THE PENNSYLVANIA AVENUE TUG-OF-WAR: THE PRESIDENT VERSUS CONGRESS OVER THE BAN ON HOMOSEXUALS IN THE MILITARY

The election of William Jefferson Clinton as the forty-second President of the United States placed the issue of homosexuals in the military at the forefront of the national consciousness. The ban on homosexuals in the military has been in effect for decades,[1] but President Clinton vowed to lift the ban during his campaign, a move which irked military leaders[2] and many civilians. Clinton's position on open homosexuality in the military left Congress up in arms as well. The Chairman of the Senate Armed Services Committee, a Democrat, expressed grave concern about the prospect of lifting or modifying the ban.[3] Advocates of lifting the ban had hoped that delaying the final implementation of the new rule would allay the fears of their opponents,[4] but the opposition proved tenacious.[5] In

1. See *infra* notes 130-48 and accompanying text for a summary of the history of the ban on homosexuals in the United States military.

2. *See, e.g.*, John Lancaster, *Why the Military Supports the Ban on Gays*, WASH. POST, Jan. 28, 1993, at A8 (canvassing military opinions on lifting the ban).

3. "We are not talking about civilian life . . . [w]e are talking about military life, and there are fundamental differences that our military people know well but too many times those of us in civilian life do not keep in mind." Lancaster, *supra* note 2, at A8 (quoting Sen. Sam Nunn).

4. *See generally Out of the Locker: Homosexuals and the Military*, ECONOMIST, Nov. 21, 1992, at A26 (identifying common concerns about homosexual behavior).

5. Congressional hearings during the spring of 1993 became quite heated, at one point escalating into a debate over human sexuality when Sen. Strom Thurmond (R-S.C.), an outspoken advocate of preserving the ban, exclaimed that "[h]eterosexuals

July 1993, President Clinton compromised by partially lifting the ban, despite his campaign promise to lift it completely.[6]

Aside from the social and political concerns, Clinton's efforts to lift the ban raise questions regarding the scope of presidential authority in this matter. Some scholars and observers believe that the President could lift the ban on his own.[7] Others believe only Congress has such authority.[8] The President's compromise,[9] which pleased neither group, is facing judicial challenges from both sides, spurred on by the congressional ratification of the policy.[10] Despite

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don't practice sodomy." The statement drew derisive laughter from the Senate gallery. *Hearing Turns Into Debate on Sodomy*, S.F. CHRON., May 8, 1993, at A3.

6. See *infra* note 9 for a brief description of the compromise plan.

7. "To reverse the ban on homosexuals requires one stroke of a pen; it can be done by executive order." *Out of the Locker*, *supra* note 4, at A27. See also *infra* notes 222-30 and accompanying text for an argument that an executive order alone is sufficient to lift the ban.

8. "[Secretary Aspin] left open the possibility that the lifting of the ban could be overturned by Congress if a consensus were not reached [during hearings]." *Clinton to Lift Gay Ban*, ST. LOUIS POST-DISPATCH, Jan. 28, 1993, at 1A.

9. Clinton's new policy is commonly called "Don't Ask, Don't Tell, Don't Pursue." Under the "Don't Ask" prong of the policy, armed forces recruiters can no longer ask potential inductees about their sexual orientation. The "Don't Tell" prong forces homosexual military personnel to keep their status secret — to "stay in the closet" — lest they face discharge, or "separation," from service. The "Don't Pursue" provision purportedly ends the so-called "witchhunts" designed to ferret out homosexuals for separation, and requires equal enforcement of the Uniform Code of Military Justice (UCMJ) against both heterosexuals and homosexuals. Jon Sawyer, *Clinton Compromises on Gays in Military*, ST. LOUIS POST-DISPATCH, July 20, 1993, at 1A.

Some question whether the military enforces its law prohibiting sodomy, Uniform Code of Military Justice, art. 125, 10 U.S.C. § 925 (1988), equally against heterosexuals and homosexuals. Commentators claim the military only enforces Article 125 against homosexuals, even though the statute makes no distinction based on sexual orientation. *See, e.g.*, RANDY SHILTS, CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY 243-44 (1993). For further discussion of Article 125 and other laws proscribing sodomy, see *infra* notes 130-34 & 149-69 and accompanying text.

10. On Sept. 28, 1993, the House of Representatives followed the Senate in codifying the "Don't Ask, Don't Tell, Don't Pursue" policy. H.R. 2401, 103d Cong., 1st Sess. (1993). The Clinton administration compromise policy passed in the House by a 301-134 vote as an amendment to the National Defense Authorization Act for Fiscal Year 1994, after the House rejected two other proposed amendments that were, respectively, more lenient and more harsh than the compromise. For the texts of each of the three proposed amendments and the debates over them, see 139 CONG. REC. H7065-89 (daily ed. Sept. 28, 1993).

Since President Clinton took office, observers had predicted that Congress would take some action with regard to the ban. *See, e.g.*, *Clinton's Plan For Gays in Mili-*

Clinton's recent attempt at a compromise, this issue is far from settled because the idea of homosexuals in the military incites great emotion and apprehension, both in and out of the armed services.[11]

This Note examines the sources and scope of executive power and the exclusion of homosexuals from military service, applying the former to the latter to show that an executive order completely lifting the ban would sustain legal and congressional attacks. Part I presents a brief historical overview of presidential power, including the President's power as commander in chief. Part II deals with a specific aspect of presidential authority, the executive order. Part III scrutinizes the military's ban on homosexuals from a constitutional perspective. Part IV asserts that the President possesses the constitutional authority to completely lift the ban. Finally, Part V concludes that the President should issue an order to lift the ban entirely.

I. PRESIDENTIAL POWER

The President wields supreme power over the armed forces as commander in chief.[12] The Constitution, however, does not articulate the extent of this power. Moreover, there is a surprising paucity of judicial interpretation of the role of commander in chief.[13] Many of the cases that address the subject were decided a century ago,[14]

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tary Pleases No One, ST. LOUIS POST-DISPATCH, July 18, 1993, at 4A; *Nervous Service*, NATION, Dec. 7, 1992, at 688 (suggesting the potential for congressional attempts to write the ban into law).

11. *See, e.g.*, Molly Moore, *Marines in Somalia Up in Arms Over Plan to Lift Ban on Gays*, WASH. POST, Feb. 13, 1993, at A10 (describing Marine response to the proposal). *See also* Lancaster, *supra* note 2, at A8.

12. U.S. CONST. art. II, § 2, cl. 1. For a thorough analysis of the President's role as commander in chief, see DOROTHY SCHAFFTER & DOROTHY M. MATHEWS, THE POWERS OF THE PRESIDENT AS COMMANDER IN CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES, H.R. DOC. NO. 443, 84th Cong., 2d Sess. (1956).

13. Very few cases actually address the precise issue of the President's power in this regard. *See infra* notes 30-43 and accompanying text. Congress recognized this difficulty when it revised Title 10 of the United States Code ("Armed Forces") in 1956 to read, "The President may prescribe regulations to carry out his functions, powers and duties under this title." 10 U.S.C. § 121 (1983). The Explanatory Note to § 121 reveals that Congress intended to clarify the vague understanding of executive power. The Explanatory Note states: "The revised section is inserted to make express the President's general authority to issue regulations, which has been expressly reflected in many laws and left to inference in the remainder." *Id.*

14. *See, e.g.*, Johnson v. Sayre, 158 U.S. 109, 115 (1895) (holding that the President is commander in chief of the armed forces "at all times," including peacetime);

and today's courts rarely refer to them. Instead, modern judges and scholars frequently turn to the words of Alexander Hamilton and James Madison as a starting point for interpreting the scope of executive power.[15]

A. *Eighteenth Century Framework*

As a leader of the Federalists, Hamilton espoused the idea of a strong central government headed by a unitary executive.[16] Though he had several opponents, Hamilton insisted that such a government would eradicate the defects and dangers of the Articles of Confederation,[17] including the inability of the national government to raise revenue[18] or to call up a militia.[19] The framers of the Constitution

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Kurtz v. Moffitt, 115 U.S. 487, 503 (1885) (placing Army regulations within the ambit of the President's authority as commander in chief).

15. *See, e.g.*, Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 668 n.2 (1990) (citing THE FEDERALIST No. 47 (James Madison)); Gregory M. Huckabee, *The War Powers Resolution: Law or Political Rhetoric?*, 34 A.F. L. REV. 207, 207 n.1 (1991) (citing THE FEDERALIST No. 74 (Alexander Hamilton)); Paul R. Verkuil, *A Proposal to Resolve Interbranch Disputes on the Practice Field*, 40 CATH. U. L. REV. 839, 841 n.9 (1991) (citing THE FEDERALIST No. 51 (James Madison)). Justice Jackson cited both Hamilton and Madison in what has become the preeminent statement on presidential power. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.1 (1951) (Jackson, J., concurring) (citing discussions of executive power in 7 WORKS OF ALEXANDER HAMILTON 76-117 (1851) and 1 JAMES MADISON, LETTERS AND OTHER WRITINGS 611-54 (1865)). *See also Youngstown*, 343 U.S. at 682 nn.26-27 (Vinson, C.J., dissenting) (citing THE FEDERALIST No. 48 (James Madison) and No. 70 (Alexander Hamilton)).

16. Despite his nearly royalist proclivities, Hamilton advocated a strong executive in the context of nationalizing, and thus strengthening, some of those powers that proved least effective under the Articles of Confederation. Among those powers were several that the Constitution assigned to the President, including the power to make treaties and to conduct foreign affairs. THE FEDERALIST No. 22, at 191-99 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

For a thorough discussion of Hamilton's concept of the "energetic executive," see DAVID F. EPSTEIN, THE POLITICAL THEORY OF *The Federalist* 171-76 (1984).

17. *See* THE FEDERALIST No. 6 (Alexander Hamilton) (urging against potential tensions in the nation under the Articles of Confederation); THE FEDERALIST No. 23, at 148 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (describing the confederation as "[d]efective"); THE FEDERALIST No. 30, at 232-33 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (enumerating the problems of the "feeble" confederation in collecting taxes).

Notwithstanding his reputation as a Jeffersonian in opposing a strong central government, James Madison also addressed the defects of the Articles at length. *See generally* THE FEDERALIST No. 38 (James Madison).

18. THE FEDERALIST No. 30, *supra* note 17, at 232-33.

intended Congress to play a significant role in military affairs,[20] but they reserved the special role of commander in chief for the President.[21]

In *The Federalist*, Hamilton elucidated his approach to the powers of the President as commander in chief. The Chief Executive, explained Hamilton, would only command the militia when Congress called it into actual service.[22] He[23] would serve as supreme commander of the armed forces,[24] but would hold no power to declare

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19. *See generally* THE FEDERALIST Nos. 24, 29 (Alexander Hamilton) (discussing the military weakness of the national government under the Articles of Confederation).

20. The Constitution provides in relevant part:

> The Congress shall have Power To . . . provide for the common Defence . . . of the United States . . . ; To declare War . . . ; To raise and support Armies . . . ; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia . . . ; To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .

U.S. CONST. art. I, § 8. *Cf.* ART. OF CONFED. art. VI (1781) (permitting individual states to maintain their own militia and activate them in event of actual invasion, even without congressional consent); *id.* art. VII (directing states to appoint certain military officers); *id.* art. IX (granting to congress "the sole and exclusive right and power of determining on peace and war, except [when a state is invaded, as provided in art. VI]"). The Articles of Confederation did not provide for a navy, an omission that Hamilton attacked as a significant failure that the Constitution rectified. *See* THE FEDERALIST No. 24 (Alexander Hamilton).

21. U.S. CONST. art. II, § 2, cl. 1. For a defense of the President's power as commander in chief by way of comparison with analogous powers of the King of Great Britain and the Governor of New York, see THE FEDERALIST No. 69, at 444-46 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

22. THE FEDERALIST No. 69, *supra* note 21, at 445-46. Hamilton characterized this power as less broad than that of either the British King or the Governor of New York. *Id.* at 465.

23. This Note refers to the President in masculine pronoun form as a matter of convenience and historical fact. No gender bias is intended.

24. THE FEDERALIST No. 69, *supra* note 21, at 446. According to Hamilton, this power was "nominally the same with that of the King of Great-Britain, but in substance much inferior to it." *Id.* As to governors, "it may well be a question whether [the constitutions] of New-Hampshire and Massachusetts, in particular, do not in this instance confer larger powers upon their respective Governors, than could be claimed by a President of the United States." *Id.*

war or to raise armies, powers granted exclusively to Congress.[25] His administrative duties would include supervising military affairs, generally with the aid of a subordinate officer.[26] The President would have complete supervision over all elements of the actual operation of the armed forces, particularly in times of war.[27] Hamilton believed that an individual could handle and exercise military power more effectively than a council,[28] and noted that such activity necessarily involved administrative elements which also properly belonged to the executive.[29] Nevertheless, ambiguity exists as to which administrative aspects of military power rightfully belong to the panoply of executive prerogatives and, in turn, to what degree.

