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Cook v. Gates and *Witt v. Department of the Air Force*: Judicial Deference and the Future of Don't Ask Don't Tell

GUSTAVO OLIVEIRA†

I. INTRODUCTION

President Barack Obama campaigned on the promise of repealing “Don’t Ask, Don’t Tell” (DADT), the law that bars homosexuals from serving openly in the military.¹ However, since taking office, President Obama has come under criticism from gay rights advocates who have grown impatient with the President’s slow progress on this issue.² In response, the President stated that he remains committed to overturning DADT.³

The place of gay men and lesbians in the military has been an ongoing area of policy inquiry for over seventy years.⁴ The earliest attempts to regulate homosexual behaviors within the armed forces were sporadic and rudimentary.⁵ Although gay men have served in the military as far back as the Revolutionary War, it was not until 1916 that the military officially prohibited sodomy.⁶

During World War II, a uniform prohibition on homosexual service was incorporated into military regulations, based primarily on the theory that homosexuality was incompatible with military service.⁷ For the next forty years, homosexuality served as an outright disqualifier for military

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1. Sheryl Gay Stolberg, *On Gay Issues, Obama Asks To Be Judged on Vows Kept*, N.Y. TIMES, June 29, 2009, at A14.

2. *Id.*

3. *Id.* The President stated that he wishes to work closely with the Pentagon and the United States Congress to overturn DADT in a “practical way . . . that takes over the long term.” *Id.*

4. DON’T ASK DON’T TELL: DEBATING THE BAN IN THE MILITARY 12 (Aaron Belkin & Geoffrey Bateman eds., 2003) (noting that, despite the armed forces’ efforts to deny their existence and disavow their findings, journalists, litigants, and scholars have uncovered enormous amounts of research documenting the Department of Defense’s concern with the incidence of homosexuality within its ranks).

5. *Id.*

6. 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, 405 (2004) (noting that the prohibition on sodomy was a criminal prohibition on homosexual conduct, not an administrative prohibition on service by persons inclined toward same-sex sexual conduct).

7. *Id.* at 406.

service regardless of conduct.⁸

Nevertheless, homosexuals continued serving throughout this period.⁹ Many served openly.¹⁰ Others kept their sexual orientation a secret during their service and were never discovered.¹¹ On the other hand, many were subjected to witch-hunts and investigations, while others suffered terrible violence.¹²

Interestingly, a trend emerged that calls into question the rationales asserted for banning homosexual military service.¹³ During this period, whenever the United States went to war, the armed forces seemed to loosen the policies barring service by gay, lesbian, and bisexual individuals.¹⁴ This raised an obvious question: if homosexual soldiers are supposedly weak, are untrustworthy, and weaken unit cohesion, why are they retained at much higher rates at times in which adequate and trustworthy fighters who contribute positively to unit cohesion are most important to the military?¹⁵ This contradiction came to the forefront of the American consciousness in the 1992 presidential elections.¹⁶

During President Bill Clinton's campaign for the White House, he promised to lift the ban on open service by gays in the military.¹⁷ President Clinton was motivated partially by the death of Alan Schindler, a U.S. Navy sailor who was brutally murdered because of his sexual orientation.¹⁸ However, once in office, President Clinton's promise to eliminate discrimination based on sexual orientation in the armed forces was met with unprecedented resistance.¹⁹ As a result, after extensive hearings and debates, a compromise was reached between the President,

8. *Id.*

9. *Id.*

10. *See id.* at 407 (explaining that many homosexual servicemen and women did not feel a need to hide their sexual identity where the environment was more relaxed or the military leader made clear that sexuality was not an issue).

11. *Id.*

12. *Id.*

13. *Id.*

14. *See id.* at 407-08 (noting a trend toward a decrease in gay discharges when the United States was at war).

15. *Id.* at 408.

16. *Id.*

17. Emily B. Hecht, *Debating the Ban: The Past, Present and Future of Don't Ask, Don't Tell*, N.J. LAW., June 2007, at 51, 51.

18. Alexander, *supra* note 6, at 417. Alan Schindler was a twenty-two-year-old radioman serving in the United States Navy. Shortly after revealing to his commander that he was a homosexual, Mr. Schindler was savagely beaten to death. Two fellow servicemen battered Mr. Schindler against the fixtures of a public toilet, leaving him so badly disfigured that his mother could identify his body only by the tattoos on his arms. According to the Navy, his head was crushed, his ribs smashed, and his penis was cut. James Sterngold, *Death of a Gay Sailor: A Lethal Beating Overseas Brings Questions and Fear*, N.Y. TIMES, Jan. 31, 1993, § 1 (Magazine), at 22.

19. Hecht, *supra* note 17, at 51.

Congress, and the military.²⁰ This compromise was the law and accompanying regulations issued by the U.S. Department of Defense (DOD) known as “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”²¹ The new law explicitly stated that discharge would no longer be based merely on homosexual status, but rather on conduct.²²

The military’s rationale for DADT is this: “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.”²³ In other words, DADT is necessary to preserve the military’s effectiveness as a fighting force and, thus, to preserve national security.²⁴ However, in the fifteen years since DADT was enacted and in light of the success of the war in Iraq,²⁵ the evidence has continued to mount that this policy rationale is unfounded.²⁶

The legal landscape of DADT changed in 2003 when the Supreme Court decided *Lawrence v. Texas*.²⁷ In *Lawrence*, the Court recognized a protected liberty interest allowing homosexuals the right to enter into private consensual relationships and still retain their dignity as free persons.²⁸ However, the Court did not declare the level of scrutiny required for a substantive due process challenge to legislation limiting private homosexual activity.²⁹ This lack of clarity has sparked vigorous debate and criticism.³⁰ Jurists, scholars, and commentators disagree over the doctrinal approach to be used in deciding a constitutional challenge to legislation that infringes on private homosexual conduct.³¹ Some have interpreted *Lawrence* to apply rational basis while others see it as a strict scrutiny opinion.³² Still, others view *Lawrence* as applying a balancing of state and individual interests somewhere between rational basis and

20. *Id.*

21. 10 U.S.C. § 654 (2006).

22. Hecht, *supra* note 17, at 51.

23. 10 U.S.C. § 654(a)(15).

24. Cook v. Gates, 528 F.3d 42, 60 (1st Cir. 2008).

25. DEP’T OF DEF., MEASURING STABILITY AND SECURITY IN IRAQ: REPORT TO CONGRESS (2008), available at http://www.defenselink.mil/pubs/pdfs/9010_Report_to_Congress_Dec_08.pdf.

26. See Hecht, *supra* note 17, at 51.

27. 539 U.S. 558 (2003).

28. *Id.* at 578.

29. See *id.* at 586 (Scalia, J., dissenting).

30. Kristin Fasullo, Note, *Beyond Lawrence v. Texas: Crafting a Fundamental Right to Sexual Privacy*, 77 FORDHAM L. REV. 2997, 3025 (2009).

31. Cook v. Gates, 528 F.3d 42, 51 (1st Cir. 2008).

32. *Id.*

strict scrutiny.³³

In 2008, the First and Ninth Circuit Courts of Appeals were faced with challenges to the constitutionality of DADT. Both circuits agreed that *Lawrence* calls for a heightened level of scrutiny; however, in applying *Lawrence*'s heightened scrutiny the two courts arrived at opposing conclusions.³⁴

Part II discusses the Supreme Court's landmark decision in *Lawrence v. Texas*. Part III argues that the First Circuit's decision to defer to Congress on military issues is consistent with the Supreme Court's precedent, while the Ninth Circuit's decision rests on an unconvincingly broad reading of *Sell v. United States*.³⁵ Part IV argues that the policy rationale for DADT is unfounded in light of the evidence that has arisen since passage of the act and the Iraq War. Part V argues that regardless of the level of scrutiny applied to private homosexual conduct, a constitutional challenge to DADT is likely to run into judicial deference on military affairs and never reach the constitutionality issue. Instead, Congress should repeal DADT. Part VI concludes.

