
ESSENTIAL TO THE NATIONAL
SECURITY:
AN EXECUTIVE BAN ON “DON’T ASK,
DON’T TELL”

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INTRODUCTION

This Article was written in the midst of renewed national debate on the wisdom and usefulness of a ban on openly gay¹ men and women serving in

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1. The word “gay” or “homosexual” throughout this Article is all-inclusive and refers to gay men, lesbians, and bisexual men and women.

the armed forces. The law known as “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (“DADT”) was passed in 1993 after controversial debate on the issue.² It was a compromise between a new president and a Congress controlled by the opposite party. DADT codified what was once merely Department of Defense policy. The outcome satisfied few.

When George W. Bush announced the beginning of the “war on terror” shortly after September 11, 2001,³ and deployed troops in Afghanistan and Iraq in the following years, the ban on gay service members took on new significance and received more attention. Six years later, the war in Afghanistan has been largely forgotten or ignored and the war in Iraq is increasingly unpopular. Recruitment numbers are down,⁴ and yet the president called for a troop “surge” to fight the growing insurgency and its escalating violence.⁵ A ban on anyone who is qualified and desires to serve the country seems unreasonable, if not downright silly.

Circumstances and facts that foreshadow the law’s demise also undermine the justifications given years ago to support it. Challenges in the courtroom continue. Several retired, high-level military officers, including some originally in favor of the ban, publicly recanted their earlier positions and called for its end.⁶ Editorials in national and local

2. See 10 U.S.C. § 654 (1993).

3. See David E. Sanger & Don Van Natta, Jr., *After the Attacks: The Events; In Four Days, a National Crisis Changes Bush’s Presidency*, N.Y. TIMES, Sept. 16, 2001; Elaine Sciolino, *After the Attacks: The Overview; Long Battle Seen*, N.Y. TIMES, Sept. 16, 2001 (noting that while addressing the military, Bush warned all members of the military to be ready to respond to the terrorist attacks).

4. See Mark Thompson, *Broken Down*, TIME, Apr. 16, 2007, at 28.

The Army has been lowering standards to meet enlistment goals, taking on more dropouts and even convicted felons. Recruiters face a bigger challenge as they to permanently add 65,000 troops

. . . . The army will be short about 3,000 midlevel officers for the next few years and faces critical gaps in such key areas as military intelligence. And suicides in the ranks have been climbing.

Id. See also Harry Levins, *In Visit Here, Army Recruiting Chief Lays Out the Numbers*, ST. LOUIS POST-DISPATCH, Feb. 24, 2007, at A2 (“In the fiscal year that ended September 30, [2006] the Army made its goal of 80,000 recruits albeit just barely”); Julian E. Barnes & Peter Spiegel, *Expanding the Military, Without a Draft*, L.A. TIMES, Dec. 24, 2006, at A18 (“After struggling in 2004, the Army missed its recruiting target in 2005. To meet its recruiting goal of 80,000 new soldiers in 2006, the Army was forced to loosen rules for those they were willing to accept”); Thom Shanker, *Army and Other Ground Forces Meet ‘06 Recruiting Goals*, N.Y. TIMES, Oct. 10, 2006, at A19 (reporting that active duty recruitment goals were met for Army, Navy, Marine Corps, Air Force, and reserve forces recruitment goals were met for Marine Corps Reserve and Air Force Reserve, but numbers fell slightly short of Army National Guard, Army Reserve, Navy Reserve, and Air National Guard recruitment goals).

5. See President George W. Bush, President’s Address to the Nation (Jan. 10, 2007), available at <http://www.whitehouse.gov/news/releases/2007/01/20070110-7.html>.

6. See Audrey Denson & Judy G. Rolfe, *Momentum: After Ten Years, a Growing*

newspapers around the country agree.⁷ Majority popular opinion in the military and the general public regarding homosexuality has been positive and accepting.⁸ Internationally, several western or western-supported nations ended their bans on openly gay service members with no negative effect.⁹ Along with the unabashedly discriminatory nature of the policy, these facts indicate that the law’s end is near. In fact, Representative Marty Meehan (D-Mass.) recently introduced legislation to overturn the ban on gay service members.¹⁰

I offer one additional perspective on the policy. The Executive branch could end the ban, at least temporarily, in the name of national security under statutory authority. The authority results from the state of national emergency existing since September 2001. The President could sign an executive order that suspends DADT and its implementing regulations. In addition to statutory authority, the Executive’s position as Commander-in-Chief of the armed forces grants broad authority for an order of this sort. Courts over the past fourteen years have deferred to Congress and military judgment in holding DADT constitutional. The judiciary also defers to the Executive in matter of national security, especially in times of war.¹¹ Courts also traditionally employ the political question doctrine to refrain from deciding disagreements between Congress and the Executive on wartime policy. This judicial deference makes challenging an executive order difficult and unlikely to succeed. Therefore, the Executive branch could effectively overturn the ban if Congress does not actually rescind the

Movement For Freedom, Service Members Legal Def. Network, http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1450.pdf (last visited Sept. 13, 2007) (noting that two generals, an admiral, and thirteen other retired senior military leaders have found “Don’t Ask, Don’t Tell” to be ineffective).

7. *See id.* (observing that the New York Times, The Washington Post, USA Today, The Chicago Tribune, The New Orleans Times-Picayune, and The Los Angeles Times, among others, take the side of allowing lesbian, gay, and bisexual service members).

8. *See id.* (finding that in a December 1993 public opinion poll, seventy-nine percent of Americans supported allowing lesbian, gay, and bisexuals to serve openly in the armed forces).

9. *See id.* (realizing that many of America’s allies, as well as the Central Intelligence Agency, the Federal Bureau of Investigation, and the National Security Agency, have dropped their bans on gay and bisexual personnel in the war on terrorism).

10. The Service Members Legal Defense Network, or SLDN, is a nonprofit advocacy organization dedicated to overturning DADT and ending discrimination and harassment of military personnel affected by it. SLDN lobbied on Capital Hill in March 2007 in support of Rep. Meehan’s bill, with some degree of success. *See* Military Readiness Enhancement Act of 2007, H.R. 1246, 110th Cong. (2007) (noting that, as of October 8, 2007, the bill had 131 cosponsors).

11. *See, e.g.,* *Able v. United States*, 155 F.3d 628, 635 (2d Cir. 1998) (elaborating that the reliance by Congress on the professional judgment and testimony of military experts and personnel in concluding that homosexual acts would compromise the effectiveness of the military is not necessarily irrational).

law.

The first part of this Article examines the historical and political contexts of DADT, and includes a description of the law itself. Next, I look at the myriad of constitutional challenges to the law under the Equal Protection and Due Process clauses of the Fifth Amendment, and First Amendment free speech clauses. In the third part, I summarize where the policy stands today, politically and socially. Lastly, I outline the national security approach in which the Executive could engage to effectively, if temporarily, overturn the ban. I also describe problems and potential challenges to this approach. My conclusion makes predictions about the policy's future in the current political climate.

BACKGROUND

I. HISTORICAL AND POLITICAL CONTEXTS OF "DON'T ASK, DON'T TELL"

Gay men have served in the military as far back as the American Revolution.¹² Until around World War I, no military laws or regulations existed on same-sex sexual conduct.¹³ In 1916, the first military law appeared in the Articles of War, which prohibited sodomy as criminal conduct.¹⁴ During World War II, a flat-out prohibition on gays serving in the military came into being.¹⁵ Official administrative policy since World War II declared that homosexuality was incompatible with military service.¹⁶

William Jefferson Clinton, on the campaign trail in 1992, promised to end discrimination against homosexuals in the military.¹⁷ When he won the presidency, this promise was one of the first he attempted to implement. Initially, he issued an executive order, as an interim policy, that disallowed

12. Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of "Don't Ask, Don't Tell,"* 21 HOFSTRA LAB. & EMP. L.J. 403 (2004); see *Sexual Orientation and U.S. Military Personnel Policy: Policy Options and Assessment*, Nat'l Def. Research Inst. (2004) [hereinafter *Sexual Orientation*] (asserting that the first widely-cited instance of a "gay discharge" was when Lieutenant Enslin was dismissed from the Continental Army).

13. See Alexander, *supra* note 12, at 405 (explaining that prior to military law regulating same-sex sexual conduct, civilian law addressed sodomy); *Sexual Orientation*, *supra* note 12 (noting that the Articles of War addressed sodomy within the military population).

14. Alexander, *supra* note 12, at 405.

15. *Id.* at 406.

16. *Id.*; S. REP. NO. 103-112, § 263, at 200 (1993).

17. See *Clinton Attacks Bush on Family Health Issues: Democrat Calls Perot "Wrong" on Gays*, S.F. CHRON., May 30, 1992, at A1 (citing a Pentagon study that says there is no evidence that allowing homosexual people in the military will lead to any problems); Ronald Brownstein, *Clinton Addresses 600 at Rally of Gays, Lesbians*, L.A. TIMES, May 19, 1992, at 24.

questioning prospective recruits about their sexual orientation.¹⁸ He then called upon his Secretary of Defense to create an executive order modifying the existing ban, which was written in Department of Defense Directives.¹⁹ In response to President Clinton’s efforts and galvanized by strong, public opposition to any change by the Joint Chiefs of Staff, Congress began its own investigation.²⁰ After multiple congressional hearings on the issue, Congress created the law known as “Don’t Ask, Don’t Tell.”²¹ The hearings were weighted heavily in favor of the military and its then-prevailing view that homosexuality was incompatible with military service.²² The Senate and House committees also disregarded reports commissioned by the Department of Defense and the Government Accountability Office (“GAO”), which concluded that integration of gays into the military was possible.²³

Justifications for the anti-gay policy shifted over the years. For example, military leaders in the past have erroneously believed that homosexuals were more prone to blackmail.²⁴ Because homosexual acts often were prohibited criminally, the belief went, homosexuals would be susceptible to blackmail if successfully seduced, and thus could be coerced into revealing military secrets or intelligence.²⁵ Similarly discriminatory beliefs that

18. See Alexander, *supra* note 12, at 408.

19. See *id.* (noting that two bills were offered to modify the ban on gays in the military: the first bill would have required the President to submit to Congress any change to existing policy on homosexuals in the military; the second bill would have required the Secretary of Defense to review department policy and submit recommendations to the President); see also DEP’T OF DEF., DIRECTIVE NO. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION (Feb. 5, 2004) [hereinafter DEP’T OF DEF., QUALIFICATION STANDARDS] (establishes the qualification standards for enlistment, appointment, and induction into the armed forces); DEP’T OF DEF. DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (Dec. 21, 1995) [hereinafter DEP’T OF DEF., ENLISTED ADMINISTRATIVE SEPARATIONS] (outlining that a propensity or intent to engage in homosexual conduct is grounds for separation from the armed forces); DEP’T OF DEF. DIRECTIVE NO. 1332.30, SEPARATIONS OF REGULAR AND RESERVE COMMISSIONED OFFICERS (Mar. 14, 1997) [hereinafter DEP’T OF DEF., SEPARATION OF OFFICERS] (noting that it is Department of Defense policy to judge the suitability of persons to serve in the Armed Forces on the basis of their conduct).

