

I'm running for President to build an America that lives up to our founding promise of equality for all - a promise that extends to our gay brothers and sisters. It's wrong to have millions of Americans living as second-class citizens in this nation. And I ask for your support in this election so that together we can bring about real change for all LGBT Americans.  
  
Equality is a moral imperative. That's why throughout my career, I have fought to eliminate discrimination against LGBT Americans. In Illinois, I co-sponsored a fully inclusive bill that prohibited discrimination on the basis of both sexual orientation and gender identity, extending protection to the workplace, housing, and places of public accommodation. In the U.S. Senate, I have co-sponsored bills that would equalize tax treatment for same-sex couples and provide benefits to domestic partners of federal employees. And as president, I will place the weight of my administration behind the enactment of the Matthew Shepard Act to outlaw hate crimes and a fully inclusive Employment Non-Discrimination Act to outlaw workplace discrimination on the basis of sexual orientation and gender identity.  
  
As your President, I will use the bully pulpit to urge states to treat same-sex couples with full equality in their family and adoption laws. I personally believe that civil unions represent the best way to secure that equal treatment. But I also believe that the federal government should not stand in the way of states that want to decide on their own how best to pursue equality for gay and lesbian couples - whether that means a domestic partnership, a civil union, or a civil marriage. Unlike Senator Clinton, I support the complete repeal of the Defense of Marriage Act (DOMA) - a position I have held since before arriving in the U.S. Senate. While some say we should repeal only part of the law, I believe we should get rid of that statute altogether. Federal law should not discriminate in any way against gay and lesbian couples, which is precisely what DOMA does. I have also called for us to repeal Don't Ask, Don't Tell, and I have worked to improve the Uniting American Families Act so we can afford same-sex couples the same rights and obligations as married couples in our immigration system.  
  
The next president must also address the HIV/AIDS epidemic. When it comes to prevention, we do not have to choose between values and science. While abstinence education should be part of any strategy, we also need to use common sense. We should have age-appropriate sex education that includes information about contraception. We should pass the JUSTICE Act to combat infection within our prison population. And we should lift the federal ban on needle exchange, which could dramatically reduce rates of infection among drug users. In addition, local governments can protect public health by distributing contraceptives.  
  
We also need a president who's willing to confront the stigma - too often tied to homophobia - that continues to surround HIV/AIDS. I confronted this stigma directly in a speech to evangelicals at Rick Warren's Saddleback Church, and will continue to speak out as president. That is where I stand on the major issues of the day. But having the right positions on the issues is only half the battle. The other half is to win broad support for those positions. And winning broad support will require stepping outside our comfort zone. If we want to repeal DOMA, repeal Don't Ask, Don't Tell, and implement fully inclusive laws outlawing hate crimes and discrimination in the workplace, we need to bring the message of LGBT equality to skeptical audiences as well as friendly ones - and that's what I've done throughout my career. I brought this message of inclusiveness to all of America in my keynote address at the 2004 Democratic convention. I talked about the need to fight homophobia when I announced my candidacy for President, and I have been talking about LGBT equality to a number of groups during this campaign - from local LGBT activists to rural farmers to parishioners at Ebenezer Baptist Church in Atlanta, where Dr. Martin Luther King once preached.  
  
Just as important, I have been listening to what all Americans have to say. I will never compromise on my commitment to equal rights for all LGBT Americans. But neither will I close my ears to the voices of those who still need to be convinced. That is the work we must do to move forward together. It is difficult. It is challenging. And it is necessary.  
  
Americans are yearning for leadership that can empower us to reach for what we know is possible. I believe that we can achieve the goal of full equality for the millions of LGBT people in this country. To do that, we need leadership that can appeal to the best parts of the human spirit. Join with me, and I will provide that leadership. Together, we will achieve real equality for all Americans, gay and straight alike.

