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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation, Plaintiff, v. UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity, Defendants.	Case No. CV 04-08425-VAP (Ex) **[Motion filed on March 29, 2010]** **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Log Cabin Republicans ("Plaintiff" or "LCR"), a non-profit corporation whose membership includes current, retired, and former members of the U.S. armed forces who are homosexual, challenges as "restrictive, punitive, . . . discriminatory," and unconstitutional the "Don't Ask Don't Tell" policy ("DADT Policy") of Defendants United States of America and Robert M. Gates ("Defendants"), including both the statute codified at 10 U.S.C. section 654 and the implementing instructions appearing at Department of Defense Instructions ("DoDI"

or "implementing instructions") 1332.14, 1332.30, and 1304.26. Defendants now move for entry of summary judgment.

I. BACKGROUND

The Court's May 27, 2010 Order recites the statutory and regulatory scheme comprising the DADT Policy, as well as the procedural history of this Motion.

Defendants' Motion for Summary Judgment ("Motion"), filed March 29, 2010, challenged Plaintiff's standing to bring this action and also attacked the merits of Plaintiff's claims. After a timely Opposition and Reply were filed,[1] each side filed supplemental briefing addressing the question of Plaintiff's standing.

On May 27, 2010, the Court issued its Order Denying in Part Defendants' Motion to the extent it challenged Plaintiff's standing to bring this action. The Court granted the parties "leave to file supplemental briefs for the sole purpose of discussing application of the

[1] Defendants also filed objections to the evidence submitted by Plaintiff in opposition to the Motion. For the reasons set forth below, the Court does not rely on this evidence in deciding the Motion, and thus need not address Defendants' objections.

Witt[2] standard to Plaintiff's substantive due process claim." (Docket No. 170 at 26:26–27:2.) Each side's Supplemental Brief was filed timely. Having denied Defendants' Motion to the extent it was based on Plaintiff's standing, the Court now addresses the merits of Defendants' Motion.

II. LEGAL STANDARD

A motion for summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998); Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes

[2] Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008).

demonstrates the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Where the non-moving party has the burden at trial, however, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. Id. at 325. Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's case. Id. The burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. See also William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial § 14:144 (2010). A defendant has the burden of proof at trial with respect to any affirmative defense. Payan v. Aramark Mgmt. Servs. Ltd. P'ship, 495 F.3d 1119, 1122 (9th Cir. 2007).

A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at

248. In ruling on a motion for summary judgment, the Court construes the evidence in the light most favorable to the non-moving party. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991); T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630–31 (9th Cir. 1987).

III. DISCUSSION

In its June 9, 2009 Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Case ("Motion to Dismiss Order" or "June 9, 2009 Order"), the Court denied Defendants' motion to dismiss as to Plaintiff's substantive due process claim and its First Amendment claim to the extent it is based on Defendants' use of service members' statements for purposes other than admissions of propensity to engage in homosexual acts, and granted Defendants' motion to dismiss as to Plaintiff's equal protection claim and its First Amendment claim to the extent it is based on Defendants' use of statements as admissions. Thus, Plaintiff's remaining claims allege violation of substantive due process and of the First Amendment. Defendants argue they are entitled to summary judgment on each of these claims. The Court addresses each separately.

A. Substantive Due Process

1. Standard of Review

Before reaching the merits of Defendants' Motion, the Court must first resolve the standard of review applicable to the DADT Policy, which the parties dispute. Plaintiff maintains the applicable standard of review is that announced by the Ninth Circuit in Witt, i.e., in order for the DADT Policy to survive constitutional scrutiny, Defendants "must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." Id. at 819.

Defendants argue the DADT Policy need only survive rational basis review, i.e., it is "rationally related to a legitimate governmental purpose." Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988); Matsuda v. City & County of Honolulu, 512 F.3d 1148, 1156 (9th Cir. 2008). For the reasons discussed below, the Court concludes that the Witt standard of review applies to Plaintiff's challenge to the DADT Policy.

Generally, courts apply rational basis review to state actions which "neither utilize[] a suspect classification nor draw[] distinctions among individuals that implicate fundamental rights." Matsuda, 512 F.3d at 1156 (quoting United States v. Salerno, 481 U.S. 739, 746

(1987)). Conversely, courts employ a heightened standard of review where state actions implicate fundamental rights.

