“Don’t Ask, Don’t Tell”: A Legal Analysis

Jody Feder
Legislative Attorney

September 2, 2009

Congressional Research Service
7-5700
www.crs.gov
R40795

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

In 1993, after many months of study, debate, and political controversy, Congress passed and President Clinton signed legislation establishing a revised "[p]olicy concerning homosexuality in the armed forces." The new legislation reflected a compromise regarding the U.S. military's policy toward members of the armed forces who engage in homosexual conduct. This compromise, colloquially referred to as "Don't Ask, Don't Tell (DADT)," holds 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 which are the essence of military capability." Service members are not to be asked about, nor allowed to discuss, their sexual orientation. This compromise notwithstanding, the issue has remained both politically and legally contentious. This report provides a legal analysis of the various constitutional challenges that have been brought against DADT; for a policy analysis, see CRS Report R40782, *"Don't Ask, Don't Tell:" The Law and Military Policy on Same-Sex Behavior*, by David F. Burrelli.

Constitutional challenges to the former and current military policies regarding homosexual conduct followed in the wake of the new 1993 laws and regulations. Based on the U.S. Supreme Court ruling in *Bowers v. Hardwick* that there is no fundamental right to engage in consensual homosexual sodomy, the courts have uniformly held that the military may discharge a service member for overt homosexual conduct. However, the legal picture was complicated by the Court's 2003 decision in *Lawrence v. Texas* which overruled *Bowers* by declaring unconstitutional a Texas law that prohibited sexual acts between same-sex couples. In addition, unsettled legal questions remain as to whether a discharge based solely on a statement that a service member is gay transgresses constitutional limits.

In recent years, several members of Congress have expressed interest in amending DADT. At least one bill that would repeal the law and replace it with a policy of nondiscrimination on the basis of sexual orientation—H.R. 1283—has been introduced in the 111th Congress.

Contents

Introduction 1
Current Law 1
Legal Challenges 2
The Judicial Doctrine of Military Deference 3
Pre-*Lawrence* Rulings 5
Post-*Lawrence* Rulings 7

Contacts

Author Contact Information 11

Introduction

In 1993, after many months of study, debate, and political controversy, Congress passed and President Clinton signed legislation establishing a revised "[p]olicy concerning homosexuality in the armed forces."[1] The new legislation reflected a compromise regarding the U.S. military's policy toward members of the armed forces who engage in homosexual conduct. This compromise, colloquially referred to as "Don't Ask, Don't Tell (DADT)," holds 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 which are the essence of military capability."[2] Service members are not to be asked about, nor allowed to discuss, their sexual orientation. This compromise notwithstanding, the issue has remained both politically and legally contentious. This report provides a legal analysis of the various constitutional challenges that have been brought against DADT; for a policy analysis, see CRS Report R40782, *"Don't Ask, Don't Tell:" The Law and Military Policy on Same-Sex Behavior*, by David F. Burrelli.

Current Law

Under the current law, a member of the armed forces may be discharged from the military if: (1) the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts; (2) the member states that he or she is a "homosexual or bisexual"; or (3) the member has married or attempted to marry someone of the same sex.[3] The statute defines "homosexual" as an individual who "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," and similarly defines "bisexual" as an individual who "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts."[4] The term "homosexual" is also defined to include the terms "gay" and "lesbian."[5]

It is important to note that nothing in the current policy prohibits the military from questioning new recruits or members about their sexual orientation, although the legislation establishing the current policy did contain a statement reflecting the sense of Congress that such questioning should be suspended but may be reinstated if the Secretary of Defense determines such inquiries are necessary to implement the policy. Indicating that such questioning may currently be discouraged, the Department of Defense (DOD) Directive implementing the DADT policy states that sexual orientation is a "personal and private matter and is not a bar to current military service ... unless manifested by homosexual conduct."[6] Current regulations, therefore, are based on conduct, including verbal or written statements. Since sexual "orientation" is "personal and private," DOD is not to ask and personnel are not to tell. Should an individual choose to make his or her homosexual "orientation" public, however, an investigation and discharge may well occur.

[1] National Defense Authorization Act for Fiscal Year 1994, P.L. 103-160 (codified at 10 U.S.C. § 654).

[2] 10 U.S.C. § 654(a).