B. *Nineteenth Century Judicial Interpretation*

United States v. Eliason provided the earliest judicial statement concerning the President's role as commander in chief.[30] In *Eliason*, the government had brought an action of assumpsit against the administratrix of the estate of an Army captain, alleging that the captain had not reimbursed the government for monies he had improperly received.[31] The defendant claimed a right to set-off based on money the captain earned over and above his salary pursu-

25. Hamilton stressed that while the King retained full authority to declare war and to raise and regulate armies, the Constitution divested the President of such broad powers. *Id.* at 446, 450.

26. THE FEDERALIST No. 72 (Alexander Hamilton). Among those tasks that "fall[ ] peculiarly within the province of the executive department" is "the arrangement of the army and navy." *Id.* at 462 (Benjamin Fletcher Wright ed., 1961). The President would delegate "immediate management" of his administrative duties to "assistants or deputies." *Id.* at 463.

27. THE FEDERALIST No. 74, at 473 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

28. *Id.* Hamilton thought common sense dictated that the Executive should have sole control, as an individual, over the military. "Even those [who] have in other respects coupled the [President] with a Council, have for the most part concentrated [sic] the military activity in him alone." *Id. See also* GOTTFRIED DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 248 (1960) (discussing Hamilton's view that the executive should control the military).

29. THE FEDERALIST No. 74, *supra* note 27, at 473. "The direction of war implies the direction of the common strength; and the power of *directing and employing* the common strength, forms an [sic] usual and essential part in the definition of the executive authority." *Id.* (emphasis added).

30. 41 U.S. (16 Pet.) 291 (1842).

31. *Id.* at 296.

ant to an 1821 War Department regulation.[32] The case hinged on the validity of the 1821 regulation because of a subsequent War Department regulation prohibiting all supplementary compensation for military officers.[33] The circuit court held that the later regulation did not limit prior disbursements; rather, it restricted extra compensation appropriated during the legislative session in which the statute and subsequent regulation was passed.[34] Therefore, the court concluded, Captain Eliason's estate was entitled to an allowance for money earned under the earlier regulation.[35]

The Supreme Court reversed, reasoning that the President has broad authority to issue regulations concerning the armed forces.[36] According to the Court, if the President can issue regulations, he can also change them at his sole discretion.[37] Thus, the second regulation effectively trumped the first. The *Eliason* Court emphasized that the President's decisions with respect to the military carry the force and effect of law, whether he acts alone or delegates authority.[38] *Eliason* became a benchmark for the doctrine of plenary exec-

32. *Id.* at 293. The regulation, Army Regulations of 1821, art. 67, § 14, permitted extra pay for additional duties performed by a commanding officer as part of the construction of fortifications. 41 U.S. (16 Pet.) at 293.

33. *Id.* The War Department issued this regulation in 1835, in compliance with a law passed by Congress ten days earlier. *See* Act of Mar. 3, 1835, ch. 26, 4 Stat. 753, 754-55 (1835).

34. United States v. Eliason, 41 U.S. (16 Pet.) 291, 293-94 (1842), *rev'g* 25 F. Cas. 997 (C.C.D.C. 1841) (No. 15,040).

35. 41 U.S. (16 Pet.) at 294; *see also* 25 F. Cas. at 998.

36. "The power of the executive to establish rules and regulations for the government of the army, is undoubted." 41 U.S. (16 Pet.) at 301. The Court found that the defendant's reliance on the 1821 regulation was an implicit recognition of that power. *Id.* at 301-02.

37. "The power to establish [rules] implies, *necessarily*, the power to modify or repeal, or to create anew." *Id.* at 302 (emphasis added).

38. *Id.* at 302. The fact that the Secretary of War issued the regulation did not render it ineffective, according to the Court, because "rules and orders publicly promulged [sic] through [the Secretary] must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority." *Id.*

On the facts of this case, the holding meant that the 1835 regulation properly superseded the 1821 regulation, so the estate could not claim the set-off. *Id.* The Court's opinion did not differentiate between an executive department regulation issued pursuant to express statutory authority and a regulation issued absent congressional mandate. It addressed the situation as though the regulation originated wholly from the executive. *See supra* note 33 (detailing congressional action on this regulation). For a more detailed exploration of the effectiveness of presidential ac-

utive authority over the military, although it was over forty years before the Supreme Court acknowledged the precedential value of *Eliason*, in *Kurtz v. Moffitt*.[39]

In *Kurtz*, the plaintiff brought a writ of habeas corpus against two city police officers who arrested him for deserting the Army.[40] Kurtz alleged that the police officers lacked authority to arrest him for violating military law because they were not representatives of the United States government.[41] The Supreme Court upheld Kurtz's claim because the government relied on a presidential proclamation no longer in effect.[42] Although presidential military orders and regulations certainly carried legal effect over members of the armed forces, the Court indicated that the authority of those regulations over civilians, particularly in peacetime, was suspect.[43]

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tion taken with or without statutory authority, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring); *see also infra* notes 91-107 and accompanying text.

Several courts have relied upon *Eliason* to support the proposition that executive department directives promulgated by cabinet officials carry the same force of law as acts of the President. *See, e.g., In re* Neagle, 39 F. 833, 860 (C.C.N.D. Cal. 1889) (Justice Department); United States v. Badeau, 31 F. 697, 699 (C.C.S.D.N.Y. 1887) (State Department); United States v. Jones, 26 F. Cas. 648, 651 (C.C.D.C. 1854)(No. 15,493a) (Department of the Navy); United States v. Freeman, 25 F. Cas. 1211, 1213 (C.C.D. Mass. 1845) (No. 15,163) (War Department), *answering questions certified from* 44 U.S. (3 How.) 556 (1845); *In re* Sheazle, 21 F. Cas. 1214, 1217 (C.C.D. Mass. 1845) (No. 12,734) (State Department).

39. 115 U.S. 487, 503 (1885). *Kurtz* was the first post-*Eliason* case to link the concept of presidential authority over the military to presidential power to issue binding military regulations as commander in chief. *Kurtz*, 115 U.S. at 503. It was the first in a long line of cases upholding the President's power as commander in chief to regulate military law. *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341 (1952); Swaim v. United States, 165 U.S. 553 (1897); Runkle v. United States, 122 U.S. 543 (1887); McDonald v. Lee, 217 F.2d 619 (5th Cir. 1954), *reh'g denied,* 217 F.2d 625 (5th Cir.), *vacated on other grounds*, 349 U.S. 948 (1955); United States v. Curtis, 28 M.J. 1074 (N.M.C.M.R. 1989).

40. *Kurtz*, 115 U.S. at 487.

41. *Id.* at 498.

42. *Id.* at 504. The proclamation on which the government relied, Exec. Order No. 1, *reprinted in* 13 Stat. 775 (1863), sought the assistance of "patriotic and faithful citizens" in returning absent soldiers to their regiments and "support[ing] the proper authorities in the prosecution and punishment of [deserters]." 13 Stat. at 776. The *Kurtz* Court found that President Lincoln issued the proclamation during wartime, which he undoubtedly had authority to do as commander in chief. Congress, however, subsequently repealed the statute on which Lincoln's order was based, so the order lost its legal effect. *Kurtz*, 115 U.S. at 504.

43. The Court grounded its decision on the invalidity of the executive order, but expressly left open the question whether valid Army regulations could "confer au-

C. *The President as Commander in Chief of the Armed Forces*

Challenges to the scope of presidential authority have frequently occurred in the context of troop movements or other affirmative uses of force. The challenges often questioned the proper scope of executive power vis-à-vis that of Congress.[44] One former Reagan Administration official found that, as of 1970, Presidents had sent troops abroad for military action 199 times, but only sixty-two of the military actions had prior explicit congressional endorsement.[45] Since 1970, that trend has continued unabated, including actions in Iran, Grenada, Libya, Panama, Iraq and, most recently, Somalia.[46] These post-1970 military forays had at least arguable legislative support under the War Powers Resolution.[47] The Resolution requires the President to notify Congress if he intends to deploy troops to a hostile area without seeking a declaration of war, regardless of whether the danger of armed conflict is actual or imminent.[48] Another relevant similarity among these military actions is their customary classification as matters of "international relations" rather

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thority upon civil officers or private citizens to enforce the military law." The Court implied in dictum that Army regulations could not delegate such authority. *Id.* at 503.

44. This is not a recent phenomenon. One author traces the origins of the executive/legislative debate over war power to Thomas Jefferson, the old foe of executive strength. As President, Jefferson sent the Navy to "the shores of Tripoli" to quell the rise of the Barbary pirates in 1801, without seeking congressional approval. Huckabee, *supra* note 15, at 207. Many members of the 29th Congress vehemently opposed "Mr. Polk's War" with Mexico — though they did authorize President Polk to "prosecute [the] war." Act of May 13, 1846, ch. 16, § 1, 9 Stat. 9 (1846). President Lincoln faced much animosity, from Congress and elsewhere, for his suspension of the writ of habeas corpus. *See, e.g.*, Proclamation No. 1, *reprinted in* 13 Stat. 730 (Sept. 24, 1862). For a brief but illustrative overview of presidential exercises of war power, see Huckabee, *supra* note 15, at 207-15.

45. Assistant Attorney General William Bradford Reynolds, *quoted in* Charles Bennett et al., *The President's Powers as Commander in Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 24 (1988).

46. Reynolds cited the first three examples; the others have occurred since he made his observations. *See id.*

See also, e.g., Molly Moore & Ann Devroy, *Officials Say Panama Taking More Time and Troops Than Expected*, WASH. POST, Dec. 23, 1989, at A7 (discussing the letter President Bush sent Congress pursuant to the War Powers Resolution); Tracy Thompson, *Two Federal Judges Reject Challenges to Bush's Actions*, WASH. POST, Dec. 14, 1990, at A45 (reporting a challenge by 52 members of Congress to the President's action in Iraq without congressional approval).

47. Pub. L. No. 93-148, 87 Stat. 555 (1973).

48. *Id.* at § 4(a).

than domestic military affairs. Calling these actions international relations allows the President to defend his actions on the ground that he unquestionably enjoys supreme authority over foreign affairs, even if he must share some military responsibility with Congress.[49]

The President's authority to regulate, as opposed to activate, the armed forces is considerably more difficult to assess. Congress has attempted several times to clarify the situation through legislation, but the statutory language is susceptible to several interpretations. Many different statutes arguably control executive directives concerning the military. First, title 10 of the United States Code gives the President general power to issue regulations to fulfill his responsibilities.[50] Second, 5 U.S.C. § 301 permits the head of any executive or military department to regulate his or her subordinates and the general operation of the department.[51] The President, in turn,

49. The President's role in foreign affairs is as clear and dominant as his regulatory power over the military is vague and contradictory. The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ; he shall nominate, and [with Senate consent] appoint Ambassadors . . . ." U.S. CONST. art. II, § 2, cl. 2; *see also* Flota Maritima Browning de Cuba, Sociadad Anonima v. Motor Vessel Ciudad de la Habana, 335 F.2d 619, 623 (4th Cir. 1964) (maintaining that "the conduct of foreign affairs is a function of the Executive"); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 773 (D.D.C. 1974) (asserting that "it is true beyond peradventure that the conduct of our foreign relations is solely in the hands of the President"). *See generally* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-27 (1936) (discussing the President's status as the ultimate decisionmaker in the sphere of international relations).

Before he became Chief Justice, John Marshall alluded to this aspect of executive power during debate in the House of Representatives, stating, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 ANNALS OF CONGRESS 613 (1800); *see also* Charles J. Cooper et al., *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 197-99 (discussing constitutional language and case law supporting the President's foreign policy supremacy).

50. 10 U.S.C. § 121 (1988). For further discussion on this codification of executive power, see *supra* note 13 and accompanying text.

51. 5 U.S.C. § 301 (1988). The original version of this statute did not mention military departments per se, because those departments (Army, Navy and Air Force) were styled "executive" until enactment of the National Security Act Amendments of 1949, 63 Stat. 578 (1949). Once they officially became military departments, Congress amended § 301 to reflect the section's continued application to the armed forces. 5 U.S.C. § 301, Historical and Revision Notes (1988). The statutory definition of "military departments" appears at 5 U.S.C. § 102 (1988).

has the final say in executive department affairs, including the regulation of executive department employees.[52]

The question of presidential regulation of the military does not end there, unfortunately. Several statutes and cases address whether members of the armed services are "employees" within the meaning of section 7301 and other statutes. For example, the Federal Tort Claims Act (FTCA) defines "employee of the government" to include members of the armed forces and on-duty National Guard members.[53] The FTCA grants military personnel the right to sue the government on certain tort claims, but excepts suits for injuries sustained in combat.[54] On the other hand, President Reagan's Drug-Free Federal Workplace Order expressly excludes members of the armed forces from the covered group of employees.[55] Title 5 of the United States Code, which contains rules for the operation of government and regulation of its employees, includes members of the armed forces in the definition of government employees.[56] Yet, some courts have held that uniformed members of the military are not employees of military departments in the context of employment discrimination.[57] The case law deter-

52. U.S. CONST. art. II, § 2, cl. 1. The military is but one of the executive departments over which the President has ultimate supervisory responsibility. See *supra* notes 22-29 and accompanying text for further discussion of the President's role as executive and military supervisor. *See also* 5 U.S.C. § 7301 (1988), which states, "The President may prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301 (1988). President Reagan advanced this section as support for his directive mandating drug testing for federal employees. Exec. Order No. 12,674, 3 C.F.R. 215 (1989), *reprinted in* 5 U.S.C.A. § 7301 (Supp. 1992).

