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THE DON'T ASK, DON'T TELL REPEAL ACT: BREACHING THE CONSTITUTIONAL RAMPARTS

HERBERT W. TITUS*

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INTRODUCTION

On July 22, 2011, *The New York Times* reported that President Barack Obama formally certified “that the American military is ready for the repeal of the ‘don’t ask, don’t tell’ policy as Pentagon officials said that nearly two million service members had been trained in preparation for gay men and women serving openly in their ranks.”¹ “Enactment of the repeal will come in 60 days,” the report continued, “because . . . the late Senator Robert C. Byrd of West Virginia . . . [required] as his price for supporting the bill . . . that the measure return to Congress for a two-month review period.”² Whether Congress “will review the law and whether any hearings will be held,” the *Times* observed, “is unclear.”³ Indeed, if the initial passage of the repeal

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1. Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES, July 22, 2011, <http://www.nytimes.com/2011/07/23/us/23military.html>.

2. *Id.*

3. *Id.*

legislation is any indication, the sixty-day period will transpire without either meaningful congressional review or hearings, the review period having been designed by Congress to provide constitutional cover so that it could, like Pontius Pilate, wash its hands of any responsibility for a change in military policy that dates back to the founding days of the republic.

I. DON'T ASK, DON'T TELL REPEAL AMENDED THE SMALL BUSINESS ACT

On December 15, 2010, in the closing days of the Second Session of the 111th Congress, H.R. 2965 was amended in the House of Representatives⁴ and given a brand new name: the “Don’t Ask, Don’t Tell Repeal Act of 2010” (DADT Repeal Act).⁵ Prior to this amendment, H.R. 2965 had been entitled the “Enhancing Small Business Research and Innovation Act of 2009.”⁶ Initially introduced in the House on June 19, 2009,⁷ H.R. 2965 had been designed as an amendment to the Small Business Act with respect to the Small Business Innovation Research (SBIR) and the Small Business Technology Transfer (STTR) programs.⁸ This bill had been the subject of hearings before the House Small Business Subcommittee on Technology and Innovation, and had been debated, amended, and passed by the House on July 8, 2009.⁹ As passed, H.R. 2965 would provide federal assistance to small businesses “that will reach either an underperforming geographic area . . . or an underrepresented population group.”¹⁰

After passage in the House, however, the Senate struck the text of H.R. 2965 and substituted the language of its own bill—S. 1233.¹¹ This bill reauthorized the SBIR and STTR programs of the Small Business Administration (SBA) through FY 2023.¹² The Senate then sent H.R. 2965, as amended, back to the House.¹³ There the bill sat until December 15, 2010, when the House took up H.R. 2965 and

4. H.R. 2965 Bill Summary & Status, All Congressional Actions with Amendments, THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02965:@@S> (last visited Nov. 2, 2011) [hereinafter THOMAS (Library of Congress)].

5. Don’t Ask, Don’t Tell Repeal Act of 2010, H.R. 6520, 111th Cong. § 1 (2010).

6. Enhancing Small Business Research and Innovation Act of 2009, H.R. 2965, 111th Cong. § 1 (2009).

7. THOMAS (Library of Congress), *supra* note 4.

8. H.R. 2965.

9. THOMAS (Library of Congress), *supra* note 4.

10. H.R. 2965 § 301.

11. THOMAS (Library of Congress), *supra* note 4.

12. SBIR/STTR Reauthorization Act of 2009, S. 1233, 111th Cong. § 101 (2009).

13. THOMAS (Library of Congress), *supra* note 4.

passed it, but with an entirely different subject and purpose.¹⁴ The newly minted H.R. 2965 was amended to read as follows:

Resolved, That the House agree to the amendment of the Senate to the bill (H.R. 2965) entitled “An Act to amend the Small Business Act with respect to the Small Business Innovation Research Program and the Small Business Technology Transfer Program, and for other purposes.”, with the following

HOUSE AMENDMENT TO SENATE AMENDMENT:

In lieu of the matter proposed to be inserted by the amendment of the Senate, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Don’t Ask, Don’t Tell Repeal Act of 2010”.¹⁵

Despite the title, the Act did not actually repeal DADT. Rather, Congress left that to the bureaucrats, delegating to the Pentagon the power to develop a “policy concerning homosexuality in the armed forces,”¹⁶ in recognition that the Secretary of Defense was already conducting a “Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. 654 [DADT].”¹⁷ Thus, the repeal act had “[n]o [i]mmediate [e]ffect on [c]urrent [p]olicy.—Section 654 of title 10, United States Code [DADT], . . . [but would] remain in effect until such time that” the Secretary of Defense completed his comprehensive review, and such completion was certified by the President to the Armed Services Committees of both houses of Congress, such certification having triggered a sixty-day period at the end of which the repeal would take effect.¹⁸

Three days after House passage, on December 18, 2010, the Senate passed amended H.R. 2965, and four days after that the President signed the DADT Repeal Act into law.¹⁹ Seven months later, on July 22, 2011, the President announced that, “[i]n accordance with the legislation that [he had] signed into law in December, [he had] certified and notified Congress that the requirements for

14. Don’t Ask, Don’t Tell Repeal Act of 2010, H.R. 2965, 111th Cong. §§ 1–2 (2010).

15. *Id.* § 1 (emphasis in original).