20. See Alexander, *supra* note 12, at 408-09.

21. See 10 U.S.C. § 654 (1993) (stating that an individual will be separated from the armed forces if the individual states that he or she is homosexual or bisexual, or if the individual engages in, attempts to engage in, or solicits another to engage in a homosexual act).

22. S. REP. NO. 103-112, § 263, at 200 (1993) (listing in detail the military and Department of Defense witnesses and merely mentioning that “the committee received testimony for the record from numerous private citizens and organizations”).

23. See H.R. REP. NO. 103-200, § 575, at 190 (1993); S. REP. NO. 103-112 (1993).

24. See RICHARD A. POSNER, *Discrimination Against Homosexuals, With Particular Reference to Military Service*, in *SEX AND REASON* 314-15 (Harvard Univ. Press 1992).

25. See *id.* (claiming that this argument is weak, because only a small percent of

homosexuals were effeminate, physically incapable of performing, or mentally unstable also prevailed.²⁶

As these justifications proved untrue, new ones took their place.²⁷ The three most current justifications are that the prohibition on homosexual conduct promotes unit cohesion, enhances privacy, and reduces sexual tension.²⁸ Current and past justifications are simply covers for anti-gay discrimination, which was demonstrated recently by Chairman of the Joint Chiefs of Staff General Peter Pace, who was quoted in the *Chicago Tribune* as saying that he believed homosexuality was “immoral,” and that DADT should remain in effect.²⁹

II. DON'T ASK, DON'T TELL

The law itself is relatively simple and straightforward. It begins with fifteen findings regarding the unique nature of military life³⁰ and why homosexual conduct is unacceptable in it. First of all,

the military personnel have access to military secrets). The fact that female spies might just as successfully seduce married enlisted men or officers and subsequently blackmail them apparently never arose.

26. *Id.*; *Sexual Orientation*, *supra* note 12 (indicating that the Chairman of the Joint Chiefs of Staff and other military leaders believed that allowing homosexuals in the military would undermine unit cohesion and performance).

27. *See Sexual Orientation*, *supra* note 12 (citing experiences of analogous institutions, such as foreign militaries and fire and police departments, to disprove negative assumptions about homosexuals in the military).

28. *See DEP'T OF DEF., ENLISTED ADMINISTRATIVE SEPARATIONS*, *supra* note 19 (describing the Department of Defense's logic behind their decision to prohibit homosexuals from serving in the military).

The presence of [homosexuals] adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the armed force; to maintain the public acceptability of military service and to prevent breaches of security.

Id. *See also* *Able v. United States*, 968 F. Supp. 850, 864 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628, 635 (2d Cir. 1998).

29. Aamer Madhani, *Don't Drop "Don't Ask, Don't Tell," Pace Says*, CHI. TRIB., Mar. 13, 2007, at 1.

30. 10 U.S.C. § 654(a)(8) (2007).

Military life is fundamentally different from civilian life in that (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community . . . exist as a specialized society; and (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

Id.

[s]uccess in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion. . . . that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.³¹

Because the U.S. military may be deployed anywhere in the world for “actual combat . . . members of the armed forces [may have to] involuntarily . . . accept . . . forced intimacy with little or no privacy.”³²

Two assertions and a conclusion follow:

The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service. The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces’ high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability. The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.³³

Thus, homosexuals detract from unit cohesion, weaken the armed forces and therefore they may be banned.

The following section outlines three bases for investigating a service member’s sexual orientation. If a finding is made that a service member has

(1) . . . engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . . (2) . . . stated that he or she is a homosexual or bisexual, or words to that effect . . . [or] (3) . . . married or attempted to marry a person known to be of the same biological sex,

then that person “shall be separated from the armed forces under regulations prescribed by the Secretary of Defense.”³⁴ Separation is mandatory upon finding (1), unless there are five further findings³⁵ that essentially rebut the presumption that the service member is a homosexual.

31. *Id.* at (a)(6)-(7).

32. *Id.* at (a)(12).

33. *Id.* at (a)(13)-(15).

34. *Id.* at (b).

35. *Id.* at (b) (1)(A)-(E) (“further findings . . . that (A) such conduct is a departure from the member’s usual and customary behavior; (B) such conduct, under all circumstances, is unlikely to recur; (C) such conduct was not accomplished by use of force, coercion, or intimidation; (D) under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interest of the armed forces in proper discipline, good order, and morale; and (E) the member does not have a propensity or intent to engage in homosexual acts.”).

Separation is also mandatory upon finding (2), unless a further finding is made that the member has “demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.”³⁶ If a service member marries or attempts to marry a person of the same sex, separation is mandatory without an opportunity for any further findings.³⁷ The burden of proof remains on the service member throughout the proceeding, according to implementing regulations.³⁸ Each branch of the service makes its own regulations.³⁹

Challenges to DADT’s constitutionality began immediately after its passage.⁴⁰ No federal appellate court has found the law unconstitutional, however. These cases are described in the following section.

III. CONSTITUTIONAL CHALLENGES TO “DON’T ASK, DON’T TELL”

The focus of this Article is not whether DADT is constitutional, a topic which has been discussed widely elsewhere. Therefore, this section only briefly summarizes the case law on constitutional challenges to DADT to provide some context for the reader. Particular attention will be paid to the

36. *Id.* at (b)(2).

37. *Id.* at (b)(3).

38. See DEP’T OF DEF., ENLISTED ADMINISTRATIVE SEPARATIONS, *supra* note 19 (stating that the service member will have an opportunity to rebut the presumption the he or she engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts); DEP’T OF DEF., SEPARATION OF OFFICERS, *supra* note 19.

39. See, e.g., DEP’T OF THE ARMY, AR NO. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, at 15-2b(1) (2005) (citing the Army’s discharge policy, which allows for a soldier to avoid separation if the purpose of the homosexual conduct was to avoid military service or if the retention of the soldier is in the interest of national security); DEP’T OF THE NAVY, *Separation by Reason of Homosexual Conduct*, in MILITARY PERSONNEL MANUAL, ch.11, § 1910-148 (2005) (noting that a member of the Navy may avoid separation by demonstrating that the homosexual acts were a departure from the member’s usual behavior, that such acts are unlikely to recur, and that the acts were not accomplished with the use of force, coercion, or intimidation); SEC’Y OF THE AIR FORCE, AFI NO. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN, § 5.43 (2004), available at <http://www.e-publishing.af.mil> (allowing for a rehearing when there is newly discovered evidence or a discovery that the prior finding was based upon fraud or collusion); U.S. MARINE CORPS, MARINE CORPS SEPARATION AND RETIREMENT MANUAL § 6207 2a (2000) (clarifying that a Marine shall be separated for engaging in homosexual conduct, unless the acts are not customary for the member, the acts are unlikely to recur, and the member does not have a propensity to engage in homosexual acts).

40. See, e.g., *Philips v. Perry*, 106 F.3d 1420, 1430 (9th Cir. 1997) (finding that a discharge did not violate the First Amendment right to free speech, when the individual previously engaged in homosexual acts, and intended to engage in sexual acts in the future); *Thorne v. United States Dep’t of Def.*, 916 F. Supp. 1358, 1368 (E.D. Va. 1996) (allowing a person to make a statement that he or she is gay without creating an irrebuttable presumption that he or she is gay); *Thomasson v. Perry*, 895 F. Supp. 820, 831 (E.D. Va. 1995), *aff’d*, 80 F.3d 915, 919 (4th Cir. 1996) (holding that “Don’t Ask Don’t Tell” does not violate the Constitution or the Administrative Procedure Act); *Richenberg v. Perry*, 909 F. Supp. 1303, 1316 (D. Neb. 1995) (holding that Air Force policy regarding homosexuality did not violate an officer’s First Amendment rights).

doctrine of judicial deference to military judgment because it is central to many of the holdings and relevant to my proposed executive order.

Constitutional challenges to DADT are fairly straightforward and most often based on the Equal Protection and Due Process clauses of the Fifth Amendment.⁴¹ Several First Amendment claims have been raised, both as alternative pleadings and as the sole claim in a case.⁴² Under substantive due process, the argument goes, sexual activity between consenting adults is protected by a “fundamental liberty interest in private adult consensual intimacy and relationships, including . . . relationships between adults of the same sex.”⁴³ Therefore, DADT violates a homosexual’s right to privacy because it “infringe[s] upon and deprive[s] homosexuals] of that liberty interest” without a compelling, important, or even legitimate government interest in doing so.⁴⁴ The equal protection argument has two basic premises. First, homosexuals should be recognized as a protected class and therefore courts must subject DADT to strict scrutiny.⁴⁵ Alternatively, the law violates equal protection because homosexuals are treated differently for committing the same acts that heterosexuals do.⁴⁶ The free speech argument is that the law impermissibly restricts speech based on content.⁴⁷

Courts across the nation have upheld DADT. The law does not violate the First Amendment because it “does not target speech declaring homosexuality; rather, it targets homosexual acts and the propensity or intent to engage in homosexual acts, and permissibly uses the speech as evidence.”⁴⁸ As for the Fifth Amendment challenges to DADT, courts have found consistently both that homosexuals are not a suspect class and

41. See *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 392 n.7 (D. Mass. 2006) (noting that although the Fifth Amendment does not contain the Fourteenth Amendment phrase “equal protection of the laws,” the equal protection concept has been found to apply to the federal government through the Fifth Amendment’s Due Process guarantee and provides the same protections as the Fourteenth Amendment’s guarantee of equal protection).

42. See, e.g., *Thorne*, 916 F. Supp. at 1372 (recognizing an individual’s claim that appearing on an ABC news program and telling viewers that he is gay, then later being dismissed from the Navy for the statement, violates the First Amendment right to free speech); *Richenberg*, 909 F. Supp. at 1306 (citing First Amendment and Equal Protection right violations as bases for his challenge against the military’s policy regarding homosexual soldiers).

43. *Cook*, 429 F. Supp. 2d at 392.

44. See *id.*

45. See, e.g., *Watkins v. United States Army*, 837 F.2d 1428, 1451 (9th Cir. 1988), *reh’g* 875 F.2d 699, 731 (9th Cir. 1989) (en banc) (reversing and holding for plaintiff on more narrow grounds); *Able v. United States*, 968 F. Supp. 850, 864 (E.D.N.Y. 1997), *rev’d*, 155 F.3d 628, 635 (2d Cir. 1998).