In Witt, the Ninth Circuit recognized that the DADT Policy implicates the fundamental rights recognized by the Supreme Court in Lawrence v. Texas, 539 U.S. 558 (2003). See Witt, 527 F.3d at 819. While declining to place its standard of review within the traditional framework of rational basis review, intermediate scrutiny, and strict scrutiny, and expressly declining to apply strict scrutiny, the Ninth Circuit held the DADT Policy constitutes an intrusion "upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in Lawrence," and is subject to heightened scrutiny. Id.

Defendants attempt to avoid application of a heightened scrutiny standard by arguing that the Witt court limited application of its standard to as-applied challenges. (Defs.' Supp. Br. at 7:16–9:6.) Although the Witt court stated that "this heightened scrutiny analysis is as-applied rather than facial," see Witt, 527 F.3d at 819, it did not address what standard of review would apply to a facial challenge to the DADT Policy.

Defendants further rely on authority reflecting the "disfavored" status of facial challenges, including Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450 (2008). This authority, however, does not establish that the standard of review depends on the nature of the challenge.[3]

To the contrary, the level of scrutiny the Court applies depends not on the nature of the legal challenge, but rather on the nature of the right implicated. See, e.g., Reno v. Flores, 507 U.S. 292, 302 (1993) (substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all . . . unless the infringement is narrowly tailored to serve a compelling state interest.") (emphasis in original); P.O.P.S. v. Gardner, 998 F.2d 764, 767–68 (9th Cir. 1993) (strict scrutiny triggered by impairment of fundamental rights). Where state action implicates a fundamental right, that action is subject to heightened scrutiny regardless of whether the nature of the challenge is facial or as-applied. The Supreme Court has applied heightened scrutiny to facial challenges where

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[3] Indeed, the consequence of the "disfavored" status of facial challenges is not a varying standard of review, but rather the requirement that the challenger prove that no circumstances exist under which the statute could be constitutionally applied. See Salerno, 481 U.S. at 745; Wash. State Grange, 552 U.S. at 457;; S.D. Myers, Inc. v. City & County of San Francisco, 253 F.3d 461, 467 (9th Cir. 2001).

fundamental rights were implicated. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845, 877–78 (1992) (applying intermediate scrutiny to facial challenge).

In Witt, the Ninth Circuit recognized that the DADT Policy implicates fundamental rights protected by Lawrence. See Witt, 527 F.3d at 819. Although it noted the as-applied nature of the plaintiff's challenge, the Witt court did not expressly limit its holding to as-applied cases. Given the centrality of its recognition of the fundamental rights implicated by the DADT Policy, Witt's heightened standard of review applies in this action challenging the Policy on a facial basis. To the extent the June 9, 2009 Order on Defendants' motion to dismiss Plaintiff's First Amended Complaint indicated otherwise, the Court, having allowed the parties to submit additional briefing on the issue, now finds the standard announced by the Ninth Circuit in Witt governs here.

2. Defendants Fail to Show They Are Entitled to Summary Judgment under the Witt Standard

Despite the order granting leave to file a supplemental brief addressing why they are entitled to summary judgment under the Witt standard, Defendants have failed to offer any argument why the DADT Policy survives

under a heightened level of scrutiny. Instead, Defendants again have sought a stay of this action,[4] (Defs.' Supp. Br. at 3–6), argued that rational basis is the appropriate standard of review, (Defs.' Supp. Br. at 6–9), argued in the alternative that the standard of review set forth in Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) applies,[5] (Defs.' Supp. Br. at 9–12), argued that Plaintiff's facial challenge cannot survive,[6] (Defs.' Supp. Br. at 12), and argued that Plaintiff is not entitled to rely on evidence outside of the DADT Policy itself and the relevant legislative history in challenging the DADT Policy.[7] (Defs.' Supp. Br. 13–15).

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[4] The Court addresses Defendants' request for a stay separately. (See infra, Section III.C.)

[5] This argument fails, as it ignores the Witt court's express disavowal of Beller's holding. Witt, 527 F.3d at 819 ("We also conclude that our holding in Beller, 632 F.2d 788, that a predecessor policy to DADT survived heightened scrutiny under the Due Process Clause, is no longer good law."), 820 ("Beller's heightened scrutiny analysis and holding therefore have been effectively overruled by intervening Supreme Court authority.").

[6] Defendants maintain that Plaintiff has failed to meet its burden of showing there are no circumstances in which the DADT Policy could be constitutionally applied. Although Plaintiff ultimately may bear the burden of proof on this issue, at the summary judgment stage the burden is on Defendants. Defendants have failed to identify any instance in which the DADT Policy could constitutionally be applied, and thus fail to meet their burden of showing they are entitled to summary judgment on this basis.

