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I. INTRODUCTION

In 2010 there were approximately 200,000 women working in our armed forces,[1] comprising around fourteen percent of the total number of active service members in the United States military.[2] The number of women serving has increased dramatically over the past fifty years,[3] and female soldiers are facing greater responsibilities[4] and more serious risks than ever before.[5] Since the September 11 terrorist attacks, at least 125 women deployed to Afghanistan, Iraq, and Kuwait have died fighting in the War on Terror[6] and another 650 have been wounded.[7] With increasing numbers of women risking their lives in service to America,[8] one might expect that accommodations for women in the military would be an important priority, and that policies disproportionately damaging female military careers would be of significant concern. However, the continued enforcement of decade-old laws, such as the ban on abortions in military facilities and the discharge of openly gay service members from military ranks, demonstrates a frightening disregard for service members'

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1. Heather D. Boonstra, *Off Base: The U.S. Military's Ban on Privately Funded Abortions,* 13 GUTTMACHER POL'Y REV. 2, 2 (2010).

2. *Statistics on Women in the Military*, WOMEN'S MEMORIAL, http://www.womensmemorial.org/PDFs/StatsonWIM.pdf (last updated Feb. 18, 2011).

3. Sandra Bookman, *Range of New Issues Facing Military Women*, ABC LOCAL (Feb. 3, 2010), http://abclocal.go.com/wabc/story?section=news/local&id=7252968.

4. *Id.*

5. *Grim Toll of Military Women Killed in War*, CENTER FOR MILITARY READINESS (Aug. 11, 2008, 2:55 p.m.), http://www.cmrlink.org/WomenInCombat.asp?docID=335.

6. *Id.*

7. Bookman, *supra* note 3.

8. *Id.*

fundamental civil rights and poses a particular threat to the safety and effectiveness of female military personnel.

While both the abortion ban and the Don't Ask Don't Tell ("DADT") policy ignited much controversy and dispute since their inception in the late twentieth century and consistently polarize politicians along party lines, for the 111th Congress, these issues have particularly generated contentious debate.[9] In contrast to DADT, which was successfully repealed by stand alone legislation passed by Congress in the final hour of the 2010 term,[10] the efforts to repeal the abortion ban during this same term did not prove successful.[11] This Note compares and contrasts the substantive details and the legislative history of each of these policies, and the disparate impact that both policies have had on female military careers.

The judicial branch is often hesitant to interfere in military matters and has consistently exhibited deference to the Armed Forces, even when individuals' fundamental rights are at stake.[12] Given the increasing political strength of the pro-life movement and the recent political shift in Congress toward a Republican House majority, however, the courts are becoming an increasingly preferable avenue for opponents who wish to challenge the abortion ban.[13] The judicial system is more insulated from the pressures of political shifts in power than the legislature.[14] Thus, the judiciary can offer greater assurance to proponents seeking to challenge the legal sufficiency of military policies because if those policies are held unconstitutional by the Court, they will not be quickly reinstated when a new party comes to power.[15] This Note contends that the arguments raised in the legal challenge of DADT in *Log Cabin Republicans v. United States*[16] can be employed to challenge the constitutionality of the abortion

9. Peter J. Smith, *Repeal of Military Abortion Ban, 'Don't Ask' Postponed While Reid Gets Votes*, LIFESITENEWS.COM (Dec. 9, 2010, 2:59 p.m.), http://www.lifesitenews.com/news/repeal-of-military-abortion-ban-dont-ask-postponed-while-reid-get-votes/.

10. Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES Dec. 19, 2010, at A1, http://www.nytimes.com/2010/12/19/us/politics/19cong.html.

11. Peter J. Smith, *Victory: Senate Strips Provision Allowing Abortion on Military Bases from Defense Bill*, LIFESITENEWS.COM (Dec. 22, 2010, 5:40 p.m.), http://www.lifesitenews.com/news/victory-senate-strips-provision-allowing-abortion-on-military-bases-from-de/.

12. *See* Greer v. Spock, 424 U.S. 828, 840 (1976).

13. *See* Smith, *supra* note 9.

14. *See* Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 787–88 (1999) ("The more insulated position of the judiciary is preferable to that of the legislature . . . The judicial function is less susceptible to political pressures than the legislature.").

15. Daniel Villareal, *Ninth Circuit Welcomes Future Anti-Gay Laws by Throwing Log Cabin and DADT Case*, QUEERTY (Sept. 29, 2011), http://www.queerty.com/ninth-circuit-declares-log-cabin-case-against-dadt-moot-leaving-door-open-to-future-anti-gay-laws 20110929/.

16. Log Cabin Republicans v. U.S., 716 F. Supp. 2d 884, 923 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011), *and reh'g denied*, Log Cabin Republicans v. U. S., No. 10-56634 (9th Cir. Nov. 9, 2011), http://www.ca9.uscourts.gov/datastore/general/2011/11/09/10-56634_order_denying.pdf. On September 29, 2011, the Ninth Circuit Court of

ban at military hospitals by examining the actual effects such policies have on unit cohesion and military readiness. The legal arguments made in *Log Cabin Republicans*, coupled with compelling testimony from service members who shed light on the deleterious effects of such policies, successfully persuaded the district court that the military may be entitled to less deference than has been traditionally given. Going forward, other courts may also be reluctant to defer to military policies if presented with similar evidence.

II. HISTORICAL CONTEXT FOR RESTRICTING ABORTIONS IN THE MILITARY

Beginning in 1966, military hospitals were no longer subject to the same laws as civilian hospitals.[17] As a result, in 1970, three years before abortion was legalized in the United States under *Roe v. Wade*,[18] the Department of Defense ("DOD") adopted a policy allowing military hospitals to provide therapeutic abortions regardless of the laws of the states where the hospitals were located.[19] At this time, thirty states and the District of Columbia prohibited abortion except when the mother's life was in danger.[20] Memoranda issued to the Surgeon General commanded that abortions could be performed in military facilities "when medically indicated or for reasons involving mental health and subject to the availability of space and facilities and the capabilities of the medical staff."[21] President Nixon overturned this policy in 1971, citing his own moral beliefs on abortion and ordering that the laws of the states where the bases were located determine the policy on abortions at military bases.[22] Once *Roe* legalized abortion in 1975, however, the DOD insisted that the military provide abortions in accordance with the principles of *Roe v. Wade*.[23] Thus, taxpayer-financed abortions became common in American military hospitals. Between 1976 and 1977 there were around 26,000

Appeals held that, due to the Congressional repeal of DADT, the case was moot and declined to grant declaratory relief. *Log Cabin Republicans*, 658 F.3d 1162, 1167. On November 9, 2011, the Ninth Circuit denied Log Cabin's petition to rehear the case en banc. *Log Cabin Republicans*, No. 10-56634 (9th Cir. Nov. 9, 2011). Log Cabin Republicans has decided not to appeal the case to the United States Supreme Court. Bob Egelko, *U.S. Court Ends Legal Challenge to "Don't Ask" Law*, S.F. CHRON., Nov. 10, 2011, at C5, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/11/09/BA8M1LSO0A.DTL &type=gaylesbian.

17. Kara Dixon Vuic, *I'm Afraid We're Going to Have to Just Change Our Ways: Marriage, Motherhood, and Pregnancy in the Army Nurse Corps During Vietnam War*, 32 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 997, 1014 (2007).

18. Roe v. Wade, 410 U.S. 113 (1973).

19. Elisabeth Bumiller, *Sex Assault Reports Rise in Military*, N.Y. TIMES, March 17, 2010, at A14, *available at* http://www.nytimes.com/2010/03/17/us/17assault.html.

20. Boonstra, *supra* note 1.

21. *Id.*

22. *Id.* at 3.