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, ias applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch’s determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2010, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. Windsor v. United States, No. 1:10-cv-8435 (S.D.N.Y.); Pedersen v. OPM, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.ii

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

**Standard of Review**

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group”; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual’s “ability to perform or contribute to society.” See Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have “demean[ed] the[] existence” of gays and lesbians “by making their private sexual conduct a crime.” Lawrence v. Texas, 539 U.S. 558, 578 (2003).iii

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, see Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, see Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in Romer v. Evans, 517 U.S. 620 (1996), and Lawrence, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and “ability to attract the [favorable] attention of the lawmakers.” Cleburne, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don’t Ask, Don’t Tell indicate that the political process is not closed entirely to gay and lesbian people, that is not the standard by which the Court has judged “political powerlessness.” Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation “bears no relation to ability to perform or contribute to society.” Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don’t Ask, Don’t Tell), in community practices and attitudes, in case law (including the Supreme Court’s holdings in Lawrence and Romer), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. See, e.g., Statement by the President on the Don’t Ask, Don’t Tell Repeal Act of 2010 (“It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.”)

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under Bowers v. Hardwick, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of Bowers in Lawrence v. Texas, 538 U.S. 558 (2003).iv Others rely on claims regarding “procreational responsibility” that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings.v And none engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, Lawrence and Romer.vi But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

**Application to Section 3 of DOMA**

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is “substantially related to an important government objective.” Clark v. Jeter, 486 U.S. 456, 461 (1988). Under heightened scrutiny, “a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.” United States v. Virginia , 518 U.S. 515, 535-36 (1996). “The justification must be genuine, not hypothesized or invented post hoc in response to litigation.” Id. at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress’ actual justifications for the law.

Moreover, the legislative record underlying DOMA’s passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.vii See Cleburne, 473 U.S. at 448 (“mere negative attitudes, or fear” are not permissible bases for discriminatory treatment); see also Romer, 517 U.S. at 635 (rejecting rationale that law was supported by “the liberties of landlords or employers who have personal or religious objections to homosexuality”); Palmore v. Sidotti, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

**Application to Second Circuit Cases**

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in Windsor and Pedersen, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a “reasonable” one. “[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity,” and thus there are “a variety of factors that bear on whether the Department will defend the constitutionality of a statute.” Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute “in cases in which it is manifest that the President has concluded that the statute is unconstitutional,” as is the case here. Seth P. Waxman, Defending Congress, 79 N.C. L.Rev. 1073, 1083 (2001).

In light of the foregoing, I will instruct the Department’s lawyers to immediately inform the district courts in Windsor and Pedersen of the Executive Branch’s view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3’s constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President’s instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the Windsor and Pedersen cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,

                                                                                    Eric H. Holder, Jr.  
                                                                                    Attorney General

The military policy was one target of this movement, dramatized by the legal challenge to the policy mounted by Leonard Matlovich. Similar challenges continued throughout the 1970s. Although largely unsuccessful, they highlighted the wide latitude of discretion allowed to commanders in implementing existing policy, which resulted in considerable variation in the rigor with which the policy was enforced.

In 1981, the DOD formulated a new policy which stated unequivocally that homosexuality is incompatible with military service (DOD Directive 1332.14, January 28, 1982, Part 1, Section H). According to a 1992 report by the Government Accounting Office (GAO), nearly 17,000 men and women were discharged under the category of homosexuality in the 1980s. The Navy was disproportionately represented, accounting for 51% of the discharges even though it comprised only 27% of the active force during this time period. Statistical breakdowns by gender and race revealed that, for all services, White women were discharged at a rate disproportionate to their representation. Overall, White females represented 6.4% of personnel but 20.2% of those discharged for homosexuality.

By the end of the 1980s, reversing the military's policy was emerging as a priority for advocates of gay and lesbian civil rights. Several lesbian and gay male members of the armed services came out publicly and vigorously challenged their discharges through the legal system. In 1992, legislation to overturn the ban was introduced in the U.S. Congress. By that time, grassroots civilian opposition to the DOD’s policy appeared to be increasing. Many national organizations had officially condemned the policy and many colleges and universities had banned military recruiters and Reserve Officers Training Corps (ROTC) programs from their campuses in protest of the policy.