[7] This argument also fails. The only authorities Defendants rely on in support of this proposition are FCC v. Beach Commc'n, Inc., 508 U.S. 307 (1993) and Goldman v. Weinberger, 475 U.S. 503 (1986). Beach, however, involved rational basis review, not heightened scrutiny.

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As the moving party, Defendants bear the burden of showing they are entitled to summary judgment. As they failed to address why they are entitled to summary judgment under the Witt standard of review, Defendants do not meet their burden of showing they are entitled to summary judgment.

B. First Amendment

Defendants argue Plaintiff's First Amendment challenge fails because "the DADT Policy and testimony establish that service members are not and have not been discharged for statements other than to show a propensity or intent to engage in homosexual acts." (Mot. at 22.) Specifically, Defendants argue Plaintiff cannot sustain its First Amendment claim because: (1) John Alexander Nicholson was discharged on the basis of his statement that he is "gay," which was used as evidence of his propensity to engage in homosexual acts and which he chose not to rebut; and (2) Lt. Col. Doe has not been discharged from the military and accordingly "no statement has been used as the basis to discharge Doe

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[7](...continued)
Goldman related to a military regulation, not an act of Congress. Furthermore, the regulation at issue applied only to the dress codes of on-duty service members. The DADT Policy is far broader in its reach and affects wholly different substantive rights; thus it is not entitled to the same degree of deference as a uniform dress regulation.

under the challenged statute or otherwise."[8] (Mot. at 24.)

Defendants' argument regarding the use of statements as admissions under the DADT Policy is unnecessary because the Court already addressed that issue in its June 9, 2009 Order. The Court dismissed Plaintiff's First Amendment claim to the extent it related to use of a service member's statement regarding homosexuality as evidence of his or her propensity to engage in homosexual acts. (June 9, 2009 Order at 21–22.) The Court based its conclusion on the Ninth Circuit's holding in Holmes v. California Army National Guard, 124 F.3d 1126 (9th Cir. 1997) that use of a service member's statement under the DADT Policy as an admission of conduct does not violate the First Amendment. See id. at 1136. The Court, however, denied Defendants' motion to dismiss Plaintiff's First Amendment claim insofar as it related to speech not used as an admission of a propensity to engage in homosexual acts. (See June 9, 2009 Order at 23–24.)

[8] Defendants appear to read the Court's June 9, 2009 Order as limiting Plaintiff's First Amendment claim to statements related to discharge. (See Mot. at 22–23.) The Court's June 9, 2009 Order, however, contains no such limitation.

Defendants argue discovery has revealed that Nicholson was discharged because of his statement that he is "gay," which created a rebuttable presumption of his likelihood to engage in "homosexual acts." (Mot. at 23.) Nicholson, Defendants argue, was discharged because his failure to rebut this presumption constituted an admission. (Id.)

According to Plaintiff, the DADT policy is "circular" because it "[p]rovides that sexual orientation is considered a personal and private matter," yet "defines 'conduct' to include a statement by a member that demonstrates a propensity or intent to engage in homosexual acts." (Opp'n at 21 (internal citations omitted) (emphasis in original).) "In other words, the fact of one's status as a homosexual is supposedly not a basis for discharge but the statement of that permissible status is." (Opp'n at 22 (emphasis in original).) "Not surprisingly, given this framework, the vast majority of discharges under DADT are for 'statements,' not conduct." (Id. (emphasis in original).)

The Ninth Circuit considered and rejected this very reasoning in Holmes, which remains binding precedent on this issue. See Holmes, 124 F.3d at 1134–36; Hensala v. Dep't of Air Force, 343 F.3d 951, 957–59 (9th Cir. 2003)

(endorsing Holmes' First Amendment analysis of the DADT Policy).

In Holmes, two service members were discharged after they made statements about their homosexuality and failed to present evidence to rebut the presumption they engaged in or intended to engage in homosexual acts. 124 F.3d at 1129–32. Though the plaintiffs presented evidence of their excellent service records, and one denied engaging in homosexual acts with fellow service members, or with any person at all during the performance of military duty, the court determined the plaintiffs failed to rebut the presumption of a propensity or intent to engage in homosexual acts:

> [U]nder the statements prong of the "don't ask/don't tell" policy, service members are not discharged for having a homosexual "status." The discharges result because of actual conduct or a propensity for conduct that is prohibited. [The plaintiffs'] respective declarations of homosexual orientation did not automatically lead to their discharge; rather, their declaration was coupled with their tacit acceptance of the link between their orientation and their conduct, as evidenced by their failure to show that they did not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts.

