

Pretend to Defend: Executive Duty and the Demise of “Don’t Ask, Don’t Tell”

Antony Barone Kolenc*

TABLE OF CONTENTS

INTRODUCTION.....	108
I. THE RISE AND DECLINE OF “DON’T ASK, DON’T TELL”	110
A. <i>The Origin of “Don’t Ask, Don’t Tell”</i>	110
B. <i>Legal Challenges under the Bush Administration</i>	112
1. <i>A Trio of Challenges: Log Cabin Republicans, Cook, and Witt</i>	112
2. <i>The Cook and Witt Decisions</i>	113
C. <i>The Impact of the 2008 Presidential Election</i>	116
II. THE DEFICIENT DEFENSE OF “DON’T ASK, DON’T TELL”	117
A. <i>The Key Strategic Litigation Decision: Not Seeking Certiorari in Witt</i>	118
1. <i>The Justification for not Seeking Certiorari</i>	118
2. <i>A Critical Analysis of the Attorney General’s Justification</i>	120
B. <i>Trial Strategies: Witt and Log Cabin Republicans</i>	124
1. <i>The Witt Trial on Remand</i>	124
2. <i>The LCR Trial</i>	126
3. <i>Assessing DOJ’s Trial Strategy in Witt and LCR</i>	129
C. <i>Post-Repeal Case Handling</i>	130
1. <i>Justice Department Censorship</i>	131
2. <i>The Witt Settlement and LCR Appeal</i>	134
3. <i>The Next Wave of DADT Litigation: The Almy Case</i>	136
D. <i>The “Adequate Representation” Standard</i>	137
III. PRETENDING TO DEFEND: CONSTITUTIONAL AND POLICY-BASED HARMS.....	140
A. <i>Neglecting the President’s Duty to “Faithfully Execute” the Laws</i>	142
B. <i>Undermining Congress’ Ability to Perform its Legislative Duties</i>	147
C. <i>Degrading the Judiciary’s Ability to Evaluate the Law</i>	152

* Antony Barone Kolenc (J.D., University of Florida College of Law) is an Assistant Professor of Law at Florida Coastal School of Law, where he teaches Constitutional Law. He served as a Lieutenant Colonel in the Air Force Judge Advocate General’s Corps before retiring in 2012, after having spent considerable time involved with the legal defense of “Don’t Ask, Don’t Tell” during the policy’s final days. The views expressed in this Article are those of the author alone and do not reflect the official policy of the U.S. Air Force, Department of Defense, or Florida Coastal School of Law. No privileged or confidential information was used in preparing this Article.

D. <i>Compromising the Role of the Department of Justice and Government Attorneys</i>	156
E. <i>Subverting the Public Trust</i>	158
CONCLUSION	161

“*[T]he political appointees at DOJ have been only pretending to mount a vigorous defense of [Don’t Ask Don’t Tell] while in fact operating to undermine it.*”
~ Ed Whelan, Ethics and Public Policy Center, October 15, 2010¹

“*This Court should require from the government either forthright advocacy defending Don’t Ask, Don’t Tell against the district court’s declaration of its unconstitutionality, or an acknowledgement that the district court was correct and a dismissal of its appeal.*”
~ Plaintiff’s Counsel, January 10, 2011²

“*[I]t appears to the merits panel that the United States is not prepared to defend the constitutionality of [Don’t Ask, Don’t Tell]*”
~ Ninth Circuit Court of Appeals, July 11, 2011³

INTRODUCTION

The stunning implosion of the Department of Defense’s controversial policy prohibiting homosexual conduct in the Armed Forces—colloquially known as “Don’t Ask, Don’t Tell”—has provided high levels of politico-legal drama in recent years. The policy’s demise has also presented an equally fascinating case study about executive power and constitutional duty.

The Constitution requires the President to “take [c]are that the [l]aws be faithfully executed”⁴ This places an institutional duty on the executive branch to enforce federal law, including an obligation to mount a legal defense for a statute challenged in the courts.⁵ Longstanding historical practice and legal scholarship

1. Ed Whelan, *Don’t Defend, Don’t Tell*, ETHICS AND PUBLIC POLICY CENTER (Oct. 15, 2010), http://www.eppc.org/publications/pubid.4279/pub_detail.asp (arguing that the Obama Administration is not vigorously defending the policy).

2. Response to Motion to Hold Appeals in Abeyance at 4, *Log Cabin Republicans v. Panetta*, No. 10-56634, No. 10-56813 (9th Cir. Jan. 10, 2011), 2011 U.S. 9th Cir. Motions LEXIS 4, at *6.

3. *Log Cabin Republicans v. Panetta*, No. 10-56634, No. 10-56813, 2011 U.S. App. LEXIS 16311, at *3 (9th Cir. 2011) (order).

4. U.S. CONST. art. II, § 3.

5. See Dalena Marcott, *The Duty to Defend: What is in the Best Interests of the World’s Most Powerful Client?*, 92 GEO. L.J. 1309, 1320 (2004) (noting “the President alone

appear to permit the President to abandon such obligation if he judges a law to be unconstitutional.⁶ But there has been little scholarly discussion about the propriety of a President claiming to defend a statute while apparently undermining it during litigation. Simply stated, does it violate a President's sworn duty for him to "pretend to defend" a statute? In the context of the demise of "Don't Ask, Don't Tell,"⁷ this article explores that question, arguing that such practice is constitutionally impermissible and simply bad public policy.⁸

Part I of this article recaps the rise and decline of DADT leading up to President Obama's election in 2008, while emphasizing three cases that paved the way for the critical litigation decisions made by the Obama Administration. Part II evaluates Ed Whelan's criticism⁹ that the Obama Administration pretended to defend DADT in court while strategically and tactically undermining the litigation. It concludes that ample evidence supports many of Whelan's charges. Finally, Part III demonstrates, using specific examples from the Obama Administration's DADT defense, how a policy of pretense harms the tripartite structure of the federal government, compromises the integrity of the government attorneys tasked with carrying out the Executive's bidding, and undermines the interests of the public at large.

is given the capacity to execute" the laws, and refusal to do so would "jeopardize the equilibrium" in our system) (quoting Attorney General Benjamin Civiletti, 43 Op. Att'y Gen. 275, 276 (1980)); *see also* Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 970 (1983) (arguing the word "[e]xecution . . . implies the responsibility to defend and to uphold the laws against attacks in court."); *Gavett v. Alexander*, 477 F. Supp. 1035, 1044 (D.D.C. 1979) ("While occasionally the Executive Branch has declined to defend laws it has considered to be unconstitutional . . . such occasions are exceedingly rare.").

6. *See infra* notes 202-214 and accompanying text (discussing a President's duty to defend federal laws against challenges in court).

7. 10 U.S.C. § 645(a)(1)-(15) (2006), *repealed* by Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

8. An equally compelling case study might examine whether the Obama Administration pretended to defend the Defense of Marriage Act (DOMA) prior to the President's February 2011 decision to stop defending the law and start attacking it. That inquiry, however, is beyond the scope of this Article.

9. M. Edward Whelan III (J.D. Harvard Law School) is president of the conservative think tank, *Ethics and Public Policy Center*. *Edward Whelan*, ETHICS AND PUBLIC POLICY CENTER, <http://www.eppc.org/scholars/scholarid.68/scholar.asp> (last visited Sept. 18, 2012). Mr. Whelan had a distinguished legal career as a law clerk to Supreme Court Justice Antonin Scalia, General Counsel for the U.S. Senate Committee on the Judiciary, and Assistant Attorney General for the Department of Justice's Office of Legal Counsel. *Id.* His experience in all three branches provided a unique vantage point for analyzing President Obama's decisions. *Id.*

I. THE RISE AND DECLINE OF “DON’T ASK, DON’T TELL”

A. *The Origin of “Don’t Ask, Don’t Tell”*¹⁰

History tells us that in the 70 years preceding DADT, the Armed Forces prohibited homosexuality.¹¹ After taking office, President Bill Clinton made a compromise with military leaders and Congress, resulting in the policy that would become known as DADT.¹² In 1993, after extensive hearings and a vigorous, public national debate,¹³ Congress codified the new policy at 10 U.S.C. § 654.¹⁴ As its

10. A discussion of the historical belief that homosexuality was incompatible with military service is beyond the scope of this article, as is any assessment of the ethics, morals, or merits of such a belief. This article focuses on the Obama Administration’s treatment of DADT as merely a case illustration. For a discussion of the policy rationales and alleged military needs that justified DADT, see generally Steven J. Fugelsang, *Reconciling Lawrence v. Texas with “Don’t Ask, Don’t Tell”: The Value of the Cook v. Gates Intermediate-Deferential Approach*, 20 GEO. MASON U. C.R. L.J. 237 (2009). For a more critical assessment of this same topic, see generally C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military’s Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. REV. 199 (1995) (attacking the underlying rationale and history of policies against homosexual conduct).

11. See Daniel R. Plane, Comment, *Don’t Mess with “Don’t Ask, Don’t Tell,”* 79 MARQ. L. REV. 377, 381-84 (1995) (providing a historical overview of homosexuals in the military). The military discharged persons who engaged in homosexual conduct, because it believed the conduct was immoral and a “sexual psychopathy.” See Fred L. Borch III, *The History of “Don’t Ask, Don’t Tell” in the Army: How We Got to It and Why It Is What It Is*, 203 MIL. L. REV. 189, 190 (2010); R.L. Evans, *U.S. Military Policies Concerning Homosexuals: Development, Implementation, and Outcomes*, 11 LAW & SEX. 113, 113, 190 (2002) (criticizing the practice). By 1981, a more formal policy emerged, shifting from a mental health rationale to an alleged impact on good order and discipline. See 32 C.F.R. § 41.13 (1981) (“Homosexuality is incompatible with military service.”). See also Chad C. Carter and Antony Barone Kolenc, *“Don’t Ask, Don’t Tell”: Has the Policy Met Its Goals?*, 31 U. DAYTON L. REV. 1, 4 (2005) (discussing how the mental illness and national security prongs of the policy “fell by the wayside” in the 1970s and 1980s).

12. See WILLIAM JEFFERSON CLINTON, *MY LIFE* 484 (2004). Clinton resented the “compromise” label:

Don’t ask, don’t tell was only adopted when both Houses of Congress had voted by a huge veto-proof margin to legislate the absolute ban on gays in the military if I didn’t do something else . . . [s]o there’s been a lot of rewriting history saying Bill Clinton just gave into that. That’s just factually false. I didn’t do anything until the votes were counted.

Dan Farber, *Bill Clinton: Colin Powell Don’t Ask, Don’t Tell Policy Fell Short*, CBSNEWS (Sept. 22, 2010), http://www.cbsnews.com/8301-503544_162-20017186-503544.html.

13. See *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong. 2 (1993); see also *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the H. Comm. on Armed Servs.*, 103d Cong. 1 (1993); *Assessment of the Plan to Lift the Ban on Homosexuals in the Military:*

primary feature, military members would no longer be asked to disclose their sexual orientation and, according to President Clinton, homosexuals would be able to serve “unless their conduct disqualifies them from doing so.”¹⁵ But in the 18 years of DADT, and to the dismay of President Clinton and gay rights groups, over 14,000 military members were discharged for homosexual conduct.¹⁶ Yet the Clinton Administration successfully defended the policy in court against a barrage of legal attacks that sought to overturn it on various constitutional grounds.¹⁷

Hearings Before the Subcomm. of Military Forces and Pers. and the H. Comm. on Armed Servs., 103d Cong. 1 (1993).

14. 10 U.S.C. § 645 (2006), *repealed by Don't Ask, Don't Tell Repeal Act of 2010*, Pub. L. No. 111-321, 124 Stat. 3515. Congress exercised its power under Article I, Section 8, to aid the military in its purpose to “prepare for and to prevail in combat” and to maintain “high morale, good order and discipline, and unit cohesion.” *Id.* at § 654(a)(3)-(4), (6). Congress found that service members “involuntarily” live and work in “forced intimacy with little or no privacy,” and thus those who engaged in homosexual conduct, or “demonstrate a propensity or intent to engage in” it, “create an unacceptable risk to the high standards . . . that are the essence of military capability.” *Id.* at § 654(a)(12), (15).

15. President's News Conference on Homosexuals in the Military, BOOK 1 PUB. PAPERS 20 (1993). The policy required the initiation of discharge of those who “engaged in, attempted to engage in, or solicited” a homosexual act; those who made a statement “that he or she is a homosexual or bisexual;” and those who “married or attempted to marry” someone of the same sex. 10 U.S.C. § 645(b)(1)-(3) Violators could not be retained in the military unless they proved certain facts, such as lack of propensity to engage in future acts. *See id.* at § 645(b)(1)(A)-(E). But those who violated the policy to avoid military service could be retained. *See id.* at § 645(e)(2). For a discussion on whether the policy met the goals of Clinton and Congress, *see Carter & Kolenc, supra* note 11, at 11-12.

16. Clinton recalled, “In the short run, I got the worst of both worlds—I lost the fight, and the gay community was highly critical of me for the compromise” Clinton, *supra* note 12, at 486. The policy's critics accused it of being status-based and harmful. *See Diane H. Mazur, Word Games, War Games*, 98 MICH. L. REV. 1590, 1592, 1598 (1999) (arguing one cannot be “metaphysically gay . . . and not engage in conduct, or have a propensity to engage in conduct, that is inextricably associated with that status.”); Kay Kavanagh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL. PUB. POL'Y & L. 142, 142 (1992) (noting the harm of hiding one's sexual identity).

17. Litigants attacked the law as a violation of due process, equal protection, and freedom of speech, but courts in several circuits upheld it. *See Able v. United States*, 968 F. Supp. 850, 865 (E.D.N.Y. 1997) (finding the policy violated equal protection), *rev'd*, 155 F.3d 628 (2nd Cir. 1998); *Hoffman v. United States*, No. 97-1258, 1997 WL 136418, at *2-6 (E.D. Pa. March 24, 1997), *aff'd*, 124 F.3d 187 (3d Cir. 1997) (mem.); *Thomasson v. Perry*, 80 F.3d 915, 927-28, 930-32 (4th Cir. 1996) (en banc); *Richenberg v. Perry*, 97 F.3d 256, 260-62 (8th Cir. 1996); *Philips v. Perry*, 106 F.3d 1420, 1426-27 (9th Cir. 1997); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1130, 1136 (9th Cir. 1997).

B. Legal Challenges under the Bush Administration

By the time of the 2000 Presidential election, it seemed the battle had been fought and won for the DADT policy. Storm clouds appeared on the horizon, however, when in 2003 the Supreme Court struck down a Texas law criminalizing homosexual conduct in the landmark case *Lawrence v. Texas*.¹⁸ Justice Anthony Kennedy penned a decision for the Court that created uncertainty about the constitutional status of homosexuals as a protected class.¹⁹ Reinvigorated opponents of DADT saw the possibility for renewed challenges in the courts.²⁰

1. A Trio of Challenges: Log Cabin Republicans, Cook, and Witt

In October 2004, a gay rights group, Log Cabin Republicans (LCR), filed a complaint in California on behalf of unidentified current and former service members, raising a facial attack against DADT using three arguments previously rejected in the 1990s.²¹ Just weeks later, in *Cook v. Rumsfeld*, twelve former service members lodged a similar complaint in Massachusetts, raising both facial and as-applied challenges.²² The LCR complaint ran into trouble with its assertion of

18. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

19. The Court overturned *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986), which had upheld an anti-sodomy law and denied constitutional protection for homosexual conduct. In *Lawrence*, Justice Kennedy recognized that the liberty interest protected by the Constitution allowed homosexual adults to engage in intimate sexual relationships and form enduring personal bonds. *Lawrence*, 539 U.S. at 567. But Justice Kennedy's cryptic opinion did not specify whether this interest was a "fundamental right" subject to some type of heightened judicial scrutiny. See Robert C. Post, *The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 96 (2003); Fugelsang, *supra* note 10, at 246 (discussing *Lawrence*).

20. See Diane H. Mazur, *Re-Framing the Debate, Is "Don't Ask, Don't Tell" Unconstitutional After Lawrence? What It Will Take to Overturn the Policy*, 15 U. FLA. J.L. & PUB. POL'Y 423, 426-27 (2003) (arguing *Lawrence* invalidates DADT as far as it is a regulation of moral codes). See also Carter & Kolenc, *supra* note 11, at 24 (questioning whether military members who engage in homosexual acts "outside the military rank structure" are protected by "*Lawrence's* liberty interest").

21. Complaint, *Log Cabin Republicans v. United States*, No. 04-8425, ¶ 1 (C.D. Cal. Oct. 12, 2004) (raising challenges under due process, equal protection, and the First Amendment). The group was a "nonprofit organization associated with the Republican Party and dedicated principally to advancing the interests of the gay and lesbian community." Order Granting Defendants' Motion to Dismiss Without Prejudice at 2, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-08425), vacated by 653 F.3d 1162 (9th Cir. 2011).

22. See Complaint at 10-11, *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (D. Mass. 2004) (arguing DADT had not survived *Lawrence* and that Congress' 1993 findings were contradicted by the evidence).

associational standing.²³ The plaintiffs in *Cook* also faced foundational challenges and were met with a motion to dismiss.²⁴ The litigation of these procedural issues delayed judicial resolution for over a year.²⁵

Meanwhile, a better vehicle to challenge DADT emerged in Washington State. In November 2004, the Air Force initiated homosexual conduct discharge proceedings against Major Margaret Witt, a reserve officer and flight nurse assigned to McChord Air Force Base in Tacoma, Washington.²⁶ Witt's affair with a married woman triggered a DADT investigation when the married woman's husband complained to the Air Force.²⁷ The investigation disclosed strong evidence that Witt had a long-term amorous relationship with another civilian woman.²⁸ Before her discharge board convened, Witt enlisted the help of the American Civil Liberties Union (ACLU) and filed a complaint on April 12, 2006, the same day the *Cook* court handed down its ruling.²⁹ Using the same arguments as in *LCR* and *Cook*, Witt asked the court to declare DADT unconstitutional and to issue an injunction to prevent her discharge.³⁰ The Government countered by filing a motion to dismiss the case.³¹

2. The *Cook* and *Witt* Decisions

The Bush Administration's Justice Department supported the DADT policy. It contended that the *Lawrence* decision was inapplicable and that the courts should defer to Congress' judgment in military matters.³² These arguments secured a victory

23. With no named plaintiffs who had suffered injury by the policy, the claim rested solely on associational standing to sue—a vulnerability in federal courts with limited jurisdiction. See Motion to Dismiss, *Log Cabin Republicans*, No. 04-8425 (C.D. Cal. Dec. 13, 2004) [hereinafter *LCR MTD*] (arguing *LCR* failed to allege associational standing and that previous Ninth Circuit cases upholding DADT precluded judicial review).

24. Memorandum of Law in Support of Defendants' Motion to Dismiss, *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (D. Mass. 2005) [hereinafter *Cook MTD*].

25. See *infra* note 33 (reporting the lower court decisions, over a year later)

26. See Complaint at 13-14, *Witt v. Dep't of the Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006) (No. 06-05195) [hereinafter *Witt Complaint*].

27. See Defendant's Motion for Summary Judgment at 2, *Witt*, No. 06-05195, slip op. (W.D. Wash. Jul. 22, 2010).

28. *Witt Complaint*, *supra*, note 26, at 13.

29. *Id.*, at 15-16.

30. *Witt Complaint*, *supra*, note 26, at 15.

31. Defendant's Motion to Dismiss and Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, *Witt*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006) (No. 06-05195) [hereinafter *Witt MTD*].

32. See generally *LCR MTD*, *supra* note 23; *Cook MTD*, *supra* note 24, at 2-3, 12; *Witt MTD*, *supra* note 31, at 2, 9. See also *infra* notes 156-61 and accompanying text (discussing the three primary arguments under Bush).

at the district court level in both *Cook* and *Witt*.³³ While noting the ambiguity in *Lawrence*, both courts concluded the decision did not create a protected class for gays and lesbians, and DADT survived rational basis review.³⁴ The *LCR* case simultaneously suffered a setback on the standing issue, essentially requiring the plaintiffs to start over.³⁵ Thus, by mid-2006, none of the constitutional challenges to DADT had succeeded.