By the beginning of 1993, it appeared that the military's ban on gay personnel would soon be overturned. Shortly after his inauguration, President Clinton asked the Secretary of Defense to prepare a draft policy to end discrimination on the basis of sexual orientation, and he proposed to use the interim period to resolve "the real, practical problems that would be involved" in implementing a new policy. Clinton's proposal, however, was greeted with intense opposition from the Joint Chiefs of Staff, members of Congress, the political opposition, and a considerable segment of the U.S. public.

After lengthy public debate and congressional hearings, the President and Senator Sam Nunn (D-GA), chair of the Senate Armed Services Committee, reached a compromise which they labeled *Don't Ask, Don't Tell, Don't Pursue*. Under its terms, military personnel would not be asked about their sexual orientation and would not be discharged simply for being gay. Engaging in sexual conduct with a member of the same sex, however, would still constitute grounds for discharge. In the fall of 1993, the congress voted to codify most aspects of the ban. Meanwhile, the civilian courts issued contradictory opinions, with some upholding the policy’s constitutionality and others ordering the reinstatement of openly gay military personnel who were involuntarily discharged. Higher courts, however, consistently upheld the policy, making review of the policy by the U.S. Supreme Court unlikely.

The policy has remained in effect since 1993, although the [Servicemembers Legal Defense Network](http://www.sldn.org/) and other organizations monitoring its implementation have repeatedly pointed out its failures. Discharges have actually increased under the policy, and harassment of gay and lesbian personnel appears to have intensified in many locales.

The failure of the policy was dramatized in 1999 by the murder of Pfc. Barry Winchell at the hands of Pvt. Calvin Glover, a member of his unit. Glover beat Winchell to death with a baseball bat while he slept. Prosecutors argued that Glover murdered Winchell because he was a homosexual. Glover was sentenced to life in prison. Subsequent inquiries by civilian groups revealed an ongoing pattern of policy violations and antigay harassment that had been ignored by higher-level officers. However, a [report by the Army Inspector General](http://www.sldn.org/templates/press/record.html?record=93) exonerated all officers of blame in Winchell's murder and found no climate of homophobia at Fort Campbell, Kentucky, the base where Winchell was bludgeoned to death.

In the wake of the Winchell murder, Hilary Rodham Clinton, then-Vice-President Al Gore, and even President Clinton labeled the *Don’t Ask, Don’t Tell* policy a failure. Campaigning for the Democratic Party’s 2000 presidential nomination, candidates Gore and Bill Bradley each promised to work to reverse the policy if he were elected. Meanwhile, candidates for the Republican nomination reaffirmed their support for the current policy (McCain, Bush) or declared that they would seek to completely prohibit military service by homosexuals (Bauer, Keyes, Forbes).

With the beginning of the new century, the White House and Congress were controlled by Republicans who were on record opposing service by openly gay personnel. Prospects for eliminating the ban appeared slim.

In 2002 and 2003, however, calls for changing the policy gained new momentum. Following the September 11, 2001, attacks on the World Trade Center and the Pentagon, the war on terrorism and U.S. military involvement in Afghanistan and Iraq created a renewed need for personnel. In that context, many objected when [nine military linguists](http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/11/15/MN57382.DTL) - including six who were fluent in Arabic - were discharged in 2002 after their homosexuality became known. In 2003, [three high-ranking retired military officers](http://www.sldn.org/templates/press/record.html?section=2&record=1310) publicly disclosed their homosexuality and challenged the DADT policy's legitimacy.

Throughout this time, public opinion appeared to favor allowing service by openly gay personnel. A December, 2003, Gallup poll registered 79% of US adults (including 68% of self-described conservatives) in favor of allowing gay men and lesbians to serve openly.

Thus, the "Don’t Ask, Don’t Tell" policy – and the broader issue of whether and how gay men and lesbians should serve in the military – remain a volatile issues with great symbolic potency.

persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.'.