II. *LAWRENCE V. TEXAS*: OVERRULING *BOWERS V. HARDWICK*

Prior to 2003, rational basis appeared the accepted standard when reviewing legislation that discriminated based on sexual orientation.³⁶ Under rational basis, the courts of appeals regularly struck down challenges to the constitutionality of DADT.³⁷ Judicial repudiation of DADT seemed hopeless until 2003, when the Supreme Court decided *Lawrence v. Texas*.³⁸

On September 17, 1998, in Houston, Texas, officers from the Harris County Police Department responded to a weapons disturbance.³⁹ The officers entered an apartment where petitioner John Geddes Law-

33. *Id.*

34. Compare *id.* at 60 (dismissing the challenge to DADT on grounds of judicial deference to Congress in cases arising in a military context), with *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821–22 (9th Cir. 2008) (remanding the substantive due process challenge and holding that, after *Lawrence*, a substantive due process challenge must satisfy an intermediate level of scrutiny).

35. 539 U.S. 166 (2003).

36. Christopher A. Scott, *Cook v. Gates: Don't Ask, Don't Tell Remains a Legal Option for the Military, but the End May Be in Sight*, Case Note, 18 LAW & SEXUALITY 183, 184 (2009).

37. See, e.g., *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1997); *Selland v. Perry*, 100 F.3d 950 (4th Cir. 1996); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996).

38. Scott, *supra* note 36, at 184.

39. Meghan M. Peterson, Case Note, *The Right Decision for the Wrong Reason: The Supreme Court Correctly Invalidates the Texas Homosexual Sodomy Statute, but Rather than Finding an Equal Protection Violation in Lawrence v. Texas, the Court Incorrectly and Unnecessarily Overrules Bowers v. Hardwick*, 37 CREIGHTON L. REV. 653, 655 (2004) (explaining how the

rence resided.⁴⁰ Once inside, the police observed Lawrence and another man engaging in a sexual act.⁴¹ Both men were arrested and charged with the crime of “deviate sexual intercourse, namely anal sex, with a member of the same sex.”⁴²

Procedurally, *Lawrence* tells a familiar story. Petitioners challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment.⁴³ The court rejected the challenge and petitioners appealed.⁴⁴ The Court of Appeals for the Texas Fourteenth District heard petitioners’ constitutional arguments.⁴⁵ Not surprisingly, the court of appeals relied on *Bowers v. Hardwick*⁴⁶ and rejected the claims.⁴⁷ Petitioners appealed to the United States Supreme Court, and certiorari was granted.⁴⁸

Justice Kennedy delivered the opinion.⁴⁹ Kennedy framed the constitutional issue as “whether petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause.”⁵⁰ To answer this question, Kennedy began by tracing the evolution of the Supreme Court cases recognizing the various due process rights protecting intimate relationships.⁵¹

Kennedy started with *Griswold v. Connecticut*⁵² and the Court’s recognition of the right to privacy and protected space of the marital bedroom.⁵³ From there, Kennedy explained that in *Eisenstadt v. Baird*⁵⁴

police responded to an informant claiming that a man was armed and “going crazy” in Lawrence’s apartment).

40. *Lawrence v. Texas*, 539 U.S. 558, 563 (2003). The right of the police to enter the apartment was not questioned. *Id.*

41. *Id.*

42. *Id.* Lawrence and his partner were accused of breaking section 21.06(a) of the 2003 Texas Penal Code Annotated. This statute provided that “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003). The statute defined “[d]eviate sexual intercourse” as follows: “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” *Id.* § 21.01(1).

43. *Lawrence*, 539 U.S. at 563.

44. *Id.*

45. *Id.*

46. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

47. *Lawrence*, 539 U.S. at 563.

48. *Id.* at 564.

49. *Id.* at 561.

50. *Id.* at 564.

51. *Id.*

52. 381 U.S. 479, 485 (1965) (invalidating a state law that prohibited the use of drugs, medicinal article, or instrument of contraception as well as aiding and abetting the use of contraceptives).

53. *Lawrence*, 539 U.S. at 565.

54. 405 U.S. 438, 438-39 (1972) (holding that a Massachusetts law prohibiting the

the Court extended the right to make decisions regarding sexual conduct beyond the marital relationship.⁵⁵ Then, in *Roe v. Wade*,⁵⁶ the Court identified the right to privacy in relation to a woman's right to have an abortion.⁵⁷ Finally, in *Carey v. Population Services International*,⁵⁸ the Court invalidated a law banning sales or distribution of contraceptives to minors.⁵⁹ In sum, this line of cases established that "the reasoning of *Griswold* could not be confined to the protection of rights of married adults."⁶⁰

After reviewing the precedent establishing and expanding the right to privacy, Kennedy launched the attack that would end *Bowers v. Hardwick*.⁶¹ First, Kennedy criticized *Bowers*'s framing of the central issue as whether the "Constitution confers a fundamental right upon homosexuals to engage in sodomy."⁶² In response, Kennedy stated:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual [in *Bowers*] put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual

distribution of contraceptives to unmarried persons violated the Equal Protection Clause of the Fourteenth Amendment).

55. *Lawrence*, 539 U.S. at 564. Quoting *Eisenstadt*, Kennedy wrote:

"It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

Lawrence, 539 U.S. at 565 (quoting *Eisenstadt*, 405 U.S. at 453).

56. 410 U.S. 113, 151-64 (1973) (recognizing that although limited, under the Due Process Clause, a woman's right to privacy includes the right to terminate her pregnancy).

57. *Lawrence*, 539 U.S. at 565.

58. 431 U.S. 678, 678 (1977) (invalidating, without a single opinion, a law that forbid the sale of contraceptive devices to persons under sixteen years of age).

59. *Lawrence*, 539 U.S. at 566.

60. *Id.*

61. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558. *Bowers* and *Lawrence* share similar facts. A police officer entered Hardwick's bedroom and observed him engaging in intimate sexual conduct with another man. *See id.* at 187-88. Hardwick was charged with violating a Georgia statute prohibiting sodomy. *Id.* In response, Hardwick brought an action in federal court to declare the statute invalid. *Id.* at 188. Hardwick alleged that he was a practicing homosexual and the statute violated his rights under the Constitution. *Id.* The Court, in a five-to-four opinion, upheld the statute, holding that the Constitution does not confer a fundamental right upon homosexuals to engage in homosexual sodomy. *See id.* at 196. Justice White delivered the majority, joined by Justices Burger, Powell, Rehnquist, and O'Connor. Justices Blackmun, Stevens, Brennan, and Marshall dissented.

62. *Lawrence*, 539 U.S. at 567.

behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that whether or not entitled to formal recognition in law, is within the liberty of persons to choose.⁶³

Next, Kennedy challenged the *Bowers* Court's argument that proscriptions against homosexual conduct have "ancient roots."⁶⁴ He explained that the idea of a "longstanding history in this country of laws directed at homosexual conduct" is misguided.⁶⁵ Kennedy finished the assault on *Bowers*'s historical foundation by noting that it was not until the "1970's that any State singled out same-sex relations for criminal prosecution and only nine states have done so."⁶⁶

Kennedy did not ignore the *Bowers* Court's point that for many centuries "powerful voices" have condemned homosexual conduct as immoral.⁶⁷ Instead, he acknowledged the source of this condemnation as "religious beliefs, conceptions of right and acceptable behavior, and traditional family values."⁶⁸ Nevertheless, Kennedy swiftly dismissed this argument, explaining that the Supreme Court's "obligation is to define the liberty of all, not to mandate [its] own moral code."⁶⁹

Chief Justice Burger's concurrence in *Bowers* also relied on historical, religious, and moral condemnation of homosexual conduct.⁷⁰ This did not escape Kennedy's critique.⁷¹ In this instant, Kennedy turned to "our laws and traditions of modern times" for examples of "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."⁷² Then, moving past "history and tradition," Kennedy reached beyond the United States for authorities challenging the soundness of Burger's concurrence.⁷³

Kennedy then returned to our own constitutional system in the

63. *Id.*

64. *Id.*

65. *Id.* at 568.

66. *Id.* at 570.

67. *Id.*

68. *Id.* at 571.

69. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

70. *Id.* "The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction." *Id.* at 572.

71. *See id.* at 572.

72. *Id.* at 571-72.

