

AIR COMMAND AND STAFF COLLEGE

AIR UNIVERSITY

“DON’T ASK, DON’T TELL”: DISCONNECTS AND SCENARIOS

by

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A Research Report Submitted to the Faculty

In Partial Fulfillment of the Graduation Requirements

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Maxwell Air Force Base, Alabama

April 2010

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## **Abstract**

The public debate concerning homosexuality in the armed forces was to a degree tamed by the passing of United States Code Title 10, Subtitle A, Part II, Chapter 37, section 654. Passed by Congress in 1993. Better known as “Don’t Ask, Don’t Tell” (DADT), §654’s established a new standard for how homosexual conduct was to be handled by the military. Since that law was passed, the courts have ruled on foundational elements of DADT which affect how the military implements the law. It is because of those rulings that it is time for Congress to readdress the issue to resolve the current and potential disconnects in how the homosexual conduct cases are handled.



The public debate concerning homosexuality in the armed forces was to a degree tamed by the passing of United States Code Title 10, Subtitle A, Part II, Chapter 37, section 654. Passed by Congress in 1993. Later becoming known as “Don’t Ask, Don’t Tell” (DADT),<sup>1</sup> §654’s implementation via policies by the Department of Defense (DoD) and the individual services has remained relatively unchanged for the last sixteen years. Avoiding the social structure debate, the immorality accusations, or the personal views of those that serve, it is important for commanders and leaders to work to resolve programmatic issues that have developed. Specifically, there is a disconnect between the law, policy and process with respect to dealing with homosexual cases in the military. Also, the military faces a myriad of scenarios as a result of the disconnect in law, policy and process that should be **considered**, but done so based on the rule of law **as opposed to** the rule of public opinion or emotional influences.

Before elaborating on the two programmatic considerations listed above, it is important to establish a frame of reference in the law. When congress passed DADT, it established a standard under which homosexuals could serve in the military. After the signing of DADT, **then-Chairman** of the Joint Chiefs of Staff, General Collin Powell, stated, “I expect that the courts will ultimately decide the issue once and for all. And when they **do**, whichever way they rule, the U.S. military will comply with the laws of the land. My position reflected my conscience and the needs of the service at the time. I say this realizing that, as time passes, public attitudes may change on this volatile subject just as they have on so many burning social controversies in recent years.”<sup>2</sup> Since that time, the courts have indeed had opportunities to “decide” but at the present, the law remains as written and subsequently the military must comply.

“Don’t Ask, Don’t Tell” emphasizes the scope of authority that the Uniform Code of Military Justice has over service members. It defines that scope as “on base or off base, and whether the member is on duty or off duty.”<sup>3</sup> The policy, in summary, says “homosexual and bisexual conduct is incompatible with military service; homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.”<sup>4</sup> The process requires commanders to serve as the initiator of discipline for violations.

The final element to establishing a frame of reference is case law. There are two paramount cases that affected the interpretation of DADT. The first case did not involve DADT directly but challenged the legality of a state’s sodomy laws. In *Lawrence v. Texas* (2003), the United States (U.S.) Supreme Court ruled that “liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence.”<sup>5</sup> A key element of *Lawrence* is that the Supreme Court applied the lowest of three levels of scrutiny which was the “rational basis test.”<sup>6</sup> “Under the rational basis test, the challenger of a law has the burden of proof. That is, the law will be upheld unless the challenger proves that the law does not serve any conceivable legitimate purpose or that it is not a reasonable way to attain the desired end.”<sup>7</sup> There other two levels of scrutiny are “intermediate” and “strict” however only intermediate is applicable for this DADT analysis.<sup>8</sup>