Public Law 103-160 – Nov. 30, 1993 – § 546, 107 Stat. 1670 (1993) (codified at 10 U.S.C. A. § 654).  
  
**§ 654. POLICY CONCERNING HOMOSEXUALS IN THE ARMED FORCES.**   
  
(a) **Findings** – Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.   
  
(2) There is no constitutional right to serve in the armed forces.   
  
(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.   
  
(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.   
  
(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.   
  
(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.   
  
(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.   
  
(8) Military life is fundamentally different from civilian life in that–

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and   
  
(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.   
  
(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.   
  
(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.  
  
(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.   
  
(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.   
  
(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.   
  
(15) 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.

(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.

(c) **Entry standards and documents** –

(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).  
  
(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) **Required briefings** – The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).   
  
(e) **Rule of construction**– Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that–

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and   
  
(2) separation of the member would not be in the best interest of the armed forces.

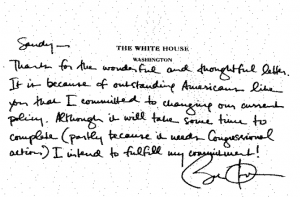
(f) **Definitions**– In this section:

(1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay " and "lesbian".  
  
(2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.   
  
(3) The term "homosexual act" means:

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and   
  
(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

1. The policy was introduced as a compromise measure in 1993 by President Bill Clinton who campaigned on the promise to allow all citizens to serve in the military regardless of sexual orientation.[5] At the time, per the December 21, 1993 Department of Defense Directive 1332.14,[6] it was legal policy (10 U.S.C. § 654)[7] that homosexuality is incompatible with military service and persons who engaged in homosexual acts or stated that they are homosexual or bisexual were discharged.[5][8] The Uniform Code of Military Justice, passed by Congress in 1950 and signed by President Harry S Truman, established the policies and procedures for discharging homosexual servicemembers.”

In January, Sandy Tsao, an army officer based out of St. Louis, MO, [told her superiors that she is gay](http://thinkprogress.org/2009/05/08/obama-dont-ask-dont-tell/%20%20http:/glaadblog.org/2009/05/07/a-personal-promise-from-president-obama-on-dont-ask-dont-tell/) — a violation of the Don’t Ask, Don’t Tell law. Tsao then wrote to President Obama, urging him to change the DADT policy: “I do hope, Mr. President, that you will help us to win the war against prejudice.” On May 5, Tsao received [a handwritten letter](http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=21121) from Obama with a pledge to repeal DADT at some point:



Working alongside gays is not a big deal for the vast majority of today’s troops, according to a Pentagon study released Tuesday.

And repealing the military’s current ban on open service by gays poses little overall risk to military readiness, unit cohesion and troop retention, the study group concluded.

Many troops’ attitudes were reflected by one special operations soldier cited in the report: “We have a gay guy [in the unit]. He’s big, he’s mean and he kills lots of bad guys. Nobody cared that he was gay,” the soldier told investigators.

Defense Secretary Robert Gates asked a study group in February to assess how a potential repeal — either through the Congress or the courts — would affect the force.

### More on DADT:

• [DADT report changes few minds on Capitol Hill](http://www.armytimes.com/news/2010/11/military-dont-ask-survey-congress-113010w/)

Overall, about 50 to 55 percent of troops said repealing the current “don’t ask, don’t tell” policy would have a mixed effect or no effect at all. Some 15 percent to 20 percent said the change would be positive. And 30 percent said repeal would have negative consequences.

Concerns about negative impact were higher among Marines, at 43 percent. Specifically among Marine infantry, or combat arms, units, some 58 percent said the change would be for the worse.

“We heard many service members express the view that ‘open’ homosexuality would lead to widespread and overt displays of effeminacy among men, homosexual promiscuity, harassment and unwelcome advances within units,” the study group said.

But those concerns were “exaggerated and not consistent with the reported experiences of many service members,” according to the report.

For example, some 69 percent of service members say they have already worked with someone they believed to be gay. Of those, 92 percent said it had no negative impact on their “ability to work together.”