In September 2006, Witt's discharge board recommended that she be honorably discharged for homosexual acts and statements.³⁶ The *Cook* plaintiffs and Witt appealed their losses almost simultaneously, with the Bush Justice Department filing briefs just a week apart in December 2006, making the same arguments that won at the district court level.³⁷ Meanwhile, the *LCR* plaintiffs experienced difficulties from their slow-moving judge,³⁸ with no relief in sight from the Ninth Circuit.³⁹

After waiting eighteen months, the First Circuit released its *Cook* opinion in June 2008, affirming the district court's full dismissal.⁴⁰ Rejecting the Government's argument for rational-basis scrutiny, the court concluded that *Lawrence* had in fact recognized a protected liberty interest that required heightened scrutiny,⁴¹ even

33. See *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 390-91, 407 (D. Mass. 2006) (granting the motion to dismiss and interpreting the complaint as facial attack); *Witt v. Air Force*, 444 F. Supp. 2d 1138, 1148 (W.D. Wash. 2006) (granting the motion to dismiss).

34. See *Cook*, 429 F. Supp. at 409-10; *Witt*, 444 F. Supp. 2d at 1148.

35. See Order Granting Defendants' Motion to Dismiss Without Prejudice, *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2006) (No. 04-8425) (dismissing without prejudice because *LCR* had not identified at least one member with standing, but allowing *LCR* to correct the deficiency). Plaintiffs amended their complaint and the Government re-asserted its motion to dismiss, still attacking associational standing. See Motion to Dismiss at 2, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2006).

36. Brief for Appellant at 9, *Witt*, 527 F.3d 806 [hereinafter *Witt Appellate Brief*]; see also *Witt*, 527 F.3d at 810 (noting that the Air Force honorably discharged Major Witt on July 10, 2007).

37. See also *infra notes* 156-61 and accompanying text (discussing the three primary arguments under Bush).

38. The judge waited for the Ninth Circuit to rule in *Witt*, and then ordered an indefinite stay pending *Witt's* final disposition. See Civil Minutes - General, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425) [hereinafter *LCR Trial Docket*].

39. In a scathing but unsuccessful motion, the *LCR* plaintiffs bemoaned the indefinite delay. See Ex Parte Application for Order Vacating Stay at 1, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425). Their two attempts to have the Ninth Circuit intervene and force a ruling also failed. See Order, *Log Cabin Republicans*, No. 08-56185, (9th Cir. Nov. 6, 2008) (denying interlocutory appeal); Order, *Log Cabin Republicans*, No. 08-73194 (9th Cir. Jan. 22, 2009) (denying writ of mandamus).

40. See *Cook v. Gates*, 528 F.3d 42, 65 (1st Cir. 2008) (re-styling the case under new Secretary of Defense).

41. *Id.* at 52. The court noted the following four reasons indicated that *Lawrence* recognized a protected liberty interest:

though that interest was somewhat limited.⁴² After dismissing the facial challenge, the court resolved the as-applied challenge⁴³ in the Government's favor.⁴⁴ Noting the unique military nature of the case, the court concluded Congress' "considered deliberation" in this area "to ensure national security" was an "exceedingly weighty interest and one that unquestionably surpasses the government interest that was at stake in *Lawrence*."⁴⁵

The Government did not fare as well in the *Witt* decision, released a few weeks earlier, which also applied heightened scrutiny but without the First Circuit's deference to Congress.⁴⁶ The Ninth Circuit declined ruling on the facial constitutionality of DADT because "[the] heightened scrutiny analysis is as-applied rather than facial."⁴⁷ Deriving its own three-factor test from Supreme Court case law in the criminal context,⁴⁸ the court considered the facts in the light most favorable to

First, *Lawrence* relies . . . on [cases where] the Supreme Court recognize[s] a due process right to make personal decisions related to sexual conduct that mandated the application of heightened judicial scrutiny. . . . Second, the language employed throughout *Lawrence* supports the recognition of a protected interest. . . . Third, in overruling *Bowers*, *Lawrence* relied on Justice Stevens' *Bowers* dissent. . . . Finally, if *Lawrence* had applied traditional rational basis review, the convictions under the Texas statute would have been sustained.

Id. The court concluded, "*Lawrence* is, in our view, another in this line of Supreme Court authority that identifies a protected liberty interest and then applies a standard of review that lies between strict scrutiny and rational basis." *Id.* at 56.

42. *Id.* ("*Lawrence* recognized only a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one's home and one's own private life. The Court made it abundantly clear that there are many types of sexual activity which are beyond the reach" of *Lawrence*.)

43. While the district court had rejected the plaintiffs' claim as framing an as-applied challenge, the First Circuit disagreed and addressed the issue. *See id.* at 56 n.8.

44. *Id.* at 56, 60.

45. *Id.* at 60.

46. *See Witt v. Dep't of the Air Force*, 527 F.3d 806, 816 (9th Cir. 2008) (refusing to "pick through *Lawrence* with a fine-toothed comb" and instead considering "what the [Supreme] Court actually *did*"). For a comparison of the *Witt* and *Cook* cases, see generally Fugelsang, *supra* note 10, at 256-57.

47. *Witt*, 527 F.3d at 819 ("[W]e must determine not whether DADT has some hypothetical, posthoc rationalization in general, but whether a justification exists for the application of the policy as applied to Major Witt."). In so doing, the court overruled *Beller v. Middendorf*, 632 F.2d 788 (9th Cir.1980) (opinion by then-Judge Kennedy), and rejected "the Air Force's attempts to justify the policy by relying on congressional findings regarding 'unit cohesion' and the like" because those findings were not tailored in application "specifically to Major Witt." *Witt*, at 819, 821.

48. *See Sell v. United States*, 539 U.S. 166, 180-81 (2003) (involving the forcible medication of a criminal defendant).

Witt.⁴⁹ While conceding that the Government had demonstrated an “important governmental interest,” the court could not resolve the other two factors, unless the record was developed further on remand.⁵⁰ This new as-applied standard would have posed major problems for the military in administering DADT;⁵¹ thus, the Bush Administration sought *en banc* review of the panel’s decision.⁵² On December 4, 2008, however, a fractured Ninth Circuit denied the Government’s request.⁵³ Four of the six dissenting judges decried the panel’s new “Witt standard,”⁵⁴ calling it an “unsanctioned and malleable standard of review,” and warned that the next step in the litigation would be “far more than a harmless remand.”⁵⁵

C. *The Impact of the 2008 Presidential Election*

Uncertainty regarding the future of DADT increased as the Obama Administration and a Democratically-controlled Congress took office following the 2008 election. Like President Clinton before him, then-candidate Barack Obama had campaigned to openly accept gay service members.⁵⁶ Pressed from both the political left and right, his Administration was about to walk a tightrope: trying to please the proponents of repealing DADT—a key party constituency—while at the same time

49. *Witt*, 527 F.3d at n.1. In 2008, when the Ninth Circuit made its ruling, the record contained no facts about Witt’s “adulterous” relationship, her relations with Air Force officers, or the homosexual statements she made to enlisted members. *See infra* note 109 and accompanying text. The only facts known to the Ninth Circuit were from Major Witt’s declaration to the district court. *See Witt* Appellate Brief, *supra* note 36, at 8-10.

50. *Witt*, 527 F.3d at 821. The three factors of the as-applied *Witt* standard ask 1) whether “important governmental interests are at stake;” 2) whether the Government action “will significantly further those concomitant state interests;” and 3) whether the Government action is “necessary to further those interests.” *Id.* at 818-19.

51. *See infra* notes 112, 117 and accompanying text (outlining testimony about the military’s need for uniformity).

52. *See Witt v. Dep’t of the Air Force*, 548 F.3d 1264 (9th Cir. 2008) (denial of *en banc* consideration).

53. *Id.* at 1265.

54. *See supra* note 50.

55. *See Witt*, 548 F.3d at 1265, (O’Scannlain, J., dissenting). Judge O’Scannlain’s dissent also noted *Lawrence*’s limited reach and that Witt’s case arose, not in a criminal context, but in a military one, where the Supreme Court had urged “deference to military policies.” *See id.* at 1271, 1274 (O’Scannlain, J., dissenting).

56. *See* David Welna, *Candidates Split on ‘Don’t Ask, Don’t Tell’ Policy*, NPR (July 29, 2008), <http://www.npr.org/templates/story/story.php?storyId=93041341> (quoting Barack Obama as saying, “I believe that we need to repeal the ‘don’t ask, don’t tell’ policy;” however, the article indicates that President Obama had reservations about imposing any such repeal upon military personnel).

showing restraint in effecting what could be one of the most controversial cultural changes to ever face the United States military.

II. THE DEFICIENT DEFENSE OF “DON’T ASK, DON’T TELL”

During his first two years in office, President Obama’s critics faulted him for not adequately defending DADT.⁵⁷ Conversely, gay rights activists maligned Obama for “vociferously defending [DADT] in court,”⁵⁸ fearing the President abandoned his commitments to them.⁵⁹ Who was correct? The following section will evaluate criticisms about the Obama Administration’s defense of DADT and examine whether the law was “adequately represented,” by borrowing a standard from Federal Rule of Civil Procedure 24(a)(2).⁶⁰

57. Although beyond the scope of this Article, critics also accused Obama of pretending to defend the Defense of Marriage Act (DOMA) prior to DOJ’s outright abandonment of the law. See William Duncan, *Same-sex marriage: The tortuous road to the Supreme Court*, SCOTUSBLOG (Aug. 17, 2011), <http://www.scotusblog.com/2011/08/same-sex-marriage-the-tortuous-road-to-the-supreme-court/> (arguing DOJ put on a “grudging defense” of DOMA and decrying the tragedy for the rule of law if the “highly motivated and well-financed” attack on DOMA were met “with the collusion of the titular defendants who would offer none or only a pro forma defense.”). See also Devin Dwyer, *‘Don’t Ask, Don’t Tell’: Is Obama Administration Bound to Defend Law it Opposes?*, ABC NEWS, Oct. 21, 2010 <http://abcnews.go.com/Politics/dont-debate-obama-administrations-legal-defense-gay-ban/story?id=11928405> (quoting Ms. Donnelly, the President of the *Center for Military Readiness* and one of President Obama’s fiercest detractors as saying “[t]his is the president’s agenda”).

58. Ben Adler, *Is Obama’s Excuse for Not Repealing ‘Don’t Ask, Don’t Tell’ Legitimate?*, NEWSWEEK, Oct. 19, 2010, available at <http://www.thedailybeast.com/newsweek/2010/10/19/is-obama-s-excuse-for-not-repealing-don-t-ask-don-t-tell-legitimate.html> [hereinafter “Newsweek Article”].

59. See Christine Simmons, *Obama HRC Speech: “I Will End Don’t Ask, Don’t Tell,” Says President Obama*, HUFFINGTON POST (Oct. 11, 2009), http://www.huffingtonpost.com/2009/10/10/obama-says-he-will-enddo_n_316524.html. While discussing the progress in DADT repeal, President Obama said, “progress may be taking longer than we like.” President Obama went on to ask supporters not to “doubt the direction we are heading . . .” Still, activists were unhappy: “[H]e did not indicate when he would accomplish these goals and we’ve been waiting for a while now.” *Id.*

60. Rule 24(a)(2) allows a party to join a case if the intervenor may be unable to protect a related interest “unless existing parties adequately represent that interest.” This section will borrow a standard derived from that rule to determine whether the Obama Administration “adequately represented” DADT in court. See *infra* notes 178-94 (discussing Rule 24 in relation to DADT).

A. *The Key Strategic Litigation Decision: Not Seeking Certiorari in Witt*

By the end of 2008, the DADT litigation reached a pivotal decision-point: two Circuits had ruled that *Lawrence* required “heightened scrutiny” of the DADT policy. The Ninth Circuit’s decision in *Witt* had created a disruptive standard with the potential to force the military to change the focus of its discharge process. One of the *Cook* plaintiffs, James Pietrangelo, petitioned the Supreme Court for certiorari,⁶¹ while, in *Witt*, the new Obama Administration obtained an extension in order to determine the proper course of action.⁶² Finally, in April 2009, the Administration decided it would fight against the Supreme Court’s review of the two cases.⁶³ As it turned out, this decision would be the crucial strategic move in the DADT litigation.

1. The Justification for not Seeking Certiorari

The Obama Administration’s decisions to not seek certiorari in *Witt* and to oppose certiorari in *Cook* set in motion an avalanche of judicial chaos that eventually led to the repeal of DADT.⁶⁴ Those determinations also attracted strong criticism from those who believed the Department of Justice (DOJ) had colluded with the gay-rights lobby to destroy DADT.⁶⁵

There is some evidence of high level communication between the Administration and Witt’s ACLU attorneys. For instance, her attorneys consulted Solicitor General Elena Kagan in early 2009. The attorneys flew to Washington, D.C., and met with Kagan on April 13, 2009, followed by a phone call with Kagan on April 20, 2009, presumably to discuss a potential settlement in the case and whether to seek certiorari.⁶⁶ These communications occurred just four days before the

61. Petition for a Writ of Certiorari, *Pietrangelo v. Gates*, 2008 WL 5451850, Case No. 08-824 (U.S. Dec. 23, 2008) (renamed from *Cook* because only Mr. Pietrangelo filed for the writ of certiorari).

62. See Order #08A729 (U.S. Feb. 23, 2009) (granting extension of time until April 3, 2009 to file for certiorari).

63. See *infra* notes 72-73 and accompanying text (discussing the Attorney General’s letter to Congress regarding *Witt*, and the Solicitor General’s brief in the *Pietrangelo* case).

64. See *infra* notes 80-91 and accompanying text (discussing the litigation of those cases, as well as Congress’ decision to repeal DADT).

65. See *infra* notes 74-76 and accompanying text (outlining Mr. Whelan’s criticisms of the Obama Administration).

66. See Declaration of Sarah Dunne in Support of Plaintiff’s Motion for Reasonable Fees Under EAJA at 16-17, *Witt v. Air Force*, No. 06-05195, (W.D. Wash. Jan. 9, 2012) (Doc 198) (Exhibit A, detailing the travels and correspondence efforts of Witt’s counsel to support her request for attorneys fees).

Attorney General notified Congress that the Administration would not be seeking certiorari in the case.⁶⁷

In making its certiorari decisions, the DOJ also received the opinion of a new political appointee, Jeh Johnson,⁶⁸ the Department of Defense (DOD) General Counsel. As the legal advisor to the Secretary of Defense, Johnson became an important voice in the DADT decisions beginning in February 2009.⁶⁹ He spoke with Solicitor General Kagan regarding potential “adverse effects” of having a trial on remand in *Witt*.⁷⁰ He anticipated the possibility of a “final adverse judgment” on remand, opining about a future “opportunity to appeal, and petition for certiorari.”⁷¹ In a letter to Kagan dated April 20, 2009, Johnson welcomed the chance “to develop a factual record” in *Witt*, concluding: “[a]fter a careful consideration of the law and facts in this case, *and the current policy considerations*, DOD has no objection to a remand”⁷² Four days later, Attorney General Eric Holder cited this “extensive consultation” with Johnson as part of his justification to the Senate Legal Counsel for not seeking certiorari in *Witt*.⁷³

67. See *infra* note 73 and accompanying text (discussing the Attorney General’s letter to Congress).

68. A former trial lawyer with a New York City-based firm, Johnson served as the General Counsel for the Department of the Air Force for two years under President Clinton. See *Biography: Jeh C. Johnson*, DOD WEBSITE, available at <http://www.defense.gov/bios/biographydetail.aspx?biographyid=173> (last visited Sept. 23, 2012). Johnson never stepped into the Pentagon prior to his job under Clinton. See David Lat, *An Afternoon with Jeh Johnson, General Counsel of the Defense Department* (Jul. 5, 2011), <http://abovethelaw.com/2011/07/an-afternoon-with-jeh-johnson-general-counsel-of-the-defense-department/>. Johnson, who regularly visited the White house, was on a first-name basis with President Obama while organizing and fundraising for his 2008 campaign. See *id.* (noting their closeness, and visits to the White House three times a week).

69. Johnson eventually played a major part as the co-chair of the DOD review that favorably assessed the potential impact of repeal on the military. See generally Dep’t of Def., *Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell,”* (Nov. 30, 2010). The Pentagon “offered a detailed look at how military life would be affected if the ban on openly gay service members [was] lifted.” Andrew Tilghman, *What’s next for ‘don’t ask,’* AIR FORCE TIMES, Dec. 13, 2010, pp. 16-17 (noting that “[f]or politicians, the Pentagon report may help sway some votes.”).

70. Letter from Jeh Charles Johnson, Dep’t of Def. Gen. Counsel, to Elena Kagan, former Solicitor Gen. (Apr. 20, 2009) (included as an attachment to Eric Holder, *Re: Witt v. Department of the Air Force*, 527 .3d [sic] 806 (9th Cir. 2008) (Apr. 24, 2009)).

71. *Id.*

72. *Id.* (emphasis added). Presumably, these “policy considerations” included President Obama’s commitment to repeal DADT, as previously stated during the campaign.

73. Eric Holder, *Re: Witt v. Department of the Air Force*, 527 .3d [sic] 806 (9th Cir. 2008) (Apr. 24, 2009) (Letter to Mr. Frankel, Senate Legal Counsel, as required by 28 U.S.C. § 530D) [hereinafter “Holder Letter”]. Holder’s letter gave four reasons for that decision: 1) the Ninth Circuit had not declared DADT unconstitutional; 2) the Supreme

The letters from Holder and Johnson read like routine explanations for a reasonable course of action; yet, President Obama's detractors lambasted the DOJ for its decision. Most notably, Ed Whelan accused the DOJ political appointees of being "complicit" in the demise of DADT and acting to "undermine" it.⁷⁴ Calling Holder's reasons implausible, Whelan asserted that the Supreme Court would have granted certiorari if asked to review the "rogue Ninth Circuit ruling."⁷⁵ Whelan offered an alternative political explanation for the decision: any trials under the *Witt* standard would "predictably generate defeats for DADT (especially if senior political appointees at DOJ supervised the litigation), which defeats would then . . . be spun as bolstering the political case for repeal of DADT."⁷⁶ In light of how the judicial and legislative drama later unfolded—as well as the contacts between Witt's attorneys and the Solicitor General—this thesis warrants further exploration.

2. A Critical Analysis of the Attorney General's Justification

President Obama endured heavy criticism from gay rights advocates for putting up any fight in the DADT cases.⁷⁷ Had the DOJ sought certiorari in *Witt*, and had the Supreme Court affirmed the policy, the reproach from LGBTQ advocates could have been extremely severe. Yet, this threat of severe reproach may not fully explain the DOJ's decision because, often, other practical reasons drive a Solicitor General's decision to not seek certiorari.⁷⁸ A closer analysis of the DOJ's reasoning is, therefore, appropriate.

Court's "usual practice" was to not review non-final, interlocutory decisions; 3) the *Witt* remand might still result in upholding the statute as applied to her, and if it was not upheld the government could petition for certiorari at the time of a final judgment; and 4) the "practical litigation considerations" associated with a remand would "provide the government with an opportunity to strengthen its case," and the "burdens" of discovery on remand could be "appropriately cabined." *Id.* At the same time, he informed Congress that the government would also oppose the petition for certiorari that had been filed *pro se* by Mr. Pietrangelo, a plaintiff in *Cook*. *Id.* at 1-2. *See also* Bob Egelko, *Obama won't oppose ruling weakening 'don't ask,'* S. F. CHRON., May 20, 2009, available at <http://www.sfgate.com/nation/article/Obama-won-t-oppose-ruling-weakening-don-t-ask-3232327.php>.