The second case of relevance is *Witt v. Department of the Air Force* (2008), which unlike *Lawrence*, was brought forth by a military member and directly challenged DADT. The attorneys for *Witt* successfully used *Lawrence* in arguments before the 9<sup>th</sup> Circuit Court of Appeals as applicable case law but the success is measured differently. The 9<sup>th</sup> Circuit Court

only serves districts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands.<sup>9</sup> When *Lawrence* was decided, its holding was applicable to all states and courts but the *Witt* case, once it was remanded by the 9<sup>th</sup> Circuit Court, affected only those districts listed above and created what is called a split circuit. The term “split circuit” refers to the tracking of “development concerning splits among the federal circuit courts.”<sup>10</sup> For example, a circuit court such as the 9<sup>th</sup> Circuit Court is not bound by the findings in the say the 4<sup>th</sup> Circuit Court of Appeals with serves Maryland, Virginia, North and South Carolina and vice versa. This is the basis for some of the scenarios explored later in this paper but is at the foundation of the first programmatic problem.

The current disconnect between the law, policy and process with respect to dealing with homosexual cases in the military is the first programmatic issue. The disconnect manifests from the *Witt* case. In hearing *Witt*, the 9<sup>th</sup> Circuit Court applied the second of three levels of scrutiny, the intermediate level. “At this review level, a law will be upheld if it is substantially related to an important government purpose. In other words, the government’s objective must be more than just a legitimate goal; the court must regard the purpose as ‘important.’ The means chosen must be more than a reasonable way of attaining the end; the court must believe that the law is substantially related to achieving the goal.”<sup>11</sup> In its finding, the 9<sup>th</sup> Circuit essentially found “the Air Force must prove that discharging her [*Witt*] advanced its goals of troop readiness and unit cohesion.”<sup>12</sup> By doing so, it put a heightened level of burden on the Air Force to discharge a member from the service based on DADT. **Herein** lies the roots of the current disconnect. Prior to *Witt*, there was only one standard for the DoD for dealing with homosexual discharges. Because the 9<sup>th</sup> Circuit Court finding in *Witt* only technically applies to those bases in that circuit, the Air Force and therefore the DoD is confronted with dealing with one standard for one

base and another standard for another base. In the interim (*post-Witt*), the DoD and Department of Justice have decided to apply the *Witt* standard across the board even though the case is still in litigation.<sup>13</sup> As a result of accepting this new standard, the services must modify the process for discharge under DADT. The Air Force for example must review each individual case where a military member disputes his/her discharge based on DADT, and the government must meet this higher standard.<sup>14</sup> For the sitting squadron commander however, the requirement to adhere to DADT has not changed. “When a commander determines that a member has engaged in homosexual conduct, the commander must initiate separation.”<sup>15</sup> The change in standard does not come into play until after a discharge board actually recommends a service member be in fact separated. It is at that point in which the accused could argue that the *Witt* standard should apply. For Air Force officers, the Secretary of the Air Force is the only separation authority but enlisted can be much *lower. It is expected, however,* that for disputed DADT separations that argue the applicability of the *Witt* standard, that the separation authority will be no lower than the Major Command Commander.<sup>16</sup>

The final point of analysis is the myriad of scenarios created by disconnects described above. These can be categorized into two types of scenarios: known and speculative. The known involves the application of DADT as the lowest level, the commander. Once there is “credible information that there is a basis for discharge,” a fact-finding inquiry is initiated.<sup>17</sup> “Only a commander in the member’s chain is authorized to initiate a fact-finding inquiry involving homosexual conduct.”<sup>18</sup> The commander’s chain of command and legal support team will be intimately involved throughout the process.<sup>19</sup> If the accusations are substantiated, the discharge proceeding will follow the process for similar violations of the Uniform Code of Military Justice. A commander’s view prior to *Witt* and after *Witt* have, for the most *part, not*

changed. Even so, however, the requirement still exists to take action if homosexual conduct is suspected.