46. See *Philips v. Perry*, 106 F.3d 1420, 1432-41 (9th Cir. 1997).

47. See, e.g., *Thorne*, 916 F. Supp. at 1372.

48. *Thomasson v. Perry*, 80 F.3d 915, 931 (4th Cir. 1996).

that there is no fundamental liberty interest that protects homosexual sex.⁴⁹ Under rational basis review, the law is constitutional because it is rationally related to a legitimate government interest.⁵⁰ The government's interest in keeping the military ready is legitimate.⁵¹ Because preserving unit cohesion is vital to a ready, high-functioning military, and the military said that homosexuals ruin "unit cohesion," prohibiting homosexual conduct by service members is rationally related to a legitimate government interest.⁵²

The Supreme Court's 2003 decision in *Lawrence v. Texas*⁵³ changed the legal status of homosexual rights, though in exactly what ways remains unclear. The Court did not articulate the standard it applied to reach its holding that a Texas law criminalizing sodomy was unconstitutional.⁵⁴ The case overturned the prior precedent, *Bowers v. Hardwick*,⁵⁵ in no uncertain terms. "*Bowers* was not correct when it was decided, and it is not correct today. . . . *Bowers v. Hardwick* should be and now is overruled."⁵⁶ Since the holding of *Bowers* was that there is no "fundamental right [of] homosexuals to engage in sodomy,"⁵⁷ one could argue that the holding of *Lawrence* is the opposite—that there *is* a fundamental right to engage in sodomy, as a private, consensual activity between adults. There is also a credible argument that the Supreme Court applied heightened scrutiny, therefore implying that homosexuals are a suspect class. If *Lawrence* stands for the proposition that homosexuals are a protected class, then strict scrutiny would apply to DADT since it targets homosexuals. DADT has been found unconstitutional under the highest standard of review, but those cases have been overturned on appeal.⁵⁸ There have been only three challenges to DADT since 2003 and none of the federal district courts

49. *See id.* at 928.

50. *See, e.g., Able*, 155 F.3d at 635 ("[W]e cannot say that the reliance by Congress on the professional judgment and testimony of military experts and personnel that those who engage in homosexual acts would compromise the effectiveness of the military was irrational.").

51. *See id.* at 634 (accepting that the government's interest in promoting unit cohesion, enhancing privacy and reducing sexual tension justified prohibiting homosexual conduct).

52. *See id.* at 635 (crediting General Colin Powell's statement that allowing an openly homosexual individual to join a small unit will destroy the bonding that is crucial for survival in times of war).

53. *See* 539 U.S. 558, 562 (2003).

54. *Id.* at 578 (holding that private life within the home deserves respect and therefore government cannot restrict private sexual activity that occurs there).

55. 478 U.S. 186 (1986) (holding that state sodomy laws are valid).

56. *Lawrence*, 539 U.S. at 578.

57. 478 U.S. at 190.

58. *Watkins v. United States Army*, 837 F.2d 1428, 1451 (9th Cir. 1988), *reh'g* 875 F.2d 699, 731 (9th Cir. 1989) (en banc); *Able v. United States*, 968 F. Supp. 850, 864 (E.D.N.Y. 1997), *rev'd on appeal*, 155 F.3d 628, 635 (2d Cir. 1998).

found DADT unconstitutional based on *Lawrence*.⁵⁹

IV. THE DOCTRINE OF JUDICIAL DEFERENCE TO MILITARY JUDGMENT

Nearly every court that upheld DADT employed the doctrine of judicial deference to military judgment. The doctrine directs courts to grant broad deference to military judgments that Congress relied on when passing legislation.⁶⁰ Simply stated, courts are “not free to disregard the Constitution in the military context, [but they] owe great deference to Congress in military matters.”⁶¹ While courts often refer to this theory as a “traditional” doctrine, it is, in fact, a relatively recent development in judicial jurisprudence.⁶² The doctrine is premised on the fact that military life is fundamentally different from civilian life, which justifies restrictions on certain individual rights that would not be tolerated outside the military context.⁶³ In practice, the doctrine allows courts to employ something less than rational basis review because deference “gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its action.”⁶⁴ Courts also have employed the doctrine when reviewing executive actions regarding the military.⁶⁵ A

59. See *Loomis v. United States*, 68 Fed. Cl. 503, 517 (2005) (holding that DADT does not implicate a fundamental right and thus is only subject to rational basis review); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) (laying out a three-part test to apply *Lawrence* when considering the constitutionality of U.C.M.J. Art. 125, which criminalizes sodomy when committed by either homosexual or heterosexual service members and ultimately finding the sodomy law constitutional); see also *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 395 (D. Mass. 2006); *Witt v. United States Dep’t of the Air Force*, 444 F. Supp. 2d 1138, 1148 (W.D. Wash. 2006).

60. See *Loomis*, 68 Fed. Cl. at 520-21 (including an excerpt from General Colin Powell’s testimony to Congress on the importance of unit cohesion in the military, and how allowing openly gay soldiers to serve may disrupt cohesion).

61. *Able*, 155 F.3d at 633-34.

62. See *Rotsker v. Goldberg*, 453 U.S. 57, 76 (1981) (deferring to Congress’s decision to require only men to register for the draft); see also Diane H. Mazur, *A Blueprint for Law School Engagement With the Military*, 1 J. NAT’L SECURITY L. & POL’Y 473, 487-98 (2005) (offering an in-depth analysis of the development of the military’s doctrine of supporting women registering for the draft); Diane H. Mazur, *Is “Don’t Ask, Don’t Tell” Unconstitutional After Lawrence? What It Will Take to Overturn the Policy*, 15 J.L. & PUB. POL’Y 423, 431-36 (2004) (making the point that civilian control over the military will largely disappear if the judiciary abdicates its role to review constitutional questions in the military context); cf. *Philips v. Perry*, 106 F.3d 1420, 1432-41 (9th Cir. 1997) (Fletcher, J., dissenting) (criticizing vehemently the doctrine of judicial deference to military judgment in the context of the “Don’t Ask, Don’t Tell” policy on the grounds that it violates homosexual service members’ equal protection).

63. See *Able*, 155 F.3d at 633 (giving examples of military law restrictions on criminal trial, First Amendment and freedom of religion rights).

64. *Id.* at 634.

65. See *id.* at 633 (emphasizing that deference by the Court to Congress and the Executive in military-related decisions has been the reason for rejecting various challenges to military policies); *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (deferring to Congress’s power during a time of military urgency, World War II, to

court would employ judicial deference when reviewing a challenge to an executive order suspending enforcement of DADT. This is explored further in Part IV.

ANALYSIS

I. "DON'T ASK, DON'T TELL" IN 2007

Two significant differences exist between the United States of 1993 and of 2007. First, the terrorist attacks of 2001 created an entirely unfamiliar sense of fear and vulnerability in Americans and led to a renewed respect for those protecting our safety.⁶⁶ Additionally, the military has been called upon to fight a new kind of war, against a somewhat abstract and untraditional enemy.⁶⁷ Second, social attitudes towards homosexuality have become more positive and accepting in the thirteen years since DADT.⁶⁸ Together, these two developments create a new context for the law, one in which DADT is unlikely to survive.

A few days after September 11, 2001, President Bush announced the United States' entry into the "war on terror," which increased demand for service members in our all-volunteer army.⁶⁹ He assured the American people that the campaign would be long, and would require sacrifices.⁷⁰ In addition, our armed forces would be called upon to fight overseas, to prevent the terrorists from attacking the United States again.⁷¹ The President sent the military into Afghanistan on October 7, 2001, to oust the Taliban and capture Osama bin Laden.⁷² Then, on March 20, 2003, the United States invaded Iraq in order to overthrow dictator Saddam Hussein.⁷³ Despite the president's premature declaration of "mission accomplished" two months later, the conflict in Iraq continues in 2007.⁷⁴

order the segregation of the Japanese-American population).

66. See Sciolino, *supra* note 3.

67. See *id.* (quoting President George W. Bush after the attacks of September 11, characterizing the fight against terrorism as a long and sustained battle against various networks of terrorist organizations).

68. See Alexander, *supra* note 12, at 432 (commenting that 2003 Gallup polls indicated that not only has there been greater support for gays in the military by the American public, but also that there seems to be improving attitudes about gays from inside the military).

69. See Barnes & Spiegel, *supra* note 4, at 18.

70. See Sciolino, *supra* note 3.

71. *Id.*

72. CNN, *Afghanistan Wakes After Night of Intense Bombings*, Oct. 7, 2001, <http://archives.cnn.com/2001/US/10/07/gen.america.under.attack/index.html> (last visited Sept. 24, 2007) [hereinafter *Afghanistan Wakes*].

73. President George W. Bush, President Discusses Beginning of Operation Iraqi Freedom, President's Radio Address, Mar. 22, 2003, available at <http://www.whitehouse.gov/news/releases/2003/03/20030322.html>.

74. Maura Reynolds & Anna Gorman, *After the War: Bush Hails Victory in Iraq*,

The president’s new strategy in Iraq calls for a surge of over 20,000 additional combat troops.⁷⁵ He has little support from Democrats in Congress, some Republican disagreement with the approach, and growing public dissatisfaction with the situation.⁷⁶ With the war’s popularity declining steadily, recruitment is difficult across all branches of the service.⁷⁷

II. GAYS SERVE IN THE MILITARY

The military historically retains gay service members in times of actual conflict, from the Korean War to Vietnam to the current crises.⁷⁸ In 1994, the year after implementation, the United States discharged just over 600 members under DADT.⁷⁹ Over the next six years, the number of annual discharges steadily increased, reaching almost 1300 in 2001.⁸⁰ In 2002 and 2003, the discharges dropped to 885 and 770, respectively.⁸¹ That represents a thirty percent decrease after the Afghanistan invasion and a forty percent decrease—compared to discharges prior to the Afghanistan operation—after Operation Iraqi Freedom began.⁸²

L.A. TIMES, May 2, 2003, at A2 (characterizing President Bush’s speech aboard the USS Abraham Lincoln as giving an optimistic assessment of the war in Iraq).

75. See Thompson, *supra* note 4, at 28 (stating that General Abizaid, former commander of the troops in Afghanistan and Iraq, warned Congress that the military would not be able to sustain a 20,000 troop surge in Iraq; however, once General Abizaid departed as commander, President Bush ordered a troop increase of 30,000).

76. See *id.*

77. See *id.* (stating that the Army has had to lower recruiting standards, partially by accepting more high school dropouts and convicted felons, to meet enlistment goals).

78. *Conduct Unbecoming: The Tenth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,”* in 2004 SERVICE MEMBERS LEGAL DEF. NETWORK 1 [hereinafter *Conduct Unbecoming*] (stating that in 2003, the Pentagon discharged the lowest number of gay, lesbian, and bisexual service members since 1995); see also Press Release, Service Members Legal Defense Network, “Don’t Ask, Don’t Tell” Dismissals Decline to Record Low (Mar. 13, 2007), available at <http://www.sldn.org/templates/press/record.html?section=2&record=3656>.

79. DAVID F. BURRELLI & CHARLES DALE, CONG. RESEARCH SERV., Rep. No. RL30133, HOMOSEXUALS AND U.S. MILITARY POLICY: CURRENT ISSUES 11 (Feb. 10, 2005), available at <http://digital.library.unt.edu/govdocs/crs/data/2005/meta-crs-6146.tkl>.