73. *Id.* at 572-73. Kennedy cited a committee advising the British Parliament that recommended the repeal of laws punishing homosexual conduct. *Id.* at 572. Moreover, Kennedy noted that "almost five years before *Bowers* was decided the European Court of Human Rights" held that laws proscribing consensual homosexual conduct were invalid under the European Convention on Human Rights. *Id.* at 573.

years following *Bowers*.⁷⁴ Kennedy discussed the importance of two major post-*Bowers* Supreme Court decisions and how they cast *Bowers* into “even more doubt.”⁷⁵ Kennedy noted that in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁷⁶ the Court confirmed that our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.⁷⁷ And “*Bowers* would deny [homosexuals] this right.”⁷⁸ Next, he discussed how in *Romer v. Evans*⁷⁹ the Court struck down class-based legislation directed at homosexuals.⁸⁰ In that case, the Court found that an amendment to Colorado’s constitution that deprived homosexuals of protection under the State’s antidiscrimination laws was “born of animosity toward the class of persons affected” and was not rationally related to any legitimate governmental purpose.⁸¹

Finally, after a brief discussion about the heavy stigma that attaches to a person convicted under the Texas law,⁸² Kennedy signed *Bowers*’s death sentence with a quote from Justice Stevens’s dissent in that same case.

“Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”⁸³

On that note, Kennedy declared that *Bowers* was overruled.⁸⁴

74. *Id.* at 573.

75. *Id.*

76. 505 U.S. 833 (1992).

77. *Lawrence*, 539 U.S. at 573-74 (citing *Casey*, 505 U.S. at 851).

78. *Id.* at 574.

79. 517 U.S. 620 (1996). In *Romer*, the Court invalidated an amendment to Colorado’s Constitution because it deprived homosexuals, lesbians, or bisexuals either by orientation, conduct, practices or relationship, of their protection under state antidiscrimination laws. *Id.* at 624. The *Romer* Court concluded that the proposed amendment was “born of animosity toward the class of persons affected.” *Id.* at 634.

80. *Lawrence*, 539 U.S. at 574.

81. *Romer*, 517 U.S. at 634.

82. *Lawrence*, 539 U.S. at 576.

83. *Id.* at 577-78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), overruled by *Lawrence*, 539 U.S. 558).

84. *See id.* at 578 (“*Bowers* was not correct when it was decided and it is not correct today. It ought not to remain binding precedent.”).

III. JUDICIAL DEFERENCE: FIRST AND NINTH CIRCUITS GO THEIR SEPARATE WAYS

A. Cook v. Gates

1. BACKGROUND AND THE DISTRICT COURT

In *Cook v. Gates*, Plaintiffs were twelve highly decorated gay, lesbian, or bisexual citizens who served in the U.S. military.⁸⁵ They served honorably in Iraq, Kuwait, Saudi Arabia, and other parts of the world in support of American military operations.⁸⁶ All served during the war on terrorism; many have devoted their entire adult lives to military service.⁸⁷ Nonetheless, each Plaintiff was discharged between 2002 and 2004 under DADT.⁸⁸

Plaintiffs filed action on December 6, 2004, challenging DADT as unconstitutional.⁸⁹ They argued that DADT violates their right to substantive due process on its face and as applied, that it denies the Plaintiffs equal protection of the law on the basis of sexual orientation, and that the portion of the act that forces discharge based on a member's statement that he or she is a homosexual violates freedom of speech.⁹⁰

The Government moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).⁹¹ Furthermore, the government argued that Plaintiffs' due process and equal protection claims failed because DADT was subject to rational basis review and the Government's "unit cohesion argument" sufficed to sustain the law under this standard.⁹²

The district court granted the Government's motion to dismiss.⁹³ First, the district court determined that the Supreme Court applied the rational basis standard in *Lawrence* and therefore did not alter the applicability of the rational basis review applied in pre-*Lawrence* challenges.⁹⁴ Next, the district court agreed that the "unit cohesion

85. Brief of Plaintiff-Appellant at 4, *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (No. 06-2313).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Cook*, 528 F.3d at 47.

91. Brief of Plaintiff-Appellant, *supra* note 85, at 5.

92. *Cook*, 528 F.3d at 47. As noted earlier, the government's "unit cohesion" argument is that "[t]he 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." 10 U.S.C. § 654(a)(15) (2006).

93. Brief of Plaintiff-Appellant, *supra* note 85, at 5.

94. *Cook*, 528 F.3d at 47-48. The district court noted that Plaintiff's liberty interest in deciding how to conduct their private lives in matters pertaining to sex was not "fundamental." Brief of Plaintiff-Appellant, *supra* note 85, at 5.

argument” set forth a rational reason for DADT.⁹⁵ As a result, the Due Process Clause challenge failed and Plaintiffs appealed to the First Circuit Court of Appeals.⁹⁶

2. THE FIRST CIRCUIT COURT OF APPEALS

On appeal, Plaintiffs alleged that the district court misread *Lawrence*.⁹⁷ They argued the district court erred by discounting *Lawrence* as an ordinary rational basis case that did not change the law.⁹⁸ Instead, Plaintiffs argued that, by overturning *Bowers*, *Lawrence* made clear “that all adults, regardless of their sexual orientation, possess a constitutionally protected liberty interest in determining how to conduct their private lives in matters pertaining to sex.”⁹⁹ Moreover, Plaintiffs argued that *Lawrence* “evinced a clear concern . . . with the equal legal dignity to which gay persons are constitutionally entitled.”¹⁰⁰ Finally, Plaintiffs concluded that “together with *Romer v. Evans*, *Lawrence* means that government may not demean the lives of gay persons by enacting laws that infringe on their fundamental liberties or treat them as a separate, secondary class.”¹⁰¹

The First Circuit rejected the district court’s reading of *Lawrence*.¹⁰² Instead, the First Circuit held that *Lawrence* “recognized a liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interests” that falls somewhere in between strict scrutiny and rational basis.¹⁰³ Subsequently, the First Circuit noted that this case arose in a “unique” context—that of congressional judgment in the area of military affairs.¹⁰⁴ Therefore, the First Circuit applied a deferential approach and concluded, “[W]here Congress has articulated a substantial government interest for a law, and where the challenges in question implicate that interest, judicial intrusion is simply not warranted.”¹⁰⁵

Unfortunately, the First Circuit’s deference to Congress leaves a constitutionally dubious law outside the reach of constitutional challenges. As unfortunate as this result may be, the First Circuit’s decision

95. *Cook*, 528 F.3d at 48.

96. *Id.*

97. Brief of Plaintiff-Appellant, *supra* note 85, at 14.

98. *Id.*

99. *Id.* at 15.

100. *Id.*

101. *Id.*

102. *Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008).

103. *Id.*

104. *Id.* at 57.

105. *Id.* at 60.

to defer is grounded on the solid precedent calling for judicial deference on military matters.

3. JUDICIAL DEFERENCE ON MILITARY MATTERS

After the end of the Vietnam-era military draft, the Supreme Court decided a series of cases that “constructed a doctrine of constitutional separatism that shields military related decisions from the usual scrutiny of judicial review.”¹⁰⁶ In 1974 the Supreme Court decided *Parker v. Levy*.¹⁰⁷ In that case, the Court upheld the conviction of an Army physician who had refused an order to conduct dermatology training for Special Forces personnel and encouraged enlisted personnel to resist combat duty in Vietnam.¹⁰⁸ The Court held that the military had “been a society apart from civilian society, so ‘[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.’”¹⁰⁹ As a result, the Court established the foundation for the new doctrine of judicial deference in cases arising in a military context that was based on the concept of separatism between the military and civilian worlds.¹¹⁰

Then, in 1980, the Court decided *Rostker v. Goldberg*.¹¹¹ In an opinion by Chief Justice Rehnquist, the Court relied on the deference doctrine to uphold Congress’s decision to bar women from registration for the selective service.¹¹² In this case, the Solicitor General argued that the Court should have relied on the deference doctrine to review Congress’s decision under rational basis, rather than the heightened scrutiny with which the Court approached gender based discrimination.¹¹³ Rehnquist rejected this argument.¹¹⁴ He explained that refining the applicable tests would do nothing to advance the substantive guarantee of due process.¹¹⁵ Instead, Rehnquist endorsed a unitary standard of deference to

106. Diane H. Mazur, *Is “Don’t Ask, Don’t Tell” Unconstitutional After Lawrence? What Will It Take To Overturn the Policy*, 15 U. FLA. J.L. & PUB. POL’Y 423, 431 (2004).

