Constitutional Law—"Don't Ask, Don't Tell": Acceptable in an Accepting Society?—*Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008)

The "Don't Ask, Don't Tell" statute (DADT), enacted by Congress in 1993, allows homosexuals into the military if they do not engage in homosexual conduct.[1] Congress created DADT to preserve the morale and unit cohesion standards of the military, but the statute is often scrutinized in light of First Amendment principles.[2] In *Cook v. Gates*,[3] the United States Court of Appeals for the First Circuit considered whether DADT's requirement of separating service members for homosexual admissions violates their First Amendment right to freedom of speech.[4] The majority reasoned that DADT does not violate service members' First Amendment rights because it treats their verbal admissions of homosexuality as evidence of homosexual conduct and does not punish for mere speech.[5] Conversely, Judge Saris reasoned in his dissent that DADT's presumption of homosexual admissions as evidence of conduct is a "dead letter" and "chills" service members' speech.[6]

On December 6, 2004, twelve former United States military members filed suit against the United States, the Secretary of Defense, and the Secretary for Homeland Security in the U.S. District Court for the District of Massachusetts claiming wrongful separation under DADT.[7] More specifically, the plaintiffs alleged that by prohibiting open homosexuality, DADT violated their substantive-due-process rights, denied equal protection based upon sexual orientation, and violated their First Amendment right to speak freely of their sexual orientation.[8] The government moved to dismiss, arguing that the due-process and equal-protection claims fail because Congress's interest in unit cohesion passes rational-basis review.[9] The government also claimed that DADT does not violate the First Amendment because the plaintiffs' speech is

1. *See* 10 U.S.C. § 654 (2006) (detailing requirements of military's policy against homosexuality). This statute effectively bans gays from military service and is commonly referred to as, "Don't Ask, Don't Tell." *See* Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of "Don't Ask, Don't Tell"*, 21 HOFSTRA LAB. & EMP. L.J. 403, 403 (2004) (detailing background of DADT).

2. *See infra* notes 17-20 and accompanying text (comparing First Amendment challenges to DADT with military's justifications); *see also infra* note 25 and accompanying text (illustrating Congress's purpose in enacting DADT).

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

4. *Id.* at 62-65 (analyzing First Amendment issue).

5. *Id.* at 65 (announcing majority holding and reasoning).

6. *Id.* at 69-74 (Saris, J., concurring in part and dissenting in part) (recognizing dead letter and speech chilling arguments).

7. 528 F.3d at 47 (identifying plaintiffs and nature of claim).

8. *Id.* (articulating plaintiffs' claims).

9. *See id.* (pointing to government's contention that only a rational-basis review need be applied).

used only as evidence that a service member committed, or has propensity for, homosexual conduct.[10]

The district court held that all of the plaintiffs' claims failed as a matter of law and dismissed the complaint.[11] The court first determined that rational basis was the appropriate standard of review for constitutional questions in a military setting.[12] Next, it dismissed plaintiffs' due-process and equal-protection claims, reasoning that the military's unit cohesion and disciplinary system passed constitutional muster as rational reasons for enacting the statute.[13] The district court then rejected the plaintiffs' First Amendment claim, reasoning that DADT separates members from the military based only on homosexual conduct and uses verbal admissions of homosexuality merely as evidence to prove a propensity to engage in such conduct.[14] The Court of Appeals for the First Circuit affirmed the district court's judgment.[15]

In 1993, Congress enacted DADT, which mandates separation of a service member who "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts."[16] Service members routinely challenge DADT's constitutionality as a violation of the First Amendment right to free speech.[17] Specifically, members of the armed forces often challenge DADT's

10. *Id.* (furthering government's arguments).

11. 528 F.3d at 48 (noting district court's ruling).

12. *Id.* at 47-48 (setting forth district court's opinion). The plaintiffs contended that the ruling in *Lawrence* applied to military settings and demanded a stronger standard of review. *See* Cook v. Rumsfeld, 429 F. Supp. 2d 385, 393-94 (D. Mass. 2006) (analyzing plaintiffs' claim in district court).