[3] *Id.* at § 654(b).

[4] *Id.* at § 654(f).

[5] *Id.*

[6] Department of Defense, *Separation of Regular and Reserve Commissioned Officers*, Directive 1332.30, December 11, 2008, 9, http://www.dtic.mil/whs/directives/corres/pdf/133230p.pdf.

It is also important to note that the law contains no mention of "sexual orientation," although DOD defines the term as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts."[7] As written, therefore, both the law and the regulations distinguish between sexual orientation and sexual conduct, and both are structured entirely around the concept of homosexual conduct as opposed to orientation, including statements concerning an individual's sexuality. Therefore, attempts to implement the statute, or analyze and evaluate it, in terms of sexual orientation, have resulted in confusion and ambiguity, and are likely to continue to do so.

In recent years, several members of Congress have expressed interest in amending DADT, and at least one bill that would repeal the law and replace it with a policy of nondiscrimination on the basis of sexual orientation—H.R. 1283—has been introduced in the 111th Congress. In addition, Senator Kirsten Gillibrand was reportedly planning to introduce an amendment to the National Defense Authorization Act (H.R. 2647/S. 1390) that would have temporarily prohibited DOD from initiating investigations or discharges pursuant to DADT, but, according to news reports, the Senator has reconsidered and has adopted a wait-and-see approach with regard to amending the policy.[8]

Legal Challenges

Constitutional challenges to former and contemporary military policies regarding homosexual conduct began to accelerate following implementation of the DADT compromise in 1993. Similar challenges have also been brought against Article 125 of the Uniform Code of Military Justice, which provides for court-martial and punishment as the court-martial may direct for acts of sodomy committed by military personnel. The Supreme Court has never directly considered a challenge to DADT and has refused to review the military's policy on several occasions, the last in 1999 when it declined to hear the appeal of two former service members who were discharged after declaring their homosexuality to commanding officers.[9]

Although the Court has never directly addressed the constitutionality of DADT, the Court has considered cases involving allegations of discrimination by the military, as well as cases involving the rights of individuals who engage in homosexual conduct, and these cases are informative. Indeed, most federal courts that have rejected challenges to DADT have relied upon judicial precedents involving "special deference" to the political branches to affirm the "considered professional judgment" of military leaders to discipline or discharge a service member for homosexual conduct or speech. This doctrine of military deference and its application in several Court decisions involving allegations of discrimination by the military are discussed in greater detail below.

Like the doctrine of military deference, Court rulings in two cases involving homosexual conduct—*Bowers v. Hardwick* and *Lawrence v. Texas*—have also played a prominent role in lower court cases involving constitutional challenges to DADT. In its 1986 ruling in *Bowers*, the Court held that there is no fundamental right to engage in consensual homosexual sodomy.[10]

---

7 *Id.* at 27.

8 Josh Rogan, "No Telling If 'Don't Ask' Policy Will Continue," *CQ Weekly*, July 20, 2009, 1694.

9 *Holmes v. California Army Nat'l Guard*, 525 U.S. 1067 (1999).

10 478 U.S. 186 (1986).

Based on this decision, the courts uniformly ruled that the military could constitutionally discharge a service member for overt homosexual behavior. Complicating the legal picture, however, is the Court's 2003 ruling in *Lawrence*,[11] which expressly overruled *Bowers* and declared unconstitutional a Texas law that prohibited sexual acts between same-sex couples.

In *Lawrence*, the Court held that the "liberty" interest in privacy guaranteed by the due process clause of the Fourteenth Amendment protects a right for adults to engage in private, consensual homosexual conduct, expressly overruling *Bowers*' contrary conclusion. In particular, the community's moral disapproval of homosexuality was no "rational" justification for deploying the power of the state to enforce those views. According to the Court:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. The right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government cannot enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.[12]

As noted above, earlier federal appellate courts, relying on *Bowers*, uniformly ruled that the military ban on homosexual acts intruded upon no constitutionally protected right and was "rationally related" to legitimate military needs for "unit cohesion" and discipline. Moreover, by equating the admission of homosexuality by individual service members—unless demonstrated otherwise—with "propensity" for illegal conduct, the DADT policy successfully avoided equal protection and First Amendment challenge as well. After *Lawrence*, however, the constitutional bulwark of *Bowers* has crumbled, arming opponents of Article 125 and DADT with an argument that current military policies abridge the due process right to privacy of service members who are gay. But to prevail in that argument, any future challenger may still have to demonstrate that findings by Congress regarding those policies defy minimal rationality, a weighty burden given the deference historically accorded the political branches in the management of military affairs. The precise standard of judicial review, in the wake of *Lawrence*, however, has yet to be firmly established.