23. *Id.*

abortions performed in military facilities for United States service women and military dependents.[24]

At the same time that barriers were coming down for women in the military, a national debate ignited regarding public funding for abortions.[25] Congress passed the Hyde Amendment in 1976, which excluded abortion from comprehensive health care services provided to low-income individuals through Medicaid.[26] In *Harris v. McRae*,[27] the Supreme Court upheld the validity of the Hyde Amendment, establishing that neither Congress nor the states had a duty to pay for abortions for women on welfare, except when the mother's life was in danger or in cases of rape or incest.[28] Following the trend that the government had no affirmative duty to provide access to abortions, the 1979 Defense Appropriations Bill curtailed taxpayer-funded abortions in military hospitals.[29] The bill forbade the use of federal funds to perform such procedures unless the pregnancy fell into one of the exceptions established in *McRae* and was the result of rape, incest, or posed a threat to a woman's health.[30] Congress renewed the tax-funding restrictions every year until 1984, when the DOD Authorization Act for the 1985 fiscal year was adopted, essentially making the ban on abortions more durable.[31] As a result, no military funds could be allocated for abortion procedures absent the narrow exclusion of life endangerment of the mother.[32]

Despite the restriction on the use of federal funds, women could still obtain therapeutic abortions in military hospitals if they paid for the procedure with their own money.[33] Especially for women stationed abroad where safe abortion services were not accessible, service women and military dependents were allowed to prepay for an abortion in the military facilities using their own funds.[34] According to a 2002 Congressional Research Service report on abortion services at military facilities, doctors

24. Boonstra, *supra* note 1, at 3.

25. Women's Research & Educ. Inst., *Chronology of Significant Legal and Policy Changes Affecting Women in the Military: 1947-2003*, WREI, http://www.wrei.org/Women%20in%20the%20Military/Women%20in%20the%20Military%20Chronology%20of%20Legal%20Policy.pdf (last visited Sept. 11, 2011).

26. *Public Funding for Abortion*, ACLU (July 21, 2004), http://www.aclu.org/print/reproductive-freedom/public-funding-abortion.

27. Harris v. McRae, 448 U.S. 297 (1980).

28. Rylance Mecca, *Injustices of the Court Rule Hyde Constitutional*, OFF OUR BACKS, Sept. 30, 1980, at 2, 2.

29. Department of Defense Appropriation Act of 1979, Pub. L. No. 95-457, § 863, 92 Stat. 1231, 1254 (1978); Amy E. Crawford, *Under Siege: Freedom of Choice and the Statutory Ban on Abortions on Military Bases*, 71 U. CHI. L. REV. 1549, 1553 (2004).

30. *Id.*

31. Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, 98 Stat. 2492.

32. *Id.*

33. Kathryn L. Ponder & Melissa Nothnagle, *Damage Control: Unintended Pregnancy in the United States Military*, 38 J. L. MED. & ETHICS 386, 390. (2010).

34. Boonstra, *supra* note 1, at 3.

overseas performed approximately 1,300 privately funded abortions on base in 1979.[35]

The opportunity to access abortion services on base if paid with private funds, however, was halted in 1988, when the DOD issued an internal administrative order that banned all abortions in military facilities, regardless of the source of funding.[36] President Clinton attempted to reverse the policy in 1993 by executive order, demanding that women in the military be given the same rights as other women in the United States if practically feasible and in accordance with the laws of the host country.[37] When Republicans became the Congressional majority in 1995, however, they reinstated the abortion ban.[38] In 2002 the Senate approved an amendment to the 2003 Defense Authorization Bill, which aimed to reduce restrictions on abortion access at overseas military bases,[39] but the House of Representatives ultimately rejected it.[40]

Today, under Title 10 of the United States Code section 1093(a), DOD funds may not be used to perform abortions except when the life of the mother is at risk.[41] Subsection (b) further restricts the use of all DOD facilities for the purpose of performing abortions except to protect the life of the mother or when the pregnancy is the result of rape or incest.[42] Although there have been numerous attempts to amend this section since the 1990s, and despite an increasing number of women serving in the military, advocates have not garnered enough support to overturn the ban. As a result, women service members are denied reproductive health rights that are available to their civilian counterparts, creating serious implications for both a servicewoman's health and for her professional career.

III. HISTORICAL CONTEXT OF THE DON'T ASK DON'T TELL POLICY

Homosexuality has historically not been allowed in the military.[43] Starting in World War II, commanding officers were given discretion in

35. Boonstra, *supra* note 1, at 3.

36. Memorandum on Privately Funded Abortions at Military Hospitals, 58 Fed. Reg. 6439 (Jan. 22, 1993).

37. Memorandum on Privately Funded Abortions at Military Hospitals, 58 Fed. Reg. 6439; *see* Boonstra, *supra* note 1, at 3.

38. National Defense Authorization Act of 1996, Pub. L. No. 104-106, § 738, 110 Stat. 186, 384 (1996); *see* Ponder, *supra* note 33, at 390.

39. S. 2514, 107th Cong. §709 (2002) (struck subsection (b) from the statute, which disallowed the use of DOD medical facilites from abortions).

40. Crawford, *supra* note 29, at 1554.

41. 10 U.S.C. § 1093(a) (1985).

42. *Id.* at § 1093(b).

43. DAVID F. BURRELLI & JODY FEDER, CONG. RESEARCH SERV., RL 30113, HOMOSEXUALS AND THE U.S. MILITARY: CURRENT ISSUES 1 (2009).

dealing with gay personnel.[44] Sodomy violated the Articles of War and individuals caught in homosexual acts could face trial, dishonorable discharge, and even confinement.[45] Generally, those who exhibited homosexual tendencies or who confided in others regarding those tendencies could either resign or be separated with an honorable, general, or less-than-honorable discharge.[46] On October 11, 1949, the DOD issued a memorandum attempting to unify military policy toward homosexual behavior, emphasizing the security risks that lesbians and gay men posed and indentified gays as unsuitable for military service.[47] Actual policies forbidding homosexuality were later put into place during the Carter Administration.[48]

Much like the abortion ban that President Bill Clinton attempted to lift when he took office in 1993, Clinton also vowed to repeal the ban on gays serving in the military.[49] During his first term in the White House, Clinton and his staff deliberated over five different versions of anti-gay policy, including the DOD regulations passed on from the Reagan administration.[50] The old DOD policy centered on a person's status, allowing officials to not only focuses on an individual's conduct, but also to encourage discovery into what an individual intended or desired.[51] The policy forbade the enlistment of "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts."[52] The Clinton Administration articulated its intention to shift concentration away from an individual's status and instead to focus on his or her conduct, emphasizing not "what they are, but what they do."[53]

In response to the impassioned debate that ensued between policymakers surrounding this issue and the warning from Congress that they could propose a bill that would codify current anti-gay policy and overturn any executive order,[54] in 1993 Clinton implemented what was intended to be a short-term compromise.[55] The interim compromise offered the DOD the opportunity to reexamine the issue and draft an executive order that would end discrimination on the basis of sexual

44. Timothy Haggerty, *History Repeating Itself: A Historical Overview of Gay Men and Lesbians in the Military Before "Don't Ask, Don't Tell," in* DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY 9, 18 (Aaron Belkin & Geoffrey Bateman eds., 2003).

45. *Id.*

46. *Id.*

47. *Id.* at 20.

48. BURRELLI & FEDER, *supra* note 43 at 1.

49. *Id.*

50. JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 19 (1999).

51. *Id.* at 27.

52. *Id.*

53. *Id.*

54. *Id.* at 21–22.

55. BURRELLI & FEDER, *supra* note 43 at 1.

orientation.[56] In addition, the interim order also gave Congress more time to consider the legislation and hold necessary hearings.[57] Meanwhile, questions regarding sexual orientation were removed from the enlistment application and Congress agreed not to enact legislation barring gays from service until the appropriate completion of congressional review.[58]

What began as an interim compromise led to a muddled policy that the Clinton administration defended as an attempt to balance the concerns of Congress and the military, while also minimizing discrimination against gays.[59] On November 30, 1993, the Fiscal Year (FY) 1994 National Defense Authorization Act was signed into law and section 571 codified the notorious DADT policy.[60] The law describes homosexuality in the military as an "unacceptable risk . . .to morale, good order, and discipline."[61] The law further qualified the grounds for discharge as follows: (1) the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts; (2) the member states that he or she is a homosexual or bisexual; or (3) the member has married or attempted to marry someone of the same sex.[62] The law stated that the DOD would explain the law to new recruits and continue to clarify the disqualifying provisions with members on a regular basis.[63] Although questions regarding new recruits' sexuality were halted in January of 1993, this law allowed for such questioning to resume but on a purely discretionary basis.[64] Thus, in practice the law mirrored what many termed a "discretionary don't ask, definitely don't tell policy."[65]

Substantial confusion for implementing the codified section ensued when on December 22, 1993, then Secretary of Defense Aspin released new DOD regulations explaining the policy on how to execute the regulations.[66] The policy recognized that sexual orientation is an extremely personal and private matter, and clarified that homosexual orientation alone does not hinder service entry or continued service unless there is also some sort of manifested homosexual conduct.[67] This policy was further clarified in 1994 when certain senators recommended the removal from DOD regulations the phrase "homosexual orientation . . . is not a bar to military service"[68] and was replaced by a "person's sexual orientation . . . is not a