16. *Id.* § 2.

17. *Id.* § 2(a)(1).

18. *Id.* § 2.

19. THOMAS (Library of Congress), *supra* note 4.

repeal have been met. *'Don't Ask, Don't Tell' will end, once and for all*, in 60 days—on September 20, 2011.”²⁰

II. THE DADT REPEAL ACT WAS PASSED IN VIOLATION OF HOUSE RULES

Article I, Section 5 of the United States Constitution authorizes “[e]ach House [of Congress to] determine the Rules of its Proceedings.”²¹ Pursuant to that authority, the House of Representatives adopted Rules of the House of Representatives. Rule XVI, Clause 7 of those rules states that “[n]o motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.”²² Adopted in 1789, this Clause requires that any amendment to a bill on the floor of the House be “germane,” that is, the “amendment must relate to the subject matter under consideration.”²³ According to the House manual, any proposed amendment “must not only have the same end as the matter sought to be amended, but must contemplate a method of achieving that end that is closely allied to the method encompassed in the bill.”²⁴

It is self-evident that the subject of DADT—open homosexual behavior in the military—is not “germane” to small business technology and innovation. The purpose of the DADT Repeal Act—permitting open homosexual behavior—is clearly unrelated to H.R. 2965’s original purpose of providing federal assistance to small business technology and innovation. The House Rules manual provides numerous examples of amendments that demonstrate just how wide off the mark the DADT repeal amendment was to the original small business subject matter of H.R. 2965. Two of those precedents are sufficient to demonstrate that the DADT repeal did not meet the germane standard. In 1962, it was stated that a bill to eliminate wage discrimination based on sex could not be amended to ban wage discrimination on the basis of race.²⁵ In 1973, an amendment expressing the intent of Congress that the President take steps to resume trade relations between Arab states and Israel was ruled not germane to a bill authorizing military funds for Israel and support for a U.N. emergency force in the area.²⁶

20. Press Release, The White House Office of the Press Sec’y, Statement by the President on Certification of Repeal of Don’t Ask, Don’t Tell (July 22, 2011) (emphasis added), <http://www.whitehouse.gov/the-press-office/2011/07/22/statement-president-certification-repeal-dont-ask-dont-tell>.

21. U.S. CONST. art I, § 5.

22. H.R. Doc. No. 107-284, at 689 (2003).

23. *Id.* at 689, 694.

24. *Id.* at 696.

25. *See id.* at 694.

26. *Id.*

The DADT Repeal Act also fails the jurisdictional test in the House rules—whether the proposed amendment is within the jurisdiction of the House Committee reporting the bill.²⁷ When H.R. 2965 was introduced in 2009: (i) it was assigned to the House Small Business and Science and Technology Committees;²⁸ (ii) hearings were held by the Science and Technology's subcommittee on Technology and Innovation;²⁹ and (iii) the amended Bill was then reported to the House by the Committee on Small Business.³⁰ After passage of H.R. 2965 in the House, the Senate amended it by substituting its SBIR/STTR Reauthorization Act, which had been reported out by the Committee on Small Business and Entrepreneurship.³¹ Had the DADT Repeal Act been introduced in either house of Congress as a stand-alone bill, there is little doubt it would have been referred to each house's respective Armed Services Committee and subjected to the normal legislative process of committee hearings.

The lame duck Democratic leadership of the 111th Congress used its supermajority to bypass that Committee process,³² and in blatant disregard of the House Rules. The American people are constitutionally entitled that any bill enacted into law be handled in accordance with the established rules of proceeding adopted by Congress to govern itself.³³

III. THE DADT REPEAL ACT DIVESTED CONGRESS OF ITS LEGISLATIVE POWERS

Prior to the DADT Repeal Act, Congress had consistently followed its lawful procedures in shaping and enacting into law its military policies governing homosexual behavior. The policies and procedures for discharging active homosexuals had been established

27. *See id.* at 698.

28. THOMAS (Library of Congress), *supra* note 4.

29. *Id.*

30. *Id.*

31. *See* SBIR/STTR Reauthorization Act of 2009, S. 1223, 111th Cong., at 1 (2009).

32. *Cf.* BLACK'S LAW DICTIONARY 1041, 1495 (9th ed. 2004) (explaining that a supermajority is a "fixed proportion greater than half (often two-thirds or a percentage greater than 50%)" and a lame duck session is a "post-election legislative session in which some of the participants are voting during their last days as elected officials"); *Final Vote Results for Roll Call 638*, OFFICE OF THE CLERK: U.S. HOUSE OF REPRESENTATIVES (Dec. 15, 2010), <http://clerk.house.gov/evs/2010/roll638.xml> (demonstrating that 235 Democratic Representatives voted for H.R. 2965, 15 voted against the measure and five Democratic Senators did not vote); *U.S. Senate Roll Call Votes 111th Congress—2nd Session*, U.S. SENATE (Dec. 18, 2010) http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00281 (demonstrating that 55 Democratic Senators voted for H.R. 2965 and no Democratic Senators voted against H.R. 2965).