The Judicial Doctrine of Military Deference

A tradition of deference by the courts to Congress and the Executive in the organization and regulation of the military dates from the earliest days of the republic. Motivating development of this constitutional doctrine was the separation of powers among the executive, judicial, and legislative branches. The Constitution grants exclusive authority to raise and support the armed forces to Congress,[13] which has "broad and sweeping" power to make all laws necessary for that purpose.[14] Similarly, the Constitution grants exclusive command of the armed forces to the

---

[11] 539 U.S. 558 (2003).

[12] *Id.* at 578 (internal quotations and citations omitted). For more information on both the *Bowers* and *Lawrence* decisions, see CRS Report RL31681, *Homosexuality and the Constitution: A Legal Analysis of the Supreme Court Ruling in Lawrence v. Texas*, by Jody Feder.

[13] U.S. Const. art. I, § 8.

[14] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

executive branch, designating the President as "commander-in-chief."[15] Nowhere does the Constitution delineate a specific role for the judiciary in military matters. Judicial authority over the armed forces arises only indirectly as arbiter of constitutional rights. Thus, the policy of extraordinary deference "to the professional judgment of military authorities" has emerged from case law,[16] particularly "when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[17]

Originally framed as a doctrine of noninterference, the early Court avoided all substantive review of military disciplinary proceedings, provided only that jurisdictional prerequisites were met. A more skeptical judicial attitude emerged during the Warren Court era, which frequently questioned the scope and operation of military rules, particularly as applied to on-base civilians and non-duty-related conduct of service members. But the pendulum returned to what has been described as the "modern military deference doctrine" with a series of Burger Court decisions in the mid-1970s. Rather than abandoning all substantive review, the current judicial approach is to apply federal constitutional standards in a more lenient fashion which, with rare exception, favors military needs for obedience and discipline over the rights of the individual servicemen. "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[18]

Among leading contemporary precedents are the Supreme Court rulings in *Goldman v. Weinberger* and *Rostker v. Goldberg*.[19] Goldman was an Orthodox Jew and rabbi serving as a commissioned officer and psychologist for the Air Force. For five years, he wore a yarmulke while in uniform, without objection from superiors until he testified as a defense witness in a court martial proceeding. The prosecuting attorney at the court martial complained to Goldman's commanding officer that wearing the yarmulke violated Air Force regulations that prohibited wearing of headgear indoors. Goldman was ultimately separated from the service for refusal to remove the yarmulke.

Goldman argued that the Air Force regulation banning headgear "infringed upon his First Amendment freedom to exercise his religious beliefs." A majority of the Court disagreed:

> Our review of military regulation challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'[20]

Because the Air Force argued that standardized uniforms were necessary to "encourage the subordination of personal preferences," the majority deferred to the "professional judgment" of

[15] U.S. Const. art. II, § 2.

[16] *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

[17] *Rostker v. Goldberg*, 453 U.S. 57 (1981).

[18] *Parker v. Levy*, 417 U.S. 733, 758 (1974).

[19] 475 U.S. 503 (1986); 453 U.S. 57 (1981).

[20] *Goldman*, 475 U.S. at 507, quoting *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953).

the Air Force. The ramifications of the majority's "subrational-basis standard—absolute, uncritical deference"—drew vigorous objections from the dissenting justices:

> The Court rejects Captain Goldman's claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress within the military hospital. No test for free exercise claims in the military context is even articulated, much less applied. It is entirely sufficient for the Court if the military perceives a need for uniformity.[21]