74. Whelan, *supra* note 1.

75. *See* Whelan, *supra* note 1 (arguing that "practical litigation considerations cut in favor of not subjecting the military . . . to litigation burdens that would be eliminated by a reversal.").

76. Whelan, *supra* note 1 ("The gay-rights lobby would surely have seen an Obama administration appeal of a ruling by the notorious Ninth Circuit as a most unpromising vehicle for its constitutional attack on DADT.").

77. *See* Newsweek Article, *supra* note 58 (noting how "Obama has now repeatedly angered the gay-rights advocates.").

78. *See* Seth Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1077 (2001)

First, in his letter to Congress, Attorney General Holder noted that the Ninth Circuit had not declared DADT unconstitutional.⁷⁹ He failed to note, however, that both appellate courts had applied *Lawrence* in a non-criminal context using heightened scrutiny, a precedent that would have lasting consequences on other laws.⁸⁰ *Witt*'s peculiar requirement for as-applied consideration of a general military discharge policy flaunted the judicial deference the Supreme Court expected in military-related decisions.⁸¹ If strictly followed, *Witt* would wreak havoc on discharges worldwide.⁸²

Second, Holder pointed out that the Supreme Court does not usually review non-final, interlocutory decisions.⁸³ This was also technically true,⁸⁴ but the *Witt* case was anything but usual.⁸⁵ Indeed, it was one of those rare cases where the Government requested rehearing *en banc*, and the Court's *Lawrence* ruling directly conflicted with other circuits.⁸⁶ Judicial insiders knew that granting certiorari was a definite

(noting that the Solicitor General typically makes an "independent evaluation . . . of each case and the cost of pursuing it" because, "[a]s a party in about forty percent of all cases in the federal courts, the United States appeals only a small fraction of the decisions it loses, and it petitions for rehearing or certiorari only rarely. Solicitors General understand the cataclysmic effects that a less-discriminating process would have on the judicial system.").

79. Holder Letter, *supra* note 73.

80. If *Lawrence* applied in military cases, where judicial deference is high, then it would apply to virtually any case involving same-sex relationships, including challenges to statutes such as the Defense of Marriage Act (DOMA). See *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (emphasizing deference due to Congress in military affairs); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) ("[C]ourts are ill-equipped to determine the impact" on military discipline).

81. See *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (noting the lack of judicial competence in military matters).

82. This unique standard could not possibly have been limited to the Ninth Circuit because military members were in a constant state of flux—deployed to foreign lands, given temporary duty across the world, and regularly reassigned to distant units. See *infra* notes 112 & 117 and accompanying text (discussing military uniformity).

83. Holder Letter, *supra* note 73.

84. The Supreme Court does disfavor granting certiorari where a judgment is not final. See SUP. CT. R. 11 (Certiorari "to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice . . ."); see also *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (refusing to grant cert where court of appeals had remanded case).

85. See *Whelan*, *supra* note 1 (arguing that the disruptive nature of *Witt* into military affairs—and its status as another "rogue" Ninth Circuit opinion—made it a likely candidate for Supreme Court review).

86. Although the First and Ninth Circuit believed *Lawrence* required heightened scrutiny, the Tenth and Eleventh Circuits found to the contrary. See *Seegmiller v. Laverkin City*, 528 F.3d 762, 771-72 (10th Cir. 2008); *Lofton v. Sec'y of the Dep't of Children &*

possibility. At the time, a gay rights attorney expressed relief because he feared the Court would defer to military decisions.⁸⁷ Perhaps most telling of all, the eleven *Cook* plaintiffs did not join Pietrangelo's *pro se* petition for certiorari; in fact, they opposed it, viewing *Witt* as the smarter way to overcome DADT.⁸⁸

Third, Holder told Congress the Government might win *Witt* on remand or, if it lost, petition for certiorari.⁸⁹ This was unlikely, but technically possible—except his argument made no sense. Win or lose, the Ninth Circuit's *Witt* standard would live to impact future DADT cases.⁹⁰ Eventually, the Supreme Court would need to rule on the Circuit's novel test. So why did Holder want to wait? Ed Whelan argued that the Obama Administration wanted the Ninth Circuit remand to irreparably damage DADT.⁹¹ At the time, Jon Davidson, the legal director of a gay- rights group, had the same idea: “[t]his decision makes it significantly easier to strike down at least the application of ‘don’t ask, don’t tell’ in many if not most cases We’re happy that this is not going forward to the Supreme Court at this point.”⁹²

Fourth, Holder opined that “practical litigation considerations” on remand would provide “an opportunity to strengthen” the case, and that discovery burdens “likely can be appropriately cabined.”⁹³ This conclusion was partly driven by DOD General

Family Servs., 358 F.3d 804, 816 (11th Cir. 2004). Other helpful factors: *Cook* had a final judgment up for certiorari, and the Ninth Circuit's view of heightened scrutiny conflicted with *Washington v. Glucksberg*, 521 U.S. 702 (1997). The issues were ripe for Supreme Court review without further fact-finding.

87. See Egelko, *supra* note 73 (quoting gay rights attorney, Jon Davidson, legal director of Lambda Legal). At the time, a law professor who supported repealing DADT also concluded that the Administration's reasons for not seeking certiorari were “unconvincing.” See Jackie Gardina, *Let the Small Changes Begin: President Obama, Executive Power, and “Don’t Ask Don’t Tell”*, 18 PUB. INT. L.J. 237, 254 (2010) (doubting the Administration's reasons and the “benefit” of a remand, and arguing that the Supreme Court is amenable to granting certiorari where there is a “split in the circuits” and in other cases with a “similar procedural posture” to *Witt*).

88. See Brief for the Cook Respondents at 2-3, *Pietrangelo v. Gates*, 2008 WL 5451850 (No. 08-824), (U.S. May 6, 2009). It was no accident that Pietrangelo was left to file for cert *pro se*. In opposing cert, his co-plaintiffs and their attorneys argued that *Witt*'s remand would develop a factual record and that the Court might not ever need to act due to the possibility of repeal. *Id.* Far from concern about judicial restraint, this strategic decision more likely reflected a grander plan from gay rights advocates who saw certiorari and affirmation in *Cook* as a dangerous possibility. See *supra* note 87 and *infra* note 92.

89. Holder Letter, *supra* note 73.

90. Indeed, it would have been better for the Government to lose *Witt* in the lower courts and have the Supreme Court reverse, making clear that *Lawrence* does not apply to DADT and that the “rational basis” test is still appropriate.

91. See Whelan, *supra* note 1.

92. Egelko, *supra* note 73 (quoting Jon Davidson, legal director of Lambda Legal).

93. Holder Letter, *supra* note 73.

Counsel, Jeh Johnson, a seasoned litigator familiar with trial tactics.⁹⁴ Johnson purportedly believed he could control the trial on remand to reduce “adverse effects.”⁹⁵ Whelan called Johnson’s belief implausible.⁹⁶ On remand, the DOJ would bear the burden of reaching back five years and proving that Witt’s presence in her Air Force unit would have been so disruptive that her discharge was “necessary” to “significantly” further important governmental interests⁹⁷—an almost impossible task. That kind of remand would inevitably bring major “adverse effects” because it would pit one part of Witt’s unit against another. Indeed, as it turned out the DOJ’s attempt to “cabin” discovery consisted of filing for a protective order to avoid “factionalizing” Witt’s unit.⁹⁸ In reply, Witt argued that depositions were necessary to accomplish the purpose of the remand and to show that reinstatement in her unit “would not negatively impact unit morale or cohesion.”⁹⁹ The judge denied the motion.¹⁰⁰

In short, Whelan’s critique raised plausible concerns about Holder’s letter, and the DOJ’s reasons seem strained upon close examination. Whatever its motives, the Obama Administration did not seek certiorari in *Witt*, and, as the DOJ requested, the Supreme Court denied certiorari in *Cook*.¹⁰¹

94. In 2004, the American College of Trial Lawyers, “one of the premier legal associations in North America” where “membership is by invitation only to experienced trial lawyers,” inducted Johnson as a Fellow. The American College of Trial Lawyers, *One Hundred Eleven Fellows Inducted at St. Louis Meeting*, THE BULLETIN, Winter 2005, at 46. See also The American College of Trial Lawyers, *About Us*, ACTL, <http://www.actl.com/Content/NavigationMenu/AboutUs/Membership/default.htm> (last visited Nov. 11, 2012).

95. See *supra* notes 70-72 and accompanying text (discussing the content of Johnson’s letter to Kagan).

96. Whelan argued that no good could come from “subjecting the military—during a time of war, no less—to litigation burdens that would be eliminated by a reversal.” Whelan, *supra* note 1. The *Witt* dissenters predicted remand would lay “the groundwork for a continuing series of fact-bound challenges to the specific application of a law” that *Witt* doubted only “by stretching substantive due process beyond repair.” *Witt v. Air Force*, 548 F.3d 1264, 1274 (9th Cir. 2008) (O’Scannlain, J., dissenting).

97. See *Witt v. Air Force*, 527 F.3d 806, 818-19 (9th Cir. 2008).

98. Defendant’s Motion for Protective Order Regarding the Depositions of Unit Members at 6, 10, *Witt v. Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006) (No. 06-05195) (arguing depositions of unit would “undermine the military’s interest in unit cohesion and morale” and put members in “impossible position”); see also Docket at 36-37, *Witt*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006) (No. 06-05195) [hereinafter *Witt* Trial Docket] (declarations).

99. Plaintiff’s Opposition to Defendant’s Motion for Protective Order at 12, *Witt*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006) (No. 06-05195).

100. *Witt* Trial Docket, *supra* note 98, Doc. 70.

101. See *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009).

B. Trial Strategies: Witt and Log Cabin Republicans

By the time Witt returned to the district court in mid-2009, *Cook* was closed and *LCR* was on its way to trial.¹⁰² A new stage of the litigation had begun. The Administration's trial strategies garnered further criticism from Whelan, who questioned why the DOJ failed to "call as witnesses some of the military leaders who continue to support DADT."¹⁰³ This section will evaluate the merits of that criticism.

1. The Witt Trial on Remand

After a year of pretrial activity, including the DOJ's failure to limit discovery depositions,¹⁰⁴ Witt headed to trial in front of the same judge who had upheld her discharge.¹⁰⁵ In July 2010, the DOJ filed for summary judgment, asserting in a footnote the President's opposition to DADT "as a matter of policy."¹⁰⁶ The motion argued that Witt's discharge significantly furthered important governmental interests.¹⁰⁷ It noted her misconduct, previously unknown to the court, including an "adulterous" affair with a married woman, homosexual relationships with other military officers, and homosexual statements to enlisted members.¹⁰⁸

The DOJ motion failed to make an additional argument that flowed from the *Cook* decision. In light of Witt's misconduct developed in the record on remand, the DOJ could have argued that *Lawrence* no longer applied to the case because Witt's

102. On October 8, 2008, the *LCR* case was transferred to the docket of Virginia A. Phillips. See *LCR Trial Docket*, *supra* note 38, Doc. 65. With Witt to provide support, the plaintiffs were now the beneficiaries of the prior delays.

103. Whelan, *supra* note 1.

104. See Defendant's Motion for Protective Order Regarding the Depositions of Unit Members at 6, 10, Witt, 444 F. Supp. 2d 1138 (W.D. Wash. 2006) (No. 06-05195) (arguing that depositions would embarrass the unit, "undermine the military's interest in unit cohesion and morale," and also risk "factionalizing the unit").

105. The judge was the Honorable Ronald B. Leighton. Compare Witt, 444 F. Supp. 2d 1138, 1140 (W.D. Wash. 2006), with Witt v. Air Force, 739 F. Supp. 2d 1308, 1309 (W.D. Wash. 2010).

106. Defendant's Motion for Summary Judgment at 2 n.1, Witt, 444 F. Supp. 2d 1138 (W.D. Wash. 2006) [hereinafter Witt Gov't MSJ] ("[T]his Administration does not support DADT as a matter of policy and supports its repeal. Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made . . .").

107. *Id.* at 8, 10-11.

108. *Id.* at 9-11. The motion argued that this conduct was relevant because it demonstrated Witt's "willingness to engage in the type of conduct that Congress could have rationally concluded could give rise to distractions within her unit," and that, "regardless of the sexual orientation of those involved, adulterous behavior, especially by an officer, is likely to be prejudicial to good order and discipline." *Id.* at 10.

“adulterous” and fraternizing conduct put her dischargeable actions outside the zone of privacy envisioned by the Supreme Court in that case.¹⁰⁹ In other words, Witt was not engaged in purely intimate conduct with no outside impact, as in *Lawrence*. Instead, the sexual conduct that resulted in her discharge was also a potential violation of the Uniform Code of Military Justice (UCMJ).¹¹⁰ In light of the judge’s later comments about the “adultery,”¹¹¹ the argument may not have succeeded, but it would have been preserved for appeal.

The summary judgment motion made two additional arguments. Regarding the third prong of the *Witt* standard, that her discharge was necessary, the DOJ merely relayed the opinion of a General Officer about the need for military uniformity.¹¹² Finally, the motion argued that it was sufficient on remand to show there was “as-applied factual support” in the record to link Witt’s conduct to Congress’ judgments in 1993, and thus the Government had no need to provide additional evidence.¹¹³

The judge denied the DOJ’s motion.¹¹⁴ Regardless, Government attorneys followed the same script at trial in September. Witt called several witnesses who testified to her stellar record and the lack of unit impact due to her homosexuality, as

109. See *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008) (holding “*Lawrence* recognized only a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one’s home and one’s own private life,” and not “in all forms and manner of sexual intimacy,” and finding DADT “includes” some activity beyond *Lawrence*’s reach); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

110. See 10 U.S.C. § 933 (“Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punishedFalse”); 10 U.S.C. § 934 (“[A]ll disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces . . . shall be punishedFalse”). The President has provided specific examples of such prejudicial conduct in the *Manual for Courts-Martial*, which prohibits forms of adultery similar to that engaged in by Major Witt. MANUAL FOR COURTS-MARTIAL UNITED STATES pt. IV, ¶¶ 62, 83 (2008) (Adultery and Fraternization). See also *United States v. Marcum*, 60 M.J. 198, 208 (C.A.A.F. 2006) (finding that the *Lawrence* zone of liberty did not apply to a military member who may have violated the UCMJ when engaging in homosexual sodomy with a lower-ranking member).

111. See *Witt v. Air Force*, 739 F. Supp. 2d 1308, 1316 (W.D. Wash. 2010) (“[T]he Court will not speculate on what the Air Force would have done . . . had she been charged with adultery and the Court will certainly not accept an uncharged offense or allegation as a basis for sustaining an otherwise unconstitutional discharge.”).

112. See Witt Gov’t MSJ, *supra* note 106, at 11 (quoting interrogatory answer of Lieutenant General Charles E. Stenner Jr., the Chief Commander of the Air Force Reserve: “To further unit cohesion, morale, good order, and discipline, the Air Force . . . needs a uniform personnel policy, not different personnel policies for separate geographical regions. This need for uniformity extends to the homosexual conduct policy. . . .”).

113. Witt Gov’t MSJ, *supra* note 106 at 12-15.

114. See Order, *Witt*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010) (No. 06-05195) (also denying a motion for summary judgment filed by Major Witt).

well as expert witnesses who criticized the DADT policy.¹¹⁵ In contrast, the DOJ did not call any unit members, and called only one witness to discuss the need for uniformity.¹¹⁶ This strategy was a near-total loss: the judge felt the testimony about uniformity “proved too much” and would defeat the need for remand,¹¹⁷ and he rejected the tactic of relying on Congress’ findings instead of evidence.¹¹⁸ He concluded that Witt’s discharge did “not significantly further the government’s interest” and ordered her to “be restored to her position as a Flight Nurse . . . as soon as is practicable, subject to meeting . . . [service] qualifications.”¹¹⁹

2. The *LCR* Trial

The *LCR* trial went even worse for the DOJ; however, much of the blame in that trial may rest with the trial judge, Virginia Phillips, who lacked judicial restraint.¹²⁰ In pretrial motions, the DOJ made valid procedural arguments¹²¹ and later sought to

115. *Witt*, 739 F. Supp. 2d at 1314-16 (W.D. Wash. 2010) (outlining the evidence presented by both Witt and the Government during the two-week trial, and finding that Witt’s substantive due process rights were violated by DADT); *see also The Witt Standard*, CENTER FOR JUSTICE (Sep. 13, 2011) <http://cforjustice.org/2011/09/13/the-witt-standard/> (“[T]he government called only one material witness to testify about the threat Margaret Witt posed to the military. . . . To rebut [him], Witt’s lawyers called the people Margaret had actually served with.”).

116. *The Witt Standard*, CENTER FOR JUSTICE (Sep. 13, 2011), <http://cforjustice.org/2011/09/13/the-witt-standard/>.

117. *Witt*, 739 F. Supp. 2d at 1314 (W.D. Wash. 2010) (“[I]f uniformity is required, exceptions cannot be encouraged. And if exceptions cannot be encouraged, as-applied analysis is pointless. . . . [This Court must] reject any notion that the overriding need for uniformity trumps individualized treatment of Major Witt.”). This exposed the folly of the *Witt* standard.

118. *Id.* at 1315 (“There is nothing in the record before this Court suggesting that [Witt’s] sexual orientation (acknowledged or suspected) has negatively impacted” the unit).

119. *Id.* at 1317 (The judge rejected her procedural due process and equal protection claims).

120. Critics argued that Judge Phillips’ decision was a “brazen and error-strewn” case study in “liberal judicial activism.” Whelan, *supra* note 1. Even the Ninth Circuit did not endorse her approach, with one judge calling her decision “particularly improper” for following “none of [the Supreme Court’s] instructions” that “departures from the constitutional text must be narrow, carefully considered, and grounded in the Nation’s history, traditions, or practices.” *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1170 (9th Cir. 2011) (O’Scannlain, J. concurring); *see also infra* notes 172-73 and accompanying text (discussing the per curiam decision).

121. The DOJ under the Obama Administration fought key pretrial issues. *See Minute Order Denying Defendants’ Request Regarding Discovery*, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425) (allowing plaintiffs extensive discovery despite the facial nature of case).

dismiss LCR's facial attack on technical grounds.¹²² In denying the dismissal, Judge Phillips concluded that she could consider LCR's facial challenge but she could not apply *Witt*'s heightened scrutiny review because it was limited only to as-applied cases.¹²³ Viewing this ruling as both illogical and inconsistent, the DOJ eventually made an unsuccessful motion to appeal the judge's ruling.¹²⁴ Yet in that same motion, the DOJ openly doubted DADT's "continued wisdom," prompting the judge to wonder if the Obama Administration would allow the DOJ to keep defending the policy.¹²⁵

In March 2010, the DOJ filed a motion for summary judgment, continuing its attack on LCR's associational standing and arguing on the merits to apply the "rational basis" test.¹²⁶ The motion did make some arguments previously pursued under the Bush Administration,¹²⁷ but it also highlighted President Obama's opinion that DADT was "wrong."¹²⁸ In June 2010, the DOJ urged the court to delay trial

122. Defendants' Supplemental Brief Addressing the Issue of Substantive Due Process, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425) (unsuccessfully seeking to dismiss the facial attack because *Witt* was "careful to note that only 'as-applied'" challenges can proceed).

123. *See* Order Denying in Part and Granting in Part Motion to Dismiss, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425) (granting parts of the Government's pre-Obama Administration motion to dismiss regarding equal protection and certain First Amendment-related statements used as admissions).

124. The judge's reasoning was inconsistent, permitting a "rational basis" facial attack despite *Witt*'s holding that the Government interest overcame "heightened scrutiny." *See* Defendants' Motion to Certify Order for Interlocutory Appeal at 8, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425).