33. *Cf.* U.S. CONST. art. I, § 5 (stating that each House of Congress has the authority to make its own rules of proceeding).

by Congress in the enactment of the Uniform Code of Military Justice signed into law by President Truman in 1950.³⁴ Then, DADT was enacted on November 30, 1993 as part of the National Defense Authorization Act for Fiscal Year 1994.³⁵ DADT itself was a compromise measure³⁶ designed to continue the military policy dating back to the nation's founding that homosexuality is incompatible with military service³⁷ and that persons who engaged in homosexual acts were subject to discharge.³⁸

Codified as 10 U.S.C. § 654(a), DADT sets forth fifteen detailed *congressional* findings.³⁹ Foremost among these findings was this statement of authority: "Section 8 of article I of the Constitution of the United States *commits exclusively* to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces."⁴⁰ Thus, Congress found that "it lies within the discretion of the Congress to *establish qualifications for and conditions of service* in the armed forces."⁴¹ Next, Congress itemized nine additional findings to support its ultimate conclusion that "[t]he *prohibition* against homosexual conduct is a longstanding element of military law that continues to be *necessary* in the unique circumstances of military service"⁴² and 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."⁴³

Based on these legislative findings, Congress directed the Department of Defense (DoD) to separate a member of the armed services from such service upon proof that said member "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts" unless certain mitigating factors are found to be present.⁴⁴ In short, the DADT Act directed the DoD to carry out

34. Uniform Code of Military Justice, Pub. L. No. 81-506, art. 125, 64 Stat. 107, 141 (1950); *Uniform Code of Military Justice*, LIBR. OF CONGRESS, 1, http://www.loc.gov/rr/frd/Military_Law/pdf/UCMJ_summary.pdf.

35. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547, 1670 (1993) (including the DADT policy as codified as 10 U.S.C. § 654).

36. Thom Shanker & Patrick Healy, *A New Push to Roll Back 'Don't Ask, Don't Tell,'* N.Y. TIMES, Nov. 30, 2007, at A14.

37. See 10 U.S.C. § 654(a)(13) (2006) (repealed 2011).

38. *Id.* § 654(b)(1).

39. *Id.* § 654(a).

40. *Id.* § 654(a)(1) (emphasis added).

41. *Id.* § 654(a)(3) (emphasis added).

42. *Id.* § 654(a)(13) (emphasis added).

43. 10 U.S.C. § 654(a)(15) (2006) (repealed 2011) (emphasis added).

44. *Id.* § 654(b).

a congressional policy in a manner prescribed by Congress in the exercise of the legislative powers vested in it by Article I, Section 8, Clause 14 “[t]o make Rules for the Government and Regulation of the land and naval Forces.”⁴⁵

In contrast, by the DADT Repeal Act, Congress divested itself of its constitutionally entrusted legislative powers. First, the so-called DADT Repeal Act repealed nothing. Rather, Section 2(c) stated, as follows: “No Immediate Effect on Current Policy.—Section 654 of title 10, United States Code, shall remain in effect.”⁴⁶ Instead, Congress left the repeal decision to the Secretary of Defense. Thus, according to subsection 2(c), the DADT policy would continue in effect until (i) the Secretary of Defense has prepared his “[c]omprehensive [r]eview” on the repeal of Don’t Ask, Don’t Tell;⁴⁷ (ii) the DoD has prepared the “necessary policies and regulations” to effect the repeal “consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces”;⁴⁸ and (iii) the “President transmits to the congressional defense committees a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff,” stating that the two previously listed requirements have been met and are in effect.⁴⁹

In short, by the enactment of the DADT Repeal Act, Congress delegated the legislative power vested in it by Article I, Section 8, Clause 14 of the Constitution to the unelected bureaucrats of the DoD.⁵⁰ Even the President has only a nominal role—that of certifying to select congressional committees that the DoD exercised the discretionary powers delegated by the repeal act.⁵¹ Thus, the Act not only delegates the specific legislative power expressly vested by the Constitution in Congress, but it transfers the executive power vested solely in the President by Article II, Section 1 to implement DoD policies and rules governing homosexual behavior in the military into the bowels of the Pentagon.⁵² The President’s act of cosigning the certification required by subsection 2(b) of the Act contemplates nothing

45. U.S. CONST. art. I, § 8, cl. 14.

46. Don’t Ask, Don’t Tell Repeal Act of 2010, H.R. 6520, 111th Cong. § 2(c) (2010) (repealing 10 U.S.C. § 654, commonly known as the Don’t Ask, Don’t Tell policy).

47. *Id.* §§ 2(a)(1), 2(b)(1).

48. *Id.* § 2(b)(2)(C).

49. *See id.* § 2(b)(2).