In *Rostker v. Goldberg*,[22] the Supreme Court dealt specifically with an equal protection challenge to gender-based military classifications—namely, Congress's decision to register men, but not women, for the military draft. In applying the "intermediate scrutiny" test of *Craig v. Boren,*[23] the majority found the draft law did not reflect "unthinking" gender stereotypes, but was the product of extensive congressional deliberations on the role of women in combat and the necessities of military mobilization. The purpose of registration was to create a pool from which combat troops could be drawn as needed. Because women were barred from combat by another law, they were not "similarly situated" to men, and their exemption from registration was "not only sufficiently but closely related to" an "important" governmental purpose. As important to the outcome, however, was the Court's articulation of the "healthy deference" due the political branches in managing military affairs. Thus, according to the majority opinion, "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," such that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed...."[24] Constitutional rules apply, and may not be disregarded, but "the different character of the military community and of the military mission requires different application of those principles."[25]

Pre-*Lawrence* Rulings

Equal deference to the military's judgment was apparent in four federal appeals court rulings to uphold the DADT policy before *Lawrence*. First to rule was the Fourth Circuit in an appeal by Lt. Paul G. Thomasson, who had been honorably discharged under the policy after he announced in March 1994 that he was gay. In *Thomasson v. Perry*,[26] the court stressed Congress's "plenary control" of the military and the "deference" owed both the Executive and Legislative Branches in matters of national defense as factors calling for judicial restraint when faced with challenges to military decision making. "What Thomasson challenges," the opinion notes, "is a statute that embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiation and deliberation."[27] Under this standard, the Fourth Circuit concluded that the government articulated a "legitimate purpose" for excluding individuals who commit homosexual acts—that of maintaining unit cohesion and military readiness—and that the law's rebuttable presumption was

---

[21] *Id.* at 528 (O'Connor J., dissenting).

[22] 453 U.S. 57 (1981).

[23] 429 U.S. 190 (1976).

[24] *Rostker*, 453 U.S. at 66.

[25] *Id.* at 64-68.

[26] 80 F.3d 915 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996).

[27] *Id.* at 923.

a "rational means" of preventing individuals who engage in, or have a "propensity" to engage in, homosexual conduct from serving in the military. Similarly, Thomasson's First Amendment claims were rejected for the reason that:

> [t]he statute 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. The use of speech as evidence in this manner does not raise a constitutional issue—the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime, or, as is the case here, to prove motive or intent.[28]

Subsequently, the Fourth Circuit relied on *Thomasson* to affirm a district court ruling in *Thorne v. U.S. Department of Defense.*[29] After reviewing the record in eight other administrative separation proceedings where the presumption that someone who has declared his homosexuality has a propensity to engage in forbidden conduct was successfully rebutted, the lower court in *Thorne* held that conduct rather than speech was the target of the DADT policy.

In *Richenberg v. Perry*,[30] the Eighth Circuit upheld the "statement" provision of DADT as applied to the discharge of an Air Force captain who had informed his commanding officer that he was gay. As in *Thomasson,* the policy was alleged to violate equal protection and free speech rights by targeting declarations of "homosexual orientation or status" unrelated to conduct and for "irrational catering to prejudice against and hatred of homosexuals." Agreeing with the Fourth Circuit, however, the *Richenberg* court found that the policy ban on homosexual acts was justified by legitimate military needs and rationally served by the rebuttable presumption of a "propensity" to act on the part of someone who has declared his homosexuality. And because the focus of DADT is to "identify and exclude those who are likely to engage in homosexual acts," while prohibiting direct inquiries into an applicant's sexual orientation, there was no basis for a First Amendment challenge, the court concluded.

In appeals from three district court rulings during 1997, the Ninth Circuit approved the discharge of a naval petty officer who admitted to sexual relations with other men and of a California National Guardsman and Navy lieutenant who had submitted written documents to their commanding officers acknowledging that they were gay.[31] In the former case, *Philips v. Perry*, the appeals court ruled that individuals who are gay are not members of a "suspect class" for purposes of federal equal protection analysis, that the military ban on homosexual "acts" was rationally related to legitimate governmental interest in "maintaining effective armed forces," and that evidentiary use of admitted homosexuality did not violate a service member's First Amendment rights. Because sufficient homosexual acts were alleged to justify discharge, the *Perry* court declined considering the constitutionality of the rebuttable presumption and statements prong of the military policy. That issue was revisited in the consolidated case *Holmes v. California Army National Guard*, however, where the Ninth Circuit ruled that military personnel who "tell," without also presenting evidence to rebut the inference that they engage in homosexual acts, may constitutionally be discharged from the service. According to the court, "We agree with the Second, Fourth, and Eighth Circuits on this issue. Although the legislature's

---

[28] *Id.* at 931.