13. Cook v. Rumsfeld, 429 F. Supp. 2d 385, 399 (D. Mass. 2006) (providing district court's reasoning for dismissing plaintiffs' due-process and equal-protection claims). Congress's intent in drafting the statute was to maintain unit cohesion in the military by targeting service members who have engaged, or have a propensity to engage, in homosexual conduct. *See* Kenneth S. Mclaughlin, Jr., Note, *Challenging the Constitutionality of President Clinton's Compromise: A Practical Alternative to the Military's "Don't Ask, Don't Tell" Policy*, 28 J. MARSHALL L. REV. 179, 185-89 (1994) (outlining Congress's intent to maintain order and unit cohesion).

14. Cook v. Rumsfeld, 429 F. Supp. 2d 385, 408 (D. Mass. 2006) (providing district court's reasoning for rejecting First Amendment claim). Military "separation" is another term for military discharge. *See Harvard Law School Lambda Second Annual Gay And Lesbian Legal Advocacy Conference: "Don't Ask, Don't Tell"*, 14 DUKE J. GENDER L. & POL'Y 1173, 1251 (2007) (clarifying "separation" as discharge).

15. 542 F.3d at 65 (affirming district court judgment due to congressional deference).

16. 10 U.S.C. § 654(b)(1) (2006) (providing initiating factors for separation).

17. *See generally* Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997) (denying breach of First Amendment rights where Naval officers discharged after declaring homosexuality); Philips v. Perry, 106 F.3d 1420, 1429-30 (9th Cir. 1997) (presenting plaintiffs' DADT challenge under First Amendment where naval officer separated for announcing homosexuality); Able v. United States, 88 F.3d 1280, 1288 (2d Cir. 1996) (explaining plaintiffs' DADT freedom-of-speech-violation claim); Thomasson v. Perry, 80 F.3d 915, 931 (4th Cir. 1996) (setting forth plaintiffs' First Amendment violation claim where Navy lieutenant separated after declaring homosexuality); *see also* Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel*, 16 WM. & MARY BILL RTS. J. 315, 315 (2007) (noting military regulations restricting free speech not new concept). The First Amendment states, in part, that Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." *See* David S. Cohen, *Justice Kennedy's Gendered World*, 59 S.C. L. REV. 673, 683 n.117 (illustrating Ninth Circuit finding that intermediate scrutiny in *Lawrence* should apply to DADT).

rebuttable presumption that a member who "stated that he or she is a homosexual or bisexual" shall be separated from the military unless that member can demonstrate that "he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."[18] Courts generally find this "statement presumption" constitutional because it is used to evidence homosexual conduct rather than to punish homosexual viewpoint or status.[19] Other courts have upheld DADT's constitutionality based on the government's legitimate purpose for creating it: to target conduct, not speech.[20]

Courts often defer to Congress's judgment in matters involving the military.[21] This is due to the military's separate, quasi-society nature, which warrants deference in order to maintain a heightened level of order.[22] Although

18. 10 U.S.C. § 654(b)(2) (2006) (stating rebuttable presumption); *see also* DEP'T OF DEF., DIRECTIVE NO. 1332.14 § E3.A1.1.8.1.2.2, ENLISTED ADMINISTRATIVE SEPARATIONS (amended 1994) (providing rebuttable presumption portion of DADT). The "rebuttable presumption" of DADT states, "A statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.*

19. *See* Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1135 (9th Cir. 1997) (holding members separated for conduct, not speech); Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir. 1996) (agreeing presumption targets acts and not "mere status or speech"); Thomasson v. Perry, 80 F.3d 915, 930 (4th Cir. 1996) (determining rebuttable propensity presumption rational and permissible as governmental employment policy). Courts have reasoned that courts need not afford First Amendment protection to speech used as evidence of conduct and foundation of a claim. *See* Able v. United States, 88 F.3d 1280, 1283 (2d Cir. 1996) (referring to rebuttable presumption as "statement presumption").