50. U.S. CONST. art. I, § 8, cl. 14; H.R. 6520 § 2(b).

51. H.R. 6520 § 2(b)(2).

52. *See Nixon v. Fitzgerald*, 457 U.S. 731, 749–50 (1982) (explaining that Article II, Section 1 entrusts the President with “supervisory and policy responsibilities of the utmost discretion and sensitivity” which, in light of the DADT repeal act, has been handed over to the DoD).

more than a rubber stamp of the policies and procedures developed solely by the DoD.⁵³

Such presidential deference to his bureaucratic subordinates is an even more egregious violation of the constitutional principle of the separation of powers than President Truman's seizure of the nation's steel mills during the Korean War.⁵⁴ As Justice Black observed in *Youngstown Sheet & Tube Co. v. Sawyer*, the President's seizure order was unconstitutional because it did "not direct that a congressional policy be executed in a manner prescribed by Congress";⁵⁵ rather, "it direct[ed] that a presidential policy be executed in a manner prescribed by the President."⁵⁶ However, section 2 of the DADT Repeal Act directs that a DoD policy concerning homosexuality in the Armed Forces be developed and implemented in a manner prescribed by the Pentagon.⁵⁷ At least with the steel seizure action, the buck stopped at the White House with an elected president politically accountable to the people. If the DADT repeal policy fails, Congress and the President have positioned themselves to scapegoat the Pentagon.

IV. THE DADT REPEAL ACT UPENDED THE LEGISLATIVE PROCESS

The statutory process by which Don't Ask, Don't Tell is being repealed, while a new policy is being put into place, is also unconstitutional. According to section 2(f) of the DADT Repeal Act, DADT is repealed sixty days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have certified to the Senate and House defense committees that the Secretary has completed his report described in section 2(a)(2) and that the Defense Department has prepared rules and regulations that are consistent with military effectiveness, unit cohesion, and recruiting/retention.⁵⁸

Whatever policies and regulations are ultimately selected by defense officials to replace DADT, they will not be the product of a constitutionally prescribed process. Article I, Section 7 of the Constitution states that a bill becomes a law when it passes both houses of Congress and is signed by the President or, if unsigned, is not returned to the house of origin by the President within ten days.⁵⁹ Under the DADT Repeal Act, the rules and regulations governing homosexual behavior in the military will become law without having

53. *See id.*

54. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

55. *Id.* at 588.

56. *Id.*

57. *See Don't Ask, Don't Tell Repeal Act of 2010*, H.R. 6520, 111th Cong. § 2 (2010) (repealing 10 U.S.C. § 654).

58. *See id.* § 2(f).

59. U.S. CONST. art. I, § 7.

to comply with either the bicameral or presentment principles, as those principles are prescribed in the Constitution.⁶⁰ As the Supreme Court ruled in *INS v. Chadha*:⁶¹ “By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials.”⁶²

According to the DADT Repeal Act, it is the Secretary of Defense, an unelected official, who will decide what policy will replace DADT.⁶³ The repeal act acknowledges that the Secretary has (i) previously issued a March 2, 2010 memorandum “directing the Comprehensive Review on the Implementation of a Repeal of [DADT]”;⁶⁴ and (ii) already established the “[o]bjectives and scope” of that review.⁶⁵ By this acknowledgment, Congress has confirmed that by enacting the DADT Repeal Act, the legislative baton is already in the Secretary’s hand. Under the repeal act, then, it is the Secretary who determines the objective and scope of the review.⁶⁶ It is the Secretary who determines what impact repeal will have on “military readiness, military effectiveness and unit cohesion, recruiting/retention, and family readiness” and what actions should be taken to meet whatever problems arise upon repeal.⁶⁷ It is the Secretary who determines “leadership, guidance, and training on standards of conduct.”⁶⁸ It is the Secretary who determines “appropriate changes to existing policies and regulations . . . regarding personnel management, leadership and training, facilities, investigations, and benefits.”⁶⁹ Only after such determinations are made does the President have any say in the matter. Even then he is only required to affix his signature to a letter certifying that “the implementation of necessary policies and regulations . . . is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.”⁷⁰

And what role does Congress play? No role whatsoever, not even a legislative veto. All that the DADT Repeal Act requires of Congress is that its “defense committees” *passively* receive a certificate signed

60. See H.R. 6520 § 2(c).

61. 462 U.S. 919 (1983).

62. *Id.* at 948–49.

63. See H.R. 6520 § 2(a).

64. *Id.* § 2(a)(1).

65. *Id.* § 2(a)(2).

66. *Id.*

67. *Id.* § 2(a)(2)(A).

68. *Id.* § 2(a)(2)(B).

69. H.R. 6520 § 2(a)(2)(C).

70. *Id.* § 2(b)(2)(C).

by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff stating that the DoD has performed the tasks set forth in section 2 of the act.⁷¹ To that end, on July 22, 2011, the President transmitted to the chairman and ranking member of the defense committees of each house of Congress a certification letter, which reads as follows:

Pursuant to section 2(b)(2) of the Don't Ask, Don't Tell Repeal Act of 2010 . . . (the "Act"), we hereby certify the following:

(1) That we have considered the recommendations contained in the report required by the memorandum of the Secretary of Defense referred to in section 2(a) of the Act, namely, the Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell," and the Report's proposed plan of action.

(2) That the Department of Defense has prepared the necessary policies and regulations to exercise the *discretion* provided by the amendments made by section 2(f) of the Act.