56. BURRELLI & FEDER, *supra* note 43, at 1.
57. *Id.*
58. *Id.*
59. *Id.* at 3.
60. 10 U.S.C. § 654 (1993) (repealed 2010).
61. *Id.* at § 654(a)(15).
62. *Id.* at § 654(b)(1-3).
63. BURRELLI & FEDER, *supra* note 43, at 3.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

bar to [military] service [. . .]"[69] The ambiguity of the term orientation, however, made it unclear exactly what was acceptable and what was forbidden.[70] While orientation was originally equated with "a sexual attraction," it was later defined as "an abstract sexual preference for persons of a particular sex"[71] and in some circumstances orientation was limited to "overt sexual behavior."[72]

Although the new law was supposed to focus on a person's conduct and not a person's status, the language of the statute and Aspin's policy regulations explicitly allowed discharge of a service member who stated that he or she was a homosexual or bisexual.[73] According to the policy, such an admission of one's homosexual status led to a rebuttable presumption that the member engaged in homosexual acts or was likely to do so in the future.[74] Although the individual may rebut the presumption by proving that he or she does not engage in such forbidden conduct or lacks the propensity and intent to do so, this rebuttable presumption revealed a dangerously blurry and perhaps nonexistent line when distinguishing status from conduct.

In August 1995, the DOD Office of the General Counsel released a memo that gave this rebuttable presumption more weight. It clarified that the burden could not be avoided merely by asserting that one's statement of homosexuality was intended to convey only a message about orientation and not about propensity or intent to engage in homosexual conduct.[75] Instead, after such a statement has been conveyed, the memo clarified, the individual bears the burden of proof that he or she "does not attempt, have a propensity, or intend to engage in homosexual acts."[76] Ultimately, Clinton's promise to amend the DOD regulations so that a person was held responsible only for her or his actions and not who she or he was fell short, and closely resembled the regulations in the previous policy.[77] Up until the policy was repealed in September 2011, gays and lesbians in the military could continue to face discharge solely because of their sexual orientation.[78]

69. BURRELLI & FEDER, *supra* note 43, at 4.
70. *Id.* at 5.
71. *Id.* at 4.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 5.
77. Geoffrey W. Bateman & Claude J. Summers, *Don't Ask, Don't Tell*, GLTBQ, http://www.glbtq.com/social-sciences/dont_ask.html (last visited July 2, 2011).
78. *Id.*

IV. DISPARATE IMPACT OF THE ABORTION BAN AND DON'T ASK DON'T TELL POLICY ON FEMALE SERVICE MEMBERS

Although both the abortion ban and DADT have serious implications for the overall efficacy of United States military operations, what is even more readily apparent is the disparate impact these policies have had on women enlisted in the Armed Forces. Adequate health care for military personnel is crucial to ensuring troop survival, recovery, and rehabilitation.[79] While the military's bountiful lifetime health insurance program, Tricare, appears to reflect the government's acknowledgment of this priority,[80] many of the shortcomings of Tricare's coverage are exposed when applied to women's health care needs. As one study reported, women in the military as a group utilize health care services twice as often, but are generally less satisfied than their male counterparts.[81] One of the most blatant gaps in coverage, bore solely by female personnel, is Tricare's failure to cover abortions, except for when the life of the mother is at risk.[82] Tricare's abortion exclusion extends beyond simply refusing to cover the procedure itself, but also denies counseling, referral, preparation, and follow-up services related to a non-covered abortion.[83] Even abortions procured as a result of fetal abnormality or for psychological reasons are exempt from coverage.[84] Beyond the failure to pay for abortion services, the military further demonstrates its lack of concern for a woman's ability to control her reproductive health by refusing access to any of its medical facilities for the purpose of obtaining this medical procedure, even when the woman agrees to privately fund the cost. As a result, in 2005, it was estimated that around 100,000 women and dependents stationed overseas were affected by harsh regulations limiting access to abortions.[85] Not only did these women have to jump through hoops in order to acquire access to the procedure, they were also unable to procure even basic information regarding their options.[86]

79. Karen Parrish, *Military Health Care More Than Just Caring for Troops,* FTLEAVENWORTHLAMP.COM (Jan. 27, 2001, 12:16 p.m.), http://www.ftleavenworthlamp.com/news/around_the_force/x286168578/Military-health-care-more-than-just-caring-for-troops.

80. Elisabeth Bumiller & Thom Shanker, *Gates Seeking to Contain Military Health Costs*, N.Y. TIMES, Nov. 29, 2010, at A1, *available at* http://www.nytimes.com/2010/11/29/us/29tricare.html.

81. *Operational Obstetrics and Gynecology*, OPERATIONAL MED., http://www.operationalmedicine.org/Powerpoint/Lectures/OperationalOBGYN.htm (last visited March 3, 2011).

82. *Covered Services*, TRICARE, http://tricare.mil/mybenefit/jsp/Medical/IsItCovered.do?kw=Abortions&x=18&y=5 (last visited March 3, 2011).

83. *Id.*

84. *Id.*

85. Leah Ginsberg, Comment, *Do Prisoners Get a Better Deal? Comparing the Abortion Rights and Access of Military Women Stationed Abroad to those of Women in Prison*, 11 CARDOZO WOMEN'S L.J. 385, 388 (2005).

86. *Id.* at 399–400.

In addition to the deleterious health risks to women who must seek later term abortions at off-base and often sub standard facilities, the abortion ban also results in serious consequences for many service women's careers. Whether a woman decides to return to the U.S. or seeks an abortion in the host country or another country nearby, all trips off base require approval from the individual's commanding officer.[87] Some officers will demand a justification for why an individual seeks the leave, which could result in a woman being forced to divulge her private information to a nonsympathetic officer.[88] The American Civil Liberties Union ("ACLU") has received reports about commanding officers that hold such strong anti-abortion sentiments that they actively attempt to interfere with women taking leave in order to obtain the procedure.[89]

Not only might individual commanding officers be morally opposed to abortion and look down on a servicewoman who attempts to procure one, but knowledge that a servicewoman is pregnant could also generate or result in bias or prejudice against the woman as irresponsible or neglectful of her duty.[90] This could substantially diminish the servicewoman's credibility in the eyes of her commanding officer, affecting career-determinative factors such as letters of recommendation and evaluations.[91] Further, without any requirement that such reports be kept confidential, an extremely intimate health decision can be leaked to the broader military community and destroy an individual's general reputation and successful integration with her peers.[92]

As part of a broader prohibition of sex in war zones, women and men in the military can face reprimands from their commanding officers for engaging in sexual relations.[93] These reprimands can affect an individual's potential for promotion, posing serious and possibly career-ending repercussions. In the Marines for example, a failure to be promoted will result in discharge.[94] Although both women and men are subjected to the same rules, women could be disparately impacted from such policies because of pregnancy. There is also evidence of a particular stigma for

87. David L. Englin, *Surrendering Rights*, NEW REPUBLIC (Sept. 12, 2002), http://www.tnr.com/doc.mhtml?i=express&s=englin091202.

88. Claudia J. Kennedy, *Letter from Lieutenant General Claudia J. Kennedy to Senate,* CENTER FOR REPRODUCTIVE RIGHTS (June 10, 2002), http://reproductiverights.org/en/document/letter-from-lieutenant-general-claudia-j-kennedy-to-senate [hereinafter Kennedy]; Ginsberg, *supra* note 85, at 401.

89. Kathryn Joyce, *Military Abortion Ban: Female Soldiers Not Protected By Constitution They Defend,* RD MAGAZINE (Dec. 15, 2009), http://www.religiondispatches.org/archive/politics/2111/.

90. *Id.*

91. *Id.*

92. *Id.*

93. Kate Grindlay et al., *Abortion Restrictions in the U.S. Military: Voices From Women Deployed Overseas*, 21 WOMEN'S HEALTH ISSUES 259, 262 (2011); Joyce, *supra* note 89, at 1.