53. 28 U.S.C. § 2671 (1988).

54. Johnson v. United States, 704 F.2d 1431, 1434 & n.1 (9th Cir. 1983); *see also* 28 U.S.C. § 2680(j) (1988) (exempting the government from liability for combat injuries sustained in wartime).

55. Exec. Order No. 12,564, § 7(e), 3 C.F.R. 224, 229 (1986).

56. 5 U.S.C. §§ 2101(3), 2105(a)(1)(C) (1988). Title 5 includes members of the armed forces in the definition of "uniformed services." The armed forces include the Army, Navy, Air Force, Marines, and Coast Guard. 5 U.S.C. § 2101(2). The definition of uniformed services encompasses certain officers of the Public Health Service and the National Oceanic and Atmospheric Administration in addition to the armed forces. 5 U.S.C. § 2101(3).

57. The District Court for the Western District of Missouri interpreted the District Court of Arizona's decision in Vance v. Arizona Army National Guard, No. 74-329, slip op. (D. Ariz. June 18, 1975), to mean that uniformed military personnel cannot be employees under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of "race, color, religion, sex, or national origin." Lear v. Schlesinger, 17 Fair Empl. Prac. Cas. (BNA) 337, 341 (W.D. Mo. 1978) (quoting

mining whether military personnel are employees of the federal government is widely split,[58] making a conclusive, permanent answer to the conflict between executive and legislative power to regulate the military unlikely.

II. EXECUTIVE ORDERS

The President's power to unilaterally regulate members of the armed forces depends largely on his ability to act unilaterally in any situation. Historically, Presidents have avoided congressional intervention by the use of proclamations and executive orders.

A. *Constitutional Basis*

The Constitution lacks any express provision authorizing the President to issue executive orders. Those who have examined the question of a constitutional mandate for executive orders point to several sources of authority, including the President's role as supervisor of the executive department and its agencies,[59] the duty to "take Care that the Laws be faithfully executed,"[60] and even the

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-16(a)). Therefore, the *Lear* court reasoned, military personnel also are not federal employees under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a (1988).

58. For other cases addressing the nature of members of the armed forces as employees of the federal government, see Frey v. California, 982 F.2d 399 (9th Cir. 1993) (concluding that state military departments — the National Guard — are not employers as defined in the ADEA); Hill v. Berkman, 635 F. Supp. 1228 (E.D.N.Y. 1986) (permitting member of the uniformed military to recover in sex discrimination suit against the government under Title VII); Davis v. United States Dep't of the Army, 602 F. Supp. 355, 356-59 (D. Md. 1985) (precluding recovery under the FTCA when an army hospital disposed of remains of stillborn fetus born to a female member of armed forces because the woman's subsequent emotional distress did not occur as an "incident to military service"). *But see* Vance v. Arizona Army Nat'l Guard, No. 74-329, slip op. (D. Ariz. 1975) (holding that member of uniformed military could not recover damages in a Title VII action against the government).

59. U.S. CONST., art. II, § 2, cl. 1. *See also* HOUSE COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 6-12 (Comm. Print 1957) [hereinafter ORDERS AND PROCLAMATIONS] (tracing the history of presidential supervision of executive officers and agencies).

60. U.S. CONST., art. II, § 3. *See also* SENATE SPECIAL COMM. ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, EXECUTIVE ORDERS IN TIMES OF WAR AND NATIONAL EMERGENCY, S. REP. NO. 1280, 93d Cong., 2d Sess. 2 (1974) [hereinafter NATIONAL EMERGENCY] (examining the historical basis for executive orders).

general notion that "the entire executive power is vested in the President."[61] Even with the amorphous constitutional foundation of executive orders, presidents have issued them in one fashion or another since 1789.[62]

B. *Historical Analysis*

Presidents have promulgated executive orders for literally thousands of purposes. George Washington established the ideal of a strong executive by issuing a "Neutrality Proclamation" in 1793.[63] Washington's successor, John Adams, continued the strong executive tradition, particularly with respect to the constitutional mandate to supervise the executive branch.[64] Having voiced zealous opposition to broad executive power prior to reaching the White House,

61. Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, IV J.L. & POL'Y 483, 487 (1988) (quoting ANDREW JACKSON, THE AUTONOMY OF THE EXECUTIVE (1834), *reprinted in* 6 THE ANNALS OF AMERICA 58, 60 (Mortimer J. Adler et al. eds., 1968)).

62. Although executive orders were not numbered until Abraham Lincoln's administration, George Washington issued "proclamations," which were equivalent in intent and effect to the later "executive orders." Cross, *supra* note 61, at 484 n.5. Estimates of the number of executive orders and proclamations, including those before Lincoln and many unnumbered thereafter, range from 15,000 to 50,000. NATIONAL EMERGENCY, *supra* note 60, at 2.

63. Washington's proclamation declared American neutrality in the conflict then occurring between France and Great Britain. As had been and would be characteristic of Washington's presidency, his two closest advisors, Treasury Secretary Alexander Hamilton and Secretary of State Thomas Jefferson, differed sharply regarding the proper message to send concerning America's position in world affairs. In part because of British ties, but also because he favored a strong executive, Hamilton supported the proclamation. Jefferson, on the other hand, as a former minister to France and a staunch foe of executive usurpation of power, believed the proclamation both unwise and unconstitutional. *See* ORDERS AND PROCLAMATIONS, *supra* note 59, at 15-16. It is particularly interesting that Washington would exercise such expansive power in light of the struggle he helped lead to break away from the British monarch, a very strong executive indeed.

64. Cross, *supra* note 61, at 485-86.

the next two Presidents, Thomas Jefferson[65] and James Madison,[66] each managed to exert substantial influence over executive affairs.[67]

Later Presidents have taken advantage of this perceived constitutional power to implement their policies, often without seeking congressional approval. Andrew Jackson fought several celebrated political battles with Congress,[68] earning the nickname "King Andrew I."[69] Use of the executive order attained an early zenith of power under Abraham Lincoln. During the Civil War, Lincoln made expansive use of his executive power, most notably in suspending the writ of habeas corpus and issuing the Emancipation Proclamation.[70]

Lincoln's suspension of habeas corpus led to two famous statements by the Supreme Court on the breadth of unilateral executive power. In the earlier of these, *Ex parte Vallandigham*,[71] a civilian

65. For an analysis of Jefferson's clashes with Hamilton over the Neutrality Proclamation, see DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 68-89 (1962).

66. Madison and Hamilton engaged in a spirited dialogue of articles published in 1793 under the pseudonyms "Helvidius" and "Pacificus," respectively, wherein the two men espoused their opposing views of the Neutrality Proclamation. Madison, like Jefferson, believed that the proclamation amounted to a declaration of *no* war, which was properly a legislative function. Any executive use of legislative power, according to Madison, was "[i]n theory, . . . an absurdity, . . . in practice a tyranny." ORDERS AND PROCLAMATIONS, *supra* note 59, at 15-18 (citing CHARLES M. THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 555-56, 596, 598-99 (1931)).

67. Cross, *supra* note 61, at 486-87. Professor Cross cites Jefferson's purchase of the Louisiana Territory and Madison's activities as de facto Secretary of State in his own administration as examples of the two Presidents' changes of heart as Chief Executive. *Id.*

68. *Id.* at 487-89. Among Jackson's battles were the fight to dissolve the Second Bank of the United States and the struggle over nullification. *Id. See generally* MARQUIS JAMES, THE LIFE OF ANDREW JACKSON 487-716 (1938) (discussing Jackson's presidency).

69. JAMES, *supra* note 68, at 606. The sarcastic title of "King," as well as its companion appellation, "[His] Celestial Majesty," were introduced and used by supporters of Henry Clay early in the acrimonious election campaign of 1832. *Id.* at 604-06.

70. Cross, *supra* note 61, at 488-89. As early as the 1860s, few questioned the right of the President to act in time of war or national crisis, even absent statutory authority. *See, e.g.*, Proclamation of Apr. 15, 1861 (calling out state militias to suppress rebellion) and Proclamation of Sept. 24, 1862 (suspending the writ of habeas corpus), *reprinted in* NATIONAL EMERGENCY, *supra* note 60, at 185-86.

71. 68 U.S. (1 Wall.) 243 (1863).

citizen[72] had spoken publicly against the actions of the United States government in the Civil War.[73] He was arrested and taken before a military tribunal which charged, tried and ultimately convicted him of opposition to the government in its efforts to suppress the rebellion.[74] Vallandigham sought a Supreme Court ruling that his arrest denied him due process, and that he was unlawfully prosecuted and convicted as a civilian under military procedure.[75] Vallandigham's chief objection, however, was that President Lincoln illegally commuted his sentence[76] to exile in the Confederacy,[77] based on the unauthorized action of a military commission.[78] The Court avoided that delicate issue by dismissing Vallandigham's petition on procedural grounds.[79]

The Court took up the substantive issue presented in *Vallandigham* in 1866, in *Ex parte Milligan*.[80] As in *Vallandigham*, Milligan, a civilian, petitioned the Court for a writ of habeas corpus,[81] which President Lincoln had suspended during the war with congressional permission.[82] Milligan, however, had filed his petition in

72. The petitioner, Clement L. Vallandigham, was a member of Congress notorious for his anti-war rhetoric. *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 591-99 (1988) (discussing Vallandigham).

73. 68 U.S. (1 Wall.) at 244.

74. *Id.*

75. *Id.* at 246.

76. Upon conviction, Vallandigham was sentenced to "confinement in some fortress of the United States, . . . there to be kept during the war." *Vallandigham*, 68 U.S. (1 Wall.) at 247.

77. *Id.* at 248.

78. Major-General Ambrose E. Burnside created the commission in order to prosecute "spies or traitors" who spoke out against the Union government while in Burnside's area of command, the Ohio Department. *Id.* at 243-44.

79. The Court considered the constitutional parameters of the Supreme Court's jurisdiction, U.S. CONST. art. III, § 2, cl. 2, and concluded that the Court lacked appellate jurisdiction over a military commission. *Vallandigham*, 68 U.S. (1 Wall.) at 249-52. The Court's original jurisdiction did not extend to issuing a writ of habeas corpus to a military tribunal after the President suspended the writ, nor did its appellate jurisdiction permit it to grant a writ of certiorari to review the tribunal's proceedings. *Id.* at 253.

80. 71 U.S. (4 Wall.) 2 (1866).

81. *Id.* at 4. Milligan, like Vallandigham, was tried and convicted by a military commission for participation in an anti-war and anti-Union organization. *Id.* at 6-7.

82. Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755 (1863) (permitting the President, "in his judgment," to suspend the writ of habeas corpus "whenever . . . the public safety may require it").

the circuit court after the war ended.[83] The Court concluded that the government had no justification to retain custody of Milligan.[84] The Court's limited holding prohibited arrests such as Milligan experienced, when neither an invasion nor a hindrance to law enforcement existed.[85] Because neither the threat of invasion nor insurrection existed in some other part of the country, there was no support for the government's action against Milligan.[86] The thrust of the *Milligan* holding has continued to affect executive action to the present day: in times of emergency or national crisis, the President may act unilaterally and, if necessary, drastically to protect the government and American citizens. Courts will scrutinize the executive action carefully, and only a compelling governmental interest in national security or the safety of American citizens will justify restricting or suspending fundamental constitutional rights.[87]

C. *Modern Use of Executive Power: The* Youngstown *Legacy*

After Lincoln, Presidents used the executive order with increasing frequency.[88] Many times, Presidents used the executive order to as-

83. Milligan filed his petition in the Circuit Court for the District of Indiana on May 10, 1865, a month and a day after Grant and Lee met at Appomattox Court House. 71 U.S. (4 Wall.) at 7.

84. *Id.* at 126-27.

85. *Id.* Milligan was arrested in Indiana, which was not invaded during the Civil War. The Court held that martial law is appropriate only when there are actual uprisings or disorder. *Id.*

86. *Milligan*, 71 U.S. (4 Wall.) at 126-27. The Court stated: "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration." *Id.* at 127 (emphasis in original). For a thorough exposition of this doctrine and a summary of *Vallandigham* and *Milligan*, see ORDERS AND PROCLAMATIONS, *supra* note 59, at 25-27.

87. In *Milligan,* the Court explained:

> The power to make the necessary laws is in the Congress; the power to execute it is in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law.