(3) That the implementation of the necessary policies and regulations pursuant to the *discretion* provided by the amendments made by section 2(f) of the Act is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.⁷²

In short, the DoD's rules and regulations governing homosexual activity in the military will become law without any further action by Congress.⁷³ Thus, the DoD's rules and regulations become law by the discretionary act of a single person—the Secretary of Defense.⁷⁴ Even Alexander Hamilton, a most vocal supporter of a strong executive, warned against the establishment of a single law-making body, calling it "one of the most execrable forms of government that human infatuation ever contrived."⁷⁵ Without the check and balance of a bicameral legislative body, America's Founders feared that, in light of the fallibility of human nature, special interests would be favored over

71. *Id.* § 2(b)(2)(A)–(C).

72. Press Release, The White House Office of the Press Sec'y, *supra* note 20 (emphasis added).

73. See H.R. 6520 § 2(c).

74. *Id.* §§ 2(a), 2(c).

75. THE FEDERALIST NO. 22, at 125 (Alexander Hamilton) (E.H. Scott ed., 1898).

public needs.⁷⁶ Indeed, by dispensing with the normal legislative hearing process open to the public, the DADT Repeal Act closed the door to any serious congressional debate over the repeal of the DADT Act—enacted just seventeen years previously—despite the fact that Congress specifically found that Article I, Section 8 of the Constitution vested Congress with the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”⁷⁷

V. THE DADT REPEAL ACT THREATENS POWERS RESERVED TO THE STATES

Many might read Article I, Section 8, Clause 14 to grant the federal government the power to require the National Guard to abide by the post-DADT rules and regulations promulgated by the DoD, just as those rules and regulations would apply to the United States Army, Navy, Marines, Air Force and Coast Guard.⁷⁸ Yet the National Guard is not a United States armed force.⁷⁹ Although, “[s]ince 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States,” the Supreme Court observed in *Perpich v. Department of Defense*, that “unless and until ordered to active duty in the Army, they retained their status as members of a separate State Guard unit.”⁸⁰ Therefore, the National Guard is still composed of fifty separate state militias.⁸¹

Congress does not have the same plenary power over these state militias as it has over the nation’s military.⁸² Article I, Section 8, Clauses 12 and 13 authorize Congress “[t]o raise and support Armies” and “[t]o provide and maintain a Navy,” but there is no similar grant of power to create the militias of the several states.⁸³ Unlike the United States Army, Navy, Marines, Air Force, and Coast Guard, the militia is not a creature of the United States Congress.⁸⁴ Rather,

76. *See id.*

77. 10 U.S.C. § 654 (2006) (repealed 2011).

78. *See* U.S. CONST. art. I, § 8, cl. 14. (giving Congress the power to “make Rules for the Government and Regulation of the land and naval Forces”).

79. *See* 32 U.S.C.S. § 101(2) (1956).

80. 496 U.S. 334, 345 (1990).

81. *See* 32 U.S.C.S. § 101(4)–(7) (1956).

82. *See* U.S. CONST. art. I, § 8, cl. 12–16 (listing Congress’s powers to “provide for organizing, arming, and disciplining, the Militia . . . reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia”).

83. *Id.* art. I, § 8, cl. 12–13.

84. *See About the National Guard*, NAT’L GUARD, <http://www.ng.mil/About/default.aspx> (last visited Nov. 2, 2011) (noting that “[t]oday’s National Guard still remains a dual state-[f]ederal force”).

the militia preexisted the adoption and ratification of the United States Constitution.⁸⁵ That is why Article I, Section 8, Clauses 15 and 16 refer to “the militia” with the definite article “the.”⁸⁶ The drafters had something very specific in mind, namely, all able-bodied male citizens of the several states generally between eighteen and forty-five years of age equipped with appropriate weaponry.⁸⁷

Although Congress is authorized to “provide for organizing, arming, and disciplining”—that is, *funding*—the militia,⁸⁸ it is *not* vested with the power to *constitute* the militia in the first instance.⁸⁹ Although Congress is authorized to govern the militia, such power is limited to “such Part of them as may be *employed in the Service of the United States*.”⁹⁰ Even then, Congress is limited in its authority to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” not as a standing army for general use as an armed force.⁹¹ Finally, whereas Congress may prescribe the rules of discipline of the militia, the training thereof remains under the authority of the states by officers appointed by the states.⁹²

No doubt, Congress is also vested by Article 1, Section 8, Clause 18 “[t]o make all Laws which shall be necessary and proper,” but this power extends only “for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.”⁹³ Congress simply has no power to constitute the militia, and therefore, no power to set the criteria of eligibility to serve in the militia.⁹⁴ That being so, the Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.”⁹⁵

This line of argument is reinforced by the Supreme Court’s recent opinion in *District of Columbia v. Heller*, wherein the Court wrote:

Unlike armies and navies, which Congress is given the power to create . . . *the militia* is assumed by Article I already to be *in*

85. See *id.* (explaining that the National Guard “traces its history back to the earliest English colonies in North America,” prior to the United States’ independence from Great Britain).

86. *District of Columbia v. Heller*, 554 U.S. 570, 596 (2008).

