NOTE

THE CONSTITUTION AS CHAPERON: PRESIDENT CLINTON'S FLIRTATION WITH GAYS IN THE MILITARY

I. INTRODUCTION

President Clinton probably did not anticipate the backlash that his unsuccessful attempt to allow avowed homosexuals to serve in the military would unleash. What began as a campaign promise to "end the ban," resulted in no meaningful change at all. In fact, the only difference from previous policy is that recruits no longer will be preemptively questioned as to their sexual orientation.[1] Needless to say, the final outcome was a disappointment to the vocal homosexual lobby.[2]

After apparently realizing that an executive order attempting to change the policy wholesale would have been unconstitutional (and perhaps politically reckless), as this Note will demonstrate, the President shifted his efforts toward amending the policy so as not to discriminate against homosexuals based on "status alone," a meaningless distinction. This retreat by the President was precipitated by a proposal put forward by Senate Armed Services Committee Chairman Sam Nunn (backed by Republican Senators Dan Coats and Strom Thurmond, also Committee members) to write the old policy into federal law. In response, the President accepted then-Defense Secretary Les Aspin's recommendation to slightly amend the old policy as mentioned above. That change then became federal law, as Congress enacted the new policy as part of the Fiscal Year 1994 Defense Authorization Act.

In so doing, Congress has prevented future Presidents from repeating President Clinton's almost-mistake. President Clinton was premature in promising something which he alone could not deliver, and the mainstream press fostered the misconception that the President had plenary power to change the policy to admit homosexuals into the military, thus misleading the American public. This Note will demonstrate that in fact the President had no power to change the ban against homosexuals in the military and, instead, would have been usurping Congress' power had he attempted the change unilaterally.

Part II will focus on the constitutional powers of the legislative and executive branches with regard to the military. Specifically, the discussion will identify the applicable constitutional provisions, revisit the Supreme Court's seminal case on presidential power, and distinguish President Truman's use of his power to racially integrate

---

1. Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1673 (1993).

2. For example, Clinton adviser David Mixner, a prominent advocate of homosexual rights, told a church convention after the new policy was announced that he "stood before them in great pain," deeply disappointed in a plan "that merely gift-wraps a horrendous policy of prejudice and hatred." Carol Sowers, *Clinton Campaign Adviser Assails 'Don't Ask' Gay Policy*, ARIZ. REPUBLIC, July 21, 1993, at A2.

the military from the case of admitting homosexuals into the military. This Note will also point out where the mainstream press blundered in explaining this complicated matter to the American people. Part III details examples of Congress' use of its military powers and demonstrates how the Supreme Court has recognized Congress' exclusive authority in that area. Part IV explains how any member of Congress by himself could have thwarted the President, had President Clinton taken *The New York Times*' advice and lifted the ban by fiat. Specifically, a federal court decision issued just prior to Operation Desert Storm suggests how a congressional plaintiff could have his constitutionally-ordained power protected in court. Part V discusses the "new" policy and argues ultimately that the new policy is a reflection of the old policy. Finally, Part VI offers some concluding thoughts regarding the President's unconstitutional attempt to admit homosexuals into the military.

II. CONSTITUTIONAL POWERS OF THE LEGISLATIVE AND EXECUTIVE BRANCHES WITH REGARD TO THE MILITARY

A. The Constitution

Congress has the power "[t]o raise and support armies . . . . [t]o provide and maintain a navy," and "[t]o make rules for the government and regulation of the land and naval forces."[3] On the other hand, the Constitution provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States."[4]

In its most essential form, the President exercises his Commander-in-Chief power when he commits troops in conjunction with foreign policy goals or national defense. In that case, it is undisputed within the parameters of the War Powers Resolution[5] that the President has the power to dictate objectives and missions to military authorities. Beyond that core authority, the President has Commander-in-Chief power to commission officers (within the manpower guidelines set by Congress)[6] and to appoint senior flag-rank (e.g., generals and admirals) officers to various command and staff positions (again, however, with senatorial approval).[7]

Finally, with regard to policy, the president may issue executive orders. "Executive orders are usually defined as presidential directives issued to federal government officials or agencies."[8] "*In issuing an executive order, the President must conform to the standards laid down in a Congressional delegation of authority*, and must also state the existence of the particular circumstances and conditions which authorize such order."[9] "Presidential . . . orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress."[10]

The popular notion after President Clinton made his Veteran's Day 1992 an-

---

3. U.S. CONST. art. I, § 8, cl. 12-14.
4. U.S. CONST. art. II, § 2, cl. 1.
5. 50 U.S.C.A. §§ 1541-1548 (1991).
6. 10 U.S.C.A. §§ 522-523 (1993).
7. 10 U.S.C.A. §§ 152(a), 154(a)(1) (1993).
8. Steven Ostrow, Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659 (1987).
9. Robert B. Cash, Note, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME LAW. 44, 50 (1963) (emphasis added) (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)).
10. Independent Meat Packers Association v. Butz, 526 F.2d 228, 234 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

nouncement that he intended to keep his campaign promise to "lift the ban" was that he could do so by simply issuing an executive order.[11] *The New York Times* reported, "[t]he current regulations prohibit homosexuals from serving in the uniformed services . . . . [The ban] can be lifted by an executive order of the President."[12] In a different article the same day the *Times* explained that "it is more likely that the ban will be lifted immediately, allowing homosexuals to enlist in the services and enabling existing service members to stop hiding their sexual orientation."[13]