107. 417 U.S. 733 (1974).

108. *Id.* at 737.

109. *Id.* at 744 (alterations in original) (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1974)).

110. Mazur, *supra* note 106, at 428.

111. 453 U.S. 57 (1980).

112. *Id.* at 60.

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

Id. at 65–66 (alteration in original) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

113. *Id.* at 69.

114. *Id.*

115. *Id.* at 69-70.

be applied in all cases involving Congress's choices about military policy.¹¹⁶ He feared that "degrees of 'deference' to legislative judgments[,] . . . which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result."¹¹⁷ On that note, the Court applied heightened scrutiny review to the government's gender based decision. Rehnquist noted that "no one could deny that . . . the Government's interest in raising and supporting armies is an 'important governmental interest,'"¹¹⁸ that the military is a unique environment "governed by separate discipline from that of the civilian,"¹¹⁹ and that, in the military context, "Congress is permitted to legislate both with greater breadth and with greater flexibility."¹²⁰ Finally, Rehnquist reiterated that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."¹²¹

Lastly, in 1986, in *Goldman v. Weinberger*, the Court upheld the military's punishment of an orthodox Jew for wearing a yarmulke indoors while in uniform.¹²² In that case, the Court repeated that "the military is, by necessity, a specialized society separate from civilian society"¹²³ and that "judicial deference . . . is at its apogee" when deciding issues in the context of military affairs.¹²⁴

On the other hand, this doctrine has been heavily criticized.¹²⁵ Professor Diane Mazur criticized the Court's deferential stance on military matters as well as the legal academy's failure to challenge the constitutionality of this doctrine.¹²⁶ She argues that the deference doctrine, as espoused in *Rostker*, is treated as longstanding and beyond question.¹²⁷ Indeed, as Mazur asserts, the facts of *Rostker* are "completely obsolete

116. See Ellen Oberwetter, Note, *Rethinking Military Deference: Male-Only Draft Registration and the Intersection of Military Need with Civilian Rights*, 78 TEX. L. REV. 173, 184 (1999) (arguing that Rehnquist's reluctance to distinguish between degrees of deference in the military context amounts to a "unitary standard of deference" even though the Court never used that specific phrase).

117. *Rostker*, 453 U.S. at 69-70.

118. *Id.* at 70.

119. *Id.* at 71.

120. *Id.* at 66 (quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974)).

121. *Id.* at 69.

122. 475 U.S. 503, 504 (1986).

123. *Id.* at 506 (quoting *Parker*, 417 U.S. at 743).

124. *Id.* at 508 (quoting *Rostker*, 453 U.S. at 70).

125. See *id.*; C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 827-43 (1988).

126. Mazur, *supra* note 106, at 440.

127. *Harvard Law School Lambda Second Annual Gay and Lesbian Legal Advocacy Conference: "Don't Ask Don't Tell,"* 14 DUKE J. GENDER L. & POL'Y 1173, 1238 (2007) [hereinafter *Harvard Law School Lambda*].

today.”¹²⁸ Since *Rostker*, Congress has repealed the federal statutes that barred women from combat service, and today, in the Army and Marine Corps, “a majority of positions can be filled by women.”¹²⁹ Finally, Professor Mazur maintains “it would be very difficult for a court today to rule, as *Rostker* did, that women would be of little use to the military in time of war.”¹³⁰

Furthermore, Professor Mazur argues that much of the law upon which *Rostker* relies is also obsolete. She explains how the Court in *United States v. Virginia* held that “classifications on the basis of sex must be supported by an exceedingly persuasive justification.”¹³¹ Therefore, she claims “it would be very difficult for a court today to slide by, as did *Rostker*, an enhanced standard of scrutiny in an equal protection case.”¹³² In other words, the only thing that survives from *Rostker* is the statement about judicial deference in matters concerning the military, and these “platitudes” from *Rostker* have been completely divorced from the facts and the law.¹³³

Nevertheless, there is no reason to believe that the current Supreme Court is ready to change course on the issue of judicial deference in the military context. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Roberts Court was faced with a constitutional challenge to the Solomon Amendments, which required the denial of federal funding to institutions of higher education that prohibited military representatives access to and assistance for recruiting purposes.¹³⁴ In a unanimous opinion, the Court denied the challenge.¹³⁵ Chief Justice Roberts began the substantive analysis by stating, “Congress’ power in this area ‘is broad and sweeping.’”¹³⁶ Chief Justice Roberts then cited the all too familiar language from *Rostker*—“judicial deference . . . is at its apogee’ when Congress legislates under its authority to raise and support armies.”¹³⁷ From this point forward, Chief Justice Roberts does not refer to the deference doctrine. However, this language signified that the opin-

128. *Id.*

129. *Id.*

130. *Id.*

131. 518 U.S. 515, 530 (1996).

132. *Harvard Law School Lambda*, *supra* note 127, at 1238.

133. *Id.* Professor Mazur goes on to argue that the problem is that courts continue to follow the culture of *Rostker* more than the law of *Rostker*. *Id.* at 1239. She argues that judicial deference to the military is a cultural phenomenon as opposed to a legal one. *Id.* This makes it much more difficult to displace. *Id.* In other words, *Rostker* is an “accurate statement about the way we view the military. It’s not an accurate statement about judicial deference or about constitutional structure or about anything else.” *Id.* at 1239.

134. 547 U.S. 47, 52 (2006).

135. *Id.* at 47.

136. *Id.* at 58 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

137. *Id.* (alteration in original) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1980)).

ion would “proceed in the shadow of the military deference doctrine.”¹³⁸

In conclusion, in *Cook*, the First Circuit’s reliance on the deference doctrine is grounded on substantial Supreme Court precedent. Even though this doctrine has been heavily criticized and essentially leaves DADT outside the reach of constitutional challenges, the likelihood that the Supreme Court will change course on this doctrine is very small.

B. Witt v. Department of the Air Force

Major Witt was an Air Force reservist nurse who was separated from the armed services, pursuant to DADT, because of her sexual relationship with another woman.¹³⁹ During her service, Major Witt never told any member of the military that she was a homosexual.¹⁴⁰ Nevertheless, she was in a long-term relationship with a civilian woman with whom she shared a residence located some 250 miles away from her Air Force base.¹⁴¹ Major Witt served in the armed forces for almost twenty years prior to her separation.¹⁴² By all accounts, she was highly decorated, having received numerous awards and medals.¹⁴³ Major Witt filed suit in the United States District Court for the Western District of Washington, arguing that DADT violated her substantive due process rights.¹⁴⁴

Like the First Circuit in *Cook*, the Ninth Circuit held that *Lawrence* required “something more than traditional rational basis review.”¹⁴⁵ The Ninth Circuit noted that strict scrutiny would be inappropriate because in *Lawrence* the Court did not discuss narrow tailoring or a compelling state interest.¹⁴⁶ In other words, *Lawrence* called for a “heightened level of scrutiny.”¹⁴⁷

Here is where the First and Ninth Circuits diverge. Whereas the First Circuit held that deference in the military context should govern the challenge to DADT, the Ninth Circuit held that a substantive due process challenge could go forward under *Sell*.¹⁴⁸ The Ninth Circuit noted that *Sell* was a “recent Supreme Court case that applied a heightened level of scrutiny to a substantive due process claim” resembling the

138. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1109 (2008).

139. Witt v. Dep’t of the Air Force, 527 F.3d 806, 809 (9th Cir. 2008).

140. *Id.* at 810.

141. *Id.* at 809.

142. *Id.* at 810.

143. *Id.* at 809.

144. *Id.* at 810-11. Major Witt also argued that DADT violated Equal Protection and procedural due process. *See id.*

145. *Id.* at 813.

146. *Id.* at 817.

147. *Id.* at 816.