87. *Perpich v. Dep’t of Def.*, 496 U.S. 334, 341 (1990).

88. U.S. CONST. art. I, § 8, cl. 16 (emphasis added).

89. See *id.* (emphasis added).

90. *Id.* (emphasis added).

91. *Id.* art. I, § 8, cl. 15.

92. *Id.* art. I, § 8, cl. 16.

93. *Id.* art. I, § 8, cl. 18.

94. U.S. CONST. art. I, § 8, cl. 15–16.

95. See *id.* amend. X.

existence. Congress is given the power to “provide for calling forth the Militia” and *the power not to create*, but to “organiz[e]” it—and not to organize “a” militia, which is what one would expect if the militia were to be a federal creation, but *to organize “the” militia, connoting a body already in existence*. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. That is what Congress did in the first militia Act, which specified that “each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after [sic] excepted) shall severally and respectively be enrolled in the militia.”⁹⁶

Therefore, the states have traditionally set enlistment standards for their National Guard units, the most prominent of which is that one must be a citizen of the state to enlist in that state’s National Guard.⁹⁷ There is no good reason why the states may not also determine who, among those citizens is “able-bodied,” that is, has a sound body, not incapacitated for service in the military. It follows that, as a matter of state law governing eligibility to serve in its National Guard unit, a state may determine that an active, open, practicing homosexual is ineligible to serve.⁹⁸

This constitutional role of the states is precisely what Virginia Delegate Bob Marshall (R-13th District) would have preserved if his January 21, 2011 bill (House Bill 2474) had been enacted into law by the Virginia General Assembly.⁹⁹ The bill would have declared that “[n]o person ineligible to serve in the Armed Forces of the United States under 10 U.S.C. § 654 [DADT] . . . as in effect on January 1, 2009, shall be eligible to serve in the National Guard.”¹⁰⁰ In support of this eligibility rule, Delegate Marshall included pertinent legislative findings, such as the long history of prohibitions against allowing open homosexuals to serve in the military dating back to President Washington.¹⁰¹ He also relied on expert testimony from committee hearings demonstrating that overt homosexual behavior adversely impacted “unit cohesion[,] . . . the condition which makes soldiers

96. 554 U.S. 570, 596 (2008) (alterations in original) (third emphasis in original) (citations omitted).

97. *See id.*

98. *See* U.S. CONST. amend. X (reserving to the States powers not delegated to the federal government).

99. *See* H.D. 2474, 2011 Sess. (Va. 2011); Delegate Robert G. Marshall—Legislation as Chief Patron, VIRGINIA LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?111+mbr+H57C> (last visited Nov. 2, 2011).

100. H.D. 2474.

101. *Id.* ¶ 19.

‘willing to risk death to achieve a common objective.’”¹⁰² In other words, active homosexual behavior in the military—like disqualifying physical disabilities—undermines combat capability, because such behavior undermines “the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.”¹⁰³

The central issue is not whether an individual who lives an openly homosexual lifestyle would make a good soldier. Rather, the issue is the impact of his behavior upon “unit cohesion” of the whole.¹⁰⁴ Under the DADT policy embraced by Virginia Delegate Marshall’s bill, there is allowance for certain exceptions to the ban on homosexual behavior in recognition that “under the particular circumstances of the case, the [service] member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale.”¹⁰⁵ Whereas a lame duck Congress may wish to grant to the Secretary of Defense discretion to embrace a finding to the contrary, the Commonwealth of Virginia need not succumb to the siren call of the homosexual lobby based upon contemporary psychological and sociological prejudices and predictions. Indeed, any federal effort to replace the composition of a state militia would be unconstitutional as only those “Laws of the United States which shall be made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land.”¹⁰⁶

VI. THE DADT REPEAL ACT PLAYS INTO THE HANDS OF THE COURTS

Tucked into the DADT Repeal Act is an acknowledgment that the Defense Secretary’s Comprehensive Review on the Implementation of a Repeal of DADT includes an “[e]valuat[ion] [of] the issues raised in ongoing litigation involving 10 U.S.C. 654.”¹⁰⁷ This euphemistic reference hid from view the vigorous attacks then being waged in federal courts by lawyers representing individual homosexual service members challenging the constitutionality of DADT.¹⁰⁸ Arguing from the

102. *Id.* ¶ 14(A).

103. *Id.* ¶ 14.

104. *See id.* ¶ 14(A)–(B) (describing factors for success in combat as high morale, good order and discipline, and unit cohesion).

105. 10 U.S.C. § 654(b)(1)(D) (2006) (repealed 2011).