Such incomplete explanations were not, however, limited to *The New York Times*. Eighteen days earlier, David Wood wrote in *The Houston Chronicle* that "[s]ince the ban is policy and not law, it can be reversed by the president without legal or congressional debate."[14] Ellen Debenport of the *St. Petersburg Times* added, "[n]ow the realization has set in that, among his enormous powers, this new young President could change military culture next year with the stroke of a pen."[15] One journalist, however, recognized that the issue was not so simple. The *Atlanta Journal and Constitution*'s Robert Akerman wrote:

> Under the U.S. Constitution, the President is commander in chief of the armed forces and has power to issue executive orders related to that function. The Congress also has power "to make rules for the government and regulation of the land and naval forces." If these two branches of government should disagree, we would have a problem.[16]

Nevertheless, since the national focus was on "Should he or shouldn't he?" instead of "Can he unilaterally?", it is no wonder that Clinton adviser David Mixner was so upset in July since just the previous November he was quoted as saying, "I don't think there will be any kind of fine lines drawn or lengthy executive order . . . . The only commitment he made was that there'd be no discrimination against gays in the military in the future."[17]

This early lack of reporting sophistication, though, was unnecessary because a cursory reading of the Constitution would have alerted reporters that at best, allowing homosexuals to serve was a two-way decision. Furthermore, investigation into constitutional law would have uncovered the following similar incident which the Supreme Court thwarted.

B. The *Steel Seizure* Case

During the Korean War, President Truman issued an executive order directing the Secretary of Commerce to take possession of the nation's steel mills to prevent a

---

11. Thomas L. Friedman, *Clinton to Open Military's Ranks to Homosexuals*, N.Y. TIMES, Nov. 12, 1992, at A1.

12. *Id.* at A22.

13. Eric Schmitt, *THE TRANSITION: News Analysis—Challenging the Military; In Promising to End Ban on Homosexuals, Clinton is Confronting a Wall of Tradition*, N.Y. TIMES, Nov. 12, 1992, at A22.

14. David Wood, *Pentagon Pressured to Admit Gays into Armed Forces*, HOUS. CHRON., Oct. 25, 1992, at A23.

15. Ellen Debenport, *Clinton's Promise to Allow Gays in Military Stirs Debate*, ST. PETERSBURG TIMES, Nov. 18, 1992, at 1A.

16. Robert Akerman, *Who Makes the Decision on Gays in Services?*, ATLANTA J. AND CONST., Nov. 13, 1992, at A12.

17. Schmitt, *supra* note 13.

threatened shutdown resulting from a labor dispute. The mill owners sued to prevent execution of the order, arguing that the order amounted to lawmaking, a legislative function which the Constitution explicitly granted to Congress and not the President.[18] In striking the order, the Supreme Court explained, "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[19]

Justice Jackson, in his famous concurrence from that case, elaborated on this idea. He explained that three possible scenarios exist which circumscribe the President's executive order power. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[20]

Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[21]

Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[22]

Justice Jackson continued:

> The Constitution expressly places in Congress power "to raise and *support* Armies" and "to *provide* and *maintain* a Navy." (Emphasis supplied.) This certainly lays upon Congress primary responsibility for supplying the armed forces . . . . While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.[23]

In promising to end the ban, President Clinton was attempting to act against Congress' will, which I will discuss later. Thus, applying the Court's holding and Jackson's reasoning to the issue of homosexuals in uniform, it becomes clear that the President's power is clearly at its "lowest ebb," if it exists at all.

By January, when President Clinton made his first move on the issue as President, the press had caught on that perhaps his power was not unmitigated. *The New York Times* editorial page opined:

> Now he needs to show that he means it by lifting the ban immediately, by executive order, and directing the Joint Chiefs to stay strictly away from any lobbying of Congress to reinstate it.
>
> True, there are risks in swift action. Even many gay leaders and members of Congress who genuinely want the ban lifted fear that an immediate executive order

18. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).
19. *Id.* at 585.
20. *Id.* at 635 (Jackson, J., concurring).
21. *Id.* at 637.
22. *Id.*
23. *Id.* at 643-644.

would spur Congress to overrule Mr. Clinton by a veto-proof margin.[24]

President Clinton, himself, allowed, "[n]ow, I would remind you that any President's executive order can be overturned by an act of Congress. The President can then veto the act of Congress and try to have his veto sustained if the act stands on its own."[25]

But just as the realization hit that a constitutional question existed, the focus began to turn toward comparing the plight of homosexuals in the military to that of 1940s blacks in the military.[26]

C. The Comparison to Integration

In one of the most famous executive orders in American history, Executive Order 9981 (July 26, 1948),[27] President Truman integrated the military. President Truman's order read as follows:

> WHEREAS it is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense:
>
> NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, by the Constitution and the statutes of the United States, and as Commander in Chief of the armed services, it is hereby ordered as follows:
>
> 1. It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin . . . .[28]

But the argument that President Clinton could legally admit homosexuals into the armed services the same way that President Truman racially mixed military units fails. First, it could be argued that all President Truman was doing was implementing what the Constitution already required via the Fourteenth Amendment's Equal Protection Clause. Thus, the President, through Executive Order 9981, was merely ahead of the Supreme Court's decision in *Bolling v. Sharpe*,[29] where the Court ruled that the Fifth Amendment's Due Process Clause has an implied equal protection component to it, as in the Fourteenth Amendment.