148. *Id.* at 818 (citing *Sell v. United States*, 539 U.S. 166, 179 (2003)).

scrutiny and analysis performed in *Lawrence*.¹⁴⁹

In *Sell*, petitioner Charles Sell was a dentist with a long history of mental illness.¹⁵⁰ Between 1997 and 1998, Sell was charged with committing multiple crimes and underwent several hospitalizations and psychiatric evaluations.¹⁵¹ In 1999, he was examined and deemed “mentally incompetent to stand trial.”¹⁵² Sell was hospitalized to determine whether he would attain competency to stand trial.¹⁵³ Two months later, the Medical Staff recommended that Sell take antipsychotic medication. He refused. The Medical Staff sought permission to administer medication against Sell’s will and that request became the subject of the proceedings.¹⁵⁴

The *Sell* Court considered whether the Constitution permitted the government to forcibly administer antipsychotic medications in order to render Sell competent to stand trial.¹⁵⁵ The Court noted the defendant’s “significant constitutionally” protected liberty interest and held that the drugs could be administered “only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.”¹⁵⁶

The Ninth Circuit recognized that *Sell*’s holding was specific to the context of forcibly administering medication.¹⁵⁷ However, the circuit court found support in their own circuit’s decision of *Miller v. Gammie*,¹⁵⁸ where, according to the *Witt* court, it held that the court “is bound by the theory or reasoning underlying a Supreme Court case, not just by its holding.”¹⁵⁹ As a result, the Ninth Circuit held that *Sell* applies “equally here” and adopted the first three parts of the *Sell* test “as the heightened scrutiny balancing required under *Lawrence*.”¹⁶⁰ In

149. *Id.*

150. *Sell*, 539 U.S. at 169. In 1982, Sell was hospitalized after telling doctors that the gold he used for fillings had been contaminated by Communists. *Id.* Sell was hospitalized again in 1984 after calling the police to report that a leopard was outside his office boarding a bus. *Id.* at 169–70. “On various occasions, [Sell] complained that public officials . . . were trying to kill him.” *Id.* at 170. In 1997, he told law enforcement that he spoke to God and that God told him to kill FBI persons. *Id.* at 169–70.

151. *Id.* at 170–71.

152. *Id.* at 171.

153. *Id.*

154. *Id.*

155. *Id.* at 169.

156. *Id.* at 178–80.

157. *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 818 (9th Cir. 2008).

158. 335 F.3d 889 (9th Cir. 2003).

159. 527 F.3d at 818.

160. *Id.* at 819.

conclusion, the Ninth Circuit held that,

when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest.¹⁶¹

C. *Ninth Circuit's Reliance on Sell and Lawrence*

The central premise in *Sell* was the “administ[r]ation of] antipsychotic drugs involuntarily to a mentally ill criminal defendant,”¹⁶² while *Witt* dealt with the right of private homosexual conduct in a military context.¹⁶³ The *Witt* court explained that the connection between *Sell* and *Witt* was that *Sell* was “another recent Supreme Court case that applied a heightened level of scrutiny to a substantive due process claim—a scrutiny that resembles and expands upon the analysis performed in *Lawrence*.”¹⁶⁴ By linking *Witt* and *Lawrence* via *Sell*'s “heightened level of scrutiny that resembles and expands upon the analysis in *Lawrence*,”¹⁶⁵ the *Witt* court ignored the significant and *different* considerations espoused in each of those cases.

Whereas *Lawrence* focused entirely on considerations and cases dealing with privacy and sexual conduct, *Sell* focused on issues and cases dealing specifically with forced medication.¹⁶⁶ For example, the *Lawrence* Court discussed at length the evolution of the doctrine defining and expanding the right to privacy. Furthermore, the *Lawrence* Court specifically discussed the historical significance of laws directed at homosexual conduct¹⁶⁷ and the “policy of punishing consenting adults for *private acts*.”¹⁶⁸ Finally, the *Lawrence* Court noted that laws criminalizing *homosexual conduct* “subject homosexual persons to discrimination both in public and private spheres.”¹⁶⁹ In other words, the

161. *Id.*

162. *Sell v. United States*, 539 U.S. 166, 169 (2003).

163. *See Witt*, 527 F.3d at 809.

164. *Id.* at 818.

165. *Id.*

166. For example, the *Sell* Court relied on *Washington v. Harper*, which recognized that an individual “possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs,” 494 U.S. 201, 221 (1990), and *Riggins v. Nevada*, which held that it was error to order that the defendant be administered antipsychotic drugs during the course of a trial over his objection without findings that there were no less intrusive alternatives, that the medication was medically appropriate, and that it was essential for the sake of defendant's safety or the safety of others, 504 U.S. 127, 135–36 (1992).

167. *Lawrence v. Texas*, 539 U.S. 558, 568–71 (2003).

168. *Id.* at 570 (emphasis added).

169. *Id.* at 575.

Court was concerned with the stigmatizing effects these laws have on homosexuals as a group. These considerations clearly show that the central issue in *Lawrence* was private homosexual conduct. Nothing in *Lawrence* indicated that the Supreme Court envisioned that its holding would be applied in such a different context, as in forced medication.

On the other hand, in arriving at its conclusion, the *Sell* Court considered several issues specific to the forced administration of antipsychotic drugs to a mentally ill defendant facing serious charges. First, the Court noted the “government’s interest in bringing to trial an individual accused of a crime”¹⁷⁰ and the “human need for security.”¹⁷¹ Next, the *Sell* Court discussed the special circumstances that must be considered when forcibly administering medication: how a defendant’s failure to take drugs can lead to lengthy confinements in an institution, the longer a defendant is institutionalized the more likely he is to forget key evidence, the government’s interest in timely prosecution, and other “fair trial” considerations.¹⁷² Finally, the Court noted that the involuntary medication must be in the “patient’s best medical interest in light of his medical conditions”¹⁷³ and that the specific kinds of drugs are relevant to the decision.¹⁷⁴ These considerations indicate that the central issue in *Sell* was indeed forced administration of antipsychotic drugs. In other words, it is unlikely that the Supreme Court considered that the holding in *Sell* would be applied to a situation as factually distinguishable from *Sell* as the substantive due process challenge in *Witt*.

Furthermore, the *Sell* Court clearly confined its holding to the specific facts presented in that case. The first prong of the *Sell* test involved identifying an “important governmental interest” and that “courts must consider the facts of the individual case in evaluating the Government’s interest *in prosecution*.”¹⁷⁵ However, the Ninth Circuit, in applying *Sell*, disregarded the “in prosecution” part of the holding. Instead, the Ninth Circuit noted that courts “must consider the facts of the individual case in evaluating the government interest.”¹⁷⁶ This is problematic for two reasons.

First, it ignores the Supreme Court’s clear effort to contain the *Sell* holding within the facts presented in that case, that is, involuntary administration of antipsychotic drugs. In arriving at its conclusion, the

170. *Sell v. United States*, 539 U.S. 166, 180 (2003).

171. *Id.*

172. *Id.*

173. *Id.* at 181.

174. *Id.*

175. *Id.* at 180-81 (emphasis added).

176. *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 820 (9th Cir. 2008).

Sell Court relied on two cases, *Washington v. Harper*¹⁷⁷ and *Riggins v. Nevada*.¹⁷⁸ Both *Harper* and *Riggins* dealt specifically with the issue of forced administration of antipsychotic drugs.¹⁷⁹ Nowhere in *Sell* does the Court mention the possibility that its reasoning or rationale should, or could, be applied outside the context of forced administration of medication. In addition, Justice Breyer's statement of *Sell*'s holding further suggests how narrowly the Court intended the case to be read—Breyer stated, "We conclude that the Constitution allows the Government to administer *those drugs . . . in limited circumstances*."¹⁸⁰ Finally, Breyer noted, "We emphasize that the court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a *particular* governmental interest, namely, the interest in rendering the defendant *competent to stand trial*."¹⁸¹

Second, by asserting that the court is bound by a decision's reasoning and not its holding, the Ninth Circuit presupposes that the Supreme Court considered how the rationale and reasoning involved in such decisions will be applied in every conceivable scenario. This is clearly not the case. As stated earlier, in both *Lawrence* and *Sell*, the Court addressed very specific, and different, issues and rested its decision on considerations specific to those cases.

The Ninth Circuit's opinion in *Witt* amounts to a defeat for opponents of DADT. By taking *Sell* out of the context of forced administration of antipsychotic drugs and applying it to private homosexual conduct in the military, the Ninth Circuit wrote an opinion that is altogether unconvincing. If the Supreme Court takes the case and overrules it, the Ninth Circuit will have done more harm than good to the cause of equality for homosexuals by providing their opponents on the Court with such an easy out.