125. The Government stated, "Congress has indicated its intent to hold hearings on the continued wisdom of DADT, and . . . the President has stated that he opposes the policy and has called for repeal of the statute." Defendants' Motion to Certify Order for Interlocutory Appeal at 2, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425). This questionable tactic puzzled the judge who, in denying the request, interpreted this statement as a "potential change" in the Government's position regarding its intent to defend the constitutionality of the statute. Minute Order Denying Motion to Certify Order for Interlocutory Appeal and Stay, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425) (finding DOJ to be untimely in its request to certify her ruling for appeal).

126. *See* Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425) [hereinafter LCR MSJ]. Over the next few months, the parties briefed the issue of standing further until the judge finally ruled against the Government on that issue. *See* Order Denying in Part Motion for Summary Judgment, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425).

127. For instance, the motion did not argue that *Lawrence* did not apply and that courts should defer to Congress. *See infra* notes 158-61 and accompanying text.

128. LCR MSJ, *supra* note 126, at 6 (noting that the President sought repeal and that Secretary of Defense "initiated a working group to study how to implement any such

while repeal efforts continued in Congress, and it argued that trial was unnecessary due to the judge's prior inconsistent ruling.¹²⁹ The DOJ's point about the inconsistency was well taken: the court denied the motion for summary judgment but reversed its prior inconsistent ruling. Instead, Judge Phillips decided to apply heightened scrutiny to the LCR facial attack, despite contrary language in *Witt* that indicated such scrutiny would be reserved for as-applied challenges.¹³⁰ This sudden switch repudiated the Government's theory of the case just a week before trial.

Despite this change, the DOJ did not alter course. It provided no evidence at trial except the 1993 legislative history,¹³¹ although it did assert several objections.¹³² The judge rejected that strategy. She believed that "a court deciding a facial challenge . . . should consider evidence beyond the legislative history . . ."¹³³ Thus, she allowed the plaintiffs to second-guess the 1993 congressional findings, putting on evidence from several former service members discharged under DADT, as well as expert testimony and extensive documentary exhibits.¹³⁴ In the end, the judge ruled that the

Congressional repeal, and Congress is now holding hearings to consider the *policy* question of whether to retain the current law. But those developments do not alter the fact that the statute Congress enacted in 1993 passes constitutional muster."). In its reply brief, the Government continued with this theme, recognizing that both "this Administration and LCR agree that Section 654 should be repealed," and that "this Administration believes the policy enacted by Section 654 is wrong," yet continuing to argue that the relevant point in time was 1993 for rational basis review. Defendants' Reply in Support of Motion for Summary Judgment at 6, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425). Although the Administration believed the policy was wrong, "it also recognize[d] that this strongly-held view [did] not abrogate the Executive's responsibility . . . to 'take Care that the Laws are faithfully executed,' U.S. Const., Art II, Sec. 3." *Id.*

129. The motion argued that under the "rational basis" standard it would serve no purpose to hold trial because the only evidence would be the statute and its legislative history. *See* Defendants' Supplemental Brief on Standard of Review at 13-14, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425).

130. *See* Order Denying Defendants' Motion for Summary Judgment at 9, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425) ("To the extent the June 9, 2009 Order . . . indicated otherwise, the Court . . . now finds the standard announced by the Ninth Circuit in *Witt* governs here."). Further, "Defendants have failed to identify any instance in which the DADT policy could constitutionally be appliedFalse" *Id.* at 10 n.6.

131. *See Log Cabin Republicans*, 716 F. Supp. 2d at 911 (C.D. Cal. 2010) (chiding the Government for relying "solely on the legislative history" despite the court's ruling that "after *Witt*, the less deferential standard identified by the Ninth Circuit in that decision applies") (citations omitted).

132. *Id.* at 895 ("Defendants asserted relevance (and often other) objections to nearly every exhibit Plaintiff sought to introduce into evidence during trial, as well as to nearly all the testimonial evidence offered.").

133. *Id.* at 897.

134. *See id.* at 921 (finding this evidence persuasive, she stated, "Plaintiff's evidence regarding unit cohesion . . . revealed that the Act not only is unnecessary to further unit cohesion, but also harms the Government's interest.").

statute did not have a “plainly legitimate sweep.”¹³⁵ Notably, she used statements from President Obama as an “admission” that DADT “undermines” the government interest.¹³⁶ The DOJ’s loss was total, topped only by Judge Phillips’ worldwide, absolute injunction on DADT,¹³⁷ despite the First Circuit’s *Cook* decision which had previously found DADT constitutional, both on its face and as-applied.

3. Assessing DOJ’s Trial Strategy in *Witt* and *LCR*

Whelan questioned the DOJ’s litigation strategy in both *Witt* and *LCR*, especially the decision to not present any witnesses to establish the legitimacy of the DADT policy. He concluded that the “only plausible explanation” is that President Obama’s DOJ political appointees “hamstrung the career lawyers from putting on their best case.”¹³⁸ But an analysis of the realities on the ground reveals a more muddled picture.

Examining *Witt* first, one can criticize the DOJ for failing to renew the Bush-era argument that Witt’s “adulterous” and fraternizing conduct had placed her outside the *Lawrence* zone of privacy.¹³⁹ Setting aside that apparent mistake, the DOJ attorneys faced an unenviable position. They chose to not put on factual evidence, leaving themselves at the mercy of un rebutted facts from Witt’s witnesses.¹⁴⁰ But had the DOJ resolved to fight under the *Witt* standard they would have had no choice but to

135. *Id.* at 894-95 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). In doing so, she brushed aside an “older” version of the plaintiffs’ burden, which required them to show “no set of circumstances exists under which the Act would be valid.” *Id.* at 894 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The judge also rejected the First Circuit’s *Salerno*-based analysis in *Cook*, noting that DADT does not expressly prohibit the types of homosexual conduct relied upon by the court to uphold the law under that facial challenge, specifically “public homosexual acts” and “coerce[d] . . . homosexual act[s].” *Id.* at 895.

136. *Id.* at 919 (quoting “the Commander-in-Chief of the Armed Forces” saying that DADT “weakens our national security,” and Admiral Mullen stating that “[a]llowing homosexuals to serve openly is the right thing to do”).

137. *See* Order Granting Permanent Injunction, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425) (“ORDERS Defendants . . . immediately to suspend and discontinue any investigation, or discharge, separation, or other proceeding, that may have been commenced under the “Don’t Ask, Don’t Tell” Act, or pursuant to 10 U.S.C. § 654 or its implementing regulations, on or prior to the date of this” Judgment.).

138. *See* Whelan, *supra* note 1 (claiming it would have been “politically awkward” for DOJ to “present[] and credit[] as witnesses the very folks who would be the administration’s most visible opponents” in the battle for repeal).

139. *See supra* notes 109-11 and accompanying text (discussing this potential argument and citing the *Marcum* case).

140. *See supra* note 113 and accompanying text (discussing the Government strategy not to put on evidence).

drag in members of Witt's unit and pit them against each other to show how Witt's presence impacted good order and discipline. Such a scenario would have been a nightmare for an Air Force unit that stands or falls on unit cohesion. Left with this Hobson's choice, the DOJ apparently decided to protect unit cohesion as much as possible.¹⁴¹ Moreover, because the *Witt* trial was an as-applied challenge, it made little theoretical sense to bring in heavy-hitting experts about the DADT policy; the case was supposed to stand or fall on the facts surrounding Witt herself.¹⁴² In the end, the DOJ paid for this risky trial strategy. In May 2012, the judge awarded over \$462,000 of attorneys' fees to Witt partly because the DOJ had "offered virtually no evidence supporting its position Indeed, it did not actually take the position [on remand] that Witt's presence was detrimental to her unit."¹⁴³

The *LCR* case presented an entirely different scenario: a facial challenge. With no unit at stake, and the judge apparently looking to disprove the 1993 congressional findings, the DOJ attorneys could have brought in experts to testify about DADT. This assumes, of course, that they could have found such witnesses. With senior military leaders already on record in support of a DADT repeal, it is not likely the DOJ could have found military experts willing to testify to the contrary. Also, until a mere week before trial the judge had ruled that she would be applying the "rational basis" test, which would have required no fact-finding at all. When the judge changed her mind at the last minute, it may have been too late for the DOJ to change course.¹⁴⁴ Therefore, even if Whelan is correct about President Obama's political appointees, there may have been few alternative defenses for the DOJ to try under the circumstances.

C. Post-Repeal Case Handling

Despite two trial losses in September 2010, the Government's DADT litigation plan was not necessarily off course. According to Attorney General Holder's letter to Congress and Solicitor General Kagan's pre-certiorari brief in *Cook*, the Government had anticipated an endgame in the Supreme Court.¹⁴⁵ Still, pressure continued to

141. See *supra* note 98 and accompanying text (citing the government's attempts to "cabin" discovery due to potential factionalizing of the unit).

142. See *supra* notes 46-49 and accompanying text (discussing the creation of the Witt Standard by the Ninth Circuit).

143. See Order on Plaintiff's Motion for Attorneys' Fees and Costs at 4, *Witt v. Air Force*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010) (No. 06-05195) (finding attorney fees to be appropriate under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), because the government's position on remand was not "substantially justified").

144. See *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 911 (C.D. Cal. 2010); see also *supra* notes 129-37 and accompanying text.

145. See *supra* notes 68-73 and accompanying text (discussing Holder's reasons for not seeking certiorari); Brief for the Federal Respondents in Opposition at 7-12, Pietrangelo

mount on the Administration, even as three former service members filed new lawsuits to pressure Congress to repeal DADT.¹⁴⁶ In this sensitive environment, the appeals of *Witt* and *LCR* had real meaning and potentially dramatic future consequences. And once again the President's critics on both the left and right cried foul over the Administration's handling of the cases.¹⁴⁷

1. Justice Department Censorship

Whelan blamed the "non-defense" of DADT on political appointees in President Obama's DOJ, especially Attorney General Holder and Solicitor General Kagan.¹⁴⁸ But another figure also loomed large in the drama: Assistant Attorney General Tony West, a political appointee who ran the DOJ's Civil Division and supervised the DADT cases¹⁴⁹ despite his ties to gay rights advocacy groups involved in DADT litigation.¹⁵⁰

v. Gates, No. 08-824, 2009 WL 1265300 (U.S. May 6, 2009) [hereinafter Federal Cert Opposition] (outlining Kagan's reasons for opposing certiorari in *Cook*).

146. See Complaint, *Almy v. Dep't of Defense*, No. 10-05627 (N.D. Cal. filed Dec. 13, 2010), 2004 WL 3095874 [hereinafter *Almy Complaint*]. The day of the filing, Service-members Legal Defense Network [hereinafter SLDN] executive director, Aubrey Sarvis warned: "We thought it was important to launch this . . . to underscore to the Senate today as they return to Washington that litigation is going to continue if they do not act [to repeal] in the lame duck session." Andrew Harmon, *DADT Victims Sue for Reinstatement*, THE ADVOCATE (Dec. 13, 2010) <http://www.advocate.com/news/daily-news/2010/12/13/3-discharged-vets-want-return-military>.

147. See Newsweek Article, *supra* note 58 (reporting frustration by gay rights activists and scholars who say that "there is no requirement for Obama to appeal" the loss in *LCR*). See also Dwyer, *supra* note 57 (quoting Ms. Donnelly as accusing Obama of not forcefully appealing the *LCR* decision due to political reasons).

148. See Whelan, *supra* note 1. Whelan should also have focused on political appointees within DOD, who consulted with the Attorney General throughout the course of the DADT litigation. See Holder Letter, *supra* note 73.

149. The Civil Division is the "largest litigating division" in DOJ, representing "the United States in legal challenges to congressional statutes." *Meet the Acting Associate Attorney General*, USDOJ (May 2012), <http://www.justice.gov/asg/meet-aag.html>. Confirmed by the Senate on April 20, 2009, West had also served in Clinton's DOJ from 1993-94. See *id.*

150. More significant for critics, West worked as "a litigation partner at Morrison & Foerster, LLP in San Francisco." *Meet the Acting Associate Attorney General*, *supra* note 149. Since West's appointment to DOJ, Morrison & Foerster teamed up with the SLDN on two high-profile post-*Witt* DADT lawsuits, representing Lieutenant Colonel Victor Fehrenbach in his lawsuit against the Air Force to prevent his discharge under DADT, as well as former service members Michael Almy, Anthony Loverde, and Jason Knight in their lawsuit seeking reinstatement to the military and a declaration that DADT is unconstitutional. See Complaint at 1-2, *Fehrenbach v. Air Force*, (No. 10-00402) (D. Idaho Aug. 16, 2010) [hereinafter "Fehrenbach Complaint"]; *Almy Complaint*, *supra* note 146, at

In November 2010, West acknowledged to reporters that defending the DADT cases had been “difficult” for the Obama Administration,¹⁵¹ and that since his appointment to the DOJ he had “worked with the Civil Rights Division’s liaison to the gay, lesbian, bisexual and transgender [GLBT] community to make sure that future [DOJ court] briefings don’t advance arguments that they would find offensive.”¹⁵² This practice was consistent with the Administration’s generally close consultation with gay rights activists.¹⁵³ In the context of the Defense of Marriage Act (DOMA) cases, West explained that the Civil Division “disavowed some arguments that we believed had no basis in fact” and actually “presented the court through our briefs with information which seemed to undermine some of the previous rationales that have been used in defense of that statute.”¹⁵⁴

With political appointees censoring the DOJ’s legal arguments according to LGBTQ sensitivities, it is difficult to say what the trial briefs in the DADT cases might have looked like had there not been this competing interest. For example, the most obvious argument the DOJ failed to present in *Witt* was that Witt’s “adultery” and other poor conduct may have placed her outside the *Lawrence* zone of privacy.¹⁵⁵ Such argument very well might have been offensive to the LGBTQ community; however, it is unclear whether the DOJ censored the argument or merely overlooked it. Similarly, it is uncertain whether the DOJ’s highly criticized decision not to present trial witnesses in *Witt* and *LCR* was politically motivated.¹⁵⁶

Perhaps the fairest way to judge the level of DOJ censorship is to compare the Obama Administration’s DADT briefs with those filed under President Bush. First, the DOJ under the Bush Administration argued that *Lawrence* was inapplicable in the context of DADT because *Lawrence* had focused on a criminal statute, *not* a personnel policy that implicated the “special circumstances and needs” of the armed

1.

151. Ryan J. Reilly, *DOJ Official: Defending DADT, DOMA ‘Difficult’ For Administration*, TPM MUCKRACKER (Nov. 22, 2010), http://tpmmuckraker.talkingpointsmemo.com/2010/11/doj_official_defending_dadt_doma_difficult_for_administration.php. West added that DOJ, “notwithstanding the administration policy view which is strongly held by us, has an institutional responsibility to defend . . . statutes, whether we agree with them or not” *Id.*

152. *Id.*

153. Joe Solmonese, the President of *The Human Rights Campaign*, a gay rights group that has hosted the President as a speaker, stated his group had “never had a stronger ally in the White House. Never,” and that the Administration had been working with his organization “on an almost weekly and sometimes daily basis.” Simmons, *infra* note 187.

154. Reilly, *supra* note 151.

155. *See supra* notes 114-117 and accompanying text (discussing the potential argument DOJ never made).

156. *See supra* notes 138 and accompanying text (discussing Whelan’s criticism about the DOJ’s conduct of the *Witt* and *LCR* trials).

forces.¹⁵⁷ Further, even if *Lawrence* applied, the Court had used “rational basis” to resolve the case and had not created a fundamental right for gays and lesbians.¹⁵⁸ Second, the Bush Administration cited to Congress’ “ample grounds” for reaching an “informed, rational judgment” that military service by “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”¹⁵⁹ In applying heightened scrutiny, the Bush Administration argued that “homosexual activity . . . involves conduct and not merely a condition;” “sexuality is not a benign trait” because it is “manifested by behavior;” and “even if homosexual *orientation*” were to get heightened scrutiny, “that would not mean that homosexual *conduct* would correspondingly receive such protection.”¹⁶⁰ Finally, the Bush Administration’s DOJ contended that the courts owe Congress considerable deference, especially when legislating in the area of military affairs.¹⁶¹ The Obama

157. *Cook MTD*, *supra* note 24, at 18-20; *Witt MTD*, *supra* note 31, at 8-9. *See also* Brief of the Appellees at 33, *Cook v. Rumsfeld*, 2006 WL 4015624, (1st Cir. Dec. 22, 2006) (No. 06-2313) [hereinafter “Cook Appellate Brief”] (arguing *Lawrence* “involved a *criminal* prohibition, which [Section] 654 most assuredly is not”).

158. *See Cook MTD*, *supra* note 24, at 20; *Witt MTD*, *supra* note 31, at 10 (citing *Cook*, 2006 WL 1071131, at *7; *Muth v. Frank*, 412 F.3d 808, 817-18 (7th Cir. 2005); *Loomis v. United States*, 68 Fed. Cl. 503, 518 (2005)). The Government also pointed out that Congress had anticipated the potential reversal of *Bowers v. Hardwick*, 478 U.S. 186 (1986), and had made clear that its judgment regarding DADT was “focused on the impact of homosexual conduct in the unique setting of military service,” and that a reversal of *Bowers* “would not alter the committee’s judgment as to the effect of homosexual conduct in the armed forces.” Reply Memorandum of Law in Support of Defendants’ Motion to Dismiss at 6, *Cook v. Rumsfeld*, 2005 WL 5280902, (D. Mass. Apr. 12, 2005) (No. 04-12546) (quoting S. REP. NO. 103-112, at 287 (1993) (Com. Rep.)). *See also* Cook Appellate Brief, *supra* note 157 at 23-24; Witt Appellate Brief, *supra* note 36 at 28-41.

159. *Cook MTD*, *supra* note 24, at 22-27 (citing 10 U.S.C. § 654(a)(15)). The Bush DOJ had unabashedly relied on the congressional findings, arguing extensively that Congress had ample reason to find that the presence of openly gay military members would impact the military’s ability to fight. It noted that “while the military is able to promote unit cohesion, reduce sexual tension, and protect personal privacy in the case of heterosexual service members by providing separate quarters for men and women, such an accommodation is not available for those individuals who engage in homosexual conduct” because they cannot be segregated by sex. *Id.* at 25-26.

160. Defendant’s Reply in Support of Defendant’s Motion to Dismiss, *Witt v. Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006) (No. 06-05195) (quoting General Colin Powell in S. REP. NO. 103-112, at 281 (1993)). The Government contended that “gays and lesbians do not constitute a suspect class or quasi-suspect class,” and that DADT “is not based on animus towards gays and lesbians; rather, as we have shown above, the statute is based on the reasonable judgment that the introduction of any sexual dynamic into military units would harm their cohesion and effectiveness.” Cook Appellate Brief, *supra* note 157 at 36, 53.

161. *See Cook MTD*, *supra* note 24 at 9-11 (quoting *Gilligan v. Morgan*, 413 U.S. 1,

Administration did not assert some of those key arguments, perhaps to avoid offending the LGBTQ community.¹⁶²

2. The *Witt* Settlement and *LCR* Appeal

Despite prior indications from Attorney General Holder and Solicitor General Kagan, the *Witt* case never saw a fully litigated appeal after remand. Without notification to Congress, the DOJ simply settled the case after the Repeal Act passed in December 2010, resulting in the retirement of Major Witt and withdrawal of the appeal.¹⁶³

The Obama Administration took a different path in *LCR*. When appeal arose in October, a future repeal of DADT was still uncertain and a worldwide injunction wreaked havoc in the Department of Defense.¹⁶⁴ But for the first time, the DOJ refused to directly assert the constitutionality of the DADT policy, arguing only that the judge's injunction was overbroad, that it would cause "irreparable injury," and that it threatened ongoing repeal efforts.¹⁶⁵ Indeed, during the entire *LCR* appeal, the

10 (1973), and relying on *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) and *Chappell v. Wallace*, 462 U.S. 296, 305 (1983)). And, of course, the briefs relied on the "substantial deference" due to the judgment of Congress, the Executive, and the military. *See Cook Appellate Brief, supra* note 157, at 12-15; *Witt Appellate Brief, supra* note 36, at 22.