And the report estimates that only about 15 percent of gays currently serving in the military would want to reveal their sexual orientation to everyone in their unit.

The survey is based on responses from some 115,000 troops and 44,200 military spouses. More than a half million questionnaires were distributed last summer.

The study group, led by Pentagon General Counsel Jeh Johnson and Army Gen. Carter Ham, also visited various military bases and held town hall-style meetings with service members.

The working group recommended against creating separate bathroom, shower facilities or sleeping areas for gays, saying that would be a “logistical nightmare” and also would evoke the “separate but equal” treatment once forced on black Americans before the civil rights movement.

Nevertheless, commanders will be able to deal with billeting or berthing situations on a case-by-case basis, the report said.

Congress may vote on repeal later this year. Meanwhile, the federal courts are reviewing a judge’s ruling in October that declared the ban on gays serving openly is unconstitutional.



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**Washington (CNN)** - A national poll released Monday indicates that a majority of Americans say they favor allowing gays to serve openly in the armed forces.

The Pew survey's release comes one day before the Pentagon is expected to release a report on how military personnel feel about the "don't ask, don't tell" policy, which bans openly gay troops for serving in the armed forces.  
  
According to the poll, 58 percent of the public approves of allowing homosexuals to serve openly, with 27 percent saying they are opposed. Pew surveys indicate little change over the past five years, but the 31-point margin in favor of allowing gays to serve is much larger than than the seven-point margin in Pew polls from the summer of 1994, when President Bill Clinton put the controversial policy in place.

A CNN/Opinion Research Corporation poll conducted earlier in November indicated that more than seven in 10 Americans said that people who are openly gay or lesbian should be allowed to serve in the military, with 23 percent opposed.

"The main difference between the CNN poll and the Pew poll is in the number of respondents who told pollsters that they didn't have an opinion on this topic - 16 percent in the Pew poll compared to only five percent in the CNN survey," said CNN Polling Director Keating Holland. "The two polls report virtually the same number who say they oppose gays serving openly in the military, which suggests that there are some people who favor that change in policy but for some reason were reluctant to admit that to the Pew interviewers. That happens occasionally on topics where moral issues and equal-treatment issues intersect."

According to the Pew survey, seven in 10 Democrats and more than six in 10 independent voters favor allowing gays to serve openly in the military with Republicans divided on the issue. By a 48 to 34 percent margin, white evangelical Protestants questioned say they oppose allowing gays from serving openly, while majorities or pluralities of other religious groups surveyed favor allowing gays to serve.

Following the release of the Pentagon report and congressional hearings, lawmakers may vote on repealing "don't ask, don't tell."

The national survey by the Pew Research Center for the People & the Press and the Pew Research Center's Forum on Religion & Public Life was conducted Nov. 4-7, with 1,255 adults questioned by telephone. The survey's overall sampling error is plus or minus 3.5 percentage points.

Since he was elected, President Obama has been dragging his feet on his campaign promise to let gays serve openly in the military—and gay-rights activists have been fuming. After avoiding the issue during his first year in office, Obama [announced his intention to overturn the policy](http://abcnews.go.com/Politics/State_of_the_Union/gays-applaud-obama-pledge-repeal-dont-ask-dont-tell-policy-state-of-the-union/story?id=9687078) created in 1993, called “Don’t Ask Don’t Tell” (DADT), which currently bans gays from serving. But he demanded that Congress do the law changing. After the president requested that the military study the issue, top generals and Defense Secretary Robert Gates testified to Congress that DADT wasn’t working. But in September Senate Republicans successfully filibustered the defense authorization that would have repealed DADT. With Republicans poised to gain Senate seats in the coming midterm elections, repeal looks even more in doubt, unless Democrats manage to pass it in the lame-duck session between the elections and the new Congress being sworn in next year.