106. U.S. CONST. art. VI.

107. Don’t Ask, Don’t Tell Repeal Act of 2010, H.R. 6520, 111th Cong. § 2(a)(2)(G) (2010).

108. *E.g.*, *Cook v. Gates*, 528 F.3d 42, 45, 47 (1st Cir. 2008); *Witt v. Dep’t. of Air Force*, 527 F.3d 806, 809 (9th Cir. 2008); *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1127 (9th Cir. 1997).

radical premise of *Lawrence v. Texas*—that the due process clause protects persons engaged in homosexual conduct in private¹⁰⁹—opponents of DADT have argued in numerous cases that DADT violated service members' due process rights because DADT prohibited them from engaging in such conduct.¹¹⁰ In response, government officials have attempted to defend DADT, claiming that it served important government interests in military readiness, individual discipline, and unit cohesion, and that, therefore, DADT justified what would otherwise be a deprivation of the service member's liberty.¹¹¹ Yet, just a month before the DADT Repeal Act was passed, the Government—including the President, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff—was undermining its defense of DADT in a case pending in the United States Court of Appeals for the Ninth Circuit by stating that “[t]he [Obama] Administration does not support [DADT] as a matter of policy and strongly believes Congress should repeal it.”¹¹²

With the enactment of the DADT Repeal, and the soon-to-be-revealed rules and regulations governing homosexual behavior in the military, it will be difficult for the Government to demonstrate that consensual homosexual conduct has anything to do with military readiness or unit cohesion. Thus, there is no reason to believe that such rules and regulations will not generate new constitutional attacks upon the enforcement of new policies. Even before the September 20, 2011 date upon which the DADT Repeal became effective, there have been demands from some pro-DADT repeal groups in the military urging recruitment outreach for gays and lesbians in the same way military recruiters target blacks, Latinos and women.¹¹³

Because the Supreme Court has recognized in *Lawrence v. Texas* that homosexuals have a fundamental right to “an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,”¹¹⁴ as one district court judge has ruled, any military rules governing their expressive activity, including sexual conduct, will be perceived as an intrusion “upon [their] personal and private lives” and will be subject to “heightened scrutiny” by the courts.¹¹⁵ Indeed, in *Witt v. Department of the Air Force*, a three-judge panel

109. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

110. *E.g.*, *Cook*, 528 F.3d at 45, 47; *Witt*, 527 F.3d at 809; *Holmes*, 124 F.3d at 1130.

111. *Witt*, 527 F.3d at 821; *Holmes*, 124 F.3d at 1133.

112. *See Log Cabin Republicans v. United States*, No. 10-56634 (9th Cir. Nov. 1, 2010) (order).

113. Rowan Scarborough, *Recruiters Pressed to Reach Out to Gays Once Ban is Lifted*, WASH. TIMES, July 28, 2011, <http://www.washingtontimes.com/news/2011/jul/28/group-wants-military-recruiters-to-target-gays-aft>.

114. *Lawrence*, 539 U.S. at 562.

115. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 911 (C.D. Cal. 2010) (quoting *Witt*, 527 F.3d at 819) (internal quotations omitted).

decided that enforcement of DADT infringed upon a service member's fundamental right to engage in private homosexual behavior, unless the Government could affirmatively demonstrate (i) that the specific application of DADT to an individual homosexual service member significantly furthers the government's interest and (ii) that there is no less intrusive means to achieve substantially the government's interest.¹¹⁶ Applying this standard, U.S. District Judge Virginia A. Phillips determined that the evidence offered by the Government in defense of DADT was not sufficiently empirical to convince her that DADT would significantly further the government interests in military readiness or unit cohesion, much less that such limitations on homosexual expression or conduct were necessary to further those interests.¹¹⁷

Judicial scrutiny in cases involving "fundamental rights"—whether termed intermediate, strict, or otherwise—is presumed to be legitimate,¹¹⁸ and within the nature and scope of judicial power. Such questions as to whether a government interest is "compelling" or "important," or whether there are less intrusive means to accomplish a government objective, have become the ordinary fare of judicial review.¹¹⁹ In earlier times, such questions were considered to be outside the exercise of judicial power. As Chief Justice Marshall put it in *McCulloch v. Maryland*, questions of the "degree of [a particular law's] necessity is a question of legislative discretion, not of judicial cognizance."¹²⁰ After all, as the Chief Justice pointed out, questions whether "[a] thing may be necessary, very necessary, absolutely or indispensably necessary," were not judicial, but political because the concept of necessity is always up for interpretation.¹²¹ Article I, Section 8, Clause 14 states that it is for Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces."¹²² Interjecting different degrees of judicial scrutiny to ascertain whether a particular rule, such as DADT, is unconstitutional departs from the inherent limits on judicial review confining the courts to discovering and applying permanent principles set forth in the constitutional text.¹²³

116. *Witt*, 527 F.3d at 819, 821.

117. *Log Cabin Republicans*, 716 F. Supp.2d at 922.

118. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978).

119. *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (comparing the judicial scrutiny applied to racial classifications to the scrutiny and government interests involved in child custody determinations); *Regents of Univ. of Cal.*, 438 U.S. at 299 (discussing generally judicial scrutiny of government interests in racial classification cases).

120. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 316 (1819).

121. *Id.* at 414.