94. Joyce, *supra* note 89.

unmarried women who get pregnant or seek abortions that could prevent future career advancement.[95]

Even women who decide to continue their pregnancy are often confronted with great hostility and contempt. In fact, before *Roe v. Wade*, servicewomen were pressured into having abortions due to a military policy of automatically discharging pregnant women.[96] Although in 1976, *Crawford v. Cushman* found that this policy violated women's due process rights,[97] people today still contend that "pregnancy is perhaps the greatest impediment to women's assimilation in the U.S. Armed Forces."[98]

Possible punishments for becoming pregnant can range from an administrative reprimand to a court martial in an effort to prevent such behavior.[99] In December of 2009, Army Major General Anthony Cucuolo issued an order threatening to punish pregnant soldiers and their sexual partners in his 22,000-person task force.[100] Although Cucuolo claimed that the rule applied equally to men, the gendered implications of detection and enforcement of such an order are impossible to ignore. As articulated in a letter from Barbara Boxer, "this policy could encourage female soldiers to delay seeking critical medical care with potentially serious consequences for mother and child."[101] For others, the result could mean not only long-term health problems, but also the end of one's military service.

V. DISPARATE IMPACT OF DON'T ASK DON'T TELL ON WOMEN IN THE MILITARY

Although DADT has less obvious gendered implications than the abortion ban, recent statistics have reflected that DADT has had a disproportionate impact on lesbians in the military,[102] particularly minority women.[103] According to Pentagon statistics gathered by an advocacy

95. Elisabeth Bumiller, *Plan Would Allow Abortions at Military Hospitals*, N.Y. TIMES, June 11, 2010, A20, *available at* http://www.nytimes.com/2010/06/11/us/politics/11abort.html.

96. Joyce, *supra* note 89.

97. Crawford v. Cushman, 531 F.2d 1114, 1126 (2d Cir. 1976).

98. Lydia Zaidman, Book Note, *Combatting the "Warrior Mentality"* 20 WOMEN'S RTS. L. REP. 33, 39 (1998) (reviewing LINDA BIRD FRANCKE, GROUND ZERO: THE GENDER WARS IN THE MILITARY (1997)).

99. Mohammed Abbas, *Military to Scrap Pregnancy Punishment*, REUTERS, Dec. 24, 2009, available at http://www.reuters.com/article/idUSTRE5BN2D620091224.

100. Mark Memmott, *Debate: Punishing Soldiers for Pregnancy*, Post in The Two-Way, NPR (Dec. 22, 2009, 9:55 a.m.), http://www.npr.org/blogs/thetwo-way/2009/12/pregnant_soldiers_courtmartial.html.

101. Gordon Lubold, *Court-Martial for Pregnant Soldiers? General Backs Off Under Fire,* CHRISTIAN SCIENCE MONITOR (Dec. 27, 2009), http://www.csmonitor.com/USA/Military/2009/1222/Court-martial-for-pregnant-soldiers-General-backs-off-under-fire.

102. Thom Shanker, *Don't Ask, Don't Tell Hits Women Much More*, N.Y. TIMES, June 23, 2008, A14, *available at* http://www.nytimes.com/2008/06/23/washington/23pentagon.html.

103. Bonnie Erbé, *'Don't Ask Don't Tell' Tougher on Minorities, Women,* POLITICS DAILY (June 1, 2010), http://www.politicsdaily.com/2010/06/01/dont-ask-dont-tell-tougher-on-minorities-women/ (last visited March 3, 2011).

group,[104] while women constitute fourteen percent of Army personnel, forty-six percent of those dismissed under the policy in 2007 were women. This demonstrated a significant increase from 2006, when it was reported that thirty-five percent of the Army's discharges and thirty-six percent of the Air Force's discharges were women.[105] Fiscal Year 2009 proved to be the worst year yet for the expulsion of servicewomen under DADT, with lesbians receiving forty-eight percent of the Army's total DADT discharges.[106] The Air Force also became the first branch of the military in which women consisted of the majority (sixty-one percent) of those dismissed under DADT, while only accounting for twenty percent of the total Air Force personnel.[107]

Even though there has been little explanation for this disparity, Nathaniel Frank, a researcher at the Palm Center who specializes in gays and the military, offered one possible factor: that homosexuality is potentially more common among women in the armed services than among men.[108] Others point to the general hostility towards women in the military, alleging that the law provides a tool for perpetuating sexual harassment.[109] One officer in the Marines explained that "often times the lesbians under my command were under scrutiny by the same men who were harassing straight women, so it was this kind of sexist undercurrent of 'You don't belong here.'"[110] Another problem was that women were accused of being lesbians when they failed to respond to the sexual advances of others, which could lead to more investigations into servicewomen than their male counterparts, and ultimately end in more female discharges.[111]

In the most extreme cases, DADT has even been exploited as a tool to enable sexual assault.[112] Reports indicate that servicemen threaten servicewomen with "outing" them as lesbians unless they agree to engage in sexual acts.[113] The irony behind the disproportionate accusations against female service members is that it is desirable for women in the armed services to embody strength and professionalism in the workplace, but "when their focus leads them to decline sexual advances from colleagues or

104. Shanker, *supra* note 102.
105. *Id.*
106. Vincent Villano, *New Data Shows Women and People of Color Hit Hardest with 'Don't Ask, Don't Tell,'* CAMPUS PROGRESS (Aug. 16, 2010), http://www.campusprogress.org/articles/new_data_shows_women_and_people_of_color_hit_hardest_with_dont_ask_don/.
107. *Lesbians More Likely to Be Kicked Out of Military*, ASSOCIATED PRESS, Oct. 8, 2009, *available at* http://www.msnbc.msn.com/id/33230836/ns/us_news-military/.
108. *Id.*
109. Erbé, *supra* note 103.
110. *Lesbians More Likely to Be Kicked Out of Military*, *supra* note 107.
111. Erbé, *supra* note 103.
112. *Id.*
113. *Id.*

supervisors, their strength as a soldier turns into doubts about their sexual orientation."[114]

VI. INFRINGING ON FUNDAMENTAL RIGHTS OF U.S. SERVICE MEMBERS

The disparate impact that the abortion ban and the DADT policies have on women in the military appear to implicate possible equal protection violations.[115] Given the fact that plaintiffs must prove intentional discrimination on the part of the government under an equal protection analysis[116] however, it is likely preferable to challenge the constitutionality of these policies with a substantive due process claim. The Due Process Clause of the Fifth Amendment states, "No person shall be deprived of life, liberty, or property, without due process of the law."[117] The Supreme Court has interpreted this clause to mean that the federal government cannot interfere with the exercise of certain fundamental rights unless the government policy passes strict scrutiny.[118] Under strict scrutiny, the policy must be justified by sufficiently important state interests and the law has to be narrowly tailored to effectuate only those interests.[119]

Both the abortion ban and the DADT policy infringe on the fundamental rights of U.S. service members, and therefore should trigger strict scrutiny analysis. In order to identify what qualifies as a fundamental right, the Court has focused on both the individual liberties explicitly listed in the Constitution, as well as those liberties that are deemed essential for exercising these constitutionally enumerated rights.[120] In the 1973 *Roe v. Wade* decision, for example, the Supreme Court rooted a woman's fundamental right to an abortion in the Fourteenth Amendment's implicit guarantee of privacy.[121] The Court acknowledged that the state's legitimate interest in the health of the mother and the life of the child increased with each trimester of pregnancy, allowing the state to impose stricter regulations on later abortions, but ultimately secured a woman's right to terminate her pregnancy during her first two trimesters.[122] Due to the advances in medical science, the Court in *Planned Parenthood of*

114. Villano, *supra* note 106.
115. U.S. CONST. amend. XIV, § 1.
116. Washington v. Davis, 426 U.S. 229 (1976).
117. U.S. CONST. amend. V.
118. *Roe*, 410 U.S. at 113 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
119. *Shapiro*, 394 U.S. at 618; *Kramer*, 395 U.S. at 621; *Griswold*, 381 U.S. at 485.
120. *Shapiro*, 394 U.S. at 618 (Court rooted the fundamental right to travel in the U.S. Const. Amend. XIV, § 1(2)); Harper v. Virginia, 383 U.S. 663 (1966) (Court rooted fundamental right to vote in U.S. Const. Amend. XV & XIX); *Roe*, 410 U.S. at 152–53 (Court held a fundamental right to privacy rooted in Amend I, II, IV, IX, & XIV).
121. *Roe*, 410 U.S. at 153.
122. *Id.* at 163.