The speculative scenarios are of some relevance because to date, the DoD has not publically stated on the record that the *Witt* standard will be applied to all military installations, branches and proceedings. Assuming for a moment that multiple standards are applied, then military members transferring from one installation in the 9<sup>th</sup> Circuit jurisdiction to an installation in the 4<sup>th</sup> Circuit could indeed be subjected to two standards. This split standard is not unprecedented in practice. The DoD currently complies with environmental and state laws individually. Taking that scenario a bit further, what if the same member is temporarily assigned back to the 9<sup>th</sup> Circuit? And what how does a deployment overseas play into this scenario? Finally, because *Witt* only directly named the Air Force as defendants, could and would the other services have to apply the *Witt* standard?

“Don’t Ask, Don’t Tell” was put in place 16 years ago and met the political objectives of time. In that time, society has arguably changed its perception, understanding and acceptance of homosexuals. Court decisions and scholarly research, like that which was sourced in this paper, support that increased acceptance but it was legal decisions in *Lawrence* and *Witt* that have primarily lead to the current disconnect between the law, policy and process in implementing DADT. As a result of these disconnects, the scenarios that commanders and service leadership face would be well served by resolution via the originators of the current law, Congress. The actions of Congress would be more widely received by the citizens of the U.S. than the results achieved in a court room. During an interview after the election of President Barrack Obama, Collin Powell commented on DADT by saying, “...it's been 15 years, and attitudes have changed. And so, I think it is time for the Congress, since it is their law, to have a full review of

it.”<sup>20</sup> Until that time however, commanders are obligated must enforce DADT as written and has been interpreted by the courts.



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## Endnotes

- <sup>1</sup> Om, Prakash, *The Efficacy of "Don't Ask, Don't Tell."* Joint Forces Quarterly, 4<sup>th</sup> quarter 2009, 88.
- <sup>2</sup> Powell, Collin and Persisco, Joseph, *My American Journey*. Random House, Inc, 1996, 559.
- <sup>3</sup> Cornell University Law School. <http://www.law.cornell.edu/uscode/10/654.html> (accessed 12 December 2009).
- <sup>4</sup> Commander in the Law, <http://milcom.jag.af.mil> (accessed 6 December 2009), 285.
- <sup>5</sup> Lawrence et al. v. Texas, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=02-102> (accessed 9 December 2009).
- <sup>6</sup> The Free Library by Farlex, <http://www.thefreelibrary.com/Breakdown+in+the+levels+of+scrutiny-a019235623>
- <sup>7</sup> Ibid.
- <sup>8</sup> Ibid.
- <sup>9</sup> AEGIS Law Library, <http://www.aegis.com/law/FedApp/9D/> (accessed 12 December 2009).
- <sup>10</sup> US Law.com [http://www.uslaw.com/law\\_blogs/Split+Circuits?blog=47](http://www.uslaw.com/law_blogs/Split+Circuits?blog=47) (accessed 12 December 2009).
- <sup>11</sup> The Free Library by Farlex, <http://www.thefreelibrary.com/Breakdown+in+the+levels+of+scrutiny-a019235623>
- <sup>12</sup> Branigin, William, *Supreme Court Turns Down 'Don't Ask' Challenge* (The Washington Post) <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/08/AR2009060801368.html> (accessed 9 December 2009).
- <sup>13</sup> Anonymous interview with person familiar with legal proceedings as it relates to *Witt v Department of Air Force*.
- <sup>14</sup> Author interview of Major Linell Letendre, USAF, Executive Officer, Civil Law and Litigation Directorate, 11 December 2009.
- <sup>15</sup> The Military Commander and the Law, p. 288.
- <sup>16</sup> Author interview of Major Linell Letendre, USAF.
- <sup>17</sup> Air Force Instruction (AFI) 36-3208 Administrative Separation of Airmen, 9 July 2004.
- <sup>18</sup> Commander in the Law, 79.
- <sup>19</sup> Commander in the Law, 78-79.
- <sup>20</sup> Zakaria, Fareed, *Global Public Square*, [http://www.huffingtonpost.com/2008/12/14/colin-powell-on-dont-ask\\_n\\_150899.html](http://www.huffingtonpost.com/2008/12/14/colin-powell-on-dont-ask_n_150899.html).

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