122. U.S. CONST. art. I, § 8, cl. 14.

123. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Although judicial discretion and law-making is in vogue, even among conservatives, this more limited judicial role in the review of the constitutionality of statutes in cases coming before the courts is dictated by the very nature of constitutional law, indeed of law itself. In *Marbury*, Chief Justice Marshall discussed the essential difference between matters of obligation and matters of discretion in order to determine whether Marbury's appointment was governed by law or by politics.¹²⁴ Only if delivery of Marbury's commission as a justice of peace was a ministerial act—one of obligation—did the appointee have a vested legal right.¹²⁵ Otherwise, it was a discretionary matter for which President Jefferson was politically, but not legally, accountable.¹²⁶ As the Chief Justice explained in *Osborn v. Bank of the United States*:

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge.¹²⁷

Thus, in the exercise of judicial review, it is not the judge who determines the law of the Constitution, it is the law of the Constitution that binds the judge. To be sure, Chief Justice Marshall wrote in *Marbury* that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”¹²⁸ but he never said—despite what most today claim he meant—that the law is whatever the judicial department says it is. To the contrary, the Chief Justice was no judicial supremacist. Rather, he justified judicial review on the ground that the law of a written Constitution bound the courts, just as it bound Congress and the President.¹²⁹ Indeed, the very purpose of putting the Constitution into writing was to define and limit not only the powers of the legislative and executive branches, but of the judicial branch as well.¹³⁰ Otherwise, why would members of the judiciary, like members of the legislative and executive departments, swear or affirm an oath to support the Constitution “if that constitution forms no rule for [their] government”?¹³¹ The Constitution is not, therefore, an

124. *Id.* at 159–62.

125. *See id.* at 158, 162.

126. *See id.* at 165–66.

127. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824).

128. *Marbury*, 5 U.S. at 177.

129. *Id.* at 180.

130. *See id.* at 176–77.

131. *Id.* at 180.

instrument to be used by judges to reach their desired result, but an instrument that binds the entire government—including the judges.¹³²

Utilizing tests like “compelling state interest,” “least restrictive alternative,” “substantial government interest,” and “undue burden,” modern courts have ushered in a reign of judicial supremacy above the written constitution, a result neither contemplated, nor sanctioned, by *Marbury*.¹³³ Today’s judges use such flexible standards and academic literature to reach their own social, economic, and political goals.¹³⁴ Thus, there is every reason to believe that many judges will substitute their views for those of the military in the formulation and implementation of the rules that will govern homosexuals and their sexual activity in the Armed Forces.¹³⁵ Such evolutionary judicial standards are well-suited to include discoveries of rights and liberties that are totally foreign to the original meaning of words and phrases such as “equal protection” and “due process of law.”

Such judicial balancing, however, does not always lead to decisions favorable to individual liberty. Adjustable standards cut both ways. While strict scrutiny may secure the right of homosexual men and women to serve more openly in the military, will such close scrutiny secure the right of military chaplains who hold strict Biblical beliefs about homosexuality?¹³⁶ While strict scrutiny will secure the right of homosexuals to publicly display their sexual orientation, will such close judicial review guarantee that service members are free to voice opinions critical of such conduct?¹³⁷ After all, even the judicial test of “rigid scrutiny” was flexible enough to justify a judicial ruling that refused to protect American citizens of Japanese origin on the west coast from President Franklin Delano Roosevelt’s Executive Order sending them to “relocation centers.”¹³⁸

132. *Id.*

133. Cf. Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12 WM. & MARY BILL RTS. J. 117, 119 & nn.9–10 (2003) (explaining that the “legitimacy of a judicially self-conferred supremacy ‘in the exposition of the law of the Constitution’” has been hotly debated throughout the United States’ history).

134. *See id.* at 123.

135. *See id.* at 120.

136. *See* Lauren Green, *Military Chaplains Mull End of Don’t Ask, Don’t Tell*, FOXNEWS.COM (July 29, 2011), <http://www.foxnews.com/us/2011/07/29/military-chaplains-mull-end-don-t-ask-don-t-tell/>.

137. *See* CHARLES A. DONOVAN, A CLASH OF INTEGRITIES: MORAL AND RELIGIOUS LIBERTY IN THE ARMED FORCES 2 (2011) (arguing that the implementation of the DADT Repeal Act may compromise conservative service members’ free speech and religious liberty rights to the detriment of their military careers); Daniel Carl, *Staff Sergeant May Lose Career Over ‘Gay’ Indoctrination*, WORLDNETDAILY (July 26, 2011, 8:11 PM), <http://www.wnd.com/index.php?fa=PAGE.view&pageId=326477> (noting that an Air Force staff sergeant may be medically discharged for failing to support the military’s new policies accepting openly gay service members).

138. *See Korematsu v. United States*, 323 U.S. 214, 216, 217–18, 219, 220–21 (1944).

CONCLUSION

At stake in the repeal of DADT is not just whether a seismic change in military policy is sustainable without damage to military readiness and unit cohesion. Additionally, the lawless process by which the repeal is being accomplished shakes the American constitutional republic at its very foundations. The central purpose of separation of powers, checks and balances, and federalism in the nation's constitution is to prevent the kind of headlong plunge taken by Congress and the President to repeal DADT in response to emotionally charged cries for equality. By the failure of both the legislative and executive branches to abide by the written covenant with the American people to exercise only those powers enumerated in the Constitution, and to exercise those powers only in accordance with the processes specified therein, the leaders of both major political parties have demonstrated that with the repeal of DADT they have violated their oaths of office to support the Constitution of the United States.