Southeastern Pennsylvania v. Casey rejected the *Roe* trimester framework and drew a new line at viability.[123] The *Casey* Court held that a woman had a right to an abortion pre-viability without undue interference from the state, but that after viability the states could restrict abortions with an exception for the life and health of the mother.[124] The Court formulated the undue burden standard: whether a government regulation imposes a substantial obstacle in a woman's path of obtaining an abortion. A regulation that imposes such a burden would effectively render it unconstitutional.[125] Although there was substantial uncertainty regarding the definition of an undue burden, the Court's analysis focused on the degree of the infringement upon the abortion right relative to the importance of the state interest served.[126]

In relation to the abortion ban, forcing a woman to risk both her health and professional advancement in order to seek an abortion outside of the base is clearly an undue burden by the federal government on a woman's right to terminate her pregnancy pre-viability. In *Casey,* the Court struck down a spousal notification requirement because an unsupportive husband could publicize her intent to have an abortion to family, friends, or acquaintances and inflict psychological intimidation or emotional harm upon her.[127] Similarly, requiring a woman to get permission from a commanding officer to leave the base in order to obtain an abortion poses comparable dangers as the spousal notification provision. "Many officers oppose abortion and have the authority to reject or delay women's request for leave."[128] Further, some service women fear their confidentiality may be breached and that they would have to face the judgment of others.[129] One woman explained that "the Army makes it impossible to keep my pregnancy confidential and not everyone is open-minded about abortions."[130] While the burden on the woman's right to choose must be balanced against the importance of the military interests served, standing alone, the burden such a ban poses on servicewomen stationed abroad is substantial and thus must pass strict scrutiny analysis.

The same fundamental right to privacy that ensured a woman's right to terminate her pregnancy in *Roe v. Wade*[131] was also found by the Court in *Lawrence v. Texas* to protect an adult's right to engage in consensual same-

123. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).
124. *Id.* at 871.
125. *Id.* at 877.
126. Crawford, *supra* note 29, at 1564.
127. *Casey*, 505 U.S. at 888.
128. Jodi Enda, *Military Women Prevented from Having Abortions Overseas*, WE NEWS (July 27, 2003), http://oldsite.womensenews.org/article.cfm/dyn/aid/1464/context/archive.
129. Grindlay, *supra* note 93, at 262.
130. *Id.*
131. Roe v. Wade, 410 U.S. 113 (1973).

sex sodomy.[132] In *Lawrence*, the Court recognized a fundamental right to "an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[133] Applying the precedent established in *Lawrence*, the Ninth Circuit in *Witt v. Department of Air Force* held that the way in which the DADT Act infringes on the personal and private lives of gays implicates the rights identified in *Lawrence*, and thus DADT was subject to heightened scrutiny.[134]

While the DADT policy infringes on the fundamental rights of gays in a number of ways, some of the most concrete examples were set forth in *Log Cabin Republicans v. United States*.[135] Judge Phillips of the United States District Court of the Central District of California found that the DADT Act not only denies gays serving in the Armed Forces the right to enjoy "intimate conduct" in their personal relationships, imposing on their privacy rights established in *Lawrence*, but the Act also denies individuals in same-sex relationships the right to speak about their loved ones while serving their country in uniform,[136] violating one of the most fundamental rights enumerated in the Constitution, the First Amendment right of freedom of speech.[137] As a result of DADT, soldiers were punished with discharges for something as small as writing a private letter to a person of the same sex with whom they shared an intimate relationship with prior to entering military service.[138] By including information in a personal communication from which an unauthorized reader might discern their homosexuality, a service member could be separated from an entity that they have risked their lives for and provides their entire livelihood. In order to justify the severe encroachment on such vital liberties, which often result in dire consequences for those affected, the DADT policy as well as the abortion ban must satisfy heightened scrutiny analysis.

VII. DON'T ASK DON'T TELL AND THE ABORTION BAN MUST BE NECESSARY TO ADVANCE AND SIGNIFICANTLY FURTHER THE GOVERNMENT'S IMPORTANT INTERESTS IN MILITARY READINESS AND UNIT COHESION

Given that both the abortion ban and the DADT policy infringe on the fundamental rights of United States service members, especially female personnel, they must satisfy a heightened level of scrutiny in order for these

132. Lawrence v. Texas, 539 F.3d 558, 564 (2003).
133. *Id.* at 561.
134. Witt v. Department of the Air Force, 527 F.3d. 818–19 (9th Cir. 2008).
135. Log Cabin Republicans v. U.S., 716 F. Supp. 2d 884, 897–909 (2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011), *and reh'g denied*, Log Cabin Republicans v. U.S., No. 10-56634 (9th Cir. Nov. 9, 2011), http://www.ca9.uscourts.gov/datastore/general/2011/11/09/10-56634_order_denying.pdf.
136. *Id.* at 923.
137. U.S. CONST. amend. I.
138. *Log Cabin*, 716 F. Supp. 2d at 898.

policies to be constitutional.[139] In *Witt*, the Ninth Circuit held that *Lawrence* applied something more than traditional rational basis review[140] and that "when the government attempts to intrude upon the personal and private lives of gays, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest."[141] Although there have been numerous justifications cited for both the DADT and abortion ban policies, the primary justification identified by the *Witt* court as important enough to satisfy heightened analysis is the Government's interests in military readiness and unit cohesion.[142]

The Center for Military Readiness defines cohesion as "the relation that develops in a unit or group where members share common values and experiences, individuals in the group conform to group norms and behavior in order to ensure group survival and goals, and members lose their personal identity in favor of a group identity."[143] A few unchallenged suppositions in the military are that "each person's desires, interests or career aspirations are completely subordinate to the accomplishment of the military mission," and the primary focus is not what is best for the individual, but what is preferable for the unit and the military as a whole.[144] When these beliefs are taken to the extreme, however, and individual interests or desires are negatively impacted or ignored, even one disgruntled service member can undermine the task at hand. Cohesion is especially hindered when elements are introduced that detract from the need for such key ingredients as mutual confidence, commonality of experience, and equitable treatment.[145] Thus, in attacking the value of military policies implemented to preserve unit cohesion, military opponents can demonstrate that not only does this policy fail to further troop unity, such policies actually detract from this desired cohesiveness and thus retard military readiness and effectiveness.

139. *Witt*, 527 F.3d at 817–18 ("Substantive due process cases typically apply strict scrutiny analysis in the case of a fundamental right . . . [I]nstead we look to another recent Supreme Court case that applied a heightened level of scrutiny to a substantive due process claim.").

140. *Id.* at 817.

141. *Id.* at 819.

142. *Id.* at 821.

143. *Women in Land Combat*, CTR. FOR MILITARY READINESS (Nov. 18, 2004, 10:50 AM), http://www.cmrlink.org/WomenInCombat.asp?docID=233.

144. *Id.*

145. *Id.*

VIII. ARGUMENTS FROM *LOG CABIN REPUBLICANS* UNDERCUT THE UNIT COHESION AND MILITARY READINESS JUSTIFICATIONS FOR MAINTAINING THE ABORTION BAN IN MILITARY FACILITIES

Arguments advanced in the legal challenge of DADT in *Log Cabin Republicans* can be employed to similarly challenge the constitutionality of the abortion ban. Defendants in *Log Cabin Republicans* maintained that the court should be limited to only the statute's legislative history when deciding whether a law is constitutional on its face. Judge Phillips disagreed, finding that it was also important to take into account the effects of a regulation in evaluating its constitutional validity.[146] This holding allowed the court to consider evidence speaking to the scope and operation of a challenged statute as opposed to only examining the motives of legislators.[147]

The *Log Cabin* court evaluated the effects and consequences of the DADT policy alongside the government's stated interests in unit cohesion and military readiness, and ultimately held that defendants failed to meet their burden of demonstrating the law's constitutionality.[148] In addition to finding no proof that the Act significantly advanced the government's interests in unit cohesion and/or military readiness, the district court also gave substantial notice to the compelling testimony of former service members who recounted numerous examples of the Act's oppressive effects on the fundamental rights of gay United States military personnel.[149] The ample testimony further persuaded the Court that in addition to failing to advance the government's interests, the DADT Act ultimately adversely affected military readiness and unit cohesion.[150] Some of the consequences identified in *Log Cabin Republicans* are also applicable to the abortion ban. Thus, these oppressive effects could be a valuable starting point in mounting a legal challenge questioning the constitutionality of the abortion ban.

IX. EFFECTS OF DON'T ASK DON'T TELL AND THE ABORTION BAN THAT DETRACT FROM MILITARY READINESS AND UNIT COHESION

One of the consequences of the DADT policy identified in *Log Cabin Republicans* that can have serious implications for unit cohesion are the

146. Log Cabin Republicans v. U.S., 716 F. Supp. 2d 884, 895–96 (2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011), *and reh'g denied*, Log Cabin Republicans v. U.S., No. 10-56634 (9th Cir. Nov. 9, 2011), http://www.ca9.uscourts.gov/datastore/general/2011/11/09/10-56634_order_denying.pdf.