20. *See* Able v. United States, 88 F.3d 1280, 1297 (2d Cir. 1996) (indicating plaintiffs must show act punishes status, not conduct, to challenge constitutionality of DADT). When it is unclear whether an act is content-based or content-neutral, the court will look to the governmental purpose in enacting it. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (discussing government's purpose as controlling consideration in determining content neutrality). The government's purpose for enacting the statement presumption was to target individuals who have engaged in, or have a propensity to engage in, homosexual acts or conduct. *See* DEP'T OF DEF., DIRECTIVE NO. 1332.14 § E2.1.10, ENLISTED ADMINISTRATIVE SEPARATIONS (1993) (stating "propensity . . . indicates a likelihood that a person engages in or will engage in homosexual acts"); *id.* § E3.A1.1.8.1.1 (assuming statement demonstrating propensity for homosexual acts provides grounds for separation).

21. *See* Loving v. United States, 517 U.S. 748, 768 (1996) (stating Congress given high level of deference when addressing military concerns); Weiss v. United States, 510 U.S. 163, 177 (1994) (stating Supreme Court defers to Congress's intent for constitutional questions of military members' rights); Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (noting judicial deference at its peak when deciding issues involving military); Shannon Gilreath, *Sexually Speaking: "Don't Ask, Don't Tell" and the First Amendment After* Lawrence v. Texas, 14 DUKE J. GENDER L. & POL'Y 953, 963 (2007) (highlighting courts' deference to military decision makers); Daniel Ryan Koslosky, *Sexual Identity as Personhood: Towards an Expressive Liberty in the Military Context*, 84 N.D. L. REV. 175, 179 (2008) (discussing courts' reluctance to interfere in military affairs); Reuter, *supra* note 17, at 330 (noting courts' deference to military affairs dates back to Vietnam War).

22. *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (indicating deference more appropriate in constitutional review of military laws rather than civilian society laws); Brown v. Glines, 444 U.S. 348, 354-55 (1980) (affording deference to regulation preventing soldiers from circulating petitions on Air Force bases); *see also* Reuter, *supra* note 17, at 331 (suggesting deference more viable in military context, but First Amendment rights must still be honored).

this deference predominates in most military matters, it is not absolute.[23] Courts must still apply *at least* a rational-basis analysis to legislation when First Amendment questions are raised, even in a military context.[24] In most cases, courts determine that the military's mission to maintain readiness, unit cohesion, and general morale constitutes a legitimate governmental interest that trumps an individual's First Amendment rights.[25]

Despite courts' overall reluctance to strike down military legislation, military service members and scholars continue to challenge DADT on First Amendment grounds.[26] Service members argue that the rebuttable presumption is a "dead letter" because it is difficult to disprove their homosexuality after making a homosexual admission.[27] Additionally, one legal scholar asserts that

23. *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (noting military members still allowed some level of First Amendment protection); Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (acknowledging deference requirement not abdication); Brown v. Glines, 444 U.S. 348, 355 (1980) (implying deference is not absolute); *see also* Reuter, *supra* note 17, at 317 (noting deference does not create unlimited power in military to violate First Amendment).

24. *See* Steffan v. Perry, 41 F.3d 677, 718-19 (D.C. Cir. 1994) (applying rational-basis review in military context). "Under rationality review the regulations pass constitutional muster if any rational basis can justify his discharge." *Id.* at 712. The Supreme Court's extension of the constitutional right to privacy to private homosexual acts sparked a debate regarding whether this protection extends to the military context. *See* Gilreath, *supra* note 21, at 966-67 (demonstrating confusion regarding level of scrutiny post-*Lawrence*). Some commentators believe that the level of review should expand beyond simple rational basis. *See id.* (suggesting strict-scrutiny review for military policies). Under strict-scrutiny review, "[r]egulation of expression may be upheld when the regulation is sufficiently divorced from the communicative content of the expression or expressive conduct." *Id.* at 967.

25. *See* Steffan v. Perry, 41 F.3d 677, 718-19 (D.C. Cir. 1994) (discussing overriding military interests in order, morale, and recruitment); Chad C. Carter & Anthony Barone Kolenc, *"Don't Ask, Don't Tell:" Has the Policy Met its Goals?*, 31 U. DAYTON L. REV. 1, 4-5 (2005) (noting military's purpose of good morale, strong order, heightened discipline, and unit cohesion); Koslosky, *supra* note 21, at 186-87 (outlining prevailing military interests in First Amendment cases); *see also* Christina Gleason, *Law and Politics Theory and Judicial Interpretation of Legislative Intent: Looking at Deference Through a Critical Lens in* Able v. United States, 21 WOMEN'S RTS. L. REP. 1, 11 (1999) (summarizing debate regarding First Amendment and military's code of conduct).