Id. at 1135.

As noted above, the Court already dismissed Plaintiff's claim to the extent it sought to challenge the use of statements as evidence of a propensity to engage in conduct. (June 9, 2009 Order at 23.) In other

words, Plaintiff's First Amendment claim fails to the extent it is premised upon service members' discharges for making statements about their homosexuality and failing to present evidence to rebut the presumption that they engaged in or intended to engage in homosexual acts. See Holmes, 124 F.3d at 1129.

Next, Defendants argue Plaintiff's First Amendment claim fails because Lt. Col. Doe is still serving in the military and has not been discharged on the basis of speech. While Lt. Col. Doe indeed has not been discharged under the DADT Policy, Plaintiff alleges the DADT Policy prevents Doe and other LCR members from "communicating the core of [their] emotions and identity to others", (see Opp'n at 23; Doe Decl. ¶ 7), and chills "public, off-base" speech such as participating in political rallies for gay rights and denouncing "biased comments about homosexuals." (Opp'n at 24.) Plaintiff also contends the DADT Policy chills service members' First Amendment right to petition the government for a redress of grievances because members like Doe are unable to identify themselves publicly as members of LCR or to testify at trial for fear they will be discharged. (Id. at 23.) Thus, according to Plaintiff, the DADT Policy chills the constitutionally protected speech of service members who have not been discharged.

Plaintiff may succeed in its facial challenge (see Opp'n at 1, 24) in one of two different methods: by showing the law (1) "is unconstitutional in every conceivable application,"[9] or (2) "seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984). The Ninth Circuit has held that "a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right." Clark v. City of Los Angeles, 650 F.2d 1033, 1039 (9th Cir. 1981) ("The overbreadth doctrine has been applied almost exclusively in the areas of [F]irst [A]mendment expressive or associational rights.") (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)).

Under the "overbreadth" doctrine, a plaintiff may challenge an overly broad statute, facially, by showing that it may inhibit the First Amendment rights of individuals who are not before the court. See, e.g., Vincent, 466 U.S. at 798-99; Village of Schaumburg v.

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[9] Plaintiff does not make this argument, which would be foreclosed in light of the Court's June 9, 2009 Order, holding the use of service members' statements as admissions constitutional under Holmes.

Citizens for a Better Env't, 444 U.S. 620, 634 (1980). That is, a plaintiff may challenge a statute on the ground that it is unconstitutional as applied to someone else, even if her own conduct is not protected under the First Amendment. See Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir. 1998) (citing Vincent, 466 U.S. at 797); Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992) (overbreadth doctrine is based on the observation that "the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court"); see also Lind v. Grimmer, 30 F.3d 1115, 1122 (9th Cir. 1994) (overbreadth doctrine is designed to avert a potential chilling effect on speech). Of course, a plaintiff whose conduct is protected may also bring a facial challenge to a statute that she contends is unconstitutional, without having to employ the overbreadth doctrine, by arguing that the statute could never be applied in a valid manner and would chill the speech of others. See Foti, 146 F.3d at 635; Nunez v. City of San Diego, 114 F.3d 935, 949 (9th Cir. 1997); Tucker v. State of California Dep't of Educ., 97 F.3d 1204, 1217 n.10 (9th Cir. 1996).

Defendants' argument that they are entitled to summary judgment on the basis of facts related to Nicholson and Doe fails, because Plaintiff is not limited to pursuing its members' individual claims. Rather,

Plaintiff may challenge the DADT Policy by showing that it has the potential to chill the expressive activity of others not before the court. See Vincent, 466 U.S. at 796–97.

A litigant making a facial challenge to a statute on First Amendment grounds bears a "heavy burden" and "must demonstrate a substantial risk that the application of the [statutory] provision will lead to the suppression of speech." Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) (citing Broadrick, 413 U.S. at 615). Here, as Plaintiff bears the burden at trial, Defendants need not produce evidence negating or disproving every essential element of Plaintiff's claim, but must point out that there is an absence of evidence supporting Plaintiff's claim. See Celotex, 477 U.S. at 325. Defendants fail to address Plaintiff's overbreadth claim whatsoever, and consequently have not met their burden of showing they are entitled to summary judgment on Plaintiff's First Amendment claim.