147. *Id.* at 896.

148. *Id.* (describing that when a governmental enactment encroaches on a fundamental right, the state bears the burden of demonstrating the law's constitutionality).

149. *Id.* at 914.

150. *Id.* at 923.

barriers to communication that the Act erects between gay and non-gay members. These barriers can directly impact important unit cohesion goals and general team bonding.[151] One of the Air Force officers concentrated on in *Log Cabin Republicans*, Michael Almy, testified that DADT, "created a natural barrier between himself and his colleagues, as he could not reveal or discuss his personal life with others."[152] Almy explained that much of the socialization among officers occurred off duty and that he was not privy to join for fear that information regarding his sexuality might slip out and result in his discharge.[153] Anthony Loverde, another gay male in the Air Force, was also hesitant to develop relationships with his peers; he was so skilled at avoiding his fellow airmen that they nicknamed him "vapor" because of his ability to vanish when off duty.[154] Jenny Kopstein also voiced concerns about having to keep her private life completely separate from her shipmates in the Navy, emphasizing that even simple questions about how she spent her weekends could place her in violation of the Act because she would be revealing the existence of her lesbian partner.[155] As a woman in the Navy, it is likely that Kopstein would already face challenges connecting with her predominately male counterparts, and also revealing a disfavored sexual orientation could possibly alienate her from her peers beyond repair.

The military testimony reviewed in *Log Cabin Republicans* also suggests that the inability to talk about one's personal life not only makes it difficult to establish individual connections within one's unit, but that constant efforts to conceal personal information also detracts from the general level of trust among service members.[156] Kopstein noted that the policy made it more difficult to establish the necessary teamwork within the unit when individuals were hiding significant parts of their identity[157] and when people were forced to choose between lying to their peers or violating DADT and risking their careers.[158] In her experience, the suspicion generated by Kopstein's evasiveness weakened trust in her unit, which she identified as one of the most essential components to unit cohesion and military readiness, especially in emergency situations or crises.[159]

Just as DADT forced individuals to lie about intimate personal details, undermining relationship development and trust building within military units, the abortion policy forces women to engage in similar clandestine

151. *See generally Log Cabin*, 716 F. Supp. 2d at 897-910.
152. *Id.* at 898.
153. *Id.*
154. *Id.* at 908.
155. *Id.* at 904.
156. *Id.*
157. *Id.*
158. *Id.* at 907.
159. *Id.* at 904.

behavior when faced with an unintended pregnancy. Although the abortion ban does not explicitly call for the discharge of women who obtain abortions off the base, because of the possibility that any one officer might view abortions as immoral and deny a woman's request to leave the base, many women are forced to be dishonest to supervising commanders in order to get permission to leave and obtain the procedure.[160] One woman in the Air Force explained that when she got pregnant she knew she couldn't talk to her immediate supervisor, so she requested time off from the next level in her chain of command.[161] In return for requesting time off she was verbally reprimanded and told that she had sinned in the eyes of God and was going to hell if she did not repent immediately.[162] Considering the power commanding officers can yield in imposing non-judicial punishment,[163] and the devastating impact they can have on a subordinate's reputation through letters of reprimand or word-of-mouth, it is often in a woman's best interest to keep such matters private. A female service member might have to work particularly hard to blend in in such a male-dominated setting, and thus she may be committed to concealing such information not only from her commanding officers, but also from other fellow soldiers who could have similarly strong moral objections. Thus, just like the men and women who were forced to keep their sexuality a secret under DADT, women seeking abortions in the military often must lie directly to commanding officers and peers to protect their careers, hindering open communication among personnel and posing a significant barrier to unit cohesion.

Another way that the abortion ban generates distrust among service members is by creating a situation in which female soldiers who become pregnant in a war zone must be sent back home to access healthcare in the United States, and as a result are often perceived as abandoning their responsibilities.[164] Even if it is not the woman's choice to return to the United States, there has developed substantial speculation and suggestion among military ranks that women purposefully get pregnant as a way to escape their tour of duty.[165] Recent efforts to punish soldiers who get pregnant in war zones lend further support to this ethos of distrust directed disproportionately at female service members.[166] Army General Anthony

160. *Repeal the Ban on Abortion for Women in the Military*, CTR. FOR REPRODUCTIVE RIGHTS (Dec. 1, 2010), http://reproductiverights.org/en/document/repeal-the-ban-on-abortion-for-women-in-the-military.

161. 146 CONG. REC. 11364, 11392 (2000).

162. 146 CONG. REC. 11364, 11392.

163. *Commanding Officers Convening Authority*, MILITARY.COM, http://www.military.com/benefits/legal-matters/ucmj-convening-authority (last visited March 4, 2011).

164. Lubold, *supra* note 101.

165. Kate Wiltrout, *Navy Gives New Urgency to Retaining Pregnant Sailors*, VIRGINIAN-PILOT (Oct. 11. 2007), http://hamptonroads.com/node/343431.

166. Memmott, *supra* note 100.

Cucolo explained his decision to court-martial both those female soldiers that get pregnant and their male partners by emphasizing, "we are facing a drawdown and anyone that leaves earlier than the expected [twelve] months creates a burden on their teammates."[167] Thus, by not allowing women the choice to terminate their pregnancies on the military base where they are stationed, the military leaves these women with no choice but to return to the United States and abandon their responsibilities to their battalions. Although they might be able to return to duty after seeking the available medical care, resentment from other military personnel and distrust of their commitment to military readiness will make unit cohesion that much more difficult to establish upon their return.

X. THE LOSS OF QUALIFED AND WELL-RESPECTED SERVICE MEMBERS

While hindering communication and generating distrust among service members has a substantial negative impact on unit cohesion and military readiness, the most serious consequence of military policies such as DADT and the abortion ban is that they directly result in the loss of a significant number of qualified, respected, and valuable personnel. In a time when the military is suffering severe troop shortages and must rely on an all-volunteer pool of applicants, losing even a single member of a tight-knit unit, especially at a moment's notice, can have serious consequences for that troop's ability to carry out the military's objectives.[168] In *Log Cabin Republicans*, the plaintiffs provided testimony that demonstrated a multitude of ways that DADT has caused the military to lose valuable members, and the Court ultimately gave significant weight to these findings.[169] Although there have been fewer studies conducted regarding the exact number of female personnel that have been separated from military service as a direct or indirect result of the abortion ban, the effects of DADT have noteworthy relevance to the effects of the abortion ban. The consequences identified as a result of DADT in *Log Cabin Republicans* are thus valuable to examine in order to gain insight into some of the arguments that can be made when challenging the legality of the abortion ban.

167. Memmott, *supra* note 100.

168. Log Cabin Republicans v. U.S., 716 F. Supp. 2d 884, 899–903 (2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011), *and reh'g denied*, Log Cabin Republicans v. U.S., No. 10-56634 (9th Cir. Nov. 9, 2011), http://www.ca9.uscourts.gov/datastore/general/2011/11/09/10-56634_order_denying.pdf. Michael Almy and Joseph Roca are only a couple examples of the kind of skilled service members lost, and the effect their discharge had on their units.

169. *Id.* at 914–15.