With regard to homosexual activity, however, since the Court ruled in 1986 that there is no fundamental right to consensual homosexual sodomy,[30] and lower federal

---

24. *Who's in Charge of the Military?*, N.Y. TIMES, Jan. 26, 1993, at A22.

25. Reprinted in N.Y. TIMES, Jan. 31, 1993, at A8.

26. The comparison began implicitly in *The New York Times* when Eric Schmitt wrote, "As Commander in Chief, Mr. Clinton can impose his order on the armed forces, just as President Harry S. Truman did in 1948 when he ordered the integration of the Army, and Mr. Clinton's aides say he will do that shortly after he becomes President on January 20." Schmitt, *supra* note 13, at A1.

Then in a flurry, the *Times* published three op-ed pieces within a week attempting to make the comparison. *See* A.M. Rosenthal, *On My Mind; General Powell and The Gays*, N.Y. TIMES, Jan. 26, 1993, at A23; Anthony Lewis, *Abroad at Home; The Issue Is Bigotry*, N.Y. TIMES, Jan. 29, 1993, at A27; Lucian K. Truscott IV, *Truman's Legacy to Clinton*, N.Y. TIMES, Feb. 1, 1993, at A19.

Finally, a law review piece came out which, in part, also made the comparison. *See* Kurt D. Hermansen, Comment, *Analyzing the Military's Justifications for its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151 (1992).

27. 3 C.F.R. 772 (1943-1948 compilation).

28. *Id.*

29. 347 U.S. 497 (1954) (federal companion case to Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), which overruled Plessy v. Ferguson, 163 U.S. 537 (1896), thereby overturning "separate but equal" doctrine).

30. Bowers v. Hardwick, 478 U.S. 186 (1986), *reh'g denied*, 478 U.S. 1039 (1986).

courts have consistently and nearly unanimously refused to apply any type of heightened scrutiny to military regulations aimed at punishing homosexual conduct,[31] an Equal Protection/Due Process argument is unavailable.

Moreover, the Supreme Court has narrowed its interpretation of Bill of Rights coverage to military members. In 1969, the Court had ruled in *O'Callahan v. Parker*[32] that for members to be prosecuted under the UCMJ, the conduct in question had to be "service related."[33] But then in 1987 the Court expressly overruled *O'Callahan* in *Solorio v. United States*,[34] holding that status as a service member, and not service-relatedness of the conduct in question, was sufficient for trial by court-martial under the UCMJ.[35] Therefore, while it seems largely accepted that racial discrimination in the military would be unconstitutional, it is far less clear that even if a right to homosexual conduct existed, that the Court would so apply that right to service members.

More importantly, however, Executive Order 9981 can clearly be seen as an act within the realm of the President's Commander-in-Chief power since all President Truman essentially did was "rearrange" troops which were already legally within his command, and under the guidelines for admission set up by Congress. With integration, blacks were already *legally* in the armed services making up all-black units whereas homosexuals have not been. A comparable executive order allowing the enlistment of homosexuals and/or retention of homosexuals who are already surreptitiously in the military would have necessitated changing the guidelines which Congress had

---

31. *See* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Beller v. Middendorf, 632 F.2d 788, 792, 798-99 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1980) (plaintiff Beller), 454 U.S. 855 (1981) (plaintiff Miller) (three cases consolidated); *but see* Meinhold v. United States Department of Defense, 808 F.Supp. 1455 (C.D. Cal. 1993); Dahl v. Secretary of the Navy, 830 F. Supp. 1319 (E.D. Cal. 1993); Elzie v. Aspin, 841 F. Supp. 439 (D.C. 1993).

Additionally, Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 655 (1992), has cast some doubt on the Ninth Circuit's jurisprudence in this area. On one hand, the *Pruitt* court stated, "to the degree that *Beller* . . . rested on prejudice of others against homosexuals themselves, rather than on disapproval of specific acts of criminal conduct, its reasoning is undercut by the Supreme Court's decisions in *Palmore* [and] *Cleburne*." *Id.* at 1165. On the other hand, however, Heller v. Doe, 113 S.Ct. 2637 (1993), and United States v. Harding, 971 F.2d 410 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1025 (1993), cast doubt on *Pruitt*. *Heller* explained that, "a State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification." 113 S.Ct. at 2643. *Harding* adds that, "in establishing a statutory classification, one need not . . . supply empirical evidence to support a rational relationship." 971 F.2d at 412.

Also, the District of Columbia Circuit vacated a prior ruling by a three-judge panel of that Circuit in *Steffan v. Aspin*, 8 F.3d 57 (1993), which struck down the pre-Clinton policy on homosexuals as unconstitutional. This unusual move (since the Justice Department did not request it) by a majority of the Circuit indicates probable reversal on the *en banc* rehearing. Eric Schmitt, *Court to Reconsider Ruling Voiding Military's Gay Ban*, N.Y. TIMES, Jan. 8, 1994, at 7.

Finally, and perhaps most importantly, the Supreme Court unanimously stayed Judge Hatter's order from *Meinhold* prohibiting the entire Department of Defense from discharging homosexuals based on their orientation or homosexual conduct. No. CV 92-6044 TJH (JRx), filed September 30, 1993. Instead, the Court limited Judge Hatter's application strictly to Meinhold's case pending disposition of the appeal to the Ninth Circuit. United States Department of Defense v. Meinhold, 114 S.Ct. 374 (1993).

32. 395 U.S. 258 (1969).

33. *Id.* at 272-73.