80. See *id.*

81. See *id.*; see also U.S. GOV’T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: FINANCIAL COST AND LOSS OF CRITICAL SKILLS DUE TO DOD’S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 8 (2005), available at <http://www.gao.gov/new.items/d05299.pdf> [hereinafter GAO, COSTS AND LOSS OF CRITICAL SKILLS] (publishing slightly different numbers from the CRS report, *supra* note 81, likely because GAO did not include some types of service in their totals, such as Reservists with less than 31 days of deployment); *Conduct Unbecoming*, *supra* note 78, at 1 (listing discharge figures for 2002 and 2003 at 909 and 787, respectively, based on Department of Defense reporting).

82. See Audrey Denson & Judy Rolfe, *Historical Timeline of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,”* Service Members Legal Def. Network, available at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1449.pdf.

The Pentagon has denied consistently that it retains gay service members during wartime and subsequently discharges them when the conflict ends.⁸³ A 2005 Congressional Research Service (CRS) report supported this assertion.⁸⁴ The report compared the number of discharges from 1980 to 2003 as a percentage of the active force, and concluded that if the Department of Defense “was using ‘Stop Loss’ to retain homosexuals during [the 1991 Persian Gulf War], we would have expected to see a drop in the wartime discharge rate followed by an increase following the crisis. Such an increase, or ‘post-crisis purge,’ is not evident in these data.”⁸⁵ However, it is impossible to speculate about a “post-crisis purge” under DADT until the current conflict ends, assuming that it ever does and that DADT remains in effect for the duration of the conflict. Also, one researcher criticized the CRS’s methodology, claiming that it averaged the discharge rates in order to hide the clear pattern of lower discharges during war.⁸⁶

Recently, however, the Michael D. Palm Center discovered direct evidence contradicting the Pentagon⁸⁷ in the course of researching a news story.⁸⁸ The organization discovered a 1999 “Reserve Component Unit Commander’s Handbook” which indicated that if a unit has received alert notification—*i.e.*, notice that the unit will be deployed, discharge for homosexual conduct is not authorized.⁸⁹ These regulations are still in

83. See Press Release, Michael D. Palm Center, Researchers Locate Army Document Ordering Commanders Not to Fire Gays: Regulations Seem to Contradict Pentagon Denial That Military Retains Gays During War (Sept. 13, 2005), available at http://www.palmcenter.org/press/dadt/releases/researchers_locate_army_document_ordering_commanders_not_to_fire_gays http://www.palmcenter.org/press/dadt/releases/researchers_locate_army_document_ordering_commanders_not_to_fire_gays [hereinafter Michael D. Palm Center, Researchers Locate].

84. See BURELLI & DALE, *supra* note 79, at 12.

85. See *id.*

86. NATHANIEL FRANK, CENTER FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY UNIVERSITY OF CALIFORNIA, SANTA BARBARA, RESEARCH NOTE ASSESSING ‘HOMOSEXUALS AND U.S. MILITARY POLICY: CURRENT ISSUES,’ A CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 1, July 6, 2005, available at <http://www.palmcenter.org/publications/dadt> (“Gay discharges have fallen during wartime for every American war since World War II, the first time records were kept.”); see also RHONDA EVANS, CENTER FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, UNIVERSITY OF CALIFORNIA, SANTA BARBARA, U.S. MILITARY POLICIES CONCERNING HOMOSEXUALS: DEVELOPMENT, IMPLEMENTATION AND OUTCOMES, 5 (2001), available at http://www.palmcenter.org/publications/dadt/u_s_military_policies_concerning_homosexuals.

87. See Michael D. Palm Center, <http://www.palmcenter.org/> (last visited Oct. 7, 2007).

88. See Michael D. Palm Center, *supra* note 83; see also Lou Chibbaro, Jr., *Out Gay Soldiers Sent to Iraq*, WASH. BLADE, Sept. 23, 2005 <http://www.washblade.com/2005/9-23/news/national/outiraq.cfm> (last visited Sept. 24, 2007) (commenting that the Palm Center found the 1999 FORSCOM while assisting ABC television for a story on Nightline about gays in the military).

89. See Michael D. Palm Center, *supra* note 83; FORSCOM, DEP’T OF THE ARMY,

effect. If the military retains gay service members during times of conflict, only to separate them later under DADT, that practice would seriously undermine the current “unit cohesion and good morale” policy justification. Arbitrary and uneven enforcement of the regulations further undermines the “unit cohesion” rationale.⁹⁰ Whether the law is enforced at all apparently depends on the commanding officer’s discretion.⁹¹

The policy’s justification in fact is undermined because gay service members currently serve in the military—some openly. Many of the challenges to DADT have been brought by gay service members who have distinguished service records. Courts have praised their honorable service, whether upholding or overturning the law.⁹² In addition, the Urban Institute estimates that 36,000 gay men and lesbians were on active duty in 2000, and that number jumps to 65,000 when including the guard and reserve.⁹³ The report also estimates that there are one million gay veterans in the United States.⁹⁴ Brigadier Generals Keith Kerr and Virgil Richard, and Admiral Alan Steinman, all retired, are the highest-ranking service members to publicly announce their homosexuality.⁹⁵ These service members’ contributions demonstrate that gay men and women do not necessarily have the feared negative effects on unit cohesion and morale.

What is more, top military leaders now publicly oppose DADT, including some of those who originally supported it.⁹⁶ Most recently, Army General John M. Shalikashvili announced his change of heart in a

FORSCOM REG. 500-3-3, FORSCOM MOBILIZATION & DEPLOYMENT PLANNING SYSTEM: VOLUME III RESERVE COMPONENT UNIT COMMANDER’S HANDBOOK (1999).

90. See generally NATHANIEL FRANK, CENTER FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, UNIVERSITY OF CALIFORNIA, SANTA BARBARA, GAYS AND LESBIANS AT WAR: MILITARY SERVICE IN IRAQ AND AFGHANISTAN UNDER “DON’T ASK, DON’T TELL” 34-38 (Sept. 15, 2004), available at <http://www.palmcenter.org/press/dadt/releases> (arguing that the policy of “Don’t Ask, Don’t Tell” is ambiguous and also that commanders often ignore reports of homosexual subordinates because they do not want to lose troops).

91. See *id.* at 38 (concluding that selective enforcement of “Don’t Ask, Don’t Tell” creates an atmosphere where certain soldiers may feel that they are targeted specifically).

92. See *Loomis v. United States*, 68 Fed. Cl. 503, 505 (2005) (explaining that Loomis received a Purple Heart and Bronze Star Medal for his service in the Vietnam War).

93. GARY J. GATES, THE URBAN INSTITUTE, GAY MEN AND LESBIANS IN THE U.S. MILITARY: ESTIMATES FROM CENSUS 2000 iii (2004), available at <http://www.urban.org/publications/411069.html> (accounting for 2.5 and 2.8% of military personnel, respectively).

94. See *id.* at iv (indicating that the states with the highest gay and lesbian veteran population are California, Florida, Texas, New York, and Georgia).

95. See John Files, *Gay Ex-Officers Say “Don’t Ask” Doesn’t Work*, N.Y. TIMES, Dec. 10, 2003, at A18.

96. See John M. Shalikashvili, *Second Thoughts on Gays in the Military*, N.Y. TIMES, Jan. 2, 2007, at A1.

New York Times editorial.⁹⁷ Now retired, General Shalikashvili was the chairman of the Joint Chiefs of Staff under Clinton from 1993-1997.⁹⁸ As Chairman, he supported the ban because he believed that changing the policy would be “too burdensome for our troops and commanders,” deferring to the “longstanding view that homosexuality was incompatible with [military] service.”⁹⁹ But now, he wrote, “the military has changed, and [] gays and lesbians can be accepted by their peers.”¹⁰⁰ He cited social science for support. A 2006 Zogby poll showed that seventy-five percent of 500 service members returning from Iraq and Afghanistan were comfortable interacting with gay people.¹⁰¹ The general pointed to other nations’ experiences with allowing openly gay people to serve and noted a need for new recruits in the continuing war on terror.¹⁰² Other prominent members of the military and Executive Cabinet also have spoken out.¹⁰³

There have been numerous social science studies on the policy, its implementation, and its effects on the military. These studies have been done by nonprofit organizations,¹⁰⁴ the GAO,¹⁰⁵ the Congressional Research Service,¹⁰⁶ and the Pentagon and Department of Defense.¹⁰⁷ All come to essentially the same conclusion: gay service members present no

97. *See id.* (stating that the military has been stretched thin from the deployments in the Middle East and anyone willing and able to go to war should be welcomed).

98. *See id.*

99. *See id.*

100. *See id.*

101. ZOGBY, BRUCE, WITTMAN, & RODGERS, ZOGBY INT’L, OPINIONS OF MILITARY PERSONNEL ON SEXUAL MINORITIES IN THE MILITARY 20 (Dec. 2006), *available at* <http://www.palmcenter.org/files/active/1/ZogbyReport.pdf>.

102. *See* Shalikashvili, *supra* note 96, at A1 (mentioning that twenty four nations, including Great Britain and Israel, have allowed gays to serve openly in the military and have not reported problems of morale or recruitment).

103. SERVICE MEMBERS LEGAL DEF. NETWORK, WHY REPEALING “DON’T ASK, DON’T TELL IMPROVES THE U.S. MILITARY,” http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/3195.pdf (last visited Dec. 3, 2007) (including MCPOCG Vincent W. Patton III, USCG (Ret.), former Assistant Secretary of Defense Lawrence Korb, the late former Navy Secretary and Senator John Chafee, and former Assistant Secretary of Defense Edward Dorn).

104. *See* Michael D. Palm Center, <http://www.palmcenter.org/> (last visited Oct. 7, 2007); Service members Legal Defense Network, <http://www.sldn.org> (last visited Oct. 7, 2007); Urban Institute, <http://www.urban.org> (last visited Oct. 7, 2007).

105. *See* U.S. GEN. ACCOUNTING OFFICE, DEFENSE FORCE MANAGEMENT: DOD’S POLICY ON HOMOSEXUALITY (1992), *available at* <http://archive.gao.gov/d33t10/146980.pdf>; U.S. GEN. ACCOUNTING OFFICE, DEFENSE FORCE MANAGEMENT: STATISTICS RELATED TO DOD’S POLICY ON HOMOSEXUALITY (1992), *available at* <http://archive.gao.gov/d33t10/146967.pdf>; U.S. GEN. ACCOUNTING OFFICE, HOMOSEXUALS IN THE MILITARY: POLICIES AND PRACTICES OF FOREIGN COUNTRIES (1993), *available at* <http://archive.gao.gov/t2pbat5/149440.pdf>; GAO, COSTS AND LOSS OF CRITICAL SKILLS, *supra* note 81.

106. *See* BURRELLI & DALE, HOMOSEXUALS AND MILITARY POLICY, *supra* note 79.