26. *See, e.g.*, Able v. United States, 88 F.3d 1280, 1300 (2d Cir. 1996) (holding DADT constitutional); Thomasson v. Perry, 80 F.3d 915, 934 (4th Cir. 1996) (determining DADT not violative of First Amendment); Reuter, *supra* note 17, at 317 (arguing military should protect members' First Amendment rights).

27. *See generally* Thomasson v. Perry 80 F.3d 915, 930 (4th Cir. 1996) (describing statement presumption as placing burden of proof on military officer). In order to rebut the presumption, a service member must demonstrate that his or definition of "homosexual" differs from the military's definition. *Id.* at 942 n.8. *Compare* 10 U.S.C. § 654(f)(1) (2006) (defining "homosexuality" as "propensity to engage in" homosexual activity), *with* DEP'T OF DEF., DIRECTIVE NO. 1332.14 § E2.1.10, ENLISTED ADMINISTRATIVE SEPARATIONS (amended 1994) (defining "propensity" to mean "likelihood that a person engages in or will engage in homosexual acts"). On rare occasions, however, the plaintiff has successfully rebutted the presumption. *See* Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997) (pointing to two examples in which admission successfully rebutted); Able v. United States, 88 F.3d 1280, 1298 (2d Cir. 1996) (reporting to date, seven out of forty-three service members successfully rebutted admission of homosexuality). Although the military also provides members with an administrative review to determine whether his or her separation was in error, such a review has not been sufficient to relieve DADT of First Amendment attacks. *See* Califano v. Sanders, 430 U.S. 99, 109 (1977) (determining administrative hearing procedures unsuited to resolve constitutional issues).

DADT is overbroad because it condemns speech made both on and *off* duty, which intrudes into civilian life.[28] Many scholars also contend that one of the main purposes of DADT, to maintain military readiness, is outdated in modern society.[29] These critics further assert that the "statement presumption" *adversely* affects military readiness and unit cohesion and call for an evaluation of DADT in light of its self-inflicting damage.[30] Some scholars argue for overturning the statute because of its adverse effects on unit cohesion and morale, and based on society's increasing acceptance of homosexuality.[31]

In *Cook v. Gates*, the First Circuit considered the constitutionality of DADT against the due-process and equal-protection challenges brought by separated military service members.[32] Analyzing the members' substantive-due-process claims, the court first determined that *Lawrence v. Texas*[33] establishes a protected liberty interest for adults engaging in private, consensual sexual conduct.[34] The court reasoned that *Lawrence* triggers intermediate scrutiny and

28. *See* Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633, 1644-50 (2004) (explaining application of DADT's statement presumption to private conversations with family, friends, chaplains, psychotherapists).

29. *See* Robert I. Correales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 475-76 (2008) (concluding fears and prejudices regarding homosexuality irrational); Gilreath, *supra* note 21, at 972-79 (describing false logic linking DADT with increased unit morale and cohesion); Pamela Lundquist, Note, *Essential to the National Security: An Executive Ban on "Don't Ask, Don't Tell"*, 16 AM. U. J. GENDER SOC. POL'Y & L. 115, 129-31 (2007) (arguing overturning DADT justified by increased need for military recruits and increasing acceptance of homosexuals). Scholars also note that the United States has failed to follow foreign allies in allowing freedom of expression for homosexuals. *See* Gilreath, *supra* note 21, at 974 (noting nation's allies desegregated homosexual and heterosexual service members); Scott Morris, Note, *Europe Enters New Millennium with Gays in the Military While the United States Drowns in Don't Ask, Don't Tell: Twin Decisions by the European Court of Human Rights*, 9 AM. U. J. GENDER SOC. POL'Y & L. 423, 430 (2001) (suggesting United States lags behind Europe regarding rights of openly gay service members).