34. 483 U.S. 435 (1987).

35. *Id.* at 450-51.

established for admission.[36]

Using Justice Jackson's analysis of the executive and legislative powers at issue here, Executive Order 9981 was not in conflict with Jackson's statement that "only Congress can provide him an army or navy to command," while a pro-homosexual executive order without corresponding congressional action would have been tantamount to the President "providing" himself a different military than Congress was willing to provide for him. The distinction at issue here is the difference between working with elements which another is responsible for supplying you with, and deciding in the first instance which elements you want. It seems that the President here was attempting to do the latter, whereas the Constitution only grants him authority for the former. In fact, the President's usurping power in this area would be the same as Congress deciding where to commit forces in battle, which is clearly a Commander-in-Chief function. In short, admitting homosexuals is a separation of powers matter, the bounds of which the President may have exceeded.

Aside from constitutional arguments, though, are the opinions of black military leaders, many of whom reject the comparison of homosexuality to race. Lieutenant General Calvin A.H. Waller, U.S. Army (Retired), deputy commander of Operation Desert Storm, notes a fundamental difference between skin color and sexual orientation: "[t]here's no question that they're being treated differently based on their lifestyle. But I don't think that you can say that what we're doing to homosexuals in this day and age is the same thing that we did to minorities in an earlier time," he said.[37] Retired Army Lieutenant General Julius W. Becton concurs by stating he finds the comparison "offensive."[38] Army Lieutenant General Samuel E. Ebbesen released a statement saying that he "personally resents" the comparison between blacks and gays.[39] Finally, and perhaps most compelling, former Chairman of the Joint Chiefs, Army General Colin L. Powell wrote in a May 1992 letter to Representative Patricia Schroeder (D-Colo.):

> I can assure you I need no reminders concerning the history of African-Americans in the defense of their Nation and the tribulations they faced. I am a part of that history.
>
> Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.[40]

Significantly, noted military sociologist Charles Moskos[41] of Northwestern University also agrees that the comparison does not fit. He points out that integration of the military resulted not from a desire for fairness, but instead a decision that integrat-

---

36. *See* 10 U.S.C. § 925 (1988) (prohibiting sodomy); *see* discussion *infra* part III.

37. Lynne Duke, *Drawing Parallels—Gays and Blacks; Linking Military Ban to Integration Fight Stirs Outrage, Sympathy*, WASH. POST, Feb. 13, 1993, at A1.

38. *Id.*

39. *Id.*

40. Colin L. Powell, Letter to Representative Patricia Schroeder, May 8, 1992. (Extracted from Congressional Research Service Report for Congress, David F. Burelli, "Homosexuals and U.S. Military Personnel Policy," (Jan. 14, 1993)).

41. Whom *The Wall Street Journal* called "the most influential military sociologist in the country" and who also supported Bill Clinton for President. Tom Philpott, *Spotlight is on Moskos*, ARMY TIMES, Aug. 2, 1993, at 16.

ed units would be more effective in battle (with the Korean War looming).[42] While 97 percent of active-duty flag officers (generals and admirals) favor the ban on homosexuals[43] (and nearly three-quarters of enlisted personnel oppose lifting the ban[44]), only about a third of white soldiers objected to racial integration at that time.[45]

III. EXAMPLES OF CONGRESS' CONSTITUTIONAL POWERS RELATED TO THE MILITARY

In a 1981 case, *Rostker v. Goldberg*,[46] the Supreme Court rejected a challenge to the male-only draft registration provision of the Military Selective Service Act.[47] The Court explained:

> The "specific findings" section of the Report of the Senate Armed Services Committee, later adopted by both Houses of Congress, began by stating:
>
> > Article I, section 8 of the Constitution commits *exclusively* (emphasis added) to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for Government and regulation of the land and naval forces, and pursuant to these powers it lies within the discretion of the Congress to determine the occasions for expansion of our Armed Forces, and the means best suited to such expansion should it prove necessary.
>
> This Court has consistently recognized Congress' "broad constitutional power" to raise and regulate armies and navies. As the Court noted in considering a challenge to the selective service laws: "The constitutional power of Congress to raise and support armies and to make *all* laws necessary and proper to that end is broad and sweeping."[48]

The Court also pointed out that "[t]he grant of constitutional authority is, after all, to Congress and not to the Executive or military officials."[49]

Two years later, in *Chappell v. Wallace*,[50] where the Court ruled that enlisted military personnel were prohibited from seeking damages relief from their superior officers for alleged violations of constitutional rights, the Court reiterated:

> Many of the Framers of the Constitution had recently experienced the rigors of military life and were well aware of the differences between it and civilian life . . . . Their response was an explicit grant of plenary authority to Congress 'To raise and support Armies'; 'To provide and maintain a Navy'; and 'To make Rules for the Government and Regulation of the land and naval forces.' It is clear that the Constitution contemplated that the Legislative Branch have *plenary* control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and

---

42. Duke, *supra* note 37.

43. Rowan Scarborough, *Top Brass Hope Ban is Retained; GOP Survey Finds 97% Oppose Homosexuals in the Military*, WASH. TIMES, July 1, 1993, at A3. 621 of 1,040 generals and admirals responded to the confidential mail survey.

44. Melissa Healy, *Senators Hear Sailors' Fears on Gays in Service*, L.A. TIMES, May 11, 1993, at A1.

45. Duke, *supra* note 37.

46. 453 U.S. 57 (1981).