71 U.S. (4 Wall.) at 139.

88. It is difficult to determine the number of executive orders with any degree of certainty, for there was no formal numbering system until 1907. Hugh C. Keenan, *Executive Orders: A Brief History of Their Use and the President's Power to Issue Them* 17-18 (1974), *reprinted in* NATIONAL EMERGENCY, *supra* note 60, at 38-39. Even without exact numbers, certain trends exist in the number and frequency of

executive orders over time. The following table lists the number of executive orders issued by each President from 1863 to January 1993. The annual average permits comparison among Presidents whose terms of office vary widely. Note especially the number of executive orders issued in times of war or national crisis.

PRESIDENT	YEARS	NO. OF ORDERS	AVERAGE*	MAJOR EVENTS
Abraham Lincoln	1861-65	3	**	Civil War
Andrew Johnson	1865-69	5	1	Reconstruction
Ulysses S. Grant	1869-77	15	4	
Rutherford B. Hayes	1877-81	0	**	
James A. Garfield	1881	0	**	
Chester A. Arthur	1881-85	3	**	
Grover Cleveland	1885-89	6	2	
Benjamin Harrison	1889-93	4	1	
Grover Cleveland	1893-97	71	18	Economic ills
William McKinley	1897-1901	51	11	Spanish-American War
Theodore Roosevelt	1901-09	1006	251	
William Howard Taft	1909-13	698	175	
Woodrow Wilson	1913-21	1791	224	World War I
Warren G. Harding	1921-23	484	194	
Calvin Coolidge	1923-29	1253	228	
Herbert Hoover	1929-33	1004	251	Stock market crash
Franklin D. Roosevelt	1933-45	3723	310	Depression, World War II
Harry S Truman	1945-53	905	113	Korean Conflict
Dwight D. Eisenhower	1953-61	482	60	
John F. Kennedy	1961-63	214	71	Bay of Pigs, Cuban Missile Crisis
Lyndon B. Johnson	1963-69	324	65	Vietnam
Richard M. Nixon	1969-74	348	63	Vietnam, Watergate
Gerald R. Ford	1974-77	169	68	
Jimmy Carter	1977-81	320	80	Hostage crisis
Ronald Reagan	1981-89	381	48	
George Bush	1989-93	166	42	Recession, Gulf War

* Approximate; partial years rounded to nearest half-year, average number of executive orders rounded to nearest whole number.

** Less than one.

Data to February 13, 1974, excerpted and adapted from Keenan, *supra*, at 19-26, *reprinted in* NATIONAL EMERGENCY, *supra* note 60, at 40-47; data since February 13, 1974, compiled from various editions of 3 C.F.R.

A cursory analysis of the tabulated information reveals that wars and economic strife produce an increase in executive orders, indicating the President's broad authority to act in such situations. Interestingly, there has been a mild downward trend in executive orders since Truman, perhaps due in part to the restriction of Truman's executive power in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579

suage problems brought on by national emergency or war.[89] Other times, Presidents asserted authority under a theory of "inherent" executive power.[90] The landmark example of such action occurred when President Truman seized the American steel mills, which led to the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer.*[91]

The *Youngstown* litigation arose out of a background of acerbic labor disputes between management and employees in the steel industry.[92] When it became apparent that no resolution to the controversy was in sight, the employees' union, the United Steelworkers of America, announced its intention to conduct a general strike.[93] The strike threatened to cripple the national defense industry, which relied heavily on steel to produce munitions, vehicles and weapons for the military effort in Korea.[94] In an attempt to avert potential catastrophe, President Truman issued Executive Order 10,340 on the night before the strike was to begin.[95] The Order authorized the Secretary of Commerce to take possession of steel mills and operate them as in the normal course of business.[96] The Secretary immedi-

(1952). See *infra* notes 91-107 and accompanying text for further discussion of *Youngstown*.

89. *See, e.g.*, NATIONAL EMERGENCY, *supra* note 60, at 143-206 (reprinting examples of executive orders promulgated in times of emergency, war or domestic disorder).

90. ORDERS AND PROCLAMATIONS, *supra* note 59, at 40. The 1957 study examined a representative sample of executive orders from 1945 to 1956, during which time Presidents Truman and Eisenhower issued 1,013 orders. Of those, 164, or 16.2%, cited no statutory authority. They did, however, cite authority as President or commander in chief or from the Constitution and "laws," which places them in the general category of "inherent" executive power. *Id.*

91. 343 U.S. 579 (1952).

92. *Id.* at 582.

93. *Id.* The government defused the situation at first, in December 1951, when the Federal Mediation and Conciliation Service intervened in response to initial threats of a strike. *Id.* There was no settlement, though, and the union renewed its call for a strike, to begin at one minute after midnight on April 9, 1952. *Id.* at 583.

94. *Id.*

95. 17 Fed. Reg. 3139 (1952).

96. *Id.*

> This occupation was to continue until, in the judgment of the Secretary . . . further possession and operation by him of any [steel mill] is no longer necessary or expedient in the interest of national defense, and [he] has reason to believe that effective future operation is assured, he shall [then] return the possession and operation of such [mill to its owner or operator].

Id. at 3141.

ately complied with the order, and the President subsequently reported this compliance and the progress of the seizures to Congress.[97] Meanwhile, the steel companies brought an action in federal district court against the Secretary, seeking injunctive relief from the seizures and invalidation of the President's order.[98] Three weeks after President Truman's initial order, the district court judge issued a preliminary injunction preventing enforcement of the seizures.[99] The Court of Appeals for the District of Columbia Circuit stayed the injunction the same day.[100] The Supreme Court granted certiorari three days later, and the arguments began just nine days thereafter.[101]

Justice Black wrote the majority opinion, which upheld the injunction and the invalidation of the executive order.[102] Justice Jackson's concurring opinion, however, brought the case its enduring fame. Justice Jackson identified three categories of presidential power and their effectiveness compared to congressional power.[103] The President enjoys his greatest degree of power when he has authorization from Congress.[104] The middle level of authority exists

97. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952). *See* 98 CONG. REC. 3842 (1952) (President's report to Congress).

98. *Youngstown*, 343 U.S. at 583-84.

99. 103 F. Supp. 569 (D.D.C. 1952).

100. Sawyer v. United States Steel Co., 197 F.2d 582 (D.C. Cir. 1952).

101. 343 U.S. at 584. Just 34 days separated the start of oral arguments at the Supreme Court from Truman's executive order itself. The arguments lasted two days, and the Court announced its decision less than three weeks later. *Id.*

102. *Id.* at 589.

103. The categories are "oversimplified," Justice Jackson conceded. *Youngstown*, 343 U.S. at 635 (1952) (Jackson, J., concurring). In fact, they may represent points on a continuum, because "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id. See also* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (characterizing the three categories as "pigeonholes;" a better metaphor is a "spectrum").

104. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Justice Jackson continued by suggesting that the President might be able to exercise putative legislative power "delegated" to him by Congress, at least where that power implicates one of his constitutional duties, such as the conduct of foreign affairs. *Id.* at 635 n.2 (Jackson, J., concurring) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)). Of course, legislative power is not "delegable" in the strict sense of the word, so Justice Jackson's suggestion perhaps would be best put in terms of congressional codification of preexisting executive power. *See generally* Steven J. Calabresi & Kevin H. Rhodes, *The*

when the President lacks congressional approval, forcing him to act with his executive powers alone.[105] Finally, the President has least authority when his actions directly contradict congressional intent.[106] These categories represent the foundation for modern understanding of executive power.[107] Subsequent cases have built upon that foundation and have modified it to fit various fact patterns.

President Carter's unilateral action to suspend private American claims on Iranian assets in exchange for the release of American hostages was a first-category, maximum-power action, according to the Supreme Court in *Dames & Moore v. Regan*.[108] Within the first category, though, the action fit into the "implied authorization" subset[109] insofar as it suspended domestic legal claims. The President

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Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1155, 1179 n.127 (citing Mistretta v. United States, 488 U.S. 361, 424-25 (1989) (Scalia, J., dissenting)).

105. "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Justice Jackson referred to President Lincoln's suspension of the writ of habeas corpus as an example of this second category of presidential power. *Id.* at 637 n.3 (Jackson, J., concurring). See *supra* notes 70-87 and accompanying text for further discussion of Lincoln's broad assumption of executive authority.

106. "When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Justice Jackson's examples here address the power of the President to discharge governmental employees. *See id.* at 638 n.4 (citing Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926)).

107. Important as it is to the current understanding of the scope of executive power, Justice Jackson's opinion is "only" a concurring opinion, as one top Clinton administration official pointed out to a rather nonplussed law student in a televised moot court competition. Stuart M. Gerson, Acting U.S. Attorney General, *in National Security Law Moot Court Competition* (C-SPAN television broadcast, Feb. 28, 1993).

108. 453 U.S. 654 (1981).

109. Though the statute in question, International Emergency Economic Powers Act, 50 U.S.C. § 1701 (1988), gives the President broad authority to contend with national emergencies emanating from outside the United States, it does not expressly permit the President to suspend any domestic legal claims. Dames & Moore v. Regan, 453 U.S. 654, 676 (1981). In conjunction with the so-called "Hostage Act," 22 U.S.C. § 1732 (1988), however, the *Dames & Moore* Court concluded that Congress "implicitly approved the practice of claim settlement by executive agreement." 453 U.S. at 680. Justice Rehnquist, writing for the Court, accomplished this bit of

also nullified attachments of Iranian property in the United States and transferred Iranian assets to the Federal Reserve Bank in preparation for transfer to Iran.[110] The Court found express authorization for these latter actions, thus obviating the need for legal justification such as the Court contrived for the claims suspension issue.[111]

While *Dames & Moore* had a statutory footing, it also implicated Article II executive powers.[112] Questions concerning the scope of these executive powers have arisen in other contexts. The Supreme Court noted in *Cafeteria and Restaurant Workers Union v. McElroy*[113] that the President has authority to control access to a military base.[114] However, the Court expressly limited that power, explaining that the President necessarily shares it with Congress.[115] The President also possesses broad authority in the field of national security, as the Court held in *Department of the Navy v. Egan*.[116] Re-

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legal legerdemain by asserting that the failure of Congress to address this specific situation "does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Id.* at 678 (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)) (alteration in original). By using this double negative, Justice Rehnquist decided that "the general tenor of Congress' legislation in this area" and "a history of congressional acquiescence in conduct of the sort engaged in by the President" lead necessarily to his result, upholding the suspension of domestic legal claims against Iran. *Id.* at 678-80.

110. *Id.* at 665-66.

111. *Id.* at 674. "A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President, . . . and that we are not prepared to say." *Id.* (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636-37 (1952) (Jackson, J., concurring)).

112. The subtext underlying much of Justice Rehnquist's opinion was the President's broad power to conduct foreign affairs. "The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government . . . ." 453 U.S. at 683 (quoting Ozanic v. United States, 188 F.2d 228, 231 (2d Cir. 1951) (Hand, J.)).

For other cases upholding the President's exclusive role in the conduct of international relations, see Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948); Security Pac. Nat'l Bank v. Government and State of Iran, 513 F. Supp. 864 (C.D. Cal. 1981).

113. 367 U.S. 886 (1961).

114. *Id.* at 890. This power is derived from the President's role as commander in chief of the armed forces. *Id.*

115. The Court found that "[t]he control of access to a military base is clearly within the constitutional powers granted to both Congress and the President." *Id.* *See supra* note 20 (listing Congress' powers granted by Article I).

116. 484 U.S. 518 (1988).

sponding to a challenge from a government employee whose security clearance was denied,[117] the Court concluded that the President's authority as commander in chief includes the ultimate responsibility for national security.[118] Stressing the importance of that responsibility, the *Egan* Court emphasized the unique nature of responsibility for national security as a power exclusively vested in the President.[119]

A third context of presidential authority appears in *American Satellite Co. v. United States*.[120] In *American Satellite*, the court rejected a challenge to the President's authority to forbid commercial payloads on space flights.[121] The court reasoned that the President had established the very policy that the plaintiff now contended he could not change,[122] and that Congress acquiesced in the President's action.[123]

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117. Egan, a laborer at a naval submarine facility, could not continue his employment there because of the denial of security clearance. *Id.* at 521. The denial largely stemmed from Egan's prior felony convictions, although the Navy indicated that his self-admitted "drinking problems" were also a factor in the decision. *Id.*

118. *Id.* at 527.

119. The Court noted that, "[The President's] authority [in national security matters] exists quite apart from any explicit congressional grant." *Id.* (citing Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 890 (1961)).

120. 26 Cl. Ct. 146 (1992).

121. *Id.* at 148. The plaintiff, American Satellite, contracted with the government to have two of its satellites launched aboard the space shuttle. The second launch, scheduled for early 1987, was scrubbed when President Reagan issued an order precluding further commercial satellite traffic on shuttle missions in the aftermath of the space shuttle Challenger tragedy. *Id.*

122. The court found an "inherent contradiction" in American Satellite's allegation. *Id.* at 153. "On the one hand, [the plaintiff] places its complete reliance on the 1982 policy statement [issued by the President permitting commercial payloads on the shuttle]. . . . When the President in effect revisited that policy in 1986, however, [the plaintiff] contends the change was illegal." *Id.* at 153-54 (footnote omitted).