30. *See* Correales, *supra* note 29, at 475-76 (noting military leaders increasingly recognize DADT unnecessarily wastes human resources by forcibly discharging homosexuals); Gilreath, *supra* note 21, at 974-75 (arguing decrease in soldiers' morale due to speech suppression negatively affects military readiness); John H.R. Lanou, *Restricted Expression and Immunosuppression: How "Don't Ask, Don't Tell" May Harm Military Readiness by Increasing the Risk of Cancer and Infectious Disease in Homosexuals*, 10 GEO. MASON L. REV. 1, 7-22 (asserting DADT harms military readiness as evidenced by link between disease and thought suppression); Pamela Lundquist, Note, *Essential to the National Security: An Executive Ban on "Don't Ask, Don't Tell"*, 16 AM. U. J. GENDER SOC. POL'Y & L. 115, 129-31 (2007) (arguing revocation of DADT necessary to preserve national security). Critics also suggested requiring homosexual military members to remain silent about sexual identity results in compelled affirmation, and punishing such affirmations violates the First Amendment. *See* Koslosky, *supra* note 21, at 197-99 (2008) (suggesting silence in military may equate to speech and compelled affirmation); *see also* Anna Stolley Persky, *Don't Ask, Don't Tell: Don't Work?: Courts and Congress Raise New Challenges to Policy on Gays in the Military*, 94 A.B.A. J. 18, 18 (2008) (providing statistics regarding number of military members separated under DADT). To date, more than 12,000 service personnel have been discharged under DADT. *Id. But see* Carter & Kolenc, *supra* note 25, at 11-12 (asserting DADT has met policy goals).

31. *See* Stolley Persky, *supra* note 30, at 18 (arguing courts should consider overruling DADT); *supra* note 30 and accompanying text (providing arguments against DADT).

32. *See id.* at 47 (setting forth issues under consideration).

33. 539 U.S. 558 (2003).

34. *See* 528 F.3d at 48-53 (reading *Lawrence* as recognizing protected liberty interest in private, consensual sexual intimacy); *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating statute

the plaintiffs' "as applied" challenge was not without merit.[35] The court, however, determined DADT did not violate the service members' substantive-due-process rights by taking a deferential approach to Congress's intent in maintaining good order and morale.[36] Following similar reasoning, the court again deferred to DADT's legislative intent and held it did not violate the members' equal-protection rights.[37]

The majority subsequently affirmed the district court's holding that DADT does not violate a service member's First Amendment right to free speech.[38] The majority reasoned that the military does not punish a member simply because of the speech, but because the speech evidences a propensity to engage in homosexual activity.[39] Additionally, the majority asserted that the statement presumption, although difficult to overcome, allows a member to prove that his or her definition of "homosexuality" differs from the statute's definition and that the member does not have a propensity to engage in homosexual activity.[40] The majority then noted that DADT does not chill free speech because it is content-neutral, thus only targeting conduct, not speech.[41] In dissent, Judge Saris explained that DADT renders it nearly impossible for a military member to show a lack of homosexual propensity after making a statement regarding sexual orientation.[42] He also argued that DADT unconstitutionally chills speech both publicly and privately, even when the member does not have a propensity to engage in homosexual activity.[43]

Both the majority and the dissent accurately acknowledged that the court should respect Congress's intent to defer to military decision making.[44] The military's need for strong morale and unit cohesion makes such deference necessary to ensure units can operate under strict standards without fear of court action.[45] Under this approach, the court properly allowed the military to

criminalizing private, homosexual conduct between adults).

35. 528 F.3d at 56 (reasoning *Lawrence* used mid-level-scrutiny review); *id.* at 56-58 (noting difficult question of as-applied challenge and limits of constitutional review in military context).

36. *See id.* at 60 (holding DADT does not violate substantive due process).

37. *See id.* at 60-62 (holding members' equal-protection rights not violated by DADT).

38. *See id.* at 62-65 (dismissing various arguments DADT violated First Amendment right of free speech).

39. *See* 528 F.3d at 63 (reasoning speech used as evidence of homosexual conduct).

40. *Id.* at 64-65 (emphasizing DADT allows member opportunity to rebut and overturn separation).