D. *Ninth and First Circuit's Divergence on Deference in Military Context*

Where the First Circuit presented a strong and thorough case for deference to Congress in the area of military affairs,¹⁸² the Ninth Circuit dismissed the issue with a mere four sentences, suggesting a weakness that could prove fatal if the Supreme Court decides to resolve this conflict.¹⁸³

177. 494 U.S. 210 (1990).

178. 504 U.S. 127 (1992).

179. *Riggins*, 504 U.S. at 129; *Harper*, 494 U.S. at 213.

180. *Sell*, 539 U.S. at 169 (emphasis added).

181. *Id.* at 181 (first emphasis added).

182. *Cook v. Gates*, 528 F.3d 42, 58–61 (1st Cir. 2008).

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

The First Circuit began its case for judicial deference by recognizing the “unique context in which the liberty interest at stake” arose.¹⁸⁴ The First Circuit cited *Loving v. United States*,¹⁸⁵ noting that the Supreme Court gives “highest deference” in military affairs.¹⁸⁶ Then, the court noted *Weiss v. United States*,¹⁸⁷ where the Supreme Court stated its adherence to deference where the “constitutional rights of servicemen [are] implicated.”¹⁸⁸ Finally, the court looked to *Rostker v. Goldberg*¹⁸⁹ noting that “judicial deference . . . is at its apogee” in cases dealing with Congress’s authority to raise and support armies.¹⁹⁰

The First Circuit then engaged in a thorough and comprehensive analysis of the reasoning behind judicial deference in a military context—the case for institutional competence and Congress’s power to raise and support armies. First, the court noted that military matters is an area where courts have little competence and the “complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.”¹⁹¹ Second, the First Circuit pointed to *North Dakota v. United States*,¹⁹² noting that, when questions arise in a military context, the Court “properly defer[s] to the judgment of those who must lead our Armed Forces in battle.”¹⁹³ Third, the First Circuit looked to *United States v. O’Brien*¹⁹⁴ in support for deference to Congress’s power to “raise and support armies and make all laws necessary to that end.”¹⁹⁵ Then, the court explained that this power is “broad and sweeping” and how the Supreme Court previously maintained Congress’s “responsibility for ‘the delicate task of balancing the rights of servicemen against the needs of the military.’”¹⁹⁶ Finally, the First Circuit cited *Rostker v. Goldberg*,¹⁹⁷ declaring that the district court undertook “an independent evaluation of evidence rather than adopting a [] . . . deferential examination of Congress’ evaluation of the evidence.”¹⁹⁸ In the end, the First

184. *Cook*, 528 F.3d at 57.

185. 517 U.S. 748 (1996).

186. *Cook*, 528 F.3d at 57.

187. 510 U.S. 163 (1994).

188. *Cook*, 528 F.3d at 57 (alteration in original) (quoting *Weiss*, 510 U.S. at 177).

189. 453 U.S. 57 (1981).

190. *Cook*, 528 F.3d at 57 (alteration in original) (quoting *Rostker*, 453 U.S. at 70).

191. *Id.* (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

192. 495 U.S. 423 (1990).

193. *Cook*, 528 F.3d at 57 (alteration in original) (quoting *North Dakota*, 495 U.S. at 443).

194. 391 U.S. 367 (1968).

195. *Cook*, 528 F.3d at 57 (quoting *O’Brien*, 391 U.S. at 377).

196. *Id.* (quoting *Solorio v. United States*, 483 U.S. 435, 447 (1987)).

197. 453 U.S. 57 (1981).

198. *Cook*, 528 F.3d at 58 (quoting *Rostker*, 453 U.S. at 82-83).

Circuit cited thirteen different cases in support for the argument that courts should defer to Congress in military context.

On the other hand, although the Ninth Circuit recognized that “judicial deference to . . . congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged,”¹⁹⁹ the court quickly dismissed the issue by noting that “deference does not mean abdication”²⁰⁰ and that “Congress . . . is subject to the requirements of the Due Process Clause when legislating in the area of military affairs.”²⁰¹

The Ninth Circuit’s dismissive treatment of the precedent calling for judicial deference is problematic because it leaves the opinion vulnerable to attack. As the First Circuit’s opinion clearly shows, the precedent for judicial deference is longstanding. In other words, if the Supreme Court chooses to hear this case, it is likely that the Justices would engage in a more thorough analysis of its own precedent for judicial deference, an analysis akin to the one performed by the First Circuit and likely to arrive at the same conclusion.

IV. THE MILITARY’S WANING RATIONALE FOR DADT

When DADT was passed, the military espoused the following rationale in support of keeping homosexuals from openly serving in the military: “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.”²⁰² However, in the fifteen years since DADT was enacted and in light of the success of the war in Iraq,²⁰³ the evidence has continued to mount that this policy rationale is unfounded. The evidence includes growing support among the public and military personnel for open homosexual service, the military’s reluctance to enforce DADT in times of conflict, the pressure on the military to lower recruitment standards to meet personnel needs and the continued strain on the armed forces as a result of personnel shortages, the increased costs of enforcing DADT, and the military’s own assessment of the wars in Iraq and Afghanistan in light of

199. *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (alteration in original) (quoting *Rostker*, 453 U.S. at 70).

200. *Id.* (quoting *Rostker*, 453 U.S. at 70).

201. *Id.* (quoting *Weiss v. United States*, 510 U.S. 163, 176 (1994)).

202. 10 U.S.C. § 654(a)(15) (2006).

203. See generally *DEP’T OF DEF.*, *supra* note 25 (discussing Iraq).

the fact that the U.S. military currently serves alongside allied forces that allow open homosexual service.

First, in a July 2008 ABC poll of a random sample of the American public, three-quarters of respondents said they “support allowing gays to serve in the military, whether they ‘tell’ or not.”²⁰⁴ This is a much broader support than existed when the DADT was put in place, and this number has been steadily rising.²⁰⁵ In 1993, when DADT was passed, fewer than forty-four percent believed that homosexuals should be allowed to serve; by 2001 this number had risen to sixty-two percent.²⁰⁶

Second, in a 2006 Zogby poll, seventy-three percent of military servicemen and women surveyed said that they are comfortable serving alongside gays and lesbians, while twenty-three percent reported that they already serve with someone known to be gay.²⁰⁷ In addition, a recent study conducted by four retired military officers and released by the Palm Center found that “evidence shows that allowing gays and lesbians to serve openly is unlikely to pose any significant risk to morale, good order, discipline or cohesion.”²⁰⁸ To support its conclusion, the study referred to the British and Israeli militaries where homosexuals currently serve openly “without hurting the effectiveness of combat operations.”²⁰⁹ Moreover, American forces in Iraq and Afghanistan are currently serving alongside allied forces from twenty-two different countries that currently allow open service by gays and lesbians.²¹⁰ As a matter of fact, among the twenty-five countries that participate militarily in NATO, more than twenty allow gays and lesbians to serve.²¹¹

Third, there is mounting evidence that military commanders are not enforcing DADT and, as a result of severe personnel shortages, are allowing or requiring openly gay service members to finish their

204. Emily B. Guskin, *Attitudes Toward “Don’t Ask, Don’t Tell” Policy Radically Change*, ABCNEWS.COM, July 19, 2008, <http://abcnews.go.com/print?id=5387980>.

205. *Id.*

206. *Id.*

207. Hecht, *supra* note 17, at 55.

208. Anne Flaherty, *Study: Military’s Gays Don’t Hurt Unit*, CHARLESTON DAILY MAIL, July 8, 2008, at 3A.

209. *Id.*

210. The following twenty-two Allied Countries with troops in Iraq and Afghanistan allow gays to serve: Australia, Austria, Belgium, Britain, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Slovenia, Spain, Sweden, and Switzerland. See SERVICEMEMBERS LEGAL DEF. NETWORK, FOREIGN MILITARIES WHICH ALLOW OPEN SERVICE (2007), available at http://sldn.3cdn.net/877fa9ce3ef2a2b2bc_wrm6bngt7.pdf.