123. *Id.* at 154. Using precedent to support the idea that congressional inaction may render an otherwise questionable executive action proper, the Supreme Court noted that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested [constitutionally] in the President by § 1 of Art. II." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring), *quoted in American Satellite*, 26 Cl. Ct. at 154. "Past practice does not, by itself, create power, but 'long-continued practice known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'" Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)), *quoted in American Satellite*, 26 Cl. Ct. at 154 (alteration in original).

Courts, however, do recognize limits on executive power, even in the pursuit of compelling governmental interests. An executive order lacking congressional assent has potential problems: it may be difficult both to enforce it and to ascertain its validity.[124] Some courts have held that, notwithstanding their inclusion in Justice Jackson's second category of presidential power,[125] only the executive department may enforce orders promulgated without congressional assent,[126] and that congressional action easily overcomes such orders.[127]

These cases, however, do not dispose of the issue whether a presidential order regulating the military will have any legal effect, in light of Congress' constitutional mandate to regulate the armed forces.[128] The precedent splits neatly into two strands, one supporting the right of the President to act unilaterally and the other asserting that Congress retains control of day-to-day military operations.[129] At present, that split is nowhere more evident than in the controversy over the ban on homosexuals in the military.

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124. See *supra* note 105 and accompanying text for a discussion of Justice Jackson's second category of presidential power.

125. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); see also *supra* note 105 and accompanying text discussing the scope of Jackson's second category.

126. *See, e.g.*, United States v. Wayte, 549 F. Supp. 1376, 1387-88 (C.D. Cal. 1982) (noting that "[a]bsent the requisite legislative foundation, the executive order is without the force and effect of law"); United States v. Martin, 557 F. Supp. 681, 688-89 (N.D. Iowa 1982) (stating that the court cannot enforce an executive order lacking statutory authority).

127. One court stated rather broadly, "Of course, an executive order cannot supersede a statute." Marks v. CIA, 590 F.2d 997, 1003 (D.C. Cir. 1978). The *Marks* court, however, did not cite any authority for its assertion, nor did it address the situation where the President's power constitutionally supersedes that of Congress, as in certain aspects of the military and foreign affairs. See *supra* notes 20-29, 59-70 and accompanying text for a general overview of the clash between executive and legislative power.

128. U.S. CONST. art. I, § 8, cl. 14.

129. *Compare* United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842) ("The power of the executive to establish rules and regulations for the government of the [armed forces] is undoubted . . . .") *with* United States v. Symonds, 120 U.S. 46 (1887) ("The authority of the [executive department] to issue . . . regulations [regarding the armed forces] is subject to the condition . . . that they must be consistent with the statutes which have been enacted by Congress in reference to the [military]."). *Cf.* Tarble's Case, 80 U.S. (13 Wall.) 397, 408 (1871).

> Among the powers assigned to the *National government*, is the power "to raise and support armies," and the power "to provide for the government of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive.

III. The Ban on Homosexuals in the Military

There is a long history of legal and administrative barriers preventing or hindering homosexuals from serving in the military. The earliest American military law proscribing homosexual acts appeared in 1917.[130] The statute forbade only assault with intent to commit sodomy.[131] Four years later, a legislative revision made sodomy itself a separate offense.[132] The law in effect today is essentially the same as that which became part of the Uniform Code of Military Justice (UCMJ) in 1951.[133] Article 125 of the UCMJ prohibits all forms of sodomy, with or without consent, and provides for punishment by court-martial.[134]

Id. (quoting U.S. Const., art. I, § 8) (emphasis added). Note that the Court in *Tarble* did not define the term "National government," but the two examples of power to which it cites are explicitly granted to Congress. *Id.*

130. Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical and Legal Perspectives*, 131 Mil. L. Rev. 55, 72 & n.116 (1991) (citing Manual for Courts-Martial, United States, para. 443 (1917)).

The military's aversion to homosexuals is not a twentieth-century phenomenon. Randy Shilts identifies Lieutenant Gotthold Frederick Enslin as the first person to be discharged from the United States military for being homosexual. Lt. Enslin was convicted by a court-martial on March 10, 1778, and literally "drummed out" of the Continental Army five days later. Shilts, *supra* note 9, at 11-12. In fact, the man historians credit as second only to George Washington in the importance of his military contributions to the American Revolution, Baron Friedrich Wilhelm von Steuben, was a renowned homosexual. *Id.* at 7-11. *See also* Joseph R. Riling, Baron von Steuben and His Regulations 1-19 (describing von Steuben's role in instilling military discipline to the ragtag Continental Army, and including a description of the Baron's "strong[ ] attract[ion]" to his seventeen-year-old interpreter and military secretary).

131. Davis, *supra* note 130, at 72-73. Originally, the definition of sodomy included only anal intercourse. *Id.* at 73.

132. *Id.* The new regulation added oral sodomy to the category of illegal activity.

133. *Id.*

134. Article 125 of the UCMJ states:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Uniform Code of Military Justice, art. 125, 10 U.S.C. § 925 (1988). Despite the provision prescribing courts-martial for violators of this section, those who participate in consensual sodomy generally undergo administrative separation from service. Davis, *supra* note 130, at 74. One commentator has noted that, although the regula-

Even before the enactment of Article 125, a regulation titled "Inaptness or Undesirable Habits or Traits of Character" governed military procedure concerning homosexuals.[135] By the end of World War II, only those who actively committed homosexual acts were subject to the regulation.[136] That was the high-water mark for tolerance of homosexuals in the military. By 1958, all requirements for discharge based only on specific acts of homosexuality disappeared, and, by 1977, discretion to retain homosexuals disappeared as well.[137]

A. *Department of Defense Directive 1332.14*

The federal regulation banning homosexuals from the military first appeared in 1981,[138] and it retains most of its operative effect despite the Clinton administration's modifications.[139] It explicitly separates persons who are homosexual regardless of any affirmative

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tion is facially neutral, a disproportionate number of those separated under Article 125 are homosexual. SHILTS, *supra* note 9, at 243-44.

135. *See* Comment, *Homosexuals in the Military*, 37 FORDHAM L. REV. 465, 465 (1969). Under this regulation, the person received an honorable, or "White," discharge unless he demonstrated one of several characteristics, including "sexual perversion including homosexuality . . . ." In that case, the person received a "Blue" discharge (without honor). *Id.* at 465-66.

136. *Id.* at 466-67.

137. Davis, *supra* note 130, at 76-77. *See generally id.* at 72-79 (summarizing the history of military laws and regulations prohibiting homosexuality).

138. Department of Defense Directive 1332.14, 32 C.F.R. § 41, App. A, pt. 1, para. H (1992) (effective Jan. 16, 1981). The introductory paragraph of the directive reveals its purpose and rationale:

> Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate the assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

Id. at para. H.1.a. (original version at 46 Fed. Reg. 9577 (1981); subsequent version at 46 Fed. Reg. 31,667 (1981)).

139. The revised policy changes the means of enforcement and lessens the fervor with which it is to be enforced. The substantive provisions, mandating separation of known homosexuals and forbidding homosexual conduct, remain in effect. *See Clinton is said to Accept Parts of Plan on Gay Ban*, N.Y. TIMES, July 16, 1993, at A10

acts they may have committed.[140] The regulation modified an earlier version that declared homosexuals unsuitable for service.[141] In its current form, the regulation makes separation mandatory[142] if a member of the armed forces commits a homosexual act[143] or attempts to do so;[144] if the member admits that he or she is homosexual or bisexual;[145] or if the member marries or attempts to marry

(describing White House attempts to reduce the severity of the ban without abandoning it completely).

140. The directive excludes homosexuals from the military based solely on their status as homosexuals. Its definition of "homosexual" encompasses all "person[s], regardless of sex, who engage[ ] in, *desire[ ] to engage in, or intend[ ] to engage in* homosexual acts . . . ." 32 C.F.R. § 41, App. A, pt. 1, para. H.1.b.(1) (1992) (emphasis added). Generally, the constitutionality of a provision that treats persons differently based on mere status is questionable. *See* Robinson v. California, 370 U.S. 660, 666-67 (1962) (invalidating a state statute that criminalized the status of "be[ing] addicted to the use of narcotics").

141. *See* 41 Fed. Reg. 9090 (1976) (listing "Homosexual or Other Aberrant Sexual Tendencies" as grounds for separation under the category of "Unsuitability").

142. "A member *shall* be separated . . . if one of [several] findings is made . . . ." 32 C.F.R. § 41, App. A, pt. 1, para. H.1.c. (1992).

Despite the compulsory nature of the regulation, one commentator has noted that the directive has been overlooked conveniently during wartime, when the need for personnel is greatest. GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS at xiii (Kate Dyer ed., 1990). Once the fighting ended, the separations resumed in earnest. *Id.* The number of discharges for homosexuality during the Vietnam years illustrates this extraregulatory discretion. Such discharges decreased an average of 28% each year for four years, from 1,708 in 1966 to just 461 in 1970. SHILTS, *supra* note 9, at 70. This "flexible enforcement" of the regulation has occurred in every major military engagement from World War II to Desert Storm. *Id.* at 71.

143. "A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." 32 C.F.R. § 41, App. A, pt. 1, para. H.1.b.(3).

144. *Id.* at para. H.1.c.(1). Exceptions to mandatory separation include, inter alia, situations when the conduct "is a departure from the member's usual and customary behavior," when it "is unlikely to recur" or when "[t]he member does not desire to engage in or intend to engage in homosexual acts." *Id.* An administrative board determines whether the member satisfies these conditions in any given case. *See generally* 32 C.F.R. § 41, App. A, pt. 3.

145. 32 C.F.R. § 41, App. A, pt. 1, para. H.1.c.(2). The exception here is when "there is a further finding that the member is not a homosexual or bisexual." *Id.* This exception exists to prevent intentional attempts to avoid military service, à la Corporal Klinger in the CBS television series "M*A*S*H." Many young American men did in fact become "gay deceivers" in an effort to escape serving in Vietnam. Several organizations and publications explicitly advocated being a "hoaxosexual" as an excellent method to dodge the draft. SHILTS, *supra* note 9, at 67-68.

someone of the same sex.[146] The discharge, if solely on the basis of homosexuality, must be honorable, unless one of several aggravating circumstances exists.[147] The remainder of the regulation prescribes procedures for instituting and conducting separation proceedings.[148]

B. *Discharge for Homosexual Conduct (Sodomy)*

Much, if not all, of the debate over the regulation centers on the second of the three separation criteria, confession of homosexuality. Cases holding that a state may constitutionally prohibit sodomy support the constitutionality of the first criterion of the regulation, affirmative homosexual acts as grounds for separation.[149] The

146. 32 C.F.R. § 41, App. A, pt. 1, para. H.1.c.(3). Whether someone is "of the same sex" as the member is "evidenced by the external anatomy of the persons involved . . . ." *Id.* This provision also contains a "Klinger exception" for "gay deceivers." *See supra* note 145.

147. Generally, the circumstances that would lead to less-than-honorable discharge entail homosexual activity that is criminal, public or in violation of the superior-subordinate relationship. 32 C.F.R. § 41, App. A, pt. 1, para. H.2.

148. *Id.* at para. H.3.

149. Currently, no less than 22 states have statutes that make sodomy between consenting adults a crime to one degree or another. The statutes generally use one or more of three terms to identify the illegal act: "sodomy;" "deviate sexual intercourse" or "conduct;" or "crime against nature." Several states that use the latter term embellish it with one or two descriptive adjectives. *See* ALA. CODE § 13A-6-63 (1982) (sodomy); ARIZ. REV. STAT. ANN. § 13-1411 (1989) ("infamous" crime against nature); ARK. CODE ANN. § 5-14-122 (Michie 1987) (sodomy; unlawful for homosexuals only); GA. CODE ANN. § 16-6-2 (Michie 1992) (sodomy); IDAHO CODE § 18-6605 (1987) ("infamous" crime against nature); KAN. CRIM. CODE ANN. § 21-3505 (Vernon Supp. 1993) (sodomy; unlawful for homosexuals only); LA. REV. STAT. ANN. § 14:89 (West 1986) (crime against nature); MD. ANN. CODE art. 27, § 554 (1957) (sodomy; unlawful for homosexuals only); MINN. STAT. ANN. § 609.293 (West 1987) (sodomy); MISS. CODE ANN. § 97-29-59 (1972) ("detestable and abominable" crime against nature); MONT. CODE ANN. § 45-5-505 (1991) (deviate sexual conduct; unlawful for homosexuals only); N.M. STAT. ANN. § 20-12-57 (Michie 1989) (sodomy; applies only to military personnel); N.C. GEN. STAT. § 14-177 (1986) (crime against nature); OKLA. STAT. ANN. tit. 21, § 886 (West 1983) ("detestable and abominable" crime against nature); R.I. GEN. LAWS § 11-10-1 (1981) ("abominable and detestable" crime against nature); UTAH CODE ANN. § 76-5-403 (1990) (sodomy). Six states describe the crime in unique terms. *See* FLA. STAT. ANN. § 800.02 (West 1976) (unnatural and lascivious act); MO. ANN. STAT. § 566.090 (Vernon 1979) (sexual misconduct; unlawful for homosexuals only); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985) (buggery); VA. CODE ANN. § 18.2-361 (Michie 1988) (to "carnally know" any person or animal). Two states explicitly prohibit homosexual acts or conduct. *See* TENN. CODE ANN. § 39-13-510 (1991) ("acts;" unlawful for homo-

landmark case in this area is *Bowers v. Hardwick*.[150] The Supreme Court in *Hardwick* rejected the argument that due process should invalidate Georgia's anti-sodomy statute.[151] Specifically, the Court held that no fundamental right to engage in homosexual sodomy existed, nor was it protected by a right to privacy, thus, the state could prohibit it.[152]

The Ninth Circuit applied similar reasoning six years earlier in *Beller v. Middendorf*.[153] In *Beller*, the Navy discharged the plain-

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sexuals only); TEX. PENAL CODE ANN. § 21.06 (West 1989) ("conduct" and deviate sexual intercourse).