162. *See supra* notes 151-52 and accompanying text

163. *See* Declaration of Sarah Dunne in Support of Plaintiff's Motion for Reasonable Fees Under EAJA, *Witt*, 444 F. Supp. 2d 1138 (W.D. Wash. Jan. 9, 2012) (No. 06-05195) [hereinafter "Witt Settlement"] (copy of full agreement). In addition, prior to repeal, the DOJ approved a gay Air Force officer's retirement. *See* Stipulation To Preserve the Status Quo, To Dismiss Plaintiff's Motion for Temporary Restraining Order and to set Briefing Schedule on Motion for Preliminary Injunction, *Fehrenbach v. Air Force*, Case No. 10-00402 (D. Idaho Aug. 16, 2010); Andrew Harmon, *Retiring Gay Service Members Honored as DADT Repeal Looms*, THE ADVOCATE, Sept. 05, 2011, <http://www.advocate.com/print/news/daily-news/2011/09/05/dadt-repeal-advocates-celebrate-retirement> (reporting Witt and Fehrenbach's joint retirement ceremony).

164. Judge Phillips enjoined DADT not just in her district or the Ninth Circuit, but in the entire world, despite the fact that the First Circuit had affirmatively upheld DADT in a facial challenge. *See* Order Granting Permanent Injunction, *Log Cabin Republicans v. United States*, Case No. 04-8425 (C.D. Cal. Oct. 12, 2010) (Doc 249); *See also infra* notes 300-02 and accompanying text (discussing the testimony of Jeh Johnson describing subsequent chaos).

165. *See* Government's Emergency Motion for Stay Pending Appeal, *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2010) (No. 10-56634) ("The President strongly supports repeal of the statute[,] . . . a position shared by the Secretary of Defense and the Chairman of the Joint Chiefs of Staff."). The court did grant the motion. *See* Order, *Log Cabin Republicans*, 658 F.3d 1162 (No. 10-56634) (emergency stay); Order, *Log Cabin Republicans*, 658 F.3d 1162 (No. 10-56634) (stay pending appeal).

DOJ did not defend the constitutionality of DADT as passed by Congress in 1993.¹⁶⁶ In every subsequent brief in the case, DOJ focused on the newly passed Repeal Act, though repeal would not become official until September 20, 2011.¹⁶⁷

On December 29, 2010, in light of the Repeal Act's passage, the Government filed a motion to indefinitely hold the appeal in abeyance,¹⁶⁸ subsequently denied by the Ninth Circuit.¹⁶⁹ For the next eight months, the DOJ dodged every chance to defend DADT directly, even risking arguments that clearly displeased the Ninth Circuit.¹⁷⁰ In hindsight, it appears the Obama Administration never intended to maintain a long-term defense in *LCR* by actually supporting the DADT statute; however, no one can dispute the effectiveness of its delay tactics until repeal was final and the case mooted on September 29, 2011.¹⁷¹ In its final chapter, the Ninth Circuit

166. This is true; however, DOJ did on occasion assert that Congress had made findings and that courts previously had upheld the policy. *See infra* notes 262-67 and accompanying text (discussing *LCR* appeal briefs).

167. *See Don't Ask, Don't Tell Repeal Act of 2010*, Pub. L. No. 111-321, 124 Stat. 3515 (2010). The Act did not officially repeal DADT, but instead set up a process wherein the law's repeal would become effective 60 days after the President, Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certified to Congress that DOD was ready for repeal, and that it was "consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces." *Id.* In fact, that certification did not come from the President and other Defense officials until July 22, 2011, and the repeal took effect on September 20, 2011. *See* Press Release, Office of the Press Secretary, Statement by the President on Certification of Repeal of Don't Ask, Don't Tell (July 22, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/07/22/statement-president-certification-repeal-dont-ask-dont-tell>; Press Release, Office of the Press Secretary, Statement by the President on the Repeal of Don't Ask Don't Tell (Sept. 20, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/20/statement-president-repeal-dont-ask-dont-tell>.

168. *See* Motion to Hold Appeals in Abeyance, *Log Cabin Republicans*, 658 F.3d 1162 (9th Cir.2010) (Nos. 10-56634, 10-56813).

169. *See* Order, *Log Cabin Republicans*, Case 658 F.3d 1162 (9th Cir. 2011) (No. 10-56634). In *LCR*'s response to the request, it argued: "The government's motion is nothing more than a transparent attempt to avoid filing a brief in which it will have to argue that Don't Ask, Don't Tell is constitutional, when the government knows – and government officials have admitted – that it is not." *See* Amended Response to Motion to Hold Appeals in Abeyance, *Log Cabin Republicans*, 658 F.3d 1162 (9th Cir. 2011) (Nos. 10-56634, 10-56813).

170. *See infra* notes 263-72 and accompanying text (discussing *LCR* appeal briefs in depth).

171. *See Log Cabin Republicans*, 658 F.3d 1162, 1168 (9th Cir. 2011) (No. 10-56634) (per curiam) (noting that DOJ had filed for a stay and "two merits briefs disputing the judgment and relief ordered, moved to reinstate the stay of the injunction after this court briefly lifted it, filed a letter brief reiterating its arguments against the district court's judgment and injunction, and at oral argument made clear that it still" advanced its positions).

used unusually heavy language to vacate all of Judge Phillips' rulings in light of repeal,¹⁷² with a strongly worded concurring opinion from one of the judges who had dissented from the *en banc* denial in *Witt*.¹⁷³

3. The Next Wave of DADT Litigation: The *Almy* Case

In December 2010, just days before Congress' repeal vote, three former service members discharged under DADT filed a complaint in a Northern California district court, apparently forum shopping to take advantage of the favorable *Witt* standard.¹⁷⁴ The plaintiffs sought military reinstatement and moved for summary judgment, arguing that after *Witt* and *LCR* the statute was unconstitutional when subjected to heightened scrutiny.¹⁷⁵ In response, the DOJ's motion to dismiss did not assert the constitutionality of DADT, although it did mention that it "respectfully disagreed" with *Witt*.¹⁷⁶ Later, the parties made attempts to "resolve the matter outside" of court,

172. See *id.* (forbidding *LCR* or "anyone else" from using her "judgment collaterally," because it vacated the "injunction, opinions, orders, and factual findings—indeed, all of its past rulings—to clear the path completely for any future litigation. Those now-void legal rulings and factual findings have no precedential, preclusive, or binding effect.").

173. See *id.* (O'Scannlain, concurring). Judge O'Scannlain saw Phillips' use of heightened scrutiny as "tantamount to a conclusion that the Supreme Court in *Lawrence* rejected its own settled approach . . ." *Id.* at 1170. "*Lawrence* did not establish any fundamental right—let alone any right relevant to the Don't Ask, Don't Tell policy in the military;" moreover, the question in DADT was "whether a service member possesses a right to serve in the military when he is known to engage in homosexual conduct or when he states that he is a homosexual." *Id.* at 1171, 1173. Judge O'Scannlain also declared that DADT "should have been upheld if it was 'rationally related to legitimate government interests.'" *Id.* at 1173. He summed up by lecturing Phillips that, "[i]n this highly charged area, we constitutionally inferior courts should be careful to apply established law. Failure to do so begets the very errors that plagued this case." *Id.* at 1174. He concluded with a warning: "When judges sacrifice the rule of law to find rights they favor, I fear the people may one day find that their new rights, once proclaimed so boldly, have disappeared because there is no longer a rule of law to protect them." *Id.*

174. The plaintiffs improperly joined together to get jurisdiction in the Ninth Circuit, even though Mr. Almy resided in Washington D.C. and could not lay proper venue in the Ninth Circuit. See *Almy* Complaint, *supra* note 146 (stating claims and noting Almy's residence in D.C.). See also Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment, Opposition to Plaintiffs' Motion for Partial Summary Judgment, and Memorandum in Support at 19-23, *Almy v. Dep't of Defense*, No. 10-5627, (N.D. Cal. Aug. 19, 2011) [hereinafter *Almy MTD*] (arguing Almy's severance and improper venue).

175. See Motion for Partial Summary Judgment at 2, *Almy*, No. 10-5627, (N.D. Cal. Jul. 27, 2011) (Doc 43) [hereinafter *Almy Partial SJ*] (arguing that *Witt* held "that in order to discharge any service member under DADT, *Lawrence* placed the burden on the military to prove that the discharge significantly furthers, and is necessary to further, the military's" important interest in good order and discipline, and unit cohesion).

176. See *Almy MTD*, *supra* note 174 at 23.

including allowing the plaintiffs to apply for re-accession under the military's new post-repeal process, which resulted in two plaintiffs returning to military service.¹⁷⁷ The Administration's handling of the *Almy* case begged the question of whether the DOJ would be willing to substantively defend DADT in the future.

D. The "Adequate Representation" Standard

Whelan accused the Obama Administration of not properly defending DADT in court.¹⁷⁸ His criticism can be evaluated using standards stemming from Federal Rule of Civil Procedure 24(a)(2), *Third Party Intervention*. That inquiry is best viewed from the perspective of the putative client:¹⁷⁹ the Congress that wrote DADT in 1993.¹⁸⁰ In essence, third party intervention would allow Congress to defend its handiwork during litigation by becoming a party to the suit, giving it the right to make arguments, file briefs, and have a say in the suit's progress.¹⁸¹ As discussed below, the key issue would be whether the Obama DOJ provided "adequate representation" in the defense of DADT.

Rule 24(a)(2) allows a party to join a case if the intervenor "claims an interest relating to the . . . transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that

177. *Order, Almy*, No. 10-5627 (N.D. Cal. Sep. 30, 2011). Through the normal course of that re-accession process, the two plaintiffs other than Almy have been re-accessed to the military. See Shaun Knittel, *SLDN Wins Reinstatement for Discharged Airman*, SEATTLE GAY NEWS (May 25, 2012) http://www.sgn.org/sgnnews40_21/page1b.cfm.

178. See *supra* note 1 and accompanying text (discussing Whelan's accusations).

179. See Theodore C. Hirt, *Current Issues Involving the Defense of Congressional and Administrative Agency Programs*, 52 ADMIN. L. REV. 1377, 1392-93 (2000) ("[A]dministrative agencies [may] disagree with Congress' decision to regulate in a specific area, or how it has done so, but that should not preclude an effective defense of the statute. In that case, the government client, in a sense, may be Congress itself.").

180. Another interesting article could address the duty to defend in the context of a Congress that no longer desires to perpetuate a statute. That is exactly what happened in *Gavett v. Alexander*, 477 F. Supp 1035, 1043-44 (D.D.C. 1979), when the Carter Administration abandoned the defense of a law favoring the National Rifle Association, but Congress did not attempt to intervene or appear as *amicus*, despite an invitation from the court. In the case of DADT, the overwhelmingly Democratic Congress of early 2009 would have been pleased with the statute's demise in the courts, thus saving it the political effort of effecting a repeal, which turned out to be a major undertaking in 2010.

181. See Charles Tiefer, *Government Lawyering: The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROB. 47, 62 (1998) ("[T]he courts and DOJ accept congressional counsel as necessary presenters of a special federal government position.").

interest.”¹⁸² In the context of a federal statute, Congress can claim an interest in a suit challenging a law’s constitutionality,¹⁸³ and protecting that interest will likely be impaired if a court strikes down the law—unless the Executive is adequately representing it. But what exactly constitutes an “adequate defense”?

To determine what constitutes an “adequate defense” it seems particularly appropriate to use Ninth Circuit precedent because DADT was impacted most by that circuit’s case law. The Ninth Circuit developed a three-part test to evaluate whether an intervenor will be adequately represented in a case. These “adequacy” factors are “(1) whether the existing parties will undoubtedly make all of the intervenor’s arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.”¹⁸⁴ The key is to first determine the similarity of interests between the proposed intervenor and those that are already a party to the litigation.¹⁸⁵ The overall case against “adequate representation” is strengthened by the “minimal” showing standard of Rule 24(a)(2), which requires only that Congress’ interests “may have been” inadequately represented by the Obama Administration’s DOJ.¹⁸⁶

The Obama Administration did not “adequately represent” the interests of Congress when litigating the DADT cases. Looking first to the “similarity of interests” between the DOJ and the 1993 Congress, it is evident that the

182. Fed. R. Civ. P. 24(a) (2011).

183. See *Windsor v. United States*, 97 F. Supp. 2d 320 (S.D.N.Y. 2011) (allowing intervention and recognizing a “cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them.”). In its motion to intervene in another DOMA case, the House argued that it “self-evidently has a strong interest in defending the constitutionality of its legislative handiwork False” Motion to Intervene at 9, *Dragovich v. Treasury*, 848 F.Supp. 2d 1091 (N.D. Cal. 2011).

184. *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 394 S.E.2d 712, 715 (S.C. 1990) (adopting and summing up the Ninth Circuit’s test). See *Blake v. Pallan*, 554 F.2d 947, 951 (9th Cir. 1977); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983); *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982) (adopting the Ninth Circuit test). This is not intended to be a difficult standard to meet. See *Sagebrush*, 713 F.2d at 528 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) (noting the “minimal” showing that representation “may be” inadequate)).

185. See *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 132 (2d Cir. 2001) (noting that courts must determine whether a party’s interests are “so similar to those of the [intervenor] that adequacy of representation was assured”); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (stating that the most important factor is “how the [intervenor’s] interest compares with the interests of existing parties”). But see *Freedom From Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (denying an intervenor’s motion under Rule 24 because the movant had “presented no evidence that would lead us to doubt that the federal defendants’ ultimate objective is to uphold the challenged statutes.”).

186. See FED. R. CIV. P. 24(a)(2).

Administration had a built-in incentive *not* to defend the cases vigorously, in order to further its interest in the political repeal process and to please a key constituency of the President's party.¹⁸⁷ Coupling this reality with the various noted peculiarities in the DOJ's defense of the statute, a reasonable argument can be made that the 1993 Congress had dissimilar interests from the Obama Administration's DOJ.

Next, applying the Ninth Circuit's first and second "adequacy" factors, the DOJ demonstrated it could not "undoubtedly make"—nor even that it was "willing to make"—all of Congress' arguments to defend DADT.¹⁸⁸ Assistant Attorney General West admitted that his division was vetting some of the Government's court briefs with a "liaison to the gay, lesbian, bisexual and transgender community," and not advancing "arguments that they would find offensive."¹⁸⁹ This was apparent in the *LCR* appeal and in the motion response in *Almy*.¹⁹⁰ The DOJ was unwilling to make key strategic decisions to protect Congress' long-term interests, as seen in its refusal to seek certiorari in *Witt* and its later decision to settle the case,¹⁹¹ leaving harmful precedent on the books to perhaps perpetuate damage in the future. This was not in the interests of the law, nor the U.S. Treasury, because it left the door open for 14,000 service members to return and seek damages on the theory that the military had violated their constitutional rights.¹⁹² In December 2010, the lead attorney in *Almy* explained, "It's the *Witt* case that makes this case possible."¹⁹³

187. See Christine Simmons, *Obama HRC Speech: "I Will End Don't Ask, Don't Tell," Says President Obama*, HUFFINGTON POST, Oct. 11, 2009, http://www.huffingtonpost.com/2009/10/10/obama-says-he-will-enddo_n_316524.html (noting slow progress in DADT repeal, but "asking supporters to trust his administration's course").

188. This is especially true since the February 2011 decision to abandon the defense of DOMA. See Letter from Eric Holder, Att'y Gen., to Rep. John Boehner, House Speaker (Feb. 23, 2011) (announcing the position that DOMA is unconstitutional). In 2011, the DOJ argued that DADT was not subject to heightened scrutiny. Compare Cook Appellate Brief, *supra* note 157, at 41, with Defendant United States' Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment and Intervenor's Motion to Dismiss at 8, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2011) (No. 10-CV-8435) (arguing the opposite).

189. Reilly, *supra* note 151.

190. See *supra* notes 163-78 and accompanying text (discussing the defense of those cases).

191. In the context of DOJ seeking the appeal of a case on behalf of the United States, or of pursuing settlement, another article might wish to explore whether those decisions are of the same kind as more typical litigation decisions, such as presenting arguments, writing briefs, or calling certain witnesses.

192. Service members discharged under DADT are able to file claims in the Court of Federal Claims (CoFC) to recover damages for alleged constitutional violations. For instance, in 2011 a former Air Force service member discharged under DADT brought a class-action lawsuit against the Air Force in CoFC, seeking full separation pay damages. See *Collins v. United States*, 101 Fed. Cl. 435 (2011) (denying the DOJ's motion to dismiss the

Finally, looking to the third “adequacy” factor, the 1993 Congress would have offered a “different perspective on the proceedings.”¹⁹⁴ That Congress would likely have asserted that it had fairly and accurately balanced the equities and assessed the “risk” associated with homosexual conduct within military ranks, a perspective notably absent from the Obama Administration’s DADT defense.¹⁹⁵ It would also, no doubt, have reasserted the strong arguments from the Bush Administration that had been effective in the lower courts, and even in the First Circuit.

Applying the Rule 24 standard to the facts at hand, one can conclude the Obama Administration did not “adequately defend” DADT. Whelan would say that it pretended. The remainder of this Article will use specific references from this case study to illustrate the constitutional and policy issues that arise when the Executive intentionally fails to adequately defend statutory challenges.

III. PRETENDING TO DEFEND: CONSTITUTIONAL AND POLICY-BASED HARMS

Regardless of political affiliation or sexual orientation, no person should cheer when the executive branch pretends to defend a statute. While this Article examines how the Obama Administration pretended to defend DADT, previous Administrations have done similarly,¹⁹⁶ and subsequent Administrations will likely do so again.¹⁹⁷

The final portion of this article will illustrate that this practice of pretense results in significant consequences because it undermines the U.S. Constitution and perpetuates public distrust in government officials. Indeed, as will be shown,

case).

193. Harmon, *supra* note 146, (quoting lead attorney Drew Woodmansee).

194. See *Berkeley Elec. Coop., Inc. v. Mt. Pleasant*, 394 S.E.2d 712 (S.C. 1990).

195. See *id.* (summing up the test).

196. No one has fully catalogued the times Presidents have engaged in this tactic, but it has occurred before. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), President Nixon had his Solicitor General defend a voting law, “but he began his argument by informing the Court of the views of the President and the Department of Justice questioning the statute’s constitutionality.” Marcott, *supra* note 5, at 1327. Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976), then-Solicitor General Robert Bork and Attorney General Levi filed two separate briefs before the Supreme Court—one defending the law “on behalf of the Attorney General and the Federal Election Commission as parties,” and another more critical brief “on behalf of the Attorney General as appellee and the United States as amicus curiae.” Waxman, *supra* note 78, at 1082-83. See also Drew S. Days III, *In Search of the Solicitor General’s Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 490 (1995) (relaying a story about Nixon’s aborted attempt to drop the government appeal of a case disfavored by IT&T, a large Republican Party donor).

197. For instance, aspects of President Obama’s domestic agenda might be at the mercy of a future Republican administration with an incentive to undermine them in the same way Obama undermined the DADT law.

“pretending to defend”: 1) neglects the President’s Article II duty to “faithfully execute” the laws because it neither protects constitutional laws nor abandons unconstitutional ones; 2) undermines Congress’ capacity to perform its Article I duty by diminishing its ability to provide oversight and defend its handiwork; 3) degrades the Judiciary’s Article III duty to determine the law by compromising the adversarial system and lowering the overall quality of legal analysis; 4) compromises the integrity of government attorneys by subverting the role of the Justice Department and creating ethical dilemmas for individual government counsel; and 5) harms the public trust by trampling the will of the majority and impairing government transparency. In order to illustrate each of the aforementioned harms, this Article will use examples from the Obama Administration’s putative defense of DADT.