107. *See, e.g.*, GAO, COSTS AND LOSS OF CRITICAL SKILLS, *supra* note 81.

long-term negative effect on military unit cohesion, or morale.¹⁰⁸

Many reports highlight the law’s negative effects on the military. For example, the GAO concluded that, at the very least, the cost of recruiting replacements for service members separated under the policy was about \$95 million over a ten-year period.¹⁰⁹ Training costs added at least another \$95 million.¹¹⁰ Additional costs, not reflected in the \$95 million, included inquiries and investigations, counseling and pastoral care, separation functions, and discharge reviews.¹¹¹ A Blue Ribbon Commission convened by the University of California, Santa Barbara to look into this report concluded that the total cost to taxpayers was \$363.8 million, which is about ninety-one percent higher than the GAO estimate.¹¹²

DADT has also cost the military man- and womanpower by both discharging service members and barring recruits. This has a negative impact on military readiness. According to the Pentagon, more than 10,000 service members have been separated since the law’s inception.¹¹³ The law also has disqualified an untold number of talented and willing Americans from serving their country. Of those separated, over two hundred of them have been linguists training in the languages needed most right now, Arabic, Farsi, and Korean.¹¹⁴ Considering the low recruitment numbers and missed recruitment goals that the military is facing currently, this poses a serious threat to military readiness.¹¹⁵

Congress is in the best position to overturn DADT because it can repeal the law. In 2005, Rep. M. Meehan (D-Mass.) introduced the Military

108. See generally Lou Chibbaro Jr., ‘Open Gays’ Can Serve Military Well, *Study Says*, WASH. BLADE (Dec. 7, 2001), available at <http://www.sldn.org/templates/press/record.html?section=5&record=445>.

109. GAO, COSTS AND LOSS OF CRITICAL SKILLS, *supra* note 81, at 29.

110. *Id.* at 14-5.

111. *Id.* at 15-6 (acknowledging that costs for these services include a portion related to homosexual conduct but that the military does not keep track of the specific amount that is delegated for that purpose).

112. FRANK J. BARRETT ET AL., BLUE RIBBON COMMISSION REPORT, FINANCIAL ANALYSIS OF “DON’T ASK, DON’T TELL:” HOW MUCH DOES IT COST? (Feb. 2006), available at <http://www.palmcenter.org/files/active/0/2006-FebBlueRibbonFinalRpt.pdf>.

113. See GAO, FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS, *supra* note 81, at 8; see also Press Release, Michael D. Palm Center, Experts Debate Likely Effects of Lifting Gay Ban (Oct. 10, 2005), available at <http://www.palmcenter.org/press/dadt/releases/> (finding that recruitment of straight people may not decline if the gay ban were overturned).

114. See GAO, COSTS AND LOSS OF CRITICAL SKILLS, *supra* note 81, at 21 tbl. 2.

115. See Barnes & Spiegel, *supra* note 4, at A18 (noting that the Army has been accepting more enlistees scoring in the lowest percentile on the military aptitude test to meet its recruiting goals); Shanker, *supra* note 4, at A19 (reasoning that the cash bonuses received by recruits upon enlistment likely enabled all branches of the military to meet their recruitment goals for the 2006 fiscal year).

Readiness Enhancement Act (“MREA”), with 122 co-sponsors.¹¹⁶ In March, 2007, Mr. Meehan re-introduced the bill as the MREA of 2007, with 109 co-sponsors.¹¹⁷ The MREA’s sole purpose “is to institute in the Armed Forces a policy of nondiscrimination on the basis of sexual orientation.”¹¹⁸ The MREA expressly repeals 10 U.S.C. § 654 and establishes a detailed policy, prohibiting the Secretary of Defense from discriminating “on the basis of sexual orientation against any member of the armed forces or against any person seeking to become a member of the armed forces.”¹¹⁹ Discrimination is defined as “the taking of any personnel or administrative action—including any action relating to promotion, demotion, evaluation, selection for an award, selection for a duty assignment, transfer, or separation—in whole or in part on the basis of sexual orientation.”¹²⁰ For those seeking to become members of the armed forces, “denial of accession . . . in whole or in part on the basis of sexual orientation” also is considered discrimination.¹²¹ The Secretary of Defense “may not establish, implement, or apply any personnel or administrative policy, or take any personnel or administrative action . . . on the basis of sexual orientation.”¹²² Section 4(e) also mandates that any person who had been separated under DADT, “if otherwise qualified for re-accession into the armed forces, shall not be prohibited from re-accession into the armed forces on the sole basis of such separation.”¹²³ Nothing in the Act creates a private cause of action for damages,¹²⁴ nor is it to be construed as

116. See H.R. REP. NO. 109-1059 (2005) (removing the DADT policy and instituting a new policy of nondiscrimination).

117. See H.R. REP. NO. 110-1246 (2007). Five new House members co-sponsored the bill within two weeks of its introduction, and the number has been climbing steadily. As of June 25, 2007, the total number of co-sponsors was 126. See The Library of Congress, THOMAS, <http://thomas.loc.gov>. Additionally, Rep. Ellen Tauscher (D.-Cal.) will become the lead sponsor of the bill in July, 2007, when Rep. Meehan steps down to become chancellor of the University of Massachusetts, Lowell. See Josh White, *New Leader in Military Policy Battle*, WASH. POST, June 15, 2007, at A19 (discussing Rep. Tauscher belief that a Democratic president is necessary for the bill to pass).

118. H.R. REP. NO. 110-1246, at § 2.

119. *Id.* §§ 3-4(a). (stating that the Secretary of Homeland Security also has this authority with respect to the Coast Guard when it is not operating as a service in the Navy).

120. *Id.* § 4(b)(1).

121. *Id.* § 4(b)(2).

122. *Id.* § 4(c).

123. *Id.* § 4(d)-(f) (stating that this section does not prohibit the Secretaries from “prescribing or enforcing regulations governing the conduct of members of the armed forces if the regulations are designed and applied without regard to sexual orientation,” and defines “sexual orientation” to mean “heterosexuality, homosexuality, or bisexuality, whether the orientation is real or perceived, and includes statements and consensual sexual conduct manifesting heterosexuality, homosexuality, or bisexuality”).

124. *Id.* § 6.

furnishing dependent benefits in violation of the Defense of Marriage Act.¹²⁵ Finally, the MREA requires that the Defense Secretary revise Department of Defense regulations to conform to the new nondiscrimination policy and to direct the Secretaries of each military department to similarly revise their branch’s regulations.¹²⁶

The bill was re-introduced in the midst of news announcing the President’s planned troop surge in Iraq, calling for more than 20,000 additional deployments in the civil-war-torn nation.¹²⁷ Then, two weeks later, the *Chicago Tribune* quoted Chairman of the Joint Chiefs of Staff General Peter Pace as saying that he believed homosexuality was “immoral,” and that DADT should remain in effect.¹²⁸ Several prominent newspapers ran editorials drawing a connection between the ban on gay service members and the call for troop increases.¹²⁹ General Pace retracted his remarks, saying that he should not have aired his personal views on homosexuality, though he did not apologize.¹³⁰ Politicians from both parties condemned the remarks.¹³¹ Congressman Meehan called for an

125. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419-20 (1996) (articulating that no state is required to recognize or provide any rights to a marriage between two members of the same sex that occurred in a different state).

126. H.R. REP. NO. 110-1246, at § 7. This includes all equal opportunity and human relations regulations, eliminating procedures for involuntary discharges based on sexual orientation and adding regulations “governing victims’ advocacy programs to include sexual orientation discrimination . . . for which members of the Armed Forces and their families may seek assistance.” *Id.* § 7(a)(1)-(3).

127. See Steve Chapman, “Don’t Ask” Rule’s Serious Tradeoffs, CHI. TRIB., Mar. 4, 2007, at 7 (asserting that the current DADT policy represents a disservice to homosexuals and the military in a time when the armed forces are in need of more troops); Andrea Stone, *Bill Targets “Don’t Ask, Don’t Tell” Medical Personnel Among Dismissed Servicemembers*, USA TODAY, Feb. 28, 2007, at 5A (“A Government Accountability Office report in February 2005 found that at least 800 dismissed gay service members had skills deemed ‘mission critical’ by the Pentagon.”).

128. Aamer Madhani, *Don’t Drop “Don’t Ask, Don’t Tell,” Pace Says*, CHI. TRIB., Mar. 13, 2007, at 1.

129. See *id.*; *Old Prejudice Dishonors New Military Generation*, USA TODAY, Mar. 14, 2007, at 10A (comparing the unfounded nature of the current discrimination against homosexuals to prior military restriction on blacks and whites serving together); Cynthia Tucker, *Immorality: U.S. Abuse of Gays in Military*, ATLANTA J. & CONST., Mar. 18, 2007, at B6 (observing the hypocrisy in DADT policy because during wartime less servicemen are dismissed than in periods when no military conflict exists).

130. See William Neikirk & Karoun Demirjian, *Pace Takes Fire on Gays Remark*, CHI. TRIB., Mar. 14, 2007, at 3.

131. *Id.* (mentioning how Democratic presidential candidates Senator Hilary Clinton and Senator Barack Obama immediately criticized the general for making the remark, but oddly did not immediately distance themselves from its content); see Lynn Sweet, Editorial, *How Obama, Clinton Tripped on Gay Rights*, CHI. SUN-TIMES, Mar. 22, 2007 (declaring that both candidates inadvertently stumbled by failing to directly answer the question of whether homosexuality was immoral when initially asked); *Brownback Backs Pace Remark on Gays*, CHI. TRIB., Mar. 16, 2007, at 5 (reporting that Republican presidential candidate and Kansas Senator Sam Brownback supported the general).

apology from General Pace.¹³² Less than one month after the General's remarks, President Bush supported DADT in a press conference.¹³³

The sensational story brought gays in the military to the forefront of national conversation, and gave some indication of the current political temperature on the issue. Highly unscientific polling on CNN conducted the day the story broke revealed an audience evenly split on whether gays should be allowed to serve, though the "yes" answers prevailed by a slim margin. SLDN and others argued that the General's inappropriate comments demonstrated the law's true basis in prejudice and discrimination.¹³⁴ The issue clearly remains controversial. In fact, seeking to avoid controversial Senate confirmation hearings, the Bush administration declined to reappoint Gen. Pace as Chairman of the Joint Chiefs of Staff in early June 2007.¹³⁵ Defense Secretary Robert Gates believed that the confirmation process would have focused on Gen. Pace's involvement in the Iraq conflict,¹³⁶ however, a week before the official announcement, people speculated that Gen. Pace stepped down in part because of reactions to his comments on homosexuality.¹³⁷

Despite Congress's primary authority to repeal DADT, the president could effectively overturn the ban if Congress did not, based on statutory and constitutional authority as the Commander-in-Chief of the armed forces.¹³⁸

132. See *General Under Fire: Top Military Leader Expresses Regret but Doesn't Apologize for Calling Homosexuality "Immoral,"* CHI. TRIB., Mar. 14, 2007, at 3 (quoting Representative Meehan, who described General Pace's statements as in conflict with the current public and military opinion because the military is turning away troops in order to support a policy of discrimination).

133. President George W. Bush, President Makes Remarks on the Emergency Supplemental (Apr. 3, 2007), available at <http://www.whitehouse.gov/news/releases/2007/04/> (declining to reveal his personal beliefs on whether he considered homosexuality immoral).