The District of Columbia, Nevada and Michigan repealed their laws against sodomy in 1993. *See* Rene Sanchez, *D.C. Sodomy Law Is Off the Books*, WASH. POST, Sept. 18, 1993, at B3; *Bill That Permits Gay Sex Becomes Law in Nevada*, ORLANDO SENTINEL, June 18, 1993, at A12; *Gay Relations in Minnesota: Protected But Illegal*, MINNEAPOLIS STAR-TRIB., Apr. 5, 1993, at 3B (listing, *inter alia*, 1993 legalization of sodomy in Michigan). The Kentucky Supreme Court ruled the anti-sodomy law in that state unconstitutional in 1992. *See* Thomas Tolliver, *High Court Won't Review Its Ruling on Sodomy*, LEXINGTON HERALD-LEADER, Jan. 23, 1993, at C2.

Several other state anti-sodomy laws withstood challenges in 1993. *See, e.g.*, Dan Bennett, *Man Fights 187-Year-Old Oral Sex Law*, NEW ORLEANS TIMES-PICAYUNE, Jan. 9, 1993, at B1 (Louisiana); Joan I. Duffy, *Everett Asks Repeal of Ark. Sodomy Law, Says Son is Gay*, THE COMMERCIAL APPEAL (Memphis, Tenn.), Mar. 18, 1993, at A7 (Arkansas); Elizabeth Kastor, *The Battle for the Boy in the Middle: Little Tyler's Mom Is a Lesbian, So Grandma Got to Take Him Away*, WASH. POST, Oct. 1, 1993, at C1 (Virginia); Gardner Selby & Mary Lenz, *It's a Done Deal for Lawmakers in Austin: Session Closes Amid Protest, One Last Pitch*, HOUS. POST, June 1, 1993, at A11 (Texas); Greg Trevor, *House Won't Consider Decriminalizing Sodomy*, CHARLOTTE OBSERVER, Apr. 23, 1993, at 1C (North Carolina).

150. 478 U.S. 186 (1986).

151. *Id.* at 196.

152. The Eleventh Circuit Court of Appeals agreed with Hardwick's argument that he had a fundamental right to engage in sodomy. 760 F.2d 1202 (11th Cir. 1985). Hardwick also successfully argued in the court of appeals that his activity was a "private and intimate association that [was] beyond the reach of state regulation . . . ." 478 U.S. at 189.

The Supreme Court reversed on both grounds. It held that sodomy was not among "those fundamental liberties that are 'implicit in the concept of ordered liberty,'" *id.* at 190-91 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)), nor was it a liberty interest "deeply rooted in the Nation's history and tradition," *id.* at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)), that required Fourteenth Amendment due process protection. In addition, the Court noted that many states have statutes forbidding sodomy, and concluded that this long legacy of statutory proscription was further evidence that there was no "history" or "tradition" of permitting sodomy. *Id.* at 192-94. See *supra* note 149 for a list of states that prohibit sodomy.

153. 632 F.2d 788 (9th Cir. 1980), *cert. denied sub nom.* Beller v. Lehman, 452 U.S. 905 (1981), *and cert. denied sub nom.* Miller v. Weinberger, 454 U.S. 855 (1981).

tiffs after each admitted to taking part in homosexual acts.[154] They brought suit against the Navy, alleging violations of their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and implicitly seeking a ruling that the ban on homosexuals[155] was unconstitutional.[156] The court rejected their claims and affirmed the discharges.[157]

Addressing the plaintiffs' due process claims, the *Beller* court first disposed of the procedural due process prong by refusing to find any deprivation of a property or liberty interest.[158] On the issue of substantive due process, the court avoided the question of whether homosexual activity is a fundamental right[159] and chose instead to meld the substantive claim with elements of equal protection doctrine.[160] The court found the two doctrines much the same: the more basic the right asserted, the more important the government's interest must be, and the closer the nexus must be between the ac-

154. 632 F.2d at 792-95.

155. The Secretary of the Navy promulgated the regulation at issue in *Beller*. The regulation only applied to the Navy. SECNAVINST 1900.9C, *quoted in Beller*, 632 F.2d at 802 n.9. The Navy regulation is roughly analogous to Department of Defense Directive 1332.14, which did not become official until after *Beller* was decided. See *supra* notes 138-48 and accompanying text for a discussion of Directive 1332.14.

156. The plaintiffs also sought injunctions preventing their discharges, along with various individual claims. 632 F.2d at 793-95.

157. *Id.* at 812.

158. This is the "threshold inquiry" in procedural due process cases. Beller v. Middendorf, 632 F.2d 788, 805 (9th Cir. 1980) (citing Board of Regents v. Roth, 408 U.S. 564 (1972)). The court found that any purported property interest in continued employment in the Navy was extinguished when the plaintiffs admitted their homosexual acts. *Beller*, 632 F.2d at 805 (citing Berg v. Claytor, 436 F. Supp. 76, 81 (D.D.C. 1977), *vacated on other grounds*, 591 F.2d 849 (D.C. Cir. 1978)).

The court had a more difficult time deciding whether the plaintiffs' claims implicated a protected liberty interest. The court conceded that had the allegations of the plaintiffs' homosexual acts been false, there would certainly have been a deprivation of liberty, for the false charges could result in a "stigma" that could limit the plaintiffs' ability to find other employment. *Id.* at 806. False allegations were not a problem for the court, though, because the plaintiffs admitted their actions. *Id.* Moreover, "[t]he mere fact of discharge from a government position does not deprive a person of a liberty interest." *Id.*

159. The Supreme Court later took up this issue in Bowers v. Hardwick, 478 U.S. 186 (1986). For more on *Hardwick*, see *supra* notes 150-52 and accompanying text.

160. 632 F.2d at 807-12.

tion and the government's interest.[161] Applying that analysis, the court used the lowest level of scrutiny, rational basis review,[162] to conclude that discharge from the military of those who commit homosexual acts is rationally related to the legitimate governmental interest in national security and military order.[163]

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161. *Id.* at 807-08 (citing Roe v. Wade, 410 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

162. The court implied that the regulation could withstand at least intermediate-level scrutiny, in which the regulation must be substantially related to an important governmental interest. "[T]he importance of the governmental interests furthered [by the regulation] . . . outweigh[s] whatever heightened solicitude is appropriate for consensual private homosexual conduct." 632 F.2d at 810.

163. Proponents of the ban on homosexuals often advance the national security interest to bolster their position. The *Beller* court quoted the affidavit of the Assistant Chief of Naval Personnel describing the rationale for the ban.

> [I]t is perceived that homosexuality adversely impacts on the effective and efficient performance of the mission of the United States Navy in several particulars.
>
> (a) Tensions and hostilities would certainly exist between known homosexuals and the great majority of naval personnel who despise/detest homosexuality, especially in the unique close living conditions aboard ships.
>
> (b) An individual's performance of duties could be unduly influenced by emotional relationships with other homosexuals.
>
> (c) Traditional chain of command problems could be created, i.e., a proper command relationship could be subverted by an emotional relationship; an officer or senior enlisted person who exhibits homosexual tendencies will be unable to maintain the necessary respect and trust from the great majority of naval personnel who despise/detest homosexuality, and this would certainly degrade the individual's ability to successfully perform his duties of supervision and command.
>
> (d) There would be an adverse impact on recruiting should parents become concerned with their children associating with individuals who are incapable of maintaining high moral standards.
>
> (e) A homosexual might force his desires upon others or attempt to do so. This would certainly be disruptive.
>
> (f) Homosexuals may be less productive/effective than their heterosexual counterparts because of:
>
> (1) Fear of criminal prosecution;
>
> (2) Fear of social stigmatization;
>
> (3) Fear of loss of spouse and/or family through divorce proceedings as a result of disclosure;
>
> (4) Undue influence by a homosexual partner.

Beller v. Middendorf, 632 F.2d at 811 n.22; *see also* Judith Hicks Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685, 691-95 (1992) (cataloguing some of the justifications given by the military for excluding homosexuals). These and other justifications bear a striking resemblance

Four years after *Beller*, the Court of Appeals for the District of Columbia Circuit reached an identical conclusion on nearly identical facts in *Dronenburg v. Zech*.[164] After refuting certain procedural claims, Judge Bork, writing for the majority, addressed the appellant's privacy and equal protection arguments.[165] He summarily rejected the assertion that *Griswold v. Connecticut*[166] and its progeny[167] created a constitutional right to privacy in all areas of personal bodily conduct.[168] After finding no constitutional right to participate in homosexual activity, the court upheld the regulation because it rationally advanced the legitimate government interest in maintaining morale and discipline within the armed forces.[169]

C. *Discharge for Homosexual "Status"*

As important as the decisions in *Beller* and *Dronenburg* were, they left open the critical question whether the military may force homosexuals out of the service merely for *being* homosexual.[170]

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to the rationale of those who sought to exclude African-Americans from the military in the 1940s. *See* Kenneth A. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 510-22 (1991) (discussing the complications of racial integration in the military); *see also* SHILTS, *supra* note 9, at 187-90 (same).

164. 741 F.2d 1388 (D.C. Cir. 1984). Like the plaintiffs in *Beller*, Dronenburg was discharged from the Navy after admitting repeated participation in homosexual activity on a Navy base. *Id.* at 1389.

165. *Id.* at 1391.

166. 381 U.S. 479 (1965) (holding that there is a right to privacy derived from constitutional rights taken as a whole).

167. *Dronenburg*, 741 F.2d at 1391 (citing Carey v. Population Services Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967)).

168. *Id.* Judge Bork concluded that *Griswold's* acknowledgement of zones of privacy did not guarantee that any and every given personal "right" would rest within the "penumbra." *Id.* at 1392. In short, the right to privacy, according to the *Dronenburg* court, is not absolute. *Id.* at 1394-95.

169. *Id.* Not only was the interest legitimate, it was "a *crucial* . . . interest common to all our armed forces." *Id.* (emphasis added). Judge Bork characterized the inquiry as whether the regulation was "rationally related to a permissible end." Dronenburg v. Zech, 741 F.2d at 1398 (emphasis added). See also *supra* text accompanying note 151 for a discussion of the Supreme Court's analysis of *Hardwick*.

170. As noted above, the plaintiffs in both cases were discharged for committing homosexual acts while in the armed forces. *See supra* notes 158 & 164 and accompanying text; see also *supra* note 140 questioning whether a regulation that punishes on the basis of status is constitutional.

The court in *Rich v. Secretary of the Army*[171] explicitly addressed that issue. As in *Beller* and *Dronenburg*, the plaintiff in *Rich* challenged his discharge from the armed forces, but this case differed because there was no admission nor evidence that Rich committed any homosexual acts while in the service.[172] The primary basis for his discharge was his statement to a superior that he was homosexual.[173] Rich disputed his discharge on substantive[174] and procedural[175] due process and equal protection[176] grounds, but the court sided with the Army in upholding the ban.[177]

Due process and equal protection have been the predominant grounds for challenging the ban since *Rich*. During the last five years, several courts have considered the application of one or both of these to the ban on homosexuals in the military. Perhaps the most significant of these is *Watkins v. United States Army*.[178]

171. 516 F. Supp. 621 (D. Colo. 1981), *aff'd*, 735 F.2d 1220 (10th Cir. 1984).

172. Rich did not discover his homosexual predilections until after the deaths of his wife and son. *Id.* at 623.

173. *Id.* A second reason for the discharge was a written denial of homosexuality on a questionnaire he completed before his "realization" that he was homosexual. *Id.* at 624.

174. *Id.* at 626-27. Rich was unable to convince the court that he had a liberty interest in private consensual homosexual activity. *Id.* The court applied the reasoning of the Ninth Circuit in *Beller*, determining that the "special circumstances" surrounding service in the military outweighed any interest Rich may have had in engaging in private homosexual activity. *Id.* at 627.