Before addressing these policy harms, it is prudent to inquire about the benefits an Executive gains by pretending to defend statutes. There are at least two. First, pretense may allow an Administration to avoid distracting public criticism, which could harm a President’s image and the ability to secure his agenda. If a statute has solid public or congressional support, it could be dangerous for a President to refuse to defend it. Even if a law has lost public support, it may require a delicate hand to secure its demise through the political process. Second, pretense may give a President more freedom to exercise executive power, because key actions will take place away from the public eye.

In the case of DADT, both these benefits were in play for President Obama. Though public support for repeal had gained momentum, it had not yet reached a level where he could act too drastically without risking a backlash. Furthermore, his highest policy objective, health care reform, was destined to expend a great deal of political capital. Though Congress favored repeal, too strong a repudiation of DADT might have invited legislators’ attempts to intervene in the suits, thus impeding the DOJ’s free hand over the litigation. Finally, as President Clinton learned, playing one’s hand too early or too powerfully can goad one’s adversaries into action. In other words, it is often better for the Executive to ease change in slowly while taking action behind the scenes at strategic moments.

But change would take time and patience. Except for leaving the disruptive *Witt* standard in place on remand, the Administration did not act in the public eye on the issue during its first year, much to the dismay of LGBTQ advocates.¹⁹⁸ Then, in January 2010, President Obama began the march to repeal with a comment in his State of the Union address, followed by congressional testimony from his top Defense leaders,¹⁹⁹ whom he had left in place after President Bush’s departure. In the

198. The gay rights lobby “fumed” as it viewed Obama “dragging his feet on his campaign promise,” distressed that he insisted “that Congress do the law changing.” Newsweek Article, *supra* note 58, (“[W]hat especially makes some DADT opponents’ blood boil is that the administration is fighting so hard for DADT in court.”).

199. *See* President Barack Obama, State of the Union Speech (Jan. 27, 2010)

end, the perfect storm of dual court rulings in *Witt* and *LCR*, and a chaotic worldwide injunction, had Defense Secretary Robert Gates and top military leaders pleading with Congress to repeal the law in an orderly fashion before the courts took matters out of the Executive's hands.²⁰⁰ Without the assistance of *Witt* and *LCR*, repeal might have failed.²⁰¹

A. *Neglecting the President's Duty to "Faithfully Execute" the Laws*

When a President fails to defend a federal statute, he neglects his Article II duty to "faithfully execute"²⁰² the laws because he acts neither to protect a constitutional law nor to abandon an unconstitutional one—something a President cannot legitimately do.

At a minimum, the President's duty to "faithfully execute" requires him to enforce constitutional laws.²⁰³ Even if a President determines that a statute is unconstitutional, some scholars believe this duty still requires the Executive to enforce the law,²⁰⁴ while others would argue that this duty forbids such enforcement.²⁰⁵ In either case, the President is duty-bound. In practice, since the

(transcript available at http://abcnews.go.com/Politics/State_of_the_Union/state-of-the-union-2010-president-obama-speech-transcript/story?id=9678572&page=12) ("This year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are."); see also Borch, *supra* note 11, at 205 ("[T]he first official statements on DADT occurred on 3 February 2010, when [Gates] and [Mullen] testified before the Senate Armed Services Committee," calling on Congress to put "an end to the sixteen-year-old 'don't ask, don't tell law,' a major step toward allowing openly gay men and women to serve in the U.S. military for the first time.") (citations omitted).

200. See Tilghman, *supra* note 69, at 16-17 (noting military leaders' testimony in Congress in December 2010, before the repeal vote). See also *infra* notes 298-304 and accompanying text (relaying the congressional testimony).

201. The two cases acted "as a powerful legal whipsaw against DADT, with *Witt* badly weakening the government's legal basis for enforcing the policy, and *Log Cabin* ultimately bringing it down in a final, majestic crash . . ." *The Witt Standard*, *CTR. FOR JUSTICE* (Sept. 13, 2011), <http://cforjustice.org/2011/09/13/the-witt-standard/>. The repeal act passed in December 2010, with an effective repeal date of September 20, 2011. See Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

202. U.S. CONST. art. II, § 3.

203. See Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 *VAND. L. REV.* 389, 395-98 (1987); Eugene Gressman, *Take Care, Mr. President*, 64 *N.C. L. REV.* 38, 382-841 (1986).

204. For a discussion of the various theories, see Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 *GEO. L.J.* 1613, 1618-28 (2008); Curtis A. Bradley and Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 *CONST. COMMENT.* 307, 334-36 (2006).

205. See Prakash, *supra* note 204, at 1616-17, 1627 (citing the oath to "preserve,

beginning of the nation, Presidents have assumed the power *not* to enforce laws of dubious constitutionality.²⁰⁶ Indeed, this practice was formalized in the opinions of Attorneys General²⁰⁷ and through presidential signing statements.²⁰⁸

protect and defend” the Constitution; the historical practice; and the combination of the Faithful Execution Clause and the Supremacy Clause). But some argue that “[s]uch a view . . . inexorably leads to the usurpation by the Executive of the [other branches’] roles.” COMM. ON GOV’T OPERATIONS, THE PRESIDENT’S SUSPENSION OF THE COMPETITION IN CONTRACTING ACT IS UNCONSTITUTIONAL, H.R. REP. NO. 99-138, at 11 (1985) (reacting to Reagan’s decision not to enforce a statute).

206. See Prakash, *supra* note 204, at 1644-45 (citing Jefferson’s refusal to enforce the Sedition Act and Jackson’s position on the national bank); Bradley and Posner, *supra* note 204, at 336 (noting Andrew Johnson’s impeachment due to his opposition to the Tenure of Office Act); The Att’y Gen.’s. Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 57 (1980); Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 209 (1994) (citing silence in *Myers v. United States*, 272 U.S. 52 (1926), as tacit approval of Wilson’s non-enforcement of a statute). *But see* Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1119-26 (9th Cir. 1988), *withdrawn in part en banc*, Lear Siegler, Inc. v. Lehman, 893 F.2d 205 (9th Cir. 1989) (reprimanding and finding “bad faith” in Reagan Administration’s disregard of the Competition in Contracting Act of 1984).

207. Jeremiah Black’s opinion to President Lincoln recognized this right. Mem’l of Captain Meigs, 9 Op. Att’y Gen. 468-69 (1860). See also Bradley and Posner, *supra* note 204, at 336; Marcott, *supra* note 5, at 1316-18 (reporting similar later opinions). *But see* Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 WM. & MARY BILL RTS. J. 183, 186-87 & n.27 (2007) (compiling a chain of 15 opinions from 1823 to 1890 advising Presidents about “mandatory” actions of Executive officials, and relating Attorney General Caleb Cushing’s 1854 opinion that when “laws define what is to be done by a given head of department, and how he is to do it, there the President’s discretion stops.” (quoting Office and Duties of Att’y Gen., 6 Op. Att’y Gen. 326, 341 (1854))); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342) (stating the President cannot “authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government.”); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838) (“[I]t would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution.”).

208. Presidents Monroe, Jackson, and Tyler issued the first such statements, which accompany a President’s signature on a bill and give his views on a law’s applicability or constitutionality. Malinda Lee, *Reorienting the Debate on Presidential Signing Statements: The Need for Transparency in the President’s Constitutional Objections, Reservations, and Assertions of Power*, 55 UCLA L. REV. 705, 710-11 (2008). The last hundred years witnessed an ever-increasing number of them. Bradley and Posner, *supra* note 204, at 312-13 (reporting statistics compiled by political scientist Christopher Kelley). George W. Bush faced stiff criticism for his signing statements. See Lee, *supra*, at 729-30; I-Wei Wang, *Schoolhouse Rock Is No Longer Enough: The Presidential Signing Statements Controversy and Its Implications for Library Professionals*, 100 LAW LIBR. J. 619, 635 (2008) (discussing the controversy).

Likewise, the President has a duty under Article II to defend constitutional laws from legal challenge.²⁰⁹ Nonetheless, Presidents have also felt duty-bound *not* to defend questionable laws in court.²¹⁰ Though some criticize this practice,²¹¹ it too has a long lineage.²¹² Most often invoked where the Executive's power is threatened, Presidents have increasingly resorted to this practice with other types of laws.²¹³ These decisions at times lead to odd results.²¹⁴

209. Mark B. Stern and Alisa B. Klein, *The Government's Litigator: Taking Clients Seriously*, 52 ADMIN. L. REV. 1409, 1417-18 (2000) ("The Attorney General may not decline to defend a statute simply because a current administration regards the legislation as ill-advised It is well established that the President has no 'dispensing power' by which he can decline to give effect to duly-enacted legislation."). See also LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 132-33 (1987) (drawing upon a collection of letters from past Attorneys General regarding the Executive's duty to defend statutes, and noting an erosion of that duty over time).

210. See *The Att'y Gen's. Duty to Defend the Constitutionality of Statutes*, 43 Op. Att'y. Gen. 325 (1981) ("The [DOJ] appropriately refuses to defend an act of Congress . . . in the rare case when [a law] . . . infringes on the constitutional power of the Executive . . ."). See also Hirt, *supra* note 179, at 1392 ("In situations in which the statute may encroach upon the powers of the Executive Branch, however, the Department ultimately may [apply] a more searching inquiry in that analysis."). The battles over the "legislative veto" provide a strong example of this practice. See *Clark v. Valeo*, 559 F.2d 642, 647 n.4 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (striking down legislative veto).

211. See Note, *supra* note 5, at 971 n.2 (arguing that President's refusal to defend a statute in court amounts to *de facto* power to repeal, which is a legislative function). But because Congress can intervene to defend a statute, this concern seems overstated. See FED. R. CIV. P. 24; see also *supra* notes 181-84 and accompanying discussion (concerning intervention).

212. See *Myers v. United States*, 272 U.S. 52 (1926) (Executive successfully argued against constitutionality of statute that had infringed on Wilson's power to remove Postmaster General).

213. See *United States v. Lovett*, 328 U.S. 303 (1946) (F.D.R.); *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (Kennedy); *Gavett v. Alexander*, 477 F. Supp. 1035 (D.D.C. 1979); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (Reagan); *Turner Broad. Sys., Inc. v. FCC*, 810 F. Supp. 1308 (D.D.C. 1992), *enforced*, 819 F. Supp. 32 (D.D.C. 1993), *vacated*, 512 U.S. 622 (1994) (Bush I); Chrysanthe Gussis, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. MICH. J.L. REFORM 591, 591-92, 597-98 (1997) (Clinton's opposition to HIV-related law); Letter from Richard A. Hertling, Assistant Att'y Gen., to Patrick J. Leahy, Chairman, Comm. on the Judiciary (Jan. 18, 2007), *Duty to Defend—Department of Justice Oversight*, 1 J.L. (1 PUB. L. MISC.) 30, 36-43 (2011) (Bush II's non-defense of 10 statutory provisions); Letter from Eric Holder, Att'y Gen., to Rep. John Boehner, House Speaker (Feb. 23, 2011) (available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>) (Obama's abandonment of DOMA).

214. For instance, after George H.W. Bush changed his mind in favor of state aid to traditionally black colleges, one case saw the Government's reply brief assert the opposite

But an Executive that pretends to defend a statute poses a different constitutional problem. Unlike a President who feels duty-bound to openly²¹⁵ abandon the defense of a statute, an Executive who “pretends” merely acts out of duplicity and insincerity.²¹⁶ Such a decision is not a “faithful execution” of the laws, because it neither acts to fully defend a constitutional statute nor does it protect the public from an unconstitutional one.

In the context of DADT, the Executive failed to perform its Article II duties. Upon taking office, the Administration had a duty to exercise independent judgment and decide if DADT violated the Constitution.²¹⁷ This required a candid assessment by the Attorney General, applying the “reasonable argument” test that had been accepted by recent administrations, including President Obama’s.²¹⁸ Thus, if no reasonable argument could be made to defend DADT’s constitutionality, the Executive had a duty to abandon any legal defense and to notify Congress.²¹⁹ It did

position than that asserted in its initial brief. *Compare* Brief for the United States at 63-65, 76 n.39, *United States v. Fordice*, 505 U.S. 717 (1991) (No. 90-1205), 1991 WL 527603, at *32-33, *41 n.39, *with* Reply Brief for the United States at n.*, *United States v. Fordice*, 505 U.S. 717 (1991) (No. 90-1205), 1991 WL 538730, at *16 & n.*). *See* Days, *supra* note 196, at 492 (discussing the comparison). And when Bill Clinton disagreed with the legal briefing in a case before a Minnesota Bankruptcy Court, his administration withdrew its briefs just before oral argument, and then declined to participate in the argument. *See* Days, *supra* note 196, at 492-93 (describing the case of *Christians v. Crystal Evangelical Free Church (In re Young)*, 148 B.R. 886 (Bankr. D. Minn. 1992), *aff’d*, 152 B.R. 939 (D. Minn. 1993).

215. *See* Hirt, *supra* note 179, at 1392-93 (“In situations in which the Department determines that it cannot present reasonable arguments in support of a statute, it advises both the court and the Congress of its decision. In that way, Congress has the opportunity to participate in the litigation in its own name.”).

216. This is not unlike an obscure signing statement intended to hide true intent. *See* Lee, *supra* note 208, at 736 (arguing that a president’s obscure statements “evade[] political accountability for his constitutional judgments”).

217. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1190 & n.2 (2006) (discussing Executive statutory interpretation, but also recognizing the significance of Executive constitutional interpretation).

218. The Obama Administration acknowledges that this is the proper standard to follow and has cited to it in DADT cases. *See supra* notes 154-62 and accompanying text. In 1994, Clinton’s Attorney General penned an authoritative opinion summing up the state of the law and articulating the “reasonable argument” standard for deciding whether DOJ can defend a statute. *See* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994) (Assistant Attorney General Walter Dellenger). *See also* Marcott, *supra* note 5, at 1316-18 (recognizing that the “reasonable argument” standard has become accepted). *But see* Waxman, *supra* note 78, at 1084-85 (noting only two exceptions to defending a statute: interference with Executive power, and when it “would require the Solicitor General to ask the Supreme Court to overrule one of its constitutional precedents”).

219. *See* Gussis, *supra* note 213, at 601 n.54 (noting that a presidential duty exists “to administer [a statute] until it is declared unconstitutional by the courts”) (quoting *Income Tax – Salaries of President and Federal Judges*, 31 Op. Att’y Gen. 475, 476 (1919)). *See also*

not do this, apparently reflecting the Administration's judgment that the law was constitutional. Of course, the Attorney General could not have realistically advised otherwise: a decade of case law upholding the policy made it "black letter" law, even if the *Lawrence* case had created reason to doubt.²²⁰

After the verdict that DADT was constitutional, the Administration became duty-bound to fully defend it in court with all reasonable arguments, even if it politically disagreed with those arguments.²²¹ Yet, the Obama Administration did not do this, as discussed in detail in Part II, leading to the conclusion that the Administration did not provide an "adequate defense" of the law.²²² To the contrary, the President's own public statements about the unfairness of the policy and its harm to the military's interests struck at the very heart of the law's basis.²²³

Moreover, it cannot be considered a "faithful execution" for the Executive to censor reasonable legal arguments—previously validated in courts across the nation—due to the sensitivities of the law's adversaries.²²⁴ This censorship became apparent as repeal approached, especially when the *Almy* plaintiffs attacked the constitutionality of DADT in their motion for summary judgment in July 2011.²²⁵ In response, the DOJ opted out of direct defense. Consequently, gone were the

Prakash, *supra* note 204, at 1627 ("Nothing in the Constitution . . . grants a discretionary power to enforce unconstitutional statutes . . .").

220. Arguably, the President could have believed that the Executive Branch was the ultimate arbiter of the law—a position with some scholarly recommendation. *See* Prakash, *supra* note 204, at 1645 ("[T]he Constitution never requires the President to accept the constitutional conclusions of his co-equal branches."); Morrison, *supra* note 217, at 1190 ("Statutory interpretation is not the exclusive province of the courts; it is a core function of the executive branch as well."). But this position may have placed him too close in ideology to his predecessor, George W. Bush.

221. *See* Hirt, *supra* note 179, at 1393 ("The long-standing policy at the Department is that its attorneys have 'a duty to defend the constitutionality of an Act of Congress whenever a reasonable argument can be made in its support,' even if the Department 'conclude[s] that the argument may ultimately be unsuccessful in the courts.'").

222. *See supra* notes 194-202 and accompanying text (applying the "adequate representation" standard).

223. *See* *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 919-920 (C.D. Cal. 2010) (considering as an admission that "Commander-in-Chief" said DADT "weakens our national security"). Unlike other policy decisions, a President's statements as the Commander-in-Chief about the underlying rationale for a key military policy go to the heart of the law and could easily cause a judge to doubt the constitutional propriety of such a policy.

224. *See supra* notes 160-64 and accompanying text (discussing the Department of Justice's censorship).

225. *See* *Almy Partial SJ*, *supra* note 175, at 2 (arguing that *Witt* held "that in order to discharge any service member under DADT, *Lawrence* placed the burden on the military to prove that the discharge significantly furthers, and is necessary to further, the military's" important interest in good order and discipline, and unit cohesion).

substantive arguments made under President Bush and the early Obama Administration about *Lawrence* and rational basis and deference to Congress.²²⁶ Attorneys made no attempt to link the three plaintiffs to Congress' findings, as was done (unsuccessfully) in the *Witt* motion.²²⁷ In place of these arguments was a half-hearted assertion that summary judgment was not appropriate at this time because the Government wanted to "conduct limited discovery . . . into the impact of plaintiffs' discharges in light of the governmental interests that the Ninth Circuit identified in *Witt*."²²⁸ The Administration should have allowed the DOJ to defend the policy fully, as required. By interfering, it did a disservice to the dignity of the Executive's constitutional duties.

B. Undermining Congress' Ability to Perform its Legislative Duties

When an Executive pretends to defend a federal law, it undermines Congress' duties under Article I by diminishing its ability to provide oversight and to defend its own legislative handiwork. Congress has a legitimate, constitutional role in overseeing certain activities of the executive branch.²²⁹ This oversight applies to the Justice Department, itself a creation of Congress.²³⁰ In overseeing the DOJ's activities, Congress may mandate that the Executive disclose certain information, such as whether the DOJ has decided not to defend or appeal a statute found to be unconstitutional.²³¹ Congress also has a valid interest in ensuring that its legislative handiwork is not ignored or abandoned through executive inaction.²³²

226. See *Almy MTD*, *supra* note 174, at 7-8.

227. See *Witt Gov't MSJ*, *supra* note 106, at 3.

228. *Almy MTD*, *supra* note 174, at 24.

229. See Kenneth A. Klukowski, *Making Executive Privilege Work: A Multi-Factor Test in an Age of Czars and Congressional Oversight*, 59 CLEV. ST. L. REV. 31, 33 (2011) ("The Constitution empowers Congress to engage in vigorous oversight actions over legislative matters and also over executive actions performed by, or involving, congressionally-created offices and Senate-confirmed officers."); see also *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927); *Watkins v. United States*, 354 U.S. 178, 194-195 (1957) (affirming the power to oversee the Executive Branch). *But see Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) (noting that the power is "not unlimited").

230. It is only because of specific statutory authority that the DOJ represents the United States in most actions. See 28 U.S.C. § 516 (2006) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor [sic], is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

231. See 28 U.S.C. § 530D (2006); see also Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1143-44 (2009) (discussing Congress' need to access data to carry out its duties "from legislating, to overseeing administrative agencies, to impeaching, to judging the elections, returns, and qualifications of its members . . ."); see

When inter-branch conflicts came to a head in the 1970s over the legislative veto, Congress had no permanent office with which to defend abandoned statutes, forcing it to rely on *ad hoc* defense and private counsel.²³³ The *Ethics in Government Act of 1978*²³⁴ tried to address this problem by creating and empowering the Senate Legal Counsel to participate in litigation, including challenges to the constitutionality of a law.²³⁵ If the Executive failed to defend a statute, Congress would be ready to intervene under Federal Rule of Civil Procedure 24, or perhaps to file an *amicus* brief.²³⁶ This ability was not meant to stop the Executive from defending federal laws in court.²³⁷ In that same Act, the Attorney General is required to transmit a

generally Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 KAN. L. REV. 579, 626-28 (2009) (discussing Congress-mandated disclosures and Executive resistance).