C. A Stay of This Action Is Not Warranted

In their Supplemental Brief, Defendants again seek a stay of this action.[10] Defendants appear to advance three

[10] Defendants use the vehicle of their Supplemental Brief to seek a stay of this action despite having leave to file this brief "for the sole purpose of discussing application of the Witt standard to Plaintiff's (continued...)

arguments in support of this request: (1) a stay would be in the interests of all parties as it may moot the need for a trial; (2) a stay would permit the Court to avoid reaching constitutional issues; and (3) the Court should defer to the other branches of government on questions involving the military. For the reasons set forth below, the Court finds none of these arguments persuasive, and declines to stay this action.

1. A Stay Is Unlikely to Moot This Action

Defendants argue that a stay is appropriate because a measure to repeal the DADT Policy currently is pending in both houses of Congress. Defendants contend that "the Court should defer ruling on LCR's facial constitutional challenge to allow the political branches to properly consider whether the implementation of a repeal would be consistent with the standards of military readiness, military effectiveness, and unit cohesion." (Defs.' Supp. Br. at 6:17–20.)

A stay of this action on the basis of this pending legislation would be unjustified for at least two reasons. First, at this time it is speculative to assert that the measures in question, section 591 of Senate Bill

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[10](...continued)
substantive due process claim." (Docket No. 170 at 26:26–27:2.) The Court nevertheless considers the merits of Defendants' request.

3454, and section 536 of H.R. 5136, will ultimately be included as part of the final defense authorization bill that emerges from Congress.

Second, even if these measures were to become law, they still would not repeal the DADT Policy immediately. As Defendants concede, ultimate repeal depends on several contingencies. First, the Secretary of Defense must complete a "Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. 654" (the "Review") initiated on March 2, 2010. The currently contemplated repeal measures provide no deadline for completion of the Review; thus there is no means for the Court to determine when this first condition precedent may occur, if ever. Second, once the Review has been completed, the President must transmit a certification signed by himself, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff stating that they have: (1) considered the recommendations and proposals of the Review; (2) prepared necessary policies and regulations for repeal of the DADT Policy; and (3) determined that implementation of those policies and regulations is "consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces." S. 3454, 111th Cong. § 591(b)(2)(C) (2010); H.R. 5136, 111th Cong. § 536(b)(2)(C) (2010). Again, the measure provides no deadline for the President to

transmit such a certification, and effectively vests him with discretion to decline to do so.

In other words, the currently contemplated legislation, were it to become law, would not result in imminent repeal of the DADT Policy. Given the many contingencies involved – including the threshold contingency of Congressional approval – and the lack of clear timelines, any ultimate repeal that may result from this legislation is at this point remote, if not wholly speculative.

2. The Court Is Not Obligated to Stay This Action to Avoid Constitutional Questions

Defendants cite the well-established principle that "courts should not decide constitutional issues if they can reasonably avoid doing so." (Defs.' Supp. Br. at 4:8–9.) This is a canon of construction, however. See Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105–06 (1944) (applying doctrine of avoidance to require courts to await determinations on local law issues before reaching questions of constitutionality). Whether or not to stay a case is a separate matter, one within the Court's discretion. See Mediterranean Enter., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1465 (9th Cir. 1983) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to

enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.") (quoting Leyva v. Certified Grocers of California, 593 F.2d 857, 863–64 (9th Cir. 1979). Here, for the reasons discussed above, the possibility that action by the legislative and executive branches will moot this case is sufficiently remote that a stay of this action is inappropriate.

3. The Court Is Not Obligated to Defer to the Judgment of the Legislative and Executive Branches

Defendants' argument that "Congress, rather than the courts, [should] make decisions regarding the military," (Defs.' Supp. Br. at 6:9–10), also lacks merit. It is true, as the Supreme Court has recognized, that the military is entitled to a certain degree of deference. See, e.g., North Dakota v. United States, 495 U.S. 423, 443 (1990) ("When the Court is confronted with questions relating to military discipline and military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle."). That deference, however, is not unlimited, and must be balanced against the courts' "time-honored and constitutionally mandated roles of reviewing and resolving claims." Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004). This role "does not infringe on the core role of the military." Id. Defendants have

identified no authority requiring the Court to stay this action on this basis or to refrain from reaching the constitutional questions presented. Accordingly, the Court declines to enter a stay.

IV. CONCLUSION

For the reasons set forth above, the Court DENIES Defendants' Motion.

Dated: July 6, 2010

Virginia A. Phillips

VIRGINIA A. PHILLIPS
United States District Judge