41. *Id.* at 65 (rejecting claim DADT chills speech). If the court determined DADT is content-based, as opposed to content-neutral, the court would need to apply a strict-scrutiny standard of review. *See id.* at 66-67 (Saris, J., concurring in part and dissenting in part).

42. *Id.* at 71 (Saris, J., concurring in part and dissenting in part) (contending outdated and cherry-picked cases relied upon to prove statement was rebuttable). Judge Saris also noted that the availability of administrative review is not sufficient to answer constitutional questions. *Id.*

43. *See* 528 F.3d at 73-74 (Saris, J., concurring in part and dissenting in part) (reasoning deference should only exist for military speech in military setting).

44. *See supra* note 22 and accompanying text (providing history of judicial deference in military context).

45. *See supra* note 22 and accompanying text (describing military need for morale, order, and unit cohesion).

investigate and separate members who engage in homosexual conduct.[46] The First Amendment protects certain speech, not conduct, and DADT's purpose in targeting certain actions, or propensity to engage in such actions, does not violate free speech.[47]

The majority appropriately rejected the "dead letter" and "speech chilling" arguments that the dissent supported.[48] The government's examples of successful statement rebuttals and the member's option of administrative review sufficiently illustrate that DADT is not "dead letter."[49] Although difficult to prove, military members have a real opportunity to rebut statements regarding homosexuality and to overturn their separation.[50] Furthermore, the chilling of private and public speech does not violate the First Amendment right to free speech when it merely evidences conduct.[51]

The court, however, failed to evaluate DADT in light of modern society's evolving viewpoints and to analyze DADT's failure to fulfill its intended purpose.[52] Homosexuality is widely accepted in the United States and throughout the world; therefore, restricting speech based upon such conduct directly contradicts public policy.[53] Although the military does not ban homosexuals, restraining those already enlisted from speaking about sexual orientation could actually decay the morale of those individuals.[54] Promoting such low morale among service members harms entire units, thus adversely affecting the need for unit cohesion and high morale.[55] It is imperative to maintain military cohesion in consideration of the current state of war and terrorist threats in the United States and across the globe.[56] Rather than removing 12,000 service members because of sexual orientation, the courts should do their part in the United States's quest to increase active military

46. *See supra* note 21 and accompanying text (demonstrating Congress's intent behind legislation targets conduct, not speech).

47. *See supra* notes 21, 22 and accompanying text (arguing DADT targets conduct and propensity to engage in conduct); *see also supra* note 17 (setting forth language of First Amendment).

48. *See supra* notes 41-44 and accompanying text (highlighting majority opinion and dissenting argument).

49. *See supra* note 41 and accompanying text (arguing DADT dead letter).

50. *See* Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997) (providing examples of successful statement rebuttals); Able v. United States, 88 F.3d 1280, 1298 (2d Cir. 1996) (reporting seven of forty-three service members successful rebutted homosexuality admission).

51. *See* Thomasson v. Perry, 80 F.3d 915, 932-33 (4th Cir. 1996) (noting content-neutral restrictions chilling speech not unconstitutional).

52. *See supra* notes 30-31 and accompanying text (outlining arguments against DADT in modern society).

53. *See supra* note 31 and accompanying text (demonstrating DADT's ban on homosexual speech inconsistent with modern world views).

54. *See supra* note 30 and accompanying text (providing evidence of forced silence decreasing homosexual military members' morale).

55. *See supra* note 30 and accompanying text (outlining DADT's negative effects on unit cohesion and morale).

56. *See* Perksy, *supra* note 31, at 18 (providing statistics of military members separated under DADT); *see also supra* note 30 and accompanying text (highlighting current heightened need for unit cohesion).

membership by overturning DADT.[57]

In *Cook v. Gates*, the First Circuit considered whether DADT violated military members' First Amendment right to free speech. The majority accurately concluded that DADT targets conduct, rather than speech, and thereby complies with the First Amendment. The court erred, however, in not overturning the statute, on public-policy grounds, in light of modern society's views of homosexuality and the adverse effects DADT has on its intended purpose of unit cohesion and high morale.

Brett E. Heyman

57. *See supra* note 30 and accompanying text (noting United States's current need for military members).