175. Rich claimed that his admitted homosexual acts were "isolated episodes stemming from immaturity or curiosity . . . ." Rich v. Secretary of the Army, 516 F. Supp. at 627. He argued that Army Regulation 635-200 required officers to exclude "isolated episodes" of homosexual behavior in making their exclusion determinations, which the commanding officer in charge of the proceeding allegedly failed to do. *Id.* at 627-28. The court deferred to the officer's inference "as the trier-of-fact in this case" that as an admitted homosexual, Rich had committed homosexual acts, notwithstanding the lack of actual proof of those acts. *Id.* at 628.

176. Rich argued that his exclusion for being homosexual violated the Equal Protection Clause of the Constitution. The court concluded, however, that homosexuality was not really a "status" like gender, but a form of conduct. *Id.* Therefore, the Army could proscribe homosexual conduct with a regulation rationally related to a legitimate governmental interest. *Id.* The court held that the exclusion of homosexuals was rationally related to "legitimate governmental interests in discipline and morale." *Id.*

177. *Id.* at 629.

178. 875 F.2d 699 (9th Cir. 1989) (en banc).

Watkins had completed a long, strange trip through the courts[179] when the Ninth Circuit issued a panel decision prohibiting enforcement of an Army anti-homosexuality regulation.[180] The majority decided the case on equitable estoppel grounds.[181] In his concurrence, Judge Norris believed that the judgment properly rested on the suspect classification strand of equal protection.[182] The judge employed a three-part test to determine whether the Army denied Watkins equal protection.[183] First, Judge Norris concluded that the regulation did discriminate on the basis of sexual orientation.[184] Second, he determined that strict scrutiny was appropriate because

179. The litigation itself began in 1982, but the Army first investigated Watkins' homosexuality ten years earlier. *Id.* at 702. Along the way, the case generated five separate decisions. *See id.* at 701 n.1 (citing prior decisions).

From the day of his enlistment, Watkins never hid his homosexuality from military or government officials. Watkins even performed a popular female impersonation show at numerous military installations, and an article about his show appeared in the *Army Times*. MARY ANN HUMPHREY, MY COUNTRY, MY RIGHT TO SERVE 253-54 (1990); SHILTS, *supra* note 9, at 155-56. In spite of this behavior, Watkins remained in the Army for fourteen years. The Army refused to discharge him "because he could not really *prove* he was gay." *Id.* at 64.

180. *Watkins*, 875 F.2d at 711. The regulation at issue, unlike Directive 1332.14, excluded homosexuals from reenlistment. *Id.* at 703. See *supra* notes 138-48 and accompanying text for a discussion of the Directive 1332.14.

181. The majority made three findings in this regard. First, the court was competent to review internal military affairs. *Id.* at 705-06 (citing Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971)). Second, because Watkins showed that the government committed "affirmative misconduct" and that serious injustice would accrue from the Army's refusal to reenlist Watkins, estoppel could lie against the government. *Id.* at 707-09 (citing, *e.g.*, Wagner v. Director, FEMA, 847 F.2d 515 (9th Cir. 1988); Johnson v. Williford, 682 F.2d 868 (9th Cir. 1982)). Third, the court found that each of the four elements of estoppel were present: the Army knew about Watkins' homosexuality during his entire career, Watkins could reasonably "believe the Army intended him to rely on its acts," he knew that homosexuality was "a non-waivable disqualification for reenlistment," and Watkins relied "to his injury" on the Army's failure to discharge him. *Id.* at 707-11. "[E]quity cries out and demands that the Army be estopped from refusing to reenlist Watkins on the basis of his homosexuality." *Id.* at 711.

182. *Id.* at 711-31 (Norris, J., concurring).

183. Watkins v. United States Army, 875 F.2d at 712 (Norris, J., concurring).

184. *Id.* at 712-16. The regulation on its face purported to proscribe homosexual conduct, but it defined homosexual as those who "*desire*[ ] bodily contact between persons of the same sex . . . ." *Id.* at 714. Under that definition, the Army could refuse reenlistment to persons who never committed a homosexual act, but who had a homosexual orientation. *Id.*; see also *supra* note 140 quoting the analogous language in Department of Defense Directive 1332.14.

homosexuals constitute a suspect class.[185] Third, applying a deferential form of strict scrutiny,[186] the judge rejected each of the Army's asserted interests in maintaining the regulation against homosexuals.[187]

The Seventh Circuit exhibited much greater deference to military decisionmaking in *Ben-Shalom v. Marsh*.[188] In this case, as in *Watkins*, the Army discharged the plaintiff for mere homosexuality without conduct.[189] The court in *Ben-Shalom*, however, held that the plaintiff's admission of homosexuality necessarily admitted ho-

185. 875 F.2d at 724-28 (Norris, J., concurring). Judge Norris reached his conclusion by considering each of the factors in suspect class determination. He found that homosexuals had "suffered a history of purposeful discrimination." *Id.* at 724 (citing, *e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (noting that a homosexual must have a history of purposeful discrimination to be considered suspect); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1975) (same); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (same)). Discrimination against homosexuals is "invidious" because sexual orientation is irrelevant to one's ability to function in society and "classifications based on sexual orientation reflect prejudice and inaccurate stereotypes. . . ." *Id.* at 724-25. "[S]cientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change." *Id.* at 726. Finally, "homosexuals as a group cannot protect their right to be free from invidious discrimination by appealing to the political branches." *Id.* at 727. *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (identifying suspect class factors).

For more on suspect class doctrine as it applies to homosexuals, see Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205 (1993); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Harris M. Miller II, *An Argument for the Application of Equal Protection Heightened Protection Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); see also *infra* note 235 exploring a possible link between genetics and homosexuality, which would support the concept of homosexuals as a suspect class.

186. Judge Norris recognized that the military deserves some judicial deference in reviewing internal matters. *Watkins*, 875 F.2d at 728 (Norris, J., concurring). He questioned the propriety of deference because Congress only criminalized sodomy between military personnel, not homosexuality itself. *Id.* (citing 10 U.S.C. § 925 (1988)).

187. Even with deference to the military, Judge Norris rejected the asserted justifications for maintaining the ban, drawing an analogy to the rationales for racial segregation in the armed forces fifty years ago. *Watkins*, 875 F.2d at 729 (Norris, J., concurring). The justifications include avoiding interpersonal discord, preventing ridicule of the military in general and protecting the military's public image. *Id.* Each of these has a clear analogy in the integration struggle. *Id.*

188. 881 F.2d 454 (7th Cir. 1989).

189. *Id.* at 456.

mosexual desire as well.[190] It distinguished *Rich*[191] on the ground that Rich was ambivalent about his sexuality, whereas Ben-Shalom freely admitted she was a lesbian.[192] The court disagreed with the *Watkins* concurrence, refusing to believe that homosexuality is a suspect classification.[193] Instead, the regulation need only pass rational basis scrutiny, under which the *Ben-Shalom* court found it satisfactory.[194]

Ben-Shalom alternatively proposed a unique basis for challenging the ban: the First Amendment.[195] The court disposed of that argument by again deferring to military judgment.[196] The regulation restricts conduct rather than speech, according to the court, and in addition, the military has a legitimate interest in restricting certain speech.[197] The court concluded that Ben-Shalom's declarations of homosexuality may have been "speech" in the First Amendment sense.[198] Nevertheless, the regulation proscribing those declarations satisfied the four-prong test of *United States v. O'Brien*[199] for determining whether government may restrict "speech."[200]

190. *Ben-Shalom* and *Watkins* both concerned the same Army regulation, providing for the discharge of any person who "desires bodily contact between persons of the same sex." *Id.* at 464. See *supra* note 184 and accompanying text for additional discussion of the regulation.

191. See *supra* notes 171-77 and accompanying text for a discussion of the *Rich* opinion.

192. Ben-Shalom v. Marsh, 881 F.2d at 464.

193. *Id.* at 465.

194. "The . . . regulation, we find, clearly promotes a legitimate government interest sufficient to survive rational basis scrutiny . . . '[There] is no doubt that the [*Watkins*] majority's intrusion into military affairs, unjustified by important federal interests, will have a disruptive effect upon military discipline.'" *Id.* (quoting Watkins v. United States Army, 875 F.2d 699, 736 (9th Cir. 1989) (en banc) (Hall, J., dissenting)).

195. Ben-Shalom argued that the First Amendment protected her declarations of homosexuality. Because the regulation applied to those who express a "desire" for homosexual activity, she contended, it prevented her from freely stating her sexual orientation. *Id.* at 459.

196. *Id.* at 461. Deference to the military is greater in First Amendment matters. *Id.* (citing Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).

197. *Id.* at 462. "[Ben-Shalom] is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes. What [she] cannot do, and remain in the Army, is to declare herself to *be* a homosexual." *Id.*

198. *Ben-Shalom*, 881 F.2d at 462.

199. 391 U.S. 367 (1968).

200. [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial

More recently, the plaintiff in *Pruitt v. Cheney*[201] also argued a violation of the First Amendment when challenging her discharge from the Army Reserve.[202] Conceding that the armed forces may prohibit homosexual conduct, Pruitt contended that the military could not discharge her solely on the basis of a newspaper article identifying her as a homosexual.[203] Pruitt had no more success with that argument than did Ben-Shalom; the court affirmed summary judgment against her.[204] She gained a minor victory, however, on her equal protection claim,[205] despite the fact that the court did not consider homosexuals a suspect class.[206] Under rational basis review, the proper level of scrutiny for non-suspect classes, the court declared that Pruitt averred facts sufficient to state an equal protection violation.[207] The Department of Defense petitioned the Supreme Court for a writ of certiorari, but the court denied the writ

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government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater that is essential to the furtherance of that interest.

Id. at 377, *quoted in Ben-Shalom*, 881 F.2d at 462.

201. 963 F.2d 1160 (9th Cir.), *cert. denied*, 113 S. Ct. 655 (1992).

202. Pruitt, a Methodist minister and a Major in the Army Reserves, was the subject of a newspaper article in which she revealed that she was a lesbian and that she had been married to other women on two occasions. *Id.* at 1161.

203. *Id.* at 1163. Pruitt asserted that her statements in the article were "protected expression," and the court agreed with her to some extent. *Id.*

204. *Id.* at 1167. The court pointed out that Pruitt based her First Amendment claim on "the classic dichotomy between the punishment of speech and the punishment of conduct." *Id.* at 1163. According to the court, the Army regulation in question proscribed only homosexual conduct, which it inferred from Pruitt's statement that she was a homosexual. *Id.*

205. *Id.* at 1164-67. After *Watkins*, equal protection superseded due process as the constitutional claim of choice for litigants asserting their rights as homosexuals. For cases relying on equal protection arguments, see High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 570-74 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 463-66 (7th Cir. 1989); Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455, 1457-58 (C.D. Cal. 1993), *appeal denied*, No. CV-92-6044-TJH, 1993 WL 195368 (9th Cir. Mar. 5, 1993) (per curiam); Steffan v. Cheney, 780 F. Supp. 1, 3-10 (D.D.C. 1991), *rev'd sub nom.* Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), *reh'g granted*, 8 F.3d 57, 70 (D.C. Cir. 1994).

For further discussion of *Meinhold*, see *infra* note 233.

206. The *Pruitt* court did not address the suspect class issue, but by applying rational basis scrutiny, they implied that homosexuals do not comprise a suspect class. *Pruitt*, 963 F.2d at 1166-67 (citing *High Tech Gays*, 895 F.2d at 576-77; *City of Cleburne*, 473 U.S. at 448, 450 (1985)).

207. *Pruitt*, 963 F.2d at 1167.

in December 1992.[208] Thus, *Pruitt* is the latest conclusive word regarding the constitutionality of the ban on homosexuals in the military, but, as recent events demonstrate, it is not likely to be the last.

IV. PRESIDENT CLINTON SHOULD LIFT THE BAN COMPLETELY

As Bill Clinton took the oath of office on January 20, 1993, he faced many daunting tasks. On top of the economic troubles, the turmoil in Bosnia-Herzegovina and Somalia, and the Attorney General debacle, the new President chose to launch an assault on the regulation barring homosexuals from military service. Analysts and Washington insiders felt that the President's decision was a public relations disaster,[209] coming as it did in the midst of so much strife. Most of the public supports the President's desire to lift the ban,[210] notwithstanding a vocal minority strong enough to force Clinton to compromise his campaign pledge.[211] Predictably, the spectrum of opinion runs neatly along conservative/liberal lines, with the military fairly united in opposition to lifting the ban.[212] The military has little choice in the matter, for they must obey the President's orders.[213] Congress cannot overcome the President's order, because even if Congress has authority to regulate military affairs generally,[214] a statutory ban on homosexuals could not survive equal pro-

208. 113 S. Ct. 655 (1992).

209. *See* William A. Henry III, *Clinton's First Fire Fight*, TIME, Nov. 30, 1992, at 42 (commenting on the emotional response to Clinton's proposal).