134. See *supra* notes 132-34 and accompanying text.

135. See Anne Flaherty, *Senate Leader Criticizes Pace, Petraeus*, NAVY TIMES, June 15, 2007, http://www.navytimes.com/news/2007/06/ap_senatecritics_070614 (last visited Sept. 24, 2007); Kathleen Parker, *Gen. Pace's Collateral Damage*, SFGATE.COM, June 15, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?file:/c/a/2007/06/15/EDGKOP3GAT1.DTL> (last visited Sept. 24, 2007) (noting Defense Secretary Robert Gates' statement that he believed Pace's termination had nothing to do with his performance, but rather that the circumstances made it necessary to let him go).

136. Thom Shanker, *Chairman of Joint Chiefs Will Not be Reappointed*, N.Y. TIMES, June 9, 2007, at A1 ("I have decided that at this moment in our history, the nation, our men and women in uniform, and General Pace himself would not be well-served by a divisive ordeal in selecting the next chairman of the Joint Chiefs of Staff.").

137. See Joshua Lynsen, *General Who Called Gay Sex 'Immoral' to Retire*, WASH. BLADE, June 8, 2007, <http://www.washblade.com/2007/6-15/news/national/10757.cfm> (last visited Sept. 24, 2007).

138. See 10 U.S.C. § 123(a) (2007).

III. ESSENTIAL TO OUR NATIONAL SECURITY: SUSPENDING THE BAN THROUGH EXECUTIVE AUTHORITY

Although Congress codified Don’t Ask, Don’t Tell, the executive branch has specific statutory authority to suspend the law’s enforcement, at least temporarily.¹³⁹ The president’s declaration of a national emergency in the wake of the September 11, 2001, attacks triggered statutory authority that specifically allows the president to suspend separation of commissioned officers.¹⁴⁰ The president also had the authority to suspend separation of all other soldiers in the armed forces.¹⁴¹ These provisions, together with the Commander-in-Chief powers, create executive authority to effectively overturn the ban. The president could issue an executive order directing the Secretary of Defense to suspend the regulations implementing DADT. Past presidents exercised this authority in similar situations and for similar ends.¹⁴² Traditional judicial deference to the Executive in matters of national security, coupled with the political question doctrine, makes any challenge to the order unlikely to succeed. Therefore, the Executive branch could make an argument using national security to circumvent the ban on gays in the military.

A. Constitutional Authority of Congress & the Executive Regarding the Armed Forces

Both the legislative and executive branches share authority over the U.S. armed forces. The Constitution delineates Congress’s responsibility with much more detail than it does for the Executive.¹⁴³ The constitutional mandates that the Executive “be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”¹⁴⁴ This clause is colloquially known as the Commander-in-Chief powers. In contrast,

139. *See id.*

140. *See id.*; Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (announcing in accordance with the requirements of the National Emergencies Act, 50 U.S.C. § 1601 (1976), that President Bush declares a national emergency and intends to invoke 10 U.S.C. § 123, allowing him to temporarily suspend any provision that would separate a commissioned officer from the armed forces).

141. 10 U.S.C. § 12305(a) (2007).

142. *Cf.* Exec. Order No. 12,968, 60 Fed. Reg. 40,245, 40,250 (Aug. 7, 1995) (proclaiming by executive order that when reviewing an individual’s application for a position that requires access to classified information, the government can not take into account sexual orientation).

143. *Compare* U.S. CONST. art. I, § 8, cl. 11-16 (providing Congress an extensive list of powers, including the power to declare war, raise funds for the Armed Forces, and create laws for disciplining military members), *with* U.S. CONST. art. II, § 2 (stating only that the president is the Commander in Chief, but failing to delineate what powers the title entails).

144. U.S. CONST. art. II, § 2.

Congress has authority to

provide for the common defence . . . ; define and punish . . . Offences against the Law of Nations; declare War, . . . and make Rules concerning Captures on Land and Water; . . . raise and support Armies; . . . provide and maintain a Navy; . . . [and] provide for organizing, arming, and disciplining, the Militia.¹⁴⁵

Congress also holds the proverbial purse strings, which includes appropriations to the military,¹⁴⁶ while the president must “take Care that the Laws be faithfully executed.”¹⁴⁷ This clause gives the president the power to make regulations that implement the laws Congress passes, such as the Department of Defense regulations implementing DADT. Thus, Congress and the Executive together regulate the armed forces.

B. National Emergency Powers

The president also has the authority to declare national emergencies.¹⁴⁸ The term national emergency is not well-defined by statute, but has come to refer to sudden attacks, such as those that occurred on September 11, 2001, and natural disasters, such as Hurricane Katrina. The National Emergencies Act outlines the exclusive means for making such a declaration and provides a termination date if the president does not officially end the emergency.¹⁴⁹ It also mandates that the president indicate what power and authority he is activating in response to the crisis.¹⁵⁰ There are at least 160 legal provisions that could be activated by a national emergency declaration.¹⁵¹

President Bush formally declared a national emergency three days after the September 11, 2001, attacks on Washington and New York, which remains in effect.¹⁵² He activated nine statutes, including 10 U.S.C. § 123,

145. *Id.* art. I, § 8, cl. 1, 10-16.

146. *See id.* art. I, § 9, cl. 12-13 (allocating to Congress the responsibility to raise funds for supporting the armies, but placing a two year limit on the use of funds).

147. *Id.* art. II, § 3.

148. National Emergencies Act, 50 U.S.C. § 1601, *et seq.* (1976); *see* HAROLD C. RELYEA, CONG. RES. SERV., TERRORIST ATTACKS AND NATIONAL EMERGENCIES ACT DECLARATIONS 1-6 (2005), *available at* <http://www.fas.org/irp/crs/RS21017.pdf> (illustrating that prior to the passage of National Emergencies Act, presidents had unfettered discretion to implement their emergency powers).

149. *See* 50 U.S.C. § 1622(d) (2007) (providing that the termination date be decided either by joint resolution or by the date specified by the President in his proclamation).

150. 50 U.S.C. § 1631 (2007).

151. *See* RELYEA, *supra* note 148, at 3 (citing DAVID M. ACKERMAN & RICHARD F. GRIMMETT, CONG. RES. SERV., DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: BACKGROUND AND LEGAL IMPLICATIONS (2003), *available at* <http://www.fas.org/sgp/crs/natsec/RL31133.pdf>).

152. *See* Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

in the subsequently issued executive order.¹⁵³ This statute authorizes the president, in time of war or national emergency, to “suspend the operation of any provision of law relating to the . . . separation of commissioned officers of the Army, Navy, Air Force, Marine Corps, or Coast Guard Reserve.”¹⁵⁴ The suspension will remain effective until two years after the last extension of the national emergency declaration, or until one year after the termination of the war or national emergency, whichever occurs first.¹⁵⁵ To summarize, the president has authority to regulate the military under his constitutional Commander-in-Chief powers. In addition, he has the authority to declare national emergencies in times of crisis. Congress created standby statutory authorities triggered by a national emergency declaration. Among these, is the power to suspend any law relating to the separation of commissioned officers. When President Bush declared a national emergency on September 14, 2001, he explicitly activated the authority related to suspending separations.¹⁵⁶ Thus, the president now has statutory authority to suspend separation proceedings under DADT for commissioned officers.

The president could exercise this authority by issuing an executive order citing 10 U.S.C. § 123(a). The order could state that separation proceedings against commissioned officers under DADT are suspended for the duration of the national emergency.¹⁵⁷ The order may also include a brief explanation, indicating that national security depends on a strong military, which needs all willing and able soldiers. Because the military has not declared homosexuals unfit to serve, the need for bodies on the ground would likely trump the unit cohesion issue.¹⁵⁸

Although 10 U.S.C. § 123 applies only to commissioned officers, the president has alternate statutory authority to suspend DADT regulations for enlisted service members and non-commissioned officers in the reserves. A stop-loss order is the most effective way to retain these service members. Under 10 U.S.C. § 12305, the president may, “notwithstanding any other provision of law,” suspend laws relating to the promotion, retirement, and

153. See Exec. Order No. 13,223, 66 Fed. Reg. 48,201, at 48,201-02 (Sept. 14, 2001).

154. 10 U.S.C. § 123(a) (2001).

155. See *id.* § 123(b).

156. See Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (invoking 10 U.S.C. § 123 and various other provisions of the United States Code relating to the separation of commissioned officers).

157. See 10 U.S.C. § 123.

158. See 10 U.S.C. § 654(a)(8) (finding that military life is a specialized society and the conditions of military service require cohesion within military units); see also DEP’T OF DEF., SEPARATION OF OFFICERS, *supra* note 19 (ordering administrative separation for officers with substandard performance or officers who have committed misconduct).

separation of “any [reserve component] member of the armed forces who the President determines is essential to the national security of the United States.”¹⁵⁹ The law applies to reserve forces serving on active duty in accordance with an order issued pursuant to 10 U.S.C. § 12302.¹⁶⁰ Section 12302 states that “[i]n time of national emergency declared by the President,” an authority designated by the Secretary of the service concerned may order any unit or member to active duty for not more than twenty-four consecutive months.¹⁶¹ These statutes create a similar chain of authority as that under 10 U.S.C. § 123—the Commander-in-Chief powers plus delegated statutory authority allows for an executive order suspending enforcement of DADT separations.¹⁶² The legal reasoning is only slightly different because the statutory language differs, but the effect is the same.

All of the services have issued a skill-based stop-loss order at least once in the five and a half years since September 11, 2001.¹⁶³ At the end of 2006, the Army National Guard and Reserves had 10,731 active soldiers retained through stop-loss authority.¹⁶⁴ According to the Army Times, the Marine Corps discontinued the stop-loss policy and the Navy last used it in April 2003.¹⁶⁵

159. 10 U.S.C. § 12305(a) (2007).

160. *See id.*

161. 10 U.S.C. § 12302(a) (2007).

162. *Compare* 10 U.S.C. § 123 (2001) (allowing the president during times of war or national emergency to suspend laws relating to the separation of commissioned officers), *with* U.S. CONST. art. II, § 2 (declaring the president the commander-in-chief of the armed forces), *and* 10 U.S.C. 12305(a) (providing the president the ability to suspend any provisions of law that cause the separation of any individual deemed essential to national security during times when the reserve forces have been activated under statutory authority).

163. *See* LAWRENCE KAPP, CONG. RES. SERV., OPERATIONS NOBLE EAGLE, ENDURING FREEDOM, AND IRAQI FREEDOM: QUESTIONS AND ANSWERS ABOUT U.S. MILITARY PERSONNEL, COMPENSATION, AND FORCE STRUCTURE 7 (2005), *available at* <http://digital.library.unt.edu/govdocs/crs/data/2006/meta-crs-8369.tkl> (defining “stop loss” as the exercise of the president’s authority to suspend separation of military personnel for a period of time, and noting that none of the services currently have a skill-based stop-loss policy in effect). The Army does have a unit-based stop-loss policy for deployments to Iraq and Afghanistan, which it estimates will affect 36,700 soldiers during the current rotations for Iraqi Freedom and Enduring Freedom. *Id.*

164. *See* Gordon Lubold & Matthew Cox, *Minimize Stop-Loss, Gates Tells Service Secretaries; Policy Currently Retains More Than 10,000 Soldiers*, ARMY TIMES, Feb. 5, 2007, at 19 (suggesting that the Army will end the stop-loss when it reaches its goal of 547,000 soldiers).

