay service members' biggest concerns will no longer be coming out, but coming home.

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