Then last week, came a reversal of fortune for gay-rights advocates. A federal district court [ruled](http://online.logcabin.org/news_views/reading-room-back-up/dont-ask-don-t-tell-legal-action/statement-on-log-cabin.html) in *Log Cabin Republicans v. United States* that the current policy against gays was unconstitutional. But on Thursday the Obama administration, which had defended the law in court, asked the court to stay the injunction against enforcement of DADT while they appealed it. (On Monday, Judge Virginia Phillips [said](http://www.pe.com/localnews/stories/PE_News_Local_D_dontask19.20f56dc.html) she was tentatively inclined to reject the administration’s request.)

DADT: Kicked Out But Ready to Go Back Lissa Young’s quest to serve her country again

Obama has now repeatedly angered the gay-rights advocates: first by refusing to undo DADT himself, then by vociferously defending the law in court, and now by appealing the ruling and asking for it to be stayed. “Obama has made choices identical to those that would have been made by the Bush administration,” says Jonathan Turley, a constitutional law expert at George Washington University.

At the very same time that the Department of Justice was issuing its request to the court, President Obama was asked pointedly during his MTV town hall, why he does not just overturn “Don’t Ask Don’t Tell” by executive order, as President Harry Truman had desegregated the military in 1948. Obama replied that the situation was not analogous because in this case Congress had actually passed a law imposing the discriminatory rule, and so only Congress can repeal it. (Obama did promise that repeal would happen on his watch.)

But is it true that Obama has to wait for Congress to act? Most legal experts agree that a president cannot simply change a law by fiat. “Obama is correct in the most general terms,” says Diane Mazur, a former Air Force officer who teaches law at the University of Florida. “Federal law can go away in one of two ways: Congress can repeal it or a court can find it unconstitutional.” And it would seem hypocritical for liberals, who complained during the Bush administration that the executive branch was arrogating too much power to itself, to decide suddenly that they like the unitary executive when their side controls it. “I would be unhappy to hear Obama reading his commander-in-chief power to ignore Congress,” says Robert Burt, a professor at Yale Law School.

“As Americans become more accepting of LGBT people, the most extreme elements of the anti-gay movement are digging in their heels and continuing to defame gays and lesbians with falsehoods that grow more incendiary by the day,” said Mark Potok, editor of the *Intelligence Report*. “The leaders of this movement may deny it, but it seems clear that their demonization of gays and lesbians plays a role in fomenting the violence, hatred and bullying we’re seeing.”

1) RELEVANT EVIDENCE- Courts may consider relevant evidence of speech, beliefs, or expressive conduct to the extent that such evidence is offered to prove an element of a charged offense or is otherwise admissible under the Federal Rules of Evidence. Nothing in this Act is intended to affect the existing rules of evidence.

(2) VIOLENT ACTS- This Act applies to violent acts motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability of a victim.

(3) CONSTITUTIONAL PROTECTIONS- Nothing in this Act shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the First Amendment and peaceful picketing or demonstration. The Constitution does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence.

(4) FREE EXPRESSION- Nothing in this Act shall be construed to allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs.

It is somewhat ironic to be evaluating Obama as a progressive President in relation to the LGBT community because the issues raised by the mainstream LGBT community and identified by Obama as the issues to which he is committed are only marginally progressive, if progressive at all. The goals of the LGBT community are classically liberal. The LGBT community wants to be fully enfranchised politically, they want the same opportunities and protections in the workplace that others are granted, and they want full social and cultural rights. Being denied these rights, protections and opportunities are self-evidently wrong; wrong morally and wrong legally. The denial of these rights violates the equal protection clauses of the Constitution (5th and 14th Amendments), the Universal Delcaration of Human Rights, the Convention on Political and Civil Rights.

All Americans should join the struggle to change this. However, such a change would not be progressive, unless the term is deprived of all of its radical content; it would not change an economic structure that is unfair, unjust and unequal. It would not change a political system that is only in place because it guarantees that there will be no significant changes to the status quo. In other words, the LGBT movement is much like the Civil Rights Movement and the Liberal Feminist Movement. It accepts the social order and demands its rightful place within it. Obama even finds this politically threatening.

What is the progressive element in this struggle?