165. *See id.* (claiming that the Navy’s stop-loss policy prevented 480 sailors from leaving the service). No information was available regarding any recent Air Force stop-loss orders. *See id.* In late 2001, the Air National Guard and Air Force Reserve implemented a stop-loss policy that affected all career fields through January 2002. *See* Rod Hafemeister, Seena Simon & Val Gempis, *Stop-loss; Advances in the War in Afghanistan Mean Freeze in Retirements, Separations Could End in a Few Weeks*, AIR FORCE TIMES, Dec. 3, 2001, at GEN 1203 (describing how the stop-loss policy has prevented Tech. Sgt. Ronald Williams from retiring from the Air Force even though he is physically unable to perform his job).

Administrative separations under DADT should continue despite stop loss orders, according to military regulations.¹⁶⁶ A stop-loss order does not apply to most involuntary separations—such as those based on criminal acts, or to regulations or policies that lead to involuntary separations.¹⁶⁷ For example, the 2002 Marine Corps stop-loss order states that “commanders will continue to separate marines for reasons of hardship, physical disability, involuntary administrative separation, or violation of the Uniform Code of Military Justice (“UCMJ”).”¹⁶⁸ The Army orders specifically exempt certain types of separations from the stop-loss and “discharge for homosexual conduct” is one exemption.¹⁶⁹ The list of exemptions refers to AR 635-200, the regulations covering DADT separations.¹⁷⁰ However, another Army Reserve regulation tells commanders that if a unit has received alert notification, meaning that their unit will be deployed, discharge for homosexual conduct is not authorized.¹⁷¹ When confronted with the regulation, a military spokesperson admitted that Reservists and National Guardsmen have been sent to Iraq even though they have claimed to be gay, or were accused of being gay.¹⁷² Apparently commanders have wide discretion regarding who will be deployed.

166. See KAPP, QUESTIONS AND ANSWERS, *supra* note 163, at 7 (“[T]he adoption of a stop-loss policy does not modify service policies or regulations which might lead to an administrative discharge (e.g. for homosexuality) or to a medical discharge.”); BURELLI & DALE, *supra* note 79, at 9-10 (explaining that a claim of homosexuality arising during a stop-loss will be examined critically because skepticism may arise about whether it is merely an attempt to avoid deployment or combat); see also *Stop-loss Facts*, ARMY TIMES, June 14, 2004, at 11 (“Stop-loss does not affect most involuntary separations or retirements, nor does it generally limit laws, regulations, or policies that lead to involuntary separations, retirements or releases from active duty.”).

167. See KAPP, *supra* note 163, at 7 (asserting that a stop-loss order will not prevent the separation of an individual from the armed forces if it results from homosexuality or a medical discharge).

168. Bulletin from the Marine Admin., Expanded Stop Loss Policy for Force Protection, MARADMIN 491/02, Sept. 13, 2002, available at <http://www.usmc.mil/maradmins/maradmin2000.nsf/maradmins?OpenForm&Start=6.196> (follow “EXPANDED STOP LOSS POLICY FOR FORCE PROTECTION”).

169. See KAPP, *supra* note 163, at 7.

170. U.S. Army, Miscellaneous Policies, <http://www.armyg1.army.mil/MilitaryPersonnel/policy.asp> (follow the hyperlinks below “Stop Loss” and “Matrixes”). (providing the specific exemption regarding officers in either of these three branches, which reads “Resignation for the good of the service due to homosexual conduct”). Air Force and Navy regulations were not available from this website. *Id.*

171. See FORSCOM, *supra* note 89.

172. See *Afghanistan Wakes*, *supra* note 72 (noting that the spokesperson admitted that the regulation was aimed at service members who say they are gay to avoid service, which is prohibited by DADT in 10 U.S.C. § 654(e)). None of the regulations include guidelines for determining if a service member is claiming to be gay to get out of the military. *Id.*

Nothing in 10 U.S.C. § 12302 mandates that separations under DADT must be unaffected by a stop-loss order. The only articulated standard is presidential determination that the member is “essential to the national security of the United States.”¹⁷³ As Commander-in-Chief, the president has broad discretion to make that determination. And when the president’s military strategy requires an increase in troop deployment in an all-volunteer force, he can call upon all willing and able service members during this conflict.¹⁷⁴ Therefore, the president could direct the Secretary of Homeland Security to issue a stop-loss order that specifically applies to separations under DADT regulations.¹⁷⁵

Stop-loss orders are unpopular because they involuntarily extend active tours of duty.¹⁷⁶ Secretary of Defense Robert Gates has called for an end to the policy for both active and reserve forces for that reason.¹⁷⁷ However, given that most service members discharged under DADT are separated involuntarily, a stop-loss policy that allows them to serve may not be as unpopular.

C. Precedent Orders

While it may seem like a radical approach, past presidents have issued executive orders for similar ends. Almost sixty years ago Harry Truman signed an executive order ending racial segregation in the military and, more recently, William Clinton instituted a nondiscrimination policy via an executive order that protected homosexuals seeking security clearances.¹⁷⁸ These two executive orders significantly changed the composition of the military by explicitly ordering an end to discrimination.¹⁷⁹ The order I propose differs from those issued by Truman and Clinton in two ways. First, the past orders did not suspend enforcement of an existing statute.¹⁸⁰

173. 10 U.S.C. § 12305(a) (2007) (noting that the President may suspend any provision of law separating any member of the armed forces).

174. See Lubold & Cox, *supra* note 164 (noting that stop-loss is one of the strategies employed to retain troops when needed).

175. See Exec. Order No. 13,286, 68 Fed. Reg. 10,619, 10,626 (Feb. 28, 2003) (amending a 1990 order by President George W. Bush that originally delegated the suspension authority to the Secretary of Transportation, and transferring that power to the Secretary of Homeland Security).

176. See Lubold & Cox, *supra* note 164, at 18 (noting also that stop loss results in many soldiers being retained past their planned retirement dates, which prompted Defense Secretary Robert Gates to state that use of stop loss will be minimized).

177. See *id.*

178. See Exec. Order No. 9,981, 13 Fed. Reg. 4,313, 4,313 (July 26, 1948); see also Exec. Order No. 12,968, 60 Fed. Reg. 40,245, 40,249 (Aug. 2, 1995).

179. See Exec. Order No. 12,968, 60 Fed. Reg. 40,245, at 40,249.

180. Executive orders have the same force and effect of law because they are the result of delegated legislative authority. See Exec. Order No. 9,981, 13 Fed. Reg. 4,313, 4,313 (July 26, 1948); see also STEPHEN DYCUS ET AL., NATIONAL SECURITY

Second, they rested on nothing more than general constitutional authority, rather than specific statutes.¹⁸¹

Prior to 1995, the Defense Department’s Industrial Security Clearance Office (“DISCO”), which issued security clearances for employees of Department of Defense contractors, subjected gay employees to heightened security clearance checks.¹⁸² A 1987 case challenged this increased scrutiny as a constitutional violation, and the federal district court found the process unconstitutional.¹⁸³ However, the Ninth Circuit reversed, finding that homosexuality was not a suspect class under equal protection analysis and applying rational basis review, held the process constitutional.¹⁸⁴ Thereafter, in 1995, President Clinton issued an executive order stating that the “United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information.”¹⁸⁵ Even more specifically, “[n]o inference concerning the [access eligibility] standards in this section may be raised solely on the basis of sexual orientation.”¹⁸⁶ Clinton cited no authority for this order other than his general constitutional authority and U.S. laws.¹⁸⁷ Because the order affected executive agencies,¹⁸⁸ and the president has wide discretion to make regulations for such agencies, he had the authority to act.¹⁸⁹

President Truman’s 1948 order ending race discrimination in the armed forces is an analogous precedent because it declared the presidential policy that there “be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.”¹⁹⁰

LAW 44-45 (4th ed. 2007); Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 297-301 (1983).

181. See Exec. Order No. 9,981, 13 Fed. Reg. 4,313 (July 26, 1948); see also Alexander, *supra* note 12, at 413.

182. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1364 (N.D. Cal. 1987) (adding that the Defense Department believed that homosexual actions warranted expanded investigations of the applicants because such activity was derogatory).

183. *Id.* at 1362.

184. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990).

185. Exec. Order No. 12,968, 60 Fed. Reg. 40,245, 40,250 (Aug. 2, 1995).

186. *Id.*

187. *Id.* at 40,245 (declaring his power to make this order was based on the power vested in him as President by the Constitution and the laws of the United States).

188. See *id.*

189. See *id.* at 40,253 (requiring “active oversight and continuing security education and awareness programs to ensure effective implementation of this order”).

190. Exec. Order No. 9,981, 13 Fed. Reg. 4313 (July 26, 1948) (establishing a committee to oversee military practices to ensure that the president’s policy is adequately implemented).

Truman relied on his authority as president under the Constitution and U.S. laws, citing his Commander-in-Chief authority as well.¹⁹¹

These two precedent orders demonstrate that the president has the legal authority to end discrimination in the military via executive order, without a specific statutory basis. The order I propose regarding DADT would similarly end a discriminatory practice, albeit temporarily. The fact that this order contradicts the president's duty to enforce the law is ameliorated by other statutory grants of power and the president's broad discretion to lead the armed forces.

D. Challenges to an Executive Order Lifting the Ban

Inevitably, the order would come under attack because it addresses a controversial issue. A legal challenge raises complex questions regarding its form and who has standing to get into court. The president has conflicting authority. The Constitution mandates that the president faithfully execute the laws,¹⁹² and DADT is a valid law. Additionally, Congress explicitly delegated certain powers to the president regarding military matters. By issuing an executive order suspending the enforcement of DADT, the president appears to violate his constitutional duty. However, courts have interpreted the Commander-in-Chief powers broadly to give the president wide discretion regarding military strategy and tactics during conflicts.¹⁹³ These laws were designed to give the Commander-in-Chief the flexibility needed to make decisions about managing a war.¹⁹⁴ DADT was written and passed during peacetime, but the country is now embroiled in a foreign civil war with no end in sight. Given the different circumstances between 1993 and the present, there may be acceptance of the president's temporary exercise of authority to suspend this law. These factors make the order very likely to survive an attack. This section briefly explores some of the potential challenges.

There are at least three potential claims that can be brought against the Executive after it issues the order suspending DADT separations.¹⁹⁵ One possibility is that a member of Congress would attack the order as unconstitutional on its face. In the alternative, a Congressman might demand a writ of mandamus, calling on the president to enforce DADT.

191. *Id.*

192. U.S. CONST. art. II, § 3.

193. *See, e.g.,* DaCosta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973) (holding that the President's tactical and strategic military decisions constituted nonjusticiable political questions).

194. *See id.*

195. The plaintiff could name as defendant the president or the Secretary or Secretaries of the service issuing the implementing regulations.