47. 50 U.S.C. App. § 451 *et seq.* (1976 ed. and Supp. III).

48. Rostker v. Goldberg, 453 U.S. 57, 65 (1981) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968); *See* Lichter v. United States, 334 U.S. 742, 755 (1948)) (other citations omitted).

49. *Id.* at 80 n.15.

50. 462 U.S. 296 (1983).

Congress and the courts have acted in conformity with that view.[51]

The aforementioned cases demonstrate that the framers made an intentional and explicit decision to vest Congress with the powers enumerated and associated with Article I, Section 8, Clauses 12-14. In exercising its powers under Article I, Section 8, Congress has implicitly stated its position regarding homosexuals in the military through laws regulating military service. For example, Congress enacted the Uniform Code of Military Justice ("UCMJ"),[52] which is a subset of federal penal law that only applies to members of the military.[53] Among the provisions of the UCMJ is Article 125 (Sodomy), which proscribes "unnatural carnal copulation with another person of the same or opposite sex."[54]

Congress has also required that the Punitive Articles of the UCMJ must be explained to all service members within six days of the commencement of active duty, after completion of six months on active duty, and at every reenlistment thereafter.[55] Along with the explanation requirement, enlisted service members are required to take an enlistment oath which binds them to "obey . . . orders . . . according to regulations and the Uniform Code of Military Justice."[56] Although less specific than the UCMJ, the oath of office required of all military officers states, "I will well and faithfully discharge the duties of the office on which I am about to enter."[57] These duties include administering non-judicial punishment under Article 15 of the UCMJ (for minor UCMJ infractions) and preferring charges (i.e., judicial proceedings) against their subordinates for possible trial by court-martial when more serious violations have occurred.

Coupled with the required oaths and explanation/enforcement requirements are laws regulating fraudulent and unlawful enlistments/appointments.[58] The sections which address fraudulent enlistment and unlawful enlistment cover homosexuals. These provisions mandate dismissal from the service, among other penalties.[59] Thus, Congress has established a framework whereby all soldiers are given notice from the beginning of their enlistments that sodomy is unlawful; has required that all enlisted service members swear out an oath to obey all UCMJ provisions; and has required all officers to swear an oath to discharge the duties of their office, which includes enforcing the UCMJ. This includes enforcing the prohibition on sodomy, and discharging those who have fraudulently/unlawfully enlisted. Congress' intent could hardly be more clear.

But Congress has even been more explicit than that.[60] While amending Title 10

---

51. *Chappell*, 462 U.S. at 300-01 (1983) (emphasis in original) (citation omitted).

52. 10 U.S.C.A. §§ 877-934 (1983 & West Supp. 1993) [hereinafter UCMJ].

53. The Supreme Court has explained, "There can be no question but that Clause 14 grants the Congress power to adopt the Uniform Code of Military Justice." Kinsella v. United States, 361 U.S. 234, 247 (1960).

54. 10 U.S.C. § 925 (1988).

55. 10 U.S.C.A. § 937 (West Supp. 1993).

56. 10 U.S.C.A. § 502 (West Supp. 1993).

57. 5 U.S.C. § 3331 (1988).

58. Fraudulent enlistments refer to "knowingly false representation or deliberate concealment as to qualifications . . . ." 10 U.S.C. § 883 (1988). Unlawful enlistments relate to those "ineligible" for service. 10 U.S.C. § 884 (1988).

59. 10 U.S.C. §§ 818-820, 883-884 (1988).

60. I thank John C. Murdock, Notre Dame Law School Class of 1994, for his work on much of the following material through the end of Section II. He included parts of it in a Memorandum of

in 1958, Congress expressed its intent to administratively discharge commissioned or warrant officers who possessed a homosexual orientation.[61] Specifically, the report stated that it was amending 10 U.S.C. sections 3258, 3448,[62] 8258, and 8448[63] for the purpose of facilitating a general discharge "under circumstances which clearly indicate that he (the servicemember) is not qualified for further military service."[64] One of the circumstances which the report mentioned as grounds for disqualifying a commissioned or warrant officer from further service was "homosexual tendencies not manifested by overt acts while in the service."[65] In other words, a homosexual orientation or tendency alone, without any homosexual conduct, was seen by Congress as justifiable grounds for dismissal.

Finally, under 10 U.S.C. section 5947, entitled "Requirement of Exemplary Conduct," Congress charged all "commanding officers and others in authority in the naval service" with the following duty:

> [To] show in themselves a good example of virtue, honor, patriotism, and subordination; . . . to guard against and suppress all dissolute and immoral practices . . . and to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.[66]

Since Congress made it clear that homosexual conduct (i.e., sodomy) is forbidden in the military,[67] and it seems transparent that the only reason for prohibiting sodomy would be on moral grounds, "dissolute and immoral practices" under the above statute must be construed to include sodomy. And because naval officers are required by law to "guard against" or prevent the occurrence of sodomy, this mandate would require the exclusion of homosexuals as a necessary precaution to prevent the unnatural acts proscribed by the sodomy statute.[68] Congress evidently enacted section 5947 because of the unique demands of the military lifestyle, a lifestyle with which homosexuality and other "immoral practices" are incompatible.

Title 10's existence also means that any executive branch policy on this issue (pre-Clinton) had been enacted necessarily in accordance with congressional policy, and not of the President's own volition. While Congress has delegated to the service secretaries the power to prescribe regulations establishing the grounds for early discharge of enlisted service members, such power must be exercised in accordance with the law Congress has enacted (i.e., the UCMJ). The Supreme Court has explained this idea with regard to another executive agency by stating:

> This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be

---

Law which he submitted to Headquarters, United States Marine Corps, in the Spring of 1993.