Obama is clearly not progressive, and he is ambivalent at best in keeping his commitment to the community. He knows LGBT community will vote for him anyway as Bulworth said about Democrats failure to help African Americans “What are you going to do, vote Republican?

the state of California, considered by many to be one of the most progressive states, through the process of a state-wide initiative, Proposition 8, has taken away the right of gays and lesbians to marry.

The consequences of the passage of Proposition 8 for gays and lesbians is obvious; their right to be married, if they so choose, is being denied. But also the argument put forward by the supporters of the proposition labels gays and lesbians, at least implicitly, as a deviant group, and gay and lesbian marriage as a deviant practice. Further this denial of rights and the marginalizing of gays and lesbians contribute to creating a hostile social environment which can lead to hate crimes and the bullying of gay and lesbian school children. The latter is an increasing and disturbing phenomenon in American society. Less discussed in the public debate on gay marriage and family issues are the implications of the passage of Proposition 8 for American democracy and all minority groups. If Proposition 8 is not overturned by the courts, at this point, California District Court Judge Von Walker has ruled that Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and is therefore unconstitutional. The Ninth Circuit Court of Appeals issued a stay on Judge Walker’s ruling until it has ruled on the appeal.

Proposition 8 was directed at one minority group and took away that group’s rights, but it also raises a serious question for American democracy and should be a concern of all minority groups and of all those who believe in equality of rights, a principle to which Obama repeatedly has affirmed a commitment. A profound question is raised: can the majority, through a democratic process, take away the rights of a minority? If Proposition 8 is allowed to stand, then the answer is that a legal precedent has been established doing just that. And the consequences are far reaching. Could the hysteria following another 9-11 create the environment for the majority to vote on rescinding the rights of Moslems?

The ballot initiative referred to as Proposition 8 was passed in California in 2008. It originated after the California Supreme Court struck down an earlier proposition, Proposition 22 that passed in 2000. Proposition 22 sought to establish marriage between a man and a woman as the law in California. The California Supreme Court ruled in 2008 that Proposition 22 was a violation of the equal protection clause of the California Constitution. As a result of the California Supreme Court ruling, it appeared that same sex marriage would be recognized as the legal right of gay and lesbian couples in California. The Proposition 8 initiative challenged this presumed right, but in a different way than the Proposition 22 initiative. Proposition 8 sought to amend the California Constitution to say that “Only marriage between a man and woman is valid or recognized in California.” Even though Proposition 8 passed by margin of 53 to 47, a judge has issued a stay, and the stay remains in effect, while the 8th Circuit Court of Appeals reviews the case.\* Despite the fact that the Obama administration has remained silent on Proposition 8, the President refusing to use even his “bully pulpit,” opponents of the Proposition are encouraged by the Administration’s change of policy on DOMA , even this change of policy his only limited to not defending DOMA in court. In Holder’s letter to Congress, he says that the Department will “take an affirmative position on the level of scrutiny that should be applied to DOMA.” This could mean that the Department and the Administration may take the side of the opponents of Proposition 8 when it finally reaches the Supreme Court. Of course, a more affirmative Administration option would be to challenge all state laws which exclude gays and lesbians from the right to marry.\* This could be done under the the Amendments equal protection clause.

The compromise agreement became law in 1993 (10 U.S.C.A.654). The legislation states that there is no constitutional right to serve in the military and it claims that Section 8 Article 1 of the Constitution gives Congress the right to “establish qualifications for and conditions of service in the armed forces.” The legislation then goes on to state that the uniqueness of the military as an institution demands the acceptance of certain codes of conduct relative to its successful functioning. Under 654 (a ) the legislation restates the historical contention that homosexuality is inconsistent with military service. It says:

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.   
  
(15) 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.

However, the 654(15)(b) goes on to state the results of the compromise and the new policy that would determine whether or not a service member could be discharged, called Don’t Ask, Don’t Tell, Don’t Pursue. By the end of his presidency, Bill Clinton, came to the conclusion that DODT had been a failure. Discharges of gays and lesbians had actually increased under DODT. According to the military, fourteen thousand service members have been discharged since its enactment.