[29] 945 F. Supp. 924 (E.D.Va. 1996), aff'd per curiam, 139 F.3d 893 (4th Cir. 1998).

[30] 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (U.S. 1997).

[31] *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir 1997), cert. denied, 525 U.S. 1067 (U.S. 1999).

assumption that someone who has declared his homosexuality will engage in homosexual conduct is imperfect, it is sufficiently rational to survive [equal protection] scrutiny ..."[32]

In *Able v. United States*,[33] upholding the DADT policy, the Second Circuit faulted a contrary federal district judge's decision for failing to give proper deference to Congress and the military judgment. The opinion emphasized a judicial tradition of applying "less stringent standards" of constitutional review to military rules than to laws and regulations governing civilian society. Judicial deference was warranted by the need for discipline and unit cohesion within this "specialized community," matters for which courts "are ill-suited to second-guess military judgments that bear upon military capability and readiness."[34] In addition, "extensive Congressional hearings and deliberation" provided a "rational basis" for the government's contention that the prohibition on homosexual conduct "promotes unit cohesion, enhances privacy and reduces sexual tension."[35] Consequently, the court concluded, "[g]iven the strong presumption of validity we give to classifications under rational basis review and the special respect accorded to Congress' decisions regarding military matters, we will not substitute our judgment for that of Congress."[36]

Post-*Lawrence* Rulings

Some argue that the *Lawrence* ruling in 2003 altered the constitutional framework for analyzing both Article 125 and the DADT policy. According to this view, by finding a fundamental liberty interest in consensual homosexual activity, *Lawrence* demands closer scrutiny of both the means and ends of the current military policy. Under traditional equal protection doctrine, the legislature has broad latitude to draw lines based on any "non-suspect" classification—homosexuality included—provided only that the policy is "rationally related" to a "legitimate" governmental interest. In the past, the military has satisfied this "lenient" test by invoking the need for unit cohesion, discipline, and morale—interests uniformly affirmed by pre-*Lawrence* appellate courts to uphold the DADT policy. The government generally bears a far greater burden, however, when defending any action that interferes with individual rights or liberty interests deemed "fundamental" for due process purposes. To pass constitutional muster, the challenged measure or policy must be "narrowly tailored" to a "compelling" governmental interest.[37]

In this regard, Article 125 has been criticized by its opponents for codifying the same "moral disapproval" as the Texas statute involved in *Lawrence* and for being overbroad and underinclusive. One commentator stated:

> This broad ban does not limit itself to sodomy on military premises, nor to acts of sodomy between superiors and inferiors in the chain of command ... It is not limited to any context in which one might think there were secondary effects separate from moral disapproval.

---

[32] *Id.* at 1135. See also *Jackson v. Dep't of the Air Force*, 132 F.3d 39 (9th Cir. 1997) (holding that individuals who are gay are not members of a suspect class and that the military's regulations are rationally related to a legitimate government interest and are not arbitrary or irrational).

[33] 155 F.3d 628 (2d Cir. 1998).

[34] *Id.* at 634.

[35] *Id.*

[36] *Id.* at 636.

[37] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

> *Lawrence* tells us that mere disapproval, standing alone, is an inadequate basis for such a law.[38]

Consequently, some argue that military interests in good order and discipline previously accepted by the courts are not sufficient to trump the liberty interest identified by *Lawrence*. Supporters of the continued viability of Article 125 and the DADT policy, however, argue that there is no immediate parallel between constitutional precedent as applied to the civilian and military sectors. Thus, the unbroken line of appellate decisions supporting current policies against homosexuality, aided by the modern military deference doctrine, would as likely tilt the balance in the government's favor in any future judicial contest. Moreover, some argue that whatever implications *Lawrence* may have on Article 125, a penal statute, may not be directly translatable to the DADT policy, which provides for administrative separation from the military, but no criminal penalty.