232. See *I.N.S. v. Chadha*, 462 U.S. 919, 940 (1983) (“We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.”). Some scholars, however, assert separation-of-powers concerns. See James W. Cobb, *By “Complicated and Indirect” Means: Congressional Defense of Statutes and the Separation of Powers*, 73 GEO. WASH. L. REV. 205, 229-30 (2004) (noting that Congress may have an inherent power to defend federal statutes because “without such authority, the executive branch could decline to defend any federal statute, effectively nullifying Congress’s legislative power,” but then rejecting that argument).

233. See Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707, 729 (1985) (citing S. REP. NO. 95-170, at 11-12 (1977)) (discussing the reasons Congress created a statutory scheme providing for its own defense and notification. Fisher explained how the Executive had previously left Congress in a bind because “in both *Doe v. McMillan* and *Eastland v. United States Servicemen’s Fund* . . . the Justice Department withdrew its representation of Congress just as the litigation reached the Supreme Court.”).

234. See 2 U.S.C. §§ 288(a)-(n) (2006).

235. See *id.* at § 288(a) (creating the Senate Legal Counsel). The House also has a means of legal defense. See Cobb, *supra* note 232, at 210-11 n.44 (“[T]he House . . . has the equivalent of an in-house counsel: the Office of General Counsel . . . [who is] charged with defending federal statutes . . .”). This should not pose separation-of-powers issues. See Tiefer, *supra* note 181, at 49 (“Congress uses its institutional counsel when litigating . . . the constitutionality of statutes.”). See also Cobb, *supra* note 232, at 206-07 (“[N]o court has directly confronted the issue of whether Congress litigating in defense of a federal statute comports with our scheme of separated powers. One court, though, has intimated that widespread use of this tactic may run afoul of the Constitution.”).

236. Intervention under Rule 24 is the better of the two options because *amici* “cannot appeal from adverse decisions, they cannot move for summary judgment or otherwise participate in the actual conduct of the litigation, and they cannot provide a suit with an adverseness of parties that it would otherwise lack.” Note, *supra* note 5, at 981-82.

237. See Days, *supra* note 196, at 501-02 (recognizing that “[b]ecause both houses of Congress now have the formal capacity to represent themselves in court, one could argue that the need for Solicitors General to presume the constitutionality of, and defend in court,

report to Congress in any case where the DOJ determines it “will contest, or will refrain from defending any provision of law . . . [based on the position] that such provision of law is not constitutional.”²³⁸ Congress intended this requirement to assist with its proper oversight role, as well as to provide it with sufficient notice to intervene and defend an abandoned statute.²³⁹ Congress overhauled this requirement in 2002, making it permanent and adding more detailed provisions to protect its interests.²⁴⁰

When the executive branch merely pretends to defend a law, it hinders Congress in its proper oversight role. The Attorney General will likely feel no obligation under 28 U.S.C. § 530D to notify legislators when the DOJ is asserting a putative defense. In the absence of the Executive’s clear repudiation of a law’s defense, Congress might not recognize the need to intervene to protect its institutional interests, nor might the rules permit it.²⁴¹ Thus, the action of pretense by the Executive may unfairly

the acts of Congress is less than it once was,” but then arguing that DOJ should still defend statutes in the interest of the government speaking with “one voice,” and to prevent the Executive “from using litigation as a form of post-enactment veto of legislation that the current administration dislikes”).

238. See Act of Nov. 9, 1978, P.L. 95-624, § 13, 92 Stat. 3464 (1979); see also Act of Nov. 30, 1979, P.L. 96-132, § 21, 93 Stat. 1049 (1980) (laying out the Attorney General’s reporting duty in particular fiscal years). If the Attorney General decided not to defend a statute, and if the Senate Legal Counsel intervened under 2 U.S.C. § 288c, the Attorney General was also relieved of all responsibility to defend the case. See 2 U.S.C. § 288k (2006); see also Cobb, *supra* note 232, at 209-10 (discussing the statutory scheme under § 288). In the 1980s, it was also suggested that the Attorney General publish his report in the *Congressional Record* “to insure that these decisions are subject to public awareness and scrutiny regardless of whether either house decides to undertake their defense.” Note, *supra* note 5, at 984.

239. In *League of Women Voters v. FCC*, after the Department of Justice abandoned defense of a statute, the Senate was permitted to file an *amicus* brief, convincing the court to dismiss the case on ripeness grounds. 489 F.Supp. 517, 520-21 (C.D. Cal. 1980). But in other cases, Congress was invited to intervene through other processes. For instance, in *Pacific Legal Found. v. Watt*, DOJ stipulated with the plaintiffs to request that the district court invite “both Houses of Congress to participate in the proceedings as *amici curiae*.” 529 F.Supp. 982, 985 (D. Mont. 1981).

240. See 28 U.S.C. § 530D (2006). There is scholarly doubt about the efficacy of “second-order disclosure requirements,” especially where Congress has not required some sort of consultation by the Executive. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 329 (2010) (Pozen notes that the presence of notification requirements “raises the costs of such secrecy - that official is now a lawbreaker - and it enhances the political standing of Congress, the courts, and the public to punish violations that are found out.”). But other options beyond notification are few. See *id.* at 330-34 (discussing various congressional options); see generally Jason Mehta, *Assessing the Electronic Surveillance Modernization Act (ESMA): Distorting, Rather Than Balancing, the Need for Flexible Electronic Surveillance and Robust Congressional Oversight*, J. TECH. L. & POL’Y 225, 242-43 (2007).

241. See Michele Estrin Gilman, *The Last Word? The Constitutional Implications of*

undermine a co-equal branch of government and offend the balance of power set out in the Constitution.²⁴²

In the context of the DADT cases, the Executive undermined Congress' Article I duties when it failed to petition the Supreme Court for certiorari in *Witt*, implying that it would continue defending the statute after the *Witt* remand and then later settling the case without further congressional notification.²⁴³ Initially the Administration gave signs it would appeal *Witt* as planned,²⁴⁴ although it did not ask the Ninth Circuit to stay the judge's order requiring reinstatement.²⁴⁵ The Repeal Act in December 2010 delayed the party's additional briefing until May 3, 2011, when the court stayed the case until November 2011.²⁴⁶ Then, on May 10, 2011, Witt announced she had reached a "final settlement" that provided her with full retirement benefits and removed the discharge order from her military service record.²⁴⁷ Moreover, as part of that settlement the DOJ agreed to "drop its appeal of the federal

Presidential Signing Statements: Litigating Presidential Signing Statements, 16 WM. & MARY BILL RTS. J. 131, 149-50 (2007) (discussing the circuit split that requires some intervenors to establish Article III standing because they would "have all the rights and responsibilities of other parties . . ."); *see also* *Newdow v. United States Congress*, 313 F.3d 495, 499 (9th Cir. 2002) (refusing to allow Senate to intervene in Pledge of Allegiance case because of lesser institutional interest than in *Chadha*, and to avoid it from becoming a "roving commission."). Despite the *Newdow* case, Congress would likely have been allowed to intervene in the DADT cases, due to its interest in military affairs and the deference due Congress by the courts. There may be problems with Congress establishing standing to be a party to the lawsuit.

242. *See* Sofia E. Biller, *Flooded by the Lowest Ebb: Congressional Responses to Presidential Signing Statements and Executive Hostility to the Operation of Checks and Balances*, 93 IOWA L. REV. 1067, 1122-23 (2008) (arguing oversight is no attempt "to increase its own powers at the expense of the Executive Branch' or a disruption of the proper balance of powers." (quoting *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988))).

243. *See supra* notes 63-73 & 90-98 and accompanying text (discussing Attorney General Holder's representations to Congress in 2009 and the subsequent settling of the *Witt* case in 2011).

244. *See* Notice of Appeal, *Witt v. Air Force*, Case No. 06-05195 (W.D. Wash. 2010) (Doc.180).

245. *See* Gene Johnson, *Witt Expects Air Force Reinstatement*, Associated Press, Nov. 30, 2010, available at <http://www.spokesman.com/stories/2010/nov/30/witt-expects-air-force-reinstatement/> (noting the Air Force filed its appeal but "did not seek a stay to block Witt from rejoining her unit," and explaining that the Department of Justice was not likely to seek a stay, or so it "informally told Witt's legal team," according to one of Witt's lawyers. As 2010 drew to a close, "Witt said she expects to rejoin her unit in January at the latest.").

246. *See* Docket, *Witt v. Air Force*, Case No. 10-36079 (9th Cir.) (Docs 1-13).

247. *Final Settlement to Landmark Lawsuit: Major Witt to Retire With Full Benefits*, AMERICAN CIVIL LIBERTIES UNION (May 10, 2011), available at <http://www.aclu-wa.org/news/final-settlement-landmark-lawsuit-major-witt-retire-full-benefits>.

court ruling in her favor.”²⁴⁸ The parties implemented the *Witt* settlement in September 2011.²⁴⁹

Under the provisions of § 530D, the DOJ’s decision to settle the case should have triggered another timely report to Congress, possibly allowing legislators to intervene prior to any final agreement.²⁵⁰ By failing to do so, the DOJ ignored not only the law, but also its open representations in April 2009, opting instead to settle matters behind closed doors in May 2011. With one stroke, the Administration guaranteed that the *Witt* standard would indefinitely remain on the books as good law.²⁵¹ Arguably, had Congress recognized that its institutional interests were being subverted from 2009 through 2011, legislators, at a minimum, could have written *amici* briefs to supplement missing arguments from the DOJ briefs.²⁵² Alternatively, Congress could have employed one of its many other available tools to try to prevent the harm.²⁵³

248. *See id*; *see also* Witt Settlement, *supra* note 163 (full settlement agreement as filed by her lawyers).

249. On September 4, 2011, Witt celebrated her retirement in a ceremony with Lieutenant Colonel Victor Fehrenbach, a gay Air Force officer allowed to retire after he brought suit in August 2010. *See* Harmon, *supra* note 146 (stating that “Per her legal settlement, Witt will be given credit for 20 years of service and will officially retire 10 days after the repeal of DADT becomes effective. Her retirement date is scheduled for October 1st, the same day as Fehrenbach’s.”).

250. Specifically, § 530D(B)(ii) required the Attorney General to make a report “within such time as will reasonably enable [Congress] . . . to intervene in timely fashion,” if he “determines . . . not to appeal or request review of any judicial . . . determination adversely affecting the constitutionality of any such provision.” The district court’s finding that DADT was unconstitutional as applied to Major Witt fell into this category. 28 U.S.C. § 530D (2006).

251. Had the Administration stayed the course, in light of the final result in the LCR case—mootness and vacatur—as well as the potential mootness in other as-applied challenges, such as the *Almy* case, it may very well mean that if settlement had not occurred, the *Witt* case may also have become moot and vacated, taking a very questionable precedent off the books. *See* *Camreta v. Greene*, 131 S. Ct. 2020, 2035 n.10 (2011) (citing *Karcher v. May*, 484 U.S. 72, 93 (1987) (finding vacatur may not be appropriate if party settles the case)).

252. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 465-68 (2009) (discussing the very real impact of *amici* briefs on the federal bench, and cases where the court has ruled using an *amicus* argument).

253. *See* Bradley and Posner, *supra* note 204, at 359-60 (Congress can hold “oversight hearings; it can cut budgets, jurisdictions, enforcement powers; it can require reports and audits; it can (though the Senate) vet nominees and refuse to confirm them; it can order investigations of the president and his subordinates; it can impeach the president.”); *see also* Gilman, *supra* note 241, at 141-42 (detailing “informal supervision” methods to include pressure with “a background threat that noncompliant federal agencies may find their budgets cut or their programs eliminated.”).

C. Degrading the Judiciary's Ability to Evaluate the Law

A President who “vigorously defends” a law shows “proper respect” for Congress’ “policy choices” and “preserves for the courts their historic function of judicial review.”²⁵⁴ But an Executive who only “pretends to defend” harms the Judiciary by compromising the effectiveness of the adversarial system and lowering the overall quality of legal analysis of the case.

The adversarial system in the United States relies on the parties to frame the issues for a neutral court to decide, with the parties tracking down and asserting all relevant arguments in favor of their positions.²⁵⁵ To illustrate, former Solicitor General Seth Waxman related a story of his vigorous defense of a questionable law.²⁵⁶ He lost the case but explained that the “adversarial system of constitutional adjudication” was well served by his efforts:

The United States’ briefs served the valuable purpose of articulating for the Supreme Court the strongest possible rationale in support of constitutionality—a much stronger case than anything that had been articulated by or to Congress. Those arguments in turn prompted the parties challenging the statute to hone and improve their own positions. And when the Court concluded that the statute should be invalidated, it did so with assurance that it had considered the very best arguments that could be made in its defense.²⁵⁷

A similar result can occur if the Executive openly abandons a law’s defense, allowing Congress to intervene or at least file an *amicus* brief.²⁵⁸ This ensures that a debate will occur by two parties with something to lose, which raises the level of

254. Waxman, *supra* note 78, at 1078 (also noting that Solicitors General “do not attempt to reach our own best view of a statute’s constitutionality; rather, they try to craft a defense of the law in a manner that can best explain the basis on which the political branches’ presumed constitutional judgment must have been predicated.”).

255. Frost, *supra* note 252, at 453-60 (compiling quotes about necessity of party presentation). In general, courts limit themselves to those issues. *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (“The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.”).

256. Waxman, *supra* note 78, at 1078.

257. *Id.*

258. See Note, *supra* note 5, at 981-82 (noting that the Supreme Court discourages *amicus* briefs that “simply reiterate the litigants’ arguments”). Some, however, wonder whether the use of *amici* may also undermine the principle of party representation. See Frost, *supra* note 252, at 451, 465-68 (“Judges who turn to *amici* are not setting their own agenda, as judges who raise issues *sua sponte* can be accused of doing. Furthermore, the parties may respond to arguments by *amici*, and thus provide the judge with an adversarial exchange on the new issues raised.”).

conversation so that a court can assess the law's validity.²⁵⁹ But a party can hinder a court's ability to determine the law by putting on a pretend defense that holds back crucial arguments or key issues.²⁶⁰

In the context of DADT, when the Administration ceased its vigorous defense of the law, it deprived the courts of the best arguments from which to judge the statute's constitutionality. Though discussed in Part II of this Article,²⁶¹ additional details drawn from the *LCR* appeal will demonstrate the full impact of this practice on the Judiciary. First, the DOJ stopped making the arguments on appeal that had won the DADT cases below, such as distinguishing *Lawrence* and arguing against heightened scrutiny; all that remained was an oblique argument for judicial deference to the judgments of Congress.²⁶² Post-repeal briefs were even less on point. In its February 2011 opening brief, the DOJ refused to defend DADT or address the district court's rulings about the statute, instead reframing the issue to focus solely on the 2010 Repeal Act.²⁶³ Meanwhile, the *LCR* attorneys fully argued their clients' position and hammered the Government's apparent "about-face" on the defense of the statute.²⁶⁴ This left the court in the unenviable position of relying on three private *amici* to make the arguments the DOJ ignored.²⁶⁵

259. See Gussis, *supra* note 213, at 634-35 (noting that when "Clinton declined to defend the HIV provision, he ensured debate . . . that had been ignored previously by Congress. This debate ultimately led to the repeal.").

260. For instance, the burden is placed entirely on the court to go outside its usual neutral role to find arguments on each side. See Frost, *supra* note 252, at 478-79 (DOJ could avoid "doctrines they dislike and lines of precedent they hope will be overturned. In such cases, judges should have the discretion to go beyond the arguments in the parties' briefs, because failure to do so would let litigants control an essential aspect of the judicial function.").

261. See *supra* notes 174-79 and accompanying text (discussing the *LCR* appeal).

262. See *supra* notes 243-45 and accompanying text (discussing DOJ emergency stay request).

263. See Brief for the Appellants at 37-38, *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011) (per curiam) (Nos. 10-56634, 10-56813), 2011 WL 860457, at *38 (reframing the issue as follows: "[W]hether it is constitutional for Congress to leave § 654 in place to facilitate an orderly transition in military policy while the Department of Defense completes the training and preparation needed in advance of repeal.").

264. Brief for Appellee/Cross-Appellant, *Log Cabin Republicans* at 1-2, *Log Cabin Republicans*, 658 F.3d 1162 (Nos. 10-56634, 10-56813), 2011 WL 1556172, at *1 (mocking DOJ's brief that "does not argue that DADT was or is constitutional" and arguing that DOJ "abandoned and waived any such claim and concedes . . . Don't Ask, Don't Tell is unconstitutional"). Despite these arguments, DOJ would not back down, accusing *LCR* of trying to "relitigate the past and proceed as if the Repeal Act does not exist." Reply Brief for the Appellants at 1, *Log Cabin Republicans*, 658 F.3d 1162 (Nos. 10-56634, 10-56813).

265. Specifically, the Foundation for Moral Law argued that *Lawrence* was a "radical departure from the common law tradition and from previous court decisions," that it did not "extend its scope . . . in a military context," and that the question should be analyzed under

The Government's refusal to make relevant arguments eventually led to conflict with the Ninth Circuit. When LCR applied to lift the stay on Judge Phillips' order,²⁶⁶ the DOJ doubled-down on its refusal to defend the "old" DADT,²⁶⁷ and a frustrated court lifted the stay as requested.²⁶⁸ It followed that action with another order flatly rejecting the DOJ's novel position:

After reviewing the briefs filed by the parties, it appears to the merits panel that the United States is not prepared to defend the constitutionality of 10 U.S.C. § 654 The Government argues only that the [DADT Repeal Act] is constitutional. But the district court found § 654, not the Repeal Act, unconstitutional. And § 654 remains the law of the land today, even though it is scheduled to be repealed once certain conditions are satisfied, which, as of the

the rational basis test. Brief Amicus Curiae of Found. For Moral Law, on Behalf of Defendants-Appellants/Cross-Appellees at 3-4, *Log Cabin Republicans*, 658 F.3d 1162 (Nos. 10-56634, 10-56813), 2011 WL 156169, at *3-4. The National Legal Foundation argued that the case should have been dismissed because, under *Witt*, DADT "can be challenged *only* on an as-applied basis." Brief Amicus Curiae of the Nat'l Legal Found., in Support of Defendant-Appellants-Cross-Appellees Urging Reversal at 3-4, *Log Cabin Republicans*, 658 F.3d 1162 (Nos. 10-56634, 10-56813), 2011 WL 1556171, at *3. And a group of various chaplaincy-related *amici* argued that rational basis was the appropriate reviewing standard under *Witt*, and that "military religious liberty provides an additional ground for both upholding the law and rejecting . . . a broad facial challenge." Brief of Amicus Curiae the Church of God Of Prophecy Chaplaincy Ministries et al. at 2-3, *Log Cabin Republicans*, 658 F.3d 1162 (Nos. 10-56634, 10-56813), 2011 WL 1556170, at *3.

266. See Motion of Appellee / Cross-Appellant Log Cabin Republicans to Vacate Stay of Injunction at 1, *Log Cabin Republicans*, 658 F.3d 1162 (Nos. 10-56634, 10-56813) (arguing that the Government was still enforcing DADT yet could no longer establish that there was "a likelihood of success on the merits, namely the constitutionality of" DADT because DOJ had "abandoned that claim and no longer argues that Don't Ask, Don't Tell is constitutional.").