211. See Jamie Reno, *Beginning the Conversation: Fifteen Years After the “Don’t Ask, Don’t Tell” Policy Was Enacted for the U.S. Military, Congress Is Prepping To Review the Law*, NEWSWEEK.COM, July 21, 2008, <http://www.newsweek.com/id/147961/page/1>.

terms.²¹² In 2005, a group of researchers studying military personnel policy discovered a regulation halting the discharge of gay soldiers about to be mobilized.²¹³ The regulation states that, if discharge for homosexual conduct is requested subsequent to the “unit’s receipt of alert notification, discharge isn’t authorized. Member will enter AD (active duty) with the unit.”²¹⁴ This not only runs contrary to the Pentagon’s assertion that the military would never send gays to war and discharge them when the conflict ends,²¹⁵ but also undermines the military’s “most aggressive argument in opposition to open homosexual service.”²¹⁶

Fourth, while the military is busy discharging two homosexual service members each day,²¹⁷ they have simultaneously been loosening recruitment standards to “expand its diminishing pool of recruits.”²¹⁸ For example, the Army has offered larger enlistment cash bonuses, allowed more high school dropouts and applicants with low scores on its aptitude test, as well as loosened weight and age restrictions.²¹⁹ Furthermore, according to data released in 2008 by the House Committee, the Army and Marine Corps increased the number of felons recruited into their ranks, raising questions about the “military’s ability to attract quality recruits at a time when it is trying to increase enlistment.”²²⁰ This is a particularly disturbing trend. At a time when the military is most strained, it continues to separate qualified service members, many of who are highly decorated and distinguished, simply because of their sexual orientation.²²¹

212. Robert I. Correales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 431 (2008).

213. Michael D. Palm Ctr., *Regulations Seem To Contradict Pentagon Denial that Military Retains Gays During War*, PALMCENTER.ORG, Sept. 13, 2005, http://www.palmcenter.org/press/dad/releases/researchers_locate_army_document_ordering_commanders_not_to_fire_gays.

214. *Id.*

215. *Id.*

216. Correales, *supra* note 212, at 430.

217. Hecht, *supra* note 17, at 55.

218. Lizette Alvarez, *Army Giving More Waivers in Recruiting*, N.Y. TIMES, Feb. 14, 2007, at A1.

219. *Id.*

220. Lizette Alvarez, *Army and Marine Corps Grant More Felony Waivers*, N.Y. TIMES, Apr. 22, 2008, at A21.

221. Some of the plaintiffs in *Cook v. Gates* included: Thomas Cook, attained the rank of Specialist (E-4) with an Intelligence specialty and was the recipient of the Army Achievement Medal; Megan Dresch, attained the rank of Private Second Class (E-2) with a Military Police specialty and was the recipient of the National Defense Service Medal and the Army Service Ribbon; Dr. Laura Galaburda, attained the rank of Second Lieutenant (O-1) and was a resident physician with training specializing in family medicine; Jack Glover, attained the positions of Flight Adjutant, General Military Corps Advisor, Operations Group Commander with the rank of Cadet Lieutenant Colonel, and Cadet Lieutenant Colonel as Group Commander; David Hall, attained the rank of Staff Sergeant (E-5) with an Aircraft Armament Systems specialty and was

Fifth, implementation of DADT has come with an enormous financial cost. In a 2005 study, the Government Accountability Office (GAO) reported that between 1994 and 2003 the average annual cost to recruit new service members was \$10,500 per person.²²² During this same time period, 9352 gay service members were discharged.²²³ Therefore, the total cost to train new recruits to replace these service members was estimated at \$95 million.²²⁴ However, these figures did not include the cost of “investigation, counseling/pastoral service for discharged members, separation procedures, the cost of review board operations and the cost of defending legal challenges to the policy.”²²⁵ It is likely that the total cost is much higher. In fact, a study conducted by the University of Santa Barbara estimated the total cost of DADT approximates \$360 million.²²⁶

Perhaps the most damning evidence against the military’s rationale for DADT is the military’s own assessment of its performance in the Iraq War. In the September 2008 Report to Congress, the military reported that the “overall security situation in Iraq has continued to improve.”²²⁷ In other words, if, at this moment, there are openly gay men and women serving in the armed forces while commanders and colleagues are aware of their sexual orientation and these soldiers are not being separated because of a shortage of personnel, and on top of

the recipient of the Air Force Achievement Medal, the Air Force Commendation medal, the Air Force Longevity Service Award, the Air Force Training Ribbon, the NCO Professional Military Education Ribbon, the Armed Forces Expeditionary Medal, the Air Force Outstanding Unit Award, and the Air Force Good Conduct Medal; Jenny Lynn Kopfstein, attained the rank of Lieutenant Junior Grade (O-2) and was the recipient of the Navy Achievement Medal, the Meritorious Unit Commendation, the Battle “E” Ribbon, the National Defense Service Medal, the Armed Forces Expeditionary Medal, the Sea Service Deployment Ribbon, the Navy Expert Rifle Medal, the Navy Expert Pistol Shot Medal, and the Surface Warfare Qualification Breast Insignia; Justin Peacock, recipient of the Coast Guard Unit Commendation Award, the Coast Guard Meritorious Commendation, and the National Defense Service Medal; Derek Sparks, attained the rank of Petty officer First Class and was the recipient of Sailor of the Quarter Award, four Sea Service Ribbons, the COMCARGRU with one letter of commendation, the National Defense Service Medal, the SW Asia Service medal, a Navy Unit Commendation, the Navy Expert Pistol Medal, the Navy Battle “E” Ribbon, the Kuwait Liberation Medal; three Navy and Marine Corps Achievement Medals, four Navy Good Conduct Awards; a Meritorious Unit Commendation Citation, and the Navy Expert Rifle Medal; Stacy Vasquez, attained the rank of Sergeant First Class (E-7) and was the recipient of the Army Commendation Medal, the Army Achievement Medal, the Army Good Conduct Medals, the National Defense Service Medals, the Armed Forces Reserve Medal with “M” device, NCO Professional Development, Sergeant Audie Murphy Club Member, U.S. Army Gold Recruiter Badge with 3 Sapphire Achievement Stars, and the U.S. Army Basic Recruiter Badge with 3 Gold Achievement Stars.

222. Correales, *supra* note 212, at 431.

223. *Id.*

224. *Id.*

225. *Id.*

226. Hecht, *supra* note 17, at 55.

227. DEP’T OF DEF., *supra* note 25, at iii.

this we are “winning” the war,²²⁸ then the “presence in the armed forces of persons who demonstrate a propensity to engage in homosexual acts” is not “creat[ing] an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”²²⁹

V. CONGRESS’S TURN TO ACT

Justice Kennedy, as judge on the Ninth Circuit Court of Appeals said, “[O]ne does not surrender his or her constitutional rights upon entering the military, but the Supreme Court has repeatedly held that constitutional rights must be viewed in light of special circumstances and needs of the armed forces.”²³⁰ Moreover, some courts find a “constitutionally mandated deference to military assessments and judgments [that] gives the judiciary far less scope to scrutinize the reasons . . . that the military has advanced to justify its actions.”²³¹ The two main arguments in favor of deferring to Congress on matters involving the military are that the judicial system lacks the competence necessary in this area and, as a separation of powers matter, military policies should be left to the legislative and executive branches.²³² On the other hand, some other courts give less deference to the government when fundamental rights are involved.²³³

The two principal arguments in favor of deference are based on five underlying doctrines that apply to the DADT policy.²³⁴ In a 2007 panel

228. Nationwide research in August 2008 indicates that 68% of Iraqis believe that the Iraqi Army is winning the battle against terrorists and that 58% of Iraqis believe the Iraqi Police Force are winning the battle against crime. This is a 16-percentage point increase in perception for the Iraqi Army and a [sic] eight-percentage point increase in perception for the Iraqi Police since November 2007.

DEP’T OF DEF., MEASURING STABILITY AND SECURITY IN IRAQ: REPORT TO CONGRESS 29 (2008) (footnote omitted), available at www.defenselink.mil/news/d20080930iraq.pdf.

229. 10 U.S.C. § 654(a)(15) (2006).

230. Pamela Glazner, Comment, *Constitutional Law Doctrine Meets Reality: Don’t Ask, Don’t Tell in Light of Lawrence v. Texas*, 46 SANTA CLARA L. REV. 635, 651 (2006) (quoting *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980)).

231. *Id.* at 652.