XI. LOSING SERVICE MEMBERS UNDER DON'T ASK DON'T TELL

One of the most obvious costs of the effect DADT has had on military readiness and unit cohesion is the loss of members who violated the policy by acknowledging their homosexuality, or who are investigated and ultimately "deemed" homosexuals.[170] After serving three tours in Iraq, garnering many awards and honors in the Air Force, and attaining one of the highest level security clearances available for military personnel, Major Almy was relieved of his duties and stripped of his security clearance when his sexual orientation was revealed.[171] Despite never telling anyone in the military that he was gay and thus holding up what he believed was his end of the bargain, he was discharged merely because another individual came across private email messages that contained information about his sexual orientation.[172] Even in light of Almy's decades of service to the U.S. military, and numerous letters of recommendation and support issued from Almy's commanding officers, subordinates, and peers, one email was enough to discount his remarkable career.[173]

John Nicholson was another service member who, despite possessing extremely unique and valuable language skills and qualifying for the most difficult level of language training in the Army, was ultimately discharged under DADT.[174] Similar to Almy's situation, when a letter Nicholson wrote to a man with whom he had engaged in a relationship with before joining the Army was read by one of his peers, he was turned over to the company commander and immediately informed of the initiation of his discharge proceedings.[175]

Losing experienced service members with vital and unique skills crucial to carrying out important military missions, such as Almy and Nicholson, has an obvious detrimental impact on military readiness and on the other members in their units. Almy testified that after being relieved of his command, he remained on base to perform ad hoc duties and observed the effect his abrupt removal had on his former unit.[176] Almy recounted that "the maintenance, availability, and readiness of the equipment to meet the mission declined."[177] One officer observed that the squadron fell apart after Almy was separated from his unit, demonstrating how important Almy was not only to the mission but also to his troop.[178]

170. 10 U.S.C. § 654 (b)(1-3).
171. *Log Cabin*, 716 F. Supp. 2d at 897–99.
172. *Id.* at 898.
173. *Id.* at 899–900.
174. *Id.* at 906.
175. *Id.*
176. *Id.* at 899–900.
177. *Id.* at 900.
178. *Id.*

Another way that DADT and the abortion ban lead to a loss of qualified military personnel is through the health complications that individuals experience as an indirect result of these policies. Even though some health problems only warrant temporary leave and allow some space for rehabilitation and reintegration into the service, there are a number of cases where individuals have experienced such severe pain and suffering that it has led to permanent military separation.[179]

In *Log Cabin Republicans*, plaintiffs highlighted the testimony of Joseph Rocha to demonstrate how DADT can separate individuals from the service by creating an environment so hostile to suspected gay service members that individuals fear for both their physical and mental well-being.[180] Although Rocha never told anyone about his sexual orientation, some of his peers suspected he was gay and engaged in systematic and prolonged harassment in order to humiliate him.[181] At one point Rocha was leashed like a dog, paraded around the grounds in front of other soldiers, tied to a chair, force-fed dog food, and left in a dog kennel covered in feces.[182] Rocha was hesitant to report this treatment for fear that it would lead to an investigation into his own sexual orientation, but eventually the harassment got so bad that Rocha decided it was impossible for him to continue serving under the restraints of the Act while also fulfilling the commitment expected of him.[183] After receiving an honorable discharge, Rocha was diagnosed with post-traumatic stress disorder and major depression,[184] the true irony being that he developed these mental health problems not from violence experienced in the battlefield, but from harassment in his own platoon. DADT not only played a critical role in generating a hostile environment towards gay service members, but it also left Rocha vulnerable and defenseless to report the misconduct because it could draw attention to his own possible violation of the policy. Ultimately, the Navy lost an exemplary leader who continued to excel and advance far longer than most people could have managed under such horrific treatment. Although DADT was not implemented to further harassment of gay service members, in practice it helped sustain continued persecution that only served to detract from the overall unit cohesion and military readiness.

179. *See* Log Cabin Republicans v. U.S., 716 F. Supp. 2d 884, 903 (2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011), *and reh'g denied*, Log Cabin Republicans v. U.S., No. 10-56634 (9th Cir. Nov. 9, 2011), http://www.ca9.uscourts.gov/datastore/general/2011/11/09/10-56634_order_denying.pdf (describing Joseph Roca who was diagnosed with post-traumatic stress disorder with major depression after his discharge); *see* Joyce, *supra* note 89 (describing Amy, who was found mentally incompetent to remain in the Marines after self-inducing an abortion).

180. *Log Cabin*, 716 F. Supp. 2d at 903.

181. *Id.* at 901.

182. *Id.*

183. *Id.* at 903.

184. *Id.*

XII. LOSING SERVICE MEMBERS UNDER THE ABORTION BAN

Unlike DADT, which includes specific language to discharge persons that violate the policy, most servicewomen who experience separation from the military because of the abortion ban do so when they are forced to return to the United States before they have time to obtain the procedure off the base. For example, there is an Army policy that a pregnant soldier in Iraq be evacuated within two weeks of becoming pregnant,[185] and as one woman explained, the military would not let her stay on active duty if she was a single parent and thus her career would be over if she had to have the baby.[186]

Another cause of separation can be when women suffer serious health consequences because they cannot obtain an abortion on base and resort to dangerous tactics to end their pregnancy.[187] In some cases, with no other perceived alternatives, women contemplate and carry through self-induced abortion.[188] One pregnant Marine, Amy, resorted to a self-induced abortion when she didn't want to seek permission from her commanding officer in order to leave the base.[189] Amy, who was raped while stationed abroad utilized herbal abortifacient supplements she ordered online. When she could not find a coat hanger she substituted her sanitized rifle cleaning rod and a laundry pin to manually dislodge the fetus.[190] While it is difficult to imagine resorting to such a horrific extreme to end one's pregnancy, Amy explained that her situation was "like being given a choice between swimming in a pond full of crocodiles or piranhas."[191] Even in an effort to keep her pregnancy a secret and salvage her career, as a result of serious complications from the attempt, Amy had to confide in a military doctor.[192] While still in the hospital, Amy's First Sergeant came to her room to announce that she would be punished under Article 92 of the Uniform Code of Military justice for having had sex in a war zone and was fined $500 and given a suspended rank reduction.[193]

Ultimately, Amy was sent home when a military psychiatrist diagnosed her with acute anxiety, post-traumatic stress disorder, and depression and declared her too psychologically unstable to remain.[194] Although the

185. Joel Hilliker, *What Do You Do With A Pregnant Soldier?*, THETRUMPET.COM (Dec. 30, 2009), http://www.thetrumpet.com/?q=6856.5364.0.0.

186. Grindlay, *supra* note 93, at 262.

187. *See* Joyce, *supra* note 89 (describing a Marine who was discharged after self-inducing her abortion and experiencing severe medical complications as a result).

188. Joyce, *supra* note 89.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

abortion ban did not directly result in Amy's discharge, the abortion ban exacerbates the already prevalent opposition to pregnant women in the military and forces them to cope with the situation on their own. This is similar to the way that DADT cultivated a hostile environment toward gay service members, such as Rocha, which left them vulnerable to harassment. While some women are able to access the procedure off base, and others agree to a temporary leave in order to seek services in the United States, still others like Amy work with the limited resources available to them and attempt to take matters into their own hands in a desperate effort to salvage their careers.[195] No matter which avenue chosen, all options encompass serious risks to a servicewoman's health and/or military reputation and career and often lead to separation from the military, either through discharge or health complications. The damage sustained to the military is the loss of necessary members, which can greatly detract from military readiness. As General Cucolo explained, "My female soldiers are invaluable—many of them hold high impact jobs. In general, my troops are few in number and I need them all."[196]

XIII. DEMONSTRATING THE MEASURABLE IMPACT OF DON'T ASK DON'T TELL AND THE ABORTION BAN ON MILITARY RESOURCES AND READINESS

While many of the military justifications for the abortion ban lack credible evidence, when establishing a correlation between the important interests asserted and the policy implemented, it is sometimes helpful to steer away from abstract morality and unit cohesion arguments and to focus on the statistics, which leave little room for disagreement. In *Log Cabin Republicans*, plaintiffs accomplished this by steering away from the compelling testimony utilized to undercut cohesion arguments and providing the court with hard numbers that emphasized the impact that DADT had on measurable military goals.[197] For example, when emphasizing the impact of discharging qualified service members, plaintiffs submitted statistics that highlighted troop shortages, and broke down the specific number of service members discharged annually. When combining these statistics with the compelling testimony of a few of the most shocking cases, the court was able to get a more complete picture of the harm incurred.

Given that one of the arguments against repealing the abortion ban is the potential monetary cost that could be imposed on the military and on

195. Joyce, *supra* note 89.

196. Memmott, *supra* note 100.

197. Log Cabin Republicans v. U.S., 716 F. Supp. 2d 884, 914–16 (2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011), *and reh'g denied*, Log Cabin Republicans v. U.S., No. 10-56634 (9th Cir. Nov. 9, 2011), http://www.ca9.uscourts.gov/datastore/general/2011/11/09/10-56634_order_denying.pdf.