The third possibility is that a homophobic soldier—a service member who is aware of a gay soldier in his or her unit and claims that unit cohesion has diminished as a result—might try to prevent the order from taking effect through an injunction.

Any of these plaintiffs likely would have standing problems. The three main standing requirements are injury in fact, a causal connection, and redressability.¹⁹⁶ In addition, “when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.”¹⁹⁷ It is unlikely that a Member of Congress could allege injury in fact. The Supreme Court ruled in *Raines v. Bird* that legislators may not sue in their institutional capacity unless their votes have been “completely nullified” by allegedly illegal action.¹⁹⁸ In this instance, Congress could pass legislation through the bicameral process that would override the executive order. Accordingly, the legislator’s vote would not be nullified by the order and the legislator would not have standing.¹⁹⁹

E. Homophobic Soldier Hypothetical

The homophobic soldier might have a better chance at establishing standing, though the challenge is still unlikely to succeed. The soldier would be able to show a causal connection between the executive order and the gay soldier remaining in the unit. He could also demonstrate that the issue would be redressed by an injunction preventing the order from taking effect. The homophobic soldier may be able to show injury in fact. That requirement is met only by a showing of concrete and particularized injury that is actual or imminent and not merely conjectural.²⁰⁰ While there is no case directly on point, the holding in *Pietsch v. Bush*²⁰¹ is instructive. In that case, a private citizen sued the president and the Secretary of Defense, among others, to stop military actions in the first Persian Gulf War.²⁰² The court held that the plaintiff had no standing because he had not “alleged a ‘distinct and palpable’ injury, in fact, that he suffers by reason of the

196. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

197. *Id.* at 562.

198. *See* 521 U.S. 791, 814, 823 (1997).

199. The Member of Congress’s challenge would also likely fail the doctrine of ripeness for the same reason. *Dellums v. Bush*, 752 F. Supp. 1141, 1149 (D.D.C. 1990) (noting that “[j]udicial restraint must, of course, be even further enhanced when the issue is one . . . on which the other two branches may be deeply divided”). An issue is not ripe “unless and until each branch has taken action asserting its constitutional authority.” *Id.* at 1150. Here, Congress would have the chance to assert its constitutional authority by repealing the executive order through the bicameral process.

200. *Lujan*, 504 U.S. at 560.

201. 755 F. Supp. 62 (E.D.N.Y. 1991).

202. *Id.* at 62-63.

activities in the Persian Gulf.²⁰³ The court stated that the “[p]laintiff’s contention that he is being made ‘AN ACCESSORY TO MURDER AGAINST HIS WILL,’ and . . . that this fact is causing him severe emotional distress, is too abstract to amount to a ‘case or controversy’ under Article III, Section 2.”²⁰⁴ The *Pietsch* court’s finding of no standing rested in part on the fact that the plaintiff was not in the military. Thus, *Pietsch* seems to suggest that a service member directly affected by a deployment order might have a better chance at establishing standing. However, even if a plaintiff obtained standing, the court could rule the issue a nonjusticiable political question and dismiss it with prejudice, as the D.C. District court did in *Ange*.²⁰⁵

Separation of powers issues dictate that the judiciary remove itself from purely political questions, which it has neither the authority nor the expertise to address.²⁰⁶ The court in *Ange* listed numerous elements—any one of which is sufficient—that are necessary to invoke this doctrine:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁰⁷

The political question doctrine is broad and would likely apply in the homophobic soldier hypothetical for at least two reasons. The Constitution commits power to regulate the armed forces to Congress and the Executive.²⁰⁸ The court would not be able to resolve the issue without making a policy determination about allowing homosexuals to serve in the military. Courts reviewing DADT have found that the question was not

203. *Id.* at 66.

204. *Id.*

205. *See id.* at 515 (explaining the dismissal as resting upon the constitutional delegation of authority to the executive and legislative branches and the court’s concern about intruding into those realms).

206. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

207. *Ange*, 752 F. Supp. at 512.

208. U.S. CONST. art. I, § 8 cl. 12 (giving the right to raise and support Armies to Congress); U.S. CONST. art. II, § 2 (authorizing the President to be Commander-in-Chief of the Army and Navy).

one to be resolved by judicial discretion.²⁰⁹ In another case from the Vietnam War era, a service member challenged the enforcement of a presidential directive ordering the Secretary of Defense and service secretaries to mine the ports and harbors of North Vietnam.²¹⁰ The Second Circuit held that the executive’s actions presented a nonjusticiable political question because there was a lack of judicially discoverable and manageable standards to evaluate whether they were “merely a new tactical approach within a continuing strategic plan.”²¹¹ Lifting the ban on gay service members is arguably a tactical approach implementing the president’s strategic plan to increase troop levels in Iraq. Therefore, no standards to evaluate the action likely exist here, either.

It is likely, therefore, that courts would dismiss any challenge to my proposed executive order, even if a plaintiff could get standing. It is important here to note that standing is a narrower basis for dismissal than the political question doctrine. Standing requirements go to the fitness of a particular plaintiff to present a case against the defendant, allowing the court to avoid addressing the merits of a claim.²¹² Thus, another plaintiff, could establish standing, to sue on the same issue. In contrast, a dismissal due to nonjusticiability disallows a court from hearing the issue at all.²¹³

Ultimately, the executive order would be immune to any challenge because it is grounded on clear statutory authority. Congress delegated the power to suspend any provision of law relating to the separation of members of the armed forces to the president if he determines the suspension to be essential to national security.²¹⁴ Virtually every plaintiff would have difficulty establishing standing. In addition, deference by the courts “to military-related judgments . . . has been the basis for rejections to a variety of challenges to Congressional and Executive decisions in the military domain.”²¹⁵ Alternatively, a court likely could invoke the political

209. *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998); *see also* *Heller v. Doe*, 509 U.S. 312, 319 (1993) (holding that rational basis review in equal protection analysis does not permit courts to pass judgment on the logic behind Congress’ constitutional choices).

210. *DaCosta v. Laird*, 471 F.2d 1146, 1147 (2d Cir. 1973).

211. *Id.* at 1155.

212. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (implying that if standing is not found, then the court will not proceed to judge the case on its merits, and further noting the specific requirements for standing as injury in fact, a causal connection between the injury and the conduct, and redressability).

213. *See Ange v. Bush*, 752 F. Supp. 509, 515 (D.D.C. 1990) (holding that inquiry into presidential deployment orders constitutes a nonjusticiable political question and therefore dismissing the plaintiff’s claims).

214. 10 U.S.C. § 12305(a) (2001).

215. *See Able v. United States*, 155 F.3d 628, 633 (2d Cir. 1998) (noting many examples of other challenges that courts have dismissed, including a challenge of the president’s power to define military death penalty factors and Congress’ authority to

question doctrine and dismiss the case on that ground.

F. The Temporary Nature of an Executive Order

A central problem with this proposal remains. Executive orders neither can nor should last indefinitely, especially orders that suspend the enforcement of laws. Thus, this temporary measure only protects gay service members during times of conflict. For example, the order to suspend separations of commissioned officers under the law could last until one year after the national emergency ends.²¹⁶ The heinous and hypocritical practice of subsequently discharging homosexual members of the armed forces when combat subsides might continue. The temporary nature of the measures also does not address the problem of hiding sexual orientation. If gay service members were not guaranteed permanent protection, they have no reason to “come out.”

In the long run, however, allowing gay soldiers to serve would have a positive effect. Although the military may not be the most appropriate place for social experiments,²¹⁷ the relatively painless integration of both racial minorities and women in the military bodes well for successfully integrating homosexuals. Assuming the vast majority of gay service members would continue to serve the country honorably and without deteriorating unit performance, as they currently do, the experience could provide evidence that the military can function under suspended enforcement of DADT. If the order were to remain in effect for several years—which is likely considering the open-ended nature of the global war on terror—the evidence would strongly undermine the last remaining justification for the ban. Overall, it could provide political cover for Congress to quietly repeal the law even before the national emergency terminated.

V. CONCLUSION

The Military Readiness Enhancement Act of 2007 (“MREA”) was referred to the House Subcommittee on Military Personnel at the end of March. It is hard to predict what chance of success the MREA has, but it is clear that DADT will remain a topic for public debate throughout the 2008 presidential campaign season. In two early, televised debates in New Hampshire, the eight candidates for the Democratic nomination indicated

order the National Guard into active duty, which implies that, due to the significant deference afforded to legislative and executive decisions affecting the military, similar challenges would likely be dismissed as well).

216. See *supra* note 158 and accompanying text; see also 10 U.S.C. § 123(b).

217. S. REP. NO. 103-112, § 263, at 280 (1993) (noting that “training troops to change social attitudes is a formidable task”).

that they would repeal DADT, while all ten of the Republicans seeking their party’s nomination expressed support for the law.²¹⁸ One can only speculate whether the country’s respect and support for those who wish to serve in an unpopular war will extend to gay men and women.

The current DADT debate arises in an atmosphere of public hostility to another controversial gay rights issue—marriage. Thirteen states in 2004, and seven states in 2006, passed amendments to their state constitutions defining marriage as a union of one man and one woman, which brings the total to twenty-six states.²¹⁹ The current administration enthusiastically supports the Defense of Marriage Act, which defines marriage as a “legal union between one man and one woman,”²²⁰ and would like to see such language added to the federal Constitution.²²¹ Therefore, the President’s and the Republican party’s outspoken stands against gay rights portend a potentially fierce fight against granting any gay rights in the next two years.

Given the fairly hostile reception to Mr. Bush’s Iraq policies and falling public support for the war, the administration may simply ignore the MREA instead of actively opposing it. It is safe to assume that this administration would not even consider issuing an executive order that would effectively suspend DADT, if the MREA did not pass. Therefore, it may be a strategy for the next president to deploy.

218. See Carolyn Lochhead, “Don’t Ask, Don’t Tell” Battle Brews, S.F. CHRON., June 14, 2007, at A4; Robin Toner, For “Don’t Ask, Don’t Tell,” Split on Party Lines, N.Y. TIMES, June 8, 2007, at A1.

219. CNN Same Sex Marriage Bans Winning on State Ballots, Nov. 3, 2004, available at <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/index.html> (noting that eleven states passed anti-gay-marriage constitutional amendments in the November election and two other states passed them earlier in 2004); see also Human Rights Campaign, Statewide Marriage Prohibitions, Sept. 19, 2007, available at http://www.hrc.org/documents/marriage_prohibit_20070919.pdf; Monica Davey, *Liberals Find Ray of Hope on Ballet Measures*, N.Y. TIMES, Nov. 9, 2006, at P16 (noting that in the 2006 election, Arizona voters rejected a constitutional amendment to restrict marriage to one man and one woman, which was the first rejection of such a measure in the twenty eight state elections that have considered the issue since 1998). Arizona, however, has a statutory ban on gay unions. *Id.*

220. Defense of Marriage Act, Pub. L. No. 104-199, § 7, 110 Stat. 2419-20 (1996) (defining spouse to only refer to someone of the opposite sex who is a husband or wife).

221. President George W. Bush, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>.