61. S. REP. NO. 1864, 85th Cong., 2d Sess., *reprinted in* 1958 U.S.C.C.A.N. 3296.

62. Repealed in 1980.

63. Repealed in 1980.

64. S. REP. NO. 1864, *supra* note 61.

65. *Id.*

66. 10 U.S.C. § 5947 (1988).

67. 10 U.S.C. § 925 (1988).

68. This presumes that homosexuals will engage in sodomy. While it may be argued that a homosexual could serve in the military and not engage in homosexual activity, this seems rather implausible in the vast majority of cases. *See infra* note 93.

> binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that *the grant of authority contemplates the regulations issued.*[69]

Pursuant to congressional delegation and the Supreme Court's guidance, pre-Clinton administrations drafted regulations which made homosexual orientation grounds for discharge.[70]

Also within Title 10, Congress chose to delegate some of its plenary powers under Article I, Section 8, Clause 14 (the "make rules" clause) to the President.[71] The delegation states, "[t]he President may prescribe regulations to carry out his functions, powers, and duties under this title." The Constitution, however, circumscribes how far a President can extend this delegation; for all Presidents are bound to "take care that the laws be faithfully executed."[72] The punitive provisions of Title 10 are federal law. Therefore, any Executive policies working against their spirit would consequently be void. More importantly, the President would be in violation of his constitutional duty.

As early as 1842, the Supreme Court held that rules and regulations which are promulgated by the executive branch, by virtue of the Commander-in-Chief powers, are binding upon the armed forces to the extent that such edicts are "within the sphere of his legal and constitutional authority."[73] Forty-four years later, in *United States v. Symonds,*[74] the Supreme Court qualified the executive branch's legal authority to regulate, order or instruct the naval forces by holding that:

> The authority of the Secretary [of the Navy] to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court.[75]

In summary, the President currently has two sources of power by which he can regulate the armed forces. First, the President can regulate within the scope of the delegated powers given to him by Congress under Title 10. Second, despite the plenary congressional powers of Article I, Section 8, Clause 14, the Supreme Court has held that the powers of the Commander in Chief also include an inherent power to regulate the armed forces.[76] Importantly, these inherent regulatory powers are qualified by the

---

69. Chrysler Corp. v. Brown, 441 U.S. 281, 308 (1979) (emphasis added).

70. *See* D.O.D. Directive No. 1332.14 (1982), and 32 C.F.R. pt. 41, app. A (1993). Commissioned officers were separated for cause pursuant to D.O.D. Directive No. 1332.30 (1986). Also, D.O.D. Directive No. 6130.3 (1986) listed homosexuality as a mental disorder which disqualifies homosexuals who are candidates for enlistment, commission, or induction.

71. 10 U.S.C. § 121 (1988); *see also* 10 U.S.C. § 113 (1988) (referring to the Secretary of Defense).

72. U.S. CONST. art. II, § 3.

73. United States v. Eliason, 41 U.S. 291, 301-02 (1842).

74. 120 U.S. 46, 49-50 (1886).

75. *Id.*

76. ___ [I]t has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of

requirement that they must be consistent with, not contrary to, the statutory scheme made pursuant to Congress' plenary powers. Again, the Court has already illuminated the President's power in this area:

> Section 201 of Executive Order 11246 directs the Secretary of Labor to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof." But in order for such regulations to have the "force and effect of law," *it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress.*[77]

Thus, the fundamental problem remains that Congress never intended to admit homosexuals into the military; therefore, the President could not do so alone. If he tried, then it would be up to the courts to act, provided that a proper plaintiff brought suit.

IV. THE IMPLICATIONS OF *DELLUMS V. BUSH*

During the build-up prior to Operation Desert Storm, Representative Dellums and 53 other members of Congress (including one senator) unsuccessfully filed suit to enjoin President Bush from initiating an offensive attack against Iraq without a declaration of war or other explicit congressional authorization. In discussing Congress' power "[t]o declare [w]ar" under Article I, Section 8, Clause 11, U.S. District Judge Harold Greene explained:

> While the Constitution itself speaks only of the congressional power to declare war, it is silent on the issue of the effect of a congressional vote that war not be initiated. However, if the War Clause is to have its normal meaning, it excludes from the power to declare war all branches other than the Congress.[78]

By analogy, this explanation would also apply to Clauses 12-14, especially with regard to governing and regulating the armed forces. In other words, the President should normally be excluded from raising, supporting, providing, maintaining, and regulating the armed forces, since the Constitution assigns those powers to Congress.

In the end, however, *Dellums* was decided on ripeness grounds. The court reasoned:

> It would be both premature and presumptuous for the Court to render a decision on the issue of whether a declaration of war is required at this time or in the near future when the Congress has provided no indication whether it deems such a declaration either necessary, on the one hand, or imprudent, on the other.[79]

By so ruling, the court followed Justice Powell's proposal from *Goldwater v. Carter*,[80] where he reasoned in concurrence that "'a dispute between Congress and the

---

> peace, or in time of war . . . . If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

Reid v. Covert, 354 U.S. 1, 38-39 (1957) (footnote omitted).

77. Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979) (emphasis added).
78. Dellums v. Bush, 752 F. Supp. 1141, 1144 n.5 (D.D.C. 1990).
79. *Id.* at 1149-50 (footnote omitted).
80. 444 U.S. 996 (1979).