210. "Polls show a majority of the public favors lifting the ban." *Id.*

211. The original Clinton administration plan called for an immediate end to questioning recruits about their sexual orientation and to investigating the sexual orientation of current members. *Accord Near on Gays*, ST. LOUIS POST-DISPATCH, Jan. 29, 1993, at 1A. The "instruction" also suspended all discharge cases pending against alleged homosexuals. *Id.* Defense Secretary Les Aspin originally was to draft an executive order implementing the new regulations, during which time Congress was to hold hearings on the matter. Barton Gellman, *Clinton Sets 2-Phase Plan to Allow Gays in Military*, WASH. POST, Jan. 22, 1993, at A1. The administration scaled back the plan significantly, bowing to "realistic political options." Editorial, *Don't Ask, Don't Tell, Don't Budge*, ST. LOUIS POST-DISPATCH, July 18, 1993, at 2B.

212. *See Worse Than a Crime*, NAT'L REVIEW, Dec. 14, 1992, at 18 (opposing lifting the ban); *Contra Ending the Ban*, NEW REPUBLIC, Dec. 7, 1992, at 7 (favoring lifting the ban).

213. "[T]he armed forces stand 'ready to do what we're told.'" Henry, *supra* note 209, at 42 (quoting Gen. Colin Powell, Chairman of the Joint Chiefs of Staff).

214. See *supra* notes 44-62 and accompanying text discussing the President's role as commander in chief.

tection scrutiny.[215] Public opinion opposing the action will have little effect because the reasons people give in support of the ban generally reflect stereotypes and fears.[216]

A. *Opinion Within the Military*

The military is a remarkable breeding ground for stereotypes and uneducated conclusions about homosexuals, much as it was for African-Americans not too long ago.[217] Military personnel complain about homosexuals' promiscuity[218] and their own uneasiness about simply being around homosexuals.[219] Many members of the military feel threatened by the presence of homosexuals in close proximity, especially with the added fear of AIDS.[220] Some of them, in fact, seem baffled by the idea of homosexual military service.[221]

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215. See *infra* notes 231-37 and accompanying text discussing probable failure of statutory ban.

216. See *infra* notes 217-21 and accompanying text discussing attitudes of members of the armed forces towards homosexuality.

217. For an excellent discussion of the struggle for acceptance by African-Americans in the armed forces, see Karst, *supra* note 163, at 499, 510-22. Karst also examines the exclusion of homosexuals from the military in general and the exclusion of women from combat. *See generally id.*

218. An unusually crass comment concerning this stereotype that all homosexuals are promiscuous came from a staff sergeant deployed in Somalia. "I don't want to walk into the Marine Ball and find two guys swapping spit on the dance floor." Moore, *supra* note 11, at A10.

219. "As for me, personally, I can work with them as long as they don't give me no eye contact." Moore, *supra* note 11, at A10 (quoting soldier).

220. Lancaster, *supra* note 2, at A8.

221. A striking example of the ignorance of some who favor the ban took place on CNN's "Crossfire" program in January 1993, when host Mike Kinsley and Lt. Col. (Ret.) William Gregor discussed the issue of homosexuals in the military.

> KINSLEY: [A]s you know in 1948, President Truman desegregated the military, and there were many objections. The analogy is not perfect, but there is this similarity. . . . [T]oday the military is the most successfully racially integrated part of our society. Now, doesn't that teach a lesson?
> GREGOR: No, it doesn't. The semantics of the saying, the situation is different. I suggest that you look at the studies of the attempts to induct active venereals during World War II. In those studies, you will read that —
> KINSLEY: What's an active venereal? You mean someone who has venereal disease?
> GREGOR: A person who is actually diseased when he came in.
> KINSLEY: Well, no — what does that have to do with homosexuals?
> GREGOR: Well, precisely why as a public health concern. If you've donated blood recently, you'll read this safety article, and it'll say right on [it], if you are [a] man who have had sex with another man since 1977, even once, do not give

Although unreasonable, the reaction of the average member of the service is not without relevance, and the President should be prepared to take it into account.

B. *Effectiveness of an Executive Order*

An issue critical to the ultimate eradication of the ban is whether an executive order would suffice to overturn it entirely. The President certainly could not justify the order on national emergency grounds.[222] He could not rely on a specific statutory grant of power because no statute specifically authorizes the President to establish

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blood. Now, what that means in civilian society is we use universal precautions. We've probably seen a basketball game pause while people change bloody jerseys, but what —

KINSLEY: Are you suggesting that someone is going to catch AIDS on the battlefield? Is that your point?

GREGOR: What will be the effect in the military of attempting to apply universal standards? Will we stop every boxing match —

KINSLEY: Colonel, once again I don't understand your point.

GREGOR: — at West Point and sanitize the ring?

KINSLEY: Do you have any evidence that anyone has ever or could ever catch AIDS because of blood in a battlefield? Because the experts say that's impossible.

GREGOR: Well, wait a second, sir. Let's imagine for a second, you've gone through training [for] years and developed the habit of universal precautions. Every time somebody gets a nosebleed, you stop the game. Everybody who gets blood on the floor, you disinfect it. Now you go to the battlefield. Every tanker knows that on a battlefield, next to fire, the main cause of death is exsanguination, you bleed to death.

KINSLEY: What does that have to do —

GREGOR: The question is, if a penetrator courses through a turret and amputates a gunner's arm, will the tank commander, having developed this habit of universal precautions, instantaneously and swiftly grab that bloody stump [sic] to save the life of his friend? Or will he hesitate and allow the life of his buddy to slip away?

KINSLEY: Well, wouldn't you say that if someone gay wants to join the military and is willing to take the risk of that rather absurd scenario you just painted, [and] that his commander would be unwilling to grab his bloody stump, then he should be allowed to join the military? What are you worried about?

GREGOR: No, that's not the point. You are failing to identify the people who pose a risk.

Crossfire: Homosexuals in the Military (CNN television broadcast, Jan. 25, 1993), *available in* LEXIS, Nexis library, CNN file.

222. See generally NATIONAL EMERGENCY, *supra* note 60, at 139-44 discussing executive orders in times of emergency.

qualifications for military service.[223] However, the President could point to several general statutes, interpreting them to suit his needs.[224] He also could cite his exclusive constitutional power as commander in chief to support his authority in this area.[225] The President's order would be effective under any or all of these justifications, as the experiences of his predecessors attest.[226]

The law is fairly clear that the only device that can overrule an executive order is another executive order.[227] The ban on homosexuals was not originally an executive order, but an executive department directive.[228] Nonetheless, because the President supervises all of the executive departments,[229] any directive of one of those departments is tantamount to a statement from the President himself.[230] Therefore, President Clinton could legally and constitutionally lift the ban *in toto* by executive order.

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223. See *supra* notes 59-129 and accompanying text surveying the basis for presidential action.

224. *See, e.g.*, 5 U.S.C. § 301 (1988) (allowing regulation of subordinates within executive department); 5 U.S.C. § 7301 (1988) (permitting the President to issue regulations concerning executive department employees); 10 U.S.C. § 121 (1988) (granting the President broad authority to "issue regulations" respecting the armed forces). See also *supra* notes 50-52 and accompanying text discussing statutory authority for presidential action.

225. U.S. CONST. art. II, § 2, cl. 1; see *supra* notes 44-58 and accompanying text evaluating scope of President's role as commander in chief.

226. Over 16 percent of the executive orders issued from 1945 to 1956 asserted no statutory authority at all, yet only one of 1,013 orders promulgated during that time was overruled by something other than another executive order. ORDERS AND PROCLAMATIONS, *supra* note 59, at 40. The one exception was President Truman's order seizing the steel mills, which the Supreme Court invalidated in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). For a discussion of *Youngstown*, see *supra* notes 91-107 and accompanying text.

227. *See supra* note 226. Of course, courts may review executive orders and overturn them if they find that the orders violate the Constitution. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *cf.* Marks v. CIA, 590 F.2d 997 (D.C. Cir. 1978) (holding that President's executive order cannot supersede a statute).

228. See *supra* notes 138-48 and accompanying text for an overview of the Department of Defense Directive.

229. U.S. CONST. art. II, § 2, cl. 1.

230. "We may take it as settled that Navy Regulations approved by the President are . . . endowed with 'the sanction of the law.'" Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 891 (1961) (quoting Marshall, C.J.). *See also supra* note 38.

C. *Inadequacy of Congressional Action*

The President shares certain authority over the military with Congress,[231] yet the Constitution literally vests Congress with regulatory power over the armed forces.[232] What the Constitution gives, however, the Constitution may take away, for Congress cannot enact a statute that contradicts a constitutional mandate. A statute to reinstate the ban would be unconstitutional as a violation of equal protection.[233] The statute would fail either because homosexuals are a suspect class[234] or because a rational basis for excluding homosexuals no longer exists by current scientific standards.[235] Congress simply cannot supersede the President's power as commander in chief and as chief executive to issue regulations for the conduct of mem-

231. See *supra* notes 20 & 115 discussing the President's sharing of power with Congress.

232. "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces . . . ." U.S. CONST. art. I, § 8, cls. 1, 14.

233. Pruitt v. Cheney, 963 F.2d 1160 (9th Cir.), *cert. denied*, 113 S. Ct. 655 (1992); Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993), *appeal denied*, No. CV-92-6044-TJH, 1993 WL 195368 (9th Cir. Mar. 5, 1993) (per curiam).

As the first judicial statement asserting that the ban is unconstitutional, *Meinhold* is likely to be one of the first challenges to the ban to reach the United States Supreme Court. *Pentagon to Fight a Gay-Bias Ruling*, N.Y. TIMES, Oct. 13, 1993, at A19. On September 30, 1993, one day before President Clinton's "Don't Ask, Don't Tell, Don't Pursue" policy was to take effect, the federal district judge who wrote the majority opinion in *Meinhold* issued an order enjoining enforcement of the ban unless the government could show "proven sexual conduct" that would "interfere with the military mission of the armed forces." *Id.* (quoting order). A three-judge panel of the Ninth Circuit Court of Appeals upheld the order on October 8, denying the government's motion to suspend or vacate the order. *Id.* The Ninth Circuit's decision forced the Department of Defense to suspend investigations and separations of homosexuals and delayed implementation of the revised policy. Bettina Boxall, *U.S. Loses Bid to Stay Ruling on Gays in Military*, L.A. TIMES, Oct. 12, 1993, at A3.

234. *See* Watkins v. United States Army, 875 F.2d 699 (1989) (en banc) (Norris, J., concurring) (labeling homosexuals as a suspect class).

235. *See* Davis, *supra* note 130, at 55-64 (explaining scientific theories about homosexuality). Scientific research continues to pursue a link between heredity and sexual orientation. A 1993 study by geneticists at the National Cancer Institute found, with more than 99% certainty, a particular section of DNA on the X chromosome containing a gene that plays at least some role in determining male sexuality. Robert Pool, *Evidence for Homosexuality Gene*, SCIENCE, July 16, 1993, at 291-92; Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, SCIENCE, July 16, 1993, at 321-27.

bers of the military.[236] In short, President Clinton currently has sole and uncontrovertible authority to lift the ban on homosexuals in the military, if he chooses to do so.[237] Given his reluctance to do so, however, it will be left to the courts to judicially end the ban once and for all.

V. CONCLUSION

The President is the commander in chief of the United States armed forces and the head of the executive branch. These roles give him far-reaching authority to issue regulations concerning the operation of the military and the conduct of its members. The President can promulgate regulations through the use of executive orders, and, though they cannot conflict with a valid statute, they carry the force and effect of law.

The exclusion of homosexuals from military service owes its existence to unsubstantiated fears and stereotypes irrationally associated with sexual orientation. While the military undoubtedly may regulate and proscribe certain conduct, its ban of homosexuals merely because of their status as homosexuals violates the constitutional guarantee of equal protection under the law. Moreover, military leaders are demonstrably aware that homosexuals are capable of serving honorably and with distinction in the United States armed forces.[238] Homosexuals as a class have long suffered from invidious and intentional discrimination; the ban is one more example of this shameful heritage. Because President Clinton failed to take one small step by executive order, the courts must assume the responsi-

236. See *supra* notes 44-58, 225 and accompanying text discussing scope of presidential authority as commander in chief.

237. Although President Clinton vowed during his campaign to lift the ban entirely, the administration presently must defend the "Don't Ask, Don't Tell, Don't Pursue" policy, which it promulgated as a compromise. The administration thus finds itself unexpectedly fighting a court order that forbids all discrimination against homosexuals in the military. *Frank Defends Clinton on Military-Gays Issue*, WASH. TIMES, Oct. 14, 1993, at A10. See *supra* note 233 for further discussion of this court order.

238. *See generally* GAYS IN UNIFORM, *supra* note 142 (containing numerous Department of Defense reports and memoranda questioning the continued validity of the ban against homosexuals in the military).

bility of allowing homosexuals to take a giant leap toward full acceptance in the military and in society.

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