232. *Id.*

233. See, e.g., *Thomasson v. Perry*, 80 F.3d 915, 950 (4th Cir. 1997) (Hall, J., dissenting) (“[W]hile I will defer, as I ought and must, to the professional judgment of military commanders on things military, I may never defer to their judgment on things constitutional.”).

234. *Harvard Law School Lambda*, *supra* note 127, at 1232.

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Id.

discussion at Harvard University, Professor Tim Bakken outlined these five doctrines:

First, Article I of the Constitution provides express authority to Congress to call, regulate, and discipline the armed forces. Article II makes the President the Commander-in-Chief. Second, under the doctrine established in *Youngstown Sheet & Tube v. Sawyer*, the government's authority is at its zenith when Congress and the President agree on a matter, such as the "Don't Ask, Don't Tell" policy. Third, in the statute establishing the "Don't Ask, Don't Tell" policy . . . Congress made findings of fact based on congressional hearings. Fourth, the military has supported the policy. Fifth, in assessing the policy, the Court will question only whether there is any conceivable basis for the policy.²³⁵

Next, Professor Bakken presented a hypothetical illustrating these doctrines. Suppose a military contractor claimed he was discriminated by the military because the military chose a competitor's helicopters rather than his fixed-wing airplanes for combat operations.²³⁶ The contractor introduces evidence that his aircraft is better than the chosen helicopters.²³⁷ As a result, the judge sides with the contractor and orders the military to use fixed-wing planes "despite congressional findings, Presidential concurrence with Congress, and the testimony from the leaders of the military to the contrary."²³⁸

The judge's decision in Professor Bakken's hypothetical would be suspect because of the limitations of official hearings.²³⁹ "No witness, video, or evidence could convey in a courtroom the reality and horror of combat."²⁴⁰ Furthermore, a judge's orders could not provide for the type of adjustments needed in combat. More importantly, Professor Bakken noted that, from a constitutional standpoint, the judge's conclusions would contravene Congress's findings and that

the judge's order to use a different aircraft would be based on a conclusion that the due process clause, never before protecting in a military context the kind of discrimination the contractor is claiming, superseded Congress's and the President's express authority in Articles I and II to oversee and command the military.²⁴¹

Professor Bakken's hypothetical illustrates the difficulty that a constitutional challenge to DADT would encounter in the face of judicial

235. *Id.* (footnote omitted) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 1232-33.

deference in military matters. The military's motivation for choosing helicopters over fixed-wing aircraft or heterosexual over homosexual might be an operational necessity.²⁴² The military's conclusion may be based on prejudice toward the contractor or homosexuals, and this conclusion might be very wrong.²⁴³ However, the Supreme Court has concluded that the judge "can almost never be a more effective decision maker than a military leader when military matters are at issue, even when the military is restricting what is in the civilian context a [constitutional] right."²⁴⁴

Furthermore, some argue that, when courts defer to another institution because that institution has greater expertise on the matter (in this case the military) or because that institution has the superior legal authority (in this case Congress), these "deferee" institutions owe reciprocal obligations to the deferring institution.²⁴⁵ Notably, as Professor Horwitz noted, this deferee party is expected to

observe a minimum level of appropriate process in its deliberations. . . . [T]hose deliberations should be sufficiently structured and transparent to earn the trust of the deferring institution, and the deferee should take some pains to explain its reasons and its process in a way that provides a similar assurance that its conclusions are the result of a meaningful, full, and fair exercise of its expertise.²⁴⁶

Moreover, Professor Horwitz noted, "[O]ne of the foundations of legal authority-based deference is that the Constitution has equipped the political branches with a variety of mechanisms to ensure sound, legitimate, and accountable decisionmaking . . . [including] open, extended, and transparent deliberation, and a meaningful opportunity to air opposing viewpoints."²⁴⁷

Perhaps this argument explains why the outcome of *Witt* seems justifiable even though the court supported its conclusions with unconvincing arguments. DADT was approved by Congress and signed by the President after considerable deliberations and public discourse.²⁴⁸ The detailed legislative record indicates that Congress's conclusion that DADT was necessary to preserve the military's effectiveness as a fighting force were "the result of a meaningful, full, and fair exercise of its expertise." But that was fifteen years ago. Today, it is difficult to ignore the mounting evidence suggesting that even after careful deliberation,

242. *Id.*

243. *Id.*

244. *Id.* at 1233-34.

245. Horwitz, *supra* note 138, at 1102.

246. *Id.*

247. *Id.*

248. *Cook v. Gates*, 528 F.3d 42, 60 (1st Cir. 2008).

Congress was wrong.²⁴⁹

This does not mean that courts should disregard the doctrine of judicial deference and strike down DADT. Instead, Congress should take the opportunity to repeal DADT. For example, when President Barack Obama's Press Secretary Robert Gibbs was asked if the new administration would "get rid of the Don't Ask Don't Tell" policy, he replied, "you don't hear a politician give a one-word answer much. But it's, 'Yes.'"²⁵⁰ This may indicate that President Obama has opened a window of opportunity for overturning DADT.²⁵¹ More importantly, if the President's commitment proves real and he pushes for repeal of DADT, he would likely do so either through the Congress or from within the military.²⁵² If Congress decides to take another look at DADT, it can engage this sensitive issue with "open, extended, and transparent deliberation, and a meaningful opportunity to air opposing viewpoints."²⁵³ Congress can have military leaders publicly explain their rationale for supporting the continuation of DADT in light of the new evidence. Furthermore, Congress can hear testimony from military leaders that oppose DADT; this would help present the repeal of DADT to the public, not as a political endeavor but as a change emanating from within the armed forces.²⁵⁴ In this way, the decision to abolish DADT would come from an elected body, and it would be carried by at least some voices from inside the military as opposed to coming from the nine Justices on the Supreme Court.

249. See discussion *supra* Part III.

250. Carl Cameron, *Obama To End Military's "Don't Ask, Don't Tell" Policy*, FOXNEWS.COM, Jan. 14, 2009, <http://www.foxnews.com/story/0,2933,479952,00.html>.

251. *But see id.* ("An Obama adviser and retired Air Force General Merrill McPeak has stated DADT should be retained. Perhaps the statement by White House Press Secretary Gibbs helps to clarify President Obama's position and his commitment to effectively ending DADT.").

252. *Id.*

253. Horwitz, *supra* note 138, at 1102.

254. An open letter signed by 104 retired Generals and Admirals calls for the repeal of DADT.

We—the undersigned—respectfully call for the repeal of the "don't ask, don't tell" policy. Those of us endorsing this letter have dedicated our lives to defending the rights of our citizens to believe whatever they wish. Scholarly data shows there are approximately one million gay and lesbian veterans in the United States today as well as 65,000 gays and lesbians currently serving in our armed forces. They have served our nation honorably. We support the recent comments of former Chairman of the Joint Chiefs, General John Shalikashvili, who has concluded that repealing the "don't ask, don't tell" policy would not harm and would indeed help our armed forces. As is the case with Great Britain, Israel, and other nations that allow gays and lesbians to serve openly, our service members are professionals who are able to work together effectively despite differences in race, gender, religion, and sexuality. Such collaboration reflects the strength and the best traditions of our democracy.

Nathaniel Frank, *104 Generals and Admirals: Gay Ban Must End*, Nov. 17, 2008, <http://palmcenter.org/press/dadt/releases/104Generals%2526Admirals-GayBanMustEnd>.

VI. CONCLUSION

The opinions in *Cook v. Gates* and *Witt v. Department of the Air Force* illustrate why pursuing the repeal of DADT through executive and congressional channels, instead of judicial channels, would be ideal. *Cook* shows that a challenge to the constitutionality of DADT is likely to be disregarded under the doctrine of judicial deference to the military. Although opinions vary on whether this doctrine is still sound, the Roberts Court has signaled that it will continue to uphold it. On the other hand, *Witt* shows that, even if a court believes that the doctrine of judicial deference is not enough to stop the court from reaching the constitutionality question, the courts are left with little guidance as to how to apply *Lawrence*'s holding to private homosexual conduct in the military context. Although the Ninth Circuit attempted to resolve this issue in *Witt*, the court ended up stretching Supreme Court precedent to such a degree that its opinion was unfortunately unconvincing.