President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.'"[81] Justice Powell would require a constitutional impasse between the political branches before the Judiciary would step in. Judge Greene interpreted this to mean, "unless the Congress as a whole, or by a majority, is heard from, the controversy here cannot be deemed ripe; it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it."[82]

Regarding homosexuality, a "majority" of Congress had been heard from via Title 10. Therefore, the only requirement that a congressional plaintiff would have had to meet in order to enjoin the President from singlehandedly overturning the ban is standing. Again, *Dellums* is of assistance. Judge Greene applied a two-part test from *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*[83] and *Allen v. Wright*,[84] which requires a plaintiff to allege: (1) that he personally suffered actual or threatened injury, and (2) that the injury can be traced fairly to the challenged action and is likely to be redressed by a decision in favor of the plaintiff.[85]

More in accord with the hypothetical situation whereby President Clinton would have attempted unilaterally to overturn the policy without congressional assent, *Moore v. United States House of Representatives*,[86] held that "where a congressional plaintiff suffers 'unconstitutional deprivations of [his] constitutional duties or rights . . . if the injuries are specific and discernible,' a finding of harm sufficient to support standing is justified."[87] This holding intimates that any single member of Congress could sue to prevent execution of an executive order overturning the ban, since such an executive order would be a substantial step toward condoning sodomy in the ranks, against Congress' explicit intent.

Single-member standing also alleviates a problem alluded to in *Dames & Moore v. Regan*,[88] which held that Congress *implicitly* approved a longstanding practice of foreign claims settlement by executive agreement. In *Dames & Moore*, the Court relied heavily on the fact that Congress tolerated "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . ."[89] This has never been the case with homosexuals in the military.

Moreover, *Dames & Moore* upheld "the President's action in nullifying the attachments and ordering the transfer of the assets . . . *pursuant to specific congressional authorization*."[90] Thus, President Carter's action in that case stands in opposition to President Clinton's proposed executive order which would have had no corresponding congressional authorization. Finally, *Dames & Moore*-type acquiescence requires thirty years or more of congressional silence.[91]

---

81. 752 F. Supp. at 1150 (quoting Goldwater v. Carter, 444 U.S. at 997).
82. 752 F. Supp. at 1151.
83. 454 U.S. 464, 472 (1982).
84. 468 U.S. 737, 751 (1984).
85. 752 F. Supp. at 1147.
86. 733 F.2d 94' (D.C. Cir. 1984).
87. 752 F. Supp. at 1147 (quoting *Moore*, 733 F.2d at 952).
88. 453 U.S. 654 (1981).
89. *Id.* at 686 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 610-11 (1952)).
90. *Id.* at 674 (emphasis added).
91. In *Dames & Moore*, the Court observed that the President had entered into at least ten binding settlements with foreign nations which Congress implicitly approved from 1952 until the Executive

At best, then, the most that a President could hope for were he to take an executive order-only approach to changing the policy on homosexuals would be "a healthy deference to legislative and executive judgments in the area of military affairs . . . ."[92] Thus, a court could conceivably read the President's Commander-in-Chief power broadly to allow him to change the policy at will. Such a judicial decision, however, would be unwise.

First, and most practically, without a corresponding change in the UCMJ, a situation would then exist where homosexuals could be "lawfully" enlisted but then shortly thereafter punished for violating Article 125 (Sodomy). On the other hand, President Clinton's desire was to allow enlistment only of those who admit to homosexual inclinations and therefore were previously prohibited, but who assert that they will not engage in homosexual conduct.[93] Nevertheless, as the Seventh Circuit pointed out, "acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct . . . . [I]t is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct."[94] Effectively, then, extreme judicial deference to an executive order without corresponding legislative action would amount to a catch-22.

Furthermore, if a court deferred to an executive order change of policy on this matter, it would have to ignore James Madison's writings when he defended the Constitution against charges that it established insufficiently separate branches of government. He wrote that separation of powers, "does not mean that these (three) departments ought to have no *partial agency* in, or no *controul* [sic] over the acts of each other," but rather "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted."[95]

The Court also recognized this idea in *Bowsher v. Synar*,[96] when it noted:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.[97]

So even if a popular consensus would ever be reached to allow homosexuals to serve in the military, Congress would have to cooperate in changing the policy.

Orders at issue in the case were promulgated in 1981. *Id.* at 680-86.

92. Rostker v. Goldberg, 453 U.S. 57, 66 (1981).

93. This dilemma is still, as yet, unclear. In theory a "homosexual" who neither admits nor acts on that description may serve. The obvious question, however, is whether such a person is meaningfully homosexual. In any case, since Congress has written the new policy into law, the problem that could have resulted has been somewhat avoided.

94. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

95. THE FEDERALIST No. 47, at 325-26 (James Madison) (J.Cooke ed. 1961) (emphasis in original).

96. 478 U.S. 714 (1986).

97. INS v. Chadha, 462 U.S. 919, 951 (1983).

V. THE OLD AND THE NEW

So what has transpired? If one compares the "new" policy, which is now federal law, with the old, which was a Department of Defense regulation, it becomes readily apparent that except for the recommendation to continue not asking recruits about their sexual orientation, the policies are not different from one another.[98] Indeed, the vote breakdown would indicate that the new legislation is essentially conservative, with liberal Democrats such as Senators Kennedy and Lieberman having opposed it in Committee,[99] thereby giving further indication that any change lacked much substance. Even the "rebuttable presumption" exception whereby an individual may claim that he is homosexual, but may then disprove that, is no change from previous Department of Defense Policy.[100] One must ask, of course, given the social stigmatization

---

98. "The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1671 (1993).