However, a close reading would have, at least, tempered some of the enthusiasm and optimism and prepared the community for something much less than it had hoped. For Obama, equality may be a founding principle of American society and one to which he is committed, but not when it comes to gay marriage. His commitment is to civil unions for gays and lesbians, not marriage, a position he has consistently maintained throughout his Presidency. Much of his argument reproduces that made by supporters of Proposition 8, the California initiative that sought to amend the California constitution to exclude same-sex marriages. In public debate, the advocates for Proposition 8 argued that the denial of the right to marriage does not deny gay couples the right to civil unions and its benefits. If this position were to become established policy, gays and lesbians, in regard to marriage, would be a legally separate but supposedly equal community.

Further, in the letter, Obama, at the very least, is disingenuous, or at the worst, reveals an appalling misunderstanding of the authority of the federal government in relation to states when those states attempt to deprive “persons” of their right to “life, liberty, and property.” He states that “the federal government should not stand in the way of states that want to decide on their own how best to pursue equality.” The fact is that thirty-seven states are not pursuing equality in relation to gay and lesbian marriage, but have enacted legislation that legally enshrines inequality. The denial of gays and lesbians the right to marriage is a clear violation of the Fourteenth Amendment which was passed to do just what Obama says the federal government should not do, stop states from the pursuit of “(in)equality.”

And although he claims that he has been courageous in speaking about the issues of the LGBT community in hostile environments and will never compromise, there is a very real ambivalence to his position which is revealed when he says that he will not “close (his) ears to the voices of those who still need to be convinced.” Those “who need to be convinced” would be the people who have been successful in making inequality the law of the land for gays and lesbians in many parts of the United States, and those whose ways of thinking or systems of belief whether religious or ideological do not allow for being “convinced” of an alternative point of view. The ambivalence is heightened by Obama’s invitation to the same anti-gay pastor he speaks of in the letter, Rick Warren, to offer the invocation at his inauguration. Pastor Warren apparently not having been “convinced,” has been found to be active in generating anti-gay legislation in several African countries, one of which is Uganda. At the present, Uganda is considering draconian anti-homosexual legislation that imposes the death penalty for what it calls “aggravated homosexuality” (Democracy Now, 2011, March 25).

Holder argues that the level of scrutiny applied by the circuit courts which have upheld DOMA Section 3, rational scrutiny, and which the Department defended, is not an “appropriate level of scrutiny.” He goes on, “the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional” (Holder, 2011, February 23). He concludes in the part of the letter entitled “Application to Section 3 of DOMA:

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress’ actual justifications for the law (Holder, 2011, February 23).

Obama embraces two different and contradictory theories of democracy, and of the powers of the presidency, neither of which are progressive. He embraces one theory in domestic and foreign policy in relation to the so-called war on terror. In this theory of democracy, democracy is subordinated to the necessities of national security and the power of the president is not constrained by the Constitution, or laws enacted by the legislative branch, nor judicial rulings. Under this theory, the President is not constrained by international law either and consistency in policy is not a demand.

There are several assumptions underlying this; the first is a conservative belief that social change for the good is inevitable, and societyHe further argues that until legislation has been passed it would be .lrelation to progressive issues, has made his policy decisions based on a “weak” interpretation of the power of his office, an interpretation so “weak” that he claims his administration is forced to defend laws that it believes are unconstitutional. Jonathan Turley asks a question concerning the obligation of a president to enforce laws that he and his administration, or the courts, have determined are unconstitutional. He says can you imagine a law being passed that denies a racial minority the right to marry and a President defending it, a President who is committed to equality as a moral principle (Adler, 2010). And, if the authors may take this analogy a little further, imagine that the Courts have ruled this law unconstitutional, or that the Administration itself has determined it to be unconstitutional, and the administration still ordered the offices of the federal government to continue to enforce it. Imagine that this occurs within the context of the same president bombing another country and claiming that neither the constitution nor the law of the land, War Powers Act, apply to him.