The task of parsing these issues has fallen to the courts as they confront a new generation of legal challenges to the military's policies regarding homosexuality. In 2004, for example, the U.S. Court of Appeals for the Armed Forces, which is the military's highest judicial tribunal, issued a decision regarding the appeal of an Air Force linguistic specialist who was convicted by court martial on sex-related charges, including consensual sodomy with a subordinate. That case, *United States v. Marcum*, appears to have established the current standard that military courts use to evaluate post-*Lawrence* challenges to military policies regarding homosexuality.[39] A central issue in the case was whether *Lawrence* nullifies Article 125 and compels reversal of the service-member's sodomy conviction. The appeals court upheld Marcum's conviction, but not strictly on the basis of homosexual activity, instead pointing to the inappropriateness of sex between subordinate and superiors in the same chain of command. In *dicta*, the court strongly suggested that *Lawrence's* ban on laws prohibiting sexual intimacy may apply to the military as well. It even went on to "assume without deciding" that Marcum's conduct did fall within the protections of *Lawrence.* Such protection, however, was insufficient to shield him from the gender-neutral charge of sex with a subordinate.

In reaching its decision, the *Marcum* court established a test that provides guidance on how to apply the principles of *Lawrence* to the military environment. Any challenge to convictions under Article 125 are reviewed on a case-by-case basis according to the following three-part test:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence* [e.g., involving public conduct, minors, prostitutes, or persons who might be injured/coerced or who are situated in relationships where consent might not easily be refused]? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?[40]

In the wake of *Marcum*, some courts appear to be skeptical of challenges to Article 125 and DADT, especially when other factors, such as homosexual activity with a subordinate, are involved. For example, in *Loomis v. United States*, the United States Court of Federal Claims

---

[38] "Gay rights ruling gets test in military," *NLJ*, vol. 27, No. 7. pp 1, 33 (quoting David Cruz of the University of Southern California Law School).

[39] 60 M.J. 198 (C.A.A.F. 2004).

[40] *Id.* at 206-07.

applied the *Marcum* test to the case of a lieutenant who was discharged for homosexual conduct.[41] Because the lieutenant was of significantly higher rank than the private with whom he had had sexual relations, the court found that "the nature of the relationship between plaintiff and the PFC ... is such that consent might not easily be refused and thus it is outside of the liberty interest protected by *Lawrence*."[42] In other cases, however, courts have been more receptive to *Lawrence*-based challenges to military policies regarding homosexuality. For example in *United States v. Bullock*,[43] the U.S. Army Court of Criminal Appeals relied on *Lawrence* to overturn the guilty plea of a male soldier who engaged in consensual oral sodomy with a female civilian in a military barracks. Although the case involved heterosexual conduct, it appears to be the first decision by a military tribunal to recognize a right to engage in consensual adult sodomy, under principles that may be equally applicable to Article 125 prosecutions targeting homosexual activity.[44]

Meanwhile, only two federal courts of appeals have issued decisions in cases involving post-*Lawrence* challenges to DADT, and both of these courts have grappled with questions regarding the standard of review that should apply. The problem is that the *Lawrence* decision did not explicitly deem the right to engage in private consensual homosexual conduct to be a "fundamental" liberty interest, nor did the Court specifically identify the standard of review to be used in the future. Indeed, the decision appeared to apply neither traditional rational basis review nor strict scrutiny.

Identifying the standard of judicial review to apply was the central issue in *Witt v. Department of the Air Force*,[45] a recent decision in which the Court of Appeals for the Ninth Circuit reinstated a lawsuit against the military's DADT policy. In 2004, Major Margaret Witt, a decorated Air Force officer who had been in a long-term relationship with another woman, was placed under investigation for being a homosexual. Although Witt shared a home 250 miles away from base with her partner, never engaged in homosexual acts while on base, and never disclosed her sexual orientation, the Air Force initiated formal separation proceedings against her due to her homosexuality. Witt filed suit in district court, claiming that the DADT policy violated her constitutional right to procedural due process, substantive due process, and equal protection, but the district court dismissed her suit for failure to state a claim.[46] The Ninth Circuit affirmed the district court's dismissal of the equal protection claim, but remanded the procedural and substantive due process claims to the district court for further consideration.