This statement and the rest of the Committee's proposed legislation bears a striking resemblance to the previous Department of Defense policy. *Compare* with 32 C.F.R. Pt. 41, App. A, Pt. 1, Para. H (1993), which said:

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

99. *See Senate panel approves Clinton policy on gays in the military*, UNITED PRESS INT'L, July 23, 1993.

100. *Compare* the current law, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1671-72 (1993):

> (B) Policy.-A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
>
> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that-
>
> (A) Such conduct is a departure from the member's usual and customary behavior;
>
> (B) Such conduct, under all the circumstances, is unlikely to recur;
>
> (C) Such conduct was not accomplished by use of force, coercion, or intimidation;
>
> (D) Under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
>
> (E) The member does not have a propensity or intent to engage in homosexual acts.
>
> (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated 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.
>
> (3) That the member has married or attempted to marry a person known to be of the same biological sex.

of homosexuality, why a person who does not engage in or intend to engage in homosexual conduct would ever say he is a homosexual. Thus, for a person to say that he is a homosexual must mean that he either truly does intend to engage in prohibited conduct, or is merely seeking an early discharge.

The new legislation does not address when a commander has enough evidence to investigate, but it defies reason to think that the executive branch would discourage military officers fr. .n investigating instances of homosexuality (i.e., sodomy infractions) occurring in their commands. Under the new policy, "credible information" will be required before launching an investigation.[101] This does not include investigations solely to determine an otherwise unimplicated soldier's sexual orientation during security clearance checks.[102] Nor does it include investigations based only on the mere allegation or statement of another, or rumors/suspicion;[103] although it could include a statement by a third party who suspects another service member of homosexuality without having any direct evidence of it.[104] Instead, the commander must have a reasonable belief based on articulable facts.[105] Of course, this raises the question of what a military prosecutor would do if a commander came to him with credible information gathered after an initially "capricious" investigation. This scenario indicates that President Clinton's guidelines are necessarily dependent upon self-policing.

More importantly, however, this policy only codifies what has been the practice up until now. It is appropriate here to point out that the oft-repeated shibboleth that "witch hunts" were somehow a norm prior to President Clinton is preposterous. Pentagon spokesman Doug Hart explained before President Clinton took office that:

> The only way an investigation takes place is if there is a criminal act involved . . . . The stories of witch hunts and exuberant investigations are just not

---

with the pre-Clinton Policy, 32 C.F.R. Pt. 41, App. A, Pt. 1, Para. H (1993):

> c. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this section if one or more of the following approved findings is made:
>
> (1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:
>
> (a) Such conduct is a departure from the member's usual and customary behavior;
>
> (b) Such conduct under all the circumstances is unlikely to recur;
>
> (c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;
>
> (d) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and
>
> (e) The member does not desire to engage in or intend to engage in homosexual acts.
>
> (2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.
>
> (3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

101. *Policy Guidelines*, ARMY TIMES, Aug. 2, 1993, at 13.

102. *Field officers have discretion to investigate, The Rules of 'Don't Ask, Tell, Pursue'*, NAVY TIMES, Jan. 3, 1994, at 4.

103. *Id.*

104. *Id.*

105. *Policy Guidelines*, ARMY TIMES, Aug. 2, 1993, at 13.

> true. A majority of those who are found to be homosexual are found out through self-proclamation. Others are found out through complaints or people who turn them in. Very few are found through investigation.[106]

VI. SOME CONCLUDING THOUGHTS

While moral arguments, as well as arguments pertaining to issues of privacy, exist as to why homosexuals should not be admitted into the military, those arguments are beyond the constitutional issues addressed in this Note. The Constitution has empowered each of the three branches of government with particular powers by which each branch may effectively represent the people for whom the Constitution was written. In attempting to admit homosexuals into the military, the President may have overstepped the powers which the Constitution delegates to the Executive Branch with regards to the military. Moreover, the President may have badly miscalculated the position of the American people on the issue of homosexuality. A 1991 survey conducted by the National Opinion Research Center at the University of Chicago indicated that 71 percent of Americans felt that sex between homosexuals was always wrong.[107] Additionally, 57 percent said that homosexual relations between consenting adults should not be legal.[108]

As representatives of the American people, Congress should not capitulate to a policy which would contravene the position of the American people. The Constitution has delegated to Congress alone the power to determine the composition of the United States military. Congress should enjoin any attempt by the President to transgress the powers which the Constitution has delegated to the Executive Branch. With standing to enjoin any future attempt by the President to admit homosexuals into the military, Congress should protect its constitutionally delegated powers in representing the voice of the American people.

*Frank T. Pimentel**

106. Debenport, *supra* note 15.

107. Richard Morin, *Most Americans Say Gay Sex is 'Wrong'*, WASH. POST NAT'L WKLY EDITION, Feb. 15-21, 1993, at 37.

108. *Id.*

* B.A., University of Notre Dame, 1987; J.D. Candidate, University of Notre Dame Law School, 1994. I dedicate this Note to my late mother, Patricia Rose (Kiernan) Pimentel, who loved me enough from an early age to help me discern the law as written in our hearts (Romans 2:15) by our Creator.