267. DOJ summed up the three arguments it was asserting in defense of DADT: 1) "that Log Cabin lacks standing to sue"; 2) "that § 654, as it now exists following enactment of the Repeal Act and pending completion of the orderly process required for repeal to become effective, is constitutional"; and, 3) "that the district court lacked authority to enter a worldwide injunction." Government's Opposition to Log Cabin's Motion to Vacate Stay of Injunction at 4-5, *Log Cabin Republicans*, 658 F.3d 1162 (Nos. 10-56634, 10-56813). In response, LCR argued, "Since the government no longer argues that the statute is constitutional, the stay order lacks a continuing legal foundation and must be vacated. The government's opposition offers no rebuttal to this essential deficiency." Reply Brief of Log Cabin Republicans in Support of Motion to Vacate Stay of Injunction at 1, *Log Cabin Republicans*, 658 F.3d 1162 (Nos. 10-56634, 10-56813).

268. Order, *Log Cabin Republicans v. United States*, Nos. 10-56634, 10-56813, 2011 WL 2637191, at *1 (9th Cir. July 6, 2011) (using Holder's DOMA abandonment letter against the Government, noting, "The circumstances and balance of hardships have changed, and appellants/cross-appellees can no longer satisfy the demanding standard for issuance of a stay.").

2012/13]

EXECUTIVE DUTY

155

date of this order, has apparently not yet occurred. Therefore, the central issue this court must address on appeal is whether the district court properly held that § 654 is unconstitutional.²⁶⁹

In that same order, the Ninth Circuit acknowledged that while the Government was free to “refrain from defending the constitutionality” of DADT, under 28 U.S.C. § 530D the Attorney General was required to notify Congress of such a decision and that if the Government chose not to defend the statute, “the court may allow amicus curiae to participate in oral argument in support of constitutionality pursuant to Federal Rule of Appellate Procedure 29(g).”²⁷⁰ Later, the court partly relented on lifting the stay, after the DOJ filed a motion for reconsideration.²⁷¹

In the end the DOJ was saved by the effective DADT repeal date and the mootness doctrine.²⁷² If the Ninth Circuit had been required to issue a substantive decision on the merits, it would have had no advocacy by the Government whose statute was the issue in question.²⁷³ An adversarial system requires an adversary who will fight to the best of its ability. By refusing to engage in the relevant debate, despite the court’s outright rejection of its new theory, the DOJ did not aid the cause of justice.

269. Order, *Log Cabin Republicans v. United States*, Nos. 10-56634, 10-56813, 2011 WL 2683238, at *1 (9th Cir. July 11, 2011).

270. *Id.* (ordering DOJ to advise the court of its intentions). The Government answered this order with a letter, essentially restating its position that “[t]he government has not addressed the question the district court decided because the statute the district court considered has been changed, fundamentally altering the legal lens through which a Court must evaluate the constitutionality of the statute.” Letter from Henry Whitaker, U.S. Dep’t of Justice Attorney, Civil Div., Appellate Staff, to Molly Dwyer, Clerk, U.S. Court of Appeals for the Ninth Circuit (July 14, 2011).

271. In its emergency motion, DOJ submitted a declaration from the General in charge of repeal, outlining the status of implementation and pleading to allow it to continue. Corrected Emergency Motion Under Circuit Rule 27-3 for Reconsideration of Order Lifting Stay of Worldwide Injunction at 2-3, *Log Cabin Republicans*, 658 F.3d 1162 (Nos. 10-56634, 10-56813), 2011 WL 2732248, at *2-3. The court partially reimposed the stay except that it continued to enjoin “investigating, penalizing, or discharging anyone” under DADT. Order, *Log Cabin Republicans v. United States*, Nos. 10-56634, 10-56813, 2011 WL 2982102, at *1 (9th Cir. July 15, 2011). A few days later, it made that order permanent, noting bluntly, however, that “[i]n its briefs, the government does not contend that 10 U.S.C. § 654 is constitutional.” Order, *Log Cabin Republicans v. United States*, Nos. 10-56634, 10-56813, 2011 LEXIS 16310, at *3-4 (9th Cir. July 22, 2011).

272. *Log Cabin Republicans*, 658 F.3d at 1165-66 (discussing the Ninth Circuit’s dismissal of the case on mootness grounds).

273. See *supra* notes 165-70 and accompanying text (discussing the Ninth Circuit’s rebuke of the DOJ for refusing to defend the statute as written).

D. *Compromising the Role of the Department of Justice and Government Attorneys*

When the executive branch requires its Justice Department to put on a pretend defense of a law, the proper role of government attorneys is compromised, subverting independent legal advice and creating ethical dilemmas for individual counsel.

The DOJ is led by the Attorney General, a position that existed even prior to the creation of the United States Government.²⁷⁴ That office is intended to provide the President with “the highest quality legal advice possible”; however, internal angst can occur when political motivations creep into the office’s legal opinions, compromising this independent advice.²⁷⁵ In 1870, Congress created the office of Solicitor General to assist the Attorney General, and that position now wields great influence regarding issues to appeal to the Supreme Court.²⁷⁶ Indeed, the Court relies on the Solicitor General’s “high standards of candor and fair dealing before the Court,” as he “step[s] out from the role of partisan advocate to assist in the orderly development of the law and to insist that justice be done even where the immediate interests of the federal government may not appear to benefit.”²⁷⁷

Under today’s standards, the DOJ has repeatedly stated that it will defend a statute whenever a “reasonable argument” supports its constitutionality.²⁷⁸ It does so

274. *See* Setty, *supra* note 231, at 582-83 (explaining that the office was “modeled after the English governmental system and the colonial state governments in America”).

275. *Id.* (criticizing the politicization of DOJ during the Bush Administration and opining that “[a] different set of principles and practices in the Obama administration OLC seems likely given the vigorous support of transparency by the incoming [Obama] administration.”).

276. *See* Days, *supra* note 196, at 486-87 (“[F]or most purposes, the Solicitor General has the last word with respect to whether, and on what grounds, the United States will seek review in the Supreme Court, and he determines what cases from the federal trial courts the government will seek to reverse on appeal.”).

277. *Id.* at 487-88. He also notes that, at least initially, the Solicitor General is given “a large measure of independence free of policy considerations that ‘might, on occasion, cloud a clear vision of what the law requires.’” *Id.* at 495 (quoting *Role of the Solicitor, 1 Op. Off. Legal Counsel* 228, 232 (1977)). The President ultimately may command the SG to make certain arguments before the Supreme Court—and some Presidents have exercised this authority. *See id.* at 489.

278. *See* Marcott, *supra* note 5, at 1318-19 (discussing the “evolving positions of Attorneys General” over the past forty years and quoting Solicitor General Ted Olson: “[I]f we can in good faith find a defense, to provide a defense, we should bend over backwards to do that.”); Press Release, Dep’t of Justice, Attorney General William French Smith (May 6, 1982) (the Department is responsible “to defend acts of Congress unless they intrude on executive powers or are clearly unconstitutional.”). Yet not every Solicitor General believes that an unyielding loyalty to acts of Congress is the best public policy. *See* Waxman, *supra* note 78, at 1083 (noting Solicitor General Bork’s view that an SG’s “obligation” to the constitutional system means it cannot simply assume “whatever Congress enacts we will defend, entirely as advocates for the client and without an attempt to present the issues in the

with the assistance of an army of government attorneys, all licensed to practice law in some jurisdiction and governed by *Rules of Professional Conduct*.²⁷⁹ Most of these state-mandated rules are drawn from the American Bar Association (ABA), and they include “provid[ing] competent representation to a client,”²⁸⁰ “exercis[ing] independent professional judgment and render[ing] candid advice,”²⁸¹ “not knowingly mak[ing] a false statement of fact or law to” a court,²⁸² and not “engag[ing] in conduct involving dishonesty” or “that is prejudicial to the administration of justice.”²⁸³

When a President pretends to defend a statute, he cannot go it alone—he needs the assistance of government attorneys and the Solicitor General to make the pretense a success. But censoring a DOJ attorney, or asking the Solicitor General to represent a disingenuous position to a court, undoubtedly challenges the integrity of those attorneys and creates ethical dilemmas.²⁸⁴ Censored government attorneys are placed in a difficult position, knowing that the most reasonable, accepted, and effective arguments have been censored, despite the Executive’s official position that a law is constitutional and worthy of vigorous defense.

In the context of DADT, this Article has highlighted several instances where attorneys made stretched or creative arguments or where they were potentially censored from making the strongest arguments to defend DADT.²⁸⁵ In some instances, these attorneys’ obligations to their states’ rules of professional conduct may have been put in conflict with their duties to the executive branch. Further, the DADT litigation placed the DOJ in a difficult position, wanting to support the Administration’s long-term policy goals but also bound by ethical duties and requirements to report to Congress.²⁸⁶ It is unclear that the DOJ achieved that fine balance.

round”).

279. 28 U.S.C. § 530B(a) (2006) (requiring that government attorneys comply with all applicable state laws and rules as well as Federal court rules governing attorneys).

280. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2011).

281. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2011).

282. MODEL RULES OF PROF’L CONDUCT R. 3.3 (2011).

283. MODEL RULES OF PROF’L CONDUCT R. 8.4 (2011).

284. The entire situation can become hopelessly confused because DOJ is often torn between various conflicting Agency opinions and must find the best position for the United States; this can sometimes lead to arguments and positions that would not typically be taken in representing an individual client. See generally Days, *supra* note 189 (discussing the many clients and conflicts in the SG’s office).

285. See *supra* notes 140-43, 148-162, 167 and accompanying text.

286. See *supra* notes 150-54, 231 and accompanying text (discussing Mr. West’s admissions about the difficulty defending DADT and the requirements of 28 U.S.C. § 530d to report to Congress).

Solicitor General Kagan faced a similar challenge. She took the unusual step of filing a pre-cert opposing brief in *Cook*, a case with a *pro se* petitioner.²⁸⁷ Her brief made points similar to the *Cook* plaintiffs who opposed certiorari, and it tried to minimize the First Circuit's use of heightened scrutiny.²⁸⁸ Kagan also met personally with Witt's attorneys from the ACLU during the crucial period leading up to the decision not to seek certiorari.²⁸⁹ One must wonder about the representations made in that brief, especially since the *Witt* case never became a vehicle for addressing the Ninth Circuit's troublesome new standard due to its back-room settlement without congressional notification.

In sum, when the Executive pretends to defend a case, he compromises not only his own sense of integrity but also the integrity of those attorneys entrusted by the nation with its legal safekeeping.

E. *Subverting the Public Trust*

Not only does "pretending to defend" degrade the three co-equal branches of government, but it also harms the public trust by undermining legislative democracy and impairing the ideal of transparency in government policymaking.

The American form of democracy relies on its elected representatives to reflect the will of the majority in its laws and policies.²⁹⁰ Policymakers should act in the open for all to see. Indeed, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."²⁹¹ When Congress receives information as part of its oversight duties, it can usually release that data, increasing the level of public discourse on important issues of the day.²⁹² Thus, an Executive who either vigorously defends a law or openly abandons it ensures the debate over a law's

287. See Federal Cert Opposition, *supra* note 145, at 6, 12.

288. See *supra* note 88 and accompanying text (discussing the *Cook* plaintiff's opposition brief). Kagan's brief made a similar point that if the *Witt* remand finds DADT constitutional as applied, then "the practical difference between that court's approach and the First Circuit's analysis may prove relatively slight. . . . The pendency of *Witt* thus militates in favor of allowing the First Circuit's decision to stand." Federal Cert Opposition, *supra* note 145, at 6, 9. "The court's decision . . . rested not on its choice of a formal standard of review, but on its strong deference to Congress's judgments on matters relating to the armed forces." *Id.* at 9.

289. See *supra* note 66 and accompanying text.

290. See generally Lee, *supra* note 208 (discussing the importance of transparency in government).

291. Mehta, *supra* note 240, at 242 (quoting Justice Brandeis).

292. See Pozen, *supra* note 240, at 329 ("If second-order disclosure rules serve no other purpose, they can at least provide insight into how the President is interpreting and enforcing the Constitution and the lawsFalse").

potential defects will be a public one and that the cause of government transparency will be furthered. Honest and open public debate also ensures that legislators will be fully informed of the issues so that they might act with a free hand to do the will of the majority for the benefit of the public. By allowing an open debate to work its influence on both Congress and the Judiciary, the Executive has done its job.²⁹³ But none of those policy objectives are facilitated when the President hides the ball from Congress, the courts, and the public.

In the context of DADT, President Obama openly pushed for repeal, making his argument against the statute to the public and Congress on the campaign trail and in his addresses.²⁹⁴ At the same time, the Administration publicly claimed to be vigorously defending the law in the courts as a matter of duty and comity.²⁹⁵ Presumably, the public believed that all the best legal arguments were being marshaled to the defense of DADT and that all the best strategies were being used to win the case. Despite these impressions, behind the scenes the Administration was not adequately representing the statute in its arguments, aided by at least one judge who seemed to lack judicial restraint.²⁹⁶

When the DADT trials went sour, the public was left with the impression that the law could no longer bear judicial scrutiny and that a change to the policy by the courts was imminent, despite the DOJ's best efforts.²⁹⁷ This is best shown through the testimony of military and defense leaders before Congress in December 2010 in support of repeal. Secretary of Defense Gates testified that the legislative repeal of DADT was "a matter of some urgency" due to the courts, which could impose change "immediately by judicial fiat, by far the most disruptive and damaging scenario I can imagine and the one most hazardous to military morale, readiness and battlefield performance."²⁹⁸ His sentiments were fully echoed by military leaders of

293. See Lee, *supra* note 208, at 712-13 (relating how Reagan's clear announcement of his intention not to enforce a law allowed the plaintiff to "clearly trace his injury" to establish standing and allowed Congress and the Judiciary to react to the President's action).

294. See Simmons, *supra* note 59 (indicating Obama was "reaffirm[ing] his campaign pledge to end the ban on homosexuals serving openly in the military"); Obama, *supra* note 199 ("This year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are.").

295. See *supra* notes 128, 274-78 and accompanying text (discussing the footnotes contained in the DADT briefs indicating the President's disapproval of the law but the DOJ's historical duty to still defend it).

296. See *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1170 (9th Cir. 2011) (per curiam) (O'Scannlain, J., concurring); Frost, *supra* note 252, at 488-89 (arguing that because the Executive "has long-term interests that are at times opposed to those of Congress," a court must be careful to "correct an executive misinterpretation of federal law" or else it "enables the executive to displace the legislative and judicial roles in lawmaking").

297. See *infra* notes 298-302 and accompanying text (discussing military leaders' testimony to Congress regarding this impression).

298. *The Report of the Department of Defense Working Group that Conducted a*

all varieties, all referencing their fear that Congress must repeal DADT before the courts do so without sufficient implementation time.²⁹⁹

Most interesting was the ironic testimony of DOD's Jeh Johnson, the man who personally participated in the Administration's dubious decision in April 2009 not to seek certiorari in *Witt*, arguing at the time that the remand could avoid "adverse effects."³⁰⁰ Even though his own recommendation had propelled the *Witt* case into continued litigation, along with its subsequent impact on the *LCR* case, Johnson did not shirk from appearing before Congress with a message about the urgency of the DADT litigation: "I'd like to take a moment to talk to you . . . as the lawyer for the [Defense Department]. I want to repeat and elaborate upon what Secretary Gates . . . ha[s] said and ask that Congress not leave our military's fate on this issue in the hands of the courts."³⁰¹ He then trotted out the parade of horrors caused by Judge Phillips' injunction—made possible because of his own advice to remand *Witt*—to punctuate the exigency of his request for repeal.³⁰²

Comprehensive Review of the Issues Associated with a Repeal of Section 654 of Title 10, U.S.C., "Policy Concerning Homosexuality in the Armed Forces": Hearings Before the S. Comm. On Armed Servs., 111th Cong. 8 (Dec. 2, 2010) [hereinafter Dec. 2 Hearings] (statement of Hon. Robert M. Gates, Secretary of Defense).

299. See *Dec. 2 Hearings, supra* note 298, at 11 (statement of Admiral Micheal G. Mullen, USN, Chairman, Joint Chiefs of Staff) ("I believe now is the time to act. I worry that unpredictable actions in the court could strike down the law at any time, precluding the orderly implementation plan we believe is necessary to mitigate risk."); see also *The Report of the Department of Defense Working Group that Conducted a Comprehensive Review of the Issues Associated with a Repeal of Section 654 of Title 10, U.S.C., "Policy Concerning Homosexuality in the Armed Forces": Hearings Before the S. Comm. On Armed Servs., 111th Cong. 85-86, 88, 94 (Dec. 3, 2010) (statement of General James E. Cartwright, USMC, Vice Chairman of the Joint Chiefs of Staff: "It is impossible to predict what will happen in the courts and unpredictability fuels risk. My greatest concern, should the law change through the judicial process, is DOD could lose its ability to transition in a way that facilitates managed implementation.") (statement of Admiral Gary Roughead, USN, Chief of Naval Operations: "[10 U.S.C. § 654] is currently the subject of ongoing litigation and I cannot predict its outcome. I do believe any change in the law is best accomplished through the legislative process and not judicially.") (statement of General Norton A. Schwartz, USAF, Chief of Staff of the Air Force: "I . . . emphasize and add my strong endorsement to Secretary Gates' advice that legislative action . . . is far preferable to a decision by the courts, from which we would enjoy less latitude to properly calibrate implementation. Precipitous repeal is not . . . where your Armed Forces want to be.")*

300. See *supra* notes 70-72 and accompanying text (discussing Johnson's letter).

301. *Dec. 2 Hearings, supra* note 298, at 12-13 (Statement of Hon. Jeh C. Johnson, General Counsel, Department of Defense, Co-Chair, Comprehensive Review Working Group).

302. See *id.* at 13 ("We got a taste of [our] possible future in October and November in the *Log Cabin Republicans* case," further explaining that "in the space of 8 days, we had to shift course on the worldwide enforcement of the law twice, and in the space of a month face the possibility of shifting course four different times now. This legal uncertainty is not

2012/13]

EXECUTIVE DUTY

161

In contrast to the public national debate that initiated DADT in 1993,³⁰³ the repeal of the policy in 2010 came during a “lame duck” session of Congress, on the wings of testimony by desperate military leaders who feared imminent judicial action that could harm national security.³⁰⁴ This type of court-induced crisis undermines the majoritarian principles of American democracy.

CONCLUSION

The events leading to the repeal of DADT leave no doubt that the policy had arrived at its allotted time to be uprooted.³⁰⁵ Sundry political and judicial forces, as well as a good number of “coincidences,” conspired to destroy it. Future scholars may discuss for some time the rightness or wrongness of the policy, its necessity, or inhumanity. Hopefully, that conversation will also include a discussion of its final putative defense in the courts.

Presidents have every right to zealously advocate for the policies that matter to them, especially when they believe fundamental rights are at stake. When it comes to the faithful execution of the laws, however, the Executive is duty-bound to devote its full measure to either defend a constitutional statute or to discard an unconstitutional one. What the Executive *cannot* legitimately do is approach that duty using means of pretense and pretext. The integrity of that office too passionately pleads for openness and sincerity.

When it comes to the demise of DADT, the evidence seems to point in one direction. For very good political reasons, the DOJ—presumably at the behest of the Obama Administration—made high drama of the litigation, with considered strategic decisions taken at key moments, securing the law’s disgrace in the courts. Some might call this a pretend defense, but whatever its name, it is bad public policy. Whether done by Republican or Democrat, this harmful practice should be identified and uprooted from any institution that bears the word “Justice” in its title.

going away any time soon.”). Of course it wasn’t—thanks to the remand in *Witt*.

303. See *supra* notes 13-14 and accompanying text (discussing the public debate and hearings preceding DADT in 1993).

304. See *supra* notes 297-302 and accompanying text (discussing the testimony of military leaders before Congress).

305. “There is a time for everything, and a season for every activity under heaven: . . . a time to plant and a time to uproot, a time to kill and a time to heal, a time to tear down and a time to buildFalse” *Ecclesiastes* 3:1-3.