Finding that the result in *Lawrence* was "inconsistent with the minimal protections afforded by traditional rational basis review" and that the cases upon which the *Lawrence* Court relied all involved heightened scrutiny, the Ninth Circuit ultimately held that "*Lawrence* applied something more than traditional rational basis review," but left open the question whether the Court had applied strict scrutiny, intermediate scrutiny, or a different type of heightened scrutiny.[47] Hesitating to apply traditional strict scrutiny to Witt's claim in the absence of the application of "narrow tailoring" and "compelling governmental interest" requirements in *Lawrence*, the Ninth Circuit instead looked to another Supreme Court case that had applied a heightened level of

---

[41] 68 Fed. Cl. 503 (Ct. Cl. 2005).

[42] *Id.* at 519. See also, *United States v. Barrera*, 2006 CCA LEXIS 215 (A.F. Ct. Crim. App. 2006).

[43] 2004 CCA LEXIS 349 (A.C.C.A. Nov. 30, 2004).

[44] But see *United States v. Stephens*, 2007 CCA LEXIS 428 (N-M.C.C.A. October 11, 2007).

[45] 527 F.3d 806 (9th Cir. 2008).

[46] *Witt v. United States Dep't of the Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006).

[47] 527 F.3d 806, 817 (9th Cir. 2008).

scrutiny to a substantive due process claim.[48] Extrapolating from its analysis of this case, the Ninth Circuit concluded:

> We hold 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. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.... In addition, we hold that this heightened scrutiny analysis is as-applied rather than facial.... Under this review, we must determine not whether DADT has some hypothetical, post hoc rationalization in general, but whether a justification exists for the application of the policy as applied to Major Witt.[49]

Although the court ruled that the government clearly advances an important governmental interest in management of the military, the court was unable to determine from the existing record whether DADT satisfies the second and third factors and therefore remanded the case to district court for further development of the record. It is important to note that even if the district court does ultimately find in favor of Major Witt, the decision would not invalidate the DADT policy. Unlike a facial claim, in which the constitutionality of a statute is evaluated on it face as if it applies to all hypothetical plaintiffs, the Ninth Circuit directed that the constitutional inquiry in *Witt* be conducted on an "as applied" basis. As a result, the impact of any decision by the district court would be limited to Major Witt and would not apply to other plaintiffs, who would be required to file their own individual claims.

Shortly after the Ninth Circuit issued its opinion in the *Witt* case, the Court of Appeals for the First Circuit handed down a decision upholding a lower court's dismissal of a challenge to DADT brought by 12 gay and lesbian veterans who had been discharged under the policy. In the case, *Cook v. Gates*,[50] the First Circuit agreed with much of the Ninth Circuit's reasoning in *Witt*, although the opinions differed in some important respects. Like the Ninth Circuit, the First Circuit concluded that the *Lawrence* case "did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label."[51] In contrast to the Ninth Circuit, however, the First Circuit evaluated the claim as a facial challenge and concluded that the plaintiffs' challenge failed. According to the court, the *Lawrence* decision recognized only a narrowly defined liberty interest in consensual adult sexual activity that excludes other types of sexual conduct, including homosexual conduct by service members.[52] Although the First Circuit noted that an as-applied challenge might involve conduct that does fall within *Lawrence's* protected liberty interest—such as homosexual conduct occurring off-base between consenting adults—the court nevertheless concluded that such as-applied challenges fail when balanced against the governmental interest in preserving military effectiveness.[53] As a result, the court dismissed the plaintiffs' as-applied challenge.

---

[48] *Sell v. United States*, 539 U.S. 166 (U.S. 2003).

[49] 527 F.3d 806, 819 (9th Cir. 2008).

[50] 528 F.3d 42 (1st Cir. 2008).

[51] *Id.* at 52.

[52] *Id.* at 56.

[53] *Id.* at 60.

In summary, historically undergirding the judicial approach to military policies regarding homosexuality has been a tradition of deference to Congress and the Executive in the regulation of military affairs. The *Lawrence* decision marked out a constitutional safe harbor for private homosexual conduct between consenting adults in the civilian sphere founded on due process principles. Cases pending now and in the future may call on the courts to reconcile these precedents in evaluating the constitutionality of DADT and Article 125.

Author Contact Information

Jody Feder
Legislative Attorney
jfeder@crs.loc.gov, 7-8088