U.S. taxpayers, it is especially important for opponents of the ban to emphasize the costs associated with not allowing abortions in military facilities.[198] After weighing the costs of unintended pregnancy and the resources necessary for accommodating pregnancy leave, the military goals of readiness and efficiency are clearly better served by making abortion and birth control accessible.[199]

The military bears a tremendous cost to transport and replace servicewomen who are reassigned due to pregnancy, as evidenced by a field hospital that served up to 10,000 female soldiers in Operation Desert Storm.[200] In the hospitals' reports, "the number one reason for evacuating women out of the conflict theater was pregnancy."[201] In addition, in 1998, the DOD reported spending around $35,000 to recruit and train each enlistee.[202] Since twenty-five percent of unintended pregnancies occur among women with less than one year of active duty, the military experiences a huge financial loss when new service members leave.[203] Although not every woman who experiences an unplanned pregnancy will choose to terminate it, it is within the military's best financial interest to allow her the choice of whether or not to continue her pregnancy.[204] Especially when considering the need for manpower in a time when volunteers are scarce, losing a service member in any capacity can have a substantial effect on the military's overall efficiency and success.

In addition, forcing women to seek abortions outside of military bases increases the costs to both the individual woman and to the military. The ban on abortion means more lost days from work for servicewomen who sometimes have to travel to other countries to obtain the procedure.[205] In addition, higher risk of serious injury persists if women must seek abortions in substandard facilities.[206] This results in more time the woman must take off to recuperate and the added healthcare costs the military will have to bear to alleviate her medical complications.[207] For example, one servicewoman stationed abroad who had to find a provider off the base to carry out an abortion ended up in the military emergency room when she began severely bleeding hours after the procedure was completed.[208] The servicewoman recounted, "I remember thinking how ridiculous it was that they wouldn't perform the actual procedure, but were essentially going to

198. Crawford, *supra* note 29, at 1574.
199. Ponder, *supra* note 33, at 386–87; Boonstra, *supra* note 1, at 5.
200. Ponder, *supra* note 33, at 386.
201. *Id.*
202. *Id.*
203. *Id.* at 387.
204. *Id.*
205. Ginsberg, *supra* note 85, at 400–01.
206. *Id.*
207. *Id.*
208. Sarah Lohmann, *Filibustering Human Rights*, MS. MAGAZINE, Fall 2010, at 16.

have to provide all of my post-surgical care."[209] Although there is no guarantee that the servicewoman would not have experienced similar complications if she had received the procedure in a military hospital, if a woman is forced to seek assistance from a substandard facility, it is the military that has to pay for any off-base medical blunders. In contrast, if the military allowed women to access the procedure on base it would cost the hospital no extra charge, because the woman would be paying for the procedure upfront and out of her own pocket.[210] Thus, the military could ensure adequate care within its own hospital and decrease the number of complications resulting from procedures obtained off the base.

Ultimately, the arguments utilized in the challenge of DADT can be employed to challenge the constitutionality of the abortion ban at military hospitals by inquiring into the actual effects such policies have had on unit cohesion and military readiness. While the testimony from actual service members can bring life to the numbers and statistics presented in the studies, both kinds of evidence are necessary to convince the courts to steer away from their long history of giving deference to the military. In the past, when balancing military efficacy with restrictions on individual rights, the Supreme Court has consistently interpreted the Constitution to give deference to policies deemed necessary to support the greater military mission.[211] The Court in *Greer v. Spock*, articulating the importance of deference to the military, explained, "[D]eference gives a military commander appropriate discretion 'to avert what he perceives to be a clear danger to the loyalty, discipline, or morality of troops . . . under his command.'"[212] The Court has also held that, "deference is warranted when the policy in question concerns the 'complex, subtle, and professional decisions as to the composition, training, equipping and control of military forces.'"[213] Thus, with a strong line of precedent supporting military deference, opponents of the abortion ban will have to draw on some of the strategies and arguments developed in *Log Cabin Republicans*.

XIV. THE IMPORTANCE OF OVERTURNING THE ABORTION BAN AND DON'T ASK DON'T TELL THROUGH JUDICIAL AVENUES

DADT was repealed in the final days of the 111th Congress as Democrats forced through a couple of last priorities before they had to relinquish control of the House of Representatives to the Republicans.[214]

209. Lohmann, *supra* note 208, at 16.
210. Joyce, *supra* note 89.
211. Crawford, *supra* note 29, at 1564.
212. Greer v. Spock, 424 U.S. 828, 840 (1976).
213. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
214. Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES, Dec. 19, 2010, at A1, *available at* http://www.nytimes.com/2010/12/19/us/politics/19cong.html?pagewanted=all.

While the specific provision eliminating DADT was initially part of a larger Pentagon Policy bill, when it appeared that Republicans would successfully block the repeal of DADT, Democrat congressional leaders pursued the stand-alone legislation and ultimately generated a vote on repealing the policy.[215] By a vote of sixty-five to thirty, with eight Republicans joining the Democrats, the Senate approved the repeal of DADT and sent it to President Barack Obama where the bill received final approval.[216]

Although the repeal of DADT through the legislative process achieved Log Cabin Republicans' primary goal of overturning the ban of gays and lesbians in the military, Log Cabin Republicans also "wanted a federal court to declare the law unconstitutional so that a future administration could not come back and reinstate DADT or a similar anti-gay law."[217] Given that the judicial process is significantly more insulated from the political pressures of a newly elected party than the legislative process,[218] a court ruling that a law is unconstitutional can go a long way towards ensuring that such a law remains on the books.[219] In addition, in the case of DADT and the abortion ban, where soldiers suffered serious and measurable consequences as a result of arguably unconstitutional policies, the judicial process can also provide for possible reinstatement, back pay, or other compensation to the aggrieved service member.[220] Thus, even if the abortion ban is eventually successfully repealed by legislation, as was the case with the DADT policy, obtaining judicial precedent that establishes the unconstitutionality of the abortion ban will provide added stability that this ban will not be easily reinstated. The judicial precedent may also provide the foundation for different legal challenges seeking to protect the fundamental rights of women in the military.

XV. CONCLUSION

Since many military officials continue to justify the abortion ban to further unit cohesion and military efficacy, the ban would fall under the deference the Court affords to military purview.[221] Nonetheless, *Log Cabin Republicans* demonstrates the possible legal arguments available to parties who wish to challenge the constitutionality of the abortion ban. Under substantive due process, the government is not allowed to place an undue burden on a woman's right to choose whether or not to terminate her pregnancy, and if a provision does interfere with such fundamental rights, it

215. Hulse, *supra* note 214, at A1.
216. *Id.*
217. Villarreal, *supra* note 15.
218. Miller, *supra* note 14.
219. Villarreal, *supra* note 15.
220. *Id.*
221. *Witt,* 527 F.3d at 818.

must be in furtherance of compelling government interests, and narrowly tailored to fit those needs. Given that both unit cohesion and military readiness are important government interests, the crux of a legal challenge to the abortion ban will be demonstrating that the policy of prohibiting abortions in military facilities does not in fact further the objectives articulated by the military. Even if it is the defendant's burden to show that its policies are narrowly tailored to its stated interest, in order to get the court to deviate from its tendency to defer to the military regarding its own policies, plaintiffs are going to be most successful when they provide evidence of their own. As was employed in *Log Cabin Republicans*, testimony from individuals within the military, and from those most directly impacted by these policies, in addition to statistics and numbers demonstrating a measurable military impact can give the court a better idea of the actual effects these policies have on service members' fundamental civil rights. When such testimony further demonstrates that not only are the military's interests in unit cohesion and military readiness not served by these policies, but actually negatively impacted by them, it can provide the court with more incentive to hold such policies unconstitutional.

In moving forward with any kind of legal challenge of the abortion ban, opponents of the ban will have to produce more empirical evidence of the numbers of women who are discharged or leave the military in connection with this policy. Given that there might be a more indirect link between women who leave due to unacceptable access to reproductive health care and those who leave as a result of being identified as gay, these studies might require more complex causal analysis. Additional studies will also have to be undertaken regarding the impact of losing women to pregnancy and the effect leave has on military readiness. Part of what made the *Log Cabin Republicans* challenge so compelling was that the plaintiffs had been collecting statistical data for years in order to demonstrate how DADT actually harmed unit cohesion and military readiness. With more women serving in the military and in increasingly vital positions, these studies will possibly be easier to initiate and perform, and will hopefully further reveal some of the ways in which women continue to experience a disparate amount of the negative impact of policies pertaining to military personnel. While legislatures continue to introduce congressional bills in an attempt to repeal the abortion ban in military facilities, a judicial precedent establishing the ban as unconstitutional would offer the most protection of a servicewoman's fundamental right to an abortion. Without this judicial precedent, the policy could be reinstated should a political shift occur in Congress, leaving proponents of repeal right back where they started.